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Trust Indenture Act of 1939: A Sleeping Statute Comes Back to Life

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In December 2014 and January 2015, the U.S. District Court for the Southern District of New York issued two separate decisions involving the Trust Indenture Act of 1939 (the "*TIA*"), a statute that has been rarely invoked in its over 75 year old history. Both cases, *Marblegate Asset Management v. Education Management*[1] and *MeehanCombs Global Credit Opportunities Funds v. Caesars Entertainment Corp*,[2] involved creditors challenging out-of-court restructurings on the basis that the obligor violated the TIA by impairing creditors' practical ability to receive payment on their debts. The impact of the two contemporaneous decisions has opened a floodgate of questions in the restructuring community – chiefly, why has the TIA not been invoked by minority creditors with more frequency; does the current financial landscape nullify the need for the TIA; and what will be the ultimate consequence of these decisions on obligors and creditors alike when engaging in out-of-court negotiations? The Southern District's decisions may prove fruitful in hindering nonconsensual out-of-court restructurings, to the benefit of minority-stake creditors otherwise in jeopardy of losing their practical ability to receive payment on debts, but conversely, the decisions could hinder the ability of a distressed obligor to freely negotiate in an out-of-court context without the associated costs and expenses of a judicial process.

At a minimum, the decisions have put obligors on alert when crafting out of court restructuring strategies that may arguably impair creditors' practical ability to receive payment. The twin decisions will likely give creditors who previously had little to no voice at the bargaining table some increased leverage. However, because of the underdeveloped judicial guidance surrounding the TIA, the true impact of these decisions remains to be seen. Until we have clarity, many speculate that the uncertainty surrounding the decisions will temporarily cripple out-of-court restructurings and, in turn, increase Chapter 11 filings as the alternative and more prudent means for effectuating reorganizations.

I) Need for the Trust Indenture Act of 1939

Central to understanding the recent decisions interpreting the TIA is the history behind the statute. During the 1930s, Congress passed a flurry of bankruptcy-related legislation. Beginning in 1933, Congress amended the existing bankruptcy laws by first allowing

[1] *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, No. 14 CIV. 8584 KPF, 2014 BL 366259 (S.D.N.Y. Dec. 30, 2014).

[2] *MeehanCombs Global Credit Opportunities Funds, et. al. v. Caesars Entertainment Corp., et. al.*, Case No. 14-cv-07091, ECF No. 28, 2015 BL 9980 (S.D.N.Y. Jan. 15, 2015).

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individuals – and then corporations – to reorganize instead of liquidating.[3] By 1937, Congress had twice authorized municipal reorganizations.[4] The next year, Congress passed the Bankruptcy Act of 1938, which substantially revised almost every provision of the Bankruptcy Act of 1898.[5] The Bankruptcy Act of 1938 was passed, in part, to grant individuals new privileges, minimize evasions by dishonest debtors, improve administrative processes, and promote transparency and accountability.[6] In all cases where debts exceeded $250,000, bankruptcy trustees became mandatory, whereas previously debtors were simply allowed to continue operating as a debtor-in-possession.[7] The new Act also required the Securities and Exchange Commission to evaluate a plan's impact on public investor interests in cases involving more than $3 million.[8]

Underlying the expansion and overhaul of the bankruptcy process through the 1930s was the Congressional intent to encourage (or even require) increased judicial overview of reorganizations. The need for such supervision was openly expressed in a comprehensive 1937 study by the Securities and Exchange Commission, which reflected unease over insider control of bond issuances and reorganizations.[9] The study noted that because individual investors usually had little information and small holdings, it became impossible or impractical for them to defend their positions.[10] The Securities and Exchange Commission study also suggested that insiders sought opaque reorganizations at the expense of minority investor groups because of ''the desire of the management to be reinstated in control of the enterprise [after reorganization] and its desire to thwart all investigation of its own alleged misdeeds . . . .''[11] Consequently, the Securities and Exchange Commission advised Congress that any legislative program designed to protect the interests of investors ''must involve an *extension* of the supervisory power of judicial or administrative agencies.''[12]

Increased judicial oversight over reorganizations continued with the passage of the TIA, which established federal statutory standards for governing trust indentures.[13] Legislative history indicates that Congress enacted the TIA to address various and prevalent deficiencies in trust indentures at the time – chiefly, the failure of indentures to require evidence of an obligor's performance under the indentures, the lack of disclosure and reporting requirements, and the presence of significant obstacles to collective bondholder action.[14] According to Congress, these deficiencies were compounded by the perceived lack of transparency in drafting indentures and the growing number of bond issuances.[15] In light of these problems and the Securities and Exchange Commission's extensive 1937 study,[16] Congress passed the TIA to prevent obligors' ''[e]vasion of judicial scrutiny of the fairness of debt-readjustment plans . . . .''[17]

The changes to the financial landscape in the last half century have raised questions regarding whether the need for the TIA has been nullified.[18] For example, one commentator has noted that because sophisticated and large financial institutions, such as mutual funds, now hold the overwhelming majority of securities issued under most indentures, the risk of a corrupt deal impacting an individual is mitigated.[19] Even back in 1995, Congressman Jack Fields called for the repeal of the TIA on the grounds that the 1939 law ''has been eclipsed by market developments'' because the market required indenture provisions more stringent than the TIA did.[20]

II) Challenges Brought under the Trust Indenture Act of 1939

The challenges in both *Education Management* and *Caesars* were primarily based upon Section 316(b) of the TIA, which provides that an indenture security holder's right to receive principal and interest under an indenture ''shall not be impaired or affected without the consent of such holder . . . .''[21] Despite the TIA's over 75 year history, there have been few cases determining precisely what sort of actions ''impair or affect'' a hold-

[3] *See* Act of Mar. 3, 1933, ch. 204, 47 Stat. 1467, 1467–70 (creating § 74 of Bankruptcy Act of 1898); Act of June 7, 1934, ch. 345, 48 Stat. 911, 912–25 (creating § 77B of Bankruptcy Act of 1898).

[4] *See* Act of May 24, 1934, ch. 345, 48 Stat. 798 (creating Chapter IX of Bankruptcy Act of 1898); Act of Aug. 16, 1937, ch. 657, 50 Stat. 653 (creating Chapter X of the Bankruptcy Act of 1898 in light of the Supreme Court's reversal of predecessor in *Ashton v. Cameron Cnty. Water Improvement Dist. No. 1*).

[5] *See* Charles Jordan Tabb, *History of Bankruptcy Laws in the United States*, 6 ABI Law Review 5, 29 (1995).

[6] *See* Vincent L. Leibell, Jr., *The Chandler Act – Its Effect Upon the Law of Bankruptcy*, 9 Fordham Law Review 380, 386 (1940). For example, any creditor could be heard on all matters and could controvert material allegations, whereas the predecessor Act had permitted only groups of creditors holding certain threshold amounts to do so. *See* George Cochran Doub, *Corporate Reorganizations under Chapter X of the National Bankruptcy Act*, 3 Maryland Law Review 1, 26 (1938).

[7] *See* Chandler Act, *supra* note 6, at 395.

[8] *Id.* at 396.

[9] *See* Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective Reorganization Committees, Part III, Committees for the Holders of Real Estate Bonds 225-26 (1937).

[10] *See* Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective Reorganization Committees, Part II, Committees and Conflicts of Interest 1 (1937).

[11] *Id.* at 16.

[12] *See* Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective Reorganization Committees, Part I, Strategy and Techniques of Protective and Reorganization Committees 898 (1937) (emphasis added).

[13] *See* S. Rep. No. 76-248, at 1–2 (1939).

[14] *Id.* at 5–8.

[15] *Id.* at 4. At the time the TIA was being considered by Congress, securities governed by an indenture approximated $40 billion. *Id.* As of December 31, 2013, securities governed by indentures were nearly $37 trillion. *See* SIFMA Statistics, Updated Jan. 29, 2015, http://www.sifma.org/research/statistics.aspx.

[16] *Id.* at 8.

[17] *Id.* at 26.

[18] *See, e.g.*, Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 Yale L.J. 232, 258 (1987); James Gadsden, *Trust Indenture Act Under Attack*, 113 Banking L.J. 967 (1996).

[19] *See* Voting Prohibition in Bond Workouts, *supra* note 18, at 259.

[20] *See* Trust Indenture Act Under Attack, *supra* note 18, at 968 (quoting press release of Congressman Jack Fields).

[21] *See* 15 U.S.C.A. § 77ppp (West).

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er's right to receive payment of principal and interest. But, an examination of that case law illustrates how the courts in *Caesars* and *Education Management* concluded that the TIA may constrain the restructurings proposed therein.

A. Early Cases Involving Section 316(b) of the Trust Indenture Act

One of the initial cases that addressed Section 316(b) of the TIA was the 1992 case *UPIC Co. v. Kinder-Care Learning Centers*.[22] Specifically, in *UPIC*, the U.S. District Court for the Southern District of New York was asked to decide whether indenture subordination provisions violated Section 316(b) of the TIA because they ''impaired or affected'' a noteholder's right to receive payment of principal and interest.[23] The court ultimately agreed with the obligor's argument that although Section 316(b) guaranteed an investor's ''procedural'' right to commence an action for nonpayment of debts, Section 316(b) ''does not affect or alter the substance of a noteholder's right to payment of principal and interest . . . and cannot 'override' '' an indenture's subordination provisions.[24] The court found that the subordination provisions did not impair the investor's unconditional right to receive payment of principal and interest, but instead only established and protected the relative rights of debtholders of varying seniority. As a result, the court held that the indenture did not violate the TIA.[25] Although the decision affirmed priority schemes common in debt issuances, the court provided little guidance about the substance of a debtholder's right to receive payment.

Approximately seven years later, the Southern District of New York issued a preliminary injunction against a corporation for violating Section 316(b) of the TIA for attempting to transfer assets out while leaving its debts behind. Specifically, in the seminal case *Federated Strategic Income Fund v. Mechala Group Jamaica*,[26] a group of noteholders sought an injunction against Mechala on the grounds that Mechala's out-of-court restructuring and tender offer violated the TIA.[27] Mechala's out-of-court restructuring involved a cash tender offer contingent on consents to amending the governing indenture.[28] Once a majority of noteholders tendered their notes, the indenture would be amended to eliminate, among other things, (1) certain events of default, (2) guarantees of the notes by Mechala's subsidiaries, and (3) the requirement for the obligor to maintain a corporate existence.[29] After the indenture was amended and the tender offer was completed, Mechala would transfer all of its assets to its subsidiaries, leaving only a holding company with ''nominal amount[s] of cash and other assets . . . .''[30]

In analyzing the merits in the context of a preliminary injunction, the U.S. District Court for the Southern District of New York noted that the proposed restructuring violated the TIA because it violated the noteholders' practical ability to recover payments:

> Taken together, these proposed amendments could materially impair or affect a holder's right to sue. A holder who chooses to sue for payment at the date of maturity will no longer, **as a practical matter**, be able to seek recourse from either the assetless defendant or from the discharged guarantors.[31] [emphasis added]

Ultimately, the court granted the plaintiffs a preliminary injunction on the grounds that (1) the plaintiffs would likely be successful on the merits because the tender offer violated the TIA by leaving noteholders with little recourse from the assetless defendant or discharged guarantors, and (2) the plaintiffs would suffer irreparable harm by virtue of being unable to recover against an insolvent defendant.[32]

B. Twenty-First Century Decisions Rejecting *Mechala*

After the Southern District of New York's decision in *Mechala*, where the court found that the TIA protected a creditor's ''practical'' right to recover, courts in other jurisdictions took an opposite approach – interpreting Section 316(b) of the TIA as protecting only a legal right to payment.[33]

For instance, in *Northwestern Corp.*, the Delaware bankruptcy court ruled that a transfer of assets without a transfer of appurtenant liabilities, which ultimately led to a bankruptcy filing, did not violate a creditor's right to receive payment under the TIA.[34] The Delaware bankruptcy court, without offering substantial analysis, concluded that the TIA applied only to a creditor's ''*legal* rights and not the [creditor's] *practical* rights to the principal and interest itself.''[35]

Similarly, in *YRC Worldwide*, an obligor successfully sought a declaratory judgment that the indenture trustee was required to sign supplemental indentures removing a provision prohibiting the transfer of substantially all of a debtor's assets.[36] The indenture trustee alleged, among other things, that it could not sign the supplemental indentures without violating Section 316(b) of the TIA.[37] Ultimately, the U.S. District Court for the District of Kansas reasoned that although removing the provision ''might make it more difficult for holders to receive payment directly'' from the obligor,[38] removing the provision did not impair a creditor's legal right to receive payment because the TIA made no guarantees regarding a creditor's *practical* rights.[39]

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[22] *UPIC & Co. v. Kinder-Care Learning Centers, Inc.*, 793 F. Supp. 448 (S.D.N.Y. 1992).
[23] *Id.* at 456–57.
[24] *Id.* at 457.
[25] *Id.* at 459.
[26] *Federated Strategic Income Fund v. Mechala Grp. Jamaica Ltd.*, No. 99 CIV 10517 HB, 1999 WL 993648 (S.D.N.Y. Nov. 2, 1999).
[27] *Id.* at *3
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at *7.
[32] *Id.* at **5–10.
[33] *YRC Worldwide Inc. v. Deutsche Bank Trust Co. Americas*, No. 10-2106-JWL, 2010 BL 149963, at *8 (D. Kan. July 1, 2010); *In re Nw. Corp.*, 313 B.R. 595, 600 (Bankr. D. Del. 2004).
[34] *See Nw. Corp.*, 313 B.R. at 600.
[35] *Id.* (emphasis in original).
[36] *See YRC Worldwide Inc.*, 2010 BL 149963 at *1.
[37] *Id.*
[38] *Id.* at *8.
[39] *Id.* (quoting *Nw. Corp.*). Interestingly, the *YRC Worldwide* court distinguished its case from *Mechala* by noting that the debtor was not in-fact seeking to transfer all of its assets (but instead merely removing the restriction to do so) and furthermore did not remove the guarantees on the notes. *See YRC Worldwide Inc.*, 2010 BL 149963 at *8. It is unclear whether the

When taken together, the reasoning in *Northwestern Corp.* and *YRC Worldwide* suggests that only direct modifications to an indenture's terms providing for payment would constitute a violation of the TIA.

C. Southern District of New York's Reconfirmation of *Mechala*

In December 2014 and January 2015, the U.S. District Court for the Southern District of New York essentially rejected the reasoning in *Northwest Corp.* and *YRC Worldwide*.[40]

In *Marblegate Asset Management v. Education Management Corp.*, the Southern District of New York denied noteholders' request for a preliminary injunction despite finding that Education Management Corp. likely violated the Section 316(b) of the TIA.[41] Education Management Corp. had made a tender offer to its noteholders, offering a certain amount of convertible equity and $400 million in cash.[42] In its offering materials, Education Management Corp. warned that if it did not receive 100% of debt tendered, it would be forced to conduct an intercompany sale, in which Education Management Corp.'s parent company would release its guarantee of the loans, the secured lenders would foreclose on substantially all Education Management Corp.'s assets, and the secured lenders would sell the assets back to a newly formed subsidiary.[43] The newly formed subsidiary would distribute debt and equity to consenting creditors that supported the proposed restructuring.[44] As a result, dissenting creditors would be left with claims against an assetless Education Management Corp.

In finding that the TIA provided protection with respect to certain nonconsensual restructurings, the court reasoned that the TIA ''protects the *ability*, and not merely the formal right, to receive payment in some circumstances.''[45] The court then refined its holding in *Mechala* by offering a test for determining violations of the TIA:

> Practical and formal modifications that do not explicitly alter a core term 'impair[] or affect[]' a bondholder's rights to receive payment in violation of the Trust Indenture Act *only when* such modifications effect an involuntary debt restructuring.[46] [emphasis added]

The court emphasized that the purpose of Education Management Corp.'s intercompany sale was ''to effect a *complete* impairment'' of the dissenting creditors' rights to receive payment and thereby would violate the TIA.[47] However, despite concluding that the obligor had violated the TIA, the court ultimately denied the plaintiffs' request for a preliminary injunction because they failed to meet the other preliminary injunction factors of establishing irreparable harm, showing a balance of equities that favored an injunction, and proving that public interest favored an injunction.[48]

About a month later, in *MeehanCombs Global Credit, et. al. v. Caesars Entertainment Corp.*, the Southern District of New York reaffirmed its reasoning in *Mechala* and *Education Management*.[49] In *Caesars*, a group of plaintiffs alleged that removal of the guarantee of parent company Caesars Entertainment Corporation (''*CEC*'') coupled with the transfer of the assets of Caesars Entertainment Operating Company (''*CEOC*'') violated the TIA because it impaired the plaintiffs' practical ability to recover payment.[50] CEC made a tender offer in which noteholders would be paid par plus accrued interest and transactional fees in costs, in exchange for which, the noteholders would consent to amendments to remove (1) CEC's guarantee of the notes, and (2) the covenant restricting CEOC's ability to dispose of substantially all its assets.[51] Afterwards, CEC would ultimately aim to transfer CEOC's assets away while leaving its debt behind and push CEOC into bankruptcy.[52]

Examining the plaintiffs' claim under the 12(b)(6) standard, the court concluded that the proposed restructuring could survive a motion to dismiss and that the defendants had probably violated the TIA.[53] Directly relying on *Mechala* and *Education Management*, the court found that the TIA protected against more than only formal and explicit modifications to the legal right to receive payment, and as set forth in *Mechala* and *Education Management*, prevented a party from leaving creditors with an ''empty right to assert a payment default from an insolvent issuer . . . .''[54]

III) Considerations for Future Restructurings

The *Caesars* and *Education Management* decisions involved distinct facts that enunciated complementary principles about the TIA. Both cases featured restructurings with large institutional and sophisticated creditors that had similarly large and sophisticated counsel. However, in *Education Management*, the obligor negotiated with 18 asset management firms holding 80.6% of its secured debt and 80.7% of its unsecured debt.[55] Furthermore, the plaintiffs in *Education Management* held $20 million of the obligor's debt, worth just 3.5% to 4.5% of their respective assets under management.[56] Consequently, one might intimate that in light of the large sophisticated parties, the TIA would be considered a less critical protection because such parties can adequately protect their own interests, mitigating many of Congress' concerns underlying the TIA. By contrast, in *Caesars*, the plaintiffs were large institutional clients, but the majority of notes were owned by individual in-

YRC Worldwide court would rule similarly if faced with the facts in *Mechala*.

[40] *See Caesars Entm't Corp.* 2015 BL 9980, at *5 n.50; *Educ. Mgmt. Corp.*, 2014 BL 366259, at **18-19 (''The language and logic of the *Northwestern Corp.* and *YRC Worldwide* decisions would suggest that Plaintiffs have no claim, as nothing about the [proposed restructuring] prevents them from asserting a legal claim . . . .'').

[41] *See Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, No. 14 CIV. 8584 KPF, 2014 BL 366259, at *1-2 (S.D.N.Y. Dec. 30, 2014).

[42] *Id.* at *7.

[43] *Id.* at **7-8.

[44] *Id.*

[45] *Id.* at *19 (emphasis in original).

[46] *Id.* at *21 (brackets in original).

[47] *Id.* at *22 (emphasis added).

[48] *Id.* at **23-24.

[49] *See Caesars Entm't Corp.*, 2015 BL 9980, at *1.

[50] *Id.*

[51] *Id.* at *2.

[52] *Id.*

[53] *Id.* at **4–5.

[54] *Id.* at *5.

[55] *See Educ. Mgmt. Corp.*, 2014 BL 366259, at *6.

[56] *Id.* at *15.

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vestors,[57] reinforcing one of Congress' initial reasons for passing the TIA – the protection of individual investors who otherwise had insufficient clout to protect themselves from unsupervised restructurings. Thus, despite the relatively narrow concerns originally expressed by Congress when enacting the TIA, courts are signaling that the statute could apply across a broad range of factual circumstances.

Taken together, *Mechala*, *Education Management*, and *Caesars* apparently prevent an obligor from impairing creditors' practical ability to collect on debts by stripping a company's assets and removing any corporate guarantees. Although courts have not articulated clear guidelines as to the other actions that would constitute an impairment violating the TIA, in the aftermath of *Education Management* and *Caesars* there are several important considerations for both obligors and creditors alike engaging in out-of-court restructurings. For instance, Section 304 of the TIA exempts various classes of securities from the Act, including those securities exempt from the Securities Act of 1933, securities offered by an obligor with an aggregate amount outstanding less than $10 million, or securities issued by a foreign government or its subdivisions.[58] Therefore, from the perspective of unconsenting creditors interested in using the TIA as a shield to gain additional leverage, a threshold determination is whether the TIA even applies to the security at issue.

From the perspective of the obligor, a useful exercise may be assessing whether the risks of litigating the validity of the proposed out-of-court restructuring under the TIA outweigh the costs and expenses associated with seeking relief under Chapter 11 of the Bankruptcy Code. If a creditor brings a challenge under the TIA, litigation could take years to bring finality to the out-of-court restructuring, particularly given the uncertainty and fact-specific nature surrounding what constitutes appropriate indenture modifications. By contrast, although filing for relief under the Bankruptcy Code presumably may constitute more upfront costs, a prepackaged or prenegotiated plan could give obligors court-approved relief in a much more narrow timeframe than an out-of-court restructuring riddled with creditor challenges. In that regard, it remains to be seen whether the uncertainty caused by the *Education Management* and *Caesars* decisions will ultimately increase the number of Chapter 11 filings as obligors seek to avoid restructuring routes that do not provide immediate clarity and finality.

Nevertheless, if an out-of-court restructuring ends up being challenged, obligors should be mindful of the various defenses that were not persuasive to the Southern District of New York. The obligor in *Education Management* argued that rights to payment can be limited by the indenture itself. The argument follows that the TIA only protects those indenture rights explicitly bargained-for and accepted by creditors when they purchased the securities in the market place.[59] The court rejected the argument with a simple syllogism – the TIA must have been passed to protect *something*, and if the TIA were limited to protecting just the contents of an indenture, then it would merely be an act to enforce the indenture, which would nullify the purpose of having the TIA.[60] Furthermore, the obligor in *Education Management* argued that the dissenting creditors would have other state law remedies to enforce their rights, such as bringing an action for fraudulent conveyance.[61] The court again rejected the argument, noting that plaintiffs were ''not required to place their faith in an action of an entirely different nature.''[62]

It is worth noting that if an obligor is found liable for violating the TIA, a transferee receiving the obligor's assets potentially may be liable for the debts, even if no corporate guaranty ever existed or an existing one was consensually removed by creditors. Indeed, in *Education Management* the court seemingly implied the existence of a guaranty, even though such a guaranty was consensually removed by creditors. The court reasoned, in the context of a preliminary injunction's ''irreparable'' injuries analysis, that an obligor making itself judgment-proof in violation of the TIA could be subject to ''broad principles of veil-piercing'' that would ''enable the Court to facilitate a demand for payment from [the obligor] wherever within its corporate structure assets happen to be located.''[63] Consequently, the court suggested that even in the absence of a guaranty, affiliate corporations may not be protected from equitable principles.

In an attempt to avoid any such litigation, in the appropriate situation some obligors may view the calculated risk of a Chapter 11 filing as outweighing the uncertainty of an out-of-court restructuring, which could face challenge if it does not garner unanimous consent. In *Education Management*, the court noted that obligors could modify certain indenture terms to pressure debt holders into accepting exchange offers.[64] Citing a commentator, the court speculated that obligors could remove covenants that prohibited the company from paying dividends, required the company to maintain a specified net worth, or barred the company from incurring senior debt.[65] However, taken to the extreme, even removing these covenants could trigger a violation of the TIA. For example, a company could violate the TIA by issuing dividends to creditors equal to substantially all assets. One could also envision a situation short of the ''complete impairment'' found in *Mechala*, *Education Management*, or *Caesars*.[66] For example, if Education Management Corp. or Caesars Entertainment Corp. removed the covenant prohibiting a transfer of substantially all its assets, but did so in the context of a merger or acquisition in which the acquiror agreed to assume the debts, query whether a court could find that such a transaction would not impair a creditor's ''practical'' ability to receive payment because the acquiror would be liable for the debt. The question remaining is how much is too much impact on a creditor's ''practical'' ability to receive payment before the restructuring violates the TIA's protections.

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[57] *See Caesars Entm't Corp.* 2015 BL 9980, at *1.
[58] *See* 15 U.S.C.A. § 77ddd(a)(1)–(10) (West).
[59] *See* Education Management Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 14–15, *Marblegate Asset Management, LLC, et. al. v. Education Management Corp., et. al.*, No. 14-cv-08584 [hereinafter ''*EDMC Brief*''].
[60] *See Educ. Mgmt. Corp.*, 2014 BL 366259, at **19-20.
[61] *See* EDMC Brief, at 15.
[62] *See Educ. Mgmt. Corp.*, 2014 BL 366259, at *14.
[63] *Id.* at *14.
[64] *Id.* at *21.
[65] *Id.*
[66] *Id.* at *22.

In light of the uncertainty that the *Education Management* and *Caesars* decisions have created, companies and investors hoping to conduct out-of-court restructurings should certainly exercise caution while we see the full spectrum of threshold actions deemed to impair creditors' practical ability to collect on debts, and whether the decisions are followed by other courts. Indeed, because many indentures are governed by New York law, courts in other jurisdictions may give additional consideration to the Southern District of New York's *Education Management* and *Caesars* decisions. Given the TIA's aim of promoting judicial scrutiny, out-of-court restructurings may still prevail over the historically more expensive route of Chapter 11, particularly if obligors are able to accomplish their goals through less aggressive approaches in the absence of unanimous consent. However, because of the still evolving judicial guidance surrounding the TIA, obligors may determine it is too risky to proceed down this road, as opposed to restructuring in a bankruptcy court.

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