

## **Beating Back Bias in Insurance Claims Before it Beats on You: A Discussion of Implicit Bias in the Settlement of Claims and the Dangers Faced if Unresolved**

Although it may seem as though notions of “implicit bias” have come to our collective consciousness only in the last several months, scholars, social scientists and human behaviorists have, in fact, been grappling with this challenging issue for decades. Even the United States Supreme Court has noted the existence and potentially significant role of implicit bias in society and matters of law. As Justice Kennedy wrote for the majority in 2015:

Recognition of disparate impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping. (*Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc.*, 576 U.S. \_\_\_, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015).

Likewise, during that same year, President Obama, in eulogizing the victims of the Mother Emmanuel shooting in Charleston, South Carolina, stated:

Maybe we now realize the way racial bias can infect us even when we don't realize it, so that we're guarding against not just racial slurs, but we're also guarding against the subtle impulse to call Johnny back for a job interview but not Jamal.

But one might well note, this is a legal and insurance claims conference. Why should we care or pay attention? What does implicit bias have to do with my job and what I do? The answer is that unchecked implicit bias may already be costing insurance companies significant dollars and may even pose a threat to regulatory scrutiny and claims of bad faith. Especially as society and the business world moves to more overtly embrace diversity and the value of all individuals and all lives, claim professionals and defense lawyers who fail to do so may find themselves misjudging their claims, misjudging their juries and engaging in patterns of practice that open the door to allegations of discriminatory and unreasonable conduct.

One headline from the insurance world trumpets: “GEICO pays \$6mn to settle insurance bias charges.”<sup>1</sup> As the result of an investigation by the California Department of Insurance, GEICO, in 2016, settled claims that it improperly and in violation of California law discriminated based on gender, educational attainment and occupation when quoting auto insurance rates online. Under the settlement, GEICO agreed to no longer consider education and occupation when determining coverage limits for people who otherwise qualify as “good drivers.” According to the article, the use of underwriting factors like

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<sup>1</sup> <https://www.insurancebusinessmag.com/us/news/breaking-news/geico-pays-6mn-to-settle-insurance-bias-charges-24134.aspx>.

gender, marital status, occupation and credit score has been under fire in the wake of a report released by the Consumer Federation of America. The report detailed the proliferation of the use of non-driving rating factors by insurers, including rate increases as much as 115% for those with poor credit scores.

Other work by the CFA revealed that GEICO would charge 19% more for a bank teller with a high school degree than for a bank executive with a college degree, and 41% more for a high school graduate in retail than the same bank executive.

It would not seem too great a stretch to imagine similar theories and arguments being applied to the claims departments of insurance companies and not just to underwriters. It is also not too big a leap to envision a civil complaint seeking recovery of damages for such alleged practices, based not only on a company's consideration of an individual claim but also on how claims in general are handled and how they may reflect an implicit bias.

### **What is Implicit Bias?**

According to the Kirwan Institute for the Study of Race and Ethnicity,<sup>2</sup> implicit bias refers to “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” Implicit biases involve both favorable and unfavorable perceptions and can be triggered involuntarily, without an individual's awareness or deliberate control. Importantly and in contrast to overt bias, unconscious biases are not revealed through introspection and often exist without the individual even recognizing them.

As the name suggests, implicit bias operates at the subconscious level, making it difficult (but not impossible) to avoid or neutralize. Nevertheless, in order to avoid unfairness and exposure to the types of potential claims identified above, companies and lawyers would be well advised to take steps to ensure that their evaluation of claims and their settlement decisions must somehow be free of bias and discriminatory impact. Harvard's well-known and well-regarded [Project Implicit](#) is a helpful resource for explaining and understanding implicit bias, and the [Implicit Association Tests \(IAT\)](#) (available free online) are helpful at uncovering the test-taker's hidden biases involving race, gender, disability, age, and other characteristics, through word-picture association. What we learn may surprise us but, by becoming aware, we can all take better care that our conduct does not reflect what we now know may indeed be unknowingly impacting the judgments we reach and the decisions we make.

### **Implicit Bias and Claims Evaluation**

Insurance claims professionals and defense lawyer evaluate claims and make recommendations as to amounts of settlement and expected jury verdicts on a daily basis. Are, as suggested here, implicit biases impacting those evaluations and recommendations? If so, how?

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<sup>2</sup> <http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2016-implicit-bias-review.pdf>

One litigator related her experience with implicit bias and the manner in which it played out in evaluating the case:

Several years ago, I had a case where I was asked to provide a settlement analysis for my client, which was a large third-party administrator. I went through the standard process of evaluating the case and considered the age of the plaintiff and her life expectancy, as well as the extent of her injury, the permanency of that injury, the cost of her medical treatment, what future treatment she would need, her ability to work, her loss of earnings and her level of pain and suffering. My settlement recommendation was neither high, nor low, from my perspective. However, the client dismissed my analysis immediately. What was interesting was that the dismissal was done using terms that could be classified as “buzz phrases,” such as “people like her don’t need that kind of money” and “she’s just not a quality human being. I don’t want her to get a large settlement. Let’s make her sweat it out.” What was the plaintiff like? Where did she live? What made her not a quality human being? I’m not sure of all of the answers to these questions, but she was a middle-aged African-American woman who lived in a working class neighborhood that was primarily African-American and Latino. She had an Associate’s degree and had been working for a number of years when she sustained her injury. There was nothing to outwardly suggest that she was not “a quality human being.” The claims adjuster refused to settle the case, and it dragged on for another year.

The result of the failure to settle this case early was that by the time it did settle, my client paid \$50,000 more than the original settlement recommendation. This case has always resonated with me because it is emblematic of the many reasons why diversity and inclusion should be important to the insurance industry. Was the adjuster in this case a racist? Probably not. Did his unconscious biases about African-Americans impact the value that he placed on the case? Probably.<sup>3</sup>

It is easy to understand that our case evaluations are based on a number of assumptions about the circumstances surrounding the claim, among the most significant of those being about the claimant himself or herself. To the extent that those evaluations may differ solely because of gender, race, sexual orientation, nationality or the like and to the extent that those differences are not backed by evidence supporting the different values associated with them, we have most likely landed on implicit bias. If implicit bias is similarly impacting the judge and jury that hears the case, the disparate evaluations and case value projections may indeed be legitimate. Who, however, can understand the implicit biases of the judge and jury, especially when those same biases are not recognized in ourselves? Moreover, how many case evaluations identify those biases and consider or discuss their impact on the case. What is the likely result, for example, if the biases of the jury are different than those of the evaluating lawyer or claims professional?

The author relating her experience goes on to conclude that it might be more helpful and effective to emphasize the fact that “the case could have settled more quickly and more cheaply had the adjuster

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<sup>3</sup> <https://marshalldennehey.com/sites/default/files/pdf-articles/O%20416%20by%20N.%20Ingram%20%2805.06.16%29%20DRI%20Diversity%20Insider.pdf>

been able to recognize and appreciate the value of a non-white life. . . All cases need to be evaluated as accurately as possible. This starts with the first-line adjuster. These adjusters need to recognize and overcome any inherent biases they have. As a case proceeds into the litigation process, it is incumbent upon defense counsel to do the same. The recognition that unconscious biases may play into analysis will not only help improve accuracies in setting reserves and settlements.”<sup>4</sup>

Claims, whether or not litigated, are rife with similar opportunities for implicit biases to play an oversized and unrecognized role. We lawyers are typically asked how a given witness will present to the jury? How will the judge and jury like the plaintiff or the plaintiff’s attorney? What is the value of a facial scar? Is it different if it’s suffered by a 30-year-old male construction worker as opposed to a 30-year-old female cashier (or construction worker)? Is an injury suffered by Johnny worth more than the same injury suffered by Jamal? How do our evaluations and our settlement authorizations answer those questions?

### **How Can Implicit Bias Be Eliminated or Reduced?**

Reduction of implicit bias may be as easy as (and certainly begins with) the individual being made aware of and coming to grips with his or her own subconscious biases. It certainly appears that awareness of unconscious bias helps limit its effect on one’s decision-making. One 2007 study, involving the NBA, for example, looked at games from 1991 through 2004 and showed that referees called more fouls against players that were of a different race than the referee.<sup>5</sup> The release of the study results triggered extensive media coverage and criticism of the NBA. Following the extensive media coverage, the researchers repeated the study and found no significant disparity in the number of fouls called based upon race. While clearly too small a sampling to draw overly broad conclusions, the study certainly suggests that self-awareness of bias may be an effective antibody to implicit bias. As Justice Sotomayor has noted in a 2014 dissenting opinion:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.<sup>6</sup>

A group called the Intellectual Property Owners Association identified certain strategies available to increase our awareness of our own implicit biases:

Implicit Association Test (IAT). [T]hese tests, from Project Implicit and sponsored by Harvard University, seek to measure implicit attitudes by measuring the strength of associations between concepts (e.g., gender, race, age, sexual orientation, religion, weight, mental health) and evaluations (e.g., good, bad) or stereotypes (e.g., nurturing, athletic). Scoring is based upon how quickly or slowly concepts are associated with evaluations or stereotypes.<sup>7</sup> For example, if

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<sup>4</sup> *Id.*

<sup>5</sup> Devin G. Pope et al., Awareness Reduces Racial Bias, ECONOMIC STUDIES AT BROOKINGS, ES WORKING PAPER SERIES (Feb. 2014), [www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racialbias/awareness\\_reduces\\_racial\\_bias\\_wolfers.pdf](http://www.brookings.edu/~media/research/files/papers/2014/02/awareness-reduces-racialbias/awareness_reduces_racial_bias_wolfers.pdf).

<sup>6</sup> *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (Sotomayor, J., dissenting)

<sup>7</sup> PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html>.

a person on average more quickly sorts the concept/stereotype of women being in the home than the concept/stereotype of women being leaders in the workplace, then that person]would be said to have an implicit preference for women in the home. [citation omitted] Because these tests measure unconscious attitudes, the results can be surprising and uncomfortable.<sup>173</sup> However, they assist in awareness of personal implicit biases. [citation omitted]

- Learn from surprises. Someone behaving in a way that surprises you can present an opportunity for examining your implicit biases. [citation omitted] For example, have you ever worked with someone for a period via email or phone and then been surprised upon meeting them to learn that their appearance (gender, race, etc.) was different from what you had imagined? Examining why you were surprised and what that says about your unconscious biases will help you become aware of those biases and how they may be influencing your decisions.<sup>8</sup>

The authors of that white paper do, however, also conclude that there are constructive steps to be taken beyond mere awareness. In particular, they recommend a series of straightforward behavioral changes that they believe will effectively stand as barriers so as “interrupt” or help prevent implicit bias from impacting decisions and behavior:

- Find motivation. Motivation to reduce implicit bias aids a person’s ability to do so. [citation omitted]
- Be self-observant and self-critical. Pay attention to your thinking and your decision making. Be comfortable doubting your objectivity and critically examining the reasons for your decisions. Catch yourself applying stereotypes and actively redirect your thinking.
- Remind yourself of your own unconscious biases. People who believe that they are unbiased or color/gender/status blind are more biased than people who acknowledge the existence of their bias. [citation omitted] Several studies demonstrate this. For example, in one study, participants were taught about either multiculturalism or “color blindness” and then given a black/white IAT.[citation omitted] Those participants who had been taught about multiculturalism showed less implicit bias than those taught about color blindness. [citation omitted] Acknowledge differences and seek them out to improve your decision-making. [citation omitted]
- Make yourself uncomfortable. Seek out situations and relationships that require you to spend time with people who are different from you. Doing so will give you an opportunity to learn and grow. In fact, the more uncomfortable you

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<sup>8</sup> <https://ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf>

are, the more you will learn. [citation omitted] Consider joining groups in which you are the minority. Be the male ally in a female group.

- Expose yourself to counter-stereotypical situations. If you have a bias toward thinking of leaders as men, read about successful female leaders.

### Danger Ahead? A Glimpse Into the Future

Were I in the business of managing an insurance company's risk or predicting an emerging type of claim, I would take a very close look at the question of how implicit bias impacts claims settlements. The decisions made by claims professionals and the factors relied upon in making those decisions can be cast in a suspect light, especially in an age of social concern with discrimination and bias. This can even be true only because of disparate impacts caused not by the insurance company or claims professional themselves but by what evidence is allowed or how the jury is instructed.

For example, when an economist projects the future income of a minority child, what factors are considered? Is that income predicted to be less because there exists evidence demonstrating that minorities earn less money than whites? One author argues against that kind of evidence:

We should not replicate the discriminatory patterns of the past by projecting them into the future. Indeed, for many other identities (notably, religion), no economist, court or jury would reason that because certain religious groups have higher incomes than others, we should take a plaintiff's religion into account when calculating damages.<sup>9</sup>

What about the likelihood of seeking and obtaining medical treatment? May (or should) one consider that African-Americans typically receive less medical care in the United States than whites in similar circumstances?

The questions surrounding implicit bias and its impact in the claims industry are far more numerous than the answers. The future is unclear. However, where "doing the right thing" increasingly means trying to make our institutions more egalitarian in their work and in their treatment of all people, failing to take steps to reduce potential implicit bias may be viewed as discriminatory and perhaps in bad faith. Lawyers who fail to take their own implicit biases into consideration in their work may be doing a disservice to their clients and may be making themselves less effective as litigators and trial counsel.

By suggesting that there are economic reasons to come to understand and eradicate implicit bias in the performance of legal and claims work, I do not wish to suggest that these are somehow more important or should be more compelling than the multitude of ethical, professional and moral reasons for doing so. To the contrary, by becoming aware of our implicit biases, taking the time to understand how and when they play a role in our work and in our lives and by making behavioral changes to eliminate or reduce them, we can all do our part in making our world – as well as our company or law firm – a better and more just place for everyone.

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<sup>9</sup> <https://www.enjuris.com/blog/news/race-gender-injury-settlement/>

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