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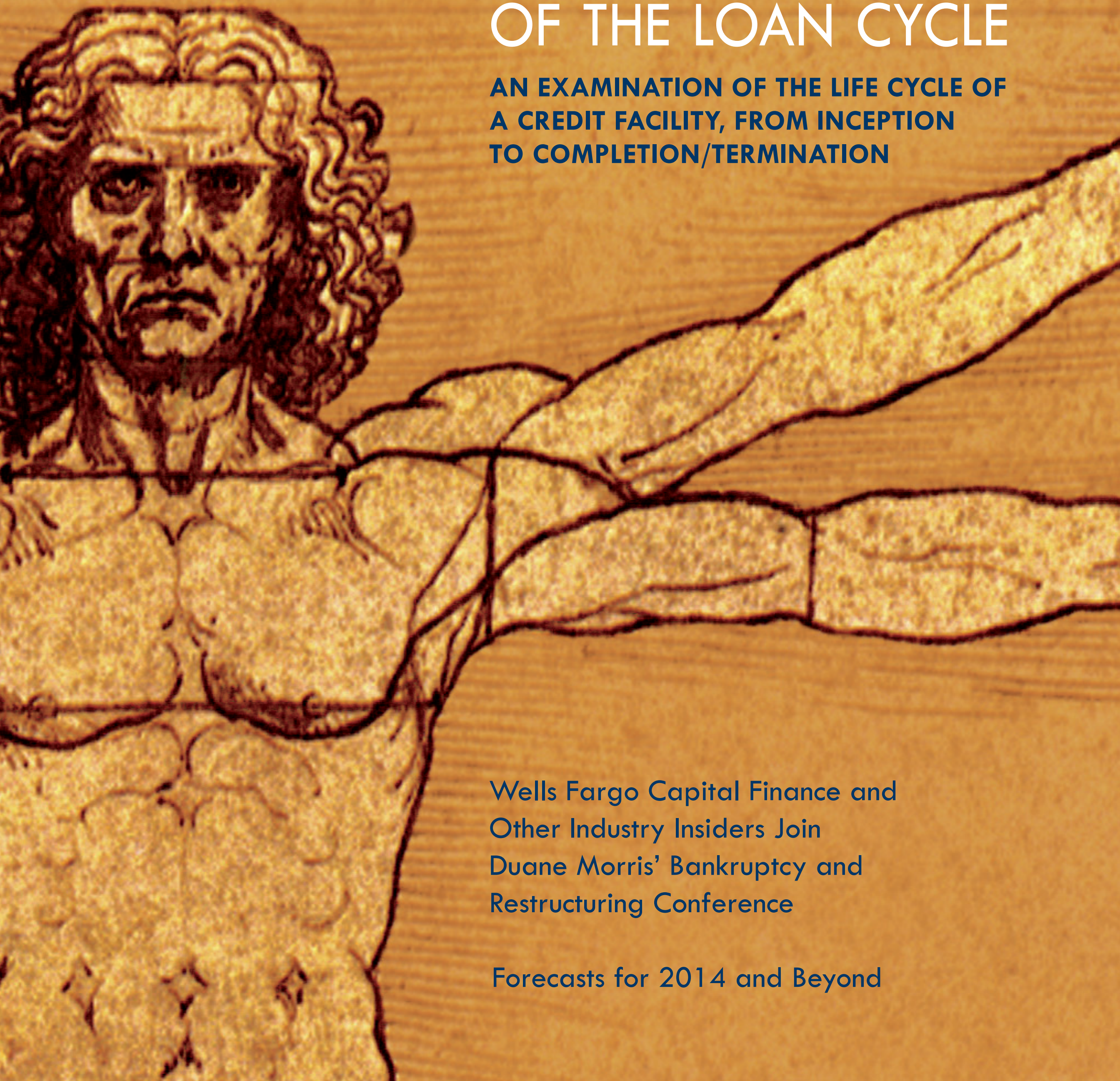

ANATOMY OF THE LOAN CYCLE

AN EXAMINATION OF THE LIFE CYCLE OF A CREDIT FACILITY, FROM INCEPTION TO COMPLETION/TERMINATION

Wells Fargo Capital Finance and Other Industry Insiders Join Duane Morris' Bankruptcy and Restructuring Conference

Forecasts for 2014 and Beyond

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LETTER FROM THE EDITORS

As one looks at potential business opportunities emerging in 2014, it is impossible to overlook 2013, a year in which the markets signaled an outlook more positive than at any time since the onset of the financial crisis and the Great Recession in 2008.

In the United States, the S&P 500 Index rose more than 30 percent and commodity prices moved toward a more rational, less speculative balance. Energy independence in the U.S., a prospect unimaginable for decades, continued to emerge in 2013 as a clear medium-term possibility, as did the corresponding prospect for a real recovery in American manufacturing. Even Europe, while still mired in an atmosphere of slow growth compounded by legacy social welfare costs, is beginning to show signs of vitality for investors.

All told, there are many reasons to like the business and investment environment unfolding in 2014. Why then, in the face of this rising tide that should be lifting all boats, does bank lending to mid-size and larger businesses remain sluggish?

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It is just this conundrum that provided the thematic focus for our recent colloquium, "Anatomy of the Loan Cycle," which offered a stage for the views of senior lending executives from major commercial banks together with those of our finance-focused restructuring lawyers. The "Anatomy" event supplies the underlying fodder for this publication—the second in our *Optimize* series—focused on how the prism of credit and debt provides greater insight into the economy at large and how the many intertwined interests in the credit/debt formula can reap new returns.

This was a no-holds-barred examination of how major financial institutions currently view their markets and the factors likely to accelerate or impede those markets, all of which may point to solutions for breaking the obdurate credit logjam.

We hope you'll agree that this edition of *Optimize* contributes to the dialogue in the industry, and we welcome your questions and comments.

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A CURIOUS LANDSCAPE: HOW DID WE GET HERE AND WHERE MIGHT WE BE GOING?

It is well-settled that in the years following devastating economic events or even less dramatic cyclical declines, illiquidity reigns, debt becomes expensive and hard to obtain, and lenders dictate the terms of the few loans that get made.

The uncertainty and apprehension that naturally and predictably followed the sub-prime mortgage crisis and Lehman's implosion in 2008 seemed the perfect landscape for a lengthy, hard-money, asset-based lending (ABL) environment. The downturn was precipitous, arguably the most severe since the Great Depression, and in many quarters, it was perceived as potentially cataclysmic. The most recent earlier time of severe economic distress—the early nineties, when an overheated commercial real estate market finally came to its senses and purged its excesses—resulted in typical fallout: few loans and only on lender-friendly terms.

"If the past was any indication of what should have happened, we would have gone from a period of crisis to a period of contraction, with the banks purging bad assets," says James J. Holman, a partner with Duane Morris. "Under normal circumstances, we would have had two or three years of pain—with a marked increase in bankruptcies and borrowers personally paying on loan guarantees—and an enforcement regime, with banks cracking down and demanding strict compliance on loan agreements."

Yet now, only several short years removed from a painful recession that many feared would become an economic Armageddon, banks and nontraditional lenders have piles of cash and a desire to lend it, keeping the ABL market alive. Further, commercial borrowers, rather than lenders, are largely calling the shots on loan terms.

From Left: Darryl Kuriger of Wells Fargo Capital Finance; Lauren Lonergan Taylor of Duane Morris; Matthew Berk, formerly of Carl Marks; Wendy Simkulak of Duane Morris; John Brady of Wells Fargo Capital Finance; and Jim Holman of Duane Morris at the Anatomy of the Loan Cycle conference.

"Generally speaking, conditions are either favorable for lenders, favorable for borrowers or balanced," says Darryl Kuriger, managing director at Wells Fargo Capital Finance, where he oversees large, multi-lender loans. "Over the last few years, the conditions have been more favorable for borrowers than for lenders. There's plenty of capital to be loaned. Most of the banks are flush with cash because of regulatory requirements for them to have capital on hand. Because of Dodd-Frank, the banks have exited some of their more exotic businesses—trading and origination of highly structured, synthetic products—and have gotten back to making traditional commercial loans. Most American companies are flat or growing modestly because the macro economy isn't particularly strong, so companies don't need to borrow that much. It's all supply and demand."

"Anatomy of the Loan Cycle" focused on this curious landscape and examined where the credit markets are, how they got here and where they might be headed. The panel discussed the causes of the most recent crisis and offered learned opinions about what future events might cause the pendulum to swing back the other way, using the life cycle of an asset-based loan as a microcosm. Joining Holman were fellow Duane Morris partners Lauren Lonergan Taylor and Wendy M. Simkulak, all of the firm's Business Reorganization and Financial Restructuring Practice Group. Rounding out the panel were John P. Brady, Senior Vice President at Wells Fargo Capital Finance, Kuriger and Matthew Berk, formerly a Managing Director at Carl Marks.

AN UNPRECEDENTED COLLAPSE, AN UNPRECEDENTED RESPONSE

To understand why banks are lending and borrowers are calling the shots, it may be worthwhile to look at the specifics and severity of the sub-prime meltdown, Lehman's demise and the ensuing recession. Ironically, it was the severity of the 2008 collapse and the panic it caused that have kept asset-based lending going.

The total sub-prime market in 2008 was relatively modest—less than 5 percent of the total mortgage market—Matthew Berk recalled: "So even if it all went away, that's not all that big a deal and the economy could absorb it without too much pain. What nobody saw at the time was the value and scope of derivatives tied to the performance of that portion of the mortgage market. They were all bets on market performance with major players on each side—I'm long, you're short, we'll see where we stand a year from now and settle up—that were not limited to the value of the underlying securities. If at any point in that year, you're out of the money by a certain amount, you have to put up real collateral to ensure you can pay me. Lehman went into crisis because it was overly long on the market, and when those securities started losing substantial value, Lehman didn't have the capital to meet the collateral calls and let the market play out."

Had the decline been more modest and the fears of depression less pronounced, intervention by the federal government, if any, probably would have been far less aggressive than it was. In the wake of Lehman's demise, the usual political and philosophical debate followed over the proper role of government and what, if anything, it should do to bolster the ailing economy. Economists who advanced the notion of federal government intervention carried the day over the objections of their laissez-faire counterparts. The federal government intervened in a significant way, most notably with the several hundred billion-dollar Troubled Asset Relief Program (TARP), but also by backstopping AIG, whose problems were similar to Lehman's but which was viewed as too crucial to the insurance market to fail.

One of the stated goals of the TARP program, in which the U.S. Treasury Department bought financial institutions' assets and equity, was to keep the lending landscape as close to normal as possible—thereby encouraging banks to lend to each other, to commercial borrowers and to consumers. TARP and its

Limiting exposure in a lending environment like this requires close study.

related programs amounted essentially to infusions of cash, in that they obviated the need for banks to hoard money to guard against future losses tied to troubled assets. As a result, banks could remain in the lending game.

"Put one way, the federal government provided liquidity," Holman said. "Put another, it printed money and threw a lot of it in the banks' direction."

That left banks with huge amounts of cash and a need to lend it, if they hoped to see returns and earn money. Meanwhile, the economy has limped ahead, stabilized, but hardly robust—and exhibiting relatively insignificant growth. Businesses are generally not expanding operations or growing via acquisition; their aggregate appetite for debt is slack.

FOR BORROWERS, IT'S FAT CITY

Of the major asset-based lenders, "We're all chasing the same deals," said Wells Fargo's Brady, who manages a portfolio of mostly $30 million and under ABL loans. "There's not a lot of new demand coming online, and we're all looking to lend to the better credits."

That scenario has kept interest rates at historical lows, but cheap money is not the only result of the imbalance of supply and demand. Lenders are writing asset-based loans with four- and five-year maturities, rather than the traditional two, and fewer financial covenants. Borrowers are negotiating for more lenient reporting and reserve requirements. Hoping both to keep their most creditworthy borrowers happy and to try to cross-sell other products to them, banks are generally willing to be more flexible with those commercial borrowers. They are increasingly tolerant of junior lenders and borrowers' desires to have them in deals.

"Like our competitors, we are willing to take incremental risks as to structure to try to close asset-based loans and maintain the relationship with the borrower," Brady said. "If the characteristics suggest an advance rate of 85 percent on accounts receivable and 50 percent on inventory, we might bump our numbers a bit. In an environment like this, when you deem a loan or a borrower worth it, you stretch out and give the borrower more availability, while still keeping a good handle on exposure. The more comfortable we feel about the borrower and their prospects, especially when there's more money chasing fewer deals, the more availability we'll allow. Borrowers will ask us: 'Can we report monthly instead of daily or weekly? Do you have to do three field exams a year? How about one or two? How about appraisals yearly instead of every six months?' We're getting pushed on these things and being forced to reevaluate the structures. We take them on a case-by-case basis and try, when possible, to protect borrowers' time, effort and expense. All these borrowers downsized coming out of the down cycle and they don't have fat, so they want to avoid—and we want to help them avoid, where possible—taking people away from their core mission."

Adds his colleague Kuriger: "These days, in the loan document, as a banker you highlight the 20 things you *really* don't like of the 50 things you don't like, and then you negotiate and get rid of the 10 you absolutely can't live with. It all comes down to your tolerance for pain, balanced against what your experience tells you will really hurt if [things go badly]. In this environment, you often end up saying, 'I don't love this, but in my experience, things like that haven't generally cost us money, so we'll live with it.'"

With low rates of return, generally unfavorable terms and partial ceding of control to borrowers, why do banks remain in the ABL game? "The importance of the loan itself is one thing," said Kuriger, who handles primarily large, multi-lender debt. "The importance of the prospect of the cross-sell is something else entirely. If a prospective borrower is working on a major acquisition, the loan is only a portion of what the bank can offer. Cash management, depository accounts and investment banking services come into play, and there's no shortage of internal constituencies eager to offer those services. The credit officers have to balance that, knowing that no amount of fees generated from ancillary services can make up for a bad loan. In the end, the bank looks at the overall picture and decides whether to extend credit and, if so, on what terms."

Panelists Darryl Kuriger, Lauren Lonergan Taylor and Matthew Berk bask in the afterglow of an enlightening discussion.

ALTERNATIVE LENDERS: THE ABCs OF BDCs, HEDGE FUNDS & NEWFANGLED INVESTMENT BANKS

Besides severity, one key difference between the 2008 meltdown and earlier downturns was the proliferation of hedge funds, business development corporations (BDC), private equity funds and other alternative lenders as a source of cash. "This time, those private pools of capital are out there," Berk said. He pointed out that the major investment banks, which previously had been conservative private partnerships investing their own money, have since gone public, raised significant capital and are competing with hedge funds, BDCs and banks to make direct loans. The private lenders tend to tolerate more risk than traditional lenders, and often are formed to take advantage of distress. "Their investors mandate that they pursue and return high yields. They're managed differently. They're essentially unregulated and they're a big force in today's ABL market." In fact, 2013 marked the first time in history that nonbank lenders held more than 50 percent of the debt in the leveraged loan market.

"As long as the rules of the game stay the same," Berk said, referring to the relatively unregulated landscape that private funds enjoy, "the trend will probably increase gradually. Nonbanks will have bigger and bigger pieces of the lending market." He acknowledges, however, that precise trend lines are hard to forecast because added regulation of private funds would alter the playing field. "Private capital will still win deals because they are faster and more flexible," he said. "But banks have

Duane Morris' Lauren Lonergan Taylor makes her point to (from left) Ernest May and Anwar Young of Wells Fargo Capital Finance.

weapons too—size, distribution capacity and other products—that they offer which private funds do not and will not, such as foreign exchange capability. If you're not a loan customer of a bank, the bank may be less interested in providing you with the other products."

Hedge funds and other private lenders can also have an edge over traditional banks, Berk says, because of their radically different cost structure and cost of capital. Heavily regulated banks must reserve for possible losses, with the size of the reserve varying directly with the risk of the loan. "Anything that the bank has to reserve cannot be deployed otherwise, and there's a cost to money doing absolutely nothing but sitting there as a reserve," Berk says. "That cost gets figured into how banks price their loans, and that can give the private pools of capital an edge on pricing." (The cost of reserves can even motivate banks to sell performing loans at discounts, he says: "They sell the loan, which frees up the reserve and that, in turn, cleans up the balance sheet.")

The likeliest challenge to private funds' prominence in ABL will be when interest rates rise, according to Berk, who says: "That's the big open question. If short-term rates increase to 3 or 4 percent, are all those loan funds still going to be in the game or gone? If rates go to 4 or 5 percent and I can invest in T-bills at that level essentially without risk, do I want to invest in a fund at 7 or 8 percent? That's a harder call than it is today, when it's zero for T-bills and 4 or 5 percent with the funds. If it's Apollo or Cerberus, with gold standard management, investors have probably decided to stay with them unless they mess something up. Joe's Loan Store, which got started with a few million dollars, will go away because it won't be able to raise more capital. Nobody knows where those lines will be drawn or how many will go away. These are important issues because they will determine the competitiveness of the lending environment, and that will have a significant effect on ABL."

THE COLLATERAL TAFFY PULL IN BANKRUPTCY: INSURANCE CARRIERS WANT (TO KEEP) THEIR SHARE

When companies liquidate through bankruptcy, the battle among creditors for collateral can be fierce. We tend to think of lenders, including debtor-in-possession lenders, who generally enjoy a priority lien on debtors' assets, as those who have an interest in collateral. Insurance companies, however, also often take collateral—particularly, to secure an insured's obligation to reimburse an insurer for amounts within deductibles. As Duane Morris partner Taylor explains: "Losses covered by an insurance program develop over time so insurance agreements often require an insured to post collateral at the onset of the insurance program and to provide additional collateral over time if necessary. Typically, those agreements also provide that the insurer may retain that collateral until all claims covered by the insurance program are fully and finally closed and cannot be reopened."

Duane Morris partner Christopher Winter (left) shares insights with Gary Farnesi of Cape Bank.

According to Duane Morris partner Simkulak, "The amount of collateral that is necessary is generally based upon actuarial calculations and financial factors." As such, the amount of an insurer's claim can be estimated at any given time, but the valuations thereof can vary depending on what information is available and how it is assessed. However, the value of the collateral that an insurer actually holds at any given time is normally not disputable, as it is most often in the form of a letter of credit or cash. Thus, an insurer's claim and collateral present similar yet in some ways, polar-opposite issues than those of other secured creditors. As Simkulak explains: "Most creditors have claims for liquidated amounts but the value of their collateral (*e.g.*, real property or inventory) needs to be estimated; whereas, insurers have collateral in finite amounts but claims that need to be, at least in part, estimated." Thus, when challenges arise regarding the amount of collateral that an insurer is holding or when an insurer asserts that its claim is in excess of the amount of collateral it holds, there is often a battle of actuarial and financial experts. In most recent cases, Simkulak and Taylor agree, the courts have understood the carriers' needs to hold collateral and have prevented other parties-in-interest from getting to the insurance companies' collateral.

COAL AND FRACKING AND HEALTHCARE, OH MY!

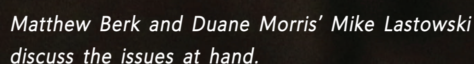
Some industry sectors—those that feature significant working capital, receivables and inventory—generally fit the ABL model better than others. Steel mills, metals, consumer products companies with distribution facilities and retailers with inventory are generally made for ABL, Wells Fargo's Kuriger says. He adds that ABL lenders are looking to extend their reach to the technology industry and healthcare, which together comprise a significant portion of the nation's gross domestic product. Similarly, he says, banks are looking to expand geographically and follow their borrowers to the east and south, as far as Europe and Asia. (Obtaining perfected security interests and enforcing them can be a challenge, he acknowledges, but one that can be overcome.)

Berk sees lending challenges ahead in the energy subsectors of coal and hydraulic fracturing, but for the opposite reasons. The Obama administration and the U.S. Environmental Protection Agency look with disfavor on coal and plants that burn coal, Berk says, putting increasing pressure on the relatively few coal players that survive. "Coal is long past its peak and there's no indication it will take off again, so the risk in investing in coal is high. Fracking is the opposite. If you're investing there, you're on the early side of the curve and there appears to be a huge reserve of natural gas in the United States and elsewhere. As quickly as fracking has taken off, there are players all over the landscape, from mom-and-pop operators to multinationals," he says. "The industry is volatile due to pricing and regulation, and because it's so new, there is likely to be quite a bit of shakeout. The smaller players will combine to create bigger ones, or they'll go away. Even if you're right on the industry, you still have to pick the right horse."

As for healthcare, Berk sees an industry in flux—"flogged to death in the newspaper every day"—and a tricky investment landscape that extends to affiliated businesses in healthcare, such as pharmaceutical, medical devices and supplies, and assisted living, among others. "Healthcare doesn't go away," he acknowledges, "but it will be challenging to figure out where companies stand with regard to new rules and, as a result, which are the solid investments."

The bottom line, Berk says: "As you see capital flow to favored industries, it becomes harder to raise capital for those that are out of favor. Refinancings become more challenging, and that results in sales and reorganization."

Says Kuriger: "Lenders know they need to expand into different industries, and the way they'll do it is to slowly build expertise in those sectors. They'll do a small deal, then a couple of small deals, learn from their mistakes, learn to evaluate collateral and then do larger deals in those industries for the better credits. They'll look especially to strong companies to minimize the likelihood they'll have to test their ABL asset valuation assumptions because the risk of default is so low. As an industry, we came through Lehman in decent shape because we stuck to the disciplines of asset-based lending, and that's what we'll try to continue to do."



Matthew Berk and Duane Morris' Mike Lastowski discuss the issues at hand.

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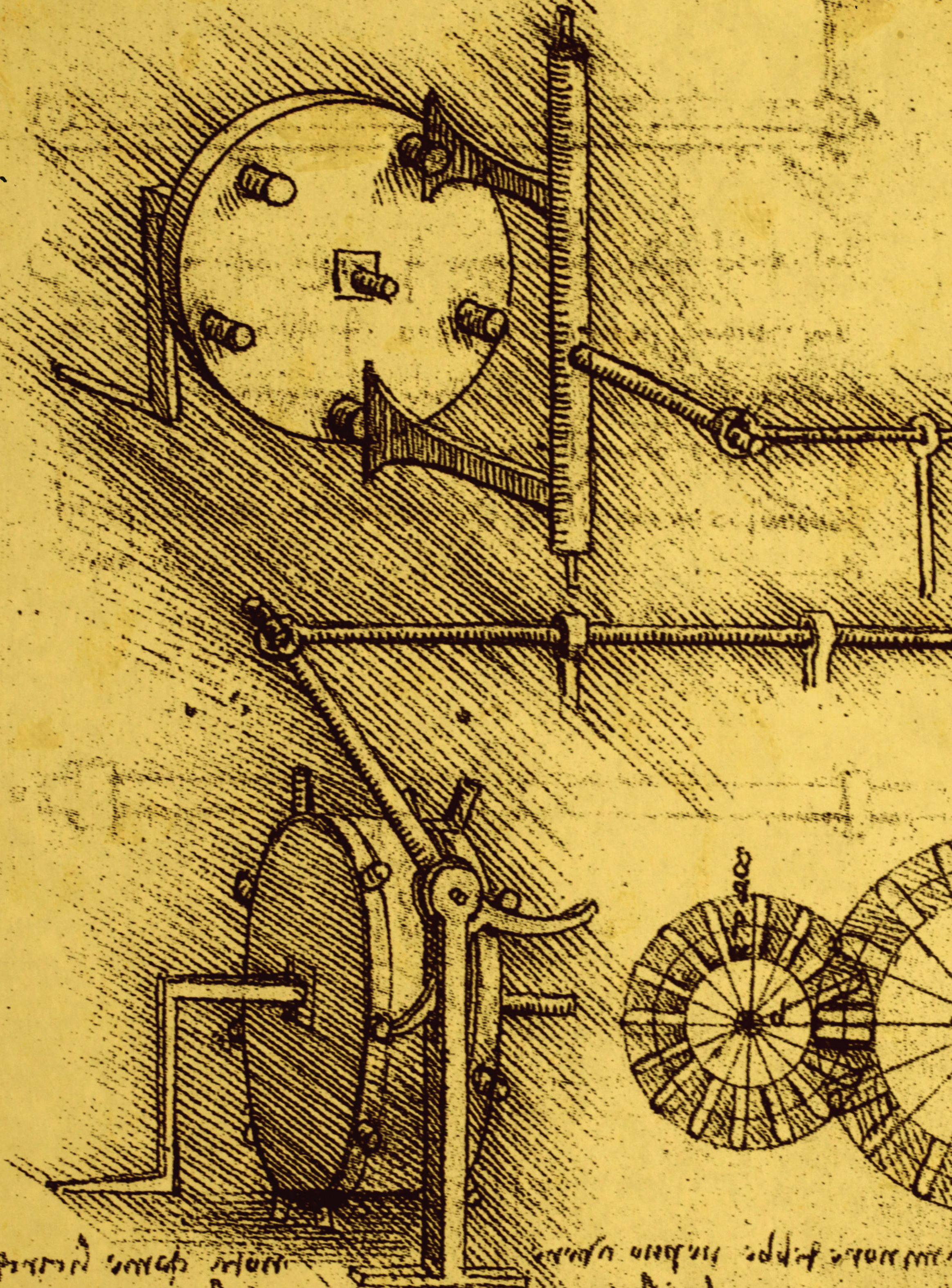
As the machine churns on, eventually troubled companies will be called to account and purged from the system.



THE PENDULUM WILL SWING

For bankers (and attorneys who focus on reorganizations and bankruptcy law), there is some consolation in knowing that nothing stays the same forever. For borrowers—alas—there is some consternation in knowing nothing stays the same forever. As surely as the spigot flew open and cheap money poured out, at some point, the raging torrent will become but a trickle. But when will that happen, and what might cause it?

According to Holman: "At some point, there will be entirely too much money chasing too few assets and goods, which will drive up the prices of those assets and goods. When that inflation occurs—when there's any sign of inflation—the Fed will start retracting. We haven't seen it yet, but it's probably only a matter of time. The lending deals that are in place, at ridiculously low rates and at long maturities, are life support for companies. But there's not a lot of new ideas or job growth. At some point, troubled companies will be called to account and be purged from the system."

What impact will those borrower-driven loan terms have on lenders once this purge begins? Taylor says: "When the pendulum starts to swing, the looser terms in loan documents borne of an excess of cash and little demand will prove less than ideal for lenders. Lenders may face challenges in calling a default and exiting a credit in a timely manner. Those softer terms will give borrowers a longer rope."

Says Brady: "The big question is how regulators—whether it's the Fed, or the legislative side, or the Office of the Comptroller of the Currency—will view the ABL product line. Under Dodd-Frank, will they see it as leveraged? That would put pressure on the banks and raise costs. If that happens, many lenders might get out of or restrict ABL activity. That would result in better pricing from the banks' perspectives, but would dry up liquidity overall. You'd have fewer players looking to lend, even fewer if some alternative lenders get out. All of that would increase borrowers' costs. Inflation could be a factor, but the significant game changer is regulation. We've had inflation before and figured it out. Regulation equals uncertainty as to the cost of doing business in the leveraged market."

SPEAKER PROFILES

JAMES J. HOLMAN is a Partner at Duane Morris LLP. Mr. Holman practices in the areas of commercial finance law, business reorganization, business and municipal insolvency, and complex asset planning. He represents institutional lenders, trust companies, insurance companies and businesses in a broad spectrum of transactions, including corporate finance, asset sales and planning structures, business restructuring and bankruptcy. He also provides advice on matters affecting wealth and asset planning for high net worth individuals.

WENDY M. SIMKULAK is a Partner at Duane Morris LLP. Ms. Simkulak practices in the areas of bankruptcy, corporate reorganization, creditors' rights, commercial finance, secured transactions and international commerce. She represents financial institutions, insurance companies, trade creditors, lessors, liquidating trustees and debtors in debt restructurings and in all aspects of a bankruptcy case. Ms. Simkulak has served as counsel to insurance companies providing prepetition and/or postpetition insurance coverage to debtors in complex chapter 11 cases and has advised mortgagees and assignees of non-residential leases in large chapter 11 cases.

LAUREN LONERGAN TAYLOR is a Partner at Duane Morris LLP. Ms. Taylor practices in the areas of commercial finance, secured transactions, business reorganization, financial restructuring, creditors' rights and bankruptcy law. She represents numerous commercial banks, insurance companies, non-institutional lenders and borrowers in secured lending, asset-based lending, leasing and credit enhancement transactions and other types of commercial transactions. Ms. Taylor has assisted both creditors and borrowers in complex workout, restructuring and insolvency matters, including in connection with the enforcement of remedies through commercial litigation in federal and state court.

Duane Morris' Jim Holman addresses the audience as Duane Morris' Wendy Simkulak and Wells Fargo Capital Finance's John Brady listen attentively.

MATTHEW BERK is a former Managing Director at Carl Marks. Mr. Berk has more than 30 years' experience in providing transactional and financial restructuring guidance to financially challenged businesses, as well as counseling creditor constituencies seeking to successfully maximize their recoveries in distressed situations. As an investment banker, principal and attorney, he has been involved with numerous chapter 11 proceedings, out-of-court restructurings, and distressed sale and financing transactions in the United States and internationally.

JOHN P. BRADY is a Senior Vice President at Wells Fargo Capital Finance, which offers traditional asset-based lending, specialized junior and senior secured financing, factoring and financing for domestic and international trade to a wide range of companies throughout the United States, Canada and the United Kingdom.

DARRYL KURIGER is Managing Director, Loan Sales & Syndications, at Wells Fargo Capital Finance. He has spent most of his career working in debt capital markets, with a particular emphasis in asset-based lending. Mr. Kuriger has held functional positions in loan syndications, underwriting, originations and portfolio management. He has served a broad array of clients in the industrial growth, consumer and retail industries.

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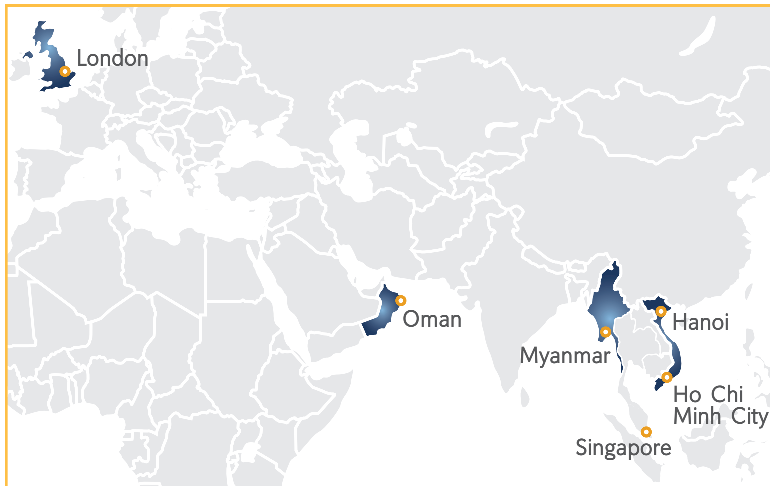
ABOUT DUANE MORRIS

With experienced bankruptcy and restructuring lawyers across our domestic and global platform, coupled with the deep capabilities of more than 700 lawyers across all practice areas, Duane Morris offers the resources to optimize our clients' interests. From creditor to debtor, and trustee to committee, our bankruptcy practice is regularly recognized as one of the most active for both case volume and value of assets. We leverage our core experience in bankruptcy law, creditors' rights and asset recovery actions and the full range of services for commercial mortgages and other asset classes, working with banks, non-bank lenders, special servicers, debt purchasers and asset buyers.

On the distressed deal side, our lawyers have negotiated and brokered major transactions in such industries as manufacturing, real estate, telecommunications and retail. Five of the practice group's former attorneys are sitting United States Bankruptcy Court judges, and another is a judge on the United States Court of Appeals for the Third Circuit.



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