

CHAPTER 13

S.B. No. 34

An Act relating to the regulation of health spa services; providing criminal and civil penalties and enforcement procedures, including injunctions; providing private actions for damages.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. The Health Spa Act is adopted to read as follows:

“Section 1. **SHORT TITLE.** This Act may be cited as the Health Spa Act.

“Section 2. **PURPOSE.** The purpose of this Act is to safeguard the public against fraud, deceit, imposition, and financial hardship and to foster and encourage competition, fair dealing, and prosperity in the field of health spa operations and services by prohibiting or restricting practices by which the public has been injured in connection with contracts for and the marketing of health spa services.

"Section 3. CUMULATIVE REMEDIES. The provisions of this Act are not exclusive and are in addition to any other procedures or remedies provided for by other law.

"Section 4. CONSTRUCTION. This Act shall be liberally construed and applied to promote its underlying purpose as set forth in Section 2 of this Act and to provide efficient and economical procedures to secure the protection it provides.

"Section 5. WAIVERS: PUBLIC POLICY. A person, including a person who buys a membership from a former member, may not waive any provision of this Act by contract or by other means. A purported waiver is contrary to public policy and is void and unenforceable.

"Section 6. DEFINITIONS. In this Act:

"(1) 'Contract' means an agreement by which one becomes a member of a health spa.

"(2) 'Department' means the Texas Department of Labor and Standards.

"(3) 'Facilities' means equipment, physical structures, improvements, improvements to leasehold premises, and other tangible property, real, personal, or mixed, used by a health spa at each location to conduct its business, including but not limited to saunas, whirlpool baths, gymnasiums, running tracks, swimming pools, shower areas, racquetball courts, martial arts equipment, and exercise equipment.

"(4) 'Health spa' means a business primarily involved in the sale of memberships that provides the members instruction in a program of physical exercise or provides the members use of the facilities of the health spa for a program of physical exercise. The term does not include an organization that is tax exempt under 26 U.S.C. 501 et seq., a private club owned and operated by its members, an entity primarily operated for the purpose of teaching dance or aerobic exercise, an entity primarily engaged in physical rehabilitation activity related to an individual's injury or disease, an individual or entity engaged in an activity authorized under a valid license issued by this state, or an activity conducted or sanctioned by a school operating under the Education Code.

"(5) 'Member' means a person entitled to the benefits of membership in a health spa.

"(6) 'Membership' means the status under a contract between an individual and a health spa that entitles the individual to the use of services or facilities of the health spa.

"(7) 'Person' means an individual, corporation, association, organization, partnership, business trust, trust, estate, and any other legal entity.

"(8) 'Prepayment' means a payment for all services or for the use of facilities made by members of a health spa before the first day the services or facilities are made available to the members.

"(9) 'Purchaser' means a person who purchases a health spa membership.

"(10) 'Seller' means a person who owns or operates a health spa or who offers for sale the right to use the facilities or the services of the health spa.

"(11) 'Services' means programs, plans, guidance, or instruction that a health spa provides for its members, including diet planning, exercise instruction, exercise programs, and instructional classes.

"Section 7. AUTHORITY TO OPERATE. A person may not operate a health spa or offer for sale or sell memberships in a health spa in this state unless the person complies with this Act.

"Section 8. REGISTRATION. (a) A health spa shall file a registration statement with the department before offering for sale or selling memberships in this state. The registration statement must contain:

"(1) the name and address of the health spa;

"(2) the name and address of any person who directly or indirectly owns or controls 10 percent or more of the outstanding shares of stock in the health spa;

"(3) the type of available or proposed facilities and services; and

"(4) the approximate size of the health spa measured in square feet.

"(b) The registration statement must also contain either:

"(1) a full and complete disclosure of any litigation, or any complaint filed with a governmental authority, relating to the failure to open or the closing of a health spa brought against the owners, officers, or directors of a health spa that was completed within the past two years or is currently pending; or

"(2) a notarized statement that states that there has been no litigation, or complaint filed with a governmental authority, relating to the opening or closing of the health spa within the past two years.

"(c) The health spa shall update the statement not later than the 90th day after the day on which a change in the information required in the statement occurs.

"(d) Each health spa registering under this section shall maintain a copy of the registration statement in the files of the health spa. The health spa shall allow a current member or a prospective purchaser of a membership to inspect the registration statement on request.

“(c) The department may charge each health spa that files a registration statement with the department a reasonable fee not to exceed \$100 to cover the cost of filing. The department may not require a health spa to provide information other than that provided in the registration statement.

“Section 9. ESCROW. (a) Except as provided by Subsection (d) of this section, a health spa or its assignee or agent that accepts prepayments for its memberships shall deposit all of the funds received as prepayments in an escrow account established with a financial institution whose accounts are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, which shall hold the funds as escrow agent for the benefit of the members that prepay. The health spa shall deposit prepayments received at least as often as biweekly and shall make the first deposit not later than the 14th day after the day on which the spa accepts the first prepayment. Not later than the 14th day after the day on which the first prepayment is received, the spa shall give the department a notarized statement that identifies the financial institution in which the prepayments are held in escrow and the name in which the account is held. The prepayments shall be held in escrow until the 30th day after the date that the health spa fully opens for business.

“(b) If the health spa does not fully open for business before the 181st day after the date it first sells a membership in the health spa or if the spa does not remain open for 30 days, the members whose fees are held in escrow under this section shall receive a full refund of their membership fees from the escrow agent.

“(c) If the health spa remains open for 30 days after the date the health spa initially fully opens for business, the health spa may withdraw the escrowed funds at its discretion if the health spa files an affidavit with the department certifying that all obligations of the health spa for which a lien could be claimed under Chapter 53, Property Code, have been paid and if no person is eligible to claim a lien under that chapter during the period the health spa accepts prepayments.

“(d) Subject to the limitations of this subsection, an owner of one or more health spas in operation in this state is not required to escrow prepayments on the opening of an additional health spa in this state if the health spas in operation have operated for at least two years preceding the date the first membership in the additional spa is sold and if none of the members of the spas in operation have initiated litigation against the owner's spas relating to the failure to open or the closing of a health spa or filed a complaint relating to the failure to open or the closing of a health spa with any governmental authority in the state against the owners, officers, or directors of the health spa.

“The total number of spas opened by the owner during any two-year period to which the exception provided by this subsection applies is limited to twice the number of spas in operation on the first day of the two-year period.

“(e) For the purposes of this section, the date on which a health spa fully opens is the date on which all services of the spa that were advertised before the opening or promised to be made available, whether or not contained in the contract, are available for use by its members.

“Section 10. SECURITY. (a) Except as provided by Subsection (d) of this section, on or before the 30th day after the date a health spa opens its facilities for the use of its members, the health spa shall file with the department a surety bond issued by a surety company licensed to do business in this state, or, in lieu of and in equal amount to the bond, a certificate of deposit, letter of credit, or other negotiable instrument issued by a financial institution in this state whose deposits are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. The bond, certificate of deposit, letter of credit, or other instrument shall be payable in favor of the state and shall be held for the benefit of any members of the health spa who suffer financial losses due to the insolvency or cessation of operation of the health spa. ‘Financial losses’ shall mean and be limited to any unused or unearned portion of such member's dues or fees. Such a member may bring an action based on the bond and recover against the surety regardless of the number of claimants or claims filed against the bond, but the liability of the surety may not exceed the aggregate amount of the bond. If the claims filed against the bond exceed the amount of the bond, the surety shall pay the amount of the bond to the department for distribution to the claimants on a pro rata basis. The surety is relieved of liability under the bond on payment of the amount to the department.

“(b) The amount of the security required under Subsection (a) of this section is 20 percent of the total value of the prepayments received by the health spa. However, the amount of the security may not be less than \$20,000 or more than \$50,000.

“(c) The health spa shall maintain the security in the amount provided in Subsection (b) of this section in effect for two years after the date the security is filed with the department. Thereafter, the health spa shall continuously maintain security in the amount of \$5,000.

“(d) A health spa is exempt from the security requirements of this section if the owner of the health spa owns at least one other spa in this state which has operated at one location for at least the two years preceding the effective date of this Act and against which none of its members have initiated litigation or filed a complaint with any governmental authority in this state relating to the failure to open or the closing of the health spa.

“(e) The following provisions shall be applicable to all bonds issued hereunder:

“(1) Regardless of the number of years the bond shall continue in force or the number of premiums payable or paid, the limit of the surety’s liability stated in the bond shall not be cumulative from year to year or period to period.

“(2) The surety shall not be liable through a bond for punitive damages or for civil or criminal penalties assessed against a health spa, its individual owners, or its employees.

“(3) The bond written by a surety hereunder shall be continuous until cancelled by the surety or terminated by the health spa only upon giving 90 days prior notice to the department of such cancellation.

“(4) A surety hereunder shall not be liable for any claim brought or suit filed against a bond if the claim or filing of a suit occurs more than two years from the last effective date of the bond.

“Section 11. PREPAYMENTS. A health spa may offer for sale or sell memberships before the date on which the spa opens for business. If the health spa does not open before the 181st day after the day on which a membership is prepaid, the person who made the prepayment is entitled to a full refund of the amount prepaid in the manner provided by Subsection (b) of Section 9 of this Act.

“Section 12. CONTRACT TERMS. (a) The health spa must deliver a fully completed copy of a contract to a purchaser before the contract is signed. The contract constitutes the entire agreement between the seller and the purchaser. The contract must be in writing and must be signed by the purchaser.

“(b) A contract may not require the purchaser to make payments or to finance the contract for more than two years after the date on which the contract is made. The term of a contract may not be measured by the life of the purchaser. If the purchaser is required by the contract to pay a renewal fee of not less than \$50, the contract may contain a renewal option for as long as two additional years after the date on which the contract expires.

“(c) When the terms of two or more contracts between the same parties overlap for any period, the contracts are considered as one contract for the purpose of this Act.

“(d) A contract may not require or entail the execution of a note or series of notes by the purchaser that when separately negotiated will cut off as to third parties a right of action or defense that the purchaser may have against the seller.

“(e) Each contract shall state in at least 10-point boldfaced type:

“(1) ‘NOTICE TO PURCHASER: DO NOT SIGN THIS CONTRACT UNTIL YOU READ IT OR IF IT CONTAINS BLANK SPACES.’

“(2) ‘IF YOU DECIDE YOU DO NOT WISH TO REMAIN A MEMBER OF THIS HEALTH SPA, YOU MAY CANCEL THIS CONTRACT BY MAILING TO THE HEALTH SPA BY MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DAY YOU SIGN THIS CONTRACT A NOTICE STATING YOUR DESIRE TO CANCEL THIS CONTRACT. THE WRITTEN NOTICE MUST BE MAILED BY CERTIFIED MAIL TO THE FOLLOWING ADDRESS:

(Address of the health spa home office).’

“(3) ‘IF THE HEALTH SPA GOES OUT OF BUSINESS AND DOES NOT PROVIDE FACILITIES WITHIN 10 MILES OF THE FACILITY IN WHICH YOU ARE ENROLLED OR IF THE HEALTH SPA MOVES MORE THAN 10 MILES FROM THE FACILITY IN WHICH YOU ARE ENROLLED, YOU MAY CANCEL THIS CONTRACT BY MAILING A NOTICE TO THE HEALTH SPA STATING YOUR DESIRE TO CANCEL THIS CONTRACT. THE WRITTEN NOTICE MUST BE MAILED BY CERTIFIED MAIL TO THE FOLLOWING ADDRESS:

(Address of the health spa home office).’

“(4) ‘IF YOU DIE OR BECOME TOTALLY AND PERMANENTLY DISABLED AFTER THE DATE THIS CONTRACT TAKES EFFECT, YOU OR YOUR ESTATE MAY CANCEL THIS CONTRACT AND RECEIVE A PARTIAL REFUND OF YOUR UNUSED MEMBERSHIP FEE BY MAILING A NOTICE TO THE HEALTH SPA STATING YOUR DESIRE TO CANCEL THIS CONTRACT. THE HEALTH SPA MAY REQUIRE PROOF OF DISABILITY OR DEATH. THE WRITTEN NOTICE MUST BE MAILED BY CERTIFIED MAIL TO THE FOLLOWING ADDRESS:

(Address of the health spa home office).’

“Section 13. CANCELLATION OF CONTRACTS. (a) A member may cancel a contract before the fourth business day after the date on which the contract is signed by notifying the

health spa of the cancellation in writing. Written notification is considered given if the notification is mailed by certified mail to the home office of the health spa and postmarked not later than midnight of the third business day. The health spa shall refund all money paid to the purchaser exercising the right to cancel.

“(b) A member may cancel a contract on written notice by certified mail to the home office of the health spa if the health spa goes out of business and fails to provide facilities within 10 miles or moves its facilities more than 10 miles from the location in which the member is enrolled. A member may cancel a contract in the same manner if the health spa fails to provide advertised services. If a contract is canceled under this subsection, the member is liable for an amount equal to the value of services received and facilities used under the contract up to the date of the cancellation, and if the member has paid money under the contract in excess of that amount the health spa shall promptly refund to the member the excess.

“(c) A purchaser of a membership may cancel a contract if the member dies or becomes totally and permanently disabled after the date on which the contract takes effect. The purchaser remains liable for an amount equal to the value of services received and facilities used by the member under the contract up to the day on which the death occurred or the disability was incurred. The health spa shall make a pro rata refund of funds paid under the contract in an amount based on the time remaining in the contract term up to a maximum of 50 percent of the total contract amount. The health spa may require a purchaser or the purchaser’s estate to provide reasonable proof of total and permanent disability or death.

“(d) A health spa shall make a refund required under this section before the 31st day after the date the health spa receives the notice of cancellation.

“Section 14. ASSIGNMENTS. (a) A contract between a health spa and a member is not assignable without written notice of the assignment to the member at the address shown on the contract. The notice must identify the contract and inform the member that he must notify the assignee in writing, not later than the 30th day after the date on which the notice was mailed, of any facts or circumstances giving rise to a claim or defense against the health spa that the member may have. The notice of assignment must state the names of the member and the health spa, a description of the services, the contract balance, and the number and amount of the installments.

“(b) A person who purchases a health spa is responsible for fulfilling the terms of any contract in effect on the date the person purchases the health spa.

“(c) This section does not apply to an agreement relating to the financing or refinancing of a health spa that does not involve the sale of the spa.

“Section 15. UNENFORCEABLE CONTRACTS. (a) A contract or assignment of a contract that does not comply with this Act is void and unenforceable as contrary to public policy.

“(b) A contract entered into in reliance on wilful and false, fraudulent, or misleading information, representation, notice, or advertisement of the health spa owner or operator is void and unenforceable.

“Section 16. LIST OF MEMBERSHIP PLANS. Each health spa shall prepare a comprehensive list of all membership plans offered for sale by the health spa. The health spa shall disclose the list on request to each prospective purchaser of a membership plan.

“Section 17. PROHIBITED ACTIVITIES. (a) A health spa may not offer a special offer or discount unless the special offer or discount is available to all prospective members.

“(b) A health spa may not make a material misrepresentation to a current member, prospective member, or purchaser of a membership contract regarding:

“(1) the qualifications of the staff;

“(2) the availability, quality, or extent of the facilities or services;

“(3) the results obtained through exercise, dieting, weight control, or physical fitness conditioning programs;

“(4) membership rights; or

“(5) the period that a special offer or discount will be available.

“(c) A health spa may not fail or refuse to:

“(1) file or update the registration statement required by Section 8 of this Act;

“(2) establish the escrow account required by Section 9 of this Act; or

“(3) maintain the security required by Section 10 of this Act in full force and effect.

“(d) A health spa may not advertise that it is bonded by the state.

“(e) A health spa may not sell a membership plan not included in the list required by Section 16 of this Act.

“Section 18. INJUNCTION. (a) A district attorney, county attorney, or the attorney general may sue in a court of competent jurisdiction to enjoin or restrain a person from engaging in conduct described by Section 17 of this Act.

“(b) Except as prescribed by Subsection (c) of this section, a district attorney, county attorney, or attorney general who intends to sue under this section shall notify the defendant of the alleged prohibited conduct not later than the seventh day before the date the suit is filed.

“(c) The notice prescribed by Subsection (b) of this section is not required if the district attorney, county attorney, or attorney general intends to request that the court issue a temporary restraining order.

“Section 19. ACTION FOR DAMAGES. (a) If a member is injured as a result of an unlawful act or practice by the seller, the member may bring an action against the seller in a court of competent jurisdiction in the county in which the seller resides, the county in which the seller has his principal place of business, a county in which the seller is doing business, the county in which the member resides, or the county in which the transaction occurred. The court may award actual damages and equitable relief as it considers necessary or proper. A member may obtain punitive damages in an appropriate case.

“(b) In an action brought under this section, the court may award reasonable attorney’s fees and costs to the prevailing party.

“(c) A member must bring an action under this section not later than one year after the date on which the district attorney, county attorney, or attorney general terminates an action brought under Section 18 of this Act or within two years after the violation is discovered, whichever is later.

“Section 20. CIVIL PENALTIES. A person who violates the terms of an injunction issued in an action brought under Section 18 of this Act is liable to the state for a civil penalty of not more than \$25,000 for a single violation and not more than \$50,000 for all violations of the injunction. A district attorney, county attorney, or the attorney general may bring suit to recover the civil penalty in the court that issued the original injunction.

“Section 21. DECEPTIVE TRADE PRACTICES. A violation of this Act is a false, misleading, or deceptive act or practice within the meaning of Section 17.46, Business & Commerce Code. Any public or private right or remedy prescribed by Chapter 17 of the Business & Commerce Code may be used to enforce this Act.

“Section 22. OFFENSES. (a) A person who knowingly or intentionally operates or attempts to operate a health spa in violation of Section 8, 9, or 10 of this Act commits an offense. An offense under this subsection is a Class A misdemeanor.

“(b) A person commits an offense if with actual notice that an investigation has begun or is about to begin in connection with the enforcement of this Act the person intentionally conceals, alters, destroys, or falsifies a relevant or material document or record. An offense under this subsection is a Class A misdemeanor.

“(c) A person commits an offense if the person, in response to a subpoena or civil investigative demand issued under Section 17.61, Business & Commerce Code, intentionally falsifies or withholds documents, records, or pertinent materials that are not privileged. An offense under this section is punishable by a fine not to exceed \$2,000.

“Section 23. INVESTIGATIVE AUTHORITY. A district attorney, county attorney, or the attorney general may investigate alleged violations of this Act and may enforce any penalty or remedy authorized by this Act against a violator.

“Section 24. ACT OF GOD. If, after a health spa opens, an act of God or other event beyond the control of the health spa owner or operator renders the health spa unusable for 30 consecutive days or more, the health spa must extend the contract term for each affected member by the amount of time the health spa is unusable.

“Section 25. APPLICABILITY. (a) Except as provided by Subsection (b) of this section, this Act applies to a health spa in operation on or after September 1, 1985.

“(b) Section 9 of this Act does not apply to a health spa that began operation before September 1, 1985.”

SECTION 2. This Act takes effect September 1, 1985.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on February 13, 1985, by a viva-voce vote; passed the House on March 27, 1985, by a non-record vote.

Approved: April 3, 1985

Effective: September 1, 1985