

# ERISA "Stock Drop" Cases: Keeping Securities Fraud Litigation Company

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When a company's stock price suddenly drops, shareholders often file lawsuits under the Securities Exchange Act of 1934 (Exchange Act). However, in addition to suits under the federal securities laws, publicly traded companies that sponsor qualified defined contribution plans, which often offer company stock as an investment option to employees, also likely face litigation from their employees under The Employee Retirement Income Security Act of 1974 (ERISA). These actions, typically filed as class actions, allege that the company, its board of directors, and its senior officers are ERISA fiduciaries who breached their alleged fiduciary duties. Under Section 502(a)(2) of ERISA, plan participants may obtain relief from plan fiduciaries for breaches of their fiduciary duties.

These ERISA "stock drop" lawsuits typically rely on the same facts as the parallel securities fraud lawsuit and fit a basic pattern. The complaints allege that the company established an individual account defined contribution plan, featuring company stock as an investment option, and that participants suffered losses because the company stock declined, often as the result of some purported wrongdoing by the company or insiders. The complaints further allege that a broad panoply of corporate insiders are fiduciaries who breached their duties by: (1) investing plan assets in company stock; (2) failing to freeze or divest company stock from the plan; (3) making false statements about

company stock to plan participants; and (4) failing to monitor fiduciaries.

While both securities fraud cases and ERISA stock drop lawsuits center on the facts leading up to a decline in the company's stock price, the two types of litigation have critical differences. ERISA plaintiffs have a number of advantages over securities plaintiffs who seek relief under Securities and Exchange Commission Rule 10b-5. First, while shareholders in a Rule 10b-5 action must prove they made an actual purchase or sale of a "security,"<sup>1</sup> there is no such purchase/sale requirement under ERISA. Second, while shareholders must prove scienter to recover in securities fraud cases,<sup>2</sup> plaintiffs in ERISA cases only need to show that a fiduciary duty has been breached, which often requires no proof of intentional conduct.<sup>3</sup> Third, the damages potential of an ERISA action have an in terrorem effect because under ERISA Section 409, a fiduciary must personally restore "any losses to the plan."<sup>4</sup> (emphasis added). Fourth, fraud allegations under the Exchange Act are fact-specific and must meet the heightened pleading requirement found in Rule 9 of the Federal Rules of Civil Procedure<sup>5</sup> while ERISA claims for breach of fiduciary duty are subject to only the lower "notice pleading" requirement of Rule 8 of the Federal Rules of Civil Procedures.<sup>6</sup>

## *Nuts and Bolts of an ERISA Action*

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As a threshold matter, ERISA stock drop litigation focuses on defined contribution plans,<sup>7</sup> which have participant-directed eligible individual account plans (EIAP). An EIAP is a profit sharing, stock bonus, thrift or savings plan, or employee stock ownership plan that explicitly provides for the acquisition and holding of stock issued by the plan sponsor.<sup>8</sup>

To establish any plan, an employer must take some elementary steps. Every ERISA plan must have a sponsor,<sup>9</sup> which is not a fiduciary function, and a named fiduciary that administers the plan.<sup>10</sup> Fiduciaries must act solely in the interest of plan beneficiaries and participants and must discharge their duties "with the care, skill, prudence, and diligence" of a "prudent man acting in a like capacity and familiar with such matters..."<sup>11</sup> Fiduciaries also are charged with administering the plan in accordance with its documents to the extent those are consistent with ERISA.<sup>12</sup>

In addition, plan documents must establish every plan.<sup>13</sup> The plan documents often prove key in stock drop litigation. Normally an employer sponsors the plan and adopts the plan documents. These documents typically delegate to the board of directors or a board committee the responsibility for appointing and removing administrators, either a committee or an individual. Sometimes, the employer retains the designated fiduciary role, which can present problems in defending these cases. In most cases, however, a plan committee or several committees are appointed to oversee the plan.<sup>14</sup>

Fiduciary status is a functional test under ERISA that is dependent upon a factual analysis of a party's actual conduct.<sup>15</sup> Even for those not designated as fiduciaries, ERISA imposes fiduciary status if they undertake certain discretionary actions with respect to a plan or its assets.<sup>16</sup> Moreover, some courts have held that ERISA does not require a showing of discretion for individuals who handle plan assets.<sup>17</sup>

Two lines of cases have developed in the ERISA stock drop litigation area. First, there are cases resulting from fraudulent corporate transactions as exemplified by the notorious Enron Corporation and other corporate scandals of the post dot-com era, where the issuers are in bankruptcy and the securities have become worthless. These cases involve allegations of egregious fraud by corporate insiders. Perhaps not surprisingly, courts more willingly have expanded ERISA concepts in these cases in order to provide some recovery to injured participants.<sup>18</sup>

Second, there are garden-variety stock drop cases, where the plan's stock fund has lost value because of a decline in the company's market capitalization.<sup>19</sup> These cases typically raise more negligence-based allegations of general breach of fiduciary duty, including lack of prudence or diligence.<sup>20</sup>

The complaints in both types of cases almost invariably are styled as class actions with a participant suing on behalf of a class of plan participants who sustained losses. Some cases, however, are pleaded as derivative actions on behalf of the plan.<sup>21</sup> Claims in derivative ERISA actions can be reduced to three categories: (1) failure to exercise prudence; (2) failure to disclose; and (3) failure to monitor or co-fiduciary breach.<sup>22</sup>

Stock drop litigation may be pursued under three separate ERISA sections, each with a different remedy. First, Section 502(a)(1) authorizes a participant or beneficiary to file suit to recover benefits or to enforce rights under a plan.<sup>23</sup> Second, Section 502(a)(2) permits a beneficiary or fiduciary to file suit on behalf of a plan under Section 409, which imposes personal liability on fiduciaries who breach their duties.<sup>24</sup> Third, Section 502(a)(3) is an omnibus provision, authorizing participants to sue either fiduciaries or parties in interest for individual relief.<sup>25</sup> Plaintiffs suing under Section 502(a)(3), however, are limited to equitable relief.<sup>26</sup> Although

plaintiffs have invoked all three theories, most stock drop cases are styled as Section 502(a)(2) claims.

Although some commentators predicted that ERISA stock drop actions were tied to the 2000-2002 economic downturn and would dissipate when the market recovered, these lawsuits appear to have become a permanent feature in the securities litigation landscape. Indeed, with an estimated \$14 trillion in retirement plan assets<sup>27</sup> and a current economic downturn that has caused the value of many employer securities held in these plans to drop, ERISA stock drop litigation has only increased in recent years and shows no signs of slowing down. Over 250 new ERISA lawsuits have been filed since 2000. However, the floodgates may not be as wide open as plaintiffs' attorneys had thought as appellate courts are beginning to hand down ground rules that limit where these claims may go.

*Investment Opportunities in Company Stock May Open the Door to ERISA Stock Drop Litigation*

To succeed on a securities fraud claim, a plaintiff must prove that the defendant, acting with scienter, used a manipulative or deceptive device or contrivance in interstate commerce, the mail, or a securities exchange and that the plaintiff relied on this information, which was material, in his or her purchase of a security, and suffered a loss as a result of that reliance.<sup>28</sup> For an ERISA claim, however, a plaintiff must show that the defendant was a fiduciary, breached his fiduciary duty to act solely in the interest of plan participants, failed to act as a prudent person in a like capacity, failed to diversify the plan's investments in order to decrease the risk of loss, failed to act in accordance with plan documents, or engaged in any transaction expressly prohibited by ERISA.<sup>29</sup>

Many retirement plans are designed to provide employees an opportunity to invest in company stock, but may potentially expose a company to an ERISA stock drop case. In fact, a plan fiduciary even may be liable for *failing* to include company stock as an investment option when the stock later

thrived.<sup>30</sup> Accordingly, many plans require that the administrator invest in company stock or offer it as an investment option—i.e. that the plan "hardwire" the stock into the plan.<sup>31</sup> Yet, when the stock drops in value, those same fiduciaries likely will face ERISA actions for allowing employees to invest in the devalued company stock.

ERISA fiduciaries must act prudently, diversify investments when appropriate, act with undivided loyalty to plan participants, and follow the plan documents.<sup>32</sup> As a general matter, fiduciaries must administer the plans as written and are not permitted to vary from plan design.<sup>33</sup> In the early 1990s plaintiffs charged fiduciaries with breaching their fiduciary duties by failing to divest company stock from the plans. Since ERISA expressly stated that Employee Stock Ownership Plans (ESOPs) shall invest their assets "primarily" in company stock and excepted ESOPs from the duty to diversify, defendants argued that they could not breach their fiduciary duties by failing to diversify.<sup>34</sup> Defendants persuasively contended that Congress was well aware of the risks posed to retirement savings by ESOPs, but nevertheless encouraged their development for policy reasons.<sup>35</sup> The disagreement over diversification was compounded by two seemingly irreconcilable ERISA provisions: Section 404, requiring a fiduciary to diversify, and Section 407, excepting ESOPs from the duty to diversify. Prior to the current wave of stock drop litigation, however, a federal appellate decision<sup>36</sup> and a U.S. Department of Labor (DOL) opinion letter<sup>37</sup> questioned whether ESOP fiduciaries could absolve themselves entirely based upon the non-diversification statutory provision.

To reconcile ERISA Sections 404 and 407, courts developed the presumption of fiduciary prudence doctrine, as illustrated by the Third Circuit in *Moench v Robertson*.<sup>38</sup> In *Moench*, ESOP participants sued their employer bank after its failure and subsequent seizure by the Federal Deposit Insurance Corp. Plaintiffs contended that the plan fiduciaries should have divested the bank shares from the plan. The fiduciaries argued that they were entitled to rely upon the statutory

exemption for ESOP plans under Section 407. The district court agreed and granted the fiduciaries' motion for summary judgment, holding that they were entitled to rely upon the statutory provision excepting ESOPs from any diversification requirement.<sup>39</sup>

On appeal, the Third Circuit reversed and remanded. The Third Circuit commented that ERISA presented an inherent conflict, which courts needed to address in order to provide "a way for the competing concerns to coexist."<sup>40</sup> To evaluate the ESOP fiduciaries' decision under a strict fiduciary standard was inappropriate and "would render meaningless the ERISA provision excepting ESOPs from the duty to diversify."<sup>41</sup> Accordingly, the Third Circuit adopted an abuse of discretion standard to evaluate fiduciaries' compliance with the statute. It held that "keeping in mind the purpose behind ERISA and the nature of ESOPs themselves...an ESOP fiduciary who invests the assets in company stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing the fiduciary abused its discretion."<sup>42</sup> The Third Circuit only vaguely described the showing necessary to rebut the presumption, simply stating that plaintiffs may introduce evidence that demonstrates continued investment in company securities would defeat the purpose of the trust because of unanticipated and unknown circumstances at the time the plan was settled. The Third Circuit also commented that fiduciaries could show that they impartially considered alternative actions to demonstrate that they properly exercised their discretion. It cautioned, however, that in evaluating this presumption, a district court must keep in mind that if a fiduciary "does not maintain the investment in employer's securities, it may face liability for that caution, particularly if the employer's securities thrive."<sup>43</sup>

For better or worse, the presumption of fiduciary prudence has been interjected fully into stock drop cases on plan design and prudence. Plaintiffs unsuccessfully attempted to distinguish this

authority on the grounds that ESOPs are statutorily charged with investing in company stock during the Enron litigation.<sup>44</sup> A decision arising from that case, however, only created confusion and ambiguity with respect to the concept of fiduciary prudence. In *Enron*, the court adopted the DOL's view, as expressed in its remarkable amicus brief, which argued that notwithstanding the provisions of a company plan requiring investment in employer securities and ERISA's provisions deleting the diversification requirements for EIAPs, fiduciaries still had an obligation to examine the prudence of the investment.<sup>45</sup> Although the *Enron* court adopted the DOL's view that fiduciaries must always exercise prudence and consider diversification, it was unnecessary to make such a broad holding. As the *Enron* court itself commented, Enron's plan contained boilerplate language that generally required fiduciaries to exercise prudence and to diversify plan investments "unless it is clearly not prudent to do so."<sup>46</sup> Several district courts have adopted the *Enron* court's reasoning and routinely have denied motions to dismiss breach of fiduciary duty claims alleging failure to diversify or to exercise prudence.<sup>47</sup> These decisions suggest that a fiduciary's obligations increase in the presence of allegations of fraud.

Nevertheless, in *Wright v. Oregon Metallurgical Corp.*, the Ninth Circuit questioned *Moench's* consistency with ERISA, given the statute's express treatment of the diversification requirement for ESOPs.<sup>48</sup> In *Wright*, plaintiffs sued after the company's stock declined following a merger with a telecommunications firm. There were no allegations of corporate fraud or mismanagement. The Ninth Circuit applied the *Moench* presumption of fiduciary prudence and affirmed the district court's dismissal of a stock drop lawsuit against ESOP fiduciaries because the fiduciaries had no obligation to investigate diversification merely because the stock fluctuated after the merger.<sup>49</sup>

In contrast, the First Circuit adopted the *Moench* presumption in an ESOP case, but reversed the district court's dismissal of fiduciaries. In *Lalonde v. Textron, Inc.*,<sup>50</sup> plaintiffs sued fiduciaries, the issuer,

and the directed trustee alleging that they violated their fiduciary duties by failing to diversify the ESOP's assets. Plaintiffs further alleged that Textron and its fiduciaries, some of whom were senior corporate officers, participated in or had knowledge of a scheme to inflate Textron's stock value. The ESOP sustained a financial loss, at least on paper, because the value of Textron's shares declined. The First Circuit held that if plaintiffs proved that the fiduciaries participated, in essence, in securities fraud, then defendants might have breached their fiduciary duties owed to participants. The First Circuit reasoned, "the odds of plaintiffs' succeeding on their breach of fiduciary duty claims against the Textron defendants might be very long, but 'that is not the test [on a motion to dismiss].'"<sup>51</sup>

#### *Current Developments in ERISA Stock Drop Actions*

Recent decisions in ERISA stock drop litigation continue to provide important direction for litigants. In particular, courts continue to discuss the viability of *Moench's* presumption of fiduciary prudence with four circuits expressly adopting the presumption. See *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008), *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008), and *Kuper*, 66 F.3d 1447.

Most recently, in *In re UBS AG ERISA Litigation*,<sup>52</sup> former UBS employees who owned retirement funds holding UBS common stock brought an action against UBS and certain of its subsidiaries, committees, committee members, and directors alleging violation of fiduciary duties under ERISA due to the substantial losses sustained by UBS in late 2007 to 2008 as a result of the collapsed mortgage-backed securities market. Plaintiffs alleged that defendants breached their fiduciary duties to plan participants by continuing to offer the UBS Stock Fund as an investment option after they knew it was no longer prudent to do so. The court granted defendants' motion to dismiss by relying on the *Moench* presumption of fiduciary prudence. The court found that the plan documents expressly

mandated that UBS stocks be offered as an investment option, and that the "settler either required or strongly encouraged the plan fiduciaries to offer UBS Stock Fund as an investment option to plan participants."<sup>53</sup> Therefore, because the plan agreement limited the trustee's discretion in offering UBS stock, the presumption of fiduciary prudence applied.<sup>54</sup> Plaintiffs then failed to allege facts sufficient to overcome the *Moench* presumption.<sup>55</sup>

Another issue facing courts in stock drop cases is whether the plaintiff has standing to sue—i.e., was the plaintiff actually *harmed*, or did the plaintiff actually benefit from the allegedly inflated stock? Under ERISA Section 502(a)(2), civil actions only can be brought "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 409." Thus, the Supreme Court has held that breach of fiduciary duty claims under ERISA Sections 409 and 502(a)(2) only provide relief to the plan.<sup>56</sup> The standing issue is raised when plaintiff sold the security in question at an "artificially inflated" cost. Some district courts have found that such plaintiffs lack constitutional "injury in fact."<sup>57</sup>

Addressing standing, the Eighth Circuit in *Brown v. Medtronic, Inc.*<sup>58</sup> endorsed a "fair traceability" concept. The *Brown* plaintiff did not have standing with respect to an alleged improper business practice that did not reach the public until months after the plaintiff had completely liquidated his ESOP account because he realized share price inflation caused by the defendants' allegedly improper promotion of a product. The *Brown* plaintiff, however, did have standing with respect to a second alleged improper business practice that was revealed to the public both before and after his sales. In that situation, the Eighth Circuit held, the plaintiff may have suffered some loss traceable to the second improper business practice.

A third major issue confronting the courts is the concept of "hardwiring"—does the plan *require* the inclusion of company securities as an investment

option? And if so, what happens to the fiduciary when the stock value drops? In *In re Citigroup ERISA Litig.*, 2009 BL 184739, the district court dismissed an ERISA stock drop claim because the plan required the stock fund be "permanently maintained" as an investment option.<sup>59</sup> However, some courts have held that a fiduciary has an obligation to disregard a plan's terms when abiding by them would contravene the duties imposed by ERISA.<sup>60</sup>

In sum, stock drop claims are embedded in ERISA and because of the Internal Revenue Code and generalized corporate considerations, many public companies always will sponsor deferred contribution plans that offer company stock. Plan sponsors and fiduciaries will need to monitor their plan and practices. As this article suggests, stock drop claims, like most labor-based claims, are preventable.

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<sup>1</sup> 15 U.S.C. § 78j; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735 (1975) (only actual purchasers or sellers of securities may seek relief under Rule 10b-5).

<sup>2</sup> *Aaron v. SEC*, 446 U.S. 680, 691 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976) (court unwilling to extend scope of Exchange Act to require merely negligent conduct).

<sup>3</sup> *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

<sup>4</sup> ERISA Section 409(a) provides: Any person who is a fiduciary to the plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to the plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be such to such other equitable or remedial relief as the court may

deem appropriate, including removal of such fiduciary.<sup>29</sup> U.S.C. § 1109(a). In the past, plan participants could sue only on behalf of the plan, such that the monetary recovery was returned to the plan, but since the Supreme Court's 2008 decision in *LaRue v. DeWolff, Boberg & Assoc.*, 552 U.S. 248 (2008), individual participants have been able to bring suit for losses to individual 401(k) accounts and directly receive any money recovered in the lawsuit (which can be the difference in the value of the stock before and after the drop).

<sup>5</sup> Fed. R. Civ. P. 9(b) ("the circumstances constituting fraud or mistake shall be stated with particularity"). This heightened level of pleading can make it difficult for plaintiffs in securities fraud cases to withstand a motion to dismiss.

<sup>6</sup> See *Rankin v. Rots*, 278 F. Supp. 2d 853, 865 (E.D. Mich. 2003) (Rule 9(b) is not applicable to ERISA cases where the plaintiff alleges breach of fiduciary duty and not fraud), *Beesley v. International Paper Co.*, No. 06-CV-00703, 2009 BL 21333 (S.D. Ill. Feb. 4, 2009) (same); but see *In re Elec. Data Sys. Corp. ERISA Litig.*, 305 F. Supp. 2d 658, 671 (E.D. Tex. 2004) (plaintiff needs to meet Rule 9(b) requirements when the claims is based on a duty to disclose).

<sup>7</sup> ERISA recognizes two general categories of retirement plans: defined benefit plans and defined contribution plans. See generally *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 433 (1999). A defined benefit plan is a traditional pension where the participant is entitled to a fixed payment upon retirement. *Id.* at 439. Defined contribution plans, on the other hand, establish an individual account for each participant, to which the employee makes contributions, often augmented by the employer. In a defined contribution plan, the participant makes the investment decision and assumes the risk of loss.

<sup>8</sup> ERISA Section 407(d)(3), 29 U.S.C. § 1107(d)(3).

<sup>9</sup> ERISA Section 3(16)(B), 29 U.S.C. § 1002(16)(B).

<sup>10</sup> ERISA Section 402(a)(1), 29 U.S.C. § 1102(a)(1).

<sup>11</sup> ERISA Section 404(a)(1)(B); 29 U.S.C. § 1104(a)(1)(B).

<sup>12</sup> ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

<sup>13</sup> ERISA Section 402(a)(1), 29 U.S.C. § 1102(a)(1).

<sup>14</sup> See, e.g., BETTY L. KRIKORIAN, FIDUCIARY STANDARDS IN PENSION AND TRUST FUND MANAGEMENT, § 2.05 at 2-19-20 (1995).

<sup>15</sup> ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A).

<sup>16</sup> ERISA prescribes a functional test for fiduciary status. ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A),

provides that: A person is a fiduciary with respect to a plan to the extent (i) he exercised any discretionary authority or discretionary control respecting management of such plan or exercised any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of a plan.

<sup>17</sup> See, e.g., *Firstiers Bank N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir.), cert. denied, 513 U.S. 871 (1994); *IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997).

<sup>18</sup> The *Enron* decision probably best exemplifies the doctrine where the court adopted an expansive definition of fiduciary responsibility to reach even the directors and directed trustees. *In re Enron Corp. Securities, Derivative and ERISA Litig.*, 284 F. Supp. 2d 511, 581-602 (S.D. Tex. 2003).

<sup>19</sup> See, e.g., *In re Sprint Corporation ERISA Litig.*, No. 03-CV-02202 (D. Kan. filed Oct. 9, 2003).

<sup>20</sup> Plaintiff alleged, for example, in *Sprint* that defendants should have realized that the traditional telephone business was subject to a decline. See Third Consolidated Amended Complaint filed Oct. 8, 2004, at ¶¶ 93-94.

<sup>21</sup> See, e.g., *Crowley v. Corning, Inc.*, No. 02-CV-06172 (W.D.N.Y. filed Apr. 1, 2002).

<sup>22</sup> More specifically, plaintiffs assert one or more of these contentions: (1) corporate insiders failed to provide adequate information, including accurate financials, to participants; (2) corporate insiders acted imprudently, failing to close company stock as an investment option or failing to divest the plan of company stock; (3) corporate insiders acted imprudently in offering company stock as an investment option in the first place; (4) corporate insiders labored under a conflict of interest and violated their duties by failing to retain an independent fiduciary; (5) corporate insiders improperly encouraged participants to invest in company stock, knowing it was a bad investment; (6) corporate insiders breached their duties by failing to disclose to participants material inside information regarding the company; (7) corporate insiders failed to disclose illegal business practices at the company, which devalued the stock; (8) corporate insiders breached their duties by trading for their own accounts based upon inside information; and (9) corporate insiders breached their fiduciary duties when they froze company stock as an investment

alternative or froze further investments in company stock.

<sup>23</sup> 29 U.S.C. § 1102(a)(1).

<sup>24</sup> 29 U.S.C. § 1102(a)(2).

<sup>25</sup> 29 U.S.C. § 1102(a)(3).

<sup>26</sup> *Mertens v. Hewitt Associates*, 516 U.S. 489 (1996); *Great-West Life & Annuity Co. v. Knudson*, 534 U.S. 204 (2002); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1260-61 (10th Cir. 2004).

<sup>27</sup> This figure is estimated as of year-end 2008.

Source: 2009 Investment Company Fact Book ([http://www.icifactbook.org/fb\\_sec7.html](http://www.icifactbook.org/fb_sec7.html)).

<sup>28</sup> 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

<sup>29</sup> ERISA Section 404; 29 U.S.C. § 1104.

<sup>30</sup> *Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004); *Bunch v. W.R. Grace & Co.*, 532 F. Supp. 2d 283 (D. Mass. 2008).

<sup>31</sup> E.g., *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097-98 (9th Cir. 2004) (usually courts give the highest level of deference to fiduciaries of a plan that, as a matter of plan design, require company stock to be offered).

<sup>32</sup> ERISA Section 404(a)(1); 29 U.S.C. § 1104(a)(1).

<sup>33</sup> ERISA Section 404(a)(1)(b); 29 U.S.C. § 1104(a)(1)(b).

<sup>34</sup> Section 404(a)(2) excepts EIAPs, including ESOPs, from the obligation to diversify company stock. 29 U.S.C. § 1104(a)(2). ESOPs are designed to invest "primarily in qualifying employer securities." ERISA Section 407(d)(6)(A), 29 U.S.C. § 407(d)(6)(A).

<sup>35</sup> *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995).

<sup>36</sup> *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

<sup>37</sup> DOL Opinion No. 90-05A.

<sup>38</sup> 62 F.3d at 560.

<sup>39</sup> *Id.* at 570.

<sup>40</sup> *Id.* at 571.

<sup>41</sup> *Id.* at 571-2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 572.

<sup>44</sup> 284 F. Supp. 2d at 668-70.

<sup>45</sup> *Id.* at 668.

<sup>46</sup> *Id.*

<sup>47</sup> *Wright*, 360 F.3d at 1097-8; *Cokenour v. Household International, Inc.*, No. 02-CV-07921 (N.D. Ill. Mar. 31, 2004) ("A fiduciary is required to discharge his or her duties 'with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims' . . . [then] the Committee

Defendants cannot hide behind the provisions of the Plan") (citation omitted); *In re Sears Roebuck & Co. ERISA Litig.*, No. 02-CV-08324 (N.D. Ill. Mar. 3, 2004) at 7.

<sup>48</sup> 360 F.3d at 1097-98.

<sup>49</sup> *Id.*

<sup>50</sup> 369 F.3d 1 (1st Cir. 2004).

<sup>51</sup> *Id.* at 7. Compare, *In re McKesson HBOC, Inc.*

*ERISA Litig.*, No. 00-CV-20030 (N.D. Cal. Sept. 30, 2002) (accepting the insider trading defense) with *Enron*, 284 F. Supp. 2d at 565 (rejecting defense and criticizing *McKesson*).

<sup>52</sup> No. 08-CV-06696 (S.D.N.Y. Mar. 24, 2011).

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.*

<sup>55</sup> See also *Dudenhoeffer v. Fifth Third Bancorp*, No. 08-CV-00538, (S.D. Ohio Nov. 24, 2010); *In re SLM Corp., ERISA Litig.*, No. 08-CV-04334 (S.D.N.Y. Sept. 24, 2010); *In re Bank of Am. Corp. Securities, Derivative, & ERISA Litig.*, No. 09-MDL-02058, 2010 BL 199601 (S.D.N.Y. Aug. 27, 2010); *In re Lehman Brother Securities and ERISA Litig.*, 683 F. Supp. 2d 294, 301 (S.D.N.Y. 2010); *In re Citigroup ERISA Litig.*, No. 07-CV-09790, 2009 BL 184739 (S.D.N.Y. Aug. 31, 2009) (on a motion to dismiss, Judge Stein held the presumption applied and plaintiff failed to plead facts to overcome it); *Howell v. Motorola, Inc.* 633 F.3d 552 (7th Cir. 2011) (court held there was no evidence to support rebuttal of *Moench* doctrine, because although the price of its securities declined, there was no evidence that Motorola was a failing company).

<sup>56</sup> *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

<sup>57</sup> See, e.g., *Taylor v. Keycorp*, No. 08-CV-01927 (N.D. Ohio, Aug. 12, 2010); *In re: Boston Scientific Corp. ERISA Litig.*, 254 F.R.D. 24 (D. Mass. 2008); *Brown v. Medtronic, Inc.*, 619 F. Supp. 2d 646 (D. Minn. 2009); *Vermeulen v. ProQuest Co.*, No. 06-CV-12327 (E.D. Mich. Apr. 23, 2007); but see *Patton v. Northern Trust Co.*, 703 F. Supp. 2d 799 (N.D. Ill. 2010).

<sup>58</sup> 628 F.3d 451 (8th Cir. 2010)

<sup>59</sup> See also *In re Wachovia Corp. ERISA Litig.*, No. 09-CV-00262, 2010 BL 181486 (W.D.N.C. Aug. 6, 2010); *In re Bear Stearns Companies, Inc. Securities Derivative, and ERISA Litig.*, No. 08-MDL-01963, 2011 BL 43797 (S.D.N.Y. Jan. 19, 2011)

<sup>60</sup> *Gearren v. McGraw-Hill Companies, Inc.* 690 F. Supp. 2d 254 (S.D.N.Y. 2010); *Agway, Inc., Employees' 401(k) Thrift Inv. Plan v. Magnuson*, No. 03-CV-01060, 2006 BL 108213 (N.D.N.Y. Oct. 12, 2006) ("ERISA casts upon fiduciaries an affirmative, overriding obligation to reject plan terms where those terms would require such

imprudent actions in contravention of the fiduciary duties imposed under ERISA."); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) ("ERISA commands fiduciaries to obey Plan documents only to the extent that are consistent with other fiduciary duties."); *Enron*, 284 F. Supp. 2d at 549.