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- √ does NOT accept and fees from investment advisors
- √ does NOT offer any investment products
- √ does NOT have any hidden fees
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## Employees name investment adviser in 401(k) suit

A wave of litigation in small-plan market could follow, experts say

By Mark Bruno  
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New targets have surfaced for lawsuits over 401(k) fees: small retirement plans, their investment advisers and service providers.

A group of fewer than 30 employees at a small company in Kansas has filed a lawsuit against the investment adviser, record keeper and custodian for its \$2 million 401(k) plan, alleging that the trio of plan providers caused participants to pay "secret" and "excessive" fees.

The claim itself is a familiar one, of course, as more than a dozen Fortune 500 companies that boast billions in their 401(k) plans have been hit with similar suits in the past four years.

However, experts said, this latest suit represents the first time that participants have taken aim at such a small plan — and an investment adviser.

They also suggested that this could just be the beginning of a potential wave of litigation in the small-plan market, one that could put a bull's-eye on investment advisers and service providers that typically supply most of these plans.

“Despite all the attention that the fee issue has received, too many participants are still not being made aware of what they're actually paying for,” said John Turner, director of the Washington-based Pension Policy Center.

“And until this problem is solved, it's likely that a growing number of firms that provide services to 401(k) plans will become logical targets for participants,” said Mr. Turner, a former head of the pension research office at the Department of Labor.

In the latest litigation, participants in the plan at Wichita-based Orthopedic and Sports Medicine at Cypress LLC filed a complaint against its three key 401(k) plan providers: SJP Advisors LLC and VLP Corporate Services LLC, both of Dallas, and The Charles Schwab Corp. of San Francisco, the custodian for the plan.

The group of participants alleges that the trio engaged in undisclosed — and unauthorized — revenue-sharing practices that inflated the fees that workers at the company paid to have their assets held in the 401(k) plan. In the complaint, the group stated that Schwab “would secretly pay a share of its revenue received from the mutual funds that were held by the plan to VLP,” and also facilitated additional undisclosed payments to SJP.

Mike Cianfrocca, a spokesman for Schwab, declined to comment on the suit, citing company policy not to discuss pending litigation.

Christine Mora, an attorney for VLP and SJP — which are affiliated firms — said she hasn't yet seen the suit and couldn't immediately offer any comment.

Revenue sharing, a practice in which mutual fund fees participants pay are often used to offset a plan's record-keeping and administrative costs, is fairly common in 401(k)s of all sizes.

“But at small plans, they have fewer resources to monitor or understand the practice. Many small plans have no idea what they're actually paying, let alone if they're paying too much,” said Greg Ash, head of the Employee Retirement Income Security Act litigation group at Spencer Fane Britt & Browne LLP in Jefferson City, Mo.

“Now that more people are becoming aware of it, however, you can expect participants at smaller plans to try and recover some of the undisclosed fees they've probably been paying for years,” he said. “And even though the small businesses that sponsor the 401(k)s may not have deep pockets, their service providers probably do.”

The law doesn't require service providers to disclose information on revenue sharing — which has been a central point of the dozens of suits filed against large companies, such as Deere & Co. and Wal-Mart Stores Inc.

Members of Congress have been angling for months to formally mandate increased fee disclosures in 401(k) plans, with a proposal going through the House of Representatives.

“But the door is still wide open,” said Phyllis Klein, senior director at Raleigh, N.C.-based Captrust Financial Advisors, which advises 401(k) plans with typically \$20 million to \$500 million in assets.

She and other advisers who work with small plans said that many of their clients — aware of just how susceptible they have become to fee litigation — have been taking matters into their own hands and are directly demanding more disclosures from service providers.



It's incumbent upon these companies to at least ask for more disclosures at this point,” said Tom Ruggie, president of Ruggie Wealth Management in Tavares, Fla., an investment adviser to the small-401(k) market. “The service providers can say no, of course, but it's a plan sponsors' duty to seek out more information given all that's going on around fees at the moment.”

Smaller plans are also asking their advisers to conduct fee reviews more regularly now in a bid both to lower the expenses in their plans and protect themselves if they are hit with a suit

**Tom Ruggie**

“That could lead many small companies to discover that the fees in their own plans are actually quite high,” said Jason Roberts, partner in the employee benefits and securities practice at Los Angeles-based Reish & Reicher. “And rather than being hit with a suit, they may then choose to go on the offensive and actually file one against their service providers.”

Some of the large-company fee suits are expected to go to trial this year, and observers noted that rulings in these cases will provide some guidance on how individual courts view the 401(k) fee issue.

“But until we have some actual definition from Congress and the Labor Department, you can expect to see these types of suits continue at all levels,” said Brian Graff, executive director and chief executive of the American Society of Pension Professionals and Actuaries in Arlington, Va.