

ROLLUPS OF LIMITED PARTNERSHIPS: QUESTIONS OF REGULATION AND FAIRNESS

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I. THE ROLLUP PHENOMENON

Frequently, despite differences in the formal nature of the events and transactions under scrutiny, the same basic legal issues recur. Whether a particular type of conflict of interest is troublesome is an example of such a recurrent legal question. Rollups of limited partnerships, recently the object of attention from Congress, the Securities and Exchange Commission (SEC), and the investing public, raise many conflict-of-interest questions similar to those leveraged buyouts (LBOs) present. To be sure, LBOs and rollups differ in many ways; they tend, nonetheless, to share features that induce squeamishness in many observers.

In a rollup transaction, limited partnerships are combined or reorganized, and new securities are issued to the partners. The typical rollup involves finite-life limited partnerships, which are merged or reorganized into a new partnership, corporation, or real estate investment trust. The successor entity whose securities the limited partners received has different compensation arrangements with the general partner and different policies for reinvestment and distribution of earnings and proceeds from asset sales than did the original limited partnership entities. Often the new entity's securities are listed for trading on a stock exchange or through NASDAQ. Although the proponent of a rollup might be a third party, many rollup proponents have been the limited partnership's general partner or a person or entity affiliated with the general partner.

Like an LBO, a rollup substitutes, for the equity interests public investors initially held in securities, something quite different. Like an LBO, a rollup—especially if it includes multiple limited partnerships—raises numerous complex questions about valuation of the assets and entities involved. Finally, like a management-endorsed LBO, a rollup proposed by an incumbent general partner or its affiliate may confer substantial

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benefits on persons occupying fiduciary positions, benefits created by the use of the entity's own assets.¹ Indeed, the structure of many rollups furthers the general partner's interests, both visibly and aggressively.

Surveying the last decade's control transactions in aggregate, one might view rollups as an intriguing but relatively minor phenomenon, as a brightly colored small fry in an ocean of much larger fish. Between January 1, 1985 and February 22, 1991, registration statements for sixty-five rollups became effective, involving 1,197 entities, about 1.2 million investors and a reported exchange value² of approximately \$6.9 billion. Eighty-three percent of these rollups involved either real estate or oil and gas partnerships.³ The aggregate amount involved in rollup transactions represents about two percent of the aggregate value of investments subject since 1985 to transactions involving a change of control.⁴ From this aggregate perspective, it may seem surprising that the small fry spawned the extensive legislative and regulatory activity described below. In many respects, however, both rollups and investors in limited partnerships involved in rollups have characteristics that make legal intervention easy to explain.

Consider first the demographics of ownership. Large numbers of limited partnerships offered investment interests to the public in the 1980s.⁵ Limited partnership interests sold by broker-dealers are overwhelmingly

1. See generally A.A. Sommer, Jr., "Going Private" *Half a Generation Later*, 70 WASH. U. L.Q. 571 (1992) (detailing recurring normative questions raised by LBOs and other variants on going-private transactions).

2. Exchange value is based on the appraised value of the limited partnership's assets. The purpose of calculating an exchange value is to set a conversion ratio between limited partners' equity interests and equity interests (shares or limited partnership units) in the successor entity. Exchange value is computed on the assumption that the partnership's property will be sold by a willing seller to a willing buyer over a reasonable period of time. Thus, exchange value is not the same as, and indeed would be greater than, liquidation value, which assumes a prompt sale of the partnership's assets and its subsequent dissolution. See Securities and Exchange Commission, *Follow-up Report of SEC Staff on "Roll-Ups" of Limited Partnership Interests*, April 16, 1991 [hereinafter SEC Follow-up Report], in *Limited Partnerships: Hearings on H.R. 1885 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 419, 423 (1991) [hereinafter *Hearings*].

3. See Securities and Exchange Commission, *Report on "Roll-ups" of Limited Partnership Interests* [hereinafter SEC Rollup Report], in *Hearings, supra* note 2, at 102, 105-06.

4. *Hearings, supra* note 2, at 216 (testimony of Richard C. Breeden, Chairman, SEC).

5. Between January 1, 1985 and February 22, 1991, about 1,700 limited partnerships registered approximately \$104 billion in limited-partnership interests with the SEC for sale to the public. Roughly 13,800 limited partnerships filed a Form D for offerings of \$87 billion, for Regulation D and other offerings exempt from registration under § 4 of the Securities Act, 15 U.S.C. § 77d(6) (1988). See SEC Rollup Report, *supra* note 3, at 106.

a "retail" product, promoted and sold to individual investors (sold successfully to eight million individual investors, by one estimate).⁶ Few institutions invest in or follow the fate of these securities. Second, the typical limited partnership subsequently involved in a rollup initially will have sold finite-life interests to its investors.⁷ Investors in these limited partnerships were perhaps aware of the cyclical nature of the industries involved (most often real estate and oil and gas). Indeed, investors also may have realized that a fickle Congress might jeopardize or eliminate the tax-favored status their investments enjoy. But the risks the limited partners assumed and the miseries they suffered were focused initially on specific assets and projects for a finite duration. The rollup substituted an infinite-life security with a different configuration of risk and return characteristics. Third, unlike shareholders in corporations, under state law limited partners generally have no right to dissent from merger or reorganization transactions and receive the fair value of their investment interests in cash. By latest count, three states and the District of Columbia now mandate dissenters' rights⁸ under some circumstances,⁹ in merger or other reorganization transactions involving limited partnerships.¹⁰ These amendments to states' limited-partnership statutes,

6. *Hearings, supra* note 2, at 33 (testimony of John F. Blake, Chairman, American Association of Limited Partners). Another estimate is that 10 million individuals bought into limited partnerships in the 1970s and 1980s, investing about \$90 billion in publicly traded units in a diverse range of businesses, including real estate, oil and gas ventures, equipment leasing, and cable television. William Power, *Market for Limited Partnership is Rife with "Predatory Pricing," NASD Finds*, WALL ST. J., Nov. 18, 1991, at C1.

7. Limited Partner Roll-up Transactions, Exchange Act Release No. 29,313, [Current] Fed. Sec. L. Rep. (CCH) ¶ 84,810, at 81,819 (June 17, 1991) [hereinafter SEC Rollup Rule Proposal].

8. See CAL. CORP. CODE §§ 15679.1 to 15679.14 (West 1991); D.C. CODE ANN. § 41-428(h) (1990); MD. CORPS. & ASS'NS CODE ANN. § 10-208(f) (Supp. 1991); N.Y. PARTNERSHIP LAW §§ 121-1105 (McKinney Supp. 1991).

9. Under the California statute, appraisal rights are unavailable if the security to be exchanged is publicly traded. CAL. CORP. CODE § 15679.2(b)(1)(A) (West 1991). If, however, five percent or more of any class of interests demand that their interests be purchased for cash, appraisal rights are available even for publicly traded securities. The limits on appraisal rights for shareholders in corporations are comparable. See CAL. CORP. CODE § 1300(b)(1) (West 1991).

10. Many rollup transactions lead to a surviving entity that is a corporation. Achieving this result may dictate how the transaction is structured, depending on the applicable state's law. Delaware permits the direct merger or consolidation of limited partnerships formed under Delaware law with corporations, whether foreign or domestic. See DEL. CODE ANN. tit. 6, § 17-211 (Supp. 1990). Delaware's limited partnership statute does not compel the provision of dissenters' rights to limited partners in any merger or consolidation transaction. See *id.* The Delaware corporation statute permits the direct merger or consolidation, with a Delaware corporation, of domestic and foreign limited partnerships. See DEL. CODE ANN. tit. 8, § 263 (Supp. 1990). Under this statute, dissenters' appraisal rights are limited to stockholders. See *id.* § 262(a). Other states require a more indirect

however, followed a spurt of rollup activity. At the time, a rollup required simply the approval of the proportion of limited partners specified in the limited partnership agreement or statute—typically a simple majority—to bind all limited partners to the rollup's terms. As a result, from the standpoint of nonassenting limited partners, the transaction resembled a "cramdown" in a bankruptcy reorganization rather than a buyout.¹¹ The public image of rollups was not enhanced by the widespread practice of paying, out of the limited partnership's assets, fees to broker-dealers and proxy soliciting firms on an outcome-contingent basis.¹² "Yes" votes earned a fee while "no" votes did not, and the entire amount of compensation paid depended on whether the rollup was approved.¹³

Finally, while the securities issued in rollup transactions have not fared well as a group in secondary trading, the typical rollup proposed by a general partner confers benefits on the general partner or its affiliate. Rollup sponsors have argued that the transactions benefitted limited partners by replacing an illiquid, infrequently traded security with a liquid, listed, and tradeable security. Liquidity appears, however, to have been achieved at a cost. The SEC examined trading-price data for ninety-two partnerships involved in fourteen rollup transactions, partner-

route, involving more discrete transactions, to achieve the same end. One such plan would involve an exchange offer, made by the rollup-surviving corporation to the limited partners, offering shares of stock in the corporation in exchange for the limited partnership's assets. The rollup's proponents would also solicit the consent of a majority of the limited partners to the dissolution of the limited partnership and distribution of the stock, on terms set forth in the consent. See CAL. CORP. CODE § 15681(b) (West 1991) (except as otherwise provided in partnership agreement, nonjudicial dissolution shall occur upon the consent of the general partner and a majority in interest of the limited partners). The dissenters' rights provision in the California statute applies to "reorganization" transactions in which one limited partnership exchanges interests in itself for partnership interests that it acquires in another limited partnership, if immediately after the acquisition it is in control of the other limited partnership. See *id.* § 15679.1(a)(3). Of course, the provision also applies to mergers among two or more limited partnerships into one of them. See *id.* § 15678.1. The dissenters' rights provision does not seem to specify its applicability when the merger or reorganization involves a corporation, as could occur under § 263 of the Delaware Corporation Code.

11. A "cramdown" imposes a reorganization plan on a dissenting class of creditors. See 11 U.S.C. § 1129(b) (1988). It requires the court's approval. See *infra* notes 78-79.

12. See Order Granting Approval of Proposed Rule Change Relating to Corporation in Connection with the Solicitation of Roll-ups of Direct Participation Programs, Exchange Act Release No. 29,582, 56 Fed. Reg. 42,095 (Aug. 19, 1991) (approving new rule of National Association of Securities Dealers (NASD) barring members from receiving differential compensation for soliciting votes to approve rollups; compensation limited to two percent of exchange value of newly issued securities in rollups).

13. See *id.* The NASD's rule prohibits its members from soliciting unless the general partner or rollup sponsor agrees to pay all expenses if the limited partners do not approve the rollup.

ships for which prior trading data, albeit sporadic, existed. Excluding one rollup that distributed substantial cash to limited partners, trading prices of the surviving entities on the first trading day after the rollup were twenty-three percent below prices prior to the rollup.¹⁴ More generally, the same study found post-rollup trading prices to be 16.5% below exchange values.¹⁵ Interestingly, shares in real estate investment trusts (REITs)—as subject to the slump in real estate prices as real estate rollups—grew in value during the 1980s at an annual rate of 8.25%.¹⁶

At the same time, the typical rollup achieved advantages for its sponsoring general partner. First, the constitutional documents for the surviving entity typically make it difficult for equity holders to remove the entity's management.¹⁷ Many rollups shift the basis of the general partner's compensation from management fees determined as a percentage of distributions paid to limited partners to fees determined by the amount of assets under management.¹⁸ In depressed markets affecting the real estate and oil and gas industries, a shift away from compensation contin-

14. See SEC Follow-up Report, *supra* note 2, at 429-30.

15. *Id.* at 430-31.

16. See *Hearings, supra* note 2, at 41 (statement of John F. Blake). One reason for this difference might be that federal tax law compels a REIT to distribute as taxable dividends at least 95% of its "real estate investment trust taxable income," rather than retaining the earnings. See I.R.C. § 857(a)(1) (1988).

17. A consolidated master limited partnership emerging from a rollup might, for example, require a two-thirds vote of limited partners to remove the general partner. If the surviving entity is a corporation, an option under the Delaware corporation statute would be a certificate provision staggering the terms of the corporation's directors, with directors being removeable only for cause (unless the certificate provides otherwise). See DEL. CODE ANN. tit.8, § 141(k)(1) (1991). Another certificate provision might require a supermajority shareholder vote to remove directors for cause. See *id.* § 102(b)(4). Although no Delaware case addresses the permissibility of such a supermajority provision directly, at least one case notes such a provision without questioning it. See *Stroud v. Milliken Enters., Inc.*, 585 A.2d 1306, 1329 (Del. Ch. 1988) (corporation's certificate authorized removal for cause only upon affirmative vote of 75% of shareholders). Compare REV. MODEL BUS. CORP. ACT §§ 7.27 & 8.08 (1983) (articles may provide directors removeable only for cause; articles may set greater voting requirements for shareholder action than those specified in statute) with CAL. CORP. CODE §§ 204(2)(5), 301.5 & 303 (West 1991) (articles may not increase vote required to remove directors; any or all directors are removeable without cause if removal approved by outstanding shares; if a listed corporation has articles providing for a classified board, director is not removeable if votes cast against removal would suffice to elect the director if voted cumulatively in election of directors).

18. See *Hearings, supra* note 2, at 259, 264 (statement of Frank J. Wilson, Executive Vice President and General Counsel, NASD). Post-rollup, the operating costs of the surviving entity may be substantially greater than those of the constituent limited partnerships. See, e.g., MILESTONE PROPERTIES, INC., PROXY STATEMENT/PROSPECTUS 27 (Oct. 12, 1990) (initial operating expenses of corporation resulting from rollup to be approximately \$768,666 higher than combined operating expenses of partnerships, approximately \$372,334 in 1990; cost increase reflects shift from passive

gent on cash flow would be advantageous to the general partner. Rollups also change the general partner's original subordinated interest in proceeds generated by asset sales to an interest on a par with the limited partners' residual interest.¹⁹ The typical rollup, moreover, loosens or eliminates initial restrictions on borrowing and on a rich array of transactions between and among affiliated entities (including loans and asset transfers).²⁰ Finally, by combining limited partnerships with variable track records, the general partner reduces its potential liability for nonperforming properties by enlarging and diversifying the entity's assets.²¹

This narrative raises two questions, one immediate and one more subtle. First, why did limited partners often (but not always) vote to approve these transactions? Second, did reputational effects play any role? Specifically, were any securities-industry participants prompted by a concern for their own reputations to constrain the opportunistic behavior that seems to typify rollup proposals?²² The first question has a large number of possible answers. Publicly offered limited partnerships were purchased by a highly diffuse base of retail investors, each of whom

property management to an active operating company and includes salaries of corporation's management).

19. If the rollup allocates stock in a successor corporation to a general partner, its original subordinated interest has been elevated to the residual interest of limited partners who also receive stock. Rollup prospectuses have been known to acknowledge that the basis for allocating a particular equity stake to the general partner may approach the ineffable. See *MILESTONE PROPERTIES, INC.*, *supra* note 18, at 41 (investment banker's valuation of components necessary to reaching opinion as to fairness of equity allocation was "necessarily subjective"). The allocation of equity to the general partner in this particular rollup had an interesting history, fully chronicled in the Proxy Statement/Prospectus (PS/P). The initial terms of the proposed merger, described in a preliminary PS/P, met with dissatisfaction from a former officer of the general partner who, along with his family and IRA trust, owned 87 limited partnership units. The initial terms allocated 15% of the rollup corporation's equity to the general partner. Negotiations among the general partner and the objecting limited partner and his lawyer led to a reduction to 9% in the equity to be allocated to the general partner. *Id.* at 45. The negotiations also led to the cash payment of \$30,000 to the limited partner "to compensate him for the time spent in opposing the original transaction and negotiating the terms of the Merger," an additional payment of \$5,000 to review the PS/P, and the payment of his reasonable attorney's fees (estimated at \$60,000). The PS/P described all three payments as "part of the costs of the proposed merger. . . ." *Id.* The corporation and the partnership also agreed to indemnify the limited partner "in connection with any liability arising out of the proposed merger or his involvement with the related documents." *Id.*

20. See SEC Rollup Report, *supra* note 3, at 110.

21. See *Hearings*, *supra* note 2, at 264 (statement of Frank Wilson).

22. See generally Jason Scott Johnston, *Opting In and Opting Out: Bargaining for Fiduciary Duties in Cooperative Ventures*, 70 WASH. U. L.Q. 291 (1992) (discussing concern for one's reputation as a possible deterrent to opportunistic behavior).

invested only ten thousand dollars on average.²³ Thus, most investors did not have large individual stakes in their limited partnerships and, but for their association as fellow limited partners, were not associates. The SEC's rules on proxy solicitation complicated any effort to organize previously unassociated limited partners to oppose a rollup proposal. In particular, SEC Rule 14a-2(b)(1) defines as a "solicitation," to which the rules apply, any solicitation of ten or more persons;²⁴ under SEC Rule 14a-6, proxy soliciting material must be filed in preliminary form with the SEC at least ten days prior to its distribution to security holders.²⁵ These rules reportedly surprised limited partners attempting to organize opposition among fellow investors.²⁶ Moreover, many rollups were aggressively promoted by broker-dealers and proxy soliciting firms, an unsurprising fact given the common practice of making their compensation outcome contingent.²⁷ Unsophisticated investors, suggests one source, may be loath to do things that will incur the ire of the general partner, recognizing that after the rollup the persons in control of the general partner will continue to be significant actors.²⁸

Limited partners might also vote to approve a rollup because other options are limited and unattractive. As noted above, limited partners did not have the statutory right to exit from the partnerships and the transaction through the exercise of appraisal rights. The secondary market in limited-partnership units is informal and thin—one study

23. *Hearings, supra* note 2, at 41 (statement of John F. Blake) (average limited partnership investment was \$10,000).

24. SEC Rule 14a-2(b)(1), 17 C.F.R. § 240.14a-2(b)(1) (1991). *See also* SEC Rule 14a-1(l), 17 C.F.R. § 240.14a-1(l) (1991) (defining "solicitation" to include the furnishing of a form of proxy or other communication under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy).

25. SEC Rule 14a-6(a), 17 C.F.R. § 240.14a-6(a) (1991).

26. *See Hearings, supra* note 2, at 15-17 (statement of Anne Petrocci) (limited partner who distributed one-page statement of opposition to rollups at meeting of limited partners received phone calls seven days later from SEC official who informed her that she might have violated the securities laws; limited partner was "pretty intimidated" because "[i]t is like getting a call from the IRS. I don't know anything about the SEC").

27. Repeated telephone contacts between soliciting agents and limited partners were common. *See id.* at 254 (statement of Michael Joseph Connolly, Massachusetts Secretary of State). One witness opined that solicitors' tactics "closely resemble[d] the activities of 'boilerroom' operators we see peddling phony investments to the public." *Id.* at 304-05 (statement of Dee Harris on behalf of NASAA).

28. *See* Kenneth R. Hillier, Note, *Rolling Down the Curtain on "Roll-Ups": The Case for Federal Legislation to Protect Limited Partners*, 90 MICH. L. REV. 155, 160 (1991). Hillier specifically discusses litigation as an action that limited partners fear the general partner will take badly; other acts, including voting, also seem vulnerable to a fear of retaliation.

estimates that only \$250 million to \$300 million in such units are sold annually.²⁹ Additionally, the National Association of Securities Dealer (NASD) has publicly asserted that this market is afflicted by widespread objectionable practices, including excessive markups.³⁰ Prices in the secondary market for limited-partnership units also reflect the unkind treatment Congress gave to many limited partnerships and their partners in the 1986 Tax Reform Act. Similarly, some limited partners may vote to approve an otherwise problematic rollup transaction because the rollup is generally not a taxable event, and the limited partner values her retention of a continuing ability to time the recognition of income. If instead the limited partnership liquidates its assets or enters bankruptcy proceedings, limited partners experience taxable events that often lead to the recapture of prior tax benefits.³¹

Rollup proponents seemed remarkably free of concern that their reputations would be damaged due to their association with a problematic transaction. In one notable exception, some broker-dealers, having initially sold the limited partnership to their retail customers, refused to promote the rollup and, in some instances, actively pressed the rollup sponsors to design a better deal. Krupp Corp. of Boston twice amended one 1990 real estate rollup in response to criticism from brokers and investors, reducing fees paid to the soliciting dealer and shifting a portion of the solicitation costs onto Krupp itself.³² The general effect of broker-dealers' concern for reputational effects was likely limited by the reported practices of other rollup sponsors, which included threats to sue broker-dealers who recommended "no" votes against the transactions, accompanied by threats to pass on client lists to other broker-dealers who then could earn the commission payable for a "yes" vote.³³

29. Power, *supra* note 6, at C1 (reporting results of NASD study).

30. *See id.*

31. Under present law, if the entity surviving the rollup is a partnership, no gain or loss is recognized to the partnership or the contributing partners if the rollup is an exchange of partnership assets for an interest in the surviving partnership. *See* I.R.C. § 721(a) (1986). If the surviving entity is a corporation, no gain or loss is recognized if property is transferred to a corporation solely in exchange for stock in the corporation, and if immediately after the exchange such person or persons are in control of the corporation. *See id.* § 351(a). "Control" for this purpose means ownership of stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote and at least 80% of the total number of shares of all other classes of stock of the corporation.

32. *See* Thomas Watterson, *Some Troubled Partnerships Turn To 'Rollups'*, BOSTON GLOBE, Dec. 13, 1990, at 109 (City ed.).

33. *See* Joyce Terhaar, *Centennial Suffers New Cash Crisis*, SACRAMENTO BEE, June 18, 1989, at D1 (reporting threats by Centennial Group, Inc. in connection with rollup of real estate limited partnerships).

II. REACTIONS TO THE PHENOMENON

As it happens, the pace of rollup proposals flagged noticeably in late 1990 after a House subcommittee began to hold oversight hearings on rollups.³⁴ Although many factors could explain this drop, including prior completion of rollups for most partnerships in which the transaction would benefit all concerned, a reported explanation is the sensitivity of rollup sponsors to close scrutiny of any pending transaction by the SEC and the House subcommittee.³⁵ On the congressional front, concern with rollups led to proposed legislation, described below. Among other provisions, the proposals mandate dissenters' rights. The SEC adopted a new rule to enhance the quality of disclosure rollup sponsors make to limited partners, along with a statement of interpretive guidance on complying with its earlier disclosure requirements. NASD adopted a rule prohibiting its members from accepting differential compensation to solicit votes approving rollups. And, as noted above, a few states amended their limited-partnership statutes to mandate dissenters' rights for limited partners.

An initial matter, however, is the general justification for *any* legislative or administrative response. Investors in publicly offered limited partnerships were characterized in congressional hearings as, by and large, individuals well above the poverty line who invested a fraction of their investment portfolios in vehicles that often afforded tax benefits to the investors.³⁶ To be sure, investing a major proportion of one's wealth in an illiquid interest in assets managed entirely by others would recommend itself to few investors. Additionally, limited partners bought securities in an entity defined by its limited-partnership agreement and by the relevant state's limited-partnership statute, even when the agreement did not foreclose the rollup scenario and state law permitted rollups but did not mandate dissenters' rights. Should the risk of being rolled up thus be

34. *Hearings, supra* note 2, at 212 (statement of Subcommittee Chairman Edward J. Markey).

35. *See id.* (Chairman Markey predicts that "the next rollup which is offered is going to afford the general partners an incredible front row experience as to how Congress works [as] we dissect the operation of that rollup."). *See also id.* at 215 (SEC Chairman Breeden predicts that "those sponsors would also have a chance to see the hailed abilities of the SEC to review documents very, very carefully.").

36. Or in the more colorful language of one witness before the House subcommittee, "[t]his so-called [limited partnership] industry came about by selling tax abuses to tax dodgers." *Limited Partnerships: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 101 (1990) [hereinafter *Hearing*] (testimony of Scott G. Miller, President, Miller Reports).

characterized as simply another investment risk, comparable to the impact of macroeconomic trends on the partnership's business? Should mitigating the consequence of a rollup simply be left to provisions in partnership agreements?

Justifications that support the provision of mandatory dissenters' rights to corporate shareholders seem just as applicable in the limited-partnership setting. In both settings, a merger transaction binds all equity holders to a forced exchange of their original investment securities for securities (or other consideration) that may be dramatically different. Indeed, in the typical rollup, limited partners initially held finite-life securities representing residual and income interests in specific properties and projects. The rollup mandates the exchange of these securities for infinite-life securities with differently defined claims on income and asset-sale proceeds, over a more diversified pool of assets. The resulting metamorphosis in investment security seems more profound than that produced by many corporate mergers. Moreover, the publicly offered limited-partnership interest is an investment *product*, defined by terms that do not reflect individually negotiated deals with investors who become partners.

It is also difficult to argue that most limited partners, especially those who invested before the rollup transaction became common, knew when they invested of the future risk of being rolled up. Although the SEC requires that the offering document summarize the provisions of the partnership agreement, including its voting requirements, it has not required "a specific line item disclosure . . . about the possibility of a future rollup transaction."³⁷ Indeed, one might instead argue that the apparently comprehensive quality of disclosure the SEC mandates makes this omission significant in itself, as it arguably leads investors to believe that all major risk factors have been affirmatively disclosed. Moreover, rollup proposals confront limited partners with a yes-no, take-it-or-leave-it, up-down vote on one proposed transaction. Limited partners who might prefer continuation of the partnership under its original terms, or liquidation of its assets, to the rollup have no explicit opportunity to rank those preferences along with the rollup proposal.

Finally, the internal governance structure of a limited partnership differs significantly from that of a publicly traded corporation. Limited partnerships lack independent directors—that is, persons not affiliated

37. *Hearings, supra* note 2, at 248 (testimony of Richard Breeden).

with the entity's operating management who are capable of acting on behalf of the interests of public equity holders. Even observers who are skeptical about the role of independent directors in responding to LBO proposals concede the existence of "counter-examples in which a committee of structurally independent directors has appeared to function quite adversely" to management's interests.³⁸

The legislative proposals that emerged from the House Committee on Energy and Commerce and the Senate Banking Committee include two different components: they mandate specified dissenters' rights in limited-partnership rollups and attempt to reform proxy solicitations conducted in connection with rollups. The dissenters' rights provisions amount to a limited preemption of state law. They would amend sections 6(b) and 15A(b) of the Securities Exchange Act³⁹ to require that stock exchanges and registered securities associations deny listing to rollup-generated securities and prohibit association members' participation in a rollup subject to the statute,⁴⁰ unless the rollup transaction includes specified dissenters' rights for limited partners. These rights consist of the right to an appraisal and compensation or to retain a security under the same terms and conditions as the original security, unless the associa-

38. William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW 2055, 2059 (1990) (observation of Delaware's Chancellor).

39. 15 U.S.C. §§ 78f, 78o-3 (1988).

40. The legislation defines "partnership rollup transaction" as "a transaction involving the combination or reorganization of one or more partnerships, either directly or indirectly, whereby investors in the original partnership or partnerships receive new securities or securities of another entity in exchange for their partnership interests." H.R. 1885, 102d Cong., 1st Sess. § (b)(4)(A) (1991). The definition is subject to exclusions, including transactions involving only issuers (both pre and post-rollup) that are not required to register or report under § 12 of the Exchange Act, 15 U.S.C. § 78l (1988); transactions involving only the reorganization or restructuring of a single partnership resulting in "no significant adverse change in any of . . . voting rights, the term of existence of the entity, management compensation or investment objectives . . ."; and transactions involving the reorganization of a single partnership to incorporate, trust, or association form "if each investor is provided an option to retain a security under substantially the same terms and conditions of the original issue. . . ." H.R. 1885, §§ 2(a)(4)(A)(ii)-(iv). Thus, whether a conversion of a single limited partnership into a corporation would be defined as a "rollup" depends on the transaction's treatment of limited partners, its impact on the duration and objectives of the entity itself, and its impact on management compensation. See also S. 1423, 102d Cong., 1st Sess. (1991). For a description of a proposed conversion, see Karen Blumenthal, *Mesa's Pickens, Reversing His Stance, Wants to Change Firm to a Corporation*, WALL ST. J., Aug. 6, 1991, at C15 (describing proposed exchange offer to be followed by 1-for-5 reverse stock swap; transaction would enable limited partnership to eliminate at deep discount \$164 million in accrued distributions owed to preferred unit holders). See also *In re Mesa Ltd. Partnership Preferred Unitholders Litig.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,454 (Del. Ch. Dec. 10, 1991) (court declines to enjoin conversion of single limited partnership into corporation).

tion or exchange determines that granting those rights would be infeasible or not in the financial interest of dissenting limited partners. In that event, limited partners are entitled to "other comparable rights," which could include the use of an independent committee, unaffiliated with the general partner or sponsor, with the authority to protect limited partners' interests by hiring independent advisors, negotiating on the limited partners' behalf, and making recommendations to limited partners concerning the proposed rollup. "Comparable rights" also include limited partners' rights not to have their voting power unfairly reduced or abridged, the right not to bear an unfair portion of the costs of a rejected rollup transaction, and "restrictions on the conversion of management profit-sharing interests and incentive fees into asset-based management fees."⁴¹

The proxy reform proposals in some respects seem to reiterate, clarify, or modestly expand certain aspects of present proxy regulation, such as the issuer's obligation to provide a list of security holders to a holder,⁴² which some rollup sponsors reportedly had refused to do.⁴³ Additionally, no solicitation or offering period may be briefer than the greater of sixty days or a period set by the SEC. More substantively, the proposals require a rollup proponent to include in its soliciting materials "an opinion on the fairness of the proposed transaction to holders of each security," which includes "such information, representations, and undertakings with respect to the analysis of the transaction, scope of review, preparation of the opinion, and basis for and methods of arriving at conclusions" as the SEC may require by rule. The preparer of the fairness opinion must meet criteria set by the SEC for independence and may not receive compensation contingent on the transaction's approval or

41. H.R. 1885, 102d Cong., 1st Sess. § 3(2)(12)(E) (1991).

42. At present, under SEC rule 14a-7(c), a security holder has no absolute right to obtain a list of fellow holders. 17 C.F.R. § 240.14a-7(c) (1991). The SEC has proposed a revision of its proxy rules—presently on hold—to amend Rule 14a-7 so that the security holder requesting a list, rather than the issuer, would have an election whether to obtain the list (at his or her own expense) or have the soliciting materials mailed by the issuer. See *Regulation of Shareholder Communications*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,811, at 81,859-60 (June 17, 1991). State law defines limited partners' rights to obtain such lists. See REV. UNIFORM LIMITED PARTNERSHIP ACT §§ 105(a)(1) & (b) (1985) (limited partnership to maintain at its office in state a current list of partners' full names and last known addresses; records available to inspection and copying at the reasonable request and at the expense of any partner).

43. See *Hearings*, *supra* note 2, at 447 (statement of Massachusetts Securities Division) (reporting claim of general partner sponsoring rollup that it has discretion to "exercise business judgment" whether to release list to investors opposing rollup).

completion. The preparer must be given access to the issuer's premises, personnel, and relevant books and records. Finally, the preparer must be represented "to have undertaken an independent analysis of the fairness of the proposed rollup transaction to holders based upon the information obtained through such access and upon other independently obtained information. . . ."⁴⁴

The proposals thus go further than the SEC's going-private rule, Rule 13e-3, which does not require the issuer to obtain an independent fairness opinion. Under SEC Rule 13e-3, if the issuer receives "any report, opinion (other than an opinion of counsel) or appraisal from an outside party which is materially related to the Rule 13e-3 transaction," the issuer must disclose to shareholders its findings and recommendations, any limitations imposed by the issuer or affiliate, the procedures followed by the preparer, the preparer's compensation, and any "material relationship" between the preparer and the issuer or its affiliates occurring in the past two years or mutually contemplated for the future.⁴⁵ Likewise, Rule 13e-3 directly regulates neither the independence of parties who render fairness opinions nor the structure of their compensation.

In June 1991, to enhance disclosure in connection with rollups, the SEC proposed rules which it adopted in late October. In retrospect, the SEC's overall response to the rollup phenomenon seems less than ideal. Rollups require the solicitation of limited partners' consents and thus are subject to the SEC's proxy solicitation rules if the issuer is registered under the Securities Exchange Act. If the rollup transaction entails an exchange of securities, the registration and prospectus requirements in the Securities Act may apply. Finally, many rollup transactions fit within the scope of SEC Rule 13e-3 because the transaction entails the purchase of equity securities by an affiliate of the issuer. Only ten percent of rollup transactions, however, complied with Rule 13e-3's disclosure requirements; the rule includes an exemption for transactions in which investors receive an equity security with "substantially the same rights" as the security they surrender, a requirement that, according to the SEC staff, "historically has been deemed to be met if unaffiliated security holders receive common stock or limited partnership interests."⁴⁶

44. H.R. 1885, 102d Cong., 1st Sess. §§ 2(b)(1)(E)(ii)(IV) (1991).

45. See Schedule 13E-3, 17 C.F.R. § 240.13e-100, item 9(a) & (b) (1991). Item 8 in Schedule 13E requires the issuer itself to state whether it believes the transaction to be fair and the basis for its belief. *Id.* item 8.

46. See SEC Rollup Report, *supra* note 3, at 113.

Exemptions from 13e-3 aside, rollup sponsors generated many documents reviewed by the SEC.

Investors, in turn, testified before congressional committees that they found the several-hundred-page documents sent to them to be incomprehensible. Chairman Markey of the House subcommittee displayed a diagram ranking the readability of various types of material. Rollup disclosure documents ranked well below the minimum readability score required by a majority of states for life and health insurance policies, and ranked even below the Internal Revenue Code.⁴⁷ To be sure, one might have responded that difficulty in reading something illustrates the need for competent professional advice. This avenue of response was foreclosed when Richard Breeden, the SEC's Chairman, testified before the Securities Subcommittee of the Senate Banking Committee: "I have taken a look at some of the documents filed with us in these roll-up transactions and I would like to meet the person who can understand all of the disclosures in some of those documents."⁴⁸

The SEC's new rule applies to all rollups subject to registration under the Securities Act. In general, all rollups to which it applies are subject to disclosure requirements comparable to those of SEC Rule 13e-3. Additionally, the new rule requires the provision of individual-partnership prospectus supplements to investors in *each* separate partnership included in the rollup transaction, summarizing the transaction's effect on that partnership. Separately, the SEC issued a release of interpretive guidance under its earlier rules detailing how issuers should make disclosure more comprehensible for investors (and, one hopes, for the SEC's Chairman as well).⁴⁹ Comparable to Rule 13e-3, the rollup rule requires the general partner to state whether it believes the rollup is fair to investors in each partnership⁵⁰ and to state whether these views are based on an opinion or report obtained from a third party. The disclosure document must then identify any such opinion or report that is materially related to the transaction and provide specific information about it.⁵¹ The rollup rule requires a comparison of the consideration to be gener-

47. See *Hearings*, *supra* note 2, at 6.

48. *Limited Partnership Reorganizations, or "Rollups": Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 1st Sess. 74 (1991) (testimony of Richard C. Breeden).

49. *Limited Partnership Reorganizations and Public Offerings of Limited Partnership Interests*, Securities Act Release No. 6900, 17 C.F.R. § 231 (1991).

50. See SEC Rollup Rule Proposal, *supra* note 7, at 81,826.

51. *Id.* at 81,827.

ated for investors by the rollup with the consideration investors would receive upon liquidation.⁵² It also requires the rollup sponsor to describe the benefits it will receive from the transaction and any conflicts of interest the transaction may produce.

III. EFFECTIVENESS OF THE REACTIONS

To what degree will these legislative and administrative reactions mitigate or eliminate the troubling aspects of rollups? An initial hunch is that their efficacy is likely to vary considerably. As to the effect of additional disclosure requirements, standing alone, Chairman Breeden himself expressed reservations:

The Commission appreciates the concerns that members of Congress have about whether limited partners have been treated fairly in roll-up transactions. Some transactions may have been unfairly structured and unfairly promoted. Ultimately, the answer to such fairness concerns, however, is better articulation and enforcement of the state law fiduciary duties of general partners towards limited partners.⁵³

Jeffrey Davis and Kenneth Lehn's study of the impact and efficacy of SEC Rule 13e-3 is an additional basis for cautious pessimism. Their study found that *higher* premiums are paid to shareholders in exempt transactions than in transactions subject to the rule.⁵⁴

Other aspects of the reform packages seem more promising. Mandatory dissenters' rights—whether state or federally created—respond directly to investors' wish to exit from a bad deal that otherwise could be imposed on them by majority vote. Moreover, as is frequently pointed out in the corporate-law literature,⁵⁵ investors' exercise of appraisal rights depletes the surviving entity's cash, which is likely to be an unappetizing prospect to a general partner concerned about enhancing or maintaining its fee income. Mandatory dissenters' rights may thus provide an incentive to a transaction's proponent to structure it attractively, so that fewer holders will dissent. To be sure, the congressional proposals, as described above, permit alternatives to cash appraisal rights when such rights would not be feasible or would not be in limited partners'

52. *Id.* at 81,826.

53. *Hearings, supra* note 2, at 198 (statement of Richard C. Breeden).

54. Jeffrey Davis & Kenneth Lehn, *Information Asymmetries, Rule 13e-3 and Premiums in Going Private Transactions*, 70 WASH. U. L.Q. 587 (1992).

55. See, e.g., Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223 (1962).

interests. Much, then, could turn on the relative willingness or reluctance of stock exchanges and securities associations to permit and supervise the use of these alternatives. Indeed, the effectiveness of the first alternative—appointment of an independent negotiating committee for the limited partners—would seem to depend on the spirit with which committees discharge their undertaking. It is also worth noting that state-law-mandated appraisal rights often contain exceptions and qualifications; for example, the California statute creating an appraisal right for limited partners is inapplicable to holders of interests in publicly traded limited partnerships unless five percent or more of any class of interest demand that their interests be purchased for cash.⁵⁶ Under some circumstances, moreover, the California statute makes appraisal the limited partner's exclusive remedy.⁵⁷ The congressional proposals, in contrast, do not explicitly authorize these sorts of exceptions and qualifications to a limited partner's right to "an appraisal and compensation. . . ."

The reform packages do not, however, speak directly to the ultimate safeguard Chairman Breeden identified, that is, the fiduciary inhibitions state law imposes on the general partner in its relationship with limited partners. Fiduciary norms, defined as they are by courts in the context of specific transactions, cannot enforce, articulate, or invigorate themselves. Rollups appear to have generated surprisingly little litigation.⁵⁸ One explanation for the paucity of litigation is the relatively small amount the typical limited partner invests.⁵⁹ Another is that, to date, the SEC has

56. See CAL. CORP. CODE § 15679.2(b)(1) (West 1991).

57. See *id.* § 15679.14. If a state statute makes appraisal the exclusive remedy for dissenting security holders, but also denies appraisal rights for particular types of transactions, then dissenting security holders are left with no remedy. A notorious example is the Virginia statute, which, while making appraisal the exclusive remedy for stockholders opposing a merger, specifically excludes bank mergers from appraisal. See VA. CODE ANN. § 6.1-43 (Michie 1988). See generally *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749 (1991) (minority stockholder unable to show that misleading proxy statement caused damage).

58. See SEC Rollup Report, *supra* note 3, at 121 (reporting high settlement rate among suits challenging rollups). The sole reported opinion to date involving a rollup appears to be *American Insured Mortgage Investors v. CRI, Inc.*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,730 (S.D.N.Y. Nov. 26, 1990), which examines alleged violations of Exchange Act §§ 14(a), (d) & (e), 15 U.S.C. §§ 78n(a), (d) & (e) (1988), in connection with an exchange offer for limited partnership units.

59. See *Hearings*, *supra* note 2, at 41 (statement of John F. Blake) (average limited partnership investment was \$10,000). One source suggests that limited partners may be inhibited in suing the general partner because they fear its retaliation. See Hillier, *supra* note 28, at 160.

brought no enforcement action related to a rollup.⁶⁰

Cases best known for their articulation of fiduciary norms are often remembered more for the court's rhetorical flourishes than for its application of the norms to resolve a concrete dispute. *Meinhard v. Salmon*, for example, is best known for Judge Cardozo's insistence that fiduciaries owe their beneficiaries "a punctilio of an honor the most sensitive." We remember the rhetoric but not the opinion's more specific use of fiduciary standards to analyze and resolve a dispute among joint venturers in the ownership of an interest in commercial real estate.⁶¹ The dearth of opinions dealing specifically and concretely with rollups counsels caution in any attempt to extrapolate from opinions applying fiduciary standards to other types of transactions. Some tentative observations nonetheless are possible, drawing most directly from cases involving the sale of partnership assets and less directly from cases evaluating self-dealing transactions between corporations and their directors or majority shareholders.

Partners who purchase partnership assets self deal in partnership property. Fellow partners may consent to the purchase, either contemporaneously or, in advance, through express provisions in the partnership agreement. Suppose the limited partners agree in the partnership agreement that the general partner may, without their specific consent, acquire "less than substantially all of the real property" owned by the partnership, "upon terms which the General Partner shall determine in its sole discretion."⁶² In *Jerman v. O'Leary*, the agreement used this language, and the court still held that the general partners' fiduciary obligation to the limited partners obliged them to pay "fair market value" for the property. Moreover, the court obliged the general partners "not to conceal from their partners any facts in their possession which would bear upon the question of fair market value" and to "reveal any other information regarding the purchase of this property which bore upon its value or the method they were utilizing to pay for it."⁶³ *Jerman* specifically criticized the general partners' failure to disclose a zoning change to the property's appraiser and the general partners' apparent failure to seek a new appraisal in light of this change. Although the general partners in-

60. See SEC Rollup Report, *supra* note 3, at 121 (SEC currently investigating "several" rollup transactions).

61. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

62. See *Jerman v. O'Leary*, 701 P.2d 1205, 1209 (Ariz. Ct. App. 1985).

63. *Id.* at 1210.

formed the limited partners of the zoning change, the court concluded that a trier of fact could find that the general partners failed to act in good faith and that, in breach of their fiduciary duty, they paid a price for the property well below its market value.

In short, prior doctrine supports the proposition that limited partners' generalized consent to the general partners' purchase of partnership property does not exempt specific purchase transactions from judicial scrutiny. The general partner continues to be subject to duties to be candid and to pay fair value for the property. An open question is the effect on these duties of exculpation language authorized by statute. In 1990, Delaware amended its version of the Revised Uniform Limited Partnership Act to provide that a partner's duties, including fiduciary duties, "may be expanded or restricted by provisions in a partnership agreement," and that a partner shall not be liable to the partnership or to other partners "for the partner's good faith reliance on the provisions of such partnership agreement. . . ."⁶⁴ This language seems to permit the partnership agreement to specify exclusively the general partner's duties. It also permits exculpatory provisions in limited partnership agreements that cut a much wider swath than certificate provisions that exculpate corporate directors.⁶⁵ One wonders whether a court would find that a general partner relied "in good faith" on a provision like the consent-to-purchase provision in *Jerman* if the purchase price were significantly less than fair market value.⁶⁶ If a general partner proposes to pay nothing or next to nothing to purchase partnership assets, is the consent-to-purchase provision operating in an unconscionable fashion?

If the partnership's assets are sold to a third-party purchaser, the general partner has an obligation to account for value it diverts from the sale transaction without the consent of the limited partners.⁶⁷ The obligation

64. DEL. CODE ANN. tit. 6, § 17-1101(d) (Supp. 1990).

65. See DEL. CODE ANN. tit. 8, § 102(b)(7) (1991).

66. Another issue is the impact of this statutory provision on the assumption that the general partner's fiduciary obligations exist concurrently with rights and obligations defined by the partnership agreement. See *Labovitz v. Dolan*, 545 N.E.2d 304 (Ill. App. Ct. 1989) (provision in agreement granting general partner "sole discretion" to make distributions of cash to limited partners does not relieve general partner of fiduciary duty; general partner has burden of establishing that it acted fairly), *appeal denied*, 550 N.E.2d 557 (Ill. 1990). One court recently put the matter more strongly: "The fiduciary duty of partners is an integral part of the partnership agreement whether or not expressly set forth therein. It cannot be negated by the words of the partnership agreement." *Wartski v. Bedford*, 926 F.2d 11, 20 (1st Cir. 1991) (applying Massachusetts law).

67. See *In re U.S.A. Cafes, L.P. Litig.*, [Current] Fed. Sec. L. Rep. ¶ 96, 056 (Del. Ch. Jun. 7, 1991).

to account—and, to an undetermined extent, other aspects of the general partner's fiduciary obligation—extends to the controlling shareholders and directors of a corporate general partner.⁶⁸ If the benefit the general partner receives is not disclosed to the limited partners, they would not be able to consent to the general partner's receipt of it. Indeed, if the limited partners' consent is to be adequately informed, the value of the benefit—if susceptible to quantification—should be disclosed as well. In evaluating whether a partner consented to his fellow partner's personal pursuit of an investment opportunity in contravention of their partnership agreement, a court recently emphasized the need for “complete and unambiguous disclosure to the partnership.”⁶⁹ Similarly, according to the same court, when one partner has superior knowledge or experience that other partners rely upon, their dealings should be evaluated under a high standard, indeed one requiring a “punctilio of honor.”⁷⁰

It is possible to structure an analysis of these issues as they pertain to rollups by using the general framework adopted by the Delaware Supreme Court in *Weinberger v. U.O.P., Inc.* for going-private transactions.⁷¹ *Weinberger* requires that such transactions meet a test of “entire fairness.”⁷² More specifically, it subjects such transactions to two separate tests of fairness: fair dealing and fair price.⁷³ “Fair dealing” under *Weinberger* encompasses questions of the transaction's timing, its initiation and structuring, and the process through which its proponents obtained the approval of the corporation's directors and shareholders.⁷⁴ Applied to rollup transactions, the partnership cases discussed above further flesh out the “fair dealing” test. Fair dealing, among other things, requires that the limited partners be able to evaluate the effect of the transaction on their investment interests, in close conjunction with the benefit the transaction will yield to the general partner. The limited partners' reliance on the general partner to operate the entity, and the general partner's superior knowledge, require, at a minimum, a candid sharing of

68. *Id.* In *U.S.A. Cafes*, Chancellor Allen expressly declined to define the scope of directors' and controlling shareholders' fiduciary duties to limited partners, mentioning specifically that his opinion does not reach questions of liability for usurpation of opportunities and waste of assets. *Id.* at 90,326 n.3.

69. See *Wartski*, 926 F.2d at 14.

70. *Id.* at 13.

71. *Weinberger v. U.O.P., Inc.*, 457 A.2d 701 (Del. 1983).

72. *Id.* at 710.

73. *Id.* at 711.

74. *Id.*

the general partner's evaluation of the rollup transaction with the limited partners.⁷⁵ Perhaps these factors require more: if the general partner is under a strong ongoing duty to consider its fellow partners' welfare and to refrain from acting for purely private gain,⁷⁶ may it sponsor or endorse a rollup that is not of real benefit to the limited partners? May it sponsor or endorse a rollup that produces fewer benefits, however measured, for the limited partners than for itself?

Although separable, questions of fair dealing intersect with questions of fair price. As suggested above, and because the general partner is under a duty to account to the partnership for the value of benefits it receives, in the rollup context a "fair price" standard requires one to examine the value of benefits going to the general partner in assessing the fairness of the consideration received by limited partners. Additionally, "fair price" analysis appropriately focuses on the position of limited partners in an individual partnership that owns particular assets. Limited partners are under no duty to rescue either their general partner or investors in affiliated limited partnerships, whether through a rollup transaction or some other rescue vehicle.

Finally, the history of rollup transactions, coupled with the compelled participation of nonassenting investors, suggests the relevance of fairness standards developed in the context of bankruptcy reorganizations. Defenders of rollups characterized them as "reorganizations" of entities that owned properties in temporarily distressed markets.⁷⁷ Two bankruptcy-specific notions of fairness are worth examining. First, a majority of a class of creditors may not bind the nonassenting minority to the terms of a reorganization, unless the plan of reorganization gives the whole class of creditors value at least equal to liquidation value.⁷⁸ Second, the court may not impose a plan on a nonassenting class of creditors, whose interests are impaired by the plan, unless that class receives an absolute priority over claims of junior classes.⁷⁹ In a rollup, is it fair

75. Once again, the best rhetorical flourish is Judge Cardozo's. In *Globe Woolen Co. v. Utica Gas & Electric Co.*, 121 N.E. 378 (N.Y. 1918), a self-dealing director was said to be under a duty to his fellow directors "to warn and to denounce" as to "improvidence or oppression, either apparent on the surface, or lurking beneath the surface but visible to his practiced eye." *Id.* at 380.

76. *Wartski*, 926 F.2d at 20.

77. *See, e.g., Hearing, supra* note 36, at 42, 88-89 (testimony of Christopher L. Davis and William B. Dockser).

78. 11 U.S.C. § 1129(a)(7) (1988).

79. 11 U.S.C. § 1129(b) (1988). That is, claims of the dissenting class must be paid in full before any junior class may share in the plan.

to require limited partners to accept less value than they would realize upon liquidation of the limited partnership's assets? And is the rollup fair if it advances the previously subordinated claims of the general partner, placing them on a par with the residual ownership claims of the dissenting limited partners?

In general, analysis under the "fair price" standard should reach more broadly in the rollup context than it typically does in the going-private or LBO setting. Rollups do not give limited partners cash, the easiest-to-value consideration. Rather, they give an equity security in a new consolidated entity. The typical rollup continues the relationship between limited partners and their general partner, rather than terminating it. The general partner, by successfully sponsoring a rollup and redefining its relationship with the limited partners, typically obtains a variety of benefits and advantages that have no counterparts in an LBO or a going-private transaction.

IV. CONCLUSION

Many of the questions this Article raises await further developments. The efficacy of the legislative and regulatory reforms directed to rollups cannot be assessed in advance of their implementation. Likewise, the significance of fiduciary norms in rollup scenarios cannot be determined abstractly, without concrete application of these norms to individual impugned transactions. It is evident, however, that the fundamental issues rollups raise are neither unique nor unprecedented.

