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## News at 11

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### A Delaware District's Guide to Pleading Preference and Fraudulent-Transfer Claims



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The U.S. Bankruptcy Court of the District of Delaware recently issued a decision that clarifies the requirements to adequately plead a preference or constructive fraudulent-transfer complaint. The decision serves as a welcome guide for anyone seeking to assert or defend against such claims at the pleading stage, which often serves as an important inflection point given the burdens of discovery that will follow a well-pleaded complaint. This article provides an overview of the short — but illuminating — decision in *Nimble Gravity*,<sup>1</sup> and it offers some key practice takeaways in light of the decision.

#### A Review of *Nimble Gravity LLC*

The decision arises from the chapter 11 cases of *Packable Holdings LLC* and its affiliates (together, the debtors), which began in August 2022. Almost two years later, in April 2024, the official committee of unsecured creditors was granted derivative standing to pursue chapter 5 causes of action on the debtors' behalf via stipulation. The committee thereafter commenced an adversary proceeding against *Nimble Gravity LLC* seeking to avoid and recover payments made to it by the debtors on the grounds that the payments constituted either preferential transfers or, in the alternative, constructively fraudulent transfers.

Preferential transfers are payments made by a debtor to a creditor in the 90 days immediately preceding a bankruptcy filing (or the preceding year,

if the creditor is an insider).<sup>2</sup> Section 547 of the Bankruptcy Code allows the debtor, trustee (where applicable) or, in this case, a creditors' committee with derivative standing, to avoid any transfer of a debtor's interest made during the applicable time period and demand the return of such interest to the debtor's estate.<sup>3</sup>

Fraudulent transfers are similarly avoidable under § 548 of the Bankruptcy Code. In broad terms, § 548 allows the recovery of transfers made within two years of the date of a bankruptcy filing where such transfers were made with actual intent to "hinder, delay, or defraud," or resulted in less than reasonably equivalent value in exchange.<sup>4</sup>

In June 2024, *Nimble Gravity* moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as well as Civil Rule 12(b)(3) for improper venue (an argument the court noted briefly, but dismissed as underdeveloped). On Oct. 30, 2024, the court issued its decision on *Nimble Gravity*'s motion to dismiss, providing an informative analysis of the pleading requirements for preference and fraudulent-transfer claims. In ultimately finding that the official committee of unsecured creditors had sufficiently pled both claims, the court denied *Nimble Gravity*'s motion to dismiss.

As any discussion of pleading standards would be incomplete without referencing the U.S. Supreme Court's famous *Iqbal* and *Twombly* duo, the court began its analysis by briefly referencing the standard that plaintiffs cannot simply "recite

<sup>1</sup> *Official Committee of Unsecured Creditors v. Nimble Gravity LLC (In re Pack Liquidating LLC)*, 2024 WL 4633499, Case No. 22-10797, Adv. Proc. No. 24-50048 (Bankr. D. Del. Oct. 30, 2024).

<sup>2</sup> 11 U.S.C. § 547(b)(4).

<sup>3</sup> *Id.*

<sup>4</sup> 11 U.S.C. § 548.

elements of a cause of action” and hope to survive a motion to dismiss.<sup>5</sup> Further, the Third Circuit applies a “three-step plausibility test” when reviewing the adequacy of a complaint, consisting of the following: (1) taking “note of the elements a plaintiff must plead to state a claim”; (2) accepting “all the complaint’s well-pleaded facts as true”; and (3) determining “whether the plaintiff’s factual allegations are sufficient to support a plausible claim for relief.”<sup>6</sup> The *Nimble Gravity* decision also noted that a reviewing court “should consider only the allegations within the four corners of the complaint, which includes materials attached to the complaint,” but that a plaintiff is not required to provide “actual tangible evidence” to substantiate its claims, such as copies of relevant invoices, bills or canceled checks at this stage.<sup>7</sup>

## Preference Claims

Moving past the general standards for pleading claims, the court first addressed the requirements for pleading preference claims under § 547(b) of the Bankruptcy Code. To establish a plausible preference claim, the court stated that a plaintiff must “(i) identify the nature and amount of each antecedent debt; (ii) identify each alleged preference; and (iii) allege that it conducted reasonable due diligence into the defendant’s known or reasonably knowable affirmative defenses.”<sup>8</sup>

The third prong is a relatively recent addition, arising from Congress’s enactment of the Small Business Reorganization Act of 2019 (SBRA). It added language to § 547(b) noting that a trustee may, “based on reasonable due diligence in the circumstances of the case and taking into account a party’s known or reasonably knowable affirmative defenses,” avoid transfers that meet the other elements of a preferential transfer.<sup>9</sup> After the SBRA’s enactment, significant questions arose as to how to implement this new requirement, such as whether it created an affirmative defense or an additional element to plead and how (or whether) it must be addressed in a complaint.

It was not until 2023 that the Delaware courts held in *In re Pinktoe Tarantula Ltd.* that the “due-diligence requirement is an element of a preference claim, not an affirmative defense.”<sup>10</sup> In *Nimble Gravity*, the court further clarified that meeting these three elements is “generally sufficient” to establish a plausible claim that provides enough factual detail to put the defendants on notice.

Addressing the first prong, the court stated that a complaint must identify the amounts owed, describe the relationship among the parties, and link the allegedly preferential transfers to that relationship.<sup>11</sup> The court found that a complaint does not have to identify the specific agreement that gave rise to the purported preferential transfer or supply the defendant with “everything [that] it might wish to

know about the plaintiff’s claims,” but need only provide “enough detail to allow the defendant to identify the payment in question.”<sup>12</sup>

Here, the committee met this standard by alleging that “during the course of their relationship, the debtors and defendants entered into agreements for goods and/or services and that those agreements gave rise to the \$195,699.29 in allegedly preferential payments,” even though it did not specify the exact agreement that gave rise to the payments at issue.<sup>13</sup> Although *Nimble Gravity* had asserted that the complaint’s factual allegations were insufficient because there were several different contracts between the parties, the court found that the allegations were sufficient and that any additional information *Nimble Gravity* may desire could be sought through discovery.

Turning to the second prong, the court stated that to properly identify an alleged preference, the complaint must provide the “(i) date of transfer; (ii) name of the transferor; (iii) name of the transferee; and (iv) amount of the transfer,” as well as the particular transferor where there are multiple debtors in a bankruptcy case.<sup>14</sup>

The committee satisfied this requirement by including an exhibit identifying the transferring debtor, *Nimble Gravity*, as the transferee, the transfer date and the amount of each transfer.<sup>15</sup> While these elements might seem basic, they could provide defendants with fodder for a successful motion to dismiss, particularly in cases of fraud or mismanagement, where the debtor’s books and records often render it challenging to identify the particular debtor or details on historical financials.

Finally, on the third prong, the court specifies that to plead due diligence adequately, a complaint must only include a “general allegation that all conditions precedent have occurred.”<sup>16</sup> As the court explained, Delaware courts have identified the relatively new due-diligence requirement as a condition precedent governed under Civil Rule 9(c). Therefore, the *Iqbal/Twombly* standard under Civil Rule 8 does not apply. Civil Rule 9(c) instead broadly provides that it suffices to “allege generally that all conditions precedent have occurred or been performed.”<sup>17</sup>

The court found that the committee’s due-diligence allegations were sufficient because they alleged that the committee conducted its own due diligence into *Nimble Gravity*’s affirmative defenses by reviewing the books and records in its possession, and that it sent a demand letter to *Nimble Gravity* seeking additional information about potential affirmative defenses it may have.<sup>18</sup>

The court rejected *Nimble Gravity*’s argument that due diligence was unsatisfied because the committee did not identify the agreement that gave rise to the preferential transfers, and the court emphasized that a plaintiff need only allege that it conducted due diligence into the defendants’ affirmative defenses, not produce tangible evidence in support of

5 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *In re Liquid Holdings Grp. Inc.*, No. 17-50662 (KG), 2019 WL 3380820, at \*1 (Bankr. D. Del. July 25, 2019).

6 *In re Pack Liquidating LLC*, No. 22-10797, 2024 WL 4633499, at \*2 (Bankr. D. Del. Oct. 30, 2024).

7 *Id.*

8 *Id.*

9 11 U.S.C. § 547(b).

10 *In re Pinktoe Tarantula Ltd.*, No. 18-10344 (LSS), 2023 WL 2960894, at \*5 (Bankr. D. Del. April 14, 2023).

11 *Id.*

12 *Id.*

13 *Id.* (internal citations omitted).

14 *In re Pack Liquidating LLC*, No. 22-10797, 2024 WL 4633499, at \*3 (Bankr. D. Del. Oct. 30, 2024).

15 *Id.*

16 *Id.*

17 Fed. R. Civ. P. 9(c).

18 *In re Pack Liquidating LLC*, No. 22-10797, 2024 WL 4633499, at \*3 (Bankr. D. Del. Oct. 30, 2024).

their claim.<sup>19</sup> As an important practice point, the court’s reliance on the fact that the committee’s demand letter requested information on any potential affirmative defenses shows that plaintiffs would be wise to include such a request in demand letters going forward, particularly for complaints with a Delaware venue.

## Fraudulent Transfer

Moving to the committee’s fraudulent-transfer claims, the court stated that to “plead constructive fraud adequately, the plaintiff need only allege that there was a transfer for less than reasonably equivalent value at a time when the debtor was insolvent.”<sup>20</sup> In this case, the committee appropriately alleged the transfer date, the face amount of the transfer, the transferee and transferor, and that if payments were not made on account of an antecedent debt, then they were made for less than reasonably equivalent value.<sup>21</sup> While the court seemed to indicate that these allegations might not have been sufficient had the committee pled actual rather than constructive fraud, as actual fraud is subject to Civil Rule 9(b)’s heightened pleading standard, this was an adequately pled constructive-fraud claim.<sup>22</sup>

## Practice Takeaways

The *Nimble Gravity* case is a valuable guide for any Delaware plaintiffs drafting preference or fraudulent-transfer complaints. It will help ensure that they have pled such claims with sufficient particularity to survive a motion to dismiss. By the same token, the case is also a good reference for any defendants seeking to identify weaknesses in a complaint and successfully prosecute motions to dismiss.

With respect to preferential transfers, the case clarifies that a plaintiff’s complaint need not include any tangible evidence to support its allegations. To meet all three elements of a preference claim, the complaint must specify:

1. the date, transferee, transferor and amount of each alleged transfer, as well as the relevant debtor where there are multiple;
2. the relationship between the parties;
3. the link between the relationship of the parties and the transfers; and
4. an allegation that due diligence into the defendant’s affirmative defenses, to the extent knowable, was conducted.

*Nimble Gravity* indicates that a fairly low level of factual detail is needed for the slightly more ambiguous requirements numbered 2-4 above. A relationship between the parties and link to the transfers is adequately pled simply by including a general statement that the parties entered into agreements for certain goods or services that gave rise to the preference claims at issue, even without specifying the exact agreement from which the transaction arose.

On the flip side, particularly where the *Nimble Gravity* court’s decision is nonbinding on other bankruptcy courts, defendants might want to continue to press for details of the contract at issue, particularly where some — but not all —

contracts between the parties were assumed.<sup>23</sup> The due-diligence requirement is met by including a general allegation that due diligence was conducted and an allegation of the specific efforts to conduct due diligence. However, plaintiffs must consider what due-diligence efforts are sufficient to meet this requirement.

From *Nimble Gravity*, it is sufficient to allege that a review was conducted of available books and records, and the defendant was sent a demand letter for additional information. It is unclear whether one of these actions would independently be sufficient or what other methods of conducting due diligence may meet this requirement. Where possible, a plaintiff should likely take both actions and allege as much in their complaint.

Alternatively, defendants should highlight where any of the aforementioned facts are missing or appear less fulsome than the committee’s allegations in *Nimble Gravity*. In addition, as the court confirmed, the main objective of these requirements is to provide a defendant with “sufficient information to identify the payment in question,” and where there are unique facts that make it difficult for a defendant to do so even where the plaintiff has met the bare elements of the claim, that distinction should be emphasized. Defendants should also be aware that in light of this ruling, it would be unwise to ignore a demand letter if they believe that they have potent affirmative defenses that if identified in response could support an argument that the plaintiff failed to conduct sufficient diligence.

Separately, for constructive fraudulent transfers, *Nimble Gravity* shows that a plaintiff should allege the (1) transfer date, (2) face amount, (3) transferee, (4) transferor, and (5) an allegation that the transfer was for less than reasonably equivalent value. Under *Nimble Gravity*, this final prong can be met by alleging that the transfer was not made on account of an antecedent debt, although allegations of a similar level of specificity (or, perhaps more appropriate, lack thereof) would likely also be sufficient. Although the decision does not substantively address allegations of the debtor’s insolvency, a cautious plaintiff would be wise to include an allegation that the debtor was insolvent at the time of the transfer (bearing in mind that no evidence to support that allegation, or any of the other elements, is necessary at this stage). **abi**

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<sup>19</sup> *Id.*  
<sup>20</sup> *Id.* at \*4 (internal citations omitted).  
<sup>21</sup> *Id.*  
<sup>22</sup> *Id.*

<sup>23</sup> *In re Kivi Int’l Air Lines Inc.*, 344 F.3d 311, 314 (3d Cir. 2003) (“[T]he assumption of a contract under 11 U.S.C. § 365 bars a preference claim by a trustee.”).