



The doctrine of in pari delicto generally bars wrongdoers and their successors from suing their co-conspirators for fraud or negligence. Does that doctrine apply once the wrongdoing entity is placed into receivership and a receiver is appointed to take over and recapture the entity's assets? The First Department tackled that question recently. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

FIRST DEPARTMENT

TORTS, IN PARI DELECTO

Castleman v Interactive Brokers LLC, 2026 NY Slip Op 05904 (1st Dept Oct. 13, 2026)

Issue: Does the doctrine of in pari delicto apply to bar a receiver of an entity engaged in wrongdoing from suing its co-conspirators on the grounds of negligence or fraud?

Facts: "[T]he Commodity Futures Trading Commission (CFTC) filed a civil complaint in the United States District Court, Southern District of New York against EminiFX, Inc. and Eddy Alexandre, the company's sole owner and its Chief Executive Officer," alleging that EminiFX was a Ponzi scheme. The District Court appointed plaintiff as the temporary, and then permanent, receiver for EminiFX, with authority to: "(i) assume full control of the Receivership Defendants by removing Alexandre and EminiFX and any officer or agent of the Receivership Defendants, from control and management of the affairs of the Receivership Defendants; (ii) prevent irreparable loss, damage, or injury to any customers or clients of any of Receivership Defendants' business activities; (iii) collect all funds owed to the Receivership Defendants; and (iv) initiate lawsuits necessary to preserve or increase the value of the receivership estate."

After removing EminiFX's leadership and taking full control of the company, plaintiff brought this action against defendant Interactive Brokers LLC, alleging that "beginning in December 2021 through January 2022, Alexandre transferred at least \$9 million of customers' deposits from EminiFX to his personal bank accounts. Within days of those transfers, Alexandre transferred the funds to his personal investment account at IBKR, which IBKR then approved for trading. The deposits consisted of \$1 million on December 30, 2021; \$2 million on January 12, 2022; and \$6 million on January 26, 2022. These deposits were significantly larger than prior deposits into Alexandre's IBKR account, which generally ranged between \$10,000 and \$20,000." Plaintiff alleged that IBKR did not conduct "any meaningful due diligence or investigation into EminiFX," which would have "uncovered that EminiFX was being operated as a Ponzi scheme based on (i) its promises to potential participants that they would receive outsized, nonsensical returns; (ii) Alexandre's ultra-risky investments; and (iii) the large deposits into Alexandre's IBKR account that substantially diverged from the account's transactional history." Finally, plaintiff alleged that even though IBKR knew the trades could draw scrutiny from regulators, "IBKR merely froze certain of Alexandre's option positions, leading to losses of more than \$7 million of EminiFX customer funds in Alexandre's IBKR account. As of July 6, 2022, only \$1,752,994.40 remained in Alexandre's personal IBKR account for plaintiff to recover."

IBKR moved to dismiss, arguing that "the doctrine of in pari delicto ('in equal fault') prevents the receiver, who stands in EminiFX's shoes, from holding IBKR liable." Plaintiff countered that "the in pari delicto defense should not apply to an innocent successor like an equity receiver seeking to recover on behalf of EminiFX's innocent investors and creditors. Plaintiff further contends that even if the doctrine applies, there is an issue of fact as to the applicability of the 'adverse interest' exception to in pari delicto."

Supreme Court granted IBKR's motion to dismiss, holding that the trustee stepped into the company's shoes and its wrongdoing precluded this action under in pari delicto. Nor did the adverse interest exception apply, the court held, because the "the wrongdoing agent (Alexandre) was the sole owner of the principal (EminiFX) at the time of the misconduct."

Holding: The First Department, with two Justices dissenting, affirmed. The court explained, "[t]he common law doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers. In other words, the doctrine bars a corporation engaged in wrongdoing from suing its co-conspirators on the grounds of negligence or fraud . . . The wrongdoer's misconduct is not only imputed to the corporation through the bad acts of its officers, but also to the corporation's successors." Although the plaintiff argued, and the dissent agreed, that "the in pari delicto doctrine does not apply to plaintiff because he is not a derivative shareholder plaintiff or a bankruptcy trustee appointed pursuant to 11 USC § 541, but rather a receiver appointed pursuant to 28 USC § 3103," the court nevertheless held that "there is no significant difference between bankruptcy trustees and nonbankruptcy receivers for purposes of in pari delicto . . . Both bankruptcy trustees and federal receivers are representative fiduciaries who take control of the entity's assets and pursue claims

on its behalf for the benefit of innocent creditors or investors. There is thus no basis to differentiate bankruptcy trustees from receivers when applying in pari delicto.”

Relying on the Court of Appeals’ decision in *Kirschner v KPMG LLP* (15 NY3d 446 [2010]), which the First Department held was dispositive, the court held that the in pari delicto doctrine barred the plaintiff receiver’s claims on behalf of the innocent investors. Indeed, the court explained, “the trustee’s status as a representative fiduciary acting for the benefit of innocent creditors did not exempt him from the doctrine . . . Plaintiff is a representative of the corporation and stands in its shoes, as the subject order specifically appointed the receiver ‘for . . . the Receivership Defendants,’ not the innocent customers/investors. The complaint acknowledges that the June 2022 order ‘appointed plaintiff as the permanent Receiver for EminiFX and its affiliates or subsidiaries owned or controlled by EminiFX.’ Plaintiff’s claims belong to the corporation, regardless of whether the innocent customers/investors are the intended beneficiaries of this action as emphasized by plaintiff and the dissent. Consequently, as with a derivative plaintiff or trustee who stands in the shoes of corporate malefactors, plaintiff’s powers are bound by the rights of the entity in receivership.” Thus, the court reasoned, “[t]here is no doubt that the fraud perpetrated against the innocent investors was very serious, but those facts do not change the status of the receiver or place the receiver in the shoes of the innocent investors. The order clearly appointed the receiver as a representative of EminiFX and its affiliates and subsidiaries. As a representative fiduciary of the corporation, the role of the receiver is in part to collect and preserve the corporation’s assets to the fullest extent possible, but it must do so within the bounds of the rights of the corporation. The identity of the ultimate beneficiaries is irrelevant because the claims belong to the wrongdoing entity represented by the receiver, not to the customers. As the corporation may not sue its co-conspirator for negligence or fraud, neither may its successor, plaintiff receiver.

Finally, the court held, New York’s narrow adverse interest exception, which provides that “when an agent is engaged in a scheme to defraud his principal, either for his own benefit or that of a third person, the imputation of the agent’s knowledge to his principal fails because he cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose,” did not apply here. As Supreme Court held, the “sole actor” rule barred application of the exception because “the adverse interest exception does not apply if the alleged wrongdoer was, at the time of the misconduct, either the sole manager or the sole owner of the entity,” which Alexandre indisputably was.

THIRD DEPARTMENT

CIVIL PROCEDURE, EXTREME RISK PROTECTION ORDER

Matter of New York State Police v Brian LL., 2026 NY Slip Op 05832 (3d Dept Oct. 8, 2026)

Issue: Did the State Police satisfy their burden to show, by clear and convincing evidence, that respondent was likely to engage in conduct that would result in serious harm to himself or others, such that the courts should issue an extreme risk protection order?

Facts: During an internal investigation of the respondent, a Connecticut resident, by his employer, the New York State Department of Motor Vehicles, respondent participated in two videoconferences with agency staff regarding the investigation and a grievance that respondent had filed. During the second videoconference, “a rifle and a pistol were prominently displayed behind respondent.” The next day, he called another DMV employee and “alluded to animosity with his supervisor, who he previously accused of discrimination, and stated that it was ‘not going to go well’ and that it was unwise for respondent to continue to work under him. DMV reported respondent’s statements and his display of firearms to [the State Police], which then commenced this proceeding, first seeking a temporary extreme risk protection order (hereinafter TERPO) and then a final extreme risk protection order (hereinafter ERPO). In its TERPO application, petitioner did not cite any of the grounds enumerated in CPLR 6342 (2), instead alleging that respondent’s intentional display of firearms during the grievance hearing constituted an indirect threat of implied workplace violence.”

Supreme Court denied the TERPO application, holding that the State Police “had not shown probable cause to believe that respondent was likely to engage in conduct that would result in serious harm to himself or others” and scheduled a final ERPO hearing. Respondent moved to dismiss, arguing that Supreme Court lacked personal jurisdiction, that venue did not properly lie in Albany County, and that service was improper. Supreme Court ultimately “denied the motion to dismiss and, following a hearing, granted the petition and issued a final ERPO that expired on January 31, 2026.”

Holding: Although the Third Department rejected the respondent’s jurisdictional defenses because he worked in New York and the ERPO proceeding arose from work-related activities and the ERPO statute’s venue provisions do not prevent the proceedings from being brought against nonresidents like respondent, the court ultimately reversed the final ERPO, holding that the State Police failed its burden to demonstrate “by clear and convincing evidence that respondent was likely to engage in conduct that would result in serious harm to himself or others.” The court explained, “a likelihood of serious harm means a substantial risk of physical harm to others manifested by homicidal or other violent behavior that places others in reasonable fear of serious physical harm. When determining an ERPO petition, the court must consider the nonexhaustive factors set forth in CPLR 6342 (2) including, among other things, any threat or act of violence or use of physical force directed toward self, the petitioner, or another person. The statute does not require either an explicit threat or expert testimony to predict a respondent’s future conduct, such that an implied threat may suffice under some circumstances.”

Here, however, the court held, the evidence at the hearing was equivocal and, thus, insufficient to satisfy the clear and convincing standard of proof. “Petitioner’s documentary evidence and the testimony adduced at the hearing suggest that respondent’s statement about things ‘not going to go well’ connoted future litigation. Specifically, petitioner submitted an investigator’s report summarizing the labor representative’s observations and her candid contemporaneous concession that respondent’s worrisome statement could be construed as a threat to sue; at the hearing, she struggled to recall whether or how she characterized this statement to police as a threat of violence. The investigator’s report noted that respondent’s lawfully owned firearms were never brandished, mentioned or ‘otherwise used in any threatening manner’ but instead were purportedly placed to intimidate the videoconference participants. The report further summarized the investigator’s communications with the Connecticut police who conducted a welfare check at petitioner’s request and reported that respondent explained his statement as a reference to litigation and that they declined to initiate that state’s red flag law after their interaction with him.”

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