

Titanium Dioxide: The Latest Target in Consumer Class-Action Lawsuits

Titanium dioxide (TiO₂) is a naturally occurring white powder used to boost colors in a wide range of food and non-food consumer products, making colors look brighter and more defined. It can also be used as a white pigment, added to products to increase white opacity.

The U.S. Food and Drug Administration (FDA) has approved the use of TiO₂ as a color additive in food, drugs, and cosmetics, including drugs and cosmetics intended for use around the eyes. 21 C.F.R. §§ 73.575, 73.1575, 73.2575. In food, TiO₂ may be used for coloring generally, subject to two restrictions: (1) "[t]he quantity of titanium dioxide [cannot] exceed 1 percent by weight of the food" and (2) "[i]t may not be used to color foods for which standards of identity have been promulgated . . . unless added color is authorized by such standards." 21 C.F.R. § 73.575(c). For drugs and cosmetics, the amount used must be consistent with "good manufacturing practice." 21 C.F.R. §§ 73.1575(c), 73.2575(b).

Despite TiO₂'s green light from the FDA, consumers nevertheless have begun bringing putative class actions challenging the presence of TiO₂ in consumer products, alleging that the presence of TiO₂ makes the products unsafe. In *Thames v. Mars, Inc.*, 3:22-cv-04145 (N.D. Cal. filed July 14, 2022), the first class-action lawsuit of its kind, the plaintiff alleged violations of consumer protection statutes based on the presence of TiO₂. Following *Thames*, plaintiffs quickly brought three additional class-action lawsuits alleging similar claims of deception based on the presence of TiO₂ in various consumer products ranging from candy to pain relievers to tampons.

- ***Thames v. Mars, Inc.*, 3:22-cv-04145 (N.D. Cal. filed July 14, 2022).** The plaintiff alleged that the defendant materially omitted that Skittles contained TiO₂, an alleged toxin known to pose health problems, and thus deceived the plaintiff into believing the candies were fit for human consumption when they were not.
- ***Mignin v. Mars, Inc.*, 1:22-cv-04243 (N.D. Ill. filed Aug. 11, 2022).** In a nearly identical complaint to *Thames*, the plaintiff alleged that the defendant materially omitted that Skittles are unfit for human consumption because they contain TiO₂. As a result of this omission, the plaintiff was injured by paying full price for the product when the candies were, in fact, worthless.
- ***Morrison v. Johnson & Johnson Consumer Inc.*, 3:22-cv-01276 (S.D. Cal. filed Aug. 29, 2022).** The plaintiff alleged that the defendant's marketing and labeling of Tylenol, which materially omitted the safety concerns associated with TiO₂, misled reasonable consumers into believing that the pills were safe.
- ***Paulson v. This is L. Inc.*, 1:22-cv-04665 (N.D. Ill. filed Aug. 31, 2022).** The plaintiff alleged that L. brand "100% Organic Core Tampons" misleads consumers to believe that the tampons were made entirely from cotton and/or organic ingredients when the product contains TiO₂, as well as polyester and paraffin. In addition to omissions, this lawsuit challenges specific misleading statements such as "No Chlorine Bleaching and Dyes," which allegedly mislead consumers to believe there is no added coloring.

Most recently, plaintiffs brought two additional lawsuits against a multinational consumer goods corporation asserting claims, like those made in *Paulson*, that the marketing and labeling of the company's tampon brand were misleading due to the presence of TiO₂.

In addition to these class-action lawsuits, since May 18, 2022, Environmental Health Advocates Inc. has filed eight nearly identical lawsuits in California state courts asserting claims for violation of California's Proposition 65 based on companies' alleged failure to warn for TiO₂ in a variety of personal care and cosmetics products.^[1]

Takeaway

This rising trend of TiO₂-related litigation follows a larger consumer and regulatory focus on the presence (or risk) of contaminants and other allegedly harmful ingredients, such as [perfluoroalkyl and polyfluoroalkyl substances](#) (PFAS) and [benzene](#). With this in mind, companies should partner with trusted counsel to review product formulations and label claims and consider long-term strategies to mitigate litigation risk.

Endnote

^[1] *Environmental Health Advocates Inc. v. Buth-Na-Bodhaige Inc.*, CGC-22-599678 (S.F. Super. Ct. filed May 18, 2022); *Environmental Health Advocates Inc. v. Tarte Inc., et al.*, CGC-22-599743 (S.F. Super. Ct. filed May 23, 2022); *Environmental Health Advocates Inc. v. The Creme Shop Inc., et al.*, T22-1056 (Santa Clara Super. Ct. filed May 26, 2022); *Environmental Health Advocates Inc. v. Forma Brands LLC, et al.*, T22-1195 (Santa Clara Super. Ct. filed June 16, 2022); *Environmental Health Advocates v. Too Faced Cosmetics LLC, et al.*, T22-985 (S.F. Super. Ct. filed July 27, 2022); *Environmental Health Advocates Inc. v. Physicians Formula Cosmetics Inc., et al.*, CGC-22-600957 (S.F. Super. Ct. filed July 27, 2022); *Environmental Health Advocates Inc. v. Mineral Fusion Natural Brands LLC, et al.*, CGC-22-601187 (S.F. Super. Ct. filed Aug. 9, 2022); *Environmental Health Advocates Inc. v. Urban Decay Cosmetics LLC, et al.*, T22-1772 (Alameda Super. Ct. filed Oct. 7, 2022).

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