

# What's the Harm? Second Circuit Requires Proof of Irreparable Harm to Enjoin Restrictive Covenant Violations

## The Bottom Line

- Federal district courts in the Second Circuit will not presume that a company will suffer irreparable harm for a restrictive covenant violation.
- Parties should not rely on contractual stipulations alone to establish irreparable harm.
- A party seeking a court injunction for the breach of a non-compete or non-solicitation covenant must present actual evidence that it will suffer imminent, irreparable harm.

When companies seek a court injunction for a restrictive covenant violation, they often focus on the covenant's enforceability. They do this by arguing that the non-compete and customer non-solicitation covenants protect legitimate business interests – and is narrowly tailored to protect those interests.

A recent federal appeals court ruling, however, highlights the need for companies to also demonstrate the likelihood that they would suffer irreparable harm without the injunction. The U.S. Court of Appeals for the Second Circuit held that there is no automatic presumption of irreparable harm due to the breach of a restrictive covenant and that contractual stipulations of irreparable harm are not sufficient for establishing irreparable harm.

The opinion, which for now only applies in federal courts in New York, Connecticut and Vermont, underscores the importance of presenting concrete evidence of the likelihood of immeasurable harm to goodwill, client relationships or the ability to compete in the geographic area if the court does not enjoin the breach of a restrictive covenant.

## The Court Case

In *JTH Tax, LLC d/b/a Liberty Tax Service v. Agnant*, Alexia Agnant is a former franchisee of Liberty Tax Service. In March 2022, Liberty terminated Agnant's franchise agreement, claiming that Agnant materially violated the franchise agreement. Liberty demanded that Agnant comply with the

agreement's various post-termination obligations, including her non-compete and customer non-solicitation covenants. After Agnant refused, Liberty filed suit and sought a preliminary injunction.

The district court refused to enjoin Agnant, and Liberty appealed.

## No Automatic Presumption of Irreparable Harm in the Second Circuit

It is a longstanding principle in the Second Circuit that the most important prerequisite to securing a preliminary injunction is establishing a likelihood of irreparable harm without the injunction. To establish irreparable harm, the party seeking a preliminary injunction must show that its injuries cannot be adequately remedied by an award of monetary damages alone.

In prior cases, such as *Ticor Title Ins. Co. v. Cohen*, the Second Circuit appeared to endorse the view that the continuing breach of a restrictive covenant would cause the plaintiff irreparable harm. This is because a breach of the covenant could result in damages that are difficult to quantify, such as the loss of customer relationships that would produce an indeterminate amount of business in years to come.

On appeal, Liberty sought to take this view one step further by arguing that courts should *presume* irreparable harm in cases involving ongoing or threatened breaches of non-compete and non-solicitation covenants. The court rejected this argument, finding that there is no automatic presumption of irreparable harm due to a breach of a restrictive covenant and that the plaintiff must offer evidence that it will suffer imminent injury that cannot be remedied absent a preliminary injunction.

## What Constitutes Evidence of Irreparable Harm?

The Second Circuit explained that Liberty did not present any concrete evidence to support a finding of irreparable harm, such as evidence that Agnant's continuing operations would harm Liberty's goodwill, client relationships or ability to compete in the geographic area. For example, Liberty had not offered evidence of a prospective franchisee seeking to imminently open a store in the market where Agnant operated, and, therefore, that Liberty's ability to compete would be hindered by Agnant's business.

Instead, the evidence presented at the preliminary injunction hearing cut against Liberty's contention that it would suffer irreparable harm without the injunction. Agnant testified that her new company was not operating under Liberty Tax's name and that she no longer had access to any of Liberty's confidential information or resources. Liberty did not rebut this evidence.

Liberty also argued that Agnant acknowledged in her franchise agreement that any breach of her restrictive covenant obligations would cause irreparable harm to Liberty. Contractual stipulations of irreparable harm are common in restrictive covenant agreements. In prior cases, such as *Ticor Title Ins. Co.*, the Second Circuit indicated that such clauses could be viewed as an admission of irreparable harm by the breaching party. In the *JTH Tax* decision, however, the Second Circuit held that such clauses are entitled to some weight but are not sufficient on their own to establish irreparable harm. The party seeking the injunction must still present evidence demonstrating the likelihood that it will suffer irreparable harm without the injunction.

---

### **For More Information**

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

**Neal Klausner****Partner/Co-Chair**

212 468 4992

[nklausner@dglaw.com](mailto:nklausner@dglaw.com)**William Kukin****Associate**

212 468 4810

[wkukin@dglaw.com](mailto:wkukin@dglaw.com)