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Six Class Actions for 16 Microliters: A Case Study

Articles & Press

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February 20, 2018 – Mary Bartkus, Special Counsel, has authored a paper titled "Six Class Actions for 16 Microliters: Eye Drop Litigation Reopens in New Jersey is Dismissed in Massachusetts, and is on Appeal to the First Circuit. Hedging and Forum Shopping. A Media Rush to Judgment."

The Social Science Research Network published the paper on February 20, 2018. You may download it [here](#).

Six putative class actions were filed in five United States federal jurisdictions against manufacturers and distributors of prescription eye medications approved and regulated by the United States Food and Drug Administration. The claim in four parallel actions is that plaintiffs unfairly or unconscionably were compelled to purchase an unusable or wasted portion of each eye drop in multi-use containers, in violation of state consumer legislation alleged to incorporate the United States Federal Trade Commission Policy Statement on Unfairness.

One of the parallel actions, *Cottrell v. Alcon*, has been reopened by the United States District Court for the District of New Jersey, on remand from the United States Court of Appeals for the Third Circuit. A second parallel action, *Gustavsen v. Alcon*, was dismissed by the United States District Court for the District of Massachusetts based on impossibility preemption, and is on appeal to the United States Court of Appeals for the First Circuit. Two other parallel actions and two related actions were dismissed in three other federal jurisdictions.

The paper describes the claims in the parallel actions, discusses whether a claim advanced may be in conflict with theories of recovery, describes the procedural history of the six putative class actions, including forum shopping and media coverage, and focuses on the two remaining parallel actions, *Cottrell and Gustavsen*, in particular on the preemption opinion in *Gustavsen*.

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Mary E. Bartkus

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