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New York Times

PayPal co-founder Peter A. Thiel, who confirmed this week he was behind the funding of former wrestler Hulk Hogan's litigation against Gawker Media LLC. Hogan won a $140 million verdict earlier this year.

Does litigation financing deny proper justice?

By America Hernandez
Daily Journal Staff Writer

It's a brave new world when multimillionaires can no longer afford to defend their reputations from the media in court.

These days, it takes a billionaire with a mission.

PayPal co-founder Peter A. Thiel said as much this week when he confirmed his were the deep pockets behind the $140 million win against Gawker Media LLC, which acquired celebrity wrestler Hulk Hogan's sex tape and published it online as news. *Bollea v. Gawker Media LLC et al.,* 12-12447-CI (6th Jud. Circ. Fl., filed Oct 15, 2012)

But even as litigation financing gains ground in the marketplace and in attorneys' minds, the idea of a rich man with a legal vendetta as large as his pocketbook still sparks debate over the integrity of a justice system flooded with so much outside cash.

"People who are asking whether what Thiel did was appropriate because it's not his lawsuit and he's not an official funder are missing the point," declared James A. Batson, an investment manager at the publicly listed Bentham IMF, which has put up sums for suits in the U.S. since 2011 and abroad since 2001.

"At the end of the day and at every step of the litigation, the judge and jury concluded the case was meritorious. Why Thiel did it is irrelevant."

Others like Alan L. Zimmerman, chief legal officer at Law Finance Group in Mill Valley, disagree.

"I don't think any responsible funder backs a case to extract pain, and I don't think it's healthy for our legal system," said Zimmerman, whose forthcoming article in the NYU Journal of Law and Business addresses the rising need for outside funding as the cost of cases skyrockets.

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"That said, there are parties who use their own money to punish people economically with suits, and on the defense side in the product liability and medical malpractice spaces, you have to go hand to hand with insurance companies for years before they lay their swords down and write a check."

Talk of leveling the playing field is ubiquitous in conversations on third-party funding.

Less so is whether adding more money to the mix exacerbates the problem.

All agree the business is booming.

Burford Capital Ltd, the world's largest litigation and arbitration financier, committed about $100 million to U.S. matters in 2010, the first year after it went public, according to annual reports.

Today the company's portfolio stands at more than $627 million invested in domestic litigation.

Burford's average investment jumped from $8 million in 2014 to $12 million in the first part of 2016, officials said.

Part of the boost is the diversity in what can be funded.

Most capital providers began with so-called "one offs," or individual matters that were funded after analyzing the merits of the case.

These days the trend is making deals directly with firms to provide liquidity for associate hires and operating costs, and taking a percentage of the contingency on 10 open cases as collateral.

The practice has its critics, most notably the U.S. Chamber of Commerce, which remains staunch in its position that more financing means more frivolous litigation.

But those scouring the case files say meritless claims are bad for profits. They also point out that litigation financiers exert no control over trial strategy, whereas an insurance company regulates which attorneys can be hired, what is litigated and when the client can be forced to settle.

In fact, prior to 1858 contingent fee arrangements were illegal and afterward were viewed with contempt in the U.S., according to *Rooney v. Second Ave. R.R.*

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Unanimous jury sides with Google

But lawyers remain circumspect despite big win over Oracle

By Tim O'Connor
Daily Journal Staff Writer

SAN FRANCISCO — Alphabet Inc.-owned Google's utilization of elements from fellow technology titan Oracle Corp.'s Java computer language and programming platform in its Android mobile operating system was a fair use under copyright law and not merely an excuse for theft, a jury decided Thursday.

The San Francisco federal court panel reached a unanimous decision near the close of the third full day of deliberations following a two-week retrial of a lawsuit in which Oracle accused the Mountain View-based company of infringement.

The victory was a major win for Google, which has been tangling in court with Oracle for nearly six years over whether it wrongfully took the declaring code from 37 Java application programming interfaces, or APIs, when building Android and didn't get a license from Sun Microsystems Inc. — which was bought by Oracle in 2010.

The jury verdict, though, is highly unlikely to end the legal battle between the two Silicon Valley giants, one in which Oracle has sought as much as $9 billion in damages from Google.

Immediately after the verdict was announced, Oracle General Counsel Dorian Daley said the company would ask the U.S. Court of Appeals for the Federal Circuit to overturn it — the same court that reversed Google's 2012 district court victory in the first trial of the case.

"We strongly believe that Google developed Android by illegally copying core Java technology to rush into the mobile device market," Daley said in a statement. "Oracle brought this lawsuit to put a stop to Google's illegal behavior."

"We believe there are numerous grounds for appeal and we plan to bring this case back to the Federal Circuit on appeal," she added. *Oracle America Inc. v. Google Inc.*, 10-CV3561, (N.D. Cal, filed Aug. 12, 2010).

Perhaps that's why despite handshakes, smiles, muffled laughs and back-slaps in the courtroom after the jury left, Google's legal team from San Francisco-based Keker & Van Nest LLP had a fairly muted reaction to the verdict.

Only newly elevated partner Reid Mullen showed any emotion when U.S. District Judge William Alsup's courtroom deputy read the verdict finding that yes, Google's use of Oracle's intellectual property was a "fair use" protected under U.S. copyright law, the only question on the verdict sheet.

Mullen smiled broadly, leaned back in his chair and whispered an emphatic, "Yes." Next to him, lead attorney Robert A. Van Nest maintained the same poker face he wore throughout the trial. Later, as he walked to the elevators, he said only, "We are grateful for the jury's verdict."

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GUEST COLUMN

Senate botched 9/11 bill

By Stephen I. Vladeck

On May 17, the Senate by unanimous consent passed the Justice Against Sponsors of Terrorism Act (JASTA), a bill that is putatively designed to make it easier for victims of the September 11 attacks and their families to hold Saudi Arabia liable in U.S. court for the alleged role of several of its senior government officials (and royal family members) in financing the al-Qaida operations that led to 9/11. JASTA has incited controversy from its inception. Among other things, critics have objected that its waiver of Saudi Arabia's sovereign immunity violates international law, and the Obama administration has publicly worried

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Criminal Law and Procedure: Denial of federal habeas petition proper in case challenging death sentence under Antiterrorism and Effective Death Penalty Act. *Smith v. Ryan,* USCA 9th, DAR p. 5078

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Criminal Law and Procedure: Husband convicted of wife's murder obtains habeas relief following expert witness's retraction of bite mark testimony, which constituted 'false evidence' under recently-amended Penal Code Section 1473. *In re Richards,* CA Supreme Court, DAR p. 5046

Criminal Law and Procedure: Constitutional claim by juvenile homicide offender serving two consecutive 25-years-to-life sentences rendered moot by newly-enacted statutes requiring parole hearing by 25th year of incarceration. *People v. Franklin,* CA Supreme Court, DAR p. 5060

Criminal Law and Procedure: Sentencing court may use defendant's prior juvenile murder conviction as basis for special circumstance that made current first degree murder conviction punishable by death. *People v. Salazar,* CA Supreme Court, DAR p. 5093

Tulare County judge loses bid to stay on bench

By Phil Johnson
Daily Journal Staff Writer

Ousted Tulare County Superior Court Judge Valeriano Saucedo's appeal of a judicial misconduct ruling to the state Supreme Court was denied Wednesday, likely ending a 40-year legal career.

The Commission on Judicial Performance ordered Saucedo off the bench in early December when it ruled the judge's unusual relationship with his clerk, and his statements about the relationship, violated numerous canons of the Code of Judicial Ethics.

"It is a sad day for our court, but one we all had an idea might be coming," Tulare County Superior Court Presiding Judge Gary L. Paden said. "His situation has put our court in a bind, with two retirements and his removal."

Paden said the county's 19-judge bench has relied on the state's assigned judges program to fill the gap. Saucedo had been handling a civil calendar with some family law, Paden said.

The CJP found Saucedo attempted to blackmail his clerk, Priscilla Tovar, by writing an anonymous letter he told Tovar he intercepted. The letter, addressed to Tovar's husband, alleged an affair between the married clerk and a court bailiff. *Saucedo v. Commission on Judicial Performance*, S232770.

Saucedo was also found to have sent 400 text messages to Tovar and showered her with more than $25,000 in gifts, including a trip to Disneyland and a used BMW.

While Saucedo described his relationship with Tovar as "too familiar," he denied writing the letter. His attorney, Randall A. Miller of Miller Law Associates APC, previously described the CJP's punishment as excessive and noted Saucedo's actions were never alleged to have impacted his rulings.

A sexual relationship between Saucedo and Tovar was never alleged, and judges who have had sex with court staff or law students during court hours have been censured, but not removed, the attorney added. Miller could not be reached for comment Thursday.

Pending an appeal to the U.S. Supreme Court, the county's first Latino judge will no longer work in the primarily Latino county where he was born.

"Everyone in this county is well aware of what happened in this case," Paden said. "Believe me, it was a shocking situation, and one I hope everyone will use to remind themselves of what is and what is not appropriate."

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Murphy Cooke Kobrick was started by ex-SEC litigators known for their skill in resolving cases. Page 4

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Brexit: Who cares, and why?
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Hulkster tags Thiel to body slam Gawker
We now know billionaire Peter Thiel funded Hulk Hogan's recent privacy lawsuit. But is that good thing? I think so. By Anoush Hakimi Page 8

Speedy Synthesizer
Deborah Saxe draws on 35 years of experience to mediate cases. Verdicts & Settlements

9/11 bill is the worst of both worlds

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that its passage could irrevocably damage U.S. relations with Saudi Arabia, cause massive economic blowback, and invite other countries to subject the United States to broader liability in their courts going forward. On the flip side, proponents of the bill have argued that, as much as anyone, the 9/11 victims and their families deserve their day in court, and if senior Saudi officials really did play a role in financing the attacks, then the Saudi government *ought* to be held liable.

Needless to say, there are compelling arguments on both sides of this debate. And had the Senate passed the version of JASTA initially reported out of the Judiciary Committee, that debate would be front and center. But at the last minute, while no one was looking, the Senate passed a substitute — and dramatically weaker — version of JASTA proposed by Texas Sen. Jon Cornyn. In the process, the Senate opted for the worst of both worlds, enacting legislation that would likely have all of the deleterious consequences feared by the Obama administration, but *without* making it materially easier for the 9/11 victims and their families to recover damages against Saudi Arabia. Presumably in an effort to reach some kind of compromise, the Senate passed a bill with enormous costs and few benefits, proving once again how little Congress can be trusted today seriously to grapple with such momentous policy disputes.

New York Times

The World Trade Center towers in 1998.

As initially drafted, JASTA was designed to overrule a series of decisions by lower federal courts (especially the district and appeals courts in Manhattan) that had adopted interpretations of a pair of federal laws — the Foreign Sovereign Immunities Act (FSIA) and the Anti-Terrorism Act (ATA) — making it all-but impossible to hold Saudi Arabia liable, even if senior Saudi officials *were* involved in financing the 9/11 attacks. For example, courts interpreted an exception to the sovereign immunity conferred by the FSIA for noncommercial torts to require that the "entire tort" take place within the United States (thereby excluding alleged financial dealings that largely took place overseas). And courts have also read the ATA to not allow "secondary" liability — that is, liability for *indirect* responsibility for acts of international terrorism within the United States. Taken together, these rulings (and others) had all-but slammed the door on any number of lawsuits, including the 9/11 victims and their families' effort to hold the Saudi government liable for 9/11.

STEPHEN VLADECK
American University

Like the initial version of the bill, the version of JASTA that the Senate passed on May 17 appears at first blush to fling that door back open. Thus, the bill includes an amendment to the FSIA to eliminate the requirement that the "entire tort" take place within U.S. territory, and it amends the ATA to expressly allow both (1) suits against foreign sovereigns and (2) theories of secondary liability. So far, so good. But three provisions of the Cornyn substitute bill largely deprive these amendments of any practical impact.

First, through a series of complex provisions, the Cornyn bill limits secondary liability under the ATA to suits against *private* defendants, thereby excluding claims that, for example, the Saudi government can be held liable for indirectly supporting the 9/11 attacks. In other words, the bill makes a big show out of subjecting foreign governments to suit under the ATA, but then kneecaps that provision by allowing such liability only where the foreign government was *directly* responsible for the underlying act of international terrorism.

Second, the Cornyn bill creates a complicated procedure whereby the U.S. government may intervene in any suit asserting a claim based upon JASTA, and may seek a stay "if the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state." Although the bill limits the duration of such a stay to 180 days, it also provides for mandatory extensions of a stay in perpetuity "if the Secretary of State recertifies that the United States remains engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state." In other words, the Cornyn bill gives the federal government near-unilateral power to put these suits on hold — perhaps indefinitely.

Third, even if one of these cases ever actually leads to the return of a judgment against Saudi Arabia, the Cornyn bill makes it virtually impossible for that judgment to be *enforced*, because it fails to either incorporate an existing waiver of Saudi Arabia's immunity from the attachment of its assets within the United States or create a new one. Thus, even if Saudi Arabia can't invoke sovereign immunity from a lawsuit under JASTA, then, it could almost certainly invoke sovereign immunity from enforcement of a judgment under JASTA.

By all accounts, the Senate's evisceration of JASTA hasn't actually obviated the Obama administration's foreign policy and reciprocity objections, since the bill is still a symbolic blow to U.S.-Saudi relations, and still at least opens the door (in theory if not in practice) to unprecedented damages suits against foreign sovereigns. And all of this even though the bill that passed the Senate no longer actually accomplishes what the 9/11 victims and their families are seeking.

Reasonable minds can surely disagree over whether the benefits of the original version of JASTA justify its substantial costs. But wherever one comes down on that dispute, the version that passed the Senate gets rid of most of those benefits without ameliorating any of the costs. There are responsible ways for legislators to reach necessary compromises in bills like JASTA, but this ain't it.

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The EU is not unity merely for the sake of unity

By John Claassen

The national motto of Belgium — a country rapidly becoming as well known for its troubled immigrant neighborhoods as for its chocolate, lace and beer — is the weak "L'Union fait la force" ("Union makes strength"). The motto begs the questions of "Why" and "Who cares?" Proponents of Brexit are asking that question regarding the European Union as the United Kingdom prepares to vote to withdraw from the EU next month.

Belgian history offers no convincing answer to those questions on a national level. In 1830, when Flanders, a Dutch speaking region to the North, and Wallonie, a French speaking region to the South, declared themselves independent from the Netherlands, about the only things the dissenting provinces shared was a border, Catholicism, and the belief that they lacked fair representation in the Netherlands. To Americans, the lack of representation resonates as a rallying cry for independence, but it hasn't been much of a unifying force since then. France's motto, "liberty, fraternity and equality" and Germany's informal motto, "Unity, Justice and Equality" both promise substantially more to their citizens than unity for unity's sake. As for religion, Catholicism has not recently been a particularly unifying force in Europe.

New York Times

Belgian soldiers and police patrol as people gather for a peace rally in Brussels, March 27.

Belgium's internal differences routinely draw more attention than its commonalities. For much of the 19th century, Wallonie was more developed economically. Its proximity to coal helped fuel strong textile and steel industries. Flanders was less developed. Walloons were concerned that their economic strength would be used to support Flanders. Over the last century, roles have been reversed.

Given the linguistic and economic differences between the regions, it comes as little surprise that Belgium's central government has been stripped of much authority, with substantial power being held by the regions.

Belgians, among the more cosmopolitan people in Europe, approach national unity with ambivalence. Belgians do not judge others by Belgian cultural standards, as the French and Germans often do with their cultural standards. They look abroad because almost everything happens abroad. Because of Belgium's openness to immigration, about 12 percent of its 10 million inhabitants are immigrants, with about half coming from other EU countries. There is a rich tradition of immigration of Muslims from Morocco, with Islam now the second most practiced religion (3.5 percent). No strong national tradition and culture rise to keep out foreigners. Yet, no melting pot reduces recent immigrants into a common Belgian identity because there is not much of one. Although many Belgians are open and approachable, Muslims in particular among immigrants face persisting discrimination in housing, education and employment.

As much as their cosmopolitanism is a strength, Belgians' ambivalence towards unity is also a weakness. The lack of coordination among national and local police forces in Belgium after the terrorist attacks in Brussels earlier this year attests to this weakness. The lack of any effective policy for integrating Muslims without discrimination — a distinctly national role — also does.

Knowing Belgium's national weakness, international organizations have stepped in to fill the void. The rest of Europe saw no threat in the placement of the EU's executive branch in Brussels. Europe's bureaucracy now presides over much of the rest of Europe from there. NATO resides in Brussels, too. Taking a cue from these international organizations, foreign terrorist organizations have also moved into Belgium. ISIS in particular, has found support in poor immigrant neighborhoods, including Brussel's Molenbeek. These neighborhoods have high unemployment, high crime, and youths who face formidable discrimination.

It is in no small measure ironic that the EU today is as divided as its host country. The Greek financial crisis and Russia's intervention in Ukraine have tested its unity. The ongoing refugee crisis, which has exacerbated divisions among member states, has shaken the EU to its core. The U.K. is not the first of its member countries to ask, "Why" and "Who cares?"

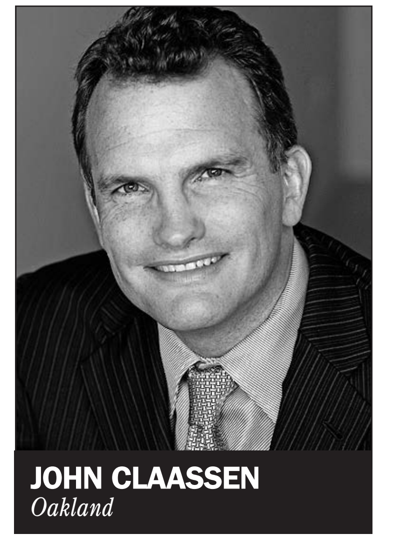
The parallels between Belgium and the EU are real. The EU, like Belgium, is cosmopolitan, open and deeply interested in the world around it by comparison to the larger nation states it interacts with (Russia, China and the U.S.). The EU, like Belgium, historically has been and is politically and economically divided. The EU has been unable to deal well enough with the integration of some immigrant populations.

Still, it should be easier for Europe as a whole to answer the questions than for Belgium. The EU was born of the atrocities of the world wars. Those two monuments to human failure serve as timeless reminders why a go-it-alone approach taken by countries in the past to continent-wide problems carries huge risk. The EU came about to strengthen its member countries against destructive forces from abroad, particularly the Soviet Union. In the aftermath of WWII, American and European leaders alike quickly apprehended that the Soviets were capable of overrunning the continent. The regions in Belgium did not unite from these exigencies.

Thus, Boris Johnson's recent likening of the EU to Nazi Germany is wrong. The EU was conceived of and is a protector of basic human rights from threats emanating from within and without. While the EU is incomparable to Nazi Germany, there is an apt analogy between those sad times and now. In the years leading up to WWII, the U.K. tried, as it is now attempting to do again, to place short-term national interests ahead of its long-term interests and the interests of most states on the continent. Its doing so quickly became known as appeasement.

As Britain considers Brexit, it needs to keep in mind that the EU does not represent unity merely for the sake of unity. Rather, the EU is a critical safeguard of personal freedom and security in an area of the world that is routinely buffeted by storms too powerful for isolated countries to weather on their own.

John Claassen *is an attorney working in Oakland. He has lived and studied for two years in Europe, including in Belgium.*



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