

## Provisional Remedies: West Virginia

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A Q&A guide to the various provisional remedies available in West Virginia state courts. This Q&A addresses the legal standards in West Virginia for obtaining provisional remedies, the application procedures for each remedy, and limitations imposed on each remedy. Answers to questions can be compared across a number of jurisdictions (see Provisional Remedies: State Q&A Tool).

**Following the suspension or modification of many judicial functions in 2020 due to COVID-19, West Virginia state courts have resumed most operations, but local courts may impose special rules impacting some litigants (such as remote proceedings). Check the West Virginia Judiciary's Coronavirus Disease 2019 (COVID-19) website for the latest developments in this jurisdiction.**

### Overview of State Provisional Remedies

#### 1. List each provisional remedy available in your jurisdiction and the statutory authority (if any) for each.

West Virginia law provides for the following provisional remedies:

- Attachment (W. Va. Code § 38-7-1; W. Va. R. C. P. 64).
- Preliminary injunction (W. Va. R. C. P. 65(a)).
- Temporary restraining order (W. Va. R. C. P. 65(b)).
- Receivership (W. Va. Code § 53-6-1; W. Va. R. C. P. 66; *State ex rel Donley v. Baker*, 164 S.E. 154, 156 (W. Va. 1932)).

#### 2. For each remedy listed in Question 1, describe:

- The nature of each remedy.
- Whether the remedy is limited to certain categories of actions or only available under certain conditions.

#### Attachment: W. Va. R. C. P. 64; W. Va. Code § 38-7-1

In West Virginia, an attachment order enables the plaintiff to secure property to repay a claim for damages or a debt before entry of a judgment (W. Va. Code § 38-7-1).

An attachment order is available in any civil action to recover:

- A claim or debt arising out of a contract.
- Damages for any wrong committed.

(W. Va. Code § 38-7-1.)

#### Preliminary Injunction: W. Va. R. C. P. 65(a)

A preliminary injunction compels affirmative conduct or prevents conduct. A preliminary injunction preserves the status quo between the litigants pending a final determination on the merits of an underlying claim for permanent injunction or other claims for relief. (*Kessel v. Leavitt*, 511 S.E.2d 720, 776 (W. Va. 1998).)



### Temporary Restraining Order: W. Va. R. C. P. 65(b)

A temporary restraining order is an attempt to maintain the status quo and is issued pending a hearing on an application for a preliminary injunction (W. Va. R. C. P. 65(b); *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 575 S.E.2d 362, 368 n.7 (2002)).

### Receivership: W. Va. R. C. P. 66; W. Va. Code § 53-6-1

A receivership is the judicial appointment of a person to take control of designated property during litigation if there is a danger of loss or misappropriation of the property (W. Va. Code § 53-6-1).

**3. For each remedy listed in Question 1, provide the legal standard used by the court when deciding to grant the remedy.**

### Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64

In West Virginia, an order of attachment may be issued if the defendant satisfies any of the following:

- Is a non-resident of West Virginia.
- Has or is about to move out of the state.
- Conceals themselves to avoid service of process.
- Is removing or about to remove property out of the state.
- Is converting or about to convert property.
- Is about to fraudulently assign or dispose of the property.
- Has fraudulently assigned or disposed of the property.
- Fraudulently withholds money, property, or effects that may satisfy the defendant's debts.
- Fraudulently contracted the debt or incurred liability.

(W. Va. Code § 38-7-2.)

### Preliminary Injunction: W. Va. R. C. P. 65(a)

Four factors are considered to determine whether to issue a preliminary injunction:

- The likelihood of irreparable harm to the plaintiff without the injunction.
- The likelihood of harm to the defendant with an injunction.
- The plaintiff's likelihood of success on the merits.
- The public interest.

(*Camden-Clark Mem'l Hosp. Corp. v. Turner*, 575 S.E.2d 362, 366 (W. Va. 2002).)

### Temporary Restraining Order: W. Va. R. C. P. 65(b)

A temporary restraining order may be granted without notice to the adverse party if:

- The affidavit or verified complaint clearly shows that immediate and irreparable injury, loss, or damage will occur to the applicant before the adverse party's opposition can be heard.
- The applicant's attorney certifies to the court in writing:
  - any efforts made to give notice; and
  - why notice should not be required.

(W. Va. R. C. P. 65(b).)

### Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66

To obtain the appointment of a special receiver, an applicant must show that both:

- That either:
  - the applicant has a clear right to the property;
  - the applicant has a lien on the property; or
  - the property is a special fund for the satisfaction of a claim.
- The possession of the property by the nonmovant was:
  - obtained by fraud; or
  - the property is in danger of loss from the defendant's neglect, waste, misconduct, or insolvency.

(*State ex rel. Battle v. Hereford*, 133 S.E.2d 86, 91 (W. Va. 1963).)

### Applying for State Provisional Remedies

**4. For each remedy listed in Question 1, what is the procedure for applying for that relief? Include any limits placed on the method of applying for that remedy (for example, whether the statute disallows applications for preliminary injunctions to be brought by orders to show cause).**

#### Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64

In West Virginia, a party may move for an order of attachment by filing an affidavit with the clerk of the court in which the action is brought stating:

- The nature of the claim.
- The amount the plaintiff believes to be entitled to recover in the action.
- That the affiant believes one or more grounds exists for attachment under W. Va. Code § 38-7-2 (see Question 3: Attachment).

(W. Va. Code § 38-7-1.)

#### Preliminary Injunction: W. Va. R. C. P. 65(a)

If a party seeks a preliminary injunction, the party must file a petition if no civil action yet exists or a motion if a civil action is already pending, accompanied by an affidavit, providing the reasons the party is entitled to said injunction. In all cases, a hearing is held to give the defendant a fair opportunity to oppose the application. A preliminary injunction may be issued if the court is satisfied by affidavit or otherwise by the plaintiff's equity in the matter. (*Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n*, 393 S.E.2d 653, 661-63 (W. Va. 1990).)

#### Temporary Restraining Order: W. Va. R. C. P. 65(b)

Generally, courts require notice and a hearing on a party's application for a temporary restraining order (TRO) absent exigent or extraordinary circumstances. A TRO may be granted without notice, but the application must be accompanied by both:

- An affidavit or verified complaint.
- A certification regarding notice requirements.

(W. Va. R. C. P. 65(b).)

#### Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66

The practice of appointing receivers is in accordance with the practice previously followed in West Virginia (W. Va. R. C. P. 66). Parties must file a motion for the appointment of a receiver with the court (*State ex rel. Battle*, 133 S.E.2d at 92).

**5. For each remedy listed in Question 1, list any documents that are required as part of the application.**

#### Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64

In West Virginia, a party seeking an order of attachment must file an affidavit stating:

- The nature of the plaintiff's claim (W. Va. Code § 38-7-1).
- The amount the plaintiff believes the plaintiff is justly entitled to recover in the action (W. Va. Code § 38-7-1).
- The grounds for the attachment (W. Va. Code §§ 38-7-1 and 38-7-2).
- Material facts showing the existence of the plaintiff's grounds for seeking attachment, unless the plaintiff seeks attachment because the defendant is a nonresident (W. Va. Code § 38-7-3).

#### Preliminary Injunction: W. Va. R. C. P. 65(a)

A party seeking a preliminary injunction must provide:

- Notice to the other party (W. Va. R. C. P. 65(a)).
- A verified complaint or supporting affidavit (*Ashland Oil v. Kaufman*, 384 S.E.2d 173, 176 n.2 (W. Va. 1989)).

#### Temporary Restraining Order: W. Va. R. C. P. 65(b)

A party seeking a temporary restraining order with or without notice to the adverse party must provide an affidavit or verified complaint, including a certification from the party's attorney (W. Va. R. C. P. 65(b)).

### Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66

A party seeking the appointment of a receiver must file a motion for the appointment of a receiver with the court (*State ex rel. Battle*, 133 S.E.2d at 92.)

#### 6. For each remedy listed in Question 1, if the remedy is requested on notice, indicate:

- What notice is required.
- Any time limits applicable to the notice.
- Whether the adverse party may submit opposition, and if so, when and how.
- Whether the adverse party is entitled to a hearing.

### Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64

#### Notice

In West Virginia, notice of the order of attachment must be served on the defendant (W. Va. R. C. P. 64).

#### Time Limits for Notice

The notice must be served and a return made by the defendant within 30 days after the court issues the order for attachment (W. Va. R. C. P. 64).

#### Opposing an Application

A garnishee must serve an answer within 90 days after service of the order of attachment unless the answer is waived (W. Va. R. C. P. 64).

#### Hearing

A defendant is entitled to a prejudgment hearing before execution of an attachment. The hearing must be held between five to ten days after the affidavit is filed. The hearing establishes facts:

- Regarding the nature of the obligation under which the plaintiff claims a right to possession.
- Justifying the seizure according to the grounds provided in the affidavit.

(W. Va. Code § 38-7-1.)

### Preliminary Injunction: W. Va. R. C. P. 65(a)

#### Notice

A party must issue a notice of a preliminary injunction to the adverse party (W. Va. R. C. P. 65(a)).

#### Time Limits for Notice

The defendant must:

- Receive notice of a request for a preliminary injunction.
- Be provided fair opportunity to:
  - oppose the application; and
  - prepare for opposition.

(*State ex rel. E. I. duPont de Nemours & Co. v. Hill*, 591 S.E.2d 318, 326 (W. Va. 2003).)

While there is no standard time limit for how much notice is required, simply making a request for a preliminary injunction during a hearing does not satisfy the notice requirement (*State ex rel. E. I. duPont de Nemours & Co.*, 591 S.E.2d at 326). Generally, whether sufficient notice is given depends on the specific facts of each case.

#### Opposing an Application

A defendant must be given a fair opportunity to both:

- Oppose the application for a preliminary injunction.
- Prepare for the opposition.

(*State ex rel. E. I. duPont de Nemours & Co.*, 591 S.E.2d at 326).

#### Hearing

A hearing is held on the application of a preliminary injunction (*State ex rel. E. I. duPont de Nemours & Co.*, 591 S.E.2d at 326).

### Temporary Restraining Order: W. Va. R. C. P. 65(b)

#### Notice

Notice is required to obtain a temporary restraining order (TRO) unless the moving party provides:

- An affidavit or verified complaint clearly showing that the applicant will suffer immediate and irreparable injury, loss, or damage before the adverse party's opposition is heard.
- The applicant's attorney certifies in writing:
  - any efforts made to give notice; and
  - why notice should not be required.

(W. Va. R. C. P. 65(b).)

### Time Limits for Notice

The West Virginia Rules of Civil Procedure do not specify any time limits applicable to notices for a TRO.

### Opposing an Application

Time limits for opposing a motion for a TRO are not specified in W. Va. R. C. P. 65(b). However, W. Va. R. C. P. 6(d) specifies that a response to any motion, including any supporting brief or affidavit, must be filed at least two days before a hearing on a motion. The response must be served at least:

- Two days before the hearing if served by hand delivery or fax.
- Four days before the hearing if served by mail.

(W. Va. R. C. P. 6(d).)

An adverse party who was not given notice of a motion for a TRO may give two days' notice to the applying party to appear and move for a TRO's dissolution or modification. The court must hear and determine the motion as expeditiously as justice requires. (W. Va. R. C. P. 65(b).)

### Hearing

A hearing may or may not be held before a trial court's decision to grant or deny a TRO. The adverse party is not entitled to a hearing on an application for a TRO. If a TRO is granted without notice to the opposing party, the party requesting the TRO must file and set a hearing for a motion for a preliminary injunction at the earliest possible time, which takes precedence of all matters except older matters of the same character. A party's failure to do so will result in the dissolution of the TRO. (W. Va. R. C. P. 65(b).)

## Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66

### Notice

West Virginia law does not specify notice requirements for the application for a receivership.

### Time Limits for Notice

West Virginia law does not specify time limits for notice of an application for a receivership.

### Opposing an Application

West Virginia law does not specify how or when to submit opposition to an application to appoint a receiver.

### Hearing

West Virginia law does not specify whether an adverse party is entitled to a hearing on an application for a receivership.

### 7. For each remedy listed in Question 1, please describe:

- Whether ex parte applications are allowed.
- The procedure for obtaining ex parte relief.
- Any additional standard that must be met if the remedy is sought ex parte.

## Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64

### Ex Parte Applications

Ex parte applications for attachments are allowed in West Virginia (W. Va. Code § 38-7-41).

### Procedure for Ex Parte Relief

The petition must both:

- State the nature of the claim.
- Give security for costs.

(W. Va. Code § 38-7-41.)

The court impanels a jury to inquire into the claim, unless the jury trial is waived. If the petitioner is found to have an interest in the property, the court issues an order as necessary. (W. Va. Code § 38-7-41.)

### Additional Standards for Ex Parte Applications

Any interested person may file an application at any time before the property attached is sold (W. Va. Code § 38-7-41).

### **Preliminary Injunctions: W. Va. R. C. P. 65(a)**

#### **Ex Parte Applications**

While ex parte applications for preliminary injunctions are allowed, notice to the adverse party is required (W. Va. R. C. P. 65(a)).

#### **Procedure for Ex Parte Relief**

An ex parte injunction is only granted if it clearly appears from specific facts shown by an affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party's opposition can be heard. Additionally, the attorney for the party seeking the preliminary injunction must provide a certification of either:

- Any efforts made to provide notice to the adverse party.
- The reasons why notice should not be required.

(*Ashland Oil*, 384 S.E.2d at 178.)

#### **Additional Standards for Ex Parte Applications**

An ex parte preliminary injunction is an extraordinary remedy that is justified only under extraordinary circumstances (*Ashland Oil*, 384 S.E.2d at 178).

### **Temporary Restraining Order: W. Va. R. C. P. 65(b)**

#### **Ex Parte Applications**

A party may seek an ex parte temporary restraining order (TRO) (W. Va. R. C. P. 65(b)).

#### **Procedure for Ex Parte Relief**

The court may grant a TRO ex parte only if:

- It clearly appears from specific facts shown by affidavit or verified complaint that the plaintiff will suffer immediate and irreparable injury, loss, or damage before the court can hear the adverse party.
- The applicant's attorney certifies to the court in writing:
  - any efforts to give the adverse party notice; and
  - why notice should not be required.

(W. Va. R. C. P. 65(b).)

#### **Additional Standards for Ex Parte Applications**

There are no additional standards that must be met when seeking a temporary restraining order ex parte.

### **Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66**

#### **Ex Parte Applications**

A party may seek an ex parte appointment of a receiver (*State ex rel. Battle*, 133 S.E.2d at 91).

#### **Procedure for Ex Parte Relief**

An applicant may file an ex parte application for appointment of a receiver (*State ex rel. Battle*, 133 S.E.2d at 91). However, notice must be given if practicable and only excused in cases involving irreparable impending injury (*Ruffner v. Mairs*, 11 S.E. 5, 8 (W. Va. 1890)).

#### **Additional Standards for Ex Parte Applications**

Courts should exercise extreme caution in appointing receivers on an ex parte application and carefully determine whether it is proper to do so. As a general rule, courts grant an ex parte receivership:

- Under peculiar and urgent circumstances.
- Where the right to be protected is clear.
- If there is no other safe or expedient remedy.

(*State ex rel. Battle*, 133 S.E.2d at 91.)

## **Other Issues for Provisional Remedies**

**8. For each remedy listed in Question 1, are any limits placed on the duration of the remedy (for example, whether a temporary restraining order is limited by statute to a certain number of days)?**

### **Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64**

West Virginia law does not specify any limits on the duration of an order for attachment.

### **Preliminary Injunction: W. Va. R. C. P. 65(a)**

There is no limit on the duration of a preliminary injunction and it generally remains effective until the court enters a final judgment.

### Temporary Restraining Order: W. Va. R. C. P. 65(b)

A temporary restraining order (TRO) must expire by its terms no more than ten days after the date it is entered unless:

- The court extends the time for good cause shown.
- The party against whom the order is directed consents to extending the TRO for a longer period.

(W. Va. R. C. P. 65(b).)

### Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66

There is no limit on the duration of a receivership. However, under common practice, courts discharge a receivership when there is no further use for the receiver, which generally occurs after the court's final judgment.

**9. For each remedy listed in Question 1, state whether a bond or other form of security must be provided if the remedy is granted and include any guidelines for the amount and form of the bond or security.**

### Attachment: W. Va. Code § 38-7-1; W. Va. R. C. P. 64

In West Virginia, a party seeking an order of attachment must post a bond of at least double the amount of the estimated value of the property to be attached, as indicated on the plaintiff's affidavit (W. Va. Code § 38-7-8).

### Preliminary Injunction: W. Va. R. C. P. 65(a)

A party seeking a preliminary injunction must post a bond in an amount the court directs. The bond must be given to the court clerk. (W. Va. Code § 53-5-9; W. Va. R. C. P. 65(c).)

### Temporary Restraining Order: W. Va. R. C. P. 65(b)

A temporary restraining order may only be issued when the applicant gives security:

- In a sum the court deems proper.
- For the payment of costs, damages, and reasonable attorneys' fees that a wrongfully restrained party may incur.

(W. Va. R. C. P. 65(c).)

The applicant does not need to give security if the adverse party is the US, the state of West Virginia, or any of its officers or agencies. (W. Va. R. C. P. 65(c).)

### Receivership: W. Va. Code § 53-6-1; W. Va. R. C. P. 66

A special receiver must post a court-approved bond (W. Va. Code § 53-6-1).

## Quasi-Provisional Remedies

**10. Are there any additional remedies available in your jurisdiction (such as *lis pendens* or seizure of chattel) that are not technically considered provisional remedies but function similarly?**

### Prejudgment Seizure of Personal Property

West Virginia allows prejudgment seizure of personal property that is the subject of litigation by a designated officer (W. Va. Code § 55-6-1).

### Civil Arrest

An order for civil arrest is:

- A judicial order for the arrest of a defendant in a civil action.
- Only authorized in a pending action.

(W. Va. Code § 53-7-1; *Ogg v. Murdock*, 25 W. Va. 139, 145 (1884).)

### *Lis Pendens*

A person commencing an action to enforce any lien on, right to, or interest in real estate must file and record with the county court clerk a notice of *lis pendens* of the action stating:



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- The title of the cause.
- The court in which the action is pending.
- Names of all the parties.
- Description of the real estate affected
- Nature of the lien, right, or interest sought to be enforced.
- Name of the person whose estate is affected.

(W. Va. Code § 55-11-2.)

Mere commencement of the action does not operate as constructive notice (W. Va. Code § 55-11-2).

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