

Barking without Biting: How Corwin did not Change M&A

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The lecture will explore takeover law in the United States, particularly so-called Revlon duties. Litigation against M&A transactions is so ubiquitous that it is often characterized as a “deal tax” that parties must pay to the plaintiff’s counsel regardless of the lawsuit’s merits. Courts and other policymakers intervened to mitigate the litigation abuses of the early 2010s. One notable example is the Corwin case, considered one of the most consequential corporate law decisions of the 2000s. The decision departs from the long-standing regime of enhanced scrutiny for directors of target companies, including those imposed by Revlon, which requires directors to seek the highest price reasonably achievable in a change of control transaction in favor of the much less demanding business judgment rule, whenever “a transaction . . . is approved by a fully informed, uncoerced vote of the disinterested stockholders.” The paper on which the lecture is based explores the impact of two Delaware Supreme Court cases, C&J Energy (2014) and especially Corwin (2015), on transactional merger practice. The Corwin decision, which replaced the enhanced scrutiny for directors of target companies imposed by Revlon with the less demanding business judgment rule when a transaction is approved by a fully informed, uncoerced vote of the disinterested stockholders, has been criticized by some legal scholars for de facto limiting directors’ fiduciary duties by reducing the ability of plaintiffs to pursue monetary claims against boards of directors in M&A transactions. The paper analyzes the impact of these court decisions on M&A contracting practices, including the size of lock-ups and target termination fees, pre-signing market checks, and go-shop provisions. The study analyzes all domestic public deals in the 2010-18 period for a contestable domestic target with an equity value of at least \$100 million and found only a limited impact on M&A contracting practices.