

# FRANCIS G. PILEGGI DISTINGUISHED LECTURE IN LAW

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## **Does Delaware Compete?**

### **ABSTRACT**

After a century of academic thinking that states compete for corporate chartering revenues, a revisionist perspective has emerged in which states do not compete for chartering revenues, leaving Delaware all alone in the interstate charter market. Firms either stay incorporated in their home state or reincorporate to Delaware, but rarely go elsewhere. What's more, other states don't even try to provide the services Delaware provides. Delaware has a monopoly, one that goes unchallenged.

I here use industrial organization concepts to better illuminate this competitive setting. Even if no other state seriously challenges Delaware for the reincorporation business, it still must operate in three key competitive arenas. First, it must attract firms to reincorporate away from their home state. The dynamism of American business interacts with the corporate chartering structure to create a broad avenue of chartering competition, even if no state actively seeks to take chartering revenue away from Delaware. Second, Delaware has reason to fear a once-and-for-all exit of corporate America to another state. It's a slim risk, but it would be catastrophic for Delaware's budget and the one instance we have of serious state-to-state competition—New Jersey's demise as the corporate capital at the beginning of the twentieth century—was just that: rapid exit and a new winner, not long-term hand-to-hand combat. Similarly, and third, Delaware has reason to fear federalization of core elements of its corporate law even if no other state actively competes for charters. A reputation for bad decision making (or bad decision makers) could impel Congress to displace Delaware, in whole or in part, perhaps as an excuse during an economic downturn. While the odds of full displacement are quite low, Sarbanes-Oxley shows us that the odds of substantial partial displacement are not.

These ideas have parallels in the industrial organization, antitrust literature on contestable markets: a single producer can dominate a market, but, depending on the nature of its technology and its market, it could lose its market share overnight. Hence, it acts like a competitor on some issues, or knows it must provide a package that overall is attractive to the primary users of corporate law. Delaware could face this kind of catastrophic loss in two dimensions: the traditional horizontal one of a competing state, and the vertical one of federal displacement.