Reprinted from the January 2006 issue of *The Banking Law Journal*

THE BANKING LAW JOURNAL

VOLUME 123 NUMBER 1 JANUARY 2006

HEADNOTE: CHALLENGING CLAIMS BY BANKRUPT BORROWERS
Steven A. Meyerowitz **1**

DEFENSES TO CLAIMS BY BANKRUPTCY TRUSTEES AGAINST LENDERS: THE *IN PARI DELICTO* DEFENSE AND THE "*WAGONER* RULE"
Thomas J. Hall and Janice A. Payne **3**

PROPOSED CHANGES IN U.S. BANK CAPITAL REGULATIONS
James J. Croke, Jr. and Peter C. Manbeck **16**

USER FRIENDLY FHA: HUD MODIFIES AND STREAMLINES CERTAIN FHA REQUIREMENTS
Phillip L. Schulman and Holly M. Spencer **30**

A COMPARATIVE STUDY OF US AND JAPANESE BANK DIRECTORS' DUTY OF DISCLOSURE
Mitsuru Misawa **39**

BANKING BRIEFS
Donald R. Cassling **80**

EDITOR-IN-CHIEF
Steven A. Meyerowitz
President, Meyerowitz Communications Inc.

MANAGING EDITOR
Adam McNally

BOARD OF EDITORS

Henry J. Bailey
Professor of Law, Emeritus
Willamette Univ. College of Law

Paul Barron
Professor of Law
Tulane Univ. School of Law

George Brandon
Partner, Squire, Sanders & Dempsey LLP

Barkley Clark
Partner, Shook, Hardy & Bacon LLP

John F. Dolan
Professor of Law
Wayne State Univ. Law School

Stephanie E. Dreyer
Attorney, Jenkens & Gilchrist, P.C.

Thomas J. Hall
Partner, Chadbourne & Parke LLP

Michael Hogan
Ashelford Management Serv. Ltd.

Mark Alan Kantor
Washington, D.C.

Satish M. Kini
Partner, Goodwin Procter LLP

Paul L. Lee
Partner, Debevoise & Plimpton LLP

Jonathan R. Macey
Professor of Law
Cornell Law School

Martin Mayer
The Brookings Institution

Julia B. Strickland
Partner, Stroock & Stroock & Lavan LLP

Marshall E. Tracht
Professor of Law
Hofstra University School of Law

Stephen B. Weissman
Partner, Rivkin Radler LLP

Elizabeth C. Yen
Partner, Hudson Cook, LLP

Bankruptcy for Bankers
Howard Seife
Partner, Chadbourne & Parke LLP

Technology, Law, and Banking
James F. Bauerle
DKW Law Group LLC

Audit Committees
Christopher J. Zinski
Partner, Schiff Hardin LLP

Banking Briefs
Donald R. Cassling
Partner, Jenner & Block LLP

THE BANKING LAW JOURNAL is published ten times a year by A.S. Pratt & Sons, 1725 K St. NW, Suite 700, Washington, DC 20006, Copyright © 2006 ALEX eSOLUTIONS, INC. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. Requests to reproduce material contained in this publication should be addressed to A.S. Pratt & Sons, 1725 K St. NW, Suite 700, Washington, DC 20006, fax: 703-528-1736. For subscription information and customer service, call 1-800-572-2797. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 10 Crinkle Court, Northport, New York 11768, SMeyerow@optonline.net, 631-261-9476 (phone), 631-261-3847 (fax). Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. While the utmost care will be given material submitted, we cannot accept responsibility for unsolicited manuscripts. POSTMASTER: Send address changes to the Banking Law Journal, A.S. Pratt & Sons, 1725 K St. NW, Suite 700, Washington, DC 20006.

Defenses to Claims by Bankruptcy Trustees Against Lenders: The *In Pari Delicto* Defense and the "*Wagoner* Rule"

THOMAS J. HALL AND JANICE A. PAYNE

The authors discuss the scope and application of the equitable defense of in pari delicto to claims on behalf of a bankruptcy debtor's estate and explain when, under the Wagoner *rule, a trustee lacks standing to sue on such claims.*

When fraud or misconduct leave a company insolvent and forced to seek protection under the Bankruptcy Code, with increasing frequency bankruptcy trustees target lenders as defendants in actions to generate recoveries for the benefit of the debtor's estate. A common scenario goes something like this: A company borrows money from a lender. Through the misconduct of its management, the company becomes insolvent and is forced into bankruptcy. The trustee of the company's bankruptcy estate then brings suit against the lender, alleging that the lender aided and abetted the misconduct or breached some supposed fiduciary or other duty in connection with its extension or administration of credit to the company.

Mr. Hall, a member of the Board of Editors of *The Banking Law Journal*, is a litigation partner, and Ms. Payne is a litigation associate, with the New York office of Chadbourne & Parke LLP. The authors can be reached at thall@chadbourne.com and jpayne@chadbourne.com, respectively. The authors gratefully acknowledge the assistance of litigation associate Jeanne Cho in the preparation of this article. The views expressed herein are not necessarily those of the firm or its clients. The law applicable to the issues addressed herein varies from state to state, and the general discussion herein should not be relied upon as legal advice.

Drawing upon the equitable defense that bars recovery by a plaintiff bearing equal fault with the defendant for the alleged harm, common law principles of agency imputation, and the Constitutional requirement that a plaintiff has standing to sue, a lender may have a two-pronged attack to launch against such claims. Where the debtor's management was complicit in the alleged wrongdoing, such conduct may be imputed to the debtor and the lender may assert the equitable defense of *in pari delicto* to claims on behalf of the debtor's estate to recover for such wrongdoing.[1] A lender also may be able to score an early knock-out by moving to dismiss under the *Wagoner* rule on the grounds that the trustee, standing in the shoes of the tainted debtor, lacks standing to sue on such claims. This article provides an overview of the scope and application of these related and useful doctrines.

THE DEFENSE OF *IN PARI DELICTO*

In pari delicto is a broadly recognized common law doctrine under which a plaintiff is barred from pursuing claims against a defendant where the plaintiff was involved in the defendant's wrongful conduct on which the claims are based, and is at least equally at fault with the defendant for that wrongful conduct. The policy behind this doctrine is that no one should be "permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own inequity, or to acquire any rights by his own crime."[2] Accordingly, "[t]he law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains…."[3] Thus, if a claim is brought against a lender by or on behalf of a company, and if the company was involved in the lender's wrongful conduct which serves as the basis for the claim, the *in pari delicto* doctrine may bar the claim.

IMPUTING AN EMPLOYEE'S WRONGFUL CONDUCT TO THE COMPANY

In the corporate context, an employee's wrongful conduct committed in the course of employment generally is attributable to the company. This is

based on the universal principle that an agent's conduct is imputed to his principal so long as the agent was acting within the scope of his employment.[4] The basis for imputing knowledge to the principal is that the agent has a duty to disclose to his principal information obtained in the course of his agency and is presumed to have fulfilled this duty.[5] Thus, "under the rule of imputation the principal is chargeable with the knowledge the agent has acquired, whether the agent communicates it or not."[6] As such, where a company's management or employees have engaged in misconduct, that misconduct generally is chargeable to the company.

THE EXCEPTIONS TO AGENCY IMPUTATION

The wrongful conduct of a company's employees is not always attributable to the company for the purposes of barring claims by or on behalf of the company. The so-called "adverse interest" exception "rebuts the usual presumption that the acts and knowledge of an agent acting within the scope of his employment are imputed to the principal."[7] The presumption on which the principle of imputation is based is that the agent "has discharged his duty to disclose to the principal all material facts coming to his knowledge with reference to the subject of his agency."[8] The adverse interest exception rebuts this presumption "precisely because the agent is involved in a scheme to defraud the principal for the agent's individual benefit."[9] As one court has explained:

> [W]here an agent, though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside the scope of his agency, and it would be most unjust to charge the principal with knowledge of it.[10]

Thus, where the director or officer acts on his own behalf and not in "any official or representative capacity for the corporation," that misconduct will not be imputed to the corporation.[11]

Generally, courts have construed the "adverse interest" exception very narrowly. The exception can only be applied "when the agent has totally abandoned the principal's interest."[12] Generally, the "adverse interest" exception will

not apply when the agent has mixed motives and is acting in the interests of both himself and corporation, even though the "primary motivation [ ] is inimical to the principal."[13] If the company has benefited in some way from the agent's misconduct, while persons other than the company and its owners have been harmed, the adverse interest exception should not apply.[14]

The "adverse interest" exception is, in turn, subject to its own exception, known as the "sole actor" rule. The adverse interest exception rebuts the usual presumption that the agent has disclosed all material facts to the principal because, where the agent is defrauding the principal, such disclosure cannot be presumed.[15] However, "where the principal and agent are one and the same," the agent's knowledge is imputed 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."[16] The sole actor rule applies regardless of whether the misconduct was adverse to the interests of the corporation.[17]

This sole actor rule comes into play when the party who engaged in the misconduct dominated and controlled the corporation,[18] as in the case where the agent is the sole shareholder of the corporation[19] or the agent has "unfettered control" and is allowed "to operate without meaningful supervision with respect to a particular type of transaction."[20] In sum, the sole actor rule applies when the "ultimate decisionmaking authority on all issues of significance rest[s] to varying degrees with [the managers]."[21]

THE PRINCIPLES OF AGENCY IMPUTATION AND THE *IN PARI DELICTO* DEFENSE AS A BAR TO CLAIMS BY A BANKRUPTCY TRUSTEE

Where the doctrine of *in pari delicto* would bar a company from bringing claims against its lender, the company's bankruptcy trustee, standing in the shoes of the debtor company, may likewise be barred from bringing such claims.

A debtor's bankruptcy estate includes "all legal or equitable interests of the debtor in property *as of the commencement*" of bankruptcy, including all legal and equitable causes of action.[22] A bankruptcy trustee is deemed to "stand[ ] in the shoes of the bankrupt corporation and has standing to bring

any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy"[23] and, significantly, is "subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor."[24] For example:

> [I]f the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had.[25]

Courts must evaluate the defenses to trustee claims as they existed at the commencement of the bankruptcy,[26] and must not take into account conduct that occurs after the commencement of the bankruptcy case.[27] Because the trustee takes claims subject to any defenses that existed prior to bankruptcy, where the management of the debtor was involved in the alleged wrongdoing, the claims may be barred by the defense of *in pari delicto*, if the company bears fault for the claim.[28]

If it can be shown that, prior to the commencement of the bankruptcy case, the debtor's management was involved in the misconduct for which the trustee seeks to recover — and that misconduct can be imputed to the debtor — the trustee may be barred from bringing the claim.[29] The principles of imputation discussed above will be used to determine whether the debtor is responsible for the conduct of its agent, including a determination of whether the adverse interest exception rebuts the presumption of imputation and whether the sole actor rule applies.

For example, in *R. F. Lafferty & Co.*, the Third Circuit held that the doctrine of *in pari delicto* barred a creditors committee, standing in the shoes of the debtor, from bringing its claims against a third party because the misconduct of the debtor's agent was imputed to the debtor and, consequently, to the creditors committee.[30] The Third Circuit found that the applicability of the *in pari delicto* doctrine turned on "whether or not the debtors will be deemed to have participated in wrongdoing because of the acts of the Debtors' management."[31] In its analysis of imputation, the Third Circuit discussed the adverse interest exception and the sole actor rule and concluded that, even if the management had acted adversely to the corporation, the sole

actor rule applied because the management in this case — the Shapiro family — was the "sole representative" of the corporation.[32]

In *In re Hedged-Investments Assocs., Inc.*, the Tenth Circuit applied the *in pari delicto* doctrine to bar a bankruptcy trustee's suit against a third party.[33] *Hedged-Investments* involved a Ponzi scheme run through a solely owned corporation and three limited partnerships. When the scheme collapsed, the corporation and the partnerships went into bankruptcy. The bankruptcy trustee brought suit on behalf of the debtors against third-party investors who had profited from the Ponzi scheme.[34] The district court applied the *in pari delicto* defense and dismissed the suit.[35]

Some trustees have sought to preserve their ability to bring claims, notwithstanding the complicity of the debtor and its management, arguing that they are "innocent successors" and should not be bound by the pre-petition conduct of the debtor.[36] To the extent a trustee is exercising his authority under Section 541 of the Bankruptcy Code, however, this argument generally has been a non-starter because that section specifically requires courts to look at claims and defenses as of the date of commencement of the bankruptcy case — not after.[37]

An additional potential limitation on the use of the *in pari delicto* defense is the requirement that the plaintiff (or in the case of a trustee action, the debtor) be at least equally at fault with the defendant for the defense to act as a bar to claims.[38] Generally, unless the "degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed."[39] For example, some courts have refused to bar a claim on *in pari delicto* grounds where the plaintiff was unaware of the fraudulent scheme or its purpose,[40] or, did not instigate the misconduct but merely succumbed through coercive tactics,[41] because of unequal bargaining positions,[42] or to gain an attractive business opportunity.[43]

UNDER THE *WAGONER* RULE, THE DEBTOR'S COMPLICITY IN THE ALLEGED MISCONDUCT MAY DEPRIVE A BANKRUPTCY TRUSTEE OF STANDING

Under Article III of the U.S. Constitution, the threshold requirement to bringing any claim is that the plaintiff has standing.[44] To have standing, 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."[45] In the bankruptcy context, a trustee (or, in some cases, a creditors committee)[46] is subject to the standing requirement. As the Second Circuit has explained:

> [The Article III] "case or controversy" requirement coincides with the scope of the powers the Bankruptcy Code gives a trustee, that is, 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 limitation that the legal rights asserted must be his own.[47]

A bankruptcy trustee's standing, however, is limited to "claims held by the bankrupt corporation itself" and he has no independent standing "to sue third parties on behalf of the estate's creditors."[48] In determining whether a claim belongs to the estate or the creditors, the nature of the company's role in the alleged misconduct is a critical part of the analysis.

Invoking the law of agency imputation and the requirement of Constitutional standing, the *Wagoner* rule — named for the seminal case of *Shearson Lehman Hutton, Inc. v. Wagoner* — provides that where a "bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors."[49] "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 defrauding the investors.'"[50] Accordingly, when third party defendants are accused of assisting a company's managers in wrongdoing, "the claim 'belongs to the creditors qua creditor's,' and cannot be asserted by the company, its trustee in bankruptcy, a committee of unsecured creditors, or anyone else standing in the shoes of the debtor corporation."[51] In sum, a corporation engaged in fraudulent behavior cannot later claim to be a victim of the fraud that it helped to perpetrate.[52] Although the *Wagoner* rule speaks in terms of the *fraudulent* conduct of a company's management, it has been applied to a wide range of legal theories including negligence,[53] negligent misrepresentation,[54] breach of fiduciary duty,[55] aiding and abetting fraud/breach of fiduciary duty,[56] breach of contract,[57] and RICO.[58]

In *Wagoner*, the sole stockholder, director, and president of the company — Kirschner — had used the proceeds of notes to finance his fraudulent stock trading.[59] After the corporation became insolvent, the trustee brought claims against the defendant investment bank for breach of fiduciary duty in allowing Kirschner to engage in inappropriate transactions.[60] The court held that because Kirschner participated in the alleged misconduct, his misconduct must be imputed to the company and the bankruptcy trustee, therefore, lacked standing to sue Shearson Lehman for aiding and abetting Kirschner's alleged unlawful activity.[61] The court concluded that any claim seeking recovery for the debtor's misconduct belonged to the debtor's creditors, not to the trustee.[62]

The *Wagoner* rule has been used successfully to dismiss claims by a creditors committee against lenders due to lack of standing. For example, in *In re Mediators, Inc.,* the debtor was a corporation engaged in acquiring advertising time on radio and television for its clients in exchange for products and services of its clients.[63] The debtor's sole shareholder and CEO was an art collector who caused the corporation to make millions of dollars worth of art purchases. When the corporation faced bankruptcy, the CEO entered into a business arrangement with Citibank to finance the purchase of the art collection from the corporation so that it would not be subject to liquidation.[64] After the corporation filed for bankruptcy, the creditors committee, standing in the debtor's shoes, brought, *inter alia*, claims alleging that Citibank had aided and abetted the corporation in breaching the corporation's fiduciary duty to its creditors.[65] Applying the *Wagoner* rule, the court found that the creditors committee lacked the standing to bring such claims against Citibank.[66]

The *Wagoner* rule also is subject to the adverse interest exception. Thus, if the director or officer was acting adverse to the company, his or her conduct will not be imputed to the corporation. Without imputation to the corporation, there can be no imputation to the trustee, and therefore, the *Wagoner* rule is inapplicable.

In turn, the adverse interest exception is subject to the sole actor rule. One example of how courts have applied the sole actor rule in a case involving the *Wagoner* rule was *In re Mediators, Inc.* In that case, the debtor's sole shareholder[67] had engaged in wrongful activity by attempting to hide the corporation's art collection from liquidation. In making its claim against the

bank that had financed the business arrangement to hide the art collection, the creditors committee raised the adverse interest exception.[68] Finding that the sole shareholder and the principal corporation were "one and the same," the court held that the sole actor rule applied.[69]

Another example of the application of the sole actor rule is *Breeden v. Kirkpatrick & Lockhart, LLP*.[70] In that case, the debtor corporation had only two shareholders[71] — a married couple — whose two sons were the only decision-makers at the corporation. The shareholders gave "unfettered control" of the corporation's financial operations to one of the sons.[72] Accordingly, the court found that "sole actor" rule applied to defeat the adverse interest exception.

It is worth noting that, although founded on fundamental principles of agency law that are nearly universal in application, the *Wagoner* rule was developed in the Second Circuit and based on New York law and, as such, likely has no precedential force outside that circuit. In a recent case governed by the law of North Carolina — *In re Parmalat Sec. Litig.*[73] — the District Court for the Southern District of New York concluded that *Wagoner* was not controlling and refused to "ground its analysis" on that case or its progeny.[74] The *Parmalat* court found that, at most, the *Wagoner* rule was "potentially persuasive authority" regarding New York's treatment of liability among joint tortfeasors and the imputation of an agent's acts to its principal.[75] The court went on to apply North Carolina law and concluded that the doctrine of *in pari delicto* applied because *Parmalat*, the debtor, had participated in the complained-of wrongdoing.[76] The *Parmalat* court declined to apply the adverse interest exception, finding that the management had acted in the interests of the company.[77]

CONCLUSION

Both the doctrine of *in pari delicto* and the related *Wagoner* rule can provide an effective response to claims that a lender is responsible for damages sustained by a company through the misconduct of its management. When faced with claims that it is responsible for harm suffered by the debtor at the hands of its own management, a lender should consider using these doctrines as a basis for seeking early dismissal.

NOTES

[1] *Shearson Lehman Hutton Inc. v. Wagoner,* 944 F.2d 114 (2d Cir. 1991).
[2] *In re Parmalat Sec. Litig.,* 383 F. Supp. 2d 587, 596 (S.D.N.Y. 2005).
[3] *Id.*
[4] W*ight v. Bankamerica Corp.,* 219 F.3d 79, 86 (2d Cir. 2000) (a "fundamental principle of agency [is] that the misconduct of managers within the scope of their employment will normally be imputed to the corporation") (internal citations omitted); *see Steinburg v. Mikkelsen,* 901 F. Supp. 1433, 1437 (E.D. Wis. 1995); *see also* Restatement (Second) of Agency: Unauthorized Acts of General Agent § 161 (2005).
[5] *See Am. Nat'l Bank v. Miller*, 229 U.S. 517, 521-522 (1913); *Maryland Cas. Co. v. Tulsa Indus. Loan & Inv. Co.,* 83 F.2d 14, 16 (10th Cir. 1936); *Martin Marietta Corp. v. Gould, Inc.,* 70 F.3d 768, 773 (4th Cir. 1995); *Waitt v. Speed Control,* No. C-00-4060, 2002 WL 1711817, at *22 (N.D. Iowa June 28, 2002); *see also* Restatement (Second) of Agency: Agent Having Duty to Reveal Knowledge § 275; Restatement (Second) of Agency: Duty to Give Information § 381 (2005).
[6] *Martin Marietta Corp.,* 70 F.3d at 773; *see also* Restatement (Second) of Agency: Agent Having Duty to Reveal Knowledge § 275 (2005).
[7] *Wight*, 219 F.3d at 87 (internal citations omitted); s*ee Am. Sur. Co. v. Pauly,* 170 U.S. 133, 156-57 (1898); *see also* Restatement (Second) of Agency: Agent Acting Adversely to Principal § 282 (2005).
[8] *See Sec. Investor Prot. Corp. v. BDO Seidman,* LLP, 49 F. Supp. 2d 644, 650 (S.D.N.Y. 1999) (internal citations omitted).
[9] *Id.*
[10] *Wight*, 219 F.3d at 87 (internal citation omitted).
[11] *Parmalat*, 383 F. Supp. 2d at 597; *see also In re Walnut Leasing Co., Inc.,* No. 99-526, 1999 WL 729267, at *4 (E.D. Pa. Sept. 8, 1999).
[12] *In re Mediators,* 105 F.3d 822, 827 (2d Cir. 1997); *accord In re Bennet Funding Group, Inc.,* 336 F.3d 94, 100 (2d Cir. 2003); Wight, 219 F.3d at 87.
[13] *See BDO Seidman,* 49 F. Supp. 2d at 650.
[14] *See Cenco Inc. v. Seidman & Seidman,* 686 F.2d 449, 456 (7th Cir. 1982) ("fraud on behalf of a corporation is not the same thing as fraud against it. Fraud against the corporation usually hurts just the corporation; the stockholders are the principal if only victims….But the stockholders of a corporation whose officers commit the fraud for the benefit of the corporation are beneficiaries of the fraud").
[15] *In re Mediators,* 105 F.3d at 827.
[16] *Id.*
[17] *Official Comm. of Unsecured Creditors v. R. F. Lafferty & Co., Inc.,* 267 F.3d 340, 359 (3d Cir. 2001).

[18] *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP,* 322 F.3d 147, 165 (2d Cir. 2003); *see also Breeden v. Kirkpatrick & Lockhart LLP,* 268 B.R. 704, 710 (S.D.N.Y. 2001).
[19] *In re Mediators,* 105 F.3d at 826; *see also Wagoner,* 944 F.2d at 120; *Breeden*, 268 B.R. at 710.
[20] *Breeden*, 268 B.R. at 709.
[21] *Id.* at 710.
[22] 11 U.S.C. § 541(a) (2005) (emphasis added); *see also O'Dowd v. Trueger*, 233 F.3d 197, 202 (3d Cir. 2000); *3 Collier on Bankruptcy* ¶ 323.02[1] (15th ed. 2005).
[23] *Wagoner*, 944 F.2d at 118; *see also Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1094 (2d Cir. 1995).
[24] *Lafferty*, 267 F.3d at 356; *see also In re Gebco Inv. Corp.,* 641 F.2d 143, 146 (3d Cir. 1981).
[25] S. Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868 (capitals in the original omitted); *see also* H.R. Rep. No. 95-595, at 367-68 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323 (same).
[26] *See Bank of Marin v. England,* 385 U.S. 99, 101 (1966) ("The trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankruptcy but for the filing of the petition."); *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.,* 124 F.3d 487, 495 (3d Cir. 1997) (stating that it is a "fundamental principle that the estate succeeds only to the nature and the rights of the property interest that the debtor possessed pre-petition").
[27] *Lafferty*, 267 F.3d at 357 ("The plain language of [11 U.S.C. § 541]…prevents courts from taking into account events that occur after the commencement of the bankruptcy case.")
[28] *Lafferty*, 267 F.3d at 354; *In re Hedged-Investments Assocs., Inc.,* 84 F.3d 1281, 1284-85 (10th Cir. 1996).
[29] *See Lafferty*, 267 F.3d at 355, 358-60.
[30] *Id.* at 360.
[31] *Id.* at 355.
[32] *Id.* at 359-60.
[33] *Hedged-Investments,* 84 F.3d at 1284-86.
[34] *Id.* at 1282.
[35] *Id.* at 1284-86.
[36] *FDIC v. O'Melveny & Myers,* 61 F.3d 17, 19 (9th Cir. 1995); *Scholes v. Lehmann,* 56 F.3d 750, 754 (7th Cir. 1995).
[37] Some courts have recognized an "innocent successor" exception in cases involving receivership as opposed to a bankruptcy trustee. The important distinction that

must be noted is that receivers are not under the purview of 11 U.S.C. § 541, as bankruptcy trustees are. *See Lafferty,* 267 F.3d at 358; *see also O'Melveney,* 61 F.3d at 19; *Scholes*, 56 F.3d at 754.

[38] *See Jersey Dental Lab. v. Dentsply Int'l Inc.,* 180 F. Supp. 2d 541, 549 (D. Dec. 2001) (doctrine of *in pari delicto* means "of equal fault").

[39] *Pitler v. Dahl,* 486 U.S. 622, 636 (1988).

[40] *McAdam v. Dean Witter Reynolds Inc.,* 896 F. 2d 750, 757 (3d Cir. 1990).

[41] *Jersey Dental,* 180 F. Supp. 2d at 550.

[42] *CVD, Inc. v. Raytheon Co.,* 769 F.2d 842, 856-57 (1st Cir. 1985).

[43] *Greene v. General Foods Corp.,* 517 F.2d 635, 646 (5th Cir. 1975).

[44] *Lafferty*, 267 F.3d at 347 (citation omitted).

[45] *Warth v. Seldin,* 422 U.S. 490, 499 (1975).

[46] A creditors committee, while not a "trustee," is in a position analogous to a trustee because it is suing on behalf of the debtor. *See, e.g., In re Mediators,* 105 F.3d at 826.

[47] *Wagoner*, 944 F.2d at 118.

[48] *In re Gebco*, 641 F.2d at 146.

[49] *Wagoner*, 944 F.2d at 118.

[50] *In re Complete Management, Inc.,* No. 02 Civ. 1736, 2003 WL 21750178, at *2 (S.D.N.Y. July 29, 2003).

[51] *Lippe v. Bairnco Corp.,* 218 B.R. 294, 301 (S.D.N.Y. 1998) (quoting *In re Mediators,* 105 F.3d at 826); *see also Bennett Funding,* 336 F.3d at 99-100 (citing with approval the *Wagoner* rule in holding that a bankruptcy trustee lacks standing to bring malpractice, breach of fiduciary duty, and negligence claims against the company's third party accountants and attorneys).

[52] One of the elements of fraud is that the injured party must show that it "relied on the truth of the fraudulent representations." *Cenco*, 686 F.2d at 454. Obviously, a corporation engaged in the fraud could not satisfy this requirement.

[53] *Hirsch*, 72 F.3d at 1095; *Bennet Funding,* 336 F.3d at 101-02.

[54] *Id.*

[55] *Hirsch*, 72 F.3d at 1092-94; *Bennet Funding,* 336 F.3d at 101-02.

[56] *In re Mediators*, 105 F.3d at 827; *Wagoner*, 944 F.2d at 119-20.

[57] *Hirsch*, 72 F.3d at 1092-94.

[58] *Id.*

[59] *Wagoner*, 944 F.2d at 116.

[60] *Id.* at 116-17.

[61] *Id.* at 120.

[62] *Id.*

[63] *In re Mediators,* 105 F.3d at 824.

[64] *Id.*

[65] *Id.*
[66] *Id.* at 827.
[67] *Id.* at 824.
[68] *Id.* at 827.
[69] *Id.* at 827-28.
[70] *Breeden*, 268 B.R. 704.
[71] *Id.* at 711.
[72] *Id.* at 709.
[73] *Parmalat*, 383 F. Supp. 2d at 595.
[74] *Id.*
[75] *Id.* at 595-96.
[76] *Id.* at 596.
[77] *Id.* at 597.