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OF THE NINTH CIRCUIT

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**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re: ) BAP No. CC-09-1321-DMkJa  
)  
RUSSELL L. SMITH and )  
JOY C. SMITH, ) Bk. No. SV 09-13847-MT  
)  
Debtors. )

\_\_\_\_\_)  
RUSSELL L. SMITH and )  
JOY C. SMITH, )  
Appellants, )  
v. )  
ELIZABETH F. ROJAS, Chapter )  
13 Trustee; UNITED STATES )  
TRUSTEE, )  
Appellees. )

\_\_\_\_\_)  
In re: ) BAP No. CC-09-1364-DMkJa  
)  
STEVEN HAMBURG and )  
MICHELLE HAMBURG, ) Bk. No. SV 09-17343-MT  
)  
Debtors. )

\_\_\_\_\_)  
STEVEN HAMBURG and )  
MICHELLE HAMBURG, )  
Appellants, )  
v. )  
ELIZABETH F. ROJAS, Chapter )  
13 Trustee; UNITED STATES )  
TRUSTEE, )  
Appellees. )

**O P I N I O N**

Argued and Submitted on May 20, 2010  
at Pasadena, California

1 Filed - July 8, 2010

2 Appeal from the United States Bankruptcy Court  
3 for the Central District of California

4 Hon. Maureen A. Tighe, Bankruptcy Judge, Presiding

5  
6 Before: DUNN, MARKELL and JAROSLOVSKY,<sup>1</sup> Bankruptcy Judges.  
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28 <sup>1</sup> Hon. Alan Jaroslovsky, U.S. Bankruptcy Judge for the  
Northern District of California, sitting by designation.

1 DUNN, Bankruptcy Judge:  
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3 The bankruptcy court dismissed debtors' chapter 13<sup>2</sup> cases on  
4 the basis that the debtors exceeded the § 109(e) unsecured debt  
5 limit for chapter 13 eligibility. Asserting that the bankruptcy  
6 court erred when it included in the unsecured debt calculation  
7 the amount owed on wholly unsecured junior consensual liens, the  
8 debtors appealed. We AFFIRM.

9 **I. FACTS<sup>3</sup>**

10 The parties in these cases are casualties of the steep  
11 decline in real property values that resulted when the so-called  
12 "Housing Bubble" burst.

13 The Smiths

14 On September 20, 2006, Russell and Joy Smith purchased their  
15 California residence ("Smith Residence") for \$570,000.  
16 Countrywide Home Loans ("Countrywide") financed the purchase  
17 price with a \$545,000 loan to the Smiths, secured by a first  
18 position deed of trust on the Smith Residence. One year later,  
19 Washington Mutual Bank ("WAMU") loaned the Smiths an additional  
20 \$250,000, secured by a second position deed of trust on the Smith  
21 Residence. One year and five days later, the Smiths filed a  
22 voluntary chapter 13 petition. In their bankruptcy schedules,  
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24 <sup>2</sup> Unless otherwise indicated, all chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
26 All "Rule" or "FRBP" references are to the Federal Rules of  
27 Bankruptcy Procedure, Rules 1001-9037.

28 <sup>3</sup> There are no factual disputes in these appeals.

1 the Smiths asserted the value of the Smith Residence as of the  
2 petition date was \$370,000, based on an appraisal dated October  
3 13, 2008.<sup>4</sup> The outstanding balance owed to Countrywide was  
4 \$547,782 pursuant to the Smiths' Schedule D filed in the case.  
5 Because the value of the Smith Residence as of the petition date  
6 was less than the amount owed to Countrywide on the first lien,  
7 the Smiths sought a determination from the bankruptcy court that  
8 they could (1) stop making payments to WAMU and (2) treat WAMU's  
9 claim as "wholly unsecured for purposes of plan confirmation."  
10 The bankruptcy court entered an order on May 15, 2009,  
11 determining that the value of the Smith Residence was \$370,000,  
12 and that WAMU's claim "is undersecured for purposes of this  
13 Chapter 13 Case, such that upon confirmation of Debtors' Chapter  
14 13 plan, [WAMU] will be treated as a general unsecured claim and  
15 paid pro rata with other allowed unsecured claims." In their  
16 chapter 13 plan, the Smiths proposed to treat WAMU as an  
17 unsecured creditor.

18 The chapter 13 trustee moved to dismiss the Smiths'  
19 bankruptcy case, or convert it to a chapter 7 case, asserting  
20 that because WAMU's claim was not secured by a lien, the debt  
21 underlying the claim must be counted as unsecured debt for  
22 purposes of chapter 13 eligibility. Adding WAMU's unsecured debt  
23 to the unsecured debt the Smiths included in their Schedule F  
24 brought the Smiths' total unsecured debt to \$470,035.36, an  
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26 <sup>4</sup> The Smiths' original Schedule D dated September 24, 2008,  
27 reflected a value for the residence of \$425,000. Their amended  
28 Schedule D dated December 15, 2008, was filed to reflect the  
appraised value of \$370,000.

1 amount that exceeded the \$336,900 statutory maximum for chapter  
2 13 eligibility. The Smiths countered that the WAMU debt remained  
3 secured, notwithstanding WAMU's treatment under the Smith Plan,  
4 both because the "strip off" occurred postpetition, and because  
5 WAMU's lien would not actually be void until the Smiths received  
6 their chapter 13 discharge. Asserting itself to be bound by the  
7 Ninth Circuit's decision in Scovis v. Henrichsen (In re Scovis),  
8 249 F.3d 975, 981 (9th Cir. 1999), the bankruptcy court entered  
9 its Memorandum of Law ("Eligibility Memorandum") determining that  
10 the Smiths exceeded the unsecured debt limit for chapter 13  
11 eligibility and granting the chapter 13 Trustee's motion to  
12 dismiss. The Smiths timely filed their notice of appeal.

13 Concerned that the appeal ultimately would be rendered moot  
14 by the Smiths' inability to perform any plan in the event the  
15 dismissal order was reversed, the bankruptcy court confirmed the  
16 Smith Plan and abated the dismissal order until the appeal could  
17 be decided so that the Smiths could continue making payments  
18 under the Smith Plan.<sup>5</sup> Further, the bankruptcy court, observing  
19 the implications on chapter 13 eligibility in a time of  
20 substantially reduced property values, certified the issue as  
21 appropriate for a direct appeal to the Ninth Circuit.

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24 <sup>5</sup> After the Smiths filed their notice of appeal, the  
25 bankruptcy court issued an amended Eligibility Memorandum. It  
26 appears that the purpose of the amendment was (1) to add to the  
27 caption debtor names and case numbers for two other cases already  
28 included in the discussion and to whom the Eligibility Memorandum  
related, and (2) to add the signatures of five additional Central  
District bankruptcy judges who joined in the ruling contained in  
the Eligibility Memorandum.



1 these payments "upon completion of their Chapter 13 plan and  
2 subsequent entry of the Chapter 13 discharge in the instant  
3 proceeding." In their chapter 13 plan, the Hamburgs proposed to  
4 treat BAC as an unsecured creditor.

5 After entering the Eligibility Memorandum in the Smith case,  
6 the bankruptcy court determined, apparently sua sponte, that its  
7 analysis applied to the Hamburgs' case as well. Because the  
8 Hamburgs' unsecured debt, taking into consideration the amount of  
9 the BAC claim, exceeded the \$336,900 unsecured debt limit  
10 established by § 109(e), the bankruptcy court dismissed the  
11 Hamburgs' case, but confirmed the Hamburg Plan and stayed the  
12 effectiveness of the dismissal order until resolution of this  
13 appeal. The Hamburgs timely filed their notice of appeal.

## 14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C.  
16 §§ 1334 and 157(b) (2) (A) and (O).

17 28 U.S.C. § 158(c) provides that jurisdiction over a timely  
18 appeal from a bankruptcy court order lies with this panel, unless  
19 (1) the parties make a timely election to have the appeal heard  
20 by the district court, 28 U.S.C. § 158(c), or unless the  
21 bankruptcy court has certified, inter alia, that the order  
22 appealed from involves a matter of public importance. 28 U.S.C.  
23 § 158(d) (2) (A) (i). To facilitate the direct appeal process for  
24 the issue in these appeals, the bankruptcy court stated in the  
25 Eligibility Memorandum:

26 There have been a number of other cases presenting this  
27 same issue, but they have been dismissed or converted  
28 to Chapter 7 for failure to make plan payments before  
any ruling on the debt limits issue could be issued.  
Debtors making decisions about how to save their home

1 need to know clearly before a case is filed whether  
2 Chapter 13 is a viable option or whether they must find  
3 a way to file a much more expensive Chapter 11 case.  
4 This is a matter of significant public importance in an  
5 area where foreclosure rates are at an historic high  
6 and the debt limits set by Congress do not adequately  
7 address a large number of average home owners in  
8 financial distress.

9 Eligibility Memorandum at 10:6-13.

10 Consistent with this invitation of the bankruptcy court, the  
11 Smiths and the Hamburgs invoked Rule 8001(f)(4) and requested  
12 that the bankruptcy court certify their appeal to be heard  
13 directly by the court of appeals, which it did. However, other  
14 than requesting and obtaining the certification, neither debtors  
15 took any other necessary action to bring the appeals before the  
16 Ninth Circuit. In particular, they did not comply with Rule  
17 8001(f)(5), which is titled explicitly "Duties of Parties After  
18 Certification." Rule 8001(f)(5) provides: "A petition for  
19 permission to appeal in accordance with Fed. R. App. P. 5 shall  
20 be filed no later than 30 days after a certification has become  
21 effective as provided in subdivision (f)(1)." The importance of  
22 complying with Fed. R. App. P. 5 cannot be overstated, because  
23 certification is only the first step in obtaining a direct  
24 appeal; the second is that the circuit court must accept the  
25 appeal. The Ninth Circuit explained the direct appeal process  
26 thoroughly in Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir.  
27 2009), emphasizing that only if the court of appeals grants  
28 permission to appeal under Fed. R. App. P. 5 does it assume  
jurisdiction over the appeal.

The bankruptcy clerk properly transmitted each of these  
appeals to our BAP Clerk, notwithstanding the existence of the



1 certification. Blausey at 1128 (“The bankruptcy court should not  
2 have sent the record to our court until we granted the petition  
3 for permission to appeal.”). Thereafter, the BAP Clerk issued  
4 the briefing schedule.

5 In the Smith appeal, the Smiths brought the issue of the  
6 direct appeal certification to our attention by their motion  
7 requesting that our briefing schedule be vacated. Our motions  
8 panel granted an extension of the briefing dates, but noted that  
9 the mere existence of the certification did not suspend  
10 prosecution of an appeal before the BAP. Similarly, in the  
11 Hamburg appeal, the Hamburgs brought the issue of the direct  
12 appeal certification to our attention by their response to our  
13 Clerk’s Notice of Deficient Appeal and Impending Dismissal,  
14 issued because the Hamburgs had not completed the record in their  
15 appeal. In this response, the Hamburgs requested that we  
16 transfer the appeal directly to the Ninth Circuit. Our motions  
17 panel denied the request that we certify the matter to the court  
18 of appeals, stating: “The bankruptcy court already made the  
19 predicate certification; Appellants did not file a timely  
20 petition for leave to appeal; it is up to the court of appeals,  
21 and not this panel, to decide whether to entertain a late  
22 petition for leave to appeal.”

23 The Ninth Circuit has not granted permission for either  
24 appeal to be heard as a direct appeal; we therefore retain  
25 jurisdiction to decide these appeals pursuant to 28 U.S.C. § 158.

### 26 **III. ISSUE**

27 Whether a debt secured by a consensual lien that is wholly  
28 unsecured under § 506(a) should be counted as unsecured debt for

1 purposes of determining the eligibility of debtors for chapter 13  
2 relief under § 109(e).

#### 3 IV. STANDARDS OF REVIEW

4 Eligibility determinations under § 109 involve issues of  
5 statutory construction and conclusions of law, including  
6 interpretation of Bankruptcy Code provisions, which we review de  
7 novo. See Mendez v. Salven (In re Mendez), 367 B.R. 109, 113  
8 (9th Cir. BAP 2007) (§ 109(h)); see also Soderlund v. Cohen (In re  
9 Soderlund), 236 B.R. 271, 272-73 (9th Cir. BAP 1999) (whether a  
10 debt is liquidated or contingent is a question of statutory  
11 interpretation under § 109(e) which is reviewed de novo). De  
12 novo review requires that we consider a matter anew, as if it had  
13 not been heard before, and as if no decision had been rendered  
14 previously. United States v. Silverman, 861 F.2d 571, 576 (9th  
15 Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R.  
16 225, 229 (9th Cir. BAP 2008).

#### 17 V. DISCUSSION

##### 18 A. The Problem

19 These appeals have arisen during the current difficult  
20 economic time which is being referred to as "The Great  
21 Recession." The collapse of the "Housing Bubble" has been  
22 identified as a significant cause of a severely depressed housing  
23 market. The Central District of California, where these appeals  
24 originate, is one region that has been particularly hard hit by  
25 the downturn in the prices of homes. In some areas, home values  
26 are a mere 50% of what they were when the home values peaked a  
27 few years ago.

28 During the accelerated growth of home values as the bubble

1 was building, homeowners gained substantial equity very quickly.  
2 Many homeowners accessed that equity through credit lines or  
3 other loans secured by second and sometimes third deeds of trust  
4 on their homes. As with the Smiths and Hamburgs, many  
5 individuals find themselves owing significantly more for their  
6 homes than the homes are now worth, and are struggling to meet  
7 the substantial payment obligations incurred both to purchase  
8 their homes and for their equity borrowings.

9 As mortgage defaults have increased, so have bankruptcy  
10 filings. While many homeowners have walked or will walk away  
11 from their homes, others are trying to save their homes by using  
12 the provisions of chapter 13. These appeals address one major  
13 challenge faced by homeowners attempting to save their homes in  
14 chapter 13: debt limits for chapter 13 eligibility.

15 As relevant to these appeals involving joint debtors,  
16 section 109(e) provides:

17 Only . . . an individual with regular income and such  
18 individual's spouse, that owe, on the date of the  
19 filing of the petition, noncontingent, liquidated  
20 unsecured debts that aggregate less than  
\$336,900 . . . may be a debtor under chapter 13 of this  
title.

21 We are asked to determine whether, when the debt of a creditor  
22 that holds a second mortgage on a debtor's residence is wholly  
23 unsecured on the petition date, the debt constitutes unsecured  
24 debt for purposes of the § 109(e) eligibility calculation,  
25 notwithstanding that the creditor's lien has not been avoided  
26 judicially as of the petition date.

27 By way of background, we restate certain bankruptcy  
28 fundamentals, "The term 'debt' means liability on a claim."

1 § 101(12). "The term 'claim' means . . . right to payment,  
2 whether . . . such right is . . . secured, or unsecured . . . ."  
3 § 101(5) (A). "The term 'creditor' means . . . entity that has a  
4 claim against the debtor that arose at the time of or before the  
5 order for relief concerning the debtor . . . ." § 101(10) (A).  
6 Thus, for bankruptcy purposes, the second lienholders are simply  
7 creditors who hold claims. As an independent fact, each also  
8 holds a lien, which is defined as a "charge against or interest  
9 in property to secure payment of a debt . . . ." § 101(37).

10 B. "Strip Off" Can Be Favorable to Chapter 13 Debtors

11 Section 1322(b) (2) provides that a chapter 13 plan may  
12 "modify the rights of holders of secured claims, other than a  
13 claim secured only by a security interest in real property that  
14 is the debtor's principal residence. . . ." While this provision  
15 prohibits the "strip down" of a partially secured lien on a  
16 debtor's principal residence, it does not prohibit the "strip  
17 off" of a wholly unsecured lien. Compare Nobleman v. American  
18 Sav. Bank (In re Nobleman), 508 U.S. 324 (1993), with Zimmer v.  
19 PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002).

20 When, as in the cases before us, a home's value has fallen  
21 to the point that the second lienholder is fully unsecured,  
22 § 1322(b) (2) allows a chapter 13 debtor to "strip off" the second  
23 lien.

24 The context in which "strip off" has become important to  
25 chapter 13 debtors in these "Housing Bubble" cases is in the  
26 application of § 1325(a) (5) to the lien of a wholly unsecured  
27 creditor. The requirements for confirmation of a chapter 13 plan  
28 are found in § 1325.

1 With respect to secured creditors, § 1325(a)(5)  
2 requires generally that a chapter 13 plan must provide  
3 one of three alternative treatments: treatment to which  
4 the secured creditor consents; retention of collateral  
by the debtor with a stream of payments to the secured  
creditor; or surrender of the collateral to the secured  
creditor.

5 Trejos v. VW Credit, Inc. (In re Trejos), 374 B.R. 210, 214 (9th  
6 Cir. BAP 2007). Thus, under § 1325(a)(5), unless the holders of  
7 allowed secured claims have consented to receiving no payments,  
8 they must receive a "stream of payments" having a present value  
9 equal to their allowed secured claims if the debtors intend to  
10 keep their residences. However, by its terms, § 1325(a)(5)  
11 applies only to an "allowed secured claim."

12 The actual lien stripping process is effectuated through  
13 § 506, which appropriately is entitled "Determination of secured  
14 status." Section 506(a) states that to be an "allowed secured  
15 claim," the prerequisite for payment under § 1325(a)(5), there  
16 must be value to which the lien of a secured creditor can attach.  
17 Thus, a determination under § 506(a) that a creditor is wholly  
18 unsecured effectively excuses debtors from treating the  
19 creditor's claim as secured under the chapter 13 plan.

20 The purpose of § 506 is "to give the [bankruptcy] court  
21 appropriate authority to ensure that collateral or its proceeds  
22 is returned to the proper creditor." H.R. Rep. No. 95-595, at  
23 382 (1977). Under nonbankruptcy law, to be a "secured claim," a  
24 claim need only be secured by collateral of some sort; the value  
25 of the collateral does not matter, unless and until enforcement  
26 against the collateral is undertaken, at which time "the actual  
27 value of the security interest is most often determined by the  
28 enforcement procedure." 4 COLLIER ON BANKRUPTCY

1 ¶ 506.03[4][a][i], at pp. 506-21 - 506-22 (Alan N. Resnick &  
2 Henry J. Sommer, eds., 16th ed. 2010). "Section 506(a) operates  
3 as a substitute for enforcement in the sense of fixing the value  
4 of a secured creditor's legal entitlements associated with its  
5 security interest while avoiding the enforcement process itself  
6 so that the property may be used or disposed of in a manner  
7 consistent with the goals of the Bankruptcy Code." 4 COLLIER ON  
8 BANKRUPTCY ¶ 506.03[4][a][ii], at p. 506-23.

9 Section 506(a)(1) provides that

10 An allowed claim of a creditor secured by a lien on  
11 property in which the estate has an interest . . . is a  
12 secured claim to the extent of the value of such  
13 creditor's interest in the estate's interest in such  
14 property, . . . and is an unsecured claim to the extent  
15 that the value of such creditor's interest . . . is  
16 less than the amount of such allowed claim.

17 Rule 3012 implements § 506(a) by authorizing the bankruptcy  
18 court to determine the value of a claim. The Advisory Committee  
19 note to Rule 3012 explains:

20 Pursuant to § 506(a) of the Code, secured claims are to  
21 be valued and allowed as secured to the extent of the  
22 value of the collateral and unsecured, to the extent it  
23 is enforceable, for the excess over such value. The  
24 valuation of secured claims may become important in  
25 different contexts . . . .

26 (Emphasis added.)

27 Appellants invoked the provisions of § 506(a) and asked the  
28 bankruptcy court to determine the value of the legal entitlements  
associated with second lien claims while avoiding the enforcement  
process of foreclosure. With the uncontested valuations  
Appellants presented to the bankruptcy court, the Appellants  
achieved their desired result: there was no value to which the  
liens could attach. As a consequence, the second lienholders did

1 not hold allowed secured claims, and Appellants were allowed to  
2 treat them as general unsecured creditors in the context of their  
3 bankruptcy cases.

4 C. Implications of "Strip Off" for Chapter 13 Eligibility

5 An unintended consequence of "strip off" is the impact that  
6 changing a claim's "status" from secured to unsecured can have on  
7 chapter 13 debtor eligibility under § 109(e).

8 The Smiths and Hamburgs appear to concede that the claims of  
9 the wholly unsecured<sup>6</sup> second lienholders, like any other  
10 unsecured claim, will be discharged upon completion of their  
11 chapter 13 plans. See Lam v. Investors Thrift (In re Lam), 211  
12 B.R. 36, 41 (9th Cir. BAP 1997). However, they contend that the  
13 second lienholders retain the rights of secured creditors until  
14 the moment of discharge, and therefore, their claims cannot be  
15 counted as unsecured for chapter 13 eligibility purposes.

16 The Smiths and Hamburgs invoked § 506(a) to determine the  
17 secured status of the second lienholder claims and obtained a  
18 determination that both claims were wholly unsecured. They  
19 assert on appeal that this is all the relief they requested, and  
20 the bankruptcy court erred when it took the further step of  
21 determining that the second lienholder claims must be counted as  
22 unsecured for purposes of chapter 13 eligibility.

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25 <sup>6</sup> As a matter of semantics, the Appellants prefer to  
26 characterize the second lienholders' claims as "undersecured."  
27 They attempt to create a distinction where there is no real  
28 difference. Under their respective plans, the Smiths and the  
Hamburgs treat the second lienholders as having wholly unsecured  
claims. As noted by the bankruptcy court, "unsecured" is the  
more "accurate term." Eligibility Memorandum, at p. 4 n.5.

1           1.    Scovis is controlling authority

2           The bankruptcy court recognized that Scovis v. Henrichsen  
3 (In re Scovis), 249 F.3d 975, 981 (9th Cir. 2001), provided  
4 binding precedent for deciding that under § 506(a), the claims of  
5 the second lienholders were to be counted as unsecured claims as  
6 of the petition date for purposes of § 109(e) eligibility.

7           Appellants urge a “mechanical” application of Scovis based  
8 on the following language:

9           We now simply and explicitly state the rule for  
10 determining Chapter 13 eligibility under § 109(e) to be  
11 that eligibility should normally be determined by the  
debtor’s originally filed schedules, checking only to  
see if the schedules were made in good faith.

12 Scovis, 249 F.3d at 982.

13           We agree with Appellants that no issue was raised that their  
14 schedules were not filed in good faith. Thus, they assert, if  
15 Scovis is to be applied “mechanically,” the bankruptcy court  
16 erred when it failed to count the second lienholder claims as  
17 secured claims simply because they were included as “Creditors  
18 Holding Secured Claims” on Schedule D, and not as “Creditors  
19 Holding Unsecured Nonpriority Claims” on Schedule F. Appellants  
20 find fault with the bankruptcy preparation software, asserting  
21 that it, not they, reduced the amount of the secured claims of  
22 the second lienholders to zero on Schedule D. Scovis, however,  
23 was intended to ensure a straightforward and realistic  
24 application by incorporating into eligibility determinations the  
25 concept that a debt’s “status” could be as readily ascertainable  
26 as its “amount,” no matter in which schedule the debt appeared.  
27 See id. at 984. We observe that the software conducted exactly  
28 the simple formulaic calculation that the bankruptcy court



1 otherwise would have done manually in this case, and the  
2 Appellants attested to the accuracy of their schedules by signing  
3 them "under penalty of perjury."

4 Scovis hinged on the status of a junior judgment lien. In  
5 ascertaining the extent to which the judgment lien, included in  
6 Schedule D rather than in Schedule F, was unsecured for § 109(e)  
7 purposes, Scovis considered not only the scheduled value of the  
8 property, the amount of the first trust deed and the amount of  
9 the judgment lien, but also the debtors' declared California  
10 homestead exemption. The Scovis court determined that, because  
11 the debtors had listed both the homestead exemption and the  
12 judgment lien on the schedules, the bankruptcy court was provided  
13 a "sufficient degree of certainty" to regard the entire judgment  
14 lien as unsecured for eligibility purposes. This was true even  
15 though the debtors, as in the cases before us, had not included  
16 any portion of the judicial lien as an unsecured claim on their  
17 Schedule F.

18 In the cases before us, both the Smiths and the Hamburgs  
19 listed in Schedule D the value of their residence and the amount  
20 owing on the first trust deed. Because the first trust deed in  
21 each case exceeded the value of the residence, the bankruptcy  
22 court had a "sufficient degree of certainty" to determine that  
23 the second liens were wholly unsecured under § 506(a). Indeed,  
24 the only reason that the second liens could be avoided in chapter  
25 13 is because they were wholly unsecured, not undersecured.  
26 Otherwise, § 1322(b)(2), by its plain terms, would preclude  
27 modifying the rights of the second lienholders in a chapter 13  
28 plan.

1 Appellants also contend that under Slack v. Wilshire Ins.  
2 Co. (In re Slack), 187 F.3d 1070, 1073 (9th Cir. 1999), the  
3 “bankruptcy court cannot look to post-petition events to  
4 determine the amount of the debt.” Appellants would have us read  
5 this phrase with “unsecured” as a modifier to “debt.” However,  
6 the issue in Slack was whether a debt was noncontingent and  
7 liquidated, and therefore whether it should be counted at all in  
8 a chapter 13 eligibility determination. There is no dispute  
9 before us that the amount of the debt of the second lienholders  
10 is fixed as of the petition date; our issue is whether the debt  
11 is unsecured. Significantly, this exact issue was addressed by  
12 the Scovis court:

13 Although [in Slack] we were defining the term  
14 ‘liquidated’ and not ‘secured,’ we included in the  
15 eligibility determination readily ascertainable  
16 amounts, even though liability on the debt had not been  
17 finally decided. . . . This principle of certainty  
18 carries equal force in the present context, where the  
19 homestead exemption’s effect on the status of Debtors’  
20 debt as secured or unsecured is readily ascertainable.

21 Scovis, 249 F.3d at 984.

22 In the context before us, the “principle of certainty”  
23 applies where the effect of the value of the property on the  
24 status of Appellants’ debts as secured or unsecured is readily  
25 ascertainable. A claim is secured only to the extent of the  
26 value of a creditor’s interest in the estate’s interest in such  
27 property. § 506(a)(1). Thus, the question for the bankruptcy  
28 court was, on the petition date, did the second lienholders have  
secured or unsecured claims for purposes of § 109(e).

Appellants appear to concede that, in light of its reliance  
on Miller v. United States (In re Miller), 907 F.2d 80 (8th Cir.

1 1990), Scovis applies to at least a subset of consensual liens.  
2 In Miller, the formulaic calculation of unsecured debt adopted by  
3 Scovis was applied to a consensual lien that was secured not only  
4 by the debtor's residence, but also by farmland and farm  
5 equipment. Id. at 81. The only issue we see, and as raised by  
6 the Smiths and the Hamburgs, is whether the Scovis analysis  
7 changes because the second lien claims in these cases were  
8 consensual liens secured solely by real property that is the  
9 principal residence of the debtors. Appellants, in a surprising  
10 inconsistency, argue that it is § 1322(b)(2) that prohibits a  
11 change in the status of the second lienholders' claims because it  
12 precludes modification of the rights of claims secured only by a  
13 debtor's principal residence to render those claims unsecured.  
14 However, that is in actuality what Appellants sought and  
15 accomplished through their motions to determine the secured  
16 status of the WAMU and BAC claims. It is disingenuous for  
17 Appellants now to assert that all § 1322(b)(2) allows is the  
18 cessation of payments during the pendency of the case.  
19 Appellants have in fact modified the rights of the second  
20 lienholders within the bankruptcy context; by operation of  
21 § 506(a), the second lienholders no longer hold secured claims  
22 for purposes of their bankruptcy cases.

23 2. Timing of lien "avoidance" does not matter

24 Nor are we persuaded that the Scovis analysis is in any way  
25 altered because the second liens may not have been avoided.<sup>7</sup>

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27 <sup>7</sup> Appellants argue at great length in their briefs that  
28 their motions before the bankruptcy court sought only to  
reclassify wholly unsecured deeds of trust, not to attack the

(continued...)

1 Scovis itself involved a judgment lien that had not yet been  
2 avoided. In fact, it is difficult to imagine any situation where  
3 the original schedules in a case ever would include as a secured  
4 lien, a lien that already had been avoided in the bankruptcy  
5 case.

6 Scovis instructs that determination of the "status" of a  
7 judicial lien claim as secured or unsecured requires the  
8 application of § 506(a). Id. at 983. "[A] vast majority of  
9 courts, and all circuit courts that have considered the issue,  
10 have held that the unsecured portion of undersecured debt is  
11 counted as unsecured for § 109(e) eligibility purposes." Id.

12 Appellants assert "[the second lienholders] retain all  
13 rights and remedies under California law, as well as their  
14 security interest, and therefore are secured for purposes of  
15 section 109(e) eligibility." Appellants' Opening Brief at 17:5-  
16 7. They contend that because the second liens are not  
17 irrevocably void until the chapter 13 discharge is entered, and  
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19 <sup>7</sup>(...continued)  
20 validity or priority of the liens. They assert that due process  
21 requires that an adversary proceeding be filed "to determine the  
22 validity, priority, or extent of a lien or other interest in  
23 property . . ." prior to actual avoidance of the wholly unsecured  
24 lien. Rule 7001(2). We need not reach this issue. For our  
25 purposes, we need only decide whether the application of § 506(a)  
26 can operate to change the status of a claim from secured to  
27 unsecured in a bankruptcy case and whether such change impacts a  
28 § 109(e) eligibility determination. We observe that § 506(d)  
provides: "To the extent that a lien secures a claim against the  
debtor that is not an allowed secured claim, such lien is  
void. . . ." Further, § 1327(c) provides: "Except as otherwise  
provided in the plan or the order confirming the plan, the  
property vesting in the debtor under subsection (b) of this  
section is free and clear of any claim or interest of any  
creditor provided for by the plan."

1 because their lien rights are not eliminated under California law  
2 until foreclosure, see, e.g., Cal. Civ. Code § 2903, the second  
3 lienholders remain secured creditors even though they cannot  
4 enforce their rights in the collateral in the bankruptcy case.

5 We do not dispute that the determination of property rights  
6 by the bankruptcy court ordinarily is controlled by state law.  
7 Butner v. United States, 440 U.S. 48, 54 (1979). However, we  
8 disagree that merely holding a security interest on the petition  
9 date means that the creditor is a secured creditor for purposes  
10 of the Bankruptcy Code generally, or § 109(e) specifically.

11 Under section 506(a), a creditor's rights in property  
12 are dependent on the bankruptcy estate's interest in  
13 property; the determination of the estate's interest is  
14 separate from and must precede the determination of the  
15 creditor's interest. If the estate has no interest in  
16 the property at issue, . . . it is not possible for the  
17 claim of [the] creditor . . . to be secured by that  
18 property under section 506(a).

19 United States v. Snyder, 343 F.3d 1171, 1176 (9th Cir. 2003).

20 While Snyder addressed what happened to a creditor's lien if the  
21 property to which it attached never became property of the  
22 bankruptcy estate under § 541(c)(2), it is instructive in the  
23 chapter 13 eligibility analysis: where a creditor cannot enforce  
24 its security interest in property of the estate, the creditor is  
25 precluded from "attaining secured status in the bankruptcy  
26 proceeding." Id. at 1179, quoting In re Taylor, 289 B.R. 379,  
27 383-84 (Bankr. N.D. Ind. 2003) ("[T]he fact that a creditor does  
28 not hold a lien upon property of the estate does not mean there  
is no underlying right to payment; only that the claim is not  
'secured' in the bankruptcy sense of the word.").

1 **VI. CONCLUSION**

2 Section 1322(b)(2) allows chapter 13 debtors to "strip off"  
3 from their residences wholly unsecured liens. Section 506(a)  
4 provides that an allowed "claim" of a "creditor" secured by a  
5 "lien" on "property in which the estate has an interest . . . is  
6 a secured claim to the extent of the value of such creditor's  
7 interest in the estate's interest in such property, . . . and is  
8 an unsecured claim to the extent that the value of such  
9 creditor's interest . . . is less than the amount of such allowed  
10 claim." Thus, by its terms, § 506(a) provides that the  
11 undersecured portion of a lien claim is an unsecured claim.  
12 Section 506(d) implements § 506(a) by providing that the lien is  
13 void as to any unsecured portion of the claim.

14 The bankruptcy court did no more than it was asked: it  
15 determined the secured status of the WAMU and BAC claims under  
16 § 506(a). By application of § 506(a), that portion of the claim  
17 of a secured creditor that is undersecured is an unsecured claim.  
18 Having asked the bankruptcy court to determine that the WAMU and  
19 BAC claims were wholly unsecured, and having scheduled them as  
20 such, the debtors cannot now complain because the Bankruptcy Code  
21 requires classification of those claims as unsecured claims in  
22 their full amounts, especially where they intend to treat the  
23 second lienholders as wholly unsecured creditors for all purposes  
24 under their plans.

25 The bankruptcy court correctly determined that the Smiths  
26 and the Hamburgs exceeded the unsecured debt limits for chapter  
27 13 eligibility in light of Scovis. Therefore, unless the Ninth  
28 Circuit revisits and alters the Scovis decision in this context,

1 dismissal of the Appellants' chapter 13 cases cannot constitute  
2 error.

3 Chapter 13 debt limits are mandated by statute. Bankruptcy  
4 courts are required to apply the provisions of the Bankruptcy  
5 Code as they are written. To the extent the existing chapter 13  
6 debt limits are too low to provide chapter 13 relief to  
7 homeowners impacted by the current economic climate, that is a  
8 matter within the purview of Congress.

9 We AFFIRM.

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12 JAROSLOVSKY, Bankruptcy Judge, concurring:

13  
14 The decision of my brethren is a proper application of  
15 binding case law, and I accordingly concur. I write separately  
16 only to point out that the confluence of new circumstances and  
17 old cases has created a perfect Catch-22<sup>8</sup> for the Smiths and the  
18 Hamburgs: they are ineligible for chapter 13 because they need  
19 the relief afforded by chapter 13, and would be eligible if they  
20 did not need the relief.

21 I begin by noting that we are declaring ineligible debtors  
22 who were clearly intended by Congress to be eligible for chapter  
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24 <sup>8</sup> The term "Catch-22" is familiar to those of a certain age  
25 who remember the 1961 black satire of that title by Joseph  
26 Heller. Set in World War II, it described army regulations which  
27 purported to allow a bomber pilot driven to insanity by the  
28 dangers of combat to request relief, but also specified that  
concern for one's safety in the face of dangerous combat was the  
process of a rational mind. Thus, anyone who asked to be  
relieved was by definition sane and not eligible to be relieved.

1 13 relief. They are solid middle-class wage earners. When  
2 Congress fashioned the debt limits set forth in § 109(e) of the  
3 Bankruptcy Code, it had in mind debtors who owned a middle-class  
4 residence with, typically, a first and second mortgage, a vehicle  
5 loan or two, and a significant but not excessive amount of  
6 unsecured debt, typically credit card obligations.<sup>9</sup> I quite  
7 agree that courts cannot create eligibility where none has been  
8 intended by Congress. Quintana v. United States (In re  
9 Quintana), 107 B.R. 234, 241 (9th Cir. BAP 1989). However, in  
10 this case we are taking away eligibility which Congress intended.  
11 Eligibility for chapter 13 should be liberally interpreted so as  
12 not to unnecessarily obstruct the eligibility of debtors desiring  
13 relief. In re Lambert, 43 B.R. 913, 919 (Bankr. D. Utah 1984).  
14 This is especially the case when the debtors seeking relief are  
15 exactly the kind of debtors Congress had in mind when fashioning  
16 eligibility.

17 The only meaningful relief under the Bankruptcy Code for  
18 debtors caught in the mortgage crisis is the ability, in some  
19 chapter 13 cases, to remove junior encumbrances from their home.  
20 For most of these debtors, the complexity and expense of a  
21 chapter 11 case is beyond their means. My sense of fairness and  
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23 <sup>9</sup> A review of the legislative history of § 109(e) makes it  
24 clear that the dollar amounts were deemed necessary by Congress  
25 because chapter 13 was being opened to small businesses, a major  
26 change from old chapter XIII which was limited to wage earners.  
27 The limitations were deemed necessary to keep businesses out of  
28 chapter 13 which were more properly reorganized in chapter 11.  
9 Bkr.L.Ed, Legislative History § 82:4. Congress clearly did not  
intend the limits to keep ordinary middle class wage earners out  
of chapter 13.



1 the depth of the crisis lead me to look for a way to make chapter  
2 13 available to debtors like the Smiths and the Hamburgs.

3 We are expected by the Court of Appeals to follow the  
4 decisions of other circuits in most instances. United States v.  
5 Battley (In re Berg), 188 B.R. 615, 620 (9th Cir. BAP 1995).

6 This direction requires my concurrence. However, the Court of  
7 Appeals has the power to distinguish its prior decisions and  
8 consider whether it should follow those of other circuits. I  
9 believe that such an approach to the issue of chapter 13  
10 eligibility would be wise.

11 The Smiths and Hamburgs have been declared ineligible  
12 because Scovis v. Henrichsen (In re Scovis), 249 F.3d 975 (9th  
13 Cir. 2001) and Miller v. United States (In re Miller), 907 F.2d  
14 80 (8th Cir. 1990), require the court to add some debt secured by  
15 a mortgage to the unsecured debt total. These two cases,  
16 combined with an unforeseen and unprecedented drop in home values,  
17 have created an impediment to chapter 13 relief certainly not  
18 within the contemplation of Congress in 1978.

19 Scovis is readily distinguishable on its facts. That case  
20 found that a debt: (1) which began as unsecured, (2) became  
21 secured by legal process, and (3) was readily returnable by  
22 operation of law to unsecured status, should be treated as  
23 unsecured for eligibility purposes. In that case, the intent of  
24 Congress was clearly honored; an unsecured debt was treated as  
25 such notwithstanding its fleeting status as technically secured.  
26 If Scovis were the only applicable case, I would urge that it be  
27 distinguished on that ground. However, Miller represents a more  
28 serious hurdle, as the Smiths and Hamburgs cannot prevail unless

1 a conflict between the circuits is created.

2 In most instances, revisiting a more or less settled issue  
3 of law is not sound policy. However, this instance is the  
4 exception because application of Miller to the current situation  
5 creates losers without any winners. In the Smiths' case, it was  
6 the chapter 13 trustee who sought dismissal. In the Hamburgs'  
7 case, the court apparently raised the issue on its own. In  
8 neither case did the junior deed of trust holder object to  
9 avoidance of its lien; economic circumstance, not bankruptcy law,  
10 has rendered the liens worthless. It is purposeless to the point  
11 of cruelty to maintain a rule of law which benefits nobody, does  
12 only harm and severely limits the availability of a salutary law.

13 If I were free to visit the issue anew, I would hold that  
14 for chapter 13 eligibility purposes ordinary residential mortgage  
15 debt is properly treated as secured notwithstanding the current  
16 value of the collateral. Because I feel bound by Miller, I must  
17 concur in a different result.

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