

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 21, 1998 Revised: _____

Subject: Homestead Exemption/Forced Sale

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Wiehle</u>	<u>Moody</u>	<u>JU</u>	<u>Fav/1 amendment</u>
2.	<u>_____</u>	<u>Krasovsky</u>	<u>RC</u>	<u>_____</u>
3.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
4.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

I. Summary:

The bill proposes amending section 4, Article X, Florida Constitution, to provide that the existing homestead exemption from forced sale does not apply to the extent that the owner of the homestead acquires or increases an equity interest in the homestead through the prepayment of mortgage debt with the intent to hinder, delay, or defraud the owners' creditors.

The bill proposes amending section 4, Article X of the Florida Constitution.

II. Present Situation:

A. Constitution Amendment Process

Article XI of the Florida Constitution sets forth the various methods of proposing amendments to the State Constitution and the method of approval or rejection of those proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. s. 1, Art. XI, Fla. Const. Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing. s. 5, Art. XI, Fla. Const. If the proposed amendment is approved by a vote of the electors, it becomes effective as an amendment to the State Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment. *Id.*

B. Constitutional Homestead Exemption from Forced Sale

The Florida Constitution provides an exemption from forced sale or lien for homestead property. s. 4, Art. X, Fla. Const. “Homestead” property must be owned by a natural person and includes:

- If located outside a municipality, one hundred sixty acres of contiguous land and improvements thereon, which cannot be reduced without the owner’s consent by reason of subsequent inclusion in a municipality; or,
- If located within a municipality, one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

Id.

There are express exceptions to the exemption, including liens or forced sale 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. *Id.* The exemption passes to the surviving spouse or heirs of the owner. *Id.*

C. Exemption Statutes

Chapter 222 of the Florida Statutes provides for exemptions from forced sale, including provisions setting forth the relationship of the chapter and the Federal Bankruptcy Code, providing for jurisdiction of claims of exemptions, providing for the process for making a claim, and providing exceptions to claims of exemptions where there has been a fraudulent transfer or fraudulent asset conversion *with the intent to hinder, delay, or defraud the creditor.*

Section 222.20, F.S., provides that, in accordance with s. 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. s. 522(b)), residents of this state are not entitled to the federal exemptions provided in that section. However, an individual debtor under the Federal Bankruptcy Reform Act of 1978 may exempt, in addition to any other exemptions allowed under state law, any property listed in subsection s. 522 (d)(10) of that act. *Id.* These exemptions include the debtor’s right to receive a social security benefit, unemployment compensation, or a local public assistance benefit; a veteran’s benefit; a disability, illness, or unemployment benefit; alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and, subject to specified conditions, a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. 11 U.S.C. s. 522(b). Section 222.20, F.S., specifically provides that nothing contained therein affects the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

Chapter 222, F.S., gives jurisdiction over exemption claims to the circuit courts. The circuit courts have equity jurisdiction to order and decree the setting apart of homesteads and of exemptions of personal property from forced sales. s. 222.08, F.S. They also have equity jurisdiction to enjoin the sale of all property, real and personal, that is exempt from forced sale. s. 222.09, F.S. Finally, they have equity jurisdiction to determine whether any property claimed to

be exempt is so exempt, and if the property is not exempt, to subject the property, or so much of the property as may be necessary, to the satisfaction of a judgment or decree, and may enjoin the sheriff or other officer from setting apart as exempt property that which is not exempt.

s. 222.10, F.S.

A person may designate real property, a mobile home, or a modular home as homestead property exempt from forced sale either before or after levy on the property. ss. 222.01 and 222.02, F.S. This includes a designation of homestead by any person owning and occupying any dwelling house, including a mobile home used as a residence, or a modular home, on land not his or her own which he or she may lawfully possess, by lease or otherwise. s. 222.05, F.S. A person may designate homestead property before levy by making a written statement containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that the real property, mobile home, or modular home is the person's homestead. s. 222.01, F.S. The statement must be signed by the person making it and must be recorded in the circuit court. *Id.* A person may designate homestead property after levy by notice under oath made before any officer of this state duly authorized to administer oaths, at any time before the day appointed for the sale thereof, of what that person regards as his or her homestead and a description thereof.

s. 222.02, F.S. Upon such notice, only the remainder of any property subject to the levy is subject to sale under such levy. *Id.*

If the creditor in any execution or process sought to be levied is dissatisfied with the quantity of land selected as homestead, the creditor may notify the officer levying the property and have the officer to cause the property to be surveyed. s. 222.03, F.S. Upon a survey indicating that the amount of property claimed as homestead is incorrect, the amount of property claimed is to be increased or decreased, as appropriate, based on the survey. *Id.* After any requested survey has been made, the officer making the levy may sell the property levied upon which is not included in homestead property. s. 222.04, F.S.

No exemption from attachment, garnishment, or legal process provided by ch. 222, F.S., is effective if it results from a fraudulent transfer or conveyance as provided in ch. 726, F.S. s. 222.29, F.S. Chapter 726, F.S., provides for avoidance of fraudulent transfers in general. Additionally, s. 222.30, F.S., provides that 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.*

In an action for relief against a fraudulent asset conversion, a creditor may obtain avoidance of the fraudulent asset conversion to the extent necessary to satisfy the creditor's claim, an attachment or other provisional remedy against the asset converted in accordance with applicable law, or, subject to applicable principles of equity and in accordance with applicable rules of civil procedure, an injunction against further conversion by the debtor of the asset or of other property or any other relief the circumstances may require. s. 222.30, F.S. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on

the asset converted or its proceeds. *Id.* A cause of action with respect to a fraudulent asset conversion is extinguished unless an action is brought within 4 years after the fraudulent asset conversion was made. *Id.* If an asset is converted and the converted asset is subsequently transferred to a third party, the provisions of ch. 726, F.S., apply to the transfer to the third party. *Id.*

D. Federal Bankruptcy Code

The Federal Bankruptcy Code also provides for avoidance of fraudulent transfers. 11 U.S.C. s. 548. The Code provides, in part, that the bankruptcy trustee may avoid any transfer of a property interest of the debtor that was made on or within one year before the date of the filing of the petition for bankruptcy, if the debtor voluntarily or involuntarily made the transfer *with actual intent to hinder, delay, or defraud* any entity to which the debtor was or became indebted on or after the date that such transfer was made. *Id.*

E. Case Law

As early as 1912, the Florida Supreme Court stated that:

Organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home. But the law should not be so applied as to make it an instrument of fraud or imposition upon creditors.

Milton v. Milton, 58 So. 718 (Fla. 1912).

In 1925, the Florida Supreme Court first held that an equitable lien existed on and could be enforced against homestead property, due to the acts of the debtor to avoid payment to creditors. *Jones v. Carpenter*, 106 So. 127 (Fla. 1925). In this case, the Court summarized the facts, the “considerations of right and justice supporting the claim for equitable lien,” as follows:

The record shows that appellant brought this suit in behalf of the creditors of the Jacksonville Bread Company, a bankrupt corporation; that in October and November, 1920, appellee being its president took from the funds of said corporation the aggregate sum of \$535.84, more specifically referred to elsewhere in this opinion, and used the same to pay for labor and materials to improve his home; that he did in fact make substantial improvements on his home with said funds; that in less than two months after said funds were withdrawn, petition in bankruptcy was filed against said corporation, and on July 5, 1921, it was adjudicated a bankrupt; that appellee is insolvent, and judgment against him would be worthless; and that he now refuses to replace said funds or pay same into the bankrupt estate or any part thereof and defends against such payment on the ground that said funds have become a part of his homestead.

Id. at 129.

The Court stated that the facts of the case constituted “an injustice and hardship on creditors that the homestead exemption should not be extended to, and we think appellee must make

restitution.” *Id.* at 130. The Court further stated that the homestead exemption cannot be used as a shield after fraudulently imposing on others. *Id.*

The Court has since held in three other cases that an equitable lien could be applied against homestead property. In the first case, money was advanced for use to improve the real property of another, with an ambiguous verbal agreement that the persons advancing the money would obtain an interest in the real property, however no interest was ever conveyed. *La Mar v. Lechliden*, 185 So. 833 (Fla. 1939). No fraud was established in this case. *Id.* at 836. Instead, the holding was based on the unjust enrichment which would otherwise result to the defendant because the plaintiffs innocently, with the belief that they had the right to do so, and with the consent of the defendants placed permanent and valuable improvements on the defendant’s land. *Id.*

In the second case, the plaintiff advanced money to the defendant and worked for him without compensation over a number of years based on an agreement that defendant would care for plaintiff for the rest of plaintiff’s life, an agreement which was not kept. *Sonneman v. Tuszynski*, 191 So. 18 (Fla. 1939). The holding was based on a special equity in the defendant’s real property as plaintiff’s monetary advances and labor had increased the value of that property. *Id.*

In the third case, despite the fact that plaintiff bank knew that defendant and her husband were engaged in dissolution of marriage proceedings at the time, it loaned money to defendant’s husband, secured by a mortgage on the marital home, and permitted the husband to obtain defendant’s signature without requiring her to sign in the bank’s presence, with the result that he forged her signature. *Palm Beach Savings and Loan Association, F.S.A. v. Fishbein*, 619 So.2d 267 (Fla. 1993). In the subsequent foreclosure action, the trial court held that the defendant had not abandoned her homestead interest and that the mortgage could not be foreclosed against the house. *Id.* at 269. However, the trial court held that the bank had an equitable lien on the house to the extent that the loan proceeds were used to satisfy preexisting mortgages and taxes. *Id.* The Supreme Court overturned an appellate decision and affirmed the trial court, saying that to do otherwise would provide to the defendant a windfall to which she was not entitled. *Id.* at 271. The Court further stated that the homestead exemption is intended to be a shield, not a sword. *Id.*

The burden in such cases is on the party seeking the lien and the Florida Supreme Court has stated that “we must assume that the debtor is honest unless and until the contrary is established.” *Slatcoff v. Dezen*, 76 So.2d 792, 793 (Fla. 1954).

Despite this line of cases, there have been a number of bankruptcy cases holding that when non-exempt assets are converted to exempt homestead assets, the exemption cannot be infringed, even where the intent behind the conversion of assets was to delay, hinder, or defraud creditors. *Bank Leumi Trust Company of New York v. Lang*, 898 F.Supp. 883 (S.D.Fla. 1995); *In re Popek*, 188 B.R. 701 (Bkrcty.S.D.Fla. 1995); *In re Lane*, 190 B.R. 125 (Bkrcty.S.D.Fla. 1995); and *in re Clements*, 194 B.R. 923 (Bkrcty.M.D.Fla. 1996). These cases are based on a conclusion of law that the express exceptions to the homestead exemption are to be strictly construed and if one of the exceptions is not applicable to a case, the property is exempt. e.g., *Bank Leumi*, at 887. Additionally, the line of cases culminating in *Fishbein* is seen as imposing an equitable lien only

where a debtor fraudulently procures funds to invest in homestead property. e.g., *Bank Leumi*, at 888. One of the courts also addressed the provisions of s. 222.29, F.S., which provides that an exemption from attachment, garnishment, or legal process provided by this chapter is not effective if it results from a fraudulent transfer or conveyance. *In re Clements*, at 925. The court concluded that the statute is inapplicable to homestead for two reasons. *Id.* First, the statute expressly applies to exemptions provided by ch. 222, F.S., and homestead is provided by the constitution. *Id.* Second, the Legislature cannot by statute impair rights given by the constitution; it would take a constitutional amendment to restrict the homestead exemption right. *Id.*

III. Effect of Proposed Changes:

The bill proposes amending the homestead provisions of the constitution to provide that the homestead exemption does not apply to any property to the extent that the homestead is acquired, or that the equity value of the homestead is increased, through the prepayment of any mortgage debt with the intent to hinder, delay, or defraud the owners' creditors.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would render ineffective an indeterminable number of claims of homestead exemption, or portions of such claims, with an indeterminable economic impact on the involved home owners and their creditors.

C. Government Sector Impact:

The bill may increase case loads to an indeterminate extent in both state and federal courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:

The amendment deletes the language relating to intent to hinder or delay creditors, leaving this provision as intent to defraud creditors. It also provides that the exemption does not apply to the extent property is *improved* with such intent and adds ballot title language.