

Jurors' Perceptions in the Economic Decline

by Tara Trask and Linda Petersen

The current financial crisis has infiltrated American life in a way unmatched by other events in recent history. We are clearly at a turning point in many ways, and just how this decline will ultimately influence Americans is yet to be fully understood. On a more specific level, the ways in which these issues will affect the legal system, lawsuit filings, juror decision-making and, ultimately, verdicts is also still unknown. Nonetheless, trends are beginning to emerge that may shed light on what the future holds. One thing is certain - the implications for litigators are complex.

Effects of a Changing Jury Pool

What do corporate cutbacks and the declining economy mean for juries? What we know is that the pools of jurors appearing in courts are changing daily and will most likely continue to do so. With unemployment rates on a steady increase, it is apparent that more jurors will have recently lost their jobs, or are in jeopardy of doing so. Despite reports a few months ago that this trend seemed to be waning, recent data indicate otherwise. In one recent Florida trial, 10% of the pool interviewed on the first day of jury selection had lost their jobs within the past six months, and two of those had just become unemployed that week (Duret, 2009).

The sudden appearance of the recently unemployed in jury pools changes that group in at least three respects. First, some of those people will be from the wealthier, more highly educated cohort who, when employed, may have been excused from duty in the past. Second, those jurors who were laid off may harbor deep resentment toward corporate America in general. Third, these jurors are surely stressed due to financial strain and their uncertain future. In fact, and as expected, more jurors are asking to be excused from service out of consideration for the risk involved in being away from their jobs at times of layoffs, or because they are actively looking for employment. Financial pressures in general are looming and jurors are feeling it.

More Americans are worried about debt than ever before, with 30% reporting they are “somewhat” or “very” worried (Gallup, 2009), and that worry translates into chronic stress and anger. The lower the education level, and the lower the income, the higher the worry, stress and anger. Among the most worried, nearly three quarters reported feeling stress “a lot of the day,” and nearly a third reported feeling angry much of the time.

These strains have become apparent in the courtroom. Jurors distracted by worry over paying their mortgages or putting food on the table are having a more difficult time concentrating. And jurors who are angry are looking for a target. Clarity, brevity and a respect for jurors' time has always been important – it is even more so now.

The Impact of the “Financial Fear Factor” on Jurors

Mass media coverage of the financial crisis seems to be driving a recession like no other. Economists are reporting several factors that are contributing to increased unemployment. It is apparent that ordinary Americans have cut back sharply on spending in the past few months as they have watched the value of their homes and investments decline. At the same time, businesses, sensing lower demand, are trimming hours and payrolls to conserve resources. Fear, economists say, is fueling a vicious cycle, with companies

and consumers taking preemptive action in anticipation of further bad news, which in turn helps assure that the future news will be indeed be bad (Reynolds and Nicholas, 2009).

UCLA economist Lee Ohanian (Reynolds and Nicholas, 2009) drives home the point: “The reason why employers are letting people go is not the traditional reason that employees are costing more than they are bringing in. It’s the fear factor. The crisis of confidence is having a big impact on employer decisions to hire and invest, and on consumer decisions to purchase. This is the first recession I’ve seen that has that characteristic.”

Worry is rampant among the general public. The percentage of Americans who say they are worried about keeping up with their monthly payments over the next six months reached 25% in May of 2009 (Gallup, 2009). A recent community attitude survey of 400 participants conducted in the Southern District of New York (Empirical Creative, 2009) found that 75% had been personally affected in a negative way by the economic crisis. Moreover, of those participants who reported they had *not* been affected in a negative way, a majority of them (56%) said they were concerned that at some point in the near future they *will* become negatively affected.

The bleak outlook of the general public affects both attitudes and behavior. The Pew Research Center (2008) reports that 92% of the public rate the national economy as only fair or poor, and a substantial majority (61%) judge their personal finances that way. Both measures are among the lowest recorded in the past 15 years. This bearish view is causing growing numbers of consumers to say they are cutting back on purchases or reconsidering their saving or retirement decisions.

Importantly, this survey suggests that the psychological impact of bad times, rather than an actual decline in family financial conditions, is the principal driver of cutbacks and reconsiderations. Nearly 60% of those who say they are cutting back or delaying purchases report they are doing so because they *worry* things might get worse. Just 28% say they are cutting back because their financial situation actually declined. And this worry is accentuated among the more affluent consumers. A full 72% of those with family incomes of \$75,000 or more per year cite concerns about what might happen as a reason for their intended cutbacks.



Enough Blame to Go Around

So, how does this fear and anxiety play out when deciding who to blame for the current state of affairs? Data we have collected on 116 mock jurors from Texas, Louisiana, and Oklahoma over the past few months indicate that jurors hold consumers, government, lenders and big corporations alike responsible. Other national research (Harris Interactive, 2009) shows that Americans spread the blame around to the public and private sectors as well, but a majority places “a lot” of blame on banks (76%), Wall Street (57%) and big business (55%).

A community attitude survey (Empirical Creative 2009) shows that a majority of New York jury-eligible residents blame senior-level corporate executives for the recession, and they are angry. Specifically, 74% believe that the United States is currently experiencing an economic crisis because senior-level corporate executives have acted with greed and carelessness. Sixty percent believe those executives actually committed financial crimes. A majority (55%) has a lot of anger toward executives and most (70%) feel that their trust in the integrity and honesty of senior-level corporate executives is at an all-time low, something to be considered when calling one as a witness.

Concerning guilt, almost half of the people participating in this survey believe that if the United States government accuses a senior-level corporate executive of committing financial fraud, he or she probably did it. And, nearly a third admit that the current economic crisis would make it very difficult for them to presume that senior-level corporate executives accused of committing financial fraud are innocent until proven guilty. Notably, these same jurors say they would tell a judge that they can be a fair and impartial juror in such cases. Presumably, the effect of this attitude would not be limited to criminal trials, but would extend to civil cases involving large corporations as well.

Distrust extends to insurance companies as well. According to a recent Harris poll (Harris Interactive, 2008), many people blame the insurance industry the most for rising healthcare costs. When asked who is most to blame, insurance companies were viewed as the culprit more than pharmaceutical companies, the government, hospitals, or physicians. And this blame was expressed across all demographic groups – young and old, male and female, rich and poor, no matter where in the country they lived, and regardless of political party.

In fact, cynicism about business in general is growing. The American public is increasingly skeptical about the power and profits of large companies and business corporations (Pew Research, 2008). A majority (59%) say that business corporations make too much profit, up from 53% in 2004. The percentage saying that business corporations make a fair and reasonable amount of profit fell from 39% to only 33%. While large majorities over the past 15 years have said they think too much power is concentrated in the hands of a few large companies, the numbers who feel strongly about this has grown to 70%, up from 64% in 2004.

In fact, Gallup reported in June 2009 that most Americans endorse government action to limit executive pay at major companies. A majority of Democrats (77%), and Independents (56%), and even a large segment of Republicans (42%) supported such controls. Younger people, under the age of 65 (63%), were more likely than older Americans (46%) to favor limits. And, while support for limits was higher among lower income individuals, a majority (51%) of those making \$90,000 or more a year favored limits.

Conflicting Findings for Trial Lawyers

What does this distrust, blame, and anger aimed at business mean for juries in civil suits? On the face of it, one would assume this is not a good time to be a corporate defendant. And, in fact, our recent experience in mock trials supports the notion that the public's view of big business is becoming increasingly negative. Even in disputes between large corporations, we have noted that jurors tend to view the larger as the "big" guy who is out to get the "little" guy, even when the little guy is a multimillion dollar business. The larger and wealthier the company, the less jurors trust them. And, they are more likely to hold them responsible for wrongdoing. Indeed, national research indicates that while consumer confidence in big business was exceedingly low, American's faith in small business remained strong with 60% reporting "a great deal" or "quite a lot" of confidence in those operations (Gallup, 2008).

Experts on both sides of employment litigation say they expect juries this year to be more sympathetic to employee plaintiffs than to employers, holding management to higher standards and doling out larger verdicts in cases involving everything from wrongful termination to retaliation to age and race discrimination (Baltes, 2009). Most jurors - having lost a job themselves, or watched a friend or relative lose one - will likely identify more with employees.



An interesting conflict arises, however, when jurors consider the implications of their verdicts. In deliberations we have witnessed a sharp increase in mock jurors struggling with the effect of a pro-plaintiff decision on the employees of the defendant corporation. They articulate concern and questions about the number of people they may put out of work with a large damage award. While jurors are willing to hold corporations responsible, they are hesitant to award excessive damages out of concern for the trickle down effect on workers. From an anecdotal perspective, this reasoning seems to have increased sharply in recent months in the mock trials we have conducted.

What Will Jurors Do Next?

Clearly, the specifics of a case will influence the perceptions of jurors, and it will be imperative to ask the right questions in voir dire. Our recent research with mock trials continues to confirm our expectations about which jurors may lean toward the plaintiff or defense on a particular matter, but there are sometimes interesting surprises. One type of personality that is appearing more and more in these times is the one who simply does not want a plaintiff to get something “for nothing” (even if that “nothing” is ownership of a patent). They seem to resent the idea that, while their own hard work has yielded very little, someone else may get millions. It’s the “if I can’t have it, you can’t have it” mentality and it is particularly resistant to large damage awards. From the plaintiffs’ perspective, identifying those jurors is crucial..

Staying on top of the pulse of the nation, and the venire, is also important. The mood of the country swings with current events, and there is recent evidence that citizens are becoming a bit more optimistic about the economic climate. What might be predictive one month in one location may shift the next month; what may be true in one locale may vary significantly in another. These are volatile times; requiring constant vigilance to maximize the reliability of our research and increasing the importance of current, case-specific testing.

Anecdotally, the intersection between a perceived increase in liability awareness and thoughtful moderation of damages will be an interesting trend to watch. The tort reform movement, quite active in several states, has brought terms like “frivolous lawsuit” into everyday American vernacular and indeed in these times, anything “frivolous” may well be frowned upon, particularly if jurors believe it will cost jobs. And taken from the opposite perspective, in the current climate, what plaintiffs’ counsel can afford to bring such a suit? Perhaps the trend most likely to take root in the coming years is simply one of moderation. Time will tell.

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13,450+

13,450. That's the number of reads our May issue of *The Jury Expert* had as of Monday, July 20 (the day before we published this issue). Our online debut issue (in May 2008) had a few more than 500 reads. Over the past year we have grown a lot and we are grateful to the thousands of you who read our pages every issue. And even more grateful (dizzily so!) when you pass us on to your friends and colleagues.

We are also grateful to the academics and researchers who write for us and turn theory into practice and especially grateful to the members of the American Society of Trial Consultants (ASTC) without whom we would not exist. ASTC member trial consultants continue to inform, educate and surprise us with creative and practical articles focused on improving litigation advocacy. So thanks to all of you and to paraphrase a young Sally Fields--"you like us, really like us".

This issue is filled with lessons for uncertain times. We have articles on terror management theory and how to use it at trial, two articles on damages in times of recession (does it make a difference in awards and if so, how?), getting the most out of videos at trial, exploring the TODDI defense (this other dude did it!), how to prepare your witness for the environment change from office to actual courtroom, and negotiating in the new millennium. Plus our July favorite thing and a book review. It's hot outside! Stay inside, enjoy the air conditioning and read *The Jury Expert*!

--- *Rita R. Handrich, Ph.D.*



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