# Private Funding of the Lawsuit That Killed Gawker Spells Trouble

## OPINION: If duplicated, billionaire's strategy could threaten an independent media.

***Ben Feuer, The National Law Journal***

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Hulk Hogan.

*John Pendygraft/Tampa Bay Times via AP*

Last month, the internet laid to rest Gawker, a mainstay of independent news reporting since the web's dark ages, aka 2003. The site gained fame for its coverage as devoted to capital-punishment think pieces as to catty "Page Six"-style gossip. It imploded not from the usual bursting bubble that signals dot-com doom, but rather the bursting of its bank account following a Florida jury's award of $165 million to 1980s faux-wrestling icon Hulk Hogan.

Hogan sued Gawker for invasion of privacy after it posted a sex tape of Hogan and his best friend's wife. Gawker protested that Hogan made his sex life an issue of public interest by discussing it in his books and on Howard Stern's radio program.

Undoubtedly, Gawker was no Washington Post. But after the verdict, which ultimately led Gawker into bankruptcy, a curious and stunning fact emerged: Hogan's litigation had largely been funded by PayPal co-founder Peter Thiel.

The Silicon Valley billionaire and Donald Trump delegate has borne a smoldering grudge against Gawker since 2007. That's when one of its sister blogs, the now-defunct Valleywag, outed Thiel as gay. Thiel would come to describe Valleywag as the "Silicon Valley equivalent of al-Qaida."

It later turned out that not only had Thiel funded Hogan's lawsuit, but that the funding allowed Hogan's legal team to deliberately choose causes of action that would not trigger Gawker's insurance — a rare tactic in this type of litigation, because plaintiffs usually want access to an insurance company's deep pockets and risk aversion to obtain a favorable settlement. But it's one that meant Gawker alone would pay for damages if it lost.

## ANY MEANS NECESSARY

That, however, was reportedly part of Thiel's plan. As Forbes later explained, "Thiel secretly declared a multi-front war against Gawker, seeking to crush it by any means necessary."

One method was to fund all manner of litigation against the website. Win or lose, defending the lawsuits alone could send Gawker's insurance costs so high as to render it uninsurable, and thus inoperable. The Hulk verdict merely accelerated the inevitable.

Whatever Gawker's merits, there's something troubling about the idea that publishing a video with at least an arguable public interest component can shut a news shop. Even more troubling is the apparent reality that with enough wealth, a billionaire can successfully wage a secret war of litigation attrition against a news organization that happens to present a viewpoint he despises.

Courts are an instrument of government, and the First Amendment generally limits governmental interference in speech based on its content, especially involving public figures like Thiel. The success of Thiel's approach could easily have a chilling effect on less salacious journalistic reporting that impacts the wealthy.

Existing law doesn't offer an easy solution. Third-party litigation funding, while new and controversial, is an important and rapidly growing piece of modern litigation practice. But it also has clear downsides, as exemplified by the tricky problem posed by Thiel's innovative strategy regarding Gawker.

Rather, it may be time for courts, legislatures and legal ethics groups to revisit some old ideas. At English common law, imported to the states, tort and even criminal actions existed for barratry (the act of bringing repeated litigation to harass), maintenance (an otherwise uninterested person providing financial support to prolong litigation), and champerty (a third party sharing in the proceeds of litigation he or she maintains).

The U.S. Supreme Court limited these actions in 1963's *NAACP v. Button*, where it held Virginia legal-ethics provisions barring maintenance could not prevent the NAACP from funding representation of individuals raising constitutional racial discrimination claims.

Although the court distinguished the NAACP's activity from permissibly regulated "oppressive, malicious, or avaricious use of the legal process for purely private gain," regulations like Virginia's soon fell out of vogue.

But the collapse of Gawker suggests it's time to consider them again. Barring litigation financing of speech-related torts like defamation may make sense. That wouldn't raise the same concerns the Supreme Court identified in *Button*, especially if limited to "oppressive, malicious, or avaricious use of the legal process for purely private gain."

## SILENCING CRITICS?

These torts exist in tension with essential First Amendment protections for speech and the press, and aren't frequent subjects of funding anyway. That narrow restriction could help prevent a wealthy and vindictive litigation financier from using the interplay between litigation and insurance to force the closure of whatever pillar of the Fourth Estate

offends him.

The goal is not to protect the world's sex-video hawkers, but rather, in the second gilded age, to ensure that the legal system does not offer an additional tool for the powerful to silence an independent media. After all, whether you like Gawker or loathe it, Thiel's approach signals new, very real risks for every publisher of controversial reporting.

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*Ben Feuer is the chairman of the California Appellate Law Group, a 10-attorney appellate boutique in San Francisco. He handles business and civil appeals in state and federal courts, and is a former law clerk on the U.S. Court of Appeals for the Ninth Circuit. You can find him at www.calapplaw.com.*