



## Does The In Pari Delicto Defense Apply In Derivative Actions?

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“In pari delicto” is a Latin phrase meaning in equal fault. It is an equitable defense that precludes a plaintiff from recovering for an injury that arose from a wrongdoing in which she participated. In a shareholder derivative suit, the plaintiff is the corporation. If a shareholder derivative suit is brought against the corporation’s directors and officers, is the *in pari delicto* defense available?

### Court Holds That *In Pari Delicto* Doctrine May Apply To Shareholder Derivative Suits

Recently, the Nevada Supreme Court held that the *in pari delicto* defense is available in shareholder derivative actions. *In re Amerco Derivative Litigation*, 127 Nev. Adv. Op. 17 (2011). In assessing whether to apply the doctrine, the court found that a corporate agent’s actions are normally imputed to the corporation. The rationale for doing so is to encourage corporate managers to select and monitor carefully corporate agents.

### The “Adverse Interest” Exception

However, the court also found that an agent’s action won’t be imputed to the corporation if the agent’s actions are “completely and totally adverse” to the corporation. The Nevada Supreme Court found that this “adverse interest” exception did not apply because the plaintiffs had not alleged:

- Any defendant had totally abandoned Amerco’s interests;
- Amerco was completely harmed; or
- The defendants acted solely for their own benefit.

### The Sole Actor Rule

The Court recognized one exception to the adverse interest exception. If an agent is the sole agent or sole shareholder of a corporation, then the agent’s knowledge and conduct will be imputed to the corporation even when the agent has totally abandoned the corporation’s interest. The rule is a bit of a misnomer because, according to the Court, it also applies when there are multiple owners and managers who are each engaged in

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fraud against the corporation. Technically, the Court's views on the sole actor rule may be *dicta* because the Court found that the adverse interest exception did not apply, and thus, there was no need to consider whether an exception to the exception existed.

### **The Court May See This Case Yet Again**

The Nevada Supreme Court did not hold that the defendants had succeeded in their *in pari delicto* defense. Rather, the Court remanded the case to the trial court to determine, after discovery and briefing, whether the defense should be applied.

### **Epilogue – One Family's Battles**

Amerco is the parent corporation of U-Haul. Leonard S. Shoen founded U-Haul in 1945. He gave his 12 children most of the stock in Amerco. The resulting internecine litigation has resulted in numerous reported decisions in the Arizona, Nevada and federal courts. See *Bishop & Zucker on Nevada Corporations and Limited Liability Companies* § 5.4 n. 34. Ronald J. Watkins wrote a book about the Shoen family battles, *Birthright*, and the book became the subject of its own litigation. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993) and *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995).

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