

Testimony of Wayne Klein¹
U.S. House Subcommittee on Commerce, Trade, and Consumer Protection
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“Contact Lens Sales: Is Market Regulation the Prescription?”

My name is Wayne Klein. I am a special Assistant Attorney General prosecuting antitrust violations for the State of Utah. I appreciate the opportunity to testify here today on H.R. 5762. Helping consumers maximize the value of their contact lens purchases is important both to buyers of lenses and to the creation of a competitive market for the sale of replacement lenses. This Subcommittee is familiar with the anticompetitive and abusive practices that have been prevalent in this industry. Thank you for adopting the Fairness to Contact Lens Consumers Act in 2002.

This topic has consumed many years of my professional life as an antitrust enforcer. First was the six-year litigation against the then-dominant contact lens manufacturers. Utah was one of 32 states that sued contact lens manufacturers and others alleging conspiracies to prevent consumers from obtaining prescriptions and conspiracies to prevent discount suppliers of replacement contact lenses from obtaining lenses to sell.² Second was our support for passage of the Fairness to Contact Lens Consumers Act in 2003. Third, in 2004, the Utah Attorney General submitted comments to the Federal Trade Commission on behalf of 31 states urging improvements to the proposed Contact Lens Rule. The FTC adopted our recommendations. Fourth was helping draft the Utah Contact Lens Consumer Protection Act, which is a forerunner to H.R. 5762.

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² *In re Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M.D. Fla). Additional information about that enforcement case can be found in the testimony of Robert L. Hubbard before this Subcommittee on September 9, 2001 (testifying in support of the Fairness to Contact Lens Consumers Act).

I am here to say that more needs to be done to promote consumer choice and to protect buyers of replacement contact lenses.

Antitrust Laws and Anticompetitive Conduct by Sellers of Contact Lenses

The antitrust laws, often referred to as the Magna Carta of the free enterprise system, are designed to maximize consumer welfare and promote consumer choice. Strong competition is the best means of delivering the highest number of goods to consumers at the lowest prices while rewarding innovation and high quality. Removing artificial restraints on competition and consumer choice maximizes the number of sellers.

Ten years ago, competition was restrained by collusion among the contact lens manufacturers and optometric trade associations who forced consumers to purchase all replacement contact lenses from the prescribing optometrist rather than from cheaper mail-order suppliers. The result was that consumers paid 20-40% more than the competitive price for replacement lenses. That problem was solved by the Fairness to Contact Lens Consumers Act and the injunction entered against the defendants in the states' enforcement action.

Now we face a new threat. It is a shame that health care practitioners, manufacturers, and their associations are so afraid of competition that they engage in artifices to deny choices to consumers and put their own financial interests ahead of patient interests. Some contact lens manufacturers have grown rapidly by promising optometrists that they can increase their profits by forcing consumers to purchase high-priced lenses available only from the optometrist that writes the prescription.

This hijacking of consumer interest is possible only because of two factors that are unique to the contact lens industry. First: contact lenses can be sold only by prescription. That prescription must identify the contact lens by brand name; no substitutions are allowed or generic

equivalents. Second: optometrists not only treat patients, they also sell lenses to those patients. Unlike physicians prescribing medications, optometrists sell what they prescribe.³ The combination of these two factors permits optometrists' business interests to distort the optometrists' duty to serve the interests of their patients. In that situation, the optometrist can charge whatever price the optometrist chooses. This is the antithesis of consumer choice.

Consumer Welfare, Patient Health, and Improper Financial Motivations

Applying the antitrust laws in the health care industry is exceedingly tricky. The difficulty lies in separating the medical decisions from the financial ones. If a way can be found to divorce those two categories from each other, it is possible to use the antitrust laws to maximize the consumer decisions while leaving the medical decisions to the health care providers. We seek to maximize the economic benefits of competition without negatively affecting the *legitimate* health-related decisions. This principle also can be stated in the converse: we seek to prevent health care providers from disguising their economic interests as health care concerns. This concept was stated well in a June 2006 letter from the American Optometric Association to the contact lens manufacturer CooperVision. The letter is attached.

We are very fortunate that this separation of economic and medical influences can be accomplished in the contact lens market. This involves three steps:

1. Separating the *demand* for prescriptions from the demand for replacement contact lenses.
2. Eliminating an optometrist's ability to tie eye examinations to the purchase of replacement contact lenses. An optometrist remains free to do both: provide eye examinations and sell lenses. But the optometrist should not be able to force a customer to buy both products from the optometrist.

³ Some research has indicated that the average eye care provider earns more income from the sale of contact lenses than from providing eye examination services.

3. Increasing competition for the sale of replacement lenses. Once a patient is freed from the compulsion of buying lenses only from the examining optometrist, all sellers of those lenses can compete for the customer's business. The larger the number of sellers, the lower the prices that will be offered to consumers.

Health Care Concerns Are Protected

This solution does not limit an optometrist's ability to prescribe the product that is best for the patient. What it does do is limit an optometrist's ability to charge his patient supracompetitive prices for a product available only from that optometrist. Under the Act, an optometrist can prescribe any contact lens brand, so long as the manufacturer of that lens makes that brand available to a reasonable number of other sellers of replacement contact lenses. The best way to ensure that an optometrist truly believes that one particular brand is the best product for a patient is to empower that patient with the ability to buy additional lenses from other sellers – who may compete with the examining optometrist.

Competitive Markets May Increase Health Benefits

In the antitrust conspiracies of the last decade, sellers made the false claim that buying replacement lenses from alternative channels raised the health risks to patients. No evidence was ever presented in support of that claim and the defendants agreed not to make that assertion absent scientific evidence of health risks. State antitrust enforcers believe that lower prices and greater convenience for patients will actually increase the likelihood that patients will replace their lenses at the frequency recommended by their optometrists.

Summary

This legislation is a skillful device to separate the medical and financial influences that affect a patient's purchase of replacement contact lenses. Optometrists would remain free to sell

what they prescribe, but they would not be able to prescribe what they alone sell. The bill would increase competition and consumer choice in three important ways:

1. Increased competition between manufacturers of contact lenses;
2. Increased competition between prescribers of contact lenses (optometrists); and
3. Increased competition between contact lens sellers who do not prescribe lenses and contact lens prescribers who prescribe and sell lenses.

Antitrust enforcers seek to eliminate artificial influences that restrain competitive market forces. This bill accomplishes that goal in a manner that will directly and substantially benefit millions of consumers. I urge this Subcommittee to push adoption of this legislation.