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## The Life (and Death?) of Corporate Waste

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# The Life (and Death?) of Corporate Waste

Harwell Wells\*

## *Abstract*

*At first glance, corporate waste makes no sense. The very definition of waste—a transaction so one-sided that no reasonable business person would enter into it, an act equivalent to gift or “spoliation”—suggests that it would never occur, for what corporation would ever enter into a transaction so absurd? Yet waste claims are regularly made against corporate managers. Respected judges have downplayed waste as a “vestige” and described it as “possibly non-existent,” the Loch Ness monster of corporate law; but waste survives. It is a remnant of ultra vires, a doctrine proclaimed largely dead for the last hundred years—but waste is not dead. It confounds our model of managerial responsibility; after decades in which corporate directors’ and officers’ duties have been focused into the fiduciary duties of care and loyalty, waste sits outside that framework, for historically waste isn’t a fiduciary duty at all. This Article, the first modern survey of the corporate waste doctrine, discusses the origin of corporate waste, documents and explains its survival, and tentatively foresees its demise.*

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\* I. Herman Stern Professor of Law, Temple University James E. Beasley School of Law. Thanks to Larry Hamermesh, Joan MacLeod Heminway, Justice Jack Jacobs, Chancellor Travis Laster, Tom Lin, Mohsen Manesh, Chief Justice Leo Strine, Robert Thompson, and participants in the conference on Corporate Law, Governance, and Purpose for comments on various stages of this project, to Andy Park for excellent research assistance, and to Lyman Johnson and David Millon for ongoing inspiration.

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### *I. Introduction: Waste's Confusions*

At first glance, corporate waste makes no sense. The classic definition of waste<sup>1</sup>—a transaction in which “what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid,”<sup>2</sup> an act equivalent to “gift” or “spoliation” of corporate assets—suggests that waste should never arise, for what corporation would ever enter into a transaction so absurd?<sup>3</sup> Yet waste claims are regularly made. The conventional wisdom is that waste claims never succeed;<sup>4</sup> but

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1. In this Article I usually refer to “corporate waste” as simply “waste.” Other bodies of law, notably property, have their own waste doctrines, which are unconnected to corporate waste. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY 329, 432 (3d ed. 2010) (overviewing property law and the distinct waste doctrine in that area of the law). While this Article focuses on waste in corporations, waste can also be found in other business entities. *See Trover v. 419 OCR Inc.*, 397 Ill. App. 3d 403 (Ill. App. Ct. 5th Dist. 2010) (discussing waste in LLCs); *Williams v. Habul*, 219 N.C. App. 281, 283 (N.C. Ct. App. 2012) (discussing a corporate waste claim, among others, brought by an LLC owner against a second owner in the same LLC); Thomas E. Rutledge, *The 2010 Amendments to Kentucky's Business Entity Laws*, 38 N. KY. L. REV. 383, 413 n.245 (2011) (“While typically seen in the context of corporations, waste can also occur (and is equally actionable) in the context of a partnership.”).

2. *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962).

3. *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57, 59 (Del. 1952).

4. *See, e.g.*, Rudolf Koch & Christopher Lyons, *Delaware Insider: Executive Compensation Lessons from Freedman v. Adams*, BUS. LAW TODAY (March 2013), [http://www.americanbar.org/publications/blt/2013/03/delaware\\_insider.html](http://www.americanbar.org/publications/blt/2013/03/delaware_insider.html) (last visited Apr. 6, 2017) (“Traditional compensation claims, alleging that particular compensation were excessive and thereby constituted corporate

empirical studies show that at some stages of litigation they do,<sup>5</sup> and some of the most significant corporate law cases of the last decade have dealt with corporate waste.<sup>6</sup> Respected judges have called for sharply limiting it, referring to it as a “vestige”<sup>7</sup> and deriding it as the mythical “Loch Ness Monster” of corporate law; still, waste survives.<sup>8</sup> It is a remnant of *ultra vires*, a doctrine proclaimed dead for the last hundred years—but waste is not dead.<sup>9</sup> It confounds our model of managerial responsibility; after decades in which discussion of directors’ and officers’ duties have focused on the fiduciary duties of care and loyalty, waste still sits outside that framework, for waste until now has not been seen as an aspect of fiduciary duties at all.<sup>10</sup>

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waste, have not fared well under Delaware law. Most fail the rigors of Rule 23.1 and are dismissed at the pleading stage.”) (on file with the Washington and Lee Law Review).

5. See, e.g., Randall S. Thomas & Kenneth J. Martin, *Litigating Challenges to Executive Pay: An Exercise in Futility?*, 79 WASH. U. L.Q. 569, 573–85 (2001) (documenting survival of waste claims at various stages of litigation).

6. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 73–75 (Del. 2006) (concluding that payment of a severance package did not amount to waste); *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 135–40 (Del. Ch. 2009) (finding that shareholders were unable to show that demand was futile on waste claims relating to a stock repurchase program).

7. *Harbor Fin. Partners v Huizenga*, 751 A.2d 879, 882 (Del.Ch. 1999).

8. See *Zupnick v. Goizueta*, 698 A.2d 384, 387 (Del.Ch. 1997) (reviewing the Plaintiff’s assertion that he has pleaded cognizable claims of waste).

9. On other surviving remnants of *ultra vires*, see, for example, STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 30–33 (3d ed. 2015) (explaining MBCA § 3.04(b)’s three “limited exceptions under which the *ultra vires* doctrine has some lingering validity”); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1314–51 (2000) (determining that illegal activities and the non-profit sector serve as a place for the “surviving vestige of *ultra vires* doctrine”).

10. See *In re Walt Disney*, 906 A.2d at 35 (describing the distinct concepts of fiduciary breach and committing waste). On recent developments in Delaware fiduciary law, see Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Belotti, & Jeffrey M. Gorris, *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporate Law*, 98 GEO. L.J. 629, 673–90 (2010) (describing the “rise and fall” of certain fiduciary concepts and their implications moving forward); Robert Thompson, *The Short, but Interesting Life of Good Faith as an Independent Liability Rule*, 55 N.Y.L. SCH. L. REV. 543, 544 (2010) (examining “why good faith gained such added prominence during [the] recent period and what its eclipse tells us about the evolution” of fiduciary duty law”).

This Article is the first modern study thoroughly canvassing waste—its origins, growth, present role, and future prospects.<sup>11</sup> It proceeds as follows. Part II tracks the prehistory of waste in the ultra vires doctrine—the now largely discarded set of rules that barred corporations from acting for purposes not spelled out in their corporate charters—focusing particularly on the strand of ultra vires eventually reworked as waste, the ban on gifts by a corporation.<sup>12</sup> Part III demonstrates how this ban on gifts was, starting in the 1930s, reworked into the modern doctrine of corporate waste in a series of cases, which sought to rein in executive compensation and police the growth of new methods for compensating corporate executives.<sup>13</sup> There is a reason waste appeared at this time, when limits on corporate activity were

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11. Other modern articles have looked at waste in particular contexts. *See, e.g.*, Joseph K. Leahy, *Are Corporate Super PAC Contributions Waste or Self-Dealing?*, 79 MO. L. REV. 283, 303–10 (2014) [hereinafter Leahy, *Super PAC*] (examining different approaches to corporate waste and concluding that a shareholder lawsuit challenging a typical Super PAC contribution is unlikely to succeed on a theory of waste); John W. Murrey, III, *Excessive Compensation in Publicly Held Corporations: Is the Doctrine of Waste Still Applicable?*, 108 W. VA. L. REV. 433, 453–57 (2005) (concluding that Delaware “has failed to apply the traditional doctrine of waste” in recent decisions); William A. Nelson, II, *Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures*, 13 NEV. L.J. 134, 138–39 (2012) [hereinafter Nelson II, *Post-Citizens United*] (introducing the history and evolution of waste case law in Delaware). Several very good student Notes have also been written on the topic. *See* Steven C. Caywood, Note, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111, 135 (2010) (concluding that a “revitalized corporate waste doctrine would allow shareholders to have some meaningful power as a safeguard against a board of directors that excessively compensates executives”); Charles Gass, Note, *Outer Limits: Fiduciary Duties and the Doctrine of Waste*, 92 DENV. U. L. REV. ONLINE 93, 104 (2015) (surveying waste doctrine’s application under Delaware Law and through an empirical analysis determined that waste claims are “infrequent”); Eric L. Johnson, Note, *Waste Not, Want Not: An Analysis of Stock Option Plans, Executive Compensation, and the Proper Standard of Waste*, 26 J. CORP. L. 145, 146 (2000) (determining the proper standard of waste in Delaware and addressing whether current treatment of corporate waste in the Court of Chancery is proper); Jamie L. Kastler, Note, *The Problem with Waste: Delaware’s Lenient Treatment of Waste Claims at the Demand Stage of Derivative Litigation*, 95 MINN. L. REV. 1899, 1901 (2011) (arguing that Delaware courts should explicitly place waste under the obligation of good faith).

12. *Infra* Part II.

13. *See infra* Part III (outlining waste’s emergence in the compensation, charitable gift, and political donation contexts).

eroding but courts' need to investigate and cast light on questionable corporate decisions was not. Waste would be the first of a series of "equitable safety valves"—what Robert Thompson has dubbed judicial "fail-safe devices"—allowing courts to scrutinize and second-guess corporate decisions that did not clearly violate fiduciary duties, but also made little sense as the products of careful business judgment.<sup>14</sup> This Part also shows how waste, once developed, was deployed—largely unsuccessfully—to challenge other novel corporate expenditures, notably charitable and political donations.<sup>15</sup> Part IV follows waste's oscillating fortunes into the first decade of the twenty-first century.<sup>16</sup> Courts were rarely comfortable with waste's ill-defined scope, letting it languish for decades, and even calling for its limitation or revision in the 1990s. Yet waste also had its uses, and occasionally found favor in courts' eyes, notably in the landmark *Disney* litigation.<sup>17</sup> Part V moves toward the present day, observing that waste is losing its independent existence as courts have found in the revived duty of good faith both an alternative doctrinal safety valve for questioning corporate decisions and a means to transplant waste into the modern framework of corporate fiduciary duties.<sup>18</sup>

## II. Waste's Origins

Waste has its roots in *ultra vires*,<sup>19</sup> the doctrine flourishing in the nineteenth century, which held that directors had no power to

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14. See *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 895 (Del. Ch. 1999) (describing corporate waste and the continued utility of an "equitable safety valve"). See generally THOMPSON, *infra* note 28. Thompson's influence on this Article should be clear.

15. *Infra* notes 135–142.

16. *Infra* Part IV.

17. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 35 (Del. 2006) (discussing a shareholder suit questioning the Disney board's decisions with respect to the firm's number-two officer and his proposed generous termination benefits).

18. *Infra* Part V.

19. As recognized, e.g., both by scholars, see ERIC CHIAPPINELLI, *CASES AND MATERIALS ON BUSINESS ENTITIES* 385 (3d ed. 2014) (noting that waste is a remnant of the *ultra vires* doctrine) and courts, see *Lewis v. Vogelstein*, 699 A.2d 327, 335–36 (Del. Ch. 1997) (linking waste to *ultra vires*).

“perform[] acts outside the corporation’s authority” as spelled out in its charter or general law.<sup>20</sup> Ultra vires embodied the nineteenth century’s belief that the corporation was a creation of the state, possessing only such powers provided by the state in its charter, and constantly threatening to exceed its bounds.<sup>21</sup> Ultra vires acts were those “not merely irregular in form or done by unauthorized organs, but acts which the corporation could not legally do in any manner without having first changed its constitution.”<sup>22</sup> The doctrine was well-established by 1855, when the U.S. Supreme Court in *Dodge v. Woolsey*<sup>23</sup> held that courts have “jurisdiction over corporations, . . . to restrain those who administer them from doing acts which would amount to a violation of charters.”<sup>24</sup> While ultra vires’s main justification was in protecting society from corporations’ potentially overweening power, it also served to protect shareholders from corporate controllers’ departure from the corporation’s limited scope.<sup>25</sup> In an era lacking many modern checks on managerial discretion such as mandatory disclosure or efficient capital markets, ultra vires was another means to discipline agents and, together with the fiduciary constraints on negligence, fraud, and self-dealing, was a major guarantor of faithful corporate governance.<sup>26</sup>

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20. ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* §§ 36 (1897). On the history of ultra vires, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 77–79 (1992) (describing ultra vires doctrine’s treatment during the period of 1870–1960); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 59–64 (1991) (discussing its history in the section on “Classicism and Ultra Vires”); Greenfield, *supra* note 9, at 1302–14 (explaining the history of ultra vires through a “rise and fall” narrative).

21. See HENRY W. BALLANTINE, *BALLANTINE ON CORPORATIONS* § 67 (1927) [hereinafter *BALLENTINE 1927*] (describing the basis of the ultra vires doctrine); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 212, 218–19 (1990) (connecting ultra vires to artificial entity theory of the corporation).

22. FREUND, *supra* note 20, at 62.

23. 59 U.S. 331 (1855).

24. *Id.* at 341.

25. See, e.g., FREUND, *supra* note 20, at 62 (“[An ultra vires] act may constitute a violation . . . in two different directions; as against the associates who do not concur in it is a breach of contract or trust; as against the state it is a breach of a limitation imposed upon the body corporate . . .”).

26. See Greenfield, *supra* note 9, at 1304–07 (noting the surviving remnants of ultra vires, on which modern waste law is based). On fiduciary duties in the nineteenth century, see, e.g., JOSEPH KINNICUT ANGELL, SAMUEL AMES & JOHN LATHOP, *TREATISE ON THE LAW OF PRIVATE CORPORATIONS*

Ultra vires was a more inflexible curb on a corporation's managers than were fiduciary duties. While the fiduciary duties tested whether managers used their powers carefully and loyally, ultra vires asked whether they possessed power to act at all. Under ultra vires, directors and officers who acted beyond the corporation's powers were liable—perhaps absolutely—for such acts.<sup>27</sup> According to a leading treatise, *Thompson on Corporations*,<sup>28</sup> unlike with fiduciary duty analysis, liability for an ultra vires act did not generally turn on intent or state of mind:

The rule is that if directors of a limited company apply the money of the company for purposes so outside its power that the company could not sanction such application, they may be made personally liable as for a breach of trust; but if they apply the money of the company, or exercise any of its powers, in a manner which is not ultra vires, then a strong and clear case of malfeasance must be made out to render them liable for a loss thereby occasioned to the corporation.<sup>29</sup>

*Fletcher on Corporations*<sup>30</sup> made a similar point; for a court “to enjoin ultra vires acts . . . it is not necessary that there shall be

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AGGREGATE 325 (9th ed. 1871) (noting that directors can be called to account if they “made themselves answerable by their negligence or fraud”).

27. If an ultra vires act was not yet executory, shareholders could seek an injunction preventing it and in extreme situations the state could seek a quo warranto proceeding to revoke the corporate charter. See GEORGE WASHINGTON FIELD, *THE DOCTRINE OF ULTRA VIRES: ILLUSTRATED AND EXPLAINED BY SELECTED CASES, CLASSIFIED AND FULLY ANNOTATED* 229 (1881) (“The general rule is that if a corporation is about to engage in an enterprise not authorized by the charter or [lacking in the corporate provisions,] a court of equity will, by injunction, restrain such acts . . . for the protection of the rights of stockholders.”); see also HOVENKAMP, *supra* note 20, at 58–64 (discussing ultra vires).

28. SEYMOUR D. THOMPSON, *2 COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS* (1908); see also *Sheldon v. Bills*, 166 N.W. 117, 117 (Neb. 1918) (noting that directors who expend a sum “for a purpose beyond their powers as directors . . . will be personally liable for the loss” and that directors’ “honest belief at the time that such action [would] result in such benefit to the company will not relieve them from liability”). But see *Spering’s Appeal*, 71 Pa. 11, 24 (1872) (stating that directors may not be liable for ultra vires action in a case where the corporation’s charter was so complicated that even with due care they could have made a mistake regarding it).

29. THOMPSON, *supra* note 28, at 300.

30. WILLIAM MEADE FLETCHER, *6 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* (1919) [hereinafter *FLETCHER ON CORPORATIONS*].



any intentional wrong or actual fraud on the part of the officers or other stockholders. It is enough that the act be ultra vires.”<sup>31</sup> The rigidity of ultra vires’s limits also helps explain a feature that would survive into waste; a majority of shareholders could not ratify ultra vires acts in the face of a single shareholder’s dissent, even though a majority did have the power to ratify other acts that may have exceeded a corporate agent’s express authority.<sup>32</sup> In a typical ratification, a principal is asked to affirm a transaction that it had the power to enter into, the problem being that the particular agent lacked authority to commit the principal to it.<sup>33</sup> In ultra vires situations, in contrast, the corporation itself lacked power to enter into the transaction.<sup>34</sup>

Ultra vires was an often-litigated and befuddling topic; according to one authority, there was “perhaps no part of the law concerning corporations in which we meet with so much difficulty, confusion, and conflict of opinion.”<sup>35</sup> During the doctrine’s heyday, when corporations had narrow and specific purposes, courts frequently found themselves finely parsing charter provisions to determine whether the power to perform a particular act could be discerned in a corporation’s enumerated

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31. *Id.* § 4062.

32. *See, e.g.,* *Endicott v. Marvel*, 87 A. 230, 233 (N.J. Ch. 1913) (“The transactions of a board which cannot be sustained against the will of a single stockholder . . . are acts which are either ultra vires, fraudulent, or illegal.”); FLETCHER ON CORPORATIONS, *supra* note 30, § 4062 (“[A]ny misapplication or diversion of assets to purposes not authorized by its charter, even though all other stockholders may consent, is a breach of trust toward a dissenting stockholder.”).

33. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 (AM. LAW INST. 2006) (defining ratification). “Ratification” is also a technical term under Delaware corporation law used at times in a different sense. *See* *Corwin v. KKR Fin. Holdings, LLC*, 125 A.3d 304, 309–11 (Del. 2015) (“Instead, the Chancellor read *Gantler* as a decision solely intended to clarify the meaning of the precise term ‘ratification.’”); J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1446, 1480–91 (2014) (“Vice Chancellor Jacobs . . . argued for the need to distinguish between (1) ratification in its “classic” or paradigmatic form, . . . and (2) ‘the effect of an informed shareholder vote that was statutorily required for the transaction to have legal existence.’”).

34. *See* *City of Harper Woods Emps.’ Ret. Sys. v. Olver*, 577 F. Supp. 2d 124, 134 (D.D.C. 2008) (discussing ultra vires as “lack of capacity”).

35. *See* BALLANTINE 1927, *supra* note 21, § 67 (noting the immensely complicated and inconsistent application of ultra vires law).

purposes; cases examined whether, for instance, a railroad company could pay for improvements on a resort hotel located on the railroad's line,<sup>36</sup> or whether a company chartered to manufacture musical instruments could guarantee the expenses of a musical festival that would increase the manufacturer's sales.<sup>37</sup>

A few acts, however, were held to be ultra vires for any corporation.<sup>38</sup> Most important for this Article, gifts—donations for which the corporation would receive nothing in return—were invariably ultra vires. According to *Morawetz on Corporations*,<sup>39</sup> the “property and funds of a corporation . . . cannot be devoted to any use which is not in accordance with their chartered purposes, except by unanimous consent. No agent of a corporation has implied authority to give away any portion of the corporate property . . . gratuitously.”<sup>40</sup> Forty years later *Ballantine on Corporations*<sup>41</sup> reported the same limit, with the same explanation: “[A] gift of its property by a corporation not created for charitable purposes is in violation of the rights of the stockholders and is ultra vires[.]”<sup>42</sup>

While gifts were a distinct category of ultra vires acts, corporate waste was not. As a distinct doctrine and cause of action, corporate waste did not yet exist. Nineteenth century cases certainly refer to “waste,” but the term characterized the result of a range of disfavored actions and could be the result of

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36. See *W. Md. R. Co. v. Blue Ridge Hotel Co.*, 62 A. 351, 357 (Md. 1905) (concluding that the “hotel company has paid nothing and parted with nothing under this contract, and is therefore, under all the authorities, without any right of action”).

37. See *Davis v. Old Colony R.R. Co.*, 131 Mass. 258, 258–59 (1881) (finding that the agreement is ultra vires, and therefore no action can be maintained upon it against either defendant).

38. See, e.g., FLETCHER ON CORPORATIONS, *supra* note 30, § 3424 (noting that torts and crimes are always ultra vires).

39. 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (1886).

40. *Id.* at 399. Authorities were divided on whether an apparent gift that was “really for the benefit of the corporate enterprise,” and so not truly gratuitous, was ultra vires. *Id.* at 424.

41. BALLANTINE 1927, *supra* note 21.

42. *Id.* at 207–08.

either a violation of fiduciary duties or an ultra vires act.<sup>43</sup> For example, in 1832 *Robinson v. Smith*,<sup>44</sup> one of the first American cases dealing with directors' fiduciary duties, New York's Chancellor held that,

[directors of a] joint-stock corporation, who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good their loss. And they are equally liable, if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust.<sup>45</sup>

In the 1847 Massachusetts case *Smith v. Hurd*,<sup>46</sup> "waste" similarly described the result of a violation of fiduciary duties; according to Chief Justice Shaw, the case concerned "various acts of negligence and malfeasance . . . in consequence of which . . . the whole capital of [a] bank was wasted and lost."<sup>47</sup> That said, the term certainly could also characterize the result of ultra vires acts. In *Gilbert v. Finch*,<sup>48</sup> a 1903 Massachusetts case, the directors of an insurance company used company funds to purchase control of another insurance company in violation of the first company's charter.<sup>49</sup> The court found that the directors had acted in good faith, but their transaction still "was ultra vires, and constituted a waste of the funds" of the company.<sup>50</sup> Only in the twentieth century would "waste" take on a distinctive meaning in corporation law.

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43. See *Rabe v. Dunlap*, 25 A. 959, 961 (N.J. Ch. 1893) ("A corporation holds its property as the trustee of its stockholders, and they, like any other *cestui que trust*, have a right to have the trust property judiciously and honestly managed, and preserved from waste and misappropriation.").

44. 3 Paige Ch. 222 (N.Y. Ch. 1832).

45. *Id.* at 231.

46. 53 Mass. 371 (1847).

47. *Id.* at 383; accord ANGELL, AMES & LATHROP, *supra* note 26, at 325 (discussing "waste or misapplication of the corporate funds" in a section discussing officers' duties and obligations); see also THOMPSON, *supra* note 28, at 278 ("Directors are held personally liable for suffering the corporate funds or property to be wasted or lost by gross negligence or inattention to their duties.").

48. 66 N.E. 133 (N.Y. 1903).

49. See *id.* at 133 (noting that the directors took \$35,000 from the company and purchased the new insurance companies with the money).

50. *Id.* at 134; accord THOMPSON, *supra* note 28, at 300 ("Directors may be personally liable where they engage in a business not within the corporate powers, and thereby waste or lose the corporate assets.").

### III. Waste's Emergence

Waste did not emerge until the twentieth century, but ultra vires had largely disappeared by the end of the nineteenth.<sup>51</sup> It was a doctrine for an economic world where corporations were creations of the state, strictly limited to a few purposes, and mistrusted. By early in the twentieth century, however, Americans were becoming more comfortable with corporations, coming to view them not as threatening monoliths wielding special powers but as merely another form in which to conduct business.<sup>52</sup> Limits on corporate purpose rapidly eroded, and it soon became possible to charter a corporation “for any lawful business purpose.”<sup>53</sup> By the 1920s ultra vires mostly lingered as a dubious mechanism by which some corporations attempted to “evade liability upon an irksome contract, by showing [their] incapacity to make the contract.”<sup>54</sup> Yet while the broader

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51. See HORWITZ, *supra* note 20, at 78 (“Even within the last remaining bastion of the ultra vires rule, the law of contracts, courts after the Civil War had begun a retreat.”).

52. See MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933*, at 89–91 (1990) (noting the increased acceptance of the corporation as a natural rather than artificial entity). This is not to say that opposition to the giant corporation ever completely disappeared.

53. See E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886–1936*, 50 HARV. L. REV. 27, 29 (1936) (noting new business corporations acts allowing for the formation of corporations for any lawful purpose); Wiley B. Rutledge, Jr., *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 305, 317–18 (1937) (“All of the new statutes seem to abandon the old attempt at enumeration of specific types of businesses open to incorporation.” (quotation at 317)). Intriguingly, it may be that restrictive purpose clauses are making a comeback in limited liability companies, leading one to wonder whether litigation over LLC purpose can be far behind. See Suren Gomtsian, *Contractual Mechanisms of Investor Protection in Non-Listed Limited Liability Companies*, 60 VILL. L. REV. 955, 984 (2016) (stating that these company-purpose limitation clauses were used to reduce the discretion of the management); Peter Molk, *How Do LLC Owners Contract Around Default Statutory Provisions?*, 42 J. CORP. L. (forthcoming 2017) (discussing how LLCs maneuver around default provisions through operating agreements). My thanks to Professor Mohsen Manesh for this information.

54. See BALLANTINE 1927, *supra* note 21, at 235 (achieving this by extending the doctrine to relations with third parties). The prevailing view of ultra vires by the 1920s is shown by the header to Ballantine’s discussion: “Basis of the doctrine of ultra vires—The defense of ultra vires is frequently not meritorious.” *Id.* at 234. Ultra vires has survived in nonprofit law. See Henry

strictures of ultra vires disappeared, the prohibition on gifts by corporations persisted, and would in the 1930s be seized upon and reworked by courts and litigants into the doctrine of corporate waste. The rest of this Part will look at the development of corporate waste from the 1930s to the 1950s, particularly in an area where many of the most important decisions occurred: executive compensation. It will then more briefly examine two other areas where waste was repeatedly invoked, the laws of charitable gifts and political donations.<sup>55</sup>

### A. Compensation

Most of the waste doctrine's development and elaboration would come in a series of challenges to executive compensation.<sup>56</sup> Even before this, though, ultra vires's ban on gifts had been applied to some forms of officer and director compensation. Corporations could not, for example, decide after the fact to compensate officers or directors for past services:

When an officer is not impliedly entitled to compensation for services, a vote or other promise by the directors or stockholders to pay him therefor given after the services have been performed, is not only without consideration, and void as a promise on that ground, but is also *ultra vires*, as a misapplication of the corporate funds.<sup>57</sup>

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Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 990 (2014) (stating that the use of ultra vires has continued to exist but in a weakened form in the context of nonprofit corporations); *see also infra* notes 165–169 and accompanying text (discussing corporate waste).

55. *See infra* Sections III.B–C (outlining statutes and case law present in both areas of charitable gifts and political donations where waste was invoked).

56. *See, e.g.*, *Rogers v. Hill*, 289 U.S. 582, 585 (1933) (filing a claim to dispute the validity of an agreement between stockholders and the vice president and president to pay the officers large amounts of money in addition to their salaries); *McQuillen v. Nat'l Cash Register Co.*, 112 F.2d 877, 883–84 (4th Cir. 1940) (stating that courts ordinarily will not review directors' decisions to fix salaries except when the directors improperly elect to give themselves excessive salaries).

57. BALLANTINE 1927, *supra* note 21, at 410. This doctrine did not apply “under such circumstances as to raise an implied promise.” *Id.*

There was also some language in treatises that suggests that excessive compensation could be treated as a gift. *Fletcher on Corporations* reported that “in the case of exorbitant and unreasonable salaries, the court may, on the petition of the minority stockholders, enjoin the payment of such salaries.”<sup>58</sup> It is unclear whether this targeted compensation that involved self-dealing by corporate controllers, as hinted by the reference to “minority stockholders,” or all compensation, but the idea could clearly be stretched in the latter direction.<sup>59</sup>

The doctrine of corporate waste “[was] nurtured, if not spawned”<sup>60</sup> in the classic case of *Rogers v Hill*,<sup>61</sup> a challenge to compensation that reached the U.S. Supreme Court in 1933.<sup>62</sup> Before discussing that case, though, we should ask why courts developed corporate waste as a distinct doctrine in the 1930s. By the 1920s, ultra vires had almost completely disappeared, along with rigid corporate codes and narrow corporate purpose provisions in corporate charters.<sup>63</sup> Fiduciary duties still functioned to limit managerial malfeasance, but they were most effective at blocking self-dealing.<sup>64</sup> Other familiar tools for checking managers and protecting shareholders, such as the market for corporate control and robust disclosure requirements, did not yet exist to any great degree. Managerial power and overreach enabled by increasingly dispersed shareholding were,

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58. FLETCHER ON CORPORATIONS, *supra* note 30, at 4038; *see also* THOMPSON *supra* note 28, at 848 (“[E]xcessive and extravagant salaries to officers must be viewed in the light of a waste of corporate assets.”).

59. FLETCHER ON CORPORATIONS, *supra* note 30, at 4038 (citing *Mathews v. Headley Chocolate Co.*, 100 A. 645 (Md. 1917)).

60. Victor Brudney, *Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations*, 25 J. CORP. L. 209, 210 n.7 (2000).

61. 289 U.S. 582 (1933).

62. *Id.* I discuss this case in Harwell Wells, “No Man Can Be Worth \$1,000,000 a Year”: *The Fight over Executive Compensation in 1930s America*, 44 U. RICH. L. REV. 689, 724–37 (2010), from which the discussion of *Hill* and its progeny is drawn.

63. *See* 1 W. COOK, TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK, vii–viii (4th ed., Callaghan 1898) (“The doctrine of ultra vires is disappearing.”).

64. *See, e.g., In re Allen-Foster-Willett Co.*, 116 N.E. 875, 876 (Mass. 1917) (“Obviously, Allen, while a director of the company charged with the duty of conserving its monetary welfare for the benefit of all concerned, could not lawfully buy at a discount claims against it.”).

however, becoming public issues—as shown by the popularity of William Z. Ripley’s 1927 exposé *Main Street and Wall Street*<sup>65</sup> and then Adolf Berle & Gardiner Means’s 1932 *The Modern Corporation and Private Property*.<sup>66</sup> The Great Depression only heightened hostility to corporations and corporate management.<sup>67</sup> Given all this, we should not be surprised that in the 1930s courts were motivated to seek additional tools to police corporate activity, and to find in waste a “fail-safe doctrine[] to enable courts to review director conduct that seem[ed] to satisfy traditional standards used to test director behavior, but where the decision simply [didn’t] make sense.”<sup>68</sup>

*Rogers* was a challenge to a bonus plan at American Tobacco.<sup>69</sup> The plan resulted from a corporate bylaw adopted in 1912 allocating 10% of the firm’s net profits above a fixed amount to its six senior executives.<sup>70</sup> By 1930 the payments were, by contemporary standards, huge. For example, American Tobacco’s president received a \$168,000 salary and an \$842,507 bonus that year.<sup>71</sup> News of this and similar payments at other firms sparked public outrage and a series of lawsuits.<sup>72</sup> In *Rogers*, shareholders attacked the payments under several theories, losing at the Second Circuit before winning in front of the Supreme Court.<sup>73</sup> Their challenges turned on both technicalities of corporate law (for example, whether the bylaw was properly adopted) and more

65. WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* (1927).

66. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

67. See Charles R.T. O’Kelley, *The Evolution of the Modern Corporation: Corporate Governance Reform in Context*, 2013 U. ILL. L. REV. 1001, 1023 (stating that due to the Great Depression “corporations cut wages, reduced production, and laid off workers”).

68. Thompson, *supra* note 10, at 544.

69. See *Rogers v. Hill*, 60 F.2d 109, 110 (2d Cir. 1932) (stating that a shareholder sought to invalidate the by-laws of the American Tobacco Company).

70. See *id.* (seeking to invalidate Article XII of the bylaws). The bonus was 10% of profits above \$8,222,245, which was the profit earned by American Tobacco in 1912; in 1930, the firm’s profits exceeded \$20,000,000. *Id.* at 113.

71. *Id.* at 114 (Swan, J., dissenting).

72. See Wells, *supra* note 62, at 709–13 (discussing such lawsuits).

73. See *Rogers v. Hill*, 289 U.S. 582, 585 (1933) (“Plaintiff maintains that the by-law is invalid and that, even if valid, the amounts paid under it are unreasonably large and therefore subject to revision by the courts.”).

general assertions that the payments were inequitable; but the latter was a difficult case to make. The bonuses were not per se illegal under corporate law, nor the product of self-dealing (the bylaw had been adopted well before any of the recipients joined the company), and there was, the court concluded, no “inference of actual or constructive fraud.”<sup>74</sup> Despite this, the Supreme Court held that the bonuses could be challenged in court; “the payments under the by-law,” it held, had “become so large as to warrant investigation in equity.”<sup>75</sup> Quoting a dissent from the lower court, it stated “the applicable rule: ‘If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part, and the majority stockholders have no power to give away corporate property against the protest of the minority.’”<sup>76</sup>

This statement summarizes corporate waste in its modern form: a transaction in which a corporation has received something that has “no relation to the value . . . for which it is given,” a “gift in part,” one forbidden by the well-established principle that corporations cannot make gifts.<sup>77</sup> Though clearly drawing on *ultra vires*, *Rogers* announced a new rule, seemingly rooted in equity, prohibiting not only corporate transactions in which there is no consideration at all—gifts—but transactions in which there was no substantial connection between what the corporation gave and what it received.<sup>78</sup> Applying this rule, though, would pose problems for courts traditionally reluctant to become too involved in corporate decision-making, a reluctance already embodied in the longstanding business judgment rule.<sup>79</sup>

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74. *Id.* at 584–85.

75. *Id.* at 591.

76. *Id.* (quoting *Rogers v. Hill*, 60 F.2d 109, 113 (2d Cir. 1932) (Swan, J., dissenting)).

77. *Id.* I have found no case before *Rogers* using the term “gift in part” to describe waste or *ultra vires* actions; its last Delaware use is in *Saminsky v. Abbott*, 185 A.2d 765, 770 (Del. 1961) (applying waste doctrine to a common-law business trust).

78. The Court cites earlier cases for this proposition, but those cases involved self-dealing by corporate controllers. See, e.g., *Rogers v. Hill*, 60 F.2d 109, 114 (2d Cir. 1932) (Swan, J., dissenting) (citing *Endicott v. Marvel*, 87 A. 230 (N.J. Ch. 1913); *Collins v. Hite*, 153 S.E. 240 (W. Va. 1930)).

79. See Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 412 n.33



Compensation was, after all, rarely a pure gift.<sup>80</sup> Would courts actually venture to weigh corporate payments, at least those lacking indicia of self-dealing, to determine when they were so extravagant as to constitute gifts in part?

The answer, it became clear over the rest of the decade, was no. After *Rogers*, a series of cases would challenge executive compensation as violating the rule handed down in *Rogers*, but in not a single one did plaintiffs win.<sup>81</sup> Courts' hesitant approach was summed in a 1939 case, *McQuillen v National Cash Register Co.*,<sup>82</sup> where the court made clear that it would not second-guess pay merely because it appeared high: "We must distinguish between compensation that is actually wasteful, and that which is merely excessive. The former is unlawful, the latter is not."<sup>83</sup> Waste only existed, according to the court, where there had been "a failure to relate the amount of compensation to the needs of the particular situation by *any* recognized business practices, honestly, even though unwisely adopted—namely, the result of bad faith, or a total neglect of or indifference to such practices."<sup>84</sup> At least regarding executive compensation, waste already seemed a dead letter.

A handful of cases asserting waste did succeed, but in these the compensation at issue was payment for past services not granted until after service was performed.<sup>85</sup> In *Fidanque v.*

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(2013) (noting the long history of the business judgment rule in Delaware).

80. Compensation payments awarded after services were rendered, such as a bonus on retirement, were sometimes treated as gifts—payments made without consideration. *Infra* note 81 and accompanying text.

81. Some cases would count as wins for plaintiffs because the investigation into pay packages discovered other wrongs, such as overpayment of bonuses due to miscalculations. One court, in examining a complex bonus plan at General Motors, did state that it would have found that bonuses paid during the 1920s were wasteful, had the claim not been time-barred. *Winkelman v. Gen. Motors Corp.*, 44 F. Supp. 960, 967 (S.D.N.Y. 1942).

82. 27 F. Supp. 639 (D. Md. 1939).

83. *Id.* at 653.

84. *Id.*

85. On this rule, see ROBERT CHARLES CLARK, CORPORATE LAW 195–97 (1986) (citing *Adams v. Smith*, 153 So. 2d 221 (Ala. 1963), as a case involving a minority shareholder successfully challenging payments that the corporation's board of directors ordered). There were also cases claiming waste that appeared, on close inspection, to be about self-dealing. *See, e.g., Cullen v. Governor Clinton Co.*, 110 N.Y.S.2d 614, 617 (N.Y. App. Div. 1952) (holding salary paid to

*American Maracaibo Co.*,<sup>86</sup> the court found a consulting contract for a retired officer to be waste because the payments were chiefly for past services, holding “[t]he fact that the contract may constitute a gift in part only does not help . . . since a totally inadequate consideration would invoke the same principles of law as the absence of any consideration.”<sup>87</sup> On similar grounds, a few courts held that pensions awarded to the widows of corporate officers could also be wasteful. In *Moore v. Keystone Macaroni Manufacturing Co.*,<sup>88</sup> for example, the Pennsylvania Supreme Court held that a board’s decision to pay the widow of the company’s founder and president \$25,000 a year “in recognition of the long and valued services rendered to [the] corporation . . . by her deceased husband”<sup>89</sup> was ultra vires and against the general rule forbidding a corporation to “give away, dissipate, waste or divert the corporate assets.”<sup>90</sup>

This advance and retreat in the 1930s would be the first in a repeated pattern of ups and downs in waste’s career.<sup>91</sup> First would come a moment when there appeared to be the need for an “equitable safety valve” allowing scrutiny of corporate acts not obviously violative of the fiduciary duties, a moment in which courts would invoke the waste doctrine and threaten to give it broad application.<sup>92</sup> Once this passed, though, courts would

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controlling shareholder for hotel management, when management contract was already in place, wasteful).

86. 92 A.2d 311 (Del. Ch. 1952).

87. *Id.* at 321 (citing *Rogers v. Hill*, 289 U.S. 582 (1933)); *accord* *Fogelson v. Am. Woolen Co.*, 170 F.2d 660, 663 (2d Cir. 1948) (“A retirement plan which provides a very large pension to an officer who has served to within one year of the retirement age without any expectation of receiving a pension, would seem analogous to a gift or bonus.”).

88. 87 A.2d 295 (Pa. 1952).

89. *Id.* at 297.

90. *Id.* at 298 (citing 6 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS 667–68 (perm. ed.)); *accord* *Adams v. Smith*, 153 So. 2d 221, 224 (Ala. 1963) (finding payment to widow ultra vires).

91. A point made in *Thomas & Wells*, *infra* note 97, at 858 (“By one estimate, executive compensation did not again attain the heights of the early 1930s until the end of the 1980s.”).

92. *See* *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 895 (Del. Ch. 1999) (“Although I recognize that our law has long afforded plaintiffs the vestigial right to prove that a transaction that a majority of fully informed, uncoerced independent stockholders approved by a non-unanimous vote was wasteful, I question the continued utility of this ‘equitable safety valve.’”).

retreat from waste and return to their general deference to the business decisions of unconflicted directors as embodied in the business judgment rule.<sup>93</sup> Waste would never disappear, but it would only rarely gain any traction.<sup>94</sup> We can see this in the 1950s challenges to stock option compensation, and in a related area in challenges to mutual fund fees.<sup>95</sup> It is also this time when we see Delaware law become central to the development of the waste doctrine.<sup>96</sup>

The stock option cases are probably better known.<sup>97</sup> In 1950, changes in tax law made it easier for corporations to award stock options grants as compensation.<sup>98</sup> Such “restricted stock option grants” would become popular for executives as they were often taxed at rates lower than the then-sky-high marginal income tax rates.<sup>99</sup> Yet options grants were worrisome; they were hard to value (pre Black-Scholes) and threatened to allow managers to transfer ownership to themselves, a longstanding fear of reformers.<sup>100</sup> In 1952, the Delaware Supreme Court decided two major cases asserting such grants were waste: *Gottlieb v. Heyden*

93. See, e.g., HENRY W. BALLANTINE, LAW OF CORPORATIONS, 160–61 (rev. ed. 1946) [hereinafter BALLANTINE 1946] (“Courts will not, in general, undertake to review the expediency of contracts or other business transactions authorized by their directors. . . . But it is presumed in this ‘business judgment rule’ that reasonable diligence and care have been exercised.”).

94. See Thomas & Wells, *infra* note 97, at 857 (“Executive compensation faded as an issue at the end of the 1930s.”).

95. See *id.* at 868–69 (“During the 1950s, the prevalent issue concerning executive compensation in the Delaware courts was the validity of corporate stock option grants.”).

96. *Rogers v. Hill* was a U.S. Supreme Court case interpreting New Jersey law, but was “long incorporated in Delaware law.” 1 R. FRANKLIN BALLOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ASSOCIATIONS § 4.11 (2d ed. Supp. 1992).

97. My discussion of the stock option cases draws on Randall S. Thomas & Harwell Wells, *Executive Compensation in the Courts: Board Capture, Optimal Contracting, and Officers’ Fiduciary Duties*, 95 MINN. L. REV. 846, 868–73 (2011). Delaware law had allowed stock options since at least 1929, but their widespread popularity was new to the 1950s. See *Grimes v. Alteon*, 804 A.2d 256, 263–64 (Del. 2002) (“The predecessor provision to Section 157 was first passed in 1929, the first statute in the nation expressly to authorize the issuance of options.”).

98. For a discussion of this tax change, see Steven Bank, Brian Cheffins & Harwell Wells, *Executive Pay: What Worked?*, 42 J. CORP. L. 59, 77 (2016).

99. See *id.*

100. See generally BERLE & MEANS, *supra* note 66, at 180–85.

*Chemical Corp.*,<sup>101</sup> and *Kerbs v. California Eastern Airways*.<sup>102</sup> The claims in the two cases were identical: that the options were given for no cognizable consideration and were therefore equivalent to gifts.<sup>103</sup>

Waste allowed the courts to make a more searching examination of this relatively novel form of compensation than did traditional fiduciary duties; one observer even claimed that such close scrutiny was “an un-Delaware-like approach.”<sup>104</sup> What professedly worried the court in these cases was the possibility that the grants would be given for little consideration, or be structured so that the corporation never received the promised consideration at all.<sup>105</sup> To avoid either possibility, in *Kerbs* the court handed down a two-part test for option grants—a test arguably more demanding than the traditional test for waste.<sup>106</sup> The court held, first, that there needed to be “a reasonable relationship between the value of the services to be rendered by the employee and the value of the options granted,” which echoed the basic test for waste and would prevent the options being exchanged for a peppercorn.<sup>107</sup> Second, the court required that

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101. 90 A.2d 660, 664 (Del. 1952).

102. 90 A.2d 652, 656–58 (Del. 1952).

103. In both cases the plans were adopted by boards whose members might receive the options, but were subsequently ratified by shareholders, which would have the effect of curing any taint of self-dealing “unless the action of the directors constituted a gift of corporate assets to themselves or was *ultra vires*, illegal, or fraudulent.” *Kerbs*, 90 A.2d at 655; see also *Gottlieb*, 90 A.2d at 665 (“Ratification by stockholders, indeed, is frequently decisive of controversies in this field of law.”).

104. Harry G. Henn, Book Review, 49 CORNELL L.Q. 574, 576 (1964).

105. See *Kerbs*, 90 A.2d at 657

Sufficient consideration to the corporation may be, *inter alia*, the retention of the services of an employee, or the gaining of the services of a new employee, provided there is a reasonable relationship between the value of the services to be rendered by the employee and the value of the options granted as an inducement or compensation.

106. See *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997) (“If, however, there is *any substantial* consideration received by the corporation, and if there is a *good faith judgment* that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude *ex post* that the transaction was unreasonably risky.”).

107. *Kerbs*, 90 A.2d. at 656; see also *Haft v. Dart Group Corp.*, Civ. A. No. 13736, 1994 WL 643185, at \*2 (Del. Ch. Nov. 14, 1994) (“The legal test of corporate waste is more demanding than a peppercorn standard . . .”).

there be “circumstance which may reasonably be regarded as sufficient to insure that the corporation will receive that which it desires to obtain by granting the options.”<sup>108</sup> Because under the plan challenged in *Kerbs* an employee could, theoretically, receive the options, quit, and immediately exercise them, the court held that the option grants did not meet its test—they did not ensure that the airline would receive the employees’ services it had bargained for.<sup>109</sup> Note that this test was applied *ex ante*; the possibility that an employee could take the options and run rendered them waste, even if in fact the employee stayed at the firm.<sup>110</sup>

Yet having invoked waste to make its point, the court then avoided repeating the exercise in subsequent cases. This was in part due to statutory change; Delaware’s legislature amended its corporation law in 1953 to make clear that a board’s judgment concerning consideration for options would be conclusive “absent fraud.”<sup>111</sup> More consequentially, when a stock option case again reached the Delaware Supreme Court, in 1960’s *Beard v. Elster*,<sup>112</sup> the court weakened the rule adopted in *Kerbs*.<sup>113</sup> While reciting that the rule remained unchanged, the court distinguished *Kerbs* from *Beard* by noting that in the former case, the options had been granted by a self-interested board and only later ratified by shareholders.<sup>114</sup> In *Beard*, in contrast, approval

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108. *Kerbs v. Cal. E. Airways*, 90 A.2d 652, 657 (Del. 1952).

109. *Id.* The court in handing down this rule cited *Rosenthal v. Burry Biscuit Corp.*, a case of gross self-dealing where the controlling stockholder of a corporation awarded himself a large in the money options grant. 60 A.2d 106, 109 (Del. Ch. 1948).

110. In *Gottlieb v. Heyden Chemical Corp.*, a similar options plan was considered, but the case was remanded to Chancery to determine whether there was “consideration which has a value reasonably related to the concessions made by the corporation.” 90 A.2d 660, 666 (Del. 1952).

111. See 2 GEORGE THOMAS WASHINGTON & HENRY V. ROTHSCHILD, 2ND, COMPENSATING THE CORPORATE EXECUTIVE 569, 578–79 & n.43 (3d ed. 1962).

112. 160 A.2d 731 (Del. 1960).

113. See *id.* at 737 (“It is true that *Kerbs* and *Gottlieb* lay down a fundamental rule governing all stock option plans, however adopted.” (emphasis added)).

114. See *id.* at 737–39 (“[I]n the *Kerbs* case, the fact that the Directors who voted in favor of the plan were permitted by the plan to leave the company’s employ . . . impaled the plan upon the prong of failure to provide reasonable safeguards that the corporation would receive the contemplated benefit . . .”).

had been given by disinterested directors and then ratified by shareholders; in such a situation, the court concluded, the business judgment rule would be appropriate, and a court would be “precluded from substituting [its] uninformed opinion for that of experienced business managers . . . who have no personal interest in the outcome.”<sup>115</sup>

Waste’s limited utility was made plain as well in challenges to compensation in mutual funds. After suffering a collapse in the 1930s, the mutual fund industry made a comeback following World War II as cautious investors saw mutual funds as a way to participate in the stock market.<sup>116</sup> Under the Investment Company Act of 1940—which reconstituted the industry—mutual funds had an unusual managerial structure: each fund was a separate investment company with its own board, which contracted with an adviser to actually run the fund; the structure was intended to prevent advisers from simply looting wholly-owned funds, as had allegedly occurred in the 1930s.<sup>117</sup> The funds were in fact creatures of the adviser, however, creating a thicket of conflicts. Many observers came to believe this allowed advisers to pry “excessive” payments from supine, controlled boards.<sup>118</sup>

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115. *Id.* at 738. For a retrospective on Delaware’s changing approach to stock options, see *Lewis v. Vogelstein*, 699 A.2d 327, 336–39 (Del. Ch. 1997) (“In *Beard v. Elster* . . . the Delaware Supreme Court relaxed slightly the general formulation of *Kerbs et al.*, and rejected the reading of *Kerbs* to the effect that the corporation had to have (or insure receipt of) legally cognizable consideration in order to make an option grant valid.” (quotation at 337)).

116. See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 222–31 (3d ed. 2003) (“After the 1929 stock market crash, the reputation of the investment companies declined even more rapidly than it had grown in the previous three years.”).

117. See Alfred Jaretzki Jr., *The Investment Company Act of 1940*, 26 WASH. U. L.Q. 303, 308–10 (1941) (“The original bill to regulate investment companies followed in many respects the pattern of recent federal legislation.” (quotation at 308)); Note, *The Mutual Fund and Its Management Company: An Analysis of Business Incest*, 71 YALE L.J. 137, 137 (1961) (“The mutual fund sells its own shares to the public. Governed by the investment decisions of its management company, it then invests the proceeds in marketable securities.”). See generally WILLIAM BIRDBHISTLE, *EMPIRE OF THE FUND* 29–49 (2016).

118. See COMM. ON INTERSTATE FOREIGN COMMERCE, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, H.R. REP. NO. 89-2337, at 12 (1966) (Conf. Rep.) (“The courts have held that since the contracts under which the fees were paid

In the 1950s and 1960s, almost fifty lawsuits were filed alleging that payments to mutual fund advisers constituted waste.<sup>119</sup> The typical claim was that advisers did not adjust their fees—usually 0.5% of assets under management—as funds grew, even though economies of scale meant that expenses did not increase at the same rate as did a fund’s size.<sup>120</sup> Most of the claims ended in minor settlements, but a few went to trial, including what became the leading case, *Saxe v Brady*,<sup>121</sup> a 1961 Delaware action. The plaintiffs lost, but the court did lay out what became one of the classic definitions of waste:

[W]hether what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid. If it can be said that ordinary businessmen might differ on the sufficiency of the terms, then the court must validate the transaction.<sup>122</sup>

Under this approach, for a fee to be found wasteful, noted one respected jurist, it would have to be not just “unreasonable,” but “unreasonably unreasonable.”<sup>123</sup> Strikingly, in the case of mutual funds it was the very difficulty of satisfying this test for corporate waste that eventually produced change.<sup>124</sup> So useless was waste as a limit to fees that in 1969 Congress amended the Investment

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had been ratified by shareholders and by unaffiliated directors, the plaintiffs had to bear the burden of proving affirmatively that the fees were so grossly excessive that payment thereof constituted a waste of corporate asset.”).

119. H.R. REP. NO. 89-2337 at 83.

120. See Ben L. Fernandez, *The Duties of Mutual Fund Independent Trustees with Respect to the Investment Advisory Fee*, BOS. B.J., Mar.–Apr. 1997, at 13 (1997) (“In connection with the analysis of economies of scale, the relevant question is whether ‘the per unit cost of performing fund transactions increased as the number of transactions increased.’”).

121. 184 A.2d 602 (Del. Ch. 1962).

122. *Id.* at 610.

123. *Mutual Fund Legislation of 1967: Hearings on S. 1659 Before the S. Comm. on Banking & Currency*, 90th Cong. 1015 (1967) (statement of Judge Henry J. Friendly); see, e.g., Mark S. Vander Broek, Comment: *The Demand Requirement in Investment Company Act Shareholder Actions*, 50 U. CHI. L. REV. 1500, 1504–05 (1983) (“The unaffiliated directors appeared unable to prevent excessive advisory fees, and plaintiff shareholders seeking to attack the fees in court were consistently defeated by the existing ICA standard that required them to prove that payment of the fees amounted to ‘corporate waste.’”).

124. See *id.* at 1505 (“In an attempt to control excessive advisory fees, Congress amended the ICA in 1970.”).

Company Act to include a new Section 36(b) imposing fiduciary duties on advisers in relation to fees—effectively taking the issue away from state courts and state corporate law doctrine.<sup>125</sup>

Waste would be largely quiescent in the core areas of corporate law for the next two decades. Before jumping ahead to later developments, though, we turn briefly to examine waste's role in two other areas of corporate expenditures, charitable gifts and political donations.

### *B. Charitable Gifts*

Under *ultra vires*, gifts in general were forbidden, and the classic example of such a forbidden gift was a gift to charity.<sup>126</sup> A leading English case spoke the rule: “Charity has no business to sit at boards of directors *qua* charity.”<sup>127</sup> While there was a small space for donations that promised to redound to the corporation's immediate or short-term benefit, such gifts were allowed precisely because they were not true gifts.<sup>128</sup> This rule was

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125. See COMM. ON INTERSTATE FOREIGN COMMERCE, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, H.R. REP. NO. 89-2337, at 135 (1966) (Conf. Rep.); SELIGMAN, *supra* note 116, at 378–80. Whatever hopes for it, in the end Section 36(b) did no better for investors than did the waste doctrine. Lyman Johnson, *Protecting Mutual Fund Investors: An Inevitable Eclecticism*, in RESEARCH HANDBOOK ON MUTUAL FUNDS (William Birdthistle & John Morley, eds. 2016) (explaining that no investor has ever won a claim under Section 36(b)).

126. See FLETCHER ON CORPORATIONS, *supra* note 30, at 2148–49 (“[T]here is no question but that an ordinary business corporation is without power to give away part of its property” in the form of “a mere gift, such as a gift to charity”).

127. BALLANTINE 1946, *supra* note 93, at 228 (quoting *Hutton v. West Cork Ry. Co.* [1883], 23 Ch. Div. 654, 673 (C.A.)).

128. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (indicating that “incidental humanitarian expenditures of corporate funds for the benefit of the employees” would be allowable); *Steinway v. Steinway & Sons*, 40 N.Y.S. 718 (N.Y. Sup. Ct. 1896) (“If that act is . . . lawful in itself, . . . is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful, sense, it may fairly be considered within charter powers.”); see also Note, *Donations by a Business Corporation as Intra Vires*, 31 COLUM. L. REV. 136, 136 (1931) (“Gifts by business corporations, organized for profit, are ordinarily *ultra vires*. But donations are made with the expectation that pecuniary benefits to the corporation will result.”).



weakened in the 1930s as several states adopted statutes specifically allowing corporate charitable donations without requiring recognizable benefit to the corporation, probably in response to immiseration and anti-corporate sentiment during the Great Depression.<sup>129</sup>

Even with this change, though, charitable donations were not automatically allowed, and fear lingered that such donations would be found ultra vires.<sup>130</sup> This was partially overcome in the well-known 1953 case of *A.P. Smith Manufacturing v. Barlow*,<sup>131</sup> where the New Jersey Supreme Court held a corporate charitable donation to Princeton University intra vires under the common law of corporations.<sup>132</sup> The court reasoned that the donation, while not providing immediate benefits to Smith Manufacturing, would still eventually advance the interests of the company as well as the community—a widely followed holding that allowed corporate donations largely to occur without fear of ultra vires.<sup>133</sup> Yet there was an important caveat; while the case apparently rested on the common law, the court also looked to New Jersey’s statute, which allowed only “reasonable” donations—defined as

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129. See Note, *Corporations—Charities—Statute Making Contributions to Charity by Corporations Intra Vires*, 52 HARV. L. REV. 538, 538–39 (1939) (listing statutes adopted over the previous decade allowing corporate charitable donations). See generally Ray Garrett, *Corporate Donations to Charity*, 4 BUS. LAW. 28 (1948) (citing different surveys to give an idea of corporate donations to charities at the time).

130. See Garrett, *supra* note 129, at 28 (“It was the traditional rule that a donation of its property by a corporation not created for charitable purposes was ultra vires and in violation of the rights of the stockholders.”).

131. 98 A.2d 581 (N.J. 1953).

132. See *id.* at 590 (“There is no suggestion that it was made indiscriminately or to a pet charity of the corporate directors in furtherance of personal rather than corporate ends.”). New Jersey did have a statute allowing charitable donations, but the statute arguably did not apply to the company here because it was passed long after the company’s incorporation. See *id.* (“We find that it was a lawful exercise of the corporation’s implied and incidental powers under common-law principles and that it came within the express authority of the pertinent state legislation.”).

133. See *id.* (“[I]t was made to a preeminent institution of higher learning . . . and was voluntarily made in the reasonable belief that it would aid the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates.”). The court also warned that donations could not be to “pet charities,” a signal that the duty of loyalty would still apply to decisions to give charitable donations. *Id.*

less than 5% of capital and surplus—to place a limit on the size of a donation.<sup>134</sup>

How such a reasonableness limit was applied is shown in 1969's *Theodora Holding Corp. v Henderson*,<sup>135</sup> where the Delaware Supreme Court upheld a \$528,000 charitable donation.<sup>136</sup> The grounds for the challenge were not entirely clear; while the plaintiff claimed the donation was a violation of the controlling shareholder's fiduciary duties, the court appeared to ask whether the donation was ultra vires.<sup>137</sup> After noting that Delaware's statute gave corporations power to make charitable donations and, unlike New Jersey's statute, put no limits on the donation's size, the court still concluded that "the test to be applied in passing on the validity of a gift such . . . is that of reasonableness" and pointed to federal tax law's deduction limitation of 5% of income as a measure of reasonableness.<sup>138</sup> The gift fell below this 5% limit, and the court also found this would end up "benefiting plaintiff in the long run."<sup>139</sup> Twenty years later in *Kahn v Sullivan*,<sup>140</sup> Delaware's Supreme Court would make clear that *Theodora* dealt with a corporate waste claim when it affirmed the approval of a settlement over another corporate charitable donation: that of Occidental Petroleum for a museum named after the firm's founder, Armand Hammer.<sup>141</sup> It held that the test for waste—at least in the charitable context—was *Theodora's* test of reasonableness, with IRS provisions again "a helpful guide."<sup>142</sup>

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134. See *id.* at 587 ("[T]he contribution shall not exceed [5]% [o]f capital and surplus unless the excess is authorized by the stockholders at a regular or special meeting.").

135. 257 A.2d 398 (Del. 1969).

136. *Id.* at 401.

137. See *id.* at 404–05 (inquiring into the reasonableness of the charitable donation).

138. *Id.* at 405. The limit is now 10%. See I.R.C. § 170(b)(2)(A) (2012) ("The total deductions under subsection (a) for any taxable year (other than for contributions to which subparagraph (B) or (C) applies) shall not exceed 10 percent of the taxpayer's taxable income.").

139. *Theodora Holding*, 257 A.2d at 405.

140. 594 A.2d 48 (Del. 1991).

141. See *id.* at 63 ("In this case, we find that all of the Court of Chancery's factual findings of fact are supported by the record.").

142. *Id.* at 61.

In corporate charitable giving we see once more the strictures of ultra vires transform into the weaker and more rarely invoked ban on waste. Certainly, some of this is due to broadening views of corporate purpose and a more capacious approach to how a donation could eventually benefit a corporation. By the 1950s, gifts were allowed not only for the corporation's immediate benefit but to benefit the free enterprise system in which corporations flourished.<sup>143</sup> Yet the shadow of corporate waste still hangs over this jurisprudence, in the rule that charitable donations be "reasonable" and the use of the IRS deductible limit as a rough measure of that.<sup>144</sup> Corporate decisions to give charitable gifts still occur under a more watchful judicial eye than do other corporate acts.

### C. Political Donations

As with charitable gifts, there was little question at the beginning of the twentieth century that corporate donations to politicians and political campaigns were ultra vires.<sup>145</sup> Whatever

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143. See *supra* note 133 and accompanying text (demonstrating a case where a corporation made a charitable donation to Princeton University in order to benefit the community).

144. The requirement that donations be "reasonable" is not to be found in either Delaware's corporate statute nor the Model Business Corporation Act.

145. See, e.g., *Mobile Gas Co. v. Patterson*, 293 F. 208, 226 (M.D. Ala. 1923) (finding contributions to political campaigns not a legitimate corporate expense); *McConnell v. Combination Min. & Mill. Co.*, 76 P. 194, 199 (Mont. 1904) ("The donation to Louis S. McClure and to the Bimetallic Mining Company were clearly outside of the purposes for which the corporation was created, both being for strictly political purposes."); see also Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Laws*, 92 GEO. L.J. 871, 915-17 (2004) ("The noted political reformer Perry Belmont contended that corporate law held the promise of at least a partial remedy for owners of all types of corporations offended by the use of their money for campaign contributions." (quotation at 915)); Daniel Lipton, Note, *Corporate Capacity for Crimes and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1919-24 (2011) ("Courts considered corporate political expenditures to be ultra vires before lawmakers outlawed political uses of corporate funds." (quotation at 1919)). Many states in the early twentieth century also banned corporate political contributions through legislation. See *id.* at 1923 ("[T]he wave of legislation reinforcing the ultra vires doctrine against corporate political expenditures was also motivated by a perceived public interest.").

a corporation's specific purposes, advancing political causes was not among them.<sup>146</sup> When in 1906 it was discovered that the New York Life Insurance Company had donated \$50,000 to the Republican National Committee, New York's Court of Appeals had no problem in holding that the company "had not the right, under its law of existence, to agree to make contributions for political campaigns, any more than to agree to do other things foreign to its charter."<sup>147</sup> A New York investigation of corruption in the life insurance industry that year urged that the law be changed so that "[n]ot only should [a political contribution] be expressly prohibited and treated as a waste of corporate moneys," but any agent making a donation for a corporation should be guilty of a misdemeanor.<sup>148</sup> There was, as usual, a caveat to this rule—some authorities suggested that a corporation could donate funds to defeat a cause deemed "inimical to its interests"—but the idea that corporations largely lacked the power to make political donations undergirded many of the first campaign-finance laws adopted early in the twentieth century, including the United States' first national campaign finance law, the Tillman Act.<sup>149</sup>

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146. See Lipton, *supra* note 145, at 1919 ("The ultra vires nature of such expenditures, however, did not derive from an abstract philosophy of corporate personhood, but instead stemmed from the scope of corporate purpose authorized by the shareholders.").

147. *People ex rel. Perkins v. Moss*, 80 N.E. 383, 387 (N.Y. 1907). The case was actually about whether George W. Perkins, the New York Life executive who arranged the donation, could be tried for larceny for taking the company's money and giving it to the committee; the court held in a divided opinion that he could not, but only because he lacked the intent necessary to have committed the crime. See *id.* ("The essential element of the 'intent to deprive and defraud' is nowhere to be found, and there is no just basis for the inference."); see also JOHN A. GARRATY, *RIGHT-HAND MAN, THE LIFE OF GEORGE W. PERKINS* 190–93 (New York: Harper & Bros., 1957).

148. Winkler, *supra* note 145, at 918 (quoting STATE OF N.Y., REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK APPOINTED TO INVESTIGATE THE AFFAIRS OF LIFE INSURANCE COMPANIES, Assemb. Doc. No. 41, 106 (1906)).

149. *Id.* at 916 (quoting ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS 87–88 (1908)); see also Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 235 (1981) [hereinafter Brudney, *Business Corporations*] ("By the beginning of this century, public pressure resulted in regulatory restrictions on corporate political expenditures even if authority for such expenditures could be found within corporate charters."); Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 837 (1961) (providing an example of a typical state statute

While most of the cases labeling political donations *ultra vires* were from early in the twentieth century, this is another area where the idea that some expenditures were *ultra vires* lingered. Here too, however, as the belief that a corporation was circumscribed by a limited purpose faded, so did the notion that all political donations, irrespective of purpose, were *ultra vires*. In *Abrams v. Allen*,<sup>150</sup> a 1947 New York case, the court held that use of corporate assets to promote an official's personal views could "state a cause of action for waste, mismanagement, lack of due care, or conversion";<sup>151</sup> but in making these claims, plaintiffs were careful to claim that the expenditures were not actuated by "honest bona fide considerations affecting the welfare" of the corporation.<sup>152</sup> As states changed their legislation to allow some corporate political expenditures, many still banned donations not directly tied to the corporation's business. The Massachusetts campaign finance law eventually struck down by the U.S. Supreme Court in *First National Bank of Boston v. Bellotti*,<sup>153</sup> for example, only prohibited corporations from making expenditures to influence a vote "other than [on] questions materially affecting the property, business, or assets of the corporation."<sup>154</sup> In other words, it was contributions that would return no benefit to the corporation that the statute barred: those constituting waste. In a 1981 article reviewing the Court's political speech jurisprudence, Victor Brudney argued, in a section headed *Ultra Vires Speech*:

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prohibiting corporations from contributing to political campaigns).

150. 74 N.E.2d 305 (N.Y. 1947).

151. *Corporate Political Affairs Programs*, *supra* note 149, at 844.

152. *Abrams*, 74 N.E.2d at 305; *see also Corporate Political Affairs Programs*, *supra* note 149, at 824–27 (detailing corporate expenditures promoting particular views). Some thirty years later, a similar claim also appeared in *Cort v. Ash*, 422 U.S. 66 (1975), where plaintiffs alleged a corporation's political donations were illegal and, thus, *ultra vires* under Delaware law. *Id.* at 72 n.6 ("[T]here is not properly before us respondent's argument that the acts of a Delaware corporation violative of United States criminal statutes are *ultra vires* acts under Delaware corporation law."). Illegal donations may also violate a director's fiduciary duties, irrespective of whether or not the corporation benefits. *See Miller v. AT&T*, 507 F.2d 759, 762 (3d Cir. 1974) ("[E]ven though committed to benefit the corporation, illegal acts may amount to a breach of fiduciary duty in New York.").

153. 435 U.S. 765 (1978).

154. *Id.* at 765.

*Waste*, that the power remained for a state to ban certain kinds of corporate speech by requiring unanimous shareholder approval of the expenditure (as is required under classic doctrine for approval of any wasteful expenditure).<sup>155</sup>

As corporate political donations became increasingly regulated by state and federal legislation, waste claims against corporate political expenditures tapered off, though they did not disappear. During the 1990s, in *Stern v. General Electric*,<sup>156</sup> the plaintiff in a series of cases alleged that General Electric's donations to its political action committee were wasteful. The claim was subsequently thrown out by a court operating under New York's distinctive definition of waste, which required bad intent and that there be "a transaction no person of ordinary sound business judgment" would have judged the corporation received "fair benefit" for.<sup>157</sup> Today, in the wake of the U.S. Supreme Court's decision in *Citizens United v. FEC*,<sup>158</sup> scholars are again quarrying the waste doctrine to see if it could provide any limit on a corporation's political expenditures.<sup>159</sup>

#### IV. Waste's Work

##### A. Waste's Frustrations

From the 1960s into the 1980s, waste as a doctrine was at a low ebb.<sup>160</sup> This is probably because executive compensation was

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155. See Brudney, *Business Corporations*, *supra* note 149, at 243–52 (“To start with the least complicated configuration, let us assume that state common law or statutory law forbids waste by corporate management, and that it defines waste as expenditures from which the enterprise cannot reasonably be expected to benefit.”).

156. 837 F. Supp. 72 (S.D.N.Y. 1993).

157. *Id.* at 76.

158. 558 U.S. 310 (2010).

159. See, e.g., Leahy, *Super PAC*, *supra* note 11, at 290 (“As such, this article undertakes a detailed inquiry into the theories—waste and self-dealing—that these authors propose that shareholders could use to successfully challenge a corporate political contribution.”); Nelson II, *Post-Citizens United*, *supra* note 11, at 144–45 (“Shareholders may file derivative claims of corporate waste against directors of corporations to challenge corporate independent political expenditures that they believe are detrimental to the corporation.”).

160. This is not to say there were no cases asserting waste. See, e.g., Kelly v. Bell, 254 A.2d 62, 74 (Del. Ch. 1969) (rejecting an assertion that a corporation's

not a significant issue for much of that period, and the line of cases stemming from *Rogers v. Hill*<sup>161</sup> was seen as chiefly applying to executive compensation.<sup>162</sup> When courts did address compensation, they more often looked at the process used to set it, not whether the resulting pay package constituted waste.<sup>163</sup> It was also at this time that statutory reforms swept away what little was left of ultra vires. In 1950, the Model Business Corporation Act (MBCA) eliminated ultra vires claims except in very limited circumstances, making plain what had already occurred in judicial decisions.<sup>164</sup> In 1967, Delaware followed suit in the revised Delaware General Corporation Law (DGCL), “severely constrict[ing] the categories of claimants who [could] raise the ultra vires defense.”<sup>165</sup> These changes illuminate not only the dwindling of ultra vires, but how waste had become detached from its predecessor. By the end of the 1970s we begin to see cases refer to acts that could be waste or ultra vires, a distinction emphasizing the separation of the two.<sup>166</sup> A prime illustration of this divergence appeared when the American Law Institute adopted its controversial *Principles of Corporate*

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voluntary payment in lieu of taxes was waste).

161. 289 U.S. 582 (1933).

162. See CLARK, *supra* note 85, at 197–99 (treating *Rogers* as solely a case about executive compensation); Detlev Vagts, *Challenges to Executive Compensation: For the Markets or the Courts?*, 8 J. CORP. L. 231, 232 (1983) (identifying the growing concerns of over-generous management compensation).

163. See Vagts, *supra* note 162, at 268 (“Rather than attack the compensation problem head-on, the courts have focused on what was done inside the corporations by the board of directors, by committees, and by the shareholders.”).

164. MODEL BUSINESS CORPORATION ACT § 6 (1950); see also Whitney Campbell, *The Modern Business Corporation Act*, 11 BUS. LAW. 98, 102 (1956) (“[S]ection 6 of the model act . . . abolishes the . . . ultra-vires [doctrine], while preserving the doctrine to a very limited degree.”).

165. 1 ERNEST L. FOLK, III, RODMAN WARD, JR. & EDWARD P. WELCH, FOLK ON THE DELAWARE GENERAL CORPORATE LAW 2-21 to 2-24 (2015); see also DEL. CODE ANN. tit. 8 § 124 (2017) (limiting ultra vires); *Casanaro v. Bloodhound Techs.*, 65 A.3d 618, 648–54 (Del. Ch. 2013) (discussing Section 124 and ultra vires in Delaware law).

166. See *Michelson v. Duncan*, 407 A.2d 211, 218–19 (Del. 1979) (noting that voidable acts are those that are “performed in the interest of the corporation but beyond” management authority, in contrast “from acts which are ultra vires . . . or waste of corporate assets”). This is not to say that the link between waste and ultra vires was completely forgotten, just that the two concepts were increasingly not seen as the same thing. *Id.*

*Governance*,<sup>167</sup> which briefly discussed—and largely dismissed—the “common law doctrine of ultra vires” in one section, while devoting a separate section to waste in which ultra vires was not mentioned—treating them as two separate concepts.<sup>168</sup>

Waste claims had at least one troublesome aspect, though, that made the doctrine difficult to completely ignore: they could be tough to get rid of, at least in Delaware—home of the majority of the nation’s giant corporations. At first glance, they should not have been. Waste claims were on their face implausible (a transaction no rational business person would make, at least absent fiduciary duty violations?), and no court after mid-century found a transaction wasteful in a final judgment.<sup>169</sup> But unlike with some fiduciary duty claims, there was no straightforward procedure to eliminate a waste claim—in particular, mere majority ratification by shareholders did not immediately extinguish a waste claim,<sup>170</sup> a rule best explained as a survival of the principle that void acts such as ultra vires could only be ratified by unanimous shareholder vote.<sup>171</sup>

Nor was it always easy for courts to dismiss waste claims in the early stages of litigation.<sup>172</sup> Most notably, waste claims survived summary judgment motions more often than one would

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167. PRINCIPLES OF CORPORATE GOVERNANCE (AM. LAW INST. 1994).

168. Compare *id.* § 2.01 (referencing the “common law doctrine of ultra vires”), with *id.* § 1.42 (discussing “waste of corporate assets” with no reference to ultra vires).

169. See Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge’s Retrospective*, 5 HARV. BUS. L. REV. 141, 155 (2015) (stating corporate waste as “an event never proved in any case I am aware of”).

170. See *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997) (“In all events, informed, uncoerced, disinterested shareholder ratification of a transaction in which corporate directors have a material conflict of interest has the effect of protecting the transaction from judicial review except on the basis of waste.”).

171. The most sensible explanation for this rule is that unanimous ratification is “akin to universal acquiescence by all possible stockholder plaintiffs. The act remains void, but there is no one left to challenge it.” Laster, *supra* note 33, at 1457 n.51.

172. It should be noted that the waste claims examined here were almost all derivative, and survived motions to dismiss for lack of demand on the basis of the second prong of *Aronson v. Lewis*, which requires plaintiffs to plead particularized facts sufficient to create a reasonable doubt that the challenged transactions were otherwise the product of a valid business judgment. 473 A.2d 805, 814–15 (Del. 1984).



expect, in good part due to their fact-specific nature. According to the Delaware Supreme Court in 1979's *Michelson v. Duncan*,<sup>173</sup> “[c]laims of gift or waste of corporate assets are seldom subject to disposition by summary judgment; and when there are genuine issues of fact as to the existence of consideration, a full hearing is required regardless of shareholder ratification.”<sup>174</sup> It dated this approach back to the stock option cases, which it believed “indicate[d] a strong disfavor for summary judgment . . . where waste of corporate assets [was] alleged.”<sup>175</sup> In one later case, the court quoted this passage from *Michelson* in justifying a refusal to grant summary judgment, even while stating that the “plaintiffs’ claim of waste [was] barely supported by the record.”<sup>176</sup> This is not to say that waste claims always survived summary judgment, only that they did so more than one would expect considering the stringency of the waste test.<sup>177</sup> Later empirical studies lend support to this conclusion.<sup>178</sup>

The ability of some waste claims to survive summary judgment, while troublesome for defendants, may not have been perceived by others as a problem at all. It has already been suggested that one of waste’s functions was as a tool for courts to authorize detailed inquiry into dubious corporate transactions that were not, on their surface, blatant violations of fiduciary duties. If that is the case, then the waste claims that survived summary judgment were doing useful work, empowering plaintiffs to investigate shady deals and, maybe, warning corporate managers against particularly ill-thought or senseless

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173. 407 A.2d 211 (Del. 1979).

174. *Id.* at 223 (citing *Kerbs v. Cal. E. Airways*, 90 A.2d 652 (Del. 1952) and *Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660 (Del. 1952)).

175. *Id.*

176. *Schreiber v. Carney*, 447 A.2d 17, 27 (Del. Ch. 1982).

177. *See Orban v. Field*, No. 12820, 1997 WL 153831, at \*10 (Del. Ch. Apr. 1, 1997) (“Although a determination of whether a payment constitutes waste is an inherently factual inquiry which is difficult to determine on a summary judgment motion, there are some cases in which a set of facts, if true, may be said as a matter of law not to constitute waste.” (internal citations omitted)).

178. *See Thomas & Martin, supra* note 5, at 573–85 (documenting survival of waste claims at some stages of litigation). The success of waste claims may change over time; a later review found that, between 2000 and 2014, ten out of fifty-two Delaware cases asserting waste survived summary judgment. *Gass, supra* note 11, at 104.

transactions. Be that as it may, by the 1990s Delaware's courts were criticizing the doctrine, perhaps because of a new wave of litigation produced by rapidly rising executive compensation,<sup>179</sup> or because of the difficulty of harmonizing the waste doctrine with Delaware's fiduciary framework.<sup>180</sup> Whatever the reason, by the mid-1990s Delaware's courts were expressing frustration with waste's persistence and even doubts about its existence.<sup>181</sup>

An initial burst of criticism came in 1995's *Steiner v. Meyerson*,<sup>182</sup> where Chancellor Allen highlighted the bizarre qualities of a waste claim in the course of a shareholder challenge to executive compensation.<sup>183</sup> Waste, he noted, is said to occur when "a corporation is caused to effect a transaction on terms that no person of ordinary, sound business judgment could conclude represent a fair exchange,"<sup>184</sup> or in the more extreme phrasing of *Saxe* when there is a transaction so one-sided that no person of ordinary, sound business judgment could even "entertain the view that [it] represented a fair exchange."<sup>185</sup> Invoking the doctrine asked a court to pass on a transaction's fairness, contradicting the usual rule that "[a]bsent an allegation of fraud or conflict of interest courts will not review the substance of corporate contracts."<sup>186</sup> All this for a doctrine that was at best a

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179. One source found that between July 1, 1989, and December 31, 1991, Delaware's Court of Chancery reviewed ninety-eight proposed settlements in class or derivative litigation, one-third of which alleged excessive compensation or corporate waste. Susan Lorde Martin, *The Executive Compensation Problem*, 98 DICK. L. REV. 237, 244 (1994).

180. See John L. Reed & Matt Neiderman, "Good Faith" and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty, 29 DEL. J. CORP. L. 111, 117 (2004) (comparing the waste doctrine to Delaware's implementation of exculpation provisions).

181. See *Steiner v. Meyerson*, No. 13139, 1995 WL 441999, at \*1 (Del. Ch. July 19, 1995) ("The very high hurdle that a shareholder must overcome if he seeks to impose liability on a theory of corporate waste is, thus, in fact a protection of one of the basic utilities that the corporate form offers.").

182. *Id.*

183. See *id.* ("This action challenges as corporate waste and breach of fiduciary duty certain contractual arrangements through which Telxon Corporation compensates its senior officers and its directors.").

184. *Id.*

185. *Id.* (quoting *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962)).

186. *Id.* at \*5.

“theoretical exception to [that] statement very rarely encountered in the world of real transactions.”<sup>187</sup> Lest one be in any doubt about his view of the doctrine, he observed that “rarest of all—and indeed, like Nessie possibly non-existent—would be the case of disinterested business people making non-fraudulent deals (non-negligently) that meet the legal standard of waste!”<sup>188</sup> In sum, waste was not only an inconvenient doctrine; it might describe only nonexistent transactions.

With newly voiced doubts about the existence of waste came more restrictive approaches to it.<sup>189</sup> In *Lewis v. Vogelstein*,<sup>190</sup> decided two years after *Meyerson*, Chancellor Allen faced a familiar claim: that stock option grants were wasteful.<sup>191</sup> The opinion restated the standard definition: “waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade,” typically a gift or exchange that serves “no corporate purpose.”<sup>192</sup> The court then,

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187. *Id.*; see also *Gagliardi v. TriFoods Int’l Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996) (referring, apparently, to waste when discussing a “theoretical exception” to the general rule that “in the absence of facts showing self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses . . . as a result of a decision . . . in good faith”).

188. *Steiner v. Meyerson*, No. 13139, 1995 WL 441999, at \*5 (Del. Ch. July 19, 1995).

189. See *Zupnick v. Goizueta*, 698 A.2d 384, 387–88 (Del. Ch. 1997) (concluding that a multimillion dollar stock option grant given a CEO eligible to retire immediately was not waste).

190. 699 A.2d 327 (Del. Ch. 1997).

191. See *id.* at 329 (“[I]t is asserted that the grants of options actually made under the 1996 Plan did not offer reasonable assurance to the corporation that it would receive adequate value in exchange for such grants, and that such grants represent excessively large compensation for the directors . . .”).

192. *Id.* at 336. Determining whether an expenditure was for “no corporate purpose” raises intriguing theoretical questions in light of recent developments, specifically the insistence in one recent decision that a corporate purpose must be linked to promoting “the value of the corporation for the benefit of its shareholders.” *Ebay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010). In the few waste cases that address the question of whether an act was for a “corporate purpose,” however, the questioned purpose is usually a variant of self-dealing. See *Chrysogelos v. London*, No. 11910, 1992 WL 58516, at \*9 (Del. Ch. Mar. 25, 1992) (allowing a waste claim to proceed when the challenged expenditure was a share repurchase allegedly intended to entrench the board). *But see*, *Gorbow v. Perot*, 539 A.2d 180, 189 (Del. 1988) (rejecting the claim that “buying the silence of a dissident within management constitute[d]

however, retreated from the approach set out in the 1950's cases, which promised special scrutiny for stock options.<sup>193</sup> In *Kerbs* and *Gottlieb*, the Chancellor concluded, the test applied had not been a test for waste at all but instead a form of heightened scrutiny no longer required:

In this age in which institutional shareholders have grown strong and can more easily communicate . . . [shareholder ratification is] a more rational means to monitor compensation than judicial determinations of the 'fairness' or sufficiency of consideration, which seems a useful technique principally to those unfamiliar with the limitations of courts and their litigation processes.<sup>194</sup>

Going forward, the test to be applied to ratified stock option plans would be the "classic test" for waste "(i.e., no consideration; gift; no person of ordinary prudence could possibly agree, etc.)."<sup>195</sup> Having discarded the sweeping approach of the earlier stock option cases, however, the court was still snared in precedent, making it difficult to dismiss a waste claim.<sup>196</sup> An "allegation[] that an arm's-length corporate transaction constitutes a waste of assets . . . is inherently factual and not easily amenable to determination on a motion to dismiss and indeed often not on a motion for summary judgment."<sup>197</sup> The waste claim in *Vogelstein* survived the motion to dismiss.<sup>198</sup>

The capstone to the Delaware courts' increasingly skeptical approach to waste was 1999's *Harbor Finance Partners v.*

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an invalid business purpose" and was therefore waste); *see also* Lyman Johnson & David Millon, *Corporate Law after Hobby Lobby*, 70 BUS. LAW. 1, 22 (2014/2015) (noting that unless corporations are free to pursue non-pecuniary ends, all corporate social responsibility is ultra vires).

193. *See Lewis*, 699 A.2d at 337 (discussing that the stock option cases were "very problematic"). Or so it claimed. *See* Lori B. Marino, *Executive Compensation and the Misplaced Emphasis on Increasing Shareholder Access to the Proxy*, 147 U. PA. L. REV. 1205, 1242–44 (1999) (providing a skeptical read of *Lewis*'s reading of the 1950's stock options cases).

194. *Lewis*, 699 A.2d at 338.

195. *Id.*

196. *See id.* at 338–39 (discussing the precedent of waste claims and its analysis pursuant to "[t]he standard for determination of motions to dismiss").

197. *Id.* at 339.

198. *Id.*

*Huizenga*,<sup>199</sup> in which stockholder plaintiffs challenged a merger.<sup>200</sup> Then Vice-Chancellor Strine's opinion posed a question, which must have occurred to many thoughtful observers: why could a waste claim not be extinguished by ratification from a majority of informed disinterested shareholders?<sup>201</sup> Shouldn't such ratification by definition signal that this was a transaction on which reasonable businesspersons could differ, and so not meet the test for waste? While the rule not permitting shareholder ratification was a "seemingly sensible doctrine," he wrote, its "actual application has no apparent modern day utility . . . except as an opportunity for Delaware courts to second-guess stockholders."<sup>202</sup> Transactions attacked as waste in Delaware courts were typically "garden variety transactions that may be validly accomplished by a Delaware corporation if supported by sufficient consideration," ranging from stock option plans to corporate mergers.<sup>203</sup> Waste did not, in his account, protect stockholders where there had been ratification.<sup>204</sup> If "fully informed, uncoerced, independent stockholders have approved the transaction, they have, it seems to me, made the decision that the transaction is a 'fair exchange.'"<sup>205</sup> In closing, while the opinion acknowledged that there may be "valid reasons for [waste's] continuation," it called for those reasons to be "articulated and weighed against the costs the vestige imposes on stockholders and the judicial system. Otherwise, inertia alone may perpetuate an outdated rule fashioned in a very different time."<sup>206</sup> Though none of these cases called for waste's complete abolition, each expressed deep doubts about waste as presently constituted. An observer in 1999 would

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199. 751 A.2d 879 (Del. Ch. 1999).

200. See *id.* at 881 ("This matter involves a challenge to the acquisition of AutoNation, Incorporated by Republic Industries, Inc.").

201. See *id.* at 895 (stating that he questions the "continued utility" of such extinguishment of a claim once it has been ratified by the shareholders).

202. *Id.* at 896–97.

203. *Id.* at 897.

204. See *id.* at 898 (stating that disinterested stockholders should be given leeway with "little reason to leave the door open for a judicial reconsideration of the matter" if they "are given the information necessary to decide").

205. *Id.* at 901.

206. *Id.* at 902.

have been entirely justified in assuming the doctrine was about to be further marginalized. That observer would have been wrong.

### B. Waste's Uses

While waste came under fire in the 1990s, its utility in corporate law had not completely disappeared, as shown by two of the major cases in the following decade, *In re Walt Disney Company Derivative Litigation*<sup>207</sup> and *In re Citigroup Inc. Shareholder Derivative Litigation*.<sup>208</sup> The role it would play was summed up in *Sample v. Morgan*,<sup>209</sup> a case where shareholders challenged a stock incentive plan that provided three corporate insiders with a significant ownership stake in their firm in exchange for \$200.<sup>210</sup> “When pled facts support an inference of waste,” the opinion explained, “judicial nostrils smell something fishy and full discovery into the background of the transaction is permitted. In the end, most transactions that actually involve waste are almost found to have been inspired by some form of conflicting self-interest.”<sup>211</sup> Waste “allows a plaintiff to pass go at the complaint stage even when the motivations for a transaction are unclear by pointing to economic terms so one-sided as to create an inference that no person acting in good faith pursuit of the corporation’s interests could have approved the terms.”<sup>212</sup> The opinion then articulated waste’s role as a safety valve allowing further scrutiny of transactions that were not on their surface fiduciary duty violations, but were inexplicable otherwise.<sup>213</sup>

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207. 906 A.2d 27, 75 (Del. 2006).

208. See 964 A.2d 106, 112 (Del. Ch. 2009) (“The motion to dismiss is denied as to the claim in Count III for waste . . .”).

209. 914 A.2d 647 (Del. Ch. 2007).

210. See *id.* at 650–53 (“[G]iving away nearly a third of the voting and cash flow rights of [the] company . . .” (quotation at 652)).

211. *Id.* at 670. Query whether this should read “almost always.” *Accord In re Lear Corp. S’holder Litig.*, 967 A.2d 640, 657 (Del. Ch. 2008) (stating that waste is a “rigorous test designed to smoke out shady, bad faith deals”); see also STEPHEN BAINBRIDGE, *CORPORATE LAW* 128 (3d ed. 2015) (“[I]nquiry into the rationality of a decision is a proxy for an inquiry into whether the decision was tainted by self-interest”).

212. *Sample*, 914 A.2d at 670.

213. See *id.* at 669 (“[T]he doctrine of waste is a residual protection for stockholders that polices the outer boundaries of the broad field of discretion

Waste worked this way in *Disney*, where shareholders challenged the Disney board's decisions to hire, then fire, Michael Ovitz as the firm's number-two officer and to pay him generous termination benefits (\$130 million after roughly a year's work).<sup>214</sup> Among other claims, plaintiffs alleged that the board could have dismissed Ovitz for cause and paid him nothing upon termination, therefore making the large payment he did receive a gift.<sup>215</sup> While the chancery court initially dismissed the claims, the Delaware Supreme Court's reversal (in part) of this decision ultimately produced a bench trial in which, before Disney won, its board's decision to grant Ovitz's compensation was raked over the coals—providing a case study in how Delaware courts could, when they chose, use waste as an opening for rigorous critique of board decision-making procedures.<sup>216</sup>

*Disney* showed waste being used as a tool to enable investigation and identify proper corporate procedures, but also something more. In *Disney* and later *Citigroup*, waste also gave courts a means to demonstrate publicly that they were aware of and responsive to larger social and political developments. In the case of *Disney*, the larger development was rising executive compensation and calls for limits on it.<sup>217</sup> Compensation became a major issue in the 1990s, with the Federal Government intervening to curb its growth in 1993 and threatening to do so

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afforded directors by the business judgment rule.”).

214. Three decisions were important: The Delaware Supreme Court's affirming and reversing in part the Chancery's dismissal of the initial charges, *Brehm v. Eisner*, 746 A.2d 244, 267 (Del. 2000); the subsequent trial court decision, *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 778 (Del. Ch. 2005); and the Supreme Court's upholding of that decision, *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 75 (Del. 2006).

215. *Brehm*, 746 A.2d at 265.

216. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1010–20 (showcasing Delaware courts' use of opinions to set corporate norms); see also Lyman Johnson, *Counter-Narrative in Corporate Law: Saints, Sinners, Apostles, and Epistles*, 2009 MICH. ST. L. REV. 847, 851 (2009) (“Unlike the re-tellers of the biblical gospel, however, the ‘apostles’ of corporate law—the elite corporate bar—frequently screen out the moral tone when writing their ‘epistles’ about *Disney* . . .”).

217. See *In re Disney*, 906 A.2d at 56 (stating that the plaintiffs contend that the compensation committee's approval of Ovitz's employee agreement resulted in an “enormous payout,” upon which the committee did not have adequate information regarding the “magnitude” of the amount it could be).

for the rest of the decade.<sup>218</sup> The *Disney* case allowed Delaware's courts to broadcast that they took high pay seriously, thereby dissuading non-Delaware actors from taking further steps to limit high compensation.<sup>219</sup> Indeed, in 2002, after the first *Disney* Supreme Court decision and about the time that the Sarbanes–Oxley Act<sup>220</sup> was passed—significantly impinging on state corporate law—two distinguished Delaware jurists wrote of the need for Delaware courts to address executive compensation more closely after many years of a “hands-off approach,” noting that one way courts might police such compensation would be through a “qualitatively more intense form of judicial review, through, for example, a reinvigorated application of the concept of waste.”<sup>221</sup> This did not come to pass, exactly—waste was not “reinvigorated” after this case—but it helps explain why waste was deployed the way it was in *Disney*.<sup>222</sup>

Waste would play a similar role in the first major case responding to the 2008 financial crisis: *Citigroup*.<sup>223</sup> *Citigroup* was not, initially, primarily a waste case; rather, plaintiffs' main claim was that Citigroup's directors had ignored a series of “red flags” in the lead-up to the crisis, thereby violating their oversight duties as spelled out in *In re Caremark International Inc. Derivative Litigation*.<sup>224</sup> The court quickly disposed of the

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218. Harwell Wells, *U.S. Executive Compensation in Historical Perspective*, in RESEARCH HANDBOOK ON EXECUTIVE PAY 41, 50–51 (Jennifer G. Hill & Randall S. Thomas eds., 2012).

219. See Mark Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 643 (2003) (describing rumblings that, after Sarbanes–Oxley, Delaware “could attack excessive executive pay”).

220. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 745, 750 (2002) (codified at 15 U.S.C. § 7211 (2012)).

221. William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 1001 (2003).

222. See Roe, *supra* note 219, at 643 n.211 (discussing that the possible decision by the Delaware Supreme Court in *Disney* was either due to the promulgation of Sarbanes–Oxley or “the state's direct perception of the underlying corporate problems”).

223. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 111 (Del. Ch. 2009).

224. See *id.* at 121 (claiming that the financial markets displayed “worsening conditions” that reflected Citigroup's vulnerability to “exposure,” and due to the director's lack of oversight they were liable under the standard set out in *Caremark*).



oversight claims, concluding that there was no serious evidence that the directors had disregarded their *Caremark* responsibilities and that the claim was really a “straightforward claim of breach of the fiduciary duty of care,” exculpated under Citigroup’s charter.<sup>225</sup> Yet tacked onto the oversight claim were a series of waste claims, and one survived.<sup>226</sup> In November 2007, as the crisis hit, Citigroup’s board had agreed to provide retiring CEO Charles Prince \$68 million and fringe benefits in return for which Prince would sign a non-compete agreement and certain other agreements.<sup>227</sup> The Chancellor concluded that the court was provided little information about “the real value, if any, of the various promises given by Prince” and that “[w]ithout more information . . . there is a reasonable doubt as to whether the letter agreement meets the admittedly stringent ‘so one sided’ standard or whether [it] awarded compensation that is beyond the ‘outer limit’” of waste.<sup>228</sup>

*Citigroup* arguably fell within the older line of cases in which courts more closely, scrutinized payments made to retiring executives.<sup>229</sup> It was perceived, however, as the product of a “political zeitgeist” that had turned against major financial institutions and their compensation practices that had done so much to produce the crisis.<sup>230</sup> Some speculated that the case might herald “the beginning of a new era in Delaware business jurisprudence.”<sup>231</sup> One law firm advised clients that after *Citigroup*, “extra care must be taken with respect to executive compensation packages coinciding with decreasing corporate

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225. *In re Citigroup*, 964 A.2d at 128 n.65.

226. *See id.* at 140 (“Defendants’ motion to dismiss is denied as to the claim in Count III of the Complaint for waste . . .”).

227. *Id.* at 139.

228. *Id.*

229. *See supra* notes 85–88 and accompanying text (discussing the decisions pursuant to payments for past services). *But see* Joseph W. Cooch, *In re Citigroup Inc. Shareholder Derivative Litigation: In the Heat of Crisis, Chancery Court Scrutinizes Executive Compensation*, 6 J. BUS. & TECH. L. 169, 186–91 (2011) (providing an argument that *Citigroup* departed from earlier decisions).

230. *See* Michael J. Biles & Kimberly G. Davis, *Keeping Current: Corporate Compensation*, BUS. L. TODAY, Sept.–Oct. 2009, at 22, 22 (stating that it was an “unusual move from the traditionally pro-business Delaware courts”).

231. *Id.*

success,”<sup>232</sup> while another warned that “the *Citigroup* decision is likely to leave open a window of opportunity for shareholders to bring claims relating to executive compensation and severance packages under the doctrine of corporate waste.”<sup>233</sup>

Both *Disney* and *Citigroup* made it possible to conclude that the waste doctrine was being rejuvenated, and would be wielded as it briefly had been in the 1930s, as a way for courts to cast a harsh light on excessive pay and larger governance failures. Standing by itself, *Citigroup* was an excellent illustration of the potentially flexible application of waste and the ways that it could focus attention and criticism on board decisions. Yet as the financial crisis passed, the wheel turned again. Several later cases alleging waste in the granting of executive compensation were dismissed, and *Citigroup* was eventually dismissed “without compensation to any plaintiff or plaintiff’s attorney.”<sup>234</sup> In retrospect the case was an outlier. As in earlier iterations, a brief period in which it appeared waste might be given expansive application was followed by a retreat from the doctrine.

What role then does waste still have to play? One answer is that it no longer has any distinctive role to play and that it is already in the process of being folded into Delaware’s framework of fiduciary duties as a subset of good faith.

### V. Waste and Good Faith

Today, there is a strong trend towards treating waste as an aspect of the fiduciary duty of good faith. A great deal has been written about good faith over the last twenty years, so a brief

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232. HERBERT F. KOZLOV ET AL., *IN RE CITIGROUP: DELAWARE COURT OF CHANCERY ALLOWS CLAIM FOR CORPORATE WASTE BASED ON EXECUTIVE COMPENSATION TO PROCEED, BUT DISMISSES ‘HINDSIGHT’ FIDUCIARY DUTY CLAIMS*, REED SMITH 3 (2009), <https://www.reedsmith.com/files/Publication/217a3b75-30a4-40d5-b38b-b6967113eaf8/Presentation/PublicationAttachment/119c3ebf-553c-4453-aa74-2359c58e4fa2/alert09077.pdf>.

233. *Delaware Chancery Court Revisits Oversight Liability and Corporate Waste*, DUANEMORRIS (Mar. 22, 2009), <http://www.duanemorris.com/alerts/alert3190.html> (last visited Apr. 30, 2017) (on file with the Washington and Lee Law Review).

234. Christine Hurt, *The Duty to Manage Risk*, 39 J. CORP. L. 253, 278 (2014) (citing *In re Citigroup Inc. S’holder Derivative Litig.*, No. 3338-VCG, 2012 WL 628347 (Del. Ch. Feb. 23, 2012)).

summary will suffice.<sup>235</sup> Some variant of “good faith” has been an element of fiduciary duties since modern notions of directors’ duties began to take shape.<sup>236</sup> Statements that fiduciary duties included, or had to be carried out with, “good faith” were commonplace a century ago.<sup>237</sup> But good faith was more often invoked than analyzed.<sup>238</sup> It drew new attention starting with two decisions in the 1990s. In the first, *Cede & Co. v. Technicolor Inc.*,<sup>239</sup> the Delaware Supreme Court announced that there was a “triad” of fiduciary duties: loyalty, care, and good faith.<sup>240</sup> This unsettled earlier models of fiduciary duties and attracted litigants who saw in good faith a way to avoid exculpatory clauses by recasting gross negligence claims as claims of bad faith.<sup>241</sup> In the second case, *In re Caremark*, just three years after the announcement of the “triad” of fiduciary duties it was suggested

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235. For the most useful recent articles on good faith, see Joseph K. Leahy, *A Decade After Disney: A Primer on Good and Bad Faith*, 83 U. CIN. L. REV. 859, 864 (2015) [hereinafter Leahy, *A Decade After Disney*]; Strine, Jr. et al., *supra* note 10, at 634; Thompson, *supra* note 10, at 544.

236. See Strine, Jr. et al., *supra* note 10, at 633 (noting long history of “good faith” in Delaware corporation law).

237. See MORAWETZ, *supra* note 39, at 483 (“It is manifest . . . that the directors of a corporation occupy a position of the highest trust and confidence, and that the utmost good faith is required in the exercise of the power conferred upon them.”); see also *Lofland v. Cahall*, 118 A. 1, 3 (Del. 1922) (“Directors of a corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing . . .”); *Vance v. Phx. Ins. Co.*, 72 Tenn. 385, 388 (1880) (“Directors of a corporation undoubtedly occupy a fiduciary relation toward the stockholders, and are bound to good faith and reasonable diligence in the performance of their duties.”).

238. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64 (Del. 2006) (“[T]he duty to act in good faith is, up to this point relatively uncharted.”).

239. 634 A.2d 345 (Del. 1993).

240. *Id.* at 361.

241. See Strine, Jr. et al., *supra* note 10, at 631 (stating that since *Technicolor*, plaintiffs could “subject the directors to damages liability even in the absence of improper subjective motivation”). Gross negligence would constitute a violation of the duty of care, and the typical corporation has amended its charter to exculpate directors for monetary damages for violations of that duty as allowed by DGCL section 102(b)(7), but that provision also prohibits exculpating “acts or omissions not in good faith.” *Id.* at 696 (quoting DEL. CODE ANN. tit. 8, § 102(b)(7)).

that good faith was an aspect of the duty of care, further confusing the existing fiduciary framework.<sup>242</sup>

The initial ambiguity surrounding good faith attracted litigants seeking an “independent tool for courts to find liability or enjoin activities that [did] not quite fit within established doctrinal categories.”<sup>243</sup> Good faith, then, was the latest candidate for the role of judicial “fail-safe” played by waste and, more briefly, “substantive due care.”<sup>244</sup> In a series of decisions beginning with *Disney* in 2006, however, Delaware courts corralled good faith and placed it within the more familiar dyad of fiduciary duties, holding it was an aspect of the duty of loyalty. In *Disney* Delaware’s Supreme Court described acts not in good faith<sup>245</sup> as occupying the space between “disloyalty in the classic sense (i.e., preferring the adverse self-interest of the fiduciary or of a related person to the interest of the corporation) [and] gross negligence.”<sup>246</sup> The concept covered conduct “which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence.”<sup>247</sup> In *Stone ex rel v. Ritter*,<sup>248</sup> decided later that year, the Court made explicit that good faith fit squarely under the duty of loyalty.<sup>249</sup> These and later decisions, while shying away from providing a comprehensive list of acts not in good faith, made clear that lack of good faith would be found only in a situation where a director had acted not just with gross negligence but with subjectively bad

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242. See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (“[T]he core element of any corporate law duty of care inquiry: whether there was good faith effort . . .”).

243. Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 34 (2005).

244. Thompson, *supra* note 10, at 545–46.

245. There was a brief scholarly debate about whether there were actions, which were neither in good faith nor met the requirements for bad faith, but, more recent work has argued convincingly that there is no middle ground—acts are either in good faith or in bad faith. See Leahy, *A Decade After Disney*, *supra* note 235, at 898–99 (“[T]he no-man’s-land that Nowicki identifies—conduct that is neither in good faith nor in bad faith—does not exist.”).

246. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006).

247. *Id.* at 66.

248. 911 A.2d 362 (Del. 2006).

249. See *id.* at 369–70 (holding that good faith is a “subsidiary element,’ i.e. a condition” of the duty of loyalty (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

intent;<sup>250</sup> such as “intentional dereliction of duty [or in] conscious disregard of one’s responsibilities.”<sup>251</sup> In a 2009 opinion, *Lyondell Chemical Co. v. Ryan*,<sup>252</sup> the Court further narrowed good faith, holding, in a case dealing with a company’s sale, that only if directors had “knowingly and completely failed to undertake their responsibilities,” and had “utterly failed to attempt to obtain the best sale price,” would they have not acted in good faith.<sup>253</sup> After its short day in the sun, good faith seemed to have lost any role as a significant check on directorial action.<sup>254</sup>

The taming of good faith was part of a movement towards simplifying fiduciary duties, in part by “rebifurcating” them—restoring fiduciary duties to those of loyalty and care.<sup>255</sup> That impulse to simplify and rationalize the bases for directorial liability has now reached waste, which in several recent cases has been characterized as an aspect of good faith—more precisely, waste has been taken as an indication of lack of good faith.<sup>256</sup> This is a surprise, because the two are conceptually quite distinct. The present-day test for waste is objective: waste is a transaction so one-sided that no rational business person would enter into it.<sup>257</sup> One way of determining whether this has occurred is whether in the transaction the corporation has received “any

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250. See Strine, Jr. et al., *supra* note 10, at 689–90 (discussing *Disney* and *Ritter*).

251. *In re Disney*, 906 A.2d at 64.

252. 970 A.2d 235 (Del. 2009)

253. *Id.* at 243–44; see also Thompson, *supra* note 10, at 549–51 (discussing *Disney*, *Ritter*, and *Lyondell*).

254. See Thompson, *supra* note 10, at 556 (discussing the disappearance of the “potential for director liability based on good faith”).

255. See Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1234 (2010) (“[M]any scholars and jurists [seek] to return the law of fiduciary duties to greater simplicity.”).

256. As others have certainly noted. See Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131, 1153, 1154 n.103 (2006) (discussing that a waste analysis is “really about the ‘good faith’ of the decisionmaker”). The survey presented here to some extent, recapitulates earlier discussions. See Leahy, *Super PAC*, *supra* note 11, at 308–11, and Kastler, *supra* note 11, at 1911–14 for additional information.

257. *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (quoting *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 362 (Del. Ch. 1998)).

substantial consideration.”<sup>258</sup> What is not usually asked is whether those who authorized the transaction believed it to be a good deal or not. A waste allegation may raise further questions about the actor’s state of mind (may lead “judicial nostrils [to] smell something fishy”),<sup>259</sup> but the waste determination itself should not rest on the mindset of the actor. The test of good faith, in contrast, is clearly subjective—looking to the decision-maker’s state of mind.<sup>260</sup> And even when waste does point to a fiduciary duty breach, there seems no reason to think it must always point to a breach of good faith; one could imagine a wasteful transaction that on closer examination was produced by gross negligence, or was disguised self-dealing.

The history of waste and, before that, ultra vires, also point away from equating waste and good faith. In the nineteenth century, it was clear that ultra vires was a very different category from the fiduciary duties. As noted above, whether an act was ultra vires did not turn on the state of mind of the individuals committing the act.<sup>261</sup> It was possible furthermore to commit an ultra vires act in good faith. *Thompson on Corporations*, for instance, reported a case where, when “trustees of a religious corporation, without authority, changed the securities in a trust fund from those authorized by law to those unauthorized by law, it was held that they were personally liable . . . no matter how perfect the good faith with which they made the change.”<sup>262</sup>

Several modern cases observed a similar divide between good faith and waste. In *Gottlieb*, for instance, the court apparently accepted that the stock options at issue there were granted in good faith, yet still remanded to the lower court to determine whether the corporation had received consideration for them:

[h]onest directors conceivably might give away to their associates in the enterprise substantial amounts of a corporation’s property in the belief that the gift would produce

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258. *Id.*

259. *Sample v. Morgan*, 914 A.2d 647, 670 (Del. Ch. 2007).

260. *See Strine, Jr. et al.*, *supra* note 10, at 633 (discussing good faith as the “state of mind required of a loyal director”).

261. *See supra* notes 27–33 and accompanying text (discussing ultra vires).

262. *See THOMPSON ON CORPORATIONS*, *supra* note 28, at 300. There appears to be an exception to this rule for directors who acted with all due care but were mistaken as to their powers. *Id.* at 302.

such gratitude that ultimately the corporation's generosity would be more than repaid. There would be nothing immoral or dishonest about such an action, but it would not be legally sound.<sup>263</sup>

Forty years later in *Meyerson*, Chancellor Allen would state that “[t]he waste claim entails no claim of bad faith or conflict of interest (if it did it would be a breach of fiduciary duty claim).”<sup>264</sup> And, in several cases, notably both *Disney* opinions, the Delaware Supreme Court analyzed plaintiffs’ waste claims separately from those of breach of fiduciary duty.<sup>265</sup>

That said, there is to be found in older cases language linking waste and fiduciary duties. In *McQuillen*, one of the earliest cases addressing a waste claim, the court stated that waste had to be the result of “bad faith, or a total neglect of or indifference to [recognized business] practices.”<sup>266</sup> In New York it appears to have long been the rule that waste required a violation of fiduciary duties, with a successful claim needing proof not only of a wasteful transaction, but that “directors . . . acted with an intent to serve some outside interest, regardless of the consequence.”<sup>267</sup>

Several early Delaware cases also made this connection. 1993’s *Emerald Partners v. Berlin*,<sup>268</sup> stated that in “a transaction in which the corporation received *no* consideration . . .” a waste claim—a section 102(b)(7) provision would not protect directors because “they would have acted in bad faith.”<sup>269</sup> More

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263. *Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 663–64 (Del. Ch. 1952).

264. *Steiner v. Meyerson*, No. 13139, 1995 WL 441999, at \*5 (Del. Ch. July 19, 1995).

265. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 73–75 (Del. 2006) (analyzing waste claims separately from fiduciary duty claims); *Brehm v. Eisner*, 746 A.2d 244, 259–66 (Del. 2000) (analyzing duty of care, waste, and “substantive due care” claims).

266. *McQuillen v. Nat’l Cash Register Co.*, 27 F. Supp. 639, 653 (D. Md. 1939).

267. *Aronoff v. Albanese*, 446 N.Y.S.2d 368, 371 (N.Y. App. Div. 1982); *accord Stern v. Gen. Elec. Co.*, 924 F.2d 472, 476 (2d Cir. 1991) (“[A]ctions of corporate directors are subject to judicial review only upon a showing of fraud or bad faith.”).

268. Civ. A. No. 9700, 1993 WL 545409, at \*1 (Del. Ch. 1993).

269. *Id.* at \*8. The question of whether waste could be exculpated under section 102(b)(7) was unsettled for a time, with a few cases holding that an exculpatory clause would protect a defendant director from a waste claim. *See*

consequentially, in *Vogelstein* Chancellor Allen, who the year before in *Steiner* had been clear that waste did not necessarily entail bad faith,<sup>270</sup> wrote a passage connecting the two:

Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. . . . If, however, there is *any substantial consideration* received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude *ex post* that the transaction was unreasonably risky.<sup>271</sup>

This injects a subjective element into at least one definition of waste. Under this approach, while the complete absence of consideration suffices to mark a disputed transaction as wasteful, “any substantial” consideration will mean it’s not wasteful, so long as an additional element is present: a good faith judgment that the transaction was worthwhile.

The next few years saw several more cases in which waste was tied to bad faith (or lack of good faith). Most often the connection was that a wasteful transaction indicated that bad faith might also be present—that the decision under attack was “so far beyond the bounds of reasonable judgment that it seem[ed] essentially inexplicable on any ground other than bad faith.”<sup>272</sup> If waste signaled bad faith, then the reverse could also

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Green v. Phillips, No. 14436, 1996 WL 342093, at \*6 (Del. Ch. June 19, 1996) (holding that a waste claim not bringing directors’ duty of loyalty and good faith into question is covered by section 102(b)(7)). More recently, however, a court has refused to dismiss a waste claim by reference to a section 102(b)(7) clause; given the trend that conflates waste and good faith, this appears the better approach. See Se. Pa. Transp. Auth. v. Abbvie Inc., C.A. No. 10374–VCG, C.A. No. 10408–VCG, 2015 WL 1753033, at \*14 n.114 (Del. Ch. Apr. 15, 2015) (“This Court has found that, doctrinally, waste is a subset of good faith under the umbrella of the duty of loyalty (and thus is not protected by a Section 102(b)(7) exculpation provision).”).

270. See *Steiner v. Meyerson*, No. 13139, 1995 WL 441999, at \*5 (Del. Ch. July 19, 1995) (“The waste claim entails no claim of bad faith . . .”).

271. *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997) (internal citations omitted).

272. *Parnes v. Bally Entm’t Corp.*, 722 A.2d 1243, 1246 (Del. Ch. 1999) (quoting *In re J.P. Stevens*, 542 A.2d 770, 780–81 (Del. Ch. 1988)). *Stevens* does not directly refer to waste, but rather speaks of a transaction so inadequate as to bear “the badge of fraud.” *Id.* at 781 n.5.



be true according to some decisions: the presence of good faith showed that a transaction was not waste.<sup>273</sup> That is one reading to give to the above-quoted language of *Vogelstein* and it's echoed elsewhere.<sup>274</sup>

From here it has been a short step for Delaware courts to merge waste and good faith—either by taking waste as necessarily entailing an act of bad faith or by asserting that waste simply *is* bad faith, in the process erasing waste's longstanding position outside the fiduciary duty framework. In the *Disney* trial decision, the Chancellor wrote that “[t]he Delaware Supreme Court has implicitly held that committing waste is an act of bad faith.”<sup>275</sup> This falls short of a direct holding, but it shows the two doctrines' overlap, as does an assertion in *Sample* that waste was “sometimes misunderstood as being founded on something other than a breach of fiduciary duty.”<sup>276</sup> In the years since these decisions, the link between waste and good faith has only tightened. More than one Chancery opinion has treated waste as essentially a signal of a breach of good faith. In *Hampshire Group Ltd. v. Kuttner*,<sup>277</sup> for example, the court stated that the “waste test is just another way to examine whether a fiduciary breach has been committed,”<sup>278</sup> while in *Cancan Development, LLC v. Manno*<sup>279</sup> the court stated that waste is “best understood as one means of establishing a breach of the duty of loyalty's subsidiary element of good faith.”<sup>280</sup> Most recently some courts have directly equated the two. In a 2014 case, *Xcell Energy and Coal Co., LLC v. Energy Investment*

273. See *Lewis*, 699 A.2d at 336 (“[I]f there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste . . .”).

274. Or simply quoted, as in *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) and *In re Nat'l Auto Credit, Inc. S'holder Litig.*, No. Civ.A. 19028, 2003 WL 139768, at \*13 (Del. Ch. Jan. 10, 2003).

275. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005) (citing *White v. Panic*, 783 A.2d 543, 553–55 (Del. 2001)).

276. *Sample v. Morgan*, 914 A.2d 647, 669 (Del. Ch. 2007) (citing *Steiner v. Meyerson*, Civ. A. No. 13139, 1995 WL 44999 at \*6 (Del. Ch. July 19, 1995)).

277. C.A. No. 3607-VCS, 2010 WL 2739995, at \*1 (Del. Ch. July 12, 2010).

278. *Id.* at \*35.

279. C.A. No. 6429-VCL, 2015 WL 3400789, at \*1 (Del. Ch. May 27, 2015).

280. *Id.* at \*20. *But see* *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 786 (Del. Ch. 2016) (discussing waste as “a means of proving bad faith conduct”).

*Group, LLC*,<sup>281</sup> the Chancery Court described waste as a “species of breach of fiduciary duty claim,”<sup>282</sup> while a year later, in *Southeastern Pennsylvania Transport Authority v. Abbvie Inc.*,<sup>283</sup> the Chancellor stated that waste is “a subset of good faith under the umbrella of the duty of loyalty.”<sup>284</sup> Not every case equates the waste and good faith,<sup>285</sup> but the trend to conflate the two is clear. After an eighty-year run, waste’s existence as a freestanding doctrine in corporate law may be reaching its end.

### VI. Conclusion: Waste’s Future

Waste now occupies an uncertain place in Delaware corporate law. Recent cases have increasingly tied waste to good faith, a move which in turn lodges waste under the fiduciary duty of loyalty. Connecting waste to good faith makes sense; as discussed above, waste and good faith analyses have often played similar roles in corporate law—borrowing from one recent decision, each has been invoked as a “‘fiduciary out’ from the business judgment rule, for situations where, even though there is no indication of conflicted interest or lack of independence on the part of directors, the nature of their action can in no way be understood as in the corporate interest.”<sup>286</sup> But if waste is no more than a species of bad faith, then its invocation seemingly adds little to good faith analysis, and one is left wondering what

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281. C.A. No. 8652-VCN, 2014 WL 2964076, at \*1 (Del. Ch. June 30, 2014).

282. *Id.* at \*9.

283. C.A. No. 10374-VCG, C.A. No. 10408-VCG, 2015 WL 1753033, at \*1 (Del. Ch. Apr. 15, 2015).

284. *Id.* at \*14 n.114. The opinion does hedge a bit on this, noting that “the existence of an academic debate as to whether that issue is truly settled,” *id.* (citing Kastler, *supra* note 11, at 1911–14, and Leahy, *Super PAC*, *supra* note 11, at 308–09), and treating plaintiffs’ claim of a breach of good faith separately from their waste claim. *Id.* at 15–16.

285. In one recent case, for instance, the Chancery Court wrote that “bad faith is similar to the much older fiduciary prohibition on waste, and like waste, is a *rara avis*.” *In re Chelsea Therapeutics Int’l Stockholders Litig.*, No. 9640-VCG, 2016 WL 3044721, at \*1 (Del. Ch. May 20, 2016). But note that the decision also speaks of the “fiduciary prohibition on waste.” *Id.*

286. *See In re Chelsea Therapeutics*, 2016 WL 3044721, at \*1 (discussing good faith).

justification remains for a separate doctrine of corporate waste at all.

One argument for retaining waste as a separate doctrine is that, historically and conceptually, waste and good faith are simply not the same thing. As shown above, waste is an offshoot of *ultra vires*, has long been treated as distinct from the fiduciary duties, and is usually measured by an objective test.<sup>287</sup>

Good faith, in contrast, has always been tied to fiduciary duties and, in its contemporary form, is measured subjectively, by the fiduciary's state of mind.<sup>288</sup> Certainly, fiduciary duties have a degree of flexibility to respond to unanticipated situations, and the fiduciary categories have not been as fixed in the past as one might expect,<sup>289</sup> but placing waste under good faith would be moving it from a conceptual space it has occupied for almost a century—a space outside fiduciary duties—and inserting it into a fiduciary framework it has not previously inhabited.

One could also object that, if waste were treated solely as an aspect of the duty of loyalty, it would lose much of its power as an equitable fail-safe—or safety valve, or fiduciary out (pick your term). One of waste's distinctive (and criticized) features has been that a waste claim cannot be extinguished by less-than-unanimous shareholder ratification of the challenged transaction.<sup>290</sup> In this it differs from fiduciary claims, which in many instances can be defanged or extinguished by majority but non-unanimous shareholder approval.<sup>291</sup> In *Corwin v. KKR Financial Holdings LLC*,<sup>292</sup> for example, the Delaware Supreme

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287. Albeit with a subjective element at times. See *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997) (“If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste . . .”).

288. See *Strine, Jr. et al.*, *supra* note 10, at 643 (“[A] director cannot act loyally if she uses her corporate powers in bad faith to pursue improper ends.”).

289. See, e.g., *Johnson*, *supra* note 79, at 413 (discussing the business judgment rule and how both duties of care of loyalty were subsumed into it).

290. See *supra* notes 170–178 and accompanying text (discussing waste and shareholder ratification).

291. Assuming the ratification meets such requirements as being disinterested, uncoerced, and informed. See *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 900 (Del. Ch. 1999) (discussing the parameters needed to invoke the amelioration of fiduciary duty claims).

292. 125 A.3d 304 (Del. 2015).

Court held that when “a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested shareholders,” the transaction is protected by the business judgment rule and the sole claim remaining to shareholders will be waste.<sup>293</sup> Furthermore, in this situation the business judgment presumption is apparently irrebuttable, leaving waste the only possible option for shareholders.<sup>294</sup> Other recent cases have also indicated that Delaware courts are increasingly open to mechanisms that mitigate or eliminate fiduciary duty claims following majority, disinterested shareholder approval of the challenged transaction.<sup>295</sup> If waste claims are determined to be fiduciary duty claims, then it seems logical that they too could be vulnerable to a non-unanimous shareholder vote, leaving dissenting shareholders with no claim at all. (The story may be different when transactions have not received proper, or any, shareholder ratification.)

This may however be less a loss than it seems. While courts have not as yet held that a waste claim can be extinguished by non-unanimous shareholder approval, recent decisions have made clear just how dubious courts are of waste claims where there has been disinterested shareholder ratification. In *Singh v. Attenborough*,<sup>296</sup> decided last year, Chief Justice Strine

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293. *Id.* at 305–06. The Court stated that this was well-supported by Delaware precedent and only thrown into doubt by some unclear language in *Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009). *See id.* at 309 n.19. That waste is the only claim left to shareholders was suggested in the Supreme Court decision and made explicit in the lower court decision. *See In re KKR Fin. Holdings S’holder Litig.*, 101 A.3d 980, 990 (Del. Ch. 2014) (“Having not alleged waste, plaintiffs’ complaint here will be dismissed if they fail to rebut the business judgment presumption.”).

294. *See Singh v. Attenborough*, 137 A.3d 151, 151–52 (Del. 2016) (stating that the waste exception is the only option left).

295. *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 645–46 (Del. 2014) (adopting rule that the business judgment standard will be applied to controller buyouts if certain conditions are met, including conditioning of the transaction on approval of independent, empowered Special Committee and informed, uncoerced approval by majority of minority shareholders); *see also In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727, 737–38 (Del. Ch. 2016) (stating that the business judgment standard will irrebuttably apply when an informed, uncoerced majority of stockholders approve a merger offer under DGCL section 251(h) by accepting a tender offer).

296. 137 A.3d 151 (Del. 2016).

hearkened back to *Huizinga* and his doubts about many waste claims.<sup>297</sup> “When the business judgment rule standard of review is invoked because of a [shareholder] vote,” he stated, “dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful.”<sup>298</sup> While reducing waste to good faith may eliminate its use in cases where there has been proper shareholder approval, it may already be effectively useless in such cases.

Whatever objections one might raise to merging waste into good faith, there are also arguments to be made in favor of that move. For one, waste claims have often hinted at fiduciary violations; it has always been difficult to imagine cases of waste where someone did not violate his or her fiduciary duties. A transaction so irrational as to be wasteful, in other words, is also one so irrational as to suggest that directors demonstrated “a conscious disregard for [their] duties” in approving it.<sup>299</sup> From their inception, indeed, waste claims have often appeared to have a fictive quality, with allegations of “irrationality” cloaking an implication that the transaction benefitted the decision-maker.<sup>300</sup> If waste claims have always carried with them a whiff of fiduciary violations, then it may not be a radical leap to treat a waste claim as really asserting a fiduciary breach.

Finally, it could be that waste has so outlived its origins that it can no longer survive even as a vestige or anachronism. As this Article has shown, waste grew out of *ultra vires*, and while it was born after *ultra vires* had died, waste still developed in a milieu where restrictive corporate statutes and charters were in living

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297. See *id.* at 152 (discussing waste in reference to disinterested, uncoerced shareholder votes).

298. *Id.* at 151–52 (citing *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 881–82, 901 (Del. Ch. 1999); accord *In re Volcano Corp.*, 143 A.3d at 750 (“Because volcano’s fully informed, uncoerced, disinterested stockholders approved the Merger . . . the business judgment rule irrebuttably applies.” (internal citations omitted))).

299. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009).

300. See, e.g., *Rogers v. Hill*, 289 U.S. 582, 591 (1933) (challenging extremely large bonus payments made to senior executives); *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962) (challenging large payments made to investment company’s adviser).

memory.<sup>301</sup> It also developed when at least one of ultra vires's rules, that against corporate gifts, remained strong. Well before the twenty-first century, however, that larger conceptual framework had simply faded away. Corporation statutes today are enabling and not restrictive,<sup>302</sup> and corporations' charters typically empower them to engage in "any lawful act or activity" for which a corporation may be organized.<sup>303</sup> Waste, then, is today—and probably has been for many years—a doctrine *sui generis*, not rooted in any larger legal framework governing managerial duties. If the original ground from which waste grew has long since washed away, perhaps transplanting waste into the duty of loyalty is a way to ensure that it will still flourish.

Such a move could even find support in the historical story told here. While corporate waste as a distinctive doctrine was developed in the 1930s, courts since the early American republic have decried "waste" by corporate managers, and in early cases that term was sometimes used to describe the result of a breach of fiduciary duties.<sup>304</sup> In *Robinson v. Smith*, the first American shareholder derivative suit, the court handed down as a rule that directors are "liable, if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust."<sup>305</sup> Folding corporate waste into good faith would, in this view, only be returning to the time when the word "waste" described the result of directors' "inattention to the duties of their trust."<sup>306</sup>

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Corporate waste is already recognized as a vestige, an odd survival from the first Gilded Age reworked and reworked again across the twentieth century by courts and litigants who could have cared less about its historical roots. Recently courts have

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301. See *supra* Part III ("Waste's Emergence").

302. JAMES D. COX & THOMAS L. HAZEN, *BUSINESS ORGANIZATIONS LAW*, § 2.2, 56 (3d ed. 2011).

303. See DEL. CODE ANN. tit. 8, § 102(a)(3) ("Contents of certificate of incorporation.").

304. See *supra* Part III (looking at areas where waste was usually claimed—compensation, gifts and political donations—and how waste was thought to be a part of the fiduciary duty framework).

305. 3 Paige Ch. 222, 231 (N.Y. Ch. 1832).

306. *Id.* at 222.

increasingly treated waste as interchangeable with good faith, and it may well be that we are witnessing the twilight of waste as an independent doctrine. But waste, even if a vestige, is a vestige that has from time to time proven useful, providing courts a means to cast light onto decisions not always easily reachable by more traditional fiduciary claims. Waste may not survive as an independent doctrine, but one can hope that the role it played will not be abandoned.