

Are 401(K) Fees Too High? The High Court May Have An Opinion

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Jerry Schlichter is a 401(k) hunter. He's a litigator who sues retirement plan sponsors for charging excessive fees to participants -- and he goes after big game.

Schlichter has brought lawsuits against 14 large corporations since 2006 aimed at forcing them to change practices he contends cost retirement savers dearly. He has settled six of the cases, recovering \$125 million for participants (before legal fees) and getting important agreements from plan sponsors to cut plan fees.

Now, one of Schlichter's pending cases may be taken up by the U.S. Supreme Court. If that happens, it would be the first time the high court has considered a case involving high 401(k) fees. A win there could force plan sponsors to take greater fiduciary responsibility for their plans.

The cost of workplace retirement investing has gotten more attention in recent years, especially since the rollout in 2012 of federal regulations requiring that fees be spelled out more clearly in quarterly statements sent to participants. Fees and expenses are one of the most important determinants of success in retirement saving. The U.S. Department of Labor calculates that a 1-percentage-point difference in costs for a 35-year-old worker could reduce a retiree's account balance by 28 percent at retirement age.

The quarterly statements are a good start in that they provide partial transparency on the cost of plans to workers. The statements provide the expense ratios for the mutual funds you own, and total expenses. But the statements stop short of shining light on the practices targeted by Schlichter.

The case he hopes the high court will agree to take up charges that California-based utility Edison International (*Tibble v. Edison International*) offered mutual funds carrying retail share price fees, when the same funds could have been had at lower institutional prices. The higher expenses paid by plan participants were shared by the mutual funds and the plan's record keeper, the lawsuit charges. In turn, Edison allegedly received a reduction from the record keeper in the fees it pays for plan administration.

"Sometimes we see employers who are asleep at the switch in terms of monitoring the costs that their workers are paying," says Schlichter, managing partner of St. Louis-based Schlichter, Bogard & Denton. "But sometimes they are getting a benefit in reduced fees from the service providers that benefit the company, not the workers."

Schlichter says this occurred in another case he is pursuing against ABB Inc., the power and automation technologies company (Tussey v. ABB, Inc.). That case, which is bouncing around on appeals, alleges that excessive fees charged to plan participants were, in effect, used to subsidize the cost of non-retirement plan services provided to the company by record keeper Fidelity Investments, including payroll processing and record keeping for the company's health plan.

A Fidelity spokesman noted that an appeals court recently found that Fidelity didn't breach its fiduciary duty, but he declined to comment on ABB's recent decision to replace Fidelity as record keeper. ABB didn't respond to a request for comment.

The Edison class action was dismissed in March by the 9th U.S. Circuit Court of Appeals, and the plaintiffs have asked the Supreme Court to take up the case. The court has asked the U.S. Solicitor General and the Labor Department to weigh in with a brief, which some observers think suggests the case will get a hearing. One core issue Schlichter is pressing: how long a plan sponsor has fiduciary responsibility for an investment choice once it has been placed in the plan's menu. Another is whether a plan sponsor can make its own interpretation of fiduciary responsibility to participants.

Large 401(k) plans tend to be among the best run and least expensive for participants. Yet Schlichter already has lots of trophies on his wall: settlements with Bechtel, Caterpillar, Cigna, General Dynamics, International Paper and Kraft Foods. The core allegations in those cases involved imprudent investment options, excessive fees and misleading information about fees.

No matter how the pending cases conclude, they underscore a key fact that workers often don't understand: Plan participants bear most of the cost of their 401(k). "Your plan isn't free, and 99 percent of the time, the employer isn't paying the cost - you are," says Thom Clark, an expert in employee benefits law and partner at the Lowenbaum Partnership, a St. Louis law firm.

Schlichter says the recently introduced quarterly disclosure forms are helping workers understand fees, but he urges people to pay attention to the fees they are charged by workplace plans and compare them with published expense ratios for the same funds offered to the public.

"If it's more than 1 percent, they ought to be asking why that is - especially if they work for a very large company," he says. "Warren Buffett doesn't pay retail prices for stocks, and neither should the employee of a billion-dollar 401(k) plan."

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