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

IN RE:	)	
	)	
MARTHA MARIE PERINE,	)	Case No. 16-4446
	)	
Debtor.	)	

ORDER GRANTING MOTION TO APPROVE COMPROMISE

The debtor's confirmed chapter 13 plan provided that the auto loan secured by her 2012 Hyundai Accent would be paid as secured for $7,237 with the rest of the claim to be treated as unsecured. Unfortunately, her car did not make it to the end of the case, and the question now is what should be done with the insurance proceeds.

Debtor filed a motion to approve compromise stating that the Hyundai has been totaled and that Progressive Insurance will settle the claim for $5,438.15. The remaining secured balance on claim no. 2 of Wollemi Acquisitions is $911.71 plus a small amount of accrued interest and applicable trustee's commission, so after payment of the secured claim there will be about $4,500 left over from the insurance proceeds. The debtor can exempt only $1,680 of that amount but wants it all to buy a replacement vehicle; she contends that since she has largely paid down the secured claim through her plan payments, she has "earned" that value and should not have to "pay it twice." The chapter 13 trustee opposes this request and asks that the net funds (minus the exempt $1,680) be applied to the chapter 13 case with the percentage paid to unsecured creditors to increase accordingly.

The trustee and the debtor agree that the surplus insurance funds are property of the debtor's bankruptcy estate. The dispute is over who gets the funds: the debtor or the chapter 13 trustee on behalf of the unsecured creditors, who are being paid 15.52% on their claims under the

confirmed plan. This order does not deal with the lien retention provision of the plan since the secured creditor has not objected to the debtor's motion.

The first question here is whether the debtor is entitled to "possession" of the nonexempt surplus insurance funds. The court discussed the possession issue at greater length in *In re Elmore*, case no. 20-20229, where the court denied the trustee's motion for turnover of $8,000 the debtors had in the bank at filing and allowed the debtors to retain possession of the nonexempt funds. Of course, those bank funds had to be accounted for in determining the plan payment.

In short, under Bankruptcy Code § 1306(b), "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." The default rule under Code § 1327(b) is that vesting of estate property – but not possession – changes at confirmation. However, the district plan form used in debtor's 2016 case reverses § 1327(b)'s default rule:

> **Vesting of Property of the Estate**
>
> Property of the Estate shall revest in the Debtor(s) upon discharge or dismissal of the case.[1]

The district has "elected to use this approach 'to extend the protection of the automatic stay to debtors throughout the life of the chapter 13 case.' This plan alternative is allowed under the Bankruptcy Code because [§] 1327(b) specifically says that the default rule applies 'except as otherwise provided by the plan.'" *In re McIntosh*, No. 11-03417-7-MAM, 2015 WL 13774756, at *2 (Bankr. S.D. Ala. Jan. 27, 2015) (Mahoney, J.) (internal citation omitted).

[1] The debtor filed her chapter 13 plan using the version of the plan in effect in this district at the time. The current version is more specific but the court's analysis would be the same.

Because the district form plan utilized in this case addresses vesting but not possession, it does not alter the default provision of § 1306(b) that the debtor remains in possession of all estate property except as provided in a confirmed plan or order confirming plan. *See, e.g.*, *In re McConnell*, 390 B.R. 170, 177 (Bankr. W.D. Pa. 2008). That includes the insurance proceeds here since they are not addressed in the plan or confirmation order.

The second issue is whether the debtor's confirmed chapter 13 plan should be modified to account for the surplus insurance proceeds. To apply the surplus insurance funds to the case and increase the percentage to unsecured creditors from the current 15.52% would be in effect a plan modification under Code § 1329. One of the requirements for confirmation of a chapter 13 plan and also any subsequent plan modification is that the unsecured creditors must receive at least as much as they would if the case were a chapter 7 liquidation. *See* 11 U.S.C. §§ 1325(a)(4), 1329(b)(1). Because unliquidated causes of action – for example, personal injury claims – are not included in calculating the plan payment under § 1325(a)(4), the non-vesting provision of this district's plan form ensures that those assets remain property of the estate (to the extent not exempt) to be paid to the trustee for distribution to unsecured creditors if and when liquidated.

But here, the value of the 2012 Hyundai Accent has already been factored into the liquidation analysis and the calculation of plan payments. The insurance proceeds are a substitute for the wrecked vehicle – not new assets or value coming into the estate. The insurance proceeds of $5,438.15 are less than the total of the $7,237 secured claim (which has already been accounted for in the plan and mostly paid) and the exempt amount of $1,680 (which does not affect the liquidation analysis). The existing plan met the liquidation test of Code § 1325(a)(4) at confirmation and meets it now.

Although a change in circumstance is not required to modify a confirmed plan, the bankruptcy court must determine whether there is a legitimate reason for the proposed modification. *See In re Guillen*, 972 F.3d 1221, 1229-30 (11th Cir. 2020). Here, the court does not find such a reason and declines to modify the plan under § 1329 to increase the percentage on unsecured claims or require that the surplus funds be applied toward the case.

As with unliquidated claims, the result would be different if the insurance proceeds were more than the total of the secured claim and exemptible amount and had not already been fully accounted for in the § 1325(a)(4) liquidation analysis. Or if the debtor's plan payment record were bad, the court would consider ordering that some or all of the nonexempt surplus insurance proceeds be paid to the trustee for application to the case even if the percentage to unsecured creditors did not change.

The court thus grants the debtor's motion to approve settlement as follows: Progressive Insurance is directed to send $4,338.15 directly to the debtor to use toward a replacement vehicle and $1,100 to the Chapter 13 Trustee, P. O. Box 1779, Memphis, TN 38101. The trustee shall apply the funds in this order: the creditor's secured claim and any accrued interest and applicable commission; and then any remainder to the debtor.

After payment of its secured claim, Wollemi Acquisitions shall release the certificate of title to the vehicle to the insurer at the following address: IAA MS Title Center, Stock# 30225773**,** 100 Auction Way**,** Byram, MS 39272.

Dated: June 28, 2021

Hon. A. Callaway

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE