IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,549
3 DCA CASE NO. 97-03068
L.T. CASE NO. 97-14980 CA 20

GEORGE R. CAPLE and CAPLE ENTERPRISES, INC.,

Appellants,

v.

TUTTLE'S DESIGN-BUILD, INC.,

Appellee.
_____/

BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs/Appellants George R. Caple, and Caple Enterprises, Inc. will be referred to as they stand in this Court, as they stood in the trial and district courts and as Caple. Defendant/Appellee Tuttle's Design-Build, Inc. will be referred to as it stands in this Court, as it stood in the trial and district courts and as Tuttle's.

"A" refers to the appendix filed with this brief. Emphasis is supplied by counsel unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Caple appeals a Third District decision which found Fla.Stat. § 702.10(2) (1997) unconstitutional and reversed a nonfinal order that required Tuttle's to make interest payments during the pendency of mortgage foreclosure proceedings. The Third District found the statute fails to protect mortgagors' due process rights and impermissibly conflicts with this Court's rulemaking authority. Tuttle's Design-Build, Inc. v. Caple, 712 So.2d 1213 (Fla. 3d DCA 1998). Tuttle's has never denied that it owes principal or interest. It has only contested the amount owed: it claims $3 million; the mortgage is for over $6 million. Mortgage foreclosures take an average eight to 16 months to conclude. Pursuant to the trial court's order, Tuttle's would pay just under $1 million if the foreclosure lasted 16 months, far less than the amount it concededly owes. It would take over five years before any of Tuttle's payments were "at risk."

The Third District invalidated this statute even though Tuttle's did not raise most of its constitutional arguments in the trial court and the arguments it did raise had nothing to do with the order against Tuttle's. This case is a perfect example of why the legislature passed Fla.Stat. § 702.10 in the first place -- to deal with mortgagors' abuses of the system that delay foreclosure and prevent mortgagees from receiving validly due payments.

The sale of the nursery and its financing. Caple owned a

large wholesale ornamental plant nursery in Homestead. In April 1996, he sold the business, including the real and personal property, to Tuttle's for $17,000,000. (A. 89). As part of that transaction, Tuttle's gave Caple Enterprises promissory notes for $6,550,000, $1,126,505.10 and $652,045.79. Tuttle's gave Caple individually a note for $150,000. (A. 10-27). The notes were secured by a purchase money first mortgage on the land, fixtures and present and future structures and improvements. (A. 10-27).

At the same time, Tuttle's and Caple executed a security agreement which gave Caple a security interest in collateral located on the property and on contiguous leased property. They also executed a financing statement. (A. 128-39). And as additional security for the notes, Tuttle's gave Caple a collateral assignment of lease -- if Tuttle's failed to timely pay the notes Caple could exercise Tuttle's rights as lessee and take possession of the leased premises. (A. 140-47).

Tuttle's paid Caple in full on the $ 652,045.79 note on August 30, 1996. Tuttle's paid $576,505.10 toward the $1,126,505.10 note in December 1996. (A. 92). Tuttle's paid the balance of the principal on that note in May 1997, by letter of credit. (A. 93).

But Tuttle's did not pay the June 1997 installment of principal of $1,350,000, together with accrued interest, on the $6,550,000 note. Caple declared the note in default and accelerated the entire balance on July 1, 1997. (A. 147-48).

Tuttle's defaulted under the mortgage and note in the original principal amount of $150,000 by failing to pay George R. Caple the installment of principal that was due June 1, 1997, in the amount of $50,000, together with the accrued interest on the note for the month of May, 1997. The payment on the note was due June 1, 1997. George Caple declared the note in default and accelerated the entire balance by letter dated, mailed and faxed to Tuttle's on July 1, 1997. (A. 149).

Tuttle's owes Caple Enterprises, Inc. the principal balance due under the mortgage and notes, security agreement and assignment in the amount of $6,550,000 with interest from May 1, 1997, on the outstanding and unpaid principal balance at the default rate of 25% percent per annum, the maximum allowed by law, and late charges. Tuttle's owes George Caple the principal balance due under the mortgage and notes, security agreement and assignment in the amount of $150,000.00, with interest from May 1, 1997, on the outstanding and unpaid principal balance at the default rate of 18% percent and late charges.

The foreclosure. Caple filed a verified foreclosure complaint against Tuttle's on July 3, 1997. (A. 1-74). He requested the court to issue an order to show cause pursuant to Fla.Stat. § 702.10(2). (A. 75-76). The trial court entered the order to show cause and set a hearing for August 18. (A. 75-76). On July 28, Tuttle's filed a motion to dismiss which raised various defenses,

including failure to join an indispensable party. (A. 77-89). Tuttle's did not object to the show cause order; it did not object to the hearing; it did not challenge the trial court's authority to conduct the hearing; it did not challenge the statutory show cause procedure; it did not question the constitutionality of § 702.10(2).

Caple filed an amended verified foreclosure complaint which joined the allegedly indispensable party, DFW Capital Partners. (A. 90-174). Caple again requested an order to show cause. The trial court set the hearing for September 15. (A. 175-76).

Again, Tuttle's said nothing about any impropriety in the procedures or the trial court's authority. Tuttle's answered and demanded a jury trial. (A. 177-87). It raised several affirmative defenses to the merits of the foreclosure action: failure of consideration; prevention of performance; prior superseding breach; inequitable conduct; failure of conditions precedent. At no point in its answer did Tuttle challenge § 702.10(2) or the trial court's authority to conduct the show cause hearing.

Caple filed an affidavit in which he swore again to the allegations of the amended complaint and detailed the principal and interest due as of September 15. He filed a second affidavit as to the past and future principal and interest due through December 1997. (A. 193-229).

Tuttle's filed an affidavit on September 12, just three days

before the hearing. (A. 188-92). It detailed some of the facts in support of Tuttle's affirmative defenses; it alleged $3,000,000 of the $6,500,000 outstanding on the mortgage was in dispute. It concluded: "We do not intend to delay this matter; rather I intend to prove the matters described in our affirmative defenses and in this affidavit, and then to pay any amount adjudicated to be payable by the Company to Caple." (A. 191). The affidavit said nothing about § 702.10(2).

The parties could not proceed with the hearing on September 15 because heavy rains and flooding prevented counsel from reaching the courthouse. (A. 254). The court reset the matter for September 19. Again, Tuttle's said nothing about § 702.10(2) or any due process problems.

At the outset of the hearing, Caple's counsel stated his arguments and requested the court to order Tuttle's to make interest payments during the foreclosure proceeding. (A. 233-37). He gave the court Caple's previously-filed affidavits as to the amounts due. (A. 235).

Tuttle's counsel responded to Caple's arguments on the merits. (A. 237-42) The trial court asked why some interest payments should not be made. (A. 239). Only at this point in the proceedings, almost as an afterthought, did Tuttle's counsel briefly mention that he questioned the constitutionality of § 702.10. Tuttle's did not request the trial court to rule on the

issue.

> THE COURT: Why shouldn't the interest continue to be paid, even if there is a dispute over either inventory or affecting the principal amount that might be due?
>
> MR. SALTER: Because, Your Honor, it's like any other thing. The interest will be due on a liquidated amount that is owed. The amount that is owed is in dispute and, Your Honor, if I can say this -
>
> THE COURT: I am going to give you a chance to say it because I am not sure how I am going to deal with your clients.
>
> MR. SALTER: I know, Your Honor, and this statute is really remarkable. I think it is unconstitutional. It was passed in 1993. I have tried to find some cases on it.
>
> What is happening here in substance is the Supreme Court passes rules for summary judgment and so on, but on affidavits when there are disputes about the amount of a debt, how much ought to be paid, in 10 or 15 minute hearing, someone is asking to put our lights out, to shut down the business, to take interest income that is owed to another creditor. That, I think, is the problem.

(A. 241-42). Tuttle's made no other mention of the statute's validity.

Tuttle's did not say that it could not pay the interest owed Caple.

> THE COURT: Okay, and I can't help but think they have got to be first in time since they own the business.
>
> You haven't said, "Judge, I can't afford to pay more than $40,000 a month." You have just taken the position that because there is a possible lawsuit over the amount of the

> inventory that was delivered as opposed to what should have been delivered, that you can just time frame freeze, and that doesn't sound right to me.

(A. 243).

Tuttle's admitted its outstanding notes in favor of Caple totaled $6,500,000; that only $3,000,000 was in dispute. (A. 238).

> THE COURT: But I don't see why they are not entitled to interest payments. Okay, you can't pay the principal payments. There is a dispute over them.
>
> * * *
>
> THE COURT: Let's say you are over-paying them interest payments. Based on what eventually gets resolved, it will just be a credit, the excess amounts.
>
> MR. SALTER: I think the affidavit says that there are claims, while damages, while still calculating them, are $3,000,000.
>
> THE COURT: Six and a half million is owed.

(A. 243-44).

The trial court's ruling. The trial court found Caple was likely to prevail in the foreclosure action. (A. 249). It therefore ordered Tuttle's to make the interest payments in accordance with § 702.10(2). All payments due as of October 31 were to be paid by November 1. Each succeeding payment would be due on the first of each month thereafter under the terms of the notes. All amounts paid pursuant to the order will be credited against the mortgage obligation that the court ultimately determines to be

due. (A. 246, 249).

At no time before or during the hearing did Tuttle's raise the issue of the trial court's authority to conduct the hearing. It never mentioned a jury trial. It did not request an evidentiary hearing; it never indicated it believed the show cause hearing did not constitute an evidentiary hearing. Brian Tuttle did not even come to the hearing; Caple did. (A. 231). Tuttle's did not proffer any testimony. It did not attempt to call witnesses. It did not attempt to offer evidence other than its affidavits. It did not object to Caple's affidavits or request permission to cross examine Caple on them.

Tuttle's did not request the trial court to permit it to voluntarily make the interest payments into the court registry in lieu of paying Caple directly. Tuttle's did not request the court to order Caple to provide a bond as a condition of receiving the interest payments from Tuttle.

Over three months after it was served with the statutory show cause order, over a month after the trial court's oral order and only three days before its first interest payment was due, Tuttle's sought prohibition and an emergency stay from the Third District based on the alleged unconstitutionality of Fla.Stat. § 702.10(2). It claimed the statute invaded the Supreme Court's rulemaking authority, allowed for a punitive debtor's bond, denied debtors a right to a jury trial and denied an evidentiary hearing.

Tuttle's said nothing about the lack of a creditor's bond. The Third District Court found prohibition was an incorrect remedy, but took jurisdiction over the case as a nonfinal appeal pursuant to Fla.R.App.P. 9.130(a)(3)(B).

The Third District's ruling. The Third District reversed. It found § 702.10(2) unconstitutional because it fails to protect mortgagors' due process rights and it impermissibly conflicts with procedural rules established by this Court. Tuttle's Design-Build, Inc., 712 So.2d at 1214.[1/]

[1/] Tuttle's also claimed the statute was unconstitutionally vague and ambiguous and that the trial court unconstitutionally denied Tuttle's due process by failing to conduct an evidentiary hearing. The Third District did not rule on these issues; Caple will not address them here.

SUMMARY OF ARGUMENT

Tuttle's appeal to the Third District was simply a debtor's attempt to delay foreclosure proceedings. The trial court ordered Tuttle's to pay interest during the pendency of these foreclosure proceedings. Tuttle's admitted it only disputed $3 million of the $6 million it owes. Yet Tuttle's sought relief from the Third District to avoid paying interest during the foreclosure. It claimed Fla.Stat. § 702.10(2), the commercial mortgage foreclosure statute, is unconstitutional for several reasons. It did not argue those issues in the trial court; it did not obtain a ruling from the trial court on the ambiguous passing reference it made to alleged unconstitutionality in the middle of the hearing; it did not even have standing to raise most of the issues because those matters are not at issue in this case. Nevertheless, the Third District addressed those substantial constitutional challenges which were raised for the first time on appeal and on which the trial court did not rule. It should not have done so.

In any event, the statute is constitutional. The Third District found § 702.10(2) did not meet due process requirements because it deprived a mortgagor of property by requiring payment under the mortgage and note or giving the mortgagee possession during the litigation. Tuttle's Design-Build, Inc., 712 So.2d at 1215. It held the statute lacked a fundamental due process protection because it did not require a creditor bond. The Third

District also suggested that the mortgagor's due process interests could have been protected by requiring payments be made into the court registry rather than to the mortgagee.

In finding the statute invalid, the Third District failed to recognize that flexibility is a significant trait of procedural due process. Due process is not a technical concept; it does not guarantee any particular form of procedure. It essentially requires notice and an opportunity to be heard. Whether a statute gives a party adequate due process is determined by consideration of the interests to be affected, the risk of erroneous deprivation through the procedures under attack and the interest of the party who seeks the prejudgment remedy, including any interest the government has in providing the procedure. Here, both the debtor and creditor have significant interests to be protected. The procedures minimize the risk of erroneous deprivation. The creditor has substantial interests because it has the right to be paid in accordance with the mortgage and it has the right to possession of the property. The government also has a substantial interest. The legislature made extensive findings which gave rise to this statute. It found that mortgage foreclosure in Florida took much longer than in other states. This resulted in a loss of over $100 million a year to the Florida economy. Debtors had a substantial incentive to delay proceedings so they could continue to use the property; they raised frivolous defenses to do so. Yet debtors

did not maintain the property during litigation or make any payments for its use. Therefore, the legislature provided a procedure through which the debtor can be required to make its interest payments during the foreclosure proceedings, and to be given credit for those payments at the conclusion of the case. At the same time, the legislature recognized that the debtor had a right to be heard on its defenses. Section 702.10(2) does not deprive the debtor of that right.

The Third District held the statute invalid because it does not require the mortgagee to post a bond; it based its ruling on this Court's decision in Gazil, Inc. v. Super Food Services, 356 So.2d 312 (Fla. 1978). However, unlike § 702.10(2) which provides for notice and an opportunity to be heard prior to any deprivation, Gazil addressed a statute which permitted an ex parte prejudgment deprivation. Further, § 702.10(2) provides a remedy -- any monies the mortgagor pays during the proceedings are credited against the mortgage obligation. Quite simply, § 702.10(2) provides a debtor with prior notice, a hearing and adequate post-deprivation remedies; due process requires no more. The lack of a bond should not invalidate the statute. In addition, Florida law provides damages for wrongful foreclosure and other claims in tort or contract. And several other Florida statutes permit comparable prejudgment procedures in areas such as landlord tenant disputes or condominium disputes; those statutes do not require

bonds. There is no reason why mortgagees should be required to post a bond. In fact, the debtor has the property. What other bond needs to be posted?

The Third District also found the statute unconstitutionally infringes on this Court's rulemaking authority. Tuttle's Design-Build, Inc., 712 So.2d at 1215-16. It reached this conclusion simply because the statute contains procedures. It found the order that required payment of funds before entry of judgment was, in effect, an order granting an injunction and the statute's failure to provide for a creditor's bond conflicts with the bond requirement in the temporary injunction rule, Fla.R.Civ.P. 1.610. Id. at 1215-16. It also found improper legislative rulemaking because subsection (d) of § 702.10, which permits a debtor to post bond for the amount of the unpaid mortgage in lieu of making payments as provided in the mortgage instrument, exceeded the amount required under Fla.R.App.P. 9.310(b) to stay a prejudgment order. Id. at 1216. The Third District misconceived the concept of rulemaking authority. The legislature has the authority to pass statutes which deal with substantive rights. This statute clearly does so. The legislature also has the authority to incorporate procedures into substantive statutes to the extent that those procedures are integrally related to the substantive rights. That is plainly the case here. The legislative findings on the interrelationship between procedural delays and loss of substantive

rights more than amply demonstrate the statute's validity. The legislature has not infringed on the this Court's rulemaking authority here.

In sum, the Third District incorrectly found § 702.10(2) unconstitutional. The legislature carefully and properly crafted this statute to meet competing needs and interests. Its substantial findings validate the statute. Caple respectfully requests this Court to quash the Third District's contrary decision.

ARGUMENT

I. THE THIRD DISTRICT SHOULD NOT HAVE ADDRESSED SUBSTANTIAL CONSTITUTIONAL QUESTIONS WHICH WERE NOT PROPERLY RAISED IN THE TRIAL COURT.

Tuttle's never raised any of the constitutional challenges it argued on appeal in the trial court. It never obtained a ruling from the trial court on the issues. It never challenged the provision that permits interim interest payments to a commercial mortgagee during the pending foreclosure proceedings. In fact, Tuttle's never mentioned any potential problems with the statutory procedure. Rather, for two months Tuttle's followed the statutory procedure and defended the case on the merits. These are not appropriate circumstances under which a court should invalidate a statute on constitutional grounds.

Nevertheless, Tuttle's raised, and the Third District accepted two constitutional challenges: (1) the statute impinges on the Supreme Court's rulemaking authority, primarily because it does not require a creditor's bond; and (2) the statute denies due process because it does not provide for a creditor's bond or similar protection. The Third District should have rejected these arguments. The trial court never ruled on these issues because Tuttle's articulated none of them before it filed its brief in the Third District.[2/] Tuttle's did no more than complain about the

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[2/] In fact, when Tuttle's filed the petition for writ of (continued...)

shortness of the 15 minute hearing (in the middle of the hearing) and claim the legislature infringed on the Supreme Court's rulemaking authority -- without ever explaining how. And the trial court did not even rule on those brief complaints.

One of the main themes of Tuttle's' brief in the Third District was a challenge to the lack of a creditor's bond.[3/] Tuttle's never mentioned the word "bond" in the trial court. One of Tuttle's arguments on the invalidity of not requiring a creditor's bond was that it allegedly conflicts with the bond requirement of Fla.R.Civ.P. 1.610(b), the temporary injunction rule. But Tuttle's did not even realize the trial court's order could be considered an injunction until it improperly sought prohibition in the Third District and that Court treated the petition as a non-final appeal -- from an injunction order under Fla.R.App.P. 9.130(a)(3)(B).[4/] Those issues were raised as afterthoughts.

[2/] (...continued)
prohibition that began the proceedings in the Third District Tuttle's did not even articulate all the issues it later raised.

[3/] Tuttle's also claimed the debtor's bond for the balance owed on the mortgage, an alternative to making payments under the mortgage, was punitive. The Third District did not address the issue. Rather, it found that subsection (d) violated this Court's rule making authority, although Tuttle's did not even challenge that subsection on that ground.

[4/] In its first attempt to challenge the statute when it filed a petition for writ of prohibition, Tuttle's only claimed (1) the statute violated the Supreme Court's rulemaking authority (by violating the right to jury trial and suggesting a punitive debtor's bond); and (2) the statute denied an evidentiary hearing (continued...)

Appellate courts should not address substantial constitutional questions when a party did not raise them properly or obtain a ruling on them from the trial court. Century Village, Inc. v. Wellington, 361 So.2d 128, 134 (Fla. 1978)(party could not raise due process challenge to Fla.Stat. § 711.63(4) which provided for deposit of owners' payments into court registry where it was raised for first time on appeal); Sanford v. Rubin, 237 So.2d 134 (Fla. 1970)(constitutionality of a statute cannot be challenged for the first time on appeal); Grandos v. Miller, 369 So.2d 358 (Fla. 4th DCA 1979)(court rejected constitutional challenge to Florida statute that permits condominium owners to deposit payments into court registry during litigation; "Constitutional arguments . . . were not presented to the trial court or ruled on by the trial court. Even constitutional issues will not be decided by an appellate court if raised for the first time on appeal"); St. Paul Fire & Marine Ins. Co. v. Hodor, 200 So.2d 205 (Fla. 3d DCA 1967)(party could not challenge on appeal constitutionality of statute pertaining to the recovery of attorney's fees from an insurer "inasmuch as the trial court did not expressly rule on the issue . . ."). A party has an obligation to obtain a ruling from the trial court. Flanagan v. State, 586 So.2d 1085, 1092 (Fla. 1st DCA 1991)(failure to obtain ruling on mistrial motion waived

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[4/] (...continued)
and the right to jury trial. The petition nowhere mentioned the lack of a creditor's bond.

it for appeal); LeRetilly v. Harris, 354 So.2d 1213, 1214 (Fla. 4th DCA 1978)(failure to obtain ruling waives objection; "The trial court can hardly be held in error for a ruling which it did not make"). From all that appears in this record, the trial court may not even have considered counsel's offhand comments about his beliefs on the statute's constitutionality to have been a serious challenge that required a ruling. Quite simply, the Third District should not have addressed these issues; Tuttle's waived any right to challenge the constitutionality of § 702.10(2).

Finally, Tuttle's did not have standing to raise many of the issues it argued to the Third District; the Third District should not have addressed those issues.

> One cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, or unless the unconstitutional feature renders the entire act void or renders the portion complained of inoperative . . . . The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties.

State ex. Rel. Clarkson v. Phillips, 70 So.2d 367, 369 (Fla. 1915). See also State v. Hagan, 387 So.2d 943, 945 (Fla. 1980)("Appellees may not challenge the constitutionality of a portion of the statute which does not affect them"); Waterman v. State, 654 So.2d 150, 153 (Fla. 1st DCA 1995)(party did not have

standing to raise constitutional challenge to provision that allowed for imprisonment of convicted National Guard members where party himself was not sentenced to imprisonment); State v. Rawlins, 623 So.2d 598, 601 (Fla. 5th DCA 1993)(boater only had standing to challenge constitutionality of act which pertained to area of river where he was cited for speeding).

In its appeal, Tuttle's criticized § 702.10(2) for problems that have nothing to do with Tuttle's and are not found in the trial court's order Tuttle's appealed. For example, Tuttle's claimed in the Third District that subsection (g) is insufficient to protect a debtor if the debt is discharged unless a creditor's bond is required. But Tuttle's is in possession of the property, which is worth far more than the amounts in dispute. And its interest payments are not at risk. A creditor's bond is irrelevant.[5/] It also claimed that the debtor's bond alternative provided in subsection (d) was punitive. But the trial court never required Tuttle's to post the bond. Therefore, Tuttle's lacked standing to challenge the constitutionality of those parts of the

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[5/] Tuttle's admits over $6,865,572 is owed on the mortgage and only $3 million is in dispute. The trial court only ordered Tuttle's to make interest payments in accordance with the mortgage. The interest payments are not in dispute. Even if every penny of interest paid were credited toward the outstanding principal, it would take over five years at $61,417 per month before any of Tuttle's payments were "at risk." But the average contested foreclosure is over in eight to 16 months. (A. 315). This foreclosure could continue for more than three and a half years beyond the time involved in the average proceeding before Tuttle's interest payments could conceivably be at risk.

statute; the question was moot. The Third District should have rejected Tuttle's challenge; such a constitutional challenge should have been left for another day and another debtor.

II. FLA.STAT. § 702.10(2) IS NOT UNCONSTITUTIONAL ON ITS FACE. ITS LACK OF A CREDITOR'S BOND REQUIREMENT DOES NOT DENY DUE PROCESS BECAUSE THE STATUTE AS A WHOLE PROVIDES THE DEBTOR WITH AMPLE PREDEPRIVATION NOTICE AND AN OPPORTUNITY TO BE HEARD.

If this Court finds that some or all of the issues on appeal were adequately preserved, this Court should still quash the Third District's ruling; its decision was incorrect. Due process has no fixed set of procedural requirements. The Court must view the statute as a whole and determine whether it meets constitutional standards. This statute meets those standards; it contains adequate due process safeguards.

After much study, the legislature passed § 702.10(2) in an effort to remedy problems it found in commercial mortgage foreclosures. Debtors receive prior notice and an opportunity for a hearing at a meaningful time, the primary due process requirements for prejudgment remedies. The legislature had a significant economic interest in promulgating these expedited foreclosure procedures; the statute is rationally and reasonably related to the legislature's intent. Previously, the debtor had an economic incentive for delay because he could retain possession of the property and its benefits, while paying no interest. Now, the statute

"takes the economic incentive out of delay while at the same time preserving the right of the occupant to defend." (A. 279). The Third District should have upheld this statute on all grounds. It erred in failing to do so.

The Third District found that § 702.10(2) violates due process because it does not require the creditor to post a bond. Tuttle's Design-Build, Inc., 712 So.2d at 1215. It was concerned with the fact that the creditors here are not institutional lenders and therefore might not adequately safeguard the debtor's interest. 712 So.2d at 1215. However, due process does not automatically require a creditor to post a bond in prejudgment proceedings. "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause." McKesson Corp. v. Div. Of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39 n.21, 110 S.Ct. 2238, 2251 n. 21 (1990)(taxpayers' ability to withhold contested tax assessments and challenge their validity in a predeprivation hearing satisfies due process). And the Third District overlooked the fact that the debtor's possession of the property, which is worth far more than the interest payments ordered, should give the debtor sufficient security in the event the creditor does not ultimately prevail.

The Third District also suggested in dicta that, at a minimum, the mortgagor's interests could have been protected by re-

quiring the debtor's payments be made into the court registry. Tuttle's Design-Build, Inc., 712 So.2d at 1215. That procedure was unnecessary here. Tuttle's never denied that it owed the principal or interest. It contested $3 million; the mortgage is for over $6 million. It would take over five years of foreclosure proceedings before any of Tuttle's payments were "at risk." And, in any event, Caple would have voluntarily made the payments into the court registry. Tuttle's simply never asked it to do so.

A. Fla.Stat § 702.10(2) meets the essential due process requirements and is more than amply supported by the legislature's substantial findings as to the need for this statute.

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Connecticut v. Doehr, 501 U.S. 1, 9, 111 S.Ct. 2105, 2112 (1991)(quoting Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976)). "[It] is flexible and calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 320, 96 S.Ct. at 896. In fact, flexibility is its most significant trait. Schiffhartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion, 732 F.2d 1543, 1546 (11th Cir. 1984). It "guarantees 'no particular form of procedures; it protects substantial rights.'" Mitchell v. W.T. Grant Co., 416 U.S. 600, 610, 94 S.Ct. 1895, 1901 (1974). Therefore, the procedures required depend on the circumstances.

Schiffhartsgesellschaft Leonhardt & Co., 732 F.2d at 1546 ("[T]he most immutable characteristic of procedural due process is that it constantly changes. A court cannot impose specific procedures in different situations unless it 'ignores the one precept that insulates procedural due process, like all constitutional doctrines, from susceptibility to black letter law formulation'"). The adequacy of the procedures used to safeguard due process vary depending on the circumstances surrounding the deprivation. Doehr, 501 U.S. at 9, 111 S.Ct. at 2112. The relevant inquiry in determining whether a statute violates the due process clause is:

> First, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of an erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protection.

Id. (referring to considerations for determining the constitutional sufficiency of administrative procedures as established in Mathews).

Fla.Stat. § 702.10(2) establishes the rights and responsibilities of the parties in prejudgment remedies during foreclosure proceedings. Applying the first prong of Mathews, this Court must find § 702.10(2) affects significant private

interests on both sides. The debtor owns the property it purchased; the creditor has a substantial interest in the unpaid balance on the notes and mortgage. But the debtor's rights to possession and title are subject to defeasance because it defaulted in paying the notes and mortgage due the creditor. Thus, "resolution of the due process question [regarding § 702.10(2)] must take into account not only the rights of the buyer of the property but those of the seller as well." Mitchell, 416 U.S. at 604, 94 S.Ct. at 1898.

Due process does not guarantee a debtor can keep possession throughout foreclosure proceedings, regardless of whether it pays interest. A debtor is not entitled to withhold interest simply because it raises affirmative defenses. Cf. Karsteter v. Graham Companies, 521 So.2d 298 (Fla. 3d DCA 1988)(not unconstitutional to require mobile home tenant to make payments during proceedings or lose possession). See also Bystrom v. Diaz, 514 So.2d 1072, 1075 (Fla. 1987)(Fla.Stat. § 194.171(5), (6) upheld as constitutional; statute required taxpayer to pay undisputed amount of taxes assessed during suit challenging assessment; requirement did not unreasonably restrict access to courts or deny due process; "Due process requires that a taxpayer be given a meaningful opportunity to be heard. Diaz and Marshall each had such an opportunity, but forfeited it by failing to pay subsequently assessed taxes before delinquency"). The possibility

that the debtor might lose possession if it fails to pay does not violate due process. Mitchell, 416 U.S. at 607, 94 S.Ct. at 1900 ("We cannot accept [the debtor's] broad assertion that the Due Process Clause of the Fourteenth Amendment guaranteed to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed").

> To follow the course suggested by the tenants would enable a devious tenant to live rent free during the litigation, if he could frame a legally sufficient pleading. We see no more reason to expect a landlord to continue furnishing housing without rent than to expect an oil supplier to continue furnishing oil without payment during a period of litigation. Therefore, we have concluded that the trial judge was correct in issuing the writs of possession upon the refusal of Smith and Lang to deposit rent as required by the statute. By so holding, we do not mean to imply that by failing to deposit rent, a tenant's cause of action is lost to him. He loses only his right to retain possession of the premises if he fails to pay the rent to the landlord or into the registry of the court. Any cause of action against the landlord to which he may be otherwise entitled is still available to him.

K.D. Lewis Enter. Corp., Inc. v. Smith, 445 So.2d 1032, 1035 (Fla. 5th DCA 1984)(Fla.Stat. § 83.60(2) requires tenants to make rent payments to the landlord or into the registry during litigation or lose possession).

Section 702.10(d) provides a debtor with alternative ways it may retain possession of the property during a litigated

foreclosure. However, debtors should not be able to "have [their] cake and eat it too." Bauman v. Day, 892 P.2d 817, 821 (Alaska 1995)(upholding order that required debtor to cure default as condition of setting aside non-judicial foreclosure). Courts have long recognized that debtors raise frivolous defenses for the sole purpose of thwarting foreclosure. To prevent this dilatory practice, courts have required the debtor to cure the deficiency as a condition of prolonging the proceedings. In so ordering, they have noted that such a requirement does not prevent the debtor from raising its claims, either as affirmative defenses or in a separate action. Cf. id. at 824; Matter of Gates, 42 B.R. 4 (Bankr.N.D.Ga. 1983)(court ordered debtor to make monthly payments to the mortgagee as a condition of filing Chapter 11 finding the sole purpose for the filing was for an automatic stay and to thwart the foreclosure).

The creditor has rights which must be protected during foreclosure. The creditor has the right to be paid in accordance with the mortgage or given possession of the property. Mitchell, 416 U.S. at 607, 94 S.Ct. at 1900. The creditor has a substantial interest in preventing further use and deterioration of the property.

> [T]he creditor has a 'property' interest as deserving of protection as that of the debtor. At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments,

> into the court or otherwise, upon which his right to possession is conditioned.

Fuentes v. Shevin, 407 U.S. 67, 102, 92 S.Ct. 1983, 2005 (White, J. dissenting). Without some protection, the creditor will lose the availability of credit or incur greater expense in obtaining it. Id. at 103, 92 S.Ct. at 2005.

Thus, both creditor and debtor have substantial interests to be taken into account in the Mathews due process analysis.

As to the second Mathews inquiry, the procedures under § 702.10(2) do not create a substantial risk of erroneous deprivation. Nor are the procedures insufficient. The primary due process requirements for prejudgment remedies are prior notice and an opportunity for a hearing at a meaningful time. The statute provides for, and the debtors received, both.

The third Mathews inquiry concerns the creditor's interest. This is answered in part by the first Mathews prong, discussed above. The balance of the inquiry is answered by the statute's legislative history. In 1993, the legislature established the Mortgage Foreclosure Study Commission. It did so because "[m]ortgage foreclosure laws in Florida [were] antiquated." (A. 277). The Study Commission was to review Florida foreclosure law and make recommendations for change. Its recommendations formed the basis of Fla.Stat. § 702.10(2). The Study Commission found mortgage foreclosures in Florida took much longer than in other states. This resulted in a loss of over $100 million dollars to

the Florida economy annually. There was a "linear relationship" between the time it took to foreclose and the loss to the lender.

> The lender does not receive interest payments to which it is entitled. This loss of income is rarely recovered when the property is eventually sold.
>
> Where real estate values decline, the [lender] suffers a loss of the principal advanced when the value is received on the eventual foreclosure is less than the debt.
>
> Once the debtor goes into default and knows that it is likely to lose the property, maintenance is frequently abandoned. As a result, the property value depreciates and ordinary care is not undertaken.
>
> * * *
>
> Legal fees increase due to time consuming foreclosure practices.

(A. 277-78).

The Study Commission recommended the courts be empowered to order commercial debtors to pay for the continued use of the property if the foreclosure was litigated because it found:

> Under the current law a person may stop making mortgage payments and continue using the property. <u>There is an incentive on a person to delay the mortgage foreclosure in order to continue making economic use of it. This results in frivolous defenses being asserted for delay while the occupant uses the property for his own profit yet fails to maintain it or make any payments for its use.</u>
>
> * * *
>
> [W]hen a defense is interposed, the court would be given the discretion to require the occupant to make payment for the continued

> use during the pendency of the litigation or, failing to do so, be dispossessed of the property. This would take the economic incentive out of delay while at the same time preserving the right of the occupant to defend.

(A. 279). The Study Commission believed 1993 Mortgage Foreclosure Reform proposal would "be a significant boost to the economy . . . ." Id.

The Study Commission specifically noted that it would be appropriate to borrow procedures from statutes on other prejudgment remedies and the landlord tenant statutes for two purposes – to speed the procedure and to protect the debtor's due process rights..

> The Commission recognizes the import of allowing a mortgagor with valid defenses the opportunity to raise and litigate all such issues. The Commission considered recommending a summary procedure for foreclosure actions similar to the one contained in the Florida Residential Landlord and Tenant Act. The idea was rejected. But the Commission did conclude that there are concepts in chapters 78 and 83 of the Florida statutes that should be utilized in foreclosure cases. Specifically, the courts – as in a replevin action – should issue orders to show cause why a final judgment of foreclosure should not be rendered. And the courts – similar to a landlord tenant action – should have the discretion to require the default payments to be deposited with the registry of the court or other third party during the pendency of the foreclosure proceeding. The Commission believes that this will shorten the overall foreclosure action and effectively discern which claims have prima facie merit – all without compromising the mortgagor's fundamental right to have their cases properly

heard by the court.

(A. 305).

Thus, the legislature had a significant economic interest in promulgating expedited foreclosure procedures. The Study Commission's recommendations, which were followed in large part when § 702.10 was enacted, addressed the need for expedited proceedings without denying the debtor's right to be heard; it is rationally and reasonably related to the legislature's intent.

In light of the legislative history which shows the legislature's serious concerns about the millions of dollars lost to the Florida economy each year because of drawn-out foreclosure proceedings and the protections the statute provides the debtor, the statute meets Mathews' overall requirements and should be upheld.

B. There is no constitutional requirement that a creditor post a bond.

The Third District found § 702.10(2) unconstitutional because it "lacks a fundamental due process protection: a provision for a creditor bond to protect the debtor from mistaken repossession or payment." Tuttle's Design-Build, Inc., 712 So.2d at 1215. The Third District analysis is incorrect for several reasons.

The Third District did not analyze the statute in its entirety when it addressed Tuttle's due process challenges. Instead, it focused on one concern as if due process required that particular element -- a creditor's bond. But the cases do not contain a per se requirement for such a bond. Since Fla.Stat. §

702.10(2) meets the basic due process requirements set out above, the lack of a creditor's bond requirement does not invalidate it. In any event, there is a practical answer to the Third District's concerns -- the creditor's interest in the property (here at least $3 million and possibly over $6 million) is more than adequate to protect the debtor if he prevails.

Federal courts do not require a creditor's bond, even in ex parte proceedings. Posting a bond is only one option. Shaumyan v. O'Neill, 987 F.2d 122, 128 (2d Cir. 1993)(Connecticut ex parte prejudgment attachment statute upheld as applied to contractor who claimed unpaid balance on contract for home repairs; due process did not require creditor's bond where state had remedy of vexatious litigation statute; postdeprivation hearing sufficient to satisfy a debtor's procedural due process rights); Jones v. Preuit & Mauldin, 822 F.2d 998, 1002 (11th Cir.), vacated on other grounds, 833 F.2d 998 (11th Cir. 1987). The Eleventh Circuit in Jones interpreted Mitchell to permit protection of the debtor's financial interest in the event of wrongful taking caused by an ex parte procedure "[e]ither via the posting of a bond by the creditor or by allowing an action for damages suffered as a result of the wrongful [taking]." This is consistent with Eleventh Circuit decisions that have addressed a state "taking" and deprivations of property by state employees under the color of law. Cf. Lindsey v. Storey, 936 F.2d 554, 561 (11th Cir. 1991)(wrongful seizure and

retention of property by sheriff's office did not violate due process; "[N]o due procedural process violation has occurred 'if a meaningful postdeprivation remedy for the loss is available'"); Tinney v. Shores, 77 F.3d 378 (11th Cir. 1996)(mobile home owners had no action for due process violations based on sheriff's seizure pursuant to landlord's ex parte prejudgment attachment where there was no showing of inadequate postdeprivation remedies).[6/]

Florida provides more than adequate postdeprivation remedies. First, § 702.10(2)(g) itself provides that any monies paid shall be credited against the mortgage obligation. Further, a mortgagor can recover damages for wrongful foreclosure. See Republic Nat'l

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[6/] A majority of the Supreme Court refused to address the issue of whether a creditor's bond was required where a party sought to rely on a prejudgment attachment statute in an intentional tort case in which the creditor otherwise had no interest in the property. Doehr, 501 U.S. at 9, 111 S.Ct. at 2112. Four justices did find such a bond especially necessary in tort cases because it provided an extra measure of protection against the danger of wrongful attachment where the plaintiff had no prior interest in the property and the outcome of the tort action was uncertain. Doehr, 501 U.S. at 20, 111 S.Ct. at 1117. The plurality limited its conclusion to the tort context.

> Unlike determining the existence of a debt or delinquent payments, the [tort] issue does not concern 'ordinarily' uncomplicated matters that lend themselves to documentary proof.

Id. "The low standard of proof required in the affidavit of probable cause combined with the inability of a court to predict with precision the outcome of an intentional tort case with all of its complex variables outweighed the procedural safeguards provided by a postdeprivation hearing." Shaumyan, 987 F.2d at 125 (citing Doehr, 501 U.S. at 14, 111 S.Ct. at 2114). The concerns addressed in Doehr are not present here.

Life Ins. Co. v. Creative Investments Real Estate, Inc., 429 So.2d 87 (Fla. 5th DCA 1983). The debtor may also have claims under tort or contract. Cf. Guthartz v. Lewis, 408 So.2d 600 (Fla. 3d DCA 1982)(tenants in suit to recover rents in excess of federal rent control maximum could recover under contract or tort); City of Treasure Island v. Provident Management Corp., 678 So.2d 1322 (Fla. 2d DCA 1996)(in the absence of a bond or when a party seeks to recover damages beyond the amount of the bond for wrongful injunction, malicious prosecution is an option). Moreover, the debtor may be entitled to attorney's fees under Fla.Stat. § 57.105(1) if it proves the foreclosure was "frivolous" or if it makes an offer of judgment in an appropriate amount pursuant to Fla.Stat. § 768.79. With all these postdeprivation remedies, due process does not require a bond.

Fla.Stat. § 702.10(2) is not the only Florida statute that does not require a creditor's bond. Numerous other statutes do not require a bond to initiate a procedure which may be considered a "taking." For example, the statutes on residential landlord tenant disputes do not require the landlord to post bond. Fla.Stat. § 83.60. Nor does a lessor in an action to enforce a lien for rent payable against a condominium owner or association have to post a bond. Fla.Stat. § 718.401. Similarly, Fla.Stat. § 679.503 allows a secured party the right to self help -- without a bond.

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

These statutes protect landlords and creditors of apartments, mobile homes, condominiums and condominium associations, as well as secured creditors of personalty interests. They uphold their rights to assert their interests in property where the debtor has defaulted; these laws do not require a bond. There is no reason why such a bond should be required from commercial mortgage creditors of real property where the debtors are otherwise protected. In fact, there is an even stronger reason for upholding § 702.10(2). Section 702.10(2) does not permit an ex parte "taking." Rather, it provides a debtor additional protection by requiring a show cause hearing and a finding by the court that the creditor will likely succeed before any "taking" may occur. The debtor's interests are more than adequately protected. A creditor's bond is not necessary.

The Third District based its ruling on this Court's decision in Gazil, Inc. v. Super Food Service, 356 So.2d 312 (Fla. 1978). The Third District's reliance is misplaced; Gazil addressed the due process requirements for prejudgment remedies obtained through ex parte proceedings. Further, this Court's decision in Gazil was based on the Supreme Court's analysis and holding in Mitchell, which set out the due process requirements for prejudgment reme-

dies obtained through ex parte proceedings.

Mitchell contains no such bond requirement. The Court upheld the constitutionality of a Louisiana statute that allowed sequestration without notice or a prior hearing. It did so, at least in part, because the creditor posted a bond that protected the debtor in the event of wrongful sequestration. Mitchell, 416 U.S. at 608, 94 S.Ct. at 1900. However, the creditor's bond was only one of the safeguards provided by the statute; it was not the primary reason the Court found the statute constitutional. Rather, the Court focused on the fact that the statute provided for judicial control of the entire process and it made an immediate postdeprivation hearing available. Id. at 617-18, 94 S.Ct. at 1905. The Court did not discuss, much less require, a creditor's bond when the debtor was given prior notice and an opportunity to be heard. Quite simply, as the Court held long ago, a bond is a mere deterrent, not a substitute for prior notice and a hearing.

> To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing. . . . The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence

> of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

Fuentes, 407 U.S. at 83-84, 92 S.Ct. at 1996.

Similarly, this Court's discussion in Gazil offers no support for the concept that the due process clause per se requires a creditor's bond. The Third District has misread the case. In Gazil, this Court simply listed the five operative provisions of the replevin statute, including its requirement that the creditor post a bond, and concluded that the statute met the test of Mitchell. This Court did not hold that a creditor's bond was required to meet due process. There is a difference between requiring a bond to meet due process and holding that the bond requirement adds to the determination that a particular statute meets due process. See Fuentes, 407 U.S. at 84, 92 S.Ct. at 1996.

In dicta, the Third District suggested the statute would be constitutional if it required the debtor to make interest payments into the court registry. Tuttle's Design-Build, Inc., 712 So.2d at 1215. A debtor can request the trial court to allow it to do just that, pursuant to Fla.R.Civ.P. 1.600.[7/] Doral Mobile Home

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[7/] Rule 1.600 provides

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of any other thing capable of

(continued...)

Villas, Inc. v. Doral Home Owners, Inc., 661 So.2d 24, 25 (Fla. 2d DCA 1994)(even though sequestration statute did not apply to particular plaintiff, plaintiff could request leave to deposit rent payments in court registry pursuant to rule 1.600). Caple would have agreed to such relief; Tuttle's never requested it.

The Third District also expressed concern that the mortgagees are not institutional lenders "from whom the mortgagor can arguably expect to recover all sums paid" in the event the mortgagor prevails. Tuttle's Design-Build, Inc., 712 So.2d at 1215. There is no basis for such concern, institutional lenders or not. Nothing in this record indicates that the Caples (who built this $17 million nursery business in the first place) could not, or would not, repay any amounts overpaid during the course of this litigation. If Tuttle's had any such concerns, it should have raised them in the trial court -- where the parties would have had the opportunity to present evidence on the matter. But on the present, barren state of the record, it was inappropriate for the Third District to imply that these creditors would be any less likely than a bank to repay monies wrongfully paid at the conclusion of the litigation. Finally, nothing in this record indicates

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[7/] (...continued)
delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and by leave of the court. Money paid into court under this rule shall be deposited and withdrawn by court order.

that any remaining mortgage obligation would not be far greater than any amounts Tuttle's might have to pay during litigation. In other words, all indications are that Tuttle's will still owe Caple money.[8/]

In sum, Fla.Stat. § 702.10(2)'s lack of a creditor's bond does not render it unconstitutional.

III. FLA.STAT. § 702.10(2) DOES NOT IMPINGE ON THIS COURT'S RULEMAKING AUTHORITY BECAUSE THE STATUTE IS SUBSTANTIVE.

The Third District found the statute is legislative rule-making and therefore unconstitutional under Art.V, § 2, Fla.Const. The Third District was incorrect. This statute is substantive, like the statutes on other prejudgment remedies. It does not simply regulate practice and procedure in the courts; it creates a special proceeding to protect a party's rights. Any procedures are an integral part of the substance of the statute and therefore do not unconstitutionally infringe on this Court's rulemaking authority. Such a statute is a perfectly valid exercise of legislative authority.

"Substantive law creates, defines and regulates rights." State v. Garcia, 229 So.2d 236 (Fla. 1969). Substantive law includes "those rules and principles that fix and declare the

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[8/] The Third District also suggested in dicta that Tuttle's had substantial affirmative defenses which, if proven, could avoid foreclosure. Id. at 1215. That is incorrect. Tuttle's only contested $3 million of the $6 million outstanding on the mortgage. At best, $3 million of its debt will be avoided.

primary rights of individuals with respect to their persons and property." Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So.2d 730, 732 (Fla. 1991). Where a statute is substantive and "operates in an area of legitimate legislative concern," the court should not invalidate it as an intrusion on the Supreme Court's rulemaking authority. The statute should be construed as constitutional, if at all possible. VanBibber v. Hartford Acc. & Indem. Ins. Co., 439 So.2d 880, 883 (Fla. 1985).

> We have consistently held that statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality. This is particularly so in areas of the judicial process that necessarily involve both procedural and substantive provisions to accomplish a proposal's objective.

Leapai v. Milton, 595 So.2d 12, 14 (Fla. 1992).

This Court has rejected similar challenges to statutes when the procedural provisions are intertwined with substantive rights. See Smith v. Dep't of Ins., 507 So.2d 1080, 1092 & n.10 (Fla. 1987)("any procedural provisions of these sections are intimately related to the definition of those substantive rights")(concerning pleading punitive damages, standards for remittitur and additur and itemized verdict requirements). See also Lunstrom v. Lyon, 86 So.2d 771, 772 (Fla. 1956)(statute of limitations creates substantive rights); VanBibber, 439 So.2d 880 (statute that prohibited joinder of insurers within legislature's power to regulate insur-

ance industry, though it affected joinder of parties in courts).

Fla.Stat. § 702.10(2) was intended to affect the property rights of commercial creditors and debtors during litigated foreclosure proceedings. It gives creditors the right to receive payments in accordance with the mortgage or take possession of the property during litigated proceedings. It gives them the alternative right to protect their property interest through requiring the debtor to post a bond if the debtor elects not to make payments under the mortgage. And the rights were granted to ameliorate a problem which the legislature found had resulted from delays in the judicial system. Therefore, the legislature wove procedural-type provisions into the substantive statute as a means of ensuring the substantive rights. But such an interrelationship between substantive and procedural provisions does not invalidate the statute, as Smith made clear. In instances such as this, the statute passes constitutional scrutiny.

The Third District found the statute conflicts with Fla.R.Civ.P. 1.610(b) because the statute in essence provides for an injunction and, unlike the rule, does not require a creditor's bond. But the statute and rule do not "conflict" merely because the injunction rule contains a bond requirement and the statute, which permits relief in the nature of an injunction, does not. That is a superficial, and incorrect, analysis. The legislature decided that it would not be appropriate to require a creditor's

bond in the limited circumstance of a commercial foreclosure for the reasons previously explained in issue II. That decision and reasoning have nothing to do with whether a rule of procedure might generally require a bond for most temporary injunctions. The decision to dispense with a bond in the statute is a substantive one, well within the legislature's prerogative. Thus, there is no impermissible conflict between the statute and the rule.

The Third District also found that § 702.10(2) conflicted with Fla.R.App.P. 9.310(b), the supersedeas bond rule, which permits a party to post a bond in the amount awarded plus twice the statutory interest rate.[9/] It is questionable whether this rule even applies in mortgage foreclosure proceedings. Compare Cerrito v. Kovitch, 406 So.2d 125, 126 (Fla. 4th DCA 1981)("[a] judgment for recovery of money otherwise secured, as by a mortgage on real property, calls into play the general rule set out in [9.310](a) rather than the exception contained in (b)") with Nelson v. Santora, 570 So.2d 1374 (Fla. 1st DCA)(applying rule 9.310(b) to appeal of a final judgment of foreclosure). Nevertheless, even if rule 9.310(b) is applicable, there is no conflict between the statute and the rule. As is evident from the legislative history discussed in issue II, the purpose of the statute was to expedite foreclosure proceedings and, in so doing, to prevent debtors from

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[9/] This is one more argument that Tuttle's never raised -- at any point in time.

unbridled and free possession and use of the property during contested foreclosure proceedings. The legislature has the authority to determine a debtor's right to property placed in foreclosure proceedings; subsection (d) established just that. It also established the creditor's right to protection of its property or temporary possession of the property itself. Quite simply, the statute does not usurp this Court's rule making power. It merely limits the debtor's right to the property; it simply informs the debtor you cannot "have cake and eat it too." It is substantive. Subsection (d) both establishes and limits the debtor's right to the property and the creditor's rights during contested foreclosure proceedings.

Other Florida statutes operate in a similar manner. Section 702.10(2) is comparable to Fla.Stat. § 77.24, which permits a garnishee to secure release of its property at any time before entry of judgment by posting a bond "[i]n at least double the amount claimed in the complaint with interest and costs or if the value of the property garnished is less than this amount, then double the value . . . ." It is also comparable to Fla.Stat. § 78.068 which permits a replevin defendant to obtain release of the property seized under a prejudgment writ by posting bond in the amount of one and a quarter the amount due and owing on the agreement. Neither of these comparable statutes are unconstitutional simply because they legislate an issue which coincidentally also

may be covered by a rule.

Fla.Stat. § 702.10(2) establishes each party's rights and obligations during the foreclosure proceedings. It is substantive in nature. Any procedural provisions contained in this section are closely intertwined with those substantive rights. Therefore, § 702.10(2) does not unconstitutionally infringe on this Court's rule-making power.

CONCLUSION

For the foregoing reasons, Appellees GEORGE R. CAPLE and CAPLE ENTERPRISES, INC., respectfully request this Court to quash the order entered below, find Fla.Stat. § 702.10(2) constitutional and remand with directions that Tuttle's be required to make the interest payments as ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this _____ day of September, 1998, to: Vance E. Salter, Esq. and Christopher N. Johnson, Esq., COLL DAVIDSON CARTER SMITH SALTER & BARKETT, P.A., Counsel for Tuttle's, 3200 Miami Center, 201 South Biscayne Boulevard, Miami, FL 33131-2312; Gary A. Woodfield, Esq., EDWARDS & ANGELL, Counsel for DFW Capital, 250 Royal Palm Way, Palm Beach, FL 33480-4309; and Robert M. Quinn, Esq., CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER, P.A., Counsel for BNY Fin. Corp., P.O. Box 3239, Tampa, FL 33601.

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