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Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements

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Abstract

Legal scholars have focused much attention on the incorporation puzzle—why business corporations so heavily favor Delaware as the site of incorporation. This paper suggests that the focus on the incorporation decision overlooks a broader but intimately related set of questions. The choice of Delaware as a situs of incorporation is, effectively, a choice-of-law decision. A company electing to charter in Delaware selects Delaware law (and authorizes Delaware courts to adjudicate) legal disputes going to the allocation of governance authority within the firm. In this sense, the incorporation decision is fundamentally similar to any setting in which a company selects a law and authorizes (or selects) a forum in which disputes are to be resolved. We study a data set of 412 merger and acquisition contracts contained as exhibits in SEC Form 8-K filings by reporting corporations over a seven month period in 2002 in order to assess the decisions the parties have made regarding choice-of-law and choice-of-forum. We find that, although Delaware law and forum are frequently selected in these contracts, there is a relative “flight” from Delaware in the contractual setting. Delaware corporations tend to choose Delaware law less than other corporations choose the law of their state of incorporation. Furthermore, in those contracts specifying Delaware law, many firms did not specify Delaware as the litigation forum. Corporations that choose Delaware law tend to choose Delaware as a litigation forum less than corporations that choose other states’ laws tend to choose such states as a litigation forum. Delaware was the place of incorporation for 189 merger contracts; it was the choice of law for 132. With respect to forum selection, 115 contracts that designated a forum had Delaware corporate acquirers. Yet only 64 contracts specified Delaware as the litigation forum. In contrast, for example, New York had eight corporate acquirers and 45 contracts specifying that New York law governed. We investigate the determinants underlying these decisions about choice-of-law and forum selection. Regression results confirm the flight from Delaware law and forum, conditional on Delaware being the acquiring firm’s place of incorporation.

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I. Introduction

A leading problem in the theory of American corporate law is to explain why Delaware is chosen as the state of incorporation by such a large percentage of large firms. An early view saw Delaware as providing charter terms that favored corporate managers at the expense of shareholders and the public at large.³ Later theorists postulated that Delaware might rather be providing terms that benefited all parties to the corporate contract *ex ante* – the “race to the top” view.⁴ Some have suggested that Delaware incorporation may represent neither a race to the top nor to the bottom, but rather a race to somewhere in the middle because the interests of corporate managers and other influential parties align only partially with the interests of the public.⁵ More recently still the notion of a beneficial competition among the states for corporate charters has been challenged on the grounds that state competition may not produce value-increasing rules,⁶ that Delaware’s dominance is so great that effective competition does not exist,⁷ at least with any other state than the firm’s principal place of business,⁸ or that the most salient competition is not between states but rather between states and the federal government.⁹ Others have examined the role of attorneys in the process, arguing that the self-interest of transactional attorneys influences the selection of Delaware as a chartering state¹⁰ as well

³ See generally William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (arguing that Delaware corporate law attracts corporations because it has historically favored managers at the expense of shareholders).

⁴ See generally ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (AEI Press 1993) (arguing that state competition for charters has created a system that benefits investors); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987) (arguing that Delaware’s reluctance to adopt anti-takeover regulations reflects shareholder preference); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913 (1982) (arguing that a line of Delaware court cases departing from pro-management rules will harm shareholders); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (supporting the economic theory that competitive corporate legal systems promote optimality for shareholders).

⁵ See generally Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (stating that Delaware law is the result of a political equilibrium between interest groups on the “supply side,” namely Delaware taxpayers and attorneys, and the “demand side,” namely out-of-state shareholders and managers).

⁶ See generally Lucian Ayre Bebachuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (arguing that managerial opportunism and externalities can influence states in adopting undesirable corporate laws); Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989) (arguing that competition for charters has led Delaware to sacrifice optimality for pro-management rules).

⁷ See generally Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) (arguing that only Delaware stands to earn substantial tax revenues and legal work from incorporation, so other states do not compete).

⁸ See generally Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002) (asserting that firms make a binary choice between Delaware and their home states when deciding where to incorporate).

⁹ See generally Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003) (arguing that whether Delaware “raced to the top” or “raced to the bottom,” it was influenced more by the threat of federal action than by state competition).

¹⁰ See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 273-77 (1985) (arguing that attorneys reduce their labor costs when their expertise concentrates on Delaware because it is a single jurisdiction where outcomes are more predictable).

as the nature of the contractual clauses that are included in the charters.¹¹ Delaware incorporation has also been investigated empirically, with some studies finding advantages to the choice of Delaware charter¹² and others casting doubt on the robustness of these results.¹³

The benefits of Delaware corporate law are said to lie, among other things, in its flexibility and openness to variation, with most provisions operating only as default rules that can be avoided by contrary provisions in the charter or bylaws;¹⁴ the high degree of competence, specialized knowledge, and integrity of its judiciary;¹⁵ the substantial body of decided cases which lends predictability and reliability to its corporate law;¹⁶ its reliance on corporate franchise taxes, which bonds it against changes in the law that would not be desired by corporate managers;¹⁷ and the relative insulation of the Delaware lawmaking process from special interests hostile to corporate interests.¹⁸

Sometimes overlooked in the debate over Delaware incorporation is that the real issues at stake have to do with choices of law and forum. Aside from franchise taxes due to the Delaware treasury,¹⁹ the principal consequence of Delaware incorporation is that the company opts into Delaware law to resolve disputes going to the allocation of power and duty within the company.²⁰ Delaware incorporation also operates as a weak choice-of-forum decision: directors and officers of companies incorporated in Delaware are

¹¹ See generally John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001) (claiming that the advice a law firm gives a corporation has more influence on whether it will adopt takeover defenses than other more traditional variables).

¹² See generally Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (finding that Delaware firms are worth substantially more than non-Delaware firms).

¹³ See generally Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004) (finding that small Delaware firms were not worth more than small non-Delaware firms between 1996 and 2002 and that large Delaware firms were not more valuable than large non-Delaware firms between 1991 and 2002).

¹⁴ E.g., FRANK H. EASTERBROOK & DANIEL R. FISCHL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15 (1991).

¹⁵ See, e.g., Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1362 (2000) (describing literature claiming “that Delaware, through its reliance on charter revenue and its judicial selection process, has committed itself to provide corporate laws that enhance firm performance, and that market forces lead firms to adopt these value-enhancing laws”) (footnote omitted); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 277 (1985) (arguing that Delaware is the preferred state of incorporation in part because “the continuity in and small size of [the court that] hears corporation law cases” produces both judicial expertise and predictable decisions).

¹⁶ Romano, *supra* note 15, at 274.

¹⁷ *Id.* at 258-61.

¹⁸ See, e.g., John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 762-63 (1987) (arguing that Delaware continues to be “the preeminent authority on corporate-law matters” because powerful lobbies within the state support preserving Delaware’s status as such, and because those lobbies are relatively unopposed within the state).

¹⁹ See Roberta Romano, *The Genius of American Corporate Law* 6-11 (1993).

²⁰ At least, this is the conventional view of the “internal affairs doctrine” of corporate law. For a theoretical treatment stressing the fact that the selection of the state of incorporation is essentially a choice-of-law decision, see Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1162 (2000) (asserting that, generally, favoring rules which respect parties’ choice-of-law decisions further economic efficiency).

subject to that state's jurisdiction over matters growing out of their corporate activities,²¹ and Delaware may be the only state where, as a practical matter, all defendants in a case involving alleged breaches of fiduciary duty can be joined.²² Incorporation in Delaware is, however, a weak choice-of-forum decision because it does not purport by its own terms to be exclusive. A plaintiff could bring a suit in any state (or even abroad) where he or she could obtain jurisdiction over all defendants. Delaware law would be applied (presumably) in such a case but the forum would be different.²³

Viewing Delaware incorporation as a choice-of-law and choice-of-forum option permits us to understand the incorporation decision in the context of a broader universe of corporate behavior. As shown in Part III below, companies frequently agree to choice-of-law and choice-of-forum provisions when they enter into contracts.²⁴ These contracts cover a wide range of corporate activities, from employment and severance agreements to settlements of disputes to mergers and asset purchases to financing agreements and securities transactions – and much more. Thus, the debate over Delaware incorporation can be understood as a specific case of a more general inquiry into the importance of choice-of-law and choice-of-forum decisions by corporations that enter into contracts with third parties.

Insofar as they tend to appear repetitively in corporate contracts, and to assume relatively standardized terminology, choice-of-law and choice-of-forum provisions in corporate contracts may be considered, at least to some degree, as examples of contractual “boilerplate.” Such a characterization should not be taken as indicating that these clauses are unimportant. A rich literature on boilerplate, much of it of recent origin, suggests that despite its repetitive and standardized nature, boilerplate can have significant efficiency effects. Scholars have debated the fairness of boilerplate provisions for consumers, with some decrying them as exploitative²⁵ and others pointing to evidence that they sometimes function in the consumer's interests.²⁶ A substantial body of recent

²¹ *Armstrong v. Pomerance*, 423 A.2d 174, 175-79 (Del. 1980); DEL. CODE ANN. tit. 10, § 3114 (2006).

²² See Part IV.C *infra*.

²³ *Id.*

²⁴ [no footnote needed]

²⁵ See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1205-06 (2003) (evaluating the assertion that form contracts are less favorable to buyers than to sellers); Ronald J. Mann, “*Contracting for Credit*,” 104 MICH. L. REV. 899, 912-14 (2006) (recognizing that credit card companies are able to exploit consumers in part by hiding unattractive contract terms within less prominent boilerplate provisions); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 594-603 (1990) (arguing that form contracts disadvantage consumers because consumers are unlikely to read or understand the contract terms, and because businesses know and exploit this fact).

²⁶ See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829-31, 833-34 (2006) (arguing that one-sided contract provisions allow sellers discretion and therefore enhance consumer welfare, because sellers will exercise that discretion in a way that maintains their positive reputation among consumers); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006) (arguing that standard-form contracts benefit consumers because the seller then has “discretion to grant exceptions . . . on a case-by-case basis”); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements* 32-36, 4 (Aug. 22, 2005) (working paper, available at <http://ssrn.com/abstract=799274>) (arguing that sellers with market power do not include in their form contracts unusually biased terms, and that form contracts therefore pose less risk to consumers than

scholarship investigates other features of boilerplate provisions, including theories about the efficiency implications of the production of boilerplate by different forms of organization;²⁷ the determinants of change in standardized terms;²⁸ the effects of boilerplate as devices for consumer screening, price discrimination, or cartelization,²⁹ the use of boilerplate as a means for facilitating communication among sophisticated parties;³⁰ the efficiency tradeoff between standardization and individual tailoring of boilerplate terms;³¹ the use of boilerplate in particular industries;³² and the proper role of a court in interpreting boilerplate clauses.³³ The contributors to this evolving literature vary in many respects, but share the premise that boilerplate provisions are, or can be, important determinants of the overall value of a contract to a party.

A substantial body of contract theory suggests, therefore, that choice-of-law and choice-of-forum provisions may have an impact on corporate value. Particular features of choice-of-law and choice-of-forum provisions tend to reinforce this conviction. Although their enforceability is sometimes challenged, courts generally give effect to choice-of-law and choice-of-forum clauses.³⁴ States engage in competition in the areas of choice-of-law and choice-of-forum that is analogous, in important respects, to the competition posited for corporate charters.³⁵ The presence of such competition tends to indicate that choice-of-law and choice-of-forum provisions have important real-world consequences. And empirical evidence suggests that forum matters in shaping case

previously was thought); cf. Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements* 24-25 (Aug. 22, 2005) (working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799282) (arguing that sellers of computer software do not use "rolling contracts," where a consumer does not know the terms of the contract until after her purchase is complete, to hide one-sided contract terms).

²⁷ See Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075, 1098-1102 (2006) (discussing the legal and policy implications of boilerplate developed by for profit organizations, nonprofit organizations, and the state).

²⁸ See generally Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929 (2004) (finding that the standardization of boilerplate terms in sovereign bond offerings led parties to adopt terms in spite of their preferences).

²⁹ See generally David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006) (discussing the potential uses of boilerplate provisions by suppliers to impose higher transaction costs upon consumers).

³⁰ See generally Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006) (examining the use of boilerplate provisions by sophisticated bargainers to achieve a strategic advantage that is distinct from the substantive content of the boilerplate term).

³¹ See generally Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006) (discussing how boilerplate provisions take advantage of modularity in striking a balance between portability and individual tailoring).

³² See generally Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006) (examining the role of boilerplate terms in the automobile manufacturing industry).

³³ See generally Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006) (arguing that courts should interpret boilerplate provisions entered into by sophisticated parties as if they were statutes, rather than by utilizing traditional contract interpretation techniques).

³⁴ See generally Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003) (empirical study finding that choice-of-law clauses were routinely enforced, even when the effect was to override the regulatory law of the forum state).

³⁵ See Larry Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 DEL. J. CORP. L. 999, 1007-18 (1994) (discussing state statutes compelling enforcement of choice-of-law clauses).

outcomes.³⁶ Moreover, in one important respect choice-of-law and choice-of-forum provisions differ from other types of boilerplate. The standard boilerplate term is a clause that remains invariant across contracts (e.g., an integration clause providing that the written contract sets forth the entire agreement of the parties). In the case of many choice-of-law and choice-of-forum clauses, the form of the clause is standardized but the specific law and forum chosen by the parties are not. These must be determined for each individual contract. The transaction-specific tailoring of these clauses suggests additional reasons for inferring that the specific venue and law chosen may have importance for the contracting parties.

This paper is a preliminary inquiry into the uses of choice-of-forum and choice-of-law clauses in corporate contracts. We study a data set consisting of all merger and acquisition agreements contained as exhibits to Form 8K “current report” filings with the Securities and Exchange Commission (SEC) for the seven month period January 1 to July 31, 2002. The motivation for using this data set is described more fully below, but the short explanation is that these contracts allow us to examine choice-of-law and choice-of-forum clauses in a setting where these clauses are reasonably analogous to corporate chartering decisions – contracts involving fundamental corporate events that are material to the welfare of sophisticated corporate parties.

In brief, our study yields the following conclusions. We find evidence that choice-of-law and choice-of-forum provisions are vigorously negotiated in these merger contracts. No single state dominates in either category; no share of the market for these clauses exceeds 33 percent. As might be expected, we find that a substantial degree of overlap exists between choice-of-law and choice-of-forum. If a particular state’s law is chosen as applicable to the contract, that state’s forum is also very likely to be selected. However, the overlap was not complete: a substantial number of contracts designated a forum to adjudicate disputes that was not located in the state whose law was selected to govern the substantive issues. Further, and quite interestingly, we find that while the contracting parties always opted to include choice-of-law provisions in their contracts, the same was not true for choice-of-forum provisions. Only 53 percent of the contracts contained litigation forum selection clauses. Given that the parties could easily select the forum as well as the applicable law – and given that the forum selected can sometimes be as important if not more important than the law chosen – the frequent failure of the parties to specify a forum for resolution of disputes presents a theoretical puzzle.

Investigation of the determinants of choice of a particular state law or forum generated several results. We find a positive, significant association between the principal place of business of both the acquired firm and the acquiring firms and the law and forum selected in the contract. We similarly find positive significant associations between the states of incorporation of the acquired and acquiring firms and the chosen law and forum. We found lesser, but still significant, associations between the location of the attorneys for the reporting firm and the choice of law and forum.

The analogy between contractual choice-of-law and forum and incorporation suggests theoretical reasons to suppose that Delaware might be chosen preferentially to

³⁶ See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1511-13 (1995) (finding that plaintiffs are generally less successful in cases where a forum transfer has occurred than in cases where there was no transfer).

other states in the merger context. For example, Delaware judges are reputed to have expertise in corporate matters and to be highly capable jurists. Although the issues governed by choice-of-law and choice-of-forum clauses go to questions of contract interpretation rather than internal corporate affairs, it is reasonable to suppose that the contract issues in merger agreements will be at least closely interwoven with questions commonly adjudicated by the Delaware courts. Because disputes in merger contracts will often be resolved through equitable relief (for example, a motion for a preliminary injunction), it is also reasonable to assume that the Delaware Chancery Court, which is the court of first instance for corporate cases, will also be the forum for adjudication of many if not most disputes over the contracts in our data set. Thus the perceived advantages of Delaware law and forum in corporate cases may carry over to the context of choice of law and forum in merger contracts.

We find strong evidence that Delaware is, in fact, preferred to most other states as a provider of law and forum in the data set under study. But that preference is largely related to Delaware being the state of incorporation. We also find evidence that the preference for Delaware incorporation is greater than the preference for Delaware law or forum in resolving contractual disputes. Companies are more likely to select Delaware as the state of incorporation than they were to select Delaware as the provider of law or forum. To the degree there is a flight from Delaware in this respect, the beneficiaries appear to be New York and California, which are preferred as providers of law and forum as compared with states other than Delaware, holding other factors constant. The outflow from Delaware is not trivial. Delaware was the place of incorporation for 189 merger contracts; it was the choice of law for 132. With respect to forum selection, 115 contracts that designated a forum had Delaware corporate acquirers. Yet only 64 contracts specified Delaware as the litigation forum. In contrast, New York had eight corporate acquirers and 70 contracts selecting New York law and 45 selecting New York as the litigation forum.

Further exploring the analogy between choice-of-law/forum and incorporation, we inquired whether Delaware law or forum would be preferentially chosen by the parties when the acquired firm was publicly held. The reason for this inquiry is that in such a situation, the fiduciary duties of the acquired firm's directors may become salient issues, and Delaware courts can be posited to be experts at adjudicating matters pertaining to directors' fiduciary duties.³⁷ We found that the public nature of the acquired firm had a significant positive association with Delaware law being chosen and with Delaware as the choice-of-forum. We also investigated whether the choice of law or forum decisions might be related to the location of the attorney. Other things equal, we might expect attorneys to opt for the law and/or forum where they are licensed to practice. We do find a significant association between the acquirer's attorney's location and the contractual choice of law and forum. However, attorneys also often specified a law and/or forum in a state other than that where they were listed as doing business.³⁸ We also find evidence that attorneys in New York are significantly more likely to specify a forum than are attorneys located in other states.

³⁷ We thank Marcel Kahan and John Coates for independently suggesting this inquiry.

³⁸ It may be that attorneys in these cases practiced in firms that also had offices in the selected forum, but our data did not permit us to investigate this question.

This article is structured as follows. Part II describes the data analyzed. Part III describes the basic patterns of incorporation, business and attorney location, and choice of law and forum. Part IV explores the choice-of-law in merger contracts and Part V explores the choice-of-forum. Part VI reports on the decision whether to designate a litigation forum in merger contracts. Part VII concludes.

II. The Data Set

The data consisted of merger agreements contained as exhibits to Form 8K “current report” filings with the Securities and Exchange Commission for the seven month period January 1 to July 31, 2002. Form 8K must be filed by SEC reporting firms to disclose certain material corporate events or changes that have not previously been reported by the company.³⁹ One important such event is a merger agreement.⁴⁰ We searched Form 8K filings that contained an exhibit containing this type of contract.⁴¹ We analyzed each such contract to determine whether it could be categorized as a merger, including major asset acquisitions and stock transactions.

There are cogent theoretical reasons for examining this data set. By definition, the merger agreements in the data set form part of transactions deemed material (i.e., important) by the reporting firm. Because the contracts are important to the reporting firm’s operations, we can assume that they receive some degree of care and attention during the negotiation and drafting phase, either from the reporting firm’s employees or from outside counsel. Because we are examining contracts that are written before disputes arise, moreover, we can be reasonably confident that in most cases the contracting parties did not anticipate the nature of any dispute that might arise, and therefore would not know whether a particular term would help or hurt them in the event of a conflict. These characteristics suggest the hypothesis that, within some range of error, the contract terms that we observe may represent reasonably efficient allocations of rights and duties among the parties. In this paper, we are concerned with two choices in particular made by the contracting parties: the law picked to govern in the event of a dispute over the contract, and the forum selected for the adjudication or resolution of such a dispute.

Since much of this study explores whether corporations are attracted to, or shy away from, Delaware law or courts, merger agreements have another appealing feature. Corporate law and corporate governance law are particular strengths of Delaware. If Delaware law or courts are to attract contractual provisions or litigation, one might expect Delaware’s attractiveness to be strongest in contracts such as merger agreements. So we

³⁹ For the current rules, *see* Securities and Exchange Commission, Form 8-K, <http://www.sec.gov/about/forms/form8-k.pdf> (last visited January 4, 2006).

⁴⁰ Reporting firms entering merger agreements routinely file Form 8Ks disclosing the essential terms of the proposed transaction. Exhibits to Form 8K are classified by types of contracts. Among the types of contract that must be filed as Exhibits are “Any material plan[s] of acquisition, disposition, reorganization, readjustment, succession, liquidation or arrangement” 17 C.F.R. § 229.601(b)(2).

⁴¹ The filings typically include the merger agreement itself as an exhibit to the filing. These merger agreements, which are available on-line via both the SEC and LEXIS, thus provide an excellent source of information about the contractual choices made by parties engaged in business consolidations.

expect a study of merger contracts to yield results that are conservative in the sense that this is an area which should show Delaware in its most favorable contractual setting.⁴²

III. Places of Incorporation, Business and Attorney Locale, and Choice of Law and Forum

This part describes the basic patterns of incorporation, business and attorney locale, and choices of law and forum.

Table 1 shows the distributions by state of key attributes that might be expected to be associated with patterns of choice of law and forum. These include the acquirer's places of business and incorporation, the acquired firm's place of incorporation and the acquirer's attorney's place of business.

Table 1. Distribution by Locale of: Acquiring Firm's Place of Business and Incorporation, Acquired Firm's Place of Incorporation, Attorney's Place of Business

	Acquirer place of business		Acquirer place of incorporation		Acquired place of incorporation		Acquirer's attorney's place of business	
	N	%	N	%	N	%	N	%
AZ	9	2.18	0	0.00	3	0.73	2	0.49
CA	93	22.57	20	4.85	35	8.50	74	17.96
Canada	13	3.16	4	0.97	11	2.67	1	0.24
CO	9	2.18	12	2.91	8	1.94	12	2.91
CT	7	1.70	0	0.00	0	0.00	0	0.00
DC	2	0.49	0	0.00	0	0.00	13	3.16
DE	5	1.21	189	45.87	168	40.78	0	0.00
FL	19	4.61	15	3.64	13	3.16	10	2.43
GA	11	2.67	5	1.21	10	2.43	15	3.64
IL	14	3.40	3	0.73	3	0.73	18	4.37
MA	15	3.64	3	0.73	6	1.46	17	4.13
MD	11	2.67	6	1.46	7	1.70	5	1.21
NC	4	0.97	3	1.73	1	0.24	2	0.73
NH	5	1.21	1	0.24	4	0.97	0	0
NJ	12	2.91	4	0.97	8	1.94	5	1.21
NV	9	2.18	53	12.86	22	5.34	3	0.73
NY	45	10.92	8	1.94	10	2.43	67	16.26
OH	8	1.94	5	1.21	4	0.97	5	1.21
OR	4	0.97	5	1.21	4	0.97	3	0.73
Other	53	12.86	42	10.19	56	13.59	38	9.22
PA	16	3.88	12	2.91	8	1.94	16	3.88
TX	23	5.58	5	1.21	10	2.43	15	3.64
United Kingdom	0	0.00	1	0.24	7	1.70	1	0.24
UT	11	2.67	6	1.46	2	0.49	8	1.94
VA	7	1.70	5	1.21	8	1.94	4	0.97

⁴² We fully agree with comments we have received indicating that results would be enhanced by branching out to other forms of contract. The short answer is that we have preliminarily coded choice-of-law provisions in over 1500 other contracts available from Form 8K SEC filings in 2002. Compared to all other substantial areas of contract, Delaware in fact does attract the most choice-of-law provisions in merger agreements. We thus believe our results are conservative in the sense just described.

WA	7	1.70	5	1.21	4	0.97	7	1.70
Unknown	0	0.00	0	0.00	0	0.00	70	16.99
Total	412	100.00	412	100.00	412	100.00	412	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states with at least five mergers satisfying any one of the four column criteria are reported individually. States without at least five mergers satisfying at least one of the column criteria are coded as “Other”. Except for the attorney’s place of business, unknown places are coded as “Other”. Unknown places are trivially few except for attorney’s place of business.

Table 1 confirms Delaware’s dominance as a place of incorporation for publicly held firms. The “Acquirer place of incorporation” columns show that Delaware is the acquirer’s state of incorporation for 189 of 412 (45.9 percent) agreements. Other than Delaware, only Nevada achieves even a five percent share of the acquirer-incorporation market. Large or commercially prominent states, California, New York, and Texas, have miniscule shares of the incorporation market but substantial or nontrivial shares of the “Acquirer place of business” (the table’s first two numerical columns) listings. Delaware’s attraction is not a function of where companies do substantial business. As the first two columns show, Delaware is the “Acquirer place of business” for only 1.2 percent of firms. Here California and New York are more dominant, with Texas third. The fifth and sixth numerical columns show that Delaware is the dominant place of incorporation for acquired firms as well as for acquiring firms. It is the acquired company’s state of incorporation for 168 of 412 (40.8 percent) agreements. The pattern across states of the acquirer’s attorney’s place of business, though often not indicated in the EDGAR filings searched (17 percent “Unknown”), more closely resembles the place-of-business pattern than the incorporation pattern.

Table 2 shows that Delaware’s dominance continues for variables of interest here. It shows that Delaware accounts for 32.0 percent of the governing law clauses, with New York a distant second and California ranking third. Delaware also leads as a litigation forum choice, though to a lesser extent, as shown in Table 2’s third and fourth numerical columns.

Table 2. Distribution by Locale of: Governing Law Chosen & Litigation Forum Specified in Merger Contracts

	Governing law chosen		Litigation forum specified	
	N	%	N	%
CA	50	12.14	32	7.79
Canada	6	1.46	3	0.73
CO	9	2.18	6	1.46
DE	132	32.04	64	15.57
FL	19	4.61	9	2.19
GA	6	1.46	3	0.73
MA	6	1.46	5	1.22
MD	8	1.94	5	1.22
NJ	7	1.70	4	0.97
NV	27	6.55	7	1.70
NY	70	16.99	45	10.95
OH	5	1.21	2	0.49
Other	48	11.65	27	6.57
PA	10	2.43	1	0.24
TX	9	2.18	2	0.49
None or not applicable	0	0.00	195	47.45

Any	-	-	1	0.24
Total	412	100.00	411	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states with at least five mergers satisfying either of the column criteria are reported individually. States without at least five mergers satisfying at least one of the column criteria are coded as “Other”. Contracts that list both New York and Delaware law, usually phrased as New York law applies except where Delaware law applies, are listed as choosing New York law.

Although Delaware leads as a place of incorporation, choice-of-law, and litigation forum, it is the relation among the three that is of principal interest to us. If Delaware’s efficient and skilled judges and procedures are part of the positive attraction of Delaware as a place of incorporation, as some claim, one expects Delaware to attract choice-of-law clauses disproportionately relative to other states. In fact, however, once one accounts for Delaware as the place of incorporation, firms tend to flee Delaware as a choice of law and forum. Tables 1 and 2 suggest as much. Delaware provides for 45.9 percent of acquirers’ places of incorporation but only 32.0 percent of choice-of-law provisions. Table 2 shows that when contracts specify a litigation forum, Delaware also suffers a net outflow compared to its dominance of the place of incorporation.

IV. Empirical Results: Exploring the Choice-of-law Pattern: Are Delaware Courts and Judges Attracting Governing Law Clauses?

Simple bivariate analysis suggests that, after accounting for the decision of where to incorporate, merging firms tend to reject Delaware as a choice of law. We use the acquiring firm’s state of incorporation and locale, the attorney’s locale, and the relation of these variables to choice-of-law to suggest flight from Delaware on choice-of-law matters. Regression analysis, in which we simultaneously account for variables considered individually in the bivariate analysis, is consistent with the simpler analyses.

A. Choice-of-law Bivariate Analysis

To explore the pattern of flight from Delaware, we examine in more detail the relation between incorporation and location characteristics and choice-of-law. Table 3 simplifies the earlier tables by focusing solely on choice-of-law and by reducing the geographical units to Delaware, New York, California, and Other. All places of incorporation or choices of law other than Delaware, New York, and California are coded as Other.

Table 3A shows first that a strong association exists between state of incorporation of the acquiring firm and choice-of-law. The boldface diagonal percents show that, across the four major locales in the table, at least 53 percent of choices of law are the same as the place of incorporation. New York and California acquirers show a strong affinity for choosing their incorporation state’s laws, with both choosing such laws about 80 percent of the time. Delaware shows the weakest association between incorporation state and choice-of-law.⁴³ The positive association between choice-of-law and place of incorporation is highly statistically significant ($p < .001$).⁴⁴

⁴³ These results are consistent with Florencia Marotta-Wurgler’s study of 597 end-user software license agreements between software vendors and purchasers. Marotta-Wurgler found that Delaware law was

Table 3A also shows that choice-of-law provisions tend to flow “away” from Delaware and Other and towards New York and California. Delaware acquirers account for 181 incorporations, as Table 3’s first row shows, but only 135 choices of law, as the table’s first numerical column shows. Similarly, the residual Other category has 198 incorporations but only 155 choices of law. New York, in contrast, shows an increase in choices of law relative to incorporations. It has only six incorporations but 63 choices of law. Similarly, California increases from 20 incorporations to 52 choices of law. Table 3B reports the results for the relation between choice-of-law and the *acquired* firm’s place of incorporation. It shows a positive relation similar to that of acquiring firms and the relation is also highly statistically significant.

Table 3A. Acquirer Firm State of Incorporation and Choice-of-Law

Acquirer state of incorporation	Choice-of-law				Total
	DE	NY	CA	Other	
DE (N)	96	37	20	28	181
Percent	53.04	20.44	11.05	15.47	100.00
NY (N)	1	5	0	0	6
Percent	16.67	83.33	0.00	0.00	100.00
CA (N)	3	0	15	2	20
Percent	15.00	0.00	75.00	10.00	100.00
Other (N)	35	21	17	125	198
Percent	17.68	10.61	8.59	63.13	100.00
Total (N)	135	63	52	155	405
Percent	33.33	11.56	12.84	38.27	100.00

Table 3B. Acquired Firm State of Incorporation and Choice-of-Law

Acquired state of incorporation	Choice-of-law				Total
	DE	NY	CA	Other	
DE (N)	89	28	10	30	157
Percent	56.89	17.83	6.37	19.11	100.00
NY (N)	0	2	0	0	2
Percent	0.00	100.00	0.00	0.00	100.00
CA (N)	0	0	9	0	9
Percent	0.00	0.00	100.00	10.00	100.00
Other (N)	43	31	29	123	226
Percent	19.03	13.72	12.83	54.42	100.00
Total (N)	132	61	48	153	394
Percent	33.50	15.48	12.18	38.83	100.00

chosen in less than 2% of the contracts that specified a governing law, even though 21% of the contracting firms were incorporated in Delaware. The major flight from Delaware in her study is to California: 45 of the contracts involving Delaware-incorporated vendors selected California law, far more than any other state. California law was chosen in 27% of the contracts that specified a governing law, even though only 17% of the firms in her sample were incorporated in California. Interview with Florencia Marotta-Wurgler, Assistant Professor of Law, New York University, in N.Y., N.Y. (Aug. 23, 2006).

⁴⁴ This and similar bivariate significance levels reported in several tables below are based on simple multinomial logit models in which the four choice-of-law outcomes are modeled as a function of dummy variables representing the states of incorporation.

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other.” Excludes seven mergers that designate both Delaware and New York law.

One expects not only the place of incorporation but also the place of business to be associated with the choice of law. Table 4A, which reports on acquiring firms, explores that relation and also allows study of the flow of cases with place-of-business, rather than place of incorporation as a baseline. Again, the emboldened diagonal entries suggest a strong association between place of business and choice-of-law. For each place-of-business state, the greatest choice-of-law percent is in that state. Table 4A also shows flow from California and Other as places of business to New York and Delaware as choices of law. New York is the place of business for 42 firms but the choice of law for 63 firms. The enormous flow towards Delaware—five places of business and 135 choices of law—is presumably a consequence of its prominence as a state of incorporation and the association between state of incorporation and choice-of-law. Table 4B shows that the relation between place of business and choice-of-law for acquired firms is quite similar to that for acquiring firms. The positive association between place of business and choice-of-law in both tables is highly statistically significant ($p < .001$).

Table 4A. Acquirer Firm Place of Business and Choice-of-Law

Acquirer place of business	Choice-of-law				Total
	DE	NY	CA	Other	
DE (N)	4	0	0	1	5
Percent	80.00	0.00	0.00	0.00	100.00
NY (N)	10	25	1	6	42
Percent	23.81	59.52	2.38	14.29	100.00
CA (N)	33	4	40	16	93
Percent	35.48	4.30	43.01	17.20	100.00
Other (N)	88	34	11	130	263
Percent	33.46	12.93	4.18	49.43	100.00
Total (N)	135	63	52	153	403
Percent	33.50	15.63	12.90	37.97	100.00

Table 4B. Acquired Firm Place of Business and Choice-of-Law

Acquired place of business	Choice-of-law				Total
	DE	NY	CA	Other	
DE (N)	3	0	0	1	4
Percent	75.00	0.00	0.00	25.00	100.00
NY (N)	5	20	2	7	34
Percent	14.71	58.82	5.88	20.59	100.00
CA (N)	37	7	29	12	85
Percent	43.53	8.24	34.12	14.12	100.00
Other (N)	89	36	19	133	277
Percent	32.13	13.00	6.86	48.01	100.00
Total (N)	134	63	50	153	400

Percent	33.50	15.75	12.50	38.25	100.00
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Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other.” Excludes seven mergers that designate both Delaware and New York law.

One expects that attorneys are another key influence on choice-of-law. Attorneys are likely to specify the law of a state with which they are familiar. They are likely to be most familiar with the law of the jurisdiction in which they are located. We thus expect New York attorneys to tend to specify New York law in their contracts, California attorneys to specify California law, and so on.

Table 5 shows the relation between the attorney’s address and choice-of-law. The dominant laws specified are, as above, Delaware and Other. The place of incorporation likely is driving their dominance. The bold diagonal percents indicate, as expected, a reasonably strong association between attorney locale and choice-of-law. (Note that Delaware is not the attorney place of business for any firm in our sample.) Only Delaware successfully competes with attorney locale. The positive association between choice-of-law and attorney place of business is highly statistically significant ($p < .001$).

Table 5. Attorney Place of Business and Choice-of-Law

Attorney place of business	Choice-of-law				Total
	DE	NY	CA	Other	
NY (N)	25	28	2	8	63
Percent	39.68	44.44	3.17	12.70	100.00
CA (N)	31	3	28	10	72
Percent	43.06	4.17	38.89	13.89	100.00
Other (N)	79	32	22	137	270
Percent	29.26	11.85	8.15	50.74	100.00
Total (N)	135	63	52	155	405
Percent	33.33	15.56	12.84	38.27	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other,” as are contracts with unknown attorney place of business. Excludes seven mergers that designate both Delaware and New York law.

The results so far suggest that Delaware dominates as the choice of law but that, after accounting for place of incorporation, choices of law flow away from Delaware and towards New York and California. The possibility remains that movement of choice-of-law towards New York and California is a consequence of those states’ relatively strong showings as places of business or attorney locales. To assess whether these factors fully account for the flow away from Delaware, we limit the sample in two ways. First, we exclude all mergers in which New York is the place of business or the attorney locale. Second, we exclude all mergers in which California is the place of business or the attorney locale.

Table 6, panel A, shows the results with the New York exclusions. After the exclusions, no cases remain in which New York is the state of incorporation of the acquiring firm. Nevertheless, New York is the choice of law in 24 mergers. Choice-of-

law flows to New York from both Delaware corporations and from corporations other than our three principal states. Panel B shows that, after excluding California businesses and attorneys, California law is the choice of law in eight mergers. Both New York and California show an inflow but New York's is more substantial. The associations between state of incorporation and choice-of-law in both panels is highly statistically significant ($p < .001$)

Table 6. State of Incorporation and Choice-of-Law, Excluding New York and California Firms Located in Those States or with Attorneys in Those States

Choice-of-law					
A. Excluding firms located in New York and firms with attorneys located in New York					
Acquirer's state of incorporation	DE	NY	CA	Other	Total
DE (N)	78	11	19	22	130
Percent	60.00	8.46	14.62	16.92	100.00
CA (N)	1	0	15	2	18
Percent	5.56	0.00	83.33	11.11	100.00
Other (N)	26	13	15	117	171
Percent	15.20	7.60	8.77	68.42	100.00
Total (N)	105	24	49	141	319
Percent	32.92	7.52	15.36	44.20	100.00
B. Excluding firms located in California and firms with attorneys located in California					
DE (N)	59	33	1	22	115
Percent	51.30	28.70	0.87	19.13	100.00
NY (N)	1	4	0	0	5
Percent	20.00	80.00	0.00	0.00	100.00
CA (N)	1	0	2	0	3
Percent	33.33	0.00	66.67	0.00	100.00
Other (N)	30	20	5	110	165
Percent	18.18	12.12	3.03	66.67	100.00
Total (N)	91	57	8	132	288
Percent	31.60	19.79	2.78	45.83	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as "Other." Excludes seven mergers that designate both Delaware and New York law.

New York's inflow of mergers choosing its law does not appear to be attributable to a particular industry. We have identified the two-digit SIC codes for thirteen of the 24 New York choice-of-law firms. No industry is represented more than twice. Nor is the inflow a function of the particular form of corporate combination, such as stock deal in contrast to asset acquisition.

B. Choice-of-Law Regression Analysis

Regression analysis allows us to explore simultaneously the effect of the previously discussed variables—choice-of-law, state of incorporation, business locale, and attorney location—on law and forum choices. Preliminarily, we note some likely limitations on what regression models might accomplish with respect to both choice-of-law and choice-of-forum. The previous tables establish that several factors—places of

incorporation and business as well as attorney locale--are positively associated with choice-of-law. These factors are unlikely to be independent of one another. In reasonable regression models, the variables explaining choice-of-law (and, as shown below, choice-of-forum) thus depend on one another. These interdependencies suggest using systems of equations to model choice-of-law and its related factors.⁴⁵ Unfortunately, statistical methodology has made only modest progress in solving complex systems of equations involving categorical data.⁴⁶ Fully modeling all or even most of the dependencies that may exist in the models reported is likely not feasible given the limited available data and the state of statistical methodology. Nevertheless, the simple descriptive story suggested by the bivariate tables throughout this article is reasonably consistent with the regression models we report. So, while we acknowledge the formal limitations of the models we use, a reasonable interpretation of the totality of results reported supports our conclusions.

One basic question is what factors lead a corporation to specify Delaware law or Delaware as a litigation forum. In light of the hypothesis that the public or private status of acquired firms should be associated with whether Delaware law is chosen, we add variables for public status to explore these factors. It is appropriate to also ask what factors move firms to migrate away from Delaware as a choice of law. The hypothesis that merging firms migrate away from Delaware suggests that incorporation in Delaware should be associated with choosing governing law other than Delaware's more than being incorporated in another state is associated with choosing governing law other than that state's.

To assess the effect of corporate public status, we define two dummy variables, "Acquirer public" and "Acquired public." "Acquirer public" equals one when the acquiring firm is public and equals zero otherwise. "Acquired public" equals one when the acquired firm is public and equals zero otherwise. Table 7 summarizes these variables and their relation to whether Delaware law or forum is chosen. Public acquiring firms select Delaware law at a higher rate (34.9 percent) than private acquiring firms (18.9 percent). The difference is marginally statistically significant ($p=.066$). Delaware law is chosen significantly ($p<.001$) more often in the case of public *acquired* firms (46.6 percent) than in the case of private acquired firms (23.1 percent), thus confirming the Kahan-Coates hypothesis⁴⁷ that Delaware law would be especially attractive when public firms are acquired. With respect to choice-of-forum (for those contracts designating a forum), no acquirer effect emerges ($p=.484$). But the acquired firm's public status is

⁴⁵ The models explored thus likely raise issues of endogeneity. For example, abandoning the choice-of-law in forum selection appears, according to model (3) in Table 16 below, to be a function of the chosen law (in particular Delaware law). But the selection of Delaware law is itself likely a function of other factors such as state of incorporation (for example, Delaware corporations tend to choose Delaware law) and other factors. The presence of endogeneity with respect to multiple variables raises questions of model validity that are not necessarily resolved by combining endogenous and exogenous variables in a single equation or even by two-equation systems such as bivariate probit models.

⁴⁶ Theodore Eisenberg, *Empirical Methods and the Law*, in STATISTICS IN THE 21ST CENTURY 179, 186 (Adrian E. Raftery, Martin A. Tanner & Martin T. Wells eds., 2002).

⁴⁷ See *supra* note 33 and accompanying text.*** (the footnote referenced will likely changed since we think that additional footnotes are necessary above)***

strongly associated with Delaware being the chosen forum ($p < .001$). These variables will be added to our models of choice-of-law and choice-of-forum explored below.

Table 7. Public Status and Choice-of-Forum and Law

	Choice-of-forum			Choice-of-law		
	Delaware forum chosen	Delaware forum not chosen	Total	Delaware law chosen	Delaware law not chosen	Total
Acquirer public (N)	61	139	200	128	239	367
Percent	30.50	69.50	100.00	34.88	65.12	100.00
Acquirer private (N)	3	9	12	7	30	37
Percent	25.00	75.00	100.00	18.92	81.08	100.00
Total	64	148	212	135	269	404
Percent	30.19	69.81	100.00	33.42	66.58	100.00
Acquired public (N)	45	43	88	82	94	176
Percent	51.14	48.86	100.00	46.59	53.41	100.00
Acquired private (N)	19	105	124	53	176	229
Percent	15.32	84.68	100.00	23.14	76.86	100.00
Total	64	148	212	135	270	405
Percent	30.19	69.81	100.00	33.33	66.67	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. Excludes seven mergers that designate both Delaware and New York law.

In addition to defining a simple dummy variable equal to one when Delaware law is chosen and zero otherwise, we define a variable, “choice-of-law other than state of incorporation” (the “flight” variable), that equals one when the acquiring firm’s state of incorporation and choice-of-law do not match. It equals zero when they do match. The hope is to see if Delaware as a place of acquirer incorporation is positively or negatively associated with the flight variable. Table 8 summarizes this variable. It shows that Delaware acquiring corporations tend to reject Delaware law more than other corporations tend to reject their states’ laws. Forty-seven percent of 181 Delaware acquirers rejected Delaware law. Other acquirers rejected their states’ laws less than 35 percent of the time. The difference across the four state-of-incorporation categories is marginally statistically significant ($p = .056$, using Fisher’s exact test) and the 47 percent rate of flight from Delaware law is substantially higher than those of New York and California.

Table 8. Choice-of-Law Other than State of Incorporation

Acquirer’s state of incorporation	Choice-of-law = state of incorporation	Choice-of-law \neq state of incorporation	Total
DE (N)	96	85	181
Percent	53.04	46.96	100.00
NY (N)	5	1	6
Percent	83.33	16.67	100.00
CA (N)	15	5	20
Percent	75.00	25.00	100.00

Other (N)	125	73	198
Percent	63.13	36.87	100.00
Total (N)	241	164	405
Percent	59.51	40.49	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other.” Excludes seven mergers that designate both Delaware and New York law.

New York as an attorney locale, as an acquiring company’s place of business, or as an acquired company’s place of business may attract New York as a choice of law. To examine whether these features account for the flight from Delaware law, we report in the Appendix a version of Table 8 that excludes cases with New York attorneys or places of business.⁴⁸ Delaware corporations then choose non-Delaware law in approximately 41 percent of mergers, the sample as a whole chooses law other than the state of incorporation in approximately 34 percent of mergers (analogous to Table 8’s total row), and the differences in the table are statistically significant ($p=0.050$). If one excludes mergers with California attorney or place-of-business connections as well as mergers with these New York connections, the result is more statistically significant ($p=.010$).

Table 8’s summary of nonconcordance between state of incorporation and choice-of-law shows promising results. We now seek to model nonconcordance by accounting for multiple factors described individually in earlier tables. Table 9 reports logistic regression results for two dependent variables. The first, assessed in models (1) and (2), is equal to one if Delaware law is specified and equal to zero otherwise. The second dependent variable, assessed in models (3) and (4), is the flight variable. Since both dependent variables are dichotomous, logistic regression is appropriate.⁴⁹ The models include dummy variables for public-private corporate status, place of incorporation, corporate locale, and attorney locale. Model (1) includes the full sample. Model (2) excludes mergers in which acquiring firms or their attorneys are located in New York. All models report adjusted standard errors to account for clustering by two-digit Standard Industrial Classification code.⁵⁰

In model (1), the coefficients on the New York, California, and Other incorporation variables are all negative relative to the Delaware corporation reference category and the coefficient for Other is statistically significant. The coefficients for New York and California are larger than the coefficient for Other. Their lack of statistical significance may be a consequence of the relatively few firms in the sample that incorporated in those states. The negative signs suggest that selecting Delaware law is negatively associated with being a non-Delaware corporation, as suggested by the bivariate results in Table 8. The positive, significant associations on the public status variables indicate that Delaware law is preferred by public acquiring and acquired firms compared to private firms. The coefficients on the acquirer’s business locale variables

⁴⁸ See *infra* app. tbl.A-1.

⁴⁹ Some combinations of variables have low frequencies. We therefore use bootstrap methods to compute the standard errors in the logistic regressions. See generally BRADLEY EFRON & ROBERT J. TIBSHIRANI, AN INTRODUCTION TO THE BOOTSTRAP (CRC Press 1998) (1993) (discussing the method of the bootstrap for assessing statistical accuracy).

⁵⁰ We located SIC codes for 63 percent of the contracts. The remaining contracts were grouped together in a single category. Results in Table 9 do not materially differ using unclustered models. The sensitivity of two models in Table 16 is described in the text note under that table.

are all negative and large. A test of the hypothesis that the coefficients are jointly zero yields $p=.004$, suggesting that business locale other than Delaware is negatively associated with Delaware as a choice of law. Model (2) yields results consistent with model (1) in the subsample that excludes New York businesses and attorneys.

Models (3), (4), and (5) assess whether Delaware corporations are more likely to flee their state of incorporation's laws than are other corporations. Model (3)'s substantial size and negative sign for New York and California acquirer coefficients indicates that such firms are less likely to reject their incorporating state's laws. But the two coefficients are not statistically significant, either singly or jointly. Model (4) removes the three insignificant place-of-business variables and the insignificant "Acquiring firm public" variable. This simplified model shows a significant tendency of non-Delaware corporations to choose their incorporation states' laws more than Delaware corporations do. The coefficients on all three place-of-incorporation variables are negative, the New York variable is statistically significant, and the Other variable is marginally statistically significant. In model (5)'s reduced sample, which excludes New York businesses and attorneys, the coefficients on the California and Other incorporation variables (no New York acquiring corporations are in the sample) are negative. Thus, the reduced sample provides modest additional support for the flight from Delaware law.

In models not reported here, the acquired firm's place of business being in New York was significantly negatively associated with Delaware as a choice of law and significantly positively associated with flight from the acquirer's place of incorporation. Models that accounted for the nature of the corporate combination, through inclusion of a dummy variable for whether the transaction was described as an "acquisition," rather than as a merger or share exchange, did not yield results materially different from those reported in Table 9.

Table 9. Logistic Regression Models of Choice-of-Law Being Delaware and Being Other than Acquirer's State of Incorporation

	Dependent variables				
	(1) Delaware law chosen	(2) Delaware law chosen, exclude NY contracts	(3) Law chosen ≠ state of incorporation	(4) Law chosen ≠ state of incorporation	(5) Law chosen ≠ state of inc., exclude NY contracts
Acquired firm public	1.405** (5.17)	1.483** (3.69)	-0.276 (0.88)	-0.193 (0.64)	-0.215 (0.69)
Acquiring firm public	1.229+ (1.70)	1.570* (2.07)	-0.073 (0.17)		0.062 (0.10)
Acquiring firm inc. in NY	-2.518 (0.36)		-2.776 (0.33)	-2.126* (2.35)	
Acquiring firm inc. in CA	-2.330 (0.79)	-3.731 (0.52)	-1.099 (1.37)	-0.939 (1.33)	-1.256 (1.29)
Acquiring firm inc. in Other	-1.919** (7.18)	-2.276** (7.52)	-0.011 (0.06)	-0.313+ (1.66)	-0.287 (1.06)
Attorney business in CA	-0.026 (0.06)	0.210 (0.23)	-0.630+ (1.68)	-0.723+ (1.83)	
Attorney business in Other	-0.475 (1.56)		-0.664** (2.64)	-0.967** (4.10)	-0.354 (0.92)
Acquiring firm bus. in NY	-3.820 (0.25)		-1.006 (0.06)		
Acquiring firm bus. in CA	-2.685 (0.18)	-2.134 (0.14)	-2.442 (0.14)		
Acquiring firm bus. in Other	-2.221 (0.15)	-1.686 (0.11)	-3.111 (0.19)		
Constant	1.250 (0.09)	0.118 (0.01)	3.152 (0.19)	0.688* (2.07)	-0.142 (0.22)
Observations	402	316	402	405	316

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as "Other." Excludes seven mergers that designate both Delaware and New York law. Reference category for place of incorporation is Delaware. Reference category for attorney place of business is New York in models (1), (3) and (4), Other in model (2), and California in model (5). Reference category for place of business is Delaware in models (1), (2), and (3). Models (2), (4), and (5) exclude mergers with contracts indicating that New York is the acquirer's place of business or the attorney's place of business. Models account for clustering on two-digit Standard Industrial Classification codes. Bootstrap-based z statistics are in parentheses. + significant at 10%; * significant at 5%; ** significant at 1%

C. Conflict of Laws Considerations

Aspects of Delaware law may govern even if a contract specifies another state's law. A New York choice-of-law provision in a merger contract involving a Delaware corporation does not necessarily mean that New York law governs all aspects of the merger contract. In general, under New York choice-of-law rules, New York's courts will apply Delaware substantive law to merger-related matters of internal corporate governance even in the presence of a contractual New York choice-of-law provision. "Under New York law, the law of the incorporating state has traditionally been applied to the internal affairs of a foreign corporation."⁵¹ Thus, for example, assertions of unfair

⁵¹ BBS Norwalk One, Inc. v. Raccolta, Inc., 60 F. Supp. 2d 123, 129 (S.D.N.Y.), *aff'd*, 205 F.3d 1321 (2d Cir. 1999); Hart v. Gen. Motors Corp., 517 N.Y.S.2d 490, 492 (N.Y. App. Div. 1987) ("One of the abiding principles of the law of corporations is that the issue of corporate governance . . . is governed by the law of

treatment by dissenting shareholders of foreign corporations likely would not be governed by New York law even in New York courts.⁵²

If a contract specifies New York law, and New York choice-of-law rules mandate applying Delaware law, it is nevertheless reasonable to view contractual choice of New York law as evidence of flight from Delaware law or attraction of New York law. For several reasons, the choice of New York law remains an important decision should litigation occur. First, the choice reflects an overall preference for New York law over that of Delaware on many subjects. When a New York forum is chosen, New York law will govern procedural issues,⁵³ and can govern issues unrelated to internal corporate governance.⁵⁴ Second, when contacts with New York are sufficiently strong compared to contacts with Delaware, New York law may even govern substantive matters touching on corporate governance.⁵⁵ Merely designating New York law in the contract introduces the possibility of plausibly arguing in litigation that New York law should govern on one or more issues. Third, for many of the contractual provisions studied here, the contract indicates that New York law should apply without regard to conflict-of-law rules.

Thus, consideration of conflicts-of-law rules is necessary to understand the detailed effect of specifying that a state's laws will govern. But, even after accounting for conflicts principles, the decision to designate New York or another state's laws is a significant endorsement of such laws and, in the case of a Delaware corporation, a notable failure to embrace Delaware law.

V. Empirical Results: Exploring the Choice-of-Forum Pattern of Flight from Delaware

This part explores the choice-of-forum clauses in the merger contracts. It first reports the relations between forum choice and state of incorporation, business locale, and attorney locale. It then shows the relation between choice-of-forum and choice-of-law. Regression results then confirm that Delaware corporations tend to opt for other states' fora more than other corporations opt for non-incorporating states' fora. For

the state in which the corporation is chartered”)); *Sokol v. Ventures Educ. Sys. Corp.*, No. 602856/02, 2005 WL 3249447, at *4 (N.Y. Sup. Ct. June 27, 2005) (citing *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996)).

⁵² *Globalvest Mgmt. Co. L.P. v. Citibank, N.A.*, No. 603386/04, 2005 WL 1148687, at *8 (N.Y. Sup. Ct. May 12, 2005) (citing *Mantei v. Creole Petroleum Corp.*, 402 N.Y.S.2d 822, 823 (N.Y. App. Div. 1978)) (“[c]omplaints arising out of alleged unfair treatment of dissenting stockholders in a merger or consolidation of foreign corporations have traditionally been held to be matters that should not be entertained in the courts of this state”).

⁵³ *Sokol*, 2005 WL 3249447, at *5.

⁵⁴ *Id.*

⁵⁵ *See, e.g., Greenspun v. Lindley*, 352 N.Y.S.2d 633, 637 (N.Y. App. Div. 1974), *aff’d*, 36 N.Y.2d 473 (1975) (indicating that “in certain unusual instances the law of the forum or of another state having more significant contacts with the transactions might be applied in place of the law of the state of incorporation”); *Lewis v. Dicker*, 459 N.Y.S.2d 215, 217 (N.Y. Sup. Ct. 1982) (“[t]he general rule in [New York] is the rule of ‘center of gravity’ or most significant contacts”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971).

purposes of this analysis, we focus only of the state of the forum selected and do not distinguish between federal and state courts within a state.⁵⁶

A. Choice-of-Forum Bivariate Analysis

Table 10, analogous to Table 3, focuses on choice-of-forum by again reducing the geographical units to Delaware, New York, California, and Other. As before, all places of incorporation or choices of law other than Delaware, New York, and California are coded as Other.

Table 10A, which addresses the acquiring firm’s state of incorporation, shows that a strong association exists between state of incorporation and choice-of-forum for litigation (conditional on a litigation forum having been designated), though the association is a bit weaker than the association for choice-of-law. The boldface diagonal percents show that, across the four major locales in the table, at least 40.9 percent of choices of forum are the same as the place of incorporation. New York corporations, however few, show an affinity for choosing New York courts. Delaware shows the weakest association between incorporation state and choice-of-forum. Only about 41 percent of Delaware acquiring corporations specify Delaware courts for litigation.

Table 10A also shows that the choice of litigation forum, like the choice of law, tends to flow away from Delaware and Other and towards New York and California. Delaware acquirers that specify a litigation forum account for 115 incorporations but only 64 forum choices. Similarly, the Other incorporation category has 89 incorporations but only 76 choices of forum. New York, in contrast, shows an increase in choices of forum relative to incorporations. Its four incorporations are accompanied by 45 choices of forum. Similarly, California increases from nine incorporations to 32 choices of forum. Table 10B, which addresses the acquired firm’s state of incorporation, shows a pattern similar to that of Table 10A. The positive association between state of incorporation and choice-of-forum is highly statistically significant ($p < .001$) in both tables.

Table 10A. Acquirer Firm State of Incorporation and Choice-of-Forum

Acquirer state of incorporation	Choice-of-forum				Total
	DE	NY	CA	Other	
DE (N)	47	27	17	24	115
Percent	40.87	23.48	14.78	20.87	100.00
NY (N)	0	4	0	0	4
Percent	0.00	100.00	0.00	0.00	100.00
CA (N)	2	1	4	2	9
Percent	22.22	11.11	44.44	22.22	100.00
Other (N)	15	13	11	50	89
Percent	16.85	14.61	12.36	56.18	100.00
Total (N)	64	45	32	76	217
Percent	29.49	20.74	14.75	35.02	100.00

⁵⁶ Of the contracts that specified a forum, 23.4% specified a federal forum. New York federal courts were specified in 31.1% of the contracts specifying New York as the forum. The analogous figures for other jurisdictions were 29.7% for Delaware, 12.5% for California, and 18.2% for Other.

Table 10B. Acquired Firm State of Incorporation and Choice-of-Forum

Acquired state of incorporation	Choice-of-forum				Total
	DE	NY	CA	Other	
DE (N)	43	22	9	24	98
Percent	43.88	22.45	9.18	24.49	100.00
NY (N)	0	1	0	0	1
Percent	0.00	100.00	0.00	0.00	100.00
CA (N)	0	1	1	0	2
Percent	0.00	50.00	50.00	0.00	100.00
Other (N)	20	20	20	50	110
Percent	18.18	18.18	18.18	45.45	100.00
Total (N)	63	44	30	74	211
Percent	29.86	20.85	14.22	35.07	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other.” Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum.

As in the case of choice-of-law, one expects the place of business to be associated with the choice-of-forum. Table 11A explores that relation for acquiring firms. The diagonal entries again suggest a strong association between place of business and choice-of-forum. For each place-of-business locale, the largest choice-of-forum percent is that locale. Table 11A also shows that acquirers with California and Other as places of business tend to flow away from their states of business and to New York and Delaware as choices of forum. New York is the place of business for 31 firms but the choice-of-forum for 45 firms. The flow towards Delaware—three places of business and 64 choices of forum—is, as in the case of inflow as a choice-of-law, presumably a consequence of its prominence as a state of incorporation. Table 11B, which reports on acquired firms, shows a pattern similar to that of Table 11A. The positive association between business locale and chosen forum is highly statistically significant in both tables ($p < .001$).

Table 11A. Acquirer Firm Place of Business and Choice-of-Forum

Acquirer place of business	Choice-of-forum				Total
	DE	NY	CA	Other	
DE (N)	2	0	0	1	3
Percent	66.67	0.00	0.00	33.33	100.00
NY (N)	10	17	1	3	31
Percent	32.26	54.84	3.23	9.68	100.00
CA (N)	19	4	22	8	53
Percent	35.85	7.55	41.51	15.09	100.00
Other (N)	33	24	9	64	130
Percent	25.38	18.46	6.92	49.23	100.00
Total (N)	64	45	32	76	217
Percent	29.49	20.74	14.75	35.02	100.00

Table 11B. Acquired Firm Place of Business and Choice-of-Forum

Acquired place of business	Choice-of-forum				Total
	DE	NY	CA	Other	
DE (N)	1	1	0	1	3
Percent	33.33	33.33	0.00	33.33	100.00
NY (N)	3	12	1	4	20
Percent	15.00	60.00	5.00	20.00	100.00
CA (N)	16	7	21	7	51
Percent	31.37	13.73	41.18	13.73	100.00
Other (N)	44	25	8	64	141
Percent	31.21	17.73	5.67	45.39	100.00
Total (N)	64	45	30	76	215
Percent	29.77	20.93	13.95	35.35	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as "Other." Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum.

As was also the case for choice-of-law, one expects attorneys to influence merging parties' choice-of-forum. Familiarity with their jurisdiction's courts is likely as important as familiarity with its law. Table 12 shows the relation between the reporting company's attorney's places of business and choice-of-forum. The chosen fora are spread relatively evenly across the four fora but the association between the attorney's place of business and selection of that locale as the forum is statistically significant ($p < .001$). Delaware's 29.5 percent exceeds the New York and California shares. The place of incorporation again likely drives its prominence.

Table 12. Attorney Place of Business and Choice-of-Forum

Attorney place of business	Choice-of-forum				Total
	DE	NY	CA	Other	
NY (N)	17	22	2	8	49
Percent	34.69	44.90	4.08	16.33	100.00
CA (N)	17	3	17	6	43
Percent	39.53	6.98	39.53	13.95	100.00
Other (N)	30	20	13	62	125
Percent	24.00	16.00	10.40	49.60	100.00
Total (N)	64	45	32	76	217
Percent	29.49	20.74	14.75	35.02	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as "Other." Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum.

As in the case of choice-of-law, Delaware numerically dominates over New York and California as the choice-of-forum but, after accounting for place of incorporation, choices of forum flow away from Delaware and towards New York and California. The

possibility again remains that movement of choice-of-forum towards New York and California is a consequence of places of business or attorney locales. To assess whether these factors fully account for the flow away from Delaware, we again limit the sample by (1) excluding all mergers in which New York is the place of business or the attorney locale, and (2) excluding all mergers in which California is the place of business or the attorney locale.

Table 13, panel A, shows the results with the New York exclusions. After the exclusions, no cases remain in which New York is the state of incorporation of the acquiring firm. Nevertheless, New York is the choice-of-forum in 15 mergers. Choice-of-forum flows to New York from Delaware corporations. Panel B shows that, after excluding California businesses and attorneys, California law is the choice of forum in eight mergers. Both New York and California show an inflow but New York's is more substantial, as in the case of choice-of-law. The association between the state of incorporation and selection of that state as the forum is statistically significant ($p < .001$) in both tables.

Table 13. State of Incorporation and Choice-of-Forum, Excluding New York and California Firms Located in Those States or with Attorneys in Those States

Choice-of-forum					
A. Excluding firms located in New York and firms with attorneys located in New York					
Acquirer's state of incorporation	DE	NY	CA	Other	Total
DE (N)	36	7	15	18	76
Percent	47.37	9.21	19.74	23.68	100.00
CA (N)	0	1	4	2	7
Percent	0.00	14.29	57.14	28.57	100.00
Other (N)	7	7	11	45	70
Percent	10.00	10.00	15.71	64.29	100.00
Total (N)	43	15	30	65	153
Percent	28.10	9.80	19.61	42.48	100.00
B. Excluding firms located in California and firms with attorneys located in California					
DE (N)	25	21	3	21	70
Percent	35.71	30.00	4.29	30.00	100.00
NY (N)	0	2	0	0	2
Percent	33.33	66.67	0.00	0.00	100.00
CA (N)	0	1	0	0	1
Percent	0.00	100.00	0.00	0.00	100.00
Other (N)	14	12	5	45	76
Percent	18.42	15.79	6.58	59.21	100.00
Total (N)	39	36	8	66	149
Percent	26.17	24.16	5.37	44.30	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as "Other." Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum.

Choice-of-forum occurs not only against a background of state of incorporation but also against a background of choice-of-law. One expects parties who have specified a choice-of-law to specify courts in the chosen state as the forum for litigation. Table 14 supports this belief. Its diagonal entries indicate that the forum chosen is overwhelmingly the same as the law chosen, and the association is highly statistically

significant (p. <001). But Table 14 also indicates a further flight from Delaware. Parties who choose Delaware law are less likely to choose Delaware as a forum than parties who choose non-Delaware law are to choose their choice-of-law as choice-of-forum.

Table 14. Choice-of-Law and Choice-of-Forum

Choice-of-law	Choice-of-Forum				Total
	DE	NY	CA	Other	
DE (N)	60	3	7	15	85
Percent	70.59	3.53	8.24	17.65	100.00
NY (N)	2	35	1	1	39
Percent	5.13	89.74	2.56	2.56	100.00
CA (N)	0	1	24	1	26
Percent	0.00	3.85	92.31	3.85	100.00
Other (N)	2	1	0	60	63
Percent	3.17	1.59	0.00	95.24	100.00
Total (N)	64	40	32	77	213
Percent	30.05	18.78	15.02	36.15	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other.” Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum.

B. Choice-of-Forum Regression Analysis

To facilitate regression analysis, we define a choice-of-forum “flight” variable analogous to the choice-of-law flight variable. “Choice-of-forum other than state of incorporation,” (the choice-of-forum flight variable) equals one when the acquiring firm’s state of incorporation and choice of litigation forum do not match. It equals zero when they do match.

Table 15 summarizes this variable. It shows that Delaware acquiring corporations tend to reject Delaware as a forum more than other acquiring corporations tend to reject their states’ courts. The 59.1 percent Delaware rejection rate is higher than the 47 percent Delaware rejection rate with respect to choice-of-law shown in Table 7. The difference across all states of incorporation is statistically significant at p=.023 (Fisher’s exact test).

Table 15. Choice-of-Forum Other than State of Incorporation

Acquirer’s state of incorporation	Choice-of-forum = state of incorporation	Choice-of-forum ≠ state of incorporation	Total
DE (N)	47	68	115
Percent	40.87	59.13	100.00
NY (N)	4	0	4
Percent	100.00	20.00	100.00
CA (N)	4	5	9
Percent	44.44	55.56	100.00
Other (N)	50	39	89
Percent	56.18	43.82	100.00
Total (N)	105	112	217
Percent	48.39	51.61	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as “Other.” Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum.

As in the case of choice-of-law, New York as an attorney locale, as an acquiring company’s place of business, or as an acquired company’s place of business may attract New York as a choice-of-forum. To examine whether these features account for the flight from Delaware as a forum, we report in the Appendix a version of Table 15 that excludes cases with New York attorneys or places of business. Delaware corporations then choose non-Delaware fora in approximately 54 percent of mergers, the sample as a whole chooses a forum other than the state of incorporation in approximately 44 percent of mergers (analogous to Table 15’s total row), and the differences in the table are statistically significant ($p=0.040$). If one excludes mergers with California attorney or place-of-business connections as well as mergers with these New York connections, the results remain statistically significant ($p=0.004$).

Table 15’s difference in concordance between law and forum suggests modeling concordance as a function of previously-described factors associated with choice-of-law. Table 16 reports in model (1) a regression model of Delaware as the choice-of-forum, analogous to model (1) in Table 9. The large, positive coefficient on the “Delaware law chosen” variable suggests that the most important factor in choosing Delaware as a litigation forum is that Delaware law have been designated the contract’s governing law. It also shows the importance of the acquired firm’s public status in selecting Delaware, as was the case for choice-of-law. Model (2) explores this result with New York acquirer locale contracts and New York attorney contracts excluded. New York corporations choose New York law without variation so a regression model cannot include a dummy variable for New York corporations. In addition, the data in the restricted sample are too sparse to allow inclusion of dummy variables for all our values of the acquiring firm’s business locale. Model (2) therefore includes dummy variables only for California and Other as business locales. It yields results consistent with model (1).

Table 16’s models (3) and (4) assess whether contracts specify a forum that differs from the choice of law. Model (4) again restricts the sample by excluding firms with New York connections via business locale or attorney. Both models indicate, consistently with Table 14, that selecting Delaware law is associated with choosing a litigation forum other than state designated as the choice of law, though the marginally significant result in model (4) is sensitive to the use of industry-level clustering.

Table 16. Logistic Regression Model of Choice-of-Forum Being Delaware or A State Other than Acquirer's State of Incorporation

	Dependent variable			
	(1) Delaware forum chosen	(2) Delaware forum chosen, excluding mergers with NY contacts	(3) Choice-of-forum ≠ choice-of-law	(4) Choice-of-forum ≠ choice-of-law, excluding mergers with NY contacts
Delaware law chosen	4.723** (7.32)	3.847** (6.02)	1.428* (2.40)	1.626+ (1.80)
Acquiring firm public	-0.390 (0.49)	-0.180 (0.26)	0.568 (0.54)	
Acquired firm public	1.510** (3.55)	1.127+ (1.86)	-0.311 (0.47)	0.140 (0.20)
Acquiring firm inc. in DE			1.069* (2.20)	0.962 (1.20)
Acquiring firm inc. in CA	-0.426 (1.12)		1.136 (1.24)	1.897** (2.78)
Acquiring firm inc. in Other	-0.411 (0.98)	-1.035+ (1.80)		
Attorney business in CA	1.470* (2.44)	1.986** (2.58)	-1.537* (2.06)	-2.047* (2.38)
Attorney business in Other	-0.635 (1.43)		0.464 (1.14)	
Acquiring firm bus. in NY	0.065 (0.01)			
Acquiring firm bus. in CA	-1.423 (0.27)	-1.698* (2.16)		
Acquiring firm bus. in Other	-1.503 (0.29)	-1.338** (2.71)		
Constant	-2.593 (0.53)	-2.317** (2.66)	-3.725** (3.40)	-2.832** (6.57)
Observations	209	146	210	146

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

Note. All states other than Delaware, New York, and California are coded as "Other." Excludes mergers that designate both Delaware and New York law. Excludes mergers that do not designate a choice of forum. In model (2) exclusion of the New York business and attorney locale mergers leaves only two California corporations, too few to include the "Acquirer=CA corporation" dummy variable in the models without leading to unstable results. Reference category for place of incorporation is Delaware in models (1) and (2), and Other in models (3) and (4). Reference category for attorney place of business is New York in models (1) and (3), Other in models (2) and (4). Reference category for place of business is Delaware in models (1) and (2). Models account for clustering on two-digit Standard Industrial Classification codes. The "Delaware law chosen" coefficients in models (1) and (4) are not statistically significant in unclustered models. Bootstrap-based z statistics are in parentheses. + significant at 10%; * significant at 5%; ** significant at 1%

VI. The Decision to Designate Choice-of-Forum

Somewhat surprisingly, many merger contracts do not specify a choice of forum. As shown in Table 17, only 53% of contracts specified a forum for resolving disputes – a

notable contrast with the universal presence of choice of law clauses in the data set.⁵⁷ Since many merger contracts do not specify a choice-of-forum, it is interesting to explore factors that explain those that do. One expects the attorney to play the major role in specifying whether a contract designates a litigation forum. But one might not expect the rate of designation to vary by the factors explored here. Designating a litigation forum would seem to be a desirable contract term regardless of locale. Table 17 summarizes the rate of specifying a litigation forum by attorney locale. It shows that New York attorneys specify a litigation forum in over 70 percent of the merger contracts. The differences across locales are highly statistically significant ($p < .001$).

Table 17. Litigation Forum Specification by Attorney Locale

Atty. place of bus.	Forum not specified	Forum specified	Total
NY (N)	18	49	67
Percent	26.87	73.13	100.00
CA (N)	30	44	74
Percent	40.54	59.46	100.00
Other (N)	146	125	271
Percent	53.87	46.13	100.00
Total (N)	194	218	334
Percent	47.09	52.91	100.00

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, mergers, Jan. 2002 to July 2002.

New York attorneys more frequently designating a forum is not a function of place of incorporation or locale. They tend to designate a litigation forum more frequently than other attorneys after accounting for place of incorporation and place of business. And, as Table 12 shows, they do not overwhelmingly designate New York as the forum.

VII. Conclusion

We report strong associations between both choice-of-law and choice-of-forum and several factors: business locale, attorney locale, and state of incorporation. Against the background of these associations, Delaware's prominence as a place of incorporation drives the simple descriptive story of choice-of-law and choice-of-forum. As shown in Table 2, Delaware is the most frequent choice of both law and forum. But Delaware's attractiveness as a place of incorporation is noticeably stronger than its draw as a choice-of-law or forum. This article reports significant outflows from Delaware towards New York and California with respect to both choice-of-law and forum. These results suggest that, other than corporate governance law, Delaware's appeal to sophisticated corporations does not rest primarily on its law or on its courts, however efficient or expert they may be. If Delaware's non-corporate law were a positive attraction, one might

⁵⁷ Our finding that contracting parties specify a forum much less frequently than they specify governing law is consistent with Marotta-Wurgler's study of 597 end user software license agreements, which found that 75% of the agreements contained a choice of law clause but only 28% selected a forum. Florencia Marotta-Wurgler, "Unfair" Choice of Law, Forum, and Arbitration Clauses: Much Ado About Nothing?, in "BOILERPLATE": FOUNDATIONS OF MARKET CONTRACTS (O. Ben-Shahar ed., Cambridge Univ. Press 2007) (forthcoming).

expect Delaware to at least be the choice-of-law for companies that chose to incorporate in that state. If Delaware's courts exerted an attractive force across legal areas, one would similarly expect Delaware to be the forum of choice for firms that incorporate there.

The importance of our results depends in part on the view one has of why Delaware attracts so many large incorporations. If one believes general judicial efficiency or clarity of law is part of Delaware's appeal, then our results provide contrary evidence. If one believes that Delaware's appeal rests largely on its corporate governance rules, then one might have a neutral *ex ante* view on whether Delaware would be a magnet for choice-of-law or choice-of-forum in merger contracts.

The results probably should be interpreted less to suggest that Delaware has unattractive features than that factors other than general law or forum drive corporate choice-of-law and forum. Some factors are suggested by this study's findings of associations between places of business and attorney locale and choice-of-law and forum, as described in Tables 4, 5, 11, and 12. Another is clearly shown by the finding that mergers involving public acquired firms tend to choose Delaware law. Delaware's corporate governance features likely drive this result. For any particular set of merger partners, factors not readily observable in our data likely drive the choice of law and forum.

Our results also generate an important new question. What factors influence contracting parties to specify a choice of law but not a choice-of-forum? We show here that although a governing law is specified in every contract in our data set, a litigation forum was specified in only slightly more than half the contracts. A partial descriptive explanation emerges from New York attorneys' greater tendency to specify a forum. But even New York attorneys do not always specify a litigation forum. What factors lead so many other attorneys to fail to specify one of the most important legal terms in a contract should be the subject of further study.

Appendix

Table A-1

acquirer	Law chosen not state of incorporation		Total
	no	yes	
DE corp.	74	51	125
	59.20	40.80	100.00
CA corp.	15	3	18
	83.33	16.67	100.00
Other	113	48	161
	70.19	29.81	100.00
Total	202	102	304
	66.45	33.55	100.00

Fisher's exact = 0.050

Table A-2

acquirer	Forum ≠ incorp. st.		Total
	no	yes	
DE corp.	34	40	74
	45.95	54.05	100.00
CA corp.	4	3	7
	57.14	42.86	100.00
Other	43	21	64
	67.19	32.81	100.00
Total	81	64	145
	55.86	44.14	100.00

Fisher's exact = 0.040