

STRATEGIC CHOICES IN MERGER AGREEMENTS: A STUDY OF DECISIONS TO CHOOSE (AND NOT TO CHOOSE) LAW AND FORUM

BRIAN E. PRICE*

I.

INTRODUCTION

Academic articles have long pondered the question why companies in such great numbers choose Delaware as their place of incorporation. Many theories—too numerous to mention—have been put forward to explain this occurrence. Suffice it to say that basically any possible explanation for why Delaware incorporation is so popular has been put forward.¹ The purpose of this paper, however, is not to try to understand why companies flock to Delaware in such great numbers, but rather to look at two lesser-studied factors, choice of law and choice of forum, to see if a relationship exists with a company's state of incorporation. In some sense, it is not so much where a company is incorporated that matters, but rather which law is applied to substantive actions which that company chooses to undertake. As a proxy for these actions, we will look at material definitive agreements of merger between corporations, also known more simply as merger agreements. We presume that these agreements are those which the corporations entering into them consider to be important since the agreements must be filed with the Security and Exchange Commission (SEC) and be properly represented to shareholders. Our analysis will look then to the choice of governing law and choice of adjudication forum in these contracts and compare them with a battery of explanatory variables.

As mentioned above, a number of explanations have been put forth as to why companies seek out Delaware incorporation, but our task here is to look more closely at whether corporations generally seek out what Delaware has to offer in

* J.D. Candidate, 2009, New York University School of Law; B.S. Mathematics/Applied Science, B.A. Economics, History, UCLA.

1. Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1975-77 (2006).

terms of law and adjudication. Obviously, Delaware corporations have chosen the Delaware General Corporation Law (DGCL) over the corporate laws of other states, but that decision may have taken place in a somewhat altered context. For many large (and old) companies it is likely that the choice of Delaware incorporation happened long ago and for many companies the Delaware choice may reflect a simple bandwagon effect reflecting an assumption of the benefits of Delaware law from the fact that so many other companies incorporate there. One of the benefits of looking at merger agreements is that, in a sense, we get a fresh look at corporate law choice since, despite the fact that the company may be incorporated elsewhere, they are effectively selecting the state law which they feel is best suited to their preferences presently. This, of course, ignores that choice of governing law and adjudication forum in a merger agreement is limited to those aspects of the law which will affect that contract. As a result, the choice of law may reflect state law which is particularly well suited for the contract, but maybe less so for more general corporate issues such as governance and shareholder issues.

Throughout our analysis, it will be useful to compare the results here to those from a similar empirical study by Theodore Eisenberg and Geoffrey Miller. Although the Eisenberg and Miller study also analyzes choice of law and choice of forum as dependant variables, it should be kept in mind that the data there was not gathered in the same way as here so some differences can be explained simply by the collection process.² Nevertheless, comparisons will be useful and any patterns from the Eisenberg and Miller study which can be reconfirmed here will only strengthen our argument.³

2. Furthermore, the Eisenberg and Miller study uses slightly different explanatory variables. In particular, they do not include business or attorney location variables for acquired firms. However, they do analyze the public or private status of the acquiring corporation in a variable which we do not consider here.

3. Whereas the data from the Eisenberg and Miller study came from searches of the SEC EDGAR database, our data is derived from the SEC full-text Form 8-K filing database. The reader should note that whereas EDGAR is a more general and all-inclusive database, the Form 8-K database is much smaller and directly suited to our type of search. Although our database may be more effective in filtering out unwanted results, it is a much smaller database (which in part can explain why our data set is roughly half that of Eisenberg and Miller for a similar study length).

Our results, for the most part, illustrate overwhelmingly what we might expect to find: companies flock to Delaware to incorporate and a majority of companies choose Delaware governing law and adjudication forum in their merger agreements. This first point is precisely in line with the overwhelming amount of literature on point and, although our sample is not of corporations generally but of those corporations which entered into merger agreements during the time period of the study, it seems fair to presume that this is at least a modest representation of corporations in general. The second point, despite being what we might expect, does not really tell us that much in and of itself given that we assume companies tend to select law and forums with which they are comfortable. It is also important to see that, although almost every merger agreement made a governing law choice, a substantial minority made no forum choice whatsoever. More will be said about this later but it is certainly interesting that so many contracts would leave such a seemingly important decision to chance.

The analysis of the two dependant variables, choice of governing law and choice of adjudication forum, will be achieved by looking at six different descriptive variables, three for the acquiring firm and three for the firm being acquired. State of incorporation simply records in which state each company is incorporated as is required to be reported on the 8-K form. State of business location and state of attorney business location identify the location of the business and the attorneys representing that business. The information for these location variables is recorded in the notice section of the merger contract which is included as an exhibit to the 8-K form. A flight variable will also be used to record continuity between a firm's state of incorporation and their choice of law and forum. A firm is considered to have flown from their incorporation state if they choose either the law or forum of another state in their contract, depending on which of these latter two variables we are considering.

The state of incorporation descriptive statistic is relatively uninteresting in that roughly half of the contracts choose Delaware as both the state of incorporation and the choice of law. This trend is diminished somewhat when we look at choice of forum due to the aforementioned large number of corporations making no choice of forum. The state of business location statistic is not very informative until we run regressions,

since there is a pretty even spread between many states. The attorney location statistic is interesting and confirms intuition that a large number of the lawyers working on these agreements are located in New York and to a lesser extent California. The flight statistic tends to confirm that companies incorporated in Delaware flee Delaware choice of law and forum less than companies incorporated elsewhere flee their state's choice of law and forum. Overall, however, there is net outflow from Delaware as 147 of the acquiring corporations in our sample were incorporated in Delaware but only 135 contracts chose Delaware governing law. This outflow was even more dramatic for forum selection with only 97 contracts choosing Delaware as the adjudication forum.

The logistic regression analysis for the choice of law variable tends to show Delaware corporations are more likely than non-Delaware corporations to select Delaware as the governing law in their contracts. However, companies whose lawyers are located outside Delaware are more likely to make the selection of Delaware governing law while companies whose place of business is outside Delaware are less likely. We also find that non-Delaware corporations are more likely than Delaware corporations to flee their state for another state's governing law. The regression analysis for the choice of forum variable yields moderately different results. The choice of Delaware governing law seems to be the single most important factor in a company likewise choosing Delaware as the adjudication forum. Attorney location is also an important positive factor with companies whose attorneys are located outside Delaware being more likely to choose Delaware as the forum. Interestingly, the results displayed little correspondence between a company's state of incorporation and the choice of Delaware as the adjudication forum. Finally, it is important to note the large negative constant term which indicates that the average firm is likely to choose no forum at all, according with our descriptive data.

We will progress in Part II with an overview of the data collection methods used in acquiring the data studied later on. This section is necessarily important because there is no standard method for data collection; every independent study will introduce variance into its data set due to variations in collection methods. Ideally, however, through a properly controlled collection procedure much of this variance can be eliminated

so that the results can be replicated through similar processes. In Part III, we will analyze the data through descriptive statistics. The patterns uncovered here will speak for themselves without the need for more complicated statistical tools. Part IV will analyze choice of law as the dependent variable first by giving descriptive statistics using the various explanatory variables and then through regression analysis. Because of the categorical nature of the variables in question, it is necessary to use logistic regression. Part V uses the same methods used in Part IV, but uses choice of forum as the dependant variable. In Part VI, we will analyze more in depth the choice of a large percentage of contracting parties to not include a forum selection clause and what factors may be driving such a decision. Part VII will conclude.

II.

DATA COLLECTION

The data were taken from 8-K current report filings which must be filed by a corporation with the Securities and Exchange Commission in accordance with the Exchange Act to announce any one of a list of major events.⁴ In particular, these data were taken from 8-K's representing the announcement under item 1.01 of entry into a material definitive agreement.⁵ A search was done of SEC filings for all item 1.01 filings between April 1 and September 30, 2006 (the search more specifically necessitated searching Exhibit 10 to the 8-K form as this is where the complete text of the material definitive agreement is filed). The choice of the 8-K current report filings as the research set is natural due to the necessarily public nature of the reports and their concurrent filing with the events in question. They are likewise a good choice because we can be fairly certain that the contracts reasonably allocate to both parties the rights and duties because, as noted by Eisenberg and Miller, they are written before disputes arise and

4. Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Exchange Act Release No. 49,424, [2003-2004 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 87,158 (Aug. 23, 2004).

5. The 8-K form can be found on the SEC's website at <http://www.sec.gov/about/forms/form8-k.pdf>.

the parties, as a result, do not know which terms would be to their advantage.⁶

The data recorded for each contract were the choice of governing law over a dispute, the forum or jurisdiction selected for adjudication of a dispute, state of incorporation for acquiring and acquired firm, state of business location for acquiring and acquired firm, and state of attorney's business location for acquiring and acquired firm. Analysis of how the companies decide to assign one firm as the acquirer and another as the acquired firm is beyond the scope of this paper but, as will be mentioned later, there is a real difference in the results depending on whether we are considering the acquirer or the acquired firm. State of incorporation was generally recorded in the first few subsections of the contract naming the parties. Choice of law and choice of forum were generally easy to record since the vast majority of contracts have independent sections for each, assuming the contract makes such a choice in the first place. State of business location and state of attorney's business location were both inferred from the mandatory notices subsection to the contract. Although it is not certain that each corporation or their attorney's truly does have their principal offices in the location given, the notices section does give us a sense of what location the company wants its shareholders to associate with the company (since the purpose of the 8-K filing is as notice to those shareholders). It must also be noted that a very small number of contracts did include both multiple business locations and multiple attorneys but for simplicity sake, only the first of each was recorded into data. Likewise, a similarly small number of contracts did name multiple governing laws relevant to different types of disputes but these were generally of no consequence since the choice recorded was that for which a dispute concerning the contract itself related.

The data set is not without its problems, especially those related to human error. First, rather than simply recording data for each and every contract that came up in the results, much difficulty was taken to exclude duplicate contracts.⁷ Du-

6. Eisenberg, *supra* note 1, at 1984.

7. This may help explain the smaller number of contracts in our sample as compared to that of Eisenberg and Miller. This disparity can also be explained by, as previously mentioned, different databases sampled and differ-

plicate filings exist because each contract necessarily has two parties, each of which can file with the SEC or because one of many subsidiaries of a larger company files. In order to remove some of the effects of over-counting contracts which appeared more than once in the raw results, only one of each was recorded. However, this was not a perfect process; it is possible that not all of these duplicates were removed from the data set. Also, many filings are merely amendments to prior filings and do not represent unique filings as far as data acquisition is concerned, whether or not they in fact are unique in our data set. Next, like the duplicate problem, because the data collection was done manually, there is a likelihood either that there were errors in the recording of the correct data or that the incorrect data was recording through human error. Any number of things could influence such a mistake, including misinterpretation of the wording of a contract or simply recording the wrong state.⁸

III.

ANALYSIS OF DATA

We will begin our analysis of the data by looking at the basic patterns found with a specific view to the raw numbers themselves for assistance. Tables 1a and 1b display the distributions by state of the firm's place of business, state of incorporation, and attorney's place of business for the acquiring firm and the acquired firm, respectively. The most telling relationship from both tables is the confirmation of the general intuition of Delaware's dominance in the market for incorporations. Delaware corporations make up 62.03% (147 of 247) of the acquiring firms and 52.59% (127 of 247) of the acquired firms. The greater number of acquiring firms incorporated in Delaware over acquired firms may also match the intuition that acquiring firms will be larger and more sophisticated and thus may seek out the benefits of Delaware law. Other

ent time periods. Whereas our sample is from mid-2006, the Eisenberg and Miller study is taken from the first half of 2002.

8. It should be noted once again that the comparisons made throughout the analysis with the Eisenberg and Miller study necessarily cannot comprehend differences in the two studies with regard to the exact data collection methods. Each data recorder is different and has certain peculiarities which cannot be quantified and cannot be properly addressed in a comparison of two unique studies.

trends to note in state of incorporation are that next to Delaware there are no large numbers of companies flocking to any one state in particular (in fact, Nevada is second for both groups with 9.28% and 5.91%, respectively).⁹ This may come as a surprise, but even more striking is that New York and California, the two largest states by population and in which a large amount of business takes place, have such a marginal share of corporations.

What is not striking, however, is that California and New York are number one and two in the number of corporations with their offices in those states. In fact, without doing a more detailed comparison, one can see a rough correlation between state population and the number of companies with their business in that state. This immediately establishes that almost every company incorporated in Delaware (in fact all but one) has its place of business in another state. We could attempt to make this statement stronger and argue that there is no correlation between place of incorporation and place of business, but our data are simply not extensive enough and in fact, with the exception of Delaware, the opposite would seem to be true.

Also as expected, the lawyers for these firms tend to be clustered in New York and California. What is surprising here is that a much greater percentage of acquiring firm's lawyers are located in New York (34.60%, 82 out of 247) as opposed to acquired firm's lawyers (20.25%, 48 out of 247). This pattern might also be explained in that we would expect acquiring firms to be larger and more sophisticated so that these firms would be represented by larger law firms which generally are located in New York. There also seems to be a rough correspondence between the number of firms located in a particular state and the number of attorneys located in that state. This phenomenon seems to be a clear representation of the fact that companies generally want to have legal representation close to where they do business and, if companies do more business in more populous states, then there will likewise be more law firms there representing those companies.

9. See David Mace Roberts & Rob Pivnick, *Tale of the Corporate Tape: Delaware, Nevada and Texas*, 52 BAYLOR L. REV. 45 (2000) (arguing that Nevada and Texas have altered their corporate laws so as to challenge and eliminate any advantage Delaware may have).

TABLE 1A.
DISTRIBUTION BY LOCATION OF ACQUIRING FIRM'S PLACE OF
BUSINESS, INCORPORATION, AND ATTORNEY'S PLACE OF BUSINESS

State	Acquirer Place of Business		Acquirer Place of Incorporation		Acquirer Attorney Location	
	N	%	N	%	N	%
AL	2	0.42	0	0.00	0	0.00
AZ	5	2.11	0	0.00	1	0.42
CA	37	15.61	4	1.69	38	16.03
CO	6	2.53	0	0.00	2	0.84
CT	8	3.38	0	0.00	1	0.42
DE	1	0.42	147	62.03	1	0.42
DC	1	0.42	0	0.00	7	2.95
FL	5	2.11	2	0.84	5	2.11
GA	13	5.49	10	4.22	8	3.38
IL	14	5.91	0	0.00	11	4.64
IN	0	0.00	0	0.00	0	0.00
IA	0	0.00	0	0.00	0	0.00
KS	0	0.00	0	0.00	1	0.42
KY	0	0.00	0	0.00	0	0.00
LA	2	0.84	0	0.00	1	0.42
ME	1	0.42	0	0.00	0	0.00
MD	2	0.84	4	1.69	0	0.00
MA	8	3.38	1	0.42	10	4.22
MI	4	1.69	3	1.27	3	1.27
MN	9	3.80	4	1.69	8	3.38
MS	1	0.42	1	0.42	0	0.00
MO	2	0.84	1	0.42	1	0.42
NE	2	0.84	0	0.00	0	0.00
NV	3	1.27	22	9.28	0	0.00
NJ	1	0.42	0	0.00	4	2.69
NM	0	0.00	0	0.00	0	0.00
NY	33	13.92	8	3.38	82	34.60
NC	4	1.69	2	0.84	0	0.00
ND	1	0.42	0	0.00	0	0.00
OH	5	2.11	2	0.84	3	1.27
OK	2	0.84	1	0.42	1	0.42
OR	1	0.42	2	0.84	1	0.42
PA	2	0.84	1	0.42	3	1.27
RI	0	0.00	0	0.00	1	0.42
SC	0	0.00	0	0.00	2	0.84
SD	1	0.42	0	0.00	0	0.00
TN	0	0.00	0	0.00	0	0.00
TX	24	10.13	4	1.69	19	8.02
UT	3	1.27	0	0.00	2	0.84
VT	1	0.42	1	0.42	0	0.00
VA	6	2.53	1	0.42	1	0.42
WA	4	1.69	2	0.84	2	0.84
WV	0	0.00	0	0.00	0	0.00
WI	1	0.42	1	0.42	1	0.42
International	21	8.86	12	5.06	4	1.69
Unknown	1	0.42	1	0.42	13	5.49
Total	237	100.00	247	100.00	237	100.00

TABLE 1b.
DISTRIBUTION BY LOCATION OF ACQUIRED FIRM'S PLACE OF
BUSINESS, INCORPORATION, AND ATTORNEY'S PLACE OF BUSINESS

State	Acquirer Place of Business		Acquirer Place of Incorporation		Acquirer Attorney Location	
	N	%	N	%	N	%
AL	3	1.27	3	1.27	4	1.69
AZ	2	0.84	0	0.00	1	0.42
CA	41	17.30	8	3.38	42	17.72
CO	9	3.80	2	0.84	3	1.27
CT	3	1.27	0	0.00	1	0.42
DE	0	0.00	127	53.59	0	0.00
DC	2	0.84	0	0.00	14	5.91
FL	9	3.80	5	2.11	5	2.11
GA	15	6.33	10	4.22	16	6.75
IL	13	5.49	2	0.84	13	5.49
IN	2	0.84	0	0.00	0	0.00
IA	1	0.42	0	0.00	0	0.00
KS	1	0.42	2	0.84	0	0.00
KY	1	0.42	1	0.42	0	0.00
LA	2	0.84	0	0.00	0	0.00
ME	1	0.42	0	0.00	0	0.00
MD	0	0.00	11	4.64	1	0.42
MA	7	2.95	2	0.84	9	3.80
MI	4	1.69	3	1.27	2	0.84
MN	6	2.53	6	2.53	5	2.11
MS	2	0.84	0	0.00	0	0.00
MO	5	2.11	1	0.42	3	1.27
NE	2	0.84	0	0.00	0	0.00
NV	4	1.69	14	5.91	0	0.00
NJ	11	4.64	2	0.84	3	1.27
NM	1	0.42	1	0.42	1	0.42
NY	21	8.86	5	2.11	48	20.25
NC	2	0.84	1	0.42	1	0.42
ND	0	0.00	0	0.00	0	0.00
OH	4	1.69	3	1.27	5	2.11
OK	1	0.42	0	0.00	0	0.00
OR	2	0.84	2	0.84	1	0.42
PA	10	4.22	5	2.11	12	5.06
RI	0	0.00	0	0.00	0	0.00
SC	2	0.84	2	0.84	1	0.42
SD	0	0.00	0	0.00	0	0.00
TN	2	0.84	1	0.42	2	0.84
TX	19	8.02	4	1.69	19	8.02
UT	0	0.00	2	0.84	1	0.42
VT	1	0.42	1	0.42	0	0.00
VA	5	2.11	1	0.42	3	1.27
WA	3	1.27	1	0.42	2	0.84
WV	1	0.42	0	0.00	0	0.00
WI	2	0.84	1	0.42	2	0.84
International	11	4.64	6	2.53	2	0.84
Unknown	4	1.69	2	0.84	15	6.33
Total	237	100.00	237	100.00	237	100.00

Table 2 below illustrates that not only do corporations flock in droves to Delaware to incorporate, but also they overwhelmingly choose to avail themselves of Delaware law and adjudication. The number of contracts choosing Delaware law (135 of 247) is roughly on par with the number of acquiring and acquired firms incorporated in Delaware (147 and 127 out of 247, respectively). Although this might seem to imply that companies incorporated in Delaware subsequently choose Delaware law in their contracts, we cannot infer that these represent the same data points. As we will demonstrate later, there is a more refined effect taking place here with a number of Delaware corporations opting out of Delaware law and a roughly equal number of non-Delaware corporations opting into Delaware law giving the illusion of no net change.

In fact, were we to try to imply a correlation between state of incorporation and governing law in general, we would be faced with the relatively high number of contracts choosing New York law (29 of 247) and the almost non-existent number of companies incorporated in New York (8 and 5 out of 247, respectively for acquiring and acquired firms). This pattern could be explained, however, by the number of companies either with their business in New York or with their lawyers in New York. The first explanation seems less likely though since there is no other state with a matching percentage between business location and governing law (i.e. California has 15.61% of the acquiring businesses but only 4.22% of the contracts choosing its governing law). So it would seem that New York lawyers are driving some of the movement to specify New York governing law; more will be said about this later.

Choice of forum exhibits a similar pattern to choice of forum with the major exception that a large percentage (29.11%, 69 of 247) of contracts simply specify no forum at all. As will be addressed later on, this is a strategic move on the part of the writers of the contract who either think the forum that will be chosen in the event of a dispute will favor their side or they simply choose not to address the issue (or perhaps other relevant dealings between the companies in question address this issue and make the point moot).¹⁰

10. Although the results described in Table 1a and 1b roughly mirror those of Eisenberg and Miller, those described in Table 2 diverge somewhat. In particular, the percentage they determined for Delaware governing law

TABLE 2.
DISTRIBUTION BY LOCATION OF GOVERNING LAW CHOICE AND
FORUM SPECIFIED

State	Choice of Law		Choice of Forum	
	Number	Percentage	Number	Percentage
AL	0	0.00	1	0.42
CA	10	4.22	11	4.64
DE	135	56.96	97	40.93
FL	5	2.11	4	1.69
GA	7	2.95	3	1.27
IL	3	1.27	2	0.84
MD	9	3.80	6	2.53
MA	2	0.84	1	0.42
MI	3	1.27	0	0.00
MN	4	1.69	1	0.42
MS	1	0.42	0	0.00
MO	2	0.84	1	0.42
NJ	0	0.00	1	0.42
NM	0	0.00	1	0.42
NY	29	12.24	23	9.70
NV	7	2.95	3	1.27
NC	1	0.42	0	0.00
OH	3	1.27	1	0.42
OR	1	0.42	1	0.42
PA	3	1.27	2	0.84
SC	1	0.42	0	0.00
TX	5	2.11	6	2.53
VA	1	0.42	0	0.00
WA	2	0.84	2	0.84
WI	1	0.42	1	0.42
Unknown	2	0.84	69	29.11
Total	237	100.00	237	100.00

IV.

EMPIRICAL RESULTS FOR CHOICE OF LAW PARAMETER

Choice of Law Bivariate Analysis

Table 3 shows that, at least for Delaware, there is a strong correlation between the company's state of incorporation and the governing law chosen in the contract. The pattern may or may not exist for other states as well, but for New York and

selections is 32.04% (which is much lower than our 56.96%) while their number of contracts with unspecified forums is 47.57% (which is much higher than our 29.11%). This discrepancy seems unlikely to be due simply to sampling difference and is most likely a result of differences in experimental design and indicative yet again of the different databases used to gather sample data.

California there are simply too few data points to make a meaningful inference. Likewise, for all the other states we may be inclined to presume a correlation but were we to divide this category state by state there would again be too few data points to be meaningful.

There is also somewhat of a move away from Delaware towards other states, New York, and California for choice of governing law by acquirers. Delaware accounts for 147 acquiring incorporations but only 135 choices of law whereas New York accounts for only 8 acquiring incorporations but 29 choices of law (likewise, 0 acquiring corporations and 10 choices of law for California). The other state category similarly evinces a moving away of choices of law, but since we cannot confirm each state individually and there are too few data points for each we cannot be sure of the effect. The bottom line here is that acquiring companies trend to New York and California with reference to choice of governing law to a moderate extent.

This effect is similar for acquired companies, in that we see increases from state of incorporation to choice of law for both New York and California, but interestingly there is an increase in the number of Delaware choices of law as compared with the number of Delaware incorporations (from 127 Delaware corporations to 135 Delaware choices of law).¹¹

11. Our data here roughly match that of Eisenberg and Miller with the exception that the effect of moving away from Delaware is much less marked here (and in fact nonexistent in the case of acquired firms) whereas they show large decreases in the number of firms choosing Delaware law for both groups.

TABLE 3.
ACQUIRING/ACQUIRED FIRM STATE OF INCORPORATION AND
CHOICE OF LAW

	Choice of Law				
Acquirer/ Acquired State of Incorporation	Delaware	New York	California	Other	Total
Delaware	108/104	15/11	5/2	19/10	147/127
%	73.47/81.89	10.20/8.66	3.40/1.57	12.93/7.87	100.00/100.00
New York	5/2	3/3	0/0	0/0	8/5
%	62.50/40.00	37.50/60.00	0.00/0.00	0.00/0.00	100.00/100.00
California	0/1	0/0	4/7	0/0	0/8
%	0.00/12.50	0.00/0.00	100.00/87.50	0.00/0.00	100.00/100.00
Other	22/28	11/15	1/1	44/53	78/97
%	28.21/28.87	14.10/15.46	1.28/1.03	56.41/54.46	100.00/100.00
Total	135/135	29/29	10/10	63/63	237/237
%	56.96/56.96	12.24/12.24	4.22/4.22	26.58/26.58	100.00/100.00

Table 4 reveals that, as expected, a very large number of companies with their place of business outside Delaware choose Delaware governing law. More specifically, these businesses appear to come from every state except New York, which itself maintains (or even increases) the number of choices of law over the number of businesses located in New York. Once again, we have to be careful not to presume that the companies that have their business in New York are the same companies that choose New York governing law. In this vein, it is entirely possible that companies with their business in New York do in fact leave for Delaware but that other companies with their businesses outside New York choose its law, perhaps because their lawyers are there. Also note that Delaware is the place of business for only one firm in our sample (and ironically, this one firm had the audacity to opt out of Delaware law and choose California law instead).

TABLE 4.
ACQUIRING/ACQUIRED FIRM PLACE OF BUSINESS AND
CHOICE OF LAW

	Choice of Law				
Acquirer/ Acquired Place of Business	Delaware	New York	California	Other	Total
Delaware	0/0	0/0	1/0	0/0	1/0
%	0.00/0.00	0.00/0.00	100.00/0.00	0.00/0.00	100.00/0.00
New York	15/10	11/7	0/1	7/3	33/21
%	45.45/47.62	33.33/33.33	0.00/4.76	21.21/14.29	100.00/100.00
California	23/24	4/3	8/9	2/5	37/41
%	62.16/58.54	10.81/7.32	21.62/21.95	5.41/12.20	100.00/100.00
Other	97/101	14/19	1/0	54/55	166/175
%	58.43/57.71	8.43/10.86	0.60/0.00	32.53/31.43	100.00/100.00
Total	135/135	29/29	10/10	63/63	237/237
%	56.96/56.96	12.24/12.24	4.22/4.22	26.58/26.58	100.00/100.00

Table 5 presents the relation between the attorney's place of business and choice of law. As with Table 4 above regarding the company's place of business, the trend here appears to be moving towards Delaware and away from the other states. The previously mentioned large discrepancy between acquiring firm attorneys and acquired firm attorneys located in New York is eliminated. This would seem to confirm our previous conclusion that New York lawyers drive their clients to Delaware.¹²

12. The results in Tables 4 and 5 reflect those of Eisenberg and Miller only in movement towards Delaware away from other states but not in terms of percentages. They found a much tighter correlation between the two place of business variables and choice of law, much of which simply goes back to their much lower overall figure for Delaware governing law selections mentioned above.

TABLE 5.
ACQUIRING/ACQUIRED FIRM ATTORNEY PLACE OF BUSINESS AND
CHOICE OF LAW

	Choice of Law				
Acquirer/ Acquired Attorney Place of Business	Delaware	New York	California	Other	Total
Delaware	0/0	1/0	0/0	0/0	1/0
%	0.00/0.00	100.00/0.00	0.00/0.00	0.00/0.00	100.00/0.00
New York	49/30	19/11	0/0	14/7	82/48
%	59.76/62.50	23.17/22.92	0.00/0.00	17.07/14.58	100.00/100.00
California	27/27	2/2	6/6	3/7	38/42
%	71.05/64.29	5.26/4.76	15.79/14.29	7.89/16.67	100.00/100.00
Other	59/78	7/16	4/4	46/49	116/147
%	50.86/53.06	6.03/10.88	3.45/2.72	39.66/33.33	100.00/100.00
Total	135/135	29/29	10/10	63/63	237/237
%	56.96/56.96	12.24/12.24	4.22/4.22	26.80/26.80	100.00/100.00

Choice of Law Regression Analysis

We now turn to regression analysis in order to simultaneously model the effects of all the aforementioned variables. Regression analysis with this data is not without problems, particularly since it is highly likely that the explanatory variables (i.e. state of incorporation, place of business, attorney location) are interdependent with one another. This interdependency, although worrisome, does not automatically make the results undependable; we can use these results in conjunction with the previous bivariate analysis to achieve a fuller result.

Table 6 represents descriptive statistics of what we will call the flight variable. This variable basically records any difference between the state of incorporation of the company and the choice of law made in the contract and if so then there has been flight. The overall trend is that roughly two-thirds of the companies, both acquiring and acquired, chose to keep the governing law of their state of incorporation while only about one-third changed. Although there are too few data points for New York and California to give a confident interpretation, there are distinct differences between Delaware and other states for both subcategories. It appears as though Delaware corporations were far less likely to leave their state of incorporation for the greener pastures of another state's governing laws than other state corporations were. Only 26.53% (39 of 147) of Delaware acquiring corporations fled while 56.41%

(44 of 78) of other acquiring corporations fled (similarly, only 18.11% (23 of 127) of Delaware acquired corporations fled compared with 55.67% (54 of 97) of other corporations that fled).¹³ Although the data clearly demonstrate that a notable portion of Delaware corporations do choose other state laws to govern their contracts, this portion is far less than that for other state corporations.

TABLE 6.
ACQUIRING/ACQUIRED FIRM STATE OF INCORPORATION AND
FLIGHT IN CHOICE OF LAW

	No Flight	Flight	Total
Acquirer/Acquired State of Incorporation			
Delaware	108/104	39/23	147/127
%	74.37/81.89	26.53/18.11	100.00/100.00
New York	3/3	5/2	8/5
%	37.50/60.00	62.50/40.00	100.00/100.00
California	4/7	0/1	4/8
%	100.00/87.50	0.00/12.50	100.00/100.00
Other	34/43	44/54	78/97
%	43.59/44.33	56.41/55.67	100.00/100.00
Total	149/157	88/80	237/237
%	62.87/66.24	37.13/33.76	100.00/100.00

We now turn to Table 7 which presents the results of logistic regression based on two different dependant variables, Delaware law chosen and flight. Logistic regression is appropriate because of the categorical nature of both the dependant and independent variables. Such logistic regression requires the creation of dummy variables for each variable we wish to analyze in the model. For example, the Delaware law chosen variable has a value of one if Delaware law was selection and a zero otherwise, and likewise the flight variable has a value of one if there was flight from the state of incorporation to a different state's governing law and a value of zero if the two states were the same. Similarly, dummy variables were created for state of

13. This result is in stark contrast to the Eisenberg and Miller results which show a more neutral flight effect as between Delaware and other states. Although they only give results for acquiring companies, they found that 46.96% of Delaware corporations fled while 36.87% of other state corporations fled. This difference is reflected in this study's regression results which show a much less concrete result than the Eisenberg and Miller study.

firm incorporation, state of business location, and state of attorney location for each of the three comparison state groups in question, New York, California, and other (thus generating nine independent dummy explanatory variables used in each model). Models (1) and (2) analyze the Delaware law chosen variable with model (1) using acquiring corporation explanatory variables and model (2) using acquired corporation explanatory variables. Likewise, models (3) and (4) look at the flight variable based respectively upon acquiring and acquired corporation explanatory variables.¹⁴ By not including dummy variables for Delaware, we make this the reference category upon which the changes in other categories are measured against. The table reports the coefficient in the top line describing relative change and the standard error in the bottom line describing variability.¹⁵

In model (1), the coefficients for firms incorporated in other states and businesses located in New York and California are all negative relative to the reference category with that for firm incorporated in other statistically significant at the 1% level. The lack of significance for the business location variables merely reflects the small number of contracts which fit into those categories and does not imply that there is not really something going on there. The negative numbers for all the business location dummies suggests that the choice of Delaware law is negatively associated with a company having its

14. Each model reports a coefficient and a standard error for each independent variable. Coefficients are reported as log-odds, but odds ratios can be recovered by taking the inverse of the natural logarithm of the coefficient. For example, in Model (1) the coefficient for the Firm Located in Other variable is -2.200 which equates to an odd ratio of .111 ($= e^{-2.200}$). Thus, acquiring firms incorporated in these other states are only about one-ninth as likely to choose Delaware governing law as are acquiring firms incorporated in Delaware. The reported standard errors are used to test for significance and can also be used to construct confidence intervals (a z-statistic is acquired by dividing the coefficient by the standard error). For example, the Firm Located in Other variable has a standard error of 0.36 which yields a z-statistic of -6.18 ($= -2.200/0.36$) which is significant at the 1% level. Alternatively we can use the standard error to construct a 95% confidence interval of (-2.898, -1.503) which, converted to odds ratios, tells us that we can be fairly certain that these firms are somewhere between one-twentieth and one-fifth as likely to choose Delaware law.

15. The firm incorporated in California dummy variable had to be dropped from the two acquiring corporation models (1) and (3) in part because of the small number of contracts in that category.

place of business outside Delaware. The large negative coefficient for firm incorporated in other and its significance suggest that there is a negative association between choice of Delaware law and incorporation in most states. This is just what we would expect from Table 3 which shows a large number of companies incorporated in other states opting for New York and California governing law. The positive (and statistically significant for California at the 5% level) coefficients for attorney location suggest a positive association between the choice of Delaware law and a company having an attorney outside of Delaware. This, coupled with the fact that most attorneys are outside Delaware to begin with, suggests that attorneys generally opt out of their own states governing law in order to choose Delaware law. This relationship is also supported by the results from Table 5 which showed this mass exodus of attorneys towards Delaware governing law.¹⁶

Model (2) reveals similar results to those found in model (1), with almost every coefficient maintaining its sign and increasing in size. In this model, all the state of incorporation dummies give negative coefficients, with those for California and other states large and statistically significant at the 1% level. This suggests that the choice of Delaware law is negatively associated with a company being a non-Delaware corporation. As in model (1), the business location dummies are all negative with New York significant at the 5% level and California significant at the 10% level. This suggests, as in model (1), a negative association between choice of Delaware law and a company having its place of business outside Delaware. Again, all the attorney location variables are positive but they are now each significant at the 10% level implying an even stronger inference can be made of the positive relation between choice of Delaware law and attorney location outside of Delaware.

In model (3), we find no real patterns between states in each of the three subcategories of incorporations, business location or attorney location. As in model (1), the only non-trivial explanatory variable is state of incorporation as other

16. Model (1) roughly mirrors the results found by Eisenberg and Miller with the exception of the attorney location variables which they found to be uniformly negative. Nevertheless, the strong concordance between the incorporated in other states variable and the business location variables is promising.

states. This suggests a positive relationship between flight from state of incorporation and being incorporated in one of these other states. This is in accord with what we found in Table 6: that non-Delaware corporations are much more likely than Delaware corporations to flee their state of incorporation for another state's governing law. Model (4) provides substantially the same results as those found in model (3) and confirms what we just said about the state of incorporation in other states variable. There also appears to be more of a trend with respect to the business location variables which exhibit a consistently positive tendency. Although none are statistically significant, which can be explained by a small sample size, this suggests a positive relation between flight from state of incorporation and business location in states other than Delaware. This model thus illustrates once again what we saw in Table 8 that companies incorporated and located outside of Delaware flee that state more often.

TABLE 7.
LOGISTIC REGRESSION MODELS OF DELAWARE CHOICE OF LAW AND
FLIGHT WITH DEPENDANT VARIABLES BASED ON BOTH ACQUIRING
AND ACQUIRED CORPORATION STATUS

	(1)	(2)	(3)	(4)
	Dependant Variables			
	Delaware Law Chosen (Acquiring)	Delaware Law Chosen (Acquired)	Flight in Law (Acquiring)	Flight in Law (Acquired)
Independent Variables				
Firm Incorporated in NY	0.418 (0.84)	-0.903 (1.03)	1.066 (0.81)	0.366 (1.03)
Business Location in NY	-1.761 (1.65)	-3.276* (1.55)	-0.110 (1.67)	1.292 (1.50)
Attorney Located in NY	0.958 (0.714)	1.646+ (0.86)	1.017 (0.68)	0.139 (0.76)
Firm Incorporated in CA	- (1.927)	-3.354** (1.17)	- (0.579)	-0.428 (1.465)
Business Location in CA	-1.927 (1.70)	-2.661+ (1.55)	0.579 (1.72)	1.465 (1.54)
Attorney Located in CA	1.973* (0.89)	1.875+ (1.00)	-0.728 (0.83)	-1.430 (0.94)
Firm Incorporated in Other	-2.200** (0.36)	-2.507** (0.35)	1.617** (0.34)	1.668** (0.33)
Business Location in Other	-0.208 (1.584)	-2.091 (1.42)	-0.932 (1.63)	0.623 (1.42)
Attorney Located in Other	0.513 (0.70)	1.579+ (0.82)	0.374 (0.67)	-0.030 (0.72)
Constant	0.844 (1.59)	2.216 (1.21)	-0.996 (1.64)	-2.054 (1.27)
Observations	233	237	233	237
Pseudo R ²	0.1732	0.2403	0.1156	0.1340

Standard errors in parentheses

+ significant at 10% level, * significant at 5% level, ** significant at 1% level

V.

EMPIRICAL RESULTS FOR CHOICE OF FORUM PARAMETER

Choice of Forum Bivariate Analysis

This section will explore the choice of forum variable just as the previous section explored the choice of law variable. We will do so through the use of bivariate analysis as in Tables 3 through 6 and with regression analysis over multiple models. Table 8 represents the analog of Table 3, but for the choice of forum variable rather than the choice of law variable. If we ignore the small number of contracts that fall into the catego-

ries for California and New York, this table shows a similar pattern to that in Table 3 with a high correlation between state of incorporation and state choice of forum. The number of Delaware corporations, however, that also choose Delaware as the forum is markedly lower than the number of Delaware corporations that also choose Delaware law. Only 53.74% of acquiring corporations and 62.20% of acquired corporations from Delaware also choose Delaware as their forum while the corresponding percentages for Delaware law are 73.47% and 81.89%. This difference can in part be explained by the high number of corporations overall (29.11%) that chose no litigation forum at all and we can presume that at least some of these corporations are incorporated in Delaware (and in fact, 31.29% of Delaware corporations chose a forum in the other state category which includes none). The other interesting thing to note from this data is the increase to a relatively high percentage of the number of incorporations in other states that likewise choose other states for their forum. The data indicate an increase in this percentage over that for incorporations in other states which also choose law in other states (from 56.41% to 69.23% for acquirers and from 54.64% to 71.13% for acquired firms). This is again most likely driven by the fact that contracts which make no choice of forum are included in the other state category.¹⁷

17. This data is strongly in accord with that of Eisenberg and Miller except that they measure the other/other category differently with only 55.68% and 44.95% of companies respectively therein as compared with our 69.23% and 71.13%. The difference seems to come from a much greater evidence of movement to California from other states as the choice of forum for Eisenberg and Miller with 12.60% and 18.35% respectively as opposed to our 1.28% and 1.03%.

TABLE 8.
ACQUIRING/ACQUIRED FIRM STATE OF INCORPORATION AND
CHOICE OF FORUM

	Choice of Forum				
Acquirer/ Acquired Place of Incorporation	Delaware	New York	California	Other	Total
Delaware	79/79	12/10	10/6	46/32	147/127
%	53.74/62.20	8.16/7.87	6.80/4.72	31.29/25.20	100.00/100.00
New York	5/2	1/2	0/0	2/1	8/5
%	62.50/40.00	12.50/40.00	0.00/0.00	25.00/20.00	100.00/100.00
California	0/0	0/0	0/4	4/4	4/8
%	0.00/0.00	0.00/0.00	0.00/50.00	100.00/50.00	100.00/100.00
Other	13/16	10/11	1/1	54/69	78/97
%	16.67/16.49	12.82/11.34	1.28/1.03	69.23/71.13	100.00/100.00
Total	97/97	23/23	11/11	106/106	237/237
%	40.93/40.93	9.70/9.70	4.64/4.64	44.73/44.73	100.00/100.00

Table 9 represents the data analogous to that represented in Table 4 showing bivariate statistics between company place of business and choice of forum. As with the choice of law analysis, there are almost zero companies that have their place of business in Delaware which implies that to get to the roughly 40% of companies that choose Delaware as their forum we need companies with their place of business in other states to leave those states. The general trend seems to be away from California and other states to Delaware as the chosen forum while New York roughly maintains its share. This is likewise roughly in line with what we found in the analysis of choice of law except that the movement away from the other states category seems to be less (only 63 of the 166 acquiring companies from other states also chose other states law while 106 chose other states forum). This represents what we would expect, however, when we take into account the fact that the other category includes no forum selected whatsoever, so this lack of change is most likely being driven by those corporations that choose no forum and thus appear as though they have moved to the other states category. It is necessary once again to keep in mind that the other states category accounts for both other states and no forum selected and since 69 of 237 contracts chose no forum while 37 selected a state other

than Delaware, New York or California that roughly 2 out of 3 contracts in the other category are no choice at all.

TABLE 9.
ACQUIRING/ACQUIRED FIRM PLACE OF BUSINESS AND
CHOICE OF FORUM

	Choice of Forum				
Acquirer Place of Business	Delaware	New York	California	Other	Total
Delaware	0/0	0/0	1/0	0/0	1/0
%	0.00/0.00	0.00/0.00	100.00/0.00	0.00/0.00	100.00/0.00
New York	13/10	8/4	0/1	12/6	33/21
%	39.39/47.62	24.24/19.05	0.00/4.76	36.36/28.57	100.00/100.00
California	18/17	1/2	7/8	11/14	37/41
%	48.65/41.46	2.70/4.88	18.92/19.51	29.73/34.15	100.00/100.00
Other	66/70	14/17	3/2	83/86	166/175
%	39.76/40.00	8.43/9.71	1.81/1.14	50.00/49.14	100.00/100.00
Total	97/97	23/23	11/11	106/106	237/237
%	40.93/40.93	9.70/9.70	4.64/4.64	44.73/44.73	100.00/100.00

Table 10 is the analog of Table 5 and represents bivariate analysis of the attorney's place of business and state choice of law. The numbers found in this table are on par with those in Table 9, with the obvious exception of New York. Perhaps due to the fact that there is an overrepresentation of New York in terms of attorneys, we find that a large number of companies whose attorneys are in New York, particularly for acquiring firms, do not choose New York as their forum (only 23 of 82 contracts with attorneys from New York for acquiring companies chose New York as the forum). Significant decrease in the number of companies with businesses in other states that choose other states as their forum continues for attorneys, but to a much smaller extent. Whereas we saw decreases of 60 and 69 respectively for place of business, we see decreases of only 10 and 39 for attorney place of business. This is likely reminiscent of the fact that a good portion more attorneys are not in these other states to begin with rather than that they are there and choose to move away. The main trend, however, in comparison with the choice of law analysis earlier on, is that far fewer firms choose Delaware as their forum than choose Delaware as their choice of law and they appear to be moving to the other states (and in particular to the choice of no forum category).

TABLE 10.
ACQUIRING/ACQUIRED FIRM ATTORNEY PLACE OF BUSINESS AND
CHOICE OF FORUM

	Choice of Forum				
Acquirer/ Acquired Attorney Place of Business	Delaware	New York	California	Other	Total
Delaware	0/0	1/0	0/0	0/0	1/0
%	0.00/0.00	100.00/100.00	0.00/0.00	0.00/0.00	100.00/100.00
New York	38/28	16/8	0/0	28/12	82/48
%	46.34/58.33	19.51/16.67	0.00/0.00	34.15/25.00	100.00/100.00
California	21/21	0/2	6/8	11/11	38/42
%	55.26/50.00	0.00/4.76	15.79/19.05	28.95/26.19	100.00/100.00
Other	38/48	6/13	5/3	67/83	116/147
%	32.76/32.65	5.17/8.84	4.31/2.04	57.76/56.46	100.00/100.00
Total	97/97	23/23	11/11	106/106	237/237
%	40.93/40.93	9.70/9.70	4.64/4.64	44.73/44.73	100.00/100.00

Table 11 summarizes the results of a bivariate analysis of the choice of law variable and the choice of forum variable. By looking at the diagonal panes, we can immediately see that, as a whole, a strong majority of contracting parties choose both the same state for governing law and as the forum. There is a sub-pattern present, however, in that a strong minority of parties (in the range of 24.44% to 40.00%) choose to move to the other state category from the state with which they chose governing law. Although it is premature to infer anything concrete, it seems highly likely that these firms which choose the other category are in fact opting for no forum at all which would match our previously recorded 29.11% for the total percent of contracts that choose no forum.¹⁸

18. The results shown in Table 11 are extremely similar to those reported by Eisenberg and Miller. In fact, if we ignore New York and California, which due to their low total number of contracts are likely somewhat skewed, we find a difference of only a couple percentage points in the diagonal Delaware/Delaware and other/other categories.

TABLE 11.
CHOICE OF LAW AND CHOICE OF FORUM

	Choice of Forum				
Choice of Law	Delaware	New York	California	Other	Total
Delaware	95	2	5	33	135
%	70.37	1.48	3.70	24.44	100.00
New York	1	20	0	8	29
%	3.45	68.97	0.00	27.59	100.00
California	0	0	6	4	10
%	0.00	0.00	60.00	40.00	100.00
Other	1	1	0	61	63
%	1.59	1.59	0.00	96.83	100.00
Total	97	23	11	106	237
%	40.93	9.70	4.64	44.73	100.00

Choice of Forum Regression Analysis

We will now begin regression analysis in order to better understand the choice of forum variable while simultaneously seeing the effects of each of the explanatory variables described above in the bivariate analysis. In order to do so, as with the choice of law variable, we will define a flight variable for choice of forum which is equal to zero if the choice of forum is the same as the company's state of incorporation and equal to one if they are not the same.

A bivariate analysis of the flight variable for both acquiring and acquired firms can be found below in Table 12. It is immediately obvious that, as compared with the flight variable for the choice of law variable as described in Table 6, there is much more flight in the choice of forum flight variable. Whereas for the choice of law flight variable we had flight rates of 26.53%, 62.50%, 0.00%, and 56.41% for Delaware, New York, California and other states acquiring corporations respectively, for the choice of forum flight variable, we have flight rates of 46.26%, 87.50%, 100.00% and 79.49% respectively for acquiring corporations. As a whole, about 55% of firms changed from their state of incorporation to a new choice of forum (or lack of a choice) whereas only about 35% of firms switch governing law.¹⁹ It is also worth noting that

19. This pattern is similar to that found in Eisenberg and Miller whose rate of flight for choice of law was about 40% whereas their rate of flight for choice of forum was about 52%.

firms incorporated in Delaware are substantially less likely than firms incorporated elsewhere to flee in their choice of forum in a merger contract. Whereas only 46.26% and 37.80% respectively of Delaware corporations fled Delaware adjudication, 79.49% and 74.23% of other states' corporations chose another state as their forum. As with the choice of law flight variable, but to a somewhat lesser extent, it appears that Delaware corporations are substantially more likely to stay in Delaware than their counterpart corporations in other states are. The higher overall rates of flight for all companies can in part be explained by the propensity to choose no forum at all (29.11% of contracts) which will always be recorded as a flight, since virtually every contract does specify a state of incorporation for both acquiring firm and acquired firm.

TABLE 12.
ACQUIRING/ACQUIRED FIRM STATE OF INCORPORATION AND
FLIGHT IN CHOICE OF FORUM

	No Flight	Flight	Total
Acquirer/Acquired State of Incorporation			
Delaware	79/79	68/48	147/127
	53.74/62.20	46.26/37.80	100.00/100.00
New York	1/2	7/3	8/5
	12.50/40.00	87.50/60.00	100.00/100.00
California	0/4	4/4	4/8
	0.00/50.00	100.00/50.00	100.00/100.00
Other	16/25	62/72	78/97
	20.51/25.77	79.49/74.23	100.00/100.00
Total	96/110	141/127	237/237
	40.51/46.41	59.49/53.59	100.00/100.00

Table 13 presents the results of logistic regression for two dependant variables, Delaware forum chosen and the flight variable. The explanatory variables are the same as with the choice of law analysis above, except that here we add the Delaware choice of law variable. As in Table 7, Table 13 shows the four models with two models for each dependant variable representing the use of both acquiring and acquired firm explanatory variables. Also, note that in most models several variables were dropped because of problems associated with their comparatively small size to the whole data set.

Models (1) and (2) both exhibit strong positive coefficients which are statistically significant at the 1% level for the Delaware law chosen variable. This seems to imply that contracts which chose Delaware law were positively associated with the choice of Delaware as the forum. This is in agreement with what we already stated in reference to Table 11 and elsewhere but serves as more confirmation of the intuition that should a contract pick Delaware law then it seems likely it would want Delaware to be the forum for interpreting that law. Models (1) and (2) also give positive coefficients, many of which are statistically significant, for the several attorney location variables. This implies that the choice of Delaware as forum is positively correlated with an attorney being located in some other state. As previously mentioned, this does not really tell us very much since most of the attorneys in the sample are already located outside of Delaware. Nevertheless, this does confirm the fact that these attorneys are proactively choosing Delaware as the forum rather than the state in which their business is located. The large constant coefficient values in both models (1) and (2) and high level of statistical significance suggests that, all things being equal, firms are less likely to choose Delaware forum, which confirms the data above and the large numbers of firms opting for no choice of law.

Models (3) and (4) present statistically significant results for the Delaware law chosen variable but in the negative direction and with less magnitude. This suggests that a company fleeing its state of incorporation for another in forum choice is negatively associated with that company being a Delaware corporation (i.e. Delaware companies are less likely to flee Delaware when they choose a forum). As with the logistic regression models for the choice of law variable, models (3) and (4) show a positive coefficient for incorporation in other states that is statistically significant at the 1% level. This effect is most likely a consequence of the inclusion in the other states category of the no forum choice option and thus represents what we have already said about a large number of contracts opting for this choice rather than their state of incorporation. Similarly, we find that the coefficients on the attorney located in California variable are negative and statistically significant. The explanation for this effect is less clear but the consequences are obvious in that California lawyers are in large part

not choosing California as the adjudicating forum in their contracts, a result which is borne out in Table 10.

TABLE 13.
LOGISTIC REGRESSION MODELS OF DELAWARE CHOICE OF FORUM
AND FLIGHT WITH DEPENDANT VARIABLES BASED ON BOTH
ACQUIRING AND ACQUIRED CORPORATION STATUS

	(1)	(2)	(3)	(4)
	Dependant Variables			
	Delaware Forum Chosen (Acquiring)	Delaware Forum Chosen (Acquired)	Flight in Forum (Acquiring)	Flight in Forum (Acquired)
Independent Variables				
Delaware Law Chosen	4.697** (0.78)	4.881** (0.84)	-1.357** (0.34)	-0.681* (0.34)
Firm Incorporated in NY	1.614 (1.53)	-0.647 (2.10)	1.894+ (1.13)	0.489 (1.08)
Business Location in NY	- (1.52)	1.953 (1.38)	- (1.52)	1.554 (1.52)
Attorney Located in NY	2.494* (1.16)	3.305* (1.30)	-1.023 (0.87)	-1.293 (0.89)
Firm Incorporated in CA	- (0.90)	- (0.90)	- (0.90)	-0.104 (0.90)
Business Location in CA	-0.136 (1.01)	- (1.01)	1.224 (0.83)	2.788+ (1.53)
Attorney Located in CA	2.538+ (1.36)	3.195* (1.32)	-2.525* (1.07)	-2.791** (1.02)
Firm Incorporated in Other	-0.667 (0.48)	-0.919* (0.47)	1.226** (0.39)	1.256** (0.36)
Business Location in Other	-0.152 (0.68)	1.127 (0.82)	-0.225 (0.49)	1.556 (1.41)
Attorney Located in Other	2.196+ (1.16)	1.933 (1.18)	-1.289 (0.87)	-1.174 (0.85)
Constant	-5.888** (1.41)	-7.056** (1.54)	2.141* (0.93)	-0.262 (1.20)
Observations	237	237	237	237
Pseudo R ²	0.4625	0.4973	0.1825	0.1443

Standard errors in parentheses

+ significant at 10% level, * significant at 5% level, ** significant at 1% level

VI. A CLOSER LOOK AT THE CHOICE OF NO FORUM SELECTION CLAUSE

In this section, we will analyze the choice of forum variable more in depth looking for patterns that can help explain

why merging companies may or may not choose to specify an adjudication forum. As mentioned before, the 29.11% of contracts in this sample which do not specify a forum is far lower than the 47.09% of contracts in the Eisenberg and Miller study which do not.²⁰ Another interesting study of dispute resolution clauses in end-user license agreements (EULAs), however, finds that only 28% of contracts include forum selection clauses.²¹ We should be careful not to draw too many comparisons between our own study and this one since the latter deals with contracts not negotiated in the same way as merger contracts²², but the results are nevertheless enlightening. Tables 14, 15 and 16 give relevant statistics to the choice of whether or not to identify an adjudication forum broken down into our three main explanatory variables of state of incorporation, place of business, and attorney place of business.

It seems intuitively reasonable that larger, more evolved companies would be more likely to specify forum in their merger agreements than would be companies for which less is at stake in such an agreement. As a proxy for size and sophistication, we can look at companies incorporated in Delaware which have their place of business in California and New York and whose lawyers are located in New York. Table 14 shows that Delaware corporations overwhelmingly choose to specify forum in their contracts (80% for both acquiring and acquired corporations) whereas corporations incorporated in other states specify forum far less (only 56% and 60%). The results in Table 14 showing differences between incorporation states are statistically significant at the 1% level for both acquiring and acquired corporations. Although the results in Table 15

20. Eisenberg, *supra* note 1, at 2011.

21. Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?*, (NYU Center for Law, Economics and Organization, Research Paper No. 08-08), available at <http://ssrn.com/abstract=1093293>.

22. The Marotta-Wurgler study identifies this characteristic that makes EULAs unique from merger contracts: "Forum selection clauses do not represent a joint effort between buyers and sellers to maximize surplus by reducing commercial uncertainty. . . . Sellers exploit their superior bargaining power by requiring disputes to be heard in a forum convenient to them, where they have business ties or political influence to benefit from local favoritism," *Id.* Although an argument could be made that there is oftentimes unequal bargaining power in corporate mergers, it is not on par with that found in the typical EULA and as such, the terms in merger agreements can be seen more as the result of negotiation.

are not highly statistically significant, we can see a trend that companies with their place of business in California and New York are moderately more likely to specify forum (between 73% and 83%) than are companies having their place of business in other states (66% and 69%). Finally, in Table 16 we find that corporations with attorneys in New York and California are about 15-20% more likely than their counterparts in other states to specify forum. The results showing differences between attorney locations are statistically significant at the 10% level for acquiring firms and at the 1% level for acquired firms. All this seems to suggest precisely what we would expect, that more sophisticated firms in more developed markets are far more likely to specify a choice of forum in their contracts.

TABLE 14.
FORUM SPECIFICATION BY STATE OF INCORPORATION²³

State of Incorporation	Forum Specified	No Forum Specified	Total
Delaware	118/102	29/25	147/127
%	80.27/80.31	19.73/19.69	100.00/100.00
New York	6/4	2/1	8/6
%	25.00/20.00	75.00/80.00	100.00/100.00
California	0/4	4/4	4/8
%	0.00/50.00	100.00/50.00	100.00/100.00
Other	44/57	34/38	77/95
%	56.41/60.00	43.59/40.00	100.00/100.00
Total	168/168	69/69	237/237
%	70.89/70.89	29.11/29.11	100.00/100.00

23. Each table provides descriptive statistics for both acquiring and acquired firms, respectively.

TABLE 15.
FORUM SPECIFICATION BY PLACE OF BUSINESS

Place of Business	Forum Specified	No Forum Specified	Total
Delaware	1/0	0/0	1/0
%	100.00/0.00	0.00/0.00	100.00/0.00
New York	25/17	8/4	33/21
%	75.76/80.95	24.24/19.05	100.00/100.00
California	31/30	6/11	37/41
%	83.78/73.17	16.22/26.83	100.00/100.00
Other	111/121	55/54	166/175
%	66.87/69.14	33.13/30.86	100.00/100.00
Total	168/168	69/69	237/237
%	70.89/70.89	29.11/29.11	100.00/100.00

TABLE 16.
FORUM SPECIFICATION BY ATTORNEY PLACE OF BUSINESS

Attorney Place of Business	Forum Specified	No Forum Specified	Total
Delaware	1/0	0/0	1/0
%	100.00/0.00	0.00/0.00	100.00/0.00
New York	61/39	21/9	82/48
%	74.39/81.25	25.61/18.75	100.00/100.00
California	32/37	6/5	38/42
%	84.21/88.10	15.79/11.90	100.00/100.00
Other	74/92	42/55	116/147
%	63.79/62.59	36.21/37.41	100.00/100.00
Total	168/168	69/69	237/237
%	70.89/70.89	29.11/29.11	100.00/100.00

The question still remains as to why any set of merging companies would consciously choose not to specify forum. For our purposes, we will ignore the fact that the lawyers for merging firms could simply have forgotten to put a forum selection clause in the merger contract, although this is a distinct possibility, but is unfortunately impossible to determine. In consciously choosing to forego the opportunity to specify forum, negotiating firms necessarily know that they are gambling that in the future the relevant law will put any litigation over the merger contract in a forum beneficial to their cause. Perhaps it is that there is already some obvious litigation forum, as where both firms do business in a particular locale or are incorporated in the same state, but this hardly addresses why the firms would fail to formally lay out this forum in their contract. Another theory is that the firms simply could not

agree on a choice of forum. In this scenario, each firm finds it less costly to forego the possibility of letting negotiations break down by ignoring the forum selection clause while taking on the risk that in the future they will have to litigate in a forum not to their liking. A flaw in this theory, however, is that our empirical results show that more sophisticated companies, particularly those companies that are more likely to consider this kind of cost-benefit analysis, tend to include these clauses.

Nor can we find that companies leave out forum specification clauses simply because they think that courts will ignore them. Very little court opinion is on-point for forum selection clauses in merger agreements but there is an abundance of court opinion on these clauses generally, particularly for consumer contracts. The Delaware Court of Chancery has stated that “[c]hoice of law and forum are undoubtedly material terms.”²⁴ The Supreme Court has upheld the applicability of forum selection clauses where such clauses were used in consumer contracts in cases like *Carnival Cruise Lines, Inc. v. Shute*²⁵ but even that case can be seen as one with limited applicability.²⁶ A brief summary concluding statement should prove beneficial: “Like choice-of-law clauses, forum-selection

24. *USA Cable v. World Wrestling Federation Entertainment, Inc.*, 26 DEL. J. CORP. L. 605, 800 (2001). Although the court in this case applied New York law by stating “New York law holds that injection of a forum selection clause into a proposed contract is a material alteration of the contract”, the court is still identifying the importance forum selection clauses hold by stating that “by striking the choice of law and forum selection terms of Viacom’s offer, USA’s response varied materially from that offer insofar as it related to the Series and, thus, USA failed to match.” *Id* at 801. This hints at yet another reason firms may choose not to specify forum, that is, they may be much more concerned with the law applied in a given case as opposed to precisely where that case is litigated.

25. 499 U.S. 585, 597-98 (1991). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 14 (1985) (“Where such forum-selection provisions have been obtained through ‘freely negotiated’ agreements and are not ‘unreasonable and unjust’, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), their enforcement does not offend due process.”).

26. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1322-25 (1993) (“Carnival does not stand for the proposition that mere inclusion of a term in a form contract amounts to adequate notice. . . . The Court stressed that its holding should be read in light of two limiting facts: the non-local nature of the dispute and the fact that the consumers did ‘not claim lack of notice of the forum clause.’”).

and arbitration clauses are not always enforced strictly according to their terms, and may be disregarded by courts willing to look beyond the face of the clause for interpretive evidence, or to override the clause in favor of some countervailing policy or principle. But such clauses do receive some weight in practice; many courts enforce them presumptively. . . ."²⁷

VII.

CONCLUSION

Our results demonstrate various correlations between choice of law and choice of forum and explanatory factors of business and attorney location and state of incorporation. The raw numbers demonstrate how popular the choice of Delaware is for incorporation, choice of governing law, and to a lesser extent, choice of adjudication forum. Whereas not an overwhelming percentage of companies are incorporated in Delaware (62.03% and 53.59% respectively for acquiring and acquired corporations), when we take into account that no other state has more than 10% of the aggregate for acquiring corporations and 6% of the aggregate for acquired corporation we truly see Delaware's dominance. This pattern continues roughly unchanged for choice of law with a simple majority choosing Delaware while the next closest state is around 12% of the total. Although we do recognize a substantial outflow of Delaware corporations choosing New York and California governing law, the difference is made up for by other state corporations opting into Delaware governing law so the net total remains roughly the same.

The choice of forum statistic is different from state of incorporation and choice of law in that we see a non-trivial dip in the number of merger contracts choosing Delaware which can be explained through our observation of a large minority of contracts which simply choose no forum at all. For all states in the sample, we see a much higher rate of flight from state of incorporation in choice of forum than for choice of law. The question why roughly 30% of the contracts in our sample specify no litigation forum at all is stifling. Eisenberg and Miller

27. Avery Wiener Katz, *Essay: The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 510 (2004); see also Marotta-Wurger, *supra* note 21, at 12 n. 20 ("In most states, forum selection clauses are *per se* enforceable absent unconscionability").

argue that perhaps it is a consequence of the attorneys themselves, with New York attorneys more likely than other attorneys to specify a forum.²⁸ We do find that New York attorneys significantly more often than other attorneys specify as such, but we, as do Eisenberg and Miller, still question why many of these attorneys still make no forum choice.

What remains overwhelmingly true is that basically no companies or their lawyers are located in Delaware yet somehow a random company is tremendously more likely to be incorporated there and choose Delaware law to govern its material contracts. Delaware has a monopoly on these markets. In determining the governing law, we find that businesses located outside Delaware are less likely to choose Delaware law while companies whose attorneys are located outside Delaware are more likely to choose Delaware law. In determining forum, attorneys once again dictate to a large extent the choice of Delaware forum but we note mixed results for business location and state of incorporation. By far the most common explanatory reason why contracts choose Delaware forum is that they chose Delaware governing law as well.

We raise many questions for further study herein which unfortunately cannot be explained by analysis of the data alone. Once again we ask why so many material contracts fail to choose an adjudication forum yet literally none fail to choose a governing law. Perhaps another good direction for research would be to look at the attorneys themselves who put together these contracts and ask if they indeed are acting as we predict. That is, what strategic reasons do these lawyers have for specifying a certain state's law to govern their contract and what might be the strategy involved in failing to include a choice of forum provision. As with any empirical study, we should leave mindful that beyond the aggregate statistics analyzed above lie actual discrete contracts which represent the completion of lengthy negotiations by the parties involved. The explanations for why certain provisions were and were not included in each contract will necessarily never reach our analysis, let alone the contract language, and it is these explanations that can only be uncovered through further targeted research.

28. Eisenberg, *supra* note 1, at 2012.

