Contractual Remedies in Mergers

Dhruv Aggarwal, Albert H. Choi, and Geeyoung Min*

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Abstract

This paper investigates the impact of a recent Delaware corporate law decision that restricted a merger target's ability to recover damages from a breaching buyer. First, we present a theoretical analysis to generate empirical predictions. Second, we show that the decision led to a decrease in both the target and the joint values in mergers governed by Delaware law. Third, we hand-collect relevant provisions from merger agreements and find that the agreements governed by Delaware law increasingly include target-friendly non-price terms after the decision. We also present evidence suggesting the deal price decreased for transactions governed by Delaware law that incorporated the non-price contract terms. Overall, the paper demonstrates how remedy provisions play an important role in merger transactions and how contracting parties respond to an exogenous change in deals jurisprudence.

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* Northwestern University School of Law, University of Michigan School of Law and European Corporate Governance Institute ("ECGI"), and Michigan State University School of Law, respectively. We would like to thank Lin Bai, Bobby Bartlett, Brian Broughman, Ed Fox, Eduardo Gallardo, Steven Haas, Jim Hines, Eric Klinger-Wilensky, Uday Rajan, Gabriel Rauterberg, Fernan Restrepo, Adriana Robertson, Steven Davidoff Solomon, and Kathy Spier; workshop participants at Fordham Law School, Northwestern University Law School, and University of Michigan Law School; and conference participants at 2024 Sokol Colloquium at University of Virginia, 2024 Penn-NYU Empirical Contracts Workshop, 2024 Corporate and Securities Litigation Workshop at UCLA, 2024 Canadian Law and Economics Conference at University of Toronto, and 2024 Conference on Empirical Legal Studies (CELS) at Emory University. Comments are welcome to dhruv.aggarwal@law.northwestern.edu, alchoi@umich.edu, and geeyoung.min@law.msu.edu.

1. Introduction

What remedy should a target be entitled to get from a breaching buyer in a merger transaction? This seemingly straightforward question has vexed M&A practitioners and judges over the years. In transactions involving a public company target, the buyer typically commits to paying merger consideration directly to the target shareholders (and not the target), most likely at a premium above the pre-announcement target stock price. Yet, the merger agreement is executed among the buyer, the target and the buyer's wholly owned merger subsidiary, excluding the target shareholders as direct parties to the agreement. Furthermore, these agreements often expressly stipulate that the target shareholders are not recognized as third party beneficiaries of the agreement.

This contract structure creates a puzzling scenario when the buyer breaches the merger agreement and the merger fails to close, raising questions about who has suffered harm and what remedies are available. Although the target shareholders lose the promised merger premium from the buyer, this loss does not appear to constitute direct harm to the target itself, as it retains its assets and operations ostensibly unchanged before and after the breach. At the same time, given that the target shareholders are expressly denied a third party beneficiary status, it is unlikely that they can pursue a direct claim against the buyer, despite having lost out on the merger premium.

To deal with this structural and contractual conundrum, many M&A practitioners have been contractually stipulating the target's right to collect the "lost premium" (i.e., the premium the target shareholders would have received) from the buyer when the buyer breaches and the merger fails to close.[1] The clause has been colloquially known as the "Con Ed" provision. In the recent case of *Crispo v. Musk*,[2] however, the Delaware Chancery Court ruled that such provisions are unenforceable. The court reasoned that the target company suffers little, if any, direct harm from the buyer's breach, and allowing the disappointed target to collect the "lost premium" from the breaching buyer is in violation of contract law's anti-penalty doctrine. The *Crispo* decision implies that, in Delaware, target companies in wrongfully terminated mergers cannot recover lost premia from breaching buyers unless the merger agreement recognizes the shareholders' right to collect damages and expressly (and exclusively) delegates such a right to the target. Given that Delaware law governs most major deals, the *Crispo* decision represents a major legal change in M&A transactions.[5]

The *Crispo* decision took market participants by surprise since dealmakers had long relied on the legal validity of Con Ed provisions and included them in merger agreements. In response to the *Crispo* decision, on March 28, 2024, the Delaware State Bar Association's Corporation Law Council proposed to amend the Delaware General Corporation Law ("DGCL"), allowing the parties to expressly include a lost premium provision in a merger agreement.[6] The proposed amendment also permitted the designation of the target corporation as a "representative" of the target shareholders in

[1] The practice became more prevalent after the case of *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005). See Thomas and Stair (2009). See Kling and Nugent, Negotiated Acquisitions of Companies, Subsidiaries, and Divisions §15A (2022).

[2] *Crispo v. Musk*, 2023 Del. Ch. LEXIS 466 (Del. Ch. 2023).

[5] See Appendix A for a more detailed analysis of the legal issues, including the anti-penalty doctrine.

[6] Richards Layton & Finger, 2024 Proposed Amendments to the General Corporation Law of the State of Delaware, March 28, 2024.

the merger agreement to collect the stipulated damages, effective upon shareholders' adoption of the agreement.[7] On August 1, 2024, the amendment became effective.

This paper analyzes the impact of the *Crispo* decision, including how the case has shaped subsequent contracting practice. Following a brief overview of the relevant literature, the paper first engages in hypothesis development with a stylized, theoretical model on the impact of disallowing an injured target from collecting a merger premium from a breaching buyer. The stylized theory offers several empirical predictions. For instance, holding everything else constant, the theory predicts that disallowing monetary damages will generally be harmful to the target that has already entered into a merger agreement. It also predicts that restricting the target from collecting any damages from a breaching buyer can lead to possibly too many breaches (i.e., inefficient breaches), thereby reducing the overall (expected) surplus from the transaction.

Another implication of the theoretical analysis is that the *Crispo* decision incentivizes transacting parties to opt into a contractual "fix" to better realize the transactional surplus and to prevent inefficient breaches. Furthermore, the absence of a remedy for breach can discourage transactions with a relatively small surplus from moving forward, as the risks of buyer breaches would outweigh the potential gains. This can, in turn, drive up merger premiums because only the deals with sufficiently high surplus will be considered worthwhile. If, however, the transacting parties can "neutralize" the impact of the *Crispo* decision using contract provisions, the impact on the merger premium would be minimal. Therefore, the reaction to the *Crispo* decision could manifest itself in either price or non-price terms. The model tees up empirical questions to see (1) whether the *Crispo* decision has had a significant effect on firm value in open deals and (2) whether the decision has led to changes in non-price terms and/or deal premia.

Second, following up on the hypothesis development, the paper examines the stock market reactions to the *Crispo* decision to determine whether the decision had any meaningful impact on target companies. At the time of the decision, there were about 49 pending transactions involving public targets, for which we have access to relevant data. Among them, 35 were governed by Delaware law and 14 were governed by non-Delaware law. With this dataset, we utilize the event study methodology to see the stock price reaction of the target companies. The paper finds that, for transactions governed by Delaware law, there was a statistically significant, negative return on the target companies' stocks. The result is robust to the different windows around the decision with which the abnormal returns are measured. A difference-in-differences analysis shows that Delaware targets had abnormal returns that were significantly smaller than targets in open mergers governed by non-Delaware laws. Furthermore, the event study analysis on the joint values of both the buyers and the targets shows that the Delaware deals experienced a negative abnormal joint return in relevant windows. These findings suggest that the *Crispo* decision was a negative shock to Delaware targets and jointly on the buyers and targets, and the decision had a meaningful economic impact on affected mergers.

Third, we manually collect relevant provisions from publicly announced and filed merger agreements to determine whether and how the contracting practice has been shaped by the *Crispo* decision.[8] In the aftermath of *Crispo*, M&A practitioners have suggested several possibilities for

[7] *Id.*

[8] Scholars have earlier documented that, particularly in sovereign debt context, transacting attorneys do not seem to rationally respond to an adverse court decision and changes in contract terms, instead, resemble a "random mutation." See Choi, Gulati, and Scott (2018a and 2018b). See also Gulati and Scott (2013).

restoring the ability of the target to recover the promised premium from a breaching buyer. This exercise can inform us about how M&A practitioners (or commercial contracting parties) can respond to a legal shock and how contracting practice can converge to a new equilibrium. We collected 233 merger agreements with agreement dates from one year before *Crispo* to one year after (i.e., between October 31, 2022, and October 31, 2024). 121 agreements were entered into before *Crispo*, 46 were entered into after *Crispo* but before the proposed DGCL amendment, and the remaining 66 were agreed to after the DGCL amendment was proposed.

Our analysis of the contract terms uncovers a few important patterns. First, we observe an emergence of two new contracting practices in response to *Crispo*: recognizing the shareholders as third-party beneficiaries, while at the same time expressly designating the target corporation as the sole entity to bring suit against the buyer to collect damages; and explicitly designating the target company as its shareholders' "agent" for recovering the lost merger premia. The second contractual innovation—an explicit agency designation—may be seen as a variant of the first, but is more controversial from a legal doctrinal perspective, as explained in the legal background in Appendix A. We observe that, after the decision, especially for Delaware deals, the frequency of such provisions has increased substantially, to almost half of the sample agreements. This finding supports the hypothesis that the transactional lawyers (or at least a sizable subset of them) seem to be actively responding to the decision.[9]

With respect to the impact on deal premium, we first find that, after *Crispo*, Delaware deals with a contractual "fix" in response to the decision had a lower premium. This is consistent with the theoretical prediction that a contractual "fix" will lead to a lower premium. We acknowledge the fact that both price and non-price terms of a merger agreement are being determined simultaneously, and this leads us to caution against reading too much into the results on merger premia. The overall results, however, indicate that transactional parties seem to have responded fairly robustly to *Crispo* by changing non-price terms, and that price and non-price terms are substitutable.

The paper is organized as follows. In Section 2, we present a brief overview of the relevant literature. Section 3 presents a stylized theoretical model to develop various hypotheses. Section 4 explains our data collection process and presents summary statistics. Section 5 presents the results of event studies that show that the *Crispo* decision decreased value for firms most directly affected: targets in mergers governed by Delaware law and announced (but not completed or canceled) as of the decision date. It also shows that the joint values of targets and buyers suffered a negative abnormal return. Section 6 presents an empirical analysis of how transacting parties have responded to the *Crispo* decision, by examining the hand-collected deal terms from transactions that were announced before and after the decision. Section 7 discusses implications from the study and concludes with suggestions for future research. Appendix A includes a more detailed discussion of the legal background, and Appendix B presents additional empirical results, including robustness checks.

2. A Brief Overview of Related Literature

This paper builds on a few important lines of scholarship. First, a number of scholars have examined the impact of the change in the law (either through a court decision or a statutory or

[9] We have also consulted with a number of M&A transactional lawyers regarding the importance and the consequence of the decision and various response proposals, and verified that *Crispo* had a tangible effect on contracting practices.

regulatory change) on firm value using the event study methodology.[10] For instance, previous papers have documented significant changes to firm value caused by court decisions on fee-shifting bylaws (Dammann 2022), forum-selection bylaws (Aggarwal, Choi, and Eldar 2020), jury verdict against a breaching buyer in a merger (Cutler and Summers 1988), and the court's grant of specific performance against a buyer in a merger (i.e., forcing the buyer to close the transaction) (Listokin 2005).

Another important line of literature has examined the impact of M&A law changes. A number of papers have examined the impact of change in state anti-takeover statutes on firms and their agents, including firm performance (Giroud and Mueller 2010), labor wages (Bertrand and Mullainathan 1999, Bertrand and Mullainathan 2003), managerial stock ownership (Cheng, Nagar, and Rajan 2005), and capital structure (John and Litov 2010). Others have looked more specifically at how transacting parties' behavior changes in response to changes in M&A law. Restrepo and Subramanian (2017) find that prohibiting deal protection devices leads to a decline in deal volumes.[11] Cain, Fisch, Davidoff Solomon, and Thomas (2018) find that after it became harder for plaintiffs to bring frivolous lawsuits, the volume of merger litigation and attorneys' fee awards decrease. Boone, Broughman, and Macias (2019) find that reducing target shareholders' appraisal right decreases the target shareholders' return.[12]

A smaller number of studies have examined how contracts respond to the change in law. Romano and Sanga (2017), for instance, find a significant increase in the adoption of exclusive forum provisions after Delaware courts expressed their willingness to uphold such provisions. Barzuza and Curtis (2017) similarly show that corporations rapidly enhanced contractual indemnification protections for their directors after a Delaware court decision weakened directors' default entitlement to indemnification. Closer to our paper are studies that examined changes in commercial contracts in response to a change in case law. The earlier papers have mostly found that even sophisticated commercial parties do not respond to a legal shock. Choi, Gulati, and Scott (2018a and 2018b), for instance, analyze sovereign debt litigation and find that transactional lawyers began copying the terms from previous deals with relatively minor adjustments in response to a surprise court decision. Kahan and Gulati (2021) similarly found little changes in bond contracts in response to a surprise court decision. Given that the prior empirical work shows little or no response from sophisticated contracting parties to changes in law, an interesting question remains over whether and how contracting parties in M&A transactions would respond to the *Crispo* decision.[13]

[10] For a comprehensive overview of the use of event study methodology in law and the criticisms, see Bhagat and Romano (2002a and 2002b).

[11] There is empirical literature that examines the impact of target termination fee on merging parties behavior, such as whether it leads to a higher merger premium (Officer 2003), a higher deal completion rate (Bates and Lemmon 2003), and a shorter bidding process (Boone and Mulherin 2007). By comparison, this paper examines how buyer damages provision affects contracting parties' behavior in response to a legal shock.

[12] There also is scholarship that examines how M&A activity is affected by changes in other laws, such as the change in tax law (Choi, Curtis, and Hayashi 2019), change in shareholder vote on golden parachutes (Choi, Lund, and Schonlau 2020), and fairness opinions (Badawi, Cain, and Solomon 2023).

[13] See also Jennejohn, Nyarko, and Talley (2022) and Choi, Gulati, Jennejohn, and Scott (2023) for studies on "evolution" of terms used in M&A transactions. Previous works have noted the challenge of endogeneity in empirically analyzing merger contracts (Palia and Scott 2015). We believe we have identified a natural experiment (through the case of *Crispo v. Musk*) and show how M&A contracting has changed due to the decision.

3. A Simple Model

In this section, we present a simplified, theoretical model to examine the impact of making it more difficult for a target company to recover lost premia (or other damages) from a breaching buyer[14]. The model will generate hypotheses for empirical tests. The basic idea of the model here is that, without a remedy against a breaching buyer, buyer would be more willing to breach the contract when the merger becomes unattractive. This will be true particularly when the surplus from the transaction is small. This implies that for the buyer to consummate the transaction, surplus from the transaction must be sufficiently large and the lack of liability will push up the transaction price. Conversely, with damages for breach, the buyer becomes more willing (or compelled) to close the transaction even when the surplus (buyer's valuation for the target) is small. This lowers the expected surplus from the transaction and leads to a lower transaction price. That is, ceteris paribus, either the transaction price will get larger for Delaware targets after the *Crispo* case, or non-price contractual terms will become more pro-target after the case, which may lead to a decrease in merger premium.

The baseline model assumes that the *Crispo* case would simply eliminate (or, at least substantially reduce) the monetary remedy against a breaching buyer without affecting other remedies. If the transacting parties can get around the *Crispo* issue, for instance, through a contractual remedy, the effect of the decision can be neutralized. In particular, if the injured target can more readily secure specific performance as remedy (forcing the buyer to close the transaction) after the decision, or if the parties can contractually counteract the impact of *Crispo*, the increase in merger premium effect can disappear. In fact, if the court becomes more likely to grant specific performance as a remedy against a breaching buyer or if non-price terms become more pro-target, the (expected) premium can even be lower for the mergers that are executed after the decision.

With that caveat, here is a simple theoretical scenario. Suppose we have two transacting parties: one buyer and one seller (target). To be consistent with the setting, the target is a publicly traded company and the buyer wants to acquire the target. The target and the buyer are utilizing a triangular merger structure, under which the target shareholders will receive the consideration directly from the buyer when the merger closes. Suppose the target shareholders' reservation value is (fixed at) $c > 0$.[15] The buyer's reservation value (v) for the target is initially uncertain and is distributed on the support $[\underline{v}, \overline{v}]$, with the probability density function (pdf) of $f(\cdot)$ and the cumulative density function (cdf) of $F(\cdot)$. We assume that $\underline{v} < c < \overline{v}$ and $E(v) > c$. In terms of timing, we assume that, at $t = 1$, the parties enter into a merger agreement with the (aggregate) consideration of p to be paid to the target shareholders.[17] At the negotiation stage, the target receives $\delta \in [0,1]$ fraction of the expected transactional surplus. At $t = 2$, the buyer's valuation (v) realizes; at $t = 3$, the buyer decides whether to consummate the transaction or breach; and at $t = 4$, the target pursues remedy (if any). For simplicity, let's assume that there is no time discounting and, for now, we'll focus on monetary damages as remedy. Specific performance will be discussed later.

[14] There is a theoretical literature that examines the impact of damages for contract breach on contracting party's decision to breach, make reliance investment, deterring third party entry, etc., and this stylized theory builds on that literature. See Rogerson (1984), Shavell (1984), and Spier and Whinston (1995).

[15] This assumption is made for simplicity. We can allow the target's reservation value to vary, but the main analysis will carry through, with some additional complications.

[17] Using the aggregate consideration measure simplifies the analysis. If there are n number of target shares outstanding, the per-share consideration will simply be p/n.

Suppose that if the buyer were to breach and walk away from the transaction, the buyer must pay damages of $d \geq 0$ to the target, where $d \in [0, p-c]$. With these damages, the buyer will breach if $-d > v - p \Leftrightarrow p - d > v$. This implies that the probability of completing the transaction is $(1 - F(p-d))$, and from the ex ante perspective, the expected surplus (W) is given by:

$$E(W) = E(v - c | v \geq p - d) = \big(1 - F(p-d)\big) \int_{v=p-d}^{\overline{v}} (v-c) \frac{f(v)}{1 - F(p-d)} dv$$
$$= \int_{v=p-d}^{\overline{v}} (v-c) f(v) dv.$$

The seller's and the buyer's expected profits are respectively given by:

$$E(\pi_b) = \int_{v=p-d}^{\overline{v}} (v-p) f(v) dv - \int_{v=\underline{v}}^{p-d} df(v) dv = \int_{v=p-d}^{\overline{v}} (v-p) f(v) dv - F(p-d) d,$$

and

$$E(\pi_s) = \int_{v=p-d}^{\overline{v}} (p-c) f(v) dv + \int_{v=\underline{v}}^{p-d} df(v) dv = \big(1 - F(p-d)\big)(p-c) + F(p-d) d.$$

Before we proceed, a few important points about the model. From the setup, we can derive at least a few important results. First is with respect to the impact of damages on closing probability. When we differentiate $(1 - F(p-d))$ with respect to d, we get:

$$\frac{\partial (1 - F(p-d))}{\partial d} = f(p-d) > 0.$$

In other words, from the setup, as the damages increase, the probability of the parties successfully consummating the transaction increases. This result is not really surprising, but will have implications about the market's expectation about the chances of successful completion. Second, when we differentiate the expected welfare function with respect to damages, we get:

$$\frac{\partial E(W)}{\partial d} = (p - c - d) f(p-d).$$

The right hand side is equal to zero when $d = p - c$.[18] In other words, the expected transactional surplus is maximized with expectation damages. Finally, we make one regularity assumption. When we differentiate $E(\pi_s)$ with respect to p, we get:

$$\frac{\partial E(\pi_s)}{\partial p} = \big(1 - F(p-d)\big) - f(p-d)(p-c) + d \cdot f(p-d)$$
$$= \big(1 - F(p-d)\big) - f(p-d)(p-c-d).$$

[18] The second order condition is also satisfied so long as $f''(\cdot)$ is not "too negative."

We assume that:

$$\big(1 - F(p-d)\big) - f(p-d)(p-c-d) > 0 \;\forall p \in [c, \overline{v}].$$

This assumption is equivalent to $\frac{1}{p-d-c} > \frac{f(p-d)}{1-F(p-d)}$, i.e., the hazard rate is not too big. Given that $p - d \in [c, \overline{v}]$, if $\frac{1}{\overline{v}-c} > \frac{f(v)}{1-F(v)}$ in the relevant parameter range, the condition is satisfied. The assumption (regularity condition) ensures that when the merger price goes up, the target's expected profit also rises, which is reasonable.[19]

When the parties enter into the merger agreement at $t = 1$, (p, d) will satisfy: $E(\pi_s) = \delta E(W)$, which becomes:

$$\big(1 - F(p-d)\big)(p-c) + F(p-d)d = \delta \cdot \int_{v=p-d}^{\overline{v}} (v-c) f(v) dv.$$

If we treat d as being given, this equality implicitly defines p as a function of d (among other variables). In order to get the relationship between p and d, we can rely on the implicit function theorem and totally differentiate the equation.[20] When we do so, and with some algebra, we get:

$$\begin{aligned} p'(d)\big\{\big(1 - F(p-d)\big) - (1-\delta)(p-d-c)f(p-d)\big\} \\ = -F(p-d) - (1-\delta)(p-d-c)f(p-d). \end{aligned}$$

The right hand side of the equation is negative. When we examine the terms within curly brackets on the left hand side, we see that $\big(1 - F(p-d)\big) - (1-\delta)(p-d-c)f(p-d) < 0$ if

$$\frac{f(p-d)}{1-F(p-d)} < \frac{1}{(1-\delta)(p-d-c)}.$$

Given that $(1-\delta)(p-d-c) = p-d-c$ when $\delta = 0$ and $\delta \in [0,1]$, $\frac{1}{(1-\delta)(p-d-c)} \geq \frac{1}{p-d-c}$. With the regularity assumption given above, therefore, we get $\frac{f(p-d)}{1-F(p-d)} < \frac{1}{(1-\delta)(p-d-c)}$, and

$$p'(d) = \frac{-F(p-d) - (1-\delta)(p-d-c)f(p-d)}{\big(1 - F(p-d)\big) - (1-\delta)(p-d-c)f(p-d)} < 0.$$

In other words, as damages increase, the merger price falls. Although the mathematical analysis is fairly involved, the main reasoning is fairly straightforward. As damages increase, the parties expect to

[19] The reason why this regularity condition is necessary is that when the deal price goes up, this will increase the chances of deal not closing (when $v < p - d$) and that could have a perverse effect of decreasing the target's expected return. The condition ensures that the latter effect isn't too strong compared to the effect of increasing the consideration for the target.

[20] The reason for this complication is that, unlike many other scenarios, in this setting the price term (p) (along with damages) is serving two simultaneous functions: dividing up the surplus between the parties and affecting the size of the surplus (by affecting the buyer's breach decision).

close the transaction even when the surplus from the transaction is relatively small, and this leads to a lower expected valuation by the buyer and to a lower transaction price.

The stylized, theoretical model renders a few predictions. First is the impact and the significance (importance) of the *Crispo* decision on the target, the buyer, and the joint surplus. For instance, with respect to those transactions that are pending at the time of the decision, if we assume that, due to the *Crispo* decision, the target shareholders became less likely to be fully compensated for the buyer's (material) breach and the buyer's breach is a concern, the decision will have a negative impact on the target.[21] Furthermore, whether the decision will have a positive effect on the buyers depends on the chances of the target receiving specific performance as a remedy (i.e., force the buyer to close the transaction). Although the decision seems to be generally favorable to the buyers, if the chances of receiving a specific performance remedy increases after the decision, for instance, the decision can actually have a negative effect on the buyers. Overall, however, the decision is likely to lead to a decrease in joint surplus.

Second, the model shows that, after the *Crispo* decision, without any remedies, because the buyer no longer needs to worry about having to pay damages and the parties expect the low-surplus transaction to not close with less recourse against a breaching buyer, the expected transactional premium will be higher. On the other hand, if the transacting parties can contractually address the problem raised by *Crispo*, there will be no increase in premium. In other words, if the parties successfully create a damages provision against the buyer, the merger premium will likely decrease. From the joint surplus perspective, given that the impact of the decision is to create too many inefficient breaches (when $v > c$) or the court granting specific performance too often (even when $v < c$), both of which are inefficient, the decision creates an incentive for the transacting parties to contractually deal with the shrinking transactional surplus. Finally, although not expressly discussed, if, for instance, $c < p < \underline{v}$ in equilibrium, such that the buyer always has an incentive to close the transaction, the parties will not have an incentive to include a non-price contractual response to *Crispo*.

Overall, the theoretical model opens the possibility of empirically examining the changes, if any, in the contracting practice before and after the decision. The model also predicts a possible deal price response to the decision and to an inclusion (or exclusion) of a non-price response. Figure 1 visualizes how changes in contractual remedy could affect the probability that transactions choosing Delaware law close.

4. Data and Summary Statistics

To empirically appraise *Crispo* decision's impact on the market for corporate control, we collect subscription and hand-collected data from a range of sources. First, we obtain information about stock prices from the Center for Research in Security Prices (CRSP). Second, we collect information about public company merger transactions from FactSet. We restrict the sample to targets headquartered in the United States, with a transaction value of at least $100 million, traded on the New York Stock Exchange, NASDAQ, or American Stock Exchange, and with consideration of at least $5 per share

[21] This will be true so long as the target's probability of getting specific performance as remedy is not for certain. In Delaware, at least since *IBP v. Tyson*, courts have been willing to grant specific performance as remedy and merger agreements typically provide for an injured party to seek specific performance without having to prove that monetary damages would have been "adequate." See *IBP, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001). See also Goldstein (2004) and Listokin (2005).

(Cain et al. 2018). We gather this information for mergers announced between October 31, 2022 (one year before the *Crispo* decision) and October 31, 2024 (one year after the *Crispo* decision). Also from FactSet, we collect information about transaction size, target profitability multiple (proxied by the ratio of enterprise value (EV) to earnings before interest, tax, depreciation, and amortization (EBITDA)), indicators for whether the deal consideration was all cash, or if it was a diversifying merger (i.e., the target and acquirer do not belong to the same industry), and information on target and buyer law firms. Third, with respect to the law firms, we collect data on whether each law firm is among the top 25 law firms, in terms of total deal values it represented in the years of 2023 and 2024. This data comes from the Global Mergers and Acquisitions Review published by LSEG ("London Stock Exchange Group") Data & Analytics.

Finally, for all the deals in our sample, we collect merger agreements from the SEC's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) and hand-code relevant provisions from the agreements. Two important provisions we looked for are: (1) whether the agreement expressly allows the target corporation to sue on behalf of its shareholders; and (2) whether the agreement designates the target corporation as an "agent" or "representative" of its shareholders (in pursuing the remedy). Out of 273 deals that are identified in FactSet, for about 40 deals, we were unable to locate the agreements, and this leaves us with 233 deals with full agreements. Table 1 defines all variables used in the paper's empirical analysis, while Table 2 presents summary statistics of the deals that are used in the event studies and the empirical analysis on the agreement terms.

5. Stock Market Reaction to *Crispo v Musk*

As discussed in the theoretical background section, the direction and magnitude of the economic effect of the *Crispo* decision is not immediately obvious. On the one hand, holding other remedies (including specific performance) fixed, the weakening of Con Ed provisions would make it more likely that acquirers will breach merger contracts and frustrate target shareholders' expectations that they will receive the merger premium. This view should translate to *Crispo* leading to the lowering of firm value for merger targets. A competing perspective is that *Crispo* could have led to null (or even positive) effect on target value because the company could still seek specific performance after the decision. With respect to specific performance, since target shareholders still had some hope of receiving merger premia if their company successfully sought specific performance, *Crispo* may have had no economically significant effect on firm value. It may even be possible that the new prominence of specific performance might *increase* firm value, since there is some empirical evidence that specific performance remedies are accompanied by more positive market reactions (Listokin 2005).[22] Finally, there is a lurking possibility that the *Crispo* case simply did not matter, particularly given the "optional" nature of the Con Ed provision,[23] and the market may not have taken the Chancery Court's decision to signal a change in Delaware deals jurisprudence.

To ascertain the price effect of the *Crispo* decision, we use the event study methodology. If *Crispo* had any appreciable effect on firm value, it would have been reflected in the stock prices of affected companies around the time of the Chancery Court's decision. We first examine the stock price movements of firms most affected by the decision: targets in mergers with Delaware governing

[22] We do not view this possibility as being very likely, since few other studies have found similar evidence supporting specific performance as a value-maximizing alternative to damages.

[23] As discussed in Appendix A, a typical Con Ed provision merely states that the injured target *may* collect a lost premium from the breaching buyer and does not require the buyer to pay the lost premium, and some have argued that, given the optional nature, it does not matter whether the agreement had such a clause.

law, for deals whose agreements had been finalized before *Crispo*, but not yet completed (or cancelled) as of the decision date. The sample of Delaware merger targets consists of 35 merger targets (out of 49 merger targets in the event study sample). This sample size is large enough to run a conventional event study, so long as *Crispo* had a large enough economic effect (MacKinlay 1997, 31).

We use the standard Fama-French three-factor asset pricing model (Kothari and Warner 2007), which estimates a firm's stock return as:

$$R_{it} = a_{it} + \beta_{mt}R_{mt} + \beta_{SMB}R_{SMB} + \beta_{HML}R_{HML} + \varepsilon_{it}.$$

Here, R_{it} is the return on stock i on date t minus the risk-free rate; R_{mt} is the market return on date t minus the risk-free rate; R_{SMB} is the return on a portfolio of small companies; and R_{HML} is the book to market factor which is the portfolio of firms with high book value to market value ratio. The abnormal return that can be traced to the event is the actual return minus the expected return:

$$AR_{it} = R_{it} - \hat{\alpha}_i - \hat{\beta}_{Mt}R_{Mt} - \hat{\beta}_{HML}R_{HML} - \hat{\beta}_{HML}R_{HML}.$$

We calculate the abnormal returns for various event windows around the date of the *Crispo* decision (October 31st, 2023). To calculate the expected return R_{it}, we follow the finance literature and use a 255-day "estimation window" that ends 46 trading days before the beginning of the event window. We require that each firm have data for at least 40 trading dates during the estimation window (Child et al. 2021). Our variable of interest is the cumulative abnormal return (CAR) for each event window, defined as the sum of abnormal returns for each day in the window.

Table 3 presents the cumulative abnormal return associated with different event windows. In column (1), we find that the average abnormal returns for day 0 is -0.436 percentage points, which is statistically significant at the 95% level. The results for longer event windows around day 0 are larger and more statistically significant. Thus, the effect associated with event windows [0,1], [0,2], [-1,1], and [-2, 2] are -0.699, -2.273, -1.302, and -2.577 percentage points respectively, all being statistically significant at the 99% level. As a robustness test, columns (6) and (7) of Table 1 present CARs for the event windows [-7, -3] and [3, 7], which do not include the date of the *Crispo* decision. If the results show the effect of the Chancery Court decision, these windows should not have a statistically significant CAR. Consistent with this intuition, the CARs for these two placebo windows have small *t*-statistics that do not approach statistical significance. The results suggest that *Crispo* led to a loss in firm value for affected firms. Moreover, the restriction of the effect to event windows that include day 0 suggests that the destruction of firm value was driven by the Chancery Court's decision.

Figure 2 graphs the 95% confidence intervals for the abnormal returns around the time of the *Crispo* decision. Day "0" in this figure refers to October 31, 2023. The results suggest that the stock price of the firms in our samples exhibit smaller abnormal returns between event days -1 and +3 around the *Crispo* decision. The abnormal returns before and after these days (i.e., between -7 and -2 and between +4 and +7) do not seem to yield any discernible patterns. The figure suggests that *Crispo* had an economically and statistically significant decrease in firm value for targets in mergers choosing Delaware law that had deals announced but not completed or withdrawn as of the date of the decision.

To further examine the hypothesis that the *Crispo* decision had an economically significant effect, we conduct a difference-in-differences analysis, once again using the CARs around different

event windows as the dependent variable. The control group consists of 14 targets in deals that did *not* choose Delaware as the governing law and were announced (but not completed or canceled) before the *Crispo* decision. We expect *Crispo* to primarily affect merger agreements governed by Delaware law, since the *Crispo* decision was a novel articulation of Delaware law. However, we acknowledge the possibility that *Crispo* could affect the expected judicial treatment of contractual clauses in mergers governed by non-Delaware law, since the decision was based on blackletter contract doctrine, which could be relevant to other state courts' interpretation of Con Ed provisions.[24]

Panel B of Table 3 presents the results of the difference-in-differences analysis, displaying the coefficient for the indicator variable equaling 1 for Delaware choice of law. We cluster the standard errors in this difference-in-differences regression at the treatment level, i.e., at governing law (Abadie et al. 2023). The coefficient for Delaware choice of law is negative but not significant at traditional levels for the event windows [0] and [0, 1]. However, it is both negative and statistically significant for the longer event windows [0, 2], [-1,1], and [-2, 2]. The coefficient is not significant for the placebo event windows [-7, -3] and [3, 7].[25] The results in Panel B of Table 3 are consistent with the thesis that *Crispo* had an economically significant effect, and that this effect was concentrated in mergers that chose Delaware law as the governing law. In unreported results, we re-run the analysis in Panel B with controls for deal size, target profitability, and indicators for all cash transactions and diversifying mergers (the same controls used in section 6). The negative coefficient for Delaware choice of law becomes even larger and more statistically significant. However, given the small sample size for the event study, we only report the baseline results without these financial controls.

Crispo's effect on the joint value of the buyer and acquirer is not entirely unclear ex ante. If *Crispo*'s weakening of Con Ed provisions made it cheaper for acquirers to breach merger agreements and walk away from the transaction, one would expect the firm value the acquirer increase after the decision. At the same time, per our legal discussion in Appendix A, not enforcing a Con Ed provision could result in the target's more likely seeking and getting a specific performance remedy. If that were the case, the decision can have a potentially negative effect on the buyers. Furthermore, for both the buyer and the target, the decision could inject some uncertainties into the deal, which would, presumably, put a negative pressure on both the target's and the buyer's stock price. Overall, the decision can lead to a reduction in joint value, either through too many inefficient breaches, through an inefficient enforcement of specific performance, or through the reduction in deal certainty.

To test the *Crispo* decision's effect on joint value, Panel C of Table 3 re-runs the event study analysis for mergers governed by Delaware law, with the dependent variable equal to the abnormal returns for the value-weighted portfolio of the target and acquirer (Bradley et al. 1988, Cutler and Summers 1988).[26] Since this exercise requires data on the market capitalization for both companies, our sample size is only 28 in Panel C. We find negative and statistically significant decreases in joint

[24] As discussed in Appendix A, the *Crispo* decision relied heavily on the anti-penalty doctrine in contract law, which is applicable in other states. The decision will serve, at least, as a persuasive authority for non-Delaware courts.

[25] In untabulated results, we re-run the analysis in Panel B with controls for deal size, target profitability, and indicators for all cash transactions and diversifying mergers (the same controls we later use in our analysis in section 6.1). The negative coefficient for Delaware choice of law becomes even larger and more statistically significant. However, given the small sample size for the event study, we only report the baseline results without these financial controls.

[26] More precisely, $AR_{joint,t} = w_A \cdot AR_{acquirer,t} + w_T \cdot AR_{target,t}$, where w_j is determined based on the market capitalizations before the relevant event window. The market capitalization data comes from Factset, and is calculated based on the closing stock price from one day before the announcement of the merger.

value for Delaware mergers over the longer event windows ([0, 2], [-1, 1], and [-2, 2]).[27] Repeating the exercise in Panel C for the joint value of mergers governed by laws of other jurisdictions, we do not find statistically significant results for any event window. While the results for joint value should be treated with caution due to the small sample size, they suggest that the *Crispo* decision was welfare reducing for mergers governed by Delaware law.

6. Contractual Responses to *Crispo v. Musk*: Price and Non-Price Terms

As hypothesized in section 3, *Crispo* decision has made it less costly for the buyers to breach merger agreements and can potentially lead to more inefficient, opportunistic breaches. With the potential inefficiency, the case created the possibility for transacting parties to deal with buyer opportunism through a contractual response. Furthermore, depending on whether there is a contractual response, this could also have an impact on the deal premium. In this section, we examine the responses that were adopted by the transacting parties after the *Crispo* decision. We divide the section into two parts: we first start by examining the non-price terms of the deals before and after the *Crispo* decision and then examine price responses.

6.1. Non-Price Response to *Crispo*

With respect to the changes in non-price terms, we hand-code information on two non-price terms most likely to have changed in response to the decision. First, we collect data on whether the merger agreement explicitly allowed the target to sue on behalf of its shareholders for (material or intentional) breach of the merger agreement. Such a provision increases the chances of the target company collecting a lost premium from a breaching buyer. Second, we code for whether the merger agreement explicitly designated the target company as its shareholders' "agent" (or "representative") for collecting the lost merger premia. The explicit agency designation can be seen as a variant of the broader contractual innovation of granting the target the exclusive right to sue the buyer for lost premia. We view it as a more aggressive response and code it separately.

Before we present the statistical analysis on non-price terms, an example could be useful. The Third Party Beneficiaries provision used in AstraZeneca's acquisition of Icosavax (a pharmaceutical company) is informative. The merger agreement was entered into on December 11, 2023, and the agreement was filed (with the SEC) on December 12, 2023, after *Crispo*. The consideration used was cash and the transaction value was $753.46 million. The relevant provision, section 10.6 of the agreement,[30] creates a few important conditions. First, it makes it clear that the agreement does not, expressly or impliedly, confer any third parties rights or remedies. Second, as a carve-out, if specific performance has been denied by the applicable court, it preserves the right of the target stockholders to "seek any monetary damages (including *monetary damages based on a lost premium*)" (italics added). Third, and finally, the right to receive damages granted to the target shareholders can "only be enforceable on behalf of the Company Stockholders by the Company in its sole and absolute discretion, as *agent* for the Company Stockholders" (italics added). In short, the provision recognizes the target stockholders as third party beneficiaries in a narrow circumstance but only allows the target

[27] The joint abnormal returns are not, however, significantly different from zero for the [0] or [0, 1] windows. The outcome is also not statistically significant for the placebo [-7, -3] window. While it is negative and significant for the [3, 7] placebo, it is only marginally significant at the 10% level, and this too might reflect lingering value destruction after the *Crispo* decision.

[30] The agreement is filed and is available at: https://www.sec.gov/Archives/edgar/data/1786255/000119312523293389/d654575dex21.htm.

to sue the buyer and collected lost premium damages on behalf of the stockholders. The provision seems to deal successfully with the issues raised by *Crispo*.

Turning to the statistical analysis, foremost, Figure 3 graphs the average prevalence of provisions allowing targets to sue on behalf of shareholders. We split this figure into three time periods: the year before *Crispo*, the interval between *Crispo* and the proposal for DGCL amendments, and the period after the amendment proposal. We show the incidence of this provision separately for agreements governed by the laws of Delaware and other jurisdictions. Before *Crispo*, few merger agreements contained such a provision: 28.42% of merger agreements choosing Delaware law designated target companies as being able to sue on behalf of their shareholders, while 7.69% of non-Delaware agreements did so. After *Crispo* but before the proposed DGCL amendment, we see a significant jump in the prevalence of such clauses, to 48.72% (28.57%) of Delaware (non-Delaware) merger agreements. Finally, after the DGCL amendments were proposed, we find these clauses in 47.37% of Delaware merger agreements. We do not find this clause in any non-Delaware merger agreement, but this could be because of the relatively low sample size for mergers entered into after the March 2024 DGCL amendment proposal (for which we have data for 57 Delaware and only 9 non-Delaware deals). Figure 4 shows a similar pattern in the prevalence of contract provisions designating merger targets as their shareholders' agents in recovering lost premia. The increase in such provisions is especially notable for agreements choosing Delaware law as the governing law. For these Delaware deals, the prevalence of such explicit agency designations jumped from 4.21% before *Crispo* to 35.9% in the intermediate period to 35.1% after the DGCL amendments were proposed.[31]

To more formally examine whether the treatment group changed its non-price terms in response to the *Crispo* decision (and to the DGCL amendment proposal), we estimate the following linear probability model for merger *i* for a company in industry *j* agreed to at time *t*:

$$Non - Price\ Term_{i,t} = \beta\left(Post_t \times Delaware_{i,t}\right) + \alpha Post_t + \eta Delaware_{i,t} + \delta X_{i,t} + \pi_j + \gamma_t + \epsilon_{i,t}. \quad (1)$$

The dependent variable $Non - Price\ Term_{i,t}$ is an indicator that equals 1 if the merger agreement contains the specified non-price term (depending on the regression model, either (1) allowing it to sue for breach of the agreement on behalf of shareholders or (2) explicitly designating the target company as its shareholder's agent). There is a high level of correlation between the presence of these two contractual terms (0.64), but a non-negligible number of deals feature one but not the other.

Note that in this model, $Post_t$ equals 1 for the entire period after the *Crispo* decision, encompassing the period immediately after the decision as well as the period after the DGCL amendments were proposed. As is standard in the literature on mergers (Kamar et al. 2009 and Badawi et al. 2023), we include controls for industry fixed effects through the variable π_j, where we define

[31] One issue that remains is that why the rate of adoption is not higher in Delaware mergers after *Crispo*. As we show in the paper, the adoption rate is not fully explained by other factors, such as deal financials, industry, year, and the identity of target law firm. For certain deals where the parties do not anticipate any potential breach by the buyer, such a provision would be unnecessary. For other deals where the target can secure specific performance, again the provision would be unnecessary. Still further, by asking for a contractual fix, the target could be sending an "adverse" signal to the buyer. See Spier (1992). Note that, even before *Crispo*, the rate of adoption was substantially lower. Although we do not show this in the current version of the paper, before *Crispo*, many deals did not have a lost premium clause.

industry at the two-digit standard industrial classification (SIC) code level. γ_t is a time fixed effect term at the year level. In some specifications, we also include a vector of merger financial controls, $X_{i,t}$, namely the natural logarithm of transaction size, the ratio of enterprise value to EBITDA (a standard multiple reflecting the profitability of the target company), and indicators for whether the merger consideration was all cash and if it was a diversifying merger (i.e., the target and acquirer belonged to different two-digit SIC codes). We use robust standard errors, which we cluster at our level of treatment: the governing law of the merger agreement (Abadie et al. 2023).

Table 4 presents the results from estimating the equation. The interaction between $Post_t$ and $Delaware_{i,t}$ has a significant and positive coefficient estimate regardless of which contractual term is the dependent variable and whether we control for financials. The baseline results indicate that Delaware mergers became about 33 percentage points more likely to allow target firms to sue on behalf of their shareholders, as well as 41 percentage points more likely to explicitly designate the targets as shareholders' agents to recover lost merger premia.[32]

One concern with the results could be that they are driven by sample imbalance in the sample, because Delaware is the most common choice of law in mergers. From Table 2, Panel B, we can see that 82% of the deals in the sample had Delaware choice of law provision. To account for this possibility, we re-run the analysis in equation (1) clustering standard errors at the industry level rather than at the choice of law. Panel A of Appendix Table B1 presents the results of this analysis, and shows that the coefficient for the interaction between $Post_t$ and $Delaware_{i,t}$ continues to have a significant coefficient estimate for both the new contract terms introduced after the Chancery Court decision, and regardless of whether we control for financials. Panel B clusters on the merger's governing law, but now uses the wild cluster bootstrap introduced in Cameron et al. (2008). Once again, while the estimated standard errors are slightly larger than the original estimates, the variable of interest, the interaction between $Post_t$ and $Delaware_{i,t}$, continues to show a significant coefficient for both contractual responses to *Crispo*.

Next, in order the estimate the impact of law firms, we run a modified version of equation (1) where we estimate a triple difference model interacting *Post* and *Delaware Choice of Law* with an indicator variable called *Top 25 Target Law Firm*. This indicator equals 1 if the target is represented by a law firm that was among the top 25 law firms (by revenue) for U.S. targets in the year 2023, as reported by LSEG (2023). As seen in Table 2, Panel B, about 55% of targets in our sample were represented by a law firm in the top 25 ranking. The literature documents not only that elite law firms play an important role in M&A transactions (Krishnan and Masulis 2013), including adopting legal terms, but also that these law firms exhibit "sticky contracting": the same boilerplate legal language appears in their work product across complex transactions (Coates 2001, Romano and Sanga 2017, Badawi and de Fontenay 2019, and Nyarko 2021). Our conversations with practitioners suggest that top-ranked target law firms may have more vigorously responded to *Crispo*.

[32] Both *Crispo* and *Con Ed* cases involved one-step mergers where target shareholders would require third-party beneficiary status to sue the breaching buyer, as they otherwise lacked standing. Some transactional lawyers have argued that *Crispo* is less likely to apply to deals structured as two-step transactions with an initial tender offer, since shareholders participating in the first-stage tender would be able to establish direct contractual relationship (Hall and Cerqueira 2024). In untabulated results, we re-run the analysis in Table 4, excluding the 30 tender offers in the dataset, and find that the results become stronger, with the interaction between $Post_t$ and $Delaware_{i,t}$ having a larger magnitude while remaining highly statistically significant.

We estimate this triple difference model because leading target law firms had the "obligation" of coming up with contractual innovations in response to the exogenous legal shock, and previous work shows that high-quality lawyers are responsible for contractual innovations. Appendix Table B2 presents the results of the triple difference model. The triple interaction term does not have a statistically significant coefficient in any model. Thus, target law firm prestige does not seem to have a consistent significant effect on either of the two contractual innovations after *Crispo*. This seems to indicate that the contractual responses were coming not just from the top firms but were more widespread across different law firms.

Although the statistical results on non-price terms are fairly strong, one concern with our results could be that mergers governed by Delaware law may be different from those choosing the law of other jurisdictions. We do not think this concern undermines our result for three reasons. First, our conversations with experienced deals practitioners indicate that, while there may be differences between Delaware and other deals, these differences are uncorrelated to the changes *Crispo* caused to contracting practice. Second, in the regression analysis, presented in Table 4, we control for deal characteristics, along with year and industry fixed effects. Third, we re-estimate equation (1) using the entropy-balancing technique introduced by Hainmueller (2012). We balance the first moments of the covariates (ln(transaction size), Enterprise Value/EBITDA, and dummies for all cash transactions and diversifying mergers) for Delaware and non-Delaware mergers and run the regression for the reweighted sample. Appendix Table B3 presents the results from the entropy-balanced analysis. The variable of interest, the interaction between $Post_t$ and $Delaware_{i,t}$, continues to have a positive and statistically significant coefficient with a high magnitude. Both qualitative and quantitative analysis suggest that the changes in non-price terms are unlikely to be driven by differences between Delaware and other deals.

Finally, we examine the impact of the announcement of the proposal to amend the DGCL in response to the *Crispo* decision. The reason for treating the post amendment proposal period separately is to allow for the possibility that the amendment proposal itself could have been a significant and salient event, which could have encouraged more transactional parties to adopt the contractual fixes.[33] We split the *Post* variable from prior analyses into two separate indicator variables: *Post-Crispo*, which equals 1 for mergers announced between the Chancery Court decision and the March 28, 2024 proposal of the DGCL amendments, and *Post-DGCL Proposal*, which equals 1 for mergers announced after March 28, 2024.

Table 5 presents the results of this analysis. The coefficient for the interaction between Delaware choice of law and each of the time dummies (whether *Post-Crispo* or *Post-DGCL* Proposal) is positive and statistically significant for the baselines. The broad picture that emerges from Table 5 is that transacting parties began adopting contractual responses to *Crispo* even before the DGCL amendments were announced in March 2024, since the coefficient for the interaction between *Post-Crispo* and Delaware choice of law is positive and statistically significant in all but one of the models. However, the adoption of the two contractual provisions has not slowed down even after Delaware legislatively neutralized *Crispo*, since the coefficient for the interaction between *Post-DGCL Proposal* and Delaware choice of law is also positive and significantly different from zero. Market participants

[33] Although the DGCL amendment became effects on August 1, 2024, another reason we focus on the amendment proposal is that, based on our discussion with practitioners and judges, amendment proposal event seems to be much more important than the actual amendment. In an unreported result, when we also include the actual amendment, the substantive results are the same.

therefore seem to rely on both private ordering and legislative change to adapt to unexpected changes in deals jurisprudence.

6.2. Deal Price Response to *Crispo*

The *Crispo* decision and the subsequent response could also lead to a change in the deal premium. As examined in Section 3, when there is no contractual response and the prospective buyers will have more opportunities to walk away from the deal without having to pay any meaningful damages, this will jeopardize certain deals, especially those with relatively low premium (or potential surplus). This can, in turn, increase the expected premium for the deal. On the other hand, if market participants respond to *Crispo* by including target-friendly contract terms, there may be no effect on deal premia, or these premia will be lower compared to the deals without a contractual response.

To assess *Crispo*'s effect on merger premia, we estimate the following regression model, for a target in merger *i* belonging to industry *j* with a merger agreement finalized at time *t*:

$$Premium_{i,t} = \beta\left(Post_t \times Delaware_{i,t}\right) + \alpha Post_t + \eta Delaware_{i,t} + \delta X_{i,t} + \pi_j + \gamma_t + \epsilon_{i,t}. \quad (2)$$

The outcome variable, $Premium_{i,t}$, equals difference between merger price and the stock price of the target either one or five days before the merger announcement, as a percentage of the pre-announcement stock price. To prevent outliers from driving our results, we winsorize both our premium measures at the 2.5% level on both tails. The key variable of interest is the interaction between two indicator variables: $Post_t$ (which equals 1 if the merger agreement was finalized after the *Crispo* decision) and $Delaware_{i,t}$ (equaling 1 if the merger agreement selected Delaware law as the governing body of law).

Figure 5 presents bar graphs for mergers that chose Delaware law, split based on the agreement date (before *Crispo*, immediately after the decision, or after the DGCL amendment proposal) and if it featured any of the contractual terms described above, showing the average one-day premium. For our mergers of interest, Delaware deals including the contract terms, there was a highly statistically significant post-*Crispo* decrease in the average premium from 70.31% to 28.46% (*t*-statistic of 3.058). There is no statistically significant difference in the premia for Delaware mergers not displaying the contractual terms. In unreported results, we find that there is no post-*Crispo* statistically significant change in premium for deals choosing non-Delaware governing law, regardless of whether there was a contractual response in response to the decision. However, this could be driven by the relatively smaller number of non-Delaware deals, so we do not depict non-Delaware deals graphically. The results are qualitatively unchanged if we instead plot the five-day premium. Figure 5 thus provides some descriptive evidence suggesting that target-friendly contract terms in mergers governed by Delaware law could have lowered premia.

Table 6 presents the results from estimating equation (2), using the one- or five-day premium as the dependent variable. Regardless of which period we measure the premium over, for the baseline models, the interaction between $Post_t$ and $Delaware_{i,t}$ has a negative and statistically significant coefficient (p<0.1). The baselines regression in column (1) (column (3)) reflects a post-*Crispo* decline in merger premium for deals choosing Delaware law equal to 29.56% (27.5%) of the sample mean.

The result suggests that the deal premium significantly decreased for deals governed by Delaware law after *Crispo*.

In Table 6, we are lumping together all deals regardless of whether an individual transaction had a non-price contractual response to the *Crispo* problem. As examined in section 3, to the extent that a contractual "fix" can successfully prevent any opportunistic breach by a buyer, this could have a negative effect on the deal premium. To unpack the impact of the contractual fix to the deal premium, we estimate a triple difference model that is a modified version of equation (2): the dependent variable still is the merger premium, but we now estimate a triple interaction between *Post*, *Delaware Choice of Law*, and an indicator called *Non-Price Response*, which equals 1 if the deal adopted either of the contractual provisions designed to address *Crispo*. Table 7 presents the results of this model. The triple interaction has a negative and highly significant coefficient across all four regression specifications. Also, as a robustness check, we estimate a triple difference model using an entropy-balanced sample, as we did earlier. The results are shown in Appendix Table B4. Although the magnitudes and statistical significance are somewhat weaker, the basic results remain the same. Both of these results suggest that, in *Crispo*'s aftermath, merger premia specifically decreased for Delaware deals that adopted target-friendly contractual non-price terms.

While the results are consistent with the hypothesis regarding the substitutability of price and non-price terms, we do not want to overstate the results. A limitation of the empirical exercise in Table 7 is that price and non-price responses are presumably co-determined by the change in deals jurisprudence after *Crispo*. Nevertheless, Table 7 presents suggestive evidence that the non-price contractual response also predicts (or at least correlates with) a price effect. Collectively, the empirical results indicate that the primary effect of *Crispo* was the introduction of pro-target contractual terms in deals choosing Delaware law. Buyers in deals where these contract terms were adopted seem to have, in turn, successfully obtained a lower price, as indicated by smaller merger premia after *Crispo*.

7. Conclusion

How do transacting parties contract for potential breach and merger failures? Anticipating and providing for potential merger failures is an important function offered by transacting parties can add significant value to a merger. The earlier literature has largely focused on the ability of the target corporation to accept a superior offer from a competing bidder (with no shops, go shops, fiduciary outs, match rights, etc.) or the ability of the buyer to walk away from the transaction when the target suffers a "material adverse change."[34] There has been little examination of how the contracting parties deal with a merger partner's breach. More broadly, the issue of whether and to what extent commercial parties respond to an exogenous change in the legal environment (e.g., a court decision or a statutory change) has been one of the most important questions in contract and commercial law. The case of *Crispo v. Musk*, possibly one of the most impactful decisions on mergers and acquisitions jurisprudence in Delaware, provides a valuable opportunity for scholars to examine these issues. This paper has attempted to investigate the impact of and the responses to this legal shock.

The paper started with a brief introduction of the legal background, followed by presenting a stylized model that generated a number of empirical predictions. With the theoretical and legal background, the paper has first shown that, examining the deals that were open at the time of the decision, the decision had a statistically significant, negative effect on the stock prices of Delaware

[34] See, e.g., Choi and Triantis (2010), Badawi and de Fontenay (2019), and Choi (2021).

targets. The event study also shows that the joint values of targets and buyers decreased around the time of the decision. Second, with manually collected data on merger agreement provisions, the paper has shown that, since the decision, the transacting parties in Delaware deals are significantly more likely to adopt contractual provisions that attempt to undo the impact of *Crispo*. Consistent with the theoretical model, merger premia decreased for affected deals that included the contractual fixes. Although it remains unclear whether the contractual provisions would have been able to fully resolve the lack of remedies problem, the analysis has shown that the transactional lawyers' response was relatively quick and also significant. At the same time, however, the analysis has uncovered notable variations in these contractual responses, with some post-*Crispo* deals lacking any special provisions responding to the Chancery Court decision. These variations raise interesting questions regarding how and why lawyers respond differently to a legal shock. We intend to examine contractual variations more in future research.

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Figure 1

The Impact of Damages on Transactions

This figure depicts how changes in contractual remedy could affect the probability that transactions choosing Delaware law close, as predicted in the theoretical model contained in section 4.

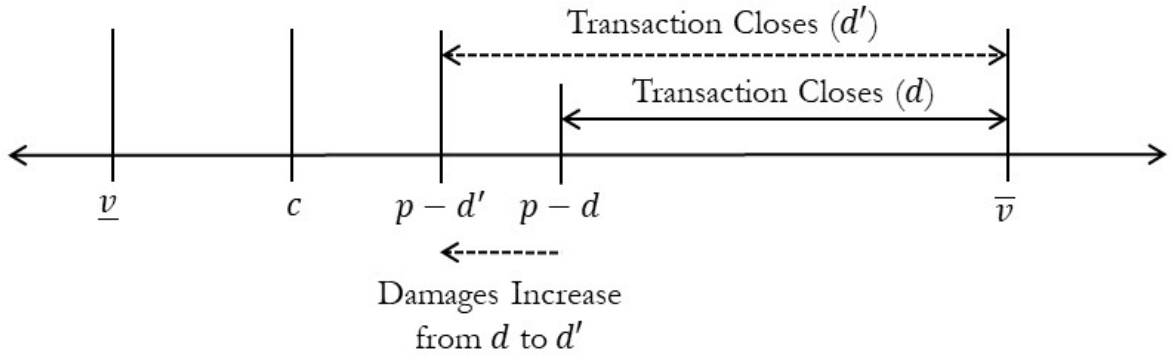


Figure 2

Abnormal Returns for Delaware Mergers around *Crispo*

This figure shows the 95% confidence intervals for the abnormal returns for targets in mergers with Delaware choice of law that had been announced but not completed or withdrawn as of the date *Crispo* was announced, over the [-7, 7] window. Day "0" is October 31st, 2023, when *Crispo* was decided. The abnormal returns are calculated using the Fama-French three factor asset pricing model and are winsorized at the 2.5% level, but the figure is qualitatively unchanged without winsorization.

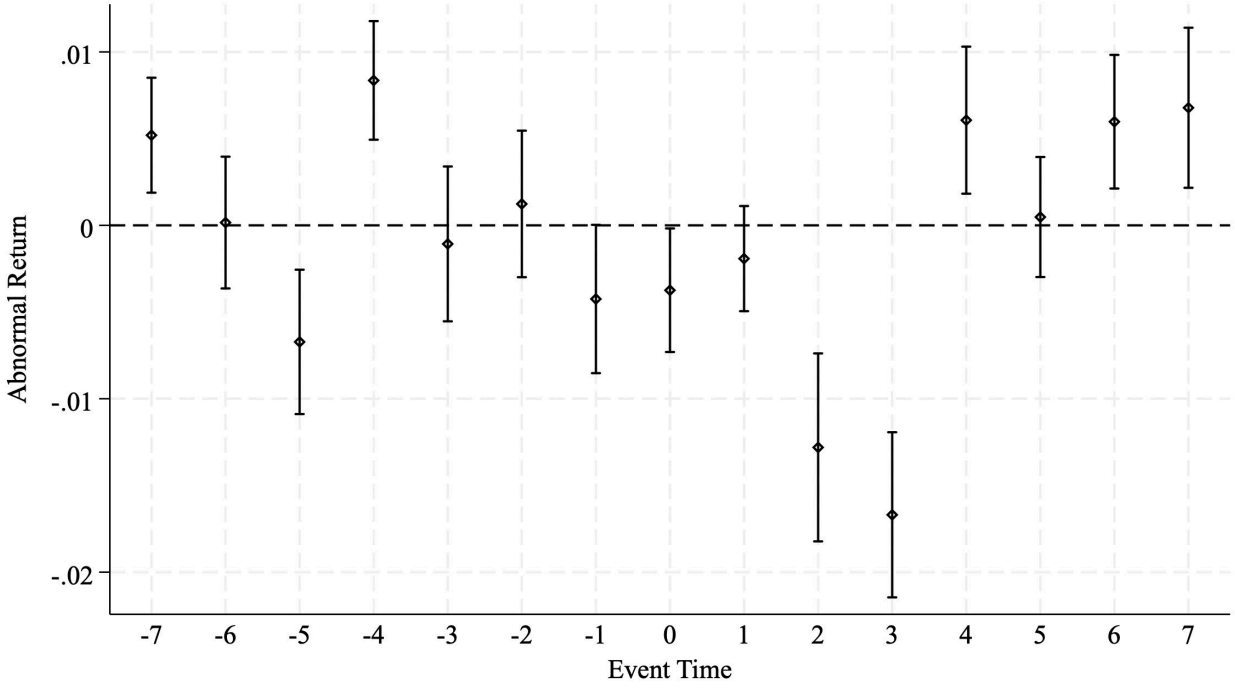


Figure 3

Target Right to Sue on Behalf of Shareholders: Before and After *Crispo*

This figure graphs the average share of merger agreements that explicitly allow the target company to sue on behalf of its shareholders for breaches of the merger agreement, split by whether the merger agreement was finalized before or after *Crispo* and whether it chose Delaware governing law.

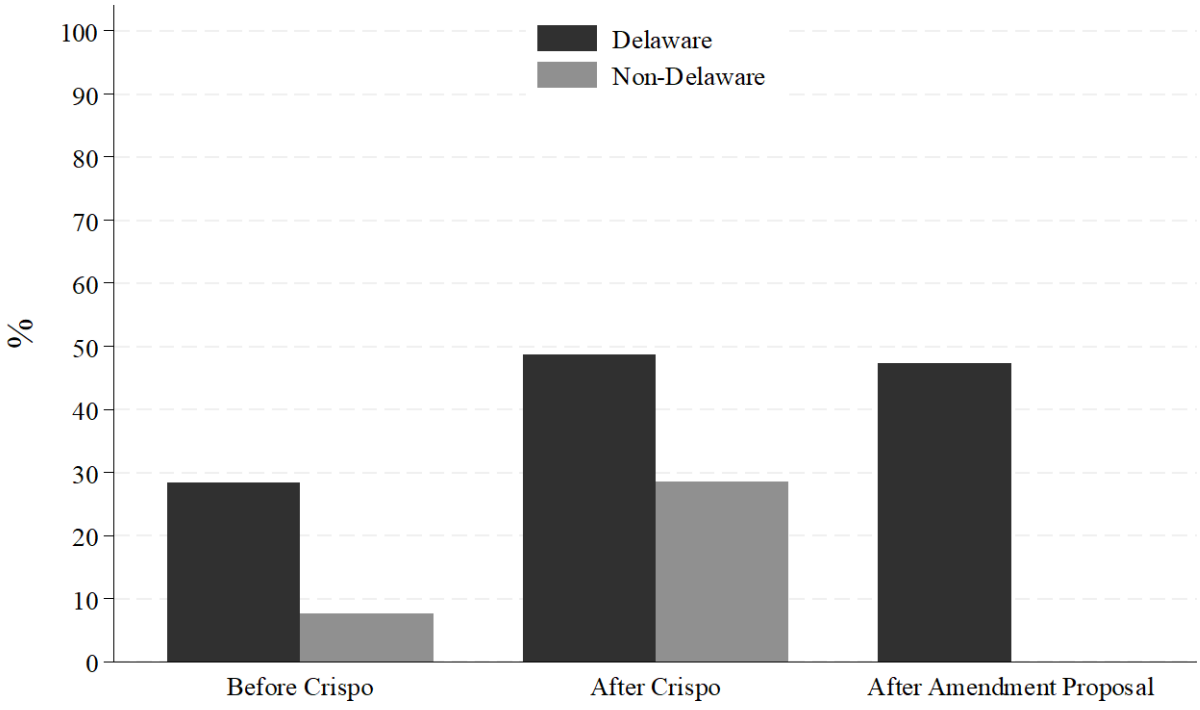


Figure 4

Explicit Agency Designation: Before and After *Crispo*

This figure graphs the average share of merger agreements that explicitly designate the target company as its shareholders' agent for recovering lost merger premia, split by whether the merger agreement was finalized before or after *Crispo* and whether it chose Delaware governing law.

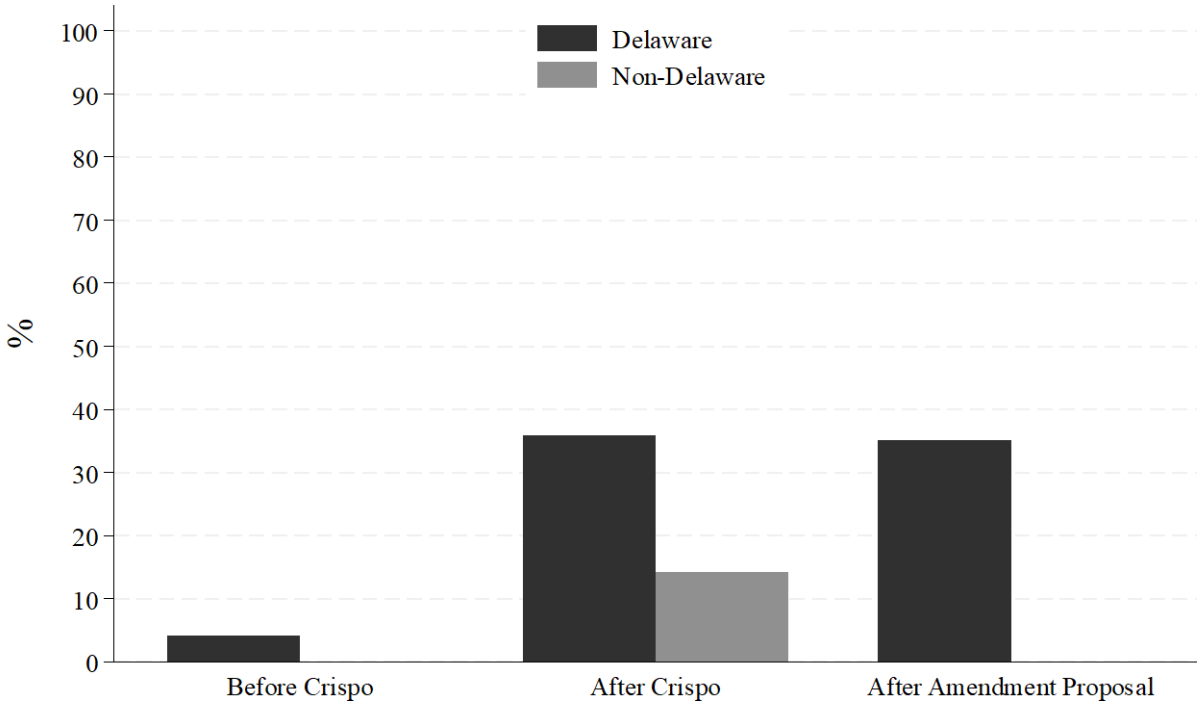


Figure 5

Merger Premia for Delaware Deals: Before and After *Crispo*

This figure shows the average one-day premia for mergers with Delaware choice of law. The darker bars represent average merger premia without a contractual provision while grey bars represent merger premia with a contractual provision.

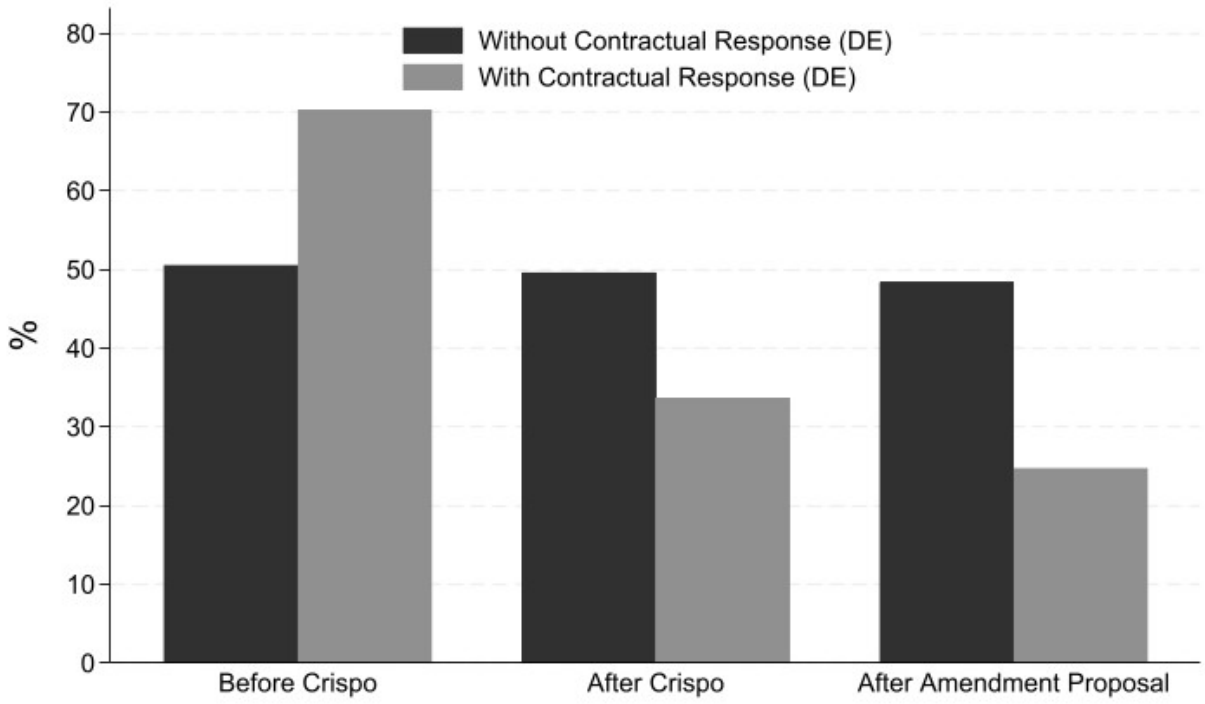


Table 1

Variable Definitions

Variable	Definition	Source
All Cash Transaction	An indicator equal to 1 if the merger consideration solely consisted of cash	FactSet
CAR	Cumulative abnormal return estimated in a given event-window using the three-factor Fama French model	WRDS, manual checks
Company Right to Sue on Behalf of Shareholders	An indicator variable equal to 1 if the merger agreement allows the target company to sue on behalf of its shareholders for breaches of the merger agreement	Hand-Coding
Delaware Choice of Law	An indicator variable equal to 1 if the merger agreement is governed by Delaware law	FactSet, Hand-Coding
Diversifying Merger	An indicator variable equal to 1 if the two-digit SIC codes of the target and acquirer are different	FactSet, Hand-Coding
Enterprise Value/EBITDA	The ratio of enterprise value to earnings before interest, tax, depreciation, and amortization	FactSet
Explicit Agency Designation	An indicator variable equal to 1 if the merger agreement designates the merger target as its shareholders' agent for recovering lost merger premia	Hand-Coding
Five Day Premium	The difference between merger price and the stock price of the target five days before the merger announcement, as a percentage of that stock price	FactSet
Ln(Transaction Size)	The natural logarithm of the value of the merger	FactSet
Non-Price Response	An indicator variable equal to 1 if the merger agreement includes a contractual provision to address the effect of *Crispo*	Hand-Coding
One Day Premium	The difference between merger price and the stock price of the target one day before the merger announcement, as a percentage of that stock price	FactSet
Post	An indicator variable equal to 1 if the merger agreement was finalized after the *Crispo* decision was announced on October 31st, 2023	FactSet, Hand-Coding

Post-*Crispo*	An indicator variable equal to 1 if the merger agreement was finalized after the *Crispo* decision was announced on October 31st, 2023 but before the DGCL amendment was proposed on March 28th, 2024	FactSet, Hand-Coding
Post-DGCL Proposal	An indicator variable equal to 1 if the merger agreement was finalized after the DGCL amendment in response to the *Crispo* decision was proposed on March 28th, 2024	FactSet, Hand-Coding
Top 25 Target Law Firm	An indicator variable equal to 1 if the merger target was represented by a law firm ranked in the top 25 based on deal volume in LSEG (2023)'s report for U.S. targets	LSEG (2023)

Table 2

Summary Statistics

This table presents the summary statistics for the data used in the paper. All variables are defined in Table 1.

Panel A. Event Study Sample

	N	Mean	Median	SD
CAR[0]	49	-0.39	-0.55	1.29
CAR[0,1]	49	-0.56	-0.80	1.70
CAR[0,2]	49	-1.80	-2.23	2.65
CAR[-1,1]	49	-0.78	-1.10	3.14
CAR[-2,2]	49	-1.89	-2.23	3.72
CAR[-7,-3]	49	0.65	1.11	3.03
CAR[3,7]	49	0.07	0.66	2.90
Delaware Choice of Law	49	.71	1	.46

Panel B. FactSet Sample

	N	Mean	Median	SD
All Cash Transaction	233	.67	1	.47
Company Right to Sue on Behalf of Shareholders	233	.33	0	.47
Delaware Choice of Law	233	.82	1	.39
Diversifying Merger	230	.66	1	.47
Explicit Agency Designation	233	.17	0	.37
Enterprise Value/EBITDA	200	.22	9.3	182.7
Five Day Premium	232	47.32	28.16	59.56
Ln(Transaction Size)	233	7.47	7.51	1.42
Non-Price Response	233	.33	0	.47
One Day Premium	232	45.13	26.47	60.86
Post	233	.48	0	.5
Top 25 Target Law Firm	233	.55	1	.5

Table 3

Event Study Results

This table presents the results of an event study using the Fama-French three-factor asset pricing model. Panel A shows the cumulative abnormal returns over different event windows for targets in mergers governed by Delaware law, for deals that had been announced but not completed or withdrawn as of the date *Crispo* was announced. Panel B shows the coefficient for Delaware choice of law in a difference-in-differences analysis where the dependent variable is cumulative abnormal returns over different event windows and the control group is mergers that did *not* choose Delaware as governing law and had similarly been announced (but not completed or withdrawn) before the Chancery Court's decision in *Crispo*. Standard errors in all panels are robust, and for Panel B are clustered at the level of the merger agreement's governing law. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

Panel A. Stock Price Effect of *Crispo* for Targets in Mergers Governed by DE Law						
(1)	(2)	(3)	(4)	(5)	(6)	(7)
AR[0]	CAR[0,+1]	CAR[0,+2]	CAR[-1,+1]	CAR[-2,+2]	CAR[-7,-3]	CAR[3,7]
-0.436**	-0.699***	-2.273***	-1.302***	-2.577***	0.466	-0.062
(-2.74)	(-2.56)	(-5.84)	(-2.86)	(-5.05)	(1.00)	(-0.12)
N=35. *t*-statistics in parentheses. * p<0.10, ** p<0.05, *** p<0.01.						

Panel B. Difference-in-Differences Analysis: Coefficient for DE Choice of Law						
(1)	(2)	(3)	(4)	(5)	(6)	(7)
AR[0]	CAR[0,+1]	CAR[0,+2]	CAR[-1,+1]	CAR[-2,+2]	CAR[-7,-3]	CAR[3,7]
-0.178	-0.499	-1.653**	-1.820***	-2.406*	-0.652	-0.419
(-0.32)	(-1.34)	(-2.29)	(-2.85)	(-2.07)	(-0.57)	(-0.62)
N=49. *t*-statistics in parentheses. * p<0.10, ** p<0.05, *** p<0.01.						

Panel C. Stock Price Effect of *Crispo* for Joint Value of Mergers Governed by DE Law						
(1)	(2)	(3)	(4)	(5)	(6)	(7)
AR[0]	CAR[0,+1]	CAR[0,+2]	CAR[-1,+1]	CAR[-2,+2]	CAR[-7,-3]	CAR[3,7]
1.028	-0.677	-1.097**	-1.292**	-2.685***	-0.782	-1.751*
(0.03)	(-1.44)	(-2.32)	(-2.34)	(-3.89)	(-1.05)	(-2.13)
N=28. *t*-statistics in parentheses. * p<0.10, ** p<0.05, *** p<0.01.						

Table 4

Contractual Responses to *Crispo*

This table presents the results of a linear probability regression model where the dependent variable is an indicator for whether the company can sue on behalf of shareholders for breach of the merger agreement in columns (1) and (2) and for whether the merger agreement explicitly designated the target as its shareholders' agent to recover lost premia in columns (3) and (4). All models use data from mergers announced between October 31, 2022 (i.e., a year before the *Crispo* decision) and October 31, 2024 (a year after the *Crispo* decision). All specifications include industry and year fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	Company Right to Sue on Behalf of Shareholders		*Explicit Agency Designation*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	0.0264	-0.170	0.0159	-0.104
	(0.198)	(-0.615)	(0.487)	(-1.174)
Delaware Choice of Law	0.102	0.0139	0.0621**	-0.0976
	(1.607)	(0.124)	(2.555)	(-1.387)
Post *x* Delaware Choice of Law	0.330***	0.520*	0.411***	0.583***
	(3.380)	(2.445)	(7.928)	(5.608)
Ln(Transaction Size)		0.0525***		0.0520***
		(5.114)		(8.856)
Enterprise Value/EBITDA		-0.00005***		0.000257***
		(-4.105)		(40.90)
All Cash Transaction		0.237***		0.0535***
		(4.792)		(6.798)
Diversifying Merger		0.0729*		0.0663***
		(2.095)		(4.408)
Observations	211	177	211	177
Adjusted R-squared	0.193	0.189	0.202	0.239
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Table 5

Contractual Responses to *Crispo*: Impact of DGCL Amendment Proposal

This table presents the results of a linear probability regression model where the dependent variable is an indicator for whether the company can sue on behalf of shareholders for breach of the merger agreement in columns (1) and (2) and for whether the merger agreement explicitly designated the target as its shareholders' agent to recover lost premia in columns (3) and (4). All models use data from mergers announced between October 31, 2022 and October 31, 2024. All specifications include industry and year fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	Company Right to Sue on Behalf of Shareholders		*Explicit Agency Designation*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post-*Crispo*	0.0144	-0.0748	-0.0206	-0.130**
	(0.0753)	(-0.204)	(-0.418)	(-3.047)
Delaware Choice of Law	0.0897	0.0153	0.0502**	-0.115
	(1.426)	(0.131)	(2.270)	(-1.797)
Post-*Crispo x*	0.344*	0.412	0.457***	0.613***
Delaware Choice of Law	(2.077)	(1.252)	(6.363)	(8.124)
Post-DGCL Proposal	0.177	-0.132	0.155***	0.0901
	(1.492)	(-0.705)	(4.195)	(0.843)
Post-DGCL Proposal *x*	0.324***	0.601***	0.382***	0.513***
Delaware Choice of Law	(4.113)	(4.767)	(8.620)	(5.415)
Ln(Transaction Size)		0.0544***		0.0529***
		(5.281)		(6.631)
Enterprise Value/EBITDA		-0.00001		0.000291***
		(-0.993)		(27.08)
All Cash Transaction		0.232***		0.0444***
		(4.940)		(5.828)
Diversifying Merger		0.0681*		0.0603***
		(1.955)		(4.066)
Observations	211	177	211	177
Adjusted R-squared	0.192	0.184	0.202	0.239
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Table 6

Merger Premia after *Crispo*

This table presents the results of an ordinary least squares (OLS) linear regression model where the dependent variable is the one-day merger premium in columns (1) and (2), and five-day merger premium in columns (3) and (4). All models use data from mergers announced between October 31, 2022 (i.e., a year before the *Crispo* decision) and October 31, 2024 (a year after the *Crispo* decision). All specifications include industry and year fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. All dependent variables are winsorized at the 2.5% level. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	One Day Premium		*Five Day Premium*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	-7.343	9.872	3.105	21.65
	(-0.751)	(0.524)	(0.288)	(1.150)
Delaware Choice of Law	-1.635	3.452	2.198	10.58
	(-0.267)	(0.265)	(0.392)	(0.754)
Post *x* Delaware Choice of Law	-13.33*	-25.89	-12.96*	-26.92
	(-1.887)	(-1.726)	(-1.936)	(-1.709)
Ln(Transaction Size)		-19.64***		-18.77***
		(-8.360)		(-8.830)
Enterprise Value/EBITDA		0.0461***		0.0400***
		(14.08)		(14.54)
All Cash Transaction		-16.35**		-12.56**
		(-3.293)		(-3.122)
Diversifying Merger		12.21**		12.80***
		(3.084)		(3.824)
Observations	186	155	186	155
Adjusted R-squared	0.188	0.352	0.191	0.345
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Table 7

Merger Premia after *Crispo* with Non-Price Controls

This table presents the results of an ordinary least squares (OLS) linear regression model where the dependent variable is the one-day merger premium in columns (1) and (2), and five-day merger premium in columns (3) and (4). All models use data from mergers announced between October 31, 2022 and October 31, 2024. All specifications include industry and year fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. All dependent variables are winsorized at the 2.5% level. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	One Day Premium		*Five Day Premium*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	-6.184	1.861	5.942	17.24
	(-0.583)	(0.0747)	(0.504)	(0.752)
Delaware Choice of Law	-10.60**	-3.528	-4.585	4.848
	(-2.301)	(-0.286)	(-0.989)	(0.359)
Post x Delaware Choice of Law	7.680	-7.037	3.864	-13.18
	(1.038)	(-0.377)	(0.548)	(-0.740)
Non-Price Response	-31.74**	-37.89**	-17.69*	-25.96*
	(-2.277)	(-2.600)	(-1.865)	(-2.116)
Post x Non-Price Response	19.24	61.80*	-2.850	37.94
	(1.191)	(2.081)	(-0.220)	(1.527)
Delaware Choice of Law x	44.42***	54.96**	27.01**	39.26**
Non-Price Response	(3.030)	(3.268)	(2.613)	(2.716)
Post x Delaware Choice of Law x	-58.70***	-90.21**	-30.50**	-60.67*
Non-Price Response	(-3.592)	(-3.018)	(-2.442)	(-2.440)
Ln(Transaction Size)		-19.67***		-18.71***
		(-9.723)		(-9.562)
Enterprise Value/EBITDA		0.0520***		0.0446***
		(16.65)		(17.47)
All Cash Transaction		-16.49**		-12.62**
		(-3.063)		(-2.898)
Diversifying Merger		11.72**		12.47***
		(3.079)		(3.800)
Observations	209	175	209	175
Adjusted R-squared	0.229	0.333	0.224	0.323
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Appendix A: The Legal Background

What remedy should a disappointed target be entitled to receive from a buyer's material breach of a merger contract? The reason why the answer to this question is not straightforward stems from at least a few different sources. First, in most merger transactions with a public target (i.e., a target with dispersed shareholders and a listed stock), the transacting parties use a triangular structure, under which a buyer's merger subsidiary, without any physical assets or prior operations (often created solely for the purposes of the merger), will merge with the target corporation. Once the merger becomes effective, the surviving corporation (either the merger sub or the target) becomes a wholly-owned subsidiary of the buyer, with all the assets and operations of the target. Second, the contracting entities in the merger agreement are the buyer, the target, and the merger sub. Third, the merger agreements will often expressly stipulate that, except in narrow circumstances,[35] the agreement does not confer any rights to third parties.

The result of this is that, although the target shareholders are the (intended) "beneficiaries" of the transaction, they do not have the right to bring lawsuit against the buyer in case the merger fails to consummate, for instance, due to the buyer's breach of the agreement. At the same time, because the target corporation is not entitled to receive anything from the merger and, before and after the merger, remains (de jure) the same, in case the buyer breaches the agreement and the merger fails to consummate, , the target corporation, as a contracting entity, is arguably not entitled to any damages.

Of course, the parties who suffer harm, when the buyer breaches the merger agreement and the merger fails to close, are the target's shareholders. But they are not parties to the merger agreement and the buyer, in most cases, concerned about possibly being subject to target shareholders' (indiscriminate) lawsuits, including class action suits, insists that the merger agreement makes explicit that there are no third party beneficiaries. Assuming that the target corporation is not suffering any (tangible) harm from the buyer's breach, unless the target corporation can receive specific performance or a contractually-stipulated reverse termination fee as a remedy, this state of affairs can potentially endow the buyer with almost complete freedom over whether to close the transaction or breach the agreement and walk away from the transaction. In fact, in *Consolidated Edison v. Northeast Utilities*,[36] decided in 2005, the Second Circuit Court ruled that when a third party beneficiary provision in a merger contract limits the rights of target shareholders to bring suit to post-closing, the target shareholders cannot bring a suit against a breaching buyer to collect the merger consideration.[37]

Soon after the Consolidated Edison case, M&A lawyers, concerned about allowing a prospective buyer too much free rein, devised a contractual solution. One of the "solutions" was to give an express contract right to the target to collect the "lost premium" on behalf of the target shareholders. This is colloquially known as the "Con Ed" provision. The provision contained in the merger agreement for Elon Musk's acquisition of Twitter is exemplary. Section 9.7 of the agreement foremost expressly disclaimed third-party beneficiaries.[38] In section 8.2 of the agreement, titled

[35] The narrow circumstances include: allowing the target shareholders to receive the promised consideration after the merger has become effective, allowing the target directors and officers to continue receiving the benefits of the D&O insurance, etc.

[36] *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005).

[37] See Thomas and Stair (2009) for an in-depth discussion of the case and how the holding can be confined to the specific facts of the case and the language of the agreement.

[38] Agreement and Plan of Merger by and among X holding I, Inc., X Holdings II, Inc., and Twitter, Inc. on April 25, 2022, available at: https://www.sec.gov/Archives/edgar/data/1418091/000119312522120461/d310843dex21.htm. Section 9.7

"Effect of Termination," the section stated that when the agreement is terminated, the agreement will become "null and void." At the same time, the provision went on to state that:

> no such termination shall relieve any party hereto of any liability or damages (which the parties acknowledge and agree shall not be limited to reimbursement of Expenses or out-of-pocket costs, and, in the case of liabilities or damages payable by Parent and Acquisition Sub, would *include the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders*) (taking into consideration all relevant matters, *including lost stockholder premium*, other combination opportunities and the time value of money), which shall be deemed in such event to be damages of such party, resulting from any *knowing and intentional breach* of this Agreement prior to such termination (italics added).[39]

The combined effect of the expressly disclaiming third party beneficiaries and allowing the target corporation (Twitter) to collect damages (including "the benefits of the transaction…lost by the [Twitter's] stockholders" for buyer's "knowing and intentional breach" seems to have meant that, while Twitter shareholders cannot bring a lawsuit in case buyer knowingly and intentionally breached the contract, Twitter could collect the lost premium on behalf of its shareholders.

Given that the original Con Ed decision was based on New York law, it was not entirely clear whether such a provision would be upheld in Delaware. M&A lawyers seemed to operate with a plausible assumption that the Delaware courts would honor such a provision.[40] However, their expectation was dashed in the recent case of *Crispo v. Musk*.[41] The case itself rose out of an application for $3 million of mootness fee by a Twitter stockholder against Elon Musk on the theory that his lawsuit was at least causally related to Musk's eventual decision to close the transaction. In deciding whether the plaintiff-shareholder was entitled to the mootness fee, the Chancery Court addressed the enforceability of the Con Ed provision contained in the merger agreement entered into in the acquisition of Twitter. According to the court, since only the Twitter shareholders are entitled to receive a premium in case the merger closes, but the shareholders are not granted a third party beneficiary status under the agreement, under the anti-penalty doctrine in contract law, the Con Ed provision was not enforceable.[42] Hence, according to the court, the plaintiff-shareholder did not have a meritorious claim to begin with and was not entitled to a mootness fee.

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of the merger agreement, titled No Third-Party Beneficiaries, states: "…this Agreement is not intended to and *shall not confer upon any Person other than the parties hereto any rights or remedies hereunder*; provided, however, that it is specifically intended that (A) the D&O Indemnified Parties (with respect to Section 6.6 from and after the Effective Time), (B) the Company Related Parties (with respect to Section 8.3) are third-party beneficiaries and (C) the Parent Related Parties (with respect to Section 8.3) are third-party beneficiaries" (italics added).

[39] Id. at Section 8.2.

[40] See Kling and Nugent, Negotiated Acquisitions of Companies, Subsidiaries, and Divisions §15A (2022) (stating that "The Con Ed standing/damages issue certainly appears to be a problem in New York; whether it will be followed in Delaware is still an open question").

[41] *Crispo v. Musk*, 2023 Del. Ch. LEXIS 466 (Del. Ch. 2023).

[42] For the anti-penalty doctrine, see Restatement (Second) of Contracts §356(1) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss"). See also UCC §2-718, Goetz and Scott (1977), Schwartz (1990), Farnsworth §12.18 (2004), and Choi (2021). The other possible interpretation that the Chancery Court dealt with was that, the Con Ed provision does make Twitter shareholders third party beneficiaries but only when the merger agreement is terminated and specific performance is not available. Since the agreement was never terminated and the transaction ultimately closed, the plaintiff-shareholder's right to bring suit never vested.

Before we discuss the strategies that were adopted by M&A lawyers in response to the *Crispo* decision, a brief mention of a salient issue seems warranted. As written, the lost premium provision does not seem to impose an affirmative obligation on a breaching buyer to pay the lost premium to the target. The Twitter merger agreement, for instance, states that the damages "payable by Parent" would "include the benefits of the transaction…lost by the Company's stockholders," taking into consideration all relevant factors, "including lost stockholder premium."[43] This is in contrast to (liquidated) damages approach (such as target or reverse termination fees) where, once the conditions of the fees are satisfied, the obligation to pay the fee is affirmative.[44] Given the "optionality,"[45] even if the liability provision were to not mention the possibility of collecting the lost premium, prior to *Crispo*, one would expect a disappointed target to seek such a remedy in court. In other words, it is not entirely clear how much the lost premium phrase, by merely stating the possibility of collecting a lost premium, is really adding to the liability provision.

Notwithstanding the uncertainty and the optionality with respect to a lost premium clause, M&A lawyers have made a few drafting proposals in response to *Crispo*.[46] First, there is a possibility of target stockholders expressly endowing the target corporation with the exclusive right to sue a breaching buyer or making the target an agent to collect a lost premium. For instance, when adopting the merger agreement at a shareholder's meeting, the target stockholders can create an agency relationship with the target company. Even further, perhaps that agency relationship can be created unilaterally when the target enters into a merger agreement with a buyer. This agency designation solution, however, leaves at least a few questions unanswered. If the agency relationship has not been created before the shareholders' meeting, it is unclear what would happen if the buyer were to (materially or intentionally) breach the agreement before a target shareholder meeting has taken place. Certain deals, such as a two-step transaction under DGCL 251(h), do not require a shareholder vote. It is also not entirely clear whether a majority of the target shareholders can create an agency relationship (by approving the proposed merger) for all stockholders.[47] Finally, whether such a relationship can be created *unilaterally* by the target when the agreement is executed and before the shareholders' meeting is also unclear.

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[43] See Agreement and Plan of Merger by and among X holding I, Inc., X Holdings II, Inc., and Twitter, Inc. on April 25, 2022, section 8.2 Effect of Termination.

[44] For instance, under Section 8.3(b) of the Twitter merger agreement, in case Parent (X Holdings I, Inc.) has materially breached the covenants or representations and warranties and the agreement is terminated in response by Twitter, "Parent *shall*…pay…the Parent Termination Fee [of $1 billion]" (italics added). See Agreement and Plan of Merger by and among X holding I, Inc., X Holdings II, Inc., and Twitter, Inc. on April 25, 2022, section 8.3 Termination Fee. Section 8.3(c) of the agreement goes on to state that, unless the breach was "knowing and intentional," the collection of the termination fee "shall constitute the *sole and exclusive monetary remedy of the Company*" (italics added). When read together with Section 8.2 of the agreement, in case the buyer materially breaches the agreement and the agreement is terminated, Twitters' sole remedy is to collect the Parent Termination Fee of $1 billion. In case the breach is knowing and intentional, Twitter can also pursue the lost premium.

[45] In the Twitter transaction, the relevant portion of the Effect of Termination section states that the Parent and Acquisition Sub would be liable for damages, which "tak[es] into consideration all relevant matters, including lost stockholder premium…." Even if such a phrase were absent, for instance, presumably in litigation the target will introduce the evidence of lost premium in calculating the damages for the buyer's material breach.

[46] See, e.g., Hunton Andrews Kurth, "Delaware Court Addresses Ability to Sue Buyers for Lost Premiums in M&A Deals." November 16, 2023. Some of the strategies were also discussed in the *Crispo* decision. See *Crispo v. Musk*, 2023 Del. Ch. LEXIS 466, 19 – 21 (Del. Ch. 2023).

[47] Instead of trying to create an agency relationship using a merger agreement, another proposal is to create that relationship through a charter or a shareholder-adopted bylaw provision. Similar challenges will likely arise under this proposal.

A second possibility is to try to loosen the no third party beneficiary provision. Instead of unconditionally stating that there are not third party beneficiaries, the merger agreement could recognize the target shareholders as intended third party beneficiaries. If a broad grant is not desirable, the agreement could perhaps grant third party beneficiary rights to target shareholders in narrow circumstances. For instance, the agreement can recognize third party rights to the shareholders only when the agreement has been terminated in response to the buyer's material or intentional breach. This narrow third party right grant would allow the target to pursue other remedies, including specific performance, for buyer's breach and avoid target shareholder lawsuit against the buyer, at least until the target has terminated and abandoned the transaction. One issue with this proposal is whether a prospective buyer would agree to such a modification. After all, target shareholders can potentially bring direct claims against the buyer with an "alleged" breach by the buyer.[48]

Still another option is to utilize a reverse termination fee provision, for instance, by allowing the target to collect a reverse termination fee from the buyer when the buyer has materially or intentionally breached the agreement and the deal has been terminated. While providing certainty, this solution also raises issues. Given the Chancery Court's unwillingness to enforce a lost premium provision under the contract law's anti-penalty doctrine, the ruling also raises the possibility that the reverse termination fee provision could be struck down under the same doctrine, especially if the size of the fee is (sufficiently) large. On the other side of the spectrum, if the fee is too small, it may grant a prospective buyer too much incentive to breach the agreement with little comfort to the target.[49]

While the M&A lawyers were devising responses to the *Crispo* decision, on March 28, 2024, the Council of the Corporation Law Section of the Delaware State Bar Association made a formal proposal to amend the Delaware General Corporation Law.[50] In particular, the proposal amended DGCL 261 to allow transacting parties to include two provisions in their merger agreements. Under the new section 261(a)(1), the merger agreement can include a provision for penalties (including a lost premium) against a party's failure to perform or consummate the merger. This is regardless of the contract law's prohibition against a penalty. Second, under the new section 261(a)(2), the merger agreement can appoint one or more persons (e.g., the target corporation) as the "representative" of the stockholders with the exclusive authority to enforce the rights of the stockholders, including the right to receive payments. According to the proposal, such appointment will be effective at the time of the execution of the merger agreement and will be binding on all shareholders.[51]

The Delaware legislature approved these changes, and the state's Governor signed the amendment into law on July 17, 2024. The modified DGCL 261 came into effect on August 1, 2024,[52] and effectively neutralized the impact of the *Crispo* decision. At the same time, however, given that

[48] See Kling and Nugent §15A.03 ("It is one thing to have a single litigation with the target itself….It is quite another to have to deal with hundreds of lawsuits all around the country from disgruntled target shareholders").

[49] Id. (stating that reverse termination fee provisions "have historically awarded amounts much less than the aggregate potential damage claims based on loss of the premium").

[50] Richards Layton & Finger, 2024 Proposed Amendments to the General Corporation Law of the State of Delaware, March 28, 2024. If the amendment proposal gets adopted by the Delaware legislature, the provisions will become effective in the summer of 2024.

[51] The proposal is expected to be introduced to the Delaware General Assembly for consideration during its regular session in the summer of 2024.

[52] See https://www.foley.com/insights/publications/2024/07/delaware-market-practice-amendments-general-corporation-law/.

the amendment is an enabling (rather than mandatory) provision, the transacting parties will have to include the necessary provisions in their merger agreements.[53]

The legal discussion raises a few important questions. First is the impact of *Crispo* on firm value. Given the optionality feature of the lost premium provisions, it remains to be seen whether the decision had any impact on firm value for targets (particularly those in mergers governed by Delaware law). Second, as we explain in our game-theoretic model in section 3, market participants could respond to the *Crispo* decision by either increasing premia for affected mergers or changing non-price terms through contractual innovation. We thus need to empirically establish whether the Chancery Court's unexpected decision led to changes in price or non-price terms. Finally, the speed and method of responses to *Crispo* are ex-ante unpredictable. While the Delaware corporate bar proposed a statutory fix to the Chancery decision, this did not occur till eight months after *Crispo*. Given the contractarian nature of merger law, one may expect that market participants would contractually counteract the court decision through private ordering even before the legislative fix was proposed.

[53] Given the salient nature of the proposal, we can posit that the transacting parties' contracting practice to change in response to the proposal.

Appendix B: Additional Results

Appendix Table B1

Contractual Responses to *Crispo*: Alternative Clustering

This table presents the results of a linear probability regression model where the dependent variable is an indicator for whether the company can sue on behalf of shareholders for breach of the merger agreement in columns (1) and (2) and for whether the merger agreement explicitly designated the target as its shareholders' agent to recover lost premia in columns (3) and (4). All models use data from mergers announced between October 31, 2022 and October 31, 2024. All specifications include industry and year fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the target's industry in Panel A. We use the wild cluster bootstrap from Cameron et al. (2008) while clustering on the merger agreement's governing law in Panel B. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

Panel A. Clustering at Target Industry

	(1)	(2)	(3)	(4)
	Company Right to Sue on Behalf of Shareholders		*Explicit Agency Designation*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	0.0264	-0.170	0.0159	-0.104
	(0.203)	(-0.748)	(0.166)	(-1.376)
Delaware Choice of Law	0.102	0.0139	0.0621	-0.0976*
	(0.792)	(0.0892)	(0.895)	(-1.782)
Post *x* Delaware Choice of Law	0.330**	0.520**	0.411***	0.583***
	(2.444)	(2.418)	(4.897)	(5.710)
Ln(Transaction Size)		0.0525**		0.0520***
		(2.579)		(3.817)
Enterprise Value/EBITDA		-0.00005		0.000257
		(-0.212)		(1.576)
All Cash Transaction		0.237***		0.0535
		(2.852)		(0.688)
Diversifying Merger		0.0729		0.0663
		(1.163)		(1.396)
Observations	211	177	211	177
Adjusted R-squared	0.193	0.189	0.202	0.239
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Panel B. Wild Cluster Bootstrap at Merger Governing Law

	(1)	(2)	(3)	(4)
	Company Right to Sue on Behalf of Shareholders		*Explicit Agency Designation*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	0.0264	-0.170	0.0159	-0.104
	(0.190)	(-0.597)	(0.468)	(-1.139)
Delaware Choice of Law	0.102	0.0139	0.0621**	-0.0976
	(1.544)	(0.120)	(2.454)	(-1.345)
Post x Delaware Choice of Law	0.330***	0.520**	0.411***	0.583***
	(3.247)	(2.371)	(7.616)	(5.440)
Ln(Transaction Size)		0.0525***		0.0520***
		(4.960)		(8.590)
Enterprise Value/EBITDA		-0.00005		0.000257***
		(-3.982)		(39.67)
All Cash Transaction		0.237***		0.0535***
		(4.648)		(6.594)
Diversifying Merger		0.0729*		0.0663***
		(2.032)		(4.276)
Observations	230	195	230	195
Adjusted R-squared	0.196	0.186	0.252	0.288
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Appendix Table B2

Contractual Responses to *Crispo*: Is There a Top Law Firm Effect?

This table presents the results of a linear probability regression model where the dependent variable is an indicator for whether the company can sue on behalf of shareholders for breach of the merger agreement in columns (1) and (2) and for whether the merger agreement explicitly designated the target as its shareholders' agent to recover lost premia in columns (3) and (4). All models use data from mergers announced between October 31, 2022 and October 31, 2024. All specifications include industry and year fixed effects, and columns (2) and (4) control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	Company Right to Sue on Behalf of Shareholders		*Explicit Agency Designation*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	-0.0173	-0.366*	0.0206	-0.00112
	(-0.204)	(-2.393)	(0.544)	(-0.0225)
Delaware Choice of Law	0.145**	-0.0253	0.0566**	-0.119
	(2.202)	(-0.266)	(2.205)	(-1.681)
Post x Delaware Choice of Law	0.381***	0.769***	0.466***	0.595***
	(4.840)	(7.347)	(9.706)	(7.465)
Top 25 Target Law Firm	0.0448	-0.113	0.0467	0.0484
	(0.268)	(-1.728)	(0.931)	(1.222)
Post x Top 25 Target Law Firm	0.153	0.313	-0.0313	-0.193
	(0.495)	(1.138)	(-0.297)	(-1.440)
Delaware Choice of Law x	-0.0839	0.0651	-0.0174	-0.00994
Top 25 Target Law Firms	(-0.507)	(0.936)	(-0.362)	(-0.245)
Post x Delaware Choice of Law x	-0.200	-0.464	-0.0881	-0.0370
Top 25 Target Law Firms	(-0.648)	(-1.680)	(-0.836)	(-0.276)
Ln(Transaction Size)		0.0522***		0.0545***
		(4.427)		(11.93)
Enterprise Value/EBITDA		-0.00006**		0.000262***
		(-3.534)		(76.34)
All Cash Transaction		0.252***		0.0699***
		(4.337)		(7.310)
Diversifying Merger		0.0868*		0.0721***
		(2.248)		(4.125)
Observations	211	177	211	177
Adjusted R-squared	0.180	0.188	0.191	0.247
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes

Appendix Table B3

Contractual Responses to *Crispo*: Entropy-Balanced Sample

This table presents the results of a linear probability regression model where the dependent variable is an indicator for whether the company can sue on behalf of shareholders for breach of the merger agreement in columns (1) and (2) and for whether the merger agreement explicitly designated the target as its shareholders' agent to recover lost premia in columns (3) and (4). All models are run on an entropy-balanced sample, where we balance the first moments of covariates (transaction size, Enterprise Value/EBITDA, and indicators for all cash transaction and diversifying merger) for Delaware and other deals. All models use data from mergers announced between October 31, 2022 and October 31, 2024. All specifications include industry and year firm fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	Company Right to Sue on Behalf of Shareholders		*Explicit Agency Designation*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	0.585**	0.438	0.00759	-0.107
	(3.497)	(1.910)	(0.145)	(-1.270)
Delaware Choice of Law	0.0980*	0.0381	0.0506	-0.00163
	(2.360)	(0.505)	(1.369)	(-0.0275)
Post x Delaware Choice of Law	0.150**	0.252**	0.399***	0.483***
	(3.541)	(3.188)	(3.928)	(4.231)
Ln(Transaction Size)		0.0604		0.0388**
		(1.887)		(3.020)
Enterprise Value/EBITDA		-0.000111**		0.000256***
		(-2.548)		(34.90)
All Cash Transaction		0.0900		0.0783***
		(1.054)		(6.127)
Diversifying Merger		-0.0156		0.0307
		(-0.293)		(0.680)
Observations	177	177	177	177
Adjusted R-squared	0.317	0.322	0.248	0.269
Industry-Year Fixed Effects	Yes	Yes	Yes	Yes

Appendix Table B4

Merger Premia after *Crispo* with Non-Price Controls: Entropy-Balanced Sample

This table presents the results of an ordinary least squares (OLS) linear regression model where the dependent variable is the one-day merger premium in columns (1) and (2), and five-day merger premium in columns (3) and (4). All models are run on an entropy-balanced sample, where we balance the first moments of covariates (transaction size, Enterprise Value/EBITDA, and indicators for all cash transaction and diversifying merger) for Delaware and other deals. The data is from mergers announced between October 31, 2022 and October 31, 2024. All specifications include industry and year fixed effects, and columns (2) and (4) further control for transaction size, the enterprise value/EBITDA multiple, and indicators for whether the deal is all cash and a diversifying merger. All variables are described in Table 1. All standard errors are robust and clustered at the level of the merger agreement's governing law. All dependent variables are winsorized at the 2.5% level. The ***, **, and * denote significance at the 1%, 5%, and 10% levels.

	(1)	(2)	(3)	(4)
	One Day Premium		*Five Day Premium*	
	Baseline	With Deal Financials	Baseline	With Deal Financials
Post	-16.42**	-16.57	-2.340	-3.761
	(-2.570)	(-1.401)	(-0.277)	(-0.289)
Delaware Choice of Law	-23.47*	-10.15	-17.86	-5.349
	(-2.427)	(-0.599)	(-1.354)	(-0.251)
Post x Delaware Choice of Law	2.714	-1.901	0.322	-2.932
	(0.526)	(-0.178)	(0.0378)	(-0.208)
Non-Price Response	-14.39***	-24.69	-4.649	-13.68
	(-3.848)	(-1.814)	(-1.654)	(-1.135)
Post x Non-Price Response	1.462	44.55	-18.60	21.43
	(0.120)	(1.428)	(-1.597)	(0.677)
Delaware Choice of Law x Non-Price Response	24.30***	37.43*	11.67**	22.82
	(5.210)	(2.217)	(3.067)	(1.514)
Post x Delaware Choice of Law x Non-Price Response	-29.97**	-69.45*	-5.208	-41.46
	(-2.554)	(-2.287)	(-0.460)	(-1.363)
Ln(Transaction Size)		-14.38**		-13.32*
		(-2.540)		(-2.115)
Enterprise Value/EBITDA		0.0563***		0.0473***
		(21.87)		(16.15)
All Cash Transaction		-8.730		-7.180
		(-1.204)		(-1.575)
Diversifying Merger		20.88*		19.97*
		(2.092)		(2.376)
Observations	175	175	175	175
Adjusted R-squared	0.638	0.682	0.602	0.645
Industry Fixed Effects	Yes	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes	Yes