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BY MICHAEL H. TRAISSON, MICHAEL KWIATKOWSKI AND SAMANTHA GIUGLIANOTTI

The Continuing Saga of Amber Heard and Johnny Depp

Can Heard Discharge the Judgment and Obtain a "Fresh Start"?



Michael H. Traisson
Cullen and Dykman LLP
New York and Chicago



Michael Kwiatkowski
Cullen and Dykman LLP
Garden City, N.Y.



Samantha Giuglianotti
Cullen and Dykman LLP
Garden City, N.Y.

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. The U.S. Supreme Court has recognized "that a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'"¹ Section 101, *et seq.*,² provides for the discharge of debts through the bankruptcy process.

Nondischargeable Debts in General

Despite the underlying principle of a "fresh start," § 523 lists 19 kinds of debt that can survive a bankruptcy case and allow creditors to continue collections.³ These nondischargeable debts include those arising from fraud, willful and malicious actions, family support, tax debts, and bad acts in general.⁴ A creditor bears the burden of proving each element of an exception to discharge by a preponderance of the evidence.⁵ As the *Hyman* court noted, "The consequences to a debtor whose obligations are not discharged are considerable; in many instances, failure to achieve discharge can amount to a financial death sentence. In view of these harsh consequences, exceptions to discharge are to be narrowly con-

strued, and genuine doubts should be resolved in favor of the debtor."⁶

In addition to § 523 excepting certain debts from discharge, the Bankruptcy Code entitles creditors and parties-in-interest to challenge a debtor's right to discharge.⁷ Thus, while the bankruptcy law protects "honest but unfortunate"⁸ debtors from debts they incur, it also protects creditors who have claims against debtors that, as a matter of public policy, should not be discharged.

Depp v. Heard Judgment

The well-publicized defamation case of Johnny Depp and Amber Heard resulted in a judgment of \$10,350,000 against Heard.⁹ Assuming that Depp will seek to enforce the judgment, whether filing personal bankruptcy under chapter 7 can provide relief to Heard and discharge the judgment remains to be seen. A decision to file for bankruptcy will depend 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 her right to a discharge and/or object to the dischargeability of the judgment debt.¹⁰

In finding against Heard, a Virginia jury found that under state law, she published a statement about

¹ *Gorgan v. Gamer*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

² Unless otherwise noted, all section references herein are to the Bankruptcy Code.

³ See generally 11 U.S.C. § 523.

⁴ *Id.*

⁵ *Gorgan*, 498 U.S. at 291.

⁶ *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007) (citations omitted).

⁷ See generally 11 U.S.C. §§ 727, 1328.

⁸ *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).

⁹ Judgment Order, *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911 (Va. 2019), available at fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/high-profile/depp%20v%20heard/cl-2019-2911-order-6-24-2022.pdf (hereinafter "Judgment Order"). Setting off the \$2 million awarded to Heard against Depp, Heard is liable for \$8,350,000 in damages. Judgment Order at p. 1-2.

¹⁰ *Gorgan*, 498 U.S. at 291.

Depp that was false and defamatory.¹¹ 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.¹² In order to prove “actual malice” in connection with a defamation claim, the plaintiff must show that the statement was published with knowledge that it was “false or [made] with reckless disregard of whether it was false or not.”¹³ However, “the actual malice standard does not measure malice in the sense of ill will or animosity, but instead the speaker’s subjective doubts about the truth of the publication.”¹⁴

Is the Judgment Debt Potentially Dischargeable?

Generally, a judgment based on defamation may be nondischargeable if the judgment creditor proves both “willful and malicious” conduct.¹⁵ To establish that a debtor caused “willful injury” under § 523(a)(6), the creditor must prove either that the debtor deliberately intended to cause the injury or that, based on the debtor’s conduct, there was a substantial certainty that the injury would occur as a result of the debtor’s conduct.¹⁶ As such, because a judgment sounding in defamation can be construed as a willful injury, it may be precluded from discharge under § 523(a)(6).¹⁷

As such, Depp may argue that the state court verdict and judgment preclude relitigation of the issue of whether Heard acted willfully and maliciously through collateral estoppel and are sufficient to establish the elements of exception to discharge under § 523(a)(b).¹⁸ However, the Supreme Court has held that “willful” under § 523(a)(b) includes “only acts done with the actual intent to cause injury” rather than “acts, done intentionally, that cause

injury.”¹⁹ In addition, courts have recognized that not all intentional torts, such as defamation, are covered under § 523(a)(b).²⁰ Therefore, if Heard was found only to have published the defamatory statement intentionally and the statement caused injury to Depp, rather than that she published the statement with the intent to cause injury to Depp, then she might not meet the “willful” requirement under § 523(a)(b).

As for the “malicious” requirement, although the jury found that Heard acted with “actual malice,” the “malice” required to except judgment debt from discharge is not necessarily equivalent to the definition of “actual malice” that is required to support a defamation claim, which could be established by showing that the debtor had recklessly disregarded the truth.²¹ Stated otherwise, reckless disregard can be sufficient to establish defamation, but it is not sufficient to establish “maliciousness” under § 523(a)(b).²² A “malicious” act under § 523(a)(b) involves “(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.”²³ This definition differs from the “actual malice” required to prove defamation in cases of public figures, because a finding of “actual malice” is insufficient to prove that no “just cause or excuse” existed.²⁴

Based on the jury’s finding that Heard was liable for defamation, the first two prongs (*i.e.*, a wrongful act done intentionally) are satisfied as a matter of law.²⁵ As for the third prong, “it is the wrongful act that must be committed intentionally rather than the injury itself.”²⁶ Thus, the third prong may be satisfied, because Depp alleged that 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.²⁷

As to the last prong, courts in the Ninth Circuit, where Heard may potentially file her bankruptcy based on her residence, have rejected a “*per se* rule”

Michael Traison is a partner in Cullen and Dykman LLP’s Bankruptcy and Creditors’ Rights Department in New York and Chicago. Michael Kwiatkowski is Of Counsel in the firm’s Garden City, N.Y., office. Samantha Giuglianotti is a summer associate in the firm’s Garden City, N.Y., office and a student at St. John’s University School of Law.

11 Judgment Order (stating that “the jury returned a verdict in favor of Mr. Depp on all three remaining defamation counts”). See also Special Verdict Form, *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911 (Va. 2019), see link, *supra* n.9 (hereinafter, “Special Verdict Form”). According to the available blank verdict form, in order for the jury to find in Depp’s favor on the defamation counts, the jury had to have found that Heard “made or published” the statement and that the statement was “false.” Under Virginia law, when a plaintiff alleges defamation by publication, a plaintiff must plead “(1) publication of (2) an actionable statement with (3) the requisite intent.” *Va. Citizens Def. Leava v. Couric*, 910 F.3d 780, 783 (4th Cir. 2018) (quoting *Schaefer v. Bouffault*, 290 Va. 83, 91-92 (Va. 2015)).

12 *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). See Special Verdict Form (in order for jury to find in Depp’s favor on the defamation counts, jury had to have found that Heard “acted with actual malice”).

13 *Sullivan*, 376 U.S. at 280. “This includes when a defendant acts ‘with a high degree of awareness of [the statement’s] probable falsity or [if the defendant] entertained serious doubts as to the truth of his publication.’” *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013) (brackets in original).

14 *Church of Scientology Int’l v. Behar*, 283 F.3d 168, 174 (2001).

15 11 U.S.C. § 523(a)(6). See, e.g., *In re Berlin*, 513 B.R. 430, 436 (Bankr. E.D.N.Y. 2014) (finding that debtor’s actions were “willful and malicious” under § 523(a)(6) and holding that subject judgment based on defamation was nondischargeable).

16 *In re Patch*, 526 F.3d 1176, 1180 (8th Cir. 2008). “Willful” under § 523(a)(6) is a subjective element. *Id.*

17 See, e.g., *In re Robinson*, No. WW-21-1042-TLB, 2021 WL 3578939 at *5 (B.A.P. 9th Cir. Aug. 12, 2021) (defamation was “willful and malicious” under § 523(a)(6), and therefore nondischargeable, because debtor acted “with a subjective motive to inflict injury” and knew that statements were false when posting them); *In re Khaligh*, 338 B.R. 817, 831 (B.A.P. 9th Cir. 2006) (“willful” requirement was met under § 523(a)(6) where defamatory statements were made with “intent to harm”).

18 *Gorgan*, 498 U.S. at 284 (collateral estoppel principles apply in nondischargeability proceedings under Bankruptcy Code).

19 *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (concluding that term “willful” in § 523(a)(6) modifies term “injury,” thus “indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury”) (emphasis in original).

20 *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th Cir. 2012) (stating that “injury is willful within the meaning of section 523(a)(6) only if intended; if [it is] the result but not the intended result of an intentional act, the debt arising from the injury is dischargeable,” and “not even all intentional torts are covered”) (citations omitted; emphasis in original).

21 See, e.g., *In re Ellerbee*, 177 B.R. 731, 742 (Bankr. N.D. Ga. 1995) (noting that “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)”).

22 See, e.g., *In re Evers*, 212 B.R. 945, 949 (Bankr. E.D. Wis. 1997) (“[A] libel suit is not what is before this court. What is involved is an action seeking a declaration that a debt is nondischargeable. Actual malice under the criteria for proving libel is not the same as malice for § 523(a)(6) purposes.”).

23 *In re Jercich*, 238 F.3d 1202, 1209 (9th Cir. 2001) (citation omitted).

24 See *In re Thompson*, 162 B.R. 748, 765 (Bankr. E.D. Mich. 1993) (“[A] finding of ‘actual malice’ is not incompatible with a finding that ‘just cause or excuse’ existed for making the defamatory statement.”).

25 *In re Hagele*, EC-15-1033-JUDTa, 2016 WL 3965899, at *6 (B.A.P. 9th Cir. July 18, 2016) (“Because the Summary Judgment Order found [that the] Debtor committed defamation, the first two prongs [of the malicious element] are satisfied as a matter of law.”).

26 *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1106, (9th Cir. 2005).

27 Complaint, *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911 (Va. 2019), available at http://fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/high-profile/depp%20v%20heard/cl-2019-0002911_complaint_8766635_03_01_2019.pdf (alleging that Depp’s reputation and career suffered as a result of statements because he endured “public scorn” and “lost roles in movies”).

that “there could never be a just cause or excuse for defamation.”²⁸ The debtor has the burden on the final element and may satisfy it by affirmatively asserting “just cause or excuse.”²⁹ Thus, if Heard is able to affirmatively assert a “just cause or excuse” for the wrongful act of defaming Depp, she might be able to defeat his claim that the judgment debt is not dischargeable.

While it “may be rare to find a just cause and excuse for defamation,”³⁰ some courts have found that under certain circumstances, a debtor’s statements that led to a potential “willful and malicious” injury against another were “fully justified” based on the debtor’s genuine belief in the veracity of the statements.³¹ For example, in *In re Zhou*, the debtor made false accusations of the plaintiff sexually assaulting her.³² The *Zhou* court found that the debtor’s actions were intentional and deliberate, and that the debtor knew she was injuring the plaintiff, therefore satisfying the “willful” element under § 523(a)(b).³³ However, the court held that the “malicious” element was not satisfied because the debtor was “credible when she stated that she believed” that the plaintiff sexually assaulted her due to her mental state at the time.³⁴ In the debtor’s mind, the allegations “were and are true,” and the debtor was thus “fully justified” in making the statements.³⁵

Conclusion

The nondischargeability of certain debts and debtors is an important consideration when contemplating filing for bankruptcy. Whether a debt can be discharged depends on the type of debt and whether a creditor objects to the discharge of the debt. Beyond the possibility of discharge through chapter 7, it remains to be seen whether Depp will seek to enforce the judgment against Heard. On July 21, 2022, Heard’s attorneys filed a notice of appeal, stating that she is appealing the judgment, decisions on post-trial motions, and “all additional Orders and rulings by the Trial Court.”³⁶ That is certainly the proper first step on what may be a long road ahead for Heard in addressing the potential financial impact of the judgment. **abi**

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²⁸ *Hagele*, 2016 WL 3965899, at *6.

²⁹ *Id.* See also *In re Sangha*, 597 B.R. 902, 914 (Bankr. C.D. Cal. 2019) (“Courts to consider the issue have determined that just cause or excuse is in the nature of an affirmative defense.”); *In re Ang*, 589 B.R. 165, 182 (Bankr. C.D. Cal. 2018) (“The final element of malicious injury is lack of a just cause or excuse, which [the] Defendant has the burden to prove.”).

³⁰ *Sicroff*, 401 F.3d at 1107, n.5.

³¹ *In re Zhou*, 331 B.R. 274, 277 (Bankr. E.D. Mich. 2005).

³² *Id.* at 277 (plaintiff claimed that debtor falsely accused him of serial sexual assaults and other crimes and filed state court complaint alleging, among other things, defamation).

³³ *Id.*

³⁴ *Id.* The debtor suffered from schizophrenia and thus experienced paranoid delusions. *Id.* at 276.

³⁵ *Id.* at 277.

³⁶ Notice of Appeal, *John C. Depp, II v. Amber Laura Heard*, CL-2019-2911 (Va. 2019), available at s3.documentcloud.org/documents/22105710/notice-of-appeal-7-21-22-file-stamped.pdf?bcs-agent-scanner=842fa31c-64b2-f641-8882-589d92d88433.