Strafford

Presenting a live 90-minute webinar with interactive Q&A

The In Pari Delicto Defense to Bankruptcy and Other Claims Against Directors, Officers, and Third Parties

Anticipating or Raising the Defense in Bankruptcy and Other Asset Recovery Litigation

WEDNESDAY, JUNE 10, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Ronald R. Peterson, Partner, **Jenner & Block**, Chicago

James D. Silver, Partner, **Kelley Kronenberg**, Ft. Lauderdale, Fla.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

IN PARI DELICTO
OR JUST PLAIN
UNCLEAN HANDS

PRESENTED BY:

RON PETERSON & JAMES D. SILVER

(Strafford June 10, 2020)

Jenner & Block

Email:

rpeterson@jenner.com

Office: (312) 923-2981

Cell: (847) 858-2400

Kelley Kronenberg

Email: jsilver@kklaw.com

Office: (954)370-9970

Cell: (305) 588-5664

IN PARI DELICTO

"[N]o court should be required to serve as paymaster of the wages of crime, or referee between thieves." *Stone v. Freeman*, 298 N.Y 268, 271, 82 N.E. 2d 571 (N.Y. 1948).

In pari delicto derives from the *Latin in pari delicto potior est conditio defendentis* in case of equal or mutual fault…the position of the [defending] party… is the better one." *Bateman Eichler, Hill Richards, Inc. v. Berner* 472 U.S. 299, 306 (1985) (citation omitted).

IN PARI DELICTO

- Latin for "In Equal Fault".
- Policy of In Pare Delicto:
  - Courts should not become involved in disputes between wrong doers.
  - Courts should discourage conduct by wrong doers.
- The Policy of Tort Law
  - Compensate victims
  - Deter future bad conduct

MORAL HISTORY

- The Court of Appeals for the 7th Circuit noted in *Shondel v. McDermott, 775 F.2d 859 (7th Cir. 1985): The maxim that he who comes into equity must come with clean hands, although comparatively recent as equity maxims go, see Chafee, Coming Into Equity With Clean Hands [1] 47 Mich. L. Rev. 877 (1949), which captures very nicely the moralistic, rule-less, natural law character of the equity jurisprudence created by the Lord, Chancellors of England, when the office was filled by clerics. The moralistic language in which the principles of equity continue to be couched is a legacy of a time when a common lawyer could, without sounding too silly, denounce equity as a "roguish thing" because "Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. "*

IT'S JUST NOT AN OLD EQUITY MAXIM ANYMORE

- With the merger of law and equity, these equitable maxims have the same force as the rules adopted by the common law courts. While in ancient times the application of equity maxims was discretionary by the Chancellor, they now have become fixed. Those modern litigators who are that it is just equity find themselves with a losing argument.

THE HIGHWAYMAN'S CASE 35 L.Q. REV. 197 (1893)

- This is one of the earliest accounts of the maxim of unclean hands. One Highwayman sued the other for an accounting of the ill gotten gains. The Court refused the petition of an accounting on the grounds of unclean hands. It would not resolve the affairs of two felons. Ultimately, the Court ordered both the plaintiff and the defendant to be hung.
- The question that we wrestle with today, would the result be any different if the Plaintiff Highwayman's victims brought the suit against the defendant Highwayman? What if these victims were represented by a bankruptcy trustee? Should, and does the result change?

CHOICE OF LAW

- Generally applicable state law on in pari delicto will apply to state law causes of action.
- Federal law, for cases in federal court, will determine whether in pari delicto is treated as a threshold standing issue or as an affirmative defense.
- In bankruptcy cases, federal law determines whether the in pari delicto defense may be asserted against claims of bankruptcy trustee.
- Most circuit courts of appeal hold that as to section 541 debtor causes of action (non-avoidance claims), if the debtor's claims would have been barred by in pari delicto, the trustee's claims will be barred by in pari delicto, in other words the trustee steps into the debtor's shoes for purposes of these debtor causes of action.

PETERSON V. MCGLADREY LLP 792 F.3D 785 (7TH CIR. 2015)

- This case is part of a greater scandal known as the Petters Ponzi scheme. A scheme that defrauded over 3.4 billion dollars from investors. Gregg Bell who managed Lancelot, the largest feeder fund acted as a factor for television sets. The method that Bell and Petters setup called for the ultimate purchaser of the television set to put money in a lock box. Subsequently, Petters told Bell that the money would instead come from a Petters controlled entity. Bell failed to tell his investors that a key safeguard had been lost.

PETERSON V. MCGLADRY CONT. …

- In the meantime, McGladry, Lancelot's auditors, conducted several certified audits and failed to discover Petters fraud although there were more red flags than there is at a bull fight.
- The Court of Appeals, in affirming the trial court, granted a motion to dismiss, which gave the auditors a get out of jail free card. It held that Bell's failure to disclose the loss of the lock box was a complete defense to the auditors. The Court rejected the concept announced by the Court in an earlier decision that removal of the bad actor cleansed the receiver to proceed with its litigation.

PETERSON V. MCGLADREY CONT. …

- Instead, the Court ruled that the innocent victims stood in the shoes of Bell and his guilt was imputed to them. Neither the policy goals of pari delicto or the goals of tort law were accomplished in this decision. It was a triumph of formalism over policy.
- The Court found that the Trustee stands in the shoes of the debtor and the debtor's misconduct is imputed to the Trustee. There are no Illinois cases saving a bankruptcy trustee from pari delicto although there are receivership cases.

ELEVENTH CIRCUIT DECISION, *ISAIAH V. JP MORGAN CHASE BANK, 2020 WL 2823653 (11TH CIR. JUNE 1, 2020)*

- In June 1, 2020 decision, 11th Circuit finds that Florida receiver has no standing to pursue claims against third parties that allegedly aided Ponzi scheme.
- The major undercurrent is that claims for aiding and abetting Ponzi scheme of a company whose primary existence was to perpetrate a Ponzi scheme are claims of the defrauded investors – not the claims of the receiver for the entities that perpetrated the fraud.
- In other words, a corporations cannot be said to suffer an injury from the fraud it perpetrated. Court also wrote: "It is axiomatic that a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership." *Id*. at *4.
- Citing *Freeman v. Dean Witter Reynolds*, 865 So.2d 543 (Fla. 2d DCA 2003), the 11th Circuit discussed how the Florida court distinguished between" An honest corporation with rogue employees, which can pursue claims for the fraud or intentional torts of third parties while in receivership, and a sham corporation created as the centerpiece of a Ponzi scheme, which cannot pursue such claims." Id at *6 (quoting *Freeman*, 865 So.2d at 552.)
- *Isaiah* court also recognized that a receiver who stands in the shoes of a corporation – lacks standing to pursue such Ponzi tort claims because the corporation, "whose primary existence was as a perpetrator of the Ponzi scheme cannot be said to have suffered injury from the scheme it perpetrated." Id. at *6. (Quoting *O'Halloran v. First Union Nat'l Bank of Fla*, 350 F. 3d 1197, 1203 (11th Cir. 2003))

ISAIAH CONTINUED…

- This is a very impactful case, it rejects the notion that a receiver is cleansed of the sins of the receivership entity where the receiver is pursuing claims for aiding and abetting a fraudulent scheme, or failing to discover the fraudulent scheme. It does so by viewing the issue as one of standing, and finding standing lies with the defrauded investors and not the receiver.
- Receivers and bankruptcy trustees can attempt to limit *Isaiah* as the court there noted that there was no allegation that the receivership entities engaged in any legitimate activities or had at least one honest member of the board of directors or an innocent stockholder" such that the fraudulent acts of its principals, the Ponzi schemers, should not be imputed to the entities themselves. Time will tell whether creative receiver and trustee lawyers can navigate around *Isaiah* in this manner. However, there is broad language, which defense counsel will almost certainly seize on, to argue against limiting *Isaiah* in this fashion.

FELTMAN V. PRUDENTIAL BACHE SECURITIES 122 B.R. 466 (S.D. FLA. 1990)

- The bankruptcy trustee alleged the debtors were sham corporations for the sole purpose of defrauding creditors. Court held trustee lacked standing to pursue claims against brokers, bankers, and accountants, that allegedly furthered the fraud.
- Court stated "All corporations are legal fictions. In this case, however…[debtor entities] were simply fictitious."
- "As the corporations were essentially only conduits for stolen money any injury to the debtors in this case must be substantially coterminous with the injury to defrauded creditors. Everything Gherman stole from the debtor corporations, the debtor had stolen from the creditors. Thus, any alleged injury to the debtors is as illusory as was their corporate identity." *Feltman* at 473-74.

ROTHSTEIN PONZI SCHEME

- Rothstein, through his law firm, Rothstein Rosenfeld Adler perpetrated a massive Ponzi scheme, selling interests in what turned out to be fictitious legal settlements.
- The bankruptcy trustee sued a major bank for aiding and abetting the Ponzi scheme. The bank and the bankruptcy trustee then used the aiding and abetting claim to settle the bankruptcy estate's claims against the bank and also to provide for a bar order enjoining any party that could be deemed a creditor, including the defrauded investors, from suing the bank for its alleged role in the Ponzi scheme.
- Ultimately, the major objections to the bar order in favor of the bank were settled.
- Query whether the *Isaiah* decision may have undermined the trustee and bank's bar order strategy by suggesting that the bankruptcy trustee had no standing to sue the bank for aiding the Ponzi scheme. Under this reasoning, parties whose claims against the bank could argue that the settled claim was wholly illusory and therefore would not support an injunction cutting off the claims of third parties against the bank.

WAGONER RULE

- Under Wagoner Rule, when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against that third party for the damage to the creditors because the claim belongs to the creditors. See Shearson *Lehman Huttton, Inc. v. Wagoner*, 944 F. 2d 114, (2d Cir. 1991.
- The Wagoner Rule is a variation on the in pari delicto defense but views it as a threshold matter of standing by asking whether the miscreant corporation has been damaged by the fraudulent scheme it perpetrated. Since the Plaintiff bears the burden of showing its standing, the Wagoner Rule increases the chances a claim can be defeated at the outset of the case.
- By contrast, where the matter is dealt with strictly as an in pari delicto defense, the defendant has the burden of proving the defense, and it is less likely a claim will be shot down as early in the case
- Most view the Wagoner Rule as only applying in the Second Circuit. However, a June 1, 2020, decision of the 11th Circuit used standing as the basis for dismissing a complaint for Ponzi scheme torts—concluding that since the receivership entity was the perpetrator of the Ponzi scheme, it could not have been damaged by it. *See Isaiah v. JPMorgan Chase Bank, N.A.*, 2020 WL 2823653(11th Cir. June 1, 2020)

MADOFF PONZI SCHEME
PICARD V. JPMORGAN CHASE & CO. (IN RE BLMIS) 721 F.3D 54 (2D CIR. 2013)

- The Trustee's claims against numerous financial institutions for aiding and abetting the massive ponzi scheme were defeated by application of the Wagoner Rule and the in pari delicto doctrine. Picard alleged that the defendants were complicit in Madoff's fraud and facilitated his Ponzi scheme. The Second Circuit found: "[t]hese claims fall squarely within the rule of *Wagoner* and the ensuing cases: Picard stands in the shoes of BLMIS and may not assert claims against third parties for participating in a fraud that BLMIS orchestrated." *Id* at *64.

NCP 901 A. 2D 871 (NJ 2004)

- Where the shareholders were without knowledge of any wrongdoing, there will be no imputation and the defense of pari delicto will fail.
- This case represents a minority view with the Courts of Appeal who have decided the issues of pari delicto have sided with the defendants.

WORK AROUNDS

- Receiverships or Assignments for the Benefit of Creditors
- Public Policy
- Attorneys
- Adverse Interest
- Intentional Tort vs. Negligence Tort
- Avoidance Powers

RECEIVERSHIPS

- *Scholes v. Lehmann*, 56 F.3rd 750 (7th Cir. 1995)
- Facts. Huge Investment Ponzi Scheme. At the SEC's request, the Court appointed a Receiver. The Receiver sued the debtor's principal, Douglas, Douglas' wife, Douglas' favorite charities and a net winner investor seeking to set aside innumerable fraudulent transfers under Illinois state laws. Among the defendant's many arguments was pari delicto defeated the receiver's cause of action.
- In response, the Court of Appeals held that the defense of in pari delicto loses its sting when the person who is in pari delicto is eliminated. Citing *McCandless v. Furlaud*, 296 US. 140 (1936). The corporation is no longer an evil Zombie.

SCHOLES V. LEHMANN CONT. …

- This case has serious limitations. There is little doubt that pari delicto is not a defense to an avoidance action by either a trustee or a receiver. Second, Judge Easterbrook in the *Peterson* case rejected the argument of his fellow judge , Posner and held that the trustee, unlike the receiver is bound by the limitations of 11 U.S.C. 541. The receiver is a creature of equity and is the court's officer and represents the interests of creditors and does not stand in the shoes of the debtor. (*but see* recent Eleventh Circuit Decision in *Isaiah v. JPMorgan Chase Bank* discussed above – Receiver steps into entity's shoes except for fraudulent transfer and looting claims) *Scholes* has been cited with approval by 112 court decisions and questioned in only two.

RECEIVERSHIP VS. BANKRUPTCY

- A federal equity receivership may have two distinct advantages for creditors. First, pari delicto may not be a defense and second the safe harbor contained in 11 U.S.C. 546 may not be applicable, at lease outside the 2nd Circuit. On the other hand, the receiver may have a far different distribution scheme than the trustee in bankruptcy. If the receiver was appointed at the request of the S.E.C., he may be compelled to equity before creditors. Also, a receiver has no right to avoid most preferential transfers. The receiver does not necessarily enjoy the same nationwide service of process that a bankruptcy trustee enjoys. However, it is worth considering.
- See Also *O'Melveny Meyers,* 61 F.3d 17 (9th Cir. 1195).

PUBLIC POLICY

- Public Policy concerns are often the last bastion of the litigator. However, the U.S. Supreme court has opened a potential exception to pari delicto. ***Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985). In this case, unscrupulous brokers were trafficking in insider information. They told their customers about insider information, making them culpable under Rule 10(b)(5) as well. The U.S. Supreme Court in rejecting the pari delicto defense pointed out that sometimes, particularly in Anti-Trust and Securities cases, public policy demands that the real wrongdoers be punished in order to establish good business ethics.**

PUBLIC POLICY CONT. …

- Bateman perhaps creates a large door through which future Trustees and Plaintiffs can defeat pari delicto.

ATTORNEYS

- *Peterson v. Katten Muchin Rosenman* LLP, 782 F.3d 789 (7th Cir. 2015).
- The same day that the McGladry case was argued and then decided, the court came down with the Katten lawsuit. Katten, like McGladry, argued that pari delicto saved them. Unfortunately, the Court viewed attorneys differently.
- The Court found that Bell went to Katten for legal and business advice and Katten failed to warn him of the infirmity of not having a lock box. The court found that lawyers who hold themselves as specialist in business law, are sometimes liable for the business advice they give or fail to give.

THE ADVERSE INTEREST RULE

- For this rule to apply, the Corporation cannot, by itself, be an engine of fraud, nor can it benefit form the nefarious activities of its agents, directors and officers.
- *Cenco Inc. v. Seidman & Seidman,* 66 F.2d 449 (7th Cir. 1982). In this case, the jury brought in a verdict for the auditing firm. The Corporation appealed, claiming that the trial court should have allowed a conspiracy, and the aiding and abetting count should go to the jury. The Court of Appeals found that when a debtor is an engine of fraud, pari delicto prevents the artful managers who ran the fraud to recover anything. As the Court noted, the purpose of tort law is to compensate victims and to deter wrong doing. Allowing the bad people to recover achieves neither of those goals.

KIRSCHNER V. KPMG, LLP 15 N.Y. 3D 446 (2010).

- In this case the Court of Appeals certified to the New York Court of Appeals the issue of when should the adverse interest rule apply. Generally, the adverse interest rule states that if the actor was acting adversely to the corporation, his conduct will not be impute to the corporation. If it is not imputed to the corporation, then the doctrine of pari delicto does not apply. The appellant trustee urged the court to balance the illusionary benefit to the corporation against the nightmare of real future harm and apply the exception.

KIRSCHNER, CONT. …

- The appellee urged the court to narrow the adverse interest rule to cases where the corporation received no advantage whatsoever.
- By a four to three decision, the New York Court of Appeals adopted the narrow test. A corporation that receives a benefit of any kind must accept the consequence and the agent's actions are imputed to the corporation.

INTENTIONAL TORT VS. NEGLIGENCE TORT SHOULD IT MAKE DIFFERENCE?

- *Official Comm. Of Unsecured Creditors of Allegheny Health Educ. & Research Found. V. Pricewaterhousecoopers, LLP* 605 P.a. 269 (2010). Did a bankruptcy arising out of the W.D. Pa., the Creditors' Committee sue Pricewaterhousecoopers ("PWC") for an alleged bad audit? PWC defended stating that the doctrine of in pari delicto sheltered them from liability because the debtor's insiders had engaged in fraud. The U.S. Court of Appeals for the 3rd Circuit certified the case to the Pennsylvania Supreme Court.

ALLEGHENY CONT. …

- The Court found that Pari Delicto is imputed to the committee and that in normal negligence cases PWC should be afforded the advantages of the defense. However, where an auditor secretly and collusively participates with the debtor's insider in a fraud, the defense is unavailable.

This decision my be a lose-lose for all concerned. While trustee's and a creditor committee can sue the auditor for intentional tort, most D&O policies contain exclusions for fraud and criminal acts. The court is forcing trustees to plead their way out of the coverage. This is not good news for the auditors either who would prefer insurance coverage to pay their legal expenses.

IN PARI DELICTO--GENERALLY NOT APPLIED TO DEFEAT CLAIMS AGAINST COMPANY'S INSIDER FIDUCIARIES OR OTHER CONTROL PERSONS

- *In re Optimal US Litigation*, 813 F. Supp 2d, 383,400 (S.D.N.Y 2011) "…In pari delicto 'does not apply to the actions of fiduciaries who are insiders in the sense they either are on the board or in management, or in some other way control the corporation'".
- *Global Crossing Estate Representative* v. *Winnick*, 2006 WL 2212776, at *15 (Bankr. S.D.N.Y. Aug 3, 2006) ("[T]o the extent Plaintiff can establish that Defendants alleged control and domination of Global Crossing rendered them corporate insiders and fiduciaries, *Wagoner* and the 'in pari delicto' rule will not bar Plaintiff fiduciary duty claims.") (citation omitted).
- *In re KDI Holdings, Inc.*, 277 BR 493, 518 (Bankr. S.D.N.Y. 1999). ("[T]he Committee has alleged sufficient facts with regard to Austin's and Schneider's insider status through domination and control.

CONTINUED….

- A corporate insider may not use in pari delicto to escape liability for acts in which he participated. *See In re The Browns Schools*, 386 BR 37 (Bankr. D. Del. 2008); *In re Adelphia Communications Corp*., 322 BR 509, 529 (Bankr. S.D.N.Y. 2005).
- *In re Health South Corp. Shareholders Litigation* 845 A. 2d. 1096, 1107 (Del. Ch. 2003) affd. 847 A. 2d 1121 (Del.. 2004). "Scrushy cannot wield the doctrine of in pari delicto to escape liability. It is because corporations must act through living fiduciaries such as Scrushy that the application of the in pari delicto doctrine has been rejected in situations where corporate fiduciaries seek to avoid responsibility for their own conduct.
- The reality that Health South itself may be liable to third parties due to the failure of its managers…does not mean that Health South has no right to seek recompense from the managers….to hold otherwise would leave the constituencies of corporate entities --- with no recourse when their corporation is injured by its managers. Like its equitable counterpart, the unclean hands doctrine, the *in pari delicto* defense will not be applied when its acceptance would contravene an important public policy." *Id* at 1107-08.

IN PARI DELICTO DOESN'T APPLY TO BANKRUPTCY AVOIDANCE ACTIONS

- *In re Financial Resources Mort.,* Inc., 454 BR 6, 23-24, (Bankr. D. N. H. 2011) In pari delicto held not to apply to trustee actions under chapter 5 of the Bankru[tcy Code.
- *In re TelexFree, LLC*, 941 F. 3d 576, 585 (3d Cir. 2019) In pari delicto) did not defeat standing of bankruptcy trustee to defeat chapter 5 avoidance claims in massive Ponzi scheme case.
- *Mukamal v. BMO Harris Bank N.A.,* (*In re Palm Bach Finance Partners*) 2012 WL 12865225 at *12 (Bankr. S.D.Fla. July 3, 2012) In pari delicto not defense to bankruptcy trustee's fraudulent transfer claim under 11 U.S.C. §§ 544 or 548.
- *Official Comm. Of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F. 3d 1145, 1151-1152 (11th Cir. 2006) Fraudulent conveyances…are an exception to the general rule that the trustee takes the debtor's estate as it is at the commencement of the bankruptcy."

RECEIVER'S FRAUDULENT TRANSFER CLAIMS GENERALLY NOT SUBJECT TO IN PARI DELICTO DEFENSE

- *Scholes v. Lehman*, 56 F. 3d 750 (7th Cir. 1995) Receiver permitted to sue the Ponzi scheme's principals and the recipients of fraudulent transfers of the corporation's assets.
- *Isaiah v. JPMorgan Chase Bank, N.A.*, 2020 WL 2823653(11th Cir. June 1, 2020) Recognizing that in pari delicto is not applied to bar receiver's claims for fraudulent transfer or looting.

FLORIDA ASSIGNMENT FOR THE BENEFIT OF CREDITORS– AN IN PARI DELICTO WORK AROUND?

- Fla Stat. § 727.108 (1)(b) provides "In an action in any court by the assignee for the first immediate transferee of the assignee other than an affiliate or insider of the assignor, against a defendant to assert a claim or chosen action of the estate, the claim is not subject to and any remedy may not be limited by, a defense based on the assignor's acquiescence, cooperation, or participation in the wrongful act by the defendant which forms the basis of the claim or chose in action." Thus, might a Florida company with substantial claims against third parties for aiding and abetting a Ponzi or other fraudulent scheme, or failing to discover it, place the entity in Florida's insolvency proceeding known as an assignment for the benefit of creditors to avoid in pari delicto.
- Allowing the assignee to bring claims without fear of the in pari delicto defense appears to be the clear intent of the statute, and this is explicitly set forth in the statutory text.
- However, if an assignee is confronted with the standing argument based on the *Isaiah* decision will the assignee still be able to use the statute to avoid having the claim defeated by virtue of the Assignor's substantial participation in the fraud?
- The statutory protection from in pari delicto appears limited to claims "of the estate." Under *Isaiah's* reasoning, arguably, a claim on behalf of an entity that perpetrated the Ponzi scheme is not a claim "of the estate"", but would rather be the claim of the defrauded investors.

AVOIDANCE ACTIONS

- Wile the argument has been made, there are no cases that have found that the trustee is stymied by pari delicto in avoidance cases. That is because the Trustee is not standing in the shoes of the debtor, but the overshoes of the creditors. 11 U.S.C. 541 is not involved. Instead, 11 U.S.C. 544, cloaks him in the rights of a creditor.
- Richard Mason, a noted Chicago, bankruptcy lawyer has argued that in personem suits can be brought under 11 U.S.C. 544, and avoid pari delicto in its entirety. I have yet to see such a suit succeed.

RON PETERSON BIO

Ronald R. Peterson concentrates his practice in the areas of commercial, insolvency and bankruptcy law. A fellow of the American College of Bankruptcy, he focuses primarily on representing debtors, trustees, creditors, committees, landlords and secured lenders in Chapter 11 cases. In addition to his insolvency litigation practice, Mr. Peterson counsels clients on a variety of transactional issues, including corporate restructurings.

Since 2003, *Chambers & Partners* has named him one of the country's leading lawyers in bankruptcy law. He is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability. Mr. Peterson is a member of the firm's Restructuring and Bankruptcy and Bankruptcy Litigation Practices. He is also a member of the Real Estate and Construction Litigation and Corporate Finance Practices and the Real Estate Finance Litigation and Workout Task Force.

RON PETERSON BIO CONT…

Mr. Peterson has been a member of the panel of Chapter 7 Trustees for the Northern District of Illinois, Eastern Division since 1988. He has presided over numerous complex commercial cases, including Stotler & Co, the country's 10th largest commodities house, and Lancelot Investment, a $1.7 billion Ponzi scheme. Mr. Peterson has also served as examiner in Robert Lund, a large real estate developer and the Chairman of the Creditors' Committee in Thomas J. Petters, a $3.5 billion Ponzi Scheme. Mr. Peterson is a member of the American Bankruptcy Institute, Commercial Law League of America and the Business Bankruptcy Committee of the Business Law Section and the Bankruptcy Litigation Committee of the Litigation Section of the American Bar Association. He is a Director and past president of the National Association of Bankruptcy Trustees and is also a member of INSOL (International Association of Restructuring, Insolvency & Bankruptcy Professionals). Mr. Peterson served as the co-chairman of the avoidance power and in pari delicto committee of the ABI's Chapter 11 Reform Commission and a Commissioner on the ABI's consumer reform commission. Mr. Peterson is also a federal equity receiver and a member of the National Association of Federal Equity Receivers.

Mr. Peterson is a prolific lecturer and writer on bankruptcy and commercial law issues.

JAMES SILVER BIO

James D. Silver is a Partner in Kelley Kronenberg's Fort Lauderdale office and heads the firm's Commercial Creditors Rights and Bankruptcy Practice. Silver's practice includes business bankruptcy, creditors rights, and insolvency, as well litigation surrounding those areas and commercial litigation.

Best Lawyers in America in the areas of Bankruptcy and Creditor Debtor Rights and Commercial Litigation.

South Florida Legal Guide, *Top Lawyer*, Bankruptcy, Creditors' and Debtors' Rights

AV Preeminent® Rating, Martindale-Hubbell

Graduated *magna cum laude* in the top 3% of his class from the University of Miami School of Law where he was a member of the Law Review, and served as Associate Research Editor of the Law Review.

JAMES SILVER BIO CONT…

Representative Matters

Lead counsel at prior firm in the bankruptcy representation of the largest victims group of more than 80 defrauded investors in the $1.2 billion Ponzi scheme involving Scott Rothstein's defunct law firm, for which he received a "Most Effective Lawyers" award from the Daily Business Review. Silver also assisted in state court litigation issues in the aiding and abetting fraud claims brought against the major banks. The representation ultimately resulted in recovery of approximately a quarter billion dollars for the client group.

Appointed as receiver in SEC enforcement action by United States District Court, Middle District of Florida, over various entities engaged in a multi-state ponzi-scheme involving wireless credit card terminals. Administered receiver estate, oversaw and participated in investigation and litigation in effort to recover funds for defrauded investors. Developed and oversaw claims procedure for receivership and distribution of recovered funds on account of claims in the receivership. Testified at trial in Texas of principal of receivership entities who was found guilty and sentenced to 99 years in prison.

Represented unsecured Creditors Committee and Liquidating Trustee in connection with the bankruptcy of one of the then largest wholesale distributors of brand-name fragrances in the United States, and oversaw investigation and involved in related litigation arising from alleged fraudulent scheme relating to $65 million line of credit and alleged inflating of sales for S.E.C. filings. Negotiated Chapter 11 plan resulting in assignment of Bank Group claims to bankruptcy estate while settling claims for equitable subordination of Bank Group's claims and providing for Bank Group's participation in distributions under confirmed plan.

Lead bankruptcy counsel for Bank assignee in Chapter 11 bankruptcy of affiliate of individual corporate guarantor against whom a judgment for $40 million plus had been entered, and against whom a freeze order had been entered freezing more than $40 million in assets the judgment debtor was holding in an offshore Cayman Island trust. Ultimately negotiated a settlement through a judicial settlement conference for more than $30 million.

Lead bankruptcy counsel for State of Florida Department of Economic Opportunity in connection with removal of its state court fraud related litigation to the bankruptcy court for the Southern District of Florida in connection with bankruptcy of digital effects company discussed above. Successful in having bankruptcy court abstain from removed litigation and having same remanded to the State Court.

Assisted in bank representation in Chapter 11 bankruptcy of health care magnate who at one time had net worth of approximately $500 million, and who owned a 33,000 square foot mansion on the ocean in Palm Beach. The mansion ultimately sold to Donald Trump for $41.4 million. Involved in fraud investigation and discovery and other aspects of the bankruptcy.