

ABOVE THE LAW

Third-Party Litigation Financing: The Latest Chimerical Lifeline For The Legal Profession

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The legal industry has taken its lumps. At the top, growth is [modest at best](#). At the bottom, law school applications have [dropped off dramatically](#). There are scary book titles like Steven Harper's [The Lawyer Bubble: A Profession in Crisis](#) (affiliate link) to spook the industry even more.

But some are pushing back against the gloom and doom and projecting a bright future ahead. The new hope for Professor [Bradley T. Borden](#) is third-party litigation financing (“TPLF”), dropping millions into lawsuits in exchange for a hefty cut at the end so they can party like a champ(erty).

Litigation finance is drawing [considerable talent](#) and will certainly change the way law firms and clients do business. But it's no pathway to rekindle the pre-recession boom.

Professor Borden laid out [his argument](#) for bringing the unblemished success of the private equity industry to law in a Huffington Post piece last week:

First, the capital infusion will make more lawsuits viable and increase the complexity of lawsuits. The increase in the number and complexity of lawsuits will drive up the demand for more and better litigating attorneys.

Professor Borden's first point also translates to "it will clog the courts with more frivolous lawsuits" — which is a boon to an ATL writer trawling for content, but that's about it.

The problem is that "moar lawsuits equals moar lawyers" is just a flawed and dated argument. Borden fails to grasp that lawsuits are no longer litigated that way. Technology and the learned experience of law firms and clients have fundamentally shifted the legal landscape. The document management firms that take on the economies of scale involved in investing in high-end review software and employ temp attorneys at bargain-basement prices in less desirable legal markets (I'm looking in your direction, Detroit), as well as the advances in predictive coding and artificial intelligence, are not going away. Increasing complex litigation no longer requires the firm to bring on more bodies to read hundreds of thousands of pages — it will all be outsourced either to struggling lawyers or the HAL 9000 — keeping the lid on the job market for litigators.

Second, faced with the increased likelihood of having to defend their actions and incur the costs of litigation and the higher costs of losing lawsuits, businesses will take greater care to structure transactions and practices legally. Such efforts will require the skills and expertise of competent transactional and regulatory attorneys, further increasing the demand for attorneys.

For this to make a lick of sense, one must assume that (a) both in-house and outside counsel phone it in when structuring deals in the status quo, and (b) having more lawyers looking at documents alleviates future legal issues. First, I doubt any lawyer will admit to sloughing it, and the hours logged by transactional and regulatory attorneys bear this out. Second, I'm confident every attorney will admit — if only in hushed tones — that bringing more lawyers into the process invariably compounds future legal problems. Too many cooks and what-not.

Third, TPLF, combined with an improving economy (which can't hold back indefinitely) and the relative dearth of attorneys that will result from the decreasing law school enrollment, portend a perfect storm that will hit the legal market.

But some law firms (and most clients) are realizing that the era of big staffing is over. The "manual labor" of document review and due diligence can be farmed out to the glut of out-of-work attorneys willing to make peanuts to service their loans. An improving economy will drive up the wages they can demand (because they could leave the law entirely to take advantage of better opportunities), but not to the level that once enticed students to law school in droves. If law students aren't guaranteed of getting boom-era salaries — and the majority of law students never will — there is nothing that will convince students to take on the debt law schools create unless the schools embrace fundamental change.

Professor Borden seems to be holding out for TPLF to rejustify the status quo legal landscape. TPLF may be a lot of things, but a [TARDIS](#) is not one of them.

The challenges facing a stagnant legal market cannot be addressed when you begin from the premise, "How can we go back to exactly where we were before?" It's the kind of "everything's cyclical" thinking critiqued in Bruce MacEwan's new book, [Growth Is Dead: Now What?](#) (affiliate link).