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PRIVATE POLICING OF MERGERS AND ACQUISITIONS: AN EMPIRICAL
ASSESSMENT OF INSTITUTIONAL LEAD PLAINTIFFS IN TRANSACTIONAL
CLASS AND DERIVATIVE ACTIONS

BY DAVID H. WEBBER*

Transactional class and derivative actions have long been controversial in both the popular and the academic literatures. Yet, the debate over such litigation has thus far neglected to consider a change in legal technology, adopted in Delaware a dozen years ago, favoring selection of institutional investors as lead plaintiffs in these cases. This Article fills that gap, offering new insights into the utility of mergers and acquisitions litigation. Based on a hand-collected dataset of all Delaware class and derivative actions filed from November 1, 2003 to December 31, 2009, I find that institutional investors play as large of a role in these cases as they do in federal securities fraud class actions, leading 41% of them. Controlling for the size of the deal and other factors, institutions have been more likely to assume a lead role in cases with lower premiums over the trading price, at least until the collapse of Lehman Brothers in September 2008, at which point most institutional types increased their litigation activity and sued in higher premium deals too. Other case and deal characteristics significantly predict institutional lead plaintiffs, such as the number of complaints filed in the case (an illustration of lead plaintiff competitiveness), the length of the complaint (a measure of attorney effort), whether the transaction is cash-

*Associate Professor of Law, Boston University Law School. I would like to thank Former Chancellor William Chandler of the Delaware Court of Chancery, and Kenneth Lagowski, Office Manager for the Register in Chancery, for facilitating access to the data analyzed in this paper. For many insights and comments, I thank Bill Allen, Alan Feld, Keith Hylton, Marcel Kahan, Michael Klausner, Michael Perino, Adam Pritchard, Roberta Romano, Natalya Shnitser, Lynn Stout, Randall Thomas, Fred Tung, David I. Walker and participants at the Seventh Annual Conference on Empirical Legal Studies at Stanford Law School (2012), the Canadian Law and Economics Association Conference at the University of Toronto Faculty of Law (2012), Berle IV: The Future of Securities/Financial Markets at University College London (2012), the Corporate Law and Policy Seminar at the New York University School of Law (2012), the Sixth Annual Conference on Empirical Legal Studies at Northwestern University School of Law (2011), and the Boston University School of Law Faculty Workshop (2011). I would also like to thank Arcangelo Cella, Seongyeon Chang, Nicholas DiLorenzo, Andrew Dunning, Caroline Cuddihee Holda, Patrick Gilbert, Daniel Jeng, Huailu Li, Molly Muzevich, Russ Neldam, Joanne Oleksyk, Ian Peck, and Stuart Duncan Smith for excellent research assistance.

for-stock, the market capitalization of the target, and the presence of "Go-Shop" provisions (which negatively correlate with institutional lead plaintiffs). I also find that public-pension funds, in particular, target controlling shareholder transactions.

I present evidence that public-pension funds, alone among institutional types, statistically significantly correlate with the outcomes of greatest interest to shareholders—both an increase in the offer price and lower attorneys' fees. The improvement in offer price associated with public-pension funds may be because they are better shareholder representatives. It may also be because they "cherry-pick" the best cases, although I offer some evidence against this hypothesis. These results are consistent with the view that public-pension funds outperform traditional lead plaintiffs as monitors of class counsel and that they reduce agency costs for shareholders in mergers-and-acquisitions litigation.

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I. INTRODUCTION

The debate over transactional class and derivative actions continues to rage both inside and outside academia.¹ In the most typical case, the shareholders of the target company sue the target's board of directors and the board of the acquirer.² Often, the shareholders allege that the target board, aided and abetted by the acquirer, breached its *Revlon* duties by failing to maximize the price for the target's shares.³ Complaints in such cases tend to include allegations that material information about the transaction has not been disclosed, and that the defendants have consented to coercive deal terms that stifle the bidding process or otherwise force the target shareholders to accept a low bid.⁴

Popular and academic commentators are divided over the utility of such litigation.⁵ Some have argued that every deal faces litigation, that

¹See, e.g., C.N.V. Krishnan, et al., *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248, 1265 (2012) ("[T]he expected rise in takeover premia [from deals litigation] more than offsets the fall in the probability of deal completion."); Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, N.Y. TIMES, June 8, 2012, available at <http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/> [hereinafter Daines & Koumrian, *Merger Lawsuits*] ("Litigation can be effective in protecting shareholder interests in some deals, but questioning every deal seems to impose excessive costs on the companies involved and their shareholders."); Jessica Silver-Greenberg, *Why Merger Lawsuits Don't Pay*, WALL ST. J., Aug. 27, 2011, available at <http://online.wsj.com/article/SB10001424053111904009304576530742353849726.html> (observing that the number of merger lawsuits are growing but questioning whether the suits "result in tangible awards").

²See Daines & Koumrian, *Merger Lawsuits*, *supra* note 1 ("According to a study by Cornerstone Research and Robert M. Daines, companies that were sold for more than \$100 million in 2010 and 2011 reported more than 1,500 lawsuits filed against them and the directors of the target companies.").

³*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) ("[When] the break-up of the company [is] inevitable . . . [t]he duty of the board . . . change[s] from the preservation of [the company] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

⁴See Krishnan et al., *supra* note 1, at 1248; Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 144 (2004).

⁵Compare Daines & Koumrian, *Merger Lawsuits*, *supra* note 1 (noting that while

the overwhelming majority of such cases are frivolous, that the only people who benefit from these cases are the lawyers, and that the costs of these suits outweigh their benefits to shareholders.⁶ Others have taken the opposite view, that the litigation costs are overblown and that shareholders benefit from such litigation.⁷ But what has been missing from this debate is an assessment of this litigation in light of a crucial change in legal technology, adopted in Delaware over a decade ago, favoring the selection of institutional investors as lead plaintiffs.⁸ This legal innovation was designed to address several of the critiques of such litigation, but its implementation has never been empirically assessed.⁹ This Article fills that gap. It makes clear, as demonstrated below, that there are multiple tiers of transactional litigation, and that a nuanced assessment of its merits should account for the identity of the lead plaintiffs—whether they are individuals or institutions—and of equal if not greater importance, what type of institutions they are.¹⁰

This decade-old innovation in mergers-and-acquisitions litigation in Delaware, which has long served as the main arena for such cases,¹¹ was part of a broader paradigm shift in aggregate shareholder litigation, originating with a seminal law review article, *Let The Money Do The Monitoring: How Institutional Investors Can Reduce Agency Costs in*

litigation is sometimes necessary and valuable, challenging every deal is unlikely to be in shareholder interests), *with* Thompson & Thomas, *supra* note 4, at 207 ("[Although] [s]hareholder litigation has often been cast in the role of the evil stepsister of modern corporate governance . . . the acquisition-oriented shareholder class actions filed in Delaware add value, even if they also have costs.").

⁶See Daines & Koumrian, *Merger Lawsuits*, *supra* note 1; *see also* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1806 (2004) ("Delaware law relating to mergers and class actions created a litigation environment that was rife with potential for opportunistic behavior by the plaintiffs' bar[,] . . . plaintiffs' attorneys generally responded by behaving opportunistically[,] and . . . Delaware's courts did not effectively protect corporations or their shareholders from the resulting litigation-related agency costs.").

⁷See Thompson & Thomas, *supra* note 4, at 140 ("Placing our findings in the historical context of the debate over the value of representative shareholder litigation, we believe that acquisition-oriented class actions substantially reduce management agency costs, while the litigation agency costs they create do not appear excessive.").

⁸See *e.g.*, *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000) (holding that the institutional shareholders should serve as lead plaintiff).

⁹See *infra* pp. 29-31.

¹⁰See *infra* Part V.

¹¹See ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS—FEBRUARY 2013 UPDATE 4-6 (2013), available at <http://www.cornerstone.com/getattachment/199b1351-aba0-4f6d-92f0-24b50f4a4b29/shareholder-Litigation-Involving-Mergers-and-Acqui.aspx>.

Securities Class Actions.¹² In this Article, Elliot Weiss and John Beckerman argued that courts should favor selection of institutional investors as lead plaintiffs in federal securities fraud class actions.¹³ Weiss and Beckerman argued that financially and legally savvy institutional investors with large stakes in the outcome of the case would have both the motivation and sophistication to litigate thoroughly and monitor class counsel.¹⁴ In contrast, the unsophisticated individual lead plaintiffs who dominated class actions at that time had little incentive or ability to monitor class counsel because they had small stakes in their cases and were often hand-picked by plaintiffs' lawyers.¹⁵ In 1995, Congress enshrined the Weiss and Beckerman proposal in the Private Securities Litigation Reform Act ("PSLRA").¹⁶ Five years later, the Delaware Court of Chancery adopted a similar presumption, favoring selection of institutional-investor lead plaintiffs in mergers-and-acquisitions class and derivative actions.¹⁷

The emergence of institutional-investor lead plaintiffs in federal securities fraud class actions has been studied in numerous academic articles, including two by this Author.¹⁸ This is the first piece to examine their role in the context of mergers-and-acquisitions cases, which differ in fundamental respects from securities fraud class actions;¹⁹ we should

¹²Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2126-27 (1995).

¹³*Id.* at 2105 ("Courts would benefit [if] institutional investors with large stakes in class actions [were] to serve as lead plaintiffs.").

¹⁴*Id.* at 2095 ("Institutions' large stakes give them an incentive to monitor, and institutions have or readily could develop the expertise necessary to assess whether plaintiffs' attorneys are acting as faithful champions for the plaintiff class.").

¹⁵*Id.* at 2054 ("[A]ttorneys operating on a contingent fee basis initiate most such suits in the names of 'figurehead' plaintiffs with little at stake.").

¹⁶15 U.S.C. § 78u-4 (2006).

¹⁷*See* TCW Tech. P'ship v. Intermedia Commc'ns, Inc., 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000) ("[I]t seems appropriate, at least, to give recognition to large shareholders or significant institutional investors who are willing to litigate vigorously on behalf of an entire class of shareholders, provided no economic or other conflicts exist between the institutional shareholder and smaller, more typical shareholders.").

¹⁸*See* David H. Webber, *The Plight of the Individual Investor in Securities Class Actions*, 106 NW. U. L. REV. 157 (2012) [hereinafter Webber, *Plight*]; David H. Webber, *Is "Pay-to-Play" Driving Public Pension Fund Activism in Securities Class Actions?*, 90 B.U. L. REV. 2031 (2010) [hereinafter Webber, *Pay-to-Play*].

¹⁹Some of the most obvious differences between securities fraud class actions and mergers-and-acquisitions class actions include that the former very often run parallel to SEC or other governmental investigations, and involve accounting restatements. *See infra* notes

not assume that a successful innovation in one of these types of litigation can automatically be transplanted to the other. I elaborate upon this point below.²⁰

This Article aims to answer three primary questions pertaining to institutional-investor leadership of deal cases in Delaware. First, have institutions accepted Delaware's invitation to serve as lead plaintiffs, and if so, what case and deal characteristics attract them?²¹ Second, are certain types of institutions—subdivided into public-pension funds, labor-union funds, mutual funds, and the catchall "private non-mutual funds"—more inclined to litigate period, or to litigate certain types of cases or deals?²² Third, do institutions generally, and certain types of institutions specifically, correlate with better case outcomes for shareholders?²³ To offer short answers to each of these questions, I find that: first, institutions have obtained 41% of lead plaintiff appointments since Delaware adopted a rule favoring their selection,²⁴ and they tend to obtain these appointments in cases where shareholders are offered low premiums and comparatively unfavorable deal terms.²⁵ Presumably, these are the cases we would want them to litigate, *ex ante*. Second, there is some variation between institutional types regarding the deal and case characteristics with which they are affiliated.²⁶ For example, public-

121-22 and accompanying text. Institutional lead plaintiffs and their lawyers are frequently accused of free riding off of these governmental investigations in securities fraud class actions. *See infra* note 123 and accompanying text. Such governmental investigations are much less frequent in the context of mergers-and-acquisitions litigation, depriving institutions and their law firms of the free ride they may or may not enjoy in 10b-5 cases. *See* UNITED STATES DEPARTMENT OF JUSTICE, AGENCIES, <http://www.justice.gov/agencies/index-list.html> (last visited Jan. 17, 2014) (the DOJ investigates securities fraud through the US Attorney's Office, but only investigates antitrust elements of mergers and acquisitions); *see also* UNITED STATES SECURITIES AND EXCHANGE COMMISSION, ENFORCEMENT DIVISION, *About* <http://www.sec.gov/divisions/enforce/about.htm> (last visited Jan. 17, 2014) (discussing the SEC's role in investigating securities fraud but not discussing mergers and acquisitions or investigation under the Williams Act); *see also* DELAWARE OFFICE OF THE ATTORNEY GENERAL, Fraud Division, <http://attorneygeneral.delaware.gov/office/fraud.shtml> (last visited Jan. 17, 2014) (discussing investigation into securities fraud but not discussing investigation into mergers and acquisitions). Moreover, securities fraud class actions often accompany voluntary financial restatements by the company, which are often tantamount to an admission of liability. *See infra* notes 129-30 and accompanying text. Similar admissions of wrongdoing rarely occur in the transactional litigation context. *See infra* note 126 and accompanying text.

²⁰*See* discussion *infra* pp. 20-22.

²¹*See infra* Parts IV.A, V.

²²*See infra* Part V.B.

²³*See infra* notes 431, 484 and accompanying text.

²⁴*See infra* note 184 and accompanying text.

²⁵*See infra* p. 74-77.

²⁶*See* discussion *infra* Part V.B.

pension funds target controlling-shareholder acquisitions.²⁷ Third, I find evidence that public-pension funds—alone among institutional types—correlate with improved share price and lower attorneys' fees for target shareholders.²⁸ Given that these funds constitute the most frequent institutional lead plaintiffs,²⁹ their case selection and case performance offer some support for the policy favoring selection of institutional-investor lead plaintiffs.

In addressing these questions, this Article advances two lines of corporate law scholarship: the shareholder-activism literature, and the shareholder-litigation literature.³⁰ First, it advances the scholarship on shareholder activism, which focuses on the objectives, methods, and circumstances under which investors—particularly institutional investors—engage corporate boards and fellow shareholders for the purpose of influencing the business decisions or governance structures of corporations.³¹ Litigation has commonly been understood as one form of shareholder activism, albeit an extreme and confrontational form.³² Below, I argue that institutional participation in mergers-and-acquisitions litigation is a form of shareholder activism, and is best understood in light of the prior research on such activism.³³ This literature helps contextualize why certain institutional types pursue (or avoid) lead plaintiff appointments in deal litigation, and what types of cases we might expect them to select.³⁴ Second, the shareholder-litigation literature helps frame the data presented here within the larger debate over the utility of mergers-and-acquisitions litigation, and shareholder

²⁷See *infra* pp. 55-56.

²⁸See *infra* Part VI.A, C.

²⁹See *infra* Table 2.

³⁰See *infra* Part III.

³¹See John Armour & Brian R. Cheffins, *The Rise and Fall (?) of Shareholder Activism By Hedge Funds 2* (European Corporate Governance Institute, Working Paper No. 136/2009, September 2009), available at <http://ssrn.com/abstract=1489336> [hereinafter Armour & Cheffins, *Rise and Fall*] ("Shareholder activism has been described as 'the exercise and enforcement of rights by minority shareholders with the objective of enhancing shareholder value over the long term.'" (quoting Chee Keong Low, *A Road Map for Corporate Governance in East Asia*, 25 NW. J. INT'L L. & BUS. 165, 186 (2004))).

³²See Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 316 (2008) (summarizing CalPERS' monitoring of securities fraud class action suits and "influential role in the high-profile *Cendant* litigation" as a model of institutional activism).

³³See *infra* at III.B.

³⁴See *infra* at III.B.

litigation generally.³⁵ It helps assess the performance of institutional investors in the lead plaintiff role, specifically, whether the lead plaintiffs adequately represent the class, and whether they successfully select and monitor class counsel.³⁶ Do the lead plaintiffs control class counsel, or does class counsel control the lead plaintiffs? As discussed more fully below, I find some evidence that institutions appear to be exercising judgment independent of their lawyers;³⁷ the finding that public-pension funds correlate with lower attorneys' fees³⁸ is also particularly important. Thus, this Article takes the natural next step in developing these two lines of corporate law scholarship.

The Article proceeds as follows: Part II provides some background on transactional litigation and discusses Delaware law for selecting lead plaintiffs in such cases, comparing it to federal law.³⁹ Part III contextualizes this Article within the shareholder litigation and shareholder activism literatures, as noted above.⁴⁰ Part IV describes the sample and basic statistics.⁴¹ Part V discusses the case characteristics associated with institutional lead plaintiffs generally, and with various types of institutional lead plaintiffs specifically, public-pension funds, labor-union funds, mutual funds, and private non-mutual funds.⁴² Part VI analyzes the relationship between institutional lead plaintiffs, plaintiffs' law firms, case characteristics, and case outcomes.⁴³ A brief conclusion follows.⁴⁴

³⁵See *infra* at III.B.

³⁶See *infra* at III.B.

³⁷See *infra* Part VI.A.

³⁸See *infra* Part VI.C.

³⁹See *infra* Part II.

⁴⁰See *infra* Part III.

⁴¹See *infra* Part IV.

⁴²See *infra* Part V.

⁴³See *infra* Part VI.

⁴⁴See *infra* Part VII.

II. THE THEORY AND PRACTICE OF SELECTING INSTITUTIONAL LEAD PLAINTIFFS IN DELAWARE AND BEYOND

A. *Delaware Law for Selecting Lead Plaintiffs in Transactional Class and Derivative Actions*

In *TCW Technology Limited Partnership v. Intermedia Communications, Inc.*, the Delaware Court of Chancery established criteria for the selection of lead plaintiffs and lead counsel in Delaware transactional class and derivative actions.⁴⁵ The court developed these criteria in response to a lead plaintiff contest between three sets of claimants: traditional shareholder claimants, institutional shareholder claimants, and derivative claimants.⁴⁶ Although the Delaware Court of Chancery traditionally resisted becoming embroiled in lead plaintiff disputes, encouraging the contestants to reach an agreement on their own,⁴⁷ in *TCW Technology*, the parties could not agree, forcing the court to decide.⁴⁸ In its opinion, the Delaware Court of Chancery noted that, "[o]ver the past ten years, members of the Court of Chancery have been asked, with increasing frequency, to become involved in the sometimes unseemly internecine struggles within the plaintiffs' bar over the power to control, direct and (one suspects) ultimately settle shareholder lawsuits filed in this jurisdiction."⁴⁹ The court held that in making the lead plaintiff selection, it should consider the following factors: (1) "the quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs[;]" (2) which "shareholder plaintiff has the greatest economic stake in the outcome of the lawsuit[;]" and (3) "whether a particular litigant has prosecuted its lawsuit with greater energy, enthusiasm or vigor than have other similarly situated litigants."⁵⁰ The opinion notes that the second factor "is similar to the federal system that now uses a model whereby the class member with the largest economic interest in the action is given responsibility to control

⁴⁵*TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000).

⁴⁶*Id.* at *1.

⁴⁷*See id.* at *3.

⁴⁸*Id.* ("[The] attempt to encourage a similar compromise of competing interests in these shareholder actions, unfortunately, has failed.")

⁴⁹*TCW Tech.*, 2000 WL 1654504, at *3.

⁵⁰*Id.* at *4.

the litigation."⁵¹ In applying these criteria, Chancellor Chandler selected two institutional investors as co-lead plaintiffs.⁵²

In June 2002, the Delaware Court of Chancery settled on final criteria for lead plaintiff selection.⁵³ In *Hirt v. U.S. Timberlands Service Company, LLC*, the court held that it would consider the following factors: (1) the "quality of the pleading[;]" (2) "the relative economic stakes of the competing litigants . . . (to be accorded 'great weight');" (3) "the willingness and ability of the contestants to litigate vigorously on behalf of an entire class of shareholders;" (4) "the absence of any conflict between larger, often institutional, shareholders and smaller shareholders;" (5) "the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit;" and (6) "competence of counsel and their access to the resources necessary to prosecute the claims at issue."⁵⁴

As I demonstrate below, the "great weight" accorded to the relative economic stakes of the contestants has ushered in a period of substantial participation of institutional-investor lead plaintiffs in Delaware, in some ways paralleling the increased participation of these investors in federal securities fraud class actions.⁵⁵ But even though they share the same objectives, there are meaningful differences between the PSLRA standard and Delaware law.⁵⁶ The PSLRA created a rebuttable presumption that "the most adequate plaintiff . . . is the person or group of persons that . . . in the determination of the court, has the largest financial interest in the relief sought by the class[.]"⁵⁷ In adopting this provision, Congress endeavored "to increase the likelihood that institutional investors will serve as lead plaintiffs."⁵⁸ Congress believed that plaintiff-attorney agency costs could be reduced if the lead plaintiff

⁵¹*Id.*; accord 15 U.S.C. § 78u-4 (2006).

⁵²*TCW Tech.*, 2000 WL 1654504 at *4 ("Based on these considerations, I conclude that the institutional shareholders . . . should serve as lead plaintiff, with all of the other shareholder actions consolidated with the two institutional lawsuits for purposes of the scheduled preliminary injunction hearing.").

⁵³*Hirt v. U.S. Timberlands Serv. Co.*, 2002 WL 1558342, at *2 (Del. Ch. July 9, 2002).

⁵⁴*Id.*

⁵⁵See PRICEWATERHOUSECOOPERSLLP, 2011 SEC. LITIG. STUD. 27 (Apr. 2012), available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/2011-securities-litigation-study.pdf (noting that institutional investors, including public and union pension funds, represented 38% of the lead plaintiffs in securities cases filed in 2011).

⁵⁶See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb)-(cc).

⁵⁷15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

⁵⁸S. Rep. No. 104-98, at 11 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 690.

had a large enough stake in the outcome to be incentivized to monitor class counsel, and if the lead plaintiff were sufficiently sophisticated to act on its incentive skillfully.⁵⁹

Probably the most meaningful difference between the PSLRA and Delaware law is that Delaware's "relative economic stakes" language is more flexible than the federal standard because it can be read to let courts assess the size of the lead plaintiff applicant's stake both absolutely and relative to its own portfolio.⁶⁰ For example, in *In re Del Monte Foods*, the court, for several reasons, selected as lead plaintiff a pension trust that owned 25,000 shares worth \$475,000 and representing 0.07% of its assets under management instead of a European asset manager for private and institutional clients that held 1,899,900 shares worth \$36 million and representing 0.02% of its assets under management.⁶¹ Despite the latter applicant's far larger absolute stake, the relative stakes of the two applicants were approximately equal.⁶² In contrast, the PSLRA created a rebuttable presumption that the entity with the largest absolute stake in the case is the presumptive lead plaintiff, even if that stake represents a trivial investment for the applicant.⁶³ As I have argued elsewhere, I view the flexibility of the Delaware approach as superior to the federal approach because it implicitly acknowledges that a lead plaintiff's incentive to monitor class counsel—a key role of a lead plaintiff—may be a function of how important the investment is to that lead plaintiff, relative to its entire investment portfolio.⁶⁴ But despite this comparative advantage, I maintain that, in practice, the Delaware process for selecting a lead plaintiff omits a vital step in screening lead plaintiffs. The Delaware process does not require disclosure of, and makes no effort

⁵⁹See *id.* (demonstrating intent to increase the likelihood that institutional investors be chosen as lead plaintiff); see also Weiss & Beckerman, *supra* note 12, at 2105-06 (suggesting the basis for the "most adequate plaintiff" provision).

⁶⁰See Webber, *Plight*, *supra* note 18, at 171 ("[I]n contrast to federal courts' congressional mandate to favor lead plaintiffs with the largest absolute loss, Delaware's 'relative economic stakes' language has opened the possibility for selection of a lead plaintiff with the largest loss relative to its own assets.").

⁶¹*In re Del Monte Foods Co. S'holders Litig.*, 2010 WL 5550677, at *6 (Del. Ch. Dec. 31, 2010).

⁶²*Id.* at *6-*7.

⁶³*Id.* at *5.

⁶⁴See Webber, *Plight*, *supra* note 18, at 171 ("[I]n *In re Del Monte Foods Co. Shareholders Litigation*, Vice Chancellor Laster noted the size of lead plaintiff applicants' losses relative to their overall assets under management in selecting a lead plaintiff that had a smaller absolute but larger relative loss. . . . *In re Del Monte* [establishes] that the incentive to monitor class counsel stems, at least in part, from the relative size of the investor's loss.").

to assess, lead plaintiff applicants' stakes in the bidder(s).⁶⁵ It only assesses their stakes in the target.⁶⁶

As a lead plaintiff, an institutional investor should typify the class of target shareholders and zealously advocate on its behalf.⁶⁷ "The institution must strive to maximize the price paid for the class's shares by the acquirer, augment disclosures, and create an open bidding process in the hope that the class will benefit from a bidding war."⁶⁸ But as I have noted in prior work, "institutional investors' interests may run counter to these objectives" when they also hold shares in the acquiring company.⁶⁹ "The dollars they win as members of the target class are dollars they lose as an acquirer shareholder, and vice versa. If the institutional investors' stake in the acquirer is greater than their stake in the target, their net financial incentive is to lower the bidding price, not increase it."⁷⁰ It is true that, in most instances, the self-interest of institutional-investor lead plaintiff applicants, combined with the fiduciary responsibilities of representing the target-shareholder class, should incentivize the institutions to correctly calibrate their interests in the target and the acquirer on their own, without disclosure.⁷¹

Still, the lack of disclosure may cause problems. It may cause institutions not to check what their stake in the acquirer is, not least because the plaintiffs' attorneys monitoring their portfolios have no incentive to check, and because it may be difficult to assess the size of their stake if the fund utilizes many outside investment managers.⁷² Moreover, funds that have a larger stake in the bidder than the target might proceed in the lead plaintiff role anyway because of private

⁶⁵See *id.* at 207 (noting that an institution should not serve as a lead plaintiff if its financial interest in the bidder outweighs its interest in the target).

⁶⁶See *id.*

⁶⁷See DEL CT. CH. R. 23(a)(3) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class . . .").

⁶⁸Webber, *Plight*, *supra* note 18, at 206. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986) (creating a duty for the board to get the best possible price for the shareholders once the company is for sale). *But cf.* *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) (holding that the fulfillment of *Revlon* duties during a change of control does not always require the administration of an auction).

⁶⁹Webber, *Plight*, *supra* note 18, at 206.

⁷⁰*Id.*

⁷¹See *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 198 (3d Cir. 2005) (noting lead plaintiffs are fiduciaries for the class they represent).

⁷²See Webber, *Plight*, *supra* note 18, at 167 (discussing institutions' portfolio-monitoring arrangements with plaintiffs' law firms).

benefits to its own board members, such as favorable publicity for a pension fund trustee who is an elected official.⁷³ And in the extreme case, institutions with a stake in the bidder that exceeds the target might even obtain a lead plaintiff appointment for the purpose of thwarting the litigation.⁷⁴ This might seem farfetched, but the market has seen similar mercenary behavior in the empty-voting context.⁷⁵ In a previous article, I proposed a mechanism by which courts should require disclosure of a prospective lead plaintiff's position in the acquirer, as well as in the target, and for disqualifying the proposed lead plaintiff under certain circumstances.⁷⁶

I raise this issue here because it is possible that institutional lead plaintiffs' bidder stakes could predict the cases they pursue, and their performance.⁷⁷ This Article offers no analysis of this potential explanatory variable because the data is unavailable.⁷⁸ I note that, if it were available, it might well reveal that the lead plaintiff applicant's stake in the bidder plays little or no role as an explanatory variable

⁷³See *id.* at 207 ("[P]oliticians serving on a fund's board might win favorable publicity by using the fund's lead plaintiff status to win concessions from the bidder in favor of the target, particularly if the target is located within the politician's constituency and employs voters.").

⁷⁴See *id.* at 208 ("[A]n institutional investor could obtain lead plaintiff status for the purpose of thwarting the litigation.").

⁷⁵See *e.g.*, Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 816 (2006) (describing instances of insiders and hedge funds using derivative investments to decouple voting rights and economic stakes in order to achieve a result contrary to the interests of shareholders whose voting and economic rights were integrated).

⁷⁶See Webber, *Plight*, *supra* note 18, at 207 (proposing that an institution should not serve as a lead plaintiff if its financial interest in the bidder outweighs its interest in the target).

⁷⁷See *id.* at 167 (noting that better outcomes result for shareholders in securities class actions when institutional investors serve as lead plaintiffs).

⁷⁸One potential source of this data is the Form 13-Fs that institutional investors with assets in excess of \$100 million are required to file with the SEC. See Securities Exchange Act of 1934 § 13(f), 15 U.S.C. § 78m(f) (2012); U.S. SECURITIES AND EXCHANGE COMMISSION, FORM 13F—REPORTS FILED BY INSTITUTIONAL INVESTMENT MANAGERS, available at http://blogs.law.harvard.edu/corpgov/files/2012/03/Cornerstone_Research_Shareholder_MandA_Litigation_03_2012.pdf. But Form 13-Fs have been filed for virtually none of the public-pension funds in my sample because most of these funds utilize outside investment managers, often several outside managers, and it is these investment managers—and not the funds themselves—that file the Form 13-Fs. See Securities Exchange Act of 1934 § 13(f), 15 U.S.C. § 78m(f)(1) (2012) (establishing that institutional investment managers are responsible for filing such reports with the Commission). Investment manager Form 13-Fs do not reveal the amount of their clients' funds that are invested in particular stocks. See C.S. Agnes Cheng et al., *Institutional Monitoring Through Shareholder Litigation*, 95 J. FIN. ECON. 356, 362 n.21 (2010).

because institutional investors have strong economic and legal incentives not to take a lead plaintiff role representing a shareholder class that is actually litigating against its interests, as outlined above.⁷⁹ But one cannot exclude the possibility that bidder stake could impact case selection and performance.⁸⁰

III. PRIOR LITERATURE

As noted in the Introduction, this Article sits at the intersection of two strains of corporate law scholarship: the shareholder-litigation literature, and the shareholder-activism literature.⁸¹ The relevant shareholder-activism literature focuses on the types of institutional investors that engage in such activism and the types of activism they engage in, ranging from litigation to proxy contests, say-on-pay initiatives, or behind-the-scenes campaigns designed to influence the direction or governance of a publicly-held company.⁸² The literature on private securities and corporate litigation focuses on the agency costs of class counsel, the deterrent and compensatory effects of such litigation, and cost-benefit analyses of it.⁸³ I will briefly outline these scholarly domains. Later in this Article, I will rely upon them to interpret and contextualize my data and its implications for further research.⁸⁴

A. *Private Securities and Deal Litigation*

The purpose of private securities and transactional litigation is to provide shareholders with a tool for policing a broad range of managerial misconduct.⁸⁵ It is well understood that the separation between corporate

⁷⁹See Webber, *Plight*, *supra* note 18, at 206.

⁸⁰See *id.* at 219 (noting that although better outcomes result for shareholders in securities class actions when institutional investors serve as lead plaintiffs, this could be due to "cherry-picking" the best cases).

⁸¹See *supra* text accompanying note 30.

⁸²See Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 479, 482 (1991) (describing types of institutional investors, including public-pension funds and private funds, and the types of activism they engage in, including corporate governance proposals and proxy contests).

⁸³See *e.g.*, Cheng et al., *supra* note 78, at 357 (describing agency costs, deterrent and compensatory effects of litigation, and the cost-benefit analysis of securities litigation).

⁸⁴See *supra* Part VII.

⁸⁵See Thompson & Thomas, *supra* note 4, at 144-45 (concluding that securities class actions, like state court shareholder suits, are generally brought over corporate governance and

ownership and control generates agency costs, creating managerial interests that are distinct from those of the shareholders.⁸⁶ Delaware law recognizes the potentially dramatic rise in such managerial agency costs in the context of a merger or acquisition.⁸⁷ For example, in responding to a hostile offer, the board of directors may institute defensive measures such as a poison pill to stop a transaction that would benefit shareholders, but strip the board and management of the perks of their positions.⁸⁸ In a friendly deal, target managers may tolerate a lower price in exchange for private benefits such as generous severance packages or an employment contract with the new combined entity.⁸⁹ In management buyouts or controlling shareholder acquisitions, managers, and the board, may both face direct conflicts of interest between negotiating a low acquisition price for themselves or the controlling shareholder and maximizing the price for shareholders.⁹⁰

managerial performance).

⁸⁶See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 66 (Revised ed. 1968) (discussing how corporate development has led to the separation of ownership and control); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976) (explaining how agency costs are generated by the separation of corporate ownership and control).

⁸⁷See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (declaring that boards have an "enhanced duty" in the context of mergers-and-acquisitions because of the "the omnipresent specter" that is a breach of the duty of loyalty to shareholders); see also Thompson & Thomas, *supra* note 4, at 145 (stating that Delaware's imposition of additional duties on directors in a merger context are due to the risk of increased agency costs in that setting).

⁸⁸See Stephen M. Bainbridge, *Exclusive Merger Agreements and Lock-Ups in Negotiated Corporate Acquisitions*, 75 MINN. L. REV. 239, 273 (1990) ("[I]f incumbent management defeats the bidder, target directors and officers will retain their positions, but target shareholders will lose a substantial premium for their shares."). See generally Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) (providing a thorough treatment of the board's authority to block unsolicited bids).

⁸⁹See Thompson & Thomas, *supra* note 4, at 145 (explaining that in friendly acquisitions there is the "constant fear" that target management will sell too cheaply in exchange for personal benefits, such as severance packages or continued employment); see also Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 118 (1965) (deducing that whenever there is a merger there is some side-payment to the target management because they are in the position to garner almost all of the "control premium" over the market price of the stocks for themselves). For an overview of litigated cases involving private board member deal benefits, see also, Bainbridge, *supra* note 88, at 273-74 (providing overview of litigated cases involving private board member deal benefits).

⁹⁰See Thompson & Thomas, *supra* note 4, at 145; see also Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 786 (2003-04) (noting that controlling shareholders may exercise private benefits of control either by squeezing out the minority shareholders or selling their controlling stake). But see Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769,

Delaware law offers several means of reducing such agency costs in the transactional context. For instance, the boards of the target and the acquirer, as well as a majority vote of the shareholders, must approve friendly deals.⁹¹ In the absence of a conflict of interest, Delaware courts apply the deferential business judgment rule to such transactions.⁹² In the presence of such a conflict, like an acquisition by a controlling shareholder, Delaware courts apply "entire fairness" review, a form of scrutiny that is more stringent than the business judgment rule, developed in a line of cases following *Weinberger v. UOP, Inc.*⁹³ In the mid-1980s, Delaware courts developed a level of intermediate scrutiny between *Weinberger* "entire fairness" and the business judgment rule.⁹⁴ *Unocal Corp. v. Mesa Petroleum Co.* established this "enhanced scrutiny," requiring that in a hostile bidder situation, defensive measures instituted by an independent board must be instituted in response to a real threat to the target and must be proportional to the threat.⁹⁵ Finally, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Delaware courts began developing a line of cases requiring the board to have a duty to maximize the price for target shareholders in any sale of control of a corporation.⁹⁶ Target shareholders have standing to bring private class or

820 (2006) ("[T]he empirical evidence indicates shareholder premiums are essentially identical in management-sponsored leveraged buyouts and arm's length leveraged buyouts."). See generally John C. Easterwood, et al., *Controlling the Conflict of Interest in Management Buyouts*, 76 REV. ECON. & STAT. 512 (1994) (providing an empirical analysis of the effectiveness of various methods of combating the conflict of interest that arises when managers bid to acquire the firms they manage).

⁹¹See DEL CODE ANN. tit. 8, § 251(b)-(c) (2010) (describing the procedure for the board's adoption of a merger agreement); see also Thompson & Thomas, *supra* note 4, at 145.

⁹²See Thompson & Thomas, *supra* note 4, at 146.

⁹³See *id.* (discussing the application of entire fairness review to shareholder transactions when a conflict of interest exists and crediting the *Weinberger* case as first announcing this standard); see also *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) ("When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain.").

⁹⁴See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("[A]n enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."); see also Thompson & Thomas, *supra* note 4, at 147 ("Beginning in 1985, the Delaware courts developed an intermediate standard of review, more intrusive than the deferential business judgment rule, but short of the entire fairness of *Weinberger*.").

⁹⁵493 A.2d at 955.

⁹⁶506 A.2d 173, 184 (Del. 1986); see also Thompson & Thomas, *supra* note 4 at 147 ("The promise of the *Revlon* decision itself was that in any sale of corporate control, the target company's board of directors had a duty to maximize shareholder value by taking the highest price for the company.").

derivative actions to enforce these rights against recalcitrant boards or managers.⁹⁷ Such private rights of action should reduce managerial agency costs by forcing managers to act in the interests of shareholders in the transactional context.

But litigation to enforce these rights generates costs of its own, including agency costs created by the disconnect between the interests of plaintiffs' lawyers and those of the shareholder class they represent.⁹⁸ Much of the academic debate over such litigation focuses upon whether it actually reduces managerial agency costs and, even if it does, whether this benefit outweighs the litigation costs.⁹⁹ For example, Daines and Koumrian reviewed reports of mergers-and-acquisitions shareholder litigation in SEC filings related to acquisitions of U.S. public companies valued over \$100 million and announced in 2010 or 2011.¹⁰⁰ They found that almost all of these transactions triggered several lawsuits, which were "filed shortly after the deal's announcement and often settled before the deal's closing."¹⁰¹ Few of these lawsuits resulted in tangible monetary benefits to shareholders; most settled for additional disclosures or, less frequently, changes to the terms of the deal.¹⁰² They also found that, while requiring additional disclosures is a common outcome, there were no cases in which shareholders rejected the deal after the additional disclosures were provided.¹⁰³ In another study, Cain and Davidoff

⁹⁷See Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 218 (1999).

⁹⁸See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 19 (1991) (attributing high agency costs in class action and derivative litigation primarily to the inability of the class to effectively monitor the attorneys).

⁹⁹Compare Thompson & Thomas, *supra* note 4, at 207 ("[W]e conclude that the acquisition-oriented shareholder class actions filed in Delaware add value, even if they also have costs."), with Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 282 (1986) (concluding that derivative suits do not have a material impact on the firm's managerial agency costs and its shareholders because of the insignificant magnitude of the shareholder's wealth-effects).

¹⁰⁰ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, RECENT DEVELOPMENT IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS—MARCH 2012 UPDATE 1 (2012), available at http://blogs.law.harvard.edu/corpgov/files/2012/03/Cornerstone_Research_Shareholder_Mand_A_Litigation_03_2012.pdf.

¹⁰¹*Id.* at 1.

¹⁰²*Id.* at 11.

¹⁰³*Id.*; see also Brittany M. Giusini, Note, Pure Resources' "Fair Summary" Standard:

utilized a nationwide dataset and reported that, between 2005-2011, there was a sharp increase in the percentage of transactions valued at more than \$100 million that were targeted by a lawsuit, from 39.3% to 92.1%, raising concerns about the frivolousness of such litigation.¹⁰⁴

In contrast, Krishnan, Masulis, Thomas, and Thompson ("KMTT") examine merger activity from 1993 to 2001.¹⁰⁵ Controlling for a variety of factors, they found that mergers-and-acquisitions subject to litigation were completed at a significantly lower rate than those not subject to litigation.¹⁰⁶ They also found that mergers-and-acquisitions subject to shareholder litigation have significantly higher premiums in takeover deals.¹⁰⁷ And they found that, in merger waves with friendly single-bidder offers, shareholder litigation acts as a substitute for the presence of a rival bidder by "polic[ing] low-ball bids and lead[ing] to improved offer prices."¹⁰⁸ Most importantly, they found that "the expected rise in the takeover premia [for cases subjected to shareholder litigation] more than offsets the fall in the probability of deal completion, resulting in a positive expected gain to target shareholders."¹⁰⁹ Thus, the KMTT article provides evidence that deal litigation benefits shareholders.¹¹⁰ This Article takes the next natural step in developing this line of scholarship by assessing the types of lead plaintiffs in these cases,¹¹¹ the case characteristics associated with particular institutional types,¹¹² whether Delaware's policy favoring selection of institutional lead plaintiffs improves outcomes for shareholders and whether certain types of institutional investors are particularly effective in the lead plaintiff role.¹¹³

Although I am not aware of another article that assesses the role of lead-plaintiff types in transactional litigation, some prior work has examined their role in federal securities fraud class actions.¹¹⁴ Michael

Disclosures Away From Obtaining Clarity in the M&A Context, 38 DEL. J. CORP. L. 595, 619-25 (2013) (discussing the costs and benefits of increasing disclosures in Delaware).

¹⁰⁴Matthew Cain & Steven Davidoff, *A Great Game: The Dynamics of State Competition and Litigation*, 3 (January 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758.

¹⁰⁵See Krishnan et al., *supra* note 1, at 1248.

¹⁰⁶*Id.* at 1265.

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 1264.

¹⁰⁹Krishnan et al., *supra* note 1, at 1250.

¹¹⁰*Id.* at 1264-65.

¹¹¹See discussion *infra* Part IV.

¹¹²See discussion *infra* Part V.

¹¹³See discussion *infra* Part VII.

¹¹⁴See generally Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J.

Perino found that, federal securities fraud class action cases with public-pension lead plaintiffs have larger investor recoveries and significantly lower attorney fee requests and awards than cases with other lead plaintiffs, even after controlling for institutional self-selection.¹¹⁵ Similarly, Cheng, Huang, Li and Lobo found that institutional owners can use securities litigation as a disciplinary mechanism because

[securities class actions] with an institutional lead plaintiff are less likely to be dismissed and have significantly larger settlements. Further analysis indicates that all types of institutions show significantly better litigation outcomes with public pension funds generating the largest settlement amount. We also found that, within three years of filing the lawsuit, defendant firms with institutional lead plaintiffs experience greater improvement in board independence than those with individual lead plaintiffs.¹¹⁶

Similarly, Choi, Fisch and Pritchard found that, post-PSLRA, public-pension-fund lead plaintiffs correlate with higher recoveries in securities fraud class actions;¹¹⁷ Cox, Thomas, and Bai similarly found higher recoveries by both public-pension funds and labor-union funds.¹¹⁸ Thus, these studies provide evidence that some institutional-investor lead plaintiffs in securities fraud class actions, notably public-pension funds, provide better shareholder outcomes in the form of higher settlements, lower attorneys' fees, and improved board independence.¹¹⁹

Still, the substantial differences between transactional litigation and securities fraud litigation should make one cautious before importing the lessons from one form of litigation to the other.¹²⁰ First, securities

EMPIRICAL LEGAL STUD. 368, 369-70 (2012).

¹¹⁵*Id.* at 369.

¹¹⁶Cheng et al., *supra* note 78, at 358.

¹¹⁷See Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 895-96 (2005) [hereinafter Choi et al., *Do Institutions Matter?*] (analyzing outcomes of securities fraud class actions post-PSLRA).

¹¹⁸See James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 379 (2008).

¹¹⁹See Cheng et al., *supra* note 78, at 357-58; Choi et al., *Do Institutions Matter?*, *supra* note 117, at 895-96; Cox et al., *supra* note 118, at 379; Perino, *supra* note 114, at 369-70.

¹²⁰See *supra* note 19.

fraud class actions led by institutional lead plaintiffs—and public-pension funds in particular—often correlate with the presence of a simultaneous governmental investigation into the fraud.¹²¹ Typically, these investigations are conducted by the SEC, though occasionally by the U.S. Department of Justice or other government entities.¹²² This correlation has led to speculation that public-pension funds and other institutional investors "free ride" off of these investigations,¹²³ although some studies suggest that public-pension funds correlate with higher settlements even when accounting for a government investigation.¹²⁴ At least one recent study has compared the market reaction to stand-alone SEC investigations versus stand-alone private securities class actions, in part to address claims that securities fraud class actions free ride off of governmental investigations, adding little value of their own.¹²⁵ Governmental investigations are virtually nonexistent in the context of transactional litigation, and thus, there is no parallel investigation for public-pensions or other institutions to free-ride on.¹²⁶ Because I do find that public-pension funds correlate with better outcomes for target shareholders in deal litigation,¹²⁷ this Article offers support for the view

¹²¹See, e.g., Perino, *supra* note 114, at 379, 381 ("[P]ublic pension fund plaintiffs are significantly more likely to be involved in . . . cases with parallel governmental enforcement actions than noninstitutional plaintiffs.").

¹²²See James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1589 n.8 (2006) (stating that the Securities and Exchange Commission and the U.S. Department of Justice are capable of sanctioning violators).

¹²³See *id.* at 1605-06 (suggesting the potential for public-pension funds to free ride off of government investigations to minimize the costs incurred).

¹²⁴See, e.g., *id.* at 1624, 1630-31 (finding that institutional lead plaintiffs correlate with higher settlements even when controlling for an SEC investigation); Cox et al., *supra* note 118, at 378-79 ("[S]ettlement size is positively and significantly correlated with . . . the presence of an SEC enforcement action."); Perino, *supra* note 114, at 383-84 (finding a positive correlation between public-pension funds securities litigation lead plaintiffs and settlement amounts while controlling for governmental enforcement action).

¹²⁵See Stephen J. Choi & Adam C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 2, 4-5 (N.Y.U. Center for Law, Economics and Organization, Working Paper No. 12-38, 2012), available at <http://ssrn.com/abstract=2109739> (comparing market reaction to stand-alone SEC investigations versus SEC stand-alone securities class actions and finding evidence that class actions are superior to SEC investigations in targeting fraud and imposing sanctions on companies).

¹²⁶See SEC DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL § 1.4.1 (2012), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (describing the SEC's mission as investigating and litigating only violations of federal securities laws).

¹²⁷See, e.g., Webber, *Plight*, *supra* note 18, at 167 ("Overall, the use of institutional investors as lead plaintiffs correlates with better outcomes for shareholders in securities class

that these funds can vindicate the rights of shareholders on their own, without government help.¹²⁸

Similarly, it has often been observed that institutional-investor lead plaintiffs in federal securities fraud class actions, including public-pension funds, bring cases when the defendant company has voluntarily restated its own financial statements because of accounting deficiencies.¹²⁹ In effect, such actions begin with an admission of wrongdoing by the company, thereby greatly aiding securities fraud class action plaintiffs in meeting their burden of proof on liability.¹³⁰ But in mergers-and-acquisitions litigation, no admission of wrongdoing akin to a financial restatement occurs.¹³¹ Thus, studying such litigation affords the opportunity to assess the effectiveness of public-pension fund lead plaintiffs, and institutional lead plaintiffs generally, when they do not have the benefit of an admission of wrongdoing as an alternative explanation for their successes.

There are additional differences between securities fraud and transactional class actions that caution against readily applying the lessons of one form of litigation to the other. For example, as discussed at length in this piece, diversified institutional investors may often find themselves holding stakes in both target and bidder companies.¹³² Such conflicting ownership stakes have the potential to create sharp conflicts of interest between shareholders, and could undermine the policy favoring selection of institutional-investor lead plaintiffs.¹³³

Finally, the underlying transactions, the applicable substantive law, and the economics of transactional class actions differ greatly from

actions . . .").

¹²⁸See discussion *supra* Part IV.A.

¹²⁹See, e.g., Choi et al., *Do Institutions Matter?*, *supra* note 117, at 892 (finding significant correlation between institutional lead plaintiffs and the presence of a fraud-related earnings restatement or SEC investigation); see also Perino, *supra* note 114, at 379, 381 ("[P]ublic pension fund plaintiffs are significantly more likely to be involved in . . . RESTATEMENT cases . . . than noninstitutional plaintiffs.").

¹³⁰Compare Choi et al., *Do Institutions Matter?*, *supra* note 117, at 895 (excluding accounting restatements unrelated to fraud), with Perino, *supra* note 114, at 378-79, 383 (including all restatements and concluding public-pension funds still correlate with better outcomes for shareholders).

¹³¹See *supra* note 19.

¹³²See *infra* notes 167-69 and accompanying text; see also Webber, *Plight*, *supra* note 18, at 205 (stating the possibility of institutional investors owning shares in bidder as well as target companies).

¹³³See Webber, *Plight*, *supra* note 18, at 205-06 (discussing the conflict that exists when institutional investors hold stakes in both target and bidder companies and the potential for focus on the bidder company over the target company).

securities fraud class actions.¹³⁴ Transactional class actions require less commitment of time and resources from both lead plaintiffs and lead counsel for a number of reasons. For instance, they are not subject to the onerous pleading requirements of the PSLRA, nor to the bar on discovery prior to a motion to dismiss that so substantially increases the costs to plaintiffs in federal securities fraud class actions.¹³⁵ In addition, the PSLRA creates a strong presumption that the lead plaintiff applicant with the largest absolute loss be selected as the lead plaintiff.¹³⁶ As discussed earlier in Part II, Delaware law is more flexible, emphasizing the "relative economic stakes" of the applicants.¹³⁷ Consequently, lead plaintiff selection may be less predictable in Delaware than at the federal level, affecting both institutional case selection and outcomes. And while no one enjoys being a defendant in any lawsuit, the stigma, if any, that attaches to defendants for not abiding by *Revlon* would seem to have less of a negative reputational impact than would an accusation of fraud. No one goes to jail for violating *Revlon*. And while the threat of withdrawal of insurance coverage due to actual fraud may impact the dynamics of a securities fraud case, such threats are infrequent—if not nonexistent—in the context of transactional class actions, where fraud is rarely alleged.¹³⁸

Thus, it is important to let the data tell the story of institutional lead plaintiffs in transactional litigation. That story is told below. But there is one final point to be made before it begins.

¹³⁴See *infra* notes 135-38 and accompanying text.

¹³⁵See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319-21 (2007) (presenting the heightened standards that apply to securities fraud class actions and recognizing that ordinary civil actions only require a "short and plain statement" of their claim, as is required under Federal Rule of Civil Procedure 8(a)(2)).

¹³⁶See, e.g., Webber, *Plight*, *supra* note 18, at 166 ("As Congress intended, federal courts have since interpreted the PSLRA's 'largest financial interest' clause to mean the largest absolute loss. Thus, whichever individual or entity incurs the largest loss and moves for the position becomes the presumptive lead plaintiff." (footnote omitted)).

¹³⁷See *supra* note 54 and accompanying text; see also Webber, *Plight*, *supra* note 18, at 166 ("Delaware courts weigh the 'relative economic stakes' of competing lead plaintiff movants in the outcome of the lawsuit, which suggests the possibility that the lead plaintiff that has the most at stake relative to its own assets, and not on an absolute scale, could be appointed lead plaintiff." (footnotes omitted)).

¹³⁸See Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 802 (2009) (reporting that the fraud exclusion of insurance policies is often raised in settlement talks and, therefore, does not have the impact that would be anticipated).

B. *Shareholder Litigation As A Form of Shareholder Activism*

"Shareholder activism has been described as 'the exercise and enforcement of rights by minority shareholders with the objective of enhancing shareholder value over the long term.'"¹³⁹ Understanding the landscape of institutional shareholder activism offers some context for assessing what types of institutions one might expect to obtain lead plaintiff appointments in transactional litigation, and why. The literature divides shareholder activism into two broad categories: *ex ante* or "offensive" activism and *ex post* or "defensive" activism.¹⁴⁰ *Ex ante* or offensive activists "first determine whether a company would benefit from activism, then take a position and become active."¹⁴¹ Typically, hedge funds fall into this category.¹⁴² Hedge funds profit by engaging in targeted hedges rather than by diversifying.¹⁴³ Among those funds that engage in activism, it is likely that they do so as a principal investment strategy, rather than an isolated effort.¹⁴⁴ As Kahan and Rock put it, "activism presumably entails learning, with funds that have done more of it becoming better at it, and funds with an activist reputation more easily attracting support from other investors and inducing management changes."¹⁴⁵ Such funds rely upon a value-investing approach, rather than quantitative theories of finance.¹⁴⁶ The managers of these funds are often former investment bankers, seeking out underperforming assets to invest in by studying balance sheets, income statements, and other information.¹⁴⁷ The managers' activist strategies might include "share

¹³⁹ Armour & Cheffins, *Rise and Fall*, *supra* note 31, at 2 (quoting Low, *supra* note 31, at 186).

¹⁴⁰ See Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 56-57 (2011) (describing the difference between "offensive" and "defensive" shareholder activism).

¹⁴¹ Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. Rev. 1021, 1069 (2007).

¹⁴² See *id.*

¹⁴³ See *id.* at 1070 ("[T]hey engage in targeted hedges, rather than diversification, to eliminate unwanted risks.").

¹⁴⁴ See, e.g., *id.* ("To be a successful activist, it is probably helpful for a fund to engage in activism as a principal strategy . . .").

¹⁴⁵ Kahan & Rock, *supra* note 141, at 1070.

¹⁴⁶ See Armour & Cheffins, *Rise and Fall*, *supra* note 31, at 3-4.

¹⁴⁷ See e.g., *id.* at 4 (observing that managers of activist hedge funds analyze corporate fundamentals to find underpriced and underperforming stock).

buy-backs, spinoffs, mergers, or [changes to] the composition of the board of directors[]."148

In contrast, *ex post* or "defensive" shareholder activism occurs "when fund management notes that portfolio companies are underperforming, or that their governance regime is deficient"149 Such activists tend to be public-pension funds or labor-union funds, and to a lesser extent, mutual funds.¹⁵⁰ These investors employ diversification strategies in which they seek to reduce, if not eliminate, firm-specific risk while approximating a market rate of return.¹⁵¹ These strategies reduce research costs and minimize investigation into particular business decisions.¹⁵² Such funds may gain from activism that improves profitability across markets as a whole, as "universal owners" with long-term investment horizons to match long-term liabilities in the form of retirement benefit payments.¹⁵³ An *ex post* or defensive shareholder activist does not own enough shares to win boardroom control or dictate corporate policy,¹⁵⁴ "but potentially can use their stake as a departure point in garnering support for the changes they advocate."¹⁵⁵ Thus, these funds have pushed for reforms that may be applied to a broad swath of companies, like splitting the role of chairman of the board and chief executive officer, or pressing for an end to classified boards.¹⁵⁶ In pursuing these goals, these funds have relied upon academic research demonstrating that such governance reforms improve share-price performance and, more consistently, Tobin's Q, a measure of firm value.¹⁵⁷ Such strategies may be pursued, and have been pursued, at

¹⁴⁸Kahan & Rock, *supra* note 141, at 1043.

¹⁴⁹*Id.* at 1069.

¹⁵⁰*See id.* at 1042 (noting that traditional institutions, such as public-pension funds and mutual funds, have historically made resolutions relating to issues of corporate governance rules).

¹⁵¹*See, e.g., id.* at 1043 ("To the extent that the 'activism' takes the form of merely voting in favor of proposals by others (or against proposals made by the company's board), it represents a rather passive form of 'activism.'").

¹⁵²*See* Kahan & Rock, *supra* note 141, at 1044.

¹⁵³*See id.* at 1070 ("[M]utual funds [and other traditional institutions] view and market themselves as vehicles for diversification, which enables their investors to gain broad exposure to markets at low costs.").

¹⁵⁴*See* Armour & Cheffins, *Rise and Fall*, *supra* note 31, at 56.

¹⁵⁵*Id.*

¹⁵⁶*See* Kahan & Rock, *supra* note 141, at 1070; *see also* *Shareholder Rights Project*, HARVARD LAW SCHOOL, <http://srp.law.harvard.edu/> (last visited Dec. 27, 2013).

¹⁵⁷*See* Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107, 107 (2003) (finding that strong shareholder rights result in higher

many companies via precatory shareholder resolutions at relatively low cost because they require little or no specific firm knowledge prior to implementation.¹⁵⁸ They have also been pursued via shareholder litigation, at least at the federal level.¹⁵⁹

It is fair to ask whether transactional litigation fits squarely into either *ex ante*/"offensive" or *ex post*/"defensive" activism.¹⁶⁰ In some respects, it does not. For example, most transactional litigation is brought in deals that will ultimately close.¹⁶¹ Litigating shareholders usually hope that the deals will close—in friendly deals that they will close at a higher price than what the board approved,¹⁶² and in hostile deals that they will close at all, in spite of board opposition.¹⁶³

firm value, profits, and sales growth, lower capital expenditures, and fewer corporate acquisitions); *see also* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 785 (2008) (finding increases in the entrenchment index are monotonically associated with economically significant reductions in firm valuation during the 1990 to 2003 period); Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, *Learning and the Disappearing Association Between Governance and Returns*, 108 J. FIN. ECON. 323, 346-47 (2013) (providing evidence that the disappearance of the correlation between stock returns and governance indices in the 2002 to 2008 period was due to market participants' gradually learning to appreciate the difference between strong and poor governance firms, and that the indices' negative association with Tobin's Q and operating performance nevertheless persisted). *Contra* John E. Core, Wayne R. Guay & Tjonne O. Rusticus, *Does Weak Governance Cause Weak Stock Returns? An Examination of Firm Operating Performance and Investors' Expectations*, 61 J. FIN. 655, 657, 659 (2006) (finding that evidence does not support a causal relationship between poor governance and weak stock returns).

¹⁵⁸*See* James F. Cotter, Anil Shivdasani & Marc Zenner, *Do Independent Directors Enhance Target Shareholder Wealth During Tender Offers?*, 43 J. FIN. ECON. 195, 197 (1997) (concluding that independent outside directors enhance target shareholder gains from tender offers). *See generally* Kenneth Lehn, Sukesh Patro & Mengxin Zhao, *Governance Indexes and Valuation: Which Causes Which?*, 13 J. CORP. FIN. 907, 908 (2007) (finding evidence that firms with low valuation multiples were more likely to adopt provisions comprising the governance indices, not that the adoption of these provisions depresses valuation multiples).

¹⁵⁹*See* *Shareholder Activism*, EUR. CORP. GOVERNANCE INST., (Feb. 19, 2013), <http://www.ecgi.org/activism/index.php> (discussing shareholder activists' reliance on academic research, connecting corporate governance with shareholder performance).

¹⁶⁰*See* Armour & Cheffins, *Rise and Fall*, *supra* note 31, at 2-3 (contrasting "defensive" activism, the agitation for change by an investor with a pre-existing sizeable stake in a company looking to protect that stake, with "offensive" activism, the practice of increasing one's stake in a company with the expectation that non-profit-maximizing practices will be changed, and advocating for that change if necessary).

¹⁶¹*See* Thompson & Thomas, *supra* note 4, at 198 (finding that friendly deals subject to litigation closed over 65% of the time and hostile deals subject to litigation closed about 64% of the time).

¹⁶²*See id.* at 164.

¹⁶³*See id.* (claiming that when prospective acquirers sue, the ultimate goal is for the deal to go through, rather than any specific outcome for the litigation).

Consequently, the target will cease to exist as an independent entity, and the shareholders will either be cashed out, or will find themselves owning shares of the new, combined entity.¹⁶⁴ Thus, in one sense, the benefits of deal litigation may be short term and temporary, rather than systemic and permanent.¹⁶⁵

But one might also take the view that the benefits of such litigation are, in fact, systemic and permanent, of the type that might be pursued by diversified, long term, universal owners with pre-existing stakes in the target.¹⁶⁶ While it is true that the target itself will cease to exist, diversified shareholders may benefit market-wide from a well-run private policing regime to the extent that private enforcement makes it more difficult for target boards to implement defensive measures (like poison pills or classified boards).¹⁶⁷ Also, litigation may make it more difficult for such boards to manipulate transactional bidding processes to extract private benefits at the expense of shareholders in friendly-deal situations, (at least insofar as the private policing regime's costs are outweighed by these benefits).¹⁶⁸ Challenging mechanisms of director entrenchment might enhance the overall value of a diversified portfolio by making it more difficult for boards to inhibit value-enhancing acquisitions or otherwise undermine the market for corporate control.¹⁶⁹

In fact, as demonstrated below, these cases are dominated by public-pension funds and labor-union funds.¹⁷⁰ Mutual funds and hedge funds play a minimal role in transactional class and derivative actions,¹⁷¹ and I find little or no evidence that these funds ever take a stake in a company for purposes of engaging in such litigation.¹⁷² As discussed more fully below, institutional-investor participation in these cases

¹⁶⁴See *id.* at 202.

¹⁶⁵See Thompson & Thomas, *supra* note 4, at 203.

¹⁶⁶See John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1478, 1481 (1990-91).

¹⁶⁷See *id.* at 1430-38, n.17, 31, 38, 39.

¹⁶⁸See *id.*

¹⁶⁹See *id.* at 1504-06 (noting that board entrenchment reduces shareholder value and value would increase if eliminated). *But see* Jay B. Kesten, *Managerial Entrenchment and Shareholder Wealth Revisited: Theory and Evidence from a Recessionary Financial Market*, 2010 B.Y.U. L. REV. 1609, 1617 (2010) (finding firms that were less entrenched generated lower returns than firms that were more entrenched, but noting there may be other contributing factors).

¹⁷⁰See Kahan & Rock, *supra* note 141, at 1042.

¹⁷¹See Thompson & Thomas, *supra* note 4, at 143-44.

¹⁷²See *id.*

coheres best with *ex post* "defensive" shareholder activism, in which shareholders with a pre-existing stake in the target company bring suit.¹⁷³ I will revisit the shareholder activism discussion below in light of my data.¹⁷⁴

IV. THE SAMPLE

I began with a hand-collected dataset comprising all 454 shareholder-derivative and class action lawsuits filed in the Delaware Court of Chancery from November 1, 2003 to December 31, 2009.¹⁷⁵ I obtained this data directly from Lexis-Nexis File and Serve, which is utilized by the Delaware Court of Chancery as its electronic filing system.¹⁷⁶ I began collecting data from November 2003 because that is when the Court of Chancery first instituted use of this system.¹⁷⁷ I searched all cases from this time period using the Clerk of the Court's own search field category for "derivative and class actions". I ended my collection in 2009 because, at the time of collection, this seemed the most reasonable date by which I could still expect that a substantial number of filed cases would be completed.

Of these 454 cases, I identified 290 (64%) as class or derivative actions brought in mergers-or-acquisitions cases.¹⁷⁸ Among these deal cases, 97% were brought as class actions, with the remaining cases brought as derivative actions.¹⁷⁹ Of the 454, 8 cases were brought as both class and derivative actions.¹⁸⁰ Though I include all of these deal cases in basic statistics, I exclude cases filed on or after September 15, 2008 from the regressions below. As I explain, the collapse of Lehman Brothers on that date wrought substantial changes in deal litigation, providing an interesting portrait of how litigation changes in a time of crisis.¹⁸¹

¹⁷³See Matheson & Olson, *supra* note 166, at 1503-05.

¹⁷⁴See *supra* Part IV.A.

¹⁷⁵Every Table throughout this Article is based on this Sample.

¹⁷⁶See, *Electronic Filing in the Delaware Judiciary*, JUDICIAL BRANCH OF THE STATE OF DELAWARE, <http://courts.delaware.gov/efiling/index.stm> (last visited Dec. 27, 2013).

¹⁷⁷See *id.*

¹⁷⁸See *infra* Table 1.

¹⁷⁹See *infra* Table 1.

¹⁸⁰See *infra* Table 1.

¹⁸¹See *infra* p. 48.

Median (mean) case length for pre-Lehman deal cases is 278 (368) days.¹⁸²

A. *Basic Statistics—Institutional Lead Plaintiff Characteristics*

An obvious first conclusion from the data presented here is that institutional investors have accepted Delaware's invitation to participate as lead plaintiffs in these suits.¹⁸³ Table 1 demonstrates that, of the 290 mergers-and-acquisitions cases filed from November 1, 2003 to December 31, 2009 in the Delaware Court of Chancery, institutional lead plaintiffs served in approximately 41% (118/290) of them.¹⁸⁴ This figure has remained fairly constant year-over-year, with exceptions being 2006 and 2007, in which institutional participation reached a high of 51% and a low of 32%, respectively.¹⁸⁵

Table 1: Number of Deal Cases by Year and Lead Plaintiff Type

Year	Number of Cases	Institutional LP no. (%)
2003 ¹⁸⁶	10	4 (40.00)
2004	40	15 (37.50)
2005	59	24 (40.68)
2006	43	22 (51.16)
2007	46	15 (32.61)
2008	35	15 (42.86)
2009	57	23 (40.35)
Total	290	118 (40.69)

While the overall rate of institutional participation has remained fairly constant, the type of institutional-investor lead plaintiff has changed over time.¹⁸⁷ In particular, public-pension and labor-union fund

¹⁸²See *infra* p. 48.

¹⁸³See *infra* Table 1.

¹⁸⁴See *infra* Table 1.

¹⁸⁵See *infra* Table 1.

¹⁸⁶Figures for 2003 are for November and December alone.

¹⁸⁷See *infra* Table 2.

participation has increased dramatically, coinciding with a sharp decline in participation by private non-mutual funds.¹⁸⁸

Table 2: Number of Cases With At Least One Institutional Lead Plaintiff Type by Year¹⁸⁹

Year	Public-Pension	Union	Mutual Fund	Private Non-Mutual	Total
2003 ¹⁹⁰	0	0	0	4	4
2004	0	2	1	12	15
2005	1	4	3	21	29
2006	3	2	1	19	25
2007	8	3	1	7	19
2008	8	5	0	5	18
2009	12	12	1	2	27
Total	32	28	7	70	137

Increased public-pension fund participation may reflect the prevalence of portfolio monitoring by plaintiffs' law firms. Many institutions interested in obtaining lead plaintiff appointments enter into portfolio monitoring arrangements with plaintiffs' law firms, often several firms.¹⁹¹ The law firms directly access the investment portfolios of the institutions *via* the funds' accounts with custodial banks.¹⁹² In many instances, the law firms will discover a potential fraud or a suspiciously unattractive deal, and notify institutions with significant

¹⁸⁸See *infra* Table 2.

¹⁸⁹Note that multiple institutional types may appear as lead plaintiffs in the same case. Thus, if a public-pension fund appears in the same case as a labor-union fund, they would count once towards each column. This explains why the total here is greater than the 118 cases with at least one institutional lead plaintiff.

¹⁹⁰Figures for 2003 are for November and December alone.

¹⁹¹See William B. Rubenstein, *What We Now Know About How Lead Plaintiffs Select Lead Counsel (and Hence Who Gets Attorneys Fees!) In Securities Cases*, 3 CLASS ACTION ATT'Y FEE DIG. 219, 219-20 (2009) ("[S]ome plaintiffs firms have entered into arrangements whereby they monitor the funds' investments for irregularities and suggest possible grounds for litigation. . . . MissPERS has monitoring agreements with a dozen firms . . .").

¹⁹²See *id.* at 219.

exposure that they may qualify for lead plaintiff status.¹⁹³ Once notified of the fraud or suspicious transaction, institutions typically issue a request for proposals to the firms monitoring their portfolios.¹⁹⁴ The proposals state the law firms' assessments of the strengths and weaknesses of the case, argue whether the fund should or should not pursue it, and, of course, if the fund does pursue it, why it should select that firm as lead counsel.¹⁹⁵ Thus, the mere fact that plaintiffs' lawyers monitor public-pension fund portfolios may lead the funds to bring federal securities fraud class actions or transactional class actions.

Some critics of securities fraud class actions and the relationships between plaintiffs' lawyers and public-pension funds, such as the U.S. Chamber of Commerce, have argued that the funds' participation in such suits is the product of "pay-to-play".¹⁹⁶ They argue that plaintiffs' lawyers contribute to politicians who serve on pension-fund boards in exchange for those politicians selecting the lawyers as lead plaintiffs in securities class actions.¹⁹⁷ A similar logic would apply to transactional class actions. I have argued in a separate empirical article that I believe pay-to-play allegations are overstated, and that other factors appear to be driving the funds' litigation activism.¹⁹⁸ Some researchers have argued that pay-to-play may affect attorneys' fees, rather than the decision to bring suit in the first place.¹⁹⁹

¹⁹³See, e.g., *id.* at 220 ("Coughlin Stoia would provide free monitoring services of the Funds' investments and would suggest that the Fund bring securities class actions if it found any irregularities. In return, if the Fund did choose to bring suit, Coughlin Stoia would be retained to represent the Fund on a contingent fee basis.").

¹⁹⁴See *id.* at 219-20 ("MissPERS claims it is able to play each [monitoring firm] off against the other in terms of determining the fee arrangement.").

¹⁹⁵See Rubenstein, *supra* note 191, at 219 (describing plaintiffs firms' actions in monitoring arrangements); see also *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc.*, 2004 WL 5326262, at *4 (N.D. Cal. May 27, 2004) (indicating that nothing about the monitoring arrangements between firms and Funds prevents the Funds from serving as class representatives in a lawsuit).

¹⁹⁶See Press Release, U.S. Chamber of Commerce, U.S. Chamber Says Overturning Stoneridge Case Will Harm Investors, Job Creation & Economic Recovery (Aug. 4, 2009), <http://www.uschamber.com/press/releases/2009/august/us-chamber-says-overturning-stoneridge-case-will-harm-investors-job-creat> (insisting that the system of securities class action litigation is rife with abuse, including "pay-to-play" arrangements).

¹⁹⁷See *id.*

¹⁹⁸See Webber, *Pay-to-Play*, *supra* note 18, at 2033.

¹⁹⁹See, e.g., Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650, 651 (2011) (observing that while state pension funds as lead plaintiffs generally achieve lower attorneys' fees, state pension funds with managers who received large campaign contributions from lead

It is also possible that the relatively high percentage of public-pension-fund lead plaintiffs in 2008 and 2009 reflect increased litigation activism by the funds in response to losses incurred during the recession that began in 2007.²⁰⁰ These funds may have decided to become more aggressive on the litigation front in an effort to make up for their losses and to help close the gap between the funds' assets and their liabilities.²⁰¹ It is true that litigation by all institutional types increased sharply after the collapse of Lehman Brothers in September 2008, perhaps reflecting similar concerns across all institutions, though it should be noted that the uptick in public-pension-fund participation precedes the full onset of the crisis.²⁰²

Still, because of the purported financial guarantees provided to them by taxpayers, sporadic instances of corruption, and the more confrontational approach they have taken with corporate management, both in courtrooms and at shareholder meetings, public-pension funds have been subjected to unusually harsh assessments of their investment performance.²⁰³ Public pressure may have prompted them to be proactive in making up for losses caused by the financial crisis, including through increased litigation activism.²⁰⁴ Additional data from the coming years will enable us to determine if this uptick in their mergers-and-acquisitions litigation activism was a temporary product of the crisis or something else.

In addition, these funds' successful record as lead plaintiffs in these suits may encourage them to bring more of them. As demonstrated below in Tables 12 and 14, public-pension funds are the only institutions that statistically significantly correlate with the outcomes of utmost interest to shareholders—an increase from the offer price to the final

attorney firms did not); *see also* Webber, *Pay-to-Play*, *supra* note 18, at 2081 (providing evidence against the theory that pay-to-play drives pension-fund participation in securities litigation).

²⁰⁰*See* Webber, *Pay-to-Play*, *supra* note 18, at 2036 (noting public-pension fund board members have incentives to both recover fund losses and advance the fund's bottom line).

²⁰¹*See id.*

²⁰²*See supra* Table 2.

²⁰³*See, e.g.*, Tom Petrino, *Public Pension Funds Forced on Defensive*, L.A. TIMES, Dec. 5, 2004, at C1 (quoting David Hirschmann, then senior vice president of the U.S. Chamber of Commerce, calling CalPERS' activist approach "a labor agenda in corporate governance clothing," highlighting the irony of calls to terminate a fund active in corporate governance because of its own mismanagement, and drawing attention to CalPERS' below trend performance during the dot-com bust).

²⁰⁴*See id.*

price, and lower attorneys' fees.²⁰⁵ This record may make shareholders more inclined to apply for the lead plaintiff role, and may make judges more inclined to select them for the role. Similarly, the increase in public-pension-fund participation in Delaware mergers-and-acquisitions litigation may be the slightly delayed by-product of their increased participation in federal securities fraud class actions.²⁰⁶ The successful participation by these funds in securities fraud class actions may have motivated them to expand their litigation activity into the transactional space as well. The reverse may also be the case, although it appears that the increase in public-pension-fund activity in securities fraud litigation preceded that in deal litigation.²⁰⁷

Labor-union funds comprise 16.5% of lead plaintiff appointments in federal securities fraud class actions—a higher percentage than that obtained by public-pension funds²⁰⁸—but they are somewhat less active than their public counterparts in Delaware deal litigation, as shown in Table 2.²⁰⁹ There are a number of possible explanations for this. One might attribute their less frequent participation than public-pension funds to their smaller size, but, of course, this disadvantage at the lead plaintiff selection stage is just as true in federal securities fraud class actions as it is in Delaware.²¹⁰ And as noted above, unlike federal law, Delaware law lacks a rebuttable presumption that the individual or entity with the largest stake in the case be the lead plaintiff.²¹¹ Delaware considers the relative economic stakes of the lead plaintiff applicants.²¹² Ironically,

²⁰⁵See *infra* Tables 12, 14.

²⁰⁶See Webber, *Pay-to-Play*, *supra* note 18, at 2039 (noting that public-pension funds, whose participation in securities class actions just after the passage of the Private Securities Litigation Reform Act was nonexistent, have since assumed a dominant role in such litigation).

²⁰⁷Compare *supra* Table 2, with Webber, *Pay-to-Play*, *supra* note 18, at 2039 ("Institutional investor participation as lead plaintiffs, and, in particular, public pension fund participation, rose modestly from zero percent pre-PSLRA to over ten percent between 1996 and 2000. . . . But more recently, public pension funds . . . have begun to step forward in significant numbers to lead securities class actions. In both 2006 and 2007, these funds served as lead plaintiff in 40% of securities class actions.").

²⁰⁸See Stephen J. Choi, *Motions for Lead Plaintiff in Securities Class Actions* 1, 42 (N.Y.U. L. & ECON. RES. PAPER SERIES, Paper No. 08-53, 2008) [hereinafter Choi, *Motions*], available at <http://ssrn.com/abstract=1293926> (reporting that labor-union funds were selected as a lead plaintiff in 16.5% of the cases in the sample while public-pension funds were lead plaintiff in 13.4%).

²⁰⁹See *supra* Table 2.

²¹⁰See Webber, *Plight*, *supra* note 18, at 171.

²¹¹See *id.* (noting the difference between federal law and Delaware law for selection of lead plaintiffs); cf. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (2006).

²¹²See *Coyne v. Catalyst Health Solutions*, 2012 WL 2052731, at *1 (Del. Ch. May 25,

because of this more flexible approach, Delaware law should be more favorable to the selection of labor-union lead plaintiff applicants than is federal law, at least for applicants competing against larger public pension funds. Nevertheless, public-pension funds' larger absolute stakes may give them an advantage at the lead plaintiff selection stage under other *Hirt* factors, such as the quality of the lead counsel, as superior counsel may prefer to work with larger public-pension funds who can serve as repeat players, or the willingness and ability of the lead plaintiff applicant to litigate vigorously, which may advantage funds with more resources.²¹³

Still, even if we assume that these larger stakes do confer advantages upon public-pension applicants, Delaware judges often avoid selecting lead plaintiffs themselves, instead requesting that the lead plaintiff applicants reach their own agreements about the structure of the lead plaintiff group.²¹⁴ It is therefore possible that labor-union funds could often obtain co-lead plaintiff appointments with larger public-pension funds, if they insisted upon it. Instead, relatively low labor-union-fund participation in these suits may reflect their decision to free ride off of public-pension fund efforts.

Of course, this would also be true for federal securities class actions. The difference may lie in the fact that there are far fewer Delaware transactional cases than federal securities class actions.²¹⁵ It may be that labor-union funds are inclined to bring the same cases as public-pension funds at the transactional level, but that they are interested in bringing different cases at the federal level. Or they are interested in bringing more cases than public-pension funds do, and there are still numerous federal securities cases "left over" for them to lead,

2012) (citing *Hirt v. U.S. Timberlands Serv. Co.*, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002)) (accordg "great weight" to the relative economic stakes of the candidates for lead plaintiff in the outcome of the suit).

²¹³See *Hirt*, 2002 WL 1558342, at *2 (noting factors for lead plaintiff selection such as the quality of lead counsel or the willingness and ability of the lead plaintiff).

²¹⁴See, e.g., *TCW Tech. Ltd. v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504, at *3 (Del. Ch. Oct. 17, 2000) (dictum) ("In every single instance that I am able to recall, this Court has resisted being drawn into [lead plaintiff appointment] disputes.").

²¹⁵My data show there were 224 transactional and derivative class action filings in Delaware between November 2003 and the Lehman Brothers bankruptcy on September 15, 2008, while there were 904 federal securities class action filings over the same time period. See CORNERSTONE RESEARCH, *Securities Class Action Filings—2013 Mid-Year Assessment*, 3 fig. 2, at 3 (2013), available at http://securities.stanford.edu/clearinghouse_research/2013_YIR/Cornerstone-Research-Securities-Class-Action-Filings-2013-MYA.pdf.

whereas there are fewer Delaware transactional cases. It may also be that labor-union funds may sometimes bring cases outside of Delaware, though public-pension funds may do the same.²¹⁶ Finally, labor-union incentives in these cases may be more complex than those of public-pension funds. For example, union members may be employed by either target or bidder companies, thereby complicating the unions' views of the proposed transaction.²¹⁷ This might make them less inclined—or more inclined—to bring a lawsuit, depending on the circumstances of the individual case.

Mutual funds play little role in Delaware transactional litigation.²¹⁸ They served as lead plaintiffs in just seven cases in the sample.²¹⁹ This is consistent with the low rate of mutual fund participation in federal securities class actions, and shareholder activism generally.²²⁰ This clearly reflects a conscious decision by mutual funds to avoid participating as lead plaintiffs in these suits. Mutual funds manage even more assets than public-pension funds do, and own substantial stakes in the transactions that are the subject of the suits studied in this Article.²²¹ They are sophisticated and credible,²²² and Delaware judges would likely be eager to appoint them if they applied. But they don't.²²³

The reasons they do not apply are likely similar to the reasons they rarely participate in securities fraud class actions or in shareholder activism more broadly.²²⁴ The strongest reason is the free rider

²¹⁶See, e.g., John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 611 [hereinafter Armour, Black & Cheffins, *Losing*] (reporting a growing trend of lawsuits over mergers-and-acquisitions transactions being brought in jurisdictions outside of Delaware); Cain & Davidoff, *supra* note 104 (examining the dynamics of state competition for merger litigation cases).

²¹⁷See, e.g., Webber, *Plight*, *supra* note 18, at 160 (noting the conflicting incentives of union members employed by both target and bidder companies).

²¹⁸See *supra* Table 2.

²¹⁹See *supra* Table 2.

²²⁰See discussion *supra* Part III.B.

²²¹Compare INV. CO. INST., 2012 INVESTMENT COMPANY FACT BOOK 9 (52d ed. 2012), available at http://www.icifactbook.org/2012_factbook.pdf (reporting that there were over \$11.6 trillion invested in mutual funds in 2011), with U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, 753 tbl.1217 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s1219.pdf> (recording that there were \$2.928 trillion invested by state and local public-pension funds in 2010).

²²²See Kahan & Rock, *supra* note 141, at 1048 (recognizing the benefits of mutual funds).

²²³See *infra* notes 224-32 and accompanying text.

²²⁴See discussion *supra* Part III.B.

problem.²²⁵ One question at the heart of shareholder litigation—and of shareholder activism more generally—is why anyone, institution or individual, would seek a lead plaintiff appointment when all they are entitled to collect is their pro rata share of the settlement or verdict?²²⁶ Optimally, one should prefer that someone else bear the costs of serving as a lead plaintiff. For mutual funds that compete with one another, and that may face withdrawals annually or even quarterly based on fund performance, serving as a lead plaintiff means incurring costs while conferring free benefits on your competitors, who, as class members, also obtain their pro rata share of settlements or verdicts.²²⁷ Thus, it is often economically irrational for mutual funds to serve as lead plaintiffs, or to engage in shareholder activism more broadly.²²⁸ In contrast, public-pension funds and labor-union funds have no true competitors.²²⁹ Individuals employed by a state or local government entity, or in certain capacities by a private company, have their retirement savings automatically invested in the public-pension fund or labor-union fund associated with their employer.²³⁰ If a fund beneficiary is unhappy with the fund's performance, the beneficiary's only option is to change jobs, not move one's retirement savings to a competitor.²³¹ Thus, while public-pension funds and labor-union funds still face the free rider problem

²²⁵See Rock, *supra* note 82, at 461-62 (discussing the free rider problem and its benefits).

²²⁶See Kahan & Rock, *supra* note 141, at 1052-54 (concluding that mutual funds should only engage in activism when a fund has a disproportionate stake in the portfolio company such that the fund's relative gain over its competition outweighs the costs of the activism).

²²⁷See *id.*

²²⁸See *id.* at 1053-54 (showing the extent to which any benefit derived from mutual funds' activism would be diluted by benefit to the competition); see also, e.g., Rock, *supra* note 82, at 473-74 (citations omitted) ("To the extent that money managers are evaluated in comparison to other managers and to market indices, such money managers will have no selective incentives to engage in actions that improve the performance of widely diversified funds across the board. A change that benefits all will benefit none.").

²²⁹See Kahan & Rock, *supra* note 141, at 1065-66 (noting that hedge funds need not worry about competitor funds).

²³⁰See, e.g., *id.* at 1059 (listing among the differences between public-pension funds and hedge funds the fact that public-pension funds do not have to compete in the market for capital).

²³¹See, e.g., MASS. PUB. EMP. RET. GUIDE, 2 (2012), available at <http://www.mass.gov/perac/guide/retirementguide.pdf> (explaining that contributing to a state-run retirement system is mandatory for "nearly all" full-time public employees).

when serving as lead plaintiffs, or engaging in any activism, they incur fewer costs from such free riding than do mutual funds.²³²

There are additional reasons why mutual funds often avoid shareholder activism and litigation. First, a substantial component of the mutual fund business consists of investing the 401(k) retirement savings of public company employees.²³³ These funds will not want to jeopardize this business by suing their customers, the corporate boards, and corporate managers that select which mutual fund options to offer their employees.²³⁴ Second, mutual funds may avoid litigation for "social network" reasons.²³⁵ Unlike the firefighters, police officers, and teachers who sit on the boards of trustees of public-pension funds, mutual fund managers are more likely to travel in the same business, social, and educational circles as do corporate managers and directors.²³⁶ Such social-network effects may reduce their participation in aggressive activism "within the circle."²³⁷ Because mutual funds diversify their investments, the kind of activism that would be logical for them to pursue bears a closer resemblance to that undertaken by public-pension funds, which is based in part on a strategy of pursuing change at a broad swath of companies, and thereby potentially alienating many people

²³²See Kahan & Rock, *supra* note 141, at 1065-66.

²³³See *Frequently Asked Questions About 401(k) Plans*, ICI.ORG, http://www.ici.org/policy/retirement/plan/401k/faqs_401k (last visited Oct. 11, 2013) (stating that 60% of 401(k) assets were held in mutual funds as of September 30, 2012).

²³⁴See Kahan & Rock, *supra* note 141, at 1055-56 (demonstrating that mutual funds' desire to retain corporate pension accounts contributes substantially to their reluctance to engage in shareholder activism); cf. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 602 (1990) (observing that Armstrong World Industries transferred its employee savings plan business to Fidelity after Fidelity stopped opposing a Pennsylvania antitakeover law that Armstrong supported).

²³⁵See Kahan & Rock, *supra* note 141, at 1054 ("Managers of such funds may be reluctant to antagonize present or future clients of their parent company with their governance activity.").

²³⁶See *id.* 1054-55 (explaining that the afflictions that mutual fund management companies have with other financial institutions could make those managers hesitant with governance activism); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 822 (1993) ("The composition of public fund boards may also explain why public funds are more active in corporate governance than private funds even if private fund managers lack conflicts of interest involving other business relations with issuers.").

²³⁷Cf. Romano, *supra* note 236, at 822 (arguing that private funds would be less likely to engage in activism than public-pension funds because the private-fund managers do not receive the same professional benefits by challenging company management).

within the social network.²³⁸ In addition, as relayed to me by a director of corporate governance and associate general counsel at a top mutual fund, such funds avoid leading activist campaigns because their financial analysts prize, and guard, their access to senior corporate managers.²³⁹ Such analysts prefer that their employers avoid actions that might alienate corporate managers who might then refuse to respond to their inquiries.²⁴⁰ This is not to say that mutual funds engage in no activism.²⁴¹ But they usually allow public-pension funds and labor-union funds to take the lead, to become the public face of activist initiatives, following the lead of these funds by occasionally voting in favor of their activist initiatives.²⁴² Finally, different mutual fund managers within the same mutual fund family may hold different stakes in the target and bidder companies, and may have adverse interests in the outcome of the suit.²⁴³ Engaging in litigation or activism may raise conflicts within the mutual fund family.²⁴⁴ Thus, free-riding competitors, business conflicts, social-network conflicts, and conflicts within mutual fund families all deter mutual funds from obtaining lead plaintiff appointments.²⁴⁵

²³⁸See *id.* at 818 (citing CalPERS's criticism of Sears, General Motors, ITT, and others through its shareholder rights program as an example of a public pension fund's effort to influence several companies).

²³⁹See Gregg Wolper, *Shareholder Activism, Mutual Fund Style*, MORNINGSTAR (May 28, 2013), <http://ibd.morningstar.com/article/article.asp?id=598082&CN=brf295>, <http://ibd.morningstar.com/archive/archive.asp?inputs=days=14;frmtId=12,%20brf295> (stating that a potential downside to activism is a likelihood of decreased meetings with the companies and analysts).

²⁴⁰*Id.*

²⁴¹See Kahan & Rock, *supra* note 141, at 1069.

²⁴²See *id.* at 1043 (reporting that most mutual funds do not seek governance change by spearheading shareholder proposals). There is one form of activism with which mutual funds are associated: behind-the-scenes activism. *Id.* at 1044. For example, mutual funds have engaged companies outside the public eye to push for confidential voting, board diversity, and limitations on targeted stock placements. *Id.* Because such activism takes place behind the scenes, it is difficult to quantify. Still, it is reasonable to infer that such activism is both infrequent and ineffective, in part because shareholders who are unwilling to go public with their activist demands lack leverage over corporate managers. Without such leverage, it is difficult to discern why managers would accede to activist demands. See *id.* at 1044-45 (discussing regulatory obstacles to the effective coordination by shareholders of such behind-the-scenes efforts).

²⁴³See Webber, *Plight*, *supra* note 18, at 206.

²⁴⁴See *id.* (finding that those within the mutual fund family may have competing interests in the target company).

²⁴⁵See *supra* Part IV.A.

I place the remaining institutional investors into a catchall category called "private non-mutual funds."²⁴⁶ This category includes a small number of hedge funds and other private-entity-investor lead plaintiffs.²⁴⁷ It also includes a large number of private entities whose business functions or purposes are not readily apparent.²⁴⁸ Overall, private non-mutual funds comprise the largest group of institutional lead plaintiffs in the sample, serving in the role in 72 of 290 cases.²⁴⁹ These funds are discussed in greater detail below in Part V.B.ii.²⁵⁰ For purposes of this section, I note that the participation of these funds as lead plaintiffs counters those of public-pension and labor-union funds. Their participation has dropped as participation of the latter has risen.²⁵¹ Such funds served as lead plaintiffs in 21 cases in 2005, dropping to just 2 cases in 2009.²⁵²

One possible explanation for the decline of private non-mutual-fund lead plaintiffs is that other, larger players are crowding them out.²⁵³ Public-pension funds and labor-union funds may simply have more at stake in these cases than do private non-mutual funds, and win lead plaintiff appointments accordingly. Relatedly, Delaware's development of clearer standards for its lead plaintiff selection process, favoring larger players, may have driven smaller institutional investors or law firms without institutional clients to bring cases in jurisdictions outside of Delaware, taking these institutions with them.²⁵⁴ Armour, Black, and Cheffins provide evidence that Delaware has been losing cases to other jurisdictions, and that part of this trend may be related to Delaware's

²⁴⁶See *supra* Table 2.

²⁴⁷See *supra* Table 1. Hedge funds participated as lead plaintiffs in only eight cases in the sample.

²⁴⁸*Cf.* SEC, MUTUAL FUNDS: A GUIDE FOR INVESTORS, 5 (2007), available at <http://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf> (recognizing that investment types such as "hedge funds" and "funds of hedge funds" are not mutual funds).

²⁴⁹See *supra* Table 1.

²⁵⁰See *infra* Part V.B.ii.

²⁵¹See *supra* Table 2.

²⁵²See *supra* Table 2.

²⁵³See *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504, at *4 (Del. Ch. Oct. 1, 2000) (holding that when deciding which plaintiff to pick for the lead plaintiff position, one factor to consider is how much each plaintiff shareholder has at stake in the outcome of the lawsuit).

²⁵⁴See Armour, Black & Cheffins, *Losing*, *supra* note 216, at 650-51 (finding support for the hypothesis that Delaware's use of a multi-factor analysis to appoint a lead plaintiff rather than a first-to-file basis is causing smaller firms to bring suit in other fora).

adoption of lead plaintiff selection criteria.²⁵⁵ As a general observation, this trend suggests that some of the results in this Article may be understated, particularly those in the latter half showing correlations between institutional lead plaintiff types and case outcomes.²⁵⁶ Individuals, smaller institutions, and their lawyers, attempting to litigate weaker cases, may find themselves unable to compete for lead plaintiff and lead counsel appointments in Delaware.²⁵⁷ Therefore, they take their lawsuits elsewhere.²⁵⁸ If these weaker cases, led by plaintiffs with less ability to monitor counsel, were included in the sample, the contrast between, for example, public-pension-fund lead plaintiffs and traditional lead plaintiffs might be even greater than presented here.

Before concluding this section, it is worth revisiting the shareholder-activism literature outlined above in light of these data on institutional-investor participation.²⁵⁹ As noted, it is debatable whether mergers-and-acquisitions litigation fits squarely within the types of activities that would normally be thought of as shareholder activism, in part because if the litigation succeeds, the target of the activism will disappear.²⁶⁰ The usual objective of such suits is a quick bump in price, a classic short-term strategy.²⁶¹ Yet, in other ways, these data show that deal litigation may fit into the strategic/incidental pattern of activism identified by Kahan and Rock, or offensive or defensive activism in Armour and Cheffins' terminology.²⁶² Though one could surmise that hedge funds would take a position in the target—perhaps even after the deal is announced, as an arbitrage—and then file suit, their infrequent

²⁵⁵*Id.* at 646 ("When plaintiffs' lawyers cannot resolve for themselves who should be lead counsel, judges outside Delaware often appoint as lead or co-lead counsel the firm that filed first. Consequently, since *TCW Technology*, filing first has probably been more valuable to plaintiff lawyers outside than inside Delaware. This could create incentives for some lawyers—especially smaller firms, without established track records in Delaware—to race to file *outside* Delaware." (citations omitted)).

²⁵⁶See discussion *infra* Part IV.A (discussing why public-pension funds are likely the institutions chosen for lead plaintiff roles).

²⁵⁷See Cain & Davidoff, *supra* note 104 (concluding that Delaware favors awarding higher attorney's fees in strong cases over attracting many weak cases, thereby diluting its law).

²⁵⁸See Armour, Black & Cheffins, *Losing*, *supra* note 216, at 645.

²⁵⁹See *supra* Part III.B.

²⁶⁰See discussion *supra* notes 160-65 and accompanying text.

²⁶¹See Krishnan et al., *supra* note 1, at 1248, 1253 (explaining that in mergers-and-acquisitions litigation, the harm sought to be remedied is usually "too low a price").

²⁶²Armour & Cheffins, *Rise and Fall*, *supra* note 31, at 2-3; Kahan & Rock, *supra* note 141, at 1069.

participation in these actions reveals that this is not a strategy they pursue.²⁶³ In contrast, the frequent institutional lead plaintiffs are classic incidental or defensive activists, bringing litigation over pre-existing ownership stakes.²⁶⁴ Such activism coheres with the economic analysis provided by Kahan and Rock to explain why certain institutions engage in one type of activism or the other.²⁶⁵ Though not costless, transactional class actions are relatively inexpensive for institutional investors to pursue, largely because the litigation costs are borne by the plaintiffs' law firms.²⁶⁶ Moreover, hedge funds may avoid these suits because the expensive "learning" that is required to make most activism profitable may not be worth the investment here.²⁶⁷ The returns from such litigation may be too expensive and too infrequent to be worth the cost, and the learning that would be required is really legal learning more akin to the expertise of a plaintiffs' law firm than the expertise of sophisticated hedge fund asset managers. It may also be the case that the hedge funds simply prefer to free ride off of public-pension funds and other institutional investors, rather than incurring their own litigation costs. Also, hedge funds are notoriously secretive about their trading strategies, and may not wish to reveal them in a deposition, as might be required of them when serving in the lead plaintiff capacity.²⁶⁸

Thus, while not a perfect fit, the shareholder-activism literature suggests that obtaining a lead plaintiff role in a transactional class action is more akin to incidental or defensive shareholder activism, and is more consistent with the profit models of diversified investors like public-pension and labor-union funds than that of hedge funds.

²⁶³See *supra* Table 2 (showing a diminishing presence of "Private Non-Mutual" funds, which includes hedge funds, in transactional litigation).

²⁶⁴See Kahan & Rock, *supra* note 141, at 1069.

²⁶⁵See *id.* at 1069-70.

²⁶⁶See Macey & Miller, *supra* note 98, at 52; *cf.* Kahan & Rock, *supra* note 141, at 1070 (arguing that the narrowly-tailored strategy of activism is suitable for hedge funds).

²⁶⁷See Kahan & Rock, *supra* note 141, at 1070 (stating that strategic activist mutual funds must learn from more experienced activists in an expensive learning phase).

²⁶⁸See, e.g., *Hedge Fund Trading Styles Overview*, MACROPTION, <http://www.macroption.com/hedge-fund-trading-styles-overview/> (last visited Oct. 26, 2013) ("Hedge fund managers often keep their trading strategies secret to preserve their competitive advantage and the strategy's profitability.").

B. Basic Statistics—Deal Characteristics

The discussion of deal characteristics in this Section is designed to paint a portrait of the overall landscape of mergers-and-acquisitions class and derivative actions. An appreciation of this landscape is conducive to understanding why certain types of institutional investors concentrate their efforts in one part of it or another.

First, most of the litigation is targeted at friendly deals; 191/290 (65%) were brought in such deals, whereas just 13/290 (4%) were brought in hostile deals.²⁶⁹ This is not surprising, since most deals are friendly deals.²⁷⁰ Of the litigated deals, 69/290 (23%) involved a controlling shareholder acquirer.²⁷¹ These deals find themselves in the crosshairs of public-pension funds, as discussed more fully below in Part V.²⁷² Of the litigated deals, 50/290 (17%) of litigated deals contained two bidders or more;²⁷³ these deals are targeted by the top plaintiff law firms,²⁷⁴ as discussed more fully below in Part V.²⁷⁵

Table 3: Deal Characteristics²⁷⁶

Deal Characteristics	Number of Cases
Controlling Shareholder	69
LBO	42
Friendly	191
Hostile	13
Second Bidder	39
More Than 2 Bidders	11

²⁶⁹See *infra* Table 3.

²⁷⁰See *infra* Table 3.

²⁷¹See *infra* Table 3.

²⁷²See discussion *infra* Part V.

²⁷³See *infra* Table 3.

²⁷⁴See *infra* Table 7.

²⁷⁵See discussion *infra* Part V (discussing the types of deals top plaintiff law firms target).

²⁷⁶The figures in this Table add up to more than the total number of deal cases because there is some overlap between the deal characteristics described. Likewise, the percentages in the paragraphs discussing this Table could add up to more than 100%.

In terms of deal structure, 209/290 (72%) were cash-for-stock deals.²⁷⁷ It would not be surprising if this is higher than the overall percentage of deals that are cash for stock, at least in part because under *Revlon*, Delaware law is favorable to target plaintiff shareholders in cash out deals.²⁷⁸ In contrast, 49/290 (16%) cases were brought in stock-for-stock deals.²⁷⁹

Table 4: Deal Structure

Structural Features	Number of Cases
Cash-for-Stock	209
Stock for Stock	49
Hybrid-Stock	17
Hybrid-Cash	10
Hybrid-Half	1

Table 5 presents the most frequently litigated deal terms.²⁸⁰ The deal term that was most likely the subject of litigation was the termination fee (117 cases).²⁸¹ The termination fee is an agreed-upon fee that the target company will pay the bidder if the deal is not completed.²⁸² The primary purpose of the termination fee is to protect the initial bidder who, after conducting costly due diligence and making a public bid, may be upstaged by free-riding competitive bidders who then bid a penny more.²⁸³ Without a termination fee, no bidder will want to bid first.²⁸⁴ A

²⁷⁷See *infra* Table 4.

²⁷⁸See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986) ("[W]hen addressing a takeover threat, [the] principal is limited by the requirement that there be some rationally related benefit accruing to the stockholders."); *supra* note 3 and accompanying text.

²⁷⁹See *infra* Table 4.

²⁸⁰See *infra* Table 5.

²⁸¹See *infra* Table 5.

²⁸²See Thomas A. Swett, *Merger Terminations After Bell Atlantic: Applying a Liquidated Damages Analysis to Termination Fee Provisions*, 70 U. COLO. L. REV. 341, 355 (1999).

²⁸³See *id.* at 356 (listing protecting information and opportunity costs of first bidder as a purpose of the termination fee).

²⁸⁴See Ely R. Levy, Note, *Corporate Courtship Gone Sour: Applying a Bankruptcy*

typical termination fee should be between 3–5% of the offer.²⁸⁵ Termination fees are frequently targeted by shareholder lawsuits²⁸⁶: they amount to a penalty for shareholders exercising their lawful right to decline a bid, and may be coercive, particularly for deals where the offered premium is not much more than the termination fee.²⁸⁷ Yet, termination fees did not correlate with any particular lead plaintiff type.²⁸⁸ This is probably because they are frequently litigated as a matter of course by all types of lead plaintiffs.²⁸⁹

In a typical deal process, the target board performs a market check, hopefully negotiating with multiple bidders before settling upon one, and then consenting to a No-Shop provision that limits the board from shopping the company to other potential bidders.²⁹⁰ No-Talk provisions similarly limit the target board from speaking with other potential bidders.²⁹¹ No-Shops and No-Talks were litigated in 25 and 7 cases,

Approach to Termination Fee Provisions in Merger and Acquisition Agreements, 30 HOFSTRA L. REV. 1361, 1371 (2002) (suggesting that, although this position is contested, termination fees can benefit the target because they may induce the initial bid).

²⁸⁵See Brian JM Quinn, *Optionality in Merger Agreements*, 35 DEL. J. CORP. L. 789, 808 n.87 (2010) ("[C]ourts have approved fees in the range of 3% of transaction value and as large as 6% of transaction value.").

²⁸⁶See, e.g., *In re IXC Commc'ns, Inc. v. Cincinnati Bell, Inc.*, 1999 WL 1009174 at *28-*29 (Del. Ch. Oct. 27, 1999) (addressing the plaintiff's claim that the termination fee contributed to the board of director's breach of fiduciary duty); cf. John C. Coates, IV, *M&A Break Fees: US Litigation vs. U.K. Regulation*, 24, 27 (Harvard Law Sch., Harvard Public Law Working Paper No. 09-57, 2009), available at <http://ssrn.com/abstract=1475354> (suggesting that termination fees do not generate suits because litigation is significantly more frequent in deals without termination fees, but also positing that there is an interaction between termination fees and bid competition which may complicate the causal relationship of termination fees to litigation).

²⁸⁷See *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 1997) (indicating the possibility that a termination fee could be coercive, given the presence of structurally or situationally coercive factors). *But cf.* *Phelps Dodge Corp. v. McAllister*, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999) ("Consequently, I do not take up plaintiffs' challenge to the termination fee as being unduly coercive, although I think 6.3 percent certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point. . . . I need not reach this issue . . .").

²⁸⁸See *supra* text accompanying note 175. This determination is based on the Author's compilation of research from 2003 to 2009, comprising of 454 shareholder derivative and class action lawsuits in the Delaware Court of Chancery.

²⁸⁹See *infra* Table 5.

²⁹⁰See Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 736 (2008) [hereinafter Subramanian, *Go-Shops*]; Karl F. Balz, *No-Shop Clauses*, 28 DEL. J. CORP. L. 513, 514 (2003) (further explaining No-Shop provisions); cf. *Go-Shops, supra*, at 756-60 (discussing the characteristics of Go-Shop provisions that support the fulfillment of the *Revlon* requirement).

²⁹¹See Balz, *supra* note 290, at 514 (explaining the No-Talk provision).

respectively.²⁹² On the other hand, Go-Shop provisions reverse the typical bidding process.²⁹³ A board enters into an agreement with a single bidder at the outset, and then, with a deal in hand, turns to the market with the bidder's consent to seek a better offer.²⁹⁴ Go-Shop provisions have recently emerged as a deal technology and have stirred controversy, with advocates arguing that they are shareholder-friendly and detractors suggesting that they are mere window dressing for done deals, enabling them to withstand *Revlon* scrutiny without a true bidding process.²⁹⁵ Recent empirical research offers evidence that Go-Shops result in higher premiums for shareholders, except in management buyouts, suggesting that it is usually appropriate for Go-Shops to be viewed as satisfying a board's *Revlon* duties.²⁹⁶ Go-Shops were litigated in 13 cases.²⁹⁷ As will be discussed below in Part V.A, Go-Shop provisions negatively correlate with institutional lead plaintiffs.²⁹⁸

Table 5: Deal Terms

Deal Terms	Number of Case
Termination Fee	117
No Shop	25
No Talk	7
Go Shop	13

I also examined the target's listing exchange. The vast majority of target companies were listed on either NASDAQ or NYSE, with slightly more companies listed on NASDAQ (133) than NYSE (115).²⁹⁹ It is

²⁹²See *infra* Table 5.

²⁹³See Subramanian, *Go-Shops*, *supra* note 290, at 735.

²⁹⁴See *id.* at 730 (describing the Go-Shop process).

²⁹⁵See *id.* at 739-40 (comparing the view that a Go-Shop provision can only improve a seller's position because it allows subsequent higher bids to be considered with the view that no real post-deal shopping happens, but the provision allows the buyer to curtail pre-deal shopping).

²⁹⁶See *id.* at 751-52, 760 (finding that pure Go-Shop deals achieve approximately 5% higher abnormal returns for target shareholders than No-Shop deals).

²⁹⁷See *infra* Table 5.

²⁹⁸See *infra* Part V.A.; *supra* Table 1.

²⁹⁹See *infra* Table 6.

tempting to state that this follows a well-known pattern of litigation more frequently targeting technology companies, who dominate NASDAQ and tend towards greater share-price volatility.³⁰⁰ This argument has been used to explain why such companies are more likely to be targeted by a securities fraud class action.³⁰¹ More volatile companies are more likely to incur the sharp drop in price that is associated with a shareholder suit.³⁰² Similarly, volatility might explain the suits here, to the extent that deal litigation and deal price are affected by the 52-week high.³⁰³

Table 6: Target Listing

Exchanges	Number of Target Companies Listed
NYSE	115
NASDAQ	133
Other	32

Finally, I examined plaintiff-law-firm participation. Below, Table 7 identifies the most frequent law-firm participants.³⁰⁴ Some of these firms are significant players in securities fraud class actions, and some are not.³⁰⁵ The legal issues and the economics of transactional and

³⁰⁰See Ken Little, *What Market Indexes Tell Us[:]* *The Dow and Other Market Indexes Explained*, ABOUT.COM, <http://stocks.about.com/od/understandingstocks/a/Indexes102704.htm> (last visited Sept. 14, 2013) ("Nasdaq is heavily weighted to technology stocks."); *Education: Aggressive Growth Investing*, ZACKS INV. RESEARCH, <http://www.zacks.com/education/articles.php?id=58> (last visited Sept. 14, 2013) (explaining that many technology companies on the NASDAQ have high beta ratings which denote volatility).

³⁰¹*D&O and Securities Litigation: Recent Trends in Federal Securities Litigation*, GORDON & REES LLP (Feb. 2007) <http://www.gordonrees.com/publications/viewPublication.cfm?contentID=343> (indicating that a strong market and low stock volatility reduces the number of lawsuits filed).

³⁰²See Baruch Lev, *How to Win Investors Over*, 89 HARVARD BUS. REVIEW 54, 54-55 (Nov. 2011) (arguing that lowering volatility reduces the likelihood of a shareholder lawsuit).

³⁰³See Malcolm Baker, Xin Pan & Jeffrey Wurgler, *The Effect of Reference Point Prices on Mergers and Acquisitions*, 106 J. FIN. ECON. 49, 50-51 (Oct. 2012) (finding that offer prices are biased towards the 52-week high).

³⁰⁴See *infra* Table 7.

³⁰⁵See Choi, *Motions*, *supra* note 208, at app.D (listing frequent lead counsel in securities class actions).

securities class actions differ substantially from one another, as discussed earlier in Part III.A,³⁰⁶ which might lead one to think that different universes of law firms would litigate the two types of cases. On the other hand, two key factors enable the same plaintiff law firms to operate in both fields of litigation: (1) both involve representation of a class of shareholders for a contingency fee;³⁰⁷ and (2) both lend themselves to portfolio monitoring relationships with institutional-investor clients because such clients are favored class representatives in both types of cases.³⁰⁸ As for the first point, these firms already operate on a business model that requires them to finance litigation for extended periods of time on their own, rather than through the collection of monthly billings from clients who pay by the hour.³⁰⁹ Unlike traditional law firms, these firms need not create a new business model to move from one field of litigation to another.³¹⁰ And as for the second point, firms that engage in portfolio monitoring have ready access to the clients and the information that they need to realistically pursue lead counsel appointments in either transactional or securities fraud class actions.³¹¹ Still, it is noteworthy that many of the firms that do participate in both forms of litigation designate different attorneys and sometimes different practice groups to focus on each litigation specialty.³¹²

I offer additional analysis of law firms and case characteristics in Part V.A. below.³¹³

³⁰⁶See discussion *supra* Part III.A.

³⁰⁷See 4B MICHAEL J. CHEPIGA & PAUL C. CURNIN, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 80:10 (3d ed. updated 2012).

³⁰⁸See Rubenstein, *supra* note 191, at 219 (discussing how the monitoring of investments by plaintiffs firms leads to the retention of that firm as lead plaintiff in most cases).

³⁰⁹See Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291, 311-13 (1994) (describing the complex financing contracts entered into by the class action plaintiffs' attorneys).

³¹⁰See *id.* at 291.

³¹¹See discussion *supra* Part III.A (noting that law firms who engage in portfolio monitoring have access to information such as client investments).

³¹²*E.g.*, *Our People*, CHIMICLES & TIKELLIS, LLP, <http://www.chimicles.com/our-people> (last visited Sept. 14, 2013) (illustrating that some firms may designate attorneys to work exclusively on transactional class actions, rather than securities fraud class actions).

³¹³See discussion *supra* Part V.A.

Table 7: Most Frequent Plaintiff Law Firm Participant³¹⁴

Plaintiff Law Firm	Number of Appearances
Rosenthal, Monhait & Goddess, P.A.*	129
Chimicles & Tikellis, LLP**	60
Rigordsky & Long, P.A.*	52
Milberg, Weiss, Bershad, Hynes & Lerach, LLP	31
The Brualdi Law Firm, P.C.	29
Wolf Popper LLP	24
Faruqi & Faruqi, LLP**	23
The Weiser Law Firm, P.C.	21
Schiffirin & Barroway, LLP	20
Prickett, Jones & Elliott, P.A.*	19
Bernstein Liebhard & Lifshitz, LLP	18
Wolf Haldenstein Adler Freeman & Herz, LLP	17
Goodkind Labaton Ruddoff & Sucharow, LLP**	15
Lerach Coughlin Stoia Geller Rudman & Robbins, LLP	14
Bull & Lifshitz, LLP	12
Glancy Binkow & Goldberg, LLP	11
Gardy & Notis, LLP	10
Wechsler, Harwood Halebian & Feffer, LLP	10

*Headquartered in Delaware. **Office in Delaware.

³¹⁴An earlier version of this table, based on the data collected for this Article, was published by Brian Cheffins, John Armour, and Bernard Black. Brian Cheffins, John Armour & Bernard Black, *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2 COLUM. BUS. L. REV. 427, 473-74 (2012) (illustrating an earlier version of Table 7). The reason for the slight discrepancy between the data presented in this table and the data published in the aforementioned article is that this table includes appearances by firms in earlier incarnations under slightly different names.

V. THE CASE CHARACTERISTICS ASSOCIATED WITH INSTITUTIONAL LEAD PLAINTIFFS

In this Section, I examine what case characteristics are associated with institutional lead plaintiffs, and with particular types of institutional lead plaintiffs, focusing on public-pension funds, labor-union funds, and private non-mutual funds. This discussion will not involve mutual funds and hedge funds, which rarely participate in these suits.³¹⁵

But before doing so, I offer a brief explanation of why I exclude cases following the bankruptcy filing of Lehman Brothers on September 15, 2008.³¹⁶ This event is typically viewed as the trigger of the profound financial crisis of 2008.³¹⁷ It wreaked tremendous economic havoc which manifested itself in mergers-and-acquisitions litigation as it did almost everywhere else.³¹⁸ A comprehensive assessment of how this event affected mergers-and-acquisitions litigation is beyond the scope of this Article. However, I note that in unpublished statistical tests, I find substantial differences before and after the bankruptcy filing of Lehman Brothers in key case characteristics, such as the size of the premium in litigated deals. Deal premiums over which investors might have been ecstatic pre-Lehman became subject to suit post-Lehman.³¹⁹ Moreover, as discussed in Part IV above, all institutions began litigating more deals post-Lehman.³²⁰ Because the focus of this Article is an assessment of transactional litigation in "normal times," and not in the midst of a financial panic, I set aside post-Lehman Brothers cases in assessing the data on case characteristics and case outcomes associated with institutional-investor lead plaintiffs.

³¹⁵See Kahan & Rock, *supra* note 141, at 1042-43 (explaining that hedge funds and mutual funds represent a passive form of activism).

³¹⁶See *In re Lehman Brothers Holdings Inc.*, No. 1:08-BK-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008).

³¹⁷See, e.g., JOSEPH TIBMAN, *THE MURDER OF LEHMAN BROTHERS: AN INSIDER'S LOOK AT THE GLOBAL MELTDOWN 7* (2009); MARK T. WILLIAMS, *UNCONTROLLED RISK: THE LESSONS OF LEHMAN BROTHERS AND HOW SYSTEMIC RISK CAN STILL BRING DOWN THE WORLD FINANCIAL SYSTEM 1* (2010).

³¹⁸See PRICEWATERHOUSECOOPERSLLP, *supra* note 55, at 5 (describing the increase in mergers-and-acquisitions litigation as a percentage of transactions after 2008).

³¹⁹*Id.*

³²⁰See *supra* text accompanying note 202; Table 2.

A. *Institutional-Investor Lead Plaintiffs in the Aggregate*

In my first cut at the data, I examine institutional investors in the aggregate.³²¹ What cases are they attracted to? What cases do they avoid?

Table 8: Determinants of an Institutional Lead Plaintiff

	Model One	Model Two	Model Three
Complaint Length	0.05813 (0.001)***		
Complaints		0.443691 (0.000)***	0.421172 (0.001)***
Premium < 20%	0.71658 (0.034)**	0.720147 (0.036)**	0.729398 (0.034)**
Go-Shop	-1.60346 (0.033)**	-1.40027 (0.066)*	-1.34263 (0.075)*
Target MCAP	0.121455 (0.175)	0.19444 (0.036)**	0.20778 (0.028)**
Cash/Stock	0.730229 (0.094)*	0.924989 (0.045)**	0.921716 (0.046)**
Control SHH			0.348724 (0.387)
P-Value	0.000	0.000	0.000

Binary logistic regressions with dummy-dependent variable for institutional lead plaintiff. This data is Pre-Lehman. *** = 1% confidence, ** = 5% confidence, * = 10% confidence.

³²¹ See *infra* Table 8.

First, complaint length correlates with institutional lead plaintiffs.³²² To place this variable in context, I note that the baseline complaints in these cases are often short.³²³ I would describe some of them as "control-find-replace" complaints, in which the only details altered by the law firm from case-to-case are the names of the plaintiffs.³²⁴ These complaints contain broad allegations of misconduct and generic pleas to increase disclosure, open up the bidding process, and raise the offer price.³²⁵ In contrast, institutional lead plaintiffs correlate with longer complaints that reflect a substantial review of the case details, identifying specific problems with the transaction and enumerating its legal flaws.³²⁶ The complaint length reflects this deeper investigation of the case made by the institutions and the law firms that they select to represent them.³²⁷ Complaint length may also reflect a competitive environment for lead plaintiff selection. Delaware courts consider the quality of the complaint in lead plaintiff selection.³²⁸ Complaint length may roughly proxy for complaint quality; institutions in a competitive situation (and their lawyers) likely write longer complaints when competing for the lead plaintiff role.

³²²See *supra* Table 8.

³²³Mean complaint length is 19 pages, maximum is 68 pages, and a minimum is 6 pages. See *supra* Table 8.

³²⁴In some cases, the plaintiff's gender may not even be identified correctly. See discussion *infra* pp. 58-59 (discussing "cut and paste" complaints).

³²⁵See, e.g., *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 364 (Del. 2006) (affirming Delaware Court of Chancery decision to dismiss shareholder derivative action with non-institutional plaintiff for failure to plead with sufficient specificity).

³²⁶See, e.g., *In re Citigroup Inc. Derivative S'holder Litig.*, 964 A.2d 106, 114-15 (Del. Ch. 2009) (institutional lead plaintiff's complaint was eighty-six pages long); *TCW Tech. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000) (appointing institutional plaintiffs lead plaintiffs because their pleadings covered the claims being made by smaller shareholders and because of the enthusiasm with which they have litigated).

³²⁷Interestingly, as noted below in Table 13, the most frequent law firm participants in these cases (excluding local counsel) correlate with shorter complaints, except when they serve institutional-investor lead plaintiffs, in which case they correlate with longer complaints. See *infra* Table 13. This suggests either that institutional investors demand more work from these firms, that firms work harder when litigating cases associated with institutions, or that the institutions use firms other than the most frequent players.

³²⁸See, e.g., *Hirt v. U.S. Timberlands Serv. Co.*, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002) (recognizing that the "quality of the pleading" is an important factor to consider when deciding who to designate as lead plaintiff).

Not surprisingly, the number of complaints correlates with institutional lead plaintiffs.³²⁹ It may be that the number of complaints proxies for case quality, with more complaints correlating with poor deal terms and unhappy investors bringing suit independently of one another.³³⁰ The correlation between the number of complaints and institutional investor lead plaintiffs may also be an example of herding behavior, with one institution's involvement attracting the attention of others.³³¹ In particularly large, high-profile cases, institutions may compete to assume the lead role.³³² Then again, institutions might also prefer to free ride off of the lead-plaintiff efforts of other institutions, which would run counter to the institutional-herding explanation.³³³ Another version of the herding explanation is that the number of complaints may also reflect interest by plaintiff law firms representing small clients. These law firms may file suit where they observe or anticipate that institutional investors will also file suit. The firms hope that the institutions' counsel, upon winning the lead counsel role, will offer them some work on the case in exchange for a small percentage of the legal fee. Like jackals hovering around the lion's kill, these firms know that the cost of chasing them away may be greater than the cost of letting them eat scraps. For example, one cost that the small firms can impose on the larger players is to object to the settlement at the court hearing.³³⁴ Even lions prefer well-fed jackals to hungry ones.

The offer premium is the percentage difference between the offer price and the target's pre-offer trading price.³³⁵ One might expect that

³²⁹See *supra* Table 8.

³³⁰See Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1768 (2010) ("[I]nstitutional investors in derivative suits are drawn to the bigger, higher-quality cases.").

³³¹John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor As Corporate Monitor*, 91 COLUM. L. REV. 1277, 1310 (1991) ("Institutional investors often share the same views and thus trade in a herd-like manner.").

³³²Note that the market capitalization of the target is significant in Models Two and Three, suggesting that institutions bring suit in larger cases. See *supra* Table 8.

³³³See Coffee, *supra* note 331, at 1285-86 n.23 (discussing the "free rider" problem).

³³⁴See Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 436-38 (2003) (discussing objection "blackmail" where an objector's attorney seeks only to maximize his fee); Bruce D. Greenberg, *Keeping the Flies out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 961-64 (2010) (discussing tactics objector counsels use in order to increase their fees, especially in larger litigations).

³³⁵See, e.g., Dale A. Oesterle, *Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis*, 71 CORNELL L. REV. 53, 60-

offer premium alone would negatively correlate with institutional investor lead plaintiff appointments. One view of mergers-and-acquisitions litigation is that low-deal premiums motivate shareholder suits; shareholders ultimately care about price, and might remain quite content with coercive deal terms if they are well-compensated for it.³³⁶ Therefore, one would expect that the size of the premium would negatively correlate with institutional lead plaintiffs. Yet, premium alone was not significant in any regression model.³³⁷

In Table 8, I further subdivide the premium data using a dummy variable for deals whose initial offers constitute a less-than-20% premium.³³⁸ The 20% threshold is frequently used in practice as a "rule of thumb" for whether a deal's terms are fair for shareholders; deals with 20%+ premiums may be difficult to challenge, whereas deals below the threshold are more vulnerable.³³⁹ Here, the results are significant at the 5% confidence level.³⁴⁰ Deals with a less-than-20% offer premium positively correlate with institutional lead plaintiffs, as expected.³⁴¹ Half of all cases with less-than-20% offer premiums are led by institutions (56/113).³⁴² In contrast, institutions lead just 32% of more-than-20% offer-premium deals (36/111).³⁴³

Go-Shop provisions negatively, and statistically significantly, correlate with institutional lead plaintiffs, at the 5% confidence level in Model One, and at 10% confidence in Models Two and Three.³⁴⁴ Go-Shop provisions encourage the target board to shop the company to other potential higher bidders, usually within some specified time frame.³⁴⁵ The presence of such a provision may persuade potential institutional lead plaintiffs not to bring suit. It may indicate that the target board has complied with *Revlon* by taking the appropriate steps to obtain the

61 (1985-86) (discussing the functioning of an offer premium).

³³⁶See Webber, *Plight*, *supra* note 18, at 204 (a central component of mergers-and-acquisitions complaints is that the offer price is too low).

³³⁷See *supra* Table 8.

³³⁸See *supra* Table 8.

³³⁹Aaron Yoran (Jurkevitz), *Advance Defensive Tactics Against Takeover Bids*, 21 AM. J. COMP. L. 531, 531 n.1 (1973) ("[In the United States,] a 20% premium [is] a common rule of thumb.").

³⁴⁰See *supra* Table 8.

³⁴¹See *supra* Table 8.

³⁴²See *supra* Table 8.

³⁴³See *supra* Table 8.

³⁴⁴See *supra* Table 8.

³⁴⁵See Subramanian, *Go-Shops*, *supra* note 290, at 730 (defining Go-Shop provisions).

highest price for shareholders.³⁴⁶ Alternatively, a Go-Shop provision may simply be an indicator of an attractive deal for shareholders.³⁴⁷ Its presence may be a measure of the target and the bidder's confidence in the quality of the deal. It may not be doing any work itself to fend off a potential lawsuit, but may simply indicate that a deal is attractive enough that it is highly likely that no lawsuit is forthcoming, at least not one from a sophisticated institutional lead plaintiff. A less sanguine view of the negative correlation between the presence of Go-Shops and institutional lead plaintiffs is not that Go-Shops reflect the attractiveness of the deal, but that they deter other bidders from trying to outbid the target board's current choice of acquirer, or pay the accompanying termination fee.³⁴⁸ Institutions may avoid suit where they fear a diminished probability of a second bidder, and consequently, a lower likelihood of share-price appreciation. Still, prior research suggests that this cynical view of Go-Shops is misplaced, at least outside of the MBO context.³⁴⁹

In Models Two and Three, the market capitalization of the target positively correlates with institutional lead plaintiffs.³⁵⁰ This supports the contention that institutional investors target larger deals.³⁵¹ They may do so both because they have more at stake in these deals and because they prefer to litigate high-profile transactions that may attract favorable attention for institutions serving as shareholder advocates. Still, it should be noted that target-market capitalization alone does not predict institutional-investor lead plaintiffs, and is not even statistically significant in all models.³⁵²

Cash-for-stock deals also positively correlate with institutional lead plaintiffs.³⁵³ Most deals are cash-for-stock deals.³⁵⁴ But the fact that

³⁴⁶See *id.* at 731 ("[G]o-[S]hop provisions, appropriately structured, can satisfy a target board's *Revlon* duties.").

³⁴⁷See Phillip Mills & Mutya Harsch, *How to Avoid the Jump*, 25 INT'L FIN. L. REV. 44, 45 (2006) (discussing the attractive features of a Go-Shop provision).

³⁴⁸See Subramanian, *Go-Shops*, *supra* note 290, at 736 ("[T]he combination of the fee and the first bidder's match right may deter a prospective bidder.").

³⁴⁹See *id.* ("[Outside the MBO context,] [o]n average, go shops yield more aggregate search, significant post-signing competition, and slightly higher returns to target shareholders than traditional no-shop deals.").

³⁵⁰See *supra* Table 8.

³⁵¹See Erickson, *supra* note 330, at 1768 ("[I]nstitutional investors in derivative suits are drawn to the bigger, higher-quality cases.").

³⁵²See *supra* Table 8.

³⁵³See *supra* Table 8.

cash-for-stock deals are particularly targeted by institutional investors requires explanation. One possible cause is *Revlon*.³⁵⁵ *Revlon* creates a favorable legal regime for plaintiff shareholders, because in cash-out mergers directors face enhanced scrutiny and a duty to maximize the share price.³⁵⁶ In contrast, the legal regime in stock-for-stock deals is more complex.³⁵⁷ Delaware courts have taken the view that shareholders in stock-for-stock transactions are more insulated from abuse than shareholders in cash-out mergers, in part because they maintain an ongoing stake in the enterprise.³⁵⁸ Plaintiff shareholders may therefore be more inclined to bring litigation under a *Revlon* regime, both because they are more susceptible to exploitation in cash-for-stock deals, and because the law makes it more likely that they can obtain a favorable outcome from the litigation.³⁵⁹ Yet, it is also worth noting that Thomas and Thompson find no improvement in outcomes in *Revlon* cases versus other cases.³⁶⁰ Institutions may merely be acting on the perception that they will do better in *Revlon* cases.

Finally, I note that in Model Three, controlling-shareholder transactions do not significantly correlate with institutional lead plaintiffs.³⁶¹ I highlight this result because it is a principal distinction between cases brought by institutions overall and cases brought by the most active and successful institutional lead plaintiffs—public-pension funds. Public-pension funds target controlling-shareholder deals in their lawsuits.³⁶² Minority shareholders are at their most vulnerable in such transactions.³⁶³ I discuss this point further in the next Section.³⁶⁴

³⁵⁴See Elliott J. Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of Weinberger v. UOP, Inc.*, 8 DEL. J. CORP. L. 1, 2 n.4 (1983) (noting that cash-out mergers are the most common type of mergers).

³⁵⁵*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986).

³⁵⁶*Id.* at 182, 184 (holding that directors who sell in cash-out mergers have a duty to get the best price for stockholders rather than to protect the corporate assets).

³⁵⁷See generally *Arnold v. Soc'y of Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) (illustrating the complexities of the legal regime in stock-for-stock deals).

³⁵⁸See *id.* at 1289-90.

³⁵⁹See *Revlon*, 506 A.2d at 182, 184 (holding that the director's role is to get the best price for the stockholders at a sale of the company, making plaintiffs less susceptible to exploitation and increasing the likelihood of a favorable outcome from litigation).

³⁶⁰See Thompson & Thomas, *supra* note 4, at 195-96 (noting *Revlon's* slight effect on shareholder litigation outcomes).

³⁶¹See *supra* Table 8 (noting that of the cases with institutional lead plaintiffs only .348724 are controlling-shareholder transactions).

³⁶²See *infra* Table 9.

³⁶³Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978) (stating that controlling-shareholder transactions are coercive).

B. Case Selection Variables by Institutional Type

1. Public-Pension Funds and the Targeting of Controlling-Shareholder Transactions

The most notable difference between transactions targeted by institutional lead plaintiffs generally and those targeted by public-pension funds is that the latter are much more likely to target controlling-shareholder transactions.³⁶⁵ As noted in Table 10 below, the presence of a controlling shareholder is a statistically significant predictor of a public-pension lead plaintiff.³⁶⁶ The likelihood of a public-pension lead plaintiff increases dramatically in the presence of a controlling shareholder.³⁶⁷ There are a number of reasons why this might be the case.

of minority stockholders because the majority can require the minority to accept terms through majority rule).

³⁶⁴See *infra* Part V.B.i. (examining why minority shareholders are most vulnerable to exploitation by an acquirer in a controlling shareholder transaction).

³⁶⁵See *supra* Table 8 (noting that in Model Three, institutional lead plaintiff cases with controlling shareholders was .348724); *infra* Table 9 (noting that in Model Three, public-pension lead plaintiffs with controlling shareholders was 1.48324).

³⁶⁶See *infra* Table 10.

³⁶⁷See *infra* Table 9.

Table 9: Indicators of Public-Pension Lead Plaintiff

	Model One	Model Two	Model Three
Complaint Length	0.069676 (0.001)***	0.062668 (0.004)***	0.06913 (0.001)***
Hostile	1.31811 (0.168)		1.33169 (0.192)
Target Market Cap	0.748832 (0.000)***	0.697917 (0.000)***	0.759752 (0.000)***
Controlling Shareholder	1.52773 (0.015)**	1.12596 (0.098)*	1.48324 (0.021)**
Cash-for-Stock	0.337657 (0.642)		0.441603 (0.554)
# Lead Plaintiffs		0.128425 (0.077)*	
Premium			-0.28704 (0.869)
Go-Shop			-0.757747 (0.522)

Binary logistic regressions with dependent-dummy variable for the presence of a public-pension fund lead plaintiff, including Pre-Lehman deal cases only. The premium, complaints, and Go-Shop variables were dropped from Models One and Two in this regression for lack of significance. *** = 1% confidence, ** = 5% confidence, * = 10% confidence.

First, minority shareholders are most vulnerable to exploitation by the acquirer in a controlling-shareholder transaction.³⁶⁸ In the typical acquisition, the acquirer is a third party.³⁶⁹ But in a controlling-shareholder transaction, the acquirer is an insider.³⁷⁰ Controlling shareholders play a substantial role in influencing the composition of the target's board of directors, thereby undermining the board's ability to

³⁶⁸See Brudney & Chirelstein, *supra* note 363, at 1357.

³⁶⁹See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176, 178 (Del. 1986) (illustrating a normal acquisition where both possible acquirers were third parties).

³⁷⁰See, e.g., *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113, 1115 (Del. 1994) (illustrating a controlling-shareholder transaction where the acquirer is an insider).

independently assess price and deal terms.³⁷¹ Controlling shareholders also have access to inside information.³⁷² Such access can give a controlling shareholder the ability to favorably time its acquisition to squeeze out the minority shareholders, depriving them of the full benefit of their investments.³⁷³ For example, a controlling shareholder in a pharmaceutical company might attempt an acquisition prior to publication of clinical studies demonstrating the likely success of a drug in the company's research and development pipeline. For these reasons, Delaware courts have instituted additional legal protections for minority shareholders in controlling-shareholder transactions.³⁷⁴

This combination of the strong potential for exploitation of minority investors,³⁷⁵ and the attendant legal protections designed to thwart such exploitation,³⁷⁶ may attract public-pension lead plaintiffs. Such plaintiffs may be more inclined to participate in cases where they are particularly vulnerable to exploitation; they may be further attracted to such cases when the legal protections in place increase the likelihood that their leadership of a lawsuit will result in tangible benefits. It may also be the case that any investor would happily lead such cases, but that public-pension funds are well-positioned to seize the leadership role because they are the largest institutional players (at least among institutions willing to participate in such litigation), have the most at stake, and therefore are favored for the lead plaintiff role under the *Hirt* factors outlined above.³⁷⁷ Below, I will revisit this question of whether public-pension funds are the best litigators, or whether they just cherry-pick the best cases.³⁷⁸

³⁷¹Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 9-10 (2005) (discussing lack of independent assessment by target's board where acquirer controls selection of target's board).

³⁷²*Id.* at 32 (noting that controlling shareholders have access to inside information and could take advantage of nonpublic information).

³⁷³*Id.* (stating that inside information gives controlling acquirers the ability to freeze out the minority at a more favorable time).

³⁷⁴*See supra* Part III.B (discussing additional protections for minority shareholders in controlling-shareholder transactions).

³⁷⁵*See supra* note 363 and accompanying text.

³⁷⁶*See supra* Part III.B.

³⁷⁷*See Hirt v. U.S. Timberlands Serv. Co.*, 2002 WL 1558342, at *2 (Del. Ch. June 9, 2002); *see also supra* text accompanying notes 53-54 (outlining the *Hirt* factors).

³⁷⁸*See infra* Part VI.A.

As with institutions generally, target-market capitalization is a significant predictor of a public-pension lead plaintiff.³⁷⁹ But this factor correlates much more strongly with public-pension lead plaintiffs than it does with institutions generally.³⁸⁰ The coefficients for the target-market capitalization variable are more than three times larger for public-pension funds than for institutions generally.³⁸¹ Moreover, the results increase in statistical significance from 5% confidence for institutions generally to 1% confidence for public-pension funds.³⁸² In further analyzing the correlation between market capitalization and public-pension lead plaintiffs, I subdivided the targets by market capitalization into quartiles, from 0–25th, 25th–50th, 50th–75th, and 75th–100th percentiles.³⁸³ The simple regression below in Table 9A illustrates the probability of suit by a public-pension-fund lead plaintiff by target market capitalization:

Table 9A: Public-Pension Lead Plaintiffs By Target-Market Capitalization

Target Market Capitalization By Quartile			Model One
Target Percentile	MCAP	25th–50th	-0.9097 (0.942)
Target Percentile	MCAP	50th–75th	1.6335 (0.058)*
Target Percentile	MCAP	75th–100th	2.8368 (0.000)***

Thus, public-pension funds obtain lead plaintiff appointments in large-deal cases in which they also have a high stake.³⁸⁴ It is clear that

³⁷⁹See *supra* Table 9 (showing a correlation between public-pension lead plaintiffs and target market capitalization).

³⁸⁰Compare *supra* Table 8 (showing data for institutions generally), with *supra* Table 9 (showing data for public-pension lead plaintiffs).

³⁸¹Compare *supra* Table 8 (coefficient range of 0.12 to 0.2 for institutions), with *supra* Table 9 (coefficient range of 0.7 to 0.75 for public-pensions).

³⁸²Compare *supra* Table 8 (institutions), with *supra* Table 9 (public-pensions).

³⁸³See *infra* Table 9A (showing data for public-pension lead plaintiffs by target-market capitalization).

³⁸⁴See *supra* Table 9A.

public-pension funds save their litigation ammunition for the largest targets, though size alone is not the only factor.³⁸⁵

Like institutions generally, the length of the complaint also increases the probability of involvement by a public-pension lead plaintiff.³⁸⁶ Public-pension funds write complaints that are nearly twice as long as the overall sample; the median (mean) complaint length for public-pension funds is 29 (29) pages, compared to a median (mean) of 15.5 (17.9) pages for cases overall. The length of the complaint is utilized here as a proxy for attorney and lead plaintiff effort.³⁸⁷ As noted earlier, complaint length is probative of lead plaintiff and lead counsel effort.³⁸⁸ Shorter, "cookie cutter" complaints with "cut and paste" lead plaintiffs and claims tend to be written by law firms representing individual lead plaintiffs who stand little chance of obtaining an appointment.³⁸⁹ Such lead plaintiffs, and more likely, their counsel, have probably filed suit in the hope that no one else will, or that the ultimately-appointed lead plaintiff will give the attorneys who filed the short complaint some work on the case and a small share of the fee.³⁹⁰ Winning lead counsel may choose to do so in the hope that these attorneys will not direct their individual clients to object to the settlement.³⁹¹ In contrast, longer complaints tend to be written by lead counsel representing institutional investors who have a realistic chance of winning the appointment.³⁹² As noted above, Delaware courts consider the quality of the complaint in making this selection.³⁹³

³⁸⁵See *supra* Table 9A.

³⁸⁶Compare *supra* Table 8 (illustrating how the length of the complaint correlates with an institutional lead plaintiff), with *supra* Table 9 (illustrating how the length of the complaint correlates with involvement of a public-pension lead plaintiff).

³⁸⁷See *supra* notes 326-28 and accompanying text (describing possible reasons why complaint length is correlated with involvement by institutional lead plaintiffs and higher quality complaints).

³⁸⁸See *supra* notes 326-27 and accompanying text.

³⁸⁹See *supra* notes 324-25 and accompanying text.

³⁹⁰Choi et al., *Do Institutions Matter?*, *supra* note 117, at 873; Charles Silver & Sam Dinkin, *Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions*, 57 DEPAUL L. REV. 471, 478 (2008).

³⁹¹See Silver & Dinkin, *supra* note 390, at 478.

³⁹²See *supra* notes 326-27 and accompanying text.

³⁹³See *TCW Tech. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1654504 at *4 (Del. Ch. Oct. 17, 2000) (stating that the plaintiff that has the greatest economic stake in the outcome should be chosen to represent the class); *supra* note 328 and accompanying text.

Unlike institutional investors generally, the offer premium plays little or no role in public-pension-fund case selection.³⁹⁴ This result is particularly intriguing given that the involvement of public-pension funds alone correlate with an increase in offer price, as discussed below.³⁹⁵ Moreover, public-pension lead plaintiffs do not correlate with cash-for-stock deals.³⁹⁶

I conclude this Section with some final observations about public-pension lead plaintiffs. First, unlike institutional investors generally, participation of public-pension funds does not correlate with the number of complaints.³⁹⁷ I find some weak evidence that they correlate with the number of lead plaintiffs, as evidenced in Table 9 above.³⁹⁸ I note that this result is not particularly robust. There are a few possible explanations for why public-pension funds might correlate with the number of lead plaintiffs, rather than with the number of complaints. First, public-pension funds may be more likely to file for the lead plaintiff role in pre-arranged groups of two or more, rather than individually.³⁹⁹ Stephen Choi finds some evidence for this kind of coalition building by public-pension funds in securities fraud class actions.⁴⁰⁰ In competitive lead plaintiff situations, institutions eager to assume the lead plaintiff role, and the law firms that represent them, are incentivized to form such groups.⁴⁰¹ They may aggregate their stakes in the target to increase their probability of being selected as lead plaintiffs.⁴⁰² Such voluntary aggregation into lead plaintiff groups prior to filing a complaint or moving for lead plaintiff appointment may explain why the number of lead plaintiffs correlates with public-pension participation and why the number of complaints does not. Such

³⁹⁴ Compare *supra* Table 8 ("Premium < 20%"), with *infra* Table 12 ("Premium").

³⁹⁵ See *infra* Table 12.

³⁹⁶ See *supra* Table 9.

³⁹⁷ Compare *supra* Table 8, with *supra* Table 9.

³⁹⁸ See *supra* Table 9.

³⁹⁹ See Choi, *Motions*, *supra* note 208, at 211-12.

⁴⁰⁰ See *id.* (suggesting that the presence of multiple lead counsel in an initial lead plaintiff motion in 21.2% of the sample indicates the formation of a plaintiff group before the lead plaintiff appointment).

⁴⁰¹ See *id.*; see also Silver & Dinkin, *supra* note 390, at 477-78 (discussing the incentives for investors to occupy the lead plaintiff position and why public-pension funds in particular are more eager to assume the lead plaintiff role).

⁴⁰² See Choi, *Motions*, *supra* note 208, at 211-12; Cox et al., *supra* note 118, at 366 ("There is a continuing practice of permitting groups of individuals to aggregate their claims, particularly when they share a pre-existing relationship.").

aggregation may be facilitated by portfolio monitoring, discussed earlier.⁴⁰³ Law firms that engage in portfolio monitoring may be able to identify multiple public-pension clients and offer to aggregate their stakes for purposes of applying for the lead plaintiff role.⁴⁰⁴ Another, related, explanation might be that public-pension funds, and their attorneys, may prefer not to litigate the lead plaintiff issue, instead opting for a "big tent" strategy comprised of larger lead plaintiff groups.⁴⁰⁵ But if this were the case, one might still expect to see more complaints, followed by aggregation. Finally, smaller players may be less inclined to file complaints in cases in which public-pension funds have, thinking that they have little hope of obtaining any lead plaintiff or lead counsel role against such competition.⁴⁰⁶ Perhaps public-pension funds are less susceptible to threats from smaller players objecting to settlement, given their frequent participation in such suits, their experienced counsel, and their comparative success in the lead plaintiff role, as discussed more fully below.⁴⁰⁷

It is commonly known that public-pension funds actively engage in corporate-governance-reform efforts.⁴⁰⁸ I hypothesized that corporate-governance issues could constitute a factor in their case selection. Accordingly, I used the Bebchuk, Cohen and Ferrell Entrenchment Index ("E-Index") to determine if board-entrenchment measures could attract (or repel) public-pension lead plaintiffs, but the results were not significant, nor were they significant for other institutions or for institutions generally.

⁴⁰³See *supra* note 311 and accompanying text.

⁴⁰⁴See Webber, *Plight*, *supra* note 18, at 167.

⁴⁰⁵See Webber, *Pay-to-Play*, *supra* note 18, at 2051-52 (stating that large public-pension funds with losses large enough to qualify them for a lead plaintiff appointment frequently forgo the opportunity to be appointed lead plaintiff).

⁴⁰⁶See Webber, *Plight*, *supra* note 18, at 180 (recognizing the possibility that sophisticated individual investors may like to obtain lead plaintiff appointments, but have no chance to obtain a leadership role under the current system that favors institutional lead plaintiffs).

⁴⁰⁷See *infra* notes 429-38 and accompanying text.

⁴⁰⁸See Webber, *Plight*, *supra* note 18, at 199-200 (discussing the participation of public-pension funds in corporate-governance reform).

2. Labor-Union Funds, Mutual Funds, and Private Non-Mutual Funds

Table 10: Indicators of Labor-Union Lead Plaintiff

	Model One	Model Two	Model Three
# Complaints	0.302665 (0.001)***	0.297939 (0.002)***	0.292741 (0.002)***
targetMCAP	0.415387 (0.024)**	0.407735 (0.028)**	0.408012 (0.028)**
Cash-for-Stock	2.6752 (0.074)*	2.66328 (0.09)*	2.79401 (0.089)*
Duty of Faith		2.86035 (0.038)**	2.91036 (0.036)**
Duty of Loyalty		-2.73203 (0.044)**	-2.72851 (0.044)**
Derivative			0.773596 (0.639)

Binary logistic regression with dependent variable dummy for labor-union fund. This data is Pre-Lehman and P-values are indicated in parentheses. *** = 1% confidence; ** = 5% confidence; * = 10% confidence.

What is most noteworthy about labor-union-fund lead plaintiffs is that they strongly correlate with cash-for-stock deals.⁴⁰⁹ As noted earlier, institutional lead plaintiffs (except public-pension funds) correlate with cash-for-stock deals.⁴¹⁰ But the correlation between labor-union funds and cash-for-stock transactions is far stronger than it is for other institutions.⁴¹¹ Labor unions target these transactions, and may also be successful at obtaining lead plaintiff appointments in them because the larger public-pension funds direct more of their attention to controlling-shareholder transactions.⁴¹² As noted earlier, cash-for-stock deals deprive investors of future profits of the target.⁴¹³ The potential for exploitation of such investors, and the accompanying legal protections offered to such

⁴⁰⁹See *supra* Table 10 (Cash-for-Stock).

⁴¹⁰See *supra* Table 8 (Cash/Stock); *supra* text accompanying note 355.

⁴¹¹Compare *supra* Table 10 (2.7-2.8 labor-union fund coefficient), with *supra* Table 8 (0.73-0.92 institution coefficient).

⁴¹²Compare *supra* Table 9 (Controlling Shareholder), with *supra* Table 9 (Cash-for-Stock).

⁴¹³See *supra* notes 353-60 and accompanying text.

investors by Delaware courts under *Revlon*, may make it attractive to litigate such deals.⁴¹⁴

A couple of points of comparison with public-pension funds are also worth making here. As noted in Table 8, the involvement of institutions generally correlates with longer complaints and more complaints.⁴¹⁵ Public-pension funds correlate with the former but not the latter,⁴¹⁶ though they do correspond with more lead plaintiffs, for the reasons discussed above in Part IV.A.⁴¹⁷ Labor-union funds correlate with more complaints, but not longer ones.⁴¹⁸ This suggests that they apply in competitive cases, but cannot, or do not, succeed in getting their attorneys to draft longer and more detailed complaints. Finally, like other institutions, target-market capitalization correlates with labor-union lead plaintiffs, less strongly than for public-pension funds, and more strongly than for other institutional types.⁴¹⁹ Labor-union funds also target larger cases in which they have more at stake.⁴²⁰

Because there are so few mutual-fund lead plaintiffs in the sample, there is little to be said about their non-participation in these suits.⁴²¹ As discussed above, mutual funds face several conflicts in serving as lead plaintiffs that other institutional types do not face.⁴²² These conflicts render them passive participants in these cases.⁴²³

⁴¹⁴See *supra* note 359 and accompanying text.

⁴¹⁵See discussion *supra* Part V.A.; *supra* Table 8.

⁴¹⁶See *supra* Table 9.

⁴¹⁷See discussion *supra* Part IV.A.

⁴¹⁸See *supra* Table 10.

⁴¹⁹See *supra* Table 9A (Public-Pension Lead Plaintiffs by Target-Market Capitalization); Table 10 (Labor-Union Lead Plaintiff by Target-Market Capitalization); *infra* Table 11 (Private Non-Mutual-Fund Lead Plaintiffs by Target-Market Capitalization).

⁴²⁰See *supra* Table 10.

⁴²¹See *supra* text accompanying notes 218-19, 224.

⁴²²See discussion *supra* Part IV.A.

⁴²³See *supra* text accompanying notes 241-42.

Table 11: Indicators of Private Non-Mutual-Fund Lead Plaintiffs

	Model One
# Complaints	0.297743 (0.001)***
Target Market Cap	-0.05498 (0.545)
Premium < 20%	0.670328 (0.066)*
Cash-for-Stock	0.52565 (0.273)
Go-Shop	-1.8581 (0.088)*

Binary logistic regression with dependent-dummy variable for private funds. *** = 1% confidence, ** = 5% confidence, * = 10% confidence.

Finally, private non-mutual funds follow the overall pattern for institutions, targeting cases in which multiple complaints have been filed, in which the premium is below 20%, and avoiding Go-Shop provisions.⁴²⁴ Unlike other institutions, market capitalization of the target is not significant,⁴²⁵ suggesting that these funds target smaller deals. Nor do deal characteristics other than premium and Go-Shops seem to matter.⁴²⁶ Finally, private non-mutual funds do not seem to make the effort to write longer complaints.⁴²⁷

VI. THE RELATIONSHIP BETWEEN LEAD PLAINTIFFS, LEAD COUNSEL, CASE CHARACTERISTICS, AND CASE OUTCOMES

In this Section, I assess the outcome of greatest interest to shareholders, the increase in share price from the offer to the final price, and attorneys' fees.

⁴²⁴See *supra* Table 11.

⁴²⁵Compare *supra* Table 9A, and *supra* Table 10, with *supra* Table 11.

⁴²⁶See *supra* Table 11.

⁴²⁷See *supra* Table 11; discussion *supra* Part V.A.

A. *Percentage Change From Offer to Final Price*Table 12: Indicators of Percentage Increase from Offer to Final Price⁴²⁸

	Model One	Model Two (Completed Deals Only)	Model Three
Public- Pension Dummy	0.09394 (0.087)*	0.09047 (0.056)*	0.09885 (0.055)*
Friendly	0.0688 (0.032)**	0.01793 (0.518)	0.06857 (0.029)**
Cash-for- Stock	0.10757 (0.010)**	0.00934 (0.803)	0.09307 (0.016)**
Target Market Cap	0.009274 (0.283)	-0.00277 (0.712)	0.010567 (0.197)
SPDR 500 Change From Offer to Final	0.45957 (0.000)***	0.22142 (0.011)**	0.47529 (0.000)***
Deal Close	0.18888 (0.000)***		0.15844 (0.000)***
Derivative	0.0395 (0.781)	0.0338 (0.771)	
Premium			-0.09257 (0.278)
Go-Shop			0.03821 (0.538)
Hostile			-0.04277 (0.573)
R-squared	29.9%	7.1%	29.8%

OLS regression with dependent variable=percentage change from offer to final price (pre-Lehman). P-values in parentheses. *** = 1% confidence; ** = 5% confidence; * = 10% confidence.

⁴²⁸For transactions with multiple cases that remained unconsolidated, I included only the first case by filed date in assessing the change from offer to final price, to avoid overweighting these transactions in my results. I included all cases in basic statistics.

The results show that public-pension funds correlate with an increase from the offer to the final price.⁴²⁹ I emphasize here that this result includes a control for overall market movements—the percentage change from the offer to the final price of the SPDR 500, an electronically-traded fund that tracks the S&P 500.⁴³⁰ This result potentially justifies the policy favoring selection of institutional-investor lead plaintiffs, at least insofar as this policy leads to the selection of public-pension funds. One possible interpretation of this result is that public-pension funds do, in fact, improve representation for shareholders in these suits, much as the theory supporting their selection predicts. Public-pension funds are large institutional investors with substantial stakes in these cases, at least on an absolute basis.⁴³¹ They therefore have "skin in the game".⁴³² They have incentives to monitor class counsel and to make sure that the case is litigated properly because of their substantial dollar investments in the target (subject to the size of their investment in the acquirer, if any).⁴³³ They are fiduciaries with access to counsel, including, in some cases, the state attorney general's office or the city counsel's office.⁴³⁴ They are comparatively sophisticated, repeat consumers of legal services with established relationships with law firms and, in many instances, portfolio-monitoring arrangements with these firms.⁴³⁵ Such portfolio monitoring may allow the funds to play the law firms against each other in negotiating the best contracts for legal representation, and securing the highest quality work product.⁴³⁶ Their motivation and relative sophistication may actually result in improved prices for the shareholders they represent.⁴³⁷ They may make better litigation decisions.⁴³⁸ They may prevent the law firms that represent the class from expending too little effort, settling the case too quickly, or underinvesting in the litigation. The law firms may also work harder to

⁴²⁹See *supra* Table 12.

⁴³⁰See MUTUAL FUNDS REGULATION AND COMPLIANCE HANDBOOK § 34:2 (West 2012 ed., database updated through 2013) (defining the SPDR 500).

⁴³¹See *supra* notes 213-14 and accompanying text.

⁴³²See *supra* notes 213-14 and accompanying text.

⁴³³See *supra* note 64.

⁴³⁴See Webber, *Plight*, *supra* note 18, at 219.

⁴³⁵See *id.*

⁴³⁶See Perino, *supra* note 114, at 385-87 (describing reductions in attorneys fees due to negotiation by public-pension fund lead plaintiffs).

⁴³⁷*Cf. id.* at 383-384, 390 (concluding the same in regards to public-pension fund participation in securities class actions).

⁴³⁸*Cf. id.* at 374.

please public-pension fund clients, given their potential to serve as repeat customers. The funds may also have the political clout or the media savvy to attract attention to the case, or to exercise other levers of power that may compel the defendants to increase the offer price. Public-pension fund litigation skill, political clout, and media savvy may induce the target board to seek a price increase from the acquirer, and may induce the acquirer to grant it.

Another potential interpretation of this result is that public-pension funds cherry-pick the best cases, that is, they obtain lead plaintiff appointments in those cases with the greatest likelihood that the final price will exceed the offer price.⁴³⁹ This could be because they select the cases with case attributes that correlate with good outcomes.⁴⁴⁰ It could also be that they select cases in which arbitrageurs will drive up the price above the initial offer price.⁴⁴¹ I cannot rule out these possibilities, but there is evidence that cuts against them.⁴⁴² First, in terms of cherry-picking the best cases, there is little overlap between the variables that predict public-pension lead plaintiffs and the variables that predict increased share price. For example, public-pension funds clearly target controlling-shareholder transactions, but litigation over such transactions does not significantly correlate with improved prices,⁴⁴³ whereas litigation with public-pension lead plaintiffs does.⁴⁴⁴ Other variables that one might associate with cherry-picking, such as the market

⁴³⁹Some research on federal securities fraud class actions suggests that public-pension funds correlate with better outcomes for shareholders, even accounting for cherry-picking. *See* Perino, *supra* note 114, at 369; *see also* Cheng et al., *supra* note 78, at 358; Choi et al., *Do Institutions Matter?*, *supra* note 117, at 892 ("[P]ublic pension[] [funds] tend[] to target both larger stakes cases and those with stronger evidence of fraud.").

⁴⁴⁰*See* Perino, *supra* note 114, at 376-77.

⁴⁴¹It is frequently the case that arbitrageurs drive the target price up after an offer is announced to somewhere above the initial target price but below the offer price, discounted by the risk that the deal will not close. *See, e.g., How Mergers and Acquisitions Affect Stock Prices*, LEARNING MKTS., <http://www.learningmarkets.com/how-mergers-and-acquisitions-affect-stock-prices/> (last visited Feb. 15, 2013). In a small number of cases arbitrageurs may drive the target price up even above the initial offer price. *Id.* How frequently this occurs is a matter of dispute. *See, e.g.,* Jan Jindra & Ralph A. Walkling, *Speculation Spreads and the Market Pricing of Proposed Acquisitions*, 10 J. CORP. FIN. 495, 501 n.9 (2004) (finding negative speculation spreads in 23% of cash tender offers from a sample of 362 deals in excess of \$10 million in 1981-1995 (which predates the entry of institutional investors into deal litigation)). Note that the Jindra and Walkling article does not address the effect of litigation on the pricing of proposed acquisitions.

⁴⁴²*See infra* notes 443-50 and accompanying text.

⁴⁴³*See supra* Table 9.

⁴⁴⁴*See supra* Table 12.

capitalization of the target (a proxy for deal size)⁴⁴⁵ and cash-for-stock deals (which trigger *Revlon* duties)⁴⁴⁶, are controlled for here. And still other variables that one might associate with cherry-picking—such as those associated with institutional lead plaintiffs generally, like low-premium deals—are simply not significantly correlated with an increase from the offer to the final price.⁴⁴⁷ Similarly, many of the same variables that would predict cherry-picking of cases would predict cherry-picking of deals in which arbitrageurs drive up the price above the offer price. The premium, the number of bidders, the presence of controlling shareholders, whether the deal is hostile or friendly, and price changes prior to the offer have all been used as controls in research on speculation spreads, as they were here.⁴⁴⁸ Yet, the result for public-pension funds persists even in the presence of these variables.⁴⁴⁹ Finally, as noted earlier, individual and small institutional lead plaintiffs with weaker cases and less experienced counsel avoid suit in Delaware because they are unlikely to obtain lead plaintiff and lead counsel appointments under the *Hirt* factors.⁴⁵⁰ Thus, the results here likely understate the correlation between public-pension lead plaintiffs and case outcomes like increased price.

Deal structure also plays an important role in increasing share price.⁴⁵¹ Here, cash-for-stock deals positively and statistically significantly correlate with improvements in the final price.⁴⁵² One possible interpretation of these results is Delaware's favorable legal

⁴⁴⁵See *supra* note 379 and accompanying text.

⁴⁴⁶See *supra* note 3 and accompanying text.

⁴⁴⁷In the case of arbitrageurs, the causation could also run the opposite way—arbitrageurs could drive up prices because they see or anticipate a public-pension fund (or its chosen law firm) litigating the case. Also, there simply may not be any correlation between public-pension-fund litigation activity and arbitrageur activity.

⁴⁴⁸See, e.g., Jindra & Walkling, *supra* note 441, at 516 tbl.6 (controlling for premium, multiple bidders, blockholders, whether the deal is hostile or friendly, and changes in price prior to the announcement of the offer, or "runup," in multivariate regressions on speculation spreads). Note that "runup" and multiple bidders were dropped from the regressions for lack of significance.

⁴⁴⁹See *id.* at 518.

⁴⁵⁰See *supra* notes 211-14 and accompanying text.

⁴⁵¹See Lawrence A. Hamermesh, *Premiums in Stock-for-Stock Mergers and Some Consequences in the Law of Director Fiduciary Duties*, 152 U. PA. L. REV., 881, 883-84 (2003) (discussing that the inability to share in gains as a reason to pay premiums in cash-for-stock, but not in stock-for-stock mergers).

⁴⁵²See *supra* Table 12.

regime for cash deals.⁴⁵³ Under *Revlon*, which applies in cash-out mergers, a board is subjected to enhanced scrutiny and is legally obligated to maximize share price.⁴⁵⁴ The *Revlon* risk faced in cash-out-mergers by the target board directly, and by the bidder board for aiding and abetting a *Revlon* breach, may explain the bump in price.⁴⁵⁵ Note that stock-for-stock deals do not correlate with such a bump.⁴⁵⁶

Finally, friendly deals correlate with improved share price.⁴⁵⁷ In friendly deals, the bidder board is also subject to suit, usually on the grounds of aiding and abetting the target board's breaches of fiduciary duty, as noted above.⁴⁵⁸ Moreover, because both boards want to consummate the deal, the acquirer may be more willing to increase its price.⁴⁵⁹ In contrast, hostile deals usually involve the bidder board in a de facto alliance with the target's shareholders against the target board.⁴⁶⁰ In such deals, shareholders are litigating to try to force the target board to accept the bidder's offer, or at least to negotiate with the bidder, so the bidder may feel less need to increase its offer.⁴⁶¹

⁴⁵³See *supra* note 278 and accompanying text. *But see* Bradley R. Aronstam & David E. Ross, *Retracing Delaware's Corporate Roots Through Recent Decisions: Corporate Foundations Remain Stable While Judicial Standards Of Review Continue To Evolve*, 12 DEL. L. REV. 1, 17 (2010) (noting a need for a "uniform standard" in mergers).

⁴⁵⁴See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180, 182 (Del. 1986) (stating that a company's board faces an enhanced duty to maximize shareholder value at sale).

⁴⁵⁵*But see* Thompson & Thomas, *supra* note 4, at 196 (finding no substantial gains for shareholders in deals subject to transactional litigation when *Revlon* duties apply, despite the popular perception that such gains exist).

⁴⁵⁶See *id.* at 147 (finding directors can negotiate a stock-for-stock deal and not trigger *Revlon* duties).

⁴⁵⁷See *supra* Table 12.

⁴⁵⁸See, e.g., *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 734-35 (Del. Ch. 1999) (evaluating claim of aiding and abetting breach of *Revlon* duties and stating elements of the claim), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000).

⁴⁵⁹*But see* Thompson & Thomas, *supra* note 4, at 206 (finding that premiums proposed for hostile deals may be substantially higher than those in the friendly deals).

⁴⁶⁰See, e.g., Gregory R. Andre, *Tender Offers for Corporate Control: A Critical Analysis and Proposals for Reform*, 12 DEL. J. CORP. L. 865, 869, 889-95 (1987) (discussing target management's desire to retain control of the corporation, often in opposition to target shareholders' desire to sell their stock at a premium over market); *see also* *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388-91 (Del. 1995) (evaluating acquiring corporation and target shareholders' claim to enjoin target board's decision to repurchase its own stock in an effort to thwart the hostile offer); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 952, 954-55 (Del. 1985) (establishing higher level of scrutiny for directors' actions in hostile bid situations because there is a greater chance directors may not act in shareholders' best interest).

⁴⁶¹See, for example, *Unocal*, 493 A.2d at 949-51, where the tender offering minority shareholder filed a complaint to challenge target board's decision to self-tender in response to

Naturally, whether the deal closes strongly predicts an increase in price.⁴⁶² For this reason, in Model Two I report results only for deals that close.⁴⁶³ Note that in this Model, only the result of interest stands—the positive and statistically significant correlation between public-pension lead plaintiffs and an increase from the offer to the final price.⁴⁶⁴ This finding provides some additional support for the contention that public-pension funds do more than just cherry-pick the best cases.⁴⁶⁵ Only the presence of these funds correlates with improved price.⁴⁶⁶

B. *Top Plaintiff Law Firm Case Characteristics*

In Table 13, I assess the case characteristics affiliated with the top plaintiff law firms by number of appearances (Model One), excluding local counsel.⁴⁶⁷ I also assess the case characteristics affiliated with the top plaintiff law firms by number of appearances and reputation (Model Two), excluding local counsel.⁴⁶⁸

the hostile tender offer. For a further example, see *Unitrin*, 651 A.2d at 1385.

⁴⁶²See, e.g., *How Mergers and Acquisitions Affect Stock Prices*, *supra* note 441.

⁴⁶³See *supra* Table 12.

⁴⁶⁴See *supra* Table 12.

⁴⁶⁵See *supra* notes 439-42 and accompanying text.

⁴⁶⁶See *supra* Table 12.

⁴⁶⁷See *infra* Table 13.

⁴⁶⁸See *infra* Table 13. These include Milberg, Wolf_Popper,_Schiffirin Barroway, Lerach Couglin, Bernstein, Liebhard, and Goodkind Labaton.

Table 13: Case Characteristics Associated with Top Plaintiff Law Firms
(Excluding Local Counsel)

	Model One	Model Two
# Complaints	0.497979 (0.000)***	0.721016 (0.000)***
Complaint Length	-0.02074 (0.246)	-0.01895 (0.302)
Friendly	1.21259 (0.0002)***	1.69 (0.000)***
TargetMCAP	-0.05944 (0.517)	0.026786 (0.94)
Post-Cox	-0.32289 (0.382)	-1.30303 (0.001)***

Binary logistic regression with dependent variable dummy for top 5 plaintiff firm. This data is Pre-Lehman and P-values are indicated in parentheses. *** = 1% confidence; ** = 5% confidence; * = 10% confidence. Cash-for-stock was dropped as a control variable here because it was never significant in any model pertaining to plaintiff law firms. The dependent variable for Models One was the top plaintiff law firms by number of appearances, excluding Delaware counsel. The dependent variable for Model Two included the top plaintiff law firms by number of appearances and by reputation.

Perhaps the most notable result in Table 13 is that the market capitalization of the target does not significantly correlate with a top plaintiff law firm.⁴⁶⁹ Contrary to popular belief, the most active plaintiff law firms do not simply bring suit in the largest deals.⁴⁷⁰ Of course, they do not avoid them either.⁴⁷¹ And before congratulating these firms for their perspicacity in case selection, it is troubling to observe that such firms negatively correlate with complaint length—they write shorter, less thoughtful complaints.⁴⁷² These results are statistically significant for firms by reputation, and just shy of significant for firms by number of

⁴⁶⁹See *supra* Table 13.

⁴⁷⁰See *supra* Table 13.

⁴⁷¹See *supra* Table 13.

⁴⁷²See *supra* Table 13.

appearances (though I note that the coefficients here are negative as well).⁴⁷³ This suggests that the top players are quick filers looking to grab a case, and not engaging in thoughtful case selection. But there is an important caveat to this point. The result flips when it is interacted with an institutional lead plaintiff.⁴⁷⁴ Thus, in cases in which there is both an institutional lead plaintiff and a top plaintiff law firm, whether it be by number of appearances or reputation, complaints are longer.⁴⁷⁵ Thus, the top plaintiff law firms write longer complaints for their better clients (or better cases). In general, though, these firms often sue with individual lead plaintiffs.⁴⁷⁶ In unreported regressions, I find that there is no statistically significant correlation between top law firms and institutional lead plaintiffs generally, or any particular type of institution.⁴⁷⁷

Finally, the post-*Cox* variable represents cases filed in Delaware after the Delaware Court of Chancery's decision in *In re Cox Communications Inc., Shareholders Litigation*.⁴⁷⁸ In *Cox*, then-Vice Chancellor Strine granted the plaintiffs' lawyers only one-quarter of the \$5 million in requested fees, even though the defendants had consented to the fees.⁴⁷⁹ The case was viewed as the first in a series of fee-cutting cases that some sources have cited for the tendency of some firms to bring mergers-and-acquisitions cases outside of Delaware.⁴⁸⁰ Although this *Cox* variable was not significant for the most frequent lead counsel in Delaware mergers-and-acquisitions cases, it does negatively correlate with elite firms, suggesting that these firms may have taken some of their business elsewhere in the aftermath of *Cox*.⁴⁸¹

⁴⁷³See *supra* Table 13.

⁴⁷⁴See *supra* Table 13.

⁴⁷⁵Pearson correlation between institutional lead plaintiffs interacted with top plaintiff law firm (appearances) and complaint length is 0.117 with a p-value of 0.082; Pearson correlation between institutional lead plaintiffs interacted with top plaintiff law firm (reputation) and complaint length is even stronger, with a coefficient of 0.133 and a p-value of 0.048.

⁴⁷⁶See *supra* Table 13.

⁴⁷⁷See *supra* Table 13.

⁴⁷⁸*In re Cox Commc'ns Inc., S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005).

⁴⁷⁹*Id.* at 648.

⁴⁸⁰Armour, Black & Cheffins, *Losing*, *supra* note 216, at 648 (hypothesizing that *Cox* is a potential cause of certain law firms bringing mergers-and-acquisitions suits outside of Delaware).

⁴⁸¹See *supra* Table 13; see also Armour, Black & Cheffins, *Losing*, *supra* note 216, at 648.

C. Attorneys' Fees

Table 14 below demonstrates that public-pension funds negatively correlate with attorneys' fees granted.⁴⁸² The results are statistically significant in both models, which vary only by whether one includes the most frequent law firm participants or just elite law firm participants.⁴⁸³ The regressions control for other factors that might impact attorneys' fees, including relevant deal characteristics, the target's market capitalization, the overall market movement, the change in the deal price subsequent to the offer, if any, and attorney hours worked.⁴⁸⁴

⁴⁸²*See infra* Table 14.

⁴⁸³*See infra* Table 14. For elite law firms, see *supra* note 468.

⁴⁸⁴*See infra* Table 14.

Table 14: Attorneys' Fees (Natural Log)

	Model One	Model Two
Public-Pension Dummy	-0.14896 (0.018)**	-0.13267 (0.035)**
Elite Plaintiffs Firms	-0.06704 (0.091)*	
Top 5 Plaintiff Law Firms		-0.05896 (0.145)
Friendly	0.05239 (0.175)	0.05112 (0.189)
Cash-for-Stock	-0.02896 (0.550)	-0.02992 (0.540)
Target Market Cap	0.0042 (0.727)	0.00369 (0.761)
SPDR Change from Offer to Final	0.1494 (0.255)	0.1677 (0.226)
Deal Close	-0.01202 (0.838)	-0.01965 (0.742)
Change from Offer to Final Price	-0.05041 (0.601)	-0.06551 (0.497)
Attorney Hours	1.51E-05 (0.169)	1.13E-05 (0.309)
R-squared	24.2%	23%

OLS regression with dependent variable the natural log of granted attorneys' fees and expenses. *** = 1% confidence; ** = 5% confidence; * = 10% confidence.

These results are consistent with the idea that public-pension funds should be able to bargain for lower attorneys' fees, for several reasons.⁴⁸⁵ First, because of portfolio monitoring by multiple law firms, the funds are well positioned to force the firms to compete against one another to

⁴⁸⁵See, e.g., Perino, *supra* note 114, at 384 ("Public pensions that are sophisticated repeat players should be able to bargain for lower attorney fees than other types of lead plaintiffs. Plaintiff's attorneys should also be willing to compete for public pension fund business as a way to increase the likelihood of becoming lead counsel in large and lucrative class actions.").

win the lead counsel role.⁴⁸⁶ They will obtain bids from multiple law firms to represent them in the case.⁴⁸⁷ Law firms may be willing to cut their fees for public-pension-fund clients not only because the firms face competition, but because the public-pension funds are attractive clients with large holdings who may become repeat players in litigation.⁴⁸⁸ The public-pension funds may also be able to secure lead plaintiff appointments in larger, higher-stakes cases where the potential fee awards may be greater in absolute terms, even if they are smaller in relative terms.⁴⁸⁹ Trustees who serve on public-pension-funds boards may also serve as a valuable source of law firm referrals to other public-pension trustees with whom they interact at professional and educational conferences.⁴⁹⁰

As with the finding in Table 12 for the change from offer to final price, only public-pension funds correlate with the outcome of interest, in this instance, lower attorneys' fees.⁴⁹¹ The results in Tables 12 and 14 set public-pension funds apart from other institutional investors.⁴⁹² As discussed more fully below, while I find some evidence that institutional investors generally appear to be selecting and bringing the cases that, *ex ante*, we would want them to, public-pension funds alone correlate with an improved outcome for shareholders in these cases.⁴⁹³

VII. CONCLUSION

This Article demonstrates that institutions have accepted Delaware's invitation to serve as lead plaintiffs in transactional class and derivative actions. It shows that public-pension funds and labor-union funds have become the leading institutional participants in these cases, and that public-pension funds in particular correlate with the outcomes of greatest interest to shareholders: an increase from the offer to the final price, and lower attorneys' fees. Even taking a restrained and skeptical view of the evidence presented here, one would still conclude that

⁴⁸⁶See Rubenstein, *supra* note 191, at 220 ("MissPERS claims it is able to play each [monitoring firm] off against the other in terms of determining the fee arrangement.").

⁴⁸⁷See *id.*

⁴⁸⁸See *id.* at 221.

⁴⁸⁹See *id.*

⁴⁹⁰See Rubenstein, *supra* note 191, at 221.

⁴⁹¹See *supra* Table 12.

⁴⁹²See *supra* Tables 12, 14.

⁴⁹³See discussion *infra* Part VII.

institutional investors are, if little else, cherry-picking the best cases, at least when their case selection is viewed *ex ante*. They target larger, cash-for-stock, low-premium deals, and they correlate with longer complaints, which reflect greater attorney effort. As noted earlier, public-pension funds target cases involving controlling shareholders. From this *ex ante* perspective, these are the cases one would likely cherry-pick. Larger deals mean more money at stake for the class, for the lead plaintiff, and for the attorneys. Cash-for-stock deals trigger *Revlon* duties that are favorable to plaintiff shareholders. Lower-premium deals are more vulnerable to attack because they look like the acquirer is underpaying for the target. And controlling-shareholder transactions trigger acute concerns about exploitation of inside information by company insiders to favorably time an acquisition at the expense of minority shareholders. Thus, institutions target cases with more dollars at stake, less attractive deal characteristics, and legal remedies available to redress the transactions' shortcomings—the same cases any rational plaintiff would target.

Even if we conclude that the funds cherry-pick the best cases and add no other value, this may be enough to justify the policy favoring the selection of institutional lead plaintiffs, at least insofar as they cherry-pick the best cases, and not merely deals in which arbitrageurs would drive up the price anyway. If nothing else, under the cherry-picking theory, institutional investors serve as an early screen of case quality. Simply by agreeing to serve as a lead plaintiff, they send a signal of case quality to the market, to the defendants, to the court, and to the class of shareholders that they represent. This point is brought into relief when one recalls that the data could have come out differently. For example, it is possible that there could have been no correlation between case characteristics and institutional lead plaintiffs, suggesting haphazard and thoughtless case selection, or case selection that correlated only with the interests of attorneys, not shareholders.

But some of the evidence suggests that institutional investors do more than cherry-pick. Even accounting for deal characteristics associated with cherry-picking of either cases or deals in which arbitrageurs would drive up the price, public-pension funds correlate with an improvement from the offer price to the final price. As discussed above, this could be because public-pension funds are superior litigators, or that defendants are more willing to capitulate to their demands even if they are not actually better litigators. Moreover, this Article presents evidence that institutional investors, particularly public-pension funds, exercise independent judgment both when selecting and when

monitoring their lawyers. Most importantly, public-pension funds correlate with lower attorneys' fees, suggesting more active monitoring of class counsel.

At a minimum, then, Delaware's policy favoring the selection of institutional-investor lead plaintiffs appears to be working, at least because institutions do seem to cherry-pick the best cases, which is itself of value as an early indicator of case quality. This Article also offers some empirical support for the view that public-pension funds, in particular, improve outcomes for shareholders for reasons that may go beyond cherry-picking and that are at least partially attributable to the funds themselves: their litigation skills, their reputation, their monitoring of class counsel, or all three.