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## Colorado's 'Strong Arm' Muscling Into 401(k)-Fee Litigation

By Beagan Wilcox Volz January 25, 2017

A Colorado personal injury attorney who refers to himself as “the strong arm” has been running ads on local television stations in the state looking for workers who are unhappy with their 401(k)s, an asset management professional based in Denver confirms.

Franklin Azar, who founded **Franklin D. Azar & Associates** in 1987, is known for representing people who have been injured in car accidents — and for his ubiquitous TV ads seeking potential plaintiffs. Azar, who has offices in Aurora, Colorado Springs, Pueblo and Trinidad, Colo., also trumpets his role as the personal injury partner of the Denver Broncos.

In addition to TV ads seeking potential 401(k)-fee plaintiffs, the law firm has a page on its website dedicated to “401k retirement class action,” which states, “Many employees have a retirement plan through their employer. Depending on how your plan and investments were managed you may be entitled to money compensation. If you did have a plan through your employer, please contact our office.” The site prompts visitors for information and promises to help determine whether they might have a case within 10 minutes.

An assistant for Azar did not respond to requests for comment.

While Azar may be the most unusual example of a plaintiff’s law firm attempting to break into 401(k)-fee litigation, he is far from the only one. Big settlements in this area in recent years may have caught the attention of law firms without any previous Employee Retirement Income Security Act experience.

For example, Boeing in November 2015 agreed to pay \$57 million to resolve plaintiffs’ claims that it selected and retained mutual funds with excessive management fees, among other allegations. Earlier that year, Lockheed Martin settled breach-of-fiduciary-duty claims for a record \$62 million.

“I do think that the lure of large settlements has enticed new lawyers to enter the space and to look for cases to bring,” writes Jamie Fleckner, partner at Goodwin and chair of its Erisa litigation practice, in an e-mail response to questions. “These are not cases generated by aggrieved 401(k) participants, but by the result of lawyer advertising.”

A number of law firms have jumped into the Erisa space in the past few years.

Los Angeles–based **Solouki Savoy**, which represents plaintiffs in employment cases, filed what appears to be its first 401(k)-fee suit — against **Starwood Hotels & Resorts Worldwide** — in December.

Minneapolis-based law firm **Nichols Kaster** has filed at least seven suits since the beginning of 2015 involving 401(k) plans sponsored by financial services firms. Nichols Kaster had not previously filed any 401(k)-fee suits, dating back to at least 2008, as previously reported.

Plaintiff's lawyers like those at Nichols Kaster who want to target financial services firms in Colorado would not have to look far. Industry firms with operations or headquarters there include Empower Retirement, Fidelity, Janus, OppenheimerFunds, **Schwab**, TIAA and T. Rowe Price.

Chestnut Hill, Mass.-based Sokolove Law, which also focuses on personal injury cases, has also reportedly been running television ads in Colorado, looking for possible 401(k)-fee plaintiffs. The law firm did not respond to a request for comment.

"It's not surprising at all for me that other law firms are trying to get into the action," says Marcia Wagner, managing director of the Wagner Law Group. "That's what law firms do. You can see something analogous with mesothelioma and asbestos and tobacco.... What was Jerry Schlichter's background before he got into Erisa?"

In 2006, St. Louis-based **Schlichter Bogard & Denton** began bringing a string of 401(k)-fee cases that have resulted in at least 10 settlements totaling more than \$300 million. Prior to those cases, Schlichter seems to have focused on personal injury claims involving railroad workers, firefighters and others, according to his bio on the law firm's website.

But Wagner, who says she has been an Erisa lawyer for three decades, cautions that there is a "steep learning curve" for those entering the field, and it requires a significant commitment to reap any benefits.

The courts themselves also may have encouraged new entrants simply by ruling that cases can proceed.

The lawsuits typically claim that a plan sponsor breached its fiduciary duty by failing to select the cheapest possible investments, although courts have "repeatedly recognized that Erisa does not require such a race to the bottom," notes Goodwin's Fleckner.

"Until courts more regularly reject these manufactured claims, however, we can expect more suits to be filed and more lawyers who are not experienced in this area to venture into the space."

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