COMMITTEE ON FEDERAL COURTS

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COMMENT ON PROPOSED RULE 16.1(c)(4)
TO THE ADVISORY COMMITTEE ON CIVIL RULES

The New York City Bar Association ("City Bar") greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committee on Civil Rules (the "Advisory Committee").

The City Bar, founded in 1870, has approximately 23,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. It includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar's Committee on Federal Courts (the "Federal Courts Committee") addresses substantive and procedural issues relating to the practice of law in the federal courts. The Federal Courts Committee respectfully submits the following comments on the proposed Rule 16.1(c)(4) of the Federal Rules of Civil Procedure.

I. Background

The Advisory Committee has proposed a new Rule 16.1 governing management of Multidistrict Litigation ("MDL"). The proposed rule is designed to guide the MDL court in addressing the various and complex issues unique to an MDL proceeding. However, in explaining proposed Rule 16.1(c)(4), the committee note does not fully describe the purpose of the provision or its potential function. The City Bar recommends revisions to the proposed committee note to Rule 16.1(c)(4) to provide additional detail and clarity on the issues that the provision is designed to address and its place in the discovery process.

II. Considerations

Proposed Rule 16.1(c)(4) directs the parties, as part of the initial management conference report required by Proposed Rule 16.1(c), to address "how and when the parties will exchange information about the factual bases for their claims and defenses." This provision targets the distinctive MDL problem that some claims are insufficient at the time of filing but may not be disposed of quickly because of the number of claims and the preference to address common issues first. Proposed Rule 16.1(c)(4) provides a valuable mechanism to ensure early exchange of information to prevent insufficient claims and defenses from clogging the MDL. The proposed rule reflects the current practice in many MDLs and is designed to protect all parties and the court from the burden of insufficient claims and defenses.

However, we would go further in the committee note accompanying Rule 16.1(c)(4) to make clear that the provision is not itself designed to weed out insufficient claims and defenses early in the litigation. Similarly, we would make clear in the note that the provision functions as a form of early discovery, like an initial disclosure, rather than functioning as a pleading rule. To ensure appropriate implementation of the rule, the City Bar recommends adopting changes to the committee note that identify the issue targeted and explain that the provision is a discovery mechanism.

The Advisory Committee should not adopt any changes to proposed Rule 16.1(c)(4)—or any other provision of proposed Rule 16.1—that would implicitly or explicitly alter the pleading or dismissal standards. To the extent that the Advisory Committee seeks to address the problem of insufficient claims through a pleading or dismissal rule—whether a change in pleading standard or a new mechanism for ensuring that claims meet that standard in an MDL—such a substantive change should not be buried in a case management rule and should not be unique to MDLs. Rather, any changes to pleading requirements or changes to dismissal mechanisms must be made through amendments to the rules governing pleadings and dismissals. As currently proposed, Rule 16.1(c)(4) does not appear to alter either pleading or dismissal standards, and the City Bar supports that aspect of the provision.

The City Bar also supports that Rule 16.1(c)(4) imposes reciprocal disclosure obligations on both plaintiffs and defendants for their initial claims and defenses, informed by the respects in which parties are differently situated. While MDLs have not been reported to create the same incentives for insufficient defenses as insufficient claims, courts have flexibility under this rule to adopt an exchange mechanism and timing that do not burden the parties and promote efficient and fair management of the matter.

III. Proposed Revisions

Based on the foregoing considerations, we support the adoption of Rule 16.1(c)(4) as drafted but propose the following revisions to the committee note to proposed Rule 16.1(c)(4): Rule 16.1(c)(4). Experience has shown that in certain MDL proceedings early exchange of information about the factual bases for claims and defenses can facilitate the efficient management of the MDL proceedings. Such exchange of information may be useful to determine the sufficiency of claims and defenses and prevent insufficient claims or defenses that would not have been brought outside the MDL context from burdening all parties and the court. Some courts have

utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings. The exchange of information under this provision is akin to initial disclosures and other early discovery mechanisms; this provision does not change the parties' pleading obligations or the standards for dismissal.

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens, including by considering different parties' individual circumstances. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. For example, it is widely agreed that discovery from individual class members is often inappropriate in class actions, but with regard to individual claims in MDL proceedings exchange of individual particulars may be warranted. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

Respectfully submitted,

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