THE ENGLISH VERSUS THE AMERICAN RULE ON ATTORNEY FEES: AN EMPIRICAL STUDY OF PUBLIC COMPANY CONTRACTS

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The American rule for attorney fees requires each party to pay its attorney, win or lose; the English rule (applicable in most of the world) requires the losing party to pay the winner's reasonable attorney fees. We study fee clauses in 2,347 contracts in large corporations' public securities filings. Because contracting parties can opt out of the default American rule at low cost, we expected opting out to predominate if the English rule more efficiently compensates counsel. Parties in fact contract out of the American rule in 60% of contracts, which far exceeds the rate of contracting out of other default dispute-resolution rules—those allowing for access to courts (avoidable through ex ante agreement to arbitrate) and the right to a jury trial. Thus, parties often find that the American rule is not optimal. Still, parties choose the American rule about as often as the English rule; the remaining fee clauses they choose are intermediate forms such as "one-way" fee shifts that require only one of the parties to pay the other's fees.

Certain factors help explain the observed pattern of rules through their association with acceptance of the American rule. These factors include specific contract types, the presence of a non-U.S. party, the absence of arbitration clauses and jury-trial waivers, selection of New York law, and a likely long-term relation between the parties. Conversely, factors such as state laws that impose symmetric fee responsibility and an increasing degree of contract standardization are negatively associated with acceptance of the American rule. More generally, our findings suggest that the American rule is not optimal in many large commercial contracts and that sophisticated parties often reject default rules sufficiently important to them. Theoretical models should resist the assumption that one fee rule is most efficient in all contexts, and models should account for real-world factors associated with fee clauses.

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INTRODUCTION

Jurisdictional competition for legal business is intense. States in the United States have long competed for legal business,[1] and the phenomenon is growing in Europe.[2] Attorney-fee compensation is one basis for competing for legal business. For example, the German Federal Minister of Justice competes for legal business on behalf of Germany by invoking the predictability of Germany's fees: "[T]he fees of the lawyers for both plaintiff and defendant are the same and can therefore be calculated from the outset."[3]

Growing competition for legal business adds renewed importance to assessing the use and efficiency of attorney-fees rules. The American rule on attorney fees ordinarily requires parties litigating disputes

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1 *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1485–87, 1503–12 (2009) [hereinafter Eisenberg & Miller, *The Flight to New York*]; Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2079–98 (2009).

2 *See* THE LAW SOC'Y OF ENG. & WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE 8–16, 20 (2007), *available at* www.haitz-rechtsanwaelte.de/de/newsarchiv/data/aktuelles__4_2.pdf; LAW—MADE IN GERMANY 5–29, *available at* http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf (last visited Nov. 12, 2012). The competition can be bizarre. A brochure seeking to attract litigation business to England and Wales brags about "the absence of any general duty of good faith." THE LAW SOC'Y OF ENG. & WALES, *supra*, at 5.

3 LAW—MADE IN GERMANY, *supra* note 2, at 29.

to compensate their own attorneys regardless of the outcome.[4] In the state of Alaska, and in most Western legal systems other than the United States, the prevailing norm is the English rule, which provides that the losing party must pay the winner's reasonable fees.[5] Variations on the American and English rules exist, including a California statute requiring a party to pay its adversary's fees if the party loses in litigation under a contract that specifies that the party is to receive fees from its adversary if it prevails.[6] Rules on attorney compensation have stimulated an animated policy debate—a dialogue characterized in the political arena more by the intensity of the views expressed than

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4 *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245–47 (1975). An exception exists for litigation found to have been vexatious or brought in bad faith. *See* Chambers v. Nasco, Inc., 501 U.S. 32, 45–46 (1991). In some settings deemed to implicate a strong public interest, such as constitutional tort litigation, "fee-shifting" statutes modify this rule to require losing defendants to pay prevailing plaintiffs' fees. *See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 240–41 (1984); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662; Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 321, 327–28 (1984). The motivation behind many such statutes is to enable financially disadvantaged parties with meritorious cases to obtain counsel in situations where contingent fees are not effective. *See* Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 733 (2010) (noting that certain fee-shifting statutes are intended to "facilitat[e] the access of low-income people to the civil justice system"). Efforts to attract counsel via statutory fee shifting have met with mixed success, however. *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) (finding no clear evidence that fee shifting leads to an increase in the number of cases filed).

5 *See* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 44–47 (1984); Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125, 128 (2003). The English rule has many variations and often does not provide for complete indemnification of the winner's costs. *See* Pfennigstorf, *supra*, at 44–47. For Alaska's rule on fees, see ALASKA R. CIV. P. 82 (requiring the loser to pay a percentage of the winner's fees). A loser-pays provision is also found in section 5-111(e) of the Uniform Commercial Code, pertaining to violations of obligations by issuers of letters of credit. U.C.C. § 5-111(e) (2011). Nevada allows an award of attorney fees to a prevailing party when the prevailing party has not recovered more than $20,000. NEV. REV. STAT. § 18.010(2)(a) (2008).

6 *See* CAL. CIV. CODE § 1717(a) (West 2009) ("In 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."). Washington and Oregon also have statutes similar to California's. *See* OR. REV. STAT. § 20.096 (2011) (stating that if a contract provides for fees to one party, the prevailing party is entitled to fees); WASH. REV. CODE ANN. § 4.84.330 (West 2006 & Supp. 2012) (same). In the data set we study, attorney-fee-clause information is contained in 168 contracts governed by California law, 17 governed by Washington law, and 7 governed by Oregon law. New York has a statute that has a similar effect but is limited to landlord-tenant relations. *See* N.Y. REAL PROP. LAW § 234 (McKinney 2006) (requiring a landlord to pay a tenant's attorney fees if a lease of residential property requires the tenant to pay the landlord's attorney fees).

by convincing arguments for any particular arrangement.[7] Many researchers have also addressed attorney compensation from a theoretical perspective.[8] But despite decades of investigation, no consensus has emerged.[9] The question remains: which rule specifies the efficient arrangement for compensating counsel?

The failure of prior research to generate consensus on this issue suggests the value of a different approach. Instead of employing a normative or theoretical perspective, we investigate the question empirically. Subject to minor constraints, contracting parties may adopt any arrangement they wish for allocating attorney fees if a dispute arises under the contract.[10] They can do nothing, in which case the background legal rule will apply.[11] Or they can contract around the background norm by specifying some other arrangement—a "loser-pays" approach found in many of the world's legal systems, a one-way fee-shifting rule awarding fees to one party if it prevails but not to the other, or indeed any other arrangement the parties wish.[12]

The pattern of contract clauses is interesting in its own right, and it also illuminates the policy debate about optimal-fee arrangements. Because parties negotiate contract terms ex ante—before disputes arise—their incentives are to adopt terms that maximize joint value.[13] Unless externalities are present, maximizing value to the parties will also maximize social welfare. Thus, if parties are well informed and

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7 *See* Amir Efrati, *U.S. Policy on Attorneys Fees Sparks Debate at State Level*, WALL ST. J., May 17, 2007, at A12; Linda Greenhouse, *Supreme Court Roundup: Ruling Limits Awarding of Legal Fees for Plaintiffs*, N.Y. TIMES, May 30, 2001, at A20.

8 *See generally* Rowe, *supra* note 4 (evaluating rationales that academics advance to support fee-shifting rules); William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992) (exploring the English "payment into court" rule and considering how it could be incorporated into U.S. practice); Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863 (1998) (examining attorney-compensation schemes).

9 *See, e.g.*, Avery Wiener Katz, *Indemnity of Legal Fees*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION 63, 64–65 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (finding that the current state of economic knowledge prevents reliable prediction of the effect on litigation costs or social benefit of a fee rule requiring fuller indemnity).

10 *See, e.g.*, 20 AM. JUR. 2D *Costs* § 64 (2005) ("[G]enerally parties are free to provide for attorney's fees by an express contractual provision.").

11 *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245–47 (1975).

12 *See, e.g.*, Percival & Miller, *supra* note 4, at 240; Rowe, *supra* note 4, at 662; Note, *supra* note 4, at 328.

13 *See, e.g.*, Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 213, 220–30 (2000) (arguing that if the 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, 5–9 (1995) ("[P]arties would tend to adopt ADR if it would lead to mutual advantages.").

other barriers to contracting are absent, we can expect that the decisions made tend to reflect the efficient ex ante solution to contracting problems.[14] Examining contracting behavior can therefore help address questions about dispute resolution that have heretofore been answered only normatively or theoretically.

We employ this approach by examining 2,347 contracts filed with the Securities and Exchange Commission (SEC) by public firms in 2002.[15] This data set offers benefits as a resource for investigating the efficiency of dispute-resolution arrangements. The contracts in question are drafted by the parties at the time they negotiate their deal; both parties at this point in time share an interest in maximizing the joint value of the contract—and therefore in adopting contract terms that are most efficient ex ante. Because these contracts involve at least one SEC reporting company, the terms are likely negotiated by sophisticated parties and drafted by well-qualified attorneys. And because the contracts in question are reported to the SEC in connection with an event deemed material to the financial condition of the reporting company, the contracts themselves are likely important to the parties. In this data set, we can therefore expect to see parties who have real money at stake striving to adopt the most efficient contractual terms.

We employ two approaches to assess fee-clause practices disclosed in this data set. The first compares the rate at which contracting parties opt out of the default fee rule with the rate at which the parties opt out of two other default rules on dispute resolution: (1) the norm that formal dispute resolution will occur in court, and (2) the right to a jury trial.[16] Contract clauses opting out of these rules take the form of: (1) ex ante agreements to arbitrate, and (2) ex ante waivers of jury trial. We find that, compared with the two other default rules, parties overwhelmingly opt out of the American rule. Parties opt out of court litigation by using arbitration clauses in about 11% of contracts. They opt out of jury trial in about 20% of contracts. In comparison, parties opt out of the American rule in about 60% of contracts. The massive opting out of the American rule suggests that this approach to attor-

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14 *See* Hylton, *supra* note 13, at 220–30; Shavell, *supra* note 13, at 5.

15 This study continues our investigation of dispute-resolution provisions in commercial contracts. Our other studies using these data are: Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539 (2007) [hereinafter Eisenberg & Miller, *Do Juries Add Value?*]; 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) [hereinafter Eisenberg & Miller, *Ex Ante Choices of Law and Forum*]; Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007) [hereinafter Eisenberg & Miller, *The Flight from Arbitration*]; Eisenberg & Miller, *The Flight to New York*, *supra* note 1.

16 *See infra* Part III.A.

ney fees may not, in general, be the optimal arrangement for large commercial contracts.

The American rule's comparative disfavor has implications for the general methodology of this study. In prior studies of commercial contracts, we found surprisingly low rates of opting out of litigation (into arbitration) or trial by jury.[17] While these studies suggested that litigation and jury trials might not be as inefficient as some critics have argued, the observed pattern could also have been due to simple inertia. The same cannot be said for attorney-fees clauses, where the contracting parties displayed a notable willingness to reject the background legal rule. We infer that sophisticated parties do in fact manage dispute-resolution clauses in large commercial contracts. In this light, it appears likely that the failure to opt out of litigation or jury trials represents a meaningful decision in many cases about which arrangement best serves the needs of contracting parties.

While our first approach compares opt-out rates across three different default rules, our second approach focuses primarily on opting out of the American rule.[18] It describes the pattern of attorney-fee-clause use and the pattern's relation to factors that vary—such as type of contract, international status, and presence of other clauses. We find that, while parties reject the default attorney-fee rule in great numbers, they do not reach consensus about a single optimal-fee rule. In about two-fifths of the contracts, parties 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 preferable to the American rule in all circumstances, we would expect to see a nearly uniform pattern of selecting that regime. This was not the case. In about two-fifths of the contracts, parties either specified the American rule or did nothing—in either case leaving intact the background rule that each party pays its own attorney, win or lose. The pattern shows substantial popularity for the American rule but no consensus. In the remaining contracts—about one-fifth of the total—parties opted out of the American rule but did not select the English rule, electing instead a modified form of loser-pays arrangement.

For particular types of contracts, parties show little or no variation in the fee clause specified, suggesting either that one perceived efficient clause exists for that type of contract or that industry and legal

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17 *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008); Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 541.

18 *See infra* Part III.C.

practice may dominate fee-clause choice.[19] In other contract types, parties displayed considerably greater fee-arrangement variation. Significant variation also exists across states and corresponds with the California provision limiting the effectiveness of contractual one-way fee shifting.[20] On the other hand, the observed pattern resists simple theoretical explanation. Parties obviously take fee arrangements seriously, given the substantial rate of opting out of background norms. But it is difficult to identify a single goal they seek to achieve. Industry norms, legal practices, and network effects obviously play an important role in shaping contractual fee provisions.[21] Beyond this, the observed variation may reflect a variety of factors, including the unique circumstances of individual contractual relationships, explanatory variables not captured in our data set, or disagreement among attorneys and contracting parties about the structure of optimal-fee arrangements. Future research might probe more deeply into particular types of contracts to determine which explanations, if any, best explain the observed pattern.

This Article is structured as follows. Part I discusses the literature on attorney fees, identifies background factors against which we observe fee clauses, and specifies the hypotheses we test. Part II describes the data, and Part III presents the results, which are discussed in Part IV.

I
Background and Hypotheses

This Part reviews the literature relating to the policy of attorney-fee clauses, the theories developed with respect to such clauses, and the relevant available empirical evidence. It then discusses background conditions against which such clauses are drafted that should influence observed clause patterns. We then formulate hypotheses to be explored.

A. Literature

1. *Policy*

Rules for compensating attorneys in civil litigation have long been debated.[22] Those who believe that the civil justice system is out

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19 *See infra* Appendix Tables A1–A3.

20 *See infra* Table 4, Appendix Table A1.

21 *See, e.g.*, *infra* Appendix Table A4.

22 *See, e.g.*, Ronald Braeutigam, Bruce Owen & John Panzar, *An Economic Analysis of Alternative Fee Shifting Systems*, 47 Law & Contemp. Probs. 173, 173 (1984); John J. Donohue III, Commentary, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 Harv. L. Rev. 1093, 1093–94 (1991) (rebutting the argument that adopting the English rule on fee shifting would increase the likelihood of settlements and

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.[23] Among such proposals were the 1991 proposal of the Council on Competitiveness,[24] the Republican House majority's 1994 Contract with America,[25] and the proposal by former presidential candidate Texas Governor Rick Perry.[26] Various proposals have also been introduced in Congress and state legislatures to implement some form of a loser-pays rule.[27] These proposals to move toward the English rule have been resisted—with considerable success—by those who argue that a loser-pays provision would "deter middle-income persons from pursuing reasonable claims or defenses, and place them at an unfair disadvantage in disputes with risk-neutral parties."[28]

2. *Theory*

Legal economists have created a virtual cottage industry of analyzing the various incentive and efficiency effects of different fee re-

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arguing that the Coase theorem suggests that the English rule would not influence settlement rates).

23 *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 143, 145–46 (Ed Gillespie & Bob Schellhas eds., 1994) (claiming that the House Republicans' reform bill "penalizes frivolous lawsuits by making the loser pick up the winner's legal fees"); 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).

24 PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 16, 19, 24, 25 (1991), *reprinted in* 60 U. CIN. L. REV. 979, 993–94, 1002–03 (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).

25 CONTRACT WITH AMERICA, *supra* note 23.

26 *See* Op-Ed., *Loser Pays, Everyone Wins*, WALL ST. J., Dec. 15, 2010, at A20.

27 *See, e.g.*, Attorney Accountability Act of 1995, H.R. 988, 104th Cong. § 2 (1st Sess. 1995) (proposing that a nonprevailing party must pay the prevailing party's attorney's fees in federal civil diversity litigation where an offer of settlement has been made). In 1980, Florida enacted a statute for medical malpractice litigation similar to the one later proposed in the Attorney Accountability Act. *See* FLA. STAT. § 786.56 (repealed 1985). Although the state medical association enthusiastically supported the statute, 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. & ORG. 345, 355–56 (1990).

28 H.R. REP. NO. 104-62, at 28 (1995). For a description of a similar policy debate in England, see Richard Lewis, *Litigation Costs and Before-the-Event Insurance: The Key to Access to Justice?*, 74 MOD. L. REV. 272, 273, 277–85 (2011) (advocating for before-the-event insurance as a means of providing access to justice for claimants who otherwise would not be able to afford to participate in the legal system).

gimes.[29] But the volume of ink these analysts have spilled has not resulted in agreement as to the relative social utility of the rules.[30]

Most analyses compare the English rule with the American rule on attorney compensation.[31] The English rule holds the potential, as its proponents argue, to deter frivolous or nonmeritorious lawsuits since a defendant facing such a lawsuit has an incentive to vigorously litigate the case, knowing that it will almost certainly win and its adversary will pay its fees.[32] 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.[33]

But a more complete economic analysis must also take account of other effects. Most importantly, relative to the American rule, the English rule increases risk to litigants by eliminating the built-in hedge

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29 As Avery 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." Katz, *supra* note 9, at 65. Eight years earlier, John J. Donohue III described the literature on fee shifting as "immense." Donohue, *supra* note 22, at 1093 & n.1.

30 The following review of the literature draws in part from Katz's excellent summary. *See generally* Katz, *supra* note 9 (providing a survey on fee shifting).

31 *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. Econ. Literature 1067, 1073 (1989) (analyzing the economic roles of the American and English rules in dispute resolution); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. Econ. & Org. 143, 145–54 (1987) (evaluating litigation expenditures under the English rule); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 Tex. L. Rev. 1943, 1946–61 (2002) (reviewing the empirical literature on the impact of the English rule on attorney behavior); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 Ind. L.J. 59, 78–81 (1997) (summarizing the influence of American civil procedure in substantive tort law); Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 Law & Contemp. Probs. 139, 139–42 (1984) (surveying the impact of the English rule on settlement decisions). Among academic writers, Robert A. Kagan and Albert W. Alschuler have been among the more vigorous proponents of moving toward the English rule as a strategy for combating perceived excesses and abuses in the American legal system. *See generally* Kagan, *supra* note 23 (examining the issues associated with adversarial legalism in the United States and proposing changes to address these issues); Alschuler, *supra* note 23 (criticizing the United States' adjudicative services).

32 *See* Kagan, *supra* note 23, at 239; Alschuler, *supra* note 23, at 1831. *Compare* A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. Legal Stud. 141, 141 (1998) (finding that the English rule encourages low-probability plaintiffs to go to trial more than the American rule does), *with* David Rosenberg & Stephen M. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 Int'l Rev. L. & Econ. 3, 5 (1985) ("[U]nder the British system the willingness of the plaintiff to litigate and to file a claim will be less than under the usual American system if the likelihood of prevailing is low." (emphasis omitted)).

33 *See* Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 Int'l Rev. L. & Econ. 3, 4, 17–19 (1990). A study of Alaska's loser-pays rule found that it did not significantly deter frivolous litigation. *See* Susanne Di Pietro, Teresa W. Carns & Pamela Kelley, Alaska Judicial Council, Alaska's English Rule: Attorney's Fee Shifting in Civil Cases 79–90, 138–42 (1995), *available at* http://www.ajc.state.ak.us/reports/atyfee.pdf.

that the loser does not have to pay the winner's fees.[34] This risk 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.[35]

The choice between the English and American rules may also affect litigation expenditures. Some have argued that the English rule would reduce parties' incentives to drive up their adversaries' costs, since they face a positive probability of paying those costs in the event they lose the case.[36] On the other hand, the relatively greater risk of the English rule implies that parties have more at stake in the litigation: they litigate not just to obtain (or avoid) a judgment but also to obtain payment of their attorney fees and to avoid paying their adversary's fees.[37] 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.[38] Greater stakes and decreased marginal costs imply that the parties may spend relatively more on litigation, a potential social cost.[39] 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 its own legal expenditures in a form of "arms race" or may be intimidated into reducing its efforts.[40] Moreover, the social effect of increased litigation expenditures is itself ambiguous: while transactions costs increase, the quality and accuracy of litigation outcomes and judicial precedents may also increase.[41]

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.[42] However, an alternative view is that the English rule may decrease the settlement rate because a condition for litigation is that the

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34 *See* Donohue, *supra* note 22, at 1107–08.

35 *See* Alschuler, *supra* note 23, at 1815 n.23; Donohue, *supra* note 22, at 1107–08; Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1091 (1993).

36 *See* Alschuler, *supra* note 23, at 1830–31.

37 *See* John J. Donohue III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 202–03 (1991) (citing John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 158, 176–78 (1989)).

38 *See* Donohue, *supra* note 37, at 202.

39 This is because parties under the English rule have more to lose or gain from the outcome and because they anticipate reimbursement for the costs incurred. *See* Braeutigam, Owen & Panzar, *supra* note 22, at 180; Katz, *supra* note 31, at 158.

40 *See* Katz, *supra* note 9, at 67–68.

41 *See id.* at 67–68, 76–77.

42 *See* Donohue, *supra* note 37, at 202–03, 208 (arguing that the larger stakes associated with the English rule induce parties to settle).

parties must be mutually optimistic,[43] and optimistic parties may view the opportunity to get their fees paid as an inducement to trial.[44] Even if the effect on settlement rates were unambiguous, this would not necessarily generate clear prescriptions as to social policy because settlements have costs as well as benefits. These costs include both the private expenditures of negotiating and enforcing the settlement[45] and certain social costs: settlements deprive the legal system of valuable judicial precedents and may reflect inaccurate estimates of the underlying legal liabilities because of factors such as asymmetric information or differences in risk aversion or stakes.[46]

The increased risks and potentially increased litigation expenditures associated with the English rule may also induce potential litigants not to sue in the first place.[47] But optimistic parties may be more inclined to file lawsuits under the English rule because they expect to win and therefore discount the risk of losing the case and having to pay their adversaries' fees.[48] The effect of the English rule on the litigation rate is thus also ambiguous: relative to the American rule, the English rule encourages litigation by optimistic plaintiffs but discourages litigation by pessimistic plaintiffs.[49] Moreover, like settlement, a decision not to file a lawsuit is not necessarily socially efficient. Not suing saves the cost of litigation but also reduces the deterrent effect that the threat of litigation has on parties who might otherwise

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43 The condition of mutual optimism is a basic premise of the economic analysis of trials. *See, e.g.*, John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 296 (1973) (emphasizing the importance of parties agreeing on the probabilities of the court's action to the role of settlement decisions); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66 (1971) (explaining that in criminal proceedings, "a necessary condition for a settlement is that both the defendant and prosecutor simultaneously gain from a settlement compared to their expected trial outcomes"); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 422 (1973) ("[A] principal cause of litigation is 'mutual optimism'—both parties believe they have a good chance of winning.").

44 *See* Steven M. Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 65–66 (1982) ("[C]onditional on suit having been brought, the likelihood of trial under the British system will be greater than under the American system.").

45 *See* Alan E. Friedman, Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67, 72–75 (1969) (analyzing fixed costs in the bargaining and drafting stages of settlement agreements).

46 *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 81–84 (2010) (explaining the role of risk preference and bargaining imbalances in inaccurate settlements).

47 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 539 (3d ed. 1986); Roger Bowles, *Settlement Range and Cost Allocation Rules: A Comment on Avery Katz's* Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 3 J.L. ECON. & ORG. 177, 178 (1987); Alfred F. Conard, *Winnowing Derivative Suits Through Attorneys Fees*, 47 LAW & CONTEMP. PROBS. 269, 281 (1984) (arguing that fee considerations may prevent the initial filing of suits); Hause, *supra* note 37, at 176.

48 *See* Shavell, *supra* note 44, at 59.

49 *See id.* at 59, 71–73.

violate the law.[50] Further, to the degree litigation expenditures increase under the English rule, this factor encourages settlements because it implies that the litigation costs avoided through settlement will be greater.[51] In this respect, the English rule may induce more settlements, but, again, the social value of settlements versus litigation is itself ambiguous.

Any complete welfare analysis must also evaluate the effects of different fee regimes on primary behavior. To the degree that the English rule encourages meritorious litigation, this effect ought to feed back into primary conduct by encouraging people to comply with underlying legal norms.[52] However, the possibility of judicial error complicates the analysis,[53] and other policy instruments—such as damages multipliers, punitive damages, or fines—may be more effective at inducing desirable primary behavior.[54] No consensus exists about whether the English or the American rule better promotes desirable primary conduct.[55]

Also relevant in a complete welfare analysis is the impact of different fee regimes on the evolution and form of the law itself. Academics take different stances regarding this impact. For instance, Robert Prichard argues that the English rule enhances the predictability of legal rules relative to the American rule and suggests that predictabil-

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50 *See id.* at 71–73 ("[L]itigation will be worthwhile to society as long as its deterrent and compensatory value exceeds total legal costs plus public administrative expenses. . . . [I]t is apparent that the private benefit and cost calculation may diverge from the social, and in any direction.").

51 *See* Hause, *supra* note 37, at 158 ("The greater stakes of a trial under the indemnity system will tend to induce larger trial expenditures than would occur under the American system. In turn, the settlement rate will tend to be greater under the indemnity system because of the larger gains potentially available if a settlement is reached instead of going to trial.").

52 *See* Katz, *supra* note 9, at 76.

53 *See* A. Mitchell Polinsky & Steven M. Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 99–103 (1989) (arguing that legal errors influence the decision to file suit in a civil case).

54 *See* Louis Kaplow, *Shifting Plaintiffs' Fees Versus Increasing Damage Awards*, 24 RAND J. ECON. 625, 628 (1993) ("Shifting plaintiffs' fees and increasing damage awards may affect the likelihood of settlement differently."); Katz, *supra* note 9, at 77; A. Mitchell Polinsky & Daniel L. Rubinfeld, *Optimal Awards and Penalties when the Probability of Prevailing Varies Among Plaintiffs*, 27 RAND J. ECON. 269, 273 (1996) ("The reason it is possible to raise the award and the penalty so as to discourage suits without reducing deterrence is, in essence, that potential plaintiffs whose probability of prevailing is sufficiently high are favorably affected by these changes, while potential plaintiffs whose probability is relatively low are adversely affected.").

55 *See, e.g.*, Clinton F. Beckner III & Avery Katz, *The Incentive Effects of Litigation Fee Shifting when Legal Standards Are Uncertain*, 15 INT'L REV. L. & ECON. 205, 215 (1995) (finding that neither the American nor the British rule on attorney-fee allocation better encourages "efficient substantive behavior").

ity is generally a desirable feature of legal systems.[56] Keith Hylton, however, 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.[57] But 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.

Taken as a whole, the theoretical literature is indeterminate as to the practical effects and social utility of attorney-fee regimes. Avery Katz aptly 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 are [sic] 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.[58]

3. *Evidence*

If theory does not provide an answer, can data fill the void? Empirical research on the effects of the English and American rules is sparse.[59] Don Coursey and Linda Stanley found, in an experimental setting, that subjects settled more frequently under the English rule than under the American rule.[60] Edward Snyder and James Hughes, in studies of Florida medical malpractice litigation, found that under the English rule parties were less likely to settle filed cases, plaintiff verdicts were more frequent, settlements were larger, and average de-

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56 *See* J. Robert S. Prichard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEGAL STUD. 451, 451–55 (1988).

57 *See* Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427, 452–59 (1995).

58 Katz, *supra* note 9, at 64–65.

59 For an excellent survey, see generally Kritzer, *supra* note 31 (reviewing the existing empirical research on the effects of attorney-fee structures).

60 *See* Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161, 170 (1988).

fense costs were higher.[61] These findings suggest that the English rule does have a significant impact on litigation strategy. But studies of Alaska's loser-pays statute raise doubts about this conclusion.[62] The Alaska Judicial Council found little evidence that the state's English rule affected case filing rates or had much influence on attorney strategy.[63]

Simulation studies have reached inconsistent results about which rule generates the most settlements.[64] Katz's simulation study concluded that the English rule would increase litigation expenditures, on average, relative to the American rule.[65] 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.[66]

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 to either the American or the English rules.[67] Theodore Eisenberg and Stewart Schwab found that a one-way pro-plaintiff fee-shifting rule increased trials and possibly increased 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.[68]

Other empirical studies have analyzed offer-of-judgment regimes, in which if a party offers to settle a case, the counterparty is required to pay the adversary's costs (which potentially include attorney fees) if the outcome at trial is less favorable than the offer. Albert Yoon and Tom Baker found that a bilateral offer-of-judgment rule with uncap-

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61 *See* James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 238, 243 (1995); Snyder & Hughes, *supra* note 27, at 374–77.

62 *See* DI PIETRO, CARNS & KELLEY, *supra* note 33, at 79–90, 138–39 (1995); Susanne Di Pietro, *The English Rule at Work in Alaska*, 80 JUDICATURE 88, 89–91 (1996). Another study found "that civil and tort filings in the District of Alaska, while below the national average, resembled those in a sample of similar districts." Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Case Filings*, 29 ALASKA L. REV. 1, 43 (2012).

63 *See* DI PIETRO, CARNS & KELLEY, *supra* note 33, at 79–80, 106–18, 138–39.

64 *Compare* Hause, *supra* note 37, at 158 (concluding that the English rule is more likely to encourage settlements than the American rule), *and* Philip L. Hersch, *Indemnity, Settlement, and Litigation: Comment and Extension*, 19 J. LEGAL STUD. 235, 241 (1990) (same), *with* Donohue, *supra* note 37, at 202–03, 203 n.32 (suggesting that the English rule would lead to more trials).

65 *See* Katz, *supra* note 31, at 171.

66 *See* Keith N. Hylton, *Litigation Cost Allocation Rules and Compliance with the Negligence Standard*, 22 J. LEGAL STUD. 457, 459, 466, 476 (1993).

67 *See id.* at 459; Hylton, *supra* note 35, at 1071–72.

68 *See* Schwab & Eisenberg, *supra* note 4, at 745–49.

ped attorney fees reduced the time required to resolve disputes.[69] Thomas D. Rowe, Jr. and his colleagues conducted surveys on a two-way offer-of-judgment rule with fees included in the sanction, finding that the rule affected certain aspects of the hypothetical pretrial bargaining.[70] Coursey and Stanley's experimental study found that test subjects settled cases under the federal offer-of-judgment rule more frequently than under the American rule or the English rule and that settlements tended to be more favorable to defendants than under the American rule.[71] Laura Inglis and her coauthors, using an experimental approach, concluded that a symmetrical offer-of-judgment rule covering only the costs of litigation had no effect on settlement rates as compared to an environment lacking any cost-shifting rule, but they also found that expanding an offer-of-judgment rule to include attorney fees as well as costs would increase settlement rates.[72]

Overall, academic research has 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 tend to stimulate greater expenditures if a dispute winds up in court.[73]

B. Background Conditions

Fee-clause arrangements exist against background conditions. Many of the contract types we study involve transactions that are similar to earlier transactions. In transactions with analogous prior transactions, lawyers often begin drafting with a previously used document. If a contract from a similar transaction contains an attorney-fee clause, that clause will persist unless someone decides to try and change it.

The clause may exist in a prior transaction because the law office or client has a general practice of including it in every transaction without specifically considering its use in each case. Or the clause may exist because the particular fee clause is common in transactions of the relevant kind within an industry. The clause may also exist because the attorney and client concluded, after due consideration, that

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69 *See* Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 159, 191–93 (2006).

70 *See* Thomas D. Rowe, Jr. & David A. Anderson, *One-Way Fee Shifting Statutes and Offer of Judgment Rules: An Experiment*, 36 JURIMETRICS J. 255, 273 (1996); Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13, 30 (1988); Rowe, *supra* note 31, at 163–71.

71 *See* Coursey & Stanley, *supra* note 60, at 170–75.

72 Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel R. Simmons & Erik Tallrot, *Experiments on the Effects of Fee Shifting and Discovery on the Efficient Settlement of Tort Claims* 20–30 (The Berkeley Elec. Press Legal Series, Working Paper No. 501, 2005), *available at* http://law.bepress.com/expresso/eps/501.

73 *See, e.g.*, Katz, *supra* note 9, at 72; Kritzer, *supra* note 31, at 1957.

the clause was best for the client and the counterparty did not object.[74] For example, a loser-pays rule has little appeal to a party who believes that its counterparty cannot afford to pay fees if the party prevails. Regardless of the cause, a fee clause may persist even when it is not value maximizing if, in the individual case, the costs of changing the clause exceed the benefits.

Law governing fee clauses should also influence whether a new transaction retains a clause. This effect can be independent of the reasons leading to a clause's past use in a given type of transaction. Common use of a clause in a transaction governed by one state's law does not necessarily support its use if another state's law governs. The most important feature of state law governing fee clauses is whether it imposes two-way fee shifting when a contract provides for one-way shifting. And, for at least one class of contracts, public bond indentures, federal law influences fee-clause provisions.[75]

As noted above, California, Oregon, and Washington law provide that a contract with one-way fee shifting is deemed to implement two-way fee shifting.[76] If a contract provides that one party receive fees if it prevails, California Civil Code section 1717 automatically changes the contract to a loser-pays contract.[77] Section 1717 effectively transforms one-way fee shifting to the English rule.[78] Given section 1717 and similar statutes, parties have little incentive to include a one-way fee-shifting provision in states following the California rule.

Another background legal norm is found in the federal Trust Indenture Act of 1939 (TIA), which provides default provisions relating to attorney fees that are deemed to be included in indentures unless expressly excluded.[79] Section 315(e) of the TIA states:

> The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable

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74 One practitioner, after hearing a presentation based on this Article, stated: "It is my practice to consider whether or not to add an attorney's fees clause to an agreement: which side is more likely to sue; can the other side pay our side's legal fees; is our client a 'deep pocket.'"

75 *See, e.g.*, Trust Indenture Act of 1939 §§ 315(e), 323(a), 15 U.S.C. §§ 77ooo(e), 77www(a) (2006).

76 *See supra* note 6 and accompanying text.

77 *See id.*

78 *See* CAL. CIV. CODE § 1717(a) (West 2009); *supra* note 6 and accompanying text.

79 *See* Trust Indenture Act of 1939 § 318(c), 15 U.S.C. § 77rrr(c).

> costs, including reasonable attorney's fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant . . . .[80]

This clause vests discretion in a court to award attorney fees to either party, based in part on the merits of the litigants' positions. As such, it resembles a loser-pays rule with discretion vested in the court about whether to award fees. The TIA also dictates that a similar rule apply in litigation involving misleading statements relating to trust indentures.[81] These fee-related provisions can be expected to influence the frequency of types of fee clauses in bond indenture agreements.

C. Hypotheses

Our study, the first of its type, formulates and tests hypotheses about contracting parties opting out of three default rules—the American rule, access to court, and availability of jury trial—at different rates, and parties selecting one fee rule over another. As discussed above, selection of a fee rule provides evidence about the ex ante efficient contractual solution.[82] Because the contracts in our data set are drafted by business attorneys for business clients, we expect them to reflect prevailing attitudes in the business community.

Our first hypothesis—that parties will tend to opt out of the American rule—is relevant to both approaches to the data. With respect to comparing the rates at which sophisticated contracting parties opt out of three default rules, the hypothesis is readily supportable. The often-expressed preference for the English rule contrasts with litigator skepticism, in at least some contexts, about the fairness of arbitration.[83] And our prior study indicates that the con-

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80 *Id.* § 315(e), 15 U.S.C. § 77ooo(e). The Act limits the applicability of the fee provision in the following proviso:

> *Provided*, That the provisions of this subsection shall not apply to any suit instituted by such trustee, to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per centum in principal amount of the indenture securities outstanding, or to any suit instituted by any indenture security holder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

Id. (emphasis added).

81 *See id.* § 323(a), 15 U.S.C. § 77www(a).

82 *See supra* notes 13–14 and accompanying text.

83 *See* ABA SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 181 (2009) (finding that both plaintiff and defense counsel report that arbitration is more likely to produce a less fair outcome than litigation would produce); *see also* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011) (indicating that there is a "significant repeat-employer–arbitrator pairing effect in which employees" fare worse "where the same arbitrator is involved in more than one case with the same employer, a finding supporting some of the fairness criticisms directed at mandatory employment arbitration").

tracts in our sample rarely opt for arbitration.[84] The matter is less clear with respect to opting out of the American rule on fees compared to waiving jury trial. Evidence exists that only about 36.5% of trials involving contracts between two businesses were before juries.[85] Thus, one should not necessarily expect parties to reject the American rule more than they reject jury trial since business disputes tend not to have jury trials. Nevertheless, about 80% of the contracting parties in our sample declined to waive jury trial ex ante,[86] so it is not unreasonable to forecast a higher opt-out rate from the American rule.

With respect to the particular choice-of-fee rule, as discussed above, business interests have tended to support loser-pays arrangements in the political arena.[87] The one relevant U.S. survey of business attorneys of which we are aware supports Alaska's retention of its loser-pays rule.[88] Thus, we hypothesize that the contracts in our data set will display a significant level of opting out of the American rule.[89]

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

Given that most Western countries administer some form of a loser-pays system,[90] we may hypothesize that foreign counterparties in international contracts will feel uncomfortable with the U.S. approach and bargain for use of their own attorney-compensation rules.[91] This

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84 Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 335, 350.

85 The 36.5% estimate is the authors' calculation using the data contained in U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STUDY NO. 23862, CIVIL JUSTICE SURVEY OF STATE COURTS, 2005, *available at* http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/23862/detail. For a description and analysis of these data, see generally LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (2008) (presenting and summarizing the data). The calculation is based on contracts cases in the data that contain at least one business entity as a defendant and at least one business entity as a plaintiff. The results are weighted to reflect the sample design of the survey, which included 46 of the 75 largest counties in the United States and 106 of the smaller counties in the United States. U.S. DEP'T OF JUSTICE, *supra*.

86 Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 539, 552.

87 *See* Op-Ed., *supra* note 26.

88 A survey of business attorneys in Alaska, which administers a loser-pays rule, found overwhelming support for retaining the rule rather than reverting to the American rule. *See* DI PIETRO, CARNS & KELLEY, *supra* note 33, at 143 ("96% of the [surveyed] attorneys who spent half or more of their time handling business and corporate matters wanted to keep [Alaska's version of the English rule].").

89 The hypothesis is a "soft" one in that at least one countervailing force is at work. All of the contracts in our sample have a sufficient U.S. connection to appear in the SEC EDGAR database. The American rule likely would be the default rule unless the parties expend effort to overcome it.

90 *See supra* note 5 and accompanying text.

91 Evidence exists demonstrating that attitudes toward dispute-resolution provisions can noticeably vary between the United States and other countries. A law firm survey shows large differences between U.S. and U.K. counsel with respect to use of arbitration. *See* FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 6TH ANNUAL LITIGATION TRENDS SURVEY REPORT 21–22 (2009), *available at* http://www.fulbright.com/images/publications/2009AnnualLitigationTrendsSurveyFindingsReport.pdf (reporting that 51% of U.K. companies

preference should result in observation of a lower rate of American-rule use in international contracts compared to contracts in which both parties are domestic.

This international-contracts comparison is of special interest because it may provide a cleaner test than other comparisons of the perceived efficient rule. Some background conditions, such as the clauses in previous transactions, should be less dominant in international transactions. Although the U.S. party's background experience is more likely to be with the American rule, the English rule will be more familiar to the foreign party. Differing background experiences should lead international-contract parties to focus specifically on the fee rule. The parties are more likely to perceive the rule that emerges from this process as the efficient rule than a fee rule shaped by the shared background of domestic experience.

Hypothesis: Loser-pays provisions will be more frequently observed in international contracts.

Attorney-fees provisions can be included in contracts that specify that dispute resolution shall be by arbitration rather than litigation. The rules of some dispute-resolution 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.[92] Thus, some commentators encourage attorneys drafting arbitration agreements to consider including a specific "provision authorizing the arbitrator to award attorneys' fees."[93] The English rule or other fee-shifting rules may be difficult to administer in arbitration, however, because identifying the prevailing party may be impossible.[94] Moreover, the broad discretion given to arbitrators may vitiate the English rule's effect because the arbitrator can engage in nontransparent tradeoffs between the award on the merits and the

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surveyed preferred arbitration for domestic disputes compared to 32% of U.S. companies, and noting that a higher fraction of U.K. companies had commenced international arbitrations). 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 that law's rules. *See* Katz v. Berisford Int'l PLC, No. 96 Civ. 8695 (JGK), 2000 U.S. Dist. LEXIS 9535, at *19–27 (S.D.N.Y. July 6, 2000) (applying the English rule in a contract containing a choice-of-law clause specifying English law, despite a conflict of laws between New York law and English law); Cutler v. Bank of Am. Nat'l Trust & Sav. Ass'n, 441 F. Supp. 863, 864–65 (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 safety deposit box in a London branch of the bank).

92 *See, e.g.*, Tony Starr, *Choosing Between Litigation and Arbitration*, Bos. B.J., Mar./Apr. 2005, at 31, 32.

93 *Id.*

94 *See, e.g.*, Moore v. First Bank of San Luis Obispo, 996 P.2d 706, 710 (Cal. 2000) (affirming the arbitrator's decision that each party must bear its own attorney fees, despite a fee-shifting provision that was favorable to the bank, because the arbitrator did not designate a prevailing party).

award of fees.[95] Accordingly, we may hypothesize that the parties may perceive little benefit in opting out of the American rule in the case of arbitrations.

Like the international-contracts comparison, comparing fee-clause use across contracts with and without arbitration clauses may be especially informative in identifying the perceived efficient fee rule. Arbitration clauses in our set of contracts are surprisingly rare; they appear in less than 11% of the contracts.[96] Parties who agree to an infrequently used provision that carries the serious consequence of opting out of the court system are likely to have focused on dispute-resolution clauses.[97] Background practices, such as clauses used in prior transactions, are less likely to appear by default in such contracts.

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.[98] In "one-off" arrangements—for example, the sale of an asset—the parties anticipate a brief relationship, extending (absent problems with the sale) only to the closing of the transaction.[99] In other contracts—employment contracts being paradigmatic—the parties anticipate a substantial period of performance during which they will have to work together.[100] 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 be deemed in the wrong—a consequence that may enhance the possibility of strained relations by requiring one party to pay the other's fees.[101]

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95 *See, e.g.*, JAMES ACRET & ANNETTE DAVIS PERROCHET, CONSTRUCTION ARBITRATION HANDBOOK § 12:13 (2012 ed. 2012) ("Arbitrators are free to award on the basis of broad principles of fairness and equity, and an arbitrator need not make findings or state reasons in support of the award.").

96 Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 335, 351 tbl.2.

97 *See, e.g.*, Starr, *supra* note 92, at 32 (advocating that parties who have decided to include an arbitration provision "focus carefully and thoughtfully on drafting the arbitration provision, and resist the temptation to simply insert [a] boilerplate arbitration provision").

98 Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 124 (1988) ("The more relational an exchange, the more unlikely it is that parties will plan and allocate risks optimally. Their promises can be incomplete at best. As a result, relational norms such as cooperation and compromise, rather than promises, largely govern these parties' associations.").

99 *See id.* ("[D]iscrete exchange, such as buying a coat off the rack, requires relatively little interaction between parties.").

100 *See* David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 468 (1992) ("Many of the contracts into which firms enter are long-term relationships with suppliers, lenders, and employees.").

101 *See, e.g.*, Snyder & Hughes, *supra* note 27, at 345 (discussing how under the English rule, the losing party bears the costs of both parties). The English rule may also double

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 the standardization of contract terms and other dispute-resolution decisions, such as the decision to submit disputes to mandatory arbitration or to waive jury-trial rights.[102] It is therefore worth exploring whether standardization is also associated with fee-clause choice. As in prior studies, we use the distribution of the choice-of-law pattern for each contract type as an objective measure of standardization.[103] A contract type with a standardized choice-of-law provision likely has greater standardization than contract types that designate many choices of law.[104] Based on this measure, some financial transactions, such as bond indentures, credit commitments, pooling and servicing agreements, security agreements, trust agreements, and underwriting agreements, have high standardization.[105] Asset sale/purchase agreements, merger contracts, and securities purchase agreements have intermediate standardization.[106] Less regularized transactions, such as employment contracts, settlements, and licensing agreements, have relatively low standardization.[107]

Contract standardization, standing alone, need not suggest that a particular attorney-compensation rule is the most efficient, but it may have implications for the distribution of fee clauses.[108] We expect that parties will have negotiated less standardized contracts with some care. Since parties presumably gave more individual attention to each 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.[109] If the historical negotiated terms were the product of substantial bargaining, more highly standardized classes of contracts might be expected to have settled on what parties perceived to be an

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litigation costs, which are ultimately borne by one party. *See id.* at 351. The imposition of such a burden could strain the long-term contractual relationship between the parties.

102 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 542, 554–57; Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 342–43, 353–57.

103 Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 554–57.

104 *See id.* at 554.

105 *See id.* at 554–56. For a description of pooling and servicing agreements, see *infra* note 124 and accompanying text.

106 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 554–56.

107 *See id.*

108 *Cf. id.* at 556–57 (finding a "definite trend," but not a monotonic relation, between standardization and the rate of jury-trial-waiver provisions).

109 *See* Justin Sweet, *Standard Construction Contracts: Some Advice to Construction Lawyers*, 40 S.C. L. REV. 823, 827 (1989) ("Even experienced owners who do not use national standard contracts will develop their own general conditions for use in repeated transactions.").

optimal-fee clause. This view 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 United States is the American rule,[110] 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; (2) the distribution of fee clauses will be more variable in less standardized contracts.

Loser-pays rules increase the risk of litigation.[111] It is possible, therefore, that parties may shun loser-pays rules when litigation is inherently risky. This possibility suggests a potential interaction between loser-pays rules and jury-trial waivers. Because juries are thought to increase litigation risk,[112] testing whether the failure to bargain away jury trial is associated with the reduced 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 is of particular interest. As noted above, ex ante jury-trial waivers, like arbitration clauses, are rare and occur in only about 20% of our sample.[113] Comparing fee-clause use across contracts with and without jury-trial waiver clauses, like the comparisons for international contracts and arbitration clauses, may be especially telling evidence about the perceived efficient fee clause.[114] The presence of a clause waiving jury trial is evidence that the parties have tended not to rely on prior forms.[115]

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

Attorney-fee clauses may reflect industry-specific patterns.[116] A contract term on attorney fees may develop in an industry and be perpetuated by practice or inertia while a different term may appear in another industry. Contracts in some industries may be more subject

110 *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245–47 (1975); Kritzer, *supra* note 31, at 1946.

111 *See* Donohue, *supra* note 22, at 1107–08; Donohue, *supra* note 37, at 202–03; Hause, *supra* note 37, at 176.

112 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 543, 545–46.

113 *See id.* at 541, 553 tbl.2.

114 *See id.* at 583 n.84; Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 335, 349–51, 369.

115 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 545–48, 556–57.

116 *See, e.g.*, *infra* Appendix Table A4; *cf.* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 555–57, 566 (finding that jury "[w]aiver clause use varies by industry").

to breach than contracts in other industries, leading to potential preferences for one type of attorney-fee provision over another.[117]

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 11.4% of the contracts.[118] We do, however, report results based on the governing law specified in contracts. As previously reported, New York dominates as the governing choice of law in the contracts studied here.[119] New York–specific effects, if they exist, should be accounted for in assessing the pattern of fee clauses specified. In addition, a key background condition is the substantive California law regulating attorney-fee clauses.[120]

Hypotheses: (1) The choice of New York law or forum will be significantly correlated with the type of fee provision chosen; (2) the choice of California law or forum will be significantly correlated with the fee provision chosen.

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.[121] SEC reporting firms must file Form 8-K to disclose certain material corporate events or changes that the company has not previously reported.[122] 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, as well as sixty-seven contracts for which suitable fee-clause information was not available. The resulting sample consists of 2,347 contracts.

We coded the contracts for a variety of contract terms, including terms related to the settlement of disputes that might arise under the

117 *See* Hillman, *supra* note 98, at 131 ("Contract law is a 'club,' held in reserve, that reinforces parties' business cultures." (footnote omitted)).

118 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 565 tbl.9 (showing 269 of 2347 contracts as having New York attorney locale).

119 *See* Eisenberg & Miller, *The Flight to New York*, *supra* note 1, at 1478. 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, *see 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.

120 *See* Cal. Civ. Code § 1717(a) (West 2009); *supra* note 6 and accompanying text.

121 *See infra* Table 1.

122 For the current rules on filing a Form 8-K, see SEC, Form 8-K, *available at* http://sec.gov/about/forms/form8-k.pdf (specifying certain material events that an issuer must report by filing Form 8-K with the SEC).

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, we studied six months of contracts, covering the period from January 1 to June 30, 2002. 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.[123] 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 trustee who holds title to and collects the income from the assets and passes the funds through to investors.[124] Trust agreements establish these trusts and define certain powers and responsibilities.[125]

TABLE 1: TYPES OF CONTRACTS STUDIED
(number of contracts in parentheses)

Asset sale/purchase (299)	Pooling & servicing (169)
Bond indentures (154)	Securities purchase (442)
Credit commitments (215)	Security agreements (35)
Employment (109)	Settlements (71)
Licensing (46)	Trust agreements (45)
Mergers (410)	Underwriting (352)

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Securities purchase agreements were the most frequent contract type, accounting for 18.8% 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 the data for these contracts cover one extra month. 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, like asset sale or purchase and

123 *See* Eisenberg & Miller, *Ex Ante Choices of Law and Forum*, *supra* note 15, at 1981, 1983–84.

124 *See, e.g.*, Circuit City Credit Card Master Trust, Current Report (Form 8-K), at Ex. 4.2 (Jan. 31, 2002). *See generally* Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1662 (2004) (describing this type of agreement as a particular asset-backed security—a pure pass-through certificate—in which "the owner of the receivables transfers them to a trustee pursuant to a trust agreement in exchange for certificates that represent a 100 percent beneficial ownership interest in the receivables" (footnote omitted)).

125 *See* Plank, *supra* note 124, at 1662–67; *see, e.g.*, First Consumers Nat'l Bank, Current Report (Form 8-K), at Ex. 4.3 (Jan. 31, 2002).

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.

The key outcome variable in this study is the contracts' treatment of attorney fees. 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.[126] We coded a contract as containing the English rule if the contract specified that the losing party would pay attorney fees.[127] The English rule, under which the losing party pays, is illustrated by the following clause: "In the event of any dispute hereunder, or in the event of any action to enforce the terms and provisions of this Agreement, the prevailing party shall be entitled to recover from the other his reasonable attorneys' fees and disbursements and other costs incurred in connection therewith."[128] We coded a clause as employing the English rule *with discretion* when the court has discretion to award fees to the prevailing party but the fee is not an entitlement.[129]

In addition to the symmetric fee risks of the English and American rules, some contracts provide that only one party is liable for fees. For example, one of the contracts we studied involved a merger in which a nonreporting company was the surviving corporation and the key stockholder of the target company agreed to indemnify other parties, including the nonreporting company, for losses, liabilities, claims, and damages relating to the transaction, including attorney fees.[130] No indemnity flowed the other way.[131] Similarly, in an employment agreement with the reporting company Vizacom Inc., the

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126 *See, e.g.*, SAN Holdings, Inc., Current Report (Form 8-K), at Ex. 10.1 § 8(l) (Jan. 3, 2002) ("Each of the Parties will bear its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby.").

127 *See, e.g.*, J2 Commc'ns, Current Report (Form 8-K), at Ex. 10.2 § 9(g) (May 31, 2002).

128 *Id.*

129 *See, e.g.*, BancorpSouth, Inc., Current Report (Form 8-K), at Ex. 4.8 § 5.14 (Jan. 28, 2002) ("All parties to this Indenture agree . . . that [the] court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant . . . ."). This fee clause, like other fee clauses, introduces further complexity into the taxonomy of fee clauses because the loser-pays rule does not apply to all parties affected by the indenture, such as the trustee. *See id.*

130 *See* North Shore Capital III, Inc., Current Report (Form 8-K), at Ex. 2.1 § 10.2 (Apr. 16, 2002).

131 *See id.*

employee agreed to pay the costs that Vizacom might incur in connection with its efforts to enforce a confidentiality provision.[132]

A final contract category involves fee clauses under which parties may benefit from the clauses in different circumstances.[133] Those fee clauses, which do not fit one of the above categories, are coded as "other." This coding would apply, for example, to some indemnification clauses that indemnify both parties but under different circumstances.[134]

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. Table 2 shows, for example, that about 37% of the contracts specified or retained by default the American rule of each side paying its own fees. This is approximately the same percentage of contracts that specify the English rule. 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 17% of the contracts.

TABLE 2: FREQUENCY OF ATTORNEY-FEE CLAUSES

Contractual-fee rule	Number	%
American rule	870	37.1%
English rule	855	36.4%
English rule, with discretion	101	4.3%
One company pays fees	404	17.2%
Other	117	5.0%
Total	2347	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

III
EMPIRICAL RESULTS

We do not observe the original transactions from which the observed contracts evolved. We therefore reiterate that our data cannot establish whether particular fee clauses appear in contracts because of background factors, such as tendencies of law offices or industries to use particular fee clauses, or because the parties believed the clause

132 *See* Vizacom Inc., Current Report (Form 8-K), at Ex. 10.2 § 7(e) (Jan. 14, 2002).

133 *See, e.g.*, FASTNET Corp., Current Report (Form 8-K), at Ex. 2.1 § 10 (Apr. 19, 2002).

134 *See id.* As another illustration, the contract may provide that the seller must pay the buyer's attorney fees if the court finds that the seller made a misrepresentation or false warranty, and that the buyer must pay the seller's fees if the court holds that the buyer wrongfully failed to deliver the purchase price at the closing.

was most efficient for their transaction. Conditional on background factors, our results show what sophisticated parties regarded as optimal-fee clauses. Interpreting the different rates of fee clauses' use, we report below for contracts specifying that California law governs compared to contracts specifying another state's law governs is less difficult. Transactions do not fundamentally differ across states, so interstate differences in fee-clause use are reasonably attributable to differences in legal rules, with the usual reservations about the use of observational data.

This Part first presents results showing the opt-out rate from the American rule compared to the opt-out rates from court adjudication (by requiring arbitration) and jury trial. Next, this Part shows the importance of the California rule's symmetric attorney-fee requirement. It then reports the relation between hypothesized individual factors and fee-clause choice. Finally, this Part presents regression results that model specification of the American rule as a function of multiple factors.

A. Opt-Out Rates from Default Dispute-Resolution Clauses

Our first assessment of the American rule is the rate at which parties reject the rule compared to the rate at which they reject other dispute-resolution clauses. Table 3's first two rows show that parties contract around the default court setting through an ex ante arbitration clause in only 10.6% of contracts. The third and fourth rows show that parties contract out of jury trial in about 20% of contracts. The last two rows show that, in comparison, parties contract out of the American rule on fees in over 60% of contracts.

Substantial rejection of the American rule, as shown in Table 3, demonstrates that parties do not passively accept default dispute-resolution rules. Although passive acceptance might explain the arbitration and jury-trial opt-out patterns, it is inconsistent with the fee-clause pattern. Since we assess opt-out rates from three default rules in the same contracts, many factors affecting these rates are constant. Each contract has the same parties, the same subject matter, the same industry, the same attorneys, and the same time of negotiation. The high rate of default-fee-rule rejection can thus be interpreted as showing the parties' (or attorneys') views of the desirability of the rule compared to the other default rules.

B. The Effect of State Law: The California Rule

The data include transactions of similar types governed by different choices of law. Table 4 shows the use of fee clauses for the leading choice-of-law states—Delaware, New York, and California, which we combined with Oregon and Washington, the two other states that

TABLE 3: RATE OF DEFAULT RULE ACCEPTANCE, BY KIND OF DISPUTE-RESOLUTION CLAUSE

Dispute-resolution clause	Accept default rule	Opt out of default rule	Total
Arbitration (default = no arbitration) no.	2554	304	2858
%	89.4%	10.6%	100%
Jury trial (default = no waiver) no.	2256	560	2816
%	80.1%	19.9%	100%
Attorney fee (default = American rule) no.	870	1477	2347
%	37.1%	62.9%	100%

Sources: Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 553 tbl.2; Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 351 tbl.2; SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no.=number of contracts. The major difference between the number of contracts in the total column is due to excluding the contract category "other" from this study.

have adopted California's rule of symmetric fee shifting[135]—and all other states combined. Table 4 demonstrates that California-rule contracts contain the English rule much more often than contracts governed by other states' laws. California-rule contracts specify the English rule, with or without discretion, just over 51% of the time, more than the approximately 35% of the time parties use the English rule in other states.[136] In contracts that select either the American rule or the English rule, California-rule contracts specify the English rule at a statistically significantly higher rate ($p<0.001$) than other states.[137]

135 *See supra* note 6 and accompanying text.

136 The weighted average of use of the English rule in Delaware, New York, and other locales is 35.5%.

137 Formally, the significance level reported in the text can be viewed as exploring the hypothesis that the full populations of contracts subject to the California rule and contracts not subject to the California rule, of which we observe only samples, are equally likely to specify the American rule given the rates at which the American rule is observed to be specified in our data. By convention, the hypothesis being tested is called the null hypothesis. *See* GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, STATISTICAL METHODS 64 (8th ed. 1989) (explaining the process of statistical hypothesis testing). The reported significance level, which is also often referred to as a *p*-value, represents the probability of rejecting the null hypothesis when it is in fact true. In this case, an incorrect rejection of the null hypothesis would lead to the mistaken conclusion that, in the full populations of California-rule and non-California-rule contracts, the American rule is selected at different rates. The *p*-value measures the likelihood that the observed differences in rates are attributable to mere random sampling variation rather than to real differences. *See id.* If the *p*-value is 0.05, for example, there is a 5% probability that the observed or larger differences could occur by chance if in fact the null hypothesis were true. By arbitrary convention, *p*-values at or below the 0.05 level are described as statistically significant. *See* THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 197 (Stephen E. Fienberg ed., 1989). The small *p*-value reported in text indicates that, for these data, one is extremely unlikely to reject the null hypothesis by chance. That is, it is extremely unlikely that the full populations of California-rule and non-California-rule contracts, of which we observe

TABLE 4: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY GOVERNING LAW

Governing law	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
DE no.	123	93	2	81	21	320
%	38.4%	29.1%	0.6%	25.3%	6.6%	100.0%
NY no.	385	417	88	181	38	1109
%	34.7%	37.6%	7.9%	16.3%	3.4%	100.0%
CA rule no.	57	98	5	23	9	192
%	29.7%	51.0%	2.6%	12.0%	4.7%	100.0%
Other no.	257	217	6	113	43	636
%	40.4%	34.1%	0.9%	17.8%	6.8%	100.0%
Total no.	822	825	101	398	111	2257
%	36.4%	36.6%	4.5%	17.6%	4.9%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion. CA-rule states are California, Oregon, and Washington. The total number of contracts reported in the table is less than 2,347 because no choice of law was coded for some contracts.

This greater rate is not due to one or two contract types. Appendix Table A1 shows that, for every contract type for which our data contain more than two California-rule contracts, these contracts specified the English rule at a rate equal to or higher than other states' rates.[138] Table 4 provides evidence that one important factor influencing the choice-of-fee clauses is whether state law imposes two-way shifting whenever one-way fee shifting is specified. In presenting other results below, we will note whether they are sensitive to this California-rule effect.

C. Bivariate Results

Table 2 above shows that no fee clause dominates across all contract types. While Table 2 supports the hypothesis that sophisticated parties flee the American rule (because 62.9% of contracts specify either the English rule or a variant of one-party shifting), no uniform opt out from the American rule into the English rule appears. The American rule is as prominent as any other fee-clause provision. Indeed, if one accounts for California section 1717's effective imposition of the English rule if the contract specifies one-way fee shifting,[139] Table 4 shows that parties use the American rule more frequently than they do the English rule.

only a sample, in fact have the same rates of using the American rule, given the rates in the sample we observe.

138 *See infra* Appendix Table A1.

139 *See supra* text accompanying notes 76–78.

An additional question is whether contract or party characteristics help explain the observed fee-clause pattern. Table 5 reports the frequency of fee clauses by contract type. 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, accounting for 62.3% of the contracts. This relation is unsurprising in light of the TIA provisions discussed in Part I.[140] The English rule dominates underwriting agreements, covering 92.3% of the contracts, but this characterization of the underwriting contracts' fee clauses is debatable, as described in Part IV below.[141] The fee structure where one company pays fees dominates in trust agreements, which in our sample are parts of loan transactions with the borrower agreeing to pay attorney fees.

As shown in Table 5, however, for most contract types, neither the American nor the English rule dominates. Parties to loan agreements (credit commitments and security agreements) opt mostly to require the nonreporting company—usually the borrower—to pay the lender's fees. When those agreements do not contain such a clause, parties 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 employ our residual category of "other" fee clauses at the highest rate. Appendix Table A1 shows greater dominance of the American rule for all contract types other than underwriting contracts if one excludes California.[142]

We hypothesized that parties to international contracts would opt for loser-pays rules. Panel A of Table 6 reports the results for contracts between domestic parties, and Panel B reports the results for contracts with a non-U.S. party. The surprising result is that non-U.S. parties do not opt out of the American rule more frequently than domestic parties. If one limits the sample to contracts that specify either the American or English rule, domestic contracts contained the American rule in 764 of 1533 (49.8%) contracts and international contracts contained the rule in 106 of 192 (55.2%) contracts. The American rule's greater prominence in international contracts was not statistically significant ($p=0.161$).[143] The international-contract results are not sensitive to including California-rule contracts.

The similarity between domestic and international contracts persists in comparable contract types across the two panels in Table 6. Asset sale or purchase contracts, merger agreements, and securities

140 *See supra* Part I.B.
141 *See infra* Part IV.B.
142 *See infra* Appendix Table A1.
143 *See supra* note 137.

TABLE 5: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY CONTRACT TYPE

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
Asset sale/purchase no.	117	126	1	12	43	299
%	39.1%	42.1%	0.3%	4.0%	14.4%	100.0%
Bond indentures no.	53	0	96	5	0	154
%	34.4%	0.0%	62.3%	3.2%	0.0%	100.0%
Credit commitments no.	97	5	0	112	1	215
%	45.1%	2.3%	0.0%	52.1%	0.5%	100.0%
Employment contracts no.	52	37	1	19	0	109
%	47.7%	33.9%	0.9%	17.4%	0.0%	100.0%
Licensing no.	19	21	0	3	3	46
%	41.3%	45.7%	0.0%	6.5%	6.5%	100.0%
Mergers no.	184	140	0	52	34	410
%	44.9%	34.1%	0.0%	12.7%	8.3%	100.0%
Pooling & servicing no.	85	4	0	72	8	169
%	50.3%	2.4%	0.0%	42.6%	4.7%	100.0%
Securities purchase no.	199	157	2	57	27	442
%	45.0%	35.5%	0.5%	12.9%	6.1%	100.0%
Security agreements no.	10	4	0	21	0	35
%	28.6%	11.4%	0.0%	60.0%	0.0%	100.0%
Settlements no.	30	35	0	5	1	71
%	42.3%	49.3%	0.0%	7.0%	1.4%	100.0%
Trust agreements no.	2	1	1	41	0	45
%	4.4%	2.2%	2.2%	91.1%	0.0%	100.0%
Underwriting no.	22	325	0	5	0	352
%	6.3%	92.3%	0.0%	1.4%	0.0%	100.0%
Total no.	870	855	101	404	117	2347
%	37.1%	36.4%	4.3%	17.2%	5.0%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion.

purchase contracts had the greatest numbers of international deals, yet no striking difference emerged in their rates of specifying the American or English rules.

We hypothesized that we would observe loser-pay clauses less often in contracts that provide for mandatory arbitration. Appendix Table A2 reports results for contracts with and without arbitration clauses.[144] Our hypothesis is refuted because those agreeing to arbitration tend to prefer, rather than avoid, the English rule. If one again limits the sample to contracts choosing either the American or English rule, contracts without arbitration clauses specified the American rule in 789 of 1509 (52.3%) contracts and arbitration-clause contracts specified the American rule in 78 of 213 (36.6%) contracts.

144 *See infra* Appendix Table A2.

Table 6: Frequency of Attorney-Fee Clauses, by Contract Type and International Status

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
	A. Domestic contracts					
Asset sale/purchase no.	92	114	1	10	36	253
%	36.4%	45.1%	0.4%	4.0%	14.2%	100.0%
Bond indentures no.	51	0	94	5	0	150
%	34.0%	0.0%	62.7%	3.3%	0.0%	100.0%
Credit commitments no.	87	5	0	103	1	196
%	44.4%	2.6%	0.0%	52.6%	0.5%	100.0%
Employment contracts no.	47	37	1	19	0	104
%	45.2%	35.6%	1.0%	18.3%	0.0%	100.0%
Licensing no.	14	15	0	3	3	35
%	40.0%	42.9%	0.0%	8.6%	8.6%	100.0%
Mergers no.	167	121	0	46	33	367
%	45.5%	33.0%	0.0%	12.5%	9.0%	100.0%
Pooling & servicing no.	84	4	0	71	8	167
%	50.3%	2.4%	0.0%	42.5%	4.8%	100.0%
Securities purchase no.	162	128	2	52	24	368
%	44.0%	34.8%	0.5%	14.1%	6.5%	100.0%
Security agreements no.	10	4	0	20	0	34
%	29.4%	11.8%	0.0%	58.8%	0.0%	100.0%
Settlements no.	26	28	0	4	1	59
%	44.1%	47.5%	0.0%	6.8%	1.7%	100.0%
Trust agreements no.	2	1	1	41	0	45
%	4.4%	2.2%	2.2%	91.1%	0.0%	100.0%
Underwriting no.	22	312	0	4	0	338
%	6.5%	92.3%	0.0%	1.2%	0.0%	100.0%
Total no.	764	769	99	378	106	2116
%	36.1%	36.3%	4.7%	17.9%	5.0%	100.0%
	B. International contracts					
Asset sale/purchase no.	25	12	0	2	7	46
%	54.3%	26.1%	0.0%	4.3%	15.2%	100.0%
Bond indentures no.	2	0	2	0	0	4
%	50.0%	0.0%	50.0%	0.0%	0.0%	100.0%
Credit commitments no.	10	0	0	9	0	19
%	52.6%	0.0%	0.0%	47.4%	0.0%	100.0%
Employment contracts no.	5	0	0	0	0	5
%	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Licensing no.	5	6	0	0	0	11
%	45.5%	54.5%	0.0%	0.0%	0.0%	100.0%
Mergers no.	17	19	0	6	1	43
%	39.5%	44.2%	0.0%	14.0%	2.3%	100.0%
Pooling & servicing no.	1	0	0	1	0	2
%	50.0%	0.0%	0.0%	50.0%	0.0%	100.0%
Securities purchase no.	37	29	0	4	3	73
%	50.7%	39.7%	0.0%	5.5%	4.1%	100.0%
Security agreements no.	0	0	0	1	0	1
%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
Settlements no.	4	7	0	1	0	12
%	33.3%	58.3%	0.0%	8.3%	0.0%	100.0%
Underwriting no.	0	13	0	1	0	14
%	0.0%	92.9%	0.0%	7.1%	0.0%	100.0%
Total no.	106	86	2	25	11	230
%	46.1%	37.4%	0.9%	10.9%	4.8%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion. International contracts are those without a U.S. party.

The American rule thus was significantly ($p<0.001$)[145] less prominent in contracts specifying arbitration than in other contracts. The preference for the English rule in arbitration-clause contracts is a consistent pattern even when one controls for contract type. Contract types with a reasonably large number of agreements containing arbitration clauses—asset sale or purchase, employment, mergers, and securities purchase—show lower rates of American-rule use compared to contracts of the same types not containing arbitration clauses. The arbitration-clause results are not sensitive to the inclusion of California-rule contracts.

Table 7 reports the association between attorney-fee clauses and relational contract status, with the relational categorization of contract types coded as described in Part I.C.[146] Table 7's first two rows suggest a modest preference for the English rule in nonrelational contracts. The most distinctive results are the low rate, 12.4%, at which relational contracts specify the English rule and the high rate, 39.6%, at which relational contracts specify that one company pays fees. This asymmetry is attributable to the credit contracts that we treat as relational, in which financial institutions often obtain one-way fee obligations that favor lenders.[147] This tendency supports the hypothesis that relational contractors tend to favor the American rule.

But this result is sensitive to contracts subject to the California-fee rule. Although only about 10% of relational contracts in other states designate the English rule, 42% of relational contracts subject to the California rule designate the English rule. The California-rule jurisdictions were less likely to specify a one-company-pays rule. About 29% of California-rule-jurisdiction relational contracts specify that one company pay fees, compared to about 40% of relational contracts in non-California-rule jurisdictions.

Table 8 reports the distribution of attorney-fee clauses by degree of standardization, which—as described in Part I.C—is classified as low, medium, or high. Since standardization does not vary within contract type, we only report the results aggregated by standardization.

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145 *See supra* note 137.

146 Coding contracts' relational status can be imprecise. A settlement, for example, may terminate a short-term or long-term relation, or it may promote a continued relation. We crudely coded for relational status based on contract categories, with the following contract categories coded as more likely to be relational: credit commitments, employment, licensing, pooling and service agreements, and security agreements; and the following categories coded as less likely to be relational: asset sale or purchase, 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 the relational status for these contracts is insufficiently clear.

147 *Cf.* Katz, *supra* note 9, at 66 (drawing attention to the use of one-way fee shifting in some standardized contracts, which usually operate in favor of the drafting party).

TABLE 7: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY RELATIONAL CONTRACT STATUS

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
Nonrelational no.	605	783	99	136	105	1728
%	35.0%	45.3%	5.7%	7.9%	6.1%	100.0%
Relational no.	263	71	1	227	12	574
%	45.8%	12.4%	0.2%	39.6%	2.1%	100.0%
Total no.	868	854	100	363	117	2302
%	37.7%	37.1%	4.3%	15.8%	5.1%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; 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.

Table 8 also shows no strong preference for the American or English rule by degree of standardization. The rate of choosing one of the rules varies by 7.3% or less across standardization levels. Highly standardized contract types have some tendency, however, to have a more variable distribution of fee rules. About 86% of the least standardized (the "low" rows) contracts employ the American or English rule, while only about 63% of the most standardized (the "high" rows) contracts employ either rule.[148] If one divides fee rules into the American rule and all others, the difference in American rule use across standardization levels is highly statistically significant ($p<0.001$).[149] This result indicates that the American rule has a diminished role in the most highly standardized contracts. The standardization results are not sensitive to including California-rule contracts.

We hypothesized that the English rule would be more prominent in contracts waiving jury trials. Appendix Table A3 shows fee-clause use as a function of the presence of jury-trial waiver, controlling for type of contract.[150] Parties used both the English and American rules less frequently in contracts where they waived jury trial than in contracts where they did not. Overall, 37.5% of contracts not waiving jury trial specified the American rule and 38.7% of nonwaiver contracts specified the English rule. These rates exceed the rates of contracts

148 The difference diminishes if one includes as employing the English rule the 10% 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.

149 *See supra* note 137.

150 *See infra* Appendix Table A3.

TABLE 8: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY DEGREE OF STANDARDIZATION

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
Low no.	101	93	1	27	4	226
%	44.7%	41.2%	0.4%	12.0%	1.8%	100.0%
Medium no.	500	423	3	121	104	1151
%	43.4%	36.8%	0.3%	10.5%	9.0%	100.0%
High no.	269	339	97	256	9	970
%	27.7%	35.0%	10.0%	26.4%	0.9%	100.0%
Total no.	870	855	101	404	117	2347
%	37.1%	36.4%	4.3%	17.2%	5.0%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; 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.

specifying the American and English rules in contracts that waived jury trials, 35.5% and 27.3%, respectively. Parties or attorneys who go 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 twenty observations under both jury-clause conditions, results varied.[151] Parties to asset sale or purchase contracts who waived jury trial preferred the English rule over the American rule. In nonwaiver contracts, 41.1% of asset sale or purchase contracts used the American rule, while 40.3% used the English rule. In jury-waiver contracts, 27.5% of asset sale or purchase contracts used the American rule and 52.5% used the English rule. Credit commitments' waiver contracts tended to flee the American rule in favor of one company paying fees. In nonwaiver contracts, 60.5% of credit-commitment contracts used the American rule and 34.2% used a one-way fee rule. In credit commitment waiver contracts, 36.7% used the American rule and 61.9% used a one-way fee rule. Merger agreements did not noticeably vary by waiver clause. Securities purchase waiver contracts migrated away from the American rule and toward the English rule. Of nonwaiver contracts, 50.3% used the American rule, while 32.2% used the English rule. Of securities purchase contracts waiving jury trial, 31.1% used the American rule and 44.3% used the English rule. The jury-trial waiver results are not sensitive to the inclusion of California-rule contracts.

151 *See id.*

As noted above, New York law dominated the choice of law in the contracts in our sample.[152] Although we have no reason to believe that the seemingly efficient ex ante choice-of-law rule should be associated with a particular attorney-fee clause, the choice of New York law may affect some of the results.[153] We therefore assess whether fee-clause patterns vary with choice of law by reporting results separately for contracts designating New York law and contracts selecting other governing laws. Table 9 shows the pattern of fee clauses as a function of contract type. Panel A shows the results for New York law contracts and Panel B shows the results for contracts designating other law choices. We excluded contracts that did not specify a choice of law. The "total" rows for the two panels suggest no substantial preference for the American rule or the English rule based on designating New York law. Of contracts designating New York law, 34.7% chose the American rule and 37.6% the English rule. Of contracts designating non–New York governing law, 38.0% selected the American rule and 35.5% the English rule.

In Table 9, 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 chose the English rule. If one excludes underwriting contracts, 46.9% of contracts designating New York law chose the American rule and only 14.3% of New York contracts chose the English rule. Nonunderwriting contracts that did not designate New York law chose the American rule in 38.6% of contracts and the English rule in 34.5% of contracts. Thus, New York contracts shunned the English rule in favor of other fee provisions. This pattern persisted in asset sale or purchase, licensing, and settlement contracts, areas that likely use standard forms least often.

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 A4 reports the pattern of fee clauses by industry and suggests that fee-clause type is not strongly associated with industry.[154] No industry had as much as 50% of contracts specifying either the American rule or the English rule.

D. Regression Results

As shown above, several variables contribute to the attorney-fee-clause pattern. 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

152 *See* Eisenberg & Miller, *The Flight to New York*, *supra* note 1, at 1478.
153 *See supra* note 119 and accompanying text.
154 *See infra* Appendix Table A4.

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

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
	A. New York law chosen					
Asset sale/purchase no.	42	18	0	6	13	79
%	53.2%	22.8%	0.0%	7.6%	16.5%	100.0%
Bond indentures no.	47	0	86	4	0	137
%	34.3%	0.0%	62.8%	2.9%	0.0%	100.0%
Credit commitments no.	61	1	0	41	0	103
%	59.2%	1.0%	0.0%	39.8%	0.0%	100.0%
Employment contracts no.	6	3	0	3	0	12
%	50.0%	25.0%	0.0%	25.0%	0.0%	100.0%
Licensing no.	5	5	0	0	0	10
%	50.0%	50.0%	0.0%	0.0%	0.0%	100.0%
Mergers no.	36	17	0	9	7	69
%	52.2%	24.6%	0.0%	13.0%	10.1%	100.0%
Pooling & servicing no.	65	4	0	69	8	146
%	44.5%	2.7%	0.0%	47.3%	5.5%	100.0%
Securities purchase no.	88	59	1	27	10	185
%	47.6%	31.9%	0.5%	14.6%	5.4%	100.0%
Security agreements no.	7	1	0	13	0	21
%	33.3%	4.8%	0.0%	61.9%	0.0%	100.0%
Settlements no.	8	3	0	2	0	13
%	61.5%	23.1%	0.0%	15.4%	0.0%	100.0%
Trust agreements no.	1	1	1	3	0	6
%	16.7%	16.7%	16.7%	50.0%	0.0%	100.0%
Underwriting no.	19	305	0	4	0	328
%	5.8%	93.0%	0.0%	1.2%	0.0%	100.0%
Total no.	385	417	88	181	38	1109
%	34.7%	37.6%	7.9%	16.3%	3.4%	100.0%
	B. New York law not chosen					
Asset sale/purchase no.	75	108	1	6	30	220
%	34.1%	49.1%	0.5%	2.7%	13.6%	100.0%
Bond indentures no.	6	0	10	1	0	17
%	35.3%	0.0%	58.8%	5.9%	0.0%	100.0%
Credit commitments no.	36	4	0	71	1	112
%	32.1%	3.6%	0.0%	63.4%	0.9%	100.0%
Employment contracts no.	46	34	1	16	0	97
%	47.4%	35.1%	1.0%	16.5%	0.0%	100.0%
Licensing no.	14	16	0	3	3	36
%	38.9%	44.4%	0.0%	8.3%	8.3%	100.0%
Mergers no.	99	92	0	37	21	249
%	39.8%	36.9%	0.0%	14.9%	8.4%	100.0%
Pooling & servicing no.	20	0	0	3	0	23
%	87.0%	0.0%	0.0%	13.0%	0.0%	100.0%
Securities purchase no.	111	98	1	30	17	257
%	43.2%	38.1%	0.4%	11.7%	6.6%	100.0%
Security agreements no.	3	3	0	8	0	14
%	21.4%	21.4%	0.0%	57.1%	0.0%	100.0%
Settlements no.	22	32	0	3	1	58
%	37.9%	55.2%	0.0%	5.2%	1.7%	100.0%
Trust agreements no.	1	0	0	38	0	39
%	2.6%	0.0%	0.0%	97.4%	0.0%	100.0%
Underwriting no.	3	20	0	1	0	24
%	12.5%	83.3%	0.0%	4.2%	0.0%	100.0%
Total no.	436	407	13	217	73	1146
%	38.0%	35.5%	1.1%	18.9%	6.4%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion.

candidates to explore,[155] we simplify the analysis by employing a dichotomous dependent variable equal to "1" if a contract specifies the American rule on fees and equal to "0" if the contract specifies another fee rule, including the English rule. We thus model associations with selecting the American rule rather than associations with a more detailed fee-clause pattern.

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, non-U.S. party status, New York as the choice of law, and the California rule imposing symmetric fee obligations. We code these five variables 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.[156] Model (2) addresses this limitation by foregoing use of the individual contract-type dummy variables and adding variables, constructed from the contract types, for relational status and standardization. Model (3) is a multilevel logistic regression model using random intercepts for contract types. 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.[157] Models (2) and (3) exclude trust agreements because we did not code relational contract status for them. The regression models should be viewed with caution, as some of the explanatory variables are not exogenous. For example, a positive association exists between the presence of arbitration clauses and jury-trial-waiver clauses.[158] We report these factors for their contribution to assessing whether the relations described above persist when accounting for multiple contract characteristics.

The results in Table 10 are consistent with the nonregression results in Part III.C. In Model (1) of Table 10, employment contracts

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155 For example, one might use multinomial logit models in which the dependent variable could be coded to allow for multiple outcomes corresponding to different observed-fee clauses.

156 Multicollinearity can result in instability of regression coefficients, which can obscure the effects of individual variables. *See, e.g.*, RAYMOND H. MYERS, CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS 79, 218 (1986).

157 *See* ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 246 (2007) ("[Multilevel models allow a]ccounting for individual- and group-level variation in estimating *group-level* regression coefficients."). The number of groups (types of contracts) in our data is not very large. For a discussion on using multilevel models in relation to the number of groups or the number of observations within a group, see *id.* at 275–76.

158 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 552–54.

TABLE 10: REGRESSION MODELS OF CONTRACTS SPECIFYING THE AMERICAN RULE ON FEES

	Model (1)	Model (2)	Model (3)
	Dependent variable = American rule specified		
Asset sale/purchase	-0.059		
	(0.034)		
Bond indentures	-0.162***		
	(0.034)		
Credit commitments	0.008		
	(0.042)		
Employment contracts	0.061		
	(0.056)		
Licensing	-0.020		
	(0.068)		
Pooling service	-0.044		
	(0.044)		
Securities purchase	-0.014		
	(0.033)		
Security agreements	-0.137**		
	(0.059)		
Settlements	-0.024		
	(0.058)		
Trust agreements	-0.313***		
	(0.017)		
Underwriting	-0.396***		
	(0.017)		
Non-U.S. party	0.083**	0.111**	0.078**
	(0.036)	(0.037)	(0.033)
Arbitration clause	-0.141***	-0.164***	-0.156***
	(0.027)	(0.031)	(0.035)
Jury-trial-waiver clause	-0.120***	-0.048*	-0.113***
	(0.028)	(0.026)	(0.028)
California rule	-0.101**	-0.111**	-0.109**
	(0.032)	(0.038)	(0.039)
New York law governs	0.070**	0.007	0.063**
	(0.025)	(0.025)	(0.024)
Relational contract		0.160***	0.127
		(0.026)	(0.085)
Standardization		-0.147***	-0.110**
		(0.020)	(0.053)
Number of contracts	2249	2204	2204
Number of groups			11
Pseudo r-squared	0.110	0.042	
Proportionate reduction in error	4.9%	-0.4%	0.6%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: Models (1) and (2) show the marginal effects of logistic regression models with robust standard errors in parentheses. Model (3) shows the marginal effects of the fixed effects portion of 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.
*$p<0.1$, **$p<0.05$, ***$p<0.01$

have the largest positive coefficient of the contract types and are thus most likely to employ the American rule, similar to the results shown in Table 5; Model (1) is different only in controlling for non-U.S. party status and the presence of arbitration clauses and jury-trial-waiver clauses. Since Models (1) and (2) report marginal effects, we

can interpret the reported coefficients as the marginal change in the probability of a contract specifying the American rule as a dummy variable changes from zero to one. Underwriting agreements and trust agreements are the least likely to use the American rule, with probabilities of specifying the rule reduced by 39.6% or 31.3%, respectively, compared to merger agreements.

For variables other than contract types, the previous tabular results also persist. As suggested by Table 9, once we control for contract type, contracts specifying New York law tend to use the American rule. As suggested by Table 4 and California Civil Code section 1717, contracts subject to the California rule are about 11% less likely to use the American rule than are contracts not subject to the rule. As suggested by Table 6, non-U.S. party status is associated in all models with use of the American rule. As suggested by Appendix Table A2, the presence of an arbitration clause is associated in all models with rejection of the American rule. As suggested by Appendix Table A3, the presence of a jury-trial-waiver clause is negatively associated with use of the American rule. As suggested by Table 7, relational contract status is associated with acceptance of the American rule. But note that this effect is not statistically significant[159] 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 8, increased standardization is associated with rejecting the American rule.

At least one source of nonindependence might artificially reduce the standard errors in Table 10 and therefore lead to spurious significance levels: several firms appear multiple times in the data. The prominence of asset-backed financing during the period we studied led financial institutions to appear particularly frequently.[160] For example, Credit Suisse First Boston appears as the reporting party in twenty-two contracts, and several other firms appear multiple times.

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159 See *supra* note 137 for an explanation of statistical significance. In the regression context, the null hypothesis is that the regression coefficient for an explanatory variable (in this case, the relational contract dummy variable) is equal to zero. A regression coefficient equal to zero corresponds to no association between the explanatory variable and the variable sought to be explained (in this case, whether the contract specifies the American rule). A regression coefficient that differs from zero at a statistically significant level indicates that it is unlikely that there is no association between the explanatory variable and the variable sought to be explained, given the observed data sample.

160 *See* Sumit Agarwal, Jacqueline Barrett, Crystal Cun & Mariacristina De Nardi, *The Asset-Backed Securities Markets, the Crisis, and TALF*, 34 ECON. PERSP. 101, 101 (2010), *available at* http://qa.chicagofed.org/digital_assets/publications/economic_perspectives/2010/4qtr2010_part1_agarwal_barrett_cun_denardi.pdf ("ABS issuance grew steadily, increasing liquidity and reducing the cost of financing. From an annual issuance of $10 billion in 1986, the ABS market grew to an annual issuance of $893 billion in 2006, its peak in the U.S.").

We ran Models (1) and (2) with standard errors clustered by firm, producing essentially the same results as in Table 10. The significance of error for jury-trial waiver increased to p=0.101 from its reported significance at the 0.1 level[161] in the Table 10.

IV
Discussion

We first discuss the implications of the high rate of American-rule rejection. We then discuss the results in relation to Part I.C's hypotheses and suggest limitations on efficiency-based inferences due to the nature of our data.

A. Hypotheses Confirmed and Not Confirmed

The high rejection rate of the American rule confirms our first hypothesis: that parties will tend to opt out of the American rule. Parties opted out of the American rule at a much higher rate than they opted out of two other default rules. Table 3 shows that parties accepted the default rule of access to court in 89.4% of contracts, the default rule of access to jury trial in 80.1% of contracts, and the default American rule on fees in only 37.1% of contracts.[162] These differences persisted for specific contract types. The three contract categories that were least likely to be based on a simple markup of prior contract forms—employment, licensing, and settlements—confirm the breadth of differences. These three categories show acceptance of access to courts in, respectively, 63.1%, 66.7%, and 83.3% of contracts.[163] They show acceptance of access to jury trial in, respectively, 61.3%, 60.4%, and 70.8% of contracts.[164]

The rejection rate of the default American rule illuminates the high acceptance rates of the arbitration and jury-trial default rules previously demonstrated in these contracts.[165] Their high acceptance rates can no longer be interpreted as parties merely failing to overcome the inertia of default provisions; shunning arbitration and embracing jury trials can now more plausibly be interpreted as evidence of the normative appeal of courts and juries.

The data confirmed other predictions. Relational contracts tended to be associated with the American rule, as we predicted, although this pattern was significant in only one of two regression mod-

161 *See supra* note 159.
162 *See supra* Table 3.
163 *See* Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 351.
164 *See* Eisenberg & Miller, *Do Juries Add Value?*, *supra* note 15, at 553. These percentages treat contracts with arbitration clauses as belonging to the class of contracts that waive jury trial.
165 *See supra* Table 3.

els.[166] 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. This may well be the efficient outcome with respect to fee clauses for such contracts.

We also predicted that loser-pays rules would be more frequently observed in contracts waiving jury trial. The data in Table 10 confirmed this: jury waivers were negatively associated with the American rule in bivariate analysis and in the regression models.[167] This pattern may be due to the parties' greater confidence that judges will rule in their favor, and thus their greater willingness to trade off the liability of paying 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. Since jury-trial waivers are relatively rare, their presence, like the presence of arbitration clauses, is likely associated with more detailed focus on dispute-resolution provisions and less likely attributable to using a prior transaction's documents. This conscious choice suggests that the negative association with the American rule is evidence of the English rule's perceived efficiency. But Appendix Table A3 shows that the low standardization contract areas—employment, licensing, and settlement—inconsistently preferred the English rule.[168] This inconsistency, which differs from the arbitration-clause results, suggests that the association between use of the English rule and use of jury-trial waivers is less strong evidence of the perceived efficiency of the English rule than is the association based on the presence of an arbitration clause.

Several of our hypotheses were disconfirmed. We predicted that foreign parties would tend to demand fee arrangements conforming to their home country practices and therefore that contracts with foreign parties would tend to opt out of the American rule. Table 10 reveals that the opposite was the case: contracts with non-U.S. parties were significantly more likely to utilize the American rule. We conjecture that in the context of contracts with foreign parties, background default rules—the American rule for the domestic party and the English rule for the foreign party—clash. The parties are less likely to use a particular clause by default. In this perspective, lower use of the English rule familiar to one party may be evidence that parties can overcome background conditions when efficiency demands it. Alternatively, international companies may accept the American rule in contracts with U.S. parties because they believe that American courts

166 *See supra* Table 10.

167 *See supra* Table 10.

168 *See infra* Appendix Table A3.

lack experience in applying the English rule, which requires that one party be deemed to be right.[169]

We expected that parties who entered contracts with mandatory arbitration clauses would prefer the American rule because determining which party prevailed is often impossible in arbitration. Our prediction was disconfirmed: parties to contracts with arbitration clauses turned out to be relatively more likely to opt out of the American rule.[170] To the extent that arbitration-clause use, an unusual event, is a reasonable proxy for the individual negotiation of dispute-resolution terms, rather than mere acceptance of preexisting forms, background conditions are a less persuasive explanation for fee-clause choice in contracts with arbitration clauses than for other contracts.[171] This suggests that the arbitration-clause results, in contrast to the international-contract-clause results, constitute evidence that parties tended to regard the English rule as optimal. This inference is conditional on arbitration-clause selection not correlating with some other factor that points toward use of the English rule. The factor we hypothesized—uncertainty about the prevailing party—pointed toward use of the American rule, which suggests that the evidence from arbitration-clause contracts is an even stronger indication that parties to these contracts regarded the English rule as optimal.

We hypothesized that loser-pays provisions would be more frequently observed in individually negotiated contracts and less frequently observed in standardized contracts. Table 8 suggests that highly standardized contracts tended to be associated with greater use of the English rule. Regression models confirm this association, with standardization significantly negatively associated with the American rule: the more standardized the contract, the more likely the parties were to reject the American rule.[172] These results may be due to the tendency of highly standardized contracts to involve loans in which financial institutions insist that borrowers pay their fees in the event of a dispute over repayment.[173] Table 5 supports this explanation because it shows that credit-commitment contracts and security agreements have by far the highest rates (over 50%) of fee provisions under which one party pays fees. Plausible inferences about perceived effi-

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169 It is also possible, as Michael Frakes observed in commenting on this Article, that psychological factors influence the nature of the arrangement selected.

170 *See supra* Table 10.

171 *See* Eisenberg & Miller, *The Flight from Arbitration*, *supra* note 15, at 350–51, 351 tbl.2 (finding that approximately 89% of contracts do not mandate arbitration).

172 *See supra* Table 10.

173 *See* Stephen L. Sepinuck & Tina L. Stark, *The Big Deal About the Fine Print: Negotiating and Drafting Contractual Boilerplate*, 61 CONSUMER FIN. L. Q. REP. 848, 852 (2007) (indicating that lenders frequently employ standardized contracts mandating that borrowers pay attorneys' fees regardless of the disposition of the case).

ciency are difficult to derive from the fee-clause pattern in standardized contracts. Their very standardization increases the likelihood that fee clauses persist through the marking up of documents from similar deals rather than through express focus on what is efficient for a specific deal.[174] On the other hand, we may conjecture that the standardized terms evolved in response to efficiency-based considerations and therefore tend to reflect generically efficient outcomes.

We also erroneously predicted that the distribution of fee clauses would be more variable in less standardized contracts. Contrary to our prediction, the variance in fee terms increased rather than decreased with standardization.[175] The result is a bit mysterious and not easily explainable with reference to plausible conjectures about the behavior of the parties.

B. Issues Specific to Contract Types

Our study confirms the hypothesis that fee provisions vary with contract type, with statistically significant differences in fee arrangements among the twelve contract categories.[176] This result suggests that features of the underlying business transactions are significant drivers of fee arrangements. We offer some explanations specific to certain contract types for the observed data. Further research into fee provisions could elucidate additional features that may explain the observed variance among types of contract.

As shown in Table 5, underwriting agreements are distinctive. Parties to underwriting agreements chose the American rule in only 6.3% of the contracts and the English rule in 92.3%. This pattern likely reflects the dynamics of legal exposure in this kind of contract and could also suggest fragility in distinguishing among fee clauses.

Litigation relating to underwriting contracts usually involves a third party suing for alleged misrepresentations in a securities-registration disclosure document.[177] Information related to most misrepresentations is likely to be more readily available to the issuing company than to the underwriter.[178] This asymmetrical knowledge suggests that issuer responsibility for liability to third parties, including attor-

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174 *See* Andrew A. Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. REV. 789, 796 (2010) (suggesting standardized clauses are an efficient way of employing reusable terms in commercial agreements).

175 *See supra* Table 8.

176 *See supra* Table 5.

177 *See* Candida P. José, Note, *Section 11 of the Securities Act of 1933: The Disproportionate Liability Imputed to Accountants*, 27 DEL. J. CORP. L. 565, 566, 568–69 (2002).

178 *Compare id.* at 580–82 (describing the underwriter's basic duties as "market[ing] the issuer's securities for distribution among investors"), *with* Jennifer O'Hare, *Institutional Investors, Registration Rights, and the Specter of Liability Under Section 11 of the Securities Act of 1933*, 1996 WIS. L. REV. 217, 242 ("[U]nderwriters are subjected to liability because they hold themselves out as professionals who are able to evaluate the financial condition of the

ney fees, may be more efficient than underwriter liability. For underwriting agreements, obligating the issuer to potential indemnitee's attorney fees may therefore be value maximizing.

The contracts in our data set confirm this pattern. For example, an underwriting agreement for Virginia Electric and Power Company states:

> The Company agrees to indemnify and hold harmless each Underwriter . . . against any and all losses . . . and to reimburse each such Underwriter . . . for any legal or other expenses (including, to the extent hereinafter provided, reasonable outside counsel fees) incurred by them in connection with investigating or defending any such losses . . . insofar as such losses . . . arise out of or are based upon any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or the Prospectus . . . or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .[179]

The indemnity does not reach liability based on information provided by underwriters.[180]

Conversely, underwriters may generate liability in circumstances in which the underwriter has superior knowledge.[181] Issuers often obtain indemnity clauses from underwriters to cover such events.[182] The above Virginia Electric and Power Company underwriting agreement also provides:

> Each Underwriter agrees . . . to indemnify and hold harmless The Company . . . against any and all losses . . . and to reimburse each of them for any legal or other expenses (including, to the extent hereinafter provided, reasonable outside counsel fees) incurred by them in connection with investigating or defending any such losses, . . . insofar as such losses . . . arise out of or are based upon any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or the Prospectus . . . or the omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading if such statement or omission was made in reliance upon information furnished herein or in writing to the Company by or on behalf of such Underwriter . . . .[183]

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issuer." (quoting McFarland v. Memorex Corp., 493 F. Supp. 631, 646 (N.D. Cal. 1980)) (internal quotation marks omitted)).

179 Va. Elec. & Power Co., Current Report (Form 8-K), at Ex. 1 § 9(a) (Jan. 29, 2002).

180 *See id.*

181 *See* Samuel N. Allen, *A Lawyer's Guide to the Operation of Underwriting Syndicates*, 26 NEW ENG. L. REV. 319, 326–27 (1991).

182 *See id.*

183 *See* Va. Elec. & Power Co., *supra* note 179, at Ex. 1 § 9(b). The effect of mutual indemnification clauses in underwriting agreements is questionable. A review of indem-

Thus, in this frequent fee-clause arrangement, the issuer agrees to pay the underwriter's attorney fees if liability stems from issuer behavior, but the underwriter pays the issuer's fees if liability is based on underwriter behavior.[184] This arrangement is akin to the English rule and is coded as such in our data, although the contracts implement it through mutual one-way fee-shifting provisions. This version of a loser-pays provision may be value maximizing because in these types of cases, the allocation of responsibility for harm is clear: the company is responsible for the harm when the underwriter is held liable for actions undertaken in reliance on the company's false representations; and the underwriter is responsible for the harm when the company is held liable for actions undertaken in reliance on the underwriter's representations.[185] Where responsibility for harm is clear, imposing the full cost of the harm—including the costs of the other party's defense in litigation—on the responsible party makes sense.[186]

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nity provisions for underwriters concluded that "the majority of the federal courts of appeals is in favor of limiting the availability of indemnity in securities suits." *In re* Colonial BancGroup, Inc. Sec. Litig., No. 2:09cv104–MHT, 2010 WL 119290, at *3 (M.D. Ala. Jan. 7, 2010). The likelihood of an enforceable indemnity is especially low when the underwriter or issuing company is not free from fault. *See, e.g.*, Eichenholtz v. Brennan, 52 F.3d 478, 485 (3d Cir. 1995) ("Denying claims for indemnification would encourage underwriters to exhibit the degree of reasonable care required by the 1933 and 1934 Acts." (citing Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1108 (4th Cir. 1989))); Laventhol, Krekstein, Horwath & Horwath v. Horwitch, 637 F.2d 672, 676 (9th Cir. 1980) ("[P]ermitting indemnity would undermine the statutory purpose of assuring diligent performance of duty and deterring negligence." (citing 3 LOUIS LOSS, SECURITIES REGULATION 1831 (2d ed. 1961))); Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1288 (2d Cir. 1969) (denying an underwriter's appeal seeking indemnity "where the underwriter ha[d] committed a sin graver than ordinary negligence"); *In re* Crazy Eddie Sec. Litig., 740 F. Supp. 149, 151 (E.D.N.Y. 1990) ("Indemnification is not available as a matter of policy to parties who have knowingly and willfully violated the federal securities laws." (quoting Bernstein v. Crazy Eddie, Inc., 702 F. Supp. 962, 984 (E.D.N.Y. 1988)) (internal quotation marks omitted)); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 956–57 (S.D.N.Y. 1975) (extending the holding in *Globus* to include ordinary negligence). But the United States Court of Appeals for the Seventh Circuit has suggested that indemnity may be unavailable even when the party seeking relief is factually innocent of the securities violation. *See* King v. Gibbs, 876 F.2d 1275, 1282 n.10 (7th Cir. 1989) ("It is difficult to see how a right to indemnification for even innocent persons would serve the deterrent function which underlies the statute."). Parties may be willing to include such clauses for what they are worth, but doubts about their enforceability lower the stakes of granting indemnity and blur the inferences about efficiency derivable from their existence in a contract. *See* Helen S. Scott, *Resurrecting Indemnification: Contribution Clauses in Underwriting Agreements*, 62 N.Y.U. L. REV. 223, 231 (1986).

184 *See* Allen, *supra* note 181, at 326–27 ("[E]ach of the underwriters severally indemnifies the issuer against liabilities arising out of material misrepresentations or omissions from the registration statement and prospectus, but only to the extent that those misrepresentations or omissions were made or omitted in reliance upon written information furnished to the issuer by the underwriters . . . .").

185 *See id.*

186 *See In re Colonial BancGroup*, 2010 WL 119290, at *3.

But we could also reasonably code this common underwriting contract fee pattern differently. The indemnity clauses quoted above relate to untrue statements or omissions in connection with third-party actions. In actions between issuers and underwriters that do not involve third parties, standard underwriting agreements do not opt out from the American rule.[187] So, for example, if the issuer sues the underwriter for failing to deliver proper underwriting services, the American rule applies and coding these contracts as accepting the American rule would not be unreasonable.

The fragility of coding extends one step further. Although the indemnity clauses superficially appear to be symmetric, the actual risk of issuers paying attorney fees is substantially higher than the risk of underwriters paying attorney fees. Issuers have access to and supply the public with much more material information than underwriters.[188] Suits by third parties are more likely to be based on issuer behavior than on underwriter behavior.[189] The formally symmetric indemnity provisions are, in economic reality, closer to one company, the issuer, obligating itself to pay attorney fees. Coding the standard underwriting contracts as English-rule contracts respects the symmetry of the indemnity clauses and reflects the economic reality of third-party reactions being the most likely sources of liability. But such coding downplays the application of the American rule to issuer-underwriter disputes, however unlikely they may be, and downplays another aspect of economic reality: the issuer's likely greater risk of exposure.

If one were to recode to the American rule the 325 underwriting contracts shown in Table 5 as selecting the English rule, the American rule would comprise 58% of the contracts choosing either the English or American rules and 50% of all contracts. The American rule would thus remain, by far, the most rejected of the three default dispute-resolution clauses we have coded. Regardless of how one codes underwriting contracts, the detailed express treatment of fees departs from the standard American-rule treatment.

In the case of bond indentures, the English rule with discretion is the dominant fee provision, accounting for 62.3% of the indentures.[190] The dominance of the English rule with discretion for bond indentures may well be attributable to the TIA's application to public

187 *See* Va. Elec. & Power Co., *supra* note 179, at Ex. 1 § 9.

188 *See* Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 245–46 (2009) (noting that the traditional "gatekeeper" role of the underwriter has diminished in recent years, in part due to the "speed with which new securities issues can be brought to market," and that underwriters act primarily as "insurer[s] for disclosure failure").

189 *See id.* at 241, 245–46.

190 *See supra* Table 5.

debt indentures.[191] For example, a bond indenture of Medicis Pharmaceutical Corporation allows courts to "assess reasonable costs, including reasonable attorneys' fees and expenses, against any party litigant in [a] suit," as stated in the TIA.[192] This clause is reasonably characterized as adopting the English rule with discretion. But, consistent with the TIA, the clause does not apply to suits brought by the indenture trustee or by large debt holders.[193] The observed fee provisions thus incorporate the background norm established in the TIA.

The TIA does allow parties to opt out of this background rule.[194] The fee agreements we observed, however, not only displayed a pattern of not opting out of the norm but in fact showed that parties tend to specifically restate the norm as part of their indenture. We may infer, therefore, that parties consider this norm of the English rule with discretion to be value maximizing, perhaps because it allows the court to impose a fee sanction on small holders who bring nonmeritorious litigation in an effort to extract a settlement offer. On the other hand, when the indenture trustee or large holders bring the lawsuit, concern about frivolous or extortionate litigation is greatly mitigated. In such cases, reversion to the default American rule, or to one-way general indemnity by the issuer, may allow the trustee and large holders to be less hesitant to act against debt issuers.

These factors likely lead to the observed concentrations of particular fee-clause use. The broader point is that the observed fee arrangements may reflect contract-specific factors that are not fully captured by a simple taxonomy. Further research into specific contract types may reveal other reasons for the observed variance in fee clauses across contract types.

C. Limitations on Inferences

We close with caveats that may qualify the inferences that our results support.

1. Our data cover a particular sample of contracts: major commercial contracts deemed to constitute or relate to material events for publicly traded firms. Because of this specific focus, our results do not necessarily translate to other contracts. For example, concerns about frivolous litigation may be lower in the business-to-business contracts we study than they would be in business-to-consumer contracts. The

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191 *See supra* Part I.B.

192 *See, e.g.*, Medicis Pharm. Corp., Current Report (Form 8-K), at Ex. 4-1 § 6.11 (June 6, 2002); *see also* Am. W. Holdings Corp., Current Report (Form 8-K), at Ex. 4-15 § 4.14 (Jan. 31, 2002) ("[S]uch court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in [a] suit . . . .").

193 *See, e.g.*, Medicis Pharm. Corp., *supra* note 192; Am. W. Holdings Corp., *supra* note 192.

194 *See* Trust Indenture Act of 1939 § 315(e), 15 U.S.C. § 77ooo(e) (2006).

data are also cross-sectional; information for periods before and after the first half of 2002 could differ. With respect to international contracts, our sample is from a database limited to firms with U.S. public offerings. This factor may affect whether the data support inferences applicable to other international contracts.

2. Multiple factors may explain the fee-clause pattern, none of which can be definitively ruled in or out from our data. For example, our data do not allow us to identify whether the parties' revealed preferences are due to a fee clause's perceived role in enhancing settlement probability, reducing litigation expenditures, or other factors.

3. The fee-clause pattern may not necessarily represent optimal contract terms if attorneys do not focus on fee clauses. Perhaps lawyers negotiating contracts often do not actively consider fee clauses and merely adopt the American rule by default or incorporate forms with fee clauses without considering the implications of the relevant provisions.

4. Even if attorneys do actively consider and negotiate fee provisions, they will not necessarily arrive at efficient terms. A possible explanation for the overall pattern's inconsistency is that drafters have limited knowledge of fee-clause effects on contracting parties' behavior; drafters do not know any better than others about what the clauses' actual effects will be.[195] They have neither databases nor the theoretical perspective of academics, who are themselves conflicted about the effects of specific fee provisions.[196] Drafters' incentives to acquire knowledge of particular clauses' effects may be limited if the anticipated transactions costs of bargaining prevent the parties from achieving an optimal substantive result. Perhaps the attorney-fee allocation is 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 contract provisions.[197] And no obvious market process exists that would drive out less efficient clauses despite parties not knowing which those are.[198]

5. Even if fee clauses represent optimal terms between contracting parties, they are not necessarily socially optimal if third-party effects are important.[199] Decisions about litigation involve externali-

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195 *See* Katz, *supra* note 9, at 76–77 (discussing the unpredictable effect of fee clauses on substantive behavior).

196 *See supra* Part I.A.2.

197 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* DI PIETRO, CARNS & KELLEY, *supra* note 33, at 51.

198 We thank John Leubsdorf for this point.

199 *Cf.* Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333–34 (1982) (claiming that private incentives to sue are not necessarily coextensive with the interests of society at large).

ties.[200] The court system is subsidized, meaning that parties do not pay the full social costs of litigating.[201] Litigation thus imposes uncompensated costs on the public.[202] On the other hand, litigation also generates positive externalities by enhancing compliance with efficient laws and producing precedents to guide future conduct.[203] If the externalities are significant and not offsetting, the inferences from our findings regarding the welfare qualities of different fee regimes could be reduced.

6. The observed contract terms may not align with social welfare if agency costs are significant (i.e., if the attorneys who negotiate and draft contracts serve their own interests rather than their clients' interests). Attorney-compensation arrangements are potentially important to attorneys' well-being (assuming that the same firm that negotiates the contract will also conduct any ensuing litigation), and therefore agency costs may skew the observed contract terms away from arrangements that would maximize the joint welfare of the parties.

Notwithstanding these caveats, our approach offers valuable information pertinent to theoretical and public policy debates about optimal-fee provisions. Our evidence establishes a widespread practice of parties opting out of background legal norms. That practice would not exist if parties and their counsel considered the norms themselves highly desirable. Even though contract drafters may not consider dispute-resolution terms to be the most important items, these terms do occupy the time and attention of counsel.[204] The contracts themselves, moreover, are significant to the financial condition of SEC reporting companies,[205] creating an incentive for the companies to give these terms attention. Attorney-compensation clauses appear in a significant number of contracts likely to be individually negotiated, such as employment contracts and settlement agreements.[206] Even when contracts are standardized—for example, pooling and servicing agreements—sophisticated business lawyers have likely thoroughly reviewed

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200 *See* Hylton, *supra* note 13, at 222 (arguing that "litigation costs borne by the parties do not reflect all of marginal costs of litigation"); Shavell, *supra* note 199, at 333–34.

201 *See* Hylton, *supra* note 13, at 222 (noting that while parties pay for their attorneys' time, they do not pay for the time of the judges, jurors, and court employees).

202 *See id.*

203 *See, e.g.*, Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984) (discussing the social benefits that judicial adjudication provides but settlement between parties cannot provide).

204 *See, e.g.*, Starr, *supra* note 92, at 32 (discussing the various factors that business lawyers should consider when drafting a dispute-resolution clause).

205 *But cf.* Katz, *supra* note 9, at 67 (suggesting that the nondrafting party may fail to notice a fee provision in a contract but acknowledging that this observation is concerned with one-sided fee-shifting clauses).

206 *See supra* Table 5.

and considered the templates.[207] Accordingly, the presence or absence of an attorney-compensation clause in sophisticated commercial contracts likely often reflects considered judgments about what arrangement best serves the joint interests of the parties.

Conclusion

This study of attorney-fee clauses in public company contracts demonstrates a remarkable degree of opting out of the American rule and into alternative regimes in which parties pay their counterparties' fees under defined circumstances. This pattern contrasts markedly with that observed for mandatory arbitration clauses and jury-trial waivers, where sophisticated contracting parties tend not to opt out of the background legal norm. We infer from the data that the American rule on attorney fees is often not an optimal regime for compensating attorneys in disputes over important contracts among sophisticated parties.

While the pattern of opting out of the American rule is clear, no real consensus emerged as to which compensation system firms prefer. The English rule was the most popular alternative, but we also observed other arrangements, such as one-way fee-shifting clauses, in a significant number of cases. The observed fee arrangements may thus reflect contract-specific factors that are not fully captured by a simple taxonomy. Further research into specific contract types may reveal other reasons for the observed variance in fee clauses across contract types.

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207 Loser-pays clauses are found in widely available model contracts. *See, e.g.*, Settlement, Release, Covenant Not to Sue, Waiver and Non-Disclosure Agreement—Instinet Group Inc. and Kenneth K. Marshall ¶ 18 (May 3, 2002), *available at* http://print.onecle.com/contracts/instinet/marshall.sep.2002.05.03.shtml ("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.").

TABLE A1: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY CONTRACT TYPE AND GOVERNING LAW

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
	A. California rule applies					
Asset sale/purchase no.	10	23	0	0	2	35
%	28.6%	65.7%	0.0%	0.0%	5.7%	100.0%
Bond indentures no.	0	0	4	0	0	4
%	0.0%	0.0%	100.0%	0.0%	0.0%	100.0%
Credit commitments no.	3	1	0	7	0	11
%	27.3%	9.1%	0.0%	63.6%	0.0%	100.0%
Employment contracts no.	5	7	1	2	0	15
%	33.3%	46.7%	6.7%	13.3%	0.0%	100.0%
Licensing no.	2	7	0	1	0	10
%	20.0%	70.0%	0.0%	10.0%	0.0%	100.0%
Mergers no.	14	33	0	4	5	56
%	25.0%	58.9%	0.0%	7.1%	8.9%	100.0%
Securities purchase no.	21	17	0	7	2	47
%	44.7%	36.2%	0.0%	14.9%	4.3%	100.0%
Security agreements no.	0	1	0	1	0	2
%	0.0%	50.0%	0.0%	50.0%	0.0%	100.0%
Settlements no.	1	9	0	1	0	11
%	9.1%	81.8%	0.0%	9.1%	0.0%	100.0%
Underwriting no.	1	0	0	0	0	1
%	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Total no.	57	98	5	23	9	192
%	29.7%	51.0%	2.6%	12.0%	4.7%	100.0%
	B. California rule does not apply					
Asset sale/purchase no.	107	103	1	12	41	264
%	40.5%	39.0%	0.4%	4.5%	15.5%	100.0%
Bond indentures no.	53	0	92	5	0	150
%	35.3%	0.0%	61.3%	3.3%	0.0%	100.0%
Credit commitments no.	94	4	0	105	1	204
%	46.1%	2.0%	0.0%	51.5%	0.5%	100.0%
Employment contracts no.	47	30	0	17	0	94
%	50.0%	31.9%	0.0%	18.1%	0.0%	100.0%
Licensing no.	17	14	0	2	3	36
%	47.2%	38.9%	0.0%	5.6%	8.3%	100.0%
Mergers no.	122	77	0	42	23	264
%	46.2%	29.2%	0.0%	15.9%	8.7%	100.0%
Pooling & servicing no.	85	4	0	72	8	169
%	50.3%	2.4%	0.0%	42.6%	4.7%	100.0%
Securities purchase no.	178	140	2	50	25	395
%	45.1%	35.4%	0.5%	12.7%	6.3%	100.0%
Security agreements no.	10	3	0	20	0	33
%	30.3%	9.1%	0.0%	60.6%	0.0%	100.0%
Settlements no.	29	26	0	4	1	60
%	48.3%	43.3%	0.0%	6.7%	1.7%	100.0%
Trust agreements no.	2	1	1	41	0	45
%	4.4%	2.2%	2.2%	91.1%	0.0%	100.0%
Underwriting no.	21	325	0	5	0	351
%	6.0%	92.6%	0.0%	1.4%	0.0%	100.0%
Total no.	765	727	96	375	102	2065
%	37.0%	35.2%	4.6%	18.2%	4.9%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: California rule of symmetric fee clauses applies to contracts governed by California, Oregon, and Washington law; no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion.

Table A2: Frequency of Attorney-Fee Clauses, by Contract Type and Arbitration Clause Presence

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
	A. Without arbitration clause					
Asset sale/purchase no.	99	96	1	10	33	239
%	41.4%	40.2%	0.4%	4.2%	13.8%	100.0%
Bond indentures no.	52	0	96	5	0	153
%	34.0%	0.0%	62.7%	3.3%	0.0%	100.0%
Credit commitments no.	93	5	0	110	1	209
%	44.5%	2.4%	0.0%	52.6%	0.5%	100.0%
Employment contracts no.	34	19	0	15	0	68
%	50.0%	27.9%	0.0%	22.1%	0.0%	100.0%
Licensing no.	15	12	0	2	3	32
%	46.9%	37.5%	0.0%	6.3%	9.4%	100.0%
Mergers no.	164	103	0	42	24	333
%	49.2%	30.9%	0.0%	12.6%	7.2%	100.0%
Pooling & servicing no.	85	4	0	72	8	169
%	50.3%	2.4%	0.0%	42.6%	4.7%	100.0%
Securities purchase no.	187	126	1	54	21	389
%	48.1%	32.4%	0.3%	13.9%	5.4%	100.0%
Security agreements no.	10	3	0	20	0	33
%	30.3%	9.1%	0.0%	60.6%	0.0%	100.0%
Settlements no.	27	27	0	4	1	59
%	45.8%	45.8%	0.0%	6.8%	1.7%	100.0%
Trust agreements no.	2	1	1	41	0	45
%	4.4%	2.2%	2.2%	91.1%	0.0%	100.0%
Underwriting no.	21	324	0	5	0	350
%	6.0%	92.6%	0.0%	1.4%	0.0%	100.0%
Total no.	789	720	99	380	91	2079
%	38.0%	34.6%	4.8%	18.3%	4.4%	100.0%
	B. With arbitration clause					
Asset sale/purchase no.	18	30	0	2	10	60
%	30.0%	50.0%	0.0%	3.3%	16.7%	100.0%
Bond indentures no.	1	0	0	0	0	1
%	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Credit commitments no.	3	0	0	2	0	5
%	60.0%	0.0%	0.0%	40.0%	0.0%	100.0%
Employment contracts no.	18	18	1	4	0	41
%	43.9%	43.9%	2.4%	9.8%	0.0%	100.0%
Licensing no.	4	9	0	1	0	14
%	28.6%	64.3%	0.0%	7.1%	0.0%	100.0%
Mergers no.	19	37	0	10	10	76
%	25.0%	48.7%	0.0%	13.2%	13.2%	100.0%
Securities purchase no.	12	31	1	2	6	52
%	23.1%	59.6%	1.9%	3.8%	11.5%	100.0%
Security agreements no.	0	1	0	1	0	2
%	0.0%	50.0%	0.0%	50.0%	0.0%	100.0%
Settlements no.	3	8	0	1	0	12
%	25.0%	66.7%	0.0%	8.3%	0.0%	100.0%
Underwriting no.	0	1	0	0	0	1
%	0.0%	100.0%	0.0%	0.0%	0.0%	100.0%
Total no.	78	135	2	23	26	264
%	29.5%	51.1%	0.8%	8.7%	9.8%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion.

TABLE A3: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY CONTRACT TYPE AND JURY-TRIAL WAIVER

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
	A. No jury-trial waiver					
Asset sale/purchase no.	106	104	1	12	35	258
%	41.1%	40.3%	0.4%	4.7%	13.6%	100.0%
Bond indentures no.	52	0	94	5	0	151
%	34.4%	0.0%	62.3%	3.3%	0.0%	100.0%
Credit commitments no.	46	4	0	26	0	76
%	60.5%	5.3%	0.0%	34.2%	0.0%	100.0%
Employment contracts no.	47	36	0	19	0	102
%	46.1%	35.3%	0.0%	18.6%	0.0%	100.0%
Licensing no.	18	19	0	2	2	41
%	43.9%	46.3%	0.0%	4.9%	4.9%	100.0%
Mergers no.	133	108	0	34	26	301
%	44.2%	35.9%	0.0%	11.3%	8.6%	100.0%
Pooling & servicing no.	83	4	0	68	8	163
%	50.9%	2.5%	0.0%	41.7%	4.9%	100.0%
Securities purchase no.	161	103	1	33	22	320
%	50.3%	32.2%	0.3%	10.3%	6.9%	100.0%
Security agreements no.	8	1	0	6	0	15
%	53.3%	6.7%	0.0%	40.0%	0.0%	100.0%
Settlements no.	22	32	0	4	1	59
%	37.3%	54.2%	0.0%	6.8%	1.7%	100.0%
Trust agreements no.	2	1	1	40	0	44
%	4.5%	2.3%	2.3%	90.9%	0.0%	100.0%
Underwriting no.	22	311	0	4	0	337
%	6.5%	92.3%	0.0%	1.2%	0.0%	100.0%
Total no.	700	723	97	253	94	1867
%	37.5%	38.7%	5.2%	13.6%	5.0%	100.0%
	B. Jury-trial waiver					
Asset sale/purchase no.	11	21	0	0	8	40
%	27.5%	52.5%	0.0%	0.0%	20.0%	100.0%
Bond indentures no.	1	0	2	0	0	3
%	33.3%	0.0%	66.7%	0.0%	0.0%	100.0%
Credit commitments no.	51	1	0	86	1	139
%	36.7%	0.7%	0.0%	61.9%	0.7%	100.0%
Employment contracts no.	5	1	1	0	0	7
%	71.4%	14.3%	14.3%	0.0%	0.0%	100.0%
Licensing no.	1	2	0	1	1	5
%	20.0%	40.0%	0.0%	20.0%	20.0%	100.0%
Mergers no.	51	32	0	18	8	109
%	46.8%	29.4%	0.0%	16.5%	7.3%	100.0%
Pooling & servicing no.	2	0	0	4	0	6
%	33.3%	0.0%	0.0%	66.7%	0.0%	100.0%
Securities purchase no.	38	54	1	24	5	122
%	31.1%	44.3%	0.8%	19.7%	4.1%	100.0%
Security agreements no.	2	3	0	15	0	20
%	10.0%	15.0%	0.0%	75.0%	0.0%	100.0%
Settlements no.	8	3	0	1	0	12
%	66.7%	25.0%	0.0%	8.3%	0.0%	100.0%
Trust agreements no.	0	0	0	1	0	1
%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%
Underwriting no.	0	14	0	1	0	15
%	0.0%	93.3%	0.0%	6.7%	0.0%	100.0%
Total no.	170	131	4	151	23	479
%	35.5%	27.3%	0.8%	31.5%	4.8%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; Am. rule = American rule; Eng. rule = English rule; disc. = discretion.

TABLE A4: FREQUENCY OF ATTORNEY-FEE CLAUSES, BY INDUSTRY

Contract type	Am. rule	Eng. rule	Eng. rule, with disc.	One co. pays fees	Other	Total
Mineral industries no.	25	39	4	15	5	88
%	28.4%	44.3%	4.5%	17.0%	5.7%	100.0%
Construction industries no.	11	8	1	2	3	25
%	44.0%	32.0%	4.0%	8.0%	12.0%	100.0%
Manufacturing no.	61	43	4	24	7	139
%	43.9%	30.9%	2.9%	17.3%	5.0%	100.0%
Transportation & utilities no.	25	43	6	11	2	87
%	28.7%	49.4%	6.9%	12.6%	2.3%	100.0%
Communications no.	37	36	1	10	3	87
%	42.5%	41.4%	1.1%	11.5%	3.4%	100.0%
Wholesale trade no.	21	25	3	18	9	76
%	27.6%	32.9%	3.9%	23.7%	11.8%	100.0%
Retail trade no.	33	32	2	14	3	84
%	39.3%	38.1%	2.4%	16.7%	3.6%	100.0%
Finance, insurance, & real estate no.	241	239	58	121	19	678
%	35.5%	35.3%	8.6%	17.8%	2.8%	100.0%
Services no.	181	170	7	79	28	465
%	38.9%	36.6%	1.5%	17.0%	6.0%	100.0%
Instruments & related products no.	25	18	0	6	4	53
%	47.2%	34.0%	0.0%	11.3%	7.5%	100.0%
Food & kindred products; agriculture, forestry, fishing no.	13	12	0	4	1	30
%	43.3%	40.0%	0.0%	13.3%	3.3%	100.0%
Paper & allied products no.	6	4	1	2	1	14
%	42.9%	28.6%	7.1%	14.3%	7.1%	100.0%
Chemicals & allied products no.	55	45	3	14	5	122
%	45.1%	36.9%	2.5%	11.5%	4.1%	100.0%
Industrial machinery & equipment no.	22	33	3	17	13	88
%	25.0%	37.5%	3.4%	19.3%	14.8%	100.0%
Electrical & electronic equipment no.	41	42	4	19	4	110
%	37.3%	38.2%	3.6%	17.3%	3.6%	100.0%
Transportation equipment no.	8	10	3	5	2	28
%	28.6%	35.7%	10.7%	17.9%	7.1%	100.0%
No SIC listed or SIC missing no.	65	56	1	43	8	173
%	37.6%	32.4%	0.6%	24.9%	4.6%	100.0%
Total no.	870	855	101	404	117	2347
%	37.1%	36.4%	4.3%	17.2%	5.0%	100.0%

Source: SEC EDGAR database. The dates for these data span from January 2002 to June 30, 2002, for all contract types other than mergers and January 2002 to July 31, 2002, for merger contracts.

Note: no. = number of contracts; 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 seventeen reasonably sized classifications. The twenty-eight industry groups used in U.S. GEN. ACCOUNTING OFFICE, GAO-03-864, PUBLIC ACCOUNTING FIRMS: MANDATED STUDY ON CONSOLIDATION AND COMPETITION 111 (2003), were reduced to the seventeen industry groups used in Theodore Eisenberg & Jonathan R. Macey, *Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients*, 1 J. EMPIRICAL LEGAL STUD. 263, 286 tbl.6 (2004).