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## Federal judge denies MassMutual's motion to dismiss ERISA suit

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By Editorial Staff    Thu, May 29, 2014

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*U.S. District Judge Patti B. Saris ruled on May 20 that MassMutual became a "functional fiduciary" when it decided to collect a 1% revenue-sharing fee from third-party mutual fund companies that were offered as investment options under the plan.*

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MassMutual was a "functional fiduciary" under ERISA sections 3(21)(i) and (iii) when it "determined its own level of compensation" as a service provider to a Kansas City-based flooring maintenance firm's 401(k) plan, a federal district judge in Massachusetts has decided.

Judge Patti B. Saris [ruled](#) on May 20 in the long-running case of Golden Star Inc. versus MassMutual that the insurer became a fiduciary when it decided to collect a 1% revenue-sharing fee from third-party mutual fund companies that were offered as investment options under the plan.

"The case law is clear that a service provider's retention of discretion to set compensation can create fiduciary duties under ERISA with respect to its compensation," the judge wrote. She denied MassMutual's motion to dismiss the case and said she will rule on the plaintiffs' motion for class certification in the future.

The suit is one of several ongoing federal lawsuits in which 401(k) plan participants or sponsors have accused a retirement plan service provider of violating ERISA (the Employee Retirement Income Security Act of 1974) by not acting as a *fiduciary*—a trusted adviser that puts client interests ahead of its own—in the manner or in the amount that it charged for recordkeeping or investment-related services.

"It appears to be in the MassMutual situation that because they could change the amount of the wrap fees inside their separate account vehicles at their own discretion, without plan sponsor/independent fiduciary approval, even if they weren't a fiduciary before, they become a 'functional' fiduciary," ERISA attorney and [blogger](#) Tom Clark told RIJ in an email this week.

"Any person or company that has the ability to control plan assets is a functional fiduciary. And then it follows that controlling your own compensation is self-dealing under the prohibited transaction and fiduciary duty rules. But please note, so far no liability has been found. Everyone still has their day in court," he added.

"It has been the law for 40 years under ERISA that a fiduciary cannot control the amount of compensation it receives from plan assets. For example, you couldn't just say to the recordkeeper, 'Charge whatever you think is fair' and throw them the checkbook to the plan trust account," Clark wrote.

"Done properly, a non-plan sponsor fiduciary, or any plan service provider, is allowed to receive reasonable compensation from plan assets, but an independent fiduciary has to approve it. For example, a plan's investment committee approves the hiring of a 3(21) investment advisor and approves her compensation at 30 basis points," he said

“Whether or not that amount is reasonable under the law, the 3(21) [advisor] is not considered a fiduciary as to her own compensation, because it was the investment committee that approved it, although she will be a fiduciary as to investment advice given to the plan.

According to the latest court document, MassMutual had provided Golden Star's retirement plan with recordkeeping services and investment options—including proprietary and third-party funds in separate accounts—through a group annuity contract since 1993. Under the contract, MassMutual was allowed to set separate account management fees at up to 1% of the daily market value of the accounts.

Aside from the determination of MassMutual's fiduciary status, the case centers on a dispute over the practice of revenue sharing, and whether revenue sharing arrangements are sufficiently disclosed or if the payments enrich others at the expense of the plan participants.

Golden Star claims that the revenue sharing payments that MassMutual has been paid by third-party mutual fund providers are largely unrelated to services provided to Gold Star and are “pay to play” payments for access to the plan.

MassMutual has claimed that the payments were used to “offset the fees and other payments it would otherwise collect from [the Golden Star plan] or its participants as compensation for management of the separate accounts.”

Golden Star says there was no “dollar for dollar” offset. There's also a dispute about when MassMutual told Golden Star about the revenue sharing arrangements, according to the court document.

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