



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

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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.

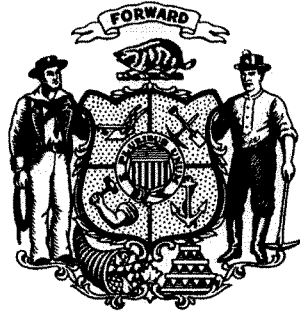
Distinguished constitutional law experts who have studied this issue agree. My office recently sought the opinion of University of Wisconsin Law School faculty members regarding the constitutionality of AB 766. Their conclusions were unequivocal. In their letter responding to my inquiry, they state that “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

# State of Wisconsin



2005 Assembly Bill 766

Date of enactment:  
Date of publication\*:

## 2005 WISCONSIN ACT

**AN ACT** to renumber 893.55 (1); to renumber and amend 893.55 (4) (d); to amend 655.017, 893.55 (2), 893.55 (3) and 893.55 (4) (b); and to create 893.55 (1d) and 893.55 (4) (d) 2. of the statutes; **relating to:** recovery of noneconomic damages in medical malpractice cases.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 655.017 of the statutes is amended to read:

**655.017 Limitation on noneconomic damages.** The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider if the act or omission occurs on or after May 25, 1995 the effective date of this section .... [revisor inserts date], and for acts or omissions of an employee of a health care provider, acting within the scope of his or her employment and providing health care services, for acts or omissions occurring on or after May 25, 1995 the effective date of this section .... [revisor inserts date], is subject to the limits under s. 893.55 (4) (d) and (f).

**SECTION 2.** 893.55 (1) of the statutes is renumbered 893.55 (1m).

**SECTION 3.** 893.55 (1d) of the statutes is created to read:

893.55 (1d) (a) In this subsection, "fund" means the injured patients and families compensation fund under s. 655.27.

(b) The legislature finds the following related to the limitation on noneconomic damages in sub. (4) (d):

1. Affordable and accessible health care benefits patients and the public in general.

2. A cap on noneconomic damages is one factor necessary to maintain affordability and accessibility.

3. A cap on noneconomic damages, together with mandatory liability insurance coverage for health care providers, mandatory participation in the fund by health care providers, and unlimited economic damage awards, ensures adequate compensation for victims of medical malpractice.

(c) The legislature further finds that a medical liability system should promote the following objectives:

1. Provide adequate compensation to victims of medical malpractice through economic and noneconomic damages.

2. Protect access to health care services across the state and across medical specialties by limiting disincentives for physicians to practice medicine in Wisconsin such as the unavailability of professional liability insurance coverage, high cost of insurance premiums, large fund assessments, or unpredictable or large noneconomic damage awards as recognized by a 2003 U.S. congress joint economic committee report, a 2003 federal department of health and human services study, and a 2004 office of the commissioner of insurance report.

\* Section 991.11, WISCONSIN STATUTES 2003-04 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

3. Help contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care as recognized by a 2002 federal department of health and human services study and a 2003 U.S. congress joint economic committee report.

4. Help contain health care costs by providing more predictability in noneconomic damage awards allowing insurers to set insurance premiums that better reflect their financial risk as recognized by a 2003 U.S. federal department of health and human services study, a 2003 government accounting office study, and a 2005 office of the commissioner of insurance report.

5. Help contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the fund and allow the fund's board of governors to approve reasonable assessments for health care providers as recognized by a 2005 legislative fiscal bureau memo, a 2001 legislative audit bureau report, and a 2005 office of commissioner of insurance report.

**SECTION 4.** 893.55 (2) of the statutes is amended to read:

893.55 (2) If a health care provider conceals from a patient a prior act or omission of the provider which has resulted in injury to the patient, an action shall be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided by sub. (1) (1m), whichever is later.

**SECTION 5.** 893.55 (3) of the statutes is amended to read:

893.55 (3) When a foreign object which has no therapeutic or diagnostic purpose or effect has been left in a patient's body, an action shall be commenced within one year after the patient is aware or, in the exercise of reasonable care, should have been aware of the presence of the object or within the time limitation provided by sub. (1) (1m), whichever is later.

**SECTION 6.** 893.55 (4) (b) of the statutes is amended to read:

893.55 (4) (b) The total noneconomic damages recoverable for bodily injury ~~or death~~, including any action or proceeding based on contribution or indemnification and any action for a claim by a person other than the injured person for noneconomic damages resulting in bodily injury, may not exceed the limit under par. (d) for each occurrence on or after ~~May 25, 1995~~ the effective date of this paragraph .... [revisor inserts date], from all health care providers and all employees of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the injured patients and families compensation fund.

**SECTION 7.** 893.55 (4) (d) of the statutes is renumbered 893.55 (4) (d) 1. and amended to read:

893.55 (4) (d) 1. The limit on total noneconomic damages for each occurrence under par. (b) on or after ~~May 25, 1995~~ the effective date of this paragraph .... [revisor inserts date], shall be ~~\$350,000 and shall be adjusted by the director of state courts to reflect changes in the consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor, at least annually thereafter, with the adjusted limit to apply to awards subsequent to such adjustments~~ \$550,000 for a person who is under the age of 18 at the time of the injury, and shall be \$450,000 for a person who is age 18 or over at the time of the injury.

**SECTION 8.** 893.55 (4) (d) 2. of the statutes is created to read:

893.55 (4) (d) 2. The board of governors created under s. 619.04 (3) shall submit a report to the legislature as provided under s. 13.172 (2) by January 1 of every odd numbered year of any recommended changes to the limits on noneconomic damages established in subd. 1. The report shall include the reasons why the changes are necessary to meet the intent of the legislative findings under sub. (1d).