
**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11308-JMD
Chapter 13

Philip W. Mans,
Debtor

John F. Cullen, Esq.
CULLEN & O'CONNELL, P.A.
Attorney for Debtor

Christopher J. Seufert, Esq.
SEUFERT PROFESSIONAL ASSOCIATION
Attorney for William and Norinne Field

Lawrence P. Sumski, Esq.
Chapter 13 Trustee

MEMORANDUM OPINION

I. INTRODUCTION

On September 15, 2000, the Court held a hearing on a motion to dismiss or convert filed by Lawrence P. Sumski, the Chapter 13 Trustee (the "Trustee"). The Trustee sought to dismiss or convert the Debtor's case on two grounds. First, the Trustee sought to dismiss or convert for the Debtor's failure to supply the Trustee with copies of his income tax returns. Second, the Trustee sought to dismiss or convert for the Debtor's failure to qualify as a debtor under 11 U.S.C. § 109(e) as his unsecured debt exceeds the limit of \$269,250.00 for Chapter 13 cases. At the hearing, the Court declined to rule on the tax return disclosure issue. However, the Court did rule that the Debtor's unsecured debt exceeded the limit of \$269,250.00 making the Debtor ineligible for Chapter 13. This opinion sets forth the Court's reasoning for its decision.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On May 1, 2000, the Debtor filed a Chapter 13 bankruptcy petition.¹ In Schedule F to his Chapter 13 petition the Debtor listed \$325,310.86 in unsecured debt, which debt was owed to seven different creditors. The Debtor listed the creditors and amounts owed as follows.

Creditors	Amount Owed as Listed in Schedule F
American Express Optima Card	\$ 3,645.16
Bank of New Hampshire (Visa)	6,237.00
Christopher Seufert, Esq.	200,000.00
Citibank Credit Services	3,952.45
First USA Bank–First Card	8,946.43
Sears Premier Card	2,529.82
William and Norinne Field	100,000.00
Total	\$325,310.86

The Debtor listed the debts owed to William and Norinne Field (the “Fields”) and their attorney, Christopher Seufert, as disputed.

By the time the Court conducted the hearing on the Trustee’s motion to dismiss or convert, six creditors had filed eight proofs of claims in the Debtor’s case. The creditors and amounts listed on the proofs of claims are as follows.

Creditors	POC No.	Amount Listed on POC
American Express Travel Related	4	\$ 3,061.14
American Express Centurion Bank	5	3,742.64
American Express Travel Related	7	41.58
Bank of New Hampshire (Visa)	2	7,099.80
Citibank/CHOICE	6	4,084.17
Sears, Roebuck & Co.	1	2,529.82
William and Norinne Field	3	446,158.69
Internal Revenue Service	8	8,288.56
Total		\$474,961.40

¹ The Debtor previously filed for Chapter 11 bankruptcy protection on December 7, 1990. That case was subsequently converted to Chapter 7 and remains pending at this time.

The deadline for filing proofs of claims was September 5, 2000 for all creditors, except governmental units, which have until October 30, 2000 to file a proof of claim.

All of the proofs of claims on file, except the one filed by the Fields, assert unsecured claims; these claims total \$28,802.77. The Fields assert that their claim of \$446,158.69 is secured by an attachment of collateral worth between \$150,000.00 and \$200,000.00.² The Fields have a judgment from the Merrimack County Superior Court dated October 8, 1999 that breaks down their claim as follows.

Element	Amount
Damages and taxation of costs	\$334,674.00
Statutory interest	19,727.60
Attorney fees	91,757.09
Total	\$446,158.69
Plus costs	\$337.08

It is undisputed that the Fields' judgment is a final judgment.

III. DISCUSSION

Section 109(e) describes the eligibility requirements of Chapter 13 of the Bankruptcy Code and specifically provides:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$269,250 and noncontingent, liquidated secured debts of less than \$807,750 . . . may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e). In his motion, the Trustee argues that the Debtor's unsecured debt exceeds the \$269,250.00 limit based on the unsecured debt listed in the Debtor's schedules. In response, the Debtor argues that the Court should not make the eligibility determination until all claims are filed and allowed.³

² The Debtor valued the collateral, his personal residence, in Schedule A at \$150,000.00.

³ Note that the Debtor does not assert that the Fields' claim is noncontingent or unliquidated and for good reason. A debt is noncontingent "if all events giving rise to liability occurred prior to the filing of the bankruptcy petition." Nicholes v. Johnny Appleseed of Washington (In re Nicholes), 184 B.R. 82, 88 (B.A.P. 9th Cir. 1995), quoted in In re Tabor, 232 B.R. 85, 89 (Bankr. N.D. Ohio 1999). An unsecured debt becomes liquidated in amount once reduced to judgment. See Elliott v. Papatones (In re Papatones),

The Debtor has filed an objection to the Fields' claim on the grounds that it should be bifurcated pursuant to section 506(a) of the Bankruptcy Code⁴ into a secured claim of \$100,000.00 and an unsecured claim of \$234,674.00. The Debtor believes that the Fields are not entitled to recover attorney's fees, costs, and other charges, including interest, as part of their claim, which under the final state court judgment total \$111,484.69 (plus costs of \$337.08, which amount was omitted from the Fields' proof of claim). The Debtor believes that section 506(b) of the Bankruptcy Code prevents the Fields' from recovering these elements of their claim. If these amounts are omitted from the Fields' claim and the claim is treated as partially secured in accordance with the Debtor's analysis, the Debtor's unsecured debt would total \$263,476.71,⁵ which is within the Chapter 13 limit.

Thus, the issue before the Court is whether the Trustee's motion is premature as no final determination of the Fields' claim has been made by this Court. The Court concludes that it is not. The majority view advocates importing a section 506(a) analysis to section 109(e) to define "secured" and "unsecured" since "[r]efusing to count the undersecured portion of a secured creditor's claim as unsecured

143 F.3d 623, 626 (1st Cir. 1998); see also Slack v. Wilshire Ins. Co. (In re Slack), 187 F.3d 1070, 1074-75 (9th Cir. 1999) ("Even if a debtor disputes the existence of liability, if the amount of the debt is calculable with certainty, then it is liquidated for the purposes of § 109(e)."). Here it is undisputed that the Debtor's obligation to the Fields arose prepetition and was reduced to final judgment. In addition, while the Debtor disputes the Fields' claim, the parties agree that even disputed claims should be included in the section 109(e) analysis. See In re Jordan, 166 B.R. 201, 202 (Bankr. D. Me. 1994) ("[T]he vast majority of courts have held that the existence of a dispute over either the underlying liability or the amount of a debt, does not automatically render the debt either contingent or unliquidated . . . '[S]o long as it is otherwise noncontingent and unliquidated a claim should not be excluded from § 109(e) calculations merely because it is disputed.'").

⁴ Section 506(a) provides in relevant part:

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

11 U.S.C. § 506(a).

⁵ The claims filed to date total \$474,961.40. Subtracting \$100,000.00, in accordance with the Debtor's assumption of value as set forth in his objection to the Fields' claim, for the Debtor's interest in the collateral securing the Fields' claim and \$111,484.69 for the attorney's fees and interest from \$474,961.40 would leave \$263,476.71 in total unsecured claims.

debt ignores reality and could lead to absurd results.” See Soderlund v. Cohen (In re Soderlund), 236 B.R. 271, 274 (B.A.P. 9th Cir. 1999). The Court agrees with the majority view and holds that the undersecured portion of a secured creditor’s claim should be counted as unsecured debt for section 109(e) eligibility purposes. See id. at 275.

The Fields have asserted a claim in the total amount of \$446,158.69. They allege that the collateral securing their judgment is worth as much as \$200,000.00. However, the Debtor has valued the collateral at \$150,000.00 in his bankruptcy schedules. Notwithstanding the value in his schedules, the Debtor now claims that his undivided one-half interest in the collateral, his personal residence, is valued at \$100,000.00. If the Fields’ security interest in the collateral only applies to the Debtor’s interest, then the Debtor’s schedules would indicate \$75,000.00 as the value of their secured claim, leaving an unsecured claim of \$371,158.69. However, at the time the Fields perfected their attachment on the collateral, it was titled to the Debtor’s adult daughter as trustee under a family trust and the trustee was a party defendant in state court litigation brought by the Fields. Shortly before the commencement of this proceeding, the trustee conveyed the property to the Debtor and his spouse. Accordingly, the Fields’ security interest was perfected before the Debtor and his spouse acquired rights in the collateral and they may be secured for the full value of the collateral. In that case, the Fields would have a secured claim for \$150,000.00 and an unsecured claim for \$296,158.67.⁶ Bifurcating their claim pursuant to section 506(a) into secured and unsecured components using either of the alternative values for their secured claim results in an unsecured claim for the Fields which itself exceeds the debt limit of section 109(e).

As explained above, however, the Debtor argues that the Fields are not entitled to assert a claim for the attorney’s fees and interest awarded by the state court. In support of his position he cites both to section 506(b) of the Bankruptcy Code and In re Tricca, 196 B.R. 214 (Bankr. D. Mass. 1996). In Tricca, a secured creditor attempted to obtain a secured claim for pre-petition attorney’s fees incurred in a foreclosure action even though the promissory note did not provide for attorney’s fees. The secured

⁶ Since the minimum value of the Fields’ unsecured claim is greater than the limit in section 109(e), the Court does not need to decide the exact amount of the Fields’ secured claim.

creditor argued that the right to attorney's fees could be incorporated into its mortgage by reference to state foreclosure statutes. The court ruled that section 506(b) of the Bankruptcy Code does not permit a secured claim for legal fees and costs which did not arise from the agreement. However, the court allowed the secured creditor an unsecured claim for legal fees and costs by virtue of its rights under the state foreclosure statute.⁷ In this case, the "agreement" that forms the basis of the Fields' claim is the final pre-petition state court judgement, which does include attorney's fees. As indicated at the hearing, the Court believes that the Fields are entitled to assert a claim in the exact amount liquidated by the state court in its final judgment as the Debtor has articulated no valid basis for disallowing these elements of their claim.⁸

Accordingly, the Court finds that the Fields have an unsecured claim of at least \$296,158.69. When added to the other unsecured claims of \$28,802.71, the Debtor's unsecured debt totals at least \$324,961.40 and, therefore, the Debtor is ineligible for Chapter 13.

IV. CONCLUSION

On their face, the Debtor's schedules demonstrate that he is ineligible for Chapter 13. Examination of the claims filed in the Debtor's case to date compel the same conclusion, even after bifurcating the claim of the Fields, the Debtor's largest creditor. For the reasons stated above, the Court holds that Debtor's unsecured debt exceeds the limits imposed by section 109(e) of the Bankruptcy Code. The Trustee's motion shall be granted and the Debtor's case dismissed.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order consistent with this opinion was entered on September 18, 2000. As indicated at the hearing held on September 15, 2000, the time to appeal the Court's order shall run from the date this opinion is entered. See Fed. R. Bankr. P. 8002(c)(1) (indicating

⁷ Under the Debtor's application of Tricca, it would appear that the Fields would still have a secured claim no greater than \$150,000.00 and an unsecured claim that would include attorney's fees and costs which would still result in the Debtor being ineligible for Chapter 13 under section 109(e).

⁸ Indeed, if the Debtor were permitted to do so, it might constitute an impermissible collateral attack on the final state court judgement.

that a bankruptcy judge may extend the time for filing the notice of appeal by any party except in limited circumstances not applicable in this case).

DATED this 22nd day of September, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge