Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board	FILED IN THE SUPREME COURT MAY 30 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2011-2012 #84 **Petitioners:** Don Childears **v.** **Respondents:** Corrine Fowler and Stephen A. Brunette **and** **Title Board:** Suzanne Staiert, Sharon Eubanks, and David Blake	▲ **COURT USE ONLY** ▲
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ANSWER BRIEF OF PETITIONER DON CHILDEARS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☐It contains _____ words.

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☐For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

☑For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☑I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Michael D. Hoke

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Don Childears ("Petitioner"), registered elector of the State of Colorado, through his undersigned counsel, respectfully submits the following Answer Brief in support of his Petition for Review of Final Action of the Title Setting Board Concerning Proposed Initiative 2011–2012 No. 84.

SUMMARY OF ARGUMENT

The Proponents' Opening Brief responds in a straightforward fashion to Petitioner's argument that Initiative #84 is so vague that a title cannot be set: they argue that along with Proponents, a Denver Post business reporter who covers foreclosure issues, the legislative staff conducting the Review and Comment hearing, and the Title Board staff all misunderstood the measure. These diverse parties have not disagreed on a minor interpretation of ancillary provisions of the measure; they have come to contrary conclusions regarding the basic meaning of the key requirement of the Initiative. Moreover, the Proponents even go so far as to contend that their own statements and that of their counsel throughout this process contradicting their current explanation of their own measure were simply mistakes. Where the central features of a measure cannot be determined with any confidence, a title cannot be set.

Nor can a title be set when a measure is amended substantially other than in direct response to comments from legislative staff. Here, while staff offered

grammatical comments not intended to affect the substance of the measure, those changes in fact led to substantial changes in the *meaning* of the measure that were not responsive to comments. Proponents' sole argument regarding these substantial changes is that they always intended the latter meaning, even though such meaning was inconsistent with the original text of the measure.

In addition, no title may be set where a measure advances multiple, disconnected *purposes*. Proponents have admitted that the measure is intended to advance at least two purposes which Petitioner believes to be separate and unrelated: to heighten the evidentiary burden in foreclosure proceedings, and to require that security interests be recorded before any foreclosure proceeding can commence. But the natural and foreseeable consequences of the measure, if adopted, would be to burden several substantive rights in addition to the procedural changes it would require. Under this Court's prior case law, such a measure violates the single-subject requirement.

Finally, even if the Title Board had jurisdiction to set a title, the title must be stricken. The current title contains the catch-phrase "sufficiently establish," which suggests that current law allows parties to foreclose on real property based on "insufficiently established" rights, and suggests a "yes" vote without any explanation of what the measure would actually require. Proponents make no

argument to the contrary. And the title omits key features of the measure, such that the current title is misleading.

STANDARD OF REVIEW

Petitioner does not agree with Proponents' statement of the standard of review to the extent it purports to state the complete standards applicable to each separate issue for review. As noted in Petitioner's Opening Brief, this Court reviews jurisdictional questions *de novo*, and Petitioner has raised three separate jurisdictional challenges to the Title Board's action.

ARGUMENT

A. THE PROPONENTS' ARGUMENT—THAT ALL OF THE OTHER PARTIES IN THIS ACTION HAVE SIMPLY MISUNDERSTOOD THE MEASURE—DEMONSTRATES THE MEASURE'S VAGUENESS.

1. Every party involved in the initiative process to date, including the Proponents themselves at prior hearings, has interpreted the measure's central requirement differently from Proponents' revised view.

If the measure is not vague, as Proponents suggest, then the Proponents' own conduct is inexplicable, as is the understanding expressed by several other parties throughout the process. Proponents do not deny that they have advanced two contradictory interpretations of the central feature of the measure, yet they ask this Court to decide that the language of the measure is clear and that it cannot support their original interpretation and that of opponents, legislative staff, and the

Title Board staff. Initially, Proponents asserted that the measure would require certain evidence to be recorded with the county clerk before foreclosure proceedings could be commenced. They now argue that such an interpretation "makes little sense."[1]

In essence, Proponents would have this Court believe that their apparent complete reversal in their interpretation of their own measure originated with (1) "a misstatement" made by a Denver Post reporter after interviewing Proponent Brunette, (2) a separate "misstatement" made by the legislative staff during review and comment—again, after speaking with Proponent Brunette about the issue, (3) another "misstatement" by their attorney in enthusiastically agreeing with the legislative staff's interpretation of the measure, and (4) another "misstatement" by Proponent Brunette himself when he told legislative staff in no uncertain terms that the measure required evidence to be recorded with the county clerk.

Even the Title Board members initially understood the measure to require *recording* of the "competent evidence." It is not mere coincidence that all of these parties came to the same conclusion regarding the principal requirement of the measure; that conclusion is a result of the essential ambiguity in the text of the

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[1] Opening Brief of Proponent/Respondents ("134 Brief"), *In re Ballot Title 2011–2012 #84*, 2012SA134 (filed May 16, 2012), at 9. Proponents' articulate their chief argument regarding the meaning of the measure in the 134 Brief.

measure itself, as well as Proponents' own confusion over their intent in drafting the measure.

On March 30, 2012, the Denver Post published an article about Initiative #84.[2] The first paragraph of the article notes that the initiative takes a "harder" approach than a failed legislative proposal that would have eliminated the "holder" process by requiring foreclosing parties to file certain evidence of their right to foreclose, precisely what the Proponents now argue their measure accomplishes.[3] Rather, the article states that, under the proposed initiative, "[f]oreclosures can't happen unless all loan papers are properly recorded with the county first." Proponent Brunette is quoted multiple times in the article, in which the author concludes: "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."[4] Proponents offer no

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[2] Ex. 6, David Migoya, *Failed bill on foreclosure filing in Colorado may get second chance on November ballot*, THE DENVER POST (Mar. 30, 2012), http://www.denverpost.com/business/ci_20287488/failed-bill-foreclosure-filing-colorado-may-get-second.

[3] Ex. 6. The failed legislative proposal referenced in the article was House Bill 12-1156, a copy of which is attached hereto as Exhibit 7.

[4] Ex. 6 (emphasis added).

explanation as to why this claim by the Denver Post is a "misstatement," except to insist that the measure does not require recording of the "competent evidence."

At the Review and Comment hearing on April 6, 2012, the legislative staff stated that its reading of the measure was to "prohibit the commencement of foreclosure proceedings until the party . . . files competent evidence of its right to foreclose *with the clerk and recorder* . . . ."[5] This was legislative staff's understanding even after they had spoken with Proponent Brunette the day before about the measure.[6] Again, Proponents offer no explanation for legislative staff's understanding of the measure in this regard, except to say that this, too, was a "misstatement."

But apparently it was a "misstatement" with which both Proponent Brunette and his counsel readily agreed. When a Review and Comment staff member read the staff's understanding of the measure during the April 6 hearing, counsel for Proponents enthusiastically agreed.[7] Proponent Brunette agreed, and even interrupted to clarify that the evidence must not merely be *filed* with the county

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[5] Petr.'s Opening Br. at 8 & Ex. 1 at 1 (emphasis added).

[6] *See* Petr.'s Opening Br. Ex. 2 at 01:43–01:54 (member of legislative staff noting that "I talked to Mr. Brunette on the phone yesterday about some of the comments we had in the memo . . . .").

[7] Petr.'s Opening Br. at 8 & Ex. 2 at 00:23–01:00.

clerk, but it must be *recorded.* When legislative staff challenged Mr. Brunette with the fact that the measure uses the word "files," he reiterated: "'filing' pertains to the filing of evidence in the court, but the evidence that's filed would be evidence that has been recorded in the clerk and recorder's office."[8]

Proponents' Opening Briefs do not attempt to explain how both Mr. Brunette and his counsel could themselves have understood the measure to require the competent evidence to be recorded. Instead, they simply ignore the exchange and insist that the Proponents intend for the measure to require recording of the security interest only.

Even some of the Title Board members initially understood the measure to require the evidence to be recorded. Deputy Secretary Staiert expressed concern during the April 27 rehearing, and noted that Proponents' current position is contradicted by the text of the measure, saying: "There's just no set apart between this 'files competent evidence' and the 'valid security interest' in your language."[9] At the time, Proponents' counsel admitted that the measure's drafting was "less

[8] Petr.'s Opening Br. at 8 & Ex. 2 at 01:18–01:40.

[9] Petr.'s Opening Br. Ex. 4 at 54:14–16.

than optimal"[10] but Proponents are simply silent on the essential vagueness in the measure now.

2. The text of the measure does not support Proponents' current position that only the security interest must be recorded.

Notably, in their Opening Brief, Proponents do not actually analyze the text of the measure itself or attempt to explain how the text supports their new interpretation of it, except to note one member of the Title Board's apparent belief that "a phrase set off by commas usually refers back to the first item immediately preceding that phrase . . . ."[11] Of course, this purported "usual rule[] of statutory construction"[12] is nothing of the sort; familiar counterexamples are ubiquitous. For instance:

- Article I, section 1 of the United States Constitution states that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Clearly, it is the Congress, and not the States, that consists of two houses.
- Article II, section 19(1)(b)(I) of the Colorado Constitution authorizes bail except for certain offenses, including "[a] crime of violence, as may be defined

[10] *Id.* at 54:19 & 55:13.

[11] 134 Brief at 8 (discussing statement by Ms. Eubanks at the April 27, 2012 Title Board rehearing).

[12] *Id.*

by the general assembly, alleged to have been committed while on probation or parole . . . ." It is the crime, not the violence (or the general assembly), which must be alleged to have been committed while on parole or probation under this section.

- Title 42, section 1983 of the U.S. Code applies to: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities . . . ." Under section 1983, the phrase "of any State or Territory" modifies *all* of the listed items, including "statute, ordinance, regulation, custom, or usage," and not just "usage."
- As noted in Petitioner's Opening Brief, the U.S. Supreme Court refused to apply the Proponents' supposed rule of statutory construction in interpreting section 1322(b)(2) of the Bankruptcy code. Moreover, that rule has also been soundly criticized in the legal literature.[13]

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[13] Petr.'s Opening Br. at 14–15 (citing *Nobelman v. Am. Savings Bank*, 508 U.S. 324, 327–28 (1993); Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 81, 86–89 & 91–93 (1996).

- Another key example may be drawn from the measure itself, which states that *something* must be "recorded before the foreclosure is commenced with the recorder of deeds, created by section 8 of article XIV of this constitution . . . ." There is presumably no dispute that it is the "recorder," and not the "deeds," that is "created" by article XIV, section 8.

Proponents instead rely heavily on the principle that the measure must be interpreted in a manner that is "just," "reasonable," and "feasible of execution."[14] But that is not the only criterion for statutory construction. Indeed, when a statute is ambiguous, courts may, among other things, also look to the "object sought to be attained" to determine the meaning of a statute[15]—just as the Supreme Court did in *Nobelman*.[16] Here, the Proponents themselves have suggested that the purpose of the measure is to alter the evidentiary burden in foreclosure proceedings[17]—not to mention their initial statements that the purpose was to require that the evidence be recorded. Given the Proponents' principal focus on the "evidence," as opposed to security interests, it is not surprising that even the Proponents themselves would interpret the measure to require recording of the "competent evidence."

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[14] 134 Br. at 8 (citing C.R.S. § 2-4-201(c),(d)).

[15] C.R.S. § 2-4-203(1)(a).

[16] 508 U.S. at 327–28 (focus of statutory provision guided interpretation).

[17] Proponents' Opening Br. at 11.

But a definite meaning of the measure is not readily discernible. Proponents now claim that their original interpretation (and that of so many others, as discussed above) "makes little sense."[18] In fact, a close examination of the language of the measure reveals some grammatical oddities. First is the unresolvable ambiguity as to what must be recorded. Likewise, the measure clearly contemplates that a "foreclosure is commenced with the recorder of deeds," which makes no sense at all, since foreclosures are typically commenced with the public trustee. And the measure makes no mention of where the evidence is to be filed, unless it is to be "in the county in which the real property is located." Very little concrete meaning can be conclusively gleaned from the text of the measure. For the Title Board to set a title, then, it had to take Proponents' later statements of intention on faith, and expect that any court later interpreting the measure (if adopted) would do the same.

The Title Board need not consider every possible interpretation of a measure in order to set a title, but it must be clear on the key provisions of the measure, which must be fairly and accurately represented in the title. Here, the Title Board could not have been clear as to the most important requirement of the measure. It was therefore improper for the Title Board to set a title.

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[18] 134 Br. at 9.

B. THE PROPONENTS MAKE NO ARGUMENT AS TO WHY SUBSTANTIVE CHANGES MAY BE JUSTIFIED BY MERELY TECHNICAL COMMENTS THAT ARE NOT DISCUSSED AT REVIEW AND COMMENT.

Proponents do not address the first substantial change they made to the measure by moving "files" to after the phrase "in the foreclosure proceeding," except to say that Ms. Eubanks, a Title Board member, "confirmed" that all of the changes Proponents made were in response to comments from the legislative staff.[19] As noted in Petitioner's Opening Brief, the Title Board erred in deferring to statements made in private by a legislative staff member regarding the responsiveness of the changes.[20] But it is also clear that the changes proposed by the legislative staff were intended merely as technical changes that should not affect the meaning of the measure. Given that the change did substantially affect the meaning of the measure, it cannot be said that the change in meaning was responsive to any comments or discussion from legislative staff. Proponents' silence on this issue is telling.

But Proponents also made another substantial change to the measure: they changed the definition of "competent evidence" from a mandatory list of components to a non-exclusive, non-mandatory and merely illustrative list of

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[19] Proponents' Opening Br. at 9.

[20] Petr.'s Opening Br. at 23–24.

examples by changing "shall include" to "includes." Proponents do not dispute that the measure now merely lists examples of evidence; astonishingly, they instead claim that this was always their intention with the measure.[21] But Proponents do not offer any explanation as to how "shall include" could possibly be interpreted to mean "may optionally include, among other things" or something similar. Nor do they address the standard legislative interpretation of "shall" as imposing a mandatory condition.[22] In the absence of any such explanation—and there can be no such explanation—the only possible conclusion is that the meaning of the measure changed substantially. Accordingly, the measure should have been resubmitted for additional review and comment, and the Title Board lacked jurisdiction to set a title.

C. UNCONNECTED PURPOSES MAY CONSTITUTE SEPARATE SUBJECTS, AND BURDENS ON SUBSTANTIVE RIGHTS AS WELL AS SIGNIFICANT AND FORESEEABLE CONSEQUENCES CONSTITUTE SEPARATE PURPOSES.

While Proponents emphasize that the Court does not address the merits of a measure, the Court must sufficiently examine an initiative to determine whether or not it violates the constitutional prohibition against initiative proposals containing

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[21] *See* Proponents' Opening Br. at 10.

[22] *See* Petr.'s Opening Br. at 19 & n.28 (citing *Colorado State Bd. of Med. Examiners v. Saddoris*, 825 P.2d 39, 43 (Colo. 1992)).

multiple subjects.[23] "A proponent's attempt to characterize a proposed initiative under 'some overarching theme' will not save the measure if it contains separate and unconnected *purposes*."[24] Here, the measure would work drastic changes to disparate areas of law and business practice, none of which are necessarily or properly connected to one another, or to the measure's purported aim of altering the evidentiary burden in foreclosure proceedings. Proponents must be presumed to intend the natural and probable or foreseeable consequences of the measure.[25] Those consequences, therefore, illustrate the purposes behind the measure. Here, those purposes are numerous and broad ranging.

As noted in Petitioner's Opening Brief, the measure would, among other things, prospectively eliminate substantive foreclosure rights under certain circumstances, retroactively eliminate substantive foreclosure rights of current holders of unrecorded security interests, substantially burden or eliminate access to

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[23] *In re Ballot Title 2011–2012 #3*, 274 P.3d 562, 565 (Colo. 2012).

[24] *Id.* at 565–66 (emphasis added).

[25] Colorado law generally imputes an intent to accomplish the foreseeable and natural or probable consequences of one's actions. *See, e.g.*, *Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 238 (Colo. 2003) (non-economic damages are available for breach of contract where they are foreseeable and are a natural and probable result of the breach); *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 921 (Colo. 1993) (for purposes of government takings, the government is presumed to intend the "direct, natural or probable result" of its action).

the secondary mortgage market for loans backed by real estate in Colorado, substantially burden or eliminate the use of MERS for tracking ownership of loans and servicing rights, and require the filing of private personal and financial data contrary to current privacy law.

These changes are precisely the sort of surreptitious consequences "coiled up in the folds" of the measure that the single-subject requirement is intended to prevent. Voters would almost certainly be surprised to learn that a vote in favor of a measure described as changing the evidentiary burdens in foreclosure proceedings would destroy the secondary mortgage market and radically restrict the mortgage lending environment in the state. This is no different than the issue presented in *In re Proposed Initiative for 1997–98 No. 84*, where the Court reasoned that "voters would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible elimination, of those state programs."[26] Unlike this year's Initiative #3, in which "the plain language of the measure unambiguously proposes a new 'Colorado public trust doctrine,' *describes the impact of that doctrine on other legal rights*, and lays out procedures for implementing and enforcing the constitutional amendment," and the plain language

[26] *Id.* at 567 (discussing *In re Proposed Initiative for 1997–98 No. 84*, 961 P.2d 456, 460 (Colo. 1998).

of the measure is not "confusing or otherwise misleading,"[27] Initiative #84 fails to disclose the significant effects it would have on numerous substantive areas of law in confusing and ungrammatical language. It keeps its several disparate purposes "coiled up in the folds." The Initiative therefore violates the single-subject requirement, and the Title Board must be reversed on jurisdictional grounds.

D. "SUFFICIENTLY ESTABLISH" IS AN IMPERMISSIBLE CATCH-PHRASE REQUIRING THE TITLE TO BE REJECTED.

As noted in Petitioner's Opening Brief, the phrase "sufficiently establish" is evocative of a deficiency in current law that the proposed measure would correct. And the phrase is particularly troubling in light of the fact that the title set by the Title Board does not mention anything regarding what changes in the evidentiary burden would result from the measure's adoption. All voters will learn from the title is that current law apparently permits foreclosures on the basis of insufficiently established rights to foreclose, and that the measure would change this. It therefore suggests to an uninformed voter that a "yes" vote is warranted, regardless of the actual substance of the measure. Accordingly, the phrase is impermissible and the title must be rejected.

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[27] *Id.* at 567–68.

Proponents do not address this issue at all, except to say that they did not identify the term as a catch-phrase.[28] Proponents do, however, acknowledge that the Title Board must avoid using catch phrases, and that the purpose of the rule against such catch phrases is to prevent prejudicing voters in favor of an initiative merely by virtue of the words' appeal to emotion.[29] Here, that goal will be undermined if the title set by the Board is permitted to stand. The Title Board should therefore be reversed.

E. PROPONENTS FAIL TO ADDRESS THE FACT THAT THE TITLE OMITS CENTRAL FEATURES OF THE MEASURE.

Aside from its omission of the significant burdens the measure would place on numerous substantive rights, the Proponents' Opening Brief does not address the title's failure to indicate even the basic nature of the proposed changes to the evidentiary standard for foreclosure proceedings. Moreover, the title omits a surprising and unexpected feature of the measure—that all of the evidence must be recorded before foreclosure proceedings can be commenced, which is a "material component" of the measure according to the Proponents.

Proponents' arguments in support of the title focus solely on the appropriateness of addressing future impacts and legal effects or applications of the

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[28] *See* Proponents' Opening Br. at 14.

[29] *Id.* at 13.

measure in the title. Proponents are incorrect in their blanket assertion that the consequences of a measure should not be reflected in a title. For example, a measure might be submitted that in a single sentence proposes to delete article V, sections 1(2), (5) & (6) of the Colorado Constitution. An appropriate title could not simply state that these sections would be deleted from the Constitution, but would need to reflect the fact that the deletions would eliminate the initiative process entirely. A title must accurately and fairly reflect the key features of the measure. Proponents simply fail to address the fact that the title here does not do so.

Because the title omits central features of the measure, including features Proponents themselves have identified as material, the title must be rejected.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests, pursuant to section 1-40-107(2), that the actions of the Title Board with respect to the Initiative be reversed and the matter be remanded to the Title Board with instructions to strike the titles and return the initiative to its proponents or, to the extent the Title Board had jurisdiction to set a title, to correct the errors in the title at a future meeting of the Title Board.

Respectfully submitted this 30th day of May, 2012.

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I hereby certify that on May 30, 2012, a true and correct copy of this **ANSWER BRIEF OF PETITIONER DON CHILDEARS** was delivered via overnight delivery service to the following:

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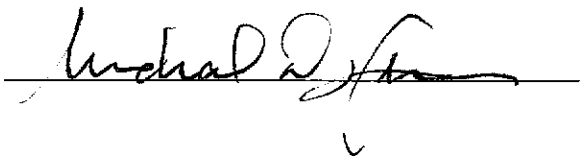

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Failed bill on foreclosure filing in Colorado may get second chance on November ballot

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

Exhibit 6

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."

David Migoya: 303-954-1506, dmigoya@denverpost.com,

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.

Second Regular Session
Sixty-eighth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 12-0186.01 Duane Gall x4335 **HOUSE BILL 12-1156**

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A BILL FOR AN ACT

CONCERNING MEASURES TO IMPROVE THE RELIABILITY OF INFORMATION PROVIDED IN CONNECTION WITH REAL ESTATE FORECLOSURES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://www.leg.state.co.us/billsummaries.)

Current law allows a "holder of an evidence of debt" (holder), generally, a bank or other financial institution, to foreclose on real property under a deed of trust even if the holder's interest is based on an assignment from the original lender and the assignment or other

intermediate documents are not produced, simply by providing a statement from the holder's attorney that the holder's interest in the property is valid. **Sections 1 and 3** of the bill remove this provision and otherwise tighten the rules for documentation of the holder's interest that must be filed with the public trustee before a foreclosure sale is authorized.

Section 2 amends provisions governing the court order authorizing sale by a public trustee (rule 120 order, referring to C.R.C.P. 120) to place the burden of proof on the holder in all cases to demonstrate that the holder does in fact have a valid assignment or other basis for its assertion that it is entitled to foreclose on the property. Section 2 also explicitly states that the rule 120 order is not a final judgment adjudicating all claims of rights and interests in the property, as a judgment under rule 105 (a "quiet title judgment") would be.

Section 4 suspends any eviction proceeding if the rule 120 order has been challenged, until the challenge is resolved.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 38-38-101, **amend** (1) introductory portion, (1) (b) introductory portion, (1) (b) (II), (1) (c) introductory portion, (1) (c) (II), (1) (g), (2) (a), and (8); **repeal** (6) (b); and **add** (1) (i) and (1) (j) as follows:

38-38-101. Holder of evidence of debt may elect to foreclose. (1) **Documents required.** Whenever a holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property ~~therein~~ described IN THE DEED OF TRUST for sale, the holder or the attorney for the holder shall file the following with the public trustee of the county where the property is located:

(b) The original evidence of debt, including any modifications to the original evidence of debt, ~~together with~~ AND the original indorsement or assignment ~~thereof~~ OF THE EVIDENCE OF DEBT, if any, to the holder of the evidence of debt or other proper indorsement or assignment in accordance with subsection (6) of this section or, in lieu of the original

evidence of debt, one of the following:

(II) A copy of the evidence of debt and ~~a certification~~ AN AFFIDAVIT signed and properly acknowledged by ~~a~~ THE holder of ~~an~~ THE evidence of debt, acting for itself or as agent, nominee, or trustee under subsection (2) of this section, ~~or a statement signed by the attorney for such holder~~ citing the paragraph of section 38-38-100.3 (20) under which the holder claims to be a qualified holder and certifying ~~or stating~~ that the copy of the evidence of debt is true and correct and that the use of the copy is subject to the conditions described in paragraph (a) of subsection (2) of this section; or

(c) The original recorded deed of trust securing the evidence of debt and any original recorded modifications of the deed of trust or any recorded partial releases of the deed of trust, or in lieu ~~thereof~~ OF THE ORIGINAL RECORDED DEED OF TRUST, MODIFICATIONS, OR PARTIAL RELEASES, one of the following:

(II) Copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust and ~~a certification~~ AN AFFIDAVIT signed and properly acknowledged by ~~a~~ THE holder of ~~an~~ THE evidence of debt, acting for itself or as an agent, nominee, or trustee under subsection (2) of this section, ~~or a signed statement by the attorney for such holder~~ citing the paragraph of section 38-38-100.3 (20) under which the holder claims to be a qualified holder and certifying ~~or stating~~ that the copies of the recorded deed of trust and any recorded modifications of the deed of trust or recorded partial releases of the deed of trust are true and correct and that the use of the copies is subject to the conditions described in paragraph (a) of subsection (2) of this section;

(g) A statement, executed by the holder of ~~an~~ THE evidence of debt, ~~or the attorney for such holder,~~ identifying, to the best knowledge of the person executing ~~such~~ THE statement, the name and address of the current owner of the property described in the notice of election and demand; ~~and~~

(i) COPIES OF ALL DOCUMENTS NOT OTHERWISE LISTED IN PARAGRAPHS (a) TO (h) OF THIS SUBSECTION (1) SHOWING AN UNBROKEN SERIES OF INTERVENING INDORSEMENTS OR ASSIGNMENTS BETWEEN THE ORIGINAL EVIDENCE OF DEBT SECURED BY THE DEED OF TRUST AND THE HOLDER FILING THE NOTICE OF ELECTION AND DEMAND; AND

(j) IF THE PERSON COMMENCING THE FORECLOSURE IS ACTING AS AN AGENT, NOMINEE, OR TRUSTEE FOR ANOTHER PERSON, DOCUMENTS DEMONSTRATING THE PERSON'S AUTHORIZATION TO ENFORCE THE EVIDENCE OF DEBT.

(2) **Foreclosure by qualified holder without original evidence of debt, original or certified copy of deed of trust, or proper indorsement.** (a) (I) A qualified holder, whether acting for itself or as agent, nominee, or trustee under section 38-38-100.3 (20) (j), that elects to foreclose without the original evidence of debt pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section, or without the original recorded deed of trust or a certified copy ~~thereof~~ OF THE ORIGINAL RECORDED DEED OF TRUST pursuant to subparagraph (II) of paragraph (c) of subsection (1) of this section, or without the proper indorsement or assignment of an evidence of debt under paragraph (b) of subsection (1) of this section, ~~shall,~~ by operation of law, ~~be deemed to have agreed~~ AGREES to indemnify and defend:

(A) Any person liable for repayment of any portion of the original

evidence of debt in the event that the original evidence of debt is presented for payment to the extent of any amount, other than the amount of a deficiency remaining under the evidence of debt after deducting the amount bid at sale; and

(B) Any person who sustains a loss due to any title defect that results from reliance upon a sale at which the original evidence of debt was not presented. ~~The indemnity granted by this subsection (2) shall be limited to actual economic loss suffered together with any court costs and reasonable attorney fees and costs incurred in defending a claim brought as a direct and proximate cause of the failure to produce the original evidence of debt, but such indemnity shall not include, and no claimant shall be entitled to, any special, incidental, consequential, reliance, expectation, or punitive damages of any kind.~~

(II) A qualified holder acting as agent, nominee, or trustee ~~shall be~~ IS liable for the indemnity pursuant to this subsection (2).

(6) **Indorsement or assignment.** (b) ~~Notwithstanding the provisions of paragraph (a) of this subsection (6), the original evidence of debt or a copy thereof without proper indorsement or assignment shall be deemed to be properly indorsed or assigned if a qualified holder presents the original evidence of debt or a copy thereof to the officer together with a statement in the certification of the qualified holder or in the statement of the attorney for the qualified holder pursuant to subparagraph (II) of paragraph (b) of subsection (1) of this section that the party on whose behalf the foreclosure was commenced is the holder of the evidence of debt.~~

(8) **Assignment or transfer of debt during foreclosure.** (a) (I) The holder of the evidence of debt may assign or transfer the

secured indebtedness at any time during the pendency of a foreclosure action without affecting the validity of the secured indebtedness. Upon receipt of written notice signed by the holder who commenced the foreclosure action or the attorney for the holder stating that the evidence of debt has been assigned and transferred and identifying the assignee or transferee, the public trustee shall complete the foreclosure as directed by the assignee or transferee or the attorney for the assignee or transferee.

(II) EACH ASSIGNEE OR TRANSFEREE DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (a) SHALL COMPLY WITH THE DOCUMENTATION REQUIREMENTS OF PARAGRAPHS (i) AND (j) OF SUBSECTION (1) OF THIS SECTION AND SHALL SUPPLEMENT THE RECORD ACCORDINGLY.

(III) ~~No~~ A holder of an evidence of debt, certificate of purchase, or certificate of redemption ~~shall be~~ IS NOT liable to any third party for the acts or omissions of any assignee or transferee that occur after the date of the assignment or transfer.

(b) The assignment or transfer of the secured indebtedness during the pendency of a foreclosure ~~shall be deemed~~ IS made without recourse unless otherwise agreed in a written statement signed by the assignor or transferor. The holder of the evidence of debt, certificate of purchase, or certificate of redemption making the assignment or transfer and the attorney for the holder ~~shall~~ have no duty, obligation, or liability to the assignee or transferee or to any third party for any act or omission with respect to the foreclosure or the loan servicing of the secured indebtedness after the assignment or transfer. ~~If an assignment or transfer is made by a qualified holder that commenced the foreclosure pursuant to subsection (2) of this section, the qualified holder's indemnity under said~~

~~subsection (2) shall remain in effect with respect to all parties except to the assignee or transferee, unless otherwise agreed in a writing signed by the assignee or transferee if the assignee or transferee is a qualified holder.~~

(c) If an assignment or transfer is made to a holder of an evidence of debt other than a qualified holder, the holder ~~must~~ SHALL file with the officer the original evidence of debt and the original recorded deed of trust or, in lieu ~~thereof~~ OF THE ORIGINAL DOCUMENTS, the documents required in paragraphs (b) and (c) of subsection (1) of this section. ~~An assignee or transferee shall be presumed to not be a qualified holder, and as such, shall be subject to the provisions of this paragraph (c), unless a signed statement by the attorney for such assignee or transferee that cites the paragraph of section 38-38-100.3 (20) under which the assignee or transferee claims to be a qualified holder is filed with the officer.~~

SECTION 2. In Colorado Revised Statutes, 38-38-105, **amend** (2) (a) as follows:

38-38-105. Court order authorizing sale mandatory - notice of hearing for residential properties. (2) (a) (I) ~~On and after January 1, 2008,~~ Whenever a public trustee forecloses upon a deed of trust under this article, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to rule 120 or other rule of the Colorado rules of civil procedure. The order ~~shall~~ MUST recite the date the hearing was scheduled if no hearing was held, or the date the hearing was completed if a hearing was held, which date in either case must be no later than the day prior to the last day on which an effective notice of intent to cure may be filed with the public trustee under section

38-38-104.

(II) NOTWITHSTANDING ANY OTHER PROVISION OF LAW AND REGARDLESS OF WHETHER A HEARING IS HELD, THE COURT SHALL REVIEW THE APPLICATION AND SUPPORTING DOCUMENTS FILED BY THE APPLICANT FOR THE ORDER AUTHORIZING SALE AND SHALL MAKE SPECIFIC FINDINGS ON THE FOLLOWING ISSUES:

(A) WHETHER THE APPLICANT IS THE HOLDER OF THE EVIDENCE OF DEBT;

(B) WHETHER THE APPLICANT IS THE REAL PARTY IN INTEREST TO FORECLOSE THE DEBT;

(C) WHETHER THE APPLICANT HAS LEGAL STANDING TO FORECLOSE THE DEBT; AND

(D) WHETHER THE DOCUMENTS PROVIDED BY THE APPLICANT ARE AUTHENTIC AND SUFFICIENT TO RESOLVE THE ISSUES IDENTIFIED IN SUB-SUBPARAGRAPHS (A) TO (C) OF THIS SUBPARAGRAPH (II).

(III) THE COURT SHALL SET FORTH ALL FINDINGS ON THE ISSUES IDENTIFIED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (a) IN THE COURT'S ORDER THAT EITHER GRANTS OR DENIES THE APPLICATION FOR AN ORDER AUTHORIZING SALE. THE BURDEN OF PROOF IS ON THE APPLICANT TO DEMONSTRATE COMPLIANCE WITH ALL DOCUMENTATION REQUIREMENTS SET FORTH IN THIS ARTICLE AS PART OF ITS APPLICATION FOR AN ORDER AUTHORIZING SALE.

(IV) A sale held without an order authorizing sale issued in compliance with this paragraph (a) ~~shall be~~ IS invalid.

(V) AN ORDER AUTHORIZING SALE THAT IS ISSUED PURSUANT TO THIS SECTION IS NOT A FINAL JUDGMENT AND IS ENTERED WITHOUT PREJUDICE TO ANY PARTY SEEKING INJUNCTIVE OR OTHER RELIEF,

INCLUDING A COMPLETE ADJUDICATION OF ALL CLAIMS OF RIGHTS AND INTERESTS IN THE SUBJECT PROPERTY UNDER C.R.C.P. 105 IN A COURT OF COMPETENT JURISDICTION.

SECTION 3. In Colorado Revised Statutes, 38-38-100.3, **amend** (10) (d) as follows:

38-38-100.3. Definitions. As used in articles 37 to 39 of this title, unless the context otherwise requires:

(10) "Holder of an evidence of debt" means the person in actual possession of or person entitled to enforce an evidence of debt; except that "holder of an evidence of debt" does not include a person acting as a nominee solely for the purpose of holding the evidence of debt or deed of trust as an electronic registry without any authority to enforce the evidence of debt or deed of trust. For the purposes of articles 37 to 40 of this title, the following persons are presumed to be the holder of an evidence of debt:

(d) The person in possession of an evidence of debt with EVIDENCE THAT PROVES THE PERSON'S authority, which may be granted by the original evidence of debt or deed of trust, to enforce the evidence of debt as agent, nominee, or trustee or in a similar capacity for the obligee of the evidence of debt.

SECTION 4. In Colorado Revised Statutes, 13-40-104, **amend** (1) introductory portion and (1) (f) as follows:

13-40-104. Unlawful detention defined. (1) ~~Any~~ A person is guilty of an unlawful detention of real property in the following cases:

(f) (I) EXCEPT AS PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (f), when:

(A) The property has been duly sold under any power of sale,

contained in any mortgage or trust deed that was executed by ~~such~~ THE person, or any person under whom ~~such~~ THE person claims by title subsequent to THE date of the recording of ~~such~~ THE mortgage or trust deed; ~~and~~

(B) The title under ~~such~~ THE sale has been duly perfected; and

(C) The purchaser at ~~such~~ THE sale, or his or her assigns, has duly demanded the possession ~~thereof~~ OF THE PROPERTY.

(II) IF AN ACTION FOR INJUNCTIVE OR OTHER RELIEF THAT CHALLENGES THE SALE OF THE PROPERTY UNDER A POWER OF SALE UNDER C.R.C.P. 120 (d) HAS BEEN FILED IN A COURT OF COMPETENT JURISDICTION, THE COURT SHALL STAY OR DISMISS WITHOUT PREJUDICE AN ACTION FOR POSSESSION UNDER THIS PARAGRAPH (f) UNTIL THE ACTION FOR INJUNCTIVE OR OTHER RELIEF HAS BEEN DETERMINED BY JUDGMENT ON THE MERITS IN THAT COURT;

SECTION 5. Applicability. The provisions of this act apply to foreclosure proceedings in which the notice of election and demand is filed on or after the effective date of this act.

SECTION 6. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.