

Daily Journal

The Practitioner Bankruptcy Law

Dismissing O.J.

Will a Court Allow Simpson to Go Bankrupt?

By Howard Madris

Bankruptcy court may likely be the next legal forum for O.J. Simpson.

By filing a Chapter 11 petition, Simpson could appeal the civil judgment and stay the wrongful death plaintiffs from seizing his nonexempt assets during the bankruptcy, without having to post an appeal bond. 11 U.S.C. Section 362. Absent a bankruptcy filing, Simpson would have to post an appeal bond equal to 150 percent of the judgment (at least \$12.75 million, plus punitive damages) to obtain a stay pending appeal. California Code of Civil Procedure Section 917.1(b). However, Simpson's bankruptcy might be dismissed as a "bad-faith" filing or because it is not in the interests of his creditors.

Bankruptcy Code Section 1112(b) authorizes a bankruptcy court to dismiss a Chapter 11 case for "cause." Numerous courts have held that a lack of good faith in filing constitutes cause for dismissal as a bad-faith filing. See, e.g., *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994). The existence of good faith "depends on an amalgam of factors and not upon a specific fact." *In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986).

Alternatively, under Section 305(a)(1), a bankruptcy court can abstain from exercising its jurisdiction and order dismissal if it is in the interests of creditors and the debtor. However, that section has rarely been applied to dismiss cases filed to avoid the bond requirement (so-called bond bankruptcies). Indeed, the two courts that abstained pursuant to Section 305(a)(1) observed that there was also cause to dismiss under Section 1112(b).

Marsch is the only published Court

of Appeals decision addressing whether a bond bankruptcy can be filed in good faith. In *Marsch*, the 9th U.S. Circuit Court of Appeals ordered dismissal pursuant to Section 1112(b). The debtor had filed to avoid bonding her appeal of a judgment requiring that she return the value of stock she received from her ex-husband.

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The bankruptcy court granted the debtor's ex-husband's motion to dismiss pursuant to both Sections 1112(b) and 305(a)(1) and awarded sanctions against the debtor, without publishing an opinion. However, the bankruptcy court stayed the dismissal order for 60 days to allow the debtor to liquidate her assets.

On appeal, the Bankruptcy Appellate Panel upheld the Section 305(a)(1) abstention order, but reversed the Section 1112(b) dismissal order. The panel reasoned that the bankruptcy court's decision to delay dismissal for 60 days was inconsistent with a determination that the case was filed in bad faith.

The 9th Circuit upheld both the bankruptcy court's dismissal and the award of sanctions. However, it did not address the propriety of abstention under Section 305(a)(1). Section 305(c) provides that an order of abstention is not reviewable by the courts of appeals.

In ordering dismissal under Section 1112(b), the 9th Circuit recognized that some courts have held that filing bankruptcy to stay collection during an appeal without posting bond is a bad-faith "litigation tactic" designed to "act as a substitute for a supersedeas bond," thereby warranting dismissal. But other courts have held that Chapter 11 may be used to avoid posting an appeal bond, provided the debtor establishes that satisfaction of the judgment would "severely disrupt the debtor's business," and the debtor cannot satisfy the judgment with "nonbusiness assets," added the court.

The 9th Circuit held that dismissal was proper because the debtor was not involved in a business venture, and she had the financial means to pay the judgment. However, it explicitly left open whether a petition filed solely to avoid bonding an appeal is in bad faith, even where the collection of the judgment would severely disrupt the debtor's business and the debtor lacks the ability to pay the judgment.

It is unclear whether *Marsch* mandates dismissal where the debtor lacks an ongoing business and the ability to satisfy the judgment or to post an appeal bond.

Post-*Marsch*, several bankruptcy courts in the 9th Circuit have dismissed Chapter 11 bond bankruptcies as in bad faith where the debtors could not establish that they were engaged in business and that they lacked the funds to post the appeal bonds. In *In re Boynton*, 184 B.R. 580, 583 (Bankr. S.D.Cal. 1995), dismissal was ordered because the debtors' stock account did not constitute a going concern. There were no employees or operations that would be severely harmed if the case were dismissed. Furthermore, the

debtors failed to establish that they lacked the funds to post the bond.

Additionally, allowing the bankruptcy case to proceed would permit the debtors to use assets, which the judgment creditor would otherwise have seized, to finance an appeal and to pay living expenses, without any downside to the debtors. Furthermore, if the debtors prevailed on their appeal, they would dismiss the bankruptcy case without any reorganization purpose having been served.

It is unclear whether the *Boynton* court would have dismissed the case if the debtors were operating a business with employees or clearly lacked the ability to satisfy the judgment or to post an appeal bond. The court observed that with the exception of one case, courts dismissing bond bankruptcies on bad-faith grounds dealt with smaller judgments where the debtor was able to satisfy the judgment while staying in business, whereas good faith was found where the judgments were large and the debtor lacked the funds to satisfy the judgment and remain in business.

Another bankruptcy court in the 9th Circuit held that good faith exists if a Chapter 11 petition is the debtor's only alternative to stay a judgment pending appeal. *In re Glenn McKitrick Byrd*, 172 B.R. 970, 973 (Bankr. W.D. Wash. 1994). Conversely, one court held that a bond bankruptcy is inherently in bad faith even if the debtor's business clearly lacks the ability to post an appeal bond. *In re Karum Group, Inc.*, 66 B.R. 436, 438 (Bankr. W.D. Wash. 1986).

Only one published bankruptcy case discusses the propriety of dismissing a bond bankruptcy under Section 305(a)(1). In *In re Business Information Co., Inc.*, 81 B.R. 382 (Bankr. W.D. Pa. 1988), the court ordered abstention and dismissal pur-

suant to Section 305(a)(1) in lieu of dismissal under Section 1112(b), even though there was also cause to dismiss under the latter section. The court abstained for several reasons:

- The debtor's appeal related to an issue of unsettled nonbankruptcy law that could be resolved in another forum.

- The case was probably a two-party dispute between the judgment creditor and the debtor, as it was unlikely that other creditors had similar claims.

- The judgment creditor had already waited five years for his money, due primarily to the debtor's delay.

- Continued litigation would drain the bankruptcy estate of funds.

It is questionable whether O. J. Simpson can file a Chapter 11 petition in good faith to avoid posting an appeal bond. If the court requires that Simpson have an ongoing business that would be severely disrupted by the wrongful death plaintiffs executing on his assets, Simpson may not satisfy such a standard. To the extent that Simpson's "business" consists of signing autographs, selling videos or books and making personal appearances, execution on Simpson's nonexempt assets would probably not severely disrupt his continued ability to engage in such activities.

In any event, the bankruptcy court might adopt the holding of *Karum*, and rule that a petition is always filed in bad faith if the debtor's sole goal is to avoid posting an appeal bond and the debtor would not be insolvent absent the judgment. Conversely, Simpson might assert that he had another purpose in filing the petition: that the claims of his other creditors, such as his attorneys, are so large that he would have filed for bankruptcy protection even absent an adverse judgment in the wrongful death case.

It is also possible, although less likely, that a bankruptcy court could abstain and dismiss the case pursuant to Section 305(a)(1). Simpson would presumably argue that allowing the wrongful death plaintiffs to execute on his assets will impair the ability of his other creditors to satisfy their claims, and thus be contrary to such creditors' best interests.

The wrongful death plaintiffs would likely argue that they have waited long enough. They might also assert that if Simpson were to lose his appeal, a true reorganization might not be possible. Section 523(a)(6) precludes a debtor from discharging indebtedness caused by "willful and malicious injury," thereby preventing Simpson from restructuring their claim.

The wrongful death plaintiffs might claim that Simpson's appeal will drain the estate of assets, or that Simpson's other creditors should not be dragged into the bankruptcy forum due to a two-party dispute. The abstention issue will likely depend on the number of creditors and the amounts of their claims.

Perhaps the resolution of these issues in the Simpson bankruptcy case (if there is one) will result in greater uniformity among future bankruptcy courts analyzing whether to dismiss bond bankruptcies. However, until the 9th Circuit explicitly states whether such petitions can ever be in good faith, the viability of bond bankruptcies filed in the 9th Circuit will remain in question.