

COMMISSION AUTHORIZED

PREPARED STATEMENT

OF

CHARLES A. HARWOOD

**DIRECTOR
SEATTLE REGIONAL OFFICE
FEDERAL TRADE COMMISSION**

**BEFORE THE
JOINT ADMINISTRATIVE RULES REVIEW COMMITTEE
OF THE
WASHINGTON STATE LEGISLATURE**

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Mr. Chairman and Members of the Committee: I am pleased to appear before you today to discuss the recent amendments to the rules of the Washington State Board of Optometry. These new rules affect how optometrists deal with opticians concerning contact lens prescriptions¹. This testimony represents the views of the Seattle Regional Office and the Bureau of Consumer Protection of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

This testimony will concentrate on two new rules that have the effect of limiting competition between dispensing opticians and optometrists, by giving optometrists control over consumers' ability to choose where to have their contact lens prescriptions filled. Based on the evidence that the staff of the Federal Trade Commission has assembled on this issue, we believe that allowing opticians to compete in fitting contact lenses is likely to benefit consumers by increasing competition and lowering prices without impairing the quality of eye care. We are concerned that the rule will result in consumers losing those benefits.

I. Interest and Experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² Pursuant to this statutory mandate, the Commission encourages competition in the licensed professions, including the health care professions, to the maximum extent compatible with other state and federal goals. For several years, the Commission and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, such as lawyers, physicians, optometrists, dentists,³ pharmacists, and other non-physician health care providers. In addition, the staff has submitted

¹ Inquiries regarding this testimony should be directed to Charles A. Harwood, Director, Seattle Regional Office (206-553-4656) or to Richard F. Kelly, Assistant Director, Bureau of Consumer Protection (202-326-3304).

² 15 U.S.C. § 41 et seq.

³ See, e.g., Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988); Oklahoma Optometric Ass'n, 106 F.T.C. 556 (1985); Wyoming State Board of Chiropractic Examiners, 110 F.T.C. 145 (1988) (consent order); Connecticut Chiropractic Association, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65,093 (December 13, 1991)); Texas Board of

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comments about these issues to state legislatures, administrative agencies, and others.⁴ As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the Commission is particularly interested in restrictions that may adversely affect the competitive process and raise prices to consumers.

The staff of the Commission has been investigating competition problems in the eye care professions for nearly two decades. The Commission conducted a rulemaking proceeding about the eye care industry in the 1970's. That proceeding resulted in the 1978 trade regulation rule against restraints on vision care advertising.⁵ Another rulemaking proceeding in the 1980's examined other kinds of restraints on the business practices of eye care professionals. The Commission concluded that

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Chiropractic Examiners, C-3379 (order modified April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)).

⁴ See, e.g., Comments to New Jersey Senate (May 14, 1987) (contact lens fitting by opticians); New Jersey General Assembly (April 11, 1991) (dispensing and sale of prescription drugs by physicians); South Carolina Legislative Audit Council (February 26, 1992) (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractic Examiners); Texas Sunset Advisory Commission (August 14, 1992) (Boards of Optometry, Dentistry, Medicine, Veterinary Medical Examiners, and Pharmacy); see also testimony before the Committee on Business Legislation, Maine House of Representatives (January 8, 1992) (optometry).

⁵ Advertising of Ophthalmic Goods and Services, 16 CFR Part 456 ("Eyeglasses Rule"). The Commission found that prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer were unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. The Eyeglasses Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the Eyeglasses Rule's prescription release requirement was upheld but the advertising portions were remanded for further consideration in light of the Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (finding state supreme court rules against attorney advertising violated the First Amendment). American Optometric Association v. FTC, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the Commission has addressed advertising restrictions through administrative litigation. See, e.g., Massachusetts Bd. of Optometry, 110 F.T.C. 549 (1988).

restrictions on commercial practices have caused significant injury to consumers, in both monetary losses and less frequent vision care, without providing consumer benefit.⁶ Based on the evidence assembled in the rulemaking proceeding,⁷ the Commission adopted a rule to prohibit state-imposed⁸ restrictions on several types of commercial arrangements.

In the course of those proceedings, the staff of the Commission conducted two comprehensive studies. The first, published in 1980 by the Commission's Bureau of Economics, compared the price and quality of optometric goods and services in markets where commercial practices were subject to differing degrees of regulation ("Bureau of Economics Study").⁹ The second, published in 1983 by the Bureaus of Consumer Protection and Economics, compared the price and quality of cosmetic contact lens fitting services performed by opticians, optometrists, and ophthalmologists ("Contact Lens Study").¹⁰ The Contact Lens

⁶ Ophthalmic Practice Rules ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10286 (March 13, 1989) ("Commission Statement").

⁷ In the course of the formal "Eyeglasses II" rulemaking, the Commission received 243 initial comments, 24 rebuttal comments, and testimony from 94 witnesses during three weeks of public hearings. The commenters and witnesses included consumers and consumer groups, optometrists, sellers of ophthalmic goods, professional associations, federal, state and local government officials, and members of the academic community.

⁸ The rule, drafted to apply to optometry, prohibited restraints against affiliating with non-optometrists, locating in commercial settings, operating branch offices, and using nondeceptive trade names. In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule. The Eyeglasses II rule was vacated by the Court of Appeals, on the ground that the Commission lacked the statutory authority to make rules declaring state statutes unfair. But the Commission's substantive findings, that the restrictions harmed consumers, were not disturbed. California State Board of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990), reh'g denied, 924 F.2d 243 (1991).

⁹ Bureau of Economics, Federal Trade Commission, The Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

¹⁰ Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983). The
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Study, which is directly relevant to the rules being considered by this Committee, is described in more detail below. A copy of the Contact Lens Study is attached to this testimony.

II. Description of the Rules

The first of the new rules defines a "contact lens prescription" as a written order from an optometrist to another optometrist, physician, or dispensing optician.¹¹ The second new rule, which governs "determination of contact lens specifications by dispensing opticians,"¹² applies only to opticians who are not directly supervised by the prescribing optometrist. Such independent dispensing opticians may be authorized to determine contact lens specifications, with the consent of the prescribing optometrist. But a contact lens prescription is not to be written until after a final evaluation of the lens on the eye of the patient; at that time, the prescription is released to the dispensing optician.

Under these new rules, opticians may still fit contact lenses, but only under much more tightly controlled direction by optometrists. A contact lens prescription may be filled only by an optician who works under the optometrist's direct supervision or by an independent dispensing optician who must, in each case, be specifically and individually authorized in advance by the optometrist. By this requirement, and by requiring that a prescription be released directly to the dispensing optician, rather than to the consumer, the rule now apparently gives the optometrist considerable, if not complete,¹³ control over the consumer's choice of an optician.

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"cosmetic" contact lenses that were studied are lenses worn as an alternative to eyeglasses. The study did not deal with therapeutic lenses, which may be required for medical reasons other than the simple correction of vision.

¹¹ Wash. Admin. Code § 246-851-520. Other regulations have been amended so that a prescription is always referred to as "written." See Wash. Admin. Code §§ 246-851-270, 246-851-360.

¹² Wash. Admin. Code § 246-851-530.

¹³ An earlier draft of the regulation had referred to "the patient's request" that a prescription be filled by an independent dispensing optician. In the final regulation, that phrase, which implied that the consumer might have had some right to choose where to have contact lenses fitted, was deleted and the requirement that the prescription be issued only to the
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III. Findings of the Contact Lens Study

Preventing qualified opticians from fitting contact lenses unless specifically permitted to do so by optometrists will limit how effectively opticians can compete with optometrists. Thus, it is likely to increase prices and decrease the availability of contact lens fitting services.¹⁴ Restricting this competition might be justified if restrictions were necessary to assure high quality care. But based on the results of the Contact Lens Study, we believe that competition among these provider groups is unlikely to have any adverse effects on the quality of eye care provided to consumers.

The Contact Lens Study was designed to examine the differences, if any, between the contact lens fitting services provided by opticians and the services provided by others.¹⁵ The study compared the quality of cosmetic¹⁶ contact lens

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optician and not to the patient was added. The justification given for these changes in the draft was that federal and state laws did not require releasing a contact lens prescription to a patient.

¹⁴ This conclusion about the relationship between price and restrictions on competition is supported generally by economic analysis and by numerous studies. See, e.g., Bureau of Economics Study, supra n. 9. See generally, C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation, FTC Bureau of Economics Staff Report, October 1990 (reviewing studies reported in economics literature); Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (November 1984); L. Benham & A. Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. L. & Econ. 421 (1975); Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. L. & Econ. 337 (1972). See also J.R. Schroeter, S.L. Smith and S.R. Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 36 J. Indus. Econ. 49 (1987); T. Calvani, J. Langenfeld and G. Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988).

¹⁵ Contact Lens Study, supra n. 10.

¹⁶ The Contact Lens Study covered cosmetic contact lenses, which are lenses worn as an alternative to eyeglasses. It did not cover therapeutic lenses, which are those that may be required for other medical reasons, such as for cataract surgery patients. The
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fitting provided by opticians,¹⁷ private optometrists, commercial optometrists¹⁸ and ophthalmologists. The staff was assisted in the study by the major eye care professional organizations: the American Academy of Ophthalmology, the American Optometric Association, and the Opticians Association of America. Representatives of these associations agreed upon the procedures to use and standards to apply in examining the eyes of the study subjects. The study included over 500 cosmetic contact lens wearers located in 18 urban areas across the country. All of the survey subjects had been fitted with contact lenses within the preceding three years and were still wearing them.

An ophthalmologist, an optometrist, and an optician examined each subject, looking for seven potentially pathological conditions that are commonly associated with improper contact lens fitting. The procedures closely resembled those that contact lens fitters perform in "follow-up" evaluations. For each subject, a "summary quality score" was determined based on the examiners' findings for each of the seven conditions for each eye. In addition to this summary quality score, intended to indicate the overall health of the subject's eyes, each of the seven eye conditions was also scored separately. The survey data was then analyzed by expert statistical consultants and economists experienced in survey research.

The study found that the quality of cosmetic contact lens fitting provided by opticians was comparable to that provided by ophthalmologists and optometrists. The study found that there was no significant difference in the quality of cosmetic contact lens fitting performed by the different classes of providers. The summary quality scores showed no statistically significant differences among the provider groups. For some of the particular conditions, small differences did appear; however, those differences are not consistent across provider groups. That is, while opticians did slightly better than other providers

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study also did not cover types of lenses which had only recently become available, such as extended wear lenses.

¹⁷ The opticians included in the study were permitted, under the laws of their states, to fit contact lenses.

¹⁸ Commercial optometrists included those who were associated with chain optical firms, used trade names or practiced in commercial locations.

with respect to some conditions, some other providers did slightly better for other conditions.¹⁹

The study also examined the prices of cosmetic contact lens fitting services. In contrast to quality of service, which was substantially the same among provider groups, prices ranged widely. On average, ophthalmologists charged the highest prices, opticians and non-commercial optometrists the next highest prices, and commercial optometrists the lowest.

The Contact Lens Study remains the most complete and reliable study of this subject of which we are aware.²⁰ Because it studied how opticians fitted cosmetic contact lenses in jurisdictions where they were permitted to provide that service, its findings, although based on data now twelve years old, should still apply where they are permitted to do so now. The study's findings do not support claims that there are significant differences in the quality of cosmetic contact lens fitting services performed by different types of providers.

IV. Conclusion

Allowing opticians to provide contact lens fitting services in competition with other providers can be expected to encourage all types of providers, including optometrists and ophthalmologists, to lower their prices or improve their services. Restricting how qualified opticians can compete in offering contact lens fitting services appears to be unnecessary to protect the public from poor quality service. Instead, restricting that competition is likely to result in consumer injury, by reducing competition and increasing the prices of contact lenses.

¹⁹ Out of 24 comparisons that were possible, based on the data, differences appeared for only three. The differences were small, and evidences of superiority were evenly shared; that is, each provider group (opticians, optometrists, and ophthalmologists) appeared (slightly) superior to the others on one of these three comparisons. Contact Lens Study, *supra* n. 10, pp. 37-38.

²⁰ Optometrists' associations, in opposing the Commission's rulemaking efforts, criticized the study's methods and findings. After reviewing these criticisms, the Commission concluded that the Contact Lens Study (and the Bureau of Economics Study) provided reliable information about the cost and quality of eye care, and that the criticisms offered did not materially discredit the study's key findings. Commission Statement, *supra* n. 6, at 10,294.