

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

**IN RE DISPOSABLE CONTACT LENS
ANTITRUST LITIGATION**

**) MDL DOCKET NO. 1030
) SETTLEMENT AGREEMENT WITH
) JOHNSON & JOHNSON VISION
) CARE, INC.**

AMICUS BRIEF

OF

**THE AMERICAN ANTITRUST INSTITUTE,
THE CONSUMER FEDERATION OF AMERICA,
NATIONAL CONSUMERS LEAGUE, AND
THE CONSUMER ALLIANCE**

WITH RESPECT

TO

THE JOHNSON & JOHNSON CONTACT LENS SETTLEMENT

The American Antitrust Institute (“AAI”) submits these comments on behalf of itself and the Consumer Federation of America, the National Consumers League, and The Consumer Alliance in response to the Court’s Order regarding the April 23, 2001, settlement with Johnson & Johnson Vision Care, Inc. (“J&J”). As discussed below, we share the concerns expressed by the Attorneys General in their Plaintiffs’ Request For A Prompt Hearing On Vistakon’s Intent As To The Injunctive Relief Provisions Of The Settlement filed on July 13, 2001. J&J’s conduct subsequent to the preliminary settlement agreement, and purportedly in accordance with the settlement, is not in the best interest of consumers of contact lenses.

The AAI is an independent Washington-based non-profit education, research, and advocacy organization. Its mission is to increase the role of competition as a fundamental aspect

of our national economic policy. Its background and work product may be found on the Internet at www.antitrustinstitute.org.

Consumer Federation of America (CFA) is a nonprofit consumer advocacy group whose members includes 285 state, local and national consumer organizations, who in turn have a combined membership of over 50 million people. More information about CFA can be found at its website, www.consumerfed.org.

The National Consumers League is the nation's oldest consumer organization. Its mission is to identify, protect, represent, and advance the interests of consumers. Its website is www.ncl.org.

The Consumer Alliance ("TCA") is a broad-based, national coalition of dozens of consumer, senior, minority, rural, employee, low-income, farm and small business organizations that provides a unified voice on issues affecting ordinary consumers. TCA educates the media, consumer advocates, policymakers, and the general public about regulatory and legislative initiatives that affect families and individuals and advocates for their interests.

The contact lens litigation is an important example of how the antitrust laws can be utilized to promote competition on behalf of the nation's consumers. We applaud the accomplishments of the Attorneys General and the private bar that have brought this notable litigation to a final fairness hearing.

We come before this Court because of our concern that J&J is already misconstruing two provisions of the Settlement Agreement -- ¶7(b) and ¶15(a) -- in a manner that will stifle the very competition that the underlying litigation was intended to protect. Indeed, absent clarification by the Court, J&J may use these two provisions as a cover for destroying the mail order competition that this case seeks to maintain and which benefits consumers so much.

Paragraph 7 of the Settlement Agreement Should be Clarified to Make Certain that J&J Cannot Harm the Competition that the Litigation was Designed to Protect.

Paragraph 7 of the Settlement Agreement provides:

7(a) Johnson & Johnson will sell and distribute its replacement contact lenses to alternative channels of distribution (as defined in this Settlement Agreement) for a period of five (5) years from the date this Settlement Agreement becomes final under paragraph 12 hereof.

7(b) Subject to subparagraph (a) above, Johnson & Johnson will sell to alternative channels of distribution in a commercially reasonable and non-discriminatory manner, provided that any such alternative channel of distribution, like any other authorized account, will sell contact lenses only to consumers based upon a valid prescription and in compliance with all federal and state laws and regulations regarding the sale or dispensing of contact lenses, and agrees not to substitute diagnostic lenses for a revenue-producing product.

Based on its recent conduct, J&J is construing ¶7(b) as granting it the unilateral right to determine whether alternative distributors are in compliance with state laws. Moreover, as the Attorneys General noted in their filing, J&J has expressed its intention to use this purported power to cut off sales to mail order companies. Indeed, J&J has boasted that the Settlement Agreement leaves it better off than it would have been if it had won the case. See Contact Lens Spectrum, June 2001, attached as Exhibit 1 (“This settlement is a better result than if we had a jury verdict in our favor”).

J&J has now established a policy of presuming that a mail order company is not in compliance and requiring mail order applicants to prove they are in compliance with the laws of all the states. As a practical matter that is impossible to do. As the Court itself noted, a number of state laws are ambiguous and few, if any, issue certificates of compliance. J&J has also apparently taken the position that if a mail order company fails to establish it is in compliance

with any state law, J&J can cut off sales in all states, including those where the mail order company is in compliance. Significantly, J&J has imposed no such requirements on eye care professionals, who sell contact lenses to consumers at prices that on average are 20% higher (and in some cases as much as 50% higher) than the mail-order companies, even though many eye care practitioners fail to comply with state laws requiring that they make available prescriptions to their customers.

To make matters worse, J&J has prepared an analysis of state laws, which it distributed to its sales people, purporting to show that 22 states preclude the sale of contact lenses by mail order, while in fact the Court itself had already determined that only two states do. See Exhibit 2 hereto. Apparently, J&J intends to substitute its self-interested analysis for the Courts while at the same time claiming that its new anticompetitive effort is part of a “Court approved distribution policy.” See Exhibit 3.

In essence, under the rubric of the settlement, J&J appears to be engaged in exactly the same conduct that was the source of concern in the underlying case – boycotting discount mail order companies. According to Philip Keefer, President of J&J’s Vistakon Division:

This settlement is a better result than if we had a jury verdict in our favor. . . . The handcuffs are off us now. We plan an aggressive effort so that only authorized accounts sell Acuvue lenses in the future. If an account wants to sell our lenses, it has to show us it complies with all state laws. . . . If an account can’t show us it operates legally in every state in which it sells, we don’t have to sell to it...This judge understood what this case was about. He stood by our right not to sell to anyone who broke the law, and he affirmed our distribution policy.” (Contact Lens Spectrum, June 2001, attached as Exhibit 1.)

As part of its new “aggressive effort,” J&J has distributed to its sales personnel a “Terms and Conditions Fact Sheet” (Exhibit 4) imposing the following conditions on mail order companies:

- New account applicants must have a “license” in “all states in which they sell or intend to sell – Proof required.” In fact, most states do not provide for any such license.
- If a mail order company has ever sold contact lenses “contrary to any federal or state law,” it must “furnish certification” that it is “in compliance” with state laws. In fact, few if any states issue such certifications.
- “Accounts selling into states without physical locations can only purchase from Vistakon – not distributors.” This requires a mail order company to have offices in 50 states which would dramatically increase costs and, in turn, the price of contact lenses to consumers.

As a practical matter, no mail-order distributor can comply with these requirements. J&J executives have admitted as much in public statements. Thus, the effect of these restrictions is to nullify the objective for which the plaintiffs in the litigation fought so hard.

To the extent a mail-order company cannot get access to J&J lenses, consumers will suffer.¹ Mail order companies sell contact lenses at prices that are generally 20% lower than most optometrists’. If J&J can cut off mail order companies, it can raise the prices of its lenses without fear of losing business, and consumers will pay even more. Eye care practitioners will prescribe J&J in preference to less expensive competing brands that are available at mail order houses because the eye care practitioners do not want to face mail-order competition for the sale of replacement lenses. Indeed, J&J’s already dominant market share can be expected to increase even more as it panders to the eye care practitioners’ anticompetitive desire to preclude price competition. It would be a perverse abuse of antitrust law if J&J were permitted to misuse a pro-competitive settlement as an anticompetitive weapon.

¹ During the pendency of this litigation, J&J did not aggressively enforce its policy of denying mail order companies a source of supply of their lenses. But, after the settlement, when the ‘handcuffs’ of the litigation were lifted, J&J adopted its new, self-proclaimed “aggressive effort” to cut off mail order companies. Because J&J is the largest seller of disposable contact lenses, mail order companies must stock its products to maintain their goodwill with consumers. A consumer requesting a J&J lens is unlikely to think well of a mail order company that does not stock the lens he or she needs.

In light of the evidence that J&J is already attempting to manipulate the settlement in an anticompetitive manner, AAI respectfully suggests that the Court clarify that it intends to interpret paragraph 7 as presuming that a company is in compliance with all federal and state laws until such time as a court with jurisdiction makes a final non-appealable determination that the company is not in compliance and then only for the period of subsequent noncompliance. Further, the Court should clarify that J&J may not use a mail order company's noncompliance with one state's law as a justification for withholding sales of lenses for resale to consumers in all states, including those where there has been no final non-appealable judicial determination of noncompliance. Why should a mail order company's failure to comply with a law or regulation in, e.g., Delaware, deprive consumers in, e.g., Florida, of the benefit of lower-priced contact lenses?

This clarification by the Court, even without amending the settlement language, would simply reflect what we believe must have been intended by the Attorneys General when they agreed to the settlement: a company must be presumed innocent until proven guilty, and a court of law, not J&J, must make the determination whether a mail order company is in compliance with the law. Contrary to its misreading of the settlement, J&J does not stand for "Judge and Jury."

As a matter of public policy, a private company like J&J should not be allowed to take on a governmental role. Indeed, the Supreme Court has consistently held that private companies cannot, consistent with the antitrust laws, exercise governmental powers. In the classic *Fashion Originators Guild* case, the Supreme Court struck down a boycott, rejecting the defendants' arguments that they were just trying to enforce state laws. *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). The Court there reasoned that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'entrenches upon the power of the national legislature and violates the statute.'" 312 U.S. at 465. To permit J&J unilaterally to place the burden on companies to first prove the negative, that they have never violated a state or federal law or regulation, would allow J&J, in

the guise of protecting consumers, to illegally refuse to deal with discounters who provide consumers with the benefit of price competition for contact lenses.

PARAGRAPH 15(A) SHOULD BE CLARIFIED

Paragraph 15(a) should also be clarified to ensure that it is not interpreted as depriving state officials of prosecutorial discretion. Paragraph 15(a) provides: “In accordance with their jurisdiction, Attorneys General for the States and Florida agree to continue to administer or enforce their state laws regarding the sale, dispensing and/or furnishing of contact lenses.”

We of course recognize the importance of enforcing duly enacted laws. However, J&J is interpreting this provision as requiring states actively to enforce all laws restricting the mail-order sale of contact lenses in a new and more aggressive manner. According to Mr. Keefer of J&J:

Our settlement is significantly different from those of the other defendants because we don’t have to unconditionally give in to mail order houses. Attorneys general must enforce the laws in their states, which means that they will in fact partner with us. (Optometric Management, June 2001, Exhibit 5.)

The judge is dead serious about this—he is absolutely committed to enforcing the law [against mail order companies]. And if the states don’t enforce their laws, the judge is going to force them to do that. (Vision Monday, July 9, 2001, Exhibit 6.)

The Court should make clear that the State Attorneys General retain their prosecutorial discretion to file cases that are in the public interest. The States should not be forced to be J&J’s accomplice in an anticompetitive scheme. Prosecutorial discretion is not only inherent in state sovereignty, but it also ensures that laws are not enforced in a manner that unreasonably harms competition. Certainly to the extent that legislation does not state otherwise, enforcement officers

are expected to execute the laws with normal discretion. We urge the Court to make known to the parties that it will interpret paragraph 15(a) as no more than a continuation of existing enforcement discretion, rather than some new requirement of mandatory enforcement.

CONCLUSION

If it were not for Johnson & Johnson's own reported statements, we would not be raising the need for judicial clarification of the settlement agreement. We believe that the Court can and should state its own interpretation from the bench, as proposed herein, to put Johnson & Johnson on notice that if it goes forward along the lines it apparently envisions, it will be subject to contempt proceedings.

Respectfully submitted,

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