The Attorneys General of the 31 States that prosecuted the contact lens antitrust litigation[1] believe that some lens manufacturers and some eye care professionals ("ECPs") are making an effort to restrict the sale of disposable contact lenses through all forms of discount sales, including the Internet, mail order, pharmacies and mass merchandisers.[2]

The Attorneys General brought their lawsuit, in 1996, because of specific and overwhelming evidence that lens manufacturers entered into agreements with organized optometry to prevent discount sellers from selling replacement lenses to consumers. We found that the actions to exclude the discount sellers and reserve sales of replacement lenses exclusively to ECPs resulted in fewer choices for consumers of where to buy lenses, in higher prices to consumers to purchase lenses and a risk that high ECP prices were discouraging lens wearers from purchasing new lenses as frequently as recommended. Despite the final judgment's requirement that lens manufacturers sell to alternative channels in a commercially reasonable manner, lenses do not flow freely to Internet sellers.[3] For example, the largest manufacturer of disposable lenses, Johnson & Johnson, refuses to sell to the largest Internet and mail order seller of lenses, 1-800 Contacts, because of claims that 1-800's sales procedures comply with neither federal law nor the laws of several states.

Most State laws require a contact lens seller to dispense lenses only to a consumer who has a valid and unexpired lens prescription. Some States require that a written prescription be obtained by

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[1] *In re Disposable Contact Lens Litigation*, MDL Docket No. 1030 (M.D. Fla.)

[2] The views expressed in this summary are in accord with the views of the Attorneys General of the Plaintiff States, as I understand them, but I do not write for anyone but myself and my views are not necessarily the views of any State Attorney General or the Maryland Attorney General.

[3] Johnson & Johnson, one of the lens manufacturer defendants, agreed to a court order that it must sell lenses to alternative channels that sell only upon a valid prescription and in accordance with applicable federal and state dispensing lens.

the seller before lenses can be dispensed. The State Attorneys General along with the FTC believe that such dispensing laws should be interpreted in a manner that will enhance consumer access to replacement lenses. A restrictive interpretation may seriously limit competition to the ECPs, which increases costs and diminishes consumer convenience without providing any offsetting benefit to public health and safety. We have seen no evidence, although we asked for it repeatedly during the investigation and litigation of the lens case, that a consumer is at greater risk for ocular injury from purchasing lenses from an out of state Internet or mail order seller than from an in-state ECP. In fact, it is our view that the convenience and lower prices that result from Internet and mail order sales encourages consumers to comply with their ECPs wearing instructions because lens wearers will be less inclined to stretch the use of their disposable lenses by wearing them longer than is medically indicated.

The Attorneys General also believe that the ways in which prescription requirements are interpreted may have competitive consequences. For example, we think that unless a State law is explicit to the contrary, a lens seller does not have to receive an actual written prescription to dispense lenses. In fact, most State laws do not require that the actual written prescription be provided to the lens seller. If a patient has a valid unexpired prescription, that patient should be able to get his replacement lenses by phoning in the prescription information, faxing it or sending it over the Internet. We believe that the sellers of lenses are justified in believing that their customers are being truthful about whether they have a valid prescription and the contents of the prescription. In contrast to prescription drugs, virtually no consumer will self prescribe contact lenses, consequently it is reasonable for a seller to assume that every contact lens wearer who orders lenses has received a prescription for those lenses. While it is good practice for a lens seller to verify with the prescribing ECP that the lens

prescription is valid, unexpired and reported accurately, unless a State statute requires it, we don't believe that a seller has violated state dispensing laws simply by failing to confirm the prescription. For example, in Maryland, while it is required that a seller dispense only on a valid prescription, a seller has violated the dispensing laws of Maryland only if he knowingly dispenses without a prescription. Maryland law does not require the seller to confirm that the prescription is valid and unexpired.

Finally, the States believe that lens manufacturers should sell to any discount seller on the same basis that it sells to any other account unless there is a formal finding by a judicial body in a state that a seller has violated the state's dispensing laws.[4] State Attorneys General believe that in some instances state dispensing laws have been misconstrued in an effort to make it more difficult for an out-of-state discount seller to compete against ECPs. Although the health of the patient is often put forth as a reason for a restrictive interpretation of state dispensing laws, the evidence that was uncovered during the Disposable Contact Lens Antitrust Litigation indicated that for some ECPs, their primary concern with sales of replacement lenses by alternative channels was not the ocular health of their patients but maintaining the revenue stream provided by the sale of lenses. Attorneys General want to encourage competition in as many commercial activities as possible. We believe that in the past the concern expressed by ECPs that buying lenses from an alternative channel would cause harm to patients eyes was used as a pretext for attempts to restrict competition in the replacement contact lens market.

JRT:ket\conlens\FTCSummary

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[4]Johnson & Johnson opposes this view. The Court in M.D.L. 1030 has declined to order Johnson & Johnson to adopt this view as a matter of interpreting the injunctive relief provision of the settlements in the litigation.