

## **The Slow Erosion of a Health Care Provider's Protection from Large Malpractice Verdicts**

**By John R. Braley IV**

In Virginia, unlike many states, medical malpractice claims brought by a patient against a health care provider are subject to a statutory damages cap which varies based on the year of the alleged act of malpractice. While the mere existence of a tort damages cap is salutary, the protection provided by the cap is slowly eroding in two distinct but important ways. First, the damages cap continues to increase each year at a rate greater than inflation. When the damages cap was first enacted, suits against providers were limited to \$750,000. However, a claim accruing today is subject to a much higher cap of \$1,700,000. By July 2008, the cap will increase to \$2,000,000. Although the current cap statute states that the July 2008 increase will be "the final annual increase," the statute has been amended several times since its inception in order to increase the cap.

Second, the Virginia Supreme Court has construed the cap on malpractice verdicts narrowly and in a manner that may subject providers to exposure beyond rational expectations. For example, some providers may technically find themselves subject to two separate caps arising from what is, practically speaking, one malpractice event. The seminal case of *Bulala v. Boyd* is illustrative of how a provider may face two caps rather than one. In *Bulala*, a pregnant patient established a relationship with an obstetrician/gynecologist (OB/GYN). After entering active labor, the patient was admitted to a hospital in the Shenandoah Valley. The OB/GYN was informed that his patient had been admitted, however, he did not immediately proceed to the hospital. Prior to crowning, a nurse at the hospital discovered a complication. The nurse alerted the OB/GYN via telephone, but he arrived after the birth of a severely asphyxiated child. In one combined lawsuit, the mother, father and infant brought a medical malpractice action against the OB/GYN. The child was alleged to have suffered a physical injury. The mother allegedly suffered mental anguish and her own physical injury, perineal tearing. The father alleged an emotional distress claim. Additionally, the parents jointly sued to recover the child's medical expenses. The jury returned a verdict for all three plaintiffs, awarding \$8,300,000. The OB/GYN appealed requiring the Virginia Supreme Court to interpret the damages cap. The Court held that the mother's claims were entitled to one damages cap, and the child's claims were entitled to a second damages cap. Just as importantly, the Court held that the father's claim for emotional distress and the joint claim for the child's medical expenses were subsumed within the child's damages cap given their derivative nature.

At the time of the *Bulala* case, the damages cap stood at \$750,000. However, the above fact pattern is an excellent example of how a provider may be subject to exposure well beyond the limitation stated in the statute.

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