

# ARTICLES

## A MODEL FOR THE USE OF ADR TO EFFICIENTLY DISTRIBUTE A SIGNIFICANT SETTLEMENT FUND IN MASS CLAIMS LITIGATION WITHOUT SACRIFICING AN INDIVIDUALIZED ASSESSMENT OF CLAIMS

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### I. INTRODUCTION

Courts in the United States struggle to deal with litigation involving large numbers of claimants. A challenge in these cases is balancing the need for efficiency with opportunities for individualized claim assessment. Generally speaking, efficiency can be sacrificed at the expense of individualization, and vice-versa, but it is often difficult to strike a middle ground. The settlement process described in this article successfully managed this tension and as such can serve as a model for distributing a substantial fund in mass claims litigation.

This article will begin by detailing the legal background of the litigation of *A v. B* (2013). Section II will go on to discuss the settlement fund participation options outlined in the *A v. B* (2013) Settlement Agreement (“Settlement Agreement”). Section III will discuss various aspects of implementing the settlement. Finally, the article will conclude with a reflection on the settlement process, and how the distribution of this settlement fund may serve as a model for future funds.

### II. BACKGROUND OF THE LITIGATION

In 2013, a U.S District Court gave final approval to the settlement in a class action case involving allegations of race discrimina-

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tion against a prominent fortune 500 firm.<sup>1</sup> This ruling ended the litigation odyssey for the claimants who alleged individual and systemic race discrimination against African Americans beginning in 2005. The period between 2005 and late 2013 was filled with dramatic losses and victories for each side largely focused on whether class members had enough in common to warrant class certification.<sup>2</sup> A pivotal win for the class came in 2012 when the court certified as a class-wide issue the question of whether the company-wide teaming and account distribution policies had a disparate impact on African American employees.<sup>3</sup> The trial in the case was set for 2014 and the parties reached a settlement in 2013. The settlement included a \$160 million fund to be distributed to class members and three years of policy changes at the firm. This is arguably both the largest per capita settlement fund in an employment racial discrimination case and the largest common fund settlement in an employment discrimination case.<sup>4</sup>

### A. *The Legal Significance of the Litigation*

Since the middle of the last century, class action litigation has been at the heart of landmark changes in prisoners' rights, school desegregation, consumer practices, and employment discrimination in the United States.<sup>5</sup> The class action mechanism allows potentially aggrieved individuals to aggregate claims in order to challenge systemic wrongdoing, illustrate patterns of discrimination, and efficiently allow their voices to be heard. As such, class actions have been an important tool for civil rights lawyers to effect change. In the employment discrimination context, the Civil Rights Act of 1991 called for jury trials as a matter of right and expanded the recovery available to plaintiffs, thus making class ac-

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<sup>1</sup> *A. v. B.* (2013). For confidentiality reasons, the names and certain identifying information from the case is withheld. Throughout this paper, the case will be referenced as "*A. v. B.* (2013)."

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* The firm's teaming policy allowed employees in the same office to form teams in order to share clients. The firm's account distribution policy set the criteria for the assignment of a departing employee's accounts to other financial advisors within the same office.

<sup>4</sup> According to an expert in this litigation, while there are settled class actions that report higher recoveries, those reports include the value of non-monetary relief. See Declaration of John C. Coffee, Jr. ¶¶ 11–13.

<sup>5</sup> Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 *B.C. L. REV.* 367, 367–68 (2008).

tions more economically worthwhile.<sup>6</sup> Major corporations including Mitsubishi, Coca Cola, Texaco, Boeing, Home Depot, Smith Barney, Abercrombie & Fitch, and Sprint have settled class actions that require them to fund multi-million dollar settlements and change their practices regarding diversity in the workplace.<sup>7</sup>

In 2011, the Supreme Court ruled that 1.5 million women claiming systemic gender discrimination at Wal-Mart failed to meet the requirements of a class action pursuant to Federal Rule of Civil Procedure 23(a) and Rule 23 (b)(2) because the commonality requirement of Rule 23 was not met.<sup>8</sup> The commonality rule requires the plaintiffs to show that there are common questions of law or fact.<sup>9</sup> In the opinion authored by Justice Scalia, the Court noted that the plaintiffs failed to show a uniform policy that compelled managers to discriminate that would serve as the “glue” to create a common claim of discrimination among their allegations rather than the discretionary decisions of multiple managers.<sup>10</sup> The Court further found that the statistical, expert, and anecdotal evidence presented by the class was inadequate to prove that a general policy of discrimination existed, a level of proof that the Court ruled was necessary at the class certification phase.<sup>11</sup> The Court also concluded that Wal-Mart was entitled to have any back pay awards determined individually, rather than based on a formula, in order to allow the company to raise individual affirmative defenses in each claimant’s case.<sup>12</sup> The *Wal-Mart v. Dukes* decision has been widely viewed as a significant setback for the use of the class action as a vehicle for implementing social change in the workplace.<sup>13</sup>

The 2012 ruling in this litigation gave civil rights plaintiffs renewed hope regarding the viability of the class action. In the decision, the judge found that the proposed disparate impact of the firm’s centralized teaming and account distribution policies warranted certification as an issue class pursuant to Federal Rule of Civil Procedure 23(c)(4).<sup>14</sup> An issue class allows a court to certify a

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

<sup>9</sup> *Id.* at 349.

<sup>10</sup> *Id.* at 352.

<sup>11</sup> *Id.* at 353.

<sup>12</sup> *Id.* at 362.

<sup>13</sup> See Andrey Spektor, *The Death Knell of Issue Certification and Why that Matters After Wal-Mart v. Dukes*, 26 ST. THOMAS L. REV. 165, 167 (2014).

<sup>14</sup> A. v. B. (2013). Pursuant to Federal Rule of Civil Procedure 23(b)(2), the Court also certified the issue of appropriate injunctive relief in the event that the policies at issue were found to have had a disparate impact on the certified class.

specific issue or issues common to all of the claimants' cases for resolution on a class-wide basis, but also requires that individual issues be resolved in separate adjudications. As the decision noted, an important advantage of an issue class is the ability to efficiently streamline the litigation of numerous claims.<sup>15</sup> The judge observed that in the event that the class-wide questions were resolved in favor of the plaintiffs, these common issues would not need to be revisited in each of the hundreds of individual lawsuits from the claimants, which would be necessary to determine how each plaintiff was impacted by the policies at issue and to consider any claims of intentional discrimination.<sup>16</sup> If the class-wide issues were resolved in favor of the firm, the case would end and hundreds of claims would not be litigated. The decision also made clear that the judge viewed this ruling as consistent with the Supreme Court's holding in *Wal-Mart*.<sup>17</sup> Specifically, the teaming and account distribution policies served as the "glue" connecting all of the claims of the class of financial advisors that the Supreme Court found lacking in the plaintiffs' case in *Wal-Mart*.<sup>18</sup>

### B. *The Settlement Agreement*

The Court's ruling paved the way for the parties to settle the case, as all parties faced a high stakes trial on the class-wide issues certified by the Court and the potential for protracted litigation on each claimant's case. After months of mediation, the parties reached a resolution that was approved by the District Court.

The definition of the class covered by the court approved Settlement Agreement included, "all African American Financial Advisors and Financial Advisor Trainees who have been assigned a production number in the domestic U.S. retail brokerage unit any time from May 6, 2001 through the Preliminary Approval Date." Based on the definition of the class, approximately 1433 individuals were eligible to participate in the settlement including 288 current employees. Of course, at the time of the settlement, the participation rate of potential claimants in the settlement was unknowable. A \$160 million dollar fund was established to provide all monetary relief in the case. The funds were used to make awards to class

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

members and to cover all attorneys' fees and costs, all costs associated with administering the settlement fund including the cost of the claims administrator and special master, neutrals' fees and expenses, neutral training costs, and bonuses paid to named plaintiffs and steering committee members.

From the \$160 million settlement fund, \$25 million was set-aside in an "extraordinary fund" for claims that merited additional monies due to a number of factors. Every claim that involved a class member who filed a race discrimination claim in a federal court, state court, or arbitral body was automatically deemed an extraordinary claim. Other claims could warrant consideration as an extraordinary claim for reasons, such as filing an internal complaint of race discrimination or retaliation; filing a charge of discrimination with the EEOC; severe racial harassment; and severe emotional distress and extraordinary financial hardship, such as bankruptcy, loss of home, or a prolonged period of unemployment following a separation from the firm.

The Settlement Agreement also called for substantial programmatic relief. The teaming and account distribution policies were changed in order to eliminate the possibility that African American and minority employees would be unfairly harmed by the practices. The firm agreed to hire two coaches to support African American employees and trainees. A monitor/coach would be hired to compare the training, performance success, and attrition rate of African American and non-African American employees and trainees. In addition, two experts, one chosen by the firm and one chosen by class counsel and the named plaintiffs, would review and evaluate the firm's teaming and pooling practices. A leadership council consisting of the monitor/coach and other African American employees, including any currently employed named plaintiffs was established to review and provide input related to hiring and supporting African American employees and trainees. A diversity fund, supported at a level of at least \$1 million a year, was established for employees of color and women to host business development events. The Settlement Agreement also called for voluntary exit interviews with departing employees and trainees in order to understand the reasons for the employee's separation from the firm. Manager evaluations would include a diversity and inclusion category. For each open executive or director position in the relevant division, at least one diverse candidate would be interviewed. Finally, the firm agreed not to require mandatory arbitration of employment discrimination claims.

The Settlement Agreement called for the appointment of a special master charged with a number of duties. The special master's key role was to make the final decision on all monetary distributions to claimants in order to ensure a fair and consistent dispersal of the fund. In addition, the special master would rule on requests for inclusion in the settlement class and requests to file late claims. The special master also was to report to the District Court and to class counsel on the distribution process. Finally, the special master was responsible for negotiating and paying any costs associated with administering the Settlement Agreement. I was appointed to serve as the special master and write this to share my experience in the hopes of providing insights for future settlements.

### III. THE SETTLEMENT FUND DISBURSEMENT PROCESS

#### A. *The Simple and Detailed Claim Forms*

Class members had the option of filing either a simple claim form or a detailed claim form in order to request payment from the settlement fund. The simple claim form required claimants to answer three brief questions and sign the form under penalty of perjury. In contrast, the detailed claim form asked claimants to answer approximately fifty questions in detail and sign the form under penalty of perjury. In addition, any claimants seeking financial compensation for a post-firm employment period had to submit qualified evidence of their work history and income. Claimants could preserve their right to have their case evaluated by a neutral in an individualized claims resolution process by filing a detailed claim form. Providing these options served to balance the tension that exists in mass claim settlements between efficiency and individualized assessment of claims.

Claimants who filed simple claim forms received an expedited payment without an individualized assessment of the claim. Six hundred eighty-one claimants filed simple claim forms. Payments to these claimants were based primarily on their length of service, status as either an employee or trainee at the firm, time in the class period, and whether they lateraled in at the firm. Claimants opting to file simple claim forms were not eligible for participation in the \$25 million extraordinary fund intended to provide additional monetary compensation for deserving claims.

The simple claim form process offered a number of advantages to claimants. Payments were made to claimants filing the simple form within a month of the claims submission due date. Due to individual financial circumstances, the decline in the economy in the late 2000s, and the lengthy duration of the litigation of this matter, quick payment was meaningful to many claimants. Other claimants did not want to revisit their tenure at the firm and the simple claim form did not require any details about their employment experience. Claimants could participate in the settlement fund even if they were unsure about how racial discrimination had impacted them while at the firm. Claimants who remained employed at the firm could file a claim and receive payment without much process thus minimizing any sense of conflict with their employer. Of course, these advantages came at the cost of foregoing the chance to receive a greater award based on an individualized assessment of the claim at the risk of receiving a lesser award.

Filing a detailed claim form gave claimants several options. First, they preserved the right to an individual assessment of their claim by a neutral. Second, only claimants filing detailed claim forms were eligible for consideration as an extraordinary claim, warranting participation in the \$25 million extraordinary fund. Finally, claimants filing detailed claim forms were given the option of electing an expedited monetary award equal to the award given to claimants filing simple claim forms. Claimants filing a detailed claim form were rewarded with the ability to know what their expedited settlement would be before they chose to accept this amount. Four hundred eighteen claimants filed detailed claim forms. Of these claimants, 173 elected to receive their expedited monetary award. The fact that so many claimants did elect the expedited monetary award is evidence that the amount of these awards was meaningful to many class members.

### B. *The Individualized Claims Resolution Process*

Ultimately, 242 claims were processed through the individualized claims resolution process (“ICRP”). The ICRP involved evaluation of the claim by a single neutral either based solely on the claim form or with the additional benefit of a 90-minute in-person or video-conference interview. All but one claimant ultimately elected to participate in the interview process.

Pursuant to the Settlement Agreement, the neutrals were selected by class counsel in consultation with the special master. The Settlement Agreement called for a training of the neutrals and the special master covering the firm's policies and practices, the evidence and legal theories of the case, and the conclusions reached by several experts retained by the class in the litigation.

For each claimant participating in the ICRP, an expert prepared an office statistical report regarding the racial composition of the office, the racial composition of any teams or pools, account transfers and distributions in that office, and any other racial disparities including compensation and attrition. These reports were presented to the neutral at the start of each interview.

### 1. Neutrals

In order to be considered as a neutral in the ICRP, individuals had to be knowledgeable about employment discrimination. Neutrals were also selected based on their ability to manage the emotional nature of the claims, their willingness to commit to working with the special master to ensure fairness and consistency among all awards, their ability to differentiate between claims in the absence of a defense perspective, and their ability to commit the time required to conduct all of the interviews in Chicago during a three month period so that the funds could be distributed to claimants as expeditiously as possible.

The eighteen neutrals selected included retired federal judges, civil rights lawyers from both management and plaintiff perspectives, academics, and professional mediators and arbitrators. This mix allowed for a variety of perspectives and experiences to influence the awards. The talent, commitment, and integrity that this group brought to the process was exceptional.

When the neutrals were selected, it was unclear how many of the 418 detailed claims would be scheduled for interviews as those claimants had the right to forego the interview and accept the expedited monetary award. Most neutrals conducted ten to fifteen interviews, while some did as many as twenty-five or as few as four interviews. Ideally, a smaller number of neutrals would have handled more cases in order to make the task of ensuring consistency among awards more efficient. In retrospect, however, I would be hard-pressed to eliminate any of the neutrals given the unique contributions each brought to the process.

Neutral selection also considered the racial diversity of the panel. One need only look at the photos of the roster of neutrals at

any dispute resolution services provider to see that the dispute resolution field has its own work to do to include African Americans as well as other minority groups among the ranks.<sup>19</sup> To ignore racial diversity in neutral selection would only compound the issues raised by the allegations of unfair treatment of African Americans at the firm. Further, the analysis of claims involving discrimination towards African Americans is best done with the voices of a number of African American neutrals in the mix. This is not to say that only African American neutrals are qualified to resolve claims of racial discrimination towards other African Americans. It is undeniable however that the life experiences of African American neutrals could benefit the process. The five African American neutrals brought this perspective and much more to the ICRP.

The two-day training for the neutrals and the special master took place in April 2014, one month before the interviews were scheduled to begin. This allowed the neutrals to spend some time digesting the training materials and the interview protocols without leaving a long gap between the training and the actual interviews that might have resulted in a failure to retain the information. On day one of the training, class counsel provided an overview of the litigation, the legal claims, and the industry in which the claimants were working. This was followed by a presentation from an expert for the class regarding the sociology of race discrimination in the firm's workplace.

Day two of the training began with a presentation from a class expert regarding the impact that differences in account distribution opportunities have on employees in this industry over the course of their careers. The neutrals were particularly struck by evidence showing that white trainees received significantly more accounts than African American trainees starting in the first month of their training program at the firm. This presentation illustrated the cumulative effect that these differences in account distribution had on the opportunities and compensation of white and African American employees throughout their tenure at the firm.

The neutrals role-played in small groups using the interview protocol created by class counsel and the special master. This al-

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<sup>19</sup> The lack of diversity among professional neutrals has been noted for decades. See Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators*, NYSBA J., Jan. 2012, at 33; David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR is a Necessity*, ACC DOCKET, Oct. 2013, at 41; David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 1, (2008); and Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG. 22 (2012).

lowed the neutrals to experiment with a variety of approaches to obtain the information needed to analyze the factors to be considered when making the awards. Another benefit of the role-playing was the opportunity for this group of highly qualified neutrals to observe and learn new techniques from each other. On four occasions during the two-day program, every neutral was given the opportunity to share a question, insight, or suggestion with the entire group. As a result, the experience, wisdom, and learning needs of the individuals were shared with all. The neutral training also created a community of support and learning for the neutrals and the special master. During meals and evenings, the neutrals socialized and shared their thoughts about the pending interviews. This camaraderie served the process well once the intensity of the actual interviews became real.

One issue that was resolved during the neutral training session was the appropriate level of formality for the interview process. One school of thought was that the interview served as the claimant's "day in court" and should proceed as such in terms of questioning format, introduction of evidence, and the formal tone of the neutral. On the other hand, sharing a personal history and the impact of discrimination in the workplace is often emotional, the defendant would not be present and the neutral could serve to support the interview experience as well as evaluate the relative merits of the claims. Class counsel and the special master discussed this issue prior to the training and wanted the input of the experienced neutrals. Based on the lively discussion of this issue with the neutrals, a decision was made to allow for a less formal exchange between the neutral and the claimant, to make every attempt to support the claimant's storytelling experience, while simultaneously reminding each claimant that his or her claim would be evaluated relative to other claims using the information available to neutrals during the process.

## 2. Interview Logistics

All in-person interviews took place in Chicago at the offices of class counsel during May, June, and July 2014. Claimants could request a travel advance against their award if they could not afford the travel expenses independently. Claimants also had the option of participating in the interview via video-conferencing. This allowed claimants living abroad, as well as those who could not or did not want to make the trip, to have their claim individually assessed. Thirty-two interviews were conducted via video-conferencing.

ing. All video-conferences were administered by a single independent organization in order to assure a high quality connection as well as to maintain the confidentiality of the interview.

Neutrals were given training regarding best practices in conducting interviews via video teleconferencing. First, sound levels and picture clarity should be confirmed. Everyone in either location must be introduced so that all parties knew the identity of everyone participating in the interview. Neutrals were advised to address the technology and its effect on the process before the interview began. For example, in order to make eye contact, neutrals needed to look at the camera lens and not at the eyes of the claimant on the screen. Neutrals were instructed to check in frequently regarding the sound and visuals quality. Finally, neutrals needed to pace the interview appropriately so that everyone was able to finish their sentences and maximize the ability to observe nonlinguistic cues.

Giving claimants options regarding modes of participation in a settlement process is important. For the most part, the video-conferencing worked well and maximized participation in the ICRP. Anecdotally, however, I would report that claimants who participated in the interview process in-person seemed to report a higher level of satisfaction with the interview experience. Perhaps this was due to a greater ease for all parties to connect in-person without any technological barriers

### 3. Role of the Parties in the Interviews

#### i. Class Counsel

Class counsel remained actively involved in almost every phase of the fund distribution. Class counsel provided information to class members throughout the process, provided input on protocols to the special master, provided information during the neutral training session, worked with the experts on providing the office statistical reports, presented these reports during the interview, and prepared and assisted claimants before and during their interviews. Class counsel did not have a role in determining the final awards to claimants who participated in the ICRP, a role they could not play given their duty to the class as a whole. Only a handful of claimants engaged private counsel to represent them in the ICRP with the large majority relying exclusively on the services provided by class counsel.

## ii. The Firm and Counsel

The defendant and its counsel did not play any role in the distribution of the settlement fund with one narrow exception. For any request for inclusion in the class from an individual not identified as being a member of the class, the firm provided information regarding that person's eligibility to participate in the class as defined by the definition of the class in the Settlement Agreement. Limiting the firm's role protected both the firm and claimants, particularly those who remained employed at the firm, from any concerns or allegations of retaliation for participating in the settlement. Further, once the defendant committed the funds, any role it might play in determining how the funds would be allocated would only cost the firm additional resources, including attorneys' fees and time.

Not having a defense perspective in the process presented challenges and opportunities. The biggest challenge stemming from the firm's absence was the lack of presentation to the neutral regarding reasons other than race discrimination that might account for a class member's experience at the firm. For example, during the economic downturn in the late 2000s, the majority of trainees of all races struggled to meet the production requirements necessary to become full employees. The neutrals, and ultimately the special master, had to use the information available in the expert reports, office statistical reports, and other documents to evaluate the impact factors other than race played in each claimant's history at the firm.

On the other hand, giving each claimant the chance to speak to a neutral with the support of class counsel and without the firm presenting information regarding deficiencies in the claimant's performance or perception of events allowed the claimant to feel respected and heard during the interviews. Many claimants reported that the interview process was cathartic and allowed them to move forward and gain a sense of closure regarding their employment experience. In order to mitigate the concern that the empathetic tone of the interviews might inflate the claimants' expectations regarding the awards, the neutrals reminded each claimant that the fund was significant, but not unlimited and would need to be divided among a large number of class members based on the relative strength of their claims.

#### 4. The Office Statistical Reports

The attorneys, neutrals, and class members participating in the ICRP had to sign a protective order ensuring that information, including any firm data related to customer accounts, employees racial composition of offices, or account distributions, would be kept confidential. In addition, the Settlement Agreement required that class counsel retain sole custody of the office statistical reports. Practically speaking, this meant that the class members first learned what the statistical reports revealed regarding account distribution in their office either immediately before or during their interview. For some claimants, discovering through this data that white financial advisors or trainees received significantly more and better accounts through the account distribution system gave them a sense of relief in that they could release any sense that they were lacking as professionals. For other claimants, the impact of learning that they were not given comparable accounts was traumatic and caused a high level of distress. This was particularly true if the office statistical data was striking in terms of racial disparities. The neutrals were called on to work through these reactions with the claimants during the interview process.

#### 5. Managing the Emotional Aspect of the Interview Process

The neutrals overwhelmingly reported that the claimants were impressive professionals with strong credentials. For many claimants, the defendant was viewed as the most prestigious employer in the industry. The interviews largely involved stories of high hopes, broken dreams, and for some, painful accounts of personal racial discrimination at the hands of firm management and colleagues. As a result, the interviews involved a great deal of emotion, with sadness and anger being the most common responses.

In the neutral training, and in the meetings with neutrals throughout the three months of interviews, strategies for managing the emotional nature of the interviews were explored and shared. First, emotional reactions were normalized. Tissues and water were provided in every interview room. Claimants were told that others had been having similar reactions in order to reduce any shame associated with having an emotional experience. At times, claimants were given the option of a short break. Neutrals acknowledged the claimants' emotions. At the end of the interviews, some claimants asked if they could symbolically leave their pain in the interview room in order to move forward.

The vast majority of the interviews involved highly emotional claimants. Yet, a number of claimants did not display much emotion while sharing their experience at the firm. This did not always correlate to a claim involving little emotional distress. Some individuals do not and cannot share emotions with strangers in the context of an interview about their professional lives. The neutrals had to consciously measure the value of the claim, not based on the number of tears or level of outrage, but on the facts and impact on the individual involved.

The neutrals had the difficult task of simultaneously managing the claimants' emotions and expectations, gathering enough information to make an informed valuation of the claim, and processing some very distressing stories. The claims involving racist remarks and actions were troubling, but not necessarily the norm. Observing the way in which preferences and unconscious bias lead to a disparate impact on African American employees was perhaps more disturbing for the neutrals who faced the subtleties of this type of racism in a professional setting.

The neutrals also faced stories of devastation for claimants who could not put their lives back together after leaving the firm. Several claimants ended up homeless for a period of time. A number of claimants ended up divorced or lost custody of their children they believed due to economic and other stresses they faced as a result of racial discrimination. Many claimants never recovered professionally. Others faced bankruptcy and the loss of their home and belongings.

Almost every neutral experienced intense reactions to this work during the interview process. They relied on each other for support and guidance. As the special master, I sat in interviews with each neutral from time to time, checked in with them about their own wellbeing as well as the work, and reminded them to separate the emotions from the evaluation of the claims. After particularly difficult interviews involving individuals who experienced significant trauma in their lives during the relevant period, the neutral and I would carefully sift through the facts to determine if the outcome was connected to racial discrimination at the firm. In some instances, the causal connection between a claimant's loss and racial discrimination at the firm was quite strong, while in other cases extraneous factors intervened. The neutrals also were reminded that they were not the advocates for the claims that they heard in the interviews. Rather, they needed to accurately assess each claim and share that assessment and the basis for their valua-

tion with me as the special master. Ultimately, the goal was to fairly and consistently make awards to all claimants interviewed by all neutrals.

## 6. Fairness and Consistency among Awards

The ultimate task of ensuring the fairness and consistency among awards fell to me in my role as special master. Several strategies were implemented in order to achieve this goal.

First, all claims automatically deemed extraordinary claims by virtue of having filed a claim of race discrimination and any claim involving an individual who had been employed by the firm for more than ten years was assigned to one of three neutrals. Clustering the interview assignments in this way assured that these potentially significant claims would be heard by a small group of neutrals that could easily compare all of these claims.

Second, as special master, I sat in on a large number of interviews and checked in frequently with the neutrals regarding the approach that they were taking to valuation. The dialogue regarding valuation was an ongoing discussion, which evolved as we completed more interviews. For example, before the interviews began, the idea that a terminated claimant's home went into foreclosure seemed quite likely to warrant participation in the extraordinary fund. Sadly, it became clear that foreclosure was not an extraordinary event given the economic climate of the late 2000s, and further consideration of the circumstances was needed in order to consider participation in the extraordinary fund.

Once the interviews were completed, each neutral prepared an award recommendation report for the special master with details about the basis for their recommendations. Based on this, neutrals were given a graph showing how their awards for each claimant group compared to the awards made by other neutrals. The other neutrals were not identified. This gave the special master and the neutrals a sense of how they valued claims relative to the other neutrals. For some neutrals, all of their awards were multiples of the other neutrals' awards and needed to be reduced. Other neutrals found that they were less generous than most in their awards and adjusted accordingly.

After each neutral worked on the awards independently; the special master met with all of the neutrals together to ensure that all claims across the neutral pool were treated consistently. During these sessions, neutrals presented their cases to the group, disclosed their approach to valuation, and asked for guidance on the

treatment of specific circumstances. As the special master, I had individual meetings with some neutrals to ask questions regarding their valuation of certain cases. I also used the office statistical reports and other data to check assumptions and to compare claimants' experiences.

In November 2014, I presented the awards to the District Court for final approval. The awards were approved and checks were mailed to claimants in early December 2014.

### 7. Timely Payment to Claimants

After ensuring the fairness of the process, distributing the awards in a timely fashion was paramount. Claimants electing to file a simple claim form received their awards within a month of the claim-filing deadline. Claimants who opted to participate in the ICRP received their award less than one year from the time the Settlement Agreement was approved. The fact that 81% of potential class members filed a claim rather than the typical participation rate of 25% to 50% in employment class actions makes this efficient timeline all the more remarkable.

## IV. CONCLUSION

Serving as the special master in this settlement process was an intense and educational experience. For over a year, this task was on my mind for most of my waking hours. Each phase of the process brought new challenges and problems to be addressed.

First, the legacy of the fund distribution process outlined in this article should be considered. This process can serve as a model for settlements reached after a case has been certified as an issue class pursuant to Federal Rule of Civil Procedure 23(c)(4) or for any settlement that involves making awards to a sizable group of plaintiffs.<sup>20</sup> The process provided claimants with a number of claim resolution options. The expedited payment option served claimants who valued fast payment and ease of process. The individualized claims resolution process answered the cry for individualized claim assessment called for by the Courts in both this litigation and

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<sup>20</sup> The question of how large of a class this process could effectively serve is an interesting one. I believe that the process could well serve a class several times the size of the class in this litigation. Issues including the cost of individualized assessments as well as time that claimants requesting an individualized assessment would wait for their award to be paid should be considered.

the *Wal-Mart Stores, Inc.* decision.<sup>21</sup> Providing each claimant with the chance to be heard by an experienced neutral in a supportive setting, while simultaneously maximizing fairness and consistency among the awards, presented a challenge that was achieved through the commitment of the outstanding neutrals engaged in the process.

This settlement process highlighted the evolving face of racism in the workplace. The impact that decisions regarding account distribution and teaming opportunities had on the African American claimants was profound and troubling. While such bias at the defendant firm was at issue in this case, most individuals and organizations need to examine the role that such bias, whether explicit or implicit in nature, plays out every day in the workplace.

Unlike other settlement processes that I have been a part of, an intentional effort was made to recognize the psychological toll that processing intense emotional experiences had on almost everyone involved. Claimants were reliving painful experiences. Class counsel was responsible for processing in detail hundreds of claims, each a unique account of real or perceived racism. Neutrals were simultaneously supporting the claimants by bearing witness to their stories and performing the essential task of valuing their claims. Making the decision to support the emotional experience for everyone in the process proved to be a success. Balancing this support against managing the claimants' expectations and ensuring a fair valuation of the claims was a challenge that the neutrals met. Many of the neutrals reported that their role in this settlement process was the most meaningful work they had been called upon to perform.

In light of the Supreme Court's ruling in *Wal-Mart Stores, Inc.*, as well as the Court's ruling in this case, the likelihood that significant settlements involving large numbers of claimants will occur with any frequency is unclear. If they do occur, models for settlement processes will be needed. The process outlined here is one that proved successful.

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<sup>21</sup> See *Wal-Mart Stores*, 564 U.S. 338. These courts called for individual adjudications to assess causation, to allow the defendant to raise affirmative defenses, and to determine the impact of any discrimination on each employee. The individualized claims resolution process outlined in this article is an example of such an adjudicatory process with one notable exception. The defendant did not participate in the hearings, and therefore did not present a defense. I have been involved in the administration of a class action settlement that included options for both mediation and arbitration with a full defense. Not surprisingly, the process was largely adversarial and the settlement took many years to be completed.

