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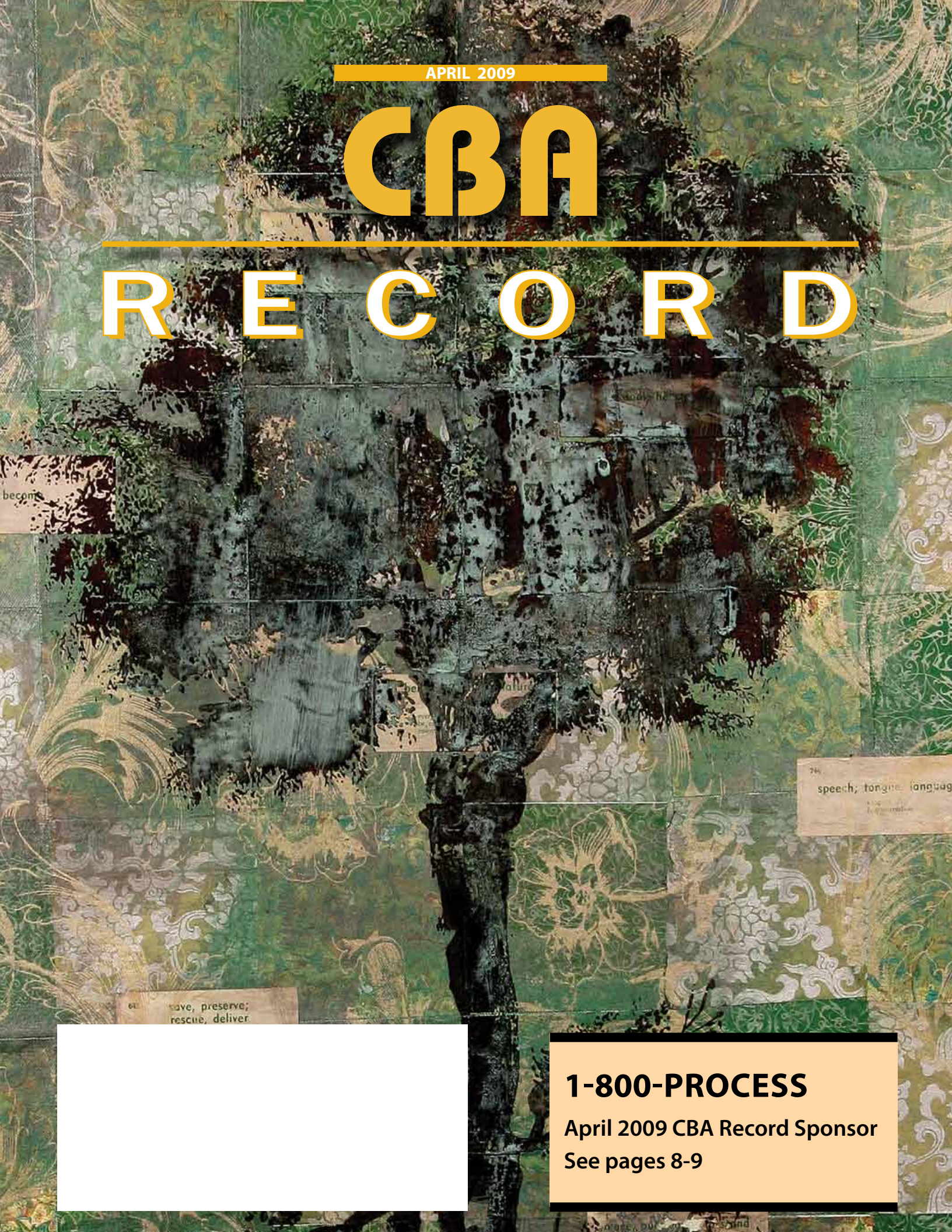

CONFLICT RESOLVED: SETTLING DEFENDANTS NOT INCLUDED ON JURY VERDICT FORMS

By Matthew A. Passen

Editor's Note: The article "Should Settling Defendants Appear on a Jury Verdict Form?" appeared in the last issue of the **CBA Record.** Shortly after the submission deadline for the last issue, the Illinois Supreme Court decided the issue discussed in that article. This piece updates that article.

Until recently, Illinois courts were split over whether to include defendants who settle with the plaintiff prior to trial on the verdict forms when the jury apportions fault among the remaining parties. Compare *Heupel v. Jenkins*, 379 Ill. App. 3d 893 (1st Dist. 2008) with *Yoder v. Ferguson*, 381 Ill. App. 3d 353 (1st Dist. 2008).

The Illinois Supreme Court has resolved the issue, holding that settling defendants are excluded from apportionment of fault, and therefore should not be included on jury verdict forms. *Ready v. United/Goedecke Services, Inc.*, 2008 WL 5046833 (Ill. Nov. 25, 2008).

Settling Defendants Are Not "Defendants Sued by the Plaintiff" Under Section 2-1117

Section 2-1117 of the Code of Civil Procedure ("section 2-1117") codifies joint and several liability and apportionment of fault. *See* 735 ILCS 5/2-1117 (West 2004). Pursuant to section 2-1117, a jury is to apportion fault among "the plaintiff, the *defendants sued by the plaintiff*, and any third party defendants who could have been sued by the plaintiff." *Id*. (emphasis added).

In *Ready*, the "central issue" was whether defendants, once they have settled, are "defendants sued by the plaintiff" within the meaning of section 2-1117.

The Court found that section 2-1117 is "ambiguous" with regard to this issue. The Court noted that the phrase, "defendants sued by the plaintiff", is not defined in the statute, nor is there any "clear indication of a legislative preference for either of the parties' asserted meanings over the other." Further, the "difference in appellate court interpretations of section 2-1117" strongly suggested the statute is ambiguous.

Because of the statute's ambiguity, the Court looked to "tools of interpretation" to determine the meaning of section 2-1117. The first "tool" provides that "where the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent." Accordingly, the legislature's 2003 amendments to section 2-1117, which did not address the appellate court's holding in *Blake* – namely, that settled defendants are not included on verdict forms -- suggested "the legislature's acceptance, as of 2003, of this judicial interpretation of section 2-1117."

The second "tool of interpretation" states that an "amendment to a statute creates a presumption that the amendment was intended to change the law." The Court noted that the Tort Reform Act of 1995 ("the Act") amended section 2-1117 to specifically include settling defendants in the apportionment of fault. However, once the Act was held unconstitutional in its entirety in *Best v. Taylor Machine Works,* 179 Ill. 2d 367 (Ill. 1997), section 2-1117 reverted back to its original language, which was not intended to include settling defendants in the apportionment of fault.

Therefore, the Illinois Supreme Court held that section 2-1117 "does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit." The Court refused to consider the countervailing policy arguments, which it found was "a task better left to the legislature."

Impact on Trial Lawyers

The *Ready* decision will immediately impact Illinois litigators on both sides of the bar.

Prior to the Supreme Court's decision, many plaintiffs were hesitant to settle with less than all defendants for fear of having to respond to an "empty chair" defense at trial. It is unclear whether *Ready* has completely absolved such concerns because remaining defendants may still argue that a settled defendant was the "sole proximate cause" of the plaintiff's injury. *See Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83 (Ill. 1995).

In *Ready*, the trial court excluded "any evidence at trial regarding the conduct of the settling defendants," which the Illinois Supreme Court ultimately affirmed. Accordingly, *Ready* supports the exclusion of evidence at trial concerning settled defendants, at least against those defendants who were not the "sole proximate cause" of plaintiff's injuries.

Generally, *Ready* promotes the Illinois public policy of encouraging settlement agreements. Plaintiffs will be more inclined to settle with peripheral defendants without fear of having to respond to an empty chair defense at trial. Similarly, defendants can settle with the plaintiff and eliminate their risk of being found jointly and severally liable under section 2-1117.

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