



University of San Diego

Center for Public Interest Law

Children's Advocacy Institute

March 29, 2004

Federal Trade Commission
Office of the Secretary, Room 159-H (Annex A)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Contact Lens Rule, Project No. R411002

This letter and its attachment are submitted in response to the Commission's proposed regulations implementing H.R. 3140, the "Fairness to Contact Lens Consumers Act" (Act).

Since 1980, the Center for Public Interest Law (CPIL) has studied and reported on California's regulation of business, trades, and professions, including the practice of optometry. The enclosed testimony, formally submitted by CPIL to the California Joint Legislative Sunset Review Committee at its December 2001 hearing on the State Board of Optometry, more fully explains the expertise of CPIL on matters of professional and occupational licensing. I have reviewed various documents pertaining to the Commission's above-referenced proceeding, including the State Board's February 25, 2004 submission, before preparing this letter.

Passage (and appropriate implementation) of the Act is beneficial to consumers. As identified in the enclosed testimony, well-written contact lens prescription "release" laws combat one of the most antiquated and objectionable practices routinely employed by the optometric profession — refusal to release to a consumer his or her prescription, which prevents the patient/consumer from easily purchasing contact lenses from outlets other than the prescriber-optometrist.

In this regard, California's recently-enacted "release" legislation, AB 2020 (Correa) (Chapter 814, Statutes of 2002) should be considered a model for the Commission's regulations implementing H.R. 3140. Generally, AB 2020 represents a good balance between the interests of all parties, including consumers, contact lens sellers, and prescribers. It is also important to note that AB 2020 (Correa) was a product of compromise between previously mistrustful parties — optometrists and

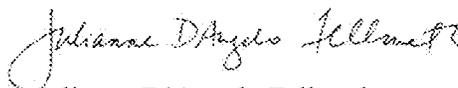
“alternative” contact lens sellers. The ability of these parties to put aside their differences and develop model legislation should be acknowledged and commended.¹

To the extent AB 2020 is fairly considered a model, the Commission may wish to pattern its regulations, to the maximum extent practicable, on the provisions of California law, which since its enactment has been well-received by all parties. In its February 25, 2004 submission, the State Board of Optometry suggests two amendments to the proposed federal regulations — specifically, amendment of the timeframe for verification of contact lens prescriptions, and the addition of exemptions to the release requirement for certain types of lenses — which would mirror California law. CPIL has no objection to the State Board’s proposed amendments.

In the last 20 years, the marketplace for replacement contact lenses has changed dramatically. Enactment of AB 2020 (Correa) and H.R. 3140 is evidence of that change. The Commission’s regulations should promote the responsible growth of this marketplace which has greatly benefited consumers.

Thank you for your consideration of these comments. If you have questions, please feel free to contact me at CPIL’s San Diego office.

Sincerely,



Julianne D’Angelo Fellmeth
Administrative Director
Center for Public Interest Law

Enc: December 2001 Testimony to Joint Legislative Sunset Review Committee

¹As stated in my enclosed testimony, historically the relationship between the optometric profession and competitor contact lens sellers has been marked by litigation and hostility. Typically, state regulatory boards (usually controlled by optometrists) have been complicit in these efforts to unfairly restrict competition in the rapidly-evolving contact lens marketplace, but — as noted above — recent developments in California are encouraging.

JOINT LEGISLATIVE SUNSET REVIEW COMMITTEE
Sunset Hearing on Board of Optometry
December 5, 2001

Comments of Julianne D'Angelo Fellmeth
Administrative Director, Center for Public Interest Law

Good morning, Madame Chair and Members of the Committee:

My name is Julie D'Angelo Fellmeth, and I am the Administrative Director of the Center for Public Interest Law (CPIL) at the University of San Diego School of Law.

For 21 years, CPIL has studied the state's regulation of business, trades, and professions. For 21 years, we have monitored the activities of between 25–50 different regulatory agencies — including the Board of Optometry.

My staff and I personally attend the meetings of these agencies, and we publish the *California Regulatory Law Reporter*, a journal that chronicles the activities and decisions of 25 California regulatory agencies. I have appeared before this Joint Committee many times in its review of many other agencies.

After the presentation you just heard, I'm not sure you need to hear much more from me in order to decide for yourselves that this Board is basically dysfunctional (or "incredibly dysfunctional," as stated by Senator Figueroa). Its members are at odds with each other. Its members are at odds with its executive officer. Due to this infighting, the Board has not held a business meeting in over a year. It is clearly not engaging in public protection.

You may have already concluded that this Board should be reconstituted (as you recommended last year and as has happened to the Dental Board), and you are right.

But that is not enough. This Board should not only be reconstituted. Its entire composition should be changed from a professional member supermajority to — at the very least — a public member majority. That is the only way you are going ensure that this Board will act in the public interest and not in the interest of the profession it regulates.

Today, I'd like you to step back and look at the forest instead of the trees, because the problems of this Board are much bigger than the seven "trees" before you (the six board members and the executive officer). Please don't be tempted to conclude that this Board's deficiencies are the result of "personality problems" between seven people who just don't get along very well. The problems of this Board stem directly from the fact that the law requires the optometry profession to dominate this board. And the optometry profession has a long history of anticompetitive conduct that is not in the public interest — not just here in California, but across the nation.

For 20 or 30 years, the optometry profession has been engaged both in turf battles with other eye care professionals, and in the age-old intra-profession battle of private practice optometrists vs. optometrists who work for corporations. The bottom line is that the major efforts of this profession — for the past two or three decades — have been not toward public protection but instead toward self-protection and professional promotion. Because of the profession's supermajority on this Board, those priorities are reflected in the actions and in the inactions of this Board.

I want to briefly take you through several examples of this anticompetitive and self-protective behavior across the nation.

As I mentioned, I teach law at the USD School of Law, and one of the cases I require my students to read every year is a U.S. Supreme Court case called *Gibson v. Berryhill*¹, decided in 1973 — at a time when optometry was largely carried out through private practice and not corporations. This case is about the Alabama Board of Optometry, which at that time consisted entirely of optometrists, and entirely of private practice optometrists. Those Board members instituted disciplinary proceedings against some optometrists who worked for Lee Optical, an optometric corporation — solely on grounds that they worked for a corporation. The corporate optometrists filed suit in federal court seeking an injunction against the Board on grounds that its members were biased — as private practice optometrists, the Board members stood to personally profit if they were successful in their quest to put the corporate optometrists out of business. The federal courts — all the way up to the U.S. Supreme Court — agreed with the corporate optometrists that the Board members were abusing their governmental authority by instituting disciplinary proceedings against their competition so as to put them out of business and personally profit.

That is one example of what can happen when a profession captures its own regulatory agency. And it happened within this very profession — thirty years ago. And it got worse. Across the country, state optometry associations and state boards of optometry — all dominated by private-practice optometrists — convinced state legislatures to enact statutes favoring the private practice of optometry and disfavoring corporate optometry.

State boards of optometry — again, dominated by private practice optometrists — began to use their rulemaking powers to adopt regulations that tended to discourage corporate optometry and worked to the professional advantage of private practice optometrists.

Things got so bad that the Federal Trade Commission (FTC) began to investigate these statutes and regulations in the late 1970s, and found that they actually harmed consumers — they resulted in higher prices and reduced the quality of eye care available to the public.²

¹ 411 U.S. 564 (1973).

² 54 Fed. Reg. 10,285 (Mar. 1, 1989).

In 1989, the FTC issued a rule barring state legislatures and state boards of optometry from adopting these kinds of anticompetitive statutes and regulations. This Board led the charge in challenging the FTC's rule and its authority to adopt the rule. This Board was the lead plaintiff in the case — it fought for the right to be anticompetitive. And it won — not on the merits, not because the court found that these kinds of statutes and regulations are good for consumers; but on grounds that the FTC lacked jurisdiction to bar states, as states, from enacting these kinds of provisions. The court held that the FTC lacked authority to declare state statutes and regulations to be unfair trade regulations.³ In effect, the court threw this ball back into your court.

Now, as corporate optometry has gained ground across the country over the past 20 years, many of these anticompetitive statutes and regulations have been repealed or softened by state legislatures and state boards. So, even though the FTC lost in court, it has won in the long run.

But that has not stopped this profession from attempting to protect itself in other ways. For example, in the late 1980s and early 1990s, this Board basically refused to license anyone who had been educated as an optometrist in another country. The Board was permitted to admit to the examination foreign graduates whose curriculum was substantially equivalent to California's — but it didn't. And the Board was permitted to send foreign graduates with deficient curricula to a remedial or "refresher" course — but it never approved one. The Board continued this pattern until it was interrupted by the Senate President Pro Tem — not Senator Burton or even Senator Lockyer before him. Senator David Roberti intervened in this mess in 1987 and authored a bill prohibiting the Board from denying permission to take the exam to a foreign graduate.⁴ He later required the Board to spend \$300,000 to create and approve a remedial course that could be taken by foreign graduates. At the time, this course of behavior by this Board was called "disgraceful" by the DCA Director.

Another example: Historically, members of this profession have made more money off the sale of products than from services rendered. While the medical profession has sworn off selling the products it prescribes because of the obvious conflict of interest that poses, this profession has clung to that practice. Many optometrists make more money off the sale of contact lenses and related products than they do off their professional services. And — as a profession — they have conceived of many ways to ensure that patients purchase replacement contact lenses from them at marked-up prices, rather than from less expensive outlets that are now permitted to sell contact lenses. The most common way to ensure this is to make sure the patient does not get the contact lens prescription. While 26 other states have enacted laws requiring optometrists to give patients their contact lens prescriptions so that patients can purchase replacement lenses at a place of their choice, the California Board has yet to meaningfully address that issue.

³ California State Board of Optometry v. Federal Trade Commission, 910 F.2d 976 (D.C. Cir. 1990).

⁴ SB 1347 (Roberti) (Chapter 1473, Statutes of 1987).

Meanwhile, the attorneys general of 32 states — including California — just concluded about two months ago a six-year federal antitrust class action in Florida against major contact lens manufacturers, the American Optometric Association, and individual optometrists for conspiring to ensure that disposable contact lenses are only sold through optometrists and not through less expensive pharmacies or Internet outlets.⁵ All the defendants settled the case — of course, none of them admitted wrongdoing, but they collectively paid over \$50 million in rebates to consumers who had been harmed by this practice plus \$34 million in fines and attorneys' fees.

This is the track record of the profession that controls this Board. This is the culture that has pervaded this Board for 30 years. This is one of the reasons this Board is so ineffective, in our view, from a consumer protection standpoint. Over the past eight years, this Board has done literally nothing that has affected consumers except to adopt one regulation requiring optometrists to post a sign in their offices warning consumers that optometrists are not required to release contact lens prescriptions. That's it — in eight years.

I want to be clear. I am not implying that optometrists are the only board members who have ever abused their governmental positions. Year after year, you have heard me testify regarding similar problems at other regulatory boards that are captured by the profession they regulate — including my own. However, the track record of this particular profession is egregious, and should disqualify it from maintaining a supermajority on the board which is supposed to regulate it in the public interest.

This profession's track record is one of the reasons this Board did not even have a toll-free complaint line until 1999, whereas most other DCA boards had one by the mid-1980s. This profession's track record is one of the reasons why this Board did not adopt citation and fine regulations until 1999 — when it had the authority to do so since 1983.

The optometry profession is using this Board to further its own interests. And it is able to do this because it occupies a supermajority of the positions on this Board.

When a profession controls its own regulatory agency, it focuses on issues not of public protection and enforcement but of enhancing the barriers to entry and expanding its scope of practice. That has clearly been the case with this Board.

In 1998, both the Department of Consumer Affairs and the staff of this committee called for greater public member participation on this Board. That did not happen in 1998. As a result, you have before you a dysfunctional agency that is doing nothing. It must happen in 2002. I strongly urge you to recommend conversion of this Board to a public member majority.

Thank you for your consideration of these comments.

⁵ In re Disposable Contact Lens Antitrust Litigation, No. MDL 1030 (M.D. Fla).