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*From the Research Handbook on Mergers and Acquisitions (eds. Hill and Davidoff Solomon)
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15. Lead plaintiffs and lead counsel in deal litigation

David H. Webber

<a>1. INTRODUCTION

The shareholder lawsuit is the primary vehicle for enforcing corporate law. While closely related fields like securities regulation rely on private shareholder lawsuits to supplement the enforcement work of public regulators like the Securities Exchange Commission, corporate law enforcement depends largely on private rights of action brought by aggrieved investors and their lawyers. The purpose of these lawsuits is straightforward: to induce corporate fiduciaries like boards and managers to abide by the duties of loyalty and care in overseeing the corporation. There are many situations that implicate these fiduciary duties, but none that are as fraught with conflict and temptation as mergers and acquisitions (M&A). Not surprisingly, M&A generates a significant amount of litigation.

One problem with this litigation, which is supposed to be a tool for policing the misconduct of corporate fiduciaries, is that it creates a new set of fiduciaries with temptations to self-serve that, to an extent, mirror those of boards and managers. Just as traditional corporate fiduciaries can exploit an acquisition to favor their own interests over those of target shareholders, plaintiffs' lawyers can exploit a deal lawsuit to do the same. They can, for example, quickly settle a meritorious case in exchange for meaningless disclosures, no price improvement for the target shareholder class, and an attorneys' fee. In such instances, shareholders are not protected from self-serving directors and managers by their lawyers. Instead, they're mugged by them for the second time.

Delaware has instituted legal reforms designed to 'watch the watchmen', that is, to ensure that plaintiffs' lawyers prioritize the interests of the shareholder class they represent, rather than their own interests. Borrowing from the lead plaintiff and lead counsel provisions of the federal Private Securities Litigation Reform Act of 1995 ('PSLRA'), (Weiss and Beckerman 1995) the Delaware Chancery Court – the primary forum for M&A litigation – has adopted criteria for the

selection of lead plaintiffs and lead counsel in transactional class actions. The criteria of most interest include: (1) favoring institutional investor class representatives who have the sophistication and motivation to monitor class counsel, to make sure that counsel conducts the litigation in the interests of shareholders and not their own interests; and (2) selecting lead counsel based on the quality of the complaint, the firm's zealously in litigating the case to date, and its prior performance record. More recently, Delaware judges have increasingly emphasized the quality of the law firm that represents the class.

In the following pages, I will review some of the recent scholarship on deal litigation and the lawyers and investors who bring these cases. I will focus, in particular, on the recent wave of empirical scholarship addressing both deal litigation generally and the role played in it by lead plaintiffs and lead counsel. My bottom line is that the prevalent view of lawyers and lead plaintiffs as being irrelevant to deal and lawsuit outcomes has been challenged by empirical scholarship finding that lawyers and lead plaintiffs seem to matter. The weight of the empirical evidence to date suggests that better firms and plaintiffs do more work, are associated with better results, and the market takes notice and reacts to law firm quality in particular.

<a>2. THE THEORY BEHIND MERGER LAWSUITS

In the generic merger or acquisition, a third party acquirer makes an offer for the target company to its board. Target boards and managers face multiple conflicts of interest in this situation. Acquisition of the company can result in personal windfalls for these fiduciaries, ranging from the triggering of golden parachutes to the vesting of stock options to the potential for lucrative employment arrangements at the newly combined entity. Such temptations might induce boards and managers to ease the acquirer's path to closing the deal by, for example, insufficiently negotiating to maximize the offer price, or rigging the deal process to favor the board's preferred acquirer over an acquirer who might be willing to pay more. Conversely, in a hostile bidder situation, the board or management might decline a favorable offer for the company not because it's a bad deal, but because they want to protect their own jobs. They can deploy a poison pill to hold off an unwelcome acquirer. Finally, the conflicts can be even more acute when the acquirer is an insider like a controlling shareholder or the company's own management. Insiders may favorably time their acquisition to squeeze out minority shareholders at a low price. They may

exploit their insider status and their influence over the board to undermine the usual shareholder protections in negotiating a deal.

Delaware law governing mergers and acquisitions is calibrated to these conflicts. Where there is no identifiable conflict of interest, Delaware courts apply the deferential business judgment rule to such transactions (Thompson and Thomas 2004). Where there is such a conflict, such as a controlling shareholder offer, Delaware courts apply ‘entire fairness’ review. Entire fairness was developed in a line of cases following (and including) *Weinberger v. UOP, Inc.* It subjects deals to more stringent scrutiny than the business judgment rule.¹ In between those two standards of review, Delaware applies a level of intermediate scrutiny called ‘enhanced scrutiny’. In a hostile bidder situation, defensive measures instituted by an independent board must be introduced in response to a legitimate threat to the target and must be proportional to the threat.² Finally, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Delaware courts embarked upon a line of cases requiring the board to maximize the target price for shareholders in any sale of control of a corporation.³ Target shareholders have standing to bring private class or derivative actions to enforce these rights against boards or managers (Thompson 1999). Such private rights of action should induce managers to act in the interests of shareholders in the transactional context.

<a>3. THE REALITIES OF MERGER LITIGATION

Whether deal litigation works as intended is a highly controversial question. Initial empirical studies suggested that it was working as hoped. Research based on lawsuits filed prior to the recent surge in deal litigation found that attorneys’ fees were lower and awards higher in deal suits than other types of corporate litigation. The studies also found that litigation increased the risk of a deal not closing, but it also increased takeover premiums by an amount that offset that

¹ *Weinberger v. UOP, Inc.*, 457 A.2d 701 (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’).

² *Unocal Corp. v. Mesa Petroleum, Co.*, 493 A.2d 946 (Del. 1985).

³ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

risk (Thompson and Thomas 2004; Krishnan et al. 2012). Studies based on more recent data document a dramatic increase in this litigation, triggering concerns about its utility. Today, the announcement of a merger almost automatically triggers a lawsuit. Multiple studies have demonstrated that 95 percent or more of transactions in excess of \$100 million are targeted by a shareholder lawsuit (Cain and Davidoff Solomon 2013; Daines and Koumrian 2013). In 2013, 97.5 percent of deals above the \$100 million threshold were targeted by a lawsuit (Cain and Solomon Davidoff 2013). The high litigation rate and the low rate of outcomes resulting in tangible benefits to shareholders have called into question whether these lawsuits need reform.

Multijurisdictional merger litigation has posed a further challenge to the merger litigation ideal. Rather than suing in just one forum, competing plaintiff law firms have brought simultaneous shareholder lawsuits arising out of the same underlying facts in multiple forums. States compete to attract this merger litigation via attorneys' fees and settlement rates (Cain and Davidoff Solomon 2011, 2015). Multijurisdictional litigation poses several challenges, increasing procedural burdens on courts, and incentivizing pro-plaintiff rulings and awards (Badawi 2013; Cain and Davidoff Solomon 2015). For a time, the emergence of multiform litigation was enhanced by and coincided with an exodus of these suits from Delaware, historically its primary forum, though that exodus has seemingly reversed itself (Armour et al. 2012; Badawi 2013; Krishnan et al. 2015). While this return to Delaware predated the adoption of exclusive forum provisions, such provisions requiring shareholders to bring intracorporate litigation in one forum, usually Delaware, may further aid in reducing the out-of-Delaware trend.⁴ The more recent wave of empirical scholarship on deal suits covers the time period in which multiform litigation began to increase, and overlaps to an extent with the out-of-Delaware trend. Some of the pathologies described in the literature may be symptoms of the problem of multiform litigation, rather than other aspects of deal litigation.

Apart from the frequency and location of these cases, their underlying merits are cause for further concern. Consider disclosure-only settlements. Many transactional suits end with additional disclosures about the deal and negotiations over it, but no changes to the merger agreement and no increase in the price. In theory, these disclosures should enable shareholders to

⁴ See *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del 2015).

make a more informed choice about whether to vote in favor of the proposed transaction, a requirement for its completion. But research empirically testing this proposition suggests that these disclosures have no effect on the shareholder vote (Fisch et al. 2015). The widely shared intuition is that these additional disclosures would primarily reveal information that reflects negatively either on the deal itself or on the process by which it was negotiated. If the information were positive, the defendants would have disclosed it earlier. Assuming that this intuition is correct, one would expect that this new information would lead to a lower shareholder vote in favor of the deal. But in fact, this information has no effect on the shareholder vote (Fisch et al. 2015).

This evidence calls into question the rationale for most merger litigation. A majority of this litigation settles, with the remainder being dismissed (Daines and Koumrian 2013). Among the cases that settle, most settle for additional disclosures only, with no change to the merger agreement and no increase in price. In 2012, 81 percent of settled cases included only additional disclosures and attorneys' fees (Daines and Koumrian 2012). If these additional disclosures have no effect on the shareholder vote, the litigation that produced them may have little or no utility. It is not impossible to conclude that shareholders might be better off without it, and indeed, Delaware has recently taken steps to undercut disclosure-only settlements.⁵

One step up from a disclosure-only settlement is a settlement resulting in an amendment to the merger agreement, but still no price improvement. In theory, an amendment to the merger agreement negotiated in response to a lawsuit should improve the shareholder vote in favor of the deal. In most cases, when a merger agreement is amended in response to a shareholder lawsuit, it is amended to reduce merger protections (Daines and Koumrian 2012). Typically, merger protections like termination fees, no talk provisions, or no shop provisions, make it more difficult for a third-party acquirer to submit a competing bid. Reducing or eliminating these protections makes it more likely either that a third party will emerge to offer a higher price, or that shareholder confidence in the deal's fairness will increase precisely because no third party has emerged to offer more, even after barriers to their emergence have been reduced. Amendment settlements rarely lead to an actual increase in price. Therefore, amendments should improve the shareholder vote.

⁵ *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del Ch. 2016).

Researchers have found weak evidence supporting this contention, with a moderately significant improvement in the shareholder vote in response to an amendment settlement (Fisch et al. 2015). The shareholder ‘yes’ vote as a percentage of outstanding shares increases by 4.5 percent in amendment settlements, though other measures of shareholder voting were not statistically significant (Fisch et al. 2015). Most of these settlements involved a reduction in the size of the termination fee, which is a fee the target is required to pay the potential acquirer if the deal fails to close (Fisch et al. 2015). Termination fees are designed to protect these suitors, who may incur substantial due diligence and other costs to compile a bid, and naturally fear that they will fail to recoup these costs if their offer is rejected outright or in favor of a free-riding competitor. Excessive termination fees may coerce shareholders into accepting a lesser quality deal for fear of paying a penalty for saying no. Paradoxically, a reduced termination fee might lead to fewer votes in favor of the deal precisely because the penalty for opposing it has been reduced. Thus, a reduction in the ‘yes’ vote could be value adding. Regardless of how to interpret these results, the fact that the authors find some evidence of statistically significant changes in the shareholder vote in response to an amendment settlement suggests that a segment of the market values them.

The best outcome for shareholders and their lawyers in a deal case is an improvement in price. In the next section, I discuss the scholarship assessing the effect of litigation generally, and lawyers and lead plaintiffs, on this outcome of ultimate interest to shareholders.

<a>4. SELECTING CLASS REPRESENTATIVES

Delaware law allows certification of a class action if the lead plaintiff is a typical and adequate class representative, and if a class action is superior to other forms of bringing suit, like individual actions. In this sense, it is no different from federal law or the law of other states. Anyone who owns even one share in a target company meets the Rule 23 test of typicality and adequacy, since that shareholder’s economic interests are aligned with the class, even if she has less at stake than other investors. In most jurisdictions nationwide, courts do not inquire into the identity of the lead plaintiff or the counsel that represents her beyond the requirements of Rule 23. If more than one complaint is filed challenging a deal, most state courts mechanically appoint whichever law firm and party filed the first complaint as class representatives. This rote

approach has led to the widely derided ‘race to the courthouse’, in which poor quality or inexperienced firms representing unsophisticated plaintiffs with little actual stake in the transaction represent the interests of the entire class of target company shareholders. The race to the courthouse incentivizes filing speed over all other attributes in a law firm and a lead plaintiff.

Around a dozen years ago, the Delaware Court of Chancery began raising the standards for selection of lead plaintiffs and lead counsel beyond the floor established by Rule 23. In cases like *TCW Technologies* and *Hirt*, Delaware set forth criteria for the selection of these class representatives. In selecting a lead plaintiff, the court relies on: (1) the quality of the pleading; (2) the relative economic stakes of the competing litigants (which is 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 various contestants have prosecuted the lawsuit; and (6) competence of counsel and their access to resources necessary to prosecute the claims in issue.⁶ While the second prong has traditionally been given the most weight, more recently Delaware judges have been emphasizing the sixth, conducting searching reviews of the lead counsel contestants’ track records and openly criticizing firms that fail to demonstrate tangible benefits to shareholders in prior representations.⁷

Delaware’s purpose in undertaking these reforms has been to reduce the agency costs of transactional class action lawyers. That undertaking stemmed from a widely held view that persists to this day and was expressed in a 2004 law review article, ‘File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions’ (Weiss and White 2004). The view is that litigation generally and plaintiffs’ lawyers in particular free ride off of market dynamics, deal characteristics, and other factors that actually drive price improvements. Lawyers themselves could be expected to bring little of value given the inadequacy of oversight under the then-current Delaware procedures, which involved little more than the typical protections of Rule 23. While it may be true that a lead plaintiff who owns a small number of shares is a typical

⁶ *Hirt v. U.S. Timberlands Serv. Co.*, 2002 WL 1558342 (Del. Ch. July 9, 2002).

⁷ See Motion to Consolidate and Organize Counsel and the Court’s Ruling, *In re Compellent Technologies, Inc. Shareholder Litigation*, No. 6084-VCL (Jan 13, 2011) ([http://www.delawarelitigation.com/uploads/file/int76\(2\).pdf](http://www.delawarelitigation.com/uploads/file/int76(2).pdf)); *In re SS & C Technologies, Inc. Shareholder Litigation*, 948 A.2d 1140, 1151 (Del. 2008).

and adequate class representative, such an investor may lack the economic incentive or the skill with which to monitor class counsel, to make sure it is acting in the interests of the class. An indifferent or incompetent lead plaintiff might not protect her own interests well, never mind those of the class. By moving beyond Rule 23, Delaware aspired to reduce the agency costs of class action lawyers. Theoretically, institutional lead plaintiffs with a substantial stake in the transaction have economic incentives and appropriate skill to keep the lawyers focused on maximizing price (Weiss and Beckerman 1995). Independent judicial evaluation of the skill, zeal, and prior experience of the lawyers offers an additional screen of lawyer quality and fidelity to shareholders. How have these Delaware reforms impacted deal litigation in that crucially important forum?

<a>5. LEAD PLAINTIFFS

Delaware's adoption of lead plaintiff selection criteria has transformed the identity of class representatives bringing suit in that forum. Between 2003 and 2009, the percentage of institutional investor lead plaintiffs remained flat, hovering around 40 percent of lead plaintiffs overall (Webber 2012). But the identity of those institutions changed markedly. Public pension funds and labor union funds went from infrequent participants in these suits, with only four appearances by public pension funds and eight appearances by union funds between 2003 and 2006, to the dominant players in these suits, with public pensions alone leading 28 of these suits from 2007 to 2009, and union funds not far behind at 20 suits (Webber 2014). Mutual funds and hedge funds rarely participated in these suits (Webber 2014). The increased participation of these institutional investors inevitably followed criteria that would favor their selection. More challenging to answer is whether the effort expended by these investors themselves, or by the courts who favor their selection, has any value?

Some evidence suggests that it does. One study finds that while institutional investors overall do not correlate with better outcomes for shareholders, public pension funds do: pension lead plaintiffs correlate with both an increase in merger consideration and lower attorneys' fees. (Webber 2014). Similarly, public pension funds – but not other institutional investors – have been found to correlate with better outcomes for shareholders in federal securities fraud class actions, including both higher recoveries and lower attorneys' fees (Cheng et al. 2010; Perino

2012). One question is whether these correlations can be explained by pension fund case selection, or litigation monitoring. Are public pension lead plaintiffs good at ‘cherry-picking’ the best cases, selecting cases that will have more favorable outcomes for shareholders, or is the improved value for shareholders a result of pension fund skill in overseeing class counsel? These are not easy to tease apart in the data, but some evidence suggests that public pension monitoring skill, and not just case selection, explains the results. A few studies have found some evidence that public pensions correlate with better case outcomes even after controlling for case features associated with cherry-picking, and that they correlate with greater attorney effort (Cheng et al. 2010; Perino 2012; Webber 2014). That suggests their skillful monitoring of class counsel explains the results. Still, even if these studies established nothing more than that pension funds skillfully select the best cases, adding little value besides putting their name on the filing, this too has some benefit. It sends a signal of case quality to the market, the court, and to adversaries.

Most public pension fund lead plaintiffs have enrolled in portfolio monitoring services with plaintiff law firms (Webber 2014). These law firms gain direct access to the investment portfolios of their public pension clients, typically via their custodial bank accounts. When these firms pursue a vulnerable deal (or a securities fraud class action) they evaluate which of their pension fund clients have a significant investment in the target. This evaluation follows logically from Delaware’s emphasis on the size of the lead plaintiff applicant’s investment. In contrast to the procedure under the PSLRA, Delaware courts take into account not just the absolute size of the applicant’s stake, but also its size relative to the applicant’s overall investment portfolio. Once the firms have identified appropriate candidates, they prepare requests for proposals and circulate them to the pension funds in the hopes of identifying an appropriate lead plaintiff applicant (or applicants) (Webber 2014).

The dynamics of the portfolio monitoring process may explain some of why public pension funds correlate with a bump in price and lower attorneys’ fees. First, pension funds often enroll in these monitoring services with multiple plaintiff law firms. (The services are free.) They are therefore well placed to force the plaintiff law firms to compete against each other on fees. Typically, the funds negotiate a matrix of fees, in which the fees get lower as the absolute recovery increases, and higher as the case gets longer (Perino 2012; Webber 2014). Plaintiff law firms must compete on the price of their services if they want to represent the pension fund. And in contrast to individual lead plaintiffs, these institutional clients are more sophisticated

consumers of legal services. They are themselves fiduciaries, and they often have access to outside counsel and sometimes in-house counsel. This is particularly true for the largest pension funds. Large public pensions are broadly and deeply invested in the market, and are therefore more likely to have a stake in an attractive lawsuit target, and more likely to have a stake that is substantial enough to obtain the lead plaintiff position. The larger they are, the more likely they are to be sophisticated consumers of legal services, and also repeat players and therefore highly attractive clients.

Thus, two dynamics characterize the relationship between pension fund clients and plaintiff law firms. The pension funds are, on average, more legally sophisticated than a hand-picked individual lead plaintiff, and the lawyers are particularly eager to please these clients. The lawyers may therefore bring their strongest cases to these clients; the clients may in turn only be interested in litigating the cases that are legally strongest and in which they have the most at stake. The lawyers may accept lower fees in percentage terms both to please these clients and because in strong cases with substantial assets at stake the fees may be high on an absolute basis, even if they are a relatively small percentage of the overall benefit conferred on the class by the suit. Pension funds may be better at reviewing plaintiff law firm filings and participating in settlement negotiations because of their relative legal sophistication. To the extent the pensions are substantial investors in the acquirer, they may have leverage over its management, which may in turn be more inclined to satisfy their demands.

<a>6. LEAD COUNSEL

Delaware law also favors selection of quality class counsel. That factor is enumerated in the *Hirt* test above, in which the court will consider the zeal and skill with which the proposed class counsel has litigated the current case, and its track record litigating previous cases (Erickson 2015). While this criterion has been evaluated by the Chancery Court for more than a decade, it has informally become more important over time because Delaware judges appear to be more interested in applying it aggressively. Some recent comments from the bench illustrate this tendency. In a motion under *In re Compellant Technologies*, Vice Chancellor Laster commented directly on the quality of the law firms before him: ‘But you guys – at least the Abraham firm – had some good results. And so does the Labaton firm. And the Faruqi folks, you couldn’t

identify one. And you need to – it’s a big hole in your firm resume’.⁸ Similarly, Vice Chancellor Lamb expressed his dismay over the performance of the Brualdi law firm, stating that the firm’s actions, ‘demonstrate a pattern of, at best, carelessness, and, at worst, a deliberate effort to mislead the court’.⁹

Two recent studies assess the impact of law firm quality on merger litigation. Deploying different methodologies, both conclude that law firm quality matters in these suits. One natural challenge faced by any such study is the question of how to define firm quality. The studies take different approaches. One defines law firm quality according to several metrics. For top law firms, these include the firm rankings in Legal 500, which combines objective criteria with peer review to assess law firm quality, and firm rankings by Securities Class Action Services, which ranks firms according to case outcomes and attorneys’ fees in securities class actions. Securities class actions are distinct from merger class actions, though there is significant overlap between the plaintiff law firms in both fields; if a firm is successful in one field, it is likely to be successful in the other (Badawi and Webber 2015). For poor quality firms, these include a Bloomberg News study of firm performance by outcome and fee awards, and disparaging comments from the bench about specific law firms by Delaware judges, like those quoted above. (Badawi and Webber 2015). A second study defines law firm quality a bit differently. It looks to the attorneys’ fees awarded in cases with ‘informed clients’, that is, high fees awarded in cases involving institutional investor lead plaintiffs (Krishnan et al. 2015).

Badawi and Webber deploy an event study methodology to test the market reaction to law firm quality. Event studies examine the market reaction to public events, and are a widely accepted methodology in the finance and law and finance literatures (Bhagat and Romano 2001). The Badawi and Webber study finds that when top quality plaintiff law firms file suit in deal cases, markets react positively, but when poor quality firms (and no top firms) file suit in deal cases, markets react negatively (Badawi and Webber 2015). They do not find these results for all cases, but for management buyouts (MBOs) and controlling shareholder transactions. These are

⁸ Motion to Consolidate and Organize Counsel and the Court’s Ruling, *In re Compellent Technologies, Inc. Shareholder Litigation*, No. 6084-VCL (Jan 13.2011) ([http://www.delawarelitigation.com/uploads/file/int76\(2\).pdf](http://www.delawarelitigation.com/uploads/file/int76(2).pdf)).

⁹ *In re SS & C Technologies, Inc. Shareholder Litigation*, 948 A.2d 1140, 1151 (Del. 2008).

the most conflict-ridden deals. Consequently, they are the deals where one would most expect law firm quality to matter. Unlike most transactions which involve a third-party acquirer engaged in an arms-length transaction, MBOs and controlling shareholder deals involve an inside acquirer. Such acquirers trigger heightened fairness concerns. Because they have access to inside information, they can favorably time an acquisition to squeeze out minority shareholders at a low price. For example, managers or controlling shareholders could know that there has been a successful clinical trial of a new drug in the research and development pipeline, and squeeze out the minority shareholders before the stock price reflects the promising new development. Also, managers and controlling shareholders have heightened influence over the board. They may be directly responsible for hiring board members; they may have personal and business relationships with them. Consequently, they might be able to distract board members from their fiduciary duty to prioritize the interests of shareholders in an acquisition.

Delaware law applies heightened ‘entire fairness’ scrutiny to controlling shareholder deals, meaning that courts must assess both the fairness of the process and the fairness of the price.¹⁰ Defendants bear the burden of showing why the transaction was fair unless they can demonstrate that the deal was approved either by a special committee of independent board members or by a majority of the minority shareholders.¹¹ If the deal has obtained approval in one form or the other, the burden shifts back to the plaintiffs to demonstrate the deal’s unfairness; and if it receives both forms of approval, the deal will be reviewed under the highly deferential business judgment rule.¹² MBOs are not subject to entire fairness review but still typically require at least one form of approval or the other. Given the heightened concerns about the process in these deals, and their attendant legal protections for minority shareholders, law firm quality ought to matter here if it matters anywhere. It does, as noted. The positive market reaction to top firms could be because they select the best cases. It could also be because the market expects top firms to litigate better, to be able to open up the bidding process and obtain an increase in the offer price. The negative market reaction to poor quality firms might reflect the

¹⁰ *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

¹¹ *Ibid.*

¹² *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

market's disappointment that a troubled deal will not be challenged by competent class counsel, or that a weak firm might only succeed in delaying the merger without obtaining any substantive amendment to the agreement or a price improvement. Regardless, the evidence suggests that markets notice law firm quality in MBOs and controlling shareholder deals, and react accordingly.

Krishnan, Davidoff Solomon, and Thomas similarly analyze the effect of plaintiff law firm quality on case outcomes. The study examines the top five jurisdictions for M&A litigation: California, Delaware, Florida, New York, and Texas. As with the Badawi and Webber study, this study finds that top firms target management buyouts and going private transactions. It further finds that top firms litigate cases more vigorously, have fewer motions to dismiss granted against them, win more procedural motions, and have higher-value settlements. Using instrumental variables for unobserved case quality, their study still finds that top firms correlate with more frequent and higher value settlements, suggesting that it is not just case selection but litigation effort and/or skill that explains the superior results (Krishnan et al. 2015). The study offers a textured view of plaintiff lawyers, in which some firms file numerous cases and settle quickly, whereas others litigate vigorously to obtain results for target shareholders.

Taken together, these studies suggest that law firm quality matters, at both the top and the bottom of the scale. Top quality firms may select better cases, or litigate them better, or both. Poor quality firms may disrupt or delay a deal's closing, or may disappoint the market which expected a lawsuit to obtain value for shareholders only to have it litigated by a weak firm. These results contradict the view that law firms do not matter in deal litigation. The evidence suggests that they correlate with better outcomes for shareholders, and that markets notice. Both articles support the proposition that there is a positive role to be played by courts and by institutional clients in screening for plaintiff law firm quality.

<a>7. CONCLUSION

Delaware has moved beyond the traditional limits of class certification in selecting lead plaintiffs and lead counsel. While retaining the requirements of lead plaintiff typicality and adequacy, it has moved to further reduce the agency costs of class actions by implementing criteria favoring the selection of institutional investor lead plaintiffs and experienced, qualified lead counsel. In

adopting these criteria, it has responded to the concern that plaintiff lawyers serve their own interests and neglect those of shareholders. In turn, the market caters to these criteria. Large institutional investors screen for lead counsel quality in opting for portfolio monitoring programs in which counsel aid in identifying claims on their behalf. The empirical evidence suggests that these efforts to sift for law firm and lead plaintiff quality make a difference. Public pension funds lead plaintiffs, and top quality lead counsel, correlate with better outcomes for shareholders in deal cases. The market reacts positively to the filing of suits by top firms and negatively to the filing of suits by poor quality firms. The evidence suggests that lead plaintiffs and lead counsel do not just free ride off of deal dynamics, but seem to matter in and of themselves.

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