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# 401(k) lawsuits being brought more aggressively against retirement plan advisers

Chances of getting sued are more common now than five years ago, says one lawyer



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By **Greg Iacurci**

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Retirement plan advisers are increasingly being drawn into 401(k) lawsuits, as litigation creeps down market and plaintiffs' lawyers test out new legal theories to ensnare advisers, according to a panel of litigation experts speaking Monday afternoon.

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"I think the chances of [getting sued] are more common now than they were five years ago," said Thomas Clark Jr., partner at The Wagner Law Group. "The theories are more aggressively being brought against advisers."

Lawsuits against retirement-plan sponsors began appearing en masse in 2006, when law firm Schlichter Bogard & Denton sued several large corporations with multibillion-dollar 401(k) plans. Most litigation up to this point has targeted only the largest plans as well as service providers such as record keepers, often for breach of fiduciary duty due to excessive 401(k) fees.

But litigation is heading down market to smaller plans – the market in which most 401(k) advisers operate.

"We've started to see cases going all the way down to \$100 million, \$90million [plans]," said Mr. Clark, who spoke at the annual National Association of Plan Advisors conference in Nashville. Lawsuits have even been brought against employers with plans as small as \$9 million, he said.

Michael Wolf, a litigator at Schlichter Bogard & Denton, said it's "not too far away" from plan sponsors suing their advisers to bring them into a lawsuit as a responsible party.

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"What we're seeing in our litigation is plan sponsors trying to fob off responsibility for things that went wrong on the plan adviser," Mr. Wolf said.

Mr. Clark, who tracks several ongoing lawsuits, said he's compiled a list of five theories attorneys have recently used to bring legal claims against advisers. One theory, for example, tests whether a fiduciary 401(k) adviser can be held liable as a "party in interest," or basically anyone who provides services to a plan, Mr. Clark explained.

"There are more and more theories against advisers as fiduciaries," said Mr. Clark, a former attorney at Schlichter Bogard & Denton.

"It seems to be any which way to Sunday you might get the golden ticket," he added.

The outlook is somewhat positive for advisers, though. Both Mr. Clark and Mr. Wolf said it's likely lawsuits targeting small retirement plans won't persist. The time and expense of litigating against a small plan — from which any sort of damage recovery (and profit for plaintiffs' attorneys) would be relatively small — is a high hurdle for litigators.

"It's a game of chicken on some of these lower-asset plans," Mr. Clark said. "The plaintiffs' lawyers will jump off the road first."

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