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Practice and Pleadings

Robert Singletary

PRACTICE AND PLEADINGS

I. LONG ARM STATUTE

Several court opinions of 1981 served to clarify the nature and extent of contacts required under the District of Columbia Long Arm Statute. The statute, found at section 13-423 of the D.C. Code, provides a number of grounds on which in personam jurisdiction may be based.[1] It is a codification of the "minimum contacts" doctrine first enunciated in *International Shoe Co. v. Washington*.[2]

In *Steinberg v. Interpol*,[3] the United States Court of Appeals for the District of Columbia Circuit examined section 13-423(a)(4). This subsection grants jurisdiction for causing tortious injury in the District of Columbia through actions outside the jurisdiction. In *Steinberg*, plaintiff brought a defamation action against defendant Interpol. The suit was based on Interpol's distribution of a document in the United States and other countries listing plaintiff as a wanted international criminal. Except for this act, Interpol's contacts with the United States were few. It disseminated information here and maintained close contact with the Department of Justice, but kept no offices within the United States. Its interaction with this country was limited to the exchange of information with the United States National Central Bureau (USNCB). The trial court found these contacts

1. D.C. CODE ANN. § 13-423 (1981) provides:

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—

. . . .

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia . . . .

2. 326 U.S. 310 (1945). In *International Shoe* the Supreme Court replaced the previous jurisdictional fictions of "presence," "consent" and "doing business," with "minimum contacts." Under the minimum contacts test, jurisdiction will be exercised if defendant's contacts with the forum state make it fair and just to subject it to defend a suit there. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court of Calif., 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); McGee v. International Life Ins. Co., 355 U.S. 220 (1957). For background on the jurisdictional concepts preceeding *International Shoe*, see 2 J. MOORE, J. LUCAS, & J. WICKER, MOORE'S FEDERAL PRACTICE § 4.25[2] (2d ed. 1981).

3. 672 F.2d 927 (D.C. Cir. 1981).

insufficient to fulfill the requirements of section 13-423(a)(4), and dismissed for lack of jurisdiction.

The United States Court of Appeals for the District of Columbia Circuit reversed. At the outset, it noted that the jurisdictional question was not whether the plaintiff should sue in another forum but whether the plaintiff was entitled to any forum. Framing the issue in terms of whether Interpol should be held answerable at all within the United States, the court turned to an examination of Interpol's contacts. It found the communications with USNCB sufficient, standing alone, to justify jurisdiction.

In *Mouzavires v. Baxter*,[4] defendant's contacts were even fewer than in *Steinberg*. Plaintiff, a local law firm, had been engaged by defendant, a Florida law firm, to assist the defendant in a lawsuit. Plaintiff's contacts with the forum consisted of its preliminary telephone call to defendant and the execution of a subsequent retainer agreement by mail. Later, a dispute arose between the parties as to compensation and the plaintiff sued in the Superior Court of the District of Columbia. Jurisdiction was based on the "transacting any business" provision of section 13-423(a)(1). In reversing the lower court's quashing of service, the District of Columbia Court of Appeals stated that the language of subsection (a)(1) granted an expansive basis for jurisdiction. The relevant consideration, the court said, was whether the defendant engaged in any contractual activities which have a consequence in the District. If there were a sufficient connection between the defendant and the District to require the defendant to appear, the requirements of subsection (a)(1) would be met and in personam jurisdiction would be found.

The *Steinberg* and *Mouzavires* decisions change the District of Columbia's concept of long-arm jurisdiction. The resulting view differs significantly from *International Shoe* and subsequent cases. In some respects, the District's approach is more constrained than the *International Shoe* doctrine. Section 13-423(b) requires the claim to be related to the activities on which jurisdiction is based. In contrast, *International Shoe* holds only that the jurisdiction must not violate the due process clause of the fourteenth amendment;[5] "relationship" is not necessarily a prerequisite to meeting the due process test.[6] Since the District statute requires relationship while the common law does not, the District concept is in this respect more strict.

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4. 434 A.2d 988 (D.C. 1981).

5. 326 U.S. 310 (1945) (state laws regarding personal jurisdiction are constrained by the due process clause). *See also* Shaffer v. Heitner, 433 U.S. 186 (1977) (all bases of jurisdiction must conform with the due process clause).

6. In *International Shoe*, the court recognized that "there have been instances in which the continuous operations within a state were . . . of such a nature as to justify suit against it

In other respects, the District approach to long-arm jurisdiction exceeds the limits set by the *International Shoe* doctrine. In *Hanson v. Denckla*,[7] the Supreme Court reiterated that only the defendant's activities may be examined when considering the minimum contacts question. The test is whether the defendant's actions in view of "fair play and substantial justice" render it acceptable to require the defendant to appear.[8] *Steinberg*, however, approached the question differently. It termed the issue as whether the plaintiff should have a forum at all in the United States. It considered the fairness and convenience to the plaintiff rather than to the defendant. As such, the focus of the court's inquiry in *Steinberg* was misplaced.

Nevertheless, the court probably reached the correct result for long-arm jurisdiction could have been found based solely on an examination of Interpol's activities within the United States. Interpol derived substantial benefit from the information exchanged with USNCB. Thus, under *International Shoe* and its progeny, there was enough contact to find jurisdiction. By focusing, however, on the convenience of the plaintiff the court confused the approach mandated by *International Shoe*.

Similarly, in *Mouzavires*, the court examined the activities of both the defendant and the plaintiff. The court's justification for this approach was the previous agency relationship between the parties. The plaintiff's actions as agent, it argued, were attributable to the defendant. Nevertheless, this was a needless expansion of the *International Shoe* approach. Jurisdiction could have been found on defendant's actions alone. For example, telephone calls and correspondence have been the basis of long-arm jurisdiction.[9] *Mouzavires* went further, however, and established the principle that, when a former agent sues a nonresident principal, the activities of the agent may grant jurisdiction over the nonresident principal. This caveat undermines the *Hanson* approach of ignoring unilateral acts of the plaintiff.[10]

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on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318 (citations omitted).

7. 357 U.S. at 253.

8. *International Shoe*, 326 U.S. at 316.

9. *See Mouzavires*, 434 A.2d at 995, *citing* Morton v. Environmental Land Systems, Ltd., 55 Ill. App. 3d 369, 370 N.E.2d 1106 (1977); Cook Assoc. Inc. v. Colonial Broach & Mach. Co., 14 Ill. App. 3d 965, 304 N.E.2d 27 (1973); G & W Body Works, Inc. v. Estate of Eschberger, 557 S.W.2d 835 (Tex. Civ. App. 1977); Cohn-Daniel Corp. v. Corporacion De La Fonda, Inc., 514 S.W.2d 338 (Tex. Civ. App. 1974).

10. *See supra* note 7 and accompanying text.

II. LIMITATIONS OF ACTIONS

In *Dupree v. Jefferson*,[11] the United States Court of Appeals for the District of Columbia Circuit for the first time addressed whether the statute of limitations was tolled during the pendency of a suit later involuntarily dismissed without prejudice. The plaintiff sued the district, its chief of police, and several other police officials. A prior suit on the same claim had been involuntarily dismissed without prejudice. During the pendency of the prior suit, the time limit under the applicable statute of limitations had run. When the second action was brought, the trial court held that the statute was not tolled during the first suit, and therefore plaintiff's second action was time barred.[12]

The United States Court of Appeals for the District of Columbia affirmed. It noted that although the issue had not been resolved, *York & York Construction Co. v. Alexander*[13] had addressed a similar problem. In *York*, the District of Columbia Court of Appeals had determined that statutes of limitations are not tolled during a suit later voluntarily dismissed without prejudice. This followed the United States Supreme Court decision of *Willard v. Wood*.[14] The District of Columbia Circuit extended *York*'s reasoning to the instant case, stating that the important consideration was not whether the dismissal was involuntary or voluntary, but rather whether it was without prejudice. Thus, the court held that the statute of limitations in the District of Columbia is not tolled during the pendency of a suit later involuntarily dismissed without prejudice.

In the District of Columbia, the statute of limitations applicable to fraud actions begins to run when the injured party either discovers the fraud or when he would have discovered it after a diligent effort.[15] In *Richards v. Mileski*,[16] the District of Columbia Circuit extended this "discovery" rule to an unusual set of facts.

In *Richards*, the plaintiff sued six former federal officials alleging numerous tort injuries.[17] Each claim arose out of the defendants' alleged in-

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11. 666 F.2d 606 (D.C. Cir. 1981).

12. Dupree v. Jefferson, No. 79-1847 (D.D.C. May 29, 1979) (order dismissing action as time barred).

13. 296 A.2d 710 (D.C. 1972).

14. 164 U.S. 502 (1896).

15. International Ladies' Garment Workers v. NLRB, 463 F.2d 907 (D.C. Cir. 1972); Carmichael v. Egan, 433 F. Supp. 465 (D.D.C.), *rev'd*, 584 F.2d 558 (D.C. Cir. 1978); King v. Kitchen Magic, Inc., 391 A.2d 1184 (D. C. 1978); Doolin v. Environmental Power, Ltd., 360 A.2d 493 (D.C. 1976).

16. 662 F.2d 65 (D.C. Cir. 1981).

17. Richards' complaint contained the following counts: fraudulent misrepresentation, defamation of character, interference with economic advantage, intentional infliction of se-

tentional falsification of investigative reports. These reports, made while plaintiff was an employee of the United States Information Agency, labeled Richards a homosexual. Because of these charges, Richards resigned in 1955. At that time, Richards knew neither the source of the charges nor of the falsified reports. Twenty-three years later, through a Freedom of Information Act request, Richards learned of the falsifications and promptly brought suit.[18]

The trial court granted defendant's motion to dismiss without oral argument. Motions to reconsider and for leave to amend were similarly denied. The District of Columbia Circuit reversed and remanded. The court first noted that for federal claims in which no statute of limitations is specified, the appropriate local statute is used.[19] Second, it stated that even when the local statute is borrowed, policies as to tolling of limitations on federal claims remain a federal question.[20] Tolling policies of common law tort claims are governed by district precedents.[21] In view of the foregoing, the appeals court found Richards' action not barred by the statute of limitations. It held that the statute of limitations began to run upon discovery. The long period of time between the alleged tort complained of and its discovery was irrelevant to computation of the limitations period.

III. VOLUNTARY DISMISSAL

Rule 41(a)(1) of the Federal Rules of Civil Procedure[22] governing a plaintiff's right to voluntary dismissal, was adopted to guard against abu-

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vere emotional distress, and violation of constitutional rights to privacy, due process and the privileges and immunities of citizenship. *Id.* at 67.

18. *Id.*

19. The court cited Fitzgerald v. Seamans, 553 F.2d 220, 223 (D.C. Cir. 1979). *Accord*, Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975); Macklin v. Specter Freight Sys., 478 F.2d 979, 994 (D. C. Cir. 1973); UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

20. *See* Fitzgerald v. Seamans, 553 F.2d 220, 228 (D.C. Cir. 1977).

21. The court cited Nyhus v. Travel Management Corp., 466 F.2d 440, 443 n.11 (D.C. Cir. 1972). *Accord*, Filson v. Fountain, 197 F.2d 383, 384 (D.C. Cir. 1952); Kaplan v. Manhattan Life Ins. Co., 109 F.2d 463, 465-66 (D.C. Cir. 1940); Wells v. Alropa Corp., 82 F.2d 887, 888 (D.C. Cir. 1936).

22. FED. R. CIV. P. 41(a)(1); D.C. SUPER CT.—CIV. R. 41(a)(1). These rules are identical and provide in part:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . . Unless otherwise stated in the notice of dismissal . . . the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

sive use of voluntary nonsuits.[23] Prior to its adoption, federal courts applied state law on voluntary dismissals in actions at law,[24] pursuant to the Conformity Act.[25] State law varied widely but, in general, allowed liberal use of voluntary nonsuit.[26] In the District of Columbia, a plaintiff could take nonsuit at any point up to the rendering of a verdict, subject only to payment of the defendant's costs.[27] These liberal nonsuit provisions provided a powerful tool in vexatious litigation.[28] Rule 41(a)(1) changed this by granting a right to voluntary nonsuit only until defendant's answer was served or until motion for summary judgment was made.[29]

In *Bernay v. Sales*,[30] the District of Columbia Court of Appeals considered whether to impose additional restrictions, beyond those stated in the rule on the nonsuit. In *Bernay*, plaintiff Sales had filed suit against Bernay alleging loss of consortium, alienation of affection, and criminal conversation. The two latter causes of action have since been abolished by statute in the District of Columbia.[31] Although the plaintiff initially obtained a default judgment, the case was subsequently reopened and pretrial motions were made. At this point, plaintiff filed a notice of dismissal of her complaint. Although defendant opposed the notice, the trial court held that

23. 5 J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE — 41.02[1] (2d ed. 1981) (citing numerous United States Courts of Appeals opinions); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2363 at 151-52 (1971) [hereinafter cited as C. Wright & A. Miller].

24. C. WRIGHT & A. MILLER, *supra* note 23, at 151; *but see* Jones v. S.E.C., 298 U.S. 1, 19 (1936), where the Supreme Court indicated that voluntary nonsuits may be taken in both legal and equitable actions: "[A] plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter."

25. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, U.S. REV. STAT. tit. 13, ch. 18 § 914, *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992.

26. In some states, plaintiffs could dismiss up to the point where issue was joined. In others, the right existed until trial began. In still others, dismissal could be had until the case was submitted to the jury, and in some, at any time prior to verdict. C. WRIGHT & A. MILLER, *supra* note 23, at 151. For a survey of previous state law on the subject, see Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20 (1920) and Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice*, 37 VA. L. REV. 969 (1951).

27. American Electrotype Co. v. Kerschbaum, 105 F.2d 764 (D.C. Cir. 1939) (per curiam).

28. Through the use of voluntary dismissal, defendant could be required to defend fully a number of times against the same claim without the benefit of a conclusive judgment. *See generally id.*

29. Rule 41(a)(1), *supra* note 22. It is important also to note the two-dismissal limitation. A second voluntary dismissal based upon or including the same claim is deemed an adjudication on the merits and becomes law of the case.

30. *Bernay*, 424 A.2d 123 (D.C. 1980), *vacated*, 435 A.2d 398 (1981) (per curiam).

31. D.C. CODE ANN. § 16-923 (1981).

since plaintiff was technically in compliance with Rule 41(a)(1)(i), dismissal must be granted. On appeal, the District of Columbia Court of Appeals affirmed the lower court's findings that plaintiff was in technical compliance, but held that plaintiff was not entitled to dismissal as a matter of right, under the doctrine enunciated by the Second Circuit in *Harvey Aluminum, Inc. v. American Cyanamid Co*.[32] Rather, the court of appeals said that dismissal should be granted, if at all, under Rule 41(a)(2), which provides for dismissal only by court order. In *Harvey*, the Second Circuit held that dismissal is unavailable despite Rule 41(a)(1)(i) if three conditions exist: (1) the merits of the controversy have been fully presented to the court; (2) the defendant has expended considerable amounts of time and effort in establishing his or her defense; and (3) the plaintiffs chances of success on the merits are extremely remote.[33] Noting that all three factors were present in *Bernay*, the court remanded for a determination of whether dismissal with court approval should be granted.[34]

Subsequently, however, the court of appeals granted plaintiff's petition for rehearing and repudiated its previous adoption of *Harvey*.[35] In a per curiam opinion, the court noted that the *Harvey* exception undermines the compromise achieved in Rule 41(a)(1) and, as such, "presents an awkward and potentially inequitable alternative to the rule."[36] It now found the rationale underlying the *Harvey* conditions to be the product of "vague tests, susceptible of not only broad but inconsistent applications."[37]

In rejecting the previously adopted *Harvey* exception, the court of appeals has moved away from a distinctly minority view of Rule 41(a)(1). Several circuits have criticized the *Harvey* doctrine and refused to adhere to it.[38] The Second Circuit itself has admitted its weaknesses.[39] *Harvey* is

32. 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953).

33. *Harvey*, 203 F.2d at 107-08.

34. *Bernay*, 424 A.2d at 125, 129.

35. Bernay v. Sales, 435 A.2d 398, 402-03 (D.C. 1981) (per curiam).

36. *Id.* at 403.

37. *Id.*

38. D.C. Electronics, Inc. v. Nartron Corp., 511 F.2d 294, 297-98 (6th Cir. 1975) (merits of controversy not before court thus *Harvey* rationale is without validity); Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters, 506 F.2d 914 (5th Cir.), *cert. denied*, 422 U.S. 1048 (1975) (only minimum amount of time expended and no contention that there was only a minimal chance of success on merits; alternative holding rejected broad reading of *Harvey*); Littman v. Bache & Co., 252 F.2d 479 (2d Cir. 1958) (merits not before court).

39. Thorp v. Scarne, 599 F.2d 1169 (2d Cir. 1979). The Second Circuit in this case said:

> [W]hile *Harvey Aluminum* may have furthered one purpose of Rule 41(a)(1)(i), that of confining dismissals to an early stage of the proceedings, it did so at the expense of a concurrent and perhaps equally important purpose, that of establishing a bright line test marking the termination of a plaintiff's otherwise unfettered right voluntarily and unilaterally to dismiss an action.

increasingly being strictly limited to its facts. In the District of Columbia, technical compliance with Rule 41(a)(1) continues to insure voluntary dismissal as a matter of right. As a result, the District retains an easily administered, bright line test for voluntary nonsuit. In avoiding the indefinite determination and application of the *Harvey* criteria, moreover, the *Bernay* holding advances the purpose of Rule 41(a)(1). The rule as now interpreted advances the goals of certainty, uniformity, and consistency by giving parties clear instructions as to when a voluntary nonsuit may be taken.

IV. ADMISSIONS UNDER RULE 36

Under Rule 36 of the Federal Rules of Civil Procedure, one party may request another party to admit the truth of designated issues.[40] If the other party failes to respond within thirty days, those issues are deemed admitted.[41] Before its amendment in 1970, however, the rule was ambiguous about the extent to which a party was bound by his admissions.[42] The changes made by the 1970 amendments were designed to clarify this ambiguity.[43] They termed Rule 36 admissions as "conclusive."

Id. at 1175.

40. FED. R. CIV. P. 36; D.C. SUPER. CT.—CIV. R. 36.

41. Rule 36(a) states in part:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .

FED. R. CIV. P. 36(a); D.C. SUPER. CT.—CIV. R. 36(a).

42. Prior to the amendments, a number of courts viewed Rule 36 admissions as equivalent to sworn testimony. Under those cases, admissions under the rule could be controverted. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2264, at 741-42 nn.78-80 (1971).

43. Rule 36(b) now reads:

> (b) *Effect of Admission*. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party [pursuant to such request] *under this rule* is for the purpose of the pending action only and [neither constitutes] *is not* an admission by him for any other purpose nor may *it* be used against him in any other proceeding.

Material added in 1970 is italicized. Deleted material is bracketed. *See also* 4A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 36.01[6] (2d ed. 1981). FED. R. CIV. P. 36; D.C. SUPER. CT.—CIV. R. 36.

In *Rainbolt v. Johnson*,[44] the United States Court of Appeals for the District of Columbia for the first time considered to what degree a trier of fact was required to recognize admissions. Plaintiff brought suit against a trustee and his wife alleging breach of trust and conspiracy. The United States District Court referred the matter to an Auditor-Master. During discovery, plaintiff served a number of requests for admissions on both defendants, however, these were not answered within the thirty day limit nor at any subsequent time prior to trial. The Auditor-Master made a report to the district court containing findings of fact, conclusions of law, and a recommended finding. In his report, the Auditor-Master gave binding effect to some of the issues deemed admitted by defendants' failure to respond, but completely ignored others. The district court adopted the report and rendered judgment for plaintiff.

Because the Auditor-Master had ignored admissions that entitled plaintiff to damages five times greater than those actually granted, Rainbolt appealed the judgment. He argued that the Auditor-Master should have given binding effect to all admissions. The court of appeals agreed and held that all admissions were conclusively binding. It remanded the case to the district court with instructions to enter judgment for the higher amount.[45]

The *Rainbolt* decision is in keeping with the purpose of the 1970 amendments.[46] If admissions are not deemed conclusive, Rule 36 is of little help in framing and narrowing the issues before trial. Conversely, parties would have to prepare evidence and defenses despite the securing of admissions. As a result, the time required to prepare for and conduct a trial would be considerably lengthened.

V. NOTICE: SUITS AGAINST THE SOVEREIGN

The District of Columbia has in some circumstances statutorily waived the immunity granted it by the common law doctrine of sovereign immu-

44. 669 F.2d 767 (D.C. Cir. 1981).

45. *Id.* at 769.

46. The advisory committee note on the 1970 amendments state:

> The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. . . . Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.

FED. R. CIV. P. 36 advisory committee note (citations omitted).

nity.[47] As a prerequisite to the grant of a particular cause of action, section 12-309 of the D.C. Code requires notice be given the District within six months after the cause of action arises.[48] In *Gwinn v. District of Columbia*,[49] the District of Columbia Court of Appeals for the first time addressed whether the required period for notice is tolled during plaintiff's minority.[50]

In *Gwinn*, plaintiff-appellant sued supervisory school personnel for injuries sustained during an altercation on school grounds in June 1968.[51] Gwinn was eleven years old at the time of the incident. No written notice of the claim was given to the District of Columbia until suit was filed in January 1978, over nine years after the injury had occurred. The trial court granted defendant-appellee's motion to dismiss with prejudice on the ground that the notice requirements of section 12-309 had not been met.

On appeal to the District of Columbia Court of Appeals, Gwinn argued that section 12-302 of the D.C. Code should be incorporated implicitly into the notice provision. Section 12-302 of the D.C. Code allows for the tolling of the statute of limitations during a prospective litigant's minority.[52] The court, however, rejected this argument. Noting that section 12-309 is in derogation of the doctrine of sovereign immunity, the court stated that it should be strictly construed.[53] To permit the notice period to be tolled during minority would allow a delay in excess of seventeen years before the District of Columbia need be notified. Such a holding would ignore both

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47. D.C. CODE ANN. § 1-1202 (1981).

48. D.C. CODE ANN. § 12-309 (1981) provides in relevant part:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage.

49. 434 A.2d 1376 (D.C. 1981).

50. The District of Columbia Court of Appeals has previously addressed the procedure and sufficiency of notice under § 12-309. *See* DeKine v. District of Columbia, 422 A.2d 981 (D.C. 1980); Breen v. District of Columbia, 400 A.2d 1058 (D.C. 1979); Washington v. District of Columbia, 429 A.2d 1362, 1365 (D.C. 1981).

51. The plaintiff's complaint alleged District school employees were negligent in their failure to prevent the altercation, in their failure to stop it once it had commenced, and in their failure to obtain medical attention for plaintiff. Plaintiff's injuries included the loss of sight in one eye.

52. D.C. CODE ANN. § 12-302 (1981) provides in pertinent part: "(a) . . . [W]hen a person entitled to maintain an action is, at the time the right of action accrues: (1) under 18 years of age . . . he or his proper representative may bring action within the time limited after the disability is removed."

53. 434 A.2d at 1378. *See* Pitts v. District of Columbia, 391 A.2d 803 (D.C. 1978); Braxton v. National Capital Housing Auth., 396 A.2d 215 (D.C. 1978). *See also* Stone v. District of Columbia, 237 F.2d 28, 34 (D.C. Cir. 1956) (Prettyman, J., dissenting).

statutory language and legislative purpose.[54] Therefore, the court held that the required time period for notice of claim under section 12-309 is not tolled during the minority of the prospective plaintiff.[55]

VI. ATTACHMENT BEFORE JUDGMENT

The Supreme Court has held that state statutes granting the provisional remedy of attachment before judgment must meet the requirements of the due process clause.[56] To pass this test, the statutes must provide certain protections for the defendant-debtor.[57] The District of Columbia statute providing for attachment before judgment[58] has been held to conform to these requirements.[59] One of the protections it provides is to require the

54. *Gwinn*, 434 A.2d at 1378. *See also* Shehyn v. District of Columbia, 392 A.2d 1008, 1013 (D.C. 1978); Miller v. Spencer, 330 A.2d 250, 251 (D.C. 1974); Hurd v. District of Columbia, 106 A.2d 702, 704 (D.C. 1954).

55. *Gwinn*, 434 A.2d at 1378-79.

56. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

U.S. CONST. amend. XIV, § 1 states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

57. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (defendant's protections include the right to have plaintiff post a protective bond, the right to recover possession of the goods if the defendant posts a bond, and the right to a hearing prior to any seizure of his property).

58. D.C. CODE ANN. § 16-501 (1981) provides in pertinent part:

> (a) This section applies to any civil action in the United States District Court of the District of Columbia or the Superior Court of the District of Columbia, for the recovery of:
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> (1) specific personal property;
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> (2) a debt; or
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> (3) damages for the breach of a contract, express or implied.
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> . . . .
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> (e) Before a writ of attachment and garnishment is issued, the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment; except that in any case in which the plaintiff states in his affidavit that the value of specified property to be levied upon is less than the amount of his claim, the court may set the amount of such bond in an amount twice the value of the property being attached, and, notwithstanding the provisions of subsection (f) of this section, only the property so specified shall be levied upon . . . .
>
> (f) If the plaintiff files an affidavit and bond as provided by this section, the clerk shall issue a writ of attachment and garnishment, to be levied upon as much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff.

59. Tucker v. Burton, 319 F. Supp. 567, 572 (D.D.C. 1970). For a discussion of the validity of prejudgment seizures, see Annot., 18 A.L.R. FED. 223 (1974); Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973).

posting of a bond by the plaintiff. This procedure is designed to insure defendant against damages arising from wrongful attachment. The amount of the bond must be for twice the amount of the claim or, if the value of the property attached is less than the amount of the claim, twice the value of the property seized.[60] In *Metro Rentals, Inc. v. Wagner*,[61] the District of Columbia Court of Appeals addressed whether the posting of a bond for less than the statutorily required amount renders the subsequent writ of attachment void.

Metro Rentals sought to set aside the writ of attachment of a competing judgment creditor, Wagner. Wagner had previously obtained a judgment against the common judgment debtor in Virginia and had filed suit on the judgment in the District of Columbia. Pending the outcome of the District of Columbia suit, Wagner moved under section 16-501 for prejudgment attachment of funds in control of a local law firm. The trial court granted the motion and ordered the appellee Wagner to post bond equal to the amount of his claim. Appellant Metro Rentals, through a separate action, obtained a writ of attachment on the same funds at a later date. Metro Rentals sought and was granted leave to intervene in Wagner's case against the common defendant for the purpose of establishing the priority of the liens. Metro Rentals moved to have Wagner's attachment declared void on the ground that Wagner had failed to post bond in the amount required by section 16-501(e). The trial court denied the motion.

On appeal, appellant again argued that the filing of a proper bond was a prerequisite to the validity of the issued writ. The District of Columbia Court of Appeals disagreed and affirmed the trial court's ruling. The purpose of the bond requirement, it said, was to protect the defendant-debtor. The filing of an affidavit required under section 16-501(b), (c), and (f), provided the jurisdictional basis for the writ to issue. When bond posted was for less than the required amount, the proper course was to allow defendant to proceed under section 16-505,[62] rather than to set aside the writ. In view of the available statutory remedy and the perceived limited pur-

60. D.C. CODE ANN. § 16-501(e) (1981).

61. 435 A.2d 1072 (D.C. 1981).

62. D.C. CODE ANN. § 16-505 (1981) provides:

> The defendant or any other person interested in the proceedings who is not satisfied with the sufficiency of the surety or with the amount of the penalty named in the bond filed pursuant to section 16-501, may apply to the court for an order requiring the plaintiff to give an additional bond in such sum and with such security as may be approved by the court. If the plaintiff fails to comply with any such order the court may order the attachment to be quashed and any property attached or its proceeds to be returned to the defendant or otherwise disposed of, as to the court may seem proper.

pose of section 16-501(e), the court held that a statutorily insufficient bond did not affect the validity of the issuing writ.

The court cited *Cooper v. Reynolds*,[63] and *W.B. Moses & Sons v. Hayes*[64] to support this conclusion. *Cooper*, however, involved the interpretation of a Tennessee attachment statute. The reliance on *Cooper* as controlling the interpretation of the District of Columbia statute in both *Moses* and *Metro Rentals* appears misplaced. Further, *Moses* and *Cooper* involved defendant-debtor challenges to the validity of writs issued upon them. As such they are not factually on point. The holding in *Metro Rentals* ignores the language of section 16-501(f) which directs the clerk to issue a writ of attachment "[i]f the plaintiff files an affidavit and *bond* as provided by this section . . . ."[65] The section clearly requires posting of a bond for twice the amount of the claim. Also ignored are cases which stress that attachment before judgment is a drastic remedy and requires strict compliance with statutory procedures.[66]

Despite its questionable support, *Metro Rentals* establishes that failure to meet the bond requirements of section 16-501(e) does not affect the validity of the writ of attachment subsequently issued. Failure to meet the affidavit requirements of section 16-501(b), (c), and (d) renders the writ void.[67] Failure to meet the notice requirements of section 16-502 renders the lien created by the attachment unperfected.[68]

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63. 77 U.S. (10 Wall.) 308 (1870).

64. 36 App. D.C. 194 (D.C. Cir. 1911).

65. *See* D.C. CODE ANN. § 16-501(f) (1981), *supra* note 58 (emphasis added).

66. Jack Development, Inc. v. Howard Eales, Inc., 388 A.2d 466, 468-69 (D.C. 1978) (noncompliance with notice requirements under attachment statute renders lien unperfected against other; priority lost as to those persons); Petroni v. Bass, 186 F. Supp. 759, 760 (D.D.C. 1960) (conclusory statements contained in affidavit insufficient to state facts showing grounds of claim; affidavit held insufficient and writ quashed); Rieffer v. Home Indemnity Co., 61 A.2d 26, 27 (D.C.), *modified on other grounds*, 62 A.2d 371 (D.C. 1948) (facts alleged in affidavit held insufficient to allow conclusion that debtor was evading service of process; writ quashed).

67. *Petroni*, 186 F. Supp. at 760; *Rieffer*, 61 A.2d at 27.

68. *Jack Development, Inc.*, 388 A.2d at 468.