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

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

IN RE:	)	
	)	
Peggy Bedsole Proffitt,	)	Case No. 18-4608
	)	
Debtor.	)	

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

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; prepetition 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. The Eleventh Circuit has adopted an "ability-to-pay" standard.

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 not 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

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[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
U.S. BANKRUPTCY JUDGE

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

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE FOR THE SOUTHERN DISTRICT OF ALABAMA, **Appellant,**	)	
vs.	)	**Civil Action No. 23-00221-KD-N**
JOHNNY BRACKSTON HILL, LISA JO ANN BOUTWELL, **Appellee.**	)	
In re: **JOHNNY BRACKSTON HILL, LISA JO ANN BOUTWELL,** **Debtors.**	)	**Bankruptcy Case No. 18-02317-HAC**
CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE FOR THE SOUTHERN DISTRICT OF ALABAMA, **Appellant,**	)	
vs.	)	**Civil Action No. 23-00219-KD-N**
PEGGY PROFFITT, **Appellee.**	)	
In re: **PEGGY PROFFITT,** **Debtor.**	)	**Bankruptcy Case No. 18-04608-HAC**

ORDER

This action is before the Court[1] on appeal from the decision of United States Bankruptcy Judge Henry A. Callaway entered May 30, 2023; the record on appeal (doc. 4, Civil Action No. 23-00219-KD-N; doc. 5, Civil Action No. 23-00221-KD-N); Trustee Christopher T. Conte's

[1] The Trustee's unopposed Motion to Consolidate is moot. See Civil Action No. 23-00221-KD-N (Doc. 4).

Brief of Appellant (doc. 11,[2] Appellees Johnny Brackston Hill, Lisa Jo Ann Boutwell and Peggy Proffitt's Answering Briefs (doc. 12), and Reply Brief of The Trustee (doc. 13); and the Trustee's Appendices to the Appeal (doc. 11, Civil Action No. 23-00219-KD-N; doc. 14, Civil Action No. 23-00221-KD-N).

I. Background

Chapter 13 Debtor, Lisa Jo Ann Boutwell and Chapter 13 Debtor Peggy Proffitt were both injured in post-petition accidents that resulted in nonexempt net settlement proceeds. Boutwell was injured when merchandise fell on her head in a Dollar General Store. Proffitt was injured when she tripped and fell at a Wal-Mart Store. Boutwell's net settlement proceeds are $19,685.61, and Proffitt's net settlement proceeds are $7,685.39, both after payment of all attorney fees and costs and subrogation interests. Proffitt has an additional expense of $240.00, an insurance co-pay and possible expense of $500.00 for surgery on her nose. Boutwell and her husband Johnny Brackston Hill are currently paying $852.00 per month to the Trustee under a confirmed plan that pays a 40.25% dividend to unsecured creditors. Proffitt is paying $964.00 per month to the Trustee under a confirmed plan that pays a 62.19% dividend to unsecured creditors. The Debtors have used their respective $7,750.00 personal property exemption under Alabama law and cannot exempt any of the net settlement proceeds.

The Trustee filed motions pursuant to 11 U.S.C. § 1329 to modify the Debtors' respective Chapter 13 plans to increase the dividend to the unsecured creditors based on the existence of the post-petition net settlement proceeds. The Trustee requested that Boutwell's nonexempt proceeds of $19,685.61 be applied to the plan, in addition to the Debtors' monthly payments, to increase the percentage paid to unsecured creditors to 77.07%. The Trustee requested that

[2] For ease of reference, citations for the Brief of Appellant, Response and Reply are to the docket of Civil Action No. 23-cv-00221-KD-N.

Proffitt's nonexempt proceeds of $7,685.39 be applied to the plan, in addition to the Debtors' monthly payment, to increase the percentage paid to unsecured creditors to 76.86% but does not object to reimbursement of $240.00 to Proffitt from the nonexempt settlement proceeds for out-of-pocket expenses.

The Bankruptcy Court denied the motions. The Bankruptcy Court found that the Debtors' non-exempt settlement proceeds from the post-petition personal injury claims are property of the Debtors' estates under 11 U.S.C. § 1306(a). However, the Bankruptcy Court determined that the settlement proceeds are "assets" of the estates and not "projected disposable income" under 11 U.S.C. § 1325(b), and therefore, the "projected disposable income" test did not provide a basis for modification.

The Bankruptcy Court also found that the settlement proceeds, even though part of the bankruptcy estate, are not included in the liquidation test of 11 U.S.C. § 1325(a)(4) because they "would not be part of a hypothetical Chapter 7 under 11 U.S.C. § 541(a) or § 348(f)" (applying the theory that a hypothetical Chapter 7 liquidation necessitates a hypothetical conversion to a Chapter 7 and as a result the property of the estate is "based on the property the debtor had on the date of the petition not the date of the conversion.").

The Bankruptcy Court then determined that under the Eleventh Circuit's "non-statutory 'ability to pay' standard," which applies "proposed plan modifications based on post-petition assets," the settlement proceeds do not increase the Debtors' ability to pay, are not "windfalls, and therefore, do not warrant a "plan modification to increase the percentage paid to unsecured creditors" (doc. 1).

The Bankruptcy Court ordered the Trustee to apply the settlement proceeds to the respective Chapter 13 plans at the current percentage rate for the unsecured creditors,[3] rather than a higher percentage rate. The Trustee filed notices of appeal. The Trustee's motions for stay pending appeal was granted.

II. Appellate jurisdiction, venue, and standard of review

The Court has appellate jurisdiction to hear final orders of the Bankruptcy Court pursuant to 28 U.S.C. § 158(a)(1) ("The district courts of the United States shall have jurisdiction to hear appeals [ ] from final judgments, orders, and decrees[.]"). Venue is proper because the appeal "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." Id.

A bankruptcy court's findings of fact are reviewed for clear error. In re Colortex Industries, Inc., 19 F.3d 1371, 1374 (11th Cir. 1994) ("The district court makes no independent factual findings; accordingly, we review solely the bankruptcy court's factual determinations under the "clearly erroneous" standard."); In re Daughtrey, 896 F.3d 1255, 1273 (11th Cir. 2018) (citations omitted). ("A factual finding is not clearly erroneous unless, after reviewing all of the evidence, we are left with 'a definite and firm conviction that a mistake has been committed.'") A bankruptcy court's legal conclusions and any mixed questions of law and fact are reviewed *de novo*. In re Am.-CV Station Grp., Inc., 56 F.4th 1302, 1309 (11th Cir. 2023). "The district court must independently examine the law and draw its own conclusions after applying the law to the facts, and then may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or

[3] The Bankruptcy Court explained that "…all of the settlement proceeds are going to the debtors' cases at the confirmed percentages, so they will not receive any funds from the settlement unless their cases are paid in full on the confirmed terms." (doc. 1, p. 19).

remand with instructions for further proceedings." McKinney v. Russell, 567 B.R. 384, 386 (M.D. Ala. 2017) (citation omitted).

Additionally, the "court may affirm the bankruptcy court's judgment 'on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below." In re McLemore, 2023 WL 401332, at *3 (M.D. Ala. Jan. 25, 2023) (quoting Perry v. United States, 500 B.R. 796, 798 (M.D. Ala. 2013) (quoting Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007)).

III. Analysis

A. The Bankruptcy Court's findings of fact

The parties do not dispute the Bankruptcy Court's factual findings (doc. 11, n. 9, p. 49). Accordingly, the factual findings are adopted by this Court (doc. 1, p. 4-7).

B. The Bankruptcy Court's legal conclusions

1. Property of the Chapter 13 bankruptcy estates.

The parties do not dispute the Bankruptcy Court's decision that the settlement proceeds are property of the Chapter 13 bankruptcy estates under 11 U.S.C. § 1306(a) and the confirmed plans (doc. 12, p. 8).

2. Modification of the Chapter 13 plan.

Pursuant to 11 U.S.C. § 1329[4], captioned "Modification of a plan after confirmation", a Chapter 13 plan may be modified, upon the request of the trustee, the debtor, or the holder of an

[4] Title 11 U.S.C. § 1329, captioned "Modification of plan after confirmation", states as follows:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; …

allowed unsecured claim, to "increase or reduce the amount of payments on claims" to unsecured creditors. 11 U.S.C. § 1329(a)(1). Pursuant to 11 U.S.C. § 1329(b)(1), a modified plan must meet the requirements of 11 U.S.C. § 1325(a). This includes the "best interests of creditors" or "liquidation" test found in 11 U.S.C. § 1325(a)(4); and because 11 U.S.C. § 1325(a) references 11 U.S.C. § 1325(b), the projected disposable income requirement found in 11 U.S.C. § 1325(b)(1)(B) is also applicable.[5]

3. Liquidation Test

Section 1325(a) generally sets out the plan confirmation requirements. Relevant here, the "best interests of creditors" or "liquidation" test is found in 11 U.S.C. § 1325(a)(4). As applied to plan modifications, the statute requires that any modification must ensure that:

> 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

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> (b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

[5] Title 11 U.S.C. § 1325, captioned "Confirmation of plan", in relevant part, states as follows:

> (a) Except as provided in subsection (b), the court shall confirm a plan if— …
>
> > (4) 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;
> > …
>
> (b)(1)(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.
>
> (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

> that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1325(a)(4). The purpose appears to be to protect the unsecured creditors' recovery by determining what the unsecured creditors would receive if the debtor proceeded under Chapter 7 instead of Chapter 13. The Chapter 7 liquidation test establishes the least amount that a modified plan may provide to unsecured creditors. The issue in dispute is what assets are included in the liquidation analysis under Chapter 7.

The Bankruptcy Court found that while the claim, or the settlement proceeds, was part of the Chapter 13 estate under 11 U.S.C. § 1306, i.e., property of the estate at the time of the proposed plan modification, it should "not [be] included in the liquidation analysis because that claim would not be part of a hypothetical chapter 7 under either § 541(a) or § 348(f)." (doc. 1, p. 12). Relying on the assumption that the hypothetical Chapter 7 liquidation test is accomplished by way of a hypothetical conversion to Chapter 7, the Bankruptcy Court applied 11 U.S.C. § 348(f). This statute states that when a Chapter 13 case is converted to a case under another chapter, the "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[.]" 11 U.S.C. § 348(f).[6] "[D]ate of filing the petition" meant the date of the original Chapter 13 petition. From this, the Bankruptcy Court held that because the post-petition personal injury settlement could not be "property of the estate, as of the date of filing of the petition", the settlement proceeds could not be included in the liquidation test. To further the position that the "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,

[6] The Bankruptcy Court relied upon *8 Collier on Bankruptcy* ¶ 1329.05, (Richard Levin & Henry J. Sommer eds., 16th ed.); In re Taylor, 631 B. R. 346 (Bankr. D. Kan. 2021), and In re Madrid, 2023 WL 3563019 (Bankr. W.D. Wash. May 18, 2023).

converted to chapter 7", the Bankruptcy Court points out that Congress did not include post-petition personal injury claims in 11 U.S.C. § 541(a)(5) as it did "inheritances, divorce property settlement, and life insurance proceeds to which the debtor becomes entitled within 180 days of the petition" (doc. 1, p. 11). Consequently, the Bankruptcy Court found that the liquidation test would not provide a basis for the proposed modification based on the receipt of settlement proceeds.

The Trustee argues the Bankruptcy Court erred by hypothesizing a conversion from Chapter 13 to Chapter 7 and consequently, 11 U.S.C. § 348(f) does not apply (doc. 11, p. 49-59). The Trustee points out that the relevant statutes for modification – 11 U.S.C. § 1329(b) and § 1325(a)(4) - do not mention a conversion, and no conversion occurs when the hypothetical Chapter 7 liquidation analysis is applied to a plan modification (Id., p. 53) (collecting cases). The Trustee explains that the purpose of – to exclude postpetition assets from the converted estate and thus encourage debtors to try Chapter 13[7] – is "not at play when the debtor is not converting … and the only issue is what assets are to be valued in a liquidation analysis on plan modification." (Id., p. 54). In that circumstance, the "purpose" of the liquidation test "is to ensure that the unsecured creditors receive at least as much as they would under the modified plan as under a hypothetical liquidation applied on the date of the modified plan." (Id.).

The Court agrees that 11 U.S.C. § 348(f) is inapplicable to the liquidation analysis. Specifically, the Court declines to graft a "hypothetical conversion analysis" under 11 U.S.C. § 348(f) and 11 U.S.C. § 541(a)(5) into the hypothetical Chapter 7 analysis. Instead, the Court finds persuasive the majority of courts that have held "the effective date of the plan" means the

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[7] "If a Chapter 13 debtor is not able to meet his plan commitments, he can convert to a Chapter 7 and still hold onto his postpetition assets, putting him in no worse position than if he had filed Chapter 7 originally." (doc. 11, p. 54).

date of modification, not the date of the original Chapter 13 plan. In re Montenegro, - - - B.R. - - -, 2023 WL 8655441, at *4 (Bankr. S.D. Fla. Dec. 14, 2023) ("This Court adopts the majority view and concludes that the effective date of the modified plan controls."); In re Nachon-Torres, 520 B.R. 306, 313 (Bankr. S.D. Fla. 2014) (collecting cases).[8] And since the statute directs the Court to look at the amount that would be paid on such claim if the estates of the debtors were liquidated under Chapter 7 **on such date** [date of modification], the Court looks to what assets are property of the debtors' estates currently (not at the time of filing the original Chapter 13 petition).

In In re Waldron, 536 F. 3d 1239 (11th Cir. 2008), the Eleventh Circuit found that property of the estate under 11 U.S.C. § 1306(a)(1) included post-petition underinsured motorist insurance proceeds from a post-petition accident, and that the debtors were required to amend

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[8] In re Tinney, 2012 WL 2742457, at *1 (Bankr. N.D. Ala. July 9, 2012) ("Whether the Court should grant the Trustee's motion simply boils down to whether the temporal language in § 1306 — 'after commencement of the case but before the case is closed, dismissed, or converted'— expands the 180–day time period in § 541(a)(5)(A); the Court finds that by its plain language § 1306 does just that. The large majority of courts to address the issue agree.") (collecting cases); In re Roscoe, 2017 WL 2839496, at *1–3 (Bankr. M.D. Fla. June 28, 2017) ("A well-respected minority of courts interpret section 1306 to incorporate the 180–day time limit found in section 541(a)(5).[] These courts also view section 541(a)(5) as a more specific statute concerning life insurance and inheritance proceeds that should prevail over section 1306(a)(1). But the reference in section 1306(a) to section 541 focuses on the 'kind' of property specified in 541. And, more importantly, section 1306(a) includes its own specific time parameters. Because section 1306 is applicable only in chapter 13 cases,[] it is the more specific statute and therefore more compelling when addressing chapter 13 issues."); In re Roberts, 514 B.R. 358, 364–65 (Bankr. E.D.N.Y. 2014) (footnotes omitted) (emphasis added) ("This Court is unpersuaded by the minority view. If the initial plan confirmation date is used to calculate the liquidation value for the best interests of creditors test for plan modification purposes, *the test fails to account for any property of the estate acquired post-confirmation, which, as in this case, may be the very basis for modifying the plan. If the best interests of creditors test need not account for post-confirmation property, a debtor will always satisfy the test at modification because it was satisfied at the initial plan confirmation.* The majority view, by accounting for property of the estate acquired post-confirmation, maintains the purpose of the best interests of creditors test at modification, ensuring that creditors receive at least as much as they would under a chapter 7 liquidation.").

their schedules to include this asset. (The debtors' post-confirmation personal injury settlement proceeds were exempt under Georgia law). The Eleventh Circuit stated that "[t]he disclosure of post confirmation assets gives the trustee and creditors a meaningful right to request under section 1329, a modification of the debtor's plan to pay his creditors." 536 F. 3d at 1245. From this, courts have reasoned that "[t]here would be no purpose served in holding that post-confirmation property is property of the estate if there was not a mechanism to include that property for purposes of distribution. That mechanism is provided by recalculating the chapter 7 test as of the date of the modified plan." In re Nachon-Torres, 520 B.R. at 314.

In this circumstance, where an asset has come into the Chapter 13 estate post-confirmation, it must be valued as of the date of modification for purposes of 11 U.S.C. § 1325(a)(4) and the value should be added to the previously calculated "best interests of creditors" test result at confirmation. In this action, the value of the post-confirmation assets of the Debtors' estates – the net settlement proceeds - should be added to the calculation of the "best interests of creditors" to determine whether the proposed modified plan satisfies 11 U.S.C. § 1329.

Applying the liquidation test, the increased distribution to the unsecured creditors as proposed by the Trustee, provides at least as much to the unsecured creditors as they would receive in a hypothetical Chapter 7 liquidation. Therefore, the best interest of creditors or liquidation test provides a basis for modification.

4. The "projected disposable income" test

The "projected disposable income" test is found in 11 U.S.C. § 1325(b)(1)(B). The test has been applied to Chapter 13 plan modifications in this circuit and the parties do not contest its

application.[9] The projected disposable income test "provides that all of the debtor's projected disposable income to be received in the applicable commitment period" must be applied to the payments to the unsecured creditors. Accordingly, if the settlement proceeds increase the Debtors' projected disposable income, modification of the plan to account for these proceeds is required.

The Bankruptcy Court determined that since the settlement proceeds were not "regular income", a "substitute", or an "anticipated stream of payments", the proceeds were not "disposable income" (doc. 1, p. 9-10). Rather, the Court classified the settlement proceeds as assets. Consequently, the Court concluded that the "projected disposable income" test did not require modification of the plan.

The Court agrees that the settlement proceeds do not meet the definition of "disposable income" as used in an initial plan confirmation, but nevertheless may be considered as additional disposable income. As explained in In re Peebles, 500 B.R. 270 (Bankr. S.D. Ga. 2013):

> [T]he disposable income test [has] application in the context of a modification, but [] its application differs somewhat from that in an initial plan confirmation. To begin with, the Court agrees with the Debtors that the [settlement proceeds are] not "disposable income" as strictly defined under § 1325(b)(2), because that subsection defines disposable income as "current monthly income received by the debtor" less amounts reasonably necessary to be expended for maintenance and support of the debtor, certain charitable contributions, and expenditures necessary for a debtor's business if the debtor is engaged in business. The definition thus incorporates the concept of "current monthly income" which is defined in 11 U.S.C. § 101(10A). This section states, in relevant part:
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> > The term "current monthly income"—
> > (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's

[9] See In re Abrams, 632 B.R. 240, 241–42 (Bankr. S.D. Ala. 2021); In re Heideker, 455 B.R. 263 (Bankr. M.D. Fla. 2011); In re Heyward, 386 B.R. 919 (Bankr. S.D. Ga. 2008).

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> spouse receive) without regard to whether such income is taxable income, derived during the 6–month period ending on—
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and
> (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)....

> 11 U.S.C. § 101(10A). The six month look-back period of § 101(10A)(A) would clearly exclude [the settlement proceeds at issue], which [debtors] did not receive until well after the petition date. As one court noted, "[b]ecause the current definition of projected disposable income results in a calculation that is, in large part, fixed by pre-petition circumstances, reviewing that calculation at the time of a post-confirmation modification may not be particularly meaningful. Because of its statutory definition, 'current monthly income' once correctly calculated should not change over time. Thus, attempting to apply § 1325(b) to a § 1329 modification is not favored by post-BAPCPA cases." *In re Wetzel,* 381 B.R. 247, 251–52 (Bankr.E.D.Wis.2008).
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> However, the Court rejects the notion that this narrow definition of disposable income that applies in the context of a debtor's plan confirmation will preclude a trustee from seeking an upward modification based on assets acquired by the debtor post-confirmation. It is illogical and contrary to the plain language of § 1329 to suggest that a post-confirmation "windfall" of any kind, which would presumably always be excluded from the new definition of disposable income, cannot support a modification by the trustee. After all, such [settlement proceeds] still represents disposable income in the broader sense of being funds that are not needed for the support of the debtor or their dependents. ...**The Court concludes that modifications were intended to capture sources of income or assets that did not exist during the six month look-back period which is used to calculate disposable income for purposes of confirming a Chapter 13 plan in the first instance.**
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> ...
>
> The Court finds that nothing in the disposable income test of § 1325(b) precludes the Trustee's efforts to modify the plan pursuant to § 1329.

In re Peebles, 500 B.R. at 275–76 (emphasis added). Thus, although the "disposable income" test does not provide a basis for modification, it also does not preclude modification.

5. Bankruptcy Court's exercise of discretion to not modify

"Even where modified plans satisfy these express limits, the statute reserves to the discretion of the bankruptcy court whether to confirm a modified plan. The bankruptcy court 'shall confirm' a Chapter 13 plan if it meets the requirements of § 1325, [11 U.S.C.] § 1325(a), but the court has discretion to confirm modified plans. Plans 'may be modified' if they meet the requirements of § 1329. [11 U.S.C.] § 1329(a). Nothing prevents a bankruptcy court from refusing to confirm a modified plan put before it." In re Guillen, 972 F.3d 1221, 1229 (11th Cir. 2020)

The Bankruptcy Court interpreted the Eleventh Circuit's decision in In re Waldron, as adopting a "non-statutory 'ability to pay'" standard, and exercised its discretion under 11 U.S.C. § 1329, to find there was "no legitimate reason" to increase the percentage to the unsecured creditors as requested by the Trustee. The Bankruptcy Court found that modification was not required under the "ability to pay" standard because the settlement proceeds did not "substantially improve" the Debtors' financial condition nor were they "unanticipated gain" which would increase their ability to pay the creditors.

The Bankruptcy Court first reasoned that 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" and therefore, a settlement to compensate for loss of this asset does not "suddenly turn that non-estate asset into an asset which must be paid to prepetition creditors." (doc. 1, p. 17-18). Instead, the settlement proceeds are not new assets coming into the bankruptcy estate, because the Debtors have "given consideration in the

form" of their injuries, pain and suffering. The undersigned does not agree with the novel conclusion that the settlement proceeds are not new assets and are instead consideration.

However, the Court does not find that the Bankruptcy Court abused its discretion. "Although § 1329(a) does not explicitly state what justifies such a modification, it is well-settled that a substantial change in the debtor's financial condition after confirmation may warrant a change in the level of payments." In re Arnold, 869 F.2d 240, 241 (4th Cir. 1989). The Bankruptcy court determined that the relatively small amount of settlement proceeds did not substantially improve the financial condition of the Debtors whereas to justify a modification. This determination was made after the Bankruptcy Court received testimony from the Debtors which indicated that they are still living paycheck to paycheck. In addition, Debtor Boutwell was already on disability when "heavy merchandise" fell on her head in Dollar General. She testified that her husband took time off work at a paper mill to care for her after the accident, and they had to borrow $3,500.00 from her parents. Also, they have two vehicles, but her husband had an accident in one of their vehicles and needs $6,000 to repair it. Debtor Proffitt needs cosmetic surgery estimated at $500.00 for her nose after her fall at Walmart.

V. Conclusion

For the reasons discussed herein, the Bankruptcy Court's decision is AFFIRMED.

DONE and **ORDERED** this 12th day of January 2024.

s / Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

2025 WL 2179249
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

In re: JOHNNY BRACKSTON HILL,
LISA JO ANN BOUTWELL, Debtors.
CHRISTOPHER T. **CONTE**, Plaintiff-Appellant,
v.
JOHNNY BRACKSTON HILL, LISA JO ANN BOUTWELL, Defendants-Appellees.
In re: PEGGY BEDSOLE PROFFITT, Debtor.
CHRISTOPHER T. **CONTE**, Plaintiff-Appellant,
v.
PEGGY BEDSOLE PROFFITT, Defendant-Appellee.

No. 24-10264, No. 24-10265
|
Filed: 08/01/2025

Appeal from the United States District Court for the Southern District of Alabama D.C. Docket No. 1:23-cv-00221-KD-N

Appeal from the United States District Court for the Southern District of Alabama D.C. Docket No. 1:23-cv-00219-KD-N

Before Branch, Abudu, and Kidd, Circuit Judges.

Opinion

PER CURIAM:

***1** In these consolidated cases, Lisa Jo Ann Boutwell and Peggy Proffitt (collectively "the debtors"), two debtors in Chapter 13 bankruptcy, received post-petition personal-injury settlement payments. Christopher T. **Conte**, their bankruptcy-estate trustee ("the trustee"), sought to take that money and distribute it to the debtors' creditors on top of the debtors' regular payments to their creditors. The bankruptcy court declined to modify the debtors' payment schedules, and the district court affirmed.

The trustee argues on appeal that the bankruptcy court should have granted his motions for modification because the proposed plans met the requirements of 11 U.S.C. § 1329, and the settlement proceeds increased the debtors' ability to pay their unsecured creditors. We conclude, however, that the bankruptcy court did not abuse its discretion by denying the trustee's motions. Accordingly, after careful review and with the benefit of oral argument, we affirm.

I. Background

A. Lisa Jo Ann Boutwell

On June 11, 2018, Boutwell filed for Chapter 13 bankruptcy. That October, the bankruptcy court confirmed her Chapter 13 payment plan, which provided for monthly payments of $852 for 66 months to her unsecured creditors. All told, Boutwell's unsecured creditors would receive 40.25% of their full claims under Boutwell's confirmed plan, a figure referred to as a 40.25% "dividend."

Subsequently, in August 2019, Boutwell was injured at a Dollar General when merchandise fell onto her head. As a result, Boutwell suffered several bulged discs requiring surgery. Boutwell's doctor also told her to stay in bed for three months and to not lift anything "heavier than a dinner plate." Boutwell testified in May 2023 that she was "still recovering" from her injuries. Boutwell continued to see a pain management doctor and wear a Transcutaneous Electrical Nerve Stimulation ("TENS") unit because of the accident.

Boutwell received a $45,000 settlement from Dollar General. Of that figure, $15,750 went to attorneys' fees, $3,463.65 went to expenses incurred by special counsel, and $6,100.74 paid for subrogation and medical bills. Accordingly, Boutwell received $19,685.61 in net settlement proceeds.

During the bankruptcy court proceedings, Boutwell also testified about her financial situation. She does not work; she receives Social Security disability payments. Her husband (and co-debtor) works at a paper mill. Boutwell testified they live "paycheck to paycheck." They have one working vehicle. Boutwell's husband had also borrowed Boutwell's mother's truck, but he hit a deer with the truck, incurring over $6,000 in damages that they could not pay to fix the truck. After Boutwell's accident and surgery, Boutwell's husband took time off work to help care for her, and they had to borrow $3,500 from her parents to help pay the bills.

B. Peggy Proffitt

On November 12, 2018, Proffitt filed for Chapter 13 bankruptcy. The following April, the bankruptcy court confirmed her Chapter 13 payment plan, which provided that she would pay $964 per month for 60 months to her

unsecured creditors. All told, Proffitt's unsecured creditors would receive a 62.19% dividend.

***2** Subsequently, in July 2022, Proffitt was involved in a slip-and-fall accident at a Walmart. Proffitt was walking out the door of the store when her foot caught on a rug, and she fell flat onto the concrete outside. She suffered a deep cut on her elbow (which did not require stitches) and a gash on her nose. Proffitt's nose still has a scar from the gash. Proffitt would need additional surgery to have the scar removed, which was estimated to cost about $500. The fall also exacerbated pre-existing back pain. Her income did not change as a result of the accident.

In November 2022, Proffitt received a $13,000 settlement from Walmart. Of that figure, $4,550 went to attorneys' fees, $189.57 went to expenses, and $575.04 went to subrogation. Accordingly, Proffitt received $7,685.39 in net settlement proceeds.

C. Procedural History

In the debtors' respective bankruptcy proceedings, the trustee moved under 11 U.S.C. § 1329 to modify the debtors' payment plans to have all of their net settlement proceeds paid to the trustee. The trustee sought to use the money to increase Boutwell's unsecured creditors' dividend from 40.25% to 77.07% and to increase Proffitt's unsecured creditors' dividend from 62.19% to 76.86%. The bankruptcy court held an evidentiary hearing on the trustee's motions for modification.

Applying 11 U.S.C. § 1329, which governs modifications of Chapter 13 bankruptcy plans, the bankruptcy court denied the trustee's motions. The bankruptcy court first determined that the debtors' net settlement proceeds were property of their bankruptcy estates. The bankruptcy court then determined that the Bankruptcy Code did not require the court to modify the debtors' bankruptcy plans to account for the post-petition personal-injury net settlement proceeds. Finally, the bankruptcy court determined that the settlement proceeds did not increase the debtors' ability to pay their unsecured creditors' claims. Thus, the bankruptcy court found "no legitimate reason for the modification requested by the trustee" and denied the motions, invoking its discretionary authority.

The trustee appealed to the United States District Court for the Southern District of Alabama. The bankruptcy court stayed enforcement of its order denying modification. In that order, the bankruptcy court provided that the debtors would continue to make their plan payments and could apply for a discharge upon completion of their plans, but such completion and discharge would be "without prejudice to the trustee's right to pursue modification of the plans to apply the nonexempt Settlement Funds to the cases and increase the percentage paid on unsecured claims." [1]

***3** The district court affirmed the bankruptcy court. The trustee appealed to us.

II. Standard of Review

In bankruptcy cases, we "sit[ ] as a second court of review and thus examine[ ] independently the factual and legal determinations of the bankruptcy court and employ[ ] the same standards of review as the district court." *In re Brown*, 742 F.3d 1309, 1315 (11th Cir. 2014) (quotation omitted). "Where, as here, the district court affirms the bankruptcy court's order, we review the bankruptcy court's decision." *In re Rosenberg*, 779 F.3d 1254, 1264 (11th Cir. 2015).

Here, the decision of whether to modify a confirmed Chapter 13 plan is committed to the discretion of the bankruptcy court. *See* 11 U.S.C. § 1329(a) ("At any time after confirmation of the plan but before the completion of payments under such plan, the plan *may* be modified ...." (emphasis added)); *In re Guillen*, 972 F.3d 1221, 1229 (11th Cir. 2020) (observing that § 1329 "reserves to the discretion of the bankruptcy court whether to confirm a modified plan"). Accordingly, we review the bankruptcy court's decision for an abuse of discretion. *See SuVicMon Dev., Inc. v. Morrison*, 991 F.3d 1213, 1225 (11th Cir. 2021). A court "abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Id.* (quotation omitted). A court may "also abuse its discretion by committing a clear error in judgment." *Id.* (alteration adopted) (quotation omitted).

III. Discussion

On appeal, the trustee raises several issues with the bankruptcy court's decision not to modify the debtors' Chapter 13 plans. We conclude, however, that the bankruptcy court did not abuse its discretion.

As mentioned, 11 U.S.C. § 1329 governs modifications of confirmed Chapter 13 bankruptcy plans.[2] For a plan to be modified under section 1329, the proposed modification must conform with "[s]ections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title." 11 U.S.C. § 1329(b)(1). If a proposed modification meets the relevant requirements, then "the plan may be modified." *Id.* § 1329(a). We have recognized that "[n]othing prevents a bankruptcy court from refusing to confirm a modified plan put before it," even "where modified plans satisfy" the requirements of section 1329. *Guillen*, 972 F.3d at 1229. Accordingly, our review turns on (1) whether the trustee's proposed modifications met the requirements of section 1329; and (2) if so, whether the bankruptcy court abused its discretion by denying the proposed modifications.

***4** Turning to section 1329, that statute requires, in relevant part, modified plans to comply with "the requirements of section 1325(a)." 11 U.S.C. § 1329(b)(1). Section 1325, in turn, among other things, sets minimum requirements for what the debtor must pay to his unsecured creditors pursuant to the proposed plan under consideration. *See generally id.* § 1325(a)(4), (b)(1). The "liquidation test," codified in § 1325(a)(4),[3] sets a floor on the total value of the debtor's payments to her unsecured creditors: the total value of the payments under the Chapter 13 plan must be "not less than" the proceeds the unsecured creditors would receive in a hypothetical Chapter 7 liquidation. *Id.* § 1325(a)(4). And the "disposable-income test," codified in § 1325(b)(1),[4] provides a floor for how much of the debtor's projected disposable income must be paid to unsecured creditors: all of it. *Id.* § 1325(b)(1)(B).

The parties and amici dispute several issues about whether and how the liquidation and disposable-income tests apply to modified plans under section 1329. We, however, need not decide those issues today. Notably, the debtors do not contest that even under their reading of sections 1325 and 1329, the trustee's proposed modified plans met the applicable minimum requirements of those statutes. The debtors' position makes sense: as discussed, sections 1325 and 1329 set floors for what the debtors must pay their creditors, and the trustee in this case sought to have the debtors pay *more* to their unsecured creditors than the debtors were previously paying. Unsurprisingly, the trustee also contends that his proposed modified plans met the requirements of section 1329. Accordingly, we will assume without deciding that the trustee's proposed modified plans met all relevant requirements of section 1329.

We next turn to "the discretion of the bankruptcy court whether to confirm a modified plan" that meets the requirements of section 1329. *Guillen*, 972 F.3d at 1229. Here, after an evidentiary hearing, the bankruptcy court decided not to modify the debtors' plans. The bankruptcy court reasoned that both debtors were still experiencing pain from their injuries as of the bankruptcy court's hearing, Boutwell was living paycheck-to-paycheck and needed money to pay for car repairs and to repay her parents, and Proffitt needed additional surgery. Accordingly, the bankruptcy court found that the settlement proceeds did not increase the debtors' ability to pay their unsecured creditors in a way sufficient to justify approval of the trustee's proposed modifications. The bankruptcy court's conclusion finds ample support in the record based on Boutwell's and Proffitt's testimony at the bankruptcy court's evidentiary hearing. Accordingly, we find no "clear error in judgment" here. *SuVicMon Dev., Inc.*, 991 F.3d at 1225 (quotation omitted).

***5** The trustee disagrees and asserts that the bankruptcy court erred in its judgment because the settlement proceeds increased the debtors' ability to pay their unsecured creditors.[5] We have explained, however, that while "an unforeseen change in circumstances is a good reason to permit a modification that ... satisfies § 1329," modification is not required: "*[n]othing* prevents a bankruptcy court from refusing to confirm a modified plan put before it." *Guillen*, 972 F.3d at 1229 (emphasis added).

In sum, we assume the trustee's proposed modifications of the debtors' Chapter 13 bankruptcy plans met the requirements of 11 U.S.C. § 1329. The bankruptcy court, however, was within its discretion to deny the proposed modifications, and it had satisfactory reasons for doing so here. Accordingly, we affirm the denial of the trustee's motions to modify the debtors' bankruptcy plans.

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2025 WL 2179249

Footnotes

1 In August 2024, the debtors both received discharges from their Chapter 13 bankruptcy plans. In light of these discharges, we asked the parties to brief the following question: "What effect, if any, do those discharges have on the justiciability of the Chapter 13 Trustee's appeal?" *See Neidich v. Salas*, 783 F.3d 1215, 1216 (11th Cir. 2015) (holding that "the dismissal of a Chapter 13 case moots an appeal arising from the debtor's bankruptcy proceedings" and observing that the debtor no longer had "a Chapter 13 plan ... that the trustee objects to"). A case is moot if "a court finds that it can no longer provide a plaintiff with effective relief." *In re Stanford*, 17 F.4th 116, 121 (11th Cir. 2021). Here, however, we conclude that the bankruptcy court's stay order kept this appeal from becoming moot. By staying its order denying modification, the bankruptcy court essentially discharged the debtors *except for* the settlement proceeds, which would be held off to the side until the trustee's appeal was resolved. Thus, as the trustee notes, if we affirm, the settlement proceeds "would be disbursable to the Debtors," but if we reverse, the proceeds "would be disbursable to the unsecured creditors as an additional dividend." With a remaining dispute about who gets the settlement proceeds, we may still provide relief in this case. Accordingly, this appeal is not moot. *See id.*

2 For relevant background, "Chapter 13 of the Bankruptcy Code is designed to facilitate adjustments of the debts of individuals with regular income through extension and composition plans funded out of future income, under the protection of the court." *Brown*, 742 F.3d at 1315 (quotation omitted). "Under Chapter 13, any individual with regular income may file for Chapter 13 reorganization and make payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid." *Id.* at 1315–16 (quotation omitted). Unlike Chapter 7 bankruptcy, in which a debtor's assets are liquidated and his creditors are paid with the proceeds, a Chapter 13 debtor gets to "retain his non-exempt assets and use his regular income (instead of those assets) to repay his debts" according to his confirmed bankruptcy plan. *Id.* at 1316. Sections 1321 through 1325 of Title 11 of the United States Code govern initial plan confirmation, and section 1329 governs post-confirmation modification of plans. *See* 11 U.S.C. §§ 1321–25, 1329.

3 The liquidation test provides, in full, that under a Chapter 13 plan, "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 [cannot be] 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." 11 U.S.C. § 1325(a)(4).

4 The disposable-income test provides, in full, that

> [i]f the trustee or [an unsecured creditor] objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. § 1325(b)(1). In other words, under a Chapter 13 plan, unsecured creditors must be receiving everything they are owed, otherwise the debtor must be paying everything she can. *See id.*

5 The trustee also argues that the bankruptcy court's decision conflicts with our decision in *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008). Not so: our decision in *Waldron* merely reaffirmed the trustee's and unsecured creditors' right to *request* modification. 536 F.3d at 1245–46. We did not hold that the trustee or unsecured

creditors are *entitled* to modification. Again, "[n]othing prevents a bankruptcy court from refusing to confirm a modified plan put before it." *Guillen*, 972 F.3d at 1229.

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