

Supplemental Civil Remedies-Indirect Purchaser Discussion Outline

Note: Possible recommendations have been narrowed to those that appeared to receive substantial support from four or more Commissioners during the deliberation meeting on May 8 2006, or on which additional discussion was sought. Indications of support for particular recommendations are based on AMC Staff's recording of discussions during and the transcripts of the deliberation meeting on May 8. No Commissioner is bound by the indications reflected in this document, and it is understood that Commissioners may change their positions from those tentatively indicated in initial deliberations.

I. <i>Indirect Purchaser Reform</i>

[1] No statutory change is appropriate, and law should be allowed to develop subsequent to passage of the Class Action Fairness Act.

[2 *Commissioners favored: SC, DC*]

[2] Recommend that *Illinois Brick* be overruled by statute so that indirect purchasers may sue under federal law to recover damages.

[10 *Commissioners favored: BB, DC, MD, DG, JJ, DK, SL, JS, DC, JW, JY*]

If so:

[a] Recommend that the rule in *Hanover Shoe*, barring the pass-on defense, also be overruled by statute.

[10 *Commissioners favored: BB, DC, MD, DG, JJ, DK, SL, JS, DC, JW, JY*]

[b] Recommend a statute that would permit resolution of all purchaser claims in a single federal forum.

[10 *Commissioners favored: BB, DC, MD, DG, JJ, DK, SL, JS, DC, JW, JY*]

[c] Recommend legislation that preempts state laws permitting indirect purchasers to recover so that any claim for damages by an indirect purchaser must be brought in federal court.

[5 *Commissioners favored: MD, DG, SL, JS, JW*]

[d] Recommend adoption of a statutory provision that would allow removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III.

[5 *Commissioners favored: BB, JJ, DK, DV, JY. 5 Commissioners favored as alternative to preemption: MD, DG, SL, JS, JW*]

[e] Recommend that courts, in the exercise of their discretion, use structured (or "trifurcated" proceedings) in purchaser litigation.

[4 *Commissioners favored: JJ, JS, DV, JW*]