

## An Eye on 401(k) Fees

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Jerry Schlichter, founding and managing partner of Schlichter, Bogard & Denton based in St. Louis, Missouri, is making national headlines as he tackles the issues of excessive fees, conflicts of interest and self-dealing in 401(k) plans. Repeatedly elected and named in the list of “Best Lawyers in America” for his work in Personal Injury Litigation, Mr. Schlichter joined the ranks of the “50 Most Influential People in the 401k Industry” (by 401kWire.com) in 2007 for his work on nationwide class action suits addressing these issues.<sup>1</sup> Schlichter is considered a pioneer for fighting on behalf of the employees and retirees of large 401k plans, alleging that excessive fees and conflicts of interest were deteriorating their retirement savings.

Ensuring reasonableness and transparency of fees in 401(k) plans has been a hot topic in the industry for the past few years. However, Jerry Schlichter was the first attorney in the U.S. to challenge 401(k) fee reasonability directly at the source. According to the Department of Labor (DOL), a 1% difference in Plan fees results in a 28% difference in a participant’s retirement savings over a 30-year work life.<sup>2</sup> Schlichter and his firm spent nearly two years investigating industry practices which led them to believe that many employer-sponsored 401(k) plans are plagued with excessive fees and abuses by plan providers. As the lead attorney on the first and only full trial of an excessive 401(k) fee case in the U.S., he obtained a verdict of more than \$50 million on behalf of the participants of the ABB 401(k) plan. Since filing his first case in 2006, Schlichter and his firm have represented employees of companies such as Cigna, Bechtel, General Dynamics, International Paper Company and Caterpillar, and won settlements totaling more than \$125 million on behalf of plan participants.<sup>1</sup> However, it’s not just about the money. Schlichter has also brought about significant changes pertaining to fees in these plans as well as to fees and practices in the 401(k) industry as a whole in order to benefit current and future participants. “That’s always been the goal, to make sure fees are reasonable,” he stated.<sup>3</sup>

The fight is far from over. While Schlichter is taking on fees case by case and greatly impacting the way employers handle fees in their plans, these issues continue to pollute the industry. “We continue to see excessive fees being paid, and we...continue to see self-dealing. We also see poor selection of funds in the plan from a performance standpoint,” explains Mr. Schlichter.<sup>4</sup>

In a July 12, 2013 interview with radio personality Charlie Brennan on KMOX, Jerry Schlichter discussed red flags regarding plan fees along with questions to ask employers.<sup>5</sup> Below is a summary of the discussion.

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<sup>1</sup> Schlichter, Bogard & Denton - Jerry Schlichter. <http://www.uselaws.com/attorney/17>

<sup>2</sup> The Charlie Brennan Show - 12 July 2013. KMOX News Radio 1120.

<http://stlouis.cbslocal.com/2013/07/12/charlie-brennan-friday-july-12th-jerry-schlichter-on-401k-fees-francis-howell-public-hearing-3-brits-kayaking-the-mississippi-r/>

<sup>3</sup> Edwards, Greg. Schlichter case in line for U.S. Supreme Court. St. Louis Business Journal.

<http://www.bizjournals.com/stlouis/print-edition/2014/04/11/schlichter-case-in-line-for-u-s-supreme-court.html?page=all>

<sup>4</sup> Stern, Linda. Stern Advice - How 401(k) lawsuits are bolstering your retirement plan. Reuters.

<http://www.reuters.com/article/2013/11/05/us-column-stern-advice-idUSBRE9A40S320131105>

<sup>5</sup> The Charlie Brennan Show - 12 July 2013. KMOX News Radio 1120.

<http://stlouis.cbslocal.com/2013/07/12/charlie-brennan-friday-july-12th-jerry-schlichter-on-401k-fees-francis-howell-public-hearing-3-brits-kayaking-the-mississippi-r/>

Red Flag: When looking at your statement, review the schedule of fees. Remember, you have a right under the law to inquire about fees orally or in writing.

What to Ask: What are the fees in my Plan? Why are these fees at the level they are at? What added services or added value am I receiving by paying this fee compared to a lower fee?

What to Ask: Are you dealing with any of the service providers on the 401(k) Plan (such as banks, record keepers, etc.) in your own account for the company?

Red Flag: Mr. Schlichter gives the following example - If a bank were to allow the company to take out a loan at a more favorable interest rate in return for getting the company's 401(k) business, this would be in violation of the law. In the case of *Tussey v. ABB, Inc.*, Fidelity was running payroll processing, health and welfare plan processing and the defined benefit plan for the company all at a profit loss but making a 51% profit off of the employees through their 401(k) Plan.

What to Ask: How are the administrative fees being paid in my Plan? Are the administrative fees based on the asset amount or charged per participant? If the fees are charged based on asset amounts, why?

Red Flag: The amount of record-keeping work required is relatively the same for each participant, it does not change based on asset size. Mr. Schlichter gives the example of a participant with a \$5,000 balance and one with a \$50,000 balance. If the administrative fees were charged per participant, these two participants would be paying the same amount. If the administrative fees were asset based, the participant with \$50,000 would pay 10 times more in administrative fees than the participant with \$5,000. Since the amount of work being performed for each participant is the same, the per-participant approach is most reasonable.

What to Ask: Have you shopped around for alternatives with more reasonable fees?

Red Flags: An answer of "no" to this question is a huge red flag. Plan Sponsors have a fiduciary duty under the law to ensure that all fees that affect the plan are reasonable and periodically check for better alternatives. Remember - a 1% difference in fees equates to a 28% difference in retirement savings over a 30 year period, according to the DOL. This makes "shopping around" for lower fees a crucial task.

The bottom line is fees dilute retirement savings. The less money paid out in fees, the more money left for retirement. Participants have a right under the law to know what fees are being paid out of their Plan and Plan Sponsors have a duty to ensure that these fees are reasonable. Mr. Schlichter is causing a paradigm shift in the industry as he progresses through these cases, challenging the norms and building a new precedent for future cases of this type. In an interview with the New York Times, he stated, "As these cases have progressed and the settlements occurred, more judges are understanding the practices and the harm to retirees. A body of law is developing, setting out fiduciary practices and standards."<sup>6</sup>

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<sup>6</sup> Morgenson, Gretchen. A Lone Ranger of the 401(k)'s. The New York Times.  
[http://www.nytimes.com/2014/03/30/business/a-lone-ranger-of-the-401-k-s.html?\\_r=0](http://www.nytimes.com/2014/03/30/business/a-lone-ranger-of-the-401-k-s.html?_r=0)