



1 DISCUSSION

2 Section 109(e) provides:

3 Only an individual with regular income that  
4 owes, on the date of the filing of the  
5 petition, noncontingent, liquidated,  
6 unsecured debts of less than \$336,900 . . .  
7 may be a debtor under chapter 13 of this  
8 title.

9 The central issue before the Court is whether a claim scheduled  
10 as secured by property of the estate, but which, based upon  
11 Debtors' schedules, is undersecured or wholly unsecured, is to  
12 be included as "unsecured debts" under § 109(e).

13 Debtors' Schedule F, filed with the Court on January 9,  
14 2009, listed unsecured debts totaling \$223,260.20, none of which  
15 were identified as contingent, unliquidated, or disputed. Their  
16 Schedule D listed a total of \$828,636 in secured debts, while  
17 indicating that \$133,426 was unsecured because the value of the  
18 collateral purportedly securing it was insufficient to fully  
19 secure the claims of certain creditors. Among those were the car  
20 creditor and the creditors secured by the first and second  
21 position mortgage holders. As is readily seen, adding \$133,426  
22 of undersecured debt to \$223,260.20 of Schedule F unsecured debt  
23 yields total unsecured debt of \$356,686.20, which exceeds the  
24 statutory ceiling of § 109 by almost \$20,000. So the critical  
25 question is whether it is correct to include in the eligibility  
26 calculation a wholly unsecured second position mortgage (which  
debtors announced in their plan they intended to strip off,  
making it an unsecured claim for purposes of the plan); and

1 whether it is correct to include the undersecured portion of the  
2 first position mortgage, all as listed by debtors in their  
3 Schedule D. For the reasons set out hereafter, the Court finds  
4 and concludes that it is correct to add both amounts to the  
5 Schedule F unsecured debt to determine debtors' eligibility under  
6 11 U.S.C. § 109. When that is done, as already noted, debtors'  
7 total unsecured debt as of the time of filing of their petition  
8 exceeds the ceiling fixed by statute, making debtors ineligible  
9 for Chapter 13 relief. Accordingly, the Chapter 13 Trustee's  
10 objection to confirmation on eligibility grounds must be  
11 sustained.

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

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

22 249 F.3d at 982. In the case at hand, there is no suggestion  
23 that debtors' schedules were not made in good faith.  
24 Accordingly, the analysis begins and ends with a review of  
25 debtors' schedules.

26 In Scovis, the Ninth Circuit went on to hold that the  
unsecured portion of a judgment creditor's undersecured judgment

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1 lien on the debtor's residence is to be counted as unsecured debt  
2 under § 109(e) for Chapter 13 eligibility purposes. Id. at 983.

3       There is a question of whether a first position secured  
4 claim can be bifurcated into secured and unsecured claims as of  
5 the time of filing of the debtor's petition. However, in Scovis,  
6 the Ninth Circuit held that the undersecured portion of the  
7 judgment creditor's claim was to be "counted as unsecured for  
8 eligibility purposes," though no actual bifurcation under § 506  
9 had yet occurred. 249 F.3d at 983. The court in Scovis followed  
10 what it deemed the majority view:

11               [A] vast majority of courts, and all circuit  
12               courts that have considered the issue, have  
13               held that the unsecured portion of  
                  undersecured debt is counted as 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  
19               avoided until after the Chapter 13 petition  
20               was filed, the fact that Debtors listed both  
21               the homestead exemption and the lien on the  
22               schedules provides the bankruptcy court with  
                  a sufficient degree of certainty to regard  
                  the judgment lien as unsecured for  
                  eligibility purposes.

23 Id. at 984.

24       Thus, based upon debtors' schedules, \$37,000 of the debt  
25 secured by the first position deed of trust is to be counted as  
26 unsecured debt, as is the entire \$89,000 which would otherwise be

1 secured by the second position deed of trust. In addition,  
2 according to Schedule D, there is also \$2,435 of undersecured  
3 debt for a refrigerator and \$4,990 on a vehicle, plus a nominal  
4 \$1.00 in property tax. When those amounts are added to the  
5 \$223,260.20 listed on Schedule F, the total is \$356,685.20, which  
6 exceeds the ceiling of § 109 and makes debtors ineligible for  
7 Chapter 13 relief.

8 In reaching the foregoing conclusion, the Court has  
9 considered whether the first petition mortgage can properly be  
10 bifurcated for eligibility purposes if the mortgage is a purchase  
11 money mortgage and applicable state law makes such an obligation  
12 nonrecourse because of a state's anti-deficiency laws. The  
13 parties in this case have not raised, briefed or argued the  
14 issue, so its resolution may not be necessary to deciding the  
15 Chapter 13 Trustee's objection to confirmation.

16 Many states have adopted anti-deficiency legislation over  
17 the years, intending to protect consumers from deficiencies  
18 arising from foreclosure on their principal residences. If such  
19 a deficiency were nonrecourse as to the debtors, then the  
20 question was whether such a nonrecourse claim should be counted  
21 in calculating the debtors' eligibility under § 109(e). Among  
22 other materials, the Court considered two cases which appear to  
23 answer the question: Johnson v. Home State Bank, 501 U.S. 78  
24 (1991) and In the Matter of Lindsey, Stephenson & Lindsey, 995  
25 F.2d 626 (5<sup>th</sup> Cir. 1993).

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1        Johnson involved a Chapter 13 case filed after the debtor  
2 had discharged his personal liability on the debt secured by  
3 real property in Chapter 7. The bank's lien against the  
4 collateral remained after discharge, and the debtor proposed to  
5 pay it through a Chapter 13 plan. The issue addressed by the  
6 Supreme Court was whether the bank's mortgage interest after the  
7 Chapter 7 discharge was a "claim" amenable "to inclusion in a  
8 Chapter 13 . . . ." 501 U.S. at 83. The Court found it was such  
9 a claim because the bank still had a right to payment from the  
10 proceeds of sale of the property or "[a]lternatively, the  
11 creditor's surviving right to foreclose on the mortgage can be  
12 viewed as a 'right to an equitable remedy'", which is part of the  
13 definition of "claim" in 11 U.S.C. § 101(5).

14        In support of its conclusion, the Court looked in part to  
15 11 U.S.C. § 102(2) which, as a rule of construction, states:  
16 "'claim against the debtor' includes claim against property of  
17 the debtor; . . . ." The correlative legislative history states:

18                    Paragraph (2) specifies that "claim  
19                    against the debtor" includes claim against  
20                    property of the debtor. This paragraph is  
21                    intended to cover nonrecourse loan agreements  
22                    where the creditor's only rights are against  
23                    property of the debtor, and not against the  
24                    debtor personally.

25        In the Matter of Lindsey, Stephenson & Lindsey, 995 F.2d 626  
26 (5<sup>th</sup> Cir. 1993) involved a nonrecourse loan that expressly  
recited that the obligor had no personal liability on the note.  
The issue came up in a Chapter 12 case and involved whether the  
obligation was a claim against the debtor notwithstanding its

1 nonrecourse nature for purposes of calculating debtor's  
2 eligibility in Chapter 12, which has similar ceilings on debt.  
3 The Fifth Circuit applied the same approach as Johnson and  
4 concluded the nonrecourse note was a "claim" under the Bankruptcy  
5 Code. Further, the court concluded that the "note composes part  
6 of the partnership's aggregate debt and disqualifies it from  
7 Chapter 12 relief." 995 F.2d at 629.

8 To the extent it is necessary to answer the question about  
9 nonrecourse purchase money debt and whether it should be counted  
10 nonetheless in determining a debtor's eligibility for Chapter 13,  
11 the Court believes the foregoing authorities provide the answer  
12 and indicate that nonrecourse debt is to be counted for § 109  
13 eligibility purposes.

14 Since the debtors' total unsecured debt exceeds the \$336,900  
15 ceiling, debtors are not eligible to participate in Chapter 13.  
16 Since they are not eligible, their Chapter 13 case should be, and  
17 hereby is dismissed. In re Slack, 187 F.3d 1070 (9<sup>th</sup> Cir. 1999).  
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19 IT IS SO ORDERED.

20 DATED: AUG 26 2009

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23 PETER W. BOWIE, Chief Judge  
24 United States Bankruptcy Court  
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