

## **Paying it Forward by Paying Attention to Liquidating Chapter 11 Plans and Trusts Can Do a Truckload of Good**

By Judge Catherine Peek McEwen

Perhaps you've stumbled across the paper lodged on my webpage titled, "Gifting, The Real Thing: Overcoming § 347(b) in Chapter 11 Liquidating Cases" ([http://www.flmb.uscourts.gov/judges/tampa/mcewen/Gifting\\_Article\\_Ch11.pdf](http://www.flmb.uscourts.gov/judges/tampa/mcewen/Gifting_Article_Ch11.pdf)). If not, then now is a good time to do so. If so, then now is a good time for a refresher. By paying attention when drafting liquidating plans or creditor trusts, the debtor in possession can do some real good for its community by "paying it forward." What happened recently in the very old consolidated case of United Schools, Inc. et al. hammered home this point.

In the 1989 (yes, you read that right) consolidated chapter 11 cases of three affiliates that operated truck driving schools, the plan's center point was the funding an irrevocable creditor trust with some assets, including, importantly, a life insurance policy on the life of an older gentleman who, sadly, was not expected to live very long. As it turned out, the gentleman defied odds and lived until 2010. The trust agreement included a provision naming the creditors as beneficiaries and prescribing how their distributions would be calculated until their allowed claims were paid. The trust agreement also included provisions permitting the trustee, a bank that ultimately became Bank of America through a series of mergers, to seek guidance from the court on any trust issue.

Fast forward to 2016 when DIP lawyer Tom Little filed a motion seeking guidance on what to do with surplus funds; the creditors had been paid in full and the trustee had apparently done very well in investing the trust assets. The Court saw a hole in the original trust agreement big enough to drive a truck through in that no provision was made for surplus funds, and the transfer of the assets to the trust was irrevocable. The Court suggested that the trustee consider charitable uses, including selecting a legal services corporation in each of the three cities in which the debtor had schools at the time and distributing the surplus funds one-third to each. The trustee selected Bay Area Legal Services, Inc. (BALS) in the Tampa Bay area and two similar legal service providers in cities in two other states. This approach is consistent with the holding of *In re Xepdior, Inc.*, 354 B.R. 218 (Bankr. N.D. Ill. 2006).

BALS recently reported to the Court that it had received almost \$75,000 from the trust! But you don't have to have a truckload of surplus funds to warrant attention to the "what-if?" issue in liquidating plans or creditor trusts. Even a small donation is appreciated by charities. 10-4, Good Chapter 11 Drafting Buddies!!