

DEFAMATION, BANKRUPTCY & THE FIRST AMENDMENT

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ABSTRACT

In recent years, a series of high-profile defamation cases has wound up in bankruptcy court, involving such colorful characters as Rudy Giuliani, Alex Jones, and Cardi B. As demands and verdicts swell with the rise of social media in a polarized age, defamation defendants are filing bankruptcy more frequently and at earlier stages of litigation. But that doesn't mean bankruptcy is a magic wand for waving away debt. To the contrary, much defamation debt may be nondischargeable as "willful and malicious" under section 523 of the Bankruptcy Code. Of course, consumer bankruptcy attorneys are all too familiar with bankruptcy's discharge exceptions, but some courts are now starting to apply the exceptions to small businesses attempting to reorganize under subchapter V of the Code — a category that includes Alex Jones's InfoWars.

Defamation law is coming to bankruptcy court, and it's bringing the First Amendment with it. Yet scholars and practitioners have not yet placed these three areas of law — defamation, bankruptcy, and the First Amendment — next to each other. This Article provides both theoretical and practical guidance to litigants and lawyers, showing how bankruptcy's substantive and procedural rules will process defamation debt, including when the First Amendment protections of *New York Times v. Sullivan* and related cases are triggered. The ensuing mixture is a cocktail of torts, contracts, civil procedure, federal courts, and constitutional law.

Speech is important, and it's not going away. When speech injures others, compensation and punishment are in order. Yet forgiveness and a fresh start have their place as well. As to individuals, defamation debt should cause us to reflect on

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whether our “fresh start” policy in bankruptcy is too anemic. As to business entities, the defamation cases continue to raise the specter of whether chapter 11 makes it too easy for bad actors to shed debt without compensating victims, suffering consequences, or reforming behavior. Either way, attorneys must be prepared to provide forward-thinking legal advice about bankruptcy whenever insolvency is on the horizon.