

### Judge OKs litigant's contract claim based on agreed orders



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Can violation of an agreed order add up to a valid breach of contract claim?

Yes — with reservations — according to U.S. District Judge Joan B. Gottschall. *Evergreen Marine Corp. v. Division Sales Inc.*, 2003 U.S. Dist. LEXIS 3425 (March 10).

Evergreen, an ocean carrier, sued one of its customers, Division Sales Inc., fighting over possession of thousands of cartons of cargo. In addition to seeking replevin under Illinois law, Evergreen asked for a temporary restraining order.

The judge hearing the emergency call entered a TRO. But the TRO was vacated under an agreed order that limited what DSI could do with the cargo.

Later, a default judgment was vacated based on an oral "standstill agreement," that again limited what the defendants could do with the cargo.

In an amended complaint, Evergreen alleged that DSI and other defendants breached the terms of the agreed order and standstill agreement. Moving to dismiss, the defendants argued that alleged breach of agreed orders can only be remedied through contempt proceedings.

As Gottschall explained (with citations and quotation marks omitted):

"Allowing parties to bring claims for breach of contract based on

violations of agreements memorialized in agreed court orders is a troublesome idea. Agreed orders are a routine component of every action. Most courts encourage parties to resolve disputes that arise during the course of litigation by agreement whenever possible. Parties frequently reach an agreement in part to appease the court, and in part because they understand that not all battles are worth fighting.

"To treat such agreements as potential contracts could well discourage parties from consenting to agreed orders because the agreement could expose the party to liability for breach of contract that would not exist under the virtually identical situation where the parties allowed the court to enter an order without contest. And treating agreed orders as contracts could unduly complicate judicial proceedings, giving rise to satellite litigation and, given the lengthy statutes of limitation applicable in contract actions, inviting the parties to litigate breaches of agreed court orders years after the original litigation ended. To make matters worse, the lawyers (and the judge) could be the witnesses — a factor which is far from insignificant.

"Under the American Bar Association's Model Rules of Professional Conduct, if a lawyer is 'likely to be a necessary witness' in an action, that lawyer cannot also act as advocate (except under limited circumstances). As a result, any lawyer who is a necessary witness will be subject to disqualification.

"For that matter, the witness-lawyer's firm may also be disqualified, depending on the circumstances. And if the judge's testimony is required, recusal is likely to be necessary.

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"Furthermore, Evergreen may well be able to obtain relief without bringing a breach of contract claim. The court has 'inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner.' *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 737 (7th Cir. 1999); 18 U.S.C. §401. The court has the power to order remedial sanctions 'to compensate [Evergreen] for losses sustained as a result of [defendants'] non-compliance with an existing court order.'

"That said," Gottschall continued, "the court sees no reason to restrict Evergreen's remedy to a contempt proceeding. For one thing, the fact that agreements are enforceable by order of court does not mean that the agreements cannot also constitute contracts. Further, to hold a party in contempt, the district court must be able to point to a decree from the court which sets forth in specific detail an unequivocal command which the party in contempt violated.

"If the order is not clear, but rather simply refers to an agreement of the parties on a certain subject and is ambiguous as to what exactly is required (e.g., the court's orders regarding the standstill agreement, which is an oral agreement evidently not reduced to writing), does this mean the injured party has no remedy?

"In a contract case, in the event of an ambiguity, the court could hear evidence on the parties' intent. This would not be permissible in a contempt proceeding because the very ambiguity necessitating such evidence rules out the possibility that the respondent has violated an unequivocal command of a court order.

"Moreover, parties could reach an agreement during the course of litigation that has the effect of taking some portion of the case out of contention, but fail to memorialize the agreement through the entry of an agreed order.

"If one party later violates the agreement, the aggrieved party could not initiate a contempt proceeding because no court order was entered.

"Should that mean there is no remedy?

"Limiting an aggrieved party to a contempt remedy is more problematic than the opposite, although the opposite presents a multitude of problems. An aggrieved party should be quite careful in deciding how to proceed, however, given the possibility of disqualification and other complications."

Balancing these competing arguments, Gottschall concluded that Evergreen's "breach of contract claims must be evaluated just like any other breach of contract claim."