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## **STATEMENT OF THE CASE AND THE FACTS**

Amici<sup>1</sup>, Florida Bankers Association, Florida Retail Federation, NACM of Florida, Inc., and NACM Florida Gulf Coast Unit, Inc., accept Petitioner's Statement of the Case and the facts insofar as they relate to the particular proceedings below. However, amici believe the facts of this case, disturbing as they may be, barely serve to illuminate the scope of the issue here before the Court. Respondent Elmer Hill is neither unique nor particularly egregious in his manipulation of the protection the people of the state of Florida reserved to themselves by exempting homestead from forced sale in Article X, Section 4 of the Florida Constitution ("Homestead Exemption").

Others, like Mr. Hill, have used the Homestead Exemption not to protect a family from becoming destitute and wards of the community, but to protect their wealth while failing to make a good faith attempt to satisfy at least some portion of their just and legal obligations to creditors. In 1986, Gary Froid, a

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<sup>1</sup> Florida Retail Federation, NACM of Florida, Inc., and NACM Florida Gulf Coast Unit, Inc., jointly moved for leave to appear as amici curiae. That motion was granted on February 3, 2000. Undersigned counsel would like to clarify the nature of the business of and the relationship between the two NACM groups which was inadvertently misstated in the Motion. Both are associations which represent businesses from the credit management side, but they do not themselves manage credit. Also, both entities are separate and distinct chapters of the national association and are not otherwise related.

successful insurance agent, faced bankruptcy when the bank of which he was a director--and in which he held stock--failed. At the time of his bankruptcy, he owned a home valued at \$700,000, IRA's and life insurance policies which the Constitution and the law of Florida exempt from the reach of creditors. However, Mr. Froid was not content with the generous exemptions already afforded him. Prior to declaring bankruptcy, he cashed out a non-exempt \$75,000 certificate of deposit to pay down the mortgage on his home and liquidated another \$35,000 in non-exempt assets which he invested in his life insurance policies. Thus, at the time he declared bankruptcy, his exemption had increased by \$110,000--money which was legally owed to his creditors.<sup>2</sup>

Roy Talmo, former principal of Data Lease Financial Corporation, used \$700,000 of the company's assets to pay down the mortgage on his home in Florida. The company could not recover those assets, or any portion of them, when Talmo declared bankruptcy in 1993, declaring the home as exempt homestead under the Florida Constitution.<sup>3</sup>

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<sup>2</sup> St. Petersburg Times, February 4, 1990.

<sup>3</sup> The Palm Beach Post, October 18, 1994. Of course, once the creditors' claims were extinguished in the bankruptcy proceeding, Mr. Talmo was free to sell or remortgage his homestead to pull out excess equity for his own enjoyment.

William Durham, much like Mr. Hill in the instant case, acquired his wealth through defrauding others. When judgment--and forced restitution--seemed inevitable, however, Mr. Durham sold his home in Kentucky and came to Florida, purchasing a condominium in Pinellas County. Those he had injured were unable to recoup their losses because Mr. Durham was able to raise Florida's Homestead Exemption as a bar to their claims.<sup>4</sup>

In a case currently pending in the United States Bankruptcy Court for the Middle District of Florida, In re Jeffrey A. Weston, Case No. 97-1859-8G7 (Bankr. M.D. Fla), the bankruptcy court judge found the following facts: Jeffrey Weston, a resident of Indiana, stole trade secrets and confidential information from his employer so that he, Weston, could set himself up in competition. The employer sued Weston in Indiana state court for, among other things, unfair competition, misappropriation of trade secrets and confidential information, and unjust enrichment. When it became obvious that the trial was going badly for Mr. Weston, he executed a promissory note to his attorney (his step-uncle) in the amount of \$71,750, which he secured with a mortgage on his home in Indiana. The home was otherwise free of liens.

The jury returned a verdict against Mr. Weston in the amount of

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<sup>4</sup> St. Petersburg Times, February 4, 1990.

\$271,780.07, finding him guilty of misappropriation of the trade secret he had used to generate income. The judgment reflected the amount of profit Mr. Weston had derived from the illegal use of the trade secrets over a two-year period.

Once the judgment was entered, Mr. Weston closed his banking account and no longer dealt with banks. The income he received from his business was unaccounted for thereafter. He paid the bulk of his expenses with cashiers' checks, but the source of the funds used to purchase those checks was not recorded sufficiently to give the court a picture of his financial condition. Thus, discharge was denied.

Mr. Weston's scheme to protect his assets was not entirely futile, however. Three months after the judgment was entered against him, and without selling his home in Indiana, Mr. Weston came to Florida and purchased a home in Sarasota, Florida, for \$153,490.03 *in cash*. He has declared that residence his homestead and, therefore, exempt from forced sale to satisfy the just and legal judgment entered against him in favor of the employer he cheated and abused.<sup>5</sup>

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<sup>5</sup> The United States Bankruptcy Court's Findings of Fact and Memorandum of Law in In re Weston are attached hereto as Appendix A.

These and other reported cases<sup>6</sup> demonstrate that the issue here before the Court is neither academic nor immaterial. What was intended by the people of the state of Florida as a refuge for honest householders who have fallen into financial crisis through bad luck, bad times, or bad fiscal management has become the refuge of the well-to-do who would prefer to maintain their personal wealth rather than to fulfill their financial obligations to creditors.

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<sup>6</sup> See, e.g., In re Miller, 188 B.R. 302 (Bkrtcy.M.D.Fla. 1995) (shortly after \$530,000 in notes came due, debtor sold \$461,000 in non-exempt real estate for \$250,000, using cash proceeds to buy homestead and pay off loans against life insurance); In re Bandkau, 187 B.R. 373 (Bkrtcy.M.D.Fla. 1995) (court found solvent debtors converted most non-exempt assets to exempt annuities and homestead equity to shield assets from single major creditor); In re Thomas, 172 B.R. 674 (Bkrtcy.M.D.Fla. 1994) (two days prior to bankruptcy, debtors sold non-exempt automobile, using bulk of proceeds to pay down homestead mortgage); In re Coplan, 156 B.R. 88 (BkrtcyM.D.Fla. 1993) (facing liability on guarantee, "financially sophisticated" debtors sold home in Wisconsin (\$40,000 homestead exemption), bought \$228,000 home in Florida for cash); In re Schwarb, 150 B.R. 470 (Bkrtcy.M.D.Fla. 1992) (facing \$100,000 judgment, debtor sold \$210,000 in non-exempt real estate and mutual funds, bought \$85,000 in annuities, used balance to pay off mortgage on homestead); In re Decker, 105 B.R. 79 (Bkrtcy.M.D.Fla. 1989) (facing impending bankruptcy, debtors cashed in CD early for substantial penalty and sold note at substantial discount, using resulting cash to pay off \$67,000 mortgage on homestead); In re Blum, 41 B.R. 816 (Bkrtcy.S.D.Fla. 1984) (facing liability on guarantee, debtor liquidated various securities and bank accounts in months prior to filing, used proceeds to pay down homestead mortgage and buy annuities).

## **SUMMARY OF THE ARGUMENT**

The earliest interpretations of Florida's Homestead Exemption recognized that the goal of protecting the family from losing its home and means of subsistence was not served by extending the scope of Homestead Exemption to protect the wealth of an individual who could pay debts, but refused to do so. In determining whether an asset ostensibly entitled to Homestead Exemption was beyond the reach of the claimant, the Court consistently looked to the good faith of the debtor asserting the exemption and to the source of the investment in the protected asset. In those cases in which the debtor had used funds rightfully owed to another to purchase or improve homestead property, this Court was prompt to set aside that part of the exemption created in fraud of the creditor by imposing an equitable lien against the homestead property. This application satisfies the Court's fundamental requirements that the Homestead Exemption must be liberally construed for the protection of the family, but must not, itself, become an instrument of fraud on creditors.

In recent years, some bankruptcy courts have failed to heed the warning against misapplying Homestead Exemption so as to condone fraud on creditors. This has resulted from a misunderstanding of a case this Court

decided in a context unrelated to the issue here before the Court. In a case in which the state was attempting to require forfeiture of homestead used in the commission of a felony, the Court recognized that the three express exceptions to constitutional Homestead Exemption did not authorize the legislature to impose loss of homestead as a statutory penalty for criminal behavior. However, the issue before the Court is not whether the legislature may vacate constitutional homestead protections. Rather, it is whether the constitution itself may be used to perpetrate a fraud on creditors. This Court has consistently answered the question in the negative.

Testing whether assets have been converted from non-exempt to exempt in order to hinder, delay or defeat the claims of creditors does not create any unfair burden on the courts or on debtors. The issue has arisen in most of the cases cited herein, with the burden of proof of fraud and overreaching on the party attempting to obtain an equitable lien against homestead. The courts are well equipped to receive and weigh the evidence required to determine the motivation behind the conversion of assets from non-exempt to homestead.

The policy underlying the concept of Homestead Exemption is ill served by allowing debtors to hinder, delay or defeat their creditors by converting non-exempt assets to exempt assets. Florida adopted homestead exemptions,

whether by statute or by constitutional fiat, in order to create a stable, economically viable society. This was accomplished by allowing families to retain a roof over their heads and the ability to support themselves so that society at large would not be burdened with the support of those who lost homestead to creditors. Historically, the scope of homestead was limited to that which was required for subsistence. While Florida's constitutional Homestead Exemption is unlimited, it is not intended to be a mechanism for converting wealth otherwise available for the payment of just debts and obligations into protected assets.

Ironically, applying Florida's constitutional Homestead Exemption so as to allow debtors to convert non-exempt assets to exempt homestead with impunity does nothing to protect the individuals who were the intended beneficiaries of the provision. Most individuals seeking bankruptcy protection are truly without assets with which to pay creditors. Those who have a homestead typically hold it subject to a mortgage which falls within an express exception to Homestead Exemption and which may therefore be foreclosed and lost to the debtor. It is only the relatively well-to-do debtor (who could make some payment on his obligations without being reduced to poverty) who will be able to liquidate non-exempt assets and to invest them in homestead or

other exempt assets. Thus, Florida's Homestead Exemption has become a magnet for the debtor with assets who wishes to defraud creditors. The people of the state of Florida neither intended such an application of their constitution nor welcome the consequences of ignoring the fundamental precepts of fairness and equity which militate against it.

### **ARGUMENT**

The earliest cases in which this Court analyzed the purpose and effect of Florida's constitutional Homestead Exemption recognized two specific rules for its application: First, the exemption should be liberally applied to protect the family home. Second, the exemption should not become a means of defrauding or imposing upon creditors. Milton v. Milton, 58 So. 718 (Fla. 1912); Drucker v. Rosenstein, 19 Fla. 191. 199 (1882). Federal courts in Florida have faithfully followed the Court's guidance on the first precept; however, they have applied it to the exclusion of the second.<sup>7</sup> See, e.g., Bank Leumi Trust Company of New York v. Lang, 898 F. Supp. 883 (S.D. Fla. 1995).

#### **I. THE FLORIDA SUPREME COURT HAS NOT INTERPRETED**

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<sup>7</sup> Although bankruptcy is a federal proceeding controlled by federal rule and statute, the Bankruptcy Code permits the individual states to opt out of the federal scheme of exemptions and make state exemptions applicable in bankruptcy. 11 U.S.C. § 522(b). Florida opted out of the federal exemptions. § 222.20, Fla. Stat.

**ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION AS A  
SAFE HARBOR FOR FRAUD AND IMPOSITION ON CREDITORS.**

From its earliest interpretations of Florida's Homestead Exemption, the Florida Supreme Court has acknowledged that the people of the state of Florida did not intend that protection to extend sanctuary to the well advised, well-to-do debtor who has the means and ability to manipulate the law to preserve his wealth at his creditors' expense.

Where the Court found that a debtor had improperly increased his homestead with the intent to defraud those entitled to the benefit of the assets used to increase it, the Court did not hesitate to impose an equitable lien against the homestead to recoup the assets rightfully owing to the creditor.

As early as 1912, in Milton, 58 So. at 718, the Court raised the question of bad faith to determine whether the defendant had a valid Homestead Exemption. William Milton, the debtor, had inherited land from his mother after he had incurred and defaulted on debts. Within weeks of his mother's death, Milton moved his family onto the land and declared it his homestead. In the meantime, his creditors attempted to execute against the property to recover the moneys owed them. The Court determined that Milton was entitled to Homestead Exemption, under the facts of this case. But the context in which the decision was made raises the clear implication that other facts could have

yielded a different result: "**There is no sufficient showing of bad faith** on the part of William Milton in moving on and claiming homestead rights in the lands." Id. at 719 (emphasis added).

In Jones v. Carpenter, 106 So. 127 (Fla. 1925), the Court met those different facts. In that case, J. Weller Carpenter purchased a home and moved into it with his family, thus creating a homestead. Carpenter was the president of Jacksonville Bread Company which, a few years after Carpenter's purchase of his home, went into bankruptcy. In the ensuing proceedings, it became clear that Carpenter had been expending corporate funds for improvements and maintenance to his home. When the bankruptcy trustee attempted to recoup those funds through imposition of an equitable lien on the property, Carpenter raised the defense of Homestead Exemption.

The Court found that the equitable lien was an available and appropriate remedy. A cursory reading of the case may lead one to the conclusion that the lien was imposed because of the determination that the claim fell within the exception to Homestead Exemption relating to improvements on homestead property.<sup>8</sup> However, it is unmistakable on the record that the contractual

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<sup>8</sup> But no property shall be exempt from sale . . . for the payment of obligations contracted . . . for the erection or repair of improvements on the real estate exempted.

obligations for the improvements to the homestead had been satisfied. The workers had been paid. On the other hand, Carpenter had no express contract with the corporation to reimburse it for the funds he had misappropriated to finance the improvements. Thus, the Court recognized the fundamental principle that use of funds rightfully belonging or owed to another to improve (or to purchase) homestead property will not protect the homestead owner from the ultimate obligation to repay those funds, even where no express contract exists or where no judgment has been entered prior to the expenditure of the funds.

In the instant case, Hill gained great wealth by misappropriating business opportunities and income from others to whom he owed a fiduciary duty. He then used those funds to purchase a homestead. Like Carpenter, he seeks to avoid his legal responsibility to those he injured by converting non-exempt assets to exempt so as to keep the benefit of his illegal acts for his own enjoyment. As the Florida Supreme Court implied in Milton and expressly ruled in Carpenter, the protection of ill-gotten gains against those from whom they were taken is not a valid exercise of Homestead Exemption.

The Florida Supreme Court again recognized that an equitable lien was

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Article X, § 1, Fla. Const. (1868).

appropriate where the homestead claimant sought to convert the assets and effort of another to his own benefit in Sonneman v. Tuszynski, 191 So. 18 (Fla. 1939). There, the Court found that the protection of Homestead Exemption did not permit the owner of homestead to ignore obligations to others which had allowed him to obtain and to enhance the value of his homestead. In that case, Mrs. Sonneman had become the benefactor of the defendant, Tuszynski, living with him in an almost maternal relationship. Over the course of the years, she had provided housekeeping services and had advanced funds for his benefit-- funds which had allowed him to acquire a business he later sold and converted into a homestead in Florida. During this time, the defendant had consistently promised to provide for Mrs. Sonneman for the rest of her life. However, that promise was revoked when the defendant married<sup>9</sup> and his wife undertook to force her off the property and out of their lives. The plaintiff, then 78 years old and penniless, turned to the courts for relief. The defendant, not unexpectedly, asserted the protection of the Homestead Exemption to avoid his moral obligation to Mrs. Sonneman.

The Florida Supreme Court was unimpressed. It found that the funds

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<sup>9</sup> Under the 1868 Constitution, Mr. Tuszynski could not claim homestead prior to his marriage, as he was not a "head-of-household." Homestead exemptions were limited to heads of households at that time.

and sweat equity Mrs. Sonneman had invested in Mr. Tuszynski's property and welfare, both before and after his move to Florida and the creation of his homestead, entitled Mrs. Sonneman to an equitable lien against the property.

Our conclusion is that [Mrs. Sonneman] is entitled to an equitable lien on the real property . . . for money advanced by her to the defendant in the sum of \$1700, with interest at the rate of six per cent per annum from and after November 1, 1934, until paid. Likewise, for labor and service by her performed for the defendant at the sum of \$50 per month . . . with interest at the rate of six per cent per annum until paid. **The equitable lien hereby declared may be enforced against the appellees' homestead exemption.**

Id. at 21 (emphasis added). In short, the Court found that Mrs. Sonneman had also invested in the property. Mr. Tuszynski was not permitted to void her interest through a declaration of homestead. Significantly, there was no finding that at the time Mr. Tuszynski accepted Mrs. Sonneman's largess, he intended to cheat her. Rather, the change in his circumstances came after he had received the benefits and after he had established homestead status.

By contrast, Mr. Hill intended to gain his wealth by cheating those to whom he owed a duty of loyalty. When it became obvious that he was going to be held accountable for his wrongdoing, he brought that wealth to Florida as a non-exempt asset and is attempting to take advantage of Florida's unlimited

Homestead Exemption by converting those non-exempt assets to exempt homestead. The purpose and effect can only be to prevent those he had injured and defrauded from any remedy for their injury.

It is these cases and the salutary and equitable principles enunciated therein<sup>10</sup> which have been ignored in the wake of Bank Leumi, 898 F. Supp. at 883. In Bank Leumi, the Langs were being sued on a personal guarantee of \$1.8 million. To avoid liability, they sold their home in New Jersey (where they would have been entitled to exempt only \$30,000 of their homestead) and moved to Florida. Once within the jurisdiction of Florida's unlimited Homestead Exemption, they purchased a home for \$522,000 in cash and invested another \$500,000 in annuities (which are subject to statutory exemption pursuant to Florida Statutes section 222.14). Thereafter, a judgment was entered against the Langs for the full amount of the guarantees, and Bank Leumi attempted to collect its judgment in federal court in Florida by levying against the home and the annuities. The Langs asserted the exempt status of those assets; Bank Leumi sought to avoid the exemption by proving that non-exempt assets had

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<sup>10</sup> These cases illustrate one further precept: Florida courts have always provided a remedy for fraud and have consistently refused to reward those who perpetrate it. It is untenable to argue that the Constitution of the state creates a means of perpetrating fraud for which there is no remedy.

been converted to exempt assets for the purpose of hindering, delaying or defrauding their creditors. The Bank Leumi court made the express finding that the **sole** purpose for the Langs' move to Florida and their purchase of the home and the annuities had been to hinder the creditors and to defeat their claims. Nonetheless, the court refused to set aside any portion of the Homestead Exemption, narrowly construing the language of Article X, section 4 of the Florida Constitution. In other words, the court there protected the family home **even though** the home had been purchased for the express purpose of defrauding and imposing on creditors.

In reaching this decision, the Bank Leumi court relied on an over-expansive reading of a decision of this Court, Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992). Caggiano involved an attempt by the state to forfeit homestead property used in commission of a crime. Caggiano had been convicted of racketeering in violation of the Florida RICO Act for bookmaking out of his home. Caggiano asserted Homestead Exemption as a defense to the forfeiture. On appeal, the Florida Supreme Court determined that the state could not, by statute, avoid the protection granted by Article X, section 4 of the Constitution. The Court went on to note that the people of the state had acknowledged only three exceptions to the exemption and had not provided for

the loss of homestead as a criminal penalty. The Caggiano Court's enumeration of the three exceptions to Homestead Exemption<sup>11</sup> led the Bank Leumi court to ignore the overarching precept repeatedly recognized in earlier Florida Supreme Court decisions--that the Homestead Exemption may not be used fraudulently to convert assets otherwise available to satisfy the claims of creditors to exempt status.

This case does not present the Caggiano issue. The Court is not asked to remove the protections of bankruptcy as a penalty for wrong-doing. Rather, 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. In other words, does the state of Florida protect that portion of homestead which is, itself, fraudulent?

The Constitution of the State of Florida does not compel United States Bankruptcy Courts (or any other courts) to reward a debtor's clear intent to hinder, delay or defraud his creditors by recognizing the Homestead Exemption

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<sup>11</sup> Failure to pay taxes or assessments on the homestead, obligations contracted for the purchase, improvement or repair of the homestead, or obligations contracted for labor performed on the homestead. These exceptions appeared in the original constitutional declaration of the exemption. See, Article X, § 1, Fla. Const. (1868).

as a bar to the creditor's claims. Moreover, public policy militates strongly against so expansive and unfair an application of the protection.

**II. DENYING HOMESTEAD EXEMPTION TO THE EXTENT NON-EXEMPT ASSETS HAVE BEEN CONVERTED TO EXEMPT ASSETS IN FRAUD OF CREDITORS DOES NOT CREATE AN UNFAIR BURDEN ON THE COURTS OR ON DEBTORS.**

Milton, Carpenter, and Sonneman also illustrate that the burden of proof of the bad faith of the debtor sufficient to impose an equitable lien on homestead falls on the party claiming entitlement to the remedy. This creates no extraordinary burden on either the debtor or the courts, even though such findings will, of necessity, turn on the specific facts of each case. The trial courts of this state are well equipped to make the determination<sup>12</sup>, on all of the facts before them, as to whether the debtor, like Mr. Milton, has acted in good faith, or like Messrs. Carpenter and Tuszynski, has attempted to convert and protect wealth to which he had no moral or equitable right. Such a determination was clearly within the scope of the inquiry in both Bank Leumi and In re Weston. Explicitly recognizing the existence of this remedy where

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<sup>12</sup> Since the events giving rise to this case occurred, the Florida legislature enacted Florida Statutes sections 222.29 and 229.30, which explicitly impose upon the courts the obligation to determine whether assets other than homestead claimed as exempt were converted in order to commit a fraud on creditors.

homestead protection has been claimed for assets which were converted from non-exempt status to exempt status will not create an unworkable burden on the courts; neither will it weaken the significant protections intended to be created by the Homestead Exemption. Rather, it will advance the policies giving rise to the protections of Homestead Exemption.

**III. PUBLIC POLICY DOES NOT FAVOR INTERPRETING THE HOMESTEAD EXEMPTION TO PERMIT THE WELL-TO-DO TO AVOID JUST, LEGAL OBLIGATIONS TO CREDITORS.**

Since its initial appearance in Florida law, the Homestead Exemption was intended to encourage settlement and development in Florida. Prior to the first provision of a Homestead Exemption in the 1868 Constitution, the concept of protecting the homestead had evolved in Florida from English common law. See Dennis Wall, Homestead and the Process of History, 6 Fla. St. U. L. Rev. 877, 895-96 (1978)<sup>13</sup>. After Florida had abolished imprisonment for debt in 1822, some portion of the real property holdings of a debtor were subject to levy for debts. In 1862, Congress passed the Homestead Act which granted up to 160 acres of land to anyone who would move onto the land and farm it.

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<sup>13</sup> Mr. Wall's article is well worth reading. It is both scholarly and informative and dispels a number of misconceptions about the history of and policy underlying "homestead" exemptions from Roman times to the present.

The purpose, obviously, was to encourage actual settlement and cultivation of lands in the federal public domain. Lewton v. Hower, 18 Fla. 872 (1882). See also, Adams v. Church, 190 U.S. 510, 516 (1904).

It was in the context of the federal Homestead Act, then, that the people of Florida first gave constitutional protection to the homestead, echoing much of the language of the federal act and adopting the same acreage limitations. In Lewton, the Florida Supreme Court acknowledged that the purpose of Florida's Homestead Exemption was the same as the purpose of the Congressional act-- to encourage settlement and to benefit the family. 18 Fla. at 881. Notably, Florida limited the exemption to heads of families at that time, further recognition that the purpose of the exemption was to attract stable, industrious citizens to the state. The limitation to heads-of-households has been removed in recognition of the changes in society in the past century, but the policy underlying the exemption has not changed.

Our society and our economy operate on the principle that people should pay their debts. Most people do. Allowing homesteads acquired in fraud of creditors as exempt encourages people to not pay their debts and to hide their wealth in their exempt homesteads. It causes creditors to remain unpaid while the debtor enjoys the benefit of the homestead with impunity.

The Homestead Exemption is intended to protect a fairly acquired homestead but not one fraudulently acquired. If an individual buys a homestead in Florida, makes a down payment in a reasonable amount, and pays off or reduces the mortgage by regular payments over a period of years and enjoys an increase in the equity in the homestead by paying down the mortgage (or if the owner has the good fortune to see the market value of the homestead go up), that homestead is protected from the claims of creditors. Even a homestead purchased for cash when the owner is not in financial distress and therefore not purchasing it to defraud creditors is protected by the exemption. That protection operates to preserve some means of shelter and survival when the owner of homestead faces claims arising from any of the misfortunes that may happen over the course of a person's life or even from his own improvidence.

The reported cases, including the representative sample set out in the Statement of Facts and the Case, indicate that there has been a migration of debtors to Florida from other states where there is no homestead exemption, or where the homestead exemption is limited in value. Attorneys who regularly file bankruptcy for debtors tell of the several calls a month they receive from out-of-state debtors or their attorneys calling to confirm that homesteads

acquired in Florida in fraud of creditors may be kept as exempt. The subject has been covered on the 60 Minutes program on CBS television. Florida's reputation as a haven for wealthy debtors has even become the subject of comment in a leading bankruptcy treatise: "The combination of a favorable climate and a liberal homestead exemption has led some debtors to Florida. Simply by relocating, the debtor may avoid both a cold climate and the heat generated by creditors asserting claims against the debtor." 4 Collier on Bankruptcy (15th ed.) §522.08[4] (internal citations omitted).

Clearly, this publicity has attracted to Florida the exact opposite of the type of settler the Homestead Exemption was designed to attract. Instead of attracting hard-working, stable contributors to the sound economic growth of the state, the overbroad applications of the protection of Homestead Exemption have become a magnet for those who have gained wealth at the expense of others and who feel no compunction about turning their backs on their just and legal obligations.

The allowance of a homestead acquired in fraud of creditors as exempt works solely in favor of the debtor with some wealth. Most individuals in financial trouble either have no homestead or have a homestead with a modest

equity, encumbered by a mortgage which may be foreclosed without regard to the protections of bankruptcy or of the Homestead Exemption. It is the debtor with some significant wealth who can afford legal advice from the experienced lawyers with sophisticated knowledge of the most current judicial interpretations of the available exemptions. It is the debtor with wealth to preserve who can sell an out-of-state home, pull up stakes and move to Florida to buy a homestead. It is the debtor with wealth to preserve who can juggle assets, liquidate the non-exempt ones and put the proceeds into a homestead. It is the debtor with wealth to preserve who attempts to use the Homestead Exemption as a sword against the creditors instead of the shield that it is intended to be.

Homestead exemption was never intended to put creditors at risk that debtors would avoid paying those debts reasonably collectible. Exemptions are

founded in a humane and enlightened policy, having respect to the **common welfare**, as well as to the benefit of the individual debtor. Their obvious purpose is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; **security of the state from the burden of pauperism, and of the individual citizen from destitution.**

West Florida Grocery Co. v. Teutonia Fire Insurance Co., 77 So. 209, 212 (Fla. 1917)(emphasis added). "The object of the exemption laws is to protect people

**of limited means** and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want . . ." Carter's Administrator v. Carter, 20 Fla. 558 (1884)(emphasis added).

If this Court pronounces authoritatively that debtors can keep as exempt homesteads acquired in fraud of creditors, lawyers must ethically advise their debtor clients that the law permits this.<sup>14</sup> Debtors will undoubtedly take advantage in this. More debtors will acquire homesteads in fraud of their creditors. This will likely cause people who loan money and extend credit to seek mortgages on homesteads of borrowers to protect the creditors from the debtors' increasing their equity in their homesteads or selling one homestead to acquire a more valuable one in fraud of creditors.

The result will be more loans and extensions of credit secured by mortgages on homesteads. When there is a default, there will be no question then that the creditor holding a mortgage on the homestead will be entitled to foreclose it. Thus, it is likely that more honestly impecunious debtors will lose

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<sup>14</sup> In fact, it would seem obvious that bankruptcy counsel, in the zealous representation of their clients' interests, would be ethically obligated to advise debtors to relocate to Florida and to convert non-exempt assets to protected homestead. This obviously creates a tension with Rule of Professional Conduct 4-8.4(c) "A lawyer shall not . . . engage in conduct involving dishonest, fraud . . ."

their homesteads than do now. This will work to the disadvantage of the debtors with modest equities in their homesteads.

If debtors may keep homesteads acquired in fraud of creditors as exempt, then the creditor-debtor relationship becomes a game in which the creditor will be at an unfair disadvantage. When a debtor defaults in payment of a debt, the creditor's remedy is to file suit to collect the debt. The creditor often has no idea what the debtor's non-exempt assets are. The creditor cannot use discovery to find out the debtor's assets; such information usually is not relevant to the litigation until after the creditor obtains judgement.

Therefore, when the debt goes into default and the creditor files suit, the creditor is not able to pursue pre-judgement attachment or garnishment of assets before the debtor liquidates the assets and puts the proceeds into a homestead. If the creditor does know of non-exempt assets, the creditor must convince a judge of the necessity for a pre-judgment attachment or garnishment and must bear the expense of the attorneys' fees to obtain it, as well as the cost of a bond. If the creditor cannot identify non-exempt assets or cannot get a pre-judgment attachment, all the debtor need do is stand by and, at the time it appears the creditor will inevitably obtain a judgment, liquidate the non-exempt assets and use the proceeds to acquire a homestead or to pay

down the mortgage or to make improvements to an existing homestead.<sup>15</sup> This is not a fair playing field for the creditor who may have extended credit based upon the debtor's financial statement showing the non-exempt assets as assets that would presumably be available to pay the debt. It is not good for society at large; it is certainly deleterious to the economy of this state. It was not the intent of the people of the state of Florida who reserved the homestead protection to themselves in the Florida Constitution.

On the other hand, if the Florida Supreme Court reinforces the message of Milton, Carpenter, and Tuszynski, solvent debtors will no longer flee to this state to avoid facing their obligations. Solvent Floridians will not engage in fraudulent pre-bankruptcy planning to place assets beyond the reach of creditors. Those citizens of this state who are fairly entitled to the Homestead Exemption will have lost nothing--they will still be protected from the forced sale of their honestly acquired homestead property. The only prejudice will be to those who intend to use the homestead laws to the detriment of those who made their wealth possible.

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<sup>15</sup> This will inevitably be the case where the wealthy individual, like Hill, faces entry of a judgment for claims arising out of tortious behavior. In that case, the claimant, like Havoco, is completely helpless to enjoin the conversion of assets prior to entry of the judgment.

It appears that the United States Bankruptcy Courts have place too great an emphasis on the protection of the debtor by homestead, without acknowledging the implicit obligation of those who claim the homestead to have dealt fairly with creditors. The state of Florida requires and deserves a more enlightened application of its constitutional Homestead Exemption.

## **CONCLUSION**

For the foregoing reasons, Amici Curiae respectfully request this Honorable Court to answer the question certified by the United States Circuit Court of Appeals for the Eleventh Circuit in the negative and to explicitly state that Florida's exemptions do not and have not ever been intended to protect those who use them with the specific intent of hindering, delaying or defrauding creditors.

Respectfully submitted,

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## **CERTIFICATE OF FONT SIZE**

The brief is submitted in Arial Regular at 14 point.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by first class mail, postage pre-paid, this 15th day of February, 2000, to John E. Venn, Jr., Esquire, of John E. Venn, Jr., P.A. at 220 West Garden State, Suite 603, Pensacola, Florida 32501; Louis K. Rosenbloum, Esquire, of Louis K. Rosenbloum, P.A., at 4300 Bayou Boulevard, Suite 36, Pensacola, Florida 32503; and to J. Nixon Daniel, III, Esquire and John P. Daniel, Esquire, of Beggs & Lane, at Post Office Box 12950, Pensacola, Florida 32576.

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## **INDEX TO APPENDIX**

Appendix A In re Jeffrey A. Weston, Case No. 97-1859-8G7 (Bankr. M.D. Fla)