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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

THOMAS SCIRANKO,

Plaintiff,

vs.

FIDELITY & GUARANTY LIFE  
INSURANCE COMPANY, a foreign  
insurer,

Defendant.

Case No: CV-05-2806-PHX-NVW

**PLAINTIFF'S RESPONSE TO  
AMEND THE PRETRIAL  
DEADLINES**

Plaintiff Thomas Sciranko ("Plaintiff"), through counsel undersigned and pursuant to Rule 6, FED. R. CIV. P., hereby responds to Defendant Fidelity & Guaranty Life Insurance Company's ("FGLIC" or "Defendant") Motion to amend the pretrial deadlines and request that this Court deny the request because it is not really a motion to extend the pretrial deadlines but a motion to reopen discovery because the Defendant failed to timely perform discovery.

**MEMORANDUM OF POINTS AND AUTHORITIES****PREFACE**

This Court's Order of August 3, 2007 does not raise any new issues with regard to damages or discovery, it narrows the issues for trial. Two years after the Plaintiff filed his Complaint in this action, this Court heard the arguments and decided to limit the Plaintiff to claims for breach of contract. The Defendant will prevail if it proves actual fraud occurred in the application process. If the Plaintiff prevails then he is entitled to the

1 resulting damages for failure to the pay benefits, if he can prove he was disabled during  
2 the two benefit periods

3 The Defendant's Motion is an attempt to re-open discovery without any basis to  
4 do so after realizing that it failed to disclose evidence for its defense. The Defendant has  
5 known from the outset that the Plaintiff intended to plead and prove entitlement to  
6 disability benefits for the full two year period in which they were owed. The Defendant  
7 first denied that the Plaintiff was disabled, then argued that the Plaintiff's disabling  
8 condition was irrelevant, implying that it knew what the Plaintiff was claiming. But the  
9 Defendant failed for twelve months to produce any evidence on the Plaintiff's entitlement  
10 to benefits. It is now attempting to reopen discovery under the ruse that the Court has  
11 raised new issues.

## 12 **ARGUMENT**

13 The Federal Rules of Civil Procedure require that discovery deadlines should be  
14 not be extended absent excusable neglect. Rule 6 (b) Fed. R. Civ. Pro. The Defendant  
15 has not established that its dilatory motion is based upon excusable neglect. It is not  
16 entitled to re-open discovery on the eve of the Pretrial deadlines, 9 months after the  
17 close of discovery.

18 The Plaintiff filed the Complaint in this action August 29, 2005. In it, the Plaintiff  
19 alleged, *inter alia*:

20 7. That during in about March of 2005, the Plaintiff became totally  
disabled as defined under the policy.

21 8. That the Plaintiff timely notified the Defendant, F&G Life, of his  
22 disability, provided relevant medical records and made claim for total  
disability benefits under the policy.

23 9. That as of June 11, 2005, the Plaintiff had satisfied the policies ninety  
(90) days elimination (waiting).

24 10. That benefits became due and owing the Plaintiff.

25 *See* Plaintiff's Complaint Para. 7 through 10.

26 The Defendant denied each of these allegations and affirmatively alleged that the  
27 Defendant failed to fulfill the contractual right to total disability benefits. *See*  
28 Defendant's Answer Para. 7-10 and 41. The Defendant was well aware, when it filed

1 its Answer, that it would be contesting the Plaintiff's right to disability benefits as part  
2 of its defense.

3 On December 16, 2005 this Court signed the Pretrial Order setting deadlines for  
4 Discovery, Disclosure of Experts, and for Dispositive Motions. Thereafter, on August 6,  
5 2006, the Court also extended all deadlines and discovery on stipulation of the parties.  
6 The Defendant had until December 15, 2006 to perform an IME or record review. It had  
7 several months to decide whether it would disclose an expert to testify about the  
8 Plaintiff's condition and could have asked for more time to conduct such discovery long  
9 ago.

10 The Plaintiff filed an initial disclosure alleging that damages included waiver of  
11 premium for the life of the Plaintiff and two years worth of Disability Income Benefits.  
12 The Plaintiff also alleged that the consequential damages for the breach include the life  
13 insurance benefits. The Plaintiff also disclosed in December of 2005 the Plaintiff's  
14 doctors, who have attested to the Plaintiff's continuing disability and the status of his  
15 condition.

16 On January 5, 2006, the Plaintiff propounded written discovery in which it  
17 specifically asked the Defendant:

18 **REQUEST FOR ADMISSION NO. 3:** Admit that, the Plaintiff  
19 established that he was unable to perform the duties of any occupation  
20 for which he might be suited by reason of his education, training or  
experience.

21 Admit \_\_\_\_\_ Deny \_\_\_\_\_

22 **INTERROGATORY NO. 3:** If you denied Request for Admission No.  
23 3, state each and every fact that supports your denial.

24 Plaintiff's Request for Admissions and Non-Uniform Interrogatories

25 The Defendant objected to the Request on the basis that it was irrelevant even  
26 though it had raised the defense in its Answer, and otherwise specifically denied it. In  
27 support of its denial, the Defendant alleged that facts within the claim filed supported the  
28 denial. Under Rule 33 Fed. R. Civ. Pro., the Plaintiff was now required to prove this

1 fact. The Defendant has neither changed its position nor supplemented any fact,  
2 evidence or testimony that would prove the denial.

3 During discovery at the deposition of Dr. Gosalia and later, of the Plaintiff, the  
4 Plaintiff's counsel elicited testimony on the issue of the Plaintiff's ability to work and  
5 his prognosis for the future. *See* Plaintiff's Separate Statement of Facts in Support of his  
6 Response to the Defendant's Motion for Summary Judgment at Para. 56-59. The  
7 Defendant's Vice President of Claims, who personally oversaw the denial of the  
8 Plaintiff's claim, admitted that, but for the pre-existing condition the Defendant would  
9 have paid the claim. *See* Plaintiff's Separate Statement of Facts in Support of his  
10 Response to the Defendant's Motion for Summary Judgment at Para.165. These facts  
11 were not disputed by the Defendant in replying to the Plaintiff's Separate Statement of  
12 Fact, other than to argue that they were irrelevant. *See* Defendant's Statement of Facts  
13 in Support of Reply to Motion for Summary Judgment and Controverting Statement of  
14 Facts to Plaintiff's Statement of Facts at Para.26, and Para.50.

15 The Plaintiff also disclosed medical records that the Defendant did not already  
16 have to help establish his disabling condition and right to disability benefits. The  
17 Defendant was well aware that the Plaintiff would be calling Dr. Gosalia to testify about  
18 the Plaintiff's condition and that the Plaintiff has been unable to work at any job since  
19 March of 2005.

20 Now in complete disregard of this Court's discovery orders, months after the close  
21 of discovery, the Defendant seeks more time for new discovery under the ruse that it had  
22 not had a chance to evaluate the Plaintiff's condition until now. The Defendant is  
23 attempting to imply that the Court has raised the issue of proving entitlement to contract  
24 benefits in its Order of August 3, 2007. This is simply not true.

25 The Defendant's Motion argues that the Defendant is entitled to seek discovery  
26 because the Court has stated that the Defendant's reliance on the policy exclusion  
27 "rendered superfluous an exhaustive review of the nature and effect of Sciranko's  
28

1 disability.” It is clear that the Court’s statement refers to the Plaintiff’s expert’s  
2 opinions. Certainly, it does not give rise to re-open discovery.

3 The Defendant also seeks to apparently raise new defenses that it sees arising from  
4 the Court’s August 3, 2007 Order. The Court commented on the evidence of potential  
5 fraud because the Plaintiff did not seek benefits immediately after the first heart attack,  
6 but also stated that because the Defendant did not raise this issue that it could not be  
7 considered by the Court. While this comment on the evidence ignored the undisputed  
8 fact that the Plaintiff returned to work for three more years after the 2002 attack, it in no  
9 way created any new claim or defense. At best, it is evidence to be presented by the  
10 Defendant, now that the Court has narrowed the issues.

11 Nor does this statement give rise to allow the Defendant to re-discover evidence of  
12 the 2002-2004 physical condition of the Plaintiff, in order to somehow raise the defense  
13 under A.R.S. § 20-1109 and rescind the policy. The Defendant failed to raise that  
14 defense and has waived it, especially now that the issues are drawn for trial. Rule 8 Fed.  
15 R. Civ. Pro.; *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 505(1<sup>st</sup> Cir. 1996) The  
16 Defendant was given an ample amount of time to amend its Answer in the Pretrial  
17 Order. It was also given ample time to discover this defense and did not do so. In  
18 addition, the Plaintiff disclosed the Defendant’s Medical records including those from  
19 the 2003 heart attack.

20 More importantly, the Defendant has expressly stated that it did not intend to  
21 rescind the policy and has been collecting premiums for the period of the entire lawsuit.  
22 It cannot collect premiums for two years and then argue fraud, without suffering the  
23 effect of ratification. The time to raise such a defense has long since passed.

### 24 CONCLUSION

25 Simply put, the Defendant decided long ago how it would defend this case and is  
26 not entitled to change now, on the eve of trial. This is especially true nine months after  
27 the close of discovery. Based upon the foregoing, the Plaintiff requests that this Court  
28 deny the Defendant’s Motion.

1 DATED: September 14, 2007.

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