STRAUB, *Circuit Judge*, dissenting:

The question before this Court is whether Section 316(b) of the Trust Indenture Act (the "TIA") prohibits Defendant-appellant Education Management Corporation ("EDMC") from engaging in an out-of-court restructuring that is collusively engineered to ensure that certain minority bondholders receive no payment on their notes, despite the fact that the terms of the indenture governing those notes remain unchanged. Because the plain text of the statute compels the conclusion that it does, I would answer that question in the affirmative and uphold the judgment of the District Court. I therefore respectfully dissent.

I begin my analysis with the language of Section 316(b) of the TIA. *See United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1281 (2014) (quoting *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) ("When interpreting a statute, we 'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'"). "Where the statute's language is 'plain, the

sole function of the courts is to enforce it according to its terms.'" *Kozeny*, 541 F.3d at 171 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). Indeed, it has been pronounced "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

In interpreting the language of the statute, I am guided by standard principles of statutory construction. Statutes should be read so as "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). *See also United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992) (noting that it is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Anderson*, 15 F.3d 278, 283 (2d Cir. 1994) ("[C]ourts will avoid statutory interpretations that render provisions superfluous."). Further, "[t]he 'whole act' rule of statutory construction exhorts us to read a section

of a statute not 'in isolation from the context of the whole Act' but to 'look to the provisions of the whole law, and to its object and policy.'" *United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) (quoting *Richards v. United States*, 369 U.S. 1, 11, (1962)). Here, the plain language of Section 316(b) requires the conclusion that the Intercompany Sale as envisioned in the Restructuring Support Agreement violates the TIA.

Section 316(b) of the TIA reads as follows:

> **(b) Prohibition of impairment of holder's right to payment**
> Notwithstanding any other provision of the indenture to be qualified, ***the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security***, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, ***shall not be impaired or affected without the consent of such holder*** . . . .

15 U.S.C. § 77ppp(b) (emphasis added).

As delineated by the District court, "[t]he text poses two questions: what does the 'right . . . to receive payment' consist of, and when is it 'impaired or affected' without consent?" *Marblegate*

Asset Mgmt., LLC v. Educ. Mgmt. Corp., 111 F. Supp. 3d 542, 546 (S.D.N.Y. 2015) ("*Marblegate II*"). EDMC and the Steering Committee[1] (together, "Appellants") read the text narrowly, with EDMC arguing that "[o]n its face, the statutory text is unambiguous in protecting only the 'right' of a noteholder to receive payment when due and to sue for enforcement of such payment." EDMC App. Br. 19; *see also* Steering Committee App. Br. 20 ("The language of the TIA demonstrates that Section 316(b) was intended to be a narrow limitation on the ability of noteholders to delegate to a Noteholder Majority the power to alter their right to payment of principal and interest through amendments of the indenture's provisions, and not a broad proscription on all out-of-court restructurings, however effected.") By contrast, Marblegate reads the text broadly, arguing that "the right to receive payment is 'impaired' or 'affected' when the ability to receive payment under

[1] "Steering Committee" refers to the Steering Committee for the Ad Hoc Committee of Term Loan Lenders of EDMC, an intervenor-appellant in this appeal.

the bond is stripped away—not only through formal amendment of a bond's payment terms, but also by other means." Marblegate App. Br. 24. I am persuaded by Marblegate's reading of the statute.[2]

The terms "right," "impair," and "affect" are undefined in the TIA, so we must look to their ordinary meaning. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). A "right" is typically defined as "[s]omething that is due to a person by just claim, legal guarantee, or moral principle," or "[a] legally enforceable claim that another will do or will not do a given act." Black's Law Dictionary (10th ed. 2014). On the basis of this definition, Appellants argue that actions only violate Section 316(b) if those actions affect the "legal entitlement" to payment – i.e. by altering the terms of the bond so that a bondholder can no longer

[2] Although Marblegate agreed at oral argument that the limiting principle it proposed requires reference to the legislative history, *see* Oral Tr. 44:10—45:17, this acknowledgment does not alter its reading of the plain text as covering the actions at issue in this case.

legally *claim* the right to receive payment under their original terms. Nothing in Section 316(b), Appellants urge, entitles bondholders to *actual* payment on their notes.

This argument, however, nearly eliminates the import of the terms "impair" and "affect" and imposes qualifications in Section 316(b) that simply do not exist. The term "impair" means "to diminish the value of." *Id; see also Humana Inc. v. Forsyth*, 525 U.S. 299, 301 (1999) ("The dictionary defines 'impair' as to weaken, make worse, lessen in power, diminish, relax, or otherwise affect in an injurious manner.") The term "affect" means "to produce an effect on; to influence in some way." Black's Law Dictionary (10th ed. 2014). Even defined as a "legal entitlement" or "claim," it is unquestionable that the "right" to receive payment can be "diminished" or "affected" without actual modification of the payment terms of the indenture. By making it impossible for a company to pay the amount due on its notes, for example, the "right" to receive payment is "diminished" because it literally has

been made worthless. Surely, a bondholder's right or "legal entitlement" to receive payment is impaired when actions are taken to ensure that the bondholder either consents to a change in his payment terms or receives *no* payment on his notes at all.[3] *See* Black's Law Dictionary (10th ed. 2014) (explaining that the term "impair" is "commonly used in reference to diminishing the value of a contractual obligation to the point that the contract becomes invalid *or a party loses the benefit of the contract*" (emphasis added)).

Had Congress intended merely to protect against modification of an indenture's payment terms, it could have so stated. Nothing in the language of Section 316(b), however, cabins the prohibition on impairing or affecting the "right . . . to receive payment" to mere

[3] Of course, there are a number of actions that could be said to impair the right of noteholders to receive payment, ranging from poor business decisions at one end to deliberate attempts to devalue the business at the other. But whereas noteholders clearly give their implied consent for ordinary course business transactions and decisions to be carried out, and are compensated for the risk that the business will be run unsuccessfully by the interest that they receive on the notes, the same cannot be said of a deliberate act to render their right to receive payment worthless. In that latter circumstance, Section 316(b) requires the noteholder's explicit consent.

amendment of the indenture. In fact, that Congress used the broad phrase "impaired or affected" implies that it did not intend Section 316(b) to be limited in its scope to mere amendments. Because we are compelled to give every term in a statute effect, our reading of the statute must account for rather than ignore this phraseology. *Cf. United States v. Woods*, 134 S. Ct. 557, 567 (2013) (explaining that the "ordinary use" of the word "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings" (internal quotation marks omitted)). Further, Section 316(b) is written in the passive voice; its prohibition is nowhere limited to actions taken by a noteholder majority. Despite Appellants' arguments to the contrary, nothing in the text of the statute requires the narrow reading that Section 316(b) merely prohibits modification of an indenture's core payment terms (amount and due date) by noteholder majority action without consent of the individual noteholder.

Although not determinative to my analysis, it is worth

considering the structural argument that Appellants make in further support of their textual interpretation. *See* EDMC App. Br. 21 ("The statute's focus on legal entitlements is reaffirmed by its structure."); Steering Committee App. Br. 21. This argument, however, is also unconvincing. Section 316(a) of the TIA relates to collective action clauses—i.e., clauses permitting a certain percentage of holders to consent to changes to the indenture terms.[4] Unlike Section 316(b),

[4] Section 316(a) states in relevant part:

(a) Directions and waivers by bondholders

The indenture to be qualified--

> **(1)** shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions authorizing the holders of not less than a majority in principal amount of the indenture securities or if expressly specified in such indenture, of any series of securities at the time outstanding (A) to direct the time, method, and place of conducting any proceeding for any remedy available to such trustee, or exercising any trust or power conferred upon such trustee, under such indenture, or (B) on behalf of the holders of all such indenture securities, to consent to the waiver of any past default and its consequences; or
> **(2)** may contain provisions authorizing the holders of not less than 75 per centum in principal amount of the indenture securities or if expressly specified in such indenture, of any series of securities at the time outstanding to consent on behalf of the holders of all such indenture

which is mandatory, Section 316(a) is permissive. It states, for example, that an indenture *may* contain provisions permitting the majority of noteholders to consent on behalf of all noteholders "to the waiver of any past default and its consequences." 15 U.S.C. §77ppp(a). It also permits indentures to contain provisions whereby 75% of noteholders can consent on behalf of all noteholders "to the postponement of any interest payment for a period not exceeding three years from its due date." *Id.*

Appellants argue that Section 316(b) should thus be read as an "exception" to 316(a); while 316(a) states what collective action clauses are permitted, 316(b) simply states what collective action clauses are *not* permitted. But nothing in either of the two provisions in Section 316 indicates that 316(b) is meant to be an exception to 316(a). Moreover, as Marblegate urges, it is perhaps

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> securities to the postponement of any interest payment for a period not exceeding three years from its due date.

15 U.S.C. § 77ppp(a).

more reasonable to view 316(a)(2)—which permits a 75% vote to defer interest for three years—as an exception to 316(b). *See* 15 U.S.C. §77ppp(b) (prohibiting modification of right to receive payment without noteholder's consent "except . . . as provided in paragraph (2) of subsection (a) of this section.").

At a minimum, the language of Section 316(b) covers the actions taken by EDMC and the Steering Committee here. The Restructuring Support Agreement presented Marblegate with what the District Court rightfully deemed a Hobson's choice—to accept a modification of the payment terms of its notes, or to receive no payment at all. The Intercompany Sale, which stripped the issuers of their assets and removed the parent guarantee, ensured that no future payments of principal or interest would be made on the notes. This scheme did not simply "impair" or "affect" Marblegate's right to receive payment—it annihilated it.[5] The methodology used

[5] Appellants argue that Marblegate's right to receive payment was not annihilated, or even impaired or affected, by their actions because Marblegate

to accomplish that annihilation is of little interest when the end result is squarely at odds with the plain intent of Section 316(b). *See In re Olson*, 818 F.2d 34, 47 (D.C. Cir. 1987) (noting that interpreting a statute in a manner that "would undercut [its] plain intent . . . and permit the accomplishment by indirect means of a result that the statute prohibits being accomplished by direct means" would produce "an unreasonable result"). We therefore need look no further than the plain text of Section 316(b) to hold that the

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still maintains a legal claim for payment and it may sue, perhaps in state court, for enforcement of that payment. But this argument misses the point. Even if Marblegate maintains a "legal claim" for payment upon which it can sue, that legal claim was surely impaired by actions that intentionally made the company unable to pay any judgment awarded against it. The effect of the Intercompany Sale was to transfer all or substantially all of EDMC's assets to a new, wholly owned subsidiary of EDMC, and EDMC explicitly warned that this meant its assets "would not be available to satisfy the claims of [dissenting] Holders." App'x 52. The Intercompany Sale thus deliberately placed EDMC's assets beyond the reach of non-consenting noteholders, while the effect of the release of the parent guarantee would be to eliminate noteholders' ability to seek payment from EDMC's guarantor. We have held that a company's complete inability to pay a monetary judgment constitutes a risk of irreparable harm when a company is nearly insolvent in the context of preliminary injunctions. *See Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249-50 (2d Cir. 1999). Surely, then, a bondholder's right to receive payment on its bond by the bringing of a lawsuit has been impaired or harmed when the company has rendered itself unable to satisfy any monetary judgment. While the right to sue remains intact, the ability to recover anything as a result of that suit has vanished, rendering the suit meaningless.

Intercompany Sale, as envisioned by the Restructuring Support Agreement, violates the TIA. Based on the plain terms of Section 316(b), I would hold that an out-of-court debt restructuring "impairs" or "affects" a non-consenting noteholder's "right to receive payment" when it is designed to eliminate a non-consenting noteholder's ability to receive payment, and when it leaves bondholders no choice but to accept a modification of the terms of their bonds.

I am cognizant of the parade of horrors that Appellants predict will result from interpreting the TIA in the manner above. However, threatening dire commercial consequences from the refusal to read a statute in a manner inconsistent with its plain language is not a sufficient basis to override the correct interpretation of the law. We must not forget the long-standing imperative that *making* law is the job of the legislature and not of the courts. Where, as here, the statute's language is plain and unambiguous, the "sole function of the courts is to enforce it

according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *accord DiCristina*, 726 F.3d at 96. Certain undesirable consequences might well arise from the fact that Section 316(b) prohibits actions such as those taken by EDMC in this case. But "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *United States v. Rodgers*, 466 U.S. 475, 484 (1984). *See also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.").[6] The bond market has surely undergone

[6] Significantly, Congress recently abandoned two proposals to amend § 316(b), first through a 2015 highway bill rider and then through an omnibus appropriations legislation rider. The proposals would have narrowed the definitions of impairment of the right to payment and the right to institute suit for nonpayment. In response to the latter proposal, 18 law professors sent a letter to members of Congress urging them to reject the proposed amendment, which would have been undertaken without legislative hearings or public comment, because the amendment "could have broad negative unintended consequences in the securities market." Letter sponsored by Georgetown University Law Center to Members of Congress (Dec. 8, 2015). Several major asset managers also sent a letter expressing their disapproval for amendment

significant alterations since the enactment of the TIA, including that the main players are now sophisticated corporate entities on both sides. But it is not for this Court to alter the TIA on its own accord, and "none of this establishes why the plaintiffs should be barred from vindicating their rights under the [TIA]" as it currently stands. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013). "Our role is not to craft a resolution that will solve all the problems that might arise in hypothetical future litigation involving other bonds and other [parties]," *id.*, but it is instead to interpret the TIA in as fastidious a manner as we are able. In so doing I would hold that Section 316(b) of the TIA bars the actions at issue in this case.

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without the opportunity for hearings and public comment, as "the adverse consequences to the economy and to capital markets could be significant." Letter from BlackRock, Inc, DoubleLine Group LP, Oaktree Cap. Mgmt., L.P., Pac. Inv. Mgmt. Co, T. Rowe Price Assocs., & Western Asset Mgmt. Co. to Members of Congress (Dec. 14, 2015). This past March, the Chamber of Commerce sent a letter "encourag[ing] Congress to clarify the rules of the road on this important subject." Letter from R. Bruce Josten, U.S. Chamber of Commerce, to Members of Congress (Mar. 31, 2016). That Congress has to date declined the invitation to take up this issue does not provide this Court with a directive to override and narrow the clear language of § 316(b).

CONCLUSION

Because the Intercompany Sale as proposed under the Restructuring Support Agreement would have the effect of imposing on Marblegate a choice between a modification of their core payment terms or receiving no payment at all—thereby clearly impairing Marblegate's right to receive payment under the original terms of the indenture—I would hold that it violates the plain text of Section 316(b) of the Trust Indenture Act and affirm the judgment of the District Court. Our system of governance is organized such that Congress is tasked with writing the law and the federal courts are tasked with applying, not rewriting, it. If Congress and the parties affected by the TIA are unsatisfied with the law's consequences, it is for Congress rather than this Court to amend it. I therefore respectfully dissent.