$160M Merrill Race Case A Road Map For Future Class Actions

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Law360, New York (September 05, 2013, 7:32 PM ET) -- The race bias suit against Bank of America Corp.'s Merrill Lynch & Co. Inc. unit that yielded a proposed $160 million **settlement** last week will serve as a blueprint for bringing successful discrimination class actions in the aftermath of the U.S. Supreme Court's landmark Dukes v. Wal-Mart decision, lawyers say.

Many plaintiffs lawyers have been playing into the defense bar's hands by pursuing claims on behalf of overly broad classes that the Dukes decision counsels against, but the class in black broker George McReynolds' case against Merrill — limited to the issue of whether the company's policies had a disparate impact and whether classwide injunctive relief was appropriate — was different.

"This is the first truly significant employment discrimination class action settlement post-Dukes, so this will encourage plaintiffs' lawyers to invest in employment discrimination class actions and demonstrates that this area of the law is not dead," said Seyfarth Shaw LLP partner Gerald L. Maatman Jr. "A lot of people say McReynolds is a beacon of light that plaintiffs' lawyers are looking at, post-Wal-Mart, as the new way forward."

The Merrill Lynch class, which covered African-Americans who worked as financial advisers or financial adviser trainees since 2004, was certified in July 2012, after the Seventh Circuit struck down a prior decision denying class certification in the case.

The certification ruling came more than a year after after the high court's blockbuster June 2011 **decision** to nix a class of some 1.5 million women in a gender bias suit against retail giant Wal-Mart Stores Inc., a ruling widely seen as raising the bar for plaintiffs seeking class status.

Seeking to certify an "issue" class and only asking for injunctive relief can help plaintiffs get around the hurdles posed by Dukes — which held, among other things, that the mammoth class was unmanageable and that the bias allegations didn't present a common issue that could be resolved in a single cases.

And classes that aren't asking for monetary relief can also sidestep questions about whether the need for individualized damages assessments precludes class certification, which have been frequently raised in the employment context since the Supreme Court's **March ruling** in Comcast v. Behrend.

"It suggests particularly clever strategy for plaintiffs to stay in the driver's seat, and control the issues that bear on class certification," Ford & Harrison LLP partner Mark Konkel said of the Merrill Lynch case.

Plaintiffs in employment discrimination cases want to give the court as many options as possible when it comes to class certification, and not limit their claims exclusively to injunctive relief, said Sanford Heisler LLP Chairman David Sanford.

But in light of the case law that's developed in the class action space over the last few years, an injunctive relief class should be among those options, Sanford said, adding that going forward, employment plaintiffs will be putting forward injunction relief classes as options more frequently, he said.

"If you have an injunctive class, at the end of the day, that's still a great success," Sanford said.

And while it may seem like proceeding on behalf of an injunctive relief class translates to giving up any potential financial reward, that's not necessarily the case. After all, the McReynolds plaintiffs were able to secure a commitment from Merrill to pay $160 million, an amount the plaintiffs said in court papers was "one of the largest common funds ever achieved in settlement of an employment discrimination class action."

A similar class action brought on behalf of black and Latino brokers against Morgan Stanley & Co. **settled** for one-tenth of that amount — $16 million — the Merrill plaintiffs noted in a motion for preliminary approval of their deal.

And lawyers for a prevailing party in a class action that invokes Title VII, as McReynolds did, can recover reasonable attorneys fees even if they only seek and obtain injunctive relief.

But the "hidden jewel" in a situation like this is the liability finding that would underlie the determination that an injunction is appropriate, said Linda Friedman of Stowell & Friedman Ltd., who represents the McReynolds class.

That finding of liability "becomes the springboard from which the class members can also recover their losses," Friedman said, noting a slew of Merrill workers are ready to press individual claims against the company.

"If you have real live human beings who you know will file claims, what you really want is the liability determination, because you give them something of great value," Friedman said.

If the court ruled in McReynolds' favor on the disparate impact liability issue and ordered injunctive relief, the plaintiffs could have used that liability finding and sought damages from Merrill Lynch, just not as a class, lawyers said.

Friedman said that the approach in the Merrill case would only be effective with real people who were willing to file claims, as opposed to an illusory class. However, seeking a green light for a pared-down class is "a great road map to get class certification," she added.

"You don't ask for more than you need," Friedman said.

--Editing by John Quinn and Katherine Rautenberg.