



**JIM DOYLE**  
**GOVERNOR**  
**STATE OF WISCONSIN**

---

December 2, 2005

TO THE HONORABLE MEMBERS OF THE ASSEMBLY:

I am vetoing Assembly Bill 766. This bill is the Legislature's response to *Ferdon v. Wisconsin Patients Compensation Fund*, the recent Wisconsin Supreme Court decision that struck down as unconstitutional Wisconsin's preexisting cap on noneconomic damages in medical malpractice cases. This bill creates new caps on noneconomic damages for persons injured as a result of medical malpractice: \$450,000 for persons age eighteen and older, and \$550,000 for persons under age eighteen.

I am vetoing AB 766 because it is very unlikely that the Wisconsin Supreme Court would uphold it. While I've always said that caps could be structured to address the concerns of the Wisconsin Supreme Court, AB 766 would almost certainly be struck down and, as a result, does not represent a real solution.

The bill's primary failing is that it ignores one of the Court's major concerns – that caps “cannot be set unreasonably low.” The Court has already struck down a \$445,775 cap. Passing what is virtually the same cap – \$450,000 – and including a nominal increase for persons under age eighteen does not represent a serious effort to address the concerns of the Wisconsin Supreme Court.

Moreover, the amount of the caps in AB 766 would likely be considered arbitrary and lacking a rational basis by the Wisconsin Supreme Court. Before this bill was drafted, a legislative task force was created and charged with studying the issue of medical malpractice caps. The task force heard testimony and gathered evidence, but in making its final recommendations, did not select an actual cap amount or an appropriate range. The task force left the cap amount blank, for legislators to later fill in. It seems terribly unlikely that the Wisconsin Supreme Court would find that the caps in AB 766 have a rational basis when the task force process that ultimately led to their passage left the most crucial element of the caps – the amounts – blank.

Distinguished constitutional law experts who have studied this issue agree. My office recently sought the opinion of University of Wisconsin Law School faculty members regarding the constitutionality of AB 766. Their conclusions were unequivocal. In their letter responding to my inquiry, they state that “AB 766 at most half-heartedly attempts to address only one of the several constitutional problems of its predecessor, and clearly fails in that attempt.” The letter concludes: “there is no rational basis for [AB 766].”

Legal experts agree that a Court which found a \$445,775 cap unconstitutional would most certainly strike down a cap not even \$5000 higher. Approving a law that would be quickly overturned doesn't do anyone any good. Instead, I encourage all the interested parties on all sides of this issue to get together and figure out a responsible and lasting solution that has a real chance of being upheld by the Wisconsin Supreme Court.

Respectfully submitted,

JIM DOYLE  
Governor

