

Temporary Restraining Orders and Preliminary Injunctions in the EDVA — Fast Relief in the Rocket Docket

Virginia Rocket Docket Blog

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Fed. R. Civ. P. 65 allows a district court to issue a temporary restraining order (TRO) and/or a preliminary injunction to maintain the status quo and avoid irreparable harm while a suit is pending. The process is intended to move quickly, and in the EDVA, it can move very quickly. In a recent example, an EDVA judge resolved a motion for preliminary injunction in a week, ordering the defendant to respond six days after the motion was filed and ruling on the motion from the bench the following day. See *Northern Virginia Citizens Ass'n., Inc. v. Federal Highway Admin., et al.*, Case No. 1:23-cv-00356-LMB-IDD (E.D. Va. April 7, 2023) ([ECF No. 40](#)).

Given the accelerated speed of the process, particularly in the EDVA, below is a discussion of common questions relating to Rule 65 motions in the EDVA:

Request a TRO or a Preliminary Injunction or Both?

A plaintiff is not required to file a motion under Rule 65 when it files its complaint, but it cannot wait long without undermining its argument that it is suffering irreparable harm in the absence of preliminary relief.

Typically, a plaintiff will either file a motion for TRO and preliminary injunction along with its complaint or skip the request for a TRO and move for a preliminary injunction shortly thereafter. In *Northern Virginia Citizens Ass'n.*, for example, the plaintiff filed its motion 15 days after the complaint was filed, just after the complaint was served but did not ask for a TRO.

While *Northern Virginia Citizens Ass'n* moved very quickly, when no TRO is sought, the procedure can follow a timetable that is very similar to other pretrial motions. For example, in *PRE Holding, Inc. v. Monaghan Med. Corp.*, Civil Action No. 3:09CV458-HEH, 2009 U.S. Dist. LEXIS 107222 (E.D. Va. Nov. 17, 2009), the plaintiff filed its motion for a preliminary injunction three weeks after filing the complaint, but both parties obtained extensions to file their briefs, the court held a hearing two months later and issued its ruling more than three months after the motion was filed.

With or Without Notice to the Defendant?

Rule 65 allows a district court to issue a TRO without notice to the defendant, but a plaintiff must set forth specific

facts in an affidavit or verified complaint showing that immediate or irreparable harm will result before the defendant can be heard. The plaintiff's counsel must also certify in writing any efforts made to give notice and why it should not be required. These restrictions limit *ex parte* TRO hearings to true emergencies, such as the need to seize counterfeit goods or stop impending action, and in those cases, a plaintiff in the EDVA can often be heard shortly after the motion is filed. As the *GMS* case discussed below shows, however, there can be a delay of several weeks even where the plaintiff requests an immediate *ex parte* hearing.

The EDVA judges strongly prefer that a plaintiff give notice of the filing of a request for a TRO so that all parties can be present for the TRO hearing, and the court will typically move swiftly to order a response to the motion and hold a hearing.

A recent case, *Variable Annuity Life Ins. Co. v. Coreth*, provides an example of a typical timeline. There, the plaintiff filed its complaint and motion for TRO on April 5, 2021 and served the defendants the same day. The court directed the defendants to file its opposition to the motion on April 12, held a hearing on April 16, entered the TRO the same day and issued its opinion shortly after that. *Variable Annuity Life Ins. Co. v. Coreth*, Case No. 3:21CV223, 535 F.Supp.3d 488 (E.D.Va. 2021). Similarly, in *GW Acquisition Co., LLC v. Pageland L.L.C.*, Case No. 1:22CV255-LMB-JFA (E.D.Va. March 23, 2022), the plaintiff sought a TRO to require defendants to execute documents in connection with a property purchase. The plaintiff filed its motion with its complaint, gave notice to the defendant, who did not appear, and the Court awarded the TRO 10 days after its filing.

One Hearing or Two?

Where the defendant has received notice of a request for a TRO and preliminary injunction, the case can follow one of two paths. In one path, the court converts the application for a TRO into one for a preliminary injunction and holds a single hearing. See e.g., *GMS Indus. Supply, Inc. v. G&S Supply, LLC*, Civil Action No. 2:19CV324-RCY-LRL (E.D.Va. Aug. 30, 2019) (ECF No. 70 at 8-9). In *GMS*, the plaintiff filed its motion for TRO the day after filing its complaint and sought an immediate *ex parte* hearing, asserting that the 10 defendants were located throughout the country and that advance notice would potentially result in the concealment or destruction of evidence. Despite the request for urgency, as the hearing on the motion did not occur until five weeks after the motion was filed, and a preliminary injunction issued seven weeks later, long after the plaintiff sought immediate relief.

In the second path, the court holds two hearings – a summary hearing on a TRO followed by a lengthier preliminary injunction hearing, often after some discovery. See e.g., *SDSE Networks, Inc. v. Mathur*, Civil Action No. 1:22CV1024-MSN-IDD (E.D. Va. Sept. 15, 2022) (ECF No. 33). In *SDSE*, the court issued a TRO after notice to the defendant just six days after the motion was filed and held a full evidentiary hearing on the request for a preliminary injunction three months later.

The choice between these two paths can depend on where the case is filed and the judge assigned to the case. For example, both *GMS* and *SDSE* involved claims for trade secret misappropriation and breach of contract against former employees and so involved similar issues. *SDSE*, however, was filed in the Alexandria Division, where the plaintiff could notice a hearing on the court's Friday motions docket a week after filing its TRO motion. *GMS*, by contrast, was filed in the Norfolk Division, where leave of court is required to schedule a hearing. In addition, the district judge in *SDSE* acted very swiftly, *sua sponte* scheduling a telephonic hearing the next business day after the motions were filed, ordering the parties to complete briefing on the motions over the next

two days and granting the TRO from the bench the day after briefing was completed. While perhaps not unprecedented, such quick attention from the court does not occur in every case.

What About Experts?

Most requests for preliminary relief in complex cases involve some form of expert testimony, whether a survey expert in a Lanham Act case, an infringement expert in a patent case or a forensic computer expert in a trade secret misappropriation case. If a movant must have an expert to establish its likelihood of success on the merits, counsel must swiftly identify and retain a qualified expert who can provide a declaration that is filed with the motion. A defendant opposing a TRO request will have little time to develop opposing expert testimony but can often obtain sufficient time before a subsequent preliminary injunction hearing to allow for discovery of the plaintiff's expert and submit its own expert declaration. In both cases, an expert's declaration should be as detailed as possible because EDVA judges often do not hear live testimony from experts on preliminary injunctions.

Discovery? Live Testimony? Pre-Hearing or Post-Hearing Briefs?

The parties may or may or may not conduct any discovery prior to a preliminary injunction hearing. When discovery occurs, it can range from simply document production and interrogatories to detailed discovery plans that address all types of discovery, including third-party discovery and protocols for expert discovery, depositions, and forensic computer discovery, such as the [joint scheduling plan](#) proposed by the parties in *SDSE*. In all cases, the court expects counsel to cooperate to complete discovery efficiently in a limited time frame.

In general, the EDVA judges prefer the efficiency of documentary evidence and witness declarations to live testimony. Live testimony, however, can be very effective and is often necessary for movants to meet their burden of showing a likelihood of success on the merits and irreparable harm. In *GMS*, for example, the court held a three-day evidentiary hearing involving a mix of live testimony and witness declarations, and the court specifically noted the weight it gave to the plaintiff's primary fact witness, whom it described as an extremely credible, articulate and straight-forward. *GMS Indus. Supply, Inc. v. G&S Supply, LLC*, Civil Action No. 2:19CV324-RCY-LRL (E.D.Va. Aug. 30, 2019) (ECF No. 70 at n.6). In *SDSE*, by contrast, the parties filed numerous exhibits, including fact and expert witness declarations, prior to the hearing and presented no live testimony.

The procedures for briefing also vary. In *GMS*, the parties relied on their initial motion briefing and the court requested post-hearing briefs in lieu of closing argument, while the parties in *SDSE*, filed extensive pre-hearing briefs and there was no post-hearing briefing.

The bottom line is that there are no set procedures for pre-hearing discovery, the presentation of evidence or briefing on preliminary injunctions. As in many other areas, the EDVA judges provide guidance on their preferences and depend on counsel to fill in the details by agreement.

Takeaways

For movants, the primary takeaway is that counsel must act diligently and quickly to assemble the necessary evidence, determine quickly whether it needs expert testimony or discovery from the defendant and obtain a

hearing date when emergency relief is requested. Defendants must investigate even more quickly and develop its own discovery and litigation plan within a few days of receiving a motion for TRO or a preliminary injunction. For both parties, the few weeks between the filing and resolution of a Rule 65 motion is an intense period of investigation, witness preparation, discovery, briefing and often a mini-trial. The stakes are very high, because the court will reach conclusions on the merits of the case. As a result, preliminary injunctions are often case dispositive, leading quickly to settlement of the overall litigation.

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