COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2011-2012 #84

MOTION FOR REHEARING

On behalf of Don Childears, a registered elector of the State of Colorado, the undersigned counsel hereby submits this Motion for Rehearing on Initiative 2011-2012 #84 and as grounds therefore states as follows:

On first glance, the measure appears to be a simple amendment relating to the evidentiary burden in foreclosure proceedings. But on closer inspection, it is apparent that the measure is so poorly drafted that it cannot be meaningfully interpreted for the purpose of setting a title. Nevertheless, under either of the distinct interpretations articulated by the proponents, it appears to encompass several conflicting subjects and will likely require substantive changes to disparate statutes and regulations that are not restricted to the foreclosure process. The title set by the Title Board does not—and cannot—accurately reflect any of these issues. Moreover, the measure was substantially altered after review and comment in ways that were not merely responsive to comments or questions presented at the review and comment hearing. The measure also impermissibly encompasses numerous subjects that are not interrelated and contains an improper catch phrase.

I. The Title Board lacks jurisdiction because the measure is so vague that it is impossible to set a title that accurately reflects the true purposes of the measure.

Under Article I, Section 1(5.5) of the Colorado Constitution, ballot measures are void to the extent any subject embraced in the measure is not clearly expressed in the title. When there is an incomprehensible subject, a single subject in the title cannot be stated. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 44*, 977 P.2d 856, 858 (Colo. 1999) ("Here, perhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.").

This ballot measure is so vague and ambiguous as written its own proponents have changed their interpretation of what it requires and have presented contradictory positions to the review and comment panel and to the Title Board as to its fundamental purpose. During the review and comment hearing, the staff read verbatim from the staff memorandum that:

> **The major purpose of the proposed amendment . . . appears to be to prohibit commencement of foreclosure proceedings until the party claiming the right to foreclose in the foreclosure proceedings files competent evidence of its right to foreclose with the clerk and recorder of the county in which the real property is located.**

Counsel for the proponents expressly agreed with this statement. One of the proponents, a foreclosure attorney, suggested that the word "files" in that statement of purpose should be changed to "records" because the measure will require the "competent evidence" to have been recorded with the county clerk (as opposed to merely filing it in the foreclosure process). Likewise, after interviewing at least one proponent, the Denver Post described the purpose of the measure as being to ensure that "all loan papers are properly recorded with the county first." (*See* attached Exhibit A.) The Title Board's initial staff draft of the title also reflected the understanding that the measure required competent evidence to be filed with the county clerk.

But before the Title Board, the proponents argued precisely the opposite—that the competent evidence would not have to be filed or recorded with the county clerk, and the measure was not intended to prohibit "commencement" of foreclosure proceedings. Not only are these statements of purpose or intent fundamentally at odds, neither interpretation is entirely consistent with the final text of the measure itself, which appears to require the competent evidence to have been recorded with the county clerk before the foreclosure is commenced, but also requires that the evidence be "filed" in some indeterminate location and in some indeterminate fashion before any person is "deprived" of real property through foreclosure.

Given the lack of consistent interpretation of the measure by the proponents, and the lack of a plain meaning discernable from the measure's text, the Title Board cannot set a clear title that accurately reflects the measure's substance. The title adopted by the Title Board, which does not indicate that any evidence has to be recorded or that the recording must occur before the foreclosure process is commenced, does not accurately reflect the substance of the measure as submitted to the Title Board.

II. The measure was substantially amended after review and comment without being subjected to additional review and comment.

The Title Board lacks jurisdiction, and the title cannot be set, because the measure was substantially altered after review and comment but was not sent back for additional review and comment as required by C.R.S. § 1-40-105(2). Because these changes were substantial and not responsive to direct questions or comments by Legislative Council or Office of Legislative Legal Services staff, the Title Board lacks jurisdiction to set a title for the measure.

III. The proposed measure impermissibly contains multiple subjects that are not necessarily connected.

The measure violates the single-subject requirement of Article 5, Section 1(5.5), of the Colorado Constitution, because it includes the following separate and distinct subjects:

1. Altering the evidentiary burden in foreclosure proceedings by requiring "competent evidence" and modifying the current standard permitted under C.R.S. § 38-38-101(1)(b)(I)–(III);
2. Eliminating substantive foreclosure rights in the event that there is any defect in assignments or indorsements of the evidence of debt, and thereby invalidating C.R.S. § 38-38-101(6)(b);
3. Prospectively prohibiting foreclosure pursuant to unrecorded security interests;

4. Retroactively eliminating substantive foreclosure rights, as established by private contract, of current holders of unrecorded security interests or of interests obtained through unrecorded assignments or transfers;
5. Substantially burdening or eliminating access to the secondary mortgage market for loans issued on Colorado real property;
6. Substantially burdening or eliminating use of the modern MERS system for tracking ownership of loans and servicing rights;
7. Implicitly amending C.R.S. § 4-3-104 to exclude promissory notes as freely assignable negotiable instruments;
8. Altering the title process for real property in Colorado (*see* Exhibit A, Denver Post article in which proponent Brunette is quoted as saying "[t]he intent is to ensure there are no gaps in the line of title . . . . Title records now are being totally messed with.").
9. Requiring public filing of private financial data, possibly restricting the holding in *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (Colo. 1980) and restricting individuals' privacy interests in certain financial data; and
10. Requiring counties to accept filings or recording of evidence of debt and related assignments and transfers.

IV. The title is misleading and does not accurately reflect the multiple subjects addressed by the measure.

The title also violates C.R.S. § 1-40-106(3) because it is misleading, is likely to create confusion among voters, does not correctly and fairly express the true intent and meaning of the initiative or the multiple subjects encompassed by it, and does not unambiguously state the principle of the provision sought to be added. For example, the purpose of the measure as expressed by the proponents during the review and comment hearing is to "overrule" C.R.S. § 38-38-101(6)(b), which permits foreclosure in cases where the evidence of debt is without proper indorsement or assignment, but the title does not mention § 38-38-101(6)(b) or the function or purpose of that section. Nor does the title indicate that parties will no longer be permitted to foreclose by posting corporate surety bonds as currently permitted by § 38-38-101(1)(b)(I).

Moreover, given the numerous, unconnected substantive rights that will likely be altered or burdened by the measure, it is important that the title accurately reflect those substantive effects. Yet the title set by the Title Board does not clearly state, for example, that current holders of interests secured by real property stand to lose those rights if the measure is adopted. Nor does the title reflect the important substantive effect the measure will have on the public availability of personal financial data if promissory notes or other evidence of debt must be recorded with the county clerk.

V. The title contains impermissible catch-phrases.

The title impermissibly contains two catch phrases—"competent evidence" and "deprivation of any real property"—that could form basis of slogans for use by those who expect

to carry out a campaign in favor of the measure. "Competent evidence" is impermissible because it suggests to an uninformed voter that "incompetent evidence" is currently permitted in foreclosure proceedings and does not accurately convey the nature of the evidence required. "Deprivation of any real property" suggests a forcible intervention to deny persons of their rightful property, and misstates the nature of a foreclosure proceeding.

Please set this matter for rehearing, pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 25th day of April, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2012, a copy of this Motion for Rehearing was sent to the designated representatives and their counsel by email as follows:

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EXHIBIT A

Failed bill on foreclosure filing in Colorado may get second chance on November ballot

By David Migoya The Denver Post The Denver Post
Posted:

DenverPost.com

Undaunted that legislators killed a bill requiring that lenders prove their right to foreclose on a home, backers of the failed proposal have filed it as a ballot initiative with a harder approach: Foreclosures can't happen unless all loan papers are properly recorded with the county first.

That means anytime a lender sells or transfers a note, as has been the practice for several years in the mortgage-backed securities business, the holder must file it with the county recorder of deeds.

Colorado has not required assignments — the legal word for when a mortgage or note exchanges hands — to be recorded for years, a critical part of the problem in determining who actually owns a note during a foreclosure, proponents of the initiative say.

"The intent is to ensure there are no gaps in the line of title," attorney Stephen Brunette said. "Title records now are being totally messed with. Colorado's foreclosure process today is fundamentally unsound."

The ballot initiative — called the Foreclosure Due Process and Fraud Prevention Initiative — squarely takes on Colorado law that uniquely allows for "no-doc" foreclosures, where lenders can take a home without ever having to prove they have that right.

"In other states, courts are scrutinizing whether the foreclosing party has the right to foreclose and concluding that in most cases (they haven't) demonstrated that right with proper documentation," said Debra Fortenberry, a Colorado Springs attorney who helped draft the initiative with Brunette and the Colorado Progressive Coalition.

"In Colorado, there is nothing to scrutinize," she said.

No other state allows for a foreclosure without the lender first proving it is the right entity to do so. Colorado allows foreclosure lawyers to sign a "statement of qualified holder," which basically says they think their client owns the note or mortgage without ever actually seeing it — a practice some states have labeled as "robo-signing."

Colorado law allows a foreclosure to continue even if the lawyer gets it wrong — and doesn't hold anyone accountable for the mistake. It's a crime in Nevada, one of the states to use deeds of trust like Colorado.

Initiative hearing set

Opponents of House Bill 1156 who helped kill it in a Republican-controlled committee March 13 said the initiative could push lenders from the market.

"Our one concern is that nothing hurt lending in Colorado," said Don Childears, president of the Colorado Bankers Association. "We're not jumping to a conclusion that it's automatically bad and have organizations against it tomorrow. But we're aggressively thinking through its impact."

HB 1156 sought to have lenders provide proof — theoretically a certified copy of a mortgage or loan note — that they had the right to foreclose on a property. It also would have required a judge to review the paperwork and certify a lender's standing before ordering the public auction of a foreclosed home.

The proposed initiative is scheduled for a hearing at the Legislative Council on April 6, the first step to reaching November's ballot. The proposal would need more than 87,100 validated signatures to get on the ballot, according to the Colorado secretary of state's office.

"Foreclosure is the only civil proceeding in Colorado where no disclosures are required," Brunette said. "Even in small-claims court, you have to produce the evidence so you can sue, but to take a home, they don't have to produce

a thing."

Tracking ownership

Mortgages were bought and sold so often in what became toxic mortgage-backed securities that it became difficult — and costly — to file each of the resulting transfers with a county.

Colorado does not require every ownership transfer of a mortgage to be recorded, but other states do.

Thousands of homeowners facing foreclosure — even those who simply wanted to refinance as interest rates tumbled — have recounted experiences of simply trying to determine who owned their mortgage.

The initiative nearly replicates a similar law recently passed in Nevada, which requires that all mortgage loan documents and their transfers be recorded. If not, the lender is not allowed to foreclose.

"If lenders have their stuff in a row, all their documents properly filed like they used to do it, there will absolutely be no problem," Brunette said. "This solves the problems."

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Ballot proposal

This is the text of the foreclosure initiative filed with the Colorado secretary of state's office. Once a legislative measure, the plan was killed in committee:

No person shall be deprived of real property through a foreclosure unless the party claiming the right to foreclose files in the foreclosure proceeding competent evidence of its right to enforce a valid security interest, recorded before the foreclosure is commenced, with the clerk and recorder of the county in which the real property is located, in accord with Article XIV, Section 8 of this Constitution. Competent evidence shall include (1) the evidence of debt; (2) endorsements, assignments, or transfers, if any, of the evidence of debt to the foreclosing party; and (3) duly recorded assignments, if any, of the recorded security interest to the foreclosing party. Any statutes inconsistent with this Article II, Section 25(a) are repealed on the effective date of this Section.