



The Continuing Saga of Amber Heard and Johnny Depp: Is Bankruptcy the Next Stop and Is a “Fresh Start” Available for Amber Heard?

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A fundamental concept of American bankruptcy law is to provide a “fresh start,” enabling businesses and individuals to have a second chance in their business or personal financial affairs. Title 11 of the United States Code, commonly referred to as the Bankruptcy Code, provides for the discharge of debts through the bankruptcy process.

Despite the underlying principle of a “fresh start,” Section 523 of the Bankruptcy Code lists nineteen kinds of debt that can survive a bankruptcy case and allow creditors to continue collection. These nondischargeable debts generally include those arising from fraud, willful and malicious actions, family support, tax debts, and generally, bad acts. Additionally, Section 727 of the Bankruptcy Code permits the Bankruptcy Court to deny discharge of the debtor if certain “bad faith” activities can be proven. In essence, while the bankruptcy law protects “honest but unfortunate”^[1] debtors from debts they incur, it also protects creditors who have claims against debtors which, as a matter of public policy, should not be discharged.

Creditors are entitled to challenge the debtor’s right to a discharge. However, a debt falling within one of the exceptions is not automatically excepted from discharge. The creditor has the burden of requesting that the court declare a debt nondischargeable. In several prior client alerts, we have discussed nondischargeability of debts.^[2]

The well-publicized defamation case of Johnny Depp and Amber Heard resulted in a substantial judgment against Heard. Setting off the amount awarded to Depp, Heard will be liable for approximately \$8 million in compensatory and punitive damages.

Assuming that Depp will seek to enforce the judgment, whether filing personal bankruptcy can provide relief to Heard and discharge the judgment remains to be seen. As usual, a decision to file bankruptcy will be based on many factors including Heard’s other assets and debts, available exemptions, and the likelihood of discharging

the judgment debt. If Heard chooses to file, the burden will be on Depp to challenge Heard's right to a discharge and/or object to dischargeability of the judgment debt.

In finding against Heard, the jury found that, under Virginia law, she published a statement about Depp which was false and defamatory. The jury also found that Heard made the statement with "actual malice" which is required to recover damages for defamation where the purported victim is a public official or public figure and the alleged defamation relates to a matter of public concern.

Generally, a judgment based on defamation may be nondischargeable if the judgment creditor proves both "willful and malicious" conduct. As such, because a judgment sounding in defamation can be construed as a willful injury, it may be precluded from discharge under Section 523(a)(6). However, although the jury found that Heard acted with "actual malice," the "malice" required to except judgment debt from discharge is not necessarily the equivalent to the definition of "actual malice" required to support a defamation claim, which could be established simply by showing that the debtor had recklessly disregarded the truth. *See for example, In re Ellerbee*, 177 B.R. 731, 742 (Bankr. N.D. Ga. 1995) (noting that "[a] finding of malice in connection with defamation," under state law "may or may not include conduct that would be considered malicious in the context of section 523(a)(6)").

For purposes of Section 523(a)(6), "malicious" injury generally requires (a) a wrongful act, (b) done intentionally, (c) which necessarily causes injury, and (d) done without just cause or excuse. *See Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001). Since the jury found Heard liable for defamation, the first two prongs are satisfied as a matter of law. The third prong is likely to be satisfied because Heard's statements, claiming that Depp physically and sexually abused her, caused Depp to lose millions in movie contracts and substantially harmed him in his occupation as an actor.

The last prong may provide Heard with a potential argument. Courts in the Ninth Circuit, where Heard may potentially file her bankruptcy based on her residence, have found that although it "may be rare to find a just cause and excuse for defamation," *In re Sicroff*, 401 F.3d 1101, 1107, n.5 (9th Cir. 2005), there is no *per se* rule that there could never be just cause or excuse for defamation. *In re Hagele*, EC-15-1033-JuDTa, 2016 WL 3965899, *6 (B.A.P. 9th Cir. July 18, 2016). The debtor carries the burden of going forward on the final element of malice which may be satisfied by the debtor affirmatively asserting "just cause or excuse." Thus, if Heard is able to affirmatively assert a "just cause or excuse" for the wrongful act of defaming Depp, she may be able to defeat his claim that the judgment debt is not dischargeable and potentially avoid having to pay the judgment.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison (mtraison@cullenllp.com) at (312) 860-4230. We thank Samantha Giuglianotti, a 2022 Summer Associate with Cullen and Dykman LLP, for her assistance and research in the preparation of this alert.

Footnotes

[1] *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor’.”) (quotation marks and citation omitted).

[2] Non Dischargeable Debts – Cullen and Dykman (cullenllp.com), including those arising from bad acts: Debtors Behaving Badly: Non-Dischargeability of Debt Based on Debtor’s “Bad Acts” (cullenllp.com), and student loan debt: Student Loan Debt Discharged in Recent Bankruptcy Court Opinion - Cullen and Dykman LLP (cullenllp.com); Student Loan Debt Discharged in Recent Illinois Bankruptcy Court Opinion - Cullen and Dykman LLP (cullenllp.com); Another Bankruptcy Court Rules in Favor of Discharging Student Loan Debt. - Cullen and Dykman LLP (cullenllp.com); An Update on Student Loan Debt: Interpretation of the Statute is Critical - Cullen and Dykman LLP (cullenllp.com).

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