



Testimony of Robert L. Hubbard¹
H.R. 2221, Fairness to Contact Lens Consumers Act
Subcommittee Commerce, Trade, and Consumer Protection
Energy and Commerce Committee
United States House of Representatives
September 9, 2003, 1 p.m.

I am pleased to testify here today on H.R. 2221. The States wholeheartedly support federal legislation that requires eye care practitioners (ECPs) to release contact lens prescriptions, which H.R. 2221 does. Unlike most physicians, eye care practitioners sell what they prescribe. Thus, individual ECPs derive substantial revenue from the sale of replacement contact lenses and have an economic incentive to withhold prescriptions from customers to prevent consumers from shopping for replacement lenses elsewhere. In light of that incentive and the power of ECPs over prescriptions, the bill helps give consumers what they need to make their own choices about where to buy replacement contact lenses.

In re Disposable Contact Lens Antitrust Litigation

As part of enforcing antitrust and consumer protection laws, state Attorneys General have an interest in maintaining open and competitive markets and have long been focused on markets for the sale of contact lenses. The most significant manifestation of that interest is *In re Disposable Contact Lens Antitrust Litigation*, which involves 32 States² and a certified class in the Middle District of Florida, Jacksonville Division, in front of United States District Judge Harvey

¹ Director of Litigation, Antitrust Bureau, New York State Department of Law. I also serve as Chair of Plaintiff States' Steering Committee in the *Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M.D. Fla.) and Chair of the Contact Lens Working Group of the NAAG Antitrust Task Force.

² Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wisconsin.

Schlesinger. In that litigation, plaintiffs alleged the high price and limited availability of replacement contact lenses resulted from illegal collusion among contact lens manufacturers (Johnson & Johnson Vision Products, Inc. d/b/a Vistakon (J&J), Bausch & Lomb, Inc. (B&L), and CIBA Vision Corp. (CIBA)), the American Optometric Association (AOA), other groups of optometrists, and 13 individual optometrists. Plaintiffs charged that the illegal agreement made it more costly and difficult for consumers to buy replacement contact lenses from mail order firms or pharmacies.

In re Disposable Contact Lens Antitrust Litigation was a massive undertaking. The investigation that led to the litigation began with a complaint to Florida made by Monty Belote of the Florida Consumer Action Network. The effort included over 200 depositions, 45 motions for summary judgment, a docket sheet with over 1,400 entries, and five weeks of trial before a jury before plaintiffs reached a settlement with the last defendant. Even after the settlements, the states acted to enforce the injunctive relief provisions of the settlements.

One major theme of plaintiffs' claims was that the illegal agreement included making it difficult for consumers to get their prescriptions. The Attorneys General gathered and offered evidence showing systematic efforts by ECPs, their trade associations, and the other defendants to prevent consumers from obtaining or using their prescriptions. Aided by their trade association and contact lens manufacturers, ECPs exchanged ideas and discussed in their trade journals methods to discourage consumers from requesting their prescriptions or to make the prescriptions they did release less useful. They advised colleagues to refuse to give consumers prescriptions or make consumers sign waivers that absolve the eye care practitioner of "liability" in connection with the

prescription.³

Ultimately plaintiffs settled with all of the defendants, and by order dated November 1, 2001, the Court granted final approval of the settlements.⁴ B&L agreed to sell its lenses to mail order and pharmacies on a non-discriminatory basis, deposit \$8 million into a settlement fund, and offer a benefit package valued at \$121 to all consumers who purchased contact lenses since 1988.⁵ B&L guaranteed it would distribute at least \$9.5 million worth of benefits, by agreeing to deposit the difference between what was distributed and the \$9.5 million into the settlement fund. J&J also agreed to sell its lenses to alternatives like mail order and pharmacies on a non-discriminatory basis. J&J agreed to deposit \$25 million into a settlement fund, offer a benefits package to contact lens wearers valued at \$100, guarantee distribution of \$30 million in benefits, and pay up to \$5 million to former wearers of J&J lenses.⁶ AOA agreed to pay \$750,000, and the 13 individual defendants agreed to pay \$8,000 each. Additionally, AOA agreed to open access to replacement lenses for

³ See, e.g., Koetting, *I Want my Contact Lens RX*, OPTOMETRIC ECONOMICS, 30-37 (February 1991); Kirkner, *10 Ways to Keep RXs from Walking*, REVIEW OF OPTOMETRY, 59-64 (Sept. 15, 1994) (article about a roundtable of optometrists discussing how to keep patients from using competitors); Snyder, *Winning the War Against Mail Order Contact Lenses*, OPTOMETRY TODAY, Vol. No. 1 (1993). Koetting's article describes the specific practices used, as simple refusal to give prescriptions, falsely claiming that federal or state law prohibits release of the prescription, writing prescriptions for brands that are not widely available, or conditioning the prescription on signing by consumers of a waiver or disclaimer.

⁴ State settlements are posted on the website of the State Enforcement Committee of the Antitrust Section of the ABA, at <http://www.abanet.org/antitrust/committees/state-antitrust/home.html>. The lens settlements on the settlement portion of that website, within the 11th Circuit portion of the list of settlements.

⁵ The B&L benefits package includes: (1) a single \$50.00 rebate per claimant on the purchase of four multipacks and an additional \$25.00 rebate per claimant on an additional purchase of four multipacks of B&L disposable contact lenses; (2) a single \$25.00 rebate per claimant on an eye examination, provided that the claimant also provides proof of purchase of Bausch & Lomb contact lenses; and (3) coupons and product samples for B&L lens care products.

⁶ The J&J benefits package includes: (1) \$50 off the purchase of four six-packs of J&J disposable lenses; (2) \$25 off the cost of an eye exam; and (3) an additional \$25 off a future purchase of four or more lens six-packs.

consumers and to not restrict where consumers can obtain contact lenses, including an agreement to refrain from opposing the release of contact lens prescriptions.⁷ The Attorneys General hope that consumers will enjoy significant benefits as a result of these settlements.⁸

State Competition Advocacy in Contact Lens Markets

Still, States have long recognized that litigation and the fruits of litigation cannot address all of the competitive problems characteristic of contact lens markets. Litigation did not and cannot insure that every eye care practitioner releases prescriptions as a matter of practice. Litigation cannot address the fundamental structural problem in the market: that ECPs both prescribe and sell contact lenses. Thus, to protect further the interests of consumers in contact lens markets, states have also engaged in competition advocacy in support of consumers who buy and use contact lenses.

States engaged in competition and consumer advocacy in vision care markets generally when the States commented on the Federal Trade Commission's "Prescription Release Rule." That Rule was premised on the finding that many consumers had difficulty comparison shopping for eyeglasses because ECPs refused to release prescriptions. The Rule requires an ECP to provide the patient at no extra cost a copy of the patient's eyeglass prescription immediately after the eye examination is complete.⁹ The Rule also: (1) prohibits the ECP from conditioning the availability of an eye care

⁷ The specific provision of the settlement between plaintiffs and the AOA concerning prescription release provides: "Consistent with state law, the AOA will not object to the release of contact lens prescriptions, except in the affirmative exercise of an optometrist's own medical judgment related to the specific, identified and documented health needs of a particular patient. The AOA will not develop, disseminate, or urge the use of forms designed to limit either the availability or utility of prescriptions. A form may contain reasonable expiration dates, limitations on refills and other provisions which are consistent with state law and good optometric practice." Settlement ¶ 5(a).

⁸ Early in the litigation, the States also settled with CIBA and the other groups of optometrists.

⁹ 16 CFR Part 456, (a) - (c), known as the "Prescription Release Rule," promulgated in 1978.

examination on an agreement to purchase ophthalmic goods; and (2) requires ECPs to release eyeglass prescriptions to their patients regardless of whether they request the prescription.¹⁰ The automatic release rule alerts the consumer that the purchase of eyeglasses can be separate from obtaining an eye exam. Contact lenses were excluded from this rule because each pair required a new fitting.

For over twenty years that FTC Rule has mandated the release of eyeglass prescriptions, and the Rule has served consumers well. Mandating the release of eyeglass prescriptions has fostered a competitive market for the retail sale of eyeglasses. Consumers have enjoyed ever increasing competitive alternatives for purchasing their eyeglasses. Consumers can have eyeglasses made in as little as one hour and at a very low cost.

The States' comments on the FTC rule in 1997 both supported continuation of the Rule and urged that the Rule be extended to contact lens prescriptions.¹¹ The States urged that mandatory release of contact lens prescriptions would have similar results, lowering consumer costs, as well as enhancing the healthier use of these lenses by consumers. Since the FTC had promulgated the eyeglasses Rule, the contact lens industry had developed in ways that justified adding contact lens prescriptions to the Rule. When the Rule was adopted, soft contact lenses were designed to be replaced annually, coinciding with the period typically recommended for reexamination by eye care practitioners. Beginning in the late 1980s, manufacturers began to market and sell what are now

¹⁰ *Id.*

¹¹ States Comments dated Sept. 2, 1997, of Attorneys General to the Federal Trade Commission re 16 CFR Part 456 (Spectacle Prescription Release Rule), available at the Legislative Advocacy portion of the State Enforcement Website, *supra* note 3. The states submitting those comments were Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, New York, Ohio, Pennsylvania, West Virginia, and Wisconsin.

known commonly as “disposable” or “frequent replacement” contact lenses, which are designed to be replaced daily, weekly, or monthly. For these and other contact lenses, manufacturers developed methods that greatly lessened the quality control problems of late 1970s. Because contact lenses are now reliably reproduced, replacement contact lenses are no longer individually checked or individually adapted on the eye. Moreover, consumers have increasingly chosen lenses that are replaced frequently over other types of contact lenses, and selling replacement contact lenses has developed into a significant market. The FTC retained the Rule, but did not extend the rule to contact lenses.

States have reiterated their position that mandatory prescription release should apply to contact lenses. Thirty nine Attorneys General acted to support of federal legislation last year (H.R. 2663) that would have achieved that result.¹²

Mandating the release of contact lens prescriptions would still benefit consumers. Anti-consumer, anticompetitive practices have not ended. Enforcement proceedings in the *Disposable Contact Lens Antitrust Litigation* illustrated that many consumers still have significant difficulties getting their contact lens prescriptions. Forms implementing the practices discussed in the articles cited above continue to be used. Although twenty-six states require release of contact lens prescriptions, the specific requirements vary and anti-consumer, anticompetitive practices persist

¹² Letters dated March 18, 2002 from State Attorneys General to Representatives sponsoring H.R. 2663, the Contact Lens Prescription Release Act of 2001, available at the Legislative Advocacy portion of the State Enforcement Website, *supra* note 3. The thirty nine attorneys general who joined that letter were from Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oregon, Puerto Rico, Rhode Island, South Carolina, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia, Wisconsin, and Wyoming.

concerning contact lens prescriptions that are not permitted under the FTC eyeglass Rule. Federal legislation would create a uniform national rule and extend that rule to all of the nation's consumers.

The legislation would have a significant impact. Today, over 26 million consumers wear contact lenses. Alternative suppliers, like pharmacies, mail order, buying clubs, department stores, and discount merchandisers, give consumers a convenient and cost-effective method of purchasing replacement contact lenses. The alternatives typically apply a smaller markup than ECPs. These savings typically are passed on to consumers in the form of lower costs and increased convenience. Obtaining contact lenses from alternatives may also spare consumers the cost of an extra unnecessary office visit to an eye care practitioner.

Health care concerns have no evidentiary basis and do not justify restraining consumer choice

The principal reason some ECPs advance for refusing to provide a patient with his or her contact lens prescription, at least when public policy makers are paying attention, is health care. By withholding prescriptions, ECPs argue they are ensuring that the patient comes back for eye care. If a consumer wants or needs replacement lenses, the ECP theoretically could force the consumer to return to the ECP's office and check the consumer's eye health. A receptionist or nurse could probe the consumer's habits or the ECP could perform an examination. This "consumer health" argument is based on the theory that, as a "medical device," contact lenses require a professional's attention. Yet, replacement lenses are not and need not be individually fit by an eye care practitioner.

Contrary to this argument, mandatory prescription release would probably benefit consumers' ocular health. As the cost and convenience of buying replacement lenses improves, the safety of wearing contact lenses, particularly disposable or frequent replacement lenses, should also improve.

If buying lenses is expensive and inconvenient, consumers may stretch wearing schedules or engage in other conduct to extend the life of their contact lenses. Wearing lenses for too long can harm consumers if the lenses become dirty or carry bacteria or viruses that would not develop if the lenses were replaced more frequently. Easier access to, and lower prices for, replacement lenses encourage consumers to use the lenses properly, thereby increasing patient safety.

In addition and based on their experience in the *Disposable Contact Lens Antitrust Litigation*, States are skeptical of the health care claims made by the opponents of prescription release. The litigation addressed significant disputes about the relationship between ocular health and the sale of replacement disposable contact lenses by alternative channels of distribution. The AOA claimed that sales by alternatives threatened ocular health, which plaintiffs alleged (and the AOA denied) was deceptive.¹³ Plaintiffs alleged that a 1990 AOA presentation to the Food & Drug Administration was deceptive.¹⁴ Plaintiffs also asserted that the AOA in 1992 decided not to survey the issue because the results might be that alternative channels did not threaten, and may even improve, ocular health, and that such a survey would have to be disclosed.¹⁵ In addition, Plaintiff States propounded various contention interrogatories about studies on contact lenses and ocular health, including one asking the AOA to “Identify and describe all studies of which you are aware that discuss any effect the dispensing of contact lenses by alternative channels has on ocular health.” In addition to objecting to the interrogatory, “the AOA state[d] it is aware of no specific study as defined [in the

¹³ Plaintiff States’ Amended Complaint ¶¶ 49-55, Doc. No. 7 (97 CV 861); Florida Complaint ¶¶ 37, 41, Doc. No. 1 (94 CV 619); Consolidated Class Complaint ¶¶ 37, 40, Doc. No. 23.

¹⁴ Florida’s Consolidated Statement of Facts dated March 19, 1997, at 19-22, Doc. No. 270; Plaintiff States’ Consolidated Statement of Facts dated Nov. 12, 1999, at 57-60, Doc. No. 849.

¹⁵ Florida’s Consolidated Statement of Facts dated March 19, 1997, at 29 n. 128, Doc. No. 270; Plaintiff States’ Consolidated Statement of Facts dated Nov. 12, 1999, at 83 n. 241, Doc. No. 849.

objection].”¹⁶ Finally, arguing that the testimony had no scientific basis, plaintiffs moved to preclude expert testimony on whether alternative channels endangered the health and safety of consumers.¹⁷ The AOA opposed that motion, which was undecided when plaintiffs settled with the AOA.

At plaintiffs’ insistence and to settle those claims, the AOA agreed to limit what it could say and do concerning those health care assertions. Paragraph 5(h) of the settlement between plaintiffs and the AOA provides:

The AOA shall not represent directly or indirectly that the incidence or likelihood of eye health problems arising from the use of replacement disposable contact lenses is affected by or causally related to the channel of trade from which the buyer obtains such lenses. Specifically, AOA shall not represent directly or indirectly that increased eye health risk is inherent in the distribution of replacement disposable contact lenses by mail order, pharmacies, or drug stores. This paragraph shall not prohibit the AOA from making such representations where such representations are supported by valid, clinical or scientific data.

Sales by ECP competitors do not give rise to any eye health problems that the AOA can “support by valid, clinical or scientific data.”¹⁸ The States have repeatedly asked the AOA to provide to the States any such data if the AOA becomes aware of such data, but no such data has ever been provided.

Moreover, this health care justification was properly rejected when forwarded to justify the refusal to release eyeglass prescriptions, and should now be rejected as a justification for refusing

¹⁶ The AOA’s Response to States’ Third Discovery Requests to the AOA dated February 8, 1999, at 32.

¹⁷ Plaintiffs’ Motion *In Limine* to Preclude Expert Testimony of Louis A. Wilson, A. Christopher Snyder, Gerald E. Lowther and Oliver D. Schein, and Memorandum of Law dated Aug. 25, 1999, Doc. No. 774.

¹⁸ Indeed, the AOA has not provided any evidence of consumer harm, which is quite telling. Disposable contact lenses were introduced and alternative channels began selling them in the late 1980s. The States would expect any consumer harm flowing from the sale of replacement contact lenses by alternative channels to have become manifest by now if there were such evidence.

to release contact lens prescriptions.

Moreover, a theoretical concern that a patient will not follow health care directions without some coercion being applied does not justify withholding information from consumers or eliminating consumers' right to choose. The means of protecting the patient's health are obvious and straightforward. The ECP can and should give consumers full and complete advice about the need for proper and timely examinations. The ECP can set a reasonable expiration date on prescriptions. Product packaging and literature can fully inform consumers about the advisability of periodic examinations. ECPs can offer to set appointments in the future to encourage timely re-examinations and can contact patients with reminders at appropriate intervals. Yet, the consumer should be allowed to choose based on that information, and should not be forced to do what an ECP wants based on the practitioner's refusal to provide a prescription.

Conclusion

When buyers are free to select their suppliers based on the availability of reasonable prices, high quality service, and convenience, everyone benefits. Legislation mandating the release of contact lens prescriptions can move us closer to that goal. The states firmly support mandatory contact lens prescription release.