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Merrill Settlement Likely to Spark Similar Suits

By Anna Oberthur

Daily Journal Staff Writer

A Merrill Lynch & Co. agreement to pay \$37 million to settle a class action brought on behalf of the firm's own stockbrokers is likely to have a domino effect throughout the securities industry.

Lawyers said the settlement could spark a flurry of overtime claims by financial-services professionals and prompt employers to take a hard look at their compensation systems in an effort to avoid similar lawsuits.

"There will be a substantially stepped-up analysis of stock brokers' overtime rights and, undoubtedly, stepped-up litigation as well," said Michael Rubin, a partner at Altshuler, Berzon, Nussbaum, Rubin & Demain in San Francisco.

The settlement, reached last week, was thought to be the first of its kind involving stockbrokers and overtime pay.

The suit, *Burns vs. Merrill Lynch, Pierce, Fenner & Smith Inc.* 04cv04135, was filed last year in San Francisco on behalf of the firm's California brokers, who argued that

under state and federal law, they should be paid overtime.

Merrill has treated its brokers, who earn most of their income from sales commission, as if they were exempt from those laws.

A settlement hearing has been set for Sept. 9 before U.S. District Judge Maxine M. Chesney.

In the settlement's wake, brokers will evaluate whether they have a right to overtime and presumably will pursue claims for statutory relief modeled on the Merrill Lynch litigation, according to Rubin, who has represented workers in similar cases.

"Historically, when big results are obtained, it does become an area of focus," said Steven Zieff, an employment attorney at Rudy, Exelrod & Zieff in San Francisco. "I do think people are going to take a serious look at the securities industry after a case like this."

Attorneys pointed to *Bell vs. Farmers Insurance Exchange*, 87 Cal.App.4th 805 (2001), in which an Alameda County jury awarded insurance adjusters seeking over-

time pay a \$90 million verdict.

At the time, employment experts predicted the ruling would open the door for adjusters to claim millions of dollars worth of overtime, and many suits did follow.

"It wouldn't surprise me if that same sort of thing happened here," Zieff said.

Federal overtime law exempts from overtime rules the commissioned sales staff of certain retail businesses, such as clothing stores, according to Mark Thierman, the Reno lawyer who filed the lawsuit against Merrill Lynch.

Thierman argued the stockbrokers were not engaged in a retail operation and therefore didn't fall within the exemption.

"Selling stock or buying stock is not a retail activity. You don't buy them to consume them, but to sell them," Thierman said.

The question in the case "really gets down to what's retail," said David Borgen, a partner at the Oakland class-action firm Goldstein, Demchak, Baller, Borgen &

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In the proposed settlement Merrill Lynch's lawyers at Munger, Tolles & Olsen signed last week, the company said that it would "clarify certain compensation policies concerning financial advisers in California."

Mark Herr, a Merrill Lynch spokesman, said earlier this week that the firm had already made those changes, but he declined to say what they were.

Thierman has similar suits pending in California against other big brokerage houses including Morgan Stanley, UBS and the Smith Barney unit of Citigroup.

Those on the other side of the table view the deal as fortunate because settlements do not set a precedent, according to Wendy Lazerson, a labor and employment partner at Bingham McCutchen in East Palo Alto.

"Different industries have tended to become the focal point of overtime claims

one by one, said Lazerson, wondering which would be the next target.

"My guess is there would be a lot of plaintiffs lawyers out there that file what I call copycat lawsuits," Lazerson said. "It will be interesting to see what happens with other brokerages [and] how other firms react."

Large settlements such as Merrill Lynch's encourage in-house lawyers and human-resources professionals to examine their practices, Borgen said.

"Employers are going to have to look at compensation systems and job descriptions carefully," he said.

The settlement's ripples are likely to be widespread.

"There are a lot of companies out there in this sector," said Borgen. "This could potentially affect a lot of people, particularly in a financial center like San Francisco."

The *New York Times News Service* contributed to this report.

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