

[Home](#) > [Publications](#) > [Franchise Lawyer](#) > [2015](#) > [Winter 2015: VOL 18, NO. 1](#) > [Litigator's Corner: They Are Violating the Injunction, Now What? Enforcement Strategies](#)

Litigator's Corner: They Are Violating the Injunction, Now What? Enforcement

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Perhaps this scenario sounds familiar: Your phone rings and your client, who is noticeably upset, needs assistance enforcing a restrictive covenant in its franchise agreement. Your investigation reveals that a terminated franchisee subject to a post-term non-competition provision has opened a competing business just down the street from its former location. After hours of work preparing the verified complaint, motion for preliminary injunctive relief, and related briefs and evidentiary materials, you present your client's case at the injunction hearing and the court grants your motion. The terminated franchisee is now enjoined from competitive misconduct. Victory!



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But what happens when this same former franchisee violates the injunction? Perhaps the franchisee's spouse comes in and starts to operate the competitive business. What options are available to the franchisor to stop this violation, and how will a court likely resolve the situation? Obtaining an injunction is an essential first step to enforcing a restrictive covenant, but obtaining the injunction and enforcing it are quite different concepts.

Contempt Proceedings

Injunction violations are enforced through contempt proceedings, which can be either criminal or civil. In most instances, civil contempt proceedings will apply to enforce injunctions entered in non-competition cases, so only civil contempt will be addressed in this article. Civil contempt proceedings are governed by the Federal Rules of Civil Procedure and the common law, which gives a court the inherent authority to enforce its own orders.

The first step in establishing civil contempt is moving the court to issue an order to show cause why the defendant should not be adjudged in contempt. "On a contempt motion, the movant bears the initial burden of proving, by clear and convincing evidence, the defendant's noncompliance with a court order. After the movant

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satisfies this burden, the burden shifts to the alleged contemnor to explain his noncompliance at a show cause hearing.” *Thomas v. Blue Cross and Blue Shield Assoc.*, 594 F.3d 814, 821 (11th Cir.2010); see also *F.T.C. v. Trudeau*, 579 F.3d 754, 776 (7th Cir.2009). The franchisor must, by clear and convincing evidence, establish that: the underlying order allegedly violated was valid and lawful; the underlying order was clear, definite, and unambiguous; and the contemnor had the ability to comply with the underlying order. *U.S. v. Koblitz*, 803 F.2d 1523, 1527 (11th Cir.1986); see also *Jones v. Brown*, 425 Fed.Appx. 93, 95 (3rd Cir.2011); *Prima Tek II, L.L.C. v. Klerk’s Plastic Industries, B.V.*, 525 F.3d 533, 542 (7th Cir.2008). It is important that a franchisor’s motion cite the specific language of the injunction at issue and provide specific evidence establishing how the defendant has violated the injunction.

Assuming the franchisor meets its burden, the court will set a hearing requiring the franchisee to show cause why it should not be held in contempt. If found in civil contempt, the violator may be required to compensate those injured by the contempt. Furthermore, courts have wide latitude in fashioning a remedy for civil contempt. The purpose of sanctions in civil contempt proceedings is to coerce the contemnor to comply or to compensate a plaintiff for losses suffered due to the contempt. Thus, the first step in supporting a motion to show cause is to collect new evidence not only to establish that violations have occurred, but also to support the franchisor’s request for certain remedies.

Evidence of Violations

Evidence in the form of agreements, affidavits, photographs, maps, driving distances, social media posts, and the like, may have been filed in support of the motion for a preliminary injunction. But the mission now is to marshal new evidence that shows the violation of the injunction. Such evidence may include photographs, videos, documents, and other materials and information gathered by “secret shoppers” or investigators. Additional evidence may also be gathered through the discovery process, including depositions, requests for production, interrogatories, and subpoenas.

At the conclusion of your investigation, you should have a good sense of whether a legitimate claim for civil contempt exists by applying the factors set forth above. If the violation does not require immediate judicial intervention, consider sending the franchisee a cease and desist letter that will serve as a supporting exhibit to any future motion to show cause. The cease and desist letter serves another important function as well: it provides notice and an opportunity to stop the violation without requiring additional motion practice before the court.

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Arguments Against Alleged Violations

Arguments typically asserted by franchisees in response to an alleged violation of a preliminary injunction include substantial compliance, lack of intent to violate the order, lack of notice, and disagreement regarding the intended meaning, effect, and scope of the injunction. Franchisees have also attempted to thwart injunctions by arguing that the order improperly references the complaint or another document, in violation of Federal Rule of Civil Procedure 65(d)(1)(C), which requires an injunction to state its terms without reference to a separate document.

Sometimes, defendants will seek to avoid the preliminary injunction (and the franchisor's other claims) by filing a bankruptcy petition. This generally triggers an automatic stay and thereby halts civil contempt proceedings until a franchisor files a motion with the bankruptcy court requesting that the stay be lifted.

If the court grants the motion for civil contempt, it may also impose other sanctions, such as awarding fees and costs associated with the violation, extending the duration of the injunction in place, and revising the language of the injunction to make it more restrictive. The case of *New Horizons Computer Learning Centers, Inc. v. Silicon Valley Training Partners, Inc.*, No. 2:02CV459, 2003 WL 23654790 (M.D. Fla. Nov. 12, 2003), illustrates these principles in practice when a franchisor continues to police the enforcement of its injunction by bringing a motion for civil contempt. In this case, New Horizons sent default notices to its computer training franchisee Silicon Valley Training Partners, Inc. ("SVP") for failure to make timely royalty payments and provide financial reports. *Id.* at *3. During the time when these notices were sent and prior to termination of the SVP's franchise agreement, an SVP co-founder filed the fictitious name Innovative Technology Institutes ("ITI") and advised former SVP clients that ITI would honor SVP's training commitments. *Id.*

New Horizons terminated the franchise agreement, reminded SVP of the non-competition covenant, and ultimately obtained a preliminary injunction against SVP. *Id.* at *4. Unbeknownst to the New Horizons, ITI's competing business was already fully operational. Upon discovering this, New Horizons filed an amended complaint. On the eve of a scheduled show cause hearing, SVP filed for bankruptcy, causing the litigation to be stayed. *Id.* After the franchisor successfully moved the bankruptcy court to lift the stay, the court held a show cause hearing and found that the franchisee had violated its injunction. *Id.* at *5-8. The court concluded the franchisee was in civil contempt, awarded fees and costs, and extended the duration of the injunction. *Id.* at *10.

Remedies Appropriate to the Circumstances

It is also important to consider what specific remedies are

appropriate to the circumstances presented. For example, if there are legitimate concerns regarding ongoing or future violations, it is appropriate to request that the court include monitoring or reporting provisions in the order of civil contempt. In *Bunzl Distrib. Northeast, LLC v. Boren*, Civ. No. 07-3706, 2008 WL 43995, (D.N.J. Jan. 2, 2008), the court issued an injunction prohibiting, among other things, “[c]ausing or attempting to cause any company listed on [a list of Bunzl customers] to divert, terminate, limit, or in any manner modify or fail to enter into any actual or potential business relationship with Bunzl.” *Id.* at *1. After the defendant admittedly violated the injunction, the plaintiff filed a motion for contempt. *Id.* In opposing the motion, the defendant argued that although he did sell to customers on the list in violation of the court’s injunction, that was inadequate grounds for contempt because “[f]or a salesman who sold approximately \$9 million of product...during the last full year...the sale of product producing a profit of less than \$5,000 cannot be deemed substantial or contemptuous.” *Id.* at *2. The court disagreed, stating that “[s]ubstantial compliance’ is not measured by a ratio of sales to profits, but is determined by whether the party took ‘all reasonable steps’ to comply with the order.” *Id.*

In finding the defendant in civil contempt for violating its order, the court went further than imposing the routine remedies of extending the injunction and requiring the defendant to pay fees and costs. It also ordered the defendant to produce records relating to Bunzl’s customers, for purposes of determining whether additional violations existed, and it ordered the defendant to file monthly certificates of compliance with the injunction, subject to the penalty of perjury. *Id.* at *6.

As Bunzl teaches, it is key to identify how the injunction is being violated, what harm such violations are causing, and what remedy would alleviate the harm. In doing so, franchisors should advance pragmatic remedies that courts can easily enforce and monitor.

Having restrictive covenants that franchisors can rely on is critical to protecting the franchise system. Many franchisors are willing to pursue an injunction for a franchisee’s breach of a restrictive covenant, but the hard truth is that obtaining the injunction can be just the beginning. To make the injunction meaningful and set precedent within the franchise system, franchisors must monitor compliance with injunctions and institute contempt proceedings when violations occur.