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IN THE

**United States Court of Appeals  
for the Fourth Circuit**

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No. 03-2105L

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CONTINENTAL CASUALTY COMPANY,

*Appellant,*

v.

NEAL S. SMITH,

*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

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REPLY BRIEF OF APPELLANT,  
CONTINENTAL CASUALTY COMPANY

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. ARGUMENT .....	1
A. Mr. Smith Offers No Authority Or Support For The District Court’s Imposition Of Social Security Ruling 90-1p On ERISA Plans.....	1
B. Mr. Smith Mistakenly Accuses Continental Of Omitting Facts From Its Brief.....	3
C. Mr. Smith Mistakenly Accuses Continental Of Ignoring Evidence In The Administrative Record.....	6
D. The District Court Improperly Relied Upon The Results Of The Coghill Study As Substantive Medical Evidence.....	10
II. CONCLUSION .....	15

## TABLE OF AUTHORITIES

CASES	Page
<i>In re Agent Orange Prod. Liab. Litig.</i> , 611 F. Supp. 1223 (E.D.N.Y. 1985), <i>aff'd</i> , 818 F.2d 187 (2 <sup>d</sup> Cir. 1987).....	14
<i>Barnett v. Kaiser Found. Health Plan, Inc.</i> , 32 F.3d 413 (9 <sup>th</sup> Cir. 1994) .....	14
<i>Beeson v. Johnson</i> , 668 F. Supp. 498 (E.D.N.C. 1987), <i>rev'd</i> , 894 F.2d 401 (4 <sup>th</sup> Cir. 1990).....	14
<i>Berry v. Ciba-Geigy Corp.</i> , 761 F.2d 1003 (4 <sup>th</sup> Cir. 1985) .....	12
<i>Black &amp; Decker Disability Plan v. Nord</i> , 538 U.S. 822, 123 S. Ct. 1965 (2003) .....	<i>passim</i>
<i>Clemmons v. Bohannon</i> , 918 F.2d 858 (10 <sup>th</sup> Cir. 1990) .....	13
<i>Conrad v. Cont'l Cas. Co.</i> , 232 F. Supp. 2d 600 (E.D.N.C. 2002) .....	3
<i>Gallagher v. Reliance Standard Life Ins. Co.</i> , 305 F.3d 264 (4 <sup>th</sup> Cir. 2002) .....	<i>passim</i>
<i>Gottshall v. Consol. Rail Corp.</i> , 988 F.2d 355 (3 <sup>d</sup> Cir. 1993), <i>rev'd</i> , 512 U.S. 532 (1994).....	13
<i>Holman v. Gillen</i> , 2002 WL 31834875 (N.D. Ill. Dec. 17, 2002).....	14
<i>Nigro v. City of Chi.</i> , 1992 WL 112239 (N.D. Ill. May 20, 1992).....	14
<i>Pastre v. Weber</i> , 717 F. Supp. 992 (S.D.N.Y. 1989).....	14
<i>Pyles v. Merit Sys. Prot. Bd.</i> , 45 F.3d 411 (Fed. Cir. 1995) .....	13
<i>Rowland v. Mad River Local Sch. Dist.</i> , 730 F.2d 444 (6 <sup>th</sup> Cir. 1984) .....	13
<i>Sias v. Sec'y of Health &amp; Human Servs.</i> , 861 F.2d 475 (6 <sup>th</sup> Cir. 1988) .....	13

### OTHER AUTHORITY

Fed. R. Evid. 201 .....	11, 12
Fed. R. Evid. 201 advisory committee's notes .....	11, 12
2 Kenneth C. Davis, <i>Administrative Law Treatise</i> § 15.03 (1958) .....	11

## I. ARGUMENT

### A. Mr. Smith Offers No Authority Or Support For The District Court's Imposition Of Social Security Ruling 90-1p On ERISA Plans

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Continental's opening brief explained how the district court's decision cannot stand following the Supreme Court's decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 123 S. Ct. 1965 (2003). Specifically, Continental articulated the following three points: (i) the district court erred by imposing on ERISA plans a Social Security Ruling which requires a peculiar procedural and substantive analysis of pain-related disability claims; (ii) the district court erred by imposing on ERISA plans a new version of the treating physician rule, holding pain medications prescribed by treating physicians are "objective evidence of disabling pain"; and (iii) the district court erred by imposing on ERISA plans the burden of proving through "substantial evidence" that the claims of pain were exaggerated.

In response, Mr. Smith argues Continental reads *Nord* in an "overly-broad" fashion. Continental is not asking the Court to extend *Nord*, but rather to apply *Nord*. In *Nord*, the Supreme Court invalidated the Ninth Circuit's importing of a treating physician rule from Social Security regulations into a rule of law applicable to ERISA plans. 123 S. Ct. at 1972. Continental similarly seeks to

invalidate the district court's adoption of a substantive and procedural Social Security Ruling as a new substantive rule of law applicable to ERISA plans.

Continental further submits that *Nord* bars the district court from using any variation of the treating physician rule. *See id.* Finally, Continental submits the district court's burden shifting formula is contrary to *Nord* because the district court imposed a "discrete burden" on Continental to refute "specially weighted" evidence. *See id.* Thus, the contention that Continental is reading *Nord* in an overly broad fashion simply cannot withstand scrutiny.

Mr. Smith further contends that "[m]any ERISA-based decisions have utilized Social Security law concepts as part of their analysis" and cites *Gallagher v. Reliance Standard Life Insurance Co.*, 305 F.3d 264 (4<sup>th</sup> Cir. 2002), as a "strong example of the necessary and common use of Social Security Authority in ERISA-based decisions." (Appellee's Br., pp. 47, 48.) Not only is *Gallagher* not "strongly" supportive of Mr. Smith, but it is not supportive at all.

In *Gallagher*, the claimant argued the insurer had to give "substantial weight" to the Social Security Administration's determination of disability. 305 F.3d at 275. This Court rejected that argument, holding the insurer was not required to give "substantial weight" to Social Security's determination of disability, because of differences in the definition of disability. *Id.*

In addition, not one of the post-*Nord* ERISA cases cited by Mr. Smith approves of adopting a Social Security regulation as a rule of law to be followed by ERISA plans. (*See* Appellee’s Br., pp. 45-46 and cases cited therein.) This is not surprising because the district court’s analysis is so clearly contrary to *Nord*.<sup>1</sup>

Mr. Smith further suggests the district court merely looked to Social Security law for guidance. (Appellee’s Br., p. 47.) The district court, however, stated that “[t]he evidentiary assessment of pain cannot reasonably differ whether a claimant seeks disability benefits under a private plan of insurance or under the public scheme of social security.” (J.A. 19.) The district court then quotes the pain standard in SSR 90-1p *verbatim* and applies that standard to Mr. Smith’s claim. (J.A. 19-20, 28-34.)<sup>2</sup>

B. Mr. Smith Mistakenly Accuses Continental Of Omitting Facts From Its Brief

In a vain effort to discredit Continental, Mr. Smith asserts in footnotes throughout his brief that facts were “excluded from Appellant’s Brief.” (Appellee’s Br., pp. 3-17 nn.1-30, 35-38 nn.32-40, 42-44 nn.41-44.) Although it

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<sup>1</sup> Mr. Smith cites *Conrad v. Continental Casualty Co.*, 232 F. Supp. 2d 600, 604 (E.D.N.C. 2002), as a post-*Nord* decision that purportedly adopts a similar pain analysis as the district court did here. (Appellee’s Br., p. 45.) Contrary to Mr. Smith’s contention, *Conrad* was decided on October 30, 2002, several months prior to the Supreme Court’s decision in *Nord*.

<sup>2</sup> Mr. Smith accuses Continental of hypocrisy because it relied on a Plan provision allowing for offset of monthly benefits by any Social Security disability award. (Appellee’s Br., p. 49 n.46.) Reliance on a plan provision is not within the definition of “hypocrisy.”

undoubtedly is true that Continental omitted certain facts from its brief, it is equally true that Continental's fourteen-page statement of facts was a thorough review of the relevant facts. (*See* Appellant's Br., pp. 2-16.)

Moreover, the majority of the "facts" Mr. Smith claims Continental omitted are in Continental's brief. (*Compare* Appellee's Br., n.2, *with* Appellant's Br., pp. 4-5 (describing Dr. Lowe's opinions in the Physician's Statement and citing J.A. 571); *compare id.*, n.3, *with* Appellant's Br., p. 5 (describing job requirements in Employer's Statement and citing J.A. 567); *compare id.*, n.4, *with* Appellant's Br., p. 7 (describing results of March 2000 MRI and citing J.A. 579); *compare id.*, n.5, *with* Appellant's Br., p. 7 (describing results of February 2000 MRI and citing J.A. 585); *compare id.*, n.6, *with* Appellant's Br., p. 6 (describing results of June 1999 MRI and Dr. Davis's interpretation of results, and citing Dr. Solomon's interpretation of results (J.A. 598)); *compare id.*, n.11, *with* Appellant's Br., p. 8 (describing the telephone interview and citing J.A. 553-555); *compare id.*, n.12, *with* Appellant's Br., pp. 9-10 (describing Dr. Solomon's March 13, 2001 report and citing same (J.A. 508/78)); *compare id.*, n.13, *with* Appellant's Br., pp. 10-11 (describing Dr. Kahan's findings and citing J.A. 501-503); *compare id.*, n.14, *with* Appellant's Br., pp. 12-13 (describing Dr. Sutter's findings and citing J.A. 496-497/67-68); *compare id.*, n.15, *with* Appellant's Br., pp. 11-12 (describing Dr. Launder's opinions and citing J.A. 486-492/57-63); *compare id.*, n.16, *with*

Appellant's Br., pp. 12-13 (describing Dr. Sutter's findings and citing J.A. 496-497/67-68); *compare id.*, n.18, with Appellant's Br., p. 12 (describing Mr. Kranitz's findings and citing J.A. 481, 485); *compare id.*, n.23, with Appellant's Br., pp. 15-16 (describing Drs. Macedo's and Meyer's evaluations and citing J.A. 272-274); *compare id.*, n.24, with Appellant's Br., p. 11 (noting, *inter alia*, Dr. Launder's finding of "mild limb atrophy" and citing J.A. 487/58); *compare id.*, n.32, with Appellant's Br., p. 8 (describing telephone interview of Mr. Smith and citing J.A. 553-555); *compare id.*, n.38, with Appellant's Br., p. 5 (describing job requirements in Employer's Statement and citing J.A. 567); *compare id.*, n.43, with Appellant's Br., p. 9 (quoting Dr. Lowe's notes and, contrary to Mr. Smith's accusation, including the words "without excruciating pain".)

Mr. Smith further accuses Continental of failing to mention the results of "most of the objective tests conducted on Appellant in its Brief." (Appellee's Br., p. 32.) Continental, with two exceptions,<sup>3</sup> referenced all of the testing performed on Mr. Smith, including the MRI and CT scan in April 1998, x-ray testing in

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<sup>3</sup> Continental did not discuss, in brief, a nerve conduction study performed on Mr. Smith one and one-half years before his date of disability. (J.A. 593-594.) Continental also omitted the radiologic findings from a study performed about fifteen months before Mr. Smith's date of disability, which notably found "there is no evidence in the examination to indicate a discogenic basis for the patient's clinical disorder." (J.A. 98.) Continental's independent medical reviewer, in fact, considered both studies. (J.A. 323-24, 333.) Continental omitted these tests from its brief because they were tangential to the issues raised in brief. Indeed, Mr. Smith fails to explain how either test is material to the outcome.

January 1999, the MRI and CT scan in June 1999, the February 2000 MRI, and the functional capacity evaluation in December 2001. (Appellant's Br., pp. 6-7, 15-16.) Notably, Mr. Smith's brief does not reiterate all of this testing because it is in Continental's brief. (*Compare id. with* Appellee's Br., pp. 5, 14, 31-32.)

Further, contrary to Mr. Smith's assertion, the objective testing did not confirm Mr. Smith's "disabling condition" or his "pain symptoms." (Appellee's Br., pp. 32-33.) Indeed, the district court found that "[a]lmost no [objective medical evidence] substantiates the intensity of pain that Mr. Smith said he was feeling." (J.A. 21.) Although Continental recognized during the claims review process that some of the objective testing supported some degree of back pain, the testing did not support the intensity of pain or the functional loss alleged by Mr. Smith. (J.A. 253.)

C. Mr. Smith Mistakenly Accuses Continental Of Ignoring Evidence In The Administrative Record

In a similar vein, Mr. Smith accuses Continental of failing to consider statements he made during a telephone interview with Continental employee Cheryl Sauerhoff.<sup>4</sup> (Appellee's Br., pp. 34-35.) The administrative record proves otherwise.

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<sup>4</sup> In fact, the telephone interview was conducted by Pam Ward, not Cheryl Sauerhoff. (J.A. 249, 553.)

Continental's denial letter discussed Mr. Smith's statements during the telephone interview, but concluded this information did not preclude Mr. Smith from performing the duties of his regular occupation. (J.A. 251-253.) Given that Continental's denial letter discussed the telephone interview, it can hardly be legitimately argued that Continental failed to consider the telephone interview.

Mr. Smith similarly contends Continental "never took into consideration many of [his] job duties" in violation of *Gallagher*, 305 F.3d at 270. (Appellee's Br., p. 37.)<sup>5</sup> Both Continental's denial letter and the appeal denial letter quoted and relied upon the job description provided by Mr. Smith's employer. (J.A. 250-252, 330-331 (quoting J.A. 566-567).) The independent medical reviewer, Dr. Soriano, also considered the employer's job description. (J.A. 323.)

Mr. Smith further contends Continental ignored the opinion of Marilyn Schwartz, the employer's Director of Human Resources, who allegedly stated that

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<sup>5</sup> In *Gallagher v. Reliance Standard Life Insurance Co.*, 305 F.3d 264 (4<sup>th</sup> Cir. 2002), the insurer, Reliance, looked to the Department of Labor's Dictionary of Occupational Titles ("DOT") to define the insured's material duties. *Id.* at 271. On appeal, the insured argued that use of the DOT description of job duties, as opposed to the actual job duties of the insured, rendered the insurer's disability determination "fatally flawed." *Id.* at 272. The Court rejected this argument, reasoning that the only significant discrepancy between the DOT job description and the actual job description was a travel requirement. *Id.* This difference was not "fatal" because in order to qualify for benefits the insured had to be "unable to perform each and every material duty of his occupation." *Id.* Thus, even if the insured were unable to travel, the insured still had to prove he was unable to perform all of his non-travel duties. *Id.* The Court concluded the insurer's adoption of the description of job duties from the DOT was not inappropriate. *Id.* at 273.

Mr. Smith was “unable to function in his capacity, being unable to travel for the purpose of seeing clients or training sales employees.” (Appellee’s Br., p. 38.)

Ms. Schwartz, a layperson, did not opine that Mr. Smith was unable to perform his occupation, but rather stated “[i]t is my understanding that he is unable to function in this capacity.” (J.A. 151.) Ms. Schwartz’s “understanding” of Mr. Smith’s functional limitations is not an opinion, even from a layperson, that Mr. Smith is unable to perform his job duties.

Mr. Smith further accuses Continental of “bad faith conduct” by supporting its claims decision with Dr. Solomon’s alleged “typographical error” regarding the last date he treated Mr. Smith. (Appellee’s Br., pp. 40-41.) According to Mr. Smith’s brief, the last day Dr. Solomon examined him was July 11, 2000.<sup>6</sup> (*Id.*, p. 40.)

According to the administrative record, Dr. Solomon examined Mr. Smith on March 13, 2001 (J.A. 508), and June 11, 2001. (J.A. 271.) Mr. Smith’s brief further omits mention of the fact that his counsel prepared the letter containing the alleged error and his counsel submitted that letter to Continental. (J.A. 271.) Notably, the administrative record is devoid of any statement from Dr. Solomon

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<sup>6</sup> During the claim review process, however, Mr. Smith’s counsel, in a letter to Continental, made specific reference to and quoted from Dr. Solomon’s March 13, 2001 examination. (J.A. 467.)

indicating the June 11, 2001 date was in error. In sum, Mr. Smith cannot blame Continental for his error, if indeed it was an error.

Finally, Mr. Smith accuses Continental of deception in the written questionnaire sent to Dr. Lowe in April 2001 because the questionnaire makes reference to Continental's "unsupported hearsay findings" of physical therapist Mr. Simanski. (Appellee's Br., pp. 5-6.) According to Mr. Smith, Mr. Simanski's findings, "[i]n all likelihood," concerned Mr. Smith's condition as of July 10, 2000 rather than January 26, 2001.<sup>7</sup> (*Id.*, p. 6.)

First, hearsay is routinely considered during the administrative adjudication of claims for disability benefits. The opinions of Mr. Smith's health care providers, including Mr. Simanski, were all hearsay, but were all considered by Continental. Mr. Smith certainly cannot be suggesting that evidentiary standards should be applied during the ERISA benefits determination process.

Second, Continental committed no impropriety by providing Dr. Lowe with the information received from Mr. Simanski, a physical therapist. Continental accurately stated Mr. Simanski's opinion, and Dr. Lowe was free to give Mr. Simanski's opinion whatever weight Dr. Lowe thought appropriate. Dr. Lowe's

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<sup>7</sup> Mr. Smith again contends this fact was "excluded in Appellant's Brief." (Appellee's Br., p. 6 n.9.) This "in all likelihood" argument is a contention by Mr. Smith, not a fact.

answer to Continental's question was not "uninformed," at least not due to anything Continental said about Mr. Simanski's opinions.

Finally, Mr. Smith cites no evidence confirming that Mr. Simanski was referring to Mr. Smith's condition as of July 10, 2000, rather than the last day of physical therapy on January 26, 2001. Mr. Simanski indicated his opinion was as of "when he released Mr. Smith." (*See* J.A. 543.) Based on the records indicating the last day Mr. Smith underwent physical therapy was January 26, 2001, it was reasonable for Continental to believe Mr. Simanski was referring to Mr. Smith's condition at that time. (*See* J.A. 543.)

D. The District Court Improperly Relied Upon The Results Of The Coghill Study As Substantive Medical Evidence

Mr. Smith contends the district court did not consider the News Release and Coghill Study as substantive evidence, but merely as illustrative of the point that there is "no accurate test to measure a patient's self-report of pain." (Appellee's Br., pp. 49-50.) According to the district court, however, the News Release and Coghill Study established "a physiological basis for individual differences in pain sensitivity." (J.A. 18.) This proposition is the bedrock upon which the district court constructs its pain platform. Although the citation is in a footnote, the News Release and Coghill Study are integral to the district court's decision.

Mr. Smith contends Continental waived any objection to the district court's reliance on the News Release and Coghill Study by failing to request a hearing on

this issue. (Appellee’s Br., pp. 50-51 (citing Fed. R. Evid. 201(e).) The record, however, is clear, Continental first learned of the News Release and Coghill Study upon receipt of the district court’s decision. No authority is cited or exists to support Mr. Smith’s assertion that, after judgment, Continental had an obligation to request a hearing, as opposed to noticing an appeal.

Mr. Smith further argues the district court could take judicial notice of the News Release and Coghill Study under Rule 201 of the Federal Rules of Evidence. (See Appellee’s Br., pp. 50-51.) The “fact” extracted from the News Release and Coghill Study was not properly the subject of judicial notice because it was not an “adjudicative fact.” Under Rule 201, a court may only take judicial notice of “adjudicative facts.” See Fed. R. Evid. 201(a), (b). Adjudicative facts “are simply the facts of the particular case,” those “concerning the immediate parties – who did what, where, when, how, and with what motive or intent.” Fed. R. Evid. 201 advisory committee’s notes (quoting 2 Kenneth C. Davis, *Administrative Law Treatise* § 15.03 at 353 (1958)). The conclusion the court drew from the News Release and Coghill Study was not one of “the facts of [this] particular case.”

Still further, in order to fall under the umbrella of judicial notice, the facts must not be “subject to reasonable dispute.” Fed. R. Evid. 201(b). A fact is “not subject to reasonable dispute” if it is either “generally known within the territorial jurisdiction of the trial court” or “capable of accurate and ready determination by

resort to sources whose accuracy cannot reasonably be questioned.” *Id.* The standard is “one of caution in requiring that the matter be beyond reasonable controversy.” *Id.*, advisory committee’s notes.

As explained in Continental’s brief in chief, the News Release and Coghill Study are not free from reasonable dispute. (Appellant’s Br., pp. 34-37.) The study’s theory is neither “generally known” nor “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

Mr. Smith argues that, “[g]iven the rapid advancements in medical science, new information which clarifies medical issues which was not available at the time of the initial closure of the administrative record should be allowed under the doctrine of judicial notice.” (Appellee’s Br., p. 53.) The Court should reject this invitation to write new law because it lacks foundation in either the Federal Rules of Evidence or the Federal common law. Further, this proposed “rule” is unsound. Federal court reliance on each new study and experiment would interfere with a plan administrator’s discretion to determine eligibility for benefits. *See Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4<sup>th</sup> Cir. 1985) (“To review *de novo* all the evidence trustees *might* have considered is to transfer the administration of benefit and pension plans from their designated fiduciaries to the federal bench. Such

substitution of authority is plainly what the formulated standards in [ERISA] are intended to prevent.”).

Finally, Mr. Smith seeks solace in cases he claims took judicial notice of “medical evidence.” (Appellee’s Br., pp. 52-53.) The cases cited, however, are not helpful because none involved a court taking judicial notice of the findings from a single, new, and untested scientific study. Moreover, none of the cases involved a court relying upon a study that was not part of the ERISA plan’s administrative record. *See, e.g., Pyles v. Merit Sys. Prot. Bd.*, 45 F.3d 411, 415 (Fed. Cir. 1995) (non-ERISA case in which court took judicial notice of medical and English language dictionaries); *Gottshall v. Consol. Rail Corp.*, 988 F.2d 355, 374 n.7 (3<sup>d</sup> Cir. 1993) (non-ERISA case in which court cited law review articles concerning the feigning of psychological injury in court proceedings), *rev’d*, 512 U.S. 532 (1994); *Clemmons v. Bohannon*, 918 F.2d 858, 865 n.5 (10<sup>th</sup> Cir. 1990) (non-ERISA case in which court judicially noticed federal statutes and regulations, state statutes, government reports, municipal ordinances, and the Surgeon General’s reports referred to or incorporated into the Congressional Record); *Sias v. Sec’y of Health & Human Servs.*, 861 F.2d 475, 480 (6<sup>th</sup> Cir. 1988) (non-ERISA case in which court judicially noticed cost of claimant’s cigarette habit and the “massive body of medical opinion” concerning particular dangers of smoking); *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 454-56 (6<sup>th</sup> Cir. 1984)

(Edwards, J, dissenting) (non-ERISA case in which dissenting judge recommended that courts take judicial notice of facts and studies concerning homosexuality); *Holman v. Gillen*, 2002 WL 31834875, \*4 (N.D. Ill. Dec. 17, 2002) (non-ERISA case in which court took judicial notice of medical studies submitted as court exhibits in prior case); *Nigro v. City of Chi.*, 1992 WL 112239, \*1, 3 n.2 (N.D. Ill. May 20, 1992) (non-ERISA case in which court took judicial notice of consent decree and the date when acts, pursuant to the decree, were accomplished); *Pastre v. Weber*, 717 F. Supp. 992, 994 n.1 (S.D.N.Y. 1989) (non-ERISA case in which court took judicial notice that “there are no major blood vessels in the scalp; blood is there supplied by capillaries, from which, upon a laceration, it would ooze, not spurt”); *Beeson v. Johnson*, 668 F. Supp. 498, 503 (E.D.N.C. 1987) (non-ERISA case in which court took judicial notice of certain hazards of tobacco smoke “known to everyone”), *rev’d*, 894 F.2d 401 (4<sup>th</sup> Cir. 1990); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1243 (E.D.N.Y. 1985) (non-ERISA case in which court took judicial notice of numerous epidemiological reports and a particular scientific technique “accepted by a sufficient number of courts to allow judicial notice to be taken”), *aff’d*, 818 F.2d 187 (2<sup>d</sup> Cir. 1987). In the one ERISA case cited by Mr. Smith, the court did not take judicial notice. *Barnett v. Kaiser Found. Health Plan, Inc.*, 32 F.3d 413 (9<sup>th</sup> Cir. 1994). Thus, none of the cases cited by Mr. Smith supports his contention concerning judicial notice.

## II. CONCLUSION

For the reasons stated, Continental Casualty Company respectfully requests that this Court vacate the district court's August 4, 2003 order granting Mr. Smith's motion for summary judgment and direct the entry of a judgment in favor of Continental based on its cross-motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22<sup>nd</sup> day of December, 2003, two copies of Continental Casualty Company's Reply Brief to the United States Court of Appeals for the Fourth Circuit were mailed, first class, postage prepaid, to:

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