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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Supreme Court Won't Question Class Cert. In Merrill Bias Suit

By **Abigail Rubenstein**

Law360, New York (October 01, 2012, 8:53 PM ET) -- The U.S. Supreme Court on Monday opted not to review the certification of a class of black brokers suing Merrill Lynch & Co. Inc. for race discrimination, leaving in place a Seventh Circuit ruling that attorneys say will bolster plaintiffs' efforts to secure class treatment in the wake of the high court's Dukes decision, which tightened class cert standards.

The Seventh Circuit in February reversed the trial court's decision denying class certification to black financial advisers, holding that despite a lack of commonality among the group of brokers, the case would still benefit from class status because the dispute was over two centralized Merrill policies that the plaintiffs claim had a disparate impact on black employees.

Although the landmark Walmart v. Dukes has generally been perceived as raising the bar for plaintiffs seeking class certification, the Seventh Circuit held that it actually helped show that the Merrill brokers led by George McReynolds could be treated as a class. Merrill filed a petition in July asking the Supreme Court to take the case, maintaining that the Seventh Circuit's decision contradicted Dukes, but the high court on Monday declined to take the case, letting the appeals court's plaintiff-friendly precedent stand.

"What [the] McReynolds [case] did was put a U.S. court of appeals firmly in support of civil rights advocates bringing appropriately scaled and sensibly thought-out Title VII classes, and I think it also makes a very strong pitch that there is no benefit to employers or to employees of having individuals bring separate disparate impact cases over the same policies," said Paul Mollica of Outten & Golden LLP, who represents employees.

As such, the Seventh Circuit's ruling and Supreme Court's choice not to review it are encouraging to defenders of employee rights, Mollica told Law360.

"Major national and international employers have what appear to be neutral, routine kinds of policies having to do with right from very beginning getting hired, and then earnings and promotions that they have never bothered to test for job relatedness and business necessity, and McReynolds is a checkered flag dropping for civil rights advocates who want to challenge these policies on a classwide basis," he said.

And with the decision left untouched by the high court, employers can expect to see plaintiffs point to the decision in an effort to overcome arguments that Dukes prevents a class from being certified, attorneys say.

"What employers are seeing is that plaintiffs' attorneys are more and more citing to McReynolds as exhibit one, saying Dukes is not a magic wand the employer can wave at a

class action and make it go away," Gerald Maatman of Seyfarth Shaw LLP said. "It is one of a rebooting series of arguments that plaintiffs can make to try to get around Dukes."

The high court's decision not to take the case means that employers will increasingly have to contend with this "McReynolds effect," Maatman said.

"McReynolds is as much about pleading class actions as it is about pursuing class actions," Allan King of Littler Mendelson PC said.

"I think it set a standard for pleading so that if plaintiffs say the magic words, then perhaps they can get around Dukes at the initial stages," King said, though he expressed skepticism about the ability of many plaintiffs to ultimately be able to prove that certain effects emanated from centralized corporate policies.

And management-side attorneys were also quick to point out that they didn't believe the Supreme Court's denial of certiorari amounted to an endorsement of the Seventh Circuit's decision.

The justices are likely waiting for more lower courts to consider similar issues in the wake of Dukes before it takes up the question, Maatman said.

The issues raised in the McReynolds case — including the viability of so-called issues classes — could still end up before the Supreme Court sometime in the future after more courts have weighed in, attorneys said.

"Undoubtedly there is going to be an effort [by plaintiffs] in other circuits to apply the Seventh Circuit's analysis, and if a split does develop as a result in terms of disparate impact cases under Title VII, then the Supreme Court could decide to take up the issue at a certain point," Jay Waks of Kaye Scholer LLP said.

The McReynolds case dates back to 2005, when a group of black financial advisers lodged the suit against Merrill, which was acquired by Bank of America Corp. in 2009. The plaintiffs claimed that Merrill had engaged in companywide discrimination against black applicants and brokers in hiring, promotions and compensation through policies that had a disparate impact.

The suit specifically takes aim at two company policies: Merrill's teaming policy, in which individual brokers were allowed to form teams that shared customers in order to boost business for each member of the team, and its account distribution policy, by which the client accounts of departing Merrill brokers were doled out to the remaining brokers through various criteria.

The plaintiffs turned to the Seventh Circuit after U.S. District Judge Robert W. Gettleman rejected the plaintiffs' bids for class certification, and the appeals court determined that class treatment would be the most efficient way to adjudicate the disparate impact claims.

In accordance with the ruling, Judge Gettleman has certified a class of over 700 current and former brokers to determine whether the two polices had an unlawful disparate impact and, if so, whether any classwide injunctive relief is warranted.

The bank's petition to the high court argued that the Dukes decision rejected a disparate impact class bringing similar nationwide claims over a policy that provides for discretion by local managers based on the same kind of evidence that the plaintiffs are relying on in the case against Merrill. The petition further contended that the Seventh Circuit's ruling deepened a circuit split over whether courts can certify a so-called issue class even when it acknowledges, as the appeals court did, that individual trials would be needed to determine the defendant's liability to individual class members.

But the justices were not persuaded to take on the case.

"We have suffered a few denials in this case but this is the first one we've celebrated," the plaintiffs' attorney Linda Friedman of Stowell & Friedman Ltd. said of the high court's denial of cert Monday.

A Merrill Lynch spokesman declined to comment.

The class is represented by Linda D. Friedman, Suzanne E. Bish and George S. Robot of Stowell & Friedman Ltd.

Merrill Lynch is represented by Stephen M. Shapiro, Timothy S. Bishop and Lori E. Lightfoot of Mayer Brown LLP, Jeffrey S. Klein, Nicholas J. Pappas and Allan Dinkoff of Weil Gotshal & Manges LLP, and Jonathan D. Hacker, Framroze Virjee, Adam P. Kohsweeney and Anna-Rose Mathieson of O'Melveny & Myers LLP.

The case is Merrill Lynch Pierce Fenner & Smith Inc. et al. v. George McReynolds et al., case number 12-113, in the U.S. Supreme Court.

--Additional reporting by Bill Donahue, Megan Stride and Django Gold. Editing by Elizabeth Bowen and Lindsay Naylor.

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