I. Gannett: Circuits Split over ERISA Single-stock Fund Litigation

The defined contribution retirement savings plan has emerged as the predominant method for retirement savings in the United States.[1] The transition from defined benefit plans, which provided defined benefits for participants upon retirement, to defined contribution plans, which define the contribution made by the employer to the participant employee's retirement savings account in lieu of fixed payments upon retirement, has resulted in a shifting of risk from employers to employees.[2] Along with this shift of investment risk, and as the value of these investments has grown,[3] the importance of the role of the fiduciaries, who are charged with administering and managing the investment plans on behalf of the plan participants, has become clear.[4]

However, while the importance of fiduciaries and their duties has been clarified, a recent circuit split has cast doubt upon the uniform application of those fiduciary duties. This article examines the decisions of *Stegemann v. Gannett Company, Inc.*[5] and *Schweitzer v. Investment Committee of Phillips 66*,[6] in which the Fourth and Fifth Circuit Courts of Appeals published divergent opinions on the application of the fiduciary duties of diversification and prudence with regard to single stock funds in defined contribution retirement savings plans. This article begins with a brief overview of several rules arising under the Employee Retirement Income Security Act of 1974 (ERISA), followed by a factual overview of *Schweitzer* and then

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[1] Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and Dominated Funds in 401(k) Plans*, 124 YALE L.J. 1476, 1479 (2015) ("Participant-directed defined-contribution retirement plans are now the primary savings vehicle for most Americans' retirement."); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 453 (2004) ("Americans today primarily conceive of and implement retirement savings in the form of individual accounts.").

[2] Zelinsky, *supra* note 1, at 453 (introducing the differences in risk between defined benefit and defined contribution plans).

[3] Ayres & Quinn, *supra* note 1, at 1479 ("Defined contribution plans hold more than $4.4 trillion of workers' retirement savings.").

[4] 29 C.F.R. § 2550.404a-1 (1979) (explaining duties of plan fiduciaries to act on behalf of participants and beneficiaries).

[5] 970 F.3d 465 (4th Cir. 2020), *petition for cert. filed*, 2020 WL 6545920 (U.S. Oct. 30, 2020) (No. 20-609).

[6] 960 F.3d 190 (5th Cir. 2020).

Gannett. After attempting to identify the legal issue at the heart of the circuit split, this article concludes with a discussion of the potential impact of these decisions.

A. Overview of ERISA Issues

There are two ERISA issues that are necessary background for interpreting the divergent decisions in *Schweitzer* and *Gannett*: the fiduciary duties required by the ERISA statute and special rules for the treatment of employer stock.

1. *Fiduciary Duties Imposed by ERISA*

ERISA imposes multiple duties on the fiduciaries responsible for managing the retirement plans for the purpose of "providing benefits to the participants and their beneficiaries" and "defraying reasonable expenses of administering the plan."[7] The two duties at issue in the cases here, are the duty of prudence and the duty of diversification as required by the ERISA statute.[8] The accompanying regulations, issued by the Department of Labor, outline the requirements of fiduciaries pursuant to their duties of prudence and diversification.[9] However, while fiduciary duties under ERISA are codified in the statute, the common law duties owed by fiduciaries to trustees cannot be ignored: the Supreme Court has asserted the importance of using common law doctrine to interpret and apply the fiduciary duties mandated by the ERISA statute.[10]

2. *Special Rules for Employer Stock*

In both *Gannett* and *Schweitzer*, the courts focus on applying the duties of prudence and diversification in the context of single stock

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[7] 29 U.S.C. § 1104(a)(1)(A)(i)–(ii) (2018).
[8] § 1104(a)(1)(B)–(C) (outlining the duties of prudence and diversification); s*ee infra* Part D (discussing fiduciary duties at issue in *Gannett* and *Schweitzer*).
[9] 29 C.F.R. § 2550.404a-1 (discussing the investment duties of plan fiduciaries).
[10] Varity Corp. v. Howe, 516 U.S. 489, 497, 116 S. Ct. 1065, 1070, 134 L. Ed. 2d 130 (1996) ("Consequently, we believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.").

funds.[11] It is worth noting at the outset that there are different rules for "qualifying employer securities" which are not violative of the duty of diversification or the diversification requirements of the duty of prudence.[12] It is not uncommon for firms to sponsor Employee Stock Ownership Plans (ESOP).[13] Because ESOPs are designed to encourage investment in an individual's employer, they are inherently undiversified and have been exempted from the fiduciary duties mandated by ERISA to the extent that they require diversification.[14]

In the present cases, there was agreement between the courts in determining the securities of the predecessor company are not qualifying employer securities under ERISA.[15] Establishing that the single stock funds in question were qualifying employer securities in ESOPs is a critical element of the decisions because it requires both courts to then apply the duties of prudence and diversification to analyze the single-stock funds in question.

B. Fifth Circuit Decision in *Schweitzer v. Investment Committee of Phillips 66*

1. Facts in Schweitzer

ConocoPhillips spun-off its downstream refining businesses to create Phillips66 and maintained its upstream exploration and

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[11] *See generally Gannett*, 970 F.3d 465; *Schweitzer*, 960 F.3d 190.

[12] § 1104(a)(2) ("In the case of an eligible individual account plan … the diversification requirement … and the prudence … is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities …").

[13] NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, A DETAILED OVERVIEW OF EMPLOYEE OWNERSHIP PLAN ALTERNATIVES, https://www.nceo.org/articles/comprehensive-overview-employee-ownership (observing more than 6,000 companies offering ESOPs in 2018).

[14] Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 415–17 (2014) (explaining why ESOPs have been exempted from fiduciary duties require diversification by Congress).

[15] *Schweitzer*, 960 F.3d at 195 ("The ConocoPhillips Funds were not 'employer securities' after the spinoff and were no longer exempt from the duties under § 1104(a)(1)(B) and (C)."); *Gannett*, 970 F.3d at 475 (citing *Schweitzer*, 960 F.3d at 195 (2020)) (determining that after spin-off securities were no longer qualifying employer securities).

extraction businesses in ConocoPhillips.[16] ConocoPhillips employees who became employees of Phillips66 had participated in Conoco Phillips's defined contribution plan and held a large quantity of ConocoPhillips stock in two single-stock funds.[17] Consequently, upon completion of the spin-off, every shareholder received one share of Phillips66 for every two shares of ConocoPhillips.[18] In total the two single-stock funds, one holding Phillips66 and another holding Conoco Phillips, held 58% of the Phillips66 plan's assets.[19] The Phillips66 plan beneficiaries brought suit claiming that the plan fiduciaries had violated the duty of prudence and the duty of diversification by failing to divest the single-stock ConocoPhillips fund.[20]

2. *Claims in Schweitzer*

The plaintiff's main argument in *Schweitzer* under the duty of diversification centered on the relationship between the single-stock fund and the entirety of the plan. Plaintiffs alleged that there was inadequate diversification in there being a single-stock fund, which accounted for an excessive percentage of the plan's assets.[21] This argument, however, was rejected by the court.[22] Under the Fifth Circuit's reasoning, because there was disclosure from the plan fiduciaries to the plan participants regarding diversification, and the plaintiffs failed to allege that there was inadequate opportunity for diversification, the claim was dismissed.[23] It is worth noting that it

[16] *Schweitzer*, 960 F.3d at 192–93 ("ConocoPhillps Corporation … spun off Phillips 66 as a separate, independent company.").
[17] *Id*. at 193 ("These accounts included large investments in two single-stock funds comprised of ConocoPhillips stock.").
[18] *Id*. ("As a result of the separation, each employee received on share of Phillips 66 stock for every two shares of ConocoPhillips stock held in their account.").
[19] *Id*. ("Together, these funds accounted for 58% of the Plan's assets.").
[20] *Id*. ("Plaintiffs allege that the Investment Committee and its members … breached their fiduciary duties of diversification and prudence under ERISA by failing to independently review the merits of divesting the ConocoPhillips Funds.").
[21] *Id*. at 196 ("Plaintiffs' argue that the Fiduciaries breached this duty by holding an excess percentage of Plan assets in ConocoPhillips Funds, exposing participants to a high risk of large losses.").
[22] *Id*. at 195–96 (rejecting plaintiffs' argument because duty of diversification applies at the plan level).
[23] *Id*. at 196.

looks as if the plaintiffs in *Schweitzer* failed to plead this claim, and if they did it was not pleaded as effectively as the plaintiffs' claim in *Gannett*.[24] This difference in claims is a potential basis for distinguishing the two cases.[25]

Plaintiffs in *Schweitzer* also pleaded a duty of prudence claim on two separate grounds. First, the plaintiffs alleged that the single-stock fund was imprudently included as part of the plan because the fiduciary should have known that the market price of the Conoco Phillips stock was too high based on the level of risk facing Conoco Phillips.[26] The Fifth Circuit dismissed this claim on the grounds that *Fifth Third Bancorp. v. Dudenhoeffer*[27] foreclosed the argument that a fiduciary acted imprudently for not beating the market.[28]

It is the plaintiff's second claim, based on the duty of prudence, that drives the disagreement with the Fourth Circuit. In their second claim, that the plan fiduciaries breached the duty of prudence owed to the plaintiffs, the plaintiffs allege that single-stock funds are inherently imprudent due to increased risk resulting from the lack of diversification.[29] While the Fifth Circuit seemingly acknowledges that there is inherent risk in single-stock funds, it held that, in a defined contribution plan where the plan participants have the option to divest from the single-stock fund, and the fiduciary provided appropriate disclosure about the risk, that a single-stock fund is not imprudent.[30] And as the defendant fiduciaries met all of these requirements, the claim was dismissed.[31]

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[24] *Id.*; *Gannett*, 970 F.3d at 478.
[25] *Schweitzer*, 960 F.3d at 195; *Gannett*, 970 F.3d at 478.
[26] *Schweitzer*, 960 F.3d at 197.
[27] 573 U.S. 409, 426 (2014) ("[W]here a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.").
[28] *Schweitzer*, 960 F.3d at 197 ("In so doing, *Dudenhoeffer* effectively foreclosed claims, like Plaintiffs', that a fiduciary should have known from public information that the market underestimated the risk of holding a publicly traded security.").
[29] *Id*. at 197–98 ("Plaintiffs claim that holding a single-stock fund is imprudent per se because of the risk inherent in holding an undiversified asset.").
[30] *Id*. at 198 ("'ERISA does not require fiduciaries of [a defined contribution plan] to act as personal investment advisers to plan participants …'").
[31] *Id*. at 199.

C. Fourth Circuit Decision in *Stegemann v. Gannett Company, Inc.*

1. Facts in Gannett

In the case before the Fourth Circuit, the publicly traded company, Gannett (Old Gannett), changed its name to TEGNA and spun-off its publishing arm into an independent business (New Gannett).[32] Old Gannett maintained a defined contribution plan and contributed to employee accounts in the form of employer stock.[33] Consequently, when some of the employees of Old Gannett became employees of New Gannett, their investments holdings included Old Gannett Stock.[34] This resulted in the employees of New Gannett having a sizeable investment in TEGNA: allegedly TEGNA stock made up to 21.7% of the total value of New Gannett's defined contribution plan value.[35] The TEGNA stock was placed in a single-stock fund and the fund was frozen, meaning that the fund's holdings were limited to the stock held at the date of the spin-off, and beneficiaries were allowed only to maintain or decrease their holdings in the fund.[36] The fund was maintained as part of the plan's menu from the date of the spin-off in June 2015 through June 2017.[37] The price of TEGNA stock fell by 19.3% during the second half of 2015, and then fell by another 16% over the course of 2016.[38] Finally, two years after creating the frozen single-stock fund, the decision was made to liquidate the TEGNA fund over the course of twelve months beginning in July 2017.[39] However, by the time the plaintiff beneficiaries filed suit in August 2018, the fund had not yet been liquidated.[40]

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[32] *Gannett*, 970 F.3d at 469.
[33] *Id*.
[34] *Id*. at 470.
[35] *Id*. at 471 ("'[T]he Plan had a "significant holding" in TEGNA stock that was "problematic."'").
[36] *Id*. at 470 ("However, the fund was 'frozen,' meaning that it started with the TEGNA stock in the Plan at the time of the spin-off, but participants would not be able to increase investment in the fund thereafter …").
[37] *Id*. at 469–72.
[38] *Id*. at 471.
[39] *Id*. at 472.
[40] *Id*. at 471 ("Nevertheless, as of August 2018 (the date of Plaintiff's proposed Amendment Complaint), the TEGNA Stock Fund has still not been fully liquidated.").

2. *Holding in Gannett*

The plaintiffs in *Gannett*, like in *Schweitzer*, pleaded claims based on breaches of the duties of diversification and prudence owed by the plan fiduciaries to the plaintiff beneficiaries. The plaintiffs' duty of diversification claim focused on the role of the single-stock funds in the plan and claimed that the plan in its entirety was not sufficiently diversified.[41] The distinguishing feature of this claim, over the claim in *Schweitzer*, is that the *Gannett* plaintiffs claim the Gannett and TEGNA stock-funds were too closely correlated because they were in the same sector and had historically moved together.[42] According to the plaintiffs, the correlation caused a lack of diversification at the plan level.[43] This correlation theory, in the view of the Fourth Circuit, represents a plausibly stated claim for a breach of the duty of diversification.[44]

The plaintiffs' claim that the fiduciaries breached a duty of prudence by failing to divest the single-stock TEGNA.[45] This claim leverages the obligation to monitor and to diversify to maintain a prudent investment product.[46] The crux of plaintiffs' argument, however, is that the diversification requirement applies at the fund level and the maintenance of the single-stock fund as an option on the plan menu was imprudent.[47] The defendant fiduciaries vigorously attacked this claim, arguing that the duty of diversification that applies at the plan level is distinct from, and does not have any overlapping diversification requirements with, the duty of prudence which applies at the fund level.[48] With the litigation at the motion to dismiss stage, the court's ruling takes on a particular significance.[49] By not dismiss-

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[41] *Id*. at 478 ("[P]laintiffs do argue that there was a failure to diversify at a plan level, not just at a fund level.").
[42] *Id*. (summarizing claims made by plaintiff).
[43] *Id*. ("[B]ecause New Gannet and TEGNA are in the same sector and tend to rise and fall together, the interplay between the two single-stock funds cased the Plan overall to have a diversification problem.").
[44] *Id*. ("Accordingly, Plaintiffs' correlation theory plausibly states a claim for a breach of the duty of diversification under § 1104(a)(1)(C).").
[45] *Id*. at 476 (finding allegations of plaintiffs sufficient to state a claim).
[46] *Id*. ("Plaintiffs allege that Defendants breached their duty of prudence because they did not monitor and remove the allegedly imprudent TEGNA Stock Fund.").
[47] *Id*.
[48] *Id*. at 476–77.
[49] *Id*. at 468.

ing the plaintiffs' claims for breach of failure to divest the single-stock fund, the court is in effect acknowledging that there is some set of facts that would allow a single-stock fund to be inherently imprudent because of a lack of diversification.[50] It is applying the duty of prudence's diversification requirement to the individual fund.[51]

D. Summarizing the Split: Application of Fiduciary Duties

The split between the Fourth and Fifth Circuit Courts of Appeals is noteworthy because of the strong similarities in the fact patterns. The divergent applications of both the duty of prudence and duty of diversification represent substantial differences in application of the ERISA statute and interpretation of the fiduciary duties it imposes on investment committees.

1. Duty of Prudence

Both courts applied the duty of prudence at a different level of the plan. While *Schweitzer* applied the duty of prudence at the plan level,[52] the court in *Gannett* applied the same duty to the fund level.[53] In *Schweitzer*, the court engages with the fact that a single-stock fund might be inherently imprudent; however, the court seems to limit the scope of the duty of prudence, and its requirement to ensure prudent diversification, from creating obligations at the plan level.[54] The *Schweitzer* court accepts that the only obligation required by the duty of prudence with regard to diversification is to ensure that the plan participant is informed of the dangers of maintaining an undiversified portfolio.[55] This in effect merges the duty of diversity and the duty of prudence, where both apply only at the plan level, and the only

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[50] *Id*. at 476 (stating that plaintiffs' allegations plausibly state a claim for breach of duty of prudence).
[51] *Id.* at 477–78 (discussing how the duty of prudence can be applied at the fund level).
[52] *Schweitzer*, 960 F.3d at 198–200.
[53] *Gannett*, 970 F.3d at 476.
[54] *Schweitzer*, 960 F.3d at 198 ("[C]ourts have expressed concern about the prudence of single-stock funds ….").
[55] *Id*. at 199–200 (concluding that having received risk disclosures plaintiffs "cannot enjoy their autonomy and now blame the Fiduciaries for declining to second guess that judgment.").

obligation is to ensure that across the plan menu there is the possibility of achieving diversity.[56]

The Fourth Circuit's approach to the duty of prudence leads in a different direction. The *Gannett* court extended the duty of prudence, and its requirement to ensure prudent diversity, to the individual fund level.[57] Or perhaps more accurately, as the litigation is only in the motion to dismiss phase, the court did not foreclose the possibility of the duty of prudence requiring a fiduciary to divest a single-stock fund.[58] The court distinguishes between the diversification requirement of the duty of prudence and the diversification required by the statutory duty of diversification.[59] The Fourth Circuit, interpreting the ERISA duty of prudence in light of the common law, extends the duty of prudence's diversity requirement based on the risk management goals that undergird the goals of diversification.[60]

2. *Duty of Diversification*

The Circuit Courts also split on the application of the duty of diversification. The Fifth Circuit's decision in *Schweitzer* limited the scope of the duty of diversification in the context of defined contribution plans.[61] Under the Fifth Circuit's reasoning, the duty of diversification only extends to the plan level in respect to defined contribution plans because the plans allow participants to choose an allocation.[62] The court reasons that consequently, if a fiduciary has established a sufficient plan option so that a participant can be

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[56] *Id*. at 195–96 (discussing the duty to diversify under ERISA).

[57] *Gannett* at 476–77 (asserting that "each available fund on a menu must be prudently diversified").

[58] *Id*. at 473 (stating that litigation is at motion to dismiss stage).

[59] *Id*. at 477–78 (distinguishing between the duties of prudence and the duty of diversification).

[60] *Id*. at 477 (citing RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. e(1)) (interpreting ERISA duties in light of ERISA, case law, and trust law); *see also* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. e(1).

[61] *Schweitzer*, 960 F.3d at 196 (discussing the differences in duty to diversify regarding defined benefit and defined contribution and limiting duties in defined contribution plans to plan level diversification).

[62] *Id*. ("[T]he participants then choose how to allocate their assets to the available options.").

diversified and warn the participants of a risk of diversification, then the duty is fulfilled.[63]

The Fourth Circuit however, reached a different result in *Gannett*. In *Gannett*, the court held that the fiduciary cannot use the defense of participant choice to dismiss claims at the motion to dismiss stage of litigation.[64] However, the nature of the claim at issue in *Gannett* is different than in *Schweitzer*. The claim in *Gannett* alleges that the fiduciary did not sufficiently diversify the plan's fund menu because of the correlative effects of the Gannett and TEGNA stocks.[65] The claim of "correlation" was notable absent in *Schweitzer*.[66]

E. Uncertainty for Corporate Spin-off Transactions and ERISA Litigation

The impact of the Gannett decision will be felt in the context of ERISA litigation, as well as in the future of corporate spin-offs. Litigation of ERISA disputes can result in complex class action lawsuits lasting upwards of a decade and leading to high value settlements.[67] The *Gannett* decision portends to open an entirely new claim for class action plaintiffs to allege under ERISA.[68] Indeed, the impact of *Gannett* is already being felt, with at least one plaintiff

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[63] *Id*. (dismissing claim because plaintiffs did not allege failure to offer sufficient options or failure to warn).
[64] *Gannett*, 970 F.3d at 481 ("[W]e disagree with that court on whether a defendant may invoke that autonomy in a motion to dismiss.").
[65] *Id*. at 478 (explaining that plaintiffs are claiming the diversification issue occurred at the plan level).
[66] *Schweitzer*, 960 F.3d at 196.
[67] *See* Jacklyn Wille, *ERISA Class Settlements Rebounded to $449 Million in 2019*, BLOOMBERG L. (Dec. 26, 2019, 4:56 AM), https://news.bloomberglaw.com/employee-benefits/erisa-class-settlements-rebounded-to-449-million-in-2019 ("[A] $55 million deal signed by ABB Inc., ended a 12-year legal clash that spawned two trips to a federal appeals court and multiple unsuccessful appeals to the U.S. Supreme Court.").
[68] *See* Karl Nelson et al., *2020 Year-End ERISA Disputes Update*, GIBSON, DUNN & CRUTCHER LLP (Feb. 11, 2021), https://www.gibsondunn.com/2020-year-end-erisa-disputes-update/ (including the development of a circuit split arising from *Gannett* and *Schweitzer* as a hot topic for class action ERISA litigation).

having cited the case to support its claims in an ERISA action.[69] When paired with the nature of corporate spin-off transactions, which naturally result in plans having single-stock funds outside of ESOP protections, this decision could open the floodgates of litigation by offering a new claim for plaintiffs to use to get through the courthouse doors.

Perhaps more significant than the impact *Gannett* may have on ERISA litigation broadly is the potential for *Gannett* to deter corporate spin-offs. The corporate spin-off has been one of Wall Street's favorite transactions for almost 50 years.[70] However, these transactions which create multiple companies with the idea of creating value have a mixed track record of success when it comes to value creation.[71] Because a corporate spin-off, by definition, creates two companies from one company, these transactions naturally produce single-stock funds in both companies. Under the reasoning and application of the duty of prudence in *Gannett*, which deemed single-stock funds imprudent, corporate spin-off transactions would be required to liquidate the single-stock fund resulting from the transaction or face risk of litigation if the single-stock fund underperforms.[72] This new rule will lead to inconsistencies in the fiduciary duties of investment companies or other plan fiduciaries.

Inconsistency often leads to uncertainty. Take for example, a hypothetical transaction based on the facts of *Schweitzer* and *Gannett*.

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[69] Anderson v. Intel Corp., No. 19-CV-04618-LHK, 2021 WL 229235, at *2, *6 (N.D. Cal. Jan. 21, 2021) (explaining that plaintiff's rely on *Gannett* for duty of prudence claim).

[70] Gailen L. Hite & James E. Owers, *Security Price Reactions Around Corporate Spin-off Announcements*, 12 J. FIN. AND ECON. 409, 409 (1983) (describing study of 123 spin-off transactions between 1963 and 1981).

[71] *See, e.g.*, *id.*(summarizing results to conclude that financial performance depended on the motivations for the transaction); Jonathan Boyer, *Spinoffs Have Dramatically Underperformed. Here's How to Profit from Them*, FORBES (Jan. 17, 2020, 7:10 AM), https://www.forbes.com/sites/jonathanboyar/2020/01/17/spinoffs-have-dramatically-under-performed-how-to-profit-from-them/?sh=582f63d07d0f ("When our analysts dug into the numbers, we found companies that were spun off over the past decade under-performed the S&P 500 by 2.7 percentage points per year on average."); FINRA Staff, *What Do Corporate Spinoffs Mean for Investors?*, FINRA (Aug. 12, 2016), https://www.finra.org/investors/insights/what-do-corporate-spinoffs-mean-investors (discussing one study finding that while some spin-offs generate excess returns, some spun-off companies generated no returns at all).

[72] *See supra* Part C (discussing facts and holding of *Gannett*).

Company A effectuates a spin-off, creating an independent company, Company B, and rebranding the smaller and more focused Company A as Company C. Every share of Company A is exchanged for some number of shares in of Company B and some number of shares of Company C. This includes the Company A shares held by Company A's Employee Stock Option Plan (ESOP), which Company A, like many other public companies, maintains to allow its employees to participate in ownership of the company.[73] Company A also maintained a defined contribution retirement plan, which was administered in accordance with ERISA. The former employees of Company A, now employees of either Company B or Company C, hold an interest in both Company B and Company C. What are the obligations of the new investment companies of Company B and Company C? After the Fourth and Fifth Circuit Courts of Appeals split in *Schweitzer* and *Gannett*, the fiduciaries' obligations depend on jurisdiction. Indeed, it would appear that in a jurisdiction following the *Gannett* approach, corporate spin-offs would become less favorable by requiring a liquidation of single-stock funds held by the predecessor companies.

Perhaps an important consideration is whether discouraging these corporate spin-off transactions is a good policy decision. In light of the lack-luster performance of corporate spin-offs, a policy focused on protecting plan beneficiaries, who face financial losses to their retirement savings when corporate spin-offs underperform, may seem beneficial.[74] ERISA's fiduciary duties "draw on the common law of trusts."[75] The common law generally requires prudent fiduciaries to reduce or minimize diversifiable risks.[76] Diversifiable risk or nonmarket risk is imprudent because investors are not compensated for bearing this type of risk.[77] This risk is embodied in a single-stock fund. The policy question becomes, whether economic benefit from corporate spin-offs outweighs the greater uncompensated risk placed

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[73] NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, *supra* note 13.

[74] *See* sources cited *supra* note 71 (considering the performance of corporate spin-offs).

[75] *Gannett*, 970 F.3d at 469.

[76] RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. e(1) ("In the absence of contrary statute or trust provision, the requirement of caution ordinarily imposes a duty to use reasonable care and skill in an effort to minimize or at least reduce diversifiable risks.").

[77] *Id.* ("Because market pricing cannot be expected to recognize and reward a particular investor's failure to diversify, a trustee's acceptance of this type of risk cannot, without more, be justified on grounds of enhancing expected return.").

on plan beneficiaries. When some empirical studies have found as many as 40% of corporate spin-offs underperform, the risk placed on beneficiaries seems so high as to warrant restrictions on holding single-stock funds arising from these transactions.[78]

Given this split's potential for causing significantly different policy outcomes, this circuit split may need to be resolved by the Supreme Court. After the defendants in *Gannett* filed for certiorari, the Court has asked for a responding brief from the plan beneficiaries.[79] A decision from the Supreme Court might be the only way to resolve this split as litigation in other circuits risks amplifying its effects.[80]

Stephen Aber[81]

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[78] *See* FINRA Staff, *supra* note 71 ("40 percent of spun off companies didn't generate any stock returns in their first year.").

[79] Emily Brill, *High Court Seeks Worker's Input on Gannett ERISA Fight*, LAW360 (Jan. 5, 2021, 12:15 PM), https://www.law360.com/articles/1341575/high-court-seeks-workers-input-on-gannett-erisa-fight ("The nation's highest court on Monday asked the workers to respond to Gannett's October petition for review, in which the company argued that the Fourth Circuit's August decision would force retirement plan caretakers to eschew single-stock investment options even if they perform well.").

[80] Maureen J. Gorman et al., *Appellate Court Split in Recent Single Stock Fund Litigation*, BENEFITS & COMPENSATION BLOG (Sept. 15, 2020), https://www.mayerbrown.com/en/perspectives-events/blogs/2020/09/appellate-court-split-in-recent-single-stock-fund-litigation (last visited Jan. 31, 2021) ("Given the sophisticated (and growing) ERISA plaintiffs' bar, we also expect there may be a surge of single stock fund cases (both in the Fourth Circuit and elsewhere), at least until the Supreme Court resolves how ERISA's fiduciary duties of diversification and prudence apply to single stock funds.").

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