

Provisional Remedies: Delaware

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A Q&A guide to the various provisional remedies available in Delaware state courts. This Q&A addresses the legal standards in Delaware 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 nonessential judicial functions in 2020 due to COVID-19, Delaware courts have resumed most operations, but local courts may impose special rules impacting some litigation (such as remote proceedings). Check the [Delaware Judiciary Response to Coronavirus Disease \(COVID-19\)](#) 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.

Delaware maintains separate courts of law and equity. The following provisional legal remedies are available in Delaware's courts of law (for example, the Superior Court):

- Attachment and garnishment (10 Del. C. §§ 3501 - 3513).
- Replevin (10 Del. C. §§ 9631 - 9640).

The following provisional equitable remedies are available in the Court of Chancery, Delaware's court of equity:

- Preliminary injunction (Del. Ch. Ct. R. 65(a)).
- Receivership *pendente lite* (pending the litigation) (Del. Ch. Ct. R. 148 - 168).
- Sequestration (10 Del. C. § 366; Del. Ch. Ct. R. 4(db)).
- Temporary restraining order (Del. Ch. Ct. R. 65(b)).

Additionally, the Delaware Court of Chancery:

- Can order an appointment of a corporate custodian or receiver if the corporation is insolvent (8 Del. C. § 226).

- Has a limited power of post-judgment attachment, which it can use solely to compel the appearance of resident defendants after a default judgment (10 Del. C. § 365).

The notice of pendency, or *lis pendens*, is available in both the law and equity courts (25 Del. C. §§ 1601 - 1614).

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 and Garnishment: 10 Del. C. §§ 3501 to 3513

Delaware courts of law can attach, or seize, a defendant's property before trial (10 Del. C. §§ 3501 - 3513). The property is usually not immediately transferred to the plaintiff but held pending the outcome of the litigation (Del. Super. Ct. Civ. R. 4(b)).

Garnishment is an attachment of the defendant's property which is in the possession, custody, or control of a third party (*Pauley Petroleum, Inc. v. Cont'l Oil Co.*, 235 A.2d 284, 291 (Del. 1967)).

Attachment and garnishment are only available under exigent circumstances, including when a defendant has fled or is about to flee the jurisdiction (10 Del. C. § 3501). Delaware exempts some property from seizure (10 Del. C. § 4902).

Banks, trust companies, savings institutions, loan associations, and insurance companies are generally not subject to attachment or garnishment, with limited exceptions (10 Del. C. § 3502(b), (c)).

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

A notice of pendency, or *lis pendens*, is a notice given to potential buyers of real property that there is pending litigation that may affect title to the property. It does not establish a lien on the property but provides notice to third parties that the purchase is subject to the judgment rendered in the litigation. (*DiSabatino v. Salicete*, 695 A.2d 1118, 1119 (Del. 1997).) There is no common law *lis pendens* doctrine in Delaware and the remedy is statutory (25 Del. C. § 1614).

A notice of pendency is available if the judgment sought by the plaintiff affects the title to, or enforces an equitable lien on, real estate (25 Del. C. § 1601(a)). A notice of pendency is not available:

- On a claim relating to real estate where a successful plaintiff is entitled only to money or money damages.
- To enforce a mechanic's lien.
- To foreclose on a mortgage at law.

(25 Del. C. § 1601(b).)

Preliminary Injunction: Del. Ch. Ct. R. 65

A preliminary injunction is a court order requiring a litigant to perform or stop performing a certain action before entry of a final judgment (*Joyland Daycare Ctr. v. Dir. of Dept. of Servs. For Child., Youth and Their Fams.*, 1996 WL 74713, at *2 (Del. Ch. Jan. 22, 1996)). This equitable remedy is only available in the Delaware Court of Chancery (*Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *2 (Del. Ch. Nov. 5, 2004)).

Preliminary injunctions are available when a party's action or inaction will cause imminent and irreparable harm so that, absent an injunction, the applicant cannot obtain adequate relief through or following the underlying action (*In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 513 (Del. Ch. 2010)).

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

The Delaware Court of Chancery has the inherent power to appoint a receiver *pendente lite* (pending litigation) over a corporate defendant to protect either:

- The plaintiff from irreparable harm.
- The corporation's assets pending litigation.

(*Beal Bank, SSB v. Lucks*, 1998 WL 778362, at *3 (Del. Ch. Oct. 23, 1998).)

The receiver effectively takes control of the corporation's assets until the litigation is resolved (Del. Ch. Ct. R. 149 and 151). The Delaware Court of Chancery is reluctant to grant receivership except in extraordinary cases (*Beal Bank*, 1998 WL 778362, at *3).

Replevin: 10 Del. C. §§ 9631 to 9640

Replevin actions are *in rem* actions to gain possession of a specific property. A summons issued in a replevin action acts as a type of temporary restraining order instructing the defendants not to intentionally destroy, damage, sell, or secret property that is the object of the claim (10 Del. C. § 9633; see Temporary Restraining Order).

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

The Delaware Court of Chancery may compel the appearance of a non-resident defendant by sequestering, or seizing and selling, any of the defendant's property (10 Del. C. § 366; Del. Ch. Ct. R. 4(db)). The defendant's property must be located in Delaware (*Gordon v. Michel*, 297 A.2d 420, 424 (Del. Ch. 1972)). Sequestration is only available if the plaintiff seeks a money judgment (*Cable Adver. Networks, Inc. v. DeWoody*, 632 A.2d 1383, 1386–87 (Del. Ch. 1993)).

Sequestration is similar to foreign attachment, which is available in Delaware's courts of law (see Attachment and Garnishment). Sequestration was a common method of establishing jurisdiction over non-resident defendants until the US Supreme Court held that the "minimum contacts" standard applied to actions brought *in rem*, and a defendant's mere possession of property in Delaware was not enough to support *quasi in rem* jurisdiction unless the subject matter of the dispute related to the property (*Shaffer v. Heitner*, 433 U.S. 186 (1977)). Sequestration is rare but still available.

Sequestration is only available if the defendant is a non-resident of Delaware (10 Del. C. § 366). A domiciliary of Delaware may still be a non-resident and sequestration is available if a domiciliary:

- Is gone from the state for a substantial period of time.
- Has left no indication of the domiciliary's destination.
- Leaves no evidence of an intent to return to Delaware.
- Has maintained no residence within the state.

(*Wife v. Husband*, 271 A.2d 51, 53 (Del. Ch. 1970).)

Temporary Restraining Order: Del. Ch. Ct. R. 65

A temporary restraining order (TRO) is similar to a preliminary injunction, but is of a short, determinate duration (see *Trilogy Portfolio Co., LLC v. Brookfield Real Est. Fin. P'rs, LLC*, 2012 WL 120201, at *4 (Del. Ch. Jan. 13, 2012)). It is typically issued to bridge the gap between a plaintiff's application for a preliminary injunction and the subsequent hearing, and it protects the status quo to prevent imminent and irreparable harm pending a preliminary injunction hearing or final resolution of the matter (*CBOT Hldgs., Inc. v. Chicago Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007)). The test for obtaining a TRO is different when compared to a preliminary injunction, but a TRO is generally available under the same circumstances for obtaining a preliminary injunction (see Preliminary Injunction).

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

Attachment and Garnishment: 10 Del. C. §§ 3501 to 3513

The standard for writs of attachment (also used to obtain a garnishment) depends on whether the defendant is a resident of Delaware. For resident defendants, the plaintiff must prove that either:

- The defendant cannot be found.
- The defendant owes the plaintiff at least \$50 and with the intent to defraud their creditors or to elude process either:
 - has absconded from their usual place of abode;
 - is about to leave the state; or
 - has left the state.

(10 Del. C. § 3501.)

For non-resident defendants, the plaintiff must prove that all of the following are true:

- The defendant cannot be found.
- The defendant resides out of the state.
- The plaintiff has a good cause of action against the defendant for more than \$50.

(10 Del. C. § 3506.)

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

A notice of pendency does not require court approval. Under certain conditions, a court with proper jurisdiction over the action may direct the recorder of deeds to cancel the notice (*DiSabatino*, 695 A.2d at 1121).

The court must cancel the notice of pendency if:

- The recording party fails to comply with the statutory notice requirements of 25 Del. C. § 1605.
- The final judgment entered denying the claim covered by the notice of pendency is no longer appealable.
- The claim relating to the real estate is one which, if successful, entitles the party solely to recover money or money damages.

(25 Del. C. § 1606.)

The court may cancel a notice of pendency if the recording party fails to prove a probability of success in the underlying action. The cancellation may contain conditions that the court deems just and proper. (25 Del. C. § 1608.)

Preliminary Injunction: Del. Ch. Ct. R. 65

A plaintiff seeking a preliminary injunction prohibiting a party from taking certain actions must show the following elements:

- A reasonable probability of success on the merits.
- That immediate and irreparable harm will result absent injunctive relief.
- That the harm to the plaintiff if the injunction is denied exceeds the harm to the defendant if the injunction is issued.

(*Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).)

The court may also consider whether an injunction is in the public interest (see *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *1 (Del. Ch. Nov. 1, 2007); *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 559 (Del. Ch. 2000)).

The court applies a stricter standard for a plaintiff seeking a preliminary injunction requiring a party to take certain actions, known as a “mandatory” injunction. In cases of mandatory injunctions, the court considers whether the plaintiff shows that it “is entitled as a matter of law to the relief it seeks based on undisputed facts.” (*Alpha Nat. Res., Inc. v. Cliff’s Nat. Res., Inc.*, 2008 WL 4951060, at *2 (Del. Ch. Nov. 6, 2008).)

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

The Court of Chancery considers receivership *pendente lite* an “extraordinary” and “intrusive” remedy and is generally hesitant to appoint one. The Court of Chancery will only do so if it is clear that:

- Irreparable loss to the property at issue is imminent.
- Appointment of a receiver will prevent the harm.

(*Beal Bank, SSB*, 1998 WL 778362, at *3.)

To meet the standard of proof for irreparable loss, the party seeking appointment of a receiver must show a well-grounded apprehension of injury and more than a possibility of danger and loss (*Beal Bank, SSB*, 1998 WL 778362, at *3).

A court will not appoint a receiver where it can find another less stringent means of protecting the parties’ rights (*Beal Bank, SSB*, 1998 WL 778362, at *3).

Replevin: 10 Del. C. §§ 9631 to 9640

A stay in replevin actions issues automatically with the summons in the action. During the stay, the plaintiff may not sell, damage, destroy, or secret the items. (10 Del. C. § 9633; *Falciani v. Zinszer*, 2018 WL 3654903, at *1 (Del. Super. Ct. July 31, 2018).)

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

The Court of Chancery decides whether to order sequestration after determining whether the seizure is legally permissible, including whether the plaintiff has shown *prima facie* that the seizure procedure was validly invoked (*Cable Adver. Networks*, 632 A.2d at 1386). The following factors must also be satisfied:

- The property must be located in Delaware (*Cable Adver. Networks*, 632 A.2d at 1383 n.1).
- The defendant must be a non-resident of Delaware (10 Del. C. § 366).

- The plaintiff must seek a money judgment (*Cable Adver. Networks*, 632 A.2d at 1386-87).
- The plaintiff must show that the defendant has sufficient minimum contacts with Delaware for the court to have jurisdiction (*Cable Adver. Networks*, 632 A.2d at 1386-87; see *Shaffer*, 433 U.S. at 216).

Temporary Restraining Order: Del. Ch. Ct. R. 65

To obtain a temporary restraining order (TRO), a plaintiff must prove:

- The plaintiff has a colorable claim.
- Absent the entry of the order, plaintiff will suffer irreparable harm.
- Absent entry of the order, the hardship to the plaintiff outweighs the harm the order may cause to the defendant.
(*Smart Home, Inc. v. Selway*, 2011 WL 3808274, at *1 (Del. Ch. Aug. 15, 2011).)
- That the claimed harm is imminent (*Roseton OL, LLC v. Dynegy Holdings Inc.*, 2011 WL 3275965, at *8 (Del. Ch. July 29, 2011)).

A claim is colorable unless it is frivolous or so lacking in merit that it is impossible for the plaintiff to succeed (*Trilogy Portfolio Co., LLC*, 2012 WL 120201, at *5).

The standard of proof to obtain a TRO is less strict than the standard for a preliminary injunction because the plaintiff must prove a colorable claim instead of a reasonable probability of success on the merits. However, if the applicant has had the opportunity to develop evidence and present a record from which the court may make a more informed judgment concerning the merits, the court applies a test similar to the preliminary injunction standard (*Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *7 (Del. Ch. Apr. 19, 1999) (quoting *Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996)).

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 and Garnishment: 10 Del. C. §§ 3501 to 3513

In Delaware, a plaintiff applies for legal attachment or garnishment in its complaint (Del. Super. Ct. Civ. R. 4(b)(1)).

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

The recording party files a notice of pendency with the recorder of deeds in the county where the contested real estate is located. The notice must be under oath and include:

- The court in which the action was brought, the caption of the action, and the civil action number.
- The object of the action or the affirmative relief sought.
- A legal description sufficient to identify the affected property.
- The names of each party against whom the notice is directed to be indexed.

(25 Del. C. § 1601(a).)

Within five days after filing the notice of pendency, the recording party must serve or send by first-class mail a copy of the notice to:

- The last known address of each party against whom the notice of pendency has been indexed.
- All persons shown on the public record to have an interest in or lien on the real estate at issue.

(25 Del. C. § 1605.)

Failure to provide proper notice will, on motion of an aggrieved party, result in mandatory cancellation of the notice (25 Del. C. § 1606(1)).

Within ten days after filing the notice of pendency, the recording party or its attorney must file an affidavit with the court in the underlying action stating that the party mailed copies of the notice to the required parties. The affidavit must include:

- The names of the parties.
- The date on which the notice was sent.
- The addresses to which it was sent.

(25 Del. C. § 1605.)

Preliminary Injunction: Del. Ch. Ct. R. 65

A party seeking a preliminary injunction must either:

- Request the remedy in its verified complaint.
- File a separate motion with notice and supporting affidavit.

(Del. Ch. Ct. R. 65(a)(1).)

It is common practice in Delaware to seek a preliminary injunction in the verified complaint, then file a separate motion and supporting brief for a preliminary injunction stating the precise nature of the relief sought and conduct to be prohibited (Del. Ch. Ct. R. 65(a)(1)). The court also hears oral argument on a motion for a preliminary injunction. If the party has not filed a motion to expedite proceedings generally, the typical practice is to:

- Request a hearing in a cover letter to the court.
- Enclose copies of the complaint and the motion for preliminary injunction.
- Explain the need for an expedited hearing.

The requesting party must post a bond in an amount determined by the court for the payment of costs and damages incurred by any party who is wrongfully enjoined (Del. Ch. Ct. R. 65(c)). The requesting party should include an argument regarding the bond amount in its motion and be prepared to address it at oral argument. The party should post the security immediately after the court signs an injunction order because the order is not effective until the bond is posted. (Del. Ch. Ct. R. 65(c).)

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

A plaintiff applies for a receivership *pendente lite* by verified complaint. The complaint must state the facts justifying the receivership and a prayer for that relief. (Del. Ch. Ct. R. 149.)

Replevin: 10 Del. C. §§ 9631 to 9640

The plaintiff must file a statement of claims setting out the replevin action (10 Del. C. § 9632). The court then issues the stay as part of the summons for this action (10 Del. C. § 9633)

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

A plaintiff applies for sequestration along with and generally as part of the prayer for relief in its complaint (10 Del. C. § 366).

Temporary Restraining Order: Del. Ch. Ct. R. 65

Seeking a temporary restraining order (TRO) requires the same steps as a preliminary injunction (Del. Ch. Ct. R. 65(b); see Preliminary Injunction).

The court may waive the notice requirement if:

- It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition.
- The applicant's attorney certifies to the court in writing any efforts made to give notice and the reasons supporting the claim that notice should not be required.

(Del. Ch. Ct. R. 65(b).)

It is common practice to file a motion for a TRO and supporting brief simultaneously with the complaint. The court may hear oral argument on a motion for a TRO. The requesting party typically files a motion to expedite proceedings and scheduling the TRO hearing is resolved along with the resolution of the motion to expedite.

The court requires the requesting party to post a bond in an amount determined by the court to pay the costs and damages incurred or suffered by any party who is found to be wrongfully enjoined. The party does not need to post the bond when seeking a TRO but should be prepared to post it immediately after the court signs an order granting relief for the TRO to take effect. (Del. Ch. Ct. R. 65(c).)

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

Attachment and Garnishment: 10 Del. C. §§ 3501 to 3513

A party seeking a writ of attachment must file:

- The complaint.
- An affidavit by the plaintiff or some credible person providing the facts required under:
 - 10 Del. C. § 3501 for domestic attachment; or
 - 10 Del. C. § 3506 for foreign attachment.

(Del. Super. Ct. Civ. R. 4(b)(1).)

The affidavit must state:

- A non-resident defendant's last known address or a statement that the address is unknown and cannot be found with due diligence.
- Information about the property including:
 - a reasonable description;
 - the estimated amount and value;
 - the nature of the defendant's title or interest and the legal title holder if the interest is equitable;
 - the source of the affiant's information; and
 - the reason for omitting any required statements.

(Del. Super. Ct. Civ. R. 4(b)(1).)

A requesting plaintiff must post a bond before the writ is issued (Del. Super. Ct. Civ. R. 4(b)(2); see Question 9: Attachment and Garnishment).

If the writ of attachment is directed to a garnishee (a third party that has possession of the defendant's property), the plaintiff must provide \$20 per garnishee for service (Del. Super. Ct. Civ. R. 5(aa)(2)).

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

A party filing a notice of pendency must file the notice with the recorder of deeds.

The requesting party must file an affidavit, stating compliance with the notice requirements, with the court in the underlying action within ten days of filing the notice of pendency. (25 Del. C. § 1605.)

Preliminary Injunction: Del. Ch. Ct. R. 65

If a plaintiff does not include a prayer for a preliminary injunction in its complaint, the plaintiff must file a motion, a proposed order, and supporting affidavit and provide notice to the opposing party (Del. Ch. Ct. R. 65(a)(1)).

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

A verified complaint is required to apply for an appointment of a receivership *pendente lite* (Del. Ch. Ct. R. 149).

Replevin: 10 Del. C. §§ 9631 to 9640

A plaintiff must file a statement of claims before a summons is issued, setting out all the necessary averments that constitute the right of action (10 Del.

C. § 9632). The stay is automatically issued as part of the summons for the action (10 Del. C. § 9633).

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

The applicant must file an affidavit stating:

- A non-resident defendant's last known address or a statement that the address is unknown and cannot be found with due diligence.
- Information about the property sought to be seized, including:
 - a reasonable description;
 - the estimated amount and value;
 - the nature of the defendant's title or interest, and if equitable in nature, the legal title holder's name;
 - the source of the affidavit's information; and
 - the reason for omitting any of the required documents.

(Del. Ch. Ct. R. 4(db)(1).)

The court has the discretion to waive or modify compliance with the requirements based on the application stating the reasons (Del. Ch. Ct. R. 4(db)(5)).

Temporary Restraining Order: Del. Ch. Ct. R. 65

A plaintiff may include a prayer for relief in its complaint for the underlying action. Otherwise, a party must file a supporting affidavit. (See *Dempsey v. State*, 2006 WL 3933737, at *3 (Del. Ch. Dec. 21, 2006).) The applicant usually must give notice to the opposing party by including a prayer for injunctive relief in the complaint and serving the motion for TRO with the complaint. A party seeking a TRO should file a proposed order with its motion.

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 and Garnishment: 10 Del. C. §§ 3501 to 3513

Notice

If a defendant has been successfully served with the complaint after commencement of an action, no further notice is necessary. The plaintiff's application for attachment or garnishment will appear in the complaint and the accompanying affidavit. The Prothonotary will issue a writ specifying a reasonable description of the property to be seized and deliver it to the sheriff or a court-appointed person for service. (Del. Super. Ct. Civ. R. 4(b)(1), (5).)

Time Limits for Notice

The Prothonotary must publish the writ in a newspaper in the county where the property is located within 20 days of issuing the writ. Additionally, for a non-resident defendant, the Prothonotary must send, by registered mail, certified copies of the complaint, affidavit, writ, and return to the defendant within seven days of the sheriff's return of the writ. Publication is not required if the defendant is served before the writ would otherwise be published, and mailing is not required if the defendant is personally served. (Del. Super. Ct. Civ. R. 4(b)(5).)

Opposing an Application

A defendant may release the attachment by posting security. A non-resident defendant may ordinarily release an attachment by entering a general appearance in the case and moving to release. (Del. Super. Ct. Civ. R. 4(b)(3).)

A defendant may also file a motion to quash or vacate the writ of attachment (see *Guardian Cap. Corp. v. Distant Horizon Dream, Inc.*, 1993 WL 258926, at *1 (Del. Super. Ct. July 2, 1993)). A third party in possession of the garnished property may oppose the garnishment, but only if the third party shows that its rights or interests have been affected by the garnishment. A corporation will not ordinarily have standing to challenge the garnishment of its stock. (*Harrington v. Hollingsworth*, 1996 WL 769635, at *3 (Del. Super. Ct. Dec. 20, 1996).)

Hearing

Generally, a defendant is entitled to a hearing before attachment takes effect (*Fuentes v. Shevin*, 407 U.S. 67, 81–82 (1972); see *Gordon*, 297 A.2d at 423). However, there are several exceptions, including if attachment is used to secure jurisdiction over a non-resident defendant where the defendant is not entitled to a hearing (*Fuentes*, 407 U.S. at 91 n.23; *Gordon*, 297 A.2d at 423).

A defendant is entitled to a hearing before garnishment of wages can take effect (*Mills v. Bartlett*, 265 A.2d 39, 40–41 (Del. Super. 1970) (citing *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337 (1969))).

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

Notice

The party recording a notice of pendency must serve or send by first-class mail a copy of the notice to:

- Each party against whom the notice of pendency has been indexed.
- All persons shown on the public record to have an interest in or lien on the real estate which is the subject of the notice.

(25 Del. C. § 1605.)

Time Limits for Notice

The recording party must serve or send the copies of the notice within five days of filing the notice with the recorder of deeds (25 Del. C. § 1605).

Opposing an Application

An aggrieved person may seek cancellation of a notice of pendency by filing a separate action in the court having jurisdiction of the underlying case (25 Del. C. §§ 1606 and 1608; *DiSabatino*, 695 A.2d at 1120–21). Anyone with ostensible interests in the disputed real property qualifies as an aggrieved person even if the person is not a party to the underlying action (*DiSabatino*, 695 A.2d at 1121).

Hearing

The opposing party is not entitled to a hearing before a notice of *lis pendens* is filed. However, the opposing party is entitled to a hearing on a motion for mandatory or discretionary cancellation (25 Del. C. § 1608).

Preliminary Injunction: Del. Ch. Ct. R. 65

Notice

All applications for a preliminary injunction require giving notice to the opposing party by serving either:

- A copy of the verified complaint.
- The motion for preliminary injunction and supporting affidavit.

(Del. Ch. Ct. R. 65(a)(1).)

Time Limits for Notice

There are no set time limits for serving a notice of a preliminary injunction. However, applications for a preliminary injunction are often accompanied by motions to expedite proceedings. The results of the motion generally determine the preliminary injunction hearing schedule. The court will set a schedule if the adverse party opposes the motion.

Opposing an Application

The court rules on a preliminary injunction at a hearing scheduled for that purpose. The adverse party opposes the injunction by submitting an opposition brief prior to that hearing.

Hearing

The court holds a hearing for an application for a preliminary injunction. The court may order the trial of the action on the merits to be consolidated with the hearing. (Del. Ch. Ct. R. 65(a)(2).)

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

Notice

Service of the complaint satisfies notice on a party regarding an application for the appointment of a receiver *pendente lite*. The Delaware Court of Chancery may require the defendant to show cause why a receiver *pendente lite* should not be appointed or continued (Del. Ch. Ct. R. 149).

Time Limits for Notice

See Notice.

Opposing an Application

The defendant may oppose the application through a motion to dismiss claiming that the plaintiff has failed to plead sufficient facts justifying the appointment of a receiver (see *TVI Corp. v. Gallagher*, 2013 WL 5809271, at *5 and *19 (Del. Ch. Oct. 28, 2013)).

Hearing

If the court issues a rule to show cause, the defendant is entitled to a hearing (Del. Ch. Ct. R. 149).

Replevin: 10 Del. C. §§ 9631 to 9640

Notice

The plaintiff must notify the defendant by serving the complaint and summons on the defendant (10 Del. C. § 9633).

Time Limits for Notice

See Notice.

Opposing an Application

The defendant in a replevin action may oppose the complaint (see *JLJ Enters., Inc. v. Keyek*, 1992 WL 148093, at *1 (Del. Super. Ct. June 5, 1992)). Once the court has ordered a writ of replevin, the defendant may retain possession by posting a bond (*Harlan & Hollingsworth Corp. v. McBride*, 69 A.2d 9, 11 (Del. 1949)).

Hearing

Delaware law does not specify whether the defendant is entitled to a hearing on the stay associated with a replevin action.

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

Notice

Sequestration requires both publication and service by mail. The court must publish a writ of sequestration at least once per week for a minimum of three weeks before the court-ordered date of the defendant's appearance (10 Del. C. § 366(a)). For service by mail, the register of the Chancery Court must mail a certified copy of the order and pleading asserting the claim to the defendant (Del. Ch. Ct. R. 4(db)(2)).

Time Limits for Notice

There is no specific time limit for notice by publication. For service by mail, the register in the Chancery Court must mail the required documents within three business days of the filing of a bond by the plaintiff or at another time that the court determines (Del. Ch. Ct. R. 4(db)(2)).

Opposing an Application

A defendant may not directly oppose a writ of sequestration. However, the writ may be mooted if the defendant enters a general appearance in the action. The defendant may, after notice to the plaintiff, move the court to release all or part of the seized property. The court will grant the release if the plaintiff cannot show a reasonable possibility that a release would make it substantially less likely for the plaintiff to recover in a successful judgment. The court may release the property at any time after sufficient security is given. (10 Del. C. § 366(a).)

Hearing

A defendant in a sequestration action is not entitled to a hearing (*Gordon*, 297 A.2d at 423).

Temporary Restraining Order: Del. Ch. Ct. R. 65

Notice

Most temporary restraining order (TRO) applicants provide notice to the opposing party because the requirements are less stringent than ex parte TROs (Del. Ch. Ct. R. 65(b)). See Question 7: Temporary Restraining Order for information about ex parte applications. That notice must conform to Del. Ch. Ct. R. 5.

Time Limits for Notice

The Court of Chancery Rules do not supply any time limits for notice of a TRO. However, parties seeking a TRO typically give notice by serving the motion for TRO simultaneously with the complaint.

Opposing an Application

The party subject to a proposed TRO who has been served notice may oppose the motion by submitting a brief in opposition.

Hearing

The party opposing a TRO is not entitled to a hearing. However, for a motion for a TRO with notice, it is routine practice for the court to hear oral argument.

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 and Garnishment: 10 Del. C. §§ 3501 to 3513

Ex parte applications are allowed for attachment and garnishment provided that the defendant receives service of the complaint with the application (Del. Super. Ct. Civ. R. 4). There are no special standards or considerations regarding this application.

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

Filing a notice of pendency is necessarily ex parte because the notice is filed with the recorder of deeds and not with the court. Therefore, there are no special standards or considerations regarding an ex parte filing of a notice of pendency.

Preliminary Injunction: Del. Ch. Ct. R. 65

An application for a preliminary injunction may not be made ex parte (Del. Ch. Ct. R. 65(a)(1)).

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

A plaintiff may not apply for the appointment of a receiver *pendente lite* in an ex parte proceeding (Del. Ch. Ct. R. 149).

Replevin: 10 Del. C. §§ 9631 to 9640

The stay associated with a replevin action is necessarily ex parte because it is issued as part of the summons in that action. Therefore, there are no special standards or considerations regarding an ex parte application for a stay in a replevin action.

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

All sequestration applications are ex parte because the plaintiff makes the application along with the complaint. Therefore, there are no special standards or considerations regarding an ex parte application for sequestration. However, when seizure is used to create jurisdiction, the court evaluates the exigency that allegedly justifies the lack of notice and hearing before ordering sequestration (*Cable Adver. Networks*, 632 A.2d at 1386).

Temporary Restraining Order: Del. Ch. Ct. R. 65

Ex Parte Applications

The Delaware Chancery Court Rules permit ex parte applications for temporary restraining orders (Del. Ch. Ct. R. 65(b)).

Procedure for Ex Parte Relief

An ex parte application is made by making a written certification to the court of:

- Efforts made to provide notice to the opposing party.
- Reasons that the notice should not be required.

(Del. Ch. Ct. R. 65(b).)

If a TRO is granted ex parte, the hearing for the subsequent preliminary injunction must be set as early as possible and takes precedence over all matters except “older matters of the same character.” The court will dissolve the TRO if the applicant does not apply for a preliminary injunction at the hearing. The party subject to the TRO may on two days’ notice move for a dissolution or modification of the order. (Del. Ch. Ct. R. 65(b).)

Additional Standards for Ex Parte Applications

The court will only grant a TRO ex parte if it is clear from the affidavit or verified complaint that immediate and irreparable injury, loss, or damage will occur to the applicant before the adverse party opposes the application (Del. Ch. Ct. R. 65(b)).

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 and Garnishment: 10 Del. C. §§ 3501 to 3513

There are no limits on the duration of attachment. However, a defendant may petition the court to release the attached property (see Question 6: Attachment and Garnishment).

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

A notice of pendency is effective for three years. The court may extend it for another three years before the term expires for good cause shown. There is no limit on the number of times the notice may be extended, but the court cannot extend a term that has already expired. (25 Del. C. § 1604.)

Preliminary Injunction: Del. Ch. Ct. R. 65

The court has discretion to set the duration of a preliminary injunction and typically sets the injunction to expire when the plaintiff's claim is resolved either judicially or by settlement.

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

There are no time limits applicable to the appointment of a receiver *pendente lite*.

Replevin: 10 Del. C. §§ 9631 to 9640

The stay associated with a replevin action lasts until the court issues a judgment in that action (10 Del. C. § 9633).

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

There are no time limits concerning sequestration. A defendant may move to release the sequestered property (see Question 6: Sequestration).

Temporary Restraining Order: Del. Ch. Ct. R. 65

A temporary restraining order (TRO) generally terminates when the court holds a preliminary injunction hearing. The court has discretion to set the date of the hearing. An ex parte TRO may not last for longer than ten days but the court may extend the TRO for ten days or longer with the consent of the party to whom the TRO is directed. (Del. Ch. Ct. R. 65(b).)

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 and Garnishment: 10 Del. C. §§ 3501 to 3508

A plaintiff seeking a writ of attachment must post a bond in an amount with surety approved by the court issuing the writ. To determine the amount, the court may consider:

- The kind of property to be seized.
- The estimated value of the property.
- The possibility of loss to the defendant as a result of the seizure.
- Other relevant matters.

(Del. Super. Ct. Civ. R. 4(b)(2).)

If a writ is issued, a defendant may post security to release the property. The security must both:

- Be approved by the court.
- Be worth the lesser of:
 - the current value of the property; or
 - the amount claimed in the action.

(Del. Super. Ct. Civ. R. 4(b)(3)(B).)

Notice of Pendency (*Lis Pendens*): 25 Del. C. §§ 1601 to 1614

The party filing a notice of pendency is not required to provide any security. However, a party cancelling the notice may have to post security. For example, in an enforcement action of an equitable lien securing a money payment, the court may require a party moving for cancellation to post security to ensure the payment of the money secured by the real estate. (25 Del. C. § 1607.)

Preliminary Injunction: Del. Ch. Ct. R. 65

An applicant for a preliminary injunction must provide security in an amount that the court deems proper so that the adverse party may recover if, after a full hearing, the court finds that that party was wrongfully enjoined. If the applicant already posted security for a temporary restraining order, new security need not be posted and the prior security will also secure the preliminary injunction. (Del. Ch. Ct. R. 65(c).)

Receivership *Pendente Lite*: Del. Ch. Ct. R. 148 to 168

The applicant for the appointment of a receiver *pendente lite* does not need to post a bond or provide any other security.

Replevin: 10 Del. C. §§ 9631 to 9640

The stay associated with an action for replevin does not require a bond or other security.

Sequestration: 10 Del. C. § 366; Del. Ch. Ct. R. 4(db)

The Chancery Court has discretion, on a case-by-case basis, to require the plaintiff to provide security (10 Del. C. § 366(b)). The Court of Chancery rules governing sequestration proceedings also allow the plaintiff's filing of a bond (Del. Ch. Ct. R. 4(db)(2)). The statute or the rules do not provide further guidance on the criteria for determination. Because of sequestration's similarity to attachment, the court may find the criteria that the Delaware Superior Court considers regarding security for an attachment application as persuasive (Del. Super Ct. Civ. R. 4(b)(2); see Attachment and Garnishment).

Temporary Restraining Order: Del. Ch. Ct. R. 65

An applicant for a temporary restraining order (TRO) must provide security in an amount that the court deems

proper from which the adverse party may recover if the court finds that the party was wrongfully restrained (Del. Ch. Ct. R. 65(c)).

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?

There are no other additional remedies available in Delaware.

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