December 1, 2005

Amy Kasper
Chief Legal Counsel
Office of the Governor
State Capitol 115 East
Madison, WI 53702

Dear Ms. Kasper:

You have asked me on behalf of the Governor to assess the constitutionality of Wisconsin State Assembly Bill 766 under the Wisconsin Constitution as interpreted by the Wisconsin Supreme Court in *Ferdon v. Wisconsin Patients Compensation Fund*, 701 N.W. 2d 440 (Wis. 2005).

As Associate Dean for Academic Affairs, I took the liberty of consulting with Professors Heinz Klug and David Schwartz. Both are constitutional law experts and teach this subject here at UW-Madison Law School. They provided me with extensive analytical comments which are the basis for the views expressed here.

It is quite clear that AB 766 suffers from the exact same constitutional defects as the statutory predecessor struck down in *Ferdon* under the state Equal Protection clause. 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.

A couple of facts about the history of Med-Mal Caps are worth emphasis:

In 1986, the legislature enacted a $1 million cap. This Cap sunsetted in 1991. From 1991 to 1995, *there was no cap at all*.

The cap which was struck down as unconstitutional in current 2005 dollars was actually $445,775. (The $350,000 cap enacted in 1995, adjusted for inflation.)

An analysis of the likely outcome of litigation of the constitutionality of the Caps in AB766 requires attention to both the majority opinion and the concurring opinion of Justice Crooks, joined by Justice Butler.

<u>The Majority Opinion</u>

A. Wisconsin Equal Protection Doctrine Applied to the Predecessor Statute

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In *Ferdon,* the Wisconsin Supreme Court struck down a statutory cap of $350,000 for non-economic damages in medical malpractice cases, on the grounds that the cap violated the state equal protection clause. Applying a rational basis review "with teeth," the *Ferdon* Court reasoned that the damages cap had to be rationally related to at least one legitimate governmental objective to meet the requirements of the Wisconsin equal protection clause. By setting a damages cap of $350,000 (increased to $410,332 at the time of the Court's analysis due to a built-in inflation index), the legislation effectively created a distinction between two classes of medical malpractice claimants: those whose non-economic losses are less than or equal to the cap, and those with more serious injuries whose non-economic losses exceed the cap. The statute fully compensates the former group but undercompensates the latter. The undercompensated group, it should be noted, includes plaintiffs who suffer emotional harm due to medical malpractice injuring a family member. The "per occurrence" feature of the damages cap means that all related claims are treated as a single claim for cap purposes, so that an unmarried, childless plaintiff will be compensated to the same extent as a plaintiff group including the emotionally harmed spouse and dependent children of the physically injured person.

The question for the Court was whether the disadvantage imposed on the undercompensated class of plaintiffs is rationally related to a legitimate governmental objective. The Court thoroughly considered five different legislative objectives, and determined that the damages cap was rationally related to none of them. Simply put, it advances none of these purposes.

1. Ensuring fair and adequate compensation for victims of medical malpractice.

2. Providing reasonably priced medical malpractice insurance for health care providers.

3. Keeping the Fund's annual assessment on health care providers reasonably low.

4. Controlling health care costs to consumers.

5. Attracting and retaining qualified health care providers.

B. Justice Crooks View

Justice Crooks was no less emphatic and direct in getting to the salient points in the his concurring opinion.

He made at least 4 critical points.

(1) "While I recognize that the legislature may place a statutory cap on non-economic damages in medical malpractice actions, the cap cannot be set unreasonably low."

(2) "If $1,000,000 was the appropriate figure for the cap in 1986, how can a $350,000 cap satisfy the constitutional requirements nine years later [i.e., in 1995]?"

(3) "Such a low cap . . . *denies plaintiffs the constitutional right* to trial by jury. . ."

(4) "I conclude that this particular cap [i.e., the $350K cap adjusted for inflation up to $445K], set unreasonably low by the legislature, violates [equal protection, and the right to trial by jury in conjunction with the right to a remedy under the Wisconsin Constitution]."

It is also instructive to notice that Justice Crooks, in an interview in Wispolitics, said that Med-Mal Caps can be constitutional. However, he agreed that:

". . . there has to be a rational basis for what is done in terms of the cap figure. And No. 2, you can't set the cap figure so low that it offends the right to a remedy and the right to trial by jury. So basically I have no problems with caps in med-mal cases. It seems to me the final decision is up to the Legislature as long as the Legislature keeps in mind those principles - a rational basis for what's done and not so low as to offend the right a remedy and the right to trial by jury.

"In my concurring opinion . . . I specifically recounted the history where we went from in the '70s a $500,000 cap, which was a conditional cap, only if the fund got into trouble, to a $1 million cap in the mid-80s to no cap in the early '90s to a bill that proposed a cap at $250,000 and all of a sudden out of the air it became $350,000 in 1995. No real basis. No track shown for the figure that was adopted. And a figure, $350 (thousand), nine or 10 years after the million-dollar cap. It appears to be, from what was presented to the court, somewhat nonsensical.

"So all I was saying in that case was do it right and you can have constitutional caps."

C. Analysis of AB 766

Is anything different about AB 766 that would make it come out differently under the *Ferdon* or Crooks analysis? Since AB 766 identifies no legislative objectives that were left out of the *Ferdon* and Crooks' analysis, the question, simply put, is whether the operative provisions of the bill – are rationally related to any of the above five objectives. The answer is plainly not.

AB 766 differs from the predecessor statute in only two respects: (1) it codifies an upward adjustment to $450,000 for the damages cap; and (2) it allows an additional $100,000 – a cap of $550,000 – for plaintiffs who were under 18 at the time of injury.

It is immediately apparent that AB 766 does nothing to address the lack of a rational relation between the noneconomic damages cap and reasons 2-5 in the Court's opinion and Justice Crooks' fundamental objection. If a $350,000 cap has no discernable impact on lowering insurance or health care costs or influencing physician location decisions, a somewhat higher damages cap will not better accomplish those objectives.

Yet it is also readily apparent that the modest cap increases fail to address the concerns about fairness and adequacy of compensation that were decisive in *Ferdon*. To be sure, the life expectancy of younger persons will exceed that of older persons, making it reasonable to project

that younger *plaintiffs will* need larger damage awards to gain full and fair compensation relative to older persons with comparable injuries. Yet to simply draw a line at 18 is arbitrary, since the statute makes no distinction between, on the one hand, 1- and 17- year olds; and between 18- and 60- year olds, on the other, despite the huge variation in life expectancies. Moreover, lifting the cap by $100,000 for under-18 malpractice victims falls far short of accounting for life expectancy and associated damages variance between infant and elderly plaintiffs.

Perhaps most important, notwithstanding the very modest acknowledgment of the life-expectancy differential correlated with plaintiffs' ages, AB 766 suffers from the exact same constitutional failing as its predecessor.

Nor does AB 766 come close to satisfying *Justice Crooks'* clearly stated concern, that it not be set too low. In Justice Crooks words, there is no rational basis for it.

Sincerely,

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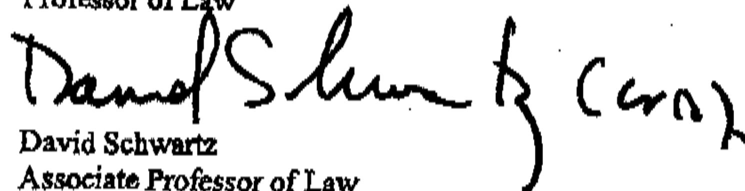
Heinz Klug
Professor of Law



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