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ABA AMERICAN BAR ASSOCIATION
Forum on Construction Law

VOLUME 21, NUMBER 3 • SPRING 2020

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An Ancient Problem, A New Awareness: Slavery in Construction Materials Supply Chains

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In March of 2019, a federal jury in Brooklyn returned guilty verdicts against construction company owner, Dan Zhong, related to his use of slave labor on construction projects in the United States, including a high-rise project in midtown Manhattan and a mansion on Long Island. Zhong brought many of his crew from China, forced them to work seven days a week, locked them in cramped conditions, threatened them with financial ruin and deportation, and even had them violently punished if they tried to leave. In characterizing the case, the United States Attorney pointed out the imperative for confronting this type of exploitation: Zhong’s “crimes not only violate our laws, they contradict the values of this country.” These values are both long-standing and modern: while the Thirteenth Amendment’s 1865 prohibition of slavery continues to protect workers from forced labor, the Trafficking Victims Protection Act of 2000 made it clear that they are also protected from psychological coercion, including threats of deportation if they lack immigration status.

Human trafficking and forced labor on construction projects is immoral and criminal. We are sure that no one reading this article, nor any of our clients, would ever want to contribute to such a practice. But just because we don’t see forced labor on our jobsites does not mean that our projects are “slave free.” Far from it. Construction projects are complex, and their materials supply chains even more so. Even a project that ensures that the workers on site are free to come and go and are not being threatened, extorted, or exploited may be at risk of modern-day slavery – because while the job-site might be local, the materials supply chain has become global.

Just imagine all the components that comprise a roof, and work backwards, down to the literal nuts and bolts, and even the raw materials. Chances are, that somewhere along one of these supply chains, someone — maybe even a child — was forced to work to create the materials that our industry regularly relies upon. While Mr. Zhong’s slavery scheme was brutal and shocking to realize, the construction supply chain is infected with equally horrific conditions. Cleaning up our supply chains will not come easily, but it is necessary. It is not only the right thing to do, it is required by federal law.

Since the 1930s, under the Smoot Hawley Tariff Act (the “Tariff Act”), the United States has officially banned the import of materials “mined, produced or manufactured wholly or in part” by forced labor. But a major loophole under the Tariff Act allowed importation in the event that goods were “not mined, produced, or

manufactured in such quantities in the United States as to meet the consumptive demands of the United States.” This “consumptive demand” exception essentially prevented any meaningful enforcement of the law over the subsequent 85 years, as U.S. manufacturers and builders argued that important inputs such as rubber, rare earth minerals, and palm oil could not be produced in America.

But in 2016, recognizing that all supply chains are now global, and that forced labor could no longer be tolerated as an off-shore problem, Congress managed to close the loophole with the passage of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). Under Section 910 of TFTEA, Congress completely eliminated the consumptive demand exception. Now, it is unequivocally illegal to import anything into the United States created by forced labor. In addition, under TFTEA, the Commissioner of Customs is required to submit annual reports to Congress documenting all the instances that this section of the law was enforced and identifying the materials that were denied entry.

The movement to deny entry of slave-produced materials has already begun. Just this past fall, Customs and Border Patrol (CBP) issued “withhold release” orders for gold from the Democratic Republic of the Congo, rubber gloves from Malaysia, diamonds from Zimbabwe, clothes from China and bone black (a key ingredient in filtration) from Brazil. While TFTEA was an Obama Administration legacy, it passed with bipartisan support and is one policy that is continuing under the Trump Administration. In the words of Acting CBP Commissioner Mark Morgan, “CBP’s issuing of these five withhold release orders shows that if we suspect a product is made using forced labor, we’ll take that product off U.S. shelves.” The terrible swift sword of anti-slavery enforcement has hit the medical supply industry, garments, and air and water filtration – it is only a matter of time before this commitment to deny entry to materials produced by forced labor in a globalized supply chain impacts the construction industry.

We already know that certain building materials are more likely to have been tainted by forced labor and deserve more scrutiny. The Bureau of International Labor Affairs publishes a list of materials likely produced by child labor, forced labor or both. The 2018 list identifies numerous materials that can easily make their way onto our projects if we are not careful. For example, bricks from over twelve countries are created by child labor. Bamboo from Myanmar is also on the list as sourced by child and forced labor, yet several floor manufacturers openly identify the country as their source. Glass made

the list and so did rubber, textiles, steel and electronics. Timber from six countries is harvested by either child or forced labor. Multiple minerals — the compounds that make glass curtain walls energy efficient and provide the electronics infrastructure for today’s “wired” buildings — are mined by enslaved children or prisoners all over the world.

The Department of Labor list is a sobering view into forced and child labor, but it is necessarily a broad snapshot of entire commodities industries. While they identify liability risks (and may even begin to establish a duty of care) for common inputs, these lists do not necessarily help owners, design professionals or contractors penetrate or even begin to understand their often opaque supply chains on their own. Instead, construction industry professionals need to come together, look outside our usual orbits, and collectively seek change.

The authors are both members of a working group that was convened for that purpose by the Grace Farms Foundation. The goal of the Architecture and Construction Working Group is ambitious: “[T]o eradicate modern slavery from the built environment by convening ecosystem leaders and creating actionable outcomes with systemic impact.” The Working Group includes design professionals, builders, a professional specifier, and even a supply chain specialist with a focus on labor abuses. The Working Group began convening in 2019 and has made significant strides to raise awareness of the problem.

But awareness is not enough. As CBP continues to increase scrutiny on construction materials, as the FBI and ICE continue to investigate modern slavery cases, addressing forced labor in your supply chain and jobsites may not just be a moral choice, but a necessity. Imagine if your client’s substantial completion deadline was compromised because a supplier fell behind as a crucial material was the subject of a “withhold release” order at the border. What would you advise your client to do? Tell them to apologize to the owner and explain that their project was about to be built with child labor? Tell them to hope for the best while they scramble for an alternative? Challenge the decision? What if you represent an owner whose opening is thwarted? Again, running a fair and ethical jobsite is no longer enough; the minute that an input is specified that has international components, you have inherited any exploitation that may have produced it.

Regardless of delivery method and contractual scheme, every member of the team — design professionals, construction managers, contractors, owner’s representatives and design-builders — promise to abide by the law in the performance of their duties. Any of these players could get caught up in a tussle that attempts to sort out the responsibility for late delivery caused by illegally sourced materials. In this first round of TFTEA enforcement, the construction industry dodged a bullet. But like everything else, it is better to

see the problem coming and attempt to deal with it in your contracts ahead of time.

Before it becomes readily apparent how to minimize the risk of specifying materials that depend on forced and child labor, and while the industry attempts to understand the problem, it may be wise to insert a disclaimer for a missed substantial completion deadline that was the result of an inadvertent violation of TFTEA. Coupling the disclaimer with some kind of duty to cooperate with consultants may invite the parties to seek outside help. This new category of “force majeure” will definitely spark discussions and even pushback, but it will force the industry to at least acknowledge the problem. Hopefully, professional consultants already versed in sustainability and worker-led social responsibility will eventually emerge as another member of the project team. In the meantime, however, we should assume that more withhold release orders are well on their way and take contractual precautions. We encourage everyone to assess their own risk and invite you all to seek guidance from us in the Architecture and Construction Working Group as we navigate this new risk together. ■



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Congrats Ryan Bullard! – Winner of the Forum’s Law Student Writing Competition

University of North Carolina School of Law student, **RYAN BULLARD**’s paper “What’s Past is Prologue” harkens back to a case in which neighbor sued neighbor and international reporters fanned the flames of public outrage in a sleepy historic neighborhood in Raleigh, North Carolina. An ironic battle of Shakespearean proportions between the past and the present, the Cherry-Gordon House fiasco shows how far some architectural laymen are willing to go to enforce their idea of appropriate design, and how dangerous that can be. Read Mr. Bullard’s award winning paper on UC Online at www.ambar.org/FCLUC.

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