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ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Thaddeus Cardle Carter

CHAPTER: 13

ATTORNEYS: J. A. Lockett, Jr., R. P. Reynolds, J. J. Hartley

DATE: 11/28/01

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In re

THADDEUS CARDLE CARTER,

Case No. 00-12541

Debtor.

**ORDER DENYING TRUSTEE'S MOTION TO INCREASE PAYMENTS**

John A. Lockett, Jr., Selma, Alabama, Attorney for Debtor  
Robert P. Reynolds, Tuscaloosa, Attorney for Regions Bank  
John C. McAleer, III, Mobile, Alabama, Chapter 13 Trustee  
Jeffery J. Hartley, Mobile, Alabama, Attorney for John C. McAleer, III

This matter is before the Court on the motion of the chapter 13 trustee to increase payments. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion to increase payments.

**FACTS**

Thaddeus Cardle Carter filed a chapter 13 bankruptcy case on June 29, 2000. Mr. Carter's proposed plan provided that the only secured creditor, Bank United, would be paid outside the plan. Nonpriority, unsecured claims would be paid 1% pro rata from payments to the plan. Upon the trustee's recommendation at confirmation, Mr Carter orally amended his plan to increase the pro rata payout to unsecured creditors to 30%. Mr. Carter's plan was then confirmed without objection on August 28, 2000. Under the confirmed plan Mr. Carter was to pay \$200 per month for 60 months based upon the claims as scheduled by the debtor. The bar date for filing claims was October 8, 2000. Upon motion by the trustee, the payment amount was increased to \$236 per month by order dated July 9, 2001 because the amount of the claims

was actually higher than the debtor's listing. Since that time, no additional claims have been filed and the debtor's employer has consistently remitted payments to the trustee pursuant to a wage deduction order.

In his schedules, Mr. Carter listed his homestead at a value of \$48,000. His schedules show the homestead has a lien on it in the amount of \$21,833. This leaves equity in the property of \$26,167. One half of the equity belongs to his spouse. Mr. Carter has claimed a \$5,000 homestead exemption in his half interest of \$13,084. Equity of \$8,084 remains. If this equity were paid to creditors, they would receive more than 60% of their claims.

Counsel for Regions Bank sent correspondence to the trustee's counsel on July 9, 2001 advising of the substantial equity that existed in Mr. Carter's homestead. The trustee then filed a motion to increase payments.

#### LAW

The issue is whether the trustee can challenge Mr. Carter's confirmed plan, over a year after it was confirmed, to increase the percentage to be distributed pro rata to unsecured creditors to account for the equity in Mr. Carter's homestead. Section 1327(a) provides that "The provisions of a confirmed plan bind the debtor and each creditor . . ." However, under § 1329(a), an unsecured creditor or the trustee may modify a debtor's confirmed plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan." There is a split of authority as to whether such a modification shall be granted as a matter of right so long as it complies with the Code requirements of a plan or whether it is granted only upon a showing of substantial, unanticipated change in the debtor's ability to pay. This Court analyzed that issue in *In re Flenory*, Case No. 99-14099 (Bankr. S.D. Ala., May 23, 2001).

In the *Flennory* case the debtor received an unexpected tax refund in the amount of \$3,447. This Court followed the majority rule. For a trustee or creditor to compel modification of a confirmed plan there must have been a substantial change in the debtor's circumstances. In the *Flennory* case, the tax refund did not constitute a substantial change and thus, the trustee could not modify the plan against the debtor's wishes.

In this case, the amount of the equity is substantial. However, there has been no change in Mr. Carter's circumstances. Mr. Carter included in his schedules the property and the amount of the lien on the property. The information was available to creditors and the trustee at the filing of the case and none objected to the plan at the time of confirmation.

This motion is essentially a motion to modify, alter or revoke the confirmation order. Whether governed by 11 U.S.C. § 1330(a) or Fed. R. Civ. P. 60(b), which is applicable pursuant to Fed. R. Bankr. P. 9024, the motion is untimely. *Id.* The plan was confirmed more than a year before the filing of this motion by the trustee and there has been no change in debtor's circumstances. The trustee and creditors are bound by the terms of the confirmed plan under the Code and the doctrine of res judicata. *In re Warren David James*, Case No. 94-11885 (Bankr. S.D. Ala. June 14, 2000) (citing 11 U.S.C. § 1327(a); *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd)*, 898 F.2d 1544 (11th Cir. 1990), *cert. denied*, 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990)). There is no basis to modify Carter's confirmation order at this late date.

IT IS ORDERED AND ADJUDGED that the motion of the trustee to increase payments is DENIED.

Dated: November 28, 2001

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE