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Austin, Texas**THE GENIUS OF THE MODERN CHANCERY  
SYSTEM**Written by:  
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**SYMPOSIUM: THE DELAWARE COURT OF CHANCERY:  
CHANGE AND CONTINUITY**

**ARTICLE**

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THE GENIUS OF THE MODERN CHANCERY SYSTEM  
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# THE GENIUS OF THE MODERN CHANCERY SYSTEM

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*The Delaware Court of Chancery has developed a transactional jurisprudence that blends the oldest traditions of equitable judging with a modern regulatory sensibility. Chancery's innovation is its deployment of common law methods to recreate the policymaking toolbox of a regulatory agency. Through its considered use of dictum, frequent engagement with practitioners and scholars of corporate law, and expert adjudication of a large and representative sample of shareholder lawsuits challenging public company deals, the Court has largely captured the substantive and procedural benefits of notice-and-comment rulemaking in announcing and developing Delaware corporate law.*

The thesis of this Essay is that the Delaware Court of Chancery has developed over the past two decades an innovative form of corporate transactional jurisprudence that blends the oldest traditions of equitable judging with a modern regulatory sensibility. The Court's approach has allowed it to supervise the market for corporate control and clarify the competing rights and obligations of corporate

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stakeholders with efficiency uncommon for a common law court.

This Essay is principally descriptive. In Part I, I identify seven aspects of contemporary Delaware deal litigation. Standing alone, none are controversial. But, as I argue in Part II, these uncontroversial attributes of M&A litigation practice add up to something new: a system of mergers and acquisition regulation that resembles old-fashioned equitable judging, but which yields special benefits typically obtained only through the operation of modern regulatory agencies. The result is a remarkable brand of commercial justice—a court that is uniquely able to regulate vast quantities of deal activity, protect the interests of absent stakeholders, test previously-announced rules of law, and announce forward-looking rules consistent with market efficiency and traditional rules of equity.

The analysis focuses on litigation brought by shareholder plaintiffs challenging announced public company deals on the ground that the directors of the target corporation breached their fiduciary duties by approving the transaction or by inadequately disclosing material facts concerning the transaction. I focus on this aspect of Chancery's docket not because these are the only important cases. To the contrary, the Court's traditional equitable function requires it to deal with a broad range of important non-corporate matters and with many significant corporate disputes—especially those that pit one company against another—that are not litigated through the prism of a stockholder challenge. But fiduciary attacks on announced deals are now the primary vehicle through which the Court develops the rules that govern director conduct and that provide transaction planners (and plaintiffs' lawyers) the basis to plan (or attack) the next deal.

## I

What follows is a thumbnail sketch of seven characteristics of fiduciary-breach M&A litigation in the Court of Chancery. Most are uncontroversial. All are supported by both data and the anecdotal experience of frequent practitioners. Many reflect significant evolution

Also available as part of the eCourse

[Say What? A Litigator's Look at Deal Provisions; plus Developments in Seller Liability in M&A](#)

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"Say What? A Litigator's Look at Deal Provisions"