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PARTIAL TERMINATION OF SINGLE-EMPLOYER TAX
QUALIFIED PLANS: CLARITY OR MISAPPROPRIATED
JUDICIAL DECISION-MAKING?

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INTRODUCTION

For over three decades, the Internal Revenue Code [hereinafter I.R.C. or Code]¹ has contained provisions that require that all benefits in a single-employer tax qualified plan become fully vested when the plan is partially terminated. However, the Internal Revenue Service [hereinafter IRS or Service] has failed to articulate a standard for determining when a partial termination has occurred. Instead, the courts and the Service have utilized a "facts and circumstances" test which does not set clear guidelines. In light of the application of inconsistent approaches by the courts, recent decisions answering partial plan termination questions have served only to further complicate the issues. The result of this evolution is a body of law that contains relatively few "bright line rules" on which employee benefits practitioners can rely.

This article examines the statutory, legislative and case history of partial terminations of single-employer tax qualified plans. It discusses an employer's ability to terminate single-employer plans prior to the enactment of the Employee Retirement Income Security Act of 1974 (hereinafter ERISA) as well as post-ERISA and thoroughly analyzes the legislative history of I.R.C. § 411,² the provision governing partial terminations. Case law, Treasury Regulations, and revenue rulings all provide examples of situations in which the courts and the Service have

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¹ For the purposes of this article, the Internal Revenue Code of 1986, as amended, will be referred to as "Code" and the Employee Retirement Income Security Act of 1974, as amended, will be referred to as "ERISA."

² All statutory sections cited herein will be those of the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

made determinations concerning whether a partial termination has occurred. Accordingly, these relevant materials are also analyzed.

The governing provisions of the Code and Treasury Regulations provide for a "facts and circumstances" test; however, no clear authoritative guidance for making such a determination has been issued. Therefore, this article provides a comprehensive analysis of the manner in which the courts and the Service have handled the issue. While this article does not recommend a bright line test, its purpose is to pinpoint the issues and to provide insight for practitioners who need to predict whether the courts and the Service will find that a partial termination has, in fact, occurred.

I. PARTIAL TERMINATIONS OF SINGLE-EMPLOYER PLANS PRIOR TO THE ENACTMENT OF ERISA

Prior to September 2, 1974,³ an employer had the sole authority to terminate a single-employer defined benefit pension plan.⁴ Terminations occurred for a variety of reasons. The most prevalent plan terminations were prompted by the severe economic hardship placed on the employer in maintaining the plan. Even if the law had obligated employers to provide promised pension benefits, employers often could not do so because of the financial constraints. Plans were fully funded only in rare circumstances. Neither the courts nor the IRS required employers to fully fund the plans.⁵ Further, after employers declared a termina-

³ The Employee Retirement Income Security Act of 1974 [hereinafter ERISA] was enacted on this date. As enacted, the Bill, H.R. 2, became Pub. L. No. 93-406 (codified as amended in scattered sections of 17 C.F.R., 26 U.S.C., 26 C.F.R., and 29 C.F.R.).

⁴ ERISA defines a "single-employer defined benefit plan" as "any defined benefit plan . . . which is not a multiemployer plan." ERISA § 4001(a)(15) (1993). A "multiemployer plan" is a plan

(i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. . . ."

Id. § 4001(a)(3) (1993).

⁵ The legislative history of ERISA illustrates congressional concern with providing "statutory protections for workers' pension programs." 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 1598 (Comm. Print 1976) [hereinafter 2 LEGISLATIVE HISTORY] (remarks of Sen. Williams). On this issue, Senator Williams specifically cited numerous examples of individuals who had believed their pensions were secure only to find later that "their pension expectations . . . [were] illusory . . . [in that] the employer may shut down, and if there . . . [were] insufficient funds to meet the vested claims of the participants, they have no recourse." *Id.* at 1599.

tion, there was no statutory requirement that employers continue funding their plans. If the plan was not fully funded, plan participants and beneficiaries had little recourse against the employer. In addition, because the Pension Benefit Guaranty Corporation [hereinafter PBGC]⁶ had not yet been established, plan participants had no assurance that they, or their beneficiaries, would ever receive benefits that had accrued.

ERISA was enacted to combat public concern relative to the weaknesses of the private pension system.⁷ To quell public worry, Congress created an insurance system to protect the pension benefits promised to employees. This system of insurance is governed by the PBGC.⁸ The PBGC guarantees that employees will receive promised pension plan benefits even if their employers are in severe financial distress and are unable to pay such benefits in their entirety.⁹

The PBGC acts as an insurer for two different types of programs—single-employer programs and multiemployer programs. The single-employer program insures the benefits of plans that are sponsored by a single employer or a group of employers.¹⁰ The multiemployer program, on the other hand, insures collectively bargained plans and those plans which are sponsored by one or more labor organizations.¹¹

⁶ See *infra* notes 8-9 and accompanying text. The PBGC has as its mission to “encourage the growth of private pension plans, pay timely and uninterrupted pension benefits, and maintain pension insurance premiums at the lowest level necessary to carry out legal obligations.” PBGC, 1992 ANNUAL REPORT 1 (1993).

⁷ Senator Dominici, a Republican Senator from New Mexico, summarized the need for legislation as follows: “The simple fact is that at the present time, there is no law which guarantees that the pension promised in past years, for which workers have devoted a lifetime of loyal service, will be paid.” 2 LEGISLATIVE HISTORY, *supra* note 5, at 1831 (remarks of Sen. Dominici).

⁸ The PBGC is analogous to the Federal Deposit Insurance Corporation [hereinafter FDIC] or the Securities Investor Protection Corporation [hereinafter SIPC]. Just as the FDIC and SIPC protect the investments of depositors in commercial banks and investors of securities respectively, the PBGC protects the pension benefits of plan participants. PBCG, 1992 ANNUAL REPORT 4 (1993).

⁹ PBGC, 1991 ANNUAL REPORT 6 (1992). The PBGC protects the pension benefits of slightly more than 32 million participants in about 67,000 single-employer pension plans. PBGC, 1992 ANNUAL REPORT 4 (1993). The PBGC also insures approximately 8.9 million participants in about 2,100 multiemployer plans. *Id.* at 6.

¹⁰ ERISA § 4022 (1993).

¹¹ *Id.* § 4022A.

II. LEGISLATIVE HISTORY OF PARTIAL TERMINATIONS

When Congress enacted Code section 401, it had not yet contemplated the concept of partial termination. The legislative history of I.R.C. § 401(a)(7)¹² evidences this omission. Specifically, the legislative history states that "the bill precludes the possibility that contributions for employees which have been deducted for income-tax purposes may revert back to the employer, or owner-employee. This requirement should serve to prevent abuses resulting from termination of plans."¹³

The pre-ERISA provisions had the effect of limiting discrimination in the event of an early plan termination by ensuring full vesting of benefits if either the plan was terminated or the employer ceased making contributions.¹⁴ Congress, however, failed to consider how benefits would be provided if there were insufficient funds upon termination.

The first reference in the Code to the term "partial termination" appeared in section 411(d)(3), which was enacted in 1974.¹⁵ The legislative history of section 411(d)(3) stated that "the rule of full and immediate vesting is still to apply in the case of a termination, or *partial termination* of a plan."¹⁶ However, neither ERISA, the Code, nor their accompanying legislative histories provided much guidance as to the definition of partial termination. Instead, practitioners had only the scant introduction of the concept of partial termination outlined in Treasury Regulation section 1.401-6(b)(2), enacted in 1963.

Treasury Regulation section 1.401-6 states that in order for a plan¹⁷ to satisfy the requirements of section 401 of the Code, the plan

must expressly provide that, upon the termination of the plan or upon the complete discontinuance of contributions under the plan, the rights of each

¹² I.R.C. § 401(a)(7) requires that a qualified pension, profit-sharing, or stock bonus trust be part of a plan that expressly provides that upon termination, the rights of each employee must become nonforfeitable to the extent of each employees' accrued benefits in the plan. I.R.C. § 401(a)(7) (1963).

¹³ H.R. REP. NO. 378, 87th Cong., 1st Sess. 261 (1962), *reprinted in* 1962-3 C.B. 261, 269.

¹⁴ In requiring full vesting upon partial termination of a plan, Congress attempted to prevent any forfeited benefits from inuring to the sponsoring employer upon the substantial reduction of the work force. *See United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir. 1983); Treas. Reg. § 1.411(d)-2(b)(2) (1977).

¹⁵ I.R.C. § 411(d)(3)(1974) is the codification, as amended, of ERISA § 401(a)(7).

¹⁶ H.R. REP. NO. 1280, 93d Cong., 2d Sess. 935 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5058 (emphasis added).

¹⁷ Under this Regulation, the term "plan" refers to a pension, profit-sharing, or stock bonus trust. Treas. Reg. § 1.401-6(a)(1) (1963).

employee to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to his account at such time, are nonforfeitable.¹⁸

Subsection (b) of section 1.401-6, while attempting to define "partial termination," provides little guidance. Subsection (b) states that whether a partial termination of a qualified plan has occurred depends upon the basis of "all the facts and circumstances."¹⁹ The subsection contains examples of both partial terminations and events which do not rise to the level of partial terminations; however, these examples provide little instruction. For example, subsection (b) states that "a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer begins to discharge his employees."²⁰ The example does not indicate, however, how many employees must be discharged before a partial or complete termination will occur. Further, it provides no guidance as to how to distinguish between a partial and a complete termination.

Section 1.401-6(b)(1) also provides that "a plan is not terminated . . . merely because an employer consolidates or replaces [a] plan with a comparable plan" nor is a plan terminated "merely because an employer sells or otherwise disposes of his trade or business if the acquiring employer continues the plan as a separate and distinct plan of its own, or consolidates or replaces that plan with a comparable plan."²¹ Therefore, while providing a few examples of items that would *not* constitute a plan termination, the Regulation provides little insight into which transactions actually would constitute partial terminations.

One final criticism of the Regulation is that, while the section attempts to identify circumstances under which a partial termination would occur, the Regulation once again fails to provide clear examples or numerical data to delineate the "facts and circumstances" standard.

¹⁸ *Id.* Benefits are considered non-forfeitable

if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him or her under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, or the completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory contributions upon his or her death.

29 C.F.R. § 2613.6(a) (1992).

¹⁹ Treas. Reg. § 1.401-6(b)(1) (1963).

²⁰ *Id.*

²¹ *Id.*

Specifically, section 1.401-6(b)(2) indicates that a partial termination will occur "when benefits or employer contributions are reduced" or when "the eligibility or vesting requirements under the plan are made less liberal."²² However, the Regulation merely reiterates that such a determination must be made based upon all the facts and circumstances and does not indicate what facts and circumstances should be considered.²³ This lack of guidance allows the Service a considerable amount of discretion on this issue. The answer to the question of what transactions qualify as partial terminations is often provided through ad hoc determinations by the IRS district offices and field agents primarily based upon straight numerical data.

In 1977, the Service issued additional regulations that attempted to define the term "partial termination." Treasury Regulation section 1.411(d)-2(b) restates the "facts and circumstances" test as the standard for determining whether a partial termination has occurred.²⁴ The Regulation also provides a special rule²⁵ for determining whether a partial termination has occurred:

[A] partial termination shall be deemed to occur if, as a result of such cessation or decrease, a potential reversion to the employer, or employers, maintaining the plan (determined as of the date such cessation or decrease is adopted) is created or increased. If no such reversion is created or increased, a partial termination shall be deemed not to occur by reason of such cessation or decrease.²⁶

²² *Id.*

²³ *Id.* Subsection (c) of the Regulation also attempts to define "complete termination." *Id.* §1.401-6(c). However, both "complete" and "partial" plan terminations are defined only through the ambiguous use of examples.

²⁴ Treas. Reg. § 1.411(d)-2(b) (1977).

²⁵ This special rule is sometimes referred to as a horizontal partial termination. *See infra* notes 140, 186-209 and accompanying text.

²⁶ Treas. Reg. § 1.411(d)-2(b)(2) (1977). Similarly, the Regulation also lists the factors to be considered in determining whether a complete termination has occurred. Among those factors are the following:

- (i) Whether the employer may merely be calling an actual discontinuance of contributions a suspension of such contributions in order to avoid the requirement of full vesting as in the case of a discontinuance, or for any other reason;
- (ii) whether contributions are recurring and substantial; and
- (iii) whether there is any reasonable probability that the lack of contributions will continue indefinitely.

Id. § 1.411(d)-2(d)(1). Treas. Reg. § 1.411(d)-2(b)(2) is explained with examples in IRS Document 6678. *Explanation for Worksheet, Form 6677, Plan Termination Standards, IRS Document 6678, (4-81)*, reprinted in PENS. & PROFIT SHARING (P-H) § 107,402, at B-1100 (Aug. 18, 1986). *See also* IRS PLAN TERMINATION HANDBOOK, § 252, 4 CCH INTERNAL REVENUE MANUAL 21,147 (Apr. 20, 1990).

However, in contrast to section 1.401-6, section 1.411(d)-2(b) provides a list of transactions which would likely support a finding by the Commissioner²⁷ that a partial termination had occurred. The following are included in that list: "[T]he exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan."²⁸

It is unclear, however, whether this list of items is exclusive or whether other factors may prompt a finding of a partial termination as well. As is illustrated by the cases described below, other factors have been considered in making such a determination. Finally, it is important to note that even though Treasury Regulation section 1.401-6 was issued before the enactment of ERISA, the Service has not revoked or updated section 1.401-6. Therefore, it appears that section 1.401-6 must be read in conjunction with Treasury Regulation section 1.411(d)-2(b).

III. INTERNAL REVENUE SERVICE RULINGS

As noted above, the term "partial termination" remains an undefined term in both the Code and ERISA. While an employer may attempt to decide whether a certain corporate event causes a partial termination, the determination ultimately remains a question of law and is decided by the court.²⁹ Treasury Regulations, revenue rulings and the *IRS Plan Termination Handbook* provide additional authority addressing the question of whether a partial termination has occurred.³⁰ How-

²⁷ The term "Commissioner," as used throughout this article, refers to the Commissioner of the Internal Revenue Service.

²⁸ Treas. Reg. § 1.411(d)-2(b) (1977).

²⁹ See *Weil v. Retirement Plan Admin. Comm. of Terson Co.*, 913 F.2d 1045 (2d Cir. 1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991); *Anderson v. Emergency Medicine Assocs.*, 860 F.2d 987, 990 (10th Cir. 1988); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, 485 U.S. 986 (1988), and *aff'd in part and rev'd in part*, 489 U.S. 101 (1989); *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991); *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990). *Cf.* *Kreis v. Charles O. Townley & Assocs.*, 833 F.2d 74, 79 (6th Cir. 1987) (look to employer's motives in determining whether a partial termination has occurred); *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*, 6 Employee Benefits Cas. (BNA) 1291 (N.D. Ga. 1984) (arbitrary and capricious standard); *Beck v. Shaw Indus., Inc.*, 2 Employee Benefits Cas. (BNA) 2366 (N.D. Ga. 1981) (arbitrary and capricious standard).

³⁰ IRS revenue rulings are usually given deference by the courts. *Gulf Pension Litig.*, 764 F. Supp. at 1163 n.4. However, the *IRS Plan Termination Handbook* does not carry such weight. *Id.*

ever, while each of these resources provide some insight, none furnishes an exact definition of "partial termination."

The IRS has provided some limited guidance through several of its rulings. In the case at issue in Revenue Ruling 72-439,³¹ an employer established a qualified profit-sharing plan for the benefit of his employees.³² Five years after the plan was established, nonsalaried employees were unionized.³³ Pursuant to the union contract, the employer amended the plan to reduce nonsalaried employees from participation in future employer contributions.³⁴ The amendment resulted in the ineligibility of 120 of the plan's 170 participants.³⁵ The IRS viewed this 70.6 percent reduction in plan participants as a partial termination of the plan.³⁶ Similarly, in Revenue Ruling 72-510,³⁷ the IRS viewed a 57.6 percent reduction of plan participants,³⁸ due to the closing of one of the employer's divisions, as a partial termination.³⁹ Further, in Revenue Ruling 73-284,⁴⁰ the IRS concluded that an 80 percent reduction of plan participants, resulting from a relocation of the company's business, constituted a partial termination.⁴¹

Private Letter Ruling 7202186880A⁴² is also worthy of mention. In that ruling, a company closed its metal stamping division,⁴³ and,

The *IRS Plan Termination Handbook* takes the position that a partial termination will occur if there is a 20 percent reduction in participation in the plan in one year followed by a complete termination in a later year or a more than a 50 percent reduction in participation in one year. *Plan Termination Handbook*, *supra* note 26, at § 252(5). Generally, courts view the *Handbook* "as a useful guide to be followed when its meaning is clear and consistent with more persuasive authority and with the underlying purposes sought to be achieved by the partial termination rules." *Gulf Pension Litig.*, 764 F. Supp. at 1163 n.4.

³¹ Rev. Rul. 72-439, 1972-2 C.B. 223.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* While the Service calculates a percentage reduction in plan participants, the authors submit that the reduction in accrued benefits, a direct result of the reduction in plan participants, is equally important.

³⁷ Rev. Rul. 72-510, 1972-2 C.B. 223. Revenue Ruling 72-510 has been superseded by Rev. Rul. 81-27, 1981-1 C.B. 228. See *infra* notes 56-59 and accompanying text.

³⁸ Ninety-five participants out of 165 were eliminated pursuant to the closing. Rev. Rul. 72-510, 1972-2 C.B. 223.

³⁹ *Id.* at 224.

⁴⁰ Rev. Rul. 73-284, 1973-2 C.B. 139.

⁴¹ *Id.* at 140. In Revenue Ruling 73-284, only 3 out of 15 employees choose to relocate to the new business. *Id.* at 139. Hence, the remaining 12 employees were discharged and their benefits under the plan were eliminated. *Id.*

⁴² Priv. Ltr. Rul. 7202186880A (Feb. 18, 1972).

⁴³ *Id.*

consequently, 96 out of 166 plan participants were terminated.⁴⁴ The IRS concluded that this 57.8 percent reduction in plan participants constituted a partial termination.⁴⁵

The aforementioned rulings indicate the Service will find a partial termination only when a "significant number" or "significant percentage"⁴⁶ of employees are affected by an event such as a plant closing, sale of a business, or corporate reorganization. However, the Service has failed to articulate a definition of the term "significant." Thus, courts as well as practitioners are undirected when attempting to determine whether percentages or absolute numbers are controlling. In addition, the Service has failed to provide guidance as to when to apply the significant percentage test. Further, while the corporate events caused by the employers in each of the above rulings resulted in a greater than 50 percent reduction in plan participants, the rulings fail to address that a significant number of employees may be terminated even though such number may not constitute a "significant percentage" under the Service's guidelines.⁴⁷

IV. CASE LAW

Generally, courts have followed the Service's "significant percentage" test in determining whether a plan termination has occurred. An examination of the relevant case law utilizing the "significant percentage" test follows.⁴⁸

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ While the test for determining whether a reduction in the number of plan participants remains far from clear, it appears that the Service, in articulating both the "significant percentage" and "significant number" standards, was attempting to address a situation in which a substantial decrease in the number of plan participants in any plan year has occurred. IRS PLAN TERMINATION HANDBOOK, *supra* note 26, Pt. VII, Ch. 7950-51.

⁴⁷ For an illustration of this deficiency, *see* text accompanying note 321 *infra*.

⁴⁸ For additional information concerning partial terminations of single-employer tax qualified plans, *see* A.B.A. SEC. LABOR & EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 358-439 (1991); MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS 794-99 (1991 & Supp. 1993); ISADORE GOODMAN, PLAN TERMINATIONS UNDER ERISA (1978); WILLIAM M. LIEBER, 1 LIEBER ON PENSIONS 3-252 to 3-264.15 (1992); Stuart M. Lewis, *Partial Terminations of Qualified Retirement Plans—An Evolving Doctrine*, 13 COMP. PLAN. J., Jul. 1985, at 223.

A. *Babb v. Olney Paint Co.*

In *Babb v. Olney Paint Co.*,⁴⁹ the employer, Olney Paint Co., spun off one of its divisions⁵⁰ with several of Olney's employees accepting employment in the spun-off corporation.⁵¹ Concerned about the protection of their benefits that had accrued with Olney, the employees instituted an action to determine their interests in the pension and profit sharing plans.⁵² The United States District Court for the District of South Carolina entered a judgment in favor of Olney and found that neither a partial nor complete termination of the plan had taken place.⁵³ Accordingly, the district court held that the employees were not entitled to full vesting of their benefits under the plan after leaving their employer.⁵⁴ The employees appealed the judgment to the United States Court of Appeals for the Fourth Circuit.⁵⁵

The Fourth Circuit applied Revenue Ruling 81-27,⁵⁶ in which the IRS held that a partial termination is deemed to occur when a "significant percentage" of plan participants are excluded from coverage.⁵⁷ The court commented that exact numerical percentages do not determine the meaning of the term "significant."⁵⁸ Instead, the court applied a facts and circumstances test.⁵⁹

⁴⁹ 764 F.2d 240 (4th Cir. 1985).

⁵⁰ *Id.* at 241.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 243.

⁵⁴ *Id.*

⁵⁵ *Id.* at 240.

⁵⁶ Rev. Rul. 81-27, 1981-1 C.B. 228. In Revenue Ruling 81-27, 95 out of 165 employees were excluded from the plan. *Id.*

⁵⁷ *Babb*, 764 F.2d at 242. See Rev. Rul. 81-27, 1981-1 C.B. 228.

⁵⁸ *Babb*, 764 F.2d at 242.

⁵⁹ *Id.* The court cited the Regulations:

Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: [T]he exclusion by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

Treas. Reg. § 1.411(d)-2(b)(1) (1977). Cf. *Weil v. Retirement Plan Admin. Comm. for Terson Co.*, 750 F.2d 10, 12 (2d Cir. 1984), *on remand*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802 (S.D.N.Y. Jun. 15, 1988).

Adhering to the Federal Rules of Civil Procedure,⁶⁰ the Fourth Circuit affirmed the finding of the district judge that a 12.84 percent reduction in employees covered by the plan did not constitute a "significant" reduction.⁶¹ Further, the court reiterated the rationale of the district judge that Olney's decision to cease making further contributions to the profit sharing plan was temporary and merely the result of unfavorable economic and business conditions.⁶² The district judge also found relevant that Olney added new participants to the profit sharing plan following the first year in which no contributions were made.⁶³ The Fourth Circuit concluded that these factors, taken as a whole, served to mitigate against the employees' allegation that Olney intended to discontinue future contributions indefinitely.⁶⁴ Hence, finding no partial termination, the Fourth Circuit held that the employees were not entitled to the full vesting of their benefits under ERISA even though the paint division employees were not given either the option of remaining with Olney or accepting employment in the new corporation.⁶⁵

B. Weil I

In *Weil v. Retirement Plan Administrative Committee for Terson Co.* [hereinafter *Weil I*],⁶⁶ former employees of the Terson Company, Inc. [hereinafter Terson],⁶⁷ who were also participants in the Retirement Plan for Salaried Employees of Ward Foods, Inc. [hereinafter Ward], instituted an action claiming entitlement to certain benefits from the plan resulting from an alleged partial termination.⁶⁸ The

⁶⁰ Rule 52(a) provides in pertinent part that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

⁶¹ *Babb*, 764 F.2d at 243.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 244-45.

⁶⁶ 750 F.2d 10 (2d Cir. 1984), *on remand*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802 (S.D.N.Y. Jun. 15, 1988).

⁶⁷ Terson's predecessor company was Ward Foods, Inc.

⁶⁸ *Weil I*, 750 F.2d at 11. The alleged partial termination resulted from a corporate reorganization in which Terson purchased Ward and relocated a substantial portion of Ward's operations. *Id.* Pursuant to the corporate reorganization, Weil and another employee were terminated. *Id.*

United States District Court for the Southern District of New York entered judgment in favor of the employer and the employees appealed.

Under the plan's structure, Ward's employees were required to contribute a specified portion of their pay to the plan's fund in order to participate.⁶⁹ The plan specifically stated that "absent termination or partial termination of the [p]lan, benefits funded by Ward would vest only after an employee had completed ten years of service."⁷⁰ Since Weil and the other employee who was terminated had less than ten years of service at the time of termination, Ward asserted that neither employee was entitled to any non-vested benefits.⁷¹

The district court first examined the effect of the corporate reorganization.⁷² Because the reorganization forced the closing of all of Ward's New York operations, the reorganization resulted in a termination of 104, or 27 percent, of the plan's 386 active participants nationwide.⁷³ In the state of New York, the effect of the reorganization was more drastic. Fifty-one, or approximately 62 percent, of 83 New York participants were terminated.⁷⁴ Nonetheless, the district court found that a partial termination had not occurred because the nationwide termination rate in this case, 27 percent, was lower than those rates in the revenue rulings upon which the court relied.⁷⁵ The terminated employees appealed.⁷⁶

The Second Circuit, in reconsidering the partial termination issue, also looked to the published revenue rulings for guidance. The court noted that these revenue rulings make clear that "the dismissal of a 'significant number of employees' *in connection with a major corporate event* constitutes a partial termination."⁷⁷ Citing a number of precedents,⁷⁸ the court accorded this interpretation "great weight."⁷⁹ The Second Circuit concluded that a partial termination may have indeed

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 11-12. Weil and the other appellant were both employees of one of the New York companies. *Id.*

⁷⁵ *Id.* at 12. Specifically, the court examined the following Revenue Rulings: Rev. Rul. 73-284, 1973-2 C.B. 139 (80 percent termination rate); Rev. Rul. 72-510, 1972-2 C.B. 223 (57.6 percent termination rate); Rev. Rul. 72-439, 1972-2 C.B. 223 (70.6 percent termination rate). *Weil I*, 750 F.2d at 12.

⁷⁶ *Weil I*, 750 F.2d at 12.

⁷⁷ *Id.* (citing Rev. Rul. 73-284, 1973-2 C.B. 137; Rev. Rul. 72-510, 1972-2 C.B. 223).

⁷⁸ See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); see also *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); H.R. REP.

occurred on these facts.⁸⁰ However, holding that the district court's record was insufficient for making such a determination,⁸¹ the Second Circuit reversed the judgment of the district court and remanded the case for further proceedings.⁸²

C. *Later Weil Proceedings*

On remand, the district court held that a partial termination of the plan had occurred.⁸³ The court adhered to the advice of the court of appeals and adopted the Service's position that the "dismissal of a 'significant number of employees' in connection with a major corporate event constitutes a partial termination."⁸⁴ The district court had little trouble concluding that the relocation and closing of several divisions after a leveraged buyout constituted a major corporate event.⁸⁵ Thus, the only question remaining was whether a "significant number" of plan participants were terminated.⁸⁶

In making the "significant number" determination, the court looked to the Plan Termination Standards published by the Treasury Department.⁸⁷ The court interpreted those standards to require the inclusion of the total number of covered employees that were terminated in the calculation of the percentage reduction.⁸⁸ By including both vested and non-vested participants, the court calculated a 33.4 percent reduction of plan participants as a result of the corporate reorganization.⁸⁹ Accordingly, the court held that a partial termination occurred.⁹⁰

On further appeal, the Second Circuit reversed, holding that only terminated partially vested plan participants should be counted in de-

No. 807, 93d Cong., 2d Sess. 65 (1974), *reprinted in* 1974-3 C.B. Supp. 236, 300; S. REP. NO. 383, 93d Cong., 1st Sess. 50 (1973), *reprinted in* 1974-3 C.B. Supp. 80, 129.

⁷⁹ *Weil I*, 750 F.2d 10, 12.

⁸⁰ *Id.* at 13.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Weil v. Retirement Plan Admin. Comm. of Terson Co.*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802, at *10 (S.D.N.Y. Jun. 15, 1988), *rev'd*, 913 F.2d 1045(2d Cir. 1990) *and vacated, in part, on reh'g*, 933 F.2d 106 (2d Cir. 1991) [hereinafter *Weil II*].

⁸⁴ *Id.* at *4 (citing *Weil I*, 750 F.2d 10, 12).

⁸⁵ *Id.* at *7.

⁸⁶ *Id.*

⁸⁷ *Id.* at *8.

⁸⁸ *Id.*

⁸⁹ *Id.* at *10. *See supra* note 83 and accompanying text.

⁹⁰ *Weil II*, 1988 U.S. Dist. LEXIS at *10.

termining whether a partial termination occurred.⁹¹ The plaintiffs filed a petition for rehearing.⁹² The Second Circuit vacated part of its previous opinion and concluded that a partial termination had occurred and that vested as well as non-vested participants must be counted in determining whether a partial termination occurred.⁹³

The Second Circuit noted that the legislative intent behind section 411(d)(3) is "far from clear."⁹⁴ However, the court followed the Service's position — that all plan participants must be included — because it viewed the Service's interpretation as a "reasonable construction in light of the examples provided in the House and Senate Reports."⁹⁵ The Second Circuit interpreted these examples to suggest that "Congress regarded a partial termination . . . [as] a sudden and dramatic change in the plan as a whole."⁹⁶ Utilizing the 33.4 percent figure discussed above, the court concluded that a partial termination of plan participants occurred.⁹⁷

On the other hand, the United States District Court for the Southern District of New York, in *Weil II*,⁹⁸ adhered to the statutory procedure outlined in the Regulations for determining whether a partial termination had occurred. As many of the other courts that have

⁹¹ *Weil II*, 913 F.2d 1045, 1051 (2d Cir. 1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991).

⁹² *Weil II*, 933 F.2d 106, 107 (2d Cir. 1991). Shortly after the Second Circuit reached a decision, the IRS sent a letter to plaintiffs' counsel which stated the following:

The Service has *always* taken the position that all plan participants, whether or not fully vested, are considered in determining whether there has been a partial termination. This position is supported by the statute, [R]egulations and legislative history under I.R.C. § 411(d)(3). Therefore, the field office's June 22, 1981, determination letter cited by the [c]ourt in *Weil I* was incorrect to the extent it inferred that only vested participants are taken into account.

Letter from Martin Slate, Director, IRS Employee Plans Technical and Actuarial Division, to Sidney Eagle, Esq. (Oct. 17, 1990), *reprinted in* 17 PENS. REP. (BNA) 1859 (Oct. 29, 1990).

⁹³ *Weil II*, 933 F.2d at 110.

⁹⁴ *Id.* at 109 (citing *Vornado, Inc. v. Trustees of Retail Store Employees' Union Local 1262*, 829 F.2d 416, 418 n.2 (3d Cir. 1987) ("[T]he purpose underlying [section] 411(d)(3) is not altogether obvious. . . ."); *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 151 (3d Cir. 1987), *cert. granted*, 485 U.S. 986 (1988), and *aff'd in part and rev'd in part on other grounds*, 489 U.S. 101 (1989) ("[I]t is not easy to divine the purpose of [section] 411(d)(3). Without a clear sense of the provision's purpose it is difficult to decide what should and should not constitute a partial termination. Clarification from Congress or the Internal Revenue Service as to the purpose of this provision would make it substantially easier to enforce.")).

⁹⁵ *Weil II*, 933 F.2d at 110. The examples cited by the court were the following: "[A] large reduction in the work force, or a sizeable reduction in benefits under the plan." *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *supra* notes 83-90 and accompanying text.

addressed the partial termination issue have done, the district court looked to the pertinent revenue rulings for guidance. However, the court did not automatically assume that because the percentage reduction was below the 50 percent threshold announced in the three precedential revenue rulings noted above⁹⁹ that a partial termination had not occurred. Instead, the court properly noted ERISA's remedial purpose of protecting pension plan benefits.¹⁰⁰ This was the only court at that time which examined the effect that the partial termination determination would have on plan participants. The court did not solely look to the effect on the company as many courts have done.¹⁰¹ Rather, the district court, after much hedging, calculated the percentage reduction exclusively for the New York division and not for the plan participants nationwide. By doing so, the *Weil II* court acknowledged that ERISA's protective purpose is to shield employees and plans and not employers. *Weil II* and its true "facts and circumstances" standard should serve as a guidepost for decision-making in the future.

D. *Bruch v. Firestone Tire & Rubber Co.*

The Third Circuit took a different approach than the *Weil I* court. The Third Circuit, in *Bruch v. Firestone Tire & Rubber Co.*,¹⁰² concluded that the question of whether a partial termination has occurred should not turn on the number of employees affected or the amount of money the employer saved by terminating the affected employees.¹⁰³ Rather, the Third Circuit, creating its own test, held that a partial termination could be found only if "so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to employees."¹⁰⁴

⁹⁹ See *supra* notes 29-41 and accompanying text.

¹⁰⁰ See *supra* note 7 and accompanying text.

¹⁰¹ See *infra* note 113.

¹⁰² 828 F.2d 134 (3d Cir. 1987), *cert. granted*, 485 U.S. 986 (1988), and *aff'd in part and rev'd in part*, 489 U.S. 101 (1989).

¹⁰³ *Id.* at 151.

¹⁰⁴ *Id.*

E. *Ehm v. Phillips Petroleum Co.*

In another case involving the "significant percentage" test, *Ehm v. Phillips Petroleum Co.*,¹⁰⁵ the district court held that the discharge of 2.5 percent of thrift plan participants nationwide did not constitute a partial termination.¹⁰⁶ In *Ehm*, former employees of Phillips Petroleum Company instituted an action in federal district court to obtain portions of thrift plan funds contributed by their employer prior to the refinery's closing.¹⁰⁷ At issue in the case was whether the employees had a vested interest in the employer contributions to the thrift plan fund.¹⁰⁸

The *Ehm* court, too, referred to the revenue rulings for guidance.¹⁰⁹ The court noted that there were no cases or revenue rulings in which a substantial number of employees were excluded from the plan.¹¹⁰ However, the court did apply the significant percentage test in this case and concluded that because only 2.5 percent—415 out of 16,444¹¹¹—of the plan participants were terminated, a partial termination had not occurred.¹¹²

F. Other "Significant Percentage" Cases

There are numerous other cases applying the significant percentage test.¹¹³ For example, in *Taylor v. Food Giant, Inc. v. Salaried Em-*

¹⁰⁵ 583 F. Supp. 1113 (D. Kan. 1984).

¹⁰⁶ *Id.* at 1116.

¹⁰⁷ *Id.* at 1114.

¹⁰⁸ *Id.*

¹⁰⁹ The court recognized that while revenue rulings do not have the same authority as Treasury Regulations, such rulings "have the force of legal precedents unless [they are] unreasonable or inconsistent with the provisions of the Internal Revenue Code." *Id.* at 1115.

¹¹⁰ At the time the *Ehm* case was decided, the largest number of employees to have been excluded from a plan had been 120 out of 170 individuals participating in a plan. *Id.* See Rev. Rul. 72-439, 1972-2 C.B. 223.

¹¹¹ *Ehm*, 583 F. Supp. at 114-15.

¹¹² *Id.* at 1115-16.

¹¹³ See, e.g., *Weil II*, 933 F.2d 106 (2d Cir. 1991) (33.4 percent reduction of plan participants constituted a partial termination); *Weil II*, 913 F.2d 1045 (2d Cir. 1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991) (discharge of 16.4 percent of non-vested participants was not sufficiently significant to cause partial termination of plan); *Kreis v. Charles O. Townley & Assocs.*, 833 F.2d 74 (6th Cir. 1987) (15 percent and 13.6 percent involuntary exclusion of plan participants did not constitute a partial termination); *Collignon v. Reporting Servs. Co.*, 796 F. Supp. 1136 (C.D. Ill. 1992) (partial termination occurred when 83 percent of employees left employer due to a sale of employer's operating assets); *Morales v. Pan Am. Life Ins.*, 718 F. Supp. 1297 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990) (closing of employer's division which resulted in a 15.3 percent reduction in the number of benefits in the plan was not a partial termi-

ployees Pension Plan,¹¹⁴ the court held that there was no partial termination where only 13 percent of the plan's participants were eliminated.¹¹⁵ Similarly, in *Wishner v. St. Luke's Hospital Center*,¹¹⁶ the court held that terminating 3.7 percent of plan participants failed to meet the significant percentage test.¹¹⁷ Also, in *Beck v. Shaw Industries, Inc.*,¹¹⁸ the court held that a discharge of only 6.2 percent of pension plan participants did not constitute a partial plan termination.¹¹⁹

G. Tipton & Kalmbach, Inc. v. Commissioner

It is important to describe one final case that applies the significant percentage test because the Tax Court, in deciding the partial termination issue, reached a somewhat perplexing result. In *Tipton & Kalmbach, Inc. v. Commissioner*,¹²⁰ an employer engaged in the engineering consulting business experienced reductions in its workforce due to the inherent volatility of the business.¹²¹ For the years 1971 and 1972, plan participations were reduced by 34 percent and 51 percent, respectively.¹²²

nation); *Bruch v. Firestone Tire & Rubber Co.*, 640 F. Supp. 519 (E.D. Pa. 1986), *aff'd in part and rev'd in part*, 828 F.2d 134 (3d Cir. 1987), *and cert. granted*, 485 U.S. 986 (1988), *and aff'd in part, rev'd in part*, 489 U.S. 101 (1989) (sale of corporate assets resulting in only a 2 percent elimination of plan participants did not constitute a partial termination); *Wishner v. St. Luke's Hosp.*, 550 F. Supp. 1016 (N.D.N.Y. 1982) (3.7 percent reduction of plan participants did not constitute a partial termination); *Lovetri v. Vickers, Inc.*, 397 F. Supp. 293 (D. Conn. 1975) (1.4 percent elimination of participants was not a partial termination); *Peter M. Borunta*, 55 T.C.M. (CCH) 670 (1988) (termination of 66 ⅓ percent of work force constituted a partial termination); IRS Special Rul., 9 Stand. Fed. Tax. Rep. (CCH) § 6911 (Sept. 11, 1978) (16.7 percent reduction in participants does not equal a partial termination).

¹¹⁴ 6 Employee Benefits Cas. (BNA) 1291 (N.D. Ga. 1984).

¹¹⁵ *Id.* at 1291. In *Taylor*, the sale of one of the employer's divisions resulted in an overall decrease in active plan participants from 344 to 306 and in the termination of 44 out of 50 division employees. *Id.*

¹¹⁶ 550 F. Supp. 1016 (S.D.N.Y. 1982).

¹¹⁷ *Id.* at 1019. In *Wishner*, 1,529 employees were participating in the pension plan at the time of the alleged partial termination. *Id.* As a result of a disassociation of a health care provider with St. Luke's Hospital, 57 employees were excluded from the plan. *Id.*

¹¹⁸ 2 Employee Benefits Cas. (BNA) 2366 (N.D. Ga. 1981).

¹¹⁹ *Id.* at 2369. In *Beck*, as a result of the sale of a plant, 100 employees out of a total of 1,599 employees covered by the pension plan at issue were removed from employment and thus excluded from the plan. *Id.* at 2367.

¹²⁰ 83 T.C. 154 (1984).

¹²¹ *Id.* at 155.

¹²² *Id.* at 156.

The Tax Court concluded that these reductions in plan participation constituted a partial termination in each year.¹²³ In so holding, the Tax Court broadly interpreted the congressional purpose behind the enactment of section 401(a)(7).¹²⁴ Specifically, in this regard, the Tax Court stated:

We infer from this a broader ameliorative purpose than simply one of preventing the reversion of contributions to an owner-employee. We think that Congress, in enacting section 401(a)(7), sought to protect employees from forfeiting their retirement benefits upon termination of a plan. This broader [c]ongressional purpose would be ill-served by holding the presence or absence of an intent or purpose to deprive employees of benefits determinative of whether a termination had occurred. Where a significant percentage of plan participants are discharged, the effect is the same regardless of the employer's intent; unless the discharge is treated as a partial termination, a significant percentage of plan participants are compelled to forfeit accrued but unvested retirement benefits.¹²⁵

This result is startling because it appears inconsistent both with prior case law and the revenue rulings noted above. As noted, many courts that have addressed the partial termination issue have referred to the revenue rulings for guidance. In each of those rulings in which the IRS found a partial termination, there were reductions of greater than 50 percent of plan participants. In *Tipton*, however, the Tax Court found a partial termination where only 34 percent of the plan participants were terminated—a perplexing and seemingly inconsistent result.

Even though the 34 percent reduction which occurred in 1971¹²⁶ was somewhat less than the 50 percent standard set forth by the revenue rulings upon which the court relied, the Tax Court in *Tipton & Kalmbach, Inc. v. Commissioner*¹²⁷ reached an equitable result in finding that a partial termination occurred. However, the problem with *Tipton* is that the court relied exclusively on the significant percentage test and did not adequately examine the surrounding facts and circumstances as required by statute.

¹²³ *Id.* at 160.

¹²⁴ *Id.*

¹²⁵ *Id.* at 161 (citations omitted).

¹²⁶ *Id.* at 155.

¹²⁷ 83 T.C. 154 (1984).

Before addressing the more recent decisions in this area, it is important to make a few additional observations. While most courts that have addressed the partial termination issue have applied the significant percentage test, they have failed to address how the significant percentage test works concurrently with the significant number test. Instead, courts have merely relied upon the significant percentage test while deemphasizing the significant number test. For example, the Tax Court, in *Tipton*, stated: “[Since 34 percent and 51 percent are significant,] [w]e need not and do not decide whether a partial termination would occur where a significant *number* of participants but not a significant *percent*, are excluded from participation in a plan.”¹²⁸ Similarly, in *Ehm v. Phillips Petroleum Co.*,¹²⁹ because only 2 percent of the employees were excluded from the plan, the court concluded that a partial termination had not occurred under the significant percentage test.¹³⁰ Assuming the correctness of the significant percentage test, the court declined to apply the significant number test.¹³¹ Indeed, no court has found a partial termination by applying *only* the significant number test.¹³²

V. RECENT APPROACHES IN ANSWERING THE PARTIAL TERMINATION QUESTION

A. *The Service's Approach*

The Service, in the *IRS Plan Termination Handbook*, states that “a plan which shows a substantial decrease (e.g., 20 percent or more) in the number of plan participants during a plan year may have experienced a partial termination.”¹³³ Therefore, under the Service’s view, an employer-initiated reduction of plan participants in excess of 20 percent *might* be significant if it is coupled with other factors, such as the closing of a plant or division.¹³⁴ Both the Service and the courts have concluded that a reduction of a percentage less than 20 percent, espe-

¹²⁸ *Id.* at 160 n.5.

¹²⁹ 583 F. Supp. 1113 (D. Kan. 1984).

¹³⁰ *Id.* at 1115-16.

¹³¹ *Id.*

¹³² *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1164 (S.D. Tex. 1991).

¹³³ *IRS Plan Termination Handbook*, *supra* note 26, Pt. VII, Ch. 7950-51.

¹³⁴ *Gulf Pension Litig.*, 764 F. Supp. at 1164. *See IRS Plan Termination Handbook*, *supra* note 26, at § 252(5).

cially on a company-wide basis, could only be significant if the employees present evidence of "egregious" factors such as the evasion of pension obligations or prohibited discrimination in favor of highly compensated employees.¹³⁵

The Service also seems to hold the view that other factors, if significant, may be indicative of the occurrence of a partial termination even with a plan participant reduction of something less than 20 percent.¹³⁶ Once again, however, the Service has failed to articulate the events that are "significant" enough to obtain an IRS ruling that a partial termination has occurred. Further, the Service has failed to state whether a reduction of a very small percentage of plan participants coupled with some undefined significant event may be sufficient to find a partial termination. In addition, it remains unclear whether a 20 percent bright line test is to be applied where, regardless of the significance of the corporate event, the percentage is so small that no partial termination could be deemed to have occurred.

B. Commentator's Viewpoint

Prior to 1985 no distinctions had been made relative to the different types of partial terminations. In July of that year, Stuart M. Lewis published his article, *Partial Terminations of Qualified Retirement Plans—An Evolving Doctrine*.¹³⁷ In that article, Lewis distinguished between two forms of partial terminations—vertical and horizontal.¹³⁸

In Lewis' view, vertical partial terminations are terminations that are the result of a plant or division closing or employee turnover.¹³⁹ The revenue rulings and relevant caselaw had previously addressed this type of partial termination. The second type of partial termination, a horizontal partial termination,¹⁴⁰ had never been discussed prior to its men-

¹³⁵ *Gulf Pension Litig.*, 764 F. Supp. at 1164. See *Weil II*, 913 F.2d 1045, 1052 (2d Cir. 1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991); *IRS Plan Termination Handbook*, *supra* note 26, at §§ 252(8), 252(9)(d), 252(10).

¹³⁶ An employer's bad motive, for example, could provide support to the Service's position that a partial termination has occurred even if the calculated percentage does not equal 20 percent or more. *Gulf Pension Litig.*, 764 F. Supp. at 1164 n.7.

¹³⁷ Lewis, *supra* note 48.

¹³⁸ *Id.* at 224-28.

¹³⁹ *Id.* at 224-26.

¹⁴⁰ A horizontal partial termination may occur in one of two ways. First, such termination may be present due to the special rule of Treasury Regulation section 1.411(d)-2(b)(2). See *Treas. Reg. § 1.411(d)-2(b)(2)* (1977). A horizontal partial termination may also occur when the

tion by Lewis.¹⁴¹ In 1991, the court in *Gulf Pension* was the first to accept Lewis' delineation between the two types of partial terminations. *In re Gulf Pension Litigation*¹⁴² illustrates the continuing struggle for clarity and represents a modern approach in determining whether a partial termination of a single-employer plan has occurred.

C. *In re Gulf Pension Litigation*

Gulf Pension involved a consolidated class action suit brought on behalf of more than 40,000 former participants in a pension plan maintained by Gulf Oil Corporation [hereinafter Gulf].¹⁴³ Gulf's management, attempting to streamline the company, enacted a corporate restructuring plan which substantially reduced its number of employees.¹⁴⁴ Amid rumors of a hostile tender offer, Gulf merged with another oil company, Chevron Corporation [hereinafter Chevron].¹⁴⁵ The management of both Gulf and Chevron agreed that maintaining the current workforce of both companies would be redundant.¹⁴⁶ Chevron, therefore, decided to sell parts of Gulf.¹⁴⁷ Accordingly, some employees were terminated.¹⁴⁸

Shortly after the terminations, a class action suit was filed on behalf of the former employees of Gulf.¹⁴⁹ The plaintiffs claimed that the

plan undergoes a series of amendments which make benefits and eligibility for benefits more restrictive than had previously been the case. See Lewis, *supra* note 48, at 227-28.

¹⁴¹ Lewis, *supra* note 48, at 227-28.

¹⁴² 764 F. Supp. 1149 (S.D. Tex. 1991).

¹⁴³ *Id.* at 1160.

¹⁴⁴ *Id.* This plan was prompted by a concern of Gulf management that Gulf's share price did not reflect its true value. *Id.*

¹⁴⁵ *Id.* The merger with Chevron was a friendly merger which avoided the hostile takeover attempt by a group led by T. Boone Pickens. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* It is important to note the individuals certified as a class by the United States District Court for the Western District of Pennsylvania. These individuals were the following:

- (1) All participants in the Pension Plan of Gulf Oil Corporation or any predecessor plan (sometimes abbreviated as the "Gulf Plan" or "Plan") who terminated employment for any reason after December 31, 1981, and before July 1, 1986, with Gulf Oil Corporation or its successors or affiliates, or any subsidiaries that had adopted the Gulf Plan ("Gulf").
- (2) All Gulf Plan participants who were accruing benefits under the Gulf Plan as of June 30, 1986.
- (3) All Gulf Plan participants who terminated Gulf employment prior to January 1, 1982, and who were receiving a pension or entitled to an immediate or deferred

defendants'¹⁵⁰ actions constituted a partial termination of the Gulf Pension Plan.¹⁵¹ The plaintiffs' assertions as well as the court's analysis of each issue follow.¹⁵²

1. Vertical vs. Horizontal Partial Terminations

As Lewis articulated, there are two types of partial terminations. Each label carries great significance and will be discussed in turn in evaluating the *Gulf Pension* court's articulation of the rules governing each type of partial termination.

a. *Vertical Partial Termination*

As noted above, prior to 1985, the concept of "horizontal partial termination" had not been introduced. Consequently, the general rule¹⁵³ for determining whether a partial termination had occurred¹⁵⁴ was a facts and circumstances test under the vertical partial termination rules. In applying the regulatory partial termination standard, the

pension or a refund of accumulated employee contributions under the Gulf Plan as of June 30, 1986.

- (4) All Gulf Plan participants who terminated employment with Gulf prior to January 1, 1982, and after December 31, 1975, who were not entitled to any pension benefit under the Gulf Plan at the time of such termination (other than a refund of accumulated employee contributions) but who, if they had been reemployed by Gulf as of June 30, 1986, would have been entitled under the ERISA break-in-service rules to credit for prior service under the Gulf Plan.
- (5) All spouses, joint annuitants, or other plan beneficiaries of any deceased Gulf Plan participants described in the foregoing categories.
- (6) All alternate payees under qualified domestic relations orders of separated or divorced Gulf Plan participants described in the foregoing categories.

Id. at 1160-61.

¹⁵⁰ The defendants were Chevron Corporation, Gulf Oil Corporation, the Chevron Corporation Retirement Plan, the Pension Plan of Gulf Oil Corporation, the Benefits Committee of the Pension Plan of Gulf Oil Corporation and each of its members, and the Pension Committee of the Pension Plan of Gulf Oil Corporation and each of its members. *Id.* at 1160.

¹⁵¹ *Id.* at 1161. The plaintiffs raised the following additional issues that are not relevant to this article and consequently will only be mentioned here. The plaintiffs claimed that two of the plans constituted "wasting trusts" under common law, that some employees were entitled to early retirement benefits, that other employees were entitled to benefits under the company's severance plan, and that the plaintiffs were entitled to damages for an alleged breach of fiduciary duty pursuant to the corporate merger. *Id.*

¹⁵² For easier readability, the court's analysis is divided into two sections — vertical partial termination and the horizontal partial termination.

¹⁵³ Treas. Reg. § 1.411(d)-2(b)(1) (1977).

¹⁵⁴ See *supra* notes 24-26 and accompanying text.

court in, *Gulf Pension*, utilized the facts and circumstances test.¹⁵⁶ In applying that test, the court relied upon the three predominant revenue rulings noted above for guidance.¹⁵⁶

As the cited revenue rulings illustrate, the most commonly applied tests for determining whether a partial termination has occurred are the significant number and significant percentage tests. However, these tests leave certain waters uncharted. The *Gulf Pension* case is significant because it provides answers to some crucial, yet unanswered, questions.

i. Are Vested Participants Counted?

Gulf Pension provides an answer to the inquiry of whether both terminated vested and non-vested employees should be considered in applying the significant number and significant percentage tests.¹⁵⁷ However, there is no unanimous authority which provides a solution to the aforementioned query.

The court, in *Gulf Pension*, ruled that not all of Gulf's terminees should be considered for purposes of determining whether a partial termination occurred. The court held that only non-vested terminees need be considered.¹⁵⁸ The court reasoned that the inclusion of vested terminees in the determination would not further the policy of preventing "a windfall to the employer through the reversion of money on which the employer has paid no federal income tax" because the termination of vested participants would not generate any forfeitures.¹⁵⁹

In the *Weil* proceedings,¹⁶⁰ the Second Circuit had initially held that in determining whether a partial termination has occurred, only the percentage of non-vested participants should be considered.¹⁶¹ This decision was contrary to the long-standing position of the IRS that the entire work force, including fully vested terminees, should be included in the significant number and significant percentage calculations. The

¹⁵⁵ *Gulf Pension Litig.*, 764 F. Supp. at 1163.

¹⁵⁶ Rev. Rul. 73-284, 1973-2 C.B. 139; Rev. Rul. 72-510, 1972-2 C.B. 223; Rev. Rul. 72-439, 1972-2 C.B. 223.

¹⁵⁷ *Id.* at 1164.

¹⁵⁸ *Id.* at 1165.

¹⁵⁹ *Id.*

¹⁶⁰ 913 F.2d 1045 (2d Cir. 1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991).

¹⁶¹ *Id.* at 1051.

Second Circuit later vacated that part of its judgment, and held that vested as well as non-vested participants should be counted.¹⁶²

For employers trying to determine whether a partial termination has occurred, this conflict of views between the circuits presents a dilemma. The conflict illustrates the fact that employers have no assurance of how the court in a specific district will rule. This difficulty in prediction is especially acute for employers with percentage reductions of plan participants either slightly above or below the 20 percent IRS benchmark.

ii. Are Employees Who Transferred to Successor Plans Counted?

Gulf Pension was the first decision to answer the question of whether employees who, as a result of a corporate reorganization or merger, later became employed with the successor corporation and whose accrued pension benefits were transferred to a successor plan, should be counted for the purposes of determining whether a partial termination has occurred.¹⁶³ Utilizing the same rationale as the above-mentioned vested/non-vested approach, which focused on the furtherance of the policy goals outlined in the legislative history of ERISA, the court concluded that such employees should not be included in the calculation.¹⁶⁴ Subsequent courts have followed the *Gulf Pension* decision on this issue.¹⁶⁵

iii. Turnover Rate

The third issue addressed in *Gulf Pension* was whether an employer should be entitled to exclude employee terminations which are the result of normal turnover.¹⁶⁶ In making this determination, the primary relevant factors are the definition of the term "normal" and whether the party asserting that a partial termination has occurred bears the burden of proof of establishing the normal turnover rate.¹⁶⁷

¹⁶² *Weil II*, 933 F.2d at 110.

¹⁶³ *Gulf Pension Litig.*, 764 F. Supp. at 1164.

¹⁶⁴ *Id.* at 1165-66. This conclusion is consistent with section 1.401-6(b)(1) of the Treasury Regulations. See *supra* note 21 and accompanying text.

¹⁶⁵ See *Halliburton Co. v. Commissioner*, 100 T.C. 216 (1993).

¹⁶⁶ *Gulf Pension Litig.*, 764 F. Supp. at 1164.

¹⁶⁷ *Id.*

Citing *Anderson v. Emergency Medicine Associates*,¹⁶⁸ the *Gulf Pension* court stated that only involuntary, employer-initiated terminations should be considered in calculating whether a significant percentage or significant number of a workforce has been terminated.¹⁶⁹ In addition, the court clarified that the burden of establishing the normal turnover rate is on the employer.¹⁷⁰ The court did not espouse its reasoning for placing the burden of establishing the normal turnover rate on the employer. However, the authors assume that placing the burden on the employer, first, furthers the policy concerns of protecting employees against a reduction of benefits at the employer's whim and, second, is appropriate since the use of the "turnover rate" is a defense to a claim that a partial termination has occurred.

iv. Time Period of "Significant" Corporate Event

Finally, the court addressed the issue of whether the significant percentage and significant number tests should be calculated on an annual basis or whether the tests may apply when a significant corporate event occurs over a two-and-one-half-year period.¹⁷¹ In answering this inquiry, the court noted that there is no language in the Regulations requiring that a significant corporate event occur within one year.¹⁷² Moreover, the Service¹⁷³ and the courts¹⁷⁴ that have addressed the issue have held that a series of employer-initiated terminations related to the same corporate event may be aggregated in determining whether a par-

¹⁶⁸ 860 F.2d 987 (10th Cir. 1988).

¹⁶⁹ *Gulf Pension Litig.*, 764 F. Supp. at 1166. This is consistent with the approach of the IRS. In General Counsel Memorandum 39,344, the IRS ruled that no partial termination occurred when the reduction in plan participants is due to employee-initiated action. Gen. Couns. Mem. 39,344 (Oct. 16, 1984). In General Counsel Memorandum 39,344, striking employees refused to return to work at the end of the strike. *Id.* The Chief Counsel's Office of the IRS reasoned that section 411(d)(3) of the Code was not enacted to protect employees from the consequences of a voluntary act. *Id.*

¹⁷⁰ *Gulf Pension Litig.*, 764 F. Supp. at 1167. The court labeled this proposition as being consistent with recent case law; see *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297, 1302-03 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990). For the IRS' view, see *IRS Plan Termination Handbook*, *supra* note 26, at § 252(7).

¹⁷¹ *Gulf Pension Litig.*, 764 F. Supp. at 1164.

¹⁷² *Id.* at 1167.

¹⁷³ In *Great Atlantic & Pacific Tea Co. v. Commissioner*, No. 29820-88R (Nov. 17, 1988), the Service issued a technical advice memorandum which found a partial termination due to a corporate reorganization over the seven year period at issue. *Id.*

¹⁷⁴ See *Weil I*, 750 F.2d 10, 12 (2d Cir. 1984), *on remand*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802 (S.D.N.Y. Jun. 15, 1988).

tial termination has occurred even though the corporate event occurs over a period of longer than one year.¹⁷⁶

v. Calculation of "Significant Number/Percentage"

As noted above, courts generally have not applied the significant number test in determining whether a partial termination has occurred.¹⁷⁶ Instead, most courts have applied the significant percentage test. However, the court, in *Gulf Pension*, clarified the meaning of the term "significant number." According to the court, a significant number equals the total number of plan members terminated, less the following:

- (i) those individuals who were already vested under the plan;
- (ii) those individuals who voluntarily retired;¹⁷⁷
- (iii) those individuals who transferred to successor plans; and
- (iv) those individuals who died.¹⁷⁸

To calculate the percentage decrease in plan participants, the court divided the significant number obtained from the formula above by the sum of the non-vested plan participants at the start of the period and the non-vested participants added throughout the period.¹⁷⁹ Applying that formula, the court found a 45.2 percent decrease in plan par-

¹⁷⁶ *Gulf Pension Litig.*, 764 F. Supp. at 1167. This holding is in accord with the view of the IRS and the Second Circuit. *Id.* at 1167-68.

¹⁷⁷ See *supra* note 132 and accompanying text.

¹⁷⁸ The court noted that this number includes both discounted and undiscounted early retirees and disability retirees. *Gulf Pension Litig.*, 764 F. Supp. at 1168.

¹⁷⁹ *Id.* Applying this formula, the court determined that in 1984, there were 1,825 total relevant reductions, i.e., 2,623 terminations less the following: 263 (vested terminatees), 483 (retirements), and 52 (deaths). *Id.* Similarly, in 1985, there were 6,588 terminations, less 1,372 (vested terminatees), 531 (retirements), 967 (transfers to successor plans), and 39 (deaths), for a total of 3,679 relevant terminations. *Id.* Finally, from January to June, 1986, there were 1,843 terminations, less 472 (vested terminatees), 187 (retirements), 245 (transfers to successor plans), and 16 (deaths), for a total of 923 relevant terminations. *Id.*

¹⁷⁹ *Id.* Applying that rationale, in 1984, the court found a percentage decrease of 13.3 percent by dividing the significant number, 1,825, by the total of 13,772 non-vested members [12,688 (previous calculation) plus 1,084 (new members)]. *Id.* Similarly, for 1985, the court found a percentage decrease of 32.4 percent by dividing the significant number of 3,679 by the total of 11,365 non-vested members [11,034 (previous calculation) plus 331 (new members added)]. *Id.* Finally, for the months January through June of 1986, the court found a percentage decrease of 12.1 percent by dividing the significant number, 923, by the total of 7,650 non-vested members [7,520 (previous calculation) plus 130 (new members)]. *Id.* It is important to note that this calculation is in accord with the Service's view. *IRS Plan Termination Handbook*, *supra* note 26, at § 252(7).

ticipants over the two-and-one-half year period.¹⁸⁰ The court held that this 42.5 percent decrease and the 6,427 employer-initiated terminations satisfied both the significant percentage and significant number tests.¹⁸¹

vi. Facts and Circumstances Test

Applying the facts and circumstances test as required by statute,¹⁸² the *Gulf Pension* court determined that the reductions in plan participants were the result of corporate planning by the defendants to reduce the benefits available to Gulf employees who remained with Chevron.¹⁸³ The court also concluded that there was an increased potential for reversion of plan assets on behalf of Gulf because the terminations occurred pursuant to a plan under which Chevron was attempting to revert surplus Gulf Plan assets for its general corporate use.¹⁸⁴ Based on all of the facts and circumstances outlined above, the court held that a vertical partial termination had occurred.¹⁸⁵

b. Horizontal Partial Termination

The revenue rulings and court decisions that have addressed the partial termination issue have primarily focused upon whether a vertical partial termination has occurred. Very little authority exists which details when horizontal reductions constitute partial terminations.

A horizontal partial termination may occur under two situations. The first situation involves the special rule in Treasury Regulation section 1.411(d)-2(b)(2) regarding a reduction of employee benefits which subsequently causes a reversion of plan assets to the employer.¹⁸⁶ Secondly, a horizontal partial termination may be deemed to occur where the adopted plan amendments make eligibility and vesting provisions more restrictive than they had been previously under the plan.¹⁸⁷

¹⁸⁰ *Gulf Pension Litig.*, 764 F. Supp. at 1168.

¹⁸¹ *Id.* at 1170.

¹⁸² A facts and circumstance analysis is required because the significant percentage alone is not sufficient to establish a partial termination. In addition to a significant reduction in plan participants, there must be a significant corporate event. *Id.* at 1167-70.

¹⁸³ *Id.* at 1170.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Treas. Reg. § 1.411(d)-2(b)(2) (1977). See *supra* notes 25-28 and accompanying text.

¹⁸⁷ See Lewis, *supra* note 48, at 227-28.

The situation alluded to in the Regulations¹⁸⁸ is comprised of two elements. First, there must be a cessation or decrease in future benefit accruals in a defined benefit plan.¹⁸⁹ Second, that cessation or decrease must create a potential reversion to the employer;¹⁹⁰ the rule does not require that an employer actually attempt to achieve a reversion.¹⁹¹ A mere potential for reversion due to a cessation or decrease of future benefit accruals is sufficient for a finding of a horizontal partial termination.¹⁹²

In *Gulf Pension*, the plaintiffs argued that they had suffered a decrease in future benefit accruals because the Gulf Plan merged with the Chevron Plan.¹⁹³ The defendants, on the other hand, argued that section 411 "protects only accrued benefits."¹⁹⁴ Essentially, the defendants asserted that the scope of the horizontal partial termination rule must be limited to the protection of future accruals of accrued benefits.¹⁹⁵ The court, unpersuaded by the defendants' argument,¹⁹⁶ held that ancillary benefits¹⁹⁷ should be included in making the determination of whether a horizontal partial termination occurred.¹⁹⁸

The court reasoned that the horizontal partial termination rule was intended to deter employers from adopting plan amendments that lessen accruals of future benefits if the result of such an amendment would be to create or increase the likelihood that the employer could receive a reversion of plan assets in the future.¹⁹⁹ The court further

¹⁸⁸ Treas. Reg. § 1.411(d)-2(b)(2) (1977).

¹⁸⁹ *Gulf Pension Litig.*, 764 F. Supp. at 1172.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* When faced with the argument that a partial termination has occurred because of a cessation or reduction in participation, employers have argued that the cessation or reduction was caused by adverse economic conditions rather than an intent to create or increase a reversion. The IRS, in Revenue Ruling 81-27, held that intent will not negate the Service's finding that a partial termination has occurred. See *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984); Rev. Rul. 81-27, 1981-1 C.B. 228.

¹⁹² *Gulf Pension Litig.*, 764 F. Supp. at 1172.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1176 (quoting Defendants' Post-Trial Brief Regarding Horizontal and Vertical Partial Terminations, at 3).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Gulf Pension* involved a claim for disability benefits. *Id.* at 1175.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1177. Notably, Congress has provided several pieces of evidence of its intent to prevent a corporate windfall. Congress, through the enactment of the Revenue Reconciliation Act of 1990, imposed an excise tax of 20 percent for any assets that revert back to the employer pursuant to a termination of an employee pension plan. Pub. L. No. 101-508 §§ 12001-02, 104 Stat. 1388, 1388-562 to 1388-566 (Nov. 5, 1990) (to be codified at 26 U.S.C. §§ 4980(a), (d)). Additionally, the Revenue Reconciliation Act of 1990 also imposed a 50 percent excise tax on the

opined that the horizontal partial termination rule was enacted to prevent an employer from amending a plan to eliminate or at least reduce future benefits promised by a plan.²⁰⁰ The court noted that this is a broader goal than that of section 411, the anti-cutback rules, which protect already accrued benefits.²⁰¹ Citing Treasury Regulation section 1.411(d)-2(b)(2),²⁰² the court held that a horizontal partial termination had occurred as a result of the merger of the Gulf Plan into the Chevron Plan on July 1, 1986 since four early retirement and other retirement-type subsidies were eliminated prospectively beginning on January 1, 1986.²⁰³ This elimination, the court concluded, resulted in a decrease in the present value of liabilities to former Gulf Plan participants ranging from \$83 to \$102 million, thereby causing the overfunded status²⁰⁴ of the merged plan.²⁰⁵ It is important to recall the effect on plan participants of a court's declaration that a partial termination has occurred. A partial termination is only significant for vesting purposes; such a declaration has no effect on whether the plan is terminated.²⁰⁶ However, in *Gulf Pension*, the court went a step beyond merely interpreting the statute and accompanying Regulations and granted an equitable remedy by concluding that the overfunded plan should have been terminated when the participants ceased to accrue additional benefits.²⁰⁷ Most practitioners, as well as these authors, believe that the court's holding exceeds the bounds of judicial activism.²⁰⁸ The statute clearly provides that the remedy for a partial termination is the full vesting of accrued benefits, not the termination of the plan.²⁰⁹

amount of asset reversion to the employer unless the employer transfers part of the reversion to a replacement plan or provides more favorable benefits. *Id.*

²⁰⁰ *Gulf Pension Litig.*, 764 F. Supp. at 1177.

²⁰¹ *Id.*

²⁰² Treas. Reg. § 1.411(d)-2(b)(2) (1977).

²⁰³ *Gulf Pension Litig.*, 764 F. Supp. at 1173.

²⁰⁴ A plan is said to be "overfunded" when the employer's accumulated contributions exceed the minimum required contribution under law. See STEVEN G. VERNON, *EMPLOYEE BENEFITS: VALUATION, ANALYSIS AND STRATEGIES* 324 (1993).

²⁰⁵ *Id.*

²⁰⁶ See Treas. Reg. § 1.401-6(b) (1963).

²⁰⁷ *Gulf Pension Litig.*, 764 F. Supp. at 1204-05.

²⁰⁸ See *infra* notes 339-42 and accompanying text.

²⁰⁹ I.R.C. § 411(d)(3) (1993).

D. *Gluck v. Unisys Corp.*

Since *Gulf Pension* utilized the concept of horizontal partial terminations, recent courts have begun to test for horizontal partial terminations in addition to vertical partial terminations. For example, in 1992, the Third Circuit rejected the notion that a partial termination could only occur vertically in *Gluck v. Unisys Corp.*²¹⁰

In *Gluck*, employees brought an action seeking damages for breach of fiduciary duty in connection with the partial termination of their pension plan.²¹¹ The alleged partial termination arose out of a merger between Burroughs Corporation and Unisys Corporation.²¹² Subsequent to the merger, the Burroughs Pension Plan was merged into the Unisys Pension Plan.²¹³ Because the Unisys Pension Plan established a uniform retirement benefit system for its covered employees, both contributory and non-contributory former Burroughs participants were placed on equal footing.²¹⁴ In addition, the Unisys Pension Plan suffered a reduction in the early retirement benefit formula, specifically eliminating the early retirement benefit for those with thirty or more years of service.²¹⁵

The employees filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging a partial termination and various breaches of fiduciary duty arising from that partial termination.²¹⁶ The district court barred the plaintiffs' fiduciary claims as untimely and dismissed the nonfiduciary claims, holding that no partial termination had occurred.²¹⁷ The employees appealed.²¹⁸

In discussing the partial termination issue, the Third Circuit reiterated the standard utilized by past courts in making the determination that a partial termination has occurred. Because courts have traditionally focused on the vertical partial termination issue, those standards involved testing for a reduction in plan participants by utilizing either the significant number or significant percentage tests.²¹⁹ The *Gluck*

²¹⁰ 960 F.2d 1168 (3d Cir. 1992).

²¹¹ *Id.* at 1175.

²¹² *Id.* at 1174-75.

²¹³ *Id.*

²¹⁴ *Id.* at 1175.

²¹⁵ *Id.*

²¹⁶ *Id.* Only the partial termination issue will be addressed in this article.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 1183.

court noted that the Third Circuit had rejected the significant number and significant percentage approaches in the past “and insisted on a relation between the number of employees terminated and the appearance of the plan as a mechanism for deferring income, not paying benefits.”²²⁰

While focusing on the tax aspects of ERISA, the *Gluck* court adhered to the facts and circumstances test and the special rule governing horizontal partial terminations outlined in the Regulations.²²¹ The court followed the horizontal partial termination rule in *Gulf Pension* because it believed that the rule “highlights the kind of employer activity that ERISA seeks to redress [—] manipulation of a tax-qualified trust to an employer’s advantage in a way that frustrates employee expectations.”²²² The court noted that the vesting requirement of section 411(d)(3) only protects employee benefits to the extent they have accrued.²²³ However, it does not prohibit all employer manipulations of future benefits.²²⁴ With those precautions in mind, the Third Circuit remanded the case to the district court for a determination as to whether the special rule in the Regulations was satisfied in this case.²²⁵

²²⁰ *Id.* (citing *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 151 (3d Cir. 1987), *cert. granted*, 485 U.S. 986 (1988), and *aff’d in part, rev’d in part*, 489 U.S. 101 (1989)). The *Gluck* court explained its rejection of the vertical partial termination test in the following manner:

We did not limit partial terminations to *vertical* partial terminations. Indeed, we had previously recognized the possibility that “a mere reduction in benefits can, in some circumstances, constitute a ‘partial termination.’” *Id.* (citing *Harris & Sons Steel Co.*, 706 F.2d 1289, 1299 n.24 (3d Cir. 1983)). We did not, in *Bruch*, expressly reject a “facts and circumstances” based approach to partial terminations. Rather, we rejected the . . . [Service]’s “significant percentage” test, disagreed with the approach of the Court of Appeals for the Second Circuit in following it, and redirected the inquiry into the event claimed to have constituted a partial termination. We refocused the inquiry on the tax aspect of ERISA, and we invited Congress or the IRS to elaborate, *Bruch*, 828 F.2d at 151, an invitation which has gone unanswered.

Gluck, 960 F.2d at 1183-84.

²²¹ *Gluck*, 960 F.2d at 1184.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 1185.

E. Halliburton Co. v. Commissioner

The most recent case to address the partial termination issue as of the writing of this article is *Halliburton Co. v. Commissioner*.²²⁶ This Tax Court decision demonstrates that courts are becoming more sensitive to the partial termination issue and the need to consider all of the surrounding facts and circumstances before making a decision that a partial termination has occurred. Halliburton Corporation²²⁷ established a defined contribution profit sharing plan for its employees in 1944.²²⁸ The plan was amended several times after its establishment through 1985, but the plan continued to receive favorable determination letters from the IRS during that time.²²⁹ While it had made annual contributions to the plan in every year prior to 1986, Halliburton made no contributions in 1986 because no profits were earned during that year.²³⁰

During April 1987, Halliburton submitted an application to the IRS for affirmation that the plan remained tax qualified under section 401(a).²³¹ In September of that same year, the IRS issued a proposed adverse determination letter which stated that the Halliburton Plan had experienced a partial termination in 1986 as a result of a large workforce decline.²³² After numerous administrative conferences, Halliburton filed a declaratory judgment action seeking a review of the Commissioner's proposed adverse determination.²³³

²²⁶ 100 T.C. 216 (1993). Shortly before the publication of this article, the Fifth Circuit, in a summary decision, affirmed the findings of the Tax Court. *Halliburton Co. v. Commissioner*, 73 AFTR 2d ¶ 94-1006 (5th Cir. 1994) (unpublished).

²²⁷ "Halliburton . . . [Company] is one of the world's largest and most diversified oil field services and engineering and construction organizations. Halliburton's business is divided into three principal categories: Oil field services and products; industrial engineering and construction services; and marine engineering and construction services." *Id.* at 216-17.

²²⁸ *Id.* at 217.

²²⁹ *Id.* During the period 1944 until 1985, Halliburton contributed approximately 10 percent of annual profits to the plan, which totalled \$575 million. *Id.* During that time, the plan paid out approximately \$600 million in benefits. *Id.*

²³⁰ *Id.*

²³¹ See I.R.C. § 401(a) (1993).

²³² *Halliburton Co. v. Commissioner*, 100 T.C. 216, 218 (1993). The determination letter concluded that the plan no longer qualified under I.R.C. § 401(a) because I.R.C. § 411(d)(3) requires that upon occurrence of a partial termination the former participants must be fully vested and at that time they were not. *Id.*

²³³ *Id.* The Commissioner filed a motion to dismiss for lack of jurisdiction and failure to exhaust all administrative remedies. This motion was denied. *Halliburton Co. v. Commissioner*, 98 T.C. 88 (1992). The Commissioner subsequently filed a motion to dismiss for failure to notify all

The court ultimately accepted defendant's argument that the alleged partial termination arose because Halliburton experienced financial difficulties during 1986 when a sharp decline in the oil industry occurred.²³⁴ Faced with this financial crisis, Halliburton adopted a broad array of cost-cutting measures.²³⁵ One of those measures involved reducing the age at which an employee became eligible for early retirement.²³⁶ In order to further reduce costs, Halliburton also implemented a wage freeze, a furlough program, and involuntary layoffs during 1986.²³⁷

On January 1, 1986, the plan had a total of 19,017 participants.²³⁸ At the end of 1986, there were 19,598 participants.²³⁹ Also relevant is the fact that during 1986, Halliburton combined its IMCO Services Division with a division of Dresser Industries to form a joint venture

affected parties. This second motion was also denied. *Halliburton Co. v. Commissioner*, T.C.M. 1992-534.

²³⁴ *Halliburton Co. v. Commissioner*, 100 T.C. 216, 219 (1993). Almost three-quarters of Halliburton's revenues come from services performed for the petroleum industry. *Id.* Due to over-production in the Middle East, the oil industry began to collapse in 1985. *Id.* During the period beginning December, 1985, to August, 1986, the price of oil plummeted from \$27 per barrel to \$10 per barrel and production of oil in the United States dropped to its lowest level since 1977. *Id.* As a result, oil exploration and production dropped drastically with the steepest decline occurring during the first seven months of 1986. *Id.*

²³⁵ *Id.* at 220. Included among those cost-cutting measures was a slash in the annual budget as well a cut in the dividend rate of 44 percent. *Id.*

²³⁶ *Id.* The early retirement age was reduced from age 55 to age 50. *Id.* The letter addressed to employees announcing this early retirement option stated the following:

This temporary change in the retirement policy is being made due to our existing work load and business forecasts for the immediate future. . . . It is for the purpose of encouraging early retirements at this time in our attempts to reduce our workforce in line with our business. While we had hoped that normal attrition would accomplish our objectives, additional reductions may be necessary. For those of you who have been contemplating early retirement, we urge your serious consideration during this period which might possibly save the job of another employee.

Id.

As noted above, the early retirement option was purely voluntary; employees age 50 and older were not forced into early retirement. *Id.*

²³⁷ *Id.* at 220-21.

²³⁸ *Id.* at 221.

²³⁹ *Id.* at 223. A summary of the changes in plan participation follows:

named M-I Drilling Fluids Co. [hereinafter M-I].²⁴⁰ As a result of the joint venture, 437 participants transferred to the M-I plan.²⁴¹

1. Application of the Vertical Partial Termination Rules

Because this case involved the elimination of employees who were covered under an employer-sponsored plan, the Tax Court applied the vertical partial termination rules in analyzing whether a partial termination occurred.²⁴² The court first noted the legislative concern the partial termination rules were designed to prevent—a reduction in plan participation resulting from abuse, bad faith, or misconduct by the employer.²⁴³ The court concluded that no bad faith was present in this case because Halliburton did not gain anything by reducing plan participation and no reversion of plan assets occurred.²⁴⁴

Halliburton argued that once the determination was made that no bad faith was present, the facts and circumstances inquiry should end.²⁴⁵ The court disagreed, noting that “[w]hile . . . one purpose of the [partial termination] rule is to prevent abuse, the rule has the additional purpose of protecting employee’s legitimate expectations of bene-

Deaths	22
Retirees	
Normal Retirements	38
Early Retirements	1,141
Terminations for Cause	264
Transferee	
To M-I Drilling Fluids Co.	437
Other Affiliates	6
Voluntary Separations	797
Involuntary Separations	0
Fully Vested	224
Partially Vested	4,560
Zero Balance Accounts	231
Total Decrease in Participation in 1986	<u>7,720</u>

Participants at Beginning of 1986	19,017
Participants Added in 1986	581
TOTAL	<u>19,598</u>

²⁴⁰ *Id.* at 221.

²⁴¹ *Id.* at 222.

²⁴² *Id.* at 225-26 (citing Treas. Reg. § 1.411(d)-2(b)(1) (1977)).

²⁴³ *Id.* at 226.

²⁴⁴ *Id.* The court concluded that Halliburton’s actions were the result of “emergency measures” necessary to protect itself from going out of business. *Id.* at 227.

²⁴⁵ *Id.*

fits.”²⁴⁶ The court further stated that “[t]he partial termination rule does not serve exclusively as a sanction for employer abuse, but also serves to protect employees who would otherwise be left out in the cold after a drastic and sudden change in the plan.”²⁴⁷

Halliburton then argued that the partial termination rules were not designed to apply to periodic layoffs that occur in cyclical industries.²⁴⁸ While recognizing that the argument asserted by Halliburton may have been meritorious in another context, the Tax Court rejected its applicability to the facts of this case.²⁴⁹

The Tax Court then discussed the importance of finding a “significant corporate event” when applying the partial termination rules,²⁵⁰ and noted that the corporate event described in this case was unlike those at issue in the prior cases and revenue rulings in which partial terminations had been found.²⁵¹ Halliburton did not permanently restructure its operations like a company which faced a closing of one of its divisions or plants.²⁵² Rather, the court found that Halliburton engaged in a “temporary economizing measure” in order to circumvent a business emergency.²⁵³ Halliburton was able to rehire a significant number of the laid-off employees relatively quickly.²⁵⁴ This, the court concluded, exemplified the transitory nature of Halliburton’s actions.²⁵⁵ Accordingly, the court held that the reduction in plan participants in

²⁴⁶ *Id.* (citing *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1182-83 (3d Cir. 1992); *Amato v. Western Union Int’l, Inc.*, 773 F.2d 1402, 1409 (2d Cir. 1985), *cert. denied*, 474 U.S. 1113 (1986); *United Steelworkers of Am. v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir. 1983)).

²⁴⁷ *Id.* at 228 (citing *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3d Cir. 1987)). As the court noted: “Petitioner’s argument boils down to the simple assertion that it was not at fault. Although this may be true, neither were the discharges the fault of the discharged employees, who nevertheless were compelled to forfeit their retirement benefits.” *Id.* at 229 (citing *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 160-61 (1984)). Accordingly, the fact that there was no bad faith motive present by the employer will not negate a finding by the court that a partial termination had occurred. *Id.*

²⁴⁸ *Id.* at 230.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 231.

²⁵¹ *Id.* Although Halliburton required a major restructuring of its operations similar to a plant closing or post-merger consolidation, Halliburton’s response to its crisis distinguished it from the typical major corporate event. *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

this case was less suggestive of a partial termination than in the case of a permanent restructuring.²⁵⁶

a. *The Significant Number Test*

The Service, consistent with the historical application of its partial termination rule, urged the Tax Court to utilize the significant number test as the exclusive means for determining that a partial termination had occurred.²⁵⁷ The court rejected the Service's test, however, stating that the significant number test had been announced in a revenue ruling²⁵⁸ and was therefore entitled to no special deference.²⁵⁹ Because the court found no legal basis for the significant number test except arbitrary decision-making on the part of IRS agents, the court rejected the Commissioner's assertions that this test should control.²⁶⁰

b. *The Significant Percentage Test*

Recognizing that the significant percentage test has been widely accepted by courts that have addressed the partial termination issue, the Tax Court applied the test in this case.²⁶¹ However, *Halliburton* is significant in that this court, for the first time, explained the possible rationale behind the significant percentage test.²⁶²

First, the court concluded that the legislative history of ERISA suggests that the relative size of the reduction is important in determin-

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ On this issue, the court stated: "[A] ruling or other interpretation by the Commissioner is only as persuasive as her reasoning and the precedents upon which she relies." *Id.* at 232. It should be noted here that the significant number test was announced in Revenue Ruling 72-510. See Rev. Rul. 72-510, 1972-2 C.B. 223.

²⁵⁹ *Id.* (citing *Higgins v. Commissioner*, 312 U.S. 212, 215, *reh'g denied*, 312 U.S. 714 (1941); *Helvering v. New York Trust*, 292 U.S. 455 (1934); *Stark v. Commissioner*, 86 T.C. 243, 250-51 (1986)). As the Fifth Circuit stated: "[A revenue] ruling is merely the opinion of a lawyer in the agency and must be accepted as such. It may be helpful in interpreting a statute, but it is not binding on the Secretary [of the Treasury] or the courts. It does not have the effect of a [R]egulation or a Treasury Decision." *Id.* (citing *Stubbs, Overbeck & Assocs. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971)).

²⁶⁰ *Halliburton Co. v. Commissioner*, 100 T.C. 216, 233-34 (1993).

²⁶¹ *Id.* at 234.

²⁶² Until this case, no court or the IRS attempted to provide any clear rationale why the test had been applied. They simply applied the test arbitrarily.

ing that a partial termination has occurred.²⁶³ Citing Senate Report No. 383²⁶⁴ and House Report No. 807,²⁶⁵ the Tax Court held that the significance of a reduction in plan participation should be judged in relation to the size of the plan, not according to the absolute number of persons eliminated from participation in the plan.²⁶⁶

The court also opined that utilizing the significant number test would disproportionately impact larger plans and would unnecessarily complicate their administration.²⁶⁷ The court applied Revenue Ruling 81-27²⁶⁸ in illustration of this point.²⁶⁹ Finally, the court concluded that utilizing the significant number test would allow even minor corporate events to fall within the partial termination rules, thereby turning the partial termination vesting rule “into a mechanism for providing severance benefits instead of retirement benefits”—a purpose not intended by Congress.²⁷⁰

In applying the significant percentage test, the court recognized that there is no “magical figure at which a partial termination occurs.”²⁷¹ However, the court painstakingly attempted to make some sense out of the 20 percent benchmark utilized by the Service.²⁷² First, the court recognized that a drop in participation of 20 percent or more must be reported to the plan sponsor under section 4043(b)(3) of ERISA.²⁷³ Further, the court noted the Service’s use of the 20 percent figure in its *Plan Termination Handbook*.²⁷⁴ Finally, the court reasoned that the 20 percent number may have arisen from a pre-ERISA annual report requirement which inquired about a drop in participation

²⁶³ *Id.* House Report No. 807 specifically provides that “a large reduction in the work force” will constitute a partial termination.” H. REP. NO. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4670, 4731.

²⁶⁴ S. REP. NO. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4890, 4935.

²⁶⁵ H. REP. NO. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4670, 4731.

²⁶⁶ *Halliburton Co. v. Commissioner*, 100 T.C. 216, 235 (1993).

²⁶⁷ *Id.*

²⁶⁸ Rev. Rul. 81-27, 1981-1 C.B. 228.

²⁶⁹ In Revenue Ruling 81-27, 95 out of 165 employees were excluded from participation in the plan. *Id.* The IRS held that a partial termination did in fact occur. *Id.*

²⁷⁰ *Halliburton Co. v. Commissioner*, 100 T.C. at 235 (citing 119 CONG. REC. 30,384-85 (1973) (statement of Sen. Javits)).

²⁷¹ *Id.* at 236 n.8 (quoting *Bruch v. Firestone Tire & Rubber Co.*, 640 F. Supp. 519, 530 (E.D. Pa. 1986), *aff'd*, 828 F.2d 134 (3d Cir. 1987, *and cert. granted*, 485 U.S. 986 (1988), *and aff'd in part, and rev'd in part*, 489 U.S. 101 (1989)).

²⁷² *Id.* at 237 n.8.

²⁷³ *Id.* (citing ERISA § 4043(b)(3) (1993)).

²⁷⁴ *Id.* (citing *IRS Plan Termination Handbook*, *supra* note 26, at § 252).

of 20 percent or more.²⁷⁵ While sensitive to the Service's view, the court properly rejected the 20 percent benchmark as an absolute test,²⁷⁶ and correctly opted to apply the facts and circumstances standard outlined in the Regulations.

c. *Defining the Class of Employees Affected*

The parties agreed that certain classes of employees should be excluded from the significant percentage calculation.²⁷⁷ Employees excluded as a result of death, normal retirement, and terminations for cause were not counted since these eliminations were not an affirmative attempt by Halliburton to reduce covered employees.²⁷⁸ In addition, citing *Gulf Pension*, both parties eventually agreed to exclude plan participants covered by a successor plan.²⁷⁹ Ultimately, the parties agreed that the partially vested participants who were involuntarily terminated in 1986 should be included in the calculation.²⁸⁰ However, the parties disagreed as to whether employees who voluntarily relinquished employment during 1986, due to either early retirement or voluntary resignation, should be counted.²⁸¹

The court agreed with Halliburton that only involuntary termines need be counted for purposes of determining the occurrence of a partial termination.²⁸² The court cited numerous cases in favor of this position.²⁸³ As further support, the court cited the Regulations for the pro-

²⁷⁵ *Id.* (citing LINDA M. LAARMAN & DAVID A. HILDEBRANDT, *Plan Terminations And Mergers*, 357 TAX MGMT. PORTFOLIO A-18(2) (1986)).

²⁷⁶ *Id.* at 237. On this issue, the court specifically stated that it will "decline to accord talismanic significance to the 20 percent rule of thumb, but will regard the percentage drop in the light of the other facts and circumstances." *Id.*

²⁷⁷ *Id.* at 238.

²⁷⁸ *Id.* See also *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1168 (S.D. Tex. 1991); *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297, 1302-03 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990).

²⁷⁹ *Halliburton*, 100 T.C. at 239. See *Gulf Pension Litig.*, 764 F. Supp. at 1165-66.

²⁸⁰ *Halliburton*, 100 T.C. at 239.

²⁸¹ *Id.* The IRS contended that both early retirements as well as voluntary resignations should be counted. *Id.* Halliburton disagreed and stated that the partial termination rules were intended only to protect plan participants who involuntarily separated from service. *Id.* at 239-40.

²⁸² *Id.* at 240.

²⁸³ *Id.* See, e.g., *Anderson v. Emergency Medicine Assocs.*, 860 F.2d 987, 990 (10th Cir. 1988); *Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 891 (10th Cir. 1988); *Kreis v. Charles O. Townley & Assocs.*, 833 F.2d 74, 79 (6th Cir. 1987); *Weil I*, 750 F.2d 10, 11-13 (2d Cir. 1984), *on remand*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802 (S.D.N.Y. Jun. 15, 1988); *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1166 (S.D. Tex. 1991); *Morales v. Pan Am. Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990).

position that only employer-initiated dismissals can cause a vertical partial termination.²⁸⁴ However, the court opined that an employee resignation may be counted as an employer-initiated dismissal if it can be shown that the employee resigned due to intolerable working conditions.²⁸⁵ Further, if it is clear that the employee quit in anticipation of being laid off and that the employee will not be able to return to work for that employer, the employee is considered to have been involuntarily terminated.²⁸⁶ In sum, the court held that voluntary, non-employer-initiated terminations are not included in deciding whether a partial termination occurred.²⁸⁷

The court then examined whether employees who took Halliburton's offer of early retirement were constructively discharged.²⁸⁸ In answering this question, the court noted that Halliburton's plan for downsizing was enacted voluntarily on a nationwide basis.²⁸⁹ Because the early retirement offer was made to all employees, and each employee "was free to accept it or not," the court reasoned this was not a case where the employees had no option but to leave the employ of the employer.²⁹⁰ The court found that the employees were not constructively discharged. Hence, the court held that employees who selected early retirement should not be included in the calculation.²⁹¹ The court further concluded that an employee's decision to take the early retirement benefit offered by Halliburton was the result of a careful weighing process in which the employee weighed the benefits and burdens of accepting early retirement versus continuing his or her employment with Halliburton.

²⁸⁴ *Halliburton*, 100 T.C. at 240 (citing Treas. Reg. § 1.411(d)-2(b)(1) (1977) ("[S]everance by the employer" of plan participants)).

²⁸⁵ *Id.* (citing *Kreis*, 833 F.2d at 81-82).

²⁸⁶ *Id.* (citing *Collignon v. Reporting Servs. Co.*, 796 F. Supp. 1136, 1141-42 (C.D. Ill. 1992); *Morales*, 718 F. Supp. at 1303).

²⁸⁷ *Id.* at 241.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 241-42. The court noted that almost every employee who left Halliburton completed a form indicating their reasons for leaving. *Id.* at 242. No one indicated that he or she was leaving because of an anticipated discharge or layoff. *Id.* Also, there is no evidence that any of the commenting employees were compelled to falsely state that they were leaving voluntarily. *Id.* at 242 n.11.

²⁹¹ *Id.* at 242 (the court cited *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1168 (S.D. Tex. 1991), for this proposition). The court reasoned that Halliburton merely made an offer of early retirement to its employees. *Halliburton*, 100 T.C. at 242. The employees were free to reject or accept the offer as they wished and were not coerced by Halliburton in any manner. *Id.* at 243. See *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987).

In *Halliburton*, the court was also confronted with the issue of whether fully vested employees laid off by Halliburton should be counted in calculating the significant percentage reduction for the significant percentage test.²⁹² Halliburton argued that these participants should be excluded,²⁹³ while the Commissioner asserted that they should be counted.²⁹⁴ However, the court passed on this question, finding it irrelevant in light of the determination that no partial termination occurred,²⁹⁵ even when such employees were included.

Halliburton also argued that participants who had no accrued benefits in the plan at the time of separation from service should be excluded from the calculation.²⁹⁶ The Commissioner, on the other hand, urged that these participants be counted since, in the Service's opinion, it is important to examine the reduction of plan participants as a whole, without regard to their vesting status.²⁹⁷ Once again, the court found this inquiry irrelevant in light of its ultimate decision that a partial termination did not occur.²⁹⁸ Nonetheless, the court included these individuals in the calculation purely for illustrative purposes.²⁹⁹

The Commissioner also contended that participants who were transferred to Halliburton affiliates other than M-I should be included in the calculation because such participants did not receive adequate vesting protection.³⁰⁰ The court disagreed, however, based on the fact that a participant's transfer did not cause him or her to lose vesting credit since the employee was allowed credit under the Plan for service to the affiliate.³⁰¹ Hence, the court concluded that these transferees should not be part of the affected class.³⁰²

²⁹² *Halliburton*, 100 T.C. at 243-44.

²⁹³ *Id.* at 244. Specifically, Halliburton argued that the purpose of the partial termination rule was to protect participants from forfeiting rights to accrued, but unvested benefits and to prevent employers from recognizing a windfall because of the reversion of funds on which the employer had paid no tax. *Id.* Halliburton asserted that these policy concerns would not be advanced by placing participants who forfeit nothing upon leaving the plan into the significant percentage calculation. *Id.*

²⁹⁴ *Id.* The Commissioner specifically asserted that the "significant contraction of [the] plan" is the focus of the partial termination inquiry, not the consequences of such event. *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 244-45.

²⁹⁷ *Id.* at 245.

²⁹⁸ *Id.*

²⁹⁹ *Id.* See *infra* note 315 and accompanying text.

³⁰⁰ *Halliburton*, 100 T.C. at 245.

³⁰¹ *Id.*

³⁰² *Id.*

During 1987 through 1989, several former participants in the Halliburton Plan who had been involuntarily separated from service were rehired and subsequently became participants in the plan.³⁰³ Halliburton urged that such participants be excluded from the percentage reduction calculation.³⁰⁴ The Service, on the other hand, argued that the only significant year for the determination was 1986.³⁰⁵ Permitting the exclusion of these employees, the Service opined, would only further complicate the decision-making process for finding a partial termination.³⁰⁶ The court resolved the issue by citing the *Gulf Pension* case for the proposition that events affecting whether a partial termination has occurred can cover more than one year.³⁰⁷

Finally, Halliburton argued that the partial termination rules apply only in the case of a permanent, rather than a temporary, reduction in plan participation as was the case here.³⁰⁸ The court agreed with Halliburton's analysis after examining all of the surrounding facts and circumstances.³⁰⁹ The court stated "that [to hold that] a large drop in plan participation, no matter how short in duration, could cause a partial termination would greatly and unnecessarily complicate the administration of plans and would needlessly discourage their establishment."³¹⁰ The court reasoned that there are times when temporary

³⁰³ *Id.* One thousand two hundred seventy-nine employees recommenced employment with Halliburton during this time. *Id.* at 245-46 n.13.

³⁰⁴ *Id.* at 246. Halliburton reasoned that these employees only experienced temporary layoffs and forfeited amounts under the plan were available for restoration upon recommencement of employment. *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* See *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1167 (S.D. Tex. 1991). The court did address the Service's concerns that considering rehired individuals will complicate and further delay the process of determining that a partial termination has occurred. *Halliburton*, 100 T.C. at 247-48. The IRS noted that an employee may be rehired as long as five years later and still be eligible for restoration of his or her forfeited account balance. *Id.* at 248. The court had little difficulty negating the Service's concerns. The court recognized that truly temporary reductions in the workforce of an employer are periods of time shorter than the five year period raised by the Service. *Id.* Further, the more time that goes by, the greater the likelihood that the employee will find new employment with another employer. *Id.* Therefore, the former employees will not be eligible to be rehired by the employer. *Id.* In this case, the majority of the individuals were rehired in 1987, while only a few were rehired in 1988. *Id.* The court concluded that rehiring within this short time frame further proved that the reduction in participants was only temporary and did not constitute a partial termination. *Id.*

³⁰⁸ *Halliburton*, 100 T.C. at 246.

³⁰⁹ *Id.* at 247.

³¹⁰ *Id.*

layoffs are a necessary and a normal part of business practice.³¹¹ Such was the situation here since the oil industry was near collapse.³¹²

The authors believe the *Halliburton* court adopted the correct view. The Tax Court adhered to the applicable regulatory language and examined all of the surrounding facts and circumstances in the case. For example, the court noted that toward the end of 1986, the price of oil was beginning to rise, thereby creating the need to increase Halliburton's workforce.³¹³ The number of operating rigs also began to rise in conjunction with the rise of the oil prices.³¹⁴ The court thus correctly concluded that there was a direct relation between the economy of the oil industry and Halliburton's reduction, and then subsequent increase, in its workforce.

d. *Calculation of the Significant Percentage Fraction*

In summary form, the court calculated the percentage reduction as follows:³¹⁵

Involuntarily separated participants	
Fully Vested	244
Partially Vested	4,560
Zero Balance Accounts	<u>231</u>
	5,015
Less:	
Rehired Involuntarily Separated Participants	
Fully Vested	45
Partially Vested	1,039
Zero Balanced Accounts	<u>40</u>
	(1,124)
NET REDUCTION IN PARTICIPATION	<u><u>3,891</u></u>

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 248.

³¹⁴ *Id.*

³¹⁵ The court included fully vested and zero balance participants in the calculation, but did so only for illustrative purposes. *Id.* at 250-51. As noted above, the court made no decision as to whether these individuals should be counted in making the determination that a partial termination has occurred. *Id.*

The Net Reduction in Participation constituted the numerator.³¹⁶ The denominator, 19,598, was calculated by adding all the participants in the Halliburton Plan on January 1, 1986 to the participants that entered the Plan during 1986.³¹⁷ The result was 19.85 percent, which the court concluded was not "significant" for partial termination purposes.³¹⁸

VI. OBSERVATIONS

The *Halliburton* court's rejection of the 20 percent absolute standard that prior courts utilized is refreshing and completely justified. There is no statutory basis for applying the 20 percent standard, especially as an absolute threshold. To the contrary, the mechanical application of that figure negates the true intent of the statute and its legislative history. While a benchmark standard may be one fact to be examined within the facts and circumstances test, such a standard should not constitute an absolute test.

Unequivocally, the Service's purpose for devising the significant percentage and significant number tests was to create both a standard that can be easily applied by affected parties and a neutral mechanism for making the determination relative to whether a partial termination has occurred. However, an examination of the case law in this area indicates that those courts which have relied only upon the significant percentage test generally do not find a partial termination.

Case law is indicative of the holding of the majority of the courts in failing to find a partial termination. In applying the significant percentage test, courts seem to simply perform a numerical calculation on a nationwide basis (i.e. compare the number of plan participants on a nationwide basis before the alleged partial termination to the number of participants after the alleged partial termination took place). However, as can easily be seen by examining any of the cases that have addressed the partial termination issue, when the test is applied, the result is substantially the same. If the ratio exceeds 20 percent—the Service's published benchmark standard³¹⁹—a partial termination will

³¹⁶ *Id.* at 251.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ The IRS seems to indicate that a 20 percent reduction in plan participants is the benchmark for determining that a partial termination has occurred. *IRS Plan Termination Handbook*, *supra* note 26, Pt. VII, Ch. 7950-51.

be deemed to have occurred.³²⁰ We provide the following example in illustration of this point.

Assume that all the plan participants of a division of a large company are terminated. If the number of plan participants in a single division is relatively small when compared to the number of plan participants on a nationwide basis, the possibility of calculating a percentage in excess of 20 percent is remote and a court would be unlikely to find a partial termination. Such a result would fly in the face of congressional intent because it would not protect the dismissed plan participants. On the other hand, dismissed plan participants would obtain a more equitable result if the courts would simply apply a divisional analysis as opposed to a nationwide analysis. If the courts utilized a divisional analysis in all circumstances, it is likely that the terminees would virtually always achieve full vesting status because a partial termination would be found. Therefore, one problem with the approach of many courts in making a partial termination determination is the application of the partial termination rules on a nationwide basis as opposed to a divisional analysis.

However, an analysis of the nationwide participation may not be a problem if the number of plan participants in a single division is not small in relation to the total number of plan participants within the corporate organization. For example,³²¹ assume that a holding company has four divisions—A, B, C, and D—with each division's employees participating in the pension plan of the holding company. The plan has 200 participants. Division A, Division B, Division C and Division D have participants in the plan of 60, 30, 10 and 100, respectively. If Division D is sold and all the plan participants are eliminated, the plan will have incurred a partial termination on both a divisional and nationwide analysis according to the Service's 20 percent benchmark

There is no explanation for this arbitrary 20 percent figure. A possible explanation may be that the PBGC uses 20 percent as the reportable event number. ERISA §§ 4043(b)(3), 4062(e) (1993). A "reportable event" for Title IV purposes is a 20 percent reduction in the number of plan participants in a plan year or a 25 percent reduction in a period of two plan years. *Id.* However, there is no compelling reason why the 20 percent threshold designed to assist the PBGC in identifying underfunded plans that may qualify for involuntary termination should have any link to the partial termination question.

³²⁰ See *supra* note 113.

³²¹ This example is discussed utilizing a nationwide, as opposed to single, corporate, division standard since such standard has been used by numerous courts which have addressed this issue. See *infra* notes 322-29 and accompanying text. While the authors do not advocate the Service's 20 percent benchmark standard as the sole means for determining that a partial termination has occurred, this standard is utilized for simplicity in this example.

standard since the reduction in plan participants is 50 percent. However, if Divisions B or C are sold independently, the Service would not view this as a partial termination since the Service applies the nationwide analysis. Under a divisional analysis a partial termination is more likely to be found.

The aforementioned example exemplifies the need for courts to apply the statutory facts and circumstances test in order to reach overall just decisions. The partial termination rules are not well-suited to absolute standards. An equitable result cannot consistently be reached utilizing a nationwide analysis in every instance. In some instances, the nationwide analysis produces the best result, while in others the single corporate divisional analysis is more equitable. As is shown in the example above, the Service may find that the closing of one division is a partial termination and determine that the closing of another division within the same company is not a partial termination. This is inequitable since the closing of one division will result in those participants becoming fully vested, while the participants of the other division do not receive equal protection.

The case law in this area further illustrates the point. In *Beck v. Shaw Industries*,³²² the plaintiffs were terminated when the company sold one of its carpet plants.³²³ The plaintiffs argued that the carpet plant should be considered a separate division.³²⁴ The court rejected the plaintiffs' argument, however, and using a nationwide analysis, held that the plant was merely a part of the company's carpet division.³²⁵ If the court had adopted the plaintiffs' assertions, a partial termination would unequivocally have been deemed to occur. While the decision does not indicate the exact number of participants that would have been included if the carpet plant were considered a separate division, the percentage reduction in plan participants would have been significantly greater than the 6.2 percent decrease which the court found.³²⁶

Similarly, *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*³²⁷ involved the sale of one of the company's divisions. The court, following *Beck*, held that a divisional analysis like the one suggested by

³²² 2 Employee Benefits Cas. (BNA) 2366 (N.D. Ga. 1981).

³²³ *Id.* at 2367.

³²⁴ *Id.* at 2368.

³²⁵ *Id.*

³²⁶ In *Beck*, 100 employees out of a total of 1,599 were discharged from employment and consequently from participating in the plan. *Id.* at 2367.

³²⁷ 6 Employee Benefits Cas. (BNA) 1291 (N.D. Ga. 1984).

the plaintiffs was not appropriate.³²⁸ As in *Beck*, if the court had accepted the plaintiffs' proposals, it almost certainly would have found a partial termination based upon the discharge of 44 out of 50 division employees.³²⁹ Moreover, in *Ehm v. Phillips Petroleum Co.*,³³⁰ the court also looked to participants nationwide and concluded that a reduction of 2.5 percent of plan participants did not constitute a partial termination.

In *Weil I*, all of Ward's New York operations were closed due to a reorganization.³³¹ That closing resulted in a 62 percent reduction of plan participants in New York.³³² However, the *Weil I* court held that a partial termination did not occur because the court concluded that the reorganization resulted in a termination of only 27 percent of the plan's active participants nationwide.³³³ This 27 percent reduction did not meet the threshold rates in the revenue rulings relied upon by the court.³³⁴ However, the court revisited the issue in *Weil II*³³⁵ and reached a different result. After examining the effect a partial termination determination would have on plan participants rather than the effect on the company, the court calculated the percentage reduction exclusively for the New York division and found a partial termination.³³⁶ The *Weil II* court, in applying a divisional analysis versus the nationwide analysis, caused the plan to fully vest all of the terminees.

The authors submit that the choice between the two analyses is an element of the facts and circumstances test. In some instances, choosing the divisional analysis and finding a partial termination may in essence be more harmful to the remaining plan participants and the employer due to the combination of the increased costs of litigating this issue³³⁷ and the terrific cost of vesting all terminated employees.³³⁸ In

³²⁸ *Id.* at 1294.

³²⁹ *Id.* at 1291.

³³⁰ 583 F. Supp. 1113 (D. Kan. 1984).

³³¹ *Weil I*, 750 F.2d 10, 11-12 (2d Cir. 1984), *on remand*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802 (S.D.N.Y. Jun. 15, 1988).

³³² *Id.*

³³³ *Id.* at 11.

³³⁴ *Id.* at 12.

³³⁵ *Weil II*, 933 F.2d 106 (2d Cir. 1991).

³³⁶ *Id.* at 110.

³³⁷ Depending on the circumstances and the plan language, the costs of litigation could be paid out of the fund's assets, which will thereby decrease the total amount of assets available to be paid as benefits to the participants of the plan. Whether or not the cost of litigation is paid out of plan assets, the employer effectively pays the bill.

³³⁸ The costs of vesting all terminated plan participants varies depending on the number of participants and the extent to which they were already vested. Forcing an employer to vest all

other cases, however, the divisional analysis may not drastically harm the employer, plan or participants. These authors do not believe that Congress intended to force employers into such high costs as a means for providing pension benefits. Taken as a whole, all of the above examples illustrate the need for courts and the Service to apply a facts and circumstances test.

Indeed, Congress specifically mandated that a "facts and circumstances" test be controlling in this area. Neither the statute, nor the governing Regulations provide for the utilization of the significant percentage test in all cases. On the contrary, neither the statute nor its legislative history mentions numerical tests. The significant percentage test is merely an arbitrary rule created by the IRS, presumably, to give some credence to the ad hoc determinations of the IRS district offices and field agents. The usefulness of the Service's 20 percent benchmark standard derives from its uniformity and ability to provide employers with a steadfast rule. However, the legislative history and governing Treasury Regulations specifically and repeatedly state that a facts and circumstances test is to be utilized. Thus, courts lack adequate justification to completely omit the only test outlined by statute.

As the Bishop of London stated in a sermon delivered before the King in 1715: "[W]hoever hath *absolute Authority to interpret* any written, or spoken Laws; it is He, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke the Law."³³⁹ This quote is illustrative of the need for constraint on the judiciary's ability to "legislate" under the guise of legislative interpretation. Some would argue that the role of the federal judiciary is and always has been an activist one.³⁴⁰ However, great legal scholars who

such employees could economically harm the employer to the point that a complete termination would occur. This would be harmful to all involved.

³³⁹ HOADLEY, *THE NATURE OF THE KINGDOM OR CHURCH OF CHRIST* 12 (1717).

³⁴⁰ For example, Judge Frank M. Johnson, a United States District Judge for the Middle District of Alabama, who is well-known for his civil rights decisions, such as *Lee v. Macon County Bd. of Educ.*, 292 F. Supp. 363 (M.D. Ala. 1968), *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); and *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956), *and reh'g denied*, 352 U.S. 950 (1956), holds such a view. Specifically with regard to this issue Judge Johnson stated: "While refusal to show proper deference to and respect for the acts and decisions of the coordinate branches of government is judicial intrusion and is, therefore, improper, a blind and unyielding deference to legislative and executive action is judicial abdication and is equally to be condemned." Honorable Frank M. Johnson, Jr., *John A. Sibley Lecture: The Role of the Judiciary With Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 469 (1977). The activism Johnson describes is not properly measured in terms of the end result, but by the means through which the result is achieved. *Id.* In Johnson's opinion, judicial activism is not "activism" at all but is a display of the court's "continuing duty to uphold the law." *Id.* at 474.

were instrumental in laying the foundation for legal jurisprudence have condemned such activism.³⁴¹ In addition, Justices Holmes and Cardozo, who acknowledged that judges must be permitted to legislate, believed that this judicial legislation should occur only through gap-filling—that judges must supply what the current law omits.³⁴²

In the case of alleged partial terminations, there is no need for gap-filling. The statute clearly spells out the intent of Congress—the test to be utilized in determining whether a partial termination has occurred is a facts and circumstances test. The statute requires no analysis of percentages. If the statute is to have meaning, it must be applied as it is written without the interjection of arbitrary absolute tests, which in effect undermine those tests specifically identified by statute.

Undeniably, the percentage of excluded plan participants is a factor that should be considered when making a determination that a partial termination has occurred.³⁴³ The percentage, at times, may be so “significant” that it may be the overwhelming factor in applying the facts and circumstances test and may ultimately lead the court to conclude a partial termination has indeed occurred.³⁴⁴ However, the calculated percentage should not be the *exclusive* factor. It is necessary to look beyond mere percentages in making the partial termination determination. Thus, a facts and circumstances test—the only test delineated in the statute—must be given priority.

Unfortunately, courts which have addressed this issue have displayed different views. For example, in *Peter M. Boruta*,³⁴⁵ the Tax

³⁴¹ Indeed, William Blackstone, in his *Commentaries on the Laws of England*, concluded that judges should not use personal judgment when making legal determinations, but should just follow the known laws and customs of the land unless the law is “manifestly absurd or unjust.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69-70 (1897). Similarly, as Bacon stated: “Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.” FRANCIS BACON, ESSAYS OF JUDICATURE. Finally, as Justice Coleridge noted: “We must not be guilty of taking the law into our own hands, and converting it from what it really is to what we think it ought to be.” *R. v. Ramsey*, 1 C. & E. 126, 136 (1883).

³⁴² See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-14 (1921); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 6 (1977).

³⁴³ See *Babb v. Olney Paint Co.*, 764 F.2d 240, 243-45 (4th Cir. 1985); *Weil I*, 750 F.2d 10, 13 (2d Cir. 1984), *on remand*, No. 82 Civ. 8468, 1988 U.S. Dist. LEXIS 5802 (S.D.N.Y. Jun. 15, 1988); *Bruch v. Firestone Tire & Rubber Co.*, 640 F. Supp. 519, 530-31 (E.D. Pa. 1986), *cert. granted*, 485 U.S. 986 (1988), and *aff'd in part, rev'd in part*, 489 U.S. 101 (1989); *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*, 6 Employee Benefits Cas. (BNA) 1291 (N.D. Ga. 1984).

³⁴⁴ See *Bruch*, 640 F. Supp. at 530-31; *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113, 1115-16 (D. Kan. 1984).

³⁴⁵ 55 T.C.M. (CCH) 670 (1988).

Court asserted that the termination of two-thirds of a plan's participants "standing alone, generally is sufficient to warrant a finding of a partial termination."³⁴⁶ Further, the court stated that "facts and circumstances" need only be considered when the percentage reduction is so small that the inference of a partial termination is not automatic.³⁴⁷ This is clearly contrary to congressional intent.

As noted above, courts that have addressed the partial termination issue have not discussed horizontal partial terminations with great emphasis. However, because the *Gulf Pension* case introduced the horizontal partial termination concept, a brief mention is merited.

Whether a court labels the partial termination horizontal or vertical, this finding renders the same result—the participants vest to the extent the plan is funded.³⁴⁸ However the *Gulf Pension* result is noteworthy for two reasons. First, the *Gulf Pension* case involves not only the cutting off of accrued benefits, but the elimination of ancillary benefits. Under the Regulations, if the employer cuts off all of the accruals, there is a partial termination and the employer would have to vest the participants to the extent funded.³⁴⁹ However, neither the statute nor accompanying Regulations makes any mention of ancillary benefits. Nonetheless, the *Gulf Pension* court considered both ancillary benefits and accrued benefits in making its determination that a partial termination had occurred.³⁵⁰

Second, the value of the ancillary benefits at issue in *Gulf Pension* was approximately 10 percent.³⁵¹ Under the Service's benchmark standard, a vertical partial termination requires a reduction or elimination of 20 percent of benefits in order to be considered "significant" under the significant percentage test.³⁵² No IRS rulings or case law prescribe a benchmark standard for determining when courts and the IRS will deem a horizontal partial termination to have occurred. In light of this fact, the results announced by the *Gulf Pension* court are both enlightening and confusing.

Arguably one would expect vertical and horizontal partial terminations to be determined utilizing different standards since they are labeled as two distinct types of partial terminations. The *Gulf Pension*

³⁴⁶ *Id.* at 670.

³⁴⁷ *Id.*

³⁴⁸ Treas. Reg. § 1.401-6(b)(1) (1963).

³⁴⁹ *Id.*

³⁵⁰ *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1177-79 (S.D. Tex. 1991).

³⁵¹ *Id.* at 1174-75.

³⁵² See *supra* notes 133-35 and accompanying text.

court affirmatively applied a different standard for determining the occurrence of each type of partial termination. The court used the Service's 20 percent benchmark standard in determining whether a vertical partial termination occurred, and found no partial termination since the percentage reduction in plan participants was less than the benchmark. However, the court concluded that a reduction in ancillary benefits of less than 20 percent constituted a horizontal partial termination.³⁵³ *Gulf Pension* thus appears to set forth a different standard for each type of partial termination and this may be appropriate if the two are truly distinctive.

Nonetheless, the distinction between both types of partial terminations remains unclear because the court did not adequately address the standards that should apply to horizontal partial terminations. Confusion is caused by the court's failure to provide guidance as to whether there are separate horizontal partial termination rules. If such rules exist, it is unclear whether they mirror the vertical partial termination rules in part or *in toto*. If the horizontal and vertical partial termination rules are intended to mirror each other, of what relevance is the distinction?

One must also question whether ERISA section 204(h) is affected by the *Gulf Pension* decision. Section 204(h) requires that a plan give fifteen days advance notice that the plan intends to adopt amendments that reduce future accruals.³⁵⁴ Section 204(h) provides further that the notice must be given before the amendments become effective.³⁵⁵ However, several questions remain unanswered. First, is the test for partial termination the same if the employer reduces ancillary benefits and not accrued benefits? Second, is 10 percent³⁵⁶ "significant" for section 204(h) purposes? Third, does section 204(h) apply at all if an accrual is not involved? At the present time, these questions remain to be decided.

The policy reasons behind ERISA and the enactment of section 411 of the Code were to protect pension benefits promised employees by their employers and to ease congressional and public concern that employers would discharge substantial numbers of plan participants in order to recognize a windfall.³⁵⁷ As noted above, the Service's or a

³⁵³ *In re Gulf Pension Litig.*, 764 F. Supp. at 1178-79.

³⁵⁴ See ERISA § 204(h) (1993).

³⁵⁵ *Id.*

³⁵⁶ See *supra* note 351 and accompanying text.

³⁵⁷ See *supra* notes 199-201 and accompanying text.

court's finding that a partial termination has occurred causes participants to fully vest to the extent funded.³⁶⁸ This result furthers the congressional intent of protecting pension benefits.

Nonetheless, the achievement of this result is costly to the employer. In today's economy, numerous employers are experiencing financial difficulties. An employer who is required to reduce the size of its workforce due to monetary constraints will not have the ability to vest participants to the extent they are affected by the partial termination. Further, because the standards articulated by both the courts as well as the Service remain far from clear or uniform, the costs of litigating these partial termination claims by plan participants are often significant. The filing fees involved in receiving an IRS determination letter further increase the costs to employers. Filing for an IRS determination letter on this issue generally increases litigation costs because the Service does not follow the approach set forth by the courts, and a party who receives an adverse decision is likely to litigate the matter. In essence, the unclear partial termination rules impose much greater costs, not only to the employer, but ultimately to the plan participants, than would the mere vesting of participants to the extent funded.

Litigation is ignited by the inconsistent approaches taken by the courts on this issue and the Service's ad hoc determinations relative to the many issues underlying the partial termination evaluation. One such inconsistency is the definition of the allowable time span encompassing the corporate event. The Service adheres to the rule that a corporate event can only occur on a calendar or fiscal year basis.³⁶⁹ In

³⁶⁸ Treas. Reg. § 1.401-6(b)(1) (1963).

³⁶⁹ This proposition is best illustrated by Form 5300 which the Service requires be completed before a determination on the partial termination issue can be rendered. The relevant portion of the Form 5300 is as follows:

Gulf Pension, however, the court opined that there is no time limit in defining the length of the corporate event.³⁶⁰

While Congress had admirable intentions of protecting the benefits of terminated plan participants when it enacted the partial termination rules, the costs of the legislation are detrimental not only to the employer, but ultimately to the plan and the plan participants as well. Hence, the rules may deter employers from initiating pension plans due to the fear of overwhelming costs. Without a defined set of rules in this area to reduce the threats and costs of litigation, congressional intentions to provide pension benefits to participants may not be served overall.

CONCLUSION

Even though the partial termination concept has existed in the Code for over three decades, no clear guidelines exist for determining when courts and the IRS will deem a partial termination of a single-employer plan to have occurred. Over that thirty year period, numerous courts as well as the IRS have addressed the partial termination issue. Without adequate guidelines, however, the result has been a plethora of inconsistent and arbitrary determinations. These inconsistencies indicate that the IRS has not provided sufficient guidance and the courts have failed to develop uniform principles for determining whether a partial termination has occurred. In order to resolve this dilemma, the

Partial Termination Worksheet	19....	19....	Year of partial termination 19....	19....
1 Participants employed:				
a Number at beginning of plan year				
b Number added during the plan year				
c Total, add lines a and b				
d Number dropped during the plan year				
e Number at end of plan year, subtract d from c				
f Total number of participants in this plan separated from service without full vesting				
2 Present value (as of month <u> </u> / <u> </u> / <u> </u> day during the year of):				
a Plan assets				
b Accrued benefits				
c Vested benefits				
3 Submit a description of the actions that may have resulted (or might result) in a partial termination. Include an explanation of how the plan meets the requirements of section 411(d)(3).				

³⁶⁰ *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1167-70 (S.D. Tex. 1991).

IRS must develop more precise rules so that inconsistencies between the Treasury Regulations, case law and IRS revenue rulings are rectified. If the IRS wishes to utilize an absolute numerical test, then one must be outlined in the statute or accompanying Regulations. Until that time, courts are left to decipher the "facts and circumstances" standard, or not.