
CONTACT LENS PRICING LITIGATION:¹
***ROBERTS v. BAUSCH & LOMB, INC.*²**

PROLOGUE

In early 1993, *Business Week* reporter Mark Maremont was in Rochester, New York, to research a story on Kodak.³ As an afterthought—to make the trip to western New York more worthwhile—he stopped by Bausch & Lomb, Incorporated, to see if he might learn about any recent developments. Bausch & Lomb is a Rochester-based manufacturer of optical, eye care, and other products, with \$2 billion in global annual revenues.⁴ During his visit, Maremont was taken on a tour of the company’s soft contact lens manufacturing plant and noticed something curious at the end of the assembly line:

A white-clad worker carefully inserts each tiny lens into a plastic blister pack filled with saline solution. Then, some lenses are sealed with a blue film and loaded into boxes marked SeeSequence 2. Another set gets covered with purple film and is stuffed into boxes marked Medalist. Soon, patients around the U.S. will be paying \$7 to \$9 per pair for the SeeSequence contacts and \$15 to \$25 for a pair of Medalists.

What’s the difference? None. Zilch. Zero. The two products contain precisely the same lens.⁵

Maremont wondered if he really understood what he was seeing and asked if the same lenses were actually going into two different boxes. The guide and other Bausch & Lomb representatives told him matter-of-factly that the lenses were indeed identical but that differences in the way the lenses were used justified the variation in packaging and prices. Maremont filed the information away for a future story.

Maremont’s observations at the Rochester plant would not have been a surprise to Ventura, California, optometrist Dr. Robert Pazen. In late 1991, Pazen had wondered why his Bausch & Lomb sales representative had delivered only a single set of trial lenses to be used with the company’s two new lines of soft contact lenses, the “SeeSequence2” and the “Medalist.”⁶ In response to Pazen’s

question, the sales representative explained that while the lenses were technically the same, the two lines were to be prescribed for different wearing and disposal times and would be sold at different prices as well. When Pazen asked if he could sell his patients less expensive SeeQuence2 lenses for the same sort of use one might make of Medalist lenses, he was informed that such use would contradict the manufacturer's labeling on the boxes. Unhappy with this policy, Pazen informed his patients that the lenses were identical and allowed them to choose between the two differently labeled boxes. Not surprisingly, they preferred the less costly version.

Maremont and Pazen's discovery reflects the evolution of contact lenses and their use by American consumers. The first company to receive FDA approval to market soft contact lenses in the United States,⁷ Bausch & Lomb introduced the product in 1971.⁸ When originally developed, soft lenses were generally worn in a manner similar to their hard or rigid counterparts: they were worn only during waking hours; they were cleaned, rinsed, and disinfected after each use; and they were replaced only after loss, damage, irritation, or a change in vision requirements (typically this meant replacement on an annual basis). One of these traditional-wear soft contact lenses, Bausch & Lomb's "Optima" brand (introduced in 1984), eventually became one of the company's most popular models. However, the process of cleaning and disinfecting soft contacts was more complicated than that for rigid lenses, and these higher-maintenance requirements led many consumers to reject switching to the new lens.

In 1981, "extended wear" soft lenses first became available for commercial distribution.⁹ These lenses could be worn continuously for up to seven days before removal, cleaning, and disinfecting, but they still were replaced only as needed. The less-frequent need to clean this type of lens—as well as simplified cleaning and disinfecting procedures generally—contributed to a rise in the overall popularity of soft contacts. In 1987, the first soft contacts marketed as "disposable" became available. These extended-wear lenses were, for some consumers, inexpensive enough to be thrown away after each use, thus eliminating the need for cleaning whatsoever. Soon, wearers had yet a fourth option: In 1991, soft contacts variously called "planned replacement," "frequent replacement," or "daily wear, two-week replacement lenses" came on the market.¹⁰ These extended or daily-wear lenses were replaced not after each use or only as needed but rather according to a specified schedule. Consumers no longer needed to have a large supply of lenses on hand as they did with disposables. In addition, they ran less risk of a buildup of proteins or other contaminants on their lenses—problems common for wearers of traditional lenses that had been retained too long.¹¹ The decision to choose a particular style of soft lens was primarily based on users' disposition toward the cleaning process and their ability to afford a more-frequent rate of replacing lenses.

The multiplicity of soft contact regimens helped increase their popularity. By 1997, 82 percent of the 28 million U.S. contacts wearers were using some sort of soft lens.¹² Of those who wore soft contacts, less than half still replaced their lenses as needed in the conventional manner; 35 percent discarded them after each use and nearly a quarter routinely replaced them according to a specified schedule.¹³ The growth in the market seemed to be centered on disposable and frequent-replacement lenses and was fueled by steady drops in the per-unit price that made the higher levels of consumption with these new regimens more affordable. By 1993, manufacturing costs in the contact lens industry had plummeted and lenses were being purchased by consumers more like a commodity than as a medical device.¹⁴ Leaps in manufacturing efficiency in the early 1990s drove the average manufacturing cost down to less than \$.50 per lens from \$2 or more five years earlier.¹⁵ But all was not rosy for the industry; although production costs and end-user prices had dropped, growth in the total number of lens wearers remained stagnant.¹⁶ By promoting the use of less-expensive disposable and frequent-replacement lenses, manufacturers might generate a higher turnover of their products, thereby counteracting any decreased profit margins from market-driven price reductions.

Although Bausch & Lomb had been the first with traditional, daily-wear soft contacts in the United States, it was soon competing with Johnson & Johnson, which marketed the Vistakon line of extended-wear contact lenses. Eventually, Bausch & Lomb fell behind in the expanding planned-replacement and disposable lens fields. Johnson & Johnson entered the soft contact business in the mid-1980s; by August 1997 it controlled 40 percent of the \$1 billion U.S. contact-lens market while Bausch & Lomb's share had dropped to 15 percent.¹⁷ Competition from Johnson & Johnson, and the desire to sell more product, created incentives for Bausch & Lomb to move quickly into the frequent-replacement and disposable lens markets. And a means of doing this lay readily at hand: relabeling and repackaging existing products for these different uses.¹⁸

There was no medical reason why the lenses that had previously been marketed for use on a daily basis could not also be used for up to seven days as extended-wear contacts. So Bausch & Lomb repackaged its traditional daily-use OptimaFW lens as a Medalist extended-wear lens; later, it repackaged the same lens again as a SeeQUENCE2 disposable.¹⁹ The new lenses—the Medalist and SeeQUENCE2—were to be prescribed when practitioners put their patients on either a “disposable program” or a “planned replacement program.”²⁰ The original OptimaFW line was still the most expensive (with an expected life of a year or longer); the Medalist occupied the middle price range and had a planned replacement period of one to three months; and the relatively inexpensive SeeQUENCE2 line was labeled as either a single-use disposable lens or a planned replacement lens with a two-week cycle.²¹ Although the wholesale and retail prices of the Medalist and SeeQUENCE2 lenses were less than that of the

OptimaFW lens, the company expected that the difference in price would be offset by increased frequency of purchase leading to an increase in revenues overall.

Bausch & Lomb sold its OptimaFW line for about \$23 per lens wholesale; identical SeeQuence2 and Medalist brands were generally wholesaled at prices of about \$2.50 and \$4.00 per lens, respectively.²² These prices were not what a contact wearer would actually pay, because the lenses were sold only through dispensing contact lens providers²³ and came in different pack sizes (single vial for the OptimaFW, four- or six-packs for the Medalist, and six-packs for the SeeQuence2). The retail price to the end-use consumer varied depending on the provider's markup. As an example, a pair of lenses might cost a consumer about \$70 for the OptimaFW but just \$8 for the SeeQuence2 or \$15 for the Medalist.²⁴ Bausch & Lomb told providers to prescribe OptimaFWs for long wear if the patient had good cleaning and care habits, Medalists for moderate levels of care and cleaning, and multiday SeeQuence2 if only minimal contact lens care and cleaning could be given. Despite the differences between the three types in name, packaging, pricing, and instructions, the lenses were identical.²⁵

For contact lens providers, part of the attractiveness of the arrangement was that they needed to carry only a single supply of trial contacts in various powers for the initial fitting regardless of which of the three lenses were actually prescribed. The providers knew that there was no difference (if for no reason other than the multiple uses for the trial contacts) but were told to prescribe the different lenses depending on the needs of the patient. Bausch & Lomb also told providers, through what was later described as an "aggressive marketing program," that they could increase the return rate of their patients, and their profits, by switching to a shorter-term lens such as the SeeQuence2 or Medalist.²⁶

The strategy seems to have worked. By 1993, Bausch & Lomb's annual report announced that "*SeeQuence* and *Medalist* lenses continued to post excellent results, with sales rising over 60%."²⁷ The company's growth in contact lens revenues was attributed to better manufacturing capability, better marketing, and better instructions for the dispensing lens providers:

Our ability to meet the surging demand for disposable and planned replacement lenses is greater than it was a few years ago thanks to major investments in new manufacturing capacity around the world. . . . Increased spending for marketing programs, research and development, and the training of eye care professionals has also been an important part of our success. Equally encouraging is the progress being made in significantly reducing operating and manufacturing costs, as productivity gains are realized.²⁸

THE LITIGATION BEGINS

One of the eye care professionals Bausch & Lomb attempted to train chose not to adopt the company's recommended marketing strategy. Pazen continued to inform his patients that the lenses were identical and gave them a choice of brands despite the package labeling. Because the patients overwhelmingly opted for the less-expensive SeeQuence2, Pazen asked the sales representative if he would take back his stock of Medalists for a refund. When the sales representative declined, the optometrist took the matter to his supervisors. After being rebuffed by the area manager, he called Bausch & Lomb's toll-free 800 number to vent his frustrations and asked to speak to the senior vice president in charge of Bausch & Lomb's Contact Lens Division, Harold O. Johnson. Much to his surprise, Pazen received a personal phone call from Johnson within the hour. Johnson confirmed that the lenses were manufactured in the same way and had the same composition and design but argued that the difference was due to what he termed "simple economic theory." Johnson gave the example of a 10-pound box of soap powder being cheaper per pound than a one-pound box. Pazen was not convinced and responded that the products were not detergents but medical devices and that he thought Bausch & Lomb's instructions to practitioners raised ethical issues. When Pazen repeated his request to have the Medalist lenses removed from his office and a credit issued, Johnson agreed, but warned that should a problem arise from use of the lenses contrary to the label's instructions, Bausch & Lomb would be unable to support or defend him.

Although Pazen had no further problems with Bausch & Lomb over the matter, Johnson's warning and the company's marketing and pricing policies continued to bother him. During an automobile ride with a chief assistant district attorney for Ventura County—who was the scheduled speaker at one of the optometrist's Rotary Club meetings—Pazen related the story about the lenses and casually asked if it was something the district attorney's office might be interested in. The information was eventually passed to Deputy District Attorney Michael Schwartz in early 1993.

While the district attorney's office was interested in determining whether the practice violated any state consumer protection laws, the deputy district attorney was concerned about the possibility of federal preemption of matters relating to pharmaceuticals and health care devices for any investigation.²⁹ In April 1993, Schwartz contacted Robert H. Shaw III, Senior Counsel for Bausch & Lomb, and was told by Shaw, and later by Bausch & Lomb's legal representatives, that federal law would preempt any claims of violation of state law. At about the same time, Schwartz sent a letter to the FDA inquiring whether the agency was planning to order Bausch & Lomb to change its lens labels, and

whether the county would have the option of pursuing the matter on its own if the FDA declined to move forward.³⁰

In July 1993, a sidebar article by Maremont in *Business Week* revealed “the contact-lens industry’s little known secret” of marketing lenses under several trade names at different prices but with little material variation. The article broke the story for the first time on a national level, saying that the only difference between the SeeQuence2 and Medalist lenses was the color of the film used to seal the blister packs. Johnson’s explanation of Bausch & Lomb’s pricing policy was also presented: “It’s simply a volume discount for the patient. . . . If you buy 104 lenses in a year, you should pay less per lens than somebody buying 20 or 30.”³¹

In early August, Schwartz received a response from the FDA that said the agency was satisfied with the current product labeling and that the county would indeed be out of its jurisdiction if it took any independent action against the company. The Ventura County District Attorney’s Office sent a second letter to the FDA asking it to reconsider the decision, and Schwartz related the details of the matter to a reporter for the *Los Angeles Times*. In early September, a *Times* story in the local Ventura County edition reported Pazen’s dealings with Bausch & Lomb and the FDA’s reluctance to address the issue.³²

News began to spread about the allegations that the differently priced lenses were actually the same item. The March 1994 issue of *Kiplinger’s Personal Finance Magazine* recounted Pazen’s experiences and Schwartz’s contacts with the FDA.³³ In response, the FDA explained why the pricing policy was not a matter of concern for them: “We don’t regulate price. The lens must be safe and effective for the purpose it’s being marketed for—which it is.”³⁴

Reporter Dawn Chmielewski, then on the staff of the *Boston Patriot Ledger*, saw the *Kiplinger* article and investigated further. In an article published on April 30, 1994, she reported that Bausch & Lomb marketed the lenses to contact lens dispensers with different directions for use despite their being identical.³⁵ She described some providers as incensed about Bausch & Lomb’s practices and others who kept the lenses’ identical composition secret from their patients. Bausch & Lomb defended its practices as benefiting those who replaced their lenses more frequently, saying, “Volume discounts are very common in the contact lens industry, as well as other industries.”³⁶ Declining to get involved, the FDA responded that more than one trade name could indeed be used for the same product: “The bottom line here is safety and efficacy. . . . The product has got to be safe and effective as a device. As long as they adhere to that, and the labeling (is truthful), that’s no problem.”³⁷

The next thing counsel at Bausch & Lomb heard was that it had been sued in Alabama.

The litigation began when a number of Boston-area residents who had learned of the allegations from the local media (possibly the *Patriot Ledger* article) contacted attorney Fredric “Rick” Ellis³⁸ and complained about the pricing disparity. After reviewing the potential for litigation, Ellis contacted Atlanta attorney Ralph Knowles³⁹ and asked him for help. The two attorneys had worked together on the silicone gel breast implant litigation, conducted primarily in Alabama. Though Alabama had only a small percentage of the sales of Bausch & Lomb contact lenses in the United States, the attorneys felt that an Alabama forum would be a good one both from a standpoint of jury selection and of judge assignment. Anticipating a nationwide class action, Knowles and Ellis contacted a geographically diverse set of plaintiff attorneys to assist in what they thought would develop into large-scale litigation, possibly involving claims of personal injury, and to help share in the costs of notice.⁴⁰

Venue in Birmingham, Alabama, was attractive because Ellis and Knowles could use local attorneys who had significant experience both in class actions and in complex medical-device litigation such as that involving breast implants. Filing in federal court was attractive because they were uncertain whether a state court judge would certify a nationwide class based in part on federal statutory claims.⁴¹ They knew a filing in the Northern District of Alabama—with two sitting judges—would yield either Judge U. W. Clemon or Judge Samuel C. Pointer as a trial judge, either of whom they felt would give them a fair shake. Representative plaintiffs were identified in the northern district, and the case was filed on May 10, 1994, in Birmingham federal district court and assigned to Judge Clemon.⁴²

PRIMARY ISSUES IN THE LITIGATION

The complaint alleged that Bausch & Lomb had violated the federal Lanham Act,⁴³ the RICO Act,⁴⁴ and various state consumer protection acts. It included also common-law claims of misrepresentation, fraud, deceit, false statements and nondisclosures of material fact, breaches of express and implied warranties, and negligence. A number of Bausch & Lomb’s top corporate officers were also individually named as defendants, although they were dropped from the litigation soon thereafter. The individual plaintiffs were identified as representatives of a proposed class of all U.S. purchasers of OptimaFW, Medalist, and SeeQuence2 lenses.

In essence, the plaintiffs alleged that Medalist and OptimaFW users were paying more than they needed to because a relatively cheap “disposable” SeeQuence2 lens would have worked as well for either a planned-replacement or traditional-wear schedule. As the plaintiffs viewed the situation, the defendants had fraudulently induced consumers to believe that the Medalist and SeeQuence2

lenses had to be replaced frequently, while only the higher-priced OptimaFW lens was suitable and safe for long-term use. Because the lenses were medical devices, the plaintiffs averred that consumers were more likely to accept without question any labeling or instructions issued by Bausch & Lomb.⁴⁵ The plaintiffs claimed that the company's plans were aided by its aggressive marketing programs with eye care practitioners, its seeking of FDA "approval" of the labeling, its insistence that lenses could be prescribed only for the purposes listed, and its practice of dropping practitioners from the soft contact lens program if they did not follow Bausch & Lomb's pricing system.⁴⁶ In the plaintiffs' view, the fact that the price on the "new" labels was reduced (rather than increased) made no difference to the core issue of deceptive practices because some consumers were induced to replace their lenses more often than necessary and others were essentially prevented from learning of the availability of a less-expensive alternative product. Though there were no allegations of safety or quality problems, the plaintiffs felt that the practices met the standards for fraud. The lawsuit sought punitive or exemplary damages as well as compensatory damages and equitable relief.⁴⁷

In response, Bausch & Lomb conceded that the lenses were the same but argued that there were a number of reasons for the different prices.⁴⁸ It asserted that the different sales and marketing practices were justified on the basis that volume-discount purchases reduced the costs for those buying shorter-period lenses.⁴⁹ No sinister scheme was envisioned; rather, the pricing strategy was designed simply to encourage eyeglass wearers to adopt soft lenses by making the convenient disposable version more affordable.⁵⁰ Moreover, the longer the lens stayed in the eye or was used overall, the more supervision would be needed by the dispensing eye care practitioner; the higher prices for the nondisposable lenses reflected the increased time the eye care practitioner required to oversee planned-replacement and traditional-wear regimes.

The defendant argued that no material facts were withheld; the fact that the Medalist and SeeQuence2 lenses were identical to the OptimaFW was fully disclosed to the FDA in the premarket approval process,⁵¹ and eye care practitioners all knew it was the same lens—and if they wanted to, the practitioners could have sold the lenses in any way and at any price they desired. Indeed, Bausch & Lomb never sold to consumers directly, only to eye care practitioners.⁵² It also asserted that the packaging was subject to FDA review and approval,⁵³ and that because the litigation involved medical devices, federal law preempted state law, eliminating state-law claims from the complaint. Finally, Bausch & Lomb argued that a class action was inappropriate because to prove claims for common-law fraud, negligent misrepresentation, or violation of the RICO statute, each individual plaintiff would have to demonstrate that he or she consciously relied on Bausch & Lomb's representations. Such a need for individual

proof would, in the defendant's view, defeat the primary justification for class treatment. Moreover, because the contact lens users based their purchases solely upon their doctor's advice and prescriptions, Bausch & Lomb argued that they could not have relied on Bausch & Lomb's statements or advertising, a necessary element in a fraud action.⁵⁴

THE LITIGATION PROGRESSES

After the initial allegations had come to light in the press in 1993–1994, state attorneys general began to take an interest in the pricing practices. At the time of the *Patriot Ledger* article, for example, the head of the consumer protection division of the Massachusetts Attorney General's office said that it planned to reexamine the labeling practices with an eye toward proceeding under the state's consumer protection act: "It clearly appears to be a troubling consumer practice, and one that we would want to look over very carefully."⁵⁵ Triggered by the articles in the press and a circulated copy of the correspondence between the Ventura County district attorney's office and the FDA, attorneys general in a number of states began a joint investigation in 1994 of the allegations of multiple pricing for the same product.⁵⁶ Craig Jordan of the Texas Attorney General's office led this multistate task force. However, the Alabama federal court case and the attorneys general investigations appear to have proceeded independently of one another. Much of the state agencies' work was done secretly and class counsel in the Alabama case was only tangentially aware of its nature. Similarly, the attorneys general thought that the matter's being litigated privately was of little relevance to the decision to pursue a formal public investigation.⁵⁷ A separate investigation, independent of the multistate task force, was also initiated by the attorney general's office of the state of Florida.⁵⁸

While there was a flurry of general media and trade journal reports around the time of the filing of the class action, neither the plaintiffs or the defendants attempted to try the case in the court of public opinion. However, two national television shows (*Dateline* and *American Journal*) ran stories on the allegations early in the life of the Alabama litigation.⁵⁹

The primary law firms prosecuting the plaintiffs' claims included a number of experienced class action attorneys. Formally, class counsel was James J. Thompson of Birmingham's Hare Wynn Newell & Newton,⁶⁰ but because Rick Ellis had initiated the litigation, the latter was primary coordinator of the case and determined the cost and fee-sharing arrangements. Beside Knowles' Atlanta office, other firms from San Francisco, San Jose, Portland (Oregon), Detroit, Birmingham, and Dothan (Alabama) joined in the action to represent the plaintiffs.⁶¹ Many of these firms had worked together in the breast implant

arena, but with one exception—Lieff & Cabraser of San Francisco—most were not well known for pursuing financial injury class action litigation.

Initially, Patricia Hulley of Bausch & Lomb supervised the defense; in the final months of the litigation, that responsibility was turned over to Susan Roberts. Bausch & Lomb's outside litigation counsel consisted of four firms, two located in Birmingham and one each in New York and San Francisco.⁶²

INITIAL CERTIFICATION AND NOTICE

From the beginning, the plaintiff firms intended to seek certification of a national class of Bausch & Lomb customers under the provisions of Rule 23(b)(3). In late September 1994—about four months after filing—a day-long evidentiary hearing was held on the issue of class certification.⁶³ While the matter was under consideration, the defendant filed a motion for summary judgment, but that was denied the very next day. On November 1, 1994, Judge Clemon certified a class of all consumer purchasers of OptimaFW and Medalist lenses with Myra Roberts as the representative plaintiff.⁶⁴ This class apparently included all U.S. resident or domiciliary consumer purchasers of OptimaFW and Medalist lenses from January 1, 1991, to November 1, 1994.⁶⁵

At the time of the initial filing, the plaintiffs' attorneys believed that the lawsuit would include allegations against Bausch & Lomb for encouraging providers to switch to more-frequently purchased lenses, rather than sticking with the conventional-wear OptimaFWs. Class counsel thought that some purchasers would have incurred additional costs due to premature disposal of lenses in good repair.⁶⁶ As more information became available, plaintiffs' attorneys saw that such claims would require additional evidence about customers' reliance on the contact lens providers' representations, thus muddying the situation for a class action, and further realized that more frequent replacement might often be medically justified. Another possibility at the initiation of the suit was that the lawsuit would encompass claims of physical injuries associated with using a lens originally designed for daily removal and cleaning (the OptimaFW) continuously for up to a week (as some SeeQuence2 and Medalist lenses were prescribed). But investigation failed to turn up any such incidents; indeed, the lens design and composition turned out to be adequately and safely suited for use in any of the various regimens. As a result, plaintiffs' attorneys ultimately focused their case solely on the price difference between the identical lenses. SeeQuence2 customers were not included in the class certification request because they, as purchasers of the least expensive lenses, would have suffered no financial damages. Indeed, two of the originally named plaintiffs were dropped from the initial class certification order when it became apparent that they had purchased only the SeeQuence2 lenses.⁶⁷ The class definition's starting date was

chosen to be January 1, 1991, because it was the plaintiffs' best estimate of the initial introduction of the SeeQuence2 lens (and therefore, the availability of a less-expensive alternative to the Medalist and OptimaFW). Members of this initial class were given until May 1, 1995 (about seven months from certification), to exclude themselves.

Plaintiffs' attorney Michael L. Williams estimated that the value of the individual claims underlying the class could be \$50–\$500 and that the class could encompass three million people who had purchased the lenses. Williams described class certification as “the first big battle between consumers and the company, and the consumers won this first one.”⁶⁸

They won the second one as well. Bausch & Lomb's petition for a writ of mandamus to the 11th Circuit with the hope of overturning the certification decision was denied on December 1, 1994.

Details for the notice of the initial class certification were approved on January 27, 1995. The court had found that there was no practical means of identifying individual class members and ordered that notice be primarily achieved by publication. The court ordered that notice, at the plaintiffs' expense, was to be accomplished in three ways:

- publication of a summary notice of class certification in 23 newspapers across the country on a single Friday (plus a second publication in *USA Today*), in two national eye care industry magazines, and via a “PR Newswire” from a company that sends electronic press releases to targeted audiences across the nation
- a first-class mailing of a somewhat lengthier notice to all of those who requested it; and
- a package containing the notice by mail, the Notice Order, and a cover letter from the court to be sent to a list (provided by Bausch & Lomb) of all eye care practitioners who had purchased either the OptimaFW or Medalist lenses. The cover letter would request that the practitioners forward a copy of the mail notice, at class counsel's expense, to their patients.⁶⁹

Plaintiff's attorneys began disseminating the notice in early 1995.⁷⁰ Plaintiffs' costs of publication were asserted to be nearly \$118,000.⁷¹ More than 13,000 letters were sent by class counsel to eye care practitioners; the cost of this mailing, including the reimbursement of the practitioners' forwarding expenses, has been estimated at slightly over \$30,000.

During 1995, and while the litigation was pending, Bausch & Lomb notified practitioners of a number of modifications to its labeling. Medalist boxes were changed to indicate that the lenses inside were actually “OptimaFW—for use

with the Medalist replacement system” and similarly, SeeQuence2 boxes now read “OptimaFW—for use with the SeeQuence2 disposable system.”⁷²

OTHER RELATED LITIGATION

Two suits, styled by class counsel as “tag-alongs” because they were filed after the Alabama case had begun, eventually played a role in the lead litigation. A state case filed in October 1994 by the firm of Milberg Weiss in San Diego involved issues substantially similar to those in the Alabama case; the major difference was that the periods of purchase for its putative class members were slightly longer than those set forth in the initial certification order for *Roberts* on November 1, 1994. A state case filed in 1996 in New York City by the firm of Starr & Holman also replicated many of the allegations set out in the Alabama case with one addition: Bausch & Lomb’s Criterion UltraFW soft lens was also said to be identical to the OptimaFW–Medalist–SeeQuence2 family. Nevertheless, the soft contact lens litigation being fought in Judge Clemon’s courtroom was the predominant suit.

MOVEMENT TOWARDS SETTLEMENT

Settlement discussions began in February 1995 after the court ruled on the scope and details of the notice of the initial class certification,⁷³ but the case continued to move forward in the courtroom. Judge Clemon consistently kept up the pace of the litigation and set a firm trial date for August 1996. Bausch & Lomb aggressively defended itself and in March 1996 moved to decertify the class. In June, the motion to decertify was heard, but a ruling was not immediately issued. Both sides pressed onward and completed discovery. However, though both the plaintiffs and defendants were ready and willing to go to trial, the parties reached an agreement to settle the case just before the scheduled trial date.

The parties’ reasons for acceding to settlement differed. The defendants felt that settlement was prudent, given the vague wording of the Alabama fraud statute with its prohibition of “any practice likely to deceive.” In addition, similar issues had never been litigated elsewhere, thus offering no clue as to how the law might be interpreted on appeal. Moreover, trial might have been held in Tuscaloosa, an arguably more plaintiff-friendly venue than Birmingham, and there was a distinct possibility of an Alabama jury awarding punitive damages, attorney fees, and RICO penalties. In its press release concerning the settlement, Bausch & Lomb stated that the agreement was preferable to “diverting resources to lengthy litigation to establish the merits of labeling that is no longer in use.”⁷⁴

As the plaintiffs' attorneys saw it, Bausch & Lomb thought it might lose very big to an Alabama jury (though it might have hoped for an 11th Circuit reversal on the certification or fraud issues). The plaintiffs' attorneys also thought that because Bausch & Lomb had retired or shifted a number of corporate officers in 1996, including some in the contact lens division, the company wanted those in the new positions to start off with a clean slate. Bausch & Lomb was also wrestling with other corporate problems, including a Securities and Exchange Commission investigation of an unrelated 1993 marketing program involving sunglasses.⁷⁵ Plaintiffs' attorneys thought another motive for settlement was Bausch & Lomb's reluctance to go to trial and have its shareholders hear testimony of questionable business practices. Finally, plaintiffs felt the defendants could settle without "betting the company."

Plaintiffs' attorneys had their own reasons to settle. Given the likelihood of a pro-plaintiff jury and what they perceived to be the favorable facts of the case, plaintiffs' attorneys were confident of a huge punitive damage verdict. But they still preferred settlement to the uncertainties of trial. Though they believed liability was clear, plaintiffs' attorneys saw that there might be problems (albeit manageable ones) determining the size of the class and estimating damages (e.g., how to calculate them, what numbers to use). The only injuries to the class members were financial, and modest at that, and there were no questions of safety and quality. Plaintiffs concluded that a settlement before trial was the best way to stop Bausch & Lomb from packaging its products in such a way as to confuse consumers; prevent any similar future behavior; bring bad publicity to Bausch & Lomb and others who might attempt the same sort of marketing scheme; and—if nothing else—allow consumers the opportunity to get their money back.

Attorneys Jim Thompson and Ralph Knowles handled the settlement discussions on the plaintiffs' behalf; Fournier J. Gale, J. Mark White, and Harry Sacks were the defendant's negotiators. By several reports, the negotiations between the parties were intense and vociferous, but a stipulation of settlement was finally signed on July 25, 1996 (though some minor amendments were made in mid-August).⁷⁶ The deal was based upon the number of lenses in question sold and the difference in the wholesale profits between the lens purchased and the SeeQuence2, estimated to total at least \$33.5 million.

DETAILS OF THE AGREEMENT

A critical aspect of the settlement was the agreed-to expansion of the class to include those who purchased Medalist and OptimaFW lens both before and after the originally specified cutoff dates, and those who purchased the Criterion UltraFW lens. The parties justified the expansion on the basis that the legal and

factual issues for these additional periods and trade names were substantially similar to those in the original certification order. But these changes had their genesis in the New York and California state court tag-along actions, both of which were eventually concluded by nominal settlements by Bausch & Lomb with the attorneys who had brought the suits. Bausch & Lomb declined to reveal to us the amount of those settlements, other than that they were for a small amount of attorney fees. (Attorneys in the Alabama case agreed that the tag-along-action attorneys were not generously paid.) With the folding-in of the tag-along claims, the parties agreed to a settlement-only class comprising residents or domiciliaries of the United States who were consumer purchasers of the following Bausch and Lomb lenses during these periods of time:

Medalist: January 1, 1991, to December 31, 1995

OptimaFW: November 1, 1990, to December 31, 1995

Criterion UltraFW: November 1, 1990, to April 30, 1996.

Bausch & Lomb agreed to pay the difference between the average wholesale price of the least expensive method of buying lenses (the SeeQuence2) and the more expensive methods (Medalist, OptimaFW, and Criterion UltraFW); it also would provide certificates (i.e., coupons) good for certain Bausch & Lomb products in an equal amount based upon the average wholesale price of those products.⁷⁷ The parties to the settlement believed that the total economic benefit to the class for the cash payments and the matching credit certificates might exceed \$67 million.⁷⁸ According to a *Wall Street Journal* article, "Fredric Ellis, a Boston lawyer for the plaintiffs, estimated that between one million and 1.5 million consumers could receive from \$25 to \$50 in cash and \$25 to \$50 in coupons, costing the company as much as \$68 million."⁷⁹ In return, class members would waive all claims arising out of the marketing and related activities of Bausch & Lomb as they pertained to the lenses, whether against Bausch & Lomb or against contact lens providers. Personal injury claims, however, were excluded from this release.⁸⁰

A thorny issue for the plaintiffs' attorneys had been how to calculate what the defendant should pay. They initially tried to calculate the class benefit as the difference in the retail prices of the products, but surveys conducted by the plaintiffs and the defendant revealed a wide disparity in prices charged by contact lens providers nationwide. Further, it could be argued that Bausch & Lomb should not be held responsible for the end-user prices because the defendant only sold the products wholesale. Using wholesale price differences and the best available figures for the number and type of lenses actually sold, the \$33.5 million cash figure was estimated on a calculation that assumed that 100 percent of the potential class would complete the claiming process. Because estimating retail price differences was deemed impractical, the attorneys added

matching credit certificates to the settlement in order to sweeten the pot for class members. There was no cap on the amount that the defendant would have to pay, but neither was there any provision for distributing unclaimed benefits; any amounts not claimed would be kept by the defendant. The plaintiffs also claimed that because Bausch & Lomb had “ceased the pricing practices which occasioned this lawsuit, [the settlement resulted] in economic benefits to millions of future purchasers.”⁸¹

Shortly after the agreement was reached, the judge granted preliminary approval of the settlement on July 31, 1996. The court found that approximately \$34 million in cash, about \$34 million in product credit (i.e., the discount coupons), and up to \$8 million in fees and expenses to be paid over and above the benefits to the class fulfilled the criteria for preliminary settlement approval.

At the time of the settlement, Bausch & Lomb said it “continue[d] to deny wrongdoing.”⁸² The settlement did not address the pricing policy *per se* and made no reference to any prohibition on Bausch & Lomb’s ability to conduct similar marketing programs in the future. Class counsel indicated to us their belief that any wholesale price differences between SeeQuence2 lenses and either the Medalist or OptimaFW lenses had ended by December 31, 1995, and likewise had ended for Criterion UltraFW lenses by April 30, 1996 (hence the reason why the defendant had insisted on these dates for the settlement class definition). But the settlement did not instigate any change in Bausch & Lomb’s pricing practices.

The effective date of the settlement was set at ten days past the expiration date of any possible appeal from the final order approving settlement. Bausch & Lomb would bear all costs of the notice and settlement administration. Pursuant to the agreement, the court appointed Arthur Andersen & Company as settlement administrator on August 16, 1996.

Notice

With the defendant bearing the costs, notice to the settlement class was to be achieved in a number of ways:

- by nationwide publication of the notice and claim form in major newspapers
- by posting of the notice and claim form on the internet until February 1, 1997
- press releases from both Bausch & Lomb and the plaintiffs on “PR Newswire” the day before the first publication notice

- a letter from Bausch & Lomb to all of its contact lens provider accounts informing them of the settlement and requesting cooperation in the settlement process, including forwarding a mailing notice to settlement class members⁸³
- a toll-free phone number, P.O. box, and internet web site from which to obtain additional information or claim forms (maintained through June 30, 1997); and
- direct mailing of the notice and claim forms to the addresses of “known Class Members.”⁸⁴

The notice had two purposes: to inform all class members of the preliminary approval of the settlement (pending the fairness hearing) and to notify further the members of the expanded class of their new class status and any opt-out requirements that pertained just to them.

Additional Opt-Out Provisions

In addition to the class earlier certified on November 1, 1994, the preliminary approval had certified an expanded class of U.S. residents and domiciliaries who made consumer purchases of Criterion UltraFW lenses from November 1, 1990, through April 30, 1996, and extended the purchase period for OptimaFW and Medalist lenses. The purchase periods for both lenses were extended to include November 1, 1994–December 31, 1995, and for OptimaFW, the last two months of 1990 were also added. An opt-out deadline of November 1, 1996, was given for purchasers of these lenses during these extended periods, but those members of the original certified class who had failed to opt out by May 1, 1995, were already bound by the settlement.⁸⁵

Claiming

The deadline for making an application for a refund was February 1, 1997. To make such a claim, one had to return a form with name, address, and phone number as well as number, type, and dates of lenses purchased to the settlement administrator, plus *one* of the following documents:

- A Verified Claim Form completed by the claimant’s contact lens provider indicating the type and date of each lens purchased, and stating that the provider’s records reflect such purchase (Bausch & Lomb provided these forms to the providers), or

- A letter from, and on the stationery of, the provider, indicating the type and date of each lens purchased and stating that the provider's records reflect such purchase, or
- An Alternative Claim Form (with any available documentation) if the claimant could not obtain either of the above two documents.⁸⁶

While submission of the first two documents with lens-provider confirmation of the purchases was preferred, a claimant would be able to receive the agreed-to compensation simply by listing the dates, types, and sources of lens purchases by using the Alternative Claim Form. The schedule of cash payments was as follows: \$5.33 for each OptimaFW lens; \$8.04 for each six-pack of Medalist lenses (in other words, \$1.34 per lens); \$5.36 for each four-pack of Medalist lenses (also \$1.34 per lens); and \$3.43 for each Criterion UltraFW lens.⁸⁷ As additional compensation for every dollar paid to the claimants, Bausch & Lomb offered an equal amount of credit toward associated products. About 10 to 15 articles were available for the credit redemption, including eye care solution, sun screen, Ray-Ban sunglasses, and contact lens cases (but not lenses, because they would have to be dispensed by practitioners rather than directly by Bausch & Lomb).

Fees and Expenses

The plaintiffs' pleadings in support of the settlement asserted that the fees and costs negotiations with the defendant took place only after the settlement terms had been agreed to. They argued that, unlike many common fund settlements, these fees and costs would be paid over and above the cash and coupons made available to claiming class members. Bausch & Lomb agreed to pay the fees and costs of class counsel as long as the amount requested did not exceed \$8 million in fees and \$600,000 in expenses to date (plus \$10,000 in additional post-settlement expenses).⁸⁸

FINAL APPROVAL OF DISTRIBUTION AND FEES

Objectors

Those who wished to comment on the proposed settlement had to submit their written statements or their requests to appear at the fairness hearing by November 1, 1996. Plaintiffs claimed that as of November 1, 1996, no substantive written objections to the settlement had been filed. The potential for objection by those involved with the two tag-along cases was forestalled because of the settlement with those attorneys.

Opt-Outs

The initial deadline for opting out of the original class was May 1, 1995.⁸⁹ Sixty-nine opt-out requests were received by this deadline.⁹⁰ November 1, 1996, was set as the cutoff date for opting out of the expanded settlement class; to do so one had to submit a personally signed Exclusion Request.⁹¹ As of that date, 34 members of the expanded class had also requested to be excluded from the settlement.⁹² The two opt-out periods were independent of one another so that a class member could have opted out for purchases made under the original class definition but remained in the expanded class for the additional periods or trade names. In spite of the opt-outs' decision not to participate in the settlement, plaintiffs' attorneys indicated to us that potential class members who opted out never initiated any formal action.

Approval of the Settlement Distribution Provisions

In their request for final approval, plaintiffs asserted that

... the proposed settlement falls at the high end of the range of reasonableness, and that settlements for lesser amounts and less advantageous terms could well have been approved as fair, adequate, and reasonable. Plaintiffs have obtained and submitted a settlement that is not merely sufficient, but is exceptional.⁹³

The fairness hearing was held November 26, 1996, and reportedly lasted about an hour with no objectors present, though some letters from optometrists were received by the court arguing that their patients were fully aware that the lenses were the same. At the conclusion of the hearing, a final order was entered that defined the members of the Rule 23(b)(3) class, approved the settlement provisions, and dismissed the case. The final order found that the notice of the proposed settlement and fairness hearing was properly disseminated as required in the July 31, 1996 preliminary order. The court also found that no meritorious objections to the settlement had been made and that the terms of the settlement were fair, reasonable, and adequate.

All members of the class who did not file a timely opt-out were barred and enjoined from prosecuting any future action against Bausch & Lomb with respect to any claims released by settlement. The court expressly reserved its jurisdiction over the action to enforce and protect the settlement stipulation, the settlement administration, or the court's judgment, although the suit was dismissed with prejudice.⁹⁴ Like the settlement agreement and preliminary approval order, the final order was silent on the issue of whether Bausch & Lomb was free to repeat the practices that had sparked the litigation.

Approval of the Fee Provisions

According to the plaintiffs, the \$8 million award requested would be “less than fifteen percent (15%) of the total monetary and certificate benefits available to class members in this settlement”⁹⁵ and less than 12 percent if the fees and costs themselves were included as part of the total settlement benefit package. The fee request claimed that either of these two percentages would be less than the 20–30 percent range used in the “majority of common fund fee awards” as well as under the 25 percent “benchmark percentage fee award.”⁹⁶ Moreover, they asserted, the fees were reasonable in light of the time and labor required, the novelty and difficulty of the case, the skills needed, the experience and reputation of class counsel, the preclusion of other employment for the attorneys involved in prosecuting the matter, awards in similar cases, the need for a contingency fee, the pace of the litigation, the results obtained, and the fact that few other attorneys would have taken on a case of this magnitude. Using only the \$33.5 million cash benefit estimate, the requested fees would have been less than 24 percent of the potential cash payment.

At the time of the application for final approval and fee award, plaintiffs asked for \$545,000 in costs already incurred and an additional \$5000 in costs anticipated from November 1, 1996, through final approval.⁹⁷ An affidavit was presented that described \$546,065 in actual plaintiffs’ expenditures.⁹⁸

The final order set forth Judge Clemon’s finding that the efforts of class counsel had “provided a substantial economic benefit to the Class of approximately \$67 million made available in cash and product certificates”; thus he deemed the amount of requested fees and expenses to be reasonable.⁹⁹ The court awarded \$8 million in fees as the parties had negotiated, and \$500,000 in expenses.¹⁰⁰ No explanation was given why the expenses awarded were less than the amount requested.

ACTUAL DISTRIBUTION OF SETTLEMENT FUNDS

Neither the plaintiffs’ attorneys nor the defendant were required to report the distribution of funds to the judge. As a result, we were dependent on the parties or attorneys to share information about the claiming process and distribution. As we went to press, we were unable to obtain such information. Bausch & Lomb declined to tell us any more than that Arthur Andersen was handling the distribution and that the totals had not been finally calculated. We contacted the settlement administrator appointed by the court, but he also declined to share distribution figures, suggesting that we talk to the attorneys involved with the case. We had hoped that the class counsel might be able to provide the figures, but they declined because of an agreement with the defense made at the

time of settlement not to discuss or divulge matters related to the settlement negotiations or the actual distribution to the class.

Without such figures, we can only estimate the claiming rate based on the defendant's reports to the SEC and mass media reports. From these sources it appears that the final distribution was substantially less than the highly publicized \$68 million. At the close of 1995, Bausch & Lomb had set aside \$21.7 million to cover the "costs and expenses reasonably estimable" of then-pending litigation, including not only this class action but also various unrelated securities suits, class actions pertaining to eye solution products, antitrust complaints, the settlements of two class actions involving hearing aids, and a related FTC action.¹⁰¹ At the time of the settlement of this class action in August 1996, Bausch & Lomb took a charge of \$16 million (\$10 million after taxes or 18 cents a share) against its third quarter earnings "which, in addition to existing litigation reserves, is deemed adequate to satisfy the costs of the proposed settlement."¹⁰² It was reported at the time that Bausch & Lomb expected the combined charge and reserves to be sufficient to cover the settlement because not all class members would make claims.¹⁰³ It appears, with this reserve and the charge, that Bausch & Lomb never expected to pay out more than \$37.7 million in cash, matching retail credit, plaintiffs' attorney fees and costs, and administration costs (assuming that *none* of the 1995 year-end reserve would be used for any litigation other than the Birmingham lens settlement). Deducting the \$8.5 million in fees and costs paid to class counsel leaves \$29.2 million as an upper boundary for the combined amount of cash, retail credit, and administration and notice costs; thus, the defendant might have estimated its maximum future cash-payment exposure for class benefits to be under \$14.6 million (subtracting costs for administration and notice). At the low end of the spectrum, full use of the 1995 year-end litigation reserve to satisfy only unrelated settlements and various pending matters would leave \$7.5 million as the predicted total exposure for items other than class counsel's fees and costs (and \$3.75 million as a maximum cash payout if administration and notice costs are ignored).¹⁰⁴

We are also limited in our ability to determine the distribution of the settlement by the lack of consistent assessments of the size of the class and the estimated damages members incurred in the purchase of the three lenses in question. In May 1994, plaintiffs believed that the class included "millions of members";¹⁰⁵ in June 1994, the plaintiffs stated that "hundreds of thousands class members purchased" Optima, Medalist, and SeeSequence2 lenses;¹⁰⁶ in November 1994, the *Wall Street Journal* reported that there were about three million buyers of the lenses;¹⁰⁷ in February 1995, the parties jointly stated that there "may well be over one million class members";¹⁰⁸ in August 1996, a plaintiffs' attorney put the figure between one million and 1.5 million consumers;¹⁰⁹ and finally in

November 1996, plaintiffs estimated that the size of the settlement class was in the “hundreds of thousands.”¹¹⁰ Nowhere in the pleadings submitted to the court in support of the application for approval of the final settlement do either the plaintiffs or the defendant set forth their appraisals of the number of lenses of each type actually purchased by class members. How many people were actually members of this class, how many of these class members actually submitted a claim form, and how much they were actually paid appear to be closely held secrets between the class counsel and the defendant.

Was the settlement a good deal for class members? Table 5.1 presents some relevant data for this analysis. The core of the plaintiffs’ complaint was that OptimaFW and Medalist users paid much more than they needed to because the less-expensive SeeQuence2 lens would have worked just as well. However, the settlement claim amounts were based on the difference in Bausch & Lomb’s wholesale price, not the actual amounts spent by consumers. Based on published articles that reported on the controversy and subsequent litigation, we believe that Bausch & Lomb offered a pair of OptimaFW lens directly to contact lens providers for about \$46, and the SeeQuence2 and Medalist brands were wholesaled at per-pair prices of about \$5 and \$8, respectively.¹¹¹ If a Medalist user successfully completed the claiming process, he or she would receive cash from Bausch & Lomb in the amount of \$2.68 for each pair and an equivalent amount in credit towards the retail price of other Bausch & Lomb products (arguably a total compensation value of \$5.36). Claiming Medalist users would be getting back 89 to 179 percent (depending on to what extent they took advantage of the product credit offer) of the money they might have saved at the wholesale rate had they originally been offered a pair of SeeQuence2s.¹¹²

Table 5.1
Price and Benefit Comparisons of Bausch & Lomb Contact Lenses

Lens	Wholesale Price per Pair ^a	Per Pair Difference Between SeeQuence2 Wholesale Price	Sample Retail Prices per Pair ^b	Per Pair Difference Between SeeQuence2 Retail Price	Class Cash Benefit per Pair ^c	Class Cash and Credit Benefit per Pair
OptimaFW	\$46.00	\$41.00	\$70.00	\$62.00	\$10.66	\$21.32
Medalist	\$8.00	\$3.00	\$15.00	\$7.00	\$2.68	\$5.36
SeeQuence2	\$5.00	—	\$8.00	—	—	—

^a“Contact-Lens Prices Change in the Blink of an Eye,” *Consumer Reports*, Aug. 1994, at 90.

^bJane Bennett Clark, “Bausch & Lomb: Pulling the Wool Over Its Customers’ Eyes,” *Kiplinger’s Personal Finance Magazine*, Mar. 1994.

^cSettlement Notice, Stipulation of Settlement and Compromise (July 25, 1996) at 11–12.

OptimaFW users would not have fared nearly as well. Their per-pair cash payment would be just \$10.66, and even with some or all of the product credit included they would only get in the range of 26 to 52 cents on the dollar. Even so, when the certainties of settlement are compared to the uncertainties of an aggressively fought trial and the delay attendant on a possible appeal, the payment schedule might seem reasonable.

Class counsel disagreed with our calculations of how well the settlement compensated class members. They told us that, based upon their analysis of defendant's records performed as part of the settlement negotiation process, there were significant fluctuations in Bausch & Lomb's wholesale prices for the products in question over the class period. They argued that the *average* wholesale price of a pair of OptimaFW lenses was approximately \$15.50 and thus the agreed-to class compensation of \$10.66 equaled the difference between the average price of the OptimaFW and SeeQUENCE2 lenses. They also asserted that the \$2.68 compensation for a pair of Medalists was equal to the difference in the average wholesale prices between that lens and the SeeQUENCE2 brand.

However, class counsel's calculations are based on wholesale prices. One could argue that the assessment of whether the claimants were adequately compensated should only be made using the end-user retail costs, because by definition class members never paid the wholesale price. Moreover, by failing to opt out in a timely fashion from the settlement, class members had waived their rights to proceed against "all optical stores, optometrists, ophthalmologists or opticians who sold Contact Lenses to Class Members during the Class Period,"¹¹³ meaning they would have no opportunity to seek additional compensation from the providers to make up the difference in the retail price. While there certainly was wide variation in how contact lens providers priced Bausch & Lomb's products, we can get some idea of typical prices from published media reports.¹¹⁴ From these sources it appears that a Medalist claimant who used all the available product credit would be getting a return fairly close to the actual difference in the lens purchase price, but an OptimaFW user would only be receiving about a third of the excess he or she had paid.

Looking at the cash benefit to the class in light of our estimated differences in the wholesale prices between the SeeQUENCE2 lens and the two other lenses, it appears that even if all of the class members made successful claims, so that Bausch & Lomb was required to pay out the projected \$33.5 million total cash benefit, not all of the "losses" at wholesale would have been returned to the class if wholesale prices generally reflected the figures published in various media articles at the beginning of the litigation. If, on the other hand, class counsel's assertion that the amount of compensation accurately reflects the wholesale price differences is correct, then all wholesale losses would have been

recovered. Regardless of which figures are used as sample wholesale prices, it is clear that members of the class who did not redeem all of their product credit would have recovered only a fraction of the additional retail price paid for either the Medalist or OptimaFW lenses.

We can use wholesale and retail price estimates to estimate the average maximum loss per class member. Assuming a total class period of about five years; yearly replacement of OptimaFW lenses; replacement of Medalist lenses at a rate of six times per year (the midpoint of the one- to three-month range generally used for its frequent replacement schedule); complete replacement of a pair of lenses every time; and that a wearer continued to use a particular lens line for the entire class period, OptimaFW and Medalist users would have had a wholesale price loss of \$205 and \$90, respectively, compared to what they would have paid for SeeSequence2 lenses.¹¹⁵ Using the retail price figures, the maximum losses would have been \$310 and \$210 for OptimaFW and Medalist users respectively. These figures demonstrate how small per-transaction losses to class members may result in sizable per-person losses over time.

EPILOGUE

In early 1997, the SeeSequence2 and Medalist labels were dropped entirely in favor of using the OptimaFW name for lenses distributed in the United States.¹¹⁶ The plaintiffs' attorneys felt that this discontinuance of trade names cured the problem at the root of Bausch & Lomb's marketing practices. However, a residual market still existed for the lenses under the prior labels (though not through channels authorized by Bausch & Lomb). By early 1998, OptimaFW, SeeSequence2, and Medalist lenses could still be ordered, at per-lens retail price differences similar to those that existed before the start of the litigation, from so-called "gray market" distributors who sell directly to consumers (rather than to authorized eye care professionals) via telephone or internet sites.¹¹⁷ It should be noted that the gray market supply of lenses with the discontinued labels and product names will eventually be exhausted.

In August 1997, Bausch & Lomb agreed to pay \$100,000 in litigation costs each to 17 states (including California and Texas) to end the joint attorney general task force investigation started in 1994. While Bausch & Lomb agreed to cease selling identical soft contact lens under different brand names (which in fact it had already stopped doing), the attorneys general settlement did not address issues regarding differences in price.¹¹⁸ As we went to press, a similar investigation conducted by the Florida Attorney General into contact lens marketing and sales practices was still ongoing.

The Assurance of Discontinuance included provisions that Bausch & Lomb would make the same wearing recommendations on the consumer labeling of

all its lenses and make certain disclosures in its advertising.¹¹⁹ In reaching the settlement, the state attorneys general discounted the assertion that the marketing practices were approved by the FDA or were due to Bausch & Lomb's need to comply with FDA requirements for contact lens labeling.¹²⁰ They argued that the practice of selling identical products under different brand names and prices constituted misleading sales tactics. New York Attorney General Dennis C. Vacco explained his state's perspective:

The difference in the cost of the various contact lenses clearly misled consumers into thinking that they were getting a better quality product. . . . Consumers are entitled to have all of the information about a product before making their purchase. . . . With this information in hand, consumers can better determine which product is most appropriate for their needs and avoid spending more money than they need to.¹²¹

Key Events	Dates
Ventura County, California, district attorney contacts Bausch & Lomb in regard to its pricing policy and also sends an inquiry letter to FDA	Early 1993
<i>Business Week</i> article is published revealing that lenses sold under different Bausch & Lomb trade names were actually the same	July 1993
Complaint filed	May 10, 1994
Certification hearing	September 22, 1994
Certification order	November 1, 1994
Notice of Certification	Early 1995
Deadline for opting out of original class	May 1, 1995
Settlement reached	July 25, 1996
Preliminary approval hearing	July 31, 1996
Preliminary approval order	July 31, 1996
Notice of preliminary settlement	August–October 1996
Deadline for opting out of expanded class	November 1, 1996
Deadline for objections	November 1, 1996
Fairness hearing	November 26, 1996
Final approval order	November 26, 1996
Notice of final approval	December 1996, January 1997

Notice of claiming procedures	December 1996, January 1997
End of claiming period	February 1, 1997
Bausch & Lomb settles an investigation by the attorneys general in 17 states and agrees to stop selling identical contact lenses under different brand names	August 20, 1997

NOTES

¹As part of our research on this litigation, we interviewed key plaintiffs' attorneys, corporate counsel for the defendants, staff members of state attorneys general offices and local district attorneys, journalists, a settlement administrator, and others. The judge in this case declined to be interviewed. We also reviewed the pleadings and papers filed in the case as well as newspaper and magazine articles, correspondence, corporate documents, press releases, and internet web site postings.

²*Roberts v. Bausch & Lomb, Inc.*, No. CV-94-C-1144-W (N.D. Ala. 1996). Hereinafter referred to as *Roberts*. Unless otherwise noted, all pleadings referenced in these footnotes were part of the *Roberts* litigation.

³Interview with Mark Maremont, reporter for the *Wall Street Journal* (formerly with *Business Week*).

⁴*Bausch & Lomb—About Us*, available on the internet at <http://www.bausch.com/About/about.html> (Jan. 28, 1998).

⁵Mark Maremont, "The Only Difference Is When You Throw Them Away," *Business Week*, July 12, 1993, at 29.

⁶Interview with Dr. Robert Pazen, O.D.

⁷Soft lenses are made from HydroxyEthylMethAcrylate (HEMA) and are "hydrophilic" or water-absorbing lenses. They are more comfortable than hard lenses because of their soft, flexible nature but are more likely to experience bacterial growth and have a greater need to be disinfected after removal. They are also more fragile and wear out within a year or two. *About Contact Lenses*, available on the internet at the Contact Lens Manufacturers Association web page, <http://www.contact.inter.net/about.htm> (Jan. 30, 1998).

⁸*Chronology*, available on the internet at the Bausch & Lomb web page, <http://www.bausch.com/About/chronology.html> (Jan. 28, 1998); *History*, available on the internet at the Bausch & Lomb web page, <http://www.bausch.com/About/history.html> (Jan. 28, 1998).

⁹*Contact Lens—Milestones in History*, available on the internet at the Contact Lens Council web page, <http://www.iglobal.com/CLC/clc-08.htm> (Jan. 28, 1998).

¹⁰*Id.*

¹¹Food and Drug Administration, "Background Information: Prices of Contact Lenses" (July 28, 1994).

¹²*Stats on Contacts*, available on the internet at the Contact Lens Council web page, <http://www.iglobal.com/CLC/clc-11f.htm> (Jan. 28, 1998).

¹³*Id.*

¹⁴"Contact-Lens Sellers Just Don't See Eye-to-Eye," *Business Week*, July 12, 1993, at 28–30.

¹⁵Maremont, *supra* note 5.

¹⁶*Id.*

¹⁷Laura Johanne, "Law: Bausch & Lomb Settles an Investigation of Contact-Lens Brand Sales by States," *Wall Street Journal*, Aug. 20, 1997, at B4. CIBA-Vision, another lens manufacturer, had 25 percent of the market.

¹⁸“Blind Ambition,” *Business Week*, Oct. 23, 1995; *Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action*, available on the internet at the Consumer Law Page, <http://www.consumerlawpage.com/article/lenses.html> (Jan. 27, 1998); Maremont, *supra* note 5.

¹⁹*Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action*, *supra* note 18.

²⁰Bausch & Lomb, *The Bausch & Lomb Disposable and Planned Replacement System Fitting Guide*, 1991 (current for Oct. 1991 to Feb. 1992) (on file with the authors).

²¹Dawn C. Chmielewski, “Users of Contacts Should Look Closer,” *Boston Patriot Ledger*, Apr. 30/May 1, 1994, at 1; Bausch & Lomb’s Petition for a Writ of Mandamus at 6; Bausch & Lomb, *supra* note 20.

²²“Contact-Lens Prices Change in the Blink of an Eye,” *Consumer Reports*, Aug. 1994, at 90.

²³Usually an ophthalmologist, optometrist, optician, or optical store.

²⁴Jane Bennett Clark, “Bausch & Lomb: Pulling the Wool Over Its Customers’ Eyes,” *Kiplinger’s Personal Finance Magazine*, Mar. 1994, at 152.

²⁵Another brand name, “Criterion UltraFW,” was later identified as also being a copy of the OptimaFW–SeeQuence2–Medalist design.

²⁶*Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action*, *supra* note 18.

²⁷Bausch & Lomb, Inc., 1993 Annual Report: Meeting Global Needs 25 (1994).

²⁸*Id.* at 3.

²⁹Interviews with Greg Brose, Supervising Attorney, Consumer & Environmental Protection Division, Ventura County, California District Attorney’s Office; and with Michael Schwartz, Deputy District Attorney, Ventura County, California District Attorney’s Office.

³⁰Constance Sommer, “D.A. Questions FDA Approval of Lens Labels,” *Los Angeles Times* (Ventura Co. East Ed.), Sept. 4, 1993, at B-1.

³¹Maremont, *supra* note 5.

³²Sommer, *supra* note 30.

³³Clark, *supra* note 24.

³⁴FDA spokesperson Sharon Snider, quoted *id.*

³⁵Chmielewski, *supra* note 21.

³⁶Bausch & Lomb spokesperson Margaret Graham-Smith, quoted *id.*

³⁷FDA spokesperson Joe Raulinaitis, quoted *id.*

³⁸Ellis is a member of the Boston firm of Ellis & Rapacki.

³⁹Knowles is a member of Doffermyre, Shields, Canfield, Knowles & Devine, an Atlanta firm.

⁴⁰Some of the plaintiffs’ attorneys, though certainly not all, had been involved in breast implant litigation.

⁴¹Subsequently, the Supreme Court held in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), that federal courts could not withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts (thus removing a potential objection to state-court adjudication of national class actions).

⁴²Class Action Complaint (May 10, 1994) (hereinafter Complaint).

⁴³The Lanham Act prohibits the use of misleading and deceptive statements in advertising. 15 U.S.C. § 1125(a).

⁴⁴The Racketeer Influenced Corrupt Organization Act provides for treble damages and attorney fees to be awarded when an enterprise conducts its affairs through a pattern of racketeering activity. 18 U.S.C. §§ 1962, 1964(c).

⁴⁵Interview with David Woodward, Assistant Attorney General, State of Minnesota.

⁴⁶Sommer, *supra* note 30; *Contact Lenses: Settlement of Bausch & Lomb Lens Wearer Class Action*, *supra* note 18.

⁴⁷Complaint at 11, 35.

⁴⁸“Bausch & Lomb Inc.: Judge Says Millions Can Join Action Over Contact Lenses,” *Wall Street Journal*, Nov. 2, 1994, at B4.

⁴⁹Johanne, *supra* note 17.

⁵⁰Harold Johnson, President of Bausch & Lomb’s contact lens division, quoted in Clark, *supra* note 24.

⁵¹Defendant’s Opposition to Motion for Class Certification (Sept. 22, 1994) at 5 (hereinafter Opposition to Certification).

⁵²*Morales Reaches Agreement with Contact Lens Maker Over Allegations of Deceptive Marketing Practices*, available on the internet at <http://www.oag.state.tx.us/WEBSITE/NEWS/RELEASES/970819cs.htm> (Dec. 26, 1997).

⁵³*Id.*

⁵⁴Defendant’s Brief in Support of Motion for Summary Judgment (Oct. 17, 1994) at 3–5 (hereinafter Motion for Summary Judgment).

⁵⁵George Weber, quoted in Chmielewski, *supra* note 21.

⁵⁶Interview with Craig Jordan, Assistant Attorney General, State of Texas.

⁵⁷Jordan interview; Woodward interview.

⁵⁸Bausch & Lomb, Inc., *10-K for Fiscal Year Ending December 30, 1995* (1996) (hereinafter *Bausch & Lomb’s 10-K for 1995*).

⁵⁹Interview with Bob Reed, Investigative Unit, *American Journal* video magazine.

⁶⁰Class Action Settlement Notice (Aug. 1, 1996) (hereinafter Settlement Notice).

⁶¹Boston’s Ellis & Rapacki; Atlanta’s Doffermyre Shields Canfield & Knowles; Birmingham’s Hare Wynn Newell & Newton; San Francisco’s Loeff Cabraser Heimann & Bernstein; Farmer Price Hornsby & Weatherford of Dothan, Alabama; The Alexander Law Firm in San Jose, California; Williams & Troutwine of Portland, Oregon; Charfoos & Christensen in Detroit; and The Attorneys Information Exchange Group, Birmingham-based plaintiffs’ bar assistance organization. See *id.*

⁶²Gregory H. Hawley and Fournier J. Gale III from Birmingham’s Maynard Cooper & Gale; J. Mark White of Birmingham’s White Dunn & Booker; George A. Riley of California’s O’Melveny & Myers; and Harry Sacks of Sacks Montgomery, New York. Settlement Notice; Stipulation of Settlement and Compromise (July 25, 1996) at 27 (hereinafter Settlement Stipulation).

⁶³Plaintiffs’ Application for Final Approval of Class Action Settlement, Including Approval of an Award of Class Counsel’s Attorneys Fees and Costs (Nov. 1, 1996) at 9 (hereinafter Application for Approval).

⁶⁴Class Certification Order (Nov. 1, 1994) at 2.

⁶⁵The Class Certification Order did not specifically set forth this purchase period, but subsequent pleadings made it clear that the class is so limited. Notice Order (Jan. 27, 1995) at 1; Order Preliminarily Approving Proposed Class Action Settlement (July 31, 1996) at 3 (hereinafter Order of Preliminary Approval).

⁶⁶See, e.g., Complaint at 18–19.

⁶⁷Class Certification Order at 2. Another of the originally named plaintiffs was dropped because she worked for one of the plaintiffs’ law firms.

⁶⁸“Bausch & Lomb Inc.: Judge Says Millions Can Join Action Over Contact Lenses,” *supra* note 48.

⁶⁹Notice Order at 2–3; Plaintiffs’ Motion for Approval of Their Proposed Plan for Dissemination of the Class Action Notice (Nov. 14, 1994) at 5–6 (hereinafter Motion for Approval of Notice).

⁷⁰Settlement Notice.

⁷¹Affidavit of James J. Thompson, Jr., Exhibit B to Application for Approval.

⁷²Emily Nelson, “Marketing & Media: Bausch to Disburse Up to \$68 Million to Settle Lawsuit,” *Wall Street Journal*, Aug. 2, 1996, at B10; Johanne, *supra* note 17; Larry Bickford, O.D., *Extra! Late News 12/11/95—Three New Contact Lens Materials, A New Soft Lens Care System and the Latest on Bausch & Lomb’s Consumer Problems*, available on the internet at the EyeCare Connection web page, <http://www.west.net/~eyecare/extra.html> (Dec. 18, 1997).

⁷³Joint Motion for Extension of Time to Commence Notice Program (Feb. 24, 1995) at 1 (hereinafter Motion for Extension).

⁷⁴Bausch & Lomb, *Bausch & Lomb Settles Contact Lens Class Action Lawsuit* (press release issued Aug. 12, 1996) (hereinafter *Bausch & Lomb Press Release*).

⁷⁵Nelson, *supra* note 72.

⁷⁶Amendment to Stipulation of Settlement (Aug. 15, 1996); Order re Administration of Proposed Settlement (Aug. 16, 1996) (hereinafter Administration Order).

⁷⁷Settlement Notice.

⁷⁸Settlement Stipulation at 12.

⁷⁹Nelson, *supra* note 72.

⁸⁰Settlement Stipulation at 7–8, 23.

⁸¹Application for Approval at 16–17.

⁸²Nelson, *supra* note 72.

⁸³This direct mailing was estimated by plaintiffs to have included “in excess of 10,000” eye care practitioners. Application for Approval at 18. Bausch & Lomb had agreed to reimburse the expenses of the practitioners for any mailing notices forwarded.

⁸⁴“Known” class members appear to be those who had directly contacted plaintiffs’ counsel or defendant or who previously had been directly notified of the class action. Application for Approval at 2, 18.

⁸⁵Settlement Notice.

⁸⁶Exhibit A to Amendment to Stipulation of Settlement.

⁸⁷Settlement Stipulation at 11–12.

⁸⁸*Id.* at 20.

⁸⁹Settlement Notice.

⁹⁰Final Order and Judgment of Dismissal with Prejudice (Nov. 26, 1996) at 2, Schedule A (hereinafter Final Order).

⁹¹Settlement Notice.

⁹²Final Order at 2, Schedule B.

⁹³Application for Approval at 8.

⁹⁴Final Order at 4.

⁹⁵Application for Approval at 20.

⁹⁶*Id.* at 21.

⁹⁷*Id.* at 21 n.4.

⁹⁸Affidavit of James J. Thompson, Jr., Exhibit B to Application for Approval.

⁹⁹Final Order at 3.

¹⁰⁰*Id.*

¹⁰¹*Bausch & Lomb’s 10-K for 1995, supra* note 59; Nelson, *supra* note 72.

¹⁰²Bausch & Lomb, *10-Q For the Quarter Ended September 28, 1996; Bausch & Lomb Press Release, supra* note 75.

¹⁰³Nelson, *supra* note 72.

¹⁰⁴It should be noted that the estimates presented herein for maximum benefit payment exposure are in current dollars and do not account for other possible additions and subtractions such as interest and taxes.

¹⁰⁵Complaint at 9.

¹⁰⁶Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Class Certification (June 29, 1994) at 2 (hereinafter Motion for Class Certification).

¹⁰⁷“Bausch & Lomb Inc.: Judge Says Millions Can Join Action Over Contact Lenses,” *supra* note 48.

¹⁰⁸Motion for Extension at 1.

¹⁰⁹Nelson, *supra* note 72.

¹¹⁰Application for Approval at 3.

¹¹¹“*Optima F.W.* soft lenses. . . cost about \$46 a pair wholesale. *Medalist* lenses. . . cost \$8 a pair wholesale. . . *SeeQuence 2* lenses. . . cost \$5 a pair wholesale. . .” “Contact-Lens Prices Change in the Blink of an Eye,” *supra* note 22, at 90.

“*Optima F.W.* . . . wholesales for \$23 per lens. . . [*Medalist*] wholesales at \$16 for four. . . [*SeeQuence2*] wholesales at \$15 for six.” Sommer, *supra* note 30, at B1.

“Wholesale prices for the [*SeeQuence2*, *Medalist*, and *OptimaFW*] lenses ranged from \$2.50 to \$23 apiece, according to the Massachusetts attorney general.” Johannes, *supra* note 17, at B1.

¹¹²Such calculations do not include the claimant’s cost of postage needed to send in a Verified or Alternative Claim Form and any supporting documentation.

¹¹³Settlement Stipulation at 22.

¹¹⁴See, e.g., Chmielewski, *supra* note 21, at 1, reporting that “. . . [*Optima FW*] lenses sell locally for \$59 to \$70 a pair. . . [*Medalist*] sells for about \$3.75 a lens. . . [*SeeQuence2* sells for] \$3.33 a lens”; Clark, *supra* note 24, at 152, reporting that “[t]he priciest, *Optima F.W.*, at \$70 a pair. . . [t]he *Medalist* lenses, for \$15. . . *SeeQuence 2* lenses (\$8). . .”; Maremont, *supra* note 5, at 29 reporting “. . . \$7 to \$9 per pair for the *SeeQuence* contacts and \$15 to \$25 for a pair of *Medalists*. . . The difference: *Optima FW*, costing \$70 a pair. . .” See also Complaint at 14, alleging “[t]he *Optima* model. . . is priced at approximately sixty to seventy dollars (\$60.00–\$70.00) per pair. The *Medalist* model. . . sells for approximately ninety dollars (\$90.00) for twelve pair. The *SeeQuence 2* model. . . price is about eighty dollars (\$80.00) for twelve pair”; and Motion for Class Certification at 3, alleging “. . . the Defendants engaged in a scheme to fraudulently induce the public to pay more (up to \$64 more per pair for *Optima* as for *SeeQuence 2*) for lenses which they claims to be different.”

¹¹⁵Again, using published reports of wholesale prices.

¹¹⁶Johanne, *supra* note 17. The Criterion UltraFW lens had already voluntarily been dropped from the Bausch and Lomb lineup prior to the stipulation of settlement.

¹¹⁷See, e.g., *Sample Price List*, available on the internet at the Contacts Plus web page, <http://www.w2.com/docs2/b7/contactsplussamples.html> (Feb. 2, 1998); *AccuLens Order Form*, available on the internet at <http://futurefocusinc.com/acculens/acculens.html> (Feb. 2, 1998); and *Eyeware Online—Bausch & Lomb*, available on the internet at <http://www.lyuks.com/blomb.html> (Feb. 2, 1998).

¹¹⁸Johanne, *supra* note 17.

¹¹⁹*Bausch & Lomb Pays States \$1.7 Million to Settle Misleading Sales Claims*, available on the internet at http://www.oag.state.ny.us/press/aug97/aug19_97.html (Dec. 19, 1997).

¹²⁰*Morales Reaches Agreement with Contact Lens Maker Over Allegations of Deceptive Marketing Practices*, *supra* note 52.

¹²¹*Bausch & Lomb Pays States \$1.7 Million to Settle Misleading Sales Claims*, *supra* note 119.