

## Professional Liability

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### ***Ray v. Beussink & Hickam, P.C.:*** **A Potential Causation Defense Raised in an Accounting Malpractice Action Relating to a Miscalculation in Pension Benefits**

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In *Ray v. Beussink & Hickam, P.C.*, 2018 IL App (5th) 170274, the plaintiff alleged that his accountant incorrectly and negligently informed him about his retirement benefits, failed to determine the accuracy of the advice given, and/or miscalculated the amount of his pension benefits. *Ray*, 2018 IL App (5th) 170274, ¶ 6. The defendants, the accountant and accounting firm, moved to dismiss on two bases. First, the defendants argued that the Police Pension Fund did not have jurisdiction to modify the plaintiff's pension benefits as more than two years had passed since the award was finalized—and accordingly there was an unlawful intervening act breaking the causal chain. *Id.* Second, the defendants argued that the complaint should be dismissed because the plaintiff failed to include the Pension Fund as a necessary party to the litigation. *Id.*

The causation position was that the plaintiff's pension was initially determined on or about March 1, 2014; the Pension Fund audited the account and modified the benefits approximately two years later on April 20, 2016. *Id.* ¶¶ 1, 3, 5, 6 and 29. The defendants claimed that the Pension Fund lacked jurisdiction to make any change more than 35 days after its original and final determination. Therefore, the modification was not in accordance with Illinois administrative law. *Id.* ¶ 19.

The Circuit Court of Union County denied the motions to dismiss and then certified two questions for appeal pursuant to Illinois Supreme Court Rule 308. *Id.* ¶ 1. The two certified questions were 1) whether the Police Pension Fund could reduce a retiree's benefits two years after the pension was awarded; and 2) whether an individual can maintain a negligence action against an accountant for advice that was consistent with the determination of the Pension Fund. *Id.* ¶ 10.

### **Background and Analysis**

On June 1, 2013, the plaintiff was promoted to the position of Interim Chief of Police for the City of Anna. *Id.* ¶ 3. He served in that role until his retirement effective March 1, 2014. *Id.* The defendant, Scott Hickam, was the plaintiff's personal accountant but also served as the accountant to the Pension Fund. *Id.* ¶ 4. Upon retirement, the plaintiff received a pension that was based upon his most recent and highest rate of pay, which was related to his position as the Interim Chief of Police. *Id.* As a result of that increase in pay at the last job, he received a \$4,000 increase in his annual pension benefits. *Id.*

On April 20, 2016, approximately two years after his retirement, the Pension Fund informed the plaintiff that it was reducing his pension benefits by the extra \$4,000 because an Illinois Department of Insurance audit found that there had

been a miscalculation. *Id.* ¶ 5. In short, to receive the \$4,000 pension increase, the plaintiff would have had to hold the job as Interim Chief of Police for a minimum of twelve months, three months longer than he did. *Id.*

### Appellate Court Analysis

The Illinois Appellate Court Fifth District performed a detailed analysis as to whether the Pension Fund properly modified the pension award. The court recognized the case law that a review or modification of a final administrative decision must be commenced within 35 days from the date the decision was served upon the parties affected by the decision. *Id.* ¶ 19 (citing 735 ILCS 5/3-103). If the agency fails to comply with the 35-day deadline, it has no jurisdiction to modify that final decision. *Ray*, 2018 IL App (5th) 170274, ¶ 19 (citing *Kosakowski v. Bd. of Trustees of the City of Calumet City Police Pension Fund*, 389 Ill. App. 3d 381, 383-84 (1st Dist. 2009)).

To address the first certified question, the Fifth District needed to consider two issues. First, the court analyzed whether the plaintiff's pension benefit award was a "final" decision by the Pension Fund, subject to administrative review within 35 days. *Ray*, 2018 IL App (5th) 170274, ¶ 21. The appellate court determined that the award of pension benefits was a final determination by the Pension Fund for various reasons, including because the plaintiff had received his benefits and because the award was included in the Illinois Department of Insurance audit. *Id.* ¶ 25.

Next, the court needed to consider whether the mistake or error that occurred constituted a "mistake" or an "error" such that the Pension Fund could statutorily correct or modify the error after the passage of the 35 days. *Id.* ¶ 26. The Fifth District determined that the miscalculation did not constitute an error within the meaning of section 3-144.2 of the Illinois Pension Code (40 ILCS 5/3-144.2(a)), and therefore is not the type of "error" that could be modified after 35 days from its final decision. *Id.* ¶¶ 34-39.

Accordingly, the appellate court concluded that the Pension Fund lacked jurisdiction to make the change in the plaintiff's pension amount. *Id.* ¶ 39. Though the Pension Fund was not a party to the litigation, the appellate court did not reserve its ruling on the issue of whether the Pension Fund had authority to modify the plaintiff's benefits—with directions on remand to include the Pension Fund as a necessary party. Instead, the appellate court performed its detailed analysis and essentially held adversely to the Pension Fund without its presence in the litigation and without its presence in the appeal.

The appellate court did not answer the second certified question concluding that reviewing the factual actions or inactions of the accountant would be necessary to make a ruling on appeal, but reviewing such factual matters were outside of the scope of the narrowly framed issue on appeal. *Id.* ¶ 44. Accordingly, the case was remanded to the trial court for "further proceedings" based upon its analysis and holdings as to the first certified question, without any specific instruction as to what those further proceedings might be. *Id.* ¶¶ 44-45.

### What was Left for the Trial Court?

The appellate court held that the Pension Award inappropriately modified the plaintiff's pension benefit under Illinois law despite the fact that the Pension Fund was not a party to the litigation. It would appear that the ruling, and any order of the circuit court, would not be directly binding upon the Pension Fund. However, there is no reason to believe that the Fifth District would have ruled any differently if the Pension Fund had been party to the action.

It is now incumbent upon the parties to the litigation in the circuit court to bring in the Pension Fund to resolve the issue with regard to the change in the pension benefits, and to have the plaintiff redressed for any pension benefits that were not paid after the modification. From a procedural standpoint, it might have been completely reasonable for the



plaintiff to have brought in the Police Pension Fund to the suit initially upon filing the litigation. However, inclusion of the Pension Fund may have raised the question of whether the lawsuit was filed in the correct court. Accordingly, dismissal without prejudice or a transfer of venue may be proper.

### Practical Takeaways

From a defense perspective on the professional liability action, it cannot be understated how important it was for counsel to assert this defense and file the motion to dismiss considering the interesting and intricate legal principle that the defense was based upon. The essence of the defense was an “unlawful intervening act” terminating the causal connection. But the alleged unlawful intervening act was not a criminal act of a third party, but a complex interpretation of the administrative law based on the action of a pension board and the Illinois Department of Insurance audit team.

Accordingly, the defense itself appears to be a stroke of genius, and the circuit court and the appellate court handled those legal issues with great precision. In defending professional liability actions, or indeed any tort case, one should consider whether a similar defense can be raised pertaining to an intervening act or event terminating the causal connection.

### About the Author

**John F. Watson** is a partner with *Craig & Craig, LLC* in the Mattoon office. Mr. Watson graduated with a Bachelor of Science in Mechanical Engineering from Bradley University in 1990 and received his J. D., with Honors, from The John Marshall Law School in 1993. During law school, Mr. Watson served as an Associate Editor for *The John Marshall Law Review*. Mr. Watson’s fields of practice include general civil litigation, medical malpractice defense, municipal liability defense, insurance coverage and insurance law, intellectual property and criminal defense litigation.

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