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Employer Stock Litigation Update: Second Circuit Adopts "Moench" Presumption

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Companies that sponsor 401(k), ESOPs and other forms of eligible individual account plans ("EIAPs") that hold company stock often are subjected to class action lawsuits under ERISA when there is a substantial decline in the stock price. One of the key bases for dismissal of these cases at the pre-trial stage is the so-called "*Moench*" presumption of prudence. Under the *Moench*presumption, a plan fiduciary's decision to continue offering company stock as an investment option is considered consistent with ERISA, unless the plaintiff can show that the fiduciary knew or should have known during the relevant time period of an imminent corporate collapse or other dire circumstances. Where pleading and proof of that kind of knowledge is absent from the plaintiffs' complaint — which often is the case for non-bankrupt plan sponsors that remain economically viable — the court may use *Moench* presumption to dismiss the lawsuit.

In *In Re: Citigroup ERISA Litigation (Gray v. Citigroup, Inc.)*, No. 09-3804 (2nd Cir. Oct. 19, 2011), the United States Court of Appeals for the Second Circuit joined the Third, Fifth, Sixth, and Ninth Circuits in expressly adopting the *Moench* presumption of prudence. Please see the attached memo for further information.

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