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Delaware's Non-Waivable Duties

Lyman P. Q. Johnson

Washington and Lee University School of Law, johnsonlp@wlu.edu

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DELAWARE’S NON-WAIVABLE DUTIES

LYMAN JOHNSON*

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If any point in dispute is not covered by the *Rules*, the decision should be made in accordance with equity.

– Rule 1-4, USGA, Rules of Golf (2008)¹

Players must not agree to exclude the operation of any *Rule* or to waive any penalty incurred.

– Rule 1-3, USGA, Rules of Golf (2008)²

INTRODUCTION

The Rules of Golf are clear that equity applies where the Rules do not, and that no Rule – including the Rule mandating the application of equity – may be waived by private agreement. If only matters were so clear with respect to fiduciary duties under Delaware law. Ostensibly, the state of the law seems straightforward. Those fiduciary duties – which are the creation of equity³ –

* Robert O. Bentley Professor of Law, Washington and Lee University School of Law; LeJeune Distinguished Chair in Law, University of St. Thomas (Minneapolis) School of Law. The author thanks Christopher Bruner, David Millon, Lash LaRue, and Michael Paulsen for very helpful comments. The Frances Law Center at Washington and Lee University and the University of St. Thomas provided financial support. John Doyle and Christopher Lauderman provided valuable research assistance.

¹ *Rules and Decisions*, U.S. GOLF ASS’N, <http://www.usga.org/Rule-Books/Rules-of-Golf/Rule-01/> (last visited Dec. 16, 2010) (“Points Not Covered by Rules”). The *Rules of Golf* are promulgated by the United States Golf Association (USGA).

² *Id.* (“Agreement to Waive Rules”).

³ *See infra* Part II.

owed by directors and officers of corporations cannot be waived,⁴ while those owed by partners in partnerships and managers of limited liability companies (LLCs) seemingly can be contractually waived, in whole or in part, by virtue of various statutes.⁵ This outcome may be incongruous, but most knowledgeable commentators – whether or not they support those statutes on policy grounds – consider the matter to be well-settled.⁶

This Article disputes that position. It contends that, to the contrary, there is substantial doubt as to whether fiduciary duties in unincorporated business associations formed under Delaware law can, by private agreement, be waived at all. The argument is not a policy argument, although the author believes that permitting wholesale waiver of fiduciary duties is objectionable and bad policy.⁷ The argument also is not that the various statutes are ambiguous or have been improperly interpreted, taken facially as they are, by Delaware courts. The argument made here operates at a far more basic level: it contends that the Delaware General Assembly is constitutionally prohibited from preventing the judges of the Delaware Court of Chancery from applying fiduciary duties as those judges think best – whether or not a private agreement purports to eliminate such duties. Judges themselves, therefore, should not refrain from applying traditional fiduciary duties as they have always done⁸ – i.e., as a particular context may equitably require.

⁴ See *infra* Part I.

⁵ *Id.*

⁶ See, e.g., Thomas E. Rutledge, *Waiving Fiduciary Obligations*, J. PASSTHROUGH ENTITIES, Mar.-Apr. 2009, at 43, 44 (“The Delaware LLC[] limited partnership and general partnership acts expressly permit the elimination of the fiduciary duties, including the duty of care and the duty of loyalty.”); Edward P. Welch & Robert Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 859, 864 (2008) (“Scholars consider the directors’ duty of loyalty to be a mandatory feature of Delaware corporation law . . . [but] parties forming a Delaware limited liability company or a Delaware limited partnership are specifically authorized by statute to agree that the managers or general partners will not owe any fiduciary duty of loyalty to the members or limited partners.”).

⁷ For policy critiques of statutes permitting broad modification or waiver of traditional fiduciary duties, see Rutheford B. Campbell, Jr., *Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes*, 96 KY. L.J. 163, 168 (2007-2008); Daniel S. Kleinberger, *Two Decades of “Alternative Entities”: From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 465 (2009). For an early, well-known scholarly defense of broad contractual freedom in the noncorporate setting, see Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 52 (1993). Professor Ribstein specifically favors the empowerment of private actors to wholly opt out of fiduciary duties. Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537, 540 (1997).

⁸ In the absence of clear contractual language modifying or eliminating fiduciary duties, Delaware courts impose traditional fiduciary duties on managers and controlling members

The argument, at bottom, is a historical argument as well as a constitutional one. Delaware's State Constitution of 1792 vested the Delaware Court of Chancery with the general equity powers equivalent to those then held by the High Court of Chancery of Great Britain.⁹ The High Court of Chancery, then, like the Delaware Court of Chancery in the Eighteenth Century (and today), had jurisdiction over fiduciary duty matters, such duties being equitable in origin.¹⁰ As a constitutional grant, the Delaware Chancery Court's jurisdiction could not be curtailed by legislative action, directly or indirectly, and that jurisdiction was not altered by subsequent amendments to the Delaware Constitution in 1831 and 1897.¹¹ This argument is fully developed in Part III.

Part I will set the argument up and demonstrate its profound juridical and practical significance by describing how the Delaware General Assembly in recent years has sought, by statute, to permit private agreements abridging fiduciary duties in the noncorporate setting. Regrettably, that effort has

of LLCs. See, e.g., *Kelly v. Blum*, C.A. No. 4516-VCP, 2010 WL 629850, at *10 nn.69-70 (Del. Ch. Feb. 24, 2010) (noting that LLC agreements must include "clear and unambiguous" provisions in order to alter traditional fiduciary duties). But see *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008), *aff'd.*, 984 A.2d 124 (Del. 2009) (suggesting without recitation of authority, per Chancellor William Chandler, that duties or obligations must be found in the agreement or contract itself). Elaborating along the lines of Chancellor Chandler's statement in *Fisk Ventures*, Chief Justice Myron Steele has similarly argued – in an article, rather than a judicial opinion – that the "default" or background rule should be that traditional fiduciary duties of care and loyalty do *not* apply in the noncorporate business setting unless expressly created by contract. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 223-24 (2009). He further elaborated on that position at a seminar titled *Recent Developments in Delaware Corporate and Alternative Entity Law* held on April 29, 2010, in Wilmington, Delaware, where he stated that only the implied contractual covenant of good faith and fair dealing – not traditional fiduciary duties – should apply as the default rule in the absence of a contract provision specifically imposing such duties. See Francis G.X. Pileggi, *Updates on Delaware Corporate Law and Alternative Entity Law*, DEL. CORP. AND COM. LITIG. BLOG (Apr. 29, 2010), <http://www.delawarelitigation.com/2010/04/articles/commentary/updates-on-delaware-corporate-law-and-alternative-entity-law/>.

⁹ *DuPont v. DuPont*, 85 A.2d 724, 728-29 (Del. 1951); see *infra* Part III. The Delaware Court of Chancery also exercises jurisdiction over equity matters by statute, DEL. CODE ANN. tit. 10, § 341 (1999), but a statute, of course, may be amended by a majority of the members of the General Assembly. For a description of the two different procedures for amending or revising the Delaware Constitution, see *infra* note 70. For a recent symposium extensively addressing the critical role played by state constitutions in our justice system, see Symposium, *State Constitutions*, 62 STAN. L. REV. 1515 (2010).

¹⁰ *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 496-98 (Del. 1982); *DuPont*, 85 A.2d 728-29; see also *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987).

¹¹ *DuPont*, 85 A.2d at 729. This Article does not address section 9 of article I of the Delaware Constitution, which mandates a remedy by the due course of law for any injury, which might also apply to total waivers. DEL. CONST. art. I, § 9.

wrongly been interpreted as effectively allowing private contracts to oust the Court of Chancery of its traditional plenary authority over the subject of fiduciary duties and to allow the legislative branch to aggrandize that authority. Part III elaborates on why there is no warrant for that “privatization” of law outcome, given the origins of equity and its key jurisprudential role in relation to law as traced in Part II, and in light of authoritative Delaware Supreme Court precedent to the contrary.

In addition to raising a serious and unresolved separation of powers issue, the practical consequences of the argument made here are threefold, and, being far-reaching, it is best to identify them at the outset. First, the argument casts substantial doubt on the legal efficacy of all those provisions in extant partnership and LLC agreements that seek to eliminate fiduciary duties. The stakes in this respect are quite large, given that since 2001 new LLC formations have outpaced all other business entity formations, including corporations, in both Delaware and across the nation.¹² Second, the argument challenges the judges of the Court of Chancery to reassert their constitutional authority – and responsibility – over this field of jurisprudence and restore time-honored fiduciary duties to the law of unincorporated business associations in Delaware.¹³ The judges can exercise their power to articulate fiduciary duties both where private agreements fail to address that subject at all and, even where agreements do address the subject of duties *ex ante* – including agreements with waivers – the judges *ex post* should apply traditional duties in the manner a particular context may equitably require. This may, in many circumstances, lead to a decision to apply the waiver, while in other circumstances it may result in a decision to disregard the waiver, in whole or in part. The key point is that, in every case, that specific determination must be made judicially; it cannot, by the very constitutional nature of equity in Delaware, be made *a priori* and categorically, either by the General Assembly or private contract or both together. Third, the law of

¹² Peter Walsh, Jr. & Dominick T. Gattuso, *Delaware LLCs – The Wave of the Future and Advising Your Clients About What to Expect*, 19 BUS. L. TODAY, Sept.-Oct. 2009, at 11, 11; see Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study*, 15 FORDHAM J. CORP. & FIN. L. 459, 459-60 (2010) (“The limited liability company (LLC) is now undeniably the most popular form of new business entity in the United States.”). A useful, but as yet lacking, piece of data is the number of existing Delaware LLCs and partnerships with waiver of fiduciary duty provisions.

¹³ In *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 167 (Del. 2002), the Delaware Supreme Court in dicta stated that common law fiduciary duties should be applied in the partnership setting. The *Gotham Partners* decision cast doubt on whether agreements in the noncorporate setting could altogether eliminate fiduciary duties, rather than just restrict them, and the decision therefore led the Delaware General Assembly to amend the noncorporate statutes expressly to permit outright elimination of fiduciary duties. See Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 12-14 (describing legislative response to *Gotham Partners*).

noncorporate business associations in Delaware is, accordingly, far more indeterminate than widely believed and more indeterminate than the law of other states, thereby more closely resembling Delaware corporate law in this regard.

There is, as it turns out, much to be learned from the Rules of Golf about the enduring place of equity in a system of rules. Those Rules, unlike current Delaware case law, have properly governed matters of equity all along.

I. THE DELAWARE GENERAL ASSEMBLY AND FIDUCIARY DUTIES: THE JUDICIAL EMBRACE

The Delaware General Assembly's treatment of fiduciary duties in corporations, on the one hand, and in unincorporated associations, on the other hand, is a study in contrasts. The General Assembly has never addressed the fiduciary duties of corporate officers, leaving that subject entirely to the judiciary, which has likewise largely neglected these duties.¹⁴ The General Assembly, however, has addressed the fiduciary duties of corporate directors, but not to permit curtailing or negating those duties. Rather, in 1986 the General Assembly permitted the charters of Delaware corporations to include a provision reducing or eliminating money damages resulting from a director's breach of care.¹⁵ The director duty of care itself, however, may not be eliminated; only the consequences of its breach may be altered.¹⁶ Neither the duty of loyalty, nor the consequences of its breach, may be altered in any way.¹⁷

With respect to noncorporate business associations, however, the legislative story in Delaware is quite different. In 2004, the General Assembly amended

¹⁴ See Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1106-08 (2009); see also *Hampshire Grp., Ltd. v. Kuttner*, C.A. No. 3607-VCS, 2010 WL 2739995, at *11 & n.77 (Del. Ch. July 12, 2010) ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors.").

¹⁵ DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

¹⁶ *Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001).

¹⁷ *Sutherland v. Sutherland*, No. 2399-VCL, 2009 WL 857468, at *4 (Del. Ch. Mar. 23, 2009) (prohibiting provisions seeking to exculpate director loyalty breaches); see *Welch & Saunders*, *supra* note 6, at 859 (articulating the "clear, negative implication" of section 102(b)(7) that exculpations for directors' duty of loyalty would be invalid and unenforceable). Although the Delaware corporate statute empowers a corporation to renounce corporate opportunities, see DEL. CODE ANN. tit. 8, § 122(17) (2001), that provision does not relieve directors of their duty of loyalty. In this regard, even if, as a theoretical matter, one conceives of corporate relationships as "contractual" in nature, corporate law recognizes that the character of those relationships will not be decided by the parties alone, but that societal interests also matter. See Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2239-40 (1992).

section 18-1101 of the Delaware Limited Liability Company Act to permit members to abolish – not simply modify – fiduciary duties themselves and liabilities flowing from a breach of those duties.¹⁸ The pertinent language is:

§ 18-1101. Construction and application of chapter and limited liability company agreement. . . .

(c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. . . .

(e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.¹⁹

Delaware also amended its general partnership statute and its limited partnership statute to permit total curtailment of customary fiduciary duties and liability for any breach of those duties.²⁰ All three of these noncorporate statutes, therefore, permit, but do not mandate, the contractual waiving of fiduciary duties. As with the limited liability company statute,²¹ the general partnership statute and the limited partnership statute both include a provision expressing a contractarian policy preference: “It is the policy of this chapter to

¹⁸ Kelly v. Blum, C.A. No. 4516-VCP, 2010 WL 629850, at *11 (Del. Ch. Feb. 24, 2010) (“[Delaware’s LLC statute] goes further by allowing broad exculpation of *all* liabilities for breach of fiduciary duties – including the duty of loyalty.”). Abolishing fiduciary duties themselves will leave investors without a remedy for managerial misconduct unless, as is unlikely, the agreement itself provides contractual protection. Eliminating only liability for a breach of duty will, by contrast, permit an investor to seek equitable relief, such as an injunction.

¹⁹ DEL. CODE ANN. tit. 6, § 18-1101(c), (e) (2005). This Article addresses subsection (c), not subsection (e). Similar arguments might be pertinent with respect to subsection (e).

²⁰ *Id.* § 15-103(a), (f) (governing general partnerships); *id.* § 17-1101(d), (f) (governing limited partnerships). As with the LLC statute, *supra* note 19, the partnership statutes do not permit elimination of the implied contractual covenant of good faith and fair dealing.

²¹ *Id.* § 18-1101(b).

give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.”²²

In Delaware courts in recent years, these new statutes consistently have been interpreted to do what they purport to do on their face: permit the elimination of fiduciary duties.²³ For example, in *Fisk Ventures, LLC v. Segal*,²⁴ the Court of Chancery held that in an LLC operating agreement “flatly stating that members have no duties other than those expressly articulated in the Agreement,” the parties had contractually eliminated traditional fiduciary duties, precisely as contemplated by the limited liability company statute.²⁵ Chancellor Chandler laid the conceptual foundation for that conclusion in the very first sentence of his opinion, where he stated: “Contractual language defines the scope, structure, and personality of limited liability companies.”²⁶ He buttressed that view with his later assertion that limited liability companies “are creatures not of the state, but of contract.”²⁷ In a July 2010 opinion, Vice-Chancellor Leo Strine likewise strongly urged that private contracting parties – not courts – control whether fiduciary duties are owed in noncorporate settings: “When, as the parties here did, they cover a particular subject in an express manner, their contractual choice governs and cannot be supplanted by the application of inconsistent fiduciary duty principles that might otherwise apply as a default.”²⁸ In addition, the Delaware Supreme Court, citing the LLC enabling statute, has upheld a provision in an operating agreement limiting manager liability for a breach of fiduciary duty to instances of fraudulent, illegal, or bad faith conduct.²⁹ Numerous cases are in accord, provided the language of such agreements is clearly drafted.³⁰ Consequently, private contracts annulling or weakening fiduciary duties, and contracts negating or

²² *Id.* §§ 15-103(d), 17-1101(c).

²³ *Kelly*, 2010 WL 629850, at *11 n.77 (collecting cases which have allowed broad exculpation for liabilities stemming from breaches of all types of fiduciary duties, including the duty of loyalty). For a good description of the reluctance in earlier decisional law to permit outright elimination of fiduciary duties, see Steele, *supra* note 13.

²⁴ C.A. No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008), *aff'd.*, 984 A.2d 124 (Del. 2009).

²⁵ *Id.* at *11.

²⁶ *Id.* at *1.

²⁷ *Id.* at *8.

²⁸ *Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS, 2010 WL 2929708, at *8 (Del. Ch. July 23, 2010).

²⁹ *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (citing DEL. CODE ANN. tit. 6, § 18-1101(e) (2005)).

³⁰ *See, e.g., DirecTV Latin Am., LLC v. Park 610, LLC*, 691 F. Supp. 2d 405, 438 (S.D.N.Y. 2010) (applying Delaware law); *Kelly v. Blum*, C.A. No. 4516-VCP, 2010 WL 629850, at *11 n.77 (Del. Ch. Feb. 24, 2010) (citing *Wood*, 953 A.2d at 141 and *Abry Partners V, L.P. v. F & W Acquisition LLC.*, 891 A.2d 1032, 1063 (Del. Ch. 2006)); *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, C.A. No. 3658-VCS, 2009 WL 1124451, at *8 (Del. Ch. Apr. 20, 2009).

reducing liability for breaching such duties, have received uniformly strong and uncritical judicial endorsement outside the corporate setting.

Courts occasionally and quite briefly do what Chancellor Chandler did in the *Fisk Ventures* decision noted above and expressly ground their rulings on the legislative policy of freedom of contract.³¹ The Court of Chancery recently stated, for example: “We should be reluctant to be more restrictive of freedom of contract than those elected by our citizens to write the statutory law.”³² Another opinion, citing an influential article by Chief Justice Steele strongly advocating judicial deference to legislative policy,³³ stated without elaboration that “the conceptual underpinnings of the corporation law and Delaware’s limited partnership law are different,”³⁴ attempting to justify on that frail basis the elimination of all duties in the partnership setting. Beyond these sparse assertions, however, Delaware judges, while broadly endorsing fiduciary duty waivers, have paid scant attention to the policy dimensions of those waivers.

Pretty clearly, the judiciary and the business law bar regard the propriety of contracting around fiduciary duties in noncorporate contexts to be settled.³⁵ To be sure, commentators are split on the policy wisdom of these enactments, with many scholars remaining quite critical.³⁶ Apart from a few dissenting voices, however, the whole episode of radically upending centuries of law took only a few short years to accomplish; or so it appears. Those who believe this, however, forget that equity originates outside law and does not readily yield to law’s strictures, a subject addressed in Part II. They also may not wholly appreciate a unique feature of equity in Delaware: that it enjoys constitutional status, and thus its judge-made doctrines cannot be abridged by statute, a subject developed in Part III.

³¹ See *supra* notes 24-27 and accompanying text.

³² *Abry Partners*, 891 A.2d at 1064.

³³ Steele, *supra* note 13, at 5. Chief Justice Steele argued that the policy directive of the General Assembly “carries the day over even the most clearly defined doctrinal common law principles.” *Id.* The Chief Justice firmly believes that legislative policy should control in this area, as he repeatedly returns to this underpinning for his position: “What the [statutory] amendment potentially does is *takes away from the courts* a well-developed framework of doctrine from the corporate law arena.” *Id.* at 14 (emphasis added). He later asserted: “Delaware courts will follow the stated statutory policy of promoting freedom of contract and recognize that as attractive as it may be, the common law governing corporate fiduciary relationships *must yield to statutory policy.*” *Id.* at 32 (emphasis added). As argued in Parts II and III, however, courts of equity legally need not, and historically have not, yielded categorically to legislatures in certain areas, including fiduciary duties.

³⁴ *Twin Bridges, LP, v. Draper*, C.A. No. 2351-VCP, 2007 WL 2744609, at *19 n.113 (Del. Ch. Sept. 14, 2007).

³⁵ See *supra* note 6.

³⁶ See *supra* note 7.

II. EQUITY'S ORIGINS AND ROLE

Equity in the Western legal tradition has always coexisted somewhat uneasily with law, threatening as it does to “subvert” and destabilize legal principles.³⁷ Aristotle cogently described the vital role of equity in a system of justice. He identified the universality of law as a potentially ironic source of injustice in particular cases: “[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms. . . . [T]he law takes the majority of cases, fully realizing in what respect it misses the mark.”³⁸ In Aristotle’s view, in certain circumstances equity must correct the possible injustice resulting from the categorical, but occasionally flawed, nature of law’s precepts:

[T]he equitable is both just and also better than the just in one sense. It is not better than the just in general, but better than the mistake due to the generality [of the law]. And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality.³⁹

In the English Chancery Court, this appreciation of equity’s meliorative flexibility in a system of universal legal rules was deeply rooted. Sounding an Aristotelian note, Chancellor Ellesmere in 1615 observed: “The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.”⁴⁰ As more modernly summarized by former Delaware Chancellor William Quillen: “[E]quity is the recognition that the universal rule cannot always be justly applied to the special case. Equity is the flexible application of broad moral principles (maxims) to fact specific situations for the sake of justice.”⁴¹ Again, the

³⁷ MARGARET HALLIWELL, EQUITY AND GOOD CONSCIENCE IN A CONTEMPORARY SOCIETY 6 (1997) (“Fundamental misconceptions of equity abound . . . because of a persistent refusal to acknowledge that equity is, by its very nature, subversive of the law.”).

³⁸ ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 141 (Martin Ostwald trans., Bobbs-Merrill Co., Inc. 1962) (c. 384 B.C.E.).

³⁹ *Id.* at 142. In the terms used by HALLIWELL, *supra* note 37, equity occasionally “subverts” law to correct a potential injustice caused by law’s inherent universality. *Id.* at 6.

⁴⁰ The Earl of Oxford’s Case, 21 Eng. Rep. 485, 486 (Ch. 1615); *see also* Bishop of Winchester v. Knight, 24 Eng. Rep. 447, 448 (Ch. 1717) (arguing that it would be a “reproach to equity” to permit a fiduciary to breach trust).

⁴¹ William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery – 1792-1992*, 18 DEL. J. CORP. L., 819, 821-22 (1993). The United States Supreme Court recently described the way in which the “exercise of a court’s equity powers . . . must be made on a case-by-case basis.” *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)). The Court went on to observe the “tradition in which courts of equity have sought to ‘relieve hardships which, from time to time, arise from a hard and fast adherence’ to more absolute legal rules, which, if strictly applied, threaten the ‘evils of archaic rigidity.’” *Id.* at 2563 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). The R&A – the Scotland-

enduring influence of Aristotle is evident in Quillen's invocation of equity in aid of attaining a larger justice to which law itself, occasionally, can be a hindrance.

Equity's role in relationship to law is well-established in Delaware corporate law. In 1971, the Delaware Supreme Court famously stated in *Schnell v. Chris-Craft Industries, Inc.*⁴² that "inequitable action does not become permissible simply because it is legally possible."⁴³ To illustrate, the Delaware Supreme Court has held that an otherwise lawful corporate contract is invalid if entering it constitutes a breach of the directors' fiduciary duty.⁴⁴ And prior approval of a director conflict of interest transaction by disinterested directors or shareholders under section 144 of the Delaware corporate statute does not

based promulgator of golf rules for all countries except the United States and Mexico – has jointly issued the *Rules of Golf* with the USGA since 1952. *The R&A Group*, THE R&A, <http://www.randa.org/en/RandA/The-RandA-Organisation.aspx> (last visited Dec. 17, 2010). In a response to an FAQ, "What does the term Equity mean?," the R&A answered quite similarly to Chancellor Quillen: "Occasionally [sic] situations arise that are simply not covered by the Rules of Golf, thus a decision must be made according to what is fair." *Rules of Golf*, THE R&A, <http://www.randa.org/en/Rules-and-Amateur-Status/Rules-of-Golf.aspx#/rules/?ruleNum=1&subRuleNum=4> (last visited Dec. 17, 2010). Under Interpretation 1-4/9, the R&A offered a colorful illustration of Rule 1-4, a rule identical to USGA Rule 1-4 (*see supra* note 1 and accompanying text):

Q: A player's ball comes to rest in a bird's nest or so close to the nest that he could not make a stroke without damaging it. In equity (Rule 1-4), does the player have any options in addition to playing the ball as it lies or, if applicable, proceeding under Rule 26 or 28?

A: Yes. It is unreasonable to expect the player to play from such a situation and unfair to require the player to incur a penalty stroke under Rule 26 (Water Hazards) or Rule 28 (Ball Unplayable).

Rules of Golf, THE R&A, <http://www.randa.org/en/Rules-and-Amateur-Status/Rules-of-Golf.aspx#/rules/?ruleNum=1&subRuleNum=4> (last visited Dec. 17, 2010). The Interpretation goes on at length to describe the relief the player will be given to be fair. *Id.*

⁴² 285 A.2d 437 (Del. 1971).

⁴³ *Id.* at 439. Justice Randy Holland has written that the *Schnell* principle is so foundational that "Delaware corporate law may well be seen as an extended commentary on the concepts of legality and equity. *Schnell* made it plain that, in Delaware, equity trumps." DELAWARE SUPREME COURT: GOLDEN ANNIVERSARY 1951-2001, at 92 (Randy J. Holland & Helen L. Winslow eds., 2001); *see also* *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. Ch. 1923) ("That . . . [a] power is found in a statute, supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny. . . . [I]f it should appear that the power is used in such a way that it violates any of those fundamental principles which it is the province of equity to assert and protect, its restraining processes will unhesitatingly issue.").

⁴⁴ *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (Del. 1994); *see also* *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 238 (Del. 2008) (applying the "the prohibition . . . against contractual arrangements that commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders").

altogether remove the transaction from later judicial scrutiny.⁴⁵ This supervening role of equity has been repeatedly recognized in Delaware lawmaking, a point underscored by Vice-Chancellor Leo Strine in a 2005 article:

For all these reasons, the judiciary's constant appreciation of the separate roles that law and equity play in the evolution of corporate law making is vital to the continued development of our system of corporate law. The self-discipline of *separating the inquiry into whether the challenged conduct is lawful, in the sense of being prohibited by a statute or governing instrument, from the inquiry into whether the challenged conduct is equitable in the particular circumstances before the court*, promotes better decision making and makes more credible the judiciary's exercise of its common law making powers. No doubt, this separation makes plainer the reality that judges – particularly Delaware judges who decide corporate cases – do make law more than occasionally. But it simultaneously forces judges to admit when they are making a debatable policy choice and to be mindful of the difference between the judiciary's role in making limited case-specific determinations of appropriate fiduciary behavior and the legislature's role in establishing broad, across-the-board limits on permissible managerial conduct.⁴⁶

A key creation of judge-made equity is the concept of fiduciary duties. As noted by former Delaware Chancellor William Allen, fiduciary duties spring from equity: “Among the most ancient of headings under which Chancery's jurisdiction falls is that of fiduciary relationships. . . . Chancery takes jurisdiction over ‘fiduciary’ relationships because equity, not law, is the source of the right asserted.”⁴⁷ Justice Randy Holland likewise recently observed that “the fiduciary duties of directors of Delaware corporations are an equitable response to the power that is conferred upon directors as a matter of statutory law.”⁴⁸

As to origins in the Anglo-American corporate law tradition, Justice Holland notes that “those equitable fiduciary duty precepts date back to a decision by the Lord Chancellor of England in 1742.”⁴⁹ In that renowned decision,

⁴⁵ See *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 614-15 (Del. Ch. 2005) (emphasizing that section 144 deals solely with problem of per se invalidity, not whether conflict of interest transactions might give rise to claims for breach of fiduciary duty).

⁴⁶ Leo E. Strine, Jr., *If Corporate Action is Lawful, Presumably There Are Circumstances in Which it Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 906 (2005) (emphasis added).

⁴⁷ *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987); see also *Malone v. Brincat*, 722 A.2d 5, 9-10 (Del. 1998) (describing fiduciary duties).

⁴⁸ Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 678 (2009).

⁴⁹ *Id.*

Charitable Corp. v. Sutton,⁵⁰ the Lord Chancellor addressed the possible liability of committee-men (directors) for gross negligence in allegedly failing to supervise company affairs.⁵¹ He ruled that such persons had accepted a position of trust, and as such, owed the obligation “to execute it with fidelity and reasonable diligence.”⁵² Later, those duties were explicitly characterized as “fiduciary” in nature,⁵³ and early Delaware decisions likewise refused to countenance such breaches of trust,⁵⁴ the Chancery Court specifically describing directors as “fiduciaries” by the early Twentieth Century.⁵⁵ From this centuries-long foundation – running from Aristotle to the English Court of Chancery to the Delaware Chancery Court – grew the deeply-embedded duties of loyalty and care now owed by corporate directors.⁵⁶

As important as the actual substantive duties delineated in *Sutton* was the Lord Chancellor’s supreme certainty of his abiding power to formulate and apply such duties: “Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private, or public capacity.”⁵⁷ And perhaps presciently anticipating an effort by law to curb equity’s power, the Lord Chancellor was emphatic: “I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination.”⁵⁸ A tribunal exercising equity jurisdiction, in the Lord Chancellor’s view, rightly claimed both the original power to create fiduciary duties and the continuing judicial power to afford a remedy for their breach.

To sum up, fiduciary duties originate from equity, not law, and they play a vital tempering role in a rules-based system of justice. Quite simply, “[t]he hallmark of a fiduciary relationship is that one person has the power to exercise control over the property of another as if it were her own.”⁵⁹ Consequently, numerous relationships are fiduciary in character, including those within trusts, corporations, partnerships, and LLCs.⁶⁰ Fiduciary duties are, historically, the

⁵⁰ 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742).

⁵¹ *Id.* at 406, 26 Eng. Rep. at 645.

⁵² *Id.*

⁵³ *Aberdeen Ry. Co. v. Blaikie Bros.*, [1854] 1 Macq. 461, 471 (H. L.) (appeal taken from Scot.).

⁵⁴ See Holland, *supra* note 48, at 680.

⁵⁵ See, e.g., *Bodell v. Gen. Gas & Elec. Corp.*, 132 A. 442, 446 (Del. Ch. 1926), *aff’d*, 140 A. 264 (Del. 1927).

⁵⁶ Holland, *supra* note 48, at 678-82.

⁵⁷ *Sutton*, 2 Atk. at 406, 26 Eng. Rep. at 645.

⁵⁸ *Id.*

⁵⁹ *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, C.A. No. 3874-VCS, 2009 WL 2501542, at *3 (Del. Ch. Aug. 5, 2009).

⁶⁰ *Id.* For a fascinating exploration of the law/equity tension and the related separation of powers issue in connection with LLC charging orders, see Thomas Earl Geu et al., *To Be or Not To Be Exclusive: Statutory Construction of the Charging Order in the Single Member*

product of courts, not legislatures.⁶¹ And critically, courts of equity claim the ongoing authority to deploy equitable constructs to modulate the innate, but sometimes problematic, universality of legal principles when – in a particular case – doing so is necessary for the greater attainment of justice.

III. IRREPRESSIBLE EQUITY

A. *The Attempted Legislative Incursion*

With the origins and role of equity in business law now understood, the critical question is whether any of this has changed in noncorporate business organizations due to the recent enactment of the various statutes noted earlier.⁶² The thrust of the three noncorporate waiver statutes is obvious and straightforward: to legislatively permit, by means of private agreement, the abridging or curtailing of fiduciary duties.⁶³ Courts, so far, have uncritically gone along with these unprecedented arrangements.⁶⁴ As argued below, however, these statutes and the agreements they endorse do not alter the traditional jurisdiction or power of the Chancery Court to interject and apply fiduciary duties in noncorporate businesses. Consequently, if Delaware courts continue to sanction these historically anomalous statutes and contracts, it is not because legally they must, but because they choose to. They can, and in certain instances should, however, choose otherwise.

It is important to emphasize that none of the statutes seeks formally or directly to oust the Chancery Court of its jurisdiction over equity matters, in general, or fiduciary duty disputes in particular. Rather, the General Assembly acted to permit contracting parties themselves to eliminate or modify fiduciary duties, notwithstanding that those duties originated in equity. Fiduciary duties, however, do not depend on contract for their existence; they are created and subsist by virtue of courts wherever a fiduciary relationship exists.⁶⁵ Their provenance not being private bargain,⁶⁶ curtailment by bargain does not legally

LLC, 9 DEPAUL BUS. & COM. L.J. 83, 112-13 (2011).

⁶¹ Delaware, unlike most states, has no statute specifying fiduciary standards of conduct for directors or officers. Such standards are entirely judge-made in Delaware. See Johnson & Garvis, *supra* note 14, at 1106-08. The same is true for general partners in partnerships and managers in LLCs. See Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, C.A. No. 3658-VCS, 2009 WL 1124451, at *8 n.33 (Del. Ch. Apr. 20, 2009).

⁶² See *supra* notes 18-22 and accompanying text.

⁶³ See *id.*

⁶⁴ See *supra* notes 23-30 and accompanying text.

⁶⁵ See *supra* notes 60-61 and accompanying text.

⁶⁶ In this regard, the author believes that Chancellor Chandler is wrong in stating, in *Fisk Ventures, LLC v. Segal*, C.A. No. 3071-CC, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008), *aff'd.*, 984 A.2d 124 (Del. 2009), that “[i]n the context of limited liability companies, which are creatures not of the state but of contract, those duties or obligations must be found in the LLC Agreement or some other contract.” Likewise, this author also believes that

or sensibly follow.⁶⁷ The noncorporate statutes permitting fiduciary duty waivers, therefore, seek indirectly to prevent courts from applying traditional, judge-made equitable concepts if contracting parties so elect. In effect, the General Assembly is aggrandizing to itself, and private parties, the power to decide what the Delaware judiciary can and cannot do in this area. The courts, as noted in Part I above, appear so far to have acquiesced to this encroachment, not on well-developed (if debatable) policy grounds, but on a puzzlingly-wrong sense of legal necessity.⁶⁸

In Delaware, the Court of Chancery has jurisdiction over matters sounding in equity – including fiduciary duty cases – both by statute and constitution.⁶⁹ Although the General Assembly can amend the jurisdictional statute, it cannot so readily amend the Delaware Constitution, nor can it revise the Constitution.⁷⁰ Thus, an important issue on the waiver question is the current

Chief Justice Steele is wrong in advocating that fiduciary duties should not exist in the noncorporate setting unless parties themselves expressly create such duties by contract. *See* Steele, *supra* note 8, at 233-34. That position does not represent mere deference to the General Assembly. It is, rather, a jettisoning of the centuries-old judicial practice of holding business managers – who exercise power over the property of others, *see supra* note 59 – to a baseline fiduciary standard. Even contractarian theorists like Judge Frank Easterbrook and Professor Daniel Fischel believe a strong set of fiduciary duty rules is necessary to supplement an investor's need to monitor a manager. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700-03 (1982). Nothing can stop the Delaware judiciary from overthrowing longstanding practices, of course, but on *stare decisis* grounds it should be done reluctantly and, in all events, it should be done forthrightly as a carefully considered *judicial* decision to abandon the imposition of duties in deference to private contract, in Chandler's case, or, in Steele's case, to abandon them *carte blanche* unless expressly created *ex ante* by contract.

⁶⁷ *See supra* notes 44-45 and accompanying text.

⁶⁸ Recently, for example, Vice-Chancellor Leo Strine expressly stated that, where one party urged the imposition of fiduciary duties in a manner apparently inconsistent with contractual language, the court was powerless to do so because “[t]his court cannot play such a role [And] [u]nder our law dealing with alternative entities such as LLCs here, this court may not do that.” *Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS, 2010 WL 2929708, at *8 (Del. Ch. July 23, 2010). That strongly, and wrongly, suggests judicial inability, not unwillingness, to act. Contrast Vice-Chancellor Strine's position with the Lord Chancellor's view in 1742 that fiduciary misconduct is never “out of the reach of courts of law or equity.” *Supra* notes 57-58 and accompanying text.

⁶⁹ *See supra* notes 9-11 and *infra* Part III.B.

⁷⁰ There are two different ways to change the Delaware Constitution. I thank my colleague Christopher Bruner for bringing this issue to my attention. A commentary on the Delaware Constitution provides a good description of these methods.

Article XVI [of the Constitution] describes two different procedures for changing the Delaware Constitution. These procedures include an amendment process by the General Assembly and a revision process by a constitutional convention. Neither procedure permits the people to vote directly on proposed changes to the Delaware Constitution. Neither procedure requires the governor's approval. . . .

scope of the Chancery Court's jurisdiction over fiduciary duty matters under

Article XVI, Section 1 authorizes amendments to the Delaware Constitution to be proposed in the General Assembly and, if agreed to by two-thirds of all the members of each house, requires the secretary of state to publish the text of the amendment in the newspapers three months before the next general election. If the General Assembly elected at that general election agrees to such proposed amendment by a two-thirds vote of all the members of each house, the amendment thereupon becomes part of the constitution.

By Article XVI, Section 2 of the Delaware Constitution, the General Assembly is authorized to submit to the people the question of whether or not a constitutional convention should be assembled for the purpose of revising the constitution. In the event the answer of the people to this question is in the affirmative, the General Assembly is then authorized to convene a constitutional convention and the method of convening such a convention is set out in Article XVI, Section 2. There is, however, no provision for the submission of the product of the constitutional convention to the people for approval or disapproval.

While there is no provision in Article XVI, Section 2 for the submission of the product of the work of a constitutional convention to the people, there is, by reason of Article XVI, Section 1, provision for an indirect submission to the people of a proposed amendment to the constitution passed by the General Assembly. This results from the requirement of publication by the secretary of state of any proposed constitutional amendment three months before the holding of a general election, to be held between the final adjournment of the originating session of the General Assembly and the convening of the General Assembly to be elected at the intervening general election.

The theory of this requirement, made clear by the delegates of the constitutional convention, is that the people, being made aware of a proposed amendment, can then judge which candidates for election to both houses of the General Assembly are in favor of the view the individual voter takes toward the proposed amendment. This is the only means provided in the Delaware Constitution for submission to the people of any change in the constitution. In this respect, Delaware differs from all of the other states of the union, which do require approval by the people of proposed changes in their constitution.

RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE* 228-29 (2002). One interpretive question that naturally arises is the difference between an "amendment" of and a "revision" to the Constitution. In an *Opinion of the Justices*, 264 A.2d 342 (Del. 1970), the individual members of the Delaware Supreme Court interpreted the relationship between an amendment of the Delaware Constitution under article XVI, section 1 and a revision under article XVI, section 2. *Id.* at 346. In construing the meaning of the terms, the justices concluded that it is the type of change and not the number of changes that determines whether section 1 or 2 is applicable. *Id.* at 345. "Amendments" are modifications that do not make a substantial or fundamental change or alteration. *Id.* at 346. Conversely, "revisions" encompass more than a mere restatement, reorganization, modernization, abbreviation, consolidation, simplification, or clarification of an existing document. *Id.* Revisions are substantial, basic, fundamental changes in the government's plan that achieve purposes and objectives beyond the lines of the present constitution. *Id.* Although the descriptions of these different types of changes serve as a helpful guide, a final determination is dependent on the facts and circumstances of each proposed change. *Id.* Under these guidelines, altering the jurisdiction of the Chancery Court would seem to be sufficiently substantial or fundamental as to constitute a "revision," thereby foreclosing action solely by the General Assembly.

the Delaware Constitution. Resolving this issue will determine whether Delaware's judges must accede to the General Assembly's effort to foreclose courts from discharging a long-held, core function, or, alternatively, whether courts themselves retain full power to apply customary fiduciary duties when faced, in a particular noncorporate case, with both inequitable conduct and a contract plainly purporting to waive all duties.

B. *The Chancery Court's Continuing Constitutional Authority Over Fiduciary Duties*

The foundational case for understanding the Court of Chancery's continuing authority over fiduciary duties in noncorporate business settings is not a business case at all, but one involving a deserted wife's suit for separate maintenance.⁷¹ After being abandoned by her husband, Dorothy Elizabeth Barton DuPont sued her husband for maintenance in the Court of Chancery.⁷² Her husband, Alfred Victor DuPont, moved to dismiss for lack of jurisdiction, contending that, by statute, the matter should be heard in Family Court.⁷³ The Court of Chancery denied the motion to dismiss and appeal was taken to the Delaware Supreme Court.⁷⁴

The *DuPont* case squarely addressed the ability of the General Assembly to reduce the Court of Chancery's equity jurisdiction. This decision necessitated a detailed examination of certain provisions of Delaware's various constitutions – those of 1897, 1831, 1792, and 1776.⁷⁵ The relationship between sections 10 and 17 of article IV of the Constitution of 1897 (then and still in effect) presented the most challenging interpretive task. Section 10, in essence, provides that the Court of Chancery “shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery.”⁷⁶ Section 17 provides that “The General Assembly, notwithstanding anything contained in this Article, shall have power to repeal or alter any Act of the General Assembly giving jurisdiction to . . . the Court of Chancery.”⁷⁷ The defendant's position in *DuPont* was that section 17 permitted the General Assembly to divest the Chancery Court of jurisdiction over his wife's suit for maintenance and confer exclusive jurisdiction in the Family Court.⁷⁸

The Supreme Court's analysis in *DuPont* combined a close reading of the text of the Constitution with a tour through Delaware's constitutional history. As to the text, the Court first noted that section 10 used the term “vested,”

⁷¹ *DuPont v. DuPont*, 85 A.2d 724, 726 (Del. 1951).

⁷² *Id.*

⁷³ *Id.* at 726-27 (citing 45 Del. Laws 935 (1945)).

⁷⁴ *Id.* at 726.

⁷⁵ *Id.* at 727-30.

⁷⁶ DEL. CONST. art. IV, § 10.

⁷⁷ *Id.* § 17.

⁷⁸ *DuPont*, 85 A.2d at 727.

while section 17 used the term “giving,” in describing the Chancery Court’s jurisdiction.⁷⁹ As to history, the Court initially observed that by virtue of the Colonial Act of 1726-1736, the Colonial General Assembly had statutorily authorized counties in Delaware to hold Courts of Chancery under the same system of equity as administered by the High Court of Chancery in Great Britain.⁸⁰ This power of the General Assembly over the Courts of Chancery was not changed in Delaware’s first Constitution of 1776, but importantly, it was dramatically changed by the Constitution of 1792.⁸¹

Section 14 of the Constitution of 1792, like section 10 of the 1897 Constitution, used the term “vested” in describing the Chancery Court’s jurisdiction, suggesting a non-disturbable jurisdiction, especially given that in 1792 no analog to section 17 of the 1897 Constitution yet existed.⁸² Only in section 12 of the Constitution of 1831 does a provision similar to section 17 appear and, like section 17, it used the word “giving” – not “vested” – in describing the jurisdiction of the Chancery Court.⁸³

In drawing on text and history to reconcile section 10 and section 17 of the current (1897) constitution, the *DuPont* Court concluded that the General Assembly could repeal the Chancery Court’s jurisdiction under section 17 only as to the *increases* in that jurisdiction as the General Assembly had made *after* 1792.⁸⁴ Critically, the Court held, the General Assembly was constitutionally prohibited from restricting the Chancery Court’s jurisdiction to less than it was in 1792.⁸⁵ And in 1792, the general equity powers of the Chancery Court were equivalent to those of the High Court of Chancery of Great Britain in 1776, the date of the separation of the United States.⁸⁶ On the facts before it, the *DuPont* Court went on to conclude that the Delaware Court of Chancery in 1951 still had jurisdiction to hear suits for maintenance because the General Assembly – under its limited, implied authority – had not conferred that aspect of equity jurisdiction on another tribunal exclusively and had not created in such a tribunal remedies equivalent to those available in the Chancery Court.⁸⁷

⁷⁹ *Id.* at 728-29.

⁸⁰ *Id.* at 728. In an earlier decision, the Delaware Supreme Court had stated that the “exact date of the [Colonial] Act has not been definitely determined. It was passed during the administration of Gov. Patrick Gordon, so its date may be fixed as between 1726 and 1736.” *Glanding v. Indus. Trust Co.*, 45 A.2d 553, 561 (Del. 1945).

⁸¹ *DuPont*, 85 A.2d at 728.

⁸² *Id.*

⁸³ *Id.* at 729.

⁸⁴ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 730. In dissent, Justice Tunnell aptly described the holding of the majority, “that the minimum limits of equity jurisdiction were frozen in 1792 and have remained so ever since.” *Id.* at 739 (Tunnell, J., dissenting).

⁸⁷ *Id.* at 734. See Geu et al., *supra* note 60, at 115 n.137 for another rare scholarly

The *DuPont* case “cemented the role of the Court of Chancery as a permanent constitutional fixture.”⁸⁸ Delaware courts have cited the case in various contexts,⁸⁹ and echoed its holding in cases involving breach of fiduciary duty claims.⁹⁰ In *Harman v. Masoneilan International, Inc.*,⁹¹ the Delaware Supreme Court held that breach of fiduciary claims falls within the Court of Chancery’s inherent or exclusive jurisdiction.⁹² Fiduciary duty claims were, as noted earlier,⁹³ cognizable in equity in Great Britain prior to 1776, the key demarcation date in *DuPont*. The heralded case of *Charitable Corp. v. Sutton*,⁹⁴ cited by Justice Holland as foundational to fiduciary duties,⁹⁵ was decided in England in 1742. Consequently, under the reasoning of *DuPont*,⁹⁶ the Chancery Court’s jurisdiction over fiduciary duty claims could not be divested through legislation enacted by the Delaware General Assembly.⁹⁷ This foundational teaching seems to have been essentially forgotten – or overlooked – in the all-important area of noncorporate fiduciary duty waivers.

C. Ongoing Judicial Discretion

For those partnership and LLC agreements purporting to waive fiduciary duties under statutory auspices, the upshot of the above analysis is simple but profound: the Chancery Court continues to have jurisdiction to hear claims that partners or managers breached their fiduciary duties and, exercising that jurisdiction, may conclude, in particular circumstances, that a partner or manager inequitably breached a fiduciary duty. This is not to say by any means that agreements waiving fiduciary duties should be wholly disregarded by the Chancery Court, or even generally disregarded. The claim here is both more basic and more demanding of the judiciary. The judges on the Chancery Court simply cannot, by blithely referring to such an agreement or the

discussion of *DuPont*.

⁸⁸ Quillen & Hanrahan, *supra* note 41, at 849.

⁸⁹ See, e.g., *Arzuaga-Guevara v. Guevara*, 794 A.2d 579, 584-85 (Del. 2001); *Lipstein v. Diamond State Tel. Co.*, No. 7763, 1985 WL 11571, at *2-3 (Del. Ch. Aug. 7, 1985).

⁹⁰ *Diabiase v. Vendemia*, C.A. No. 2002-06-178, 2002 WL 31999357, at *1-2 (Del. C.P. Sept. 17, 2002) (“It is within the Chancery Court’s jurisdiction and discretion to determine whether Plaintiff’s civil action alleging a breach of fiduciary duty of loyalty come[s] under its concurrent jurisdiction . . .”).

⁹¹ 442 A.2d 487 (Del. 1982).

⁹² *Id.* at 498-99.

⁹³ See *supra* note 40 and accompanying text.

⁹⁴ 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742). See *supra* notes 50-53, 57-58 and accompanying text.

⁹⁵ See Holland, *supra* note 48, at 678-79.

⁹⁶ See *supra* notes 84-85 and accompanying text.

⁹⁷ *Arzuaga-Guevara v. Guevara*, 794 A.2d 579, 585 (Del. 2001) (“[T]he historical equitable jurisdiction of the Court of Chancery to hear a matter cannot be divested simply by the legislative enactment of a new statute . . .”).

underlying enabling statute, avoid their own continuing responsibility to ask – in every case – whether, in equity, they should or should not enforce the contractual waiver. No references to legislative policy or contractual freedom will permit judges to sidestep this continuing power and responsibility. An example will illustrate the point.

Assume a manager-managed LLC with an operating agreement that, among other provisions, places sole and plenary managerial power in a single manager, and also clearly states that the manager owes no fiduciary duties, including any duty of loyalty, to the LLC or to any or all of its members. Assume also that the members are of age but are not especially experienced or sophisticated investors. Assume also that in the course of carrying out his managerial duties for the LLC, the manager learns of a remarkable business opportunity that, under Delaware law, clearly would be regarded as an “LLC opportunity,”⁹⁸ but, nonetheless, the manager takes the opportunity for himself. Alternatively, or in addition, assume that the manager personally transacts business with the LLC on terms that are extraordinarily advantageous to him as the counterparty and entirely unfair to the LLC.

Of course, absent the contractual waiver, the manager likely would lose on a member’s claim that he breached the duty of loyalty.⁹⁹ What difference should the waiver make? One thing the waiver does not do is categorically oust the Chancery Court of its jurisdiction or inherent power to decide that, the law notwithstanding, certain conduct is inequitable.¹⁰⁰ The court, therefore, can and should ask whether *in this case* the members can make out a claim for breach of fiduciary duty. Pertinent to this context-specific inquiry will be the language of the contractual waiver itself, the degree of moral and commercial repugnance of the managerial behavior, the experience and sophistication of the members, and the financial and strategic significance of the challenged dealings for the overall welfare of the LLC. This analysis will, as always, require the weighing of several factors and, ultimately, demands the exercise of judgment, with mindfulness being given not only to the interests of the parties before the court but also to the ramifications for business dealings more generally – the overall state of business morality being an important and

⁹⁸ See, e.g., *Broz v. Cellular Info. Sys.*, 673 A.2d 148, 154-55 (Del. 1996) (reiterating that “a corporate officer or director may not take a business opportunity for his own” if certain conditions are met).

⁹⁹ Perhaps the manager would not even have engaged in the disloyal behavior without the express waiver, possibly being deterred by an abiding sense of duty, if not the clear legal understanding of it. The very existence of an explicit waiver, however, may itself induce abandoning inhibition against unfaithful conduct. See Lyman Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and Other Senior Agents)*, 63 BUS. LAW. 147, 156 (2007) (describing how managers who understand they owe fiduciary duties may refrain from negative conduct).

¹⁰⁰ See *supra* Part III.B.

legitimate societal concern.¹⁰¹ Critically, this also means that the law of noncorporate business associations in Delaware is more indeterminate than many believe¹⁰² – and more indeterminate than the law of other states lacking Delaware’s constitutionalizing of equity. This heightened indeterminacy means Delaware’s noncorporate law more closely resembles its corporate law in this regard, perhaps according the same competitive advantage deriving from its expert judiciary. Alternatively, on the other hand, Delaware’s unique inability to permit wholesale contractual waivers may competitively disadvantage it in relation to other states.

The hypothetical case outlined above can easily be differentiated from one where the manager – rather than being disloyal – was simply, or even especially, careless. Carelessness is less egregious (though not always less harmful) than faithlessness, and therefore a waiver of such conduct likely will be enforced. This case also can be readily distinguished from those situations where members are disappointed with a manager’s particular business judgment. In that setting also, the waiver likely will be given far greater, indeed dispositive, weight. The point is that the laudable statutory and contractual quest for certainty, a commercial virtue to be sure, does not, and legally cannot, categorically obviate the exercise of equitable discretion to achieve fairness, also a decided virtue. The judges of the Chancery Court may rue this discretion, or seek in various ways to shun it or corral it. What they cannot do is deny they continue to possess it. Nor can lawyers advising parties who already have entered – or are considering entering – these contractual waivers overlook this ongoing discretion to upend unjust dealings.

This means that the debate about fiduciary duty waivers in noncorporate business entities is not over in Delaware. The venue has simply shifted back to the Court of Chancery. This is where resolution of the important debate over waivers of fiduciary duty belongs. The judges must resume the short-circuited policy discussion of these far-reaching provisions, necessarily of course, in the context of particular disputes. Those who favor outright elimination of fiduciary duties must, in an adjudicative setting, be prepared to defend waivers in every conceivable instance. The policy case, as shown above,¹⁰³ can no longer comfortably and simplistically rest on judicial deference to the General Assembly,¹⁰⁴ any more than a court can ever relinquish its judicial duties to the legislative branch. Nor does the vaunted “freedom of contract” argument for

¹⁰¹ Consideration of the law associated with so-called “private” contracts has always included the interests of society at large, protestations of contractarian theorists notwithstanding. *See supra* note 17 and accompanying text. Illegality, duress, mistake, and other doctrines, for example, all are grounds for judicially overriding private contracts. *See supra* notes 44-45 and accompanying text.

¹⁰² *See* Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 221 (2011).

¹⁰³ *See supra* Part III.B.

¹⁰⁴ *See supra* note 33 and accompanying text.

waivers in the noncorporate setting¹⁰⁵ hold up on closer scrutiny. For one thing, Chancellor Chandler has observed that LLCs “are creatures not of the state but of contract,”¹⁰⁶ while Chief Justice Steele, in contrast, has conceded that “limited partnerships and limited liability companies, like corporations, are creatures of statute.”¹⁰⁷ Of course, like many close business arrangements – including corporations – they are creatures of both statute and contract. The Delaware Supreme Court, for example, has underscored that “[i]t is settled law that certificates of incorporation are contracts.”¹⁰⁸ Moreover, participants in closely-held corporations frequently bargain over and enter into shareholder agreements that spell out the details of their relationship; Delaware law accords them “freedom of contract” in this regard,¹⁰⁹ but they remain bound by fiduciary duties. In addition, all noncorporate business statutes, like the Delaware corporate statute, confer state-ordained benefits – limited liability being the obvious example¹¹⁰ – that participants themselves do not and cannot create by contract *inter se*.

A stronger case for waivers would focus on the desirability of greater certainty and determinacy in intra-firm relations and on allowing passive investors to exchange the possibility of greater risk from broad waivers for other perceived benefits. Many investors may completely understand, reasonably foresee, and yet still be willing to bear, the risks associated with blanket waivers. They may believe that a manager’s past performance, desire to protect and enhance his or her reputation, need to access capital markets in the future, and possibly additional considerations, all coalesce to provide sufficient safeguards against truly egregious misconduct.

There is, consequently, a respectable policy case to be made for permitting broad fiduciary duty waivers *ex ante*. The fallacy, however, is reasoning that because enabling statutes are necessary to permit waivers in those instances where they are desirable and knowingly availed of, those statutes must be construed as likewise sanctioning broad waivers in *every* conceivable instance. A proper construction of the waiver statutes would regard them as necessary to permit a contractual waiver at all, but not sufficient *ipso facto* to conclusively establish the propriety of a waiver under all circumstances.¹¹¹

¹⁰⁵ See *supra* note 22 and accompanying text.

¹⁰⁶ *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008), *aff’d.*, 984 A.2d 124 (Del. 2009).

¹⁰⁷ Steele, *supra* note 13, at 5.

¹⁰⁸ *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006).

¹⁰⁹ See, e.g., DEL. CODE ANN. tit. 8, §§ 350, 354 (2001).

¹¹⁰ See, e.g., *id.* § 102(b)(6). Moreover, as distinct legal “persons,” noncorporate business entities likely enjoy the same constitutional protections enjoyed by corporations under the recent United States Supreme Court’s decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 899-900 (2010). These protections are conferred by law, not private agreement.

¹¹¹ The waiver statutes might be construed in the way section 144 of the corporate statute

The dilemma is the usual one in designing and interpreting categorical legal rules. On the one hand, Delaware's enabling statutes understandably seek to curb the potential overbreadth of applying fiduciary duty standards *ex post* where business participants appropriately chose to forgo them. On the other hand, the enabling statutes should not become legal vehicles for countenancing *ex post* all managerial conduct, whether contemplated or not, and whether egregious and misappropriating or not. Investors customarily do not bargain for betrayal; at least not all of them do all of the time.

Proponents of waivers therefore should not overstate the strength of their position. They must appreciate that just because a strong policy argument can be made for waivers in some cases – perhaps many – it does not necessarily follow that the mere presence of a contractual waiver means a conclusively strong case for enforcing it can be made in every instance on that basis alone. There are well-recognized shortcomings with much *ex ante* bargaining. These include lack of sophistication, high initial trust, difficulties of foreseeing opportunism, hesitancy to raise concerns about suspicions, and understandable concerns about creating hard feelings at the outset of a rosy business relationship.¹¹² One might pooh-pooh these as hurdles that people simply must surmount, but human dynamics are such that it is often far easier said than done. Moreover, even in carefully-crafted contracts there is reason to believe that the efficacy of contract features supposedly designed for investor protection may be overstated and that, accordingly, investors (and courts) should continue to worry about abuse of managerial discretion.¹¹³

Also, it is not clear conceptually that members or partners can waive duties running in favor of an LLC or partnership entity itself, as opposed to those owed directly to members or partners themselves. Given that LLCs and partnerships are legally distinct from their investors, and given that fiduciary duties also are owed to the entities themselves,¹¹⁴ it would seem that only an authorized representative of the LLC or partnership – not investors alone – could waive these duties.¹¹⁵ Moreover, it is not clear that the language of the

has been construed – i.e., as dealing solely with the problem of *per se* invalidity. *See supra* note 45. Moreover, as the United States Supreme Court has recently noted in a case not grounded in constitutionally-based equity: “[W]e will not construe a statute to displace courts’ traditional equitable authority absent the clearest command.” *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (internal quotation marks and citations omitted).

¹¹² Douglas K. Moll, *Minority Oppression & The Limited Liability Company: Learning (Or Not) From Close Corporation History*, 40 WAKE FOREST L. REV. 883, 911-16 (2005).

¹¹³ Lee Harris, *A Critical Theory of Private Equity*, 35 DEL. J. CORP. L. 259, 264 (2010).

¹¹⁴ In the corporate setting, of course, fiduciary duties are owed to both the corporation and its stockholders. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). The wording of the noncorporate waiver statutes – *see supra* notes 19-20 and accompanying text – likewise suggests that, absent a waiver, duties run in favor of the company or partnership itself, as well as in favor of members and partners, respectively.

¹¹⁵ For a recent example of judicial insistence on clarity as to whether an LLC itself was

waiver statutes covers breaches of fiduciary duty by a promoter in connection with formation of an LLC or partnership.¹¹⁶ In addition, upon insolvency, creditors become the beneficiaries of duties owed to the company.¹¹⁷ With a blanket waiver in place, however, partners and managers of insolvent businesses would supposedly be free of fiduciary duty constraints, even though creditors had not consented,¹¹⁸ or, as in the case with corporations,¹¹⁹ even had notice that duties had been waived. Finally, given a bankruptcy trustee's power to reject contracts¹²⁰ and a duty to creditors to maximize the value of the estate,¹²¹ the trustee might still have the power to bring breach of duty claims against managers of bankrupt LLCs and partnerships.¹²²

Waiver proponents who concede the possibility of abuse in the deployment of waivers might, nonetheless, argue that the implied covenant of good faith and fair dealing affords ample protection. That doctrine, however, as Chief Justice Steele concedes, is largely a commercial, insurance, and employment law doctrine, not a business associations doctrine.¹²³ Why try to clumsily retool an untried concept when one designed specifically for the task at hand – fiduciary duty – already exists? Moreover, recent decisional law demonstrates that there is little robustness to the doctrine and that it affords scant protection.¹²⁴ Furthermore, the institutional and legal reality is that the

acting, see *Credit Suisse Securities (USA) LLC v. West Coast Opportunity Fund, LLC*, C.A. No. 4380-VCN, 2009 WL 2356881, at *3 (Del. Ch. July 30, 2009) (holding that an LLC is not bound by an agreement not signed by person acting in a representative capacity).

¹¹⁶ See, e.g., *Roni LLC v. Arfa*, 903 N.Y.S.2d 352, 355 (App. Div. 2010) (indicating that while “[t]he parties’ business or personal relationship is not sufficient to establish a fiduciary relationship” alone, the specific facts presented are sufficient to conclude that the promoter owed a fiduciary duty).

¹¹⁷ *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007). *But see CML V, LLC v. Bax*, 6 A.3d 238, 254 (Del. Ch. 2010) (holding that a creditor has no standing to bring derivative litigation on behalf of insolvent LLC).

¹¹⁸ Of course, this can happen with an insolvent corporation as well, but only as to the duty of care. See *supra* notes 15-17. *But see infra* note 122 and accompanying text.

¹¹⁹ With respect to corporations, the exculpation of directors for duty of care breaches must be set forth in the certificate of incorporation, a public filing. See *supra* note 15. Corporate officers may not be exculpated at all. See *Johnson & Garvis, supra* note 14, at 1106-08 (recognizing the ambiguity surrounding corporate officers’ fiduciary duties, compared to the established duties of corporate directors).

¹²⁰ See 11 U.S.C. § 362 (2006).

¹²¹ *Meer v. Aharoni*, C.A. No. 5141-CC, 2010 WL 2573767, at *6 (Del. Ch. June 28, 2010).

¹²² *Id.*

¹²³ Chief Justice Steele acknowledges that in the business associations context “there is no current Delaware case law.” Steele, *supra* note 13, at 16.

¹²⁴ See *Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010) (holding that the duty of good faith is a limited and extraordinary remedy and that a court “will only imply contract terms where the party asserting the implied covenant proves that the other party has acted

manager of an LLC or general partner in a partnership *is* in a fiduciary relationship, as Delaware law conceives that relationship.¹²⁵ Contractual waivers may, under the auspices of enabling statutes, seek to eliminate fiduciary duties, but those provisions do not alter the inherent fiduciary character of the relationship itself. When a relationship of control and vulnerability is abused, the Court of Chancery must decide whether to permit such abuse on the rationale that, ostensibly, a general and open-ended *a priori* consent was given. For a time period measurable in hundreds of years, equity courts have not done so.¹²⁶ Instead, using the grammar of fiduciary duties, they occasionally halt or sanction misbehavior *ex post* and thereby also affirmatively shape conduct along healthier lines *ex ante*. There is no reason today to believe that judge-made business associations law, coupled with and supplementing contract law, is inferior to law resulting from contracts alone. In any event, Delaware's judges must settle this issue by weighing the various considerations on a case-by-case basis. This too, for hundreds of years, has been the province of equity judges. Recent legislation in the noncorporate setting did not, and constitutionally could not, change that responsibility.

CONCLUSION

Corporate law is "bi-vocal."¹²⁷ On the one hand, the legislatively-enacted corporate statute is "permissive, enabling, and expansive in its thrust," while, on the other hand, judicially-imposed duties serve as a counterforce that constrains and tempers managerial misbehavior that goes too far.¹²⁸ Each voice vitally depends on the other to co-produce a desirable balance in corporate law. In the noncorporate area, Delaware law now risks becoming "uni-vocal," with the inhibiting counter-voice of the judiciary being silenced in favor of the boundless freewheeling unleashed by the waiver statutes.

This Article has argued, however, that the Delaware judiciary has not been, and cannot be, legislatively silenced in the noncorporate area. The Delaware Constitution forbids it. Rather, the judiciary has uncharacteristically stilled its own voice and has stepped away from its longstanding constitutional responsibility to ensure that all fiduciaries use their powers faithfully. A contractual waiver of fiduciary duties in LLCs and partnerships is not a blank check to behave unjustly or in ways that are fundamentally unfair. Courts here, as elsewhere, must be venues where commutative justice can still be

arbitrarily or unreasonably, thereby frustrating the fruits of the bargain").

¹²⁵ See *supra* notes 59-60 and accompanying text.

¹²⁶ See *supra* notes 40-61 and accompanying text. As Michael J. Maimone has noted, the "decision in *Schnell* emphasized the legal principle that corporate fiduciaries may not exercise legal rights if their conduct is inequitable either in its purpose or effect." DELAWARE SUPREME COURT, *supra* note 43, at 58.

¹²⁷ Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 849 (2009).

¹²⁸ *Id.*

sought,¹²⁹ and to fulfill their justificatory role, judges must state, in every case, why they are deciding as they do. Perhaps a right understanding of the Delaware judiciary's continuing power in this area will lead its judges, once again, to resume their historic role.

¹²⁹ *Lichens Co. v. Standard Commercial Tobacco Co.*, 40 A.2d 447, 452 (Del. Ch. 1944) (holding that the function of a court of equity "is to give such relief as justice and good conscience may require").