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Stern Advice-How 401(k) lawsuits are bolstering your retirement plan

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By Linda Stern

NEW YORK, Nov 5 (Reuters) - Jerome Schlichter, the St. Louis attorney credited with literally making a federal case out of 401(k) fees, just filed his 14th class action against a company he claims mismanaged its employees' retirement savings.

The lawsuit, filed Tuesday in U.S. District Court in Massachusetts against Massachusetts Mutual Life Insurance Co, states that the firm "larded" its 401(k) program with overpriced and inferior investments and engaged in "blatant self-dealing" by making money selling its own services to the plan. MassMutual, headquartered in Springfield, Massachusetts, could not be reached immediately for comment.

Coming a year after new Labor Department rules requiring employers to clearly disclose 401(k) fees to participants, the case filed by the firm of Schlichter, Bogard and Denton is a sign that retirement plan litigation isn't going away. It's also a sign that employee-funded defined-contribution retirement plans still are imperfect, despite improvements and increasing attention from regulators and activists like Schlichter.

Mike Alfred, co-founder and chief executive officer of Brightscope, a firm that collects and publishes data about company retirement plans, says 401(k) fees have been coming down for years, thanks to pressure from Schlichter.
"His impact has been humongous," Alfred said.

From 2009 to 2011, for example, fees have come down roughly 0.3 percentage points in small, medium and large plans, he said. They've come down further than that since 2011, but final data isn't in yet.

Still, not every employer has cut plan fees, and there are issues beyond costs that remain of concern to 401(k) participants and their advocates.
The costs and practices of 401(k) plans are important consumer issues because the plans increasingly supplant traditional employer-provided pensions. Workers use them to save their own money for retirement, and employers who provide plans have a fiduciary responsibility to offer good investment choices to their workers.

"We continue to see excessive fees being paid, and we also continue to see self-dealing," says Schlichter, who since filing his first related case in 2006 has been awarded some $175 million in 401(k) fee litigation against seven companies including Caterpillar Inc, General Dynamics Corp and Cigna Corp. "We also see poor selection of funds in the plan from a performance standpoint."

So watch that space - and watch your 401(k) plan for signs of too many costs, too few choices or the feeling that you're being pushed one way or another when you make decisions.

For 401(k) participants, the news does keep getting better. Here's what the next wave of litigation should bring.

- Fees are likely to keep falling. If you work for a large company, you should see average annual management fees for the funds in your plan already below 0.5 percent - and they should be headed lower. Smaller companies have to pay more for plan management and the funds in their plans, so average fees are higher, but they have fallen below 1 percent and should be closer to 0.9 percent now, according to Brightscope data.

Remember that fees matter - an additional 1 percent fee imposed over 35 years of investing would cut a 401(k) account by 28 percent because of compounding, the Labor Department has estimated.

If you can't find low-fee funds within your plan, talk to your boss or the person at your company charged with overseeing the plan.

- Advice may improve. The Labor Department has stalled on rules that would require retirement plan advisers to be fiduciaries with the responsibility of putting the interests of plan participants above their own. But plans already do have fiduciaries - the employers who offer the plans to their workers have legal responsibilities to those workers, and lawsuits like the ones Schlichter files are making employers more conscious of those they hire to choose investments for the plan and to advise employees in the plans, says Alfred.

"The next issue may be the role of advisers in the small plan market," says Sean Hanna, editor of The 401(k) Wire, a trade publication that regularly puts Schlichter on its list of biggest 401(k) influencers.

Those advisers choose the funds that are offered inside the plans, but they also may be the ones presenting employees with their options when it's time to retire or change jobs. That's an issue that could be fraught with conflict as workers try to decide whether to keep their money in their 401(k) or move it to an outside firm like the one sending the advisers.

- Investment choices will change. They already have, as 401(k) plans now regularly offer low-cost index funds to participants. But company sponsors (the employers) will be under increasing pressure to get cheaper funds in their plans because of the 401(k) fee litigation, says Alfred. That may result in fewer actively managed mutual funds being on the menu and more alternative products like exchange traded funds showing up in retirement plans.

- You may find yourself really happy with your plan. The biggest and best plans already offer low fees and matching employer contributions to employees who might otherwise be lost trying to plan and save for their retirements - and the matching contributions are getting higher. Says Ed Ferrigno, vice president of the Plan Sponsor Council of America, which is made up of employers: "What really gets lost is that for probably half of the plan participants out there, they are getting better fees than they can get anywhere else. And that's before the match, so it's a great deal."