THE MARKET FOR LEADERSHIP IN CORPORATE LITIGATION

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Conventional wisdom has long held that leadership decisions in corporate litigation are best left to the lawyers. Even as the world of corporate litigation has changed dramatically, courts have consistently relied on the lawyers themselves to decide who among them will control litigation decisions. As a result, leadership decisions in corporate litigation are almost always made in private negotiations and back room deals. This Article pulls back the curtain on these decisions, using empirical data to conduct the first in-depth examination into the market for leadership in corporate litigation. This examination reveals a market that bears little resemblance to the ideal imagined by courts and commentators. The reliance on private ordering forces lawyers to agree to overly complicated leadership structures. These structures in turn cause lawyers to underinvest in litigation, encouraging holdouts and opportunism at the negotiating table. It need not be this way. Other types of complex litigation, from small-scale consumer class actions to multidistrict securities class actions, have successfully avoided such problems. The time has come for corporate law to draw on these insights and develop a new market for leadership in corporate litigation. In the end, leadership is far too important to be left to the lawyers.

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I. INTRODUCTION

Imagine that five shareholders, represented by a total of ten law firms, file nearly identical lawsuits against the same corporation in a single court. Once these suits are consolidated, who decides what claims to pursue, what discovery to seek, and which settlement offers to entertain? In other words, in a world of multiple filers, who controls the litigation?

The answer used to be simple. Just a few years ago, corporate lawsuits were far less common. Shareholders focused their energy on the most promising targets, carefully choosing which mergers and acquisitions to challenge.[1] Each challenged transaction sparked two, maybe three, lawsuits.[2] Today, however, the world of corporate litigation is far more complicated. Shareholders contest nearly every significant merger or acquisition.[3] Each transaction generates an average of five or six dif-

1. *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 476 (2015) (stating that, in 2005, 39.3% of transactions valued at over $100 million were subject to litigation).

2. *See id.* at 477 (stating that, in 2005, an average of 2.2 complaints were filed per challenged transaction).

3. *See* Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013* 2 (Ohio St. Pub. L. & Legal Theory, Working Paper No. 236, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2377001 (stating that, in 2013, 97.5% of transactions valued at over $100 million were subject to litigation).

ferent lawsuits,[4] and these lawsuits are often spread across the country in both state and federal courts.[5]

The legal system has struggled to keep up with these changes, and perhaps nowhere is this struggle more apparent than in the rules governing leadership. Although courts have developed formal rules to determine leadership disputes, they strongly prefer the parties to resolve these disputes themselves.[6] As a result, leadership decisions are almost always a result of private negotiations and back room deals.[7] When it comes to leadership in corporate law, private ordering—not judicial decision making—reigns.

This private ordering matters when it comes to enforcing corporate law. The legal system largely entrusts the enforcement of corporate law to private attorneys general.[8] It matters, therefore, who these private attorneys general are and what incentives they have to litigate. Accordingly, leadership decisions go to the heart of how corporate law is ultimately enforced.

Despite the importance of leadership issues, they have flown largely under the radar of corporate law scholarship.[9] A number of scholars have examined the market for leadership in securities litigation—the federal law counterpart to the state corporate lawsuits examined here.[10] In addition, a few scholars have analyzed and critiqued the formal judicial decisions in corporate litigation.[11] No one, however, has ever looked at the far more consequential informal negotiations that actually determine leadership in these suits.

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4. *See id.* (stating that, in 2013, an average of 6.9 complaints were filed per challenged transaction).

5. *See* Cain & Solomon, *supra* note 1, at 477.

6. *See infra* Part II.B.

7. *See infra* Part II.B.

8. *See, e.g.*, Amanda M. Rose & Larry J. LeBlanc, *Policing Public Companies: An Empirical Examination of the Enforcement Landscape and the Role Played by State Securities Regulators*, 65 FLA. L. REV. 395, 399 (2013) (describing the limited role played by state regulators in policing corporate misconduct).

9. Scholars have written extensively on the increasing frequency of corporate litigation, but most of the scholarship in this area focuses on the problems that arise *between courts* when litigation is filed in more than one forum, not on the problems within a single court. *See, e.g.*, Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1058–59 (2013); Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 142 (2011); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1757 (2012).

10. *See, e.g.*, Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1514–15 (2006); James D. Cox et al., *There Are Plaintiffs and . . . There are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 369–71 (2008); David H. Webber, *The Plight of the Individual Investor in Securities Class Actions*, 106 NW. U. L. REV. 157, 159 (2012).

11. *See, e.g.*, Adam Badawi, *Merger Class Actions in Delaware and the Symptoms of Multi-Jurisdictional Litigation*, 90 WASH. U. L. REV. 965, 968–70 (2013); Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 483–85; Griffith & Lahav, *supra* note 9, at 1088–92.

This Article looks behind the curtain of leadership decisions, using two types of empirical data to provide a better understanding of how the market for leadership works on the ground. First, it relies on interviews with lawyers who regularly represent plaintiffs in shareholder and other class action litigation. Second, it uses quantitative data on leadership negotiations from 200 consolidated corporate lawsuits comprising more than 850 separate cases filed over a five-year period. Together, this data allows for the first comprehensive examination of the norms governing leadership disputes in corporate litigation.

As this examination reveals, the market for leadership bears little resemblance to the ideal imagined by courts and commentators. In their interviews, lawyers repeatedly stated that, in these behind-the-scenes negotiations, they are forced to agree to complicated leadership structures that divide governance responsibilities among a surprisingly high number of legal actors. The quantitative data confirms these accounts, reflecting that even the simplest cases often involve far more law firms than are necessary to litigate effectively.

As leadership structures grow more complex, they can impact the incentives to litigate in unexpected ways.[12] Legal fees are split among a significant number of firms, which dilutes the incentives to litigate these lawsuits effectively. Firms are reluctant to spend the necessary time or resources to develop innovative legal theories. And, lawsuits that are litigated by committee are often plagued by inefficiencies. None of these developments benefit shareholders, who put their trust in plaintiffs' lawyers to make litigation decisions in their best interests.

Game theory helps explain these dynamics. Over the last several years, the plaintiffs' bar has grown in size and in turn has become less able to police itself. This expansion has created incentives for law firms to hold out in private negotiations for a leadership role and then shirk their responsibilities in the ensuing litigation. In short, as game theory predicts,[13] the growth of the plaintiffs' bar means that the legal system can no longer rely exclusively on private negotiations to police leadership disputes.

How should corporate law respond to these problems? One possibility is to draw on insights from other areas of law that have successfully navigated around these same difficulties. Nearly every type of complex litigation confronts leadership issues, from small-scale consumer class actions to multidistrict securities class actions. Across this diverse spectrum, however, corporate litigation stands alone in leaving so much power over leadership to the lawyers themselves.[14] In federal securities class actions, for example, leadership decisions are governed by the Private

12. *See infra* Part III.C.

13. *See* Part III.B.3; Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 537 (1994) (describing the role of repeated interactions in policing strategic interactions).

14. *See infra* Part III.

Securities Litigation Reform Act,[15] which sets out detailed standards for lead counsel designations.[16] In other types of complex litigation, there are not the same bright-line rules, but judges are still far more willing to intervene in leadership disputes.[17] As these examples illustrate, leadership decisions need not present the problems that have been so persistent in corporate litigation.

Corporate law should draw on insights from other types of complex litigation to address these problems. Comparing leadership practices in corporate litigation to those in other types of complex litigation, the most significant difference that emerges relates to the role of judges. The norm of judicial involvement in other areas stands in stark contrast to the hands-off approach that dominates corporate litigation. And yet, judicial involvement in leadership disputes is crucial because the law on the books has little impact if judges are unwilling to enforce it. This point reflects foundational principles of negotiation theory—lawyers can only bargain in the shadow of the law if judges are willing to provide the shadow.[18] To reform leadership negotiations, therefore, judges in corporate lawsuits must step up and decide leadership disputes.

This Article proceeds in four parts. Part II describes the law governing leadership disputes in corporate litigation. Part III sets out the informal norms governing these disputes, exploring insights from attorney interviews as well as quantitative data on leadership practices. Part IV explores leadership norms in other types of complex litigation, including consumer, antitrust, and securities class actions. Part V uses these insights to develop a new market for leadership in corporate law. As we shall see, leadership is far too important to be left to the lawyers.

II. FORMAL MARKET REGULATION

The market for leadership is relatively lawless. To recognize this point, however, one must first understand the law that does exist to govern this market. This Part provides that backdrop, first examining the formal rules governing leadership before turning to the limitations of these rules.

15. 15 U.S.C. § 78u-4 (2012).
16. *Id.* §§ 78u-4(a)(3)(B)(iii)–(v).
17. *See infra* Part III.A–B.
18. *See, e.g.*, R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960) (arguing that once legal entitlements are clearly defined, parties will bargain for a socially efficient outcome); Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 745 (2012) ("So long as the law's shadow is well defined, parties can engage in mutually valuable conduct without assuming the costs inherent in state-made legal procedures.").

A. Formal Rules

Formal regulation of leadership came late to the world of corporate litigation. Traditionally, plaintiffs' law firms relied on informal negotiations to decide leadership.[19] If three plaintiffs filed similar lawsuits, their lawyers would confer and decide how to allocate decision making authority in the case. This informal approach worked because most cases attracted a small number of filers,[20] making it relatively easy for firms to share leadership. In addition, most corporate lawsuits arising under state law were filed in Delaware, and the Delaware bar was relatively small and close-knit.[21] As a result, the lawyers typically knew each other and were able to work out arrangements that fairly allocated the work between cases.[22] These forces combined to promote an extralegal system that allowed lawyers to resolve leadership disputes without involving the court.

In the late 1990s, however, this system started to break down. In large part, this shift occurred as a result of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which created formal rules governing leadership in securities class actions—the federal law counterpart to state corporate lawsuits.[23] The PSLRA provides a rebuttable presumption that the shareholder applicant with the largest financial stake in a case will control the litigation.[24] This presumption allowed large institutional investors, such as public pension or retirement funds, to take control of most securities class actions.[25] Law firms without these institutional clients soon found themselves shut out of many of these lawsuits.[26]

As these firms looked for ways to shift their practices, state corporate law suits presented a natural opportunity.[27] These suits had many of the same targets—large, public corporations—allowing firms to leverage their existing networks of small shareholders as plaintiffs.[28] The legal

19. *See* TCW Tech. Ltd. v. Intermedia Commc'ns Inc., No. 18336, 2000 WL 1654504, at *3 (Del. Ch. Oct. 17, 2000) ("Traditionally, the Court of Chancery has allowed counsel representing individual, class or derivative plaintiffs to engage in a type of private ordering, that is, to coordinate prosecution of the litigation and to propose the most efficient means of consolidation."). This sentiment was confirmed by many of the lawyers whom I interviewed.

20. *See* Cain & Solomon, *supra* note 1, at 476–77.

21. *See, e.g.*, Cheffins et al., *supra* note 11, at 461.

22. The dominance of the law firm of Milberg Weiss LLP also meant that there was a strong actor with the institutional capital to force compromises when necessary. Several lawyers stated in their interviews that one former Milberg Weiss partner "could get a case organized" by promising that he would help the firm out in one case if the firm took a backseat in another case.

23. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

24. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb) (2012).

25. *See* Cox et al., *supra* note 10, at 369–71.

26. *See* Cheffins et al., *supra* note 11, at 467.

27. *Id.* at 474 ("Plaintiffs' law firms which brought securities class actions but also had, or could readily acquire, the ability to bring corporate lawsuits began in the 2000s to pursue the corporate side with greater vigor.").

28. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 167 (2004) ("Almost all shareholder litiga-

theories in state and federal shareholder lawsuits are different, but there are enough similarities between these suits that many lawyers were able to shift their practices relatively easily.[29]

This shift put stress on traditional leadership rules in two ways. First, as more firms entered the market, lawsuits that would have once attracted one or two filers started to attract four or five.[30] With this influx of filers, it became more difficult to craft a leadership structure that satisfied everyone. Second, some of the new entrants brought an entrepreneurial bent to corporate litigation, challenging the status quo when it came to leadership norms. Firms with institutional clients, for example, argued that they should have a greater role in litigation, rather than simply taking their pro rata share of the cases.[31] Even some firms without institutional clients began to realize they could get a larger piece of the pie if they held out during the negotiations, rather than acquiescing to the traditional approach to dividing cases. These developments destabilized the private ordering that had long dominated leadership disputes in corporate law.

The changing state of play eventually prompted courts to enter the fray. The Delaware Court of Chancery was one of the first courts to recognize a role for judicial intervention in leadership disputes. In a series of cases starting in 2000, the court articulated what eventually became known as the *Hirt* factors.[32] These factors include: (1) the quality of the pleadings; (2) the relative economic stakes of the plaintiffs; (3) the willingness and ability of the contestants to litigate vigorously; (4) the absence of any conflict between larger, often institutional stockholders and smaller stockholders; (5) the enthusiasm and vigor with which the various contestants have prosecuted the lawsuit; and (6) the competence of counsel and their access to the resources necessary to prosecute the claims.[33] No single factor on this list was determinative. Instead, the court

tion in Delaware is against public companies (91 percent: 952 of 1048) . . . [showing] the strong public corporation focus of Delaware corporate law.").

29. The lawyers with whom I spoke repeatedly confirmed this account. One lawyer stated that many lawyers simply decided, "M&A litigation looks easy, let's do that." Another lawyer who used to file primarily securities class actions stated that he had shifted his practice to state corporate lawsuits after it became difficult to get a leadership role in federal securities cases without institutional clients.

30. *Compare* Cain & Solomon, *supra* note 1, at 477 (stating that the mean number of lawsuits per transaction in 2005 was 2.2), *with* ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RES., SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 (2013), *available at* www.cornerstone.com/Shareholder-Litigation-Involving-M-and-A-Feb-2013 (finding that the mean number of lawsuits per transaction in 2012 was almost five).

31. This argument was perhaps best reflected in the Delaware Court of Chancery's 2000 decision in the *TCW* litigation, which was one of the earliest cases that articulated the factors governing leadership disputes. *See* TCW Tech. Ltd. v. Intermedia Commc'ns Inc., No. 18336, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000). In this case, the law firm of Grant & Eisenhofer, P.A., argued that it should control the litigation because it represented an institutional client that owned a significant percentage of the target corporations. Several of the lawyers whom I interviewed told me that this case was significant because it was one of the first cases in which a law firm challenged the traditional norms favoring private ordering.

32. These factors come from the Delaware Court of Chancery's 2002 decision in Hirt v. U.S. Timberlands Serv. Co., CIV. A. No. 19575, 2002 WL 1558342 (Del. Ch. July 9, 2002).

33. *Id.* at *2.

emphasized that it would use its judgment to "establish a leadership structure that will provide effective representation."[34]

In adopting these factors, the Delaware Court of Chancery explicitly rejected the PSLRA's bright-line rule, stating that it is simply "not Delaware law."[35] In other words, the court will not add up the number of shares owned by the competing shareholder applicants and select the applicant with the largest number. The court will, however, consider the *relative* economic stake of the applicants.[36] If one shareholder applicant has significantly more shares than the others, and thus a greater incentive to monitor the litigation, this fact will have "great weight" in the court's determination of a leadership structure.[37] Overall, however, the court will analyze all of the relevant factors to determine "which leadership structure will ensure the most effective representation of the interests of the plaintiff class."[38]

The Federal Rules of Civil Procedure have similarly evolved on the issue of leadership, impacting corporate lawsuits filed in federal courts. These rules used to be silent on leadership issues, reflecting a longstanding policy that the trial court should defer to plaintiffs' counsel on leadership matters in federal class actions.[39] As in Delaware, however, this private ordering became more difficult as class actions became larger and more complex. As one commentator explained, the negotiations over leadership became "the legal equivalent of an unsupervised political convention without procedural rules or even a credentials committee."[40] Ultimately, the lawyers would reach a compromise, but "[t]he price of such a compromise was often both overstaffing and an acceptance of the free-riding or marginally competent attorney, whose vote gave him leverage that his ability did not."[41] In other words, when it comes to corporate litigation, the preference for private ordering in the federal system led to the same inefficiencies that plagued state practice.

In 2003, Rule 23 of the Federal Rules of Civil Procedure was amended to require federal judges to appoint class counsel in class ac-

34. *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027-VCL, 2010 WL 5550677, at *6 (Del. Ch. Dec. 31, 2010).

35. Wiehl v. Eon Labs, No. 1116, 2005 WL 5755542, at *8 (Del. Ch. Mar. 22, 2005).

36. *See id.* at *4.

37. *See id.* at *7; *see also* Dutiel v. Tween Brands, Inc., No. 4743-CC, 2009 WL 3494626, at *3 (Del. Ch. Oct. 28, 2009). Delaware is not alone in adopting a multifactor test to decide leadership. Other states have adopted flexible standards that generally consider the experience and commitment of counsel and the qualifications of the shareholder applicant. *See, e.g.*, Sollins v. Alexander, No. 0060127/2006, 2006 WL 4682189 (N.Y. Sup. Ct. Apr. 11, 2006); Millman *ex rel* Friedman's, Inc. v. Brinkley, 2004 WL 2284505, No. 1:03-CV-3831-WSD (N.D. Ga. Oct. 1, 2004).

38. *In re* Delphi Fin. Grp. S'holder Litig., No. 7144-VCG, 2012 WL 424886, at *1 (Del. Ch. Feb. 7, 2012).

39. Indeed, the prior version of the Manual on Complex Litigation even instructed trial courts to allow plaintiffs' attorneys to determine their own leadership structures, reinforcing a strong norm in favor of private ordering. *See* MANUAL FOR COMPLEX LITIGATION § 1.92 (5th ed. 1981).

40. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 908 (1987).

41. *Id.*

tions filed in federal court.[42] This new rule preserved a role for private ordering,[43] but at the same time, gave courts the express power to intervene if the lawyers could not agree on a leadership structure or the court did not think that the proposed structure was in the best interest of the class. In cases that require judicial intervention, Rule 23(g) instructs courts to consider the competing law firms' work in the specific case, as well as their experience and resources more generally.[44] The court can also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[45]

The *Hirt* factors, and the similar factors used in corporate lawsuits filed in federal courts, were designed to bring order to a system that had grown chaotic. As courts discovered, a system that relies too heavily on private ordering opens the door to holdouts and opportunism, forcing law firms to jockey for leadership much like a politician might jockey for political support. As we shall see, however, courts have undercut these rules by continuing to promote private ordering over formal adjudication in the market for leadership.

B. Limitations of the Formal Rules

Despite the promise of formal rules governing leadership in corporate litigation, private ordering still reigns. Indeed, the formal rules were never intended to replace private ordering entirely. The rules were only meant to apply in the rare cases in which the law firms could not negotiate a leadership structure among themselves, and judges have made clear that these cases should be the exception.

The Delaware Court of Chancery, perhaps more than any other court, has been particularly outspoken in expressing its continued preference for private ordering. In the *Hirt* case itself, the court recognized that "it is customary and desirable, where multiple lawsuits are filed relating to the same transaction or set of facts, for the plaintiffs' lawyers involved to meet and vote on an organizational structure for the prosecution of the litigation."[46] In a later decision, the Delaware court held that it "*always* prefers that plaintiffs' counsel work out an appropriate consolidation compromise."[47] It has repeated this sentiment in nearly every case in which it has had to decide on a leadership structure, demonstrating its strong preference for private ordering.[48]

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42. *See* FED. R. CIV. P. 23(g).

43. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), FED. JUD. CTR. § 14.211 (2004) (stating that judges still use varied approaches to determine lead counsel, including private ordering).

44. *See* FED. R. CIV. P. 23(g).

45. *Id.*

46. Hirt v. U.S. Timberlands Serv. Co., CIV. A. No. 19575, 2002 WL 1558342, at *2 (Del. Ch. July 9, 2002).

47. Dutiel v. Tween Brands, Inc., No. 4743-CC, 2009 WL 3208287, at *2 (Del. Ch. Oct. 2, 2009) (emphasis added).

48. *See, e.g.*, Jacksonville Police & Fire Pension Fund v. Moffett, No. 8110-VCN, 2013 WL 297958, at *3 n.11 (Del. Ch. Jan. 25, 2013) (quoting *Hirt* that it is "customary and desirable" for plain-

The lawyers who practice in this area are well aware of this preference. In interviews conducted for this Article, lawyers repeatedly referenced the court's strong preference for the lawyers themselves to resolve leadership disputes. One lawyer, for example, stated that Delaware judges "*desperately* [do] not want to decide who should be lead plaintiff." Another stated that the court "hates it when firms fight over leadership." As a result, these lawyers see themselves between a rock and a hard place. On one hand, they want judges to take a more active role in leadership decisions so that the parties themselves are not left to work out a structure on their own. On the other hand, as one lawyer put the point, "if you litigate leadership, the judges get very angry." In light of this judicial hostility, lawyers only bring a leadership dispute to the court when they absolutely cannot resolve it among themselves. As a result, according to the lawyers, the theoretical possibility of judicial intervention has had little effect on private ordering in practice.

Many of the lawyers' comments in their private interviews focused specifically on Delaware, and indeed, Delaware appears the most committed to private ordering. Yet these lawyers also stated that the leadership process does not differ significantly in other jurisdictions. Delaware may be the most outspoken, but few courts, whether in Delaware or elsewhere, want to get involved in leadership battles.

This preference likely stems from the three related factors. First, it is *hard* to choose a winner in the typical lead counsel fight. Having spurned the PSLRA's bright-line rule, courts must weigh multiple factors to choose lead counsel, and many of these factors simply do not lead to an obvious choice.[49] For example, courts are supposed to consider the competence of the competing lawyers in deciding on a leadership structure, and yet in most cases, the firms all have significant experience litigating corporate lawsuits. Similarly, courts are supposed to consider the quality of the complaint. In most cases, however, firms work from the same publicly-available information, which means that there is often no significant difference in quality of the pleadings.[50] In some cases, the

tiffs' counsel to resolve leadership disputes themselves); Se. Pa. Transp. Auth. v. Rubin, No. 6323-VCN, 2011 WL 1709105, at *1 (Del. Ch. Apr. 27, 2011) ("Ideally, when several related shareholder class actions are filed in this Court, plaintiffs' counsel will confer and reach consensus regarding a leadership structure for pursuing the shareholders' interests without the Court's involvement."); Oral Argument on Cross-Motions for Appointment of Lead Counsel at 4, *In re* Crimson Exploration, Inc. Stockholder Litig., No. 8541-VCP, 2013 WL 5890398 (Del. Ch. July 12, 2013) (noting that leadership fights are "not my favorite kind of a dispute").

49. The court has often acknowledged this difficulty when pressed to decide a leadership dispute. *See, e.g.*, Wiehl v. Eon Labs, No. 1116-N, 2005 WL 5755542 (Del. Ch. Mar. 22, 2005) ("After analyzing the *Hirt* factors, the court is unable to distinguish between the firms in any meaningful way."); Letter from Vice Chancellor John W. Noble to Counsel, Fensin v. GenOn Energy, Inc., No. 7721 (Del. Ch. Aug. 24, 2012) (stating that the "*Hirt* factors provide little, if any, basis for rationally distinguishing between the two competing [leadership] proposals").

50. *See, e.g.*, Dutiel v. Tween Brands, Inc., No. 4743, 2009 WL 3208287, at *2 (Del. Ch. Oct. 2, 2009). This point was repeated by several of the lawyers I interviewed. In some cases, a particular law firm may come up with an innovative theory of liability or develop a richer set of factual allegations, but in many instances, the competing complaints are functionally identical.

choice is made easier by the fact that one firm has come up with a novel theory of liability or has a client with a significantly larger stake in the litigation. In other cases, however, there is no obvious way to pick a winner, and therefore, courts must choose between essentially comparable firms.[51]

Second, it is *awkward* to choose a winner in a leadership fight. Leadership fights are inherently personal.[52] In a summary judgment battle, the judge decides between competing legal arguments. In a leadership fight, the judge decides between competing law firms. Moreover, judges typically know many, if not all, of the lawyers seeking leadership roles. A judge who decides that one firm is better than another will likely have to see lawyers from the rejected firm at conferences or bar functions. This familiarity creates incentives for judges to avoid leadership disputes.[53]

Finally, it is *boring* to decide most leadership fights. Delaware judges deal with some of the most interesting issues in corporate law—the role of the board in times of economic upheaval,[54] the status of emerging business forms,[55] and the oppression of minority shareholders in closely held corporations, just to name a few.[56] Leadership fights raise none of these interesting topics. Judges want to spend their time on substantive issues, not procedural wrangling. This distaste leads courts to bend over backwards to avoid deciding leadership motions, instead telling plaintiffs' firms to "go in the back room and figure it out."[57]

So they do. In nearly ninety percent of cases, the plaintiffs' firms themselves decide on a leadership structure. More specifically, out of two hundred randomly selected corporate lawsuits filed in the Delaware Court of Chancery between 2009 and 2013, the law firms themselves decided on a leadership structure in 88.5% of cases. This percentage has decreased slightly over time, but it never fell below eighty percent for any of the years studied.[58]

In the end, therefore, the formal rules governing leadership are only dispositive in a handful of cases. The vast majority of cases are governed

51. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for a Reform*, 58 U. CHI. L. REV. 1, 95 (1991) ("[E]valuating lawyer competence is exceedingly difficult when the matters involved are ones of judgment rather than simple adherence to rules.").

52. Indeed, several lawyers referred to this process as a "popularity contest" because some judges have perceived favorites among the competing law firms.

53. *See, e.g.*, Oral Argument on Competing Motions for Appointment of Colead Plaintiffs and Colead Counsel and Class Certification and Rulings of the Court, *In re* Medco Health Solutions, Inc., S'holders Litig., No. 6720-CS, at 79 (Del. Ch. Aug. 23, 2011) (court stating that it decides leadership disputes "reluctantly" because "I don't wish to hurt anyone").

54. *See, e.g.*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009).

55. *See, e.g.*, Gatz Props., L.L.C. v. Auriga Capital Corp., 59 A.3d 1206 (Del. 2012).

56. *See, e.g.*, Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993).

57. This quote comes from a lawyer interviewed for this Article.

58. As discussed in Part IV, contested leadership disputes were more common in 2013, perhaps because certain members of the Delaware Court of Chancery indicated a greater willingness to decide these disputes. *See infra* notes 217–20 and accompanying text.

by informal negotiations that occur away from judicial scrutiny. As a result, if we really want to know how leadership decisions are made in corporate law, we must go inside these negotiations.

III. INFORMAL MARKET REGULATION

This Part describes the informal negotiations that dominate the market for leadership. As described below, attorneys have developed a robust set of extralegal norms that govern most leadership disputes. These norms have two important implications for corporate litigation. First, the reluctance of courts to intervene in leadership disputes creates incentives for large leadership structures that may not reflect the workload in individual cases. Second, although there are benefits to large leadership structures, this phenomenon can also lead to opportunism and reduced incentives for the law firms that litigate these suits. This Part first describes the market for leadership in corporate litigation and then uses insights from game theory to explain this market.

A. An Empirical Approach to Leadership

For this study, I gathered original data from two primary sources. First, I conducted a series of semistructured interviews.[59] Second, I reviewed leadership orders from corporate lawsuits filed in the Delaware Court of Chancery. Both sources are briefly discussed below.

Turning first to the interviews, I interviewed a total of twenty-four lawyers who regularly represent plaintiffs in class action lawsuits. Eighteen of the lawyers work in the area of corporate litigation; the rest practice in other types of class action litigation. These lawyers worked at law firms representing a range of sizes and geographic markets. I spoke with attorneys at some of the largest and most high-profile law firms in the field, as well as lawyers that work at smaller firms. The median size of the firms in my study was nineteen lawyers. Five of the lawyers interviewed were based in Delaware. Another eleven lawyers were based in offices in other states on the East Coast, and two lawyers worked for firms based outside the East Coast. This scope ensured that the lawyers had experience with leadership issues in a range of jurisdictions.

Second, I interviewed several lawyers who represent class action plaintiffs in other types of complex litigation, specifically, antitrust, consumer, and securities class actions. These interviews allowed me to compare leadership rules in other types of class actions. Again, these lawyers came from a variety of practice settings and geographic markets. The substance of these interviews is described in Part IV below.

59. A semistructured interview is one in which the researcher asks questions, but participants are also permitted to share their own observations and examples. *See* Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 759–60 (2009) (describing semistructured interviews).

These interviews followed a standard protocol. The interview subjects were chosen by a "snowball" sample technique, which starts with certain known subjects and relies upon referrals, independent research, and other sources for additional subjects.[60] Each interview took an average of one hour to complete. The interviews all covered the same basic questions, although specific follow-up questions varied by interview. They were all undertaken with the understanding that neither the participants nor their law firms would be identified and that none of their statements were for attribution.

The second type of data collected for this study included leadership orders in 200 consolidated lawsuits representing a total of 857 constituent cases. These cases were all filed between 2009 and 2013 in the Delaware Court of Chancery. With each consolidated case, I reviewed the orders filed with the court memorializing the agreement on leadership, as well as other relevant case filings.[61] These cases were randomly selected through Bloomberg Law,[62] which includes the dockets of all cases filed in the Delaware Court of Chancery.[63] These orders provide insight into the leadership structures that commonly result from these negotiations.[64]

I limited this review to leadership orders in the Delaware Court of Chancery for three reasons. First, Delaware is the dominant court for corporate litigation with more corporate lawsuits filed in Delaware than any other court.[65] Second, Delaware is extremely influential in the area of business law, and therefore, its approach to leadership issues is important

60. Many qualitative studies employ a snowball technique to identify interviewees. *See, e.g.*, *id.* at 783; Kenneth A. Bamberger & Dierdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 263 (2011); Joanna C. Schwartz, *A Dose of Reality for Medical Malpractice Reform*, 88 N.Y.U. L. REV. 1224, 1247–48 (2013).

61. *See, e.g.*, Order of Consolidation and Appointment of Plaintiffs' Lead and Liaison Counsel, *In re* Mindspeed Techs., Inc. Stockholders Litig., No. 9076-VCN (Del. Ch. Dec. 3, 2013); Order of Consolidation and Appointment of Co-Lead Counsel, *In re* Optimer Pharm. Stockholder Litig., No. 8798-VCN (Del. Ch. Sept. 13, 2013).

62. The search was limited to dockets that included any variation of the term "consolidate" or "lead counsel." I included two categories of cases in this review: (1) cases challenging mergers, acquisitions, or other types of transactions, and (2) derivative lawsuits. I did not include appraisal lawsuits or section 220 lawsuits seeking to inspect corporate books and records because these cases are less frequent and therefore may not reflect the same norms seen in more routine types of litigation.

63. *See* E-mail from Michael Korn, Bloomberg Law, to Jessica Erickson (Dec. 16, 2013) (on file with author) (stating that Bloomberg Law includes all Delaware Court of Chancery dockets from 2003 to the present).

64. Many empirical projects examine only reported decisions available through Westlaw or Lexis. Such studies suffer from a selection bias because fewer than five percent of decisions are available through these databases. *See* David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 684–85, 697 (2007) (describing the growing legal movement in conducting empirical research using full case records). As scholars are increasingly recognizing, litigation research must be done on the ground, studying case records from start to finish. *See, e.g.*, James D. Cox et al., *supra* note 10, at 367–71; Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUDS. 111, 114–15 (2009); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 237 (2008).

65. *See* DAINES & KOUMRIAN, *supra* note 30, at 2.

from a national perspective.[66] Third, unlike many other state courts,[67] cases from the Delaware Court of Chancery are available through publicly available databases, making Delaware the rare jurisdiction that allows this type of in-depth analysis.

B. Inside the Negotiations

A close examination of the market for leadership reveals a far more complicated—and troubling—system than courts and commentators envision. This Section first describes quantitative data regarding the market for leadership in corporate litigation. It then connects this data with qualitative data from lawyers regarding the frustration and inefficiencies that they experience when they negotiate over leadership. Finally, it uses insights from game theory to explain how these negotiations provide an opening for holdouts and opportunism that ultimately weaken the enforcement of corporate law.

1. Data on Leadership Negotiations

A newcomer to the world of corporate litigation would likely expect leadership structures in this area to be relatively simple. After all, few of the cases are overly complex,[68] and most settle within months of filing.[69] Moreover, the defendants are often represented by one or two law firms, suggesting that complex leadership structures are not necessary to litigate these cases.

Yet empirical data demonstrates that the market for leadership in corporate law is anything but simple. Few cases in the study involved a single lead counsel with sole control over the case.[70] Instead, the average leadership structure includes between four and five law firms.[71] Such structures often include two or three firms that serve as co-lead counsel, one or two firms that serve as members of an executive committee, and

66. *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 725 (2002) (stating that an "important advantage that Delaware offers is its extensive and widely known corporate case law").

67. Online state docket systems are often woefully incomplete, making it impossible to study a random selection of leadership decisions in other jurisdictions. *See* Bernard Black et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 619 (2012) (noting that these limitations mean that it is simply "not feasible" to examine corporate law cases across jurisdictions).

68. *See infra* notes 127–29 and accompanying text.

69. According to Cornerstone Research, for example, a majority of lawsuits challenging mergers and acquisitions settle, and these settlements occur an average of forty-two days after the lawsuit was filed. *See* DAINES & KOUMRIAN, *supra* note 30, at 5.

70. The leadership orders focus on lead counsel, not lead plaintiffs. Only twenty-seven percent of the leadership orders included a lead plaintiff, reflecting the focus in these cases on law firms rather than the representative plaintiffs. This focus stands in contrast to federal securities class actions in which courts are instructed to select a lead plaintiff that will in turn select lead counsel.

71. Specifically, the average number of firms in the leadership structure was 4.4. The median number of firms was four.

one firm that serves as liaison, or local, counsel.[72] The typical leadership structure, in other words, resembles the figure below.

FIGURE 1

This structure reflects relatively dispersed power in corporate litigation. Only three percent of cases involved a single law firm that litigated the case on its own. Slightly more cases (twelve percent) involved a single lead counsel plus one or more firms that served on an executive committee or had a similar supporting role. Still, the vast majority of cases (eighty-five percent) included at least two firms sharing the lead counsel role, and these firms often themselves shared power with multiple other firms at lower rungs of the leadership structure.

These leadership structures have stayed relatively stable during the relevant time period, even as the number of lawsuits has increased exponentially.[73] In 2009, the average leadership structure in a lawsuit filed in the Delaware Court of Chancery included 4.8 different law firms.[74] By 2013, that number had fallen slightly to 3.95 lawsuits.[75]

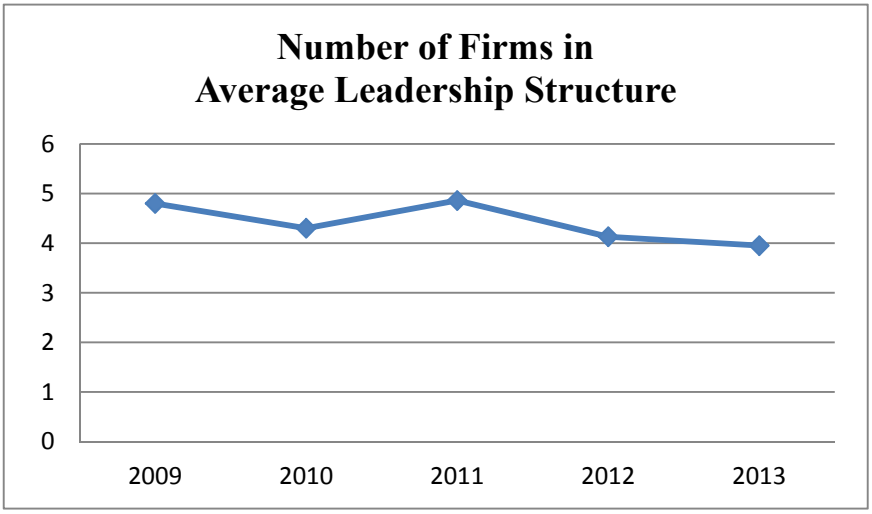
72. The median number of firms in the lead counsel role was two, the median number of firms in a secondary role (such as a member of an executive committee or a member of a committee of the whole) was one firm, and the median number of firms serving as liaison counsel was one firm.

73. *See infra* Table 1.

74. *See infra* Table 1.

75. As discussed below, this decline may be a result of more active judicial monitoring of leadership structures by select chancellors on the Delaware Court of Chancery. *See infra* notes 217–221 and accompanying text. Alternatively, there were several cases in 2013 with a significant number of filers.

TABLE 1



These figures show that dispersed power is not a new phenomenon in corporate litigation. At least for the last several years, it has been common for law firms to share control of lawsuits.

Finally, the data presented here may even understate the number of law firms involved in the litigation. This data includes only the law firms in the *Delaware* leadership structure. It does not include law firms that filed related lawsuits in other jurisdictions. Yet, nearly all merger and acquisition litigation today is filed in more than one jurisdiction.[76] Usually, one or more of these cases is filed in Delaware, but others may be filed in California, New York, Texas, Nevada, or any other state with a connection to the underlying allegations.[77]

In lawsuits in which suits are filed in multiple jurisdictions, the lawyers often confer to determine where the case should go forward.[78] These negotiations can result in a global leadership structure that gives the lawyers litigating in one jurisdiction a share of the fees if they agree that the case will proceed in the other jurisdiction.[79] These agreements fall outside

As the number of cases increases, it becomes harder for the law firms to reach a negotiated agreement over leadership.

76. Approximately half of all such lawsuits are filed in the Delaware Court of Chancery, and, even for companies incorporated in Delaware, only sixteen percent of acquisitions in 2012 were challenged *only* in Delaware. *See* DAINES & KOUMRIAN, *supra* note 30, at 2–3; Thomas & Thompson, *supra* note 9, at 1765.

77. *See, e.g.*, Thomas & Thompson, *supra* note 9, at 1765 ("Typically, suits will be filed in a state court in the state of incorporation, often the Delaware Court of Chancery, and a second set of almost identical actions will be filed in a state court where the company's corporate headquarters is located.").

78. One lawyer stated, for example, that "camps" from different jurisdictions will negotiate to allocate work and decide where the case will go forward. Another stated that multijurisdictional litigation was the "next evolution" of leadership disputes with the "same issues on a larger scale."

79. In some cases, this quid pro quo is explicit. In *In re Psychiatric Solutions, Inc. Shareholders Litigation*, the leadership order stated that "[a]ny counsel currently litigating matters related to the

the scope of this study because they are not filed with any court and therefore are not available to researchers. As a result of these behind-the-scenes agreements, however, leadership structures may be even more complicated than they appear from the leadership orders.

These negotiations allow rent seeking among the lawyers who file in alternative jurisdictions.[80] The lawyers with whom I spoke stated that firms often file in other jurisdictions if they do not think they will get a leadership position in the Delaware case. One lawyer stated, for example, that these firms are looking for a "power base. There are fights all the time with outliers who file in another jurisdiction." These observations are consistent with legal scholarship that has hypothesized that multijurisdictional litigation represents "'fee distribution litigation'" in which "lawyers attempt to derive economic rents by manipulating the jurisdictional and venue rules in which litigation occurs, as distinguished from adding value through their litigation efforts."[81]

Leadership orders may also understate the number of firms involved in the case because additional law firms may perform work in the case even if they do not have a formal role in the leadership structure. In a number of cases, law firms that did not have a role in the leadership structure later filed affidavits setting out their work in the case.[82] These affidavits suggest that, while the data above helps us understand formal leadership structures, we have less information regarding the informal roles of firms that perform work behind the scenes.

In sum, the empirical data demonstrates that most leadership structures are far more complicated than we might envision. Moreover, given the prevalence of multijurisdictional litigation, the data may even understate this dispersal of power.[83] The next question is whether these compli-

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Proposed Acquisition in the either state or federal court in Tennessee or elsewhere who are willing to drop their actions in those courts and prosecute their actions in this Court will be offered a place on the Executive Committee for purposes of prosecuting the Consolidated Action." *See* Proposed Consolidation Order at 2, *In re* Psychiatric Solutions, Inc. S'holders Litig., No. 5514-CC (Del. Ch. June 8, 2010).

80. Courts are not naïve to this reality, but they have limited power to stop it. *See, e.g.*, Oral Argument on Motions for Appointment of Co-Lead Plaintiffs, Co-Lead Counsel, and Liaison Counsel and the Court's Ruling at 25, *In re* Power-One, Inc. Stockholder Litig. (Del. Ch. June 4, 2013) (No. 8506-VCL), 2013 WL 3948994 (stating that "all you guys are going to do after you figure out who gets to have the lead role here is go out and negotiate with your brethren about what happens vis-à-vis jurisdiction").

81. *See* Thomas & Thompson, *supra* note 9, at 1757.

82. *Compare* Stipulation and Order of Consolidation, *In re* CKE Rests., Inc. S'holders Litig., No. 5290-VCP (Del. Ch. Mar. 29, 2010) (appointing the firm of Labaton Sucharow LLP as lead counsel with no other firms in the leadership structure), *with* Affidavit of Peter D. Bull of Bull & Lifshitz, LLP In Support of Plaintiffs' Application for Attorneys' Fees and Expenses (stating that the firm of Bull & Lifshitz had performed 110.5 hours of work on the case, the majority of which occurred after the court entered the leadership order).

83. For example, following an announcement that Dole Food Co., Inc.'s CEO and Chairman planned to take the company private, the company was hit with class actions in Delaware and California. The Delaware court entered an order establishing three law firms as co-lead counsel in the Delaware action. *See* Oral Argument on Cross Motions for Lead Counsel and Ruling of the Court, *In re* Dole Foods Co., Inc. (Del. Ch. Aug. 22, 2013) (No. 8703-VCL), 2013 WL 5500167. The California court established its own leadership structure that included another four law firms. *See generally* Cor-

cated leadership structures make sense in light of the particular demands of the cases. In other words, are so many firms necessary to litigate these cases effectively, or are other dynamics driving these complicated leadership structures? To answer this question, we need to understand the negotiations themselves.

2. *Lawyers' Dissatisfaction*

This Section explores the complex nature of leadership structures by going behind the scenes through interviews with attorneys who regularly participate in this area. It first describes the frustration that these attorneys feel regarding these negotiations. It then turns to the dynamics that drive these negotiations, as well as the impact of these negotiations on the distribution of attorneys' fees.

a. Frustration with Leadership Negotiations

In theory, negotiated leadership structures should be an acceptable substitute for judicially imposed orders because the negotiations occur in the shadow of the law.[84] The lawyers who participate in leadership negotiations are typically experienced practitioners who are well-acquainted with the ins and outs of state corporate law. As a result, we would expect that the negotiations would approximate the outcome these lawyers would get in court. Indeed, we might even expect that the negotiations would result in *better* outcomes than these lawyers could get in court. Negotiation theory states that, when parties bargain in the shadow of the law, they will only accept a negotiated outcome that leaves them at least as well off as they would be if they litigated the issue in court.[85] If this premise is correct, lawyers should be satisfied with the leadership structures that emerge from these negotiations.

Yet, time and again, these lawyers expressed their dissatisfaction with these negotiations. Indeed, the main takeaway from the interviews was the utter frustration that these lawyers felt toward the current system. Several lawyers told me that negotiating leadership was the worst part of their jobs. The following quotes illustrate this frustration:

1. The system is "madness."
2. "It's a mess. It's definitely a mess."

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rected Order (1) Relating and Consolidating Actions, and (2) Appointing Co-Lead and Liaison Class Counsel, *In re* Dole Food Co., Inc., S'holder Litig., No. BC511818 (Cal. Super. Ct. July 22, 2013). All told, therefore, the leadership structure for a challenge to a single transaction involved a total of seven law firms.

84. *Cf.* Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972 (1979). There are also extralegal factors that can influence the negotiations, including spite, risk preferences, and uncertainty about the law. *See id.* at 972–75.

85. *See* Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003) ("By definition, whenever there is a negotiated agreement in a two-party negotiation both parties must believe that a negotiated outcome leaves them at least as well off as they would have been if there were no agreement.").

3. The process is a "free-for-all."
4. It is a "shady underworld, a dirty, dark secret."
5. "It looks a lot like politics. It is a dirty business with strange bedfellows."
6. The rules lead to leadership structures that are "inefficient" and "ridiculous."
7. The negotiations do not have "anything to do with the merits of the case."

These lawyers did not always agree on the necessary reforms, but a majority of those interviewed stressed that the current market for leadership is rife with problems.

To be fair, not all lawyers shared these views. A minority of the lawyers interviewed for this project were relatively happy with the current approach. These lawyers tended to fall into one of two categories. First, several lawyers recognized the problems with the current system, but did not see a better option. For example, one well-respected lawyer in the plaintiffs' bar told me that he had thought a lot about this issue and simply could not think of a better alternative. As a result, even though he recognized the problems with the current system, he did not think they could be avoided. Second, some lawyers like the current system because they benefit from it. Like any system, the market for leadership has winners and losers, and some lawyers have found a way to benefit from the current system even if, as explained in greater detail below, their participation does not always benefit shareholders.

On the whole, however, the interviews reveal lawyers' deep frustration with the rules governing leadership in corporate litigation. The next question is why these lawyers are so frustrated, a question that is inextricably tied to the complicated dynamics that drive these negotiations.

b. Cause of the Frustration

This frustration arises out of a process that, at least on the surface, looks fairly benign. Lawyers know that courts will consolidate lawsuits challenging the same merger or corporate decision.[86] As a result, soon after the complaints are filed, lawyers representing the various plaintiffs start talking about how to divide the consolidated case. In some cases, the firms will agree to share power equally. In others, they might establish a more complicated leadership structure, with one or more firms serving as lead counsel and other firms playing a supporting role as members of the executive committee or as liaison (i.e., local) counsel. Once they reach a compromise, they file a stipulation with the court, consolidating the related cases and establishing the leadership structure.

86. *See, e.g.*, FED. R. CIV. P. 42 (providing that a court may consolidate cases involving a common question of law or fact); DEL. CT. CH. R. 42 (same).

The court typically grants the stipulated order without any formal review or revisions.[87] In the interviews, the lawyers did not criticize the process itself, which seems to have developed into a fairly well-oiled machine.

Nor did these lawyers criticize the substantive law. Most, for example, did not want Delaware or other jurisdictions to adopt the PSLRA's bright-line rules. They liked the flexible nature of the *Hirt* factors, as well as the similar standards used in other jurisdictions. Yet, many lawyers have lost confidence in how the law plays out behind the scenes. The question then becomes *why*. If these lawyers are bargaining in the shadow of basically good law, why are they so dissatisfied with the outcomes?

The answer lies in how the law is enforced. The legal system provides significant opportunities for holdouts during the leadership negotiations. This problem arises because firms do not have an effective mechanism to police firms that should not have a role in the case under the *Hirt* factors, but that nonetheless refuse to step back and let others lead. As discussed above, law firms face strong pressure from judges to resolve the disagreements themselves. As a result, law firms with weaker claims to a leadership position have little reason to step back and agree to forego a role in the case because they know that the firms with stronger claims have little recourse.[88]

The power of holdouts was echoed in several of the interviews. One lawyer stated that some firms have made a business of holding out during leadership negotiations. Another lawyer stressed that, if this Article says nothing else, it should stress that judges force the lawyers to negotiate, rather than resolve the dispute themselves. As a result, "the holdout firms will get ten percent [of the attorneys' fees]. Everyone else then wants ten percent as well." According to lawyers, the reluctance of courts to get involved "gives leverage to the firms with small shareholders," even if these firms should not get a leadership position under the *Hirt* factors.

Additionally, even if firms do take their disputes to court, the judge may not impose a more streamlined leadership structure. Several lawyers stated that courts have traditionally favored inclusive structures that divide work among a large number of firms, even if such structures are not necessarily the most efficient. For example, one lawyer recounted an instance in which his firm tried to exclude a firm that he knew would not contribute to the case. The firm challenged its exclusion in court, and the judge said that the firm had to be treated equally or he would not approve the leadership structure.

87. In the cases included in this study, the court almost never questioned the parties' proposed leadership structure. There were a few exceptions, *see infra* notes 107–12 and accompanying text, but these cases were few and far between.

88. *See* Oral Argument for Cross-Motions for Appointment of Lead Counsel at 22, *In re* Crimson Exploration, Inc. Stockholder Litig., (Del. Ch. July 12, 2013) (No. 8541-VCP), 2013 WL 5890398 (noting that counsel argued that "you're never going to get lawyers to reach agreement on leadership if they think that the Court's just going to add them as co-lead counsel if they can't agree").

This theme of inclusiveness is reflected in numerous judicial opinions. In one 2011 decision, for example, the Delaware Court of Chancery expressly instructed lead counsel to share work with the other law firms that had filed complaints in the case.[89] In the words of the court, the lead counsel "should act as the captain of the proverbial ship. It is lead counsel's responsibility—after consulting openly and in detail with its client and other counsel—to allocate work fairly among the willing."[90] In another case, the court stated that "although the order . . . does not give any role to the attorneys who have been unsuccessful, the Court encourages Lead Counsel to attempt to incorporate them into the case management structure."[91] As these opinions demonstrate, law firms may well face resistance from courts if they do not find a role for vocal firms that filed complaints in the case.

Finally, consistent with the data described above, the lawyers repeatedly stated that the leadership structures are influenced by the reality of the negotiations, not just the needs of individual cases.[92] Several lawyers stressed that cases almost never need more than three law firms. One lawyer stated in his interview that most cases only need one or two law firms, maybe three in the largest cases. The ideal structure, according to this lawyer, is two law firms, one of which serves as local counsel. Another lawyer stated there are benefits to having two firms in a case because they can each serve as a check on the other, but it "rarely" makes sense to have more than three firms involved in the case. A third lawyer put it even more bluntly: "If there are more than 2–3 firms in a leadership position, by definition, that is a failure. It was agreed under duress." These statements are ironic given that the leadership structures in more than sixty percent of cases in the sample included four or more law firms.[93]

These interviews confirm the concerns from the empirical data in Part II.B. The dynamics of the negotiations lead to overly inclusive leadership structures in corporate lawsuits. As we will see, these leadership

89. *See* Se. Penn. Transp. Auth. v. Rubin, No. 6323-VCN, 2011 WL 1709105, at *2 (Del. Ch. Apr. 29, 2011).

90. *Id.*

91. Coyne v. Catalyst Health Solutions, Inc., No. 7448-VCN, 2012 WL 2052731, at *2 (Del. Ch. May 25, 2012); *see also* Letter Opinion, Jauhar v. Skyterra Commc'ns., Inc., No. 4987-CC (Del. Ch. Oct. 28, 2009) ("I note that the Order provides, and I expect, that [lead counsel] will assign work in a manner that is consistent with the interests of the class and the talents and availability of all participating counsel.").

92. The dynamics of these negotiations have been confirmed in oral argument transcripts. For example, in one oral argument, a lawyer described the negotiations not as a "merits-based decision" where the law firms discussed the relative strengths of the firms. Instead, the firms simply "carv[ed] the case into economic slices, percentages." Oral Argument for Cross-Motions for Appointment of Lead Counsel at 20, *In re* Crimson Exploration, Inc. Stockholder Litig., Case 8541, at 20 (Del. Ch. July 12, 2013) (No. 8541), 2013 WL 5890398. As described by a lawyer involved in the negotiations, the premise of the negotiations was that "you should support me because I'll pay you to support me by giving you a piece of the case." *Id.*

93. Again, this point is confirmed in oral argument transcripts. *See id.* at 21 (noting that counsel stated that "[f]our firms is just too much" in a lead counsel role).

structures dilute the fees received by the law firms running the cases and in turn reduce the incentives to litigate these lawsuits.

c. Impact of Private Ordering on Legal Fees

Plaintiffs' lawyers in corporate litigation are typically compensated on a contingency basis. If the case results in a monetary award, the lawyers will receive a percentage of this award that usually ranges from fifteen to twenty-five percent.[94] If the case results in a nonmonetary benefit to the corporation or its shareholders, the court will typically order the corporation to pay the plaintiffs' lawyers a set amount that reflects, among other factors, the results achieved in the lawsuit as well as the time and effort expended by counsel to achieve these results.[95] Although courts must approve the total fee award, the law firms themselves determine how the fees will be divided among the various firms that worked on the case.[96] In other words, in the typical corporate lawsuit, the allocation of fees occurs wholly outside the scrutiny of the court.[97]

The lawyers with whom I spoke were understandably reluctant to share exact details of their fee arrangements. They were willing, however, to share some of the general practices relating to the allocation of fees. First, they stated that the allocation of fees is often decided as part of the leadership negotiations. Rather than waiting until the end of the case, they agree up front on how they will divide any fees. As discussed in Part IV, this approach is not common in other types of complex litigation.

Second, and relatedly, several lawyers stated that firms may receive a share of the fees even if they do little or no work. One lawyer told me that, in general, a member of the executive committee might get ten to fifteen percent of the fees. The work, however, is not necessarily divided in these same percentages. Several lawyers told me that the members of

94. *See, e.g.*, Lynn A. Baker et al., *Setting Attorneys' Fees in Securities Class Actions: An Empirical Assessment*, 66 VAND. L. REV. 1677, 1692 tbl. 1 (2013) (finding that the average attorneys' fees in securities class actions are approximately 22–23% of the total settlement). There is not similar data on attorneys' fees in shareholder lawsuits filed under state law, but the percentages are likely to be similar.

95. *See* Sugarland Indus., Inc. v. Thomas, 420 A.2d 142, 149–53 (Del. 1980); *In re* Plains Res. Inc. S'holders Litig., No. 071-N, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005).

96. The discretion left to lead counsel to divide fees is common in complex litigation. *See, e.g.*, Longden v. Sunderman. 979 F.2d 1095, 1101 (5th Cir. 1992) (stating that "leaving apportionment of [fees] to the Susman Attorneys themselves" was within the district court's discretion); *In re* Vitamins Antitrust Litig., 398 F. Supp. 2d 209, 224 (D.D.C. 2005) (reviewing case law holding that "lead counsel should have the initial responsibility for allocating fees from an aggregate award").

97. As explained below, law firms in corporate litigation often decide how to divide these fees as part of their negotiations early in the litigation. If they later disagree on the allocation, they may mediate their dispute, a process that again happens outside the supervision of the court. *See* Oral Argument on Motions for Appointment of Co-Lead Plaintiffs, Co-Lead Counsel, and Liaison Counsel and the Court's Ruling at 45, *In re* Power-One, Inc. Stockholder Litig., (Del. Ch. June 4, 2013) (No. 8506-VCL), 2013 WL 3948994 (referencing a mediation regarding a fee dispute). The use of mediation to resolve fee disputes was also mentioned in the lawyers' interviews, with one lawyer stating that he had been involved in a number of mediations over fees in the last several years because "money is the biggest thing people fight over."

the executive committee do little, if any, work. They might review documents. They might take a deposition. They might not do any work at all. Their ten or fifteen percent may just be a payoff for agreeing to the leadership structure. As one lawyer stated, "the executive committee doesn't mean much. Mostly, it means that you are agreeing to the leadership structure." Another lawyer stated that being on the executive committee was "code for 10–20 percent and stay out of the way."

It is important not to overstate this point. The negotiations over fees vary from case to case, and in some cases, the distribution of fees is explicitly tied to the distribution of work. But, as one lawyer stated, in the "vast majority of cases" the distribution of fees occurs up front during the leadership negotiations, a practice that one lawyer likened to a "dividend payout," while another stated that it came closer to "extortion." As we will see, these observations are entirely predictable when viewed through the lens of game theory.

3. Connecting Data and Dissatisfaction

The discussion thus far raises one crucial question. If negotiations over leadership take place in the shadow of the law, why does the reality fall so short of the structure envisioned by the law? In other words, if lawyers control these negotiations, why do they repeatedly agree to leadership structures that create such problems? Game theory helps answer this question. This Subsection explores the impact of strategic decisionmaking on private ordering in corporate litigation.

Leadership negotiations in corporate litigation are different from the classic prisoner's dilemma. In the prisoner's dilemma, individuals have no incentive to cooperate because they face only a single negotiation.[98] As a result, they will pick the outcome that maximizes their payoff in that interaction without regard to the impact of their decision on the other player.[99] Similarly, if negotiations over leadership took place in isolation, we would expect each law firm to protect its own interests in the case, even if doing so hurt other firms or the case more generally.

Negotiations over leadership, however, differ from the prisoner's dilemma in one crucial respect. Unlike the prisoners in this classic game, the lawyers involved in these negotiations have repeated interactions with each other. This familiarity means that negotiations over leadership look more like a repeated game in which the same parties repeatedly face the same type of interactions,[100] rather than the single-shot negotiation of the prisoner's dilemma.

Repeat games have the potential to avoid the problems of the prisoner's dilemma. If individuals know that they will be dealing with each

98. *See* DREW FUDENBERG & JEAN TIROLE, GAME THEORY 9–11 (MIT Press 1991) (describing the prisoner's dilemma).

99. *See id.*

100. *Cf.* Gilson & Mnookin, *supra* note 13, at 537–38.

other in the future, they will not want to shirk their responsibilities for fear of hurting their reputations and being excluded in later interactions.[101] As a result, they will adopt a long-term strategy that protects their standing among the other players in the game and maximizes their overall long-term payout.[102]

To illustrate this point, imagine a negotiation between four law firms who frequently interact with each other.[103] Given these repeated interactions, the law firms should craft leadership structures that over the long term benefit the group as a whole. They might, for example, agree to trade off as lead counsel in particular cases, recognizing that their agreement to step aside in one case will benefit them in future cases. Similarly, each firm will have an incentive to perform its fair share of the work in individual cases because firms that shirk could be excluded from later leadership roles.

The theory of repeat games helps explain why courts favor private ordering in the leadership market. Courts may well assume that, given the repeated nature of their interactions, law firms will reach solutions that promote the long-term interests of themselves and their clients. Indeed, if this assumption was correct, greater judicial involvement would be unnecessary.

This assumption, however, does not always reflect the realities of the negotiations. The benefits of repeated interactions depend on the parties' ability to exclude those who shirk on their responsibilities. As detailed above, a law firm will only act against their interests in a single interaction if the firm fears being excluded in future interactions if it does not cooperate. If the firm knows that it can shirk with impunity, it will not fear long-term consequences and the negotiations will instead resemble a single-stage interaction.

In negotiations over leadership, the firms have a limited ability to punish law firms that shirk their responsibilities for three reasons.[104] First, as discussed above, courts are reluctant to punish shirkers.[105] Courts often refuse to decide leadership disputes, insisting that the lawyers resolve their differences.[106] Even if the court agrees to hear the dispute, it may appoint multiple lead counsel or strongly encourage lead counsel to craft

101. *See* JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 261 (1994) ("A reputation can deter the first player from taking actions against the second player's interests.").

102. *See id.*

103. This discussion is based on the economic theory underlying the infinitely repeated game. Although law firms are unlikely to handle leadership negotiations over an infinite amount of time, the infinite repeated game still applies because the parties do not know when their repeated interactions will come to an end. *See, e.g.*, DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 167 (1994) (stating that "[t]he finitely repeated game is the appropriate model only if the parties know with certainty exactly when the game will end").

104. *See* MORROW, *supra* note 101, at 268 (explaining that cooperative strategies can break down if reciprocal punishment strategies are not credible).

105. *See supra* notes 46–48 and accompanying text.

106. *See id.*

an inclusive leadership structure.[107] These practices limit the ability of firms to punish those who do not live up to their responsibilities.

It is important not to take this point too far. Judges can and do decide leadership disputes. Indeed, as discussed above, the court decided a contested leadership battle in more than ten percent of the cases in my study.[108] Moreover, in at least a few instances, courts have rejected the parties' proposed leadership structure and established a more streamlined structure.[109] In other cases, courts replaced firms as lead counsel when the court did not think that the case was being litigated effectively.[110] In short, courts may be reluctant to decide leadership disputes, but they rarely refuse to do so.[111] Their reluctance, however, makes lawyers hesitant to press the issue in court.

Second, firms are reluctant to seek judicial intervention because leadership battles have high transaction costs. It takes longer to get a final resolution on leadership issues when the court has to wade into the dispute,[112] and this difference matters in certain types of corporate lawsuits. Specifically, in lawsuits challenging mergers or acquisitions, the plaintiffs often sue to enjoin the transaction. Once the transaction closes, the settlement value of the case plummets.[113] As a result, the plaintiffs face strong incentives to organize quickly so that they do not weaken their settlement position in the litigation. Law firms may decide to include a firm known for shirking simply because they do not want to spend time defending their leadership structure in court.

Third, the relatively indeterminate legal standards used to decide leadership disputes make it difficult for counsel to predict with any cer-

107. *See* Coyne v. Catalyst Health Solutions, Inc., C.A. No. 7448–VCN, 2012 WL 2052731, at *2 (Del. Ch. May 25, 2012) ("Although the order of consolidation does not give any role to the attorneys who have been unsuccessful, the Court encourages Lead Counsel to attempt to incorporate them into the case management structure."); Se. Pa. Transp. Auth. v. Rubin, No. 6323–VCN, 2011 WL 1709105, at *2 (Del. Ch. Apr. 29., 2011) ("This is not an appointment that empowers lead counsel to take most of the work or the 'good' work for itself. In short, the role of lead counsel, not to be profound, is to lead.").

108. *See supra* note 58 and accompanying text.

109. *See, e.g.*, Order Granting Class Certification, Appointing Class Representatives, and Establishing Leadership Structure at 3, *In re* Astex Pharms., Inc. Stockholders Litig., No. 8917-VCL (Del. Ch. Nov. 1, 2013) (denying proposed leadership structure that included nine different law firms because "[s]uch a structure risks significant duplication of effort and decisional inefficiencies"); Order Denying Proposed Order of Consolidation at 4, Hardy v. Hawk Corp., No. 5925-VCL (Del. Ch. Nov. 4, 2010) (denying proposed leadership structure because "I will not approve an order contemplating a non-substantive role for Delaware counsel. You are not a drop box.").

110. *See, e.g.*, *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 957 (Del. Ch. 2010).

111. *See* Transcript of Oral Argument at 14, Klein v. Walton, (Del. Ch. July 24, 2012) (No. 7455-CS) (stating that the court had "recently decided several" leadership disputes and "[j]ust picked. . . . I[t] had no problem.").

112. In cases in which the lawyers themselves decide on a leadership structure, the length of time between the first filed suit and the first leadership order was twenty-one days. In cases in which the court established a leadership structure, this time increased to thirty-five days.

113. The objective of the plaintiffs is either to (1) convince the court to halt the transaction, which will allow a more typical pace for the litigation, or (2) reach a settlement with the defendants before the scheduled closing of the transaction. Neither option is likely until there is a leadership structure for the various filers because courts will not force defendants to answer the complaints or respond to discovery until the cases are organized.

tainty how the court will rule.[114] It is more difficult for parties to bargain in the shadow of the law when they are not sure what the law is. In their interviews, the lawyers all stated that the *Hirt* factors mattered, but often stressed different factors when asked which ones were the most important. Some lawyers insisted that the client's stockholdings were the most important factor, while others stressed the quality of the pleadings or the firm's reputation. One lawyer was especially blunt on this point, stating that the *Hirt* factors are like "bible verses" because "you can always find factors and cases to support your position." As a result, lawyers almost always have a basis to argue that they should have a role in the leadership structure. This indeterminacy makes it more difficult for private ordering to reflect the formal legal standards.

Finally, and perhaps most importantly, the legal market no longer resembles the small, tight-knit market that would allow law firms to easily punish shirkers.[115] The data from this study illustrates that the law firms that file corporate lawsuits have grown beyond the close community envisioned by courts. More than sixty different firms served as lead counsel or co-lead counsel in the two hundred cases examined for this Article.[116] More than one hundred different firms had some sort of leadership role (either as lead counsel, a member of an executive committee, or liaison counsel) in these cases.[117] As the market expands, it is more difficult for firms to do the long-term bargaining and monitoring that are necessary to ensure cooperative interactions.[118] Firms, for example, cannot easily enter into arrangements to trade leadership roles in different cases. Nor can they easily punish firms that shirk their responsibilities because they may not work with the same firm for a long period of time, or they may be in a case with other firms that have not had a bad experience with the firm.

These reasons all help explain why leadership negotiations do not always promote the cooperative decision making envisioned in game theory scholarship. The complicated dynamics of real-world negotiations mean that many of the assumptions underlying repeated games simply do not hold in the leadership market. The next question is how these leadership structures impact the enforcement of corporate law more generally.

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114. *Cf.* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2500 (2004) (stating that, in criminal law cases involving indeterminate sentencing, "optimism may lead each party to look at the bargain differently through its own rose-colored glasses").

115. *See, e.g.*, Gilson & Mnookin, *supra* note 13, at 537 ("Central to the potential for lawyers to facilitate a cooperative solution to a prisoner's dilemma litigation game is an effective reputation market for lawyers. Lawyers must be able to earn and maintain observable reputations for cooperation, and lawyers must be able to observe breaches of reputation by opposing counsel and have an interest in reporting these breaches.").

116. There was not a clear division between the firms that served as lead counsel and the firms that had a more supporting role. Some firms refuse to participate in a case if they are not lead or co-lead counsel, but most occupy a variety of roles across cases.

117. *See supra* Part III.B.1.

118. *See, e.g.*, Gilson & Mnookin, *supra* note 13, at 537.

C. Broader Implications of Private Ordering

Taken together, the quantitative and qualitative data on leadership structures present a compelling picture of dysfunction in the market for leadership. The key question, however, is whether this dysfunction impacts the enforcement of corporate law. After all, it would be nice if plaintiffs' lawyers were satisfied with their working relationships, but these lawyers are sophisticated players who can generally take care of themselves. The more pressing concerns arise when problems with leadership impact shareholders, who rely on lawyers to protect their legal interests. This Section explores the costs, as well as some surprising benefits, of the reliance on private ordering in leadership negotiations.

1. Costs of Private Ordering

Dispersed leadership structures can negatively impact corporate lawsuits in three ways. First, they can reduce the incentives to litigate these cases effectively. Second, they can impact the development of innovative legal theories or strategies in these cases. Finally, they can create inefficiencies, turning litigation into decision making by committee. I discuss each in turn below.

a. Reduced Incentives to Litigate

The goal of contingency fees in class action litigation is to provide plaintiffs' lawyers with appropriate incentives to litigate cases on behalf of absent class members.[119] Leadership structures, however, can undermine these incentives because, if a law firm gets a seat at the table, it also receives a portion of the fees.

As discussed above, lawyers were reluctant to share the exact details of their fee arrangements.[120] They also stressed that these arrangements varied from case to case. Yet, several lawyers stated that it would not be unusual for the lead counsel in a given case to receive sixty-five percent of the fees, with the remaining thirty-five percent going to members of the executive committee and liaison counsel.[121] Assuming that division, if a given case ends with $1 million in fees, lead counsel will re-

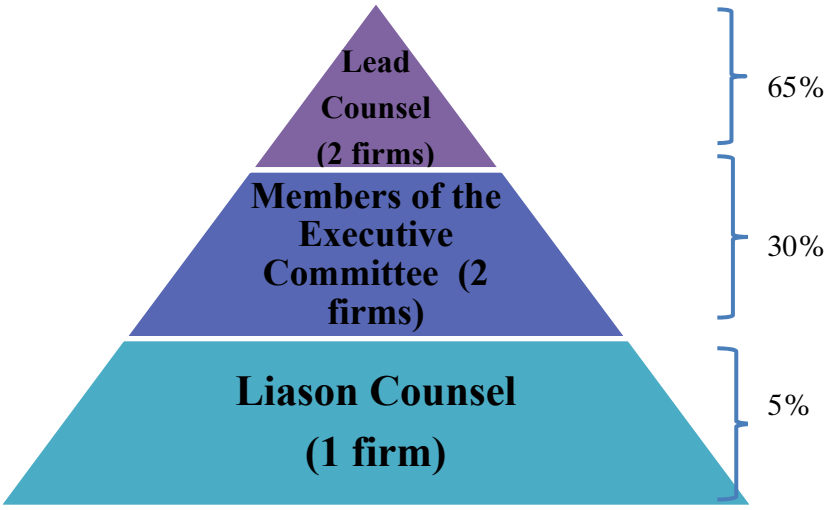
119. *See* Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U. L. REV. 1239, 1269 ("By deferring compensation to counsel until the class realizes a positive gain at the conclusion of the case, contingency fees give class counsel a direct interest in the outcome of the litigation, thus aligning counsel's interests with the interests of the class.").

120. *See supra* Part III.B.2.c.

121. These statements also find support in oral argument transcripts where lawyers have occasionally been pressed to disclose their fee offers to other firms. *See, e.g.*, Oral Argument on Motions for Appointment of Co-Lead Plaintiffs, Co-Lead Counsel, and Liaison Counsel, and the Court's Ruling at 31, *In re* Power-One, Inc. Stockholder Litig., No. 8506-VCL (Del. Ch. June 4, 2013) (counsel stated that they had offered another firm ten percent of the fees in exchange for supporting the leadership structure, an offer that the court stated was consistent with "what I was going to guess").

ceive $650,000, while the other lawyers in the case will receive $350,000. The figure below reflects this division.

FIGURE 2



This allocation of fees raises questions about the incentives of the lawyers to litigate the case effectively. If $1,000,000 was the amount necessary to get effective representation in the case, then we are not paying lead counsel enough. As a result, we should expect lead counsel to underinvest in the lawsuit. The lawyers interviewed for this Article repeatedly expressed this concern. One stated, for example, "The incentives can get crazy. If too many firms are demanding percentages, the lead firms don't have a big enough stake to incentivize them to work hard on the case."

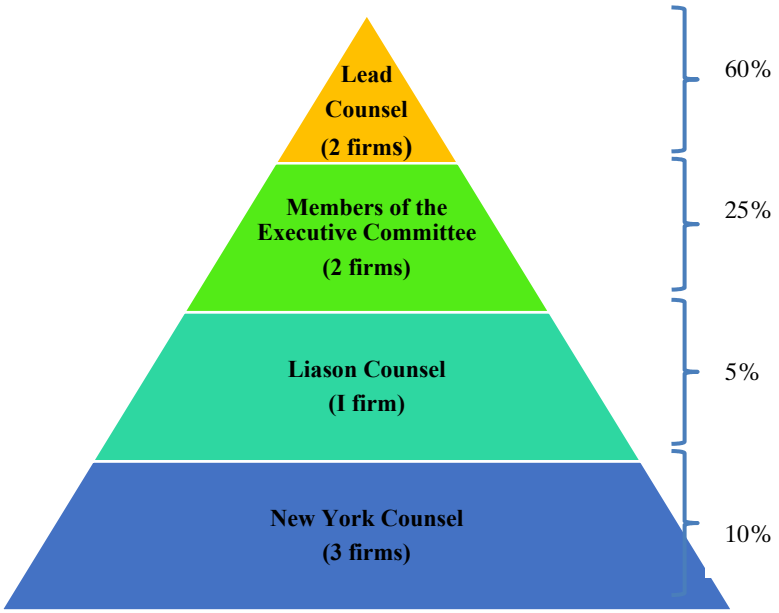
Alternatively, it could be that $650,000 is an adequate amount to incentivize lead counsel to litigate the case. This possibility, however, does not improve the overall picture. If lead counsel will vigorously pursue the case even though it will only receive sixty-five percent of the legal fees, then the remaining $350,000 is a deadweight loss. The shareholders of the target corporation paid this amount and got nothing in return. In other words, courts may be paying lawyers $350,000 of other people's money to avoid deciding leadership disputes.

The economics get even worse when multijurisdictional litigation is added to the mix.[122] Imagine that, in addition to a single consolidated case in Delaware, there are another three cases in New York state court. In a multijurisdictional scenario, lead counsel in Delaware may have to pay out another ten to fifteen percent of the case to the New York lawyers in exchange for these lawyers agreeing to litigate the case in Delaware or

122. *See* DAINES & KOUMRIAN, *supra* note 30, at 3 (stating that, for firms incorporated in Delaware, sixteen percent of mergers and acquisitions were challenged only in the Delaware Court of Chancery).

agreeing not to object to the settlement. The figure below reflects a possible allocation of fees in a case involving multijurisdictional litigation.[123]

FIGURE 3



This payout to out-of-state counsel means that lead counsel may receive an even smaller percentage of the fees, further weakening their incentives to pursue the case.

These concerns rest on the assumption that the contributions of the other law firms in the case are not worth their share of the fees. In a perfect world, each firm would receive a percentage of the overall fees that exactly corresponds with their contribution to the litigation. Based on my conversations with plaintiffs' lawyers, however, there is reason to doubt that the contributions of the firms in the lower rungs of the leadership structure are worth the full amount these firms are receiving. This point builds on the analysis of fees in Part II.B.1 in two important ways.

First, although the lawyers in these lower levels may do some work, it is not the high-level work that deserves the highest levels of compensation. Lead counsel typically does the strategic work, making substantive decisions that drive the litigation forward, while the other firms review

123. Given the private nature of these agreements, there is little data on how fees are allocated among counsel litigating the same dispute in different forums. In the few cases in which these multijurisdictional fee disputes have been brought to the court, the court has either instructed counsel to resolve the dispute themselves or ordered counsel to share the fees. *See, e.g.*, *In re* Allion Healthcare, Inc. S'holders Litig, No. 5022 (Del. Ch. Mar. 29, 2011) (ordering Delaware and New York to split part of the fees evenly); *In re* Burlington N. Santa Fe S'holders Litig. No. 5043, at ¶10 (Del. Ch. Oct. 28, 2010) (providing a global fee award for Delaware and Texas counsel and ordering counsel to divide the fee themselves).

documents or take low-level depositions.[124] And yet several lawyers stated that it is possible that lead counsel may end up with a lower multiplier than the firms in these lower rungs. In other words, lead counsel may get a lower hourly rate than firms that serve in a subordinate role.

Second, as described above, the law firms in these lower rungs may not do any work on the case. Some firms were quite candid that firms on the executive committee do not expect to have to do any work at all. This point was exemplified by the statement quoted above that being on the executive committee was "code for 10–20 percent and stay out of the way." Another lawyer stated that firms in these lower rungs of the leadership structure may do some work, but in many cases, their role is "more of a fiction" amounting to a "tax" that lead counsel pays to get a leadership role.[125]

In short, there are strong indications that lawyers may be dividing cases in ways that reduce incentives to litigate. These reduced incentives in turn impact *how* cases are litigated. If lawyers know that it is not worth their time to put additional work into a case, they will settle early in the litigation or skimp on the heavy lifting it takes to put together a successful case.[126] This observation corresponds to the problems often seen in this area of the law.[127] Shareholders file a significant number of cases, but the cases often involve little litigation activity, with one Delaware judge calling these litigation practices a "Kabuki dance."[128] And, to the extent that leadership decisions impact incentives to litigate, it is ultimately shareholders who will bear the brunt of these decisions.

124. *See, e.g.*, Oral Argument, Plaintiff's Motion to Consolidate and Motion for Expedited Proceedings at 12, Black v. Cox Commc'ns, Inc., No. 630 (Del. Ch. Aug. 24, 2004) (stating that a firm on the executive committee has "no meaningful input" into how a case gets litigated).

125. *See, e.g.*, Oral Argument on Motions for Appointment of Co-Lead Plaintiffs, Co-Lead Counsel, and Liaison Counsel, and the Court's Ruling at 46, *In re* Power-One, Inc. Stockholder Litig., No. 8506-VCL (Del. Ch. June 4, 2013) (law firm allegedly demanded "seventeen percent" of the fees and "no work" in exchange for supporting the leadership structure).

126. *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 231 (1983) ("If the private enforcer is risk averse and therefore will not gamble his time and effort on an extended litigation, his most logical strategy is to bring a high volume of cases, thereby spreading his risk, but in consequence investing relatively little time or effort in any single case.").

127. For example, one scholar has recently stated that "[c]lose students of M&A litigation have recognized that such litigation often has a 'phantom' character. Plaintiffs rush to file, then fight intensely over the appointment of lead counsel, but thereafter take little discovery, conduct no depositions, and make few motions." John C. Coffee, Jr., *Foreword: The Delaware Court of Chancery: Change, Continuity—and Competition*, 2012 COLUM. BUS. L. REV. 387, 397 (2012).

128. *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 945 (Del. Ch. 2010); *see also* Oral Argument: Motion to Appoint Lead Plaintiff and Lead Counsel and the Court's Ruling at 43, 62, *In re* Activision Blizzard, Inc. Stockholder Litig., No. 8885-VCL (Del. Ch. Dec. 3, 2013) (providing that the court stated that "as a practical matter, . . . the business model of the vast majority of plaintiffs' lawyers" is to "settle . . . case[s] without discovery").

b. Less Innovation

The common law system depends on active litigants who can encourage innovation in the law.[129] In a world in which everyone gets a seat at the table, however, firms may not have adequate incentives to invest in this innovation.

This point builds on well-accepted principles of intellectual property law. Individuals have the greatest incentives to innovate when they have a property right in the product of their innovation.[130] A Silicon Valley entrepreneur, for example, will only strive to create the next Google if she knows that she will reap the financial rewards if her product is successful in the marketplace. The legal system protects these incentives by giving entrepreneurs property rights in their inventions in the form of patents or other intellectual property rights.

Lawyers do not have formal property rights in the cases they file. In most lawsuits, however, lawyers have de facto property rights because they are chosen by one party to represent their interests. Class actions are different. A class action lawyer could spend the time and money to develop a case only to see another law firm appointed lead counsel. If lawyers see this loss as a realistic threat, they may decide not to spend the resources to develop their cases in the first instance.[131] Instead, they will try to free ride on the work of others.

Courts purport to protect innovation through the legal standards governing leadership. Both the *Hirt* factors and rule 23(g), for example, take into account the quality of the pleadings in selecting lead counsel.[132] If a law firm takes the time to develop an innovative angle or legal theory in a case, it will have an advantage in a later leadership fight. Otherwise, as at least one court has noted, "If other lawyers can free ride by copying a well-crafted complaint, counsel will have diminished incentives to investigate potential claims and file good cases."[133]

Such rules, however, may lack teeth for two reasons. First, the strength of these property rights depends on the willingness of courts to enforce them. As discussed above, many lawyers believe that courts will go to great lengths to avoid leadership disputes and may even flat-out

129. *See generally* Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733 (2004) (discussing the role of litigators in promoting the evolution of the law).

130. *See* Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 922 (2010).

131. Scholars have directly tied the lack of property rights in class action litigation to reduced incentives to litigate. *See, e.g.*, Coffee, *supra* note 126, at 233 ("In economic terms, this is a classic problem of inadequately specified property rights—the private attorney is in the same position as an inventor who knows he cannot patent an invention that he forsees [sic] or a prospector who cannot stake out a legally blinding claim. In such situations, one cannot reasonably expect the inventor or prospector to invest the same effort in search and discovery as they would if they could be assured of the ability to reap the full economic return from their invention or discovery.").

132. FED. R. CIV. P. 23(g); Hirt v. U.S. Timberlands Serv. Co. LLC, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002).

133. *In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027–VCL, 2010 WL 5550677, at *9 (Del. Ch. Dec. 31, 2010).

refuse to decide these disputes.[134] As a result, lawyers may agree to share ownership over the cases that they develop, despite formal rules to the contrary.

Second, law firms may have no need to innovate because they can instead free ride off the work of others. In a system based on dispersed leadership structures, lawyers can easily get a seat at the table in most cases simply by finding a plaintiff and filing a parallel action. These lawyers may not be appointed lead counsel, but they will likely get a role on the executive committee.[135] Lawyers can make a good living by taking a small piece of a large number of cases. The result of this practice is that firms have little incentive to seek out new types of misconduct or develop new legal theories.

This argument does not mean that innovation is absent from corporate litigation. In a number of shareholder disputes, plaintiffs' lawyers have developed novel theories of liability that have advanced the development of the law.[136] Yet, the legal system should do more to encourage this kind of innovation. Litigation, especially in common law areas, provides opportunities for the evolution of the law.[137] This process is essential in corporate law because litigation is one of the chief ways to ensure that corporate boards are responsive to the interests of shareholders.[138] If state law does not reflect the changing practices of the boardroom and the market, it will cease to serve as an effective mechanism for accountability. In short, a lack of innovation in litigation can lead to a lack of innovation in the law.

c. Greater Inefficiencies

Dispersed leadership structures can also lead to inefficiencies in how cases are litigated. Corporate litigation today is litigation by committee. Lead counsel is responsible for determining the overall strategy of the case, but it then divides the necessary work to execute this strategy

134. *See supra* Part II.B.

135. They may also control the less lucrative cases that the high-profile firms do not want, and even these suits will likely end with hundreds of thousands of dollars of attorneys' fees.

136. For example, in 2012, the law firms of Prickett, Jones & Elliott, P.A. and Kessler Topaz Meltzer & Check LLP filed lawsuits against a number of Delaware corporations that had adopted bylaw provisions requiring shareholder lawsuits to be litigated exclusively in Delaware. The firms argued that these bylaws violated unlawfully curtailed shareholders' rights by limiting where they can litigate. *See* Alison Frankel, *Shareholder Lawyers Sue Over Delaware Forum-Selection Bylaws*, REUTERS (Feb. 8, 2012), http://blogs.reuters.com/alison-frankel/2012/02/08/shareholder-lawyers-sue-over-delaware-forum-selection-bylaws. These suits fell outside the traditional mold, but were remarkably successful, with most of the targeted companies repealing the challenged bylaws. *See* Claudia H. Allen, *Exclusive Forum Provisions: Putting on the Brakes*, BLOOMBERG BNA: CORPORATE ACCOUNTABILITY REPORT 2 (Dec. 14, 2012). These cases demonstrate that some firms are taking a risk, and this risk is paying off.

137. *See, e.g.*, John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUDS. 393, 393–94 (1978) (analyzing a theory of common law development in which inefficient legal theories are discarded through constant litigation).

138. *See* Thomas & Thompson, *supra* note 9, at 1758–59.

among several other law firms. These firms, in turn, have responsibility for particular facets of the case, from discovery to expert witnesses.

This allocation of responsibilities can be beneficial. As discussed in greater detail below, dispersed leadership structures allow lawyers to pool resources, share risks, and exchange ideas, all of which benefit absent class members. Yet, there are downsides to committees as well.[139] If there is not a true captain of the ship, as in a case with multiple firms serving as lead counsel, there may not be anyone to drive the litigation. Similarly, it takes significantly more time for five firms to sign off on a motion than if one firm alone can make a decision.[140]

The lawyers interviewed for this Article confirmed these concerns. One lawyer stated, "It makes no sense to have more than one firm involved. It is so horribly inefficient and leads to duplicative work. You try to divide up the work, but you still have ten lawyers on every call and everyone wants to read everything. From a business standpoint, it makes no sense." Another lawyer stated that lawsuits can become a "circus."

These incentives also cause firms to file lawsuits soon after transactions are announced,[141] even if firms have not had time to investigate possible wrongdoing. Collectively, each firm would rather take the time to investigate possible claims and determine whether the litigation has merit before filing suit. Individually, however, each firm has an incentive to file early and submit a proposed leadership structure before too many other firms join the case.[142] As a result, even though lawyers bemoan the rush to the courthouse, they face strong incentives to file early rather than conducting a thorough prefiling investigation.[143]

139. *Cf. In re* Milestone Scientific Secs. Litig., 187 F.R.D. 165, 176 (D.N.J. 1999) (holding that a "'litigation by committee' approach to securities class actions may prove 'unnecessary and wasteful'").

140. Defense counsel have noted this concern as well. In one oral argument, the lawyer for the defendants urged the court to pick a single firm as lead counsel, with no more than one other firm as liaison counsel, because the defendants could otherwise find themselves negotiating with multiple firms or learning after the fact that some firms in the leadership structure will not agree to a deal negotiated by other firms in the leadership structure. *See* Oral Argument for Cross-Motions for Appointment of Lead Counsel at 48, *In re* Crimson Exploration, Inc. Stockholder Litig., (Del. Ch. July 12, 2013) (Case 8541–VCP), 2013 WL 5890398.

141. *See* DAINES & KOUMRIAN, *supra* note 30, at 1 (finding that lawsuits challenging mergers and acquisitions are filed an average of fourteen days after the deal is announced).

142. According to the lawyers interviewed for this Article, law firms start organizing a proposed leadership structure as soon as the first cases are filed. A firm that takes the time to conduct a thorough investigation before filing a complaint may find itself shut out of the leadership structure. If the late filer has a strong argument in favor of a leadership role, it may be able to convince the other filers or the court to amend the leadership order. If the late filer has credentials and a client comparable to those of the earlier filers, however, it may well not be able to get a place in the leadership structure. As a result, firms file early rather than risk having to fight for a role in the case after other firms have already agreed to a leadership structure.

143. Several lawyers criticized this trend, with one noting, for example, that "if you wait to file, you can be shut out of the leadership structure."

2. *Benefits of Private Ordering*

Despite the many concerns about the functioning of the leadership market, private ordering also has its advantages. First, private ordering makes it easier for attorneys to diversify their risk by maintaining a portfolio of litigation. Second, private ordering reduces the barriers to entry for new law firms hoping to enter the practice area. Finally, private ordering allows the parties to move more quickly to the merits of the litigation. Before discounting private ordering, therefore, we should recognize the benefits that private ordering brings to the market for leadership.

a. Portfolio Approach to Litigation

Private ordering allows plaintiffs' firms to manage a portfolio of litigation.[144] Legal scholars have long recognized that such portfolios are crucial to the business model of many firms that file class action lawsuits.[145] These firms typically accept cases on a contingency basis, and, as a result, they only get paid if the cases end with a favorable outcome. Rather than put all of their eggs into one basket, firms invest in multiple lawsuits just as shareholders might invest in multiple companies.[146]

The small size of most plaintiffs' firms hampers their ability to diversify fully.[147] A single firm with five lawyers may only be able to litigate four or five lawsuits on their own in a given year, making their financial fortune dependent on the outcomes of a relatively small number of cases. On the other hand, if this firm is able to obtain a position as lead or co-lead counsel in four cases and a position on the executive committee in another ten cases, the firm can more effectively spread out its risk.

Several lawyers interviewed for this Article confirmed that dispersed leadership structures help hedge the risk of contingency fee litigation. One lawyer, for example, stated that he knew law firms that had bet their firm on a single case and noted "those firms aren't around anymore." Another lawyer noted, "if you split the case, you half the risk." The lawyers noted that the desire to share leadership was especially salient in the riskier cases, such as cases where the law is unsettled or the

144. The portfolio model is especially important to lawyers' efforts to diversify because lawyers are generally not allowed to diversify through other business models. A law firm, for example, cannot easily hedge its risk by offering accounting or financial services because ethical rules in the United States prohibit partnerships and fee-splitting arrangements between lawyers and nonlawyers. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt. 1 (2002).

145. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class And Derivative Actions*, 86 COLUM. L. REV. 669, 677, 704–07 (1986) (explaining that a plaintiff's attorney is "a utility-maximizing entrepreneur who manages a portfolio of actions and thus makes litigation decisions in an individual case based upon their overall impact on the portfolio"); James H. Stock & David A. Wise, *Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results*, 16 CLASS ACTION REP. 584, 597–98 (1993) (discussing portfolio management techniques used by plaintiffs' firms).

146. *See* Coffee, *supra* note 145, at 704–07.

147. *See id.* at 706 (arguing that the "characteristically small size of plaintiff's attorneys' firms" makes it difficult for firms to diversify their risk and that, "on such a scale, it is doubtful that plaintiff's attorneys can achieve full diversification").

plaintiffs are arguing for a change in the law. Firms did not want to invest a significant amount of their own time and resources if they might not see a return on this investment. As these interviews illustrate, dispersed leadership structures can reflect sound business practices, even if they appear inefficient to outsiders.

b. Easier Entry into the Litigation Market

Dispersed leadership structures also make it easier for new law firms to enter the litigation market. These structures stand in stark contrast to a winner-take-all system in which the court chooses one or two law firms to control a given case. Under a winner-take-all system, the court will likely choose the more established firms for these leadership roles because, in each leadership contest, the more established firms will have greater experience, better clients, and more longstanding relationships with the courts. A newer firm could still earn a leadership position by developing a new angle in the case or targeting cases that the more established firms do not pursue. Overall, however, winner-take-all leadership rules are more likely to favor established law firms.[148]

Dispersed leadership rules, on the other hand, allow newer entrants to get a foothold in the market. If the leadership structure includes four or five firms, newer entrants still may not get a lead counsel position, but they may get a position on an executive committee with responsibility over a certain aspect of the case. Firms can use this responsibility to prove themselves to other firms. Over time, these opportunities may translate into greater leadership roles.

These lower barriers to entry have led to more firms in the current marketplace. The plaintiffs' bar in corporate litigation is increasingly fragmented into smaller firms, many of which started filing state law shareholder suits after the barriers to entry increased in other practice areas, such as securities class actions.[149] Several lawyers interviewed for this Article noted this shift, observing that the number of law firms filing corporate lawsuits in the state courts has increased dramatically in recent years.[150] These reduced barriers to entry have downsides, as explored above, but there are advantages to limiting market concentration as well.[151]

148. As discussed in greater detail below, this phenomenon has occurred in securities litigation. There have been few new players in the securities bar since the enactment of the PSLRA's winner-take-all lead plaintiff rules, reflecting the difficulties that newer entrants have in attracting the large institutional clients necessary to secure a leadership position in a securities class action. *See* Choi & Thompson, *supra* note 10, at 1514–15.

149. *See* Cheffins et al., *supra* note 11, at 431.

150. As one lawyer noted, for example, "There are no barriers to entry in the M&A/state law side."

151. Dispersed leadership structures also foster a cross-pollination of ideas. On the defense side, this cross-pollination tends to happen across cases as defense counsel observe successful litigation tactics used in other cases. On the plaintiffs' side, however, this cross-pollination of ideas can occur

As we have seen, the leadership market in corporate law allows shirking and opportunism, while also promoting cooperative behavior in limited instances. The next question is whether other areas of the law offer additional insights that might improve leadership negotiations in corporate law.

IV. LESSONS FROM OTHER LEADERSHIP MARKETS

Leadership disputes are not unique to corporate law. In many types of class actions, it is common for multiple law firms to file similar lawsuits, forcing lawyers and courts to decide who will control the litigation. This Part first describes the small-scale negotiations over leadership that dominate many small consumer class actions. It then explores the larger-scale negotiations—and more frequent judicial intervention—used to decide leadership disputes in antitrust class actions. Finally, it describes the hard-and-fast rules governing leadership in securities class actions. As we shall see, the market for leadership in these three areas provides important lessons into leadership disputes in corporate law.

A. Consumer Class Actions and Small-Scale Negotiations

Private ordering is the norm in many smaller class actions where cases attract only a few filers. Consumer class actions are a prime example. Although many consumer class actions are quite large with dozens of law firms competing for a leadership role,[152] others are relatively small,[153] making it easier for the lawyers themselves to decide leadership issues.

Plaintiffs' lawyers conduct these negotiations against the backdrop of relatively murky law. Consumer class actions filed in federal court are governed by Rule 23(g).[154] As discussed above, this rule does not set out a bright-line standard for the appointment of lead counsel. Instead, the court can take into account a variety of factors, from the law firms' work in identifying and investigating potential claims to their experience in

within cases. With multiple law firms involved in a single case, firms can share ideas and serve as a check on one another, ultimately leading to better lawyering for the shareholder class.

152. *See, e.g.*, Order No. 2: Adoption of Organization Plan and Appointment of Counsel, *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., (C.D. Cal. Mar. 14, 2010) (No. 8:10ML 02151 JVS) (appointing a multitier leadership structure involving separate committees of law firms for wrongful death cases, economic loss cases, discovery issues, and liaison issues with state cases because "a larger group of counsel is needed to meet the needs of this case"). The larger consumer class actions tend to resemble the antitrust class actions described in the next Section, with large-scale negotiations and greater judicial involvement. This Section focuses on smaller consumer class actions.

153. For example, one lawyer stated in his interview that "in consumer cases, there are fewer big plaintiffs and fewer duplicate cases" and therefore the leadership disputes do not resemble the "feeding frenzy" of corporate litigation.

154. FED. R. CIV. P. 23(g).

similar cases.[155] As a result, federal courts have substantial discretion in making this choice.

Moreover, many consumer class actions are filed in state court,[156] where the law is even murkier.[157] There is a remarkable lack of case law governing leadership issues in class actions at the state level. Some states follow the lead of the federal courts, applying multifactor tests that resemble Rule 23.[158] Other states approach leadership on a more ad hoc basis.[159] Given the lack of clear legal guidance in this area, the burden often falls on the lawyers themselves to establish leadership structures.[160]

Despite the imprecise legal standards, a set of norms have developed among the lawyers who practice regularly in this area. I interviewed several lawyers who specialize in consumer class actions to understand these norms. These lawyers stated that, in smaller consumer class actions, the law firms typically agree to combine forces, dividing both the work and the fees equally. Firms rarely insist on a winner-take-all arrangement because they know that judges are unlikely to give a single firm control of the case. As one lawyer stated, "no judge is going leave the second [firm] out of the mix." Firms are well aware of this likely outcome if they contest the dispute in court, and this knowledge informs their private negotiations. In other words, just as in corporate litigation, the firms are bargaining in the shadow of legal norms that favor private ordering and inclusiveness.

These informal norms guide the negotiations. Although there is a presumption that the firms will divide the case equally, this presumption can be overcome if one law firm has superior experience or investigative skills. For example, lawyers stated in their interviews that firms that take the time to investigate and develop a case are more likely to get a bigger share of a case than firms that merely copy another firm's complaint. Similarly, firms with better reputations and/or greater manpower and resources have greater leverage to demand a leadership role. For example, if one large well-established firm and two smaller and less well-known firms file similar lawsuits, it is generally accepted that the larger firm will take a more active role in the litigation. These norms are fairly

155. *See id.* The lawyers stressed this point in their interviews, with one noting for example that rule 23(g) gives judges "lots of leeway and discretion."

156. The Class Action Fairness Act ("CAFA") provides for exclusive federal jurisdiction for most class actions seeking over $5 million in damages. *See* 28 U.S.C. § 1332(d) (2012). CAFA, however, does not apply to smaller class actions, which often remain in state courts.

157. *See, e.g.*, *In re* Providian Credit Card Cases, No. A097482, 2003 WL 23002628, at *3 (Cal. Ct. App. Dec. 22, 2003) (holding that the fact that California does not have any statutes or rules governing lead counsel appointments means that the trial judge has "broad power" over these appointments).

158. *See, e.g.*, Pollard v. Alpha Technical Servs., 102 So. 3d 71, 81 (La. Ct. App. 2011) (using rule 23(g) to guide lead counsel appointments in Louisiana).

159. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.211 (2004) (noting that one approach for selecting lead counsel is for courts to "review[] the recommendations of lawyers who have filed related actions and appointing the recommended lawyers if they are adequate to represent the interests of the class").

160. *Id.* § 21.272 (stating that, "although there are 'several methods' for selecting lead counsel, "[b]y far the most common is the . . . 'private ordering' approach").

similar to the norms that underlie leadership negotiations in corporate litigation.[161]

On the whole, these arrangements seem to work relatively well. As long as the firms are reliable and perform high-quality work, they are able to divide the case fairly evenly between them. Moreover, a shared leadership structure allows the firms to merge resources and pool the risk inherent in a contingency fee lawsuit. There is always a risk that one firm will not perform high-quality work or otherwise uphold their end of the bargain, but the lawyers seemed generally content with sharing leadership in these cases.

In a sense, then, the norms in consumer class actions are similar to those in corporate litigation with private ordering dominating both practice areas. Yet important differences also emerged from the interviews. The first difference arises from the fact that, although judges in consumer class actions prefer private ordering, they are *willing* to decide leadership disputes. One lawyer's comments on this point are illustrative. When asked whether judges are willing to decide leadership disputes, she replied "yes, of course" with some surprise that one would even need to ask the question. She then stated that she could "not imagine" a judge being unwilling to decide a leadership issue. In contrast, the lawyers who specialize in corporate litigation universally stated that judges in these cases do not want to decide leadership disputes and are often unwilling to do so.[162]

This difference has important implications for understanding the market for leadership. As explained above, negotiation theory predicts that parties will bargain in the shadow of the law as long as the law itself is enforceable.[163] If courts are unwilling to enforce the law, however, the parties have no incentive to incorporate the law into their own negotiations.[164] As a result, law firms have a greater incentive to hold out in the negotiations if they know that the court will not step in and resolve the dispute.[165] This difference in incentives helps explain why lawyers in consumer class actions rarely mentioned the problem of hold outs, even though the topic dominated many of the interviews of lawyers who file corporate lawsuits.

The second key difference that emerged from the interviews was that negotiations in consumer class actions almost never include a set

161. One key difference is that the size of the plaintiff's loss does not appear to be a relevant factor in leadership negotiations in consumer class actions. The focus is on the lawyers' qualifications, not on factors that make it more likely that the plaintiff will monitor their lawyers. This difference may result from the fact that most plaintiffs in consumer class actions have relatively small stakes in the litigation, whereas it is not uncommon for plaintiffs in corporate litigation to have claims in the millions of dollars.

162. *See supra* Part II.B.

163. *See supra* notes 100–01 and accompanying text.

164. *See supra* Part III.B.3.

165. *See supra* Part III.B.3.

agreement over the division of fees.[166] In other words, lawyers in these cases do not agree during their initial discussions that each firm will receive fifty percent of the fees ultimately awarded in the case. Instead, they wait until the end of the case and divide fees based on the hours that each firm spent on the case. They may agree on target percentages up front, but the ultimate division of fees turns on the relative amount of work done by each firm.[167]

Again, this difference has important implications for the dynamics of shared leadership. If a law firm knows that it will receive fifty percent of the fees in a given case regardless of its work on the case, it has a reduced incentive to work hard. As a result, early division of fees creates incentives for some firms to free ride on the work of others. This dynamic also encourages firms to give a share of the fees to other firms in the case in order to gain a leadership position. As a result, it is not unusual for firms in corporate lawsuits to demand a set percentage of the fees in exchange for supporting the leadership structure.[168] These payoffs do not occur in consumer class actions because law firms do not receive a share of the fees if they do not do their fair share of the work.

Despite these differences, leadership norms in consumer class actions provide important insights for corporate litigation. In cases that lend themselves to smaller leadership structures, the law's hands-off approach works relatively well. As cases get bigger, however, it is harder for firms to establish a leadership structure in which every law firm has a meaningful role.

B. Antitrust Class Actions and Beauty Contests

Small-scale negotiations are not possible in larger class actions. If small consumer class actions are at one end of the litigation spectrum, antitrust class actions are at the other. In these cases, it is not uncommon for twenty-five, fifty, or even one hundred different lawsuits to be filed in connection with the same allegedly anticompetitive behavior.[169] In such cases, the lawyers cannot simply divide the litigation between them.

166. This observation is closely related to the earlier point about the value of judicial intervention. If a firm insists on a guaranteed fee, the other firms could ask the court to intervene—an option that is more difficult in corporate litigation.

167. The firms may also decide to increase or decrease a firm's lodestar by a multiplier to reflect the actual contribution of a given firm's time. A firm that is responsible for the strategic decision making and coordination in the case will generally receive a higher multiplier than a firm that simply reviews documents, even if both firms work the same number of hours.

168. *See supra* Part III.C.1.a.

169. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30 (2004) ("Antitrust litigation can, however, involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money, calling for the application of techniques and procedures for the management of complex litigation.").

Instead they need a leadership structure that reflects the complexity of the case.[170]

Just as in corporate litigation, however, judges rarely decide leadership issues in antitrust class actions.[171] Instead, lawyers who practice in this area state that, in most cases, the law firms themselves confer and decide on a leadership structure. These structures are typically even more complex than those used in corporate litigation. In corporate litigation, lawsuits may have three layers of leadership responsibilities (lead counsel or co-lead counsel, an executive committee, and liaison counsel), but few cases have more than that. In antitrust litigation, it is common for lead counsel to oversee a sprawling number of committees, each responsible for one aspect of the litigation. These committees in turn each have lead counsel who oversees a number of law firms charged with supporting the specific litigation efforts entrusted to the committee.

As a result, leadership structures in antitrust litigation are even more dispersed than those in corporate litigation. And yet the antitrust lawyers interviewed for this Article had far fewer complaints than the lawyers who handle corporate lawsuits. They did not always think that the process worked perfectly, but none described it as the worst part of their practice. Three factors may account for this difference.

First, most antitrust class actions require far more manpower than most corporate lawsuits.[172] The lawyers in this area repeatedly stressed that most antitrust class actions are so big that lead counsel legitimately needs the help of multiple other firms to fund and litigate cases. A typical case may include millions of documents, dozens of depositions, and multiple complex briefing battles. This heavy workload is so common that the law firms that typically serve as lead counsel have developed expertise in overseeing the various firms in the lower rungs of the leadership structure.[173] As a result, all of the firms included in the leadership structure have substantive work to do, unlike many of the firms in the lower rungs of a corporate lawsuit.

Second, as in consumer class actions, the firms typically do not allocate fees at the start of the cases. As explained above, in many corporate lawsuits, the law firms bargain for specific fee percentages in exchange

170. As in corporate litigation, the black letter law vests the responsibility for deciding leadership with judges. *See* FED. R. CIV. P. 23(g).

171. This description of the leadership market in antitrust class actions is based on several interviews with attorneys who practice in this area. *See supra* Part I (describing interviews undertaken for this Article).

172. Despite the larger size of most antitrust class actions, the number of law firms in the leadership structure remains a concern for courts. Rule 23(g) does not specifically address when multiple lead counsel are appropriate, but the Committee Note cautions that "the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure." *See* FED. R. CIV. P. 23(g) advisory committee notes. Consistent with these concerns, one lawyer interviewed for this Article stated that judges will reject proposed leadership orders with too many law firms in a lead counsel role.

173. The lawyers described these structures in their interviews, with one stating that the antitrust bar has the management of these cases "down to a science at this point."

for agreeing to a proposed leadership structure.[174] For example, a law firm may bargain for ten percent of the fee in exchange for supporting the leadership structure. This percentage may or may not come with an expectation that the law firm will actually do ten percent of the work. In contrast, the antitrust lawyers stated in their interviews that the distribution of fees in antitrust class actions turns on the actual work performed by each law firm, as well as the multipliers assigned to each level of the leadership structure. In other words, law firms do not receive a share of the fees simply for agreeing to the leadership structure. If a firm does not pull its weight in a given case, the law firms at higher levels of the leadership structure will simply assign the work to another firm and that firm, rather than the original firm, will be paid for the work. As a result, the opportunity to free ride is much lower in antitrust class actions.

Finally, judges are more willing to decide leadership disputes in antitrust cases. As noted above, private negotiations over leadership are common, and the lawyers stated in their interviews that federal judges prefer this private ordering. But they also stated that, despite this preference, judges are *willing* to decide leadership disputes. Indeed, when asked about the role of holdouts during the firms' negotiations, the lawyers stated that they would simply take the dispute to the judge. Lawyers do not feel like they are forced to include law firms in a leadership position simply because judges will not decide leadership issues.

In short, private ordering functions quite differently in consumer and antitrust class actions than it does in corporate litigation. In consumer and antitrust class actions, the lawyers themselves still resolve most leadership disputes, but (1) firms are not paid unless they put in their fair share of the work, and (2) judges are willing to decide leadership disputes if the lawyers cannot work out a workable solution. These differences provide insight into the problems in corporate litigation, where the norms regarding fees and judicial involvement are quite different. Private ordering, in other words, need not present the problems that are so persistent in corporate litigation. As we will see, however, private ordering is not the only way to decide leadership disputes in complex litigation.

C. Securities Class Actions and Hard-and-Fast Rules

The world of securities litigation offers a very different way to determine leadership in class actions. Rather than leaving leadership disputes to private ordering, Congress created rules to govern the leadership process. In 1995, Congress enacted the PSLRA, which created a strong presumption that the lead plaintiff in a securities class action is the shareholder applicant with the largest financial stake in the litigation.[175]

174. *See supra* Part III.B.2.c.
175. 15 U.S.C. §§ 78u-4(a)(3)(B)(iii)–(v) (2012).

The lead plaintiff in turn chooses lead counsel.[176] Accordingly, in the vast majority of federal securities class actions, lead counsel is chosen using a bright-line rule, not the more flexible standard that applies in other types of complex litigation.

This rule has eliminated most, but not all, leadership fights in securities class actions. As with any bright-line rule, there have been questions of interpretation. For example, courts have had to decide whether foreign investors are eligible to serve as lead plaintiffs.[177] Courts have also struggled with how to calculate the financial losses of the competing shareholders.[178] In general, however, the PSLRA has greatly simplified the leadership process.

As this simplification has occurred, judges overseeing securities class actions have become suspicious of the dispersed leadership structures that are so common in corporate litigation. This suspicion is most apparent when it comes to groups of plaintiffs who try to join together and aggregate their losses when filing for lead plaintiff.[179] Such aggregation is permissible in most instances, but courts generally prefer smaller leadership structures that allow cohesiveness and better monitoring of class counsel.[180] Indeed, the Securities & Exchange Commission has even filed amicus briefs urging courts to examine such groups carefully, cautioning that they may not have the active oversight and monitoring capability of a single lead counsel.[181]

This suspicion has led to relatively streamlined leadership structures in most securities class actions. According to one empirical study, more than sixty percent of securities class actions include only one or two firms serving as lead counsel.[182] Less than twenty percent of the cases had more than three firms serving as lead counsel.[183]

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176. 15 U.S.C. § 78u-4(a)(3)(B)(v) ("The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.").

177. *Compare In re* Molson Coors Brewing Co. Secs. Litig., 233 F.R.D. 147, 151 (D. Del. 2005) (noting that many courts have appointed foreign investors as lead plaintiff), *with* Steinberg v. Ericsson LM Tel. Co., No. 07 Civ. 9615(RPP), 2008 WL 1721484, at *1 (S.D.N.Y. 2008 Apr. 11, 2008) (denying foreign investor's motion to serve as lead plaintiff).

178. *See, e.g.*, *In re* Nice Sys. Secs. Litig., 188 F.R.D. 206, 217 (D.N.J. 1999) (noting that the PSLRA "does not define 'largest financial interest' or provide guidance as to how such a determination is made"); *In re* LightInTheBox Hldg. Co., Secs. Litig., No. 13 Civ. 6016(PKC), 2013 WL 6145114, at *3 (S.D.N.Y. Nov. 21, 2013) (explaining that courts use different accounting methods in calculating financial losses under the PSLRA).

179. The PSLRA specifies that the court should adopt a presumption that the "person or *group of persons*" with the "the largest financial interest in the relief sought by the class" should be the lead plaintiff, suggesting that plaintiffs should be allowed to aggregate their losses. 15 U.S.C. §78u-4(a)(3)(B)(iii) (emphasis added).

180. *See, e.g.*, Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1139 (2011) (explaining that "[o]n the whole, courts prefer smaller groups and principally reject larger ones . . . [because] smaller groups more effectively manage the litigation and lawyers").

181. *See* Memorandum of the SEC as Amicus Curiae, *In re* Baan Co. Sec. Litig., 186 F.R.D. 214, 233 (D.D.C. 1999).

182. *See* Burch, *supra* note 180, at 1120.

183. *See id.*

The different leadership practices in securities litigation raise the question whether states should adopt a similar bright-line rule to govern leadership fights in corporate lawsuits. And yet, while securities litigation has certainly changed in the wake of the PSLRA, these changes have not always been for the better. First, the winner-take-all approach has encouraged unethical practices in the solicitation of clients.[184] Legal scholars have raised the possibility that some public pension funds may be trading their participation in litigation for campaign contributions.[185] These practices are entirely predictable given the incentives created by the PSLRA. If the livelihood of attorneys depends on a client base of institutional investors, it is not surprising that attorneys have gone to great lengths to secure these clients. This example illustrates the unintended consequences of bright-line rules governing leadership.

Moreover, there is reason to question the underlying premise of the PSLRA. Should the law firm with the largest shareholder client automatically be in charge of a complex lawsuit potentially worth tens, or even hundreds, of millions of dollars? Ultimately, the goal of any leadership rule is to select counsel that will best represent the interests of absent shareholders. The size of a shareholder's stockholdings is certainly a relevant proxy, but it is imperfect at best. To give one example, a shareholder with 10,000 shares in the target company is not necessarily a better monitor than a shareholder with 9,500 shares. This is especially true if, for example, the 10,000 shares represent only a small fraction of the first shareholder's overall investments whereas the 9,500 shares represent the second shareholder's entire retirement fund.[186] Under these circumstances, we might expect that the second shareholder will care more about the litigation, and therefore serve as a better monitor over the case, even though he has fewer shares than the first shareholder.[187]

In the end, the PSLRA represents the classic tradeoff between rules versus standards. There is no guarantee that the PSLRA's bright-line rule always leads to the best leadership structures. Bright-line rules, however, do allow courts to decide leadership disputes quickly and help ensure that institutional plaintiffs with greater stakes in the litigation control complex lawsuits.

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184. *See infra* note 185 and accompanying text.

185. *See, e.g.*, Stephen J. Choi et al., *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUDS. 650, 650–51 (2011); David H. Webber, *Is "Pay-to-Play" Driving Public Pension Fund Activism in Securities Class Actions?*, 90 B.U. L. REV. 2031, 2080–81 (2010).

186. The Delaware Court of Chancery has raised similar concerns in rejecting the bright-line rules of the PSLRA. *See supra* notes 35–36 and accompanying text.

187. In addition, there is no guarantee under the PSLRA that any shareholder will have a large enough stake in the case to monitor it effectively. The PSLRA is based on market principles that presume that the shareholder with the largest financial stake in a lawsuit will have an incentive to choose the best law firm to represent the class. Imagine, however, that two shareholders are competing to be lead plaintiff. One of the plaintiffs claims damages of $1000, while the other claims damages of $2000. Under these circumstances, neither plaintiff has a large enough interest to spend the time necessary to compare the qualifications of different law firms, much less monitor the lawsuit after it has made this choice. Accordingly, it may make more sense for courts to choose among the law firms directly, rather than placing false hopes on shareholders.

V. TOWARD A NEW MARKET FOR LEADERSHIP IN CORPORATE LITIGATION

We have seen that the market for leadership in corporate litigation operates differently than the market in other types of complex litigation. In corporate litigation, the judiciary's hands-off approach, combined with a practice of dividing fees early in the litigation, creates strong incentives for plaintiffs' lawyers to agree to overly inclusive leadership structures.[188] These structures in turn promote inefficiencies and reduce the incentives to invest in these lawsuits.[189]

Corporate law should draw on insights from other types of complex litigation to address these problems. Comparing leadership practices in corporate litigation to those in other types of complex litigation, the most significant difference that emerges relates to the role of judges. In all three of the areas examined in Part IV, judges are willing to decide leadership disputes. In consumer and antitrust class actions, judges intervene when the lawyers themselves cannot decide on a leadership structure.[190] In securities class actions, judges decide leadership in the first instance using the rules laid out in the PSLRA.[191] In none of these areas, however, do judges turn the process entirely over to lawyers. This norm of judicial involvement stands in stark contrast to the hands-off approach that dominates corporate litigation.

Judicial involvement in leadership disputes is crucial because the law on the books has little impact if judges are unwilling to enforce it. This point reflects foundational principles of negotiation theory—lawyers can only bargain in the shadow of the law if judges are willing to cast that shadow.[192] In corporate litigation, this shadow is lacking. Lawyers do not think that judges are willing to step in and make the hard choices that leadership decisions require. As a result, lawyers lack the negotiating leverage to exclude law firms that do not contribute to the case.

Greater judicial involvement would also impact the second key difference in leadership practices—the division of fees among law firms. As outlined in Part IV, lawyers in other areas do not typically divide fees at the outset of the case. As a result, a law firm working on an antitrust or consumer class action is not guaranteed ten or twenty percent of the case simply because they agreed to the leadership structure. This difference impacts the incentives to litigate these cases. A law firm that knows that it will receive ten percent of a case regardless of its individual contribution will not be motivated to work as hard as a law firm whose fee is based on the hours it puts into the case.

188. *See supra* Part IV.A.
189. *See supra* Part III.C.1.c.
190. *See supra* Part V.
191. *See supra* Part IV.C.
192. *See supra* note 18 and accompanying text.

The different practices related to the allocation of fees circles back to the role of judges in these lawsuits. Judges in antitrust and consumer lawsuits are willing to decide leadership disputes, and therefore, law firms with a superior claim to a leadership position have leverage in their negotiations with competing firms.[193] If judges in corporate litigation were more willing to decide these disputes, law firms could take their disputes to court rather than buying off their competitors. This shift would keep a higher percentage of the legal fees with the firms that actually perform the work, which will in turn increase the incentives to litigate these cases effectively.

This discussion is not meant to suggest that judges today *never* decide leadership disputes in corporate lawsuits. The data indicates that judges determine the leadership structure in approximately ten percent of cases, and this percentage has increased over the last several years.[194] Lawyers believe, however, that judges are extremely reluctant to decide these cases and therefore will force them to go back to the negotiating table.[195] These beliefs, combined with courts' oft-stated admonition that lawyers should resolve these disputes privately, create a strong norm in favor of private ordering.

Moreover, in their interviews, the lawyers who practice in the area of corporate litigation almost all stated that they *wished* judges would take a more active role in deciding leadership disputes.[196] One lawyer stated starkly that "[i]f the court isn't going to decide leadership, the [*Hirt*] factors don't have as much significance." These lawyers also emphasized that judges can change the dynamics in private negotiations, even if they leave the substantive law unchanged. Under current practices, the *Hirt* factors have little impact on private negotiations. Yet, "if the judges started saying, here are the factors, and then actually started making decisions, if they decided some of the cases, then when firms are negotiating, they would have to incorporate the guidelines."

Given the benefits of judicial involvement in leadership negotiations, why have judges in corporate lawsuits been content to turn the negotiations over to lawyers? There are at least two reasons. First, in many mergers and acquisitions lawsuits, there is tremendous pressure on both sides to resolve the litigation quickly.[197] Many transactions are announced

193. *See supra* Part IV.A–B.

194. *See supra* note 58 and accompanying text.

195. *See supra* Part II.B.

196. For example, in one oral argument, counsel urged the court to pick a single lead counsel rather than appoint all of the competing firms as co-lead counsel. The lawyer argued that lawyers need "some risk that people face by not coming to an agreement and being reasonable." Oral Argument for Cross-Motions for Appointment of Lead Counsel at 44, *In re* Crimson Exploration, Inc. Stockholder Litig., No. 8541-VCP, 2013 WL 5890398 (Del. Ch. July 12, 2013).

197. *See* N. Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 45 BERKELEY BUS. L. J. (forthcoming 2015) (manuscript at 45), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329133&download=yes (describing the time pressures in merger lawsuits).

only a few months before they are scheduled to close.[198] The defendants want to ensure that the litigation will not delay the closing of the transaction. The plaintiffs in turn know that the settlement value of the case will plummet after the transaction closes because they lose their primary leverage over the defendants.[199] As a result, both sides want to move the lawsuit along as quickly as they can.

These time pressures discourage judges from more active involvement in leadership disputes. Under current rules, a dispute over leadership is treated like any other legal dispute.[200] The parties fully brief the issue over a period of weeks.[201] After this briefing is complete, the judges will typically hold oral arguments and then issue a ruling.[202] While leadership is still in flux, the judge typically will not require the defendants to respond to discovery or answer the complaints.[203] In other words, judicial involvement in leadership disputes has the potential to unduly delay leadership decisions in already time-pressured lawsuits.[204]

The data confirms these concerns. In cases in which the parties themselves agreed on a leadership structure, leadership was resolved in a median of twenty-one days. In contrast, in those cases in which the court decided leadership, resolution of this issue took another two weeks, or a median of thirty-five days. Those additional weeks can be critical in corporate litigation.

And yet judicial involvement does not need to unduly delay these lawsuits. For example, rather than filing lengthy briefs, the court could require all law firms interested in a leadership position to file a standard form on a single date. This form could address the *Hirt* factors in a streamlined way that would be easy for the court to review. There would not be the back and forth of typical motions practice, and the court would only schedule an oral argument if it believed that one would be helpful. In other words, judges have the freedom to adopt a more streamlined approach that would allow them to decide leadership disputes quickly.

The second reason that judges may be reluctant to get involved in leadership disputes is that they may doubt their institutional competency in this area. At first glance, this concern may appear ill-founded given the wide range of issues that judges decide. If judges are qualified to interpret contracts, decide employment discrimination claims, and assess the validity of patents, why can't they also appoint lead counsel? The question, however, is not whether judges are competent to decide leadership

198. *See id.*

199. Several lawyers stressed this point in their interviews. One lawyer stated, for example, that they simply do not have a month for opening briefs and then two weeks for the reply when the deal closes in less than two months.

200. *See In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 953–54 (Del. Ch. 2010).

201. *See id.* at 954.

202. *See id.*

203. *See id.* at 945.

204. *See id.* at 960.

issues, but rather whether judges are *more* competent to decide these issues than the lawyers themselves.

This question is especially relevant given that leadership is an area where lawyers have particular expertise. They have far more contact with each other than most judges do. Lawyers know who among them is likely to bring the right skills and a strong work ethic to the case and, conversely, who is likely to shirk their responsibilities.[205] They also know the lawyers with whom they work best—i.e., the lawyers whose strengths complement their weakness and whose personalities mesh best with their own. Moreover, they have an insider's view of the case and therefore may have the best sense of which organizational structure will allow them to litigate the case effectively.

Yet, judicial intervention need not rule out a role for private ordering. Lawyers can still have the freedom to organize leadership structures in the first instance. For example, judges may decide to intervene only in those cases where the leadership structure involves an overly high number of law firms. Or they could simply signal to lawyers that they are willing to decide leadership disputes when the law firms themselves cannot decide on a resolution. Under either approach, the lawyers would still negotiate leadership, but judges would step in to enforce the law when the negotiations run a risk of hurting shareholders. In short, judicial oversight and private ordering can work in tandem to resolve leadership disputes.

If greater judicial involvement is necessary to solve the problems related to leadership in corporate litigation, how do we get there? It may not be easy. As other legal scholars have demonstrated, judges are seldom inclined to play an active role monitoring complex lawsuits. In the settlement context, for example, judges are supposed to serve as gatekeepers,[206] ensuring that proposed settlements are in the best interests of absent class members.[207] And yet, judges rarely reject settlements put forth by counsel.[208]

This hesitance in the settlement context reflects the reality of the judicial role in performing a monitoring function. First, judicial dockets are so full that judges may not feel that they have the luxury of looking

205. Judges may also get an impression of the law firms over time. For example, the Delaware Court of Chancery has stated law firms can "build (and sometimes burn) reputational capital with the Court" by their actions in particular cases. *Id.* at 955–56.

206. *See* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 414 (2011) (stating that "judges both have the power and incentives to control the agency costs [in class action settlements] by refusing to grant settlement approval in cases that do not meet the standards of Rule 23" and that "the decision to grant, or refuse, approval is contingent on fulfilling their gatekeeping/fiduciary responsibilities").

207. *See* FED. R. CIV. P. 23(e).

208. *See, e.g.*, Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 91, n.107 (2003); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006); Sale, *supra* note 206.

for fights where there are none.[209] Second, judges are praised for moving through their dockets quickly, a goal that is stymied by more active review of settlement terms.[210] Finally, judges suffer from an informational deficiency in reviewing settlements because the parties all have an incentive to present only a favorable view of the settlement.[211] As a result, despite several proposals for greater judicial oversight over settlements in class action lawsuits,[212] judges continue to rubber stamp most settlements presented to them.

On the surface, many of the same institutional concerns outlined above apply to leadership disputes as well. In both instances, the lawyers negotiate the terms of the agreement largely outside the watchful eye of the court. In both instances, the lawyers then present the terms to the court as a *fait accompli*. And in both instances, the judges face significant institutional pressure to approve the terms as negotiated by the parties.

Yet, there is reason to believe that judges can take a more active role in leadership disputes than they have in the past. As outlined in Part IV, judges in *other* areas of the law are much more willing to decide these disputes.[213] Lawyers who litigate consumer or antitrust class actions repeatedly stated that while private ordering is still the norm, judges are willing to decide leadership disputes if the parties cannot resolve these disputes themselves. If judges in these areas can step up and decide leadership issues, there is no reason why judges in corporate litigation cannot do the same.

One judge has already taken aim at the norms governing leadership. Over the last few years, Vice Chancellor Travis Laster of the Delaware Court of Chancery has often used a streamlined approach to decide leadership disputes. Under this approach, soon after a party in a case files a leadership motion, Vice Chancellor Laster issues an order requiring any law firm seeking a leadership position to file an application addressing various factors relevant to the court's decision.[214] He then decides these disputes on an expedited basis.[215]

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209. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1061 (2002) ("[C]ourt dockets are sufficiently full that judges have little incentive to coerce parties to litigate.").

210. *See id.* ("Judges receive praise and prestige for having a 'rocket docket,' whereby cases are concluded quickly, either through settlement or a trial on the merits. . . . In the justice factory, volume often equals respect.").

211. *See* Rubenstein, *supra note* 208, at 1445 ("Because counsel for the plaintiff class and the defendant share an interest in obtaining court approval of the settlement, judges are unlikely to receive information that could be relevant to the fairness of the settlement from the parties themselves.").

212. *See* Lahav, *supra* note 208, at 114.

213. *See infra* Part IV.

214. *See, e.g.*, Order of Consolidation, *In re* Power-One Inc. Stockholder Litig., (Del. Ch. May 23, 2013) (Case No. 8506-VCL).

215. Notably, this procedure does not change the substantive legal standards governing leadership in shareholder lawsuits. Vice Chancellor Laster instructs the parties to address the *Hirt* factors in their applications. *See id.* This procedure shows that judges do not need to change the substantive law to change leadership practices. Instead, as they increasingly decide leadership disputes, they can change these norms underlying the substantive law, allowing the law to operate more effectively.

This procedure is changing leadership practices on the ground. Several lawyers referenced Vice Chancellor Laster's procedure in their interviews, with one stating specifically that "it has changed the way that lead counsel battles are fought." This change is reflected in the data. In 2013, for example, the percentage of contested leadership battles dramatically increased. The data collected for this study shows that from 2009 through 2012, the court decided a contested leadership battle in only 9.38% of cases. In 2013, this percentage jumped to twenty percent. Although the numbers of contested leadership battles in the sample across all years are small, it is notable that Vice Chancellor Laster decided *half* of the leadership disputes from 2013 included in this study. Given that there are a total of five judges on the Delaware Court of Chancery,[216] one would not expect one judge to hear such a high percentage of the contested leadership disputes in a given year. The number of contested cases in the sample is still too small to draw any definitive conclusions, but these figures do suggest that lawyers may be more willing to bring their leadership disputes to court if they know the judge hearing the case is willing to decide the dispute.[217]

Relatedly, the ability to change the norms in corporate litigation does not depend on *every* judge taking an active role in leadership disputes. Some judges may embrace their new role wholeheartedly; others may simply rubberstamp the proposals suggested by counsel. A change on the part of a few outspoken judges, however, could lead to more widespread changes behind the scenes. After all, the goal of this proposal is to change the norms that operate in private negotiations. To change these norms, lawyers need to know that there is a realistic possibility that judges will deny the demands of holdouts and question overly complicated leadership structures. This possibility exists as long as some judges are willing to enter the leadership fray. As a result, some judicial involvement may be all that is necessary for lawyers to be in a better position to self-regulate.

Finally, the different approaches to leadership in complex litigation demonstrate that there is not a single template that corporate law must follow. Securities class actions are governed by the hard-and-fast rules of the PSLRA, while consumer and antitrust class actions rely on the more flexible standards of Rule 23—yet lawyers in both areas seem generally satisfied with the outcomes. These examples illustrate that the form of judicial involvement may be less important than the fact that judges in

216. *See Judicial Officers of the Court of Chancery*, DEL. ST. CTS., http://courts.delaware.gov/chancery/judges.stm (last visited Mar. 4, 2015).

217. Vice Chancellor's Laster's approach is not the only way to solve the problems in this area. For example, three attorneys at the law firm of Bernstein Litowitz Berger & Grossmann LLP have suggested that courts decide leadership using a nationwide procedure similar to the procedure required under the PSLRA. *See* Mark Lebovitch, et al., *Making Order Out of Chaos: A Proposal to Improve Organization and Coordination in Multi-Jurisdictional Merger-Related Litigation*, BERNSTEIN, LITOWITZ, BERGER AND GROSSMAN LLP (Sept. 15, 2012), *available at* http://www.blbglaw.com/misc_files/MakingOrderoutofChaos.

these areas of law are willing to step in and decide these disputes. In other words, it is judicial involvement—regardless of the exact nature of the involvement—that provides the foundation for a properly functioning leadership market.

We have seen multiple windows into the market for leadership in corporate litigation, and yet they all point to the same need for greater judicial involvement in leadership disputes. The quantitative data on leadership orders demonstrates that, left to their own devices, lawyers are forced to agree to overly inclusive leadership structures.[218] The interview data reveals that, on the whole, lawyers *want* judges to step in and decide leadership disputes when the lawyers themselves cannot reach a satisfactory agreement.[219] And data from other types of complex litigation suggest that greater judicial involvement in these disputes can change leadership practices on the ground.[220] The time has come to heed these lessons and reform the market for leadership in corporate litigation.

VI. CONCLUSION

Conventional wisdom holds that leadership decisions are best left to the lawyers. As this Article demonstrates, however, this wisdom does not reflect the modern reality of corporate litigation. The legal system's reliance on private ordering forces lawyers to agree to complicated leadership structures that divide governance responsibilities among far too many legal actors. These lawyers then face incentives to shirk their responsibilities in the ensuing litigation. In an area of law that depends in large part on private attorneys general, these incentives undermine enforcement of the law and ultimately hurt shareholders.

In the end, the debate over leadership rules reflects deeper questions about governance in class action litigation. The legal system has struggled to address the agency problems in class actions, recognizing that attorneys do not always face the right incentives to act in the best interests of their absentee clients. Leadership disputes illustrate that these problems extend beyond the incentives facing individual lawyers. Instead, they affect how lawyers relate to each other and how they in turn relate to the court. To ensure proper governance over these complex cases, the law and the market must work in tandem to align the interests of lawyers with those of their clients.

218. *See supra* Part II.A.
219. *See supra* Part II.B.
220. *See supra* Part III.