PERFECT CIVIL ENFORCEMENT? LITIGATION FINANCING IN THE WAKE OF *GAWKER MEDIA V. BOLLEA*

LEE T. NUTINI & LUKE S. SMITH*

I. INTRODUCTION

A. Setting the stage

Interest in Third-Party Litigation Financing ("TPLF") resurged recently with the highly public lawsuit between Gawker Media, LLC ("Gawker") and Terry Bollea (more commonly known by his ring name "Hulk Hogan").[1] The world of litigation financing has also become increasingly ridiculed on the heels of Peter Thiel's admitted financing of Hulk Hogan's takedown of Gawker. Indeed, it was discovered that Thiel was financing not just the Hogan lawsuit, but actually funded, or sought to fund, other suits against Gawker as well.[2] Thiel's message and the media's understandable takeaway was heard loud and clear: those who have scrapped with the world's billionaires should take notice.

But the world of litigation financing—considered something of a final frontier for lucrative investment[3]—could be shut down as quickly as it is drawing attention. No doubt as Gawker enters Chapter 11 bankruptcy, businesses nationwide have likely taken notice of the

---

* Mr. Nutini currently serves as judicial law clerk to the Honorable Edward B. Atkins in the United States District Court for the Eastern District of Kentucky. Mr. Smith, the Editor-in-Chief of *Transactions*: *The Tennessee Journal of Business Law*, is in the Class of 2017 at The University of Tennessee College of Law. All opinions expressed herein are solely attributed to the authors and not to their respective institutions or employers. The authors would also like to thank Professor George W. Kuney for his wisdom and assistance in finalizing this piece.

[1] *See generally* Bollea v. Gawker Media LLC, No. 12-012446-CI (Fla. Dist. Ct. App., Jun. 7, 2016); L. Gordon Crovitz, *Peter Thiel's Legal Smackdown*, WALL ST. J., June 6, 2016, at A15.

[2] Matthew Ingram, *Gawker Bankruptcy Filing Means Peter Thiel Has Already Won*, FORTUNE, June 10, 2016, http://fortune.com/2016/06/10/gawker-bankruptcy-thiel/.

[3] *See* Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, WALL ST. J., May 15, 2016, http://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262.

vulnerability proposed by the right litigation financed by the right billionaire with a grudge. Will this prove to be a watershed moment that spurs new regulation, or will it be the first blood in a new world of so-called "perfect enforcement" in which all law breaking must be accounted for? Make no mistake, the Thiel-Gawker battle could mark the closing of investment's final frontier, but it is just as likely to begin a new era of perfect civil enforcement.[4]

The concept of perfect enforcement of laws is not new. Over the past several years, the world has become increasingly familiar with examples of perfect law enforcing technologies, such as red-light cameras.[5] Such monitoring technologies are praised for being "more accurate and less costly" but faulted for being more invasive and "downright uncomfortable" to encounter.[6] These technologies are a particular kind of enforcement: they "perfectly enforce" infractions by way of operating under continuous surveillance or "perfect surveillance."[7] The act of perfect surveillance does not seek to prevent or interfere with your violation of law; rather, the surveillance "would detect every instance of its violation."[8]

Of course, the best part about these technologies is that they are not *universal* perfect enforcement—that is, they do not yet exist everywhere and certainly do not detect any violation of law in any form. Another advantage is that they do not hold grudges because a system of universal and perfect enforcement would paralyze all actors. For example, even the youngest of generations would be guilty of such

---

[4] "Perfect" law enforcement has previously been discussed in conjunction with technology such as a stoplight and other traffic cameras. *See generally* Christina M. Mulligan, *Perfect Enforcement of Law: When to Limit and When to Use Technology*, 14 RICH. J.L. & TECH. 13 (2008). But we envision that sufficient third-party financing of lawsuits could hypothetically carry any civil lawsuit to trial. We refer to this idea as the concept of "perfect civil enforcement." Peter Thiel's funding of Hogan's case demonstrates what could be the first of a new trend in attempted perfect civil enforcement of a civil infraction that, without a grudge-holding financier, would not have been carried to its full term.

[5] *See generally id.*

[6] *Id.* at 2.

[7] *Id.* at 3.

[8] *Id.* at 3.

infractions as common as speeding, consuming alcohol, pirating media, or smoking.[9] Atonement for these common and frequent infractions would become every man's problem, but what if the machinery for perfect enforcement was owned by the wealthy—by the people with the cash to make anyone pay—financially, socially, etc.—for their infractions? What if any of your violations of law—any simple tort for instance—was almost certain to be enforced to the fullest extent of the law? Moreover, what if that enforcement would be *financed* purely in the hopes of a grand payout for the investors?

After the Thiel-Hogan-Gawker take-down, we could be entering a new age of litigation financing that could amount to *perfect civil enforcement* of law. Although the wealthy have always been able to carry out a grudge by funding a lawsuit to the point of breaking an enemy, the potential (and the incentive) for investors to finance a party's litigation through trial in the hopes of a payout has far greater consequences for the actions and risks that we choose to take under the law.

This article will briefly introduce the reader to the history and modern world of litigation financing before analyzing the effect that a billionaire-financed lawsuit, such as *Bollea v. Gawker*, may have on the burgeoning concept of perfect enforcement of civil laws. The article will also propose policy considerations to curb the unwanted effects, if any, of these lawsuits and to address related professional ethics concerns.

B. Bollea v. Gawker Media

On or about October 4, 2012, Gawker posted a written report (including excerpts of the videotaped sexual encounter) about an extramarital affair between Hulk Hogan and a woman, both of whom were married at the time.[10] In a somewhat complex set of cases, Hulk Hogan sued Gawker in Florida state court asserting claims for invasion of privacy, publication of private facts, violation of the right of publicity, and infliction of emotional distress.[11] Additionally, Hulk Hogan filed a

---

[9] *Id.* at 5.

[10] Gawker Media, LLC v. Bollea, 129 So.3d 1196, 1198 (Fla. Dist. Ct. App. 2014).

[11] *Id.*

motion for temporary injunction seeking to enjoin Gawker from publishing and otherwise distributing the video excerpts and the written report.[12] In March 2016, a Florida jury awarded Hogan a total of $140.1 million in compensatory and punitive damages.[13] Gawker's motions for a new trial and reduced damages were denied on May 2016[14], and on June 10, 2016, Gawker filed a notice of appeal.[15]

After news broke that Peter Thiel financially supported Hogan in the litigation, Gawker sought leave from the court to pursue limited discovery on the matter.[16] The judge did not rule definitively absent a formal motion, but the judge responded negatively saying, "I don't like looking at all the stuff that's published out there . . . It's not healthy."[17] As this case progresses through the appeals process, all eyes will be on how high the appeals go and how strictly the courts decide to scrutinize Thiel's involvement as well as other issues, such as First Amendment concerns.[18]

---

[12] *Id.* at 1199.

[13] Debra Cassens Weiss, *Will $140M Verdict for Hulk Hogan in Sex-Tape Case Survive Appeal?*, ABA JOURNAL (Mar, 21, 2016), http://www.abajournal.com/news/article

/will_115m_verdict_for_ hulk_hogan_in_sex_tape_case_survive_appeal (stating that award included $55 million for economic injuries, $60 million for emotional distress, and $25 million in punitive damages) (citations omitted).

[14] Kat Sieniuc, *Gawker Can't Release More Hulk Hogan Sex Tape Footage*, LAW360 (June 8, 2016), http://www.law360.com/articles/805073/gawker-can-t-release-more-hulk-hogan-sex-tape-footage.

[15] *See* Gawker Media, LLC et al., v. Terry Gene Bollea, No. 2D16-2535, (Fla. Dist. Ct. App. Jun. 10, 2016) (WestLaw).

[16] Eriq Gardner, *Judge Upholds Hulk Hogan's $140 Million Trial Victory Against Gawker*, THE HOLLYWOOD REPORTER, May 25, 2016, http://www.hollywoodreporter.com/thr-esq/judge-upholds-hulk-hogans-140-897301 (detailing Gawker counsel's request at the May 25th, 2016 hearing on a motion to dismiss and a motion for new trial).

[17] *Id.*

[18] Amy Gajda, *Privacy vs. Press*, SLATE (March 21, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/what_might_happen_if_the_hogan_gawker_case_reaches_the_supreme_court.html (stating "The Hulk Hogan case could force the Supreme Court to finally draw the line between press freedom and privacy. The press might not like it.").

The details of Mr. Thiel's financial involvement remain largely unclear. Mr. Thiel's scant comments indicate that he spent roughly $10 million dollars to hire a team of lawyers to seek out plaintiffs and initiate suits against Gawker on their behalf.[19] Hulk Hogan's case, then, is one of many suits brought against Gawker at the behest of Mr. Thiel although Mr. Thiel would not speak to other cases.[20] Mr. Thiel's animus towards Gawker stems from a 2007 article published by the media site in which Thiel was outed as gay.[21] It is also unclear how long Mr. Thiel has been pursuing litigation against Gawker.

II. BRIEF HISTORY OF LITIGATION FINANCING

The history of litigation financing intertwines with the doctrines of maintenance, champerty, and barratry.[22] Black's Law Dictionary defines maintenance as "[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation."[23] Champerty is "[a]n agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim."[24] Barratry means "[v]exatious incitement to litigation, [especially] by soliciting potential legal clients" and specifically refers to inciting baseless litigation.[25] While barratry remains barred via professional ethics rules and various statutes against frivolous litigation,[26]

---

[19] Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES, May 25, 2016, http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news&_r=0.

[20] *Id.*

[21] *Id.*

[22] Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 485 (1992).

[23] *Maintenance*, BLACK'S LAW DICTIONARY, (10th ed. 2014).

[24] *Id.*

[25] *Id.*

[26] *See generally* Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry has Evolved in Three Countries*, 38 N. KY. L. REV. 687 (2011) (giving

prohibitions on maintenance and champerty have gradually eroded in the United Kingdom, Australia, and the United States.

The doctrines of maintenance and champerty grew out of a belief that only the courts and the litigants ought to be involved in the judicial process.[27] Some scholars trace the existence of the doctrines of maintenance and champerty back to ancient Greece and Rome.[28] During the Middle Ages in England, prohibitions on maintenance and champerty arose in response to feudal lords providing maintenance for suits involving their retainers, regardless of the suit's merits.[29] The English Parliament enacted various statutes prohibiting the practice between 1275 and 1540, and it remained a tort and a crime until 1967.[30] From 1967 till 1990, maintenance and champerty agreements were unenforceable as against public policy.[31] Further, up until 1990, the U.K. traditionally barred contingency fee arrangements between a lawyer and a client for the same reasons as the bar on maintenance and champerty.[32] However, in 1990, the English Parliament passed the Courts and Legal Services Act, which made conditional fee agreements legal,[33] and since 1998, contingency fees have been permitted in all civil actions except family law matters.[34] English courts embraced the loosening of champerty and maintenance restrictions by reasoning that the prohibition arising from public policy concerns must also evolve with

---

background for the historical development of the litigation financing industry in the three countries).

[27] Martin, *supra* note 22, at 487.

[28] *Id.* at 486-87 (stating that "The Greeks and Romans assumed that if one maintained an action on behalf of another, the action was either completely unfounded or too trifling to be undertaken for any purpose other than harassing the defendant.") (citations omitted).

[29] *Id.* at 487.

[30] *Id.*

[31] *Id.*; Dietsch, *supra* note 26, at 699.

[32] Dietsch, *supra* note 26, at 698.

[33] *Id.* at 698-99.

[34] Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REF. 57, 73 (2000).

changes in views of public policy.[35] Treatment of champerty restrictions was highly discretionary and uncertain in England until *Court of Appeal in Arkin v. Borchard Lines Ltd.* in 2005.[36] In that case, the Court of Appeal held that third-party funding is acceptable so long as the funder does not control litigation decisions.[37]

Much like the U.K. and U.S., Australia historically prohibited third-party litigation financing.[38] Acceptance in Australia of third-party litigation funding began in their bankruptcy courts and gradually spread to general civil litigation.[39] Australian courts have even gone as far as to permit third-party funders to have broad powers to control the litigation.[40]

The United States shared the historical ban on champerty and maintenance with the U.K. and Australia, manifested in common law, statutory law, and public policy.[41] The reasoning behind the prohibition in the U.S. was the same as those in the U.K. and Australia: encouragement of frivolous litigation, harassment of defendants, increased damages, and resistance to settlements.[42] However, the historical prohibition received its first exception in 1908 when the American Bar Association began allowing attorneys to collect contingency fees.[43]

---

[35] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1280-81 (2011).

[36] *Id.* at 1281.

[37] *Id.*

[38] *Id.* at 1279.

[39] *Id.*

[40] *Id.* (citing Campbells Cash and Carry Pty. Ltd. v. Fostif Pty. Ltd. (2006) 229 CLR 386 (Austl.) and Mobil Oil Australia Pty. Ltd. v. Trendlen Pty. Ltd. (2006) 229 ALR 51 (Austl.)).

[41] Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 87 (2002).

[42] Steinitz, *supra* note 35, at 1279.

[43] Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795, 797-98 (2004).

Carl E. Persons made the first attempt at bona fide litigation financing in 1976 when he attempted to raise funds for antitrust litigation by selling shares of stock in the suit's outcome.[44] Although Persons's attempt failed, others caught on to the idea, so the industry began to develop in the late 1980s and early 1990s.[45] Reactions from the states have been mixed, with some states like Ohio relying on the doctrines of maintenance and champerty to invalidate litigation financing agreements with third-parties.[46] Other states, like Massachusetts, New Jersey, and Arizona, have been largely receptive to the practice and have refused to enforce the doctrine of champerty.[47] Accepting litigation finance is still relatively unresolved and developing, and some states, such as Tennessee, have began passing statutes to better regulate the industry.[48]

III. MODERN LITIGATION FINANCING

General justifications for permitting third-party litigation financing include: improved access to justice given the high cost of modern litigation[49] and that other forms of financial risk sharing are

[44] Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 347 (2004).

[45] *Id.*

[46] Dietsch, *supra* note 26, at 696.

[47] *Id.* at 694.

[48] *See* TENN. CODE ANN. § 47-16-101 (West 2014) (short title for the section is the "Tennessee Litigation Financing Consumer Protection Act"); *see also* Heather Morton, *Litigation or Lawsuit Funding Transactions 2015 Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 8, 2016), http://www.ncsl.org/research/financial-services-and-commerce/litigation-or-lawsuit-funding-transactions-2015-legislation.aspx (last visited July 24, 2016) (providing an overview of all state level litigation financing legislation as of January 2016).

[49] *See generally* Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance*, 5 UC IRVINE L. REV. 197 (2015).

already in use such as contingency fee arrangements,[50] law suit syndication,[51] pre-settlement funding,[52] and public interest litigation.[53]

Critics of third-party litigation financing bring two general categories of argument: historical-consequential and ethical.[54] Historical arguments revolve around the doctrines of maintenance and champerty and share the same concerns as those two doctrines.[55] Historical critics argue that third-party litigation financing will encourage frivolous lawsuits and at the same time discourage settlements.[56] Similarly, consequentialist critics argue that litigation financing will generally cause an increase in litigation,[57] it will encourage frivolous or speculative litigation, and that third-party litigation funders are "tilting the scales of justice in favor of plaintiffs at the expense of defendants."[58] Ethical critics argue that pre-funding evaluations may destroy attorney-client privilege,[59] the arrangements violate the prohibition of lawyers sharing fees with non-lawyers,[60] plaintiffs are victimized usurious loan

---

50 Hananel & Staubitz, *supra* note 43, at 797-98 (stating that contingency fee arrangements have been allowed in the US since 1908).

51 Martin, *supra* note 22, at 498 (stating that law suit syndication began to rise in prominence in the 1980's).

52 *Id.* (stating that pre-settlement funding has been in practice since the 1980's as well); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 573-74 (2010).

53 Martin, *supra* note 22, at 491-92.

54 *See generally* Lyon, *supra* note 52.

55 *Id.*

56 *Id.*

57 *Id.* at 590.

58 *See* Joshua Richey, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489 (2013).

59 Ani-Rae Lovell, *Protecting Privilege: How Alternative Litigation Finance Supports an Attorney's Role*, 28 GEO. J. LEGAL ETHICS 703 (2015).

60 MODEL RULES OF PROF'L CONDUCT r. 5.4; Martin, *supra* note 22, at 495; Matthew Bogdan, *The Decisionmaking Process of Funders, Attorneys, and Claimholders*, 102 GEO. L.J. 197, 207 (2014).

arrangements,[61] and financiers may influence the decision making process of litigants and lawyers.[62] Many of these critiques have engendered hot debates, but of particular concern with respect to the Theil-Gawker-Hogan throw down are the frivolous litigation and resistance to settlement critiques.

The litigation financier's profit motive serves as the main rebuttal for concerns about frivolous lawsuits and resistance to settlement. Much like an attorney using contingency fee arrangements, a third-party litigation financier has an incentive to not finance frivolous or speculative litigation. If a financier backed a dubious case, he or she is likely to lose their money. Because the financier has nothing at stake in the litigation but their investment and the financing is typically non-recourse, profit motive incentivizes the careful selection of only meritorious cases. This, in fact, has been the case at the highest levels of litigation finance.[63] At the lower levels involving small claims, the merit of financed cases is much less clear.[64] Regardless of the sophistication of the analysis of a plaintiff's claim, if a lender has a profit motive, then that profit motive incentivizes funding of meritorious claims over funding frivolous claims.

IV. LITIGATION WITHOUT PROFIT MOTIVE

What if a litigation financier does not have a profit motive? Does the financier even engage in litigation financing, or is it something different? In the media frenzy that followed news of Thiel's involvement with the Gawker case, attention immediately turned to the

---

[61] Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILLANOVA L. REV. 83, 92 (2008).

[62] Steinitz, *supra* note 35, at 1299.

[63] For example, Bentham IMF boasts a "90% success rate." However, that does not include "withdrawals." Their record is composed of 119 settlements, 13 cases won, 13 cases lost, and 35 "withdrawals." *See Our Track Record*, BENTHAM IMF, https://www.benthamimf.com/about-us/bentham-imf (last visited Aug. 2, 2016).

[64] John P. Barylick & Jenna Wims Hashway, *Litigation Financing: Preying on Plaintiffs*, 59 R. I. BAR J. 5, 7 (2011) (stating that lenders evaluate a plaintiff's case "by assessing: the presence of a skilled plaintiff's attorney; the defendant's potential liability; in car accident cases, the extent of damage to the vehicle; bright blood injuries; medical bills; and a proprietary statistical analysis of jury verdicts in comparable cases.") (citations omitted).

litigation financing industry.[65] However, the specific financial arrangements of Thiel, a Stanford-educated attorney, are far from clear.[66] On one hand, Thiel stated, "I would underscore that I don't expect to make any money from this. This is not a business venture."[67] On the other hand, he also said, "[w]e would get in touch with plaintiffs who otherwise would have accepted a pittance for a settlement, and they were obviously quite happy to have this sort of support . . . . In a way very similar to how a plaintiff's lawyer on contingency would do it."[68] Regardless of whether Thiel is covering his costs with the damage awards or just pouring money into the effort with zero expectation of a return, he is still operating without a profit motive.

Categorizing Thiel's involvement with Gawker as "litigation financing" has important implications for the justification of the industry. As previously discussed, litigation financing firms' profit motive rebuts concerns with potentially frivolous litigation and resistance to settlement – the motivation to reap a profit incentivizes firms to pursue meritorious litigation and to balance the costs associated with rejecting a settlement offer in favor of prolonging litigation. Where that profit motive is absent, the justification falls apart. Thiel himself stated that his purpose was to seek out plaintiffs who had claims against Gawker[69] and enable those plaintiffs to reject low settlement offers.[70]

Other protections against frivolous or unfounded litigation exist such as Rule 3.1 of the Model Rules of Professional Conduct,[71] 28 U.S.C.

---

65 Sorkin, *supra* note 19.

66 *Executive Profile: Peter Andreas Thiel J.D.,* BLOOMBERG, Aug. 2, 2016, http://www.bloomberg.com/research/stocks/private/person.asp?personId=161959&privcapId=43580005 (last visited Aug. 2, 2016).

67 Sorkin, *supra* note 19.

68 *Id.*

69 *Id.* ("He funded a team of lawyers to find and help 'victims' of the company's coverage mount cases against Gawker.").

70 *Id.* ("We would get in touch with plaintiffs who otherwise would have accepted a pittance for a settlement . . . .").

71 MODEL RULES OF PROF'L CONDUCT r. 3.1 (2016).

§ 1927,[72] § 110 of the Restatement of Law Governing Lawyers,[73] and Rule 11 of the Federal Rules of Civil Procedure.[74] How often those mechanisms of enforcement are actually used in practice is an entirely different question that is beyond this article's scope. For the purpose of this piece, we will assume that all litigation being brought has some basis that will render it non-frivolous.[75]

While much of the journalistic uproar can most likely be attributed to the subject matter of the lawsuit,[76] the significance of Thiel's involvement extends beyond First Amendment concerns. In the abstract: 1) an agent; 2) with significant financial resources;[77] 3) spent a large sum of their own money;[78] 4) to hire a team of lawyers to seek out strangers with valid claims against an entity;[79] 5) that the agent sought to influence.[80] The key aspect of this situation is the abstraction of the motive. With traditional third-party litigation finance (or with lawyers acting on contingency fees for that matter), the party assuming the

---

72 28 U.S.C. § 1927.

73 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 (2000).

74 FED. R. CIV. P. 11.; *see* Erin Schiller & Jeffrey A. Wertkin, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909, 909 (2001).

75 There are several reasons why this assumption is helpful, including the illustration that there is cause for concern outside of frivolous litigation and assumes away the possibility that lawyers or law firms would refuse to participate in bringing suit for fear of court-imposed penalties.

76 Journalists and media outlets have an interest in being outraged over other journalists and media companies getting sued for what they have published. *See*, *e.g.*, Mark Joseph Stern, *Peter Thiel Is Wrong About the First Amendment*, SLATE (May 26, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/should_peter_thiel_be_allowed_to_finance_hulk_hogan_s_lawsuit.html (last visited Aug. 2, 2016).

77 As of July 22, 2016, Thiel's personal net worth was estimated to be $2.7 billion. *The Midas List, #10 Peter Thiel*, FORBES, July 22, 2016, http://www.forbes.com/profile/peter-thiel/.

78 Sorkin, *supra* note 19 (stating that Thiel spent roughly $10 million financing cases against Gawker).

79 *Id.*

80 *Id.* (stating that Thiel's motive was "specific deterrence," referring to Gawker outing him, and others, as homosexual).

financial risk of litigation is seeking a profitable return on their investment.[81]

In the Thiel-Gawker situation (and special interest litigation, as discussed below), there is no profit motive. Therefore, a primary motive is to influence the defendant in some manner. Indeed, Thiel stated that his motive was "[l]ess about revenge and more about specific deterrence," referring to Gawker publicly outing him and others as homosexual.[82] Different motives for different actors are not hard to imagine, and this same dynamic is not new.

Financial support of litigation without the intention of financial benefit already occurs with pro bono work, legal aid societies, law school clinics, and public interest litigators. How different, then, is Peter Thiel, "fund[ing] a team of lawyers to find and help 'victims' of the company's coverage mount cases against Gawker,"[83] from the likes of the ACLU and the NAACP?[84] Further, how different are traditional litigation financiers from the likes of Thiel and the ACLU?

The answers to those questions turn on the different motives of each group. Public interest groups and traditional litigation financiers are similar enough that at least one commentator suggests that a litigation finance company could organize as a benefit corporation to fund public interest litigation brought by the ACLUs and NAACPs of the world.[85]

---

[81] Another difference between traditional third-party litigation financing and Thiel is that third-party litigation financiers do not appear to seek out clients. Rather, the current state of the market seems to be based on litigants applying to the financiers for funding arrangements and the financiers processing those requests. However, it is not hard to imagine a shift in business strategy by the financier, as plaintiffs' lawyers do some amount of seeking out clients currently.

[82] *Id.* (stating that Thiel also expressed other motives such as: defending those who couldn't defend themselves, Gawker was a "singularly terrible bully," and "philanthropist.").

[83] *Id.*

[84] Special interest groups with a litigation focus are being used because they seem the most similar to the situation with Thiel, as opposed to law school clinics or pro bono efforts.

[85] *See* Jason M. Wilson, *Litigation Finance in the Public Interest*, 64 AM. U. L. REV. 385, 389 (2014).

In such an arrangement, the litigation financier would provide funding in return for a share of the proceeds of public interest litigation, thus helping traditionally underfunded entities.[86] The for-profit model of "Litigation Finance in the Public Interest" ultimately runs aground with the reality that most traditional "public interest litigation" (such as racial discrimination or environmental claims) "emphasize[s] non-monetary relief and symbolic victory over large damage awards."[87] The infeasibility of this model fleshes out the different motivations and incentives of the two types of entities. Traditional litigation finance operates for and is incentivized by profit whereas traditional public interest groups have a cause for which they are fighting. Because Thiel was not seeking a profit, his motivations more closely resemble a public interest group than they do a traditional third-party litigation financier. Both Thiel and public interest groups litigate without a profit motive. This makes the initial media reaction to the Gawker case seem overblown and quick to rope in the litigation financing industry. However, as suggested by Mr. Wilson in *Litigation Finance in the Public Interest*, the worlds of litigation finance and those seeking to litigate without a profit motive are not so distant.[88]

If more entities, either individuals or companies, take Thiel's lead, could we enter a new era of using litigation as a sword for competition or personal vendettas? In this scenario, could anything less than perfect corporate compliance with laws and regulations mean financial ruin?

As an example in the corporate context, imagine Bank A wants to invest $10 million. Bank A is in competition with Bank B. Bank A knows that Bank B has recently violated a consumer protection statute (or maybe they do not). Furthermore, last year, Bank B provided information to a government investigation into the financial system that was damaging to Bank A. Following Thiel's lead, Bank A spends that $10 million on "fund[ing] a team of lawyers to find and help 'victims'" of Bank B "[w]ho otherwise would have accepted a pittance for a

---

[86] *Id.*

[87] *Id.* at 422.

[88] *Id.*

settlement . . . ."[89] There are an unlimited number of possible iterations of what could amount to a "hit-job:" Hedge Fund A shorts Company B's stock and would benefit greatly from a decline in Company B's stock price; Start-Up A is backed by Venture Capital firm B and is in competition with Start-Up C; Venture Capital firm B funds a patent infringement suit against Start-Up B.

Companies or individuals could structure their efforts in a manner similar to political spending by forming either a benefit corporation (actually reap profits from these hit-jobs) or a non-profit. For example, a solar panel company (or billionaire entrepreneur-owner of a solar panel company) could start an environmentally minded benefit corporation that focuses on suing coal, oil, and nuclear power companies. For example, under Delaware's statute, "A 'public benefit corporation' is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit(s) and to operate in a responsible and sustainable manner."[90] Further, the corporation's charter must "[i]dentify within its statement of business or purposes . . . 1 or more specific public benefits to be promoted by the corporation."[91] Furthermore, these benefit corporations would not have to be sponsored by a sole entity – they could solicit investment from any party like any other corporation.

Fiduciary duties owed to shareholders will affect the expansion of "hit-jobs" in the corporate context to a certain extent. For example, consider a situation where a CEO of Company A uses company assets to fund a third party's litigation against a rival Company B. Is this a decision that the board and officers make "in the ordinary course of business," or is this decision an extraordinary transaction that requires shareholder approval? The answer seemingly depends on how the hypothetical CEO pursues litigation funding.

---

[89] Sorkin, *supra* note 19.

[90] DEL. CODE ANN. tit. 8, § 362(a) (West 2015).

[91] DEL. CODE ANN. tit. 8, § 362(a)(1) (West 2015).

Delaware corporations are expressly permitted, among other things, to "make donations for the public welfare or for charitable, scientific or educational purposes"[92] and "[t]ransact any lawful business which the corporation's board of directors shall find to be in aid of governmental authority."[93] Corporate charitable donations are reviewed on a standard of reasonableness,[94] and it is unclear whether or not there must be any benefit to the donating corporation.[95] Delaware case law "recognizes that a court may properly consider any benefit to the corporation as an important factor when analyzing the reasonableness of a given corporate donation."[96] Given the low bar presented by a "reasonableness" standard, the decision to "charitably" fund a third party's litigation against a rival would be difficult to challenge in court from a shareholder's perspective.[97]

If, as discussed above, a corporation structures its funding of a third party's litigation against a rival as "political speech," then it will be even more difficult to learn about, let alone challenge, from a shareholder's perspective.[98] Under existing corporate law, corporate decisions to engage in political speech are considered "ordinary business decisions," which is a classification that has several important implications.[99] First, shareholders "do not have the right to vote directly on, or to enact bylaws addressing, the ordinary business decisions of the

---

92 DEL. CODE ANN. tit. 8, § 122(9) (West 2000).

93 DEL. CODE ANN. tit. 8, § 122(12) (West 2000).

94 *Sullivan v. Hammer*, 16 DEL. J. CORP. L. 1621, 1633 (1990).

95 Steven D. Frankel, *The Oracle Cases Settlement: Too Charitable to Ellison and the Plaintiffs' Attorneys?*, 4 DEPAUL BUS. & COM. L.J. 625, 639 (2006).

96 *Id.*

97 There, of course, exist other forms of action such as voting for new directors (if a director), voting for new management, and selling the stock.

98 This article largely omits constitutional discussion of corporate political speech. *See generally* Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010) (holding that the First Amendment protects corporations' freedom to spend corporate funds on indirect support of political candidates); James Bopp, Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251 (2010).

99 Lucian A. Bebchuk & Robert J. Jackson Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 87 (2010).

corporation."[100] Second, management may make all corporate political speech decisions; there is no requirement under current law that the board or independent directors make such decisions.[101] Third, ordinary business decisions do not require any special disclosures.[102] While shareholders have a right to investigate the records of a corporation,[103] there is no guarantee a shareholder will be able to uncover a "smoking gun."[104]

Outside of the corporate context, third-party litigation finance has taken several different forms through crowdfunding. Much like Peter Thiel, some crowdfunders will receive nothing in return for their financial support, and their funding is effectively a donation. Take, for example, the case of Sureshbhai Patel, an Indian citizen who was allegedly injured by a police officer in Alabama and left with more than $175,000 in hospital bills.[105] In a politically and emotionally charged situation, crowdfunding pages started raising money for both Mr. Patel, as well as the police officer involved, to cover their legal expenses, among other things.[106]

Other litigation crowdfunding websites promise a return for accredited investors.[107] LexShare is a recently founded litigation

---

100 *Id.* (citing CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232-35 (Del. 2008)).

101 *Id.*

102 *Id.*

103 DEL. CODE ANN. tit. 8, § 220 (West 2010).

104 Paul S. Miller, *Shareholder Rights: Citizens United and Delaware Corporate Governance Law*, 28 J.L. & POL. 51, 79 (2012) (describing the difficulty shareholders experience in protecting their value in a corporation from political spending by management and the board).

105 Jason Silverstein, *Indian Man, Alabama Police Officer Who Allegedly Assaulted Him Both Get Crowdfunding Campaigns*, NEW YORK DAILY NEWS, Feb. 17, 2015, http://www.nydailynews.com/news/national/indian-man-alleged-assaulting-crowdfunding-pages-article-1.2118061.

106 *Id.*

107 *See* Securities Act of 1933, Regulation D, Rules 501, 505, and 506 (definition of and exemption of registration for sale of securities to accredited investor).

crowdfunding company offering a wide variety of cases to invest in and helping potential crowdfunders with case summaries and a case progress tracker.[108] While LexShare's pitch seems to be return on investment, trialfunder.com was founded as "a catalyst for change and social justice," specifically funding police brutality cases and promising 15% of any pay out.[109] Even foreign companies are getting in on the rush. Invest4Justice is a Swiss Verein, located in Geneva, Switzerland that provides a platform to invest in lawsuits around the world, including the United States.[110] Their website promises returns on investment ranging from 140% to 4,166.67%. Notably, there is no requirement that investors in lawsuits through the site be "accredited" under SEC rules.[111]

The crowdfunding of lawsuits raises a different flavor of the same concerns found with traditional third-party litigation financing as well as some new ethical concerns that will be addressed below. For instance, concerns about attorney-client privilege only become more prominent the more widely dispersed information about the case becomes. Crowdfunding inherently relies on the internet to reach a broad base of potential funders. Websites such as LexShare must strike a careful balance between giving investors information to make an informed investment decision while also preserving the attorney-client privilege. Crowdfunding litigation also raises concerns about platform operators misleading potential investors about the merits of the case. Even if the investors are presumed to be sophisticated, platform operators generally take a percentage fee of successful funding campaigns. Therefore, platform operators have an incentive to increase the flow of funding, which could be done by overstating the merits of the case or overstating the potential award.

Regardless of whether a dedicated third-party litigation financier, a slighted billionaire, a corporation, or an internet "crowd" are financially backing a litigant, all signs point to the same direction: more money

---

108 *See* https://www.lexshares.com/.

109 Christopher Coble, *Crowdfunding Police Brutality Cases: Justice or Just a Business?*, FINDLAW (July 8, 2015), http://blogs.findlaw.com/blotter/2015/07/crowdfunding-police-brutality-cases-justice-or-just-a-business.html (last visited July 27, 2016).

110 *See* https://invest4justice.com/terms-use/.

111 *See* https://invest4justice.com/campaigns/.

being poured into litigation that could service any number of motivations. While some of these funding sources have a profit motive to incentivize backing of meritorious cases and efficient settlements, others do not. Are the financiers lacking a profit motive a good or bad thing for our legal system? Are they simply enforcing the law as it is written via private means? Or are these actors showing the wisdom of the age-old doctrines of maintenance and champerty?

V. CURBING PERFECT CIVIL ENFORCEMENT; OR, NEW ETHICAL QUESTIONS POSED BY GAWKER-LIKE LITIGATION FINANCING

If you buy that Thiel-Gawker-like litigation financing is here to stay, the most obvious response from the legal sector will be to define what sort of regulations or limitations would be necessary to curb any undesirable traits of that type of third-party enforcement of laws. For legal ethicists, the question will be more prescriptive and normative: should we want to curb the new perfect civil enforcement market, and if so, how? Generally speaking, if this type of enforcement is a watershed moment for our legal economy, what do we want that economy to look like in the years ahead? An even more incisive question is, to paraphrase L. Gordon Crovitz's similar question in the *The Wall Street Journal* in June 2016: what happens if the wealthy can fund lawsuits to bankrupt companies they dislike?[112]

As we have already noted, Peter Thiel may have answered the question for the billionaire class: "[the Gawker suit was] less about revenge and more about specific deterrence."[113] Apparently, one of his underlying motives was that he wanted to stop Gawker because he regarded the media company as a "bully" and a "bad actor" in the field of journalism, publishing scandalous details without a social conscience.[114] In other words, Thiel hoped to finance a message to other media companies: do not mess with our personal lives. Of course, "our" must necessarily mean "members of my billionaire or millionaire class"

---

112 Crovitz, *supra* note 1, at A15.

113 *Id.*

114 Ingram, *supra* note 2.

largely because no one else could fund such litigation based on their singular motive. Thiel was effectively sending a message that could be—and likely was—heard loud and clear by all businesses, not just media companies.

But was Thiel truly seeking public justice in the vein of the 1960s public interest litigation model?[115] Or was he merely seeking to impose his will on a market he disliked to seek profits—whether personal or financial? With the backdrop of maintenance being de-criminalized decades ago, perhaps Thiel, in a way, continued that public interest effort so that "bully" media companies like Gawker may either stop intruding upon the private lives of public personalities or simply stop profiting off of scandalous information.

If perfect civil enforcement becomes the deterrence that Thiel hopes for, many companies and individuals will demand the creation of a regulated space for such enforcement. In the same way that campaign finance regulation has drawn intense scrutiny, the next stage of regulated modern litigation finance will be born. What will it look like? What should it look like?

A. The Ethical Question of Perfect Civil Enforcement

When he described maintenance, whose de-criminalization birthed the modern litigation finance movement,[116] Sir William Blackstone wrote that it was "an offense against public justice, as it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression."[117] That is, he noted that the prospect of engaging in litigation financing was an ethical question. As far back as 1850, the Tennessee Supreme Court noted that "many acts [that] were adjudged to be maintenance [again, at the time, largely illegal] . . . have long since ceased to be regarded as morally or legally censurable."[118] With Thiel's high-profile actions against Gawker, have we, as a society,

[115] *See supra* note 82-83.

[116] *See generally supra* Part II.

[117] Sherley v. Riggs, 30 Tenn. 53, 54 (1850) (citing 4 Bla. Com. 135); *see also* Crovitz, *supra* note 1, at A15.

[118] *Riggs*, 30 Tenn. at 54 (quoting Campbell v. Jones, 4 Wend. 310).

pivoted once again? Those wary of a new age of Thiel-inspired hit jobs may request a return of illegal maintenance. The legal and ethical questions are important and made all the more dire by the stakes underlying cases like Hogan's. Recently, *Fortune* magazine echoed the worried sentiments felt by many when it posed the following question to its readers:

> What if Peter Thiel or some other wealthy individuals decide that they don't like the reporting that the New York Times has been doing on Syria or gun control or marriage equality? There's no reason to think this kind of behavior will be restricted to media outlets that we can all agree are reprehensible in some way—the exact same machinery could be used against any media entity, and their only defense would be to have their own billionaire to fight back.[119]

This logic is a perfectly understandable extension of thought on the fallout from Thiel's actions, and it may prophesy what will occur in the market.

A pivot in the litigation finance market will require a new prescriptive discussion on the regulations, if any, that should accompany such a disruptive tactic. Specifically, any new set of rules and regulations intended to preserve the beneficial aspects of the litigation finance market while also ameliorating market turmoil will need to focus on a new legal ethic surrounding the concept of perfect civil enforcement. For example, some free market camps may champion the de-regulated nature of litigation finance as an investment or strategic tool; meanwhile, opponents of Thiel-like litigation finance decry its effects on companies' free speech.[120] Looking to history, a revised and modern theory of maintenance could inform the way we consider the ethical implications of litigation financing.

---

[119] Ingram, *supra* note 2.

[120] *See id.*

But, as will be discussed below, the ethical questions have a new focus after the Thiel-Gawker takedown. Where once the typical regulation of litigation finance protected the unwitting consumer from predatory financiers, the Gawker lawsuit prompts questions about protecting the market or the businesses themselves from unknown financing on the opposite side. This is, we argue, a completely new way of looking at the ethics of litigation finance and its effects on the market vis-a-vis a need for regulation.

The new ethical question posed by perfect civil enforcement could first be framed, in our view, in the same vein as the limitations we place on malicious prosecutions. In common law, we generally deem prosecutions "malicious" when a civil or criminal prosecutorial team, armed with discretion, intentionally and maliciously institutes or pursues legal action without adequate justification or for an improper purpose. Malicious prosecutions may be brought in civil or criminal matters.[121] For example, in malicious criminal prosecutions, actions may be dismissed as malicious when they are egregiously brought without the requisite probable cause. Under Tennessee law, in order to establish malicious prosecution, a plaintiff must prove that "(1) the defendant had instituted a prior suit or judicial proceeding without probable cause, (2) the defendant brought such prior action with malice, and (3) the prior action was finally terminated in plaintiff's favor."[122] Successful malicious prosecution actions can award financial compensatory penalties to the plaintiff, and they are subject to a one-year statute of limitations similar to other personal torts.[123]

But by their nature and given the elements that must be proved, malicious prosecution actions may come too late to alleviate concerns of perfect civil enforcement. Businesses that wish to strike back against unwarranted litigation financed by third parties could file malicious prosecution actions, but they would have needed to succeed in the

---

[121] John Day, *Essential Elements of a Malicious Prosecution Claim in Tennessee*, DAY ON TORTS, http://www.dayontorts.com/miscellaneous-essential-elements-of-a-malicious-prosecution-claim-in-tennessee.html (last visited July 18, 2016).

[122] Himmelfarb v. Allain, 380 S.W.3d 35, 38 (Tenn. 2012) (citing Christian v. Lapidus, 833 S.W.2d 71, 73 (Tenn. 1992)).

[123] TENN. CODE ANN. § 28-3-104(a)(1) (West 2015).

lawsuit and discover who, in fact, had financed the plaintiff's suit. Beyond the timing issues, this is a high barrier to entry.

With regard to the Thiel-Gawker battle, the malicious prosecution approach is particularly problematic. First of all, Gawker lost without knowing who was financially backing the suit. Secondly, Gawker's Chapter 11 bankruptcy petition was filed June 10, 2016, and thus the effects of Hogan's massive judgment were felt almost instantly.[124] According to some estimations and based on the lead bid for Gawker's court-mandated auction, Thiel's actions reduced Gawker's value to $100 million from valuations as high as $250 million prior to the Hogan suit.[125] Thus, in a sense, the ship went down almost immediately.[126] There was certainly no time for successful filing and decision on a malicious prosecution action; Florida—the state where the Hogan action was based—has malicious prosecution elements akin to Tennessee's.[127] If a business tanks within weeks of a malicious judgment and its assets are sold at auction (as Gawker intends to do in Chapter 11), subsequent litigation would not be able to stop the momentum and spirit upon which the market bases its valuations. That is, the price investors are willing to pay for a tarnished company will drop precipitously, and the thought of correction through litigation will likely not recover that lost value. Gawker lost its value in investors' minds when it lost the Hogan case. Therefore, when we speak of what can be done to curb or limit the effects of perfect civil enforcement, perhaps subsequent litigation is not the answer as it would be in wrongful prosecutions. Wrongful prosecution litigation would not address the realities of modern litigation financed as displayed in the Gawker lawsuit.

B. What Can Be Done to Curb the Effects of Perfect Civil Enforcement, If Not Subsequent Litigation?

---

[124] In re Gawker Media, LLC, 16-11700-smb, at Docket No. 1 (June 10, 2016).

[125] Ingram, *supra* note 2.

[126] *Id.*

[127] *See* Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994).

Clearly, if subsequent corrective malicious prosecution litigation is inadequate to save a precipitous drop in value or complete bankruptcy of a tarnished company, then proactive and protective measures must be installed to ward off unwarranted market upheaval caused by litigation financing. Perhaps, then, statutes and regulations are the answer. But several questions arise under that scenario. For example, can regulations prove effective at curbing the unwanted effects of litigation financed by bad actors? How would those regulations define the bad actors from those protecting legitimate rights or interests?

At least in Tennessee, one of the first of several states to regulate litigation finance,[128] consumer litigation financing has been regulated since 2014.[129] Although a full discussion of the law is outside the scope of this article, the Tennessee Litigation Financing Consumer Protection Act "imposes price controls and other measures on lenders that provide financial assistance to consumers while they pursue legal settlements."[130] For example, the law requires litigation financiers to register in Tennessee, pay an associated filing fee, and post a surety bond of $50,000.[131] As added protection, it caps the fees the firm may charge, and consumers may also rescind the deal under certain circumstances.

Writing for the United States Chamber Institute for Legal Reform, Lisa A. Rickard wrote in 2014 that the state of Tennessee should be lauded for "enact[ing] strong safeguards around a practice that shortchanges injured consumers, increases litigation costs, and crowds court dockets."[132] This is, of course, in strong contrast to advocates of litigation finance that feel the funding practice permits more promising

---

128 Victoria Shannon, *Third-Party Litigation Funding and the Dodd-Frank Act*, 16 TENN. J. BUS. L. 15, 18 n. 19 (2014).

129 Andrew G. Simpson, *Litigation Financing Firm Exits Tennessee As New Law Goes Into Effect*, INS. J. (July 3, 2014), http://www.insurancejournal.com/news/

southeast/2014/07/03/333772.htm (last visited July 20, 2016).

130 TENN. CODE ANN. § 47-16-101 (West 2014); *Id.*

131 TENN. CODE ANN. § 47-16-106 (West 2014); Simpson, *supra* note 129.

132 Lisa A. Rickard, *Tennessee Enacts Law to Rein in Lawsuit Lending Abuses*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (April 30, 2014), http://www.instituteforlegalreform.com/resource/tennessee-enacts-law-to-rein-in-lawsuit-lending-abuses (last visited July 20, 2016).

plaintiffs access to the courthouse,.[133] but these laws have a different focus than that which is needed to curb Thiel-like hit jobs. Prior to it going into effect in July 2014, it was clear that the Tennessee consumer protection law was enacted with an eye toward the ethical implications of unchecked litigation finance on the *consumer-plaintiff*, not the market or businesses.

Regulations like Tennessee's are meant to protect unwitting consumers from predatory practices. These regulations hope that plaintiffs in need of strong financial backing do not give up the vast majority of the relief sought just because the case was financed by a third party. As noted above, current regulations address the ethical questions surrounding third party financiers preying on consumer-plaintiffs. This is a wholly different question than the question of how we can address ethical questions surrounding the effects of that litigation financing on the market and on businesses like Gawker who may be devastated by the right lawsuit.

C. The Thiel-Gawker Feud Marks an Important Shift in the Ethical Focus of Any Litigation Finance Regulation

The Gawker takedown markedly shifts our view of who might be the victim in cases that are financed by third parties. In Hogan's case specifically, his lawsuit was bankrolled by $10 million of Thiel's personal funds simply as a "deterrence" tactic.[134] Thiel did not want to dupe Hogan; he wanted to prove a point about media companies like Gawker.[135] Although it is unclear whether Thiel financially profited from the lawsuit,[136] Hogan was not put at risk by having his case financed,

---

[133] *See* Nichols, *supra* note 49.

[134] *See* Crovitz, *supra* note 1, at A15.

[135] *See id.*

[136] Sorkin, *supra* note 19. Sorkin wrote that:

> Without revealing an exact figure, [Thiel] said that estimates of $10 million in expenses so far were "roughly in the ballpark." [Thiel] added: "I would underscore that I don't expect to make any money

which distinguishes him from the sort of unwitting plaintiffs the Tennessee laws hope to protect. Indeed, Gawker was the party victimized in a way by the unknown financing; they were the party who would have profited from the existence of some form of regulation, not Hogan. The ethical focus of any litigation finance regulation, then, has shifted because of the Thiel-Gawker lawsuit.

So what type of laws and regulations would be effective? The ethical approach underlying regulations like those that exist to protect Tennessee consumers is far from and perhaps difficult to analogize when seeking to protect the market and the rights of businesses from a billionaire with a grudge. Public or privately held companies that may have strong valuations like Gawker are ostensibly sophisticated and arguably do not need regulations that, by protecting plaintiffs acting against them, protect the company itself. Hogan certainly did not need regulations' protection if Thiel, his financier, was only looking to get paid in revenge and future deterrence.

However, the purpose underlying present litigation finance regulations are not totally unhelpful. Despite Gawker being sophisticated enough to understand or pay for a proper legal defense, they may find themselves as unwitting as the consumers that state laws currently protect. As we now know, Thiel did not disclose his backing of the Hogan lawsuit until *after* the massive judgment had been awarded;[137] by the same token, Gawker could not know that revenge was on the table during settlement discussions. Gawker, at the time, only had a *suspicion* that someone in Silicon Valley was financing the

> from this. This is not a business venture." He would not say whether he had compensated any of the people, including Mr. Bollea, which could raise questions in an appeal.

Id. Knowing that Thiel is a Stanford-educated lawyer, his eyes are probably wide open to conflict of interest issues and therefore likely chose his words carefully.

[137] *Id.*; *see also* Debra Cassens Weiss, *Lawyer-turned-entrepreneur admits he financed Hulk Hogan's Gawker suit*, ABA JOURNAL (May 26, 2016), http://www.abajournal.com/news/article/lawyer_turned_entrepreneur_admits_had_financed_hulk_hogans_gawker_suit (last visited July 20, 2016).

litigation.[138] For what it is worth, Hogan himself had never mentioned a third-party backer.[139] Thus, Gawker could cry foul because it remained ignorant and unwitting until the close of the suit. That is, it did not know how much of a victim it was until it was too late. In relation to timing, we have already demonstrated how subsequent malicious prosecution litigation is not an effective answer for Thiel-like takedowns. Consequently, if laws or regulations are the answer to protecting company takedowns by private financiers holding grudges, then those laws and regulations must enter the fray as early in the litigation as possible. To put it another way, any efforts to curb unintended market consequences on funded lawsuits must come well before the target companies' value hits the rocks.

D. Some Suggestions to Mold Any Proposed Laws or Regulations

Because the ethical questions—and indeed, the motivations of the parties—underlying Gawker, like deterrence or revenge litigation, provide a novel understanding of *who* requires protection, new regulations must be borne with a unique reach. Again, litigation finance regulations protect the consumer-plaintiffs who sign on with third parties for financing of their promising suits. Here, the market may view the defendant, Gawker Media, as the victim of litigation finance. By some accounts, shapeless entities such as free speech and the market as a whole may ultimately be victimized by the onset of Thiel-like financing. If any target business's civil errors will be noticed and potentially litigated (what we have here termed "perfect civil enforcement") by targeting billionaires, company after company could be knocked into bankruptcy. Taking a nuanced view of the needs of these companies (and the individuals owning and/or running them), we offer a few suggestions to

138 Andrew Ross Sorkin, *Gawker Founder Suspects a Common Financer Behind Lawsuits*, N.Y. TIMES, May 23, 2016, http://www.nytimes.com/2016/05/24/business/dealbook/gawker-founder-suspects-a-common-financer-behind-lawsuits.html.

139 *See* Andrew Ross Sorkin, *Peter Thiel Is Said to Bankroll Hulk Hogan's Suit Against Gawker*, N.Y. TIMES, May 25, 2016, http://www.nytimes.com/2016/05/25/business/dealbook/peter-thiel-is-said-to-bankroll-hulk-hogans-suit-against-gawker.html.

consider when proposing laws or regulations to address these novel fears.

First, although the concept of who may be victimized or require protective regulations has shifted, consumers are still in need of protection. Unwitting consumer-plaintiffs will continue to require protection from predatory third-party financing even in a climate of fear for businesses like Gawker. Consumer protection laws like Tennessee's should be maintained and enriched alongside any proposed regulation of business-defendant-focused scenarios.

Second, a regulation requiring disclosure of the third-party backer would not be burdensome. Pursuant to Federal Rule of Civil Procedure 7.1, federal litigation already requires as a standard disclosure the existence of ownership of a company's stock before the case progresses.[140] If used in all litigation financing scenarios, requiring a similar type of disclosure has many benefits beyond simply keeping the courts informed about the parties. For example, disclosing the third-party financier would allow all parties to properly account for interests in settlement negotiations. As has been reported, Gawker was never aware of Thiel's interests in its settlement negotiations; thus, it could not have proposed a remedy that would assuage Thiel's concerns.[141] A proposed regulation requiring disclosure could be founded on a percentage basis; if the plaintiff expects that a certain percentage, say 15% or more, will be funded by outside financiers, then the names of those financiers must be disclosed at the outset of the litigation.[142] However, if such proposed

---

[140] *See* FED. R. CIV. P. 7.1 (requiring the filing of a disclosure statement in federal litigation by a nongovernmental corporate party to inform the court with a filing that "(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation."); *id.* at 7.1(a) (The party also has a duty to supplement this information if anything changes.); *see also* FED. R. CIV. P. 7.1(b)(2).

[141] *See* Crovitz, *supra* note 1, at A15.

[142] This could operate much the same way as disclosures under Rule 7.1. Although the philosophical implications are unclear at this early juncture, the percentage of interest surrounding the third-party financiers could be used to affect the plaintiff's standing. If he did not have over a 50%, say, financial interest in the litigation, questions would arise under justiciability doctrines. For example, would his injury be truly traceable to the defendant? Is it *his* injury that will be redressed by a favorable decision? Without proper standing, of course, the court would lack subject matter jurisdiction in the matter. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

quantitative line-drawing would be viewed as encouraging financiers to find ways to game the system, mandatory full disclosure of any interest—direct or indirect—may be required.

To remedy financiers entering litigation at an opportune time—such as when they offer to fund a suit after discovery when the likelihood of success is better estimated—the plaintiff will, as in Rule 7.1, have a continuing duty to disclose the existence of any such agreements or what percentage of the litigation costs (or exact amounts) they expect outside sources will pay.[143] Failure to disclose or ignoring the continuing duty to update the court as to a plaintiff's funding could be sanctionable like a Rule 11 violation.[144]

Third, if disclosure (whether full or on some other quantitative basis) of a plaintiff's financiers is viewed as too burdensome, a law allowing a flexible standard for the court to apply could be implemented. For example, to lessen disagreements on whether certain *quantitative* limits require disclosure of a plaintiff's financing, courts could utilize a more *qualitative* "compelling interest" approach. By that standard, upon motion by a suspicious party or *sua sponte*, a court could review materials underlying plaintiff's funding of the lawsuit at hand to determine whether a non-party's compelling interest was present that was not disclosed. If the plaintiff's ability to settle or make other ends-based decisions was significantly affected by the third-party financier(s), the court could call for their explicit disclosure to all parties.

---

143 *See* FED. R. CIV. P. 7.1(b) (requiring that the disclosure statement be "promptly" supplemented if anything changes).

144 *See* FED. R. CIV. P. 11. It is also noteworthy in recognizing the potential analogy to the discussion here that the disclosures required under Rule 7.1 (along with the continuing duty to supplement that disclosure should circumstances change) are inspired by the need to disclose conflicts of interest relevant to judges, such as the financial interests disclosed pursuant to Canon 3C(1)(c) of the Judicial Code of Conduct. *See* FED. R. CIV. P. 7.1, Committee Notes; *see also* FED. R. APP. P. 26.1 (requiring corporate disclosure statements for the same reasons at the federal appellate level). The same types of disclosures of relevant litigation financing information can reveal the financial conflicts of interest present in parties' litigation strategies. The disclosures in the litigation financing scenario would be likewise minimal and as unburdensome as the Rule 7.1 disclosures are today.

Alternatively, laws or regulations requiring disclosure on a quantitative basis could accompany a law permitting the courts to review the amount of financing as creating (or not creating) a compelling interest outside of those presented by the plaintiff. For example, in reference to Hogan's case against Gawker, if his interests were not compatible with Thiel's, and if Hogan did not have deterrence or revenge in mind, then a separate and compelling interest was present in the lawsuit. Hogan would then be required to disclose those interests. In theory, the defendant could be entitled to an evidentiary hearing on the matter to call witnesses and determine the extent of a third-party financier's effect on a lawsuit. At the very least, the defendant would be able to connect the dots and estimate all of the interests underlying the parties' positions. Such knowledge would, at a minimum, facilitate meaningful settlement negotiations.

Of course, the downside to these proposed qualitative tests being administered by the courts is the "fuzziness" of such a standard and the fact that it would create additional and ancillary work for the courts beyond the needs of the underlying litigation itself. Undoubtedly, a body of case law would develop around one of these qualitative standards, which would needlessly complicate otherwise typical litigation. And, practically speaking, the judiciary—which is already burdened with crowded dockets—would likely roll its eyes at constantly administering separate rulings on a flexible standard to avoid unwanted abuses in litigation financing scenarios. These concerns would therefore embolden support for a full, unqualified disclosure rule in litigation financing, in which complete disclosure would be required of any financier with a direct or indirect interest in the lawsuit or the lawsuit's proceeds. Such all-out disclosure should also include disclosure of anyone supplying, directly or indirectly, funding to cover any of the costs of litigation, including attorneys' fees.

No matter the law built to identify it, disclosure of financiers is key because it is now clear that the Gawker case has demonstrated the importance of knowing the financial backing of opponents. When a business's survival is at risk, simple disclosure of any third-party financiers does not seem unduly burdensome, especially given that so many regulations and professional responsibility rules militate against conflicts of interest. However, consideration of the need for these regulations will undoubtedly create heated debate. Does Main Street care about the disclosure of litigation financiers? Would Americans believe that a large, valuable, sophisticated media company like Gawker is a "victim" in need of protective laws and regulations? What if a team of billionaires decided to take down PepsiCo in a class action suit that arose and refused all settlement offers along the way? In a burgeoning era of the ability of the wealthy to finance any suit against powerful companies, the age of perfect civil enforcement could be here to stay.

Overall, these policy discussions create the larger question: should we even seek to, and can Americans stomach, the protection of these companies in the first place? This ethical, political, and economic question was drawn into the public discourse during the recent Great Recession when "too big to fail" banks were "bailed out" with government (or, more precisely, taxpayer) funds. Should we expect more of the same to create a preemptive safety net and a more hospitable litigation environment for companies like Gawker? That question, although equally compelling, will have to wait for subsequent articles to explore implications of the market as the future of modern litigation finance vis-à-vis perfect civil enforcement continues to unfold.

VI. CONCLUSION

The case of *Gawker Media v. Bollea* may present a watershed moment in the development of modern litigation financing. Peter Thiel played a public interest group by financially backing another plaintiff's case without any incentive to profit from his investment. However, the third-party litigation financing industry got caught in the fray and now faces new scrutiny. The ease with which these two were confused shows exactly how muddy the waters have become where third parties get financially involved in others' litigation. The issues and concerns presented largely depend on the specific manifestation whether it be a dedicated third-party litigation financier (either sophisticated or not), a slighted billionaire, a corporation, or an internet "crowd."

At the very least, Thiel's lawsuit financing brings to the fore various new policy questions about third-party interests in litigation moving forward. As we have discussed in this article, among those questions are the financing's implications for free speech, shifting incentives away from profits, professional responsibility, and ethical dilemmas surrounding the shift in entities being viewed as potentially victimized by wealthy financiers. Where possible, we have presented policy discussions and proposals should regulation be needed of this practice, which we believe could be termed a new age of "perfect civil enforcement" of the law. Only time will tell whether these novel legal and policy questions will permit a new market where any entity's mishaps can be perfectly enforced by the likes of wealthy financiers with questionable or unknown motives.