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Pension & Benefits Daily

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Is *Moench* the End of the Road for Employer 'Stock Drop' Claims? The ERISA 'Stock Drop' Framework Following the Second Circuit's Adoption of the *Moench* Presumption in *In re: Citigroup ERISA Litigation*

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Federal courts have seen a large number of so-called ''stock drop'' cases from employees asserting that defined contribution plan sponsors and fiduciaries are liable for permitting allegedly imprudent investment in company stock. Much of this litigation has focused on the possible application of the ''*Moench* presumption'' to defendants' actions. The presumption heightens the standard for federal courts to apply when reviewing the conduct of ERISA plan sponsors and fiduciaries and makes it easier for stock-drop defendants to get claims against them dismissed.

In a divided opinion, the U.S. Court of Appeals for the Second Circuit recently joined the U.S. Courts of Appeals for the Third, Fifth, Sixth, and Ninth Circuits in adopting the *Moench* presumption of prudence applicable in ERISA stock-drop cases.[1] The presumption—first articulated by the Third Circuit in *Moench v. Robertson*,[2]—treats an employer's decision to retain company stock as an investment option in an employee benefit plan covered by ERISA as presumptively prudent.

Although the *Citigroup* decision will undoubtedly help the defense bar, it does not insulate plan fiduciaries from liability in ERISA stock-drop cases. Indeed, in the wake of the Second Circuit's long-awaited decision, employers and fiduciaries will still need to take measures to ensure that the presumption of prudence will apply. Moreover, as the showing plaintiffs must make to overcome the presumption remains unclear, ERISA plan sponsors should take a careful look at whether and

[1] *See In re: Citigroup ERISA Litig.*, 51 EBC 1737 (2d Cir. 2011) (203 PBD, 10/20/11; 38 BPR 1961, 10/25/11); *Gearren v. McGraw-Hill Cos. Inc.*, 51 EBC 1765 (2d Cir. 2011) (203 PBD, 10/20/11; 38 BPR 1961, 10/25/11). This article discusses the *Citigroup* opinion as the lead decision. The court adopted the same reasoning in the ''companion'' *Gearren* case in a separate, *per curiam* opinion filed the same day.

[2] 62 F.3d 553, 19 EBC 1713 (3rd Cir. 1995).

how their plan fiduciaries evaluate the prudence of employer stock in retirement plans offered to employees.

Stock-Drop Claims and the Subprime Mortgage Market Collapse

When the subprime mortgage market collapsed in 2007, financial service companies that held investments in subprime mortgage securities reported losses in the millions (and in some cases, billions) of dollars. These losses translated into a drop in the value of company stock and, therefore, the value of retirement plan participants' investments in that stock. Plan participants then began to sue their employers and plan fiduciaries to collect on their losses, alleging that the companies knew or should have known of the risks associated with investing in the subprime mortgage market and did nothing to protect their employees' retirement savings.

In the years leading up to the 2007 collapse, Citigroup Inc. had significantly increased its investment in the subprime mortgage market. According to the plaintiffs in the *Citigroup* case, as the number of subprime mortgage delinquencies and foreclosures increased, Citigroup should have recognized the declining value of mortgage-backed securities and taken some sort of protective action. The plaintiffs further asserted that, due to the company's overexposure in the subprime market, Citigroup's stock price was ''inflated.'' Once the subprime mortgage market imploded, Citigroup's share price steeply declined. Ultimately, the company reported losses of about $30 billion due to its subprime exposure.

Citigroup's 401(k) Plans

The plaintiffs in the action—employees of defendants Citigroup and Citibank N.A. (collectively, ''Citigroup'')—participated in two retirement plans offered by the companies. The two plans were the same in all material respects. Both the Citigroup tax code Section 401(k) plan and the Citibuilder 401(k) plan for Puerto Rico were eligible individual account plans governed by ERISA. Both mandated that the Citigroup common stock fund be included as an investment option. According to the plan documents, the Citigroup common stock fund consisted of shares of Citigroup common stock, but could also hold cash and other short-term investments.

While the Citigroup common stock fund always was available to employees as an investment option, employees who participated in the plan had approximately 20 to 40 other investment options from which to choose. As the court observed, both plans provided that participants' accounts could be invested in the plans' investment options ''in the proportions directed by the [p]articipant.''

In reviewing the fiduciaries' decision to maintain the plans' investment in company stock, the court considered the fiduciaries' lack of discretion regarding the offering of the Citigroup common stock fund and the participants' personal allocation authority.

Employees' Claims Against Citigroup

Following the subprime mortgage crisis—and a corresponding 50 percent decline in Citigroup's stock price—employee-participants in Citigroup's two 401(k) plans filed a consolidated class action against the company. The employees principally alleged that Citigroup and defendants involved in the administration of the plans breached their fiduciary duty of prudence by failing to divest the plans of Citigroup stock despite its declining value. The employees also claimed that certain corporate defendants breached their fiduciary duty of disclosure by neglecting to provide complete and accurate information to employee participants in the plans regarding company stock and its exposure to risks associated with the subprime mortgage market.

The plaintiffs further alleged associated breaches of fiduciary duties: breach of the duty to monitor; failure to disclose necessary information to appointed fiduciaries; breach of the duty of loyalty; and co-fiduciary liability.

After adopting the *Moench* presumption of prudence, the court dismissed each of plaintiffs' claims in turn.

The Second Circuit's Adoption of the *Moench* Presumption of Prudence

Despite plaintiffs' claim that *Moench* does not align with ERISA jurisprudence, the court followed its sister circuits in adopting the presumption.[3]

Writing for the majority, Judge John M. Walker Jr. explained that the presumption provides ''the best accommodation between the competing ERISA values of protecting retirement assets and encouraging investment in employer stock.'' The court rejected plaintiffs' argument that the court should analyze the decision to offer the Citigroup common stock fund as it would a fiduciary's decision to offer any other investment option. The court ruled that considering the ''long-term horizon of retirement investing,'' placing fiduciaries in such a [situation] would be ''particularly troublesome'' and would discourage the establishment and success of employee stock ownership plans.

The court emphasized that (what it called) the ''presumption of ERISA compliance'' not only accommodates competing policy considerations, but also ''balances the duty of prudence against a fiduciary's explicit obligation to act in accordance with plan provisions to the extent they are consistent with ERISA.''

Application of the Presumption to the Prudence Claim and its Bearing on the Defense of Stock-Drop Claims

Prior to the Second Circuit's decisions in *Citigroup* and *Gearren*, employee-plaintiffs in the Second Circuit asserted that the circuit's silence on the *Moench* pre-

[3] See *Moench*, 62 F.3d 553 (3rd Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447, 19 EBC 1969 (6th Cir. 1995); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 43 EBC 2281 (5th Cir. 2008) (82 PBD, 4/29/08; 35 BPR 1034, 5/6/08); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 49 EBC 2642 (9th Cir. 2010) (189 PBD, 10/1/10; 37 BPR 2187, 10/5/10). The Second Circuit adopted the presumption with respect to both employee stock ownership plans (''ESOPs'') and eligible individual account plans (''EIAPs'').

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sumption argued against its application.[4] The court's adoption of the presumption will significantly alter plaintiffs' strategies in stock-drop litigation. Plaintiffs will now need to ensure that their pleadings carefully lay out circumstances that may overcome the presumption risk having their cases dismissed out of the gate.

Employer-defendants can also learn from the decision. In adopting the presumption, the court provided some guidance (although not necessarily clear-cut) for stock-drop claim defendants: employers and plan fiduciaries should now re-evaluate their approach to: (a) creating plans offering company stock to employees; (b) administering such plans; and (c) defending stock-drop claims related to such plans, based on these instructions.

Careful Drafting of ERISA Plans. The *Citigroup* defendants benefited from the restrictive language in the ERISA plans at issue. Under the plain language of the Citigroup 401(k) plan and the Citibuilder 401(k) plan for Puerto Rico, the plans' fiduciaries were not provided any discretion to divest the plans of Citigroup stock. The court thus afforded defendants' decision to remain invested in company stock—as mandated by the plans—judicial deference.

In articulating a standard of review for other courts in the Second Circuit to follow, the court borrowed the ''guiding principle'' from the Ninth Circuit[5] in asserting that judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest in company stock.

Express mandates in plan documents, trust agreements, summary plan descriptions, and other plan-related documents will ensure extra protection for fiduciaries who choose to remain invested in corporate stock. Notably, however, the Second Circuit (unlike the lower court) declined to completely absolve from liability fiduciaries faced with plans that ''hard-wire'' the company stock option into the plan (and thus leave those fiduciaries without any discretion to remove that company stock option or divest the plan of company stock). According to the court, ''such a rule would leave employees' retirement savings that are invested in [company stock] without any protection at all.''

Evaluation of Company's Financial Health. Appellate courts that have applied the *Moench* presumption have adopted varying standards as to when and how the presumption can be overcome (and, by association, when it is appropriate to divest a plan of company stock and/or cease investing in that stock in contravention of explicit or suggested plan terms).[6] In its original articulation of the standard, the Third Circuit in *Moench* explained: ''[T]he plaintiff must show that the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate.'' The *Moench* plaintiffs' claim that they had satisfied this standard by alleging ''the precipitous decline in the price of [company] stock,'' as well as the defendants' knowledge of its ''impending collapse,'' was insufficient to overcome the presumption.

In *Citigroup*, the court stated that, absent circumstances placing a company in a ''dire situation'' that was ''objectively unforeseeable by the [plan's] settlor,'' plan fiduciaries are not required to override plan terms: ''[W]e cannot imagine that an ESOP or EIAP settlor, mindful of the long-term horizon of retirement savings, would intend that fiduciaries divest from employer stock at the sign of any impending price decline.'' The court further ruled that proof of a company's ''impending collapse *may* not be necessary to establish liability.'' (emphasis added.)

The court declined, however, to provide concrete guidance as to what circumstances or situations are ''dire'' enough to meet this standard. This silence leaves both the plaintiff and defense bars at a loss and is particularly troublesome given that the facts of the *Citigroup* case included a fairly substantial (*i.e.*, 50 percent) decline in company stock price that was the result of investment in a relatively new market that may have not existed at the time the settlor drafted the plan.

The court also limited plan fiduciaries' duty to investigate the prudence of investment in company stock. Under the court's ruling, employee-plaintiffs cannot merely allege that plan fiduciaries failed to investigate the continued prudence of investing in company stock; instead, plaintiffs must further plead facts that, if proved, ''would show that such an investigation during the [c]lass [p]eriod would have led defendants to conclude that [corporate] stock was no longer a prudent investment.''

Thus, plaintiffs need to show not only that the plan fiduciaries failed to investigate the prudence of the plan investment, but also that such failure directly prevented those fiduciaries from recognizing the riskiness of the investment. Finding insufficient red flags to warrant a requirement that the Citigroup defendants investigate the prudence of the company stock fund, the court ''intimate[d] no view as to the possible investigatory responsibilities of other fiduciaries who are privy to additional 'warning' signs or who are operating under substantially different circumstances.'' Employers will surely now face detailed allegations of warning signs from plaintiffs attempting to rebut the presumption and will need to prepare accordingly.

Despite its relatively pro-employer ruling, the court indicated that plan fiduciaries are not immune from liability in this area. For example, the court implied that

[4] *See, e.g.*, Transcript of Proceedings at 24, *In re GlaxoSmithKline ERISA Litig.*, No. 10 CV 6419 (2011).

[5] *See Quan v. Computer Scis. Corp.*, 623 F.3d 870, 49 EBC 2642 (9th Cir. 2010) (189 PBD, 10/1/10; 37 BPR 2187, 10/5/10).

[6] ERISA Section 404(a)(1)(D) requires that fiduciaries act ''in accordance with the documents . . . governing the plan insofar as such documents . . . are consistent with the provisions of [ERISA].'' As the court pointed out, ERISA ''does not explain when, if ever, plan language requiring investment in employer stock might become inconsistent with the statute's fiduciary obligations, such that fiduciaries would be required to disobey the requirements of the ESOP and halt the purchase of, or perhaps even require the sale of, the employer's stock.'' For this reason, courts have been free to create varying standards warranting deviation from plan mandates. *See, e.g. Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099, 32 EBC 1417 (9th Cir. 2004) (49 PBD, 3/15/04; 31 BPR 618, 3/16/04) (holding that ''[m]ere stock fluctuations, even those that trend downhill significantly, are insufficient to establish the requisite imprudence to rebut the *Moench* presumption.''); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 256, 43 EBC 2281 (5th Cir. 2008) (82 PBD, 4/29/08; 35 BPR 1034, 5/6/08) (stating that plan fiduciaries do not have a duty to depart from ESOP or EIAP plan provisions ''whenever [they] are aware of circumstances that may impair the value of company stock.'').

fiduciary liability could be established if the losses resulting from the alleged fiduciary misconduct constituted a significant portion of the company's overall business. The court declined, however, to find that such a dire situation existed in *Citigroup*. Although Citigroup was exposed to tens of billions of dollars in liabilities due to its subprime mortgage securities exposure, the court considered such amounts to be insignificant (at least under the ''dire situation'' standard) when compared to the company's almost $200 billion market capitalization.

In addition, plan participants can find some reassurance in the court's refusal to judge fiduciaries' decisions ''from the vantage point of hindsight.'' The court explained that it would not rely on the steepness of the stock decline (or subsequent rebound of the stock price), but would instead consider ''the extent to which plan fiduciaries at a given point in time reasonably could have predicted the outcome that followed.'' Furthermore, as the court explained, the test of prudence is ''one of conduct rather than results,'' ensuring that a fiduciary's conduct cannot be second-guessed as long as it is reasonable.

Accordingly, based on the Second Circuit's reasoning, courts in the circuit should not impute current knowledge of the risks associated with the subprime mortgage securities market to corporate defendants acting as fiduciaries before the market's collapse.

Moving for Early Dismissal of Stock-Drop Claims. Most corporate defendants have moved to dismiss employee stock-drop claims to avoid costly and potentially damning discovery. In *Citigroup*, the court noted that the presumption of prudence would apply at the pre-discovery pleading stage and thus facilitate dismissal of plaintiffs' claims: ''Where plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused its discretion, there is no reason not to grant a motion to dismiss.'' As the court explained, the presumption is not an evidentiary presumption but, instead, acts as a ''standard of review.''

Moreover, the court followed its sister circuits in applying the *Twombly* and *Iqbal* pleading standard on a motion to dismiss.[7] Under these decisions, plaintiffs must plead a ''plausible'' claim to survive a motion to dismiss. As the *Citigroup* decision demonstrates, this is a high standard for plaintiffs to satisfy. Many stock-drop plaintiffs cannot establish ''dire circumstances'' sufficient to overcome the presumption (or even identify individual members of the responsible investment committee) without reaching the discovery stage of litigation.

The court's adoption of the *Moench* presumption at the pleadings stage will likely lead to further dismissals of ERISA stock-drop cases (at least by courts within the Second Circuit).

Dismissal of Communications Claims for Failure to Provide Information and Misrepresentation

The court also dismissed the plaintiffs' communications claim. After discussing ERISA's ''comprehensive'' set of reporting and disclosure requirements, the court found that Citigroup had sufficiently fulfilled its reporting duties with respect to the plans. According to the court, plan language explaining the risks inherent in corporate stock investment and general advice suggesting the prudence of diversification of held stock was sufficient to meet the reporting and disclosure requirements found in ERISA.

The plaintiffs' communications claims, however, were based on an alleged breach of ERISA's duty of loyalty. While cases cited by the plaintiffs on this issue imposed a duty to inform at least in part because further information ''was necessary to correct a previous misstatement or to avoid misleading participants,'' the *Citigroup* plaintiffs sought to create a duty to provide nonpublic information pertaining to specific investment options. The court disagreed with the plaintiffs' claim and cited the district court's concern that ''such a requirement would improperly 'transform fiduciaries into investment advisors.' '' Instead, looking to the language of ERISA itself, the court found that ERISA nowhere requires fiduciaries to provide plan participants with nonpublic information pertaining to the expected performance of plan investment options.[8] For this reason, the court found that, even assuming that defendants knew of the risks involved with the subprime mortgage market, they had ''no duty [under ERISA] to communicate a forecast as to when this volatility would manifest itself in a sharp decline in stock price.''

In addition, the court dismissed plaintiffs' misrepresentation claim because Citigroup and its Chief Executive Officer Charles Prince did not act as fiduciaries while discussing Citigroup's financial health. Although the dissent contended that Citigroup and Prince ''intentionally connected'' statements about Citigroup's financial health and stock performance to the likely future of plan benefits, the majority disagreed. In so stating, the dissent relied on language from the U.S. Supreme Court's decision in *Varity Corp. v. Howe*,[9] which involved a corporate defendant's inducement of its employees to switch their employment to a newly created subsidiary destined to fail. The employer in *Varity* falsely assured its employees that their benefits would be secure with the new subsidiary. In contrast, as the majority observed here, Citigroup merely ''generally encouraged its employees'' to invest in Citigroup stock.

The court dismissed plaintiffs' misrepresentation claim against the plan's administrative committee—based on the committee's incorporation by reference of allegedly misleading Securities and Exchange Commission filings into plan documents—because it found that the committee did not *knowingly* make any false statements. As the court explained, a fiduciary may only be held liable for misstatements when the fiduciary ''knows those statements are false or lack a reasonable basis in fact.'' Because the court decided the matter on a motion to dismiss, plaintiffs failure to provide specific allegations, beyond a ''naked assertion,'' did not defeat the motion.

[7] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

[8] As the majority pointed out, although Judge Chester J. Straub in his dissent would hold that ERISA fiduciaries have an affirmative duty to disclose material information to plan participants, he ''acknowledges that ERISA does not explicitly impose such a duty.''

[9] 516 U.S. 489, 19 EBC 2761 (1996).

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The court also protected employers from a requirement that plan fiduciaries must perform an independent investigation of SEC filings to assure the truth of the statements contained therein. Such a requirement, the court noted, would increase already substantial burdens borne by ERISA fiduciaries.

The Court's Unanimous Dismissal of Employees' Conflict of Interest Claim

Although the court's opinion was divided on all other counts, the panel agreed unanimously to the dismissal of the employees' duty of loyalty claim. As the court explained, this claim ''appear[ed] to be based entirely on the fact that the compensation of some of the fiduciaries was tied to the performance of Citigroup stock.'' The court held that tying fiduciary compensation to the value of company stock does not per se violate the fiduciary duty of loyalty. Under employee-plaintiffs' reasoning, the court explained, ''almost no corporate manager could ever serve as a fiduciary of his company's [p]lan.''

The court did suggest, however, that corporate fiduciaries' compensation arrangements may trigger liability under ERISA. The court noted that plaintiffs did not ''allege any specific facts suggesting that defendants' investments in Citigroup stock prompted them to act against the interests of [p]lan participants,'' implying that such facts, if properly alleged, may have swayed the court's decision.

Employers should keep in mind that tying fiduciary compensation to the performance of company stock remains a delicate arrangement. This is particularly true as employee-plaintiffs continue to bring claims under ERISA Section 404(a)(1), which requires fiduciaries to discharge their duties with respect to a plan ''solely in the interest of the participants and beneficiaries.''

Possible Force of the Dissent

Despite the long-awaited decision's significance to stock-drop jurisprudence, Judge Straub's strongly worded and lengthy dissent cannot be ignored. Notably, and of concern for future ERISA litigation, the majority and dissent *both* claim to base their opinions on ERISA's legislative history and congressional intent.

Judge Straub primarily rejected the majority's adoption of the *Moench* presumption in favor of a ''plenary'' standard of review. As Judge Straub pointed out, ERISA already provides for a standard of review for the actions of plan fiduciaries: the prudent man standard of conduct. Calling the deferential *Moench* standard an ''emasculation of ERISA's 'prudent man' standard,'' Judge Straub stated that the policies underlying ERISA principally weigh in favor of plan participant protection (and not ESOP creation).

Judge Straub also cited from the secretary of labor's amicus curiae briefs in both cases to bolster his position that ERISA is intended to be paternalistic toward plan participants and stringent with plan fiduciaries.[10] Judge Straub cited Secretary of Labor Hilda L. Solis's concern that the *Moench* presumption relegates the duty of prudence to protecting employees ''only from the complete loss of their assets in the wake of a company's collapse,'' thereby leaving them otherwise unprotected from careless plan management. According to Judge Straub, the majority's superficial explanation of the ''dire situation'' standard fails to properly address this concern. Judge Straub also observed that the majority's unexplained use of the term ''dire situation'' poses a problem for employers seeking to properly maintain investment in corporate stock as well.

Despite the panel's disagreement on most issues, the dissent agreed with the majority that—whatever the applicable standard of review—the court should focus on the conduct of the fiduciaries rather than the result of their decisions. As Judge Straub stated in articulating his preferred plenary review standard, a ''fiduciary who discharges his duty of prudence will not be liable merely because the investment ultimately fails.'' At the same time, under Judge Straub's proposed standard, to prevail on their prudence claims, employee-plaintiffs would need only show that a defendant-fiduciary failed to act ''reasonably'' in light of the facts of which he knew or should have known at the time he engaged in the challenged transaction.

Judge Straub would also place a greater disclosure burden on ERISA fiduciaries. Under his standard, corporate fiduciaries would have a duty to disclose ''material, adverse information regarding an employer's financial condition or its stock, where such information could materially and negatively affect the expected performance of plan investment options.'' Judge Straub's articulation of this disclosure duty is based on the overall financial health of the plan: ''[T]he duty to disclose would merely ensure that, where retirement plan assets are severely threatened, employees receive complete, factual information such that they can make their own investment decisions on an informed basis.''

While the majority refused to require corporate fiduciaries to disclose to plan participants nonpublic information regarding a company's financial health, Judge Straub's articulation of the duty to disclose would burden employers with constant investment monitoring. In Judge Straub's view, general plan warnings concerning the risks of undiversified investments are never sufficient to place ''lay beneficiaries'' on notice of fiduciary misconduct.

Judge Straub also took issue with the majority's exclusion of Citigroup and CEO Prince from certain disclosure claims based on the fact that they were not acting as fiduciaries in making the statements. As he explained, corporate defendants ''cannot take refuge from fiduciary status in official titles or responsibilities where their '*ultra vires*' conduct is fiduciary in nature.'' Under Judge Straub's reasoning, ''persons other than

[10] *See* Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants, *In re Citigroup ERISA Litig.*, No. 09-3804-cv, 2009 WL 7768350, at *16 (2d Cir. Dec. 28, 2009) (16 PBD, 1/27/10; 37 BPR 268, 2/2/10) (refuting the district court's assertion that plaintiff's theory of fiduciary liability would thwart the goal of Congress of encouraging ESOP formation because the assertion failed to acknowledge that ''ERISA's primary goal [is] to 'promote the interests of employees and their beneficiaries' '') (internal citation omitted); Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants, *Gearren v. McGraw-Hill Cos.*, No. 10-792-cv, 2010 WL 2601687, at *15 (2d Cir. June 4, 2010) (29 PBD, 2/16/10; 37 BPR 415, 2/23/10) (''[N]othing else in the text of ERISA speaks to any presumption of prudence for employer stock investment by plans or indicates that Congress intended to loosen the obligations of fiduciaries in any other way with regard to such investments.'').

designated plan administrators may, by performing an administrator-type function, acquire fiduciary status.'' Judge Straub's functional fiduciary theory would prove much more difficult to dispute because the lines between corporate official and plan fiduciary are frequently blurred.

Judge Straub also contested the majority's resolution of plaintiffs' misrepresentation claim. He found that plaintiffs sufficiently alleged that at least one member of the administrative committee must have known about Citigroup's risky subprime mortgage exposure and thus would have known of the falsity of the SEC filings that were incorporated into the plans.

The Future for Citigroup and Other Stock-Drop Litigation Defendants

Although the *Citigroup* defendants successfully moved for dismissal of the stock-drop claims in this consolidated class action, Citigroup remains entangled in an ongoing stock-drop litigation battle. Citigroup spent over two years in and out of court defending itself in the current action. Counsel for the plaintiffs has suggested that the plaintiffs plan on seeking rehearing en banc of the Second Circuit's decision. Furthermore, since the Second Circuit issued its opinion, another Citigroup employee filed a similar ERISA stock-drop action in the U.S. District Court for the Southern District of New York against the company and other alleged plan fiduciaries.[11]

The divided *Citigroup* court's disagreement with respect to basic ERISA policies demonstrates much of what has complicated the development of stock-drop claim jurisprudence. Until the Supreme Court takes an appeal on one of these claims, fiduciary-defendants and employee-plaintiffs will continue to argue that congressional policy favors their respective positions regarding judicial review and fiduciary liability. Because the case law has been so divided, judges have thus far been able to pick and choose those judicial interpretations which support their respective viewpoints. Employers are well-advised to keep abreast of evolving ERISA stock-drop jurisprudence and to act as prudently as possible within its shifting parameters.

[11] *See Geroulo v. Citigroup Inc.*, No. 11-7672 (S.D.N.Y. Oct. 28, 2011).

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