

## Defective Suit to Stop an Annexation Election

*Kleisner v. City of White Sulphur Springs*  
(David A. Faber, S.D. W. Va. 5:03-cv-101)

A motion for a temporary restraining order against a municipal annexation election omitted an affidavit of immediate injury, verification of the complaint, and reference to defendant notice, so the district judge denied the motion. In addition, a state court had already stayed the election.

*Subject:* Ballot measures. *Topics:* Enjoining elections; absentee ballots; ballot measure; matters for state courts; class action.

A resident and two owners of land in a part of Greenbrier County that the City of White Sulphur Springs sought to annex filed a class-action federal complaint in the Southern District of West Virginia on February 6, 2003, claiming that an annexation election scheduled on January 15 for February 14 was not allowing adequate time and procedures for absentee voting.<sup>1</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order.<sup>2</sup>

The annexation of resort properties was intended to expand the city's tax base in light of use by the resort properties and by planned resort developments of city services, including sewer services.<sup>3</sup> State law required annexation elections to be scheduled within thirty days, but state law also required absentee ballots to be available forty-two days in advance of the election.<sup>4</sup>

On the day after the complaint was filed, Judge David A. Faber denied the plaintiffs' motion because of many procedural defects.<sup>5</sup>

The plaintiffs have not filed an *affidavit* setting forth any indication of immediate and irreparable injury, loss, or damage that will occur should the temporary restraining order not be granted. The plaintiffs' complaint is *not verified*. None of the four attorneys entering an appearance for the plaintiffs has certified to the court in writing the efforts, if any, which have been made to give *notice* and the reasons supporting the claim that notice should not be required. In fact, the question of notice to the parties to be restrained makes no appearance in the documents filed with the court, whether by certification of efforts, certificate of service, or otherwise.<sup>6</sup>

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1. Complaint, *Kleisner v. City of White Sulphur Springs*, No. 5:03-cv-101 (S.D. W. Va. Feb. 6, 2003), D.E. 1; *see CSX Hotels, Inc. v. City of White Sulphur Springs*, 217 W. Va. 238, 239, 617 S.E.2d 785, 786 (2005).

2. Temporary-Restraining-Order Motion, *Kleisner*, No. 5:03-cv-101 (S.D. W. Va. Feb. 6, 2003), D.E. 2.

3. *See Pam Ramsey, Tax District Expected to Revitalize White Sulphur Springs*, Charleston Gazette, Mar. 9, 2004, at 2A; *Town Votes to Annex Greenbrier Resort*, Charleston Daily Mail, Jan. 16, 2003, at 9A.

4. *See Melanie Jarvis, Annexation and Voting Conflicts Are Putting The Greenbrier and White Sulphur Springs in a Tug-of-War*, Charleston Daily Mail, Jan. 31, 2003, at 1A.

5. Opinion, *Kleisner*, No. 5:03-cv-101 (S.D. W. Va. Feb. 7, 2003), D.E. 5.

6. *Id.* at 1–2 (emphasis added).

Moreover, a state court had already stayed the election pending further state court action.<sup>7</sup>

On February 9, the state's circuit court enjoined the annexation because the annexation petition was not accompanied by an accurate survey map.<sup>8</sup> The federal plaintiffs voluntarily dismissed their action on February 20.<sup>9</sup>

On January 29, a week in advance of the individual plaintiffs' filing their federal action, resort properties filed a federal complaint challenging the annexation and the annexation election.<sup>10</sup> Following Judge Faber's September 19 narrowing of claims,<sup>11</sup> the case was dismissed as settled early in 2004.<sup>12</sup>

West Virginia's supreme court reversed the state court injunction against annexation on July 8, 2005, reasoning that "[t]he map must reach the desired level of precision consistent with the purposes of the survey," and need not "be absolutely free from error or defect."<sup>13</sup>

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7. *Id.* at 2; see *Judge Puts Temporary Halt on Resort Annexation Vote*, Charleston Daily Mail, Feb. 6, 2003, at 9A.

8. *CSX Hotels, Inc. v. City of White Sulphur Springs*, 217 W. Va. 238, 239–40, 617 S.E.2d 785, 786–87 (2005).

9. Stipulated Dismissal, *Kleisner*, No. 5:03-cv-101 (S.D. W. Va. Feb. 20, 2003), D.E. 6; see *Greenbrier Annexation Suit Dropped*, Charleston Daily Mail, Mar. 1, 2003, at 5A.

10. Complaint, *Greenbrier Clinic, Inc. v. City of White Sulphur Springs*, No. 5:03-cv-75 (S.D. W. Va. Jan. 29, 2003), D.E. 1; *CSX Hotels, Inc.*, 217 W. Va. at 239 n.2, 617 S.E.2d 785, 786 n.2; see Melanie Jarvis, *Annexation Fight Going to Court*, Charleston Daily Mail, Feb. 1, 2003, at 1A.

11. Opinion, *Greenbrier Clinic, Inc.*, No. 5:03-cv-75 (S.D. W. Va. Sept. 19, 2003), D.E. 25.

12. Order, *Greenbrier Clinic, Inc.*, No. 5:03-cv-75 (S.D. W. Va. Mar. 29, 2004), D.E. 32 (agreed dismissal order); Order, *id.* (Feb. 4, 2004), D.E. 31 (sua sponte provisional closing of the case).

13. *CSX Hotels, Inc.*, 217 W. Va. at 242, 617 S.E.2d 785, 789; see Lawrence Messina, *Greenbrier Annexation Plan to Proceed*, Charleston Gazette, July 11, 2005, at 3A; see also *White Sulphur to Continue with Greenbrier Annexation*, Charleston Gazette, July 13, 2005, at 3C ("A majority of voting town residents and targeted property owners must approve the proposal before the annexation can take place. An election has not been scheduled.").