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“Food Fraud Database”: a New Tool to Protect Against Tainted Ingredients

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Last week, the U.S. Pharmacopeial Convention (“USP”), a scientific nonprofit that sets standards for food ingredients, medicines and dietary supplements enforceable by the Food and Drug Administration, released an updated “Food Fraud Database” that could make it easier for companies to identify tainted ingredients in food products. The database is available here: www.foodfraud.org.

USP defines “food fraud” to mean the deliberate substitution, addition, tampering or misrepresentation of food, food ingredients, food packaging, or false or misleading statements made about a food product for economic gain.

Replying on reports published in scholarly journals and the media between 1980 and 2012, USP included 1,300 records in the Food Fraud Database when it was first released in April 2012. USP added an additional 800 records last week, largely drawing its data from studies published in 2011 and 2012. The database contains information about ingredients, adulterants for those ingredients, method used to detect adulteration, and the person/study credited with discovering the adulteration. The Food Fraud Database identifies top ingredients for which “food fraud” has occurred. These include olive oil, cooking oil, milk, saffron, honey, coffee, tea, fish, clouding agents (used in beverages to improve visual appearance), black pepper, seafood, turmeric, chili powder, lemon juice, and maple syrup.

Food companies should have in place means to avoid accidentally incorporating a tainted ingredient into a food product. In the first instance, food companies should conduct careful due diligence to ensure that their suppliers are reliable and have adequate quality control in place to

avoid accidental contamination. In light of recent incidents such as the melamine contamination of milk and pet food products, companies with international ingredient suppliers should be particularly diligent.

Even with the most careful due diligence, though, food companies should be prepared in case they accidentally incorporate into their own product a tainted or otherwise inadequate ingredient. Incorporating such an ingredient could result in substantial costs and liabilities, some of which companies may be able to transfer to the ingredient supplier through an indemnification agreement.

Food companies also may have insurance coverage for some of the costs and liabilities that could result from incorporating a fraudulent ingredient into their own product.

For example, incorporation of a tainted or inadequate ingredient into a product may constitute physical damage to a food company's property, which could trigger coverage under a company's first-party property policy. Food companies making claims of this sort should be prepared to respond to insurer efforts to avoid their coverage obligations. Insurers may argue, for instance, that incorporating a fraudulent ingredient does not result in "property damage" under the terms of the policy because the property was never physically damaged, or that the damage should be excluded because of pollution, contamination or microbe exclusions. Depending on the facts and policy language, policyholders may have strong positions against these types of insurer arguments. For example, some courts have held that incorporation of a tainted ingredient constitutes property damage, particularly where the tainted ingredient cannot be removed or separated from the final product.

Similarly, insurance may protect against third-party claims arising from the incorporation of fraudulent ingredients. In some instances, a company may face third-party bodily injury claims alleging that the fraudulent ingredient resulted in disease or other injury. General liability insurance policies generally cover these types of bodily injury claims, although insurers again may attempt to avoid coverage by relying on policy exclusions such as the pollution exclusion. A company also may be a target of third-party claims by downstream food companies that allege that they incorporated a tainted ingredient into their own product. General liability policies may cover these claims as well, although insurers again may argue that the policies do not apply because incorporation of the tainted ingredient does not constitute covered property damage. As

with property coverage, policyholders often have strong responses to these types of insurer arguments.

Where a company discovers that some of its product has been tainted by a fraudulent ingredient, the company may need to recall some or all of that product. Recall costs can be substantial and can affect a company's reputation and the reputation of its products. Property policies and general liability policies often exclude some recall costs, but many food companies have obtained specialty recall policies to fill this potential coverage gap. Companies should be familiar with the terms and limitations of their recall policies, which in many instances could require a link to, or risk of, bodily injury resulting from the product. Courts recently have been divided on the extent of risk of bodily injury required to trigger recall policies, as we have discussed in a previous blog post. Food companies that currently do not have recall policies should consider whether risks associated with fraudulent ingredients justify reconsidering whether to acquire such policies.

Food companies should pay careful attention to USP's Food Fraud Database, and they should ensure that they have the best available coverage to protect against food fraud.