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Part I. Articles

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The Standing of a Trustee and How it is Impacted by the Wagoner Rule, the Adverse Interest Exception and the Sole Actor Rule

I. INTRODUCTION

Standing is one of those subjects that you study during your first year of law school that you think, if not hope, is an intellectual construct that will not be faced once you have graduated and are actually practicing law instead of just learning about it. This article is a reminder that that belief is nothing more than wishful thinking. The concept of standing is omnipresent, as will be illustrated with respect to the standing of a trustee to bring causes of action on behalf of an estate, the exception to a trustee's standing, the exception to the exception to a trustee's standing, and the exception to the exception to the exception to a trustee's standing. This area of the law, to paraphrase a quote from Winston Churchill, is a riddle, wrapped in a mystery, inside an enigma.[2]

II. THE REQUIREMENTS OF STANDING

The Constitution limits the judicial power of federal courts to deciding cases or controversies. This is found in the United States Constitution, Article III, Section 2, Clause 1. The doctrine of standing is derived directly from this Constitutional provision.[3] Because standing is jurisdictional under Article III of the United States Constitution,[4] it is a threshold issue in all cases since putative plaintiffs that do not have standing are not entitled to have their claims litigated in a federal court.[5]

Federal courts decide questions of law.[6] Standing presents a legal question of constitutional importance and is a "jurisdictional prerequisite to a federal court's deliberations."[7] Standing focuses on the party seeking to invoke federal jurisdiction, and not upon the justiceability of the issue at stake in the litigation.[8]

As a general matter, a district court is entitled to conduct the necessary proceedings to determine whether it has jurisdiction.[9] When standing is challenged in a case, it may become necessary for the district court to make findings of fact to determine whether a party has the requisite standing to sue.[10]

An example of this is the case of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[11] which implicitly supports a court's power to conduct a hearing on standing. There, the United States Supreme Court reviewed a standing determination made by a district judge following 4 days of evidentiary hearings. In that decision, the court did not question, and in fact omitted from mentioning, the authority of the district court to conduct such hearings.[12] The court simply presumed, as if the proposition were not even debatable, that the district court had the power to make findings of fact on standings. Therefore, a court acts within its discretion in conducting a hearing on the standing of a trustee.[13]

The doctrine of standing incorporates both constitutional and prudential limitations on a federal court's jurisdiction.[14] The constitutional dimension comes from the "case or controversy" requirement of Article III[15] and necessitates that the party invoking the power of a federal court have a least a "personal stake in the outcome of the controversy."[16]

To have a personal stake in litigation, the plaintiff must (1) allege a personal injury, (2) that is fairly traceable to the defendant's allegedly unlawful conduct and (3) that is likely to be redressed by the requested relief.[17] Unless the party whose standing is being questioned has a personal stake in the outcome of the controversy, the suit does not meet the case or controversy requirement of Article III of the Constitution.[18] This type of an injury has been termed a "cognizable injury."[19] The injury suffered by the plaintiff must be "a distinct and palpable injury to himself."[20] The injury must be "concrete in nature and particularized to [the plaintiff]."[21] This injury cannot be "abstract," "conjectural," or "hypothetical."[22]

The prudential requirements are rules of judicial self restraint and applied to advance the "proper-and properly limited-role" of the courts in a democratic society.[23] A primary prudential requirement is the rule that a party must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[24]

A determination of standing does not include an analysis of equitable defenses. Whether a party has standing to bring claims and whether that party's claims are barred by an equitable defense are two separate enquiries, to be addressed individually.[25] In a bankruptcy context, standing should not be measured by whether a successfully prosecuted cause of action leads to an influx of money to the estate that will be paid out again to creditors.[26]

The various components of standing result in the application of this constitutional requirement not being a mechanical formula. The Supreme Court has recommended that there be a comparison of the allegations of the particular complaint to those made in prior standing cases, while keeping in mind the important role that the doctrine of the separation of powers plays in limiting the scope of judicial authority.[27] The burden to establish standing is shouldered by the party claiming that standing actually exists.[28]

III. THE STANDING OF A TRUSTEE

Typically, the property of a bankrupt estate is a "scarce commodity."[29] The assets of the debtor are usually not enough to fully repay its creditors and these creditors are avid in their assertion to their full entitlement to the debtor's remaining assets, often pursuing the debtor outside of bankruptcy.[30]

Once a trustee is appointed, a number of the Bankruptcy Code's provisions are triggered. Under 11 U.S.C. § 323,[31] the trustee succeeds to a debtor's rights as he or she becomes the estate's representative and may sue or be sued. An estate is a term of art in bankruptcy law, and a trustee is the representative of the property of the estate under 11 U.S.C. § 541.[32] As the administrator of the bankruptcy estate, the trustee is charged with certain duties that are set forth in 11 U.S.C. § 704 which includes, without limitation, the duty to collect and reduce to money the property of the estate for which the trustee serves.[33] This should be done in a way that ensures that each similarly situated creditor of the bankrupt debtor receives its equitable share.[34]

Another applicable provision is Bankruptcy Rule 6009.[35] This Bankruptcy Rule does not create or expand whatever rights the Bankruptcy Code confers on a trustee.[36]

Consequently, the trustee, like any of a debtor's creditors, is interested in laying a claim to any property that might belong to the estate. The trustee's concern, however, is premised on a desire to avoid any number of lawsuits by individual creditors racing to the courthouse to get hold of available assets of the estate and thereby thwart the equitable goals of the bankruptcy laws.[37] These statutory provisions are given to the trustee in order to assist the trustee in achieving its goals. They streamline litigation that

has an impact on the estate by bringing it within the trustee's exclusive control. In addition, the filing of a bankruptcy petition invokes an automatic stay of "any act [by anyone other than the trustee] to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[38]

Under 11 U.S.C. § 541, the estate over which the trustee administers is provided control and is made up of all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case.[39] Causes of action belonging to the debtor fit within this definition.[40] This provision of the Bankruptcy Code restricts property of the estate to the debtor's interests as of the commencement of the bankruptcy case in issue. This establishes both temporal and qualitative limitations on the scope of the bankruptcy estate. Temporally, it puts into place a bright-line date after which property acquired by the debtor will usually not become property of the bankruptcy estate.[41] Qualitatively, this establishes that the estate's rights are no greater than they were when they were held by the debtor.[42] It was Congress' intent that the trustee stand in the debtor's shoes and "take no greater rights than the debtor himself had."[43] Section 541(a) of the Bankruptcy Code was not intended to expand the debtor's rights against others. In other words, the trustee in bankruptcy has the same rights in the property as the debtor had, no more and no less.[44]

Whether a right, such as a cause of action, belongs to the estate or individual creditors is a question of state law.[45]

Another way of analyzing this is to say that the ownership of a cause of action is determined by "applicable law," which means the law underlying the property interests or cause of action being asserted (which is normally, but not always the case, state law, and can in certain instances be federal law) determines whether the claims are property of the estate under 11 U.S.C. § 541, or otherwise can be initiated by a bankruptcy trustee.[46]

As a general rule, a trustee stands in the shoes of the debtor and has standing to bring any action that the debtor could have instituted pre-petition.[47] A trustee does not have standing to pursue claims on behalf of the debtor estate's creditors, but rather may only assert claims that belong to the debtor.[48] For a trustee to have standing to pursue a claim against a third party, he must allege that the third party has injured the debtor in a manner distinct from injuries suffered by the debtor estate's creditors.[49]

The seminal case on this point is *Caplin v. Marine Midland Grace Trust Co.*,[50] where the Supreme Court determined that a trustee in bankruptcy could not maintain an action against a third party that could not have been brought by the debtor. More specifically, if the cause of action belongs to the estate, the trustee has exclusive standing to assert it and, conversely, if the cause of action belongs solely to the creditors, the trustee has no standing to assert it. The Supreme Court dismissed the suit because, among other reasons, it could find no authority in the prior Bankruptcy Act for the trustee to prosecute a cause of action which had not been an asset of the debtor and thus was not part of the bankruptcy estate.

If this were not the case, the debtor's assets would be depleted to enforce the rights possessed by third parties and the defendants would face the danger of duplicative recoveries.[51]

In a bankruptcy case, the issue of standing relies upon the type of injury suffered by the person or entity asserting the cause of action. If the cause of action is based on an injury inflicted by a third party, then the court must decide whether the third party's actions were directed at the estate or to the individual. If the estate is a corporation and the individual is a creditor of that corporation, the issue of standing becomes complicated. The crucial question is whether the individual asserting the action seeks to recover as a creditor of the corporation in bankruptcy.[52]

There is a distinction to be made between a creditor's interest in claims held by the corporation against a third party, which are enforced by the trustee, and the direct-rather than derivative-claims of the creditor against a third party, which only the creditor is entitled to enforce.[53] A creditor is entitled to relief against a third party if its injury does not merely flow from its status as

an estate creditor, but has its genesis outside of bankruptcy. The difference is evident in cases where the estate is a bankrupt corporation used by third parties as an instrument to conduct personal business.[54]

The opposite of this principal is also true. Without specific authority to the contrary, the trustee is subject to the same defenses that could have been raised by the defendant had the action been initiated by the debtor.[55]

Although it has been held that a trustee represents all of the creditors of the estate generally, this power to represent the estate is not without its limits. Lawsuits that a trustee may bring fall into two categories: (1) those brought by the trustee as successor to the debtor's interests in the estate under 11 U.S.C. § 541, and (2) those brought under one or more of the trustee's avoiding powers. As to the former, the trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor. The trustee is subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor.[56]

As the cases cited in this section make clear, the "case or controversy" requirement established by Article III of the Constitution "coincides with the scope of the powers the Bankruptcy Code gives to a trustee."[57]

IV. THE EXCEPTION TO A TRUSTEE'S STANDING

When a bankrupt corporation has participated with a third party in defrauding that bankrupt corporation's creditors, the trustee cannot recover against that third party for the damage to the creditors. In that scenario, a claim against that third party for defrauding the bankrupt corporation with the cooperation of the bankrupt corporation's management accrues to creditors, not to the guilty corporation.[58]

In the case of *In re D.H. Overmyer Telecasting Co.*,[59] a law firm filed a proof of claim for $18,000 in attorneys' fees for services rendered to the unsecured creditors' committee in Telecasting's chapter 11 bankruptcy case. Telecasting filed a counterclaim alleging that the law firm had assisted Daniel H. Overmyer in defrauding the corporation by packing the committee with employees and subordinates and therefore subverting the committee's functions. The Bankruptcy Court ruled that Telecasting's fraud claim belonged to the unsecured creditors and the creditors' committee, not the corporation itself, because though a class of creditors had suffered harm, the corporation had not.[60] Relying on *Caplin v. Marine Midland Grace Trust Co.*,[61] the court noted that the law firm had no fiduciary duty to the debtor corporation and found that even though Telecasting alleged that it had suffered "great damage" by reason of the fraud, the claim, which asserted that the law firm had permitted the corporation to "engage in transactions which caused its assets to be squandered and which operated as a fraud on creditors,"[62] belonged to the creditors, not to the corporation. The court held that a reorganization trustee lacks standing to assert the claims of creditors against third parties who allegedly aided the bankrupt in diverting its assets.[63]

In some jurisdictions, this is called the common law defense of "in pari delicto." It is derived from the Latin phrase "in pari delicto potior est conditio defendedes," which means "where the wrong of the one party equals that of the other, the defendant is in the stronger position," and a court will not "administer a remedy."[64]

> "[W]hile a court of equity will on swift wings fly to relieve the innocent from wrong and injury, it travels with leaded feet and turns a deaf ear, when called on to furnish a cloak of righteousness to cover sin, and, where both parties are equally guilty, neither can be said to come with clean hands, and the court will relieve neither, but leave the parties where they are found."[65]

The rule in Texas, for example, even with the case of an unlawful transaction, is that courts are required to decide "whether the policy against assisting a wrongdoer outweighs the policy against permitting unjust enrichment of one party at the expense

of the other," and this balancing of equities frequently "depends upon the particular facts and the equities of the case, and the answer usually given is that which it is thought will better serve public policy."[66]

The federal courts in Texas, and other jurisdictions, have applied the federal common law of in pari delicto that also uses this concept of not allowing wrongdoers to benefit at the expense of the public in adjudicating private rights of action stemming from various federal regulatory statutes. In the case of *Bank One Capital Partners Corp. v. Kneipper*,[67] a securities fraud action filed under federal, state and securities laws, the court reasoned that the parties were in pari delicto where the "plaintiff bears at least substantially equal responsibility for the violations he seeks to redress."[68]

Another Texas court explained, after concluding that "tension" appeared to exist "between the objectives of federal securities regulatory scheme and this common law equitable defense," the elements of the "regulatory" version of this defense in the Fifth Circuit are that: (1) the fault of the parties must be clearly mutual, simultaneous, and relatively equal; (2) the plaintiff must be an active, essential, and knowing participant in the illegal activity; and (3) the effect on the investing public or on the regulatory scheme, caused by permitting the defense, must be so slight that it does not interfere with the objectives of the securities laws.[69]

In short, the doctrine of in pari delicto refers to the plaintiff's participation in the same wrongdoing as the defendant.[70] The doctrine is premised upon the equitable principal that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."[71]

In pari delicto is defined to mean "in equal fault" or "equally culpable or criminal."[72]

An example of the application of the exception of in pari delicto to a trustee's standing is found in the case of *In re Gaudette*,[73] where a chapter 7 trustee brought an adversary proceeding against the debtor and the debtor's alleged co-conspirators for their participation in an alleged scheme to conceal assets that otherwise would have been included in the bankruptcy estate. On a motion to dismiss the conspiracy counts, the Bankruptcy Court held that the cause of action belonged to creditors, not to the estate, and was one that the trustee was barred from pursuing under the New Hampshire doctrine of in pari delicto. In reaching this result, the court held that New Hampshire law forbids co-conspirators from obtaining judicial redress against each other: "the parties to the fraudulent transaction, being in pari delicto, are left by the law in the position in which they have placed themselves."[74]

Similarly, in the case of *Pate v. Hunt (In re Hunt)*,[75] the Bankruptcy Court held that independent trustees lack standing to pursue RICO claims because a co-conspirator in a fraudulent act, such as the RICO bankruptcy fraud alleged in that case, cannot also be a victim entitled to recover damages, because he could not have relied on the truth of the fraudulent representations, and such reliance is an essential element in the case of the fraud.[76]

In the Second Circuit, this exception to the trustee's standing is called the "Wagoner Rule," in recognition of the ruling in the case of *Shearson Lehman Hutton, Inc. v. Wagoner*.[77] In that case, the court held that under New York law, a bankruptcy trustee had no standing to sue Shearson Lehman Hutton for aiding and abetting the unlawful investment activity of an individual named Kirschner, the president and sole shareholder of a bankrupt corporation, HMK Management Corporation.[78] Kirschner had solicited loans from members of his church in exchange for HMK notes and other paper. He then used the proceeds of those loans to trade on HMK's account at Shearson Lehman Hutton. After the trades became unsuccessful, HMK filed for bankruptcy, and the trustee brought suit against Shearson Lehman Hutton alleging that the brokerage firm had manipulated Kirschner into excessively speculative trading. The court concluded that HMK itself had committed fraud because Kirschner, as HMK's sole stockholder and decision maker, not only knew of the bad investments, but actively forwarded them. The court also held that the trustee lacked standing to assert its claim against Shearson Lehman Hutton because a claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation.[79]

The Wagoner Rule was reaffirmed in *Hirsch v. Arthur Andersen & Co.*,[80] which involved Connecticut law. In that case, the Second Circuit held that a bankruptcy trustee lacked standing to sue Arthur Andersen & Co., an accounting firm hired by the debtor, Colonial Realty Company, for malpractice in connection with Colonial's Ponzi scheme real estate investment operation.[81] The Second Circuit held that the trustee was "precluded from asserting the professional malpractice claims alleged in the complaint because of the debtor's collaboration with the defendants/appellees and promulgating and promoting the Colonial Ponzi scheme.[82]

This exception to a trustee's standing requires that an inquiry be made to determine whether the debtor was complicit in the wrongdoing allegedly perpetuated by the third party defendant. If this misconduct is imputed to the debtor, the injury is deemed to be suffered by the debtor's creditors rather than the debtor itself, thereby precluding a trustee from pursuing such a claim on behalf of the debtor.[83]

The debtor's misconduct is imputed to the trustee, and as a consequence, the cause of action is deemed to belong to the creditors and not to the estate or the trustee, even though the trustee is seeking the recovery on behalf of the creditors.[84]

The rationale that supports the Wagoner Rule comes from the basic principal of agency that the misconduct of managers within the scope of their employment will usually be imputed to the corporation.[85] Because management's misconduct is imputed to the corporation, and because a trustee stands in the shoes of the corporation, the Wagoner Rule prevents a trustee from suing to recover for a wrong that he himself essentially undertook.[86]

Imputation refers to the attribution of one person's wrongdoing to another person.[87] While bankruptcy law dictates that the trustee steps into the shoes of the debtor when asserting causes of action, state law normally provides the substantive law governing imputation for state law claims.[88]

Under the law of imputation, courts impute the fraud of an officer to a corporation when the officer commits the fraud (1) in the course of his employment, and (2) for the benefit of the corporation.[89] This is true even if the officer's conduct was unauthorized, effected for his own benefit but clothed with apparent authority for the corporation, or contrary to instructions. The underlying rationale is that is a corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business.[90]

The case of *Shearson Lehman Hutton, Inc. v. Wagoner*[91] involved a debtor that was managed by a sole shareholder. This left unanswered the question of what constitutes the "cooperation of management" under the scenario of multiple management personnel, such that a trustee would be prevented from asserting claims on behalf of the debtor. The application of the Wagoner Rule has been extended to situations other than where the individual committing the fraud is a sole shareholder. For example, in the case of *Hirsch v. Arthur Anderson & Co.*,[92] the Second Circuit held that the Wagoner Rule applied and thus precluded the Trustee's malpractice claims where both of the debtor's general partners collaborated with third party defendants in the wrongdoing that formed the basis of the trustee's complaint. In the case of *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*,[93] the Wagoner Rule was extended to apply where all relevant shareholders and/or decision makers are involved in the fraud. Pursuant to this interpretation of the Wagoner Rule, unless a complaint alleges the existence of an innocent decision maker who could have prevented the fraud, the wrongdoing will be imputed to the corporation.[94]

In *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*,[95] the trustee of Towers Financial Corporation sued Towers' law firm for its involvement in a Ponzi scheme carried out by corporate insiders. The amended complaint identified two members of the Towers' board who were ignorant, despite an ongoing SEC investigation, of the accounting fraud being perpetrated at

Towers. The two directors had asked about the accounting practices of Towers and were given false assurances that there were no problems. The court found that the trustee had sufficiently alleged that the two directors were innocent and unaware of Towers' wrongdoing such that the other corporate agent's knowledge of the fraud was not imputed to the corporation.[96]

Besides applying the Wagoner Rule outside the sole actor scenario if all relevant shareholders and/or decision makers were involved in the wrongful conduct, the Wagoner Rule has also been applied if there is otherwise sufficient unity between the corporation and defendant to implicate the corporation itself, rather than just its agents, in the alleged wrongdoing.[97]

The Wagoner Rule imputes the misconduct of corrupt management to the corporation whenever that management dominates the company, such as with a sole shareholder, or where the corporation delegates all authority over a portion of its business to a particular manager or managers.[98] Only management that exercises complete control over the corporation, or that exercises total control over the type of transaction involved in the particular fraudulent activity at issue, is relevant. Therefore, the Wagoner Rule would not apply if there were someone involved in the debtor's management who was ignorant of the ongoing fraud and could and would if advised of the facts known to the defendant have taken steps to bring the fraudulent conduct to an end. The presence of a person with the ability to bring an end to the fraudulent activity at hand would demonstrate that the principal and agent are distinct entities and that the total control necessary for an application of the Wagoner Rule is absent.[99]

This exception to a trustee's standing has been applied to dismiss, for lack of standing, claims that have been asserted in at least seven different types of cases. The first case is where a trustee has a claim against a debtor's broker, for aiding and abetting unlawful investment activity of the debtor's president and sole stockholder and director, where the debtor's president had solicited loans from others, issuing notes to them, and used the proceeds to engage in speculative trading that dissipated the corporation's funds.[100]

The second type of a case is where the trustee has a claim against the debtor's accounting firm, for malpractice in connection with the debtor's Ponzi scheme, including both distributing misleading offering memoranda and providing deficient professional services.[101]

Third, is where a creditors' committee, on behalf of a chapter 11 debtor, sued a bank that had financed a transaction and the lawyers and accountants that facilitated it, for aiding and abetting a debtor's president and sole shareholder in the breach of his fiduciary duties by diverting assets.[102]

Fourth, is where there is a claim by liquidators of an overseas bank against a correspondent bank, for aiding and abetting the over seized bank's insiders' breach of fiduciary duty and in defrauding of the bank's depositors.[103]

Fifth, is where there is a claim by a trustee against the debtor's counsel and accountants, for their alleged malpractice, breach of fiduciary duty and negligence in failing to report, to the debtor's innocent directors and officers, their suspicions that management was employing the debtor to perpetrate a Ponzi scheme.[104]

Sixth, is where there is a claim by the trustee against brokers for aiding and abetting, or participation with, insiders in connection with the insiders' acts of waste, mismanagement, and breach of fiduciary duty.[105]

Seventh, is where there is a claim by the trustee for a defunct brokerage house in a SIPA proceeding in the Bankruptcy Court, against another brokerage house and others, for participation in the scheme to artificially inflate the price of stock and defraud the brokerage house's customers.[106]

As the above referenced cases have shown, this exception to the trustee's standing has been applied to deny the trustee's standing both in cases where the basis of the wrongful action was injury to creditors, depositors, or the public at large (and the harm to

the debtor was only incidental), and in cases where the debtor was also a victim but where the debtor's management had been a participant in the wrongful acts.[107] The Wagoner Rule only deals with claims against third parties. It does not proscribe actions against insiders for breach of fiduciary duty which are considered to be claims of the trustee.[108]

V. THE EXCEPTION TO THE EXCEPTION TO A TRUSTEE'S STANDING

There is an exception to the Wagoner Rule, known as the "adverse interest exception."[109] This exception rebuts the usual presumption that the acts and knowledge of the agent acting within the scope of its employment are imputed to the principal.[110]

Under the law of imputation, courts impute the fraud of an officer to a corporation when the officer commits fraud (1) in the course of his employment, and (2) for the benefit of the corporation.[111] The second part of the imputation test, whether fraudulent conduct was perpetrated for the benefit of the debtor corporation, is often reviewed under the adverse interest exception. Under this exception, fraudulent conduct will not be imputed if the officer's interests were adverse to the corporation and not for the benefit of the corporation.[112]

The adverse interest exception is a narrow one and only applies when the agent has "totally abandoned" the principal's interests.[113] Therefore, this exception is inapplicable when the agent acts both for himself and for the principal, though the primary motivation for the acts is inamicable to the principal.[114] This exception will apply where the officer acted entirely in his own interests and adversely to the interests of the corporation.[115] Under this exception, management misconduct will not be imputed to the corporation if the officer acted in his own interests and adversely to the interests of the corporation.[116]

The rationale for this exception is that where an agent, though outwardly acting in the business of the principal, is really committing a fraud for his own benefit, then he is acting outside the scope of his agency, and it would, as a result, be unjust to charge the principal with knowledge of that.[117]

A principal, such as a corporation, is not entitled to disavow an act of its agent while simultaneously taking advantage of the benefits of the fraudulently procured bargain.[118] In other words, the adverse interest exception is a shield for a principal, in order for the adverse acts of its agent not to be imputed to the principal to hold it liable for the misconduct of the agent. A principal is not entitled to use this doctrine as a sword to force a third party defrauded by the principal's agent to abide by the terms of the agreement.[119]

VI. THE EXCEPTION TO THE EXCEPTION TO THE EXCEPTION TO A TRUSTEE'S STANDING

The adverse interest exception itself is subject to its own exception, called the "sole actor" rule.[120] Where the principal and the agent are one and the same, the sole actor rule comes into effect and imputes the agent's knowledge to the principal even though the agent was self-dealing, because the party that should have been informed was the agent itself albeit in its capacity as principal.[121]

> … Under this exception, which is referred to as the "sole actor" or "sole representative" doctrine, see William M. Fletcher, et al., Fletcher Cyclopedia of the Law of Private Corporations, § 827, at 156 (perm. ed. rev. vol. 1994), if an agent is the sole actor or representative of the principal in the transaction to which notice is sought to be imputed, then that agent's wrongful conduct is imputable to the principal regardless of whether the agent's conduct was for the benefit of, or adverse to, the corporate interests.[122]

The rationale for this rule is that the sole agent has no one else to whom he can transfer his knowledge, and from whom he can hide it, and that the corporation must shoulder the responsibility for allowing this agent to act without any accountability.[123]

The sole actor rule applies where the corporate principal and its agent cannot be distinguished from each other, such as where the agent is a corporation's only shareholder, or where the corporation gives its agent unfettered and total control and allows the agent to operate without meaningful supervision with respect to a certain type of transaction.[124]

> These rules emerge from the notion that: where the agent is defrauding the principal … disclosure cannot be presumed because it would defeat — or have defeated the fraud. However, where the principal and agent are one and the same … [the sole actor rule] imputes the agent's knowledge to the principal notwithstanding the agent's self-dealing because the party that should have been informed was the agent itself albeit in its capacity as principal. In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709–710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

Only management that exercises total control over the corporation, or that exercises total control over a particular transaction involved in the fraudulent activity, qualifies under the sole actor exception.[126] Where the sole shareholder is alleged to have stripped a corporation of assets, the adverse interest exception to the presumption of knowledge just cannot apply.[127] In federal cases involving claims against auditors for the failure to discover fraud, the "sole actor" rule has been applied where the agent who committed the misconduct was the sole shareholder of the corporation.[128] The sole actor rule is also applicable where the wrongdoers were dual owners of the corporation and in every relevant sense dominated it.[129] This exception to the adverse interest exception was held not to apply where the wrongdoers owned 70% of a company's stock and their involvement in the company, while significant, could not be characterized as "dominating."[130]

VII. CASE EXAMPLES

In the case of *Wight v. Bank America Corp.*,[131] the plaintiffs were the liquidators of the Bank of Credit and Commerce International ("BCCI"), which led a "short, swashbuckling life" before collapsing as a result of allegations of fraud.[132] BCCI's liquidators sued one of BCCI's correspondent banks for aiding and abetting one of the manager's fraudulent schemes. The defendants argued that the adverse interest exception did not operate to cancel out the Wagoner Rule because the complaint also alleged that the corporation was dominated by corrupt prior senior managers and directors which they argued invoked the sole actor rule.[133] Pointing out that on a motion to dismiss, the complaint must be interpreted in the plaintiff's favor, the Second Circuit took as true the plaintiff's allegations that BCCI was adversely dominated by corrupt management that acted in their own interests and not in the interests of BCCI and found that this allegation prevented the dismissal of the complaint under the Wagoner Rule.[134] In sustaining the sufficiency of the complaint, the Second Circuit did not take into account whether the liquidators of BCCI had plead facts that showed the existence of an innocent member of management who would have prevented the fraud if it had been disclosed. Therefore, this decision stands for the rule that on a motion to dismiss, an allegation of adverse interests should be credited as true, and that the key inquiry of whether the guilt of the corporate officers can be imputed to the corporation should be decided on an evidentiary record and not disposed of based upon the pleadings on file.[135]

In the case of *Breeden v. Kirkpatrick & Lockhart, LLP*,[136] the trustee of a corporate debtor's bankruptcy estate brought an adversary proceeding against the debtor's accountants and attorneys for their alleged malpractice, breach of fiduciary duty and negligence in failing to report, to the debtor's innocent directors and officers, their suspicions that management was using the debtor to perpetrate a Ponzi scheme. On the defendant's motion for summary judgment, based upon the theory that management's

misconduct had to be imputed to the debtor and that the trustee lacked standing to assert claims, the district court held that, where innocent officers and directors were mere public relation figureheads or otherwise lacking in authority to remedy the situation, management's misconduct had to be imputed to the debtor, so as to bar the trustee's claims. The court noted that the decision in *Wechsler v. Squadron Ellenoff, Pleasant and Sheinfeld, L.L.P.*[137] held that the Wagoner Rule only applies where all relevant shareholders and/or decision makers are involved in the fraud, and interpreted this language to mean that some members of management are irrelevant for the purposes of applying the Wagoner Rule.[138] This decision also acknowledged that the presence of a person with the ability to bring an end to the fraudulent activity at issue would demonstrate that the principal and agent are distinct entities and that the complete control necessary for the application of the Wagoner Rule is not present.[139] The court went on to rule that as a factual matter, the trustee failed to offer evidence that such a relevant innocent decision maker existed at the debtor and granted judgment in favor of the defendants.[140] In this decision, the issue of standing was decided after a hearing, on a fully developed evidentiary record.[141]

In the cases of *In re Mediators, Inc.*,[142] *Hirsch v. Arthur Andersen & Co.*[143] and *Shearson Lehman Hutton, Inc. v. Wagoner*[144] the court found a lack of standing based on the sole actor rule, in that in each of those cases, the managers that committed the wrongdoing were also the sole shareholders, or all of the general partners, of the particular debtors.[145] In the case of *In re Mediators, Inc.*,[146] the court found that the sole actor rule prevented the creditor's committee from standing in the shoes of the debtor, from pursuing an aiding and abetting claim because the principal wrongdoer was the debtor's sole shareholder, whose knowledge must have been imputed to the debtor.[147]

With the case of *Hirsch v. Arthur Andersen & Co.*,[148] the court found that the trustee lacked standing because both the debtor's general partners collaborated with the defendants in promulgating and promoting a Ponzi scheme.[149] In *Shearson Lehman Hutton, Inc. v. Wagoner*,[150] the court issued a finding that the trustee lacked standing to assert a claim against a third party for defrauding a corporation because the corporation's sole stockholder and decision make actively cooperated in the fraud.[151]

VIII. ONE LAST EXCEPTION

In cases where a receiver has been appointed, a number of courts have refused to apply the Wagoner Rule to bar the receiver from asserting the claims of an insolvent corporation on the ground that the application of this doctrine to an innocent successor would not be equitable. These courts have thought that it was proper to take into account events arising after a corporation enters into a receivership.[152]

IX. CONCLUSION

As the cases set forth above demonstrate, the standing of a trustee is never really a given. A trustee's standing, the Wagoner rule, the adverse interest exception and the sole actor rule, when taken together, amount to the intellectual equivalent of a Chinese puzzle box. They require a great deal of cerebral grappling before the answer is eventually revealed. [See Norton Bankruptcy Law and Practice (2d ed.) §§ 4:6, 20:10; West's Key Number Digest, Bankruptcy 2048 to 2051, 3008 to 3009; Bankruptcy Service, L. Ed. §§ 29:597, 29:598.]

Footnotes

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2 *Winston S. Churchill: His Complete Speeches, 1897–1963*, ed. Robert Rhodes James, vol. 6, p. 6161 (1974).

3 Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324–3325, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82, 84-2 U.S. Tax Cas. (CCH) P 9611, 54 A.F.T.R.2d 84-5361 (1984). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). In re Bennett Funding Group, Inc., 336 F.3d 94, 99, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

4 Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471–476, 102 S. Ct. 752, 757–761, 70 L. Ed. 2d 700 (1982)

5 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re Sharp Intern. Corp., 278 B.R. 28, 35, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002). Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 156, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003).

6 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 707 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

7 Hodel v. Irving, 481 U.S. 704, 711, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 707 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

8 Flast v. Cohen, 392 U.S. 83, 99–100, 88 S. Ct. 1942, 1952–1953, 20 L. Ed. 2d 947 (1968). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). In re Bennett Funding Group, Inc., 336 F.3d 94, 99, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

9 In re U.S. Catholic Conference, 824 F.2d 156, 162, 7 Fed. R. Serv. 3d 1369 (2d Cir. 1987), judgment rev'd, 487 U.S. 72, 108 S. Ct. 2268, 101 L. Ed. 2d 69, 11 Fed. R. Serv. 3d 463, 62 A.F.T.R.2d 88-5054 (1988). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 707 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

10 Rent Stabilization Ass'n of City of New York v. Dinkins, 5 F.3d 591, 594 (2d Cir. 1993). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 707 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

11 Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595, 11 Env 1753, 8 Envtl. L. Rep. 20545 (1978).

12 Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595, 11 Env 1753, 8 Envtl. L. Rep. 20545 (1978).

13 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 707 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

14 Lamont v. Woods, 948 F.2d 825, 829, 71 Ed. Law Rep. 50 (2d Cir. 1991). Comer v. Cisneros, 37 F.3d 775, 787, 30 Fed. R. Serv. 3d 362 (2d Cir. 1994). Wight v. Bankamerica Corp., 219 F.3d 79, 86, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

15 Sullivan v. Syracuse Housing Authority, 962 F.2d 1101, 1106 (2d Cir. 1992). Wight v. Bankamerica Corp., 219 F.3d 79, 86, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

16 Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82, 84-2 U.S. Tax Cas. (CCH) P 9611, 54 A.F.T.R.2d 84-5361 (1984). Wight v. Bankamerica Corp., 219 F.3d 79, 86, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

17 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82, 84-2 U.S. Tax Cas. (CCH) P 9611, 54 A.F.T.R.2d 84-5361 (1984). In re A.R. Baron & Co., Inc., 280 B.R. 794, 799, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002).

18 Warth v. Seldin, 422 U.S. 490, 498–499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), quoting Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962). Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected on other grounds by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re Bennett Funding Group, Inc., 336 F.3d 94, 101, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

19 Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Apostolou v. Fisher, 188 B.R. 958, 966–967 (N.D. Ill. 1995), aff'd in part, rev'd on other grounds in part, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998).

20 Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979), quoting Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

21 In re U.S. Catholic Conference (USCC), 885 F.2d 1020, 1023–1024, 89-2 U.S. Tax Cas. (CCH) P 9576, 65 A.F.T.R.2d 90-430 (2d Cir. 1989). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

22 City of Los Angeles v. Lyons, 461 U.S. 95, 101–102, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

23 Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82, 84-2 U.S. Tax Cas. (CCH) P 9611, 54 A.F.T.R.2d 84-5361 (1984), quoting Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Wight v. Bankamerica Corp., 219 F.3d 79, 86, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

24 Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). See also In re Sharp Intern. Corp., 278 B.R. 28, 35, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002); In re A.R. Baron & Co., Inc., 280 B.R. 794, 799, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 708 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

25 In re Dublin Securities, Inc., 133 F.3d 377, 380, 31 Bankr. Ct. Dec. (CRR) 1160, 1997 FED App. 0368P (6th Cir. 1997). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 346–347, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001).

26 Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 348–349, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001) citing In re Jack Greenberg, Inc., 240 B.R. 486, 506 (Bankr. E.D. Pa. 1999) and Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995).

27 Allen v. Wright, 468 U.S. 737, 751–752, 104 S. Ct. 3315, 82 L. Ed. 2d 556, 18 Ed. Law Rep. 82, 84-2 U.S. Tax Cas. (CCH) P 9611, 54 A.F.T.R.2d 84-5361 (1984). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091–1092, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

28 E.F. Hutton & Co., Inc. v. Hadley, 901 F.2d 979, 984, 20 Bankr. Ct. Dec. (CRR) 827, Bankr. L. Rep. (CCH) P 73386 (11th Cir. 1990). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

29 Apostolou v. Fisher, 188 B.R. 958, 965 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998).

30 Wooten v. Loshbough, 951 F.2d 768, 770, Bankr. L. Rep. (CCH) P 74375, R.I.C.O. Bus. Disp. Guide (CCH) P 7888 (7th Cir. 1991). Apostolou v. Fisher, 188 B.R. 958, 965 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998).

31 Section 323. Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

32 In re Gaudette, 241 B.R. 491, 497, 1999 BNH 39 (Bankr. D. N.H. 1999).

33 11 U.S.C. Section 704(1). In re Gaudette, 241 B.R. 491, 497, 1999 BNH 39 (Bankr. D. N.H. 1999).

34 Apostolou v. Fisher, 188 B.R. 958, 965–966 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998). Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219, 61 S. Ct. 904, 907, 85 L. Ed. 1293 (1941).

35 Rule 6009

Prosecution and Defense of Proceedings by Trustee or Debtor in Possession

With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding on behalf of the estate before any tribunal.

36 In re Gaudette, 241 B.R. 491, 498, 1999 BNH 39 (Bankr. D. N.H. 1999). Parker v. Bain, 68 F.3d 1131, 1136, Bankr. L. Rep. (CCH) P 76652 (9th Cir. 1995) ("Rule 6009 does not authorize proceedings that Section 362 would otherwise bar …"). In re Olympia Holding Corp., 188 B.R. 287, 295 (M.D. Fla. 1994), judgment aff'd, 68 F.3d 1304, Bankr. L. Rep. (CCH) P 76703 (11th Cir. 1995).

37 Apostolou v. Fisher, 188 B.R. 958, 966 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998). In re Mortgageamerica Corp., 714 F.2d 1266, 1274, 12 Bankr. Ct. Dec. (CRR) 151, 9 Collier Bankr. Cas. 2d (MB) 603 (5th Cir. 1983).

38 11 U.S.C. § 362(a)(3). Apostolou v. Fisher, 188 B.R. 958, 966 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998).

39 11 U.S.C. § 541(a)(1).

40 Sender v. Simon, 84 F.3d 1299, 1304–1305, Bankr. L. Rep. (CCH) P 77001 (10th Cir. 1996). In re Ozark Restaurant Equipment Co., Inc., 816 F.2d 1222, 1225, 16 Bankr. Ct. Dec. (CRR) 134, 16 Collier Bankr. Cas. 2d (MB) 1148, Bankr. L. Rep. (CCH) P 71780 (8th Cir. 1987). In re Hedged-Investments Associates, Inc., 84 F.3d 1281, 1285 (10th Cir. 1996).

41 In re Hedged-Investments Associates, Inc., 84 F.3d 1281, 1285 (10th Cir. 1996).

42 Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154 n.7, 19 Bankr. Ct. Dec. (CRR) 1344, Bankr. L. Rep. (CCH) P 73091, Fed. Sec. L. Rep. (CCH) P 94568 (3d Cir. 1989). Sender v. Simon, 84 F.3d 1299, 1285, Bankr. L. Rep. (CCH) P 77001 (10th Cir. 1996).

43 H.R. Rep. No. 595, 95th Cong., 1st Sess. 368, reprinted in 1978 U.S.C.C.A.N. 5963, 6323. Sender v. Simon, 84 F.3d 1299, 1285, Bankr. L. Rep. (CCH) P 77001 (10th Cir. 1996).

44 In re Gaudette, 241 B.R. 491, 498, 1999 BNH 39 (Bankr. D. N.H. 1999). Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154, 19 Bankr. Ct. Dec. (CRR) 1344, Bankr. L. Rep. (CCH) P 73091, Fed. Sec. L. Rep. (CCH) P 94568 (3d Cir. 1989).

45 St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 700, Bankr. L. Rep. (CCH) P 73092, 14 Fed. R. Serv. 3d 1165 (2d Cir. 1989) (disapproved of on other grounds by, In re Miller, 197 B.R. 810 (W.D. N.C. 1996)). In re Ionosphere Clubs, Inc., 17 F.3d 600, 607 (2d Cir. 1994) ("Bankruptcy courts have long been charged with ascertaining, under state law, whether claims belong to the bankruptcy estate or to other claimants."). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

46 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 573 (Bankr. S.D. N.Y. 2003). In re Ames Dept. Stores, Inc., 287 B.R. 112, 122–123, 40 Bankr. Ct. Dec. (CRR) 170 (Bankr. S.D. N.Y. 2002). In re Magnesium Corp. of America, 278 B.R. 698, 705 (Bankr. S.D. N.Y. 2002).

47 In re A.R. Baron & Co., Inc., 280 B.R. 794, 799, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002). Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 708 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

48 Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 434, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972). 4 *Collier on Bankruptcy*, ¶ 541.08[6], at 541–551 (Lawrence P. King Edition, 15th Edition revised 2001) (Where applicable law makes … obligations or liabilities run to the corporate creditors personally, rather than to the corporation, such rights of action are not assets of the estate under § 541(a) that are enforceable by the trustee.). In re A.R. Baron & Co., Inc., 280 B.R. 794, 799–800, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002).

49 In re A.R. Baron & Co., Inc., 280 B.R. 794, 800, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995) (When creditors have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim and the bankruptcy trustee is precluded from doing so.). Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)) (If a trustee has

no power to assert a claim because it is not one belonging to the bankrupt estate, then he also fails to meet the prudential limitations that the legal rights asserted must be his own.).

50 Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972).

51 In re Mediators, Inc., 105 F.3d 822, 825–826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997) ("The Mediators has no standing to assert aiding and abetting claims against third parties for cooperating in the very misconduct that it had initiated … A bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself …"). See also Matter of Educators Group Health Trust, 25 F.3d 1281, 1284, 25 Bankr. Ct. Dec. (CRR) 1318, 31 Collier Bankr. Cas. 2d (MB) 703, 92 Ed. Law Rep. 19, Bankr. L. Rep. (CCH) P 75980 (5th Cir. 1994). In re E.F. Hutton Southwest Properties II, Ltd., 103 B.R. 808, 811, 21 Collier Bankr. Cas. 2d (MB) 572, Bankr. L. Rep. (CCH) P 73044 (Bankr. N.D. Tex. 1989) ("If an action under a particular theory belongs to the debtor under applicable state or federal law, then the action is "property of the estate."). In re Gaudette, 241 B.R. 491, 498–499, 1999 BNH 39 (Bankr. D. N.H. 1999). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995) (When creditors have … a claim for injury that is particularized to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so).

52 Apostolou v. Fisher, 188 B.R. 958, 967 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998). Dana Molded Products, Inc. v. Brodner, 58 B.R. 576, 578, R.I.C.O. Bus. Disp. Guide (CCH) P 6356 (N.D. Ill. 1986).

53 Steinberg v. Buczynski, 40 F.3d 890, 893, 26 Bankr. Ct. Dec. (CRR) 321, 32 Collier Bankr. Cas. 2d (MB) 494, 18 Employee Benefits Cas. (BNA) 2613, Bankr. L. Rep. (CCH) P 76212 (7th Cir. 1994). Apostolou v. Fisher, 188 B.R. 958, 967 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998).

54 Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 1354, 18 Collier Bankr. Cas. 2d (MB) 84, Bankr. L. Rep. (CCH) P 72009 (7th Cir. 1987). Apostolou v. Fisher, 188 B.R. 958, 967 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998).

55 In re Metropolitan Environmental, Inc., 293 B.R. 871 (Bankr. N.D. Ohio 2003). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001). In re Payroll Express Corp., 186 F.3d 196, 209 (2d Cir. 1999).

56 In re Gaudette, 241 B.R. 491, 1999 BNH 39 (Bankr. D. N.H. 1999). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 356, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001). In re Ostrom-Martin, Inc., 202 B.R. 267, 272, 32 U.C.C. Rep. Serv. 2d 181 (Bankr. C.D. Ill. 1996).

It should be noted, that some circuit court opinions have allowed a trustee to prosecute claims of creditors if the claims are held by all creditors rather than just some, thus distinguishing themselves from the case of Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972). See Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 1348–1349, 18 Collier Bankr. Cas. 2d (MB) 84, Bankr. L. Rep. (CCH) P 72009 (7th Cir. 1987) (Trustee of bankrupt corporation was proper party to bring alter ego action against the debtor's shareholders). Later circuit court decisions have cast doubt on the continuing vitality of this decision. See Steinberg v. Buczynski, 40 F.3d 890, 893, 26 Bankr. Ct. Dec. (CRR) 321, 32 Collier Bankr. Cas. 2d (MB) 494, 18 Employee Benefits Cas. (BNA) 2613, Bankr. L. Rep. (CCH) P 76212 (7th Cir. 1994) (Stating that the *Koch* distinction between "general" and "personal" claims is not illuminating). Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118–120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc.

v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)) (Therein, the circuit court relied on *Caplin* in denying the trustee standing to assert the dissipation claims of creditors and stated, "it is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself."). In re Gaudette, 241 B.R. 491, 500, 1999 BNH 39 (Bankr. D. N.H. 1999). In re Shadduck, 208 B.R. 1, 5, 30 Bankr. Ct. Dec. (CRR) 989 (Bankr. D. Mass. 1997). In re Rare Coin Galleries of America, Inc., 862 F.2d 896, 900, Bankr. L. Rep. (CCH) P 72501 (1st Cir. 1988).

57 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re A.R. Baron & Co., Inc., 280 B.R. 794, 799, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). In re Bennett Funding Group, Inc., 336 F.3d 94, 99, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

58 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re D.H. Overmyer Telecasting Co., Inc., 56 B.R. 657, 659 (Bankr. N.D. Ohio 1986). In re Sharp Intern. Corp., 278 B.R. 28, 35–36, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003) ("A bankruptcy trustee lacks standing under New York law to seek recovery on behalf of a debtor company against third parties for injuries incurred by the misconduct of the debtor's controlling managers.").

59 In re D.H. Overmyer Telecasting Co., Inc., 56 B.R. 657, 659 (Bankr. N.D. Ohio 1986).

60 In re D.H. Overmyer Telecasting Co., Inc., 56 B.R. 657, 661 (Bankr. N.D. Ohio 1986).

61 Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972).

62 In re D.H. Overmyer Telecasting Co., Inc., 56 B.R. 657, 659 (Bankr. N.D. Ohio 1986).

63 In re D.H. Overmyer Telecasting Co., Inc., 56 B.R. 657, 659 (Bankr. N.D. Ohio 1986). Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

64 Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 158, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003). 34 Tex.Jur.3d "Equity" § 31 (2002).

65 Grant v. Grant, 286 S.W. 647, 650 (Tex. Civ. App. Fort Worth 1926).

66 Lewis v. Davis, 145 Tex. 468, 199 S.W.2d 146, 151, Blue Sky L. Rep. (CCH) P 70029 (1947). Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 162, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003).

67 Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1197, Fed. Sec. L. Rep. (CCH) P 98935, 33 Fed. R. Serv. 3d 949 (5th Cir. 1995).

68 Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1197, Fed. Sec. L. Rep. (CCH) P 98935, 33 Fed. R. Serv. 3d 949 (5th Cir. 1995).

69 Miller v. Interfirst Bank Dallas, N.A., 608 F. Supp. 169, 171 (N.D. Tex. 1985). Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 162, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003).

70 In re Dublin Securities, Inc., 133 F.3d 377, 380, 31 Bankr. Ct. Dec. (CRR) 1160, 1997 FED App. 0368P (6th Cir. 1997). Bubis v. Blanton, 885 F.2d 317, 321, 1989-2 Trade Cas. (CCH) P 68754 (6th Cir. 1989).

71 In re Dow, 132 B.R. 853, 860, 25 Collier Bankr. Cas. 2d (MB) 1237 (Bankr. S.D. Ohio 1991). In re Dublin Securities, Inc., 133 F.3d 377, 380, 31 Bankr. Ct. Dec. (CRR) 1160, 1997 FED App. 0368P (6th Cir. 1997). American Trade Partners, L.P. v. A-1 Intern. Importing Enterprises, Ltd., 770 F. Supp. 273, 276 (E.D. Pa. 1991) (Under the in pari delicto doctrine, "a party is barred from recovering damages if his losses are substantially caused by activities the law forbade him to engage in"). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 354, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001) (The doctrine of in pari delicto provides that a plaintiff may not assert a claim against a defendant if the plaintiff bears fault for the claim.).

72 Black's Law Dictionary 711 (Revised 5th Edition 1979). Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen L.L.P., 175 F. Supp. 2d 1180, 1198 (D. Ariz. 2001) (The doctrine of in pari delicto dictates that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed in pari delicto, and the law will aid neither, but rather, will leave them where it finds them). Apostolou v. Fisher, 188 B.R. 958 (N.D. Ill. 1995), aff'd in part, rev'd in part on other grounds, 155 F.3d 876, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998) (Since the debtor corporation did not sustain injury as a victim of a fraud but was injured only because it participated in pari delicto in a fraudulent scheme, the corporation's trustee could not recover against the third party for damage to creditors).

73 In re Gaudette, 241 B.R. 491, 1999 BNH 39 (Bankr. D. N.H. 1999).

74 In re Gaudette, 241 B.R. 491, 1999 BNH 39 (Bankr. D. N.H. 1999) citing Belisle v. Belisle, 88 N.H. 459, 461, 191 A. 273 (1937) (citing Jones v. Bryant, 13 N.H. 53, 1842 WL 2097 (1842); Stevens v. Morse, 47 N.H. 532, 1867 WL 2370 (1867); and Town of Meredith v. Fullerton, 83 N.H. 124, 134, 139 A. 359 (1927)).

75 In re Hunt, 149 B.R. 96, 101, 23 Bankr. Ct. Dec. (CRR) 796, 28 Collier Bankr. Cas. 2d (MB) 304, R.I.C.O. Bus. Disp. Guide (CCH) P 8195 (Bankr. N.D. Tex. 1992).

76 In re Hunt, 149 B.R. 96, 101, 23 Bankr. Ct. Dec. (CRR) 796, 28 Collier Bankr. Cas. 2d (MB) 304, R.I.C.O. Bus. Disp. Guide (CCH) P 8195 (Bankr. N.D. Tex. 1992), citing Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 454, Fed. Sec. L. Rep. (CCH) P 98615 (7th Cir. 1982) (holding modified by, In re Jack Greenberg, Inc., 212 B.R. 76 (Bankr. E.D. Pa. 1997)). see also In re Granite Partners, L.P., 194 B.R. 318, 328, 35 Collier Bankr. Cas. 2d (MB) 1139 (Bankr. S.D. N.Y. 1996), corrected, (Apr. 16, 1996) ("If in pari delicto applies, the trustee cannot sue the third parties for injury that the corporation suffered in connection with the fraudulent scheme."). In re Gaudette, 241 B.R. 491, 500–501, 1999 BNH 39 (Bankr. D. N.H. 1999).

77 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118–120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

78 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 119–120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

79 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 119–120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997).

80 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

81 A Ponzi scheme is "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investment." Black's Law Dictionary 1180 (7th Edition 1999). Official Committee of Unsecured Creditors

v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 343, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001). It is a scheme whereby a corporation operates and continues to operate at a loss. The corporation looks as though it is profitable by obtaining new investors and using those investments to pay for the high premiums promised to previous investors. The effect of such a scheme is to put the corporation farther and farther into debt by incurring more and more liability and to give the corporation the false appearance of profitability in order to obtain new investors. In re Huff, 109 B.R. 506, 512, 22 Collier Bankr. Cas. 2d (MB) 13 (Bankr. S.D. Fla. 1989). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088 n.3, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

82 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997).

83 In re A.R. Baron & Co., Inc., 280 B.R. 794, 800, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002). In re Hampton Hotel Investors, L.P., 289 B.R. 563, 574 (Bankr. S.D. N.Y. 2003).

84 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 574 (Bankr. S.D. N.Y. 2003).

85 Wight v. Bankamerica Corp., 219 F.3d 79, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). In re Mediators, Inc., 105 F.3d 822, 826–827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094–1095, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

86 Wight v. Bankamerica Corp., 219 F.3d 79, 86–87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). see also In re Bennett Funding Group, Inc., 336 F.3d 94, 100, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Complete Management, Inc., 50 Collier Bankr. Cas. 2d (MB) 996, 2003 WL 21750178 (S.D. N.Y. 2003) (Second Circuit precedent firmly establishes the rule that a corporation has no standing to assert aiding and abetting claims against third parties for cooperating in the very misconduct that it had initiated … the Wagoner Rule … derives from the fundamental principal of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation … because managerial misconduct will be imputed to the company, a bankruptcy trustee or creditors' committee suing on the company's behalf stands in the place of the very parties who are alleged to have participated in defending the investors … hence, when professional defendants are accused of assisting a company's managers in wrongdoing, the claim belongs to the creditors … and cannot be asserted by the company, its trustee in bankruptcy, a committee of unsecured creditors, or any one else standing in the shoes of the debtor corporation.) (citations omitted). American Tissue, Inc. v. Arthur Andersen, L.L.P., 2003 WL 22909155 (S.D. N.Y. 2003). In re Sharp Intern. Corp., 278 B.R. 28, 36, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

87 Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 355, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001).

88 O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 84, 85, 87–89, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) (Holding, in the FDIC receivership context, that, without an explicit statutory provision or a special federal interest, state law governs the imputation of knowledge to corporate victims of alleged negligence). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 358, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001).

89 In re Jack Greenberg, Inc., 212 B.R. 76, 83 (Bankr. E.D. Pa. 1997), citing Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884, Fed. Sec. L. Rep. (CCH) P 95313, 38 A.L.R. Fed. 709 (3d Cir. 1975) (rejected by, Metge v.

Baehler, 762 F.2d 621, Fed. Sec. L. Rep. (CCH) P 92037 (8th Cir. 1985)). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 358–359, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001).

90 In re Jack Greenberg, Inc., 212 B.R. 76, 83 (Bankr. E.D. Pa. 1997). Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884, Fed. Sec. L. Rep. (CCH) P 95313, 38 A.L.R. Fed. 709 (3d Cir. 1975) (rejected by, Metge v. Baehler, 762 F.2d 621, Fed. Sec. L. Rep. (CCH) P 92037 (8th Cir. 1985)).

91 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

92 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

93 Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P., 212 B.R. 34, 36 (S.D. N.Y. 1997).

94 Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P., 212 B.R. 34, 36 (S.D. N.Y. 1997). Lippe v. Bairnco Corp., 218 B.R. 294, 302, R.I.C.O. Bus. Disp. Guide (CCH) P 9460 (S.D. N.Y. 1998) (Noting that where a number of key officers and directors knew about fraud, the trustee lacked standing to bring claim for aiding and abetting breach of fiduciary duty). In re A.R. Baron & Co., Inc., 280 B.R. 794, 800, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002).

95 Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P., 212 B.R. 34, 36 (S.D. N.Y. 1997).

96 Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P., 212 B.R. 34, 36 (S.D. N.Y. 1997). Official Committee of Unsecured Creditors of Color Tile, Inc. v. Investcorp, 80 F. Supp. 2d 129, 136–137 (S.D. N.Y. 1999), aff'd but criticized, 322 F.3d 147, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003).

97 Official Committee of Unsecured Creditors of Color Tile, Inc. v. Investcorp, 80 F. Supp. 2d 129, 136 (S.D. N.Y. 1999), aff'd but criticized, 322 F.3d 147, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003). Lippe v. Bairnco Corp., 218 B.R. 294, 302, R.I.C.O. Bus. Disp. Guide (CCH) P 9460 (S.D. N.Y. 1998). Securities Investor Protection Corp. v. BDO Seidman, LLP, 49 F. Supp. 2d 644, 651 (S.D. N.Y. 1999), aff'd in part, question certified, 222 F.3d 63 (2d Cir. 2000), certified question accepted, 95 N.Y.2d 831, 712 N.Y.S.2d 910, 734 N.E.2d 1211 (2000) and certified question answered, 95 N.Y.2d 702, 723 N.Y.S.2d 750, 746 N.E.2d 1042 (2001) and judgment aff'd, 245 F.3d 174 (2d Cir. 2001).

98 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). Munroe v. Harriman, 85 F.2d 493, 496, 111 A.L.R. 657 (C.C.A. 2d Cir. 1936).

99 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

100 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 119–120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

101 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995) (applying Connecticut law).

102 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997).

103 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). Wight v. Bankamerica Corp., 219 F.3d 79, 82, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

104 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003) (a bankruptcy trustee lacks standing under New York law to seek recovery on behalf of a debtor company against third parties for injuries incurred by misconduct of the debtor's controlling managers).

105 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). In re Granite Partners, L.P., 194 B.R. 318, 339, 35 Collier Bankr. Cas. 2d (MB) 1139 (Bankr. S.D. N.Y. 1996), corrected, (Apr. 16, 1996).

106 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575 (Bankr. S.D. N.Y. 2003). In re A.R. Baron & Co., Inc., 280 B.R. 794, 803, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002).

107 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 575–576 (Bankr. S.D. N.Y. 2003).

108 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 577 n.23 (Bankr. S.D. N.Y. 2003). In re Mediators, Inc., 105 F.3d 822, 826–827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). In re Granite Partners, L.P., 194 B.R. 318, 332, 35 Collier Bankr. Cas. 2d (MB) 1139 (Bankr. S.D. N.Y. 1996), corrected, (Apr. 16, 1996) (footnote omitted).

109 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 576 (Bankr. S.D. N.Y. 2003). Wight v. Bankamerica Corp., 219 F.3d 79, 86–87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). In re A.R. Baron & Co., Inc., 280 B.R. 794, 801, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002).

110 In re Hampton Hotel Investors, L.P., 289 B.R. 563, 576 (Bankr. S.D. N.Y. 2003). Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997), citing Center v. Hampton Affiliates, Inc., 66 N.Y.2d 782, 497 N.Y.S.2d 898, 899–900, 488 N.E.2d 828, 42 U.C.C. Rep. Serv. 287 (1985).

111 Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 358–359, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001). In re Jack Greenberg, Inc., 212 B.R. 76, 83 (Bankr. E.D. Pa. 1997), citing Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884, Fed. Sec. L. Rep. (CCH) P 95313, 38 A.L.R. Fed. 709 (3d Cir. 1975) (rejected by, Metge v. Baehler, 762 F.2d 621, Fed. Sec. L. Rep. (CCH) P 92037 (8th Cir. 1985)).

112 Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 359, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001). Askanase v. Fatjo, 130 F.3d 657, 666, 48 Fed. R. Evid. Serv. 543, 40 Fed. R. Serv. 3d 218 (5th Cir. 1997) (Knowledge and actions of a corporation's agent will not be imputed to the corporation if the agent was acting adversely to the corporation and entirely for his own or another's purpose so that the agent's endeavors are so incompatible that they destroy the agency). Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 705 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Hampton Hotel Investors, L.P., 289 B.R. 563, 576 (Bankr. S.D. N.Y. 2003).

113 In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Center v. Hampton Affiliates, Inc., 66 N.Y.2d 782, 784–785, 497 N.Y.S.2d 898, 488 N.E.2d 828, 42 U.C.C. Rep. Serv. 287 (1985). Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

114 In re A.R. Baron & Co., Inc., 280 B.R. 794, 801, 39 Bankr. Ct. Dec. (CRR) 237 (Bankr. S.D. N.Y. 2002). Securities Investor Protection Corp. v. BDO Seidman, LLP, 49 F. Supp. 2d 644, 650 (S.D. N.Y. 1999), aff'd in part, question certified, 222 F.3d 63 (2d Cir. 2000), certified question accepted, 95 N.Y.2d 831, 712 N.Y.S.2d

910, 734 N.E.2d 1211 (2000) and certified question answered, 95 N.Y.2d 702, 723 N.Y.S.2d 750, 746 N.E.2d 1042 (2001) and judgment aff'd, 245 F.3d 174 (2d Cir. 2001).

115 In re Sharp Intern. Corp., 278 B.R. 28, 36, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002). Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997).

116 Wight v. Bankamerica Corp., 219 F.3d 79, 86, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). Center v. Hampton Affiliates, 497 N.Y.S.2d at 900.

117 Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). Munroe v. Harriman, 85 F.2d 493, 495, 111 A.L.R. 657 (C.C.A. 2d Cir. 1936). In re Hampton Hotel Investors, L.P., 289 B.R. 563, 576 (Bankr. S.D. N.Y. 2003). In re Sharp Intern. Corp., 278 B.R. 28, 36, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

118 In re Payroll Express Corp., 186 F.3d 196, 208 (2d Cir. 1999). Restatement (Second) of Agency, § 282 cmt. h 1958) (A principal may not disclaim knowledge of the agent's fraud and yet attempt to retain a benefit obtained by the fraud; this is a restitution principal preventing the unjust enrichment of the principal).

119 In re Payroll Express Corp., 186 F.3d 196, 208 (2d Cir. 1999). Munroe v. Harriman, 85 F.2d 493, 495, 111 A.L.R. 657 (C.C.A. 2d Cir. 1936) (When a principal chooses to disclaim the act of an agent as unauthorized it may not seek to retain the benefit gained from the act; a principal who retains a benefit fraudulently obtained bears the burden of the agent's knowledge). Restatement (Second) of Agency, § 282 cmt. 1 (1958) (Where a party transfers property to another party due to the fraud of the second party's agent, the first party is entitled to rescission). In re Jack Greenberg, Inc., 212 B.R. 76, 84–85 (Bankr. E.D. Pa. 1997) citing Resolution Trust Corp. v. Farmer, 865 F. Supp. 1143, 1155–1156 (E.D. Pa. 1994) (Noting that Pennsylvania agency law provides that "knowledge of an agent whose interests are adverse to the principal cannot be imputed to the principal"); Todd v. Skelly, 384 Pa. 423, 429, 120 A.2d 906, 909 (1956) (Citing 10 Fletcher, *Corporations*, § 4877, at 345) (Where an agent acts in his own interest which is antagonistic to that of his principal, or commits a fraud for his own benefit in a matter which is beyond the scope of his actual or apparent authority or employment, the principal who has received no benefit therefrom will not be liable for the agent's tortious act."); Solomon v. Gibson, 419 Pa. Super. 284, 615 A.2d 367 (1992) (""A principal is liable to innocent third parties for the frauds … of his agent committed in the course of his employment, although his principal did not authorize, justify or participate in, or indeed know of such misconduct" … [except] where the "agent acts in his own interests which is antagonistic to that of his principal, or commits a fraud for his own benefit in the matter which is beyond the scope of his actual or apparent authority or employment."").

120 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001).

121 In re Bennett Funding Group, Inc., 336 F.3d 94, 100, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 165, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003) ("As the district court correctly noted, where, as here, 'the persons dominating and controlling the corporation orchestrated the fraudulent conduct, their knowledge is imputed to the corporation as principal' under the "sole actor" rule, which negates the adverse interest exception when the principal and agent are one and the same."), citing Official Committee of Unsecured Creditors of Color Tile, Inc. v. Investcorp, 80 F. Supp. 2d 129 (S.D. N.Y. 1999), aff'd but criticized, 322 F.3d 147, 40 Bankr. Ct. Dec. (CRR) 249, 54 Fed. R. Serv. 3d 1241 (2d Cir. 2003). see also Munroe v. Harriman, 85 F.2d 493, 495–497, 111 A.L.R. 657 (C.C.A. 2d Cir. 1936)

(knowledge of self-dealing dominant officer imputed to bank). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 359, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001) ("The general principal of the "sole actor" exception provides that, if an agent is the sole representative of a principal, then the agent's fraudulent conduct is imputable to the principal regardless of whether the agent's conduct was adverse to the principal's interest.").

122 In re Jack Greenberg, Inc., 212 B.R. 76, 86 (Bankr. E.D. Pa. 1997).

123 Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 359, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001). In re Jack Greenberg, Inc., 212 B.R. 76, 86 (Bankr. E.D. Pa. 1997).

124 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Munroe v. Harriman, 85 F.2d 493, 496, 111 A.L.R. 657 (C.C.A. 2d Cir. 1936). In re Dublin Securities, Inc., 133 F.3d 377, 380, 31 Bankr. Ct. Dec. (CRR) 1160, 1997 FED App. 0368P (6th Cir. 1997).

126 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

127 In re Mediators, Inc., 105 F.3d 822, 827, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). Cf. In re Wedtech Securities Litigation, 138 B.R. 5, 8 (S.D. N.Y. 1992) (refusing to impute misconduct to the corporation where the guilty officers were not the sole shareholders).

128 F.D.I.C. v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992) (Where the fraudulent acts were committed by the corporation's sole owner who dominated and controlled its board of directors, summary judgment was properly entered in favor of the auditor on the claim for negligence on the ground that the corporation did not rely upon the auditor). In re Jack Greenberg, Inc., 212 B.R. 76, 86 (Bankr. E.D. Pa. 1997).

129 PNC Bank, Kentucky, Inc. v. Housing Mortg. Corp., 899 F. Supp. 1399, 1403–1406 (W.D. Pa. 1994) (Granting a motion to dismiss professional malpractice claims filed by a company against its auditor on the ground that the company did not rely upon audits conducted by the auditor since it was aware, through the knowledge of its dual owners and top officers, of fraudulent conduct effecting the accuracy of the financial statements). In re Jack Greenberg, Inc., 212 B.R. 76, 86 (Bankr. E.D. Pa. 1997).

130 Comeau v. Rupp, 810 F. Supp. 1127, 1141 n.5, Fed. Sec. L. Rep. (CCH) P 97430 (D. Kan. 1992). In re Jack Greenberg, Inc., 212 B.R. 76, 86–87 (Bankr. E.D. Pa. 1997).

131 Wight v. Bankamerica Corp., 219 F.3d 79, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

132 Wight v. Bankamerica Corp., 219 F.3d 79, 81, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

133 Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

134 Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000).

135 Wight v. Bankamerica Corp., 219 F.3d 79, 87, 46 Fed. R. Serv. 3d 1372 (2d Cir. 2000). In re Sharp Intern. Corp., 278 B.R. 28, 37–38, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

136 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003).

137 Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P., 212 B.R. 34, 36 (S.D. N.Y. 1997).

138 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Sharp Intern. Corp., 278 B.R. 28, 38, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

139 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Sharp Intern. Corp., 278 B.R. 28, 38, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

140 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Sharp Intern. Corp., 278 B.R. 28, 38, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

141 Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 710 (S.D. N.Y. 2001), aff'd, 336 F.3d 94, 41 Bankr. Ct. Dec. (CRR) 155, 50 Collier Bankr. Cas. 2d (MB) 1115, Bankr. L. Rep. (CCH) P 78889 (2d Cir. 2003). In re Sharp Intern. Corp., 278 B.R. 28, 38, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002)

142 In re Mediators, Inc., 105 F.3d 822, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997).

143 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

144 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

145 In re Sharp Intern. Corp., 278 B.R. 28, 41, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

146 In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997).

147 In re Mediators, Inc., 105 F.3d 822, 826, 30 Bankr. Ct. Dec. (CRR) 353, 37 Collier Bankr. Cas. 2d (MB) 723, Bankr. L. Rep. (CCH) P 77279 (2d Cir. 1997). In re Sharp Intern. Corp., 278 B.R. 28, 41, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

148 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995).

149 Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1094, 28 Bankr. Ct. Dec. (CRR) 494, Bankr. L. Rep. (CCH) P 76756 (2d Cir. 1995). In re Sharp Intern. Corp., 278 B.R. 28, 41, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

150 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)).

151 Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 120, Bankr. L. Rep. (CCH) P 74290 (2d Cir. 1991) (rejected by, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jana, 835 F. Supp. 406 (N.D. Ill. 1993)). In re Sharp Intern. Corp., 278 B.R. 28, 41, 39 Bankr. Ct. Dec. (CRR) 172, 49 Collier Bankr. Cas. 2d (MB) 150 (Bankr. E.D. N.Y. 2002).

152 F.D.I.C. v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995) ("While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on … [an] innocent

entity that steps into the party's shoes pursuant to court order or operation of law"). Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995) (Stating that "the defense of in pari delicto loses its sting when the person who is in pari delicto is eliminated"). Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 358, 38 Bankr. Ct. Dec. (CRR) 147 (3d Cir. 2001).

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