IN THE SUPREME COURT OF FLORIDA

CASE NO. SC99-98

HAVOC0 OF AMERICA, LTD.,

Appellant,

vs.

ELMER C. HILL,

Appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

CIRCUIT COURT CASE NO. 97-2277

BRIEF OF APPELLEE

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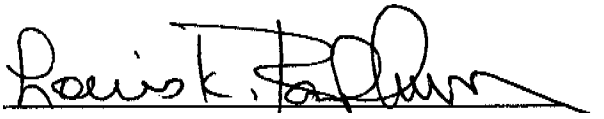

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STATEMENT OF THE CASE AND FACTS

For the purpose of this proceeding, appellee Elmer C. Hill accepts the facts stated in appellant's initial brief and the facts summarized by the Eleventh Circuit's certification opinion. Hill emphasizes, however, as acknowledged by the Eleventh Circuit, that he has consistently disputed Havoco's allegations of conspiracy and fraudulent conduct which precipitated the Illinois judgment. See Havoco of America, Ltd. v. Hill, 197 F.3d 1135, 1137 n.2 (1 lth Cir. 1999). Hill emphasizes further that the bankruptcy court has never made a factual determination that he purchased his Florida homestead in Destin for the purpose of hindering, delaying or defrauding creditors. In fact, although the decision was based on limited evidence, the bankruptcy court expressly found to the contrary and concluded: "[T]he Court cannot find that Havoco demonstrated by a preponderance of the evidence that the Debtor acted with the specific intent to defraud creditors," and Havoco "failed to show the Debtor had the requisite fraudulent intent at the time he purchased the home." (Appellant's Appendix, Tab 3-B 138 at pp. 9, 11). Moreover, no finding has ever been made in this case that the funds used by Hill to purchase the Florida homestead were the product of ill-gotten gains related to the coal brokerage services contract which formed the basis for the $15 million judgment Havoco obtained against Hill in the Illinois litigation. To the contrary, the bankruptcy court expressly determined that the

"evidence produced at the hearing showed that monies from sources other than the tainted services contract funded the purchase of the Destin residence" and that "Havoco has failed to produce any evidence that the funds used to acquire the Destin home were derived from the tainted services contract." (Appellant's Appendix, Tab 3-B138 at pp. 7-8). The bankruptcy court thus concluded that "Havoco's objection to the Destin home cannot be sustained on the basis that the home is a repository for the fruits of the Debtor's fraudulent acts." (Appellant's Appendix, Tab 3-B138 at p. 8).[1]

Concerning the "facts" stated by amici, Hill strenuously objects to their distorted account of the record in which they accuse Hill of having "used the Homestead Exemption . . . to protect [his] wealth while failing to make a good faith attempt to satisfy at least some portion of [his] just and legal obligations to creditors." Amicus Curiae Brief at 1. Similarly, with apparent disdain for the record in this case, amici also inappropriately accuse Hill of using misappropriated funds to purchase a homestead. Amicus Curiae Brief at 9, 11. These accusations are unfounded and patently false. As mentioned previously, no finding has ever

[1] Although the bankruptcy court did not allow Havoco to fully present its evidence regarding Hill's alleged scheme to defraud creditors by using nonexempt funds to acquire the Destin homestead, the court did not prevent Havoco from attempting to prove that the funds Hill used to purchase the homestead were obtained from ill-gotten gains. See Havoco, 197 F.3d at 1137.

been made in this case that Hill misused the homestead exemption for any purpose, and, indeed, the bankruptcy court reached the opposite conclusion.

Amici's unfamiliarity with the record also is evident from its discussion of equitable liens. In their brief, amici boldly assert that "the issue here is whether an equitable lien can be pressed against that portion of homestead which was created by the conversion of non-exempt assets into exempt assets for the specific purpose of defrauding creditors." Amicus Curiae Brief at 13. This statement is incorrect. Although the creditor in this case, Havoco, has objected to Hill's claimed homestead exemption, Havoco has never pled or otherwise requested an equitable lien against the debtor's homestead property. (Appellant's Appendix, Tab 3-B20).

ISSUE PRESENTED FOR REVIEW

(as framed by the certified question)

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD, WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. 726.105 OR FLA. STAT. $222.29 AND 222.30?

SUMMARY OF ARGUMENT

For over one hundred years, Florida's homestead exemption embodied by article X, section 4 of the Florida Constitution, has benefited Floridians, both rich and poor, by encouraging property ownership and protecting the family home from the reach of creditors and financial misfortune. Because the homestead exemption promotes the stability and welfare of the citizens of this state, courts have consistently given this constitutional provision a liberal construction to further its objectives, while strictly construing the three limited exceptions granted for payment of taxes and assessments, obligations contracted for the repurchase, improvement or repair of the property and obligations for labor performed on the property.

Applying these settled maxims of construction, this court in recent years, in Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992), and Tramel v. Stewart, 697 So. 2d 821 (Fla. 1997), has refused to read into the clearly worded constitutional provision an exception to the homestead exemption for civil or criminal forfeiture of homestead property, even when the homestead has been acquired or improved entirely with funds procured by criminal activity. Although acknowledging that the homestead exemption should not be used as an instrument of fraud or other reprehensible conduct, this court has made it clear that any change in the law to

allow forfeiture must originate from a constitutional amendment, not from judicial construction.

The rationale supporting Caggiano and Tramel also controls the disposition of the present certified question. In clear and unambiguous terms, article X, section 4 of the Florida Constitution authorizes only three limited exceptions to the homestead exemption and does not grant an exception for property acquired or improved with nonexempt assets with the specific intent of hindering, delaying or defrauding creditors. Although some may find this interpretation inequitable, any change in the law, as with the case of civil or criminal forfeiture, requires a constitutional amendment. In this respect, it is noteworthy that a constitutional amendment intended to disallow an exemption for homestead property acquired or improved for the purpose of defrauding creditors has been proposed and debated in recent years in both the Florida Legislature and by the Florida Constitutional Revision Commission. Both the Legislature and the Commission, however, have rejected the proposals and the amendment has not been placed on the ballot. The position adopted by the Legislature and the Commission indicates that Floridians believe that protecting the family home from financial adversity, irrespective of its cause, outweighs the legitimate economic interests of creditors and that our homestead exemption should remain sacrosanct.

The result reached by this court in Caggiano and Tramel and urged by Hill in the instant case is not inconsistent with decisions from this court which have permitted the imposition of equitable liens against homestead property. Those cases involve limited circumstances where a creditor occupies the same position as a party entitled to assert one of the three narrow exceptions to the homestead exemption (as in Fishbein, infra) or to circumstances where fraudulently or illicitly obtained funds can be traced directly to the acquisition or improvement of the homestead property. The equitable lien cases do not apply at bar for several reasons. First, the creditor, Havoco, does not stand in the shoes of a creditor entitled to assert an exception to the homestead exemption. Second, the bankruptcy court in this case found no evidence that the debtor, Hill, purchased his homestead with ill-gotten gains related to the services contract underlying the Illinois judgment obtained by Havoco. Finally, probably owing to this evidentiary deficiency, Havoco, although objecting to Hill's homestead exemption, has never pled or otherwise claimed an equitable lien against Hill's homestead property.

Further, the decisions authorizing the imposition of equitable liens when illicitly obtained funds are used to acquire or improve a homestead should be reevaluated in light of this court's decision in Tramel where forfeiture of homestead property was disallowed even though the jury determined that all of the

funds used to acquire or improve the homestead property were obtained in violation of the Florida Contraband Forfeiture Act.

ARGUMENT

A. History and Construction of the Constitutional Provision

Section 522 of the Bankruptcy Code permits a debtor to retain assets deemed "exempt" from the bankruptcy estate. See 11 U.S.C. § 522. Although section 522 defines exempt property under federal law, it permits states to designate the exemptions applicable to debtors in their jurisdiction. See 11 U.S.C. § 522(b). Florida has elected to "opt out" of the federal scheme and afford its citizens those exemptions available under state law. See § 222.20, Fla. Stat. (1991); Englander v. Mills (In re Englander), 95 F.3d 1028, 1030 (1 lth Cir. 1996), cert. denied, 520 U.S. 1186 (1997). The exemptions available under Florida law include a homestead exemption provided by article **X,** section 4 of the Florida Constitution.

Introduced in 1868, Florida's constitutional homestead exemption has served Floridians for well over 100 years as "the great bulwark of the individual homeowner." Crosby & Miller, Our Legal Charneleon, The Florida Homestead Exemption I-III, 2 U. FLA. L. REV. 12, 12 (1949). In its current embodiment, the exemption provides in pertinent part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or

> obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;
>
> (2) personal property to the value of one thousand dollars.

Art. X, § 4(a)(1)-(2), Fla. Const. (1984).

Florida's homestead exemption was founded upon considerations of public policy to promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizenry and by preserving and protecting the family home from the reach of creditors and financial misfortune. See Snyder v. Davis, 699 So. 2d 999, 1002 (Fla. 1997); Public Health Trust of Dade County v. Lopez, 531 So. 2d 946,948 (Fla. 1988); Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328, 330 (1940); Kellogg v. Schreiber (In re Kellogg), 197 F.3d 1116, 1120 (11 th Cir. 1999). "The homestead protection has never been based upon principles of equity . . . but always has been extended to the homesteader and, after his or her death, to the heirs whether the homestead was a twenty-two room mansion or a two-room hut and whether the heirs were rich or poor." Public

Health Trust, 531 So. 2d at 951. Owing to the vital public policy objectives underlying our constitutional homestead exemption, Florida courts have consistently given this provision a liberal interpretation in order to accomplish its intended purposes while strictly construing the limited exceptions to the exemption. See Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431, 432 (Fla. 1968).[2]

"Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." Florida Society of Ophthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986). In this respect, this court recently confirmed the "fundamental principle of statutory construction that where a statute is plain and unambiguous there is no occasion for judicial interpretation," The Golf Channel v. Jenkins, 25 Fla. L. Weekly S31, S32 (Fla. Jan. 13, 2000), quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992). This maxim of statutory interpretation applies with equal force to construction of constitutional

[2] Prior to 1984, the homestead exemption was limited to "property owned by the head of a family." Art. X, § 4(a), Fla. Const. (1972). Article X, section 4, was amended in 1984 to extend the homestead exemption to "property owned by a natural person" Art. X, § 4(a), Fla. Const. (1984). Notwithstanding the 1984 amendment, the underlying objectives of the homestead exemption-to encourage property ownership and protect the family home-remain unchanged. See Public Health Trust, 531 So. 2d at 948.

provisions. See State ex rel. McKay v. Keller, 140 Fla. 346, 191 So. 542, 545 (1939) (rules used in construing statutes are generally applicable when construing constitutional provisions). Thus, in the absence of an ambiguity, the precise constitutional language must be enforced by the courts, and extrinsic guides to construction are not allowed to defeat plain wording. See Florida League of Cities v. Smith, 607 So. 2d 397,400 (Fla. 1992). Adding to Havoco's onerous burden in this case, even "[l]ess latitude is permitted when construing constitutional provisions because it is presumed that they have been more carefully and deliberately framed than statutes." See Department of Environmental Protection v. Millender, 666 So. 2d 882, 886 (Fla. 1996).

With these settled principles of construction in mind, article X, section 4 of the Florida Constitution clearly and unambiguously places homestead property beyond the reach of creditors with only three narrow exceptions for (1) payment of taxes and assessments, (2) obligations contracted for the purchase, improvement or repair of the property, and (3) obligations for labor performed on the property. See Butterworth v. Caggiano, 605 So. 2d 56, 60 (Fla. 1992). Although inequities may arise occasionally from a narrow construction of these exceptions, absolutely no exception to the homestead exemption is permitted for property acquired with nonexempt assets with the specific intent to hinder, delay or defraud creditors. Any such exception cannot be created by judicial interpretation but, rather, must

originate from a constitutional amendment approved by the voters of this state. See Tramel v. Stewart, 697 So. 2d 821, 824 (Fla. 1997). In this respect, this court's comments in Public Health Trust are particularly cogent:

> The constitutional provision at issue is clear, reasonable and logical in its operation. . . . Consequently, the creditors are not asking us merely to construe or interpret the amendment but rather to graft onto it something that is not there. This we cannot do. We are not permitted to attribute to the legislature an intent beyond that expressed , . . or to speculate about what should have been intended. . . . Nor may we insert words or phrases in a constitutional provision, or supply an omission that was not in the minds of the people when the law was enacted. . , . The legislature, and in this case, the people who adopted the amendment, must be held to have intended what was so plainly expressed.

Public Health Trust, 531 So. 2d at 949 (citations omitted).

Concerning initiatives to revise the constitution, this court in Tramel encouraged the Constitutional Revision Commission to explore amendments to the homestead exemption to address forfeiture of homestead property acquired with the proceeds of criminal activity. Trarnel, 697 So. 2d at 824. In that regard, the 1997- 1998 Constitutional Revision Commission considered a proposed amendment to article X, section 4, that would have provided an exception to the homestead exemption for "the forfeiture of property acquired or improved, in whole or in part, with funds obtained through felonious criminal activity or property used in the commission of a felony." See Florida Constitution Revision

Commission (Proposal 23), http://www.law.fsu.edu/crc/pdf/0023fp.pdf. More pertinent to the present case, the Commission also debated a proposal that would have added article X, section 4(e), as follows:

> The homestead exemption in this section does not apply to any property to the extent that it is acquired or improved or its equity value increased with the intent to hinder, delay, or defraud creditors. The legislature may by general law implement this subsection.

Florida Constitution Revision Comrnission (Proposal 70), http://www.law.fsu.edu/crc/pdf/0070c1.pdf.

Strengthening Hill's interpretation of the homestead exemption, the Commission rejected both proposals resoundingly and neither amendment was placed on the ballot. In fact, Proposal 70 quoted above was rejected by a 24 to 7 vote. See Transcript of Meeting of the Florida Constitution Revision Commission, December 11, 1997, at p. 140, http://www.law.fsu.edu/crc/minutes/crcminutes121197.html. The Commission's vote indicates that the citizens of this state firmly believe that preserving and protecting the family home from financial adversity, irrespective of the source, overrides any creditor's legitimate economic interests and that our time-honored homestead exemption should remain sacrosanct. See Bigelow, 197 So. at 330 ("'The [homestead] laws are not based upon the principles of equity; nor do they in any way yield thereto; their purpose is to secure the home to the family even at the sacrifice of just demands, the

preservation of the home being deemed of paramount importance."') (quoting 26 AM. JUR. at 10).

B. Review of State Case Law Interpretations

Although the specific question certified by the court of appeals has not been answered directly, several recent decisions from this court strongly suggest that Florida's homestead exemption should remain inviolate even when the debtor invests nonexempt assets in homestead property for the purpose of hindering, delaying or defrauding creditors. In two very closely analogous cases discussed below, this court has held that Florida's homestead exemption prohibits civil and criminal forfeiture of homestead property used during the course of criminal activity, even when the proceeds of the illegal activity have been invested or used to purchase or improve the property. In light of these decisions, the certified question should be answered in the affirmative.

1. Butterworth v. Caggiano

In Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992), this court entertained the following question of great public importance certified to the court by the District Court of Appeal, Second District: "Whether forfeiture of homestead under the RICO Act is forbidden by article X, section 4 of the Florida Constitution?" Caggiano, 605 So. 2d at 57. In answering the certified question in the affirmative, the court held that Florida's homestead exemption prohibits civil

or criminal forfeiture of homestead property used in the course of racketeering activity in violation of Florida's Racketeer Influenced and Corrupt Act (Florida RICO Act). In so holding, this court acknowledged the liberal construction Florida's homestead exemption has received from the courts "to protect the family, and to provide for it a refuge from misfortune, without any requirement that the misfortune arise from a financial debt." Caggiano, 605 So. 2d at 60. The court then significantly noted that article X, section 4 of the Florida Constitution unambiguously provides only three exceptions: (1) payment of taxes and assessments, (2) obligations contracted for the purchase, improvement or repair of the property, and (3) obligations for labor performed on the property. Because forfeitures are not expressly excepted from the constitutional provision, the court was powerless to permit forfeiture of the homestead even though the property was used to foster a criminal enterprise. Caggiano, 605 So. 2d at 60 ("The Florida homestead provision clearly contains no exception for criminal activity. Neither the legislature nor this Court has the power to create one."). See also Englander, 95 F.3d at 1031 ("Because the only exceptions to homestead exemption are those specifically enumerated in the Florida Constitution, courts have refused to create new ones."). Similarly, in the instant case, the homestead exemption does not contain an exception for property acquired or improved with nonexempt assets

with the specific intent to defraud creditors, and Hill respectfully suggests that this court lacks the power to create one.

2. Equitable Lien Cases

The Caggiano court analyzed several Florida cases, relied upon by Havoco at bar, which have approved the imposition of equitable liens against homestead property. See Caggiano, 605 So. 2d at 60 n.5, citing Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980); La Mar v. Lechlider, 135 So. 703, 185 So. 833 (1939); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925); Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440 (1914); Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912). The Caggiano court distinguished these cases, however, by noting that "[v]irtually all of the relevant [equitable lien] cases involve situations that fell within one of the three stated exceptions to the homestead provision." Caggiano, 605 So. 2d at 60 n.5. For example, in Jones and La Mar, equitable liens were imposed for funds and labor used to improve homestead property.

Arnong the equitable lien cases cited at footnote five of the Caggiano opinion, Milton and Jetton Lumber are cited frequently for the proposition that the homestead exemption "should not be applied as to make it an instrument of fraud or imposition upon creditors." Milton, 58 So. at 719; Jetton Lumber, 64 So. at 442. This statement forms the entire foundation for Havoco's contention that an exception to the homestead exemption should be recognized when the owner

acquires or improves the homestead to defraud creditors. The issue of fraud, however, was not addressed in either Milton or Jetton Lumber, and the claimed homestead exemptions in those cases actually were upheld, albeit on other grounds.

As an additional factor distinguishing Caggiano from the equitable lien cases, this court noted that the evidence was "undisputed that no illicit proceeds were used to purchase, acquire, or improve Caggiano's property." Caggiano, 605 So. 2d at 61 n.5.[3] Similarly, in the case at bar, the bankruptcy judge found no evidence tracing the funds used by Hill to acquire his Destin homestead to fraud or other reprehensible conduct. (Appellant's Appendix, Tab 3-B138 at pp. 7-8). Accordingly, the equitable lien cases footnoted by the Caggiano court do not apply.[4]

Shortly after deciding Caggiano, this court again addressed the subject of equitable liens imposed against homestead property in Palm Beach Savings & Loan Ass'n, F.S.A. v. Fishbein, 619 So. 2d 267 (Fla. 1993), a 4-3 decision with a strong dissent. In that case, Mr. Fishbein obtained a $1,200,000 loan from a lending institution by forging his estranged wife's signature to a mortgage on the

[3] Compare Tramel v. Stewart, infra, and accompanying discussion.

[4] This court's decision in Bessemer, cited at footnote five of Caggiano, also is inapposite because a lien was permitted against homestead property in that case because the homestead was acquired after the lien attached.

parties' Palm Beach marital home and applied the borrowed funds to satisfy three existing mortgages on the property totaling $930,000. In subsequent divorce proceedings, Mr. Fishbein agreed to purchase his wife a new residence and delivered to her attorney as security for that obligation a quitclaim deed to the former marital home, falsely representing it was free of liens and encumbrances except those claimed by his mother and sister. After Mr. Fishbein defaulted on the agreement, Mrs. Fishbein moved back into the former marital home, and the trial judge in the divorce proceedings set the property settlement agreement aside because the husband had procured it by fraud.

In subsequent proceedings to foreclose the former marital home initiated by the lending institution which had been fraudulently induced into making Mr. Fishbein the $1,200,000 loan, the trial court sustained Mrs. Fishbein's claim that the Palm Beach house was her homestead which could not be foreclosed without her signature on the mortgage. The court, however, permitted the lending institution to impose an equitable lien against the property to the extent its funds were used to satisfy the preexisting mortgages and taxes. The Fourth District Court of Appeal upheld the finding establishing the Palm Beach house as Mrs. Fishbein's homestead, but reversed the equitable lien ruling because Mrs. Fishbein had been innocent of wrongdoing.

This court accepted jurisdiction and reinstated the equitable lien imposed by the trial judge. In so holding, the court cited earlier cases, cited by Havoco and amici at bar, acknowledging that equitable liens may be imposed against homestead property to prevent fraud or unjust enrichment directly related to the acquisition, maintenance or use of the property. See, e.g., Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925) (permitting the trustee of a bankrupt bread company to impress an equitable lien against the company president's house which had been improved by funds embezzled by the president from the company); La Mar v. Lechlider, supra (imposing an equitable lien against homestead property when the owner's family repudiated an agreement with another family under which the other family advanced money to construct an addition to the house with the understanding that the two families would live together in the house); Sonnernan v. Tuszvnski, 139 Fla. 824, 191 So. 18 (1939) (approving an equitable lien against the owner's homestead to enforce an agreement between the owner and the plaintiff whereby plaintiff advanced money for household and domestic services with the expectation that the owner would support the plaintiff for the rest of her life).

The Fishbein court also based its decision on competent, substantial evidence supporting the trial court's finding that imposition of the equitable lien placed Mrs. Fishbein in no worse position than she stood before execution of the

fraudulently obtained mortgage. In other words, because the illicitly obtained funds were used by Mr. Fishbein to satisfy valid mortgages which could have been foreclosed under an authorized exception to the homestead exemption, the fraudulently induced lending institution effectively stood in the shoes of the previous mortgagees. See Fishbein, 619 So. 2d at 270-7 1.

In the case at hand, unlike Fishbein, Havoco does not stand in the shoes of any party entitled to assert a valid exception to the homestead exemption, either by the strict letter of the constitution or "within the spirit of the exceptions to constitutional exemption of homestead property." Fishbein, 619 So. 2d at 270. Additionally, unlike Jones, La Mar and similar equitable lien cases cited by the Fishbein court, there is no evidence in this case tracing the funds used by Hill to purchase his homestead to any fraudulent or illicit enterprise or purpose. Moreover, Havoco has never requested the imposition of an equitable lien against Hill's homestead by pleadings or other papers filed in the lower courts.

3. Tramel v. Stewart

Creating some doubt about Fishbein's continued efficacy, this court more recently extended Caggiano's holding in Tramel v. Stewart, 697 So. 2d 821 (Fla. 1997), when it held that Florida's constitutional homestead exemption prohibits civil or criminal forfeiture of homestead property under the Florida Contraband Forfeiture Act, Sections 932.701-932.707, Florida Statutes (1993), even when the

homestead property has been acquired entirely with the proceeds of illegal activity. Although this decision was discussed prominently in the Eleventh Circuit's certification opinion, Havoco and its amici inexplicably fail to discuss, or even cite, the Tramel case in their briefs.

Citing the same principles of equity relied upon by Havoco, Sheriff Tramel argued that property acquired or improved with funds obtained from felonious activity (a sophisticated marijuana growing operation) should not be shielded from forfeiture by Florida's homestead exemption. This court, however, adhered to the strict letter of the constitution and observed that any exception to the homestead exemption to allow forfeiture of homestead property acquired with illegally obtained funds would require a constitutional amendment:

> Certainly, there are compelling reasons to support the forfeiture of homestead property "acquired or improved" with funds obtained through felonious criminal activity or homestead property used in the commission of felonious activity. As well, the homestead protection should not be used to shield fraud or reprehensible conduct. See Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925). However, to permit the State to forfeit a homestead based upon this criminal activity in Florida requires a constitutional revision. We call this to the attention of the Constitutional Revision Commission.

Tramel, 697 So. 2d at 824. Following Tramel's clear directive, if Florida's homestead exemption prohibits civil and criminal forfeiture of homestead property, even when the homestead has been acquired with funds obtained through

felonious activity, surely the homestead exemption extends to property allegedly acquired with nonexempt assets for the purpose of hindering, delaying or defrauding creditors.

4. Quigley v. Kennedy & Ely Insurance

Havoco and its supporting amici also have completely ignored this court's decision in Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431 (Fla. 1968), even though Quigley is the Florida state court case which comes closest to holding that Florida's homestead exemption remains inviolate even if the owner acquires or improves the homestead for the purpose of defrauding creditors. In that case, after a judgment had been entered against them, Mr. and Mrs. Quigley acquired a vacant tract of land contiguous to their existing homestead and then claimed a homestead exemption on both tracts. The trial court determined that Mr. and Mrs. Quigley had acquired the tract adjacent to their homestead subject to the judgment and therefore ruled that the newly-acquired parcel was not exempt as homestead property. The order was affirmed by the district court of appeal in Quigley v. Kennedy & Ely Ins., Inc., 202 So. 2d 610 (Fla. 3d DCA 1967). The district court of appeal cited the same principle relied on repeatedly by Havoco and amici to the effect that the homestead exemption should not be used as an instrument of fraud:

> [G]reat care should be taken to prevent the homestead exemption from levy, from becoming an instrument of fraud.

* * *

> The purchase of the vacant tract, if allowed as additional homestead, would permit the appellants judgment-debtors to deposit funds out of the reach of the appellee judgment-creditor. It would provide a basis upon which each head of a family might use after acquired surplus to increase his estate without paying his just debts. We hold that to allow this unnecessary result would be contrary to the holdings of the cases just cited.

Quigley, 202 So. 2d at 612.

Notwithstanding the district court's reluctance to extend the homestead exemption to a post-judgment transaction that might thwart the judgment creditor's legitimate collection efforts, this court quashed the district court's decision. Citing the familiar rules of construction requiring a liberal interpretation of Florida's homestead exemption and a strict construction of any exceptions thereto, this court disagreed with the district court's assessment and stated:

> The suggestion of the District Court that a judgment debtor should be restricted to land he already owns as his homestead to prevent him from depositing his funds or surplus out of the reach of his judgment creditor for the purchase of additional homestead lands appears contrary to the clear intent of the homestead provision of the Constitution.

Quiglev, 207 So. 2d at 433.

In light of Quigley and the recent decisions in Caggiano and Tramel, Hill respectfully urges this court to hold that the Florida constitution exempts homestead property from the reach of creditors, even when the homestead has

been acquired or improved with nonexempt funds for the purpose of hindering, delaying or defrauding creditors. Although some may find this interpretation of the homestead exemption unpalatable, any change in the law must come from a constitutional amendment.

C. Federal District Court and Bankruptcy Court Decisions

As noted by the Eleventh Circuit, several district court and bankruptcy court decisions have addressed the issue framed by the certified question and have reached different conclusions. See Havoco, 197 F.3d at 1141-42 (collecting cases). Among the more frequently cited and well-reasoned decisions, the bankruptcy judge in this case relied extensively on Bank Leumi Trust Co. of N.Y. v. Lang, 898 F. Supp. 883 (S.D. Fla. 1995). In that case, the debtors, husband and wife, gave the Bank of Leumi personal guarantees to secure $1,800,000 in business loans and later filed for bankruptcy in 1989 after experiencing financial difficulties. In April 1990, the bank filed suit against the debtors in New Jersey to enforce the personal guarantees and, the same month, the debtors signed a contract to purchase a home in Florida. The next month the debtors sold their New Jersey home for $940,000 and later that year completed the purchase of the Florida home for $522,000 in cash and made $178,000 in additional expenditures. Shortly after the debtors acquired the Florida home, the bank obtained judgment against them for $1,800,000 and domesticated the judgment in Florida for execution. In

subsequent bankruptcy proceedings, the court determined from the facts presented at an evidentiary hearing that the debtors converted nonexempt assets into exempt assets for the sole purpose of defrauding and hindering creditors to defeat their claims. Thus, the issue before the court was whether the debtors were entitled to claim a homestead exemption on their Florida residence even if they acquired the Florida home with nonexempt property to defraud creditors.

The court concluded that the debtors were entitled to the protection afforded by Florida's constitutional homestead exemption even if they purchased the homestead to defeat the bank's claim. See Bank Leumi, 898 F. Supp. at 886. The court specifically relied on the philosophy espoused by this court in Caggiano and its strict construction of the exceptions to Florida's homestead exemption:

> Similarly, the homestead exemption does not contain an exception for real property which is acquired in the state of Florida for the sole purpose of defeating the claims of out-of-state creditors. In light of the Supreme Court's admonition in the Caggiano [case] that the three exceptions to the homestead exemption should be read narrowly, this Court is unwilling to graft an additional exception.

Bank Leumi, 898 F. Supp. at 887.

The Bank Leumi court also distinguished the Florida cases which have imposed equitable liens against homestead property and correctly observed that "Fishbein applies to a narrow range of circumstances in which a creditor steps into

the shoes of a predecessor creditor who could have availed himself of an exception to the homestead exemption" and where "the proceeds which were procured fraudulently from the bank must be used to pay off the obligations of the original creditor." Bank Leumi, 898 F. Supp. at 888. The court further explained:

> This Court has reviewed the cases cited by Plaintiff and concludes that in the cases where Florida courts have imposed equitable liens on the basis of fraudulent, illegal, or improper conduct, those seeking homestead protection have fraudulently or improperly procured funds and then sought to defeat the claims of those to whom monies were due by using the monies to invest in, purchase or improve a homestead.

Bank Leumi, 898 F. Supp. at 888. Because the debtors in Bank Leumi had not borrowed the $1,800,000 from the bank with the intent to reinvest that money into a Florida homestead, an equitable lien (if procedurally viable) could not be imposed. Likewise, in the instant case, an equitable lien against the debtor's homestead cannot be imposed under Florida law because, on the present state of the record, there is no evidence indicating that the debtor invested any funds fraudulently obtained from Havoco into Florida homestead property.

D. Sections 222.29, 222.30 and 726.105, Florida Statutes

The certified question framed by the court of appeals cites sections 222.29, 222.30 and 726.105, Florida Statutes. See Havoco, 197 F.3d at 1143. Section 222.29, Florida Statutes provides:

> An exemption from attachment, garnishment, or legal process provided by this chapter is not effective if it results from a fraudulent transfer or conveyance as provided in chapter 726.

§ 222.29, Fla. Stat. (1995) . As pertinent to the certified question, section 222.30, Florida Statutes, provides:

> (2) Any conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor's claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor.

§ 222.30(2), Fla. Stat. (1995). Notably, sections 222.29 and 222.30 apply "only to an attachment, a garnishment, or other legal process that arises as a result of a contract, a loan, a transaction, a purchase, a sale, a transfer, or a conversion occurring on or after October 1, 1993." Ch. 93-256, § 6, Laws of Fla.

Section 726.105, Florida Statutes, part of the Uniform Fraudulent Transfers Act, provides in pertinent part:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor rnade the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor . . . .

§ 726.105(1)(a), Fla. Stat. (1989).

For several reasons, the cited statutes should not affect this court's answer to the certified question. First, Hill purchased his Florida homestead before October 1, 1993, the effective date of sections 222.29 and 222.30. Because the legislature did not express a contrary intent, sections 222.29 and 222.30 should be construed to operate prospectively only. See Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985) (in the absence of an explicit legislative expression to the contrary, substantive statutes operate prospectively rather than retroactively). Second, section 222.29 applies only to exemptions "provided by this chapter." The homestead exemption is not provided by Chapter 222, Florida Statutes, but is derived from the Florida Constitution. Finally, statutes should be construed whenever possible to avoid conflict with the constitution. See State v. Globe Communications Corp., 648 So. 2d 110, 113 (Fla. 1994); Firestone v. News-Press Publishing; Co., Inc. v. Earle, 538 So. 2d 457, 459 (Fla. 1989). A construction of sections 222.29 and 222.30 that would disallow an exemption for homestead property under the circumstances contemplated by the certified question would directly contravene the constitution and therefore cannot be sustained. For this same reason, section 726.105, although effective when Hill acquired his homestead, also must yield to the constitutional homestead exemption.

These issues were discussed by the bankruptcy court in In re Clements, 194 B.R. 923 (Bankr. M.D. Fla. 1996). Addressing the application of sections 222.29 and 222.30 to a homestead exemption, the court stated:

> First, by its own language, Fla. Stat. § 222.29 only applies to exemptions "provided by this chapter." Chapter 222 provides statutory exemptions for annuities, personal property, and other miscellaneous assets. It does not provide the homestead exemption, which is found in the Florida Constitution. Secondly, under the basic rules of construction, statutory laws enacted by the legislative body cannot impair rights given under a constitution. It would take an amendment to the Florida Constitution to restrict the right to homestead exemption. The mere passing of a statute by the Florida Legislature cannot restrict the Florida Constitution. There is no question that the disallowance of fraudulent conversions of exempt assets in Fla. Stat. § 222.29 does not extend to homestead.

In re Clements, 194 B.R. at 925.[5]

E. Amici's Arguments

The arguments advanced by amici under headings I and II of their brief have been addressed previously. Under heading III, amici essentially contend from an equitable, public policy standpoint that Florida should discard its image as a debt-

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[5] In Levine v. Weissing (In re Levine), 134 F.3d 1046, 1053 (1 lth Cir. 1998), the Eleventh Circuit determined "that the legislative amendment embodied in § 222.30 does not preclude reliance on § 726.105 regarding causes of action that accrued prior to the amendment's enactment." That decision, however, involved annuities exempted by statute and did not address a constitutional homestead.

or's refuge by restricting the scope of its homestead exemption. Amicus Curiae Brief at 16-17. In this respect, amici contend that affluent, out-of-state debtors "who can juggle assets," not typical homeowners with modest mortgages, are abusing Florida's homestead exemption to surreptitiously preserve enormous wealth. Amicus Curiae Brief at 17.

In response, amici's argument overlooks the fundamental concept that "[t]he homestead protection has never been based upon principles of equity" but, rather, applies uniformly to both rich and poor, "whether the homestead [is] a twenty-two room mansion or a two-room hut." Public Health Trust, 53 1 So. 2d at 951. Furthermore, although no one would seriously dispute amici's underlying assertion that all citizens should attempt to satisfy their debts, the protection of the family home remains the paramount objective for preserving the homestead exemption "even at the sacrifice of just demands." Bigelow, 197 So. at 330. In any event, even if this court agrees with amici that our homestead exemption and judicial interpretations thereof have unwittingly transformed Florida into a debtor's haven, any change in the law must come from a constitutional amendment, not from judicial construction of an otherwise unambiguous provision.

Concerning the need for a constitutional amendment, it is interesting to compare amici's brief with a recent Florida Bar Journal article which addressed

the issue presented by the certified question, entitled Cohen, The Use of the Florida Homestead to Defraud Creditors, 72 FLA. BAR. J. 35 (Dec. 1998). Both amici's brief filed in this case and the cited article were authored by the same lawyer, Jules S. Cohen. In his article, after thoroughly analyzing and discussing the relevant case law from this court and the federal courts, Cohen predicted that the court of appeals ultimately would "certify the question to the Florida Supreme Court because a legal issue of such significance should be settled by that court," Id. at 40. Cohen then predicted the outcome of the certification in a manner entirely consistent with Hill's position:

> Under the holding of Caggiano, it is likely that the Florida Supreme Court would conclude that a homestead acquired in fraud of creditors is exempt because there is no exception to the exemption for that in the constitution.

Id. Although Cohen criticized the expected outcome of this case based on policy reasons consistent with amici's economic interests, he acknowledged in the article that any change in the law must originate by constitutional amendment. In this respect, Cohen noted:

> There should be added to the exceptions to the homestead exemption in the constitution an exception to the exemption to the extent that money used to acquire, improve, or increase the equity in the homestead is derived from criminal or fraudulent activity.

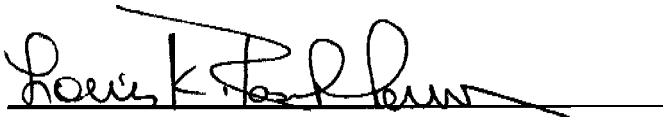
> Such an amendrnent to the constitution must be passed by both houses of the Florida Legislature and then approved by the voters of Florida. In the last session of the legislature [1998] there was a proposal to amend the constitution to create such an exception to the homestead exemption. That proposal passed the House but did not come to a vote in the Senate. Efforts are underway to have a similar proposal introduced in the next session of the legislature. Such an amendment would have a beneficial effect on creditor-debtor law in Florida.

Id. Hill certainly agrees with Cohen that until the voters of this state approve an amendment, Florida's constitutional homestead exemption must be interpreted to allow the exemption in cases where the debtor acquires or improves the homestead with nonexempt assets for the purpose of hindering, delaying or defrauding creditors. Although inequitable cases occasionally may arise, this interpretation of the constitution is vitally necessary to protect the family home from the reach of creditors and financial misfortune and to otherwise preserve the sanctity of Florida's time-honored and revered homestead exemption.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellee was furnished to John P. Daniel, Esquire and J. Nixon Daniel, III, Esquire, Beggs & Lane, attorneys for appellant, Post Office Box 12950, Pensacola, Florida 32576-2950, and Virginia B. Townes, Esquire, and Jules S. Cohen, Esquire, Akerman, Senterfitt & Eidson, P.A., attorneys for amici, Post Office Box 231, Orlando, Florida 32802-9708, by U.S. Mail this 23rd day of February, 2000.

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