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PRICING POLICIES AND COMPETITION IN THE CONTACT LENS INDUSTRY: IS WHAT YOU SEE WHAT YOU GET?

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
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WEDNESDAY, JULY 30, 2014

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:16 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Amy Klobuchar, Chairman of the Subcommittee, presiding.

Present: Senators Klobuchar and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Chairman KLOBUCHAR. I call the hearing to order and thank our witnesses for being here on an afternoon in Washington, DC.

More than 35 million Americans use contact lenses to correct their vision. Contact lenses are an essential part of our daily lives—even though I have not worn mine since the day I got married, Senator Lee. But they are a very big part of many—luckily I am still married. They are an essential part of many people's daily lives and can cost hundreds of dollars per year.

Senator Lee and I are having this hearing to examine recent pricing policies initiated by contact lens manufacturers that would affect retail price competition for contact lenses. The policies boil down to this: A manufacturer tells retailers that if they want to sell a particular contact lens, then they cannot sell them below a set price set by the manufacturer. If a retailer sets the lenses for below that price, then the supply of that particular contact lens would be cutoff.

This means that retailers, whether they are independent optometrists, national chain retailers like Lenscrafters or Pearle Vision, a big box store like Costco or Walmart or Target, or an online retailer like 1–800 CONTACTS or Vision Direct, cannot discount those contact lenses that are subject to this agreement below a certain price.

For consumers, this can mean no coupons, no rebates, no bundled discounts, or any other specials that could lower the price to below what the manufacturer has set.

This does raise legitimate questions about what the policies will do to competition and what kind of prices consumers will be paying

because of these policies. Are they lower or are they higher? What is the effect?

We can all agree that manufacturers generally have the right to decide which retailers they want to sell their products to. A nearly 100-year-old Supreme Court case, *U.S. v. Colgate*, confirms that they are free to make those decisions based on retailers' adherence to a suggested retail price. Today we will hear a variety of views on the justification for those policies and if those policies are good.

We also know that contact lenses are not typical retail products like computers or televisions or laundry detergents where consumers drive all of the choices. They can decide which product or which brand to purchase. Sometimes consumers have a prescription for a specific brand or model of a contact lens that is made by their eye professional. Eye care professionals also typically sell the contact lenses that they prescribe, creating the potential for a conflict of interest.

In addition, there may be limits on which specific contact lenses a consumer can wear and significant costs required to switch contact lenses in response to pricing changes.

After spending time and money on fitting, it may turn out that there is no other lens that would address a particular consumer's health needs, so this is a market where retail competition may be the only competition in the market.

In this discussion, we need to also consider competition at other points of the distribution chain, but the fact is that the contact lenses market is relatively concentrated. Three companies—Johnson & Johnson Vision Care, and thank you for being here, Cooper Vision, and Alcon—make up about 90 percent of the market, and adding in Bausch & Lomb brings the total close to 100 percent.

So we need to ask whether inter-brand competition between these four companies is sufficient to make up for the elimination of intra-brand competition on the retail level.

Although the manufacturers have been very clear about the fact that their pricing policies are unilateral and do not involve agreement with retailers, we have to look at the relevance of the Supreme Court's 2007 *Leegin* decision. This is the case where the Court significantly relaxed the almost 100-year-old ban on agreements between manufacturers and retailers to set minimum retail prices. Many experts believe that this decision paved the way for more unilateral pricing policies which, prior to the decision, were more risky because they could inadvertently between construed as agreements.

But whether we are here today with whatever views we have, we do not know that we are not here as judges or juries in an antitrust case, as much as Senator Lee would make a great judge, regardless of whether a minimum resale price was entered into through some sort of agreement or unilaterally. We are here, in fact, to discuss the policies and try to shed some light on what they will mean for competition for the millions of Americans who wear contact lenses.

With that, I will turn it over to my Ranking Member, Senator Lee.

OPENING STATEMENT OF HON. MICHAEL S. LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you very much, Madam Chair, and thanks to all of you for joining us today. Our hearing today focuses on the effect on consumers of recent pricing policies that have been implemented by certain manufacturers of contact lenses. It makes sense that our focus should always be on the consumer.

As Robert Bork made clear in his seminal work on antitrust, "The Antitrust Paradox," the only legitimate goal of antitrust is the maximization of consumer welfare. And, in fact, the very name of our Subcommittee reflects this observation, reflects this same focus on the consumer: the Subcommittee on Antitrust, Competition Policy and Consumer Rights.

Business decisions are no doubt complex, and neither Congress nor regulators can always be in a position to understand all the different motives and imperatives that result in a particular business adopting a particular policy. So we have to be careful not to second-guess business judgment. Our interest goes no further than to protect competition so as to maximize consumer welfare, and we seek an understanding of certain business practices for that purpose, and only for that purpose.

Any analysis we conduct, as well as any analysis conducted by the antitrust enforcement agencies within the Federal Government, must be grounded in evidence and must be consistent with well-established economic policy.

During its short history, antitrust law has at times been subject to attempts by competitors to use the process not to benefit competition within the marketplace, but instead to modify it in a way that might inure to their own benefit, that might advantage their own particular business interests. That temptation will always be present in antitrust law, and so we must always be on guard to ensure that we aim only to protect competition rather than any particular competitor or individual. By so doing we can help create market conditions that result in the most choices, in the highest quality, and the most favorable prices for consumers, who, as I mentioned at the outset, are the proper focus of our antitrust analysis.

With this in mind, I look forward to hearing from the witnesses today regarding the state of competition in the market for contact lenses and any effect that new pricing policies implemented by a few of the manufacturers might have on that market.

As I understand it, the market for contact lenses is a little different than most other product markets. It is joined by only a few other industries, such as industries involving pet medications and in some instances dermatological preparations, in that the retailer of the product is also an essential gatekeeper without whose permission in the form of a required medical prescription the product simply cannot be purchased, it cannot be obtained.

I am interested in how Federal laws might be affecting competition in the market for medications for pet animals and during recent weeks have been looking into potential legislation to address issues in that market.

With respect to the market for contact lenses, within the last 2 years three significant manufacturers have announced a new pric-

ing scheme whereby the manufacturers will not provide lenses to distributors, whether that distributor is an optometrist or a big box store like Walmart or somebody else, if that distributor sells the product to consumers below certain minimum prices.

When such policies involve an agreement between the manufacturer the retailer, they are often referred to as "resale price maintenance agreements." Minimum price arrangements can in some circumstances be justified, whether by increases in service, concerns about free riding, or for other reasons. But in most cases, the most immediate result is an increase in price as consumers no longer have the option of seeking the product at a lower price from a business that offers it at discounted prices.

This is intended as an exploratory hearing to give the Subcommittee and regulators a better understanding of the reasons for minimum price arrangements in this particular market. Tens of millions of Americans pay for contact lenses each year, spending hundreds of millions of dollars. Price matters. For example, I have heard concerns that as prices for contact lenses go up, some consumers wear their lenses longer than they should, and in so doing, risk doing some damage to their eyes, specifically in an attempt to save money. It is, therefore, fairly important that we consider very carefully the effect that minimum price arrangements might have on prices for contract lenses, and thus in turn on the consumers who wear them.

I thank the witnesses for being here today and look forward to their testimony. Thank you, Madam Chair.

Chairman KLOBUCHAR. Thank you very much.

I would like to now introduce our distinguished witnesses. Our first witness is Joe Zeidner. He has been the legal counsel at 1–800 CONTACTS since 2003, the chief legal officer, and prior to that was general counsel and corporate secretary of the company.

Our second witness is Dr. Millicent Knight. Dr. Knight was named head of professional affairs at VISTAKON, Johnson & Johnson Vision Care, in April 2014. Before that, she was a practicing optometrist for 25 years and has owned her own practice twice.

Next we will hear from Dr. David Cockrell. He is president of the American Optometric Association. He and his wife, Dr. Cheryl Cockrell, own a practice in Stillwater, Oklahoma, which is called the Cockrell Eye Care Center.

Our final witness will be Mr. George Slover. He is the senior policy counsel in Consumers Union's Washington office. Prior to that he worked for the House Judiciary and Energy and Commerce Committees, as well as the Justice Department's Antitrust Division.

Thank you all for appearing at our Subcommittee to testify. I ask our witnesses to raise their right hand and stand as I administer the oath. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ZEIDNER. I do.

Dr. KNIGHT. I do.

Dr. COCKRELL. I do.

Mr. SLOVER. I do.

Chairman KLOBUCHAR. Thank you.

We will start with you, Mr. Zeidner. Thank you.

STATEMENT OF R. JOE ZEIDNER, GENERAL COUNSEL, 1–800 CONTACTS, INC., DRAPER, UTAH

Mr. ZEIDNER. Madam Chairwoman, Senator Lee, my name is Joe Zeidner. I am General Counsel of 1–800 CONTACTS. This is my first time testifying before the U.S. Senate, and I appreciate you giving me this honor. I am proud to have my son, Pierce, here with me today.

I am here to talk about resale price maintenance programs that have been adopted by three of the four largest contact lenses manufacturers. These programs prevent us and every other retailer from selling those lenses below the price set by the manufacturer.

This development will fundamentally change our industry and in the process dramatically reduce options available to consumers. Consumers prescribed lenses covered by RPM will no longer be able to shop around for a discount. They will pay higher prices, generally now and especially in the future, as discounted sellers are forced out of the contact lens business. Decades of work by Congress, the FTC, and the State Attorneys General to separate the prescription from the purchase of contact lenses will be reversed.

Thirty-eight million Americans, two-thirds of whom are women, wear contact lenses. They will spend $4.2 billion annually on contact lenses and billions more on solutions and services such as eye exams. RPM agreements are a problem for these consumers because the marketplace for contact lenses is different. It is different in four ways.

First, under Federal law, consumers cannot purchase contact lenses without a prescription.

Second, contact lens prescriptions are brand-specific and optometrists, not the consumer, determine the brand.

Third, under Federal law, the consumer cannot substitute one brand for another, so there is no inter-brand competition and the consumer is locked in.

And, fourth, optometrists wear two hats, both as a professional and as a retailer. They sell what they prescribe. As this graphic clearly illustrated, there is an inherent conflict of interest.

Because of these constraints, RPM agreements function differently here than in other retail markets. Because consumers cannot buy contact lenses without a prescription, they cannot switch brands once prescribed. For decades, our Government has worked to prevent these constraints from being exploited for anticompetitive purposes.

In 1996, 34 State Attorneys General sued the AOA and the major manufacturers for conspiring to impede competition from alternative sellers. This map shows the States that participated. We appreciate the role played by then-Connecticut Attorney General Blumenthal.

In 2002, Senator Ted Cruz, who was then the director of the Office of Policy Planning at the FTC, proposed a verification system to make it easier for consumers to purchase their lenses from retailers other than their eye doctor.

In 2003, Congress enacted the Fairness to Contact Lens Consumers Act, guaranteeing consumers the right to automatically re-

ceive copies of their prescriptions and enacting the verification system proposed by the FTC.

In 2005, legislation was introduced, cosponsored by now-Chairman Senator Leahy, to bar manufacturers from discriminating against alternative retailers and the distribution of their products.

The latest attempt to frustrate these efforts are RPM programs. They are being introduced in the market, which is already concentrated and dominated by only four players who, between them, control the market.

The RPM program now covers 40 percent of the market and it is growing. As we sit here today, millions of Americans who have been prescribed one of these brands have unwittingly been thrown into a controlled marketplace. Those who have been choosing to buy from retailers other than their eye doctor will see fixed prices, they will see higher prices, and they will lose their ability to shop around based on price. They will have no alternative but to pay a fixed price or expend the time and money to return to their eye doctor and have him prescribe an alternative brand.

What does this mean to the contact lens wearer? As is summarized on this graph, depending upon which type of J&J lens the consumer wears, she could see costs increase as high as 112 percent above recent discount prices. Since vision correction is genetic, the cost impact on a family could be much greater. Even a consumer who has worn the same lens for years will suddenly have fewer choices and inexplicably higher prices the next time they reorder.

And to the extent RPM programs limit a consumer's ability to purchase their lenses from anyone other than her eye doctor, she and those like her will spend hundreds of millions of dollars more in time and transportation costs, in addition to having to spend more for the lenses themselves.

The irony is that ocular health is served when contact lens wearers switch out their lenses on a timely basis. By preventing consumers from shopping for a discount, RPM programs will make replacement lenses more expensive and more difficult to obtain, making it less likely that wearers will abide by the replacement schedule.

Unless someone steps in to stop these programs from dominating an already highly concentrated industry, discount shopping will be a thing of the past. Consumers will have far fewer choices of 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.

We appreciate the Subcommittee holding today's hearing, and I thank you for the opportunity to testify.

[The prepared statement of Mr. Zeidner appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much.

Dr. Knight.

STATEMENT OF MILLICENT L. KNIGHT, O.D., HEAD OF PROFESSIONAL AFFAIRS, JOHNSON & JOHNSON VISION CARE, NORTH AMERICA, JACKSONVILLE, FLORIDA

Dr. KNIGHT. Good afternoon, Madam Chairwoman and Ranking Member Lee. Thank you for the opportunity to testify today. Again, as you indicated, my name is Dr. Millicent Knight, and I am the head of professional affairs and a member of the North America Management Team for Johnson & Johnson Vision Care, the makers of ACUVUE brand contact lenses. I serve as a liaison between the company and our professional customers, which include the 50,000 independent eye care professionals who prescribe contact lenses for their patients.

Before my role, as Senator Klobuchar indicated, I was a practicing optometrist for 25 years. Although I do not see patients now, I continue to advocate on their behalf by helping our company best understand what doctors need to better serve their patients. And it is with the patient in mind that I would like to share our perspective on consumer pricing within the contact lens industry.

Let me begin by stating we have not implemented resale pricing maintenance, called an RPM, with retailers on the prices at which they will sell ACUVUE products. Rather, we have established a unilateral pricing policy, called a UPP. It is the minimum price in the market—a price that is actually lower than the current national average selling price to consumers. There are no agreements with any resellers now, nor are any planned for the future.

We believe the implementation of a UPP on several of our most widely prescribed ACUVUE brands will benefit consumers who depend on these products.

First, by implementing UPP, we are lowering the price for the most widely prescribed ACUVUE brand lenses, and based on a review of current average consumer prices across all channels—and that includes independent eye care professionals, national retailers, and online retailers—we estimate that two-thirds of patients who buy ACUVUE brands will pay a lower price for their product as a result of the UPP. An additional 17 percent of consumers will see little to no change.

In looking at Internet sales, 1–800 customers will see on average an 8.5-percent decrease in the price of ACUVUE brands if 1–800 sells at our UPP minimal retail price.

For example, one box of ACUVUE Oasys for astigmatism is now $47.00 on their website. If they charge our UPP price, the cost to the consumer will be $40.

Second, by implementing the UPP, we are passing the benefits of rebates across our entire customer base. We are replacing the burdensome rebate process with instant savings for every box purchased, regardless of the quantity. In fact, our data suggests only a very few ACUVUE consumers complete the process to redeem a rebate. With the UPP, lower prices are available to more consumers, including those who are more likely to purchase one box at a time. Typically, these are less affluent consumers who would benefit most from lower prices.

Third, by implementing the UPP, we are offering consumers more pricing transparency. Today an advertisement may show a low box price that is only obtained if the consumer buys the max-

imum quantity and redeems a mail-in rebate. Often the consumer is not aware of these conditions until the transaction is already underway. With our UPP, consumers will have significantly improved visibility to the price they can expect to pay, regardless of where they choose to purchase their contact lenses.

Finally, we believe that the transparency of UPP minimum retail price is the best way to effect a consumer price reduction. Historical pricing data shows that retail prices in the contact lens market rarely go lower. Of the 12 most popular contact lenses prescribed in the last 5 years, only Johnson & Johnson Vision Care's 1-day ACUVUE Moist showed a material price decline. Consumers like 1–800 have already shared this information with their consumers.

In closing, by instituting a UPP, lowering our prices, and by making the process by which consumers can access these lower prices simpler and more convenient, we believe we can better compete with other manufacturers in the contact lens market, and, more importantly, our UPP will lead to lower prices for a large majority of our consumers.

Thank you.

[The prepared statement of Dr. Knight appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much.

Dr. Cockrell.

STATEMENT OF DAVID A. COCKRELL, O.D., PRESIDENT, AMERICAN OPTOMETRIC ASSOCIATION, STILLWATER, OKLAHOMA

Dr. COCKRELL. Thank you. Good afternoon, Chairperson Klobuchar, Ranking Member Lee. I am Dr. David A. Cockrell, president of the American Optometric Association and an optometrist in independent practice in Stillwater, Oklahoma. I am joined today by my colleague Dr. Kerry Beebe of Brainard, Minnesota, who is here on behalf of the Minnesota Optometric Association. Like me, Dr. Beebe is currently treating patients with serious complications arising from improper contact lens use.

I do want to ask a question. My understanding is that our full submitted statement will be included in the record?

Chairman KLOBUCHAR. That is correct. Thank you.

Dr. COCKRELL. Thank you.

Along with our colleagues Dr. Michael Duenas and Dr. Beth Kneib, who participated in a meeting last week with the Subcommittee staff, we are pleased to be a resource for this panel on patient health and safety concerns and to discuss the high-quality eye care provided by the Nation's doctors of optometry.

The AOA, with more than 36,000 member doctors and affiliated associations representing each State, DC, and our Armed Forces and Federal service optometrists, is the national voice for the optometric profession, the tens of millions of patients who depend on us, and the cause for eye health care.

Optometrists provide a full range of primary eye health and vision care to our patients, including children and working adults. In my own practice, we see patients ranging in age from babies just a few months old to centenarians. Within that group, our contact lens patients range in age from the age of 2 up to over 90 years of age.

My own office's main focus is on the management and treatment of vision-related problems and eye diseases. As a team of four primary eye care physicians, we regularly see patients with conjunctivitis, cataract, glaucoma, diabetic retinopathy, and macular degeneration. Also, we perform surgery for lid procedures as well as laser surgeries for glaucoma and secondary cataract in our office.

Often we are working closely with our ophthalmologist colleagues to ensure that every patient gets the care that she or he needs. Many ophthalmology practices also prescribe and dispense contact lenses for the same reasons that optometrists do, and there is considerable agreement between the respective national organizations on appropriate patient care, eye health, and consumer safety concerns.

Given the topic of today's hearing and the AOA's role in educating the public, it is essential to state that contact lenses have been recognized in law and regulation since the 1970s as a medical device. A doctor's supervision and care for their proper and safe use is required. However, since contact lenses are so widely and successfully used by consumers, I have been asked from time to time why physician supervision is needed and what it consists of.

In my own personal experience, I have seen unsupervised or nonprescribed contact lens use result in corneal neovascularization; giant papillary conjunctivitis; corneal infections, ulcer, infiltrates and other forms of inflammation; corneal scarring; and permanent loss of vision.

As an eye doctor, what I find so profoundly tragic is that the majority of these conditions are completely preventable.

With expectations and care implications so notably high, my colleagues and I want and frequently insist on the very best contact lens products to meet our patients' needs. There have been historic innovations in these medical devices over the last three decades which I believe have benefited patients in three key ways:

First, innovation in the contact lens industry has enabled more patients to use contact lenses for a greater proportion of their vision needs;

Second, innovation has improved the quality of contact lenses so that they are easier for patients to use with less risk of harm to the eye.

Third, innovation has created healthy competition among contact lens manufacturers to bring high-quality products and competitive pricing to consumers.

The priority for the AOA is to support best practices and high standards to benefit the tens of millions of Americans who entrust their vision and eye health to my colleagues and to me. On the subject of competition generally, the AOA believes strongly that competition in the contact lens industry is positive and needed.

As I understand it, I share this table with executives representing the largest manufacturer of contact lenses in the United States and the largest seller of contact lenses in the world. They are in a better position than am I to describe and discuss their own pricing policies and strategies. Suffice it to say that in my experience of over 30 years of prescribing these devices, my contact lens patients have never had more choices, products of a higher quality, or greater affordability in their options.

As the national voice of 36,000 doctors of optometry—notably including Senator John Boozman, a longtime doctor of optometry in private practice and an AOA and an Arkansas Optometric Association member—and the tens of millions of patients we serve, we work to educate the public about the safe use of these contact lenses as a medical device and the dangers posed by unscrupulous sellers.

With consumers still facing risks, the AOA is partnering with the Food and Drug Administration on a new national public health awareness campaign to alert teenagers and young adults to the dangers connected to the improper use of contact lenses. I commend the FDA for listening so closely to concerned optometrists and the AOA.

Again, thank you very much for the opportunity to be here and to participate in today's questions.

[The prepared statement of Dr. Cockrell appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much, Dr. Cockrell.

Mr. Slover.

STATEMENT OF GEORGE SLOVER, SENIOR POLICY COUNSEL, CONSUMERS UNION, WASHINGTON, DC

Mr. SLOVER. Thank you, Chairwoman Klobuchar, Senator Lee. At Consumers Union, the policy and advocacy division of Consumer Reports, we work for a fair, just, and safe marketplace for consumers and to empower consumers to protect themselves. Product safety, square dealing, and competitive choices are all key to that mission. Our efforts in recent years to promote safety for contact lenses have included calling attention to recalls, calling for better warning labels on cleaning solution, and publishing contact lens safety tips.

On consumer choice, our efforts have included working for passage of the Fairness to Contact Lens Consumers Act of 2003. It requires eye doctors to give patients a copy of their prescription, without charge and without having to ask, so they can shop around for the best price. Before that law, many doctors were making it impossible to shop around, tying the professional eye care to purchase of contact lenses from the doctor.

And now, after the 2003 law closed off that pathway to restricting consumer choice, we are witnessing a new avenue being paved to the same destination.

We supported efforts in Congress to stop erosion of the per se antitrust prohibition against vertical price fixing, a.k.a. resale price maintenance or RPM. We saw the per se prohibition as a bulwark protector of retail competition and consumer choice.

We were dismayed when the Supreme Court overruled the century-old *Dr. Miles* precedent and swept away the per se prohibition in its 2007 *Leegin* decision. We believe the kinds of good-faith business goals the Court cited in abandoning *Dr. Miles*, including the kinds of important patient health and safety goals described by other witnesses here today, can be pursued effectively without denying the rights of consumers to shop for a better price and the rights of retailers to offer one.

The *Colgate* precedent allows a manufacturer to unilaterally, independently set retail price. But in fundamental ways, it runs counter to a manufacturer's interest to impose pricing terms that stand to reduce retail sales, and profits, by putting its product out of reach for consumers who cannot afford the higher markup.

In a competitive market, if one manufacturer tries this kind of rigid pricing on its own, another will step in and give cost-conscious consumers what they want. This kind of pricing policy makes the most sense when the manufacturer is confident it will not be undercut by competition.

So it is important to keep all that in mind when a manufacturer describes its pricing policy as "unilateral," particularly where its competitors seem to be joining in, and where others in the marketing chain—the full-price retailers—are clearly benefiting.

Whether what is being described here as unilateral may actually cross over into antitrust territory, under *Colgate* and now *Leegin*, is a question for antitrust enforcers and the courts to determine. But it certainly warrants a closer look.

And whether or not there is an antitrust violation from a legal standpoint, from a practical standpoint, no discounting means consumers cannot get better deals, because retailers cannot offer them—not good for consumers however you look at it.

Not long ago, "Buy your contact lenses at Costco" made our ShopSmart Top 15 list of money-saving tips. It looks like contact lenses may not make that list again.

The typical reason offered for tolerating RPM—that it helps prevent so-called free riding by discounters taking advantage of the extra consumer services provided by some full-price retailers—does not really come into play here. Here, the doctor charges for the eye exam the consumer needs to get the correct prescription, and for any follow-up care. The 2003 law requires the doctor to give the patient a copy of the prescription, but it does not touch the requirement that there be one. So here, the doctor is being paid separately for those extra services. So even if you accept the free rider idea in general—and there are reasons to be skeptical—but even if you do accept it, it is not really an issue here.

In short, there is no reason for professional eye care services to be tied to the sale of contact lenses. The 2003 law removed chains that once tied them tightly together, but unilateral pricing is now replacing those chains with a silken cord, softer but with a similar binding effect. Consumers are still free to shop around, but not in hopes of saving any money.

Thank you.

[The prepared statement of Mr. Slover appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much to all of you. Thank you. After I said we are not juries or judges, I'll just start out with that case, that *Colgate* decision from 1919. I assume you've all read every word.

The Supreme Court precedent from the *Colgate* case establishes that manufacturers are free to decide who they can sell their products to, as I mentioned earlier, and they can decide to stop selling products to retailers who sell below their suggested retail price.

Given the unique nature of the contact lens market, Mr. Slover, are the policies we're talking about in the contact lens industry, do you think they're somehow distinguishable from the ones outlined in the 1919 case?

Mr. SLOVER. Well, in general, the *Colgate* doctrine allows pricing restrictions to harm consumers in the name of freedom of contract. That's an accommodation that's been made. But to be under *Colgate*, the pricing policy has to be truly unilateral and not the product of communication and coordination. That is where the details lie. That is ultimately a factual question for investigators and the courts.

Things are not always what they might appear, so you have to dig a little deeper. It is not always clear what has induced the new policy, and once it's out there there's the question of deciding as you go forward whether and how to maintain it over time in the face of positive and negative reactions that you get in the marketplace.

So in this market, there are a number of ways that the eye doctors have of interacting with the manufacturers and making their views known in determining what products are available to the consumers. So it does not really change what the *Colgate* doctrine says, but it does raise some unique issues to be looking at.

Senator KLOBUCHAR. Okay. Anyone else want to comment on that?

[No response].

Senator KLOBUCHAR. Okay. The next case we talked about here was this *Leegin* case. In 2007, the Supreme Court decided that minimum resale price maintenance, which we know here is RPM agreements, should not be banned outright, overturning, as I mentioned, nearly 100 years of precedent.

Instead, they said they should be considered on a case-by-case basis under the rule of reason test which balances pro-competitive justifications for pricing policy with the anti-competitive effects.

The policies at issue today are specifically called unilateral pricing policies, so presumably, as you mentioned, there's not supposed to be an agreement between the manufacturer and the retailer on the minimum retail price.

Are there any circumstances, do you think, Mr. Slover, under which a unilateral minimal retail price policy could be considered a form of resale price maintenance and then subject to greater scrutiny?

Mr. SLOVER. Well, I would just say that it's in the details of the facts, if it's truly unilateral, then it's not going to be an antitrust violation, and *Colgate* made that clear 100 years ago and still makes that clear. The question is whether it's truly unilateral, and whether you can maintain a unilateral policy in the marketplace going forward without some kind of interaction and communication and coordination developing.

Senator KLOBUCHAR. Okay. And I do want to ask unanimous consent to include a written statement in the record from Alcon Laboraties, which is another contact lens manufacturer.

[The information referred to appears as a submission for the record.]

Senator KLOBUCHAR. I'll start with Mr. Zeidner and then you, Mr. Slover. In testimony submitted, this testimony from Alcon which is the second largest contact lens manufacturer, they said that they instituted minimum retail prices to assure that the selling price for the product was sufficient to motivate eyecare professionals to invest their time in learning and communicating the benefits of the product.

They cite the free rider problem, which I can also ask you guys about, where eye care professionals incur the cost of studying and appraising the new technology, but online and big box retailers do not. Does this make some sense? Do you agree with this assessment? Maybe I'll just go down the row here.

Mr. ZEIDNER. Sure. We do not agree with it. We do not believe that eye doctors need to have any extra incentive to fit contact lenses. They're already paid a special fitting fee to do that so they're already being paid for that.

And giving doctors an incentive through UPP may or may not promote competition among manufacturers, but it destroys competition among retailers because the consumer can't choose the brand, the brand is chosen for them by the eye doctor. They can only choose where they purchase it.

In fact, Johnson & Johnson's president said that in a Vision Monday article where she was interviewed: "The new policy sets minimum retail pricing, which has been communicated to all customers. In addition, manufacturers' rebates have been eliminated by building those discounts into the retail price of these legacy products rather than requiring customers to send in proof-of-purchase to obtain rebates. This gives the optometrist the ability to improve his or her capture rate in the office. Now the patient has no incentive to shop around."

That's really what this is about. It's about getting patients to buy from the doctor and not shopping for a discount price because there's none available.

What will happen now is a doctor can just say, here's screen shots of every discounter that you might be considering going to. There's no reason to shop around because everybody has the same price as I do.

Senator KLOBUCHAR. And so before this happened were your prices significantly lower than the other ones?

Mr. ZEIDNER. Yes. In fact, we've got—we just did this before the UPP prices which go into effect on all of J&J's products, except for ACUVUE 2, on August 1st. You can see the lowest internet price, and this is the most popular lens, ACUVUE Oasys. By the way, it used to be sold as a 6-pack, now it's sold as a 12-pack. So when we were talking earlier about buying one box, that's not available any longer.

Senator KLOBUCHAR. It's kind of hard to see. Maybe I need better contact lenses or something.

Mr. ZEIDNER. Oh. We can pass it up.

Senator KLOBUCHAR. Yes.

Mr. ZEIDNER. Maybe you need some more. So you can see, this is the same price for a 6-pack before and after. So the percentage increase at the lowest internet price just on this box is a 111-per-

cent increase. On our product right here, it's $25.87 before, $33.75 after, a 30-percent increase.

Senator KLOBUCHAR. This is what? Before? Okay. Before the retail——

Mr. ZEIDNER. Right. So across the board, everyone is going to be paying more for this most popular lens.

Senator KLOBUCHAR. Is it on all lenses that they've done this?

Mr. ZEIDNER. They've done it on all lenses except for the most antiquated lens, which is ACUVUE 2.

Senator KLOBUCHAR. Okay. All right.

Mr. ZEIDNER. Correct.

Senator KLOBUCHAR. Dr. Knight, so I have two things going here, actually. One, is—maybe we'll start with this, this pricing. I know you may have a different view of this, of what the pricing differences are. Then the second thing is about the free rider issue and if Alcon, which I know is your competitor, but their claim on this in terms of the free rider issue.

Dr. KNIGHT. First of all, our goal, as I indicated earlier, was—is to—with implementing the UPP, was to provide an opportunity for consumers to receive lower prices, and I have not had a chance to analyze the information that you have on the board there. But we have looked at your prices and as I indicated, a specific example of where your price would go down considerably, from $47.99 to $40.00, if you implement the UPP price.

If you implement our prices, your products across the board go down, on average, by 8.5 percent. That is, of course, a choice that you have and it's a choice that all retailers had prior to the implementation of this UPP policy. Some of them chose to lower their prices and many of them have not.

Senator KLOBUCHAR. Okay.

Dr. KNIGHT. In regards to the——

Senator KLOBUCHAR. Alcon's claim about—you know, sort of in my head I think about, I have a lot of sympathy for our retailers like Best Buy and Target with this marketplace fairness issue. A totally different issue, but you know, Amazon can sell a TV on the internet without having any—much employee description to customers and things like that.

Then, in fact, the person then spends an hour with their Geek Squad or whatever, and then they go online and buy it, you know, for less because the taxes are different. It's kind of a mess that I hope we're going to fix. A totally different issue.

But the reason I thought of it was that you've got optometrists and other people advising about these lenses, and maybe it's the same thing. And Mr. Zeidner pointed out that the optometrists get paid separately for that work. I just wondered what you thought about that free rider argument that Alcon makes.

Dr. KNIGHT. Well, I think that I don't know a lot about Alcon's business philosophy, but the product that they released, Dailies Total 1, was new innovation and there's a lot of cost involved in creating new innovation. There's a lot of time spent by the doctors in continuing education to learn about new products.

I believe that what they were suggesting is that this is a way of being able to ensure that doctors will take time and ensure that they learn as much as possible about new products. Most doctors

are really excited when new technology comes out. It keeps us stimulated and it's good for the consumer. So I think it would happen even without it, but at my best guess I would think that that's what the reference is about.

Senator KLOBUCHAR. Okay.

Dr. Cockrell?

Dr. COCKRELL. In reference to Alcon?

Senator KLOBUCHAR. Yes. I'm not going to hold you responsible for the pricing dispute.

Dr. COCKRELL. Perfect.

[Laughter.]

Senator KLOBUCHAR. Okay.

Dr. COCKRELL. In reference to Alcon's comments in their letter, I read that last night as well. I find it interesting. It's certainly not how it was presented to me and that's certainly not how I think the average optometrist operates. Just as Dr. Knight said, our goal must always be to find the most viable product to maintain the patients' eye health, regardless of how that lens is priced by the manufacturer to us or with or without a UPP pricing policy.

At the end of the day, if the lens doesn't fit and the patient either (a) can't see or (b) has some problem with the lens, pricing policy doesn't matter. So for us, that pricing policy doesn't make any difference for me as a private optometrist. As far as the AOA is concerned, we clearly have no position on how any company sets its pricing policy.

Senator KLOBUCHAR. Okay.

Mr. Slover?

Mr. SLOVER. The free rider argument is the classic argument for tolerating resale price maintenance and it does, you know, have some plausibility and persuadability and it was part of what persuaded the court to overturn the *Dr. Miles* per se rule. Among those who've studied it more closely, it's still controversial—both as to how much it really affects business decisions, and as to whether it's really necessary to restrict pricing in order to address it.

So I think there could very well be a perception among people in business that if they restrict pricing, that it can help address a free riding problem. We would just hope that they would find other ways to get the services that they want that don't involve restricting discounters from offering better options for consumers.

Senator KLOBUCHAR. Okay.

Well, I think I'll turn it over here to Senator Lee. Thank you.

Senator LEE. Thank you very much. Thanks to all of you for being here.

Dr. Cockrell, I didn't understand most of those terms referring to horrible eye conditions you described at the outset. I nonetheless don't want to get any of them. None of them sound pleasant at all.

I want to get back to Senator Klobuchar's question from a minute ago regarding the statement submitted by Alcon. Is there a free rider problem in this industry?

Dr. COCKRELL. You know, you're talking to a non-attorney, so the free rider language is new to me.

Senator LEE. Let's just think of it not in legal terms. Just think of it in terms of somebody being able to profit off of somebody else's services. In other words, a retailer, a distributor, whether online or

big box or otherwise, sells a product that you as an optometrist invests a lot of time in learning about, in learning how to fit, in learning the advantages and disadvantages to each patient.

Those big boxes and other retailers don't invest the same amount of time that you do. Does that result in them benefiting from work that you put in that you might not otherwise be able to be compensated for?

Dr. COCKRELL. I think at the retail end of a patient's interaction, whether I sell a contact lens or whether an online marketer sells a contact lens, at that point in line it's a product that we're selling. We provided our services for a fee, whatever that fee happens to be for the appropriate service.

So if I understand your question correctly, I think that whether that lens is discounted by me or discounted by anybody else, it's the same lens, regardless of the pricing, it's the same product at the end of the day. So I think the answer's "no."

Senator LEE. Okay. And that is because you're being paid a fee for a service that's a separate service?

Dr. COCKRELL. By the patient.

Senator LEE. By the patient

Dr. COCKRELL. Correct.

Senator LEE. By the patient.

And then Senator Klobuchar referred to this briefly, but I want to make sure I understand your answer on this one. Have you found that the profit margin for eyecare professionals in the context of selling contact lenses is diminishing?

Dr. COCKRELL. Over—well, I'll give you two answers to that. Over a period of years—in other words, I have practiced for 30 years. Over that period of time, I would say it's probably about the same but somewhat down. What happened is, as the price of contact lenses came down over time, service fees moved in one other direction.

When it comes to an actual price of a box of contact lenses that Mr. Zeidner was referring to, it's hard to relate that back to before we had disposable contact lenses. With the advent of any of these UPP policies, I think that the profitability is probably going to be much less because I would think that, in my particular case, in my practice—and I am not speaking for the AOA—I can't buy a lens in the same volume that 1–800 can, so I can't buy a lens at the same price, probably.

I certainly cannot afford to sell at the same price because I have those built-in, inherent costs that Senator Klobuchar referred to, like Target or big box does in selling a television. I've got people on the ground handling that discussion back and forth with a live patient in the room. I've got a lot more time invested in a person selling one or two boxes as opposed to if they buy boxes as a commodity. So my cost of doing business for that product, the product itself, is higher because of that.

Senator LEE. Have you taken this up with Dr. Knight? I'm just kidding.

What do you make of the fact that you do have optometrists in many instances serving two roles, both as a health care provider where they're expected to offer their sound medical judgment and they're also a vendor—they're also a retailer who sells to the very

same people who buy their products. In your experience as an optometrist, does this influence judgment—if not your judgment, then the judgment of others that you've known in the industry?

Dr. COCKRELL. I'd like to give a long answer to that. The short answer is no. The long answer is, at the end of the day whether I fit you or anyone else with a contact lens, I am ultimately responsible for the health of your eye and the outcome of that fitting policy. And in our office's case, and I think I can speak for virtually all optometrists, those problems I discussed are real and we actually see them.

The trouble that occurs for a patient is, if the lens doesn't fit, it's not like having two pairs of shoes that are both size nine and one feels good and one doesn't. If that lens is too tight and you don't get enough oxygen, because of that, you may develop corneal neovascularization.

If the patient chooses to over-wear that lens and extend the lens life far past the time it was designed by the manufacturer, then the lens builds up debris and gets dirty, and again you don't get enough oxygen through the contact lens into the cornea and you may develop neo-vascularization and the possibility of all the scarring problems I mentioned earlier.

So at the end of the day, the price of the lens or the possible profitability is really a very, very, very small factor for two reasons. First, keep in mind, from the professional side, we want to make sure that patients' eyes stay healthy.

From the business side, we want that patient/consumer to come back and see us over the next 20 or 30 years. If we don't take care of that patient and do a good job with their eye health and their vision, they're really not likely to come back. So we keep both of those factors in mind and always err to the side of safety and the best eye health for the patient.

I'll put on one more hat. I've been on the State Board of Examiners in Oklahoma for 20 years and the problems that we see that come before us from the public, every single problem I have seen in 20 years has come about because of a poorly fitting or a contact lens that was purchased from a fraudulent dealer where we've had patients' eyes harmed. We've had two cases in the past 3 years where they lost vision and ultimately wound up having to have a corneal transplant. Those situations never turn out perfectly the rest of the patient's life.

So every optometrist and ophthalmologist who fits a contact lens or deals with those problems is very careful to ascertain that the health of the eye is the most important part of that process, absolutely.

Senator LEE. Of your patients that you treat, what would you say is the rough ratio of them that choose to purchase their contact lenses from you rather than going to a third party retailer?

Dr. COCKRELL. We think—we have four doctors in our office. We think in our office it's probably closer to 50 percent, and that's pretty significant. We live in a college town. We have a large practice with a variety of patients. As I said, we have patients as young as two, due to specific eye disease, that wear contact lenses.

We have patients with a myriad of different eye diseases that purchase them from us because they're specialty contact lenses

they might not be able to get online. But across the board, they purchase from all vendors. They purchase from other vendors in town where we live, as well as online. So it's a pretty high percentage.

Senator LEE. I'm guessing that putting a contact lens in a 2-year-old is not an easy thing.

Dr. COCKRELL. There's a lot of noise involved.

Senator LEE. Yes.

Dr. Knight, you mentioned that one of the reasons why you pursued UPP was to keep prices down. I just wanted to make sure I understand how that works. One would assume more intuitively, perhaps, that if you wanted to keep prices down you might experiment with a maximum price rather than a minimum price. So why do you seek to achieve this through a minimum price? Was a maximum price something you considered either as an alternative or in addition to this?

Dr. KNIGHT. A maximum price was not part of our business strategy. We did not consider it. Our strategy focused, again, around lowering prices. We felt that the best vehicle by which to have that outcome would be to use a UPP policy. We tried lowering prices in the past without any other tool and it has not always translated into a reduction in price to the consumer.

Senator LEE. Okay. So that's how you ended up there?

Dr. KNIGHT. Yes.

Senator LEE. Do you—I see my time has expired.

Senator KLOBUCHAR. That's okay. I went on for quite a while.

Senator LEE. Yes, but you are the Chair.

Senator KLOBUCHAR. Oh, yes. I see.

[Laughter.]

Senator LEE. She wields the gavel very effectively. Thank you, Madam Chair.

You heard Dr. Cockrell mention a minute ago that he does not think that there is a free rider problem. I just wanted to get back to you on that. I know you addressed that briefly with Senator Klobuchar. Do you agree that there are—are you saying that there is not a free rider problem? Would you agree with that?

Senator KLOBUCHAR. You know, just to be fair, should I read him the paragraph from the Alcon testimony?

Senator LEE. Yes.

Senator KLOBUCHAR. I just found it, so we can see what it is. What they said was: "In recent years, however, eyecare professionals," or ACP's—that's you, right? Okay. "Have found their profit margins on the sale of contacts to be narrow. The profit margin is low because of a classic free rider problem." This is them saying this.

"An online seller or mass merchandiser which does not incur the cost of studying the technology, appraising what is best for a particular patient, or recommending a lens can generally under-price eyecare professionals who do bear those substantial costs and without whom there would be no market for contact lenses." That's what they're saying.

Dr. KNIGHT. Okay. I just wanted to make sure I was on. I don't really find there to—I have to use my particular case. When I was in practice, we charge for our fitting and evaluation fees, as Mr.

Slover indicated. So I kept my prices very competitive and some patients stayed with our practice to purchase their products and others were given their prescription to go elsewhere. Being able to sell the contact lenses in our office, though, really presented a convenience factor for a number of our patients.

We had a lot of patients who had small children, young mothers with small children, we had working professionals, and for them to be able to just have their examination, get their lenses in an office they trusted, and check one more thing off their box—list of things to do, was very helpful.

And from my vantage point, it also really helped with compliance because I really focused a lot on if the patient needed an annual supply of lenses, making sure they had all their products available so that they would stay compliant and not have some of the nasty things that Dr. Cockrell just talked about.

Senator LEE. I get that. But is there a free rider problem and are profit margins diminishing?

Dr. KNIGHT. I think it's the competitive market. Profit margins are diminishing, in a sense. But I really didn't focus so much on the cost of the products; I priced them competitively and then I charge for my services.

Senator LEE. Okay. You heard Dr. Cockrell say a minute ago that he expects his profits will diminish, at least on the retail end of things, as a result of this. Does that surprise you, and do you expect that to be the norm among eyecare professionals?

Dr. KNIGHT. Well, I'll give you an example of my office again, and I'll use a specific product. We sell the Oaysis brand contact lenses. And again, my goal is usually to give a patient an annual supply—that's what I prescribe—so that they stay compliant. That price is $250 for the annual supply. The UPP is $220. So my office will need to make an adjustment in the price, but that's in the best interests of the consumer.

Senator LEE. Okay. My time is way over. I'm sure we will follow up afterward.

Senator KLOBUCHAR. Okay. Good.

So in the end, Dr. Knight, including in your testimony, you say that ensuring lower prices for consumers was the reason you did this because—I think, just to—I don't want to characterize this, but you said that some of the price lowering wasn't passed on to the consumers when you guys would do this.

Dr. KNIGHT. Correct.

Senator KLOBUCHAR. So the reason was—or your belief and the reason was that you set these low minimum prices and then they're guaranteed to be passed on. Is that right?

Dr. KNIGHT. Well, our goal is that that—the hope is that that would be passed on. We also lowered our prices to each of the customers across the board, not just eyecare professionals but everyone who sells our products received a reduction in the cost.

Senator KLOBUCHAR. Okay.

Dr. KNIGHT. And that is what we hope would be passed on to the consumer.

Senator KLOBUCHAR. Okay. And you have five examples of minimum retail prices and all but one of them is lower than the national average retail price. How about the other products, are they

all priced lower than the national average? This is in your written testimony.

Dr. KNIGHT. Okay. I don't have that in front of me.

Senator KLOBUCHAR. It's all right.

Dr. KNIGHT. The majority of our products would be priced lower. There are some that would be priced higher and those are usually the more specialty lenses, the latest in innovation. It's a very small margin, comparatively speaking.

Senator KLOBUCHAR. Okay.

So Mr. Zeidner, you've heard this about, from Dr. Knight's standpoint, when they would lower prices without having these minimum price—unilateral price policies in place, oftentimes it wasn't passed on, from their perspective. I assume they've got data to show that. So what is your response to that?

Mr. ZEIDNER. Well, generally speaking, in the market all of the online sellers are going to be less expensive than the doctors, and that's the average OD price that we have there. So your online sellers are always going to be lower. When Dr. Knight talked about 8.3 percent on average, what's interesting is our prices—now, we have not put the new UPP prices into effect yet because we don't have to, and we're not going to raise prices on our consumers until we have to, which is August 1st.

But for some of the products, Johnson & Johnson will give rebates. We have higher prices and then, since we're not provided those same rebates from Johnson & Johnson, we rebate down to the same price that Johnson & Johnson is giving to doctors and that they're selling them for, or lower. So that's—I don't know. I'm—we're happy to supply you——

Senator KLOBUCHAR. Are your prices now, right now, lower than what their minimum price is?

Mr. ZEIDNER. On——

Senator KLOBUCHAR. What their minimum price will be August 1st, or whatever it is?

Mr. ZEIDNER. On some products they are, but we have to change all those August 1st or we get cut off.

Senator KLOBUCHAR. So we're going to be able to know September 1st how this is going?

Mr. ZEIDNER. Absolutely.

Senator KLOBUCHAR. Is that right? If they're—compared to where they were the last year?

Mr. ZEIDNER. Yes. And if the point is to save consumers money, I don't know why we have a minimum price we can't go below.

Senator KLOBUCHAR. I think—I don't want to put words in—I think she'd argue that before when they did this it somehow wasn't being passed on.

Mr. ZEIDNER. Well, but—but they don't have to do that now either. It's the minimum price but every—she said that they have to adjust their price in their office. That's—in fact, they don't have to do anything. They can actually raise the price. What we believe is manufacturers are setting that price so doctors can say, ahh, no one can compete below that.

We can stay at that price or even go higher if we want to increase our margin. So there's no expectation, at least in our minds, that that price is going to be passed on to consumers. From our

point of view in the business, all that is is insulating optometrists from having to compete with discounters that go much lower than that price.

Also, on the whole——

Senator KLOBUCHAR. So what are you—you have—I think I had asked someone else this before this hearing, but you have what percentage of the market? Like, online is what percentage, not maybe you personally?

Mr. ZEIDNER. Well, of—of online, we're probably three-quarters. And for——

Senator KLOBUCHAR. Three-quarters of—oh, you are three-quarters of online?

Mr. ZEIDNER. Of the online, yes.

Senator KLOBUCHAR. I thought you meant you're probably three-quarters of the market.

Mr. ZEIDNER. No, no, no. No, no, no.

Senator KLOBUCHAR. So you are what percentage? Do you know what percent of the market?

Mr. ZEIDNER. Yes. We're roughly 10 to 11 percent of the entire market. However, because it's so fragmented, because, as Dr. Knight mentioned, there's 40,000 to 50,000 optometrists, we're still the largest seller because it's so fragmented.

Senator KLOBUCHAR. I see.

Mr. ZEIDNER. So we are the—and we have the most data. We're happy to show as well Johnson & Johnson is not offering us, as Dr. Cockrell mentioned—we're not getting any price discount for buying volume. In fact, that's been taken away. So now the same price per box, if you——

Senator KLOBUCHAR. But that's going to be taken away with this?

Mr. ZEIDNER. Yes, ma'am.

Senator KLOBUCHAR. Okay.

Mr. ZEIDNER. Yes, ma'am.

Senator KLOBUCHAR. Okay. All right.

Mr. Slover, what do you think is going to happen with prices when this goes into effect August 1st?

Mr. SLOVER. Well, from what I've heard today, when the policy is instituted, I think for some patients who are getting their lenses from some retailers, the price is going to go down in the short term. It sounds like that's the intent and the direction. But the prices for consumers who care the most about cost and are willing to shop around for options, for them the price is going to go up and it's going to stay up.

I agree with those who have said that if the goal is to lower prices, it's more logical to put a maximum of ceiling on the retail price and to allow the retailers to go below that if they want to, than to put a floor on the price and allow the retailers to go above that. Now, historically, the courts have often found that maximum prices end up encouraging price fixing anyway, but they're treated differently under the antitrust laws. You can sort of see why they would be.

Senator KLOBUCHAR. And do you think the fact that it's more concentrated with three companies having 90 percent of the market share, and you know, sort of like—a little bit like the railroads are

right now, but do you think that's going to make a difference in how this is rolled out, like it was less concentrated and people were offering these minimum price agreements? Do you think there might be a different effect than the fact that you have a more concentrated industry?

Mr. SLOVER. Well, in general, the more concentrated a market is, the greater the risk for coordination, because it becomes easier for competitors to coordinate their conduct. And here, if—it's easier for them all to kind of watch what each other is doing and to go along and it's easier for each of them to control the situation.

Senator KLOBUCHAR. Dr. Knight, what do you think the effect this is going to have on innovation to do this? That's another piece we're talking about, about pricing. Then Dr. Cockrell brought up innovation. What do you think the effect it will have on innovation?

Dr. KNIGHT. Well, I think and I hope that it will continue to stimulate innovation. It's a competitive market and we will always react to the market, as will our competitors. Our goal is to increase our market share whenever possible and to be able to, at the same token, lower our consumer prices. But the market tends to adjust for those things.

Senator KLOBUCHAR. Could I just say one more thing with these price—minimum price agreements? Like, how long do they last? Can they be adjusted right away? Because if you had a competitive market you'd want to adjust your product right away.

Dr. KNIGHT. That is correct. They can be adjusted right away. They are not a permanent solution.

Senator KLOBUCHAR. Or a year long, or 6 months or anything?

Dr. KNIGHT. We really didn't put a timeframe on it. It is one of the means by which we wanted to try and accomplish our goal of lowering prices and if it doesn't work then we'll make an adjustment.

Senator KLOBUCHAR. Do you want to add anything, Dr. Cockrell? Do you have your microphone on there?

Dr. COCKRELL. It is now. In our particular practice I continue to hear that they occupy the top three spots in 90 percent of the marketplace. In our office—I checked before I came—on a monthly basis we order from between 10 and 15 different manufacturers. There are over 90 manufacturers and each of them provide many different lenses, so we have hundreds of lenses available.

So outside of these pressing policies of the big three that you've talked about, we can buy other products to do the same thing that may not fit the same, that may fit differently, may have different parameters.

So there's a significant amount of competition in the field when you think about 90 different vendors for a lot of these products. There are specialty lenses that we order where there's only a handful because of the disease states I talked about, and things like that. So there's really a lot of competition.

The other thing I would say on the competition, in our office, as I said, in some cases we charge lower, I think, than 1–800 does. I'm certain that we do on some products, and some are probably higher. But there's also a part of competition that is value, and it's not just value, i.e. price, it's also service, as Dr. Knight said, those patients who find it convenient to purchase in her office while

they're there, or those patients who like the care they receive in her office when the transaction takes place, or they want to be able to look across the counter and talk to somebody when they have a question about it. That's all part of the value of where they purchased those lenses as opposed to just shopping for what might or might not wind up being the lowest cost provider of that lens.

The other thing that we find happens that we explain literally on a weekly basis, our staff does this, is the confusion over rebates. You know, I don't know what percentage of rebates are actually redeemed, but from what I've read across all industries it's pretty small.

So you can have one price and then have a very big rebate, understanding that it's not going to be redeemed or that the majority are. We wind up making that explanation very frequently. So I think having one price eliminates a lot of price confusion and benefits the consumer overall, regardless of where that is, because it eliminates confusion.

Senator KLOBUCHAR. Okay.

Senator Lee.

Senator LEE. Dr. Knight, so you're saying that although prices may go up for some they may go down for others, but overall the objective here is to decrease the price paid by the typical contact lens consumer, and do you think that's what will happen?

Dr. KNIGHT. Yes, I do. And to comment to what Dr. Cockrell mentioned, in our estimates the number of consumers who actually redeem the rebates is about 6 to 8 percent.

Senator LEE. Okay. Mr. Slover, what's your response to this, particularly the assertion that on the whole for the average customer, prices are going to go down as a result of the unilateral pricing policy?

Mr. SLOVER. Well, I think for the cost-conscious consumers who are looking for the lowest price, that lowest price isn't going to be there anymore, so the prices for them are going to go up. I think there are a lot of consumers who are less cost-conscious, and for them the benefits of getting the contact lenses while they're at their doctor's office may be more important to them, and they should have that choice. But the consumers who need the extra money and are willing to shop and get the lower price ought to be able to do that.

Senator LEE. I assume there are probably a lot of customers who become relatively attached to a particular brand of contact lenses and they don't want to change, necessarily. Does that have an impact on this? I mean, does that have an impact on the extent to which prices could go up?

Mr. SLOVER. Well, I've heard that a lot of the prescriptions that are written are for a particular brand and a particular lens. To the extent that's the case, it puts a lot of the control in the optometrist's office. How that optometrist uses that authority will depend on the particular optometrist, but it has the potential to lower options for consumers.

Senator LEE. Thank you.

Do you want to follow up on that?

Dr. KNIGHT. Yes, if I may. I think more than brand, the modality of the lens is probably even more important. If I have a patient,

for instance, who has a family history of macular degeneration or is at risk for cataracts, I'm going to be looking at putting that patient in a lens that maybe has a UV component to it, for instance, to protect their eyes from that particular situation.

If I have a patient who has allergies, maybe the best modality for that patient might be to go into a lens that they dispose of on a daily basis to keep their eyes as clean and healthy as possible, and there are a variety of choices along that modality. So if a patient has a particular brand in mind that they're interested in I probably can find something along that line that would work for them, but more so than——

Senator LEE. And is your ability to do that as an optometrist enhanced by UPP? I'm just trying to figure out how it ties in to unilateral pricing.

Dr. KNIGHT. Well, whether you have a unilateral pricing policy or not, that's something that I think should be first and foremost with most practitioners. It's not so much—Mr. Slover was speaking about brand issues. Brand issues are a factor, but the bigger factor is, what's the best type of lens to put a patient in, what's the best system to put them in first and foremost, and then you choose a brand.

Senator LEE. Okay. Got it.

Mr. Zeidner, what's your response to the point that the price, on average, to the consumer of contact lenses will be reduced as a result of this?

Mr. ZEIDNER. We don't see how that can happen. Just to respond to some of the comments, every single prescription is written for a brand. That is required by law, so there is no choice by the consumer to change their brand. If they have a doctor that will allow them to ask for a specific brand for whatever reason they can, but they are locked into that brand.

Senator KLOBUCHAR. So, when they go on 1–800 CONTACT LENS—we're going to say it as much, you know, for your marketing. So when they do that, they have to have a prescription with them to get it?

Mr. ZEIDNER. Yes, ma'am.

Senator KLOBUCHAR. Okay. Thank you.

Mr. ZEIDNER. They have to have a prescription or we will verify it with the doctor's office, but it is always a brand. So there's no choice here. If it were about modality and the doctor said you need to have a 2-week lens that has these properties and then the consumer could choose the brand, that would be a competitive marketplace. That does not exist right now. That would be a competitive marketplace. This is really what we think the main issue is. We talk about and we mix these metaphors together about free riding and best buy, but this is not——

Senator KLOBUCHAR. Just to be very clear—do you love how I'm intervening?

Senator LEE. It's okay, Madam Chair.

Senator KLOBUCHAR. I said there was a difference between that——

Mr. ZEIDNER. No, no, no.

Senator KLOBUCHAR [continuing]. But it reminded me of some of those issues.

Mr. ZEIDNER. And that is the difficulty.

Senator KLOBUCHAR. I didn't mix it up?

Mr. ZEIDNER. No, no, no. And I'm not suggesting you do. We think consumers get mixed up that way because it is not a consumer product. You don't get to go and shop for the brand you want, you're told what brand you're going to get, then you go and shop for where you want to purchase it.

That is being taken away because at this point, after UPP, you're prescribed a brand and you have to pay that price. So it's really not like any other consumer product, and that is because you have a medical professional who is selling what they prescribe in the office.

It would be a lot more convenient if I could buy all my Lipitor or whatever from my doctor, but I can't because we don't allow that in medicine. But in this part of the market, we do. That's really the fundamental issue here, is because on the one hand we're talking about what's best for the patient, what they should be prescribed, on the other hand, where they can get the best price.

Well, now all that's been concentrated into one gatekeeper, and that's the optometrist. Because with UPP, there's no way to get a lower price. The doctor tells you what you're going to wear and then he tells you you can't get it cheaper anywhere else.

Senator KLOBUCHAR. But couldn't the doctor charge a higher price?

Mr. ZEIDNER. Absolutely. But then——

Senator KLOBUCHAR. But then wouldn't that make people go to 1–800 CONTACT LENS to get a cheaper price?

Mr. ZEIDNER. It would, but Dr. Knight just said that they're going to adjust their prices down to UPP, which every doctor could do that as well, too. But you can't go below UPP.

Senator KLOBUCHAR. Right.

Mr. ZEIDNER. So we can't discount any more.

Senator KLOBUCHAR. I get it.

Mr. ZEIDNER. It wouldn't make any sense for someone to want to come to us because we don't have—after this we won't have any lower price.

Senator KLOBUCHAR. Sorry.

Senator LEE. Well, that's okay.

By the way, can you tell me, or if not you can any of you tell me, why it is that there is not the equivalent in the contact lens industry of a generic prescription or of some kind of fungibility between brands?

Mr. ZEIDNER. Well, it's an interesting question. What Dr. Knight was just saying is really an interesting option. If the prescription said the modality, you need to have a modality with these type of protections, you have this type of an eye, then the consumer could say, you know what, I want to check on prices and then fit me for a couple of these and I'll choose which one I want, then you would have competition at the consumer level but you don't have that now. This is a strange market. I don't know why we don't have those, I don't know why doctors sell them. It's a different market than any other medical product.

Senator LEE. So taking your hypothetical one step further then, it's analogous, you would say, to what—not just going to a doctor

and being told, I'm prescribing you Lipitor and you may now purchase that from me, but going to a doctor and being told, I'm prescribing you Lipitor, there is no generic alternative, there are no other alternatives anywhere——

Mr. ZEIDNER. And the price is the same everywhere.

Senator LEE. Okay.

Mr. ZEIDNER. That's what the market's becoming.

Senator LEE. Dr. Knight, did you want to—oh, and Dr. Cockrell, you wanted to respond also? Let's go in that order.

Dr. KNIGHT. Sure. The modalities is only a part of the scenario. The brands are not all the same, and so to make assumption that you can switch into a generic from one manufacturer to another is just faulty. The parameters are different, the materials are different, the oxygen content is different, the water content is different; they're different materials. Patients need to be fit with those lenses to determine what's best for them.

Senator LEE. Okay. So that's why the law is the way it is, as a result of that, of those factors that you've just identified?

Dr. KNIGHT. Yes.

Senator LEE. Dr. Cockrell?

Dr. COCKRELL. I'd like to comment. You know, when you talk about a generic medication like Lipitor, the bioavailability of a chemical has to be the same, the bioavailability of the molecule has to be the same. As Dr. Knight mentioned, today I'm wearing two different lenses from two different manufacturers because I cannot see well and can't feel good with the same lens and the same manufacturer.

Senator KLOBUCHAR. That would be called like advanced eye treatment.

Dr. COCKRELL. Absolutely. But really you can't have anything such as an equivalent curve or diameter because every single characteristic of that lens is different.

Within these manufacturers, I'm not sure how many different lenses that Vistakon sells, or Cooper, but they sell many different lenses with many curves, many, many molecules that make up the actual chemical properties, and then you've got to put that on the eye.

If it's a woman who's pregnant, as her estrogen level changes the curvature of the cornea can change, so maybe the contact that fit before she was pregnant no longer fits. If someone is above 55, most people have dry eye. Maybe the lens they could wear before, they think, "I should still be able to wear it, now it's too dry and now I can't wear it."

So maybe the patient needs to go into a different modality, like Dr. Knight was talking about, where they had been wearing a lens that they replaced on a weekly, or 2-week, or monthly basis, and now the patient needs to replace that lens on a daily basis. There are so many different characteristics that must be considered.

If you leave those decisions up to the consumer to say I want to pick Brand A because it costs less, then we get back to all that myriad of problems that I talked about that may result in bad healthcare for the patient and the problems that occur. It's no different than letting me pick out which orthopedic hip replacement

that I want. To say, "I want that one because it costs less" is just faulty logic, to say the least.

Senator LEE. I think I saw your hand go up. Did you want to respond?

Mr. ZEIDNER. Yes. Just two quick things. The most popular, growing area of contact lenses is the daily lens. In fact, Novartis Ciba Vision's lens doesn't come in a base curve. Because it's so thin, it fits anyone that can wear it. So you don't have that in every contact lens.

When you look at the 510(k) filings of the major manufacturers, what the FDA says is that the base curve is in this range, it's between this and this. The manufacturer chooses which number they want, and they all chose different numbers. So it does depend on the eye and on how it fits the person, but those numbers are set by the manufacturer and they're given a range.

So it's not like they're made microscopically to that level of that exact—but it is a range and it does depend on how it fits the person's eye. But I think the point is very good, that if people want to be able to get a lower price, if Dr. Cockrell says that we don't want them choosing their own lens, what we've now done is just the opposite.

We've told them, you can't choose where to buy them because it's the same price everywhere, so we've really taken away choice completely from the consumer. If it's a bad idea for the consumer to choose their lens, we think they should at least be able to choose what they want to pay for it and now they're not able to with these RPM policies.

Senator LEE. Madam Chair, may I ask one more follow-up on that?

Senator KLOBUCHAR. Yes.

Senator LEE. Mr. Slover, from—so let's take as a given what we've heard from these witnesses about the fact that, for whatever reason, for reasons medical or reasons just related to the way the law is, we do have a marketplace in which there is not—there is not a type of prescription a doctor can write; whether the doctor should or should not be able to write that is a different question and one probably far outside the jurisdiction of this committee.

But given that a doctor cannot write a prescription for just a type of contact lens but has to write a prescription for a particular brand, a particular lens manufactured by a particular manufacturer, does that trigger special antitrust or consumer welfare concerns that might not exist elsewhere?

Mr. SLOVER. Well, in listening to the other witnesses and the health considerations that they were discussing and the patient safety concerns that they were discussing, I agree with all of those. Consumers Union would take a backseat to no one in the importance of health and safety for the patients. I don't think the health and safety questions need to be connected to the marketing questions.

The better those can be separated, the better for patients as consumers, I think. The 2003 law moved in the right direction toward separating those. I think the new pricing policies move in the opposite direction.

I think for antitrust you're looking for choices for consumers here, and the fact that there are sort of some built-in limitations in the marketplace are the kinds of things that the antitrust investigators and the courts would take a look at, and I think those are all important. But the bottom line, I think, is trying to separate out those two sets of considerations.

Senator LEE. Okay. Thank you very much.

Thank you, Madam Chair.

Senator KLOBUCHAR. Okay. Well, thank you. This has been a very good hearing and we've learned a lot. It's clearly something where we'll know a lot more in terms of the pricing issues a few months from now, or 6 months from now—I don't know how long it will take—so that we should come back and look at this again because I know how much you guys like testifying anyway.

I think we came in at this at a good time in terms of the fact that we're seeing this major change, and it could have an effect on consumers and that's why we have this committee. I realized as I was sitting here that I have to correct the record because I did wear a contact lens since my wedding—and I didn't know who made it, and it turned out it was you guys—when I had actually a condition that Dr. Cockrell is going to know is very bad called corneal abrasions for a period of years. Every so often I would have to put a Band-Aid contact lens on and they prescribed an ACUVUE, which turns out you guys make. So, there you go.

And actually one very good ophthalmologist fixed it with Lasik so I no longer have this problem, but it makes it hard to wear contacts. So you never want to lie on the record, right, Senator Lee, in front of our witnesses, but I do want to thank all of you for being here.

And again, this is a really important issue when you look at how many Americans wear contacts with a change in the pricing, possibly in response to the Supreme Court decision. I think it's really important that we keep our eye on this and see what the outcomes are going to be for consumers and continue to monitor this in the months to come.

Do you want to add anything, Senator Lee?

Senator LEE. Thank you very much.

Senator KLOBUCHAR. Okay. Thank you. This has been a productive hearing. We will keep the record open for 1 week for any additional submissions or follow-up questions. Thank you. The hearing is adjourned.

[Whereupon, at 3:39 p.m. the hearing was concluded.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

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

On

"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Wednesday, July 30, 2014
Dirksen Senate Office Building, Room 226
2:15 p.m.

R. Joe Zeidner
General Counsel
1-800 CONTACTS, Inc.
Draper, UT

Dr. Millicent Knight
Head of Professional Affairs
Johnson & Johnson Vision Care, North America
Jacksonville, FL

Dr. David Cockrell
President
American Optometric Association
Stillwater, OK

George Slover
Senior Policy Counsel
Consumers Union
Washington, DC

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 states[1] 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]

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[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.

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[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."

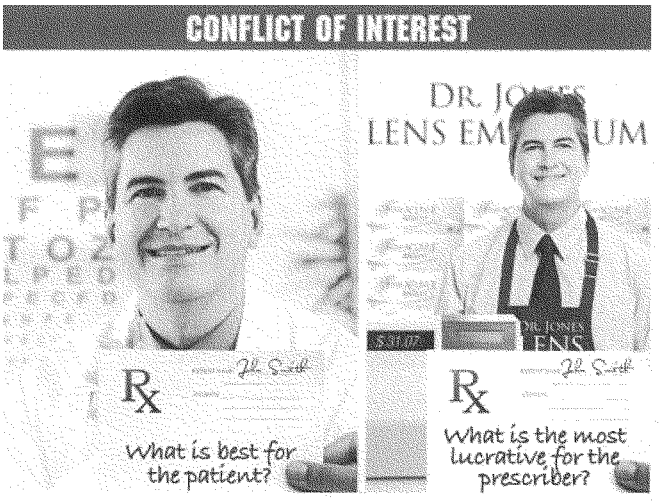
With messages like these promoting lenses subject to RPM being broadcast to eye care professionals through trade publications, blogs and social media chatrooms, is it any wonder that 40% of lenses are already covered by such policies?

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.

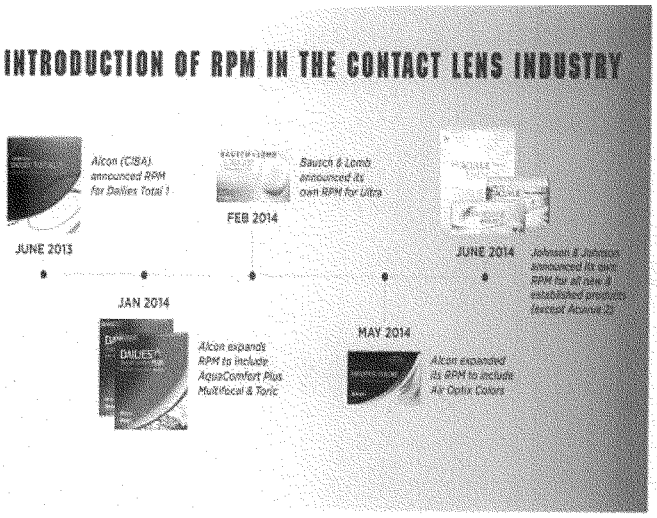
Consumers will have far fewer choices where they can purchase their lenses. They will pay higher prices – especially as discounters drop out of the market and eye care providers gain more pricing power. And, they will spend even more in time and transportation costs having to purchase refills from their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

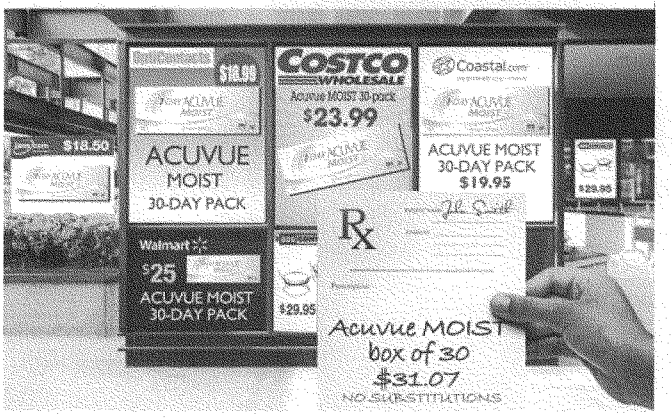

CONFLICT OF INTEREST
What is best for the patient?
What is the most lucrative for the prescriber?

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

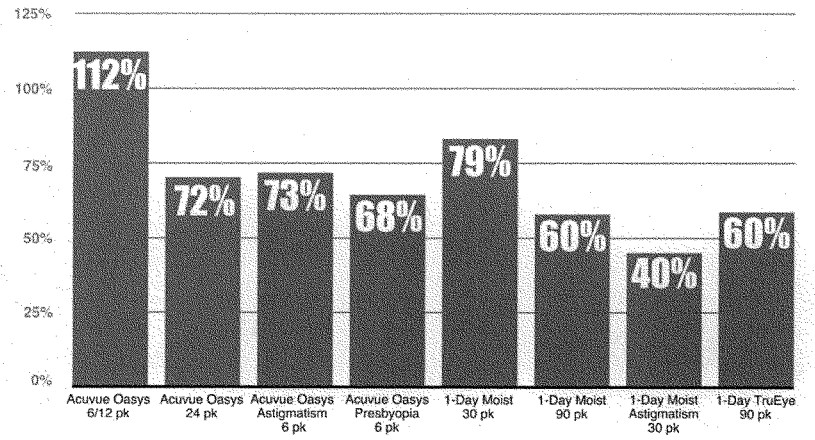

INTRODUCTION OF RPM IN THE CONTACT LENS INDUSTRY
Alcon (CIBA) announced RPM for Dailies Total 1
JUNE 2013
Bausch & Lomb announced its own RPM for Ultra
FEB 2014
JUNE 2014
Johnson & Johnson announced its own RPM for all new & established products (except Acuvue 2)
JAN 2014
Alcon expands RPM to include AquaComfort Plus Multifocal & Toric
MAY 2014
Alcon expanded its RPM to include Air Optix Colors

BENEFITS OF RETAIL COMPETITION IN THE CONTACT LENS INDUSTRY



RETAIL COMPETITION AFTER RPM

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



Johnson & Johnson
Vision Care, Inc.

Millicent L. Knight, OD, CHC, FAARM
Head of Professional Affairs
Johnson & Johnson Vision Care Inc.

The Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, United States Senate
July 30, 2014

Hearing On:
"Pricing Policies and Competition in the Contact Lens Industry: Is What You See What You Get?"

Good afternoon, Madam Chairwoman and Members of the Committee. My name is Dr. Millicent Knight, and I am the Head of Professional Affairs and a member of the North America Management Team for Johnson & Johnson Vision Care, Inc. (JJVCI), the manufacturer of ACUVUE® Brand Contact Lenses. I am pleased to have the opportunity to share with you our perspective on consumer pricing within the contact lens market.

Before joining Johnson & Johnson Vision Care, I saw patients daily for nearly 25 years as the owner of a private optometric practice in Evanston, Illinois. During that time I also served as a consultant for JJVCI and for several other eye health companies. And, although I do not see patients in my current role, I continue to advocate on their behalf by helping our company understand how eye care professionals (ECPs) may improve standards of care to best serve patient needs.

It is in the interests of serving patients' needs that I would like to share with you why we believe the implementation of a Unilateral Pricing Policy (UPP) on several of our most widely-prescribed ACUVUE® brands in the U.S. will benefit those who depend on these products for their vision correction needs.

Johnson & Johnson Vision Care made the decision to implement a UPP after thorough consideration of a number of options and independent of pricing decisions of other contact lens manufacturers. For example, we could have simply reduced prices to those who sell our products. We determined, however, that in this case, there would be no guarantee that any discount would be passed on to consumers.

By establishing a UPP:

- We are creating lower prices for the most widely prescribed ACUVUE® Brand Contact Lenses. We estimate that two-thirds of patients who buy ACUVUE® Brands will pay a lower price for their product, with an additional 17 percent of consumers seeing little or no change in price.

- We are removing manufacturer's rebates from our products and replacing the burdensome rebate process with instant savings for every box purchased, regardless of quantity purchased.

- We are offering consumers access to more transparent pricing that will allow them to make the best purchasing decision based on quality, clinical need, and price.

JJVCI has **not** established a Resale Price Maintenance program with retailers on the prices at which they will sell ACUVUE® products. Rather, JJVCI has unilaterally established a minimum price in the market – a price which is actually lower than the current national average selling price to consumers. There are no agreements with any resellers now, nor are any planned for the future.

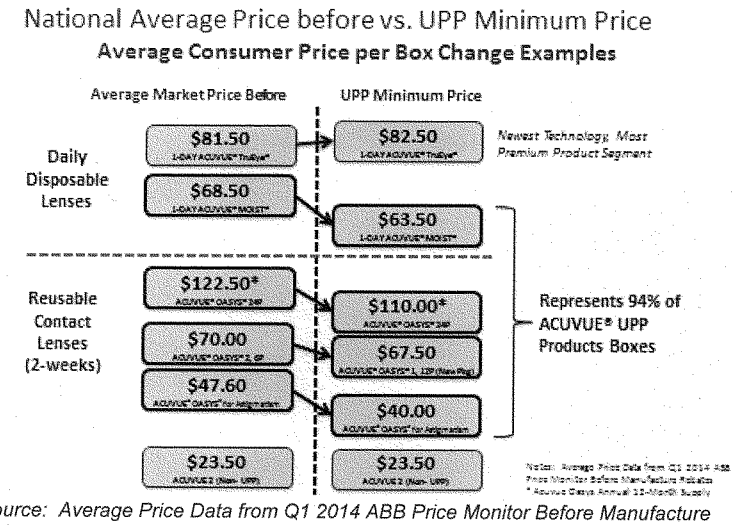
The following provides additional detail on our UPP and how it benefits consumers:

CREATING LOWER PRICES FOR THE MOST WIDELY PRESCRIBED ACUVUE® BRAND CONTACT LENSES

JJVCI implemented a UPP on its ACUVUE® OASYS® family of products (effective July 1, 2014 for new six-month supply pack; August 1 for remainder of ACUVUE® OASYS® family) and its 1-DAY ACUVUE® MOIST® family of products and 1-DAY ACUVUE® TruEye® Brand (effective August 1, 2014). Approximately 10 million consumers, 69% of the 14 million current ACUVUE® wearers in the U.S., receive prescriptions from their eye care professional for one of these three brands.

There are two significant ways that consumers will see a reduction in price for these brands:

1. The Minimum Retail Prices within our UPP are set below the current average market prices for the majority of consumers who purchase these brands. The chart on the next page demonstrates average market prices of the ACUVUE® UPP Brands before and after the new UPP Minimum Retail Prices, and the percent reduction of each. The three brands listed (one has two package sizes) represent 94% of the sales of our UPP Brands.



Source: Average Price Data from Q1 2014 ABB Price Monitor Before Manufacture Rebates
** ACUVUE® OASYS® Brand Contact Lenses Annual 12-Month Supply*
*** Annual Supply*

2. We have removed our rebates from the market and built these savings into the per-box price of our UPP brands. By providing the lower per-box prices on every box, we will reach significantly more consumers with better pricing. This is further outlined below.

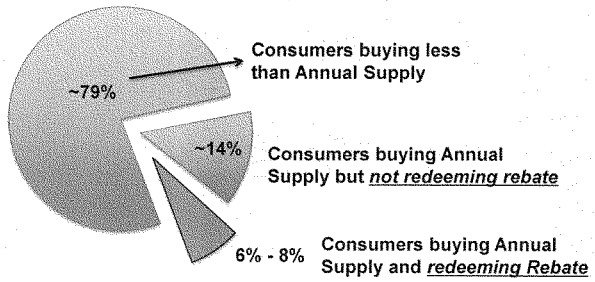
When we combine (1) the change in box-price and (2) the percent of consumers who purchase less than an annual supply or don't redeem rebates, we believe that **66% of consumers will pay lower prices as a result of our new pricing strategy**.

REMOVING MANUFACTURER'S REBATES AND REPLACING THEM WITH INSTANT SAVINGS REGARDLESS OF QUANTITY PURCHASED

While rebates provide a discount to the consumers who qualify and redeem them, in the contact lens market, rebates are generally only available to consumers who purchase an annual supply.

Historically, as demonstrated in the chart below, the majority of ACUVUE® wearers (79%) buy less than an annual supply. This means that only roughly one-in-five ACUVUE® wearers would be eligible for lower prices offered through a manufacturer's rebate. Furthermore, similar to other industries and markets where rebates are utilized, approximately only three-in-ten follow through with filling out and mailing in a rebate form in order to realize the price benefits that

rebates offer them. The rebate process can be cumbersome and it may be between six-to-eight weeks until a rebate payment is received. Our data suggests that somewhere between 6% and 8% of all ACUVUE® consumers actually redeem rebates in order to receive the best prices offered by a retailer.



With the instant savings offered through the UPP, lower prices are available to more consumers, including those who are more likely to purchase contact lenses one box at a time These are the consumers who are typically less affluent, more cash-strapped, and who are most in need of lower prices.

Additionally, ECPs have commented that it is difficult to monitor each contact lens company's rebate offers, and that it can take valuable staff time away from counseling patients to explain and field questions about the rebate process. I know patients came to me to provide the best solutions to their eye health and vision challenges. Contact lenses are a class two and three medical device and require knowledge and skill in providing best fittings and evaluations. Substantial time spent reviewing costs during a patient examination takes away valuable time from the clinical discussion.

Any change that removes distractions from the doctor-patient relationship is beneficial to both parties. I also recognize the resource burden that fulfilling and tracking rebates places on the manufacturer.

OFFERING CONSUMERS ACCESS TO MORE TRANSPARENT PRICING THAT WILL ALLOW THEM TO MAKE THE BEST PURCHASING DECISION BASED ON QUALITY, CLINICAL NEED, AND PRICE

In today's contact lens market, a variety of marketing and promotional offers encourage consumers to purchase their contact lenses either at a physical retail location or on-line. In some instances, the promoted price may not be the actual price they pay. For example, an advertisement may show a low per-box price that is only obtained if the consumer buys the maximum quantity and sends in a mail-in rebate. Often, the consumer is not aware of these caveats until the transaction is already in process.

With the removal of manufacturer's rebates, as well as the setting of Minimum Retail Prices through the UPP being implemented by JJVCI, consumers will have significantly improved visibility to the price that they can expect to pay when they select one of the ACUVUE® Brands covered under the UPP.

CLOSING

Drawing on my experience as a practicing optometrist and now in my role with JJVCI, I am confident our UPP provides transparency and simplicity in the value and costs associated with what patients trust their doctors to prescribe. Without the visibility of a UPP price, contact lens sellers may keep the price decreases for themselves and increase their margin, as we have seen in the past.

Importantly, the UPP creates greater accessibility to lower prices for everyone, not just the few patients that remember to send in their rebates correctly. Lastly, by instituting a UPP, lowering our prices and by making the process by which our consumers can access these lower prices simpler and more convenient, we believe we can better compete with other manufacturers in the contact lens market.

Statement of Dr. David A. Cockrell

President, American Optometric Association

Before the U.S. Senate Committee on Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights

July 30, 2014

Good afternoon, Chairperson Klobuchar, Ranking Member Lee and members of the subcommittee. I am Dr. David A. Cockrell, President of the American Optometric Association and an optometrist in private practice in Stillwater, OK.

The AOA, with more than 36,000 member doctors and affiliated associations representing each state, DC and our armed forces and federal service optometrists, is the national voice for the optometric profession, the tens of millions of patients who depend on us and the cause of access to eye health care.

Thank you very much for the opportunity to participate in today's hearing and to discuss the high quality care being provided by the nation's Doctors of Optometry to our patients, particularly those who wear contact lenses.

Optometrists provide a full range of primary eye health and vision care to our patients, including children, working adults and seniors. In my own practice, we see patients ranging in age from babies just a few months old to centenarians. Within that group, our contact lens patients range in age from two to more than 90.

Some patients wear contact lenses to correct their vision while others choose them for cosmetic reasons. Younger patients and patients with differing types of eye disease wear contacts for therapeutic reasons. It's for this group that contact lenses are sometimes not just the best option to have functional vision; they are the only option to achieve functional vision.

The AOA represents optometrists practicing across the full spectrum of eye care delivery, including private offices, retail settings, health centers, clinics and hospitals. Other doctors work in health agencies or are engaged in academic research and teaching.

My own office's main focus is on management and treatment of all vision related problems and eye diseases. As a team of four primary eye care physicians, we regularly see patients with conjunctivitis, cataract, glaucoma, diabetic retinopathy and macular degeneration. Also, we perform surgery for lid procedures as well as laser surgeries for glaucoma and secondary cataract.

Often we are working closely with our ophthalmologist colleagues to ensure that every patient gets the care he or she needs. Many ophthalmology practices also prescribe and dispense contact lenses for the same reasons optometrists do, and there is considerable agreement between the respective national organizations on appropriate patient care, eye health and consumer safety concerns.

The advancement of optometry to the role of the nation's frontline provider of eye health care services is tied to advances in the scope and quality of optometric education. It includes four years of undergraduate pre-medical education and successful completion of four years of optometric education – including didactic and clinical studies – at an accredited U.S. college of optometry. A one to two year residency may be pursued, commonly in specific areas of study such as pediatrics, vision rehabilitation, hospital based care and care of contact lens patients. There are also increasing opportunities for post-graduate fellowships. Board certification for optometry is also a recognized credential and the Maintenance in Certification program is approved for use in Medicare quality and performance incentives.

Optometric education is certified by the Accreditation Council on Optometric Education (ACOE), a panel recognized by the U.S. Department of Education. All Optometrists must successfully pass national and state board examinations and secure and maintain state licensure.

Given the topic of today's hearing and the AOA's role in educating the public, it's essential to state that contact lenses have been recognized in law and regulation since the 1970s as a medical device. A doctor's supervision and care for their proper and safe use is required. However, since contact lenses are so widely and successfully used by consumers, I've been asked from time to time why physician supervision is needed and what it consists of.

It is important to note the great deal of information in the lay press as well as scientific literature addressing the fact that a patient's vision and overall health are at risk with improper lens wear, care or fit. In fact, the consequences can be severe and permanent.

In my own experience, I've seen unsupervised or non-prescribed contact lens use result in:

- **Corneal neovascularization** – A corneal condition where oxygen deprivation and corneal stress cause abnormal blood vessels to grow into the normally clear, transparent cornea. This is a permanent/irreversible condition that will continue to cause increasing sight threatening damage unless detected and resolved.
- **Giant papillary conjunctivitis** – This is a very uncomfortable condition and not only makes it difficult to wear contacts over time but also makes it uncomfortable for the patient when they are not wearing lenses due to the damage and scarring that occurs on the inside surface of the lids. It is caused by a variety of reasons, all having to do with the fit of contact lenses as well as the material from which the contact lenses are manufactured.
- **Corneal infection, ulcer, infiltrate/inflammation** – Can occur due to the improper fit of the contact lenses as well as bacteria or fungal accumulation on the surface of the lens due to abuse of the correct wearing schedule, contact lens cleaning and care, or the use of a contaminated solution or cosmetic.
- **Corneal scarring** – A result of any of those things I just mentioned and it's similar to having a large blurred spot on a window that cannot be removed. The only cure in some cases is a corneal transplant – which I consider to be a very last resort for patients. Within the past year the doctors in our office have treated two patients with significant, essentially blinding scarring; a direct result of

improper contact lens wear. In both cases, the only resolution was a corneal transplant. Corneal transplants are expensive, painful and sadly, rarely leave the patient with vision as clear as they had before the incident (which brought about the need for the transplant.)

- **Permanent loss of vision** – Sometimes loss of vision can be reversed with discontinuation of the contact lens and medical treatment. Sometimes special types of therapeutic hard contact lenses can resolve vision issues but can be uncomfortable for the patient. Sometimes vision loss simply cannot be reversed by any means

As an eye doctor, what I find so profoundly tragic is that the majority of these situations are preventable.

Doctors have several criteria to evaluate patients for contact lenses to be sure they are safe and effective for long term vision and health. I'm pleased to offer a brief review of the criteria and steps to fitting contact lenses:

a. Patients will inquire about contact lenses either before or after a comprehensive eye examination. If they don't inquire and they are candidates for healthy contact lens wear, doctors will commonly ask if they prefer to wear glasses or contact lenses or if they prefer other refractive options, so these can be considered during the examination.
b. A comprehensive eye exam is usually done first (if not completed within the last 12 months) to rule out any eye disease or potential vision problems and to determine the best corrected visual acuity (BCVA) refraction -spectacle and/or contact lens prescription. During this time, corneal health is also evaluated, along with lid hygiene and general tear assessment. Once the comprehensive eye exam is complete, a contact lens fitting is the next step.
c. A full evaluation of the tear film and corneal surface are completed to determine dry eye, tear osmolarity and tear evaporation rates as a first indication of the lens material that may be most suitable for the patient. For example, a faster tear evaporation rate (less than 10

seconds after blinking) may require a lens with lower required water content to remain comfortable and healthy for the patient (it won't absorb all the tears and will leave some leftover with each blink for lens movement).

d. Measurements of the corneal surface (the front of the eye surface that the contact sits on) are done to determine curvature and minimum patient diameter requirement for the lens.
e. A determination is made regarding the most compatible lenses and lens types for the patient with the following considerations:
    i. Oxygen transmission
    ii. Water content
    iii. Lens thickness
    iv. Corneal curvature
    v. Corneal diameter
    vi. Prescription needs available (Myopia- nearsightedness, Hyperopia – farsightedness
    vii. Toric fitting needs - astigmatic/astigmatism parameters of the lens to meet visual specific prescription needs)
    viii. Specialty fit lens needs- might include but are not limited to, specialty gas permeable lenses for the treatment of corneal thinning problems (Keratoconus) and temporary post-surgical or pharmaceutical delivery lenses and amblyopic needs.
    ix. Extended wear versus daily wear is determined based on the patient's needs and ability of the patient to be compliant with care of the lenses.
    x. Determination of the lens use and environment in which the lenses will be worn- dusty work environment, dry office spaces, near vision work (at a desk), far vision work (a driver), and whether they will be worn with or without spectacle lenses over the contact lenses.
f. A trial fit is then performed. Doctors may choose several lens types by various lens manufacturers to try on the patient's cornea for best fit and comfort. Once the lens is on the cornea, we examine the fit using a biomicroscope (slit lamp), and we look for the following:

i. The lens needs to move on the eye – it cannot be too tight on the cornea, because the cornea has no blood vessels and uses the tear and atmosphere to obtain nutrients and oxygen. Lens movement is needed to pump an adequate amount of tear liquid under the lens with each blink.
ii. The lens can't be too loose, or too flat on the eye, or else the lens will move too far out of place with each blink, causing poor vision and discomfort.
iii. If the patient has astigmatism, then the astigmatic power must be located in the proper axis (area for power) and return to that location after each blink.
iv. The lens has to not absorb all the tears (low enough water content) to remain comfortable for longer wear.
v. The lens surface is examined to determine whether there are excess protein deposits on the lens from the tears. Protein bonds/adheres to the lens surface and can eventually cause problems to the inside lids. If deposits are seen early, then a lens with a different coating may be considered.
vi. Visual acuity is tested again to determine if slightly more or less power is needed for the "best controlled visual acuity.
vii. At this point, the best "first" lens for the patient is determined and we are ready to dispense the lenses.

g. Prior to dispensing the lenses, patient education must take place either by the doctor or office technician to teach the patient about lens care – how to insert the lenses, apply makeup when worn, and lid and hand hygiene for handling lenses.
i. We review insertion and removal of lenses and observe the patient completing this several times to be sure they can wear the lenses correctly (right side out for a soft lens) and most importantly can remove them safely when needed.
ii. We review lens care – how to apply wetting solution for insertion and how to wash and store a daily lens.
iii. We provide a fitting schedule to the patient to build up their wear time for comfort and corneal health – usually several hours to all day and/or extended wear use.

iv. We review supplemental tear types and use with the patient (when to use, how to use, what types are compatible with the lens, i.e., preserved, non-preserved tears).
v. We ascertain smoking status of the patient, including exposure to second-hand smoke. We provide information on increased prevalence of adverse contact lens events to the patient along with smoking cessation information.
vi. W provide warning and risk information to the patient so they know what to look for in case they have problems - signs of inflammation, discomfort, and eye discharge versus normal tearing (signs of infection versus normal tearing).

h. A follow up visit with the patient is scheduled to check for longer wear fit and eye health. This is a fast but very important doctor visit to determine whether the lenses are *compatible* with the patient's cornea: the lens is comfortable for the time the patient wears the lenses, they are remaining in place but retaining movement over wear time (not becoming tight with time), the lenses don't have excessive protein buildup, and the patient is not showing any signs of inflammation or infection (patient exhibits properly handling the lenses).
i. At this point in time, we determine the final lens prescription – will it be the first lens we have fit onto the patient, or is another lens type or lens size/material needed?
j. We write the final lens prescription and present it to the patient, which includes the manufacturer's name, the base curvature numbers, the diameter and the prescription/power of the lenses and an expiration date of the prescription.

Accordingly, my colleagues and I want and, frankly, insist on the very best contact lens products to meet our patient's needs. There have been historic innovations in these medical devices over the last three decades which I believe have benefitted patients in three key ways:

- First, innovation in the contact lens industry has enabled more patients to use contact lenses for a greater proportion of their vision needs. Because of innovations in materials and designs, many patients who were simply not

correctable with conventional eyeglasses now can experience normal vision with contact lenses.

- Second, innovation has improved the quality of contact lenses so that they are easier for patients to use with less risk of harm to the eye. We now have a large variety of true daily disposable lenses (lenses that are worn for one day and then disposed of as well as improvements in lenses that can be safely worn for up to 30 days without removal. Each of those technologies fills significantly different needs for the patients who use them. These quality improvements help with comfort, safety and compliance. But oversight from the patient's eye doctor remains a critical component to success and safety of contact lenses. Simply put, while contact lens choice is greater than ever, all contact lenses do not meet all patient requirements. It's our job to match the appropriate lens with each patient's individual needs. .

- Third, innovation has created healthy competition among contact lens manufacturers to bring higher quality products and competitive pricing to consumers. As a doctor, I observe that there are more choices than ever before that I am able to discuss with my patients.

The priority for the AOA is to support best practices and high standards to benefit the tens of millions of Americans who entrust their vision and eye health to my colleagues and to me. On the subject of competition generally, the AOA believes strongly that competition in the contact lens industry is positive and needed.

As I understand it, I share this table with executives representing the largest manufacturer of contact lenses in the United States and the largest seller of contact lenses in the world. They are in a better position than am I to describe and discuss their own pricing strategies, marketing initiatives and business objectives. Suffice it to say that in my experience of over thirty years of prescribing these devices, my contact lens patients have never had more choices, products of a higher quality or greater affordability in their options.

Using my practice as an example, we have four ODs and currently use contact lenses on a monthly basis from typically 10-15 manufacturers, each with multiple

lens types and parameters. My colleagues and I make independent, patient-centered decisions on which lens type and parameters are the best for the patient in question, depending on the patient's needs. We then work with the patient to help achieve the best outcome without regard to any other factor.

More broadly on the issue of competition, I know that the Federal Trade Commission (FTC) released a report in February 2005, which reached the conclusion that the market for contact lenses is highly fragmented and competitive. The FTC report also concluded that optometrists prescribe multiple brands of contact lenses. This is our understanding as well – optometrists prescribe the lens that is best of the patient and select from among many brands. We've seen nothing that calls into question these findings nor anything that would cast them in a different light, though we will listen carefully to the testimony and discussion today.

The health, well-being and safety of our patients is the foundation of my practice and the practices of AOA members from coast to coast. As the national voice of 36,000 Doctors of Optometry – notably including Senator John Boozman, a longtime Doctor of Optometry in private practice and AOA and Arkansas Optometric Association member – and the tens of millions of patients we serve, we work to educate the public about the safe use of contact lenses as a medical device and the dangers posed by unscrupulous sellers.

In 2005, at AOA's urging, Congress passed and the President signed legislation [Public Law 109-96] that closed a harmful loophole in Federal law by requiring even non-corrective contact lenses to be regulated as a medical device. This has helped safeguard the eye health and vision of many young Americans who were easily and openly purchasing and using decorative contacts without the care and instruction of an optometrist or ophthalmologist.

This significant safeguard and stepped-up enforcement is no guarantee for our patients though. As a member of the state board of examiners in Oklahoma I continue to see patients grievously harmed after purchasing contact lenses from illegal vendors.

With consumers still facing risks, the AOA is partnering with the Food and Drug Administration on a new national public health awareness campaign to alert teenagers and young adults to the dangers connected to the improper use of

contact lenses. I commend the FDA for listening so closely to concerned optometrists and the AOA and for making this urgent public health problem the priority it needs to be. For up to date information on the FDA-AOA contact lens safety campaign, please visit FDA.gov or directly access the recent consumer update at www.fda.gov/ForConsumers/ConsumerUpdates/ucm402704.htm.

Again, thank you for the opportunity to be here and participate in today's important discussion. I look forward to answering any questions you may have.

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

STATEMENT OF GEORGE SLOVER
SENIOR POLICY COUNSEL
CONSUMERS UNION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
SENATE COMMITTEE ON THE JUDICIARY

ON

PRICING POLICIES AND COMPETITION IN THE CONTACT LENS INDUSTRY: IS WHAT YOU SEE WHAT YOU GET?

July 30, 2014

Good afternoon, Chairwoman Klobuchar, Senator Lee, and Members of the Subcommittee. I am senior policy counsel for Consumers Union, the public policy and advocacy division of Consumer Reports. We appreciate the opportunity to testify today.

We are an independent, expert non-profit organization whose mission, since our founding in 1936, has been to work for a just, safe, and fair marketplace for consumers, and to empower consumers to protect themselves. Promoting product safety, square dealing, and competitive alternative choices for consumers are all key parts of that mission. And we do not see any reason why any of those goals should be compromised in the name of pursuing any of the others. They are all important.

With regard to contact lenses, we have helped promote product safety by, for example, calling attention in our magazine to the 2011 recall by CooperVision of its Avaira Sphere lenses, calling attention to the need for improved warning labels on contact lens cleaning solution, and publishing contact lens safety tips.

We helped promote consumer choice for contact lenses by advocating on behalf of the Fairness to Contact Lens Consumers Act, which became law in 2003. One of the key things that law did for consumers was to require

optometrists who prescribe contact lenses to give the patient a copy of the prescription, without charge, and without the patient having to ask for it. That allows the patient to shop around for the best price as well as the best service. Before that law, many optometrists were making it very difficult for their patients to shop around, tying the medical care to purchase of the product from the optometrist.

It is disheartening, after the efforts involved in getting the 2003 law enacted, and closing down that pathway to denying consumer choice, to now see another avenue opened up and traveled down to achieve the same anticompetitive result.

Consumers Union supported efforts in Congress to stop the gradual erosion of the per se antitrust prohibition against vertical price fixing, aka resale price maintenance or RPM. We saw the per se rule as a bulwark protector of retail competition and consumer choice in the marketplace.

So we were disheartened when the Supreme Court overruled the 100-year-old *Dr. Miles* precedent and the per se prohibition in its 2007 *Leegin* decision, and held that henceforth vertical pricing arrangements would be

examined under the rule of reason. We believe the kinds of legitimate business goals the Supreme Court cited in abandoning *Dr. Miles* can be effectively achieved without denying the rights of consumers to shop for a better price, and the rights of retailers to offer one.

We recognize that the equally long-established legal precedent in *Colgate* allows a manufacturer to unilaterally set retail price as one of the conditions for providing its product to a retailer – if it is truly unilateral. But in fundamental ways, it runs counter to a manufacturer's actual competitive profit-making interest to impose pricing terms that stand to reduce its retail sales, and its profits, by putting its product out of reach for consumers who can't afford the higher markup at retail.

In a competitive market, if one manufacturer tries to impose a rigid pricing policy like this, there's a natural temptation for another manufacturer to step in and take competitive advantage, and give consumers looking for a more affordable alternative what they want. Generally, a policy like this makes sense for a manufacture only if it can be confident that other manufacturers will be taking similar action, and won't be taking competitive advantage.

So it's important not to just accept at face value a manufacturer's characterization that it is acting against its profit-making interest unilaterally – particularly where its competitors seem to be joining in, and where others in the marketing chain – the full-price retailers – are getting a clear benefit.

Whether what's being presented as a unilateral pricing policy actually amounts to an antitrust violation, under *Colgate* and now under *Leegin*, is a question for antitrust enforcers, and the courts, to determine, based on evidence and the more involved market and economic analysis now required under the rule of reason. But it certainly would seem to warrant a closer look.

In any event, whether the new practice constitutes an antitrust violation from a legal standpoint, from a practical standpoint it is anti-competitive to refuse to allow discounting. Consumers are denied more affordable alternatives. They pay more than they need to, and sellers who would like to make those affordable alternatives available are denied the opportunity to do so. That's not good for consumers, however you look at it.

Buying contact lenses at Costco was one of our top 15 money-saving tips on the Consumer Reports 2011 ShopSmart list. And we have continued to encourage consumers to shop for value. It looks like contact lenses may no longer be eligible for such a list in the future.

One interesting aspect here is that the justification commonly put forward for tolerating RPM – that the pricing requirement helps prevent so-called "free-riding," where the discounter takes advantage of the extra consumer services provided by the full-price retailer, without having to pay for them – is not present here in the same way.

Here, the consumer needs to go see an optometrist – or ophthalmologist – to get the correct prescription, based on an appropriate eye examination, for which there is a charge. The 2003 law requires the optometrist to give the patient a copy of the prescription, but it doesn't dispense with the legal requirement that there be a prescription.

So here, the consumer needs to go to the optometrist to get those extra consumer services, and pays for them separately from the contact lenses. So in that sense, even if you accept the free rider idea in general – and there are

good reasons to be skeptical – but even if you accept it, it's not really an issue here.

A consumer needs to get an examination to get a prescription, wherever he or she takes the prescription to get it filled. And wherever the prescription is filled, if the consumer has discomfort or difficulty wearing contact lenses, wherever they came from, the logical thing for the consumer to do is to call the optometrist for an appointment.

In short, there's no reason for the provision of professional eye care services to be tied to the sale of contact lenses. Technically, under the 2003 law, they are not tied together. But the new unilateral pricing restrictions stand to result in much the same tying effect. Consumers will still have the right to shop around, but they will no longer be able to save money by doing so.

Thank you for bringing attention to this important consumer issue.

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Questions for the Record: Senator Amy Klobuchar

For Dr. Cockrell:

1. Do you think an increase in the price of contact lenses would result in patients using contact lenses beyond their recommended duration and risking potential harm to their eye health?
2. At the hearing, you mentioned that your office orders from 10 to 15 different manufacturers. What percentage of the contacts your office orders come from the four largest manufacturers – Johnson & Johnson, Alcon, CooperVision, and Bausch & Lomb?

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Questions for the Record: Senator Amy Klobuchar

For Dr. Knight:

1. Under this policy, I understand that retailers can't offer a product priced below Johnson & Johnson's minimum retail price. But if a retailer offered and sold the product at that specified price, could they also offer their own store coupons, rebates, or promotions such as bundling discounts or volume discounts? Would eye care professionals still be in compliance if they offer a free eye exam, or accept a rebate towards the cost of an eye exam, if the patient purchases the contact lenses from them?
2. How do you plan to enforce the unilateral price policy? Will any costs associated with enforcing the policy be passed onto consumers?

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Questions for the Record: Senator Amy Klobuchar

For Mr. Slover:

1. Do you believe that the *Leegin* decision opened the door for more minimum retail price policies such as these UPPs? Is there any empirical evidence about how minimum retail price policies impact consumer prices?
2. CooperVision is the only major manufacturer not setting minimum retail prices. Is CooperVision at a disadvantage and risking eye care professionals not prescribing their product, or do they have an advantage because they can gain market share from consumers who want to be able to shop around for the best prices?

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Questions for the Record: Senator Amy Klobuchar

For Mr. Zeidner:

1. Do contact lens prices tend to remain static or do retailers constantly change them to respond to each other and try to win over new customers and retain existing consumers?
2. CooperVision is the only major manufacturer not setting minimum retail prices. Are prices for competing products higher or lower than products from other companies that are subject to minimum resale prices?

American Optometric Association
1505 Prince Street, Alexandria, VA 22314 (703) 739-9200

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Questions for the Record: Senator Amy Klobuchar

Responses Submitted by Dr. David A. Cockrell, President of the American Optometric Association

August 20, 2014

1. Do you think an increase in the price of contact lenses would result in patients using contact lenses beyond their recommended duration and risking potential harm to their eye health?

I'm not aware of research that would support such a conclusion. My own experience is that there are typically a number of factors involved when a person disregards the recommendations for proper use of contact lenses. As a practitioner, I am in favor of innovation in contact lens features and quality, which helps all patients. To the extent a manufacturer's pricing policy supports innovation, I think that is a good thing. Also, it was my understanding that the testimony at the July 30 hearing was not conclusive on the issue of whether UPPs would tend to raise product prices overall. I recall that the testimony of the Johnson & Johnson representative indicated that most patients would pay lower prices under the UPP. In any case, if concerns were raised about compliance with usage recommendations arising from cost or individual financial considerations, I could explore other options with the patient, including spectacles which can be a less expensive but very effective choice.

The bottom line is that any failure to comply with usage recommendations is dangerous and risks potential harm to the patient's eyes. Patients who push the boundaries of lens wear and safety are the patients who most need an eye doctor to educate and counsel them. Having a good relationship and trust with the doctor is key. Part of the role of the eye doctor is to instruct patients about the safety hazards of extending the lenses beyond their best timeframe and coach them on the best ways to care for the lens and their vision. Risks such as corneal debris, protein buildup, lens edge breakdown and other lens quality issues are tied to poor patient maintenance practices and can eventually lead to their inability to wear any lens, or worse, lead to inflammation, infection, corneal trauma and sometimes vision loss. Often, patients who fail to follow recommendation related to duration of use also push the boundaries of solution use, lens sterilization, and hours of wear per day, week or month. These safety and hygienic discussions are routinely initiated by the eye doctor and they are important to the patient's general visual health. Educating patients on lens use and care – as is done face to face in my office and the offices of my colleagues across the country every day-- is just as important as the right fit.

2. At the hearing, you mentioned that your office orders from 10 to 15 different manufacturers. What percentage of the contacts your office orders come from the four largest manufacturers –Johnson & Johnson, Alcon, CooperVision, and Bausch & Lomb?

As stated during the hearing, lens choice is based on the parameters that best meet the individual patient's needs, including heath and eye safety, visual acuity with the lens and compliance capabilities. In my practice, the total for the four manufacturers is between 60-70%. Johnson & Johnson is the largest, followed by CooperVision, Alcon and Bausch and Lomb.

Just to clarify, the 10 to 15 number was for any given month. There are approximately ninety different contact lens manufacturers selling hundreds of different lenses, and over the course of a year my office orders from more than 15 different manufacturers. A lot of the smaller manufacturers sell specialty lenses which are not commonly used, but which are essential for the patients who require them.

Thank you.

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

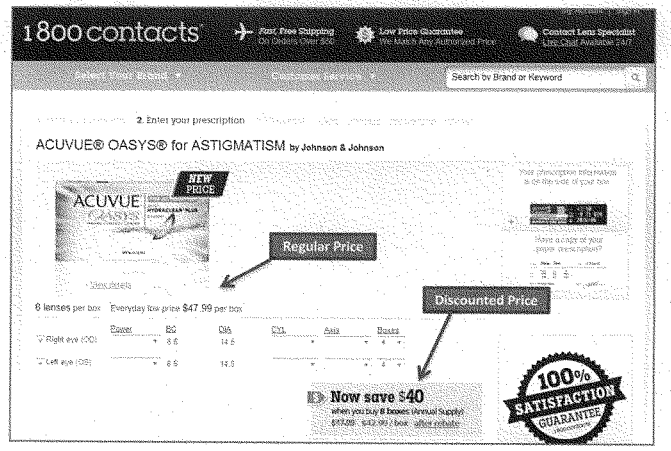
Questions for the Record: Senator Amy Klobuchar

For Dr. Knight:

1. Under this policy, I understand that retailers can't offer a product priced below Johnson & Johnson's minimum retail price. But if a retailer offered and sold the product at that specified price, could they also offer their own store coupons, rebates, or promotions such as bundling discounts or volume discounts? Would eye care professionals still be in compliance if they offer a free eye exam, or accept a rebate towards the cost of an eye exam, if the patient purchases the contact lenses from them?

   RESPONSE:

   A. Retailers maintain the right to offer store coupons, rebates or promotions (discounts) under the ACUVUE® Unilateral Pricing Policy (UPP), provided that the final net price for the product covered by the UPP remains at or above the UPP Minimum Retail Price, after discounts are applied. *For example: 1800contacts currently sells ACUVUE® OASYS® for ASTIGMATISM for $47.99 per box. The UPP Minimum Retail Price is $40.00. Under the terms of the UPP, 1800contacts could offer a discount of up to $7.99 per box from their current price. 1800contacts does offer a $40 savings on Annual Supply purchases (price of $42.99 when 8 boxes are purchased) in-compliance with the UPP. They could also offer an additional $23.92 in savings on an Annual Supply of this brand, and remain in compliance with the ACUVUE® UPP.*



   B. Johnson & Johnson Vision Care, Inc. does have a "Combined Product Discount" exception under the ACUVUE® UPP. When an annual supply of an ACUVUE® UPP product is sold, the retailer is subject to no pricing restrictions on other optical products, including eye exams. The ACUVUE® UPP product price is required to stay at or above the Minimum Retail Price, and clearly shown this way on the customer receipt and in any advertising of this type of promotion.

C. Eye Care Professionals, or any retailer that offers eye exams, could discount the cost of an eye exam per the above Combined Product Discount provision, subject to the same customer receipt and advertising guidance.

2. How do you plan to enforce the unilateral price policy? Will any costs associated with enforcing the policy be passed onto consumers?

RESPONSE:

A. Johnson & Johnson Vision Care, Inc. has three separate processes for proactive Market Price monitoring. First, there are internal resources (J&J employees) dedicated to researching, confirming and notifying sellers of UPP violations. In addition, Johnson & Johnson Vision Care, Inc. has retained two (2) independent firms to assist in monitoring Market Prices. The first of these firms monitors all on-line pricing and advertising, the second conducts in-store price validations nationwide. All customer types, regardless of size, geography, distribution method, etc. are included in one or more of these monitoring efforts. If a customer is found to be in violation of the UPP, then Johnson& Johnson Vision Care, Inc. will no longer sell products subject to the policy to that customer.

B. Johnson & Johnson Vision Care, Inc. does not sell ACUVUE® products directly to consumers. Neither our direct customers nor consumers will bear any costs associated with the UPP enforcement processes.

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

Senate Subcommittee on Antitrust, Competition Policy and Antitrust
"Pricing Policies and Competition in the Contact Lens Industry:
Is What You See What You Get?"

Questions for the Record: Senator Amy Klobuchar

For Mr. Slover:

1. **Do you believe that the *Leegin* decision opened the door for more minimum retail price policies such as these UPPs? Is there any empirical evidence about how minimum retail price policies impact consumer prices?**

Answer:

Yes, *Leegin* did open that door.

As a threshold matter, much depends on the particular facts involved in a particular restrictive pricing policy. If the pricing policy is genuinely instituted by each manufacturer unilaterally and independently of any competing manufacturer, and independently of any retailer, then the *Colgate* doctrine would already provide a defense under the antitrust laws, regardless of the harm to consumer pocketbooks. But if there is interaction between two or more manufacturers, or between a manufacturer and one or more retailers, in either the development and implementation of the policy, or in the maintenance or evolution of that policy over time, then there is an antitrust question.

And that antitrust question has unfortunately become murkier as a result of *Leegin*. There now has to be a more elaborate – and expensive – economic analysis of the market effects to substantiate precisely how the particular prohibition on discounting has resulted in a net harm to consumers. The higher expense means, as a practical matter, that fewer restrictive pricing policies will be investigated and challenged.

It should be noted, however, that the reason the *Leegin* majority gave for overturning the per se prohibition against minimum resale price maintenance agreements was that it had determined that the 100-year-old rationale for the per se prohibition was no longer an adequate justification under current economic understanding. (Four Justices disagreed.) The majority's decision did not make those agreements lawful; instead, it subjected them to that more elaborate economic analysis, under the rule of reason. It left open the door that with more experience judging such agreements under the rule of reason, a new understanding might emerge, a new basis for recognizing that indeed such agreements are inherently anticompetitive and that the per se prohibition should be reinstated.

We hope that happens. That is likely to take some time, however. And in the meantime, there is no doubt that more of these agreements will go unchallenged, and more consumers will be denied the benefits of competition at the retail level, where they shop.

As to empirical evidence, one recent empirical study, published in April 2013 by two economists at the University of Chicago, Alexander MacKay and David Aron Smith, focused on the effects of a switch from per se prohibition to rule-of-reason analysis for RPM under *Leegin* and found, as one might expect, that prices rose and output decreased, both resulting in harms to consumers that outweighed the potential benefits, if any, to consumers. An updated version of their study, from June 2014, can be found at http://home.uchicago.edu/~/mackay/MacKay%20and%20Smith%20(2014)%20-%20The%20Empirical%20Effects%20of%20MRPM.pdf.

2. CooperVision is the only major manufacturer not setting minimum retail prices. Is CooperVision at a disadvantage and risking eye care professionals not prescribing their product, or do they have an advantage because they can gain market share from consumers who want to be able to shop around for the best prices?

Answer:

When a restrictive pricing strategy becomes widespread, whether it becomes riskier for those who do not go along, or more advantageous for them, may depend on where the leverage points are and how they are exercised. If consumers who seek better value are able to call the shots, then they could demand from their doctors a prescription tailored to a manufacturer whose contact lenses can be obtained at a discount. But if those eye doctors who are benefitting from the restrictive pricing policy, and who want to discourage discounting, are able to call the shots, then they could refuse to write prescriptions for the contact lenses that can be obtained at a discount. Or more subtly, they could strongly recommend against those contact lenses, or could simply neglect to mention them in the options they tell their patients about. Under the current system, the eye doctors have a lot of built-in advantages as to leverage that will be difficult for all but the most determined consumers to overcome.

August 6, 2014

Dear Madam Chairwoman and Senator Lee:

Thank you again for the opportunity to testify before your Subcommittee last Wednesday. I appreciate you providing me this honor, and giving me the opportunity to share our assessment of developments in the marketplace for contact lenses.

Since the hearing, we have taken a close look at the testimony received by the Subcommittee. I have great respect for Dr. Millicent Knight, who testified on behalf of Johnson & Johnson Vision, and enjoyed appearing on the panel with her and the other witnesses. However, we remain perplexed by some of the statements made by Dr. Knight which are contradicted by information we have, or which we feel merit further elaboration.

As such, we provide for the record, the attached memorandum addressing some of those points. I would be pleased to provide additional information or respond to any questions you may have as the Subcommittee continues its review of this industry.

Sincerely,

R. Joe Zeidner
General Counsel

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Memorandum

RE: Statements made on behalf of Johnson & Johnson
Before the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights hearing: "Pricing Policies and Competition in the Contact Lens Industry: Is What You See What You Get?", July 30, 2014.

Statement: In her testimony, Dr. Millicent Knight, testifying on behalf of Johnson & Johnson Vision, suggested the company's new Resale Price Maintenance ("RPM") program is intended to, and will result in, lower consumer prices for Johnson & Johnson's contact lenses.

Response: Johnson & Johnson's RPM program sets *minimum* retail prices that retailers, including discounters, cannot sell below. In no way does this program impede a retailer's ability to set prices above that minimum price.

There is no incentive or requirement from Johnson & Johnson's RPM program for retailers to lower prices on these products. Rather, this RPM program immediately forces many retailers to increase prices.

For example, for the most popular J&J lens, Acuvue Oasys, the RPM program requires the lowest price Internet seller increase its price by 111%. The charts below compare prices advertised on June 26, 2014, versus the new RPM set minimum price for Acuvue Oasys and for J&J's 1-Day Moist and 1-Day TruEye lenses.

1 800 CONTACTS OFFICE OF THE GENERAL COUNSEL
66 East Wadsworth Park Drive | 3rd Floor | Draper, Utah 84020 | T 801 924 9800 | F 801 924 9915

Acuvue Oasys 6pk (Pre-RPM sold as 6 pk, Post-RPM only sold as 12pk)

	6 pk Pre-PRM*	6 lenses RPM Price	Increase	Percentage Increase
Lowest Internet Price	$15.99	$33.75	$17.76	111%
OptiContacts.com	$19.49	$33.75	$14.26	73%
Lens.com	$19.99	$33.75	$13.76	69%
Coastal Contacts	$23.99	$33.75	$9.76	41%
Sam's Club	$25.84	$33.75	$7.91	31%
1-800 Contacts	$25.87	$33.75	$7.88	30%
Walmart	$31.48	$33.75	$2.27	7%
Average OD Price	*28.11/**$34.36	$33.75	$5.64 / -$.61	20% / -2%

*Represents the net price per box for annual supply, after published rebates or discounts
**Represents the net price per box for annual supply, before rebates or discounts

1 Day Moist Pre-RPM 30 pk, Post-PRM 30pk

	30 pk Pre-PRM*	30 pk RPM Price	Increase	Percentage Increase
Lowest Internet Price	$18.48	$33.00	$14.52	79%
OptiContacts.com	$18.49	$33.00	$14.51	78%
Lens.com	$18.50	$33.00	$14.50	78%
Coastal Contacts	$19.99	$33.00	$13.01	65%
Sam's Club	$21.88	$33.00	$11.12	51%
Walmart	$25.00	$33.00	$8.00	32%
1-800 Contacts	$25.82	$33.00	$7.18	28%
Average OD Price	*27.91/**$32.08	$33.00	$5.09 / $.92	18% / 3%

*Represents the net price per box for annual supply, after published rebates or discounts
**Represents the net price per box for annual supply, before rebates or discounts

1 Day TruEye Pre-RPM 90 pk, Post-PRM 90pk

	90 pk Pre-PRM*	90 pk RPM Price	Increase	Percentage Increase
Lowest Internet Price	$51.65	$82.50	$30.85	60%
OptiContacts.com	$61.95	$82.50	$20.55	33%
Lens.com	$62.99	$82.50	$19.51	31%
Sam's Club	$66.78	$82.50	$15.72	24%
1-800 Contacts	$67.49	$82.50	$15.01	22%
Coastal Contacts	$79.99	$82.50	$2.51	3%
Walmart	$75.00	$82.50	$7.50	10%
Average OD Price	*71.44/**$83.94	$82.50	$11.06 / -$1.44	15% / -2%

*Represents the net price per box for annual supply, after published rebates or discounts
**Represents the net price per box for annual supply, before rebates or discounts

Dr. Knight's testimony that this is about reducing costs for consumers is inconsistent with the well-established purpose of a minimum RPM program; which is to increase retailers' profit margins by eliminating retail price competition (*e.g.*, eliminating the substantial discounts often offered by online and big box retailers).

The result of such a program is naturally higher prices to consumers, especially for primarily cost-conscious consumers who are the most likely to search for lower prices provided by online and big box retailers. It is not logical to conclude that policies intended to *decrease* competition on the retail level will lower prices. Rather, it is *increased* competition which generally produces lower prices and more options for consumers.

Response: The President of Johnson & Johnson Vision Care, Laura Angelini, did not state that the goal was to lower consumer prices when she described the RPM program to industry press. Rather, in *Vision Monday,* on July 2, 2014, Ms. Angelini "described this new pricing as a 'holistic multifaceted pricing policy to refocus the conversation between the doctor and the patient on eye health and product performance rather than price. This gives the optometrist the ability to improve his or her capture rate in the office,' she told Vmail. '**Now the patient has no incentive to shop around.**'"[1]

[1] *Johnson & Johnson Vision Care Introduces Unilateral Pricing Policy on 'Strategic Brand' CLs, Discontinues Some Acuvue Brands*, Vision Monday (July 2, 2014), available at http://www.visionmonday.com/vmail-headlines/article/49205/?utm_source=vmail&utm_medium=email&utm_campaign=2915_vmail_headlines&vmemail=s.tacchini@mido365.com (last visited Aug. 5, 2014) (emphasis added).

Her statements make clear the goal of the RPM program is to eliminate retail price competition for Johnson & Johnson's contact lenses. As a result, eye care providers (who typically have the highest retail prices) can capture more sales from consumers by prescribing Johnson & Johnson's contact lenses. Attached is a copy of the VisionMonday article.

Response: In a communication sent to the optometric community on June 24, 2014, Ms. Angelini similarly did not mention or otherwise support the argument that lowering consumer prices is the goal of the RPM program. Rather, in her "Dear Eye Care Professional" letter, she informed optometrists that "to further demonstrate our commitment to prescribers. . . many of you will begin to hear about our new pricing strategy . . . [that] includes a Unilateral Pricing Policy (UPP)". Nowhere in the letter is there any discussion of lowering consumer prices. Attached is a copy of the "Dear Eye Care Professional" letter.

Statement: In her submitted testimony, Dr. Knight states: "The Minimum Retail Prices within our UPP are set below the current average market prices for the majority of consumers who purchase these brands."

Response: Dr. Knight's statement relies on the source "Q1 2014 ABB Price Monitor Before Manufacture Rebates." What Dr. Knight's testimony refers to as the "Average Market Prices" actually appear to be the "Average Private Practice" prices (*i.e.*, the average retail price of private eye care providers). It does not reflect the prices charged by alternative retailers, including those charged by major discounters like Walmart, Costco, 1-800 CONTACTS, Coastal Contact, Lens.com, and many others. It also appears not to include or reflect prices paid by consumers who when purchasing lenses from their eye doctors, take advantage of available rebates.

The ABB report provides information on retail prices in the first quarter of 2014 for private ECP practices, 1-800 CONTACTS, and Walmart. The chart below compares the prices reported by ABB with the new minimum prices required by Johnson & Johnson.

Retail Prices in First Quarter 2014 (as Reported by ABB Optical Group) Compared to New Johnson & Johnson Minimum Required Retail Prices				
	Average Private Practice	1-800 CONTACTS (Annual Supply)	Walmart	New J&J Required Minimum Price
Acuvue Oasys (6 pk)	34.74	24.62	31.48	67.50 *(for a 12 pack; 6 pack discontinued)*
Acuvue Oasys (24 pk)	121.77	98.46	113.00	110.00
1 Day Acuvue Moist (90 pk)	69.98	57.49	59.88	63.50
1 Day Acuvue Moist (30 pk)	31.07	26.66	24.88	33.00
1 Day Acuvue Moist for Astigmatism (30 pk)	34.45	24.57	28.92	34.50
1 Day Acuvue TruEye	81.46	73.12	74.88	82.50
Acuvue Oasys for Astigmatism	47.60	37.37	39.92	40.00
Source: ABB Optical Group, Soft Lens Retail Price Monitor (First Quarter 2014); Johnson & Johnson, Acuvue Brand Contact Lenses, Unilateral Pricing Policy.				

Thus, the ABB's report — the source relied upon by Johnson & Johnson — shows that the new minimum retail prices are substantially above most of those charged by 1-800 CONTACTS and Walmart for Johnson & Johnson's contact lenses. For example,

- For the Acuvue Oasys 24 pack, the new minimum prices will result in more than a $10 (12%) increase for customers of 1-800 CONTACTS who purchase an annual supply.
- For the 1 Day Acuvue Moist 90 pack, the minimum price will result in more than a $5 (10%) increase for customers of 1-800 CONTACTS who purchase an annual supply; and more than a $3.50 (6%) increase for customers of Walmart.
- For the 1 Day Acuvue Moist 30 pack, the minimum price will result in more than a $8 (33%) increase for customers of Walmart; and more than a $6 (24%) increase for customers of 1-800 Contacts who purchase an annual supply.
- For the 1 Day Acuvue Moist for Astigmatism 30 pack, the minimum price will result in nearly a $10 (40%) increase for customers of 1-800 Contacts who purchase an annual supply; and almost a $5 (19%) for customers of Walmart.

Notably, the ABB analysis, on which J&J based its statements, does not include many other online or discount retailers that also regularly offer substantial discounts from the prices charged by eye care providers. Johnson & Johnson appears to have set its minimum prices near the average previously charged by private eye care providers despite data indicating that eye care providers typically charge much higher prices than online and discount retailers.

There is also no requirement or any incentive under the RPM program for eye care providers or any other retailer to lower their prices to the new RPM price. Rather, as the RPM program forces discounters from the marketplace, eye care providers will gain more pricing power, and could increase their prices even further down the road.

Response: Dr. Knight's statement refers to "the majority of consumers who purchase these brands." Based on the above analysis, it appears her reference to "the majority of consumers" means those who purchase their lenses from their eye care provider and not those purchasing from alternative retailers.

However, it should not be assumed that those who purchase from their eye care providers only purchase through that channel. It is very common in this industry for consumers to purchase their first supply of lenses from their eye care provider and their refills from alternative suppliers.

Specifically, nearly 50% of all contact lens wearers will purchase some lenses from an alternative retailer at least some time during a year, and nearly 30 percent will purchase from an online retailer. So a significant portion of the "majority of consumers" referred to by Dr. Knight may see a slight reduction in pricing when they make their initial purchase of lenses from their eye doctor, but will pay higher prices when they go to alternative retailers for their subsequent purchases during the year.

Furthermore, many of the "majority of consumers" do not actually pay out of pocket for the full price of their initial purchases of lenses. According to a recent survey, nearly 60% of contact lens wearers aged 18-49 have vision insurance, and nearly 40% of those consumers use insurance toward the purchase of their lenses, insulating them in whole or in part from prices charged by private practices.

Those consumers whose insurance covers only the initial supply of lenses may not be insulated by insurance from prices for refills. The RPM program will eliminate the ability of such consumers to shop around for a discount on those refills – the ones for which they will be paying out of their own pockets.

Conclusion: In sum, market data, J&J's comments to the optometric community and basic economics indicates that the RPM program is not intended to, and will not, reduce prices for consumers. Rather, the program will raise prices for consumers. It will:

(1) eliminate retail price competition;

(2) deny consumers who want or need to shop for their lenses based on price the ability to do so;

(3) force from the market retailers who whose business model is based on competing on price; thereby increasing the market and pricing power of high-priced eye care providers; and,

(4) provide a greater financial incentive for ECPs to prescribe Johnson & Johnson's contact lenses – which is underscored by Ms. Angelini's statements that her company's RPM program "gives the optometrist the ability to improve his or her capture rate in the office ," and will result in "the patient [having] no incentive to shop around."

Johnson & Johnson's RPM program is bad for competition and consumers. It also directly undermines, and is intended to undermine, one of the principal goals of the Fairness to Contact Lens Consumers Act (PL 108-164), which is to separate the purchase of lenses from the prescribing, and thereby increase consumers' ability to take their prescriptions out of the prescriber's office in search of lower prices and greater convenience in purchasing their contact lenses.

Sincerely,

R. Joe Zeidner
General Counsel
1-800 CONTACTS

Johnson & Johnson Vision Care Introduces Unilateral Pricing Policy on 'Strategic Brand' CLs, Discontinues Some Acuvue Brands

By Staff (/author/staff/)
Wednesday, July 02, 2014 12:27 AM

Laura Angelini, president, Johnson & Johnson Vision Care – North America.

JACKSONVILLE, Fla—Last week, in a letter addressed to eyecare professionals dated June 24, 2014, Laura Angelini, president, Johnson & Johnson Vision Care – North America, (http://www.acuvueprofessional.com/) announced the company's launch of its "Enterprise Strategy" and "roadmap for the future," part of which includes resetting the price of specific contact lens products in the U.S. according to a new "unilateral pricing policy."

Now, all wholesale customers will receive the same pricing for certain existing contact lenses already offered in the company's portfolio, Angelini told VMail. The policy applies to the company's number one reusable, Acuvue Oasys, its number one disposable, Acuvue Moist, and its 1-Day Acuvue TruEye, which Angelini described as the company's "strategic brands." The new policy also sets minimum retail pricing, which has been communicated to all its customers. In addition, manufacturer's rebates have been eliminated by building those discounts into the retail price of these legacy products rather than requiring customers to send in proof of purchase to obtain rebates.

Angelini described this new pricing as a "holistic multifaceted pricing policy to refocus the conversation between the doctor and the patient on eye health and product performance rather than price. This gives the optometrist the ability to improve his or her capture rate in the office," she told VMail. "Now the patient has no incentive to shop around."

The letter to eyecare professionals described the three areas in which the company would "demonstrate support for the profession and the professional—Prescribers, Portfolio and Preferred Partners." Within the "Prescribers" portion, the letter referenced the new pricing strategy and also introduced a new six-month supply pack of Acuvue Oasys, as a means of improving patient compliance, noting that beginning July 1, 2014, the product will no longer be available in three-month supply packs. The Oasys product portfolio also features new packaging.

The letter cited the scheduled 2015 introduction of the 1-Day Acuvue Define lens to the U.S. Already available in Asia, the contact lens is built on the 1-Day Acuvue Moist platform and adds a natural-looking luminous definition to the eye by enhancing the appearance of the iris, giving it more contrast, dimension and radiance without changing the color. Because they are not colored contact lenses but rather "add luminosity to the iris," Angelini described them as creating a new category of contact lenses. In addition, a multifocal will be added to the 1-Day Acuvue Moist family of brands.

The "Preferred Partners" section of the letter states that the company "will continue to develop solutions that further elevate the importance of the prescriber. For example, we will continue to expand the

Acuvue myAdvantage Program to include services to assist with contact lens practice management, patient education and staff support." The letter concludes with a request for feedback at customerexperience@its.jnj.com (mailto:customerexperience@its.jnj.com).

Johnson & Johnson Vision Care also announced that effective March 31, 2015, it will discontinue Acuvue Advance, Acuvue Advance for Astigmatism, Acuvue Advance Plus, as well as the Acuvue brand contact lenses that were originally introduced in 1987. Diagnostic lenses for Acuvue Advance and Acuvue Advance for Astigmatism had previously been discontinued, and diagnostic lenses for Acuvue Advance Plus will be discontinued effective Aug. 1, 2014.

Johnson & Johnson Vision Care will provide in-office tools to help doctors and staff transition patients from Acuvue Advance and the original Acuvue to the most current Acuvue technology. The company also will alert contact lens wearers by communicating the product discontinuation information on the Acuvue website (http://www.acuvue.com/). The company is also offering a reimbursement of up to $100 toward patients' fitting fees when Acuvue Advance brand family or Acuvue wearers are prescribed an annual supply of any product in the Acuvue Oasys brand family, 1-Day Acuvue Moist brand family, or 1-Day Acuvue TruEye brand contact Lenses.

"For more than 25 years, the Acuvue brand has been at the forefront of innovation, contributing to today's high standards for contact lenses," said Angelini. "Contact lens wearers continue to embrace innovative new materials, technologies, and designs that meet their vision, comfort, health and lifestyle needs. As we continue to invest heavily in research and development of new and improved products that offer benefits beyond vision correction, we have made the decision to discontinue production of some of our older technology."

Click Here to view online.

Johnson & Johnson Vision Care, Inc.

Dear Eye Care Professional,

When I last communicated with you about six months ago, I shared that Johnson & Johnson Vision Care, Inc., North America (JJVC), was in the process of carefully assessing our overall strategy so that we could best meet the needs of our customers, and asked for your feedback on what we were doing well and areas where we could improve.

Thanks to your open and candid responses, we were able to define our strategy and implement the changes and actions you told us were needed. Earlier this year, we launched our new Enterprise Strategy and roadmap for the future, with a dedicated focus on three areas you told us were important to demonstrate our support for the profession and the professional – ***Prescribers, Portfolio, and Preferred Partners***.

Prescribers
You, the eye care practitioner who prescribes our products, have our unwavering support for your clinical, business, and patient needs. In the past few months, you have told us that initiatives such as the ACUVUE® myADVANTAGE™ Program are a step in the right direction toward fulfilling our promise.

To further demonstrate our commitment to prescribers, beginning this week, many of you will begin to hear from your JJVC Sales Representative about our new pricing strategy within the United States. This includes a Unilateral Pricing Policy (UPP) for our ACUVUE® OASYS® and 1-DAY ACUVUE® MOIST® Families of Products and our 1-DAY ACUVUE® TruEye® Brand Contact Lenses. We believe the multifaceted nature of this new pricing strategy and the variety of elements that comprise the program will allow you to refocus the critical doctor/patient conversation on eye health and product performance, rather than cost. Also, by removing the complexity of rebates and building these savings into our new pricing, we believe we will be able to reach more patients with instant savings, while providing a simpler approach for everyone.

Additionally, this week we are introducing a new six-month supply pack of ACUVUE® OASYS® Brand Contact Lenses (12 lenses per box) in all available parameters. Effective July 1, 2014, we will no longer be shipping three-month supply packs (six lenses per box) of this product. In a study that captured actual product use patterns among ACUVUE® OASYS® Brand three-month and annual supply users across a four-month time period, research showed that patients with larger pack sizes tended to be more compliant in replacing their lenses bi-weekly as recommended by their doctor. Moreover, these patients had a significantly better wearing experience with respect to better comfort throughout the day, at the end of the day, and throughout the wear cycle.*

Portfolio
Since the 1987 introduction of ACUVUE®, the first disposable soft contact lens, the ACUVUE® Brand has been at the forefront of innovation, contributing to today's high standards for contact lenses. It is our goal to deliver clinically differentiated products to help you provide the best health and experience for your patients.

I know that many of you are wondering, *"What's next?"*

We are excited to share with you that in 2015 we will begin a cadence of innovation starting off by bringing 1-DAY ACUVUE® DEFINE™ Brand, the #1 contact lens within the Beauty Segment in Asia, to the United States, with a design specifically for Western Eyes. This remarkable contact lens is built upon the 1-DAY ACUVUE® MOIST® Brand Contact Lenses

platform and adds a natural-looking, luminous definition to the eye. It enhances the natural appearance of the iris, giving it more contrast, dimension, and radiance without changing the color of the eye, which will transform the definition of what a contact lens can offer you and your patients.

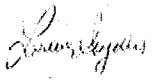
Also, we will be rounding out the 1-DAY ACUVUE® MOIST® Brand Family with a contact lens many of you have been asking for -- 1-DAY ACUVUE® MOIST® MULTIFOCAL, a daily disposable contact lens uniquely designed to meet the needs of the aging eye, while providing consistent results that you and your patients can depend on.**

Preferred Partners
It is the goal of JJVC to lead as your preferred solutions partner. We will continue to develop and provide you with a customized suite of solutions that meets your needs and further elevates the importance of the prescriber. For example, we will continue to expand the ACUVUE® myADVANTAGE™ Program to include services to assist you with contact lens practice management, patient education, and staff support.

On behalf of all of us at Johnson & Johnson Vision Care, Inc., thank you for the trust and confidence you have in prescribing ACUVUE® Brand Contact Lenses to your patients. We are counting on your support in the months to come as we continue to demonstrate our commitment to the eye care practitioner who prescribes our products.

Please continue to share your feedback with us at customerexperience@its.jnj.com.

Sincerely,



Laura Angelini
President, Johnson & Johnson Vision Care - North America

**2011/2012 study that captured actual use patterns among ACUVUE® OASYS® Brand 3-month and ACUVUE® OASYS® Annual Supply users across a 4-month time period to understand if having a larger box (Annual Supply pack) in their pantry (compared to the smaller traditional 3-month supply) would have an impact on lens consumption.*

***Pending 510(k) clearance - not available for sale within the United States*

ACUVUE® Brand Contact Lenses are indicated for vision correction. As with any contact lens, eye problems, including corneal ulcers, can develop. Some wearers may experience mild irritation, itching or discomfort. Lenses should not be prescribed if patients have any eye infection, or experience eye discomfort, excessive tearing, vision changes, redness or other eye problems. Consult the package insert for complete information. Complete information is also available from VISTAKON® Division of Johnson & Johnson Vision Care, Inc., by calling 1-800-843-2020 or by visiting www.ACUVUEProfessional.com.

Written Statement of Alcon Laboratories, Inc.
Before the Subcommittee on Antitrust of the
Senate Committee on the Judiciary

Alcon Laboratories, Inc. is pleased to submit this written statement in connection with the Subcommittee's hearing relating to unilateral pricing policies in the contact lens industry. Alcon, which has headquarters in Fort Worth, Texas, is the world's leading eye care company. It operates three divisions: Ophthalmic Pharmaceuticals, which supplies drugs for conditions such as eye inflammation and glaucoma; Surgical, which supplies, among other things, lasers and equipment used during eye surgery; and Vision Care, which principally supplies contact lenses and lens care solutions.

Alcon launched a limited unilateral pricing policy in connection with its 2013 launch of an innovative new contact lens: DAILIES TOTAL1®. DAILIES TOTAL1® was developed in response to the greatest challenge manufacturers and patients faced with respect to contact lenses: comfort. Contact lenses provide several advantages over eyeglasses, including enhanced visual acuity and cosmetic benefits. Despite these advantages, only about 15% of patients in need of vision correction use contact lenses. The principal reason for patients to select eyeglasses rather than contact lenses is that they find (or have heard) that contact lenses become uncomfortable over time. Indeed, the most common reason given by patients for switching back to eyeglasses after having used contact lenses is that the lenses became uncomfortable.

In response to this concern, Alcon initiated a program to develop a daily disposable contact lens that would provide substantially more comfort through the end of the day for the patient. The result was DAILIES TOTAL1®, the first and only water gradient contact lens, featuring an increase in water content from 33% at the silicone hydrogel core to over 80% at the surface, for the highest breathability of any daily disposable lens and superior lubricity compared to competitive daily disposable and silicon hydrogel lenses.

This was not a simple undertaking. Alcon invested ten years of effort and an estimated one million person-hours by its scientists, engineers and others to develop and bring the product to the market. Thus, the financial investment required was enormous. Investing such a substantial amount in a new product makes sense only if Alcon can recoup that investment within a reasonable period of time by selling a sufficient volume of the product.

This takes us to the vital role that eye care professionals – whom we refer to as ECPs – play in the contact lens market. Contact lenses are FDA-regulated medical devices. A patient requires a prescription from an ECP to obtain them. When a patient has an eye examination, he or she will often purchase eyeglasses from the ECP. Unless the patient specifically inquires about contact lenses, the ECP is unlikely to mention them. And even if the patient raises the possibility of buying contacts, some ECPs may not be enthusiastic about recommending them because of the historical problems with comfort.

This situation posed a huge problem for Alcon with respect to DAILIES TOTAL1®. The commercial success of the product, and other technologically advanced products, was dependent on ECPs devoting significant time to learning about the new product and explaining its benefits to patients. That was especially so because DAILIES TOTAL1® was going to be priced higher than other lenses that Alcon and other manufacturers had on the market. In

Alcon's view, the substantially increased comfort of DAILIES TOTAL1® justified the higher price from the patient's perspective. Patients, however, are unlikely to be willing to pay a higher price for DAILIES TOTAL1® unless they understand the breakthrough benefits of the product, and they are unlikely to learn that unless the ECP invests the time to learn about the product and discuss its features and benefits as part of the vision correction options available for patients.

Alcon's concern was assuring that the selling price for DAILIES TOTAL1® was sufficient to motivate the ECPs to invest their time in learning and communicating the benefits to their patients. It is simpler – and less expensive – for the ECPs to simply maintain the status quo by prescribing eyeglasses or refilling a patient's current contact lens prescription. Given that those are medically acceptable alternatives to DAILIES TOTAL1®, one cannot expect that all ECPs would go out of their way to spend time learning about and explaining new technology unless doing so was a reasonable step financially.

In recent years, however, ECPs have found their profit margins on the sale of contacts to be narrow. The profit margin is low because of a classic "free rider" problem. An online seller or mass merchandiser – which does not incur the cost of studying the technology, appraising what is best for a particular patient, or recommending a lens – can generally underprice ECPs who do bear those substantial costs and without whom there would be no market for contact lenses.

Basically, the ECP is forced to either match the discount seller's price – in which case the profit margin may be eliminated or reduced to an inadequate level – or to sell at a higher price than the discounter – in which case the patient may obtain refills (and perhaps even the original set of contacts) from the discounters. In either situation, the ECP has reduced incentive to invest in learning about and educating patients on a new technology. ECPs will prescribe contacts to patients who request them, but some ECPs may not undertake the effort to learn about and explain the new technology to patients who abandoned contacts after experiencing discomfort with them. And even for patients who request contacts, an ECP who has not invested time learning about the benefits of water gradient lenses, or is reluctant to undertake the time to explain it to the patient, may simply prescribe an older, less comfortable lens (from Alcon or another supplier). The result is that many patients who would be well served by DAILIES TOTAL1® might never learn about its benefits and consider buying this new product.

As a result of this situation, Alcon chose to create an environment in which ECPs might more likely spend time learning about the new technology and explaining it to patients, all while having the opportunity to make a reasonable profit margin. It did so by adopting its Unilateral Pricing Policy, or UPP, when it launched DAILIES TOTAL1® in 2013. That policy provided that Alcon would not supply DAILIES TOTAL1® to customers who resold it for less than the price announced by Alcon.

To be clear, Alcon did not agree with its customers regarding the price at which they would sell DAILIES TOTAL1® to patients, nor did it prevent them from charging any price they wanted when they resold the product. Rather, Alcon unilaterally stated that it would not sell this particular product to customers that it discovered were selling it below the indicated price.

The idea of adopting the UPP originated at Alcon. An Alcon employee came up with the idea after reading two articles about pricing policies in a business school publication, and he recommended it to higher management. It was never proposed to Alcon by its customers or

anyone else. Rather, it was Alcon's response to the concern that inadequate margins for ECPs would lead to inadequate education of patients about the DAILIES TOTAL1® treatment option, perhaps preventing Alcon from recouping its huge financial investment in this new product.

Alcon believes that the UPP helps most or all of those involved in the contact lens business. It helps patients who would benefit from this technology by ensuring that as many of them as possible learn about and, if medically appropriate, obtain the new lenses. It enhances Alcon's prospects of recouping its investment in the development of DAILIES TOTAL1®, and in doing so makes it economically viable for Alcon to invest in other new technologies – which again benefits patients. It helps ECPs by enabling them to earn a reasonable profit on lenses they sell, if they so choose. And we believe that in the long run it helps online and mass merchandise sellers, because in the end they can only sell this new product when an ECP has prescribed it, and we believe that the UPP will increase patient awareness of an improved contact lens option.

When the UPP was announced, it applied only to DAILIES TOTAL1®. Applying it to older lenses would have made some sense. The problem that the ECPs and Alcon faced in relation to the older the lenses, however, was much less severe because, among other things, ECPs (and many patients) are already familiar with them. In 2014, Alcon extended the UPP to cover three innovative new lenses it was launching: DAILIES® AquaComfort Plus® Multifocal, DAILIES® AquaComfort Plus® Toric, and AIR OPTIX® COLORS contact lenses. Today, the UPP applies to only four of the thirteen contact lens brands that Alcon sells. Going forward, Alcon will periodically re-evaluate whether each of these products should continue to be covered by UPP considering each product's life cycle and other factors.

In conclusion, Alcon's UPP program is good for most or all of Alcon's customers, it is good for patients and it is good for Alcon. We appreciate the opportunity to share these thoughts with the Subcommittee.

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