

# DAILY BUSINESS REVIEW

## Miami Judge Approves \$25M Merrill Lynch Settlement in 'Unicorn' Case

by Celia Ampel

South Florida attorneys secured a \$25 million settlement from Merrill Lynch, Pierce, Fenner & Smith for trustees and fiduciaries of retirement plans, a payment nearly three times the amount of the alleged losses.

The nearly 39,000-member class claimed Merrill Lynch did not fully repay them as part of a \$79 million agreement with the



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**Case:** Benjamin Fernandez et al v. Merrill Lynch, Pierce, Fenner & Smith  
**Case no.:** 1:15-cv-22782-MGC  
**Description:** Employee Retirement Income Security Act  
**Filing date:** July 27, 2015  
**Final approval of settlement date:** Dec. 18, 2017  
**Judge:** U.S. District Judge Marcia Cooke  
**Plaintiffs attorneys:** Lawrence Kellogg and Jason Kellogg, Levine Kellogg Lehman Schneider + Grossman, Miami; Frank Rodriguez and Paulino Nuñez, Rodriguez Tramont & Nuñez, Coral Gables  
**Defense attorneys:** Brian Orterlere, Philadelphia, Carol Field, Miami, David Monteiro, Dallas, Morgan, Lewis & Bockius  
**Settlement amount:** \$25 million

Financial Industry Regulatory Authority in 2014. The regulatory agreement recognized Merrill Lynch's failure to provide sales charge waivers for small business retirement accounts' mutual fund purchases.

Early in the case, class counsel persuaded a Miami federal judge that Merrill Lynch had a fiduciary duty to the plaintiffs under the Employee Retirement Income Security Act.

Because ERISA requires not only corrective repayment but also a disgorgement of profits, the plaintiffs alleged they were entitled to their alleged shortfall

of \$8.8 million plus about \$40 million in profits. Merrill Lynch argued any profits made from a failure to waive sales charges were closer to \$700,000.

The parties settled on \$16.2 million in disgorgement along with full repayment of the \$8.8 million.

U.S. District Judge Marcia Cooke of Miami gave final approval to the settlement on Dec. 18 after hearing from Vanderbilt University law professor Brian Fitzpatrick, who said he had never seen a class action agreement that recovered so much more than the class' damages.

“We characterized it for the court, and she got a chuckle out of this, as being sort of a unicorn settlement,” said Miami attorney Jason Kellogg of Levine Kellogg Lehman Schneider + Grossman, a lawyer for the plaintiffs’ class. “But it’s even more than that. [It’s] a fossil of a unicorn because we had to dig and dig and dig.”

The case was filed in July 2015 after named plaintiff Benjamin Fernandez, the CEO of the LAAD Retirement Plan and an accountant by trade, noticed a potential shortfall in what LAAD received from the 2014 FINRA agreement. LAAD was the only plan to sue or even complain about the issue, according to class counsel.

Kellogg’s father and colleague, Lawrence Kellogg, and Coral Gables attorneys Frank Rodriguez and Paulino Nuñez of Rodriguez Tramont & Nuñez spent thousands of hours trying to figure out what their clients and others like them might be owed.

They took 11 depositions and reviewed 125,000 documents and dozens of spreadsheets, according to the settlement. A data science expert also put in hundreds of hours.

“The more we learned, the more we became interested in learning more,” Lawrence Kellogg said. “We were helped very much by this data scientist, Alan Spies, who was able to take their data, do various testing on it, do hypothetical analyses of it, and I think ultimately our efforts

helped Merrill understand what happened.”

Even though Merrill Lynch was discovering the extent of the losses at the same time as the plaintiffs, Kellogg said, there were still some hard-fought issues.

The two plaintiffs firms, which have about 20 lawyers total, “faced formidable and sophisticated opposition from a 1,900-plus lawyer firm, Morgan, Lewis & Bockius, whose ERISA litigation department alone is comprised of more than 30 lawyers,” according to the motion for preliminary approval of the settlement. Morgan Lewis attorney Brian Orterlere of Philadelphia led the defense team, which also included Carol Field in Miami and David Monteiro in Dallas.

A Merrill Lynch representative declined to comment on the case.

At first, the defense contended ERISA’s fiduciary duty provision did not apply to Merrill Lynch. The New York-based company with \$2 trillion in assets argued that as a securities broker, it was regulated by FINRA and the U.S. Securities and Exchange Commission, not the U.S. Department of Labor, which enforces ERISA.

But Cooke ruled last year that because of the retirement plans involved in this case, Merrill Lynch had a fiduciary duty as defined by ERISA.

That ruling “will potentially expand the duties of and the liabilities of the securities industry

who sell to retirement plans,” Lawrence Kellogg said. “There aren’t a lot of cases that address this situation.”

Merrill Lynch also challenged the named plaintiffs’ standing to represent the entire class because they invested in just 14 mutual funds, rather than all of the 106 mutual funds that offered sales charge waivers. Class certification was also contested.

But after two March mediation sessions with Hunter Hughes of Hunter ADR in Atlanta and continued settlement talks over the phone, the defense agreed to pay \$25 million to investors in all 106 funds from January 2006 to July 2012.

Cooke approved \$8.75 million in attorney fees for class counsel, a \$150,000 fee for the named plaintiffs and about \$223,000 in costs. Fees and costs will come out of the disgorgement portion of the settlement, meaning everyone in the class will receive full repayment of losses plus a pro rata piece of the profit disgorgement.

“Initially, Merrill took a position that there was no problem with the remediation to our client LAAD,” Rodriguez said. “As we continued to dig through discovery and they responded to our requests, we were able to point out to them that they were just simply wrong.”

**Celia Ampel covers South Florida litigation. Contact her at [campel@alm.com](mailto:campel@alm.com) or on Twitter at @CeliaAmpel.**