

**Testimony of R. Joe Zeidner
General Counsel of 1-800 CONTACTS**

**Hearing before the
Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

Wednesday, July 30, 2014

Madam Chairwoman, Senator Lee and Distinguished Members of the Subcommittee:

My name is Joe Zeidner, and I am General Counsel of 1-800 CONTACTS, the nation's largest seller of contact lenses. We have served over 15 million unique customers who value having choice in where they purchase their contact lenses.

We value the relationship we have with eye care providers and with manufacturers alike. We appreciate the thousands of eye care providers who work with us on a daily basis to verify their patients' prescriptions so they may promptly receive the correct contact lenses. And, we are the largest contact lens retailer for each of the four major manufacturers of contact lenses.

So, the issue here in our minds is not eye care providers. Nor is it simply the manufacturers. It is, in fact, a fundamental flaw in this marketplace. It is flawed in a manner which leads to anti-competitive practices which harm our customers – practices like the introduction into this market of Resale Price Maintenance programs which will raise prices, and limit options for consumers at a time when Americans are looking for ways to save money.

Nearly thirty-nine million Americans wear contact lenses. They spend \$4.2 billion annually on contact lenses, and billions more on contact lens solutions and for services such as eye exams and fitting fees.

They participate in a market that is different than other areas of human healthcare. It is defined by a central conflict of interest: The prescriber is also the retailer of the products he or she prescribes, as the first slide in the appendix illustrates.

Beyond the central conflict of interest, this market is characterized by six core attributes:

1. Under federal law, contact lenses cannot be purchased without a prescription.
2. Contact lenses are prescribed by brand and the brand is almost always selected by the prescriber who often chooses among several brands that could be worn by the patient.
3. Once prescribed a brand, the consumer is effectively barred by federal law from switching to an alternative brand for the life of the prescription (if the consumer wants a different product, she typically will need to pay for another exam).
4. Because there are no substitutions, there are no generics – even for products which have been off patent for years.

5. Prescribers sell what they prescribe. There is no federal requirement that prescribers settle the conflict of interest (where the prescriber is both a health care provider and a retailer) in favor of the consumer or offer consumers choice among suitable brands.
6. Since manufacturers' sales are effectively determined by prescribers, they are free to (and have an incentive to) appeal to the prescriber's financial interests. By creating a financial incentive for the prescriber, the manufacturer can insure more of its product will be sold.

The factors which make this marketplace different, also makes it uniquely susceptible to anti-competitive activities.

Antitrust Lawsuit by Attorneys General

In 1996, Attorneys General from 34 states¹ and a national class of consumers brought an action against the American Optometric Association and the major contact lens manufacturers for conspiring to impede competition from alternative sellers.²

The second slide in the appendix shows the states that participated. We note, and appreciate, the leading role in this litigation taken by Senator Blumenthal, who was then Attorney General of the State of Connecticut.

The Attorneys General charged that eye care professionals and their trade associations coerced manufacturers into colluding with them by threatening to boycott manufacturers who would not agree to bar direct distribution of their lenses to alternative sellers such as online companies, pharmacies and big-box retailers. The state Attorneys General also had evidence that the defendants' anticompetitive practices caused substantial economic injury to consumers.³

The parties eventually settled, with the manufacturers – J&J, Bausch & Lomb, and Ciba (now Alcon) – agreeing to abandon their restrictive distribution policies and the American Optometric Association agreeing that it would not make claims that ocular health is impacted by the channel from which consumers purchase their replacement lenses.⁴

¹ Plaintiff States included: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.

² *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.).

³ See Declaration of Douglas F. Greer on Behalf of the Thirty-One Plaintiff States, *In re: Disposable Contact Lens Antitrust Litigation*, Case No. MDL 1030 (M.D. Fla.), May 1999 ([Att. 58](#)); see also Douglas F. Greer, Ph.D., Supplemental Declaration on Damages in the Contact Lens Case, March 2001 ([Att. 59](#)); *Nationwide Survey of Contact Lens Wearers*, SRI Consulting, Apr. 27, 1999 ([Att. 60](#)).

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. 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. AOA agreed to pay \$750,000, and the individual defendants agreed to pay \$8,000 each. Additionally, AOA agreed to open access to replacement lenses for consumers and to not restrict where consumers can obtain contact lenses, including an agreement to refrain from opposing the release of contact lens prescriptions.

Testimony by the FTC Staff

In 2002, the FTC staff testified in a regulatory proceeding in Connecticut, and proposed the use of a passive verification system as a means to prevent eye doctors from impeding their patients from purchasing lenses from other retailers. Of note is that appearing on behalf of the FTC was then-Director of the Office of Policy Planning, Ted Cruz. The FTC also documented how the cost to a consumer in time and travel in picking up lenses from a brick and mortar store could exceed the dollar cost of the lenses themselves.

The Fairness to Contact Lens Consumers Act

(a) Background -- In 2003, Congress enacted the Fairness to Contact Lens Consumers Act (P.L. 108-164) (“FCLCA”), guaranteeing consumers the right to automatically receive copies of their prescriptions and the right to have those prescriptions verified when purchasing from retailers other than their prescribers.

The legislation also included a provision (Sec. 4(f)) which bars sellers from altering a contact lens prescription, which in effect, bars the consumer from switching out brands. At the time, I don’t think anyone envisioned that this provision would be exploited through Resale Price Maintenance programs that force a contact lens wearer to either pay higher prices for her prescribed brand of lenses, or take the time and expense to return to her eye care provider to be fit in an alternative brand.

(b) Savings for Consumers – By giving contact lens wearers the ability to shop around for their lenses based on the price and convenience which made the most sense for them, contact lenses became less expensive and easier to obtain. Prices dropped as options for purchasing proliferated. Eye care providers also reduced prices as they sought to compete with alternative suppliers.

As I mentioned previously, in 2002, the FTC determined that the cost to a consumer in time and travel in picking up lenses from a brick and mortar store could exceed the dollar cost of the lenses themselves.

The FTC calculated that an hour long trip to a mass merchandiser had “an implicit time cost of between \$10.96 and \$26.00,” which represented “a markup of between 50 and 130 percent over the cost of a multipack.” Of note is that the calculation was based on 2001 average wage rates. Presumably, when current wage rates are considered, the implicit time cost would be significantly greater.⁵

Even assuming constant wage rates and no increase in travel time compared to more than a decade ago, the amount of time savings for consumers is considerable. In its Supporting Statement for Information Collection Provisions of the Contact Lens Rule, 16 CFR Part 315, the FTC conservatively estimated that on an annual basis, 13,642,000 purchases of contact lenses are made from a third party.

⁵ Comments of the Staff of the Federal Trade Commission, Intervenor, In Re: Declaratory proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses, State of Connecticut Department of Public Health, Connecticut Board of Examiners for Opticians, (March 27, 2002).

This estimate is based on the assumption that “each of the 38 million contact lens wearers in the US makes one purchase per year.”⁶ We believe the figure could be significantly higher since many consumers purchase lenses more than once a year, obtaining less than a yearly supply each time.

But, even assuming consumers who purchase online do so only once a year means consumers are saving millions of hours a year they would have spent otherwise traveling to their eye doctors’ offices.

At the cost figures set forth by the FTC in 2002, this would translate into an implicit time cost savings for consumers of from \$149,516,320 to \$354,692,000 annually. The actual cost benefit to consumers is likely far greater when one takes into account the savings in fuel and other related costs which would otherwise be expended for transportation to get to and from the dispensing doctor’s office.

This points to one of the reasons why Resale Price Maintenance in this industry is so devastating to consumers. If alternative retailers – such as drugstores, big box stores and online retailers – are unable to discount the prices of contact lenses, many will over time, get out of the business of selling contact lenses. Also, consumers will have less of an incentive to pursue alternative sources for contact lenses, thus missing out on their right to shop around provided them by Congress under the FCLCA. That is the idea behind these policies – discourage the patient from purchasing lenses from anyone other than the prescriber.

So, if RPM programs succeed in limiting the ability of contact lens consumers to purchase their lenses online or when they are at other retail outlets, consumers will not only pay more money for the contact lenses themselves, they will spend hundreds of millions of dollars more in time and transportation costs.

(c) Compliance with the Rule -- I will note that despite the clear provisions of the Act and its implementing Final Rule, there is some evidence many eye care professionals may be ignoring the legal requirement that they automatically release prescriptions to their patients.

Automatic prescription release remains the most cost effective and efficient means of providing consumers with notice that they have a choice as to where to fill their prescription – whether it be for eyeglasses or contact lenses. This was a key factor cited by the FTC when it decided, in its systematic review of the Eyeglass Rule concluded in 2004, to retain its release requirement. As the FTC noted, “[i]n the absence of automatic release...consumers may not know to ask for their prescription.”⁷

Despite the importance to consumers of automatic prescription release and despite the clear provisions of the Act and the Rule regarding the right of contact lens consumers to automatically receive copies of their prescriptions, a survey of optometrists reported upon on January 1, 2008, by

⁶ See Supporting Statement for Information Collection Provisions of the Contact Lens Rule, 16 CFR Part 315, page 5.

⁷ Also, “release of prescriptions enhances consumer choice at minimal compliance cost to eye care practitioners.” Ophthalmic Practice Rules, Final Rule, 69 FR 5451, 5453 (February 4, 2004).

the magazine Contact Lens Spectrum found that: “despite [the FCLCA], only half of the respondents replied ‘yes, to every patient’ when asked if they release contact lens prescriptions.”⁸

The idea that prescribers may be flaunting the prescription release requirement is not without precedent. In its 2004 review of the Eyeglass Rule, the FTC found that “[t]he evidence in the record, however, suggests that some eye care practitioners continue to refuse to release eyeglass prescriptions, even though this conduct has been unlawful under the Rules for nearly twenty-five years.”⁹

Return of Restrictive Distribution Practices

Anti-competitive practices returned to the industry after Congress enacted the Fairness to Contact Lens Consumers Act in 2003. While the then-three largest manufacturers of contact lenses were barred, by the consent decree reached with the State Attorneys General, from restricting distribution of their lenses through only eye doctors, those not bound by the agreement were free to continue such anti-competitive practices.

In 2005, Congress acted to address these practices as legislation was introduced to require contact lens manufacturers to make their lenses available on a non-discriminatory basis to prescribers, entities associated with prescribers, and alternative channels of distribution. (S. 2480 introduced by Sen. Robert Bennett (UT) and Sen. Patrick Leahy, H.R. 5762, introduced by Rep. Lee Terry.)

Also in 2005, the Senate-passed version of the Agriculture Appropriations Bill included a provision authored by Senator Bennett which would have barred the use of federal funds by the Food and Drug Administration to approve any new lenses unless the manufacturer of those lenses certified that it was distributing its lenses in a non-discriminatory manner without regard to whether the retailer was a prescriber. (Sec. 767 of H.R. 2744.) The provision was subsequently dropped in Conference.

To review the impact of the restrictive distribution practices, and other elements of the contact lens marketplace, on September 15, 2006, the Commerce, Trade and Consumer Protection Subcommittee of the House Energy and Commerce Committee held a hearing entitled: “Contact Lens Sales: Is Market Regulation the Prescription?” Soon after, the manufacturer most visibly engaged in restrictive distribution policies abandoned the practice, effectively making the need for the legislation moot.

With an end to restrictive distribution practices, and with consumers having the right to copies of their prescriptions, sources for contact lenses expanded. With increased competition came lower prices. With less expensive contact lenses that were easier to obtain, sales of contact lenses climbed.

In 2003, the largest manufacturer of contact lenses, Johnson & Johnson, had worldwide vision care revenues of \$1.271 billion. Since then, its worldwide revenues have more than doubled to \$2.9 billion in 2013.

⁸ Contact Lens Spectrum Magazine, Annual Report, Contact Lenses, 2007.
<http://www.clspectrum.com/articleviewer.aspx?articleid=101240>

⁹ Ophthalmic Practice Rules, Final Rule, 69 FR 5451, 5453 (February 4, 2004).

With a more competitive market for contact lenses, manufacturers have competed on contact lens quality and consumer benefits. Instead of investing primarily in their relationships with prescribers, they invested in the kinds of things manufacturers do in a competitive market – in advertising, marketing, and product innovation.

Since enactment of the FCLCA, we have seen the development of and popularization of lenses made of silicon hydrogel, and the spread in the use of daily disposable lenses (which promote ocular health since they are replaced daily), and of monthly modalities (which tend to have greater compliance with wearing schedules).

Back in 2003, as indicated in our product brochure, we sold 37 different brands and types of disposable lenses. Today, 1-800 CONTACTS sells more than 90 different brands and types of disposable lenses.

Introduction of RPM

(a) Background. Unfortunately, a new tactic to impede competition in the contact lens market has surfaced – Resale Price Maintenance, or as the manufacturers refer to it “Unilateral Pricing Policy” or “UPP”. The third slide shows how this new anti-competitive practice has spread in our industry.

Last year, Alcon (CIBA) announced a “UPP” for one new product (Dailies Total 1). Six months ago (January 2014), Alcon expanded its RPM program to include two more products (AquaComfort Plus multifocal and toric).

In February 2014, Bausch & Lomb announced its own RPM program for its new monthly lens (Ultra), and then in May, Alcon expanded its RPM yet again to another new product (Air Optix Colors).

Within the past month, the nation’s largest manufacturer, Johnson and Johnson Vision Care (J&J), announced its intent to institute its own RPM for all of its products – both new and all but one long established product (except Acuvue 2). The products at issue are not new technology or premium products (many have been on the market for 8-10 years).

Based on discussions with the manufacturers, we anticipate that all future J&J, Alcon and B&L products will fall under their RPM programs, and both Alcon and B&L are considering whether to further expand their RPMs to cover long established products like J&J has done. CooperVision, the sole remaining manufacturer without an RPM program, may be forced to consider following suit. We hope they do not.

(b) Does Not Fit Traditional Justifications for RPM. The U.S. Supreme Court’s *Leegin* decision in 2007 held that RPM is now subject to a “rule of reason” standard under federal antitrust law. That decision was based, in large part, on the conclusion that RPM may not always be anticompetitive because in an industry in which consumers have a vast array of competing products from which to choose, consumers can substitute a product subject to RPM for numerous other competing products:

- (1) restricting intrabrand competition (competition within a single brand) through RPM could enhance interbrand competition (competition between different brands);

(2) RPM may encourage retailers to invest in extra services that might persuade consumer to choose the RPM brand over another; and,

(3) RPM may give consumers more choices (i.e., high price and high service brands as well as low price and low service brands)

None of these potential justifications for RPM apply in the contact lens industry since:

(1) the consumer doesn't choose the brand (the optometrist prescribes the brand);

(2) there is no interbrand competition once the prescription is issued;

(3) the prescription is brand specific, and the consumer cannot substitute one brand for another;

(4) the retailer here – the prescriber – already receives a fee to compensate him for the extra services – the fitting fee he receives from the consumer; and,

(5) RPM in this industry will, and is designed and intended to, reduce the number of choices consumers have for where they can purchase their lenses.

In the contact lens industry, RPM does not work for the possible procompetitive purposes upon which the Supreme Court based its decision in *Leegin*. Trying to justify RPM on the basis that it will encourage retailers to perform extra services to influence the consumer's choice of brand, or that the consumer's ability to substitute the RPM brand for another will constrain any abuses, has no application where the optometrist (a retailer) prescribes the brand and the prescription locks the consumer into that brand.

(c) Impact on Competition. These new RPM programs are being introduced into a market which is already concentrated and dominated by only four players.

Specifically, in terms of revenue, J&J has a 35.3% of the market, Alcon 30.6%, CooperVision, 23.9% and Bausch & Lomb, 7.2%. This means these four manufacturers own 97% of the market.

What makes the adoption of RPM programs in this industry so troubling is their rapid proliferation and the fact that they threaten to dominate the entire industry. They have been adopted by three of the four manufacturers in rapid succession, and apply to both new and old products.

RPM already covers 40% of the entire market and are rapidly expanding. We project that by the end of next year, 80% of the market could be subject to RPM. And keep in mind that contact lens wearers are not choosing their brands – their eye care providers choose – and they generally are not aware of alternatives.

So as we sit here today, millions of Americans are unwittingly being thrown into a controlled marketplace, where they will see higher fixed prices, lose their ability to shop around based on price, are unaware of alternative contact lens brands, and if they are aware of alternatives, will have to expend time and money to return to their eye care provider to receive a prescription for an alternative brand.

(d) Impact on Consumers. Before imposition of RPM policies, contact lens wearers had a multitude of price points available at which they could purchase their lenses.

For example, as the fourth slide shows some of the choices available to a consumer wearing Acuvue Moist daily disposable lenses. Prices for a box of 30 lenses ranged from \$18.50 at an online seller to an average price charged by eye care providers of just over \$31 per box.

The next slide shows what these same choices will be for that consumer after RPM. The minimum price will be -- \$33 per box -- whether she buys online, from a big box retailer, or from her eye care provider.

Currently, almost 50% of adult contact lens wearers buy all or some lenses from a source other than where they had their eye exam. The leading reason has been lower prices. Often consumers purchase initially from their eye care provider under vision insurance plans, but repurchase at alternative locations with lower prices.

What does this all mean to the contact lens wearer who wants to shop around for the best price, whose budget is already tight in this difficult economic recovery, and is looking for ways to stretch her dollars?

As is summarized on the sixth slide in the appendix, depending upon which type of J&J lens the consumer wears, she could see prices increases from 40-112% compared to recent prices on the Internet – where nearly one out of every three contact lens wearers purchase some or all of their lenses. Keep in mind that the need for vision correction is genetic – so the cost impact for a family could be much greater, as multiple members of the household could be impacted.

Plus, since RPM pricing is not limited to new technologies and products, a consumer who has worn the same brand of lens for years will all of a sudden, and for no apparent reason, see her options for refills at lower prices largely disappear, and her prices (especially if she has been purchasing from an alternative retailer) inexplicably increase.

(e) Purpose of Resale Price Maintenance Programs

At the end of the day, RPM is just the latest attempt to insulate optometrists from competition from alternative retailers (who offer consumers lower prices, more choices and greater convenience) so that optometrists will prescribe the manufacturer's brand. Industry participants make no secret of this.

Writing in the publication "Review of Cornea and Contact Lenses", optometrist Gary Garber writes:

“Manufacturers also benefit from UPP because retail price erosion can be stopped. This has afforded higher profit margins....

[T]he actual price mandated by UPP has so far been higher than lenses that do not have a UPP...

Savvy practitioners will give serious thought to prescribing UPP lenses. [i]f you have a patient (who) can wear a UPP lens, and a non-UPP lens is clinically equivalent, a smart doctor will choose the UPP option.

Yes (patients) may pay more as a result, but UPP has the potential to put the brakes on significantly declining profit margins....”

Optometrist Paul Karpecki, writing in “Review of Optometric Business” states:

“Independent ODs will not be undermined by discount retailers on the basis of price

Importantly, unilateral pricing facilitates a fundamental “perception change”... Independent practices no longer will appear in the minds of some consumers to be “price gouging” for products that can be bought for less, within seconds, on a smartphone.”

Doctor Steve Rubinstein on his “Eyeguysteve’s Blog” writes:

“The big box stores and the internet contact lens providers will no longer be able to sell product less than I sell it for!

This may raise the price of contacts, and it will probably allow me as an Eye Care Professional control what my patients use and order.”

With messages like these promoting lenses subject to RPM being broadcast to eye care professionals through trade publications, blogs and social media chatrooms, is it any wonder that 40% of lenses are already covered by such policies?

Conclusion

Unless someone steps in to stop these numerous RPM programs from dominating an already highly concentrated industry, discount shopping will become a thing of the past for contact lens wearers.

Consumers will have far fewer choices where they can purchase their lenses. They will pay higher prices – especially as discounters drop out of the market and eye care providers gain more pricing power. And, they will spend even more in time and transportation costs having to purchase refills from their eye care provider.

We appreciate this Subcommittee for holding today’s hearing to shed some needed light on this expanding marketing practice, and the inclusion of a variety of stakeholders so that all perspectives can be aired. And, I thank you for the opportunity to testify. We hope this is not the end of the Subcommittee’s review of this issue, but rather a start, and that some action can be taken to restore price competition to an industry which impacts more than one out of every ten Americans.

CONFLICT OF INTEREST



34 STATES SUCCESSFULLY LITIGATED ANTITRUST CLAIMS

that **Johnson & Johnson**, **Alcon** (CibaVision), and **Bausch & Lomb** Unlawfully Conspired with Optometrists to Insulate them from Competition by Alternative Retail Channels



INTRODUCTION OF RPM IN THE CONTACT LENS INDUSTRY



BENEFITS OF RETAIL COMPETITION IN THE CONTACT LENS INDUSTRY

The image shows a hand holding a white prescription slip in front of a display board. The display board features several advertisements for Acuvue Moist 30-day packs from different retailers:

- OptiContacts:** 1-DAY ACUVUE MOIST, \$18.99
- Costco Wholesale:** Acuvue MOIST 30-pack, \$23.99
- Coastal.com:** 1-DAY ACUVUE MOIST, \$19.95
- Walmart:** \$25 ACUVUE MOIST 30-DAY PACK
- Another retailer (partially visible):** \$29.95

The prescription slip is for **John Smith** and contains the following handwritten text:

Rx
PATIENT NAME: John Smith
ADDRESS: _____
Prescription:
Acuvue MOIST
box of 30
\$31.07
NO SUBSTITUTIONS

RETAIL COMPETITION AFTER RPM

The image shows a hand holding a white prescription card in front of a display board. The display board features several advertisements for Acuvue Moist 30-day packs, all priced at \$33.00. The retailers listed are OptiContacts, Costco Wholesale, Coastal.com, Walmart, and Lens.com. The prescription card has the following text:

Rx
PATIENT NAME: John Smith
ADDRESS: _____
Prescription:
Acuvue MOIST
box of 30
\$33.00
NO SUBSTITUTIONS

Percentage Increase from Lowest Internet Price to J&J's RPM Price

