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Second Circuit Adopts Significant Protections for Fiduciaries of Employee Retirement Plans

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Publication Date: November 14, 2011

The Second Circuit has adopted a "substantial shield . . . protect[ing] fiduciaries from liability." The *Moench* prudence presumption,[1] as it is known, holds that the decision of an employee stock ownership plan (ESOP) or eligible individual account plan (EIAP) fiduciary to offer employer stock as an investment option should be reviewed only for abuse of discretion. In short, it "ensures that a fiduciary's conduct cannot be second-guessed so long as it is reasonable." The Second Circuit now joins the Third, Fifth, Sixth and Ninth Circuits; no other appellate courts have ruled on the *Moench* presumption.

In a pair of recent decisions, *In re Citigroup ERISA Litig.*, No. 09-3804, 2011 WL 4950368 (2d Cir. Oct. 19, 2011), and *Gearren v. McGraw-Hill Cos.*, Nos. 10-792-cv (L), 10-934-cv, 2011 WL 4952628 (2d Cir. Oct. 19, 2011), addressing claims that a fiduciary acted imprudently by offering employer stock as an investment option despite the employers' exposure to risky subprime mortgages, the court found that the *Moench* presumption offered "the best accommodation" between two of ERISA's primary goals: the establishment of fiduciary duties to protect employee retirement plans and the provision of special status to ESOPs and EIAPs to promote employee ownership. Where, as in *Citigroup and Gearren*, employer stock is an investment option mandated by the plan, a fiduciary's failure to divest from company stock would be an abuse of discretion only under circumstances that place the employer in a "dire situation that was objectively foreseeable" to the plan settlor. Fluctuations in stock price, even where they "trend downhill significantly," do not rebut the *Moench* presumption. The test is "one of conduct rather than results"; fiduciaries' decisions must not "be judged in hindsight." Accordingly, although Citigroup's and McGraw-Hill's stock declined by approximately 50 percent and 65 percent, respectively, over the putative class periods, the court found no abuse of discretion by the fiduciary of either plan in continuing to include employer stock as an investment option.

The court's decisions in *Citigroup* and *Gearren* also reiterated that ESOP and EIAP fiduciaries have no duty to provide retirement plan participants with non-public information regarding specific investment options. Observing that the fiduciaries were under no duty to offer investment advice or an opinion on the condition of the stock, the court refused to "improperly transform fiduciaries into investment advisors."

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1. The presumption is so named because it was first set forth in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995).