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

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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-for-stock, the market capitalization of the target, and the presence of "Go-Shop" provisions (which negatively correlate with institutional lead

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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 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

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[1]*See, 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").

[2]*See* 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.").

[4]*See* 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).

[5]*Compare* Daines & Koumrian, *Merger Lawsuits*, *supra* note 1 (noting that while 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.").

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 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]

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[6]*See* 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.").

[7]*See* 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.").

[8]*See 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).

[9]*See infra* pp. 935-36.

[10]*See infra* Part V.

[11]*See* 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.

[12]Elliot 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

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

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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.").

[16] 15 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*].

[19] Some 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 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

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-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.

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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. 926-28.

[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. 982-85.

[26] *See* discussion *infra* Part V.B.

[27] *See infra* pp. 961-62.

[28] *See infra* Part VI.A, C.

[29] *See infra* Table 2.

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 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' fees[38] is also particularly important.

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[30] *See infra* Part III.

[31] *See* 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))).

[32] *See* 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).

[33] *See infra* at III.B.

[34] *See infra* at III.B.

[35] *See infra* at III.B.

[36] *See infra* at III.B.

[37] *See infra* Part VI.A.

[38] *See infra* Part VI.C.

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]

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[39] *See infra* Part II.
[40] *See infra* Part III.
[41] *See infra* Part IV.
[42] *See infra* Part V.
[43] *See infra* Part VI.
[44] *See 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

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[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 had a large enough stake in the outcome to be incentivized to monitor

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[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.*

[55] *See* 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).

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

[57] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

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

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

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[59]*See 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).

[60]*See* 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.

[64]*See* 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 benefits to its own board members, such as favorable publicity for a

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[65]*See 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).

[66]*See id.*

[67]*See* 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 . . . .").

[68]Webber, *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).

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

[70]*Id.*

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

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

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 because institutional investors have strong economic and legal incentives not to take a lead plaintiff role representing a shareholder class that is

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[73]*See 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.").

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

[75]*See 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).

[76]*See* 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).

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

[78]One 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).

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 ownership and control generates agency costs, creating managerial interests that are distinct from those of the shareholders.[86] Delaware law

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

[80]*See 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).

[81]*See supra* text accompanying note 30.

[82]*See* 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).

[83]*See 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).

[84]*See supra* Part VII.

[85]*See* 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 managerial performance).

[86]*See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND

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]

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).

[87]*See* 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).

[88]*See* 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).

[89]*See* 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).

[90]*See* 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, 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).

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 derivative actions to enforce these rights against recalcitrant boards or managers.[97] Such private rights of action should reduce managerial

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[91]*See* 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.

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

[93]*See 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.").

[94]*See* 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*.").

[95]493 A.2d at 955.

[96]506 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.").

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

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 utilized a nationwide dataset and reported that, between 2005-2011, there was a sharp increase in the percentage of transactions valued at more

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[98] *See* 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).

[99] *Compare* 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).

[100] ROBERT 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_MandA_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: Disclosures Away From Obtaining Clarity in the M&A Context*, 38 DEL. J. CORP. L. 595, 619-25 (2013) (discussing increasing disclosures in Delaware).

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 Perino found that, federal securities fraud class action cases with public-pension lead plaintiffs have larger investor recoveries and significantly

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[104]Matthew 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.

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

[106]*Id.* at 1265.

[107]*Id.*

[108]*Id.* at 1264.

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

[110]*Id.* at 1264-65.

[111]*See* discussion *infra* Part IV.

[112]*See* discussion *infra* Part V.

[113]*See* discussion *infra* Part VII.

[114]*See generally* Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. EMPIRICAL LEGAL STUD. 368, 369-70 (2012).

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 fraud class actions led by institutional lead plaintiffs—and public-pension funds in particular—often correlate with the presence of a

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[115] *Id.* at 369.

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

[117] *See* 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).

[118] *See* 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).

[119] *See* 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.

[120] *See supra* note 19.

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

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[121]*See, 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.").

[122]*See* 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).

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

[124]*See, 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).

[125]*See* 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).

[126]*See* 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).

[127]*See, 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 actions . . . .").

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

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[128]*See* discussion *supra* Part IV.A.

[129]*See, 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.").

[130]*Compare* 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).

[131]*See supra* note 19.

[132]*See 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).

[133]*See* 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.

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

[135]*See* 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)).

[136]*See, 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)).

[137]*See 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)).

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

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[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).

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

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

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[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 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

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] 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

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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 & Tjomme 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).

[164]*See id.* at 202.

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 coheres best with *ex post*/"defensive" shareholder activism, in which shareholders with a pre-existing stake in the target company bring suit.[173]

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

[166]*See* 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).

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

[168]*See id.*

[169]*See 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).

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

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

[172]*See id.*

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

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

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[174] *See supra* Part IV.A.

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

[176] *See, 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).

[177] *See id.*

[178] *See infra* Table 1.

[179] *See infra* Table 1.

[180] *See infra* Table 1.

[181] *See infra* p. 956.

[182] *See infra* p. 956.

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

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[183] *See infra* Table 1.
[184] *See infra* Table 1.
[185] *See infra* Table 1.
[186] Figures for 2003 are for November and December alone.
[187] *See infra* Table 2.
[188] *See infra* Table 2.

Table 2: Number of Cases With At Least One Institutional Lead Plaintiff Type by Year[189]

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 exposure that they may qualify for lead plaintiff status.[193] Once notified of the fraud or suspicious transaction, institutions typically issue a

[189]Note 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.

[190]Figures for 2003 are for November and December alone.

[191]*See* 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 . . . .").

[192]*See id.* at 219.

[193]*See, 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.").

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]

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

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[194] *See 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.").

[195] *See* 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).

[196] *See* 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).

[197] *See id.*

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

[199] *See, 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 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).

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 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

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[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 Petruno, *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.*

[205] *See infra* Tables 12, 14.

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 funds[208]—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, 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

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[206] *See* 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).

[207] *Compare 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.").

[208] *See* 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%).

[209] *See supra* Table 2.

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

[211] *See 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).

[212] *See* Coyne v. Catalyst Health Solutions, 2012 WL 2052731, at *1 (Del. Ch. May 25, 2012) (citing Hirt v. U.S. Timberlands Serv. Co., 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002)) (according "great weight" to the relative economic stakes of the candidates for lead plaintiff in the outcome of the suit).

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, 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

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[213] *See 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).

[214] *See, 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.").

[215] My 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.

[216] *See, 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).

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 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]

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

[218]*See supra* Table 2.

[219]*See supra* Table 2.

[220]*See* discussion *supra* Part III.B.

[221]*Compare* 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).

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

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

[224]*See* discussion *supra* Part III.B.

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

[226]*See* 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).

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 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

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[227] *See id.*

[228] *See 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.").

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

[230] *See, 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).

[231] *See, 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).

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

[233] *See 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).

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 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

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[234]*See* 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).

[235]*See* 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.").

[236]*See 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.").

[237]*Cf.* 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).

[238]*See 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).

[239]*See* 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).

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]

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

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[240] *Id.*

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

[242] *See 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).

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

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

[245] *See supra* Part IV.A.

[246] *See supra* Table 2.

[247] *See 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).

[249] *See supra* Table 1.

[250] *See infra* Part V.B.ii.

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 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

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[251] *See supra* Table 2.

[252] *See supra* Table 2.

[253] *See* 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).

[254] *See* 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).

[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)).

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

[257] *See* 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).

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

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 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

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[259] *See supra* Part III.B.

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

[261] *See* 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").

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

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

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

[265] *See id.* at 1069-70.

[266] *See* 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).

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

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.

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]

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[268] *See, 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.").

[269] *See infra* Table 3.

[270] *See infra* Table 3.

[271] *See infra* Table 3.

[272] *See* discussion *infra* Part V.

[273] *See infra* Table 3.

[274] *See infra* Table 7.

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

Table 3: Deal Characteristics[276]

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

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

[276]The 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%.

[277]*See infra* Table 4.

[278]*See* 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.

[279]*See infra* Table 4.

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 typical termination fee should be between 3–5% of the offer.[285] Termination fees are frequently targeted by shareholder lawsuits[286]: 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]

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[280] *See infra* Table 5.

[281] *See infra* Table 5.

[282] *See* 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).

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

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

[285] *See* 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.").

[286] *See, 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).

[287] *See* 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 . . . .").

[288] *See 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.

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, 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]

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[289] *See infra* Table 5.

[290] *See* 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).

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

[292] *See infra* Table 5.

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

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

[295] *See 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).

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

[297] *See infra* Table 5.

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

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 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]

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[299] *See infra* Table 6.

[300] *See* 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).

[302] *See* 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).

[303] *See* 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).