

# Food & Beverage

## LITIGATION UPDATE

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### Table of Contents

#### Legislation, Regulations and Standards

- [1] Another House Subcommittee Looks Into Carbon Monoxide Meat Packaging . . . . .1
- [2] Meat Inspectors Blame Contamination Outbreaks on “*E. Coli* Loophole” . . . . .2
- [3] USDA Alerts Canadian Government to Increased Food Inspections . . . . .2
- [4] Canada Calls for New WTO Panel on U.S. Agricultural Subsidies . . . . .2
- [5] Avian Influenza Located on British Turkey Farm . . . . .3
- [6] FSA Asks Industry for Input on Food Labeling Terminology . . . . .3

#### Litigation

- [7] Case Management Conference Scheduled in Diacetyl Fraud Suit Against Chemical Trade Group and Manufacturers . . . . .3
- [8] Marler Files Fifth Lawsuit in Pot Pie Contamination Outbreak . . . . .4

#### Other Developments

- [9] U.S. Health Report Shows Decline in Overall Health; Obesity to Blame . . . . .5
- [10] Advocacy Group Urges Corporations to Improve Product Safety . . . . .5
- [11] CCFC Criticizes Alcohol Adverting on Boston Public Transit . . . . .5
- [12] British Group Targets Obesity and Alcohol in New Report . . . . .6
- [13] Which? Advocates 9 P.M. Watershed for Food Advertising . . . . .7
- [14] British Health Alliance Lobbies for Increased Taxation on Alcoholic Beverages . . . . .7

#### Media Coverage

- [15] Andrew Martin, “Consumers Won’t Know What They’re Missing,”  
*The New York Times*, November 11, 2007 . . . . .8

#### Scientific/Technical Items

- [16] EPA-Funded Study on Microwave Popcorn Emissions Published . . . . .8
- [17] Study Claims “Curvy” Women More Intelligent, Bear Smarter Offspring . . . . .9

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# Food & Beverage

## LITIGATION UPDATE

### Legislation, Regulations and Standards 110th Congress

#### [1] Another House Subcommittee Looks Into Carbon Monoxide Meat Packaging

Less than two weeks after a House agriculture subcommittee heard testimony about the safety of using carbon monoxide gas in meat and fish packaging, the Oversight and Investigations Subcommittee has considered the matter. The Food and Drug Administration approved the practice in 2002, deeming it Generally Recognized as Safe (GRAS). The meat industry contends that it retains the meats' natural color indefinitely without posing any threat to consumers. During the November 13, 2007, hearing, committee staffers reportedly displayed several pieces of meat wrapped in airtight packaging; the pieces that were two years old reportedly still retained a fresh, red color.

"The sole purpose of carbon monoxide packaging is to fool consumers into believing that the meat and fish they buy is fresh, no matter how old it is and no matter how decayed it might be," Subcommittee Chair Bart Stupak (D-Mich.) asserted in his opening statement. According to a news source, the committee hearing also brought to light e-mails from employees in the meatpacking industry

that question study data used by the U.S. Department of Agriculture (USDA) when it assessed carbon monoxide packaging in 2004. USDA has apparently indicated that it will review the data; a spokesperson said the agency had "no knowledge about the e-mails or concerns the company raised internally." Stupak also reportedly indicated that major food retailers have pledged to stop selling meat treated with carbon monoxide.

Meanwhile, Target Corp. is reportedly seeking permission from USDA to add a warning to meat labels for products processed with carbon monoxide. The proposed label would say "CONSUMER NOTICE: Carbon monoxide has been used to preserve the color of this product. Do not rely on color or the 'use or freeze by' date alone to judge the freshness of the product. For best results please follow the Safe Handling Instructions." This language is apparently similar to the disclosure requirements that have been included in bills introduced by Representatives John Dingell (D-Mich.) and Bart Stupak. Company executives continue to assert that the technology is safe. Hormel's CEO was quoted as saying, "Consumers are not eating bad product or being deceived." He reported that the company has sold 23 million packages of meat involving the technology and received only 48 complaints of odor or bad flavors. *See The Wall Street Journal, USA Today, CQ Healthbeat News, Reuters, Product Liability Law 360*, November 13, 2007.



## U.S. Department of Agriculture (USDA)

### [2] Meat Inspectors Blame Contamination Outbreaks on “*E. Coli* Loophole”

USDA reportedly allows meat companies to put *E. coli*-positive meat into a “cook only” category, a policy that agency inspectors claim is partly to blame for the recent rise in contamination outbreaks. Under the policy, meat that tests positive for the *E. coli* bacteria can be cooked and sold as precooked hamburgers, meat loaf, crumbled taco meat, and other cooked products. According to some USDA inspectors, this practice conceals significantly higher levels of the bacteria in packing plants than the companies report to USDA. When the companies shift contaminated meat to “cook-only” processing lines, they apparently do not report it to the agency. Further, allowing significant levels of *E. coli* to remain in the processing plants reportedly increases the risk that clean meat will become contaminated. One unnamed inspector was quoted as saying, “The government keeps putting out that we’ve reduced *E. coli* by 50 percent. And we haven’t done nothing. We’ve just covered it up.” USDA officials reportedly disagree, noting that its Food Safety and Inspection Service collects its own samples and does not need test results from the plants. Company representatives point out that cooking kills pathogens, so the meat is safe to eat, and they typically sell several million pounds of cooked beef each year to the USDA for the National School Lunch Program. See *The Seattle Times*, November 11, 2007.

### [3] USDA Alerts Canadian Government to Increased Food Inspections

USDA’s Food Safety and Inspection Service (FSIS) has [informed](#) the director of Canada’s Food Inspection Agency that it will increase its product

exams and tests of meat, poultry and egg exports, focusing on *E. coli*, *Listeria* and *Salmonella*. The new measures were apparently undertaken due to concerns about the Canadian inspection system arising after a mid-year audit and “the circumstances related to the unsafe practices employed by Ranchers Beef, Ltd., Establishment 630.” In its November 8, 2007, letter, FSIS stated, “[a] positive test result will require rejection of all product represented by the sample,” and all shipments will be held at import facilities until testing is completed and the results are negative for the pathogens. The *E. coli* contamination of Topps Meat Co. beef that put the company out of business was traced back to Ranchers Beef, and no products from that company have been eligible to enter the United States since October 20.

## World Trade Organization (WTO)

### [4] Canada Calls for New WTO Panel on U.S. Agricultural Subsidies

Canadian officials recently called on the World Trade Organization to reevaluate U.S. agricultural subsidies described by the government as “trade-distorting.” Coordinating its challenge with a similar one from Brazil, Canada has requested a WTO panel to address concerns that after accounting for domestic support, the United States exceeded its WTO commitment in 1999, 2000, 2001, 2002, 2004, and 2005. The Canadian government plans to formally announce its intention at the November 19, 2007, meeting of the WTO Dispute Settlement Body. “Canada believes that the United States has breached its international obligations by providing agricultural subsidies that exceed the levels allowed by the WTO,” said David Emerson, the minister of international trade. “This panel request comple-



ments our efforts in the Doha negotiations to further discipline and reduce trade-distorting agricultural subsidies." See *Government of Canada Press Release*, November 8, 2007.

## United Kingdom (U.K.)

### [5] Avian Influenza Located on British Turkey Farm

The U.K. Department for Environment, Food and Rural Affairs' (DEFRA) has confirmed that the deadly H5N1 strain of avian influenza has infected a Suffolk poultry farm, where officials culled 5,000 turkeys, 1,000 ducks and 500 geese suspected of having contracted the disease. The Redgrave Park Farm, a subsidiary of Gressingham Foods, initially reported the outbreak after approximately 60 birds died overnight in one of the facility's sheds. Because the turkeys were free-range and mingled with wild birds at the farm's ornamental pool, authorities are concerned that a virus reservoir may have built up in the avian population and could spread to the 3 million birds raised within the six-mile surveillance zone surrounding the outbreak's epicenter. As a precaution, officials this week euthanized some 22,000 turkeys at four farms closely linked with Redgrave Park and dispensed the antiviral drug Tamiflu® to workers operating in close proximity to the infected birds.

Meanwhile, DEFRA has also announced that the Suffolk virus strain closely resembles one responsible for recent bird flu outbreaks in Germany and the Czech Republic. In addition, investigators have focused on ducklings imported from the Netherlands and transport vehicles as possible contamination sources. "The initial sequence data suggests that it's closely related to outbreaks in the Czech Republic and Germany, which does suggest a

possible wild bird source," Acting Chief Veterinary Officer Fred Landeg was quoted as saying. "This will not be a quick exercise. This is a particularly challenging site and our priority is to adhere to strict bio-security, and the health and safety of staff on site is paramount." See *BBC News* and *CNN.com*, November 13, 2007; *The London Times*, November 14 and 15, 2007.

## U.K. Food Standards Agency (FSA)

### [6] FSA Asks Industry for Input on Food Labeling Terminology

FSA has reportedly called on the food industry to comment on new criteria that will be used in food labeling guidelines regarding terms such as "traditional," "original," "homemade," "selected," "premium," "fresh," "natural," and "pure." The agency apparently issued labeling guidelines in 2002, but has initiated its latest consultation in response to new marketing practices and consumer concerns about some product descriptions. Confusion over the term "fresh" has reportedly arisen in light of modern distribution and storage practices, and its use in phrases such as "oven fresh" and "garden fresh" have little meaning. Comments must be submitted by January 21, 2008. See *Food Production Daily.com*, November 2, 2007.

## Litigation

### [7] Case Management Conference Scheduled in Diacetyl Fraud Suit Against Chemical Trade Group and Manufacturers

A California state court will conduct a case management conference November 27, 2007, in litigation filed by food flavoring workers who allege



that an industry trade group and a number of chemical companies concealed knowledge of a link between diacetyl and occupational lung disease from the government and medical community for 20 years. *Ortiz v. Flavor & Extract Mfrs. Ass'n*, No. BC364831 (Calif. Super. Ct., Los Angeles County, filed January 17, 2007). The plaintiffs allege that they have contracted *broncholitis obliterans* as a result of occupational exposure to diacetyl and other chemical flavorings and fragrances. Among the claims they have filed is an intentional breach of voluntary undertaking as to the Flavor and Extract Manufacturers Association of the United States (FEMA).

Plaintiffs contend that FEMA knew as early as 1976 that diacetyl posed a potential pulmonary hazard and, by concealing the risk from government agencies and the medical community, “increased the risk of harm to Plaintiffs,” and “prevented OSHA [the Occupational Safety & Health Administration] and other governmental agencies from discovering the epidemic and implementing remedial measures which would have protected Plaintiffs from the toxic hazards of flavoring ingredients and would likely have prevent [sic] the occurrence of their serious lung disease.” Plaintiffs also claim that FEMA failed to sponsor appropriate scientific research despite knowing of confirmed cases of the lung disease among flavorings workers. Plaintiffs also bring causes of action for negligence, negligence per se, premises liability (as to defendants owning and supervising premises where plaintiffs worked), strict liability – failure to warn and design defect (as to defendants importing, producing or distributing machines and chemical products used in their workplaces), fraudulent concealment, breach of implied warranties, and loss of consortium. In addition to compensatory damages, plaintiffs seek punitive

damages, costs of suit and interest.

According to a news source, a FEMA spokesperson contends that the organization first learned of a link between diacetyl exposure and occupational lung disease in late 2001 when the National Institute for Occupational Safety and Health (NIOSH) was investigating reports in Missouri and asked FEMA for flavorings information. He was quoted as saying, “We provided NIOSH with voluminous information and most importantly less than a month after we got the first call from NIOSH, we had the NIOSH researchers meet with representatives from the entire FEMA membership to present their findings about microwave popcorn and to exchange information.” See *Inside OSHA*, November 12, 2007.

#### [8] Marler Files Fifth Lawsuit in Pot Pie Contamination Outbreak

Plaintiff’s lawyer Bill Marler has apparently filed another lawsuit against ConAgra seeking to recover damages on behalf of a Washington state resident who allegedly became ill after eating a Banquet® pot pie in September 2007. *Doty v. ConAgra*, No. n/a (U.S. Dist. Ct., Eastern Dist., Wash.). According to one of Marler’s Web blogs, the *Salmonella* strain that sickened the man is the same serotype that the Centers for Disease Control and Prevention has associated with the pot pie outbreak. “This is the fifth lawsuit we have filed against ConAgra in connection with this outbreak,” Marler said. “We have been contacted by dozens of people who are part of the pot pie *Salmonella* outbreak, and will continue to file lawsuits against ConAgra until they begin compensating our clients for damages.” The other lawsuits were filed in Washington, Michigan, Minnesota, and Nebraska. See *salmonellablog.com*, November 13, 2007.



## Other Developments

### [9] U.S. Health Report Shows Decline in Overall Health; Obesity to Blame

The United Health Foundation has released the 18th annual edition of its [report](#), *America's Health Rankings™: A Call to Action for People & Their Communities*, that measures the overall health of the nation by analyzing a number of health determinants and outcomes. According to the foundation, "The report indicates that the overall health of the nation declined by a rate of 0.3 percent since last year," because any modest gains in reducing cancer or cardiovascular mortality "continue to be dwarfed by increasing obesity, increasing numbers of uninsured people, children in poverty and the persistence of risky health behaviors."

The report compares the states and also ranks the country among other nations; while the United States can boast the highest life expectancy in its history – at 77.9 years – it lags behind 43 other countries. Among the health determinants the report examines are smoking, binge drinking, violent crime, infectious disease, high school graduation, health status, and several mortality measures. Regarding obesity, the study reports that rates have "increased from 11.6 percent of the population in 1990 to more than 25 percent today. More than 55 million Americans are obese and as a result are at significant risk for other diseases, such as heart disease, diabetes, stroke, and cancer."

### [10] Advocacy Group Urges Corporations to Improve Product Safety

U.S. PIRG, a federation of state public interest research groups, has launched a [corporate safety challenge](#) that calls on CEOs to test their food and

consumer products using the same standards as federal regulators; allow independent, third-party verification; eliminate the use of "dangerous chemicals like lead and phthalates"; and stop blocking more stringent regulation and enforcement. The group is also calling on Congress to (i) hire more inspectors, (ii) expand agency authority, and (iii) impose stiffer penalties on violators. According to U.S. PIRG, "Product manufacturers have recalled an estimated 25 million dangerous toys, 60 million pounds of contaminated pet food, 1 million tubes of tainted toothpaste and 1 million pounds of spinach. . . . CEOs and government officials should be demanding greater vigilance, instead of weaker regulations and diminished funding for watchdog agencies. Who knows what else might slip through the safety net?"

### [11] CCFC Criticizes Alcohol Advertising on Boston Public Transit

The Center for a Commercial-Free Childhood (CCFC) is calling for an end to alcohol advertising on Boston's public transit. CCFC is apparently basing its campaign on a recent Marin Institute report claiming that the Massachusetts Bay Area Transportation Authority (MBTA) and New York City's Metropolitan Transportation Authority (MTA) are the only two major public transit systems that allow alcohol advertising. While New York Assemblyman Felix Ortiz recently introduced legislation to prohibit public transit alcohol ads, CCFC has alleged that MBTA has ignored "politicians, community leaders, public health advocates, and concerned parents and youth" who have urged the agency to change its advertising policy. "Alcohol advertising for products ranging from Coors Light to Svedka Vodka routinely appears on MBTA trains and buses," opines CCFC, which disputes the agency's claim



that it relies on alcohol ad revenue to cover operating costs. In addition, the consumer group argues that MBTA readily revised its policy on videogame advertising “within weeks of receiving a public letter” about the marketing of *Grand Theft Auto: Vice City Stories* on Green Line trains. Public health lawyer Michele Simon, research and policy director at the Marin Institute, also weighed in on the issue, stating that the “connection between youth exposure to alcohol ads and underage drinking is well documented. Boston should join Chicago, San Francisco, Philadelphia, Seattle, and many others in saying no to alcohol ads on public transit. It’s not only possible legally, but commonsense policy.” See *CCFC Press Release*, November 8, 2007.

### **[12] British Group Targets Obesity and Alcohol in New Report**

The Nuffield Council on Bioethics this week published a report titled *Public Health: Ethical Issues* that aims to “answer the question of when and how the state should act” in protecting the health of its citizens. Established in 1991 and funded by The Nuffield Foundation, the Medical Research Council and The Wellcome Trust, the council examines the ethical questions raised by recent advances in biological and medical research. Its latest report sets forth a “stewardship model” for government and analyzes four case studies -- “infectious disease, obesity, smoking and alcohol (as a compare and contrast case), and fluoridation of water” – in the context of a framework providing “a basic structure for the consideration of ethical issues arising in public health.” The report ultimately maintains that the government has an obligation to allow people to be healthy and to reduce health inequalities, but should not coerce adults to lead healthy lives. This state role, however, “does not

absolve other parties, in particular the corporate sector, from their responsibilities,” according to the report, which also charges “the media, stakeholders and campaigning groups” with upholding “accuracy and fairness in presenting evidence.”

With regard to obesity, the council specifically argues that food and beverage companies have “an ethical duty to help individuals make healthier choices” because the industry and market forces often dictate what foods are readily available and promoted to consumers. The report contends that if businesses fail to provide comprehensive nutrition labeling or to curb marketing, then government regulation would be “ethically justifiable.” In addition, the report urges the European Commission to “consider whether there are cases in which self-regulation of food advertising for children has provided unsatisfactory and whether more binding regulation is required.” In conjunction with these measures, the council advises governments to require nutrition education and physical activity in schools; consider removing children from parents or guardians in cases of severe obesity; and improve the built environment to encourage exercise. “Children are especially vulnerable,” states the report, “and evidence shows that children’s early diet has a long-term impact on health, including obesity and its related health risks.”

The council in its alcohol case study also recommends that the U.K. government adopt the “evidence-based measures judged effective in the WHO-sponsored analysis *Alcohol: No ordinary commodity*.” In particular, the report supports an increased alcohol tax as one of many possible “coercive strategies to manage alcohol consumption, specifically in the areas of price, marketing and availability.” Calling on governments to implement



more stringent alcohol advertising policies, the report further concludes that alcohol manufacturers, vendors and marketers “need to recognize more fully the vulnerability of children and young people, and take clearer responsibility for preventing harms to health.”

### [13] Which? Advocates 9 P.M. Watershed for Food Advertising

British consumer watchdog Which? this week issued a [report](#) that criticizes new U.K. restrictions on advertising foods high in fat, sugar and salt (HFSS) on television programs viewed primarily by children. The restrictions, which took effect April 1, 2007, prohibit HFSS food advertisements during or around programs made for children or that are likely to appeal to children ages 4 to 9. Which?, however, has claimed that the top five programs for the younger-than-10 group did not fall under these rules because the viewing audience also contained adults; of the top 10 programs watched by these children, only two – “The Simpsons” and “SpongeBob SquarePants” – were subject to ad limitations. In addition, a plan to extend the ban to programs attracting children younger than age 16 would cover only two of the top 20 programs for that age group, according to Which?. The watchdog has instead proposed a 9 p.m. watershed for all HFSS advertising, despite concerns that the restrictions are still too recent to evaluate their effectiveness. “If you ban advertising no one gets thinner or fitter as a result,” a spokesperson from the Incorporated Society of British Advertising was quoted as saying. “In Sweden there is no advertising to children, and the children there are as fat as in the U.K.” See *BBC News* and *FoodNavigator-Europe.com*, November 12, 2007.

### [14] British Health Alliance Lobbies for Increased Taxation on Alcoholic Beverages

The Alcohol Health Alliance, a coalition of 24 medical and charity organizations, has reportedly asked the British government to increase alcohol prices by 10 percent, arguing that the tax would cut all alcohol-related deaths by 10 to 30 percent. The Alliance has claimed that in conjunction with relaxed licensing laws and later pub hours, the cost of alcohol has remained steady or decreased since the mid-1990s and contributed to the surge in alcohol-related deaths, which have doubled since 1991. The campaign has specifically highlighted the effects of alcohol consumption on young adults. Physicians interviewed by the Alliance reported a shift in the age profile of their patients, with 77 percent saying they had treated someone under age 25 for health problems attributed to alcohol. In addition, medical professionals noted that more adults under 30 were presenting with alcohol-related hepatitis, severe liver damage or cirrhosis, diseases usually associated with habitual drinkers in their 50s or 60s. “If you look at the burden of damage to society, it’s hugely greater for alcohol than for drugs,” said Alliance Chair Ian Gilmore, who added that Finland’s health problems soared after cutting the alcohol tax by 40 percent and suggested that a tax hike would therefore curtail heavy drinking.

Meanwhile, the British government has apparently instituted its own cross-departmental Alcohol Strategy, which includes a public information campaign, an independent review of alcohol pricing and promotion, the rigorous enforcement of underage drinking laws, and improved services for those seeking to reduce alcohol consumption. In response to the Alliance’s demands, the public





health minister also stated that the U.K. alcohol tax was already the second highest in Europe and that only 1 percent of pubs extended their hours after the change in licensing laws. “We’re looking at where it’s available, who it’s available to, how it’s being marketed, what the targeting is, and what we can do to give clear messages and to make those who are selling it responsible,” the public health minister was quoted as saying. *See BBC News*, November 13, 2007.

## Media Coverage

[15] Andrew Martin, “Consumers Won’t Know What They’re Missing,” *The New York Times*, November 11, 2007

“The Pennsylvania Department of Agriculture has decided that consumers are too dim to make their own shopping decisions,” contends *New York Times* writer Andrew Martin in this article about the state’s move to prohibit in January 2008 “absence labeling” on milk, “meaning labels that tell consumers what isn’t in a product rather than what is.” Martin addresses the initiative led by Pennsylvania Agriculture Secretary Dennis Wolff, who has argued that “hormone free,” “pesticide free” and “antibiotic free” labels are misleading because they “imply there is a safe, non-safe dimension” to dairy products. Wolff has specifically noted that all milk sold in Pennsylvania is pesticide- and antibiotic-free and that there are no scientific tests to prove that milk lacks artificial hormones (rBGH).

Martin, however, alleges that Wolff’s office yielded to pressure from rBGH-manufacturer Monsanto Co. and a contingent of dairy farmers that “have spent more than a decade trying to persuade federal authorities to ban or restrict non-rBGH labels on the grounds that there is no difference in

milk from cows that are treated with the hormone and those that are not.” In addition, Martin faults Pennsylvania officials for failing to create a system to verify marketing claims, “a process for which the Food and Drug Administration issued guidelines – in 1994.” He ultimately concludes that Wolff’s reasoning, if drawn out, would also apply to labels such as “organic,” “natural,” “from grass-fed cows,” and “locally produced.” “Wolff is bucking consumer demand, which will benefit Monsanto and a bunch of whiny dairy farmers,” opines Martin, adding that he finds “it hard to muster sympathy for farmers who refuse to change to meet consumer demands.”

## Scientific/Technical Items

[16] EPA-Funded Study on Microwave Popcorn Emissions Published

Environmental Protection Agency (EPA) researchers have concluded that several dozen volatile organic compounds (VOCs) are emitted while microwave popcorn is popping and the bag is opened, with more than 80 percent of total chemical emissions occurring during opening. [Jacky Rosati, Kenneth Krebs & Xiaoyu Liu, “Emissions from Cooking Microwave Popcorn,” \*Critical Reviews in Food Science and Nutrition\*, November 8, 2007.](#) The researchers measured VOC and particulate matter (PM) emissions from 17 types of microwave popcorn during popping, bag opening and 40 minutes after opening; they also tested air-popped popcorn. While diacetyl emissions ranged from 0.02 to 5.8 ng/cc, overall, “light” popcorn emitted lower diacetyl levels than “butter” popcorn. The most predominantly emitted chemicals “agreed with those chemicals sampled by NIOSH [the National Institute for Occupational Safety and Health] inside microwave popcorn manu-



facturing plants.” These chemicals included those “originating from the inks or glues on the bag . . . and the chemicals originating from the popcorn flavorings.” Ninety-nine percent of the emitted PM “was in the respirable range”; and the average concentration of PM emitted was 1900  $\mu\text{g}/\text{m}^3$ . According to the study, “diacetyl was not emitted by air popped corn.”

### **[17] Study Claims “Curvy” Women More Intelligent, Bear Smarter Offspring**

A recent study claims that women with a greater waist-to-hip ratio scored significantly higher on cognitive tests, as did their children. William D. Lassek and Steven J.C. Gaulin, “Waist-hip ration and cognitive ability: is gluteofemoral fat a privileged store of neurodevelopmental resources?,” *Evolution and Human Behavior*, November 2007.

Researchers, who analyzed 16,000 women and girls, concluded that those with a waist significantly smaller than the hips – ideally a ratio between 0.6 and 0.7 – scored higher on cognitive tests than “thinner” or “linear” women, according to *The London Times*. The study speculates that the fat around fuller hips and thighs contains higher levels of the omega-3 fatty acids essential to neurocognitive development during pregnancy. “Until this point the only thing we have accepted is that they [curvy women] are at an advantage in contemporary Western society,” a senior lecturer at the Brighton and Sussex Medical School said in response to the study results. “What these people are saying is that they also have an advantage biologically.” See *The London Times*, November 11, 2007; *BBC News*, November 12, 2007.



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## LITIGATION UPDATE

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