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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA**

In re  
Rodriguez  
Debtors.

OPINION

**I. Introduction**

Raul Villareal objected to confirmation of the debtors’ plan on the grounds that the Rodriguez’ are ineligible for relief under chapter 13, asserting that the Rodriguez’ unsecured debt is greater than the \$250,000 limit contained in §109(e) of the Bankruptcy Code. There are two issues that are determinative of whether the Rodriguez’ unsecured debt exceeds the debt limitation. The first issue is whether a provision in the debtors’ plan providing for the avoidance of Villareal’s claim as preferential causes the entire claim to be considered unsecured at the time of the filing of the petition. The second issue is whether the failure of creditors to file proofs of claim reduces the amount of unsecured debt for the §109(e) calculation.

**II. Facts**

The Rodriguez’ own and operate El Torero Club, a night club, and Rodriguez Auto Sales. Villareal’s claim resulted from a judgment by the Superior Court that Villareal was an employee of El Torero Club, not an independent contractor, and was entitled to the payment of minimum wages.

Villareal recorded an abstract of judgment within ninety days of the filing of the chapter 13 case and has filed a proof of claim in the bankruptcy case for \$156,212.85, which consists of the amount of the judgment plus interest and costs. No objection has been filed to the claim.

Because of extended discovery, the bar date for filing claims occurred before the hearing on confirmation of the plan. All allowed claims are now known. Excluding Villareal’s claim, the Rodriguez’ scheduled secured creditors in the amount of \$534,683.11 and unsecured creditors in the amount of \$140,091.22. The Rodriguez’ scheduled Villareal’s claim as secured; however, their plan provides for treatment of Villareal as unsecured. The plan states that “Debtor will avoid the judgment liens of Raul A. Villareal pursuant to §§544(f)(1) and 547.” The Rodriguez’ first amended plan provides for payment of five cents on the dollar to unsecured creditors. This proposed plan only satisfies the best interest of creditors test if, in fact, the Villareal judgment lien is partially secured.

Timely proofs of claim were not filed for a number of creditors -- mostly family members and friends -- comprising approximately \$72,000 of scheduled unsecured debt. In addition, the claims filed for secured debt were lower than the scheduled amounts. A chart of creditors other than Villareal reveals the following:

<u>Secured Claims</u>	<u>Scheduled Amount</u>	<u>Proof of Claim Amount</u>
Monterey County Tax Collector	1,966.15	4,899.58
Santa Cruz Tax Collector	1,339.69	1,342.69
Benito Guzman	10,395.05	10,811.03
Small Business Admin.	274,564.51	250,983.33
Coast Bank	99,040.58	None Filed
Donna Moore	92,700.00	None Filed
Merced County Support	0	491.00
Sunstate Home Loans	54,677.13	None Filed
<b>Total Secured Claims</b>	<b>534,683.14</b>	<b>268,527.63</b>
<u>Priority Unsecured</u>	<u>Scheduled Amount</u>	<u>Proof of Claim Amount</u>
IRS	1,703.00	1,922.34

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<u>General Unsecured</u>	<u>Scheduled Amount</u>	<u>Proof of Claim Amount</u>
Bank One	6,805.80	7,005.89
AT&T Universal	5,442.20	5,550.69
MBNA America	4,840.84	4,840.84
Household Finance	14,344.09	14,717.20
First Card	2,835.97	3,037.10
Household Bank	3,242.45	3,547.13
Coamerica Bank	7,158.49	6,266.83
Bank of America	3,401.96	3,686.18
Contract Service Center	3,425.73	None Filed
Discover Card, Novus	1,149.50	7,590.34
Discover Card	1,149.50	None Filed
Robin Lynne Kubicek	12,280.69	12,280.69
Mary Espinoza	311.00	None Filed
Arturo Ortiz	10,000.00	None Filed
Concepcion Ramirez	20,000.00	None Filed
Genaro Iegoretta	3,000.00	None Filed
Manuel Rocha	10,000.00	None Filed
Himelda Rodriguez	15,000.00	None Filed
Hubaldo Rodriguez	11,000.00	None Filed
Salvador Rodriguez	3,000.00	None Filed
<b>Total Unsecured Claims</b>	<b>140,091.22</b>	<b>70,445.23</b>

During his deposition, Mr. Rodriguez affirmed that he owed debts to the various family members and friends scheduled and testified that certain of them were owed more than was scheduled. The Rodriguez' contend that there are two interpretations of §109(e) in which they could be eligible to file a chapter 13 case. First, the Rodriguez' contend that Villareal's judgment lien attached to the Rodriguez' residence to the extent of the exposed equity of \$60,450.00 and remained unsecured to the extent of \$95,762.85. If the Villareal claim were treated as partially secured, the Rodriguez' would still be eligible to file Chapter 13. The Rodriguez' assert this position despite the fact that their

1 plan provides for avoidance of Villareal's secured claim as preferential.

2 Alternatively, the Rodriguez' assert that only filed claims should be considered for purposes  
3 of computing unsecured debt. Under that approach, even after including the entire amount of  
4 Villareal's claim, the unsecured debt totals only \$226,658.08. In other words, the debtor satisfies the  
5 eligibility requirements if the computation excludes debts scheduled, but for which no proof of claim  
6 is timely filed.

### 7 **III. Analysis**

#### 8 **A. Because the debtor's plan provides for avoidance of Villareal's claim, the entire** 9 **claim is considered unsecured as of the filing of the petition.**

10 The issues raised by the plan's provisions for avoidance of Villareal's claim were fully  
11 explored in the case of *In re Toronto*, 165 B.R. 746 (Bankr. D. Conn. 1994). There, the creditor  
12 obtained an attachment on the debtor's residence one month before the debtors sought chapter 13  
13 protection. The debtors listed the creditor's claim as secured, but parenthetically indicated that they  
14 would seek to avoid the claim as preferential. When the debtors filed an adversary proceeding to  
15 avoid the preferential lien, the creditor admitted every allegation and judgment was entered against  
16 the creditor. Then, the creditor moved to dismiss or convert the case because the unsecured debt,  
17 including the creditor's claim as unsecured, exceeded the debt limitation in § 109(e). *Id.* at 749-51.

18 The Bankruptcy Court determined that the creditor's claim was unsecured for § 109(e)  
19 purposes. The Court noted that under § 502(h), a claim that is avoided as preferential is treated as  
20 an unsecured claim that arose prior to the filing of the petition. The statute provides that a transferee  
21 receiving a prohibited transfer is returned to its pre-transfer status, as the holder of an unsecured,  
22 prepetition claim. The Court reasoned that "if a debtor was ineligible for chapter 13 relief at the start  
23 of the preference period, eligibility cannot be created by a preferential transfer which the debtor  
24 subsequently avoids . . . ." *Id.* at 754. If the debtor were able to treat a claim as secured for the  
25 determination of eligibility, yet treat the claim as unsecured in the plan, a debtor could effectively  
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1 rewrite the § 109(e) debt limitation.

2 I agree with the analysis in *Toronto*. A claim that is treated by the plan as avoidable from the  
3 inception of the case should also be considered unsecured for the purpose of determining the § 109(e)  
4 calculation. Since Rodriguez' plan provides for avoidance of Villareal's claim, the entire amount of  
5 Villareal's claim must be considered unsecured in computing Rodriguez' eligibility under §109(e).  
6 Under this analysis, the plan is not confirmable for two reasons: because the amount of debt  
7 scheduled exceeds the eligibility requirements for chapter 13 and because the plan fails to meet the  
8 best interest of creditors test.

9 **B. The failure of creditors to file proofs of claim does not reduce the amount of**  
10 **unsecured debt on the date of the filing of the petition.**

11 The debt limitations under 11 U.S.C. § 109(e) reflect Congress' intent to limit use of chapter  
12 13 to individuals and individuals that own small businesses. Under § 109(e), “[o]nly an individual  
13 with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated,  
14 unsecured debts of less than \$250,000. . . . may be a debtor under chapter 13 of this title.” Creditor  
15 protections, such as the voting and disclosure requirements of chapter 11, are reserved for cases with  
16 more dollars at stake. As a result, the eligibility requirements of § 109(e) are strictly enforced.

17 The only debts that are excluded from the § 109(e) computation are contingent and  
18 unliquidated debts. *Sylvester v. Dow Jones & Co. (In re Sylvester)*, 19 B.R. 671, 673 (B.A.P. 9<sup>th</sup> Cir.  
19 1982). Even a bona fide dispute over a claim does not disqualify the claim in determining eligibility.  
20 *Nicholes v. Johnny Appleseed of Wash. (In re Nicholes)*, 184 B.R. 82, 89 (B.A.P. 9<sup>th</sup> Cir. 1995).

21 The Code specifies that debts are determined on the petition date. Events occurring after the  
22 filing of the petition, such as the allowance of claims, are not relevant to the eligibility calculation.  
23 *Lamar v. United States (In re Lamar)*, 111 B.R. 327, 330 (D. Nev. 1990). See also 1 Keith M.  
24 Lundin, *Chapter 13 Bankruptcy* §1.62 (2d ed. 1994). Although there are various permutations on  
25 the facts, the legal principle remains the same: for eligibility purposes the court looks at the claims

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existing on the petition date and not with hindsight based on postpetition events. *See, e.g., Quintana v. Commissioner of Internal Revenue Service (In re Quintana)*, 915 F.2d 513 (9<sup>th</sup> Cir. 1990), *Fostvedt v. Dow (In re Fostvedt)*, 823 F.2d 305 (9<sup>th</sup> Cir. 1987).

The failure of the Rodriguez’ creditors to file proofs of claim is not relevant to the determination of the amount of debt existing on the petition date. There is no evidence before the court showing that Rodriguez’ scheduled debts were forgiven or that they were contingent or unliquidated. The Rodriguez’ unsecured debt, including Villareal’s claim, totals \$303,544.31.

**IV. Conclusion**

The Rodriguez’ unsecured debt on the date of the filing of their petition exceeded the \$250,000 statutory limitation in § 109(e) making them ineligible for relief under chapter 13. The case must be converted or dismissed.

Dated:

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UNITED STATES BANKRUPTCY JUDGE