

1



ELIOT SPITZER
Attorney General

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
Suite 26C
(212) 416-8267 (voice)
(212) 416-6015 (telecopy)
Robert.Hubbard@oag.state.ny.us (e-mail)

DIVISION OF PUBLIC ADVOCACY
ANTITRUST BUREAU

September 4, 2003

Edward C. LaRose
Trenam Kemker
2700 Barnett Plaza
101 East Kennedy Blvd
Tampa, FL 33602-5150

Re: In re Disposable Contact Lens Antitrust Litigation,
MDL 1030 (M.D. Fla.), your file No. 93-7490

Dear Ed:

I write to elaborate on the concerns that Plaintiff States have about the advocacy by your client, the American Optometric Association (AOA), for "positive" verification.¹ I write now because legislation requiring release of contact lens prescriptions is being considered by the United States Congress and I understand that the AOA may endorse or forward the complaints of others or argue to Congress that "positive" verification is needed to protect the ocular health of patients. This letter addresses Plaintiff States' concerns about those AOA activities under the settlement in this litigation between plaintiffs and the AOA.

AOA's advocacy of "positive" verification raises significant issues under the settlement's injunction

Any effort by the AOA to advocate "positive" verification raises significant issues under the injunctive relief provisions of the settlement. Such advocacy cannot include endorsing or forwarding the complaints about alternative channels made by others, nor can such advocacy assert that "positive" verification is justified by health care considerations, except in limited

¹ These issues were raised in my e-mail to you dated April 30, 2003, and your letter in response dated May 9, 2003. As used in this letter, "positive" verification refers to an alternative channel getting prescription information from consumers and consummating the sale only if the eye care practitioner (ECP) affirmatively responds to the alternative's request for confirmation of that information.

Edward C. LaRose
September 4, 2003
page 2

circumstances that do not apply here. Paragraph 5(f) of the settlement agreement requires that:

The AOA will not endorse or pass on to others complaints about the sale of . . . [replacement disposable] lenses by a non-ECP retail outlet to any person or entity, other than about violations of federal or state laws;

Thus, under the settlement, AOA may not endorse or forward to others complaints about parties that do not use "positive" verification, "other than about violations of federal or state laws."

Similarly, paragraph 5(h) provides that:

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;

Thus, the AOA may not seek to justify "positive" verification as premised on a health care justification, except when those claims "are supported by valid, clinical or scientific data."

AOA claims that "positive" verification and ocular health are linked

Despite these provisions and as you know, the AOA has recently acted on prescription verification issues. The AOA has endorsed its members' complaints about businesses that do not use "positive" verification. The AOA also has asserted that "positive" verification is related to ocular health. For example, the AOA's State Government Relations Center's Bulletin No. 43 provides:

[B]ecause the AOA believes that the eye health of patients should not be placed in unnecessary jeopardy, the AOA strongly encourages states to pursue positive verification laws in order to protect the ocular health of the public.

The same language was included in the AOA's March 2003 State Legislation Monthly Newsletter. Similarly, AOA's News Online dated March 24, 2003, included a National Contact Lens Enforcement

Edward C. LaRose
September 4, 2003
page 3

Petition that made similar assertions.

"Positive" verification necessarily impacts alternative channels under the settlement

Your letter dated May 9, 2003, stated your view that AOA's activities concerning "positive" verification cannot be equated with "complaining about or assailing alternative channels of distribution." Letter at 3. To the contrary, AOA activities concerning "positive" verification necessarily impact "alternative channels of distribution" as defined in the settlement. Section 1.a. defines "alternative channels of distribution" as sellers that do not use an ECP "in connection with the sale of contact lenses." Thus, because only ECPs can write prescriptions, an alternative channel of distribution (or "non-ECP") must secure that prescription information from a source other than the alternative channel. By making prescription information harder to obtain, complaining about or requiring "positive" verification necessarily impacts alternative channels (or ECPs who are acting like alternative channels by consummating a sale of lenses for a consumer who is not that ECP's patient).

As you know, ECPs can disadvantage competitively those alternative channels that use "positive" verification. Physicians generally do not sell what they prescribe. Unlike physicians, ECPs both prescribe and sell contact lenses. Thus, "positive" verification accords the ECP the right to veto with silence each and every sale to consumers who patronize that ECP. The ECP might "exercise" the veto by silence made possible by "positive" verification requirements for anticompetitive reasons or simply because the ECP is disorganized, inefficient, and/or unresponsive to consumers. An ECP's ability to veto a sale with silence when "positive" verification is used can reward the anticompetitive, unresponsive, and inefficient ECP and deprives consumers of the value and competition provided by alternative channels.²

² Laws in the states of California and Utah, and the Federal Trade Commission, expressly endorse "passive" or "presumed" verification, that is the alternative channel providing notice to the ECP of the prescription information provided by the consumer and consummating the sale if the ECP does not respond. CALIF. BUS. & PROF. CODE § 2546.6(a); UTAH STAT. § 58-16a-102(4); Comments of the Staff of the Federal Trade Commission, Intervenor, *In re Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses* at 13 (Conn. Bd. Examiners for Opticians, Mar. 27, 2002), available at <http://www.ftc.gov/be/v020007.htm> at 12.

Edward C. LaRose
September 4, 2003
page 4

The injunction resolved significant disputes about the health care effects of the sale of lenses by alternative channels

Your letter does not assert and my understanding is that the AOA does not assert that the need for "positive" verification is "supported by valid, clinical or scientific data."³ We would be surprised if the AOA changed its position on this topic and repeat our request that you provide to us any such data if you or the AOA become aware of such data.

As you of course recall, this settlement provision resolved significant disputes in the litigation 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.⁴ Plaintiffs alleged that a 1990 AOA presentation to the Food & Drug Administration was deceptive.⁵ 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.⁶ 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

³ Indeed, your letter does not cite any evidence of consumer harm, which we find quite telling. Disposable contact lenses were introduced and alternative channels began selling them in the late 1980s. We 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.

⁴ 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.

⁵ 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.

⁶ 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.

Edward C. LaRose
September 4, 2003
page 5

the objection]."⁷ 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.⁸ The AOA opposed that motion, which was undecided when plaintiffs settled with the AOA.

Thus, the injunctive relief provision about AOA's assertions that health care risks are associated with the sale of contact lenses by alternative channels is designed to address significant and contentious claims made by plaintiffs. At plaintiffs' insistence and to settle those claims, the AOA agreed to limit what it could say and do concerning those health care assertions.

The provisos to the settlement's injunction do not eliminate the states' concerns

In addition to asserting that AOA's activities do not fall within the injunction, your letter asserts that AOA's activities are within the "safe harbors" of paragraph 5(i), which provides:

Notwithstanding the foregoing, the AOA shall be permitted to (i) engage in collective actions protected under the *Noerr-Pennington* doctrine; (ii) present news, information or the views of its members to the public, manufacturers and others, and conduct surveys, collect data and disseminate such information, provided that such activities do not violate the proposed limitations on AOA conduct discussed above; and (iii) disseminate information about, or encourage compliance with, any federal or state laws and government regulations, including dispensing, antitrust, FTC and FDA laws;

The safe harbors under (ii) and (iii) clearly do not apply here. As to (ii), AOA is supporting or advocating a position, rather than presenting news, information, or its members' views and the provision does not apply to "limitations on AOA conduct discussed above." As to (iii), the AOA activities concerning Congress seek to influence bills being proposed, rather than seek compliance with current law.

The *Noerr Pennington* proviso in paragraph 5(i) also does not

⁷ The AOA's Response to States' Third Discovery Requests to the AOA dated February 8, 1999, at 32.

⁸ 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.

Edward C. LaRose
September 4, 2003
page 6

apply.⁹ The settlement is a judgment with the force of res judicata and interpreted like a contract. *Paradise v. Prescott*, 767 F.2d 1514, 1525-26 (11th Cir. 1985), *aff'd sub nom., United States v. Prescott*, 480 U.S. 149 (1987). Accordingly, the provisions of the settlement must be read together and one provision should not be interpreted without regard to the other provisions of the settlement. *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 171-72 (5th Cir. 1981) ("all parts of the decree have meaning and must be construed together" (citation omitted)). Read together, the injunction and the provisos are not in conflict. The AOA easily could seek legislation that disadvantaged alternative channels, as long as the AOA did not violate the provisions of the injunction. Similarly, in contract interpretation, the specific provision controls over the general provisions. *Western Oil Fields v. Pennzoil*, 421 F.2d 387, 389 (5th Cir. 1970). In this case, the specific injunction concerning AOA's health care claims controls over the general *Noerr-Pennington* proviso.

Please feel free to contact me with questions or comments about this letter.

Very truly yours,



Robert L. Hubbard
Director of Litigation

cc of pdf version by e-mail:
Edward C. LaRose
D. Biard MacGuineas
Edward A. Groobert

rlh\lms\aoa\larosesept03.let

⁹ We would find it ironic if the AOA, by arguing for this proviso, would apply a lesser standard to its conduct when dealing with the United States Congress than the AOA would apply generally.