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Can the Industry Improve? Addressing the Current Challenges of Bias in the Construction Litigation Industry

I. A Look Back: The progress the Construction Industry has made in the last 25 years

In the past two decades, the construction industry has seen more rapid changes than in any period in history, including both the Industrial Revolution and the post-World War II era. There have been major technology advances from digital records and 3-D imaging systems to smart construction software and drone technology. Health and safety standards have also improved due to continued efforts by OSHA and other agencies, which have led to a whole new attitude about safety regulations on the site.¹ The construction industry is embracing new demographics at a fast pace. "Diversity has improved in many areas of the construction industry as firms realize that reaching for a more diverse workplace is not only the right thing to do, but is also a smart business move."²

II. Types of Bias Encountered in the Construction Industry

Gender Bias

Over the last couple of decades, an increasing number of women have begun to work in the construction industry. However, women still only make up about 9.3% of those employed in construction, according to the Bureau of Labor Statistics' 2015 Population Survey.³ Approximately half of women in the construction industry hold clerical and support jobs, one-third are in management and professional positions, and one-fifth work in production.⁴ The small percentage of women in the construction industry is due in major part to the

¹ Whirlwind Steel Buildings & Components, "5 Ways the Construction Industry Has Changed in 20 years" <https://www.whirlwindsteel.com/blog/bid/406699/5-ways-the-construction-industry-has-changed-in-20-years>

² United Rentals, "The Changing Workforce: Key Trends Reshaping the Construction Industry" <https://www.unitedrentals.com/en/projectuptime/workforce/changing-workforce-key-trends-reshaping-construction-industry>

³ Construction Labor Contractors, "The Rise of Women in the Construction Industry" <http://constructionlabor.com/women-in-construction/>

⁴ New York Committee for Occupational Safety and Health, "Risks Facing Women in Construction", <http://nycosh.org/wp-content/uploads/2014/09/Women-in-Construction-final-11-8-13-2.pdf>

discrimination women face from entering and staying in the field. Sexual harassment and hostility, lack of mentors, and stereotyped assumptions about women's capabilities all contribute to the problem.⁵ Women are often kept out of the loop when it comes to construction apprenticeship opportunities. When women do take part in such programs, they face a number of hurdles, including harassment, which make women less likely than men to finish their apprenticeships. Out of 120,000 apprenticeship agreements between 2006 and 2007, 51 percent of women construction apprentices did not complete their programs, compared with 46 percent of men, according to the report.⁶ There are also differences in the health and safety concerns women face. From 2003 to 2010, the number of deaths and injuries were higher for men since women are less likely to work in the actual construction trades and are often not assigned the most hazardous jobs. However, a high percentage of women in construction work are flaggers or crossing guards, which have high death rates. Other safety concerns women face in the construction field are reproductive hazards, lack of sanitary facilities, and lack of personal protective equipment. Many contractors, especially smaller ones, don't make personal protective equipment available for women.⁷ Women have been kept out and pushed out of the trades through discriminatory apprenticeship practices, overt discrimination from employers, sexual harassment on the job site and during training, and the lack of enforcement of legal policies that are now over three decades old. The industry is changing and new populations will be needed to fill the labor shortages that will come with the recovery of the economy. The failure to open the doors of the industry to women now will not only perpetuate the social disease of sexism and discrimination; it will slow down the growth of the industry and affect the national economy.⁸

Racial/Ethnic Bias

Data obtained from the Current Population Survey (CPS), a monthly survey of 60,000 households, found that whites made up the majority of the labor force (79 percent). Blacks and Asians made up an additional 12 percent and 6 percent, respectively. American Indians and Alaska Natives made up 1 percent of the labor force, while Native Hawaiians and Other Pacific Islanders made up less than 1 percent. People of two or more races made up 2 percent of the labor force. Among employed men, Hispanics were more likely to work in the construction industry (19 percent) than were Whites (13 percent), Blacks (7 percent), or Asians (3 percent). White, non-Hispanic women make up the largest group of women in construction at 2.0 percent of all construction workers in the construction industry. Hispanic women constitute the next largest group at 0.4 percent; African American women are 0.2 percent; and Asian/Pacific Islander and American Indian/Alaska Native women are each 0.1 percent of all construction

⁵ National Women's Law Center (2014) "Women in Construction Still Breaking Ground,"

https://www.nwlc.org/wp-content/uploads/2015/08/final_nwlc_womeninconstruction_report.pdf,

⁶ Progress Illinois, "Report: Discrimination Still a Major Employment Barrier for Female Construction Workers"

<http://progressillinois.com/posts/content/2014/06/12/report-discrimination-major-employment-barrier-women-construction-workers>

⁷ New York Committee for Occupational Safety and Health, "Risks Facing Women in Construction", <http://nycosh.org/wp-content/uploads/2014/09/Women-in-Construction-final-11-8-13-2.pdf>

⁸ Moir S, Thomson M, and Kelleher, C. 2011. Unfinished Business: Building Equality for Women in the Construction Trades. Labor Resource Center, University of Massachusetts, Boston. Available at: http://scholarworks.umb.edu/lrc_pubs/?utm_source=scholarworks.umb.edu%2F1rc_pubs%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages

workers. Women make only 77 cents on the dollar compared to their male counterparts working full time, year round. The wage gap is even larger for women of color working full time, year round. African American women make only 64 cents and Hispanic women only 54 cents, for every dollar paid to white, non-Hispanic men working full time, year round.⁹

Age Bias

By 2018, the number of employees over 55 will reach 39 million, compared to 27 million in 2008.¹⁰ In the construction industry, problems include an aging workforce and lack of young people entering the workforce. The trades with the oldest median age workers are construction building inspectors (52), first-line construction supervisors/managers (47), construction managers (47) and construction equipment operators (46). The youngest median ages in construction can be found performing as explosives workers (31); helpers (31); derrick, rotary drill and service unit operators (33) and miscellaneous extraction workers (33).¹¹ According to CEO Mike Bellaman of Associated Builders and Contractors, a trade group, “one of the things we face in terms of challenges is attracting millennials to the industry. The best way to attract new workers to the industry is to emphasize to younger audiences the true nature of construction on different levels. People need to understand just how technical and innovative building can be. In order to maximize success and capitalize on the technological expertise, while also maintaining the fieldwork experience of older workers, CEOs ought to find ways to intersect younger and older generations.”¹²

Educational/Class Bias

The Construction Industry, and in particular those handling claims/lawsuits, oftentimes have unconscious biases towards individuals who do not have a legal degree and/or a college education. Although many in the insurance industry are not licensed lawyers, there is a certain percentage who are and either do not mention that in anticipation of bias against them and/or there is an implicit bias towards or against the lawyers. Likewise, in terms of the litigation of these claims, there can be certain biases against those who are handling smaller subcontractors versus those who handle large general contractors and/or developers.

Affinity Bias

Affinity bias is a predisposition towards individuals who are more like you. This oftentimes manifests as an unconscious bias as people tend to want to work with those who are like them. This will lead to the exclusion of other individuals of different race, gender, or nationality as there is a comfort level with others who are like you. The construction industry

⁹ National Women's Law Center (2014) "Women in Construction Still Breaking Ground," https://www.nwlc.org/wp-content/uploads/2015/08/final_nwlc_womeninconstruction_report.pdf

¹⁰ The Balance, “Age Discrimination Issues in the Workplace” <https://www.thebalance.com/age-discrimination-issues-in-the-workplace-2058453>

¹¹ Construction Dive: “NAHB: Construction workers older than overall US workforce” <http://www.constructiondive.com/news/nahb-construction-workers-older-than-overall-us-workforce/410822/>

¹² Construction Dive, “Filling the void: How construction executives can embrace diversity in an evolving workforce” <http://www.constructiondive.com/news/construction-industry-diversity-in-workforce/423550/>

needs to address this potentiality with inclusion, eliminating the bias by broadening the base of individuals who are involved in the litigation of these lawsuits and who are hired.

III. Reasons Why Diversity Matters for Construction Litigation Claims

The construction industry is projected to add nearly 800,000 new jobs by 2024 while struggling with an aging workforce and a shrinking pool of skilled labor.¹³ There is an increasing need to more strongly attract, recruit, and train new members of the workforce. Statistics indicate that these new workers will come from diverse populations. It is in the industry's best interest to embrace diversity and inclusion in order to withstand success.¹⁴ And yet, the construction industry continues to see underrepresentation of groups in terms of the employment rates in the industry as a whole and in terms of those landing managerial positions. At the same time, there is overrepresentation of certain groups in lower paying trades within the industry. For example, minorities are disproportionately overrepresented among laborers and conversely underrepresented among foremen and construction managers.¹⁵

The United States is not alone in these imbalances. In 2016, the rate of women in the construction industry in Canada and Australia were under 12 percent.¹⁶ In the United Kingdom, where the rate of employment of women in the construction industry is about on par with Canada and Australia, women on the construction site itself make up just one percent of the workforce according to the UK's Union of Construction, Allied Trades and Technicians.¹⁷ Similar rates exist in the United States regarding women working on the construction site.¹⁸

IV. Hiring and Mentoring Strategies for Addressing Bias in Each type of Profession

Internal policies

Unconscious bias is prevalent in hiring practices.¹⁹ In a labor market study, economists from the Massachusetts Institute of Technology and the University of Chicago sent out 5000 resumes in response to help wanted ads in Boston and Chicago.²⁰ The economists randomly assigned stereo-typical Caucasian-sounding names and African American-sounding names to otherwise

¹³ U.S. Bureau of Labor Statistics, Employment Projections: 2014-24 Summary, Dec. 8, 2015, Table 2. Employment by major industry sector, available at <https://www.bls.gov/news.release/ecopro.t02.htm>

¹⁴ Brasfield and Gorie Blog (October 13, 2015) "Why Diversity is a Key to the Construction Industry's Future"

<https://www.brasfieldgorie.com/blog/why-diversity-is-a-key-to-the-construction-industrys-future/>

¹⁵ The Construction Chart Book: The U.S. Construction Industry and its Workers (5th ed., Apr. 2013) "Members of Racial Minorities in Construction and Other Industries," chart 19b.

¹⁶ Canadian Data: <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/labor10a-eng.htm>

Australian Data: <https://www.wgea.gov.au/sites/default/files/Gender%20composition-of-the-workforce-by-industry.pdf>

¹⁷ United Kingdom Union of Construction, Allied Trades and Technicians,

<https://www.ucatt.org.uk/women-construction>

¹⁸ National Women's Law Center (2014) "Women in Construction Still Breaking Ground," pg. 3.

¹⁹ Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 Harv. C.R.-C.L. L. Rev. 481, 485 (2005)

²⁰ Id.

identical resumes.²¹ Applicants with the Caucasian-sounding names received 50 percent more callback interviews than those with African American-sounding names.²²

The Harvard Business Review ("HBR") has suggested one strategy to reduce unconscious bias's influence in the hiring process. HBR recommends managers to understand what hiring prejudices are and how they operate in your industry.²³ Managers should provide workers with education and training on the topic, because awareness training is the first step. Doing so allows employees to recognize that everyone possesses them and to identify their own biases, helping to spark ideas on "steps the organization as a whole can take to minimize them."

Individual effort

Following HBR's above recommendation, an individual could begin to eliminate her unconscious bias by discussing it with others in a safe space. Doing so again allows each individual to identify their respective biases which will allow them to identify and control them moving forward.

V. Strategies/Approaches to eliminate bias during the life of a claim

Unconscious bias is not limited to the work place in any industry. It permeates the life of a claim and can influence the claim's resolution through: 1) counsel selection, 2) insured's bias as to appointed claims handler and counsel, 3) mediation, and 4) judicial interaction.

Counsel Selection

Unconscious bias in the construction and insurance industry could influence a given case's resolution at the nascent stage of its life cycle through the counsel selection process. Insureds or appointed claims handlers could favor a particular law firm or attorney based on gender, race, class, etc., regardless of the law firm's or attorney's professional reputation. As a result, an insured's or appointed claims handler's bias could potentially hamper their ability to achieve the best resolution for their claim.

One way to control the influence of unconscious bias in the counsel selection process is to initially focus on objective categories such as a law firm's or attorney's history of obtaining the best results for their clients.

Insured's viewpoint and bias as to claims handler and counsel appointed

Although an objective process to selecting counsel may help limit unconscious bias during the life of a claim, it might not eliminate the influence of unconscious bias throughout the life cycle. Understandably, insureds need to feel comfortable as they attempt to resolve their legal matters. Insureds could partially define comfort as being confident that their appointed claims handler and counsel are competently working to resolve their legal disputes. Insureds' unconscious bias towards their appointed claims adjuster and counsel based on gender, race, etc. might, however, cloud their perception of competence during the life of their claims. For

²¹ Id.

²² Id.

²³ Rebecca Knight, *7 Practical Ways to Reduce Bias in Your Hiring Process*, Harvard Business Review <https://hbr.org/2017/06/7-practical-ways-to-reduce-bias-in-your-hiring-process>

example, insureds might perceive slow developments in their litigation as signs of their appointed claims handler and counsel's incompetence as a result of their gender, race, etc., rather than an alternative explanation such as opposing parties' refusal to reach an early resolution. As a result, insureds may hinder their relationships with their appointed claims handlers and counsel.

A possible way to prevent or minimize an insured's unconscious bias from affecting their relationships with their appointed claims handlers and counsel, the insured should attempt to identify their bias and how it may be creating turbulence in their relationships with their appointed claims adjusters and counsel.

Mediation

Unconscious bias may have a presence in Alternative Dispute Resolution ("ADR") proceedings. Ideally, ADR, such as mediation, is supposed to be conducted by an impartial third party.²⁴ However, mediators may also exercise unconscious bias that might influence the outcome of insureds' resolutions.²⁵

Some scholars have concluded participants in ADR might show prejudicial behavior in informal ADR settings.²⁶ The informality of the proceedings serves to encourage a looseness of thought that seems conducive to the conscious or unconscious assertion of biases.²⁷

Even if mediators attempt to control their unconscious bias based on race and gender, their unconscious bias might still surface as a result of an insured's or their counsel's class.²⁸ For example, a mediator might show partiality to a party based on that party's alma mater.²⁹

A possible way to anticipate unconscious bias in mediation is to identify each prospective mediator's unconscious bias and how that bias might influence mediation.³⁰ For example, determine whether the mediator graduated from your or your opposing counsel's alma mater. Doing so will allow you to gauge how each prospective mediator will treat your insured.³¹

Judicial Interaction

Although judges take an oath to "administer justice without respect to persons, and are required to perform judicial duties without bias or prejudice," their unconscious bias could

²⁴ Sean C. Griffin, *Thumbs on the Scale: How Unconscious Bias Can Affect ADR Process and What to Do About It*, 57 No. 5 DRI for Def. 28 (2015)

²⁵ *Id.*

²⁶ Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359; see also Carol Izumi, *New Directions in ADR and Clinical Legal Education*, 34 Wash. U.J.L. & Pol'y 71 (2010)

²⁷ Sean C. Griffin, *supra*, 57 No. 5 DRI for Def. 28 (2015)

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

determine the outcome of an insured's claim.³² "[J]udges harbor the same kinds of implicit biases as others [and] these biases can influence their judgment."³³

One way of trying to prevent a judge's unconscious bias from influencing his or her judgment is mandating diversity training for the judiciary that educates them on the unconscious bias and how to contain its influence.

³² Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. Davis L. Rev. 1563, 1578-1579 (2013)

³³ *Id.*