

Your case has only just begun, you have prepared your client for the long litigation road ahead, and an appeal is nowhere on your radar screen when suddenly the court issues a non-final order that denies your client immediate possession of the property at issue. Your client certainly does not want to wait until the end of an eventual trial to get it back.

What can you do now, when it counts the most?

This is the third in a series of articles brought to you by members of the OCBA's Appellate Practice Committee regarding appeals of interlocutory orders under Florida Rule of Appellate Procedure 9.130(a)(3). This installment regards item (C)(ii) of that Rule, which permits an interlocutory appeal of a non-final order determining "the right to immediate possession of property." Given that this provision regards immediate possession of property, any situation in which it may apply is sure to be significant to your client, who likely cares very little about rules of appellate procedure but a great deal about whether he or his opponent has possession of the property at issue during the balance of the litigation.

Criminal and Civil Law Applications

Although Rule 9.310(a)(2) provides that appeals of non-final orders in criminal cases are addressed in Rule 9.140, it should be quickly noted, before we lose the attention of our criminal law brethren, that there are potential applications of item (C)(ii) under Rule 9.130(a)(3) in the criminal law context. To be sure, the Committee Notes to Rule 9.130 specifically advise that "because this rule only applies to civil cases, item (C)(ii) does not include within its ambit rulings on motions to suppress seized evidence in criminal cases." However, there are examples of its permitted use by criminal defendants, such as in appeals of orders on a motion for return of an arrestee's property taken upon arrest¹ and a motion for return of seized property subsequent to an acquittal of criminal charges.² There is also a potential use by the State in seeking release of evidence as contraband, title to which vests in the seizing agency.³

Turning next to our civil litigators, the first question you might ask is: what is the meaning of "property"? (You are an attorney, of course, so you must ask such profound questions even in the face of a client who *just* wants to know if he can

keep his land, car, bank account, whatever.) Again, the Committee Notes provide guidance: "Item (C)(ii) is intended to apply whether the property involved is real or personal." In fact, it applies to real property, personal property, and even money.⁴

Item (C)(ii) also provides express examples of its application. It states that it includes, but is not limited to, "orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment." These prejudgment forms of relief can be very attractive to a client seeking an immediate result, but due to the existence of item (C)(ii), you may wish to caution your client that he or she could be inviting an interlocutory appeal by seeking the same.

Some additional examples of the application of item (C)(ii) are appeals of an order providing for a judicial sale of property,⁵ an order vacating a certificate of title issued in a foreclosure sale,⁶ and an order of taking entered in an eminent domain/condemnation proceeding permitting a condemnor to take possession and title to real property in advance of a final judgment.⁷ Landlord-tenant disputes are also ripe for application of this Rule. Of course, an order of eviction from real property counts.⁸ Interestingly, so does an order regarding whether the tenant must pay rent into the court registry.⁹ Similarly, an order granting a mortgagee's request that a defaulted mortgagor be required to pay collected rents into the court registry is also immediately appealable.¹⁰

As a result of a split of authority regarding whether orders *denying* a request for the appointment of a receiver were appealable under item (C)(ii), a new item (D) was added to Rule 9.130(a)(3) in 1992, which specifically provides that orders granting or denying the appointment or termination of a receiver are appealable non-final orders.¹¹ Thus, earlier case law addressing the application of item (C)(ii) to receiver-ship issues are now moot.

Another interesting application of this appellate rule is to orders authorizing or denying payment of an attorney's retaining or charging lien.¹²

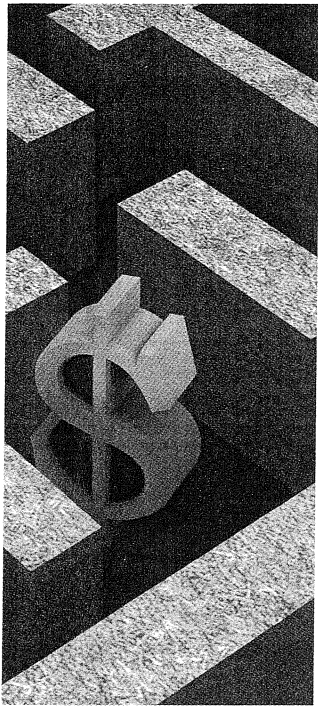
Finally, trust and estate practitioners may be interested to note a number of cases in which orders addressing trust or estate assets have been held immediately appealable under item (C)(ii). Examples include an order granting the beneficiary of a trust an immediate right of possession of an automobile,¹³ an order permitting attorney's fees and witness fees to be paid from trust assets in order to fund the defense of a challenged trust,¹⁴ and an order determining homestead property and authorizing the personal representative to take possession where the devise was by way of the residuary clause in the will.¹⁵

When Possession Is Not Really the Point

An appeal of an order determining an immediate right to possession need not solely involve a challenge to the existence of that right, but rather could regard the details of an order to transfer. For example, it was held that the question of the proper *date* of a taking in an inverse condemnation action is an integral part of a determination of the right to immediate possession of property and, therefore, can be raised through an interlocutory appeal under item (C)(ii).¹⁶ Similarly, item (C)(ii) was relied upon in an eminent domain proceeding to support jurisdiction over an appeal of the *amount* of court registry monies to be allocated to a tenant for its interest in property.¹⁷

When a "Partial Final Judgment" Is No Such Thing

Under Florida Rule of Appellate Procedure 9.110(k), partial final judgments are reviewable either on immediate appeal or subsequently on appeal from the final judgment. But looks can be deceiving, and while an order may be titled a "Partial Final Judgment," an appellate court may dismiss an immediate appeal taken under Rule 9.110(k) if the



substance of the order reveals that it, in fact, is not final. However, even if you have determined that your order is inappropriately titled, your analysis should not stop there because that same order, or a portion thereof, may be appealable

under Rule 9.130(a)(3)(C)(ii).

For example, in a case where an order titled “Partial Final Judgment” disposed of all counterclaims but reserved ruling on a count within the complaint, the Fifth District held that the order was not final, even in a partial sense, because it neither disposed of “an entire case as to any party” nor resolved matters that were independent of the matters left to be resolved.¹⁸ Nonetheless, the Fifth District noted that, in part, the order determined the right to immediate possession of property because it ordered a judicial sale of real property, and therefore, the Court had jurisdiction to address the singular question of whether the ordered sale was proper.¹⁹

Unfortunately for the Appellant, the multiple other issues raised and argued on appeal were left unaddressed by the Court.

What about a Summary Judgment?

Let’s say your opponent was granted summary judgment on a single count, while other counts remain pending. The order is unlikely to be an appealable “partial final judgment,” but, as in the above example, it may determine an immediate right to possession of some property, such that Rule 9.130(a)(3)(C)(ii) would provide immediate appellate jurisdiction.

On the other hand, what if you have moved for summary judgment on a count seeking recovery of property and your motion was denied? So long as your opponent was not granted a cross-motion, you likely cannot appeal immediately because the effect of the order “was simply to deny summary disposition of the parties’ respective claims to immediate pos-

session – not to determine those claims. The claims remain subject to determination at trial.”²⁰

When It Does Not Count

Although item (C)(ii) is applicable to many situations, it does have its limits. As the Third District has noted, the mandate from the Florida Supreme Court is to narrowly interpret Rule 9.130 so as to “restrict the number of appealable non-final orders.”²¹ Thus, that Court found that an order denying a lessor’s motion for summary judgment in a declaratory relief action brought by a lessee regarding its right to extend the lease was not immediately appealable because item (C)(ii) “allow[s] appeals only of orders which more directly determine the immediate right to possession.”²² The Court noted that it would not have had jurisdiction even if the lessor’s motion had been granted, because the order would only have involved a determination that the lessee could not exercise the option to extend, rather than that the lessor was entitled to “immediate possession.”²³ Similarly, no jurisdiction existed to immediately review an order denying a motion to recover possession of property where the order determined neither the movant’s claims of beneficial ownership, nor the record owner’s entitlement to possession.²⁴ And, in another case, the court found item (C)(ii) inapplicable to an order determining that the appellant’s tax deed was invalid and of no legal effect, because the order did not “directly” determine the immediate right to possession of property.²⁵

Conclusion

So what if you find yourself with an appealable order determining an immediate right to possession of property? Although you have 30 days from rendition of the order in which to file your Notice of Appeal, there is a relatively short deadline of 15 days after that in which to serve your Initial Brief. And, the Clerk’s Office will not be preparing a record for you; You will need to put together an appendix of the relevant records as well. If you are still involved in trial level proceedings at the same time, this two-front war, not to mention the rules of appellate procedure with which you may be unfamiliar, may be more than you want to take on alone. Thus, it may be time to call in an appellate attorney to help lighten the load and ensure a more efficient handling of the appeal, which will certainly make you and your client rest easier. Good luck!



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¹*Dismuke v. Office of State Attorney*, 948 So. 2d 1039 (Fla. 5th DCA 2007) (acknowledging jurisdiction but affirming denial of motion due to failure to allege property was not the fruit of criminal activity).

²*Eight Hundred, Inc., v. State*, 781 So. 2d 1187 (Fla. 5th DCA 2001) (noting other courts treat these orders as final post-judgment orders).

³*Kern v. State*, 706 So. 2d 1366 (Fla. 5th DCA 1998) (also noting other courts treat these orders as final post-judgment orders).

⁴*See, e.g., Termaforoosh v. Wash.*, 952 So. 2d 1247 (Fla. 5th DCA 2007) (finding jurisdiction over appeal of partial final summary judgment regarding contract for sale because it granted to sellers the right to immediate possession of \$10,000 deposit).

⁵*Shephard v. Ouellere*, 854 So. 2d 251 (Fla. 5th DCA 2003).

⁶*Household Finance and Mortgage Co. v. Osta*, 862 So. 2d 885 (Fla. 5th DCA 2003).

⁷*Niles v. Volusia County*, 405 So. 2d 1046 (Fla. 5th DCA 1981).

⁸*E.g., Herrell v. Seyfarth, Shaw, Fairweather & Geraldson*, 491 So. 2d 1173 (Fla. 1st DCA 1986) (order granting eviction); *First Hanover v. Vazquez*, 848 So. 2d 1188 (Fla. 3d DCA 2003) (order denying a writ of possession for non-payment of rent).

⁹*Florida Discount Properties, Inc. v. Windermere Condominium, Inc.*, 763 So. 2d 1084 (Fla. 4th DCA 1999) (order denying motion for payment of rent into court registry).

¹⁰*Federal Home Loan Mortgage Corp. v. Molko*, 584 So. 2d 76 (Fla. 3d DCA 1991).

¹¹*See* Fla. R. App. Pro. 9.130 committee notes 1992 amendment.

¹²*Urich & Shenkman, P.A., v. Horizon Ins. Co.*, 491 So. 2d 1195 (Fla. 1st DCA 1986); *Smith v. Daniel Mones, P.A.*, 458 So. 2d 796 (Fla. 3d DCA 1984), quashed in part on other grounds by *Daniel Mones, P.A., v. Smith*, 486 So. 2d 559 (Fla. 1986).

¹³*Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982).

¹⁴*Greene v. Borsky*, 961 So. 2d 1057 (Fla. 4th DCA 2007).

¹⁵*Harrell v. Snyder*, 913 So. 2d 749 (Fla. 5th DCA 2005).

¹⁶*Crigger v. Florida Power Corp.*, 469 So. 2d 941 (Fla. 5th DCA 1985).

¹⁷*Studiale v. Towne*, 664 So. 2d 1157 (Fla. 4th DCA 1995).

¹⁸*Shephard v. Ouellere*, 854 So. 2d 251 (Fla. 5th DCA 2003).

¹⁹*Id.*

²⁰*Miami-Dade County v. Perez*, 988 So. 2d 40 (Fla. 3d DCA 2008) (holding no jurisdiction to review order denying motion for summary judgment on quiet title claim).

²¹*Marina Bay Hotel and Club, Inc., v. McCallum*, 733 So. 2d 1133 (Fla. 4th DCA 1999).

²²*Id.*

²³*Id.*

²⁴*Corzo v. Pineiro*, 990 So. 2d 1177 (Fla. 3d DCA 2008).

²⁵*Profile Investments, Inc., v. Delta Property Management, Inc.*, 957 So. 2d 70 (Fla. 1st DCA 2007).