

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILLIAM J. BROSNAN, M.D.	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,	:	
	:	
	:	
Defendant.	:	NO. 96-4605

MEMORANDUM - ORDER

AND NOW this 10th day of March, 1999, upon consideration of the motion of defendant Provident Life and Accident Insurance Company to strike Count II of the complaint (Document No. 19) and the response of plaintiff William J. Brosnan thereto, and the supporting memoranda, and having made the following findings and conclusions, the motion will be granted:¹

1. In Count II of the complaint, plaintiff sets forth allegations of permanent disability and requests a declaration that he is totally disabled. Plaintiff further requests a declaration that he is entitled to monthly benefits under the policies, provided he complies with the

¹Plaintiff argues that the motion to strike is not timely under Fed. R. Civ. P. 12(f). This rule provides: (f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

The Court may, however, rule on an untimely motion to strike on its "own initiative." See Fed. R. Civ. P. 12(f); Sheridan v. E.I DuPont de Nemours & Co., 1994 WL 46711, at *11 (D. Del. March 28, 1994) (citing Krauss v. Keibler-Thompson Corp. 72 F.R.D. 615, 617 (D. Del. 1976)). Nevertheless, defendant's motion is not really a motion to strike in that it does not ask the Court to strike an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Rather, the motion is better characterized as a belated motion for summary judgment. Although the Court may properly deny a motion for summary judgment as untimely, a court ordered deadline for such motions does not bar the Court from considering the motion. See Manetas v. Int'l Petroleum Carriers, Inc., 541 F.2d 408, 413 (3d Cir. 1976); Adams v. City of Philadelphia, 1996 WL 138092, at *2-3 (E.D. Pa. March 26, 1996). As the motion is before the Court and raises a significant issue of law, in the interest of justice, the Court will entertain the motion.

other requirements of the policy, namely that he is receiving care by a physician which is appropriate for the condition causing his disability. Plaintiff is thus requesting in Count II of the complaint that the Court declare that he is permanently and totally disabled and entitled to future benefits under the disability policies. The language of the insurance contracts, however, does not provide for or acknowledge that a finding of permanent and total disability establishes any right to benefits or any waiver of the periodic proof of loss requirement of the policy;²

2. This is not the first time this Court has had to address the issue of equitable relief for future benefits. See Doe v. Provident Life & Accident Ins. Co., 936 F. Supp. 302 (E.D. Pa. 1996). In Doe, the plaintiff sought injunctive relief for payment of past and future benefits under three disability insurance contracts. This Court held that the plaintiff had an “adequate remedy at law and so cannot pursue his claim in equity.” Id. at 308. In so doing, this Court reasoned that the Pennsylvania Supreme Court would not allow such a suit to go forward in equity because (1) the assumption that the defendant would refuse to pay the plaintiff future benefits after a judicial determination of disability was speculative, (2) such an injunction would involve the courts in ongoing claims management of insurance policies, (3) the case concerned a private dispute and did not implicate a statutory scheme regulating coverage or payment of benefits, and (4) Pennsylvania has a relatively long legal history of denying claims for future benefits

²The policies only require defendant to pay benefits while plaintiff is totally disabled. The policy also requires that for periodic payments for a continuing loss, the plaintiff must provide written proof of loss within 90 days after the end of each period. For any other loss, written proof must be given within 90 days after the loss. (See Disability Income Protection Policy No. 6-334-697727 at 15, and Policy No. 6-335-749086 at 16). In requesting a declaration of permanent disability, plaintiff is asking the Court to reform the contract such that he need not comply with the proof of loss requirement. Such a declaration would be a de facto grant of future benefits.

- under disability policies absent complete repudiation. Id. at 307-08;
3. Plaintiff argues that Doe is distinguishable because here there has been a complete repudiation. I disagree. Here, defendant argues that plaintiff is not disabled and, therefore, *under the terms of the contract*, it is not obligated make disability payments. In the course of this litigation, defendant has also argued that the Court should rescind the contract because of material misrepresentations made by plaintiff. Under the facts of this case, neither constitutes repudiation;
 4. The repudiation of a contract requires a clear and unequivocal refusal to perform. See, e.g., Midwest Payment Systems, Inc. v. Citibank Federal Sav. Bank, 801 F. Supp. 9, 12 (S.D. Ohio 1992). Defendant has not stated, nor can it be inferred, that it will refuse to perform under the contracts. Granted, the parties dispute whether plaintiff is disabled and is entitled to benefits. However, there is no evidence that “once a judgment has been entered against it defendant will continue to improperly deny the benefits owed to plaintiff, especially in the face of possible punitive damages.” Doe, 936 F. Supp. at 308;
 5. Moreover, plaintiff has not made allegations, with respect to other insureds, that defendant has engaged in repetitive denials which require insureds to continually sue for benefits to which they are entitled. Nor does plaintiff allege that he has had to bring suit previously to enforce his rights under the policies. See Doe, 936 F. Supp. at 308. Having denied its request for rescission at summary judgment, see Memorandum and Order of December 17, 1998 at 10-13, there is nothing to indicate that the defendant will not abide by the terms of the contracts in the future;
 6. In sum, plaintiff has failed to demonstrate, even taking all inferences in his favor, that his

request for equitable relief is justified. In addition, plaintiff cites no case law to support his claim for declaratory relief in Count II of the complaint. I conclude, therefore, that plaintiff has an adequate remedy at law and so cannot pursue his claim in equity; accordingly,

it is hereby **ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that judgment is granted in favor of defendant and against plaintiff as to Count II of the complaint.

LOWELL A. REED, JR., J.