Millennium: Are Syndicated Loans Securities?

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In litigation related to the Millennium bankruptcy, the trustee for the bankruptcy's litigation trust sued the agent banks that underwrote a $1.75 billion dollar loan to Millennium, alleging that by fraudulently originating the loans they violated state "Blue Sky Laws." "Blue Sky Laws" are the state equivalent to the federal securities laws. The trustee argues that the loans should be treated as securities under the "Blue Sky Laws." The banks responded on a motion to dismiss on a number of grounds including that the loans are not securities under the "Blue Sky Laws." The LSTA recently filed an amicus brief supporting the position of the agent banks, arguing that treatment of syndicated loans as securities would radically change the process of syndicating and trading loans, and could have implications for the CLO market. It would mean that parties would have to comply with the securities law-related rules, such as preparing an offering memorandum, providing comfort letters and complying with 10(b)(5) disclosures for certain transactions.

Overall, the negotiation, making and administration of syndicated loans (before and after an event of default) would be upended as at each stage parties would have to comply with these securities law-related rules. An adverse ruling could also have implications to the direct lending market. LSTA notes that it could drive borrowers towards direct lenders since these loans are not securities. That may be the case as direct lending loans which are not DTC registered or widely traded are generally not considered securities. However, a decision adverse to the agent banks in this case, while not directly implicating direct lenders, could be troubling. Even if not directly applicable to direct lenders, we could see a radical change in practices in the syndicated market level having a direct impact on the direct lending market.

We will continue to closely monitor this case and provide updates as they occur.