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Rolling Down the Curtain on "Roll-Ups": The Case for Federal Legislation To Protect Limited Partners

Kenneth R. Hillier
University of Michigan Law School

NOTES

Rolling Down the Curtain on "Roll-Ups": The Case for Federal Legislation To Protect Limited Partners

Kenneth R. Hillier

During the early 1980s, millions of investors sought high returns and tax advantages through participation in real estate limited partnerships (RELPs).[1] RELPs would purchase one or more pieces of real estate. The general partner or an entity related to the general partner would often manage this property, and the revenues from the rental of the property would flow to the limited partners and to the general partner after the deduction of operating expenses and management fees. Generally, the partnership was intended to be of a limited duration.[2] The partnership agreement would specify a time span during which the property would be sold. After the liquidation of the RELP assets, the proceeds were to be distributed to the limited and general partners and the RELP would dissolve.[3]

Many of the RELPs' tax advantages disappeared with the passage of the Tax Reform Act of 1986.[4] Combined with the general slump in the real estate industry,[5] this led many limited partners to seek buyers for their partnership interests. Because of the lack of an organized market, however, limited partners could sell their interests only at a sharp discount to the actual value of the underlying real estate.[6]

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1. Kirstin Downey, *Congress Is Probing New Partnership Deals*, WASH. POST, Aug. 4, 1990, at E1. Syndicators raised about $68 billion between 1979 and 1988. *Id.* It is estimated that small investors invested $50 billion in RELPs during the early 1980s. Mary Rowland, *The Hazards of Roll-Ups*, N.Y. TIMES, July 22, 1990, § 3, at 16.

2. The typical duration of a RELP is 7 to 15 years. Testimony of Richard C. Breeden, Chairman of the Securities and Exchange Commission, before the Senate Subcommittee on Securities, Committee on Banking, Housing and Urban Affairs, at 6 n.3 (Feb. 27, 1991).

3. Rowland, *supra* note 1. The typical partnership agreement prohibited the reinvestment of proceeds of property sales.

4. Tax Reform Act of 1986, Pub. L. No. 99-514, 101 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C. (1988)). The Tax Reform Act restricted the deductibility of certain partnerships and reduced the tax rate for upper-income individuals from 50% to 33%, thereby eliminating the RELPs' tax advantages. *See* Immanuel Ness, *Officials Say Most Partnerships Still Profitable*, NATL. UNDERWRITER LIFE & HEALTH/FIN. SERV. ED., Sept. 11, 1989, at 50.

5. *See, e.g., Real Estate: 5-year Slump*, BOSTON GLOBE, Oct. 4, 1990, at 91 (predicting continuation of nationwide slump in real estate market caused by over-building during the 1980s); Ness, *supra* note 4, at 50 (Many RELPs were "hurt by the decline of the real estate market. . . .").

6. The lack of an organized market for RELP shares, which represent interests in private limited partnerships, makes the investment harder to sell, thereby reducing its liquidity. *Investing in Real Estate Syndicates for a Tax Break*, BUS. WK., Feb. 7, 1983, at 99. See *infra* section

Many RELP general partners seemingly came to the rescue of the limited partners, promising liquidity for the RELPs through a "roll-up," which merges two or more limited partnerships. The resultant rolled-up entity (RUE) can take the form of a corporation or a master limited partnership.[7] Because the RUE can be traded on a public stock exchange, the investment is more liquid.[8] Other supposed benefits of roll-ups include reduced operating costs through economies of scale and greater access to capital markets.[9] To date, a total of more than $1.5 billion worth of RELPs have been "rolled" into RUEs; experts estimate RELPs worth more than $3 billion are awaiting roll-ups.[10]

In part because RELP general partners need only receive a majority of "yes" votes from the limited partners to proceed with the roll-up, approval of the transaction is practically automatic.[11] The results, however, have been far from spectacular. Generally, RUE share prices have plunged dramatically after introduction to the stock market,[12] resulting in a number of tales of inheritances and retirement

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I.A.3 for a discussion of the relation between share prices and the value of the underlying real estate.

7. *See, e.g.*, Kurt Eichenwald, *N.A.S.D. Sets Rule for Brokers of Limited Partnerships*, N.Y. TIMES, May 10, 1991, at D8 (discussing corporations); Howard Rudnitsky, *Roll-Up as Rip-Off*, FORBES, June 27, 1988, at 254, 254 (discussing master limited partnerships). Master limited partnerships are partnerships whose interests may be publicly traded. *See* Eric M. Zolt, *Corporate Taxation After the Tax Reform Act of 1986: A State of Disequilibrium*, 66 N.C. L. REV. 839, 869 n.151 (1988).

8. RELP interests were not designed to be traded on a public exchange. *See* Rudnitsky, *supra* note 7, at 254; Kevin Salwen, *House Panel Told Partnership Forms Are Too Complex*, WALL ST. J., Oct. 4, 1990, at C1 ("partnerships . . . designed as long-term untraded investments").

9. Sean S. Subas & Brent Donaldson, *Roll-Up Alchemy: Iron to Gold or Gold to Iron?*, REAL EST. FIN. J., Fall 1988, at 29, 30. Margaret Opsata lists four alleged advantages: greater diversification, more efficient management, greater flexibility in debt structure, and greater liquidity. Margaret Opsata, *What's Wrong with Roll-Ups?*, FIN. PLANNING, May 1990, at 48, 48.

10. Letter from Senators Christopher J. Dodd and John Heinz to SEC Chairman Richard C. Breeden, *quoted in* Kirstin Downey, *Tough Rules Are Sought on "Roll Ups,"* WASH. POST, Oct. 6, 1990, at E1.

11. In two recent roll-ups, a few partnerships voted against the roll-up and did not participate. Breeden, *supra* note 2, at 28. Almost every other roll-up proposal presented to limited partners, however, has been approved. Many observers feel this high rate of approval is due to the fact that brokers soliciting votes from the limited partners are paid commissions (usually two percent) for each "yes" vote but nothing for a "no" vote. *See, e.g.*, Jane B. Quinn, *With Partners Like These . . .*, NEWSWEEK, July 2, 1990, at 41; Downey, *supra* note 1; Opsata, *supra* note 9, at 53; Rowland, *supra* note 1; Rudnitsky, *supra* note 7 at 256. Thus, brokers have considerable incentive to exaggerate the benefits of roll-ups.

12. For example, Liquidity Fund, Inc., a firm specializing in RELPs, provides the following data for four publicly traded RUEs:

Performance of Real-Estate Roll-Ups

	Value assigned at conversion	1st trading date	Closing price on 1st trading date	Close on 7/20/90
AREP	$20.00	7/23/87	$16.38	$9.75
Cent.	10.00	6/26/87	6.88	.13
Nat.R.	50.00	10/8/87	20.00	4.50
SW R.	20.00	2/9/83	13.00	1.38

funds lost.[13] This has led some observers to assert that only the general partner gains from a roll-up.[14]

Observers suggest several reasons for the disappointing performance of RUEs. The high fees incurred by the RELPs during the roll-up process may lower their value;[15] profitable RELPs often become lumped with unprofitable ones;[16] general partners fuel unrealistic expectations by projecting overly optimistic results;[17] and RUEs, unlike their predecessors, are subject to the scrutiny of the stock market, which emphasizes current earning capability over long-term appreciation potential.[18] Whatever the reasons, the dismal performance of RUEs[19] has led many to question the wisdom of such transactions.[20] One flaw in the roll-up process is the helplessness of a limited partner who does not want to participate in the transaction. As long as a majority of the limited partners approves the roll-up, the "dissenting" limited partner has no option but to exchange the RELP shares for shares in the new RUE.

This Note examines roll-ups and the lack of alternatives available to reluctant limited partners. Part I focuses on existing judicial remedies for limited partners, such as injunctions and actions for damages, and explains why these courses of action provide inadequate protection. This Part then reviews recent attempts at statutory protection and points out the shortcomings of these remedies. Part II examines safeguards afforded analogously situated corporate shareholders and sets forth arguments why limited partners should receive similar protection. After demonstrating the need for legislation, Part III suggests

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Rowland, *supra* note 1. *See also* Kirstin Downey, *"Roll-Ups" Elicit Wrath of Investors,* WASH. POST, Mar. 22, 1991, at B3 (citing example of roll-up of Concord Milestone partnership, which plunged from an appraised value of $9,417 at the time of the roll-up (Oct. 1990) to $2,767 by Mar. 1, 1991).

13. *See Getting Rolled in "Rollups,"* NEWSWEEK, June 24, 1991, at 43 (telling story of 77-year-old investor losing 80% of $125,000 which she had planned to leave her sons); Catherine Collins, *Limited Partnership "Roll-Ups" Catch the Attention of Congress,* L.A. TIMES, Nov. 18, 1990, at K2 (Rep. Barbara Boxer lamenting that "[m]any of my constituents have seen their savings substantially eroded by roll-ups. . . . Some have seen IRAs or other retirement savings wiped out.").

14. *See* Jill Bettner, *Partnership "Roll-Ups" Can Spell Trouble,* WALL ST. J., Feb. 28, 1990, at C1.

15. Barry Vinocur, editor of *Stanger's Investment Advisor,* estimates the typical cost of a roll-up to be $11 million to $12 million. Rowland, *supra* note 1. In one roll-up, 10% to 12% of the assets of the RELP were used to pay the roll-up expenses. Opsata, *supra* note 9, at 54. Much of this money is paid to the general partner.

16. Kevin Salwen, *Investors May Get Some SEC Help on Partnerships,* WALL ST. J., Feb. 28, 1991, at C17.

17. Opsata, *supra* note 9, at 53; *cf.* Salwen, *supra* note 16.

18. RUEs have investment lives of 50 years or more. Thus, the stock market's assessment of a RUE's value centers on income rather than asset value. Subas & Donaldson, *supra* note 9, at 31.

19. *See supra* note 12.

20. *See, e.g.,* Subas & Donaldson, *supra* note 9; Rudnitsky, *supra* note 7.

a workable structure for this statutory protection. Then, the Note discusses the relative virtues of federal and state action and concludes the need for quick, uniform action dictates that the federal government, rather than the states, should act in this area. Finally, the Note discusses recent congressional activity on the subject of roll-ups.

I. CURRENT LACK OF ADEQUATE REMEDIES

Currently, limited partners who prefer not to participate in a roll-up face a Hobson's choice between selling their shares at a sharp discount[21] and utilizing judicial action either to prevent the roll-up[22] or recover damages after the formation of the RUE.[23] The former alternative, for obvious reasons, is an unattractive one; the latter rarely succeeds.[24] Recent legislative attempts offer remedies,[25] but, unfortunately, the existing solutions fail to address several important considerations, such as the fairness of using market value to measure the RELP shares' worth.

Part I of this Note explains the lack of available remedies for dissenting limited partners. After a discussion of general litigation-related problems in section I.A.1, section I.A.2 examines the possibility of enjoining the roll-up through a preliminary injunction. Then, section I.A.3 explores the possibility of maintaining an action for damages after the roll-up has been completed. Finally, section I.B discusses one state's recent attempt to protect limited partners.

A. *Existing Judicial Remedies*

1. *General Problems Concerning Litigation*

Before examining the specific inadequacies of existing judicial remedies,[26] it may be useful to describe more general impediments to effective use of the judiciary by dissenting limited partners. These general barriers exist in other types of securities litigation initiated by investors and, hence, are not unique to the RELP investor. But due to the specific character of the RELP investor, these problems are especially severe.

The cost of litigation creates one barrier. While this expense may be worthwhile for large, institutional investors, the typical holders of RELPs only invest approximately $10,000 each.[27] A suit brought to

21. *See supra* note 6 and accompanying text.

22. *See infra* section I.A.2.

23. *See infra* section I.A.3.

24. *See infra* sections I.A.2 and I.A.3.

25. *See infra* section I.B.

26. *See infra* sections I.A.2-I.A.3.

27. Liquidity Fund, Inc., estimates that there are currently 7,948,560 limited partners with an average investment of $10,259.

enjoin a roll-up,[28] or recover damages after the roll-up,[29] would almost certainly cost a sizable portion of the average roll-up investor's holding.[30] Although the roll-up may prove costly to the RELP investor,[31] allowing the roll-up to proceed may be less expensive than litigation for most RELP investors.

If the limited partners banded together, either informally or in a class action, litigation would be more affordable. Unfortunately, informal alliances prove logistically difficult to form and maintain. The investors must ascertain the identities of other investors, determine their opposition to the roll-up, and then organize the litigation.[32] Similarly, class action suits sometimes reduce costs, but they are not without their problems, including conflicts of interest[33] and excessive attorneys' fees,[34] which may more than offset this cost reduction. Ex-

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28. *See infra* section I.A.2.

29. *See infra* section I.A.3.

30. Many securities lawyers work on a contingent-fee basis. Unfortunately, the possibility of such an arrangement, which offers some hope to plaintiffs who otherwise could not afford to bring suit, does not solve the RELP investor's problem. Because most RELP investors have relatively small holdings, the expected recovery by each plaintiff in such a suit is correspondingly small. Thus, a RELP investor may experience considerable difficulty finding an attorney to take the case on the mere chance of earning a percentage of such a small recovery.

31. For example, consider the four partnerships discussed *supra* note 12. Using the values assigned at conversion, these four RUEs declined an average of 84%. While some of this decline may be due to the slump in the real estate market, one can hardly suppose the underlying real estate declined 98.7%, as did the Centennial shares, or even 84%.

Exaggerated share values at conversion may also partially account for these dramatic crashes of share prices. The general partner often has considerable incentive to exaggerate the share values. *See infra* notes 151-52 and accompanying text. While it is impossible to say with confidence exactly how much an investor stands to lose in a roll-up, estimates range as high as 90%. *See Rep. Stark Introduces Bill to Combat Roll-Up Transactions,* Daily Tax Rep. (BNA) No. 85, at G-6 (May 2, 1990).

32. In the absence of transaction costs, such as information problems, it might be possible for dissenting partners to unite and oppose the roll-up in litigation. *See* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960). But because RELP holders do not tend to be sophisticated investors, information problems do exist and, hence, there are transaction costs. *See infra* note 35.

33. One problem is the conflict of interest between the attorney and the class. *See* Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer,* 66 TEXAS L. REV. 385, 389 (1987) (noting that the lack of control by class action plaintiffs over their attorneys leads to an inordinate decisionmaking power on the part of the attorney which, in turn, creates "potential for conflicts of interest to go unnoticed"); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. LEGAL STUD. 47, 56-58 (1975) (asserting that the attorney's stake in settling is substantially greater than that of the plaintiffs); *Developments in the Law — Class Actions,* 89 HARV. L. REV. 1318, 1537 (1976) ("Private negotiations of class action issues raise a particularly great danger of inadequate representation . . . .").

The interests of the named plaintiff can also conflict with the interests of the class. *See* Dam, *supra,* at 56-57; *Developments in the Law — Class Actions, supra,* at 1537. The last piece observed:

> During bargaining the class attorney may be forced to rely more heavily than usual upon the named plaintiff to determine class desires. A plaintiff and his attorney may erroneously conclude that the representative party's views mirror those of the class, leading them to make concessions . . . disproportionately costly [to the] absentees.

Id. at 1537.

34. *See Developments in the Law — Class Actions, supra* note 33, at 1605 ("The . . . disparity

pense thus remains a very real obstacle facing disgruntled RELP limited partners.

The generally unsophisticated nature of the RELP investors similarly limits the possibility of litigation-oriented relief.[35] Small RELP holders who oppose the roll-up may not know they have any recourse other than voting "no." Indeed, such investors may fear incurring the ire of the general partner, knowing they may remain partners with their adversary after the litigation. Even if these investors were sophisticated, the weak financial condition of many general partners[36] makes them unattractive defendants. Facing such roadblocks, the dissenting RELP limited partner steps into the litigant's batter's box with two strikes. The specific barriers to roll-up litigation, discussed below, effectively provide the strike-out pitch.

2. *Injunctive Relief*

To prevent a roll-up, a limited partner may attempt to halt the transaction by first obtaining a preliminary injunction before completion of the roll-up, and then prevailing at a full trial on the merits.[37] Although Rule 65(a) of the Federal Rules of Civil Procedure,[38] which governs preliminary injunctions in federal courts, does not set forth specific grounds for denying or granting relief, courts have developed a standard formulation.[39] Usually, four factors control: (1) the likelihood of the plaintiff prevailing on the merits; (2) a balancing of the harm to the plaintiff with the harm to the defendant if the injunction is granted; (3) the public interest; and (4) the threat of irreparable injury to the plaintiff upon the denial of the injunction.[40] The application of

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between attorneys' fees and the benefits class actions confer upon individual class members has . . . led some critics to suggest that class actions are in fact 'lawyer's lawsuits,' . . . .").

35. Most RELP limited partners are individuals holding modest investments. *See supra* note 27. Small investors tend to possess a lower level of understanding of investments and legal remedies. *See* Tamar Frankel, *What Can Be Done About Stock Market Volatility?*, 69 B.U. L. REV. 991, 997 (1989) (arguing against luring small investors back into the stock market).

36. *See* Jill Bettner, *SEC, Congressional Panel Investigate 'Roll-Up' to Check Fairness to Investors*, WALL ST. J., June 18, 1990, at C8.

37. The limited partner's cause of action against the general partner could be based on any number of theories, including inadequate disclosure, breach of contract, or breach of fiduciary duty.

38. FED. R. CIV. P. 65(a).

39. 11 CHARLES A. WRIGHT & ARTHUR K. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (1973).

40. Professor Moore asserts the showing of irreparable injury and likelihood of prevailing on the merits are the most important factors. 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65.04[1], at 65-54 (2d ed. 1991).

If the dissenting limited partner seeks an injunction in state court, there is a good chance he or she still must show irreparable injury. *See, e.g.*, Suffolk County Assn. of Mun. Employees v. County of Suffolk, 557 N.Y.S.2d 946, 948 (App. Div. 1990) (New York courts require showing of irreparable harm to the plaintiff.); Campau v. McMath, 463 N.W.2d 186, 189 (Mich. Ct. App. 1990) (Michigan requires showing of irreparable harm.); Kanter & Eisenberg v. Madison Assocs., 508 N.E.2d 1053, 1055 (Ill. 1987) (Illinois requires showing of irreparable harm.). *But see*

this formula rests in the discretion of the trial court.[41]

The "threat of irreparable injury" requirement creates problems for the dissenting limited partner. "Irreparable injury" is usually defined tautologically as "harm that has or will occur [which] cannot be repaired."[42] Any harm compensable by money damages usually falls outside this definition.[43] An exception to this principle does exist — if the damages are impossible or excessively difficult to calculate, the harm is deemed irreparable.[44]

Utilizing this exception to the money damages principle is difficult at best. The RELP investor will have difficulty demonstrating incalculable damages. The simple measure of damages incurred as a result of the roll-up is the value of the RELP shares before the roll-up minus the value of the RUE shares after the roll-up (the "before and after" measure).[45] Typically, cases in which damages have been ruled incalculable[46] have involved situations where the denial of the preliminary injunction would lead to an "after" value which cannot be measured.[47] The difficulty in the roll-up case, on the other hand, exists in the "before" measurement because the market price of the RUE shares represents, by definition, the "after" value. The key to ascertaining the appropriate "before" value is choosing the correct method of valuation of the preroll-up RELP interests, namely, whether to use the RELP's market value or net asset value.[48] As such, the problem for the RELP investor is not one of calculating or measuring damages; rather, it is one of proving damages. Consequently, the exception for incalculable damages probably would be of little help to the RELP limited partner.

Even if this avenue were more promising, strategic considerations might weigh against exploiting it. The dissenting limited partner would have to prepare for the possibility that the court would deny the

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Cooke v. Superior Court, 261 Cal. Rptr. 706 (Ct. App. 1989) (California balances interim harm to both plaintiff and defendant.).

41. Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940); 11 WRIGHT & MILLER, *supra* note 39, § 2948.

42. 11 WRIGHT & MILLER, *supra* note 39, § 2944, at 401 (citing Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966) (Judge Friendly explaining, "[A]ll that 'irreparable injury' means . . . is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired.")).

43. *See, e.g.*, Nuclear-Chicago Corp. v. Nuclear Data, Inc., 465 F.2d 428 (7th Cir. 1972); Bieski v. Eastern Auto. Forwarding Co., 354 F.2d 414 (3d Cir. 1965); American Visuals Corp. v. Holland, 219 F.2d 223 (2d Cir. 1955).

44. *See, e.g.*, Coca-Cola Co. v. Tropicana Prod., Inc., 690 F.2d 312 (2d Cir. 1982); Standard & Poor's Corp. v. Commodity Exch., Inc., 683 F.2d 704 (2d Cir. 1982); New York Pathological & X-Ray Lab., Inc. v. INS, 523 F.2d 79 (2d Cir. 1975).

45. For a more complete discussion of damages in roll-up cases, see *infra* section I.A.3.

46. *See supra* note 44.

47. These cases often involve the loss of future sales, which would prove incalculable due to many factors. *See Standard & Poor's Corp.*, 683 F.2d at 711.

48. *See infra* section I.A.3.

preliminary injunction, thereby allowing the roll-up to proceed, and might wish to preserve the ability to pursue an action for money damages after the roll-up occurs.[49] As part of the damages action, the limited partner will have to plead the measure of damages and will want to assert that this measure is logical, if not patent. Most litigants are likely to be wary of making such an argument after earlier arguing that the damages are incalculable. The dissenting limited partner may forgo use of the exception for incalculable damages to avoid being caught in this position.

In a recent article,[50] Professor Douglas Laycock disputes the existence of an irreparable injury rule. He asserts "[c]ourts have escaped the rule by defining adequacy [of damages] in such a way that damages are never an adequate substitute for plaintiff's loss."[51] Thus, Laycock believes the irreparable injury rule represents nothing more than a means for judges to reach their desired result.

Laycock's argument appears promising to dissenting limited partners, who could explain their plight and hope the court sympathizes. Accepting Laycock's thesis over the views of other authorities,[52] however, does not automatically lead to the conclusion that preliminary injunctions are available to dissenting limited partners. If, as Laycock suggests, preliminary injunctions are granted or denied based on the result desired by the judge, a judge still may not want to prevent a roll-up already approved by a majority of the limited partners. Given the magnitude of the roll-up problem,[53] reliance on the perceived arbitrary nature of the preliminary injunction apparatus would be ill-advised. Thus, Laycock's thesis does not correct the lack of remedies available to RELP limited partners.

A full hearing on the merits would occur only after a preliminary injunction motion succeeds. The court's decision to grant a permanent injunction focuses on the existence of an adequate remedy at law.[54] This test is not the equivalent of the irreparable injury test; rather, a showing of irreparable injury represents but one way to show that no adequate remedy at law exists.[55] A finding of a threat of irreparable harm in the preliminary injunction proceedings does not fulfill the "no adequate remedy" test for a permanent injunction.[56] Thus,

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49. *See infra* section I.A.3.

50. Douglas Laycock, *The Death of the Irreparable Injury Rule,* 103 HARV. L. REV. 687 (1990).

51. *Id.* at 691.

52. *See, e.g.,* 7 MOORE, *supra* note 40, ¶ 65.04[1], at 65-54; *see also* 11 WRIGHT & MILLER, *supra* note 39, § 2948, at 431 (The showing of irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction.").

53. *See supra* note 10 and accompanying text.

54. 11 WRIGHT & MILLER, *supra* note 39, § 2944, at 392.

55. *Id.* at 399-401.

56. *Id.,* § 2947, at 423.

even in the event of a successful preliminary motion, the dissenting limited partner would still have to relitigate the issue of irreparable injury at trial.

In summary, injunctive relief is difficult to obtain. The time and expense required by such a strategy further decreases the likelihood it will even be attempted. A plaintiff must be prepared to fight an uphill battle to obtain a preliminary injunction, which, even if successful, only delays the roll-up until a full hearing on the merits. At trial, the plaintiff must relitigate the entire issue of irreparable harm to show the lack of an adequate remedy at law. Success at trial, of course, cannot be guaranteed. Thus, injunctive relief offers little hope to a dissenting limited partner.

3. *Action for Damages*

As an alternative to preventing the roll-up through an injunction, a dissenting limited partner may allow the roll-up to proceed and then sue to recover damages. The difference in value between the preroll-up RELP shares (the "before" value) and the postroll-up RUE shares (the "after" value) represents the simple measure of damages. Unfortunately, this measure is "simple" only with respect to the "after" value; the court can easily determine the worth of the RUE shares by looking at the price of the RUE shares traded in the stock market.[57] The "before" value, on the other hand, is a more complicated matter, due to the illiquidity discount associated with RELP shares. Because no ready market for RELP shares exists, these shares trade for less than they would in a value-efficient market.[58]

In a value-efficient market, the market value of a security will equal the present value of the expected cash income flowing from that security.[59] In the case of a RELP, this would be the value of the underlying real estate (the "net asset value").[60] The illiquidity of the RELP shares, however, results in a market price below the RELP's net asset value. Because of this discrepancy, each party to the litiga-

57. The simplicity of the "after" is simple assuming there is no dispute over the timing of that value. Realistically, however, the parties could argue over which market price is appropriate — the price of the RUE share immediately after introduction to the market, or the RUE share price at some later date.

58. *See* Opsata, *supra* note 9, at 48 (Limited partners attempting to sell must "search for buyers on the secondary market [and] sell for less than their units [are] worth.").

59. *See* Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 913 (1989) (defining "value efficiency" as the "extent to which security prices reflect the present value of the net cash flows generated by [the enterprise's] assets").

60. This is true assuming the real estate market is also value-efficient, taking into account all future cash flows (such as rental income, sale income, and expenses). As used in this Note, "net asset value" means the amount the limited partner would receive if the real estate were liquidated. It therefore takes into account the partnership's cash distribution scheme and transaction costs which normally stem from such a liquidation.

tion will certainly attempt to use the value most favorable to it; the general partner will argue for use of the market price as the "before" value while the dissenting limited partner will champion the higher net asset value.

Market value is an attractive method to those who believe no security is ever worth more than what it would bring in the marketplace. The illiquidity of the RELP, the general partner could argue, resembles any market fact which is characteristic of the investment and affects its value. As such, according to this line of reasoning, the "before" value should reflect this illiquidity.

While this argument has some appeal, a closer examination of RELPs shows net asset value to be the more appropriate "before" value. Judicial proceedings and security laws should protect legitimate investor expectations.[61] RELPs, as real estate investments with fixed termination dates, represent the type of investment many intend to hold until the partnership dissolves.[62] In this respect, RELPs differ from corporate stocks, which have no termination date. Thus, use of the market value of the RELP as the "before" value unfairly penalizes the RELP investor for the illiquidity of an investment the investor may have never planned to sell. Because the investor expected to realize full net asset value at termination, use of the net asset value as the "before" measure clearly fits the investor's expectations.

In a sense, the roll-up is a forced sale. The general partner and the majority of limited partners, by approving the roll-up, force the dissenting limited partners to exchange their RELP shares for RUE shares. As such, the dissenting limited partner's situation parallels that of a minority shareholder forced to sell shares in a buy-out approved by the majority of stockholders. Several courts have found illiquidity discounts in the computation of premerger value to run counter to the goal of protecting minority shareholders.[63] Professor Charles Murdock, examining this situation in the corporate merger context, likewise found the illiquidity discount to be inappropriate.

> The action of those in control, by setting in motion events which lead to the buy-out of the minority (thereby providing liquidity), forecloses the minority from participating in any future growth or future advanta-

61. *See* Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 465-71 (1990) (describing the evolution of the reasonable expectations test as a means of defining "oppressive" management conduct); Robert B. Heglar, Note, *Rejecting the Minority Discount*, 1989 DUKE L.J. 258, 266.

62. *See* Subas & Donaldson, *supra* note 9, at 32.

63. *See, e.g.*, Cavalier Oil Corp. v. Harnett, 564 A.2d 1137 (Del. 1989) (rejecting use of "marketability" discount in Delaware's appraisal remedy); *In re* Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997 (Me. 1989) (finding application of "nonmarketability" discount would run "directly counter to [Maine's] appraisal statute's purpose of protecting dissenting shareholders"). For a discussion of state appraisal statutes, see *infra* notes 94-106 and accompanying text.

> geous sale. Having lost the ability to alienate these shares more advantageously, it would again be paradoxical to discount minority shares for lack of alienability when the majority, through triggering a buy-out have created a market *now* but foreclosed the possibility of a more attractive market *later.*[64]

Similarly, in the roll-up situation, it would be paradoxical and unfair to discount the RELP shares for their illiquidity when the general partner and the majority foreclosed the possibility of realizing the full net asset value at the original termination date.

Furthermore, there are reasons to doubt the accuracy of market value as a measure of the RELP shares' worth. In his landmark article, Professor George Akerlof set forth the "lemons market" theory.[65] Akerlof asserted that in markets where consumers could not easily distinguish goods on the basis of quality, consumers will only be willing to pay for average quality goods.[66] This tendency keeps higher quality goods out of the market. Consumers then adjust their assessment of the worth of an average quality good, driving prices even lower. Market value therefore fails to reflect accurately the true value of the goods. While commentators have cautioned against the application of this theory to securities such as stocks,[67] the RELP market possesses the primary characteristic of a lemons market. In the RELP market, buyers lack the information necessary to assess the true value of the RELP shares.[68] Furthermore, the quality of RELPs varies widely.[69] Thus, buyers may only be willing to pay for a RELP share of average quality. This strongly suggests market value may not be the accurate indicator of worth its supporters would claim it to be.

Unfortunately, these justifications for net asset value do not ensure that the dissenting limited partner will prevail on this issue at trial. In the absence of a statute dictating a method for valuing the RELP shares, a court may be persuaded to adopt the market value approach put forth by the general partner.[70] First, the court may be influenced by the ease of ascertaining the market value. Determining this value involves no more than a cursory examination of trades involving the RELP in question; ascertaining net asset value, on the other hand,

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64. Murdock, *supra* note 61, at 488.

65. George Akerlof, *The Market for Lemons,* 84 Q.J. ECON. 488 (1970).

66. *Id.* at 489.

67. *See, e.g.,* William Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model,* 1988 WIS. L. REV. 385, 405 n.105 (securities markets not lemons markets with respect to management performance); Joshua Ronen, *Sale of Controlling Interest: A Financial Economic Analysis of the Governing Law in the United States and Canada,* 37 CASE W. RES. L. REV. 1, 12 (1986) (noting "arrangements in the American capital market that minimize the adverse selection bias" described by Akerlof).

68. *See supra* note 35 and accompanying text.

69. *See supra* note 16 and accompanying text (discussing lumping of profitable RELPs with unprofitable ones).

70. *See supra* note 60 and accompanying text.

involves a certain amount of conjecture as to the value of the underlying real estate. Yet the ease of calculating market value does not justify its use. The purpose of a damage award is to restore the injured plaintiff to his or her previous position;[71] if damages are to serve their function, ease of measurement must yield to fully compensating plaintiffs.[72] Use of market value would frustrate the limited partner's attempt to gain redress for the injuries brought about by the roll-up.[73]

Second, a court may find further reason to resort to market value as the "before" measure by analogizing to case law or statutes developed for more common securities, such as stocks.[74] In many instances, such authorities will dictate use of market value.[75] But these

71. *See, e.g.*, WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 503 (8th ed. 1988) (Compensatory damages are intended to "restore [the plaintiff] to the position he occupied before the tort."). This proposition also holds true for cases brought in contract rather than in tort. *See* III E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 186 (1990) ("The basic principle for the measurement of th[e]se damages is that of compensation based on the injured party's expectation. One is entitled to recover an amount that will put one in as good a position as one would have been in had the contract been performed."); *cf.* Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854) (Damages "should be such as may . . . reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.").

72. Similarly, the fact that real estate valuation is not an exact science should not sway the court. It is true that two real estate appraisers may give different estimates of the value of the same property. *See* Jeff B. Coopersmith, Comment, *Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine*, 39 EMORY L.J. 267, 286 n.96 (1990). But the court should avoid allowing the imprecise nature of this damages measure to preclude effective compensation of the plaintiffs. The general partner and the majority of the limited partners, by approving the roll-up, have created this situation wherein the parties must resort to an imprecise measure of damages. *See supra* note 64 and accompanying text. Thus, the plaintiffs should not be the ones to suffer the consequences of the lack of a way to find the "true" value of the property. *Cf.* Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513 (10th Cir. 1987) (court may engage in some degree of speculation as to damages when imprecision is result of defendant's wrongdoing).

73. As a part of this obstacle of convincing the court to use net asset value as the "before" measure, the plaintiff has the burden of proving many facts (such as expectations) which are more easily "proved" to a legislature once than to courts in each case. *Cf.* Oregon v. Elstad, 470 U.S. 298, 368 (1984) (Stevens, J., dissenting) (purpose of employing irrebuttable *Miranda* presumption of coercion in fourth amendment setting is to avoid a complicated "fact-bound inquiry").

It is conceivable that the market value of a RELP could exceed its net asset value, due to factors such as superior management of the partnership. There is little evidence to suggest this occurs with any frequency, as the illiquidity discount would normally more than offset any such factor.

74. Indeed, the limited partner's complaint may compel the court to rely on such authority. Because limited partners cannot resort to any effective statutory protection, they may be forced to plead their causes of action under these analogous security cases or statutes.

75. In California, for example, the relevant case law for securities holds market value to be the normal measure of value. *See* Peek v. Steinberg, 124 P. 834, 836 (Cal. 1912). Furthermore, California's statutory damage formulae do not translate well to the roll-up situation. *See, e.g.*, CAL. CORP. CODE § 25501 (Deering 1979) (Section 25501 sets forth the measure of damages for offering or selling a security while making an untrue statement of material fact or omitting a statement of material fact. The statute sets forth four measures of damages, none of which translates well to a roll-up. The statute seems to envision the more common transaction wherein a buyer pays cash in exchange for a security. In a roll-up, however, the "buyer" exchanges his or her RELP shares for a security.).

authorities ignore fundamental differences between securities such as stocks and RELPs. For example, while stocks usually represent shares of ownership in an ongoing enterprise, RELP shares constitute interests in an entity with a finite life.[76] Use of authorities which fail to take these differences into account exacerbates the limited partner's quandary resulting from the lack of an adequate remedy. But unless a court can rely on law developed specifically for RELPs, it may feel constrained to use authorities ill-fitted to the limited partner's situation.

Finally, the general partner may convince the court to use market value by pointing out the formal structure of the RELPs. Technically, the limited partners in a RELP own a security rather than the underlying real estate.[77] The general partner could argue that the court should therefore use market value rather than net asset value to assess the worth of the limited partners' holdings. Such reasoning exalts form over substance and distracts the decision maker from finding a measure of damages which will truly return the injured plaintiffs to their previous position. By focusing on the technicalities of the RELP, the court may instead penalize the limited partners for the illiquidity of the RELPs.[78] In the absence of a statutory remedy, any one of these arguments by the general partner may result in an improper measure of damages.

B. *Existing Statutory Remedies*

On September 18, 1990, California Governor George Deukmejian signed into law a bill introduced in response to pleas from disgruntled limited partners.[79] The law amended California's statutory regulation of limited partnerships to provide dissenting limited partners with the right to require the partnership about to be rolled-up to purchase the dissenter's interest. This statute, patterned after state appraisal remedies,[80] appears at first glance to solve the roll-up problem, at least in California. Closer scrutiny reveals several flaws which still leave the RELP dissenter without effective protection.

Section 15679.2(a) of the California Corporations Code sets forth the investor's "dissenter's rights":

> If the approval of outstanding limited partnership interests is required for a limited partnership to participate in a reorganization, . . . then each limited partner of the limited partnership holding such interests may, by

76. *See supra* note 2 and accompanying text.

77. *See infra* note 176 and accompanying text.

78. This ignores the fact that the original RELP agreement contemplated the limited partners receiving a portion of the proceeds from the sale of the underlying real estate. *See supra* note 3.

79. CAL. CORP. CODE § 15679 (Deering Supp.1991).

80. *See infra* notes 94-106 and accompanying text.

> complying with this article, require the limited partnership to purchase for cash, at its fair market value, the interest owned by the limited partner in the limited partnership . . . .[81]

The statute's requirement that the partnership repurchase the dissenting partner's shares at "fair *market* value" is its first flaw. As discussed earlier, net asset value more fully compensates the dissenting limited partner.[82] Furthermore, a statute providing the right to sell a security at fair market value seems redundant, because an investor always retains that right. This language, to be fair, does provide some relief to RELP investors. First, the law provides the limited partner with a buyer.[83] Second, the statutory definition of "fair market value" as the value "as of the day before the first announcement of the terms of the proposed reorganization, excluding any appreciation or depreciation in consequence of the proposed reorganization,"[84] allows the dissenting investor to recapture any loss in value resulting from the announcement of the roll-up.[85]

While this first flaw, the use of market value, inhibits the law's effectiveness, the second flaw renders the statute largely useless. The statute applies only to "domestic limited partnerships formed on or after January 1, 1991,"[86] so the billions of dollars worth of RELPs formed during the 1980s[87] may still be rolled up without any remedy for the dissenting limited partner. Because virtually no new partnerships are currently being formed, this law is essentially an exercise in futility.[88]

While several other states have attempted to address the problems springing from roll-ups, no state has enacted a truly effective statute.[89]

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81. CAL. CORP. CODE § 15679.2(a) (Deering Supp. 1991).

82. *See supra* notes 61-78 and accompanying text (arguing that penalizing an investor for the illiquidity of an investment which the investor may never have intended to sell is inappropriate).

83. This statutory arrangement may be distinguished from a put option. With a put option, the holder of the option has the right to sell the security at a fixed price. *See* BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). This statute, on the other hand, does not provide a fixed price; rather, that determination is left to the court.

84. CAL. CORP. CODE § 15679.2(a) (Deering Supp. 1991).

85. *See* Bettner, *supra* note 14 ("Bad news, including a pending roll-up, only sends [prices] lower."). Another desirable feature of this statute is its tendency to promote agreement between the dissenter and the partnership on a buy-out price. *See* CAL. CORP. CODE § 15679.5 (Deering Supp. 1991). Furthermore, the statute would narrow the issues at trial, thereby reducing the expense associated with the litigation.

86. CAL. CORP. CODE § 15679.13 (Deering Supp. 1991).

87. *See supra* note 1 and accompanying text.

88. *See supra* note 4 and accompanying text. Of course, a proponent of this statute could argue that future changes in the tax law or the real estate market may cause a revival of partnership formation and, therefore, this statute does serve a purpose. Given the likelihood of such changes and the amount of RELPs currently subject to roll-ups, one may certainly question the wisdom of expending the effort to pass a law under such an assumption.

89. Three other jurisdictions have recently provided appraisal rights to limited partners confronted with roll-ups. *See* D.C. CODE ANN. § 41-428(h) (1990); MD. CORPS. & ASSNS. CODE ANN. § 10-208(f) (Supp. 1990); 1990 N.Y. LAWS ch. 950 (to be codified at N.Y. PARTNERSHIP

Thus, the remedies available to the dissenting limited partner remain inadequate.

II. The Analogy to Appraisal Statutes

In the absence of statutory protection, the dissenting limited partner's predicament closely resembles that of a corporate shareholder opposing a fundamental change in the corporation.[90] For example, a corporate shareholder opposing a merger,[91] like the RELP investor, owns an interest in an entity that will soon cease to exist due to the actions of the majority. Without statutory protection, the shareholders face a choice of tendering their shares[92] or selling in the open market. This choice mirrors the alternatives available to the RELP investor.[93] For the RELP limited partner, the similarities regrettably end there, for unlike RELP limited partners, dissenting corporate shareholders have recourse to state appraisal remedies.

All fifty states and the District of Columbia currently offer appraisal proceedings to corporate shareholders opposing a merger.[94] While these fifty-one statutes vary in their procedures and applications, most seek to compensate the dissenting shareholders for the "fair value" of their shares.[95] While providing access to the courts, the statutes also encourage negotiation between the parties by either requiring or emphasizing negotiation before the appraisal proceeding may commence.[96]

Appraisal statutes arose in response to a desire for change in the nature of corporate governance.[97] At common law, corporate acts such as a merger required unanimous shareholder consent.[98] Under this system, courts would block mergers and other "fundamental"

Law art. 8A § 121-1102). While each of these statutes awards "fair value" rather than "fair *market* value," two of the three laws (District of Columbia and Maryland) do so by referring to the dissenters' rights afforded corporations' shareholders. Under such a statute, courts are likely to rely on market value as they normally do for valuing stocks. *See supra* notes 74-75 and accompanying text.

90. Such a "fundamental change" might be a merger, sale of all or a substantial portion of corporate assets, or sale of corporate stock. *See* Joel Seligman, *Reappraising the Appraisal Remedy*, 52 Geo. Wash. L. Rev. 829, 831-33 (1984).

91. This section will focus on mergers, the closest analogy between the dissenting limited partner and the corporate shareholder.

92. The shareholder trades his shares for shares in the newly formed entity or for money, depending on the transaction.

93. *See supra* notes 21-23 and accompanying text.

94. *See, e.g.*, Ala. Code § 10-2A-163 (1987); Alaska Stat. § 10.06.576 (1989); Cal. Corp. Code § 1300 (Deering 1977); N.Y. Bus. Corp. Law § 910 (McKinney 1986).

95. *See, e.g.*, Ala. Code § 10-2A-163 (1987).

96. Seligman, *supra* note 90, at 830.

97. 12B William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5906.1 (perm. ed. rev. vol. 1984).

98. *Id.*

changes in the corporation at the request of a single dissenting shareholder. As one commentator described:

> These restrictions on the majority were serious impediments to the sweeping reorganizations in structure which modern needs had made the order of the day. Consequently statutes were passed in most states conferring wide powers on the majority or a specified percent of the stock, to amend the charter, sell, consolidate, merge, etc. In enacting such statutes, however, it was realized that it was necessary to afford some relief to dissenters, with the result that in most jurisdictions statutes were enacted which give the dissenters the right to receive the cash value of their stock and provide for an appraisal where no agreement as to value can be reached.[99]

Professor Melvin Eisenberg has lauded appraisal statutes, noting that the remedy "not only serves the function of permitting shareholders to withdraw under certain circumstances at a fair price, but also serves as a check on management."[100] Despite the many difficulties inherent in the remedy,[101] Eisenberg has concluded appraisal rights should be granted even where the dissenters have recourse to a market for their shares.

> [W]hile it would not be irrational to eliminate appraisal rights as to shares which are traded under conditions which are likely to insure the existence of a continuous and relatively deep market, it seems more advisable to retain the appraisal right even in such cases, partly to protect the fair expectations of those shareholders whose legitimate expectations center on the enterprise rather than on the market, and partly to serve as a well-designed emergency switch to check management improvidence.[102]

Fifteen years after Eisenberg's observations, Professor Joel Seligman critically examined the appraisal remedy, exhibiting greater trust than Eisenberg in the market's ability to provide fair value.[103] For Seligman, the crucial question was whether a given transaction may be fairly characterized as disinterested.[104] An appraisal remedy, Seligman argued, should be available for interested transactions, such as a parent-subsidiary merger.[105] In a disinterested transaction, however, the appraisal remedy is not necessary to provide a check on management. Managers, frequently owners of the corporation's stock, "usually will associate their best interest with that of their fellow

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99. *Id.* (footnotes omitted); *see also* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941) (The change to majority vote "opened the door to victimization of the minority.").

100. Melvin A. Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CAL. L. REV. 1, 84 (1969).

101. *Id.* at 85 (Eisenberg notes the appraisal remedy is "always technical; it may be expensive;" and "it is uncertain in result.").

102. *Id.* at 86.

103. Seligman, *supra* note 90, at 838-40.

104. *Id.* at 840-41.

105. *Id.* at 841.

shareholders . . . ."[106]

While Eisenberg and Seligman disagree on a great deal, both analyses support the provision of an appraisal remedy for dissenting RELP limited partners. Eisenberg's desire to protect the expectations of "shareholders whose legitimate expectations center on the enterprise rather than on the market"[107] applies with equal force to limited partners who invested in RELPs believing the RELP was a fixed-duration instrument[108] and knowing that no ready market for the RELPs existed.[109] The second benefit of appraisal remedies put forth by Eisenberg, providing a check on management, also dictates availability of a remedy for dissenting limited partners. Currently, in the absence of a remedy for the limited partners, general partners continue to promote roll-ups despite strong evidence that such transactions greatly damage the interests of the limited partners.[110] This continued practice shows the necessity of some sort of check on the general partners.

Seligman's analysis leads to the same conclusion. His view that appraisal rights are necessary when conflicts of interest prevent managers from protecting investors' interests applies to roll-ups as well. To say that the RELP general partner, in promoting a roll-up, is less than "disinterested" greatly understates the problem.[111] A general partner has conflicts of interest in several respects. The general partner receives large fees from the transaction.[112] Usually its position also becomes more secure through changes to the partnership agreement allowing removal only upon a seventy-five percent vote of the RUE shareholders instead of the fifty percent requirement usually found in RELPs.[113] Furthermore, the general partner's interest in the

106. *Id.* at 840.

107. *See supra* note 102 and accompanying text.

108. *See supra* note 2 and accompanying text.

109. *See supra* note 6 and accompanying text.

110. *See supra* note 12 and accompanying text.

111. The Delaware Supreme Court has defined "interested transaction" in the corporate context as one where directors "appear on both sides of a transaction [or] expect to derive . . . personal financial benefit from it in the sense of self dealing, as opposed to a benefit which devolves upon the corporation or all stockholders . . . ." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1983).

112. *See supra* note 15 and accompanying text.

113. *See* Opsata, *supra* note 9, at 54. Consider further the following item regarding a roll-up completed by Southmark Corp.:

> Southmark Corp. last year consolidated 35 of its real estate partnership programs into one, National Realty L.P. Among other benefits, Southmark claimed that rolling up the partnerships would achieve economies of scale. Security holders went along with the deal.
>
> The predicted cost savings are proving elusive. National Realty's most recent financials show that for the nine months ended Sept. 30[, 1988] "other operating expenses" jumped 47%, from $4.3 million to $6.3 million. A cryptic entry called "fees to affiliates" jumped more than 427%, from $137,000 to $722,000.
>
> Company says the increases in operating expenses are the result of a change in the "allocation of the general partner's and affiliates' overhead incurred in connection with administration of partnership properties." How would you put that in English? We'd say the guys who are running the place simply raised their own pay.

roll-up grows because of the change from a fixed-duration RELP to a RUE of potentially infinite duration.[114] This allows the general partner to continue to receive property management fees.[115]

Finally, the roll-up may enhance the general partner's percentage from the sale of properties. As one observer noted:

> [A]ny preferences or subordinations that existed in the individual partnerships are abolished in a roll-up. Previously, the general partner might have been prohibited from collecting management fees or taking a share of distributable cash flows until investors achieved return of capital or earned a specified return on investment. After a roll-up, future cash flows are divided among shareholders with no subordinations.[116]

This improvement of the general partner's position represents another example of the general partner's incentive to roll partnerships into a RUE. As mentioned above, these facts lead some observers to assert that only general partners do well in a roll-up.[117] The roll-up therefore exemplifies the interested transaction which, according to Seligman, necessitates an appraisal remedy. Thus, under either Eisenberg's or Seligman's evaluation of the appraisal remedy, such protection is needed in the roll-up situation as well as in the case of a corporate merger.

III. PROPOSED REMEDY

Part III of this Note first provides an overview of a proposed remedy, then sets forth the details of the remedy's structure, including how the RELP shares should be valued during the appraisal process. Part III then lists the benefits flowing from such legislation. Finally, this Part addresses the desirability of federal legislation and examines current congressional proposals.

A. *Overview of Remedy*

To address the lack of remedies available to dissenting limited partners, this Note suggests enactment of a statute with the following features. First, the remedy should require the general partner to incorporate notification of limited partners' right to dissent into the proxy materials. If limited partners do not wish to participate in the roll-up, they must provide the general partner with a notice of intent to dissent with their "no" votes. The general partner, after the vote approving the roll-up, must pay the dissenting limited partners what the general partner believes to be the fair value of the limited partners' RELP shares. Dissenters dissatisfied with this payment should then

Forbes Informer, FORBES, Jan. 9, 1989, at 16.

114. *See* Subas & Donaldson, *supra* note 9, at 33.

115. *See supra* text accompanying notes 1-2.

116. Margaret Opsata, *Roll-ups Roll On,* REAL EST. FIN. J., Summer 1991, at 71, 73.

117. *See supra* note 14 and accompanying text.

have access to a judicial appraisal proceeding, to which all dissenters are joined. At this proceeding, the court should award the dissenters an amount based on the net asset value of the underlying real estate. The court should determine this value by appointing a qualified real estate appraiser, who uses the property valuation performed by the general partner in connection with the roll-up as a minimum to his or her appraisal. This suggested procedure is set forth in greater detail below.

B. *Proposed Remedy in Detail*

To find a workable remedy structure for dissenting RELP limited partners, a legislature need look no further than the appraisal remedy set forth in the Revised Model Business Corporation Act (RMBCA).[118] The RMBCA's provisions, with a few adjustments, can promote the goal of providing dissenters with fair value for their RELP shares.

The RMBCA "seeks to increase the frequency with which assertion of dissenters' rights leads to economical and satisfying solutions, and to decrease the frequency with which they lead to delay, expense, and dissatisfaction."[119] To accomplish this, the RMBCA "motivat[es] the parties to settle their differences in private negotiations, without resort to judicial appraisal proceedings."[120]

Section 13.20[121] of the RMBCA requires that a corporation notify shareholders of their dissenters' rights under the appraisal statute in the shareholder meeting notice. Similarly, the RELP appraisal remedy should require the general partner to notify the limited partners of their right to dissent. Because limited partnerships lack a counterpart to the shareholders' meeting, such notice could be required as part of the proxy materials.[122] This notice would help provide a meaningful remedy to limited partners, many of whom would otherwise be unaware of any statutory protection.[123]

Under section 13.21[124] a dissenting shareholder must notify the

118. REVISED MODEL BUSINESS CORP. ACT, ch. 13 (Comm. on Corporate Laws of the Section of Corp., Banking & Business Law, Am. Bar Assn. 1991) [hereinafter RMBCA]. The RMBCA does not refer to its scheme as an "appraisal right," due to its emphasis on nonjudicial settlement of disputes regarding share value. The RMBCA prefers the term "dissenters' rights to obtain payment for their shares." RMBCA Ch. 13 intro. cmt. For simplicity, this Note will refer to these rights as "appraisal rights" or "appraisal remedy."

119. RMBCA Ch. 13 intro. cmt.

120. *Id.*

121. RMBCA § 13.20.

122. The general partner sends proxy materials to the limited partners to explain the roll-up and seek affirmative votes. Because these proxy materials tend to be long and complicated, the legislation should take steps to ensure that the notice of the right to dissent is not buried deep within a lengthy prospectus.

123. *See supra* notes 35-36 and accompanying text.

124. RMBCA § 13.21.

corporation of an intent to assert dissenters' rights. To provide advance warning of the number of potential dissenters, the RMBCA requires dissenters to provide this notice before the shareholder vote. If the shareholders approve the merger, section 13.22[125] calls for the corporation to "deliver a written dissenters' notice to all shareholders who satisfied the requirements of section 13.21."[126] This notice informs the shareholders of the payment demand procedure and supplies them with a form for doing so. Pursuant to section 13.23,[127] the shareholder must then demand payment for the shares within the time limits set forth in the dissenters' notice or lose his or her right to payment.

When adapting sections 13.21, 13.22 and 13.23 to the roll-up situation, a legislature could consolidate these three steps. The notice of intent to dissent, as set forth in section 13.21, could be provided at the time the limited partner votes against the roll-up.[128] A demand for payment could accompany the "no" vote, provided the notice of dissenters' rights includes instructions regarding these steps. Such a consolidation would shorten the process and make it less expensive.[129]

Pursuant to section 13.25 the corporation must "pay each dissenter who complied with section 13.23 the amount the corporation estimates to be the fair value of his [or her] shares, plus accrued interest."[130] The provision mandating payment before reaching a final agreement on value "is based on the view that since the person's rights as a shareholder are terminated with the completion of the transaction, he should have immediate use of the money to which the corporation agrees it has no further claim."[131] This immediate payment could end the dispute, thereby advancing the RMBCA's goal of settling these issues without resort to a court proceeding.[132] To achieve this goal, a statute securing dissenters' rights for RELP limited partners should incorporate a similar provision.

If the payment does not satisfy the dissenter, the shareholder may have access to the court in a judicial appraisal proceeding. Following

125. RMBCA § 13.22.

126. RMBCA § 13.22(a).

127. RMBCA § 13.23.

128. Two states currently allow shareholders to wait until the vote to express their desire to dissent. RMBCA § 13.21 annot. (1990).

129. Critics of appraisal remedies argue they are too complicated and expensive. *See, e.g.*, Robert Prentice, *Front-End Loaded, Two-Tiered Tender Offers: An Examination of the Counterproductive Effects of a Mighty Offensive Weapon*, 39 CASE W. RES. L. REV. 389, 435 (1989) (appraisal "cumbersome [and] expensive"); Richard Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. REV. 630, 650-53 (1985) (appraisal expensive and inaccurate).

130. RMBCA § 13.25.

131. RMBCA § 13.25 official cmt.

132. *See supra* note 118. This is also a broader goal of the legal system.

section 13.30,[133] the RELP appraisal statute should require the general partner to commence the court action, joining in one action all dissenters who notified the general partner of their desire to have access to appraisal.[134] The court may appoint one or more appraisers "to receive evidence and recommend decision on the question of fair value."[135] The RMBCA declines to mandate how the appraisers determine "fair value." Instead, it "leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value."[136] RELPs differ from corporations in this sense because they lack well-settled valuation methods, and differ sufficiently in other ways to suggest an obvious valuation method to be employed by a court in an appraisal proceeding. Thus, a legislature enacting a RELP appraisal statute need not take such a "hands off" approach to valuation and should therefore mandate use of net asset value.

C. *Valuation of the RELP Shares*

As discussed above,[137] market value represents the measure of a security's worth which is easiest to compute. Unfortunately, awarding market value to a dissenting RELP limited partner unjustly penalizes that investor.[138] An attempt to emulate the RMBCA's goal of giving dissenters "a right to withdraw their investment at a fair value . . ."[139] mandates a search for a better measure of value.

The courts have embarked on such a search in the corporate stock context. The Delaware Supreme Court, in *Weinberger v. UOP, Inc.*,[140] addressed the issue of valuation of minority stock in an appraisal proceeding. The court rejected the "Delaware block method"[141] and called for an approach including "proof of value by any techniques or methods which are generally considered acceptable in the financial

133. RMBCA § 13.30.

134. The joining of all dissenters would make the procedure less expensive and preclude duplicative litigation. For dissenters who share counsel to save money, some of the problems facing class action plaintiffs could arise. *See supra* notes 33-34. Most of these problems, however, will not appear in this context. For example, no difficulty regarding a search for other plaintiffs will arise, as this burden will be placed on the general partner. Furthermore, it must be emphasized that this court procedure represents the final step in a long process during which settlement may occur. *See supra* notes 119-20 and accompanying text.

135. RMBCA § 13.30(d). Appointment of a court appraiser would help the parties avoid a costly "battle of the experts."

136. RMBCA § 13.01 official cmt. (3).

137. *See supra* text accompanying note 71.

138. *See supra* notes 71-73 and accompanying text.

139. RMBCA ch. 13, intro. cmt.

140. 457 A.2d 701 (Del. 1983).

141. The Delaware block method employed a weighted average of net asset value, earnings value, and market value. The weights assigned to each value varied from case to case.

community . . . ."[142] The court, however, gave little guidance as to what constitutes these "techniques or methods."

This issue left open by the *Weinberger* court has been the subject of a great deal of literature.[143] One observer set out to "discuss[ ] the rejected 'Delaware block' approach to valuation and suppl[y] the rationale for the rejection that is missing from . . . *Weinberger.*"[144] This missing rationale turned out to be application of the "Discounted Cash Flow" (DCF) theory to stock valuation.

The DCF method relies on the premise

> that all assets . . . have value because they provide a stream of future benefits. . . . [M]odern valuation theories assume that all benefits can be converted to periodic cash equivalents during the interval in which the asset is owned. The key valuation concept is to take this future stream of dollar-denominated benefits and convert it into a current value — a single number of current dollars that is *equivalent* to the given stream of benefits over time.[145]

The DCF method complies with the *Weinberger* mandate to use a technique acceptable in the financial community, as it is the most widely used stock valuation method.[146]

Applying the DCF method to value a RELP would involve estimating the future cash inflows, including rental income and proceeds from the sale of property, and offsetting these benefits by the future cash outflows, such as debt service, maintenance expenses, and administrative costs. These future cash flows would be discounted to obtain a present value of the RELP. The most important variable in this equation is the sale price of the property at the termination date of the partnership. As such, the liquidation value of the enterprise becomes the largest determinant of value. Reliance on liquidation value has been criticized in valuation of stocks, because it may have little probative value for an ongoing enterprise.[147] In the RELP context, this criticism does not apply. Although the RELP *is* an ongoing enterprise, it also represents an enterprise designed to terminate at a given date.[148]

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142. 457 A.2d at 713.

143. *See, e.g.,* Dierdre A. Burgman & Paul N. Cox, *Reappraising the Role of the Shareholder in the Modern Public Corporation:* Weinberger's *Procedural Approach to Fairness in Freezeouts,* 1984 WIS. L. REV. 593 (1984); Glenn C. Campbell, Note, *Corporation Law* — Weinberger v. UOP, Inc.: *Delaware Reevaluates State-Law Limitations on Take Out Mergers,* 62 N.C. L. REV. 812 (1984).

144. David Cohen, Comment, *Valuation in the Context of Share Appraisal,* 34 EMORY L.J. 117, 118 (1985).

145. *Id.* at 127-28; *see also* EUGENE F. BRIGHAM, FINANCIAL MANAGEMENT: THEORY AND PRACTICE 288-382 (1977).

146. Cohen, *supra* note 144, at 131.

147. *See* Cohen, *supra* note 144, at 135 (noting "fundamental inconsistency" in using liquidation value in determining value of the stock of an ongoing enterprise); Heglar, *supra* note 61, at 265 n.35 (listing authorities rejecting or limiting use of "net asset" or liquidation value).

148. *See supra* note 2 and accompanying text.

Liquidation value, in other words, is appropriate for an enterprise which, unlike a corporation, was meant to be liquidated.

While discussing the problems inherent in a damages action, this Note concluded that net asset value is a better measure than market value of the "fair value" of RELP shares.[149] This may appear to be inconsistent with the idea of utilizing DCF analysis, but net asset value actually approximates DCF. Assuming some level of value efficiency in the real estate market, the value of the RELP's underlying real estate will equal the expected cash flows associated with that real estate.[150] Thus, use of net asset value would yield the same benefits as DCF analysis, while still providing simplicity. A RELP appraisal should therefore call for the appointment of an appraiser to give the court an estimate of the RELP's net asset value. This estimate would determine the amount paid to the dissenting limited partners.

In fact, the general partner causes an appraisal of the RELP's property to be conducted as part of the roll-up process.[151] The general partner, however, has considerable incentive to inflate the appraisal. The structure of roll-ups ensures that the number of RUE shares the general partner receives is tied to the appraisal of the real estate.[152] Inflated estimates of the real estate value also increase estimated future cash flows, thereby making the roll-up appear more attractive to the voting limited partners. Thus, estimates of the RELP's net asset value already exist, albeit in a form somewhat biased toward higher values.

These incentives would be reduced if the general partner's estimate of net asset value also determined the amount paid to dissenting limited partners. A better alternative would be to use these appraisals as a minimum value. Use of this floor would reduce the temptation to exaggerate the appraisals, but not give the general partner too much incentive to grossly underestimate the values.

D. *Benefits of the Proposed Remedy*

The primary benefit of the appraisal legislation described above is the better protection it offers RELP investors. As discussed earlier, many RELP investors planned to hold their investment until the termination date.[153] By allowing dissenting limited partners to recover

149. *See supra* section I.A.3.

150. *See supra* note 59 and accompanying text.

151. *See* Richard H. Ader, *Anatomy of a Master Limited Partnership Roll-Up,* REAL EST. FIN. J., Spring 1988, at 16, 18.

152. *Id.* (Appraisal of some properties in the Southmark roll-up were too high by 30%.); *see also* Opsata, *supra* note 9, at 53.

153. *See supra* text accompanying note 62. Of course, some investors who have voted for the roll-up have adjusted their expectations and are enticed by the roll-up's promised liquidity. This does not mean, however, that all investors who voted in favor of the roll-up have changed expectations, as liquidity is not the only promise made by general partners with respect to roll-ups. *See supra* note 9.

the fair value of their shares, undiminished by an illiquidity discount that would unfairly penalize the limited partner,[154] the statute would protect these legitimate expectations.

In addition to providing a remedy where none existed before,[155] this Note's proposal, by establishing procedures and defining the scope of inquiry, would make the process less expensive. While a limited partner would incur some expense pursuing the dissenters' rights, the amount involved would almost certainly be less than the sum required to litigate the many issues[156] that, in the absence of a dissenters' rights statute, must be litigated.

Many critics of appraisal remedies point to the relative paucity of case law on the subject as proof of the prohibitive cost of such procedures.[157] Indeed, expense can prove problematic in current state appraisal remedies which do not require the corporation to join all dissenters as parties to one appraisal proceeding.[158] This Note's proposal would address the cost problem by requiring the general partner to join all dissenters as parties to one appraisal proceeding. Furthermore, the lack of case law under state appraisal statutes may be a result of the statutes' more efficient dispute resolution procedure.[159] Because a statute addressing roll-ups should likewise emphasize negotiation before resorting to the court, many roll-up disputes could be resolved without litigation.

Finally, a statute forcing the general partner to pay fair value for dissenters' RELP shares will deter some ill-conceived roll-ups. For example, many roll-ups have lumped profitable RELPs with unprofitable ones.[160] Because the general partner could expect a fairly substantial level of dissent from holders of the profitable RELPs, the general partner would be less likely to pursue such damaging roll-ups. The statute cannot guarantee that only sensible roll-ups take place, but it can reduce the number of roll-ups completed in the future. While roll-ups need not be damaging per se, a decrease in the frequency of roll-ups must be considered a benefit, given the amount of losses incurred as a result of roll-ups thus far.[161]

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154. *See supra* text accompanying note 62.

155. *See supra* Part I.

156. *See supra* notes 57-58 and accompanying text.

157. *E.g.*, Seligman, *supra* note 90, at 829-30 (noting low frequency of appraisal proceedings and suggesting expense may be a factor discouraging such actions).

158. *See supra* note 134 and accompanying text.

159. *See* Seligman, *supra* note 90, at 830.

160. *See supra* note 16 and accompanying text.

161. *See supra* notes 12-14 and accompanying text.

E. *The Need for Federal Legislation*

1. *The Advantages of Federal Legislation*

Showing the need for legislation and suggesting a statutory structure does not quite complete the picture. The issue arises as to whether this statute should be enacted by Congress or by the states. The debate between the desirability of federal action versus state legislation is not new. In the corporate context, scholars have long debated the need for federal regulation to replace the existing system of control by the states.[162] One voice strongly advocating "federalization" of corporate law has been that of Professor William Cary. In his 1974 article examining the corporate law of Delaware,[163] Cary concluded that states' desire to attract corporations has led to a "race for the bottom, with Delaware in the lead . . . ."[164] Cary criticized Delaware's efforts to attract corporations by making its law attractive to management, asserting that "the raison d'etre behind the whole system [is] revenue for the state of Delaware"[165] and that there might not be any "public policy left in Delaware corporate law except the objective of raising revenue."[166]

The federal government, by enacting the legislation described in this Note, could prevent any such "race for the bottom" with respect to limited partnerships. Although states' financial incentive to attract partnerships may not be as strong as it is to attract corporations, states can earn revenue in the way of transaction fees or other taxes by luring partnerships. General partners, noting the difference in state laws regarding roll-ups, could seek to have the partnership agreement amended so that the partnership is based in a state with little or no protection against roll-ups. The utter lack of an effective remedy for a limited partner confronted with a roll-up mandates that protection for the limited partner, rather than a government's need for income, should drive the structure of the law.[167]

Dangers other than a "race for the bottom" lie in potentially inconsistent state regulation. RELP holders already suffer from the dif-

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162. *See* Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037 (1986) (historical overview of debate over need for federal regulation of corporations).

163. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

164. *Id.* at 705.

165. *Id.* at 668.

166. *Id.* at 684. For a contrary view, see Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 290 (1977).

167. Even if states do not engage in a "race for the bottom" to raise revenue, differences in state laws are bound to exist. To the extent different states provide varying levels of protection, general partners will have an incentive to find a state offering little or no protection against roll-ups.

ficulties associated with owning a thinly traded security.[168] Allowing states to control regulation in this area would result in inconsistent rules which vary from state to state, depending on the home state of the partnership. Subjecting different RELPs to varying levels of protection could only complicate trading, thereby adding to the imperfections of the RELP market. Federal legislation represents the best chance at consistent protection for limited partners.[169]

The debate over the merits of federal and state regulation has also occurred in the area of corporate mergers. One commentator has examined two-tier mergers and concluded "notions of federalism dictate state regulation of the second step transaction."[170] Further, "a state may be interested in preventing the loss of local employment that occurs when a corporation relocates to another state [and] avoiding other adverse impact on the local economy."[171] The differences between a corporate merger and a roll-up suggest rejection of the application of this argument to roll-up legislation. The state has no such interest in regulating roll-ups. A roll-up does not lead to loss of employment or any other such adverse effects on the local economy.[172] Rather, it simply rearranges the form of ownership of the underlying real estate.

These "notions of federalism" — i.e., the practice of allowing states to govern local interests — cannot stand up to the other reasons for preferring federal legislation. The urgency of the situation represents the foremost of these reasons. As mentioned, over $3 billion worth of RELPs could be rolled-up if the limited partners receive no protection.[173] Although enactment of federal legislation may prove a lengthy process, it certainly can be accomplished more quickly than enactment of legislation by fifty state legislatures.

Furthermore, a federal appraisal statute would not constitute a congressional excursion into an area previously controlled only by the states. Limited partnership interests already fall under the regulation

168. *See supra* note 6 and accompanying text.

169. Although promulgation of a uniform act could help achieve some consistency, the time required to enact such legislation in each state's legislature would be prohibitive. Furthermore, uniform acts do not always result in consistent legislation. *See, e.g.*, Therese H. Maynard, *The Uniform Limited Offering Exemption: How "Uniform" Is "Uniform?"*, 36 EMORY L.J. 357, 361-62 (1987) (most of 27 states enacting ULOE have modified its terms).

170. Robert O. Ball, III, Note, *Second Step Transactions in Two-Tiered Takeovers: The Case for State Regulation*, 9 GA. L. REV. 343, 370 (1985). For a contrary view, see Robert J. Graves, Note, *A Failed Experiment: State Takeover Regulation After* Edgar v. Mite Corp., 1983 U. ILL. L. REV. 457, 476 ("[S]tate legislatures should repeal their takeover statutes and leave . . . regulation . . . to the federal government.").

171. Ball, *supra* note 170, at 371.

172. Of course, a roll-up may have some small effect on a local economy by decreasing the net worth of limited partners living in the area. State regulation, however, would come from the state in which the partnership is organized, not the state in which the limited partner resides. The two states are often not the same.

173. *See supra* note 10 and accompanying text.

of the Securities Act of 1933.[174] Because limited partnership interests meet the criteria of an "investment contract" set forth by the Supreme Court in *S.E.C. v. W.J. Howey Co.*,[175] courts have held these interests to be securities subject to regulation under the 1933 Act.[176] Thus, federal action would amount to a simple exercise of Congress' well-established regulatory power.

2. *Current Congressional Proposals*

Some members of Congress, sensing the need for federal legislation, have introduced legislation to protect limited partners from roll-ups. Representative Edward Markey has introduced H.R. 1885;[177] meanwhile, Senator Christopher Dodd has proposed a similar bill, S. 1423.[178] Each of these bills calls for more complete and clearer disclosure to limited partners asked to approve a roll-up.[179] Furthermore, each proposal mandates availability of an appraisal for each limited partner who desires one.[180]

While the reforms suggested by these measures would do much to alleviate limited partners' problems with roll-ups, the proposals leave many problems unresolved. Neither bill sets forth in any detail how the appraisal is to be conducted. For example, neither proposal addresses how the parties are to determine a value for the RELP shares. Thus, it would be up to the Securities and Exchange Commission, in its rulemaking capacity, to handle issues such as whether the value of the RELP shares should be reduced by an illiquidity discount.[181] If

174. 15 U.S.C. §§ 77a-77aa (1988).

175. 328 U.S. 293 (1946).

176. *See, e.g.*, Reeves v. Teuscher, 881 F.2d 1495, 1499 n.6 (9th Cir. 1989); Rodeo v. Gillman, 787 F.2d 1175, 1177-78 (7th Cir. 1986); SEC v. Murphy, 626 F.2d 633, 640-41 (9th Cir. 1980).

177. H.R. 1885, 102d Cong., 1st Sess. (1991).

178. S. 1423, 102d Cong., 1st Sess. (1991). Furthermore, a senate bill has been introduced which would impose a tax for all roll-ups which do not provide limited partners with dissenters' rights. S. 1393, 102d Cong., 1st Sess. (1991).

179. H.R. 1885, 102d Cong., 1st Sess. § 2(a) (1991); S. 1423, 102d Cong., 1st Sess. § 2(a) (1991).

180. H.R. 1885, 102d Cong., 1st Sess. § 3(a)-(c) (1991); S. 1423, 102d Cong., 1st Sess. § 3(a)-(c) (1991). The bills also would amend proxy rules to allow limited partners to "engage in preliminary discussions for the purposes of determining whether to solicit proxies . . . ." *E.g.*, S. 1423. 102d Cong., 1st Sess. § 2(a) (1991). In addition, each would require any prospectus or solicitation to be "clear, concise, and understandable." *E.g.*, S. 1423, 102d Cong., 1st Sess. § 2(a) (1991). One major point of contention during subcommittee debate over the bills has been the definition of partnerships subject to the statute. Proponents of reform fear that too narrow a definition will provide a loophole in the act and fail to adequately protect limited partners.

181. *See supra* Section I.A.3. The SEC recently adopted rules with respect to roll-ups. The rules prohibit brokers from receiving higher compensation for soliciting "yes" votes than for obtaining "no" votes from limited partners. The rules limit broker compensation to 2% of the exchange value of the newly created securities and ensure broker compensation notwithstanding rejection of the proposed roll-up by the limited partners. Order Granting Approval of Proposed Rule Change Relating to Compensation in Connection with the Solicitation of Roll-Ups, 56 Fed. Reg. 42,095, 42,096 (1991). While these reforms appear useful, the changes may not be sufficient

one of these measures (or similar legislation) becomes law, the SEC will determine exactly how well the statute protects limited partners.

CONCLUSION

Despite the promises of general partners, roll-ups have not helped limited partners salvage their investments. On the contrary, most RUEs have performed quite poorly on the market. Despite this, over $3 billion worth of RELPs could be the subject of future roll-ups. Although there are indications that limited partners may not be as quick to approve roll-ups as they have in the past,[182] a limited partner who does not wish to participate in the roll-up has no alternative if a majority of the limited partners approves it. Litigation offers little hope to limited partners, who, on the average, hold small investments. Some states have attempted to address the roll-up problem, but only federal legislation can effectively regulate roll-ups.

This Note suggests a statutory framework for providing dissenting limited partners with an alternative to roll-ups. The suggested scheme aids limited partners by protecting their reasonable expectations through an appraisal remedy. Also, by delineating many of the logistics of the appraisal process, such a statute would reduce the expense associated with the procedure. Finally, a law requiring payment of fair value for dissenting limited partners' RELP shares may discourage some general partners from proposing ill-conceived roll-ups.

Although many members of Congress perceive the need for federal legislation, the bills proposed thus far lack specificity. The sponsors of these measures have chosen instead to leave the details to the SEC rulemaking process. It is possible that the SEC may promulgate rules which mandate a procedure similar to the one suggested here. If so, these legislators' efforts to protect limited partners will be a success. On the other hand, the bills may be defeated or the SEC may make rules which lack essential features, such as awarding dissenters an amount based on the value of the underlying real estate. In that event, dissenting limited partners may find themselves in their original predicament — confronted by a roll-up with no viable alternative to participation.

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to protect limited partners. *See* Tracey L. Longo, *NASD Board OKs Equal-Pay Rule for Roll-Up Votes*, INVESTMENT DEALERS' DIG., May 27, 1991, at 8.

182. *See* Barry Vinocur, *Protests Build Over the Roll-Up Binge*, BARRON'S, Jan. 7, 1991, at 69.