

CHAPTER 1093

S.B. No. 1405

AN ACT

relating to tests required by blood banks, records maintained by blood banks, and liability for certain activities involving human body parts; providing civil and criminal penalties.

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

SECTION 1. DEFINITIONS. In this Act:

(1) "Blood bank" means a blood bank, blood center, regional collection center, tissue bank, transfusion service, or other similar facility registered or licensed by the Office of Biologics of the United States Food and Drug Administration, and accredited by the American Association of Blood Banks and which obtains blood from voluntary donors as defined by the United States Food and Drug Administration and the American Association of Blood Banks, or qualified for membership in the American Association of Tissue Banks and which obtains blood from voluntary donors as defined by the United States Food and Drug Administration and the American Association of Blood Banks.

(2) "AIDS" means acquired immune deficiency syndrome as defined by the Centers for Disease Control of the United States Public Health Service.

(3) "HIV" means human immunodeficiency virus.

SECTION 2. AUTHORIZATION TO REQUIRE TESTS. A blood bank shall require donors to submit to tests for infectious diseases, including tests for AIDS, HIV, or hepatitis, and serological tests for contagious venereal disease, for each donation of blood. A blood bank is not required to obtain the donor's informed consent before administering tests for infectious diseases and is not required to provide counseling concerning the test results.

SECTION 3. CONFIDENTIALITY OF BLOOD BANK RECORDS. (a) The medical and donor records of a blood bank are confidential and may not be disclosed except as provided by this Act.

(b) A blood bank shall disclose all information required by law including HIV test results to:

(1) the Texas Department of Health, as required under the Communicable Disease Prevention and Control Act (Article 4419b-1, Vernon's Texas Civil Statutes);

(2) a local health authority, as required under the Communicable Disease Prevention and Control Act (Article 4419b-1, Vernon's Texas Civil Statutes);

(3) the Centers for Disease Control of the United States Public Health Service, as required by federal law or regulation; or

(4) any other local, state, or federal entity, as required by law or regulation.

(c) A blood bank shall disclose blood test results and the name of the person tested to:

(1) the physician or other person authorized by law who ordered the test;

(2) the physician attending the person tested; or

(3) the person tested or a person legally authorized to consent to the test on the person's behalf.

(d) A blood bank may report positive blood test results indicating the name of a donor with a possible infectious disease to other blood banks. A blood bank that reports a donor's name to other blood banks under this subsection may not disclose the infectious disease that the donor has or is suspected of having. A blood bank making a report as provided by this subsection is not considered to have breached a confidence arising out of any confidential relationship.

(e) A blood bank shall on request provide blood samples to hospitals, laboratories, and other blood banks for additional, repetitive, or different testing.

(f) A blood bank shall report blood test results which are found to be confirmed as HIV positive by the normal procedures blood banks presently use or found to be contaminated by other infectious diseases to the hospitals or other facilities where the blood was transfused or provided, to the physician who transfused the infected blood, or to the recipient of the blood. A blood bank may also report blood test results for statistical purposes. A blood bank that reports test results under this subsection may not disclose the name of the donor or person tested or any other information that could result in disclosure of the donor's or person's name, including addresses, social security numbers, designated recipients, or replacement donation information.

(g) All hospitals, physicians, health agencies, and other transfusers of blood shall follow the official "Operation Look-Back" procedure of the American Association of Blood Banks in notifying past and future recipients of blood and shall follow the procedures in a mandatory and strict fashion. The only exception to the notification of the recipient of blood shall be in the case of death of the recipient or the inability to locate the recipient.

(h) A blood bank may be required by a court of competent jurisdiction, after notice and hearing:

(1) to provide a recipient of blood from the blood bank (or an heir, parent, or guardian of a recipient or a personal representative of the recipient's estate) with results of tests, with donor identification deleted, of the blood of every donor of blood transfused into the recipient in accordance with Subsection (f) of this section; or

(2) if a blood bank fails or is unable to provide the test results described in Subdivision (1) of this subsection:

(A) to use every reasonable effort, including any effort which the court may direct, to locate any donor of the blood in question, and to obtain from any such person a sample of blood for testing, in which event the provisions of Section 2 of this Act shall apply, and to provide either or both, as the court may direct, test results of such blood or samples of such blood to an independent laboratory designated by the court for testing, the results of which test shall be made available to the recipient (or an heir, parent, or guardian of a recipient or the personal representative of a recipient's estate);

(B) in the event of a positive test result or in the event the blood bank fails or is unable to provide the test result or blood sample, to provide to the judge of said court in camera, under seal, such information as the court may determine to be necessary to satisfy the court that the blood bank has complied in all respects with this subsection and the court's order, or has demonstrated every reasonable effort to so comply; provided, however, that neither the name of a donor or other information that could result in disclosure of a donor's identity, such as address, social security number, designated recipients, or replacement donation information, may be divulged by the court to any other person. The court shall, however, upon motion by any party, order the taking of the deposition of the donor at a time certain and in a manner that maintains the anonymity of the donor. No party's attorney shall be denied the right to orally cross examine the donor.

(i)(1) A court of competent jurisdiction shall, upon the motion of any party, exercise the discovery powers granted in this subsection to the full extent that the exercise of such powers is reasonably necessary to obtain information from or relating to a donor other than that obtainable under Subsection (h) of this section, where such information is reasonably calculated to lead to the discovery of admissible evidence regarding any matter which is relevant to the subject matter of a pending proceeding, but cannot otherwise be obtained without threatening the disclosure of the name of a donor or other information that could result in disclosure of a donor's identity such as address, social security number, designated recipients, or replacement donation information.

(2) The discovery powers available to a court to obtain information of the type described in Subdivision (1) of this subsection are as follows:

(A) the court may order the deposition of any witness, including a donor, either orally or upon written questions and cross-questions propounded by the parties, or both;

(B) the court may compel the production of documents and things;

(C) any subpoena issued to a donor hereunder shall only be served in person at the residential address of the donor; provided, however, that upon a showing that service in person cannot be made at the donor's residence despite diligent efforts to do so, the court may order that the donor may be served at such other place or places as the court may direct.

(3) All discoverable information, including testimony, documents, or things, obtained through the exercise of the powers set forth in Subdivision (2) of this subsection shall be delivered to the parties by the court; provided, however, that the court shall first delete therefrom the name of any donor or other information that could result in the disclosure of a donor's identity, such as address, social security number, designated recipients, or any replacement donation information. The court may, in the information available to the parties, substitute fictitious names, such as "John Doe," or make such other changes as the court deems necessary to protect the confidentiality of the donor's identity. The confidential donor information described herein shall not under any circumstances be disclosed by the court to any other person, with the sole exception of the persons described in Paragraph (h)(2)(B) of this section, which persons shall not disclose such information to any other person.

(4) The exercise of the court's powers under Subdivision (2) of this subsection shall be governed by the Texas Rules of Civil Procedure, except to the extent of any conflict with this subsection.

(5) Any donor who provides information or blood samples under Subsection (h) of this section shall be immune from all liability arising out of the donation of the blood transfused in a recipient.

(j) A blood bank shall have no liability for the disclosure of information to a court in accordance with an order issued under Subdivision (2) of Section (h) of this section.

(k) There shall be no presumption of negligence or causation attaching to a donor's positive test result if the test result is obtained after the donation of blood or blood components which is the subject of discovery as provided in Subsection (h) of this section.

SECTION 4. LIABILITY. (a) Except as provided by Section 5 of this Act, a person who discloses blood bank records in violation of Section 3 of this Act is liable only for

actual damages resulting from the negligent or intentional disclosure as may be proven in a court of law.

(b) This Act does not give rise to any liability under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code).

SECTION 5. CIVIL AND CRIMINAL LIABILITY FOR DISCLOSING CERTAIN INFORMATION. (a) Any person who is injured by a violation of Subsection (d), (f), (h), or (i) of Section 3 of this Act may bring a civil action for damages. In addition, any person may bring an action to restrain a violation or threatened violation of Subsection (d), (f), (h), or (i) of Section 3 of this Act.

(b) If it is found in a civil action that a person or entity has violated Subsection (d), (f), (h), or (i) of Section 3 of this Act, the person or entity is liable for:

- (1) actual damages;
- (2) a civil penalty of not more than \$1,000; and
- (3) court costs and reasonable attorney's fees incurred by the person bringing the action.

(c) A blood bank or any person that discloses information in violation of Subsection (d), (f), (h), or (i) of Section 3 of this Act commits an offense. An offense under this subsection is a Class C misdemeanor.

(d) Each disclosure made in violation of Subsection (d) or (f) of Section 3 of this Act constitutes a separate offense.

SECTION 6. AMENDMENT. Section 77.003, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 77.003. LIMITATION OF LIABILITY. (a) A person who donates, obtains, prepares, transplants, injects, transfuses, or transfers a human body part from a living or dead human to another human or a person who assists or participates in that activity is not liable as a result of that activity *except for negligence, gross negligence, or an intentional tort.*

(b) *The Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) does not apply with respect to claims for damages for personal injury or death resulting or alleged to have resulted from negligence on the part of the person described in Subsection (a) of this section in connection with an activity designated in said subsection.*

(c) *The implied warranties of merchantability and fitness do not apply to the furnishing of human body parts by blood banks, tissue banks, or other similar organizations. For purposes of this chapter, those human body parts are not considered commodities subject to sale or barter. [The person remains liable for the person's own negligence.]*

SECTION 7. This Act shall be applied prospectively only. Nothing in this Act affects either procedurally or substantively a case that was filed in the courts of this state before the effective date of this Act.

SECTION 8. EMERGENCY. 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, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the Senate on April 22, 1987, by the following vote: Yeas 30, Nays 0; May 30, 1987, Senate refused to concur in House amendments and requested appointment of Conference Committee; June 1, 1987, House granted request of the Senate; June 1, 1987, Senate adopted Conference Committee Report by the following vote: Yeas 31, Nays 0. Passed the House, with amendments, on May 21, 1987, by the following vote: Yeas 139, Nays 2, two present not voting; June 1, 1987, House granted request of the Senate for appointment of Conference Committee; June 1, 1987, House adopted Conference Committee Report by a non-record vote.

Approved June 20, 1987.

Effective Aug. 31, 1987, 90 days after date of adjournment.