

FISCAL NOTE
Requested by Legislative Council
01/13/2015

Bill/Resolution No.: SB 2182

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill deals with transient merchants, unlawful practices, & home solicitation sales.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

This bill is not anticipated to have a fiscal impact.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

N/A

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

N/A

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

N/A

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Date Prepared: 01/13/2015

2015 SENATE JUDICIARY

SB 2182

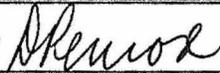
2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2182
1/27/2015
22584

- Subcommittee
 Conference Committee

Committee Clerk Signature



Minutes:

1,2

Ch. Hogue: We will open the hearing on SB 2182.

Sen. Nicole Poolman: Sponsor, support (see attached #1).

Sen. Luick: Is this quite a problem in the state of ND.

Sen. Nicole Poolman: It is. Of course, as our population is changing, and there are more people with money to be taken advantage of. This is not just something that has started with the oil boom. I think this has been something happening for quite a while and they have been enforcing it this way or trying to enforce it this way; we want to make sure that it in NDCC so they really have some teeth, to get these people who are taking advantage of our vulnerable citizens.

Ch. Hogue: Thank you.

Sen. Casper: I appreciate the AG's leadership on this bill. I've a good friend and business partner and I reviewed several contracts on this, and his mother-in-law, very genuine sweet elderly lady that lives near Washburn, on her ranch, mi-80s and still drives her truck to the Cenex every morning to have coffee and breakfast. She is an elderly, financial well-off individual at the moment. Year after year for a period of time, she had an individual come to her residence and told her that she needed her driveway resurfaced. She didn't know any better and she ended up spending thousands of dollars getting this work done on her property that was unnecessary. Then he came back many times over.

Sen. C. Nelson: What is your definition of elderly?

Sen. Casper: She was north of 80, pushing 90.

Ch. Hogue: Thank you. Further testimony in support of SB 2182.

Parrell Grossman, Director, Consumer Protection & Antitrust Division, Office of Attorney General: Support (see attached #2). This is a codification of our existing practices and will take care of some loopholes.

Sen. C. Nelson: Would this also apply to contractors, roofers, people that come in perhaps after a tornado and offer all sorts of deals that they are going to fix your house up and don't do the work.

Parrell Grossman: Yes, that would do so. It would apply to all of those situations. I would be remiss if I didn't point out that I failed to acknowledge your sponsorship.

Sen. Grabinger: In Jamestown, when I was on the council, we had a requirement for a license for transient business people that come into town. Is there a state-wide license, because what I'm reading here looks to me like this is after the fact. Is there a way we can stop it and prevent them from getting to those people?

Parrell Grossman: No, I would say not really. There is a state license, and that is the license issued by the Attorney General, the transient merchant license. They pay a \$200 fee; they have to post a bond between \$1,000 and \$50,000. It only provides a little relief in most circumstances. If you are involved in the sale of lightning rods and asphalt paving, that could be one job. Those kinds of statutes are not an effective tool to kind of regulate sellers right up front any more than you could over-regulate contractors and tell them specifically how to go about their business. Essentially, it is registration program so that the communities and the authorities that they are actually here and they are selling, and you have a way to contact them if necessary. In most cases, these individuals in fact, don't get licensed and that's why the AG would now have the authority under this statute to say that you didn't get licensed, and now we're going to cancel all of your contracts and we're going to require refunds. Actually, in many of these circumstances, if they were licensed, these sales would not be illegal unless you can prove deceptive conduct or this new component of unconscionability.

Sen. Armstrong: The new frontier for these kinds of scams is the internet; not so much the door-to-door sellers, does your office handle that as well. Does this apply to the internet at all?

Parrell Grossman: The transient merchant likely wouldn't apply to the internet sales, but that's where this component of an unconscionability would be, because those are some of the varied companies that just really cross the line and now you don't necessarily have good evidence, or you lack some evidence, but when we look at these cases, we say these are no brainers if you have this statute that bans unconscionable sales; you can go to a court and say, "look your honor, the dictionary definition, this is egregious, shockingly unfair, etc." In those kinds of circumstances it would be applied and that is continuing to get to be a big problem and many of those individuals we've never actually caught, because they are making those sales through the internet, and they aren't anything that closely resembles a legitimate entity. They hide behind their identities, they hide their location. It will help.

Sen. Luick: This would be similar to that case where, you had an individual that had had an insurance policy and basically they find out that this person is slipping and no awareness. Somehow they take advantage of them through the policy itself. Is that covered under insurance programs or would it be covered under something like this bill, if there is an obvious problem with the policy.

Parrell Grossman: That's a great question. I think that it would apply. This is actually broad authority. I don't always mention that, because it scares some folks unnecessarily but essentially insurance sales can be like sales of any other merchandise. It's just that we have a special state agency that's already dedicated to that. I don't see that as a problem; if it were necessary to apply this statute that we couldn't. It could really apply to any kind of sales of merchandise or unconscionable types of practices.

Sen. Luick: The reason I bring that up is that we had an elderly lady, good friend of ours that passed away. We found out that her insurance policy that she had been paying into this policy for 30 years, for late-term care and found out that when she was admitted to the hospital in Fargo, that the amount of that policy was basically equivalent to her premium of one way. There basically was no value to the policy whatsoever and she had paid into it for 30 years. I think that has some grounds for unconscionable practices just like you are talking about here.

Parrell Grossman: I simply would not disagree. I think it could be applied to a number of those kinds of circumstances that are just so outrageous or unjust.

Ch. Hogue: Is there any value to amending this bill to restrict it to sales to elderly or individuals with diminished mental capacity. What if I buy a vacuum cleaner from a door-to-door salesman for \$4,000? Can I go to the Attorney General and say that this is not fair, I've changed my mind. Do I need the AG's protection? Assume that I don't have diminished mental capacity.

Parrell Grossman: No, you wouldn't, but that conduct wouldn't fall under this statute because you wouldn't allow those people to sit in your home and browbeat you for three hours and tell you that you need this vacuum and this new air purification. I think that would be an unfortunate limitation; it just wouldn't apply to those circumstances. You raise kind of an example in my mind of again, vacuum cleaner sales, in which the salesperson takes the contract that contains the three day right of cancellation, as well as a 15 day business right of cancellation for someone 65 years of age or older. That information is on that contract so if they change their mind, they know they have those cancellation rights and he was folding it into a 2" square and stapling it to the back of that contract. When we asked why he was doing that, he said it was for the convenience of the consumer. We said no, you're doing that so it is difficult for that consumer to ever unstaple that and never realize that they even have any cancellation rights. I would suggest that would be a difficult case to prove to the court. There isn't any misrepresentation; he merely stapled up the notice and made it difficult for the consumer to access that information.

Ch. Hogue: It sounds like a lot of the sales folks target the elderly, is that fair and if they do, how they go about doing it. They just identify elderly through some public records or what.

Parrell Grossman: They do target the elderly a lot. I think we have quite an elderly population in our state; especially in the rural areas. These kinds of transactions like vacuum cleaner sales and magazine sales door-to-door do target the elderly. I wouldn't want you to overlook that this same kind of conduct again applies to people who go to these seminars and are told they can start this online business and they pay \$20,000/yr. or think that they can flip houses and that there are hundreds of properties in ND just waiting to be bought for a penny on the dollar, fix them up, rent them out. It just applies to a very broad context. Not everything in here that I talk about applies just to the

elderly. But it certainly does have an impact on those with diminished capacity.

Sen. C. Nelson: You mentioned earlier about transient licenses that you get through the Ag's office. Sen. Poolman referenced Mary Kay ladies. I was a Mary Kay consultant and I didn't have a license. We sold to our friends. Then there is the Avon ladies, the Pampered Chef parties, and jewelry and all of those kinds of businesses, all of which you are inviting your friends to attend. I don't see that as falling under unconscionable. At the end of each sale, it said that you had to tell them, if you bought over \$15.00 worth of product, basically it had that disclaimer that you're stating in this bill. Who has to get this transient merchant license currently? Was I illegal? Was I supposed to have gotten one?

Parrell Grossman: This statute does not apply to sellers that are permanent residents of ND.

Sen. C. Nelson: So this would be out-of-state travelling salesmen, basically.

Parrell Grossman: Essentially that's it. I'm not trying to suggest that we have a statute in ND that just applies to out-of-state entities, but essentially if you are a resident of the area, or there is an exemption available if you obtain a sales tax permit, you register with Workforce Safety for insurance and Job Service of ND to pay unemployment contributions, then you can be excluded from this statute. There are ways in which you can get excluded from this statute. It doesn't apply to salespeople that live in ND and sell in ND. Typically it does affect merchants from outside the area that come into the state, whether it's roofing, siding, paving.

Sen. C. Nelson: What about the border cities. You have East Grand Forks, Moorhead, which are kind of like one big community.

Parrell Grossman: Technically, yes it could apply on a sale between Minnesota and ND in a Fargo-Moorhead situation. I don't know if it's ever been a concern or ever been on our radar; we're not looking to unnecessarily license people.

Ch. Hogue: I see there is a fiscal note, but no fiscal impact. Why was that requested?

Parrell Grossman: I am unclear who requested that fiscal note and I was confused. We didn't request that. I don't think it will have any fiscal impact; it is just codifying our existing practices, so I'm not predicting large amounts of new revenue or large amounts of expenses because we're going this work now.

Ch. Hogue: Thank you. Further testimony in support of SB 2182. Testimony in opposition. Neutral testimony. We will close the hearing.

2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2182
1/27/2015
22586

- Subcommittee
 Conference Committee

Committee Clerk Signature



Minutes:

Ch. Hogue: What are the committee's wishes in regard to the bill?

Sen. Grabinger: I move a Do Pass.

Sen. Armstrong: Second the motion.

Ch. Hogue: One thing for the committee's consideration and this goes to my question, is okay there is a point at which you don't want to interfere with contracting parties who have the right, the law says you have the right to make a bad deal and that law is not going to protect from making a bad deal. In the example I cited, if I make a bad deal, can I run to the AG and say this is unconscionable; that is what unconscionable means. It means that it is unfair. I just throw that out for the committee's consideration. How much do we want protect contracting parties who would otherwise have the right to reject these deals or enter into these deals.

Sen. C. Nelson: By his example, on that particular case though, wasn't the unconscionable part that he came back within a year and sold her another resurfacing and had done such a miserable job. Wasn't that the unconscionable part?

Sen. Grabinger: You could also say that is misrepresentation, in the fact that they kept coming back and doing it again when it wasn't needed. They were telling her something that wasn't true.

Sen. Luick: Wouldn't it be the AG's place then to decide if it were unconscionable or not, at that point.

Ch. Hogue: Well, he or the states' attorney, either one can bring an action. It's within their discretion. I suppose if somebody made a bad deal, they are going to say, no I'm not going to do that.

Sen. Armstrong: Unconscionable is a legal term. It's defined as a question of fact.

Ch. Hogue: It's something, like Mr. Grossman said; it sort of shocks the conscience because it is so unfair that the law assumes that the person would not have entered into that transaction, were they aware of all of the facts, related to that transaction.

Sen. Casper: If you look at the bill, 51-15-02, it sort of goes through the unconscionable, deceptive actor practice, fraud, false pretense, false promise or misrepresentation. I think the court would take those into consideration.

Ch. Hogue: If the committee isn't concerned about it, I'm comfortable with the bill because I'm comfortable our AG and states' attorneys, they have to exercise prosecutorial discretion every day. I tend to think that if an able-bodied person said they essentially wanted to void a transaction, I think the AG would be able to separate those where the buyer was taken advantage and those who weren't. Further discussion. Clerk will call the roll.

6 YES 0 NO 0 ABSENT

DO PASS

CARRIER: Sen. Casper

Date: 1/27/15

Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTE

BILL/RESOLUTION NO. 2182

Senate

JUDICIARY

Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment

Do Pass Do Not Pass Without Committee Recommendation

As Amended Rerefer to Appropriations

Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Sen. Grabinger Seconded By Sen. Armstrong

Senators	Yes	No	Senators	Yes	No
Chairman Hogue	✓		Sen. Grabinger	✓	
Sen. Armstrong	✓		Sen. C. Nelson	✓	
Sen. Casper	✓				
Sen. Luick	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Casper

REPORT OF STANDING COMMITTEE

SB 2182: Judiciary Committee (Sen. Hogue, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2182 was placed on the
Eleventh order on the calendar.

2015 HOUSE JUDICIARY

SB 2182

2015 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

SB 2182
3/25/2015
25417

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to transient merchants, unlawful practices, and home solicitation sales; and to provide a penalty.

Minutes:

Testimony #1

Chairman K. Koppelman: Opened the hearing on SB2182.

Parrell Grossman, Director, Consumer Protection and Antitrust Division. Office of Attorney General: (See Testimony #1) (:30-11:40)

Rep. L. Klemin: On your testimony it says criminal sanction of a Class B misdemeanor is grossly inadequate. Is that being changed in this bill?

Parrell Grossman: No we did not propose a change.

Rep. L. Klemin: If it is grossly inadequate now would be the time to change it.

Parrell Grossman: Yes it would be. I would not be opposed to that. We just want clear authority to sue these companies and obtain refunds. It doesn't give any relief to the consumer.

Rep. L. Klemin: So you are trying to do since the States Attorney's don't want to charge these out; is to transfer these to your office.

Parrell Grossman: Yes to would give us the ability to say you were not licensed as a transient merchant therefore you have to get licensed in the future and you are banned from operating until you do and by the way all of your contracts are void.

Rep. L. Klemin: I am trying to focus on the class B misdemeanor. Putting somebody into jail for 30 days might have some effect on whether they do it again. If the States Attorney doesn't want to charge out any penalty that might result in jail time would their office be able to do that under this bill?

Parrell Grossman: Yes, typically the Attorney General doesn't not exercise the authority of local states attorneys and we would defer to them and we could bring criminal charges if he was so inclined to do that. Yes he would have the opportunity to charge these individuals.

Rep. L. Klemin: Section 1 would give you another tool to enforce the provisions of 51-15?

Parrell Grossman: Yes it would.

Chairman K. Koppelman: You are trying to stop these people from doing what they are doing and trying to get restitution for the people involved. Then the Attorney General could bring action.

Parrell Grossman: That is accurate. I would be happy to have this increased to a Class A misdemeanor in a heartbeat.

Rep. Lois Delmore: Right now what are you doing. Are we having success returning money to the victims?

Parrell Grossman: Yes we are already doing this. Under this law we can issue a cease and deices but it is not clearly provided for in the statute, but it is working. We are recovering hundreds of thousands. The next time they come back into the state then we can have them arrested. We are fairly effective in getting a lot of these contracts cancelled.

Rep. Lois Delmore: Is it required you use 65? How did you come to the number of 65?

Parrell Grossman: It just has been 65 for a long time. I would have no objections if we lowered it to 40. I am happy to have more notice. I would rather have consumers have 15 days' notice rather than three days' notice.

Chairman K. Koppelman: I thought the three day right to cancel was part of a federal trade commission regulation or statute where it was universal? Does it only apply to 65 and older?

Parrell Grossman: Under the federal law there is a three day right to cooling off rule. But the Attorney General can't enforce that federal statute.

Chairman K. Koppelman: So this gives you some teeth in the state law.

Parrell Grossman: There was a sale to an elderly woman of a vacuum cleaner for \$7000 and they were required to give them the written cancelation rights and tell them orally that you have these 15 days to cancel and he had a practice that he folds it up into a two inch square and he staples it to the back of the contract. We asked him why and he said so it is convenient for the purchaser. No it was so they can't get that detached and never looks at it and realizes she had 3 day or 15 to cancel. If I took that in front of the judge they would look unapprovingly at that individual but under current law there is no misrepresentation. It does shock the conscience.

Chairman K. Koppelman: Are there terms like shocked and unconscionable are they defined in law?

Parrell Grossman: There is the dictionary definition for unconscionable. You can't illegal that anything is unconscionable.

Chairman K. Koppelman: Does this require any more individuals or persons to register as transient merchants and what are the requirements?

Parrell Grossman: No that is unchanged. The registration process involves posting a bond with the Attorney General's office; paying a \$200 licensing fee and that bond then gives some possibility of redress to consumers if they pay money and it doesn't happen. Then they can go against that bond.

Chairman K. Koppelman: Are people who sell Avon or things like that licensed?

Parrell Grossman: No. These are individuals who have homes and business here and are not transient merchants.

Rep. L. Klemin: Is the guy driving around the neighborhood trying to sell firewood and stops when he sees a fireplace. Is he a transient merchant?

Parrell Grossman: Yes he technically is.

Rep. P. Anderson: So if an outcomes that we want then we could get ahold of them under this? Hopefully they will just go away and never come back?

Parrell Grossman: Not necessarily. Licensing is to be able to contact these people if there are problems. There are legitimate transient merchants.

Rep. P. Anderson: Most other states have this?

Parrell Grossman: Yes. I wanted to bring this forward for years now. Other states have had it for a long time. I know the Attorney General uses his authority appropriately and other states have had it for a long time.

Rep. Mary Johnson: It appears from 51-15 now that you have drawn that into the Attorney General's capabilities through this bill that there are many ways these folks can get sued by the victim plus the civil penalties that may apply. Those civil penalties; where do they go?

Parrell Grossman: Those penalties go into the Attorney General's special fund and are used there or they go back into the general fund. The legislature can appropriate those unspent fees for any purpose they want.

Rep. Mary Johnson: So with the Hazelton couple do they have a representative that is suing civilly?

Parrell Grossman: No, they have a daughter that is trying to assist her. We are not sure where these individuals are, but we are watching if they return. I don't think any of us will be able to track these individuals down.

Rep. Mary Johnson: With a Class B misdemeanor does the attorney general have the ability to file a John Doe warrant for their arrest?

Parrell Grossman: Yes, if the state's attorney did not want to prosecute these individuals the Attorney General could do it. You can't extradite on a Class B misdemeanor.

Rep. Mary Johnson: You can't issue a John Doe warrant on a misdemeanor.

Parrell Grossman: We can't get them to come back here so at what point does the Attorney General and the legislature want us to spend \$5000 suing somebody over a \$10,000 obligation.

Chairman K. Koppelman: Are any of these folks prosecuted through our general fraud statutes?

Parrell Grossman: There actually isn't a crime called fraud in ND so I would say no.

Chairman K. Koppelman: Under 51-15 it says unlawful practices, fraud and talks about fraud in the body of the statute. Are you saying that is not a criminal offense then?

Parrell Grossman: Yes there is no criminal fraud statute.

Chairman K. Koppelman: Is there a penalty in 51-15-02?

Parrell Grossman: that penalty in 51-15-02 is that the Attorney General can obtain injunctive relief; can ask the court to order all restitution and can ask the court to impose civil penalties of up to \$5000 per violation.

Chairman K. Koppelman: Pride of Dakota; are they exempt? Are they considered transient merchants?

Parrell Grossman: No they live here in the state. There is a broad exception. If you obtain a sales tax permit and register with Job Service ND and you register with Workforce Safety, the insurance you can be exempt from a transient merchant licensing requirement regardless of your origin.

Chairman K. Koppelman: So our locally domiciled folks who may have a sales tax permit; they might move around and sell merchandise at various places are exempt because their paying sales tax.

Parrell Grossman: Yes that is correct.

Chairman K. Koppelman: Our truth in advertising laws in ND were enacted in the 20s; and then amended in the 50s. It does reference advertisements. Do you see this as potentially being used to go after domestic advertisers?

Parrell Grossman: No I do not. If there is a concern we will inform the media that this solicitation is deceptive and we would appreciate it if you would stop running it, but we simply don't go after advertisers.

Josh Askvig: AARP has long looked at fraud, abuse and neglect. We would support this bill.

Opposition: None

Neutral: None

Hearing closed.

Do Pass Motion Made by Rep. D. Larson: Seconded by Rep. K. Hawken:

Discussion: None

Roll Call Vote: 13 Yes 0 No 0 Absent Carrier: Rep. K. Hawken:

Date: 3-25-15
Roll Call Vote #: 1

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB2182

House JUDICIARY Committee

Subcommittee Conference Committee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
Other Actions: Reconsider _____

Motion Made By Rep. Larson Seconded By Rep. Hawken

Representative	Yes	No	Representative	Yes	No
Chairman K. Koppelman	✓		Rep. Pamela Anderson	✓	
Vice Chairman Karls	✓		Rep. Delmore	✓	
Rep. Brabandt	✓		Rep. K. Wallman	✓	
Rep. Hawken	✓				
Rep. Mary Johnson	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. D. Larson	✓				
Rep. Maragos	✓				
Rep. Paur	✓				

Total (Yes) 13 No 0

Absent 0

Floor Assignment Rep. Hawken

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2182: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO PASS**
(13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2182 was placed on the
Fourteenth order on the calendar.

2015 TESTIMONY

SB 2182

Good morning, Chairman Hogue and members of the Judiciary Committee, my name is Nicole Poolman, State Senator from District 7 here in Bismarck and Lincoln, here to ask for your support of Senate Bill 2182.

This bill is all about consumer protection. It makes violations of the transient merchant's law violations of the unlawful sales or advertising practices law and prevents unconscionable sales practices.

This is not a bill directed to legitimate salespeople. It does not apply to the Mary Kay ladies or other home party salespeople. This is directed at the people who deliberately take advantage of the elderly, vulnerable, and developmentally disabled. This is for the man who sells an elderly woman a vacuum cleaner for \$4,000 and comes back the next year to sell her another one, or the woman who sells \$600 worth of magazine subscriptions to a developmentally disabled individual.

Parrell Grossman from the division of Consumer Protection is the expert in this area, so he will answer any technical questions you may have and explain how this bill became necessary. I respectfully ask for your support of SB 2182.

1/27/15

SENATE JUDICIARY COMMITTEE
DAVID HOGUE, CHAIRMAN
JANUARY 27, 2015

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
IN SUPPORT OF
SENATE BILL NO. 2182

Mr. Chairman and members of the Senate Judiciary Committee. I am Parrell Grossman, and it is my privilege to be the Director of the Attorney General's Consumer Protection and Antitrust Division. I appear on behalf of the Attorney General in support of Senate Bill 2182.

In terms of protecting elderly and vulnerable consumers in this state, this legislation would be the most significant consumer protection legislation in more than 20 years. It, however, would not be a significant change in terms of Attorney General Stenehjem's past and current consumer protection enforcement during his tenure in this Office. Instead, it is more of a codification or reflection of existing practices and it closes some actual or potential loopholes for individuals that engage in deceptive and, on occasion, unconscionable sales. The changes would provide solid statutory authority for the Attorney General to address some particularly egregious conduct.

Section 1 of the Bill makes violations of the transient merchants law violations of chapter 51-15, the "Unlawful Sales or Advertising Practices Law," (commonly referred to as the "Consumer Fraud Law") and gives the Attorney General the powers provided in N.D.C.C. ch. 51-15 to enforce violations of the transient merchants law. The Attorney General is the licensing authority for transient merchants, and this amendment provides the same enforcement authority that the Attorney General has in other consumer protection statutes. Most, if not all, of the consumer protection statutes enforced by the Attorney General also are cross-referenced in chapter 51-15. This change will codify the Attorney General's current enforcement of the transient merchants statute via chapter 51-15.

The current criminal class B misdemeanor is grossly inadequate to address or remedy the illegal conduct that occurs by some transient merchants. Asphalt transient pavers frequently take advantage of consumers. A Hazelton elderly couple with Alzheimer's were repeatedly victimized. Seven transient merchants took advantage of these consumers between April 2013 and May 2014 with total charges in the amount of almost \$86,000 for paving, lightning rods, etc. (Copy of Investigator's Summary E-Mail attached as an Exhibit.) Rick Berg, a former long-time legislator, was concerned when a transient paver took advantage of his elderly mother-in-law for thousands of dollars involving shoddy paving, at costs that greatly exceeded the charges by any local reputable paving company. Then, these pavers returned and re-victimized her again. When Mr. Berg asked the Attorney General what laws could address this conduct, the Attorney General indicated that he had this specific legislation in mind for a future

legislative session and that it would provide not only authority for transient sales, but also for unconscionable sales practices. Mr. Berg recently informed me that he supports Senate Bill 2182 and requested me to convey this information to this Committee.

This legislation also would impact door-to-door sales of vacuum cleaners, magazines, and smoke detectors to the elderly for inflated prices. In addition, it would apply to business opportunity scams that conduct seminars at hotels and take \$10,000 to \$20,000 or more from people now convinced they can create a product out of thin air and make a successful online business, or teach unsophisticated consumers to buy and flip real property. In spite of an otherwise iron clad agreement, we recently recovered \$15,000 for one such consumer because the seller did not have a transient merchant's license. We have required and obtained hundreds of thousands of dollars in consumer refunds by insisting on cancellation of these contracts. Nonetheless, under current law, it is quite possible the court would not cancel the contracts or order refunds. It is critical to have this authority and ability clearly stated in the law.

Section 2 of the Bill relates to unlawful practices and makes it an unlawful practice under Section 51-15-02 to engage in an act or practice that is unconscionable, or a practice that causes or is likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition. This Section is created to address situations where a seller's conduct in advertisement and sale of merchandise is outrageous, dishonest, unreasonable, or takes advantage of the buyer's lack of bargaining power, lack of information, or ability to understand the sales transaction, without the existence of false promises or misrepresentations currently prohibited under the statute. Unconscionable acts or practices would include such conduct as is incorporated in the definition of unconscionable, which includes any acts that are excessive, unreasonable, shockingly unfair or unjust, and not guided by conscience.

In addition to prohibiting deceptive practices like North Dakota's current law, 45 states and territories already ban "unconscionable practices" or "unfair practices," which are used interchangeably. The statutory scheme or term is frequently referred to as "unfair or deceptive acts and practices," or UDAP statutes. North Dakota is one of eight states that prohibit "deceptive practices" only.

The justification for prohibiting unconscionable acts or practices would include: 1) Sales of paving to a victim of Alzheimers; 2) Sales of a \$3,000 vacuum cleaner to an 85 year old woman after a three hour high-pressure sales meeting in her home, only to return within a year and sell her another one; and 3) Sales of \$2,300 in magazines to a 90 year old man in an assisted living facility. I could provide many examples of similar conduct that has occurred and I am certain you already understand the context of these practices.

These are practices that "shock the conscience" and, yet, are not necessarily banned or illegal without certain conduct or proof. It is not necessarily deceptive to sell an

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overpriced vacuum to a consumer, if no misrepresentation has occurred. The complainants typically are the adult children or other family members who were not present during the sale. You can understand the difficulties of presenting a case to the court with an elderly witness who is unsure what occurred or why her family member is complaining.

It is time to codify what the Attorney General already is attempting to do to protect vulnerable consumers, cancel oppressive contracts, and obtain refunds. This legislative change will do so. The Attorney General respectfully requests the same authority and tools already provided to 45 other states and territories, in order to fully protect our citizens.

In addition to unconscionable practices, the Section also would prohibit any act or practice that "causes or is likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition." Substantial injury usually involves monetary harm, and includes costs or fees paid by consumers as a result of an unlawful practice. A small amount of harm to a large number of people may be deemed to cause substantial injury. The act or practice would not be unlawful if the consumers may reasonably avoid injury. A person cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury. The injury must not be outweighed by countervailing benefits to consumers or competition, which means the act or practice must be injurious in its net effects. The injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.

Section 3 of the Bill updates the home solicitation cancellation procedure for consumers by getting rid of using telegrams to cancel agreements and replacing it with e-mails.

Section 4 of the Bill requires that the notification that is given to consumers during a home solicitation sale would now require that they consumer acknowledge that they have received oral notification of their cancelation rights which are already provided in N.D.C.C. ch. 51-18. This will help clarify disagreements between consumers and sellers regarding whether the consumer was orally notified of their cancelation rights. This section also updates the cancellation procedure for consumers by getting rid of the usage of telegrams to cancel agreements and replacing it with e-mails.

Section 5 of the Bill closes a loophole unique to 51-18-04.1 whereby the notice being provided to consumers of the seller's name, address, telephone number, price being charged, description of the goods or services, and the fact that they are not obligated to pay any money unless they sign and return the contract to the seller, was only being required of telepromoters and not all sellers. The change would require that this notice be given during all home solicitation sales and not just sales made by a telepromoter.

The Attorney General respectfully asks the Senate Judiciary Committee give Senate Bill 2182 a "Do Pass" recommendation.

Thank you for your time and consideration. I would be pleased to try and answer any questions.

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Grossman, Parrell D.

From: Schroeder, Chris N.
Sent: Monday, January 26, 2015 5:15 PM
To: Grossman, Parrell D.
Subject: Stramers

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On October 7, 2013 the Consumer Protection Division received a complaint from William and Elaine Stramer from Hazelton, ND, that indicated Bud Daley came to the Stramer's home uninvited and negotiated a \$4,200 an asphalt driveway in April 2013. The Stramers paid Daley a total of \$22,800. Dailey did not provide any product or services. The complaint was initially brought to CPAT's attention by the Stramer's daughter Ann, who was concerned about their welfare. Ann had described her parents as having "Alzheimer's". Ann also identified payments that her parents made to other door to door salespersons that totaled \$52,250. Ann believed that the individuals participated in some way with the sale and installation of the driveway.

Ann also identified a payment her parents made to WB Lightning Rods for the purchase and installation of lightning rods for the Stramer's home. WB Lightning Rods was from Delaware. WB Lightning Rods was not licensed as a Contractor or Transient Merchant. As a result, CPAT penalized WB Lightning \$500 for operating without the licenses, and the company was required to refund the Stramers \$2,500.

In May 2014, Ann Stramer complained to CPAT that her parents were solicited by and paid another out of state asphalt sealcoat company called Costello Coatings \$5,000. Costello Coatings was owned and operated by Bartholomew Costello from San Antonio, TX. Costello was not licensed as a Contractor or Transient Merchant. As a result, CPAT penalized Costello \$1,000 for operating without the licenses, and Costello was required to refund the Stramers \$5,000.

The following is a list of the payments the Stramers made:

April 24, 2013 to Bud Daley for \$4,200

April 25, 2013 to Bud Daley for \$4,600

April 28, 2013 to Bud Daley for \$14,000

The Stramers paid Daley a total of \$22,800.

April 25, 2013 to Patrick Dougherty dba Pave All for \$8,500

May 14, 2013 to Patrick Dougherty dba Pave All for \$10,000

May 14, 2013 to Patrick Dougherty dba Pave All for \$9,400

September 16, 2013 Patrick Dougherty dba Pave All for \$9,800

The Stramers paid Patrick Dougherty a total of \$37,700.

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April 25, 2013 to John Card for \$6,400

June 18, 2013 to John Card for \$1,900

The Stammers paid John Card a total of **\$8,300**.

June 18, 2013 to James Martin for **\$2,750**

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August 28, 2013 to WB Lightning Rods for **\$5,800**

May 9, 2014 to Costell Coatings for **\$5,000**

TOTAL: \$85,850

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3-25-15

HOUSE JUDICIARY COMMITTEE
KIM KOPPELMAN, CHAIRMAN
MARCH 25, 2015

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
IN SUPPORT OF
SENATE BILL NO. 2182

Mr. Chairman and members of the House Judiciary Committee. I am Parrell Grossman, and it is my privilege to be the Director of the Attorney General's Consumer Protection and Antitrust Division. I appear on behalf of the Attorney General in support of Senate Bill 2182.

This legislation would be the most significant consumer protection legislation to protect elderly and vulnerable consumers in more than 20 years. It, however, would not necessarily be a significant change in terms of Attorney General Stenehjem's consumer fraud enforcement during his tenure in this Office. Instead, it is a codification or reflection of existing enforcement practices and it closes some loopholes for individuals that engage in deceptive or unconscionable sales. The changes would provide solid statutory authority for the Attorney General to address some particularly egregious conduct that is not clearly prohibited by current law.

Section 1 of the Bill makes violations of the transient merchants law violations of chapter 51-15, the "Unlawful Sales or Advertising Practices Law," (commonly referred to as the "Consumer Fraud Law") and gives the Attorney General the powers provided in N.D.C.C. ch. 51-15 to enforce violations of the transient merchants law. The Attorney General is the licensing authority for transient merchants, and this amendment provides the same enforcement authority that the Attorney General has in other consumer protection statutes. The consumer protection statutes enforced by the Attorney General typically are cross-referenced in chapter 51-15 and this statute was overlooked in the past when we were updating those cross-references. This change would codify the Attorney General's current enforcement of the transient merchants statute via chapter 51-15.

The criminal sanction of a class B misdemeanor is grossly inadequate to address or remedy the illegal conduct that occurs by some transient merchants. Asphalt transient pavers, among others, frequently take advantage of consumers. A Hazelton elderly couple with Alzheimer's was repeatedly victimized. Seven transient merchants took advantage of these consumers between April 2013 and May 2014 with total charges in the amount of almost \$86,000 for paving, lightning rods, etc. (Copy of Investigator's Summary E-Mail attached as an Exhibit.) Rick Berg, a former long-time legislator, was concerned when a transient paver took advantage of his elderly mother-in-law for thousands of dollars involving shoddy paving, at costs that greatly exceeded by thousands of dollars the charges from local, reputable paving companies. Then, these pavers returned and re-victimized her again.

When Mr. Berg asked the Attorney General what laws could address this conduct, the Attorney General indicated that this particular legislation would provide the necessary authority for fraudulent transient merchant sales, including unconscionable sales practices. After reviewing this legislation, Mr. Berg confirmed his support for Senate Bill 2182.

This legislation also would impact door-to-door sales of vacuum cleaners, magazines, and smoke detectors to the elderly for inflated prices. It is a common practice to sell elderly consumers vacuum cleaners for \$3,000 or more and return again within the same year with a higher priced model. In addition, it would apply to business opportunity scams that frequently conduct seminars at hotels. They take \$10,000 to \$20,000 or more from people now convinced they can create a product out of thin air and make a successful online business. Many of these consumers have no computer, business experience, or products. These programs also claim to teach elderly or unsophisticated consumers to buy and flip real property when, in fact, there are not such properties available in North Dakota. Deception is difficult to prove in these programs with binding legal contracts. The contracts are riddled with disclaimers that fall under the deception doctrine: **"Shout the lie and whisper the truth."**

In spite of an otherwise iron clad agreement, we recently recovered \$15,000 for one such consumer because the seller did not have a transient merchant's license. We have required and obtained hundreds of thousands of dollars in consumer refunds by insisting on cancellation of these contracts. We do this relying on the ability to use chapter 51-15 to enforce chapter 51-04, the Transient Merchants Law. However, it needs to be stated in the law. Criminal prosecutors typically don't prosecute for failure to hold a transient merchants license and restitution through the criminal court in these particular circumstances is almost never an option. This statute, however, would provide the Attorney General clear legal authority to ban these practices, cancel contracts and obtain restitution.

Section 2 of the Bill relates to unlawful practices and makes it an unlawful practice under Section 51-15-02 to engage in an act or practice that is unconscionable, or a practice that causes or is likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition. This Section is created to address situations where a seller's conduct in advertisement and sale of merchandise is outrageous, dishonest, unreasonable, or takes advantage of the buyer's lack of bargaining power, lack of information, or ability to understand the sales transaction, and doesn't necessarily include clearly stated false promises or misrepresentations. Unconscionable acts or practices would include such conduct as is incorporated in the ordinary definition of "unconscionable," which includes any acts that are excessive, unreasonable, shockingly unfair or unjust, and not guided by conscience.

In addition to prohibiting deceptive practices like North Dakota's current law, 45 states and territories already ban "unconscionable practices" or "unfair practices," which are used interchangeably. The statutory scheme or term is frequently referred to as "unfair or deceptive acts and practices," or UDAP statutes. North Dakota is one of eight states that prohibit "deceptive practices" only, and do not ban "unconscionable practices."

The justification for prohibiting unconscionable acts or practices would include: 1) Sales of paving to a victim of Alzheimers; 2) Sales of a \$3,000 vacuum cleaner to an 85 year old woman after a three hour high-pressure sales meeting in her home, only to return within a year and sell her another one; and 3) Sales of \$2,300 in magazines to a 90 year old man in an assisted living facility. I could provide you endless examples of similar conduct that has occurred, although I am certain you already understand the context of these abusive practices.

These practices "**shock the conscience**" and, yet, are not necessarily banned or illegal without certain conduct or proof. It is not necessarily deceptive to sell an overpriced vacuum to a consumer, if no misrepresentation has occurred. The complainants typically are the adult children or other family members who were not present during the sale. It is difficult to present and prove a misrepresentation case to the court with an elderly victim who doesn't understand she is a victim and is unsure what even occurred or why her family member is complaining. Courts, however, will understand proof of unconscionable conduct.

It is important to codify what the Attorney General is attempting to do to protect vulnerable consumers, cancel oppressive contracts, and obtain refunds. This legislative change will do so. The Attorney General respectfully requests the same authority and tools already provided to 45 other states and territories, in order to fully protect our North Dakota citizens.

In addition to unconscionable practices, the Section also would prohibit any act or practice that "causes or is likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition." Substantial injury usually involves monetary harm, and includes costs or fees paid by consumers as a result of an unlawful practice. A small amount of harm to a large number of people may be deemed to cause substantial injury. The act or practice would not be unlawful if the consumers may reasonably avoid injury. A person cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury. The injury must not be outweighed by countervailing benefits to consumers or competition, which means the act or practice must be injurious in its net effects. The injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.

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The Attorney General respectfully asks the House Judiciary Committee give Senate Bill 2182 a "Do Pass" recommendation.

Thank you for your time and consideration. I would be pleased to try and answer any questions.

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