In the Jury Box and the Ballot Box: Public Disgust with Corporate Wrongdoing

By Richard Alexander

Americans long have been angry at government, but now a recent survey shows the public is more angry at large corporations which are seen as the major cause of growing economic insecurity. These new findings square with those discovered by CAOC in polling for Propositions 200, 201 and 202 in the fall of 1996 and merit your close study.

No pilot ever takes off without knowing which way the wind is blowing, winds aloft, the weather enroute and conditions at the destination.

The same is true when evaluating how a jury will probably respond to the facts of a particular case. Selecting a jury is more than an intuitive art form. Polling tells the experienced trial lawyer what the "legal" weather is and helps to select a route that can turn headwinds into tailwinds. The weather report for the ballot box is the same as that for the jury box. The forecast is encouraging.

Public Anger at Corporations

The polling results on the public's disgust with corporate America are stunning. The realization that corporate greed has breached the social contract is well understood by voters and jurors.

A June 1996 national survey of U.S. voters, and six follow-up focus groups, independently confirms CAOC's polling in California.

Americans of all ages, all incomes, all races, and both political parties are seething over the way large corporations have been treating their workers and the public in recent years.

This latest survey was conducted by EDK Associates and by Peter D. Hart Research, working under contract to the Preamble Center for Public Policy in Washington, D.C. The sample size of 800 provides a 95% confidence factor, plus or minus 3.5%, and the results provide excellent insight into the attitudes of jurors and voters on the image of corporate America.

People are angry about:

- Massive layoffs at a time when profits and CEO salaries are at all time highs,
- Firing full-time workers and filling their jobs with temps who get no benefits,
- Firing older workers and replacing them with younger workers at lower wages, and
- Corporate manipulation of pension and profit sharing investments.

Almost without exception, people who feel negative about corporations feel very negative and large majorities see corporate misbehavior as a "serious national problem."

When asked if reduced benefits (health care and pensions) are a "serious problem" or not, 82% say yes. Large layoffs during times of profitability are regarded as a "serious problem" by 81%; huge CEO salaries (which are now 200 times as large

Richard Alexander, CAOC Vice President, is with The Alexander Law Firm in San Jose.

as the average worker's pay) are a "serious problem" for 79%, and stagnant wages (wages that don't keep up with the rising cost of living) are a "serious problem" for 76%.

People do not believe the claim that recent corporate bashing of employees is required by a competitive global economy. Only 22% of those surveyed said they thought competitiveness motivated corporate behavior; 70% said greed was the motivating factor (while 7% said they didn't know).

The view that greed is what motivates corporations, not competitiveness, crosses all age groups, all races, all educational backgrounds, and all incomes.

It even crosses political parties: 79% of Democrats, and 63% of Republicans said they thought corporate greed explains downsizing, stagnant wages, and reduced job benefits.

Most people see corporate greed as a greater problem for the economy than government corruption, waste, and inefficiency. Asked to choose between wasteful government and corporate greed as the main obstacle preventing the middle class from getting ahead, people chose corporate greed (46%) over government waste (28%), with a substantial percentage (22%) volunteering the opinion that both were responsible.

Despite continued high levels of public dissatisfaction with government, 68% of Americans believe big corporations are as responsible as, or more responsible than, government for the economic problems of the middle class. Even among Republicans, 55% says corporations are at least as big a problem as government.

People are not angry simply because they have been denied a promotion or a pay raise. In fact, the survey shows that Americans' expectations for their living standards have shrunk. In focus groups, people stated that they no longer expect to do better and get ahead; they're just hoping — sometimes desperately — that they won't lose ground.

What does make them angry is when they, or someone close to them, is hurt by a corporation — losing their job, being forced to double up their job to take on the responsibilities of someone else who has been fired, facing outrageous health co-payments and deductibles or having their pension savings manipulated by corporate "wheeling and dealing" that destroys their right to enjoy their retirement savings. These first-hand experiences are what is fueling anger at corporations.

Corporations have tried to convince Americans that decisions affecting the lives of working people are made by "the market," which is beyond the control of mere humans. People are not buying it; according to this survey, people are beginning to see some hope of changing their lives through collective action.

Action and Accountability Being Demanded

The public clearly is ready to support government action to control corporate behavior. Most people surveyed (69%) say they generally favor government intervention to ensure that corporations act more responsibly. Some 42% strongly favor this position.

That's what Proposition 211 intends to do. The Retirement Savings and Consumer Protection Act addresses fears of corporate wrongdoing and manipulation and gives people a fighting chance to hold crooks accountable and to get their money back.

More importantly the initiative curtails the corporate practice of shielding top executives from personal responsibility for their fraudulent conduct and closes the legal loophole under which victims must prove they read each fraudulent statement in the fine print.

The Act also protects everyone's right to hire an attorney to prosecute or defend any suit and establishes civil fines for those who commit "outrageous" frauds, which will be paid to the State of California after the victims get their money back.

Interestingly, anger at corporate behavior is an issue that does not divide along racial lines. Working to control corporate behavior could provide common ground among whites and blacks.

Probably the greatest barrier to progress is a sense of hopelessness or powerlessness. Hopelessness leads to paralysis. Telling the true story about how real people have taken on corporate wrongdoing and have won can help people gain hope. Hope makes collective action thinkable and therefore possible.

The public understands the real relationship between corporations and government is a reciprocal one: corporations dump mountains of cash into elections, corrupting the basic institutions of our democracy while putting anti-government, pro-corporate extremists into office. In turn, government then subsidizes big corporations, relieves their tax burden and allows corporate lobbyists to actually sit in conference committees and write up bills that favor their companies and industries. Greedy corporations then turn around and abuse their workers, who are already bearing the brunt of the nation's unfair tax system. This kind of subsidy abuse by corporations — and the corrupt election process which feeds it — could readily become a target of significant anger. With some work, the result might be changes to get corporate money out of our elections.

The success of defective product litigation across the United States shows that corporations will not change their behavior voluntarily. It takes the power of courts and lawsuits that expose corporate decisions made solely to maximize profits at the expense of people.

Rampant Investment Fraud

When it comes to investment fraud alone reform is definitely needed.

The North American Securities Administrators Association, the state officials that regulate stock offerings, found that "older Americans are the No. 1 target of investment con artists." According to AARP's Modern Maturity Magazine, people over 65 are only 12% of the population, but they are 30% of fraud victims. California has many retirement communities so there are more frauds here.

Corporate con-artists have seriously injured California seniors, which is the reason why the American Association of Retired Persons supports and endorses Proposition 211.

Charles Keating's fraud targeted seniors (who he called "the weak, meek and ignorant") in Southern California. Over 75% of Keating's worthless bonds were sold to Californians over 50 and nearly 60% of the victims were Californians over 60. Keating's victims went to court before Congress changed the laws. Their lawsuits recovered over 60% of the losses.

Technical Equities Corp. of San Jose enticed investors by offering one-stop shopping for investment products. It was a Ponzi scheme. Money from new investors paid "returns" to earlier investors. The 1200 victims recovered most of their $113 million in losses through civil litigation. First Pension Corp of Irvine operated another Ponzi scheme. The corporation's officials went to jail. But criminal laws do not recover people's money. Eight thousand investors, including 2,000 small pension funds and IRAs, lost $136 million which they recovered in civil actions before the special interests in Congress changed the laws in favor of corporate crooks.

The L.A. Times, the Sacramento Bee, the S.F. Chronicle, the Oakland Tribune, MONEY Magazine and Jane Bryant Quinn opposed the legislation. President Clinton vetoed it. But the special interest lobbyists who kicked in millions of dollars to congressional campaigns convinced the politicians to override the President's veto.

Today, Keating's victims could only recover 6 cents or less on the dollar in federal court.

According to a 1992 Los Angeles Times survey, California and New York, the two states with the most stockbrokers, "have the weakest regulatory systems." A shortage of examiners and investigators makes it easier for brokers with bad records to continue doing business in California because California law requires that a fraud victim must actually be aware of specific fraudulent statements in all the fine print.

The fraud situation is worsening because retirement investing is exploding. Three out of four Americans over 65 receive 25% or more of their income from investments. And 10% of elderly Americans depend on investments for 50% or more of their income.

"White collar crime costs Americans more than $100 billion annually. Increasingly, free-lance stock swindlers are joining forces with organized crime," reports the Wall Street Journal, May 12, 1995 and fraud is rampant.

Thievery is out of control. William McLucas, SEC Enforcement Director, says that "criminal insider trading is a growth industry. We have as many cases today as we had during the 1980's when we were in the heyday of mergers and acquisitions activity." New York Times, June 6, 1995.

An astounding forty-five percent of Silicon Valley executives said their officers, directors and large investors had violated SEC reporting regulations. Violations often coincided with illegal insider trading. (*San Jose Mercury News*, June 28, 1993, reporting on a survey they completed of 142 companies.) Eighty-seven percent of business managers are willing to commit fraud, according to a 1990 survey by the National Association of Accountants. This same statistic was reconfirmed in a recent study by four business school professors summarized in the Journal of Business Ethics, February 1996. (*Wall Street Journal*, March 1, 1990; March 26,1996.)

When horses and cows were the mainstay of the California economy, hanging horse and cattle thieves was a popular solution to those who threatened the economic security of honest citizens.

Today it is time to hold corporate crooks personally accountable and that is what the Retirement Savings and Consumer Protection Act will do in a fair and civilized manner.

Public Policy Considerations

Millions of Californians work hard, pay their taxes, and save their money in order to provide for their economic security upon retirement. In doing so, they help support their state and local governments as taxpayers and insure that they do not become responsibilities of the state once they leave the workforce.

Many Californians are members of or have contributed to private and public pension and retirement funds that invest in securities of corporations that are publicly traded or sold and other for-profit business entities. Many others invest their retirement savings themselves in such securities.

Financial disasters like the collapse of many savings and loan institutions or the bankruptcy of Orange County result in devastating harm to the pensions and retirement savings of working people.

Full and complete disclosure of material information affecting the value of securities is necessary to protect the millions of Californians who invest in them for their retirement. Existing laws inadequately protect pension and retirement investments in these securities from losses resulting from deceptive activities, including the misrepresentation and/or concealment of material information affecting the true value of these securities.

An individual's retirement savings can also be threatened by an unexpected accident or injury. Unless victims of such accidents or injuries are able to obtain full compensation for their losses, they are often forced to use up their retirement savings to pay for medical bills or living expenses after their injury.

Consumers, pension investors, and victims of injuries need access to the civil justice system to insure that they are fully compensated for their losses and damages. Ordinary working people are often denied such access because they cannot afford to hire an attorney to represent them. Proposals are being put forward daily that would limit people's right to contract with the attorney of their choice and make it more difficult for all but the very wealthy to obtain legal representation. These proposals include, but are not limited to, efforts to make it harder for people to find representation to protect their retirement savings and investments.

In order to protect the retirement savings of all Californians, it is necessary to require full disclosure of material information that affects the value of securities or individual savings and to insure that the right to contract with an attorney to obtain compensation for injury or loss shall not be impaired, or subject to interference by the government. The March 1996 Initiative proved beyond any doubt that even on the best day for the "corporate wolves," Californians refused to give up their right to select and hire a quality lawyer of their own choice without governmental interference.

Pertinent Provisions

Once Proposition 211 is adopted it shall be unlawful, in connection with the purchase or sale of securities, for any person, for-profit corporation or other for-profit business entity, directly or indirectly, to willfully, knowingly or recklessly:

(a) make or cause to be made untrue statements of material facts,

(b) omit to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading or

(c) participate or assist in any deceptive practice, statement, course of conduct or scheme, resulting in loss to any pension fund, retirement fund, or retirement savings.

In addition, any person, for-profit corporation or other for-profit business entity that willfully, knowingly or recklessly engages in prohibited conduct shall be liable for the losses caused by that violation, as determined in an action brought in a court of competent jurisdiction by or on behalf of any person or entity, including any government entity, whose pension funds and/or retirement funds or savings have suffered a loss as a result of that violation. And the right to contract with an attorney of choice shall be free from governmental interference.

Finally the most compelling aspect of the initiative is that it holds wrongdoers personally accountable. Notwithstanding any other provision of law, any principal executive officer, director, or controlling person of a corporation or other for-profit business entity who is found individually liable for knowingly or recklessly engaging in deceptive conduct shall not be indemnified by the corporation or insurance company for any costs of defense or amounts paid in settlement or judgment against that person. Nothing in the initiative prohibits a corporation from purchasing insurance on behalf its directors, officers, employees or agents to cover corporate liability, but inside traders and corporate manipulators will not longer be bailed out by their corporations or insurance carriers. Ill-gotten gains will not be protected.

Conclusion

At the ballot box and in the jury box the policy considerations today are the same.

Can popular anger at corporations be channeled for greater defective product and environmental protection?

Can it be harnessed to make America more democratic?

Will it force corporate manipulators to be held responsible and give control to consumers over wrongdoers who exploit them?

One fact is sure. The recognition of the important role of attorneys for consumers was strengthened as a result of the public debate in the spring of 1996. That process will continue in the fall of 1996.

Onward! ■