COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 73 ("**Criminal Conduct by Businesses-Liability** "[1])

MOTION FOR REHEARING

On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007–2008 #73 ("Criminal Conduct by Businesses-Liability, hereinafter described as the "Initiative") which the Title Board ("Board") heard on March 19, 2008.

1. The Board lacks jurisdiction to set a title for this Initiative as it contains multiple, unrelated, subjects in violation of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5.

An initiative violates the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other. At first glance, the concept of a single subject requirement appears straightforward; however, an initiative with multiple subjects may be improperly offered as a single subject by stating the subject in broad terms. *See In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo. 2007); *see also, In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000).

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[1] Unofficially captioned **"Criminal Conduct by Businesses-Liability"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

"Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) (citing *In re Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X*, 900 P.2d 121, 125 (Colo. 1995)).

"The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative. *In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 282 (Colo. 2006) [hereinafter, *In re Initiative #55*]. "An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative." *In re Title, Ballot Title and Submission Clause 2007–2008, #17*, 172 P.3d 871, 875 (Colo. 2007). In light of the foregoing, the Supreme Court has stated, "We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *Id.*

Initiative 73 groups multiple provisions under a broad concept of liability, which relate to more than one subject and have at least two distinct and separate purposes that are not dependent upon or connected to each other. *See In re Initiative #55, supra,* 138 P.3d at 277.

First, the Initiative dramatically expands the criminal liability of a business entity to all of its executive officials who knowingly cause a business entity to fail to discharge a specific duty of affirmative performance imposed by law.

The Initiative next creates a plethora of new crimes where no crime previously existed. The ambiguous language of the Initiative is not limited to conduct imposed by any governmental

entity. The Initiative would ostensibly criminalize traditionally civil concepts such as the breach of the duties: of fidelity, of good-faith, of loyalty, of prudence, to give warning of a dangerous condition, to act, of supervision, and the fiduciary duty, and the exercise of business judgment rule.

Second, the Initiative allows *any* Colorado resident to bring an action against any business entity or its executive officials for conduct that violates subsections (1) and (1.5) of the Initiative. As noted below, the Initiative fails to define "resident" and would thus permit any undocumented illegal alien residing in the State of Colorado to initiate a lawsuit against any business entity or executive official. The Initiative eliminates the need for the plaintiff to have suffered any harm or injury from the defendant's alleged actions or failures to act. This is a extraordinary departure from the longstanding doctrine of standing.

Generally, to establish standing to sue, the plaintiff must show (1) an injury in fact (2) to a legally protected interest. *See Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977). The Initiative is distinguishable from traditional private rights of action in allowing a person to bring an action without requiring any injury to arise from the allegedly wrongful conduct of the business, its employees, or agents. *Cf. Coors v. Security Life of Denver Co.,* 91 P.3d 393, 398 (Colo. App. 2003) (citing Colo. Rev. Stat. § 6-1-101 *et. seq.*).[2] By way of example only, under the Initiative, any resident—citizen, non-citizen, attorney seeking fees for bringing suit, or a business person seeking to cripple a competing business with the expense of a lawsuit or merely

[2] An extension of the single subject/clear title limitation applicable to bills, the Colorado Constitution prohibits voter initiatives from containing multiple subjects. Here, the civil private right of action clearly fails to fall under the title of Colo. Rev. Stat. § 18-1-606 Criminal Liability for Business Entities.

harassing a former employer or business that he or she had a bad experience with, may file a civil complaint.

Compensatory or punitive damages may be awarded to any "governmental entity" that imposed by law the specific duty to be performed by the business entity. The Initiative does not define governmental entity. Governmental entity could include, any agency or department of federal state or local government, including, but not limited to any board, commission, bureau, committee, council, authority, institution of higher education, political subdivision, or other unit of the executive, legislative, or judicial branches of the state; any city, county, city and county, town, or other unit of the executive, legislative or judicial branches thereof; any special district, school district, local improvement district, or special taxing district at the state or local levels of government; any enterprise as defined in Section 20 of Article X of the Colorado Constitution; or any other kind of municipal, public, or quasi-public corporation.

Where legitimate claims exist, the persons residing in Colorado and on behalf of governmental entities, including the federal government, will be competing for compensatory and punitive damages with parties who have claimed to have been injured or harmed by the conduct in question; such as employees, retirees and shareholders for damages. A race to the courthouse and trial may ensue which could ultimately result in an injured party to be precluded from collecting damages from a business entity or executive official. Similarly, in consolidated cases, courts would need to apportion damages between the governmental entity and the defendant. The resident-plaintiff who has brought a claim under the Initiative will not benefit from his private right of action; the governmental entity will. Conversely, the injured plaintiff may not benefit at all. Certainly, they would be unlikely to have the same rights as the resident-

plaintiff. For example, they would be unlikely to recover their attorney fees and costs. His compensation is limited to possible award of his attorneys' fees and costs.

Under the American Rule, the Court only awards fees to the prevailing party pursuant to statute, contract, or because the matter was groundless or frivolous. *See Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859 (Colo. 2004), C.R.S. § 13-17-101, *et seq*. The Initiative, in contrast, provides fees for the successful party only where the successful party is the plaintiff. If the business entity-defendant were to prevail, it would not receive its attorneys' fees or costs. The plaintiff faces no risk beyond the cost of his own attorney in filing a complaint against a business entity or one of its employees. Even in the event that the claims are found to be frivolous, the defendant would not receive fees. This contravenes C.R.C.P. 11 and Colo. Rev. Stat. § 13-17-101, *et seq*.

Further, the Initiative is silent as to whether damages could be awarded if the conduct at issue does not arise as the result of a violation of a specific governmental law and to whom they could be awarded to (*e.g.*, State of Colorado). The Initiative fails to identify what type of damages may be awarded where the specific duty does not arise from a law imposed by a governmental entity, but rather from a common-law duty. The Initiative fails to identify how damages will be apportioned between different governmental entities when similar or different laws are the basis of a particular lawsuit.

In addition, if the plaintiff prevails in his claim against a business entity or executive official and it violated a duty imposed by one of the governmental entities above, the funds would be distributed to that entity and exempt from all revenues and spending limits set forth in

Colo. Rev. Stat. § 24-75-201.1 and the limits of TABOR. This creates a new revenue source for these governmental entities.

Finally, even though a party may not know of the specific duty to be performed, or that the business entity failed to perform such a duty, the proposed Initiative requires that a party report all facts concerning the business entity's conduct of which he or she is aware to the Colorado Attorney General. This report must be made prior to the party's being charged to qualify for the affirmative defense to a criminal charge under the proposed statute.

The Colorado Supreme Court rejected Initiative 55 under the single subject rule stating, "We identify at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits." *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55, supra*, 138 P.3d at 280; *see also, In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the State Constitution's single-subject requirement). There, the complexity and omnibus provisions were hidden from the voter. In failing to describe non-emergency services by defining, categorizing, or identifying subjects or purposes, the Initiative failed to inform voters of the services the passage would affect.

The Supreme Court rejected a proposed ballot initiative which sought to amend the Taxpayer Bill of Rights under the Colorado Constitution because it violated the constitution's single-subject requirement where the proposed initiative created a tax cut, imposed new criteria

for voter approval of revenue and spending increases, and imposed likely reductions in state spending on state programs. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999) (citing Colo. Const. art. V, § 1(5.5); art. X, § 20).

In *In re "Public Rights in Waters II,"* 898 P.2d 1076 (Colo. 1995), the Court held that grouping the distinct purposes of water conservation district elections and the "Public Trust Doctrine" under the theme of water did not satisfy the single-subject requirement because such a connection was too broad and too general to make them part of the same subject.

The Colorado Supreme Court has found numerous other situations where the single subject rule was violated. *See e.g., In re the Title, Ballot Title, and Submission Clause for 2007-2008 #17*, 172 P.3d 871 (Colo. 2007) (initiative sought to create an environmental conservation mission; however, a plain reading of the language also revealed the inclusion of a public trust standard for agency decision-making); *In re Title, Ballot Title and Submission Clause 1999-2000 #258(A)*, 4 P.3d 1094 (Colo. 2000) (elimination of school board's power to require bilingual education was not a separate subject so as to violate single-subject requirement); *In re Proposed Initiative for 1997-1998 # 30,* 959 P.2d 822, 823 (Colo. 1998) (court disapproved of an initiative burying unrelated revenue and spending increases within tax cut language).

2. The title of the Initiative is unclear, inaccurate, confusing, and misleading.

The Board's chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1094, 1098 (Colo. 2000). "In fixing titles and summary, the Board's duty is 'to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice."

Id. (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)). *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative's "not to exceed" language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity). This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant provision that was obfuscated by other elements of the proposal. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002). Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; *see also, In re Ballot Title 1997-1998 #62*, 961 P.2d at 1082. *See In re Proposed Initiative 1999-2000 #37,* 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because more than one subject and confusing).

Here, the ballot title and submission clause fail to meet this standard. The first sentence of the ballot title provides, "concerning liability for criminal conduct by business entities". The subject of this is not the current law, but rather the extension of criminal conduct to executive officials. Further, the initial sentence does not capture the fact that not only is this an expansion of liability, but it is also creating new substantive criminal laws. Nor does the measure indicate that certain crimes are already covered by Colorado law and government regulations and municipal ordinances.

The Initiative provides that it allows a Colorado resident to bring an action for civil damages against an entity or executive official for such criminal conduct. First, it fails to indicate that resident is not defined and would include an undocumented illegal alien. Second, it

does not define "civil damages". Noticeably absent is a discussion of the fact that it would allow any governmental entity to recover compensatory and punitive damages. It does not indicate what type of damages would arise or where the moneys would be paid if the claim does not arise out of a duty created by a governmental entity. Third, the ballot title does not define governmental entity. The measure is unfair as it does not indicate that the governmental entity may be competing against injured parties for damages and that this may preclude truly injured parties such as retirees, shareholders or former employees.

The Initiative does not define who must pay attorney fees and costs to the successful plaintiff.

The measure misleads the voter into believing that a party can disclose all facts known to him or her to the attorney general at any time in order to utilize this as an affirmative defense. In fact, the disclosure must occur prior to being charged. The title is silent as to this provision and would mislead voters into believing that they could disclose information at any time and not be subject to liability.

The title fails to inform the voters that all awards of damages are paid to the governmental entity and then exempted from revenue and spending limits.

The title fails to define who falls within the purview of "executive official". Indeed, an executive official does not include an agent or high managerial agent as defined by the current statute. An executive is typically understood to include a supervisor; however, under this measure it would not include a person of that level of authority. This is also confusing and misleading to the voter or signer of the petition.

In 258(A) the titles were materially defective for failure to include a key feature of the initiative which resulted in misleading and confusing the voters. The title board failed to articulate in the titles that school districts and schools cannot be required to offer bilingual programs. Voters could assume that parents of non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program, and thus, favor the proposal as assuring both programs. "It is well established that the use of catch phrase or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board. *In re Ballot Title 1999-2000 #258(A)*, *supra*, 4 P.3d at 1100; *In re Amend Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995). This rule recognizes that the particular words chosen by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion. *Id*; *see also, In Re Ballot Title 1999-2000 # 215,* 3 P.3d 11, 14 (Colo. 2000) (allowing the term "open mining" as sufficiently clear because defined by statute).

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 26th day of March, 2008.

FAIRFIELD AND WOODS, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

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