ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

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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.