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

Merrill, Advisers Strike \$17M Deal In Deferred Pay Row

By **Django Gold**

Law360, New York (August 24, 2011) -- A California federal judge will consider Thursday whether to approve a \$16.8 million settlement between Merrill Lynch & Co. Inc. and a putative class of financial advisers claiming their former employer withheld deferred compensation awards when they quit to work with competitors.

U.S. District Judge Claudia Wilken is set to determine whether to conditionally certify a class of approximately 83 former Merrill Lynch financial advisers who say the investment firm violated California business code by enforcing an unlawful contract provision that prevents the payout of three separate delayed compensation plans in the event an employee goes to work with a rival.

"We thought it was absolutely clear from the beginning that this forfeiture clause was a violation of state business code," William I. Edlund of Bartko Zankel Tarrant & Miller, who represents the plaintiffs, told Law360 on Wednesday. He said he expected Judge Wilken to sign off on the settlement.

The proposed deal, if approved, will close the book on two separate California actions brought against Merrill Lynch for allegedly breaching the terms of a compensation agreement that promised the payout of an aggregated deferred compensation pay package within two years of an employee's retirement from the company.

Merrill Lynch avoided making these payouts by including in its employment contracts a provision that absolved the company of its fiduciary obligations in the event that its financial advisers jumped ship, according to the suit.

"These provisions are void, illegal and severable under" California business code, according to a January 2011 complaint filed in San Diego Superior Court and later transferred to federal court.

The second complaint, filed in August 2010 in San Francisco Superior Court, was also transferred to federal court. A consolidated complaint for both actions was issued in July.

The proposed settlement applies to both sets of plaintiffs in the cases, which include California residents who worked for Merrill Lynch, terminated their employment between August 1996 and December 2009, and were denied their deferred compensation payouts despite qualifying for the so-called Rule of 65.

The Rule of 65 guarantees that an employee is eligible to receive the deferred compensation package after the employee's 65th birthday — or 55th birthday, provided the employee logged at least 10 years with the company.

Under the terms of the proposed settlement, ironed out following a May mediation session with Judge Edward A. Infante, the \$16.8 million settlement pool will fulfill the claims filed by the members of the putative class as well as up to \$4 million in attorneys' fees.

Merrill Lynch affiliate Merrill Lynch Pierce Fenner & Smith Inc. is also named as a defendant in the suits.

A representative for the defendants was not immediately available for comment Wednesday.

The plaintiffs are represented by William I. Edlund, Robert H. Bunzel and Howard I. Miller of Bartko Zankel Tarrant & Miller and James F. Clapp, Marita Murphy Lauinger and Zach P. Dostart of Dostart Clapp & Coveney LLP.

The defendants are represented by Joel Matthew Purles, Kathleen Marie McDowell, Terry Edward Sanchez and Victoria L. Boesch of Munger Tolles & Olson LLP.

The cases are Kerr v. Merrill Lynch & Co. Inc. et al., case number 4:11-cv-01654, and Martin et al v. Merrill Lynch Pierce Fenner & Smith Inc. et al., case number 4:10-cv-04020, in the U.S. District Court for the Northern District of California.