

In The
Supreme Court of the United States

COURTNEY KRISTEK,

Petitioner,

v.

THE TRAVELERS HOME & MARINE
INSURANCE COMPANY; HARTFORD
ACCIDENT & INDEMNITY COMPANY;
360 INSURANCE & INVESTMENTS, LLC
DBA 360 INSURANCE,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX

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**MEMORANDUM* OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(OCTOBER 21, 2021)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURTNEY KRISTEK,

Plaintiff-Appellant,

v.

TRAVELERS HOME AND MARINE
INSURANCE COMPANY; ET AL.,

Defendants-Appellees.

No. 20-17072

D.C. No. 2:20-cv-01314-JAD-DJA

Appeal from the United States District Court for
the District of Nevada Jennifer A. Dorsey,
District Judge, Presiding

Submitted October 18, 2021**
San Francisco, California

* This disposition is not appropriate for publication and is not
precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for
decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: WATFORD and HURWITZ, Circuit Judges,
and BAKER,*** International Trade Judge.

Courtney Kristek, also known as Courtney Dolan and Courtney DolanKristek,¹ appeals a district court's dismissal of her complaint in this insurance coverage case. Dismissals under Rule 12(b) or (c) and determinations of subject-matter jurisdiction are reviewed *de novo*. *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1171 (9th Cir. 2004); *Corona-Contreras v. Gruel*, 857 F.3d 1025, 1028 (9th Cir. 2017); *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1246 (9th Cir. 2017). We affirm.

I.

We first address our appellate jurisdiction under 28 U.S.C. § 1291. The dismissal order stated that, if Kristek opted not to amend her complaint, the district court would consider it an admission that she could not plead plausible claims and would dismiss with prejudice. Rather than seek leave, Kristek filed a notice of appeal on the final day of the ten-day period.

We have found a district court's order disposing of all claims to be "a full adjudication of the issues" when, if not for the grant of leave to amend, "the dismissal would have clearly evidenced the judge's intention that it be the court's final act in the matter." *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d

*** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

¹ This opinion uses the name Kristek consistent with the case caption in this Court. We address this issue below.

884, 892 & n.5 (9th Cir. 2019) (cleaned up). That logic applies here. The district court made plain that it would have dismissed with prejudice the day after the notice of appeal was filed, and had it done so the notice of appeal would have ripened. *See* Fed. R. App. P. 4(a)(2). We therefore have appellate jurisdiction.

II.

Kristek contends the district court lacked jurisdiction and should have remanded to state court for three reasons. None has merit.

First, while the notice of removal referred to 28 U.S.C. § 1333, the district court reasonably accepted defense counsel's statement that the reference to § 1333 rather than § 1332 was a typographical error. Second, the notice of removal was timely because the removing defendant, Travelers, was served on June 16, 2020, and filed the notice on July 16, 2020. *See* 28 U.S.C. § 1446; Fed. R. Civ. P. 6(a)(1)(A). Third, the district court rightly found that Travelers' failure to include proof of service on every defendant with the notice of removal was a *de minimis* defect and appropriately granted five days to amend. *See Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136 (9th Cir. 2013).

Finally, the district court did not err in treating a non-diverse defendant as a "sham defendant." The court was unable to discern any basis on which liability could be imposed against that defendant, and Kristek failed to seek leave to amend despite the district court's warning that failure to do so would be treated as a "concession that she cannot plead plausible claims." The district court therefore properly exercised diversity jurisdiction to dismiss this case. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir.

2001); *Grancare, LLC v. Thrower ex rel. Mills*, 889 F.3d 543, 548 (9th Cir. 2018).

III

Kristek's Fourteenth Amendment "due process" attack on the district court's ruling is mostly a restatement of her other theories for reversal and boils down to the theory that it was unconstitutional for the district court to rule against her. That theory is so obviously meritless that we find it unnecessary to address it. And Kristek's contention that the district court violated her rights by ruling without a jury trial presupposes that her complaint successfully stated claims on which relief could be granted.

While Kristek claims the district court did not give her "the opportunity" to participate in the entire hearing or to respond to the amended notice of removal, the record shows that after Kristek became disconnected from the hearing, the district court made multiple phone calls, sent e-mail messages, and delayed the conclusion of the hearing for 90 minutes to allow further time for contact. Moreover, nothing in the district court's order prevented Kristek from filing a new motion to remand if she believed something in the amended notice of removal was defective.

IV.

Kristek raises several claims of bias against the district court. First, she claims the district court discriminated against her based on an unspecified disability that prevented her from appearing at an in-person hearing during the pandemic. Even assuming Kristek is disabled (something not supported by the record), the district court granted Kristek's request for

a videoconference hearing, so she cannot claim prejudice.

Second, Kristek complains that the district court questioned her use of different last names as plaintiff and as counsel. But the court made plain that it was doing so simply to make sure that the caption was accurate and that the court understood the identities of the parties.² There is no basis for us to conclude that the district judge was biased.

The judgment of the district court is AFFIRMED.

² The complaint listed the plaintiff as "Courtney Kristek" and her attorney as "Courtney L. Dolan" and began with "COMES NOW Plaintiff, COURTNEY KRISTEK, individually, by and through her counsel, Courtney L. Dolan, Esq., of DOLAN LAW GROUP, LTD."

**ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NEVADA GRANTING MOTIONS TO
DISMISS THE COMPLAINT
(OCTOBER 7, 2020)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

COURTNEY KRISTEK,

Plaintiff,

v.

THE TRAVELERS HOME AND MARINE
INSURANCE COMPANY; ET AL.,

Defendant.

No. 2:20-cv-01314-JAD-DJA

Before: Jennifer A. DORSEY, United
States District Court Judge.

MINUTE ORDER

The Court makes preliminary remarks and hears representations of counsel. The Court hears oral argument on the motions to remand [10] [14]. The Court places findings and conclusions on the record and **ORDERS** that the motions to remand [10] [14] are **DENIED**.

The Court begins to make rulings on the motions to dismiss at [5] [6] [17]. While the Court was doing so, plaintiffs video connection terminated, and she dropped off of the hearing. The courtroom deputy telephoned her multiple times at the phone number listed on the docket and with the State Bar of Nevada, to no avail, reaching only an answering service that also indicated that it could not reach her. So the Court adjourned the hearing and continued it for an hour; the Court emailed the parties a new link to the 1 p.m. video hearing and made additional attempts to telephone the plaintiff, all to no avail.

The Court reconvened the video hearing at 1 p.m. Counsel for all defendants appeared; again, plaintiff was not present. The Court resumed placing its findings and conclusions on the record with respect to the motions to dismiss.

THE COURT FURTHER ORDERS that the motions to dismiss at [5] [6] [17] are GRANTED and the complaint is dismissed in its entirety without prejudice. The Court denies plaintiffs request to amend her complaint because it lacks the proposed amended complaint that Local Rule 15-1 requires, and the Court cannot determine based on the information presently before it whether amendment would be futile.

Instead, the Court will give the plaintiff the opportunity to demonstrate with a motion for leave to amend her complaint that she can state plausible claims. So, IT IS FURTHER ORDERED that Plaintiff has until October 19, 2020, to file a proper motion for leave to amend with points and authorities and a proposed amended complaint as an exhibit. Briefing on that motion will progress under LR 7-2. If the

plaintiff does not file such a motion by October 19, 2020, the Court will deem that decision to be her concession that she cannot plead plausible claims, dismiss this case with prejudice without further prior notice, and close it.

IT IS FURTHER ORDERED THAT, on each future filing, plaintiff must indicate in the attorney block of the caption that she is representing herself in a pro se capacity.

The minutes of this proceeding and the transcript will serve as the Court's official ruling. No separate written order will issue.

BENCH RULING OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
(OCTOBER 7, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

COURTNEY KRISTEK,

Plaintiff,

v.

THE TRAVELERS HOME AND MARINE
INSURANCE COMPANY; ET AL.,

Defendant.

No. 2:20-cv-01314-JAD-DJA

Courtroom 6D

Before: Jennifer A. DORSEY, United
States District Court Judge.

***[Las Vegas, Nevada; Wednesday, October 7, 2020;
10:59 a.m. Transcript p. 1]***

COURTROOM ADMINISTRATOR: Now's the time set
for a motions hearing in Case Number 2:20-cv-
1314-JAD-DJA, Courtney Kristek versus
Travelers Insurance Company, et al.

Counsel, please state your appearances.

THE COURT: Plaintiff's counsel first, please.

MS. DOLAN: Courtney Dolan-Kristek. I'm going as Courtney Dolan as attorney of record for this hearing.

MR. REEVES: William Reeves on behalf—apologies. William Reeves on behalf of the Travelers Home and Marine Insurance Company.

MR. BUTTERFIELD: Chad Butterfield on behalf of Hartford Accident & Indemnity Company. Also with me is my associate, Rachel Wise.

MR. RASMUSSEN: Good morning, Your Honor. Scott Rasmussen on behalf of 360 Insurance & Investments.

THE COURT: All right. Thank you, everyone.

So we are here on this Zoom civil hearing—motion hearing on two motions to remand and three motions to dismiss this insurance coverage action that was removed here from state court. The motions are in the docket at Numbers 5, 6, 10, 14, and 17.

Just to summarize, plaintiff, Courtney Kristek, sues two insurance carriers and her insurance agent or broker for the failure to tender a defense of claims that she alleges were asserted against her in a state court action. She's represented on the docket by Attorney Courtney Dolan.

Travelers Insurance removed the action here on the 30th day after service. Both of the other defendant's consent to removal as well, though the defendants also argue that the insurance agent or broker, 360 Insurance, a Nevada entity, is

a sham defendant sued only to defeat diversity. Paragraph 14 of the complaint—of the plaintiff's complaint alleges, quote, "Complete diversity does exist between the litigants in this case."

Though the plaintiff moves to remand this case back to state court, she does not allege lack of diversity as a basis. Primarily she alleges defective removal procedures.

So, for this hearing today I'm going to start with the motions to remand. But before I get there, I do have some questions for plaintiff's counsel. Because going through this record, I have to admit, I am perplexed by a number of things. So I want to start there.

The issue really centers, for me, on some name confusion, and the defendants tell me in various briefs that the plaintiff, named as Courtney Kristek, and plaintiff's counsel, identified on the pleadings and briefing as Courtney Dolan, are, in fact, the same person using two different names.

So let me ask plaintiff or plaintiff's counsel, who I have here right now with me on this—on this hearing, is this true?

MS. DOLAN: Your Honor, I go by Courtney Dolan as an attorney, and I go by Courtney Dolan-Kristek as both—as personally. And I've never hidden the fact that I am Courtney Dolan-Kristek. I have it in the complaint "also known as," and I have it as the certificate of parties and I've also had it in my motions.

THE COURT: So when an attorney files a lawsuit on behalf of herself, her capacity is essentially in

the capacity as a pro se party. And the way that this is reflected in the complaint—hold on one second. I'm pulling it up.

Just when I look at the very—the first page of this, the attorney block—address block says Courtney L. Dolan, Esquire, of the Dolan Law Group, as attorneys for Plaintiff Courtney Kristek. And then the caption reads Courtney Kristek, an individual, as the plaintiff.

I'm—I'm just not understanding and I'm hoping that you can shine some light on this for me. Because when I look at this, just it patently appears to be trying to perpetrate some type of a fraud on the Court, and certainly you can imagine why this would create great confusion.

Please explain to me why you're doing this this way.

MS. DOLAN: The insurance has me both as Courtney Dolan-Kristek. The state bar has me as Courtney Dolan, and I also did an "also known as." I'm allowed to proceed under my married name, and I'm also allowed to practice law under my maiden name. I'm not trying to perpetrate any fraud upon the Court, and all of my filings indicate— well, most of my initial filings, and including with the federal court, there's an "also known as" with Dolan and Kristek.

THE COURT: So what is your true legal name?

MS. DOLAN: Courtney Dolan-Kristek. I'm not trying to perpetrate a fraud on the Court. I, as a married woman, have a right to go by both names.

And with all due respect, Your Honor, this—this is irrelevant and has nothing to do with the underlying lawsuit.

THE COURT: I'm just trying to—this is my first hearing with you, Ms. Dolan-Kristek, and I'm just trying to understand who the parties are, what the allegations are, and who I have in front of me. So I'm not asking about the details of—of your marriage.

Really what I'm asking is why it appears that there—that you represent someone who is not you, and that's—I'm just telling you, quite honestly, that is what it appears when I look at this.

MS. DOLAN: No, it does not.

THE COURT: So—

MS. DOLAN: I—I go by—I go by Courtney Kristek and I go by Courtney Dolan, and that is my legal right to do so.

THE COURT: All right. So you are representing yourself in a pro se capacity because there is not a separate attorney in this case. Would that be accurate?

MS. DOLAN: I—that is correct.

THE COURT: Okay. All right. Well, I think that we need to find a way for this—the caption to accurately reflect that. So I'll get back to that, but I just wanted to understand who it is—who the parties are at this point. So I think I have some greater clarity with that now.

So let's go ahead and—

MS. DOLAN: Your Honor, I—

THE COURT:—turn then to the motions to remand.

So the plaintiff has filed a handful of motions to remand this case back to state court. I've obviously read all of the briefs on this request. I fully understand the parties' positions.

So what we're going to do is have some limited argument. I'm going to give the plaintiff ten minutes to argue her remand request, and then I'm going to give each of the defendants five minutes to oppose and respond. And I'm going to allow Ms. Dolan-Kristek to reserve up to three minutes of her time for rebuttal.

So, Ms. Dolan-Kristek, I ask you, do you want to—do you want to reserve the whole three minutes for rebuttal?

MS. DOLAN: Yes.

THE COURT: Okay. So I'm going to put seven minutes—I have a clock in here. I'm going to put seven minutes on my clock. If you have a cell phone or some other timer, perhaps you want to put that on seven minutes so that you can make sure that your—you know how much time you have left. When we get to zero, I will let you know. So I'm going to now put seven minutes on my clock. All right?

And whenever you are ready, I will hear your argument.

MS. DOLAN: Okay, Your Honor. I don't think I'm going to take the full ten minutes. I feel that I've briefed this motion for remand pretty extensively.

The highlighted points I want to address is the fact that the petition for removal is untimely under
1446—

THE COURT: Why is it untimely?

MS. DOLAN: Because it's 31 days—

THE COURT: But we—

MS. DOLAN:—instead of 30.

THE COURT:—don't count—so June has 30 days, and we don't count the date of service under Rule 6. How do we get to 31 days?

MS. DOLAN: The—the statute is—is mandatory. It says 31 days, not the 31st day. The tolling starts on the day of service, and the 30th day would have been—he was—Travelers was served on June 16th. So the 30th day would have been July 15th, and the petition was removed on the 16th, the 31st day.

THE COURT: Okay.

MS. DOLAN: In addition, the petition is defective. It does not have all of the required documents in 1446. We have no documents for Hartford Insurance. We only have an answer for 360 Insurance. There are no—there are no affidavits of service included in the petition for removal. There's only, like I said, a one-page division of insurance service document, maybe one or two pages for Travelers Insurance.

Also, the three defendant—the three defendants failed to properly join in in the petition for removal because there are no required 1441—all of the 1441 documents. There was no service on

plaintiff, the Eighth Judicial District Court petition, copy of the petition, that was filed. There was also no service of a certificate of interested parties with the removal upon plaintiff's counsel. And there was also no certificate of interested party filed for two of the defendants, for 360 Insurance and for Hartford Insurance.

The next problem we have that's defective with the petition for removal is there's no legal cite that [indiscernible] jurisdiction over this case—

THE COURT: I'm sorry, you—sorry. Ms. Dolan-Kristek, you were breaking up. There's no legal? I'm sorry.

MS. DOLAN: There's no legal cite—there's no legal cite in the petition that was filed late that grants this Court original or personal jurisdiction in this case cited by any of—by Travelers other than a—than one case claiming that 360 Insurance is a sham defendant.

Now, that—that does not provide the plaintiff adequate legal notice both service wise, because not all the required documents were served upon plaintiff's counsel, but it also makes it difficult for plaintiff's counsel to respond to the untimely petition for removal when there's no—no statutory authority that is legitimate that provides this Court jurisdiction.

They cite § 1333, which is admiral law which has nothing to do with this case, and then they cite the 1441, which they don't even—which doesn't provide jurisdiction for this Court.

And—and in the replies to the motion for remand, there still is no adequate legal authority that grants this Court jurisdiction. So it places plaintiff in a quandary and violates their due process rights to respond to the—to the motion for—for remand or the—

THE COURT: Do you—

MS. DOLAN:—petition for—

THE COURT: Do you contend that there's not diversity jurisdiction over this matter?

MS. DOLAN: There is not complete diversity.

THE COURT: So why did you allege in the complaint, in paragraph 10, that there's complete diversity?

MS. DOLAN: Your Honor, it was a typo.

THE COURT: Oh.

MS. DOLAN: There is not complete diversity. Because I do address that in the remand. I address that in the remand in the conclusion paragraph, and I address it in the replies. There's not complete diversity.

So this removal is invalid because of 1331. There's no federal question before this Court. All the— all of the causes of action are state causes of action. And there's no complete diversity between the parties because 360 Insurance, who was my insurance agent who sold the policy and serviced the policy and the claim, are—is a Nevada resident, as well as plaintiff. And no one—none of the parties refute that. So there's no jurisdiction over this case for this federal court.

THE COURT: Okay. You have about a minute and a half left. Anything else?

MS. DOLAN: No, I don't believe so. Just that the— you know, the statute should trump any case law that any of the defendants cite. No one really addresses the untimeliness of the petition other than to just claim that it's 30 days instead of 31 days, and the Court would have to ignore six federal statutes in order to grant the removal petition.

THE COURT: All right. Thank you.

All right. So let me hear from Travelers' counsel first. I'm going to put five minutes on my clock. Whenever you're ready.

MR. REEVES: Thank you, Your Honor. William Reeves on behalf of Travelers.

Counsel raises four arguments: Timeliness, required documents, legal authority, and then this 360 Insurance issue. The three were raised in her motion to remand, and all are addressed in our opposition. And, candidly, we don't—I don't have much to add relative to either of those. It's been addressed. The 31-day issue is illusory, as this Court is aware.

When we get to 360 Insurance, again, counsel's moved on us relative to it. But at the end of the day, and as reflected in our notice of removal, 360 is a sham defendant. The reason for that is she's—counsel is seeking to attribute liability to an agent for the conduct of the carrier. And it's the law of Nevada, as reflected in a number of cases, that an agent cannot be held responsible or liable for the conduct of a carrier.

And the decisional law—and I'll amplify because, again, it was not addressed in her motion to remand. So, in a sense, it's a new argument. But the three cases I would alert the Court to are the *Vargas* decision; that's at 780—788 F.Supp.2d 462. The *Dollarhide* decision; that's at 2014 WL 1573633. And the *Allen* decision; that's at 2013 WL 1104776. And that's just a sampling of the cases, and it tracks what we put in our notice of removal; that the claims against 360 Insurance fail as a matter of law given the allegations that have been pled and—

THE COURT: So let me ask Travelers this question. So in the notice of removal there's a—kind of a string cite of statutes under which you're claiming jurisdiction. The—1333 is listed in there. Like the plaintiff's allegation that there is complete diversity, was that a typo that was intended to be 1332, diversity jurisdiction?

MR. REEVES: It was, Your Honor. That's an astute observation. And apologies to this Court.

THE COURT: And—and that would certainly make the discussion about sham defendant make more sense; right? Because we're talking about—

MR. REEVES: It certainly would, Your Honor.

THE COURT:—1332 and the effect of a non-diverse defendant being named.

MR. REEVES: Certainly, Your Honor.

And I believe the briefing reflects that everybody is on the same page. I think that it's form over substance relative to counsel not being apprised of the basis of removal. It's pretty patent and

obvious at this point, and this Court has substantial, substantial briefing repetitive in nature relative to this.

And so at the end of the day this Court does have jurisdiction. I'll dignify that plaintiff alleging diversity was a typo given the position taken here today. But with that said, I've heard nothing and I've seen nothing relative to why the claims against 360 Insurance would survive.

And so, given that, this Court does have jurisdiction, which would then permit it to adjudicate the motions to dismiss filed by both Hartford and Travelers.

We'll submit, Your Honor, unless you have any further questions.

THE COURT: I don't. Thank you.

All right. I'll zero out your time, and then I will hear from counsel for Hartford next.

MR. BUTTERFIELD: Thank you, Your Honor.

THE COURT: Go ahead.

MR. BUTTERFIELD: Chad Butterfield for Hartford. Just to address a couple of the points that—that Travelers didn't highlight, on the timeliness issue—and we cited this in our motion, and the Court is well aware—Rule 6(a)(1)(A) provides the day of the event as—that triggers the period is excluded. The Court knows it's 30 days, not 31 days. Plaintiff has not cited to any legal authority to support her contention that the notice of removal was filed 31 days after and not 30 when

Rule 6 is clear on its face that the day of the event that triggers the period is excluded.

On the issue of joinder, plaintiff has ignored again the case law that we've cited that, under the statute, 1446, that all defendants must join in or consent. We provided our consent prior to the notice of removal being filed, and the notice of removal on its face indicates that both Hartford and 360 Insurance consented to the removal. That's sufficient under Ninth Circuit law. We cited to *Proctor versus Vishay International* [sic] Technology, Inc.

The notice—the procedural issues that plaintiff is raising are non-jurisdictional to this Court. Plaintiff is quibbling over minor procedural defects when 1441(b) is a non-jurisdictional statute. And when an alleged defect is merely procedural, the Court has discretion in determining whether the case should be remanded. Plaintiff hasn't acknowledged that either.

Your Honor, I believe that's all I have unless the Court has any questions.

THE COURT: I don't. Thank you very much.

MR. BUTTERFIELD: Thank you, Your Honor.

THE COURT: All right. So let's now go to 360. I have five minutes on the clock whenever you are ready, sir.

MR. RASMUSSEN: Thank you, Your Honor.

Our arguments are pretty straightforward. We also consented, and we want to make sure that's on the record with regard to the removal. We do not

disagree that 360 is a Nevada company; however, as has been laid out by Mr. Reeves prior, we believe that 360 Insurance is a sham defendant in this case because none of the claims being made by the plaintiff in this case with regard to her complaint are valid. They are a sham in they're fraudulent in many ways in the way they're doing that.

We have cited for the Court in our moving opposition or in our opposition the *McCabe* case at 811 F.2d 1336, a Ninth Circuit 1987 case; the *Hamilton Materials* case, 494 F.3d 1203, also a Ninth Circuit 2007 case; and *Eagle and American Telegraph and Telephone Company* case, 769 F.2d 561—554 [sic], also Ninth Circuit 1985 case, all of which talk about this sham, sort of a suspicion.

If you look at the actual causes of action, none of them can go against a broker. None of them create some sort of a relationship that the plaintiff keeps trying to create that doesn't exist. And we've laid out exactly what the duties are under Nevada law, which is also something that we had to do as part of our opposition, and we provided for you the case of *Vacation Village versus Hitachi*, 110 Nevada 481 (1994), which basically lays out the standard of care for insurance brokers, since there is no doubt that we are an insurance broker. We are not an insurance carrier. We did not provide insurance for the residence at issue in this case.

With that, we adopt all of the arguments that have been previously made by counsel here already in this hearing by the defense counsel, Mr. Butterfield

and Mr. Reeves, and we submit on that—on that.
Thank you.

THE COURT: All right. Thank you very much.

All right. So three minutes for rebuttal I'm putting on the clock for you, Ms. Dolan-Kristek. Whenever you're ready.

MS. DOLAN: Yes, Your Honor.

Plaintiff's counsel did address sham defendant argument in the motion for remand and for the reply brief, and also the complaint itself indicates that 360 Insurance is not a sham defendant. And also I'd like to point out that in lower court, Eighth Judicial District Court, 360 Insurance filed an answer. So they waived any—there was no mention, I believe, in the answer that 360 Insurance—they—they don't make any arguments that they're not a sham—they don't make arguments that they are a sham defendant. So I would argue that it was waived.

Also the reply addressed those numerous facts regarding 360 Insurance that includes they were the dual authorized agent for Hartford Insurance. They sold the policy that is at issue, the homeowner's policy. They service the homeowner's policy. They service the claim that was filed in December of 2017 that is—that is at issue. They indicated to plaintiff that the claim was covered and that Hartford Insurance had a duty to defend the claim when the claim was discussed in detail prior to plaintiff filing the claim and even provided the phone number to file a claim. And also plaintiff had follow-up contact with 360 Insurance concerning the claim and the policy

and also answered any policy questions and coverage questions, which I also attached a copy of Hartford's own insurance documents to plaintiff that indicates that 360 Insurance is your insurance agent and that's who you go to discuss coverage issues—insurance coverage issues. So to argue that 360 Insurance is a sham defendant is not accurate.

I also—plaintiff's counsel also provided copies of e-mail correspondence with 360 Insurance concerning the policy and the claim. When 360 Insurance argues in their motions that they had no discussions with plaintiff concerning the claim and all they did was procured the—the policy, that's a complete inaccurate and false statement.

THE COURT: All right. Anything else?

All right. Your time is up.

So—all right. Here's what I'm going to do. I'm going to rule on the motions to remand on the record. I'm going to place my findings and conclusions on the record today. So this transcript of this hearing will serve as my findings and conclusions and the record of my ruling.

I'm going to start first with the timeliness challenge. The removal here was timely. Travelers was served on June 16th and removed on July 16th. FRCP 6(a)(1)(A) tells us that these time computations apply to any local rule or court order or any statute that does not specify a method of computing time. And what it tells us is we have to exclude the day of the event that triggers the period. So we don't count June 16th. So we start

with June 17th. So the filing of this on the 16th of July was within the 30-day period.

That's also true just under a plain language reading of 1446. 1446 doesn't say by the 30th day. It says the notice of removal of a civil action shall be filed within 30 days after the service of summons upon the defendant or the receipt through service of otherwise of the initial pleading.

So, again, we're talking about the 30 days after. So, regardless, we're not going to be counting that first date of the day of service on the 16th. So although this was just within the timeliness, under the statute it is still timely. So the removal was timely.

The removal was also not improper because the notice wasn't served on the plaintiff. 1446(b) does not require service, just filing, and this was filed. Additionally, it is clear that the plaintiff, who was counsel of record because she's participating in this dual capacity, did receive it. The removal—the removal is also not invalid because the defendants failed to file certificates of interested parties.

The plaintiff does not explain how such a certificate could impact removal or make it defective. Regardless, the defendants—certainly I have in the docket here a certificate of interested parties by Travelers at Docket Number 2, and there's a certificate of interested parties by Hartford at Number 7. So those—and then 360 Insurance filed its certificate of interested parties at Number 18. So those have, in fact, now been filed.

The removal's also not defective because other defendants did not join in it. The Rule 1446(b)(2)

(A) requires all defendants to, quote, "join in or consent to the removal of the action," end quote. And the petition for removal clearly states that the other two defendants gave their consent, as both defendants also confirm in their briefing on this motion.

So really that leaves me with this final argument that removal is defective because Travelers failed to attach a complete set of the service documents for all the defendants leaving out some proofs of service and summonses.

Section 1446 indicates that remand is appropriate when a notice of removal is procedurally deficient, and certainly these are procedural deficiencies. But the courts are split on whether such deficiencies are a proper basis for remand.

The Ninth Circuit's decision in the *Kuxhausen, K-u-x-h-a-u-s-e-n, versus BMW Financial Services* case addressed a similar deficiency, the failure to attach the complaint to the removal notice. The panel in that case recognized that, quote, "This de minimis procedural defect was curable even after the expiration of the 30-day removal period."

I—based on that case, I will allow the defendants to cure their defects in the removal within the next five days to the extent that they have not yet. So you'll need to file a supplement to that notice.

And ultimately I conclude that to permit this de minimis defect to defeat removal would elevate form over substance. So I deny the motions to remand. I find that the removal was proper and that the plaintiff's remaining arguments that

the case should instead be in state court cannot defeat the timely removal of this case. So this case stays here.

So that brings me to the motions to dismiss. Again, I have read all the briefing on these motions, and I'm—I'm going to just cut to the chase here because I don't need—I don't think I need complete argument here and because I don't think today's hearing really ends the question of the sufficiency of these claims.

So here's what I'm going to do. First, I note that I do apply the plausibility standards—the plausibility standards developed in *Ashcraft versus Iqbal* and *Bell Atlantic Corp. versus Twombly*. Under those standards, to survive a motion to dismiss, a complaint must contain sufficient factual matter accepted as true to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

In considering a motion to dismiss for failure to state a claim like these, I accept all of the well-pled factual allegations in the complaint as true, and I construe them in the light most favorable to the plaintiff. While a plaintiff is not required to plead detailed factual allegations, a plaintiff must offer more than labels and conclusions or a formulaic recitation of the elements of a cause of action. Factual allegations must be enough to raise a right to relief above the speculative level.

Here I have read this complaint a number of times, and I find that it lacks the factual allegations needed to plead any claim based on this coverage theory. All of these claims really turn on the plaintiff's theory that she had claim defense coverage for claims asserted against her in a state court action, but the allegations about the nature of that coverage and the nature of the state court claims are too thin for me to find a plausible claim here at this time.

Did we lose the plaintiff?

MR. REEVES: It appears that way, Your Honor. That's what I'm showing.

MR. RASMUSSEN: Yes, I think we did.

THE COURT: All right. Let's give it a second and see if she comes back.

(Pause in proceedings.)

THE COURT: All right. I will note for the record we have made a phone call to Ms. Dolan and indicated to the person who answered the phone on her behalf that she needs to call back and reconnect. So far that hasn't happened. I'll give it a few more minutes, and we will just have to proceed without her. I appreciate everyone's patience. We're going to try calling one more time.

(Pause in proceedings.)

THE COURT: Danielle, what did they indicate?

COURTROOM ADMINISTRATOR: They couldn't get ahold of her.

THE COURT: They can't get ahold of her. Okay. We'll give it a few more minutes and see if she tries to reconnect.

And, Danielle, were you calling the phone number that we have on the docket for her?

COURTROOM ADMINISTRATOR: Yes, Your Honor.

THE COURT: Thank you.

Amber, do you know approximately what time we dropped off based on your transcript?

THE COURT REPORTER: 11:33.

THE COURT: All right. So ten minutes ago.

Do any of you, Counsel, happen to have maybe her cell number?

MR. REEVES: It's William Reeves. I do not. I was looking, Your Honor. The—I believe the number that I have is—is from her—from her complaint, from her pleading.

MR. RASMUSSEN: Your Honor, the only number that I have for Ms. Courtney L. Dolan is (702) 396-0910.

THE COURT: I think that's the one we have on the—yeah, that's the one we have on the docket. Thank you.

MR. BUTTERFIELD: And, Your Honor, that's the number on the State Bar website as well.

THE COURT: Thank you.

Danielle, would you do me the favor of calling one last time?

COURTROOM ADMINISTRATOR: Sure.

Hi. My name is Danielle, and I'm calling from the federal court for Courtney Dolan, please. Yeah. Is there any way you can see the status if she's going to rejoin the Zoom meeting? We've been trying to get ahold of her for about 12 minutes now. Thank you.

THE COURT: And then, Danielle, ask them if they have a cell number for her that they could possibly call.

COURTROOM ADMINISTRATOR: Okay. Do you possibly have a cell phone number for her? You don't? Okay. Okay.

THE COURT: So her—is that her service?

COURTROOM ADMINISTRATOR: Is this just a service? THE COURT: An answering service?

COURTROOM ADMINISTRATOR: To her office. Okay. All right. Thank you. Bye.

The assistant is working remotely, and she only has a connection to her office, no cell phone number.

THE COURT: Okay. So her assistant does not have a cell phone number for her.

All right. Well, I . . . I think what we need to do is perhaps try to continue this. Because the rulings that I anticipate I might be making here are certainly going to require some more input from Ms. Dolan-Kristek, and I have additional questions for her that will certainly impact those rulings, the answers to which will impact those rulings.

So I guess my question is: Could we resume this, this—perhaps this afternoon? Maybe we could try 1:00 o'clock?

Danielle, is it—do we have a plea at 1:30 or 1:00?

COURTROOM ADMINISTRATOR: 1:30, Your Honor.

THE COURT: 1:30.

This is—this hasn't happened to me yet, despite the fact that we do many, many Zoom hearings now and telephonic hearings. I've never just completely lost the ability to get in touch with an attorney who is in the middle of a hearing.

Let me ask, Counsel, would you-all be available to continue this hearing at 1:00 o'clock today? I don't anticipate that it will be more than about 15, 20 minutes.

MR. REEVES: On behalf of Travelers, yes, Your Honor. I'm available.

MR. BUTTERFIELD: On behalf of Hartford, I'm also available, Your Honor.

MR. RASMUSSEN: And on behalf of 360 Insurance, I'm also available. Scott Rasmussen.

COURTROOM ADMINISTRATOR: I'm going to send out a different Zoom link, and I'll send it to her. Maybe that will be better for her.

THE COURT: Okay. All right. So that's what we're going to do. We're going to pause this hearing now. We'll adjourn for the moment. We'll resume at 1:00. Danielle is going to send out a new Zoom link. So it will be a new one for everyone to connect to. It won't be the same one we have right now. So just make sure you use the new Zoom link.

We will continue to try to get in touch with her in the meantime.

If any of you gets in touch with her or hears from her, please let her know that we will be resuming at 1:00 o'clock today to complete this hearing. And we'll just see you guys in about an hour.

MR. REEVES: Thank you, Your Honor.

THE COURT: Thank you.

MR. BUTTERFIELD: Thank you, Your Honor.

THE COURT: We're adjourned now.

MR. RASMUSSEN: Thank you, Your Honor.

(Recess at 11:49 a.m., until 12:59 p.m.)

THE COURT: Go ahead and wait one minute until it's 1:00 o'clock, and then we'll call it again.

All right. I'm showing 1:00 o'clock.

COURTROOM ADMINISTRATOR: Okay. Now's the time set for a motions hearing in Case Number 2:20-cv-1314-JAD-DJA, Courtney Kristek versus Travelers Insurance Company, et al.

Counsel, please state your appearances.

MR. REEVES: Good afternoon, Your Honor. William Reeves on behalf of Defendant Travelers.

MR. BUTTERFIELD: Good morning—or good afternoon, Your Honor. Chad Butterfield and Rachel Wise on behalf of Hartford.

MR. RASMUSSEN: Good afternoon, Your Honor. Scott Rasmussen on behalf of 360 Insurance Investments.

THE COURT: All right. Well, we adjourned and reset this for 1:00 o'clock and sent out a new Zoom notice because plaintiff/plaintiff's counsel, Ms. Dolan-Kristek, dropped off of our Zoom hearing, and so I wanted to have the opportunity to let her reconnect in the event she was having some kind of Internet problems. That was more than an hour ago. We have tried repeatedly to contact her, calling her on the phone number listed both on the docket and on the State of Nevada Bar's website with no luck. We've repeatedly reached her what appears to be an answering service, and they've indicated that they cannot contact her or have been unable to contact her as well.

So I don't know what to make of what's going on, but I'm ready to rule. And so I'm just going to go forward and place my findings and conclusions on the record here today and—and finish up with this.

So when she dropped off, I stopped—and that was right after I had articulated the *Iqbal/Twombly* standard that I am applying to these three motions to dismiss. This is my ruling.

Here the complaint lacks the factual allegations needed to plead any claim based on this coverage theory. The plaintiff theorizes that she had claim defense coverage for claims asserted against her in a state court action. But the allegations about the nature of that coverage and the nature of the state court claims are simply too thin in this complaint for me to find a plausible claim here. This is a foundational problem in the factual allegations.

As to the nature of the claims in this case, the plaintiff alleges only in paragraph 10 that, quote, "all defendants in that case," that state court case, "asserted multiple claims against Insured Courtney in that lawsuit and the related cases," end quote. And as to the nature of the coverage, she alleges that she had, quote, "valid insurance claims that invoked the duty to defend."

These allegations are merely conclusory statements. They are not sufficiently factual for me to determine plausibility under *Iqbal* and *Twombly*.

A secondary problem relates to Defendant 360. The plaintiff's coverage claims against the insurers are also asserted against the insurance broker, but the duties under the law, as the defendants point out in their briefing and citing to numerous cases, the duties are different for these categories of entities and defendants. And the plaintiff has pled no facts that would currently support any claim against the insurance broker, 360.

So I grant the motions to dismiss, and this leaves me with the plaintiff's request for leave to amend. The rules of this district, specifically Local Rule 15-1, requires a request for leave to amend to be accompanied by a proposed amended complaint so that the Court can evaluate whether the proposed amendment is futile or not.

Ms. Dolan did not provide such a proposed amended complaint, and I can't tell at this point—I was going to ask her some additional questions, but I cannot tell at this point, based on the briefing, whether she can actually plead facts to support any claim. Because what I know is that the

defendants are representing to me—and I have not dug into the state court record at this point because that was not really my job at a 12(b)(6) hearing. But I have not dug into the state court record to determine if the cases that she's talking about and these alleged claims that she says have been asserted against her were actually claims asserted against her. Certainly, if there are no claims asserted against her, I think that truly complicates the ability to state a claim. But I don't know what she's talking about at this point, and I don't know what she can demonstrate. So I also don't know what her theory is for coverage for 360 and what the theory against 360, as the agent broker, would be for liability here.

So what I'm going to do is deny without prejudice the request for leave to amend at this time because it lacks a proposed amended complaint, and I need to evaluate whether amendment would be futile.

So instead what I'm going to do is give the plaintiff ten days to file a proper motion for leave to amend with points and authorities and which attaches as an exhibit a proposed amended complaint. The briefing on that motion for leave to amend will then continue in the normal course under the schedule in the local rules. I would direct everyone to Local Rule 7-2, for example.

If the plaintiff does not file such a motion within ten days—so by October 19th. Because the 10th day falls on a Saturday, it gets bumped over to the Monday. So by October 19th she will need to file a motion for leave to amend with a proper

proposed amended complaint. And if she fails to do so, I will deem that decision to be her concession that she cannot plead plausible claims, and I will dismiss this case with prejudice and without further prior notice and I will also close the case.

So, to summarize—and I will put this in a minute order—or in my minutes from this hearing, actually, not in a minute order but from my minutes from this hearing, the motions to remand at Numbers 10 and 14 are denied. The motions to dismiss at 5, 6, and 17 are granted, and the complaint is dismissed in its entirety without prejudice. Plaintiff has until October 19th of 2020 to file a proper motion for leave to amend with points and authorities and a proposed amended complaint as an exhibit to that motion.

Briefing on that motion will progress under Local Rule 7-2. If the plaintiff does not file such a motion within ten days—so, again, by October 19th, 2020—I will deem that decision to be her concession that she cannot plead plausible claims, I will dismiss this case with prejudice without further prior notice, and I will close it.

I will also note that in future filings that the plaintiff needs to make it clear in the attorney address block on the first page of all of her filings that she is representing herself in a pro se capacity. And I think I also did not address the fact that in—I want to say in the motions to remand she had asked for an award of fees. She can't—the plaintiff cannot recover fees in this case for her lawyer when she is the lawyer. So the—first of all, it's denied because it lacks merit and because the motion was denied—the motion to

remand was denied, and it's secondarily denied because someone representing themselves cannot seek attorney's fees when those fees were essentially their own personal services.

So I wanted just to make sure that I hit everything. Is there any need for clarification? I'll start with Travelers.

MR. REEVES: No, Your Honor. Thank you.

THE COURT: Hartford?

MR. BUTTERFIELD: No, Your Honor. Thank you.

THE COURT: 360?

MR. RASMUSSEN: No, Your Honor. Thank you.

THE COURT: Okay. I will note that we are now—it is 1:08, and we still have not been joined by the plaintiff. So she's—she's still not on this hearing. But I will make sure that the minutes clearly reflect my order from today so she has guidance on what she needs to accomplish.

And if any of you happens to hear from her, please, I appreciate if you can let her know that we completed the hearing, we attempted repeatedly to get in touch with her in order to do so and have her participate, but unfortunately we—none of us was successful and that she should look at the minutes.

All right, everyone. We're adjourned. Thank you.

MR. REEVES: Thank you, Your Honor.

MR. RASMUSSEN: Thank you, Your Honor.

(Proceedings adjourned at 1:09 p.m.)

Full docket text for document 43:

MINUTE ORDER IN CHAMBERS of the Honorable Judge Jennifer A. Dorsey on 9/17/2020.

RE [40] Motion to Appear Telephonically. Plaintiff's counsel (who appears to also be the plaintiff using a different name) moves to appear telephonically for the Court's 9/22/2020 hearing based on concerns about the COVID-19 pandemic [40]. Travelers responds that it has no objection to telephonic or video appearance and requests that the same accommodations be given to all counsel [42]. Good cause appearing, IT IS HEREBY ORDERED that the motion [40] is GRANTED IN PART; the 9/22/2020 hearing [39] will be conducted via VIDEO, and COUNSEL MUST APPEAR VIA VIDEO for this hearing, not merely audio/telephone.

The parties will receive a zoom invitation link from this Court's Courtroom Administrator to the email address that is listed on the docket.

The Court notes that, prior to filing this motion, Ms. Dolan/Kristek phoned and/or emailed numerous court employees and the Chief Judge with complaints about this judge having scheduled an in-person hearing. Ms. Dolan/Kristek is advised that the calendars of the individual judges in this district are kept and managed by those individual judges and that requests regarding those calendars and dockets should be directed to the assigned judge by using the procedures outlined in this Districts Local Rules. Requests for relief must be made by proper motion. L.R. 1A 7-1(b).

**ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT DENYING PETITION
FOR PANEL REHEARING
(NOVEMBER 4, 2021)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURTNEY KRISTEK,

Plaintiff-Appellant,

v.

TRAVELERS HOME AND MARINE
INSURANCE COMPANY; ET AL.,

Defendants-Appellees.

No. 20-17072

D.C. No. 2:20-cv-01314-JAD-DJA

Appeal from the United States District Court for
the District of Nevada Jennifer A. Dorsey, District
Judge, Presiding

Before: WATFORD and HURWITZ, Circuit Judges,
and BAKER,* International Trade Judge.

* The Honorable M. Miller Baker, Judge for the United States
Court of International Trade, sitting by designation.

Judges Watford, Hurwitz, and Baker have voted to deny Appellant's petition for panel rehearing, Docket No. 46, and the same is therefore DENIED.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12181-Definitions

As used in this subchapter:

(1) Commerce

The term “commerce” means travel, trade, traffic, commerce, transportation, or communication—

- (A) among the several States;
- (B) between any foreign country or any territory or possession and any State; or
- (C) between points in the same State but through another State or foreign country.

(2) Commercial facilities

The term “commercial facilities” means facilities—

- (A) that are intended for nonresidential use; and
- (B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 [1] (42 U.S.C. 3601 et seq.).

(3) Demand responsive system

The term “demand responsive system” means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system

The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus

The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity

The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad

The terms "rail" and "railroad" have the meaning given the term "railroad" in section 20102(1) 1 of title 49.

(9) Readily achievable

The term “readily achievable” means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

- (A) the nature and cost of the action needed under this chapter;
- (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term “specified public transportation” means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service

(including charter service) on a regular and continuing basis.

(11) Vehicle

The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

**42 U.S.C. § 12182-Prohibition of discrimination
by public accommodations**

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other

arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in

accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

- (i) that have the effect of discriminating on the basis of disability; or
- (ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a), discrimination includes—

- (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class

of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

- (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;
- (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;
- (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including

barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

- (v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility

It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service

If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the

effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system

For purposes of subsection (a), discrimination includes—

- (i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and
- (ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to indi-

viduals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability

Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements

For purposes of subsection (a), discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

FEDERAL REGULATIONS

§ 36.311 Mobility devices.

(a) Use of wheelchairs and manually-powered mobility aids. A public accommodation shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b)

(1) Use of other power-driven mobility devices. A public accommodation shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public accommodation can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b).

(2) Assessment factors. In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public accommodation shall consider -

(i) The type, size, weight, dimensions, and speed of the device;

App.54a

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics (e.g., whether its business is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)

(1) Inquiry about disability. A public accommodation shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) Inquiry into use of other power-driven mobility device. A public accommodation may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability.

A public accommodation that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public accommodation shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

EMAIL CORRESPONDENCE WITH COURT

Case no. 20-17072, Courtney Kristek v. Travelers Home
& Marine Ins., et al
9 messages

Thu, Jun 10, 2021 at 1:14 PM

SF CA09Calendar <SF Calendar@ca9.uscourts.gov>
To: <courtney.dolan.esq@gmail.com>

Good Afternoon,

We have received your response to being considered for oral argument in San Francisco in October. On your form thought, it appears you wrote our 2020 dates. Below we have listed our 2021 dates. Please review and let us know your availability for these dates.

October 4-8, 2021 and October 18-22, 2021
November 15-19, 20221
December 6-10, 2021

Thank you.
Calendar Unit
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco CA 94103
SF Calendar@ca9.uscourts.gov
(415) 355-8190

Thu, Jun 10, 2021 at 1:46 PM

Courtney Dolan <courtney.dolan.esq@gmail.com>

To: SF CA09Calendar <SF

Calendar@ca9.uscourts.gov> Hi, December 2021
dates are out for me.

Is there an option to zoom? I am immunocompromised, and I do not want to travel during covid.

Please advise.

Courtney L. Dolan, Esq.
Dolan Law Group, Ltd.
5940 South Rainbow Boulevard
Las Vegas, NV 89118
Telephone: (702) 396-0910

[Quoted text hidden]

Thu, Jun 10, 2021 at 2:12 PM

SF CA09Calendar <SF Calendar@ca9.uscourts.gov>

To: <courtney.dolan.esq@gmail.com>

Good Afternoon,

At this time we do expect oral argument to be back in person in October. That said, we do also expect the court will allow people to present oral argument remotely but you will most likely have to file a motion to do so. Please let us know if you have any other questions.

Thank you.

Calendar Unit

U.S. Court of Appeals for the Ninth Circuit

95 7th Street

San Francisco CA 94103
SF Calendar@ca9.uscourts.gov
(415) 355-8190

Thu, Jun 10, 2021 at 2:36 PM

Courtney Dolan <courtney.dolan.esq@gmail.com>
To: SF CA09Calendar <SF Calendar@ca9.uscourts.gov>

Lovely.

Courtney L. Dolan, Esq.
Dolan Law Group, Ltd.
5940 South Rainbow Boulevard
Las Vegas, NV 89118
Telephone: (702) 396-0910

[Quoted text hidden]

Thu, Jun 10, 2021 at 2:38 PM

Courtney Dolan <courtney.dolan.esq@gmail.com>
To: SF CA09Calendar <SF Calendar@ca9.uscourts.gov>

I should not have file a motion for an ADA
accommodation during covid 19.

Courtney L. Dolan, Esq.
Dolan Law Group, Ltd.
5940 South Rainbow Boulevard
Las Vegas, NV 89118
Telephone: (702) 396-0910

[Quoted text hidden]

Thu, Jun 10, 2021 at 3:31 PM

SF CA09Calendar <SF Calendar@ca9.uscourts.gov>

To: <courtney.dolan.esq@gmail.com>

Our apologies, we misspoke in our previous email. No motion will be needed. We have confirmed for our October calendars will not require anyone to travel or present oral argument in person. There will be remote options available.

[Quoted text hidden]

Thu, Jun 10, 2021 at 4:10 PM

Courtney Dolan <courtney.dolan.esq@gmail.com>

To: SF CA09Calendar <SF Calendar@ca9.uscourts.gov>

Thank you. Please let me know what options are available for remote options for hearings.

Thank you,
Courtney Dolan

[Quoted text hidden]

Thu, Jun 11, 2021 at 9:54 AM

SF CA09Calendar <SF Calendar@ca9.uscourts.gov>

To: <courtney.dolan.esq@gmail.com>

So far our court has been using Zoom as well as connecting to office's VTC systems. 2 weeks before your oral argument date though a courtroom deputy will reach out and inform you of the options available

as well as connect you with our AV team. They will make sure that you are able to connect to remote oral argument with whichever option you choose.

[Quoted text hidden]

Thu, Jun 11, 2021 at 11:26 AM

Courtney Dolan <courtney.dolan.esq@gmail.com>
To: SF CA09Calendar <SF

Calendar@ca9.uscourts.gov> Thank you. Sounds good.

Thank you,
Courtney Dolan

[Quoted text hidden]

RE: [FWD: Kristek v. Travelers Insurance]

Peggie Vannozzi
<Peggie_Vannozzi@nvd.uscourts.gov> Fri 9/4/2020
3:24 PM
To: Courtney.dolanlawlasvegas.com
<courtney@dolanlawlasvegas.com>

Ms. Dolan, LR IA 7-I(b) requires that you file your request as a motion in the case number assigned to Kristek vs. Travelers Insurance.

Peggie Vannozzi
Courtroom Administrator to
Chief Judge Miranda M. Du
U.S. District Court, District of
Nevada
775-686-5839
Peggie_vannozzi@nvd.uscourts.gov

From: courtney@dolanlawlasvegas.com
<courtney@dolanlawlasvegas.com>
Sent: Friday, September 4, 2020 3:03 PM
To: Peggie Vannozzi
<Peggie_Vannozzi@nvd.uscourts.gov>
Cc: Debra Kempf <Debra_Kempf@nvd.uscourts.gov>
Subject: RE: [FWD: Kristek v. Travelers Insurance]

I am still following up concerning my request below for the accommodation which I am legally entitled to under the ADA. Debra just got off the phone and initially refused to assist with the request, and was very unprofessional in my conversation with her. She also refused to address my concerns about my filings being stricken when they approved by the clerk's office, and my other issues with Judge Dorsey's chambers. This is not acceptable behavior. I had to wrangle with Debra Kempf concerning my second and third request for an ADA accommodation when she incorrectly stated that she is not the person to address these issues when she is.

Thank you for your prompt and professional response to these issues.

Courtney L. Dolan, Esq.
Dolan Law Group, Ltd.
5940 South Rainbow Boulevard
Las Vegas, NV 89118
Telephone: (702) 396-0910

----- Original Message-----

Subject: [FWD: Kristek v. Travelers Insurance]
From: <courtney@dolanlawlasvegas.com>
Date: Thu, September 03, 2020 11:46 am

To: "Peggie_Vannozzi@nvd.uscourts.gov"
<Peggie_Vannozzi@nvd.uscourts.gov>
Cc: "Debra_KemRi@nvd.uscourts.gov"
<Debra_Kempi@nvd.uscourts.gov>

Ladies, I am writing to you about the above entitled case. I was notified yesterday that a teleconference hearing was canceled in the above entitled case for September 08, 2020. It was vacated for a mandatory in person hearing for September 22, 2020. I called chambers right away, Judge Jennifer Dorsey, and I left a message that I cannot appear in person for medical reasons. Her court administrator contacted me back, and told me that I had to appear, and that I would have to file a motion to appear by telephone, even after I explained to her that I have a medical conditional that I need an ADA accommodation for during the pandemic. Deb, I have left a few messages concerning this and other issues I have had with her chambers, which I will address at a later time, but I have not heard back from you.

This is unacceptable, especially on a civil case, when few hearings are going on in Federal Court. I discussed this with Peggie yesterday, and she told me to do this email. I am not risking my health or others in my family for a court appearance, especially during the pandemic.

I appreciate your prompt response and attention to this matter. This is my second attempt at sending this email.

Thank you,
Courtney L. Dolan, Esq.

Dolan Law Group, Ltd.
5940 South Rainbow Boulevard
Las Vegas, NV 89118
Telephone: (702) 396-0910

----- Original Message-----

Subject: [FWD: Kristek v. Travelers Insurance]
From: <courtney@dolanlawlasvegas.com>
Date: Thu, September 02, 2020 10:28 am
To: "Peggie Vannozzi@nvd.uscourts.gov"
<Peggie_Vannozzi@nvd.uscourts.gov>
Cc: "Debra_KemRi@nvd.uscourts.gov"
<Debra_Kempi@nvd.uscourts.gov>

Ladies, I am writing to you about the above entitled case. I was notified yesterday that a teleconference hearing was canceled in the above entitled case for September 08, 2020. It was vacated for a mandatory in person hearing for September 22, 2020. I called chambers right away, Judge Jennifer Dorsey, and I left a message that I cannot appear in person for medical reasons. Her court administrator contacted me back, and told me that I had to appear, and that I would have to file a motion to appear by telephone, even after I explained to her that I have a medical condition that I need an ADA accommodation for during the pandemic. Deb, I have left a few messages concerning this and other issues I have had with her chambers, which I will address at a later time, but I have not heard back from you.

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others in my family for a court appearance, especially during the pandemic.

I appreciate your prompt response and attention to this matter.

Thank you,

Courtney L. Dolan, Esq.
Dolan Law Group, Ltd.
5940 South Rainbow Boulevard
Las Vegas, NV 89118
Telephone: (702) 396-0910

RE: [FWD: Kristek v. Travelers Insurance]

Debra Kempf

<Debra_Kempf@nvd.uscourts.gov> Fri 9/8/2020

5:04 PM

To: Courtney dolanlawlasvegas.com

<courtney@dolanlawlasvegas.com>

I am responding to your verbal request last week for me, as the Clerk of Court, to provide an ADA accom- modation that would allow you to appear at an hearing telephonically versus in person as currently ordered by the Court. Your request for an accommo- dation regarding your physical appearance at a hearing in a specific case must be addressed by the presiding judge in that case. I cannot make that accommodation for you. This is likely why others have suggested that you file a motion as required under our local rules.

Sincerely,

Deb Kempf

Debra Kemp
Clerk of Court
702-464-5456