UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRANSMITTAL SHEET FOR OPINIONS FOR POSTING

Will this opinion be published?	No
Bankruptcy Caption:	In re Tatiana Salinas
Bankruptcy No.:	23bk01309
Date of Issuance:	September 23, 2024
Judge:	Deborah L. Thorne

Appearances:

Attorney for Debtor	*Michael Miller* *Semrad Law Firm LLC* 11101 W. Western Avenue Chicago, IL 60643
Attorney for Ch. 13 Trustee	*Gerald Mylander* *Glenn B. Stearns, Ch. 13 Trustee* *801 Warrenville Road, Suite 650* *Lisle, IL 60532*

Summary:

Trustee filed a motion to modify a debtor's Chapter 13 plan pursuant to § 1329, arguing that her post-confirmation personal injury claim was part of the estate and the debtor could now increase payments to creditors. HELD: The Motion to Modify was denied without prejudice. At this time, the Trustee did not meet his burden of showing sufficient grounds to modify the debtor's plan..

United States Bankruptcy Court, Northern District of Illinois

JUDGE	Deborah L. Thorne	**Case No.**	23-01309
DATE	September 23, 2024	**Adversary No.**	
CASE TITLE	In re Tatiana Salinas		
TITLE OF ORDER	Order Denying Trustee's Motion to Modify Plan		

STATEMENT

This matter comes before the court on the Chapter 13 Trustee's Motion to Modify the plan of a debtor to capture proceeds from the debtor's post-confirmation personal injury lawsuit for the benefit of unsecured creditors.

In briefing, the parties take different positions on the issue of whether the post-petition claim is property of the estate for purposes of the "best interest of creditors" test required by sections 1329(b) and 1325(a). Deciding which position is correct requires a journey through a thicket of provisions governing property of the estate.[1] To put it simply: the Trustee contends that the "best-interest" test must consider property acquired post-petition as well as post-confirmation, while the debtor contends that the test contemplates only property in existence on the date of a plan's confirmation.

The more fundamental issue before the court is whether the Trustee has met his burden to show why the debtor's plan should be modified at this time, because of the existence of this post-petition personal injury claim. For reasons explained below, the court denies the motion without prejudice.

[1] No fewer than six sections of the Bankruptcy Code are at stake in this debate: sections 348, 541, 1306, 1325, 1327, and 1329.

I. Background

This case arises out of a post-petition car accident. Tatiana Salinas filed a petition for bankruptcy under Chapter 13 on January 31, 2023. Her plan, which provided for 10% dividends to general unsecured creditors, was confirmed on April 21, 2023. The plan expressly provided that property of the estate vested in the debtor upon plan confirmation. (Amended Chapter 13 Plan, Docket 28, § 7.1.) Three months after confirmation, Salinas experienced a serious car accident: her crossover SUV (the family's only working car) was totaled. And, while Salinas was released from hospital the same day, her head, both arms, and hip were injured. Her doctor ordered physical therapy for six months; ten months later, she still feels the effects of the accident. (Debtor's Response, Docket 56.) Salinas hired a law firm a month after the accident to represent her, though she has not yet filed a personal injury claim in any court. (*Id.*)

A. The Trustee's Position

These facts led the Trustee to file a Motion to Modify the Plan, requesting that any non-exempt funds from the personal injury claim go to unsecured creditors.[2] (Trustee's Motion to Modify, Docket 50.) The Trustee argues that the personal injury claim is property of the estate and asks the court to modify the plan to increase payments to the unsecured creditors, pursuant to section 1329(a)(2) of the Bankruptcy Code. The Trustee also states that, under section 1329(b), any modification of the plan must meet the requirements of section 1325(a)(4), frequently referred to as the best interest of creditors (or "best-interest") test. This section prohibits confirmation of a Chapter 13 plan that pays less to creditors than a hypothetical Chapter 7 liquidation: "The value, *as of the effective date of the plan*, of property to be distributed under the plan on account of each unsecured claim is not less than the amount that

[2] Illinois allows debtors in bankruptcy to exempt $15,000 in value on account of personal bodily injury. 735 ILCS 5/12-1001(h)(4). Because the personal injury claim has not been adjudicated, it is unknown how much value it would produce for general unsecured creditors.

would be paid on such a claim if the estate of the debtor were liquidated under chapter 7 of this title *on such date.*" 11 U.S.C. 1325(a)(4) (emphasis added).

The language referring to the "effective date" is the crux of the disagreement between the Trustee and Salinas. From the Trustee's perspective, the "effective date" referenced in this section is the date of the plan's modification. In other words, the property available to satisfy creditors in a hypothetical Chapter 7 liquidation should be measured on the date the order for modification is entered, rather than the date the Chapter 13 debtor filed the petition or the date the plan was confirmed.

To arrive at this position, the Trustee moves from section 1325 to sections 541 and 1306. Section 541 applies in all chapters of bankruptcy and sweeps in "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case," including, if they exist at the time of filing the petition, claims arising from personal injuries. Section 1306 modifies the default rule in section 541, as it governs the property specifically of chapter 13 estates. It provides, in relevant part:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title—
>
> > (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first[.]

11 U.S.C. § 1306. Thus, the Chapter 13 estate includes after-acquired property, including—the Trustee argues—property acquired post-confirmation, such as Salinas' personal injury claim. And, because the claim is property of the estate, it cannot be excluded from the best-interest test, which, the Trustee argues, with somewhat circular logic, must be met in any plan modification.

Indeed, it seems the Trustee is arguing that the best-interest test is not merely a condition of modification but is also a justification for modification.

Put simply, the Trustee argues, first, that the personal injury claim is part of the estate, and second, that this addition to the estate justifies a modification to the plan at this time.

B. The Debtor's Position

Salinas, on the other hand, argues that modification is not warranted; that the personal injury claim is not part of the estate; and that, even if it were, it should not be included in a best-interest test calculation. Salinas argues that due to the vesting provision in her plan, the personal injury claim is vested in her and is not part of the bankruptcy estate. For the purposes of modification, she argues, property of the estate is governed by section 348(f) rather than section 1306.

Like the Trustee, she arrives at her position by working backwards from the best-interest test. The "effective date" referenced in section 1325, she argues, is the confirmation date, not the modification date. Furthermore, she believes the Trustee is in error for stating that section 1306 determines the amount of the property that would be liquidated in a hypothetical Chapter 7. She urges the court to instead hold that section 348(f) controls. This section governs the property of an estate converted from Chapter 13 to Chapter 7:

> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> > (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;

11 U.S.C § 348(f). Thus, she argues that the court should only take into account property included on the date the Chapter 13 petition was filed—removing the post-petition injury claim from the purview of section 1325(a)(4) and therefore section 1329.

The Trustee and the debtor each cited cases that support their respective positions. The Bankruptcy and Circuit Courts have adopted several different approaches for measuring the estate at the time of modification, including various views on how provisions that vest property in the debtor at the time of confirmation affect the post-confirmation property of the estate. There is no controlling precedent from the Seventh Circuit or the United States Supreme Court.

II. Discussion

As an initial matter, it should be noted that the Code permits—but does not require—modification of a confirmed Chapter 13 plan. 11 U.S.C. 1329(a). Section 1329 gives the Trustee a right to seek modification, but whether or not to grant the modification is committed to the bankruptcy court's discretion. *Matter of Witkowski*, 16 F.3d 739 (7th Cir. 1994). The Trustee, as the proponent of the motion for modification, bears the burden of showing why a modification should occur. *See In re Forte*, 341 B.R. 859, 870 (Bankr. N.D. Ill. 2005).

a. Jurisdiction

The court has subject matter jurisdiction under 28 U.S.C. § 1334 and the district court's Internal Operating Procedure 15(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B), (L) and (O). Venue is proper under 28 U.S.C. § 1409(a).

b. **Modification of Chapter 13 Plans**

Neither the Code nor the Seventh Circuit nor the United States Supreme Court have expressly stated what ought to be considered when determining whether to grant a motion to modify a plan. Section 1329, titled "Modification of plan after confirmation," provides in its first subsection that a plan "*may* be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim." 11 U.S.C. 1329(a) (emphasis added). It provides four reasons for modification, one of which is relevant to this motion: to "increase or reduce the amount of payments on claims of a particular class provided for by the plan." 11 U.S.C. 1329(a)(1). It also provides, in the next subsection, that "[s]ections 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" the first subsection. These are the provisions governing the contents of a plan (section 1322), the modification of a plan before confirmation (section 1323), and the best interest of creditors test (section 1325, discussed *supra*, Part I). Crucially, unlike section 1325, section 1329(a) does not require a court to approve a modification, even if it meets the conditions described in 1329(b). Logically, because approval is discretionary, merely ticking a box next to each of the provisions in 1329(b) cannot be sufficient to warrant a modification.

What, then, should guide a court's discretion? Although the Code nowhere provides a standard to help determine whether modification should be approved, numerous courts and commentators have based their decisions on a change in the debtor's financial circumstances. *Germeraad v. Powers*, 826 F.3d 962, 972-74 (7th Cir. 2016) (collecting cases). And as a bankruptcy court stated in *In re Forte*, "Just as the chapter 13 bargain embodies a Congressional determination of overall fairness, I conclude that the determination of a motion under § 1329 seeking to adjust that bargain properly depends on the fairness of the proposed modification, viewed in light of all the circumstances." 341 B.R. 859, 870 (N.D. Ill. 2005). What these cases suggest, above all else, is that a motion to modify a confirmed Chapter 13 plan should not be granted unless the court can evaluate the circumstances of the modification, including the debtor's financial resources as they relate to the proposed modification.

Here, the Trustee has not met his burden of proving there are circumstances to warrant a modification of the plan at this time. It is unknown at this time what the personal injury claim is worth and, as a result, it is not possible to know how much it might warrant an increase in payments to the general unsecured creditors—whether or not it is property of the estate. It is also unknown if and how the debtor will be able to make any increased plan payments. There simply are not enough facts to enable the court to apply its discretion properly to this motion to modify the plan, and the motion will therefore be denied.

Conclusion

The Trustee's motion to modify the plan is denied without prejudice. Because the motion has been denied on other grounds, the court does not at this time address the other issues raised by the parties, and nothing in this order precludes the parties from raising them at a later time.

ENTER:

Dated: September 23, 2024

Deborah L. Thorne

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Honorable Deborah L. Thorne
United States Bankruptcy Judge