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Modern Waste Law, Bankruptcy, and Residential Mortgage

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MODERN WASTE LAW, BANKRUPTCY, AND RESIDENTIAL MORTGAGES

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Around the time of the subprime mortgage collapse, lenders began in earnest to sue borrowers by adapting the traditional law of waste. Today, these claims continue to rise in frequency and to expand to more jurisdictions. Lender waste claims provide a "work around" for state mortgage laws that prohibit personal deficiency judgments after foreclosure and are potentially non-dischargeable in bankruptcy.

While a recent wave of scholarship has addressed the problems of how the bankruptcy system handles mortgages, scholars have not yet explored the use of waste actions by lenders and how waste judgments intersect with bankruptcy and foreclosure. Using new research on the evolution of waste law, this Article traces the changes that allowed lenders—who at common law had no standing—to bring waste actions and how the doctrine has evolved to make those actions more available and more lucrative for lenders.

Drawing on that history, this Article argues that in the context of bankruptcy law, waste judgments create multiple problems, including frustrating the general purpose of a fresh start, amplifying concerns about peonage—particularly given the history of discriminatory subprime lending—and further obfuscating an existing circuit split on the rules for when a tort claim can be discharged.

For property law, lender waste claims create additional problems. The traditional measure of damages in waste law (market value drop) works poorly in the context of underwater mortgages. The traditional split of

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waste claims into permissive and voluntary intent aligns problematically with bankruptcy's system for determining when a claim may be discharged and when it will survive post-bankruptcy. Overall, simply transferring standard waste doctrines into the lender context defeats a number of important protections of both bankruptcy and mortgage law and is inconsistent with property theory, which recognizes the unique context of home ownership.

After examining these challenges in detail, this Article addresses whether lenders should have standing and proposes five adjustments to traditional waste doctrine in the context of residential mortgages. These proposals suggest how waste law should properly evolve to protect both lenders and borrowers.

TABLE OF CONTENTS

INTRODUCTION

In September of 2007, just prior to the subprime mortgage industry crash, Christian Mirner and Tamara Cullen-Mirner obtained a loan from First Republic Bank to purchase a residence.[1] By May 2009, the Mirners defaulted on the loan and would later file for Chapter Seven bankruptcy.[2] The bank foreclosed and sold the collateral at less than the amount of the loan.[3] California law prohibits personal deficiency judgments against borrowers when the property is a residence,[4] so the bank was unable to recover the remainder of the mortgage balance through deficiency.[5]

1 First Republic Bank v. Mirner (*In re* Mirner), Nos. 09-49872 TT, 10-4009 AT, 2010 Bankr. LEXIS 2120, at *1–2 (Bankr. N.D. Cal. July 1, 2010).

2 *Id.* at *2.

3 *Id.*

4 CAL. CIV. PROC. CODE § 580(b) (West 2018).

5 *Mirner*, 2010 Bankr. LEXIS 2120, at *5.

Instead, the bank noted that the Mirners had removed some fixtures from the house and filed a tort claim in waste[6] for $102,000.[7]

Recent empirical research shows that Americans are waiting longer to file bankruptcy, often filing after two years of barely managing financially.[8] During that time, struggling citizens often forgo even basic necessities such as food and medical care.[9] Unsurprisingly, when faced with dire economic circumstances for an extended period of time, borrowers might choose to remove and sell fixtures, as the Mirners did, while trying to maintain ownership of the home. In other words, the fixtures may well be sold to make the mortgage payments. Such actions will, however, expose the borrowers to claims under waste law. As the Mirners' case demonstrates, the waste claim could follow borrowers despite their subsequent bankruptcy and foreclosure occurring in a jurisdiction that rejects personal deficiency judgments.[10] Moreover, if the borrowers sold fixtures to pay the mortgage and attempt to remain in the home, then the lender is suing for waste for money that it already received as mortgage payments.

While a great deal of empirical work has been done in the last five years to investigate the mortgage crisis and how filing for bankruptcy impacted homeowners, to date, waste actions by lenders have not been the object of serious study. Waste actions by lenders are a more recent invention; in the common law, lenders did not have standing for waste actions.[11] In theory, the expansion of waste law to the mortgage context

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6 Waste allows a party who holds a future or non-possessory interest in property to recover for changes to the estate that detrimentally impact the inheritance. 8 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 56.03 (2019). Waste occurs in a variety of contexts, including life estates, reversions, leases, and dower property. *Id.* § 56.02.

7 *Mirner*, 2010 Bankr. LEXIS 2120, at *3.

8 Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 220, 220–21 (2018).

9 *Id.* at 221.

10 *See Mirner*, 2010 Bankr. LEXIS 2120, at *6 (reasoning that anti-deficiency legislation did not intend to bar bad faith waste claims).

11 *See* RALEIGH COLSTON MINOR & JOHN WURTS, THE LAW OF REAL PROPERTY §§ 390–393, at 339–43 (1910) (describing, separately, who is "[p]unishable for [w]aste" and who is "[e]ntitled to [c]omplain of [w]aste").

occurred in the nineteenth century.[12] In reality, lenders brought few cases. Spikes in reported cases align with both the Great Depression and the subprime mortgage crash.[13] But rather than going back down as the economy has recovered, lender claims continue to increase.[14] This continuing increase is especially notable given that after the crash, fewer people are buying homes.[15] While the alignment of claims with two major housing crises would be sufficient to justify a serious investigation, the continuing rise of claims makes such an inquiry imperative.

Using new research on the evolution of waste law, this Article traces the changes that allowed lenders—who at the common law had no standing—to bring waste actions and how the doctrine has evolved to make those actions more available and more lucrative for lenders. This Article then considers whether standing for lenders is appropriate in the context of the history of waste law, as well as property law more generally. In light of how standing has historically worked to protect property rights, this Article argues that lenders should have standing to bring claims for waste, in part, because a failure to allow such claims would undermine the security of private property rights.[16]

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12 In 1976, David Leipziger wrote, "[m]ost of the basic principles governing the real property mortgagee's remedies for waste were worked out in the 19th century." David A. Leipziger, *The Mortgagee's Remedies for Waste*, 64 CALIF. L. REV. 1086, 1087 (1976).

13 This Article refers periodically to a study of case frequency and type conducted by the author. Jill M. Fraley, Mortgage Waste Case Study (2019) (unpublished research) (on file with author) [hereinafter Mortgage Waste Case Study].

14 *Id.*

15 *See* Laura Kusisto, *After Foreclosure, Fewer Buy Homes*, WALL ST. J., Apr. 21, 2015, at A2; Laura Kusisto, *More Renters Give up on Buying a Home*, WALL ST. J. (Apr. 3, 2018, 12:41 PM), https://www.wsj.com/articles/more-renters-give-up-on-buying-a-home-1522773685 [https://perma.cc/V98H-GJ66]. Additionally, Kusisto reports that as of March 2018, "fewer homes are being built per household than at almost any time in U.S. history." Laura Kusisto, *The Next Housing Crisis: A Historic Shortage of New Homes*, WALL ST. J. (Mar. 18, 2018, 1:51 PM), https://www.wsj.com/articles/american-housing-shortage-slams-the-door-on-buyers-1521395460 [https://perma.cc/5CQ8-WAX6].

16 Concerns about robust private property rights are especially salient at this time, given the level of attacks lodged on private property as an inefficient system of ownership. *See generally* Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1 (2017) (reviewing the law and economics-based attacks on the fee simple as an efficient mechanism of ownership and arguing for the social value that landownership has on individual freedom).

Lender waste claims, however, raise a number of problems that should be addressed by the courts. In the context of bankruptcy law, this Article argues that lender waste claims present three important issues. First, lender waste claims risk frustrating the general purpose of a fresh start for the debtor, which is a central purpose of the Bankruptcy Code.[17] Second, lender waste claims amplify existing concerns about peonage.[18] Such concerns are particularly meaningful given the history of discriminatory subprime lending.[19] Third, the courts are already split—and on two separate points—about the proper interpretation of the tort discharge provision, which determines which tort claims will and will not survive to haunt the debtor post-bankruptcy.[20] Lender waste claims further obfuscate the existing circuit split.

For property law, this Article argues, lender waste claims create additional problems. The traditional measure of damages in waste law—market value change—works poorly in the context of underwater mortgages. The traditional split of waste claims into permissive and voluntary intent aligns problematically with the bankruptcy's system for determining when a claim may be discharged and when it will survive post-bankruptcy. Overall, simply transferring standard waste doctrines into the lender context defeats a number of important protections of both bankruptcy and mortgage law and is inconsistent with modern property theory.

All of these problems should be addressed carefully. Recent empirical work has demonstrated how difficult it is for borrowers to either save the home or financially recover where there is an upside-down

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17 For a detailed examination of the Supreme Court precedents addressing the "fresh start" concept and the purposes of the concept, see John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1294–300 (2018).

18 The strongest statement of the peonage problem, as it exists in current bankruptcy law, is found in Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191 (2009) (arguing that the Bankruptcy Code amendments of 2005 realized Thirteenth Amendment constitutional difficulties that had been speculative for decades).

19 *See* Carol Necole Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907, 910 (2010) (discussing the evidence of discriminatory lending practices that targeted Black and Latino families for subprime mortgages).

20 *See generally* Bank Calumet v. Whiters (*In re* Whiters), 337 B.R. 326 (Bankr. N.D. Ind. 2006) (discussing the various splits that have developed in interpreting the appropriate standard for exempting tort claims from discharge).

mortgage, even without waste claims, finding that "in the majority of cases, the bankruptcy system is incapable of saving homes," principally because current provisions of the bankruptcy code ensure that "an upside-down first mortgage cannot be reduced."[21] In short, borrowers will lose homes when the market value drops substantially, because courts will not reduce the loan to the market value.[22] Both mortgage and bankruptcy law, though, include protections for borrowers. Mortgage law in some states, has evolved to prohibit personal deficiency judgments against borrowers; this gives the borrowers a clean slate after foreclosure. Even in jurisdictions that do not prohibit personal deficiency judgments, bankruptcy eliminates personal liability for a past mortgage because such claims are dischargeable. Waste law, however, frustrates these protections.[23] Using tort law, waste claims open the door to judgments that follow a borrower after foreclosure and bankruptcy.

The key purpose of the bankruptcy system for individuals is to provide a "fresh start" to the debtor. The "fresh start" language dates to a 1904 Supreme Court case and the general concept can be found as early as 1877.[24] Current conditions already reduce the potential for that fresh start: recent research shows that people are waiting longer to file bankruptcy, even though the delay means that they are less likely to have a fresh start on the other side of bankruptcy.[25] Additionally, the time spent struggling before filing bankruptcy reduces overall wealth and well-

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21 Richard S. Gendler, *Home Mortgage Cramdown in Bankruptcy*, 22 AM. BANKR. INST. L. REV. 329, 331 (2014). Gendler examined the effectiveness of bankruptcy proceedings for saving a primary residence. *Id.* at 332. Gendler concluded that current options in bankruptcy for saving a primary residence are "overwhelmingly ineffective." *Id.* at 331.

22 *Id.*

23 Recognizing such intersections is an important lesson from the subprime mortgage crisis. In the wake of the crisis, scholars have argued for more holistic frameworks to manage mortgage delinquency, because foreclosure laws intersect with a variety of other laws as well as other social systems. Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2264 (2008). Jacoby argued, "[i]t no longer makes sense for legal scholarship to discuss mortgage enforcement exclusively in terms of foreclosure." *Id.* Unfortunately, little research has addressed the intersections. *Id.*

24 Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047 n.1 (1987).

25 Foohey et al., *supra* note 8, at 223.

being, further diminishing their chances of that fresh start.[26] Waste law exacerbates this situation, because waste claims follow borrowers in ways that a mortgage balance cannot. Waste claims create a personal judgment where state mortgage law prevents personal deficiency judgments on residences, and, because fixtures are willfully removed, waste claims will be non-dischargeable in bankruptcy.[27] This Article argues that many lender waste claims will frustrate borrower protections in mortgage law, as well as the debtor's right to a fresh start.

Bankruptcy law marks few claims as non-dischargeable, because such continuing debts jeopardize the key purpose of bankruptcy law in providing a fresh start. Bankruptcy cases, legislative histories, and scholarly works document how carefully those choices are made and how those choices represent important social policies.[28] Tort claims are one of the few non-dischargeable debts, but not all tort claims survive bankruptcy—only those that include "willful or malicious" acts. There are good reasons for tort claims to be non-dischargeable, because otherwise bankruptcy could provide a convenient escape for intentional tortfeasors.[29] Such restrictions on discharge become all the more important given that tort law ordinarily provides a variety of key social functions, including securing private duties for human rights within the domestic context.[30] Understandably, Congress has chosen to secure some

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[26] *Id.* at 220–21.

[27] The Bankruptcy Code exempts from discharge those debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (2018).

[28] *See* Howard, *supra* note 24, at 1047–48. Professor Howard's Article traces the various policy justifications behind the choices between discharge and non-discharge of debts in bankruptcy. Howard then articulates a functional and economic approach to coherently integrate the multiple policy concerns to create a central theory of discharge. *Id.* at 1048.

[29] *Id.* at 1049. Howard explains the concern that bankruptcy law could become "a shelter for debtors who have engaged in dishonesty or in culpable disregard for the rights of other persons." *Id.*

[30] Recent scholarly work draws attention to the key role of torts in protecting individual human rights in a variety of important circumstances and ensuring a civil remedy for victims. *See* Lisa J. Laplante, *Human Torts*, 39 CARDOZO L. REV. 245, 308–09 (2017) (arguing that a variety of different types of tort cases work to secure human rights and provide remedies to individuals). Other scholars have similarly considered the role of private law in securing human rights. *See, e.g.*, John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008) (considering what private duties may exist under human rights law); Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 506 (2016) (describing human rights as tort harms in the context of the Alien Tort Statute); Jordan J. Paust, *The Other Side of Right:*

torts judgments past bankruptcy. This protection, however, is limited to those torts judgments that reflect "willful and malicious" injuries.

Unfortunately, the circuits have split into multiple camps over two different aspects of the "willful and malicious" standard. The courts disagree as to whether it is a single concept or a two-part inquiry, and additionally disagree as to whether the standard is entirely subjective or can be met objectively. Depending on how the circuit interprets the discharge provision, this Article argues that waste claims may survive bankruptcy and follow the borrower even after a foreclosure.

Continuing payment obligations arising from waste judgments also create constitutional problems due to the loss of future earnings to pay a creditor. Scholars have repeatedly argued that circumstances requiring a creditor to be repaid with future earnings may create a constitutional problem of peonage, or separation of a person from their labor in a way that resembles involuntary servitude.[31] Renowned bankruptcy scholar, Margaret Howard, argued that the 2005 amendments to the Bankruptcy Code, which allowed creditors to potentially reach a debtor's future income, created "genuine constitutional difficulties under the Thirteenth Amendment" because the borrower's future income was chained to a past debt.[32] Waste claims by lenders, this Article argues, create the same types of concerns by targeting income that postdates a foreclosure and/or bankruptcy.

Private Duties Under Human Rights Law, 5 HARV. HUM. RTS. J. 51, 62 (1992) (examining private, rather than state, duties to comply with human rights law and potential private enforcement of those claims); Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1124 (1995) (examining responses to domestic violence through a human rights lens).

31 *See, e.g.*, Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 166 (1990) (arguing bankruptcy would enslave debtors to creditors "[i]f we required individual debtors with no assets to repay their creditors out of future earnings," because this would separate the person from their labor); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 412–17 (1993) (discussing whether and how human capital is exempt from creditor claims when compared to other types of property); Howard, *supra* note 18 (arguing that the Bankruptcy Code amendments of 2005 realized Thirteenth Amendment constitutional difficulties that had been speculative for decades).

32 Howard, *supra* note 18, at 191.

In addition to the bankruptcy and constitutional concerns, lender waste claims also pose problems for the logically and theoretically consistent development of property law. There are good reasons to reconsider waste doctrines in the residential mortgage context. This is particularly true given that courts have arguably moved toward embracing a more progressive and more social theory of property law.[33] To address these key doctrinal questions, this Article provides a new descriptive account of the evolution of waste claims by lenders. After examining the history, this Article provides a set of five specific proposals about how the law of waste should properly evolve to protect both lenders and borrowers in the residential mortgage context.

Part I begins with a brief primer of waste law to familiarize the reader with the doctrine in general, and specifically three aspects of the doctrine that are important for discussing waste in the context of mortgages: standing, permissive waste, and remedies. Part I then focuses on standing, the limiting factor of waste law for lenders. This Part explains the historical standing rules, which would have excluded lenders from bringing waste claims. This Part then turns to the evolution of standing in waste law to include lenders. This Part draws particular attention to districts that resist standing for lenders or limit remedies to injunctions, as well as to other ways that courts have limited the cause of action in the context of mortgages by adding hurdles for lenders.

Based on this history, Part II addresses the question of whether mortgagees should have standing to sue for waste. This Part considers two different approaches. First, this Part considers a theoretical approach to the question based on the nature of the mortgagees' interest in the property. Second, this Part considers how the lien or title approach has influenced states with respect to adoption of the substantial impairment limitation on mortgagees. Finally, this Part addresses the relationship between title or lien theory and the adoption of possession as a

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[33] *See* Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911, 912–14 (2018) (arguing that modern regulatory takings show that of the three primary theoretical approaches to property, the most prominent is now the property-as-society approach). More generally, one might argue that progressive property theory is expanding. For example, see Jessica L. Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105 (2018), for an argument expanding progressive property theory to the context of ownership of genetic information.

requirement for mortgagees—thus effectively preventing remedies for the mortgagee before foreclosure.

Part III provides an account of how applying waste law in the residential mortgage context creates issues for bankruptcy law. This Part addresses the fresh start concept, which is a central purpose of the Bankruptcy Code, demonstrating how waste law may frustrate the fresh start. This Part also demonstrates how lender waste claims amplify existing concerns about peonage. Finally, this Part addresses the current circuit split on the tort discharge provision of the Bankruptcy Code and explains how waste claims further obfuscate the existing circuit split, and then makes a proposal for how lender waste claims should be treated under the discharge provision.

Part IV focuses on property law and delves into the details of how importing traditional waste doctrines into the mortgage context has the potential to create serious and unjust impacts for borrowers. This Part addresses, in particular, the doctrine of permissive waste, the potential availability of extraordinary remedies, the problem of measuring damages in the mortgage context, and the possibility of duplicative recovery or circumventing anti-deficiency statutes.

Part V adds to the recommendation for how to interpret waste intent under the bankruptcy discharge provision by addressing best practices for lender waste cases in the state courts. Part V makes a set of five specific proposals about how the law of waste should properly evolve to protect both lenders and borrowers.

The Article proposes, first, that injunctive relief should always be available to lenders to protect the adequacy of the security interest, provided that the issue is voluntary rather than permissive waste. Second, the Article suggests that extraordinary remedies of waste law—forfeiture and treble damages—should not be available in the mortgage context via waste law. Third, the Article maintains that where there is a deficiency on a mortgage, and some portion of the reduction in property value is attributable to economics beyond the control of the mortgagor, the mortgagee should only be able to recover for waste committed in bad faith. Fourth, the Article concludes that lenders should not be able to use waste law to sue for permissive waste, except where that waste was committed in bad faith. Finally, the Article proposes that because waste law is a remedy in tort and a lender will always have remedies available through contract within the context of residential mortgages, the lender

should be limited to recovery where the damages creates a "substantial impairment" of the security.

I. THE EVOLUTION OF WASTE LAW IN THE MORTGAGE CONTEXT

Waste law is a historic cause of action, dating to the Statute of Marlborough, and thus it has a long and complex history. This Part begins with a brief primer on the core concepts involved in waste law and follows that with the history of standing for waste law. This Part then details the expansion of standing to include lenders as plaintiffs and creates a detailed history of how the courts altered traditional waste law to implement limitations on cases brought by lenders.

A. *A Brief Primer of Relevant Waste Doctrines*

Before addressing the specific situation of mortgages, it is appropriate to begin with the basic doctrines of the common law rule of waste.[34] A cause of action for waste allows a

[34] "Waste is a tort." Eastwood v. Horse Harbor Found., Inc., 241 P.3d 1256, 1260 (Wash. 2010) (en banc) (quoting WILLIAM WOODFALL, THE LAW OF LANDLORD AND TENANT 469 (6th ed. 1822)). Not all claims based on "waste" are actually causes of action in waste. Indeed, some are not based on the traditional doctrine, but instead plaintiffs base their claims on the breach of a specific contract provision that forbids "waste." For example, a provision might say that the mortgagor "shall keep the Mortgaged Premises in good repair and shall not commit waste thereon." Estate of Hatfield v. Hatfield, No. 82A01-0708-CV-375, 2008 Ind. App. Unpub. LEXIS 1219, at *2 (Ind. Ct. App. Mar. 14, 2008). Thus, waste claims can arise from "an economic loss remediable under the law of contracts." *Eastwood*, 241 P.3d at 1260–61. Such actions would be logically quite different from a waste cause of action in that the ordinary tort rules would not apply to a claim based on the breach of a term in a contract. The primary difference is that with "an economic loss as an injury in a contractual relationship 'where the parties could or should have allocated the risk of loss, or had the opportunity to do so.'" *Id.* (quoting Alejandre v. Bull, 153 P.3d 864, 870 (Wash. 2007)). Some jurisdictions have concluded that it is possible for a breach of a contract to be simultaneously a breach of a tort duty that "arises independently." The Washington Supreme Court concluded in 2010 that "an independent tort duty can overlap with a contractual obligation." *Id.* The alternative position is that "'the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses,' and '[i]f the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.'" *Id.* at 1261 (quoting *Alejandre*, 153 P.3d at 870). The Washington Supreme Court resolved the question of whether both claims are simultaneously possible: "The test is not simply whether an injury is an economic

reversioner/remainderman/future interest holder to recover against a tenant for changes to the estate that detrimentally impact the inheritance.[35] Waste arises in a variety of contexts, including life estates, reversions, and dower property.[36] The common law has long protected the reversioner's interest.[37]

The parties liable for waste and the parties granted standing to bring a cause of action for waste have changed throughout time. Initially, formal procedures limited the parties able to receive relief.[38] Historian of waste Wyndham Anstis Bewes argued that in the oldest formulation, only three parties were liable for waste, because they were liable via the operation of law, rather than "by contract or quasi contract;" these three parties were: "tenants in dower and by the curtesy, and guardians in chivalry."[39] Notably, Bewes's list of parties liable then also limits those parties who can recover; there is no leasehold or mortgage relationship listed within the three described.[40] Blackstone, similarly, described waste in terms of the specific and limited parties protected by the doctrine: Waste is a "spoil or destruction in houses, gardens, trees, or other

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loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract." *Id.* at 1264. The court noted that it was not alone in so concluding: "Other states use the same approach." *Id.* at 1264 ("A breach of a duty arising independently of any contract duties between the parties . . . may support a tort action." (quoting Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88 (S.C. 1995))); *see also* Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503, 514 (Ill. 1994) ("Where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty."); Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1369 (N.Y. 1992) ("A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship."). In fact, it is agreeable that the Supreme Court of Colorado's belief "that a more accurate designation of what is commonly termed the 'economic loss rule' would be the 'independent duty rule.'" Town of Alma v. Azco Constr., Inc., 10 P.3d 1256, 1262 n.8 (Colo. 2000) (en banc).

35 WOLF, *supra* note 6, § 56.02.

36 MINOR & WURTS, *supra* note 11 (describing, separately, who is "[p]unishable for [w]aste" and who is "[e]ntitled to [c]omplain of [w]aste").

37 WOLF, *supra* note 6, § 56.02.

38 *Id.*

39 WYNDHAM ANSTIS BEWES, THE LAW OF WASTE 1 (London, Sweet & Maxwell 1894).

40 *See* 2 CHARLES H. SCRIBNER, A TREATISE ON THE LAW OF DOWER 795 (2d ed., Philadelphia, T. & J. W. Johnson & Co. 1883) ("[L]iability did not extend to lessee for life, or for years.").

corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail."[41] Both the list of parties liable for waste and the parties positioned to sue have enlarged since Bewes's era.[42] Given that the duty arises in the context of a relationship, it is unsurprising that the law would expand in a symmetrical way: enlarging both the parties who are liable and the parties who have standing to sue.[43]

Another important aspect of the waste doctrine is the characterization of the claim as either permissive or voluntary.[44] Permissive waste arises not through malicious actions, but instead through some omission.[45] Omissions might be related to maintenance

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41 WILLIAM BLACKSTONE, *Commentaries on the Laws of England, in* THE STUDENT'S BLACKSTONE 189 (Robert Malcolm Kerr ed., London, John Murray 1873).

42 For one of the earlier discussions of the evolution of the parties, see George W. Kirchwey, *Liability for Waste. I. At Common Law*, 8 COLUM. L. REV. 425 (1908) (discussing the shifting liabilities of parties over time).

43 While the standing side has evolved to include mortgagees, the focus of this Article, the liability side, has also expanded broadly. As the Indiana Supreme Court explained:

> At common law the reversioner might sue the life tenant for damages for waste, but, as privity of estate between the parties was necessary to the maintenance of an action for waste, he might not sue one claiming under the life tenant or a stranger. This rule, however, no longer prevails, and the modern action to recover damages may be maintained against the life tenant or a subtenant or a stranger.

Rupel v. Ohio Oil Co., 95 N.E. 225, 227 (Ind. 1911) (citation omitted).

44 Many modern writers divide waste into three categories: voluntary, permissive, and ameliorating. *See, e.g.*, Thomas W. Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1057 (2011); *see also* 5 ARTHUR W. BLAKEMORE, LAW OF REAL PROPERTY § 380, at 323 (1917) (describing two types of waste, permissive and voluntary); 1 CHARLES T. BOONE, LAW OF REAL PROPERTY § 113, at 300 (1901) (categorizing two types of waste: permissive and voluntary); MINOR & WURTS, *supra* note 11, at 331–32 (categorizing waste as either voluntary or permissive, and later discussing amelioration within those structures); GEORGE V. YOOL, AN ESSAY ON WASTE, NUISANCE, AND TRESPASS 3 (London, W. Maxwell 1863) (describing ameliorating waste, then concluding that all waste is "either voluntary or permissive").

45 MINOR & WURTS, *supra* note 11, § 380, at 332–33, § 386, at 337. Formally defined, "[p]ermissive waste implies negligence or omission to do that which will prevent injury, as, for instance, to suffer a house to go to decay for want of repair or to deteriorate from neglect." Jowdy v. Guerin, 457 P.2d 745, 748–49 (Ariz. Ct. App. 1969) (citing Graffell v. Honeysuckle, 191 P.2d 858, 863 (Wash. 1948)).

not undertaken (such as fixing a roof leak), but also might include the non-payment of taxes.[46] Voluntary waste occurs when the tenant acts to harm the property directly, such as by tearing down a wall.[47]

Under the common law rule, whether the allegation was for permissive or voluntary waste, there was a single three-part test to determine whether waste had occurred. The act or omission had to create waste: "(1) [b]y diminishing the value of the estate; (2) [b]y increasing the burthen upon it; (3) [b]y impairing the evidence of title."[48]

Remedies for waste included both equitable and legal relief. Courts rarely bothered with nominal damages,[49] but otherwise enforced waste law stringently, using treble damage awards,[50] as well as injunctions.[51] Courts also, in time, granted the extraordinary remedy of forfeiture of the estate.[52]

While waste law has evolved substantially over time, and there are a wide variety of other doctrines that may be of interest to scholars, this Section has highlighted three aspects in particular: standing, permissive waste, and remedies. Each of these three aspects of the doctrine of waste is important to consider when waste law moves into the context of mortgages.

B. *Standing for Waste Claims*

The logic of standing emerges from the nature of waste, as it has evolved to a more general concept. While waste once protected only a specific set of relationships (dower and life tenancies), it evolved into a more general set of duties imposed on a person who possesses land to

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46 In its strictest formulation at the common law, this went so far as to include liability for "mischance," which suggests liability without negligence. YOOL, *supra* note 44, at 56.

47 MINOR & WURTS, *supra* note 11, §§ 380–381, at 332–33.

48 YOOL, *supra* note 44, at 2.

49 *See* BEWES, *supra* note 39, at 125–29.

50 *Id.* at 9 (discussing the "merciless" application of the rule, including treble damages, in cases of ameliorative waste).

51 1 WILLIAM CRUISE, A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY §§ 27–28, at 67 (London, A. Strahan 1804).

52 *See* Roby v. Newton, 49 S.E. 694, 682 (Ga. 1905) (explaining when the remedy of forfeiture is appropriate).

"not unreasonably injure one who has a right or possibility of future possession."[53] In this more general formulation of a duty, "waste is, functionally, a part of the law which keeps in balance the conflicting desires of persons having interests in the same land."[54] The more general formulation then led to expansion of the list of parties who were liable for waste and the list of parties who had standing to sue for waste. The remainder of this Section discusses this evolution in detail, because standing is the limiting factor of waste law for mortgagees. This Part begins by explaining the traditional standing rules, which would have excluded mortgagees from bringing waste claims. This Part then turns to the evolution of standing in waste law to include mortgagees. This Part draws particular attention to districts that resist standing for mortgagees or limit remedies to injunctions, as well as to other ways that courts have limited the cause of action in the context of mortgages by adding hurdles for mortgagees.

C. *Traditional Standing Rules*

Initially, only three parties were liable for waste: "tenants in dower and by the curtesy, and guardians in chivalry."[55] Later, the list expanded to include those parties who possessed a "remainder or reversion in fee-simple or fee-tail."[56]

Traditionally, waste did not offer a cause of action for lessees. This is particularly important in the context of mortgages because of the reasoning behind the rule:

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[53] Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985) (citing 2 HERBERT THORNDIKE TIFFANY & BASIL JONES, THE LAW OF REAL PROPERTY § 630 (3d ed. 1939)). This more general approach then gives us another definition of waste: "Waste may be defined as an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in a substantial injury." *Id.* (citing 4 THOMPSON, REAL PROPERTY § 1853).

[54] *Id.* at 395 (citing Smith v. Cap Concrete, 184 Cal. Rptr. 308 (Ct. App. 1982)).

[55] BEWES, *supra* note 39, at 1; *see also* SCRIBNER, *supra* note 40, at 795 (describing the three original parties liable for waste).

[56] 2 WILLIAM BLACKSTONE, COMMENTARIES *281.

> Lessees for life and for years were not liable. This distinction was made for the reason that tenancies of the character first named were created by law, and the law must therefore furnish a remedy for a violation of the rights of the owner of the inheritance; and lessees for life or for years acquired their interest by contract with the owner of the fee, who could have protected himself against loss in this respect.[57]

Minor on Real Property explained,

> [t]hose tenants of particular estates who come in *by the act of the parties*, are at common law liable not otherwise than upon their covenants; and if the landlord make no provision, by express agreement, against waste, he is in those cases (independently of statute) without remedy, and is left to suffer the consequences of his neglect.[58]

The rule in the common law was that "the writ of waste lay only against the tenants of estates created by the law, as distinguished from those which came into being through act of the owner."[59] The substantial remedies of waste, therefore, applied to protect property interests created by law, and not those that were created independently by contract, like leases and mortgages.

D. *Expansion of Standing to Mortgages*

Even as waste law began to expand, courts still emphasized the specific relationship of the parties involved and the nature of the property interests at stake. Waste, courts concluded, is not "to be applied inflexibly, without regard to the quality of the estate or the relation to it of the person charged to have committed the wrong."[60] Rather, the appropriate investigation is a contextual one: "the question as to whether it has been committed in a given case is to be determined in view of the particular

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57 *Roby*, 49 S.E. at 680.

58 1 RALEIGH COLSTON MINOR, THE LAW OF REAL PROPERTY § 437, at 529–30 (1908).

59 Camden Tr. Co. v. Handle, 26 A.2d 865, 867 (N.J. 1942).

60 Chapman v. Cooney, 57 A. 928, 929 (R.I. 1904).

facts and circumstances appearing in that case."[61] This meant that early expansion of standing rules was, at first, quite limited.

Initially, expanding standing to mortgagees came with limitations. Within the nineteenth century, courts expanded standing to mortgagees for waste actions in courts of equity.[62] Courts reasoned that coverage of the mortgage situation "rests upon the broad equitable consideration, that, during the life of the mortgage, the security it affords ought to be preserved unimpaired; that the mortgagor, and whoever stands in his shoes, is in conscience bound to its preservation."[63] Such an expansion to only equitable remedies essentially just provided a way for the mortgagee to make sure there was no "interference before, and not after a decree of foreclosure and sale, which settles conclusively the rights and equities of the parties."[64] Under such logic, the mortgagee's standing was limited to only equitable relief.

Additionally, in the earliest cases, equitable relief might be limited to only acts of voluntary waste rather than permissive waste. In Pennsylvania, for example, the court reasoned that they would only be concerned with "actual waste of the mortgaged premises."[65] The court refused to consider an injunction simply for "mere non-payment of taxes and failure of the mortgagor to apply rents in payment of the mortgage."[66]

Nineteenth century commentators supported the approach of limiting waste to only equitable remedies for mortgagees. Chancellor Kent argued,

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[61] *Id.*

[62] *See, e.g.*, Malone & Foote v. Marriott, 64 Ala. 486, 493 (1879) (reinstating an injunction protecting a mortgagee on the grounds that it protected the party's interests prior to the filing of the foreclosure suit).

[63] *Id.* at 492–93; *see also* Hastings v. Perry, 20 Vt. 272, 278 (1848) ("Of the right of the mortgagee to an injunction to restrain the mortgagor from the commission of waste, by which the mortgage security is in danger of being reduced in value below the amount of the mortgage debt, there can be no question. The doctrine has been too long established, and too frequently acted upon in this State, to be now controverted.").

[64] *Malone & Foote*, 64 Ala. at 493.

[65] Abraham Rosenblatt Bldg. & Loan Ass'n v. Miller, 13 Pa. D. & C. 73, 74 (Ct. Com. Pl. 1929).

[66] *Id.*

> [t]he mortgagor may exercise the rights of an owner while in possession, provided he does nothing to impair the security; but a court of chancery will always, on the application of the mortgagee, and with that object in view, stay the commission of waste by the process of injunction. An action at law by the mortgagee, will not lie for the commission of waste, because he has only a contingent interest.[67]

Within the nineteenth century, some state courts began to expand standing for mortgagees to go beyond courts of equity. A seminal case, often cited in other states, is the New York case of *Van Pelt v. McGraw*.[68] The court focused on the fact that "[t]he rights of the holder of the mortgage were therefore paramount to [the mortgagor's] rights, and any attempt on his part to impair the mortgage as a security, was a violation of the plaintiff's rights."[69] The court concluded that the law would support a case for waste, because "[t]he plaintiff's security was thereby impaired."[70] The court noted that when the mortgagee sues for waste, the "action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired."[71] Because of this, the court determined that "[h]is damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be."[72] Notably, the court went on to conclude that the timing of the suit for waste vis-à-vis foreclosure proceedings was irrelevant: "It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage."[73] As other courts adopted the rule of standing for the mortgagee, not all followed the remainder of the court's lenient approach for such cases. With those limitations on the precedent, however, a number of jurisdictions adopted the new approach to standing in this era.

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67 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 165–66 (7th ed., New York, William Kent 1851).

68 Van Pelt v. McGraw, 4 N.Y. 110, 112 (1850).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

By 1860, the Wisconsin Supreme Court recognized that "a mortgagee . . . is entitled to maintain a legal action for waste against a mortgagor."[74] Similarly, California adopted this approach in 1864, judicially with later codification.[75] In *Robinson v. Russell*,[76] the court concluded "that an action can be maintained by the mortgagee . . . when it appears that by the acts complained of the mortgage security is impaired."[77] The court cited a few cases in support of this proposition, including *Van Pelt*.[78] The court paused to note that all of the cited cases "were actions on the case for the wrongful and fraudulent injury committed upon the premises, whereby the mortgagee's security was impaired."[79] The court did not, however, focus on the wrongful and fraudulent nature of the injury, but rather on the security interest. The court concluded that the mortgagee had standing, at least in equity:

> There can be as little doubt that the mortgagee may, by injunction, stay the commission of waste upon the mortgaged premises, when he makes a proper case in equity and shows that the commission of the threatened acts will materially impair the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt.[80]

With that said, the court did limit the availability of equitable relief. The court found that either (1) the injuries needed to be irreparable, or (2)

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74 Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109, 111–12 (Wis. Ct. App. 1987) (internal citation omitted).

75 Cornelison v. Kornbluth, 542 P.2d 981, 987 (Cal. 1975) (explaining that California adopted a statute creating a duty not to commit waste on property with a lien against it).

76 Robinson v. Russell, 24 Cal. 467 (1864).

77 *Id.* at 473; *see also* Beiger Heritage Corp. v. Kilbey, 676 N.E.2d 784, 787 (Ind. Ct. App. 1997) ("In Indiana, the mortgagor who is in possession may exercise all acts of ownership, even to the committing of acts which might be considered waste, provided he does not 'render unsafe the debts secured by the mortgage.'" (citation omitted)); McCorristin v. Salmon Signs, 582 A.2d 1271, 1273 (N.J. Super. Ct. App. Div. 1990) ("[I]f the waste or damage to the mortgaged property threatens to impair the mortgagee's security, and the mortgagor has failed or refused either to pursue the claim or to take other steps to avoid prejudicing the mortgagee's interest, the mortgagee has the right to protect his interest by pursuing the claim.").

78 *Robinson*, 24 Cal. at 473.

79 *Id.*

80 *Id.*

there needed not to be an available recovery in an action for trespass, because the defendants "are insolvent or unable to respond in damages for the alleged or threatened injury."[81] Without such a show, the court concluded that an injunction could not properly be issued.[82]

In 1884, the Maine Supreme Court considered the rights of the mortgagee to bring a claim for waste.[83] The court concluded, "[t]he action (*quare clausum fregit*) lies by mortgagee against mortgagor for strip and waste."[84] The court held that liability could exist for "abusing [the property] in certain ways."[85] The threshold the court established was liability for "any act causing substantial and permanent injury."[86]

Writing in 1903, the Alabama Supreme Court focused on the duty of the mortgagee "to conserve the integrity of the property," and concluded that as a result, "[i]t is clear to us that the mortgagee is liable for the waste."[87] The focus was no longer on the division between contractual relationships and property relationships, but more generally on any relationship between concurrent holders of interests in land: "As the action evolved during the ensuing development of the common law, it was broadened so as to afford protection to concurrent holders of interests in land who were out of possession (e.g., mortgagees) from harm committed by persons who were in possession (e.g., mortgagors)."[88]

In adopting the expanded standing rule, some courts specifically adopted a broad definition of waste that included both voluntary and permissive waste. For example, in Minnesota, the Supreme Court found in 1922 that "[s]peaking in general terms it may be said that a mortgagor is chargeable with waste within the meaning of the rule whenever, through the fault of the mortgagor, the mortgagee loses some part of the security which he had when he took his mortgage."[89] The court gave examples:

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81 *Id.*

82 *Id.*

83 Vehue v. Mosher, 76 Me. 469, 470 (1884).

84 *Id.*

85 *Id.*

86 *Id.*

87 Pollard v. Am. Freehold Land Mortg. Co., 35 So. 767, 772 (Ala. 1903).

88 Cornelison v. Kornbluth, 542 P.2d 981, 986 (Cal. 1975).

89 Nielsen v. Heald, 186 N.W. 299, 300 (Minn. 1922).

> Failure to pay claims or charges which were not liens on the property when the mortgage was taken, but which, if not paid, will become liens thereon superior to the mortgage, is deemed waste within the rule. Failure to pay interest on prior mortgages or to pay taxes falls within this species of waste.[90]

Similarly, Mississippi adopted a wide definition, simply including all acts that impair the value of the mortgaged property.[91]

Not all courts considered expanding standing in the nineteenth century. Some expansion occurred by statute in the late twentieth century. In Maryland, for example, "the law of waste continues to evolve and Maryland, among other states, now recognizes the responsibility of a mortgagor to protect the value of a mortgagee's security from impairment."[92] A Maryland statute provides that "[a]ny mortgagor, including a grantor under a deed of trust given as security for the payment of a debt or the performance of an obligation . . . who, without express or implied authorization, commits or permits waste is liable for the actual damages suffered by the property."[93] As of 2001, however, the Maryland Court of Appeals found that the statute was not actually in use. The court noted that "[i]ndeed, there are no Maryland cases in which a mortgagor has been held liable to a mortgagee for waste."[94]

Other courts have allowed claims by mortgagees only much more recently—with a number adopting expanded standing rules between the 1990s and the present. In such instances, the courts have often engaged

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90 *Id.*

91 Planters' Mfg. Co. v. Greenwood Agency Co., 152 So. 476, 477 (Miss. 1934). Nebraska adopted a similarly wide rule. *See* Vybiral v. Schildhauer, 265 N.W. 241, 244 (Neb. 1936). The court concluded that

> [a] mortgagee has the right to maintain a suit to prevent waste by mortgagor in possession where the security of the mortgage debt is impaired or there is danger of the mortgaged property becoming insufficient security for the mortgage debt, and a mortgagee may properly include such application to prevent waste in the petition to foreclose the mortgage.

Id. at 242.

92 Boucher Invs., L.P. v. Annapolis-West, 784 A.2d 39, 48 (Md. Ct. Spec. App. 2001).

93 MD. CODE ANN., REAL PROP. § 14-102 (West 2018).

94 *Boucher Invs.*, 784 A.2d at 48.

in a detailed examination of the history of waste claims to support their adoption of the expanded rule of standing.

For example, the Arizona bankruptcy court considered the issue in 1992.[95] The court affirmed the expansive take, reasoning that "[c]laims for waste have evolved far beyond the original English statutes and common law claims. No longer do courts require that a plaintiff in a waste action hold a future interest."[96] The court then cited the ever-expanding list of parties who have standing, noting simply that these parties are the "holder[s] of a current interest."[97] Based on that, the court reasoned that "a vendor of real property, a lessor of real property, or a mortgagee, may maintain an action for waste."[98]

Montana did not address the issue of waste in the context of mortgages until 1997. In *Turner v. Kerin & Associates*, the Montana Supreme Court reviewed decisions from across the country dating back to the nineteenth century.[99] The court ultimately concluded, "[w]e agree that a mortgagee may state a cause of action against a mortgagor for actions or inactions which damage the collateral and thereby impair the mortgagee's ability to satisfy the secured debt."[100]

One product of the process of expanding standing for waste cases is that the very definition of the cause of action changed in many jurisdictions. The cause was no longer limited to any particular set of property relationships (such as life tenant-reversioner, lessor-lessee, etc.). Instead, some courts adopted wide definitions such as this one: "[T]he unreasonable conduct by the owner of a possessory estate that results in physical damage to the real estate and substantial diminution in the value of the estates in which others have an interest."[101]

Waste has also expanded in other ways in recent years, at least in some jurisdictions. The traditional rule of waste limited coverage to

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95 *In re* Evergreen Ventures, 147 B.R. 751, 754–55 (Bankr. D. Ariz. 1992).

96 *Id.*

97 *Id.*

98 *Id.* (citing 5 RICHARD R. POWELL, THE LAW OF REAL PROPERTY § 56.06 (1992)).

99 Turner v. Kerin & Assocs., 938 P.2d 1368, 1371–72 (Mont. 1997).

100 *Id.*

101 Prudential Ins. Co. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109, 111–12 (Wis. Ct. App. 1987) (quoting Pleasure Time, Inc. v. Kuss, 254 N.W.2d 463, 467 (Wis. 1977)).

situations involving "permanent injury" to a property.[102] In 2013, the Vermont Supreme Court enlarged this definition substantially by extending it to non-permanent damages. The court "explicitly define[d] waste to include repairable damage to property."[103] As a result, the court was able to affirm a finding of waste related to "removal of items and neglect" because such actions "constituted a substantial injury to the property, even though they could be repaired and replaced so as to avoid a permanent diminution of property value."[104]

Treatises supported the expansion of standing to mortgagees. By 1975, an *American Jurisprudence* article noted that anyone with "a specific lien against real estate has a right to restrain waste by the owner of the real estate."[105] Courts specifically cited to the treatise in adopting or affirming the wider standing rule.[106]

Similarly, the Third Restatement of Property also advocated standing for mortgagees in causes of action for waste. The Restatement described the cause of action's prima facie case in the context of a mortgage:

> (a) Waste occurs when, without the mortgagee's consent, the mortgagor: (1) physically changes the real estate, whether negligently or intentionally, in a manner that reduces its value; (2) fails to maintain and repair the real estate in a reasonable manner, except for repair of casualty damage or acts of third parties not the fault of the mortgagor; (3) fails to pay before delinquency property taxes or governmental assessments secured by a lien having priority over the mortgage; (4) materially fails to comply with covenants in the mortgage respecting the physical care, maintenance, construction, demolition, or insurance against casualty of the real estate or

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102 Prue v. Royer, 67 A.3d 895, 914–15 (Vt. 2013).

103 *Id.* at 915.

104 *Id.*

105 Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253, 257 (4th Cir. 1984) (citing 78 AM. JUR. 2D *Waste* § 13 (1975)).

106 *See, e.g.*, *id.*

improvements on it; or (5) retains possession of rents to which the mortgagee has the right of possession under § 4.2.[107]

E. *Expansion of Standing in the Mortgage Context: Special Limitations*

1. Equitable Remedies Only

One approach to limiting standing for mortgagees is to limit the remedies to equitable ones only, prohibiting damages awards. This approach mirrors the early adoption of the expanded standing approach, specifically within the context of courts of equity only. The Kansas Supreme Court, for example, found that when a mortgagor "impairs the mortgage security the remedy of the mortgagee is not at law, but in equity . . . generally [an] injunction to restrain the commission of waste upon the realty."[108]

Some courts not only adopted the equitable remedies approach, but also limited this approach to more severe situations of waste. The Kentucky Court of Appeals concluded in 1880 that the mortgagee could only receive an injunction where "the waste complained of endangered the rights of the lien creditor."[109] In other words, the security had to be inadequate before the court would intervene. West Virginia adopted a similar rule, finding that "a court of equity will not interfere to restrain [a mortgagor] . . . until it is made to appear to the court," that the waste will "render the land an incompetent security for the amount due upon the mortgage."[110] Thus, the justices concluded, "I can never assent to the issuing of an injunction in behalf of a mortgagee in such a case, unless he shows, that it is necessary to preserve his security."[111]

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107 RESTATEMENT (THIRD) OF PROP.: MORTGS. § 4.6 (AM. LAW INST. 1997).

108 Vanderslice v. Knapp, 20 Kan. 647, 649 (1878).

109 Harris v. Bannon, 78 Ky. 568, 570 (1880).

110 Core v. Bell, 20 W. Va. 169, 173 (1882) (citing 2 JOSEPH STORY, COMMENTARIES ON EQUITY OF JURISPRUDENCE § 915 (11th ed., Boston, Brown, and Company 1873); Brady v. Waldron, 2 Johns. Ch. 148 (N.Y. Ch. 1816); Hippesly v. Spencer (1820) 56 Eng. Rep. 956; 5 Madd. 422; Farrant v. Lovel (1750) 26 Eng. Rep. 1214; 3 Atk. 723; Wright v. Atkyns (1813) 15 Eng. Rep. 122; 1 Ves. & Bea. 314; Scott v. Wharton, 2 Va. (2 Hen. & M.) 25 (1808)).

111 *Core*, 20 W. Va. at 173.

Notably, when courts pursue this approach, it is not generally a rule of "substantial impairment," but rather a softer rule. As the Oregon Supreme Court explained, in the context of seeking an injunction, "[s]uch acts as will render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency, constitute, according to the consensus of authority, an impairment of the security, through the commission of waste."[112] The important point is not clear impairment, but indeed, acts that would "so far impair the value of the property as to render the security of doubtful sufficiency. . . . [A]nd it is not enough that its value may be barely equal to the debt."[113]

Modern courts have retained the equity only approach in a number of jurisdictions, absent extraordinary circumstances, such as bad faith. Connecticut courts, for example, find that "[g]enerally, a mortgagee's remedy for waste is via injunction."[114] One can also infer this position for courts such as the Alabama Supreme Court, that dismiss waste claims when the mortgagee files for foreclosure.[115]

Adopting only equitable remedies has effectively prevented (at least reported) cases within the twentieth century in a number of states. In Wyoming, for example, there are very few cases of waste in the entire twentieth century. This is likely a product of the fact that there is no assurance that there is a cause of action at law for mortgagees. The case law only seems to suggest equitable remedies. The general rule in Wyoming is that the mortgagee has a right to "restrain" action, but even this right is qualified to situations where "the property would be diminished in value by the threatened removal to such an extent as to render the mortgage security insufficient or inadequate."[116]

Kansas resembles Wyoming in that there are few modern cases. The few cases that exist suggest that remedies may be limited to injunctions

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112 Beaver Flume & Lumber Co. v. Eccles, 73 P. 201, 202 (Or. 1903) (citing State v. N. Cent. Ry. Co., 18 Md. 193 (1862)).

113 *Id.*

114 BRE, Inc. v. Superior Block & Supply Co., No. CV 95380707, 1997 Conn. Super. LEXIS 2783, at *10 n.7 (Conn. Super. Ct. Oct. 17, 1997).

115 *See, e.g.*, Edelman v. Poe, 103 So. 2d 333, 334 (Ala. 1958) (holding that pendency of foreclosure suit required dismissal of waste claim for damages).

116 Anderson v. Englehart, 108 P. 977, 979 (Wyo. 1910).

or the appointment of a receiver during the foreclosure process to prevent waste.[117]

New Hampshire also has few reported cases of waste in the mortgage context; there are none within the twentieth century that are a mortgagee against a mortgagor. The rule in New Hampshire is that a mortgagee has rights only insofar as it may be necessary to enable him to prevent waste, and to keep the land from being in any way diminished in value, or to receive the rents and profits, and to give him the full benefit of his security, and appropriate remedies for any violation of his rights under the mortgage.[118]

2. Inadequate Mortgage Security and Damages Limited to Security Interest

One approach to limiting the standing of lenders that courts adopted was to create a more stringent threshold for damages. Some courts adopted a rule that lenders only had standing for waste where the waste was sufficient to render the security "inadequate" or "insufficient."[119] For example, under Florida law, "when a mortgagee brings an action for injury to a security interest the mortgagee is entitled to 100% security for the debt owed and not, unless otherwise contracted for, more than that."[120] For standing then, the mortgagee must "demonstrate that the mortgage security has been injured and is now worth less than the amount of the outstanding debt."[121]

Notably, the strict standard may go beyond simply impairing the mortgage security to creating a "substantial" impairment. As the Court of Appeals of Wisconsin explained, there was a "common law rule that, in lien jurisdictions, a mortgagee cannot recover until his security has been

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117 *See* Garrett v. Dickerson, No. 73,404, 1996 Kan. App. Unpub. LEXIS 266, at *23–24 (Kan. Ct. App. Nov. 1, 1996) (citing KAN. STAT. ANN. § 60-2414(l) (1996)).

118 Morse v. Whitcher, 15 A. 207, 209 (N.H. 1888).

119 Moriarty v. Ashworth, 44 N.W. 531, 531 (Minn. 1890); Buckout v. Swift, 27 Cal. 433, 436 (1865); *see also* Vanderslice v. Knapp, 20 Kan. 647 (1878).

120 Ginsberg v. Lennar Fla. Holdings, Inc., 645 So. 2d 490, 500 (Fla. Dist. Ct. App. 1994).

121 *Id.*

substantially impaired which occurs only when waste has reduced the value of the encumbered property to less than the unpaid balance of the debt."[122] Under this rule, "[o]nly damage rising to the level of 'substantial injury' is considered waste."[123]

Some courts applied the more stringent waste standard only where the plaintiff sought damages and have been reluctant to apply the rule in the context of injunctions. In *Williams v. Chicago Exhibition Co.*, the court focused on the traditional view of fixtures as a part of the mortgage security, and reasoned that an injunction was reasonable to prevent the defendant from "removing [fixtures], as such removal might impair the mortgage security."[124] In this particular case, the court did not find it necessary to decide the issue, as the court determined that even if the strict rule applied, the allegations were sufficient.[125]

3. Bad Faith Cases Only

Courts have also chosen to limit mortgagees' suits to particularly egregious situations where there is evidence of bad faith.[126] This rule essentially prohibits a mortgagee from recovering deficiencies except in those instances. For example, California courts have concluded that "[t]he antideficiency statutes do not apply when the borrower has committed 'bad faith' waste resulting in impairment of the security."[127]

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122 Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109, 113 (Wis. Ct. App. 1987) (citing David A. Leipziger, *The Mortgagee's Remedies for Waste*, 64 CALIF. L. REV. 1086, 1097 (1976); *see also* Cornelison v. Kornbluth, 542 P.2d 981, 990 (Cal. 1975) ("It will be recalled that damages in an action for waste are measured by the amount of injury to the security caused by the mortgagor's acts, that is by the substantial harm which 'impair(s) the value of the property subject to the lien so as to render it an inadequate security for the mortgage debt.'" (quoting Robinson v. Russell, 24 Cal. 467, 473 (1864))).

123 Eastwood v. Horse Harbor Found., Inc., 241 P.3d 1256, 1260–61 (Wash. 2010) (quoting Moore v. Twin City Ice & Cold Storage Co., 159 P. 779, 780 (1916).

124 Williams v. Chi. Exhibition Co., 58 N.E. 611, 615–16 (Ill. 1900) (quoting 10 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 875 (John Houston Merrill ed., Northport, Edward Thompson Company1889)).

125 *Id.*

126 *See, e.g.*, Evans v. Cal. Trailer Court, Inc., 33 Cal. Rptr. 2d 646, 652 (Ct. App. 1994) (limiting waste cases by mortgagees to bad faith injuries).

127 *Id.*

The courts define bad faith waste as "reckless, intentional or malicious injury to the property."[128] Most importantly, the courts distinguish this form of waste from "waste caused by mortgagors who are subject to the economic pressures of a market depression."[129] In other words, "[a] defense exists to bad-faith waste if the failure to maintain the real property was the result of economic necessity."[130]

II. SHOULD MORTGAGEES HAVE STANDING FOR WASTE ACTIONS?

With standing for mortgagees an innovation from the traditional common law doctrine—and one that has not been accepted in all jurisdictions, or accepted in only a limited fashion—the question becomes whether mortgagees should have standing to sue for waste. First, this Part considers a theoretical approach to the question based on the nature of the mortgagees' interest in the property. Second, this Part considers how the lien or title approach has influenced states with respect to adoption of the substantial impairment limitation on mortgagees. Finally, this Part addresses the relationship between title or lien theory and the adoption of possession as a requirement for mortgagees, thus effectively preventing remedies for the mortgagee before foreclosure.

A. *The Post-Subprime Mortgage Collapse Context*

There is every reason to make regulatory choices carefully after the global financial crisis. While banks and regulators have denied responsibility, a recent study concluded that "financial regulators . . . repeatedly designed, implemented, and maintained policies that helped precipitate the global financial crisis. . . . [T]hey recklessly endangered the global economy."[131]

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128 *Id.*

129 *Id.*

130 D.A.N. Joint Venture v. Binafard, No. 97-55778, 1999 U.S. App. LEXIS 2626, at *2–4 (9th Cir. Feb. 18, 1999).

131 JAMES R. BARTH, GERARD CAPRIO JR. & ROSS LEVINE, GUARDIANS OF FINANCE: MAKING REGULATORS WORK FOR US 4–5 (2012). *But see* Paul G. Mahoney, *Deregulation and the Subprime Crisis*, 104 VA. L. REV. 235 (2018) (arguing that deregulation was not a cause of the subprime mortgage crisis).

In particular, studies have shown that a lack of regulation in home lending paved the way for the financial crisis.[132] In short, "subprime securitization may represent one of the greatest structurally-caused financial implosions of the modern world."[133] Scholars quibble about the shares of blame and cite a variety of sources. Yet, key studies concur in finding that lending practices were a prime factor.[134]

In response to the financial crisis, the majority of states enacted laws that restricted subprime lending.[135] Regrettably, those changes came rather late. In the years leading up to the crisis, scholars discussed the problem of predatory lending, including in the subprime mortgage market, but stopped at actually preventing subprime lending, finding that "the best avenue for redressing predatory lending would be a direct approach that focuses on abusive loan terms and practices, without imposing usury limits."[136]

In the aftermath of the crisis, we know that regulation in the mortgage context is important. Similarly, because waste actions by lenders may allow lenders to pursue claims against borrowers after foreclosure and bankruptcy, it is important to consider whether lenders should have standing both as a matter of social policy and in terms of the history of waste doctrine and property law more generally.

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132 *See generally* Alan White et al., *The Impact of State Anti-Predatory Lending Laws on the Foreclosure Crisis*, 21 CORNELL J.L. & PUB. POL'Y 247 (2011).

133 Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1260 (2009).

134 *See, e.g.*, Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1181 (2012) (arguing that the housing bubble was primarily caused by an excessive supply of housing finance); White et al., *supra* note 132 (citing lending practices as a primary cause of the financial crisis).

135 White et al., *supra* note 132.

136 Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259 (2002).

B. *Logical Approach of Title Theory*

Within waste law, the ownership interest provides the lynchpin for standing for a claim. The reasoning is simple:

> a party seeking to enjoin a particular use of land as waste must have a sufficient stake in the value of the ownership interest to warrant judicial interference to protect that value. While that interest might be a future interest or might be contingent, it must be an ownership interest.[137]

Focusing on this ownership interest, one way to approach whether lenders logically should have standing to sue for waste would be to consider whether the lender actually holds any type of title interest in the property at issue. Specifically, standing might logically flow from whether a state adopts a lien or title theory of mortgages. Unfortunately, that does not necessarily provide us with straightforward answers.

Professor Ann Burkhart has written about the complexities of lien and title theories of mortgages.[138] Burkhart finds that "commentators have categorized states according to one of three theories concerning the effect a mortgage has on title to the encumbered land."[139] Burkhart explains "[t]he states that cling to common-law or title nomenclature and theory are denominated title theory states."[140] On the other hand, "[t]hose states that treat a mortgage as conveying no title to the mortgagee but as creating only the right to sell the property to satisfy the secured debt in the event of default are denominated lien theory states."[141] Finally, yet another group of states "follow the intermediate theory, treat[ing] a mortgage as conveying to the mortgagee the right to possess the encumbered land and to collect the rents and profits only upon the mortgagor's default."[142]

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137 Doramus v. Rogers Grp., Inc., No. M1998-00918-COA-R3-CV, 2001 Tenn. App. LEXIS 127, at *42 (Ct. App. Feb. 28, 2001).

138 Ann M. Burkhart, *Freeing Mortgages of Merger*, 40 VAND. L. REV. 283, 322–25 (1987).

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

Burkhart has also studied the representation of these different approaches across the United States. She notes, "[a] 1902 survey of the states' mortgage laws characterized sixteen states as following the title theory of mortgages and twenty-three states and territories as following the lien theory."[143] On the other hand, "[b]y 1965, only eight states—Alabama, Georgia, Maine, Maryland, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island—still adhered to the title theory, and twenty-eight states accepted the lien theory."[144] In her update, she adds that, "Alabama, Georgia, Maine, Maryland, Massachusetts, New Hampshire, and Rhode Island continue to describe a mortgage as conveying title to the mortgagee. Relatively recent decisions indicate that Pennsylvania may be shifting to the lien theory, though Pennsylvania courts also have rendered contrary decisions relatively recently."[145]

To add to the complexity, Burkhart is unsure that the labels give us very much information about how a state actually treats mortgages in the actual laws and practices of the jurisdiction. She notes, "[i]n some title theory states, statutes alter or remove the very legal incidents that once denoted title theory treatment of mortgages."[146] Additionally, there are some jurisdictions where "courts in title theory states have held that a mortgage does not convey title to the property to the lender, but only certain rights to possess and to sell the property to satisfy the loan in the event of default."[147] As a result, we can really draw few conclusions about a state's approach to mortgages from the designation of a particular state as following either a title or lien theory.

More importantly, Professor Burkhart's overall view of the system is significant for waste law: Her overall conclusion is that, "even in title theory states, the mortgage is recognized as the appurtenance of the secured debt rather than as a title conveyance."[148] If she is correct about that, then logically, it may be less reasonable from a property law

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143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

perspective to give standing to mortgagees, because the traditional value of waste law was in protecting title interests.

Courts have considered whether property law of the state approaches mortgages with a title or lien theory when determining whether to offer standing to mortgagees. The Fourth Circuit engaged this question in depth in *Jaffe-Spindler Co. v. Genesco, Inc.*[149] The court concluded that "[l]ien states, generally, only allow a mortgagee to recover for waste if the value of the collateral goes below the amount of the outstanding indebtedness."[150] By contrast, title theory jurisdictions "allow a mortgagee to recover for any diminution in the value of security given for a debt."[151] The court viewed the title approach as distinct because "any diminution in value injures the mortgagee's *property* in a title state. In a lien state, the mortgagee has no property interest which can be injured."[152] The court notes, however, that one cannot depend on courts for consistency: "Neither lien state courts nor title state courts have followed a consistent 'party line' in all mortgage cases."[153] The court concludes that, "the generality that South Carolina is a lien state does not decide the issue of damages in the present case."[154]

Some courts have been explicitly influenced by their state's approach to lien versus title for mortgage interests. The Alabama Supreme Court explained, "when, as in this State, the mortgagee is regarded as the owner of the fee, and the mortgagor in possession as his tenant, there is additional ground for interference to restrain waste."[155] Similarly, the New Hampshire Supreme Court concluded, "[a] mortgagee is not in a general sense the owner of the mortgaged estate. Before foreclosure, his interest is not, in fact, real estate."[156] As a result, in New Hampshire, the

149 Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253, 257–58 (4th Cir. 1984).

150 *Id.*

151 *Id.*

152 *Id.* (citation omitted).

153 *Id.* (citing Wesley A. Sturges & Samuel O. Clark, *Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691, 713–15 (1928)).

154 *Id.*

155 Malone & Foote v. Marriott, 64 Ala. 486, 492–93 (1879) (citation omitted).

156 Morse v. Whitcher, 15 A. 207, 209 (N.H. 1888).

court limited the remedies of the mortgagee, saying his rights were only those as "may be necessary to enable him to prevent waste."[157]

Some states, however, are not particularly motivated by the title or lien approach. The Wisconsin Court of Appeals explained, "[a]lthough a mortgagee only has a lien on the mortgaged property, he or she is entitled to maintain a legal action for waste against a mortgagor."[158]

C. *Title Theory and the Imposition of Limitations on Mortgagees*

The title versus lien approach of the state may also contribute to the courts' reasoning in adopting limitations on waste actions in the context of mortgages. This includes both limiting mortgages to the context of equity and also imposing a barrier of substantial impairment of the security interest.

With respect to limiting mortgagees to suits for equitable remedies, the Connecticut Supreme Court has addressed the importance of the title theory in the mortgage context generally. The court noted that "the law of mortgages is built primarily on a series of legal fictions 'as a convenient means of defining the various estates.'"[159] The court explained, "[d]espite our title theory of mortgages, '[i]n substance and effect . . . and except for a very limited purpose, the mortgage is regarded as mere security . . . and the mortgagor is for most purposes regarded as the sole owner of the land.'"[160] The court then concluded that "[t]he mortgagee 'has title and ownership enough to make his security available, but for substantially all other purposes he is not regarded as owner.'"[161] As of 1900, Connecticut had rejected allowing a mortgagor to be liable to the mortgagee for waste.[162] The court refused to "in effect make the mortgagor in possession liable to an action at law for waste, while under our law heretofore he has

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157 *Id.*

158 Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109, 111–12 (Wis. Ct. App. 1987) (citation omitted).

159 Red Rooster Constr. Co. v. River Assocs., Inc., 620 A.2d 118, 122 (Conn. 1993) (quoting Ensign v. Batterson, 36 A. 51, 54 (Conn. 1896)).

160 *Id.* (quoting McKelvey v. Creevey, 45 A. 4, 5 (Conn. 1900)).

161 *Id.* (quoting *McKelvey*, 45 A. at 5).

162 *McKelvey*, 45 A. at 6–7.

not been regarded as liable at law for waste."[163] Kentucky followed a similar approach, historically. The Kentucky Court of Appeals found, "[t]he mortgagee, as has been adjudged by this court, had only a lien on the property for the payment of his debt, and could only enforce it by going into a court of equity, subjecting the property to its payment."[164]

Similarly, the lien or title approach of a state may motivate adoption of the impairment standard. In 1940, the New York Superior Court explained:

> In this state the mortgagor has long been regarded both at law and in equity as the owner of the fee, and it must be borne in mind that this is not an action for waste such as might be maintained were the plaintiff here the landlord and the defendant the tenant . . . .[165]

Because of this, the court noted the emphasis must be on "the impairment of its security resulting from the wrongful act of the defendant."[166] Based on this, the court found "the plaintiff must prove (1) a wrongful act of the defendant; (2) impairment of security resulting from that act; and (3) the amount of such impairment."[167] Thus, the title in the borrower convinced the court that it was important to establish the impairment of the security before the mortgagee could have an action for waste.

On the other hand, while Tennessee maintains title in the mortgagee, the jurisdiction still adopted a standard of impairment after consideration of the property interest at issue.[168] The Tennessee Supreme Court explained, "[t]he title that passes to the mortgagee where the mortgagor remains in possession is a potential right to protect the estate from impairment of the security to such extent as would defeat payment

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163 *Id.* at 6.

164 Harris v. Bannon, 78 Ky. 568, 570 (1880).

165 Syracuse Sav. Bank v. Onondaga Silk Co., 26 N.Y.S.2d 448, 450 (Sup. Ct. 1940).

166 *Id.*

167 *Id.*

168 Lieberman, Loveman & Cohn v. Knight, 283 S.W. 450, 454 (Tenn. 1926) ("While in theory the rule prevails in Tennessee that the mortgagee takes the legal title and is entitled to possession, in practice the doctrine is only applied when necessary to protect the mortgagee's security afforded by the estate.").

of the debt secured."[169] The court concluded that interest in the property was sufficient to allow the mortgagee to "restrain waste by the mortgagor or a third person," or to "sue and recover damages for acts done to the estate which impair the security."[170]

D. *Title Theory and the Possession Requirement*

States may also put a great deal of emphasis on which party is in possession of the property as of the time of filing suit. Connecticut courts have not refused waste actions where the mortgagor had already lost possession of the property and was, in fact, insolvent.[171] The Court of Appeals of Kentucky held in 1880 that "[n]o action for waste can be maintained by the mortgagee against the mortgagor while the former is the owner and in the possession."[172]

New York courts explained in more detail why possession should matter in the context of a mortgage relationship-based action for waste. The key question is "whether a mortgagee can maintain an action of waste against the mortgagor, before the forfeiture of the mortgage."[173] The question matters because if there has been no forfeiture, then there has been no "expiration of the time limited for the payment of the money secured by the mortgage."[174] If the expiration has not occurred, this matters in the context of waste law because "[w]aste is an injury done to the inheritance, and the action of waste is given to him who has the inheritance in expectancy, in remainder, or reversion."[175] Based on this, the court reasoned "when the mortgage is not forfeited, [the lender's]

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169 *Id.*

170 *Id.*

171 *E.g.*, BRE, Inc. v. Superior Block & Supply Co., CV 95380707, 1997 Conn. Super. LEXIS 2783, at *8 (Super. Ct. Oct. 17, 1997) ("The mortgagee has title and ownership enough to make his security available, but for substantially all other purposes he is not regarded as owner . . . .").

172 Harris v. Bannon, 78 Ky. 568, 570 (1880).

173 Peterson v. Clark, 15 Johns. 205, 207 (N.Y. Sup. Ct. 1818).

174 *Id.*

175 *Id.*

interest in the land is contingent, and may be defeated by payment of the money secured by the mortgage."[176]

Other states find possession less persuasive. Massachusetts holds that "it has long been settled in this commonwealth that as to all the world except the mortgagee the mortgagor is the owner of the mortgaged lands at least until the mortgagee has entered for possession."[177] Yet the court finds:

> Whether the mortgagee is in possession of the mortgaged premises or not, or whether his right to possession begins only with the breach of condition and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name for injury to it.[178]

The court's reasoning is that "[s]uch right of action is founded not upon the right to present possession, but on title to the estate."[179] Notably, Massachusetts concludes that there does not even have to be inadequate security: "He may maintain such an action, although his is a junior mortgage and although the security remains ample for his protection. He has a right to his security unimpaired."[180] The court concludes that possession is quite irrelevant in the mortgage context: "An action for such injury lies as well against the mortgagor, although rightfully in possession. The mortgagor is liable to the mortgagee for waste."[181]

Similarly, found itself faced with the question of whether possession mattered when it found that there was no clear answer under state law.[182] The court reasoned that "it is the majority view in the United States that

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176 *Id.*

177 Delano v. Smith, 92 N.E. 500, 501 (Mass. 1910) (quoting Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315 (1880)).

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 Genesco Inc. v. Monumental Life Ins. Co., 577 F. Supp. 72, 84–85 (D.S.C. 1983) ("Where there is no legislative or judicial pronouncement on a question of state law, a federal court under *Erie* must respond to the novel question as it believes the state judiciary would under the identical circumstances using the state decision making processes.").

a mortgagee may maintain an action for waste prior to a default in the mortgage covenants or the commencement of a foreclosure action."[183] The court found the lien versus title question not particularly relevant:

> This is true whether the mortgagee has fee title to, or merely a lien upon, the mortgaged premises because "a mortgage is everywhere considered as passing the title to land, so far as may be necessary for the protection of the mortgagee, and to give him the full benefit of his security."[184]

III. BANKRUPTCY LAW AND LENDER WASTE CLAIMS

This Part focuses on what happens when judgments from lender waste claims flow into the bankruptcy courts and the unique problems that arise in these circumstances. In particular, this Part focuses on discharge and constitutional concerns arising from the potential inability to discharge waste claims in bankruptcy.

A. *Bankruptcy and Residential Mortgages*

In theory, the "Bankruptcy Code supports home ownership."[185] We would expect this, given that home ownership is generally considered a preferable social goal.[186] Scholars have argued a variety of reasons to prefer home ownership, most falling into these three primary categories: "(1) it builds household wealth and economic self-sufficiency; (2) it generates positive social-psychological states; and (3) it fosters stable neighborhoods and communities."[187] Property theorists have long

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183 *Id.* at 84 (citing Hummer v. R.C. Huffman Const. Co., 63 F.2d 372 (7th Cir. 1933); Arnold v. Broad, 62 P. 577 (Colo. App. 1900)); W.R. Inv. Co. v. Edwards Supply Co., 24 N.E.2d 518 (Mass. 1939); *Delano*, 92 N.E. 500; Syracuse Sav. Bank v. Onondaga Silk Co., 14 N.Y.S.2d 356 (App. Div. 1939); Garliner v. Glicken, 196 N.Y.S.2d 784 (Spec. Term 1960)).

184 *Genesco Inc.*, 557 F. Supp. at 84 (quoting Waterman v. Mackenzie, 138 U.S. 252, 258–59 (1891)).

185 Salta Grp., Inc. v. McKinney, 380 B.R. 515, 524 (C.D. Ill. 2008).

186 *Id.* ("Home ownership is a highly desirable societal policy, which the federal government supports.").

187 Jacoby, *supra* note 23, at 2262.

recognized an American obsession with home ownership and the role that it plays in wealth building within American society.[188] Unsurprisingly, research suggests that home ownership is the best predictor of middle class status.[189] Bankruptcy law respects these social commitments. As one district court judge recently observed, interpreting bankruptcy law requires recognizing "[h]ome ownership and job preservation [as] social goals to which Congress has been committed for decades in numerous statutes."[190]

Yet, recent evidence suggests that the bankruptcy system does not offer substantial opportunities for salvaging home ownership. Recent empirical work has demonstrated that "in the majority of cases, the bankruptcy system is incapable of saving homes," principally because current provisions of the bankruptcy code ensure that "an upside-down first mortgage cannot be reduced."[191] In short, borrowers will lose homes when the market value has dropped substantially, because courts will not reduce the loan to the market value.[192]

The best that can be said for bankruptcy and home ownership is that bankruptcy provides an opportunity to eliminate personal liability for a past mortgage because such claims are dischargeable. After discharging a deficiency judgment, it is possible that a debtor may be rehabilitated such that home ownership would be possible in the future.

Waste law, however, frustrates these protections. Using property and tort law, waste claims open the door to judgments that follow a borrower after foreclosure and bankruptcy.

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188 *See* Joan C. Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326 (1998) (giving an account of American emphasis on home ownership in public rhetoric and noting the wealth accumulation function).

189 Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 146 (2007). *But see* Ernesto A. Longa & Nathalie Martin, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 LOY. CONSUMER L. REV. 524, 538 (2012) (finding that home ownership is the second predictor of middle class status).

190 *In re* Clemons, 404 B.R. 577, 583 (N.D. Ga. 2006).

191 *See* Gendler, *supra* note 21 and accompanying text. Most of these will be middle class homes; recent empirical studies demonstrate that filing for bankruptcy "is a middle-class phenomenon." Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 119, 127–44 (2003).

192 Gendler, *supra* note 21, at 331.

B. *Bankruptcy and the Fresh Start*

The key purpose of the bankruptcy system for individuals is to provide a "fresh start" to the debtor.[193] The "fresh start" language dates to a 1904 Supreme Court case and the general concept can be found as early as 1877.[194] Currently conditions already reduce the potential for that fresh start: recent research shows that people are waiting longer to file bankruptcy, even though the delay means that they are less likely to have a fresh start on the other side of bankruptcy.[195] Additionally, the time spent struggling before filing bankruptcy reduces overall wealth and well-being, further diminishing their chances of that fresh start.[196] Waste law exacerbates this situation, because waste claims follow borrowers in ways that a mortgage balance cannot. Waste claims create a personal judgment where state mortgage law prevents personal deficiency judgments on residences, and, because fixtures are willfully removed, waste claims will be non-dischargeable in bankruptcy.[197]

This Article argues that many lender waste claims will frustrate borrower protections in mortgage law, as well as the debtor's right to a fresh start. The scope of dischargeability is directly related to how the debtor will fare in rebuilding financial security after a bankruptcy—i.e. how much of a fresh start the debtor will have.[198]

C. *Constitutional Concerns: Waste, Bankruptcy, and Peonage*

Continuing payment obligations arising from waste judgments also create constitutional problems due to the loss of future earnings to pay a creditor. Scholars have repeatedly argued that circumstances requiring a creditor to be repaid with future earnings may create a constitutional

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193 Howard, *supra* note 24.

194 *Id.*

195 Foohey et al., *supra* note 8, at 223.

196 *Id.* at 221.

197 The Bankruptcy Code exempts from discharge those debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (2018).

198 Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 61–89 (1990).

problem of peonage, or separation of a person from their labor in a way that resembles involuntary servitude.[199] Renowned bankruptcy scholar, Margaret Howard, argued the 2005 amendments to the Bankruptcy Code, which allowed creditors to potentially reach a debtor's future income, created "genuine constitutional difficulties under the Thirteenth Amendment."[200]

Waste claims by lenders, this Article argues, create the same types of concerns by targeting income that postdates a foreclosure and/or bankruptcy. The role of waste in creating peonage is particularly important in light of studies that have demonstrated that subprime and predatory lenders particularly targeted blacks. Carol Brown, who has conducted empirical research on race and lending, concluded that "black borrowers are disproportionately victims of subprime mortgages."[201] While some argued that subprime lending opened up homeownership to more people, including more minority families, Brown points to studies by the Center for Responsible Lending, which has found that subprime lending over a period of nine years resulted in more foreclosures than more new first-time homeowners and that this "holds especially true for African-American and Latino borrowers."[202] The Center also estimated that for the year of 2005, there would be an estimated 84,000 more foreclosures than first-time homeowners among African Americans and Latinos. Moreover, evidence showed that lenders knew they were extending inferior products to clients who qualified for better.[203] Specifically, Brown explained "that one half of all subprime borrowers

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199 *See e.g.*, Gross, *supra* note 31 (explaining bankruptcy would enslave debtors to creditors "[i]f we required individual debtors with no assets to repay their creditors out of future earnings," because this would separate the person from their labor); Howard, *supra* note 18 (arguing that the Bankruptcy Code amendments of 2005 realized Thirteenth Amendment constitutional difficulties that had been speculative for decades); Sterk, *supra* note 31 (discussing whether and how human capital is exempt from creditor claims when compared to other types of property).

200 Howard, *supra* note 18, at 191.

201 Brown, *supra* note 19.

202 *Id.* at 913 n.24.

203 *Id.* at 913. Notably, Professor Cecil Hunt has argued for additional penalties in similar circumstances. Cecil J. Hunt II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211 (2003).

actually qualified for conventional financing, a disproportionate number of which were black borrowers."[204]

Indeed, in a landmark case, the City of Miami sued Bank of America and Wells Fargo, bringing complaints under the Fair Housing Act (FHA), alleging that the lenders "intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers."[205] The banks challenged the City's standing as an "aggrieved person" under the statute.[206] Focusing on the breadth of the statute, the Supreme Court concluded that the City successfully met the standard and thus had standing under the FHA.[207] A number of additional jurisdictions have now brought similar claims, alleging discriminatory mortgage practices that targeted blacks and Latinos for riskier mortgages.[208] Furthermore, evidence demonstrates that on the whole, "minority borrowers pay more on average for mortgages than non-minorities."[209]

If the racial composition of the class of subprime borrowers is consistent in lender waste cases, then more waste judgments would also fall disproportionately on blacks. This means that after being subjected to discriminatory lending practices that target blacks for subprime mortgages when they qualified for better products, black borrowers

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204 Brown, *supra* note 19, at 913. Such discriminatory practices are not limited to the mortgage context. *See* Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (2017) (addressing the credit industry and racism); *see also* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447 (2018) (engaging systemic inequality and exclusion in the context of basic necessities, including housing).

205 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1299–301 (2017).

206 *Id.* at 1300.

207 *Id.* at 1301. The Court vacated the lower court's judgment and remanded for further proceedings, specifically to determine the proximate cause standard that should be applied. *Id.*

208 Cty. of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950 (N.D. Ill. 2018); City of Oakland v. Wells Fargo Bank, N.A., No. 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915 (N.D. Ca. June 15, 2018); City of Philadelphia v. Wells Fargo & Co., No. 17-2203, 2018 U.S. Dist. LEXIS 6443 (E.D. Pa. Jan. 16, 2018). For further discussion of such cases (including a list of pending unreported cases) and the social impacts of cities as plaintiffs, see Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227 (2018).

209 Kevin A. Clarke & Lawrence S. Rothenberg, *Mortgage Pricing and Race: Evidence from the Northeast*, 20 AM. L. & ECON. REV. 138, 138 (2018).

would also be trapped paying future earnings to those lenders due to waste judgments that could not be discharged.

D. *Waste, Tort Judgments, and Discharge of Debts in Bankruptcy*

Bankruptcy law marks few claims as non-dischargeable, because such continuing debts jeopardize the key purpose of bankruptcy law in providing a fresh start. Bankruptcy cases, legislative histories, and scholarly work document how carefully those choices are made and how those choices represent important social policies.[210] Tort claims are one of the few non-dischargeable debts, but not all tort claims survive bankruptcy—only those that include "willful and malicious" acts.[211] There are good reasons for tort claims to be non-dischargeable, because otherwise bankruptcy could provide a convenient escape for intentional tortfeasors.[212] Such restrictions on discharge become all the more important given that tort law ordinarily provides a variety of key social functions, including securing private duties for human rights within the domestic context.[213] Understandably, Congress has chosen to secure some torts judgments past bankruptcy.

This protection, however, was limited to those torts judgments that reflect "willful and malicious" injuries. Courts apply this as a single

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[210] Howard, *supra* note 24, at 1047–48 (tracing the various policy justifications behind the choices between discharge and non-discharge of debts in bankruptcy, then articulating a functional and economic approach to coherently integrating the multiple policy concerns to create a central theory of discharge).

[211] *Id.* at 1051.

[212] *Id.* at 1049 (explaining the concern that bankruptcy law could become "a shelter for debtors who have engaged in dishonesty or in culpable disregard for the rights of other persons").

[213] Recent scholarly work draws attention to the key role of torts in protecting individual human rights in a variety of important circumstances and ensuring a civil remedy for victims. *See* Laplante, *supra* note 30 (arguing that a variety of different types of tort cases work to secure human rights and provide remedies to individuals). Other scholars have similarly considered the role of private law in securing human rights. *See, e.g.*, Knox, *supra* note 30 (considering what private duties may exist under human rights law); Miller, *supra* note 30 (describing human rights as tort harms in the context of the Alien Tort Statute); Paust, *supra* note 30 (examining private, rather than state, duties to comply with human rights law and potential private enforcement of those claims); Thomas & Beasley, *supra* note 30 (examining responses to domestic violence through a human rights lens).

standard that may be proven either via subjective intent or via "objective substantial certainty of harm."[214] Waste claims, possibly even permissive waste claims, will meet this standard, because the reasonable person understands that removing a fixture or failing to repair the falling porch will harm the property. As a result, waste claims are likely to be non-dischargeable under the "willful and malicious" standard as it has been interpreted.

Waste claims may be, in some cases, comparable to gambling cases. When borrowers sell fixtures from a home, such as appliances, the borrowers may be sending this money directly to the lender as a mortgage payment or otherwise applying it in their lives in a hope to avoid both foreclosure and bankruptcy. In other words, borrowers may be gambling on their ability to pull themselves out of their financial crisis in the future. In such cases, it may be more difficult to establish the intent of the borrower to commit fraud. Some cases suggest that courts have been sympathetic to the subjective beliefs of borrowers, although concerned with the rationality of the beliefs.[215] A homeowner who believes their circumstances may look up may, indeed, be more reasonable in such beliefs than the gambler. A court could conclude, as one district court did in a gambling case, that, "many would consider her foolish, or that she made significant financial miscalculations, [but that] does not make her guilty of fraud."[216]

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214 Jonathon S. Byington, *Debtor Malice*, 79 OHIO ST. L.J. 1023, 1048 (2018).

215 *See* Rembert v. AT&T Universal Card Servs., Inc. (*In re* Rembert), 141 F.3d 277, 282 (6th Cir. 1998) (describing the court's views as "not unsympathetic" to a gambling debtor's intent to repay but casting doubt on the realistic nature of that intent); *cf.* AT&T Universal Card Servs. v. Baker, 205 F.3d 1332, *1 (4th Cir. 2000) (unpublished table decision) ("It is easy to second-guess [the debtor's] choices in hind-sight, but there is a difference between optimism and recklessness." (citing *In re Rembert*, 141 F.3d at 282)). In *Barclays American/Business Credit, Inc. v. Long*, the court described a business reorganization effort, which may well have been a long shot, but "not necessarily a sham or hopeless from the beginning." Based on that, the court was willing to rely on the debtor's intent to benefit himself and others by risking money to try to re-establish the business. It might not have been good judgment under the circumstances, but the court could not find that the debtor was "intending or fully expecting to harm the economic interests of the creditor." The court concluded, "knowledge that legal rights are being violated is insufficient to establish malice, absent some additional 'aggravated circumstances.'" Barclays Am./Bus. Credit, Inc. v. Long (*In re* Long), 774 F.2d 875, 881–82 (8th Cir. 1985) (citation omitted).

216 *In re Rembert*, 141 F.3d at 282; *see also* Chevy Chase Bank, FSB v. Briese (*In re* Briese), 196 B.R. 440, 453 (Bankr. W.D. Wis. 1996) (internal quotation marks omitted) (citation omitted) (finding that the debtor "had an honest, if questionable and undoubtedly foolish, belief that she

I suggest waste cases should be treated more favorably than gambling cases in some circumstances. One reason for selling home fixtures is to acquire temporary cash, which may be used to pay the mortgage itself and thus postpone the possibility of foreclosure and/or bankruptcy. In such a situation, the lender has already obtained the money from the fixtures. Additionally, the homeowner was gambling on the possibility of better times—the possibility of avoiding a foreclosure and keeping the home. Given the special status of home ownership and its direct link to economic well-being of the family, it would be unfortunate to discourage the attempt to maintain the home if that is the family goal.

E. *Resolving the Circuit Split in the Waste Context: Interpreting the Bankruptcy Tort Claim Discharge in the Context of a Lender Waste Action*

Torts judgments might not be dischargeable as debts in bankruptcy proceedings.[217] Judgments arising from torts that were "willful and malicious" are not dischargeable.[218] The rationale behind the "willful and malicious" rule is that the debtor should not be able to discharge a debt that arose from his wrongful conduct.[219]

After years of debate over the correct interpretation of the intent requirement,[220] the U.S. Supreme Court addressed the "willful and

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could win enough to pay her debts"). *But see* AT&T Universal Card Servs. v. Mercer (*In re* Mercer), 246 F.3d 391 (5th Cir. 2001) (en banc) (finding that "*hoping* to win is *not* synonymous with *intending* to pay").

[217] 11 U.S.C. § 523(a)(6) (2018).

[218] *Id.*

[219] Turbo Aleae Invs. v. Borschow (*In re* Borschow), 467 B.R. 410, 417 (Bankr. W.D. Tex. 2012).

[220] *See* Tabb, *supra* note 198 (describing the standard as dating to 1898 but continuing to provide scholars with plenty to debate over a hundred years later); Karen N. Fischer, Comment, *The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice*, 7 BANKR. DEV. J. 245, 248–59 (1990) (examining the options for interpretation of the willful and malicious provision).

malicious" standard in *Kawaauhau v. Geiger*.[221] In *Kawaauhau*, the Court considered whether a medical malpractice judgment would be dischargeable given that it results from conduct that is negligent or reckless.[222] The Eighth Circuit, rehearing the case en banc, found that the important question is whether the judgment comes from an intentional tort or not.[223]

The Supreme Court affirmed.[224] The Supreme Court accepted the Eighth Circuit's alignment of the "willful and malicious" standard with the traditional standard for an intentional tort: "that the actor intend 'the consequences of an act,' not simply 'the act itself.'"[225] The Court revisited an earlier case, *Tinker v. Colwell*,[226] which had set the standard for tort dischargeability, and reasoned that the outcome in *Tinker* depended on the finding that the debtor had acted in criminal trespass, which sounded as an intentional tort.[227]

The Court concluded judgments arising from negligently or recklessly inflicted injuries could be discharged.[228] The Court interpreted the "willful and malicious" exclusion to apply only to "acts done with the actual intent to cause injury."[229] The Court noted that this distinguished intentional acts that merely happen to cause injury.[230] The Court reasoned that the provision refers to "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury."[231] The Court avoided including "situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor."[232] The Court avoided a broader construction of the exemption

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221 Kawaauhau v. Geiger, 523 U.S. 57 (1998).

222 *Id.* at 59.

223 *Id.* at 60 (citing Geiger v. Kawaauhau (*In re* Geiger), 113 F.3d 848, 852 (8th Cir. 1997)).

224 *Id.*

225 *Id.* at 61–62 (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (AM. LAW INST. 1965)) (emphasis omitted).

226 Tinker v. Colwell, 193 U.S. 473 (1904).

227 *Kawaauhau*, 523 U.S. at 63.

228 *Id.* at 59.

229 *Id.* at 61.

230 *Id.*

231 *Id.*

232 *Id.*

from discharge, reasoning that exceptions to discharge should be "confined to those plainly expressed."[233] A broader construction, the Court noted, could reach to a "'knowing breach of contract.'"[234]

Historically, the lower courts interpreted the "willful and malicious" standard through the *Tinker* language of actions that were "without just cause or excuse."[235] *Kawaauhau* displaced this standard, noting that the reasoning behind it was "less than crystalline."[236] Unfortunately, the same can be said of *Kawaauhau*, as there is still not a clear consensus.

Indeed, the circuits have split over two different questions: (1) Did *Kawaauhau* address only one part of the willful and malicious standard or did the Court, in fact, collapse the two into a single standard? (2) Did *Kawaauhau* create a "totally 'subjective' standard which relates solely to the internal workings of the debtor's mind," or a more objective one?[237]

The Third Circuit has not revisited the issue of tort discharge since the *Kawaauhau* decision. With that said, the courts of that circuit adhere to a Third Circuit standard that pre-dates *Kawaauhau*. The Third Circuit adopted the more objective approach, defining an action as "willful and malicious . . . 'if they either have a purpose of producing injury or have a substantial certainty of producing injury.'"[238]

Courts within the Fourth Circuit find that there is not a clear position.[239] There is some evidence to suggest that the circuit court of Appeals would adopt the subjective analysis, but the evidence is limited to a comment without further discussion or cite to a precedent on either side of the subjective/objective divide.[240] Additionally, the brief comment is less persuasive in light of an earlier unpublished opinion that suggests

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[233] *Id.* at 62 (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915)).

[234] *Id.* (quoting Geiger v. Kawaauhau (*In re* Geiger), 113 F.3d 848, 852 (8th Cir. 1997)).

[235] Tinker v. Colwell, 193 U.S. 473, 485–86 (1904) (quoting Bromage v. Prosser (1825), 107 Eng. Rep. 1051 (K.B.)).

[236] *Kawaauhau*, 523 U.S. at 63.

[237] *See* Bank Calumet v. Whiters (*In re* Whiters), 337 B.R. 326, 341 (Bankr. N.D. Ind. 2006) (discussing the various splits that have developed after *Kawaauhau*).

[238] Heer v. Scott (*In re* Scott), 294 B.R. 620, 632 (Bankr. W.D. Pa. 2003) (quoting Conte v. Gautam (*In re* Conte), 33 F.3d 303, 307 (3d Cir. 1994)).

[239] Millsaps v. Yates (*In re* Yates), No. 05-50969, 2007 Bankr. LEXIS 1614, at *16 (Bankr. W.D.N.C. Feb. 6, 2007).

[240] *Id.* at *17 (citing Duncan v. Duncan (*In re* Duncan), 448 F.3d 725, 729 (4th Cir. 2006)).

the Fourth Circuit is following the divided subjective intent or "substantial certainty" model.[241]

The Fifth Circuit found that *Kawaauhau* did not entirely distinguish between "torts substantially certain or certain to result in injury" and those "when a tortfeasor was merely indifferent to the injury and not acting with the end goal of causing that injury."[242] To not cover the second circumstance would be to adopt what is known as the "special malice" approach.[243] The Fifth Circuit refused to do so, finding that "it would make nondischargeability unnecessarily rare."[244] The Fifth Circuit held that "for a debt to be nondischargeable, a debtor must have acted with 'objective substantial certainty or subjective motive' to inflict injury."[245]

The Fifth Circuit has concluded:

> [*Kawaauhau*] never makes explicit whether it is analyzing solely the "willful" prong or the "willful and malicious" standard as a unit. Aggregating "willful and malicious" into a unitary concept might be inappropriate if the word they modified were "act," but treatment of the phrase as a collective concept is sensible given the Supreme Court's emphasis on the fact that the word they modify is "injury."[246]

With that said, the Fifth Circuit itself seems to have created a unitary standard: "[T]he term 'willful and malicious injury' is a single, unitary concept that is determined by a two-pronged test, namely, that 'an injury is "willful and malicious" where there is either an objective substantial certainty of harm or a subjective motive to cause harm.'"[247] The Fifth Circuit has clarified that it is not sufficient for the debtor to simply commit "a willful or knowing act."[248]

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241 *Id.* at *17–18 (citing Parsons v. Parks (*In re* Parks), 91 F. App'x 817, 819 (4th Cir. 2003)).

242 Miller v. J.D. Abrams Inc. (*In re* Miller), 156 F.3d 598, 605 (5th Cir. 1998).

243 *Id.*

244 *Id.*

245 Williams v. IBEW Local 520 (*In re* Williams), 337 F.3d 504, 508–09 (5th Cir. 2003) (quoting *In re Miller*, 156 F.3d at 603).

246 *In re Miller*, 156 F.3d at 606.

247 Se. Prop. Holdings, LLC v. Green (*In re* Green), No. 17-10058, 2018 Bankr. LEXIS 2050, at *8–9 (Bankr. M.D. La. July 6, 2018) (quoting *In re Miller*, 156 F.3d at 606).

248 *In re Williams*, 337 F.3d at 509.

The Sixth Circuit has adopted the dual approach of considering either specific intent for the consequences or the more objective substantial certainty that those consequences will occur.[249] Thus, the standard is satisfied by either subjective or objective evidence of intent.[250]

The Seventh Circuit found that "malicious" refers to the "conscious disregard of one's duties."[251] The court further concluded that this standard does not refer to "ill-will or specific intent to do harm."[252] The Seventh Circuit's definition focuses on the word "malicious," rather than "willful." And when courts interpret the Supreme Court's decision in *Kawaauhau* as only interpreting the term "willful," then the courts find that the Supreme Court did not overrule their more objective take on the discharge exemption.[253] Thus, the Seventh Circuit continues after *Kawaauhau* to use the more objective approach.

The Ninth Circuit found that the Supreme Court "did not specify what level of intent is necessary to satisfy the requirement that there be a 'deliberate or intentional injury.'"[254] Part of the problem, the Ninth Circuit explained, is that the Court referred to the Restatement (Second) of Torts, which itself is not clear.[255] The Restatement's primary text speaks of intent as though "the actor desires to cause consequences of his act," but the comment includes the situation where the "actor knows or is substantially certain that the consequences will result from his act and continues despite this knowledge."[256] Noting the dual possibility that arises from the Restatement approach, the Ninth Circuit also accepted this subjective or objective approach.[257]

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249 Markowitz v. Campbell (*In re* Markowitz), 190 F.3d 455, 464 (6th Cir. 1999).

250 *Id.*

251 *In re* Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994) (quoting Wheeler v. Laudani, 783 F.2d 610, 615 (6th Cir. 1986)).

252 *Id.* at 700–01.

253 Bank Calumet v. Whiters (*In re* Whiters), 337 B.R. 326, 344 (Bankr. N.D. Ind. 2006) (explaining how older precedents continue to be interpreted as valid); *see also* Heer v. Scott (*In re* Scott), 294 B.R. 620, 632 (Bankr. W.D. Pa. 2003) (noting that the Third Circuit standard "seems to retain its vitality even though it pre-dates Geiger [sic]").

254 Baldwin v. Kilpatrick (*In re* Baldwin), 245 B.R. 131, 135 (9th Cir. 2000).

255 *Id.*

256 *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (AM. LAW INST. 1965)).

257 *Id.* at 136.

Rejecting the dual subjective/objective approach of the Sixth, Seventh, and Ninth Circuits, the Tenth Circuit finds that *Kawaauhau* demands a subjective finding that "turns on the state of mind of the debtor."[258] In this circuit, the debtor "must have wished to cause injury or at least believed it was substantially certain to occur."[259]

Bankruptcy cases often involve allegations that a debtor acted intentionally to deprive a creditor of a security interest.[260] In many instances, waste acts, such as failing to make repairs or removing fixtures, will occur because the debtor is in desperate financial straits. Unsurprisingly, in many of these circumstances, the debtor is, in fact, trying to continue to keep the property and avoid foreclosure on the family's primary residence. Recent evidence about bankruptcy filings suggests that many families struggle for more than two years before filing and during that time may not only sell off all potential assets, but also go without basic necessities to try to avoid bankruptcy.[261] In such circumstances, the lost value of fixtures may well have already been given to the lender in the form of a monthly payment.

In the context of waste actions, I suggest that the odd nature of waste as both voluntary and involuntary will almost certainly cause problems for bankruptcy courts. Even if the trial court record correctly specifies the type of waste, the trial court's opinion may not provide sufficient information for a bankruptcy court to know very clearly whether a debtor's actions could be described as willful or malicious.

Additionally, I suggest that in the context of waste actions, those circuits applying an objective standard are likely to find that waste claims cannot be discharged. In selling a fixture, the debtor is substantially certain of a drop in value of the property, but the debtor is essentially gambling on the ability to replace that fixture when they recover financial stability. In light of these types of situations, this Article proposes that in waste cases, the injury or harm should be interpreted as intentional only when the intent is to deprive the lender of the value of the fixture by acting

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258 Via Christi Reg'l Med. Ctr. v. Englehart (*In re* Englehart), No. 99-3339, 2000 U.S. App. LEXIS 22754, at *9 (10th Cir. Sept. 8, 2000).

259 *Id.*

260 *See, e.g.*, Countrywide Home Loans, Inc. v. Cowin (*In re* Cowin), 492 B.R. 858 (S.D. Tex. 2013) (alleging a conspiracy to deprive the creditor of a security interest).

261 *See* Foohey et al., *supra* note 8, at 221, 242–43.

maliciously. In other words, taking an axe to the bathtub is intentionally acting to harm the lender; selling a chandelier while trying to make house payments and get another job is not. Applying a more subjective standard of intending to harm the lender (as opposed to essentially gambling the value of the fixture on future financial stability) would not penalize borrowers for trying to make a recovery without going into bankruptcy. Moreover, this approach would maintain the fresh start for those honestly struggling borrowers on the other side of bankruptcy.

IV. PROPERTY LAW AND HARDSHIPS OF WASTE LAW FOR BORROWERS

The evolution of waste law to include the mortgage context has the potential to create serious impacts for borrowers due to the way that some historical doctrines of waste play out in this specific context. In particular, waste law doctrines could work hardships for borrowers because of the doctrine of permissive waste, the potential availability of extraordinary remedies, the problem of measuring damages in the mortgage context, and the possibility of duplicative recovery or circumventing anti-deficiency statutes. This Part addresses each aspect of waste law and how it may impact borrowers specifically based on existing precedents and continued confusion about the state of the law. Additionally, this part also reflects on how the use of waste law in the mortgage context does not fit with current approaches to property theory.

A. *Permissive Waste*

Traditionally, common law courts distinguished between voluntary and permissive waste. Permissive waste was not always considered sufficient to sustain a claim for waste.[262] Permissive waste arises not through malicious actions,[263] but instead through some omission or

[262] *See* Leipziger, *supra* note 12, at 1093–94, 1130–32 (concluding that in the common law there was originally no liability for permissive waste or waste caused only by negligence).

[263] This is to be contrasted with active or voluntary waste which instead requires an affirmative act, causing destruction or alteration of the property. *See* Jowdy v. Guerin, 457 P.2d 745, 748 (Ariz. Ct. App. 1969).

failure to act in a timely fashion.[264] Omissions might be related to maintenance not undertaken, but also might include the non-payment of taxes.[265]

Permissive waste is particularly interesting in the context of mortgages because borrowers who are economically struggling may be unable to afford routine maintenance on the home, or may, at a minimum, delay such maintenance. Early on, some courts specifically refused to allow permissive waste claims against mortgagors, at least unless the contract provided such rights independently of the tort. In New Jersey, for example, "[u]nless it constitutes a breach of duty arising out of contract, the unassuming grantee of mortgaged lands is not liable to the mortgagee for permissive waste, even though the mortgage security is thereby rendered insufficient."[266] Some jurisdictions also continue to refuse permissive waste cases in the mortgage context. For example, the Wisconsin Court of Appeals refused to find that "the nonpayment of real estate taxes and mortgage interest" would sustain a cause of action for waste.[267]

Notably, however, in some jurisdictions permissive waste is likely to be routinely (and, perhaps, unthinkingly) covered exactly as voluntary waste is simply because the jurisdiction does not distinguish between the two any longer. In such jurisdictions, all types of waste are treated identically. For example, the Wisconsin Court of Appeals concluded that "[m]odern Wisconsin law does not distinguish between passive and active waste."[268] As a result, in the context of mortgages, the court "conclude[d] that the modern waste definition is broad enough in Wisconsin to include both active and passive waste."[269] The court's

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264 MINOR & WURTS, *supra* note 11, §§ 380, 386. Formally defined, "[p]ermissive waste implies negligence or omission to do that which will prevent injury, as, for instance, to suffer a house to go to decay for want of repair or to deteriorate from neglect." *Jowdy*, 457 P.2d at 748–49 (quoting Graffell v. Honeysuckle, 191 P.2d 858, 863 (Wash. 1948)).

265 *See*, *e.g.*, First Nat'l Bank v. Clark & Lund Boat Co., 229 N.W.2d 221, 223 (Wis. 1975) (finding waste liability for failure to pay taxes).

266 Camden Tr. Co. v. Handle, 26 A.2d 865, 867 (N.J. 1942).

267 Chetek State Bank v. Barberg, 489 N.W.2d 385, 387 (Wis. Ct. App. 1992).

268 Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl, Inc., 404 N.W.2d 109, 113 (Wis. Ct. App. 1987).

269 *Id.*

reasoning was, "[c]onduct which results either in active or passive waste 'may injure or threaten property rendering the debt unsafe.'"[270] As a result, the court concluded, "[c]onsequently, the mortgagee's security may be impaired by either passive or active waste and the policy for allowing the mortgagee recovery is the same regardless of the type of waste involved."[271]

A number of other courts follow Wisconsin's position. California, similarly, does not distinguish between active and passive in the context of waste law.[272] The courts define waste as "conduct, by both commission and omission, on the part of the person in possession of the property which impairs the value of the lender's security."[273] In New Jersey, the courts concluded that "a mortgagor in possession is liable to a mortgagee for permissive waste which diminishes the mortgagee's security, and renders it insufficient."[274] New York's rules appear also to include permissive waste, requiring no "physical damage" to the property, and find sufficient just "impairment of the security of the mortgage."[275]

Some jurisdictions specifically include nonpayment of taxes as covered instances of permissive waste. Notably, in California, even while waste may be limited to instances of "bad faith," the courts are willing to consider whether, in the circumstances, the nonpayment of taxes is done in bad faith.[276] Michigan also covers nonpayment of taxes and

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270 *Id.* (quoting Finley v. Chain, 374 N.E.2d 67, 79 (Ind. Ct. App. 1978)).

271 *Prudential Ins. Co. of Am.*, 404 N.W.2d at 113.

272 D.A.N. Joint Venture v. Binafard, No. 97-55778, 1999 U.S. App. LEXIS 2626, at *2–4 (9th Cir. Feb. 18, 1999).

273 *Id.* at *3 (quoting Evans v. Cal. Trailer Court, Inc., 33 Cal. Rptr. 2d 646, 652 (Ct. App. 1994)). California does, however, qualify this position by providing a defense to a bad faith waste action (which would circumvent the anti-deficiency statutes), where "the failure to maintain the real property was the result of economic necessity." *Id.* at *4.

274 Camden Tr. Co. v. Handle, 21 A.2d 354, 358–59 (N.J. Ch. 1941), *rev'd*, 26 A.2d 865 (N.J. 1942).

275 Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 120–21 (2d Cir. 1994).

276 Nippon Credit Bank, Ltd. v. 1333 N. Cal. Boulevard, 103 Cal. Rptr. 2d 421, 427–28 (Ct. App. 2001). Notably, in this case the borrowers argued against considering passive, nonpayment of taxes as bad faith waste. The borrowers argued that such a holding "'converts' conduct which is only a breach of contract into a tort." *Id.* at 428. The court found this argument "unconvincing," noting that "[t]ax policy and tort law are separate fields." The court reasoned, "[t]hat the state has chosen not to impose personal liability on property owners for real property taxes says nothing about owners' liability to other persons for the tort of waste." The court noted that waste generally "protected lenders from '*any act* which will substantially impair' their real property

insurance.[277] Wyoming follows the same rule,[278] as does Washington,[279] Nebraska,[280] and Wisconsin.[281]

Additionally, the Restatement has provided support for the jurisdictions that allow liability for permissive waste in the mortgage context. The Restatement says that waste occurs when there is damage that reduces value, "whether negligently or intentionally."[282] Additionally, the Restatement specifically includes situations where the mortgagor "fails to maintain and repair the real estate in a reasonable manner, except for repair of casualty damage or acts of third parties not the fault of the mortgagor."[283] The Restatement then expands this duty to fit with the mortgage contract provisions as well, suggesting that there is waste where the mortgagor "materially fails to comply with covenants in the mortgage respecting the physical care, maintenance, construction, demolition, or insurance against casualty of the real estate or improvements on it."[284] Finally, the Restatement addresses the issue of tax payments, finding that there is waste if the mortgagor "fails to pay before delinquency property taxes or governmental assessments secured by a lien having priority over the mortgage."[285]

Not all commentators, however, would agree with the Restatement approach. Christopher Tiedeman on *The American Law of Real Property* concludes instead that, "a mortgagor is not guilty of waste, on account of

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security." The court then found that such a rule "can properly be extended to nonpayment of real property taxes regardless of whether the omission also creates tax or contract liability." *Id.* at 429.

277 *See* Nusbaum v. Shapero, 228 N.W. 785, 789 (Mich. 1930) (failing to pay real estate taxes and insurance is waste).

278 *See* Grieve v. Huber, 266 P. 128, 134 (Wyo. 1928) (finding that "delinquent taxes and unpaid interest" are sufficient to constitute waste).

279 *See* Newman v. Van Nortwick, 164 P. 61, 62 (Wash. 1917) (holding that nonpayment of taxes is waste).

280 Phila. Mtg. & Tr. Co. v. Goos, 66 N.W. 843, 846 (Neb. 1896) (finding that delinquent taxes and unpaid interest constitute waste).

281 Schreiber v. Carey, 4 N.W. 124, 132 (Wis. 1880) (finding nonpayment of taxes or interest to be waste).

282 RESTATEMENT (THIRD) OF PROP.: MORTGS. § 4.6 (AM. LAW INST. 1997).

283 *Id.*

284 *Id.*

285 *Id.*

acts of omission. In the absence of an express covenant to repair, he is not guilty of waste, as against the mortgagee, if he fails to keep the premises in repair."[286]

Some courts, similarly, hesitate in treating permissive waste together with voluntary waste. The Supreme Court of North Dakota limited waste to more voluntary acts, concluding, "[w]aste implies neglect or misconduct resulting in material damage to property, but does not include ordinary depreciation of property due to age and normal use."[287]

Some jurisdictions specifically refuse to consider permissive waste claims based on the nonpayment of taxes. Wisconsin, for example, concluded that "nonpayment of interest and real estate taxes is not the type of physical damage necessary to a cause of action for tortious waste."[288]

B. *Problems of Remedies: Extraordinary Remedies Available for Waste*

The law of waste often provides rather extraordinary remedies for plaintiffs. The reasoning behind this was that the current possessor of the property was often someone who had a very limited claim to the estate (such as a life estate), while the plaintiff would have a much longer and more permanent interest (the reversion). In such circumstances, essentially punitive measures were necessary to ensure the safety of the estate when the current possessor might have every motivation to deplete the estate and no motivation to protect it for the future. As a result, the rule evolved that a life tenant would not only be liable for damages, but also would "forfeit 'the thing that he hath wasted,' and also pay treble damages."[289]

American courts continued the British approach, adopting both forfeiture and treble damages as remedies. Courts concluded, "voluntary

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286 CHRISTOPHER G. TIEDEMAN, THE AMERICAN LAW OF REAL PROPERTY § 265, at 384 (3d ed. 1906).

287 Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985) (citing Moore v. Phillips, 627 P.2d 831, 834 (Kan. Ct. App. 1981)).

288 Chetek State Bank v. Barberg, 489 N.W.2d 385, 387 (Wis. Ct. App. 1992).

289 Warlick v. Great Atl. & Pac. Tea Co., 153 S.E. 420, 422 (Ga. 1930) (quoting Roby v. Newton, 49 S.E. 694, 695 (Ga. 1905)).

acts of waste were deemed to terminate the right to possession and to entitle the owner to treat the former tenant as a trespasser."[290] Additionally, in some jurisdictions statutes prescribed the remedy, including options for forfeiture and treble damages.[291]

Some courts now specifically hold that forfeiture is only allowed when it is authorized by statute.[292] Such an authorization will not be inferred, but must be "clearly" stated within the statute.[293]

Notably, if forfeiture were included as a contract provision it might prove unconscionable and unenforceable, or at least enforceable only in particularly egregious circumstances. Consider how the Oklahoma Supreme Court approached this issue. The court found, "There are Oklahoma cases dealing with acceleration clauses in real estate mortgages which involve acceleration for failure to provide insurance or for commission of waste."[294] The court previously held that "acceleration clauses in a mortgage were not objectionable as being in the nature of a penalty or forfeiture."[295] With that said, the court limited the holding, noting "equity will relieve against operation of an acceleration clause where the conduct of the mortgagee has been unconscionable or inequitable."[296]

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290 Vollertsen v. Lamb, 732 P.2d 486, 497–98 (Or. 1987) (citing Parrott v. Barney, 18 F. Cas. 1249, 1251 (C.C.D. Cal. 1868)); *see also* Sparks v. Lead Belt Beer Co., 337 S.W.2d 44, 46 (Mo. 1960); Camden Tr. Co. v. Handle, 26 A.2d 865, 867–68 (N.J. 1942); Moss Point Lumber Co. v. Bd. of Supervisors of Harrison Cty., 42 So. 290, 292 (Miss. 1906); Chalmers v. Smith, 26 N.E. 95, 96 (Mass. 1891).

291 *See* Belt v. Simkins, 39 S.E. 430, 430–31 (Ga. 1901) (discussing the state statutes and the options for remedies); *see also* MONT. CODE ANN. § 70-16-106 (2019) (allowing treble damages); NEV. REV. STAT. § 40.150 (2017) (same); N.J. STAT. ANN. § 2A:65-3 (West 2019) (same); N.C. GEN. STAT. § 1-538 (2018) (originally 6 Edw. I, c. 5; 20 Edw. I, st. 2; R.C., c. 116, s. 3; Code, s. 629; Rev., s. 858; C.S., s. 893) (same).

292 *See* Landmark Tr. USA v. Smithies, No. CV085004967S, 2010 Conn. Super. LEXIS 1785, at *15–16 (Super. Ct. July 13, 2010) ("The modern view is that forfeiture is not a remedy for waste in the absence of a permissive statute. Contrary to the position taken by the plaintiff, the court does not read § 52-563 to include a remedy of forfeiture of a life estate for waste.").

293 *Id.*

294 Cont'l Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1019 (Okla. 1977).

295 *Id.*

296 *Id.*

C. *Problems of Remedies: Measuring When Waste Has Occurred*

Traditionally, waste law in the modern era has measured damages in terms of the change in market value of the property.[297] Waste law across the jurisdictions has not always provided clear rules for measurement of damages in the context of mortgages.[298]

Indeed, some jurisdictions do not have a single overall rule established. This is particularly problematic in the mortgage context, because the measurement of damages might or might not be done in relation to the market value of the property: "[A] number of states allow establishing damages for waste by showing either the difference in the market value of the property before and after injury, or by the cost of repair."[299] Addressing the lack of law in North Dakota, the Supreme Court of the state preferred the variety of options over choosing a single measurement rule.[300] The court reasoned that "[g]iven the absence of an express legislative pronouncement, and given that the object of an award of damages is to compensate without unjust enrichment, we believe there should be no exclusive test for measuring property damage for waste."[301] Instead, the court chose to "adopt the more flexible approach in which the mode and amount of proof must be adapted to the facts of each

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297 *See* Meyer v. Hansen, 373 N.W.2d 392, 396–97 (N.D. 1985) ("The general rule is that the measure of damages for waste is the difference between the market value of the property before and after the waste." (citing Lustig v. U.M.C. Indus., Inc., 637 S.W.2d 55 (Mo. Ct. App. 1982); Hamman v. Ritchie, 547 S.W.2d 698 (Tex. Civ. App. 1977); 93 C.J.S. *Waste* § 18 (2019); 78 AM. JUR. 2D *Waste* § 35 (2019)). Indeed, the market-based approach changed how waste law was defined within the nineteenth century. Jill M. Fraley, *A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas About the Transformation of Law*, 100 MARQ. L. REV. 861, 863 (2017).

298 *Meyer*, 373 N.W.2d at 396–97. For example, "[t]he North Dakota statutory provision relating to waste, § 32-17-02, does not precisely specify that the measure of damages for waste is the difference between the market value of the property before and after the waste." *Id.* at 396.

299 *Id.* (citing Jowdy v. Guerin, 457 P.2d 745 (Ariz. Ct. App. 1969)); Smith v. Cap Concrete, Inc., 184 Cal. Rptr. 308 (Ct. App. 1982); Duckett v. Whorton, 312 N.W.2d 561 (Iowa 1981); Johnson v. Nw. Acceptance Corp., 485 P.2d 12 (Or. 1971).

300 *Meyer*, 373 N.W.2d at 396–97.

301 *Id.* at 396.

case."[302] The court concluded that "depending on the facts of each case, either diminution in value or cost of repair is the appropriate measure of damages for waste."[303] More than that, the court set up a presumption for the plaintiff: "Plaintiff has the right to elect the measure deemed more accurate and if the defendant disagrees, he has the burden to prove the alternative measure is more appropriate."[304]

The Mississippi Supreme Court addressed the problem of measuring waste damages in the mortgage context in 1986, noting the split across jurisdictions. The court explained, "[g]enerally, the measure of damages for waste is the difference between the fair market value of the property before and after the waste."[305] The court noted, on the other hand, "[s]everal states, however, allow an injured party to establish damages for waste by showing *either* the before-and-after difference in fair market value or by the reasonable cost of repair."[306] Mississippi, as of 1986, "ha[d] never attempted to formulate a standard for measuring damages due to waste."[307]

Some jurisdictions measure the damage in terms of the impairment of the mortgagee's security. The Restatement follows this approach, finding that the mortgagee can recover "damages, limited by the amount of the waste, to the extent that the waste has impaired the mortgagee's security."[308] The distinction between thinking of the security interest

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[302] *Id.* (citing Ferraro v. S. Cal. Gas Co., 162 Cal. Rptr. 238 (Ct. App. 1980); Or. Mut. Fire Ins. Co. v. Mathis, 334 P.2d 186 (Or. 1959)).

[303] *Id.* at 396–97.

[304] *Id.*

[305] Bell v. First Columbus Nat'l Bank, 493 So. 2d 964, 969 (Miss. 1986) (citing *Meyer*, 373 N.W.2d at 396; Lipton Realty, Inc. v. St. Louis Hous. Auth., 705 S.W.2d 565, 569 (Mo. Ct. App. 1986); 78 AM. JUR. 2D *Waste* § 32 (2019)); *see also* Prue v. Royer, 67 A.3d 895, 914 (Vt. 2013) ("Based on this principle, the traditional measure of damages in a claim for waste has been the reduction in property value beyond that caused by normal wear and tear." (citing Lustig v. U.M.C. Indus., Inc., 637 S.W.2d 55, 58 (Mo. Ct. App. 1982))); *Meyer*, 373 N.W.2d at 396.

[306] *Bell*, 493 So. 2d at 969 (citing *Meyer*, 373 N.W.2d at 396).

[307] *Id.*

[308] RESTATEMENT (THIRD) OF PROP.: MORTGS. § 4.6 (AM. LAW INST. 1997). The Restatement further explains:

> If the mortgage relationship has ended at the time the mortgagee claims waste, an impairment of security exists if the value of the real estate is less than the sum of the mortgage obligation and the obligations secured by any liens senior to the mortgage. If the mortgage relationship continues to exist at the time the mortgagee claims waste,

versus thinking of the damage to the market value matters. As a California court explained, it could limit the amount of recovery:

> Now this action is not based upon the assumption that the plaintiff's (mortgagee's) land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be."[309]

In such a jurisdiction, the mortgagee can only sue where "the property is rendered of less value as security for the mortgage debt," and in such cases, "the damages to be awarded [would be] the amount of injury to the security resulting from the damage to the property."[310]

Finally, there is another special circumstance. As discussed previously, some courts limit recovery to those situations where the security interest is impaired, limiting mortgagor liability. In terms of damage measures, such jurisdictions are able to actually reduce the measure of waste effectively to zero in some instances. In other words, even if waste has occurred, there may be no cause provided that the property has increased in value in the market such that the security interest remains adequate. In other jurisdictions, it may not be clear whether such a requirement has been adopted: As the Fourth Circuit explained, "[w]e note that South Carolina law is not yet settled on the point of whether, in such circumstances, the reduction in value of the security becomes recoverable as waste although the value still may not have dropped below the amount of the mortgage lien."[311]

> an impairment of security exists if the ratio of the mortgage obligation to the real estate's value is above its scheduled level. In such cases, the mortgagee may restore the ratio of the mortgage obligation to the real estate's value to its scheduled level by obtaining an order compelling correction of the waste or by recovery of damages, limited by the amount of the waste.

Id.

309 Cornelison v. Kornbluth, 542 P.2d 981, 986–87 (Cal. 1975) (quoting Van Pelt v. McGraw, 4 N.Y. 110, 112 (1850)).

310 European Am. Bank v. Dupont Bldg. Assocs., 567 So. 2d 971, 972 (Fla. Dist. Ct. App. 1990).

311 Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253, 257 (4th Cir. 1984).

It is important, however, to think specifically about measuring waste in the context of an economic downturn. To understand this problem, it is appropriate to begin with a definition of a deficiency in the mortgage context. "A deficiency judgment is a personal judgment against the debtor-mortgagor for the difference between the fair market value of the property held as security and the outstanding indebtedness."[312] The California Supreme Court explained, "[i]t is clear that the two judgments against the mortgagor, one for waste and the other for a deficiency, are closely interrelated and may often reflect identical amounts."[313]

Additionally, the relationship between the two amounts will change depending on the economy and property values more generally. The court stated, "[i]f property values in general are declining, a deficiency judgment and a judgment for waste would be identical up to the point at which the harm caused by the mortgagor is equal to or less than the general decline in property values resulting from market conditions."[314] Additionally, the court continued, "[w]hen waste is committed in a depressed market, a deficiency judgment, although reflecting the amount of the waste, will of course exceed it if the decline of property values is greater."[315] On the other hand, the court reflected, "[h]owever, when waste is committed in a rising market, there will be no deficiency judgment, unless the property was originally overvalued; in this event, there would be no damages for waste unless the impairment due to waste exceeded the general increase in property values."[316]

In California, a statute protects borrowers, proscribing "a deficiency judgment after any foreclosure sale, private or judicial, of property securing a purchase money mortgage."[317] The purpose of the provision is "'in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability.'"[318]

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312 *Cornelison*, 542 P.2d at 990.

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.*

318 *Id.* (internal citation omitted).

The California Supreme Court had to determine if the statute would apply to prevent an action in waste, a tort action, as distinct from an action based on a contract. The court reasoned, "[i]t is clear that allowing an action for waste following a foreclosure sale of property securing purchase money mortgages may often frustrate [the statute's] purpose."[319] The court was particularly concerned that in some situations the "[d]amages for waste would burden the defaulting purchaser . . . and the acts giving rise to that liability would have been caused in many cases by the economic downturn itself."[320] The court explained, "[f]or example, a purchaser caught in such circumstances may be compelled in the normal course of events to forego the general maintenance and repair of the property in order to keep up his payments on the mortgage debt."[321] The court concluded, "[i]f he eventually defaults and loses the property, to hold him subject to additional liability for waste would seem to run counter to the purpose of [the] section."[322] Additionally, such an outcome would "permit the purchase money lender to obtain what is in effect a deficiency judgment."[323]

The California Supreme Court then limited this rule, noting that sometimes waste is caused by "reckless, and at times even malicious despoilers of property."[324] The court categorized these as "bad faith" claims,[325] which we have previously discussed. The court concluded,

> it is within the province of the trier of fact to determine on a case by case basis to what, if any, extent the impairment of the mortgagee's security has been caused (as in the first instance) by the general decline of real property values and to what, if any, extent (as in the second instance) by the bad faith acts of the mortgagor.[326]

The risk is that not all jurisdictions have an anti-deficiency statute like California's and even those jurisdictions that do, may or may not use

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319 *Id.* at 990–91.

320 *Id.*

321 *Id.*

322 *Id.*

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.* at 986–87, 991.

it to prevent a tort action in waste. This problem is particularly compelling given that the extension of waste law to mortgages has happened over an extensive period of time, often sporadically and often judicially. This is particularly important given that some of these concerns are interrelated. For example, the measurement of damages and the availability of a cause of action for permissive waste may combine together in some permutations of rules to particularly prejudice a borrower.

D. *Problems of Remedies: Contract-Based Remedies & Duplication*

In the mortgage context, where there is a possibility of both a contract-based claim and a tort claim, there is also a risk of duplication. In 1995, a U.S. district court dismissed waste claims, because of the risk of a double recovery.[327] Other courts have similarly reasoned that such duplication can occur. The Alabama Supreme Court dismissed a waste suit, reasoning that it could not be maintained once there was a foreclosure suit.[328] On the other hand, a New York appellate court found, "[a]n action for waste is not an action [to recover the mortgage] debt . . . and its pendency is not a defense to this action."[329]

The equitable doctrine of election of remedies could limit the risk of duplication. The purpose of the doctrine is "to prevent double recovery for the same wrong."[330] The doctrine generally is limited, however, to situations where a plaintiff maintains "inconsistent legal theories or forms of relief arising from a single set of facts."[331]

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[327] Fed. Home Loan Mortg. Corp. v. Devon Bank, No. 94 C 5527, 1995 U.S. Dist. LEXIS 9647, at *1 (N.D. Ill. July 11, 1995).

[328] *See* Edelman v. Poe, 103 So. 2d 333, 334 (Ala. 1958) (reasoning that any damages assessed applied to the mortgage indebtedness).

[329] Ferraro v. Marrillard Builders, Inc., 238 N.Y.S. 188 (App. Div. 1929).

[330] Minor v. Jacek, 694 N.W.2d 509 (Wis. Ct. App. 2005); *see also* Nw. State Bank, Osseo v. Foss, 197 N.W.2d 662, 666 (Minn. 1972) (forbidding double recovery for the same wrong).

[331] *Minor*, 694 N.W.2d at 509 (citing Bank of Commerce v. Paine, Webber, Jackson & Curtis, 158 N.W.2d 350, 352 (Wis. 1968)); *see also* Covington v. Pritchett, 428 N.W.2d 121, 124 (Minn. Ct. App. 1988) (forbidding recovery through inconsistent remedies).

It may apply, however, simply because the causes of action sound in the two different and "inconsistent" fields of contracts and torts.[332] Additionally, "[a] court may properly order an election of remedies where the plaintiff's two theories of relief are premised on the same acts of the defendant."[333]

The doctrine has been applied in the context of waste law. In *Rudnitski v. Seely*,[334] the Minnesota Court of Appeals addressed a case where the trial court ruled that waste and conversion claims were precluded.[335] The court reasoned,

> [w]e must determine whether the action for waste and the action for conversion arose out of the contract for deed, and whether recovery under these theories is inconsistent with statutory cancellation of the contract. To make our decision, we examine the nature of these actions and their relationship to this contract.[336]

This case was not a mortgage case, but a deed sale case. Still, the court approached the division of contract-based remedies and tort-based remedies.[337]

The Minnesota Court of Appeals examined another case and concluded that where a contract contained a liquid damages provision, this "does not prevent recovery for actual damages caused by events not contemplated by the clause, 'unless the contract expressly provides that damages other than those enumerated shall not be recovered.'"[338]

E. *Lender Waste Claims and Modern Property Theory*

Modern property theory includes a variety of approaches, but an overarching theme of these is a focus on property as a set of social

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332 *Minor*, 694 N.W.2d at 509 (citing Carpenter v. Meachem, 86 N.W. 552, 553 (Wis. 1901)).

333 *Id.* (citing Wills v. Regan, 206 N.W.2d 398 (Wis. 1973)).

334 Rudnitski v. Seely, 441 N.W.2d 827 (Minn. Ct. App. 1989).

335 *Id.* at 829–30.

336 *Id.*

337 *Id.* at 830.

338 *Id.*

relationships. Wesley Hohfeld re-conceptualized property rights as social relationships early in the twentieth century,[339] and in the last forty years, many theorists have reemphasized this focus on property as social relationships.[340] One strong thread within the social approach to property is the concern for property as a method of survival. This approach can be found in the classics, such as Locke,[341] but also in modern property theory.[342]

Within the context of waste law and lender claims, I would argue that if property is understood as a set of social relationships—and particularly ones centered on survival and conflict avoidance—then the home is a property. And waste law, which may be applied to any type of real property, should be interpreted to recognize the unique context of home ownership. Additionally, lender waste claims are being made in the specific context of foreclosures. A foreclosure or bankruptcy specifically indicates to us that the homeowner is in a position of jeopardy. This is precisely the survival context that is central to a social understanding of property. In light of this situation, an appropriate understanding of the nature of property should lead us to think carefully about how we allow the original doctrine of waste law to be adapted by lenders in this context.

V. PROPOSALS: WASTE DOCTRINES IN THE MORTGAGE CONTEXT

This final Part reflects on the doctrinal evolution and theoretical points discussed in the earlier portions of the Article. This Part provides five specific recommendations for how waste law logically should evolve to include the right for mortgagees to sue, but with specific limitations

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339 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 721 (1917).

340 *See, e.g.*, Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3–20 (Charles Geisler & Gail Daneker eds., 2000); Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36–75 (Stephen R. Munzer ed., 2001); CAROL M. ROSE, PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994).

341 2 JOHN LOCKE, WORKS OF JOHN LOCKE 27 (London 1714).

342 Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, *in* PERSPECTIVES ON PROPERTY LAW 28, 31 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 3d ed. 2002).

that are designed to protect particularly residential borrowers from the harshness that waste law doctrine might create if simply imported unthinkingly from the common law into the mortgage context.

Injunctive relief should always be available to mortgagees to protect the adequacy of the security interest, provided that the issue is voluntary rather than permissive waste.

Most courts expanded standing to mortgagees very early for the purposes of injunctions to restrain future waste of the mortgage security. Given that the mortgage holder does have a property right of some type and has a clear possibility of future ownership of the property, it is logical to protect that future right.

With that said, in adopting the expanded standing rules, courts have not necessarily considered the distinction between permissive and voluntary waste. As noted above, courts have not necessarily made any distinction at all in other contexts (outside of mortgages). And some courts considered the issue of permissive versus voluntary waste at a different time and separately from the context of considering standing for a mortgagee. This Article argues that mortgagees should always have standing to prevent voluntary waste, but that standing for permissive waste should be limited to the commercial context.

Extending this relief to permissive waste would be problematic for residential mortgage holders, particularly in the context of an economic downturn. A family may have made very reasonable choices to postpone repairs given family circumstances and may be able to catch up those repairs once their economic situation improves. Issuing an injunction would remove that choice from the homeowner and perhaps force them into a foreclosure situation that might otherwise be avoidable with some patience.

Extraordinary remedies of waste law—forfeiture and treble damages—should not be available in the mortgage context via waste law. Many of the present possessory interests in property at the common law were quite brief or contingent (during marriage, before marriage, for life). As a result, the far greater interest in the property was held by the future interest holder. Additionally, the present interest holder had limited or no reason to act to protect the future interest holder. In those circumstances, extraordinary remedies such as treble damages and forfeiture protected the future interest holder.

The mortgage context is quite different. The mortgagee does not have an expectation of future possession. Indeed, the mortgagee is hoping not to take possession, but rather to have the mortgage satisfied. The mortgagee is protected so long as the security remains adequate to the balance owed on the mortgage.

Additionally, the mortgagee is a sophisticated commercial party who acquired rights via a commercial transaction—indeed likely one in which the mortgagee was the more sophisticated party. During the course of that transaction, the mortgagee had the opportunity to adjust the contract in a variety of ways that would protect the mortgage company's interest.

In light of these concerns, extraordinary remedies of waste law should not be simply imported into the mortgage context. Such remedies should be made available only in limited circumstances where: (1) the waste is voluntary rather than permissive; (2) the mortgagee has written them into the contract; (3) the mortgage is commercial rather than residential; and (4) where such terms are not prohibited by either mortgage law more generally or by the concept of unconscionable terms in contract law.

Where the property is a residence, and some portion of the reduction in property value is attributable to economics beyond the control of the mortgagor, the mortgagee should only be able to recover for waste committed in bad faith. Alternatively, where it is unclear how much of a drop in value is due to damages and how much is due to the market, the burden of proof should shift to the plaintiff (the lender) to establish the amount exclusively for repairs and that should be the measure of damages.

Where damages are awarded in a waste action within a bankruptcy proceeding, discharge of the judgment should be available unless the lender can prove actual malice. It should not be sufficient to just allege an "objective substantial certainty of harm."

Part IV above explains how little agreement there is across jurisdictions on the proper measure of damages for waste law. Importantly, a number of jurisdictions do not maintain a single measure of damages, and a number of jurisdictions measure damages based on property values rather than costs of repair.

Where property values contribute to the measure of damages, it may be very difficult if not impossible to separate the drop in value caused by

an economic downturn from the drop in value caused by waste—particularly permissive waste. To prevent residential property owners from being liable in such situations for more than a fair amount or for damages that they may not have been able to afford to repair, the California rule of restricting recovery to proof of bad faith makes sense. The reasoning behind the California rule is that in such circumstances, the judgment would be for personal liability exceeding the mortgage and would burden the family moving forward in the process of finding housing. Given that statutes regularly protect borrowers from deficiency judgments that would create personal liability, there is no reason to allow the tort of waste law to provide a work-around for such statutes.

Additionally, bankruptcy was intended to provide for that fresh start—and that can only happen without a mortgage following the petitioner forward after the bankruptcy. For this reason, the bankruptcy code's discharge of torts provision should be applied to waste causes of action narrowly, allowing discharge of waste judgments unless the lender is able to prove that the borrower acted with actual malice in damaging the property.

Mortgagees should not be able to use waste law to sue for permissive waste in a residential context, except where that waste was committed in bad faith, meaning with actual malice.

If the failure to maintain the property or pay taxes or insurance is attributable to the economic circumstances of the mortgagor, the mortgagee should be limited to the recourses permitted by the mortgage contract and relevant state law.

Because waste law is a remedy in tort and a mortgagee will always have remedies available through contract, the mortgagee should be limited to recovery where the damages creates a "substantial impairment" of the security.

As a tort, waste law directs itself not to minor incidents but rather important changes in a property. Consistent with that approach and acknowledging that the mortgagee is not without a number of remedies in contract law, there is little reason to allow a mortgagee to pursue a tort claim in addition to contract claims without being able to prove a substantial impairment of the security interest.

CONCLUSION

From the time of the 2008 economic downturn and subprime mortgage collapse, lenders began in earnest to sue borrowers under a new theory of liability: tort claims for waste. Waste claims, often based on removing fixtures, work around state mortgage laws that prohibit personal deficiency judgments after a foreclosure and are likely to be non-dischargeable in bankruptcy because fixtures are willfully removed. Most disturbingly, waste often measures damages based on market values, which means borrowers may pay, via a torts judgment, for not only the value of missing fixtures that were sold during tough times, but also for a drop in market value.

The expansion of the narrow common law approach to standing to include mortgagees fits with property theory more generally. Standing is appropriate for lenders, but this does not mean that the doctrines of waste should be incorporated into the mortgage context without substantial and thoughtful inquiry. Such doctrines evolved in very different economic circumstances and with very different property interests being protected.

Some doctrines, such as extraordinary remedies, are remarkably unfair to import into the residential mortgage context. Others should be limited in the mortgage context in recognition of the contractual remedies available to the mortgagee as well as the mortgagee's general status as the more sophisticated and powerful of the two parties to the contract. This Article has proposed uniform adoption of a wider rule of standing for mortgagees in both law and equity, but has proposed a number of limitations based on property theory and the history of the doctrine.

Additionally, this Article has examined the intersections of bankruptcy and lender waste claims, proposing a solution for how to treat the intent requirements for discharging tort claims given the history of waste doctrine. This Article proposes that in waste cases the injury or harm should be interpreted as intentional only when the intent is to deprive the lender of the value of the fixture. Applying a more subjective standard of intending to harm the lender (as opposed to essentially gambling the value of the fixture on future financial stability) would not penalize borrowers for trying to make a recovery without going into

bankruptcy. Moreover, this approach would maintain the fresh start for those honestly struggling borrowers on the other side of bankruptcy.