

JUL 18 2012

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP A. SELTZER,

Plaintiff - Appellant,

v.

PAUL REVERE LIFE INSURANCE
COMPANY and UNUM GROUP, FKA
UnumProvident Corporation,

Defendants - Appellees.

No. 11-15046

D.C. No. 2:09-cv-02104-SRB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted May 14, 2012
San Francisco, California

Before: REINHARDT, CLIFTON, and N.R. SMITH, Circuit Judges.

We address Seltzer’s primary claim for lifetime benefits under the “accident” provision of his policy in a contemporaneously-filed order certifying a question of law to the Arizona Supreme Court. In this memorandum disposition,

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

we affirm summary judgment as to Seltzer's alternate theory that he is entitled to lifetime benefits under the policy amendment pertaining to "irrecoverable loss of use of both hands."

Seltzer waived this theory by failing to plead it in his complaint. Seltzer alleged that he was entitled to lifetime benefits "[b]ecause plaintiff's injury occurred as the result of accident." He did not allege that he was entitled to such benefits because he lost of use of both hands, and did not refer to the loss of use provision. He mentioned that alternate theory for the first time in his opposition to Paul Revere's motion for summary judgment, and he never moved to amend his complaint. Accordingly, we affirm the district court's entry of summary judgment as to Seltzer's loss of use provision-based contract and bad faith claims.

PARTIALLY AFFIRMED.