UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
U. S. COURTHOUSE
231 WEST LAFAYETTE BLVD.
DETROIT, MICHIGAN 48226

CHAMBERS OF
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

313 234-5120

December 21, 2004

RECEIVED IN CHAMBERS

DEC 27 2004

Hon. Lee Rosenthal
Chair, Judicial Conference Advisory Committee on Civil Rules
11535 Federal Courthouse
515 Rusk
Houston, TX 77002

Lee
Dear Judge Rosenthal:

I write on a matter that I recommend your committee consider, because I believe it relates to the integrity of the federal civil jury process.

Specifically, I refer to the practice where parties to a federal civil trial agree, either before or during trial, to "high-low" limits on the jury's verdict. For example, Plaintiff informs the jury that he/she seeks damages of $10 million; Defendant claims no liability. Nevertheless, the parties reach an agreement, that they want entered on the record but kept secret from the jury that Plaintiff, even if no caused by the jury, will receive $2 million, and Defendant, even if hit with a $10 million jury verdict, will be required to pay only $5 million. In this example, there is a $5 million high, and a $2 million low.

The jury, kept unaware of this partial settlement side deal, is deluded into thinking, with the complicity of the district judge, that they are the ultimate arbiters of the verdict in the case – e.g. from $10 million to a no cause.

I believe that as federal judges, we should not be complicit in this fraud on the jury. I propose two alternative solutions for the committee to consider:

1. Inform the jurors of the high-low agreement when it is entered on the record, so they are not deceived as they carry out their constitutional function; or
2. Advise the parties that if they enter a high-low agreement and place it on the record, the federal court case is "settled", the jury is dismissed, and they can

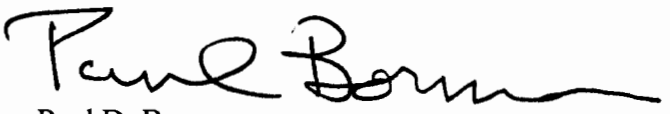
continue the resolution of the damages issue before an arbitrator.

In writing this letter, I recognize that F.R.Civ.P. 68 discusses an "Offer of Judgment," which may financially impact a jury's ultimate judgement – but even then, the judgment is true; only the costs are impacted.

I also recognize the F.R.Ev. 408 deals with compromises or offers to compromise – but that does not cover my situation where the parties have gone beyond an offer and reached a settlement, in significant part.

For the aforementioned reasons, I request that your committee discuss what I believe is an improper use of federal court juries and judges by parties to a federal civil damages case, who after reaching a "secret" high-low settlement, thereafter require the court to continue a trial charade before the jurors.

Sincerely,



Paul D. Borman
United States District Judge

PDB/rjm

cc: Hon. David Ezra, Chair, Advisory Committee on the Rules of Evidence
Hon. John Lungstrum, Chair, CACM Committee (as a member of this committee, I am sending a courtesy copy to the Chair)