

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 556 (Maienschein)
Version: February 11, 2021
Hearing Date: June 8, 2021
Fiscal: No
Urgency: No
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SUBJECT

Misuse of sperm, ova, or embryos: damages

DIGEST

This bill establishes a private cause of action for damages against a person who misuses sperm, ova, or embryos in violation of Section 367g of the Penal Code. The bill provides for damages for a prevailing plaintiff, including actual or statutory damages.

EXECUTIVE SUMMARY

In 1995, an unprecedented fertility scandal broke. A doctor at the University of California Irvine's Center for Reproductive Health was alleged to have taken women's eggs without their permission and given them to other women, resulting in at least 15 births. At the time, stealing human tissue was not a crime in this state. As a result of this and other similar incidents, SB 1555 (Hayden, Ch. 865, Stats. 1996) was introduced to criminalize such conduct.

As a result of SB 1555, it is now unlawful for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology for any purpose other than that indicated by the sperm, ova, or embryo provider's signature on a written consent form. (See Pen. Code § 367g(a).) In addition, it is unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient.

This bill provides a specific, civil cause of action for this sort of fertility fraud, where a person misuses sperm, ova, or embryos in violation of Section 367g of the Penal Code. It authorizes statutory or actual damages to be awarded to the prevailing plaintiff.

This bill is author-sponsored. It is supported by the Consumer Attorneys of California, and there is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Makes it unlawful for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or embryo provider's signature on a written consent form. (Pen. Code § 367g(a).)
- 2) Makes it unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient. (Pen. Code § 367g(b).)
- 3) Exempts from the written consent requirement persons who donate sperm to a licensed tissue bank. (Pen. Code § 367g(d).)
- 4) Provides that any person who violates the above provisions shall be punished by imprisonment for three, four, or five years, by a fine not to exceed \$50,000, or by both that fine and imprisonment. (Pen. Code § 367g(c).)
- 5) Provides for the collection and retention by a gamete bank of specified information on donors of sperm, oocytes, and embryos, and specifies the manner by which the donor may remain anonymous or waive anonymity upon request of a child conceived as a result of the donation. (Health & Saf. Code §§ 1644-1644.3.)
- 6) Prohibits untrue or misleading advertising to consumers about the nature of any property, product, or service; and applies to untrue or misleading statements made in print, over the internet, or any other advertising method. (Bus. & Prof. Code § 17500.)
- 7) Provides a civil cause of action for unfair competition, including any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. (Bus. & Prof. Code § 17200 et seq.)

This bill:

- 1) Establishes a private cause of action for damages against a person who misuses sperm, ova, or embryos in violation of Section 367g of the Penal Code.
- 2) Authorizes a prevailing plaintiff who suffers harm as a result of a violation of Section 367g of the Penal Code to be awarded actual damages or statutory damages of not less than \$50,000, whichever is greater.

COMMENTS

1. Stated intent of the bill

According to the author:

Making the decision to have a child through Assisted Reproductive techniques is monumental to a couple, and having to experience this type of fraud can be a massive violation of the personal, fiduciary, and ethical realms. While this is an illegal practice in California, there is a glaring deficiency that the Legislature can address. This decision is a costly decision for most that decide to use assisted reproductive techniques, and having that process violated can result in real and lasting damages. AB 556 would amend California civil code and allow for victims of fertility fraud to seek actual damages or damages of \$50,000 whichever is greater.

2. Providing a specific cause of action for fertility fraud

Over 20 years after the fraud precipitating passage of SB 1555, it was recently revealed that a fertility doctor in Indianapolis, from 1974 through at least 1987, was using his own semen for his patients' fertility treatments while telling them he used anonymous donors.¹ These treatments resulted in the birth of at least 50 children. Astonishingly, California is in the minority of states that make such conduct illegal. However, in the wake of this discovery in Indiana, more laws are being pushed and passed into law across the nation for both civil and criminal liability in connection with such fertility fraud.

In addition to the criminal liability already provided for in Section 367g of the Penal Code, and any other basis for potential civil liability, this bill provides a specific cause of action against anyone violating Section 367g for civil damages. The bill authorizes a prevailing plaintiff who has suffered harm as a result of the violation to be awarded actual damages suffered or statutory damages of not less than \$50,000, whichever is greater.

Writing in support, the Consumer Attorneys of California make clear that this is only the first of many steps to root out troubling practices in the fertility industry:

On top of fertility fraud, which AB 556 addresses, there have been many instances of systemic problems emerging within the largely unregulated

¹ Leila Ettachfani, *Doctors Can Legally Inseminate Patients with Their Own Sperm in Most States* (April 22, 2019) Vice, <https://www.vice.com/en/article/pajdn7/fertility-fraud-insemination-laws-donald-cline> [as of May 25, 2021].

IVF fertility clinic industry failing women and families who rely on these clinics to store their genetic material. First, there are no clear standards or guidelines for how to store eggs and embryos. An NBC News investigation found that there's no single governmental entity overseeing the fertility industry. There are instances of insufficient alarms and backup alarms on storage facilities and little to no accountability when there is a loss of people's precious genetic material because forced arbitration clauses hamper people's ability to seek justice when there is a loss. Facilities don't even have a requirement for a minimum level of insurance. All of these problems highlight how this industry is ripe for fraud and abuse.

AB 556 is an important first step towards building accountability in the fertility industry.

SUPPORT

Consumer Attorneys of California

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 41 (Umberg, 2021) establishes the Genetic Information Privacy Act, providing additional protections for genetic data by regulating the collection, use, maintenance, and disclosure of such data. This bill is currently in the Assembly Privacy and Consumer Protection Committee.

AB 825 (Levine, 2021) adds "genetic information" to the definition of personal information for purposes of the laws requiring certain businesses to implement and maintain reasonable security procedures and practices to protect personal information they own, license, or maintain. Businesses are also required to disclose a breach of genetic information. This bill is currently pending referral in the Senate.

Prior Legislation:

AB 2014 (Maienschein, Ch. 244, Stats. 2020) extended the statute of limitations for criminal offenses involving the misuse of sperm, ova, or embryos in assisted reproduction technology.

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SB 1555 (Hayden, Ch. 865, Stats. 1996) *See* Executive Summary.

PRIOR VOTES:

Assembly Floor (Ayes 68, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 1)
