

FTC Workshop on Pet Medications
Washington D.C., October 2, 2012
Statement of Robert Hubbard¹

I am pleased to be here today to talk about the Disposable Contact Lens Antitrust Litigation and the [Fairness to Contact Lens Consumers Act](#) (Contact Lens Act), the federal legislation that followed that litigation. I am focused on how that history might provide insight into the [Fairness to Pet Owners Act, H.R. 1406](#) (Pet Owners Bill), federal legislation that would require veterinarians to release prescriptions to pet owners. From my personal perspective, both the Pet Owners Bill and the Contact Lens Act address the market imperfection that arises when a doctor prescribes and sells the same product. Usually doctors do not sell what they prescribe, but eye care practitioners (ECPs) sell contact lenses and veterinarians sell prescription products for pets.

The investigation that led to the Disposable Contact Lens Antitrust Litigation illustrated that competitive issues arise and consumers pay more when ECPs both prescribe and sell contact lenses. As the market for disposable and replacement contact lenses grew, eye care practitioners (ECPs) derived a larger and larger share of the revenue for their practices from the sale of contact lenses. As alternative ways for consumers to buy contact lenses also grew, ECPs increasingly realized that their power over the prescription, which was essential for any sale of contact lenses, could be used to prevent consumers from buying contact lenses from other sources and thus protect the revenues to ECPs' practices. As a result, ECPs often made contact lens prescriptions hard to get and less useful when consumers did get them. ECPs often treated consumers more

¹ Assistant Attorney General, Antitrust Bureau, New York Attorney General's office. I gratefully thank Russell Gallaro for his assistance with this statement. These views are my own, not those of the New York Attorney General or any other state enforcer. I note also that my wife and I have two cats, and that my wife has separately submitted comments to the FTC for this workshop as a pet owner and member of the general public. Submission numbers [560891-00485](#), [560891-00490](#).

like revenue streams than patients when those consumers were interested in contact lenses.

Many of the restraints on consumer access to prescriptions resulted from concerted action among ECPs, their trade associations, and contact lens manufacturers. For example, ECPs exchanged and discussed in their trade journals, meetings, and elsewhere, methods to discourage consumers from requesting their prescriptions or to make the prescriptions they did release less useful. They advised colleagues to refuse to give consumers prescriptions or make consumers sign waivers absolving the ECP of liability if they purchased contact lenses elsewhere. Contact lens manufacturers helped, by preparing videos and otherwise, to train ECPs to prevent consumers from asking for prescriptions and to evade the requests that consumers did make. The states alleged and favorably settled claims that these activities were deceptive, violated the antitrust laws, and harmed consumers.

In addition to limiting demand, the defendants limited the supply of contact lenses for non-ECPs selling contact lenses. ECPs made clear to contact lens manufacturers that only ECPs could write the prescription required for the sale of the manufacturer's brand of contact lenses. In response, contact lens manufacturers refused to sell to 1-800 Contacts and other non-ECP sellers. The antitrust challenge to the supply restraints was settled in part by the contact lens manufacturers agreeing to sell contact lenses to alternatives like mail order and pharmacies on a non-discriminatory basis.

Yet, remedying the antitrust violations did not completely address the harm to consumers flowing from ECPs both prescribing and selling contact lenses. Individual ECPs could continue to use the power over the prescription to restrain consumers, even

when those acts did not violate the antitrust laws. Only defendant contact lens manufacturers were enjoined from engaging in supply restraints built on the ECPs' power over the prescription. Thus, States advocated and supported federal legislation that separated the power over the prescription from the ability to sell contact lenses. That is, in addition to antitrust remedies, States sought to remedy abuse of the power over the prescription enjoyed by ECPs by supporting federal legislation to give consumers what they needed to make an unrestrained choice about where to buy contact lenses.

State Competition Advocacy in Vision Care Markets

Understanding state enforcement and competition advocacy concerning contact lenses requires going back to 1978, when the Federal Trade Commission promulgated a rule for vision care markets because ECPs sold what they prescribed. Before the rule issued, many consumers paid more for eyeglasses because ECPs both prescribed and sold eyeglasses, and restrained the ability of consumers to buy eyeglasses elsewhere. In response, the FTC promulgated a rule that requires an ECP to provide consumers, at no extra cost, the consumer's eyeglass prescription immediately after the eye examination is complete (Eyeglasses Rule). The Eyeglasses Rule also: (1) prohibits the ECP from requiring a consumer to buy eye care and eyeglasses together; and (2) requires ECPs to release eyeglass prescriptions without the consumer having to ask. Because the eye exam is separated from the purchase of products and the prescription is released automatically, consumers are in effect told that eyeglasses need not be purchased only from ECPs and are not restrained by ECPs' power over the prescription.

In 1997, the FTC considered whether to rescind or alter the Eyeglasses Rule.

Based primarily on their experience concerning the Disposable Contact Lens Antitrust Litigation, States advocated that the FTC retain the rule and indeed extend the scope of the rule beyond eyeglasses to include contact lenses.² States argued that contact lenses had developed many of the characteristics of eyeglasses that justified including them within the rule. Like eyeglasses, contact lenses were no longer individually fit on each patient. Manufacturing contact lenses had become standardized and safe and contact lenses were usually replaced much more frequently than patients needed eye exams. Most fundamentally, ECPs had a financial incentive to require their patients to buy the lenses from them by using their power over the prescription to limit their patients' choices. In an era when the FTC was mostly rescinding industry rules, the FTC retained the Eyeglasses Rule, but did not extend its scope to contact lenses.

The Disposable Contact Lens Antitrust Litigation settled after 6 weeks of trial against the last defendant. But States continued to advocate for mandatory release of contact lens prescriptions. In March 2002, State Attorneys General wrote in support of federal legislation (H.R. 2663) that mandated prescription release for contact lenses.³ I testified in support of a later iteration of that legislation in September 2003.⁴ In November 2003, State Attorneys General wrote in support of the final iteration of that legislation, H.R. 3140,⁵ which Congress passed and the FTC implemented. The Contact Lens Act mandated prescription release. The Act also addressed a supply restraint built on the power over the prescription: "if the same contact lens is manufactured by the

2 [Comments of State Attorneys General to 16 CFR Part 456 \(FTC Sept. 2, 1997\).](#)

3 [Letters dated Mar. 18, 2002 from State Attorneys General to Representatives sponsoring H.R. 2663, the Contact Lens Prescription Release Act.](#)

4 [Hearing before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, House of Representatives on H.R. 2221, the Fairness to Contact Lens Consumers Act \(Sept. 12, 2003\).](#)

5 [Letter dated Nov. 14, 2003 from State Attorneys General to Representatives Tauzin, Dingell, and Burr in support of H.R. 3140, the Fairness to Contact Lens Consumers Act.](#)

same company and sold under multiple labels to individual providers, the seller may fill the prescription with a contact lens manufactured by that company under another label."⁶ The states also later sought an amendment to the Contact Lens Act to prevent other restrictive distribution practices by manufacturers that forced consumers to buy lenses from their ECPs.⁷

Both the Eyeglasses Rule and the Contact Lens Act seem to have significantly benefited consumers.⁸ Mandating the release of prescriptions by ECPs has fostered a competitive market for the retail sale of eyeglasses and contact lenses. Consumers have enjoyed ever-expanding and value driven competitive alternatives for purchasing their eyeglasses and contact lenses. Alternative suppliers, like pharmacies, mail order, buying clubs, department stores, and discount merchandisers, give consumers a convenient and cost-effective method of purchasing eyeglasses and contact lenses.

The Fairness to Pet Owners Act of 2011

The Pet Owners Bill is substantially similar to the Contact Lens Act. The Pet Owners Bill requires veterinarians to provide a prescription to pet owners, without being asked. Like the Eyeglasses Rule and the Contact Lens Act, the Pet Owners Bill prohibits prescribers from requiring, as a condition of providing the prescription: (i) purchase of the prescription product from the prescriber; (ii) payment in addition to, or as part of, the fee for examination; or (iii) waiver or disclaimer of liability for the accuracy of the prescription. Finally, the Pet Owners Bill directs the FTC to promulgate rules to carry

⁶ 15 U.S.C. § 7603(f).

⁷ [Letter dated June 29, 2006 from State Attorneys General to Senators Bennett and Leahy in Support of S. 2480.](#)

⁸ [The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study \(FTC Feb. 2005\); Possible Anticompetitive Barriers to E-Commerce: Contact Lenses \(FTC Staff Mar. 2004\).](#)

out its provisions and defines a violation as an unfair or deceptive act or practice prescribed under the Federal Trade Commission Act. These provisions are very similar to the provisions the Contact Lens Act and the Eyeglasses Rule. The Bill does not address supply restraints, including those built on the doctor's power over the prescription.

Veterinarians have the power to withhold or otherwise limit access to the prescriptions necessary for consumers to consider and to use competitive alternatives for pet medications. Moreover, manufacturers of products sold in those markets appear to restrict distribution of their products to those who can prescribe their products, emphasizing profits for veterinarians, rather than value for consumers. By restraining access to prescriptions, those practices contribute to higher prices for pet medications.

Americans spend significant amounts of money on prescription and over-the-counter pet medications.⁹ Mandatory release of prescriptions for pets will allow owners to choose more easily where to buy those prescription products. The proposed legislation would reduce the costs to consumers of prescription products both by providing an opportunity for comparison shopping by pet owners and by fostering a more competitive market for those products. The benefits would be particularly pronounced for maintenance drugs, such as flea and tick control products, heartworm preventatives, and prescription food. In addition, mandatory release of prescriptions for maintenance drugs would allow consumers to buy elsewhere and avoid otherwise unnecessary and perhaps inconvenient visits to the veterinarian. The substantial benefits enjoyed by consumers of eye care products as a result of the Eyeglasses Rule and the Contact Lens Act provide an example of the potential benefits of the Pet Owners Bill for pet owners. Unlike the

⁹ [Federal Trade Commission, Workshop on Pet Medications Issues, 77 Fed. Reg. 40355 \(July 9, 2012\).](#)

Contact Lens Act, the Pet Owners Bill does not include any provision for private label prescription products or any other supply restraint.

Health care concerns do not justify the restraints

The health care concerns used to justify the restraints also merit comment. Based on my sampling of comments submitted in advance of this workshop, veterinarians and their trade associations often assert that withholding prescriptions and restricting how prescription materials are sold is motivated by concern for the health of the animal. Veterinarians assert that the Pet Owners Bill imposes health care risks on animals, arguing that limiting where consumers can buy prescription materials motivates pet owners to see the veterinarian more often and that enables veterinarians to provide regular examinations and better oversee the distribution of drugs.

Similar arguments about health risks were made in the Disposable Contact Lens Antitrust Litigation and in opposition to the Contact Lens Act. In deciding whether and how to bring an enforcement action, the states probed the assertions by ECPs, their trade associations, and contact lens manufacturers that sales by alternative suppliers risked the ocular health of the states' citizens. Over time, States became more and more skeptical of the health care assertions made by ECPs. States requested materials to document or support the assertions, when witnesses were under oath and otherwise. The States did not find or receive any such materials and ultimately concluded and alleged in the litigation that those health care assertions were deceptive. Thus, *In re Disposable Contact Lens Antitrust Litigation* addressed the relationship between ocular health and the sale of replacement disposable contact lenses by alternative channels of distribution. Defendant

American Optometric Association (AOA), for example, claimed that sales by alternatives threatened ocular health. Plaintiff States propounded contention interrogatories about studies on contact lenses and ocular health, including one asking the AOA to “Identify and describe all studies of which you are aware that discuss any effect the dispensing of contact lenses by alternative channels has on ocular health.” In response, the AOA confirmed it was “aware of no specific study.”¹⁰

During settlement discussions and at the States’ insistence, the AOA agreed to limit what it could say and do concerning those health care assertions. Paragraph 5(h) of the settlement between plaintiffs and the AOA provides:

The AOA shall not represent directly or indirectly that the incidence or likelihood of eye health problems arising from the use of replacement disposable contact lenses is affected by or causally related to the channel of trade from which the buyer obtains such lenses. Specifically, AOA shall not represent directly or indirectly that increased eye health risk is inherent in the distribution of replacement disposable contact lenses by mail order, pharmacies, or drug stores. This paragraph shall not prohibit the AOA from making such representations where such representations are supported by valid, clinical or scientific data.

The settlement also limited when the AOA could object to the release of contact lens prescriptions.¹¹

Given that history with contact lenses, I am skeptical of the health care claims being asserted by veterinarians and their trade associations. Rather than assertions, I would prefer to see substantive evidence of health care issues related to sales of prescription products by alternative sellers. Moreover and regardless of the validity of the assertions, the regulatory system already in place is designed to address health care

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

11 “Consistent with state law, the AOA will not object to the release of contact lens prescriptions, except in the affirmative exercise of an optometrist’s own medical judgment related to the specific, identified and documented health needs of a particular patient. The AOA will not develop, disseminate, or urge the use of forms designed to limit either the availability or utility of prescriptions. A form may contain reasonable expiration dates, limitations on refills and other provisions which are consistent with state law and good optometric practice.” Settlement ¶ 5(a).

concerns and whatever standards are appropriate should be addressed through that regulatory system. Requiring a prescription was the way to address health care issues related to the sale of contact lenses because consumers needed a valid prescription from an ECP to purchase ophthalmic goods from an optician, pharmacy, mass merchant, or other alternative seller. Mandatory release of prescriptions does not eliminate the need for a prescription, and the regulatory system (as opposed to restraints imposed by market participants) is the proper way to address health care concerns.

Moreover, providing value and convenience is a very important part of promoting healthy outcomes by promoting compliance with the doctor's instructions. Consumers who are overcharged and subjected to inconvenient ways of getting prescription products tend to be less compliant, not more. Restrained consumers tended to wear contact lenses longer than recommended. The high cost of prescription medications sometimes leads consumers to skip doses or otherwise be non-compliant. And compliance promotes healthy outcomes.