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2010 ERISA Employer Stock Cases: The Good, the Bad, and the In Between—Plaintiffs' Perspective

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INTRODUCTION

An employer has a powerful incentive to offer its own stock as an investment option in a retirement plan. While contributing the stock often has no immediate cash cost to the employer, the employer can deduct the value of the stock from its income.[1] For this reason, thousands of retirement plans offer company stock, and for many plans, company stock is their single largest asset.

The Employee Retirement Income Security Act allows individual account plans to offer company stock as an investment option. But what is permitted and what is

[1] *See generally* John H. Langbein et al., Pension and Employee Benefit Law 58-59 (5th ed. 2010).

prudent are two different things. The distinction is often lost on ERISA fiduciaries. When plan participants and beneficiaries seek to hold fiduciaries responsible for disastrous investments in company stock, the fiduciaries argue that they are exempt from the normal duties that bind every other ERISA fiduciary. The fiduciaries and their stable of supporting interest groups have even come up with a catchy and pejorative moniker for these cases—they call them ''stock drop'' cases.

No doubt there are some cases that fit the ''stock drop'' description, but many of the cases filed in recent years are something else altogether. These cases seek to hold fiduciaries liable not for minor errors, but for falling down on the job completely—for negligently investing in a company that was headed not for a stock drop, but for a *plunge* caused by serious corporate mismanagement or fraud.

The collapse of the financial markets in 2007 and 2008 has rightly prompted many lawsuits seeking compensation for the irresponsible loss of retirement savings invested in company stock. As this round of the litigation has worked its way through the system in 2010, two themes have become evident.

1. For years, defendant fiduciaries have argued that if an ERISA plan document purportedly requires them to invest in company stock, then they have no duty to divest from, or even halt further investment in, the company stock—even if the stock is an imprudent investment. It is difficult to take this argument seriously, and it has gained little traction until lately, when a number of district courts have accepted it. Several of those district court rulings have been appealed, though, and we suspect that appellate courts will have little trouble rejecting the argument that the duties of an ERISA fiduciary—''the highest known to the law''[2]—can be circumvented through mere plan language that requires investment in company stock.

2. The year 2010 saw further development of the so-called ''*Moench* presumption.'' Under this doctrine, which stems from the U.S. Court of Appeals for the Third Circuit's decision in *Moench v. Robertson*,[3] a fiduciary who invests in employer stock is entitled to a presumption that it acted consistently with ERISA, a presumption that is overcome ''by establishing that the fiduciary abused its discretion by investing in employer securities.''[4] Not all courts have accepted this doctrine, and the Department of Labor rejects it.[5] But even if the *Moench* presumption is accepted, some of the decisions issued in 2010 were inconsistent with any rational interpretation of the presumption. The U.S. Court of Appeals for the Ninth Circuit's articulation and application of *Moench* in September, as well as a district court case decided just after the new year, hold out hope that a more sensible application of *Moench* is possible.

[2] *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8, 3 EBC 1417 (2d Cir. 1982).
[3] 62 F.3d 553, 19 EBC 1713 (3d Cir. 1995).
[4] *Id.* at 571.
[5] Among many other amicus briefs, see, for example, Brief of Amicus Curiae Hilda L. Solis, Secretary of the United States Department of Labor in Support of Appellant Requesting Reversal, *In re Citigroup ERISA Litig.*, No. 09-3804 (2d Cir. Dec. 28, 2009) (16 PBD, 1/27/10; 37 BPR 268, 2/2/10).

I. THE ARGUMENT FROM DESIGN

At least since *Enron*,[6] defendant fiduciaries have argued that if a plan requires company stock to be offered as an investment option, their hands are tied. ERISA Section 404(a)(1)(D), they argue, requires fiduciaries to act in accordance with the documents governing a plan.[7] If a plan requires company stock to be offered as an investment, the fiduciaries must continue to offer it, no matter what happens. To do otherwise would be to modify the plan documents—but amending a plan is the job of a settlor and not a fiduciary.[8] Hence fiduciary duties do not apply when a plan mandates investment in company stock.

There are many problems with this argument, and we lack the space to expand on all of them. But here are just a few considerations that show this ''plan design'' argument to be quite wrong:

- ERISA Section 404(a)(1)(D) tells fiduciaries to follow plan documents only ''insofar as such documents and instruments are consistent with'' ERISA's fiduciary duties.[9] There is no command to follow plan documents when they would require a fiduciary to act imprudently or disloyally, in contravention of ERISA Section 404(a)(1)(A) or (B).[10]
- Indeed, because the text of ERISA commands a fiduciary to obey the duties of prudence and loyalty, and requires a fiduciary to obey a plan's documents only when they are ''consistent with'' those duties, a fiduciary must *override* plan provisions when the duties of prudence and loyalty require it. This is hardly a novel proposition. As the Supreme Court noted a quarter century ago, ''trust documents cannot excuse trustees from their duties under ERISA.''[11] This has also been the consistent position of the Department of Labor.[12]
- ERISA voids any provision of a plan that would excuse a fiduciary from the duties of prudence and loyalty.[13] If a plan provision purports to excuse a fiduciary from exercising its prudent and loyal judgment when investing in company stock, that provision is void.
- If a plan could eliminate all fiduciary discretion over an investment, then the plan would effectively be ''fiduciary-less'' insofar as that investment is concerned—but ERISA makes that impos-

[6] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 668-69, 31 EBC 2281 (S.D. Tex. 2003) (191 PBD, 10/3/03; 30 BPR 2200, 10/7/03).
[7] *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).
[8] *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443, 22 EBC 2265 (1999).
[9] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).
[10] *See* ERISA § 404(a)(1)(A)-(B), 29 U.S.C. § 1104(a)(1)(A)-(B) (imposing fiduciary duties of prudence and loyalty).
[11] *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568, 6 EBC 1665 (1985).
[12] *See*, *e.g.*, U.S. Dept. of Labor Opinion Letter No. 90-05 (A), 1990 WL 172964, at *3 (Mar. 29, 1990) (despite plan provision to the contrary, it is the responsibility of fiduciaries to determine, based on all relevant facts and circumstances, the prudence of investing plan assets in qualifying employer securities); *accord* U.S. Dep't of Labor Op. Letter No. 83-6A, 1983 WL 22495, at *1-2 (Jan. 24, 1983).
[13] ERISA § 410(a), 29 U.S.C. § 1110(a).

sible by requiring that all authority over a plan's assets be subject to fiduciary duties.[14]

- It is sometimes argued that, because ERISA contemplates the existence of plans that invest in employer securities, plans may permissibly require fiduciaries to invest in company stock under all circumstances. This is an extravagant claim. ERISA certainly allows for the existence of eligible individual account plans (EIAPs) and employee stock ownership plans (ESOPs)—but it also sets conditions for their existence. It does not exempt fiduciaries of EIAPs and ESOPs from the general duty of prudence or the duty of loyalty.[15] Thus, a plan may not require fiduciaries to invest in company stock when doing so would be imprudent or disloyal.
- The Plan design argument would allow a company to engage in criminal activity, fraud, and other gross mismanagement and yet continue to offer its stock as a retirement investment option. This is counter to the fundamental purpose of ERISA: to prevent the misuse or mismanagement of Plan assets, and preserve them for retirement purposes.[16] The ensuing race to the bottom would pose a grave risk to retirement income security—the very focus of ERISA.

The argument that a plan can excuse its fiduciaries from investing in company stock prudently and loyally is so implausible—so difficult to square with the language, structure and purposes of ERISA—that is difficult to take seriously. But for reasons that are unclear, the argument began to gain some traction in August 2009, when the court presiding over the *In re Citigroup ERISA Litigation*[17] accepted it. A few district court decisions issued in 2010 from the Southern District of New York and elsewhere have followed *Citigroup*,[18] though others have rejected it.[19]

Citigroup has been appealed to the U.S. Court of Appeals for the Second Circuit.[20] The Second Circuit has not yet issued an opinion, but for the reasons outlined above, we are hopeful that the court will reject the contention that stock can be ''hardwired'' into a plan and fiduciaries can be excused from their duties.

We suggest, then, that 2010 will eventually be seen as the flood tide of this argument from plan design. We predict that in 2011 the intellectual focus of ERISA company-stock litigation will shift to the *Moench* presumption.

II. THE *MOENCH* PRESUMPTION

A. The Presumption Has a Shaky Statutory Foundation

Under the *Moench*[21] presumption, a fiduciary who invests in company stock ''is entitled to a presumption that it acted consistently with ERISA by virtue of that decision.''[22] As a result of this presumption, the fiduciary's decision to invest in company stock is reviewed under an abuse-of-discretion standard.[23]

From the beginning, the *Moench* presumption had no basis in the text of ERISA itself. The presumption establishes an ''intermediate prudence standard''[24] different from the normal undeferential prudence standard applied to fiduciary decisionmaking.[25] The statute does exempt fiduciaries who invest in company stock from the duty to diversify investments—but it also unambiguously subjects them to the same general prudence standard that binds every other ERISA fiduciary.[26] There is no such thing as an ''intermediate prudence standard.'' As the U.S. Court of Appeals for the Fourth Circuit has noted,

> ERISA itself sets forth the *only* test of a fiduciary's duties: the requirement that fiduciaries act ''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 and with like aims.''[27]

For its presumption, however, *Moench* relied on what it believed was the common-law principle that a trustee must administer the trust consistently with the trust instrument. The court reasoned that an ERISA fiduciary must likewise administer a plan consistently with the plan document's direction to invest in employer stock.[28] The *Moench* court's interpretation of the common law of trusts was likely inaccurate.[29] More importantly, though—and as we have seen above in our discussion of the ''argument from design''—ERISA language tells fiduciaries *not* to follow plan documents when following them would violate the mandatory duties of prudence and loyalty.[30] And the Supreme Court has said that trust law ''must give way if it is inconsistent with the

[14] *See* ERISA § 403(a), 29 U.S.C. § 1103(a) (requiring that all plan assets be held by a trustee with ''exclusive authority and discretion to manage and control the assets . . . except to the extent that'' the trustee is subject to another named fiduciary or investment authority is delegated to an investment manager).

[15] ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2).

[16] *Mass Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8, 6 EBC 1733 (1985).

[17] No. 07-9790, 2009 WL 2762708, 47 EBC 2025 (S.D.N.Y. Aug. 31, 2009) (167 PBD, 9/1/09; 36 BPR 2054, 9/8/09).

[18] *In re Am. Express Co. ERISA Litig.*, Nos. 08-10834, 08-11301, 09-1017, 09-1202 , 2010 WL 4371434, at *10, 50 EBC 1161 (S.D.N.Y. Nov. 2, 2010) (212 PBD, 11/4/10; 37 BPR 2448, 11/9/10); *In re Wachovia Corp. ERISA Litig.*, No. 09-262, 2010 WL 3081359, at *9-11, 49 EBC 2019 (W.D.N.C. Aug. 6, 2010) (152 PBD, 8/10/10; 37 BPR 1829, 8/17/10).

[19] *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-2593, 2010 WL 4386903, at *2, 50 EBC 1172 (D. Kan. Oct. 29, 2010) (210 PBD, 11/2/10; 37 BPR 2447, 11/9/10); *In re SLM Corp. ERISA Litig.*, No. 08-4334, 2010 WL 3910566, at *6-7, 49 EBC 2655 (S.D.N.Y. Sept. 24, 2010) (186 PBD, 9/28/10; 37 BPR 2190, 10/5/10); *Gearren v. McGraw-Hill Cos.*, 690 F. Supp. 2d 254, 264-65, 48 EBC 2057 (S.D.N.Y. 2010) (29 PBD, 2/16/10; 37 BPR 415, 2/23/10). More recently, Judge Baer of the Southern District of New York forcefully rejected the argument in *Veera v. Ambac Plan Administrative Committee*, No. 10-4191, 2011 WL 43534, at *3 (S.D.N.Y. Jan. 6, 2011) (5 PBD, 1/7/11; 38 BPR 58, 1/11/11).

[20] *In re Citigroup ERISA Litig.*, No. 09-3804 (2d Cir. oral arg. Sept. 28, 2010).

[21] *Moench v. Robertson*, 62 F.3d 553, 19 EBC 1713 (3d Cir. 1995).

[22] *Id.* at 571.

[23] *Id.*

[24] *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1097, 32 EBC 1417 (9th Cir. 2004) (49 PBD, 3/15/04; 31 BPR 618, 3/16/04).

[25] *See, e.g.*, *Smith v. Sydnor*, 184 F.3d 356, 365 (4th Cir. 1999).

[26] ERISA § 404(a)(1)(B), (D), 29 U.S.C. § 1104(a)(1)(B), (D).

[27] *DiFelice v. U.S. Airways Inc.*, 497 F.3d 410, 422-23, 41 EBC 1321 (4th Cir. 2007) (148 PBD, 8/2/07; 34 BPR 1845, 8/7/07) (quoting ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B)).

[28] *Moench*, 62 F.3d at 571.

[29] *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1119 & nn. 73-74 (2004).

[30] *See supra* text accompanying notes 9-15.

language of, ERISA], its structure, or its purposes.''[31] The statute forbids a fiduciary from using plan provisions as a get-out-of-jail-free card, even when the plan provisions speak of investment in company stock.

B. In 2010, Some Courts Applying the *Moench* Presumption Ignored the Fiduciary Decisionmaking Process

Probably because the *Moench* presumption is a pure judicial innovation rather than a doctrine derived from ERISA, the opinions applying the presumption ignore the traditional concern of the courts when evaluating a fiduciary's decision: the process by which the fiduciary came to that decision.[32] This year, for example, some of the district courts to apply *Moench* turned their attention exclusively to the results of the decision to invest in company stock, asking about almost nothing other than the amount of the stock price's decline.[33] Instead of asking how the fiduciaries decided to continue investing in company stock, these courts asked what happened *as a result of* that decision. Not only does this detract from a focus on process, but it also uses 20/20 hindsight to evaluate the fiduciaries' decision, rather than asking whether their decision was prudent or imprudent *at the time*.[34]

It is certainly true that process may be *inferred* from results.[35] But often in 2010, the courts applying *Moench* did not ask whether an imprudent fiduciary decisionmaking process may be inferred from the results of that process. Instead, they seemed to focus on results alone.[36] Process must be part of any *Moench* presumption that truly abides by an abuse-of-discretion standard of review. After all, one can determine whether discretion has been abused only after examining how that discretion was guided and why it was exercised in a particular manner.[37]

Thus, for example, a fiduciary *necessarily* abuses its discretion when the fiduciary simply does not exercise its discretion one way or the other—when the fiduciary fails to consider at all whether an investment in employer stock remains a proper investment. As the U.S. Court of Appeals for the Seventh Circuit noted in just such a situation, ''a discretionary judgment cannot be upheld when discretion has not been exercised.''[38]

C. The Ninth Circuit Set a Potentially Workable *Moench* Standard in *Quan v. Computer Sciences Corp.*

To be sure, even a careful process cannot save a fiduciary decision that is objectively imprudent,[39] and in *Quan v. Computer Sciences Corp.*,[40] the Ninth Circuit's opinion asked what external circumstances can make a decision to invest in company stock objectively unreasonable. It phrased this inquiry as, ''How bad do things have to be before no reasonable fiduciary in similar circumstances would have continued investing in company stock?''[41]

In answer to the question it posed, the *Quan* court answered that a decision to continue investing in company stock is objectively unreasonable if the surrounding circumstances '' 'clearly implicate[] the company's viability as an ongoing concern' or show 'a precipitous decline in the employer's stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement.' ''[42] *Quan*, then, requires (1) a ''precipitous decline'' in stock price and either (2a) ''evidence that the company is on the brink of collapse'' or (2b) evidence that it is ''undergoing serious mismanagement.'' We think this standard can be a workable one, provided it is applied with an eye toward *Moench*'s conceptual foundations and is not misread to require a evidence that the company was ''on the brink of collapse'' in addition to ''undergoing serious mismanagement.'' Evidence of *either* condition, when combined with a precipitous decline in stock price, is enough to overcome the presumption. In this regard, *Quan* is not so much a change as a ratification of prior precedent from the Ninth Circuit[43] and from district courts within it,[44] which articulated a functionally similar approach.

The *Moench* presumption sets an abuse-of-discretion standard, asking whether ''no reasonable fiduciary''

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[31] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447, 22 EBC 2265 (1999) (quotation marks and citation omitted).

[32] *DiFelice v. U.S. Airways Inc.*, 497 F.3d 410, 420 , 41 EBC 1321 (4th Cir. 2007) (148 PBD, 8/2/07; 34 BPR 1845, 8/7/07) (''When deciding whether a plan fiduciary has acted prudently, a '[c]ourt must inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.' '' (quoting *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 86, 25 EBC 2237 (2d Cir. 2001) (46 PBD, 3/8/01; 28 BPR 862, 3/13/01))); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 920, 17 EBC 2556 (8th Cir. 1994) (''The basis for personal liability in each case is the breach of duty, which is not a guarantee but a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably.'').

[33] *In re SLM Corp. ERISA Litig.*, No. 08-4334, 2010 WL 3910566, at *7, 49 EBC 2655 (S.D.N.Y. Sept. 24, 2010) (186 PBD, 9/28/10; 37 BPR 2190, 10/5/10); *In re Bank of Am. Sec., Derivative, & ERISA Litig.*, No. 09-2058, 2010 WL 3448197, at *20-21, 50 EBC 1366 (S.D.N.Y. Aug. 27, 2010) (168 PBD, 9/1/10; 37 BPR 1979, 9/7/10); *In re Wachovia Corp. ERISA Litig.*, No. 09-262, 2010 WL 3081359, at *14, 49 EBC 2019 (W.D.N.C. Aug. 6, 2010) (152 PBD, 8/10/10; 37 BPR 1829, 8/17/10); *Fisher v. JP Morgan Chase & Co.*, 703 F. Supp. 2d 374, 384-85, 48 EBC 2583 (S.D.N.Y. Mar. 31, 2010) (62 PBD, 4/2/10; 37 BPR 786, 4/6/10); *Gearren v. McGraw Hill Cos.*, 690 F. Supp. 2d 254, 270, 48 EBC 2057 (S.D.N.Y. 2010) (29 PBD, 2/16/10; 37 BPR 415, 2/23/10). While these decisions applied *Moench* at the motion-to-dismiss stage, we note that there is considerable controversy over whether this is proper. *See, e.g.*, *In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 953-54, 49 EBC 1208 (W.D. Tenn. 2010) (46 PBD, 3/11/10; 37 BPR 575, 3/16/10) (refusing to apply a presumption at the pleadings stage); *see also infra* text accompanying notes 56-60.

[34] *Cf. DiFelice*, 497 F.3d at 424 (noting that ''an investment's diminution in value is *neither necessary*, nor sufficient, to demonstrate a violation of a fiduciary's ERISA duties'' (emphasis added)).

[35] *Braden v. Wal-Mart Stores Inc.*, 588 F.3d 585, 596, 48 EBC 1097 (8th Cir. 2009) (226 PBD, 11/30/09; 36 BPR 2743, 12/1/09).

[36] *See* cases cited *supra* note 33.

[37] *See Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989) (''Unless discretion has been taken seriously ... and exercised conscientiously, the basis for deference is missing.'').

[38] *Armstrong v. LaSalle Bank N.A.*, 446 F.3d 728, 733, 37 EBC 2256 (7th Cir. 2006) (88 PBD, 5/8/06; 33 BPR 1181, 5/9/06).

[39] *See Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962, 6 EBC 2269 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

[40] 623 F.3d 870, 49 EBC 2642 (9th Cir. 2010) (216 PBD, 11/10/10; 37 BPR 2500, 11/16/10).

[41] *Id.* at 882.

[42] *Id.* (quoting *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 n.5, 32 EBC 1417 (9th Cir. 2004) (49 PBD, 3/15/04; 31 BPR 618, 3/16/04)).

[43] *See Wright*, 360 F.3d at 1099 n.5.

[44] *See, e.g.*, *In re Fremont Gen. Corp. Litig.*, 564 F. Supp. 2d 1156, 1158-59 (C.D. Cal.)

would invest in company stock.[45] In other words, the presumption is overcome when an investment is objectively unreasonable. We take *Quan*'s broad term ''serious mismanagement'' to encompass the numerous and diverse circumstances in which a company's dishonest, shoddy, or highly risky management can render investment in its stock objectively unreasonable. As much of the case law applying *Moench* has recognized, investment in company stock can be objectively unreasonable in quite a few different situations.[46]

For example—as the Department of Labor has often pointed out[47]—no reasonable fiduciary would throw plan participants' money away by investing in stock he or she knows or should know is inflated in price.[48] Or a company's stock may be so risky that putting investment savings in it would be unreasonable, even if the company is in no danger of imminent collapse.[49] It follows, then, that a company whose stock is an enormously risky investment *and* inflated in price is likewise an objectively unreasonable investment for a fiduciary to make.[50]

Under this standard, the result the *Quan* court reached under the facts of the case appears to be sensible. As described by the court, the company in that case suffered a one-day 12 percent drop in its stock price, but the price quickly rebounded to a level that surpassed the pre-drop price.[51] The stock price was not inflated.[52] Nor, more importantly, was there any evidence that the fiduciaries engaged in an imprudent or unreasonable process of decision. There was simply no evidence that the fiduciaries had violated the statutory prudence standard, let alone the *Moench* presumption. So perhaps the strangest thing about *Quan* is that the Ninth Circuit reached the *Moench* issue at all: it could have simply held that under the normal duty of prudence—the standard urged by the plaintiff—there was no breach.[53]

To be sure, we expect fiduciary defendants in the future to focus obsessively on *Quan*'s reference to a company's being ''on the brink of collapse''—forgetting that *Quan* can also be satisfied by a showing of ''serious mismanagement''—or to interpret ''serious mismanagement'' to require nothing less than Enron-level criminal activity. To interpret *Quan* this way is to forget, as we have shown, that fiduciaries may abuse their discretion in many different ways—and to weaken substantially the protections that ERISA affords. It also departs from the balancing of interests that *Moench* purports to embody, not to mention from past Ninth Circuit case law.[54]

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[45] *Quan,* 623 F.3d at 882.

[46] *Cf. In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102, 43 EBC 1005 (9th Cir. 2008) (33 PBD, 2/20/08; 35 BPR 474, 2/26/08) (noting there are a ''myriad of circumstances'' under which investment in company stock can violate ERISA's prudence standard).

[47] *See, e.g.*, Brief of Amicus Curiae Hilda L. Solis, Secretary of the United States Department of Labor in Support of Appellant Requesting Reversal at 20-21, *In re Citigroup ERISA Litig.*, No. 09-3804 (2d Cir. Dec. 28, 2009) (16 PBD, 1/27/10; 37 BPR 268, 2/2/10).

[48] See *Shanehchian v. Macy's, Inc.*, No. 07-00828, 2009 WL 2524562, at *7, 47 EBC 2052 (S.D. Ohio Aug. 14, 2009) (157 PBD, 8/18/09, 36 BPR 1965, 8/25/09); *Shirk v. Fifth Third Bancorp*, No. 05-49, 2007 WL 1100429, at *10, 40 EBC 2560 (S.D. Ohio Apr. 10, 2007) (70 PBD, 4/12/07; 34 BPR 920, 4/17/07); *In re Goodyear Tire & Rubber Co. ERISA Litig.*, 438 F. Supp. 2d 783, 793-94, 38 EBC 1456 (N.D. Ohio 2006) (132 PBD, 7/12/06; 33 BPR 1686, 7/18/06); *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 861, 37 EBC 1651 (N.D. Ohio 2006) (57 PBD, 3/24/06; 33 BPR 809, 3/28/06); *In re Honeywell Int'l ERISA Litig.*, No. 03-1214, 2004 WL 3245931, at *11, 34 EBC 1956 (D.N.J. Sept. 14, 2004) (208 PBD, 10/28/04, 31 BPR 2463, 11/2/04); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-8324, 2004 WL 407007, at *4-5, 32 EBC 1699 (N.D. Ill. Mar. 3, 2004) (45 PBD, 3/9/04; 31 BPR 621, 3/16/04); *Stein v. Smith*, 270 F. Supp. 2d 157, 164, 172, 30 EBC 2421 (D. Mass. 2003) (130 PBD, 7/9/03; 30 BPR 1537, 7/15/03); *see also Martin v. Feilen*, 965 F.2d at 671 (holding that ''pa[ying] too much'' for employer stock is a breach of duty).

[49] *See In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 892, 45 EBC 2057 (E.D. Mich. 2008) (63 PBD, 4/2/08; 35 BPR 777, 4/8/08) (''It is entirely possible that a company built on high speculation—for instance, one with no clear path to profitability, but with possibly tremendous potential—could, without fraud, attract a huge amount of capital from highly risk-tolerant investors, and thus be in no danger of imminent collapse despite being extraordinarily risky.''); *accord Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 640 (N.D. Ohio 2009) (noting that ''[w]hile Plaintiffs d[id] not allege that Key was on the verge of failure,'' they did allege that fiduciaries knew of the company's ''high risk conduct, . . . requiring a government bailout and a huge dividend reduction''); *Morrison v. MoneyGram Int'l, Inc.*, 607 F. Supp. 2d 1033, 1053, 46 EBC 1673 (D. Minn. 2009) (57 PBD, 3/27/09; 36 BPR 774, 3/31/09) (holding presumption overcome by company's ''pursuit of an extraordinarily speculative and unnecessary investment strategy that involved borrowing money and investing it in risky mortgage-backed securities'').

[50] *See In re Schering-Plough ERISA Litig.*, No. 08-1432, 2010 WL 2667414, at *5, 49 EBC 2538 (D.N.J. June 29, 2010) (125 PBD, 7/1/10; 37 BPR 1550, 7/6/10) (noting that ''although in hindsight it appears that Schering stock has recovered,'' allegations that Schering had not disclosed critical information about a drug and that there were serious business risks associated with that drug were sufficient to overcome the presumption); *Crocker v. KV Pharm. Co.*, No. 09-198, 2010 WL 1257671, at *21, 49 EBC 1459 (E.D. Mo. Mar. 24, 2010) (59 PBD, 3/30/10; 37 BPR 787, 4/6/10) (where plaintiffs alleged that the company's audit committee discovered deficiencies in the company's financial analysis and budget controls and that the recall of a drug resulted in FDA's holding the company in noncompliance, the presumption was overcome); *In re Merck & Co. Vytorin ERISA Litig.*, No. 08-1974, 2009 WL 2834792, at *3, 47 EBC 2047 (D.N.J. Sept. 1, 2009) (169 PBD, 9/3/09; 36 BPR 2060, 9/8/09) (allegations similar to those in Schering-Plough were sufficient to overcome the presumption); *In re Pfizer ERISA Litig.*, No. 04-10071, 2009 WL 749545, at *12, 46 EBC 1792 (S.D.N.Y. Mar. 20, 2009) (54 PBD, 3/24/09; 36 BPR 779, 3/31/09) (allegations that Pfizer had not disclosed critical information about two drugs, and that there were equally critical business risks associated with those drugs, overcame the presumption); *In re Merck & Co., Inc., Sec., Derivative & ERISA Litig.*, No. 05-2369, 2006 WL 2050577, at *7, 39 EBC 1053 (D.N.J. July 11, 2006) (154 PBD, 8/11/06; 33 BPR 1956, 8/15/06) (same); *In re Sprint Corp ERISA Litig..*, 388 F. Supp. 2d 1207, 1224-25, 33 EBC 2196 (D. Kan. 2004) (105 PBD, 6/2/04; 31 BPR 1227, 6/8/04) (noting that abuse of discretion can be established by a fiduciary's conflicted status and ''the stock's, not the company's,'' impending collapse due to risky business practices (emphasis in original)); *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361, 1367-68, 32 EBC 1993 (N.D. Ga. 2004) (70 PBD, 4/13/04; 31 BPR 873, 4/20/04) (high-risk business practices combined with artificial inflation were sufficient to overcome the presumption).

[51] *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 875-76, 49 EBC 2642 (9th Cir. 2010) (216 PBD, 11/10/10; 37 BPR 2500, 11/16/10).

[52] *Id.* at 885.

[53] *Cf. Brown v. Medtronic, Inc.*, —- F.3d ——, 2010 WL 5059594, at *8, 50 EBC 1490 (8th Cir. 2010) (237 PBD, 12/14/10; 37 BPR 2777, 12/28/10) (declining to adopt *Moench* presumption, and affirming the dismissal of claims on other grounds); *Syncor*, 516 F.3d at 1102-03 (declining to adopt *Moench* and holding that reversal of dismissal was required under either *Moench* or ERISA's normal statutory prudence standard).

[54] See *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1102, 43 EBC 1005 (9th Cir. 2008)(33 PBD, 2/20/08; 35 BPR 474, 2/26/08) and *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1099 n.5, 32 EBC 1417 (9th Cir. 2004)(49 PBD, 3/15/04; 31 BPR 618, 3/16/04), neither of which require a showing of ''brink of collapse'' to state a claim. *See also United States v. Contreras*, 593 F.3d 1135 (9th

D. A Recent District Court Decision Wisely Declines to Apply the Full *Moench* Presumption at the Pleading Stage

For all of possible virtues, even the Ninth Circuit's decision in *Quan* tended to neglect fiduciary decisionmaking process and to examine only the results of that process. A recent decision from the Southern District of New York joined the chorus of other cases declining to dismiss claims under the *Moench* presumption,[55] and provided a sensible, if only partial, solution to the recent neglect of process. The case also took a sensible approach to the *Moench* presumption more generally.

In *Veera v. Ambac Plan Administrative Committee*, the district court declined to apply the full *Moench* presumption (if any presumption at all) at the motion-to-dismiss stage, stating that the plaintiff, ''on the facts alleged here, deserves the opportunity to overcome the presumption.''[56] ''[A] strict application of *Moench*,'' the court said, ''is inappropriate at the motion to dismiss stage.''[57] While the company in *Veera* had gone into bankruptcy by the time the district court issued its order, the class period had ended long before the company had filed for bankruptcy and the court did not even mention in the bankruptcy in its analysis.[58]

Typically, ERISA plaintiffs neither possess nor can secure information on the fiduciaries' decision-making process until discovery begins.[59] Declining to apply the full *Moench* presumption—or to apply it at all—at the pleading stage allows plaintiffs a chance to develop a factual record on the fiduciaries' decisionmaking process. If a complaint, whatever the precise form of its allegations, raises a fair inference that the fiduciaries may have abused their discretion in the decisionmaking process—even if contrary inferences might also be drawn—the complaint should not be dismissed.[60] A too rigorous application of *Moench*, by contrast, threatens to throw out many genuinely aggrieved plan participants prematurely. In this connection, it is important to remember that *Quan* was an appeal from a grant of summary judgment, and that there was no evidence in that case of an inadequate fiduciary decisionmaking process.

We hope and trust that in 2011, courts will follow *Veera* and numerous similar precedents and, if they accept *Moench*, take a more flexible approach to it—one that accords better both with ERISA in general and with *Moench*'s conceptual foundations. Plan participants and beneficiaries *need* this protection, for if it is denied, the hundreds of billions of dollars invested in company stock in this country will effectively be without ERISA's protections at all. This would be neither sensible nor consistent with ERISA's purpose: in enacting ERISA, ''the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators.''[61]

Cir. 2010) (en banc) (three-judge panels are bound by prior panel decisions and cannot overrule them).

[55] *See, e.g.*, *In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 953-54, 49 EBC 1208 (W.D. Tenn. 2010) (46 PBD, 3/11/10; 37 BPR 575, 3/16/10) (listing cases).

[56] No. 10-4191, 2011 WL 43534, at *5 (S.D.N.Y. Jan. 6, 2011) (5 PBD, 1/7/11; 38 BPR 58, 1/11/11).

[57] *Id.* (citing *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 359 (S.D.N.Y. 2009)).

[58] *See id.* at *5-6.

[59] There is no ERISA duty to disclose internal fiduciary deliberations such as committee minutes. *See Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 862, 23 EBC 1985 (8th Cir. 1999) (205 PBD, 10/25/99; 26 BPR 2517, 10/25/99).

[60] *Cf. Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595, 48 EBC 1097 (8th Cir. 2009) (226 PBD, 11/30/09; 36 BPR 2743, 12/1/09).

[61] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.9, 6 EBC 1733 (1985).

