

HOUSE JUDICIARY COMMITTEE
LAWRENCE R. KLEMIN, CHAIRMAN
JANUARY 27, 2021

TESTIMONY BY
PARRELL D. GROSSMAN
DIRECTOR, CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL
RE: HOUSE BILL NO. 1208

Mr. Chairman and members of the House Judiciary Committee. I am Parrell Grossman, and it is my privilege to serve as the Director of the Attorney General's Consumer Protection Division. I appear on behalf of Attorney General Wayne Stenehjem in support of House Bill No. 1208.

I first want to note that due to a communication error on my part, two additional co-sponsors were inadvertently omitted as sponsors on this legislation. Representatives Pamela Anderson and George Keiser had confirmed with me that they wanted to be co-sponsors of this legislation and I failed to get this information to Chairman Klemin early enough for these two legislators to be included as additional sponsors. My oversight was unfortunate. Nonetheless, these potential co-sponsors were enthusiastic in their support of this Bill and I respectfully request that this Committee take note of their intent to co-sponsor this Bill.

The Attorney General is proposing HB1208 to make some long overdue changes to existing antitrust laws, including civil penalties and the ability to recover individual damages on behalf of North Dakota consumers. Also, for consumer fraud, we would like to extend the statute of limitations from two to four years to allow more time to discover or investigate fraudulent conduct and obtain restitution for consumers.

We believe it is time to increase ND's antitrust civil penalties from \$50,000 per violation to \$100,000 per violation. Civil penalties are \$1M in AK, FL, IL, NY and VT; \$500,000 in NE, UT, and VT; \$250,000 in AZ, CT, and OR; \$150,000 in IA; and \$100,000 in VA, WV, and WI.

The landscape in antitrust and anti-competitive conduct has dramatically changed over the years and this is about North Dakota having penalties more commensurate with illegal anticompetitive conduct that directly harms consumers' pocketbooks or limits their choices in the marketplace. As an example, you probably are aware the Attorney General and State of North Dakota are part of three multistate antitrust cases against Big Tech companies, although the type of entity matters less than the nature of illegal conduct. A \$50,000 civil penalty for one of these entities is nothing and certainly is not any deterrent to illegal conduct.

Additionally, North Dakota is part of a huge generic drug multistate case involving many different cases, drugs and participants. The states believe it is a strong price fixing case with a scheme dividing up markets and drug pricing between many companies and participants to keep all participants very profitable. It completely stifled competition and engendered higher prices for consumers, many who likely made difficult choices between drugs and other necessities. This case has been ongoing for several years and will continue to do so for many more years, and increased civil penalties in cases like this one should be an option for the Court and State of North Dakota.

Increasing these civil penalties will not impact any small businesses in North Dakota. Furthermore, these penalties would be the maximum amount and are always subject to the Court's discretion. The Attorney General typically is unlikely to ask for the maximum amount. Nonetheless, the possibility for higher penalties provides a stronger disincentive for illegal conduct.

Section 2 of the Bill proposes a very important change. It provides *parens patrie* authority for the Attorney General to recover damages sustained by North Dakota consumers as a result of antitrust violations. Most states already have specific statutory authority to recover for individual consumers, and some do not. There are approximately 30 states that have this authority, with most by statute and a few by judicial or case law authority. This authority will significantly matter for harmful anticompetitive conduct in the future, when it comes to obtaining damages or refunds for North Dakota consumers in a variety of purchases or matters. Arguably, damages that do not go to North Dakota consumers are available for consumers in other states.

Section 3 of the Bill contains proposed changes regarding North Dakota's statute of limitations (SOL) for consumer fraud. Our SOL for consumer fraud arguably is 2 years, as a "penalty or forfeiture." This limited two-year period is insufficient for fraudulent conduct. It is not enough to discover or investigate complicated violations. We do not want to rush these decisions or bring an action that might have been concluded at the investigation stage without further action. Typically, in multistate investigations and legal actions, targets are willing to enter into tolling agreements that protect states during the investigation that might lose claims because the two-year time period will run while the matter is being investigated. Sometimes, knowing the two-year SOL in North Dakota, these targets are unwilling to enter into such tolling agreements with North Dakota. It can place the Attorney General in the position of dropping out of the case or suing immediately and going it alone without sharing resources with other states. Health fraud cases related to the effects of drugs are a prime example of some limited cases or instances in which North Dakota was precluded from or passed on a multistate resolution because the misrepresentations on the drug effects occurred prior to the two years and the representations were not established as false until years later.

It is not unusual to discover fraudulent conduct near the expiration of two years, with no time to conduct a fair or appropriate investigation in order to assess whether or not to bring legal action. We certainly do not want to initiate legal actions if an investigation would not support any further action. Also, we have investigations where the defendant intentionally hides or fails to disclose other transactions and victims that we later discover from another source only after we actually file an action, finding those victims or transactions are now outside the two years. It is arbitrary to exclude other victims that, for instance, lost \$10,000 to \$50,000 or more, two years and six months earlier, and it is very difficult to explain to those victims.

These cases involve fraudulent and deceitful conduct, not breach of contract, and are more deserving of an extended SOL. Something greater than two years is reasonable and appropriate. Many states have 2 years and other states have 3 to 6 years. In Iowa, consumer fraud apparently is so frowned upon that Iowa has no SOL for consumer fraud. The Attorney General is recommending extending our SOL to 4 years.

The Attorney General respectfully requests that House Judiciary give this Bill a “Do Pass” recommendation.

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