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A Lone Ranger of the 401(k)'s

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Fair Game

By GRETCHEN MORGENSON

The arithmetic could not be simpler. The more fees you pay in your 401(k) plan, the less cash you'll have for retirement.

Still, fees hidden from view can make it hard for 401(k) holders to find out what they are paying. Plan sponsors, usually an employer, have a fiduciary duty to safeguard workers' retirement accounts. But sponsors don't always push providers like mutual funds to reduce fees or cut costs.

That may be about to change. On March 19, the Eighth Circuit Court of Appeals in St. Louis affirmed a lower-court ruling in one of the first 401(k) fee cases to go to trial. In that case, the court found that ABB Inc., a power and automation technology company, failed to monitor its plan's internal costs and paid excessive fees by not negotiating for rebates from investment companies whose funds were offered in the plan. This, the court said, violated ABB's fiduciary duties to the 401(k) participants.

The lower court awarded \$13.4 million to the ABB plan participants in that part of the case.

The significance of this ruling extends far beyond ABB. It sends a powerful message to plan sponsors everywhere: If you think you've done your fiduciary duty simply by offering low-cost funds as investment options, think again.

The suit on behalf of ABB's plan participants was filed by Jerome J. Schlichter, a partner at Schlichter Bogard & Denton in St. Louis. Since he began suing companies over fiduciary failures eight years ago, he has settled six 401(k)

cases, including ones against General Dynamics, International Paper and Caterpillar. The settlements have generated \$125 million in recoveries to 300,000 participants, minus legal fees, and secured major reductions in plan costs for the future. Five more cases filed by Mr. Schlichter are pending; one was dismissed.

The good news for all 401(k) holders is that Mr. Schlichter's cases are gaining traction in the courts. Last Monday, the Supreme Court signaled its interest in a case he filed against Edison International, a California utility. Edison had placed plan participants in high-cost retail mutual funds when cheaper institutional choices were available, and the high court asked the United States solicitor general to state the government's views on the issues in the case.

"As these cases have progressed and the settlements occurred, more judges are understanding the practices and the harm to retirees," Mr. Schlichter said. "A body of law is developing, setting out fiduciary practices and standards."

Each case differs, but most involve high and often hidden fees levied on 401(k) participants. An example is the case involving the employee retirement plan of Lockheed Martin, the military contractor. Lockheed's plan is one of the nation's largest, with 100,000 participants and \$22 billion in assets as of December 2012, the most recent public figures available. State Street Bank and Trust acts as investment manager and trustee to the plan.

For years, Mr. Schlichter said, Lockheed officials allowed State Street to receive large and hidden fees from plan investments in addition to an annual record-keeping fee of \$4 million to \$8 million. Plan participants, he contends, lost hundreds of millions of dollars as a result.

State Street also collected fees for managing an employee investment option containing only Lockheed shares and cash. Single-stock portfolios like this typically don't require much management. But State Street received fees totaling 0.02 percent of the \$6 billion-plus stock fund each year, documents in the lawsuit show. And the cash in the Lockheed fund went into a State Street investment fund, which generated more fees for the bank.

State Street's dual roles, Mr. Schlichter contends, allowed it to dictate how much cash would be held and to pay itself to manage that cash.

The Lockheed case, filed in 2006, may finally head to trial this year. Gordon Johndroe, a spokesman for the company, said in a statement: "Lockheed Martin

believes all allegations made by plaintiffs' counsel are false and remains committed to defending against this lawsuit at all stages of the litigation."

A spokeswoman for State Street issued a statement saying that the firm had not been sued and that "we strongly deny any allegations that we received unreasonable fees for services that we provided to the plans." The statement continued: "We are committed to making full disclosures to our clients regarding these services and the terms on which they are provided."

Cases can be costly to litigate. ABB, for example, has spent \$42 million on lawyers' fees defending the matter, court records show. That may be a reason that Mr. Schlichter's firm is virtually alone in bringing these 401(k) cases. Several federal judges have likened him to a private attorney general. His firm, one judge said, has risked "breathtaking amounts of time and money while overcoming many obstacles for the benefit of employees and retirees."

Cost savings from these settlements can be significant. In the Caterpillar case, an expert witness estimated that the plan's changes could generate \$56 million in savings over five years.

Battles against 401(k) plan sponsors that are somnambulant or worse are bringing a much-needed spotlight to questionable practices in these plans. But one small law firm can do only so much.

I asked the Labor Department about its actions against plan sponsors on fee-related matters. A spokesman, Michael Trupo, cited two: one against Sunkist and another against the National Rural Electric Cooperative Association.

Together, those matters generated recoveries of \$28.9 million to plan participants. Mr. Trupo added that the department's fee disclosure rules, put in place in 2012, have driven down costs for participants.

With thousands of companies offering plans covering millions of current and future retirees, let's hope the Labor Department steps it up.