Article: The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts

Theodore Eisenberg (Cornell Law School) and Geoffrey P. Miller (New York University) have on the NELLCO Repository posted a working paper titled "The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts" (March 31, 2008, New York University Law and Economics Working Papers. Paper 124). Here is the abstract:

> *We study choice of law and choice of forum in a data set of 2,882 contracts contained as exhibits in Form 8-K filings by reporting corporations over a six month period in 2002 for twelve types of contracts and a seven month period in 2002 for merger contracts. These material contracts likely are carefully negotiated by sophisticated parties who are well-informed about the contract terms. They therefore provide evidence of efficient ex ante solutions to contracting problems. In prior work examining merger contracts, acquiring firms incorporated in Delaware tended to select Delaware law or a Delaware forum to govern disputes under the merger agreements less frequently than firms in other states (New York in particular) specified the law or forum of those states. For the broader variety of contracts analyzed here, the contracting parties rarely opt for Delaware law other than for merger contracts and contracts establishing Delaware business trusts. New York law is the favored choice, with New York law chosen in 46 percent of the contracts and Delaware law, the second most frequent selection, chosen in 15 percent of the contracts. New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. With respect to choice of forum, the major finding is that a litigation forum was specified only for 39 percent of the contracts. Among those 39 percent of contracts, New York is the favored forum, accounting for 41 percent of the choices, with Delaware a distant second and accounting for 11 percent of the forum choices. When a forum is specified it*

usually matches the contract's choice of law. We also explore the decision to designate a forum, mismatches between choice of law and choice of forum, and whether parties designate an exclusive litigation forum. Overall, New York law plays a role for major corporate contracts similar to the role Delaware law plays in the limited setting of corporate governance disputes.

The paper is available here.