

# COMMITTEE NEWS

## Products Liability

### Unpacking the “Skittles Ban”

In March 2023, California consumers awoke to a flurry of news and social media coverage regarding a ban on Skittles and various other candies and snacks.<sup>1</sup> This so-called “Skittles ban” caused a frenzy online, with many misunderstanding the fundamental goals proposed by the bill in question.<sup>2</sup>

Introduced on February 2, 2023, by Assembly members Jesse Gabriel and Buffy Wicks, [California Assembly Bill 418 \(AB 418\)](#) seeks to prohibit the manufacture, sale, delivery, or distribution of food products that contain any of five substances: brominated vegetable oil, potassium bromate, propylparaben, red dye 3, and titanium dioxide.<sup>3</sup> Instead of an outright ban on the candies in question, AB 418 would

<sup>1</sup> Misty Severi, *California could ban Skittles, Sour Patch Kids, and Campbell’s soup over additives*, WASHINGTON EXAMINER (Apr. 11, 2023, 7:50 PM), <https://www.washingtonexaminer.com/policy/healthcare/california-ban-skittles-sour-patch-kids-campbell-additives>; Arianna Johnson, *Here’s Why California May Ban Skittles, Nerds and Other Popular Snacks*, FORBES (Apr. 11, 2023, 7:50 PM), <https://www.forbes.com/sites/ariannajohnson/2023/03/28/heres-why-california-may-ban-skittles-nerds-and-other-popular-snacks/?sh=f6f82a54ff5a>.

<sup>2</sup> Jennifer Hassan, Helier Cheung & Marlene Cemons, *Are Skittles dangerous? A California bill aims to ban chemicals in candy*, THE WASHINGTON POST (Apr. 11, 2023, 7:50 PM), <https://www.washingtonpost.com/wellness/2023/03/23/skittles-red-dye-titanium-dioxide/>; Matthew Cantor, *Why candy lovers shouldn’t panic over California’s ‘Skittle ban’*, THE GUARDIAN (Apr. 11, 2023, 7:50 PM), <https://www.theguardian.com/us-news/2023/mar/25/why-candy-lovers-shouldnt-panic-over-californias-skittle-ban>.

<sup>3</sup> Cal. Assemb. 418, 2023 Reg. Sess. (Cal. 2023).

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require companies to omit these additives in processed foods. These additives are already banned in other parts of the world, including the European Union (EU), from existing recipes.<sup>4</sup> Should AB 418 pass, California would be the first state to ban the above five additives. This article touches upon some of the issues that have arisen regarding titanium dioxide.

In March 2023, California consumers awoke to a flurry of news and social media coverage regarding a ban on Skittles and various other candies and snacks.<sup>5</sup> This so-called “Skittles ban” caused a frenzy online, with many misunderstanding the fundamental goals proposed by the bill in question.<sup>6</sup>

Introduced on February 2, 2023, by Assembly members Jesse Gabriel and Buffy Wicks, California Assembly Bill 418 (AB 418) seeks to prohibit the manufacture, sale, delivery, or distribution of food products that contain any of five substances: brominated vegetable oil, potassium bromate, propylparaben, red dye 3, and titanium dioxide.<sup>7</sup> Instead of an outright ban on the candies in question, AB 418 would require companies to omit these additives in processed foods. These additives are already banned in other parts of the world, including the European Union (EU), from existing recipes.<sup>8</sup> Should AB 418 pass, California would be the first state to ban the above five additives. This article touches upon some of the issues that have arisen regarding titanium dioxide.

While AB 418’s potential for success remains unclear, as a result of the “Skittles ban” press coverage, the public’s growing awareness regarding the alleged genotoxicity of titanium dioxide remains a potent catalyst for future toxic tort litigation.

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## The Use and Alleged Effects of Titanium Dioxide

Titanium dioxide is a naturally occurring white mineral that is processed, refined, and added to foods to enhance color and sheen.<sup>9</sup> In terms of UV light, titanium

4 Amanda Lee Myers, *California banning Skittles? Lawmaker fights confusion over bill targeting chemicals*, USA TODAY (Apr. 11, 2023, 7:50 PM), <https://www.usatoday.com/story/news/nation/2023/03/22/california-skittles-ban-legislation-explained/11523314002/>.

5 Misty Severi, *California could ban Skittles, Sour Patch Kids, and Campbell’s soup over additives*, WASHINGTON EXAMINER (Apr. 11, 2023, 7:50 PM), <https://www.washingtonexaminer.com/policy/healthcare/california-ban-skittles-sour-patch-kids-campbell-additives>; Arianna Johnson, *Here’s Why California May Ban Skittles, Nerds and Other Popular Snacks*, FORBES (Apr. 11, 2023, 7:50 PM), <https://www.forbes.com/sites/ariannajohnson/2023/03/28/heres-why-california-may-ban-skittles-nerds-and-other-popular-snacks/?sh=f6f82a54ff5a>.

6 Jennifer Hassan, Helier Cheung & Marlene Cimos, *Are Skittles dangerous? A California bill aims to ban chemicals in candy*, THE WASHINGTON POST (Apr. 11, 2023, 7:50 PM), <https://www.washingtonpost.com/wellness/2023/03/23/skittles-red-dye-titanium-dioxide/>; Matthew Cantor, *Why candy lovers shouldn’t panic over California’s ‘Skittle ban’*, THE GUARDIAN (Apr. 11, 2023, 7:50 PM), <https://www.theguardian.com/us-news/2023/mar/25/why-candy-lovers-shouldnt-panic-over-californias-skittle-ban>.

7 Cal. Assemb. 418, 2023 Reg. Sess. (Cal. 2023).

8 Amanda Lee Myers, *California banning Skittles? Lawmaker fights confusion over bill targeting chemicals*, USA TODAY (Apr. 11, 2023, 7:50 PM), <https://www.usatoday.com/story/news/nation/2023/03/22/california-skittles-ban-legislation-explained/11523314002/>.

9 Joy Stephenson-Laws, *Taste The Titanium Dioxide?*, PROACTIVE HEALTH LABS (Apr. 11, 2023, 7:50 PM), <https://www.phlabs.com/taste-the-titanium-dioxide>.



dioxide increases the shelf life of foods that are impacted by UV light, and is also an effective ingredient in sunscreens against UV rays. Titanium dioxide is also used to whiten paper, paint, plastic, cosmetics, and host of other products. The Food and Drug Administration (FDA) presently allows the use of titanium dioxide as a color additive in food so long as the quantity of titanium dioxide does not exceed one percent by weight of the food.<sup>10</sup> The additive has come under increased scrutiny in recent years, with the EU at the forefront of the movement to ban titanium oxide altogether.

Before 2009, the European Food Safety Authority (EFSA) permitted the use of titanium dioxide as a food additive.<sup>11</sup> In 2016, a re-evaluation of oral ingestion of titanium dioxide reported no adverse effects on consumers.<sup>12</sup> However, research and study continued in an effort to fill in data gaps and uncertainties.

A 2017 French study of rats reported titanium dioxide as a “risk factor” in the promotion of preneoplastic lesions<sup>13</sup> in rat colons.<sup>14</sup> In this study, the authors exposed rats to low doses of food-grade titanium dioxide for one week, and reported that 40% of the animals developed these preneoplastic lesions in the colon.<sup>15</sup> The study acknowledged the need for more investigation, including whether chronic exposure in humans could contribute to the development of colorectal cancer, because the study merely suggested titanium dioxide exposure could initiate carcinogenesis.<sup>16</sup> This study alone did not call the EFSA’s 2016 assessment of titanium dioxide into question.<sup>17</sup> Instead, it encouraged further research, with varying levels of success in linking titanium dioxide exposure with carcinogenesis. As of this writing, there have been no epidemiologic studies demonstrating that exposure to titanium dioxide in humans creates a risk of disease.

In 2021, the EFSA concluded that titanium dioxide was no longer considered safe as a food additive, citing various studies that, although inconclusive in nature, could not rule out a concern for genotoxicity resulting from titanium dioxide intake.<sup>18</sup>

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<sup>10</sup> 21 C.F.R. § 73.575 (2023).

<sup>11</sup> *Food colours: titanium dioxide marks re-evaluation milestone*, EUROPEAN FOOD SAFETY AUTH., <https://www.efsa.europa.eu/en/press/news/160914> (last visited Apr. 11, 2023).

<sup>12</sup> *Id.*

<sup>13</sup> Preneoplastic lesions, which precede the development of primary tumors, consist of altered cells exhibiting a higher risk of malignant evolution than normal cells. Francesco Feo, *Preneoplastic Lesions*, ENCYCLOPEDIA OF CANCER 2977–2984 (2011), [https://link.springer.com/referenceworkentry/10.1007/978-3-642-16483-5\\_4724#~:text=Definition,malignant%20evolution%20than%20normal%20cells](https://link.springer.com/referenceworkentry/10.1007/978-3-642-16483-5_4724#~:text=Definition,malignant%20evolution%20than%20normal%20cells).

<sup>14</sup> Sarah Bettini et al., *Food-grade TiO<sub>2</sub> impairs intestinal and systemic immune homeostasis, initiates preneoplastic lesions and promotes aberrant crypt development in the rat colon*, SCIENTIFIC REPORTS 9 (2017).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Maged Younes et al., *Safety assessment of titanium dioxide (E171) as a food additive*, EFSA JOURNAL 71 (2021).

<sup>18</sup> Genotoxicity refers to the ability of a chemical substance to damage DNA, thereby leading to carcinogenic effects;



Genotoxicity alone does not translate to cancer causing, but by definition means harm to DNA or chromosomes. Proponents of the ban, or any ban on a genotoxic (or potentially genotoxic) substance take the next inferential leap that any such mutation causes cancer, or at a minimum, increases the risk of disease. To date, there are no published studies that show that humans are at increased risk of disease from eating Skittles or using sunscreen. And as to sunscreens, the risk of refraining from use may far exceed any risk of use.

## Previous TiO<sub>2</sub> Litigation

Litigation over titanium dioxide as it relates to food safety has already commenced.<sup>19</sup> On July 14, 2022, Plaintiff Jenile Thames filed a class action lawsuit in the Northern District of California, alleging Defendant MARS Inc., the company that manufactures and distributes Skittles, sold Skittles, which were allegedly unfit for human consumption because they contain titanium dioxide.<sup>20</sup>

Plaintiff alleged that in February of 2016, Defendant publicly committed to phasing out the use of titanium dioxide in its products, but failed to do so.<sup>21</sup> As a result of Defendant's representations—its statements that titanium dioxide would be phased out as an ingredient—and omissions—failure to inform its consumers of the implications of consuming titanium dioxide—Plaintiff sought damages for: (1) violation of California's Unfair Competition Law; (2) violation of the Consumers Legal Remedies Act; (3) breach of implied warranty under Song Beverly Consumer Warranty Act; (4) violation of California's False Advertising Law; (5) fraud; (6) fraudulent inducement; (7) fraudulent omission or concealment and (8) quasi-contract/unjust enrichment.<sup>22</sup>

Unlike the typical toxic tort lawsuit, the damages sought were purely economic: "Plaintiff and the Class were injured by the full purchase price of the Products because the Products are worthless . . ." <sup>23</sup> Plaintiff accused Defendant of engaging in deceptive business practices, false advertising and marketing, and for profiting from its unjust practices.

On September 30, 2022, Defendant Mars filed a motion to dismiss Plaintiff's lawsuit. Among its many bases, Defendant claimed Plaintiff had not suffered an injury in

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*Titanium dioxide: E171 no longer considered safe when used as a food additive*, EUROPEAN FOOD SAFETY AUTH., <https://www.efsa.europa.eu/en/news/titanium-dioxide-e171-no-longer-considered-safe-when-used-food-additive> (last visited Apr. 11, 2023).

<sup>19</sup> See Shauneen Miranda, *A Skittles lawsuit raises questions over titanium dioxide—a legal food additive*, NPR (Apr. 11, 2023, 7:50 PM), <https://www.npr.org/2022/07/22/1112929301/skittles-lawsuit-titanium-dioxide>.

<sup>20</sup> Class Action Complaint at 1, *Thames v. MARS, Inc.*, No. 22CV04145 (N.D. Cal. July 14, 2022), 2022 WL 2783776.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 8–10, 36.

<sup>23</sup> *Id.* at 37.



fact and therefore lacked standing to sue; Plaintiff failed to allege “he or anyone else has actually suffered any physical injury from consuming the product.”<sup>24</sup> Defendant contended general allegations about health risks are too speculative to support a threat of “certainly impending” disease.<sup>25</sup> Even Plaintiff’s economic injury theories were tenuous, because the Skittles packaging disclosed the allegedly harmful substance, titanium dioxide. Mars also argued Plaintiff failed to allege that the concentration of titanium dioxide exceeded the limits imposed by the FDA, and therefore received the product Plaintiff believed he was bargaining for.<sup>26</sup>

The hearing date on Defendant’s motion to dismiss was set for December 1, 2022, but Plaintiff voluntarily dismissed the lawsuit without prejudice on November 7, 2022.<sup>27</sup> No reason was provided for Plaintiff’s dismissal of the suit.

## The Future of TiO<sub>2</sub> in Toxic Tort Litigation

The titanium dioxide ban in the EU has paved the way for litigation here in the United States. Despite studies on the impacts of long-term titanium dioxide intake, the adverse effects have yet to be realized—let alone proven. As research and studies become more advanced, the effects of titanium dioxide (or lack thereof) may become clearer. The pathways of exposure to titanium dioxide are varied, as are the sources. While the number of colorectal cancers are decreasing per capita, the number of new cases and deaths are increasing as population increases.<sup>28</sup> Our prediction is that titanium dioxide litigation will join the ranks of toxic tort litigation, and may reach beyond candy lovers. >

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<sup>24</sup> Defendant Mars, Inc.’s Notice of Motion and Motion to Dismiss; Memorandum of Points & Authorities in Support Thereof, *Thames v. MARS, Inc.*, No. 22CV04145 (N.D. Cal. Sept. 30, 2022), 2022 WL 19331121.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Jonathan Stempel, *Lawsuit claiming Skittles are unfit to eat is dismissed*, REUTERS (Apr. 11, 2023, 7:50 PM), <https://www.reuters.com/legal/lawsuit-claiming-skittles-are-unfit-eat-is-dismissed-2022-11-08/>.

<sup>28</sup> See *United States Cancer Statistics: Data Visualizations*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last visited Apr. 11, 2023, 7:50 PM), <https://gis.cdc.gov/Cancer/USCS/#/Trends/>.