Attaching Reason, Not Documents, to Rule 1.130

by Tim W. Sobczak and Kurt E. Lee

Fla. R. Civ. P. 1.130 appears to be a concise statement of what should and should not be attached to a pleading. Rule 1.130(a) states:

> Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

Although two of the three sentences contained in this rule address what should not be included within a pleading, Florida litigators appear fixated upon the single sentence of the rule that describes what should be attached and file motions alleging a failure to attach crucial documents to the opposing party's pleadings.[1] These motions are by and large dilatory and, as explained more fully herein, their reliance upon Rule 1.130 often reveals a misunderstanding of the rule. It is time to attach reason to Rule 1.130. Like the comparable federal concept, Rule 1.130 was and is simply intended to provide adequate notice to the parties of claims and defenses made.

Rule 1.130's Main Purpose: Provide Notice

Rule 1.130(a) can generally be said to have two competing purposes. The first sentence requires the pleader to incorporate or attach specified documents; the second and third sentences proscribe excessive incorporation or attachment.[2]

The first sentence's concept of requiring incorporation or attachment of documents appears to date back to the original common law rules adopted by the Florida Supreme Court in 1873.[3] According to Common Law Rule 14, applicable to common law actions in circuit court, "All bonds, notes, bills of exchange, covenants, contracts, and accounts upon which suit may be brought, or a copy thereof, shall be filed with the declaration…."[4] A similar requirement was contained in the rule's various iterations over the years, including Common Law Rule 16 (1936) and Common Law Rule 11 (1950).[5] Since the rule's inception, its purpose in requiring incorporation or attachment of the specified documents has always been "to have the plaintiff apprise the defendant of the nature and extent of the cause of action alleged, in order that he may plead thereto with greater certainty."[6]

The competing concept contained in the second and third sentences finds its derivation from Equity Rule 22 (1950).[7] Equity Rule 22 stated, among other things, that "pleadings…shall contain no unnecessary recitals of deeds, documents, contracts[,] or other instruments…," and "[no papers shall be unnecessarily annexed as exhibits."[8] Clearly, Equity Rule 22's intent was to avoid a surfeit of irrelevant exhibits.

Eventually, the two concepts were merged when, in 1954, the Florida Supreme Court adopted Rule 1.10 as part of the first version of the Rules of Civil Procedure.[9] Rule 1.10 stated the standard in nearly identical language to the modern Rule 1.130 quoted above. Merging the dueling concepts, Rule 1.10's purpose was to "avoid unnecessary recitals of documents not particularly germane to the right of action but to require attachment of those documents upon which the cause of action rests or is dependent."[10]

"Documents Upon Which Action May Be Brought or Defense Made"

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exchange, contracts, accounts, or documents upon which action may be brought or defense made" must be incorporated in or attached to the pleading. Attorneys often utilize the rule's concluding phrase — "documents upon which action may be brought or defense made" — as part of a motion to dismiss or strike to argue that unnecessary documents must be attached to a pleading. A plain reading of Rule 1.130 demonstrates that this is inappropriate.

The clause "documents upon which action may be brought or defense made" is the last of a list of specified types of documents. The types of documents immediately preceding the concluding clause illustrate those envisaged by the rule in accordance with the textual canon of construction known as ejusdem generis.[11] "[B]onds, notes, bills of exchange, contracts, [and] accounts" are all documents that supply one's right to a cause of action or defense. Thus, the terms "documents upon which action may be brought or defense made" are necessarily other types of documents that supply one's right to a cause of action or defense. Although the comments to Rule 1.130 do not elaborate on its terms, the Authors' Comment to Rule 1.120 (Pleading Special Matters) provides support for this concept when it states that "[o]nly documents which give rise to the cause of action or establish the right which has been breached need be attached."[12]

Rule 1.130 does not contemplate the incorporation or attachment of documents that are merely evidence of a portion of the plaintiff's claim.[13] "The question is not whether the written instrument would be admissible in evidence, but whether the action or the defense is derived from the instrument itself."[14] In other words, if the document at issue did not exist but the pleader would still be able to bring the cause of action or assert the defense that was originally intended, then the document need not be attached.

For example, in *Railey v. Skaggs*, 220 So. 2d 689 (Fla. 3d DCA 1969), the plaintiff/beneficiary sought, among other things, to remove the defendant/trustee for alleged abuse of fiduciary power.[15] In the complaint, the plaintiff alleged that a certain proposed agreement between the defendant and the plaintiff illustrated the defendant's breach of his fiduciary duty. The plaintiff did not attach the proposed agreement to the complaint. The trial court dismissed the complaint because it purportedly violated Rule 1.130. The appellate court reversed distinguishing between the proposed agreement, which was only material as evidence of the alleged abuse of fiduciary power, and "the document upon which the cause of action is premised," which was the trust instrument itself.[16]

Rule 1.130 also does not contemplate the incorporation or attachment of documents that relate solely to the representative right to bring an action.[17] Items relating to the representative right to bring an action are: "letters of administration, assignments of contracts, mortgages, judgments and other instruments unless a party to the assignment is suing for a breach of the assignment, claims of lien, notices in construction lien actions, notices to tenants in evictions, and deeds to show title in a party."[18] Stated another way, a document that merely confirms a party's "standing" is not a document "upon which action may be brought" no matter how pervasive the belief that such a document is required to be attached.[19]

Closely related and also not contemplated by Rule 1.130 for attachment or incorporation are documents that are a prerequisite to the pleader's ability to prevail on a cause of action. In a typical foreclosure action for example, the mortgage or promissory note at issue may provide that the mortgagee is required to provide written notice to the mortgagor upon the mortgagor's default. The written notice may be a prerequisite for the mortgagee to prevail on its claim, but the notice is not the document upon which action may be brought.[20]

What Rule 1.130 Permits in Lieu of Attachment

Perhaps the most important misconception of Rule 1.130 is that its strictures can be satisfied only by attachment. Such an interpretation completely disregards Rule 1.130's plain language. However, attorneys often argue and courts rigidly accept the notion that Rule 1.130 requires the attachment of any type of document listed in the rule.[21] There is no doubt that attaching the document at issue may be simpler, but it is not necessary if the pleading adequately incorporates the document.

Rule 1.130 states that the documents listed, "or a copy thereof or a copy of the portions thereof material

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to the pleadings, shall be incorporated in *or* attached to the pleading."[22] The use of the word "or" is significant because it provides the pleader with the choice to attach or to incorporate the portions of documents material to the pleadings into the pleading.[23]

Although there appear to be no Florida cases interpreting the term "incorporated in" as used in Rule 1.130, at the very least it is different from attachment.[24] *Black's Law Dictionary* defines the term "incorporate" as "to combine with something else" or "to make the terms of another document part of a document by specific reference." In common pleading practice, attorneys often "incorporate by reference" the allegations of another portion of the pleading by simply identifying the particular allegations and stating that they are incorporated. There is no reason to suggest Rule 1.130's use of "incorporated in" is any different. Indeed, if "incorporated in" meant "attached," there would be no reason for the rule to separately contain the words "or attach."

In the legal drafting context, Florida courts have specified elements for determining when a collateral document has adequately been incorporated into a contract. "To incorporate by reference a collateral document, the incorporating document must 1) specifically provide 'that it is subject to the incorporated [collateral] document'; and 2) the collateral document to be incorporated must be 'sufficiently described or referred to in the incorporating agreement' so that the intent of the parties may be ascertained."[25] Incorporation simply requires intent to incorporate a particular document and sufficient identification of the document being incorporated.

Thus, Rule 1.130 may be satisfied by merely stating that a particular document at issue is incorporated into the pleading at issue. In a breach of contract action for example, a plaintiff alleging, "the contract dated August 3, 2013, between party A and party B is incorporated herein," would satisfy Rule 1.130's requirements. Such an approach also fulfills Rule 1.130's purpose of providing notice of the claims or defenses made. Unless the parties entered into multiple contracts on the same day, which cannot be clearly identified through typed words, the plaintiff has satisfied the object of Rule 1.130 and apprised the defendant of the nature and extent of the cause of action alleged.[26] Additionally, Florida courts have held that a pleader may satisfy Rule 1.130 by, instead of attaching the document, stating that the document is not within the pleader's possession or control.[27] Clearly, attachment is not always necessary.

Guidance from the Federal Rules

The Federal Rules of Civil Procedure do not explicitly contain a counterpart to Florida Rule 1.130.[28] But, in federal pleading practice, the same concepts driving the Florida rule exist, and they are generally applied as this article suggests Rule 1.130 should be applied.

In federal practice, if a plaintiff's cause of action arises from a document, the plaintiff has the options of quoting the material portions of the document verbatim, attaching the document as an exhibit, or pleading the document according to its legal effect.[29] Thus, motions to dismiss based upon an alleged failure to attach documents are unlikely to be granted by a federal court.[30] When, in the 11th Circuit, a complaint lacks a central exhibit, the remedy is not dismissal; instead, the defendant may supplement the record with the necessary documentation to allow the court to consider the defendant's motion challenging the complaint substantively.[31]

Pleading the legal effect of a document under the federal standard is essentially the same process as incorporation under Rule 1.130. For example, in *Key Club Associates Ltd. P'ship v. Biron*, 1992-1 Trade Cases P 69818 (M.D. Fla. 1992), the plaintiff alleged that the defendants interfered with a contract to purchase property from a third party. The defendants sought to dismiss the complaint because it failed to attach a copy of the contract. The U.S. District Court for the Middle District of Florida denied the defendants' motion because the plaintiff sufficiently pled the legal effects of the contract by referencing the contract within the prima facie allegations of the causes of action.[32]

Like Rule 1.130, the federal rules and concepts pertaining to the incorporation or attachment of documents to pleadings are concerned with the provision of notice to the parties of claims made or defenses asserted.[33] The federal approach facilitates its objective, however, without wasteful pleading exercises. In lieu of an uncompromising attachment requirement, the federal approach simply

requires that documents at issue be addressed within its extant pleading framework. A "short and plain statement of the claim" is required pursuant to Fed. R. Civ. P. 8(a), and the Federal Rules of Civil Procedure do not change this fundamental requirement when a document supplies the pleader's cause of action.

Conclusion

The drafters of the Federal Rules of Civil Procedure largely rejected the rigid and technical pleading requirements of English common law that could cause a party to lose his or her case on technical grounds opting, instead, for the expansive and flexible aspects of equity.[34] "Although the Federal Rules of Civil Procedure and the Florida Rules of Civil Procedure differ in some respects, 'the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules.'"[35]

A vestige of Florida's Common Law Rules past is lingering in the form of Rule 1.130's seeming insistence that attorneys physically attach documents to pleadings that otherwise state a cause of action or defense. But, the requirement of document attachment is inconsistent with the text and spirit of Rule 1.130, as well as the corresponding federal pleading standards.

Under either rubric, description of the document in the pleading should be satisfactory because that provides notice of the pleader's claim or defense sufficient to satisfy Fla. R. Civ. P. 1.110's requirement that a pleading contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." It is time to reattach reason to Rule 1.130 and to adhere to the rule's purpose.❑

[1] *See, e.g.*, 5 Fla. Prac., Civil Practice §7:19 7 (2014-2015 ed.) ("As a general principle, a party who asserts a claim or defense that is based on a written instrument must attach a copy of the instrument to the pleading in which the claim or defense is raised."); Fla. Prac., Motor Vehicle No-Fault Law (PIP) §20:4 (2013-2014 ed.) (providing form motion to dismiss based upon "failure to attach assignment of insurance benefits"); Linda Dickhaus Agnant & Christine M. Hoke, *Pleadings*, Florida Civil Practice Before Trial §12.22 (2013) ("Although Rule 1.130 refers to the incorporation of documents in pleadings, the better practice is to attach copies of required documents to a pleading.").

[2] Fla. R. Civ. P. 1.130(a).

[3] 4 Fla. Prac., Civil Procedure §1.130:1 (2014).

[4] *Poppell v. Culpepper*, 47 So. 351, 352 (Fla. 1908).

[5] 4 Fla. Prac., Civil Procedure §1.130:1 (2014).

[6] *Poppell v. Culpepper*, 47 So. 351, 352 (Fla. 1908); *see also U.S. Rubber Products v. Clark*, 200 So. 385, 388 (Fla. 1941); *Diaz v. Bell MicroProducts-Future Tech, Inc.*, 43 So. 3d 138, 140 (Fla. 3d DCA 2010).

[7] *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So. 2d 598, 605 (Fla. 1966) (Rule 1.130 Committee Note); 1 Norm La Coe, La Coe's Fla. R. Civ. P. Forms R. 1.130 (2014 ed.) (source and history of rule).

[8] Editor's and Revisor's (sic) Notes for Rule 1.130.

[9] 1954 Florida Rules of Civil Procedure, http://www.law.fsu.edu/library/collection/flastat/FlaStat1953/vol2/FlaStat1953v2O-CR_Part1.pdf.

[10] *Braz v. Professional Ins. Corp.*, 101 So. 2d 594 (Fla. 3d DCA 1958).

[11] *See Van Pelt v. Hilliard*, 78 So. 693, 697 (Fla. 1918) ("By the rule of ejusdem generis, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus.").

[12] Fla. R. Civ. P. 1.120 (authors' comment) ("Only documents which give rise to the cause of action or establish the right which has been breached need be attached."); *see Walters v. Ocean Gate Phase I Condominium*, 925 So. 440, 443-44 (Fla. 5th DCA 2006) ("A complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the complaint.").

[13] *See Railey v. Skaggs*, 220 So. 2d 689 (Fla. 3d DCA 1969); *Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155 (Fla. 5th DCA 1981); *International Community Corporation-Tampa v. Davis Water and Waste Industries, Inc.*, 455 So. 2d 1164 (Fla. 2d DCA 1984); *Student Loan Marketing Ass'n v. Morris*, 662 So. 2d 990 (Fla. 2d DCA 1995); *Department of Revenue ex rel. Meire v. Bander*, 734 So. 2d 1145 (Fla. 5th DCA 1999); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489 (Fla. 4th DCA 2001); *Williams v. Palm Coast Blue Water International Corp.*, 954 So. 2d 1264 (Fla. 5th DCA 2007).

[14] 5 Fla. Prac., Civil Practice §7:19 (2014 ed.).

[15] *Railey*, 220 So. 2d at 690.

[16] *Id.*

[17] *See Braz v. Prof'l Ins. Corp.*, 101 So. 2d 594, 595 (Fla. 3d DCA 1958).

[18] Henry P. Trawick, Fla. Prac. & Proc. §6:15 (2013-2014 ed.). *See also PRA, III, LLC v. Little*, 12 Fla. L. Weekly Supp. 1006a (Fla. 6th Cir. 2005) ("Accordingly, since PRA was suing for breach of the credit card agreement, not breach of the assignment, it was not required to attach a copy of the assignment to withstand a motion to dismiss."). *But see Morales v. All Right Miami, Inc.*, 755 So. 2d 198 (Fla. 3d DCA 2000) (finding complaint failed to state cause of action when plaintiff was not the payee identified in the exhibits to the complaint and assignment filed with motion for final default judgment was not made part of the pleadings).

[19] *Compare* 7 Fla. Prac., Motor Vehicle

No-Fault Law (PIP) §20:4 (2013-2014 ed.) (providing form motion to dismiss based upon "failure to attach assignment of insurance benefits"); *with Parkway General Hospital Inc. v. Allstate Insurance Company*, 393 So. 2d 1171, 1173 (Fla. 3d DCA 1981) ("Parkway's allegation of assignment…is sufficient to state a cause of action against Allstate as required by Fla. R. Civ. P. 1.110."); *Personal Injury Solutions LLC v. State Farm Mut. Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 201a (Fla. 17th Cir. 2013) (denying motion to dismiss based upon failure to attach assignment observing, "The present case rests on a breach of the insurance contract, not a breach of the assignment."); *Healthwest Rehabilitation Group Inc. (a/a/o Jatniel D. Rodriguez) v. Progressive American Insurance Company*, 20 Fla. L. Weekly Supp. 933a (Fla. 13th Cir. 2013) (holding similar to *Personal Injury Solutions*); *Bradenton Spine and Joint Center Inc. (a/a/o Randall Marisberger) v. Progressive Express Insurance Company*, 10 Fla. L. Weekly Supp. 544b (Fla. Sarasota Cty. 2003) (holding similar to *Personal Injury Solutions*).

[20] The promissory note and mortgage are the documents that supply the mortgagee's right to a cause of action and, therefore, must be incorporated in or attached to the complaint. *See Feltus v. U.S. Bank National Association*, 80 So. 3d 375, 376 (Fla. 2d DCA 2012). Carrying out this example further, "additional" documents attached to a pleading to demonstrate satisfaction of conditions precedent may actually result in the trial court disagreeing with the plaintiff and dismissing the complaint upon a finding that conditions precedent were not satisfied. *See Progressive Express Ins. Co. v. Broussard*, 12 Fla. L. Weekly Supp. 277b (6th Cir. 2004) (finding that notwithstanding plaintiff's general averment that all conditions precedent had been satisfied, appellate court determined "the [c]omplaint should have been dismissed as the exhibits did not meet the requirements of a demand letter").

[21] *See, e.g., Stein v. Cigna Ins. Co.*, 744 So. 2d 462, 464 (Fla. 4th DCA 1997) (observing that *Safeco Ins. Co. v. Ware,* 401 So. 2d 1129, 1130-31 (Fla. 4th DCA 1981), requires a plaintiff to attach a copy of the pertinent insurance policy to the complaint where the insurer has provided the plaintiff with a certified copy thereof).

[22] Fla. R. Civ. P. 1.130 (emphasis added).

[23] It is also important to note that if a pleader chooses to attach a document, the document need not necessarily be complete. As the Florida Supreme Court stated in *State v. Seaboard Air Line Ry.*, 47 So. 986, 990 (Fla. 1908), "Now we know of no rule or statute requiring the cause of action attached to a declaration to be full and complete within itself, independent of the declaration." This is consonant with Rule 1.130's text. The rule expressly only requires the incorporation or attachment of "the portions…material to the pleadings."

[24] *See Day v. Taylor,* 400 F.3d 1272, 1276 (11th Cir. 2005) ("[A] document need not be physically attached to a pleading to be incorporated by reference into it."); *Gross v. White*, 340 F. Appx. 527, 534 (11th Cir. 2009) ("Even though the documents were not physically attached to the second amended complaint, they were incorporated by reference into it, and the district court did not err in considering them.").

[25] *BGT Group, Inc. v. Tradewinds Engine Services, LLC*, 62 So. 3d 1192, 1194 (Fla. 4th DCA 2011).

[26] *Sachse v. Tampa Music Co.*, 262 So. 2d 17, 19 (Fla. 2d DCA 1972) ("The object of the [r]ule is to apprise the defendant of the nature and extent of the cause of action so that he [or she] may plead with greater certainty….").

[27] *E.g., Parkway Gen'l Hosp., Inc. v. Allstate Ins. Co.*, 393 So. 2d 1171, 1172 (Fla. 3d DCA 1981) ("Parkway alleges that the policy in question is in the sole and exclusive possession of one or more of the defendants and will be produced through discovery. Such an allegation precludes dismissal with prejudice."); *Sachse v. Tampa Music Co.*, 262 So. 2d at 19 (internal citations omitted) ("But where the instrument is not within the pleader's possession or control, as alleged here, such failure to attach should not be fatal to the cause, and the pleader should be given an opportunity, by means of discovery proceedings, to establish the existence of the instrument.").

[28] *See United States v. Vernon,* 108 F.R.D. 741, 742 (S.D. Fla. 1986) ("A reading of the plain language of Fed. R. Civ. P. 10(c) indicates that written instruments are not required to be attached to a party's pleading."); *D'Alessandris v. Ley*, 2007 WL 3256459 at * 1 (M.D. Fla. 2007); *see also* 5A Charles Alan Wright & Arthur R. Miller, Federal Prac. and Proc. §1327 (3d ed. 2004) ("The provision for incorporation of exhibits in Rule 10(c) is permissive only, and there is no requirement that the pleader attach a copy of the writing on which his claim for relief…is based.").

[29] *E.g., Goshen Veneer Co. v. G. & A. Aircraft, Inc.*, 3 F.R.D. 344 (E.D. Pa. 1944); *Key Club Associates, Ltd. P'ship v. Biron*, 1992-1 Trade Cases P 69818 (M.D. Fla. 1992).

[30] *E.g., Acciard v. Whitney*, 2007 WL 4557256 at *1 (M.D. Fla. 2007) (denying motion to dismiss based upon Rule 1.130 in removed action); *see JPMorgan Chase Bank, N.A., v. Hayhurst Mortgage, Inc.*, 2010 WL 2949573 at *4 (S.D. Fla. 2010) (denying portion of motion to dismiss based upon failure to attach documents when identified documents could be obtained in discovery); *Grandrimo v. Parkcrest Harbour Island Condominium Ass'n, Inc.*, 2011 WL 550579 at n.1 (M.D. Fla. 2011) (declining to apply Rule 1.130 in federal action); *Lahtinen v. Liberty Intern. Financial Services, Inc.*, 2014 WL 351999 at *4 (S.D. Fla. 2014) (attempting to invoke Rule 1.130 in motion to dismiss brought in diversity action rebuffed as being inapposite).

[31] *See, e.g., Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 n. 16 (11th Cir. 1999) (noting that when a plaintiff files a complaint based on a document but does not attach a copy of that document to the complaint, the defendant may introduce the document to his or her motion attacking the complaint).

[32] *Biron*, 1992-1 Trade Cases P 69818 ("There was a contract for the purchase of property (¶22). The [d]efendants, who were not parties to the contract, attempted to block or interfere with the transaction by a course of conduct designed to prevent or delay the sale of the property (exhibit A, ¶24). Defendants acted to the detriment of the [p]laintiffs in that the burden and expense of performance of the contract were greatly increased (¶ ¶31, 34, 40, 43, 49, 57, 64, 71). That the transaction ultimately occurred is evidence of its contractual existence. Therefore, the [c]ourt finds that the complaint is not defective for want of an attached copy of the contract.").

[33] *See generally* Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief must contain…a short and plain statement of the claim showing that the pleader is entitled to relief…."); Fed. R. Civ. P. 8(b) ("In responding to a pleading, a party must: state in short and plain terms its defenses to each claim asserted against it…."); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."); *Marsh U.S.A., Inc. v. Walpole, Inc.,* 2005 WL 2372006 at *2 (M.D. Fla. 2005) (finding that a counterclaim gave the plaintiff notice of the claims against it and sufficient information to properly formulate a defense even when a contract was alleged to exist but was not attached to the counterclaim).

[34] Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 922 (1987).

[35] *Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282, 1283 (Fla. 1992) (citing *Miami Transit Co. v. Ford*, 155 So. 2d 360, 362 (Fla. 1963)); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565 (Fla. 1971) (noting that Florida's rules were modeled after Federal Rules of Civil Procedure).

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