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## A Fool for a Client?

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By Kerry Pechter      Thu, Nov 21, 2013

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*MassMutual is the latest target of the St. Louis plaintiff's attorney Jerry Schlichter, who has won eight-figure judgments and settlements in a series of "excessive fee" cases against high-profile sponsors and providers of jumbo ERISA retirement plans.*

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Jerry Schlichter, the St. Louis plaintiff's attorney whose multi-million-dollar federal class action lawsuits have revealed the vulnerability of 401(k) plan sponsors and providers to "excessive fee" complaints, has struck again.

In this case, the plan sponsor *and* the full-service plan provider is MassMutual.

The [complaint](#) was filed in U.S. District Court in Boston on November 5. The plaintiffs are participants in the MassMutual Thrift Plan, a 14,800-member, \$1.7 billion group annuity. The defendants are members of the plan's Investment Fiduciary Committee and Plan Administrative Committee, as well as Mass Mutual CEO Roger Crandall.

Excessive fees are at the heart of the complaint, as they have been in Schlichter suits against Fidelity, Ameriprise and CIGNA. The suit charges, in essence, that MassMutual enriched itself at the expense of the participants by hiring its own Retirement Services division to steering their savings mainly into MassMutual funds (and a guaranteed-return fund in its general account) when the company should have, as a plan sponsor and a fiduciary, made less expensive, non-proprietary options available.

If you love irony, this almost seems like a case of people suing themselves for moving too much money from one pants pocket to another. On the other hand, it's hardly a laughing matter.

The defendant in this case, as in a recent Schlichter case against Fidelity, is both the plan provider and the sponsor. Depending on how you choose to look at it, MassMutual's plan either chose to eat its own cooking or, alternately, it compelled its employee-participants to shop at the company store.

What was business-as-usual yesterday is apparently actionable today. (The fact that the MassMutual Thrift Plan is a "group annuity" isn't necessarily significant, we are told. According to the complaint, the return on the plan's fixed interest account assets is set for six months at a time; otherwise, the plan has no insurance features. The lawsuit specifically questions an 85-basis point risk charge on assets in the fixed interest account.)

ERISA aficionados are tracking the story. On his [blog](#), Tom Clark, an ERISA consultant (and former Schlichter law firm attorney) didn't take sides; he called the suit a wake-up call for customers of MassMutual Retirement Services:

"Plans that use MassMutual as a provider or advisors who recommend MassMutual services and products... should use this as an opportunity to review your plan's relationship with MassMutual.

This is only a complaint and no one can predict with any certainty how it will turn out. But that being said, if any of the specific allegations found in the complaint could apply to your plan, you have now been put on notice to investigate.

This can include asking for more information, re-reviewing your 408(b)(2) disclosures and agreements, or benchmarking your plan's fees. These tasks should obviously focus on analyzing any investments in your plan and ensuring that any fees paid are reasonable and necessary."

The complaint accuses MassMutual of layering extra fees on top of the fees charged by fund subadvisors, that its funds weren't as inexpensive as Vanguard's, and that MassMutual was charging its own participants more than MassMutual charged outside institutional clients.

Vanguard appears in the role of curve-wrecker in this lawsuit. The plaintiffs compare the costs of MassMutual's target date fund offerings unfavorably to similar Vanguard products, with the former costing up to 85 basis points but the latter costing as little as 17 bps.

(But that comparison may be a case of apples-and-oranges. According to Morningstar, MassMutual's TDFs are either partly or entirely actively managed, while Vanguard's are mainly or entirely funds-of-index-funds. The federal judge in this case may end up deciding whether the added expense for active management is "reasonable" in the context of an ERISA retirement plan.

[BrightScope gives the MassMutual Thrift Plan a rating of 74 out of 100; that's above the peer group average but well below best-in-class. Morningstar notes that MassMutual's retail TDFs are on the pricey side.]

If nothing else, this case suggests that, like the person who serves as his own lawyer and has a fool for a client, a full-service plan provider might think twice before hiring itself to be the provider for its own corporate plan. Even when intentions are impeccable, questions about self-dealing can't help but arise. As for intentions, the plaintiffs go for the throat by alleging that the MassMutual CEO directly profited, via bonuses linked to MassMutual's bottom line, from the economics of the plan.

The stickiest wicket in the complaint may be the charge that participants were paying for plan expenses even though the "Plan document" states "that all expenses of establishing and administering the plan including expenses with respect to the group annuity contract and fixed income agreement shall be borne by the employer as a further contribution to the plan." If true, this alludes to a broader question that the 401(k) system as a whole has yet to answer: What to tell the millions of participants who believe their plans are "free"?