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## Context Matters - What Lawyers About Choice of Law in Merger Agreements

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# Context Matters-What Lawyers Say About Choice of Law Decisions in Merger Agreements

Juliet P. Kostritsky\*

*The study of choice of law provisions in merger agreements yields various theories as to how much thought parties put into them, and what factors influence such decisions. Eisenberg and Miller found a shift to New York law and other scholars later hypothesized that parties specify New York law rather than Delaware law because New York law is more formalistic. However, a study of 343 merger agreements, consisting of 15 lawyer interviews and a survey sent to 812 lawyers across the country, suggests differently. First, there is no shift from Delaware to New York. Second, a desire for formalistic law is not the motivating factor for lawyers. Choice of law provisions in merger agreements are motivated by a multitude of contextual factors. Further, the clients' intent for choice of law is often unclear due to the way such provisions are drafted in the context of a principal agent relationship.*

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\* Everett D. and Eugenia S. McCurdy Professor of Contract Law, Case Western Reserve University School of Law. The author presented this paper to the American Law & Economics Association at its annual meeting held on May 8-9, 2014. Comments from participants were quite helpful. I am grateful for the University of Wisconsin Law School's invitation to present this paper at the inaugural John Kidwell lecture series at the University of Wisconsin Law School on February 28, 2014 and for the discussion of the paper. A videocast of the talk is available at: <https://connect.case.edu/p210rel7rq6/>. I wish to thank Michael DeAgro and Michelle DeVito who provided superb research assistance. Megan Allen, Timerra Jung and Tron Compton-Engle provided wonderful technical support for the videocast of the talk. Robert R. Myers provided superb library assistance. I am grateful to Professors Michael Heise and Brian Gran for advice on conducting a survey. They helped me avoid some pitfalls. I am most indebted to my former colleague, David P. Porter, formerly a Visiting Professor of Law at Case Western Reserve University School of Law for suggesting that I actually survey lawyers to find out more about why a particular choice of law was made. Professors Peter M. Gerhart and Ann Southworth provided valuable criticism. Errors remain mine alone.

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I. INTRODUCTION

Finding out the truth about a matter can proceed in many different ways. Neoclassical law and economists would construct models built on certain assumptions.<sup>1</sup> The empiricists and contextualists would collect data about the matter in the inductive not deductive sense.<sup>2</sup>

1. The unreality of those assumptions has led Judge Posner himself to admit that its "basic propositions are really not empirical propositions at all. They are all generated by 'reflection' on an 'assumption' about choice under scarcity and rational maximization." Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Prompt A New Legal Theory*, 95 CORNELL L. REV. 61, 68 (2009).

2. Of course, even the accumulation of evidence is subject to the "shocking discovery that induction is fallible" though of course, "it mostly works." JAMES FRANKLIN, *WHAT SCIENCE KNOWS AND HOW IT KNOWS IT* 11 (2009). Empiricists build a model of reality using large data sets and regression analysis. See Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002) (limiting definition of empirical scholarship to studies using statistical methods). For contextualists such as Professor Stewart Macaulay, "[s]tatistical studies are not enough . . . . They enter the



This Article follows the path of empiricists and contextualists by studying, in detail, the choices lawyers make in regard to choice of law provisions in merger deals.

A close study of these provisions in merger agreements is important for several reasons. It illuminates how parties make choices in drafting these contracts, shedding light on lawyering in a discrete transactional setting. Studying the process of choice of law in merger agreements highlights the difficulties courts face when they try to interpret the meaning behind any provision in a contract negotiated between commercial firms with assistance from counsel. Agency issues loom large in such settings.<sup>3</sup> If a provision is included by a lawyer and the lawyer, not the client, makes the choice of law decision, what implications does that have for a court trying to ascertain the *party's* (in the sense of the commercial firm's) intent on the choice of law issue? Is there such a thing as a party's intent when the commercial firm (the client) played little role in choosing the provision? Is the existence of a party's intent even possible if the party is not a sole proprietor? Will a study of choice of law provisions shed light on the role of lawyers more generally in transactional practice? Finally, are there implications for other issues not directly governed by the choice of law provisions? By studying the meaning of choice of law in merger agreements, we may resolve other issues involving party choice such as: What interpretive approach to take to a contract when the goal begins with ascertaining the party's intent? and Whose intent matters and why?

Choice of law provisions continue to generate great scholarly interest. Early on, scholars collected choice of law data to study whether there was a shift in the preferred choice of law in merger agreements.<sup>4</sup>

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institutions of the world and observe, systematically interview and survey individuals within them." Nourse & Shaffer, *supra* note 1, at 79, 81.

For a valuable discussion of the differences between inductively and deductively arrived at inferences, see CHARLES McCANN, JR., *PROBABILITY FOUNDATIONS OF ECONOMIC THEORY* 4-6 (1994). McCann notes Hume's insight that "[a] reliance on empirical generalizations as a basis for the establishment of immutable laws of behavior is thus doomed to failure, since no causal relationship is determinable." *Id.* at 6. This Article does not seek to establish general laws valid across all circumstances but to capture a reality of lawyer's choices in a certain context.

3. See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 *DUKE L.J.* 389, 394 (2003) (the "principal-agent problem involves the difficulty that one actor (the principal) will have in getting another actor (the agent) to work on the first party's behalf. A principal can reduce measurement costs to the extent that it can use financial or other incentives to align the self-interest of the agent with its own interests.")

4. Eisenberg and Miller emphasize that Delaware is still the preferred choice but that "to the degree that there is a flight from Delaware in this respect, the beneficiaries are New York and California." Theodore Eisenberg & Geoffrey P. Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 *VAND. L. REV.* 1975, 1982 (2006).



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To test the hypothesis that companies were fleeing to New York for their choice of law, Professors Eisenberg and Miller studied a group of merger agreements from a seven-month period in 2002 and found that there was a flight from Delaware to New York<sup>5</sup> for the parties' choice of law<sup>6</sup> in merger agreements.<sup>7</sup>

Other scholars relied on a later Eisenberg and Miller study,<sup>8</sup> which used a broader array of contracts documenting a flight to New York choice of law, to study the role of the transactional lawyer in drafting. They hypothesized that companies specify New York because of its

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5. The argument for a flight is built on data consisting of a study of merger agreements that suggest a "flow away from Delaware and Other and towards New York and California." Eisenberg & Miller, *supra* note 4, at 1989. The data showed 181 incorporations in Delaware but only 135 choice of Delaware law. *Id.* New York however, had only six incorporations but sixty-three choices of New York law. *Id.* Here the argument is not that a greater number of parties are choosing New York than they were in the past but that if a company is incorporated in New York, it is more likely to choose that state's law to govern than a company is to choose Delaware's law to govern if it is incorporated in that New York.

6. Parties can decide with each agreement what law should govern. See Larry E. Ribstein, *Choosing Law By Contract*, 18 J. CORP. L. 245, 247-48 (1993). Parties often place a provision in their merger contract specifying the law that they want to govern the agreement. *Id.* Courts approach this issue by making a distinction between matters that are corporate in nature and those that are peripheral. See *id.* at 268. For corporate matters, the court will normally apply the law of the state of incorporation, even if the merger agreement has chosen another law to govern. See *id.* at 267. This is known as the internal affairs doctrine and is generally the approach taken by courts with the exception of California. See *id.* at 266; JAMES C. FREUND, *ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS* 416 n.47 (1975). As to peripheral, non-corporate matters, courts normally enforce such provisions unless they violate a constitutional provision of state law. See Ribstein, *supra* note 6, at 294. California has a provision making it unconstitutional to enforce a non-compete clause as to a California employee even if the law of another state has been chosen to govern the agreement. See FREUND, *supra* note 6, 416 n.47.

7. I have updated the Miller and Eisenberg study with a later data set for a later period of time, January 1, 2011 through June 30, 2011. See KYLE CHEN, HAROLD HALLER, JULIET P. KOSTRITSKY & WOJBOR A. WOYCZYNSKI, *FINDING A TREND TOWARD DELAWARE AS THE CHOICE OF LAW IN MERGER AGREEMENTS* (on file with authors). My study is based on a data set from the SEC EDGAR Database and covers acquisitions of public and private targets. It directly tests the Miller and Eisenberg thesis to see if it still holds up at a later point in time. It finds that most merger agreements choose Delaware and the next most popular choice is New York. The absence of data demonstrating a flight to New York in my statistical study does not make the task of understanding why a law is chosen any easier. It simply makes it harder to argue, at least if one accepts a characterization of New York law as formal, that parties are fleeing to New York. The survey reveals that 95% of respondents indicated that there is no shift from Delaware to New York. A 2012 study followed up on the question of whether there was a net outflow away from Delaware but this study did so in the context of public acquisitions. See Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92 (2012). I began my research a couple of years ago before the Cain and Davidoff study was published.

8. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009).



substantively more formalistic contract law.<sup>9</sup> In this later work, law and economics scholars, including Jody Kraus and Robert Scott, relied on empirical evidence of a flight to support the new formalist view that courts should reject contextualism since the parties' flight to New York law demonstrates a formalistic preference.<sup>10</sup> Their hypothesis was built on earlier scholarship using models to show that utility-maximizing commercial firms would prefer formalistic contract law, and then supposed that the flight to New York law reflected that preference.<sup>11</sup>

Scott and Kraus hypothesized that parties use strategic thinking in choosing the law to govern an agreement to protect planning with respect to all of the terms in the contract.<sup>12</sup> The choice of law is made to ensure that courts use formal contract doctrine in interpreting all of the contract terms that have been carefully negotiated and chosen *ex ante*.<sup>13</sup> This hypothesis rests on a general view that lawyers carefully construct contracts and wish to guard against courts using their discretion to interpret contracts or fill in terms for the parties, absent express party direction.<sup>14</sup>

A rival hypothesis of contract drafting in contract theory (developed outside the M&A context) posits that clients and lawyers pay almost no attention to the terms of the contract *ex ante*. Instead, lawyers simply copy language from a prior agreement without much thought. The decision to copy prior language unreflectively stems from the lawyer's disinclination to spend time on a provision or term that will be difficult to bill to the client.<sup>15</sup> Claire Hill, Mitu Gulati, and Robert Scott documented this theory of contract drafting in non-

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9. Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009). Professor Scott cites the Eisenberg and Miller studies as "illustrat[ing] the strong preference of commercial parties for the formal contract law of New York in lieu of frequent exercise of equitable overrides by courts in California." *Id.* at 1062. As Kraus and Scott explain: "The strong preference of sophisticated parties for New York contract law is consistent with our claim that those parties prefer an adjudicatory system that consistently applies formal doctrine, absent the parties' express indication otherwise at the time of formation." *Id.* at 1093. Professors Kraus and Scott were referring to a larger array of contracts and not the merger agreements but if that is so, that would raise the question, why the merger agreement context would engender different results on the formality issue.

10. *Id.*

11. *See id.* at 1061-62.

12. *See* Kraus & Scott, *supra* note 9, at 1074.

13. *See id.* at 1026.

14. *See id.*

15. *But see* discussion with Lawyer 5 who took strong exception to this picture of corporate transactional drafting. Interview with Lawyer 5 (Nov. 6, 2013) (on file with author).



M&A contexts.<sup>16</sup> Based on empirical studies, they conclude that clients will not pay for bespoke drafting unless the costs of the standard language clearly pose so many risks as to outweigh the drafting costs. In addition, introducing terms different from those of a prior agreement may lengthen expensive negotiations. The cost-benefit analysis favors leaving terms the same in light of the expense of making changes and the rare chance of complications.

I begin my research with another hypothesis of contract drafting that falls into neither the Kraus/Scott strategic model nor the unreflective copying model. The hypothesis states that lawyers deliberately make the particular choice of law provision, *not* because of any substantive aspects of contract law in a particular jurisdiction, but because of the lawyers' internal professional concerns in relation to avoiding malpractice. I surmise that because lawyers would want to ensure that they are knowledgeable with the chosen law to avoid any liability for malpractice that might come with specifying the law of a jurisdiction with which they are unfamiliar,<sup>17</sup> lawyers will specify a choice of law with which they or a member of their firm are familiar. However, the data demonstrates that lawyers seem comfortable with the law of both Delaware and New York,<sup>18</sup> and that they may be comfortable with the

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16. Claire A. Hill, *What Mistakes Do Lawyers Make in Complex Contracts, and What Can and Should be Done About Them? Some Preliminary Thoughts*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 224, 229-30 (Jean Braucher et al., ed., 2013) (discussing how in securitization contracts many provisions became standardized and inserted into the contracts without much review). Mitu Gulati and Robert Scott document a similar pattern in the context of explaining the persistence of a version of the *pari passu* clause in sovereign debt contracts despite an adverse court decision. See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 73-88 (2013). They explained the failure to change the clause in terms of the costs of redrafting. *Id.* at 38. They also developed keen insights from lawyer interviews into the causes of the "stickiness" of the offending clause. *Id.* at 79. These works by Hill, Gulati and Scott represent in depth examinations of contract drafting in the context of actual lawyers conducting deals. They set a high bar and provide a paradigm for future work in the area.

17. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (a lawyer can engage in multidistrict practice when they gain a *pro hac vice* admission to appear in that court or when they are providing "legal services on a temporary basis in this jurisdiction that . . . (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission[.]")

18. See *Kirkland M&A Update: Delaware vs. New York Governing Law – Six of One, Half Dozen of Other?*, KIRKLAND & ELLIS 1 (Dec. 17, 2013), available at [http://www.kirkland.com/site/Files/Publications/MAUpdate\\_121713.pdf](http://www.kirkland.com/site/Files/Publications/MAUpdate_121713.pdf) ("[w]hile the outcome on most issues [in purchase

contract law of other jurisdictions without necessarily being licensed to practice law in it,<sup>19</sup> with the exception of Alabama and California, which seem to be outlier jurisdictions.<sup>20</sup> Lawyers seem comfortable with several possibilities for a choice of law.<sup>21</sup> Since lawyers seem comfortable with both New York and Delaware law, without necessarily being licensed in those jurisdictions, the desire to avoid malpractice cannot account for the difference between lawyers choosing New York versus Delaware law.

The Article's final hypothesis of contract drafting (and lawyering) though falls somewhat in the middle between the Kraus and Scott position of carefully tailored strategic choice of law provisions and the Hill, Gulati, and Scott unreflective copying model. It is that lawyers put a *moderate* level of thought into choice of law provisions, and that the choice is very *contextual*. Lawyers do spend some thought on the choice of law provision—it is not simply copied or ignored. This degree of thought is evidenced by the fact that some lawyers use different states' governing law in different merger agreements. But, deep thought is not given to the matter either. Lawyers' comfort with a range of governing laws, seeking to avoid only one or two jurisdictions, contributes to the lack of deep thought. This theory of contract drafting in merger agreements rejects the hypothesis that the choice of law is done strategically to choose a formalist law to protect planning with respect to all of the terms in the contract. Lawyers making choice of law decisions in merger agreements think strategically in a narrow sense (for example, which sandbagging provision applies) at times, but do not seem to think strategically in a broad sense that con-

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agreements] is unlikely to differ significantly between Delaware and New York," there are some notable exceptions.)

19. This might be especially true if the lawyer did not need to deliver an opinion. Lawyer 2 noted that some jurisdictions are frowned on, including California due to problems with enforcing non-compete covenants, Massachusetts due to being not viewed as business friendly, and Louisiana due to its civil code. Interview with Lawyer 2 (Nov. 15, 2013) (on file with author). My survey data confirmed that being licensed in the jurisdiction ranked very low with lawyers as a reason for choosing a particular jurisdiction's law to govern the agreement. In agreements where New York law was chosen, 11 out of 47 respondents ranked the law firm having an office in the jurisdiction as the least important reason for the choice of law in an agreement. In agreements where Delaware was chosen, 32 out of 70 respondents ranked "having an office in Delaware" as the least important reason for selecting Delaware law.

20. Lawyer 1 raised questions about Alabama's jury system. Interview with Lawyer 1 (Nov. 11, 2013) (on file with author).

21. Lawyer 8 explained that the basic choice of law came down to four options: the acquiring party's primary executive office, the state of incorporation, New York law, and Delaware law. Interview with Lawyer 8 (Oct. 22, 2013) (on file with author). Lawyer 2 stated that choice of law usually came down to Delaware, New York or the state in which the target is incorporated. Interview with Lawyer 2, *supra* note 19.



siders all aspects of the contract. Although there may be sound reasons to suppose any of these theories were correct,<sup>22</sup> surveying lawyers on this decision would be the only way to resolve the issue.

To find out more about *why* contracts specify New York law or another jurisdiction's law I used empirical data by (1) interviewing a select group of fifteen merger and acquisition lawyers,<sup>23</sup> and (2) conducting a survey sent to 812 mergers and acquisitions lawyers located throughout the country.<sup>24</sup> The evidence determines whether data supports that commercial firms make choice of law decisions based on a strategic desire for formalistic law,<sup>25</sup> unthinking copying, lawyer malpractice concerns, or a hybrid theory of moderate thought.

This study reveals three important findings: (1) there is no single overarching or predominant reason lawyers give for choosing the law of a particular jurisdiction to govern a merger agreement; (2) lawyers, not clients, make the choice of law decision; and (3) the particular context matters in the choice of law decision.

## II. METHODOLOGY

### A. *Phase One: Interview A Select Group Of Lawyers In The Mergers And Acquisitions Field*

The first phase of the research consisted of qualitative background interviews with fifteen mergers and acquisitions attorneys to find out more about how they think about, and choose, the law to govern a

22. The decision on choice of law may resemble many other contractual choices that demanded some thought but are not contentious or a deal-breaker. That approach to drafting may be different with a standard boilerplate contract. In such contexts, as clearly shown by Gulati and Scott, there are a number of reasons why "stickiness" and a reluctance to vary the terms at all will prevail. See GULATI & SCOTT, *supra* note 16, at 33-43. For a fascinating and closely analyzed discussion of the reasons for stickiness in such contracts, see *id.*

23. Bill Whitford emphasized the importance of speaking to lawyers rather than just sending out paper surveys. Interview with William Whitford, Professor of Law, University of Wisconsin, School of Law (Mar. 4, 2013) (on file with author). Stewart Macaulay continues to conduct this type of research with great effect ever since his study of Wisconsin businessmen revealed the non-use of contract law in their business transactions. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). My own view is that it was by talking to lawyers that a picture of the lawyering involved in the choice of law emerged.

24. The data set was compiled from the SEC EDGAR database and identified merger agreements entered into between January 1, 2011 and June 30, 2011. By looking at the notice provisions in the M&A agreements, my assistants identified 812 lawyers who worked on the agreements and were entitled to receive notifications and documents. We then compiled an email list of all the lawyers. We sent a hard copy of a letter to all 812 lawyers inviting them to participate in the study either by filling out a hard copy of the survey or by accessing a survey via the web. We guaranteed that the results would be anonymous. The majority of responses were by hard copy although some answered using a survey on the web.

25. See Kraus & Scott, *supra* note 9, at 1103.



merger agreement. These interviews were off the record and I kept the results anonymous by recording them as "Interview #1," "Interview #2," and etc. It was my hope that the preliminary phase of talking to lawyers, preferably after they had taken a draft of the survey, could proceed without any need to get a formal, signed consent or get Institutional Review Board ("IRB") approval.<sup>26</sup> The university's IRB office agreed that no consent form was required.

The interviews were with mergers and acquisitions ("M&A") lawyers I know or to whom I was referred by lawyers I know. Former students also provided helpful referrals. The interviews provided useful information about how to craft a survey. I hoped to increase the chance of getting a good response rate on the survey (the second phase of the project) by interviewing lawyers and getting their reactions to a draft survey. These lawyers' comments resulted in adjustments, and hopefully improvements, to the initial survey.

B. *Phase Two: Conduct Survey Of All 812 Lawyers From 343 Merger Agreements*<sup>27</sup>

The second phase of research involved a survey ("the survey") of all of the 812 lawyers who worked on the selected set of merger agreements. The names and addresses of the lawyers are public information from the SEC EDGAR database. The merger agreements themselves are accessible to the public via the SEC EDGAR database.<sup>28</sup>

I wrote to these 812 lawyers and gave them the opportunity to respond by mailing back a hard copy of the survey or by taking the survey online using Qualtrics.<sup>29</sup> One hundred nine survey responses came back.<sup>30</sup> The survey response rate was 13.4%.<sup>31</sup> This is an admit-

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26. I initially thought that the interviews with lawyers might require university approval through the IRB process and feared the IRB consent form would be a hindrance for lawyers participating. In fact, after speaking to a professor who has conducted interviews of lawyers, it became apparent that the lawyers found the consent form, the time spent on describing my commitment to confidentiality and the effort of getting the signed consent form annoying. Interview with Ann Southworth, Professor of Law, University of California, Irvine School of Law (Mar. 6, 2013).

27. This comprehensive survey meant that I did not need to worry about a particular group of lawyers on one side of the transaction skewing the survey results.

28. *Important Information About EDGAR*, SEC (Feb. 16, 2010), <http://www.sec.gov/edgar/aboutedgar.htm>.

29. Conversations with other scholars, who are experts in survey data, convinced me that I would get a better number of responses with a hard copy mailing than with an online survey.

30. However, not all respondents answered every question.

31. The response rate is low enough that a statistician might suggest that the results of the study cannot be used to estimate what the response rate would be for the whole population of

tedly low response rate but since this is the only survey that has systematically studied the lawyers responsible for drafting the choice of law provision in merger agreements, it may be a significant beginning in the conversation and perhaps provide a foundation for future studies.<sup>32</sup>

The results of the survey were to remain anonymous. The Information Technology Services Department at Case Western Reserve University assured me that the surveys could be filled out so that the results could not be traced back to any particular lawyer. Because the lawyers who would receive the survey are extremely sophisticated and are representing public companies in drafting merger agreements in transactions that need to be reported to the Securities and Exchange Commission ("SEC"), we had to assuage any fears that their answers would be discoverable in later litigation involving any merger transaction. This guarantee of anonymity was necessary to generate a decent participation rate.

The Qualtrics program used to conduct the survey is a robust survey tool that has been successfully used by Case Western Reserve School of Law in prior data collection. It allows for anonymity, yet also permits monitoring to determine whether surveys have been started or completed, without disclosing the identity of the survey taker. Also, it ensures that only the recipient to whom the survey was sent can fill out the survey, thereby preserving the integrity of the research results.

### C. *Phase Three: Evaluate Sample And Analyze Results*

In order for the study to be valid, the sample had to be an informed group in which the lawyers actually had to confront and think about the choice of law issue. In addition to the fact that respondent lawyers were chosen based on their experience with mergers and acquisitions, Questions 9 and 11 support that the sample was valid—sixty-six of 104 respondents chose New York law in at least one merger agreement,<sup>33</sup> while ninety-nine of 103 choose Delaware in at least one merger agreement.<sup>34</sup> There is substantial overlap because the same respondents answered both questions; since 96.12% chose Delaware, most of

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M&A lawyers. However, I have a big enough response rate that if there were a consistent and strong pattern, such as all lawyers wanting a formalist jurisdiction, it would show up.

32. I would be happy to share my email lists, list of lawyers, and survey form, all contact information as well as the list of transactions/deals covered by my 2011 survey with other scholars.

33. *See infra* Appendix Question 9 (sixty-six respondents answered "yes" to "[h]as there been a merger agreement where you have chosen New York law?").

34. *See infra* Appendix Question 11 (ninety-nine respondents answered "yes" to "[h]as there been a merger agreement where you have chosen Delaware law?").



the 63.46% that chose New York also chose Delaware on at least one occasion. The fact that a majority of respondent lawyers choose different laws on different occasions supports the fact that they have to choose and think about choice of law, verifying the validity of the sample and negating the drafting model of unreflective copying.

After the surveys were returned, I was able to schedule additional interviews with M&A lawyers. I then gathered the information acquired from both the interviews and the surveys to evaluate what determines choice of law in merger agreements. This comprehensive analysis yielded the following results.

### III. THE PRINCIPAL-AGENT PROBLEM AND OTHER INTENT ISSUES

An important caveat to understanding choice of law provisions in contracts, and what that choice can tell us about lawyering and its relevance for discerning the choice the clients/principals are making in the transactions, pertains to who makes the choice and what the process of the choice is like. Without research on that process, one might erroneously conclude that a party's intent for choice of law is clear when an explicit provision exists. However, the meaning or intent underlying choice of law provisions in merger agreements can be unclear for a number of reasons. The principal-agent relationship is particularly tricky factor in this arena. Further, intent may be unclear in the case of a corporation without a single brain, but mixed motives for the same decision, which makes my evaluation difficult.<sup>35</sup> Such issues impact choice of law theories and must be considered when evaluating the significance of such provisions.

#### A. *The Principal-Agent Relationship Yields Significant Implications In Determining The "Party's" Intent*

Perhaps the most significant finding of the survey is reflected in the answers to Questions 17 and 18 addressing to what extent the choice of laws are client-driven versus law-firm driven. In Question 17, the respondents were asked to attach a percentage to indicate the percent to which the client determines choice of law. Sixty-four of 100 respondents said it is 0%, 10%, or 20% client-driven (19, 24, and 21 respondents, respectively).<sup>36</sup> Only 4% responded that the decision was 80%,

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35. The analysis of the complexity of choice in contracts involving principals and agents has implications for other determinations of choice or intent as in contract interpretation.

36. See *infra* Appendix Question 17.



90%, or 100% client-driven.<sup>37</sup> Similarly, in Question 18, sixty-eight of 100 respondents said choice of law is 70%, 80%, 90%, or 100% law firm-driven (16, 18, 17, and 17, respectively).<sup>38</sup> Clearly, the data overwhelmingly supports the view that lawyers are making the determination about choice of law, not the client.

When a court looks at a party's agreement in any context, it is subsuming into what it calls "the party's intent"—all of the conscious and unconscious decisions that are actually made by the party's agents and advisors, without those persons necessarily, and in fact usually not, informing the principal. The agent's decisions are made without the principal's knowledge or understanding of the decision or its implications, and yet are imputed to the principal. Under these circumstances, what kind of choice or intent can we attribute to the principal when the lawyer survey results indicate that the lawyer, not the client, made the choice?

In the context of choice of law in merger agreements, lawyers cite a number of reasons for why they may want a particular governing law regardless of the clients' intent,<sup>39</sup> and the survey clearly demonstrates that lawyers are making this decision—not the client. What is left open for debate is whether this should affect determination of what the "party's" intent was in drafting a choice of law provision. Is the lawyer's intent sufficient for demonstrating the client's intent, or is the client's intent not clear in the absence of the client being involved in this decision?

Additionally, agency-cost problems are intertwined with the dynamics of the principal-agent relationship, further illustrating the potential conflict for intent in the principal-agent relationship in the context of choice of law provisions in merger agreements. The agency-cost problem develops when the interests of the lawyer and the company are not coterminous.<sup>40</sup> As O'Hara and Ribstein posit, "[a]gency costs exist whenever power is delegated to agent."<sup>41</sup> A lawyer is the client's delegate, yet the lawyer might be concerned with having a choice of law with predictability that lowers the costs of understanding laws outside the lawyer's jurisdiction, and therefore be driven to choose a

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37. Interview with Lawyer 4 (May 1, 2013) (on file with author). The small role played by clients in the choice of law contrasts with the interviews indicating that clients care about the choice of venue or forum.

38. See *infra* Appendix Question 18.

39. See *infra* Appendix Question 12 (citing expertise of judges in Delaware).

40. Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 55 (John W. Pratt & Richard J. Zeckhauser, eds., 1990).

41. See Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1157 (2000).

law with which the lawyer is familiar, even if the substantive rule at issue is a costly one to the client. Rather than choosing an unfamiliar jurisdiction, the lawyer might prefer crafting a clause around any substantive rule the client wished to avoid, even if it required additional lawyer time. Although potentially producing a choice of law satisfactory to both the lawyer and client, its creation would result in more billable hours for the law firm and more cost for the client. Further, regardless of whether the lawyer's provision accounted for the client's substantive rule concerns, the law chosen may still not be the client's intended choice.

A follow-up survey could shed more light on the diverging interests between lawyers and clients. We must know more about what lawyers tell clients about choice of law. We must also know what clients tell lawyers, such as whether they tell lawyers to handle the matter as a matter of boilerplate,<sup>42</sup> or whether they broadly delegate the decision to the lawyers. Further, do clients set any parameters on the lawyer's choice of law recommendation or determination, or is the lawyer free to make the decision for the client? Differences in answers to these questions in a future study will determine to what extent the choice of law reflects a client's preference as opposed to a lawyer's preference.

### B. *Can A Commercial Firm have Intent?*

Putting aside the principal-agent issue, is a commercial firm even capable of manifesting intent, except in the case of the sole proprietor? The principal-agent issue brings about a potential problem of determining the client's intent when the lawyer makes the decision. However, even if the lawyer does not make the decision, and the client makes the decision, who can speak for the client's intent in the case of a corporation? In the case of a sole proprietor, it is clear there is one owner and this owner is the client. However, in the case of a corporation, there may be a person within the corporation appointed to make certain decisions. Is this person's decision as to choice of law necessarily representative of the corporation's (the client's) decision, or is it merely a single person's decision? Further, should the law assess the choice differently with a sole proprietor than a corporation, or should it automatically accept that a corporation's decision-maker represents the intent of the corporation?

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42. Lawyer 13 indicated that the choice of law "is not given any conscientious thought." Interview with Lawyer 13 (Nov. 21, 2013) (on file with author).



C. *Forum Drives Law: Intent For Forum But Unclear  
Intent For Law?*

The survey demonstrates that lawyers think choice of forum influences choice of law. Thirty-four percent of respondents thought that the forum had a significant impact on the choice of law while 51% thought the forum choice had a moderate impact on the choice of law.<sup>43</sup> This raises the question that if choice of law is determined by choice of forum, is there actually intent behind the choice of law decision, or is the choice of law decision merely a result of choice of forum with no conscious thought? Let us first look at why choice of forum influences choice of law.

One key reason choice of forum influences choice of law is that lawyers do not like to bifurcate. A lawyer can legally bifurcate and specify one forum to litigate and another law to govern the agreement.<sup>44</sup> For example, a deal can have an Ohio forum applying Delaware law.<sup>45</sup> However, one lawyer said that she never bifurcated choice of law and choice of forum issues.<sup>46</sup> This lawyer's concern is that if there is an Ohio forum but Delaware choice of law, the Ohio court will place an Ohio "spin" to the Delaware law. Because some counsel fear that a court of one jurisdiction might not properly apply the law of another jurisdiction, there might be an unwillingness to select a forum that is different from the governing law.

Another lawyer articulated a different reason choice of forum might influence choice of law: many of the same issues will drive both forum and law decisions because many transactional lawyers do not always distinguish the two choices. If they are not distinguished, the relative importance of forum versus law may determine which one influences the other.

A key point I learned from counsel interviews is that clients care about forum more than they care about the choice of law issue.<sup>47</sup> Two

43. See *infra* Appendix Question 1.

44. For example, an Ohio forum applying Delaware law.

45. This would be the result under the internal affairs doctrine.

46. Lawyer 1 suggested that she never bifurcates forum and choice of law. Interview with Lawyer 1, *supra* note 20. Presumably, she always includes both a choice of forum and choice of law. *Id.* This is consistent with a result in the Eisenberg and Miller study. See Eisenberg & Miller, *supra* note 4, at 1503 ("[w]hen a forum is specified, it overwhelmingly corresponds with a contract's choice of law.").

47. Lawyer 7 suggested clients might care more about forum because of the potential costs of having to litigate in an inconvenient place, and the quality of lawyers in Delaware. Interview with Lawyer 7 (Oct. 23, 2013) (on file with author). Lawyer 11 indicated that what matters is forum, not choice of law. Interview with Lawyer 11 (Oct. 22, 2013) (on file with author). Lawyer 8 confirmed, "clients generally seem more concerned with venue than choice of substantive law." Interview with Lawyer 8, *supra* note 21.



interviewed lawyers explained that their clients worried about litigation costs<sup>48</sup> and the quality of lawyering in a jurisdiction.<sup>49</sup> Those concerns might drive the choice of a forum so as to minimize expense by the client, such as travel costs. Further, some situations may call for a specific forum for other reasons; one lawyer indicated that he thought that there was a strong pressure for the forum to be Delaware to send the case to the experts.<sup>50</sup>

The context of agreements can cause choosing forum ahead of time to be particularly important in certain situations.<sup>51</sup> Forum selection clauses may be most prevalent in two types of contracts. The first type is an adhesion contract, which potential defendants (such as cruise lines) insist on a pro-defendant choice of forum ahead of time to foreclose any plaintiffs from having the advantage of filing in a jurisdiction that is more favorable to plaintiffs.<sup>52</sup> The second type of contract involves parties who are relatively equal in bargaining strength and reach agreement on a forum so that going forward neither party can threaten to take the other party to an unfavorable forum as a way of gaining concessions.<sup>53</sup>

One lawyer who participated in the interviews said that forum might matter in choice of law where a client wants a rocket docket, such as in Virginia.<sup>54</sup> In this case, if the lawyer is choosing a particular forum for a procedural advantage, it may influence the choice of law,

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48. Lawyer 8 said venue issues could potentially add costs because of need to engage local counsel and pay travel costs. Interview with Lawyer 8, *supra* note 21.

49. Interview with Lawyer 7, *supra* note 47. "Why NY forum? Once you need to go to court in Delaware, would need to engage local Delaware lawyers and not that many great ones." *Id.*

50. Interview with Lawyer 5, *supra* note 15.

51. As Professor Robertson points out, there are reasons why particular subset of defendants might want to insist on forum selection clauses in their contracts. Email from Cassandra Robertson, Professor of Law, Case Western Reserve University School of Law, to Juliet P. Kostritsky, Professor of Law, Case Western Reserve University School of Law (Nov. 18, 2013, 15:17 EST) (on file with author).

I think that in spite of the forum non conveniens doctrine, the plaintiff still wields a lot of power in deciding where to file suit initially. So forum selection clauses are especially valuable to potential defendants, but are more valuable for avoiding unfavorable fora than affirmatively choosing favorable ones (even though the effect of the clause is to choose one—parties may choose New York or London as the forum, but they probably care more about avoiding Alabama than they care whether they actually litigate in New York or London).

*Id.*

52. See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

53. See Email from Cassandra Robertson to Juliet P. Kostritsky, *supra* note 51.

54. Interview with Lawyer 9 (Apr. 25, 2013) (on file with author). See Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799 (1998) (discussing the efficiencies of a single federal court).

especially if there is any concern about bifurcating the forum and the choice of law.

Whether parties insist on forum provisions generally<sup>55</sup> can involve the context, identity of the parties, and subsequently, whether there are particular advantages and/or disadvantages in failing to choose a forum ahead of time.

With this perspective, we can circle back to the question of whether the influence of forum on law affects the intent behind a choice of law provision. We know that lawyers do not like to split forum and law because they avoid bifurcating, and sometimes do not even distinguish forum from law. We also know that clients are much more concerned with forum than they are with law, especially in certain situations. So, choice of law may be made as a default to a choice of forum. In such a scenario, is choice of law a conscious decision being made with intent behind that decision? Or is it merely a provision that is not expressly thought about, and therefore has no unequivocal intent behind it? One could argue either way. The implications are consequential not just to choice of law provisions in merger agreements, but any contractual provision that may not be consciously thought about for various reasons.

Essentially, the question is whether there is a level of thought necessary to manifest intent. If there is, the various theories of drafting choice of law provisions become even more important. Under the formalist theory, the choice is a conscious strategic decision. But under the unthinking copying theory, the choice is not even considered. If conscious thought is required to manifest intent, and the provision is merely copied, could the provision be successfully challenged in litigation? A further study could reveal more about the relationship between choice of forum and choice of law, and the implications of this relationship.

#### D. *Mixed Motives for the Same Decision*

In large merger agreements, there are many players on both sides making decisions, and many subjective reasons behind these decisions. If multiple people have the same desire for a particular issue, but have different underlying reasons why they share this desire, their differences in reasoning may not affect the ultimate result. For example, one individual lawyer working for "Law Firm A" may choose a provision for reasons of convenience while another lawyer working for Law

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55. I do not have the data on how many parties in merger agreements choose forum as well as choice of law.



Firm A may choose the same provision but for a completely different reason. The second lawyer may have found the provision in a prior agreement and favor adopting it without much thought or motive. Another may choose that provision because of personal comfort with that jurisdiction and malpractice concerns. Yet, another lawyer may agree to it because her client has indicated that it is not a deal-breaker, or the lawyer may not know whether the choice of law proposed by the other side is objectionable and therefore cannot tell her client not to agree to it.

In such a situation, the different motives for each lawyer may be inconsequential if the same final result is reached. However, for our purposes of studying *why* lawyers act the way they do in relation to choice of law in merger agreements, such situations raise difficulty deciphering what the motive was for the choice that was made, if different parties had different motives for the same decision. These situations are common with choice of law in merger agreements, making it difficult to put the choice of law into one of the various hypotheses without understanding more about the complexities of choosing.

#### E. *Implications of Intent Issues for Formalist Theory*

The fact that lawyers and not commercial firms are choosing the law to govern the agreement undermines an important claim of the new formalists.<sup>56</sup> The logical progression of the new formalist argument is that to the extent that commercial parties are choosing New York law in greater numbers and fleeing Delaware they are embracing “the formal contract law of New York.”<sup>57</sup> However, there are intent problems with the idea that commercial firms are choosing New York for formalism. First, commercial firms are not deciding choice of law—their lawyers are deciding.<sup>58</sup> Second, even if the commercial firms are deciding, there is no single brain making choices for such a firm except in the case of a sole proprietorship, leaving an unclear intent for the firm as a whole. Further, if clients care more about venue than choice of law, then it becomes harder to argue that the *commercial firms* are

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56. If the clients were directing the lawyers' choice, then it might still be possible to argue that the choice of law represents the firm's choice. However, because of a possible divergence in interests, the lawyer may not simply implement the client's wishes. See *infra* Part IV. Alternatively, the client may not care about the choice of law and simply instruct the lawyer to make the choice. If that is the case, the choice of law does not represent a commercial firm's choice. See also *supra* Part II.

57. See Kraus & Scott, *supra* note 9, at 1062.

58. This would be true in my survey but it may not be the case in the broader array of contracts studied by Eisenberg and Miller and referenced by Kraus and Scott. Further work could be done surveying the lawyers drafting the broader array of contracts.

choosing formalistic contract law in order to “economize on contracting costs.”<sup>59</sup> If the lawyers are making the choice, what can we surmise about how much their choice reflects concerns of the client company and how much the choice reflects the lawyers’ own concerns and preferences?<sup>60</sup>

Many of the arguments for preferring formalistic contract law are been built on a model of what most commercial firms hypothetically prefer.<sup>61</sup> Recent empirical studies showing a flight to New York are cited as confirmatory evidence of the preference of commercial firms for a formalistic law. Scholars rely on the combination of the hypothetical preference and the empirical data to provide the foundation for a much larger claim that courts should normatively follow formalism and reject contextualism since that is what commercial parties prefer.

However, if the choice of law in the merger agreement is not the commercial firm’s choice but the lawyer’s choice, the choice of governing law by itself tells us little about what choice commercial firms would make or are making. Therefore, given the data collected showing a clear indication that the lawyer is making the choice, one can no longer rely on the formalist theory to assume that by enforcing choice of law the corporation’s preference is being implemented.

#### IV. NEW YORK VS. DELAWARE: COMPARISON AND IMPLICATIONS

##### A. *Lawyers are Comfortable with Both Delaware and New York Contract Law, but are More Comfortable with Delaware*

Lawyers in the survey report greater comfort with Delaware contract law than New York contract law.<sup>62</sup> When asked to “select a phrase to describe how comfortable you, or a member of your firm, are with Delaware law” with the options of “very comfortable”; “comfortable”; “probably comfortable”; and “very uncomfortable,” the op-

59. Kraus & Scott, *supra* note 9, at 1028-29.

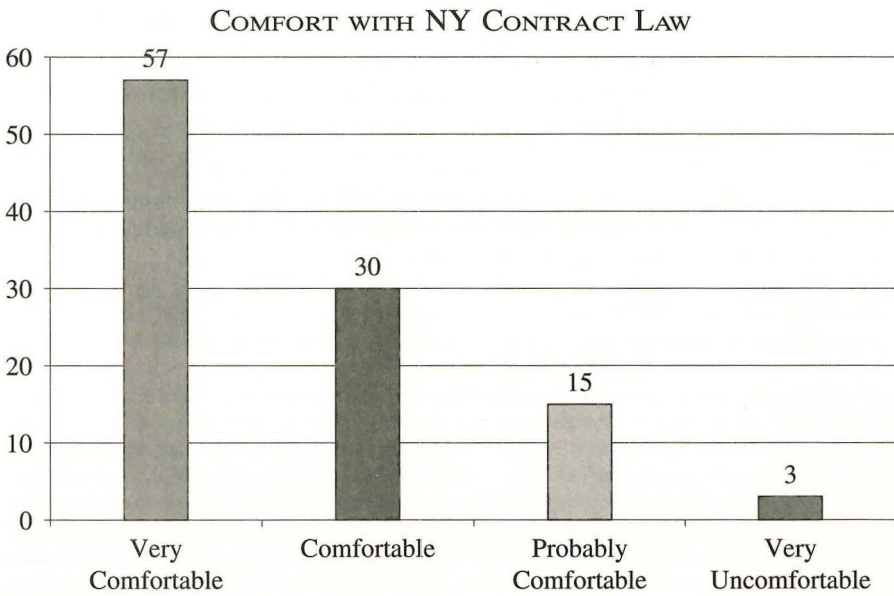
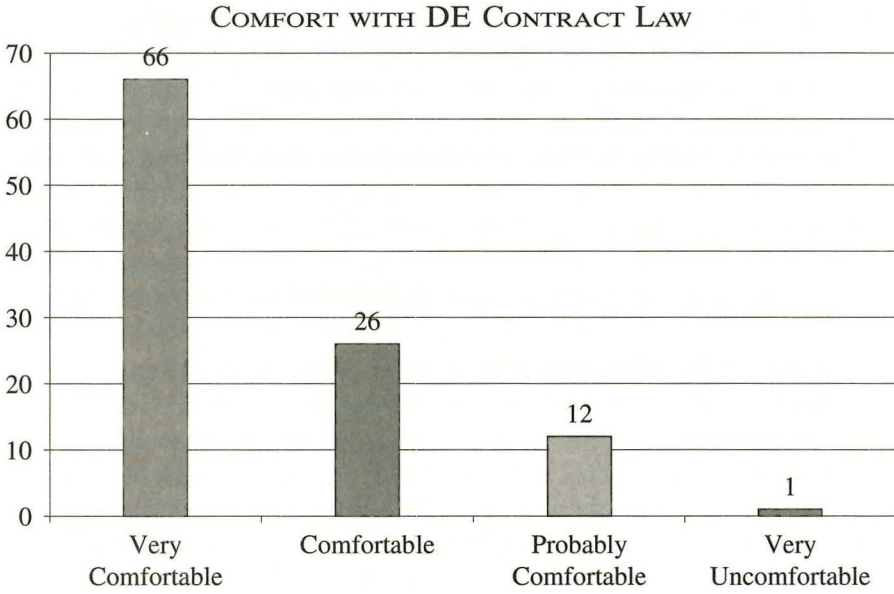
60. The possibility that there could be a disjunction between the client and the lawyer arises in the related choice of forum. As one scholar says, “[p]roblems initially occur when any divergence of interest arises between the client and the attorney.” Michael J. Maloney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread”*, 36 S. TEX. L. REV. 933, 950-51 (1995); see also SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002).

61. Kraus & Scott, *supra* note 9, at 1061. See also Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 556 (2003) (discussing interpretation that courts “should facilitate the ability of firms to maximize welfare”); see also *id.* at 573-574 (discussing *firms’* interpretive preferences) (emphasis added).

62. See Lawyer 6 indicated that “[i]f you are a Kansas lawyer, you are comfortable with Delaware but not New York law.” Interview with Lawyer 6 (Sept. 13, 2013) (on file with author).



tions generated 66; 26; 12; and 1 selections, respectively. The corresponding question for New York law generated 57; 30; 15; and 3 selections, respectively.



The first question to ask about these results is: are these results surprising or significant, and what may they explain? Second, how do the

results relate to the Article's hypothesis that lawyers devote a moderate amount of time to the choice, are fairly comfortable with the common law of most jurisdictions (except outlier ones), and that context and particular issues drive the choice of law rather than a strategic choice?

As to the first question, one lawyer<sup>63</sup> said that lawyers at big law firms in the 1990s would not have said that they were more familiar with Delaware contract law than New York contract law. Yet, survey data shows that 64% of respondents said that they were very comfortable with Delaware contract law, whereas only 56% of respondents selected the same as to New York contract law. This raises the question of what lawyers mean by comfort with the law of a jurisdiction, and how and why the lawyers' comfort level with the law of a jurisdiction affects the choice of law.

One lawyer drew a distinction between being generally comfortable with New York law in the sense of being knowledgeable enough to avoid malpractice, and possessing the degree of expertise required to render an opinion.<sup>64</sup> This lawyer would not be comfortable enough with New York contract law to give an opinion or draft a complaint.<sup>65</sup> However, the lawyer does not feel the need to be familiar with all aspects of the law because the lawyer can employ a Lex Mundi law firm that has a branch office in every state.<sup>66</sup>

When lawyers say their comfort level with Delaware contract law is high, it may be because they think that the Delaware contract law that matter the most are limited provisions such as the material adverse change ("MAC") clause<sup>67</sup> and the no-shop clause,<sup>68</sup> which are related

63. Interview with Lawyer 5, *supra* note 15. Most lawyers do not consider themselves experts in Delaware contract law but are comfortable with New York law because a partner or a firm is an expert. Interview with Lawyer 9, *supra* note 54.

64. Interview with Lawyer 1, *supra* note 20.

65. *Id.*; see e.g., *infra* Part IV.

66. Interview with Lawyer 1, *supra* note 20; See *Member Firm Locations*, LEX MUNDI, available at [www.lexmundi.com](http://www.lexmundi.com) (last visited Nov. 14, 2013) (website for global law firm).

67. See STEPHEN I. GLOVER ET AL., M&A PRACTICE GUIDE § 12.04[1]-[3]. A closing condition of a purchase agreement typically provides that there be no material adverse changes since the agreement was signed. *Id.* at § 12.04(2) (explaining that "a buyer invoking the failure of a MAC condition must meet a high burden to prove that a MAC has occurred").

68. *Id.* at § 1.04 ("The no-shop/exclusivity agreement provides that the target and its owners will not discuss the possibility of transaction with any other party while negotiations are underway."). See also EDWIN L. MILLER, JR., MERGERS AND ACQUISITIONS: A STEP-BY-STEP LEGAL AND PRACTICAL GUIDE 248 (2008) (explaining that these clauses "come in multiple strengths . . ."). Lawyer 6 said that, in public deals, "one of the most litigated issues is corporate fiduciary duty. That duty might involve when you have to shop the transaction." Interview with Lawyer 6, *supra* note 62. That lawyer found the "legal standard in Massachusetts" to be "opaque and not as clearly stated as in Delaware." *Id.*



to corporate law issues. Since most lawyers are comfortable with the Delaware General Corporation Law (“DGCL”),<sup>69</sup> they may indicate that they perhaps are also comfortable with Delaware contract law.<sup>70</sup> Expressions of comfort with Delaware contract law by a lawyer may also mean that he is just saying no one hears anything untoward about Delaware contract law in the way that parties hear bad things about California law.<sup>71</sup> It may also be a lack of experience by the lawyer with Delaware contract law.<sup>72</sup>

The Berkshire Hathaway acquisition of Burlington Northern illustrates the comfort level with Delaware contract law and its implications in an agreement.<sup>73</sup> The choice of law was Delaware. Although both companies were Delaware corporations, no Delaware lawyers were in the deal. There was no strategic choice of New York law for formalism, nor was the choice made because of a need to be licensed in the chosen jurisdiction. This demonstrates the comfort level of a New York and a California law firm with a Delaware choice of law provision.

TCo.	ACo.	C/L	TCo.	State	T	CoOp	ACo.	State	T	Colaw	ACo. Law
BN	Berk	Del	DE			Tax only	DE			NY	CA

So what explains the choice of law for Delaware? Since Berkshire Hathaway (“BH”) already owned a chunk of Burlington Northern (“BN”) and would be subject to internal affairs scrutiny,<sup>74</sup> the firms were more comfortable having Delaware law govern than having the agreement scrutinized under New York law either in a New York forum or another forum. Because lawyers do not like to bifurcate law and forum,<sup>75</sup> New York law would result in a New York forum, but

69. DEL. CODE ANN. tit. 8.

70. A recent paper suggests that this confidence in Delaware contract law may not be warranted and that “the virtues of Delaware courts in corporate law contexts may make them less than ideal at doing the ordinary work of resolving contract law disputes.” John C. Coates, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295, 335 (2012).

71. See Interview with Lawyer 5, *supra* note 15 (regarding California courts purporting to govern Delaware corporations).

72. See Coates, *supra* note 70, at 308-09.

73. Berkshire Hathaway bought all shares of Burlington Northern Sante Fe Corporation in a \$44 billion deal; Berkshire’s largest acquisition. Michael J. De la Merced, *Berkshire Best on U.S. with a Railroad Purchase*, N.Y. TIMES (Nov. 3, 2009), [http://dealbook.nytimes.com/2009/11/03/berkshire-to-buy-rest-of-burlington-northern-for-44-billion/?\\_r=1](http://dealbook.nytimes.com/2009/11/03/berkshire-to-buy-rest-of-burlington-northern-for-44-billion/?_r=1); Associated Press, *Berkshire Completes Acquisition of BNSF Railroad*, CLEVELAND (Feb. 12, 2010), [http://www.cleveland.com/business/index.ssf/2010/02/berkshire\\_completes\\_acquisitio.html](http://www.cleveland.com/business/index.ssf/2010/02/berkshire_completes_acquisitio.html).

74. See *supra* note 6 and accompanying material.

75. See *supra* Part III.C.

the court would defer to Delaware law under the internal affairs doctrine. Lawyers might fear that New York courts will misapply the Delaware law on the very important corporate issues. Accordingly, the parties will typically prefer to have Delaware law govern, preferably in a Delaware forum, even if neither law firm is a Delaware firm. In addition, BN was an acquisition of a public company. After BH acquired the rest of the BN that it originally did not hold from the public, there was no reason to have the representations or indemnities survive the transaction. And, the agreement said that the representations and warranties would not survive the merger. The most important provisions would be the MAC clause and the no-shop provision, and both lawyers would be very comfortable with Delaware law governing these corporate issues.<sup>76</sup> Most law firms, including the New York and California firms in this deal, seem fairly comfortable with Delaware contract law, consistent with the survey.

A future study could include a question on the structure of the merger to determine whether it was a true merger or a non-true merger. With this information, one could determine how that deal structure affected the answer to the comfort with New York and/or Delaware contract law.

Another explanation for greater comfort with Delaware contract law over New York contract law is based on the relationship between forum and law. Lawyers may simply be more comfortable with how the Delaware Chancery Court will respond, and see the New York court as unpredictable. To avoid bifurcating, Delaware may be favored as the choice of law. A future study could also ask about what contract provisions matter in M&A agreements and ask the lawyers whether they differ significantly in Delaware and New York for buyers and sellers.

It may also, according to Professors Cain and Davidoff, be due to events that preceded my survey, such as the fallout from the ConEdison decision and the 2008 financial recession.<sup>77</sup>

Finally, although more lawyers expressed being comfortable with Delaware than New York contract law, other lawyers still expressed a comfort with the contract law of both jurisdictions. One reason for the mutual comfort may be underlying structural factors that ensure

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76. The choice of law decisions seems to be made at the micro level rather than at the macro level.

77. See Cain & Davidoff, *supra* note 7, at 94-95 (discussing *Consol. Edison v. Ne. Utils.*, 426 F.3d 524, 531 (2d Cir. 2005)). The refusal of the New York court in *ConEdison* to allow target shareholders to sue for the share premium made some lawyers wary of choosing New York law in merger agreements.



that there will be few contract issues that arise in merger agreements. These possible factors might determine when the choice of law, including contract law, might be important. For a large number of true mergers, the new public company merges out of the former public company as a subsidiary. In these cases, few contract provisions survive the merger, so the only provisions that will matter would be those involving events that occur prior to the merger, such as the MAC clause and the no-shop provision.

On the other hand, with non-true mergers, where the merger company is not public, there will be continuing obligations to the shareholder/parent such as representations, warranties, and a possible continuation of services, all of which will implicate contract law.<sup>78</sup>

In these situations the answer to whether one felt more comfortable with New York or Delaware contract law might depend on whether you need to be concerned with matters that go beyond corporate related issues, such as the MAC clause and the no-shop provision, and involve representations and warranties which survive the closing. For those lawyers involved primarily in true mergers, the number of contract issues will be small and mostly concerned with the time prior to the closing.<sup>79</sup> Because those issues are likely to be confined to the MAC clause and the no-shop provision, if the lawyer is confident on how those two issues will be resolved, the lawyer might express a high degree of confidence in both New York and Delaware contract law.

As to the second question posed in this section pertaining to how the difference in comfort level between New York and Delaware law affect this article's theory, the theory is supported. The higher comfort level with Delaware law than New York law negates the strategic formalism theory. If lawyers were bent on adopting one governing law due to its superior formalistic quality, then it is unlikely that the lawyer would express relative comfort with the contract law of both Delaware and New York. However, the fact that lawyers tend to be comparably comfortable with both laws also negates the reflexive copying theory. If lawyers are copying provisions without any thought, it is unlikely that they will be able to compare the law of New York and

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78. Interview with Lawyer 5, *supra* note 15. See GLOVER ET AL., *supra* note 67, at § 10.02[2][b].

79. Professor Nadelle Grossman pointed out that "around 90% of them are challenged in court. The usual challenge is by a dissident shareholder—someone who usually acquires shares after the deal has been announced and through a fiduciary duty suit against the target board, seeks additional disclosure and/or seeks to have the acquirer up its offer." Email from Professor Nadelle Grossman, Professor of Law, Marquette University Law School, to Juliet P. Kostritsky, Professor of Law, Case Western Reserve University School of Law, (Mar. 7, 2014, 11:05 EST) (on file with author).

Delaware and to give an answer to their comfort level with both jurisdictions. In certain instances, lawyers may push for a particular state's law (New York or Delaware) depending on how the state law resolves: (1) the survival of the statute of limitations and (2) sandbagging<sup>80</sup> and whether the lawyer is representing a buyer or seller. The speed of resolution could also influence a choice for Delaware law, particularly in a period of financial instability.<sup>81</sup> Accordingly, this Article's theory of moderate thought is supported by these results. Some thought is put into this decision, largely dictated by the context of the agreement and its unique circumstances.

### B. *Do Lawyers Report the They Care about Formalism?*

The survey seeks to resolve one of the most persistent debates in the contract literature: whether there are perceived differences between how strictly New York and Delaware interpret contracts. Question 4 in the survey asked the respondents to “[p]lease compare the substantive contract law of New York and Delaware and pick what you feel is the appropriate answer to describe the relationship in terms of a strict approach to contract interpretation.” The study posed this question because the recent economic literature portrays the flight to New York as a preference for the stricter formalism of New York's contract law.<sup>82</sup>

The survey results do not demonstrate an overwhelming perception that New York law is stricter or more formal than Delaware law—unlike the overwhelming disparity of the results showing the lawyer, not the client, makes the choice of law. Fifty percent of respondents answered that they thought New York and Delaware shared an equally strict approach to contract interpretation. Approximately 14.13% answered that Delaware had a more strict approach, while 35.87% answered that New York was stricter. Clearly, a greater number of respondents view New York as more strict but half regard New

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80. Sometimes a buyer acquires information that might allow it to sue the seller for a breach of representation. However, if the information is acquired before the parties close, a question arises as to whether the buyer can sue for damages for breach of a representation in view of the pre-closing knowledge, because pre-closing knowledge could indicate that the buyer did not rely on the representation. In Delaware, a buyer can sue despite such knowledge unless there is an anti-sandbagging clause in the contract. New York only allows recovery if the source of the knowledge emanates from a third party, not the seller. See, e.g., Brendan J. McCarthy, *Sandbagging in M&A Deals: Is Silence Golden for Buyers?*, STOUT RISIUS ROSS (2012), available at <http://www.srr.com/article/sandbagging-ma-deals-silence-golden-buyers>.

81. Cain & Davidoff, *supra* note 7, at 111.

82. See Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1654 n.55 (2003) (study of indefinite agreements found New York to be more formal).



York and Delaware as equally strict. The balanced answer to the question helps to explain why lawyers may not be strategically choosing New York law as a means of ensuring formalism—lawyers may not think New York is more formalistic.

The interesting data surrounding this question is actually the number of respondents who did not answer the question. With ten respondents not answering, this question led to fewer answers generated than almost any other question. Several possible explanations may underlie the high non-response rate. The question may not resonate with practitioners or it may be a grey area for which the lawyers do not know the answer. The lack of responses may also indicate that what lawyers are most concerned about is predictability based on a developed body of case law that addresses particular issues that are likely to arise, not formalism or strict interpretation.<sup>83</sup> The lack of responses may show that lawyers are not even thinking in these terms of strict contract interpretation that are often employed by academics. Therefore, despite its resonance in the academic community, the importance of formalistic contract interpretation may not mean that much to practitioners who may not have the training in the nuances of the contract law of their jurisdictions.

While Question 4 sheds light on lawyers' desire for formalism, by asking about their perceived differences in strictness between New York and Delaware, Questions 10 and 12 explicitly ask lawyers what their reasons are choosing for New York and Delaware law, respectively. These responses support the Article's hypothesis that lawyers put a moderate level of thought into choice of law provisions in merger agreements. Lawyers care about the jurisdiction having a "rational jurisprudence."<sup>84</sup> That would seem to suggest that lawyers would accept a state's governing law if it were rational and not aberrant or irrational. Lawyers also report the volume of case law being a significant factor. This suggests an unwillingness to face the lack of precedent. Although these preferences negate unthinking copying, the preferences do not clearly indicate a strategic preference for formalism either. Even the one-third who ranked the substantive law of contract interpretation in New York as the top factor does not necessarily mean that they were choosing formalism. Without an understanding of why a jurisdiction is chosen,<sup>85</sup> the identification of a

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83. Interview with Lawyer 6, *supra* note 62. The issue of strict interpretation or formalistic interpretation "just did not come up." *Id.* There may be connections between predictability and formalism that could be fleshed out in a future survey.

84. See *infra* Appendix Question 12.

85. Deciphering who is behind the choice of law is complex. See *supra* Part III.A.

preference, for even a flight to New York, could not by itself demonstrate a preference for formal contract law,<sup>86</sup> even if one knew exactly what it meant to characterize the entire law of a jurisdiction as evidencing formalism.<sup>87</sup> Many reasons might underlie the choice for New York law and if those reasons do not demonstrate a preference for formalism as the motive for the choice of law, the hard data on the flight to New York would not support the new formalist claim.<sup>88</sup>

### C. *Lawyers Report No Trend to New York Away from Delaware*

Questions 5 through 8 asked participants to opine on whether they felt there was a shift in choice of law in merger agreements from New York to Delaware or from Delaware to New York, and if so, how significant that shift has been. The survey does not support a shift from Delaware to New York; actually, it may demonstrate the opposite. This is consistent with my 2013 statistical study and with the 2012 study of Cain and Davidoff finding a flow toward Delaware after the financial recession.<sup>89</sup>

Of reporting respondents, 65.05% indicated they had not noticed a shift from New York to Delaware for choice of law provisions in merger agreements.<sup>90</sup> Of the 34.95% of respondents that felt there was a shift from New York to Delaware, 41.67% felt that this shift was significant and 13.89% felt it was very significant.<sup>91</sup> Although more practitioners may feel there is not a shift away from New York to Delaware for choice of law provisions in merger agreements, those practi-

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86. Even if there was a flight to New York, if New York and Delaware are equally formalistic, then some other factor would be motivating the move to New York as the choice of law for the merger agreement.

87. Even if one could settle on or accept New York as being formal in some respects, such as adopting a hard version of the parol evidence rule, it could be contextualist in other ways. It is unlikely that a jurisdiction is ever entirely formalist or the opposite. See, e.g., *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214, 214 (N.Y. 1917). Finally, even if the law of New York might be formalist on all fronts, the law of New York could have been chosen for reasons having nothing to do with its "formal" character. Moreover, the rejection of California law may be attributable not to anti-formalism but to a desire to avoid unpredictable results by California courts.

88. Assessing the driving force behind a choice is one difficulty with empirical data. Even if the choice is made with volition and not randomly, what could one tell about the driver of the choice even if one could show a change in the disparity in the choice of law in a time series? It might show us that parties were influenced by a herd instinct to adopt the prior provision or perhaps that parties have been influenced by a buck-the-trend motivation, resulting in a change in the choice of law frequency. We need more direct data on the motivation behind the choice of law to move from the data to the underlying driver of the object of choice.

89. Cain & Davidoff, *supra* note 7, at 95.

90. See *infra* Appendix Question 5.

91. See *infra* Appendix Question 6.



tioners who do believe there has been a shift feel it is a relatively significant one.

Conversely, 92.23% of respondents said that they did *not* feel there was a shift in choice of law from Delaware to New York.<sup>92</sup> Only eight respondents felt that there was a shift from Delaware to New York, but of those eight respondents, six felt that the shift was only slightly significant. Even the few who do feel that there is a shift felt it was only marginally significant.<sup>93</sup> This strong response that there is not a shift in choice of law from Delaware to New York may be further evidence of the predictability that practitioners desire in making choice of law determinations. Delaware courts and judges are viewed as more experienced, and the high volume of case law allows lawyer to better determine possible outcomes if problems should arise that could lead to litigation.

Because this new statistical study replicates the database of the earlier study of Eisenberg and Miller and covers acquisitions of private targets, this study directly nullifies the earlier finding of a trend away from Delaware and toward New York. Still unresolved, however, are the reasons behind the choices that are being made, aside from any demonstration of a trend.

#### D. *Many Justifications for Choosing New York or Delaware Law: A Complex Picture*

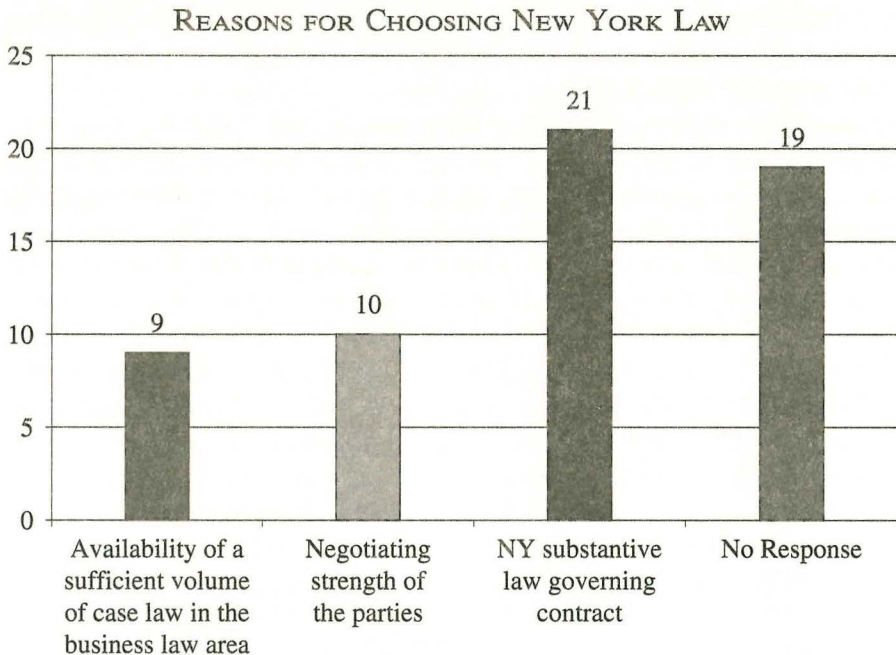
I started out with the hypothesis that would tie the choice of law to attorney locale. I surmised that the shift to New York law, if any, could be explained by a lawyer's desire to have New York law govern because of a branch office in New York. I hypothesized that the lawyers' primary goal would be to choose the law of a jurisdiction with which they were most familiar and in which they were licensed, in order to avoid malpractice claims. However, the survey showed that whether the firm is licensed in the jurisdiction was not a significant factor in the choice of law. Twenty-six out of forty-two respondents ranked the firm having an office in New York in the bottom three rankings for choosing New York law.<sup>94</sup> A possible explanation may

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92. See *infra* Appendix Question 7.

93. See *infra* Appendix Question 8.

94. Although many lawyers said the location of the firm did not matter, in some instances, the location of the law firm in New York or the presence of a branch office in New York seems to be the only factor to explain the choice of New York law. Consider the PNC/National City merger. See *PNC-National City, Merger Proposed*, SEC (Nov. 21, 2008), available at <http://www.sec.gov/Archives/edgar/data/713676/000095012308016152/y72384b3e424b3.htm>. There, National City was a Delaware corporation headquartered in Ohio. PNC was a Pennsylvania corporation headquartered in Pennsylvania. Neither had any real nexus to New York. The choice of New York



be that malpractice concerns are not high when there is such a low probability of litigation ensuing.

A competing theory proposed by other empirical scholars is a substantive preference for New York law due to its formalism, including a hard parol evidence rule.<sup>95</sup> The survey does not directly support this theory. If respondents chose New York law, the substantive law of contract interpretation ranked as the top reason for doing so. However, only about one-third of respondents gave that answer as the specific reason for their choice. The top reason for using Delaware law was a sufficient volume of cases,<sup>96</sup> which had similar non-dominating numbers.

Another competing theory was the unthinking copying theory, stating that lawyers simply copy language from a prior deal and give no thought at all to the boilerplate provisions. However, the fact that 109 lawyers who worked on mergers agreements from a six-month period in 2011 were willing to fill out a twenty-four-question survey address-

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law, however, may be explained when considering that the acquiring company lawyer, Wachtell Lipton, was a New York law firm. In addition, Jones Day and Sullivan & Cromwell had no Delaware or Pennsylvania office, and since Sullivan & Cromwell is headquartered in New York City and Jones Day has a New York branch office, choosing New York law seemed easy, especially since no opinion other than a tax opinion was required.

95. Kraus & Scott, *supra* note 9, at 1061-62.

96. See *infra* Appendix Question 12.



ing the choice of law question indicates that the lawyers had given some thought to the matter, negating the unreflective copying of prior deal language theory.<sup>97</sup>

What I learned from looking at the actual data is that it is very hard to reduce the choice of law to one factor and that many different reasons are given for a choice of law; there was not one overwhelming reason for choosing New York nor Delaware. The top reason given for choosing New York law was the substantive contract law.<sup>98</sup> However, still only twenty-one of sixty-four respondents said this is the most important factor (32.8%). One interviewed lawyer indicated that if the choice of law would be New York but for an objectionable substantive rule, the merger agreement would be drafted to contract around the objectionable rule rather than switching to another governing law.<sup>99</sup> Another lawyer interviewed said “[n]othing in particular” about the substantive law of a particular jurisdiction influenced the choice of law. Rather, the “client is comfortable with New York law” from prior transactions and counter parties are usually okay with New York law and perceive New York law to be fair, reasonable, and customary.<sup>100</sup>

Another significant reason for choosing a jurisdiction is the volume of case law. This was the top reason for choosing Delaware law, and most respondents ranked it in the top three reasons for choosing New York law. As one lawyer<sup>101</sup> explained the importance of volume of case law, “you may have a target located in Nebraska and both parties willing to use Nebraska law other than the concern that there may not be enough actual business cases that have been decided under Nebraska case law. Random example, but I think certain states are concerning because of the lack of case law.”<sup>102</sup>

One reason for the importance of volume of case law is that it lowers interpretation risk.<sup>103</sup> As one lawyer said, “[t]he issues have all

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97. See GULATI & SCOTT, *supra* note 16, at 33-44.

98. One cautionary note is that the survey did not list “rational jurisprudence” as a possible choice for the question asking the reasons underlying the choice of New York law. Had the survey done so, the lawyers might have chosen rational jurisprudence rather than substantive contract interpretation. The differences between these terms and formalism could possibly be delineated in a further survey or in future lawyer interviews.

99. Interview with Lawyer 6, *supra* note 62. “If otherwise choosing NY law and NY comes out a particular way through one of its default rules, then draft around the NY default rule; it would not be enough to shift the choice of law to Delaware.” *Id.*

100. Interview with Lawyer 2, *supra* note 19.

101. Interview with Lawyer 10 (Mar. 25, 2013) (on file with author).

102. *Id.*

103. Email from Ronald J. Coffey, Professor Emeritus, Case Western Reserve University School of Law, to Juliet P. Kostriitsky, Professor of Law, Case Western Reserve University

been litigated.”<sup>104</sup> Further, another lawyer explained the value of consistency: “if parallel provisions are in several agreements, and want consistent treatment, one might want to choose New York law where there is a large volume of cases that have treated and analyzed such a provision.”<sup>105</sup> Since lawyers make the decision on choice of law, not clients, this predictability is even more important.<sup>106</sup> The failure to predict a case outcome would possibly leave the lawyer liable for malpractice, or at least subject the lawyer to criticism from the client for not being prepared for a particular outcome.

Following volume of case law, the next top two factors for choosing Delaware are expertise of judges and a rational jurisprudence. The confidence in Delaware judges may cause lawyers to choose the law of Delaware because they are confident that the judges will apply the law more effectively. If they pick the law of New York, judges may be less expert and less reliable, and thus, there may be a less reliable application of the governing rule. However, one lawyer indicated that New York does a better job adhering to plain meaning than Delaware.<sup>107</sup> In relation to rational jurisprudence, one lawyer said, “Delaware is chosen due to well known and well respected jurisprudence in the area of contract and M&A law.”<sup>108</sup> Both of these reasons, like volume of case law, also correlate with the desire for predictability and a familiar law that helps lawyers to avoid giving wrong legal advice. One lawyer who compared Delaware M&A law to Uniform Commercial Code (“UCC”) law, which has the perceived characteristic of being uniform, confirmed the predictability of Delaware.<sup>109</sup>

The data in Question 12 raises some unanswered questions. It is not clear why substantive contract interpretation ranked more importantly for New York than Delaware. It could be that if one trusts the expertise of judges less, as lawyers seem to do for New York, then the substantive law of contract interpretation is more important as a possible constraint on court decisions. But as the degree of comfort in the expertise of the judges increases, as it does in Delaware, the con-

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School of Law (Mar. 27, 2013, 21:58 EST) (on file with author). Lowering interpretation risk creates value. See Juliet P. Kostritsky, *Interpretative Risk and Contract Interpretation: A Suggested Approach for Maximizing Value*, 2 ELON L. REV. 109 (2011).

104. Interview with Lawyer 6, *supra* note 62.

105. Interview with Lawyer 9, *supra* note 54.

106. Predictability is more important than substantive law. Interview with Lawyer 7, *supra* note 47.

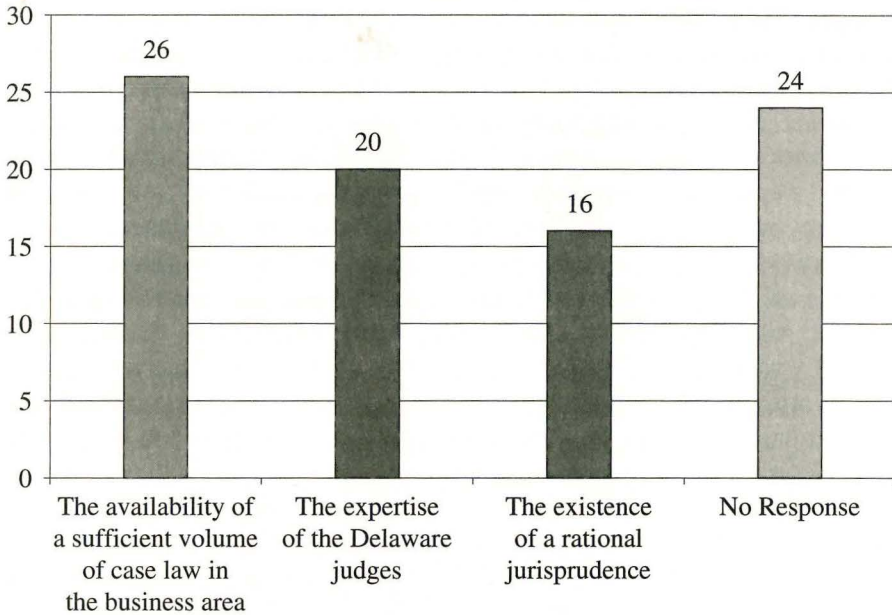
107. Interview with Lawyer 5, *supra* note 15.

108. Interview with Lawyer 4, *supra* note 37.

109. Interview with Lawyer 6, *supra* note 62.



## REASONS FOR CHOOSING DELAWARE LAW



cern with the substantive contract law decreases because lawyers are confident that the judges will reach rational outcomes.

Delaware may also be chosen as a fair compromise when there are no law firms in Delaware.<sup>110</sup> An example involves United Airlines acquisition of Continental Airlines.<sup>111</sup>

T.Co.	ACo.	C/L	TCoSt	TCoOp	ACoSt	TCoLaw	ACoLaw
Continental	UA	DE	DE	?	DE	TX	NY

In the Continental acquisition, there were two Delaware corporations, two global law firms in Texas (Vinson Elkins and Jones Day), each with no Delaware office, and a New York law firm (Cravath) acting for the acquirer. New York could have been the logical choice since the New York law firm would have a preference for New York and the Jones Day and Vinson Elkins law firms each had a New York office. However, large law firms are comfortable with compromising on Delaware as the choice of law when none of them is in Delaware, as was the outcome here.

110. Lawyer 8 mentioned Delaware as “compromise.” Interview with Lawyer 8, *supra* note 21.

111. See Dealbook, *United and Continental Announce Merger*, N.Y. TIMES (May 3, 2010), <http://dealbook.nytimes.com/2010/05/03/united-and-continental-announce-merger/>.

Other factors affecting the choice of law for Delaware that were discovered in interviews include the view that, "Delaware is a good default rule" for private sellers not involving public companies.<sup>112</sup> Another lawyer indicated that the established strong fiduciary duty rules in Delaware influenced the choice of law for Delaware when a distressed sale was involved.<sup>113</sup> Another said, "clients prefer Delaware."<sup>114</sup> Although lawyers typically decide choice of law, not the company, clients may have an influence in a subset of cases.

Many other reasons that influence choice of law were mentioned in interviews. They include: whether the sale was one involving a distressed sale;<sup>115</sup> whether the lawyer was representing a buyer or seller;<sup>116</sup> whether the lawyer was representing a private company or a public company;<sup>117</sup> whether the merger was a true merger involving the acquisition of a public company by a public company in which the public company was merged out of existence or a disposition in which a parent survives;<sup>118</sup> the desire for a neutral forum with a sufficient body of case law;<sup>119</sup> expertise of the judiciary;<sup>120</sup> the location of the company's executive offices;<sup>121</sup> a reluctance to split or bifurcate the forum and the choice of law; whether the law of a particular jurisdiction would apply to part of the transaction due to the internal affairs doctrine;<sup>122</sup> whether there was a developed set of rules on remedies;<sup>123</sup> the incorporation of the target or acquirer; and the sandbagging and survival of the statute of limitations in New York and Delaware. One lawyer cited the better quality of lawyers in New York for the choice of New York law because of a potential need to hire lawyers in the jurisdiction of the governing law if litigations ensues.<sup>124</sup> One lawyer explained a New York choice of law in terms of a "desire for a neutral forum with a developed body of commercial law."<sup>125</sup> The preferable

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112. Interview with Lawyer 4, *supra* note 37.

113. Interview with Lawyer 1, *supra* note 20.

114. Interview with Lawyer 9, *supra* note 54.

115. See GLOVER ET AL., *supra* note 67, at § 2.18(1), for a discussion of the particular issues arising when there are distressed companies.

116. Interview with Lawyer 1, *supra* note 20 (explaining the greater importance of established fiduciary law in Delaware when shareholders not getting 100%).

117. *Id.* (explaining private companies want the forum and choice of law to be where they are located and public companies want the choice to be New York or Delaware).

118. Interview with Lawyer 5, *supra* note 15.

119. Interview with Lawyer 9, *supra* note 54.

120. *Id.*

121. Interview with Lawyer 10, *supra* note 101.

122. Interview with Lawyer 5, *supra* note 15.

123. Interview with Lawyer 9, *supra* note 54.

124. Interview with Lawyer 7, *supra* note 47.

125. Interview with Lawyer 9, *supra* note 54.



travel and logistics of New York over Delaware were also cited as reasons for a New York choice of law provision.<sup>126</sup> Finally, if the target is publicly held, then the target's state of incorporation is almost always chosen.<sup>127</sup> In private company acquisitions, the buyer will usually have post-closing rights against target shareholders, so what law governs and which courts will hear it has greater meaning.<sup>128</sup> Context places a critical influence on choice of law, at least as it is reflected in the lawyers' answers. A follow-up survey could incorporate some of these reasons that were mentioned in interviews.

Another additional insight, though difficult to quantify, is that some lawyers may not consider the choice of law important<sup>129</sup> or spend much time on it. Instead, the choice of law provision is considered an ad hoc decision that is not heavily negotiated ex ante.<sup>130</sup> Lawyer interviews suggested that either the choice of law is unimportant or is not so important as to be a "deal-breaker" and therefore not one that clients or lawyers would insist on. One lawyer thought that the entire survey was strange as so little time is devoted to the issue of choice of law.<sup>131</sup> These findings suggest that there may be a disjunction between academics and practitioners on the significance of the choice of law issue. If this is the case, the reasoning behind the differences in how many agreements used Delaware law versus New York law may not be of great substance.

Or, perhaps the choice between Delaware and New York is not very consequential because there are not that many substantive differences

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126. *Id.* (indicating the counsel is more limited and travel logistics are less desirable in Delaware). See also interview with Lawyer 6, *supra* note 62.

127. Interview with Lawyer 10, *supra* note 101. Contract law has little bearing on litigation in public company target circumstances. The target is the one that has real legal problems at the shareholder level, which is governed by its corporate law. The shareholders of the target will be cashed out or converted into buyer stock, and there is never any indemnity or covenant issue post merger, meaning a buyer's choice of law would be meaningless post merger. And since the premerger litigation generally comes from and is governed by the target's corporate law, why choose anything else?

128. Interview with Lawyer 5, *supra* note 15. With private companies, New York or Delaware law will govern unless the entities are in the same jurisdiction. Interview with Lawyer 10, *supra* note 101.

129. Interview with Lawyer 5, *supra* note 15. *But see* Eisenberg & Miller *supra* note 4, at 1979 (suggesting boiler plate quality of clauses "should not be taken as indicating that the clauses are unimportant.").

130. Interviews with Lawyer 13, *supra* note 42; Interview with Lawyer 14 (Dec. 4, 2012); Interview with Lawyer 5, *supra* note 15. *But see* Eisenberg & Miller, *supra* note 4, at 1981 (suggesting that "choice of law and choice of forum provisions appear to be negotiated vigorously in these merger contracts.")

131. See Interview with Lawyer 14, *supra* note 129.

between these states when it comes to business combination law.<sup>132</sup> Then, when fighting over New York versus Delaware law, there are only two major differences between the two: the survival of the statute of limitations and sandbagging.<sup>133</sup>

A final thought to consider in comparing Delaware and New York for choice of law is that seventy of 100 respondents selected a choice of law provision other than Delaware or New York in a previous deal. After New York and Delaware, the two most popular states used by the respondents in merger agreements are California and Texas. This reliance on California is interesting as California courts are often viewed as unpredictable, and the survey otherwise indicates that practitioners strive for predictability in choice of law provisions. Choice of law provisions outside of Delaware and New York may be the result of the company's location or the nature of that company. As one lawyer explained, "[f]or private companies . . . they want forum and law choice to be where they are located."<sup>134</sup> In contrast "for public companies, Delaware or New York is always used."<sup>135</sup>

In conclusion, there are a multitude of reasons that lawyers choose New York or Delaware law. There is no single overwhelming reason to choose either. Based on all the possible reasons for a choice of law, the unthinking copying theory is obviously not valid. The formalism theory is also negated by how many alternative reasons lawyers have for choosing New York law. The data suggests that there is a moderate level of thought put into the choice of law decision, and that the decision is very contextual, as it can be driven by a large number of reasons depending on the circumstances of the parties, the lawyers, and the agreement.

#### V. CORPORATE OPINIONS AND INFLUENCE OF INCREASED LAWYER LIABILITY

The responses to Question 19, which asked whether a corporate opinion was required in the transaction, demonstrate that 76% of respondents did not require corporate opinions on their transactions. Yet, in Question 20, 89.04% of respondents reported that the fact that a corporate decision was not required did not diminish the importance

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132. Interview with Lawyer 8, *supra* note 21 (providing there are "[n]ot that many substantive differences on business combination law among the states.").

133. These two major issues are used to decide choice of law depending on whether representing buyer or seller and how these issues affect the lawyer's client. Interview with Lawyer 1, *supra* note 20.

134. Interview with Lawyer 1, *supra* note 20.

135. *Id.*



of the choice of law provision. While 84% of respondents to Question 22 answered that they would be willing to accept a choice of law provision for a jurisdiction in which neither the lawyer nor a member of their firm were licensed, the results of Question 23 suggests that 67% would engage local counsel. In Question 21, one lawyer commented that his firm would only give corporate authority opinions in Delaware, while another said that their firm would not comment directly on Delaware contract law, only the DGCL.

The fact that 67% of lawyers would engage local counsel if not licensed in a jurisdiction in which they had to render an opinion, coupled with the limits of the scope of an opinion that they would be willing to give, suggest a disjunction between what lawyers would be willing to accept in terms of choice of law and what may occur in actual practice. This concern about giving a corporate opinion in a jurisdiction where a lawyer or a member of their firm is not licensed may also relate to concerns about engaging in the unauthorized practice of law.<sup>136</sup> A lawyer may have concerns about giving a corporate opinion for a jurisdiction in which they are not authorized because it creates an increased liability for the unauthorized practice of law and malpractice should their opinion be incorrect.

Where a parent company has continuing obligations (as would be true in a private merger pictured *infra*), the acquirer may demand an opinion because they are the survivor company. The acquirer wants to be assured that continuing representations and warranties are enforceable against the parent as a matter of contract law and corporate law. Thus, they can run both ways, because the acquirer may be making promises for post-closing payments if they have withheld or escrowed some of the purchase price for protection against breaches of warranties and covenants, or paying for noncompetes by the selling shareholders over the life of the noncompete provisions (which are tax gimmicks). Also, there may be post-closing covenants by the acquirer, as in supply agreements to sell the seller products.

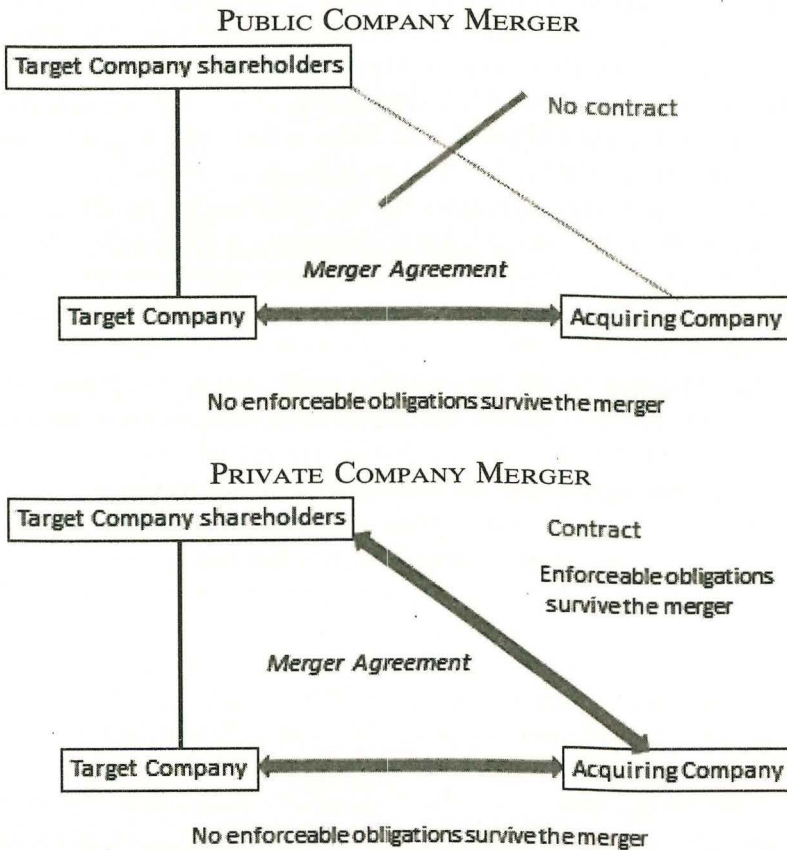
For some lawyers the need to give such an opinion may not raise professional issues, but for others the need for a corporate opinion may change the comfort level with a particular choice of law provision. A firm may need to be qualified to render a corporate opinion.

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136. The concern with the unauthorized practice of law has generated scholarship. See, e.g., Stephen Gillers, *Lessons from Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002).

you nor your firm was licensed if you were not allowed to retain local counsel?" That question would help shed light on whether the need to render an opinion in the absence of local counsel affects the choice of law and in what ways.

Further research should segregate the answers given by lawyers based on whether there was a true public-to-public merger or a private merger,<sup>142</sup> since the contractual issues differ significantly between them, as true public company mergers raise few contractual issues relative to private mergers.



142. The SEC EDGAR database that I used for my data set covers private mergers. EDGAR reports exist for some, but not most private mergers. EDGAR will cover a private merger when there is a controlling shareholder of the target public company, if the acquiring public company needs to have its own shareholders approve the merger and will cover a privately owned company that is raising capital in the public company to effectuate the merger, usually through issuing debt, but sometimes equity. The key is that the target, the parent or the acquirer, must be a reporting company in EDGAR. A truly private company will not be filing with the SEC. Interview with David P. Porter, Visiting Professor, Case Western Reserve School of Law (Nov. 6, 2013) (on file with author).



One lawyer said that he was only comfortable giving a Delaware opinion not a New York opinion.<sup>137</sup>

The effect of the presence or absence of a corporate opinion can be seen in the following example involving Berkshire Hathaway's acquisition of Lubrizol Corporation.<sup>138</sup>

Target Co	Acq. Co.	ChoiceLaw	T.Co.State	T.Co.op.	Acq.Co. State	TCoLaw	ACoL
Lubrizol	Berkshire	Ohio	OH	No	DE	OH	Ca.

In the Lubrizol merger, the California law firm Munger Tolles & Olson did not care about the choice of law because they were not required to render an opinion. Because Lubrizol is Ohio centric,<sup>139</sup> choice of law would have been Ohio law under all normal circumstances. Although the internal affairs doctrine of Delaware would come up, the Ohio lawyers working on this deal (Jones Day, Ohio) would have been comfortable and familiar with Delaware corporate law.

On this question of willingness to accept a choice of law provision for a jurisdiction where the lawyer is not licensed, one lawyer indicated that although he was not knowledgeable about contract law in the jurisdiction chosen, they "do have New York lawyers that can advise if a particular issue arises during negotiations."<sup>140</sup>

Also, it should be noted that while Delaware is widely accepted as a choice of law for many firms without a branch in the state, the survey does not directly ask whether the lawyer would be willing to deliver a legal opinion on Delaware contract law without local counsel. The importance of local counsel when legal opinions are required can be seen in the answers to Question 23 in which 67% said they would engage local counsel if the choice of law were one which they were not licensed. One lawyer interviewed said, "[n]ot unless lender required a legal opinion."<sup>141</sup>

For a follow-up survey, I would ask the question again, excluding Delaware, and say, "would you accept a choice of law in which neither

137. "My firm will not opine directly on Delaware contract law although it will opine on DGCL." Interview with Lawyer 5, *supra* note 15.

138. News Release: Berkshire Hathaway to Acquire Lubrizol for \$135 per Share in an All-Cash Transaction, SEC (Mar. 14, 2011), available at <http://www.sec.gov/Archives/edgar/data/1067983/000095012311026351/142195exv99w1.htm>.

139. *Id.*

140. Lawyer 2, who works for Cleveland firm with a New York office, said, "[y]es, if the client desired or if the other side insisted." Interview with Lawyer 2, *supra* note 19.

141. *Id.*

## VI. CONCLUSION

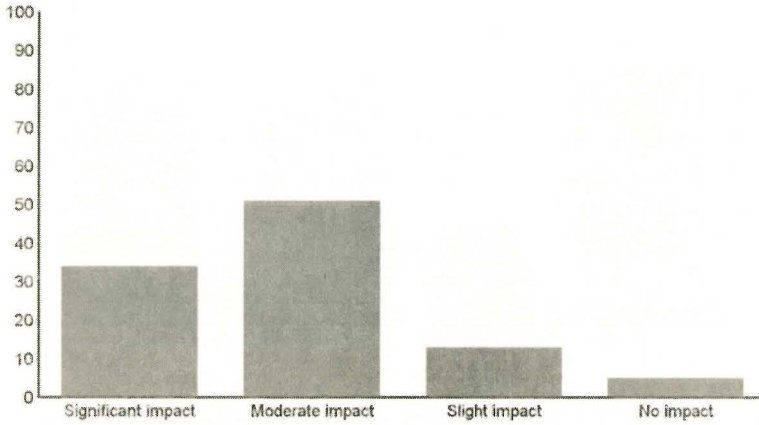
Empirical data can sometimes be used to support theoretical or normative arguments. This was true when the new formalists relied on an empirical study finding a flight to New York to argue that such a flight demonstrated the preference of commercial firms for formal contract law. Another theory is that lawyers unreflectively copy choice of law provisions from prior agreements. This survey of lawyers from 343 merger agreements seeks to resolve whether either of these theories can be validated in a set of 2011 merger agreements. This Article and the survey cast doubt on the claims for several reasons. First, the data shows that lawyers, not clients, make the choice of law. The choice of law does not represent, and cannot be used to argue that it represents, an unequivocal commercial firm choice. Second, the reasons for the choice of law are so variegated that they cannot support the argument that formalism is driving the choice. Third, lawyers do devote some attention to the matter, negating the notion that lawyers would copy language from prior deals without any thought. Finally, the data shows how important the particular context is and that without an understanding of all the variables, it is hard to decipher the meaning of the choice of law.

Further research needs to be done segregating the choice of law results in private and public mergers to see whether the results on choice of law differ. In the true public merger case, there will be so few contractual issues that the choice of the law governing the contract would have reduced importance when compared to the private merger where contractual issues exist post closing.



VII. APPENDIX

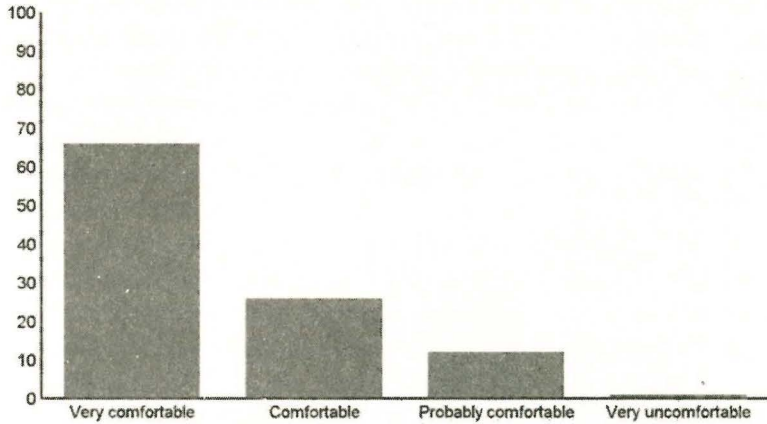
1 Please select a phrase describing the impact of the choice of forum on the choice of law:



#	Answer	Bar	Response	%
1	Significant impact		34	33.01%
2	Moderate impact		51	49.51%
3	Slight impact		13	12.62%
4	No impact		5	4.85%
	Total		103	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	4	1.89	0.65	0.80	103	103

<sup>2</sup> Please select a phrase to describe how comfortable you, or a member of your firm, are with Delaware contract law:

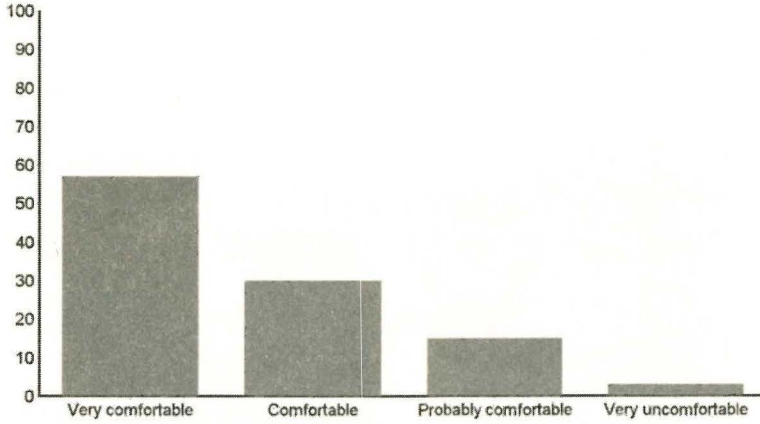


#	Answer	Bar	Response	%
1	Very comfortable		66	62.86%
2	Comfortable		26	24.76%
3	Probably comfortable		12	11.43%
4	Very uncomfortable		1	0.95%
	Total		105	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	4	1.50	0.54	0.74	105	105



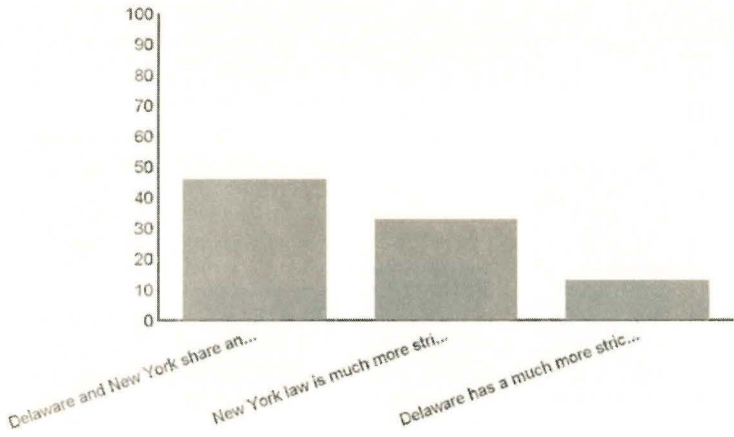
3 Please select a phrase to describe how comfortable you, or a member of your firm, are with New York contract law:



#	Answer	Bar	Response	%
1	Very comfortable		57	54.29%
2	Comfortable		30	28.57%
3	Probably comfortable		15	14.29%
4	Very uncomfortable		3	2.86%
	Total		105	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	4	1.66	0.69	0.83	105	105

4 Please compare the substantive contract law of Delaware and New York and pick what you feel is the appropriate answer to describe their relationship.

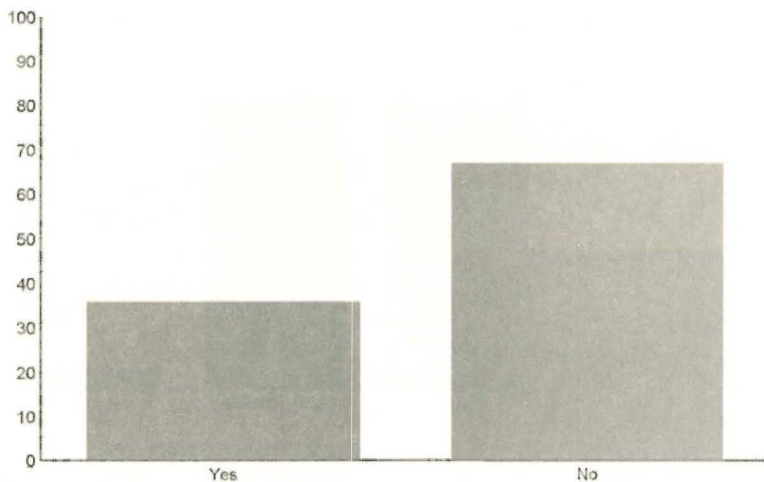


#	Answer	Bar	Response	%
1	Delaware and New York share an equally strict approach to contract interpretation		46	50.00%
2	New York law is much more strict in contract interpretation than Delaware law		33	35.87%
3	Delaware has a much more strict approach to contract interpretation than New York law		13	14.13%
Total			92	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	3	1.64	0.52	0.72	92	92



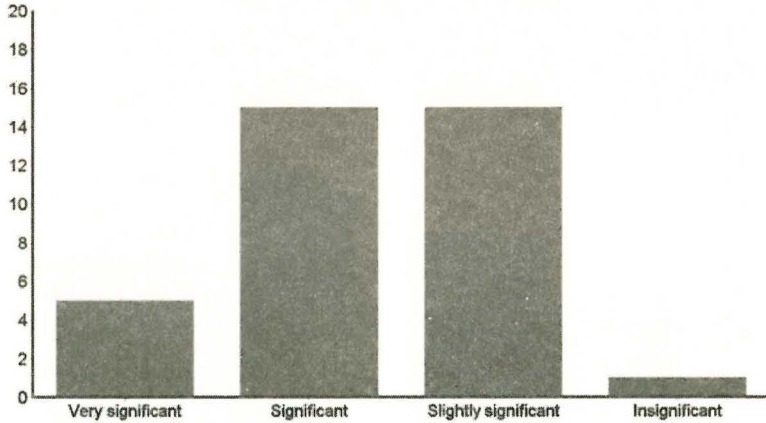
5 Have you noticed any shift in the choice of law provision in merger agreements from a New York to a Delaware choice of law?



#	Answer	Bar	Response	%
1	Yes		36	34.95%
2	No		67	65.05%
	Total		103	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.65	0.23	0.48	103	103

6 Please describe how significant the shift has been.

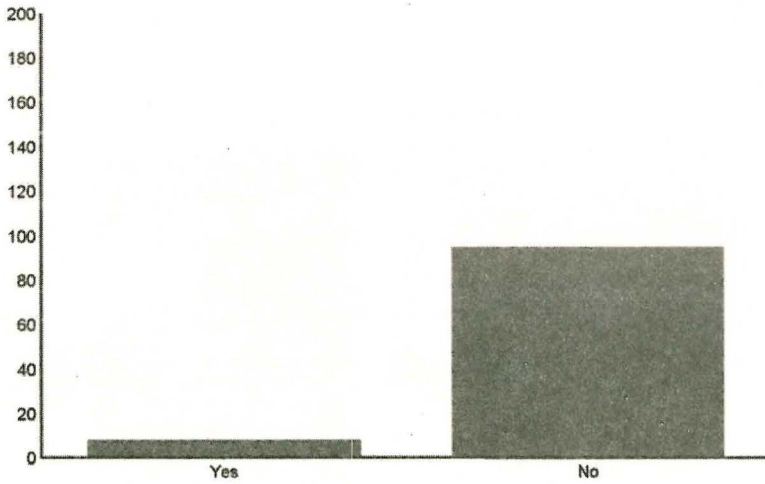


#	Answer	Bar	Response	%
1	Very significant		5	13.89%
2	Significant		15	41.67%
3	Slightly significant		15	41.67%
4	Insignificant		1	2.78%
	Total		36	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	4	2.33	0.57	0.76	36	36



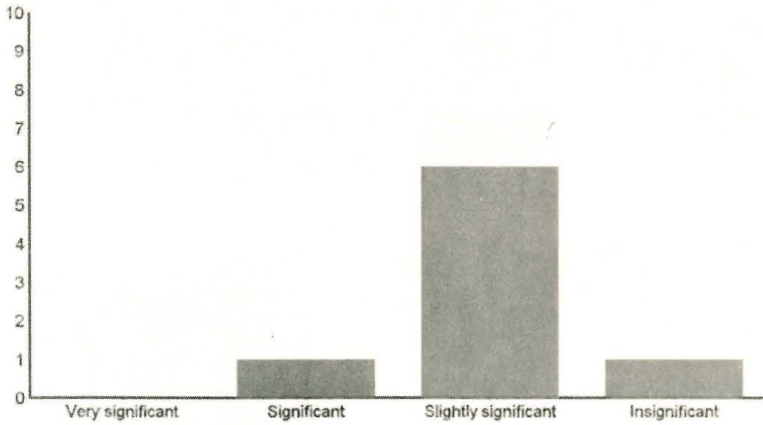
7 Have you noticed any shift in the choice of law provisions in merger agreements from a Delaware to a New York choice of law?



#	Answer	Bar	Response	%
1	Yes		8	7.77%
2	No		95	92.23%
	Total		103	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.92	0.07	0.27	103	103

8 Please indicate *how significant* the shift has been.

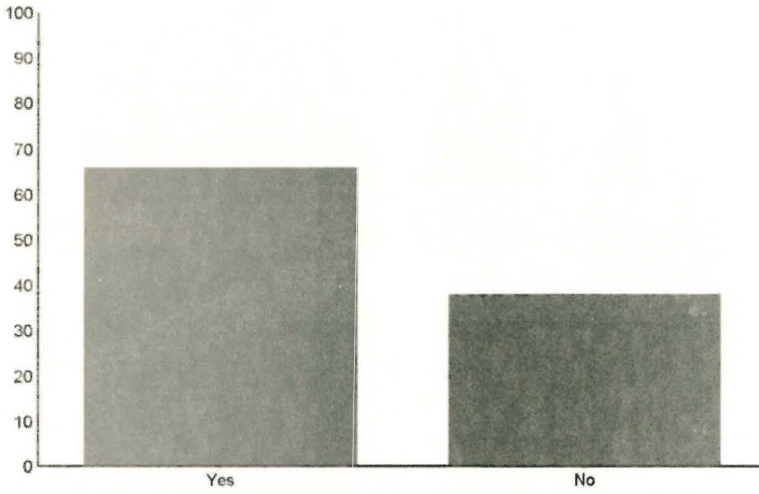


#	Answer	Bar	Response	%
1	Very significant		0	0.00%
2	Significant	█	1	12.50%
3	Slightly significant	██████████	6	75.00%
4	Insignificant	█	1	12.50%
	Total		8	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
2	4	3.00	0.29	0.53	6	8



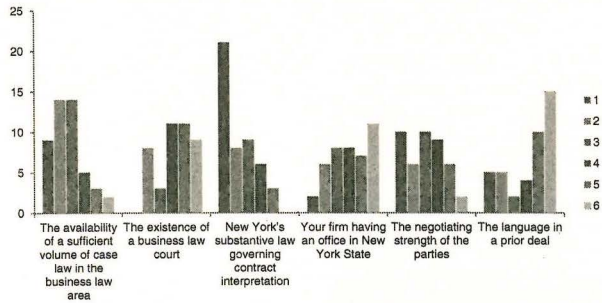
9 Has there been a merger agreement where you have chosen New York law?



#	Answer	Bar	Response	%
1	Yes		66	63.46%
2	No		38	36.54%
	Total		104	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.37	0.23	0.48	104	104

10 Please rank the following reasons for your choice of New York law in order from 1 to 6, with 1 being the most important and 6 being the least important.

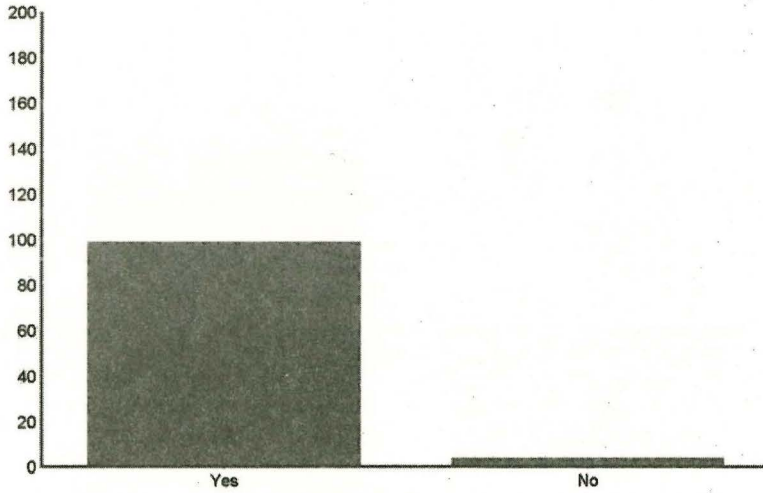


#	Question	1	2	3	4	5	6	Response	Average Value
1	The availability of a sufficient volume of case law in the business law area	9	14	14	5	3	2	47	2.68
2	The existence of a business law court	-	8	3	11	11	9	42	4.24
3	New York's substantive law governing contract interpretation	21	8	9	6	3	-	47	2.19
4	Your firm having an office in New York State	2	6	8	8	7	11	42	4.07
5	The negotiating strength of the parties	10	6	10	9	6	2	43	3.02
6	The language in a prior deal	5	5	2	4	10	15	41	4.32

Statistic	The availability of a sufficient volume of case law in the business law area	The existence of a business law court	New York's substantive law governing contract interpretation	Your firm having an office in New York State	The negotiating strength of the parties	The language in a prior deal
Min Value	1	2	1	1	1	1
Max Value	6	6	5	6	6	6
Mean	2.68	4.24	2.19	4.07	3.02	4.32
Variance	1.74	1.94	1.72	2.46	2.31	3.32
Standard Deviation	1.32	1.39	1.31	1.57	1.52	1.82
Total Responses	47	42	47	42	43	41
Total Respondents	47	42	47	42	43	41



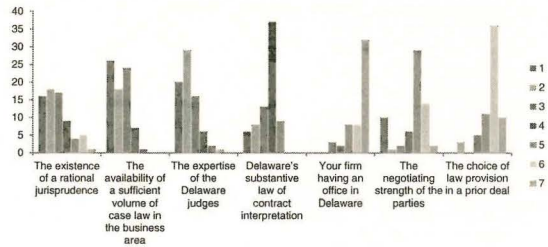
11 Has there been a merger agreement where you have chosen Delaware law?



#	Answer	Bar	Response	%
1	Yes		99	96.12%
2	No		4	3.88%
	Total		103	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.04	0.04	0.19	103	103

12 Please rank the following reasons for your choice of Delaware law in order from 1 to 6, with 1 being the most important and 6 being the least important.



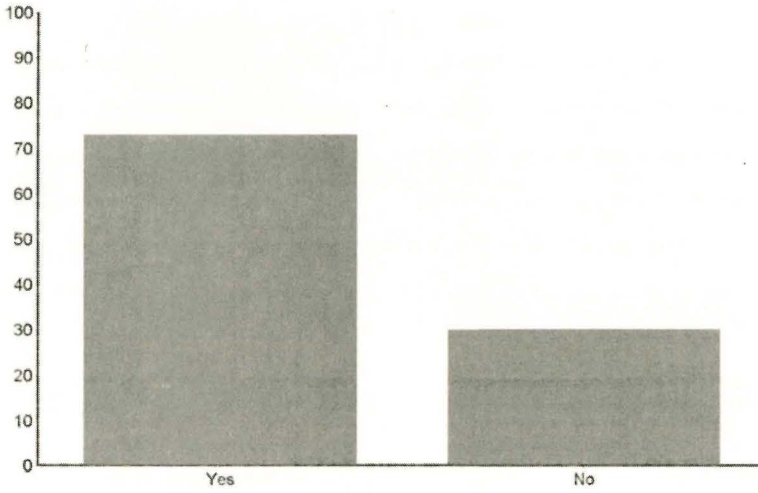
#	Question	1	2	3	4	5	6	7	Response	Average Value
1	The existence of a rational jurisprudence	16	18	17	9	4	5	1	70	2.80
2	The availability of a sufficient volume of case law in the business area	26	18	24	7	1	-	-	76	2.20
3	The expertise of the Delaware judges	20	29	16	6	2	1	-	74	2.24
4	Delaware's substantive law of contract interpretation	6	8	13	37	9	-	-	73	3.48
5	Your firm having an office in Delaware	-	-	3	2	8	8	32	53	6.21
6	The negotiating strength of the parties	10	1	2	6	29	14	2	64	4.45
7	The choice of law provision in a prior deal	-	3	-	5	11	36	10	65	5.65

Statistic	The existence of a rational jurisprudence	The availability of a sufficient volume of case law in the business area	The expertise of the Delaware judges	Delaware's substantive law of contract interpretation	Your firm having an office in Delaware	The negotiating strength of the parties	The choice of law provision in a prior deal
Min Value	1	1	1	1	3	1	2
Max Value	7	5	6	5	7	7	7
Mean	2.8	2.2	2.24	3.48	6.21	4.45	5.65
Variance	2.39	1.12	1.23	1.23	1.4	2.95	1.26
Standard Deviation	1.55	1.06	1.11	1.11	1.18	1.72	1.12
Total Responses	70	76	74	73	53	64	65
Total Respondents	70	76	74	73	53	64	65



13

Have you chosen a jurisdiction for the choice of law provision other than Delaware or New York?



#	Answer	Bar	Response	%
1	Yes		73	70.87%
2	No		30	29.13%
	Total		103	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.29	0.21	0.46	103	103

14 What jurisdiction other than New York or Delaware did you choose?

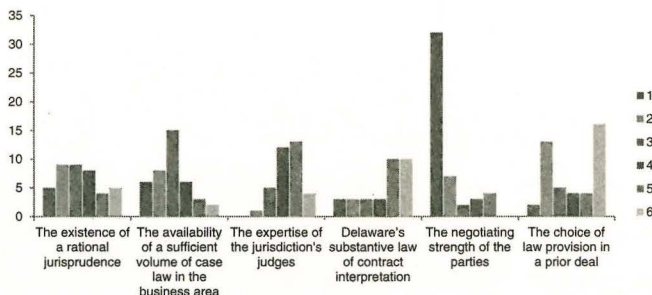
Agreements British Ca Calif **California** Carolina Choice  
 Colorado Columbia Connecticut Contracting Delaware Domicile Draft English Fl Florida Frequently  
 Ga Georgia Home Idaho Illinois Indiana Israel Jurisdiction Kentucky Law Located M&a Maryland  
 Massachusetts Michigan Minnesota Netherlands Nevada North Ny Occasionally Ohio Oil Ontario  
 Oregon Organized Pa Parties Pennsylvania Pennsylvania Quebec Rarely South Target  
**Texas** Transactions Tx Wisconsin

Text Entry
TX
California/Nevada
idaho
California
California
COLORADO
Domicile of Contracting Party
Texas
Texas for oil and gas transactions where parties are located in Texas.
Illinois
<a href="#">View More</a>

Statistic	Value
Respondents	67



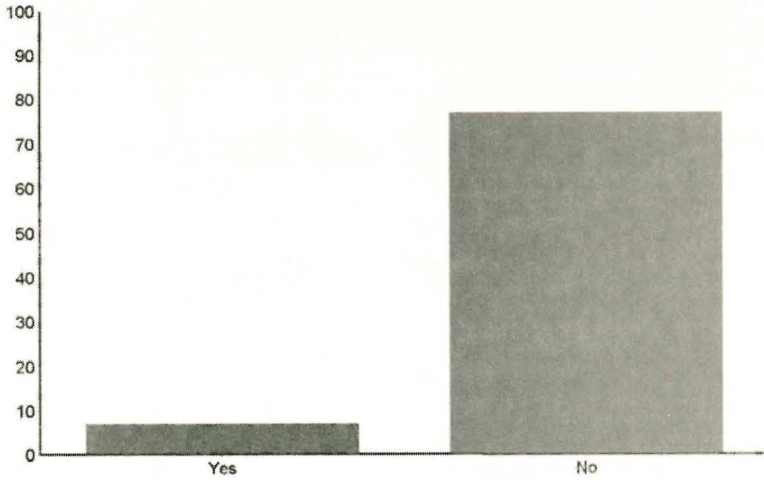
15 Please rank the reasons for your choice of non-Delaware or non-New York law, with 1 being the most important reason, 6 being the least important.



#	Question	1	2	3	4	5	6	Response	Average Value
1	The existence of a rational jurisprudence	5	9	9	8	4	5	40	3.30
2	The availability of a sufficient volume of case law in the business area	6	8	15	8	3	2	40	2.95
3	The expertise of the jurisdiction's judges	-	1	5	12	13	4	35	4.40
4	Delaware's substantive law of contract interpretation	3	3	3	3	10	10	32	4.38
5	The negotiating strength of the parties	32	7	2	3	4	-	48	1.75
6	The choice of law provision in a prior deal	2	13	5	4	4	16	44	3.98

Statistic	The existence of a rational jurisprudence	The availability of a sufficient volume of case law in the business area	The expertise of the jurisdiction's judges	Delaware's substantive law of contract interpretation	The negotiating strength of the parties	The choice of law provision in a prior deal
Min Value	1	1	2	1	1	1
Max Value	6	6	6	6	5	6
Mean	3.3	2.95	4.4	4.38	1.75	3.98
Variance	2.42	1.74	0.95	2.82	1.68	3.33
Standard Deviation	1.56	1.32	0.98	1.68	1.3	1.82
Total Responses	40	40	35	32	48	44
Total Respondents	40	40	35	32	48	44

16  
 If the acquiring or target company is incorporated in Delaware but the law of another jurisdiction was chosen, was there a desire to avoid Delaware law?

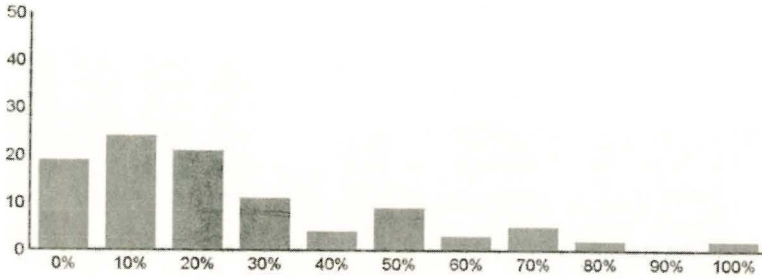


#	Answer	Bar	Response	%
1	Yes		7	8.33%
2	No		77	91.67%
	Total		84	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.92	0.08	0.28	84	84



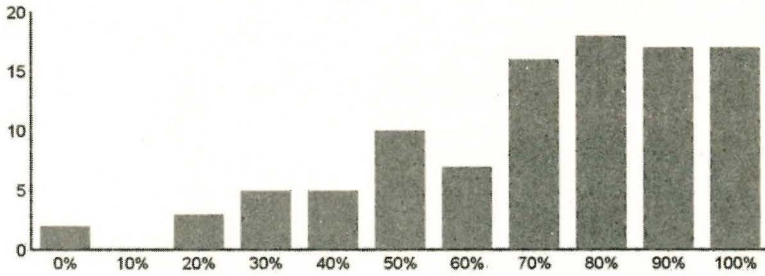
17 Percent client driven:



#	Answer	Bar	Response	%
1	0%		19	19.00%
2	10%		24	24.00%
3	20%		21	21.00%
4	30%		11	11.00%
5	40%		4	4.00%
6	50%		9	9.00%
7	60%		3	3.00%
8	70%		5	5.00%
9	80%		2	2.00%
10	90%		0	0.00%
11	100%		2	2.00%
	Total		100	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	11	3.49	5.63	2.37	100	100

18  
Percent firm driven:



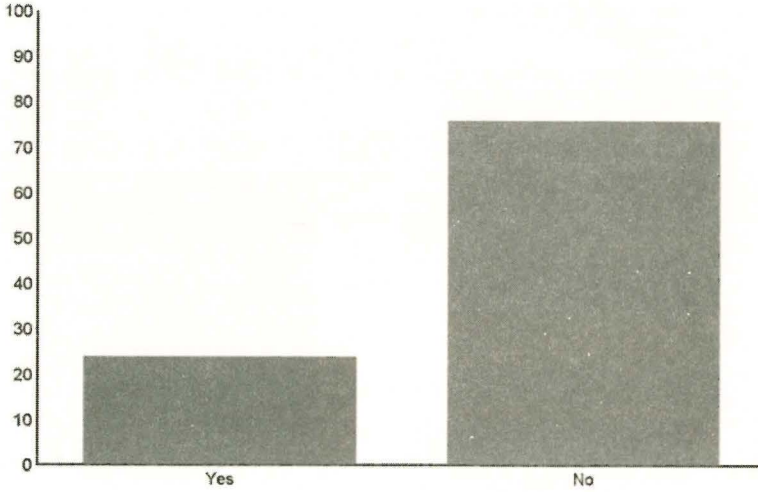
#	Answer	Bar	Response	%
1	0%	█	2	2.00%
2	10%		0	0.00%
3	20%	█	3	3.00%
4	30%	█	5	5.00%
5	40%	█	5	5.00%
6	50%	█	10	10.00%
7	60%	█	7	7.00%
8	70%	█	16	16.00%
9	80%	█	18	18.00%
10	90%	█	17	17.00%
11	100%	█	17	17.00%
	Total		100	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	11	8.12	5.88	2.43	100	100



19

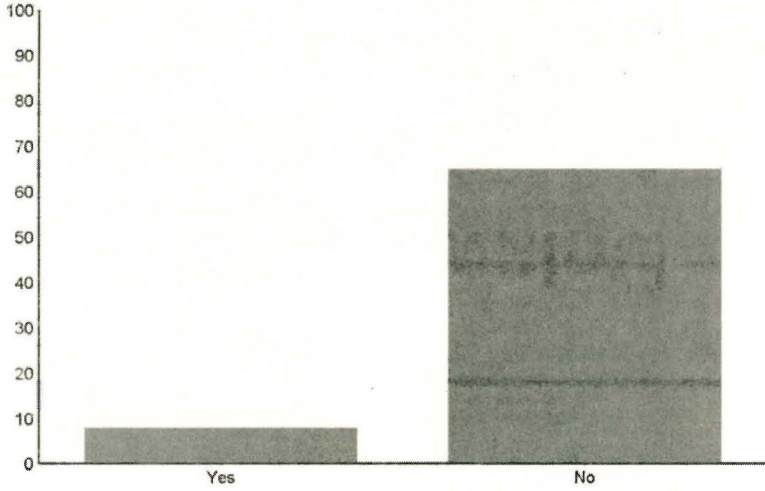
Was a corporate opinion required in your transaction?



#	Answer	Bar	Response	%
1	Yes		24	24.00%
2	No		76	76.00%
	Total		100	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.76	0.18	0.43	100	100

20 Did the fact that a corporate decision was not required lessen the importance of the choice of law provision?



#	Answer	Bar	Response	%
1	Yes		8	10.96%
2	No		65	89.04%
	Total		73	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.89	0.10	0.31	73	73



21

How did the fact that a corporate opinion was required influence the choice of law?

Advice Authority Availability Case Chose Chosen Club Comfort Contract Corporate  
**Delaware**  
 Counsel Dgcl Directly Effect Enforceability  
 Established Event Familiar **Firm** Focus General **Give** Greater Helped Impact  
 Jurisdiction **Law** Lawyer Licensed Litigation Local Marginally Member Michigan  
 Needed Opine **Opinion** Qualified Require Significant State Written York

**Text Entry**

Firm needed to be qualified in jurisdiction, our firm only gives corporate authority opinions in Delaware.

We chose the law that does not require a lawyer who is a "member of the Delaware club" in the event of litigation.

Marginally greater comfort with Delaware case law

My firm will not opine directly on Delaware contract law (enforceability), although we will opine on the DGCL.

significant impact

Not at all.

It did not

Only comfortable giving Delaware opinion not New York.

Need to be licensed to give written opinion but not to give general advice.

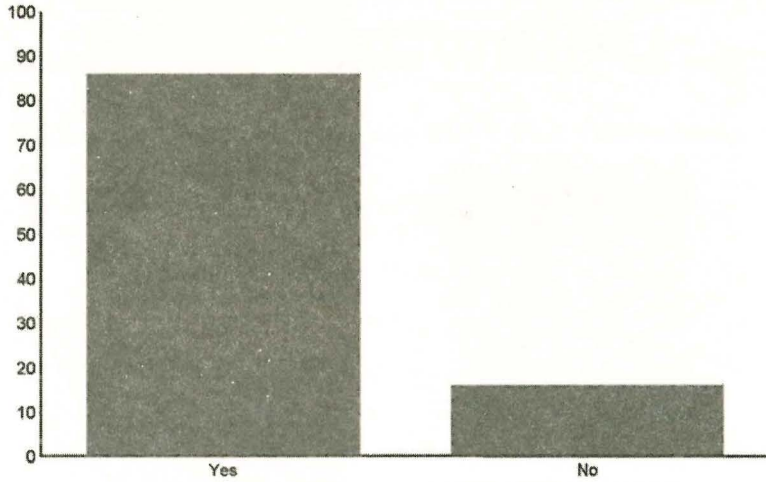
It did not

[View More](#)

Statistic	Value
Respondents	20

22

Would you have been willing to accept a choice of law provision for a jurisdiction in which neither you, nor a member of your firm, was/is licensed?

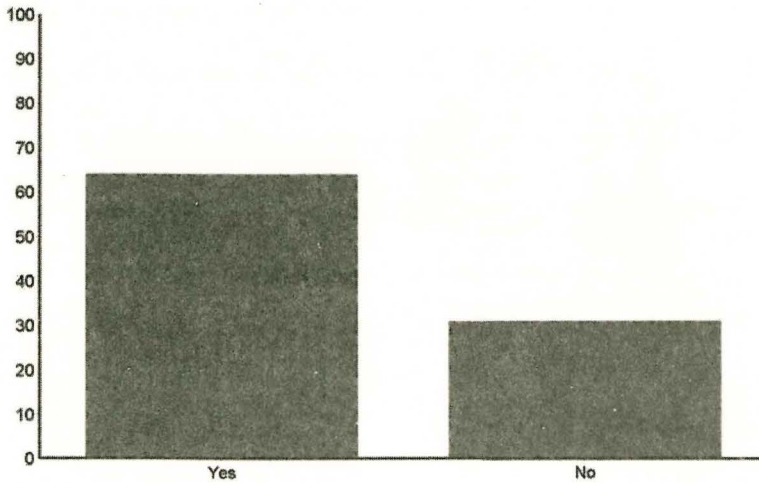


#	Answer	Bar	Response	%
1	Yes		86	84.31%
2	No		16	15.69%
	Total		102	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.16	0.13	0.37	102	102

23

Would you have specified local counsel if the agreement specified the law of a jurisdiction in which neither you, nor a member of your firm, practices law?



#	Answer	Bar	Response	%
1	Yes		64	67.37%
2	No		31	32.63%
	Total		95	100.00%

Min Value	Max Value	Average Value	Variance	Standard Deviation	Total Responses	Total Respondents
1	2	1.33	0.22	0.47	95	95



24  
Comments:

Buyer Case Certainty Choice Choose Chosen Close Constituent Continues Corporation Counsel Courts Cuts Day

**Del Delaware** Dictates Entities Generally Hand Happened Judiciary Jurisdiction

**Law** Local Located Makes **Ny** Practice Prefer Primary Prioritizing Rankings Reasons Require

Selected Shifting Target Tend Venue York 1 6 13 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36

37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71

Text Entry	
Choice of venue may be other than Del or NY even if Del or NY law is selected because one or both constituent entities are located in a jurisdiction other than NY and Del	
63	
11	
48	
20	
55	
34	
12	
None	
28	
<a href="#">View More</a>	

Statistic	Value
Respondents	77