

## Second Circuit Holds that There is no Affirmative Duty to Disclose Nonpublic Information Regarding Employer Stock

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November 5, 2011

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The Second Circuit Court of Appeals issued two decisions with respect to the maintenance of an employer stock fund in a 401(k) plan as an investment option when the plan document provides for the company stock fund as an investment alternative. In *In re Citigroup ERISA Litigation*, No. 09-3804 (2d Cir. Oct. 19, 2011), the Second Circuit ruled that the fiduciary did not abuse its discretion in continuing to offer employer stock as an investment decision because the fiduciary was following the plan document provision mandating the employer stock fund as an investment alternative and the fiduciary only must override the plan document provision regarding the company stock fund in very limited circumstances. The Second Circuit further held that the employer had no affirmative duty to disclose to plan participants nonpublic information regarding the expected performance of employer stock. In *Gearren v. McGraw-Hill Cos.*, Nos. 10-792, 10-934 (2d Cir. Oct. 19, 2011), the Second Circuit likewise adopted the presumption of prudence surrounding the offering of the company stock fund as an investment alternative when it was provided in the plan document. These two cases reflect the Second Circuit's adoption of the presumption of prudence when the plan provides that the company stock fund is an investment alternative. This presumption has also been adopted in the Third, Fifth, Sixth, Seventh and Ninth Circuits.