THE NATIONAL LAW JOURNAL

FEBRUARY 1, 2010

An ALM Publication

Daily Updates at NLJ.COM

THE MODERN JURY

A SPECIAL REPORT

ISTOCKPHOTO.FTWITTY

Advocates have to account for juror cynicism

News of financial shenanigans don't have to prejudice juries against financial defendants.

BY MATTHEW L. LARRABEE, DAVID A. KOTLER AND ALICE LIU JENSEN

Americans today, more than at any point in a generation, are frustrated with financial institutions and markets, senior executives, regulators and government in general. Lawyers in financial markets cases on both sides of the courtroom need to try cases that address this stark reality in jury pools across the country. Although the economy is showing signs of recovery, few potential jurors have forgotten how the economic crisis contributed to the failure of key businesses, trillions of dollars in lost consumer wealth and substantial taxpayer burdens for generations to come. While millions of Americans learned new vocabulary — like "bailout," "too big to fail" and "TARP" — many of those people and their families lost jobs, defaulted on their mortgages, watched their retirement savings disappear and went to sleep at night just hoping to survive the Great Recession.

Trial lawyers long have known that jurors view cases in relation to current events, and the successful ones identify and address juror predispositions in their trial strategy. This basic precept is even more important in the present economic climate: Effective representation of institutions and executives accused of financial misdeeds requires their counsel to develop themes and defenses that embrace juror cynicism and frustration over the economic collapse and its commonly perceived causes.

Since September 2008, after Lehman Brothers filed for the largest bankruptcy in history, the U.S. government has caused taxpayers to provide more than $1 trillion to save many other large financial institutions and manufacturers from a similar fate. These government-assembled remedies have created a new sense of injustice, as Americans perceive they have footed the bill for corporate bailouts while not receiving any bailout of their own 401(k) accounts. There is also a widespread perception among Americans that the regulatory system itself was broken because the government and its regulators failed both to foresee the crisis and to protect investors.

From the perspective of those who represent clients charged with financial wrongdoing, the starting point to framing a defense is the strong beliefs of potential jurors about who is to blame for all of this pain. Indeed, the common perception in the minds of many jurors is that we are living with the aftermath of an era of excessive and unchecked risk, speculation and greed, which has hurt our country deeply. Jurors also reflect a profound loss of trust in government and its regulators, believing that the rules have been skewed to protect the interests of financial institutions and large corporations rather than the taxpayers. Research by prominent jury consultants has come to the same conclusions. For example, more than two-thirds of potential jurors now believe that many companies hide important financial information from the public, more than double the rate of only two years ago.

Faced with this level of cynicism toward the entire financial system, trial lawyers in financial markets cases must ensure that the facts of the case being tried are not displaced by the "facts" jurors believe about the financial crisis. Research and experience show that jury deliberations tend to gravitate toward familiar topics that provide a level of comfort and community that would otherwise be absent from the jury room. The economic crisis provides a ready opportunity for jurors to shift their focus to a seemingly more familiar topic, even if it is only superficially understood and peripherally related to the case at hand. Such deliberations easily can devolve into a town-hall style referendum about "how bad things are," "who is responsible" and "what should be done" — with a much greater risk of unfavorable results for financial defendants.

MIXED RECORD IN FINANCIAL TRIALS

With jurors heavily influenced by their negative perceptions of financial institutions, the deck would appear to be stacked against defendants accused of financial wrongdoing. Indeed, in one of the very rare Rule 10b-5 securities fraud class actions to go to trial, in May 2009 a federal jury in Chicago found in favor of shareholder plaintiffs and

against Household International and several of its former executives. *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, No. 02-cv-05893 (N.D. Ill.). The plaintiffs alleged that Household engaged in a massive predatory lending scheme that led to a $600 million financial restatement. After a monthlong trial on liability, the jury took less than a week to enter a verdict in favor of the shareholder class.

However, several recent defense verdicts suggest that cynicism about financial institutions and executives is the beginning, not the end, of the story. In November 2009, a federal jury in New York City returned a defense verdict in favor of two former Bears Stearns hedge fund managers accused by the government of defrauding investors and lenders about the funds' massive losses on securities backed by subprime mortgages that cost investors more than $1.6 billion. After their acquittal, jurors told reporters that they had concluded that the hedge fund managers were not responsible for the overall collapse of the subprime mortgage market. As one juror explained: "The entire market crashed. You can't blame that on two people." Zachery Kouwe and Dan Slater, "2 Bear Stearns Fund Leaders Are Acquitted," N.Y. Times, Nov. 10, 2009.

In another noteworthy trial last summer, jurors found in favor of former American International Group Inc. (AIG) Chief Executive Officer Maurice "Hank" Greenberg's current firm, Starr International Inc., and against AIG, when they determined that Starr did not have to pay AIG $4.3 billion for shares Starr controlled that were used to fund a long-term compensation plan for AIG employees. Despite widespread negative press about AIG and excessive executive compensation, and after three weeks of testimony (including several days of testimony by Greenberg himself) that spanned four decades of history between AIG and Starr, the jury deliberated for just five hours before finding in favor of Starr. Liam Pleven and Chad Bray, "Greenberg Logs Victory in AIG Case, for Now at Least," Wall St. J., July 8, 2009.

Successful trials involving financial institutions and executives in this environment must go beyond legally compelling and logically sound arguments. Trial counsel for these entities and individuals need to confront jurors' negative perceptions and respond to juror feelings about the economy and financial markets.

Recognizing and correcting juror misperceptions about the parties is often a good place to start. This may require a shift in focus away from global economic issues toward the individuals involved. Showing jurors that prudent individuals acted in good faith, even if they did not foresee the extraordinary market forces caused by the crisis, and that their decisions turned out much worse than they anticipated may help jurors understand that a corporate client is made up of real people just like them.

Because jurors tend to fill information voids by injecting their own assumptions, themes like a "David and Goliath" battle between large financial institutions and investors can be dangerous since most jurors are predisposed to assume that the underdog "little guy" is the victim. Properly defining and explaining sophisticated institutional plaintiffs as market participants or speculators can neutralize or even reset this perception. Similarly, differentiating a client from institutions that have widespread negative reputations or from the government can be effective in helping jurors realize that they need not settle the question of who is to blame for the country's economic ills in order to reach a defense verdict.

> Jurors reflect a profound loss of trust in government and its regulators, believing that the rules have been skewed.

TRANSPARENCY, ACCOUNTABILITY

Focusing on transparency and accountability themes also may be helpful. For example, emphasizing that a financial institution and its leaders fully disclosed their investment strategies and risks, even if their decisions led to large losses, can be quite effective in persuading jurors that investors were not duped. Explaining that the world's most sophisticated market experts similarly failed to predict a global credit crisis and meltdown should also be carefully considered. Determining whether jurors think that governing regulations were reasonable, as opposed to whether they were grossly incapable of preventing catastrophic damage, also can be crucial in assessing whether jurors are willing to accept defense arguments that demonstrate how a financial institution "played by the rules." Yet another option is to emphasize how the crisis hurt all investors and the company itself and that, just because plaintiffs lost money, it does not mean that the company should insure their investment losses.

As more credit crisis and Great Recession-related cases head to trial, we will all learn more about juror reactions. As this article was written, we were waiting for one of these instructive verdicts in the Vivendi securities fraud class action in New York federal court. Andrew Longstreth, "Closings Begin (Finally!) in Vivendi Trial," The AmLaw Litigation Daily, Jan. 5, 2010. In his summation, Vivendi's counsel incorporated a number of the themes noted in this article. For example, he argued that Vivendi emphasized transparency and disclosure of the company's debt, cash flow and performance, and that therefore, regardless of whether the news was good or bad, it was fully disclosed. Defense counsel also sought to differentiate Vivendi from two lightning-rod companies that, unlike Vivendi, were forced into bankruptcy by an actual liquidity crisis. Id.

As this issue went to press, The Associated Press reported that the jury had found Vivendi, but not its executives, liable to its U.S. and European shareholders. The plaintiffs said that the potential payout to investors could total $9.3 billion. That amount is approximately half of what the plaintiffs' counsel were seeking.

Matthew L. Larrabee is a partner in the San Francisco office of Dechert and a member of its white-collar and securities litigation group. David A. Kotler is a partner and member of the group in the firm's Princeton, N.J., office. Alice Liu Jensen is a senior associate in the group in the San Francisco office.