COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 75 ("**Liability of Business Entities and Their Executive Officials-Civil 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 #75 ("Liability of Business Entities and Their Executive Officials-Civil 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*

[1] Unofficially captioned **"Liability of Business Entities and Their Executive Officials-Civil Liability"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A), 4 P.3d 1094, 1097 (Colo. 2000).

"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, this 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 75 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.

The staff draft of the title of the Initiative portrays this measure as civil liability for criminal conduct by business entities. Indeed, the Initiative, even in the civil context, does much more than that. First, it provides for new claims against business entities and its executive

officials. Next, it does not simply apply to existing criminal conduct, but rather to violations of hundreds of governmental laws, regulations and ordinances.

The Initiative allows *any* Colorado resident to bring an action against any business entity or its executive officials for conduct that violates Colo. Rev. Stat. §18-1-606(1)(a) *or* against the business entity's executive officials where such officials knew of the specific duty to be performed as required by law and knew that the business entity failed to perform that duty.[2] The Initiative eliminates the need for the plaintiff to have suffered any harm from the defendant's actions or failures to act. This is an extraordinary departure from the longstanding doctrine of standing. Voters will be surprised to learn that they are not just voting for civil liability for business entities for criminal conduct.

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

[2] The ballot title does not define "business entity" or "executive official". Both of these terms are defined by the text of the Initiative. Neither the ballot title nor the text defines the terms "resident", "criminal conduct" or "civil damages".

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, governmental entities, including the federal government, will be competing for compensatory and punitive damages with parties legitimately injured parties, such as employees, retirees and shareholders for damages. A race to the courthouse and trial may ensue allowing the State of Colorado or some other governmental entity to collect damages which could effectively preclude injured plaintiffs from collecting damages from the 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 or her 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), Colo. Rev. Stat. § 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 fees. 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 for having violated a duty imposed by a governmental entity, the funds would be distributed to that governmental entity and would be exempt from all revenues and spending limits set forth in Colo. Rev. Stat. § 24-75-201.1 and the limits of TABOR. This (1) creates a new revenue source for governmental entities at the potential expense of injured parties; and, (2) exempts those revenues from revenue and spending limitations.

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 sued in order to qualify for the affirmative defense to a civil complaint under the proposed statute. This duty to report is a separate and distinct subject.

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 ballot title and submission clause is 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. First, the single-subject statement is different from that which was accepted in Nos. 57, 73, and 74. The first sentence of the ballot title provides, "concerning civil liability for criminal conduct by business entities". First, this may mislead voters into reasonably believing that the measure only applies to the civil liability of businesses for criminal conduct. It fails to indicate that it applies to executive officials too or that the conduct involved does not necessarily follow from a criminal complaint.

This language further improperly suggests that a statute is already in place addressing civil liability for criminal conduct by business entities. Rather, the only specific statute is a criminal statute, not a civil statute. *See* Colo. Rev. Stat. § 18-1-606. The Initiative then goes on to provide that "in connection therewith, allowing a Colorado resident to bring an action for civil

damages against a business entity or its executive officials for the entity's failure to perform a specific duty." This portion infers that the ability of residents to bring a civil lawsuit against business entities for conduct that falls within the purview of Colo. Rev. Stat. § 18-1-606(1) already exists, but that this expansion only applies to lawsuits against executive officials. This is amplified by the next sentence of the ballot title which provides, "conditioning executive officials' liability upon their knowledge of the duty imposed by law and of the business failure to perform such duty". No such language discusses the criteria for finding a business entity liable.

The Initiative 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 money 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 Initiative 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 Initiative is confusing and unclear as to what specific type of conduct would violate applicable law. The text of the Initiative shows that this not only applies to Colo. Rev. Stat. §

18-1-606, but also conduct where the business entity's executive officials knew of the specific duty to be performed as required by law and knew that the entity failed to perform that duty. In other words, while one might presume that a violation of any state statute, law, Colorado ordinance, or regulation would create criminal liability, the Initiative's application to traditionally civil concepts is unexplained. Other questions remain unanswered, as well. For example: Would the Initiative apply to a violation of federal statutes, laws, and regulations? If the Initiative applies to federal law, would the monetary damages go to the Federal government or the U.S. Treasury? Because the title and submission clause do not address these issues, voters are likely to be confused and misled by the title and vote for the initiative based on their misperceptions.

The Initiative 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. Most common definitions of executives include a person having administrative or managerial authority in a business organization. Clearly, the implication of "executive official" would create this impression in the voter's mind. However, the definition of executive official under the Initiative is much narrower than the impression created. This is also confusing and misleading to the voter or signer of the petition.

The Initiative's title and submission clause fails to inform the voter that in order for defendants to avail themselves of the affirmative defense that they would need to make their full disclosure to the attorney general prior to being charged.

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).

3. The title, ballot title and submission clause contain an impermissible catch phrase "criminal conduct."

Catch phrases are words that work to a proposal's favor without contributing to voter understanding. *See In re Ballot Title 1999-2000 #258(A)*, *supra*. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of each phrase. *Id.* at 1100.

Catch phrases may also form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment, thus further prejudicing voter understanding of the issues actually presented. Slogans are catch phrases tailored for political campaigns—brief striking phrases for use in advertising or promotion. They encourage

prejudice in favor of the issue and, thereby, distract voters from consideration of the proposals merits. *Id.* (*i.e.*, be taught English "as rapidly and effectively as possible"). They mask the policy question.

"It is well established that the use of [a] 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).

The Initiative contains the words "Criminal Conduct," which are likely to work to the proposal's favor without contributing to voter understanding. These words mask the policy question raised by the Initiative. This is particularly misleading in the context of the measures purpose which is to allow any Colorado resident to bring a *civil* claim for relief for crime that falls within a particular criminal statute as well as conduct that does not constitute criminal conduct and falls outside of the purview of any criminal statute, ordinance or regulation. The Initiative does not cover these actions; rather, it criminalizes unidentified civil wrongs, including the failure to perform duties that are not criminal in nature.

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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