IN THE SUPREME COURT OF FLORIDA

GEORGE R. CAPLE and **CAPLE ENTERPRISES, INC.,**

Appellants,

CASE NUMBER: 93,549

vs.

TUTTLE'S DESIGN-BUILD, INC.,

Appellee.

_____/

ANSWER BRIEF

Appeal from the Third District Court of Appeal of Florida

Lower Tribunal Case Number 97-3068

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Introduction

The district court of appeal held correctly that Section 702.10(2)[1] is unconstitutional. The decision below was based on two independently-sufficient, well-settled principles.

First, prejudgment remedies are provisional and must protect the right of the defendant to recover if the provisional, prejudgment result is not sustained at trial. Such remedies should also permit the defendant to retain its money or property if it posts a surety bond--reasonably related in amount to the cash or property in controversy--as a condition of keeping that cash or property.

Second, the legislature attempted to usurp this Court's exclusive right to establish rules of civil procedure governing injunctions and injunction bonds.

The true "story behind the story" is that the Florida Bankers Association ("FBA") and the legislature were not content with a prejudgment sequestration statute recommended by the Foreclosure Study Commission in 1992; instead, they made Section 702.10(2) lopsidedly lender-friendly--and unconstitutional--by requiring that prejudgment payments be made directly to the lender/plaintiff. There is no counterpart in Florida law. All other prejudgment remedies that have been approved by this Court have assured that

[1]The full text of Section 702.10(2) and the decision below are reproduced following the last page of this brief.

the borrower/defendant's interests are protected and have not encroached on this Court's rulemaking authority.

Statement of the Case and of the Facts

The appellants'[2] statement requires clarification and correction in a number of respects:

1. Amount Owed. Caple sought to foreclose a purchase money mortgage having a remaining principal balance of $6,700,000.00 (A96), but Tuttle's had already paid Caple over $10,200,000.00 of the $17,000,000.00 total purchase price for Caple Farms (A189).

Caple's brief claims (p.2):

> Tuttle's has never denied that its owes principal or interest. It has only contested the amount owed: it claims $3 million; the mortgage is for over $6 million.

In truth, however, Tuttle's asserted affirmative defenses including: failure of consideration; non-delivery of certain inventory, contract relationships, and accounting records; interference with Tuttle's board of directors; and a prior superseding breach of the purchase and loan contracts (A183-85). Tuttle's sought a judgment denying any monetary or equitable relief to Caple, not just a reduction of the amount owed by $3 million

[2]Appellants (plaintiffs in the trial court) George R. Caple and Caple Enterprises are referred to as "Caple". The Florida Bankers Association is referred to as "FBA". The Appellee is referred to as "Tuttle's". Record references are "A ____", indicating the page number within the appellant's appendix. "FBA App. ____" refers to the Final Report of the Foreclosure Study Commission appended to the FBA amicus brief.

(A186).

In his affidavit, the President of Tuttle's merely attested that he expected that total damages, "will exceed $3,000,000.00" (A191).

The appellants' understandable effort to limit the amount in contention to $3,000,000.00 of a $6,700,000.00 obligation is not accurate; Tuttle's disputed the entire $6,700,000.00 claim in the context of a failed $17,000,000.00 sale in which Tuttle's had already paid over $10,200,000.00

2. Trial Court Order. As contemplated by Section 702.10(2), the trial court order was a continuing mandatory injunction. The order required Tuttle's to make not one payment, but a continuing series of payments, until trial, directly to Caple (A249). The payments were, if made, not subject to sequestration, escrow, or any other control to assure their return if Tuttle's prevailed at trial. Caple did not have to post any bond whatsoever. And no restrictions were placed on Caple's ability to spend or dissipate any of the prejudgment monies paid by Tuttle's.

The mortgage and notes would have required mortgage principal payments of $2,400,000.00 on June 1, 1998 (A118, A124). Under Section 702.10(2)(e), these payments as well as accrued and accruing interest would have been payable to Caple before trial, again without a bond, sequestration, or other judicial control to assure recovery. So Caple's assertion at page 2 of its brief that,

"Tuttle's would pay just under $1 million if the foreclosure lasted 16 months" (Initial Brief, p.2) is incorrect; the correct figure would be approximately $3,400,000.00, all paid prior to trial and without bond or other assurance of recovery.

3. The Trial Court Hearings. Caple set its multimillion dollar hearing at the end of a motion calendar. Counsel for Tuttle's questioned the constitutionality of Section 702.10(2) (A242), and began to discuss the matters set forth in the affidavit of Tuttle's, but the trial court interrupted and ruled before that portion of the argument was barely begun (A243-45).

Unmentioned by Caple's appellate counsel, who did not participate in the trial court proceedings, is the fact that the trial court declined, at a second hearing on October 22, 1997, Tuttle's request for an evidentiary hearing.

4. Foreclosure Study Commission Report. The FBA did not appear below, but has filed an amicus brief in this Court in support of Caple. The FBA maintains that Section 702.10(2) is an important product of the Florida Foreclosure Study Commission, and attached to its brief the 1992 Final Report of that Commission. Two key facts, however, demonstrate that the FBA's recitation of the history of the flawed statute is wrong:

(a) The Study Commission heard the reports of four

seasoned judges[3] regarding the foreclosure process before passage of the new law. Those judges recommended against a non-judicial foreclosure process, and were satisfied that the current system was working (FBA App. at 5-7).

(b) The Commission -- including among its members representatives of the FBA, and having heard the testimony of one of the FBA attorneys who filed the amicus brief here -- considered and proposed an interim-payment, prejudgment remedy that would have required, "the default payments to be deposited with the registry of the Court or other third party during the pendency of the foreclosure proceeding" (FBA App. 20). The Commission's draft Section 702.11 (unconstitutionally modified before enactment, and then re-numbered 702.10(2)) would have provided two important controls. First, any interim mortgage payments to be made before judgment would be paid, "into the registry of the court or to a third person as determined by the court" (FBA App. 23). Second, "the court may require payment of less than the full amount" of the interim payments (Id.).

In short, the legislature went far beyond what the Study Commission recommended.

Summary of Argument

[3]Three were Florida circuit court judges; one was a federal bankruptcy court judge.

As the district court of appeal correctly held, Section 702.10(2) radically and unconstitutionally altered the prejudgment due process safeguards previously afforded Florida borrowers.

After an ambiguous, non-jury pretrial procedure consisting of affidavits and "other showings made by the parties appearing," but evidently excluding non-party witnesses, apparently before discovery has been taken, the trial court is to, "make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses."

After making this determination of the "probable" outcome, the trial court may compel the borrower to pay money directly to the lender for the duration of the case, and the lender is not required to post any sort of bond.

This is a flawed departure from the tested and traditional safeguards of sequestration -- in which the funds are in the registry of the court -- or a plaintiff's prejudgment surety bond to cover damages in case the "probable" determination proves wrong and the defendant prevails on the merits.

Instead of a normal "forthcoming" bond, in which a defendant/borrower is allowed to retain its money or property by posting a bond reasonably related to the amount in controversy, the FBA’s "pay or die" statute specifies that the borrower loses possession of the mortgaged property if the interim payments aren’t made. Section 702.10(2) may not be quite the non-judicial

foreclosure statute the FBA wanted, but it is a close -- and unconstitutional -- runner-up.

Absent a protective bond or a more complete discovery and hearing procedure, the statute fails to afford the requisite and minimal due process to the borrower, and should also be declared invalid for that reason.

Section 702.10(2) is also void for vagueness and internal inconsistency, and it is void as an encroachment upon existing rules of procedure promulgated by this Court.

Argument

I. Section 702.10(2) Is Unconstitutional

A. The Statute Violates the Borrower's Due Process Rights

1. The Statute Does Not Provide for a Lender's Bond or Sequestration

The Supreme Courts of the United States and Florida have articulated a list of indispensable due process requirements for prejudgment remedies.

In Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406 (1974), the Supreme Court of the United States reviewed the protections to be afforded a borrower when a creditor pursues prejudgment remedies. When collateral for a loan becomes a battleground before judgment, held the Court, the property may be put, "in the possession of the party who furnishes protection

against loss or damage to the other pending trial on the merits." 416 U.S. 618, 94 S.Ct. at 1905. If the creditor is to receive possession, the creditor must post a bond to assure payment of the borrower's losses in case the borrower prevails at the trial on the merits.

Reciprocally, if the borrower wishes to retain possession after the creditor has made its prima facie or "probable validity" case, the borrower should provide a so-called "forthcoming" bond to protect the creditor against the diminution in value that may occur over the pendency of the lawsuit, and in case the borrower does not prevail on the merits. "Resolution of the due process question," said the Court in Mitchell, "must take account not only of the interests of the buyer of the property but those of the seller as well." 416 U.S. at 604, 94 S.Ct. 1898.

Conspicuously (and fatally) absent from Section 702.10(2) is a requirement that Caple furnish a bond to protect Tuttle's property interests in the event that Tuttle's prevails at trial. Applying Mitchell, this Court held that such a bond is one of the requirements for "minimum due process"; Gazil, Inc. v. Super Food Servs., Inc., 356 So.2d 312, 313 (Fla. 1978).

Tuttle's property interests might also have been taken into account with a sequestration provision, whereby the $737,000 per year in payments by Tuttle's, together with the $2,400,000 interim principal amounts payable in June, 1998, would have gone into the

registry of the court pendente lite rather than to Caple; the court would have directed payment of the funds to the prevailing party after adjudication of the merits. Indeed, when the Foreclosure Study Commission recommended a "show cause" process for interim payments, it specified that a borrower would pay, "into the registry of the court or to a third person as determined by the court" (FBA App. 23). In that proposal, if the lender doesn't prevail in the foreclosure, "all monies deposited pursuant to this section shall be returned." Id. Inexplicably, the Legislature jettisoned this language in enacting Section 702.10(2), in favor of a provision providing for outright, unbonded payment to the lender.

This may have been drafted with the notion that highly-collectible, regulated financial institutions would be the recipient of the prejudgment "show cause" payments, and that they could readily and reliably disgorge the payments if they lost on the merits later; in effect, why require a bond from NationsBank? But that is not the case here. The Caple plaintiffs are unregulated, private parties who did not post any sort of bond or provide any reason to believe that they could make a refund to Tuttle's if Tuttle's prevailed on the merits. And Section 702.10(2) doesn't even mandate an inquiry by the trial court to ascertain the relevant facts that could affect the amount of such a bond--the net worth of the creditor receiving the payments and the prospective damages that would be suffered by Tuttle's as a

result of the deprivation of the funds, if the deprivation is later determined to have been unwarranted.

Absent the protection of a bond to be posted by Caple or sequestration, the statute could not, and did not, stand; Gazil, 356 So. 2d at 313.

2. The Borrower's Bond Requirement is Punitive

It is not a sufficient answer to tell Tuttle's that it can avoid the deprivation by posting a bond under Section 702.10(2)(d), "equal to the unpaid balance of the mortgage on the property, including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee." On this record, the Order subject to review directed Tuttle's to make an initial payment of $165,572,[4] and monthly payments of $61,417 thereafter (plus $2,400,000.00 in principal payable June 1, 1998) pending the trial on the merits. But in order to comply with Section 702.10(2)(d) and avoid that prejudgment deprivation, Tuttle's would be required to post a bond for $6,865,572,[5] over 40 times, or 4000%, of the initial payment.

That bond requirement seems palpably punitive. Although the

[4]$6,700,000, the principal claimed by Caple, at 11% for the 82 days between August 11 and October 31, 1997.

[5]Principal plus the accrued interest. No unpaid taxes or insurance premiums were involved, as these obligations were current. The statute is unclear whether the bond must be increased each month to keep up with accruing interest, if the borrower wishes to continue the statutory stay under Section 702.10(2)(d).

legislative history leaves no fingerprints on this point, the bond provision seems calculated to be unattainable, so that the borrower will have only two real choices--make the payments, with no assurance of recovering them because the lender has provided no bond and the payments are not in the registry of the court, or lose the property summarily (Section 702.10(2)(f)).

This "borrower's bond" mechanism also offends due process, and is in marked contrast to the bonds required of borrowers to stay other statutory prejudgment remedies. A tenant wishing to stay eviction pays rent into the registry of the court and doesn't post a bond.[6] A borrower who loses the "reasonable probability" hearing under the prejudgment replevin law, Section 78.067(2), may nonetheless stay the writ, "pending final adjudication," by posting a surety bond "equal to the value of the property." Other prejudgment remedies afford the same, constitutional, right to a borrower. And this makes perfectly good sense; the bond is measured by what is proposed to be taken by the creditor, not by the total dollar amount <u>claimed</u> by the creditor (as in the unusual and draconian requirement of Section 702.10(2)(d)). To stay a

[6]Section 83.60(2), Fla. Stat. In a non-residential tenancy in which the landlord seeks a distress writ, of course, it is the <u>landlord</u> who must post the surety bond for double the amount demanded or, if levying upon the tenant's property, for double the value of the property.

taking of $165,572 "pending adjudication"[7] shouldn't require, as here, a bond for over $6.8 million.

The imposition of such a bond on the borrower as the price for a stay pending final adjudication makes absolutely no practical or economic sense. In a foreclosure--the only kind of case subject to Section 702.10--the lender is secured. For example, in this case the record discloses that Caple sold its plant nursery and farm to Tuttle's for $17 million, of which approximately $10.2 million had already been paid, with $6.7 million in disputed principal amount secured by the farm property and improvements. Most mortgagees lend on a loan-to-value ratio that provides coverage for the interest obligations that might accrue during the pendency of a foreclosure (a so-called "cushion"). And in this case, the mortgage is a purchase money mortgage, so Caple knew better than anyone the value of the property it sold to Tuttle's. On the lender's side of the equation, then, the "full amount claimed" bond of Section 702.10(2)(d) would provide <u>double</u> <u>security</u> to Caple.

But then consider the borrower's dismal side of the equation.

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[7]As detailed elsewhere in this brief, the statute does not make clear whether the lower "money judgment" supersedeas bond of Fla. R. App. P. 9.310 would be available in the event of an appeal by the borrower. By its very terms, however, that lower bond--120% of the $165,572 payment, or $198,686--would only be effective for the duration of an appeal, and would not effect a stay, "pending final adjudication of the claims of the parties" in the trial court. To obtain the latter, Section 702.10(2)(d) requires the punitive bond in the full amount claimed by the creditor, irrespective of the interim payment amount.

By definition, the borrower's property is in foreclosure. No matter what the merits of Tuttle's defenses or counterclaims, the commercial reality is that the lis pendens on the property precludes other or additional financing on that property. The statute does not provide for, nor does Florida law permit, the borrower to transfer the lien of the disputed mortgage to the bond to be posted.[8] The borrower is effectively precluded from using any of its equity in the mortgaged property to obtain a bond that will provide a second assured source of recovery for every cent of the plaintiff/lender's claim. That's not fair.

To summarize, Section 702.10(2) violates due process in two separate respects. It does not obligate the lender to provide a bond to assure that the borrower will be able to recover the funds after prevailing on the merits.[9] And it does not permit the borrower to post a bond in reasonable proportion to the value of the "property taken"--the interim interest payments--to obtain a stay of the taking, "pending final adjudication."

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[8]See Mailman Dev. Corp. v. Segall, 403 So.2d 1137, 1138 (Fla. 4th DCA 1981); White v. White, 129 So.2d 148 (Fla. 1st DCA 1961).

[9]It is not an adequate assurance of recovery to specify, as Section 702.10(2)(g) does and as the trial judge suggested, that the interim payments, "shall be credited against the mortgage obligation in accordance with the terms of the loan documents." In a prejudgment setting and before discovery in a lawsuit in which the debt is disputed, it is unclear whether, after a jury trial and upon final adjudication, there will be any debt against which to apply such a credit. Moreover, the existence of affirmative defenses and setoffs might provide a basis for the denial of foreclosure altogether.

The Supreme Court of the United States thoroughly examined and traced these requirements in Connecticut v. Doehr, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), noting the historical requirements applicable to prejudgment remedies (in that case, prejudgment attachment) that, "reduced the risk of erroneous deprivation, including requirements that...the plaintiff post a bond."[10] The plurality opinion in that case observed that, "we have repeatedly recognized the utility of a bond in protecting property rights affected by the mistaken award of prejudgment remedies," because, "[a]t best, a court's initial assessment of each party's case cannot produce more than an educated prediction as to who will win."[11] The plurality explained that, "there is no guarantee that the original plaintiff will have adequate assets to satisfy an award that defendant may win," and that there is not "any appreciable interest against a bond requirement."[12] The four-Justice plurality opinion in Doehr reviewed the prejudgment attachment statutes in all fifty States, concluding that, "neither a hearing nor an extraordinary circumstance[13] limitation eliminates

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[10]501 U.S. at 3, 111 S.Ct. at 2108. The Supreme Court held the statute in question constitutionally infirm because, among other things, the Plaintiff was not required to post a bond. 501 U.S. at 14-15, 17-18, 111 S.Ct. at 2114-16.

[11]501 U.S. at 19-20, 111 S.Ct. at 2117.

[12]501 U.S. at 21, 111 S.Ct. at 2118.

[13]This is a reference to the exigencies prescribed by the (continued...)

the need for a bond, no more than a bond allows waiver of these other protections."[14] Doehr and the Florida Supreme Court's holding in Gazil are clear; due process obligates the recipient of the "taken" property to post a bond. Section 702.10(2) fails because it does not include such a requirement.

3. Lenders Have Other, Adequate, and Constitutional Remedies

The FBA complains that it is unfair for a borrower to stop payment on a mortgage while continuing to use property, placing the lender's collateral, "at risk of waste and depreciation for however long it takes the foreclosure process to operate" (FBA brief, p. 3).

This risk has long been addressed by other remedies that are constitutional: motions for a receiver (in the case of waste or depreciation) or for sequestration of rental income under Section 697.07, for example.

The mortgage in this case contained a receivership provision that could have been invoked to prevent waste or depreciation if that was the concern (A114, ¶9(c)).

(...continued)
statutes of many states, including Florida, that are prerequisites to the issuance of certain prejudgment remedies.

[14]Doehr, 501 U.S. at 23, 111 S.Ct. at 2119.

B. Section 702.10(2) Is Unconstitutionally Vague and Ambiguous

Until this case, the new provision had not been parsed, interpreted, or tested in any meaningful way in Florida, so this is a case of first impression. Further, the new procedure for "interim payments" was not patterned after a comparable statute or procedure from some other State, so the law of other jurisdictions will shed no light on the issues here.

A careful reading of Section 702.10(2) discloses several internal inconsistencies and ambiguities.

First, the lender's application for a "show cause" order is not necessarily an ex parte process. It is referred to as a "request" in the first sentence of 702.10(2), and as a "motion filed hereunder" in 702.10(2)(e). Florida Rule of Civil Procedure 1.080(a) and 1.100(b) contemplate that a request for an order should not be ex parte, but should be in writing and should be served on the adverse party. That wasn't done by Caple here. Section 702.10(2)(a)5.b seems to condone the ex parte, "rolling start", however, by suggesting that the order to show cause may have been obtained before service of the complaint and original process. This is internally inconsistent and ambiguous.

Due process views the lender's request for this relief like any other request for relief; it ought to be in writing and it should be served so that the borrower may be heard in opposition. There is no apparent or compelling reason not to do so. The

mortgaged property is not going anywhere. The normal procedure of a written motion, notice, and a hearing would not unduly delay the matter, because the hearing on the lender's motion for an order to show cause doesn't involve the taking of evidence, and can be heard on a motion calendar. That hearing would permit the borrower to oppose the issuance of the order on legal grounds and, if the motion is granted and a show cause order entered, would allow the scheduling of any requisite discovery and the evidentiary hearing required by Section 702.10(2)(d).

The second inconsistency involves the conduct of the "probable validity" hearing under subparagraph (d). That subparagraph directs the trial judge to consider, "the affidavits and other showings made by the parties." Clearly that requires an evidentiary hearing if the parties request one, but is the borrower/defendant able to call non-party witnesses? Section 702.10(2)(a).3 indicates that such witnesses may not be called; the show cause order is to specify that the defendant may file affidavits or other papers,[15] "and may appear personally or by way of an attorney at the hearing." That particular phrase does not seem to contemplate that non-party witnesses will appear or testify. We might imply a right of cross-examination regarding these, "showings made by the parties appearing," but that certainly isn't explicit. The process sounds more like "affidavits with

[15]"Other papers"? Memoranda of law? Documentary evidence?

argument" than a mini-trial.

This slushiness could have been avoided by simply copying the precise language set forth in a replevin show cause order under Section 78.065(2)(e), which specifies that the defendant, "may appear personally or by way of an attorney and present testimony on his or her behalf at the time of the hearing." (emphasis supplied). Thanks to that language, the term, "affidavits and other showings made by the parties appearing" in Section 78.067(2) is both clearer and more consistent with due process. That cannot be said for 702.10(2), since "showings" is undefined and the order to show cause suggests that only the defendant or his or her attorney are to appear.

A third ambiguity has to do with the nature and ultimate effect, or call it the "revocability," of the prejudgment relief. If the borrower/defendant makes the interim payments pursuant to the statute, but setoffs or counterclaims reduce or eliminate the principal debt, does the borrower/defendant have a right to the return of the payments, or a ratable portion of them? The legislative history suggests that the Foreclosure Study Commission wanted a sequestration of the interest payments so that the borrower wouldn't have the free use of the property, (FBA App. 23), during the litigation. But the Commission's draft included a provision that would return the sequestered funds to the borrower/defendant if the lender doesn't prevail on the lender's

foreclosure claim, (FBA App. 23, proposed 702.11(2)); this provision, including both sequestration/court registry and repayment, died on the cutting room floor before passage. No such mechanism exists in 702.10(2) as enacted, so a prevailing borrower's right to a refund is unclear.

Fourth and finally, 702.10(2) includes a sentence in subparagraph (e) that did not make its way into the Order under review here, but which further betrays the lender-friendly/constitutionally-unfriendly character of the new law: "The order [providing for interim payment after a "probable validity" hearing] may permit, but shall not require the mortgagee to take all appropriate steps to secure the premises during the foreclosure action." Fla. Stat. § 702.10(2)(e). Does this right exist if the borrower continues in possession, is maintaining the property, and is making the interim payments as required? Such interference is unquestionably a taking, yet no bond is to be provided by the lender.

This Court is required, of course, to construe all ambiguities in a logical and constitutional fashion, and to apply first aid to the new statute to a point. But "sloppy draftsmanship" can reach a level at which it constitutes a denial of due process. Shevin v. International Inventors, Inc., 353 So.2d 89, 92-93 (Fla. 1977). Or

as colorfully argued in this very Court:[16]

> I take the position that there's nothing sacrosanct about an act of the Legislature. I know that this Court will leap to the aid of the Legislature on occasion. I have the analogy. The Legislature throws out a statute. It looks like the village drunkard, you know what I mean. And this Court rehabilitates that statute -- you know, brushes it off, puts a hat on its head, so it can go home and meet the public in a presentable condition. This Court has done that to many legislative acts.

Any one of these problems within the new law might be remediable. But the entire collection of problems can't be rehabilitated and the statute can't be redrafted. Taken as a whole, Section 702.10(2) is transparently (a) intended to give lenders radically new, untested, and draconian rights, and (b) so internally ambiguous and inconsistent as to violate due process.

C. The Statute Is Legislative Rule-Making That Encroaches Upon the Judiciary's Power

Section 702.10(2) encroaches on the judiciary's exclusive and constitutional power to promulgate rules of civil and appellate procedure in foreclosure cases. The House Committee on Judiciary's Final Bill Analysis and Economic Impact Statement stated bluntly what was sought: "To the extent that the foreclosure process is expedited, lenders will be able to recover on investments in a

[16]Shevin v. International Inventors, 353 So.2d at 94.

timely manner."[17]

In Haven Federal Savings & Loan Association v. Kirian, 579 So.2d 730 (Fla. 1991), the Florida Supreme Court ruled that the mandatory severance of counterclaims in foreclosure action (under Section 702.01), was unconstitutional because it infringed upon the judiciary's rulemaking power and conflicted with the Florida Rules of Civil Procedure.

Where there is a direct conflict between a rule and a statute, the statute on procedural matters is unconstitutional. Haven Fed. Sav. & Loan Ass'n, 579 So. 2d at 732.

The prejudgment relief in Section 702.10(2) is essentially a mandatory injunction.[18] Yet Caple has not been required to post a bond. As such, Section 702.10(2) conflicts with the bond requirement in Fla. R. Civ. P. 1.610(b).

This is compounded by the Legislature's further, and constitutionally invalid, specification of the unique bond requirement to be posted by the borrower if the borrower wishes to stay the trial court's order. Section 702.10(2)(d) apparently overrides Fla. R. App. P. 9.310 by specifying that, in order to obtain a stay of the prejudgment order requiring interim payments

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[17]Section III.C, p.12, of the Final Bill Analysis of April 19, 1993.

[18]In accepting review below, the district court of appeal noted that the Order under review is essentially an injunction, citing CMR Distribs., Inc. v. Resolution Trust Corp., 593 So.2d 593 (Fla.3d DCA 1992).

under the mortgage, the borrower must file with the trial court, "a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the mortgage on the property, including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee."

In the case at bar, the trial court ordered an interim interest payment dating back to August 11, 1997, the day the ex parte amended order to show cause was entered. As previously noted, the first payment (November 3, 1997) would have been, in the absence of this Court's stay orders, $165,572. To stay such a judgment under Fla. R. App. P. 9.310 would require a bond of $198,686; but Section 702.10(2)(d) requires a surety bond of $6,865,572, the full amount claimed by Caple, if Tuttle's wishes to stay the obligation to make the payments. The consequence of a failure to make the interim interest payments or put up the surety bond is, in the absence of "good cause," that Caple will be entitled to prejudgment possession of the property; Section 702.10(2)(f).

The redundancy and unattainability of such a bond as a practical matter have been described elsewhere in this brief. Section 702.10(2) impermissibly and unconstitutionally encroaches upon these two existing rules of practice and procedure promulgated by this Court.

II. The Constitutional Challenges Were Adequately Preserved

Caple cannot and does not dispute that Tuttle's challenged the constitutionality of Section 702.10(2) in the trial court. (Caple brief, p. 6). Caple cannot and does not dispute that argument on this point was truncated by the trial judge (A242-245). Caple nonetheless argues that each constitutional challenge was not sufficiently articulated (Caple Br. at 14). Such articulation, especially in light of the limited ability to argue, is unnecessary. To preserve an issue of unconstitutionality, it is sufficient merely to raise it. Zabel v. Pinellas County Water & Navigation Control Auth., 154 So.2d 181, 186 (Fla. 2d DCA 1963). The form in which the claim is raised need not be, "a model of specificity and clarity," in order for it to be preserved on appeal. Northwest Fla. Home Health Agency v. Merrill, 469 So.2d 893, 900 (Fla. 1st DCA 1985). The district court of appeal correctly relegated this argument to a footnote in its opinion.

An appellate court may address certain constitutional challenges even when not raised below, when the constitutionality of the statute was challenged below on other grounds. See Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986)(because trial court ruled on the facial validity of the statute, the appellate court would also consider retroactive application). Furthermore, because the lower court applied a statute that unconstitutionally deprived Tuttle's of due process, the constitutional arguments constitute fundamental

error, and need not be preserved below to be raised on appeal. State v. Johnson, 616 So.2d 1, 3 (Fla. 1993); see also Skaggs v. City of Key West, 312 So.2d 549, 551-52 (Fla. 3d DCA 1975).[19] Finally, "matters substantially affecting the public interest, even though not raised below, may be considered for the first time on appeal." Merrill, 469 So.2d at 900.[20] Thus, even though the district court considered and rejected Caple's arguments on these issues of preservation, it had the discretion to consider the constitutional questions without regard to these procedural matters. Caple cannot point to any abuse of this discretion, and its procedural arguments at this point in the appellate process are thus unfounded.

Conclusion

Section 702.10(2) represents a transparent attempt by Florida lenders to "expedite foreclosures" and "benefit lenders" (Senate Staff Analysis of February 25, 1993). The legislature went far beyond the sequestration concept recommended by the Foreclosure Study Commission.

As enacted, and as applied here, the new law encroaches on the

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[19]Once a court has jurisdiction over some of the constitutional issues, it may consider them all, or any other issue that affects the case. Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982).

[20]Both Caple and the FBA throughout their briefs claim a substantial public interest in the appeal.

judiciary's authority to regulate procedure, and upon the state and federal constitutional protections afforded borrower/defendants. Tuttle's respectfully submits that the district court of appeal correctly declared Section 702.10(2) unconstitutional, and that the decision below should be affirmed.

Respectfully submitted,

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