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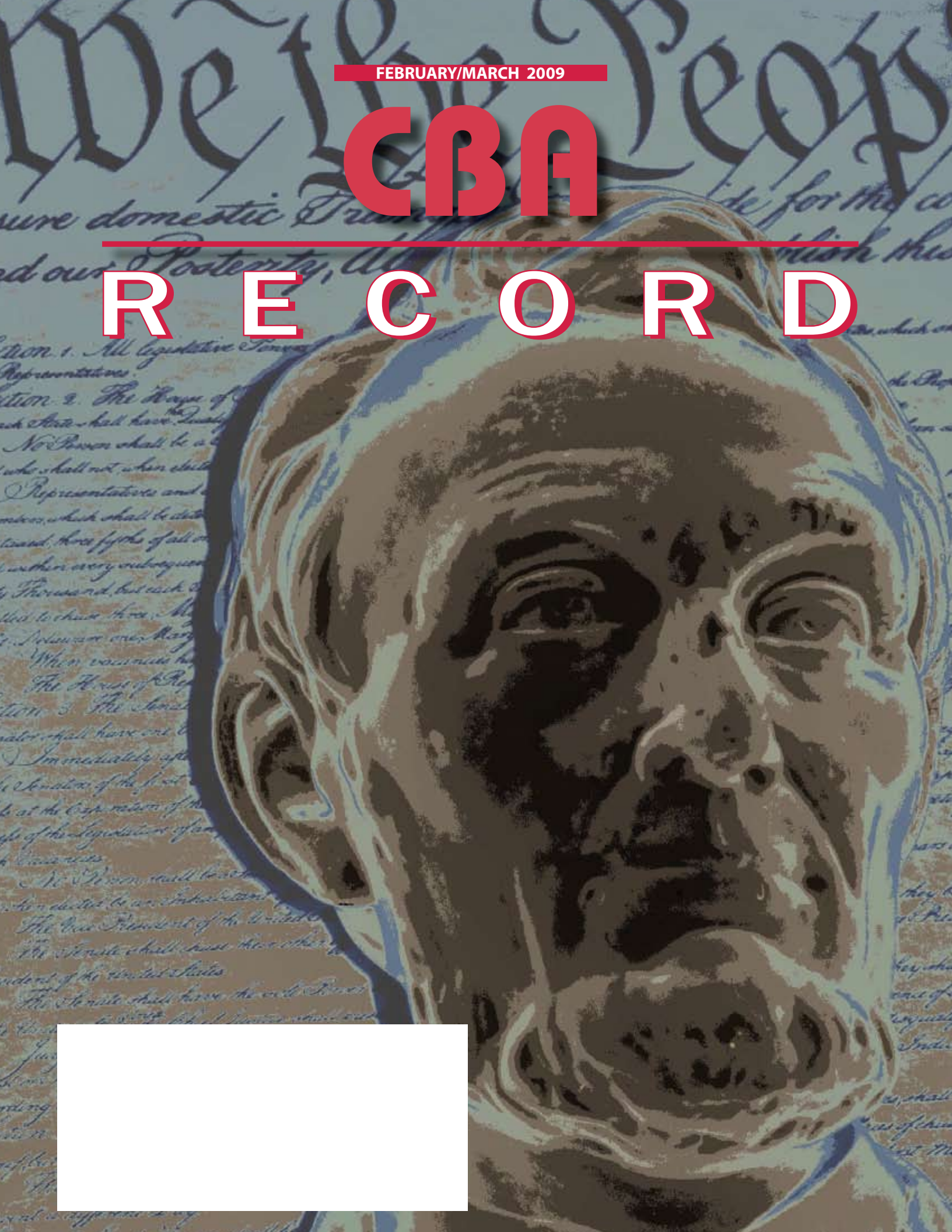

Should Settling Defendants Appear on a Jury Verdict Form?

By Matthew A. Passen

Consider this problem: Plaintiff files a personal injury lawsuit against defendants A, B and C. Prior to trial, plaintiff settles her claim against defendant A. Plaintiff proceeds to trial against defendants B and C. The question becomes: Should defendant A, who has already settled with the plaintiff prior to trial, nevertheless be listed on the verdict form for purposes of apportioning fault under Section 2-1117 of the Illinois Code of Civil Procedure?

The courts are split on this issue, as demonstrated by two recent Illinois appellate court decisions discussed below. The Illinois Supreme Court is expected to resolve this issue soon based on its granting a petition for leave to appeal in *Ready v. United/Goedecke Services, Inc.,* 367 Ill. App. 3d 272 (1st Dist. 2006).

Are Settling Defendants Considered "Defendants Sued by the Plaintiff"?

In analyzing the issue of whether to include settling defendants on a jury verdict form, courts must consider the Illinois statute codifying joint and several liability and apportionment of fault. Section 2-1117 of the Code of Civil Procedure ("section 2-1117") provides:

> Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the ***defendants sued by the plaintiff,*** and any third party defendant except the plaintiff's employer, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater…shall be jointly and severally liable for all other damages." 735 ILCS 5/2-1117 (West 2004) (emphasis added).

The phrase "defendants sued by the plaintiff," as used in the statute, has been interpreted differently by the courts. These varying interpretations have resulted in conflicting decisions as to whether a settling defendant's level of culpability should be considered by the jury when apportioning fault among the remaining parties.

Conflicting Appellate Court Decisions

As recent as March 2008, two Illinois appellate courts, both within the same district, reached opposite conclusions on this issue.

Heupel v. Jenkins: Settling Defendants Should Appear on Verdict Form

In *Heupel v. Jenkins,* 379 Ill. App. 3d 893 (1st Dist. 2008), the Appellate Court for the First District, Third Division, held that it was proper for the trial court to include on the verdict form the name of a defendant who settled with the plaintiff prior to trial. The facts in *Heupel* were unique because the settling "defendant" was never a named defendant; he settled with the plaintiff before the plaintiff filed suit. Nevertheless, the court held that the legislative intent of section 2-1117, which was to apportion fault among all tortfeasors, as well as the case law interpreting the statute in this manner, "apply equally to the instant case." 379 Ill. App. 3d at 902. In other words, the court found that "a third party need not be a named defendant in order for her relative fault to be considered by the jury." *Id.*

Moreover, the court agreed with the Fourth District Illinois Appellate Court's

rationale, in *Skaggs v. Senior Services of Central Illinois, Inc.,* 355 Ill. App. 3d 1120 (4th Dist. 2005), that the name of a prior settling defendant must appear on the jury verdict form in order to apportion her relative fault because, despite having settled and being dismissed from the case, the settling defendant does not lose her status as a "defendant sued by the plaintiff." In *Skaggs,* the court cited policy reasons for including a settling defendant on a verdict form:

> If a settling defendant may not be included under section 2-1117, a plaintiff could sue two defendants, one who is primarily at fault but indigent and one who is minimally at fault but wealthy. By settling with the indigent defendant, the plaintiff could circumvent the application of section 2-1117, leaving the wealthy defendant, even though minimally liable, jointly liable for all the damages because the settling defendant's portion of the fault can no longer be considered. *Skaggs,* 355 Ill. App. 3d at 1128.

The *Heupel* court distinguished the Fifth District Illinois Appellate Court's contrary holding in *Blake v. Hy Ho Restaurant, Inc.,* 273 Ill. App. 3d 372, 375-76 (5th Dist. 1995), in which the court interpreted "defendants" under section 2-1117 as only applying to those defendants who remain in the case when it is submitted to the jury. According to the court in *Heupel,* the same policy concerns at play in *Blake,* "namely, that allowing the jury to consider settled tortfeasors in the fault allocation would expose them to the expense of discovery and 'frustrate Illinois public policy favoring peaceful and voluntary resolution of claims through settlement agreements," did not apply. *Heupel,* 379 Ill. App. 3d at 904, citing *Blake,* 273 Ill. App. 3d at 374. This was because at trial, the plaintiff called the settling defendant as a witness to disprove defendant's "empty chair defense." *Heupel,* 379 Ill. App. 3d at 904. Accordingly, the court held the trial court did not err in naming the settling defendant on the jury verdict form.

Yoder v. Ferguson: Settling Defendants Are Not "Defendants Sued by the Plaintiff" Under Section 2-1117

One day after the *Heupel* decision, the Appellate Court for the First District, Fourth Division, reached the opposite conclusion. In *Yoder v. Ferguson,* 381 Ill. App. 3d 353 (1st Dist. 2008), the court held that the trial court did not err in refusing to include the names of settling defendants on the fault allocation jury verdict form.

Yoder arose out of a multi-vehicle accident in which Jerelyn Yoder's husband, Scott, was driving with Jerelyn sitting in the passenger seat and their two children, Zachary and Teagan, in the backseat. As a result of the accident, Jerelyn and Scott suffered severe injuries, Zachary was seriously disabled, and Teagan was killed.

Jerelyn brought suits individually, on behalf of Zachary, and as administer of Teagan's estate. She named approximately nine defendants, including Scott. Scott named the same defendants in his suit and the cases were consolidated for trial. Most of the defendants filed contribution claims. Prior to trial, Jerelyn entered into settlement agreements with Scott and one other defendant, which were found to be entered in "good faith." 381 Ill. App. 3d at 357.

Following an eight-week trial, the jury found that Scott was at least 51% responsible, and the trial court entered a judgment against him with respect to his claims. However, in Jerelyn's case, the jury found that Scott was not the sole proximate cause of the accident.

Regarding the pretrial settlements, the trial court did *not* include Scott's name on the verdict forms for the purpose of allocating fault; instead, the fault allocation was computed among the remaining, non-settling defendants. The jury entered a verdict for Jerelyn in the amount of $38.3 million.

On appeal, the "central issue" was whether the trial court erred in not including the settling defendants on the verdict form pursuant to section 2-1117. The defendants argued that the trial court erred in adopting the *Blake* court's interpretation of section 2-1117. *Yoder,* 381 Ill. App. 3d at 375. According to the defendants, the "purpose" of section 2-1117 is to provide "minimum liability for defendants that are minimally responsible for the harm." *Id.* Furthermore, they argued that the "bulk of state and federal cases that address this issue argues for the inclusion of settling defendants on the jury verdict forms." *Id.* (citing cases).

Conversely, Jerelyn argued that the "plain language" of section 2-1117 indicates that settling defendants are not to be included on the fault allocation form because, once they have settled, they are no longer "defendants sued by the plaintiff." *Yoder,* 381 Ill. App. 3d at 377. Jerelyn cited case law in which multiple courts have interpreted the statute this way. *Id.* (citing cases). Furthermore, Jerelyn asserted that her statutory interpretation is supported by the Illinois "public policy" of encouraging settlement agreements. She argued that if settling defendants appeared on verdict forms, plaintiffs would be faced with "a Hobson's choice of foregoing settlement or taking on the 'empty chair' defense of the good-faith settler during trial to show that the settler was not more at fault than the nonsettling defendants." *Id.* at 378.

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The court noted that after the case was briefed, the Appellate Court for the First District, Third Division issued an opinion on this issue in *Ready,* 367 Ill. App. 3d 272 (1st Dist. 2006). In *Ready,* the court reversed a trial court's decision for failing to include settling defendants on the verdict form. The court held that a defendant who remains in the case at trial should have his culpability assessed relative to the culpability of all defendants, including defendants who had earlier settled with the plaintiff. "Only in this manner can the intent of section 2-1117, that minimally culpable defendants be held minimally responsible, be achieved." *Ready,* 367 Ill. App. 3d at 278. The court concluded that "[f]ault is to be apportioned among all defendants sued by the plaintiff. Any settlement plaintiff enters into with any defendant should not serve to alter the remaining defendants' degree of fault." *Id.* at 279. The Illinois Supreme Court accepted the petition for leave to appeal in *Ready,* and will soon rule on this issue. *See* 222 Ill. 2d 600, 308 Ill. Dec. 333 (2006).

Nonetheless, the *Yoder* court saw "no reason to further delay the decision in this case." *Yoder,* 381 Ill. App. 3d at 378. The court adopted *Blake's* reasoning that settling defendants are no longer "defendants sued by the plaintiff" for purposes of section 2-1117. Furthermore, the court noted that the legislature's "subsequent amendment of this statute did not modify this language in response to established case law." *Id.* Therefore, the court presumed the legislature agreed with the *Blake* interpretation. Accordingly, the court affirmed the trial court's decision to limit the fault allocation form to the remaining defendants.

Impact on Practitioners

The question of whether to include settling defendants on a jury verdict form is one that continues to confuse plaintiffs, defendants and judges alike. This uncertainty in the law has made a real impact on how civil cases, in particular personal injury actions, are litigated.

Currently, many plaintiffs are hesitant to settle with less than all defendants prior to trial, for fear of having to respond to an "empty chair" defense at trial. Plaintiff lawyers, no doubt, support the position expressed in *Blake,* that allowing the jury to apportion fault to settled defendants would expose those defendants, who otherwise would have settled with the plaintiff, to the expense of unnecessary discovery and other litigation expenses. Further, such a rule would also run counter to Illinois public policy favoring settlement agreements.

Conversely, defense lawyers support the position taken in *Ready,* that jurors should be able to apportion fault among all defendants, and a settlement should not serve to alter the settling defendant's degree of fault. They argue that settling defendants, despite having settled and being dismissed from the case, do not lose their status as "defendants sued by the plaintiff" under section 2-1117.

It is anyone's guess how the Illinois Supreme Court will rule in *Ready,* especially because the language of section 2-1117 is ambiguous, the legislative intent is unclear, and there are conflicting public policy arguments. Whatever the result, this decision will have significant ramifications for Illinois practitioners on both sides of the bar. ■

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EIGHT O'CLOCK CALL

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