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Ex-Merrill Advisors Change Tactics in Dispute Over Int'l Clients

By Danielle Verbrigghe January 23, 2017

Lawyers representing a group of former Merrill Lynch advisors have dropped a putative class action lawsuit against the wirehouse over changes it made in 2015 to its international client policy, saying they intend to proceed with claims through arbitration.

Merrill Lynch

- NUMBER OF ADVISORS

16069

- FIRM-WIDE ASSETS

\$2,089,683 Million

- FEE-BASED ADVISORY ASSETS

\$528,300 Million

- DISCRETIONARY ASSETS

\$206,000 Million

- KEY PLATFORMS

Merrill Lynch - Merrill Edge Advisory Account Program (MEAP), Merrill Lynch - Strategic Portfolio Advisor, Merrill One - Custom Managed Strategy, Merrill One - Defined Strategy, ...

- Asset data as of 12/20/2016

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The case, originally filed in April 2016 as a putative class action in a federal court in North Carolina, revolves around claims from former advisors identified as **G. Perez, J. Perez and M. Sosa**, who alleged that Merrill Lynch's 2015 policy change governing international client accounts had resulted in discrimination due to a disparate impact on protected groups of employees, and wrongful termination due to constructive discharge.

Attorneys representing the plaintiffs filed a notice of voluntary dismissal last week, after several rounds of motions from Merrill that sought to prevent class action certification, strike some of the claims and redirect the proceedings to **Financial Industry Regulatory Authority (FINRA)** arbitration. An attorney for the advisors says that they now plan to pursue individual claims through arbitration.

"Merrill Lynch was filing a lot of what we would call delay-type motions in the case and we thought we would get a quicker, better resolution in a friendly FINRA forum for our [financial advisors,]" says **Michael Taaffe**, an attorney with **Shumaker Loop and Kendrick**, who represents the plaintiffs. "So we decided to pull the class action and go directly to arbitration."

More than 100 advisors who were part of the class action are in the process of filing claims through FINRA arbitration, Taaffe says.

Merrill Lynch's lawyers had filed multiple motions asking the court to strike the class allegations, arguing that the claims wouldn't satisfy requirements for class certification. Merrill had also filed a motion to dismiss with prejudice the plaintiffs' disparate impact claim, arguing that the plaintiffs had failed to identify a particular employment practice that had caused a disparate impact to any protected class of individuals.

"We've denied the allegations in [the complaint] when it was originally filed as well as when it was amended several weeks ago," said a Merrill spokesman. "We had asked the court to dismiss it and had argued that it was not the appropriate forum for the allegations."

Taaffe says that his clients aren't planning to drop any of their claims, and are actually adding some additional claims from some individual advisors.

"We made an internal decision that the quickest, best solution for the most recovery for the [financial advisors] would be arbitration," Taaffe says.

The policy change that sparked the suit happened in the summer of 2015, when Merrill Lynch had changed its policy for how financial advisors can work with international clients. The change included reducing the number of serviceable countries to 29, from 80, and requiring existing accounts outside those countries to be closed, according to an amended complaint filed by the plaintiffs. In addition, Merrill doubled the minimum account threshold for international clients to \$5 million from \$2.5 million.

If the plaintiffs' attorneys think they will have to spend years fighting for class action status, or to have the complaint handled in federal court, they may have just decided it makes more sense to proceed individually through FINRA arbitration, says **Dana Gallup**, an attorney with **Gallup Auerbach**, who isn't involved in this lawsuit.

"The plaintiffs' attorneys probably just made a strategic decision not to spend a lot of resources just on that particular fight that they're not going to win," Gallup says. "At some point it might just make more sense to take your shot at arbitration."

Having the claims proceed through arbitration is a more favorable forum for Merrill Lynch, Gallup says.

"There's no doubt that it's more favorable for an employer to be in arbitration generally, because you don't have a jury trial and typically arbitrators are more likely to be conservative in terms of not only determining liability for the case, but if they do determine liability, not giving a very high damage award," Gallup says.

In cases where class actions complaints are dismissed and plaintiffs are left to pursue individual claims, it's not common to see every potential class member follow through with a claim, says **George Miller**, an attorney with **Shustak Reynolds & Partners** who is not involved in this case.

"I think [Merrill Lynch] will consider it a victory," Gallup says. "But the fight's not over."

For the plaintiffs, bringing individual claims through arbitration means a higher potential recovery, Gallup says.

"Pursuing individual complaints is going to maximize the potential recovery for the named parties," Miller says.

However, the outcomes for individual plaintiffs could vary, he says.

"The writing was probably on the wall if they had faced multiple rounds of motions," Miller says. "Knowing what the potential outcome would be on a motion, they decided to cut their losses and go pursue individual complaints."

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