Stakeholder Capitalism in the Time of COVID

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This Article tests the claims of supporters of stakeholder capitalism ("stakeholderism") in the context of the COVID pandemic. Supporters of stakeholderism advocate encouraging and relying on corporate leaders to use their discretion to serve stakeholders such as employees, customers, suppliers, local communities, and the environment. The pandemic followed and was accompanied by peak support for, and broad expressions of commitment to, stakeholderism from corporate leaders. Nonetheless, and even though the pandemic heightened risks to stakeholders, we document that corporate leaders negotiating deal terms failed to look after stakeholder interests.

We conduct a detailed examination of all the $1B+ acquisitions of public companies that were announced from April 2020 to March 2022, totaling 122 acquisitions with an aggregate consideration exceeding $800 billion. We find that deal terms provided large gains for the shareholders of target companies, as well as substantial private benefits for corporate leaders. However, although

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Although we provide substantial detail on our findings in the body of this Article, a large Appendix we have placed on SSRN provides additional documentation that was not included here due to space constraints. Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID: Appendix* (Harvard L. Sch. John M. Olin Center Discussion Paper No. 1089), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298646 [https://perma. cc/6UP3-UTV8].

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many transactions were viewed at the time of the deal as posing significant post-deal risks for employees, corporate leaders largely did not obtain any employee protections, including payments to employees who would be laid off post-deal. Similarly, we find that corporate leaders failed to negotiate for protections for customers, suppliers, communities, the environment, and other stakeholders.

After conducting various tests to examine whether this pattern could have been driven by other factors, we conclude that it is likely to have been driven by corporate leaders' incentives not to benefit stakeholders beyond what would serve shareholder interests. While we focus on decisions in the acquisition context, we explain why our findings also have implications for ongoing-concern decisions, and we discuss and respond to potential objections to our conclusions.

Overall, our findings have significant implications for long-standing debates on the corporate treatment of stakeholders. In particular, our findings are inconsistent with the implicit-promises/team-production view that corporate leaders of an acquired company should and do look after stakeholder interests; on this view, fulfilling implicit promises to protect stakeholder interests serves shareholders' ex-ante interest in inducing the stakeholder cooperation and investment that are essential to corporate success. Our work also supports the agency critique of stakeholder capitalism which suggests that, due to their incentives, corporate leaders cannot be relied upon to look after stakeholder interests and to live up to pro-stakeholder rhetoric.

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> Covid-19 is accelerating stakeholder capitalism . . . . Companies proved their agility during the pandemic, stepped up to take care of their customers and employees . . . . We need to stop debating whether stakeholder capitalism makes sense—and instead embrace the progress the private sector has built and continue to accelerate.
> – James M. Loree, CEO of Stanley Black & Decker, July 2021[1]

> Corporate purpose is important to the recovery from the pandemic.
> – Martin Lipton, William Savitt, and Carmen X. W. Lu, of Wachtell, Lipton, Rosen & Katz, August 2021[2]

> The coronavirus crisis has accelerated the shift to stakeholder capitalism . . . . [T]he economic harm caused by the pandemic has shifted the pendulum further toward the multi-stakeholder model, as the importance of employees and customers are brought into sharper focus.
> – Bill George, Former Chair and CEO of Medtronic, May 2020[3]

I. Introduction

This Article seeks to contribute to the fundamental and heated debate on stakeholder capitalism ("stakeholderism"). Stakeholderism refers to the increasingly influential view that corporate directors and top executives ("corporate leaders") should be encouraged and relied upon to use their discretion to serve stakeholders and not only shareholders.[4] According to this view, corporate leaders should and will deliver value to stakeholders, including employees, suppliers, customers, local communities, and the environment.

This view is now supported by a large number of business leaders. In a widely heralded statement issued in 2019 by the Business Roundtable (BRT), many CEOs of major companies expressed their commitment to deliver value to all stakeholders rather than only to shareholders.[5] A subsequent manifesto of the World Economic Forum urged companies to abandon shareholder primacy and embrace stakeholder capitalism.[6]

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1. James M. Loree, *COVID-19 Is Accelerating Stakeholder Capitalism*, WORLD ECON. F. (July 30, 2021), https://www.weforum.org/agenda/2021/07/covid-19-has-accelerated-stakeholder-capitalism/ [https://perma.cc/9CA2-R67R**].**

2. Martin Lipton, William Savitt, and Carmex X. W. Lu, *Why Corporate Purpose Is Important to the Recovery from the Pandemic,* PROMARKET (Aug. 16, 2021), https://promarket.org/2021/08/16/corporate-purpose-important-recovery-pandemic-stakeholders/ [https://perma.cc/E4DH-SK69].

3. Bill George, *The Coronavirus Has Accelerated the Shift to Stakeholder Capitalism*, FORTUNE (May 12, 2020, 4:00 PM EDT), https://fortune.com/2020/05/12/coronavirus-corporate-social-responsibility/ [https://perma.cc/K2A8-ARPN].

4. *See* sources cited *infra* notes 13-14, 16-19.

5. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/AGQ9-9PHV].

6. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth*

But can corporate leaders be expected or relied upon to use their discretion to serve stakeholders? This Article seeks to shed empirical light on this question using data about numerous corporate acquisitions during the COVID pandemic, a period that followed and was accompanied by peak support for stakeholder capitalism. We find that in the time of COVID stakeholder capitalism failed to deliver on its promise.

Part II begins by discussing the stakeholderism debate and why examining large corporate acquisitions during the COVID pandemic could inform this debate. To begin with, according to the long-standing implicit-promises/team-production view, corporate leaders should safeguard stakeholders in acquisition decisions, and indeed do so, because such behavior serves the ex-ante interests of shareholders.[7] Stakeholders, it is argued, would be encouraged to invest more in their relationship with the company, and thus contribute to the company's success, if they could expect to be treated well in the event of an acquisition down the road. Therefore, the argument continues, corporate value and the ex-ante interests of shareholders would be served by corporate leaders fulfilling "implicit promises" to treat stakeholders well when considering an acquisition.

In addition, the currently influential views of supporters of stakeholderism hold that corporate leaders can now be expected to give weight to stakeholder interests and match stakeholder rhetoric with action. On this view, business and social norms, reputational incentives, and intrinsic motivation can all contribute to pro-stakeholder choices by corporate leaders, and corporate pledges, such as those expressed in purpose statements, can reinforce such tendencies.

In contrast to the above stakeholderist views, the agency critique of stakeholder capitalism argues that corporate leaders have incentives not to protect stakeholder interests beyond what would serve the interests of shareholders.[8] According to this view, regardless of how desirable it would be for corporate leaders to protect stakeholders' interests when selling the company, these leaders should not be expected to do so.

Part II also explains why the COVID pandemic provides a good setting for testing these alternative predictions regarding the behavior of corporate leaders selling their companies. First, stakeholderism was recently embraced by many CEOs of large companies and prominent business groups, and it has become pervasive in business discourse. Second, the COVID pandemic heightened employees' and other stakeholders' concerns and uncertainties, thus arguably increasing their need for protection. Third, shareholders, after an initial value shock, enjoyed a soaring stock market and significant acquisition premiums, and were therefore likely to have prospered even if corporate leaders had allocated part of the acquisition gains to stakeholders. Finally, the pandemic period was

Industrial Revolution, WORLD ECON. F. (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ [https://perma.cc/6W97-777U].

7. For a discussion of these theories, *see* sources cited *infra* notes 16-22 and accompanying text.

8. *See* sources cited *infra* notes 23-24.

accompanied by a large number of acquisitions of significant companies, and the transactions and choices we empirically investigate are consequently quite meaningful economically.[9]

Part III describes the construction of our dataset and the universe of cases it includes. Our study provides a detailed examination of all the acquisitions of U.S. public companies with a value in excess of $1 billion that were announced during the first twenty-four months of the pandemic. Our sample includes deals with an aggregate value of more than $800 billion, involving companies that together employed almost 650,000 employees. We hand-collected and examined securities filings and other materials for each of the deals to study in detail the deal and the terms produced by it.

Part III also documents the significant bargaining that was involved in producing the terms of the deals. Deals were commonly negotiated over a long period, often involved multiple offers (including improved terms obtained by target corporate leaders during the process), and frequently included deal protection provisions in return for the terms extracted from the buyers. The key question, of course, is for whose benefit corporate leaders bargained and what they obtained.

Part IV examines whether and to what extent the deal terms served the interests of shareholders and corporate leaders. Our data show that shareholders obtained significant premiums, with a mean of 37% of the pre-deal market capitalization and aggregate value exceeding $200 billion across all deals.[10] Corporate leaders, in turn, received large payoffs, both as shareholders and as executives or directors; in many cases, they also negotiated for continued positions after the sale.

Part V shows that despite clear and present risks to employees, corporate leaders largely did not negotiate for employee protections, including payments to employees in the event of post-deal termination. Part V also examines the extent to which corporate leaders protected the interests of stakeholders other than employees, including suppliers, creditors, customers, local communities, and the environment. We find that corporate leaders chose to provide little or no

9. In an earlier study, we conducted a related analysis of a different setting, focusing on private equity deals that took place mostly at earlier times before the recent rise of stakeholderism among business leaders. Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2022). Consistent with the agency critique of stakeholderism, this study found little protection for stakeholders in the deals examined. However, skeptics have questioned the significance and generalizability of our findings. In particular, discussants in conferences have argued that most of the deals of our sample occurred before the recent rise in support for stakeholderism among corporate leaders; did not include targets incorporated in Delaware, the most important jurisdiction for corporate law; focused on private equity buyers rather than strategic buyers; and were of limited overall economic significance.

We designed the current study to address such objections. This design enables us to study a large sample of deals that took place after support for stakeholderism among corporate leaders reached peak levels and that are in the aggregate of large economic significance, and this sample also includes a substantial number of deals with Delaware targets or by strategic buyers. This, we believe, makes the evidence we present in this Article especially meaningful for the debate on stakeholder capitalism.

10. Percentage values throughout the Article were rounded to the nearest whole number.

protection to these and other stakeholders. Our findings are consistent with the agency critique of stakeholderism, which posits that corporate leaders face structural incentives not to benefit stakeholders beyond what would serve shareholder value.

In Part VI, we examine whether other factors that might have led otherwise stakeholder-oriented corporate leaders to agree to the terms we have documented could have driven the lack of stakeholder protections. To examine each alternative potential factor, we identify a subset of our sample in which this factor was not present, and we examine whether substantial stakeholder protections are present in this subset of deals. In particular, we examine subsamples based on: (i) deals not driven by economic distress; (ii) deals announced in later stages of the pandemic in which economic activity was returning to normalcy; (iii) deals that received shareholder support by a large margin, so securing some stakeholder protections by reducing premiums somewhat may not have threatened obtaining shareholder approval; (iv) deals to which the *Revlon* doctrine did not apply; (v) deals governed by constituency statutes; (vi) deals in which the target was represented by "stakeholderist" legal counsel that arguably could have been relied on not to discourage corporate leaders from seeking stakeholder protections; (vii) deals to purchase targets that had high environmental, social, and governance (ESG) ratings and whose leaders could thus be expected to be more stakeholder-oriented; and (viii) deals with acquirers with low ESG ratings and who thus might have posed especially significant post-deal risks for stakeholders. We find that each of these subsamples was still characterized by a general lack of stakeholder protections.

Finally, to explore whether our findings could have been driven by some pandemic-related factors that the above testing did not address, Part VI concludes by examining the terms of a set of significant deals that closed during the year preceding the pandemic. This period, during which the BRT issued its stakeholderist statement on corporate purpose, was characterized by strong public stakeholderist rhetoric. Nonetheless, we find a lack of stakeholder protections in this pre-pandemic period similar to that documented for the pandemic-period deals, suggesting that this pattern is not due to some unidentified pandemic-related factor.

We therefore conclude in Part VII that our findings are best explained by the incentives of corporate leaders rather than by other factors. We also discuss and respond to a number of objections to this conclusion: (i) that corporate acquisitions present a selection-bias problem; (ii) that stakeholder protections are prohibitively costly; (iii) that stakeholder protections are unnecessary because stakeholders receive sufficient protection through soft pledges, the selection of a stakeholder-friendly buyer, or their own contracts with the company; and (iv) that the lack of stakeholder protection could have been the result of inertia among deal designers. Finally, we discuss the argument that our findings are limited to choices in final-period situations and are not relevant to assessing choices by ongoing businesses.

Part VIII concludes. Overall, our findings cast doubt on the validity of the implicit-promises/team-production view that has long been used to justify corporate leaders' veto power over corporate acquisitions. Our findings also question the currently influential view that, due to business and social norms, reputational incentives, and intrinsic motivation, corporate leaders can now be expected to give weight to stakeholder interests and match stakeholder rhetoric with action. On the whole, the evidence we put forward supports the view that, due to their incentives, corporate leaders should be expected not to deliver value to stakeholders beyond what would serve shareholder value.

Thus, our evidence suggests that those who are concerned about the protections of stakeholders, as we are, should not rely on corporate leaders' stakeholderist pledges but instead focus on governmental reforms that would provide real protection for stakeholders in a wide range of areas. For example, those who are concerned about the effects of corporations on the climate and on their employees should not harbor illusory hopes that corporate leaders will address such effects on their own. Instead, they should instead focus on obtaining government interventions, such as a carbon tax or employee-protecting policies. The failure of stakeholder capitalism during the COVID pandemic should give pause to all those attracted by the siren songs of stakeholderists.

II. Testing Stakeholder Capitalism

In this Part, we discuss why examining the contractual terms of corporate acquisitions during the COVID pandemic is a good way to assess the extent to which corporate leaders can be relied on to look after stakeholder interests. Section II.A discusses the stakeholderist views which assert that corporate leaders negotiating a sale of their company should be expected to look after the interests of stakeholders and not only shareholders. Section II.B then explains why the pandemic provides an excellent context for testing such views.[11]

A. Stakeholderism and Its Implications for Acquisitions

A core view of stakeholderism is that corporate leaders should be urged and could be relied upon to consider the interests of stakeholders and not just of shareholders. Versions of this theory have been debated for decades.[12] In the past few years, however, support for stakeholderism has become increasingly

11. Supporters of stakeholderism have also taken the view that the COVID pandemic provides a good setting to test the promise of stakeholder governance. For example, Stavros Gadinis and Amelia Miazad studied corporate responses to the pandemic as a way to "test how companies understand and utilize stakeholder governance in practice." Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 49 (2021). However, while the above study is based on interviews with CEOs, general counsels, and other top executives of large companies, and therefore relies on what corporate leaders say about stakeholder-oriented decisions, this Article focuses on what corporate leaders actually did for stakeholders when they made highly consequential decisions.

12. For seminal articles often cited as early statements of competing views on the subject, see E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); and Adolf A. Berle, *For Whom Are Corporate Managers Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

widespread and influential, and comes from legal scholars[13] as well as from economics, finance, and management scholars.[14] Furthermore, corporate leaders and practitioners have increasingly supported stakeholderism and pledged commitments to deliver value to stakeholders.[15]

One long-standing version of stakeholderism—implicit-promise theory and team-production theory—posits that corporate leaders should and do deliver value to stakeholders because doing so maximizes shareholder value ex ante by inducing ex ante investments by stakeholders, even if in specific situations it may reduce shareholder value ex post. For example, when negotiating the sale of the company, corporate leaders might want to protect the interests of local employees and therefore might try to obtain a formal commitment from the buyer to keep the plant in its current location, even if a relocation would increase profits for shareholders. Although such a decision would reduce shareholder value ex post, corporate leaders agree to give weight to the interests of employees in this kind of situation in order to increase shareholder value ex ante by inducing employees to join the company and contribute to its success.

In the academic literature, this version of stakeholderism was proposed more than thirty years ago in influential studies by economists Andrei Shleifer and Larry Summers[16] and by legal scholar John C. Coffee.[17] Margaret M. Blair and Lynn A. Stout further developed this version of stakeholderism in their well-known "team production" theory.[18] All these authors stressed that the ex-ante

13. *See, e.g.*, Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020); Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419 (2020); Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579 (2018); Einer Elhauge, *The Inevitability and Desirability of the Corporate Discretion to Advance Stakeholder Interests*, 106 CORNELL L. REV. 1819 (2022); Aneil Kovvali & William Savitt, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORNELL L. REV. 1881 (2021). For influential work in support of stakeholderism over the recent past, see also Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339 (2012); and Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

For a recent review of the debate, see Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851 (2021); Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363 (2021); and David J. Berger, *Reconsidering Stockholder Primacy in An Era of Corporate Purpose*, 74 BUS. LAW. 659 (2019).

14. *See, e.g.*, COLIN MAYER, PROSPERITY (2018); ALEX EDMANS, GROW THE PIE: CREATING PROFIT FOR INVESTORS AND VALUE FOR SOCIETY 12 (2020); and REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD OF FIRE (2020).

15. *See, e.g.*, BUS. ROUNDTABLE, *supra* note 5; Schwab, *supra* note 6.

16. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach ed., 1988).

17. John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435.

18. Blair & Stout, *supra* note 13. The team production theory builds on the implicit-promise theory. According to Blair and Stout, the "team production" problem "arises when a number of individuals must invest firm-specific resources to produce a nonseparable output." In such situations "team members

interests of shareholders are served by inducing cooperation and investments from corporate stakeholders, such as employees, suppliers, and creditors. Stakeholders' expectations that corporate leaders will treat them favorably in the future will encourage such cooperation and investments, thereby providing substantial benefits for the corporation's development.

In particular, according to this view, if stakeholders can expect that corporate leaders will safeguard their interests in the event of an acquisition, corporate value will be enhanced, which, in turn, will be reflected in the value that will be captured in the event of an acquisition. Accordingly, the argument goes, shareholders will prosper if corporate leaders can be relied on to fulfill "implicit promises" to treat stakeholders favorably, and corporate leaders indeed act in this way. Scholars advocating this view contend that it is therefore justifiable to provide corporate leaders with substantial power over acquisitions, so that they can safeguard the interests of stakeholders.[19]

Beyond the long-standing implicit-promises/team-production view, there has been much support recently for the stakeholder governance view under which corporate leaders should, and should be relied upon to, deliver value to all stakeholders and not only shareholders.[20] Advocates of stakeholder governance expect corporate leaders to live up to pro-stakeholder rhetoric and view leaders' pledges to protect stakeholder interests as an encouraging sign that corporate officials are prepared to do so.[21] In their view, business and social norms,

may find it difficult or impossible to draft explicit contracts distributing the output of their joint efforts, and, as an alternative, might prefer to give up control over their enterprise to an independent third party charged with representing the team's interests and allocating rewards among team members." Thus, according to them, the essential economic function of the public corporation is "to provide a vehicle through which shareholders, creditors, executives, rank-and-file employees, and other potential corporate "stakeholders" who may invest firm-specific resources can, for their own benefit, jointly relinquish control over those resources to a board of directors." *Id.*, at 247. For a further development of this view, see Lynn A. Stout, *Do Antitakeover Defenses Decrease Shareholder Wealth? The Ex Post/Ex Ante Valuation Problem*, 55 STAN. L. REV. 845 (2002).

19. *See, e.g.*, John C. Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 108 (1986); Stout, *Do Antitakeover Defenses Decrease Shareholder Wealth? The Ex Post/Ex Ante Valuation Problem*, *supra* note 18, at 847.

A different theory argues that even if corporate leaders focus solely on shareholder welfare, they should protect stakeholders because many shareholders have prosocial preferences and therefore might be willing to prefer outcomes that protect stakeholder interests even if they are associated with somewhat lower financial returns. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017); Eleonora Broccardo, Oliver Hart & Luigi Zingales, *Exit vs. Voice* 6-9 (Eur. Corp. Governance Inst., Fin. Working Paper No. 694/2020), https://ssrn.com/abstract=3671918 [https://perma.cc/B88R-4T96]. For a discussion of the prosocial preferences of some shareholders, see, for example, Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1265 (2020); Roberto Tallarita, *Stockholder Politics*, 73 HASTINGS L.J. 1617, 1620 (2022). To the extent that these theories expect corporate leaders to make stakeholder-oriented decisions, our analysis speak to them as well.

20 *See, e.g.,* the BRT statement and the Davos Manifesto referenced in *supra* notes 5-6, which urged business leaders to deliver value to all stakeholders rather than only to shareholders.

21. See, e.g., Enacting Purpose Initiative, *Enacting Purpose Within the Modern Corporation: A Framework for Boards of Directors* 9 (2020), https://enactingpurpose.org/assets/enacting-purpose-initiative—-eu-report-august-2020.pdf [https://perma.cc/AY39-GQLC] (supporting purpose statements by corporations).

reputational incentives, and intrinsic motivation lead corporate leaders to give weight to stakeholder interests.[22]

The above versions of stakeholderism, however, are not universally shared. The agency critique of stakeholderism argues that the behavior of corporate leaders that such stakeholderists anticipate is not consistent with these leaders' incentives.[23] In particular, corporate leaders have an array of incentives to attach weight to shareholder interests and little incentive to attach comparable weight to stakeholder interests.[24] According to this alternative position, corporate leaders negotiating the sale of the company will secure benefits for the shareholders and, to some extent, for themselves, but should not be expected to deliver material benefits to stakeholders. Which of these set of expectations is correct—those of stakeholderism or those of its critics—is of course an empirical question and the one on which this Article focuses.

B. The Time of COVID

Before proceeding to test the empirical predictions of stakeholderism, a brief discussion of why the first twenty-four months of the COVID pandemic provide an apt context for our empirical analysis is warranted. We identify and discuss four reasons. First, this period was preceded and accompanied by peak support for stakeholderism in business discourse. Second, the public health and economic crisis triggered by the pandemic heightened risks for stakeholders. Third, shareholders enjoyed a booming stock market, which presumably would have made them especially inclined to accept a reallocation of surplus to stakeholders. Fourth, the deals in this period were of considerable economic significance.

1. Record Support for Stakeholder Capitalism

In the period immediately preceding the outbreak of the COVID pandemic, stakeholderist rhetoric was at its height. Many prominent companies and

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22. For a discussion of the view that "intrinsic motivation" drives directors to "do a good job," see, for example, John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. REGUL. 1, 36-37 (2020).

23. Two of us have developed such a critique in Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 101 (2020). Other pieces of scholarship that have drawn attention to the incentive problem of stakeholderism are Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 908-13 (2005); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 729-32 (2007); Robert C. Clark, *Harmony or Dissonance? The Good Governance Ideas of Academics and Worldly Players*, 70 BUS. LAW. 321, 338 (2015); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015); James D. Cox & Randall S. Thomas, *A Revised Monitoring Model Confronts Today's Movement Toward Managerialism*, 99 TEX. L. REV. 1275, 1276-80 (2021); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?* 99 TEX. L. REV. 1309, 1331-34 (2021); and Stephen M. Bainbridge, *Making Sense of the Business Roundtable's Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 314 (2021).

24. For a detailed analysis of corporate leaders' incentives, see Bebchuk & Tallarita, *supra* note 23, at 140-55.

institutions explicitly embraced this approach, and numerous experts and commentators supported the view that corporate America was moving away from shareholder primacy.[25] In August 2019, a few months before the outbreak of the coronavirus, more than 180 members of the BRT, all CEOs of leading companies, signed a statement in which they committed to abandon shareholder primacy and to deliver value not only to shareholders but to all stakeholders.[26] This statement was welcomed by the press as an historical change and a revolutionary moment for U.S. corporate governance.[27] A few months later, the World Economic Forum issued a manifesto advocating a shift away from shareholder primacy and toward stakeholder capitalism;[28] and a prominent law firm defined 2019 as a "watershed year" for corporate governance due to the "advent of stakeholder governance."[29]

During the pandemic, these institutional bodies continued to profess their support for stakeholderism and expressed confidence that companies were taking the wellbeing of stakeholders into account in the midst of the global crisis. For example, on the first anniversary of the BRT statement, the president of the BRT, Joshua Bolten, claimed that the signatory companies had lived up to their commitment to deliver value to all stakeholders;[30] on the second anniversary, the BRT issued a similar statement that in the two years since the statement, its signatories "have strongly demonstrated a commitment to the Statement."[31] The World Economic Forum joined this consensus, endorsing certain "Stakeholder Principles in the COVID Era," which included protection for employees, continuing relationships with suppliers, and sustainability.[32]

In addition, many business leaders expressed their allegiance to stakeholderist principles or announced their companies' commitment to protect stakeholders from risks created by the pandemic. For example, BlackRock CEO Larry Fink predicted that "in this Covid world . . . stakeholder capitalism is only

25. For a discussion of how declining competition and other changes in industrial organization increased the pressure on companies to embrace stakeholderism, see generally Mark J. Roe, *Corporate Purpose and Corporate Competition* (Eur. Corp. Governance Inst., L. Working Paper No. 601/2021, 2021), https://ssrn.com/abstract=3817788 [https://perma.cc/9FM8-W9N9].

26. BUS. ROUNDTABLE, *supra* note 5.

27. *See* Bebchuk & Tallarita, *supra* note 23, at 124-27.

28. Schwab, *supra* note 6.

29. Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020 [https://perma.cc/58WX-QVPV].

30. Joshua Bolten, Opinion, *A Good Year for Stakeholder Capitalism*, WALL ST. J (Aug. 18, 2020, 7:15 PM ET), https://www.wsj.com/articles/a-good-year-for-stakeholder-capitalism-11597792536 [https://perma.cc/CMY9-BWAX].

31. *Business Roundtable Marks Second Anniversary of Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2021), https://www.businessroundtable.org/business-roundtable-marks-second-anniversary-of-statement-on-the-purpose-of-a-corporation [https://perma.cc/9SYW-JS7M] (emphasis omitted).

32. *Stakeholder Principles in the COVID Era*. WORLD ECON. F. (Apr. 2020), http://www3.weforum.org/docs/WEF_Stakeholder_Principles_COVID_Era.pdf [https://perma.cc/J4PL-EA6J].

going to become more and important."[33] Salesforce CEO Marc Benioff declared that Salesforce "valued stakeholders as much as shareholders."[34] The BRT built a dedicated website collecting its members' pledges and efforts benefiting employees and communities as a demonstration of companies' commitment to stakeholders.[35] In a 2021 study, legal scholars Stavros Gadinis and Amelia Miazad found that many large companies had embraced stakeholder governance as a "systematic framework . . . through specialized executive teams, direct oversight by the board, and external monitoring by investors and specialized professionals,"[36] although the resulting decisions were not always in line with stakeholder interests.[37]

Furthermore, many corporate advisers reported the increasing importance of stakeholders and stakeholder governance in corporate decisions. For example, David Katz and Laura McIntosh, of the law firm Wachtell, Lipton, Rosen & Katz, argued that "[t]he COVID-19 crisis has accelerated the nascent shift toward stakeholder-oriented governance."[38] Erica Volini, Steve Hatfield, and Jeff Schwartz of Deloitte Consulting observed that the pandemic had "thrust workforce management to the forefront of board agendas" and had increased the board's focus on the needs and "expectations of internal and external stakeholders."[39]

More generally, shortly before and during the pandemic, the topic of stakeholders became a pervasive one in corporate discourse. A search for the term "stakeholders" in the Factiva database finds only 1,389 PR Newswire press releases in the period between August 2000 and August 2002, compared to 17,350 press releases in the period between August 2019 and August 2021.[40] If all these announcements, manifestos, and commentaries expressed genuine pro-stakeholder attitudes, the period of the pandemic would certainly be a uniquely ideal time to observe corporate decisions benefiting stakeholders. Thus, by

33. Pippa Stevens, *Stakeholder Capitalism Set to Become 'More And More Important,' Says Blackrock's Fink*, CNBC (July 14, 2020, 1:04 PM EDT), https://www.cnbc.com/2020/07/17/stakeholder-capitalism-set-to-become-more-and-more-important-says-blackrocks-fink.html [https://perma.cc/EY77-9QRN].

34. SALEFORCE, *Time for a New Capitalism*: *Valuing Stakeholders as Much as Shareholders*, at 1:10, https://www.salesforce.com/company/stakeholder-capitalism [https://perma.cc/MG3R-2Z3T].

35. *Our Commitment to Our Employees and Communities,* BUS. ROUNDTABLE https://opportunity.businessroundtable.org/ [https://perma.cc/8VLG-EUKH].

36. Gadinis & Miazad, *supra* note 11, at 50.

37. *Id*. at 98-99.

38. David Katz & Laura A. McIntosh, *Corporate Governance Update: EESG and the COVID-19 Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 31, 2020), https://corpgov.law.harvard.edu/2020/05/31/corporate-governance-update-eesg-and-the-covid-19-crisis/ [https://perma.cc/RBM9-2TDX].

39. Erica Volini, Steve Hatfield & Jeff Schwartz, T*he Workforce Takes Center Stage: The Board's Evolving Role*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE (Sept. 16, 2020), https://corpgov.law.harvard.edu/2020/09/16/the-workforce-takes-center-stage-the-boards-evolving-role/ [https://perma.cc/6GBV-L4KR].

40. We searched the Factiva database for the text "stakeholders," region "United States," and news filter subject "Press Releases" for the period between January 1, 2000 and August 31, 2021.

examining transactions signed during this period, we seek to examine whether the conspicuous and pervasive stakeholder rhetoric is matched by actions.[41]

2. Vulnerable Stakeholders

The pandemic has been an incredibly challenging time for many individuals, groups, businesses, and some categories of corporate stakeholders, such as employees, customers, suppliers, local communities, and the environment. The public health crisis and economic disruption created by COVID posed significant short-term and long-term risks. Indeed, as of the time of this writing, more than two years after the onset of the pandemic, risks and uncertainties for stakeholders still loom large. One significant pandemic short-term effect was on workers: it was much more difficult for employees who lost their jobs to find new positions or occupations. In the United States, the median duration of unemployment jumped from 9.5 weeks in the last quarter of 2019 to 18.9 weeks in the last quarter of 2020.[42] Although the federal government provided substantial support to workers and other individuals (including funding for extended unemployment benefits, subsidized loans to small businesses, and stimulus payments),[43] these programs were expected to be temporary, and, in fact, many of these programs had been essentially discontinued by the end of the period we examine.[44]

Furthermore, due to the health and financial risks created by the pandemic, corporate decisions with respect to remote work, paid sick leave, bonuses and salary increases, flexible work schedules, health and safety measures, dependent care, and other COVID-related policies became critically important for employees' physical and psychological health, as well as for their financial security.[45] Finally, the emergency created the need for companies to repurpose their operations to produce masks and ventilators on a mass scale or to support their supply chains.[46]

In the long term, the pandemic is expected to have disruptive effects on workers and families. A Pew Research survey found that about half of non-retired U.S. adults believe that the economic consequences of the pandemic will

41. For a discussion of the mounting pressures "to pursue certain public policies . . . thus pushing firms toward a more 'stakeholder-oriented' position," see Martin Gelter & Julia M. Puaschunder, *Covid-19 and Comparative Corporate Governance*, 46 J. CORP. L. 557, 623 (2021).

42. *Labor Force Statistics for the Current Population Survey*, U.S. BUREAU LAB. STATS. https://www.bls.gov/web/empsit/cpsee_e10.htm [https://perma.cc/NWY8-45XS].

43. *See Covid-19 Economic Relief*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/coronavirus [https://perma.cc/U38W-8YHR].

44. *See, e.g.*, Alicia Adamczyk, *Pandemic Unemployment Benefits End in September and States Aren't Extending Them*, CNBC (Aug. 31, 2021, 11:31 AM EDT), https://www.cnbc.com/2021/08/31/federal-unemployment-benefits-end-in-a-week-states-wont-extend-them.html [https://perma.cc/WRL7-PECG].

45. For a discussion of some potential corporate responses to COVID for the benefit of employees, see *Covid-19 Resource Center*, JUST CAP., https://justcapital.com/covid-19 [https://perma.cc/5XKC-25FC].

46. *See* Alexander Cheema-Fox, Bridget Realmuto LaPerla, George Serafeim & Hui Wang, *Corporate Resilience and Response to Covid-19*, 33 J. APPLIED CORP. FIN., Spring 2021, 25-26.

make it harder for them to achieve their long-term financial goals,[47] and many observers expect that the COVID pandemic will have long-lasting effects on the economy and society, including shocks to the supply side of the economy,[48] long-term productivity reductions,[49] and macroeconomic consequences.[50]

Thus, short-term and long-term risks related to the pandemic threatened the welfare of stakeholders in the period under study. Against this backdrop, one would expect that corporate leaders negotiating the sale of a company and committed to delivering value to stakeholders (not only to shareholders) would take these risks into account and would bargain for specific protections or mitigations in the interest of stakeholders.

3. Fortunate Shareholders

While the pandemic period was traumatic in so many respects, it was not at all bad for shareholders. The COVID pandemic hit the United States after a more than decade-long bull market: in the ten years from the end of 2009 to the end of 2019, the total shareholder return for the S&P 500 was 256%, equal to an annual return of 13.5%.[51] Even during the pandemic, after an initial steep decline in stock prices from the second half of February through the end of March 2020, when the S&P 500 lost a third of its value, the stock market rapidly bounced back to pre-pandemic levels and continued growing at an even faster rate than before.[52] By August 18, 2020, the index had returned to its pre-pandemic high (February 19, 2020), and by the end of the period under study, the S&P 500 had gained 35% relative to February 19, 2020, and 41% relative to the end of 2019.[53]

Additionally, low interest rates, high levels of liquidity, and valuation opportunities drove record-high M&A activity.[54] This trend was especially

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47. Juliana Menasce Horowitz, Anna Brown & Rachel Minkin, *A Year into the Pandemic, Long-Term Financial Impact Weighs Heavily on Many Americans*, PEW RSCH. CTR. (Mar. 5, 2021), https://www.pewresearch.org/social-trends/2021/03/05/a-year-into-the-pandemic-long-term-financial-impact-weighs-heavily-on-many-americans [https://perma.cc/8M5P-JVMW].

48. Natalia Martín Fuentes & Isabella Moder, *The Scarring Effects of Covid-19 on the Global Economy*, VOXEU (Feb. 5, 2021), https://voxeu.org/article/scarring-effects-covid-19-global-economy [https://perma.cc/7SWE-G67Y].

49. Luke Bartholomew & Paul Diggle, *The Lasting Impact of The Covid Crisis on Economic Potential*, VOXEU (Sept. 21, 2021), https://voxeu.org/article/lasting-impact-covid-crisis-economic-potential [https://perma.cc/L8PQ-2EA8].

50. Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of Covid-19* (Brookings Glob. Working Paper No. 158, 2021), https://www.brookings.edu/research/social-and-economic-impact-of-covid-19/ [https://perma.cc/8VGD-89Y3].

51. This data was collected from FactSet. Total return assumes the reinvestment of all dividends.

52. Patti Domm, *How the Pandemic Drove Massive Stock Market Gains, and What Happens Next*, CNBC (Dec. 30, 2020, 10:52 AM EST), https://www.cnbc.com/2020/12/30/how-the-pandemic-drove-massive-stock-market-gains-and-what-happens-next.html [https://perma.cc/7PFX-RGCF].

53. *S&P 500*, FED. RESERVE BANK ST. LOUIS, https://fred.stlouisfed.org/series/SP500 [https://perma.cc/WFL3-M4P6].

54. Victor Goldfeld, Mark Stagliano & Anna D'Ginto, *Mergers and Acquisitions: 2022*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 27, 2022), https://corpgov.law.harvard.edu/2022/01/27/mergers-and-acquisitions-2022/ [https://perma.cc/5R2N-RTD7] ("The year 2021 was a remarkable one on many levels for M&A . . . Records were shattered across every dimension.").

powerful during 2021, the first half of which saw the highest amount spent on mergers of U.S. companies ($1.74 trillion) in over four decades.[55] There was also a surge in M&A megadeals (deals valued at more than $10 billion), fifteen of which were announced during the first five months of 2021.[56] And during the second quarter of 2021, the aggregate value of the announced deals that were each valued at more than $5 billion exceeded $734 billion—more than in any other quarter since 2006.[57]

Such a long period of significant gains for shareholders created ideal conditions for stakeholderist action. Indeed, if stakeholder-oriented corporate leaders wanted to allocate part of the value created from an acquisition to employees and other stakeholders, they could easily have done so while still delivering huge value to shareholders.

4. Economically Consequential Decisions

Finally, it is worth noting that our sample of corporate acquisitions represents a significant set of economically consequential decisions. Together, the deals in our sample have an aggregate value of more than $800 billion and affected almost 650,000 employees.

While we are interested in assessing the promise of stakeholderism in general, and we believe that this study provides insights that can be applied in other contexts, we also think that measuring the degree of stakeholder protections in such a significant sample of deals is valuable in itself, as it shows whether rhetoric is being matched by actions in some of the most relevant corporate deals signed by large public companies. Therefore, even if the stakeholderist predictions were found to be inaccurate only and exclusively within this specific context, this would still serve as a major indictment of the efficacy of stakeholderism.

From a social standpoint, stakeholderism is relevant only if it has a sizeable and systematic impact on the economy, rather than an episodic effect on a small number of companies in circumstances of little economic significance. Therefore, if stakeholderism is unable to deliver in major transactions affecting billions of dollars of value and hundreds of thousands of employees, its relevance for society is likely to be negligible.

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55. Nina Trentmann, *Cash-Laden Companies Are on a Mergers and Acquisitions Spree*, WALL ST. J. (July 3, 2021, 10:00 AM ET), https://www.wsj.com/articles/cash-laden-companies-are-on-a-mergers-and-acquisitions-spree-11625320800 [https://perma.cc/F7UB-ZNAK].

56. Luisa Beltran, *Megadeals Are Making a Roaring Comeback. Why They Lead the M&A Market*, BARRON'S (June 4, 2021, 2:13 PM ET), https://www.barrons.com/articles/megadeals-mergers-acquisitions-51622830372 [https://perma.cc/QL9Y-BAEW].

57. Darragh Byrne, Marc Petitier & Guy Potel, *Surging M&A Megadeals Top Records in Q2*, WHITE & CASE (July 26, 2021), https://mergers.whitecase.com/highlights/surging-ma-megadeals-top-records-in-q2# [https://perma.cc/BC7K-R2MM].

III. The Universe of Cases

A. Data Collection

In this Part, we describe the construction of our dataset and the universe of deals we examined. We used the FactSet M&A database to gather a sample of all acquisitions of U.S. public companies announced between April 1, 2020 and March 31, 2022. Focusing on large deals due to the higher stakes for stakeholders, we excluded from our sample deals with a transaction value below $1 billion, leaving 181 acquisitions under study. Due to their large size, the target companies of these acquisitions tend to employ more employees, to have thicker relationships with third parties, and to generate greater impact on communities. Accordingly, the risks that their sale posed to stakeholders were expected to be more significant.

Our sample period spans two years during the coronavirus pandemic. We focused on deals signed during the pandemic, as this period posed significant risks to stakeholders and was accompanied and preceded by very public pledges by numerous corporate leaders to deliver value to all stakeholders.[58]

We then applied several exclusion criteria. First, we excluded 28 acquisitions in which the target had a shareholder who held 20% or more of the target's equity prior to the acquisition, as such a shareholder could exercise effective control over the firm.[59] When the target's controller is also the acquirer, that controller has interests on both sides of the transaction and there is no arm's length bargaining. But even if the target has a controller who negotiates a deal with a third-party acquirer, this controller may act differently than a professional manager due to the controller's large equity stake in the target.[60]

Second, we excluded two agreements entered into by targets within the context of bankruptcy proceedings. Financially distressed companies do not have enough assets to cover all of their liabilities and are subject to pressures from creditors. Consequently, corporate leaders may not be able to secure protections for additional stakeholder groups when considering and negotiating the sale of a distressed company.

Third, we excluded eighteen acquisitions in which the target was a Real Estate Investment Trust company, and four deals entered into by targets incorporated outside the U.S.

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58. See *supra* Section II.B.1.

59. Delaware's long-standing approach has been cautious in determining that a minority holder exercises de-facto control over the corporation, and a shareholder needs to hold at least 20% of the voting rights to be considered as a controlling shareholder. *See, e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., No. 12711, 2018 WL 1560293, at *2, *19 (Del. Ch. Mar. 28, 2018) (concluding that it was "reasonably conceivable" that an owner of 22.1% of a company's common stock was a controlling stockholder); Calesa Assocs., L.P. v. Am. Cap., Ltd., No. 10557, 2016 WL 770251, at *10–12 (Del. Ch. Feb. 29, 2016) (concluding that a stockholder owning 26% of a company's stock exercised "actual control").

60. Later, when we analyzed the final contractual terms, we drew a clear distinction between shareholders and corporate leaders, who negotiate the deal terms on behalf of different constituencies, including shareholders. When the corporate leader is also a major shareholder, such a distinction between the two groups does not exist.

Fourth, we excluded six merger agreements that were terminated due to offers received from third parties following the signing date, which constituted superior proposals. In all of these cases, the subsequent merger agreements that were signed with the eventual acquirers were found and included in the final dataset.

Finally, we also excluded one deal for which we could not locate a merger agreement, and therefore we had no publicly available information on the detailed terms of the transaction.

Our final dataset includes 122 transactions, and it provides a representative coverage of the large deals that took place during the pandemic period. After constructing our sample of pandemic deals, we embarked on the more demanding task of manually collecting and analyzing publicly available materials about each of the deals in the sample.

Specifically, we reviewed a wide array of securities filings for each deal: the proxy statements filed with the Securities and Exchange Commission in connection with the shareholder vote on such transactions and the acquisition agreements attached to these proxy statements, the special reports (Form 8-K) and press releases filed by the parties at various points between the announcement and the closing of each deal, and the annual reports (Form 10-K) filed by the targets during the two years preceding the announcement of the deal. In addition, we also collected and analyzed media articles about each deal from national and local media outlets. Our detailed review of these materials enabled us to examine the bargaining process leading to the deal and its detailed terms with respect to the interests of shareholders, corporate leaders, and stakeholders, and to identify risks that the deals posed for stakeholders at the time of the announcement.

Finally, we augmented our data with additional data from commercially available datasets. In particular, we collected data from FactSet on the characteristics of the parties, the deal, and the deal protection provisions adopted by the parties.

B. Deals, Buyers, and Targets

1. Economic Significance

Our sample focuses on large and very large deals, which presumably involve high stakes for stakeholders. The mean value of all transactions in our sample is \$6.76 billion, and the median value is \$4.16 billion. For 24 deals, the transaction value exceeds \$10 billion; 30 deals are valued between \$5 and \$10 billion; and 68 deals are valued between \$1 and \$5 billion.

Together, the 122 deals included in our dataset are of large economic significance, with an aggregate deal value of \$824.5 billion, equal to about 2.43%

of the total U.S. market capitalization in 2019.[61] The targets in our sample are also meaningful in terms of their operations and employees. At the end of 2019, they had aggregate annual revenues of about $233 billion and employed more than 5,000 employees on average and almost 650,000 employees in the aggregate.

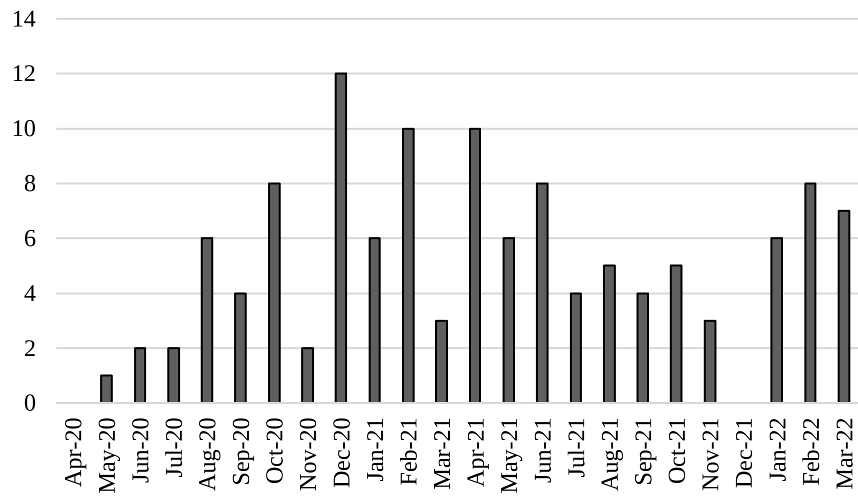
2. Deal Timing

The 122 acquisitions in our sample were announced during the twenty-four month period between April 1, 2020 and March 31, 2022. Figure 1 reports the distribution of the transactions by month during the examined period. As the figure makes clear, a vast majority of the deals in our sample (81%) were announced after the production of the vaccines for COVID-19 in November 2020, and about 54% after the first quarter of 2021, during which a substantial proportion of the U.S. population received vaccinations.[62]

61. According to the World Bank, in 2019 the market capitalization of listed domestic companies in the United States was $33.9 trillion. *Market Capitalization of Listed Domestic Companies*, WORLD BANK, https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=US [https://perma.cc/K4UJ-KMC2].

62. In mid-November 2020, both Pfizer and Moderna announced that their vaccines had been found to be 95% effective in preventing COVID-19. *See* Press Release, Pfizer & BioNTec, Pfizer and BioNTech Conclude Phase 3 Study of COVID-19 Vaccine Candidate, Meeting All Primary Efficacy Endpoints (Nov. 18, 2020), https://www.businesswire.com/news/home/20201118005595/en/ [https://perma.cc/5AA6-K4BY]; James Gallagher, *Moderna: Covid Vaccine Shows Nearly 95% Protection*, BBC (Nov. 16, 2020) https://www.bbc.com/news/health-54902908 [https://perma.cc/6CAG-5F88].

Figure 1. Transaction Announcements by Month



3. Buyers

We used the FactSet M&A database to gather information on the buyers' identities, and whether they were strategic or private equity buyers (as defined by FactSet).[63] A substantial majority (77%) of the acquisitions in our sample were by strategic buyers. The remaining deals (23%) are acquisitions by private equity firms.

One could argue that different types of buyers might have different impacts on stakeholders due to their specific post-acquisition strategies and incentives. In particular, strategic buyers might focus on product or customer complementarity, or on other revenue synergies that do not necessarily involve cost cutting, reduction of employment, or other costs or risks for stakeholders (although, as we will see, in many of the deals in the sample, such risks were clearly present at the time of announcement).

Private equity acquisitions, in contrast, often involve significant risks of adverse effects on stakeholders due to the strong incentives of private equity buyers to maximize financial returns. These strong incentives are usually generated by the heavy reliance on debt to finance the acquisition,[64] as well as by the equity-heavy compensation structures of private equity managers and the

63. The FactSet M&A dataset defines a private equity acquisition as any acquisition by a private equity firm or by a buyer backed up by a private equity sponsor that owns an interest in the acquirer of at least 20%. *See FactSet Mergers*, FACTSET, https://go.factset.com/marketplace/catalog/product/factset-mergers [https://perma.cc/KE29-SDP6].

64. *See* Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSPS. 121, 124 (2009) (stating that private equity acquisitions are typically financed with 60% to 90% debt).

managers of portfolio companies.[65] The goal of maximizing financial return is often achieved through implementing cost-cutting strategies. Indeed, there is robust empirical evidence that private equity acquisitions result in employee terminations, thereby imposing costs on some employees.[66]

Therefore, in theory, the presence of many strategic transactions, which constitute a majority of the deals in our sample, might imply better treatment of stakeholders. Arguably, corporate leaders seeking to use their power to protect stakeholders during the pandemic could more easily secure such protections when negotiating a sale to a strategic acquirer as opposed to a private equity buyer. The difference in the type of acquirer enables us to examine this hypothesis and to identify whether stakeholders receive more protections in a particular type of acquisition.

4. Targets

The 122 target companies in our sample represent 50 different industries out of the 129 industries classified by FactSet, including: packaged software (12 deals), biotechnology (8 deals), pharmaceuticals (8 deals), oil and gas production (6 deals), medical specialties (5 deals), and miscellaneous commercial services (6 deals). Thus, our sample has a broad representation of economic sectors.

The targets in our sample are also diverse in terms of their headquarters' location, with target headquarters in 30 different U.S. states. The four states that served as home to the headquarters of more than five companies in our sample are California (29 deals), Texas (17 deals), Massachusetts (14 deals), and New Jersey (7 deals). Finally, in terms of state of incorporation, a substantial majority (85%, or 104 targets) were incorporated in Delaware, the dominant state for incorporation of U.S. companies.

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65. *See* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 4-7 (2008) (discussing the organizational structure and compensation practices of private equity funds); Robert J. Jackson, Jr., *Private Equity and Executive Compensation*, 60 UCLA L. REV. 638, 640 (2013) (analyzing how executive compensation in companies owned by private equity firms differs from executive compensation in public companies, and concluding that "private equity investors tie CEO pay much more closely to performance than do the boards of directors of otherwise similar public companies"); Kaplan & Strömberg, *supra* note 64, at 130–31 ("[P]rivate equity firms pay careful attention to management incentives in their portfolio companies. They typically give the management team a large equity upside through stock and options . . . Private equity firms also require management to make a meaningful investment in the company, so that management not only has a significant upside, but a significant downside as well.").

66. *See, e.g.*, Steven J. Davis, John Haltiwanger, Kyle Handley, Ben Lipsius, Josh Lerner & Javier Miranda, *The (Heterogenous) Economic Effects of Private Equity Buyouts* 1, 43 (Nat'l Bureau of Econ. Rsch., Working Paper No. w26371, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469398 [https://perma.cc/K678-QSK2] (examining thousands of U.S. private equity buyouts from 1980 to 2013 and finding that employment at target firms shrinks 13% over two years in buyouts of publicly listed firms relative to control firms, and that average earnings per worker fall by 1.7% at target firms after buyouts, largely erasing a pre-buyout wage premium relative to control group).

5. Largest Deals Subsample

Our sample contains 24 acquisitions with a deal value higher than $10 billion (the "Largest Deals Subsample"). Table 1 lists these companies and reports some of their key characteristics. Table A1 in the Appendix lists all the other companies in our sample and similarly reports their key characteristics.

Table 1. Acquisitions above $10B

Target	*Deal Value (Billions)*	*No. of Employees in 2019*	*Industry*	*HQ Location*	*Buyer Type*
Activision Blizzard	$67.3	9,500	Recreational Products	CA	Strategic
Alexion	$39.0	3,082	Biotechnology	MA	Strategic
Xilinx	$33.8	4,891	Semiconductors	CA	Strategic
Kansas City Southern	$29.7	7,040	Railroads	MO	Strategic
Slack Technologies	$26.2	2,045	Packaged Software	CA	Strategic
Maxim Integrated	$20.5	7,115	Semiconductors	CA	Strategic
Immunomedics	$19.7	366	Biotechnology	NJ	Strategic
Nuance	$17.4	7,100	Packaged Software	MA	Strategic
Varian	$16.2	10,062	Medical Specialties	AZ	Strategic
Livongo	$15.7	615	Packaged Software	CA	Strategic
Citrix Systems	$14.5	9,000	Packaged Software	FL	Private equity
First Horizon	$13.3	8,463	Regional Banks	TN	Strategic
Noble Energy	$12.9	2,282	Integrated Oil	TX	Strategic
Concho Resources	$12.9	1,453	Oil & Gas Production	TX	Strategic
Change Healthcare	$12.7	15,000	Packaged Software	TN	Strategic
PRA Health Sciences	$11.7	17,500	Misc. Commercial Services	NC	Strategic
Hill-Rom Holdings	$11.7	10,000	Medical Specialties	IL	Strategic
GCI Liberty	$11.6	2,051	Specialty Telecommunications	CO	Strategic
Dunkin' Brands	$11.5	1,114	Food Retail	MA	Private equity
Alleghany	$11.4	13,313	Property/Casualty Insurance	NY	Strategic
Zynga	$11.3	2,245	Internet Software/Services	CA	Strategic
MyoKardia	$11.2	235	Pharmaceuticals	CA	Strategic
Acceleron Pharma	$10.4	312	Biotechnology	MA	Strategic
Proofpoint	$10.4	3,368	Data Processing Services	CA	Private equity
Mean	$18.9	5,756	–	–	–
Median	$13.1	4,130	–	–	–
Total	$453.1	138,152	–	–	–

As Table 1 shows, the deal value for the largest 24 deals had a mean of \$18.9 billion, a median of \$13.1 billion, and a total of over \$453 billion. With respect to employees, the companies in this Largest Deals Subsample had on average over 5,700 employees and in the aggregate more than 138,000 employees.

Throughout this Article, when describing our empirical findings, we will use the companies in the Largest Deals Subsample for illustration. In particular, for each issue and dimension that we study, we will report the results for the overall sample as well as the individual results for each company in the Largest Deals Subsample. For completeness, the Appendix will report the individual findings for each of the sample companies outside the Largest Deals Subsample.

C. Bargaining

1. The Process

Before considering the outcomes of the process leading to the deal, this Section examines the nature and character of this process. In particular, we examine the dimensions of the bargaining process that are likely to be associated with substantial negotiations over the terms of the deal. Table 2 reports our findings with respect to five such dimensions. Each column focuses on a different dimension of the process, which we discuss below.

Table 2. Bargaining Process

Target	*Length of Sale Process (Days)*	*Discussions with Other Bidders (Yes/No)*	*Offers by Other Bidders (Yes/No)*	*Multiple Offers by Buyer (Yes/No)*	*Negotiated Price Increase (Yes/No)*
Findings for Each of the Largest 24 Deals					
Activision Blizzard	59	Yes	No	Yes	Yes
Alexion	124	Yes	Yes	Yes	Yes
Xilinx	805	Yes	No	Yes	Yes
Kansas City Southern	413	Yes	Yes	Yes	Yes
Slack Technologies	91	No	No	Yes	Yes
Maxim Integrated	129	Yes	No	Yes	Yes
Immunomedics	90	Yes	Yes	Yes	Yes
Nuance	650	Yes	No	Yes	Yes
Varian	68	Yes	Yes	Yes	Yes
Livongo	53	No	No	Yes	Yes
Citrix Systems	158	Yes	Yes	Yes	Yes
First Horizon	52	No	No	No	No
Noble Energy	227	Yes	No	Yes	Yes
Concho Resources	369	Yes	No	Yes	Yes
Change Healthcare	235	No	No	Yes	Yes
PRA Health Sciences	366	No	No	Yes	Yes
Hill-Rom Holdings	47	No	No	Yes	Yes
GCI Liberty	108	No	No	Yes	Yes
Dunkin' Brands	109	No	No	Yes	Yes
Alleghany	13	No	No	No	No
Zynga	373	Yes	No	Yes	Yes
MyoKardia	136	No	No	Yes	Yes
Acceleron Pharma	72	Yes	No	Yes	Yes
Proofpoint	241	Yes	No	Yes	Yes
Results for the Largest Deals Subsample					
% of Yes	–	58%	21%	92%	92%
Mean	207.8	–	–	–	–
Median	126.5	–	–	–	–
Results for the Full Sample					
% of Yes	–	72%	43%	93%	92%
Mean	219.2	–	–	–	–
Median	159.0	–	–	–	–

Length of Sale Process. For each transaction, we identified the length of the sale process period (in days) from either the beginning of the target's search for a sale or its first interaction with an interested party within the context eventually leading to the deal, up to the signing of the merger agreement. The longer this period lasted, the more time was available for negotiations.

As Table 2 indicates, the deals in our sample were commonly negotiated over a substantial period. In the Largest Deals Subsample, the length of the period had a mean of 208 days and a median of 127 days. In the full sample, the length of time had a mean of 219 days and a median of 159 days.

Discussions with Other Bidders. For each transaction, we also identified whether potential buyers other than the final buyer expressed an interest in acquiring the company. The presence of potential rival buyers likely strengthens the target's bargaining position. As Table 2 shows, discussions with other bidders were common, taking place in 58% of the Largest Deals Subsample, and in 72% of the deals in the full sample.

Offers by Other Bidders. For each transaction, we also examined whether other potential buyers submitted an offer during the bargaining process. The presence of a competing offer strengthens the target's bargaining position and enhances the ability of the target's leaders to obtain favorable terms. As Table 2 indicates, rival bidders made an offer in 21% of the Largest Deals Subsample and in 43% of the deals in the full sample.

Multiple Offers by the Buyer. We also examined whether during the negotiations process the target company received more than one formal offer from the buyer with which the deal was ultimately concluded. The presence of multiple offers is likely to reflect a bargaining process in which target leaders seek to obtain improved terms. As Table 2 reports, buyers made multiple offers in 92% of the Largest Deal Subsample and in 93% of the transactions in the full sample.

Negotiated Price Increase. Last, we examined whether the final price was higher than the one proposed in the initial offer by the same buyer.[67] Such improvement is likely to reflect a successful negotiation on the part of the target's leaders. As Table 2 indicates, target leaders were able to obtain a higher price in 92% of both the Largest Deals Subsample and the full sample. Our analysis of these five dimensions, both individually and in combination, indicates that the deals under study were largely the product of a long process in which the target companies sought to use their bargaining power to obtain improved terms.

2. Deal Protection Provisions

To supplement our analysis of the five dimensions of the bargaining process, we also examined whether the final terms of the deal included deal protection provisions that protected the buyer in the event that the deal did not close.[68] Deal protections are relevant for our study for two reasons. First, they

67. If the initial offer was reduced following due diligence, we examined whether the final price was higher than the first offer the buyer made after completing the due diligence.

68. For an analysis of how deal terms affect outcomes, see Fernán Restrepo & Guhan Subramanian, *The New Look of Deal Protection*, 69 STAN. L. REV. 1013 (2017).

are valuable for the buyer, as they provide the buyer with certain benefits in the event that the deal is not completed. Thus, target leaders agreeing to deal protection provisions were in a position to receive something in return. The question is what they bargained for.

Second, deal protections make it more difficult for another potential buyer with a similar valuation of the target company to make a superior offer. This increases the freedom of target corporate leaders to negotiate a deal that provides some benefits for employees and other stakeholders, which, in the absence of deal protections, would be more vulnerable to competing offers with a higher premium for shareholders. Therefore, target corporate leaders who negotiated deal protections were in a better position to bargain for benefits for stakeholders. Table 3 reports our findings regarding the deal protections that were commonly granted to acquirers in our sample.

Table 3. Deal Protection Provisions

Target	*No-Shop (Yes/No)*	*No-Talk (Yes/No)*	*Obligation to Recommend (Yes/No)*	*Termination Fee (Yes/No)*	*Termination Fee (%)*
Findings for Each of the Largest 24 Deals					
Activision Blizzard	Yes	Yes	Yes	Yes	3.1
Alexion	Yes	Yes	Yes	Yes	3.1
Xilinx	Yes	Yes	Yes	Yes	2.9
Kansas City Southern	N/A	N/A	N/A	N/A	N/A
Slack Technologies	Yes	Yes	Yes	Yes	3.3
Maxim Integrated	Yes	Yes	Yes	Yes	3.5
Immunomedics	Yes	Yes	Yes	Yes	3.6
Nuance	Yes	Yes	Yes	Yes	3.2
Varian	Yes	Yes	Yes	Yes	2.8
Livongo	Yes	Yes	Yes	Yes	3.5
Citrix Systems	Yes	Yes	Yes	Yes	3.6
First Horizon	No	No	No	No	3.3
Noble Energy	Yes	Yes	Yes	Yes	3.5
Concho Resources	Yes	Yes	Yes	Yes	3.1
Change Healthcare	Yes	Yes	Yes	Yes	3.8
PRA Health Sciences	Yes	Yes	Yes	Yes	2.6
Hill-Rom Holdings	Yes	Yes	Yes	Yes	3.6
GCI Liberty	Yes	Yes	Yes	Yes	2.8
Dunkin' Brands	Yes	Yes	Yes	Yes	3.1
Alleghany	Yes	Yes	Yes	No	–
Zynga	Yes	Yes	Yes	Yes	4.9
MyoKardia	Yes	Yes	Yes	Yes	3.8
Acceleron Pharma	Yes	Yes	Yes	Yes	3.1
Proofpoint	Yes	Yes	Yes	Yes	3.6
Results for the Largest Deals Subsample					
% of Yes	96%	96%	96%	91%	91%
Mean	–	–	–	–	3.3
Median	–	–	–	–	3.3
Results for the Full Sample					
% of Yes	96%	96%	96%	93%	93%
Mean	–	–	–	–	3.3
Median	–	–	–	–	3.4

As Table 3 reports, the deals in our sample display an abundance of deal protections offered to the buyer. No-shop and no-talk provisions, which limit the target's ability to discuss the proposed transaction terms with third parties and to bargain for an improved deal, appeared in 96% of the deals in both the Largest Deals Subsample and the full sample. "Force the vote" requirements, which require the target's board to submit the proposed deal to a shareholder vote and therefore delay the closing of alternative deals, appeared in 96% of the deals in both the Largest Deals Subsample and the full sample. In addition, the merger agreement required the board to recommend the transaction to the target's shareholders prior to the meeting in 96% of the deals in both the Largest Deals Subsample and the full sample.

Shifting our view to contractual sanctions for the termination of the signed agreement, we find that in 91% of the Largest Deals Subsample and in 93% of the full sample, the target committed to pay either a termination fee or an expense reimbursement to the buyer in the event the deal was terminated under specified circumstances. The termination fees amounted, on average, to 3.3% of the purchase price for both the Largest Deals Subsample and the full sample.

The analysis above indicates that the deals in our sample involved significant deal protections that benefitted the buyer and impeded rival buyers. As explained above, target leaders' agreement to grant such provisions enabled them to obtain some desired term from the buyer and enhanced their flexibility to allocate some of the resulting benefit to stakeholders.

IV. Protecting the Interests of Shareholders and Corporate Leaders

In examining for whom corporate leaders bargained, we begin with shareholders (Section IV.A), and then proceed to corporate leaders (Section IV.B).

A. Gains for Shareholders

The gains that shareholders obtain from the sale of the company amount to the premium paid by the acquirer over the pre-announcement stock price. To determine the premium, we used the "unaffected premium" reported by FactSet, which is defined as the premium compared to the unaffected stock price preceding the deal's announcement. We also calculated the dollar amount of the premium for each deal, based on the transaction values reported by FactSet. Table 4 reports our findings regarding the gains to shareholders.

Table 4. Gains to Shareholders

Target	*Premium (%)*	*Monetary Gain (Billions)*
Findings for Each of the Largest 24 Deals		
Activision Blizzard	45.3	$21.0
Alexion	44.2	$11.9
Xilinx	33.9	$8.6
Kansas City Southern	28.4	$6.6
Slack Technologies	55.1	$9.3
Maxim Integrated	22.4	$3.7
Immunomedics	108.3	$10.2
Nuance	22.9	$3.3
Varian	24.4	$3.1
Livongo	10.0	$1.4
Citrix Systems	24.3	$2.8
First Horizon	37.0	$3.6
Noble Energy	7.6	$0.9
Concho Resources	11.7	$1.4
Change Healthcare	41.2	$3.7
PRA Health Sciences	30.0	$2.7
Hill-Rom Holdings	26.0	$2.4
GCI Liberty	22.7	$2.2
Dunkin' Brands	20.0	$1.9
Alleghany	25.3	$2.3
Zynga	64.3	$4.4
MyoKardia	61.2	$4.2
Acceleron Pharma	12.6	$1.2
Proofpoint	33.6	$2.6
Results for the Largest Deals Subsample		
Mean	33.8	$4.8
Median	27.2	$3.2
Total	–	$115.5
Results for the Full Sample		
Mean	37.3	$1.6
Median	30.8	$0.9
Total	–	$200.4

As Table 4 indicates, shareholders obtained substantial monetary payoffs from the deals in our sample. In the Largest Deals Subsample, the premium had a mean of 34% and a median of 27%, valued at a mean of $4.8 billion and a median of $3.2 billion. The aggregate monetary gains to shareholders totaled $115.5 billion in the Largest Deals Subsample.

In the full sample, the premium had a mean of 37% and a median of 31%, and the monetary gains to shareholders had a mean of $1.6 billion and a median $0.9 billion. Aggregate monetary gains to the shareholders of all targets in our sample were $200 billion.

B. Gains for Corporate Leaders

1. Executives

Table 5 reports our findings regarding the benefits obtained by top executives. The columns in the Table represent different sources of gains to executives, and we discuss each of them in turn below.

Table 5. Gains to Executives

Target	*Monetary Gain Qua Shareholders (Millions)*	*Payment Qua Executives (Millions)*	*Total Gain (Millions)*	*Commitment to Retain CEO*	*Commitment to Retain Other Executives*	*Announced Plan to Retain Additional Executives*
Findings for Each of the Largest 24 Deals						
Activision Blizzard	$43	$86	$129	No	No	No
Alexion	$63	$145	$208	No	No	Yes
Xilinx	$29	$76	$105	Yes	No	No
Kansas City Southern	$68	$123	$192	No	No	Yes
Slack Technologies	$1,846	$190	$2,036	Yes	Yes (2)	No
Maxim Integrated	$93	$59	$152	Yes	No	Yes
Immunomedics	$2,371	$108	$2,479	No	No	Yes
Nuance	$66	$239	$305	Yes	Yes (1)	No
Varian	$28	$132	$159	No	No	Yes
Livongo	$922	$329	$1,252	No	No	No
Citrix Systems	$108	$120	$228	No	No	Yes
First Horizon	$119	$126	$245	Yes	Yes (1)	No
Noble Energy	$9	$49	$58	No	No	Yes
Concho Resources	$40	$68	$108	Yes	Yes (2)	Yes
Change Healthcare	$60	$106	$167	Yes	Yes (5)	Yes
PRA Health Sciences	$19	$23	$42	Yes	No	No
Hill-Rom Holdings	$13	$113	$126	No	No	Yes
GCI Liberty	$709	$-	$709	Yes	Yes (7)	Yes
Dunkin' Brands	$35	$55	$90	No	No	Yes
Alleghany	$88	$97	$185	No	No	No
Zynga	$157	$90	$247	No	No	Yes
MyoKardia	$431	$214	$645	No	No	Yes
Acceleron Pharma	$103	$105	$208	No	No	Yes
Proofpoint	$66	$152	$218	No	No	Yes
Results for the Largest Deals Subsample						
% of Yes	100%	96%	100%	38%	25%	67%
Mean	$312	$117	$429	–	–	–
Median	$67	$107	$200	–	–	–
Total	$7,486	$2,806	$10,292	–	–	–
Results for the Full Sample						
% of Yes	100%	98%	100%	32%	23%	51%
Mean	$109	$61	$166	–	–	–
Median	$35	$46	$85	–	–	–
Total	$13,119	$7,275	$20,393	–	–	–

Monetary Gain Qua Shareholders. Executives usually have equity holdings in the companies they lead, and therefore obtain monetary gains from the sale in their capacity as shareholders. We included in this category of gains both monetary gains that executives made on shares they owned prior to the transaction and gains they made on shares obtained through exercising their vested stock options.

We found that the gains obtained by top executives were generally of significant value. As Table 5 indicates, the value of these gains had a mean of $312 million and a median of $67 million in the Largest Deals Subsample, and a mean of $109 million and a median of $35 million in the full sample.

Payments Qua Executives. This category of monetary gains includes additional payments received by executives in connection with the acquisition in their capacity as executives, not in their capacity as shareholders. Examples include severance payments, tax gross-up payments, and cashing out of unvested stock options or equity awards.

Some of these payments were triggered by pre-existing provisions placed in compensation agreements in anticipation of any future deal. However, a substantial portion of these payments resulted from amendments to existing compensation arrangements that were made in connection with the sale. In particular, our document review indicates that such amendments were made in connection with 42% of the deals in the Largest Deals Subsample and 44% of the deals in the full sample.

As Table 5 shows, corporate leaders received significant payments of this type. The aggregate payments to a company's team of executives had a mean of $117 million and a median of $107 million for the Largest Deals Subsample, and a mean of $61 million and a median of $46 million for the full sample.

In addition, we found that in many transactions, corporate leaders also negotiated for additional compensation-like payments, such as closing bonuses. In the Largest Deals Subsample, such payments were found in 50% of the deals, with both a mean and a median of $13 million. In the full sample, such payments appeared in 38% of the deals, and had a mean of $7 million and a median of $4 million.[69]

Total Immediate Monetary Gains. Combining the immediate monetary gains that top executives obtained as shareholders and as executives, Column 3 of Table 5 reports the total value of the immediate monetary gains that the deals we studied produced for executives. In the Largest Deals Subsample, the total immediate monetary gains had a mean of $429 million and a median of $200 million. In the full sample, these payments had a mean of $166 million and a median of $85 million. Thus, the immediate monetary gains were generally large,

69. It might be argued that these payments are part of a package intended to retain target executives. However, executives were entitled to keep these payments from the buyer regardless of whether they would continue working at the acquired target. Indeed, according to the proxy disclosures, some of those payments were made by the buyer to executives who were not expected to remain after the sale.

and they were further supplemented by future gains from continued employment by the buyer.

Retention of Executives. Another significant source of gains to executives is the prospect of their continued employment at the target after the sale, which would enable the executive to receive additional compensation in the future. In order to examine the prospect of receiving such a benefit, we examined whether deal proxy materials contained disclosures regarding the retention of the company's CEO or other top executives by the buyer. As Table 5 indicates, in 38% of the deals in the Largest Deals Subsample, and in 32% of all the deals in our sample, the buyer expressly committed to retain the target's CEO following the acquisition. In addition, in 25% of the Largest Deal Subsample and in 23% of the full sample, the proxy statement contained an express commitment to retain additional top executives other than the CEO.

Announced Plan to Retain Additional Executives. Furthermore, our document review identified a significant number of transactions with "softer" commitments in which the proxy materials disclosed a plan to retain members of the company's executive team that was not yet legally finalized.[70] As Table 5 reports, such soft commitments were found in 67% of the Largest Deals Subsample and in 51% of all deals in the full sample. Although these plans were not legally binding, they are worth noting to provide a comprehensive account of the expected benefits to executives.

2. Non-Executive Directors

Having considered the gains to executives, we now turn to examine the benefits that non-executive corporate directors obtained as a result of the transactions. Table 6 reports our findings, revealing that non-executive directors also obtained significant gains from the transactions.

70. *See, e.g.* Change Healthcare Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 64 (Mar. 5, 2021) ("Although no such agreement, arrangement or understanding exists to our knowledge as of the date of this proxy statement, certain of our other executive officers may, prior to the completion of the Merger, enter into new arrangements with UnitedHealth Group or its subsidiaries regarding employment following the consummation of the Merger."); Glu Mobile Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 69 (Mar. 25, 2021) ("While it is possible that Electronic Arts may enter to into such arrangements in the future, at this time there can be no assurance that Electronic Arts will enter into any employment or other arrangements with our management, or if so, of the terms and conditions of any such arrangements.").

Table 6. Gains to Non-Executive Directors

Target	*Monetary Gain Qua Shareholders (Millions)*	*Payment Qua Directors (Millions)*	*Directors Retained (Yes/No)*
Findings for Each of the Largest 24 Deals			
Activision Blizzard	$117	$1	No
Alexion	$21	$5	No
Xilinx	$12	$3	Yes (2)
Kansas City Southern	$43	-	No
Slack Technologies	$508	$6	No
Maxim Integrated	$14	-	Yes (2)
Immunomedics	$30	$6	No
Nuance	$27	$5	No
Varian	$9	$2	No
Livongo	$33	$15	Yes (5)
Citrix Systems	$8	$2	No
First Horizon	$52	$2	No
Noble Energy	$40	$1	No
Concho Resources	$30	$2	No
Change Healthcare	$15	$2	No
PRA Health Sciences	$5	$1	Yes (2)
Hill-Rom Holdings	$1	-	No
GCI Liberty	$6	-	Yes (2)
Dunkin' Brands	$49	$12	No
Alleghany	$305	$16	No
Zynga	$522	$1	Yes (2)
MyoKardia	$70	$6	No
Acceleron Pharma	$36	$5	No
Proofpoint	$42	$2	No
Results for the Largest Deals Subsample			
% of Yes	100%	83%	25%
Mean	$83	$4	–
Median	$32	$2	–
Total	$1,944	$97	–
Results for the Full Sample			
% of Yes	100%	77%	26%
Mean	$59	$3	–
Median	$15	$1	–
Total	$7,045	$289	–

Monetary Gains Qua Shareholders. Much like the executive officers, directors typically own shares and/or vested options in the companies they lead, and therefore, in their capacity as shareholders, obtain monetary gains from the premium negotiated with the buyer. The aggregate monetary benefit to the team of non-executive directors from their equity holdings was considerable, with a mean of $83 million and a median of $32 million for the Largest Deals Subsample, and a mean of $59 million and a median of $15 million for the full sample.

Payments Qua Directors. In addition, we found that the team of a target's non-executive directors received additional payments qua directors in most of the cases, both in the Largest Deals Subsample and in the full sample. The aggregate value of such payments had a mean value of $4 million and a median of $2 million for the Largest Deals Subsample, and a mean of $3 million and a median of $1 million in the full sample.[71]

Retention of Directors. Lastly, corporate leaders often negotiated for the retention not only of executives but also of non-executive directors. In particular, our document review found that the deal documents assigned post-closing board seats to non-executive directors of the target in nearly a third of the deals in both the Largest Deals Subsample and the full sample.

V. Protecting Stakeholder Interests?

The preceding Part has shown that both shareholders and corporate leaders benefitted substantially from the negotiated terms of the deals we studied. In this Part we turn to the heart of our inquiry: examining whether, and to what extent, corporate leaders obtained benefits for stakeholders as well.

Section V.A begins by documenting that corporate leaders often recognized that the deal posed significant risks to stakeholders. The subsequent three sections focus on the extent to which the deal terms provided protections or benefits to employees (Section V.B); suppliers, customers, and creditors (Section V.C); and to local communities, the environment, and other stakeholders (Section V.D). Overall, we find that, while corporate leaders obtained substantial benefits for shareholders and for themselves, they obtained little or no protections for employees or other stakeholders.

We would like to remind readers that certain questions that they may have about the analysis of this Part will be addressed in detail in Parts VI and VII. In particular, some readers might wonder whether the general lack of stakeholder protections reported in this Part might be due to special factors present in our sample and thus might not be telling regarding the tendency of corporate leaders to give weight to stakeholder interests. To address such concerns, we identify a number of such special factors, and for each of them we examine whether stakeholder protections are significantly present in a subsample of our data in which the special factor was not present.

71. The information on payment to non-executive directors represents the value of unvested equity subject to accelerated vesting upon closing of the merger ("single trigger") or possible termination of the director's employment ("double trigger").

In addition, in Part VII we address a number of general questions that readers might have with respect to our ability to draw inferences regarding the incentives and tendencies of corporate leaders from the lack of stakeholder protections documented below. In particular, we address potential concerns that (i) our findings are due to a selection bias problem; (ii) stakeholder protections are prohibitively costly; (iii) stakeholder protections were unnecessary because stakeholders were sufficiently protected by soft pledges, the selection of a stakeholder-friendly buyer, or contracts the stakeholders had with the company; (iv) the lack of stakeholder protections was due to inertia among deal designers; and (v) the implications of our findings are in any event limited to final-period situations and are not relevant to ongoing business choices.

A. The Stakes for Stakeholders

Before analyzing the terms of the deals, we first examined whether the presence of risks to stakeholders was apparent at the time the deals were designed and negotiated. To this end, we hand-collected and analyzed a significant amount of data from multiple sources. We reviewed a variety of securities filings made by the targets and acquirers, including filings that documented investor presentations, communications to investors and employees, and more. We also looked at media coverage of each of the deals, examining articles from national news outlets and local publications in and around cities where the targets' headquarters were located.

In many cases, we identified statements by targets or their leaders, or by reporters, that reflected expectations that the deal would pose significant risks to employees or other stakeholders. Below we discuss, in turn, statements indicating the recognition of three types of risks—cost-cutting, employee layoffs, and relocation of headquarters or facilities. Because our data collection process arguably identified only a subset of the full extent of such statements, the findings reported below likely underestimate the incidence of cases in which such risks were present and recognized.

1. Risks of Cost Cutting

Corporate acquisitions are often driven or justified by potential cost synergies, which can increase corporate profits; indeed, announcements of acquisitions are often accompanied by statements about the expected cost savings. Whereas the prospects of such potential synergies are positive for shareholders, they usually pose risks to stakeholders. In general, for each dollar saved through cost cutting, payments to some stakeholders must decline by a dollar. For example, a reduction in labor costs would be translated into lower payments to employees, through either lower wages and/or benefits or labor-force reductions, and a reduction in supplier costs would mean lower payments to suppliers.

We therefore sought to identify whether expected cost cutting was noted as a justification or motivation for some of the deals in our sample. We identified statements recognizing such risks in 15 of 24 deals in the Largest Deals Subsample (63%). Table A7 in the Appendix provides examples of such statements for each of these 15 deals. We found even higher risks, as evident from Table A7, in the other deals in our sample (72%).[72]

To illustrate, when Xilinx agreed to acquire Advanced Micro Devices, an investor presentation made by Xilinx indicated its expectation to capture "$300M [cost of goods sold] and [operating expenses] synergies within 18 months of closing."[73] Similarly, when AstraZeneca agreed to acquire Alexion Pharmaceuticals, it released a statement that "[t]he Board expects the Transaction to realise recurring run-rate pre-tax cost synergies of approximately US$500 million per annum,"[74] and that "[t]hese synergies are expected to be primarily achieved by . . . integrating common corporate functions . . . and sharing of resources in commercial and R&D."[75]

2. Risks to Employees

Cost savings can be achieved by laying off some of the acquired company's employees after the acquisition. In the case of an acquisition by a strategic buyer, for example, costs may be reduced by merging different business functions and operating them with fewer people. Our review therefore sought to identify whether post-deal risks to employment were apparent at the time the deal was announced.

We provide a detailed documentation of such statements for each and every closed deal in our sample in the Appendix. We identified statements recognizing such risks in 16 of 24 deals in the Largest Deals Subsample (67%). This trend, as evident from Table A8 in the Appendix, is even more recognizable among the smaller deals in our sample, with 77% of the deals involving statements related to the risks of employment level reduction.[76]

To illustrate from our Largest Deals Subsample, in some cases corporate leaders presented the anticipated reduction in employee levels as part of the rationale for and a driver of the gains from the deal. For example, in the Noble Energy acquisition, the acquirer's CEO conceded that "[t]he synergies in part

72. Of the 98 deals in the smaller deals subsample, 71 indicated that there would have been some cost synergies. Within these deals, 43 indicated the amount expected to be saved and 37 also indicated the source of the expected cost-savings.

73. Xilinx Inc., Investor Presentation (Form 8-K) [18] (Oct. 27, 2020).

74. AstraZeneca PLC, Circular to Shareholders and Notice of General Meeting (Form 425) 18 (Apr. 12, 2021).

75. *Id*.

76. Of the 98 deals in the smaller deals subsample, 75 contained statements related to the risks of employment-level reduction. Of these deals, 22 clearly presented the plan to reduce the headcount or eliminate certain functions in the target company. The other 53 hinted at the risk, for example by presenting the intention to embark on a thoughtful integration planning process, or by referring to expected general and administrative expense savings and elimination of redundancies, duplications or overlaps.

would be related to cutting the workforce."[77] Furthermore, media coverage of this deal reported that "job cuts at Noble will reduce the total workforce by roughly another 570 positions," as well as that "Chevron is laying off about 25% of onetime Noble Energy employees."[78] Similarly, the acquirer of Zynga stated in a press release that they expected to realize cost synergies "primarily driven by the rationalization of duplicative overhead including corporate general and administrative expenses and public company costs, as well as the benefit of scale efficiencies across the enterprise."[79]

In other cases, while acknowledging the presence of post-deal risks to employees, corporate statements sought to downplay the risks by avoiding statements about the specifics of the expected reduction in employment or stating that they would be determined in the future. For example, in the Nuance Communications acquisition, the acquired company's "Employee FAQ" stated that the parties intended to "align roles to changing priorities and joint strategies," and that "[they would] continually evaluate [their] resources."[80] Similarly, when PRA Health Sciences agreed to be acquired, it stated in an email to its employees: "Once the deal closes, the combined organization will embark on a thoughtful integration planning process."[81] Along the same lines, Hill-Rom Holdings wrote in an email sent to its employees that "even in highly complementary combinations like this one, it's common for companies to eliminate redundant positions."[82]

3. Risks to Communities

Lastly, we turn to examine the risks that the contemplated acquisitions were expected to pose to local communities. When a deal results in a relocation of the target's headquarters or facilities, the deal will likely impose costs not only on the employees residing in those locations but also on other local residents and businesses that benefit from the presence of corporate facilities and their employees.

As evident from Table A9 in the Appendix, our document review identified risks of this sort to communities in 13 out of the 24 deals in the Largest Deals

77. Carolyn Davis, *Chevron Completes Noble Energy Acquisition*, NATURAL GAS INTEL. (Oct. 5, 2020), https://www.naturalgasintel.com/chevron-completes-noble-energy-acquisition/ [https://perma.cc/A5YX-XUD5].

78. Paul Takahashi, *Chevron Laying off About 570 from Houston-Based Noble Energy After Acquisition*, HOUSTON CHRON. (Oct. 29, 2020), https://www.houstonchronicle.com/business/energy/article/Chevron-laying-off-about-570-Noble-Energy-15684950.php [https://perma.cc/B5TA-4VNT].

79. Take-Two & Zynga, Joint Press Release (Form 8-K) [4] (Jan. 10, 2022).

80. Nuance Commc'ns, Inc., Employee FAQ (Form DEFA14A) [2] (Apr. 12, 2021).

81. ICON PLC, Employee FAQs (Form 425) [2] (Feb. 24, 2021).

82. Hill-Rom Holdings Inc., Email sent to employees of Hill-Rom Holdings, Inc. (Form DEFA14A) [5] (Oct. 25, 2021).

Subsample (54%). This Table also reveals a similar pattern for all other deals in our full sample (59%). [83]

To illustrate some examples from our Largest Deals Subsample, in the acquisition of PRA Health Sciences, headquartered in Raleigh, NC, the buyer ICON was quoted as saying that "[t]he combined company will be headquartered in Dublin, Ireland [the site of ICON's headquarters]."[84] Similarly, in the acquisition of Livongo, located in Mountain View, CA, buyer Teladoc Health stated that "[t]he combined company will be headquartered in Purchase, NY, the location of Teladoc Health's headquarters."[85]

In some cases, while acknowledging the risks of relocation, corporate statements sought to downplay them by suggesting that the specifics had not yet been determined. For example, in answer to the question of "[w]hat will happen to Varian's headquarters and facilities?" Varian Medical Systems wrote in the "Employee FAQ" it issued to its employees that "[d]uring the integration planning process, we will be working on how to best bring both companies together and capitalize on the strengths and talent across each organization after closing. At this point, we don't yet have all the specifics . . . ."[86]

Similarly, during the acquisition process of Nuance, the target communicated in its "Employee FAQ" that "[t]here are still many details that need to be worked out as part of integration with Microsoft, including decisions around real estate and facilities."[87] And Hill-Rom Holdings noted in an email to its employees that "[i]t is too early to speculate about any impact to company locations, but this is an important area that our companies' integration planning team will look at carefully to make the best decision for the combined company."[88]

Thus, our comprehensive review indicates the widespread recognition of post-deal risks to stakeholders at the time the deals were negotiated. We will now turn to examine whether, and to what extent, corporate leaders addressed these risks by negotiating responsive stakeholder protections.

B. Did Deal Terms Protect Employees?

Employees are widely recognized as a key stakeholder group whose interests should be of primary concern to corporate leaders. They are explicitly listed as a significant stakeholder group requiring attention in the constituency

83. Of the 98 deals in the smaller deals subsample, 58 contained statements identifying risks of relocation. Within these deals, 23 clearly presented clearly the risk of relocating the target's headquarters or major operations away from where they operated prior to the acquisition. The other 35 hinted at the risk, for example by stating that the decision about the company locations had not been taken yet.

84. ICON PLC Press Release (Form 425) [2] (Feb. 24, 2021).

85. Livongo Health, Inc., Livongo & Teladoc Combination—Frequently Asked Questions (Form 425) [5] (Aug. 6, 2020).

86. Varian Med. Sys., Inc Employee FAQ (Form DEFA14A) [6] (Aug. 3, 2020).

87. Nuance Comm'cns Inc., Employee FAQ (Form DEFA14A) [8] (Apr. 12, 2021).

88. Hill-Rom Holdings Inc., *supra* note 82, at [8].

statutes of 31 states,[89] the United Kingdom's Companies Act,[90] the BRT statement, and the Davos Manifesto.[91]

We begin our analysis of stakeholder protections by examining whether corporate leaders sought to address a key risk for this stakeholder group – post-deal layoffs. Corporate leaders seeking to protect employees from such risks could obtain from the buyer a commitment to either (i) place certain limits or constraints on layoffs, or (ii) pay employees certain compensation in the event they are laid off. Even buyers reluctant to accept constraints on their freedom to lay off employees should be expected to be willing to pay specified compensation to laid-off employees as long as the premium is adjusted to compensate for the resulting expected cost.

Table 7 reports whether corporate leaders obtained employee protection of either kind (or both) for each of the transactions in the Largest Deals Subsample.

89. Bebchuk & Tallarita, *supra* note 23, at 117.

90. Companies Act, 2006, c. 46, § 172 (Eng.).

91. BUS. ROUNDTABLE, *supra* note 5; Schwab, *supra* note 6; *see also* Klaus Schwab, *Why We Need the 'Davos Manifesto' for a Better Kind of Capitalism*, WORLD ECON. F. (Dec. 1, 2019), https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism [https://perma.cc/LD5E-28CP] (describing stakeholder capitalism as "the best response to today's social and environmental challenges").

Table 7. Employment Protections for Employees

Target	*Commitment to Limit Firing (Yes/No)*	*Soft Pledge to Limit Firing (Yes/No)*	*Payment to Fired Employees (Yes/No)*
Findings for Each of the Largest 24 Deals			
Activision Blizzard	No	No	No
Alexion	No	No	No
Xilinx	No	No	No
Kansas City Southern	No	No	No
Slack Technologies	No	No	No
Maxim Integrated	No	No	No
Immunomedics	No	No	No
Nuance	No	No	No
Varian	No	No	No
Livongo	No	No	No
Citrix Systems	No	No	No
First Horizon	No	No	No
Noble Energy	No	No	No
Concho Resources	No	No	No
Change Healthcare	No	No	No
PRA Health Sciences	No	No	No
Hill-Rom Holdings	No	No	No
GCI Liberty	No	No	No
Dunkin' Brands	No	No	No
Alleghany	No	No	No
Zynga	No	No	No
MyoKardia	No	No	No
Acceleron Pharma	No	No	No
Proofpoint	No	No	No
Results for the Largest Deals Subsample			
% of Yes	0%	0%	0%
Mean	–	–	–
Median	–	–	–
Results for the Full Sample			
% of Yes	0%	2%	0%
Mean	–	–	–
Median	–	–	–

As the Table reports, *none* of the deals in the Largest Deals Subsample provided any protection with respect to the risks of reduced employment. In the full sample, no deal included a firm commitment to retain employees and only 2% of the deals expressed a *soft pledge*, which contains a mere intention (rather than a firm commitment) to retain as many employees as feasible or not to discharge any employee of the target.[92]

Interestingly, in a few cases, the buyer seemingly committed to continue the employment of the target's employees following the closing date.[93] However, in all such cases, the merger agreements made it abundantly clear that all provisions dealing with employee benefits are not enforceable and shall not be deemed to guarantee employment for any period of time or to limit the ability of the buyer to terminate employees.[94]

Furthermore, and perhaps more surprisingly, we found no deal in which corporate leaders secured a commitment to pay specified compensation to laid-off employees. To be clear, such compensatory provisions would not preclude acquisitions motivated in part by plans to reduce workforce redundancies, but would alter the allocation of the deal surplus between shareholders and employees. In particular, when corporate leaders agree to trade off some reduction in premium against a certain protection for laid-off employees, the buyer might still choose to terminate some employees, but the compensation they would receive would represent a share of the surplus created by the deal allocated to them and not only to shareholders.

We also searched for any additional provisions aimed at providing contractual protections for employees. One type of protection we often find in acquisition agreements involves a commitment to maintain the same level of employee compensation or benefits for a limited period. A closer analysis of this protection, however, shows that it is largely cosmetic and economically insignificant. Indeed, the transition period specified in such a provision is not long, generally 12 months, and at the end of it, the buyer is free to reduce compensation and benefits. Furthermore, the provision applies only to continuing employees whom the buyer chooses to retain. Lastly, this commitment is unenforceable: in none of the transactions in our full sample were employees granted the right to enforce any commitments made in their favor.

92. The merger agreement in the People's United acquisition contained an intention of the buyer to retain "as many employees of the Company . . . as feasible," and "to remain one of the leading employers" in the area at which the target's headquarters was located prior to the merger. People's United Fin. Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 112 (Apr. 23, 2021). Similarly, in the merger agreement of the TriState Capital Holdings acquisition, the acquirer stated that it "does not intend to discharge or terminate any employee or officer of the Company." TriState Cap. Holdings Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) A-48 (Jan. 25, 2022)).

93. *See, e.g.*, Activision Blizzard, Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) (Mar. 21, 2022); Citrix Sys. Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) (Mar. 16, 2022); Invs. Bancorp Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) (Oct. 7, 2021); Medallia Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) (Sept. 14, 2021); Stamps.com Inc. Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) (Aug. 8, 2021).

94. *See, e.g.*, Medallia Inc., *supra* note 93, at 63 ("neither this Section 6.11 nor any provisions of this Agreement relating to Company Benefit Plans will be deemed to (i) guarantee employment for any period for, or preclude the ability of Parent, the Surviving Corporation or any of their respective Subsidiaries to terminate any Continuing Employee for any reason; . . . (iii) create any third party beneficiary rights in any Person").

A second type of protection that we find in the data is the commitment to pay some bonuses to employees, either to incentivize them to stay at the company following the acquisition[95] or as a reward for their contribution to the acquisition.[96] A closer analysis of the data, however, shows that this payment does not meaningfully change the picture for several reasons.

First, such payments were made in a minority of the cases.[97] Second, and most importantly, these payments were very modest, and their economic significance is quite limited compared to the gains for shareholders. The average aggregate amount of such payments for the Largest Deals Subsample and for the full sample are $11 million and $3 million, respectively, which represent, on average, less than 0.3% and 0.2% of the gains for shareholders. Therefore, such bonus payments represent an allocation of a very small fraction of the surplus created by the transactions to employees. Finally, these payments are rarely expressed as a firm commitment and in most cases, the proxy statements merely state that the target "may" or is "allowed to" establish a retention bonus pool.[98]

C. Did Deal Terms Protect Customers, Suppliers, and Creditors?

We next turn to the stakeholder groups of customers, suppliers, and creditors. Such stakeholders are often invested in their relationship with the company and may be adversely affected by an acquisition. Indeed, these three stakeholder groups are explicitly noted in numerous constituency statutes,[99] and

95. This type of bonus payment was recorded in 19% of the transactions in the entire sample. See, for example, the Renewable Energy Group Inc. acquisition: "Any retention bonuses will be payable with respect to (i) 50% of the bonus on the closing date of the Merger and (ii) the remaining 50% of the bonus on the first anniversary of the closing date of the Merger, subject to the participant's continued employment or a qualifying termination of employment that occurs after the closing date of the Merger." Renewable Energy Grp. Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 81 (Apr. 6, 2022).

96. This type of payment was recorded in 3% of the transactions in the full sample. *See, e.g.*, Cardtronics plc, Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 67 (Mar. 30, 2021) ("Pursuant to the NCR Acquisition Agreement, the Company or any subsidiary thereof may grant cash bonuses in respect of the transaction up to an aggregate amount of $500,000, payable on the Effective Date, some of which may be paid to the Company's executive officers other than named executive officers.").

97. Such payments were made in 29% of the Largest Deals Subsample and in 20% of the transactions in the full sample. We also find that occasionally these bonus payments are shared between the target's executive officers and other employees, with the exact amount to be allocated exclusively to the employees left unspecified. The use of such bonus pooling occurs in 18% of the Largest Deals Subsample and 16% of the full sample.

98. Only 7% of the deals in the full sample contain a firm commitment. *See, e.g.* Concho Res. Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 133 (Dec. 11, 2020) (providing that the company "may establish a cash-based retention program in the aggregate amount of approximately $53 million to promote retention and to incentivize efforts to consummate the merger and to ensure a successful and efficient integration process"); Nuance Commc'ns Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 52 (May 17, 2021) ("Under the terms of the merger agreement, we may grant special cash bonuses to employees (including our executive officers) in an aggregate amount of up to $25 million and enter into agreements to provide for such bonuses. As of the date of this proxy statement, no such bonuses have been granted.").

99. *See* Bebchuk & Tallarita, *supra* note 23, at 117.

two of them (customers and suppliers) are explicitly mentioned in the August 2019 BRT statement and the Davos Manifesto.[100]

We therefore review all deal terms to identify any protections that were secured for these stakeholder groups. Table 8 reports our findings, and indicates that corporate leaders failed to negotiate post-deal protections for any of these stakeholder groups.

100. *See* sources cited *supra* notes 5-6 and accompanying text.

Table 8. Protections for Customers, Suppliers & Creditors

Target	*Customers (Yes/No)*	*Suppliers (Yes/No)*	*Creditors (Yes/No)*
Findings for Each of the Largest 24 Deals			
Activision Blizzard	No	No	No
Alexion	No	No	No
Xilinx	No	No	No
Kansas City Southern	No	No	No
Slack Technologies	No	No	No
Maxim Integrated	No	No	No
Immunomedics	No	No	No
Nuance	No	No	No
Varian	No	No	No
Livongo	No	No	No
Citrix Systems	No	No	No
First Horizon	No	No	No
Noble Energy	No	No	No
Concho Resources	No	No	No
Change Healthcare	No	No	No
PRA Health Sciences	No	No	No
Hill-Rom Holdings	No	No	No
GCI Liberty	No	No	No
Dunkin' Brands	No	No	No
Alleghany	No	No	No
Zynga	No	No	No
MyoKardia	No	No	No
Acceleron Pharma	No	No	No
Proofpoint	No	No	No
Results for the Largest Deals Subsample			
% of Yes	0%	0%	0%
Mean	–	–	–
Median	–	–	–
Results for the Full Sample			
% of Yes	0%	0%	0%
Mean	–	–	–
Median	–	–	–

It could be argued that acquirers might have an interest in treating customers, suppliers, and creditors well post-deal even in the absence of any negotiated constraints. However, in many cases, the buyer might conclude post-deal that it would be profit maximizing to pursue strategies, such as switching suppliers, increasing leverage, or raising the prices of goods and services, that could have adverse effects on customers, suppliers, or creditors. Indeed, concerns about the potential adverse effects of acquisitions on these groups were the reason that they were explicitly referenced in so many of the constituency statutes. Our findings indicate that, notwithstanding the concerns regarding the effect of acquisitions on such stakeholders, corporate leaders did not bargain for any protections for customers, suppliers, or creditors.

D. Did Deal Terms Protect Local Communities, the Environment, and Other Stakeholders?

Lastly, we examine whether corporate leaders obtained any protections for local communities, the environment, or other stakeholders, including society at large. Twenty-two constituency statutes,[101] the BRT statement, and the Davos Manifesto explicitly recognize local communities as a stakeholder group that deserves consideration.[102] The protection of the environment is noted in two constituency statutes[103] and the BRT statement[104] and has been receiving increasing attention over the past decade. Moreover, "society at large" and the "economy" are recognized as protected groups in 13 and 12 constituency statutes,[105] respectively, and in both the BRT statement and the Davos Manifesto.[106] Table 9 reports our findings on these stakeholder groups.

101. Bebchuk & Tallarita, *supra* note 23, at 117.
102. *See* sources cited *supra* notes 5-6 and accompanying text.
103. Bebchuk & Tallarita, *supra* note 23, at 117.
104. *See* sources cited *supra* notes 5-6 and accompanying text.
105. Bebchuk & Tallarita, *supra* note 23, at 117.
106. *See* sources cited *supra* notes 5-6 and accompanying text.

Table 9. Protections for Communities, the Environment & Other Stakeholders

Target	*Pledge to Retain HQ Location (Yes/No)*	*Pledge to Continue Local Investments / Philanthropy (Yes/No)*	*Environment / Climate (Yes/No)*	*Other (Yes/No)*	*Pledges Enforceable? (Yes/No)*
Findings for Each of the Largest 24 Deals					
Activision Blizzard	No	No	No	No	No
Alexion	Yes	No	No	No	No
Xilinx	No	No	No	No	No
Kansas City Southern	Yes	No	No	No	No
Slack Technologies	No	No	No	No	No
Maxim Integrated	No	No	No	No	No
Immunomedics	No	No	No	No	No
Nuance	No	No	No	No	No
Varian	No	No	No	No	No
Livongo	No	No	No	No	No
Citrix Systems	No	No	No	No	No
First Horizon	No	No	No	No	No
Noble Energy	No	No	No	No	No
Concho Resources	No	No	No	No	No
Change Healthcare	No	No	No	No	No
PRA Health Sciences	No	No	No	No	No
Hill-Rom Holdings	No	No	No	No	No
GCI Liberty	No	No	No	No	No
Dunkin' Brands	No	No	No	No	No
Alleghany	No	No	No	No	No
Zynga	No	No	No	No	No
MyoKardia	No	No	No	No	No
Acceleron Pharma	No	No	No	No	No
Proofpoint	No	No	No	No	No
Results for the Largest Deals Subsample					
% of Yes	8%	4%	0%	0%	0%
Mean	–	–	–	–	–
Median	–	–	–	–	–
Results for the Full Sample					
% of Yes	8%	6%	0%	1%	0%
Mean	–	–	–	–	–
Median	–	–	–	–	–

Pledge to Retain Headquarters Location. One of the two types of protections for local communities that were found in the data are pledges to retain the location of the company's headquarters. As Table 9 indicates, these pledges were found in 8% of both the Largest Deals Subsample and the full sample. These pledges vary in scope, duration, and in the purported use of the target's headquarters; while some of them provide that the current target's headquarters will serve as the headquarters of the combined company,[107] most of them provide that it will be retained as a base for regional operations,[108] or as headquarters for a certain division or business unit of the combined company.[109]

Additionally, pledges related to the retention of the target's headquarters were often short, vague, and underspecified. In particular, the language of these pledges did not specify what assets, employees, or operations would have to be retained in order to satisfy the pledge.

Pledge to Continue Local Investments and Philanthropy. Another type of protection for local communities or society in general that was found in the data is pledges to invest or to retain existing investments in local communities, philanthropic activities, or charitable organizations. As evident from Table 9, these pledges were only found in 4% of the deals in the Largest Deals Subsample and 6% of the deals in the full sample.

Environment. As Table 9 shows, corporate leaders did not negotiate for any post-deal constraints on the buyer's choices that would affect the environment or the climate. Thus, notwithstanding the substantial discussion of environmental and climate change risks by business leaders and their advisers during recent times, corporate leaders generally disregarded these concerns when negotiating sales of their companies.

Other Stakeholder Groups. We also looked for protections for any other stakeholder group whose interests might be considered, including "society" and the "economy." However, negotiated protections for other stakeholder groups were not found in any of the deals in the Largest Deal Subsample and were only found in one transaction in the full sample.[110] The sole example of this kind of

107. *See, e.g.*, Kansas City Southern, Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) A-76 (July 7, 2021) ("Parent shall recognize Kansas City, Missouri as the location of the headquarters of Parent's United States business and operations.").

108. *See, e.g.*, People's United Fin. Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 75 (Apr. 23, 2021) ("People's United Financial, Inc. Acquisition: "Bridgeport, Connecticut will become M&T's New England regional headquarters.").

109. *See, e.g.*, First Midwest Bancorp Acquisition Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) A-63 (July 27, 2021) ("[T]he Commercial Banking operations of Old National Bank and the Consumer Banking operations of Old National Bank shall be headquartered in Chicago, Illinois."); Alexion Pharms. Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) A-82 (Apr. 13, 2021) ("Parent intends to establish, as promptly as reasonably practicable after the Closing, a global rare diseases business unit initially comprising the 'rare disease' activities of Parent, the Surviving Company and their respective Subsidiaries and for such unit to be initially headquartered in Boston, MA.").

110. *See* Tegna Inc., Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) 61 (Apr. 13, 2022) ("Parent acknowledges that: (a) the Company's purpose includes serving the greater good of its communities and, driven by this purpose, the Company seeks to create positive societal change and impact through the reporting of its stations and its deeply held commitment to making its communities better places to live and work, (b) the Company's values of inclusion, integrity, innovation, impact and results drive its stations and employees to be forces for positive change, (c) the Company is committed to journalistic integrity as demonstrated by the adoption of its Principles of Ethical

pledge was found in the acquisition of Tegna, a media company that explicitly defines its purpose as "to serve the greater good of our communities."[111] However, even in this case the commitment is vague, underspecified, and soft, using a "commercially reasonable efforts" standard that makes it extremely difficult to hold the buyer accountable.[112]

Pledges Enforceable? Lastly, we find that in all of transactions in the sample—including those offering protection of some sort to certain stakeholder groups—the agreement chose to explicitly deny third-party beneficiaries any right to enforce any provisions using a "no third-party beneficiaries" clause. Such a clause denies any potential beneficiaries the ability to enforce the pledges given in their favor. It should be noted that in many of the cases, the merger agreements expressly exclude shareholders and corporate leaders from these clauses, enabling them to enforce their rights to receive merger consideration and indemnification, respectively.

VI. Further Empirical Analysis

Part V documented a general lack of stakeholder protections in our large sample of deals during the COVID pandemic. These findings are consistent with the view that corporate leaders lack incentives to protect stakeholders beyond what would serve shareholder value. However, before concluding that such incentives explain our findings, in this Part, we conduct a range of additional

Journalism, the launch and expansion of its VERIFY franchise to combat disinformation and its award-winning investigative journalism, (d) the Company is committed to fostering a diverse and inclusive culture, as evidenced by, among other things, its development of multi-year goals to increase Black, Indigenous and People of Color ("*BIPOC*") representation in content teams, news leadership and management roles, the development and operation of its proprietary, multi-year inclusive journalism program that includes unconscious bias and inclusive reporting training, leadership training and content audits, and its launch of Company-wide unconscious bias and microaggression training for all employees, and (e) the Company is committed to managing its environmental impact responsibly and sustainably and educating the public through its journalism. Following the Closing, Parent intends to generally operate the Company's business substantially consistently in accordance with this purpose and to use commercially reasonable efforts to maintain the aforementioned programs and goals. In furtherance of and not in limitation of the foregoing, Parent hereby commits to the Company's 2025 goals to increase BIPOC representation as follows: (i) Content Teams: By year-end 2025, to increase the diversity of the Company's content teams (news, digital and marketing employees) to reflect the aggregate BIPOC diversity of the communities the Company serves, which is approximately 36 percent; (ii) Content Leadership Roles: By year-end 2025, the Company aims to increase BIPOC representation in content leadership roles by 50 percent; and (iii) Management Roles: By year-end 2025, the Company aims to increase BIPOC representation across all management roles within the organization by 50 percent.").

111. *See About TEGNA*, TEGNA, https://www.tegna.com/about/trustworthy-impactful-journalism/ [https://perma.cc/QGQ9-5VQ7].

112. Efforts clause are specifically used to mitigate the rule of strict liability for contractual non-performance that otherwise governs. *See* Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300, 2018 WL 4719347, at *73 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018). Among these clauses, deal practitioners consider the "commercially reasonable efforts" as one of the efforts qualifiers ensuring the lowest level of commitment. *See* AM. BAR ASSOC., MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 212 (2d ed. 2010). The "commercially reasonable efforts" standard is described as "not requiring a party to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts or management time." In contrast, the "best efforts" standard is defined as "the highest standard, requiring a party to do essentially everything in its power to fulfill its obligation." *Id.*

empirical tests to determine whether our findings might be driven by other factors.

In particular, we discuss eight potential factors that could arguably engender a lack of stakeholder protections. In Sections VI.A–VI.H, we probe whether our findings could be driven by each of these factors by identifying subsets of our sample in which the considered factor was not present and examining whether deals in these subsets were characterized by more stakeholder protections. Our empirical analysis suggests that none of these eight factors drive our findings.

In Section VI.I, we extend our analysis beyond the sample of deals during the pandemic to determine whether there was something special about the pandemic period that precluded corporate leaders from following pro-stakeholder inclinations, but that can otherwise be expected to influence them in normal circumstances.

A. Deals Without Financial Distress

It might be argued that corporate leaders were unable to negotiate for stakeholder protections because their companies were in financial distress due to the pandemic. Under this view, leaders of target companies facing intense financial pressures were in no position to bargain for stakeholder protections even if they wished to do so. However, in normal times and in the absence of financial distress, corporate leaders could be expected to protect stakeholders.

Regarding this argument, it is worthwhile to note from the outset that corporate leaders in our sample were able to obtain large gains for their shareholders and for themselves, notwithstanding any financial pressures they faced. Therefore, by accepting a somewhat lower premium for shareholders, they would have been able to obtain in return some financial payoffs to, for example, employees who would lose their positions post-deal.

Nonetheless, to further test this argument, we identified a subset of companies in our sample that were clearly in a position to bargain without financial constraints at the time of the deal. In particular, we identified two subsamples of deals in which corporate leaders seemed free from financial distress, who thereby lacked any financial restrictions on their ability to bargain effectively for stakeholder protections.

First, we identified public companies with publicly traded bonds that had yields of less than 5% at the time of the deal's announcement, reflecting a market view that these companies were not facing financial distress.[113] Using data from

113. Yields reflect values of the most recent transaction as of the trading day prior to the announcement date of the deal. For companies in the sample that have multiple publicly traded corporate bonds, yields are provided for the bond with the largest outstanding issuance.

the TRACE database,[114] we identified 24 companies meeting this criterion. We refer to these companies as the "Low-Yield Subsample."

Second, we identified companies that had enjoyed a significant increase in stock price between the pre-pandemic date of January 1, 2020 and the day preceding the deal's announcement. Such an increase in the target's market cap could be viewed as reflecting the market's perception that the target was not adversely affected by the pandemic on the whole. In particular, we identified 34 companies whose unaffected share price prior to the deal's announcement exceeded their stock price as of January 1, 2020 by at least 20%.[115] We refer to these companies as the "Increased Market Cap Subsample."

We found that stakeholder protections were generally lacking in each of these two subsamples. In particular, focusing on employee protections, we found that only one deal of the Low-Yield Subsample contained a soft pledge to continue employment, while no deal in the Increased Market Cap Subsample included any provisions to protect employees from the risk of layoffs.

Similarly, regarding the treatment of other stakeholder groups, we found that none of the deals in the examined subsamples contained any material provisions benefiting customers, suppliers, creditors or the environment. Soft pledges to retain the location of the target's headquarters post-deal were found in only 3% of the deals of the Increased Market Cap Subsample and in 17% of the deals of the Low-Yield Subsample. Also, soft pledges of local investment or philanthropic activities were found in 8% of the Low-Yield Subsample deals and in none of the Increased Market Cap Subsamples deals.

Thus, the pattern we found in the two subsamples does not support the argument that the lack of stakeholder protection identified in the preceding section was driven by companies whose bargaining position was undermined by financial distress.

B. Deals on the Way to Normalcy

It might also be argued that even when corporate leaders did not face economic or financial distress, they were under unusual pressure due to the intense uncertainty caused by the pandemic. Under this view, the uncertainty caused by the pandemic induced corporate leaders to "play it safe" and therefore rush into securing a deal without engaging in much bargaining.

Again, this argument is incongruent with the fact that corporate leaders in our sample negotiated for and obtained large gains for shareholders and for themselves. Given that whatever uncertainty caused by the pandemic did not preclude corporate leaders from obtaining significant value from buyers, they conceivably should have been able to allocate part of this gain to stakeholders.

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114. The TRACE program provides data on bond transactions for all broker-dealers that are FINRA member firms. The database consolidates transaction data for public and private corporate bonds, agency debt, and securitized products, including asset-backed securities and mortgage-backed securities.

115. Unaffected share prices were obtained from the FactSet database. Information on stock prices on January 1, 2020, were obtained from the CRSP database.

To test this argument empirically, we examined the subset of deals that were signed after April 2021, when the widespread vaccination of adults in the United States presumably substantially relaxed the perceived threat of an unstoppable pandemic. We identified a subset of 56 transactions that were announced during the seven-month period from May 1, 2021, through March 31, 2022. We refer to this subsample of companies as the "En-Route-to-Normalcy Subsample."

We found that stakeholder protections were generally lacking in this subsample. In particular, with regard to employee protections, we found that only 2% of the deals adopted provisions to protect employees from the risk of layoffs, by either constraining post-deal layoffs or providing compensation to laid-off employees.

With regard to protections obtained for other stakeholder groups, we found that none of the deals in the considered subsample had any material provisions benefiting customers, suppliers, creditors, or the environment. Furthermore, we found soft pledges to retain the location of the target's headquarters post-deal and soft pledges benefiting local communities or society at large in only 7% and 4%, respectively, of the subsample's deals.

Overall, the pattern we found in the En-Route-to-Normalcy Subsample is inconsistent with the hypothesis that our general findings were driven by deals concluded under conditions of intense uncertainty.

C. Deals with Broad Shareholder Support

We next consider the potential argument that our findings regarding the general lack of stakeholder protections were driven by the need to obtain shareholder approval of the deal. In particular, it might be argued that our findings can be explained by corporate leaders' belief that shareholders would not have approved the proposed transaction had the leaders bargained for any meaningful stakeholder protections and a somewhat lower deal premium. Under this view, even if corporate leaders were interested in obtaining benefits for stakeholders, they were inhibited from doing so by the need to obtain shareholder approval.

To test this argument empirically, we identified a subset of deals in which the shareholder vote to approve the transaction exceeded the required threshold by a wide margin. In such cases, it was likely that corporate leaders would have been able to shift some of the surplus generated by the transaction to corporate stakeholders without risking the prospect of obtaining shareholder approval.

To conduct this analysis, we collected data on the outcome of shareholder votes on mergers from the ISS Voting Analytics Database.[116] We supplemented this data with voting results reported in 8-K forms filed by the company following the approval of the merger agreements by the target companies'

116. The ISS Voting Analytics database provides data about the items on the ballot at the annual meetings of Russell 3000 companies starting in 2003. *See Voting Analytics*, ISS, https://www.issgovernance.com/solutions/iss-analytics/voting-analytics [https://perma.cc/CF6D-9FWF].

shareholders.[117] We were able to identify 59 transactions in which the deal obtained support from more than 70% of the outstanding shares entitled to vote. We refer to these companies as the "High-Shareholder-Support Subsample."

Although the corporate leaders of the companies in this subsample were able to reduce premiums somewhat to shift surplus to stakeholders, we found a general lack of stakeholder protections in this subsample. In particular, only 2% of the companies in this subsample included provisions to constrain post-deal layoffs or provide compensation to employees laid off after the deal.

As to other stakeholder groups, we found that none of the deals in the High-Shareholder-Support Subsample involved any provisions benefiting customers, suppliers, creditors or the environment. In addition, (soft) pledges to retain the location of the target's headquarters were found in only 14% of the transactions, and (soft) pledges in connection with local investment or philanthropic activities were found in only 5% of the deals. Thus, the data does not support the view that the lack of stakeholder protections we documented resulted from the need to obtain shareholder approval of the deals.

D. Deals without a Revlon *Shadow*

We next turn to the potential argument that corporate leaders might have been deterred from seeking stakeholder protections by the concern that a court might review their decision under the Delaware *Revlon* doctrine.[118] Under this doctrine, once a decision to sell the company has been reached, corporate leaders have a duty to try to obtain the highest price for shareholders.[119]

We set out to test this argument empirically, by examining the subset of cases in which the *Revlon* doctrine could not apply. Following earlier work on the effects of the *Revlon* doctrine,[120] we identified a set of companies ("the Non-*Revlon* Subsample") whose acquisition could not have been subject to the *Revlon* doctrine for one of two reasons: (a) the company was incorporated in a state whose courts explicitly rejected the *Revlon* decision (Indiana, Nevada, Ohio, or Pennsylvania);[121] or (b) more than 50% of the consideration paid for the

117. We were able to obtain such data on 81 transactions, which constitute about 70% of the transactions in the full sample. The transactions for which we were unable to obtain data on the voting outcomes were mostly tender offers or recent transactions, for which shareholder meetings had not yet been held.

118. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). ("The duty of the board [changes] from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

119. *Id*.

120. Matthew D. Cain, Stephen B. McKeon & Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from Five Decades of Hostile Takeovers*, 124 J. FIN. ECON. 464, 469-70 tbl.2 (2017).

121. We obtained the list of states that have rejected the *Revlon* doctrine from Cain, McKeon & Davidoff, *supra* note 120, at 469-70 tbl.2.

company was in stock.[122] The Non-*Revlon* Subsample we put together includes 37 deals with an aggregate consideration exceeding $326 billion.

In the deals of the Non-*Revlon* Subsample, because there was no prospect of judicial intervention based on the *Revlon* doctrine, the fear of a *Revlon* review could not have deterred corporate leaders from allocating to stakeholders some of the surplus produced by the transaction. Thus, this subsample provides a good setting for testing the argument that our findings in Part V were driven by the threat of a *Revlon* action. We find that the evidence is inconsistent with this argument, as deals in the Non-*Revlon* Subsample did not offer stakeholders materially stronger protections than other deals in our sample.

With regard to employee protections, we found that the overwhelming majority of the deals in the Non-*Revlon* Subsample offer employees no protections to mitigate the risk of layoffs, whether by providing compensation in the event of layoffs or by limiting the scale or pace of layoffs. In fact, only two deals (5%) provided any such protection.

We also found that none of the transactions in the Non-*Revlon* Subsample included provisions benefiting customers, suppliers, creditors, or the environment. Additionally, only a small minority of the deals in this subsample offered soft pledges to retain the location of the target's headquarters post-deal (22%) or to retain some investment or philanthropic activities that benefit local communities (14%).[123] Overall, the evidence does not support the argument that our findings in Part V were driven by corporate leaders who were otherwise interested in benefiting stakeholders but discouraged from doing so by the *Revlon* doctrine.

E. Deals with a Stakeholderist Counsel

Next, we will consider the argument that the lack of stakeholder protections was due to discouraging input that corporate leaders received from counsel. Under this view, although corporate leaders were interested in benefiting stakeholders and accepting a somewhat lower premium for that purpose, they

122. This parameter is based on prior case law, which generally sets *Revlon* applicable at these thresholds. See *In re* Smurfit-Stone Container Corp. S'holder Litig., No. 6164-VCP, 2011 WL 2028076, at *16 (Del. Ch. May 20, 2011, revised May 24, 2011) (stating that *Revlon* would likely apply if the consideration mix was at least 50% cash); *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (holding that *Revlon* applies where 62% of consideration was cash), *aff'd sub nom.* Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (mem.).

123. Note that the incidence of soft pledges in favor of local communities is somewhat higher in the Non-*Revlon* Subsample. We do not view this difference as reflecting a meaningfully better treatment of stakeholders in the Non-*Revlon* Subsample. This is because the deals in the Non-*Revlon* Subsample generally lack meaningful protections for employees and other significant stakeholder groups such as customers and suppliers, and because, as discussed earlier (soft) pledges in favor of local communities are commonly vague, under-specified, and not legally enforceable.

Also, we note that the deals in the Non-*Revlon* Subsample are substantially larger (60% higher consideration on average). Thus, the difference between the two groups might be due to the fact that it is more natural for profit-making reasons not to move local operations when the acquired company is relatively large.

were discouraged by legal counsel advising or at least cautioning them against doing so.

To explore whether this argument could have driven our findings in Part V, we examined a set of deals in which the target was advised by a law firm strongly identified with advocacy for stakeholderism: Wachtell, Lipton, Rosen & Katz ("WLRK"). WLRK's founding partner and other senior partners have written extensively in support of stakeholderism;[124] have developed a "[n]ew [p]aradigm" of "director-centric stakeholder governance" for the World Economic Forum;[125] have issued a vast number of firm memos advocating stakeholderism;[126] and have stated in these memos that state corporate law, and, in particular, Delaware law, enables corporate leaders to give significant weight to stakeholders.[127] Therefore, it is reasonable to expect that corporate leaders advised by WLRK were not discouraged from seeking stakeholder protections.

We identified 15 deals in which WLRK served as counsel to the acquired company, referred to as the "WLRK Subsample." Whereas these deals constituted about 12% of the sample, they were, on average, significantly larger and had an aggregate acquisition consideration exceeding $170 billion and representing about 21% of the total acquisition consideration of our sample. We then examined whether, given the presence of a stakeholder-oriented counsel, corporate leaders were more likely to negotiate for and include stakeholder protections in the deals of the WLRK Subsample.

The analysis indicates that the deals in the WLRK Subsample do not exhibit any substantial incidence of stakeholder protections. None of the deals in this subsample included protections for employees regarding the risk of layoffs. Similarly, none of the deals in this subsample contained provisions benefiting customers, suppliers, creditors, or the environment. And the majority of the deals in the WLRK Subsample did not even include soft pledges to retain, at least for some specified time, the location of the company's headquarters, or its investments or philanthropic activities in local communities. Overall, the evidence does not support the argument that our findings in Part V were driven by the influence of counsel.

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124. *See, e.g.,* Martin Lipton., *Further on the Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2021), https://corpgov.law.harvard.edu/2021/07/20/further-on-the-purpose-of-the-corporation [https://perma.cc/G27A-6S9P].

125. Martin Lipton, It's Time to Adopt the New Paradigm, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm [https://perma.cc/86ZM-7NB8].

126. *See, e.g.,* David Katz & Laura A. McIntosh, *Corporate Governance Update: EESG and the COVID-19 Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 31, 2020), https://corpgov.law.harvard.edu/2020/05/31/corporate-governance-update-eesg-and-the-covid-19-crisis [https://perma.cc/MD5U-ZV5U].

127. *See, e.g.,* Martin Lipton, Karessa L. Cain & Kathleen C. Iannone, *Stakeholder Governance and the Fiduciary Duties of Directors*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 24, 2019), https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors [https://perma.cc/Q2D6-ZGUV].

F. Deals Governed by Constituency Statutes

It might be argued that regardless of the identity of the target's counsel, as long as the target is incorporated in Delaware, the target's corporate leaders might be influenced by Delaware's shareholder-focused approach. Under this view, because a majority of the targets in our sample were incorporated in Delaware, Delaware's pro-shareholders approach—or at least the perception by corporate leaders that Delaware has such an approach—could have driven our findings in Part V.

It is worth noting that to the extent that Delaware incorporation provides a substantial impediment to stakeholder-favoring choices, that would in itself imply that stakeholderism cannot currently be relied on to produce substantial benefits to stakeholders of most U.S. companies, as a majority of U.S. public companies are currently incorporated in Delaware.

Nonetheless, to explore empirically the argument that Delaware incorporations drove Part V's findings, we examined the subset of companies that were incorporated in states with constituency statutes. By adopting such statutes, these states made it patently clear to corporate leaders that they do not share whatever shareholder-centric approach characterizes Delaware law. We identified 14 acquisitions of companies incorporated in states with constituency statutes in our sample ("the Constituency-Statutes Subsample").

To the extent that Delaware incorporations drove Part V's findings, we should expect stakeholders to receive more protections in the Constituency-Statutes Subsample than in our full sample. We found, however, that stakeholder interests were not more protected in deals in the Constituency Statutes Subsample than in other subsets of our sample.

In particular, we found that only one of the deals (7%) in the Constituency-Statutes Subsample provided employees with a soft pledge to protect against the risk of reduced employment. In addition, none of the deals in the considered subsample included protections for customers, suppliers, creditors, or the environment. And only one of the deals (7%) included a soft pledge benefiting local communities. Thus, the evidence does not support the view that Part V's general findings were driven by the large number of Delaware companies.

G. Sales of Targets with High ESG Ratings

Another potential objection is that Part V's findings might have been due to targets in our sample being mostly companies that were much less stakeholder-oriented than other public companies. Under this view, companies that are stakeholder-oriented should be expected to remain independent and be reluctant to be acquired, especially during a pandemic. According to this argument, due to self-selection, stakeholder-oriented target companies were disproportionately absent from our sample, which consequently was not representative of the stakeholderist inclinations of companies in general, and this factor drove our findings regarding the lack of stakeholder protections.

There are good reasons, however, to expect companies that are stakeholder-oriented to be willing to be acquired. When a sale of a company would produce substantial surplus, stakeholder-oriented corporate leaders should still be expected to agree to an acquisition; such leaders should simply seek to ensure that by adding adequate stakeholder protections, the division of surplus would be such that stakeholders share in the gains, or that, at least, they would not be made worse off.

Nonetheless, to test this argument empirically, we identified a set of companies in our sample that had relatively high ESG ratings. To this end, we collected data on ESG ratings from Refinitiv ESG.[128] Our data provides metrics regarding each company's general "ESG Score" and its treatment of employees as reflected by its "Workforce Score."[129] Using this data, we calculated whether each company's overall ESG Score and Workforce Score were above-average or below-average in its industry. We were able to identify the ESG and Workforce Scores for 119 out of 122 target companies. More specifically, 43 of the deals in our sample involved targets with above-average ESG Scores and 30 deals involved targets with above-average Workforce Scores.

Under the considered hypothesis, deals to acquire targets with above-average ratings—especially with respect to the treatment of employees—should be expected to involve a higher incidence of employee protections in their deal terms. Our analysis, however, indicates that this hypothesis is not supported by the data. In particular, none of the subsamples of deals to acquire targets with above-average ESG and Workforce scores included protections for employees from the risk of layoffs or any other post-deal compensation to laid-off employees. In addition, none of the deals in the subsample of targets with above-average ESG Score included protections for customers, suppliers, creditors, or the environment. And only 2 of the deals in the above subsample (5%) included a soft pledge benefiting local communities. Thus, the evidence does not support the view that Part V's findings were driven by the substantial under-representation of stakeholder-oriented companies in our sample.

H. Sales to Buyers with Poor ESG Ratings

Yet another potential argument is that the stakeholder orientation of corporate leaders might have been reflected in their choosing stakeholder-

128. According to Refinitiv, the database covers over 85% of global cap firms, across more than 630 different ESG metrics. ESG scores from Refinitiv are designed to measure a company's relative ESG performance, commitment and effectiveness, based on company-reported data. The metrics encompass ten main themes, including emissions, environmental product innovation, human rights, and so on. Ratings are available on over 12,000 public and private companies globally. For the most recent version of the dataset methodology, see *Environmental, Social and Governance Scores from Refinitiv*, REFINITIV 6 (May 2022), https://www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/refinitiv-esg-scores-methodology.pdf [https://perma.cc/M3MV-CSD3]. The data collected from Refinitiv is for the year 2019.

129. The Workforce Score captures a subset of the scores in the Social category of the ESG measure. It includes metrics for diversity and inclusion, career development and training, working conditions, and health and safety. *Id.* at 22.

oriented buyers in the first place. Under this view, such a selection of buyers makes stakeholder protections unnecessary, as the target's corporate leaders had a good basis for expecting stakeholders to fare well after the deal.

Theoretically, however, there are good reasons not to expect stakeholder-oriented corporate leaders to sell only to buyers that are so stakeholder-oriented as to render stakeholder protections completely unnecessary. Sometimes a sale of a company to a given buyer that is not stakeholder-oriented could be expected to generate an especially large surplus. In such a case, stakeholderist corporate leaders should still be willing to sell the company, while ensuring that the division of the large surplus would be such that stakeholders would also be made better off, or at least not worse off, by including adequate stakeholder protection in the deal.

Indeed, the evidence in Section V.A indicates that in the deals in our sample, the choice of buyers was not by itself sufficient to eliminate concerns that the deal would have significant adverse effect on stakeholders. Recall that the analysis in that Section documented that, based on communications by the acquired company and outside observers, many deals with the buyer chosen by corporate leaders were expected to pose substantial post-deal risks for employees and other stakeholders.

Nonetheless, to test the considered argument further empirically, we created two subsamples of buyers with below-average ESG Score and Workforce Score. Using the same methodology as described in the prior subsection, we were able to identify the ESG and Workforce Scores for 81 out of 94 strategic buyers. We included those with below-average ESG Score and Workforce Score in the applicable subsamples. We also included in these subsamples all 28 private equity buyouts contained in the entire sample. Such inclusion is consistent with the empirical research we discussed in Section III.B.3 above, which shows how private equity acquisitions involve significant risks of employee terminations.

Overall, we identified in our sample a subset of 45 transactions that involved sales to buyers with below-average ESG Scores and of 52 sales to acquirers with below-average Workforce Scores. In such transactions, the buyer's poor stakeholder record could raise concerns that the deal would pose substantial risks to stakeholders. Therefore, to the extent that Part V's findings were driven by expectations that the chosen buyer would protect stakeholders on its own, the transactions in these subsamples, where buyers have poor ESG record, should be expected to include more protections for employers.

Our examination of the subsamples of sales to buyers with below-average ESG and workforce ratings, however, does not support this hypothesis. We found that only one deal included a soft pledge to protect employees from the risk of layoffs, and none of them included post-deal compensation to laid-off employees. In addition, none of the deals in the subsample of buyers with below-average ESG Score included protections for customers, suppliers, creditors, or the environment. And only one deal in the above subsample (2%) included a soft pledge benefiting local communities. The data are thus inconsistent with the view that Part V's findings were driven by corporate leaders selecting such stakeholder-oriented buyers so as to make any stakeholder protections unnecessary.

I. Deals During the Year Preceding the Pandemic

In Sections A and B above, we discussed the general lack of stakeholder protections in deals during the pandemic that did not involve firms in financial or economic distress or that occurred during the later period in which the economy was on its way to normalcy. It might be argued, however, that the COVID period had some other special characteristics that precluded corporate leaders from serving stakeholders, and that behavior during the pandemic period is thus not informative with respect to behavior in other times.

Therefore, to explore the argument that our findings are attributable to some factor that was unique to the pandemic period, we examined a sample of large deals that were announced during the year preceding the pandemic. During this period, stakeholder interests already received large support from corporate leaders, the BRT Statement had been issued, and corporate decisions were not made against the background of a pandemic.[130] We identified 17 transactions valued above $10 billion that were announced between January 1, 2019, and February 1, 2020 (the "Pre-COVID Sample"). The aggregate value of the deals in this sample exceeds $487 billion.

Our analysis of the Pre-COVID Sample deals yields findings similar to the patterns found for the sample of deals during the pandemic. First, regarding employee protections, we found that none of the deals in the Pre-COVID Sample included provisions to protect employees from the risk of being laid off. In particular, we found no provisions providing compensation to laid-off employees or provisions limiting layoffs or their pace.

Regarding other stakeholder groups, we found that none of the deals in the Pre-COVID Sample included provisions protecting customers, suppliers, creditors, or the environment. We found a (soft) pledge to retain the location of the target's headquarters in only one of the seventeen deals (6%), and a (soft) pledge benefiting local communities in only one deal (6%).

Overall, whether the results for the deals in the Pre-COVID Sample are compared to our full sample or to the Largest Deal Subsample, these results are consistent with the findings we documented in detail in our analysis of deals in the time of COVID. The results of this Section thus indicate that there is no support for the argument that our findings were driven by some special factors or conditions induced by the pandemic. Rather, our results are consistent with the view that, notwithstanding the significant support for stakeholderism expressed by corporate leaders in the last three years, corporate leaders have incentives, and thus should be expected, not to serve the interests of stakeholders beyond what would benefit shareholders.

130. *See supra* note 26 and accompanying text.

VII. Implications and Objections

In this Part we examine the implications of our findings and address several potential objections to our conclusions. The main implication of our study, we argue, is that we should not rely on managerial discretion to deliver value to stakeholders. We also discuss several possible objections regarding characteristics of our sample or alternative justifications for the decisions made by corporate leaders, explaining why we believe that these do not successfully challenge our main conclusions.

A. Implications: What Corporate Leaders Can Be Expected to Do

Having ruled out several potential alternative explanations in Part VI, we concluded that the most likely driver of our findings is the lack of incentives for corporate leaders to deliver value to stakeholders.[131] In fact, given the design of their compensation arrangements, the structure of the labor and the corporate control markets, and the other operative factors, corporate leaders have incentives not to deliver value to stakeholders beyond what is instrumentally useful to increase shareholder value. This situation conflicts with the belief of stakeholderism advocates, who expect that corporate leaders will try to allocate to stakeholders some of the surplus created by an acquisition, either to fulfill implicit promises made earlier to induce stakeholders to invest their skills in the company or because of other factors such as business and social norms or pro-stakeholder pledges.[132]

The main implication of this situation is that we should not, in fact, expect corporate leaders to use their discretion to deliver value to stakeholders. A central claim of stakeholderism is that corporate social responsibility can be an effective tool for addressing pressing social problems, such as climate change, economic inequality, or discrimination against minorities.[133] For example, a large number of major companies have been issuing pledges and statements in which they commit to reduce their carbon emissions to zero within a certain timeframe.[134]

Yet, if corporate leaders chose not to protect the environment, employees, or other stakeholders in a time when stakeholders needed extraordinary protection and shareholders enjoyed a booming market, it is not reasonable to expect them to protect stakeholders in normal times. Thus, our findings serve as a warning to policymakers and concerned citizens not to rely on the discretion of corporate leaders to help solve climate change and other pressing social

131. *See supra* Part VI.

132. *See supra* Section II.A.

133. *See, e.g.*, Aneil Kovvali & William Savitt, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORNELL L. REV. 1881, 1887-88 (2021).

134. *See, e.g.*, Renee Cho, *Net Zero Pledges: Can They Get Us Where We Need to Go?*, STATE OF THE PLANET (Dec. 16, 2021), https://news.climate.columbia.edu/2021/12/16/net-zero-pledges-can-they-get-us-where-we-need-to-go [https://perma.cc/YT97-QQR] ("Of the 2,000 largest public companies in the world, 622 have net zero strategies. In addition, over 450 financial firms pledged $130 trillion in private capital to help reach net zero by 2050.").

problems, but to pursue instead, with a renewed sense of urgency, regulatory solutions for these challenges.

B. Potential Objections

We now turn to several potential objections to our conclusions above. Some of these objections question the characteristics of our sample, while others offer alternative justifications for our findings that do not recognize the general unreliability of managerial discretion with regard to benefiting stakeholders. However, none of these objections, we argue, refute our main conclusions.

1. Acquired Companies Are Different

It might be argued that stakeholder-oriented corporate leaders would simply reject acquisition offers and would instead retain long-term independence because an independent company is a more favorable context for employees, local communities, local suppliers, and other stakeholders. According to this view, our sample, which consists of companies that made affirmative decisions to sell, is disproportionately composed of corporate leaders who have little regard for stakeholders. This theory suggests that our findings cannot be generalized to all corporate leaders and that, therefore, we cannot conclude that corporate leaders are not stakeholder-oriented, because the vast majority of stakeholder-oriented corporate leaders can be found outside our sample, among those who choose not to sell their companies.

However, this theory does not persuasively explain why stakeholder-oriented corporate leaders would refuse to sign a deal that produces a significant surplus and keep the company independent rather than sell the company and distribute part of that surplus to stakeholders. Indeed, whenever a sale entails a large surplus, as in most of the deals in our sample, it is plausibly in the best interests of stakeholders to complete the sale and allocate part of the surplus to them rather than to keep the company independent and forgo any surplus.[135]

Thus, if many corporate leaders were stakeholder oriented, as this theory suggests, one would expect to find many completed sales producing significant surplus and providing, at the same time, significant protections for stakeholders. The fact that we largely do not find such deals is strong evidence refuting this alternative hypothesis.

135. To illustrate, compare the following three scenarios among which directors of the hypothetical Alpha, Inc. must choose: (i) selling the company to buyer Beta, Inc. for a premium of $100 million and accepting that Beta would lay off 300 employees; (ii) keeping the company independent, thus avoiding the layoff of 300 employees and forgoing the $100 million premium for shareholders; or (iii) selling the company to Beta conditional on Beta committing to pay $50,000 to each laid-off employee, thus securing a $95 million premium for shareholders and a $5 million relief package for employees. The objection discussed in Section VII.B.1 suggests that virtually all directors would choose scenario (ii) to protect employees, and this is the reason why we do not observe stakeholder protections in merger agreements. However, there is no reason why directors facing a deal proposal that poses significant risks to employees, such as the example discussed above, would not choose scenario (iii), which preserves the creation of a large surplus but provides considerable protections for stakeholders.

2. Prohibitive Costs of Contractual Protections

It might be argued that including stakeholder protections in the merger agreement is prohibitively costly and that the absence of such protections does not imply that corporate leaders do not deliver other, less expensive, benefits to stakeholders. This argument is based on the observation that a prohibition to lay off employees or to relocate the company headquarters creates constraints that may potentially have huge efficiency losses in the future. Therefore, the cost of obtaining such protections from a buyer is exceedingly large.

According to this hypothesis, stakeholderism is perhaps unable to provide contractual protections in an acquisition, but can nonetheless provide many other forms of protections in the ordinary course of business. Under this view, the conclusions of our study cannot be generalized beyond the specific context of corporate acquisitions.

The objection is unconvincing. First, as explained in Section II.B.4, the transactions examined in our study are of significant economic relevance, and therefore, even if our conclusions were not generalizable, our findings would still represent a serious indictment of stakeholderism.

Furthermore, the assertion that contractual protections for stakeholders are exceedingly costly is unsubstantiated. Protections for some stakeholders—for example, employees—may be provided in ways that do not limit the buyer's freedom to make efficient business decisions, but rather impose pre-determined costs. For example, instead of a prohibition against laying off employees, corporate leaders could have bargained for a cash payment to be made to each laid-off employee. The absence of these kinds of protections with predictable, pre-quantified costs suggest that the above argument is not a relevant factor driving our findings.

3. Stakeholders Were Still Made Better Off by the Acquisition

It might be argued that, despite the absence of contractual provisions in favor of stakeholders, stakeholders were still made better off by the acquisition, either through soft pledges that cannot be observed in the transaction documents or through the selection of a stakeholder-friendly buyer.

Soft Pledges. One version of this theory is that corporate leaders may have negotiated informal commitments in favor of stakeholders. Under this view, contractual protections are hard to specify, and therefore stakeholder-oriented corporate leaders decide to protect stakeholders through unobservable soft pledges.

It is not clear, however, why corporate leaders are able to design formal contractual protections for shareholders, directors, and executives but not for employees and other stakeholders. For example, an exceptional severance payment for laid-off employees is relatively easy to specify and formalize, and there is no plausible reason why corporate leaders would prefer a soft pledge to such a simple and effective protection, other than the reluctance to reallocate value from shareholders to employees.

Furthermore, even if corporate leaders did obtain soft pledges from the buyer, it is debatable whether stakeholders would receive any meaningful benefits from them. Typically, soft pledges are so vague that it is extremely difficult to hold a party accountable for them. Also, even if the scope of the pledge is sufficiently defined, there is no enforcement mechanism that can ensure that stakeholders receive the promised benefit. In particular, in addition to the absence of formal enforcement mechanisms, the individuals who negotiated the soft pledges might well have left the company by the time the pledge must be enforced. These obvious problems are likely the reason why corporate leaders typically make sure that their own benefits and rights are documented in formal agreements.

Stakeholder-Friendly Buyer. Another version of this theory is that corporate leaders might benefit stakeholders by deliberately selecting a stakeholder-friendly buyer. Under this account, stakeholder-oriented corporate leaders accepted the offers of buyers that would not pose major risks to stakeholders and rejected (or would have rejected) the offers of alternative, less stakeholder-friendly bidders, even if such alternative offers included a higher premium. Since we observe only the offers that have been accepted, our study cannot rule out the possibility that corporate leaders did in fact deliver significant value to stakeholders by rejecting the offers of non-stakeholderist buyers.

However, this objection ignores the simple fact that corporate leaders can negotiate stakeholder protections at no additional cost to the buyer, albeit in exchange for a reduced premium. Therefore, there is no systematic reason why corporate leaders, in order to protect stakeholders, should reject a high-premium deal that creates risks for stakeholders rather than negotiate explicit protections for stakeholders and accepting a somewhat lower premium.

Furthermore, as we documented in Section V.A., in many of the deals in our sample, at the time of entering into the deal, corporate leaders were aware that the merger would produce adverse consequences for stakeholders. In all those cases, the hypothesis of a stakeholder-friendly buyer cannot explain the lack of explicit protections.

4. Stakeholders Protected by Their Own Contracts

It might be argued that explicit stakeholder protections are unnecessary because stakeholders are sufficiently protected by the terms of their own contracts with the company or by statute. Employees, for example, might not need job protections because of severance payments included in their contracts. Therefore, the reason why we do not find stakeholder protections is not because corporate leaders do not give weight to stakeholder interests but because these protections are already included in the ongoing contracts with stakeholders or are provided by law.

This argument, however, is hardly persuasive. First, employees of U.S. companies enjoy an unusually limited set of statutory protections, compared to other OECD countries.[136] For example, unlike in most other developed economies, severance pay in cases of individual dismissals or mass layoffs is not mandated by the law, and therefore is a matter of individual agreements between employers and employees.[137] Furthermore, the vast majority of U.S. workers do not belong to a labor union and do not have a written employment contract, and therefore they are typically not entitled to severance payments.[138] Finally, even those employees who do receive a severance payment typically receive a quite limited sum, usually between one and two weeks' pay for each year of service.[139]

Most importantly, one of the central rationales for stakeholderism is precisely that existing contractual protections do not sufficiently address stakeholder risks. Indeed, the argument that stakeholders can take care of themselves through their contracts with the company is the standard argument used by contractarians and laissez-faire advocates to argue against stakeholderism, not in favor of it.[140] If stakeholderism does not deliver benefits to stakeholders beyond existing contractual protections, it means that it has failed to deliver on one of its central promises.

5. Design Conventions and Inertia

A further possible objection is that stakeholder protections in merger agreements are simply not conventional and are contrary to market practice, and therefore even corporate leaders who give substantial weight to stakeholder interests find it difficult to change the customary practices. Under this view, much of M&A contractual practice is driven by conventions and standardized models, and stakeholder protections would represent a radical innovation, and therefore would be difficult to implement.[141]

However, this objection seems to ignore the sophistication of the actors involved. The deals in our samples were designed by highly skilled, highly paid experts who are perfectly capable of devising and implementing contractual

136. *See* OECD, OECD EMPLOYMENT OUTLOOK 2020: WORKER SECURITY AND THE COVID-19 CRISIS 179–81 (2020).

137. *See* id. at 180 fig.3.2.

138. Drew Desilver, *10 Facts About American Workers*, PEW RSCH. CTR. (Aug. 29, 2019), https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/ [https://perma.cc/FQN5-RQUD].

139. Deborah Acosta, *Severance Pay: What It Is and Why You Should Negotiate a Package Before Accepting a Job*, WALL ST. J. (Apr. 2, 2021, 2:29 PM ET), https://www.wsj.com/articles/severance-pay-what-it-is-and-why-you-should-negotiate-a-package-before-accepting-a-job-11608152200 [https://perma.cc/K2EG-XL82].

140. For a well-known early work taking this view, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 37 (1991).

141. For a discussion of the use of precedents in M&A legal drafting, see generally Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 64-65 (2017).

innovations. In fact, they often do so in order to adapt standard terms to deal-specific circumstances or to respond to legal or business changes.[142]

Therefore, if corporate leaders truly had incentives to obtain protections for stakeholders (perhaps as a consequence of the alleged move away from shareholder primacy towards stakeholderism), their skilled advisers would certainly find a way to design adequate contractual solutions to that end.

6. End-Period Exceptionalism

A final possible objection to our conclusions is that our findings are valid only with respect to end-period decisions, such as the sale of the company, but not with respect to ongoing business decisions. Under this view, the decisions made by corporate leaders when selling the company are different from other kinds of decisions made during the ongoing life of the company, because after the sale the company ceases to exist as an independent entity and corporate leaders leave their position and are no longer in the same relationship with shareholders and stakeholders.[143]

Although it is true that end-period decisions feature singular characteristics and may systematically differ from ongoing business decisions, acquisitions are corporate transactions of immense economic value, and therefore, even if our findings were valid solely within this context, they would still reveal a major failure of stakeholderism. Furthermore, it is not clear why corporate leaders should be expected to be less stakeholder-friendly regarding end-period decisions than regarding ongoing business decisions. Indeed, during the ongoing life of the company, corporate leaders need to be more, not less, responsive to the interests of shareholders, as they need to win their favor for subsequent reelections. In fact, corporate governance literature views end-period decisions as being at risk of being less aligned with shareholder interests.

Therefore, one could plausibly argue that corporate leaders willing to benefit stakeholders enjoy more freedom to do so in an end-period decision, such as the sale of the company, precisely because they can sacrifice shareholder value with less fear of consequences. Under this alternative view, our findings are even more significant, since stakeholder-oriented corporate leaders should be expected to be more, not less, inclined to bargain for stakeholder protections in a merger agreement rather than in an ongoing business agreement.

142. *See, e.g.*, John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation, and Patterns of Practice*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 35-36 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) (arguing that a small, but positive, fraction of a M&A contract consists of "truly unique terms that could not be found in another contract" and that market practice "changes over time in response to legal and business shocks").

143. For a general discussion of the "last period problem" in the sale of a company, see, for example, Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1941-47 (2003).

VIII. Conclusion

Focusing on the large wave of corporate deals taking place during the COVID pandemic, this Article investigated the extent to which corporate choices delivered value to corporate stakeholders. The pandemic was accompanied by peak support for stakeholderism from corporate leaders, heightened concerns about the plight of stakeholders, and prosperity for shareholders generated by booming stock markets. Nonetheless, we find that although corporate leaders negotiated for substantial gains for shareholders and their own private interests, these leaders did little to negotiate for protections for employees or other stakeholder groups. Stakeholder capitalism failed to deliver in the time of COVID.

Our findings support the view that corporate leaders have incentives not to serve the interests of stakeholders beyond what would serve shareholder value and not to act in ways that reflect alleged implicit promises to look after the interests of stakeholders in an acquisition. These findings have implications for the ongoing debate on stakeholderism, and they serve as a caution against accepting or relying on the claims made by its supporters.

Corporate leaders, our findings suggest, should not be expected to deliver value to stakeholders. Thus, those who take stakeholder concerns seriously, as we do, should avoid relying on corporate leaders to address these concerns, but rather should focus on seeking governmental reforms that would protect stakeholders in a wide range of areas. For example, those concerned about climate risk or employee welfare should recognize that corporate rhetoric on the subject cannot be expected to contribute meaningfully to addressing those problems. The failure of stakeholder capitalism in the time of COVID should give pause to all those attracted by its illusory promise.