

Depp-Heard Dispute Turns Spotlight On Defamation Coverage

By **Shawn Rice**

Law360 (August 5, 2022, 2:12 PM EDT) -- Amber Heard and Johnny Depp's closely watched defamation lawsuit recently spilled into the world of insurance, highlighting a struggle for celebrities and private individuals alike in trying to tap into homeowners policies to cover allegations over comments they made on social media.

Heard and Depp took their personal battle to Virginia court for a seven-week trial in spring, in one of several high-profile celebrity cases in which one side claimed their reputation was ruined by the other's defamatory comments. The trial culminated in a verdict of over \$10 million against Heard.

Typically, defamation cases involve statements published in news outlets covered by media liability insurance policies but individual-to-individual defamation suits raise questions on available coverage under homeowners insurance policies.

Heard is now facing just such a fight with her homeowners carrier, New York Marine and General Insurance Co., which filed suit in California federal court in July seeking a declaration that it doesn't have to defend or indemnify the "Aquaman" actress in the Depp case. Attorneys have told Law360 that Heard faces an uphill battle, given a Golden State law barring coverage for intentional acts.

Most attorneys with a defamation practice said they've seen more of these types of cases over the years and fielded queries from private individuals over libel or slander accusations. And though defendants should look at available insurance coverage, attorneys warn there are risks to involving carriers in the defense.

Some legal experts said that a defense by an insurer could complicate potential defamation settlements.

Bryan Sullivan of Early Sullivan Wright Gizer & McRae LLP said insurance carriers tend to demand a lot of facts in the file up front, to build a groundwork for the case, before they are willing to settle. This makes it difficult to settle early when insurance carriers want to wait for the facts to be fleshed out, he said.

"It has that double edge sword," Sullivan said.

Does Homeowners Insurance Cover That Statement?

A Virginia jury found on June 1 that Heard acted with malice in statements made in a 2018 Washington Post op-ed implying Depp abused her. The jury awarded "The Pirates of the Caribbean" star \$10 million

in compensatory damages and \$5 million in punitive damages, the latter of which was later reduced to \$350,000.

Heard and Depp's case offered a high-profile look at the way that defamation cases are shaped in a social media landscape where even regular people can find their words going viral, and the actress' coverage battle with New York Marine could provide insight into key defamation coverage issues, experts say.

Dori Hanswirth of Arnold & Porter LLP said defamation — a form of personal injury — is potentially covered in homeowners and umbrella policies, as seen in cases with individual defendants like Heard. "Some people are surprised to hear that," she said, acknowledging that policyholders still face challenges.

"Sometimes insurance companies will say this is all they will do. Insurance carriers will only pay X amount of dollars an hour for legal counsel. Sometimes you can convince an insurance company to do a little more for you when they realize that they have skin in the game," Hanswirth said.

Most commercial liability policies also include coverage for at least some types of defamation absent an exclusion, according to legal experts. The standard homeowners policy doesn't, but individuals can buy that coverage if they want to. Umbrella insurance can also cover defamation, but it is less common for individuals on a personal policy than for businesses, experts say.

In one noteworthy case, Bill Cosby found himself covered under his homeowners and umbrella insurance policies for sexual assault accusers' defamation suits when the First Circuit sided with the convicted comedian in June 2018.

When there is a viable homeowners policy to cover an accused individual, experts said that generally, once any portion of the complaint triggers a duty to defend, that requires an insurance carrier to cover the defense of the entire lawsuit. But that doesn't mean an insurer has to pay any adverse judgment.

Laura Gregory of Sloane and Walsh LLP said getting that defense coverage has significant value from a policyholder perspective. Insurance can be of particular value in personal cases like Heard and Depp's, where the heated nature of the litigation can lead to steeper bills, she said.

"There is an overall feeling of a plaintiff wanting to get a pound of flesh," Gregory said.

Although insurance is a small piece of the equation in defamation cases, some legal experts maintain that the existence and quantity of insurance influences how litigious and drawn-out the case becomes. In the case of the two high-profile movie stars, Depp asked for \$50 million and Heard countersued for \$100 million.

Aaron Minc of Minc Law said most defamation cases will end before they get going because people often settle for a retraction and an apology. Once insurance is involved, Minc said that people think their defense is free. If insurance didn't cover Heard's legal fees, the suit might not have gone to trial, he said.

"The cost of paying for her defense on top of the risk of losing wouldn't have been worth it," he said. "It's a lose-lose situation for her ultimately. There would have been a strong incentive for her to work out a non-monetary settlement that would have ended the case early."

"But because she had her legal fees covered she had incentive to fight and see the case through to trial," Minc continued. "Insurance encourages people to fight."

Michael Miguel of McKool Smith PC, who represents policyholders, agreed an insurer-provided defense could drag out litigation, noting that personal injury lawyers make careers from knowing how to "plead into coverage," that is, craft complaints to trigger specific provisions in the defendant's insurance policies. They will allege, for instance, that the defendant's conduct was negligent — as opposed to intentional — to pressure an insurer into funding a settlement, he said.

But an insurer-funded defense doesn't mean the insurer will simply come to mediation to throw out its limits to settle a case. There is almost an incentive for an insurer to see the case through to adjudication because an ultimate ruling that the defendant engaged in intentional conduct could relieve the carrier of its duty to indemnify any settlement or judgment.

Miguel said that he wasn't suggesting that there is current abuse by insurers, but the possibility is there.

"For that to happen where if the money is big as in the Heard case, then what do insurance carriers have to lose if they pay lawyers if there is a prospect of a verdict against a policyholder that will let them walk?" he said.

Media Defamation Versus Individual Defamation

Defamation is typically at the center of disputes raised against media companies over their news content.

The internet has played a large role in the increase in defamation claims because of the reach that an online post can have within days if not hours. Plaintiffs will often say their reputation has been ruined by what is posted on a news outlet or blogger's site and then repeated on Twitter, according to some legal experts.

Given how difficult the essential elements of a defamation claim can be to prove, many cases don't make it to trial, according to experts.

For instance, the New York Times, ABC News, CBS News and other news outlets defeated defamation claims in July over their coverage of an altercation between a high school student and a Native American activist after an anti-abortion rally. The Fox News Network also beat a defamation suit brought by disbarred attorney Michael Avenatti in July when the Third Circuit upheld the case's dismissal.

Michael Twersky of Fox Rothschild LLP said that most news outlets are careful about what they report, so direct defamation claims have become rarer. But there has been a rise in cases where the words themselves aren't defamatory, but plaintiffs argue that the implications of those words are, he said.

Hanswirth of Arnold & Porter said that plaintiffs' lawyers have gotten savvy and recognize there is a lot of money to be made if they pick the right case. This can be true for cases involving both news publications and private individuals who get into Twitter beefs with people, Hanswirth said.

"This isn't the days of a weekly newspaper and it is yesterday's news," she said.

Indeed, the average person can find themselves being sued for defamation for online content or public

statements, most often for the implication that the words had for a person's reputation, according to legal experts. Reputation is vital and people understand that now more than ever, said Minc of Minc Law.

"When things get published online, a lot more people are taking it seriously. You do see more litigation, but every case is unique," he said. "It's not proliferating at some large scale. It's pretty steady."

Mainstream media coverage of high-profile defamation cases like Heard and Depp's could lead to more litigation on the personal front, according to one legal expert. People who followed the movie stars' case grew a better understanding of the judicial system, according to Gregory of Sloane and Walsh.

Gregory said she could see more people becoming interested in talking with a lawyer when they think someone else has made defamatory remarks about them in, say, a social media post or on the field at their kids' soccer game.

While it didn't seem like a big risk before, defamation is a growing concern for insurance companies. Carriers realize that insuring defamation claims has become more expensive, and they are finding it difficult to get reinsurance for these types of claims, according to one legal expert.

Hanswirth of Arnold & Porter said that there is tension between media companies and insurance carriers. And similarly, private individuals can find it difficult getting defamation coverage under homeowners policies. Insurance companies might not think it's worth the extra premium revenue, she said.

"I don't see it as a problem that is going to go away by itself," Hanswirth said.

While Heard and Depp's case shined a spotlight on legal proceedings for defamation, some experts warned potentially litigious individuals should be cautious about moving forward with their own defamation suits, given the high burden of proof.

Sullivan of Early Sullivan said the average person should realize that once a defamation suit is filed, their private life could be opened up, just as Depp and Heard's personal affairs were.

"Other things can come up through discovery," he said. "I think some people who get trigger-happy don't want to hear that. But when they get into it, they realize that they don't want to be deposed about various aspects of their personal life."

—Additional reporting by Hailey Konnath and Dorothy Atkins. Editing by Amy Rowe.