

Sidebar

Gifts, The Real Thing: Overcoming § 347(b) in Chapter 11 Liquidating Cases

©By Catherine Peek McEwen

Unclaimed funds in a chapter 11 liquidating case can become a gift in a very real sense. A little forward-thinking draftsmanship coupled with a civic conscience can overcome the unsatisfactory consequences of § 347(b) of the Bankruptcy Code.

Here is what happens by default to unclaimed funds in a liquidating 11 under § 347(b): Either they become "the property of the debtor" – usually a defunct shell – "or of the entity acquiring the assets of the debtor, as the case may be." 11 U.S.C. § 347(b). In short, they don't go anywhere that makes sense. Here is what could become of those same unclaimed funds if specifically provided for in the plan: A specially equipped playground for handicapped children, bankruptcy filing software for a *pro bono* legal services provider, fees for inner city children to attend Boys & Girls Club events, endowment for a law student clinic at a local law school, and, well, the list is limitless.

So how do chapter 11 practitioners and their willing clients transform unclaimed funds into such feel-good projects? Simple. Provide a default provision in your chapter 11 liquidating plan for what happens if distributions on a claim cannot, for some reason, reach their target. In that event, direct where such funds should go. *See In re Future Trust, Inc.*, 387 B.R. 574, 578 (8th Cir. 2008) ("The confirmed plan controls what if any actions or conditions to participation in plan distributions are required. The plan also controls what happens when distributions are attempted via checks which are not cashed or via checks which are returned as undeliverable."). The best practice will also provide for the debtor to make a second attempt to get the funds to the original intended recipient or for the passage of a reasonable period of time for the original intended recipient to file a request for the unclaimed funds.

A simple example from a recent case of mine, *In re Quick Service Foods, Inc.*, a liquidation of a chain of Church's Fried Chicken franchises, reads:

No Distribution of less than twenty-five dollars (\$25.00) shall be made to the holder of any Claim unless a request therefor is made in writing to the Liquidating Trustee. Furthermore, checks issued in respect of Allowed Claims shall be null and void if not negotiated within one hundred and eighty (180) days after the date of issuance thereof. Requests for reissuance of any check shall be made directly to the Liquidating Trustee by the holder of the Allowed Claim with respect to which such check originally was issued. Any claim in respect of such a voided check shall be made on or before the later of (a) the first anniversary of the date on which such Distribution was made and (b) one hundred and eighty (180) days after the date of the issuance of such check. After such date, all claims in respect of void checks shall be discharged and forever barred. All unclaimed Distributions shall be transferred to Bay Area Legal Services after post-confirmation fees and expenses are paid.

Quick Service Foods, Case No. 8:08-bk-02797-CPM, Doc. No. 193 (Chapter 11 Plan of Liquidation dated 7-31-08, Art. IX, section 9.2) (Bankr. M.D. Fla.). That last sentence resulted in a modest gift of \$388.30, but the recipient's gratitude was heartfelt. The gift went towards helping to "resolve the civil legal problems of more than 22,000 low-income families who cannot have afforded to hire lawyers," said the recipient's executive director.

The support for redistribution provisions is derived from the *cy pres* doctrine. This doctrine evolved, generally, in the law on charitable trusts and is applied when the stated purpose of the trust cannot be fulfilled. In such cases, the court will modify the trust consistent with the intent. *Cy pres* means "as near as possible." The policy behind the doctrine is the prevention of forfeiture. And this anti-forfeiture policy is appropriately extended to bankruptcy cases under appropriate circumstances such as a liquidating 11.

The Bankruptcy Court for the Southern District of Florida has a local rule, LBR SD 3011-1, that can serve as a road map for anyone who is interested in treating unclaimed funds in a liquidating 11 in some way other

than as § 347(b) dictates. The rule may be accessed through the court's website, <http://www.flsc.uscourts.gov/>. Rule 3011-1 suggests that such a plan may provide for redistribution "to other creditors or administrative claimants or donated to a not-for-profit, nonreligious organization identified in the plan or disclosure statement" The rule even provides a safety net for those who fail to consider this issue before the plan is drafted – the disbursing agent may file a motion proposing disposition of unclaimed funds.

But the purpose of this paper is to avoid the need for a safety net, one that might count only if a local rule provides for it. So, go ahead, call up your electronic form chapter 11 liquidating plan from your forms folder now, and insert a placeholder for an optional redistribution provision. The placeholder will prompt those in your firm who are working on the plan to have a nice conversation with the client about the client's favorite charitable organizations. If the client doesn't care, then the firm can suggest a local legal aid office which provides *pro bono* legal services to the poor. And judges can help combat forfeiture by adding a box to their disclosure statement hearing checklist for liquidating plans: " *Ask whether there is a redistribution provision for unclaimed/undistributable funds.*"