

**2040 VIOLATING A TEMPORARY RESTRAINING ORDER OR AN INJUNCTION — §§ 813.12, 813.122, 813.123, 813.125<sup>1</sup>**

**Statutory Definition of the Crime**

Violating (an injunction) (a temporary restraining order), as defined in § \_\_\_\_\_<sup>2</sup> of the Wisconsin Statutes, is committed by one who knowingly violates (an injunction) (a temporary restraining order) issued under § \_\_\_\_\_<sup>3</sup> of the Wisconsin Statutes.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. (An injunction) (A temporary restraining order) was issued against (name of defendant) under § \_\_\_\_\_ of the Wisconsin Statutes.

(An injunction) (A temporary restraining order) is a court order prohibiting specified conduct.

ADD THE FOLLOWING FOR VIOLATIONS OF § 813.12 WHEN SUPPORTED BY THE EVIDENCE

[An injunction remains in effect even if the petitioner allows or initiates contact with the respondent or if the respondent is admitted into a dwelling that the injunction directs him or her to avoid.]<sup>4</sup>

2. The defendant committed an act that violated the terms of the (injunction) (temporary restraining order).

3. The defendant knew that the (injunction) (temporary restraining order) had been issued and knew that (his) (her) acts violated its terms.<sup>5</sup>

### **Deciding About Knowledge**

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 2040 was originally published in 1987 and revised in 1988, 1995, 2001, 2010, and 2011. This revision was approved by the Committee in December 2018; it updated the Comment and made non-substantive changes in the text.

Wis JI-Criminal 2040 is drafted for use for any one of the four restraining order/injunction statutes in chapter 813. See note 1, below. The statutes are essentially the same, though variations in the text are present. Violations of restraining orders may also constitute the offense of "harassment" as defined in § 947.013. See Wis JI-Criminal 1910, 1911, and 1912.

The constitutionality of § 813.12 was upheld in Schramek v. Bohren, 145 Wis.2d 695, 429 N.W.2d 501 (Ct. App. 1988).

For a discussion of cases involving harassment restraining orders under § 813.125, see the material following note 5.

A defendant cannot collaterally attack the validity of a harassment injunction [issued under § 813.125] in a criminal prosecution for the violation of that injunction. State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

A judge's oral remarks relating to the scope of an injunction issued under § 813.125 modify the terms of the written order. State v. O'Dell, 193 Wis.2d 333, 532 N.W.2d 741 (1995). The court noted,

however, that trial courts are “strongly encouraged” to incorporate all oral modifications into the written injunction. 193 Wis.2d 333, 344.

The restraining order statutes were amended by 1995 Wisconsin Act 71, to prohibit possession of firearms by persons subject to the orders. All persons enjoined under §§ 813.12 and 813.122 are prohibited from possessing firearms. See §§ 813.12(4m) and 813.122(5m), created by 1995 Wisconsin Act 71. Persons enjoined under §§ 813.123 and 813.125 may be prohibited from possessing firearms if a specific finding is made. See § 813.123(5m) and 813.125(4m). Possession of a firearm by persons subject to these injunctions is punishable as a violation of § 941.29. See Wis JI-Criminal 1344.

1. The instruction has been drafted for use for any one of the four restraining order/injunction offenses now defined by the Wisconsin Statutes:

- § 813.12 - Domestic Abuse
- § 813.122 - Child Abuse
- § 813.123 - Individuals at Risk
- § 813.125 - Harassment.

Note: Domestic abuse injunctions and orders under § 813.12 include an injunction or order “issued by a tribal court under a tribal domestic abuse ordinance adopted in conformity with this section.” § 813.12(1)(e).

2. In the blank provided, insert one of the following:

- § 813.12(8) - for a domestic abuse case
- § 813.122(11) - for a child abuse case
- § 813.123(10) - for an individual at risk case
- § 813.125(7) - for a harassment case.

3. In the blank provided, insert one of the following if the case involves violation of an injunction:

- § 813.12(4) - for a domestic abuse case
- § 813.122(5) - for a child abuse case
- § 813.123(5) - for an individual at risk case
- § 813.125(4) - for a harassment case.

If a temporary restraining order is involved, substitute § 813.12(3), § 813.122(4), § 813.123(4), or § 813.125(3), as appropriate.

4. This is a paraphrase of the rules stated in § 813.12(4)(c); no change in meaning is intended. Similar provisions are not found in the other injunction statutes to which this instruction applies.

5. That the defendant “knowingly” violated the order is explicitly required by §§ 813.12(8) and 813.122(11). Section 813.123(10) requires that the defendant “intentionally violates” the order. “Knowingly” is absent from § 813.125(7), which establishes the criminal penalty for violations of harassment orders. The Committee concluded that “knowingly” should be required in the latter situation as well.

Whether the order was properly served is relevant to the knowledge requirement since it is an effective way to prove that the defendant did have knowledge of the order. However, service of the injunction is not specifically dealt with in the instruction. In domestic abuse, child abuse and individual at risk cases, §§ 813.12(2), 813.122(2), and 813.123(2), respectively, provide that the “action commences with service of the petition.” Thus, without service, there could be no action and no criminal charge for violating the injunction or temporary restraining order. There is no counterpart for this subsection in § 813.125 for harassment cases. However, in order to issue the harassment injunction, the court must have found that the temporary restraining order was served on the defendant, see § 813.125(4)(a)2. Therefore, the same result – no action without service – ought to follow in the harassment case, despite the difference between the statutes.

Statutes in each of the four types of cases require that notice of the injunction hearing be served. If the defendant did not appear at the hearing, proof of service would show that he has received notice that an injunction may be issued which will contain the same terms as the temporary restraining order. It is error to instruct the jury to “accept as conclusively proven” that the defendant was served with the order. State v. Gordon, 2002 WI App 53, ¶45, 250 Wis.2d 702, 641 N.W.2d 183.

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Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), and State v. Sarlund, 139 Wis.2d 386, 407 N.W.2d 544 (1987), upheld the constitutionality of the harassment injunction statute, § 813.125. In the process, however, the court emphasized that to be valid, the injunctions had to be narrowly drawn: they “must be specific as to acts and conduct which are enjoined.” The injunction in the Salamone case, restraining “any contact” with the petitioner, was held invalid because it described the prohibited conduct too broadly.

In the Committee’s judgment, the injunction would be properly framed if it prohibited future “harassment.” Section 813.125 allows the issuance of an injunction if the person has engaged in “harassment” under § 947.013. While a violation of § 947.013 is directly punishable as a Class B forfeiture, engaging in conduct prohibited by the criminal statute also justifies the issuance of an injunction. The injunction may order a person not to engage in any more “harassment,” see § 813.125(4)(a). Violating the injunction is then punishable as a crime. That is, a person may not engage in another violation of § 947.013 without suffering criminal penalties under § 813.125. Such an injunction is valid because it only covers conduct prohibited by § 947.013. The definition of “harassment” found in that statute was upheld in the two cases cited above as providing sufficient notice of the prohibited conduct and not infringing on innocent or protected behavior.

Under this approach, a violation of § 947.013 supports the issuance of an injunction ordering the person not to violate § 947.013 again. A second violation of § 947.013 violates the injunction. This seems to avoid the overbreadth and vagueness problems of orders that prevent “all contact” or “any communication.” And in the criminal action, the issues would be: (1) was there an order; and (2) did the defendant (knowingly) engage in “harassment” as defined in § 947.013 (which definition has been upheld as constitutional).