by Paul A. Avron and Franklin H. Caplan

Incarceration for Civil Contempt: Noncompliance Is Its Own Reward

What happens in civil litigation or bankruptcy when a person subject to the court's jurisdiction flat out refuses to comply with a court order, without justification? Courts have the discretion and power to impose civil contempt and order incarceration to compel compliance. Suppose the obstinate contemnor is unusually patient despite jail time of indefinite duration, perhaps motivated by the desire to retain something valuable that may be lost by compliance with the court order. How long can incarceration for civil contempt last before its very purpose—to compel compliance—is deemed to have failed? As discussed herein, while the U.S. Supreme Court has stated that incarceration for civil contempt can last indefinitely, lower courts often impose time limits.

Consider for example the case of Stephan Jay Lawrence, who filed for bankruptcy protection in June 1997. The U.S. Bankruptcy Court for the Southern District of Florida found Lawrence in contempt for failing to comply with an order requiring him to account for and turn over monies allegedly held in the Republic of Mauritius and for failing to justify his noncompliance. The court ordered his incarceration to compel compliance. The U.S. district court and the Eleventh Circuit each affirmed the bankruptcy court's order. For more than six years, he remained in federal prison, petitioning *pro se* for release, repeatedly and unsuccessfully. Finally the U.S. district court relented, finding that such protracted incarceration for civil contempt had lost its coercive effect and become punitive, and that continued incarceration would violate the Lawrence's constitutional rights.[1] Thus, enduring patience in jail, possibly sustained by evasive purpose, won out over the judicial power to enforce a court order. The lesson is that patience can subvert the sanction of incarceration for civil contempt.

The purpose of civil contempt is to coerce a respondent to do that which has been ordered and which is capable of being done or to compel compensation for losses resulting from noncompliance.[2] Incarceration is a means to enforce a civil contempt sanction, the premise being that the contemnor holds "the keys to his prison."[3] A contempt citation is conditional in the sense that the contemnor must be able to purge the contempt by compliance.[4] Impossibility of compliance is a complete defense to a contempt citation.[5] This is referred to as the "impossibility" or "inability" defense, the burden of proof for which is on the contemnor. "In order to succeed on the inability defense, the contemnor must go beyond mere assertion of inability and establish that he has made all reasonable efforts to meet the terms of the court order that, ostensibly, he cannot perform."[6] This is a fact-based defense, subject to strict construction by the trial court and reviewable on appeal for clear error.[7] If the asserted inability to comply is self-created, the inability defense will not be recognized.[8]

It seems fair to surmise that a person who in fact can comply with a court order, but who refuses to do so and thus tempts civil contempt and possible incarceration, is motivated either by deep-felt principle or by self-interest. Whatever the motivation, the proposition is that evasive purpose would be overcome by the threat or reality of jail time of an unspecified duration. But *Lawrence* demonstrates that the powerful inducement of a "time-out" behind bars can be subverted by a patient contemnor able to bide time in jail long enough to argue that continued incarceration has no coercive effect. The impossibility or inability defense cannot be a contrivance—a self-created failure—but waiting it out in jail opportunistically may be just that. In other words, the incarcerated contemnor willing to run the clock can create his own get-out-of-jail card. In this situation, and assuming that the impossibility or inability defense is inapplicable, the jail cell is opened by evasion, not compliance.

Even if the coercive effect of jail is self-negated by the contemnor's waiting it out, incarceration for civil contempt cannot stand without coercive effect. This means that the purpose and intended effect of civil contempt and the remedy of incarceration may be undone by a resolute resister. The question is how much jail time without effect is too long. In *Lawrence*, the answer was about six years. In only a handful of other cases, it took longer. However long it takes, the lesson is that a sufficiently motivated contemnor can evade a contempt order.[9]

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Jurisprudence and practicality diverge on this. Appellate courts have rejected the proposition that prison time, in itself, demonstrates inability to comply with an order.[10] It is for the trial court, in its sound discretion, to determine whether a contemnor's incarceration has lost coercive effect. The trial court's determination is entitled to great deference on appeal.[11] According to the Eleventh Circuit, if the trial court finds that the contemnor's incarceration has not lost its coercive effect, the contemnor is entitled to hearings at "reasonable intervals in order to assure that the contempt sanction continues to serve, and is limited to, its stated purpose of coercion."[12]

But in *International Union, United Mine Workers of Am. v. Bagwell*,[13] Judge (now Justice) Alito stated that incarceration for civil contempt could last indefinitely until compliance by the incarcerated contemnor.[14] Referring to *Bagwell*, Judge Alito explained as follows in *Chadwick v. Janecka*[15]:

> [Petitioner], however, urges us not to take *Bagwell* at face value. He contends that the phrase 'indefinitely until he complies' in *Bagwell* does not mean 'permanently and without other recourse.' Instead, he maintains that '[t]he word 'indefinitely' is apparently used in its most precise sense, to mean 'with no predetermined ending date.' We have no quarrel with this definition, but this understanding of the term 'indefinitely' does not explain away the critical statement in *Bagwell* that a civil contemnor may be confined 'indefinitely until he complies.'
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> The meaning of the statement in *Bagwell* that a contemnor may be held 'indefinitely until he complies' is perfectly clear. The phrase 'until he complies' sets the point in time when confinement must cease. The term 'indefinitely' describes the length of confinement up to that point, namely, a period 'having no exact limits,' because the end point (the time of compliance) cannot be foretold. Mr. Chadwick's contrary interpretation—that 'indefinitely until he complies' means 'indefinitely until he complies or it becomes apparent that he is never going to comply'—is insupportable.[16]

The Second Circuit cited Bagwell in *Armstrong v. Guccione,*[17] finding under Supreme Court case law (citing *United States v. Rylander*[18] and *Maggio v. Zeitz*[19]) that a trial court may incarcerate a contemnor "indefinitely until he complies," or until he demonstrates that compliance is no longer possible.

The *Armstrong* court's qualification about "indefiniteness" went further than *Bagwell*, by introducing the element of a maximum time shorter than forever, and by suggesting that passage of time in itself may make compliance impossible (begging the question of whether it would have been but for self-created, self-serving delay). In *Lawrence*, the Eleventh Circuit went further yet, holding that the trial court would be obligated to release the incarcerated contemnor if it concluded that he would steadfastly refuse to comply with the court's order directing turnover of assets to a Chapter 7 trustee even though he retained the ability to comply.[20] After that pronouncement and a subsequent hearing before a magistrate judge, and his submission of a report and recommendation, the district court found that Lawrence's incarceration had lost its coercive effect, given the length of the incarceration (slightly more than six years) and his steadfast refusal to comply with the turnover order (there was no "realistic possibility that he [Lawrence] would comply"[21]). Even though Lawrence had failed to carry his burden to demonstrate that he was incapable of complying with the turnover order, the district

court could not "ignore what is self-evident. Six years is longer than most terms of imprisonment for serious federal crimes. In my view, further reviewing the matter at 'reasonable intervals' will simply not change the result."[22]

The district court made clear that it did not base its finding solely on the length of Lawrence's incarceration, but on the record before it and the totality of the circumstances (Lawrence "has come to value his money (whatever may be left) more than his liberty. … Because I find that there is no realistic possibility that Lawrence will comply … although he still has the ability to do so, his incarceration may not last indefinitely."[23]).

In 1911, the Supreme Court in *Gompers v. Buck's Stove & Range Co.*[24] explained the need for courts to be able to enforce their orders by contempt lest such orders be rendered "only advisory."[25] The Court stated as follows:

> For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would only be advisory.
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> If a party can make himself a judge of the validity of orders which have been issued, and by his own disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.
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> This power 'has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens.'[26]

There is no doubt about a court's power to impose civil contempt sanctions, including jail, for disobedience of court orders. The question we consider here pertains to the effectiveness of that power. *Lawrence* indicates that incarceration as a means to redress and overcome civil contempt is weakened. This is not to say that incarceration for civil contempt has no coercive effect. Presumably it takes a special resolve to prefer prison to purging civil contempt. Perhaps that resolve is strengthened by an especially tempting cache of waiting riches. For those with such resolve, incarceration will end at some point, despite the "indefinitely until he complies" language in *Bagwell*. The authors believe that, despite this language, most courts faced with an incarcerated contemnor who, after several years in prison, has failed to comply with a court order without having established an inability to do so will order the recalcitrant contemnor released on the same basis as the district judge in *Lawrence*. This puts an interesting spin on the virtue of patience. ⊙

Endnotes

[1]The authors refer readers to a recent law review article discussing the due process issues that arise in connection with lengthy incarceration for civil contempt: Mitchell J. Frank, *Modern Odysseus of Classic Fraud—14 Years in Prison for Civil Contempt Without a Jury Trial, Judicial Power Without Limitation, and an Examination of the Failure of Due Process*, 66 U. Miami L. Rev. 299 (Spring 2012).

[2]*See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1972); Maggio v. Zeitz, 333 U.S. 401, 407 (1948); *Newman v. Graddick*, 740 F.2d 1513, 1524 (11th Cir. 1984).

[3]3 C. Wright, Federal Practice and Procedure § 704 (2d ed. 1982); *Penfield Co. v. Securities & Exchange Comm'n,* 330 U.S. 585, 590 (1947). The Sixth Circuit has stated that incarceration for civil contempt for noncompliance with a court order is a "severe sanction" and should "ordinarily should be employed only as a last resort." *United States v. Conces*, 507 F.3d 1028, 1043 (6th Cir. 2007).

[4]*Newman*, 740 F.2d at 1525.

[5]*Id.* (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)).

[6]*Lawrence v. Goldberg*, 279 F.3d 1294, 1297 (11th Cir. 2002) (quoting *Commodity Futures Trading Comm'n v. Wellington Precious Metals*, 950 F.2d 1525, 1529 (11th Cir. 1992)). According to the Second Circuit, the contemnor's "burden is to establish his inability clearly, plainly, and unmistakably." *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995). Where the property is located in an offshore trust, the burden of establishing the impossibility defense is "particularly high." *Federal Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1241 (9th Cir. 1999). *Cf. Branch Banking and Trust Co. v. Hamilton Greens, LLC*, No. 11-80507-CIV-KAM, 2014 WL 1603759 (S.D. Fla. Feb. 26, 2014) (Magistrate judge found that, unlike Stephan Lawrence, individual defendant should not be held in civil contempt for failing to repatriate assets held in a foreign trust because he lacked power under the trust indenture to control the trust and effectuate repatriation as ordered), report and recommendation affirmed, ratified, and adopted (S.D. Fla. Mar. 24, 2014) [ECF No. 249].

[7]*Lawrence*, 279 F.3d at 1297; *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 974 (11th Cir. 1986); *Lawrence v. Goldberg*, 251 B.R. 630, 652 (S.D. Fla. 2000), aff'd, 279 F.3d 1294 (11th Cir. 2002).

[8]*Berne Corp. v. Government of the Virgin Islands*, 570 F.3d 130, 140 (3d Cir. 2009); *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803 (1st Cir. 1991); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1521 (11th Cir. 1986).

[9]*See Wellington Precious Metals*, 950 F.2d at 1530 ("[W]hen civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights."); *In the Matter of John Crededio*, 759 F.2d 589, 590 (7th Cir. 1985) ("When incarceration for civil contempt … ceases to be coercive and becomes punitive, 'due process considerations oblige a court to release a contemnor from civil contempt. …'") (quoting *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983)).

[10]*See*, e.g., *Armstrong v. Guccione*, 470 F.3d 89, 110 (2d Cir. 2006) ("The length of coercive incarceration, in an of itself, is not dispositive of its lawfulness."); *Wellington Precious Metals*, 950 F.2d at 1531 ("Prison time, in and of itself, will not satisfy Weiss' burden of proving that there exists no 'realistic possibility' that he can comply with the court's contempt order. While each passing month of incarceration may strengthen Weiss's claim of inability … many more months or perhaps even several years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt order.") (internal citation omitted); *Cf. Commodity Futures Trading Comm'n v. Armstrong*, 284 F.3d 404, 406-07 (2d Cir. 2002) ("There is surely a limit to how

long someone will choose to stay in jail, even for $14.9 million, but we see no basis for rejecting the district court's finding that Armstrong's incarceration continues to serve a coercive purpose. … The district court fully recognizes that Armstrong's civil confinement 'cannot last forever.'") (quoting *SEC v. Princeton Econ. Int'l Ltd.*, 152 F. Supp. 2d 456, 463 (S.D.N.Y. 2001)).

[11]*Simkin*, 715 F.2d at 38 (in determining whether a civil contempt sanction has lost its coercive effect the trial judge has virtually unreviewable discretion, cited in *Wellington Precious Metals*, 950 F.2d at 1531); see also, e.g., *Armstrong*, 284 F.3d at 406-07.

[12]*Lawrence*, 279 F.3d at 1301 (explaining that the trial court will be obligated to release the incarcerated contemnor if it concludes that he will steadfastly refuse to comply with the court's order even though he retains the ability to comply); see also *United States v. Harris*, 582 F.3d 512, 522 (3d Cir. 2009) (DuBois, J., concurring opinion) (discussing Delaware state court judge's order directing the release of H. Beatty Chadwick from incarceration after more than 14 years—what the authors believe is the longest term of incarceration civil contempt to date—despite finding that the contemnor had the present ability to comply with an order directing him to deposit $2.5 million with the court, which concluded that the contempt order had lost its coercive effect given the contemnor's continued refusal to comply).

[13]512 U.S. 821, 828 (1994).

[14]The complete quote is as follows: "The paradigmatic coercive, civil contempt sanction ... involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." *Bagwell*, 512 U.S. at 828.

[15]312 F.3d 597 (3d Cir. 2002).

[16]*Id*. at 608 (internal citations and quotations omitted). But this is precisely what the district court found in *Lawrence* in its order directing his release from incarceration. See text at notes 11 and 12.

[17]470 F.3d 89, 110 (2d Cir. 2006).

[18]460 U.S. at 757, 761.

[19]333 U.S. 401, 407.

[20]*Lawrence*, 279 F.3d at 1301, supra.

[21]*Lawrence v. Goldberg*, Case No. 05-20485-CIV-GOLD/TURNOFF (S.D. Fla. Dec. 13, 2006) [ECF No. 161].

[22]*Id.* at 4.

[23]*Id.* at 5 (Italics added); *Lawrence*, 279 F.3d at 1300 ("The district court must make an individual determination in each case whether there is a realistic possibility that the contemnor will comply with the order. We are mindful that, 'although incarceration for civil contempt may continue indefinitely, it cannot last forever.'") (quoting *United States v. O.C. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985)).

[24]221 U.S. 418 (1911).

[25]Gompers, 221 U.S. at 450.

[26]*Id.* (quoting *Bessette v. W.B. Conkey Co.*, 194 U.S. 337 (1904)); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *In re Debbs*, 158 U.S. 564, 595 (1895), *abrogated on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968); *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812) ("To fine for contempt-imprison for contumacy—inforce the observance of order ... are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.").

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