PEB COMMENTARY NO. 27
INJUNCTION AGAINST A NONCOMPLYING DISPOSITION UNDER SECTION 9-610 OF THE UNIFORM COMMERCIAL CODE
(December 16, 2022)

By the Permanent Editorial Board for the Uniform Commercial Code*

PREFACE

The Permanent Editorial Board for the Uniform Commercial Code (PEB) acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The PEB has resolved to issue supplemental commentary on the Uniform Commercial Code (UCC) from time to time. The supplemental commentary of the PEB generally will be known as a PEB Commentary, to distinguish it from the Official Comments to the UCC. A PEB Commentary may be denominated a commentary, a report, or otherwise as determined by the PEB.

The Resolution states that:

> The underlying purposes and policies of the PEB Commentary are those specified in Section 1-103(a). A PEB Commentary should come within one or more of the following specific purposes, which should be made apparent at the beginning of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to the inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with Section 1-103(a)(2), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and federal and state consumer protection statutes) and general principles of law and equity pursuant to Section 1-103(b); or (6) to otherwise improve the operation of the UCC.

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INTRODUCTION

Article 9 of the Uniform Commercial Code (the "UCC") provides several statutory rights to a secured party if the debtor defaults on obligations secured by a security interest.[1] One of those rights is the right of the secured party to dispose of the collateral under Section 9-610. However, that right is subject to corresponding duties on the secured party, such as the duty to act in good faith,[2] the duty to provide the debtor and certain other persons with timely notification of the disposition in advance of disposition,[3] and the duty to conduct all aspects of the disposition in a commercially reasonable manner.[4] If the secured party is not proceeding to conduct the disposition in compliance with these duties, Section 9-625(a) of the UCC provides that a court "may order or restrain . . . disposition of collateral on appropriate terms and conditions."

This Commentary addresses whether a court must deny a request for an order or restraint against a secured party proceeding with a noncomplying Article 9 disposition solely because the party making the request (the "aggrieved party") would be able to bring an action against the secured party that would result in a collectable judgment for money damages.[5]

DISCUSSION

Consider the following situation:

> Secured Party makes a loan to Debtor. To secure payment of the loan, Debtor grants to Secured Party a security interest in Debtor's member interest in a limited liability company, which owns a valuable real estate project. Debtor defaults on the loan, and Secured Party, as permitted by the loan documents, declares the loan to be immediately due and payable.
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> When Debtor does not pay the loan, Secured Party schedules a public sale of the member interest without (a) hiring any professionals to market the interest or otherwise conducting any marketing for the interest, (b) providing available information to potential bidders as to the limited liability company's operating agreement or the finances or operation of the real estate project, or (c) offering available procedures for access to the project for any physical inspection. Secured Party intends to credit bid at the sale to purchase the member interest for Secured Party's own account. Debtor receives a sufficient notification of the method, time and place of the public sale ten days before the sale date.
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> Debtor brings a lawsuit against Secured Party seeking to restrain the sale of the member interest on the grounds that the disposition does not comply with the requirement in Section

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[1] *See, e.g.*, U.C.C. §§ 9-609 (possession without use of judicial process), 9-607 (collection), 9-610 (disposition), 9-620 (acceptance of collateral).

[2] U.C.C. § 1-304.

[3] U.C.C. § 9-611.

[4] U.C.C. § 9-610(b). The requirement of commercial reasonableness may not be waived or otherwise varied by the debtor or an obligor. *See* U.C.C. § 9-602(3), (7). *See also* U.C.C. § 1-302(b).

[5] The analysis contained in this Commentary is equally applicable to a collection on collateral that is not performed by a secured party in a commercially reasonable manner when required by U.C.C. § 9-607(c) and to a collection, enforcement, or disposition if the secured party is failing to comply with other provisions of Article 9.

9-610(b) that every aspect of the disposition be commercially reasonable. Secured Party responds that such a restraint may not be ordered by the court. According to Secured Party, this is because (a) under Section 9-625(b), Secured Party would be liable for damages in the amount of any loss caused by a failure to comply with the requirements of Section 9-610(b); (b) any judgment for such liability would be collectable from Secured Party; and (c) under general principles of law and equity in the applicable state, an injunction is unavailable when the aggrieved party can be made whole for any loss by a collectable money judgment.

Section 9-625(a) of the UCC states that "[i]f it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." Section 1-103(b) provides that "the principles of law and equity . . . supplement" the provisions of the UCC, unless those principles are "displaced by the particular provisions of the Uniform Commercial Code." The question is whether, notwithstanding the power granted to courts in Section 9-625(a), a court is precluded from granting the relief described in that section if under a state's otherwise-applicable equitable principles the relief would be denied because a collectable money damages remedy is available to the aggrieved party.

For the reasons described below, we conclude that, to the extent that general state law principles governing equitable relief would limit the power granted to courts by Section 9-625(a) by precluding the availability of equitable relief where a collectable money damages remedy is available, Section 9-625(a) displaces those general principles.

While Section 9-625(a) authorizes a court to order or restrain disposition of collateral on appropriate terms and conditions, some courts have rejected requests for such relief, based not on a lack of authority or appropriateness under that section but, rather, by application of general factors limiting equitable relief under other state law when the aggrieved party has a collectable money damages remedy.[6] Under this approach, if the secured party is proceeding to conduct the disposition in violation of its duties under Article 9, the aggrieved party is not entitled to injunctive relief so long as the aggrieved party has available to it a money damages remedy that can be collected from the secured party. The aggrieved party under this approach would not suffer an irreparable harm or would have an adequate remedy at law in the form a collectable money damages remedy under Section 9-625(b). This Commentary concludes that that approach is not consistent with Section 9-625(a) and does not further the Article 9 policy of debtor protection from secured party misbehavior.

First, the approach of courts that deny injunctive relief when it would not be available under the state's general principles of equitable relief would reduce Section 9-625(a) to surplusage. Under general equitable principles, an aggrieved party seeking an injunction may typically obtain

[6] *See, e.g.*, Shelbourne BRF LLC v. SR 677 Bway LLC, 139 N.Y.S.3d 799, 800 (App. Div. 2021) (noting that "plaintiffs failed to demonstrate the requisite irreparable harm"); 1248 Associates Mezz II LLC v. 12E48 Mezz II LLC, No. 651812/2020, 2020 WL 2569405, at *1 (N.Y. Sup. Ct. May 18, 2020) (citing Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 105 N.Y.S.3d 59 (App. Div. 2019)); *cf.* Broadway 500 West Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II, LLC, 915 N.Y.S.2d 248 (App. Div. 2011) (denying an injunction request against a foreclosure of a mortgage on non-residential real property on the basis that damages are always an adequate remedy at law for collateral held by a debtor as an investment and that, therefore, there can be no irreparable harm in such a case).

it if the party shows that it is more likely than not to prevail on the merits of its claim, will be irreparably harmed if the action to be enjoined is taken, and has no adequate remedy at law and the party's hands are sufficiently "clean" to merit equitable relief.[7] A reading of Section 9-625(a) as being limited by factors that reject relief whenever there is a collectable money damages remedy would be logically equivalent to Section 9-625(a) not being included in the UCC. In fact, nothing in Section 9-625(a) refers to the unavailability of a collectable money damages remedy as a condition of obtaining equitable relief, and the better reading of Section 9-625(a) is that, under Section 1-103(b), the UCC provision displaces any general rule of law and equity that imposes such a condition.

Moreover, requiring the denial of relief under Section 9-625(a) solely because of the availability of a collectable money damages remedy would ignore the difficulty in proving the existence and amount of damages that follow from violation of the Section 9-610 rules in many cases. A theoretical remedy that founders as a result of the impracticability of proof can hardly be said to be adequate. The fact that an aggrieved party would be able to collect a money judgment from a non-complying secured party provides scant protection to the aggrieved party against violation of Article 9 and the resulting consequences. Indeed, this is recognized by Article 9 in some contexts by reallocating burdens of persuasion[8] or providing for statutory damages that need not be proved to have been suffered as actual damages.[9]

This is not to say that Section 9-625(a) requires a court to order or restrain a disposition whenever it is established that the secured party is acting inconsistently with Article 9. As stated previously, the language of Section 9-625(a) is permissive rather than mandatory. A court may take into account factors that are typically considered when deciding whether to grant equitable relief, such as irreparable harm, the availability of an adequate remedy at law and "unclean hands," and this Commentary should not be read as taking a position as to the appropriateness or inappropriateness of an order or restraint in any particular case. A court is not required, however, to deny relief under Section 9-625(a) in a case in which the relief is otherwise appropriate solely because of the availability of a collectable money damages remedy. Under a proper reading of Section 9-625(a), a court has flexibility in fashioning an order or restraint notwithstanding the availability of the collectable money damages remedy, because Section 9-625(a) gives the court the power to base any restraint on "appropriate terms and conditions."

This effect of Section 9-625(a) is contemplated by Article 1 of the UCC. Section 1-305(b) states: "Any right or obligation declared by [the Uniform Commercial Code] is enforceable by action unless the provision declaring it specifies a different and limited effect." Comment 2 to Section 1-305 then explains: "Whether . . . equitable relief is available is determined not by this section but by specific provisions *and* by supplemental principles. Cf. Sections 1-103, 2-716."[10] So, in the context of this Commentary, whether an order or restraint is available to an aggrieved party to prevent a secured party from proceeding with a non-complying Article 9 disposition is

[7] *See, e.g.*, 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2941–2950 (3d ed. 2010) (analyzing principles applicable in federal court actions).
[8] *E.g.*, U.C.C. § 9-626(a)(4).
[9] *E.g.*, U.C.C. § 9-625(c)(2), (e), (f).
[10] U.C.C. § 1-305, cmt. 2 (emphasis added).

determined by a combination of Section 9-625(a) and traditional principles on which injunctive relief may be granted, rather than on those traditional principles alone.

The discretion of the court to grant the injunction on the basis that it is established that the secured party is not proceeding in accordance with Article 9 in conducting the disposition notwithstanding the availability of the collectable money damages remedy also furthers the purpose under Article 9 of protecting the debtor and other parties against secured party misbehavior. A focus by the court solely on the availability of the collectable money damages remedy as a reason to deny an order or restraint preventing a noncomplying Section 9-610 disposition may fail sufficiently to create incentives for a secured party to conform its behavior to the requirements of Article 9. In determining whether to structure the disposition to comply with Article 9, the secured party may well take into account the burdens on the aggrieved party to (a) bring a post-disposition lawsuit against the secured party, (b) prove the amount of money damages, and (c) pay the expenses of the lawsuit. Because of those burdens, the possibility of a post-disposition lawsuit for money damages alone may fail to encourage the secured party to be as diligent in insuring that the disposition complies with Article 9 as it might otherwise be.

Section 9-625(a) follows former Section 9-507(1).[11] As Official Comment 1 to former Section 9-507 then explained:

> In the case where [the secured party] proceeds, or is about to proceed, [without complying with the requirements of goods faith and commercial reasonableness], it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. *This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded.* This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide . . . that [the secured party] proceed with the sale or other disposition under specified terms and conditions . . . .[12]

Nothing in Section 9-625(a) suggests that the remedy of restraint or judicial order to prevent a disposition not complying with Article 9 is of any less importance today than it was under former Section 9-507(1).[13]

Finally, it is not unusual that a statute, like Section 9-625(a), might modify traditional equitable principles, including the availability of injunctive relief, that would apply in the absence of the statute.[14] Indeed, other provisions in the UCC itself modify otherwise applicable rights to

[11] U.C.C. § 9-625, cmt. 1.
[12] U.C.C. § 9-507, cmt. 1 (rev. 2001) (emphasis added).
[13] The Comment may be traced back to the 1952 Official Text of the UCC.
[14] *See, e.g.*, 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2942 (3d ed. 2010) (citing federal statutes modifying rights to injunctive relief); FLA. STAT. ANN. § 39.504 (West 2022) (injunction to prevent child abuse); ME. REV. STAT. ANN. tit. 5, § 209 (West 2022) (injunction against unfair and deceptive practices).

injunctive relief.[15] Moreover, courts have recognized that, as a general matter, when evidence shows that the defendants are engaged in, or are about to be engaged in, acts or practices prohibited by a statute and the statute provides for injunctive relief to prevent such violations (without referring to traditional equitable grounds for injunctive relief), otherwise applicable equitable grounds for injunctive relief need not be shown.[16]

AMENDMENTS TO OFFICIAL COMMENTS

Official Comment 2 to Section 9-625 is amended by adding the following new paragraph at the end of the comment:

> Subsection (a) displaces other state law governing availability of the types of relief addressed in that subsection to the extent that the other state law would preclude the availability of injunctive relief in an otherwise appropriate case solely because the aggrieved party would be able to obtain a collectible money judgment for noncompliance with the rules of this Article. Rather, under subsection (a), in an appropriate case the aggrieved party should be able obtain relief of the sort described in that subsection even if it would be possible for the aggrieved party to obtain such a judgment. See PEB Commentary No. 27, dated December 16, 2022, discussing the issue in the context of a noncomplying disposition under Section 9-610. The Commentary is available at https://www.ali.org/peb-ucc.

Official Comment 2 to Section 1-305 is amended by changing its last sentence to read as follows:

> Cf. Sections 1-103, 2-716, 9-625.

[15] *See* U.C.C. § 4A-503 (limiting persons against whom an injunction to prevent executing or completing a payment order may be obtained); U.C.C. § 5-109(b) (establishing mandatory criteria for an injunction to prevent an issuer from honoring a drawing under a letter of credit).

[16] Burlington N. R.R. Co. v. Dep't of Revenue of State of Wash., 934 F.2d 1064, 1074 (9th Cir. 1991) (quoting Atchison, Topeka & Santa Fe R.R. Co. v. Lennen, 640 F.2d 255, 259-260 (10th Cir. 1981). *See also, e.g.*, Shadid v. Fleming¸ 160 F.2d 752, 753 (10th Cir. 1947) (noting that "where an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of the usual equitable grounds, irreparable injury and absence of an adequate remedy at law. It is enough if the requirements of the statute are satisfied"); Henderson v. Burd, 133 F.2d 515, 517 (2d Cir. 1943) ("The contention that the plaintiff failed to prove the existence of the usual equitable grounds for relief, such as irreparable damage, is plainly irrelevant. Where an injunction is authorized by statute it is enough if the statutory conditions are satisfied.").