IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE: Johnny Brackston Hill and Lisa Jo Ann Boutwell, Debtors.	))))))	Case No. 18-2317
IN RE: Peggy Bedsole Proffitt, Debtor.	)))))	Case No. 18-4608

ORDER DENYING MOTIONS TO MODIFY CONFIRMED PLANS

These two chapter 13 cases are before the court on motions by the trustee to modify the debtors' confirmed chapter 13 plans.[1] In each case, the debtor was injured after filing bankruptcy, settled her postpetition personal injury claim, but cannot exempt any of the net settlement amount. The trustee wants to pay the settlements to unsecured creditors on top of what the debtors are paying under their confirmed plans.

First, a note about what is not involved in these cases. These cases are not about prepetition personal injury claims – which debtors presumably know about when they file for bankruptcy. These cases are also not about whether the settlement proceeds from a postpetition personal injury claim are part of the chapter 13 estate; as discussed below, they are under Code § 1306. And these cases are

[1] The court defers ruling on the motion to modify (doc. 60) in *In re Tolbert*, case no. 21-20107, because the debtor in that case did not appear at the hearing on the motions. The court will enter a separate order continuing the motion in that case for status.

not about whether the settlement proceeds must be paid to the trustee and applied to the debtors' plan payments; they will be.

The question for the court is whether the settlement proceeds should be applied to the cases at the confirmed percentage to unsecured creditors or at a higher percentage, that is, on top of the debtors' payments under the confirmed plan. If the former, all the money goes to the trustee but is applied toward the amounts the debtors are required to pay under their confirmed plans. If the latter, the injured debtors get no benefit at all from the settlement proceeds because the proceeds will all go to unsecured creditors in addition to payments from the debtors under their confirmed plans. After reviewing the applicable law and carefully considering the record in each case (including the trustee's briefs), the court denies the trustee's motions for the reasons below.

Background

The parties filed joint stipulations which are part of the record. The court also held an evidentiary hearing on May 12, 2023, and heard testimony from debtor Lisa Jo Ann Boutwell and debtor Peggy Bedsole Proffitt in case nos. 18-2317 and 18-4608, respectively.

Case No. 18-2317, Lisa Jo Ann Boutwell

Mrs. Boutwell was injured at a Dollar General store in August 2019 when heavy merchandise fell from a shelf onto her head.[2] The blow caused herniation of discs in her neck at levels C7 and C8 with bulges at two other levels. Her injuries required spinal surgery with a

[2] The stipulation (doc. 105) says "slip-and-fall accident," but that is not correct,, according to Mrs. Boutwell's testimony.

hospital stay. The doctor told Mrs. Boutwell to stay in bed for three months and to not lift anything heavier than a dinner plate during that time. She also had to undergo physical therapy.

Mrs. Boutwell testified that, despite the neck surgery, she is "still recovering" now, three years post-accident, and still has significant neck pain from the injury. She was seeing a pain management specialist for lower back pain before the injury, and she still sees the specialist because the injury made her preexisting back pain worse. She uses a TENS unit muscle stimulator daily for pain management.

Mrs. Boutwell is on social security disability; her husband (the joint debtor) works as a contractor for paper mills. Mrs. Boutwell testified that money is very tight in their household and they "live paycheck to paycheck." Her husband and she have only one working vehicle; her husband had an accident in their other vehicle (hit a deer), but they do not have the $6,000 needed to repair it. They had to borrow $3,500 from parents while he took off work to care for her after the accident.

In October 2021, the court granted the debtors' motion to employ special counsel for Mrs. Boutwell's claim against Dollar General. (*See* docs. 62, 69). That same month, the court granted the debtors' motion to modify their confirmed plan to extend the plan term; according to the motion, the debtors were struggling with their plan payments and Mrs. Boutwell was still suffering from ongoing medical issues related to the Dollar General accident. (*See* docs. 65, 72).

Mrs. Boutwell settled her claim against Dollar General for $45,000. The net settlement (after payment of attorney's fees, medical bills, etc.) was $19,685.61, calculated as follows (*see* order approving settlement, doc. 101):

- $15,750.00 attorney's fee for special counsel (35%)
- $3,463.65 reimbursement for expenses incurred by special counsel

- $6,100.74 payment of subrogation and medical expenses
- $19,685.61 remaining balance (being held by the trustee pending further order of the court).

Mrs. Boutwell and her husband have already used the $7,750 personal property exemption they can each claim under Alabama law, so she cannot exempt any of the net settlement amount. The debtors are currently paying $852 a month to the trustee under a confirmed plan paying a 40.25% dividend to unsecured creditors. (*See* docs. 83, 105). The trustee requests that the nonexempt proceeds of $19,685.61 be applied to the plan in addition to the monthly payments made by the debtors to increase the dividend to unsecured creditors to 77.07%.

Case No. 18-4608, Peggy Proffitt

In July 2022, Ms. Proffitt caught her foot on a misplaced mat near a sliding door coming out of a Walmart store and "fell flat" forward onto the concrete. She suffered a deep cut on her elbow and a gash to her nose. Ms. Proffitt still has a scar on her nose as a result and has received estimates of about $500 for surgery to minimize the scar. The fall also exacerbated Ms. Proffitt's preexisting back pain.

In November 2022, the court approved employment of special counsel to handle Ms. Proffitt's trip-and-fall claim against Walmart. (*See* docs. 33, 37). She settled that claim for $13,000. The net settlement is $7,685.39, calculated as follows (*see* order approving settlement, doc. 58):

- $4,550.00 attorney's fee for special counsel (35%)
- $189.57 reimbursement for expenses incurred by special counsel
- $575.04 payment of subrogation expenses

- $7,685.39 remaining balance (being held by the trustee pending further order of the court).

Ms. Proffitt has already used her $7,750 personal property exemption under Alabama law and cannot exempt any of the net settlement amount. She is currently paying $964 a month to the trustee under a confirmed plan that pays a 62.19% dividend to unsecured creditors. (*See* doc. 28). The trustee requests that the nonexempt proceeds be paid into the case in addition to the debtor's monthly payments to increase that percentage to 76.86%, although he does not object to Ms. Proffitt being reimbursed $240 from the nonexempt settlement amount for out-of-pocket expenses (mainly insurance co-pays) for which she provided proof.

Legal Analysis

Under Bankruptcy Code § 1329, "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified . . . to . . . increase or reduce the amount of payments on claims" to unsecured creditors under the plan. The court's analysis of the modifications here starts with what constitutes property of the estate. The court next discusses the "disposable income" test of Code § 1325(b) and the liquidation test of Code § 1325(a), as well as the "ability-to-pay" standard that the Eleventh Circuit applies to chapter 13 plan modifications. Finally, the court analyzes whether the chapter 13 plans should be modified in the court's discretion to increase the percentage to unsecured creditors under Code § 1329.

I. The nonexempt proceeds are property of the debtors' chapter 13 bankruptcy estates.

Under Code § 541, a debtor's chapter 13 bankruptcy estate consists of all interest in property possessed by the debtor at the time of the bankruptcy filing. Under Code § 1306(a), the estate also generally includes property that the debtor acquires after the filing. While some estate property "is vested in the debtor at confirmation, under [Code §] 1327(b), . . . property acquired later vests in the estate, under [Code §] 1306(a), until the case ends or is converted . . . ." *See In re Waldron*, 536 F.3d 1239, 1243 (11th Cir. 2008). And this district's required local chapter 13 plan form provides that the property of the estate does not vest in the debtor until dismissal or discharge. The nonexempt proceeds in these cases are thus property of the debtors' estates under both Code § 1306 and the confirmed plans in each case.

II. <u>The Bankruptcy Code does not require that chapter 13 plans be modified to account for the postpetition personal injury claim proceeds.</u>

At confirmation, a debtor's plan must satisfy several separate requirements, including the "best interest of creditors" test of Code § 1325(a)(4) and the "disposable income" test of Code § 1325(b). Under the disposable income test, a debtor must apply all of his or her projected disposable income to the plan for the applicable commitment period (three years for below-median debtors or five years for above-median debtors) if unsecured creditors are not being paid 100% of their claims. And under the "best interest of creditors" test, also known as the liquidation test, unsecured creditors must receive at least as much as they would if the case were a chapter 7 liquidation. Both tests apply to proposed plan modifications, so the court discusses each as they relate to the nonexempt settlement proceeds. *See* 11 U.S.C. § 1329(b)(1); *In re Stallworth*, No. 16-4277 (Bankr. S.D. Ala. July 12, 2017) (en banc) (holding that § 1325(b)'s disposable income test applies to postconfirmation modifications).

A. The debtors' postpetition personal injury claims are assets – not income – under the disposable income test of Code § 1325(b).

The trustee contends that denying the modifications will permit a debtor "to cut short a plan without devoting all of his disposable income for the applicable plan term." (*See* trustee brief, doc. 57 in case no. 18-4608, at p.3). He makes a similar "disposable income" argument in his supplemental brief in case no. 18-4608 (doc. 65), and in his brief in case no. 18-2317 (doc. 106). But this argument confuses the liquidation test of § 1325(a)(4) with the "projected disposable income test" of § 1325(b).

Under the disposable income test, if a debtor's income changes during the plan term, the plan payments may be modified up or down as a result of the change. *See In re Tennyson*, 611 F.3d 873, 879 (11th Cir. 2010). The problem is that some courts – including the district court in *McKinney v. Russell*, 567 B.R. 384 (M.D. Ala. 2017), heavily relied on by the trustee – mischaracterize proceeds from a personal injury settlement as "income" when considering whether a plan should be modified.

Income and assets are different concepts. Under Code § 109(e), "[o]nly an individual with regular income . . . may be a debtor under chapter 13 . . . ." An "individual with regular income" is a person "whose income is sufficiently stable and regular to enable such individual to make payments under" a chapter 13 plan. *See* 11 U.S.C. § 101(30). A key feature of a chapter 13 case versus a chapter 7 case is that the "debtor does not surrender property [i.e., assets] to a trustee. Instead, chapter 13 allows an income-earning debtor to hold onto her property while she pays her creditors back over a three-to-five-year period out of her regular income[,]" while a chapter 7 trustee liquidates a debtor's assets to pay her creditors. *See In re Calixto*, 648 B.R. 119, 123 (Bankr. S.D. Fla. 2023) (citation and quotation marks omitted).

Accordingly, "the projected disposable income test and the liquidation test are separate, not stacked." *See In re Ertha*, No. 18-551 (Bankr. S.D. Ala. Dec. 2, 2021); *see also In re Villegas*, 573 B.R. 844, 850-51 (Bankr. W.D. Wash. 2017) (the liquidation and disposable income tests are separate; "that is the essence of Ch. 13, paying the value of assets which might otherwise be liquidated by a trustee in a Ch. 7, from the debtor's income over the life of the plan"). "[C]ourts have repeatedly held that only regular income and substitutes [are] counted in the determination of disposable income for the purposes of the chapter 13 test." *See In re Brown*, No. 13-35593-GMH, 2014 WL 4793243, at *2 (E.D. Wis. Sept. 24, 2014) (citation and quotation marks omitted). "'The test is whether the asset in question is an anticipated stream of payments. If it is a stream of payments, the payments must be included in projected income. If the asset is not a stream of payments, it is not included.'" *Id.* (citation omitted).

Turning to the nonexempt personal injury settlement proceeds here, "in a chapter 13 case [unlike in a chapter 7 case] only the individual debtor can bring a litigation claim." *See In re Calixto*, 648 B.R. at 124. But "because a chapter 13 plan is funded from a debtor's income (rather than her assets), successful prosecution of a litigation claim in a chapter 13 case is usually less important to creditor recoveries . . . ." *See id.* While the valuation and prosecution of the claim may be relevant to the liquidation test – particularly for prepetition claims – any proceeds from the claim are not "income." *See id.* at n.40; *In re Frysinger*, 648 B.R. 386, 390 (Bankr. D. Or. 2022) (bank account with funds from debtor's personal injury settlement not "income"). In short, the § 1325(b) disposable income test does not apply to the settlement proceeds here because those proceeds are not "income."

B. Postpetition personal injury claims are not included in the liquidation test of Code § 1325(a)(4) when considering a plan modification under § 1329(a).

The United States Supreme Court instructs courts that statutes must be interpreted according to their "plain language" unless the result would be absurd. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); *see also In re Tennyson*, 611 F.3d at 877. Under the "plain language" of Bankruptcy Code §§ 348(f) and 541, a postpetition personal injury claim is not included in a hypothetical chapter 7 and thus should not be included in § 1325(a)(4)'s liquidation test.

Code § 1329(b)(1) states that the confirmation requirements of Code § 1325(a) apply to a proposed postconfirmation modification of the plan. That includes the liquidation test of § 1325(a)(4). Under § 1325(a)(4),

> the court shall confirm a plan if . . . the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date . . . .

(emphasis added). While this hypothetical chapter 7 liquidation test applies to plan modifications, the wrinkle is that postpetition personal injury claims like the ones at hand would not be property of the bankruptcy estate if these cases were filed under chapter 7 or, absent bad faith, converted to chapter 7.

Under Code § 541(a), the bankruptcy estate is broad and includes "all legal or equitable interests of the debtor in property as of the commencement of the case." But while § 541(a) "is broad, it is not without limits; it is limited temporally by the plain language of the statute to interests that exist as of the commencement of the case . . . ." *See In re Berris*, 458 B.R. 601, 610 (Bankr. S.D. Fla. 2011). Congress knows how to include postpetition assets in a chapter 7 bankruptcy and has done so for inheritances, divorce property settlements, and life insurance proceeds to which the debtor becomes entitled within 180 days of the petition – but not postpetition personal injury claims.

See 11 U.S.C. § 541(a)(5). Likewise, absent bad faith, Code § 348(f) defines what constitutes property of the estate on conversion from chapter 13 to chapter 7: "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion . . . ." (emphasis added).

A postpetition personal injury claim, while part of the chapter 13 estate under Code § 1306, is thus not included in the liquidation analysis because that claim would not be part of a hypothetical chapter 7 under either § 541(a) or 348(f). As explained in a preeminent bankruptcy treatise:

> The most logical and practical method for such valuation [for liquidation test purposes] is to consider the value of the property that would have been liquidated in a chapter 7 case filed on the date the chapter 13 petition was filed, i.e., that property that became property of the estate under section 541, but not that property that came into the estate only pursuant to section 1306(a). It is the property held on the date of the petition that must be reflected in the schedules that the court, the trustee and creditors must rely on in deciding whether confirmation is appropriate. The only postpetition additions to such property that can be considered are those that are encompassed within section 541, such as inheritances, divorce property settlements and life insurance proceeds to which the debtor becomes entitled within 180 days of the petition. Thus, a cause of action arising from postpetition events is not property of the estate for this purpose.
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> . . . [I]t is most logical to look to the property that would have been liquidated in a chapter 7 case filed on the date the chapter 13 case was filed, because it is that property that would be liquidated if the chapter 13 case were later converted to chapter 7. Thus, the acquisition of other property that would not have been liquidated in a chapter 7 case filed on the date that chapter 13 case was filed should not be grounds for a new and revised application of the [liquidation] test if a party moves to modify the plan. The only situation in which any other property might be liquidated would be a case in which the debtor converted from chapter 13 to chapter 7 in bad faith.

8 *Collier on Bankruptcy* ¶1325.05 (Richard Levin & Henry J. Sommer eds., 16th ed.).

In other words, applying the liquidation test to a modification "does not mean . . . that the value of the property owned by the debtor at the time of the modification is considered." *See* 8 *Collier on Bankruptcy* ¶1329.05[3] (Richard Levin & Henry J. Sommer eds., 16th ed.). The liquidation "test turns on what would have happened had the debtor filed a chapter 7 case instead of a chapter 13 case." *See id.* "If a chapter 7 case had been filed, only property of the estate under section 541 would have been available to creditors and not the additional property that became property of the estate under section 1306(a)." *Id.* Thus, "property acquired after the petition, other than the limited types that become property of the estate under section 541, is not relevant to application of [the liquidation test] to a proposed plan modification." *See id.* "Indeed, if a case is converted from chapter 13 to chapter 7, property of the estate ordinarily is based on the property the debtor had on the date of the petition, and not the date of conversion." *Id.*

The court agrees with the analysis set forth by the bankruptcy court in *In re Taylor*, 631 B.R. 346 (Bankr. D. Kan. 2021). That court held that Code § 348(f), not § 1306, controls the property to be included in the liquidation analysis at modification. *See id.* at 353. Although excluding postpetition settlement proceeds from the liquidation analysis may produce a less favorable outcome for creditors, "no prepetition creditor has any (reasonable) expectation of payment from such property and exclusion of the [proceeds] promotes the fresh start policy [of the Bankruptcy Code]." *See id.* at 354 (citation, quotation marks, and brackets omitted). The court then denied the chapter 13 trustee's proposed modification which required postpetition settlement proceeds to be paid to unsecured creditors because it found that the debtor's postpetition personal injury claim was not included in the liquidation test at modification. *See id.* at 354-55; *see also generally In re Madrid*, No. 19-42260-MJH, 2023 WL 3563019 (Bankr. W.D. Wash. May 18, 2023).

Applying the liquidation test to a modification this way does not render that test obsolete; <u>pre</u>petition property (as well as inheritances, divorce property settlements, and life insurance within 180 days) is still included in the analysis. For example, if a debtor lists a prepetition personal injury claim in her schedules and values that claim at $5,000 – which the trustee then calculates as part of the liquidation test at the time of confirmation – but ends up settling the claim postpetition for $25,000, the extra $20,000 must be included in the liquidation test at modification and will go all or in part to unsecured creditors.

III. <u>The Eleventh Circuit has adopted an "ability-to-pay" standard.</u>

Instead of applying the statutory liquidation and disposable income tests, the Eleventh Circuit has adopted a non-statutory "ability-to-pay" standard to proposed plan modifications based on postpetition assets. According to the Eleventh Circuit in *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008), "Congress intended that [a chapter 13] debtor repay his creditors to the extent of his capability during the [c]hapter 13 period" of three to five years. *See id.* at 1246 (citation, quotation marks, and ellipses omitted). The *Waldron* court continued that "'[c]ertainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors.'" *See id.* (citation omitted). When a debtor acquires postpetition assets, her "creditors may share in any unanticipated gain if the court determines that these assets are available to repay debts. . . . Under the ability-to-pay standard, creditors share both the gains and losses of the debtor." *See id.* The primary issue in *Waldron* was whether the bankruptcy court had the discretion to order the debtors to amend their schedules to disclose a postpetition personal injury claim (answer: yes), and the court did not consider the specifics of plan modification under Code § 1329.

Following *Waldron*, courts within the Eleventh Circuit have held that postpetition assets like the settlement proceeds here must be paid into a chapter 13 case even though they would not have been included in the bankruptcy estate if the case were a chapter 7. *See, e.g.*, *In re Tinney*, No. 07-42020-JJR13, 2012 WL 2742457, at *3 (Bankr. N.D. Ala. July 9, 2012). This court has previously ordered that nonexempt postpetition assets be paid to the chapter 13 trustee and is not changing its ruling on that issue today. *See In re Davis*, Case No. 16-3550 (Bankr. S.D. Ala. Sept. 13, 2022). The court is not convinced that doing so is required by *Waldron*. But as a practical matter, requiring that nonexempt postpetition assets be paid to the trustee ensures that the money will not "get away" if a debtor does not complete his or her plan. And it is also consistent with this district's plan form providing that estate property does not vest in the debtor until dismissal or discharge. *See In re McIntosh*, No. 11-03417-7-MAM, 2015 WL 13774756, at *2 (Bankr. S.D. Ala. Jan. 27, 2015).

IV. The nonexempt proceeds here do not increase the debtors' ability to pay and are not "windfalls" warranting plan modification to increase the percentage paid to unsecured creditors.

The remaining issue is whether the nonexempt personal injury settlement proceeds should be applied to the debtors' cases at the confirmed percentages or, instead, on top of the debtors' confirmed plan payments to increase the percentage paid to unsecured creditors. The answer will determine whether the debtors will receive any benefit from the settlements arising from their injuries.

A confirmed chapter 13 plan – including the percentage paid to unsecured creditors – has "*res judicata* effect unless" later modified by order of this court. *See In re Davis*, 314 F.3d 567, 570 (11th Cir. 2002). By the plain language of Code § 1329, even when a proposed modification satisfies all statutory requirements, the bankruptcy court has discretion "whether to confirm a modified plan."

See In re Guillen, 972 F.3d 1221, 1229 (11th Cir. 2020); *see also In re McAllister*, 510 B.R. 409, 430 (Bankr. N.D. Ga. 2014) ("Section 1329(a) provides that a plan *may* be modified. Accordingly, if a modification meets all of the requirements of § 1329, the [c]ourt has the discretion to approve or to disapprove the modification.") (emphasis in original). "Nothing prevents a bankruptcy court from refusing to confirm a modified plan put before it." *In re Guillen*, 972 F.3d at 1229.

Although plan modification does not require a change in circumstance, the court must still determine whether there is a legitimate reason for the proposed modification. *See id.* at 1229-30. "[C]ourts have concluded that a debtor's receipt of an increase in income, or a windfall, often provides a legitimate basis for modification of a [c]hapter 13 plan." *See In re Wilson*, 555 B.R. 547, 553 (Bankr. W.D. La. 2016). "A windfall occurs when a debtor receives an unanticipated, fortuitous, and significant benefit without earning it or planning it." *In re McAllister*, 510 B.R. at 432. "Examples of windfalls include a debtor's winning the lottery or receiving a substantial inheritance or life insurance proceeds upon the death of someone other than a spouse." *Id.*

The movant – the trustee here – has the burden of establishing a reason for the proposed modification. *See, e.g.*, *In re Peebles*, 500 B.R. 270, 273 (Bankr S.D. Ga. 2013). The trustee argues that the burden should shift to the debtor to show why the plan should <u>not</u> be modified once the trustee has proved the existence of a monetary settlement; the trustee has not cited any law for this proposition and the court declines to adopt it. But even if the burden were not the trustee's, the court would still find that there is no legitimate reason to increase the percentage to unsecured creditors in these cases.[3]

Modification is not required under *Waldron*'s "ability-to-pay" standard for two reasons. First, this court finds that – as a general rule – compensatory damages for a postpetition personal injury claim resulting from an unfortunate event that was not anticipated by the debtor at the time of filing do not constitute *Waldron*'s "substantially improved financial condition" or "unanticipated gain" that increases the debtor's ability to pay creditors. *See* 536 F.3d at 1246.

The court views postpetition personal injury claims as categorically different from other types of postpetition assets like lottery winnings, inheritances, or non-spousal life insurance proceeds which might be more appropriately considered "windfalls" that increase a debtor's ability to pay creditors. A debtor who settles a postpetition personal injury claim entered bankruptcy with an important non-property, non-monetary asset: good health and the ability to live injury-free and pain-free. The debtor is then injured as the result of another party's negligence and experiences physical pain and suffering as result. That injury and pain cannot be taken away; the best that can be done is to attempt to compensate the injured person, although imperfectly, by paying money through the tort system. Almost all tort claims settle. The settlement amount is determined by negotiation but reflects the parties' estimate of what a judge or jury would be likely to award, often adjusted downward to account for disputed liability or insurance coverage limits. From that theoretical

[3] The court is unpersuaded by the trustee's argument that the court should grant his motions because the debtors did not file written responses. Debtors' counsel – who are paid a flat "no-look" fee in this district – are at a disadvantage compared to the trustee's counsel who is paid an hourly rate from the trustee's commission borne by all the debtors in this district. Counsel for Mrs. Boutwell and Ms. Proffitt offered to file a brief in opposition, but the court told her that no further briefing was necessary after the evidentiary hearing.

compensation amount the debtor loses 33-45% for attorney's fees, plus the lawyer's expenses. Subrogation and medical expenses are also deducted from the settlement. So in the usual situation, as in the two cases here, the injured debtor is left with only a fraction of the amount supposed to represent compensation. That a non-estate asset – the ability to live injury-free – was necessarily converted to property, *i.e.*, money, should not suddenly turn that non-estate asset into an asset which must be paid to prepetition creditors. The settlement proceeds are not new assets coming into the estate like lottery winnings, an inheritance, or life insurance; the injured debtor has given consideration in the form of his or her injury. To use a term employed by some courts, the injured debtor "earned" the settlement through his or her pain and suffering.

The situation might be different if a debtor receives large punitive damages or an outsized jury verdict disproportionate to his or her injury. But receiving only a portion of what is supposed to represent compensation for an injury is not a "windfall" by any means. This court disagrees with the characterization of personal injury proceeds (as a result of a car accident in which the vehicle was totaled) as a "windfall" in *McKinney v. Russell*, 567 B.R. 384, 386 (M.D. Ala. 2017).

The trustee argues that debtors can dismiss or convert their cases to chapter 7 if they do not want their settlements to be paid into their plans in addition to their confirmed plan payments. Either of those options would cause most chapter 13 debtors to lose the homes and automobiles which they filed chapter 13 to protect. The court does not consider those options to be viable alternatives for debtors with settlements like these which will not allow them to salvage their financial situations in a chapter 7 or outside bankruptcy.

The second reason modification is not required in these two cases is that the court specifically finds that the debtors here (1) do not have an increased "ability to pay," (2) did not experience "substantially improved financial conditions," and (3) did not accrue a "windfall" or "gain" that would justify modifying the plan so that all the nonexempt personal injury settlement proceeds should be paid to creditors on top of their confirmed plan payments. Both debtors testified that they are still experiencing pain and other issues as result of their injuries. Correctly viewing the postpetition personal injury claims as assets (not income), the debtors have already given substantial value, even if non-monetary, for the assets in the form of pain and suffering. Mrs. Boutwell lives "paycheck to paycheck" and needs money to pay for car repairs and repay the couples' parents. Ms. Proffitt needs additional surgery to treat her facial scar. Remember, under the projected disposable income test of § 1325(b), these debtors are already paying all of their net disposable income into their chapter 13 cases. And all of the settlement proceeds are going to the debtors' cases at the confirmed percentages, so they will not receive any funds from the settlements unless their cases are paid in full on the confirmed terms. The court finds that there is no legitimate reason for the modification requested by the trustee and the court, in its discretion, will deny the motions.

Conclusion

To the extent the court has not specifically addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. For the reasons discussed above, the court denies the trustee's motions to modify (doc. 97 in case no. 18-2317, doc. 43 in case no. 18-4608).

Dated: May 30, 2023

Henry A. Callaway

HENRY A. CALLAWAY
U.S. BANKRUPTCY JUDGE