

Source: [Legal > / . . . / > 2nd Circuit - US Court of Appeals, District & Bankruptcy Cases, Combined](#)   
Terms: [name\(global crossing estate representative\)](#) ([Edit Search](#) | [Suggest Terms for My Search](#))

2006 U.S. Dist. LEXIS 53785, \*

**GLOBAL CROSSING ESTATE REPRESENTATIVE**, Plaintiff, -v- GARY WINNICK, et al.,  
Defendants

04 Civ. 2558 (GEL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2006 U.S. Dist. LEXIS 53785

August 3, 2006, Decided

### CASE SUMMARY


**PROCEDURAL POSTURE:** Plaintiff, an estate representative for a bankrupt company, sued defendants, two groups of former shareholders of the bankrupt company, alleging (1) fraudulent transfer of assets under federal bankruptcy law and state debtor law, (2) violation of fiduciary duties owed to the company, and (3) state law corporate waste. The shareholder groups each moved to dismiss the complaint for failure to state a claim. The representative contested the motions.

**OVERVIEW:** The representative alleged that prior to the bankruptcy, the shareholders engaged in a campaign of insider selling and improper self-dealing that effectively drained the company. The court granted the motions in part. Many of the claims of fraudulent transfer of company property under 11 U.S.C.S. §§ 544 and 550 were barred by the two-year limitations period, although claims against certain shareholders related back to the original filing date as they had notice that their conduct was in question. Also, certain avoidance claims could not be based on the company's interest in its stock. In addition, these bankruptcy law claims sufficiently identified a creditor, on whose behalf the claims were advanced, to preclude dismissal. The court dismissed most of the representative's claims for damages and equitable relief based on alleged breaches of fiduciary duties. In particular, the representative did not have standing to assert these claims on behalf of the company's creditors. However, to the extent the representative could show that the shareholders' alleged control of the company rendered them insiders and fiduciaries, the representative could maintain breach of fiduciary claims.


**OUTCOME:** The court dismissed the fraudulent transfer claims as to the first shareholder group, and as to the second shareholder group to the extent they related to a merger, a secondary offering, and avoidance of stock transfers. The court dismissed the forfeiture of compensation claim and the remaining claims to the extent they were based on duties owed the parent and related to certain agreements. The court denied dismissal in all other respects.

**CORE TERMS:** stock, shareholder, fiduciary duty, designee, pari delicto, insider, fiduciary, insolvent, entity, limitations period, self-dealing, billion, statute of limitations, subsidiary, breach of fiduciary duty, summary judgment, discovery, predecessor, six-year, breaches of fiduciary duty, aiding and abetting, bankruptcy trustee, insider trading, sell stock, continuation, designated, tender offer, offering, buyout, merger


**LexisNexis(R) Headnotes** ♦ [Hide Headnotes](#)


[Bankruptcy Law](#) > [Case Administration](#) > [Examiners, Officers & Trustees](#) > [Transferee Liability](#) 


**HN1**  See [11 U.S.C.S. § 550\(a\)](#).


[Bankruptcy Law](#) > [Case Administration](#) > [Examiners, Officers & Trustees](#) > [Voidable Transfers](#) > [General Overview](#) 

**HN2**  See [11 U.S.C.S. § 544\(b\)\(1\)](#).

[Civil Procedure](#) > [Judgments](#) > [Entry of Judgments](#) > [Enforcement & Execution](#) > [Fraudulent Transfers](#) 

**HN3**  See [N.Y. Debt. & Cred. Law § 274](#).


[Civil Procedure](#) > [Judgments](#) > [Entry of Judgments](#) > [Enforcement & Execution](#) > [Fraudulent Transfers](#) 


**HN4**  See [N.Y. Debt. & Cred. Law § 273](#).


[Bankruptcy Law](#) > [Practice & Proceedings](#) > [Adversary Proceedings](#) > [Causes of Action](#) 


[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN5**  See [11 U.S.C.S. § 546](#).

[Civil Procedure](#) > [Judgments](#) > [Entry of Judgments](#) > [Enforcement & Execution](#) > [Fraudulent Transfers](#) 


[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN6**  A six-year limitations period applies to state-law actions commenced under N.Y. Debt. & Cred. Law §§ 273-74. [More Like This Headnote](#)

[Bankruptcy Law](#) > [Practice & Proceedings](#) > [Adversary Proceedings](#) > [Causes of Action](#) 


[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

**HN7**  See [11 U.S.C.S. § 108\(a\)](#).

[Bankruptcy Law](#) > [Case Administration](#) > [Examiners, Officers & Trustees](#) > [Voidable Transfers](#) > [General Overview](#) 


[Bankruptcy Law](#) > [Practice & Proceedings](#) > [Adversary Proceedings](#) > [Causes of Action](#) 


[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 


**HN8**  [11 U.S.C.S. § 546](#) is the only applicable limitations period for [11 U.S.C.S. § 544](#) claims, including claims arising under [§544\(b\)](#). Under [§ 544\(b\)](#), the trustee (or debtor-in-possession) succeeds to a claim belonging to a creditor, not to the debtor. [11 U.S.C.S. § 544\(b\)](#) provides that a trustee may avoid any transfer of an interest of the debtor in property that is voidable under applicable law by a creditor. But [11 U.S.C.S. § 108\(a\)](#), by its very terms, applies only where applicable non-bankruptcy law fixes a period within which the debtor may commence an action. The statute is explicit in that it applies to save and preserve a statute of limitations only where the cause of action sought to be asserted by the trustee is a claim that the debtor could


have brought, and thus, [11 U.S.C.S. § 546](#) provides the relevant statute of limitations and it is not extended by reference to [11 U.S.C.S. § 108](#)


(a). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Amended Pleadings](#) > [Relation Back](#) 


**HN9**  See [Fed. R. Civ. P. 15\(c\)\(3\)](#).


[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Amended Pleadings](#) > [Relation Back](#) 


**HN10**  The phrase "a mistake concerning the identity of the proper party" in [Fed. R. Civ. P. 15\(c\)](#) should clearly not be read to limit its usefulness to cases of misnomer. As long as the original complaint gives defendant adequate notice, an amendment relating back is proper even if it exposes defendants to greater damages. [More Like This Headnote](#)

[Bankruptcy Law](#) > [Case Administration](#) > [Examiners, Officers & Trustees](#) > [Fraudulent Transfers](#) > [Value](#) 


[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 

**HN11**  It would be premature to dismiss an [11 U.S.C.S. § 548\(a\)\(1\)\(B\)](#) claim on the ground that the value transferred appears, in simple mathematical terms, to exceed that of the allegedly fraudulent transfers. The totality of the circumstances must be examined, and plaintiff has the right to offer evidence in an effort to show that, contrary to appearances, it did not receive "reasonably equivalent value in exchange for the transfer." [More Like This Headnote](#)


[Bankruptcy Law](#) > [Case Administration](#) > [Examiners, Officers & Trustees](#) > [Voidable Transfers](#) > [General Overview](#) 


**HN12**  [11 U.S.C.S. § 544\(b\)](#) gives a trustee the power to avoid transfers or obligations of a debtor that are avoidable by an actual, existing unsecured creditor under non-bankruptcy law. Thus, if there are no creditors against whom a transfer is voidable the trustee is powerless to act and the burden is on the trustee to demonstrate the existence of an actual creditor with a viable cause of action. A trustee must demonstrate that there existed an actual unsecured creditor at the time of the transfer whose shoes the trustee may step into so as to avoid the transfer under applicable state law. [More Like This Headnote](#)


[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Complaints](#) > [Requirements](#) 


**HN13**  Under [Fed. R. Civ. P. 8\(a\)](#), a complaint must simply give defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of un-meritorious claims. The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of a dispute brought frankly into the open for the inspection of the court. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Bankruptcy Law](#) > [Practice & Proceedings](#) > [Adversary Proceedings](#) > [General Overview](#) 


[Civil Procedure](#) > [Justiciability](#) > [Standing](#) > [General Overview](#) 


[Constitutional Law](#) > [The Judiciary](#) > [Case or Controversy](#) > [Standing](#) > [General Overview](#) 


**HN14**  A bankruptcy trustee lacks standing to assert creditors' claims unless specifically authorized by the Bankruptcy Code. [More Like This Headnote](#)


[Business & Corporate Law](#) > [Agency Relationships](#) > [Causes of Action & Remedies](#) > [Breach of Fiduciary Duty](#) > [Remedies](#) 


**HN15**  A showing of damage to a corporation is unnecessary to assert a fiduciary duty claim, and in lieu of damages, defendants' profits arising from the breach can be disgorged to the corporation. The function of a fiduciary duty action is not merely to compensate plaintiff for wrongs committed by defendant but to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates. [More Like This Headnote](#)


[Business & Corporate Law](#) > [Agency Relationships](#) > [Causes of Action & Remedies](#) > [Breach of Fiduciary Duty](#) > [General Overview](#) 


**HN16**  Courts have held that the Wagoner and "in pari delicto" rules do not apply to claims against corporate insiders for breach of their fiduciary duties. The United States Court of Appeals for the Second Circuit has stated that a bankruptcy trustee, suing on behalf of a debtor under New York law, may pursue an action for breach of fiduciary duty against the debtor's fiduciaries. [More Like This Headnote](#)


[Business & Corporate Law](#) > [Mergers & Acquisitions](#) > [Liabilities & Rights of Successors](#) > [Successor Liability Doctrine](#) 

**HN17**  It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. [More Like This Headnote](#)


[Business & Corporate Law](#) > [Mergers & Acquisitions](#) > [Liabilities & Rights of Successors](#) > [Mere Continuation](#) 

**HN18**  The "mere continuation" doctrine applies only where one corporation survives the transaction and the predecessor corporation is extinguished. Where a predecessor has survived a transaction as a distinct, albeit meager, entity, the doctrine is inapplicable. [More Like This Headnote](#)


[Torts](#) > [Intentional Torts](#) > [Breach of Fiduciary Duty](#) > [Defenses](#) 


**HN19**  Ordinarily, under New York law, a claim for breach of fiduciary duty would be governed by a three-year limitations period if the action sought monetary relief but by a six-year period if the action sought equitable relief. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 


**HN20**  At the pleadings stage, a court's function is not to evaluate the specific facts alleged to determine whether they are alone sufficient to support judgment for plaintiff; it is only to determine whether the complaint provides defendant with fair notice of what plaintiff's claims are, the grounds upon which they rely, and makes it plausible that plaintiff will develop, through discovery, a factual record that could support relief. [More Like This Headnote](#)


[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 


[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Complaints](#) > [Requirements](#) 


**HN21**  The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is "a short and plain statement of a claim" that will give defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. [More Like This Headnote](#)


[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 


**HN22**  A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. The question is whether it is plausible that plaintiffs could develop some set of facts that would pass muster. [More Like This Headnote](#)


[Business & Corporate Law](#) > [Corporations](#) > [Shareholders](#) > [Shareholder Duties & Liabilities](#) > [Controlling Shareholders](#) > [Fiduciary Responsibilities](#) 


**HN23**  The notion that a stockholder could become a fiduciary by attribution (analogous to the result under the tort law doctrine of respondeat superior) would work an unprecedented, revolutionary change in the law, and would give investors in a corporation reason for second thoughts about seeking representation on a corporation's board of directors. [More Like This Headnote](#)

[Business & Corporate Law](#) > [Corporations](#) > [Shareholders](#) > [Shareholder Duties & Liabilities](#) > [Controlling Shareholders](#) > [Fiduciary Responsibilities](#) 

[Business & Corporate Law](#) > [Corporations](#) > [Shareholders](#) > [Shareholder Duties & Liabilities](#) > [Personal Liability](#) 

**HN24**  Shareholders' control or influence over a board's designees may serve as evidence of their control over the corporation itself. [More Like This Headnote](#)

[Torts](#) > [Procedure](#) > [Multiple Defendants](#) > [Concerted Action](#) > [Civil Aiding & Abetting](#) 

**HN25**  New York law recognizes that a third party may be held liable as a principal for a fiduciary's breach of its duties under an "aiding and abetting" or "participation" theory. [More Like This Headnote](#)

**COUNSEL:** [\*1] Andrew J. Entwistle, Entwistle & Cappucci LLP, New York, NY (Harold F. McGuire, Jr., Arthur V. Nealon, and Helen Chung, Entwistle & Capucci LLP; Peter Morgenstern, Bragar Wexler Eigel & Morgenstern, LLP, New York, NY, on the brief), for plaintiff.

Gary O. Ravert, McDermott Will & Emery LLP, New York, NY (David C. Christian, McDermott Will & Emery, Chicago, IL; Gary M. Elden, Philip C. Stahl, George R. Dougherty, and Maile H. Solis, Grippo & Elden LLC, Chicago, IL, on the brief), for defendant Continental Casualty Co.

Anthony J. Trenga, Miller & Chevalier Chartered (Mark J. Rochon and Brian A. Hill, on the brief), for defendants ULLICO Inc. and MRCo. Inc.

Robert J. Ward, Mayer, Brown, Rowe & Maw LLP, New York, NY (Beth Ann Schultz, Mayer, Brown, Rowe & Maw LLP, on the brief), for defendants Canadian Imperial Bank of Commerce ("CIBC"), CIBC Wood Gundy, CIBC Oppenheimer, and CIBC World Markets.

**JUDGES:** GERARD E. LYNCH, United States District Judge.

**OPINION BY:** GERARD E. LYNCH

**OPINION: OPINION AND ORDER**

GERARD E. LYNCH, District Judge:

The Global Crossing Ltd. Estate Representative ("Estate Representative") filed this action on behalf of now-bankrupt Global Crossing ("GC") **[\*2]** against (1) Canadian Imperial Bank of Commerce ("CIBC"), CIBC Wood Gundy Capital (SFC) Inc. ("CIBC Wood Gundy"), CIBC Oppenheimer Corp. ("CIBC Oppenheimer"), and CIBC World Markets Corp. ("CIBC World Markets"); (2) ULLICO, Inc. ("ULLICO") and MRCo., Inc. ("MRCo."); and (3) Continental Casualty Company ("CCC"). It is alleged that prior to GC's bankruptcy, the defendants -- who held GC stock, designated members to GC's board of directors, and/or provided certain financial services to GC -- engaged in a multiyear campaign of insider selling of GC shares and improper self-dealing transactions that, among other things, drained GC of capital, leaving its creditors holding the bag. On the basis of this alleged conduct, the Consolidated Amended Complaint ("Compl." or "complaint") n1 advances three sets of claims: claims arising under federal bankruptcy law and state debtor law seeking a return of funds and property allegedly fraudulently transferred to defendants (Count 1); claims alleging that defendants, either directly or through the conduct of their board designees, violated (or aided and abetted violations of) fiduciary duties owed to GC, and seeking various forms of legal and equitable **[\*3]** relief (Count 2-7); and a "corporate waste" claim arising under New York statutory law (Count 4). Defendants have now moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). For the following reasons, defendants' motions will be granted in part and denied in part.

----- Footnotes -----

n1 On January 27, 2004, the Estate Representative commenced an adversary proceeding in the bankruptcy court against, inter alia, CIBC and the ULLICO defendants. This Court withdrew the bankruptcy reference as to that proceeding (and subsequently, on June 3, 2005, the Estate Representative amended the complaint). On May 19, 2005, the Estate Representative commenced a separate adversary proceeding against CCC, CIBC Wood Gundy, CIBC Oppenheimer, and CIBC World Markets. On July 26, 2005, this Court withdrew the reference as to the May 19 proceeding; consolidated the January 27 and May 19 proceedings; and permitted the Estate Representative to file a consolidated amended complaint, which was subsequently filed. (Pl. Mem. 1 n.2.)

----- End Footnotes----- **[\*4]**

**BACKGROUND**

I. The Parties

The plaintiff in this case is the GC Estate Representative, which was formed in the course of the bankruptcy proceedings of GC and numerous related entities (which commenced in 2002). (Compl. P9.) The Estate Representative -- consisting of five individuals -- was constituted to pursue claims belonging to the GC debtors for the benefit of their creditors, whose \$ 6.2 billion in allowed claims "remain largely unsatisfied." (Id. PP13-18.)

The defendants are former GC shareholders. The CIBC defendants -- consisting of CIBC, a Canadian chartered bank, and various subsidiaries it "owned," "operated through," and "controlled" (id. P19) -- were original GC investors who acquired over 48 million shares of GC stock as well as the right to name five members of the GC board, which during the relevant period had thirteen or more members. n2 (Id.) During the relevant period, it is alleged that the CIBC defendants sold over 28 million shares of GC stock for in excess of \$ 2.4 billion. (Id.) In addition, they "provided commercial and investment banking services, underwriting services, and advisory services" to GC. (Id.)

----- Footnotes -----

n2 See Compl. PP130-33 (noting GC's predecessor, GT Parent Holdings, LDC, had 13 board members; those directors subsequently became GC directors); Rodriguez Aff., Ex. A., Prospectus for 21,000,000 Shares of Global Crossing Ltd. Common Stock dated August 13, 1998 ("Prospectus"), at 55 (noting CG had sixteen board members as of August 1998); In re Global Crossing, Ltd. Sec. Litig., 2005 U.S. Dist. LEXIS 26942, No. 02 Civ. 910, 2005 WL 2990646, at \*1 n.3 (S.D.N.Y. Nov. 7, 2005) (noting GC 10-K's indicate seventeen members as of December 1998 and twenty members as of December 1999).

----- End Footnotes----- [\*5]

The ULLICO defendants -- defendant ULLICO, a Washington D.C.-based financial services company, and its wholly-owned subsidiary MRCo. -- are also GC stockholders and had one seat on the GC board. (Id. PP20-22.) The complaint alleges that the ULLICO defendants made over \$ 200 million in two stock sales during the relevant period. (Id.) CCC, a wholly owned subsidiary of CNA Financial Corp. (which is in turn 85% owned by the Loews Corporation), was also a GC shareholder with one seat on the board, and is alleged to have made over \$ 1.7 billion in stock sales during the relevant period. (Id. P23.)

## II. Factual Summary

The complex allegations of the complaint are summarized in plaintiff's opposition memorandum: In 1997, defendants invested in a company named GT Parent Holdings, LDC ("GT Parent"), and obtained seats on GT Parent's 13-member board (5 for the CIBC defendants, 1 for the ULLICO defendants, 1 for CCC). (Pl. Mem. 2-3.) From 1997 to early 1998, GT Parent, through its subsidiaries, began to develop the Global Crossing fiber optic cable network, (id.), and in March 1998, GT Parent formed GC "to assume all its functions and assets." (Id. 3.) The GT Parent [\*6] directors became GC directors, and the GT Parent shareholders, with the exception of the CIBC defendants, exchanged their GT Parent shares for GC shares. (Id.) The CIBC defendants became the sole owner of GT Parent, which itself held 26.5% of GC's stock: in effect, the CIBC defendants used GT Parent as an intermediary to hold its GC stock, and the complaint alleges that, in fact, GT Parent had no function other than that. (Pl. Mem. 3; Compl. P148.)

In August 1998, just before GC's IPO, GC issued 7 million restricted shares to various managers, the CIBC defendants, and the ULLICO defendants. That stock was issued to buy out rights which early GT Parent investors had secured under so-called "Advisory Service Agreements," which plaintiff claims were "vehicles" under which these insider n3





























































