

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.<sup>304</sup> Some of these firms are significant players in securities fraud class actions, and some are not.<sup>305</sup> The legal issues and the economics of transactional and securities class actions differ substantially from one another, as discussed earlier in Part III.A,<sup>306</sup> 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,<sup>307</sup> 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.<sup>308</sup> 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.<sup>309</sup> Unlike traditional law firms, these firms need not create a new business model to move from one field of litigation to another.<sup>310</sup> And as for the second point, firms that engage in

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<sup>304</sup>See *infra* Table 7.

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

<sup>306</sup>See discussion *supra* Part III.A.

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

<sup>308</sup>See 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).

<sup>309</sup>See 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).

<sup>310</sup>See *id.* at 291.

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.<sup>311</sup> 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.<sup>312</sup>

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

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

<sup>312</sup>*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).

<sup>313</sup>See discussion *supra* Part V.A.

Table 7: Most Frequent Plaintiff Law Firm Participant<sup>314</sup>

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
Schiffrin & 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.

<sup>314</sup>An 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.<sup>315</sup>

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.<sup>316</sup> This event is typically viewed as the trigger of the profound financial crisis of 2008.<sup>317</sup> It wreaked tremendous economic havoc which manifested itself in mergers-and-acquisitions litigation as it did almost everywhere else.<sup>318</sup> 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.<sup>319</sup> Moreover, as discussed in Part IV above, all institutions began litigating more deals post-Lehman.<sup>320</sup> 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.

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

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

<sup>317</sup>See, 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).

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

<sup>319</sup>*Id.*

<sup>320</sup>See *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.<sup>321</sup> 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.

<sup>321</sup> See *infra* Table 8.

First, complaint length correlates with institutional lead plaintiffs.<sup>322</sup> To place this variable in context, I note that the baseline complaints in these cases are often short.<sup>323</sup> 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.<sup>324</sup> These complaints contain broad allegations of misconduct and generic pleas to increase disclosure, open up the bidding process, and raise the offer price.<sup>325</sup> 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.<sup>326</sup> The complaint length reflects this deeper investigation of the case made by the institutions and the law firms that they select to represent them.<sup>327</sup> Complaint length may also reflect a competitive environment for lead plaintiff selection. Delaware courts consider the quality of the complaint in lead plaintiff selection.<sup>328</sup> 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.

Not surprisingly, the number of complaints correlates with institutional lead plaintiffs.<sup>329</sup> It may be that the number of complaints proxies for case quality, with more complaints correlating with poor deal

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<sup>322</sup> See *supra* Table 8.

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

<sup>324</sup> In some cases, the plaintiff's gender may not even be identified correctly. See discussion *infra* pp. 964-65 (discussing "cut and paste" complaints).

<sup>325</sup> See, 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).

<sup>326</sup> See, 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).

<sup>327</sup> Interestingly, 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.

<sup>328</sup> See, 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).

<sup>329</sup> See *supra* Table 8.

terms and unhappy investors bringing suit independently of one another.<sup>330</sup> 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.<sup>331</sup> In particularly large, high-profile cases, institutions may compete to assume the lead role.<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup> One might expect that 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

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<sup>330</sup>See 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.").

<sup>331</sup>John 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.").

<sup>332</sup>Note 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.

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

<sup>334</sup>See 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).

<sup>335</sup>See, 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, 60-61 (1985-86) (discussing the functioning of an offer premium).

content with coercive deal terms if they are well-compensated for it.<sup>336</sup> 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.<sup>337</sup>

In Table 8, I further subdivide the premium data using a dummy variable for deals whose initial offers constitute a less-than-20% premium.<sup>338</sup> 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.<sup>339</sup> Here, the results are significant at the 5% confidence level.<sup>340</sup> Deals with a less-than-20% offer premium positively correlate with institutional lead plaintiffs, as expected.<sup>341</sup> Half of all cases with less-than-20% offer premiums are led by institutions (56/113).<sup>342</sup> In contrast, institutions lead just 32% of more-than-20% offer-premium deals (36/111).<sup>343</sup>

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.<sup>344</sup> Go-Shop provisions encourage the target board to shop the company to other potential higher bidders, usually within some specified time frame.<sup>345</sup> 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 highest price for shareholders.<sup>346</sup> Alternatively, a Go-Shop provision may simply be an indicator of an attractive deal for shareholders.<sup>347</sup> Its presence may be a measure of the target and the bidder's confidence in

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

<sup>337</sup>See *supra* Table 8.

<sup>338</sup>See *supra* Table 8.

<sup>339</sup>Aaron 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.").

<sup>340</sup>See *supra* Table 8.

<sup>341</sup>See *supra* Table 8.

<sup>342</sup>See *supra* Table 8.

<sup>343</sup>See *supra* Table 8.

<sup>344</sup>See *supra* Table 8.

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

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

<sup>347</sup>See 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).

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.<sup>348</sup> 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.<sup>349</sup>

In Models Two and Three, the market capitalization of the target positively correlates with institutional lead plaintiffs.<sup>350</sup> This supports the contention that institutional investors target larger deals.<sup>351</sup> 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.<sup>352</sup>

Cash-for-stock deals also positively correlate with institutional lead plaintiffs.<sup>353</sup> Most deals are cash-for-stock deals.<sup>354</sup> But the fact that cash-for-stock deals are particularly targeted by institutional investors requires explanation. One possible cause is *Revlon*.<sup>355</sup> *Revlon* creates a favorable legal regime for plaintiff shareholders, because in cash-out

<sup>348</sup>See 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.").

<sup>349</sup>See *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.").

<sup>350</sup>See *supra* Table 8.

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

<sup>352</sup>See *supra* Table 8.

<sup>353</sup>See *supra* Table 8.

<sup>354</sup>See 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).

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

mergers directors face enhanced scrutiny and a duty to maximize the share price.<sup>356</sup> In contrast, the legal regime in stock-for-stock deals is more complex.<sup>357</sup> 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.<sup>358</sup> 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.<sup>359</sup> Yet, it is also worth noting that Thomas and Thompson find no improvement in outcomes in *Revlon* cases versus other cases.<sup>360</sup> 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.<sup>361</sup> 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.<sup>362</sup> Minority shareholders are at their most vulnerable in such transactions.<sup>363</sup> I discuss this point further in the next Section.<sup>364</sup>

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<sup>356</sup>*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).

<sup>357</sup>*See 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).

<sup>358</sup>*See id.* at 1289-90.

<sup>359</sup>*See 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).

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

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

<sup>362</sup>*See infra* Table 9.

<sup>363</sup>Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978) (stating that controlling-shareholder transactions are coercive of minority stockholders because the majority can require the minority to accept terms through majority rule).

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

## 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.<sup>365</sup> As noted in Table 10 below, the presence of a controlling shareholder is a statistically significant predictor of a public-pension lead plaintiff.<sup>366</sup> The likelihood of a public-pension lead plaintiff increases dramatically in the presence of a controlling shareholder.<sup>367</sup> There are a number of reasons why this might be the case.

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<sup>365</sup>See *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).

<sup>366</sup>See *infra* Table 10.

<sup>367</sup>See *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.<sup>368</sup> In the typical acquisition, the acquirer is a third party.<sup>369</sup> But in a controlling-shareholder transaction, the acquirer is an insider.<sup>370</sup> Controlling shareholders play a substantial role in influencing the composition of the target's board of directors, thereby undermining the board's ability to independently assess price and deal terms.<sup>371</sup> Controlling shareholders

<sup>368</sup>See Brudney & Chirelstein, *supra* note 363, at 1357.

<sup>369</sup>See, 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).

<sup>370</sup>See, 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).

<sup>371</sup>Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 9-10 (2005) (discussing

also have<sup>372</sup> access to inside information.<sup>372</sup> 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.<sup>373</sup> 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.<sup>374</sup>

This combination of the strong potential for exploitation of minority investors,<sup>375</sup> and the attendant legal protections designed to thwart such exploitation,<sup>376</sup> 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.<sup>377</sup> Below, I will revisit this question of whether public-pension funds are the best litigators, or whether they just cherry-pick the best cases.<sup>378</sup>

As with institutions generally, target-market capitalization is a significant predictor of a public-pension lead plaintiff.<sup>379</sup> But this factor correlates much more strongly with public-pension lead plaintiffs than it does with institutions generally.<sup>380</sup> The coefficients for the target-market

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lack of independent assessment by target's board where acquirer controls selection of target's board).

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

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

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

<sup>375</sup>See *supra* note 363 and accompanying text.

<sup>376</sup>See *supra* Part III.B.

<sup>377</sup>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).

<sup>378</sup>See *infra* Part VI.A.

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

<sup>380</sup>Compare *supra* Table 8 (showing data for institutions generally), with *supra* Table

capitalization variable are more than three times larger for public-pension funds than for institutions generally.<sup>381</sup> Moreover, the results increase in statistical significance from 5% confidence for institutions generally to 1% confidence for public-pension funds.<sup>382</sup> 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.<sup>383</sup> 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.<sup>384</sup> It is clear that public-pension funds save their litigation ammunition for the largest targets, though size alone is not the only factor.<sup>385</sup>

Like institutions generally, the length of the complaint also increases the probability of involvement by a public-pension lead plaintiff.<sup>386</sup> 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

9 (showing data for public-pension lead plaintiffs).

<sup>381</sup> Compare *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).

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

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

<sup>384</sup> See *supra* Table 9A.

<sup>385</sup> See *supra* Table 9A.

<sup>386</sup> Compare *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).

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.<sup>387</sup> As noted earlier, complaint length is probative of lead plaintiff and lead counsel effort.<sup>388</sup> 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.<sup>389</sup> 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.<sup>390</sup> 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.<sup>391</sup> In contrast, longer complaints tend to be written by lead counsel representing institutional investors who have a realistic chance of winning the appointment.<sup>392</sup> As noted above, Delaware courts consider the quality of the complaint in making this selection.<sup>393</sup>

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

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.<sup>397</sup> I find some weak evidence that they correlate with the

<sup>387</sup>See *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).

<sup>388</sup>See *supra* notes 326-27 and accompanying text.

<sup>389</sup>See *supra* notes 324-25 and accompanying text.

<sup>390</sup>Choi 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).

<sup>391</sup>See Silver & Dinkin, *supra* note 390, at 478.

<sup>392</sup>See *supra* notes 326-27 and accompanying text.

<sup>393</sup>See *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.

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

<sup>395</sup>See *infra* Table 12.

<sup>396</sup>See *supra* Table 9.

<sup>397</sup>Compare *supra* Table 8, with *supra* Table 9.

number of lead plaintiffs, as evidenced in Table 9 above.<sup>398</sup> 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.<sup>399</sup> Stephen Choi finds some evidence for this kind of coalition building by public-pension funds in securities fraud class actions.<sup>400</sup> 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.<sup>401</sup> They may aggregate their stakes in the target to increase their probability of being selected as lead plaintiffs.<sup>402</sup> 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 aggregation may be facilitated by portfolio monitoring, discussed earlier.<sup>403</sup> 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.<sup>404</sup> 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.<sup>405</sup> 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

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<sup>398</sup> See *supra* Table 9.

<sup>399</sup> See Choi, *Motions*, *supra* note 208, at 211-12.

<sup>400</sup> 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).

<sup>401</sup> 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).

<sup>402</sup> 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.").

<sup>403</sup> See *supra* note 311 and accompanying text.

<sup>404</sup> See Webber, *Plight*, *supra* note 18, at 167.

<sup>405</sup> See 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).

role against such competition.<sup>406</sup> 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.<sup>407</sup>

It is commonly known that public-pension funds actively engage in corporate-governance-reform efforts.<sup>408</sup> 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.

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<sup>406</sup>See 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).

<sup>407</sup>See *infra* notes 429-38 and accompanying text.

<sup>408</sup>See 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.<sup>409</sup> As noted earlier, institutional lead plaintiffs (except public-pension funds) correlate with cash-for-stock deals.<sup>410</sup> But the correlation between labor-union funds and cash-for-stock transactions is far stronger than it is for other institutions.<sup>411</sup> 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.<sup>412</sup> As noted earlier, cash-for-stock deals deprive investors of future profits of the target.<sup>413</sup> The potential for exploitation of such investors, and the accompanying legal protections offered to such

<sup>409</sup> See *supra* Table 10 (Cash-for-Stock).

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

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

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

<sup>413</sup> See *supra* notes 353-60 and accompanying text.

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

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.<sup>415</sup> Public-pension funds correlate with the former but not the latter,<sup>416</sup> though they do correspond with more lead plaintiffs, for the reasons discussed above in Part IV.A.<sup>417</sup> Labor-union funds correlate with more complaints, but not longer ones.<sup>418</sup> 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.<sup>419</sup> Labor-union funds also target larger cases in which they have more at stake.<sup>420</sup>

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.<sup>421</sup> As discussed above, mutual funds face several conflicts in serving as lead plaintiffs that other institutional types do not face.<sup>422</sup> These conflicts render them passive participants in these cases.<sup>423</sup>

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<sup>414</sup>See *supra* note 359 and accompanying text.

<sup>415</sup>See discussion *supra* Part V.A.; *supra* Table 8.

<sup>416</sup>See *supra* Table 9.

<sup>417</sup>See discussion *supra* Part IV.A.

<sup>418</sup>See *supra* Table 10.

<sup>419</sup>See *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).

<sup>420</sup>See *supra* Table 10.

<sup>421</sup>See *supra* text accompanying notes 218-19, 224.

<sup>422</sup>See discussion *supra* Part IV.A.

<sup>423</sup>See *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.<sup>424</sup> Unlike other institutions, market capitalization of the target is not significant,<sup>425</sup> suggesting that these funds target smaller deals. Nor do deal characteristics other than premium and Go-Shops seem to matter.<sup>426</sup> Finally, private non-mutual funds do not seem to make the effort to write longer complaints.<sup>427</sup>

## 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.

<sup>424</sup>See *supra* Table 11.

<sup>425</sup>Compare *supra* Table 9A, and *supra* Table 10, with *supra* Table 11.

<sup>426</sup>See *supra* Table 11.

<sup>427</sup>See *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 Price<sup>428</sup>

	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.

<sup>428</sup>For 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.<sup>429</sup> 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.<sup>430</sup> 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.<sup>431</sup> They therefore have "skin in the game".<sup>432</sup> 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).<sup>433</sup> They are fiduciaries with access to counsel, including, in some cases, the state attorney general's office or the city counsel's office.<sup>434</sup> 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.<sup>435</sup> 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.<sup>436</sup> Their motivation and relative sophistication may actually result in improved prices for the shareholders they represent.<sup>437</sup> They may make better litigation decisions.<sup>438</sup> 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 please public-pension fund clients, given their potential to serve as repeat

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<sup>429</sup>See *supra* Table 12.

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

<sup>431</sup>See *supra* notes 213-14 and accompanying text.

<sup>432</sup>See *supra* notes 213-14 and accompanying text.

<sup>433</sup>See *supra* note 64.

<sup>434</sup>See Webber, *Plight*, *supra* note 18, at 219.

<sup>435</sup>See *id.*

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

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

<sup>438</sup>*Cf. id.* at 374.

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.<sup>439</sup> This could be because they select the cases with case attributes that correlate with good outcomes.<sup>440</sup> It could also be that they select cases in which arbitrageurs will drive up the price above the initial offer price.<sup>441</sup> I cannot rule out these possibilities, but there is evidence that cuts against them.<sup>442</sup> 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,<sup>443</sup> whereas litigation with public-pension lead plaintiffs does.<sup>444</sup> Other variables that one might associate with cherry-picking, such as the market capitalization of the target (a proxy for deal size)<sup>445</sup> and cash-for-stock

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<sup>439</sup>Some 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.").

<sup>440</sup>See Perino, *supra* note 114, at 376-77.

<sup>441</sup>It 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.

<sup>442</sup>See *infra* notes 443-50 and accompanying text.

<sup>443</sup>See *supra* Table 9.

<sup>444</sup>See *supra* Table 12.

<sup>445</sup>See *supra* note 379 and accompanying text.

deals (which trigger *Revlon* duties)<sup>446</sup>, 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.<sup>447</sup> 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.<sup>448</sup> Yet, the result for public-pension funds persists even in the presence of these variables.<sup>449</sup> 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.<sup>450</sup> 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.<sup>451</sup> Here, cash-for-stock deals positively and statistically significantly correlate with improvements in the final price.<sup>452</sup> One possible interpretation of these results is Delaware's favorable legal regime for cash deals.<sup>453</sup> Under *Revlon*, which applies in cash-out

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<sup>446</sup>See *supra* note 3 and accompanying text.

<sup>447</sup>In 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.

<sup>448</sup>See, 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.

<sup>449</sup>See *id.* at 518.

<sup>450</sup>See *supra* notes 211-14 and accompanying text.

<sup>451</sup>See 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).

<sup>452</sup>See *supra* Table 12.

<sup>453</sup>See *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).

mergers, a board is subjected to enhanced scrutiny and is legally obligated to maximize share price.<sup>454</sup> 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.<sup>455</sup> Note that stock-for-stock deals do not correlate with such a bump.<sup>456</sup>

Finally, friendly deals correlate with improved share price.<sup>457</sup> 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.<sup>458</sup> Moreover, because both boards want to consummate the deal, the acquirer may be more willing to increase its price.<sup>459</sup> In contrast, hostile deals usually involve the bidder board in a de facto alliance with the target's shareholders against the target board.<sup>460</sup> 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.<sup>461</sup>

Naturally, whether the deal closes strongly predicts an increase in price.<sup>462</sup> For this reason, in Model Two I report results only for deals that

<sup>454</sup>See *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).

<sup>455</sup>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).

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

<sup>457</sup>See *supra* Table 12.

<sup>458</sup>See, 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).

<sup>459</sup>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).

<sup>460</sup>See, 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).

<sup>461</sup>See, 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 the hostile tender offer. For a further example, see *Unitrin*, 651 A.2d at 1385.

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

close.<sup>463</sup> 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.<sup>464</sup> This finding provides some additional support for the contention that public-pension funds do more than just cherry-pick the best cases.<sup>465</sup> Only the presence of these funds correlates with improved price.<sup>466</sup>

### 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.<sup>467</sup> I also assess the case characteristics affiliated with the top plaintiff law firms by number of appearances and reputation (Model Two), excluding local counsel.<sup>468</sup>

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%

<sup>463</sup>See *supra* Table 12.

<sup>464</sup>See *supra* Table 12.

<sup>465</sup>See *supra* notes 439-42 and accompanying text.

<sup>466</sup>See *supra* Table 12.

<sup>467</sup>See *infra* Table 13.

<sup>468</sup>See *infra* Table 13. These include Milberg, Wolf\_Popper, Schiffrin Barroway, Lerach Couglin, Bernstein, Liebhard, and Goodkind Labaton.

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.<sup>469</sup> Contrary to popular belief, the most active plaintiff law firms do not simply bring suit in the largest deals.<sup>470</sup> Of course, they do not avoid them either.<sup>471</sup> 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.<sup>472</sup> These results are statistically significant for firms by reputation, and just shy of significant for firms by number of appearances (though I note that the coefficients here are negative as well).<sup>473</sup> 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.<sup>474</sup> 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.<sup>475</sup> 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.<sup>476</sup> 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.<sup>477</sup>

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<sup>469</sup> See *supra* Table 13.

<sup>470</sup> See *supra* Table 13.

<sup>471</sup> See *supra* Table 13.

<sup>472</sup> See *supra* Table 13.

<sup>473</sup> See *supra* Table 13.

<sup>474</sup> See *supra* Table 13.

<sup>475</sup> Pearson 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.

<sup>476</sup> See *supra* Table 13.

<sup>477</sup> See *supra* Table 13.

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*.<sup>478</sup> 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.<sup>479</sup> 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.<sup>480</sup> 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*.<sup>481</sup>

### C. Attorneys' Fees

Table 14 below demonstrates that public-pension funds negatively correlate with attorneys' fees granted.<sup>482</sup> 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.<sup>483</sup> 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.<sup>484</sup>

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

<sup>479</sup>*Id.* at 648.

<sup>480</sup> Armour, 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).

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

<sup>482</sup> *See infra* Table 14.

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

<sup>484</sup> *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.<sup>485</sup> First, because of portfolio monitoring by multiple law firms, the funds are well positioned to force the firms to compete against one another to win the lead counsel role.<sup>486</sup> They will obtain bids from multiple law

<sup>485</sup> See, 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.").

<sup>486</sup> See 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.").

firms to represent them in the case.<sup>487</sup> 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.<sup>488</sup> 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.<sup>489</sup> 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.<sup>490</sup>

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.<sup>491</sup> The results in Tables 12 and 14 set public-pension funds apart from other institutional investors.<sup>492</sup> 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.<sup>493</sup>

## 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 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,

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<sup>487</sup> *See id.*

<sup>488</sup> *See id.* at 221.

<sup>489</sup> *See id.*

<sup>490</sup> *See* Rubenstein, *supra* note 191, at 221.

<sup>491</sup> *See supra* Table 12.

<sup>492</sup> *See supra* Tables 12, 14.

<sup>493</sup> *See* discussion *infra* Part VII.

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.