EQUITABLE ALTERNATIVES FOR APPEAL BONDS IN MEDICAL MALPRACTICE ACTIONS

Current North Carolina law requires a defendant health care provider who wishes to appeal a judgment in which monetary damages were awarded to execute a written undertaking (a guarantee) for the full amount of the monetary damages awarded by the jury or court, up to twenty-five million dollars ($25,000,000).

Generally, the medical malpractice insurance carrier for a defendant health care provider will execute a guarantee for any amount within the limits of the medical malpractice insurance policy (the amount the carrier would be obligated to pay were the appeal to be unsuccessful). However, carriers are unwilling to execute a guarantee for an amount greater than the policy limits because the defendant health care provider – not the carrier – would be the one obligated to pay that amount ultimately.

In practice, this means that the health care provider is left to pay the guarantee in those cases in which appeal is most important to him or her, cases in which the judgment is grossly in excess of the health care provider's policy limits.

Assuming a health care provider has a medical malpractice insurance policy that provides one million dollars ($1,000,000) in coverage per incident, the health care provider could be called upon to execute a guarantee of up to twenty-four million dollars [$24,000,000 (the statutory limit minus the amount that would be guaranteed by the insurance company)].

A realistic, but frightening, scenario would be one in which a health care provider with one million dollars ($1,000,000) of coverage wishes to appeal a judgment in which monetary damages were awarded in the amount of ten million dollars ($10,000,000). The health care provider would be left to choose between accepting a judgment in which he or she would be personally liable for nine million dollars ($9,000,000) [the judgment minus the amount of coverage], or executing a guarantee for nine million dollars [$9,000,000 (the judgment minus the amount that the carrier would be willing to guarantee)].

Health care providers should never be forced to make such a choice. Health care providers should not have to choose between putting up personnel assets and putting up a vigorous defense of their care, including appeal.

North Carolina law should be changed to limit the amount of monetary damages for which a written undertaking must be executed in medical malpractice actions. A fair and reasonable limit would be one set at the lesser of the judgment or the amount of the health care provider's policy limits. Such a limit would still secure for the plaintiff patient either the health care provider's full policy limits or the full amount of the judgment, if the judgment is less than the policy limits.