



## Case Summaries December 3, 2021

**2 Opinions**  
**No grants**

### OPINIONS

#### PROCEDURE—APPELLATE

##### **Jurisdiction**

*Courtney N. Philips, Executive Commissioner; Sylvia Hernandez Kauffman, Inspector General; and Texas Health and Human Services Commission v. John McNeill, Jr. R.Ph.; and Nichols Southside Pharmacy*, —S.W.3d— (Tex. December 3, 2021) [19-0831]

The issues in this case are (1) whether pharmacist John McNeill’s request for findings of fact and conclusions of law following the trial court’s grant of the Health and Human Services Commission’s plea to the jurisdiction extended McNeill’s deadline to file an appeal from thirty to ninety days under Texas Rule of Appellate Procedure 26.1; and (2) whether McNeill, who contracted with the Commission as part of its Medicaid Vendor Drug Program (VDP), was statutorily entitled to a contested-case hearing to dispute the results of a program audit.

In 2012, the Commission conducted an audit of McNeill’s participation in the VDP and concluded that he had been overpaid by roughly \$70,000. McNeill requested on multiple occasions that the Commission provide him a contested-case hearing to dispute the results, and the Commission repeatedly refused. McNeill sued the Commission, alleging that he was entitled to a contested-case hearing both statutorily and under the U.S. and Texas Constitutions. The Commission filed a plea to the jurisdiction based on sovereign immunity, which the trial court granted. McNeill filed a request for findings of fact and conclusions of law. Then, eighty-seven days after the trial court’s order, McNeill filed his notice of appeal.

On appeal, the Commission argued both that McNeill was not entitled to a contested-case hearing and that the court of appeals did not have jurisdiction because McNeill’s appeal was untimely, contending that his deadline to file was thirty, not ninety, days after the trial court’s order. The court of appeals unanimously held that McNeill’s appeal was timely but fractured on

the question of whether McNeill had a right to a contested-case hearing. The majority held that he did, but on federal due process grounds, not statutory ones. The dissent felt that the majority had inappropriately reached the constitutional issue.

The Court held that a request for findings of fact and conclusions of law following a trial court proceeding extends the appellate timetable from thirty to ninety days where the trial court proceeding was the type where evidence could be considered, and evidence was before the trial court. Under this rule, McNeill's appeal was timely and jurisdiction proper. The Court further held that McNeill was entitled to a contested-case hearing under section 531.1201 of the Government Code, and that the Commission's failure to provide him one was *ultra vires* action not shielded by sovereign immunity. Finally, the Court held that the court of appeals erred in deciding on constitutional grounds where statutory grounds were available, and that the court of appeals' due process analysis in the case should not be considered authority.

## **INSURANCE**

### **Policies/Coverage**

*Dillon Gage Incorporated of Dallas v. Certain Underwriters at Lloyds Subscribing to Policy No. EE1701590*, — S.W.3d — (Tex. December 3, 2021) [21-0312]

The issues in this case are whether a gold-coin dealer sustained a loss “consequent upon” handing over coins against a fraudulent check, and whether alleged negligence by a third party was an independent cause of the loss. A thief opened an account with a gold-coin dealer under a false identity and paid for \$1.2 million in gold coins using fraudulent checks. After the checks provisionally cleared, the dealer sent shipping tracking information to the thief. The thief used this information to reroute the shipment, allowing the thief to pick up the coins. The dealer claims the shipper negligently allowed the rerouting.

The dealer made a claim against its insurance policy, which covered losses during shipment but excluded losses “consequent upon” handing over the property against fraudulent checks. The insurer refused coverage, citing the exclusion. The dealer sued, and the federal district court granted summary judgment for the insurer. The United States Court of Appeals for the Fifth Circuit certified two questions: (1) whether the dealer's losses were sustained consequent upon handing over the insured property against a fraudulent check, and if yes, (2) whether the shipper's alleged errors were an independent cause of the dealer's loss.

The Court held that “consequent upon” in the policy connoted but-for causation, based on the ordinary meaning of the words in the policy. The dealer's loss followed as a result from handing over the coins against the fraudulent check. Further, under Texas concurrent-causation doctrine, the shipper's alleged negligence was not an independent cause of the dealer's loss. The same actor or actors who forged the checks also induced the shipper to reroute the packages. The alleged shipping error was therefore dependent on handing over the property against the fraudulent checks.