

Does Revlon Matter? An Empirical and Theoretical Study

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Abstract

We empirically examine whether and how the doctrine of enhanced judicial scrutiny that emerged from *Revlon* and its progeny actually affects M&A transactions. Combining hand-coding and machine learning techniques, we assemble data from the proxy statements of publicly announced mergers over a fifteen year period, 2003-2017, ultimately assembling a dataset of 1,913 unique transactions. Of these, 1,167 transactions are subject to the *Revlon* standard, and 553 are not. After subjecting this sample to empirical analysis, our results show that *Revlon* does indeed matter for companies incorporated in Delaware. We find that for Delaware *Revlon* deals are more intensely negotiated, involve more bidders, and result in higher transaction premiums than non-*Revlon* deals. However, these results do not hold for target companies incorporated in other jurisdictions that have adopted the *Revlon* doctrine.

Our results shed light on the implications of the current state of uncertainty surrounding *Revlon* and provide some direction for courts going forward. We theorize that *Revlon* is a monitoring standard, the effectiveness of which depends upon the judiciary's credible commitment to intervene in biased transactions. The precise contours of the doctrine are unimportant provided the judiciary retains a substantive avenue for intervention. Recent Delaware decisions in C&J and Corwin have been criticized for overly restricting *Revlon*, but we suggest that such concerns are overstated so long as Delaware judges continue to monitor the substance of transactions. Thus, in applying these decisions Delaware judges should focus not on procedural aspects but the substantive component of transactions which *Revlon* initially sought to regulate.

Keywords: Corporate Law, M&A, enhanced scrutiny, Revlon duties, takeovers, merger litigation, Corwin, Fiduciary Duties, Delaware, empirical, machine learning, negotiation process, deal premium

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Draft of February 4, 2020

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* Senior Fellow, Berkeley Center for Law and Business. For helpful comments the authors wish to thank Stephen Bainbridge, Keith Bishop, Jens Dammann, Elizabeth de Fontenay, Zachary Gubler, Daniel Hemel, Travis Laster, George Mossary, and Holger Spamann as well as attendees at the 2019 BYU Winter Conference, the 2019 Conference on Empirical Legal Studies, the 2018 National Business Law Scholars Conference, the Weinberg Center 2020 Corporate Governance Symposium, and workshops participants at Harvard, The London School of Economics, NYU, and UCLA. We also thank James Hicks for research assistance.

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I. Introduction

The *Revlon* doctrine has reached almost mythical status. Named for the seminal case which invented it, *Revlon v. MacAndrews & Forbes Holdings*,¹ the doctrine holds that in a change of control transaction a seller board is required to seek and achieve the highest price reasonably available.² *Revlon* is one of the few cases every corporate lawyer knows.³ The case has been cited thousands of times in Westlaw.⁴ It is covered in every corporations casebook and the subject of hundreds of law review articles. Most importantly, it has become the touchstone doctrine for the substantive judicial review of the mergers and acquisitions transactions.

But does *Revlon* really matter? That is, can it actually be shown to affect the sale process of transactions subject to it? And, if so, how?

In this paper we conduct an in-depth empirical examination of the effect of the *Revlon* doctrine on the takeover process. We theorize that the *Revlon* doctrine – through its substantive review – will result in target boards engaging in more search and negotiation in their sale process.⁵ More specifically, we theorize that target boards acting under

¹ 506 A.2d 173 (Del. 1986).

² *Id.* at 182. See also *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989) (“[I]n a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders.”); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) (“[T]he board must act in a neutral manner to encourage the highest possible price for shareholders.”).

³ See generally James D. Cox & Randall Thomas, *Delaware’s Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Law*, 42 DEL. J. CORP. L. 323, 324 (2018) (describing *Revlon* as one of a “golden quartet” of momentous corporate law decisions).

⁴ The case has been cited 4,900 times in Westlaw, including in 1,636 law reviews (search as of June 5, 2019).

⁵ See generally Stephen M. Bainbridge, *MERGERS & ACQUISITIONS* 298-99 (2012) (distilling *Revlon* to even-handed treatment of bidders and a sales process “reasonably designed to elicit the best possible offer”). *Accord* *Frank v. Elgamal*, 2014 WL 957550, at *21 (Del. Ch. Mar. 10, 2014) (noting “best practices” that may satisfy *Revlon*, including “[s]oliciting potential acquirers in advance of agreeing to a transaction” and considering open to “alternative transactions offered by any responsible buyer”) (citations omitted).

Revlon will have more bidders during the private negotiating process, engage in more protracted negotiations with these bidders, have more third party bidder interventions post-announcement, and ultimately will achieve higher premiums.

We examine these questions through a novel M&A dataset of 1,913 transactions from 2003-2017. We build this dataset through hand-coding and utilization of machine language learning techniques of proxy and tender offer statements which describe the bidding process. We collect information on a number of variables including bidding rounds, number of bidders, types of acquirers (e.g., private equity versus strategic), and prices negotiated.

We find, essentially, that *Revlon* matters, at least for Delaware firms. For Delaware incorporated firms, deals within *Revlon* result in more protracted negotiations, more rounds of bidding, more bidders, and higher deal premiums. However, these results do not hold for states outside of Delaware that have also adopted *Revlon*. When we exclude Delaware-incorporated firms, we find no differences in any key variables for *Revlon* and non-*Revlon* deals. *Revlon* matters, but it matters only in Delaware.

Our results do not appear to be driven by other transaction-specific characteristics. For example, although we find, consistent with other studies, that private equity buyers pay significantly lower premiums (up to 8% lower on average), our other results remain qualitatively similar, indicating that private equity transactions do not drive our results. Nor are our results driven by the unique characteristics of “mergers of equals” (MOEs) whereby the parties deliberately do not seek out other bidders or focus on premium because the transaction value is in the strategic combination of the companies. In a series of robustness tests, we find significant bidding in non-*Revlon* transactions, a fact inconsistent with the idea that MOEs drive our results.

On average, *Revlon* transactions in Delaware have multiple bidders 60% of the time, 5.83 bidding rounds, a negotiation period of about four and a half months, and a 37% offer premium. Non-*Revlon*

transactions in Delaware have multiple bidders 32% of the time, 4.49 bidding rounds, a negotiation period of about three months, and a 27% offer premium. We further test this finding by examining the 23 merger of equals transactions in our sample. We find that these transactions have significantly lower measures of these variables than both *Revlon* and non-*Revlon* transactions, which indicates that our findings are not driven by mergers of equals.⁶

So, given our findings that *Revlon* matters, what can we say about how it matters? A clue is offered by the different results between states adopting *Revlon*. Although several states have adopted the doctrine, we find that it has an effect in Delaware alone. We explain this finding by reference to the more active and focused Delaware judiciary, which has a core competency in M&A transactions. Delaware courts have thus been more willing to substantively review and intervene in transactions which violate *Revlon*.⁷ This may be true even today, where Delaware courts intervene considerably less often than they did in the 1980s. The credible threat to intervene may be enough. The threat is credible in Delaware because its judiciary has demonstrated its willingness to intervene. In other states, the threat of judicial intervention is less credible, and *Revlon* therefore is less meaningful.

⁶ *Revlon* itself applies when there is a change of control or break-up of the company. *Paramount Communications v. QVC Network*, 637 A.2d 34 (1994). In *QVC*, the court held that a change of control did not occur when the shares of the combined companies were “owned by a fluid aggregation of unaffiliated stockholders both before and after the merger.” *Id.* at 46-47. These non-*Revlon* transactions are still subject to scrutiny under the *Unocal* doctrine. *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985). See *infra* notes 18-22 and accompanying text.

⁷ This is a form of enhanced scrutiny. The Delaware Supreme Court has stated that in a *Revlon* deal, “[t]he key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decision-making process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors’ action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.” *QVC Network*, 637 A.2d at 45.

Seeing *Revlon* as a flexible monitoring standard suggests a course for its future evolution. We follow corporate law theory in justifying judicial intervention in M&A as a constraint on managerial rent-seeking at a time when opportunism is relatively unconstrained by other norms. Judicial intervention may thus be less necessary when other constraints retain their force. But when, as in final period sale-of-the-company transactions, alternative constraints weaken, the case for judicial intervention strengthens.

These considerations provide insight into the debate surrounding two recent Delaware decisions that seem to substantially restrict the scope of *Revlon*-duties. *Corwin v. KKR Financial Holdings LLC* eliminated breach of fiduciary duty claims if full disclosure was made prior to shareholder the shareholder vote.⁸ Read together with *C&J Energy Services v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*,⁹ which purported to limit the ability of Delaware courts to grant injunctions under *Revlon*, *Corwin* would seem to confine *Revlon* either to transactions involving materially inadequate disclosure or to transactions where a third-party bidder seeks an injunction. Yet our results hold even when we control for these cases. We suggest two interpretations for this non-result. First, it may be that in spite of the ways in which *Corwin* and *C&J* change the law, M&A practitioners continue to advise clients based on prior norms and practices. Alternatively, it may be that notwithstanding *Corwin* and *C&J*, Delaware courts have found ample space for judicial review albeit through different mechanisms.

Ultimately, our results indicate that while *Revlon* matters, it matters in an ecosystem where there is the potential for judicial review and intervention by a competent judiciary. The lesson of *Revlon* may thus be that a standard alone is insufficient – it is the implementation and oversight which counts. As for the criticism of *C&J* and *Corwin*, such criticism may be overstated to the extent that *Revlon*'s core precept – access for judicial intervention into substantively biased transactions – is preserved.

⁸ 125 A.3d 304 (2015).

⁹ 107 A.3d 1049 (2014).

From this Introduction, the article proceeds as follows. Part II situates *Revlon* both in corporate law doctrine and corporate law theory, demonstrating its centrality to both. Part III contains our empirical analysis. It begins by developing our hypotheses and by describing our sample selection. It then offers descriptive statics and elaborates the core findings of our empirical analysis. Finally, it summarizes a series of robustness checks designed to address endogeneity concerns. Next, Part IV considers the implications of our empirical analysis by examining *how* *Revlon* matters, considering whether the doctrine ought to be expanded or contracted, and framing the interpretive issues going forward. Finally, Part V closes with a brief summary and conclusion.

II. Revlon's Place in Corporate Law

Revlon, a decision of the Delaware Supreme Court from nearly thirty-five years ago remains the leading case outlining the duties of directors in third-party mergers. Because Delaware is the most important corporate law jurisdiction¹⁰ and because third-party mergers comprise the majority of M&A activity, *Revlon* is among the most important cases in modern deal-making.¹¹ *Revlon* defines the deal market. Yet there is evidence that the *Revlon* doctrine is now in decline. Indeed, although corporate law scholars remain divided on the meaning of the doctrine, they broadly agree that whatever it meant or seemed to mean, *Revlon's* bite as a substantive standard has dissipated.¹²

¹⁰ See generally ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993) (analyzing Delaware's prominent status in corporate law).

¹¹ According to Factset Mergermetrics, over []% of merger transactions are between unaffiliated parties during the time period from 2003-2018.

¹² See Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, in THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? at 1 (Steven Davidoff Solomon and Randall S. Thomas eds., University of Chicago Press 2019) ("The takeover standards that we learn and teach in law school, *Revlon*, *Unocal*, *Weinberger*, and *Blasius*, appear to be in decline"); Charles R. Korsmo, *Corwin v. KKR and the Retreat of Judicial Scrutiny of Mergers* (Working Paper 2017); Cox, *supra* note 3, at 329 ("In recent decisions, we find that *Revlon's* bark is today greatly muffled and its bite largely nonexistent."). We further discuss this *infra* notes 82-87 and accompanying text.

This Part situates *Revlon* in modern corporate law doctrine. It first examines the origins of the decision and its impact on subsequent corporate law jurisprudence. It then analyzes the place of *Revlon* in corporate law theory, summarizing the prior literature interpreting the opinion and the more recent debate over its current relevance.

A. The Rise and Fall of Revlon Doctrine

At its core, the *Revlon* case is one in which a frustrated third-party bidder sues to enjoin the consummation of a transaction between the target company and a favored bidder. The case began when the Revlon board responded to Ron Perelman's unsolicited bid for the company by engaging in a series of defensive maneuvers designed to fend him off. Among these was the buyback of some of Revlon's public shares for a class of senior subordinated notes (the "Notes"). Perelman was determined, however, and responded to the board's defensive maneuvers by raising his bid for the company. As a result, the Revlon board determined that the best way to keep Perelman at bay was to pursue an acquisition with a "white knight" bidder, Forstmann Little ("Forstmann").¹³ Undeterred, Perelman continued to raise his bid, forcing Forstmann into a bidding war, which Perelman promised to win by engaging in fractional bidding to top any Forstmann offer. Nevertheless, the board declared Forstmann the winner and locked up the deal by granting Forstmann a below-market option to purchase one of the company's most valuable businesses should Revlon be sold to another bidder. Because the lock-up destroyed his plans for the company, Perelman had no choice but to sue for an injunction of the Revlon-Forstmann agreement to permit further rounds of bidding.

¹³ Forstmann, a private equity firm, was content to leave incumbent management in charge of substantial parts of Revlon provided they produced sufficient revenue to service the debt incurred in connection with the acquisition. CONNIE BRUCK, *THE PREDATORS' BALL* (1989).

The Delaware Supreme sided with Perelman, holding that something about the acquisition process transformed the Revlon board, famously, “from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.”¹⁴ While it would remain unclear for some years exactly what triggered this transformation and what precisely was required of boards once the transformation had occurred, *Revlon* itself clearly holds that once a company has opened itself to a bidding process, the board cannot end it without satisfying itself that the process had maximized shareholder value. The Revlon board had picked Forstmann over Perelman, it said, because Forstmann offered a better price, better financing, and had committed to supporting the value of the Notes. Rejecting the first two rationales as inconsistent with the facts, the court focused on the third, noting that the board’s principal consideration “appears to have been protection of the noteholders over the shareholders’ interests.”¹⁵ This, the court held, was the problem. The board had favored another constituency—creditors—over shareholders in the sale of the company. The point of the “auctioneer” analogy is that when the company is sold, the board must maximize shareholder value in the sale, not creditor value, employee value, or any other constituent value. Instead, “[m]arket forces must be allowed to operate freely to bring the target’s stockholders the best price available for their equity.”¹⁶ In the aftermath of the case, the duty to maximize shareholder value in a sale-of-the-company transaction came to be known as “*Revlon*-duties.”

Subsequent cases clarified the lingering questions of what triggered *Revlon*-duties and what actions were required of boards in satisfying them. With regard to the first question, *Revlon*-duties are triggered by a “change of control” which principally includes an acquisition of target shares for cash, as in *Revlon* itself,¹⁷ or in the case

¹⁴ *Revlon*, 506 A.2d 173, 182 (Del. 1986).

¹⁵ *Id.* at 184.

¹⁶ *Id.*

¹⁷ Immediately after *Revlon*, cases focused on the initiation of a process to sell or break-up the company or situations in which a target acquiesces to a takeover offer. *See*,

of a stock-for-stock acquisition, an acquisition in which diffusely held public equity is exchanged for shares of a company in which there is a controlling shareholder.¹⁸ The principal transaction type that does not trigger *Revlon* is the stock-for-stock deal in which the post-closing entity remains controlled by disaggregated stockholders.¹⁹ With regard to the second question, although *Revlon* duties require a sale process reasonably designed to maximize shareholder value, they do not require an auction or preclude a transaction negotiated with a single bidder, provided that the company is exposed to other bidders either before or after the merger agreement is signed. Many cases finding a breach of *Revlon* duties focus on a conflict of interest resulting in the board favoring one bidder over others for reasons unrelated to shareholders

e.g., *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) (holding that *Revlon* duties apply in three scenarios: (1) a sale involving a break-up, (2) a sale to an unsolicited bidder, and (3) approval of a change of control transaction). However, the concept of a change of control—essentially, a transaction in which the shareholder base changes, as in a cash-for-stock buyout—logically includes the first two categories. We therefore focus on the form of consideration in the construction of our dataset.

¹⁸ *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 37 (Del. 1993). Other potential triggers for the doctrine have been rejected. *See generally* Ronald J. Gilson & Reinier Kraakman, *What Triggers Revlon?*, 25 WAKE FOREST L. REV. 37 (1990).

¹⁹ Within these non-*Revlon* transactions there is a type of transaction known as a merger of equals. The core principle of a merger of equals is that it truly is a merger of equals driven by strategic considerations where a merger premium is unnecessary. In actuality, merger of equals often fail due to the fact that one set of managers typically winds up with the upper hand. *See* Steven Davidoff Solomon, *Lessons From the Breakup of an Advertising Merger*, THE N.Y. TIMES, Apr. 13, 2014, available at <https://dealbook.nytimes.com/2014/05/13/lessons-from-the-breakup-of-an-advertising-merger/>; Melvin Aron Eisenberg, *The Director’s Duty of Care in Negotiated Dispositions*, 51 U. MIAMI L. REV. 579, 602 (“If shareholdings are so widely dispersed that no shareholders have control, still someone has control. ...[M]anagement. Therefore, in any transaction involving the combination of two corporations with widely dispersed shareholdings in which one corporation’s management ends up in the driver’s seat, control of the other corporation *has* shifted.”). The change-of-control test, however, looks merely to whether the transaction results in the emergence of a single shareholder capable of controlling management, not whether the two corporations or their management teams are truly equal. *Paramount.*, 637 A.2d at [37].

wealth.²⁰ The same is true of *Revlon* itself, in which the court focused both on the personal antipathy between Ron Perelman and Revlon's CEO as well as the Revlon board's fear of being sued by the holders of the Notes should their value fall below par.²¹

Revlon is not the only Delaware case relevant to M&A practice. It speaks principally to deals involving unaffiliated third-party buyers. Board duties in transactions with a controlling shareholder are derived from another line of cases.²² Nor is it the only case setting forth expectations of boards in connection with third party bids. *Unocal v. Mesa Petroleum* establishes limitations on a board's ability to defend its projects from unsolicited bids.²³ And a line of cases from *Smith v. Van Gorkom* outlines further standards of conduct in deals with third party buyers.²⁴

²⁰ See, e.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1264 (Del. 1988) (management team's financial interest in winning auction and its domination of the nominally independent board contaminated sale process); *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 442 (Del. Ch. 2012) (investment banker conflict of interest); *In re Del Monte S'holders Litig.*, C.A. No. 6027-VCL (Del. Ch., Dec. 1, 2011) (investment banker conflict of interest); *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 91 (Del. Ch. 2007) (interest of founding family in remaining in management may have caused target to prefer private equity bidder).

²¹ *Revlon*, 506 A.2d at 176 (noting that the repeated bids may have been rebuffed "in part based on Mr. Bergerac's strong personal antipathy to Mr. Perelman"); *Id.* at 178 ("One director later reported (at the October 12 meeting) a "deluge" of telephone calls from irate noteholders, and on October 10 the Wall Street Journal reported threats of litigation by these creditors").

²² See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711-15 (Del. 1983) (holding that the standard of "entire fairness" applies to controlling shareholder deals); see also *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) [hereinafter *MFW*] (holding that involvement of a special committee and a majority of the minority vote may shift the standard of review from entire fairness back to the business judgment rule).

²³ 493 A.2d 946, 954 (Del. 1985). See also *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 608 (Del. 2010) (holding that a board need not abandon a long-term business strategy in the face of an unsolicited bid and may therefore keep defenses in place); *Air Products & Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 129 (Del. Ch. 2011) (same).

²⁴ 488 A.2d 858 (Del. 1985). *Van Gorkom* stands for the proposition that a board must be "fully informed" when it engages in a sale process. *Id.* at 873 ("[A] director has a duty... to act in an informed and deliberate manner in determining whether to approve

Nevertheless, *Revlon* is the central case in third party deals. *Revlon* drives judicial analyses of defensive devices, with the applicability of *Revlon*-duties typically determining the outcome.²⁵ Likewise, in contrast to other cases that clarify details—requiring, for example, a fairness opinion or a fiduciary out²⁶—*Revlon* frames the big picture, outlining the basic rules for selling a company. *Revlon* answers whether the parties can negotiate on an exclusive basis, when other bidders must be invited to join the process, and how bidding may be brought to a close. Furthermore, although *Revlon* is perhaps most applicable to sales processes, like the one in the case itself, in which an intervening bidder seeks an injunction to stop an unfair sale process, it is not limited to that context. Instead, the animating principle of *Revlon*-duties guides boards and transaction planners without regard to whether an intervening bidder arises to challenge their deal.²⁷

an agreement of merger before submitting the proposal to the stockholders.”). This principal also animates later cases holding that a board cannot preclude itself from considering intervening bids because doing so would render it uninformed at the time that it submits the transaction to shareholders for their approval. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003) (holding that “[t]he stockholders of a Delaware corporation are entitled to rely upon the board to discharge its fiduciary duties at all times” and therefore that “[t]he NCS board was required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority stockholders”). See also Sean J. Griffith, *The Omnipresent Specter of Omnicare*, 38 J. CORP. L. 753 (2013) (critiquing this line of cases).

²⁵ See Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers*, 80 TEX. L. REV. 261, 284 (2002) (empirical study finding that courts enjoined defensive devices under *Unocal* almost exclusively when *Revlon* also applied).

²⁶ The fairness opinion “requirement” is commonly associated with *Van Gorkom*, while the fiduciary out requirement is a legacy of *Omnicare*. See Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. LAW REV. 1557, 1570-71 (2007) (detailing how *Van Gorkom* imposed a de facto rule requiring target boards of Delaware companies to obtain fairness opinions); Griffith, *supra* note 24, at 754 (*Omnicare* “had immediate and wide-ranging implications both for transactional practice, effectively requiring a fiduciary out in every merger agreement.”)

²⁷ See Steven M. Davidoff & Christina Sautter, *Lock-up Creep*, 38 J. CORP. LAW. 681 (2013) (detailing the various merger agreement provisions companies negotiate under the shadow of *Revlon*)

Revlon has spread to corporate law jurisdictions beyond Delaware.²⁸ Seventeen states have decided cases involving *Revlon*-duties. Of these, five states (North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin) rejected *Revlon* from the outset,²⁹ and three other states (Indiana, Nevada, and New York) ultimately rejected *Revlon* by reversing earlier decisions holding that *Revlon*-duties applied.³⁰ By contrast, Maryland recognized the *Revlon* doctrine after reversing an earlier case that had rejected it.³¹ Hence, by 2003, of the seventeen states to have expressly considered it, the *Revlon* doctrine had been adopted into the law of nine states (California, Delaware, Illinois, Kansas, Maryland, Mississippi, Minnesota, Missouri, and New Hampshire).³²

Revlon's breadth, however, eventually fueled a crisis in shareholder litigation. Because individual shareholders can sue to enforce *Revlon*-duties against allegedly deficient boards in the absence of an intervening bidder, plaintiffs' lawyers learned to recruit a

²⁸ See Matthew D. Cain, Stephen McKeon and Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from 50 Years of Hostile Takeovers*, 124 J. FIN. ECON. 464 (2017).

²⁹ See *id.* at 469-70.

³⁰ See *id.* Indiana rejected *Revlon* as inconsistent with its non-shareholder constituency statute. See Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 Pepp. L. Rev. 971 (1992) (discussing such statutes in relation to *Revlon* and describing the Indiana statute as an express repudiation of *Revlon*). Interestingly, roughly half of the states that have adopted *Revlon* into their law also have non-shareholder constituency statutes (Illinois, Maryland, Mississippi, Minnesota, and Missouri). In spite of the apparent incongruity, such statutes may not be inconsistent with *Revlon* because all make the consideration of other constituency interests optional. George A. Moesary, *Freedom of Corporate Purpose*, 2016 B.Y.U. L. Rev. 1319, 1359-62 (2017),

³¹ See *id.*

³² See *id.* This data was compiled from Matthew D. Cain, Stephen McKeon & Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from 50 Years of Hostile Takeovers*, 124(3) J. Fin. Econ. 464 (2017) and Michal Barzuzza, *The State of State Antitakeover Law*, 95 Virginia L. Rev. 1973 (2010) and updated by hand. These articles document the position of states on *Revlon*, taking into account federal courts that have weighed in on the question.

shareholder plaintiff to sue in virtually every M&A transaction.³³ Eventually, between eighty-five and ninety-five percent of all merger transactions valued over \$100 million attracted at least one shareholder suit, typically filed as a class action.³⁴ Complaints began by invoking *Revlon* to challenge the merger process, only to be amended once the provision proxy statement was released, to allege disclosure deficiencies as well.³⁵ Appending disclosure claims to the core *Revlon* claims both opened a door to expedited discovery and cleared a path to settlement.³⁶ Taking into account the cost of discovery and the risk involved in winning a motion to dismiss under tight time constraints, defendants chose to settle for supplemental disclosures and, of course, attorneys’

³³ On the recruitment of plaintiffs, see Sean J. Griffith, *Innovation in Disclosure-Based Shareholder Suits*, 69 CASE WESTERN RESERVE L. REV. ____ (forthcoming 2019) (describing attorney advertising masked as press releases of “investigations” into board conduct designed to yield clients in merger litigation).

³⁴ Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015*, at 2, available at SSRN: <https://ssrn.com/abstract=2715890>.

³⁵ See Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RESEARCH, 1 (2012):

Common allegations include the deal terms not resulting from a sufficiently competitive auction, the existence of restrictive deal protections that discouraged additional bids, or the impact of various conflicts of interests, such as executive retention or change-of-control payments to executives. Complaints also typically allege that a target’s board failed to disclose sufficient information to shareholders to enable their informed vote. Insufficient disclosure allegations have focused on information related to the sale process, the reasons for the board’s actions, financial projections, and the financial advisors’ fairness opinions.

³⁶ Shareholders alleging disclosure claims were virtually assured of expedited discovery because the Delaware standard focusing on irreparable injury was met in every case by the argument that shareholders would be irreparably harmed by voting on deals in which adequate information had not been disclosed. See *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994) (setting forth standard for expedited discovery as a “colorable claim and . . . a possibility of . . . irreparable injury”). “Colorability” is not a substantial burden. *Sinchareonkul v. Fahnemann*, 2015 WL 292314, at *1 n. 1 (Del. Ch. Jan. 22, 2015) (“[T]he standard for expedition, colorability, which simply implies a non-frivolous set of issues, is even lower than the ‘conceivability’ standard applied on a motion to dismiss.”)

fees.³⁷ Disclosure settlements thus became the principal route out of *Revlon* claims.³⁸ But the ease of settlement only encouraged further filings until *Revlon* claims and disclosure settlements accompanied virtually every deal. The dynamic clogged Delaware courts with non-meritorious claims³⁹ and eroded the fundamental values the law sought to protect.⁴⁰

³⁷ Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015) (documenting this pattern and testing the effect of supplemental disclosures on shareholder voting).

³⁸ Approximately seventy percent of merger cases settle—and almost all the rest are dismissed. Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 477 (2015) (“[L]itigation with respect to transactions is dismissed by the court 28.4% of the time. The other 71.6% of transaction litigations result in some type of settlement.”). There are still a handful of cases that go to trial, but it is rare. *See, e.g.*, *In re Rural Metro Corp. St’holders Litig.*, 88 A.3d 54 (Del. Ch. 2014) and *In re Dole Food Co., Inc.*, 2015 WL 5052214 (Del Ch. 2015)

³⁹ Stephen Bainbridge, *Fee-Shifting: Delaware’s Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 852 (2016) (stating that merger litigation is a “problem that has reached crisis proportions”).

⁴⁰ *See, e.g.*, Joel E. Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877 (2016).

The widespread availability of disclosure settlements created perverse pressures on transactional counsel and defense counsel. Lawyers for target corporations and their fiduciaries, financial advisors and purchasers rationally expected that much M&A litigation can be resolved by means of a disclosure settlement. This knowledge lessened the influence of transactional counsel to uncover or police conflicts of interest while a sale process or transaction is pending and to ensure the prompt, full disclosure of material facts. When litigation began, defense counsel were incentivized to devote their talents to drafting supplemental disclosures amenable to a negotiated resolution, and guiding litigation along a path of least judicial oversight. Successful merits-based litigation by plaintiffs' counsel empowers transactional counsel to avoid, police, and disclose conflicts of interest. Disclosure settlements do not.

Id. at 882-83.

After experimenting with a variety of possible responses to the crisis in merger litigation,⁴¹ the Delaware judiciary responded by resetting *Revlon*. In *Corwin v. KKR Financial Holdings*,⁴² the Delaware Supreme Court affirmed the dismissal of a post-closing damages claim involving a third-party merger.⁴³ Because the shareholders had voted in favor of the merger, the court held, *Revlon*-duties no longer applied.⁴⁴ The fully-informed, uncoerced vote of shareholders cancelled the need for judicial intervention, and the applicable standard of review returned to the business judgment rule.⁴⁵ *Revlon*, in other words, does not apply. The shareholder vote substitutes for judicial scrutiny.⁴⁶

⁴¹ See, e.g., *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 560 (Del. 2014) (offering fee-shifting provisions as a potential response to the problem of non-meritorious litigation); *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (offering forum-selection as a way of dealing with non-meritorious suits filed in other jurisdictions). However, the legislature quickly reversed the judiciary on fee-shifting, and defendants proved reluctant to use forum-selection to avoid disclosure settlements. See Dan Awrey, Blanaid Clarke & Sean J. Griffith, *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 YALE J. REG. 1, 59-62 (2018) (discussing failed attempts to respond to the crisis in merger litigation).

⁴² 125 A.3d 304, 314 (Del. 2015).

⁴³ Although much of the dispute in the Court of Chancery was over whether the buyer should be treated as a controlling shareholder, the case was decided as if it were a third-party merger. *Id.* at 306-08. The logic of the opinion has since been extended to tender offers. See *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 738 (Del. Ch. 2016) (applying business judgment review where “disinterested, uncoerced, fully informed stockholders tendered a majority of [target company’s] outstanding shares into the Tender Offer”).

⁴⁴ *Corwin*, 125 A.3d, at 306 (“[W]e find that the Chancellor was correct in finding that the voluntary judgment of the disinterested stockholders to approve the merger invoked the business judgment rule standard of review and that the plaintiffs’ complaint should be dismissed.”).

⁴⁵ *Id.* at 308 (holding that an “uncoerced, informed stockholder vote is outcome-determinative, even if *Revlon* applied to the merger.”)

⁴⁶ The goal of substituting the vote for judicial scrutiny was expressly announced in the decision itself: “when a transaction is not subject to the entire fairness standard, the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves.” *Id.* at 313.

At first glance, *Corwin* may not seem like much of a departure. It follows recent Delaware cases in substituting transaction procedures, notably voting, for heightened judicial scrutiny.⁴⁷ Moreover, it was a damages case, a context in which Delaware judges had applied *Revlon* grudgingly, if at all.⁴⁸ However, the meaning of *Corwin* becomes clear when it is paired with the Delaware Supreme Court's earlier ruling in *C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*,⁴⁹ which held that transactions should generally not be enjoined in the absence of an alternative bidder.⁵⁰ Like *Corwin*, *C&J* follows longstanding Delaware practice,⁵¹ but in tandem, the decisions seem to prune *Revlon*-duties back substantially. *Corwin* clarifies that *Revlon* is generally available only for injunctions, not damages, and *C&J* clarifies that for an injunction to issue, an intervening bidder must have arisen. Together the cases seem to restore *Revlon* to its original factual context: the doctrine remains available for an intervening bidder seeking an injunction against board conduct in a competitive bidding situation. But the combination of *Corwin* and *C&J* would seem to eliminate what one influential jurist has referred to as “non-*Revlon*, *Revlon* cases”—that is, cases that involve a

⁴⁷ See, e.g., MFW, 88 A.3d 635. See also J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1443 (2014) (arguing that only in the absence of independent, disinterested, and sufficiently informed decision maker will court apply stringent review).

⁴⁸ See, e.g., *Lyondell Chem. Co. v Ryan*, 970 A.2d 235, 243 (Del. 2009) (denying damages claim by finding a board of directors had acted in good faith in spite of not having conducted a market check). See also *Corwin*, 125 A.3d at 312 (arguing that enhanced scrutiny was designed for injunctions, not damages).

⁴⁹ 107 A.3d 1049 (Del. 2014).

⁵⁰ *Id.* at 1053 (Del. 2014) (“It is too often forgotten that *Revlon*, and later cases like *QVC*, primarily involved board resistance to a competing bid after the board had agreed to a change of control . . .”) (citations omitted).

⁵¹ Delaware courts have long been reluctant to issue injunctions in single-bidder deals for fear of leaving shareholders with no transaction at all. See, e.g., *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432,439 (Del. Ch. 2012) (“Although a reasonable mind might debate the tactical choices made by the El Paso Board, these choices would provide little basis for enjoining a third-party merger approved by a board overwhelmingly comprised of independent directors, many of whom have substantial industry experience.”).

third party deal for cash and which therefore invoke *Revlon*-duties, but which, unlike *Revlon* itself, do not involve an intervening bidder pursuing an injunction.⁵² After *Corwin* and *C&J*, *Revlon*-duties may no longer apply to these cases.

Finally, it is worth noting that *Corwin* and *C&J* may not ultimately deserve the credit for stemming the tide of merger litigation in Delaware. The credit for that may go to the Court of Chancery's 2016 holding in *In re Trulia Stockholder Litigation* which raised the bar for attorneys seeking to collect fees from disclosure settlements.⁵³ Nevertheless, *Corwin* and *C&J* do seem to reflect a shift in the meaning of *Revlon* and, therefore, board duties in third-party deals. Whether the shift is a return to the original meaning of the case or a retreat from it is a subject for scholarly debate, which we discuss in the next section.

B. *Revlon's Place in Corporate Law Theory*

⁵² *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 759 (Del. 2019) (describing “third-party, non-conflicted mergers and acquisitions governed by *Revlon*” as “non-*Revlon*, *Revlon* suits”). In a footnote, the court clarified further:

Unlike in *Revlon*, where the board had resisted selling (and especially selling to a specific bidder), the fact scenario in these multiforum cases typically involved boards actively selling the corporation and seeking out buyers. The plaintiffs in these cases did not in reality seek relief for the class or to stop the deal. Instead, they used the costs and uncertainty of having suits in several forums at once to extract “disclosure-only” settlements resulting in the class getting the same economic deal supposedly being challenged, but with extra disclosures. Although these disclosures typically provided the class with nothing of substance, the plaintiffs' lawyers got a fee and the defendants a release from further exposure.

Id., at 759, n. 97 (citations omitted). An alternative view, however, is that judicial protection is most needed by shareholders in single-bidder transactions, in which there is no intervening bidder to threaten the board's favored transaction.

⁵³ 129 A.3d 884, 898 (Del. Ch. 2016) (holding that supplemental disclosures provide no compensable benefit unless they correct “a plainly material misrepresentation or omission.”).

There are literally hundreds of law review articles on *Revlon*.⁵⁴ An early wave of scholarly commentary discussed whether boards ought to be able to defend themselves against bidders at all and, if so, under what circumstances and to what extent.⁵⁵ *Revlon* settled some of these questions by suggesting that there were limits to boards' authority to employ takeover defenses in at least some situations. Scholarly commentators then turned to the task of articulating whether and when these limits to board authority should apply and to justifying them according to a larger theory of corporate law. Our review of *Revlon*'s place in corporate law theory therefore focuses on the latter wave of scholarly commentary more relevant to the questions we address in this paper. This section takes up the question of how *Revlon* fits within broader theories of corporate law and what those theories reveal about whether recent movements in the doctrine about to a return or a retreat.

Mainstream corporate law theory focuses fundamentally on the problem of agency costs.⁵⁶ Managers will divert wealth from shareholders unless something stops them.⁵⁷ The law is part of what stops them. Theft is illegal, and outright self-dealing is a breach of fiduciary duty. But markets are also part of what stops managers from taking advantage of shareholders. Firms whose managers divert all free cash flow to themselves may find themselves unable to compete in product, labor, and capital markets. The most important market for

⁵⁴ See *supra* note 4.

⁵⁵ For some of the major first generation articles on *Revlon*, see Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1 (1986); Easterbrook & Fischel, *The Proper Role of a Target's Management In Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Ronald J. Gilson, *The Case Against Shark Repellant Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775 (1982).

⁵⁶ Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

⁵⁷ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305 (1976).

constraining managerial agency costs, however, may be the market for corporate control.⁵⁸

If equity markets are efficient, the value of a corporate share reflects the degree to which management diverts shareholder wealth. This creates an opportunity to create value through acquisition. If an inefficiently run company can be taken over, the amount of shareholder wealth presently being diverted to management can be reallocated between the shareholders and the bidder. Everyone benefits, except incumbent managers.⁵⁹ Recognizing that they have much to lose from takeover, managers can be expected to manage efficiently and to divert less wealth from shareholders in order to avoid attracting the attention of a bidder. They may also adopt takeover defenses. The pattern of the law is to allow managers to adopt takeover defenses, perhaps because other market forces (labor markets, product markets, capital markets) still constrain them. But courts are less deferential to defensive measures when the board has put the company up for sale—that is, in its last period of play.

In game theory, the last period is the moment when the cooperative dynamics that had guided player conduct in prior rounds of a game predictably break down.⁶⁰ Anticipating that the game will end, players are no longer constrained by the fear that their opponent will retaliate in a future round and are motivated to extract as much as possible before the game ends. The sale of a company presents a last-period scenario, in which the ordinary constraints of product, labor, and

⁵⁸ The insight goes back to Professor Henry Manne. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965). See also authors cited in note 55.

⁵⁹ Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 842 (1981) (“Selling shareholders receive more for their stock than its value under previous management; new management receives an entrepreneurial reward through the increased value of acquired shares; and society benefits from more efficiently used resources.”).

⁶⁰ See DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 110 (1991) (showing that in repeated games, players “condition their actions on the way their opponents played in previous periods.”)

capital markets no longer constrain managerial agency costs.⁶¹ If managers can insulate their favored transaction from being challenged by intervening bidders, the market for corporate control will likewise not prevent them from diverting wealth from shareholders to themselves.

Revlon responds to precisely this problem. The increase in judicial scrutiny and the reluctance to allow defensive devices when *Revlon*-duties apply reflects a legal realization of the dangers inherent in the last-period scenario.⁶² *Revlon* ensures that management cannot extract rents in the last period by imposing judicial supervision. Following the logic elaborated above, if a manager agrees to a sub-optimal bid in pursuit of its own interests, it increases the possibility of an intervening bid, which will have the effect of reallocating the rents extracted, in part, to shareholders.⁶³ *Revlon* calls on courts to be on guard against this diversion of shareholder wealth, thereby guaranteeing the operation of some constraint on managers when the company is sold. Thus, from the perspective of corporate law theory, *Revlon* responds to the last-period problem.

Nevertheless, corporate law commentators have frequently challenged *Revlon* for doing too much or too little. One line of commentary asserts that the enhanced judicial scrutiny triggered by *Revlon* has been confined too narrowly. Insofar as *Revlon* responds to a board conflict, the same conflict often exists regardless of the form of consideration or whether the transaction involves a controlling shareholder.⁶⁴ The CEO and top managers are often replaced (and thus

⁶¹ Sean J. Griffith, *Deal Protections in the Last Period of Play*, 71 FORDHAM L. REV. 1899 (2003).

⁶² Opinions of the Delaware Court of Chancery have explicitly recognized the last period problem inherent in M&A. See, e.g., *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 458 (Del. Ch. 2011) (“Final stage transactions for stockholders provide another situation where enhanced scrutiny applies.”)

⁶³ See *supra* note 60-62 and accompanying text.

⁶⁴ J. Travis Laster, *Revlon is a Standard of Review*, 19 FORDHAM J. OF CORP. & FIN. LAW 5, 7 (2013) (“[C]onflicts exist regardless of the form of consideration or whether the post-merger entity would have a controlling stockholder.”)

face last-period incentives) regardless whether the transaction form qualifies for enhanced scrutiny under *Revlon*.⁶⁵ In recognition of this eventuality, managers may negotiate for either increased severance payments or for continued control in the combined entity, trading off merger consideration to receive them.⁶⁶ In either case, wealth is diverted from shareholders to managers. If *Revlon* does not apply to such transactions, managers may be unconstrained in diverting shareholder wealth to themselves.

Perhaps deals outside of the traditional change of control paradigm do not raise the same problems because the post-acquisition entity remains diffusely held and therefore subject to acquisition itself. In this way, the final period has not come because the company still can be sold, and should it be, the premium will go to the public stockholders.⁶⁷ But critics have pointed out that there is no rule limiting shareholders to a *single* control premium.⁶⁸ In the words of then-Vice Chancellor Strine, any time a control premium is paid, target shareholders “would rightly be worried about whether the current merger represented an unfair transfer of wealth from the [target] shareholders to the [acquiring] shareholders. ... [T]he fairness of the exchange ratio would be critical to the [target] shareholders because it fixes ... their share of any future control premium.”⁶⁹ Perhaps then enhanced scrutiny should apply any time the board negotiates for a deal premium regardless of whether the combined company can later be sold. In calling for change along these lines, Vice Chancellor Laster has urged

⁶⁵ See, e.g., Jay C. Hartzell, et al., *What's in it for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37 (2004) (studying CEO turnover in the wake of acquisitions).

⁶⁶ Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from “Mergers of Equals,”* 20 J. L. & ECON. 60, 98 (2004) (finding evidence that target CEOs trade premium for continued control).

⁶⁷ Lawrence A. Hamermesh, *Premiums in Stock-for-Stock Mergers and Some Consequences in the Law of Director Fiduciary Duties*, 152 U. Pa. L. Rev. 881 (2003).

⁶⁸ Laster, *supra* note 64, at 41 (“[T]here is no corporate law limit of one premium per stockholder.”).

⁶⁹ Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures In Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 930 (2001)

the Supreme Court to recognize *Revlon* as a form of enhanced scrutiny that “applies to negotiated acquisitions, regardless of the form of consideration.”⁷⁰ Following similar logic, the Vice Chancellor and an academic co-author have also advocated expanding enhanced scrutiny to the buy-side of acquisitions as well.⁷¹

Another line of commentary on *Revlon* argues that it ought not to be interpreted too broadly, and that it should instead be confined to the existing doctrinal paradigm.⁷² As interpreted by Professor Bainbridge, *Revlon* ought not to be understood as a response to a pervasive last-period problem but rather as a judicial compromise between board authority and judicial accountability.⁷³ To Bainbridge, enhanced scrutiny does not serve principally to align managers with shareholders but rather to ensure that the board can be trusted as a locus of authority independent of management in the takeover context.⁷⁴ When it can, Bainbridge argues, courts defer.⁷⁵

From this perspective, the existing change-of-control paradigm makes sense and ought not be expanded. Provided there is no conflict of interest, the share of gains between targets and acquirors when both companies are public ought to be a matter of indifference to diversified

⁷⁰ Laster, *supra* note 64, at 53.

⁷¹ Afra Afsharipour & Travis Laster, *Enhanced Scrutiny on the Buyside*, 53 GA. L. REV. 443 (2019).

⁷² Stephen M. Bainbridge, *The Geography of Revlon-Land*, 81 FORDHAM L. REV. 3277 (2013)

⁷³ *Id.* at 3313 (2013) (“The search for conflicted interests reflects the Delaware courts’ solution to the irreconcilable tension between authority and accountability.”).

⁷⁴ *Id.* (describing judicial enquiry into whether the board has functioned “as a separate institution independent from and superior to the firm’s managers” as involving “the role actually played by the board, especially the outside directors, the extent to which they were supplied with all relevant information and independent advisors, and the extent to which they were insulated from management influence”).

⁷⁵ *Id.* (noting that if the board passes this heightened analysis “respect-for-authority values will require the court to defer to the board’s substantive decisions. The board has legitimate authority in the takeover context, just as it has in proxy contests and a host of other decisions that nominally appear to belong to the shareholders.”).

shareholders.⁷⁶ When companies are taken private, however, diversified shareholders are not on both sides and therefore not indifferent to the division of gains.⁷⁷ Likewise, controlling shareholder deals present situations in which the controller may extract private benefits at the expense of public shareholders.⁷⁸ In either situation, target shareholders are especially concerned with the allocation of gains, and these are precisely the situations to which *Revlon* traditionally applies.⁷⁹ According to this view, any further expansion of *Revlon* is unwarranted, on either the sell side or the buy side.⁸⁰ Others go still further, arguing that *Revlon* ought to be limited to its facts or abandoned altogether.⁸¹

Finally, another line of scholarly commentary argues that *Revlon* has in fact withered away to near meaninglessness. Professors Johnson and Ricca, for example, focus on remedies to argue that *Revlon* is not meaningful in the damages context because at least since *Lyondell*, plaintiffs have an impossible case to prove.⁸² Even in the context of

⁷⁶ *Id.* at 3335 (“[S]o long as acquisitions of publicly held corporations are conducted by other publicly held corporations, diversified shareholders will be indifferent as to the allocations of gains between the parties. In turn, those shareholders also will be indifferent as to the form of consideration.”).

⁷⁷ *Id.* (“[I]f the transaction results in a privately held entity, a diversified shareholder cannot be on both sides of the transaction”).

⁷⁸ *Id.* (“If the post-transaction entity remains publicly held, but will be dominated by a controlling shareholder, there is a substantial risk that the control shareholder will be able to extract non-pro rata benefits in the future and get a sweetheart deal from target directors in the initial acquisition.”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 3337 (“the Delaware courts should not go further down the road toward applying a substantive reasonableness analysis to all corporate acquisitions”).

⁸¹ See, e.g., Franklin A. Gevurtz, *Removing Revlon*, 70 WASH. & LEE L. REV. 1485, 1488 (2013) (arguing that “because there is no sensible policy that one can articulate for *Revlon* beyond the narrow confines of the original decision” the doctrine ought to be limited to “its original foundation of choosing between two all-cash bids”). See also Franklin A. Gevurtz, *Saying Yes: Reviewing Board Decisions to Sell or Merge the Corporation*, 44 FLA. ST. U. L. REV. 437, 438 (2017) (arguing that the explosion in merger litigation signals a need to return *Revlon* to a more narrow factual context.).

⁸² Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASHINGTON & LEE L. REV. 167, 208-209 (2014) (noting that after *Lyondell*, plaintiffs must prove a breach

equitable relief, Johnson and Ricca argue, *Revlon* is essentially meaningless because transactions are so rarely enjoined.⁸³ As a result, they conclude, the importance of *Revlon* in corporate law doctrine is vastly overstated.⁸⁴

After *Corwin*, many corporate law commentators have come to agree. For example, Professor Anabtawi argues that allowing shareholder ratification to substitute for enhanced scrutiny constitutes a fundamental shift in Delaware jurisprudence which may reduce deal litigation but also deprive shareholders of important protections.⁸⁵ Likewise, although Professor Korsmo sees the outcome in *Corwin* as largely foreordained by *MFW*, he laments its potential effect on M&A transactions.⁸⁶ Numerous other corporate law commentators have expressed similar unease with *Corwin*.⁸⁷

The lingering question amid all of this debate, however, is what effect can *Revlon* be shown to have had on M&A transactions? Each of

of good faith—that is, that directors intentionally acted contrary to fiduciary duty—in order to recover damages and that proving this is virtually impossible).

⁸³ *Id.* at 173.

⁸⁴ *Id.* at 173-74 (“[T]he stakes are far smaller than many scholars, judges, and lawyers may fully appreciate.”).

⁸⁵ Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161 (2018).

⁸⁶ Charles R. Korsmo, *Delaware’s Retreat from Judicial Scrutiny of Mergers* 5 (Jan. 3, 2018) (unpublished manuscript) (on file with author) (“*Corwin* follows directly from [*MFW*]. Once you hold that the procedural trappings of an arm’s-length deal entitle a majority stockholder squeeze-out to business judgment rule deference, it would be strange indeed to deny such deference to an actual arm’s-length deal.”).

⁸⁷ See Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 643-645 (2017); Matthew Schoenfeld, *From Corwin to Dell: The Cost of Turning a Blind Eye* (Feb. 12, 2018), available at <https://ssrn.com/abstract=3122511>; Franklin A. Gevurtz, *Cracking the Corwin Conundrum and Other Mysteries Regarding Shareholder Approval of Mergers and Acquisitions* 7-8 (September 19, 2018), available at <https://ssrn.com/abstract=3252264>; Brandon Mordue, *The Revlon Divergence: Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 531, 535 (2018) (referring to *Corwin* as one of three separate lines of cases that have altered the judicial review of merger litigation by Delaware courts).

the positions in this debate assumes that *Revlon* has (or had) an important effect on M&A? But did it? What does the empirical evidence show? In the Part that follows we subject *Revlon* to empirical analysis.

III. Empirical Analysis

Evidence bearing on whether *Revlon* matters should appear in transactions subject to the doctrine. As described above, when *Revlon* applies, transaction planners must follow a sale process reasonably designed to maximize shareholder value.⁸⁸ Because this is a higher standard of judicial review than the typical standard of review (i.e., the business judgment rule), if *Revlon* matters, we predict that transactions subject to *Revlon* will differ from transactions to which the doctrine does not apply. Such a difference, if it exists, could result either from transaction planners following different sale processes for their *Revlon* deals or, alternatively, from the greater potential for the involvement of intervening bidders in *Revlon* deals.

In this part, we first develop a set of hypotheses to test empirically whether *Revlon* matters. Next, we describe the data set against which we will test our hypotheses. Third, we offer descriptive statistics of the transactions in our data set. Fourth and finally, we report the results of our empirical analysis.

A. Hypothesis Development

How will *Revlon* deals differ from non-*Revlon* deals? We develop three core hypotheses relating to the length and intensity of negotiations, the number of bidders involved, and the size of the premium paid in the deal. Moreover, insofar as it is *Revlon* that matters and not something else, any difference in these core predictions must be driven by the doctrine and not by something else, such as the type of

⁸⁸ See *supra* notes 18-20 and accompanying text.

deal (for example, MOE or non-MOE) or the type of buyer (for example, private equity or other financial buyers versus strategic bidders).

First, we observe that a sale process reasonably designed to maximize shareholder value may imply intensive negotiations. A seller seeking to maximize the value of an asset ordinarily does not accept the first offer without seeking to negotiate further.⁸⁹ Instead, a series of offers and counter-offers may develop. Alternatively, the parties may agree on certain features of the transaction but continue to negotiate other terms, such as price, over a protracted period of time. The intensity of negotiations may thus be measured in two ways: by the number of rounds of bidding or by the number of days over which negotiations occur. These lead to our first set of hypotheses:

- Hypothesis 1A: *Revlon* deals will involve more rounds of bidding than non-*Revlon* deals.
- Hypothesis 1B: *Revlon* deals will involve more days of negotiations than non-*Revlon* deals.

Because each of these relate fundamentally to the intensity of negotiations, we will occasionally refer to Hypothesis 1A and Hypothesis 1B collectively as our “negotiation process” hypotheses.

Of course, protracted negotiations are not the only way to maximize the value of an asset for sale. Rather than negotiating privately, a seller may decide to sell the company through a public auction process. Auction processes may be designed differently—with one or several rounds of bidding. Because multiple rounds of bidding are captured by Hypothesis 1A, above, we focus here on the number of bidders.

- Hypothesis 2: *Revlon* deals will involve more bidders than non-*Revlon* deals.

If Hypothesis 2 is true, it may be that transaction planners designed a multi-bidder auction from the outset or, alternatively, that the announcement of a negotiated transaction prompted the intervention of

⁸⁹ This concept is embedded in basic negotiation theory. See Stuart Diamond, *Getting More: How You Can Negotiate to Succeed in Work and Life* (2012).

outside bidders. Either of these situations can be related to *Revlon*, since a multi-bidder auction may be selected *ex ante* as the best way to maximize shareholder value and the consideration of intervening bids *ex post* may be required in order to maximize shareholder value.

Our negotiation process hypotheses along with our hypothesis focusing on additional bidders all focus on *means*—that is, *how* the transaction process is designed to maximize shareholder wealth. But we can also focus on the *ends*. Did the transaction process result in greater wealth for shareholders? The clearest way to see this is in the premium offered in the deal—the extent to which the deal price exceeded the pre-announcement share price. Transaction structures that succeed in maximizing shareholder wealth should have higher premiums.

- Hypothesis 3: *Revlon* deals will have higher premiums than non-*Revlon* deals.

Greater scrutiny of the transaction process, in other words, should result in transactions at higher premiums.

If *Revlon* matters, we would predict that all of the above hypotheses are true. Additionally, in order to demonstrate that it is *Revlon* that matters and not unrelated features of the transactional environment, our predictions must hold across time periods and through a series of controls relating to deal characteristics. We undertake this analysis in section D, below. But first, we explain how we developed our sample set and provide descriptive characteristics of the transactions in the sample.

B. Sample Set

To assemble data for analysis, we construct a sample starting with the transactions in the FactSet MergerMetrics database. These transactions were announced during the time period 2003 through 2017 and meet all of the following criteria: (1) the target is a publicly traded U.S. firm, (2) the deal size is at least \$100 million, (3) the offer price is at least \$5 per share, and (4) a merger agreement is signed and publicly disclosed through a filing with the Securities and Exchange Commission

(SEC).⁹⁰ Roughly 5% of the transactions are ultimately withdrawn. About 70% of the deal proxy statements were reviewed manually to record information disclosed in the Background of the Merger sections, including the number of bidders, bidding rounds, time period of negotiations, and bid prices during the rounds.⁹¹ The remaining 30% of transactions were coded by a machine learning algorithm that was trained on the manually-coded observations.

The result is a data set containing 1,913 unique transactions over a fifteen year period. Within this sample, we used two parameters to determine whether a transaction was within *Revlon*. First, the target company must have been incorporated in a state that had adopted *Revlon*,⁹² and second, the consideration paid in the transaction must consist of at least 50% cash.⁹³ Applying these parameters to our sample set, we found 1,167 transactions that were subject to the *Revlon* standard, and 553 that were not. We also found 193 transactions to which *Revlon* might have applied due to the form of consideration but which involved targets incorporated in a state without any *Revlon* decision. Given this ambiguity, we coded our primary *Revlon* variable as being equal to one for deals subject to *Revlon*, negative one for deals not subject to *Revlon*, and zero for the 193 transactions in states without a resolution of the *Revlon* status.

C. Descriptive Statistics

⁹⁰ This criteria is similar to that utilized in prior studies. See Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 165 (2015).

⁹¹ The time period of negotiations was measured as the difference in days between the first offer date and the merger agreement date.

⁹² For a discussion of the variation between states in adopting the *Revlon* standard, see *supra* notes 28-32 and accompanying text.

⁹³ This parameter is based on prior case-law which generally sets *Revlon* applicable at these thresholds. See *In re Smurfit-Stone Container Corp. Sh'lder Litig.*, 2011 WL 2028076 (Del. Ch. May 24, 2011) (stating that *Revlon* would likely apply if the consideration mix was at least 50% cash); *In re Lukens Inc. Sh'lder Litig.*, 757 A.2d 720 (Del. Ch. 1999) (holding *Revlon* applies where 62% of consideration was cash).

In Table 1 we report the distributions of key variables in our sample.⁹⁴ Variables relating to merger characteristics are reported in Panel A, and variables relating to target company characteristics are reported in Panel B.⁹⁵

Table 1: Transaction and Party Characteristics

<i>Panel A: Merger Characteristics</i>								
	<u>N</u>	<u>Mean</u>	<u>Std. Dev.</u>	<u>Min</u>	<u>25th %</u>	<u>Median</u>	<u>75th %</u>	<u>Max</u>
# of Bidding Rounds	1,897	5.4	3.6	1	3	5	7	30
Negotiation Days	1,825	131.5	141.3	0	39	78	169	719
Log Negotiation Days	1,873	4.4	1.3	0	3.7	4.4	5.2	10.6
Multiple Bidders Indicator	1,913	0.55	0.50	0	0	1	1	1
Private Equity / LBO	1,913	0.18	0.39	0	0	0	0	1
Offer Premium	1,819	0.34	0.26	-0.59	0.18	0.29	0.44	1.75
<i>Panel B: Target Characteristics</i>								
	<u>N</u>	<u>Mean</u>	<u>Std. Dev.</u>	<u>Min</u>	<u>25th %</u>	<u>Median</u>	<u>75th %</u>	<u>Max</u>
Log Total Assets	1,833	6.70	1.59	-0.27	5.53	6.70	7.68	13.84
Net Loss Indicator	1,833	0.25	0.43	0	0	0	1	1
Market-to-Book	1,752	2.90	3.18	0.00	1.37	2.08	3.25	46.97
Debt-to-Equity	1,770	0.90	2.28	0.00	0.00	0.30	0.98	36.65
Log Sales Growth	1,809	0.09	0.30	-2.97	-0.01	0.07	0.17	3.02
Log Age	1,839	2.64	0.62	0.00	2.20	2.64	3.09	3.74

⁹⁴ In the table, we trim outliers of the following variables: negotiation periods greater than two years, offer premiums over 200%, debt-to-equity ratios below zero or greater than 50, and market-to-book ratios below zero or greater than 50.

⁹⁵ # of *Bidding Rounds* is the number of offers and counteroffers made by any parties involved in the negotiation process, *Negotiation Days* is the number of days between the first bid date and the merger agreement signing date (typically prior to any public announcement of the deal), *Multiple Bidders Indicator* equals one if more than one party bids for a target and zero for single bidder negotiations, *Private Equity / LBO* equals one if the acquirer is a private equity firm or a leveraged buyout involving at least one private equity firm and zero for strategic transactions (as coded by MergerMetrics), and *Offer Premium* is the premium of the final offer price relative to the target's stock price 30 days before the public merger announcement.

Table 1 reveals a wide range of values for the private merger negotiation variables. The number of bidding rounds ranges from a minimum of one to a maximum of 30, with a median of five. The length of the negotiation period ranges from zero (an offer accepted within one day) to a maximum of just under two years, with a median of 78 days or roughly two and a half months. About 55% of transactions involve multiple bidders. These unique data points from the private merger negotiating process reveal considerable heterogeneity, which we exploit in subsequent tests for negotiating intensity.

Table 2 reports summary statistics for key merger-related variables, broken down by transactions subject to *Revlon* duties vs. those not subject to the *Revlon* standard. The final column reports t-statistics for differences in means between the two groups. Panel A reports details for the full sample in all jurisdictions while Panel B reports details only for Delaware-incorporated targets. As mentioned above, within-Delaware variation in *Revlon* occurs through differences in the method of payment for these mergers.

Table 2: Key Merger-Related Variables

<i>Panel A: All Jurisdictions</i>					
	<u>Non-Revlon</u>		<u>Revlon</u>		<i>t-statistic (diff.)</i>
	<i>Mean</i>	<i>N</i>	<i>Mean</i>	<i>N</i>	
# of Bidding Rounds	4.69	733	5.79	1,164	6.55
Negotiation Days	118.00	711	140.03	1,114	3.32
Log Negotiation Days	4.19	716	4.49	1,157	4.75
Multiple Bidders Indicator	0.49	746	0.59	1,167	4.59
Hostile	0.04	746	0.05	1,167	0.89
Private Equity / LBO	0.10	746	0.23	1,167	8.10
Offer Premium	0.29	696	0.36	1,123	5.53
Bid Increase %	12.51	678	14.38	1,104	1.16

<i>Panel B: Delaware-Incorporated Targets</i>					
	<u>Non-Revlon</u>		<u>Revlon</u>		<i>t-statistic (diff.)</i>
	<i>Mean</i>	<i>N</i>	<i>Mean</i>	<i>N</i>	
# of Bidding Rounds	4.49	196	5.83	1,059	5.04
Negotiation Days	95.58	190	139.98	1,016	4.73
Log Negotiation Days	3.97	194	4.47	1,052	4.62
Multiple Bidders Indicator	0.32	200	0.60	1,061	7.66
Hostile	0.06	200	0.05	1,061	-0.02

Private Equity / LBO	0.01	200	0.23	1,061	16.47
Offer Premium	0.27	186	0.37	1,019	4.54
Bid Increase %	16.22	172	14.32	1,004	-0.47

We break out Delaware and non-Delaware deals because we utilize this distinction for our robustness tests in later models. For both the full sample in Panel A and Delaware targets in Panel B, *Revlon*-mode deals have more bidding rounds, longer negotiation periods, and a greater incidence of multiple bidders. *Revlon*-mode deals are also associated with higher final offer premiums.

The univariate differences reported in Table 2 do not appear to be driven by differences in transaction type—that is, two-party exclusive mergers of equals (“MOEs”) versus open bidding for control. If non-*Revlon* deals were all MOEs, we would not expect almost half of them to involve multiple bidders, for example. Nor would we expect them to experience significant bidding activity in terms of the number of bidding rounds, negotiation days, multiple bidders and offer premium. The fact that these non-*Revlon* transactions experience this type of activity highlight that they are not predominantly MOEs as traditionally defined.

In the next section, we examine whether these univariate results continue to hold after controlling for additional variables and fixed effects.

D. Findings

In this section we first report our basic empirical findings. Then we report the results of further tests, subjecting our basic findings to a series of robustness tests.

1. Empirical Results

We first analyze our negotiation process hypotheses. Table 3 reports results from OLS regressions relating to Hypothesis 1A, predicting that *Revlon* deals would have more rounds of bidding. In each model, the dependent variable is the number of bidding rounds. Column (1) reports a baseline model, Column (2) adds control variables,

Column (3) add year fixed effects, Column (4) replaces year with industry fixed effects, and Column (5) includes both year and industry fixed effects.

Table 3: Rounds of Bidding

<i>Dep. Var: # of Bidding Rounds</i>	(1) Base	(2) Controls	(3) Year F.E.	(4) Industry F.E.	(5) Ind. & Yr. F.E.
Revlon	0.591*** (0.000)	0.415*** (0.000)	0.307*** (0.003)	0.310*** (0.008)	0.218* (0.055)
Log Total Assets		-0.139** (0.022)	-0.216*** (0.000)	-0.080 (0.248)	-0.156** (0.020)
Net Loss Indicator		0.554** (0.014)	0.201 (0.352)	0.471** (0.036)	0.148 (0.498)
Market-to-Book		-0.005 (0.899)	-0.022 (0.561)	-0.010 (0.825)	-0.024 (0.561)
Debt-to-Equity		0.000 (0.995)	0.023 (0.549)	-0.010 (0.826)	0.010 (0.814)
Log Sales Growth		-0.867*** (0.003)	-0.668** (0.016)	-0.954*** (0.002)	-0.752*** (0.008)
Log Age		0.423*** (0.004)	0.258* (0.074)	0.369** (0.021)	0.232 (0.138)
Hostile		1.607*** (0.003)	1.533*** (0.004)	1.408*** (0.004)	1.369*** (0.005)
Private Equity / LBO		1.620*** (0.000)	1.700*** (0.000)	1.487*** (0.000)	1.563*** (0.000)
Constant	5.170*** (0.000)	4.655*** (0.000)	5.736*** (0.000)	4.523*** (0.000)	5.500*** (0.000)
R ²	0.0212	0.0771	0.1319	0.1598	0.2060
N	1,897	1,708	1,708	1,700	1,700

p-values in parentheses; * *p* < 0.10, ** *p* < 0.05, *** *p* < 0.01

In all models of Table 3, *Revlon* deals are associated with a greater number of bidding rounds. This is consistent with more aggressive negotiating behavior on the part of targets and their directors, who are subject to *Revlon* duties and the expectation of obtaining the best offer price for shareholders. Alternatively, it may be that deals in *Revlon* are more likely to attract intervening bids leading to further rounds of bidding.

As show in Table 3, transactions involving private equity bidders are highly correlated with additional rounds of bidding. This finding is consistent with prior studies finding that private equity firms are more likely to participate in auctions which, in turn, lend themselves to more bidding.⁹⁶ But it also highlights that sellers generally negotiate more heavily with private equity bidders. Most importantly, the continuing statistical significance of *Revlon* deals even after the introduction of the private equity variable in this and other tables demonstrates that our results are not driven by private equity transactions.⁹⁷

We test our second negotiating process hypothesis, Hypothesis 1B, in Table 4. Similar to the number of negotiating rounds, we expect the length of negotiations to be correlated with the effort exerted by target directors in obtaining higher offer prices for shareholders or, alternatively, by delays occasioned by the need to consider intervening bids. The dependent variable in these OLS regressions is the log of the number of days during which the transaction was negotiated.⁹⁸

Table 4: Days of Negotiations

<i>Dep. Var: Log</i>	(1)	(2)	(3)	(4)	(5)
<i>Negotiation Days</i>	Base	Controls	Year F.E.	Industry F.E.	Ind. & Yr. F.E.
Revlon	0.193*** (0.000)	0.136*** (0.000)	0.094** (0.012)	0.121*** (0.005)	0.078* (0.064)
Log Total Assets		-0.175*** (0.000)	-0.194*** (0.000)	-0.164*** (0.000)	-0.182*** (0.000)
Net Loss Indicator		0.038 (0.623)	-0.082 (0.287)	0.047 (0.550)	-0.069 (0.385)
Market-to-Book		-0.028*** (0.006)	-0.032*** (0.002)	-0.034*** (0.002)	-0.039*** (0.000)
Debt-to-Equity		0.011	0.014	0.023	0.027*

⁹⁶ See Audra Boone & Frank Mulherin, *Do Auctions Induce a Winner's Curse? New Evidence from the Corporate Takeover Market*, 89 J. FIN. ECON 1 (2008); Audra Boone & Frank Mulherin, *Is There One Best Way to Sell a Company? Auctions versus Negotiations and Controlled Sales*, 21(3) J. APP. CORP. FIN. 28 (2009).

⁹⁷ We thank Professor Elizabeth de Fontenay for pointing out this issue.

⁹⁸ As in the prior table, Column (1) reports a baseline model, Column (2) adds control variables, Column (3) adds year fixed effects, Column (4) replaces year with industry fixed effects, and Column (5) includes both year and industry fixed effects.

		(0.428)	(0.256)	(0.115)	(0.050)
Log Sales Growth		-0.443***	-0.341***	-0.468***	-0.365***
		(0.000)	(0.001)	(0.000)	(0.001)
Log Age		0.164***	0.118**	0.132**	0.087
		(0.002)	(0.029)	(0.025)	(0.137)
Hostile		0.749***	0.720***	0.751***	0.737***
		(0.000)	(0.000)	(0.000)	(0.000)
Private Equity / LBO		0.236***	0.287***	0.188**	0.242***
		(0.006)	(0.001)	(0.038)	(0.006)
Constant	4.309***	5.098***	5.382***	5.127***	5.399***
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
R ²	0.0164	0.0882	0.1381	0.1360	0.1829
N	1,873	1,693	1,693	1,685	1,685

p-values in parentheses; * *p* < 0.10, ** *p* < 0.05, *** *p* < 0.01

The results from Table 4 reveal that transactions in *Revlon*-mode tend to involve negotiations over a longer time period. The *Revlon* coefficients are positive and statistically significant in all models. This finding provides evidence that targets in *Revlon* mode negotiate for longer periods, implying more negotiation intensity. Again, as in Table 3 sellers negotiate for a longer period with private equity bidders, but the results are separately significant along with the *Revlon* variable. The significance of both variables means that private equity transactions do not drive the significance of the *Revlon* variable itself and that other factors are driving this significance.

Next we turn to Hypothesis 2, predicting more bidders in *Revlon* deals. Table 5 presents results from logit models with dependent variable equal to 1 for transactions involving multiple bidders and zero for transactions negotiated exclusively with only a single bidder. Note that this information was collected from the background sections of merger proxy statements and thus includes all bidders during private negotiations, not merely publicly-observable competing bids after deal announcements.⁹⁹

⁹⁹ As in prior tables, Column (1) reports a baseline model, Column (2) adds control variables, Column (3) add year fixed effects, Column (4) replaces year with industry fixed effects, and Column (5) includes both year and industry fixed effects.

Table 5: Multiple Bidders

<i>Dep. Var: Multiple Bidders (0/1)</i>	(1) Base	(2) Controls	(3) Year F.E.	(4) Industry F.E.	(5) Ind. & Yr. F.E.
Revlon	0.260*** (0.000)	0.144** (0.014)	0.140** (0.020)	0.099 (0.144)	0.094 (0.175)
Log Total Assets		-0.179*** (0.000)	-0.186*** (0.000)	-0.179*** (0.000)	-0.184*** (0.000)
Net Loss Indicator		0.112 (0.370)	0.124 (0.338)	0.098 (0.449)	0.119 (0.373)
Market-to-Book		-0.057*** (0.005)	-0.064*** (0.003)	-0.057*** (0.008)	-0.064*** (0.004)
Debt-to-Equity		0.014 (0.633)	0.022 (0.469)	0.011 (0.710)	0.019 (0.548)
Log Sales Growth		-0.073 (0.679)	-0.125 (0.502)	-0.080 (0.661)	-0.120 (0.532)
Log Age		0.215** (0.016)	0.174* (0.060)	0.252** (0.012)	0.218** (0.034)
Hostile		-0.171 (0.441)	-0.173 (0.438)	-0.247 (0.315)	-0.237 (0.338)
Private Equity / LBO		0.943*** (0.000)	0.901*** (0.000)	0.991*** (0.000)	0.933*** (0.000)
Constant	0.121** (0.013)	0.794** (0.017)	0.174 (0.711)	-0.068 (0.958)	-0.733 (0.568)
Pseudo R ²	0.0097	0.0456	0.0561	0.0730	0.0819
N	1,913	1,723	1,723	1,698	1,698

p-values in parentheses; * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

As Table 5 demonstrates, the coefficient on *Revlon* is positive and significant in Columns (1) through (3), indicating that transactions in *Revlon* tend to involve multiple bidders. The coefficients remain positive in Columns (4) and (5), but are not statistically significant when industry fixed effects are included in the models. This finding again provides evidence that targets in *Revlon* mode may search for (or attract) more bidders, driving possibly higher premiums.

Next we test the effect of *Revlon* on deal outcomes. Table 6 reports results from OLS regressions relating to Hypotheses 3, predicting higher premiums for deals in *Revlon*. Offer premium is the

dependent variable in Table 6.¹⁰⁰

Table 6: Offer Premiums

<i>Dep. Var: Offer Premium</i>	(1)	(2)	(3)	(4)	(5)
	Base	Controls	Year F.E.	Industry F.E.	Ind. & Yr. F.E.
Revlon	0.040*** (0.000)	0.029*** (0.000)	0.025*** (0.000)	0.019** (0.014)	0.017** (0.024)
Log Total Assets		-0.026*** (0.000)	-0.026*** (0.000)	-0.026*** (0.000)	-0.027*** (0.000)
Net Loss Indicator		0.094** (0.000)	0.082*** (0.000)	0.087*** (0.000)	0.078*** (0.000)
Market-to-Book		-0.002 (0.297)	-0.001 (0.513)	-0.006*** (0.008)	-0.005** (0.027)
Debt-to-Equity		-0.002 (0.565)	-0.002 (0.458)	0.002 (0.635)	0.001 (0.817)
Log Sales Growth		-0.014 (0.727)	0.001 (0.972)	-0.006 (0.883)	0.007 (0.860)
Log Age		0.003 (0.765)	-0.003 (0.769)	-0.002 (0.860)	-0.008 (0.489)
Hostile		0.082** (0.024)	0.080** (0.028)	0.088** (0.018)	0.087** (0.019)
Private Equity / LBO		-0.080*** (0.000)	-0.078*** (0.000)	-0.069*** (0.000)	-0.066*** (0.000)
Constant	0.322*** (0.000)	0.490*** (0.000)	0.505*** (0.000)	0.515*** (0.000)	0.536*** (0.000)
R ²	0.0193	0.0969	0.1246	0.1622	0.1834
N	1,819	1,685	1,685	1,676	1,676

p-values in parentheses; * *p* < 0.10, ** *p* < 0.05, *** *p* < 0.01

Table 6 demonstrates that in all models, deals in *Revlon*-mode are associated with significantly higher offer premiums. The magnitude of this difference ranges from 1.7% to 4% higher offer premiums. In other words, a \$2.6 billion transaction, the average-sized deal in our sample, would have a \$41.6 million to \$104 million larger deal premium if it were subject to *Revlon*.

To summarize our basic empirical results: Tables 3-6 show that

¹⁰⁰ As in prior tables, Column (1) reports a baseline model, Column (2) adds control variables, Column (3) add year fixed effects, Column (4) replaces year with industry fixed effects, and Column (5) includes both year and industry fixed effects.

Revlon transactions experience longer negotiation periods, more bidding rounds, more incidence of multiple bidders and higher premiums. In the next section, we examine these results further, conducting robustness tests to confirm our findings and determine whether our results are driven by Delaware or the peculiarity of transactions subject to *Revlon*.

2. Robustness Checks

In this section, we subject our basic results to further robustness checks. In particular, we are concerned that our *Revlon* results may be driven predominantly by Delaware versus non-Delaware deals. Furthermore, we are also concerned that certain transaction characteristics—in particular whether a deal is styled as a merger of equals—might also be driving our results. We therefore devise further tests to determine whether our results are driven by Delaware or by mergers of equals.

a. Delaware versus non-Delaware Targets

We first tested whether our empirical findings are driven by Delaware deals by re-running the model specifications of Tables 3 through 6 exclusively on the non-Delaware companies in our sample. In unreported results we find that that none of the results on *Revlon* are statistically significant in these models (which include only non-Delaware firms). Our main empirical findings appear to be driven by Delaware. Thus, in other states, *Revlon* would appear to predict nothing with regard to bidding process, number of bidders, or deal premium. This non-result has a number of interesting implications, which we explore in Part IV., below.

In order to place this non-result in further context, however, we ran the same tests exclusively on Delaware companies. Table 7 reports results from the models reported in the final column of Tables 3 through 6 but only on Delaware incorporated targets. The *Revlon* coefficients are positive and statistically significant in each of these four models, consistent with the results from Tables 3 through 6. In fact, the statistical significance is stronger in Columns (3) and (4) of Table 7 than in the

finals columns of Tables 5 and 6, indicating that these findings are particularly concentrated among Delaware firms.

Table 7: Delaware Firms Only

<i>Dependent Variable:</i>	(1) <i>Number of Bidding Rounds</i>	(2) <i>Log Negotiation Days</i>	(3) <i>(Logit) Multiple Bidders 0/1</i>	(4) <i>Offer Premium</i>
Revlon	0.296* (0.054)	0.095* (0.099)	0.289** (0.005)	0.032*** (0.005)
Log Total Assets	-0.205** (0.024)	-0.178*** (0.000)	-0.162*** (0.003)	-0.032*** (0.000)
Net Loss Indicator	-0.100 (0.695)	-0.089 (0.333)	0.261 (0.106)	0.069*** (0.001)
Market-to-Book	-0.005 (0.911)	-0.029** (0.012)	-0.055** (0.036)	-0.005* (0.085)
Debt-to-Equity	0.020 (0.724)	0.015 (0.406)	-0.034 (0.498)	0.001 (0.883)
Log Sales Growth	-0.816** (0.022)	-0.385*** (0.003)	-0.190 (0.453)	0.034 (0.487)
Log Age	0.486** (0.017)	0.118 (0.125)	0.287** (0.032)	-0.029* (0.058)
Hostile	0.900* (0.082)	0.609*** (0.001)	-0.429 (0.146)	0.086* (0.057)
Private Equity / LBO	1.707*** (0.000)	0.234** (0.032)	0.955*** (0.000)	-0.080*** (0.000)
Constant	5.308*** (0.000)	5.289*** (0.000)	-0.893 (0.564)	0.616*** (0.000)
Industry & Year F.E.	Yes	Yes	Yes	Yes
R ²	0.2025	0.1934	0.1012	0.2003
N	1,110	1,106	1,090	1,089

p-values in parentheses; * *p* < 0.10, ** *p* < 0.05, *** *p* < 0.01

We further test this finding by conducting an additional robustness test in Table 8. This table reports the same regressions as those in Table 7, but across the entire sample. We include an indicator for Delaware and the interaction of Delaware and Revlon. This allows us to evaluate whether Delaware has any further impact on deal characteristics outside the scope of *Revlon*. The findings in Table 8 confirm those in Table 7, in that *Revlon* shows the positive and

statistically significant impact only through the interaction with Delaware companies.¹⁰¹

Table 8: All Firms with Delaware Interaction

<i>Dependent Variable:</i>	(1) <i>Number of Bidding Rounds</i>	(2) <i>Log Negotiation Days</i>	(3) <i>(Logit) Multiple Bidders 0/1</i>	(4) <i>Offer Premium</i>
Revlon	-0.211 (0.248)	0.093 (0.244)	-0.215* (0.083)	0.009 (0.481)
Delaware	0.296 (0.198)	-0.079 (0.377)	-0.130 (0.386)	-0.032** (0.048)
Revlon*Delaware	0.540** (0.016)	0.009 (0.920)	0.526*** (0.001)	0.026* (0.098)
Log Total Assets	-0.169** (0.015)	-0.178*** (0.000)	-0.174*** (0.000)	-0.025*** (0.000)
Net Loss Indicator	0.124 (0.572)	-0.064 (0.424)	0.128 (0.342)	0.081*** (0.000)
Market-to-Book	-0.027 (0.517)	-0.039*** (0.000)	-0.065*** (0.004)	-0.005** (0.029)
Debt-to-Equity	0.013 (0.761)	0.028** (0.043)	0.023 (0.457)	0.001 (0.727)
Log Sales Growth	-0.775*** (0.007)	-0.362*** (0.001)	-0.126 (0.511)	0.008 (0.839)
Log Age	0.282* (0.090)	0.075 (0.217)	0.205* (0.053)	-0.013 (0.291)
Hostile	1.363*** (0.005)	0.740*** (0.000)	-0.227 (0.362)	0.088** (0.018)
Private Equity / LBO	1.554*** (0.000)	0.238*** (0.007)	0.903*** (0.000)	-0.069*** (0.000)
Constant	5.166*** (0.000)	5.444*** (0.000)	-0.837 (0.512)	0.548*** (0.000)
Industry & Year F.E.	Yes	Yes	Yes	Yes
R ²	0.2096	0.1833	0.0870	0.1862
N	1,700	1,685	1,698	1,676

p-values in parentheses; * *p* < 0.10, ** *p* < 0.05, *** *p* < 0.01

Taken together, these results confirm that our main empirical results are driven by Delaware. Our findings in Table 7 are statistically

¹⁰¹ We note that when omitting year fixed effects, *Revlon* is positively and significantly related to the length of the negotiation period across all firms.

significant for Delaware companies and highly statistically significant (at the 1% level) with respect to Hypotheses 2 (number of bidders) and Hypothesis 3 (deal premium). Furthermore, the consistent statistical significance after controlling for the private equity variable shows that our results are not driven by private equity transactions.

Additionally, as noted above, the non-result on other states provides heterogeneity and controls for endogeneity.¹⁰² For example, it has often been supposed that premiums paid in cash transactions are generally higher.¹⁰³ If this were the case, however, we would expect to find higher premiums associated with our *Revlon* variable without regard to state. Instead, the lack of a statistically significant result outside of Delaware implies that the simple fact of cash consideration does not drive our results.¹⁰⁴

¹⁰² Our controls for endogeneity and selection effects as well as our model set-up explain in part our differing conclusions than in a contemporaneous paper by Professor Gubler. Professor Gubler uses a random sample of 290 deals from 2009-2016 to examine the effect of *Revlon* on deal process. He also uses an interaction term of *Revlon* * number of bids as an independent variable regressed against offer premium and finds no statistical significance. He concludes that “the effect that the number of bids has on market returns and deal premia is no different in *Revlon* mode than outside of *Revlon* mode” and therefore *Revlon* has no “substantive bite”. Zachary Gubler, *What’s the Deal with Revlon*, at 34, available at: <https://ssrn.com/abstract=3402166>. The number of bids and the deal terms themselves, however, are a joint-selection which are a product of, and influenced by, the premium. Professor Gubler does not control for this endogeneity and joint selection effects in his regression models.

¹⁰³ This supposition appears in several papers. See, e.g., Ulrike Malmendier et al., *Target Revaluation After Failed Takeover Attempts: Cash Versus Stock*, 119 J. Fin. Econ. 92 (2016); Andrei Shleifer & Robert W. Vishny, *Stock Market Driven Acquisitions*, 70 J. Fin. Econ. 295 (2003); Eliezer M. Fich et al., *Contractual Revisions in Compensation: Evidence From Bonuses to Target CEOs*, 61 J. Acc. & Econ. 338 (2016).

¹⁰⁴ To further test this proposition, in unreported results we run a robustness check on our sample by dropping all deals with less than 50% cash payment and all-stock deals. This allows us to compare deals subject to *Revlon* by court decision with identical deals which would be subject to *Revlon* but for the fact the state of incorporation of the firm has not adopted or rejected *Revlon*. Our model results remain similar, supporting the conclusion that our results are not driven by a cash payment premium for *Revlon*-mode deals. Our results thus address the point raised by Professor Gubler

b. Non-Revlon Deals versus Mergers-of-Equals

It is also possible that our results are driven by other deal characteristics. In particular, if non-*Revlon* deals predominantly constitute mergers-of-equals, which tend to have only one bidder, shorter negotiation windows, and lower offer premiums, then it may be that characteristics of those deals are more responsible for our results than *Revlon*. We therefore created an *MOE* variable, defining it as a transaction where the two parties are within 10% of market value at the time of the transaction announcement.¹⁰⁵ There are only 23 deals in our sample that thus qualify as *MOEs*, suggesting that *MOEs* are unlikely to drive our main empirical results. Nevertheless, we tested our key variables on these subsamples.

Table 9 reports sample means of our variables by *MOEs* vs. non-*MOEs*.

Table 9: Mergers of Equals

	<u>Non-MOEs</u>		<u>MOEs</u>		<i>t-statistic (diff.)</i>
	<i>Mean</i>	<i>N</i>	<i>Mean</i>	<i>N</i>	
# of Bidding Rounds	5.39	1,878	2.68	19	4.32
Negotiation Days	132.16	1,805	67.40	20	3.25
Log Negotiation Days	4.39	1,853	3.11	20	3.17
Multiple Bidders Indicator	0.55	1,890	0.26	23	3.11
Offer Premium	0.34	1,797	0.14	22	4.11

As shown in Table 9, we find that *MOEs* differ from non-*MOEs* in the number of bidding rounds, length of negotiation time, incidence of multiple bidders, and offer premiums, and these differences are all

who notes this issue and that none of these studies look at the effect of *Revlon* itself. Gubler, *supra* note 102, at 21.

¹⁰⁵ In unreported results, our results are similar when we relax our definition to within 20% of size.

statistically significant. However, MOEs do still involve multiple bidders 26% of the time. In other words, multiple bidders do not appear only in non-MOEs.

To determine whether MOEs drive our main empirical results, we re-ran all models excluding MOEs. Our results remain statistically significant with qualitatively similar magnitudes. This implies that our results are not being driven by MOEs and that in similar transactions subject to *Revlon* and not subject to *Revlon*, our results still hold. These results show that our main empirical findings are not driven by the fact that *Revlon* and non-*Revlon* transactions are fundamentally different.

In unreported results, we further examine the difference between *Revlon* and non-*Revlon* deals by examining bid-jumping. We find that 4.83% of non-*Revlon* deals receive a third party competing bid after transaction announcement, compared to 6.08% of *Revlon* deals. The t-statistic for this difference is 1.17, not statistically significant. Running these tests for Delaware deals only, we find that non-*Revlon* bids are jumped at a rate of 6.00% of deals while *Revlon* deals are jumped at a rate of 6.31%, a statistically insignificant difference (t-statistic of 0.17). These results offer further support that our main empirical findings are not driven by hidden differences between *Revlon* and non-*Revlon* deals.

IV. How *Revlon* Matters

We now have the evidence to answer the question with which we began. Yes, *Revlon* matters. For Delaware companies, *Revlon* affects the negotiation process, the number of bidders, and the transaction premium. But our basic empirical results suggest additional implications as well. In particular, they provide insights into how *Revlon* matters and, in light of the shifts in the doctrine over time, whether it should contract or expand now or in the future. We consider each of these in turn.

A. *Revlon* Matters as a Monitoring Standard

We begin with the empirical insight, noted above, that *Revlon* matters for Delaware targets but not for non-Delaware targets.¹⁰⁶ Although *Revlon* has been adopted into the law of eight other states,¹⁰⁷ it seems to matter only for companies that incorporate under the law of Delaware.¹⁰⁸ This points squarely to the role of courts in interpreting the standard. Although companies incorporated in one state may be sued in another,¹⁰⁹ Delaware-incorporated companies are subject to suit in Delaware and their home state while companies incorporated in other states are most often sued elsewhere.¹¹⁰ Given that the substance of the doctrine is the same across jurisdictions but that its application varies among states, our findings suggest that the Delaware courts use the standard to monitor transactions more strictly than other courts and that transacting parties respond in the planning and execution of transactions involving Delaware companies.

The distinction between what the law says and how it is applied has been characterized as the distinction between conduct rules and decision rules,¹¹¹ or alternatively, between standards of conduct and

¹⁰⁶ See *supra* Part III.D.2.a.

¹⁰⁷ See *supra* note 32 and accompanying text.

¹⁰⁸ See *supra* Part III.D.2.a.

¹⁰⁹ When companies are sued in another forum, the law of the state of incorporate applies. See generally Sean J. Griffith, *Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, in THE CORPORATE CONTRACT IN CHANGING TIMES, SOLOMON & THOMAS, EDS. (Chicago 2019).

¹¹⁰ Delaware companies now often adopt forum selection bylaws in favor of Delaware, increasingly the odds that Delaware will be the exclusive forum for corporate law litigation. Even without such provisions, however, merger litigation often unfolded concurrently in the home state and in Delaware. See Cain & Solomon, *supra* note 38, at 476 (highlighting the multi-state aspects of merger litigation). See also Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VANDERBILT L. REV. 1053 (2013) (discussing policy implications of merger litigation in multiple jurisdictions).

¹¹¹ See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (justifying the distinction by the desire to create and communicate strict conduct rules interpreted by more forgiving decision rules).

standards of review.¹¹² The two converge largely through the mediation of legal advisers.¹¹³ When lawyers advise clients *ex ante*, what they say about the requirements of the law (the standard of conduct) are frequently affected by their professional assessment of how those requirements will be (or have been) interpreted by judges (the standard of review).¹¹⁴ The standard of conduct is thus given specific meaning in light of the standard of review. In this way, well-advised clients adapt their conduct to the law as applied, rather than as it is written.

Our finding that clients adapt their conduct to *Revlon* in Delaware but not in other jurisdictions suggests that the doctrine has meaning primarily as a standard of review.¹¹⁵ As a standard of conduct, *Revlon* has one meaning in all jurisdictions: maximize shareholder wealth in transactions to which it applies.¹¹⁶ But as applied by different state court judges, *Revlon* can (and does) take on different meanings. Delaware's interpretation of *Revlon* as a standard of review involves

¹¹² Melvin Aaron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 *FORDHAM L. REV.* 437, 463 (1993) (noting that “corporate law presents a textbook case of the distinction between conduct rules and decisional rules”).

¹¹³ Dan-Cohen, *Decision Rules*, *supra* note 111, at 640–41 (noting that “legal advice [concerning] relevant decision rules... reduces acoustic separation”).

¹¹⁴ This follows from Holmes' famous observation that the science of the law is prediction. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897) (“[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.”).

¹¹⁵ *See Forsythe v. ESC Fund Mgt. Co. (U.S.), Inc.*, 2013 WL 458373, at *2 (Del. Ch. Feb. 6, 2013) (“What changes under *Revlon* is not the universal and loyalty-based standard of conduct that obligates a fiduciary to strive to maximize value for the beneficiary, but rather the standard of review that a court uses when reviewing the fiduciary's decisions, which narrows from rationality to range-of-reasonableness.”). *Accord Laster, Revlon is a Standard of Review*, *supra* note XX.

¹¹⁶ *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2016) (“*Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply. Rather, *Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.”) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083–84 (Del.2001)). *See also supra* notes 16-18 and accompanying text.

enhanced judicial scrutiny from rationality to reasonableness review.¹¹⁷ Other state courts may differ on their interpretation of the standard of review or on their analysis of reasonableness. Indeed, it may often be the case that the courts of other states provide no guidance on either.¹¹⁸ Moreover, it may not be that boards intentionally act differently but simply that lax enforcement leads to less aggressive shopping conduct in the sale process. In other words, given lower enforcement levels, managers and their advisors may simply not be incentivized to try as hard.

A byproduct of Delaware's leading status as a jurisdiction of incorporation is that the members of the Court of Chancery hear more corporate law disputes than judges in other states.¹¹⁹ This allows Delaware judges to develop precedent on specific aspects of merger transactions that judges in other states may never have seen. At the same time, because cases are decided under general principles of fiduciary duty, Delaware's corporate law jurisprudence remains highly flexible and fact-specific.¹²⁰ Although fiduciary duty is the basis of corporate

¹¹⁷ See *In re Netsmart Technologies, Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007) (“Although linguistically not obvious, this reasonableness review is more searching than rationality review, and there is less tolerance for slack by the directors.”). Accord Laster, *supra* note 64, at 2 (characterizing *Revlon* as a “standard of review under which the extent of judicial deference given to board decisions narrows from rationality to range-of-reasonableness”).

¹¹⁸ [cite non-Delaware examples.]

¹¹⁹ More than half of all public companies and an even larger share (65.6% percent) of Fortune 500 companies incorporate in Delaware. See DEL. DIV. OF CORPS. (<http://corp.delaware.gov>). For commentary on this fact, see, e.g., Lucian Arye Bebchuk and Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. ECON. 383, 389 (2003) (Delaware lead in large sample of public firms); R. Daines, *Does Delaware Law Improve Firm Value*, 62 J. FIN. ECON. 525, 538 (2001) (Delaware lead in study of IPOs); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. ORG. 225, 244 (1985) (providing a significant study of reincorporations and jurisdictional choice of Fortune 100 companies).

¹²⁰ Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1, 11 (2005) (“Because of the high degree of fact-specificity inherent in fiduciary-duty adjudication, corporate law judges are less bound by principles of *res judicata* and *stare decisis* than judges in other areas of law.”) Accord Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for*

law in all states, with less factual precedent to guide its application, standards like *Revlon* will have less specific meaning in states where they are less often applied.¹²¹ Indeed, our findings suggest that *Revlon* may have no meaning at all outside of Delaware.

We cannot say whether the emptiness of *Revlon* in other states results from judges interpreting reasonableness as essentially indistinct from deference or from transaction planners predicting that they will.¹²² We can say, however, that the opposite is true in Delaware. *Revlon* matters in Delaware because Court of Chancery judges take seriously the opportunity to review transactions for reasonableness. And because the judges of the Court of Chancery take it seriously, well-advised parties do so as well. As a result, we find, *Revlon* is reflected in the planning and execution of transactions involving Delaware companies.

Our findings thus reveal *Revlon* as a tool of the judiciary to monitor bias in M&A transactions. *Revlon* orders the transaction process and prevents managers, bankers and lawyers from slacking in the service of shareholders. This account is consistent with *Revlon*'s place in corporate law theory as well as its historical development. As described above, the standard grew out of a case in which a manager imposed his own views to steer a sale process and was subsequently applied in *Macmillan* and other cases to prevent management biases from infecting sale processes.¹²³ The Court of Chancery has continued to police transactions for management biases, often in altered forms, as

Corporate Charters, 68 U. CIN. L. REV. 1061, 1078 (2000) (noting that the binding effect of *stare decisis* is limited in Delaware because the supreme court can “deny that it is overruling a precedent by using case specific facts to distinguish its prior holding. Similarly the court can narrow the precedential effect of its decisions by framing its holdings narrowly and tying those holdings to specific facts.”).

¹²¹ Delaware may also guide conduct through statements in dicta designed to guide transaction planning going forward. See Edward Rock, *Saints And Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009,1016 (1997) (“Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as ‘corporate law sermons.’”).

¹²² These would be interesting questions for further research.

¹²³ See *supra* notes 20-21-[] and accompanying text.

the *Revlon* doctrine developed over the course of decades.¹²⁴ As a result, transaction planners adjusted deal structures accordingly. That they did not do so in other jurisdiction suggests that the core meaning of *Revlon* is not the one sentence recitation of the rule but rather the demonstrated willingness of the judiciary to intervene when circumstances suggest management bias. Jurisdictions without that history cannot make *Revlon* matter.

B. Should Delaware Retreat From *Revlon*?

Yet the recent history of Delaware jurisprudence suggests a retreat from substantive judicial review.¹²⁵ Transaction structures that might once have been challenged under *Revlon* have been expressly endorsed, including management-led single-bidder sale processes and strong deal protection provisions.¹²⁶ The recent decision that most commentators cite for this retreat is *Corwin*.¹²⁷

As described above, *Corwin* ostensibly substitutes procedural protections for substantive judicial review in transactions to which

¹²⁴ See *In re Toys R Us, Inc., S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005) (noting that the “paradigmatic context for a good *Revlon* claim” is one where “a supine board under the sway of an overweening CEO bent on a certain direction, tilts the sales process for reasons inimical to the stockholders desire for the best price”); *In re Netsmart Tech. Sh'hldr Litig.*, 924 A.2d 171 (Del. Ch. 2007); *In re Del Monte Foods Co. Sh'holder Litig.*, 25 A.3d 813 (Del Ch. 2011). Although *Revlon* has been used to enjoin relatively few transactions, Delaware judges have shown a willingness to use *Revlon* as a teaching platform, channeling conduct through criticism of bad actors. See Rock, *supra* note 121. Similarly, *Revlon* raises the likelihood of success on the merits, increasing settlement value and thereby the deterrence effect in applicable cases, notwithstanding whether an injunction ultimately issues.

¹²⁵ See Solomon & Thomas, *supra* note 12.

¹²⁶ See J. Travis Laster, *Changing Attitudes: The Start Results of Thirty Years of Evolution in Delaware M&A Litigation*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, GRIFFITH, ERICKSON, WEBBER & WINSHIP, EDS., 202 (Edward Elgar 2018) (cataloging these changes and attributing them to “the rise of sophisticated stockholders” as a substitute for shareholder litigation).

¹²⁷ 125 A.3d 304 (2015). For extended discussion of the *Corwin* decision in the context of *Revlon*, see *supra* notes 42-53-[] and accompanying text.

Revlon would otherwise apply. Specifically, *Corwin* holds that if the transaction wins the majority vote of fully informed, uncoerced shareholders, the standard of review shifts from enhanced scrutiny to business judgment rule deference.¹²⁸ *Corwin* does not change the standard of conduct.¹²⁹ Boards must still maximize shareholder value. But, as we argued in the prior section, conduct in fact converges upon the standard of review. By eliminating *Revlon* as a standard of review, *Corwin* at first blush suggests that many more M&A transactions will escape substantive judicial scrutiny.¹³⁰

Nevertheless, our empirical analysis does not suggest that transactions were immediately affected by *Corwin* or *C&J*. In unreported tests we find no statistically significant differences in our models, including bidding rates, before or after *C&J* and *Corwin*.¹³¹ This may be attributable to a number of factors. First, transaction planning may respond to norms more directly than changes in the law, and norms may change more slowly than law. *Corwin* takes place at the tail end of our sample—in the last two years—and insofar as transaction planners act on the basis of norms built up over decades, it may take them more than two years to fully internalize *Corwin*.

A second possibility is that *Corwin* and *C&J* have changed the state of play with regard to *Revlon* less than many suppose. That is, whatever the cases may say, Delaware courts will still find a way to intervene in transactions where there is evidence of biased processes. The plaintiffs' bar will tirelessly test transactions for signs of bias and find some way to raise what they find in court. And the Court of Chancery will find some doctrinal basis to intervene.

¹²⁸ *Corwin*, 125 A.3d, at 308.

¹²⁹ See Eisenberg, *supra* note 112, at 463 (noting that the standard of review can shift without moving the standard of conduct “in those cases where the standard of review is dramatically shifted when a given type of conduct has been approved by a designated corporate organ, while the standard of conduct remains unchanged”).

¹³⁰ See Anabtawi, *supra* note 85.

¹³¹ We similarly find no difference in our results before and after *Lyondell Chemical Corp. v. Ryan*, another case which arguably relaxed the *Revlon* standard by effectively limiting damages claims under the standard to actions not in good faith. See *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

The absence of a “*Corwin* effect” in our data may thus reflect transaction planners’ prediction that little of substance has in fact changed. This possibility finds additional support in our robustness checks, which show that *Revlon* and non-*Revlon* transactions are continuously accorded different treatment in spite of shifts in the *Revlon* doctrine over time. Transaction planners apparently know to disregard these surface-level shifts. Perhaps *Corwin* is just another surface level shift. If so, transaction planners have not been fooled. The evidence suggests they have continued to design transaction structures capable of surviving enhanced scrutiny.

Relatedly, it is important to observe that *Revlon* exists within a broader context of management constraints, such as independent boards and active shareholders, each of which has shifted over time. We argue here and one of us has argued elsewhere that *Revlon* arose as a tool to keep management accountable when other constraints make them less so.¹³² In this way, it can be viewed as a substitute for other constraints, whether legal, structural, or market-based. At the time *Revlon* was decided, boards were often weak—the “torpid if not supine” board in *Macmillan* is the classic example¹³³—and shareholders were often passive.¹³⁴

Times have changed. Inside corporations, boards became more independent and more likely to exert a structural constraint on management.¹³⁵ At the same time, outside the boardroom, institutional shareholders and especially activist hedge funds came to exert a greater structural constraint on management.¹³⁶ Insofar as *Revlon* has weakened

¹³² Griffith, *Last Period*, *supra* note 61.

¹³³ *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del.1988).

¹³⁴ See Solomon & Thomas, *supra* note 12.

¹³⁵ See generally Jeffrey N. Gordon, *The Rise Of Independent Directors In The United States, 1950-2005: Of Shareholder Value And Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).

¹³⁶ See Laster, *Changing Attitudes*, *supra* note 126; Solomon & Thomas, *supra* note 12. See also Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263 (2019). Claims of the triviality of corporate law are nothing new. See

at the same time that these other constraints have strengthened, the result may be a constant level of constraint.¹³⁷ *Revlon* may be less necessary when other constraints apply, and *Corwin* may be just another chapter in this story.¹³⁸

Moreover, judicial intervention in transactions did not end with *Corwin*. Delaware courts have now decided a series of cases challenging parties' attempts avoid judicial scrutiny by invoking *Corwin*. These cases have denied motions to dismiss on the basis of coercion in the vote,¹³⁹ inadequate disclosures to shareholders,¹⁴⁰ and the existence of a controlling shareholder,¹⁴¹ thereby preserving an

Bernard S. Black, *Is Corporate Law Trivial?: A Political And Economic Analysis*, 84 NW. L. REV. 542 (1990); Ronald J. Gilson and Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Columbia L. Rev. 863 (2013).

¹³⁷ Solomon & Thomas, *supra* note 12; Cox & Thomas, *supra* note 3.

¹³⁸ This argument was first made previously in Solomon & Thomas, *supra* note 12.

¹³⁹ See, e.g., *In re Saba Software, Inc.*, 2017 WL 1201108 (Del. Ch. Mar. 31, 2017) (finding coercion where stockholders would hold delisted stock if they voted down the deal); *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch. May 31, 2017) (finding coercion where stockholders were told underlying transaction would not occur unless they also approved other matters).

¹⁴⁰ See, e.g., *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018) (holding stockholder vote was not fully informed because proxy disclosed that the founder and chairman abstained from the board's recommendation in favor of sale without explaining the reason for abstention); *Morrison v. Berry*, 191 A.3d 268 (Del. 2018) (holding *Corwin* inapplicable due to disclosure deficiencies relating to a founder's unwillingness to consider other bidders and "troubling facts regarding director behavior"); *In re Converge, Inc. S'holders Litig.*, C.A. No. 7368-VCMR (Del. Ch. Oct. 31, 2016) (denying summary judgment because of factual questions as to whether disclosures were materially misleading); *van der Fluit v. Yates*, 2017 WL 5953514 (Del. Ch. Nov. 30, 2017) (declining *Corwin* dismissal due to failure to disclose identity of individuals who led sales outreach and possible involvement of persons receiving post-transaction employment and conversion of options).

¹⁴¹ See *In re Tesla Motors, Inc. S'holders Litig.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018) (holding that in spite of owning only 22.1% of Tesla stock, Elon Musk's influence on the transaction made him a controlling shareholder, rendering *Corwin* inapplicable). *But see In re Rouse Props., Inc.*, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018) (applying *Corwin* and holding that plaintiff had failed to plead sufficient facts concerning "clout and retributive power" for court to treat a 33.5% stockholder as

avenue for judicial intervention. As long as there are openings for plaintiffs to contest the applicability of *Corwin*, the route to judicial scrutiny remains open.

However, it is worth noting that the cases contesting *Corwin*'s applicability principally involve second order concerns rather than the central question of whether management bias was present in the planning and execution of the transaction. Whether the alternatives presented in a shareholder vote are coercive, whether the disclosures are adequate, or whether a large minority shareholder ought to count as controlling are, in a sense, procedural questions. They do not directly address the substance of whether the transaction was designed to maximize shareholder wealth. Insofar as the questions under *Corwin* are procedural—the propriety of the vote, the adequacy of the disclosures—the analysis is different in **kind** from prior cases under *Revlon* that shifted the **degree** to which they applied substantive scrutiny based upon the facts of the transaction. Transaction planners may thus respond to *Corwin*'s procedural aspects—for example, by making their proxy statements longer and more detailed, especially in describing the “Background of the Merger.” Indeed, transaction planners suggest that this has already begun to occur.¹⁴² But insofar as such procedural adaptations have less obvious wealth effects than, for example, more active bidding or higher premiums, *Corwin*'s contraction of the *Revlon* doctrine may adversely affect shareholder wealth.¹⁴³

controlling). See also Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole* (working paper) (analyzing the controlling shareholder test in the wake of *Corwin* and arguing that courts should look only to influence over the board but also to alternatives realistically available to unaffiliated shareholders).

¹⁴² Statement from Tulane Corporate Law Conference, Mar. 15, 2019.

¹⁴³ To be certain, in other areas of Delaware law procedural restrictions have been found to create value. See Matt D. Cain & Steven M. Davidoff, *Form Over Substance? Management Buy-Outs and the Value of Corporate Process*, 36 DEL. CORP. L. 849 (2011) (finding that MBO transactions with procedural protections provide greater value to target shareholders); Guhan Subramanian, *Post-Siliconix Freeze-Outs: Theory, Evidence & Policy*, 36(1) J. LEG. STUD. 1 (2007) (find that minority shareholders achieve significantly lower abnormal returns, on average, in tender-offer freeze-outs relative to merger freeze-outs with difference procedural protections).

On the other hand, it may not matter whether the central question of management bias is addressed directly, as in *Revlon*, or indirectly, as in *Corwin*, so long as the question is raised. And indeed, there is at least some evidence that pleadings under *Corwin* addressing issues of procedure are frequently argued in ways that raise core substantive concerns. For example, omitted disclosures are especially concerning precisely when they suggest ulterior motivations of management.¹⁴⁴ Likewise, an influential shareholder may be more likely to be treated as a controller when he or she is strongly self-interested in the underlying transaction.¹⁴⁵ As long as such substantive issues can be raised in challenging the procedural aspects of *Corwin*, judges can deny motions to dismiss and get to the substance of the transaction.

Ultimately, it may be too early to tell whether *Corwin* has contracted the *Revlon* doctrine in a way that harms shareholders. If it has, it has not yet turned up in our empirical results. Our theory of how *Revlon* affects transactions, however, suggests that courts should not read *Corwin* in such a way its procedural aspects overwhelm their ability to intervene in biased transactions. Insofar as what matters is the availability of a pathway into the substance of transactions, *Corwin* should not be interpreted in such a way as to block that path.

¹⁴⁴ See, e.g., *In re Xura, Inc. S'holders Litig.*, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018) (failure to disclose facts relating to \$25 million payout and future employment package to CEO in connection with a deal that undervalued the target); *Tangoe, Inc. Stockholders Litig.*, C.A. No. 2017-0650-JRS, 2018 WL 6074435 (Del. Ch. Nov. 20, 2018) (failure to disclose directors' motivation to sell the company arising from compensation-based incentives).

¹⁴⁵ For example, indicia of Elon Musk's self-interest were all over the Tesla-Solar City merger. See *supra* note 141. Musk chaired both companies and was SolarCity's largest shareholder. Additionally, SolarCity was founded by Musk's two cousins, with substantial support and encouragement from Musk himself. Musk had taken out millions of dollars in personal credit lines to buy shares in the company, and his aerospace company, SpaceX, had purchased \$165 million in bonds issued by SolarCity. See Austin Carr, *The Real Story Behind Elon Musk's \$2.6 Billion Acquisition of SolarCity, and What It Means for Tesla's Future—Not to Mention the Planet's*, *Fast Company* (June 7, 2017), <https://www.fastcompany.com/40422076/the-real-story-behind-elon-musks-2-6-billion-acquisition-of-solarcity-and-what-it-means-for-teslas-future-not-to-mention-the-planets> [perma.cc/NL7U-MPJ3].

C. Should Delaware Expand *Revlon*?

If our core finding suggests that the scope of *Revlon* ought not to be shrunk too far, perhaps it also implies that the doctrine ought to be expanded. Given that most of the non-*Revlon* transactions in our sample are defined primarily by the choice of consideration, *Revlon* could be expanded to deals involving a smaller fraction of cash consideration.¹⁴⁶ It could also cover MOEs.¹⁴⁷ Or it could expand still farther, as some have suggested, to encompass the buy-side as well.¹⁴⁸ Should it?

The logic for expanding *Revlon* is intuitive. First, as we have found, negotiations are more intense, bidders more numerous, and premiums richer when *Revlon* applies. Second, the doctrine's trigger—the fraction of cash consideration in the deal—seems largely arbitrary. Deals with 52% cash consideration do not seem fundamentally different from deals with 47% cash consideration. Furthermore, there is an argument that any standard that results in more bidding, higher premiums, and ultimately greater shareholder wealth should be expanded to all negotiated acquisitions.¹⁴⁹ If *Revlon* serves to increase shareholder wealth and shareholder wealth maximization is the goal, is it not obviously that we should want more *Revlon*?

We are not so sure. Increasing shareholder wealth in the context of acquisitions is essentially a zero-sum game in which premiums merely transfer wealth between sellers and buyers. Diversified shareholders, as Professor Bainbridge and others have pointed out, are largely indifferent because they will be on both sides of such

¹⁴⁶ We defined Non-*Revlon* deals as those those either (i) taking place in a state that had not adopted *Revlon* or (ii) consisting of less than 50% cash consideration. See *supra* notes 92-93 and accompanying text.

¹⁴⁷ See *supra* note 105 and accompanying text.

¹⁴⁸ See Afsharipour & Laster, *Buyside*, *supra* note 71.

¹⁴⁹ See *supra* notes 68-70 and accompanying text (reviewing this argument, as made by Vice Chancellor Laster).

transactions, at least when each company is public.¹⁵⁰ By exempting public stock-based deals and deals not resulting in a controlling shareholder, the *Revlon* doctrine avoids invoking scrutiny in deals where diversified shareholders are likely indifferent to the distribution of wealth between buyers and sellers. At the same time, *Revlon* applies to those transactions that matter most to diversified shareholders—that is, deals where they are not on both sides due to a private buyer and deals in which the appearance of a controlling shareholder raises the specter of private benefits of control. Whether the doctrine is responsive to last period concerns or other doubts concerning board independence remains an open question.¹⁵¹ But we consider it an achievement of the Delaware courts to have arrived at this balance without going down the rabbit-hole of asking whose wealth—diversified or non-diversified shareholders—corporate law should maximize.¹⁵² Perhaps, in other words, *Revlon* should stay right where it is.

In making this claim, we are mindful not to succumb to the Goldilocks fallacy. We are not claiming that *Revlon* is optimally designed or optimally applied. Indeed, we agree that basing application of the doctrine on whether a buyer used 51% cash versus 49% cash is essentially arbitrary. We also readily agree that *Revlon* has been invoked successfully in cases where it ought not to have applied¹⁵³ and that it has not been applied in transactions where vast sums of shareholder wealth have been destroyed.¹⁵⁴ But as discussed at length

¹⁵⁰ Bainbridge, *supra* note 72. The core insight goes back at least to Easterbrook & Fischel. See Easterbrook & Fischel, *Proper Role*, *supra* note 55.

¹⁵¹ See Part II.B *supra*.

¹⁵² We consider this an interesting academic question. See, e.g., Gregory Scott Crespi, *Maximizing the Wealth of Fictional Shareholders: Which Fiction Should Directors Embrace?* 32 J. CORP L. 381 (2007). But it is likely one that judges would prefer to avoid since answering it would have far-reaching and unforeseeable consequences beyond the case at hand.

¹⁵³ The recent flood of merger litigation would be a prime example. See *supra* notes 33-40 and accompanying text.

¹⁵⁴ See, e.g., *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989). The Time/ Warner transaction destroyed vast sums of shareholder wealth to pursue a transaction favored by management in spite of a plainly superior alternative, in the form of Paramount's cash tender offer for Time, yet it did not trigger *Revlon*

above, *Revlon* is not a fixed rule but rather a flexible monitoring standard. The precise contours of the rule thus matter less than the possibility that the judiciary will intervene in apparently biased transactions to take a closer look. As long as *Revlon* is applied flexibly, we need not be overly concerned about whether it is applied too much or too little on the margin. What is important is that scrutiny apply in scenarios giving specific cause for concern—for example, in last period transactions where boards lack independence and shareholders are passive and generally disengaged. As long as the judiciary remains attentive to that basic problem, specific doctrinal shifts are of secondary concern. *Revlon*, at its core, does just that.

This brings us back, once again, to *Corwin* and *C&J*. One reading of those cases is that together they prune back the overgrowth of *Revlon*, providing an exit from enhanced scrutiny for cases where a third-party bidder paid cash, thereby bringing the transaction within *Revlon*, but where there was no intervening bidder and no apparent conflict.¹⁵⁵ Under this reading, in the post-*Corwin*, post-*C&J* world, the *Revlon* doctrine is restored to its foundational context: an intervening bidder seeking an injunction against board conduct in a competitive bidding situation.¹⁵⁶ Indeed, the Supreme Court explained *Corwin* in precisely this way:

[A]s the years go by, people seem to forget that *Revlon* was largely about a board's resistance to a particular bidder and its subsequent attempts to prevent market forces from surfacing the highest bid. *QVC* was of a similar ilk. But in this case, there was no barrier to the emergence of another bidder and more than adequate time for such a bidder to emerge.¹⁵⁷

scrutiny. See generally RONALD J. GILSON & BERNARD S. BLACK, THE ESSENTIALS OF FINANCE AND INVESTMENT (1993) (describing the economic effects of the transaction and its immediate aftermath).

¹⁵⁵ In other words, “non-*Revlon*, *Revlon*” cases. See *supra* note 52 and accompanying text.

¹⁵⁶ See Part II.B *supra*.

¹⁵⁷ *Id.* at 1070. Moreover, the court substantially frowned on the type of injunction here, holding that not only had the wrong standard applied but a mandatory injunction

Understood in this way, *Corwin* and *C&J* are about restoring the *Revlon* doctrine to operate as a substitute for otherwise absent constraints on management.¹⁵⁸ When substitute constraints are present—as in the case of an open process where other bidders have had an opportunity but have failed to emerge—the doctrine might not be needed.

Because we are sympathetic to this reading of *Corwin* and to this interpretation of *Revlon*, we do not necessarily believe that *Revlon* should be expanded or contracted. *Revlon* should remain flexible enough to apply as needed. But therein lies the danger of *Corwin*. Insofar as *Corwin* focuses judicial analysis on procedural aspects of the vote and not on the substance of the transaction itself, it may not provide sufficient flexibility for the judiciary to intervene in biased transactions as needed. The danger, in other words, lies in the risk that *Corwin* will ossify into a rule-based analysis of procedural requirements, leaving no space for the judiciary to intervene in biased transactions.

D. *Revlon*'s Next 35 Years

The future of *Revlon* depends, in the short term, upon the future interpretation and implementation of *Corwin* and *C&J*, and over the longer term, on the demonstrated willingness of courts to intervene in substantively biased transactions. Having found that *Revlon* has value, in Delaware at least, we think it is important that the doctrine remain available as a means of entry for corporate law courts to evaluate

of this type could only be imposed after a trial and a finding that the third party bidder had aided and abetted the breach. *Id.*, at 1071-73.

¹⁵⁸ We recognize that some have argued that the Delaware courts are engaging in revisionist history in *C&J Energy*. See, e.g., Gubler, *supra* note 102, at 20 (arguing that the Delaware Supreme Court in *C&J Energy* rejected a more capacious view of *Revlon* put forth in *Barkan*). We would argue, however, that *Revlon* was designed to meet the problems of the 1980s which were boards and management unduly attempting to affect the outcome of a takeover. In other words, the actual factual paradigm of *Revlon*. *C&J Energy* merely recognizes the evolved market landscape of the current capital markets.

potentially biased transactions. Therefore, as we have already argued, *Corwin* and *C&J* should not be interpreted in such a way as to prevent courts from focusing on the core question of managerial bias. But how are they supposed to do this? How should courts interpret *Corwin* and *C&J* to preserve the underlying value of *Revlon*?

Corwin, as we have already noted, focuses courts on the procedural prerequisites of a fair and fully informed vote of the shareholders.¹⁵⁹ Cases decided in its wake have focused on such questions as when shareholder voting is coerced and when disclosures are adequate.¹⁶⁰ In our view, in order to preserve the value of *Revlon* as a monitoring standard, courts should approach these second-order procedural questions from the perspective of the first-order substantive issue. Is the evidence presented probative of managerial bias in the underlying transaction? If so, the court should be hesitant to shift the standard of review back to the business judgment rule. If not, the court should grant the vote its full cleansing effect.

To make these considerations more concrete, consider the question of the adequacy of disclosure necessary to render a shareholder vote “fully informed” under *Corwin*. There are several lines of cases in Delaware addressing adequacies of disclosure. For example, in the context of so-called “disclosure settlements,” omissions and corrective disclosures must be “plainly material.”¹⁶¹ By contrast, in the context of “mootness dismissals,” cases resulting in corrective disclosures but no class-wide release of claims, the Court of Chancery has held that supplemental disclosures need only be “helpful.”¹⁶² The disclosures that have become typical in shareholder litigation—such as, additional proxy statement descriptions of the calculations underlying a financial advisor’s fairness opinion—are now judged according to one or the

¹⁵⁹ See *supra* note 46 and accompanying text.

¹⁶⁰ See *supra* notes 139-140 (compiling cases).

¹⁶¹ See *Trulia*, 129 A.3d at 898. See also *supra* text accompanying note 53.

¹⁶² See, e.g., *In re Xoom Corp. S’holder Litig.*, 2016 WL 4146425 (Del. Ch. Aug. 4, 2016) (holding that the standard for disclosures on a mootness fee application is not materiality but rather whether the disclosure was helpful and benefited the class).

other of these standards depending upon whether the claim was resolved in settlement or mooted.¹⁶³

Neither of these standards is apt for deciding the adequacy of disclosures under *Corwin*. Instead, the inquiry should be focused on the substance underlying *Revlon* scrutiny. Further detail on the financial advisors' math is almost never relevant to a *Revlon* analysis, but evidence of management bias is. Courts evaluating the quality of disclosures under *Corwin* should therefore look to information that is probative of management bias, not matters that would be irrelevant to an application of enhanced scrutiny. If the plaintiffs succeed in uncovering previously undisclosed evidence of management bias, the shareholder vote should not count as "fully informed" and the cleansing effect of *Corwin* should not apply.

Fortunately, there is evidence that Delaware courts are moving in precisely this direction in analyzing disclosure inadequacies under *Corwin*. For example, in *Morrison v. Berry*, the Delaware Supreme Court held that a vote was not fully informed due to the company's failure to disclose a benefit made available to the company's founder (the opportunity to roll over his equity interest) that would not likely have been available from other bidders and that might have biased him in favor of the transaction.¹⁶⁴ In doing so, the Supreme Court reversed the Court of Chancery's determination that the omitted information would not have made stockholders less likely to tender, emphasizing that information may be material if a stockholder would "generally want to know [it] in making a decision, regardless of whether it actually sways a stockholder one way or the other..."¹⁶⁵ Management's potential bias in favor of a transaction is plainly something a shareholder would want to know. Similarly, in *van der Fluit v. Yates*, the Court of Chancery held that a vote was not fully informed because the target had failed to disclose that the company's co-founders were the ones soliciting bids

¹⁶³ See Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon, Randall Thomas, *Mootness Fees*, *Vanderbilt L. Rev.* (Forthcoming 2019).

¹⁶⁴ 191 A.3d 268 (Del. 2018).

¹⁶⁵ *Id.*, at 287.

for the company and that that, in the process, they had obtained commitments for post-transaction employment.¹⁶⁶ In each of these cases, the inadequacies of disclosure point to management bias in the transaction. Having found them, the courts refused to apply *Corwin* and therefore retained their ability to inquire further under *Revlon*.¹⁶⁷

A similar focus can (and should) be applied to judicial analyses of coercion under *Corwin*. If the facts suggest that management has exerted pressure to push through a transaction in which it has a particular interest to the exclusion of other corporate alternatives, courts should be more open to finding coercion. If by contrast, there is no evidence of management bias, but simply a lack of good options available to the company, the courts should be less open to coercion. Again, there is some evidence that Delaware courts are moving in this direction.¹⁶⁸

In sum, insofar as judicial analyses of questions arising under *Corwin* continue to be guided by considerations that would be relevant under *Revlon*, there is little to fear the death of enhanced scrutiny. In their analyses of disclosure inadequacies under *Corwin*, courts should focus on whether the alleged omission is probative of management bias. Likewise, in their analyses of coercion, courts should focus on whether the claim of coercion is grounded on a plausible theory of management bias. In doing so, courts will avoid deferring to transactions that raise

¹⁶⁶ 2017 WL 5953514 (Del. Ch. Nov. 30, 2017) (dismissing the complaint on other grounds).

¹⁶⁷ We recognize the lacunae in this argument. If *Revlon* is preserved through the ability for judges to intervene when there are substantive issues, it still leaves open the issue of when the corrective for inadequate disclosure is just better disclosure prior to the vote, and not enhanced judicial scrutiny of the substance. In other words, this still leaves open the possibility of evading enhanced scrutiny through full disclosure. However, we think this outcome is unlikely. Delaware courts are courts of equity and, in the face of an openly disclosed conflict, will likely find a plausible basis for substantive intervention. We acknowledge this is speculation, however, and leave this issue open, depending upon future developments.

¹⁶⁸ See, e.g., *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch. May 31, 2017) (“Fiduciaries cannot interlard [a stockholder] vote with extraneous acts of self-dealing, and thereby use a vote driven by the net benefit of the transactions to cleanse their breach of duty.”).

concerns under *Revlon* and, in continuing to apply enhanced scrutiny to these transactions, ensure that transaction planners do not disregard the doctrine, thereby destroying the value we have found in it.

What of the other states in our sample that have adopted *Revlon*? In addition to Delaware, *Revlon* applies in California, Illinois, Kansas, Maryland, Mississippi, Minnesota, Missouri, and New Hampshire.¹⁶⁹ To our knowledge none of these states has adopted *Corwin* or a case like it and therefore need not frame its analysis of disclosures or voting procedures in a way that preserves *Revlon*. But, as we argued above, these states have a more basic obstacle in achieving the benefits of enhanced scrutiny. They have not demonstrated a credible commitment to intervention in biased transactions. As a result, in spite of having *Revlon* on the books, the doctrine has had no apparent effect on transaction planning in those states. In order to make *Revlon* matter, the courts in these states must use it.

V. Conclusion

We have conducted an empirical and theoretical examination of whether and how *Revlon* matters based upon a novel M&A dataset of 1,897 transactions from 2003-2017. We find that *Revlon* matters in Delaware. Delaware firms subject to *Revlon* have more bidding rounds, more bidders, and higher premiums. These results are confirmed in robustness checks.

With respect to the question of *how*, we posit *Revlon* as a monitoring standard whose value depends upon courts putting it into effect. Delaware drives our results due to the unique form of judicial oversight practiced by Court of Chancery. This account sheds light on recent decisions, such as *Corwin* and *C&J*, that seem to restrict the scope of *Revlon* duties. We argue that as long as these doctrinal shifts preserve a flexible inroads for judicial intervention into biased transactions, then reports of the death of *Revlon* will prove to have been largely exaggerated. However, should these doctrinal developments result in

¹⁶⁹ See *supra* notes 28-32 and accompanying text.

substituting hard procedural rules for flexible substantive standards, then the effectiveness of judicial scrutiny of M&A may indeed fact diminish. The Delaware judiciary should remain attentive to these issues. Meanwhile, judges in other states should take note of the lifeless form of *Revlon* now present in their jurisdictions and consider the benefits of a *Revlon* revival.

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