



The Second Circuit Finds a Crucial Limitation in the Moensch Presumption For Retirement Plan Fiduciaries

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In *Taveras v. UBS AG*, No. 12-1662 (2d Cir. February 27, 2013), the U. S. Court of Appeals for the Second Circuit reviewed the dismissal of a complaint against UBS AG (“UBS”) in a putative class action brought on behalf of participants of two UBS retirement plans. The Plaintiffs alleged that the Defendants violated fiduciary duties imposed under ERISA. Applying the *Moensch* presumption, the court affirmed the dismissal of a claim for breach of those duties as to one of the retirement plans, but overturned that dismissal as to the second plan. In reaching this result, the Second Circuit drew a critical distinction between plan documents that required or strongly encouraged certain investments in UBS stock, and plan documents that did not.

The Plaintiffs were current and former employees of UBS and UBS Financial Services (“UBSFS”). They alleged that UBS invested heavily in subprime mortgage-backed securities from April to October, 2008, allegedly in violation of its own risk tolerance policies, and that this investment rendered UBS stock unfit for inclusion in the UBSFS 401(k) Plus Plan (“Plus Plan”) and Savings and Investment Plan (“SIP”). The Plaintiffs contended that the plan fiduciaries violated their fiduciary duties to the plan participants by (1) imprudently continuing to allow UBS stock to be offered as an investment option to plan participants, (2) violating the duty of candor by making misstatements or omissions regarding the financial condition of UBS, (3) failing to adequately monitor other fiduciaries, and (4) engaging in conflicts of interest in violation of the duty of loyalty.

The Plus Plan and SIP were ERISA-governed retirement plans for UBS employees. Each plan’s investment committee had discretion to add or delete authorized investment funds as participant investment options. However, the Plus Plan required that a UBS common stock fund be one of the investment options offered to plan participants. The SIP, by contrast, did not.

The core of the complaint was that the Plus Plan and SIP continued to offer the UBS Stock Fund as an investment option after UBS’s financial condition seriously deteriorated from 2007 to October 2008. The value of UBS stock fell seventy-four percent in that period, allegedly as a result of the investment in the

subprime mortgage-backed securities.

In ruling on the Plaintiffs' claims, the district court applied the *Moensch* presumption, a "presumption of prudence" created by the federal courts that applies to fiduciaries of certain plans who invest the plan assets they are overseeing, or offer participants the option to invest their individual accounts, in the employer's stock. As the Second Circuit later explained, this presumption is applied in order to balance competing interests: the ERISA goal of protecting retirement assets and the goal of encouraging investment in employer stock, primarily in cases where the fiduciary is obliged to offer the employer stock as a plan investment option. Where the *Moensch* presumption applies, the fiduciary's decision to invest in the employer's stock or offer it as an investment option is a presumptively prudent decision complying with ERISA. To overcome that presumption, a plaintiff must show that the fiduciary "knew or should have known that the employer, and therefore its stock, was in a 'dire situation.'"

The district court held that the Plaintiffs' complaint failed to allege facts that either overcame the presumption as it applied to both the Plus Plan and SIP, or showed that the plan fiduciaries violated their duty of prudence by retaining the UBS Stock Fund as a plan investment option.

On appeal, however, the Second Circuit distinguished between the two plans with respect to whether the *Moensch* presumption applied. The court held that the presumption applied to the fiduciaries of the Plus Plan, who were required by the plan documents to offer the UBS stock fund. Their discretion to decide whether to offer the fund was limited; they were therefore entitled to the presumption of prudence, and the plaintiffs had not pled facts to overcome it.

By contrast, although the SIP plan document included references to the UBS Stock Fund, the SIP Investment Committee had more discretion to remove the UBS Stock Fund from the plan's investment options. The Second Circuit therefore held that the *Moensch* presumption did not apply to the SIP, vacated the dismissal of fiduciary breach claims based on the SIP, and remanded those claims to the district court for further proceedings.

Taveras demonstrates that some federal circuits will not apply the *Moensch* presumption to all situations in which a retirement plan allows, or even provides for, the stock of the employer as an investment option. To provide the protection of the presumption for their retirement plan fiduciaries, plan sponsors need to draft plan provisions that clearly obligate the fiduciaries to offer the employer's stock as an investment option. Plan sponsors and their fiduciaries also need to remember that the presumption does not provide complete protection for those fiduciaries, who may still be held liable if their continued offer of the employer stock becomes imprudent in the face of an employer's "dire" deterioration and a resulting threat to the value of the stock.

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