IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 24-10265-A

CHRISTOPHER T. CONTE, STANIDNG CHAPTER 13 TRUSTEE
FOR THE SOUTHERN DISTRICT OF ALABAMA
Plaintiff-Appellant
v.
PEGGY PROFFITT
Defendant-Appellee
(District Court No. 1:23-00219-KD-N)

Case No. 24-10264-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE
FOR THE SOUTHER DISTRCT OF ALABAMA
Plaintiff-Appellant
v.
JOHNNY HILL and LISA JO ANN BOUTWELL
Defendants-Appellees
(District Court No. 1:23-00221-KD-N)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BRIEF OF APPELLANT

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May 24, 2024

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Appellant is an individual.

2. Appellant certifies that the following individuals/entities may have an interest in the outcome of this matter:

a. Boutwell, Lisa Jo Ann – Debtor/Appellee;

b. Callaway, Honorable Henry A. – Bankruptcy Judge for the Southern District of Alabama;

c. Friedman, Barry – Attorney for Special Counsel for Debtor/Appellee;

d. Hill, Johnny Brackston – Debtor/Appellee;

e. Long & Long, P.C. – Special Counsel for Debtor/Appellee;

f. Padgett, Herman – Attorney for Debtor/Appellee;

g. Robertson, Lacy – Attorney for Debtor/Appellee; and

h. Zimlich, Mark – Bankruptcy Administrator for the Southern District of Alabama.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Appellant is an individual.

2. Appellant certifies that the following individuals/entities may have an interest in the outcome of this matter:

a. Callaway, Honorable Henry A. – Bankruptcy Judge for the Southern District of Alabama;

b. Padgett, Herman – Attorney for Debtor/Appellee;

c. Proffitt, Peggy – Debtor/Appellee;

d. Robertson, Lacy – Attorney for Debtor/Appellee;

e. Stelle, Jason K. – Special Counsel for Debtor/Appellee; and

f. Zimlich, Mark – Bankruptcy Administrator for the Southern District of Alabama.

STATEMENT REGARDING ORAL ARGUMENT

The Trustee requests oral argument on this appeal. The distribution of post-petition personal injury settlement proceeds to the unsecured creditors of a Chapter 13 debtor has been a matter of routine practice for many years in the bankruptcy court below. The Trustee has handled millions of dollars of settlements every year in this manner with the bankruptcy court's approval. Such settlement proceeds increase the debtor's ability to pay his unsecured creditors during the plan period and are thus payable to them as an additional dividend. But in the cases on appeal, where the evidence indisputably established that the settlement proceeds were additional disposable income that increased the Debtors' ability to pay, the bankruptcy court set its sails in a radically new direction. It adopted the novel theory, unprecedented in the case law, that post-petition personal injury settlement proceeds are not "new assets" that increase a debtor's ability to pay because the debtor gives "consideration" for such settlement proceeds in the form of his or her pain and suffering. This analysis effectively creates, by judicial fiat, an unlimited exemption for personal injury claims, overriding and rendering meaningless the more limited exemptions for such claims, if any, established by state legislatures and by Congress itself in the Bankruptcy Code. Oral argument is therefore requested.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Legislative Bills and History

Secondary Authorities

STATEMENT OF JURISDICTION

A. Basis for District Court's Jurisdiction

The district court has jurisdiction to hear appeals from final orders of the bankruptcy court. *See* 28 U.S.C. §158(a). Venue in the district court below was proper because an appeal under §158(a)(1) "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." *Id.*

The denial of a bankruptcy trustee's motion to modify a Chapter 13 plan is the sort of "final order" that may be appealed as of right under § 158(a)(1). *McKinney v. Russell*, 567 B.R. 384, 386 (M.D. Ala. 2017) (citing *Germeraad v. Powers*, 826 F.3d 962, 967 (7th Cir. 2016)).

The orders of the bankruptcy court denying the Trustee's motions to modify the Chapter 13 plans of the Debtors, Appellees Boutwell and Proffitt, were entered on May 30, 2023 (B.Doc. 5 at 179; P.Doc. 4 at 150) and a notice of appeal was timely filed by the Trustee within 14 days after entry of these orders on June 13, 2023, as required under 28 U.S.C. § 158(c)(2) and Bankruptcy Rule 8002(a). (B.Doc. 1; P.Doc. 1).

B. Basis for this Court's Jurisdiction

This Court has subject matter jurisdiction of final decisions of district courts on appeals from final orders of the bankruptcy court decisions under 28 U.S.C. § 158(a). *See* 28 U.S.C. § 158(d)(1). The final orders of the district court affirming

the bankruptcy court orders were entered on January 12, 2024 (B.Doc. 15; P.Doc 12). Timely notices of appeal from these final orders were filed by the Trustee on January 26, 2024 (B.Doc. 16; P.Doc. 13). *See* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Did the bankruptcy court err in holding that net settlement proceeds received from the Debtors' post-petition personal injury claims were "assets" and not "income" and therefore not additional "disposable income" under 11 U.S.C. § 1325(b) requiring an increase in payments to the Debtors' unsecured creditors?

2. As the district court recognized, the "projected disposal income" test found in 11 U.S.C. § 1325(b)(1)(B) has been applied to Chapter 13 plan modifications in this Circuit and the parties did not contest its application. Further, as the court recognized, if the settlement proceeds increased the Debtors' projected disposable income, modification of their plans to account for those proceeds was "required." Did the district court then err in concluding that the "disposable income" test, although it did not "preclude" modification, did not provide a "basis" for modification?

3. In determining whether the net settlement proceeds increased the Debtor' ability to pay their unsecured creditors, did the bankruptcy court err in concluding that the Debtors gave "consideration" for those settlement proceeds, in the form of their pain and suffering, and that the settlements were thus not "new assets" that increased the Debtors' ability to pay?

4. In the adoption and application of the novel theory described in Issue No. 3, did the bankruptcy court abuse its discretion in denying the Trustee's motions to modify the Debtors' plans to increase payments to the unsecured creditors by the amount of the net settlement proceeds, where the undisputed evidence showed that all accident-related expenses had been reimbursed, that the Debtors had suffered no loss of income and no increase in ongoing expenses as a result of their accidents, and that the Debtors' disposable income, as calculated at plan confirmation, was not shown to have otherwise changed?

5. In upholding the bankruptcy court's decision, after rejecting the "novel conclusion" of that court as described in Issue No. 3, did the district court apply the wrong legal standard in requiring a "substantial" change in the debtor's financial circumstances in order to modify plan payments upwards or downwards?

STATEMENT OF THE CASE

A. Introduction

This case involves two separate but identical bankruptcy court orders denying a Chapter 13 Trustee's motion to modify the Chapter 13 plans filed in two separate bankruptcy proceedings. These motions were based upon the receipt of net settlement proceeds resulting from post-petition claims for personal injuries arising out of two separate accidents involving, respectively, the Appellees/Debtors Lisa Jo Ann Boutwell and Peggy Proffitt. The Trustee sought to increase payments to the unsecured creditors by the amount of these post-petition net settlement proceeds in each of these Chapter 13 proceedings. The bankruptcy court denied these motions and, on separate appeals, the district court affirmed in separate but identical orders. The Trustee has appealed these orders of the district court to this Court. This Court has granted the Trustee's motion to consolidate these appeals.

B. Course Of Proceedings And Disposition In Court Below and Statement Of Facts

1. *Chapter 13 proceedings commenced by Debtors Boutwell and Proffitt*

On June 11, 2018, the Debtors Johnny Hill and Lisa Jo Ann Boutwell commenced Chapter 13 bankruptcy proceedings in the Bankruptcy Court for the

Southern District of Alabama, Case No. 18-2317. (B.Doc. 5 at 10)[1] On October 1, 2018, the court confirmed a 60-month plan requiring payments of $705.00 per month (Id. at 100). On May 9, 2019, the court granted the Debtors' motion to approve the settlement of a motor vehicle accident and to distribute the net settlement proceeds to the unsecured creditors to increase their percentage recovery on their claims (Id. at 120). On October 8, 2021, on the Debtors' motion, this plan was modified to extend the plan length to 66 months and to lower plan payments (Id. at 130, 135).

On November 12, 2018, the Debtor Peggy Proffitt commenced Chapter 13 proceedings in the same court, Case No. 18-4608. (P.Doc. 4 at 7). On April 29, 2019, the court confirmed a 60-month plan requiring payments of $964.00 per month (Id. at 83-85).

Both debtors are above median income debtors requiring an "applicable commitment period" of not less than 5 years under 28 U.S.C. § 1325(b)(4)(A) (P.Doc. 4 at 14, 16; B.Doc. 5 at 17, 19).

2. Trustee's motions to modify plans based on non-exempt post-petition net settlement proceeds resulting from post-petition claims of personal injury

In their respective Chapter 13 bankruptcy proceedings, the Debtors Proffitt and Boutwell were each injured in separate post-petition accidents that resulted,

[1] References to the Proffitt and the Boutwell district court dockets will be indicated respectively by "P.Doc" and "B.Doc."

respectively, in non-exempt net settlement proceeds of $7,685.39 on Ms. Proffitt's claim and $19,685.61 on Ms. Boutwell's claim, after payment of all attorney fees and costs and subrogation interests. *See* Joint Stipulation of Facts filed in each case (P.Doc. 4 at 115; B.Doc. 5 at 164).

Pursuant to 11 U.S.C. § 1329, the Trustee filed motions to modify the Debtors' respective Chapter 13 plans to increase the payments to the unsecured creditors by the amount of these post-petition settlement proceeds. (P.Doc. 4 at 98; B.Doc. 5 at 153 and 156), and filed briefs in support of the motions (P.Docs. 4 at 102 and 117; B.Doc. 5 at 165).

3. Statement of facts from evidentiary hearing on motions to modify

On May 12, 2023, the court held an evidentiary hearing on the Trustee's motions to modify and heard testimony from the Debtors Boutwell and Proffitt. In its order denying the Trustee's motions to modify (P.Doc. 4 at 129-145; B.Doc. 5 at 179-195), *see In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023), *aff'd sub nom. Conte, Tr. for S. Dist. of Alabama v. Hill*, No. BR 18-02317-HAC, 2024 WL 140247 (S.D. Ala. Jan. 12, 2024), the court provided the following factual

summary which the Trustee adopts (with references to the applicable pages of the hearing transcript added in brackets)[2]:

> " 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. The blow caused herniation or discs in her neck at levels C7 and C8 with bulges at two other levels [P.Doc. 5 and B.Doc. 6 at .14, 28]. Her injuries required spinal surgery with a hospital stay [15]. 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 [29]. She also had to undergo physical therapy [16].
>
> Mrs. Boutwell testified that, despite the neck surge1y, she is "still recovering" now, three years post-accident, and still has significant neck pain from the injury [15, 25]. 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 [21-22]. She uses a TENS unit muscle stimulator daily for pain management [24].
>
> Mrs. Boutwell is on social security disability [14]; her husband (the joint debtor) works as a contractor for paper mills [16]. Mrs. Boutwell testified that money is very tight in their household and they "live paycheck to paycheck." [17-18]. Her husband and she have only one working vehicle [17-18]; her husband had an accident in their other vehicle (hit a deer), but they do not have the $6,000 needed to repair it [16-17]. They had to borrow $3,500 from parents while he took off work to care for her after the accident [18].

[2] The transcript of the hearing is located at P.Doc. 5 and B.Doc. 6. References are to the page numbers generated by the district court's electronic filing system.

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 [19]. 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 [33]. 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 [34]. The fall also exacerbated Ms. Proffitt's preexisting back pain [36].

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 properly 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 lo 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." *In re Hill,* 652 B.R. at 217-218.

At the hearing, Ms. Boutwell also testified that she had no medical bills that had not been paid after reimbursement of the State for its subrogation interest out of the settlement proceeds (B.Doc. 5 at 20). She has no ongoing expenses as a result of the accident (Id. at 25). She is just trying to keep some of the settlement so she can fix her mother's truck that her husband was using when he hit a deer (Id.). No evidence was presented that she and her husband did not have the ability to continue to make their Chapter 13 payments.

At the hearing, Ms. Proffitt also testified that her income had not changed as a result of the injury (P.Doc 4 at 34). She admitted she was able to make her on-going Chapter 13 payments to the end of the plan (Id. at 35). No evidence was presented of any unreimbursed medical bills or other expenses related to her accident.

Both Proffitt and Boutwell stipulated that they had not amended their Schedules to reflect any reduced income or any additional ongoing expenses as a result of their personal injury claims. See Joint Stipulation of Facts (P.Doc 4 at 115; B.Doc. 5 at 164).

4. Order denying trustee's motions to modify

On May 30, 2023, the bankruptcy court entered two identical orders, filed in both cases, denying the Trustee's motions to modify the Debtors' respective plans.

(P.Doc. 4 at 129; B.Doc. 5 at 179). *See In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023), In its order, the court first recognized that the non-exempt settlement proceeds were property of the Debtors' Chapter 13 bankruptcy estates, as held by this court in *In re Waldron*, 536 F.3d 1239, 1243 (11th Cir. 2008). 652 B.R. at 218. The court also recognized that Chapter 13 plan modifications must satisfy both the "liquidation" test of § 1325(a)(4) and the "disposable income" test of § 1325(b). *Id.* But the court concluded that neither of these tests required that the plan be modified to account for the post-petition settlement proceeds. *Id.* at 219-222.

First, the court concluded that the settlement proceeds from the Debtors' post-petition personal injury claims were "assets," not "income," thus making the "disposable income" test of § 1325(b) inapplicable. 652 B.R. at 219-220.

Second, the court concluded that these post-petition settlement proceeds were not to be included in the "liquidation" test of § 1325(a)(4) because if the Debtors had converted their Chapter 13 proceedings to Chapter 7 at the time of the plan modification, any post-petition assets would not be included in the Chapter 7 estate. The court ruled that the definition of "property of the estate" in § 348(f) controlled, rather than the definition in § 1306(a), which provides that, in Chapter 13 cases, property of the estate includes all property of the kind specified in § 541

that the debtor acquires *after* the commencement of a Chapter 13 case. 652 B.R. at 220–222.

Finally, after concluding that neither the disposable income test nor the liquidation test required payment of the settlement proceeds to the unsecured creditors, the court applied what it described as a "non-statutory ability-to-pay standard" that it interpreted this Court to have used in *Waldron*, when proposed plan modifications are based on post-petition assets. 652 B.R. at 222. The court concluded that modification was not required under this "ability-to-pay" standard for two reasons.

First, the court found that, as a "general rule," compensatory damages received for a post-petition personal injury claim "do not constitute *Waldron*'s 'substantially improved financial condition' or 'unanticipated gain' that increases the debtor's ability to pay creditors." *Id.* at 224 (citing *In re Waldron*, 536 F.3d at 1246). Such post-petition personal injury claims were "categorically different" from other types of post-petition assets, such as lottery winnings, inheritances, or non-spousal life insurance proceeds which might be considered "windfalls" that increase a debtor's ability to pay creditors. *Id.* Personal injury settlements represent compensation for "an important non-property, non-monetary asset: good health and the ability to live injury-free and pain-free." *Id.* Settlement proceeds are "not new assets coming into the estate like lottery winnings, inheritance, or life

insurance; the injured debtor has given consideration in the form of his or her injury." *Id.* "[Th]e injured debtor 'earned' the settlement through his or her pain and suffering." *Id.*

Second, the court found that plan modifications were not required because 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 non-exempt personal injury settlement proceeds should be paid to creditors on top of their confirmed plan payments." 652 B.R. at 225. This finding was based upon (1) the testimony of both Debtors that they "are still experiencing pain and other issues as a result of their injuries," and thus "have already given substantial value, even if non-monetary, for the [settlement proceeds] in the form of pain and suffering;" (2) that "Mrs. Boutwell lives 'paycheck-to-paycheck' and needs money to pay for car repairs and repay the couple's parents;" and (3) that "Ms. Proffitt needs additional surgery to treat her facial scar." *Id.* The court concluded there was "no legitimate reason" for the modifications requested by the Trustee and denied the motions. *Id.*

On June 5, 2023, the court ordered the Chapter 13 Trustee to apply the settlements on hand to the Chapter 13 plan at the current percentage to unsecured creditors (P.Doc. 4 at 146; B.Doc. 5 at 196).

5. Appeal of bankruptcy orders and entry of stay pending appeal

On June 13, 2023, the Trustee filed a timely appeal of the bankruptcy court's order of May 30, 2023, to the district court in both cases (P.Doc. 4 at 147; B.Doc. 5 at 197). The Trustee also filed motions for stay pending appeal (P.Docs. 4 at 167; B.Docs. 5 at 216 and 249). The Trustee argued that his motions to modify presented a substantial case on the merits requiring the resolution of "serious legal questions" on appeal so as to justify a stay because the balance of the equities weighed heavily in favor of granting the stay (P.Doc. 4 at 205; B.Doc 5 at 251). The Trustee declared that both debtors would soon complete their payments: The Boutwell debtors had 7 months left (B.Doc. 5 at 264) and Ms. Proffitt had 5 payments left (P.Doc. 4 at 218). In addition to showing irrevocable injury to himself and the unsecured creditors in the absence of a stay, and the absence of harm to the Debtors in granting a stay, the Trustee argued that a stay was in the public interest because the appeal had an impact far beyond the instant cases. The Trustee filed a declaration showing that he had disbursed settlement proceeds to unsecured creditors, amounting to approximately $2.5 million during fiscal year 2023, $4.3 million in 2022, and $4.6 million in 2021 (P.Doc. 4 at 219; B.Doc. 5 at 265).

On July 13, 2023, the court entered an order granting the Trustee's motions for stay pending appeal (P.Doc. 4 at 222; B.Doc. 5 at 268). The court ordered that

the Debtors continue to make their Chapter 13 plan payments to the Trustee for the remaining term of the plan in each case and that upon completion of all plan payments the Debtors would be eligible to apply for a discharge. The court further provided that the completion of the plan payments at the current percentage and the discharge of the Debtors in each case was without prejudice to the Trustee's right to pursue modification of the plans and apply the non-exempt settlement funds to the cases and increase the percentage paid on unsecured claims. In the meantime, the Trustee was to hold the settlement funds pending further orders of the court. (*Id*.)

6. District court affirmance of bankruptcy court orders

After briefing by the parties on appeal, the district court entered an order on January 12, 2024, disagreeing with several of the bankruptcy court's legal conclusions but ultimately affirming the denial of the motions to modify as within the bankruptcy court's discretion under 11 U.S.C. § 1329. (P.Doc. 12; B.Doc. 15) (hereinafter "Slip Op.").

The court first confirmed the bankruptcy court's conclusion that the settlement proceeds were property of the Chapter 13 bankruptcy estates under 11 U.S.C. § 1306(a) and under the confirmed plans. (Slip Op. at 5). Like the bankruptcy court, the district court recognized that, pursuant to § 1329(b)(1), a modified plan must meet the requirements of § 1325(a), which included the "best

interest of the creditors" or "liquidation" test found in § 1325(a)(4), as well as the "projected disposable income" test found in § 1325(b)(1)(B). (Id. at 6). The court noted that the parties did not contest the application of this "projected disposable income" test to Chapter 13 plan modifications (Id. at 10-11 and n.9)

Turning to the liquidation test of § 1325(a)(4), the district court disagreed with the bankruptcy court that § 348(f) applied to the liquidation analysis to be undertaken at the time of plan modification (Slip Op. at 8-9). Because § 1325(a) directed the court to look to 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)." (Id. at 9) (emphasis in original). Thus, the net settlement proceeds were to be included in the liquidation analysis to see whether the proposed modified plan satisfied § 1325(a)(4). (Id.) Because the proposed increased distribution to the unsecured creditors of the net settlement proceeds provided "at least as much to the unsecured creditors as they would receive in a hypothetical Chapter 7 liquidation," the liquidation test "provides a basis for modification." (Id. at 10).

Turning to the "projected disposable income" test under § 1325(b), the district court agreed that the settlement proceeds did not meet the statutory definition of "disposable income" as used in an initial plan confirmation, "but

nevertheless may be considered as additional disposable income for purposes of plan modification." (Slip Op. at 11). The court adopted the analysis of *In re Peebles*, 500 B.R. 270 (Bankr. S.D. Ga. 2013), which recognized that a post-petition inheritance received by the debtors was not "disposable income" as "strictly" defined under § 1325(b)(2), which defines "disposable income" in terms of the debtor's "current monthly income," which in turn is defined as the average monthly income during the six months preceding the commencement of the case, a look-back period which "would clearly exclude [the settlement proceeds at issue], which [debtors] did not receive until well after the petition date." (Id. at 12) (bracketed material in original) (quoting *In re Peebles*, 500 B.R. at 275–76). But the district court also adopted the conclusion of the *Peebles* court, quoted below, that such post-petition assets still represented "disposable income" that plan modifications were intended to capture under § 1329:

> "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 period. 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 represent 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 source 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.**
> . . .
>
> 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" (Slip Op. at 12) (bracketed language and emphasis in original) (quoting *In re Peebles*, 500 B.R. at 275–76).

Based upon the *Peebles* court analysis, the district court concluded that "although the 'disposable income' test does not provide a basis for modification, it also does not preclude modification." (Slip Op. at 12).

Finally, the district court turned to the bankruptcy court's application of what it defined as the "non-statutory 'ability-to-pay'" standard adopted by this Court in *Waldron*. The district court first rejected the "novel conclusion" of the bankruptcy court that the settlement proceeds were "not new assets" because the Debtors had "given consideration in the form" of their injuries, pain and suffering. (Slip Op. at 13-14) (quoting *In re Hill*, 652 B.R. at 224). But then, focusing only on any change in the Debtors' financial circumstances, the district court nevertheless upheld the bankruptcy court's ruling. In adopting a standard by which to determine whether a plan modification is justified, the court relied upon *In re Arnold*, 869 F.2d 240, 241 (4th Cir. 1989), which stated that it was "well-settled that a *substantial* change in the debtor's financial condition after confirmation may warrant a change in the level of payments." (Id. at 14) (emphasis added). The court then affirmed the bankruptcy court's decision on the basis that the "relatively

small" amount of settlement proceeds did not effect a "substantial" change in the Debtors' financial condition:

> "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 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 $6,000.00 to repair it. Debtor Proffitt needs cosmetic surgery estimated at $500.00 for her nose after her fall at Walmart." (Id.) (emphasis added).

STATEMENT OF STANDARD OF REVIEW FOR EACH CONTENTION

1. The Trustee contends that the bankruptcy court erred in concluding that non-exempt settlement proceeds received from post-petition personal injury claims are not "income" within the meaning of "disposable income" under Code § 1325(b). The standard of review for this contention is *de novo. See In re America-CV Station Grp., Inc.,* 56 F.4th 1302, 1309 (11th Cir. 2023) (bankruptcy courts' legal conclusions and any mixed questions of law and fact are reviewed *de novo*); *In re Tennyson*, 611 F.3d 873, 875 (11th Cir. 2010) ("Conclusions of law reached by a 'bankruptcy court or by the district court are reviewed *de novo*.'") (quoting *In re Bateman*, 331 F.3d 821, 825 (11th Cir. 2003))

2. The Trustee contends that the district court erred in concluding that the "disposable income" test did not provide a basis for modification. The standard of review for this contention is *de novo. See* authorities cited in contention no. 1.

3. The Trustee contends that the bankruptcy court erred in concluding that the settlement proceeds were not "new assets" that increased the Debtors' ability to pay because the Debtors gave "consideration" for the post-petition personal injury settlement proceeds in the form of their injury, pain and suffering. The standard of review for this contention is *de novo. See* authorities cited in contention no. 1.

4. The Trustee contends that the bankruptcy court abused its discretion in denying the Trustee's motions to modify, based upon its conclusion that the

Debtors gave consideration in the form of pain and suffering for the post-petition personal injury settlement proceeds which are thus not "new assets" increasing the Debtors' ability to pay. The standard of review for this contention is abuse of discretion. In assessing whether a court has abused its discretion, an appellate court reviews the lower court's "purely legal determinations *de novo*." *SuVicMon Dev., Inc. v. Morrison*, 991 F.3d 1213, 1225 (11th Cir. 2021) (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009)). A trial 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," or by "commit[ting] a clear error in judgment." *Id.* (alteration in original; citations omitted).

5. The Trustee contends that the district court applied the wrong standard in requiring a "substantial" change in circumstances for a motion to modify plan payments upward or downwards. The standard of review for this contention is *de novo*. *See In re Tennyson*, 611 F.3d at 875.

SUMMARY OF THE ARGUMENT

The payment of a Chapter 13 debtor's post-petition net settlement proceeds as an additional dividend to the unsecured creditors has been, for many years, a routine matter in the bankruptcy court below. Indeed, in the Debtor Boutwell's bankruptcy proceedings, the court had earlier approved without fanfare her motion to distribute to the unsecured creditors, as an additional dividend, the net settlement proceeds received from an earlier personal injury claim arising from a car accident.

But now, on the Trustee's motions to modify seeking the same kind of distribution, the court set its sails in a radically new direction. It adopted and applied a novel, unprecedented "general rule" that Chapter 13 debtors give "consideration" for their post-petition personal injury settlements in the form of pain and suffering, and thus these settlement funds are not "new assets" that increase the debtors' ability to pay their creditors and are not distributable to their unsecured creditors as an additional dividend. This new "general rule" served not only to defeat the motions to modify in this case but also, if sanctioned on appeal, will prevent the distribution of *any* post-petition personal injury settlements to unsecured creditors as an additional dividend in *any* case in this Circuit. Such a rule will radically alter the historical bankruptcy practice in the Southern District of Alabama, as well as other Districts in this Circuit, impacting the way millions of

dollars in such settlement funds get distributed every year. The bankruptcy court's novel theory in fact creates a new unlimited exemption, by judicial fiat, for any post-petition personal injury settlements, upending and rendering meaningless the more limited state legislative exemptions, if any, in the debtor's state of residence, legislative exemptions that are supposed to control in bankruptcy proceedings.

Stripped of the support of this untenable theory, the bankruptcy court's conclusion that the settlement proceeds did not increase the Debtors' ability to pay lacks any support in the record. All medical and other expenses related to the accidents had been reimbursed. The Debtors showed no loss of income or increased expenses as a result of their accidents and the evidence was without dispute that their income and ongoing expenses had not changed since commencement of the case. The two matters that the bankruptcy court referenced concerning the Debtor Boutwell – car repairs needed to her mother's car damaged while her husband was driving and a loan made by her parents – were not additional expenses that lowered her disposable income but additional post-petition debts owed to her parents. If her parents had wanted to have those debts paid in the Chapter 13 proceedings, proofs of claim would have to be filed and allowed by the court under the limited statutory circumstances for such post-petition claims as provided by 11 U.S.C. § 1305. Even then, such claims would be treated like all

other unsecured claims, repaid on a percentage of the claim, in the absence of a modification of the plan that justified giving such claims a priority.

The district court below, after rightly rejecting the bankruptcy court's radical new theory as a "novel conclusion," committed legal error of its own in upholding the bankruptcy court's decision. It applied a standard expressly rejected by this Court in *In Re Guillen*, 972 F.3d 1221 (11th Cir. 2020) – *i.e.*, that changes in the debtor's financial circumstances must be "substantial" to justify a change in plan payments. The district court described the bankruptcy court as having determined that the "relatively small" amount of the settlement proceeds did not "substantially improve" the Debtors' financial conditions so as to justify a modification. But having stripped the bankruptcy court of its novel "pain and suffering as consideration" theory, the district court was left with a record that showed without dispute that the settlement proceeds *had* improved the Debtors' financial condition, and *substantially* so (even if that showing were necessary) and that they had an increased ability to pay, as a result of, and to the extent of, those settlements.

The rulings below should be reversed and these proceedings remanded to the bankruptcy court with instructions to grant the Trustee's motions.

ARGUMENT

I. All Property Acquired After the Filing of a Chapter 13 Petition Is Property of the Estate and Potentially Distributable to Unsecured Creditors as an Additional Dividend.

A. Under Chapter 13, debtors keep their prepetition assets in exchange for the dedication of all their "disposable income" to creditors over the "applicable commitment period."

In Chapter 13 bankruptcy, debtors reorganize their finances by committing future disposable earnings to the repayment of creditors, instead of liquidating their assets. *See* 11 U.S.C. § 1322(a)(1). In committing all their future "disposable income"[3] to creditors, over an "applicable commitment period" (three to five years), as dictated by a court-approved plan, debtors can protect their existing assets from liquidation. Under such plans, creditors are assured they will receive at least as much as they would have received in a liquidation under Chapter 7 because any plan must satisfy the "best interests of the creditors" or "liquidation" test of 11 U.S.C. § 1325(a)(4).

[3]The debtor's "disposable income" means "current monthly income" received by the debtor "from all sources" (except for certain specified items of income) less amounts reasonably necessary to be expended for maintenance or support of the debtor. *See* Code §§ 1325(b)(2) (defining "disposable income"), 101(10A)(A) (defining "current monthly income"). The only items of income excluded are (i) benefits received under the Social Security Act; (ii) certain payments to victims of war crimes or crimes against humanity; (iii) certain payments to victims of international terrorism or domestic terrorism; and (iv) certain payments to members of the military for disability or combat-related injuries or death. *See* § 101(10A)(B)(ii).

Under Chapter 13, the debtor not only retains all prepetition assets but also, upon completion of all plan payments, receives a discharge from debts under § 1328(a). This "superdischarge" includes at least eleven categories of debt that are not dischargeable in Chapter 7. *See* 11 U.S.C. § 523(a)(6) (in part), (7), (10), (11), (12), (14b) and (15-19).

B. All post-petition assets or income that increase the debtor's ability to pay, including settlement proceeds from post-petition personal injury claims, are payable to the debtor's unsecured creditors as an additional dividend

Unlike post-petition assets in a Chapter 7 proceeding, which are not "property of the estate," the Chapter 13 estate includes any property acquired by the debtor after the Chapter 13 petition is filed and before the case is closed, dismissed or converted to a case under another chapter. *See* 11 U.S.C. § 1306(a); *In re Waldron*, 536 F.3d at 1243 (proceeds from settlements of post-petition claims for uninsured motorist benefits were property of Chapter 13 estate). To the extent this post-petition property increases the debtor's ability to pay off his debts, the plan is subject to modification to increase the amount of payments to unsecured creditors under the plan. *See* 11 U.S.C. §1329(a)(1). The "price tag" for all the benefits of Chapter 13 is this long-term commitment to devote all property acquired post-petition to the payment of creditors. *In re Tinney*, No. 07-42020-JJR13, 2012 WL 2742457, at *3 (Bankr. N.D. Ala. July 9, 2012). "Such additional property may be increased earnings, but most often comes in the form of a lump-

sum payment from, for example, casualty insurance, *settlement of a lawsuit*, life insurance proceeds, or as in this case, an inheritance." *Id.* (emphasis added).

Consistent with these principles, in *In re Waldron*, 536 F.3d 1239, this Court held that the proceeds received from the settlement of claims for uninsured motorist proceeds, arising out of post-petition accidents, were property of the Chapter 13 estate and that the bankruptcy court did not abuse its discretion in requiring the debtors to amend their schedule of assets in order to disclose any such settlements. *Id.* at 1244. In fact, in this Circuit, the debtor has a "continuing duty" to amend his or her schedule of assets to disclose any changes in assets after confirmation of the plan, including post-confirmation claims against a defendant in a later civil suit. *Id*. (citing *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002), *overruled on other grounds by Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017)); *see also Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 643 (11th Cir. 2019); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010). The disclosure of such post-petition assets "gives the trustee and creditors a meaningful right to request, under § 1329, a modification of the debtor's plan to pay his creditors." *In re Waldron*, 536 F.3d at 1245. This requested modification may seek "to increase payments made by the debtor to satisfy a larger percentage of the creditors' claims." *Id.* Conversely, if the debtor loses a stream of income, he can move to modify his plan to decrease his

payments. *Id.* at 1246. "Under the ability-to-pay standard, creditors share both the gains and losses of the debtor." *Id.* (internal citations omitted).

District court and bankruptcy court decisions in this Circuit recognize that settlement proceeds received from post-petition personal injury claims are property of the estate under § 1306(a) and will support, indeed require, a modification of the plan to increase the payments to unsecured creditors. *See, e.g., McKinney v. Russell,* 567 B.R. 384, 390-395 (M.D. Ala. 2017) (bankruptcy court abused its discretion in failing to find cause for trustee's motion to modify plan to collect net settlement proceeds of post-petition personal injury claim for benefit of unsecured creditors); *In re Springer*, 338 B.R. 515 (Bankr. N.D. Ga. 2005); *In re Studer*, 237 B.R. 189 (Bankr. M.D. Fla. 1998); *In re Nott*, 269 B.R. 250 (Bankr. M.D. Fla. 2000).

II. A Modified Chapter 13 Plan Must Satisfy Both the "Liquidation" Test of 11 U.S.C. § 1325(a)(4) and the "Disposable Income" Test of 11 U.S.C. § 1325(b)

Under 11 U.S.C. § 1329(a)(1) (Exhibit A), a plan may be modified upon the request of the debtor, the trustee, or the holder of an allowed unsecured claim to increase or decrease the amount of the payments on claims of a particular class of creditors under the plan. Under § 1329(b), the modified plan must satisfy the requirements of 11 U.S.C. § 1325(a) (Exhibit B), which includes the "best interest of the creditors" or "liquidation" test of § 1325(a)(4). And, although § 1329 does

not expressly refer to the requirements of § 1325(b) — described as the "disposable income" test[4] — the bankruptcy courts in this Circuit, including the bankruptcy court and district court below, are generally agreed that a modified plan must also comply with the requirements of § 1325(b). *See* District Court Slip Op. at 6, 10-11 and n.9; *In re Hill*, 652 B.R. at 219 (citing *In re Stallworth,* No. 16-4277 (Bankr. S.D. Ala. July 12, 2017) (*en banc*)); *In re Baxter*, 374 B.R. 292, 296 (Bankr. M.D. Ala. 2007) (because § 1325(a) begins with the phrase 'except as provided in subsection (b),' this has the effect of capturing both subsections in the mandate of § 1329 that modified plans meet the requirement of § 1325(a)). Indeed, the decisions of this Court have assumed the application of the "disposable income" test of § 1325(b) to plan modification. See *In re Tennyson*, 611 F.3d 873, 879 (11th Cir. 2010) (if debtor's "negative disposable income were to increase to a positive number [in subsequent years of 5 year plan], § 1329 would allow unsecured creditors to file for a plan modification"); *In re Waldron*, 536 F.3d at 1246 (in plan modification context, court references § 1325(b) in support of statement that Congress intended "that the debtor repay his creditors to the extent of his capability during the Chapter 13 period").

Under § 1325(b), a plan may not be approved unless it provides that all the debtor's "projected disposable income" to be received in the "applicable

[4] *See* footnote 3, *supra*, for definition of "disposable income" under § 1325(b)(2).

commitment period" will be applied to make payments to unsecured creditors under the plan. *See* § 1325(b)(1)(B). The definition of "disposable income" under § 1325(b)(2) was substantially revised by the Bankruptcy Abuse Protection Consumer Protection Act of 2005 ("BAPCPA"), one of a number of changes the BAPCPA made to Chapter 13 "for the purpose of ensuring that debtors 'repay creditors the maximum they can afford.'" *In re Adamson*, 615 B.R. 303, 308 (Bankr. D. Colo. 2020) (quoting *Ransom v. FIA Card Servs., N.A.,* 562 U.S. 61, 71 (2011)). *See In re Tennyson*, 611 F.3d at 879 ("The heart of [BAPCPA's] consumer bankruptcy reforms . . . is intended to ensure that debtors repay creditors the maximum they can afford.") (quoting H.R. REP. 109-31(I), 2, 2005 U.S.C.C.A.N. 88, 89).

In *In re Tennyson*, 611 F.3d 873, this Court held that this legislative intent behind the BAPCPA amendments compelled the finding that the "applicable commitment period" under § 1325(b) be read as a temporal requirement for the length of the plan, rather than allowing an above median income debtor to reduce the plan period below five years, unless all unsecured creditors' claims are paid in full. *Id*. at 879. Otherwise, unsecured creditors would be deprived of their full opportunity to recover on their claims by way of post-confirmation plan modifications where additional disposable income became available during those five years. *Id*.

The "liquidation" test of § 1325(a)(4) and the "disposable income" test of § 1325(b) are not cumulative; rather, each test must be met, and "the fulfillment of one has no bearing on the other." *In re Adamson*, 615 B.R. at 307 (quoting *In re Hutchinson*, 354 B.R. 523, 531 (Bankr. D. Kan. 2006)). The liquidation test serves as a floor because it is the minimum amount unsecured creditors are to be paid in a Chapter 13 case. But if the debtor can pay more based on the "disposable income" test, creditors are entitled to this larger amount. *See In re McGovern,* 278 B.R. 888, 900 (Bankr. S.D. Fla. 2002), *vacated on other grounds*, 297 B.R. 650 (S.D. Fla. 2003); *In re Keller*, 329 B.R. 697, 702 (Bankr. E.D. Cal. 2005); *In re Miller*, 247 B.R. 795, 797 (Bankr. W.D. Mo. 2000).

III. The Bankruptcy Court and District Court Erred in Concluding That the Post-petition Personal Injury Settlement Proceeds Were Not Distributable to the Unsecured Creditors as an Additional Dividend.

A. The bankruptcy court erred in concluding that the post-petition personal injury settlement proceeds were not "income" and thus not "disposable income" under 11 U.S.C. § 1325(b).

In its legal analysis, the bankruptcy court below recognized that, under its own previous decisions, the "disposable income" test of Code § 1325(b) applies to proposed plan modifications. *In re Hill,* 652 B.R. at 219. But it concluded that the proceeds from a personal injury settlement are not "income" when considering whether a plan should be modified. This conclusion deviates from generally all other decisions — both in this Circuit and others — which are univocal in holding that post-petition personal injury settlement proceeds *do* constitute additional

"disposable income" to be considered on plan modification. *See, e.g., McKinney*, 567 B.R. at 394 (M.D. Ala. 2017); *In re Russell*, No. 13-30160-DHW, 2016 WL 3564314, at *2 (Bankr. M.D. Ala. June 22, 2016); *In re Kirby*, No. BR10-40455-TLS, 2012 WL 733884, at *3 (Bankr. D. Neb. Mar. 6, 2012); *In re Stretcher*, 466 B.R. 891, 896 (Bankr. W.D. Tex. 2011); *In re Baxter*, 374 B.R. 292, 295 (Bankr. M.D. Ala. 2007); *In re Springer*, 338 B.R. 515, 519 (Bankr. N.D. Ga. 2005); *In re Studer*, 237 B.R. 189, 192 (Bankr. M.D. Fla. 1998).

The bankruptcy court's conclusion that personal injury settlement proceeds are not "income," and thus not "disposable income," is at odds not only with the holdings of all these other bankruptcy and district courts but also with the reasoning of this Court in *In re Waldron*, 536 F.3d 1239. In that case, the debtor had received settlement proceeds on a claim for underinsured motorist benefits arising from a post-petition accident. *Id.* at 1241. The Court held that the debtor's disclosure of these settlement proceeds was necessary to give the trustee and creditors a "meaningful right" to request, under § 1329, a modification of the debtor's plan to pay his creditors. *Id.* at 1245. In particular, the Court reasoned that this disclosure was required in order to determine whether the settlement proceeds might have to be paid out to the creditors as additional "disposable income":

> "Payments under a plan are based on the debtor's *disposable income* when the plan is confirmed. *Id.* §

> 1325(b)(1)(B). When a debtor discloses assets acquired *after* confirmation, creditors may move the bankruptcy court to modify the plan to increase payments made by the debtor to satisfy a larger percentage of the creditor's claims. *Id.* § 1329(a)(1)." Id. (emphasis added).

The Court thus reasoned that assets acquired *after* confirmation, such as the settlement proceeds at issue, can be "disposable income" not present at the time the plan was confirmed. The Court later explicitly referenced § 1325(b), the "disposable income" test, in support of its recognition that, under the "ability-to-pay standard" of Chapter 13, "Congress . . . intended . . . that the debtor repay his creditors to the extent of his capability during the Chapter 13 period." *Id.* at 1246 (quoting *In re Arnold*, 869 F.2d at 242). The conclusion is inescapable that, in the Court's mind, these post-petition settlement proceeds were available as additional "disposable income," and potentially distributable to the unsecured creditors. As another bankruptcy court has recognized, the whole purpose of requiring disclosure of the settlement in *Waldron* was "to determine if the asset in question could be included in disposable income." *In re Peebles*, 500 B.R. at 279.

The bankruptcy court's conclusion that the settlement proceeds were "assets," not "income," seemed to rest upon the notion that "disposable income" under § 1325(b) must be "regular" income or a "stream of payments," and that the lump sum settlement payments were neither. *See In re Hill*, 652 B.R. at 219–220. It first cited the eligibility requirements for who may be a Chapter 13 debtor, i.e.,

an "individual with regular income," defined as one "whose income is sufficiently stable and regular to enable such individual to make payments under" a Chapter 13 plan. *Id.* (citing Code §§ 109(e) and 101(30)). But these are eligibility requirements. They do not determine what is "income" under the "disposable income" test. Neither § 1325(b)(2) nor the definition of "current monthly income" at § 101(10A)(A) uses the modifier "regular" to describe income. "There is nothing in the Code to require that income be regular or periodic for § 1325(b) purposes. … Compare the '*regular* income' requirement for eligibility in 11 U.S.C. §§ 109(e) and 101(29)." *In re Minor*, 177 B.R. 576, 582 (Bankr. E.D. Tenn. 1995) (emphasis in original) (quoting Keith M. Lundin, *Chapter 13 Bankruptcy* § 5.35 (2d ed. 1994)). Numerous courts have recognized lump sum payments to be "income" for purposes of the "disposable income" test.[5] For purposes of §

[5] *See In re Launza*, 337 B.R. 286, 289 (Bankr. N.D. Tex. 2005) (personal injury settlement); *In re Adamson*, 615 B.R. at 310–313 (personal injury settlement proceeds); *Ortiz-Peredo v. Viegelahn*, 587 B.R. 321, 326 (W.D. Tex. 2018) (lump sum workers compensation settlement proceeds); *In re Harkins*, 491 B.R. 518, 527 (Bankr. S.D. Ohio 2013) ("lump sum inheritances" and "other types of lump sum receipts" must be included in calculation of "current monthly income"); *In re Melvin*, No. BR 10-92360, 2011 WL 1303307, at *1–2 (Bankr. C.D. Ill. Apr. 6, 2011) (inheritance); *In re Cotto*, 425 B.R. 72, 75 (Bankr. E.D.N.Y. 2010) (definition of current monthly income under § 101(10A) "does not distinguish between income that is nonrecurring and income that will be received on an ongoing basis.") (quoting *In re Mendelson*, 412 B.R. 75, 83 (Bankr. E.D.N.Y. 2009)); *In re Stanley*, 438 B.R. 860, 863–864 (Bankr. D.S.C. 2010) (inheritance); *In re Morgan*, 352 B.R. 693, 701 (Bankr. E.D. Ark.), *amended,* 353 B.R. 599 (Bankr. E.D. Ark. 2006) (proceeds of settlement of tort claim); *In re Minor*, 177

1325(b)(2), whether one receives income as a lump sum payment or a stream of payments is a "distinction of no consequence – any stream of payments can be turned into a lump sum through a factoring agreement; likewise, a lump sum payment can be turned into a stream of payments." *In re Launza*, 337 B.R. at 292 n.9 (holding personal injury settlement proceeds as constituting "income" and thus "disposable income" under § 1325(b)(2)).

In further support of its reading of "income," the bankruptcy court quoted from *In re Brown*, No. 13-35593-GMH, 2014 WL 4793243, at *2 (Bankr. E.D. Wis. Sept. 24, 2014). *See* 652 B.R. at 220. But the *Brown* case did not involve settlement proceeds from a personal injury claim or any other form of post-petition property. Rather the trustee was claiming that the *unrealized* increase in the cash surrender value of the debtor's *prepetition* life insurance policy was income. Not surprisingly, the court rejected the notion that such unrealized gain could be "income." The language quoted from the *Brown* court was actually lifted from *In re Burgie*, 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999). But the *Burgie* court, in discussing "regular income and substitutes," made no distinction between receipt of such income in bulk or in installments. *See* 239 B.R. at 411 (the "proper inquiry regarding the assets in question is whether they are income or income substitutes, not whether the debtor receives them in bulk or installments.").

B.R. at 582 (lump sum workers compensation award); *Watters v. McRoberts*, 167 B.R. 146, 147 (S.D. Ill. 1994) (personal injury settlement proceeds).

The only other decisions cited by the bankruptcy court, in support of its conclusion that settlement proceeds are not "income," were *In re Calixto*, 648 B.R. 119 (Bankr. S.D. Fla. 2023) and *In re Frysinger*, 648 B.R. 386 (Bankr. D. Or. 2022). *See* 652 B.R. at 220. Neither case supports the court's conclusion. The *Frysinger* case dealt only with the eligibility requirements of § 109(e) for a debtor under Chapter 13. As discussed above, § 109(e) specifically refers to an individual with "regular" income, a modifier not found in the definition of "current monthly income" under § 101(10A)(A), which is used in the definition of "disposable income" under § 1325(b)(2). The *Calixto* case simply held that there was cause to allow a Chapter 13 debtor to reopen a case to file amended schedules disclosing a post-confirmation personal injury claim, in order to pursue a state court claim. Nowhere did the court indicate that any settlement proceeds obtained from prosecuting the claim would not be "income." Indeed, there was no occasion for the court to decide whether any recovery would be payable to the unsecured creditors because they had already received 100% of their claims under the plan. 648 B.R. at 122

In summary, the bankruptcy court's decision that the settlement proceeds in these cases were not "income," for purposes of the "disposable income" test of 1325(b)(2), cannot be squared with the Bankruptcy Code and all other case law, including the decision of this Court in *Waldron*, which consistently recognize such

proceeds as income potentially distributable as additional "disposable income" under § 1325(b).

B. The district court erred in concluding that the disposable income test did not provide a basis for modification

On appeal, the district court recognized that the "projected disposable income" test found in § 1325(b)(1)(B) has been applied to Chapter 13 plan modifications in this Circuit and that the parties did not contest its application (Slip Op. at 10-11). Thus, if the settlement proceeds increased the Debtors' projected disposable income, modification of their plans to account for these proceeds was "required." (*Id*. at 11) Then, rather than adopting the bankruptcy court's characterization of the settlement proceeds as "assets" rather than "income," the district court recognized that such settlement proceeds could be considered as "additional disposable income," even though they did not meet the strict statutory definition of 'disposable income' as used in an initial plan confirmation. (*Id*.)[6] The district court adopted the analysis of the bankruptcy court in *In re Peebles*, 500 B.R. 270, which "reject[ed] the notion that this narrow definition of disposable income that applies in the context of a debtor's plan confirmation will preclude a

[6] As discussed in the case quoted by the district court, *In re Peebles*, 500 B.R. 270, "disposable income," as "strictly" defined under § 1325(b)(2), is based on average monthly income over a six month look-back period as of the commencement of the case. This six month look-back period would "clearly exclude" settlement proceeds not received until well after the petition date. (Slip Op. at 11-12) (quoting *In re Peebles*, 500 B.R. at 275-276)

trustee from seeking an upward modification based on assets acquired by the debtor post-confirmation." (*Id.* at 12) (quoting *In re Peebles*¸ 500 B.R. at 275-76). Instead, the *Peebles* court "conclude[d] 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." (*Id.*) (quoting *In re Peebles*, 500 B.R. 275-76).

Then, having concluded that such settlement proceeds could be considered "additional disposable income" and that plan modification would be "required" if they increased the Debtors' projected disposal income, the district court seemed to take a contradictory position: It concluded that the "disposable income" test, although it did not preclude modification, "does not provide a basis for modification." (*Id.*) Unless the court were referring only to the "strict" statutory definition of disposable income as used at plan confirmation, tied to a six month look-back period as of the petition date, this statement, in fact, *contradicts* the view of the court in *Peebles* that post-petition assets or income that increase disposable income *do* provide the basis for a plan modification. The only reason the *Peebles* court denied the trustee's motion for an upward modification in plan payments was because the debtor's post-petition inheritance was not property of the estate, as

stipulated by the parties; in the court's opinion, non-estate property could not constitute disposable income to support a modification. *See* 500 B.R. at 276-279.

The district court below erred in concluding that the "disposable income" test did not provide a "basis for modification" under § 1329.

C. The bankruptcy court abused its discretion in refusing to permit the distribution of the settlement proceeds to the unsecured creditors where these proceeds indisputably increased the Debtors' ability to pay

1. Whether or not post-petition settlement proceeds constitute "disposable income" under § 1325(b), they increase a debtor's ability to pay, thus warranting an increase in payments to unsecured creditors on plan modification

Although the bankruptcy court concluded that the personal injury settlement proceeds were assets, not income, and thus not "disposable income" under § 1325(b), and although the district court concluded, for other reasons, that the "disposable income" test of § 1325(b) did not provide a basis for modification, these legal conclusions were not dispositive of the Trustee's motions. Both courts recognized that they still had to decide whether the Debtors had an increased ability to pay their unsecured creditors as a result of these settlements. Indeed, the decision of this Court in *Waldron* turns upon the recognition of post-petition personal injury settlement proceeds as potentially available to increase payments to the unsecured creditors. Requiring greater distributions to creditors through plan modifications, based on a debtor's increased "ability to pay," was a central feature

of Congress' intent in amending the Bankruptcy Code in 1984 and 2005. *See In re Roscoe*, No. 8:13-BK-06517-RCT, 2017 WL 2839496, at *2 (Bankr. M.D. Fla. June 28, 2017) ("Congress intended Chapter 13 plans to be modifiable based on a debtor's increased or decreased 'ability-to-pay' during the life of the plan," a standard that "authorizes Chapter 13 plan modifications regardless of whether the new found ability to pay constitutes 'disposable income' within the meaning of Section 1325."); *In re McAllister*, 510 B.R. 409, 423–424 (Bankr. N.D. Ga. 2014) (1984 amendments to Bankruptcy Code "established a debtor's ability to pay as a standard for confirmation through enactment of the projected disposable income test and, by permitting trustees and unsecured creditors to modify the plan, carried that standard forward through the case…[T]he purpose behind [the 2005] BAPCPA changes was to strengthen enforcement of the ability to pay policy through more objective standards for determining ability to pay.") (alterations added).

There appears little discernible difference between this "ability-to-pay" standard and the "disposable income" test, other than, upon plan modification, the debtor's ability to pay is measured by the income and expenses at the time of the plan modification, rather than the income and expenses as calculated at the time of

plan confirmation.[7] In the present case, absent any proof that the Debtors' post-confirmation income had decreased, or that their ongoing expenses had increased, since plan confirmation, and absent any other evidence that the Debtors had any unreimbursed expenses related to the accident, the net settlement proceeds necessarily reflect an increased ability to pay and should be distributable to the unsecured creditors.

2. The bankruptcy court's novel theory that post-petition personal injury settlement proceeds are not "new assets," because the debtor gives pain and suffering in "consideration" for them, is without precedent and creates, by judicial fiat, an unlimited exemption for personal injury claims, unlawfully overriding all other more limited legislative exemptions for such claims.

The bankruptcy court avoided this self-evident conclusion by characterizing the settlement proceeds as "compensation" for the loss of "an important non-property, non-monetary asset: good health and the ability to live injury free and pain free." *In re Hill*, 652 B.R. at 224. Thus, the settlement proceeds were not

[7] Indeed, courts that conclude that the "disposable income" test of § 1325(b) is not applicable to plan modifications still look to the debtor's income and expenses at the time of plan modification, based on updated Schedules I and J, to determine whether the debtor has either an increased or decreased ability to pay the unsecured creditors. *See In re Goldston*, 627 B.R. 841, 855-856 and n. 14 (Bankr. D. S. C. 2021)*; In re Crim*, 445 B.R. 868, 871 (Bankr. M.D. Tenn. 2011)*;In re Prieto*, No. 308BK3308PMG, 2010 WL 3959610, at *2 (Bankr. M.D. Fla. Sept. 22, 2010); *In re Hill*, 386 B.R. 670, 676–677 (Bankr. S.D. Ohio 2008); *In re Ireland*, 366 B.R. 27, 34 (Bankr. W.D. Ark. 2007).

"new assets" coming into the estate, because the injured Debtors had given "consideration" for those settlement, i.e., they had "earned" the settlement through their pain and suffering. *Id*. Based upon this reasoning, the bankruptcy court found that, as a "general rule," compensatory damages collected on a post-petition personal injury claim "do not constitute *Waldron's* 'substantially improved financial condition' or 'unanticipated gain" that increases the debtor's ability to pay creditors." *Id.* The court went on to apply this general rule to the case at hand, "specifically find[ing] that the debtors (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 to pay all of the settlement proceeds to the creditors on top of the confirmed plan payments" because the Debtors were "still experiencing pain" and had "already given substantial value, even if non-monetary, for the [post-petition personal injury] assets in the form of pain and suffering." *Id.* at 225.

The district court rightly rejected out of hand the bankruptcy court's "novel conclusion that the settlement proceeds are not new assets and are instead consideration" (Slip Op. at 14). The bankruptcy court's "general rule" effectively creates a new unlimited exemption, by judicial fiat, for post-petition personal injury settlements, rendering meaningless the limits placed on such exemptions under state law, legislative exemptions that are to be controlling in bankruptcy

proceedings.[8] Indeed, this "general rule" effectively excludes *all* post-petition personal injury settlement proceeds, whether legislatively exempt or not, from the calculus of a debtor's "ability to pay" on plan modification. Such a rule is at odds with settled jurisprudence in this Circuit and across the nation, relating to the treatment of post-petition personal injury settlements, *see* authorities *supra* at 33, as well as the Bankruptcy Code itself, as discussed below.

An unlimited judicial exemption of all post-petition personal injury settlement proceeds is, first, inconsistent with the treatment of such proceeds by this Court in *Waldron.* The Court upheld the district court's order requiring disclosure of the debtor's post-petition UIM settlement proceeds so that the creditors would have a "meaningful right" to request an upward modification of the debtor's plan to pay his creditors. 536 F. 3d at 1245. If personal injury settlement proceeds do not increase a debtor's ability to pay, because they are

[8] The federal exemptions from the bankruptcy estate, codified at 11 U.S.C. § 522(d), are not available where states have opted out of the federal exemption scheme and created their own set of exemptions. *See In re James*, 406 F.3d 1340, 1343 (11th Cir. 2005). In such states, the bankruptcy court must look to that state's law to determine what exemptions a debtor residing in that state may claim. *See id.* Georgia limits its personal injury exemption to $10,000 exemption (which does not include pain and suffering or compensation for actual pecuniary loss). *See* O.C.G.A. § 44-13-100(a)(11)(D). Alabama has no separate exemption for personal injury claims but only a "wild card" exemption for personal property up to $7,500. *See* Ala. Code § 6-10-6. Florida offers a personal injury exemption only when the injury arises out of working in a hazardous occupation. *See* Fla. Stat. § 769.05. Otherwise, the debtor must rely on a $4,000 "wild card" exemption for personal property. *See* Fla. Stat. § 222.25.

received as "consideration" for the debtor's injury, there would have been no reason for the disclosure of the UIM settlement in *Waldron*.

Second, such an unlimited judicial exemption is at odds with the Bankruptcy Code itself, which provides limited federal exemptions for only certain components of a personal injury settlement. *See* 11 U.S.C. § 522(d)(11)(D) (providing exemption for payment, not to exceed $27,900.00, "on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss of the debtor . . .") and § 522(d)(11)(E) (providing exemption for "payment in compensation of loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor or any dependent of the debtor"). Such exemptions would not be necessary if payments on account of a personal bodily injury were not otherwise property of the estate to be considered as part of the income used in calculating the debtor's disposable income. *See In re Hammonds*, 729 F.2d 1391, 1393 (11th Cir. 1984) (exemption under § 522(10)(A) for local public assistance benefits "would be meaningless if we were to hold that the property exempted (local public assistance benefits) was not intended to be considered as estate property."). Because the Code allows debtors to exempt certain aspects of personal injury settlement proceeds, those proceeds must be included in the debtor's Chapter 13 estate and included in the calculation of income for purposes of the disposable income test under § 1325(b). *See id.*

(holding that, because the Code allows a debtor to exempt local public assistance benefits from his or her estate, such welfare benefits were included in debtor's Chapter 13 estate and available as income to fund Chapter 13 plan).

Finally, the bankruptcy court's description of personal injury settlements as "categorically different" from other post-petition assets that might appropriately considered "windfalls," because the debtor gave "consideration" for that settlement, i.e., pain and suffering, does not distinguish such settlements from other kinds of post-petition income that is clearly additional disposable income. A debtor provides labor, certainly a form of pain and suffering, as consideration for any post-petition increase in earnings. Yet no one would contend those additional earnings are not additional "disposable income" available to pay unsecured creditors. An increased ability to pay does not have to be from a "windfall," in the sense of being a pure gift, in order for the debtor's unsecured creditors to benefit from that increased ability.

3. In the absence of the bankruptcy court's novel theory, the undisputed evidence shows that the settlement proceeds increased the Debtors' ability to pay and thus must be distributed to the unsecured creditors as an additional dividend

Stripped of the "novel conclusion" that the settlement proceeds did not increase the Debtors' ability to pay, due to the "consideration" they gave for these settlements, the justification for the bankruptcy court's decision collapses. It lacks

an adequate factual foundation on which to stand. The undisputed evidence demonstrated that the Debtors' ability to pay their unsecured creditors was increased by the amount of their respective net settlement proceeds and should have been distributed to them to increase their percentage recovery on their claims.

The Debtor Proffitt admitted she had no loss of income because of her accident (P. Doc. 4 at 34), and she presented no evidence of any unreimbursed medical or other expenses related to that accident. She admitted she was able to make her remaining plan payments to the end of the plan (Id. at 35). Her schedules of income and expenses remained unamended in the wake of the accident. (P. Doc. 4 at 115). The only evidence cited by the bankruptcy court reflecting any possible change in Ms. Proffitt's financial circumstances was a potential $500 bill for a cosmetic procedure for her nose scar. But until that cost were incurred, there was nothing for the Trustee to consider as an offset against the settlement proceeds. In any event, this evidence could not have warranted more than a $500 deduction from the settlement proceeds otherwise distributable to the unsecured creditors.

The Debtor Boutwell also failed to establish any loss of income or increased ongoing expenses because of her accident. Her Schedules remained unchanged. She admitted that she had no accident-related medical expenses that had not been reimbursed nor any other ongoing expenses as a result of the accident (B. Doc. 5 at 20, 25). The bankruptcy court cited her testimony that she and her husband were

living "paycheck to paycheck," 652 B.R. at 224, but that is hardly surprising for any Chapter 13 debtor paying all her disposable income into the estate. The court also described her needing money "to pay for car repairs and repay the couples' parents." *Id.* The estimated car repairs of $6000 were for post-petition damage to her mother's truck while her husband was driving it (B. Doc. at 16-17, 25). The repayment of her parents was for a purported post-petition loan of $3500 they had made to her while she was convalescing after her accident (Id. at 18). These are not additional expenses that reduce their disposable income but post-petition claims that have not been allowed in their bankruptcy proceedings.

With certain exceptions listed in 11 U.S.C. §§ 501 and 502, post-petition claims are generally disallowed in bankruptcy cases, including Chapter 13 proceedings. *See* 8 *Collier on Bankruptcy* ¶ 1305.01 (16th Ed. 2024). Except as specifically provided in the Code, the holder of a post-petition claim is neither a "creditor" nor otherwise expressly authorized to file a claim. *Id.* ¶ 1305.02 (citing 11 U.S.C. § 101 defining "creditor" and § 501(d) allowing only specific kinds of post-petition claims in bankruptcy proceedings). The only exception to this general rule in Chapter 13 proceedings is § 1305, allowing for certain post-petition creditors – those holding tax claims and certain specified types of consumer debt – to file proofs of claim if they choose to do so and thereby participate in the plan to be treated equally with other prepetition creditors for purposes of proof, allowance,

and priority. *Id.* Section 1305(a)(2) permits debtors to obtain additional credit for services or property "necessary for the debtor's performance under the plan" and gives such creditors the right to share with prepetition creditors under the plan by filing proofs of claim. *Id.* ¶ 1305.02[2]. If the debtor wants this claim to be paid in full, the debtor may need to modify the plan and, possibly, separately classify the post-petition claim. *Id.* However, under § 1305(c), such a post-petition claim is not to be allowed if its holder knew or should have known that it was practicable to obtain the approval of the trustee before the consumer debt was incurred and this approval was not obtained. *Id.* ¶ 1305.05. The success of a Chapter 13 plan depends upon the debtor not being allowed to incur unnecessary debt, debt that cannot be repaid except on terms prejudicial to other creditors. So the trustee is given the responsibility of evaluating such matters. *Id.*

The post-petition settlement proceeds in this case could not have lawfully been used to satisfy either of the post-petition claims – for damage to Boutwell's mother's car or for the loan made to Boutwell by her parents. First, no proofs of claim were filed for either of these claims. Second, if they had been, no showing was made that either claim could have qualified under § 1305(a)(2) as a post-petition consumer debt for property or services necessary for the debtor's performance under the plan. Third, if Boutwell's parents had filed a proof of claim for the $3500 loan made by them, a loan obtained without the trustee's approval, it

would have been disallowed under § 1305(c) because Boutwell's parents knew or should have known that prior approval by the trustee was practicable and was not obtained. Finally, if either of the post-petition claims had been filed and had been allowed, they would have been treated equally with other prepetition claims, not paid in full, in the absence of a plan modification justifying such disparate treatment of this one post-petition unsecured claim.

In any event, these two post-petition debts, even if they were properly payable in full out of the settlement proceeds, did not justify denying the unsecured creditors any remaining portion of the $19,685.00 in settlement proceeds.

In summary, the bankruptcy court applied a legally erroneous rule of law in determining that the Debtors did not have an increased ability to pay their unsecured creditors, due to the "consideration" they gave for their personal injury settlements in the form of pain and suffering. The Debtors' financial circumstances remained unchanged as a result of an accident. The court abused its discretion in applying a legally erroneous rule that served to justify denial of the Trustee's motions that otherwise were entitled to be granted under the evidence presented.

D. In upholding the bankruptcy court's decision, the district court applied an erroneous standard for determining whether plan payments are due to be modified.

As discussed above, the district court properly rejected the bankruptcy court's "novel conclusion" that the Debtors' pain and suffering served as "consideration" for their settlements, and thus did not increase their ability to pay their creditors. But the district court then erred itself, in applying a standard to the Trustee's motions that has been expressly rejected by this Court: It adopted the Fourth Circuit's requirement that there be a "substantial" change in the debtor's financial condition after confirmation to warrant a change in the level of payments. (B.Doc. 15 at 14) (quoting *In re Arnold*, 869 F.2d 240, 241 (4th Cir. 1989)). Based on this standard, the district court upheld what it described as the bankruptcy court's determination that the "relatively small" amount of settlement proceeds did not "substantially" improve the financial condition of the debtors to justify modification. (*Id*.)

In *In Re Guillen*, 972 F.3d 1221 (11th Cir. 2020), this Court expressly rejected the holding of the Fourth Circuit in *In re Arnold*, which required an "unanticipated, substantial change" in the debtor's financial condition to allow for modification of a plan to increase or decrease payments. *Id*. at 1228 (citing *In re Arnold*, 869 F.2d at 243). The Court held that the "plain text" of § 1329 "does not impose a requirement that the bankruptcy court find any change in circumstances

before modifying a confirmed plan." *Id*. at 1226. The Court "decline[d] to graft this requirement onto the statute." *Id.*

Thus, there is no requirement in this Circuit that either the debtor, the trustee, or any creditor show the existence of a "substantial" change in circumstances in seeking a plan modification to alter plan payments under § 1329. Nor is there any precedent for the bankruptcy court to deny a motion seeking to increase plan payments because of the "relatively small" nature of the post-petition income or asset coming into the estate. If bankruptcy courts were given the discretion to deny plan modifications based upon such subjective considerations, this would frustrate the primary legislative objectives of the BAPCA amendments — ensuring that debtors repay creditors "the maximum they can afford," *see In re Tennyson*, 611 F.3d at 879, and, for above-median income debtors, "the elimination of judicial discretion in determining disposable income." *In re Early*, 523 B.R. 804, 810 (Bankr. S.D. Ill. 2014); *see also In re Wilson*, 383 B.R. 729, 734 (B.A.P. 8th Cir. 2008) (purpose of BAPCPA amendments to §§ 707(b) and 1325(b) was "to require above-median income debtors to make more funds available to their unsecured creditors, and to do so by limiting the court's authority to allow epenses."); *Musselman v. eCast Settlement Corp.*, 394 B.R. 801, 812 (E.D.N.C. 2008) ("Congress, in its amendments to § 1325(b) . . . sought to impose objective standards on Chapter 13 determinations, thereby removing a degree of judicial

flexibility in bankruptcy proceedings."); *In re Morgan*, 374 B.R. 353, 362 (Bankr. S.D. Fla. 2007) ("[U]se of the [IRS] Standards as a fixed allowance recognizes BAPCA's goal of removing or minimizing judicial discretion when applying the means test; allowing for a quick and formulaic analysis of the Debor's disposable monthly income"); *In re Briscoe*, 374 B.R. 1, 20 (Bankr. D.D.C. 2007) ("The means test now incorporated into the 'projected disposable income' requirement accomplishes Congress' goal of removing discretion from the judiciary, thereby preventing wayward judges from abusing their discretion by crediting debtors for unreasonable expenses").

In upholding the bankruptcy court's discretion denying the Trustee's motions to modify, the district court described the bankruptcy court as making a determination that it never made, *i.e.,* that the "relatively small" amount of settlement proceeds did not "substantially improve" the financial condition of the Debtors. The bankruptcy court never described the settlements as "relatively small." That had nothing to do with that court's analysis, which was based on the "novel conclusion" dismissed by the district court, *i.e.,* the "substantial value" the Debtors gave in "consideration" for the settlement proceeds in the form of pain and suffering. In the absence of that "consideration" theory, the undisputed evidence does show an increased ability to pay to the extent of the net settlement proceeds.

In any event, even if some "substantiality" threshold were necessary, the settlement proceeds represented a substantial increase in the Debtors' ability to pay their unsecured creditors. Distribution of Ms. Boutwell's net settlement proceeds of $19,685 to her unsecured creditors would have nearly doubled their recoveries, from 40% to 77% of their claims. Ms. Proffitt's settlement proceeds of $7,685.00, although not as large, nevertheless involved nearly a 25% increase in her creditors' recoveries, from 62% to 76%, not an insignificant increase. Making upward (or downward) adjustments to plan payments dependent upon a bankruptcy court's determination that the changes in the debtor's financial circumstances are "substantial" enough to warrant that change enables the kind of standardless judicial discretion Congress sought to eliminate by the 2005 BAPCPA amendments to § 1325, as well as frustrating Congress' intent to have debtors pay their creditors the maximum they can afford.

In summary, the district court's decision upholding the bankruptcy court's denial of the Trustee's motions to modify – after rightly discrediting the bankruptcy court's theory that such settlement proceeds were not "new assets" but given in consideration of the Debtors' pain and suffering – was based upon a legally erroneous standard, reads into the bankruptcy court's decision a determination it never made, and finally cannot be supported by the district court's own test of substantiality, assuming such a test existed in this Circuit

CONCLUSION

For all the above reasons, the decisions of the bankruptcy court and district court below must be reversed and this cause remanded with instructions to grant the Trustee's motions to modify the Debtor's plans.

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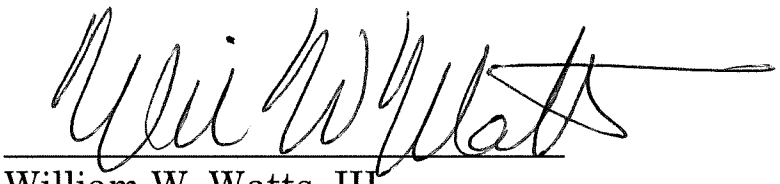
CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the word limitation set forth in Fed. R. App. P. 8.1(e)(2) and, the word limit of Fed. R. App. P., 32(a)(7)(B) because this document contains 12,946 words.
2. I further certify that this Brief complies with the font requirements set forth in Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 font.

Date: May 24, 2024



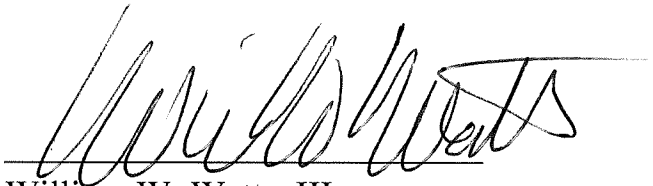
William W. Watts, III

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2024, the foregoing was filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties to this proceeding and/or served a copy by U.S. Mail as follows:

Lacy Robertson (Via CM/ECF System)
Debtors' counsel

Christopher T. Conte (Via CM/ECF System)
Chapter 13 Trustee



William W. Watts, III

ADDENDUM

EXHIBIT A

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 13. Adjustment of Debts of an Individual with Regular Income (Refs & Annos)
Subchapter II. The Plan

11 U.S.C.A. § 1329

§ 1329. Modification of plan after confirmation

Effective: March 27, 2022
Currentness

(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;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that--

(A) such expenses are reasonable and necessary;

(B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

(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.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

[(d) Repealed. Pub.L. 116-136, Div. A, Title I, § 1113(b)(2)(A)(iii), Mar. 27, 2020, 134 Stat. 312]

[(e) Repealed. Pub.L. 116-260, Div. FF, Title X, § 1001(e)(2), Dec. 27, 2020, 134 Stat. 3219]

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2651; Pub.L. 98-353, Title III, §§ 319, 533, July 10, 1984, 98 Stat. 357, 389; Pub.L. 109-8, Title I, § 102(i), Title III, § 318(4), Apr. 20, 2005, 119 Stat. 34, 94; Pub.L. 116-136, Div. A, Title I, § 1113(b)(1)(C), (2)(A)(iii), Mar. 27, 2020, 134 Stat. 311, 312; Pub.L. 116-260, Div. FF, Title X, § 1001(e), Dec. 27, 2020, 134 Stat. 3218; Pub.L. 117-5, § 2(b)(1), Mar. 27, 2021, 135 Stat. 249.)

Notes of Decisions (342)

11 U.S.C.A. § 1329, 11 USCA § 1329
Current through P.L. 118-62. Some statute sections may be more current, see credits for details.

End of Document

EXHIBIT B

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 13. Adjustment of Debts of an Individual with Regular Income (Refs & Annos)
Subchapter II. The Plan

11 U.S.C.A. § 1325

§ 1325. Confirmation of plan

Effective: March 27, 2022
Currentness

(a) Except as provided in subsection (b), the court shall confirm a plan if--

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(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;

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that--

(I) the holder of such claim retain the lien securing such claim until the earlier of--

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim 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.

(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--

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $825 [originally "$525", adjusted effective April 1, 2022][1] per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $825 [originally "$525", adjusted effective April 1, 2022)[1] per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2649; Pub.L. 98-353, Title III, §§ 317, 530, July 10, 1984, 98 Stat. 356, 389; Pub.L. 99-554, Title II, § 283(y), Oct. 27, 1986, 100 Stat. 3118; Pub.L. 105-183, § 4(a), June 19, 1998, 112 Stat. 518; Pub.L. 109-8, Title I, § 102(g), (h), Title II, § 213(10), Title III, §§ 306(a), (b), 309(c)(1), 318(2), (3), Title VII, § 716(a), Apr. 20, 2005, 119 Stat. 33, 53, 80, 83, 93, 129; Pub.L. 109-439, § 2, Dec. 20, 2006, 120 Stat. 3285; Pub.L. 111-327, § 2(a)(44), Dec. 22, 2010, 124 Stat. 3562; Pub.L. 116-136, Div. A, Title I, § 1113(b)(1)(B), (2)(A)(ii), Mar. 27, 2020, 134 Stat. 311, 312; Pub.L. 116-260, Div. N, Title III, § 320(e), (f)(2)(A)(v), Dec. 27, 2020, 134 Stat. 2016, 2017.)

ADJUSTMENT OF DOLLAR AMOUNTS

<For adjustment of dollar amounts specified in subsec. (b)(3) and (4) of this section by the Judicial Conference of the United States, effective Apr. 1, 2022, see note set out under 11 U.S.C.A. § 104.>

<By notice published Feb. 4, 2022, 87 F.R. 6625, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b)(3) and (4) of this section, effective Apr. 1, 2022, as follows:>

<Adjusted $750 (each time it appears) to $825 (each time it appears).>

<By notice published Feb. 12, 2019, 84 F.R. 3488, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b)(3) and (4) of this section, effective Apr. 1, 2019, as follows:>

<Adjusted $700 (each time it appears) to $750 (each time it appears).>

<By notice published Feb. 22, 2016, 81 F.R. 8748, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b)(3) and (4) of this section, effective Apr. 1, 2016, as follows:>

<Adjusted $675 (each time it appears) to $700 (each time it appears).>

<By notice published Feb. 21, 2013, 78 F.R. 12089, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b)(3) and (4) of this section, effective Apr. 1, 2013, as follows:>

<Adjusted $625 (each time it appears) to $675 (each time it appears).>

<By notice published Feb. 25, 2010, 75 F.R. 8747, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b)(3) and (4) of this section, effective Apr. 1, 2010, as follows:>

<Adjusted $575 (each time it appears) to $625 (each time it appears).>

<By notice published Feb. 14, 2007, 72 F.R. 7082, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b) of this section, effective Apr. 1, 2007, as follows:>

<Adjusted $525 (each time it appears) to $575 (each time it appears).>

Notes of Decisions (2328)

Footnotes

1 See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 1325, 11 USCA § 1325
Current through P.L. 118-62. Some statute sections may be more current, see credits for details.

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