



1 This Court has subject matter jurisdiction pursuant to
2 28 U.S.C. § 1334 and General Order No. 312-D of the United States
3 District Court for the Southern District of California. This is
4 a core proceeding under 28 U.S.C. § 157(b)(2)(A), (L) & (O).

5 **BACKGROUND**

6 On January 23, 2009, Larry Groh and Shulamit Hanover
7 (Debtors) filed a petition under Chapter 13 commencing this
8 bankruptcy case. In their Schedule A Debtors listed their
9 residence with a current value of \$459,500.00 (Residence). In
10 Schedule D Debtors indicated that the Residence was subject to a
11 first priority deed of trust securing a claim of \$520,000 and a
12 second priority deed of trust securing a claim of \$130,000.
13 Debtors' Schedule F showed general unsecured claims of
14 \$177,173.00.

15 The Chapter 13 trustee (Trustee) challenges the Debtors'
16 eligibility to be Chapter 13 debtors on the ground that their
17 unsecured debt exceeds the limit of \$336,900 set forth in
18 11 U.S.C. §109(e). The Trustee includes in his calculation the
19 undersecured portion of Debtors' secured debts and a potential
20 priority tax debt. A hearing was held on the Trustee's objection
21 to confirmation of Debtors' plan and motion to dismiss. The
22 Court allowed the parties to submit supplemental briefs and took
23 the matter under submission. Thereafter, the Court invited
24 additional briefing on two questions.

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1 In In re Scovis, 249 F.3d 975, 982 (9th Cir.2001) the Ninth
2 Circuit held that, absent an indication of bad faith, Chapter 13
3 eligibility should normally be determined by reference to a
4 debtor's originally filed schedules:

5 We now simply and explicitly state the rule for
6 determining Chapter 13 eligibility under § 109(e) to be
7 that eligibility should normally be determined by the
debtor's original schedules, checking only to see if
the schedules were made in good faith.

8 249 F.3d at 982. In the case at hand, there is no suggestion
9 that Debtors' schedules were not made in good faith.

10 Accordingly, the analysis begins and ends with a review of
11 Debtors' schedules.

12 In Scovis, the Ninth Circuit went on to hold that the
13 unsecured portion of a judgment creditor's undersecured judgment
14 lien on the debtor's residence is to be counted as unsecured debt
15 under § 109(e) for chapter 13 eligibility purposes. Id. at 983.

16 Debtors appear to attempt to distinguish Scovis on the
17 ground that the secured claim in that case was based upon an
18 abstract of judgment, as opposed to a consensual lien. However,
19 the Court finds nothing in the Scovis opinion to suggest that it
20 would not apply equally to an undersecured consensual lien.
21 Further, the Court can come up with no rationale for treating the
22 two differently for the purposes of § 109(e). Certainly, the
23 non-consensual lien is subject to avoidance under § 522(f) where
24 a consensual lien is not. However, as discussed below, the court
25 in Scovis included the claim both because it was undersecured and

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1 because it was subject to avoidance under separate analysis. The
2 latter is not applicable in this case, but the former is.

3 Debtors also argue that the first priority secured claim
4 cannot be bifurcated into a secured and unsecured claim at this
5 stage. However, in Scovis, the Ninth Circuit held that the
6 undersecured portion of the judgment creditor's claim was to be
7 "counted as unsecured for eligibility purposes," though no actual
8 bifurcation under § 506 had yet occurred. 249 F.3d at 983. The
9 court in Scovis followed what it deemed the majority view:

10 [A] vast majority of courts, and all circuit courts
11 that have considered the issue, have held that the
12 unsecured portion of undersecured debt is counted as
13 unsecured for § 109(e) eligibility purposes.

14 Id. The court went on to hold that the remainder of the judgment
15 lien, which was avoidable under § 522(f) as it impaired debtor's
16 homestead exemption, would be counted under § 109(e) even though
17 no avoidance action had even been commenced:

18 Even though the lien was not judicially avoided until
19 after the Chapter 13 petition was filed, the fact that
20 Debtors listed both the homestead exemption and the
21 lien on the schedules provides the bankruptcy court
22 with a sufficient degree of certainty to regard the
23 judgment lien as unsecured for eligibility purposes.

24 Id. at 984. In the case at hand, § 522(f) does not come in to
25 play. Nevertheless, the Ninth Circuit's holding further
26 illustrates the rule that the determination under § 109(e) is to
be made based solely upon a debtor's schedules, though the
procedure to bifurcate or avoid has yet to occur.

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1 Thus, based upon Debtors' schedules, \$60,500.00 of the debt
2 secured by the first priority deed of trust is to be counted as
3 unsecured debt, as is the entire \$130,000.00 which would
4 otherwise be secured by the second priority deed of trust. This
5 total, when added to Debtors' nonpriority unsecured claims of
6 \$177,173.00, is sufficient to exceed the \$336,500.00 figure and
7 render Debtors ineligible.

8 Debtors' schedules also include unsecured priority debt of
9 \$35,000.00 in favor of the Internal Revenue Service and the
10 Employment Development Department for "non-dischargeable employer
11 taxes." Though the claims were not scheduled as contingent,
12 unliquidated or disputed, the Debtors have since argued that they
13 should not be included under § 109(e) because they are
14 "contingent" claims which are actually liabilities of their
15 wholly owned corporation, Landscapers Technical Services, Inc.,
16 and that no individual liability has been assessed. It appears
17 likely that Debtors have responsible person liability for these
18 claims and that since the corporation, now closed, has no ability
19 to pay, they will be called upon to pay. However, in light of
20 the inclusion of the undersecured claims in the § 109(e)
21 calculation the Court need not resolve this issue.

22 As noted, the Court invited additional briefing on two
23 questions. One involved the potential priority tax debt which,
24 as stated above, need not be resolved in this case. The second
25 question asked whether the first position note and trust deed was
26 a purchase money obligation or refinance. If it was a purchase

1 money obligation, the follow-up question was whether the anti-
2 deficiency legislation in California making the debt nonrecourse
3 meant any deficiency should not be counted as a liability of the
4 debtors for purposes of calculating their debt limits under
5 § 109(e). The debtors, through their counsel, have advised that
6 both the first and second position notes and trust deeds were the
7 result of refinancings, not purchase money transactions.

8 Many states have adopted anti-deficiency legislation over
9 the years, intending to protect consumers from deficiencies
10 arising from foreclosure on their principal residences. If such
11 a deficiency were nonrecourse as to the Debtors, then the
12 question was whether such a nonrecourse claim should be counted
13 in calculating the Debtors' eligibility under § 109(e). The
14 court invited additional briefing because of the importance of
15 the issue and because the parties had not previously addressed
16 it. In its invitation, the court cited the parties to two cases
17 which appeared to answer the question: Johnson v. Home State
18 Bank, 501 U.S. 78 (1991) and In the Matter of Lindsey, Stephenson
19 & Lindsey, 995 F.2d 626 (5th Cir. 1993).

20 Johnson involved a Chapter 13 case filed after the debtor
21 had discharged his personal liability on the debt secured by real
22 property in Chapter 7. The bank's lien against the collateral
23 remained after discharge, and the debtor proposed to pay it
24 through a Chapter 13 plan. The issue addressed by the Supreme
25 Court was whether the bank's mortgage interest after the Chapter
26 7 discharge was a "claim" amenable "to inclusion in a Chapter 13

1" 501 U.S. at 83. The Court found it was such a claim
2 because the bank still had a right to payment from the proceeds
3 of sale of the property or "[a]lternatively, the creditor's
4 surviving right to foreclose on the mortgage can be viewed as a
5 'right to an equitable remedy'", which is part of the definition
6 of "claim" in 11 U.S.C. § 101(5).

7 In support of its conclusion, the Court looked in part to
8 11 U.S.C. § 102(2) which, as a rule of construction, states:
9 "'claim against the debtor' includes claim against property of
10 the debtor;" The correlative legislative history states:

11 Paragraph (2) specifies that "claim
12 against the debtor" includes claim against
13 property of the debtor. This paragraph is
14 intended to cover nonrecourse loan agreements
15 where the creditor's only rights are against
16 property of the debtor, and not against the
17 debtor personally.

18 In the Matter of Lindsey, Stephenson & Lindsey, 995 F.2d 626
19 (5th Cir. 1993) involved a nonrecourse loan that expressly
20 recited that the obligor had no personal liability on the note.
21 The issue came up in a Chapter 12 case and involved whether the
22 obligation was a claim against the debtor notwithstanding its
23 nonrecourse nature for purposes of calculating debtor's
24 eligibility in Chapter 12, which has similar ceilings on debt.
25 The Fifth Circuit applied the same approach as Johnson and
26 concluded the nonrecourse note was a "claim" under the Bankruptcy
Code. Further, the court concluded that the "note composes part
of the partnership's aggregate debt and disqualifies it from
Chapter 12 relief." 995 F.2d at 629.

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Since the Debtors' total unsecured debt, without considering the priority tax claims, exceeds the \$336,900 ceiling, Debtors are not eligible to participate in Chapter 13. Since they are not eligible, their Chapter 13 case should be, and hereby is dismissed. In re Slack, 187 F.3d 1070 (9th Cir. 1999).

IT IS SO ORDERED.

DATED: MAY 27 2009



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court