

NEWS & DEVELOPMENTS

PA Bankruptcy Court Rules in *In re Merritt*

The Bankruptcy Court for the Eastern District of Pennsylvania (the Honorable Jean K. FitzSimon presiding) recently declined to decide whether a chapter 13 debtor can be granted standing to prosecute a fraudulent transfer claim on behalf of its estate under *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) because the debtor had failed to first demonstrate that it was able to satisfy the prerequisites for standing under *Cybergenics*. [*In re Merritt*](#), No. 11-18134 JKF, 2015 WL 1403093 (Bankr. E.D. Pa. May 19, 2015).

Prior to its petition date, the debtor invested in a limited liability company that engaged in real estate ventures. A parade of horrors ensued: The ventures soured, the debtor lost a series of related lawsuits, the LLC's real property was sold at auction pursuant to a state court order and the debtor's membership in the LLC was stripped from it pursuant to a state court order. The debtor thereafter filed its bankruptcy petition.

Mere days before the expiration of the two-year statute of limitations to commence avoidance claims, the debtor made demand on its trustee to file a constructive fraud claim under section 548 against the party who had purchased the LLC's real property at auction. After the trustee declined to file the claim, the debtor filed the proceeding itself, and the defendant thereafter moved to dismiss on the grounds that the debtor lacked standing.

While the debtor argued that it should be accorded standing under *Cybergenics* to prosecute the fraudulent transfer claim, the court declined to expressly consider whether *Cybergenics* may be extended to grant standing to a chapter 13 debtor. The court relied on *Geiger v. Federal Home Loan Mortgage Corp. (In re Weyandt)*, 544 F. App'x. 107 (3d Cir. 2013) to support its view that a chapter 13 debtor has two equal and independent burdens to demonstrate that it should be granted standing. First, the debtor must persuasively explain why *Cybergenics* should apply to a chapter 13 case. Second, the debtor must demonstrate that, under the particular circumstances of its case, the trustee wrongfully failed to carry out its duties in declining to bring the action directly.

Here, the court held that it did not need to determine whether *Cybergenics* could apply to grant standing to a chapter 13 case because the debtor had failed to demonstrate that it could satisfy the *Cybergenics* factors even if that test were applicable. In this regard, the court noted that the debtor had materially delayed in making demand on the trustee and the trustee did not have adequate time to fairly evaluate the claim pursuant to rule 9011 of the Federal Rules of

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Bankruptcy Procedure. The court noted that the property at issue was sold at auction pursuant to a state court order, and therefore the sales price arguably equated to reasonably equivalent value as a matter of law. Finally, the court noted that the property sold at auction and subject to the fraudulent transfer claim was owned by the LLC. As the property was not owned by the debtor but by the LLC, the debtor had no interest under state law in the property on which to base a claim under section 548.

Keywords: bankruptcy and insolvency litigation, standing, fraudulent Transfer, section 548, *Cybergenics*

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