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High Court Mulls Tackling 'Single-Stock' ERISA Cases

By **Emily Brill**

Law360 (March 26, 2021, 9:59 PM EDT) -- The U.S. Supreme Court has already called for input twice this year in ERISA cases that hinge on single-stock funds' suitability for employee retirement plans, suggesting that the question of whether it's imprudent to push workers' savings toward just one company's shares could land on the high court's docket in 2021.

This question, arising out of the Fourth and Fifth circuits, will likely keep cropping up in Employee Retirement Income Security Act suits if it is not addressed by the high court, benefits attorneys said. It targets a now-common corporate practice: spinning off a company, then letting the new company's employees invest retirement savings in the parent company through a single-stock fund.

The justices will probably have to weigh in on this practice's compatibility with ERISA's diversification requirement at some point, attorneys said — it's just a matter of when. The high court's Jan. 4 and March 22 decisions to request a response to petitions to hear cases against Gannett Co. and Phillips 66's retirement plan caretakers suggests they may be interested in doing so sooner rather than later.

"This is not an issue that's going to go away," said Elizabeth Hopkins, a worker-side benefits partner at Kantor & Kantor LLP. "This is a technique that's being increasingly used by big companies, and courts are grappling with these issues."

The cases against the Gannett and Phillips 66 fiduciaries asked whether ERISA's diversification requirement forbids companies from placing single-stock funds in their retirement plan lineups.

The courts reached different conclusions, with the Fourth Circuit saying in the Gannett case that including such funds places employers at risk of flouting ERISA's diversification requirement, and the Fifth Circuit holding in the Phillips 66 suit that employers can include those funds without violating the mandate as long as the retirement plan offers other investment options.

The Fourth Circuit's finding troubled management-side attorneys, who worried that it would wipe even high-performing single-stock funds off plan lineups. They said only the Fifth Circuit's decision offers a sustainable path forward for single-stock funds in retirement plans.

"The Fourth Circuit in Gannett essentially holds that ERISA's diversification requirement applies at both the fund level and the plan level — a seemingly impossible burden for any single-stock fund that is not an employer stock fund," Mayer Brown LLP benefits partners Stephanie B. Vasconcellos and Maureen J.

Gorman told Law360 in a written statement.

After the Fourth and Fifth circuits handed down their decisions last year, the losing parties in both suits asked the high court to intervene, while the winning parties looked the other way, waiving their right to respond to the Supreme Court appeals.

But the justices, not content to ignore the petitions themselves, prodded Gannett's workers and Phillips 66's fiduciaries for a response, showing that at least one member of the court is interested in these cases.

Hopkins, the worker-side attorney, said she thinks the justices are gathering information about an issue dogging ERISA litigators but will likely wait until more circuit court case law is formed before resolving the question of single-stock funds' appropriateness for retirement plans.

If the justices do opt to hold off, they might not have to wait long, given large corporations' newfound penchant for placing single-stock funds on plan lineups after spinoffs, which has caught the attention of the ERISA plaintiffs' bar.

"This is something that's becoming increasingly common, because big companies are engaging in what they refer to as 'pension de-risking' — a way to deal with their pension obligations," Hopkins said.

Spinning off a company and directing workers' retirement savings to the parent company's stock through a single-stock fund on the new company's retirement plan is one such "pension de-risking" strategy intended to help companies save money by reducing large pension obligations, she said.

Vasconcellos and Gorman opted not to read the tea leaves about whether the Gannett or Phillips 66 cases would wind up in the Supreme Court's caseload this year, but they said the high court should definitely step in to clarify whether companies can place single-stock funds in their retirement plans without violating ERISA's diversification mandate. Until then, confusion about these funds will reign supreme when employers are forming their plans.

"Clear guidance ... from the Supreme Court will be important to help fiduciaries weigh the costs and benefits of retaining a single-stock fund, including the likelihood of a challenge in litigation surviving a motion to dismiss," the Mayer Brown attorneys said. "Unless and until clear guidance is issued, these plan fiduciaries will remain stuck in what seems to be a no-win situation."

The cases are Gannett Co. Inc. et al. v. Jeffrey Quatrone, case number 20-609, and Jeffrey Schweitzer et al. v. Investment Committee of the Phillips 66 Savings Plan et al., case number 20-1255, in the Supreme Court of the United States.

--Editing by Jill Coffey.