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“Why UPP Pricing in the Contact Lens Industry Hurts  
Consumers and Competition”

Submitted to

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Subcommittee on Antitrust, Competition Policy and Consumer Rights

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Chairperson Klobuchar and members of the Committee, I appreciate the opportunity to submit testimony regarding pricing policies in the contact lens industry. I am President of the Information Technology and Innovation Foundation (ITIF). ITIF is a nonpartisan think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity.

The Information Technology and Innovation Foundation has long conducted analysis on the issue of middleman barriers to e-commerce in a wide range of industries. One industry that has had a long practice of employing such barriers to limit consumer choice is optometry. Optometrists have lobbied for anti-competitive state laws and engaged in anti-competitive behavior in order to restrict their customers from buying contact lens from other channels, including online and “big box” retailers. They are at it once again, now by encouraging contact lens producers to use resale price maintenance policies – in this case called unilateral pricing policy (UPP). The practice of UPP is anti-competitive and anti-consumer and if allowed to continue will lead to significant consumer harm, including higher prices for contact lens. Given optometrists’ long history of collusive, anti-competitive behavior when it comes to prescribing and selling contact lens, the best solution would be for Congress to prohibit eye care professionals from selling disposable contact lens altogether, just as medical doctors do not sell drugs they prescribe to their patients. Absent that solution, Congress should amend the Fairness to Contact Lens Consumers Act to allow authorized third party sellers of contact lens to give consumers a choice of lenses based on new FDA lens categorization system based on functionality, rather than brand. Doing so would spur inter-brand competition and result in lower prices for Consumers.

### **Optometrist’s Long History of Anti-Competitive Behavior**

As noted economist Joseph Schumpeter once wrote, “The resistance which comes from interests threatened by an innovation in the productive process is not likely to die out as long as the capitalist order persists.”<sup>1</sup> If he were writing this today, he clearly would have the optometry industry in mind.

Until the 1980s contact lens wearers usually had to get their lenses through their local optometrists. The optometrists would examine the patients’ eyes, write a prescription, have the lenses made, and then dispense them to the patients at a considerable markup. However, with the advent of disposable lenses in the 1980s, contact lenses became a commodity instead of a specialty item. Thus, once a person became a successful lens wearer, frequent examinations and prescriptions became virtually unnecessary for most contact lens wearers, thus making it more feasible to obtaining contacts from other sources.

Faced with this growing threat to their business model, the American Optometrist Association fought back. According to a legal brief filed by 33 state attorneys general against the AOA, the latter pressured manufacturers to distribute only to licensed optometrists and not to alternative providers, including those who sell over the Internet and through mail order. At least one manufacturer, Ocular Sciences/American Hydron advertised to optometrists and other eye professionals that they “have a proven method to help protect your patients from the risk of mail order eye care (Our special bar coding tracks every six pack—divert to mail order and we cut you off).” But AOA was not content with just pressuring manufacturers. It actively encouraged and advised its members to avoid or discourage the release of contact lens prescriptions, even when the release was permitted or required by state law.

In addition, through their professional associations, optometrists pressured state legislatures to block legislation requiring optometrists and ophthalmologists to give the prescription to the patient. For example, Maine prohibited the release of the prescription for contact lenses to the consumer. The Wisconsin Optometric Association and other state optometric associations worked to prevent laws facilitating the release to consumers of prescriptions. Texas law required online companies to obtain an original hand-signed copy of the prescription before shipping contacts to its customers. But while many states allowed the professional to release the prescription, only 22 required it. It was because of these state laws that Congress passed in 2003 the Fairness to Contact Lens Consumers Act, which, among other things, gave consumers the same rights enjoyed by eyeglass wearers: to be able to get a prescription from the optometrist and fill from any legal contact lens seller.

After this law made it easier for consumers to buy their lenses from other distribution channels, optometrists fought back with further restrictive practices, in this case prescribing “doctors’ only” lenses. Because of these restrictive practices the American Optometric Association, was sued by 32 state attorneys general and ultimately paid a fine and agreed to not collude with manufacturers, and to cease making unsubstantiated claims that one’s health is impacted by where one’s lenses are purchased. But in this settlement with AOA and a number of contact lens manufacturers, at least one major provider was not included, CooperVision/OSI. As a result, optometrists made it known that if CooperVision/OSI sold doctors’-only lenses – e.g., lens that could not be purchased elsewhere even with a prescription – that they would prescribe these lens instead of a competitors. The doctors’-only contact lens marketing practice was designed to shield prescribers from competition, making the lenses more expensive and more difficult to obtain.

Now the optometry industry has embraced unilateral pricing policies, where they prescribe lenses sold by manufacturers that impose retail price maintenance so that other sellers, such as big box retailers and online sellers cannot sell for less than the price the optometrist sells for.

### **The Unique Nature of the Optometry Industry**

Such practices might be less harmful in other industries, but the optometry industry is different for several reasons. First, before a consumer can purchase contact lenses, he or she must first get permission from a gatekeeper (an optometrist) with a financial interest in the consumer’s choice. Indeed, an FTC staff member writes, “ECPs (eye care professionals) have an incentive to prescribe the lens that provides them with the most profit.”<sup>2</sup> And this includes a lens that the consumer cannot buy elsewhere.

Second, contact lenses are a “credence” good where consumers have a difficult time in judging the quality of the product. If a doctor tells a patient that a particular lens is the right one for her, who is she to second-guess her health care professional? As a result, because of the unique nature of this market, consumer choices will not serve as a counter-weight to the optometry profession’s anti-consumer, anti-competitive practices.

In addition, some will argue that there can be no anti-trust issues with the optometry industry because of the lack of industry concentration. Indeed, there are thousands of eye care professional practices. If

contact lens' manufacturers want to sell doctors' only lenses, or as we see today, engage in UPP policies, and there is no evidence of the manufacturers colluding with each other, this is supposedly evidence of a competitive market. But in fact, because of the unique nature of the optometry industry this is in fact not the case and instead represents anti-competitive collusion.

The best way to understand UPP policy is by looking at game theory and in particular in the prisoner's dilemma game. The prisoner's dilemma is a type of non-zero-sum game in which two players try to get rewards from a jailer by cooperating with or betraying the other player. In the prisoner's dilemma, an individual has a strong incentive to defect (i.e., to claim that they are innocent and their partner is guilty), so that the only possible equilibrium for the game is for all players to defect.

Contact lens manufacturers are in their own prisoners' dilemma. Like prisoners in the game, their optimal strategy is to cooperate and sell all their lenses without UPP. Such an agreement would benefit the industry because contact lens wearers would pay lower prices and therefore replace their lenses more often, leading to higher industry sales.

If both consumers and the manufacturers would benefit from widely distributed lenses, why have many contact lens manufacturers announced UPP policies? The answer is that like a prisoner ratting on his fellow prisoners so he can get off, each individual lens producer can gain market share over other manufacturers by selling UPP lenses. Optometrists will be more likely to sell UPP lenses because they will know that their customer cannot find a better price by going online or to a big box distributor. By selling UPP lenses that virtually guarantee patient lock in, contact lens producers know that optometrists are much more likely to prescribe their company's lenses.

Unfortunately, what makes economic sense for an individual company, just as what makes economic sense for the individual prisoner in the prisoners' dilemma game, produces a suboptimal result for both the entire industry and for consumers. Despite this, UPP will likely be the industry-wide pricing policy because optometrists have a strong financial incentive to prescribe UPP lenses and will favor companies that provide them.

Thus, UPP is likely to become the de-facto industry standard without any producer collusion because the eye care and lens prescription industry is not like normal industries. There is no incentive for a producer to break ranks and sell a non-UPP lens in order to get consumers to switch, because consumers simply have no power to switch. Indeed, the incentives are the exact opposite: for optometrists to prescribe UPP lenses.

But how do optometrists convey this desire to prescribe UPP lenses to producers? The answer is in large part through professional norms. As Dean Harvey writes in a *California Law Journal* article entitled "Anticompetitive Social Norms as Antitrust Violations," "Robust, anti-competitive, price fixing social norms may flourish in a market structure of low entry barriers and very low concentration levels."<sup>3</sup> In the case of the eye care industry, the collusion may not be in a smoke-filled room, but it's collusion all the same. In this case, it's professional collusion through norms that is leading producers to adopt UPP policies.

In the optometry profession these anticompetitive social norms are expressed in a variety of means, particularly in articles in professional journals and on social media channels that send a clear message to optometrists that they should prescribe doctors'-only lenses. For example, in an article in *Review of Cornea and Contact Lens* Gary Gerber, OD, writes:

One of the biggest benefits to practitioners of UPP is that it instantly creates a perfectly level playing field; volume discounts for large practices and online retailers go away. While this may create friction with buying groups, the benefits outweigh any ancillary issues. More importantly, however, it forces practices to focus on something other than price to keep prescriptions in their office—if all 'retailers' sell the lenses for the same price, the method and environment under which they are sold will be the factors that determine where a patient decides to purchase their lenses.”<sup>4</sup>

He goes to in essence to say, with UPP, optometrists will prescribe the UPP lens:

Manufacturers also benefit from UPP because retail price erosion can be stopped. With a 'race to the bottom' from aggressive price cutting eliminated, motivations to fit a particular lens increase; this has the ability to support and protect brand equity... All things being clinically equal (which of course they rarely are), savvy practitioners will give serious thought to prescribing UPP lenses. For example, if you have a patient with astigmatism and they can wear a UPP lens, and a non-UPP lens is clinically equivalent, a smart doctor will choose the UPP option.<sup>5</sup>

Finally, he states what is obvious to everyone in the industry “Finally, the actual price mandated by UPP has so far been higher than lenses that do not have a UPP. This has afforded higher profit margins and created a new sense of excitement surrounding contact lenses.”<sup>6</sup> Likewise, in an article in *Review of Optometric Business*, Paul Karpecki, OD, FAAO writes in favor of UPP, stating “One other exciting development: Independent practice optometry becomes reinvigorated with contact lens prescribing as a profitable specialty and practice differentiator.”<sup>7</sup>

We see similar statements on optometrist social media sites. On the Facebook site “ODs on Facebook”, a post from a person listed as Steve Silberberg (who lists himself as “ODwire.org supporting member”) on the topic “J&J goes to universal pricing” writes with regard to having to give “No more rebates etc. and 1-800 etc. goes away if they all follow B&L Alcon and now J & J. Cooper next.” In other words he is saying with UPPs competitors like 1-800 Contacts that sell for less will go out of business. And he is not so subtly encouraging CooperVision to also use UPP pricing. Another ODwire.org supporting member listed as Stephen McDaniel writes in response to J&J adopting UPP pricing, “Wow, great news. Now I might actually fit more of their lenses. Hopefully Cooper gets on board with this soon.” In other words, he is saying that he prescribes lenses based on what level of profit he makes. And he is implying that if CooperVision doesn't also adopt UPP then he will not prescribe their lenses. Another member, listed as Joe DiGiorgio, OD, writes in response to a question of how to tell your patients that these prices of industry regulated lens: “I think I'll tell my patients that the onliner must have been selling counterfeit contacts. Why else would they suddenly raise their prices to what I'm selling them.”

And they express this collective desire in meetings with industry representatives. For example, in the Facebook OD site, a person listed as Kerry Kordet Giedd, writes, “At the Ultra launch last week with 300+ ODs from around the country present there was a Huge applause (honestly, it was quite an overwhelming response) when B&L (Bausch and Lomb) announced the UPP. Without a doubt they were largely pleasing their OD base when they followed Alcon’s lead on the UPP...I think B&L will gain far more than they lose in practioner loyalty and support of this policy.”

Finally, some may argue that UPP is simply a pro-competitive form of resale price maintenance, the kind supported by the Supreme Court in the Leegin decision. But this would be an incorrect reading of Leegin for several reasons. First, in the case of doctors’-only lenses there is no free riding to correct for because the patient is paying for the advice (the eye exam) and the product separately. Second, as described above the contact lens producers are informally colluding through optometrist pressures to only prescribe UPP lenses. And third, consumers don’t really have a choice. In Leegin, consumers did not want to purchase Leegan leather products they could easily purchase another manufacturer's product. In contact lens for all intents and purpose consumers are dependent upon the decision of their eye care professionals. Fourth, there is no valid argument for why UPP might be pro-consumer. Indeed, besides raising pricing for consumers, UPP could harm patients because it may lead them to replace lenses less often. As someone listed as Frank A. Bazan writes on the Facebook OD page, UPP “will cause our patients to stretch their lenses even longer.”

In summary I commend the Committee for taking on this important issue. There is no justification for UPP policies. The main result will be less consumer choice and higher prices for consumers, less sales for manufacturers, and higher profits for optometrists. Ideally Congress would pass legislation prohibiting optometrists from selling lenses altogether. If Congress does not do that, it should amend the FCLA to make it clear that third party sellers of contact lenses should be able to sell according to lens functional categories, not just on brand. In addition, the FTC should take action under its authority in the FCLA to allow such a practice to be implemented in the industry.

Notes:

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1. Joseph Schumpeter. *Capitalism, Socialism, and Democracy* (New York: Harper Torchbooks, 1942).
  2. James Cooper, “Public versus Private Restraints on the Online Distribution of Contact Lenses: A Distinction with a Difference” at the George Mason University Mercatus Center symposium on Anticompetitive Barriers to E-Commerce, May 24, 2006, [www.mercatus.org/repository/docLib/20060518\\_James\\_Cooper\\_Contact\\_Lenses\\_May\\_2006\\_FWPTW.pdf](http://www.mercatus.org/repository/docLib/20060518_James_Cooper_Contact_Lenses_May_2006_FWPTW.pdf).
  3. Dean Harvey, “Anticompetitive Social Norms as Antitrust Violations,” *California Law Review*, 94. 3 (May 2006), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1261&context=californialawreview>.
  4. Gary Gerber, “What’s UPP, Doc?” *Review of Cornea & Contact Lenses*, June 15, 2014, [http://www.reviewofcontactlenses.com/content/d/practice\\_management/c/48867/](http://www.reviewofcontactlenses.com/content/d/practice_management/c/48867/).
  5. Ibid.
  6. Ibid.
  7. Paul Karpecki, “Unilateral Contact Lens Pricing: How it Works for the Good of Optometry,” *Review of Optometric Business*, June 18, 2014, <http://www.reviewob.com/unilateral-contact-lens-pricing-how-it-works-for-the-good-of-optometry.aspx>.