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# Recommended Citation

Eisenberg, Theodore and Miller, Geoffrey P., "The English vs. the American Rule on Attorneys Fees: An Empirical Study of Attorney Fee Clauses in Publicly-Held Companies' Contracts" (2010). New York University Law and Economics Working Papers. Paper 241. http://lsr.nellco.org/nyu\_lewp/241

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# The English vs. the American Rule on Attorneys Fees: An Empirical Study of Attorney Fee Clauses in Publicly-Held Companies' Contracts

Theodore Eisenberg and Geoffrey P. Miller\*

#### Abstract:

We study attorney fee clauses in a data set of 2,350 contracts contained as exhibits in Form 8-K filings by reporting corporations. Because 8-K filings are required only for material events, these contracts likely are negotiated by sophisticated parties and, therefore, provide evidence of efficient ex ante solutions to contracting problems. The American Rule for compensating attorneys requires each party to pay its own attorney, win or lose; the English Rule (applicable rule in most of the world) requires the losing party to pay the winner's reasonable Adoption of the English Rule or other loser-pays arrangements has frequently been proposed as a solution to perceived U.S. litigation problems. But the vast theoretical modeling literature on fees has reached no consensus. Empirical reality should help assess the models and provide new insights. Because contracting parties can opt out of the American Rule and into a loser-pays rule at low cost, we expect such opt-outs to occur frequently if the English Rule more efficiently compensates counsel. Our data show, however, that the American Rule is preferred about as often as the English Rule (or similar loser-pays rules). Choosing the American Rule is associated with the following contractual features: specific kinds of contracts, the presence of a non-U.S. party, the absence of arbitration clauses and jury trial waivers, selection of New York law in contracts other than underwriting contracts, and a likely long-term relation between the It is inversely associated with an increasing degree of contract standardization. Sophisticated parties thus often perceive the American Rule to be value-enhancing compared to loser-pays systems but contracting parties that opt out of U.S. courts through arbitration clauses, or eliminate jury trials through jury waiver clauses tend to reject the American Rule. The findings suggest that theoretical models should resist the assumption that a single attorney fee rule is most efficient in all contexts and that models should strive to account for real-world factors associated with fee clauses.

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# I. Introduction

The "American Rule" on attorney fees requires parties litigating disputes to compensate their own attorneys regardless of the outcome.<sup>1</sup> In some settings deemed to implicate a strong public interest, such as constitutional tort litigation, this rule is modified by "fee-shifting" statutes that require losing defendants to pay prevailing plaintiff's fees.<sup>2</sup> The motivation behind many of these statutes was to enable financially disadvantaged parties with meritorious cases to pay their lawyers in situations where contingent fees are not effective.<sup>3</sup> In most Western legal systems other than the United States, the prevailing norm is some form of the "English Rule" which provides that the losing party must pay the winner's reasonable fees.<sup>4</sup> Variations on the American and English rule exist, such as statutes requiring a party to pay fees if it loses in litigation

<sup>&</sup>lt;sup>1</sup> See Alyseka Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). An exception exists for litigation found to have been vexations or brought in bad faith. See Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

<sup>&</sup>lt;sup>2</sup> See Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651 (1982); Robert V. Percival & Geoffrey P. Miller, The Role of Attorney Fee Shifting in Public Interest Litigation, 47 Law & Contemp. Probs. 233 (1984); Note, State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?, 47 Law & Contemp. Probs. 2321 (1984).

<sup>&</sup>lt;sup>3</sup> E.g., Issachar Rosen-Zvi, Just Fee Shifting, 37 Fla. St. U. L. Rev. 717, 733 (2010) (Equal Access to Justice Acts are concerned with "facilitating the access of low-income people to the civil justice system"). Equal access statutes have not been highly successful. Id. at 734 ("both the Federal and state EAJAs have had, at best, only limited success in meeting the goal of equal access to justice"). Efforts to attract counsel via statutory fee-shifting have met with mixed success. See, e.g., Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 760 (1988) (no clear evidence that fee shifting leads to an increase in the number of cases filed).

<sup>&</sup>lt;sup>4</sup> See Thomas D. Rowe, Jr., Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions, 13 Duke J. Comp. & Int'l L. 125 (2003); Werner Pfennigstorf, The European Experience with Attorney Fee Shifting, 47 Law & Contemp. Probs. 37 (1984). The English Rule has many variations, and often does not provide for complete indemnification of the winner's costs. Id. One American jurisdiction, Alaska, imposes a version of the English Rule. See Alaska R.C. Pro. 82 (requiring the loser to pay a percentage of the winner's fees). A loser-pays provision is also found in § 5-111(e) of the Uniform Commercial Code, pertaining to violations of obligations by issuers of letters of credit.

under a contract which specifies that that party is to receive fees from its adversary if it prevails.<sup>5</sup>

These (and other) rules on attorney compensation have stimulated considerable discussion in policy circles -- a dialogue characterized more by the intensity of the views expressed than by convincing arguments advanced on behalf of any particular arrangement. Many researchers have also tackled questions of attorney compensation from a theoretical perspective. But despite decades of investigation, no consensus has emerged. The question remains: which rule specifies the efficient arrangement for compensating counsel?

This paper sheds new light on this debate. The paper is premised on the idea that at the time of entering into a contract, sophisticated parties have incentives to adopt terms that maximize joint value. Unless externalities are present, maximizing the value of the parties will also maximize social welfare. Thus, if such parties are well-informed and other barriers to contracting are not present, we can expect that the decisions actually made will tend to reflect the efficient ex ante solution to contracting problems.

This principle holds true for contractual provisions for dispute resolution.<sup>6</sup> At the time of contracting, when the parties do not know what type of dispute may arise during performance and cannot anticipate whether they will be plaintiffs or defendants, their mutual incentive is to adopt efficient dispute-resolution terms. Examining actual decisions made by sophisticated parties can therefore be a means for investigating

<sup>&</sup>lt;sup>5</sup> N.Y. Real Property Law § 234 (McKinney) (requiring landlord to pay tenant's attorney fees if lease of residential property requires tenant to pay landlord's attorney fees).

<sup>&</sup>lt;sup>6</sup>See, e.g., Keith Hylton, Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis, 8 Sup. Ct. Econ. Rev. 209 (2000) (if option to litigate reduces the joint wealth of contracting parties, market forces will push them in the direction of alternative forms of dispute resolution); Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. Legal Stud. 1, 5 (1995) ("parties would tend to adopt ADR if it would lead to mutual advantages").

questions about dispute resolution that have heretofore been answered only theoretically. In prior work we have examined a variety of dispute resolution provisions in commercial contracts: choice of law and choice of forum clauses, <sup>7</sup> jury trial waivers, <sup>8</sup> and arbitration agreements. <sup>9</sup>

The present paper uses the same methodology to examine contractual agreements for compensating counsel. Contracting parties have nearly complete freedom to specify whatever terms they like in this area. If they do nothing, the background American Rule will apply. But they can at low cost insert provisions that contract around the American Rule and substitute the English Rule or some other fee-shifting arrangement. Because fee provisions can affect the dynamics of litigation, we assume that the parties or their attorneys are likely to some thought to this matter. The clauses actually adopted ought to

<sup>&</sup>lt;sup>7</sup> Theodore Eisenberg and Geoffrey Miller, Flight to New York: an Empirical Analysis of Choice of Law and Forum Selection Clauses in Large Commercial Contracts, 30 Cardozo Law Review 1475 (2009); Theodore Eisenberg and Geoffrey Miller, Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements, 59 Vanderbilt Law Review 1975 (2006).

<sup>&</sup>lt;sup>8</sup> Theodore Eisenberg and Geoffrey Miller, Do Juries Add Value? Evidence From an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts, 4 Journal of Empirical Legal Studies 539 (2007). 
<sup>9</sup> Theodore Eisenberg, Geoffrey Miller and Emily Sherwin, Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non-Consumer Contracts, 41 University of Michigan Journal of Law Reform 871-96 (2008); Theodore Eisenberg and Geoffrey Miller, The Flight from Arbitration: An Empirical Study of *Ex Ante* Arbitration Clauses in Publicly-Held Companies' Contracts, 56 DePaul Law Review 335 (2007).

<sup>&</sup>lt;sup>10</sup> See, e.g., Cal. Civ. Code § 1021 ("[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . . "); Student Loan Marketing Association v. Hanes, 181 F.R.D. 629 (S.D.Cal. 1998) (applying California law). The proposition that courts will enforce contractual loser-pays arrangements may be qualified by the possibility that such an agreement would not be respected if deemed to be the result of inequality of bargaining power. In California, for example, contracts requiring payment of fees to the prevailing party will be enforced, but ones that simply stipulate that one party shall pay the other's fees, without regard to outcome, are not. See Cal. Civ. Code § 1717(a) ("[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.") Even if they enforce fee-shifting agreements, moreover, courts may exercise equitable discretion to ensure that the fees are reasonable in amount. See Federal Land Bank of Springfield v. Ambrosano, 89 A.D.2d 730, 731, 453 N.Y.S. 2d 857, 858 (1982) (applying New York law). For discussion of possibilities of opting into or out of fee rules by agreement mid-litigation, see John J. Donohue, Opting for the British Rule; or, If Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 Harv. L. Rev. 1093 (1991).

provide evidence on the theoretical and policy debate over the optimal methodology for compensating counsel.

We examine attorney fee clauses in a sample of 2,350 contracts filed with the Securities Exchange Commission in 2002 by public firms,. Many of these contracts contained explicit provisions on attorney compensation, indicating that the issue was salient to the contracting parties. About two-fifths of the contracts opted for the English Rule, a pattern indicating that a substantial percentage of the contracting parties believed this to be an efficient approach. However, if the English Rule were better than the American Rule in all circumstances, we would expect to see a nearly uniform pattern of opting in to that regime. This was not the case. About two-fifths of the contracts either did nothing or specified the American Rule – in either case leaving intact the background rule that each party pays its own attorney, win or lose. Again the pattern shows substantial popularity for the American Rule but no consensus. The remaining contracts – about one-fifth of the total – opted out of the American Rule but did not opt in to the English Rule, electing instead to adopt some modified form of loser-pays arrangement.

These results bear on the theoretical question mentioned above and provide a noteworthy instance of the relation between theoretical and empirical research. The quest for a single, most efficient fee-shifting regime may be futile in light of the evidence suggested by sophisticated parties' practices. An earlier empirical look at actual contracting practice might have limited the massive volume of contradictory models about the optimal attorney fee rule and contributed to more nuanced models that better reflect reality.

This paper is structured as follows. Part II describes the data; Part III discusses the literature on attorney fee rules and identifies the hypotheses we test; Part IV presents the results; Part V discusses the results; and Part VI concludes.

# II. The Data

The data consist of twelve types of material contracts contained as exhibits to Form 8-K "current report" filings with the SEC in 2002. Form 8-K must be filed by SEC-reporting firms to disclose certain material corporate events or changes that have not previously been reported by the company. We searched all Form 8-K filings and coded information about any contract that fit into one of Table 1's categories. We eliminated contracts that did not fit into one of the twelve contract types described below and 64 contracts for which suitable fee clause information was not available. The resulting sample consisted of 2,350 contracts.

We coded the contracts for a variety of contract terms, including terms related to the settlement of disputes that might arise under the contract, as well as information on the nature and location of the contracting parties. We also coded the type of contract, as shown in Table 1. For eleven contract categories, six months of contracts, covering the period January 1 to June 30, 2002, were studied. For merger contracts, the study covered a seven-month period from January 1 to July 31, 2002. The slightly expanded period for merger contracts draws on our earlier work on choice-of-law and choice of forum in merger contracts. Most of the contract types are self-explanatory. "Pooling and servicing" contracts are used in mortgage pass-through and other asset-backed securities arrangements; they represent agreements under which an owner transfers receivables to a

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<sup>&</sup>lt;sup>11</sup> Theodore Eisenberg & Geoffrey P. Miller, Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements, 59 Vand. L. Rev. 1975 (2006).

trustee which holds title to and collects the income from the assets and passes the funds through to investors.<sup>12</sup> Trust agreements establish these trusts and define certain of their powers and responsibilities.<sup>13</sup> We excluded contracts that could not be categorized into one of the twelve categories in Table 1.

**Table 1. Types of Contracts Studied (Number of contracts in parentheses)** 

Asset sale/purchase (323)

Bond indentures (155)

Credit commitments (217)

Employment (111)

Pooling and servicing (173)

Securities purchase (464)

Security agreements (37)

Settlements (73)

Licensing (49) Trust agreements (48) Mergers (412) Underwriting (352)

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

Securities purchase agreements were the most frequent contract type, accounting for 18.8% percent of the total. Credit-related contracts—bond indentures, credit commitments, pooling and servicing agreements, and security agreements—accounted for another 24%. Merger contracts were about 17% of the sample but note that they had one extra month of coverage in the data. Together, the contract types offer a reasonably rich variety of relations. Several contract types, including the credit-related contracts, obviously involve substantial financial institutions. Others, asset sale/purchase and merger contracts, typically involve corporate restructurings. Settlements involved resolution of disputes. Employment contracts offer insights into dispute resolution contract terms in agreements between key employees and large corporate employers.

# III. Background Literature and Hypotheses

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<sup>&</sup>lt;sup>12</sup> E.g., Circuit City Credit Card Master Trust, Form 8-K, Exh. 4.2, Amended and Restated Master Pooling Service Agreement, Dated as of December 31, 2001, filed Jan. 31, 2002, Doc. No. 02523859, at 21-22. See generally Thomas E. Planck, The Security of Securitization and the Future of Security, 25 Cardozo L. Rev. 1655 (2004).

<sup>&</sup>lt;sup>13</sup> E.g., First Consumers National Bank, Form 8-K, Exh. 4.3, Trust Agreement Between First Consumers Credit Corporation, as Seller, and Bankers Trust Company, as Owner Trustee, Dated as of March 1, 2001, and amended and restated as of December 31, 2001, filed Jan. 31, 2002, Doc. No. 02524022.

# A. Literature

# 1. Policy

Rules for compensating attorneys in civil litigation have long been the subject of debate. Those who believe that the civil justice system is out of control sometimes propose reforms to the American Rule as a solution to the problem, on the theory that if some version of the English Rule were in effect, attorneys would be deterred from filing frivolous lawsuits in hopes of nuisance value settlements. Among the most prominent such proposals were the 1991 proposal of the Council on Competitiveness, <sup>14</sup> the Republican House majority's 1994 Contract with America, <sup>15</sup> and the American Corporate Counsel Association's Tort Reform Proposal 2000. <sup>16</sup> Various proposals have also been introduced in Congress and state legislatures to implement some form of a loser-pays rule. <sup>17</sup> These proposals to move in the direction of the English Rule on fees have been resisted – with considerable success – by those who argue that a loser-pays provision would deter middle-income people from pursuing reasonable claims and defenses, and place them at an unfair advantage in disputes with risk-neutral corporations. <sup>18</sup>

# 2. Theory

<sup>&</sup>lt;sup>14</sup> Agenda for Civil Justice Reform in America, A Report from the President's Council on Competitiveness 16, 19, 24, 25 (August 1991), reprinted at 60 Cincinnati L. Rev. 979 (1992) (proposing to revise the federal offer-of-judgment rule to include the "additional costs of trial," presumably including attorney fees, and recommending a loser-pays rule for discovery motions and for federal court diversity cases, but calling for a moratorium on one-way plaintiff-favoring fee shifting statutes).

<sup>&</sup>lt;sup>15</sup> See Newt Gingrich & Dick Armey, Contract with America 143, 146 (1994).

<sup>&</sup>lt;sup>16</sup> Available at http://www.acca.com/networks/litigation/comments/tort.html (advocating for application of the English Rule in tort cases).

<sup>&</sup>lt;sup>17</sup> See, e.g., H.R. 988, Attorney Accountability Act of 1995, 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. (proposing that a non-prevailing party must pay the prevailing party's attorney's fees in federal civil diversity litigation where an offer of settlement has been made). In 1990 Florida enacted a statute for medical malpractice litigation similar to the one later proposed in the Contract With America. Although it was enthusiastically supported by the state medical association, it was repealed five years later, at the behest of the same group, after a series of costly plaintiff victories. See Edward A. Snyder & James W. Hughes, The English Rule for Allocating Legal Costs: Evidence Confronts Theory, 6 J. L., Econ., & Organization 345 (1990).

<sup>&</sup>lt;sup>18</sup> See, e.g., H.R. 988, Attorney Accountability Act of 1995, 104<sup>th</sup> Cong. 1<sup>st</sup> Sess. (dissenting views).

Analysis of the various incentive and efficiency effects of different fee regimes has been a virtual cottage industry among legal economists, generating an enormous volume of literature.<sup>19</sup> But the volume of ink spilled in analyzing the topic has not been matched by any agreement on agreement as to the relative social utility of the rules.<sup>20</sup>

Most of the work has compared the English with the American Rule on attorney compensation.<sup>21</sup> The English Rule does hold the potential, as its proponents argue, of deterring frivolous or non-meritorious lawsuits, since a defendant facing such a lawsuit has an incentive to vigorously litigate the case, knowing that it will almost certainly win and that its fees will be paid by the adversary.<sup>22</sup> The English Rule would thus appear to serve the socially valuable function of deterring wasteful litigation, at least as long as the adversary is not judgment-proof and the litigant can ascertain the probability of success before trial.<sup>23</sup>

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<sup>&</sup>lt;sup>19</sup> As Katz observed in 1999, "the scholarly literature on fee shifting has flourished in recent years, to the point where it is no longer feasible to discuss every pertinent contribution." Avery W. Katz, Indemnity of Legal Fees, in Boudewijn Bouckaert and Gerrit De Geest (eds.), Encyclopedia of Law and Economics, Volume V, The Economics of Crime and Litigation (2000). Eight years earlier Professor Donohue described the literature on fee shifting as "immense." Donohue, supra note 10.

<sup>&</sup>lt;sup>20</sup> The following review of the literature draws in part from Avery Katz's excellent summary. Katz, supra note 19.

<sup>&</sup>lt;sup>21</sup> See, e.g., Herbert M. Kritzer, Lawyer Fees and Lawyer Behavior in Litigation: What does the Empirical Literature Say?, 80 Texas L. Rev. 1943 (2002); Jonathan T. Molot, How U.S. Procedure Skews Tort Law Incentives, 73 Ind. L.J. 59, 78-81 (1997); Robert D. Cooter & Daniel L. Rubenfeld, Economic Analysis of Legal Disputes and their Resolution, 27 J. Econ. Lit. 1067 (1989); Avery Katz, Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 3 J. L., Econ., & Organization 143 (1987); Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 Law & Contemp. Probs. 139 (1984). Among academic writers, Robert A. Kagan and Albert W. Alschuler have been among the more vigorous proponents of moving towards to the English Rule as a strategy for combating perceived excesses and abuses in the American legal system. See Robert A. Kagan, Adversarial Legalism: The American Way of Law 239 (2001); Albert W. Alschuler, Mediation With a Mugger: The Shortage of Adjudicative Services and the Need For a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808, 1831 (1986).

<sup>&</sup>lt;sup>22</sup> For discussion, see A. Mitchell Polinsky & Daniel L. Rubinfeld, Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?, 27 J. Legal Stud. 141 (1998); David Rosenberg & Steven Shavell, A Model in Which Suits are Brought for their Nuisance Value, 5 Int'l Rev.L. & Econ. 3 (1985).

<sup>&</sup>lt;sup>23</sup> See Avery Katz, The Effect of Frivolous Lawsuits on the Settlement of Litigation, 10 Int'l Rev. L. & Econ. 3 (1990). A study of Alaska's loser-pays rule found that it did not significantly deter frivolous litigation. See Susanne Di Pietro, et al., Alaska's English Rule: Attorney's Fee Shifting in Civil Cases (1995), available at http://www.ajc.state.ak.us/reports/testtop.htm.

But a more complete economic analysis of the rules must also take into account their effect on other factors. Most importantly, relative to the American Rule the English Rule increases risk to the litigants by eliminating the built-in hedge that the loser does not have to pay the winner's fees.<sup>24</sup> This in itself would appear to be wealth-reducing from a social standpoint because most litigants can be assumed to be risk-averse, and the risk is a cost both parties must bear.

The choice between the English and American Rules may also affect litigation expenditures. Some have argued that the English Rule would reduce incentives of parties to drive up their adversaries' costs, since they face a positive probability of having to pay those costs in the event they lose the case.<sup>25</sup> On the other hand, the relatively greater risk of the English Rule implies that the parties have more at stake in the litigation – they are no longer litigating just to obtain (or avoid) a judgment, but also to obtain payment of their attorney fees and to avoid paying their adversary's fees. The English Rule also decreases the expected marginal costs of expenditures on a party's attorney due to the possibility that the adversary will have to pay. Greater stakes and decreased marginal costs imply that the parties may spend relatively more on litigation, a potential social cost.<sup>26</sup> On the other hand, the impact of increased expenditures by one party on the other party's expenditures is ambiguous: the adversary may ratchet up his own legal expenditures in a form of "arms race" or may be intimidated into reducing his efforts.<sup>27</sup> Moreover, the social effect of increased litigation expenditures is itself ambiguous: while

<sup>&</sup>lt;sup>24</sup> See Donohue, supra note 10.

<sup>&</sup>lt;sup>25</sup> See Alschuler, supra note 21, at 1832.

<sup>&</sup>lt;sup>26</sup> This is because they have more to lose or gain from the outcome and because they anticipate reimbursement for the costs incurred. See Ronald R. Braeutigam, Bruce M. Owen, and John C. Panzar, An Economic Analysis of Alternative Fee Shifting Systems, 47 Law & Contemp. Probs. 173 (1984); Katz, supra note 21.
<sup>27</sup> See Katz, supra note 19.

transactions costs are increased, so (potentially) is the quality and accuracy of litigation outcomes and judicial precedents.<sup>28</sup>

The greater risk associated with the English Rule might induce more settlements, reducing the social costs of trials, because in a settlement the parties can avoid having to pay their adversaries' fees. However, it is not clear that the enhanced risk of the English Rule will increase settlements: the English Rule may decrease the settlement rate because a condition for litigation is that the parties must be relatively optimistic<sup>29</sup> and optimistic parties may view the opportunity to get their fees paid as an inducement to trial.<sup>30</sup> Even if the effect on settlement rates were unambiguous, moreover, this would not necessarily generate clear prescriptions as to social policy because settlements have costs as well as benefits. These include both the private costs of negotiating and enforcing the settlement and certain social costs: settlements deprive the legal system of a potential valuable judicial precedent and may be inaccurate estimates of the underlying legal liabilities because of factors such as asymmetric information, differences in risk aversion, or differential stakes.

The increased risks and potentially increased litigation expenditures associated with the English Rule may also induce people not to sue in the first place.<sup>31</sup> But optimistic parties may be more inclined to file lawsuits under the English Rule because

<sup>&</sup>lt;sup>28</sup> Id.

<sup>&</sup>lt;sup>29</sup> The condition of mutual optimism is a basic premise of the economic analysis of trials. See, e.g., William Landes, An Economic Analysis of the Courts, 14 J. L. & Econ. 61 (1971); John Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279 (1973); Richard Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973).

<sup>&</sup>lt;sup>30</sup> See Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for Allocation of Legal Costs, 11 J. Legal Stud. 55, 62 (1982) (suggesting that the English Rule will reduce the likelihood of settlement).

<sup>&</sup>lt;sup>31</sup> See Richard A. Posner, Economic Analysis of Law 539 (3d ed. 1986); Roger A. Bowles, Settlement Range and Cost Allocation Rules: A Comment on Avery Katz's Measuring the Demand for Litigation, 3 J. L., Econ., & Organization 177 (1987); John C. Hause, Indemnity, Settlement, and Litigation, or I'll Be Suing You, 18 J. Legal Stud. 157 (1989); Alfred F. Conrad, Winnowing Derivative Suits Through Attorneys' Fees, Law & Contemp. Probs., Winter 1984, at 281.

they expect to win and therefore discount the risk of losing the case and having to pay their adversaries' fees. So the effect of the English Rule on the litigation rate is also ambiguous: relative to the American Rule the English Rule encourages litigation by optimistic plaintiffs, but discourages litigation by pessimistic plaintiffs. Moreover, like settlement, a decision not to file a lawsuit is not necessarily socially efficient. It saves on the cost of litigation, but also reduces the deterrent effect that the threat of litigation has on parties who might otherwise violate the law. To the degree litigation expenditures increase under the English Rule, moreover, this factor encourages settlements because it implies that the litigation costs avoided through settlement will be greater. So in this respect the English Rule may induce more settlements, but again, the social value of settlements versus litigation is itself ambiguous.

The effects of different fee regimes on primary behavior must also be evaluated in any complete welfare analysis. To the degree that the English Rule encourages meritorious litigation, the effect ought to feed back into primary conduct by encouraging people to comply with underlying legal norms.<sup>33</sup> However, the analysis becomes ambiguous when the possibility of judicial error is introduced;<sup>34</sup> and other policy instruments, such as damages multipliers, punitive damages, or fines may be more effective at inducting desirable primary behavior.<sup>35</sup> There is no consensus on the

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<sup>&</sup>lt;sup>32</sup> See Shavell, supra note 30.

<sup>&</sup>lt;sup>33</sup> See Katz, supra note 19.

<sup>&</sup>lt;sup>34</sup> See A. Mitchell Polinsky & Steven Shavell, Legal Error, Litigation, and the Incentive to Obey the Law, 5 J. L., Econ., & Organization 99 (1989).

<sup>&</sup>lt;sup>35</sup> See A. Mitchell Polinsky & Daniel L. Rubinfeld, Optimal Awards and Penalties When the Probability of Prevailing Varies Among Plaintiffs, 27 RAND J. Econ. 269-280 (1996); Louis Kaplow, Shifting Plaintiffs' Fees Versus Increasing Damage Awards, 24 RAND J. Econ. 625 (1993).

question as to whether the English or the American Rule better promotes desirable primary conduct.<sup>36</sup>

Also relevant, in a complete welfare analysis, is the impact of different fee regimes on the evolution and form of the law itself. Prichard argues that the English Rule enhances predictability of legal rules relative to the American Rule, and suggests that predictability is generally a desirable feature of legal systems.<sup>37</sup> Hylton examines the impact of a one-way offer of judgment rule on the development of substantive law, and concludes that a one-way pro-plaintiff fee-shifting rule is superior to either the English or the American Rules as a device for achieving predictability.<sup>38</sup> On the other hand, the English Rule or one-way fee-shifting rules may decrease rather than increase predictability if they discourage the generation of precedents; and predictability is not the only criterion by which one judges the efficacy of a litigation system.

Finally, several studies analyze the impact of offer-of-judgment rules. Analyses of one-way offers of judgment provisions (that benefit only defendants and not plaintiffs) suggest that they redistribute wealth from plaintiffs to defendants and shrink the settlement range,<sup>39</sup> but fail to reach definite conclusions about the impact of such rules on settlement rates.<sup>40</sup>

See, e.g., Clinton F. Beckner & Avery Katz, The Incentive Effects of Litigation Fee Shifting When Legal Standards Are Uncertain, 15 Int'l Rev. L. & Econ. 205 (1995).
 See J. Robert S. Prichard, A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and

<sup>&</sup>lt;sup>37</sup> See J. Robert S. Prichard, A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law, 17 J. Legal Stud. 451 (1988).

<sup>&</sup>lt;sup>38</sup> Keith N. Hylton, Fee Shifting and Predictability of Law, 71 Chi.-Kent L. Rev. 427 (1995).

<sup>&</sup>lt;sup>39</sup> See George Priest, Regulating the Content and Volume of Litigation: An Economic Analysis, 1 Sup. Ct. Econ. Rev. 163 (1982); Geoffrey P. Miller, An Economic Analysis of Rule 68, 15 J. Legal Stud. 93 (1986); Tai-Yeong Chung, Settlement of Litigation under Rule 68: An Economic Analysis, 25 J. Legal Stud. 261 (1996).

<sup>&</sup>lt;sup>40</sup> See, e.g., Katherine Spier, Pretrial Bargaining and the Design of Fee-Shifting Rules, 25 RAND J. Econ. 197 (1994) (demonstrating that offer-of-judgment rule can lead to more settlements under certain conditions); Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 Law and Contemp. Probs. 139, 165 (Winter 1984) (rejecting of settlement offer can lock parties into bargaining positions, thus discouraging later settlements)

Overall, the theoretical literature is indeterminate as to the practical effects and social utility of attorney fee regimes. Avery Katz summarizes the situation as follows:

[T]he current state of economic knowledge does not enable us reliably to predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate. The reason for this agnostic conclusion is straightforward. Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place . . . . The combination of all these external effects is too complicated to be remedied by a simple rule of "loser pays." Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others.<sup>41</sup>

# 3. Evidence

If theory does not provide an answer, can data fill the void? Empirical research on the effects of fee regimes is relatively sparse. Coursey and Stanley found, in an experimental setting, that subjects settled more frequently under the English Rule than under the American Rule. Snyder and Hughes, in studies of Florida medical malpractice litigation, found that under the English Rule: (a) parties were less likely to settle filed cases, (b) plaintiff verdicts were more frequent; (c) settlements were larger, and (d) average defense costs were higher. While these findings suggest that the English Rule does have a significant impact on litigation strategy, a study of Alaska's loser-pays statute raises doubts about this conclusion. The Alaska Judicial Council found little evidence that that state's English Rule affected case filing rates or had much influence on attorney strategy.

<sup>&</sup>lt;sup>41</sup> Katz, supra note 19, at 64-65.

<sup>&</sup>lt;sup>42</sup> For an excellent survey, see Kritzer, supra note 21.

<sup>&</sup>lt;sup>43</sup> Don L. Coursey & L.R. Stanley, Pretrial Bargaining Behavior within the Shadow of the Law: Theory and Experimental Evidence, 8 Int'l Rev. L. & Econ. 161 (1988).

<sup>&</sup>lt;sup>44</sup> Snyder & Hughes, supra note 17; James W. Hughes & Edward A. Snyder, Litigation and Settlement Under the English and American Rules: Theory and Evidence, 38 J. L. & Econ. 225 (1995).

<sup>&</sup>lt;sup>45</sup> Susanne Di Pietro et al., Alaska Judicial Council, Alaska's English Rule Attorney's Fee Shifting in Civil Cases (1995); Susanne Di Pietro, The English Rule at Work in Alaska, 80 Judicature 88 (1996).

Simulation studies have reached inconsistent results on the question of which rule generates the most settlements. As to litigation expenditures, Katz's simulation study concluded that the English Rule would increase such expenditures relative to the American Rule. Hylton, also using a simulation approach, concluded that the English Rule would generate more litigation but that the two rules would generate similar levels of legal compliance at the level of primary conduct.

Several empirical studies have examined one-way pro-plaintiff fee-shifting rules. Hylton found that such rules would minimize litigation and maximize underlying legal compliance as compared with either the American or the English Rules. Eisenberg and Schwab found that a one-way pro-plaintiff fee-shifting rule increased trials and reduced plaintiffs' success rates at trial, but also found little evidence that a one-way pro-plaintiff fee-shifting rule increased the number of lawsuits filed.

Other empirical studies have analyzed offer-of-judgment regimes. Yoon and Baker found that a bilateral offer-of-judgment rule with uncapped attorney fees reduced the time required to resolve disputes.<sup>51</sup> Rowe and colleagues conducted surveyson a two-way offer-of-judgment rule with fees included in the sanction, finding that the rule under

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<sup>&</sup>lt;sup>46</sup> Compare John C. Hause, Indemnity, Settlement, and Litigation, or I'll Be Suing You, 18 J. Legal Stud. 157 (1989) (English Rule predicted to increase settlements) and Phillip L. Hersch, Indemnity, Settlement, and Litigation: Comment and Extension, 19 J. Legal Stud. 235 (1990) (same) with John J. Donohue, The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees, 54 Law & Contemp. Probs. 194 (1991) (suggesting that the English Rule would lead to more trials).

<sup>&</sup>lt;sup>47</sup> Katz, supra note 21.

<sup>&</sup>lt;sup>48</sup> Keith N. Hylton, Litigation Cost Allocation Rules and Compliance with the Negligence Standard, 22 J. Legal Stud. 457 (1993).

<sup>&</sup>lt;sup>49</sup> Id.; Keith N. Hylton, Fee-Shifting and Incentives to Comply with the Law, 46 Vand. L. Rev. 1969 (1993).

<sup>&</sup>lt;sup>50</sup> Schwab & Eisenberg, supra note 3.

<sup>&</sup>lt;sup>51</sup> See Albert Yoon & Tom Baker, A Market Solution to Civil Litigation?: An Empirical Study of Offer-of-Judgment Rules, 59 Vanderbilt Law Review 155-196 (2006).

Stanley's experimental study found that test subjects settled cases under the federal offer-of-judgment rule more frequently than under with the American Rule or the English Rule, and that settlements tended to be favorable to defendants.<sup>53</sup> Inglis et al, using an experimental approach, concluded that a symmetrical offer-of-judgment rule covering costs of litigation only had no effect on settlement rates as compared with an environment lacking any cost-shifting rule, but the expansion of an offer-of-judgment rule to include attorney fees as well as costs would increase settlement rates.<sup>54</sup>

Overall, perhaps the most that can be said is that academic research have generated few clear-cut results other than the (obvious) conclusion that the English Rule is relatively more risky than the American Rule, and the (somewhat less obvious) proposition that the English Rule will stimulate greater expenditures on litigation. <sup>55</sup>

The lack of firm results to date suggests the value of new approaches to the issue. This paper adopts such an approach by examining what choices sophisticated parties actually make with respect to the allocation of legal fees in disputes over contracts.

# **B.** Hypotheses

Our study, the first of its type in the literature, permits the formulation and testing of hypotheses regarding the propensity of the contracting parties to select one rule over

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<sup>55</sup> See, e.g., Kritzer, supra note 21; Katz, supra note 19.

<sup>&</sup>lt;sup>52</sup> Thomas D. Rowe & David A. Anderson, One-Way Fee-Shifting Statutes and Offer of Judgment Rules: An Experiment, 36 Jurimetrics J. 255 (1984); Thomas D. Rowe and Neil Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 Law & Contemp. Probs. 13 (1988); Thomas D. Rowe, Predicting the Effects of Attorney Fee Shifting, 47 Law & Contemp. Probs. 139 (1984).

<sup>&</sup>lt;sup>53</sup> Coursey & Stanley, supra note 43.

<sup>&</sup>lt;sup>54</sup> Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel R. Simmons, and Erik Tallrot, "Experiments on the Effects of Fee Shifting and Discovery on the Efficient Settlement of Tort Claims" (March 10, 2005). ExpressO Preprint Series. Working Paper 501, available at http://law.bepress.com/expresso/eps/501.

another – information which, as discussed above, is evidence about the *ex ante* efficient contractual solution.

First, and most obviously, we can hypothesize about the rule that the parties select. Lacking consensus in the empirical literature as to the welfare effects of the various rules, we test the proposition that the contracts in our data set will reflect the view that some form of loser-pays system is preferable to the traditional American Rule on fees. Although we are largely agnostic about the preferred rule, the contracts in our sample might be expected to opt out of the American Rule less than some other classes of contracts. To the extent concern about the American Rule is associated with fear of its promotion of frivolous litigation, we do not expect that fear to be prominent with respect to the contracts in our sample. Material contracts between sophisticated actors likely are not perceived as a prime source of frivolous litigation. If that is correct, one can regard contracts' rejection of the American Rule as evidence of concerns about the American Rule other than concerns about frivolous litigation.

Hypothesis: Most of the contracts in the data set will opt out of the American Rule.

We can also construct subsidiary hypotheses testing in more detail the decision to select a particular fee allocation rule. Given that the American Rule is an outlier on the world scene, and that most Western countries administer some form of a loser-pays system, we may hypothesize that foreign counterparties in international contracts will feel

http://www.ajc.state.ak.us/reports/testtop.htm (96% of surveyed attorneys who spent half or more of th time handling business and corporate matters wanted to keep Alaska's version of the English Rule).

<sup>&</sup>lt;sup>56</sup> A survey of business attorneys in Alaska, which does administer a loser-pays rule, found overwhelming support for retaining the rule rather than reverting to the American Rule. See Alaska Judicial Council, Alaska's English Rule: Attorney's Fee Shifting in Civil Cases (1995), available at http://www.ajc.state.ak.us/reports/testtop.htm (96% of surveyed attorneys who spent half or more of their

uncomfortable with the U.S. approach and demand application of their own rules on attorney compensation.<sup>57</sup>

Hypothesis: Fee-shifting provisions will be more frequently observed in international contracts.

Attorney fees provisions can be included in contracts that specify that the resolution of disputes shall be by arbitration rather than litigation. The rules of some associations provide arbitrators with discretion to award fees, but unless the parties so specify, the arbitrator (if the arbitration is domestic) is unlikely to deviate from the American Rule.<sup>58</sup> Thus, some commentators encourage attorneys drafting arbitration agreements to consider include a specific fee-shifting provision.<sup>59</sup> The English Rule may be difficult to administer in arbitration, however, because it may be difficult to identify the prevailing party. Moreover, the broad discretion given to arbitrators may essentially vitiate the effect of the English Rule if it is selected because the arbitrator can engage in non-transparent tradeoffs between the award on the merits and the award of fees. Accordingly, we may hypothesize that the parties may perceive little benefit in opting out of the American Rule in the case of arbitrations.

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<sup>&</sup>lt;sup>57</sup> Evidence exists that attitudes towards dispute resolution provisions can noticeably vary between the U.S. and other countries. A law firm survey shows large differences between U.S. and U.K. counsel with respect to use of arbitration. Fulbright & Jaworski L.L.P., Fulbright's 6<sup>th</sup> Annual Litigation Trends Survey Report 21-24 (2009) (51% of U.K. companies surveyed preferred arbitration for domestic disputes compared to 32% of U.S. companies; and a higher fraction of U.K. companies had commenced international arbitrations), available at:

http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\$defaultview/26EBEE9A1CED6C14852576 740055DE8F/\$File/Fulbright's%206th%20Annual%20Litigation%20Trends%20Survey%20Report.pdf?Op enElement, accessed 11/1/2010.

Some authority exists to the effect that if the chosen law is one that would authorize fee-shifting, the court may award fees according to the foreign law's rules. See Katz v. Berisford Internat'l plc, 2000 U.S. Dist. LEXIS 9535 (S.D. N.Y. 2000); Cutler v. Bank of America National Trust and Savings Ass'n, 441 F. Supp. 863 (N.D. Cal. 1977) (applying the English Rule on attorney fees to an action brought in California by a Spanish plaintiff against Bank of America resulting from the theft of items from the plaintiff's safe deposit box in a London branch of the bank.)

<sup>&</sup>lt;sup>58</sup> See, e.g., Tony Starr, Choosing between Litigation and Arbitration, Boston Bar J. (March/April 2005).

Hypothesis: Loser-pays clauses will be less commonly observed in contracts that provide for mandatory arbitration.

The degree to which a contract is relational may be associated with the type of attorney fee clause used. In "one-off" arrangements – for example, the sale of an asset – the parties anticipate only a very brief relationship, extending (absent problems with the sale) only up to the closing of the transaction. In other contracts – employment contracts being paradigmatic – the parties anticipate a substantial period of performance during which they will have to work together. In long-term, relational arrangements, the parties may wish to avoid the English Rule which requires that one party be deemed to be in the right and the other deemed in the wrong for purposes of assessing fees, and which may enhance the possibility of strained relations by requiring one party to pay the other's fees.

Hypothesis: Loser-pays rules will be less frequently observed in relational contracts than in one-off contracts.

Our prior studies identified a significant association between standardization of contract terms and other dispute-resolution decisions, such as the decision to submit disputes to mandatory arbitration or to waiver jury trial rights.<sup>60</sup> It is therefore worth exploring whether standardization has a similar effect in the area of attorney compensation clauses. As in prior studies, we use the distribution of the choice of law pattern for each contract type as an objective measure of standardization. 61 A contract type with a standardized choice of law provision likely has achieved greater standardization than types of contracts that designate many choices of law.<sup>62</sup> Some

<sup>&</sup>lt;sup>60</sup> See Eisenberg & Miller, The Flight from Arbitration, supra note Error! Bookmark not defined.; Eisenberg & Miller, Do Juries Add Value?, supra noteError! Bookmark not defined..

<sup>&</sup>lt;sup>61</sup> Eisenberg & Miller, Do Juries Add Value?, supra note **Error! Bookmark not defined.**, at 554.

<sup>&</sup>lt;sup>62</sup> Id.

financial transactions, such as bond indentures, credit commitments, pooling and servicing agreements, security agreements, trust agreements, and underwriting agreements have high standardization. Asset sale/purchase agreements, merger contracts, and securities purchase agreements have an intermediate level of standardization. Less regularized transactions, such as employment contracts, settlements, and licensing agreements, have relatively low standardization.<sup>63</sup>

Contract standardization itself need not point towards a particular attorney compensation rule but may have implications for the distribution of fee clauses across the various rules. We expect less standardized material contracts to have been negotiated with some care. Since more individual attention was presumably given per contract, the distribution of attorney fee clauses in such contracts might be more diffuse than the distribution in more standardized contracts. In addition, the fact of high standardization may reflect a prior history of detailed negotiations concerning repeat-pattern transactions. If the historical negotiated terms were the product of substantial bargaining, more highly standardized classes of contracts might have been expected to settle on what was perceived to be an optimal fee clause. This would support less variability in the distribution of fee clauses.

Aside from these distributional forecasts, standardized contracts may simply reflect a preference for a set of default rules. Since the default rule for fees in the U.S. is the American Rule, one might expect highly standardized contracts to prefer, perhaps by default, the American Rule.

Hypotheses: (1) loser-pays provisions will be more frequently observed in individually negotiated contracts and less frequently observed in standardized contracts

<sup>&</sup>lt;sup>63</sup> Id.

(2) The distribution of fee clauses will be more variable in less standardized contracts.

Loser-pays rules increase the risk of litigation. It is possible, therefore, that parties may shy away from loser-pays rules when the litigation is inherently risky. This suggests a potential interaction between loser-pays rules and jury trial waivers: because juries are thought to increase the risks of litigation, it is interesting to test whether the presence of a jury reduces the likelihood that a loser-pays provision will be adopted, and conversely, whether the presence of a jury trial waiver increases the likelihood that a loser-pays rule will be adopted.

Hypothesis: Loser-pays rules will be more frequently observed in the presence of jury trial waivers.

Finally, we explore the possibility that the adoption of loser-pays reflects industry-specific patterns.

Hypothesis: Loser-pays rules will be more frequent in some industries than others.

We forego examining the relation between fee clauses and attorney locale because the available information about attorney locale suggests that no locale accounts for more than 11% of the contracts.<sup>64</sup> We do, however, report results based on the governing law specified in contracts. As we previously reported, New York dominates as the governing choice of law in the contracts studied here.<sup>65</sup> New York-specific effects, if they exist, should be accounted for in assessing the pattern of fee clauses specified.

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<sup>&</sup>lt;sup>64</sup> See also Eisenberg & Miller, Do Juries Add Value?, supra note **Error! Bookmark not defined.**, at 565 & tbl. 9.

<sup>&</sup>lt;sup>65</sup> 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

# IV. Empirical Results

For purposes of coding attorney fee clauses, we constructed a taxonomy of fee provisions. We construed a contract as containing no fee-shifting (the American Rule) when the contract did not mention fees or when it expressly invoked the standard American Rule. We coded a contract as containing the English Rule if the contract specified that the losing party would pay attorney fees. We distinguished between English Rule provisions by a separate code for English Rule provisions that allowed for discretion (these allow the court, in its discretion, to award fees to the prevailing party). Three additional codes were used. Several contracts specified that one party only was the beneficiary of an attorney fee-shifting clause in the event it prevailed in litigation. We separately coded contracts that specified that the reporting party (the party filing the report with the SEC) benefitted from the clause and contracts that specified that the non-reporting party benefitted from the clause. A last category of contracts involved fee clauses specifying that both parties may benefit from fee clauses under different circumstances.<sup>66</sup>

This Part first presents results showing the relation between individual factors and our hypotheses. It then presents regression results that report models of contracts specifying the American Rule as a function of multiple factors.

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<sup>(2009).</sup> We do not assess the relation between choice of forum and attorney fee clauses because so many of the contracts in our sample did not specify a forum, id. at 1503-04, and because the pattern of choice of forum for those contracts specifying a forum is largely explained by choice of law. Id. at 1504.

<sup>&</sup>lt;sup>66</sup> For example, the contract may provide that the seller must pay the buyer's attorney fees if the seller is found to have made a misrepresentation or false warranty, and the buyer must pay the seller's fees if the buyer is held to have wrongfully failed to deliver the purchase price at the closing.

# A. Bivariate Results

Table 2 summarizes the pattern of attorney fee clauses. In the interest of initial simplicity, it does not differentiate by contract type, international status, or other characteristics. The table shows, for example, that about 39% of the contracts specified or retained by default the American Rule of each side paying its own fees. This is approximately the same percent of contracts that specify the English Rule, with or without discretion. Together the American and English Rules account for about 80% of the contracts, with a fee clause favoring one party or the other appearing in approximately 16% of the contracts.

**Table 2. Frequency of Attorney Fee Clauses** 

Contractual fee rule	No.	%
American Rule	923	39.3%
English Rule	827	35.2%
English Rule, with discretion	100	4.3%
Nonreporting company pays fees	269	11.4%
Other	119	5.1%
Reporting company pays fees	112	4.8%
Total	2350	100.0%

Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

About the only clear result that emerges from Table 2 is that no fee clause dominates. The hypothesis that sophisticated parties will flee the American Rule is supported in the sense that most contracts contain clauses specifying either the English Rule or a variant of pro-one-party shifting. But no uniform endorsement of opting out of the American Rule or into the English Rule appears. The American Rule is as prominent as any other fee clause provision.

A remaining question is whether characteristics of contracts or parties help explain this basic observed pattern of fee clauses. Table 3 report results for the frequency

of fee clauses by contract type. For each contract type, a first row reports the number (No.) of contracts and a second row reports the percent (%) of contracts with the fee clause. The table shows some strong associations between contract type and type of fee clause. The English Rule with discretion as to the fee dominates bond indenture contracts, with 62.3% of the contracts; the American Rule dominates trust agreements, with 81.3% of the contracts; the English Rule dominates underwriting agreements, with 84.7% of the contracts. In most contractual areas, however, neither the American nor the English Rule dominates. Loan agreements (credit commitments and security agreements) opt mostly for the non-reporting company, presumably the borrower, paying the fees of the lender. When those agreements do not contain such a clause, they tend to employ the American Rule. For six of the seven other contract types, the American and English Rules appear at roughly similar rates, with the spread between them not exceeding 15%. Pooling and servicing contracts have the largest rate of using other fee clauses.

Table 3. Frequency of Attorney Fee Clauses, by Contract Type

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	Nonreporting co. pays fees	Reporting co. pays fees	Other	Total
Asset sale/purchase No.	117	126	1	7	43	5	299
%	39.1%	42.1%	0.3%	2.3%	14.4%	1.7%	100.0%
Bond indentures No.	53	0	96	3	0	2	154
%	34.4%	0.0%	62.3%	1.9%	0.0%	1.3%	100.0%
Credit commitments No.	97	5	0	110	1	2	215
%	45.1%	2.3%	0.0%	51.2%	0.5%	0.9%	100.0%
Employment contracts No.	52	37	1	11	0	8	109
%	47.7%	33.9%	0.9%	10.1%	0.0%	7.3%	100.0%
Licensing No.	19	21	0	3	3	0	46
%	41.3%	45.7%	0.0%	6.5%	6.5%	0.0%	100.0%
Mergers No.	184	140	0	19	34	33	410
%	44.9%	34.1%	0.0%	4.6%	8.3%	8.0%	100.0%
Pooling & servicing No.	85	4	0	24	8	48	169
%	50.3%	2.4%	0.0%	14.2%	4.7%	28.4%	100.0%
Securities purchase No.	199	157	2	48	27	9	442
%	45.0%	35.5%	0.5%	10.9%	6.1%	2.0%	100.0%
Security agreements No.	10	4	0	21	0	0	35
%	28.6%	11.4%	0.0%	60.0%	0.0%	0.0%	100.0%
Settlements No.	30	35	0	3	1	2	71
%	42.3%	49.3%	0.0%	4.2%	1.4%	2.8%	100.0%

Trust agreements No.	39	0	0	8	0	1	48
%	81.3%	0.0%	0.0%	16.7%	0.0%	2.1%	100.0%
Underwriting No.	38	298	0	12	2	2	352
%	10.8%	84.7%	0.0%	3.4%	0.6%	0.6%	100.0%
Total No.	923	827	100	269	119	112	2350
0/0	39.3%	35.2%	4.3%	11.4%	5.1%	4.8%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

We hypothesized that international contracts would favor loser pays fee-shifting and Table 4 explores this topic, again controlling for type of contract. Panel A reports the results for contracts between domestic parties and Panel B reports the results for contracts with a non-U.S. party. The results are surprising in that there is little systematic evidence that contracts with a non-U.S. party tend to opt out of the American Rule more than contracts with domestic parties.

If one limits the sample to contracts that chose either the American or English Rule, domestic contracts specified the American Rule in 817 of 1560 (52.4%) contracts and international contracts specified the American Rule in 106 of 190 (55.8%) contracts. The American Rule thus was more prominent in international contracts than in domestic contracts, though the difference is not statistically significant (p=0.398).

Table 4. Frequency of Attorney Fee Clauses, by Contract Type and International Status

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	Nonreporting co. pays fees	Reporting	Other	Total
			with disc.	co. pays iees	co. pays fees		
A. Domestic contracts							
Asset sale/purchase No.	92	114	1	5	36	5	253
%	36.4%	45.1%	0.4%	2.0%	14.2%	2.0%	100.0%
Bond indentures No.	51	0	94	3	0	2	150
0/0	34.0%	0.0%	62.7%	2.0%	0.0%	1.3%	100.0%
Credit commitments No.	87	5	0	101	1	2	196
%	44.4%	2.6%	0.0%	51.5%	0.5%	1.0%	100.0%
Employment contracts No.	47	37	1	11	0	8	104
%	45.2%	35.6%	1.0%	10.6%	0.0%	7.7%	100.0%
Licensing No.	14	15	0	3	3	0	35
%	40.0%	42.9%	0.0%	8.6%	8.6%	0.0%	100.0%
Mergers No.	167	121	0	15	33	31	367
%	45.5%	33.0%	0.0%	4.1%	9.0%	8.4%	100.0%
Pooling & servicing No.	84	4	0	24	8	47	167
%	50.3%	2.4%	0.0%	14.4%	4.8%	28.1%	100.0%
Securities purchase No.	162	128	2	45	24	7	368
%	44.0%	34.8%	0.5%	12.2%	6.5%	1.9%	100.0%
Security agreements No.	10	4	0	20	0	0	34

%	29.4%	11.8%	0.0%	58.8%	0.0%	0.0%	100.0%
Settlements No.	26	28	0	3	1	1	59
%	44.1%	47.5%	0.0%	5.1%	1.7%	1.7%	100.0%
Trust agreements No.	39	0	0	8	0	1	48
%	81.3%	0.0%	0.0%	16.7%	0.0%	2.1%	100.0%
Underwriting No.	38	287	0	10	2	1	338
%	11.2%	84.9%	0.0%	3.0%	0.6%	0.3%	100.0%
Total No.	817	743	98	248	108	105	2119
%	38.6%	35.1%	4.6%	11.7%	5.1%	5.0%	100.0%
B. International contracts							
Asset sale/purchase No.	25	12	0	2	7	0	46
%	54.3%	26.1%	0.0%	4.3%	15.2%	0.0%	100.0%
Bond indentures No.	2	0	2	0	0	0	4
%	50.0%	0.0%	50.0%	0.0%	0.0%	0.0%	100.0%
Credit commitments No.	10	0	0	9	0	0	19
%	52.6%	0.0%	0.0%	47.4%	0.0%	0.0%	100.0%
Employment contracts No.	5	0	0	0	0	0	5
%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Licensing No.	5	6	0	0	0	0	11
%	45.5%	54.5%	0.0%	0.0%	0.0%	0.0%	100.0%
Mergers No.	17	19	0	4	1	2	43
%	39.5%	44.2%	0.0%	9.3%	2.3%	4.7%	100.0%
Pooling & servicing No.	1	0	0	0	0	1	2
%	50.0%	0.0%	0.0%	0.0%	0.0%	50.0%	100.0%
Securities purchase No.	37	29	0	2	3	2	73
%	50.7%	39.7%	0.0%	2.7%	4.1%	2.7%	100.0%
Security agreements No.	0	0	0	1	0	0	1
%	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	100.0%
Settlements No.	4	7	0	0	0	1	12
%	33.3%	58.3%	0.0%	0.0%	0.0%	8.3%	100.0%
Underwriting No.	0	11	0	2	0	1	14
%	0.0%	78.6%	0.0%	14.3%	0.0%	7.1%	100.0%
Total No.	106	84	2	20	11	7	230
%	46.1%	36.5%	0.9%	8.7%	4.8%	3.0%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. International contracts are those without a U.S. party. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

The absence of noticeable difference between domestic and international contracts persists if one focuses on comparable contracts by comparing the same contract type across the two panels. Asset sale contracts, merger agreements, and securities purchase contracts had the greatest numbers of international deals, yet no striking difference emerged in the rate at which they specified the American or English Rules.

We hypothesized little difference in type of fee clauses based on whether parties agreed to *ex ante* arbitration. Table 5 reports results for contracts without and with arbitration clauses. Panel A reports the results for contracts without arbitration clauses and Panel B reports the results for contracts with arbitration clauses. Our hypothesizing is

not vindicated, as noticeable differences exist, with those agreeing to arbitration tending to prefer the English Rule.

If one again limits the sample to contracts that chose either the American or English Rule, contracts without arbitration clauses specified the American Rule in 842 of 1534 (54.9%) contracts and contracts with arbitration clauses specified the American Rule in 78 of 213 (36.6%) contracts. The American Rule thus was less prominent in contracts specifying arbitration than in other contracts, and the difference is highly statistically significant (p<0.001). The preference for the English Rule in contracts with arbitration clauses is a consistent pattern even when one controls for the type of contract. Each of the contract types with a reasonably large number of agreements containing arbitration clauses—asset sale, employment, mergers, and securities purchase—shows a lower rate of use of the American Rule compared to the rule's use for same contract type that does not contain an arbitration clause.

Table 5. Frequency of Attorney Fee Clauses, by Contract Type & Arbitration Clause Presence

Contract type	Am. rule	Eng. Rule	Eng. rule,	Nonreporting	Reporting	Other	Total
Contract type	AIII. Tuic	Elig. Kule	with disc.	1 0	1 0	Other	Total
			with disc.	co. pays fees	co. pays fees		
A. Contracts without arbit							
Asset sale/purchase No.	99	96	1	6	33	4	239
%	41.4%	40.2%	0.4%	2.5%	13.8%	1.7%	100.0%
Bond indentures No.	52	0	96	3	0	2	153
0/0	34.0%	0.0%	62.7%	2.0%	0.0%	1.3%	100.0%
Credit commitments No.	93	5	0	108	1	2	209
%	44.5%	2.4%	0.0%	51.7%	0.5%	1.0%	100.0%
Employment contracts No.	34	19	0	7	0	8	68
%	50.0%	27.9%	0.0%	10.3%	0.0%	11.8%	100.0%
Licensing No.	15	12	0	2	3	0	32
%	46.9%	37.5%	0.0%	6.3%	9.4%	0.0%	100.0%
Mergers No.	164	103	0	19	24	23	333
%	49.2%	30.9%	0.0%	5.7%	7.2%	6.9%	100.0%
Pooling & servicing No.	85	4	0	24	8	48	169
%	50.3%	2.4%	0.0%	14.2%	4.7%	28.4%	100.0%
Securities purchase No.	187	126	1	46	21	8	389
%	48.1%	32.4%	0.3%	11.8%	5.4%	2.1%	100.0%
Security agreements No.	10	3	0	20	0	0	33
%	30.3%	9.1%	0.0%	60.6%	0.0%	0.0%	100.0%
Settlements No.	27	27	0	2	1	2	59
%	45.8%	45.8%	0.0%	3.4%	1.7%	3.4%	100.0%
Trust agreements No.	39	0	0	8	0	1	48
%	81.3%	0.0%	0.0%	16.7%	0.0%	2.1%	100.0%

Underwriting No.	37	297	0	12	2	2	350
%	10.6%	84.9%	0.0%	3.4%	0.6%	0.6%	100.0%
Total No.	842	692	98	257	93	100	2082
%	40.4%	33.2%	4.7%	12.3%	4.5%	4.8%	100.0%
B. Contracts with arbitration	on clauses						
Asset sale/purchase No.	18	30	0	1	10	1	60
%	30.0%	50.0%	0.0%	1.7%	16.7%	1.7%	100.0%
Bond indentures No.	1	0	0	0	0	0	1
%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Credit commitments No.	3	0	0	2	0	0	5
%	60.0%	0.0%	0.0%	40.0%	0.0%	0.0%	100.0%
Employment contracts No.	18	18	1	4	0	0	41
%	43.9%	43.9%	2.4%	9.8%	0.0%	0.0%	100.0%
Licensing No.	4	9	0	1	0	0	14
%	28.6%	64.3%	0.0%	7.1%	0.0%	0.0%	100.0%
Mergers No.	19	37	0	0	10	10	76
%	25.0%	48.7%	0.0%	0.0%	13.2%	13.2%	100.0%
Securities purchase No.	12	31	1	1	6	1	52
%	23.1%	59.6%	1.9%	1.9%	11.5%	1.9%	100.0%
Security agreements No.	0	1	0	1	0	0	2
%	0.0%	50.0%	0.0%	50.0%	0.0%	0.0%	100.0%
Settlements No.	3	8	0	1	0	0	12
0/0	25.0%	66.7%	0.0%	8.3%	0.0%	0.0%	100.0%
Underwriting No.	0	1	0	0	0	0	1
%	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Total No.	78	135	2	11	26	12	264
0/0	29.5%	51.1%	0.8%	4.2%	9.8%	4.5%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

Table 6 reports the association between relational contract status, with contract types coded as described in Part III.B and attorney fee clauses.<sup>67</sup> The table's first two rows suggest a modest preference, less than an 8% difference, for the English Rule in non-relational contracts. The most distinctive result is the low rate, 12.4%, at which relational contracts specify the English Rule. This tendency supports the hypothesis that relational contractors tend to favor the American Rule.

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<sup>&</sup>lt;sup>67</sup> Coding contracts' relational status can be imprecise. A settlement, for example, may be the termination of a short-term or long-term relation or may promote a continued relation. We crudely coded for relational status based on contract categories, with the following contract categories as more likely to be relational: credit commitments, employment, licensing, pooling and service agreements, and security agreements; and the following categories as less likely to be relational: asset sales, bond indentures, mergers, securities purchase agreements, settlements, and underwritings. We omitted trust agreements from the sample for purposes of the analysis of relational contracts because relational status for these contracts is insufficiently clear.

Table 6. Frequency of Attorney Fee Clauses, by Relational Contract Status

Contract type	Am. rule	Eng. Rule	Eng. rule, With disc.	Nonreporting co.	Reporting co.	Other	Total
Nonrelational No.	621	756	99	92	107	53	1728
%	35.9%	43.8%	5.7%	5.3%	6.2%	3.1%	100.0%
Relational No.	263	71	1	169	12	58	574
%	45.8%	12.4%	0.2%	29.4%	2.1%	10.1%	100.0%
Total No.	884	827	100	261	119	111	2302
%	38.4%	35.9%	4.3%	11.3%	5.2%	4.8%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Relational contracts: credit commitments, employment, licensing, pooling and service agreements, security agreements. Nonrelational contracts: asset sales, bond indentures, mergers, securities purchase agreements, settlements, underwritings. Excludes trust agreements. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

Table 7 reports the distribution of attorney fee clauses by degree of standardization, with standardization classified as low, medium, or high. Since the standardization does not vary within a contract type, we only report the results aggregated by the measure of standardization.

Table 7 shows no strong preference for the American or English Rule by degree of standardization. The percent of contracts choosing one or the other rules does not vary by as much as 6.5% for any of the three standardization levels. Some tendency exists, however for the most highly standardized contract types to have a more variable distribution of the fee rules employed. About 86% of the least standardized (the "Low" rows in Table 7) contracts employ the American or English Rule while only 65% of the most standardized ("High" rows) contracts employ either of these rules. The difference diminishes if one includes as employing the English Rule the 9.9% of highly standardized contracts that employ the English Rule with discretion. Including the discretionary clauses makes the use of the English Rule similar in low and high standardization classes of contracts. But that qualification does not affect the diminished role of the American Rule in highly standardized contracts. If one divides fee rules into the American Rule and all others, the difference in the use of the American Rule across standardization

levels is highly statistically significant (p<0.001). So the pattern of clauses suggests a diminished role for the American Rule in the most highly standardized contracts.

Table 7. Frequency of Attorney Fee Clauses, by Degree of Standardization

Contract type	Am. rule	Eng. Rule	Eng. rule, Nonreporting co.		Reporting co.	Other	Total
			with disc.	pays fees	pays fees		
Low No.	101	93	1	17	4	10	226
%	44.7%	41.2%	0.4%	7.5%	1.8%	4.4%	100.0%
Medium No.	500	423	3	74	104	47	1151
%	43.4%	36.8%	0.3%	6.4%	9.0%	4.1%	100.0%
High No.	322	311	96	178	11	55	973
%	33.1%	32.0%	9.9%	18.3%	1.1%	5.7%	100.0%
Total No.	923	827	100	269	119	112	2350
%	39.3%	35.2%	4.3%	11.4%	5.1%	4.8%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. High standardization contracts: bond indentures, credit commitments, pooling and servicing agreements, security agreements, trust agreements, underwriting agreements. Medium standardization contracts: asset sale/purchase agreements, merger contracts, securities purchase agreements. Low standardization contracts: employment contracts, settlements, licensing agreements. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

We hypothesized that the English Rule would be more prominent in contracts that waived jury trials. Table 8 reports results showing the fee clauses used as a function of the presence of a jury trial waiver clause, while controlling for type of contract. Panel A shows the results for contracts in which jury trial was not waived and Panel B shows the results for contracts in which jury trial was waived.

Both the English Rule and the American Rule were used less frequently in contracts that waived jury trial than in contracts that did not. Overall, 40.1% of contracts that did not waive jury trial specified the American Rule and 37.2% of non-waiver contracts specified the English Rule. The rates exceed the rates of contracts specifying these rules in contracts that waived jury trials, 36.0% and 27.1% respectively. Parties and attorneys who have gone to the trouble to opt out of jury trial are more likely to specify an attorney fee rule other than the two dominant rules.

For contract types with at least 20 observations under both jury clause conditions, results varied. Asset sale purchase contracts waiving jury trial preferred the English Rule

over the American Rule. Credit commitments waiver contracts tended to flee the American Rule in favor of the non-reporting company paying fees. Merger agreements did not noticeably vary by waiver clause but did not tend towards using the English Rule. Securities purchase contracts migrated away from the American Rule and towards the English rule.

Table 8. Frequency of Attorney Fee Clauses, by Contract Type and Jury Trial Waiver

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	Nonreporting co. pays fees	Reporting co. pays fees	Other	Total
A. Jury trial not waived				<u> </u>	• •		
Asset sale/purchase No.	106	104	1	7	35	5	258
%	41.1%	40.3%	0.4%	2.7%	13.6%	1.9%	100.0%
Bond indentures No.	52	0	94	3	0	2	151
%	34.4%	0.0%	62.3%	2.0%	0.0%	1.3%	100.0%
Credit commitments No.	46	4	0	25	0	1	76
%	60.5%	5.3%	0.0%	32.9%	0.0%	1.3%	100.0%
Employment contracts No.	47	36	0	11	0	8	102
%	46.1%	35.3%	0.0%	10.8%	0.0%	7.8%	100.0%
Licensing No.	18	19	0	2	2	0	41
%	43.9%	46.3%	0.0%	4.9%	4.9%	0.0%	100.0%
Mergers No.	133	108	0	13	26	21	301
%	44.2%	35.9%	0.0%	4.3%	8.6%	7.0%	100.0%
Pooling & servicing No.	83	4	0	24	8	44	163
%	50.9%	2.5%	0.0%	14.7%	4.9%	27.0%	100.0%
Securities purchase No.	161	103	1	25	22	8	320
%	50.3%	32.2%	0.3%	7.8%	6.9%	2.5%	100.0%
Security agreements No.	8	1	0	6	0	0	15
%	53.3%	6.7%	0.0%	40.0%	0.0%	0.0%	100.0%
Settlements No.	22	32	0	2	1	2	59
%	37.3%	54.2%	0.0%	3.4%	1.7%	3.4%	100.0%
Trust agreements No.	37	0	0	8	0	1	46
%	80.4%	0.0%	0.0%	17.4%	0.0%	2.2%	100.0%
Underwriting No.	37	285	0	11	2	2	337
%	11.0%	84.6%	0.0%	3.3%	0.6%	0.6%	100.0%
Total No.	750	696	96	137	96	94	1869
%	40.1%	37.2%	5.1%	7.3%	5.1%	5.0%	100.0%
B. Jury trial waived			21270	11270	212,0		
Asset sale/purchase No.	11	21	0	0	8	0	40
%	27.5%	52.5%	0.0%	0.0%	20.0%	0.0%	100.0%
Bond indentures No.	1	0	2	0	0	0	3
%	33.3%	0.0%	66.7%	0.0%	0.0%	0.0%	100.0%
Credit commitments No.	51	1	0	85	1	1	139
%	36.7%	0.7%	0.0%	61.2%	0.7%	0.7%	100.0%
Employment contracts No.	5	1	1	0	0	0	7
%	71.4%	14.3%	14.3%	0.0%	0.0%	0.0%	100.0%
Licensing No.	1	2	0	1	1	0	5
%	20.0%	40.0%	0.0%	20.0%	20.0%	0.0%	100.0%
Mergers No.	51	32	0.070	6	8	12	109
%	46.8%	29.4%	0.0%	5.5%	7.3%	11.0%	100.0%
Pooling & servicing No.	2	0	0	0	0	4	6
%	33.3%	0.0%	0.0%	0.0%	0.0%	66.7%	100.0%

Securities purchase No.	38	54	1	23	5	1	122
%	31.1%	44.3%	0.8%	18.9%	4.1%	0.8%	100.0%
Security agreements No.	2	3	0	15	0	0	20
%	10.0%	15.0%	0.0%	75.0%	0.0%	0.0%	100.0%
Settlements No.	8	3	0	1	0	0	12
%	66.7%	25.0%	0.0%	8.3%	0.0%	0.0%	100.0%
Trust agreements No.	2	0	0	0	0	0	2
%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Underwriting No.	1	13	0	1	0	0	15
%	6.7%	86.7%	0.0%	6.7%	0.0%	0.0%	100.0%
Total No.	173	130	4	132	23	18	480
%	36.0%	27.1%	0.8%	27.5%	4.8%	3.8%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

As noted above, New York law dominates the choice of law in the contracts in our sample. Although we have no reason to believe that the *ex ante* choice of law rule perceived to be efficient should be associated with a particular attorney fee clause, some of the results may be associated with the choice of New York law. It is therefore desirable to assess whether fee clause patterns vary with choice of law. In the interest of brevity and due to New York's dominance, we report results separately for contracts designating New York law and contracts selecting any other governing law. Appendix Table A2 shows the use of fee clauses in contracts specifying the two other states that lead in choice of law, California and Delaware.

Table 9 shows the pattern of fee clauses as a function of contract type and choice of law. Panel A shows the results for contracts designating New York law and Panel B shows the results for contracts designating other law choices. Contracts that did not specify a choice of law are excluded. Inspecting the "totals" rows for the two panels suggests no substantial preference for the American Rule or the English Rule based on whether New York law was designated. Contracts designating New York law selected the American Rule in 36.5% of contracts and the English Rule in 35.1% of contracts.

Contracts designating governing law other than New York's selected the American Rule in 40.9% of contracts and the English Rule in 35.4% of contracts.

Table 9. Frequency of Attorney Fee Clauses, by Contract Type and Governing Law

Contract type	Am. Rule	Eng. rule	Eng. rule, with disc.	Nonreporting co. pays fees	Reporting co. pays fees	Other	Total
A. New York law chosen							
Asset sale/purchase No.	42	18	0	3	13	3	79
%	53.2%	22.8%	0.0%	3.8%	16.5%	3.8%	100.0%
Bond indentures No.	47	0	86	3	0	1	137
%	34.3%	0.0%	62.8%	2.2%	0.0%	0.7%	100.0%
Credit commitments No.	61	1	0	39	0	2	103
%	59.2%	1.0%	0.0%	37.9%	0.0%	1.9%	100.0%
Employment contracts No.	6	3	0	1	0	2	12
%	50.0%	25.0%	0.0%	8.3%	0.0%	16.7%	100.0%
Licensing No.	5	5	0	0	0	0	10
%	50.0%	50.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Mergers No.	36	17	0	3	7	6	69
%	52.2%	24.6%	0.0%	4.3%	10.1%	8.7%	100.0%
Pooling & servicing No.	65	4	0	24	8	45	146
%	44.5%	2.7%	0.0%	16.4%	5.5%	30.8%	100.0%
Securities purchase No.	88	59	1	25	10	2	185
%	47.6%	31.9%	0.5%	13.5%	5.4%	1.1%	100.0%
Security agreements No.	7	1	0	13	0	0	21
%	33.3%	4.8%	0.0%	61.9%	0.0%	0.0%	100.0%
Settlements No.	8	3	0	2	0	0	13
%	61.5%	23.1%	0.0%	15.4%	0.0%	0.0%	100.0%
Trust agreements No.	5	0	0	1	0	1	7
%	71.4%	0.0%	0.0%	14.3%	0.0%	14.3%	100.0%
Underwriting No.	35	279	0	10	2	2	328
%	10.7%	85.1%	0.0%	3.0%	0.6%	0.6%	100.0%
Total No.	405	390	87	124	40	64	1110
%	36.5%	35.1%	7.8%	11.2%	3.6%	5.8%	100.0%
B. New York law not chose	en						
Asset sale/purchase No.	75	108	1	4	30	2	220
%	34.1%	49.1%	0.5%	1.8%	13.6%	0.9%	100.0%
Bond indentures No.	6	0	10	0	0	1	17
%	35.3%	0.0%	58.8%	0.0%	0.0%	5.9%	100.0%
Credit commitments No.	36	4	0	71	1	0	112
%	32.1%	3.6%	0.0%	63.4%	0.9%	0.0%	100.0%
Employment contracts No.	46	34	1	10	0	6	97
%	47.4%	35.1%	1.0%	10.3%	0.0%	6.2%	100.0%
Licensing No.	14	16	0	3	3	0	36
%	38.9%	44.4%	0.0%	8.3%	8.3%	0.0%	100.0%
Mergers No.	99	92	0	13	21	24	249
%	39.8%	36.9%	0.0%	5.2%	8.4%	9.6%	100.0%
Pooling & servicing No.	20	0	0	0	0	3	23
%	87.0%	0.0%	0.0%	0.0%	0.0%	13.0%	100.0%
Securities purchase No.	111	98	1	23	17	7	257
%	43.2%	38.1%	0.4%	8.9%	6.6%	2.7%	100.0%
Security agreements No.	3	3	0	8	0	0	14
%	21.4%	21.4%	0.0%	57.1%	0.0%	0.0%	100.0%
Settlements No.	22	32	0.070	1	1	2	58
%	37.9%	55.2%	0.0%	1.7%	1.7%	3.4%	100.0%
Trust agreements No.	34	0	0.070	7	0	0	41
%	82.9%	0.0%	0.0%	17.1%	0.0%	0.0%	100.0%
, <del>•</del>	02.070	0.070	0.070	1,,1/0	0.070	0.070	100.070

Underwriting No.	3	19	0	2	0	0	24
%	12.5%	79.2%	0.0%	8.3%	0.0%	0.0%	100.0%
Total No.	469	406	13	142	73	45	1148
	107	100	13	172	13	73	1170

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

But the results by contract type show that the totals oversimplify the fee clause pattern. Underwriting contracts, by far the largest category of contracts designating New York law, overwhelmingly choose the English Rule on fees. If one excludes underwriting contracts, 47.3% of contracts designating New York law chose the American Rule and only 14.2% of New York contracts chose the English Rule. Non-underwriting contracts that did not designate New York law chose the American Rule in 41.5% of contracts and the English Rule in 34.4% of contracts. So New York-governed contracts shunned the English Rule in favor of other fee provisions. This pattern persisted in asset purchase/sale, licensing, and settlement contracts, areas in which standard forms are likely least often used. We hypothesized that fee clauses may vary by industry, either because of the nature of contracts in an industry or because of common practice within an industry. Appendix Table A1 reports the pattern of fee clauses by industry and suggests that the fee clause type is not strongly associated with industry. No industry had as much of 50% of contracts with either the American Rule or the English Rule.

B. Regression Results As Part IV.A demonstrates, several variables may contribute to the observed pattern of attorney fee clauses. We therefore employ regression models to explore the simultaneous influence of multiple factors. Although more than one dependent variable and more than one model are reasonable candidates to

explore in multiple variable models,<sup>68</sup> we simplify the analysis by employing a dichotomous dependent variable equal to "1" if a contract specified the American Rule on fees and equal to "0" if the contract specified some other fee rule, including the English Rule. We are thus modeling associations with selecting the American Rule rather than associations for a more detailed pattern of fee clauses.

Table 10 reports three regression models. The first two models are logistic regression models with robust standard errors. Model (1) uses as explanatory variables dummy variables for each contract type, with merger contracts as the reference category. It also includes dummy variables for arbitration clauses, jury trial waiver clauses, and non-U.S. party status, and New York as the choice of law. These four variables are coded at the individual contract level. Variables coded at the contract-type level, relational contract status and standardization, cannot be included in model (1) because of multicollinearity with the contract types. So model (2) foregoes using the individual contract type dummy variables and adds variables, constructed from the contract types, for relational status and standardization. Model (3) is a multilevel logistic regression model in which the contract types are modeled using random intercepts. An advantage of the multilevel model is that it allows accounting for variation across contract type through random effects but also allows predictors at the contract-type level.<sup>69</sup> Models (2) and (3) exclude trust agreements because relational contract status was not coded for them. The regression models should be viewed with caution since it is unlikely that all

<sup>&</sup>lt;sup>68</sup> For example, one might use multinomial logit models in which the dependent variable could take on the value of any of the observed fee clauses.

<sup>&</sup>lt;sup>69</sup> Andrew Gelman & Jennifer Hill, Data Analysis Using Regression and Multilevel/Hierarchical Models 246 (2007) (multilevel models allow accounting "for individual- and group-level variation in estimating *group-level* regression coefficients") (emphasis in original).

the explanatory variables are exogenous. For example, a positive association exists between the presence of arbitration clauses and jury trial waiver clauses.<sup>70</sup>

Table 10. Regression Models of Contracts Specifying the American Rule on Fees

	$(1) \qquad \qquad (2) \qquad \qquad (3)$				
	Dependent variable = American Rule for fees used				
Asset sale/purchase	-0.254				
	(0.169)				
Bond indentures	-0.848***				
	(0.227)				
Credit commitments	0.0655				
	(0.188)				
Employment contracts	0.298				
	(0.237)				
Licensing	-0.114				
	(0.325)				
Pooling service	-0.169				
	(0.215)				
Security agreements	-0.712*				
	(0.384)				
Securities purchase	-0.0494				
	(0.154)				
Settlements	-0.105				
	(0.277)				
Trust agreements	1.576***				
	(0.396)				
Underwriting	-2.357***				
C	(0.230)				
Non-U.S. party	0.363**	0.449***	0.367**		
1 2	(0.152)	(0.149)	(0.151)		
Arbitration clause	-0.760***	-0.810***	-0.763***		
	(0.159)	(0.169)	(0.158)		
Jury trial waiver clause	-0.527***	-0.225**	-0.512***		
•	(0.127)	(0.113)	(0.125)		
New York law governs	0.383***	0.139	0.373***		
8	(0.111)	(0.105)	(0.110)		
Relational contract	, ,	0.623***	0.516		
		(0.108)	(0.341)		
Standardization		-0.574***	-0.450**		
		(0.0861)	(0.210)		
Constant	0.391*	0.899***	0.760		
	(0.204)	(0.239)	(0.524)		
Observations	2252	2204	2204		
chi-squared (df)	191.5 (15)	84.52 (6)	•		
pseudo r-squared	0.0879	0.0342			
% correctly classified	64.2%	61.7%	63.7%		
Proportionate reduction in error	7.5%	-3.7%	4.0%		
1					

Note. Models (1) and (2) are logistic regression models with robust standard errors. Model (3) is a multilevel model with random intercepts for contract type. Merger agreements are the reference category for contract types in model (1). Models (2) and (3) exclude trust agreements because their relational contract status was not coded. Proportionate reduction in error is relative to a model that always forecasts rejection of the American Rule. Standard errors in parentheses. \*\*\* p<0.01, \*\* p<0.05, \* p<0.1. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

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<sup>&</sup>lt;sup>70</sup> Eisenberg & Miller, Do Juries Add Value?, supra noteError! Bookmark not defined., at 552-53.

The regression results are consistent with the non-regression results in Part IV.A. In model (1), as in Table 3, but now controlling for non-U.S. party status and the presence of arbitration clauses and jury trial waiver clauses, trust agreements and employment contracts are most likely to employ the American Rule. agreements and bond indentures are the least likely to use the American Rule. As suggested by Table 4, non-U.S. party status is associated in all models with use of the American Rule. As suggested by Table 5, the presence of an arbitration clause is associated in all models with rejection of the American Rule. As suggested by Table 8, the presence of a jury trial waiver clause is negatively associated with use of the American Rule. As suggested by Table 6, relational contract status is associated with acceptance of the American Rule. But note that this effect is not statistically significant in model (3), which also accounts for contract type. So the stronger association between relational contract status and the American Rule in model (2) is likely due to the fact that this model does not account for contract type. As suggested by Table 7, increased standardization is associated with rejection of the American Rule. As suggested by Table 9, once contract type is controlled for, contracts specifying New York law tend to use the American Rule.

# V. Discussion

The data examined above show no single overarching pattern. Parties do display a substantial tendency to opt out of the American Rule and into some variant of the English Rule. Yet the American Rule also retains considerable popularity. Our data thus

tend to indicate that neither system for compensating attorneys enjoys an overwhelming efficiency advantage.

The data do display interesting and statistically significant variation, but the interpretation of the results is not always straightforward. Several of our initial hypotheses were disconfirmed. For example, we predicted that foreign parties would tend to demand fee arrangements that conformed to the practices in their home jurisdictions, and therefore that contracts with a foreign party would tend to opt out of the American Rule. The opposite was the case: contracts with non-US parties were significantly more likely to utilize the American Rule. We do not have a clear answer for why contracts with foreign parties would display this tendency.

We also predicted that contracts containing mandatory arbitration clauses would tend to prefer the American Rule because in arbitration it is often impossible to determine which party prevailed. Here, too, our prediction was disconfirmed: contracts with arbitration clauses turned out to be relatively more likely to opt out of the American Rule. Again, the reason for this pattern is not immediately evident.

We predicted that highly standardized contracts would tend to opt for the American Rule, simply because it is the background norm in the United States, and also would display lower variance in fee arrangements than individually negotiated contracts. Our data do not support this hypothesis. Contrary to our predictions, we found some evidence that variance increased rather than decreased with standardization. Further, standardization turned out to be significantly negatively associated with the American Rule in our regression models: the more standardized the contract, the more likely it was that the parties would select into some other regime. These results may be due to the fact

that highly standardized contracts tend to be financial transactions where large banks insist that the non-reporting company (i.e., the borrower) pay their fees in the event of a dispute over repayment.

Some of our predictions were confirmed by the data. Relational contracts tended to prefer the American Rule, as we predicted, although this pattern was significant in only one of two regression models. We interpret this result as suggesting that parties in relational contracts tend to trust one another and prefer to avoid litigation that calls attention to which one of them was in the wrong from a legal point of view.

We also predicted that loser-pays rules would be more frequently observed in the presence of jury trial waivers. This prediction was confirmed in the data: jury waivers were significantly negatively associated with the American Rule in all three regression models. Perhaps this pattern is due to the parties' greater confidence that judges will rule in their favor, and thus greater willingness to trade off a liability to pay their opponent's fee in the event of a bad result in exchange for the right to have their own attorney fees paid by the adversary if they win.

Our study confirms the hypothesis that fee provisions vary with contract type. We observe highly statistically significant differences in fee arrangements among the twelve contract categories. Yet it is not easy to explain these differences. Bond indentures and underwriting agreements opted out of the American Rule at a relatively high rate; trust agreements displayed a preference for the American Rule. Why this would be the case is not evident to us. Perhaps what we are observing is simply the result of a path-dependent history of drafting in which certain clauses tended to be associated with particular types of contracts.

While we view our results as providing evidence of the efficiency of different types of attorney compensation regimes, and specifically as suggesting that, depending on the circumstances, sophisticated contracting parties view the American Rule as equally desirable with the English Rule, we also emphasize a number of potential caveats that might qualify the results:

- 1. This is the first statistical study of its kind and it is important to recognize its limitations. Our data are restricted to a particular type of contract major commercial contracts deemed to constitute or be related to material events for publicly traded firms. Our findings do not necessarily translate to other contractual settings. The contracts we study also occupy a small slice of time; ideally we would like information for periods before and after the first half of 2002. Variation across our twelve contract types in the rates of dispute resolution clauses studied suggests that more sophisticated modeling of the decision to include such clauses could be fruitful. The details of the relations between the contracting parties and the motivations of those drafting the clauses could be studied. With respect to international contracts, our sample comes wholly from a database limited to firms with public offerings in the United States. This may affect the frequency with which international contracts appear in the data or can reliably be characterized as international.
- 2. We can postulate that parties to major business-to-business contracts do not anticipate a substantial probability of frivolous litigation. If this is so, then a major advantage of the English Rule its perceived role in deterring unmeritorious lawsuits would be largely absent for the contracts in our sample. Our study does not test for whether the English Rule would be preferred by contracting parties in contexts where

frivolous litigation is considered to be a serious danger. Beyond this, we cannot, based on our data, identify whether the revealed preferences of the parties are due to a particular arrangement's perceived role in enhancing settlement probability, reducing litigation expenditures, or other factors.

- 3. The alignment between the outcome of private bargaining and social surplus will potentially be undermined if the outcome of that process affects the interests of third parties not present at the bargaining table. Decisions about litigation involve externalities. The court system is subsidized, so that parties do not pay the full social costs of going to court. In this respect litigation imposes uncompensated costs on the public at large. On the other hand litigation also generates positive externalities to the extent that it enhances compliance with (efficient) laws or produces precedents to guide future conduct. If these externalities are significant (and not offsetting), this could reduce the probative value of our research as regards the welfare qualities of different fee regimes. We do not believe, however, that the potential externalities are sufficiently important to seriously undermine the evidentiary value of our results.
- 4. The observed contract terms may not align with social welfare if agency costs are significant if the attorneys who negotiate and draft the contracts serve their own interests at the expense of their clients. There is no doubt that arrangements for compensating attorneys are potentially important to their well-being (assuming the same firm will conduct the litigation as negotiates the contract), and therefore that agency costs may potentially play a role in skewing the observed contract terms away from the ones that maximize the joint welfare of the parties. But the direction of an agency cost effect,

<sup>&</sup>lt;sup>71</sup> Cf. Steven Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. Legal Stud. 333 (1982) (emphasizing that private incentives to sue are not necessarily coextensive with the interests of society at large).

if any, is ambiguous. American attorneys may dislike the English Rule because it increases the risk of litigation and their chances of encountering dissatisfied clients in the event they lose the case. American attorneys may also dislike the process of having the reasonableness of their fees reviewed by a court. If attorneys value the income stream from litigation, they may dislike the English Rule to the extent they view it as deterring lawsuits or inducing early settlements. On the other hand, the English Rule increases the stakes of litigation and therefore may increase party expenditures on litigation, an effect that would appear to serve attorney self-interest. Overall, agency effects are ambiguous. We doubt that they are sufficiently pronounced as to render unreliable the inference that the observed contract terms reflect reasonable efforts to serve the mutual self-interest of the parties.

5. The observed outcomes in our sample may not provide reliable evidence of efficient dispute-resolution terms if the transactions costs of the bargaining prevent the parties from achieving an optimal substantive result. One hypothesis could be that the issue of attorney fee allocation is one of *de minimis* importance because most cases do not generate disputes, and most disputes result in a settlement where the parties are free to allocate fees as they like, regardless of the provisions of the contract.<sup>72</sup> Perhaps lawyers negotiating contracts do not actively consider or decide whether or not to include a clause on attorney fees. If no mention is made in the contract, the American Rule would apply as a default. On the other hand these are large commercial contracts that constitute all or part of transactions deemed to be material to the affairs of SEC-reporting

<sup>&</sup>lt;sup>72</sup> Some evidence suggests that in settlements the standard rule is that each party pays its own attorney, even when the jurisdiction administers an English Rule for trials. See Alaska Judicial Council, Alaska's English Rule: Attorney's Fee Shifting in Civil Cases (1995), available at http://www.ajc.state.ak.us/reports/testtop.htm.

companies.<sup>73</sup> The provisions for resolving disputes under the contract would appear important enough to receive attention from the attorneys. Attorney compensation clauses appear in a significant number of contracts that appear to be individually negotiated (e.g., settlement of disputes). Even when contract in question is standardized (e.g., pooling and servicing agreements), it is likely that the model on which the contract is based has already been thoroughly reviewed and considered by sophisticated business lawyers. Loser-pays clauses are found in widely available model contracts.<sup>74</sup> Accordingly, we believe it likely that the presence or absence of an attorney compensation clause in a sophisticated commercial contract will reflect considered judgments about what arrangement best serves the joint interests of the parties.

# VI. Conclusion

Our study suggests that the choice of attorney fee rules is complex and affected by multiple factors. We find that neither the American Rule nor the English rules dominates the contracting practices of sophisticated firms. The mixture of preferences for fee rules suggests that much of the voluminous theorizing about attorney fees needs to be revisited. Many theoretical models may assume that a single preferred compensation method exists. The evidence contradicts that assumption. New theories ought to try to account for the real-world variation in parties' behavior, perhaps including variables such as those explore here, or explain why parties depart from a theoretically supported result.<sup>75</sup>

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<sup>&</sup>lt;sup>73</sup> Katz suggests that the non-drafting party may fail to notice a fee provision in a contract, but his observation is concerned with one-sided fee-shifting clauses in retail or consumer contracts. Katz, supra note 19.

 $<sup>^{74}</sup>$  See, e.g., http://contracts.onecle.com/instinet/marshall.sep.2002.05.03.shtml ¶ 18, visited Sept. 7, 2006 ("Attorney Fees. The parties agree that, in any suit brought by either party for breach of this Agreement by the other, the non-prevailing party will be liable for the reasonable attorneys fees of the prevailing party.")

<sup>&</sup>lt;sup>75</sup> Combining the results in this article with those from other analyses of the same set of contracts, we can articulate some "standard" dispute resolution provisions in an imaginary but representative material contract of large firms. Our findings in this article suggest that the contract is about as likely to specify the

American Rule for fees as it is to specify a loser-pays rule. Earlier findings suggest that the contract will specify that New York law governs and that, when a forum is specified, New York will also be the favored forum. Eisenberg & Miller, supra note 65. The contract will not contain an *ex ante* agreement to arbitrate, Eisenberg & Miller, The Flight from Arbitration, supra note **Error! Bookmark not defined.**; ABA Section of Litigation, Member Survey on Civil Practice: Detailed Report 181 (Dec. 11, 2009) (both plaintiff and defense counsel report that arbitration is more likely to produce a less fair outcome than a more fair outcome compared to litigation), available at:

http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\$defaultview/EE0CFE1E19ED62808525768 D00502C34/\$File/ABA%20Section%20of%20Litigation%2C%20Survey%20on%20Civil%20Practice.pdf ?OpenElement, accessed 11/3/2010, and will not waive jury trial, Eisenberg & Miller, Do Juries Add Value?, supra note **Error! Bookmark not defined.**. Large companies' major contracts do not flee en masse U.S. courts or juries, despite rhetorical attacks on both; and they embrace the American Rule on fees about as often as they replace it. Viewing dispute resolution clauses as a package, contracting parties that favor arbitration and jury trial waivers also tend to reject the American Rule.

**Appendix** 

Table A1. Frequency of Attorney Fee Clauses, by Industry

Contract type	Am.	Eng.	Eng. rule,	Nonreporting	Reporting	Other	Total
	rule	Rule	with disc.	co. pays fees	co. pays fees		
Mineral industries No.	25	38	4	14	5	2	88
%	28.4%	43.2%	4.5%	15.9%	5.7%	2.3%	100.0%
Construction industries No.	11	7	1	3	3	0	25
%	44.0%	28.0%	4.0%	12.0%	12.0%	0.0%	100.0%
Manufacturing No.	61	43	4	19	7	5	139
%	43.9%	30.9%	2.9%	13.7%	5.0%	3.6%	100.0%
Transportation & utilities No.	30	39	6	11	2	0	88
%	34.1%	44.3%	6.8%	12.5%	2.3%	0.0%	100.0%
Communications No.	38	35	1	8	3	2	87
%	43.7%	40.2%	1.1%	9.2%	3.4%	2.3%	100.0%
Wholesale trade No.	21	25	3	14	9	4	76
%	27.6%	32.9%	3.9%	18.4%	11.8%	5.3%	100.0%
Retail trade No.	34	30	2	13	4	1	84
%	40.5%	35.7%	2.4%	15.5%	4.8%	1.2%	100.0%
Finance, insurance,& real estate No.	278	223	58	50	20	50	679
%	40.9%	32.8%	8.5%	7.4%	2.9%	7.4%	100.0%
Services No.	182	170	7	58	28	20	465
%	39.1%	36.6%	1.5%	12.5%	6.0%	4.3%	100.0%
Instruments & related products No.	25	18	0	5	4	1	53
%	47.2%	34.0%	0.0%	9.4%	7.5%	1.9%	100.0%
Food & kindred products; agr. for., fish. No.	13	12	0	3	1	1	30
%	43.3%	40.0%	0.0%	10.0%	3.3%	3.3%	100.0%
Paper & allied products No.	6	4	1	1	1	1	14
%	42.9%	28.6%	7.1%	7.1%	7.1%	7.1%	100.0%
Chemicals & allied products No.	55	44	3	12	5	3	122
%	45.1%	36.1%	2.5%	9.8%	4.1%	2.5%	100.0%
Industrial machinery & equip. No.	22	33	3	12	13	5	88
%	25.0%	37.5%	3.4%	13.6%	14.8%	5.7%	100.0%
Electrical & electronic equip. No.	41	42	4	16	4	3	110
%	37.3%	38.2%	3.6%	14.5%	3.6%	2.7%	100.0%
Transportation equip. No.	9	9	2	3	2	3	28
%	32.1%	32.1%	7.1%	10.7%	7.1%	10.7%	100.0%
No SIC listed or SIC missing No.	72	55	1	27	8	11	174
%	41.4%	31.6%	0.6%	15.5%	4.6%	6.3%	100.0%
Total No.	923	827	100	269	119	112	2350
%	39.3%	35.2%	4.3%	11.4%	5.1%	4.8%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Reporting company SEC filings include a four-digit Standard Industry Classification (SIC) code. The SIC codes yield many industry categories with too few firm for statistical analysis. We aggregate the SIC categories into 17 reasonably sized classifications. The 28 industry groups used in U.S. General Accounting Office, Public Accounting Firms: Mandated Study on Consolidation and Competition,GAO-3-864, at 111 (July 2003), were reduced to the 17 industry groups used in Theodore Eisenberg & Jonathan R. Macey, Was Arthur Andersen Different?: An Empirical Examination of Major Accounting Firms' Audits of Large Clients, 1 J. Empirical Legal Stud.263 (2004). Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.

Table A2. Frequency of Attorney Fee Clauses, by Governing Law

Contract type	Am. rule	Eng. rule	Eng. rule,	Nonreporting co.	Reporting co.	Other	Total
			with disc.	pays fees	pays fees		
DE No.	154	93	2	29	21	22	321
%	48.0%	29.0%	0.6%	9.0%	6.5%	6.9%	100.0%
NY No.	405	390	87	124	40	64	1110
%	36.5%	35.1%	7.8%	11.2%	3.6%	5.8%	100.0%
CA No.	49	85	5	15	8	6	168
%	29.2%	50.6%	3.0%	8.9%	4.8%	3.6%	100.0%
Other No.	266	228	6	98	44	17	659
%	40.4%	34.6%	0.9%	14.9%	6.7%	2.6%	100.0%
Total No.	874	796	100	266	113	109	2258
%	38.7%	35.3%	4.4%	11.8%	5.0%	4.8%	100.0%

Note. Am. rule=American rule; Eng. Rule=English rule; disc.=discretion. Source. SEC EDGAR database, LEXIS EDGAR PLUS database, Jan. 2002 to June 30, 2002 for all contract types other than mergers and Jan. 2002 to July 31, 2002 for merger contracts.