

Total Organic Fluorine Found Insufficient to Demonstrate PFAS

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A federal judge in the Northern District of California dismissed in part a consumer class action, finding that plaintiffs' total organic fluorine testing was insufficient to demonstrate that defendant's product contained per- and polyfluoroalkyl substances (PFAS). Plaintiffs in *Bounthon, et al. v. Procter & Gamble Co.* alleged that the defendant's "pure cotton" tampons contained PFAS, thus resulting in false advertising by the defendant. Plaintiffs based their allegation of PFAS contamination on total organic fluorine (TOF) analysis, which it claimed was the "gold standard" for determining the presence of PFAS in a sample. TOF is a measurement of the total amount of fluorine in a sample that is bound to organic compounds. According to plaintiffs, a finding of organic fluorine is indicative of the presence of PFAS.

The court disagreed, finding that the inference plaintiffs would like to draw that a finding of organic fluorine necessarily means a product contains PFAS is "not plausible." The court cited the very documents referenced by plaintiffs to point out that "TOF may detect organofluorine chemicals that are not PFAS." As such, plaintiffs' positive test results do not necessarily mean the defendant's product contains PFAS. Targeted PFAS analysis is necessary to demonstrate that "the total fluorine measured originally comes from the use of . . . PFAS."

This result is similar to *Lowe v. Edgewell Pers. Care Co.*, another Northern District of California case, and *Krakauer v. Recreational Equip., Inc.*, a case out of the US District Court for the Western District of Washington, where earlier this year courts found that TOF findings were insufficient to plausibly allege that the defendant's products contained PFAS. Other federal courts, including the Southern District of California, have, however, held that TOF testing is sufficient to demonstrate the presence of PFAS, at least at the motion to dismiss stage (*Hamman v. Cava Group, Inc.*).

Given the fact that targeted PFAS analysis will only detect a small fraction of the thousands of existing PFAS, it is expected that plaintiffs will continue to attempt to rely on TOF to demonstrate the presence of PFAS in consumer products unless and until appeals courts confirm that it is insufficient to prove PFAS contamination. As a result, defendants must continue to be prepared to demonstrate the inadequacy of TOF as a proxy for PFAS.

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