1979

Products Liability

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CASENOTES


In recent years, the evolution and expansion of products liability law

1. Products liability is liability imposed on a manufacturer, processor, or non-manufacturing seller of a defective product that causes injury to a third person. See R. Hursh & H. Bailey, *American Law of Products Liability*, § 1.1 (2d ed. 1974). The term products liability encompasses three distinct grounds of liability: negligence, breach of warranty, and strict liability in tort. *Id.* at § 1.3. In a products liability action based on negligence, a plaintiff must prove all the elements required for recovery in an ordinary negligence action (e.g., duty, breach of duty, causation, and injury.) *Id.* at § 1.4. In strict liability actions, a plaintiff must establish the defective condition of the defendant's product, a causal connection between the defective condition and the plaintiff's injury. *Id.* at § 1.5. In actions arising from breach of warranty, the plaintiff must establish the existence of a warranty, its breach, and a causal connection between the breach and the injury. *Id.* at § 1.4. See also W. Prosser, *Law of Torts* §§ 96-99 (4th ed. 1971).


A number of courts, seeking a theoretical basis for the liability, have resorted to a 'warranty,' either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of 'warranty' to the user or consumer. But if this is done, it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is
has been both rapid and pervasive. Until the last decade, however, this
not subject to the various contract rules which have grown up to surround such
sales.

RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1977).

Although implied warranty and strict liability are sometimes regarded as the same legal
right and remedy, there is at least a conceptual distinction between the two. As the District
of Columbia Court of Appeals stated in Cottom v. McGuire Funeral Serv., Inc., 262 A.2d
807 (D.C. 1970):

Implied warranty recovery is based upon two factors: (a) the product or article in
question has been transferred from the manufacturer's possession while in a 'defec-
tive' state . . . and (b) as a result of being 'defective', the product causes personal
injury or property damage. On the other hand, strict liability in tort is imposed on
a manufacturer when an article he places on the market . . . proves to have a
defect that causes injury to a human being or his property.

Id. at 808.

2. The origin of modern products liability law has traditionally been traced to the
which the court dispensed with the privity of contract requirement in negligence actions in
order to allow an injured plaintiff to recover against the negligent manufacturer of an auto-
mobile. Recent case law has substantially extended products liability to encompass all par-
ticipants in the manufacturing process, regardless of negligence, under theories of implied
warranty and/or strict liability. See, e.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256,
391 P.2d 168, 37 Cal. Rptr. 896 (1964) (products liability extends to all parties who are
integral to the overall production and manufacturing process); Greenman v. Yuba Power
Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (manufacturer of defective
power tool held strictly liable in tort to injured consumer); Goldberg v. Kollsman Instrument
held liable to passenger under implied warranty of fitness and merchantability); Randy
(1962) (privity of contract not required to recover on express warranty of defendant manu-
ufacturer). See generally text accompanying notes 17-30 infra. For a history of the rapid
development of products liability law, see Prosser, Assault Upon the Citadel, supra note 1, at
1099-114; Note, The Expanding Scope of Enterprise Liability, 69 COLUM. L. REV. 1084
(1969); PROSSER, supra note 1, at §§ 96 to 104.

3. To date, forty-two states and the District of Columbia have adopted the concept of
strict products liability. See, e.g., Julander v. Ford Motor Co., 488 F.2d 839 (9th Cir. 1973)
(interpreting Utah law); Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alaska
1969); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968) (en banc); Greenman v.
General Motors Corp., 544 P.2d 983 (Colo. 1975) (en banc); Garthwait v. Burgio, 153 Conn.
290, 216 A.2d 189 (1965); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976);
Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); West v. Caterpillar Tractor Co.,
336 So. 2d 80 (Fla. 1976); Ford Motor Co. v. Lee, 137 Ga. App. 486, 224 S.E.2d 168 (1976),
modified on other grounds, 237 Ga. 554, 229 S.E.2d 379 (1976); Stewart v. Budget Rent-A-
Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970); Shields v. Morton Chemical Co., 95 Idaho
674, 518 P.2d 857 (1974); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965);
Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973); Hawkeye Security
Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970), aff'd on rehearing, 199 N.W.2d 373
v. Battery Distrib. Co., Inc., 402 S.W.2d 441 (Ky. 1965); Weber v. Fidelity & Casualty Ins.
Co. of N.Y., 259 La. 599, 250 So. 2d 754 (1971); Phipps v. General Motors Corp., 278 Md.
337, 363 A.2d 955 (1976); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129
doctrine was almost exclusively limited in application to the sale of chattels and remained virtually untouched in sales of real property. Traditionally protected by the doctrine of caveat emptor, builders and sellers were able to escape liability for damage caused by defects in real property. On the heels of several recent decisions, however, products liability has


4. The delayed application of products liability to the sale of realty was caused by the courts' belief that each party has equal bargaining power in real estate transactions, thus the purchaser could adequately protect himself through an inspection of the premises. See, e.g., Halliday v. Greene, 244 Cal. App. 2d 482, 53 Cal. Rptr. 267 (1966) (declining to apply strict liability to builder because purchaser can protect himself through meaningful inspection of the premises); Feggas v. Sherrill, 218 Md. 472, 147 A.2d 223 (1958) (no implied warranty against termite damage in arms-length transactions); Denison v. Harden, 29 Wash. 2d 243, 186 P.2d 908 (1947) (no implied warranty because land has no standard quality and sale of realty based on a variety of circumstances). See also F. WILLISTON, ON CONTRACTS § 926, at 2602-04 (3d ed. W. Jaeger 1963); Bearman, Caveat Emptor in Sale of Realty—Recent Assaults upon the Rule, 14 VAND. L. REV. 541 (1961). But see notes 39-42 and accompanying text infra.

5. Caveat emptor is the ancient legal maxim that presumes a buyer is able to protect himself in market transactions where he has an opportunity to inspect the merchandise. See Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 112 (1884). The rule developed during the Middle Ages, before the onslaught of mass production, when a buyer and a purchaser stood in equal bargaining positions and the buyer had a meaningful opportunity to inspect the property for quality and defects. See generally Hamilton, The Ancient Maxm Caveat Emptor, 40 YALE L.J. 1133 (1931). While caveat emptor originally applied to all transfers of property, it is no longer applicable to sales of personal property for which extensive warranties are imposed by statute. See, e.g., U.C.C. § 2-314 (1974) (imposing implied warranty of merchantability for sale of personal property); U.C.C. § 2-315 (1974) (imposing warranty of fitness for a particular purpose).
made substantial inroads into the sale of realty, particularly with respect to the sale of newly constructed, mass-produced housing. Unable to draw any meaningful distinction between the mass production and sale of new homes and chattels, courts have extended products liability to encompass the builders, developers, and sponsors of such housing. Recently, in Berman v. Watergate West, Inc., the District of Columbia Court of Appeals for the first time applied products liability to the sale of housing by holding a realtor, and possibly a cooperative association, liable to a new home buyer. By extending products liability beyond mere developers and builders, however, the court of appeals has substantially broadened the scope of potential liability and in so doing has abandoned several important policy considerations underlying products liability.

Plaintiff Edith Berman was a tenant-shareholder in Watergate West cooperative apartments. The apartment project was originally sponsored by Watergate Improvements Associates which subsequently divided into two subsidiary corporations: Watergate Construction Corporation, the builder, and Riverview Realty Corporation, an independent sales agent. After the


8. A cooperative apartment is a multi-unit building in which each resident has an interest in the entity owning the building and a proprietary lease entitling the owner to occupy a particular apartment within the building. See 15 Am. Jur. 2d Condominiums § 62 (1976). See also Clydesdale, Inc. v. Wegener, 372 A.2d 1013 (D.C. 1977); Valois, Inc. v. Thorne, 86 A.2d 530 (D.C. 1952); 1915 16th St. Co-op. Ass'n v. Pinkett, 85 A.2d 58 (D.C. 1951). Cooperative associations may assume three types of legal forms: co-ownership, such as a joint tenancy or tenancy in common, where all tenants become co-owners in fee simple; a business trust among cooperative members to acquire and manage the property; or a corporation that issues stock of a total par value equal to the purchase price of the property, and then allocates the stock among the various apartments according to their estimated relative value. The purchasers of such shares are then entitled to a proprietary lease carrying with it the exclusive right to possession of the unit. See 2 P. Rohan & M. Reskin, Cooperative Housing Law and Practice § 2.01(1) (1977).

9. Watergate Improvements Associates was formed in 1964 as a limited partnership. The partnership formed two subsidiary corporations in the same year. 391 A.2d at 1352.
building's completion and the commencement of the plaintiff's tenancy, title passed to Watergate West, Inc., a cooperative apartment association. Shortly after moving in, plaintiff found several deficiencies in her apartment, including a defective air conditioning unit which allegedly rendered her apartment fifty percent uninhabitable. Subsequently, she filed suit for damages, but only against Riverview Realty and the cooperative, Watergate West, alleging breach of certain express and implied warranties covering her apartment unit. The trial court granted Riverview's motion for directed verdict for two reasons: first, the evidence failed to show that Riverview had extended any warranties to Berman; second, the evidence demonstrated that Riverview was acting only as a selling agent for a disclosed principal, namely Watergate Improvements Associates. The trial court likewise directed a verdict in favor of Watergate West, Inc., stating

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10. Watergate West, Inc., formed in August of 1967, was originally incorporated and directed by employees of either Riverview Realty or Watergate Improvements Associates. Brief for Appellee at 3, Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978). The cooperative did not actually acquire title to the building until May 1, 1969, several months after plaintiff took possession of her apartment. 391 A.2d at 1353.

11. At trial, plaintiff claimed the defective air conditioning system had caused substantial damage to the apartment's parquet floors, the wall, and a wool rug and pad in her bedroom. Id. As a remedy, plaintiff requested a "rent refund" of one half the amount she paid during her two and one-half year tenancy. See Record at 68, 391 A.2d at 1351.

12. Plaintiff alleged both defendants expressly and impliedly warranted the premises to be in a good state of repair and that a high standard of management would be provided. Plaintiff's Complaint for Damages at 1. Interestingly, the plaintiff's "Subscription and Deposit Agreement" expressly provided a means to settle disputes as to the condition of the apartment between the tenant and the project's sponsor. Paragraph 6 of the agreement stated:

(b) If, at the time of final inspection, it is agreed by the Member and the Sponsor that certain items have not been so completed, and the Member wishes to make immediate settlement, such items shall be listed on the final inspection form, and the Sponsor shall promptly complete such items. If the Member wishes to defer settlement until all such items are so completed, the Member shall immediately accept the apartment or unit subject to the items so listed, and shall, upon completion thereof, make full settlement hereunder. (c) In the event of a dispute between the Member and the Sponsor as to whether any item has been completed in a good workmanlike manner, the decision of the Architect referred to in the Plan of Cooperative Organization, or his designated representative, shall be final and binding upon both the Member and Sponsor.

It was stipulated at the trial that the cooperative was Watergate West, Inc., the sales and managing agent was Riverview Realty Corporation, and the sponsor was Watergate Improvements Associates. See Supp. Record at 88-89, Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978).

Although the construction company was dissolved upon completion of the building, the sponsor, Watergate Improvements Associates, still existed at the time of the suit. Nevertheless, the plaintiff sought only to bring the two defendants into the action. Interview with Robert J. Wieferich, Attorney for Plaintiff (March 24, 1979).
that even assuming plaintiff could show defendants had breached certain warranties, she still had not proven any damages.

Berman subsequently appealed pro se to the District of Columbia Court of Appeals, retaining the breach of warranty theory as her sole cause of action. In her appellate brief, however, Berman went outside the trial record to argue that the court erred in granting the directed verdict for lack of contractual privity, because factually Riverview was coextensive with the building’s sponsor and builder. Without addressing the issue of contractual privity, the court of appeals reversed, finding the action was covered by the law of products liability. Moreover, the court held that Riverview, as an integral part of the overall enterprise which placed the apartment on the market, could be held liable to the extent the apartment proved defective. Judge Mack, writing for the majority, left open the question of whether the subsequently formed cooperative could also be held liable. Instead, she remanded the case to determine whether any obstacles existed which might preclude plaintiff from recovering from those parties “prima rily responsible” for the defects. In a brief dissenting opinion, Judge Nebeker argued that the law of products liability was wholly inapplicable to the action. Noting that the record merely named Riverview as a real estate agent for the building’s sponsor, he concluded Riverview could not be held liable under any theory.

By extending products liability to the sale of housing, Berman has brought District of Columbia law in line with the clear trend of modern decisions. By expanding the scope of this liability to include realtors, however, the court of appeals has taken a quantum leap beyond any legal precedent, and in so doing has abandoned several important policy considerations underlying the doctrine of products liability.

13. In her self-written appeals brief, Berman stated “[f]actually all three of the companies are divisions or subsidiaries of Riverview Realty Corp.; with the same offices and personnel; same address and phone number.” See Brief for Appellant, supra note 10, at 3. In fact, Riverview Realty and Watergate West, Inc. are subsidiaries of Watergate Improveme nts Associates. See notes 9 & 10 and accompanying text supra.

14. 391 A.2d at 1359. The court did not specify whether its products liability holding was based on the theory of strict liability or implied warranty of fitness and merchantability. Rather, after discussing the almost identical governing principles and practical results of the two theories, the court stated “[w]hether contract or tort, there is a liability imposed for injury caused by placing a defective product into the stream of commerce in the District of Columbia.” Id. at 1357 (citing Cotton v. McGuire Funeral Serv., Inc., 262 A.2d 807, 808-09 (D.C. 1970)). See note 1 and accompanying text supra.

15. Judge Kelley joined Judge Mack in the majority opinion.

16. 391 A.2d at 1360 (Nebeker, J. dissenting).
I. TOWARDS PRODUCTS LIABILITY IN THE SALE OF HOUSING

Traditionally, recovery in a products liability action was based upon a showing of negligence or breach of warranty on the part of the manufacturer. These theories often proved insufficient to the ultimate consumer, however, since plaintiffs were faced with the difficult task of establishing contractual privity or proving a specific negligent act by the manufacturer as the cause of the injury. Due to these limitations on recovery, courts were often forced to struggle through various legal fictions to allow injured plaintiffs to prevail. Justice Traynor in a landmark decision in Greenman v. Yuba Power Products, Inc., alleviated these problems by providing a third avenue of recovery—the doctrine of strict liability in tort.


18. For examples of devices courts have used to allow recoveries absent a showing of negligence or contractual privity, see Le Blanc v. La. Coca-Cola Bottling Co., Ltd., 221 La. 919, 60 So. 2d 873 (1952) (warranty of wholesomeness implied between manufacturer and consumer); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942) (warranty "runs with the chattel" to protect all parties injured by a defective commodity); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) (manufacturer's advertising is express warranty to the consumer); Carll v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893) (manufacturer makes a continuing unilateral offer to the consumer). See also Prosser, Assault Upon the Citadel, supra note 1, at 1124-25; 2 F. Harper & F. James, supra note 17, at §§ 28.16; B. Hursh & H. Bailey, supra note 1, at §§ 4.2 to 4.4.


20. Although Greenman was the first case to apply strict tort liability to actions for ordinary defective products, the theory previously had been espoused by Justice Traynor in a concurring opinion in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) where he stated:

Even if there is not negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . If such products . . . find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

ing a judgment for an injured consumer against a defendant tool manufacturer without a finding of contractual privity, the court stated: "a manufacturer is strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Underlying its ruling was the court's desire to place the costs of injuries caused by defective products upon the manufacturers who distribute such products, rather than upon the injured persons who are typically powerless to protect themselves.

The following year, in Vandermark v. Ford Motor Co., the California Supreme Court extended its holding in Greenman to retailers, distributors, and all parties qualifying as "an integral part of the overall producing and marketing enterprise." The plaintiff in Vandermark was injured when the allegedly defective braking system in his automobile caused him to lose control and careen into a street lamp. The trial court, acting only months before Greenman was handed down, granted a nonsuit in plaintiff's action against both the manufacturer and the retailer because of their contractual disclaimers of liability. On appeal, the California Supreme Court, in another opinion authored by Justice Traynor, reversed, holding that regardless of contractual disclaimers of liability, strict products liability should be imposed upon all parties in the "chain of distribution" who place a defec-
tive product on the market. The court reasoned that by engaging in the business of distributing goods to the public, retailers are an essential component of this chain and should share with manufacturers the cost of injuries resulting from that defective product.

Several policy considerations justified the court's decision to extend strict liability to retailers. First, increasing the number of potential defendants in products liability actions provided an added incentive for all parties in the chain of distribution to take extra precautions in handling and inspecting goods for defects before they reach the consumer. Second, since the defendants could adjust the costs of such protection among themselves in the course of their continued business relationship, extending strict liability to both the manufacturer and the retailer would afford maximum protection to the injured plaintiff, yet work no injustice upon the defendants. Lastly, the retailer may be the only member of the enterprise reasonably available to reimburse the injured plaintiff.

26. The chain of distribution theory espoused in Vandermark has been widely accepted by the courts. See generally text accompanying note 30-36 infra.

27. 61 Cal. 2d at 261, 391 P.2d at 171-72, 37 Cal. Rptr. at 899-900. While Vandermark was the first decision to hold a retailer of a common product strictly liable, strict liability had been extended previously to retailers of contaminated food. See, e.g., Sencer v. Carl's Markets, Inc., 45 So. 2d 671 (Fla. 1950); Swengel v. F & E Wholesale Grocery Co., 147 Kan. 555, 77 P.2d 930 (1938); Griggs Canning Co. v. Josy, 139 Tex. 623, 164 S.W.2d 835 (1948). See also Waite, Retail Responsibility & Judicial Law Making, 34 Mich. L. Rev. 494 (1936).

28. The object of quality control in a manufacturing concern is not to optimize quality and safety, but rather to maximize profits. The extent of quality control in production ultimately rests at a level where producers feel the risk of liability resulting from defective products is balanced by the revenue saved in not pursuing more stringent production control standards. Thus, as the risk of liability under strict liability increases, producers will presumably be enticed to enact more stringent quality control measures. See Cowan, Some Policy Bases of Products Liability, 17 Stan. L. Rev. 1077, 1087-92 (1958); Noel, Manufacturers of Products—The Drift Towards Strict Liability, 24 Tenn. L. Rev. 963, 1010-12 (1957). This view has been criticized by some commentators, however, as having only a minimal impact in forcing manufacturers to adopt stricter quality control. See Plant, Strict Liability of Manufacturers for Injuries Caused by Defects in Products—an Opposing View, 24 Tenn. L. Rev. 938, 945 (1957); Prosser, Assault Upon the Citadel, supra note 1, at 1117.

29. 61 Cal. 2d at 261, 391 P.2d at 172, 37 Cal. Rptr. at 899. This rationale, often referred to as "risk spreading," is based on the premise that manufacturers and retailers are in a better position to absorb losses from defective products by passing on the cost to consumers in the form of higher prices. See Prosser, Assault Upon the Citadel, supra note 1, at 1119; Noel, supra note 28, at 1010-17.

30. 61 Cal. 2d at 261, 391 P.2d at 171, 37 Cal. Rptr. at 899. Shortly after the Greenman and Vandermark decisions, the Restatement (Second) of Torts expressly endorsed the theory of strict products liability. Section 402A of the Restatement, now accepted in many jurisdictions, provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
Spurred by the Greenman and Vandermark decisions, the District of Columbia has kept in stride with these rapid developments in products liability. In the early case of Picker X-Ray Corp. v. General Motors Corp., the Municipal Court of Appeals for the District of Columbia held that the purchaser of a defective new automobile could sue the manufacturer for breach of implied warranty of fitness despite lack of contractual privity.

After analyzing the policy considerations underlying the concept of warranty, the court concluded:

Regardless of the lack of contractual privity, the implied warranty of fitness and merchantability runs to the ultimate consumer for whose use the article or personal property had been purchased. The policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentation, outweighs allegiance to a rule of law which, if observed, might produce great injustice.

Several years later in Cottom v. McGuire Funeral Service, Inc., the District of Columbia Court of Appeals extended products liability to both manufacturers and intermediate sellers who place defective products on the market. While serving as a pallbearer, the plaintiff in Cottom was seriously injured when the handle on the casket broke. In an action against the funeral service company which sold the casket to the family and the wholesaler from whom the funeral service company had purchased the

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402A (1977). Comment f to section 402A of the RESTATEMENT states that the rule is intended to apply to any manufacturer, wholesaler, retail dealer, or distributor.

32. In Picker X-Ray, the plaintiff purchased a new General Motors car from a retail dealer. Three months later, plaintiff was seriously injured when his car veered off the road due to an alleged steering defect. The trial court granted a motion to dismiss in favor of the defendant car manufacturer on the ground there was no privity between it and the purchaser. Id. at 920.
33. Id. at 923. Elaborating on its definition of implied warranty, the court stated, "warranty is a duty imposed by law for protection of the buying public, regardless of the consent of the parties." Id. at 921. The court stated further that "since the warranty is implied, either in fact or in law, no express representations or agreements by the manufacturer are needed." Id. at 922 (emphasis added).
34. 262 A.2d 807 (D.C. 1970).
casket, the court of appeals refused to insulate the wholesaler from liability because of his lack of contractual privity with the injured party and found the wholesaler liable for bringing the product into the District.\textsuperscript{35} Decisions subsequent to \textit{Cottom} have reaffirmed the view that products liability in the District of Columbia extends to all parties participating in the chain of distribution for defective products.\textsuperscript{36}

Until recently, the doctrine of products liability which was widely accepted in the sale of chattels was virtually nonexistent in the sale of realty because of strict judicial adherence to the common law maxim of caveat emptor.\textsuperscript{37} With the dramatic increase in new home construction in recent years, however, the underlying rationale of caveat emptor—that sellers and purchasers of real property are deemed equal in bargaining positions and thus capable of protecting themselves from defective construction—has steadily eroded.\textsuperscript{38} Courts have found caveat emptor particularly inap-

\textsuperscript{35} \textit{Id.} at 810. At trial, plaintiff relied on three different theories: negligence, \textit{res ipso loquitur}, and breach of implied warranty. The trial court directed a verdict for both defendants, ruling that although there was a latent defect in the casket, plaintiff was not a "user" of the casket and thus there was no relationship between him and the defendants. \textit{Id.} at 808. The D.C. Court of Appeals ruled that plaintiff as a pallbearer was an intended user of the casket and that an intended user is entitled to as much protection as a purchaser. \textit{Id.} at 809-10. Although the court relied on \textit{Greenman} and the Restatement's adoption of strict liability, it declined to expressly adopt the doctrine and limited its holding to implied warranty. \textit{Id.} at 808-09.

\textsuperscript{36} See \textit{Stewart v. Ford Motor Co.}, 553 F.2d 130, 137 (D.C. Cir. 1977) ("it is undisputed . . . that the District of Columbia does recognize strict liability for manufacturers and intermediate sellers who place on the market defective merchandise which later injures a consumer"); \textit{McCrosin v. Hicks Chevrolet, Inc.}, 248 A.2d 917 (D.C. 1969) (retailer and manufacturer of defective automobile liable on implied warranty theory); \textit{Simpson v. Logan Motor Co.}, 192 A.2d 122 (D.C. 1963) (case remanded to determine whether plaintiff had possible action in implied warranty in light of \textit{Picker X-Ray}).

\textsuperscript{37} See, \textit{e.g.}, \textit{Druid Homes, Inc. v. Cooper}, 272 Ala. 415, 131 So. 2d 884 (1961) (adherence to caveat emptor makes for certainty in real estate law). See generally Comment, \textit{The Expanding Scope of Liability in the Home Construction Enterprise}, 5 \textit{Land and Water L. Rev.} 637, 645-49 (1970) (caveat emptor in realty sales is justified due to the clear standard of quality against which deviations from a norm can be measured); \textit{F. Williston, On Contracts} § 926 (3d ed. W. Jaeger 1963). See also notes 4 \& 5 and accompanying text supra.

Along with caveat emptor, the doctrine of merger remains in full force in realty sales. Under this doctrine, one who contracts to buy real estate generally must specify in the deed through an express warranty all conditions on which the transfer is premised or forego any action against the vendor for breach of contract or warranty. \textit{Id.}

\textsuperscript{38} The courts have noted several objections to the application of caveat emptor to the sale of homes. First, because the average homebuyer lacks the necessary knowledge and skills to adequately inspect a home, the buyer and seller no longer stand in equal bargaining positions. See, \textit{e.g.}, \textit{Weeks v. Slavick Builders, Inc.}, 24 Mich. App. 621, 180 N.W.2d 503, (1970); \textit{Tavares v. Horstman} 542 P.2d 1275 (Wyo. 1975). Second, caveat emptor often leads to harsh results when the unwary homebuyer invests the greater part of his savings in a defective home. See, \textit{e.g.}, \textit{Bethlahmy v. Bechtel}, 91 Idaho 55, 415 P.2d 698, (1966); \textit{Humber v. Morton}, 426 S.W.2d 554 (Tex Ct. App. 1968). Additionally, the builder-vendor is usually
propriate in the sale of mass-produced and prefabricated homes because the production of such homes has become increasingly similar to the production of chattels. One of the first decisions to abandon caveat emptor in the sale of real property was Carpenter v. Donohoe, in which the Colorado Supreme Court held a builder-vendor liable to the initial purchaser of a completed new home under the theory of implied warranty. The plaintiff in Carpenter, discovering severe defects in the home's construction that rendered it hazardous to the plaintiff and his family, brought suit alleging fraud and breach of warranty. The trial court dismissed the breach of warranty allegation, but allowed recovery for fraud. Reversing the trial court, Justice Frantz held that in agreements between builder-vendors and purchasers of new homes, there is an implied warranty that the builder has complied with the building code, that the home is constructed in a workmanlike manner, and that it is suitable for habitation. Since the better equipped to prevent the occurrence of defects. See, e.g., McDonald v. Mianecki, 79 N.J. 175, 398 A.2d 1283 (1979); Elderkin v. Gaster, 447 Pa. 288, 218 A.2d 771 (1972). Lastly, the buyer of a new home clearly relies on the builder-vendor's implied representation that the home was constructed in a reasonable and workmanlike manner. See, e.g., Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979). See generally Bearman, supra note 4, at 543-47; Hyatt & Rhoads, Concepts of Liability in the Development and Administration of Condominiums and Home Owners Associations, 12 WAKE FOREST L. REV. 915, 951-76 (1976); Maldonado, Builder Beware: Strict Tort Liability for Mass Produced Housing, 7 REAL ESTATE L.J. 283, 285-88 (1979).

The onslaught of pre-fabricated and mass-produced housing is a relatively recent phenomenon beginning in the wake of World War II when the demand for new housing increased dramatically. To fulfill this new demand, homes have been constructed in a manner increasingly resembling the mass-production of chattels. See Bearman, supra note 4, at 542; Maldonado, supra note 38, at 286-87; Roberts, The Case of the Unwary Homebuyer: The Housing Merchant Did It, 52 CORNELL L.Q. 835, 837 (1967).

Prior to Carpenter, several jurisdictions extended an implied warranty of habitability to homes purchased while under construction. See, e.g., Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A & M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958). In so doing, courts have assumed that a purchaser of a completed home can always inspect it for defects in its final form, while the purchaser of a home under construction has no such opportunity. See Bearman, supra note 4, at 544.

42. 154 Colo. at 79, 388 P.2d at 400.

43. 154 Colo. at 83-84, 388 P.2d at 402. The court rejected the notion that a different rule should apply to the sale of a home under construction than to a completed home stating...
Carpenter decision, the trend in most jurisdictions has been to extend an implied warranty of habitability to initial purchasers of mass-produced housing.  

The following year, in Schipper v. Levitt & Sons Inc., the New Jersey Supreme Court extended the liability of builder-vendors of defective mass-produced housing beyond those parties in contractual privity by adopting the doctrine of strict tort liability. In Schipper, the plaintiff, a tenant of the original purchaser, sued the builder-vendor for injuries suffered by his child due to a defective hot water system. Declaring that it could find "no meaningful distinctions between the mass production and sale of homes and the mass production and sale of automobiles," the court reversed the trial court's judgment of nonsuit and found the developer could be held liable under the principles of "warranty or strict liability." In dismissing as unimportant the plaintiff's lack of privity, the court stated:

[I]t seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirement of privity, which is fast disappearing in the comparable products liability field, to preclude a similar right in other occupants likely to be injured by the builder vendor's default.

The court noted several policy justifications for an extension of strict liability to the realty field. First, the average purchaser of a mass-produced, prefabricated home is typically unable to adequately inspect the home, and thus relies on the developer's skill and implied representation that the home will be constructed in a workmanlike manner. Second, the home buyer does not stand on equal footing with the builder-vendor of a

"[t]o say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it." Id.

44. See cases cited in note 6 supra.
46. The only court to apply strict liability to the sale of housing before Schipper was the Supreme Court of Mississippi in State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966). Relying on section 402A of the Restatement, supra note 1, the court found a building contractor strictly liable for installing a defective stove in plaintiff's home. Although applying policy considerations similar to Schipper, the court did not discuss its holding in relation to the common law restriction on application of strict liability to the sale of realty.
47. 44 N.J. at 96, 207 A.2d at 329. The court's either/or language indicated that it was treating the implied warranty concept and strict tort liability as synonymous. This is consistent with the current approach, which treats the two theories as functionally indistinguishable. See Restatement (Second) of Torts, supra note 1. See also Maldonado, supra note 38, at 296-97.
48. 44 N.J. at 95, 207 A.2d at 328.
49. Id. at 91, 207 A.2d at 325.
mass-produced home. Moreover, public interest dictates that "if such injury results from defective construction, its cost should be borne by the responsible developer who created the danger and who is in a better economic position to bear the loss, rather than by the injured party who justifiably relied on the developer's skill and implied representation."

Since Carpenter and Schipper, the doctrine of products liability has been increasingly applied to the sale of real estate, whether under the rubric of strict liability or under a theory of implied warranty of habitability. Moreover, although Carpenter and Schipper involved only the builder-vendors of prefabricated housing, other jurisdictions have extended products liability to include landlords and builder-developers of condominium units. For example, in Javins v. First National Realty Corp., the

50. See generally Bearman, supra note 4, at 545-48; Comment, Implied Warranties in the Sale of New Homes, 23 U. Fla. L. Rev. 626 (1971).

51. 44 N.J. at 91, 207 A.2d at 326.

52. Since the Schipper decision, several other courts have expressly applied the strict tort liability theory to the sale of real property. See, e.g., Stuart v. Crestview Mutual Water Co., 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (1973) (residential developer strictly liable to purchaser for installation of defective water system); Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969) (manufacturer of a lot strictly liable for defective subsurface conditions resulting from improper filling and grading); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (builder-vendor strictly liable to home's second owner for damage caused by defective heating system); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972) (recovery allowed for faulty concrete foundation in new home under § 402A). For a list of cases applying products liability to housing under an implied warranty theory, see note 6 supra.


54. See, e.g., Gable v. Silver, 258 So. 2d 11, aff'd per curiam, 264 So. 2d 418 (Fla. 1972). See notes 57-62 and accompanying text infra. In perhaps the furthest extension of products liability in the sale of housing to date, the Supreme Court of California in Connor v. Great Western Savings & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), held a lending institution liable on negligence grounds for financing an undercapitalized and inexperienced real estate developer. The extension of products liability to lenders is still a minority position, however, and the Connor decision has been narrowly interpreted. See, e.g., Kinner v. World Savings & Loan Ass'n, 57 Cal. App. 3d 724, 129 Cal. Rptr. 400 (1976) (distinguishing Connor due to less integral role of lender); Skerlec v. Wells Fargo Bank Nat'l Ass'n, 18 Cal. App. 3d 1003, 96 Cal. Rptr. 434 (1971) (lender insulated from liability for acting merely in a lending role). See also Gutierrez, Liability of a Construction Lender under Civil Code Section 3434: An Amorphous Epitaph to Connor v. Great Western Savings & Loan Association, 8 Pac. L.J. 1 (1977).

United States Court of Appeals for the District of Columbia held that a warranty of habitability, as measured by the standards set out in the housing regulations, is implied by law in all leases, and that breach of this warranty gives rise to the usual remedies for breach of contract. Implied warranty also provided the basis for recovery in *Gable v. Silver.* In *Gable,* a group of condominium apartment owners sued the project's builder-developers for damage caused by a defective air-conditioning unit. The Florida Court of Appeals upheld the judgment for the plaintiffs by declaring that in keeping with "present day trends, logic and practical justice in realty dealings," an implied warranty of fitness and merchantability from the builder should extend to the purchaser of new condominiums. This recognition of implied warranties in condominium sales has been codified in several jurisdictions. In keeping with this trend, the District of Columbia City Council recently passed the Condominium Act of 1976, requiring all builders and developers of condominiums to warrant each unit against structural defects for one year from the date each unit is conveyed. Moreover, similar legislation with respect to cooperatives has

56. 428 F.2d at 1082. The court relied on the same reasons for imposing liability under an implied warranty of habitability in residential leases as it did in the sale of housing: the inequality of bargaining power between the landlord and tenant; the lack of tenant leverage in enforcing demands for better housing; the severe shortage of housing that increases the landlord's bargaining power and escalates the need for maintaining and improving apartments; and the indignity of slum living and its detrimental effect on the whole society. *Id.* at 1079-80. Cf. *Brown v. Southhall Realty Co.,* 237 A.2d 834 (D.C. 1968) (any lease of premises containing housing violations existing at the beginning of the tenancy known to the landlord is illegal and void).

57. 258 So. 2d 11, aff'd per curiam, 264 So. 2d 418 (Fla. 1972).

58. 258 So. 2d at 18. Notably, the court limited application of this warranty to builders.

59. See, e.g., *FLA. STAT. ANN.* §§ 718.203 to 719.203 (West Supp. 1978) (extending three-year warranty of fitness and merchantability to both condominiums and cooperatives); *MD. REAL PROP. CODE ANN.* §§ 10-203, 10-204 (1976) (extending one year warranty of habitability and workmanlike construction to sales of all property including condominiums); *N.J. STAT. ANN.* § 46:3B-3 (authorizing N.J. Department of Community Affairs to promulgate warranties in new homes).

60. *D.C. CODE ANN.* § 5-1201 (Supp. V 1978). Section 5-1247(b) provides in pertinent part:

(b) [t]he declarant shall warrant against structural defects [in] each of the units for one year from the date each is conveyed and all of the common elements for two years. . . . [F]or the purposes of this subsection, structural defects shall be those defects in components constituting any unit or common elements which reduce the stability or safety of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration, or replacement. Nothing in the subsection shall be construed to make the declarant responsible for any items of maintenance relating to the units or common elements. . . .

61. Notably, the statutory guarantee only applies to persons who execute the condomin-
been proposed before the Council.\textsuperscript{62}

Despite this rapid development and acceptance of products liability in the sale of realty, a notable distinction exists between the scope of liability in sales of realty and in sales of chattels. Unlike chattels, in which liability extends to all parties in the chain of production and distribution, products liability (either under implied warranty or strict liability) in the sale of realty has never been imposed on a party other than a builder or developer of a particular project.\textsuperscript{63} In \textit{Berman v. Watergate West, Inc.}, the District of Columbia Court of Appeals tried to close this gap by applying the “chain of distribution” theory espoused in \textit{Vandermark} to the sale of mass-produced housing.

\section*{II. \textit{Berman v. Watergate West, Inc.}: An Overextension of Products Liability}

This recent trend abandoning caveat emptor and traditional remedies for the sale of defective housing provided the foundation for the decision in \textit{Berman v. Watergate West, Inc}. After a lengthy discussion of the development of products liability in the housing market, the majority sought to bring itself in line with recent decisions by holding the defendants accountable regardless of contractual privity. Relying on the strict liability theory espoused in \textit{Vandermark}, the court held that all parties playing an integral part in placing the defective apartment on the market could be held liable to the ultimate consumer.\textsuperscript{64} By extending products liability beyond the builder and sponsor of a cooperative apartment to encompass the realty company and possibly even a cooperative association, however, the court of appeals has significantly surpassed the scope of previous decisions.

\begin{itemize}
\item \textsuperscript{62} See the proposed amendment in the nature of a substitute to Bill 2-248, D.C. Council § 212 (1978) (calling for a three year warranty against material defects in the sale of newly constructed cooperative apartments). The proposed amendment was dropped from active consideration by the Committee on Housing and Urban Development, however, in the wake of strong opposition at a July 14, 1978 public hearing. Interview with Pierre J. Wessel, Attorney for the Committee on Housing and Urban Development (May 22, 1979).
\item \textsuperscript{64} 391 A.2d at 1359.
\end{itemize}
To the extent that *Berman* extends liability to builders and vendors only, the decision is a well reasoned approach, destined to bring District of Columbia law much closer to the realities of the modern housing market. The following factors illustrate the logic of this approach. First, in an era when prefabricated homes are increasingly being built in response to severe housing shortages, the buyer and seller no longer stand in equal bargaining positions in negotiating the sale of a home. Essentially, the ordinary purchaser is often limited to mass-produced housing in which he has neither the competency nor the money to adequately inspect a home for hidden defects, and thus he is forced to rely on the skill of the developer and implied representations that the home is reasonably fit for habitation.65 Second, the risk of products liability for mass-produced housing may arguably reduce the consumer's risk by promoting stricter quality control in the construction and inspection of new homes.66 Lastly, while the added costs of products liability may prove only incidental to the conscientious, quality minded builder, the costs of litigating complaints and repairing defects may effectively weed out builders and developers who consistently market defective housing.67 Consequently, the *Berman* decision will allow the homebuyer greater protection against latent defects while distributing the losses among those better able to afford them.68

Although the adoption of products liability for builders and vendors may be well reasoned and long overdue, the extension of such liability to real estate agents and possibly to the subsequently formed cooperative associations does not merit the same regard. The *Berman* court held Riverview Realty accountable to the plaintiff because it had occupied an integral role in the overall production and marketing enterprise by placing the defective apartment into the stream of commerce.69 After noting that


66. *See* note 28 and accompanying text *supra*.

67. One of the first advocates of this view was Lord Williston, who, in speaking of implied warranties in real estate, stated, "[i]t would be much better if this enlightened approach were generally adopted with respect to the sale of new homes for it would tend to discourage much of the sloppy work of jerry-building that has become perceptible over the years." F. Williston, *On Contracts* § 926A (3d ed. W. Jaeger 1963). *Accord*, Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968) (caveat emptor would lend "encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work"). *See also* Maldonado, *supra* note 38, at 300.

68. This risk spreading policy was initially recognized with respect to chattels. *See* note 29 *supra*. This rationale has since been recognized by commentators as applicable to the sale of housing. *See*, e.g., Maldonado, *supra* note 38, at 300.

69. 391 A.2d at 1359. Although *Vandermark* was decided solely on grounds of strict liability, it is unclear whether *Berman* was decided exclusively on grounds of strict liability or implied warranty of habitability. Rather, the court stated "[w]hether contract or tort,
the realty company was formed as a subsidiary of the project’s sponsor, the majority justified its extension of liability to Riverview by holding that a sponsor’s division into subsidiaries should not insulate it from liability. Notably, however, the court did not hold Riverview liable because it might have acted as the *alter ego* of the project’s sponsor. As Judge Nebeker’s dissenting opinion points out, there is absolutely no evidence in the record that Riverview was “one and the same” with the builder or sponsor, nor was there any suggestion of fraud or deceit regarding the company’s incorporation that would have justified piercing the corporate veil to hold Riverview liable. Further, there was no showing of negligence, contractual privity, or misrepresentation on the part of Riverview. Rather, the record merely established that Riverview was an independently incorporated realtor working for a disclosed principal, namely Watergate Improvements Associates. Thus, relying on *Vandermark*, the court extended products liability to realtors acting in their brokerage capacity for defects found by the ultimate consumer.

There is some uncertainty, however, as to whether the majority intended there is a liability imposed for injury caused by placing a defective product into the stream of commerce in the District of Columbia” *Id.* at 1357 (citing Cottom v. McGuire Funeral Serv., Inc., 262 A.2d 807, 808-09 (1970)).

70. Generally, a corporation cannot be held liable for the activities or obligations of a separately created and distinct legal entity. This is true even in the case of parent-subsidiary corporations or in corporations related by common control and stock ownership. See, e.g., Overstreet v. Southern Ry. Co., 371 F.2d 411 (5th Cir. 1967), *cert. denied*, 387 U.S. 912 (1969) (distinct corporate entity will not be disregarded solely because of common corporate names, stockholders and officers); Food Fair Stores v. Blumberg, 234 Md. 521, 200 A.2d 166 (1964) (mere fact that corporation owns majority of stock of another corporation does not destroy separate legal identity). See also W. CARY, CORPORATIONS 109 (4th ed. 1969).

71. 391 A.2d at 1360 (Nebeker, J., dissenting). Distinct corporate personalities will be disregarded when used to defeat public convenience, protect fraud, or justify wrong. See, e.g., Vogel v. Bankers Bldg. Corp., 112 Cal. App. 2d 160, 245 P.2d 1069 (1952) (non-issuance of stock coupled with fraud or bad faith will allow court to disregard corporate entity). See also W. CARY, supra note 70, at 109.

72. Real estate brokers may be held liable to purchasers of property where there is misrepresentation as to, or nondisclosure of physical defects in, the property sold. See, e.g., Saporta v. Barbagelata, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963) (realtor held liable for nondisclosure of termite damage known to him but unobservable by the purchaser); Spagnapani v. Wright, 110 A.2d 82 (D.C. 1954) (realtor held liable in fraud to purchasers for flagrantly inaccurate representation as to cost of heating a home). See generally Annot., 8 A.L.R.3d 550 (1969). A realtor may also be held liable when there is a breach of fiduciary duty owed to the principal. See, e.g., Ornamental & Structural Steel Inc. v. BBG Inc., 20 Ariz. App. 16, 509 P.2d 1053 (1973) (realtor held liable to principal for disclosing material defects in property to purchaser with consent of principal). See also Comment, *The Real Estate Broker-Purchaser Relationship: Louisiana and Common Law*, 52 Tul. L. Rev. 157 (1977).

73. An agent of a disclosed principal may not be disclosed absent a showing of fraud or misrepresentation. See *Restatement (Second) of Agency* § 320 (1970).
to rule this broadly. The court paid close attention to the fact that both the realtor and the cooperative were subsidiaries of the building's sponsor.\textsuperscript{74} Although there was nothing in the record alleging any \textit{alter ego} relationship, the court may have implicitly relied on Mrs. Berman's \textit{pro se} argument that the two defendants were actually coextensive with the project's sponsor.\textsuperscript{75} Thus, a narrow interpretation of the court's holding would only extend products liability to realtors formed as subsidiary agents of the projects' sponsor.

If the majority intended to broaden the scope of this liability to include an independent realtor, however, the court of appeals has misinterpreted the role of a real estate agent and abandoned important policy considerations underlying the products liability theory. The court justified its holding by analogizing Riverview's position in marketing apartments to that of an ordinary retailer, and then applying the \textit{Vandermark} chain of distribution theory.\textsuperscript{76} This theory, initially applied to retailers, is inapplicable to realtors for several reasons. First, a realtor plays a substantially less integral part in the overall production and marketing enterprise than an ordinary retailer or manufacturer. Essentially, the retailer is a seller while the realtor is an agent. A realtor's function is to find a purchaser for the principal's product,\textsuperscript{77} and acts only for and through the authority granted by the principal, with no independent contracting authority.\textsuperscript{78} In addition, the realtor neither owns the product he sells, nor participates in the chain of title. On the other hand, the retailer plays a far more integral part in transmitting the product to the consumer. The retailer is the owner and title-holder of the goods. Thus, he is generally free to establish the terms and conditions of purchase from the manufacturer and resale to the consumer.\textsuperscript{79} This control affords the retailer significantly more economic

\textsuperscript{74} See 391 A.2d at 1351-55 (court engages in detailed discussion of the parties' relationship).

\textsuperscript{75} Id. See note 13 and accompanying text supra.

\textsuperscript{76} 391 A.2d at 1359. The court did not discuss any of the distinctions or similarities between retailers and realtors. Rather, the court simply concluded that because realtors assist in putting the product on the market, they should be included in the scope of liability. Id.


\textsuperscript{78} See Restatement (Second) of Agency § 55 (1970).

clout in bargaining with the manufacturer of the defective product and in allocating the costs of products liability.

The policy considerations underlying the extension of products liability to retailers as enunciated in Vandermark are likewise inapplicable to realtors. A primary justification advanced for imposing liability on all parties in the distributional chain is to spur the parties to be more responsive to the quality control and safety of the product. This rationalization assumes that a particular defendant has in some way contributed to the defect, or at least is in a position to exert economic pressure for stricter quality control.80 A real estate agent acting solely in a brokerage capacity, however, is wholly removed from the production, control or possession of the defective product and thus cannot be deemed a contributing cause of the defect.81 Consequently, by holding Riverview solely accountable for the defect in the apartment, the court penalized the realtor for a defect it could not have caused, leaving unscathed those parties who were primarily responsible.

In finding the realtor liable, the court might have reasoned that realtors could have an indirect impact in discouraging the marketing of poorly constructed homes. For example, a realtor may simply refuse to represent any disreputable dealer of poorly constructed homes which he feels presents an undue risk of products liability, thereby impeding the flow of defective housing onto the market. This potential impact, however, is tempered by several practical considerations. First, as in Berman, the realtor dealing with a new builder and a new housing project may have no way to ascertain the quality of construction and workmanship outside of an independent and costly inspection. This expense would ultimately be passed on to consumers in the form of increased prices of homes or higher brokerage fees. Second, given the crowded and competitive field of realty sales, it seems unlikely that all realtors would refuse to market a home of questionable quality merely due to a remote risk of a products liability action.82 In

80. See note 28 and accompanying text supra.
81. With respect to retailers, there is a split of authority as to whether they may be held strictly liable when they have in no way participated in the manufacturing process and when the product leaves their control in exactly the same condition as they received it. Compare McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965) (druggist not held strictly liable for damages caused by drug sold in its original sealed package) and Sam Shaineburg Co. v. Barlow, 258 So. 2d 242 (Miss. 1972) (retailer not held liable for damage caused by shoes sold in same condition received from manufacturer) with Sams v. Ezy-Way Foodliner Co., 157 Me. 10, 170 A.2d 160 (1961) (retail grocer held liable for prepackaged frankfurter containing particles of glass).
82. This risk of the realtor being held liable under a products liability theory is relatively small since liability will generally not extend to the realtor until the plaintiff has shown that s/he has no means of recovery against any of the parties who are primarily responsible for the defect. See 391 A.2d at 1359. See text accompanying notes 89-92 infra.
light of the minimal control exercised by realtors over the quality and safety of the product, imposition of liability under both the facts and policy of *Vandermark* is unfounded.

Equally unfounded is the court's suggestion that the cooperative association might also be liable if the parties primarily responsible for placing the defective product on the market were beyond the reach of the injured plaintiff.\(^8\)3 Likening the role of the cooperative to that of a landlord,\(^8\)4 the court stated that liability might attach solely because of the cooperative's superior ability to distribute and to insure against losses. The cooperative, however, did not take title to the building until all construction had been completed and the defective appliances installed. In these circumstances, the cooperative was clearly outside the *Vandermark* chain of distribution.\(^8\)5 Moreover, imposing liability on Watergate West could in no way encourage better quality in the construction of housing units since the ultimate loss would be shared among the individual shareholders of the cooperative (including plaintiff), none of whom were engaged in the manufacture or marketing of the apartments. Clearly then, the court's rationale rested on a policy decision that the additional protection afforded the injured plaintiff outweighed the burden of imposing liability on a faultless defendant. While such a policy is not necessarily misguided, it is inconsistent with traditional products liability reasoning.

Finally, extension of liability to both the realtor and cooperative can be challenged on the basis that the parties "primarily responsible" were not beyond the reach of the plaintiff.\(^8\)6 In the present case, plaintiff never took action against those parties primarily responsible for the damage to her apartment—namely the builder, the sponsor, or the manufacturer of the defective appliance.\(^8\)7 Although the project's builder, Watergate Construction Company, was dissolved shortly after completing the construction, the project's sponsor, Watergate Improvements Associates, remained available to the plaintiff throughout the proceeding.\(^8\)8 Nevertheless, plaintiff main-

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83. 391 A.2d at 1359.
84. Although the court of appeals has previously analogized the role of a cooperative association to that of a landlord, see, e.g., 1901 Wyoming Ave. Coop. Ass'n v. Lee, 345 A.2d 456, 458 n.2 (D.C. 1975) (tenant action against cooperative for failure to repair plumbing), there is a fundamental distinction between the two. A landlord owns and operates the building for profit, while the cooperative is generally a non-profit corporation that owns and operates the building for the use, benefit and enjoyment of its members, all of whom are shareholders in the corporation. See note 8 supra.
85. See notes 9-10 and accompanying text supra.
86. This consideration was instrumental in *Vandermark*'s decision to extend products liability beyond a mere manufacturer. See text accompanying note 30 supra.
87. Interview with Robert J. Wieferich, Attorney for Plaintiff (March 24, 1979).
88. Interview with Director, Watergate Improvements Associates (March 28, 1979).
tained the breach of warranty theory as her sole cause of action against the realtor and cooperative. While there may be some justification for finding these secondary parties liable in the rare instances where all other potential defendants are beyond the reach of the injured plaintiff, when nothing stands in the way of recovering from the parties primarily responsible, courts have declined to extend products liability to its farthest reach. Contrary to this general rule, the Berman decision suggests that one can successfully recover from a realtor of defective housing without first, or at least simultaneously, exhausting a remedy against the builder or sponsor. In light of the realtor's minimal control over the construction and marketing of the defective product, a better approach would be to restrict the realtor's liability to instances where all other defendants are beyond the plaintiff's reach.

III. CONCLUSION

It is clear that the District of Columbia, in keeping with the modern and better reasoned trend of recent decisions, has adopted the law of products liability in the sale of mass-produced housing. Abandoning the common law rule of caveat emptor, the court of appeals has remedied the imbalance of bargaining power and legal recourse between the buyer and seller of a new home, and has provided greater incentive for quality and workmanlike construction in the District of Columbia. By indicating on its face that products liability for defective housing may be extended beyond builder-vendors to independent realtors, however, the court has abrogated some of the traditional policy considerations underlying products liability.

89. Traditionally, subsequently formed subsidiaries and successor corporations have been free from liability for the acts and torts of their predecessors. Several recent decisions have indicated, however, that these successor corporations may be liable when they continue corporate activity in a manner similar to the parent or predecessor company and are the only party reasonably available to the injured plaintiff. See, e.g., Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 547 (1977); Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 356 A.2d 458 (1976). See also Note, Expanding the Products Liability of Successor Corporations, 27 Hastings L.J. 1305 (1976).

90. 391 A.2d at 1359. Notably, it appears the statute of limitations would not have barred plaintiff's cause of action against any of the parties in the chain of distribution. The statute of limitations for actions arising out of injuries caused by defective or unsafe improvements to real property generally runs for ten years from the time the improvements are substantially completed. See D.C. Code Ann. § 12-310 (1973). Moreover, in agreements under seal, as in the plaintiff's Proprietary Lease and Occupancy Agreement, this period may be extended to twelve years. See Ramey v. Burrascano, 324 A.2d 687 (D.C. 1974). Since the entire chronology of this action required less than ten years, see notes 8-13 and accompanying text supra, it appears unlikely the statute of limitations would have precluded the plaintiff from seeking recovery against those parties "primarily responsible."
While such a decision will provide increased protection for the home buyer against defective housing, it undoubtedly will lead to a significant adjustment in the bargaining relationship between builders and realtors, which ultimately will result in higher prices for new homes at a time when the District of Columbia is already besieged with a severe housing shortage. Considering the uncertainty of the holding, coupled with its potentially far reaching ramifications, *Berman* should be interpreted cautiously in future decisions.

*Joseph A. Lynott*

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Extrajudicial statements, known as hearsay, are generally not admissible in court as substantive evidence because they do not have the same guarantees of reliability as statements made by witnesses testifying directly. Underlying this hearsay rule is the need to avoid prejudice to the parties resulting from the jury's consideration of unreliable evidence. Exceptions are permitted, however, when the out of court statement is shown to be necessary and trustworthy. Prior inconsistent statements, made out of court as statements of then-existing state of mind, are admissible over the hearsay objection.
court and technically within the hearsay rule, are not considered sufficiently reliable as substantive evidence. To ensure the reliability of jury verdicts, however, they are admissible to impeach the credibility of a witness. In order to limit prior statements to this purpose, District of Columbia Superior Court Rule 30 enables opposing counsel to request a jury instruction, confining the use of prior statements to evaluating the credibility of a witness.


4. Prior inconsistent statements are defined as any statements made prior to the present trial, either oral or written, that contradict present testimony. Also included is conduct that evidences a belief inconsistent with the statements made at trial. Such statements or conduct are used to undermine a witness’s credibility by showing that he has made one statement on the witness stand and a contradictory statement at a previous time. For purposes of attacking credibility, the truth of either statement is neither material nor presumed. See Brooks v. United States, 309 F.2d 580, 582 (10th Cir. 1962), cert. denied, 383 U.S. 916 (1966); McCormick, supra note 1, at § 34 & n.7.

5. For discussion of limited purpose evidence and limiting instructions see note 8 infra.


In addition to prior inconsistent statements, the Federal Rules of Evidence have varied from the common law by classifying as nonhearsay other extrajudicial statements that fall within the traditional definition. Compare Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968), cert. denied, 394 U.S. 964 (1969)(prior identifications admitted as hearsay exception if declarant is available for cross-examination) with Fed. R. Evid. 801(d)(1)(C)(prior identifications are nonhearsay if declarant is available for cross-examination); Coltrane v. United States, 418 F.2d 1131 (D.C. Cir. 1969)(prior consistent statements of witness are not admissible unless witness’ credibility has been impeached) with Fed. R. Evid. 801(d)(1)(B)(prior consistent statement admissible as nonhearsay to rebut charge of recent fabrication); Smith v. United States, 312 A.2d 781 (D.C. 1973)(admission of party-opponent admissible as hearsay exception) with Fed. R. Evid. 801(d)(2)(admissions of party opponent admissible as nonhearsay).

7. Sup. Ct. R. Crim. 30, which is identical to Fed. R. Crim. P. 30, states in pertinent part:

At the close of the evidence or at such earlier time during the trial . . . any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its ver-
ibility of a witness.\textsuperscript{8} Absent this request, the federal and District of Columbia appellate courts have, under a separate rule,\textsuperscript{9} required judges to issue a sua sponte instruction at the time the statement is offered to preserve the party's right to a fair trial.\textsuperscript{10} In \textit{Johnson v. United States},\textsuperscript{11} the Court of

dict, stating distinctly the matter to which he objects and the grounds of his objection.

For a discussion of Rule 30, see note 13 and accompanying text \textit{infra}.


The standard jury instruction in the District of Columbia on the limited use of prior inconsistent statements reads:

The testimony of a witness may be discredited or impeached by showing that he has previously made statements which are inconsistent with his present testimony. Such prior statements are admitted into evidence solely for your consideration in evaluating the credibility of the witness. Should you find the prior statements to be inconsistent, you may consider such statements only in connection with your evaluation of the truth of the witness's present testimony in court. You must not consider the prior statement as establishing the truth of any fact contained in that statement.

\textit{Criminal Jury Instructions for the District of Columbia No. 1.06 (D.C. Bar Ass'n 3d ed. 1978)}[\textit{hereinafter cited as Criminal Jury Instructions}]. \textit{Cf. Pattern Jury Instructions (Criminal Cases) No. 7A} (prepared by Committee on Pattern Jury Instructions, District Judges Ass'n 5th Cir. 1978)(contains no warning that jury may not use prior inconsistent statements for truth contained therein).

9. \textit{Sup. Ct. R. Crim.} 52(b), which is identical to \textit{Fed. R. Crim. P.} 52(b), states "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For a discussion of Rule 52(b), see note 15 and accompanying text \textit{infra}.

Appeals for the District of Columbia recently abolished the absolute obligation to issue limiting instructions and directed future courts to determine the need for such instructions on a case-by-case basis.

Johnson and two co-defendants, Allen and Smallwood, were charged with armed robbery. At trial, Allen admitted his own involvement in the robbery and offered testimony exculpating Johnson. The arresting officer, testifying for the government, related a statement Allen had made immediately after his arrest, in which he named Johnson as a primary participant in the robbery. Allen's prior statement, therefore, contradicted his own sworn testimony at trial. Johnson's attorney neither requested a limiting instruction at the time the evidence was offered, nor objected to the court's final charge to the jury, as required under Rule 30 of the District of Columbia Superior Court Rules, Criminal Division. Although the final charge included a general instruction that prior inconsistent statements

12. Id. at 1085. Allen had stated that Johnson had been under the effects of narcotics withdrawal and was therefore oblivious to the fact that a robbery was taking place. Id.

The general rule in the federal jurisdictions is that, in order to raise the issue on appeal, counsel must have either requested a limiting instruction or objected to its absence before the close of the trial. See, e.g., United States v. Solomon, 422 F.2d 1110, 1114 (7th Cir.), cert. denied, 399 U.S. 911 (1970); Wilson v. Wiman, 386 F.2d 968, 970 (6th Cir. 1967), cert. denied, 390 U.S. 1042 (1968); United States v. Curry, 358 F.2d 904, 912 (2d Cir. 1965), cert. denied, 385 U.S. 873 (1966); Nutt v. United States, 335 F.2d 817, 819 (10th Cir.), cert. denied, 379 U.S. 909 (1964); Newman v. United States, 331 F.2d 968, 971 (8th Cir. 1964), cert. denied, 397 U.S. 975 (1965); Dearing v. United States, 328 F.2d 512, 515 (1st Cir.), cert. denied, 377 U.S. 1003 (1964); Sica v. United States, 325 F.2d 831, 836 (9th Cir. 1963), cert. denied, 376 U.S. 952 (1964); Smoot v. United States, 312 F.2d 881, 886 (D.C. Cir. 1962); Blakeley v. United States, 249 F.2d 235, 236 (5th Cir. 1957)(per curiam). Rule 105 of the Federal Rules of Evidence has also been interpreted as requiring counsel to request the limiting instruction. See FED. R. EVID. 105 ("the court, upon request, shall restrict the evidence"). This requirement does not preclude the trial judge from issuing an instruction sua sponte if he determines one is necessary to avoid plain error. See 1 WEINSTEIN & BERGER, supra note 8, at ¶ 105[01]; C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE, Evidence § 5065 (1977).

Although federal appellate decisions are not necessarily binding upon the District of Columbia Court of Appeals, see note 34, infra, they provide guidance for interpretation of Superior Court Rules when those rules are "literally or substantively identical" to the federal rules. Cooper v. United States, 353 A.2d 696, 701 n.11 (D.C. 1975). Since SUP. CT. R. CRIM. 30 is identical to FED. R. CRIM. P. 30, these decisions are persuasive authority for District of Columbia Court of Appeals decisions.

The purpose of the rule is to allow the trial judge an opportunity to correct any errors in his charge that might require a new trial. See United States v. Indiviglio, 352 F.2d 276, 280 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966); Villaroman v. United States, 184 F.2d 261, 262 (D.C. Cir. 1950); Watts v. United States, 362 A.2d 706, 708-09 (D.C. 1976)(en banc). See also FED. R. EVID. 103(a) & Adv. Comm. Notes.
could only be used for impeachment purposes, there was no specific reference to the arresting officer's testimony.\textsuperscript{14}

On appeal, Johnson argued that Allen's prior statement was hearsay, admissible only for determining Allen's credibility and not for the truth of the testimony. He maintained that although counsel had made no objection to the instructions at trial, the court was permitted by Rule 52(b) of the Superior Court Rules to notice plain errors affecting substantial rights.\textsuperscript{15} Relying on prior District of Columbia court interpretations of this rule requiring a sua sponte limiting instruction at the time such evidence is offered, Johnson argued that the trial court had committed plain error by failing to issue the instruction. Judge Kelly, writing for the majority of the three-judge panel, reversed the conviction, holding that the trial court's failure had substantially prejudiced Johnson's right to a fair trial.\textsuperscript{16}

Three months later, the appellate court granted the government's petition for a rehearing \textit{en banc}.\textsuperscript{17}

\textsuperscript{14} 387 A.2d at 1085.

\textsuperscript{15} \textit{See}, \textit{e.g.}, \textit{Watts v. United States}, 362 A.2d 706, 708n.3 (D.C. 1976)(\textit{en banc}). For the text of rule 52(b), see note 9 \textit{supra}. The federal courts under \textit{Fed. R. Crim. P. 52(b)} are also permitted to notice errors affecting substantial rights not objected to at trial. \textit{See}, \textit{e.g.}, \textit{United States v. Sisto}, 534 F.2d 616 (5th Cir. 1976); \textit{United States v. Leonard}, 494 F.2d 955 (D.C. Cir. 1974); \textit{Chubet v. United States}, 414 F.2d 1018 (8th Cir. 1969); \textit{Herroz v. United States}, 226 F.2d 561 (9th Cir. 1955), \textit{cert. denied}, 352 U.S. 844 (1956). \textit{See also Wright & Graham, supra} note 13 at \textit{Criminal § 856}. However, these rules do not eliminate the requirement that a timely objection be made. \textit{See United States v. Graydon}, 429 F.2d 120, 123-24 (4th Cir. 1970). The corresponding provision in the Federal Rules of Evidence is substantially the same. \textit{See Fed. R. Evid. 103(d) & Adv. Coll. Notes.}

The purpose of the plain error rule is to protect both the rights of the defendant and the judicial integrity of the courts. There does not seem to be any single definition of plain error; it is a concept more easily recognized by courts than defined. \textit{Wright & Graham, supra} note 13, at \textit{Criminal § 856}. \textit{See, e.g.}, \textit{Kotteakos v. United States}, 328 U.S. 750, 760-61 (1946)(the object of the rule was "to substitute judgment for automatic application of rules"; the "task was too big, too various in detail, for particularized treatment"); \textit{United States v. Barcenas}, 498 F.2d 1110, 1113 (5th Cir.), \textit{cert. denied}, 419 U.S. 1036 (1974)(plain error is determined by facts and circumstances of each case). \textit{See also Gibbs, Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts, 3 Vill. L. Rev. 48 (1957).} For a discussion of the standards applied under the plain error rule, see notes 74-79 and accompanying text \textit{infra}.


\textsuperscript{17} District of Columbia Court of Appeals, General Rules 40(c) provides that:

A majority of the judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except \textit{(1)} when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or \textit{(2)} when the proceedings involves [sic] a question of exceptional importance.

Relying principally on Rule 40(c)(1), the government, in its petition for a rehearing, urged
Upon reconsideration, the court found that failure to issue an immediate limiting instruction did not constitute plain error, and reversed its prior decision. Judge Yeagley, writing for the seven member majority, urged a strict interpretation of the Rule 30 requirement that errors not be judicially noticed on appeal unless counsel had requested limiting instructions during the course of the trial. Although recognizing that Rule 52(b) permits exceptions when the failure to give an instruction substantially prejudices the rights of a party, the court found that the obligation of the trial judge to issue instructions without request of counsel, as established by District of Columbia case law, went beyond the appropriate scope of the sua sponte exception. Based on its finding that the limiting instruction in the final charge to the jury had been sufficient to prevent substantial prejudice, the court concluded that Johnson did not fit within the Rule 52(b) exception to Rule 30.

Judge Kelly, joined by Judge Mack in dissent, agreed with the majority's articulation of the general rule, but objected to the court's factual determination of insubstantial prejudice. Reasoning that the general jury instructions were inadequate to prevent the jury's use of the prior inconsistent statement as substantive evidence, Judge Kelly concluded that this was sufficiently prejudicial to require reversal. Johnson's strict reading of Rule 30 will undoubtedly create the benefit of eliminating a substantial number of unnecessary retrials. Additionally it will increase the possibility of undue prejudice to defendants by permitting the inadvertent admission of hearsay evidence. Given these conflicting results, the value of Johnson's strict reading of Rule 30 was inconsistent with prior holdings, and that overruling Lofty v. United States, 277 A.2d 99 (D.C. 1971), was necessary to insure uniformity in future decisions. Petition for Rehearing En Banc at 1-2, Johnson v. United States, 356 A.2d 639 (D.C. 1976), rev'd, 387 A.2d 1084 (D.C. 1978)(en banc). The District of Columbia Court of Appeals, in its order granting the rehearing en banc, did not articulate the reasons for its decision. However, the subsequent reversal may indicate that the court felt the earlier disposition had improperly deviated from the settled rule of law.

18. 387 A.2d at 1086-88. This interpretation is consistent with strict construction of the plain error exception to Rule 30 required by most jurisdictions. See, e.g., United States v. Bermudez, 526 F.2d 89, 96-97 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); United States v. Conley, 523 F.2d 650, 654 n.7 (8th Cir. 1975), cert. denied, 424 U.S. 920 (1976); United States v. Valencia, 492 F.2d 1071, 1074 (9th Cir. 1974); United States v. King, 420 F.2d 946, 947 (4th Cir.) (per curiam), cert. denied, 397 U.S. 1017 (1970). For a discussion of the exceptions which the court deemed permissible, see note 71 and accompanying text infra.

19. 387 A.2d at 1089.

20. Judges Kelly and Mack were the same judges who comprised the two-member majority of the first Johnson opinion.

21. 387 A.2d at 1090 (Kelly, J., dissenting). The dissenters considered this to be the central issue of the case and were critical of the majority's failure to accord it similar importance. Id. at 1090 n.1. See note 73 and accompanying text infra.

22. 387 A.2d at 1090 (Kelly, J., dissenting).
depends on whether the benefits to the judicial system compensate for any impediments to defendants' rights to a fair trial.

I. THE DEVELOPMENT OF THE SUA SPONTE REQUIREMENT

Hearsay, an extrajudicial statement offered at trial as substantive evidence,\textsuperscript{23} is not subject to the guarantees provided when the witness is present on the stand,\textsuperscript{24} subject to an oath\textsuperscript{25} and cross-examination.\textsuperscript{26} Consequently, such statements may furnish less reliable evidence. Prior inconsistent statements, made out of court and thus substantively unreliable,\textsuperscript{27} are admissible in the District of Columbia only for impeaching the

\begin{itemize}
  \item \textbf{23. See} McCormick, \textit{supra} note 1, at § 246; 5 J. Wigmore, \textit{Evidence} § 1361 (Chadbourn rev. ed. 1974).
  
  The statement can be written or oral, or may consist of nonverbal conduct so long as it is intended as an assertion. \textit{See} FED. R. EVID. 801(a); McCormick, \textit{supra} note 1, at § 246. Conduct is considered to be assertive when the act is the equivalent of words and the intent of the act is to make a statement, the truth of which is offered as evidence. \textit{See}, e.g., FED. R. EVID. 801(a) & Adv. Comm. Notes; McCormick, \textit{supra} note 1, at § 250 & n.34 (pointing to a suspect in a line-up to identify him). Nonassertive conduct is circumstantial evidence of a condition sought to be proved at trial even though the actor did not intend to assert that condition. \textit{See}, e.g., FED. R. EVID. 801(a) & Adv. Comm. Notes; McCormick, \textit{supra} note 1, at § 250 & n.36 (measures taken by family offered to show that person was insane). Extrajudicial statements which are not considered hearsay include verbal acts, such as oral statements of offer and acceptance between contracting parties, and verbal parts of acts which are explanatory words that accompany and clarify a transaction. \textit{See} FED. R. EVID. 801(c) & Adv. Comm. Notes; McCormick, \textit{supra} note 1, at § 249.
  
  \item \textbf{24. The presence of the witness at trial permits the trier of fact to observe the witness}'s demeanor while testifying, which provides information for evaluating his credibility. \textit{See} Mattox v. United States, 156 U.S. 237, 242-43 (1895); NLRB v. Dinion Coil Co., 201 F.2d 484, 487 (2d Cir. 1952); Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949); McCormick, \textit{supra} note 1, at § 245. \textit{See generally} Sahm, \textit{Demeanor Evidence: Elusive and Intangible Impenetrables}, 47 A.B.A.J. 580 (1961). In all civil proceedings the federal courts require that “the testimony of witnesses shall be taken orally in open court, unless otherwise provided . . . by these rules . . . .” FED. R. CIV. P. 43(a).
  
  \item \textbf{25. The oath requirement serves two functions. Its ceremonial and religious aspects create an obligation within the witness to speak the truth. It also apprises him of the danger of criminal prosecution for perjury.} \textit{See} Morgan, \textit{Hearsay Dangers and the Application of the Hearsay Concept}, 62 HARV. L. REV. 177, 185-88 (1948); McCormick, \textit{supra} note 1, at § 245. \textit{But see} 5 Wigmore, \textit{supra} note 23, at § 1362 (oath requirement incidental). The Federal Rules of Evidence have relaxed the oath requirement at trial so that an affirmation, a “solemn undertaking to tell the truth,” is also acceptable. FED. R. EVID. 603 & Adv. Comm. Notes.
  
  \item \textbf{26. Cross-examination is the opportunity afforded opposing counsel to probe a witness about the substance of his direct testimony and to ask questions designed to raise doubts about his credibility.} By testing the recollection of the witness, cross-examination exposes faults in his perception and memory. Consequently, it is generally agreed to be the primary factor in assuring the trustworthiness of testimony. \textit{See} Morgan, \textit{supra} note 25, at 186, 188; McCormick, \textit{supra} note 1, at §§ 19, 245; 5 Wigmore, \textit{supra} note 23, at §§ 1362, 1367-68.
  
  \item \textbf{27. For opposing viewpoints, see notes 94-97 and accompanying text infra.}
\end{itemize}
credibility of a witness. 28 Accordingly, the District of Columbia courts have required that the jury be informed of the limited use of these statements sometime during the trial to prevent undue prejudice resulting from the improper consideration of their contents. 29 It was not until Coleman v. United States 30 that the courts extended this rule to require a sua sponte instruction at the time the testimony is offered.

In Coleman, the government sought to impeach two of its own witnesses by offering prior statements contradicting their testimony at trial. This was permissible under section 14-102 of the District of Columbia Code, 31 provided the government made a satisfactory showing of surprise. 32 The de-

28. The District of Columbia adheres to the orthodox rule that prior inconsistent statements may only be used to impeach the credibility of a witness. They cannot be used to support the truth of their contents. See note 6 supra.

29. See Byrd v. United States, 342 F.2d 939, 940 (D.C. Cir. 1965) (error to fail to instruct jury regarding use of prior statements offered by government against defense witness); Bartley v. United States, 319 F.2d 717, 719-20 (D.C. Cir. 1963) (reversal for failure to instruct jury either immediately or in final charge regarding use of prior statements offered against own witness).

30. 371 F.2d 343 (D.C. Cir. 1966) (per curiam), cert. denied, 386 U.S. 945 (1967). The need for a sua sponte instruction was previously considered by the court in Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019 (1954). The court reasoned that the final charge to the jury regarding the use of prior statements was sufficiently clear to prevent their being used as substantive evidence. Id. at 26. The court did, however, acknowledge that an immediate instruction would have been desirable. Id. at 26 n.17.


When the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made . . . statements substantially variant from his sworn testimony about material facts in the cause.

This rule codifies District of Columbia common law relating to the impeachment of one's own witness. See Smith v. United States, 17 F.2d 223, 224 (D.C. Cir. 1927). The common law rule presumed that the party calling the witness vouched for his honesty and reliability. This rule, however, has been rejected in the federal courts since it is based on the false assumption that a party has a free choice in selecting his witnesses. See United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), cert. denied, 375 U.S. 958 (1963); Fed. R. Evid. 607 & Adv. Comm. Notes (party may impeach the credibility of any witness called). See also United States v. Norman, 518 F.2d 1176, 1177 (4th Cir. 1975) (per curiam) (rule against impeaching own witness "archaic, irrational and potentially destructive of the truth-gathering process"); E. Morgan, Basic Problems of Evidence 69-71 (1962) (rule against impeaching own witness irrational). See generally 3 Weinstein & Berger, supra note 8, at § 607[01]; Hauser, Impeaching One's Own Witness, 11 Ohio St. L.J. 364 (1950); Ladd, Impeachment of One's Own Witness, 4 U. Chi. L. Rev. 69 (1936).

32. The party seeking to impeach its own witness must approach the bench, explain why he anticipated different testimony, and request permission to examine the witness regarding the prior inconsistent statement. See Trial Manual, supra note 3, at 15.50. The concept of surprise is a broad one; normally, the court's ruling on surprise may not be overturned unless it is clear that there was no rational basis for the decision. Wheeler v. United
fense did not request a limiting instruction at the time the evidence was admitted, nor did the trial judge issue such an instruction. On appeal, the defendant argued that this failure by the trial judge was plain error requiring reversal.\(^{33}\) The Court of Appeals for the District of Columbia Circuit affirmed the conviction,\(^{34}\) concluding that the final charge to the jury was adequate to prevent substantial prejudice.\(^{35}\) It held prospectively, however, that the trial court must issue an immediate limiting instruction when prior inconsistent statements were offered to impeach a party's own witness.\(^{36}\) The majority concluded that the defendant's right to a fair trial and the desirability of avoiding unnecessary retrials were sufficiently compelling to take the responsibility for the limiting instruction away from the attorney and place it with the trial judge.\(^{37}\)

This prospective ruling was affirmed one year later by the same court in Jones v. United States.\(^{38}\) Facing facts similar to those in Coleman,\(^{39}\) the

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\(^{33}\) 371 F.2d at 344-45. Appellant additionally argued that the trial court incorrectly permitted the prosecutor to read to the jury the entire contents of the prior statements. The reviewing court rejected this argument, reasoning that the trial court had discretion to admit as much of the statement as it deemed necessary. Id. at 345 (relying on Wheeler v. United States, 211 F.2d 19, 25 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019 (1954)).


\(^{35}\) 371 F.2d at 345.

\(^{36}\) Id. at 346. The court noted the inherent difficulty in effectuating the intention of § 14-102 to limit the use of prior inconsistent statements to the issue of credibility. Although the statute is silent as to limiting instructions, the court reasoned that the privilege it provides must be coupled with an immediate cautionary instruction if the legislative intent was to be fulfilled. Id. at 345-46.

\(^{37}\) Id. at 346.

\(^{38}\) 385 F.2d 296 (D.C. Cir. 1967)(per curiam).

\(^{39}\) The government, pursuant to § 14-102, introduced prior inconsistent statements to impeach its own witness. The defense neither requested a limiting instruction at the time the evidence was offered, nor objected to the final charge to the jury. Appellant argued on
Jones court used a two-step analysis in its per curiam decision. First, the court reasoned that use of prior statements to impeach one's own witness necessitated a limiting instruction at some point during the trial in order to prevent substantial prejudice. 40 Relying on its holding in Coleman, the court then concluded that only an immediate sua sponte instruction could effectively limit the jury's use of the statement.41 The court went on to discuss whether an immediate limiting instruction, sua sponte, was required for prior statements used to impeach a witness called by opposing counsel.42 Noting that prior statements are generally unreliable evidence, admissible only for impeachment purposes, the court concluded that the sua sponte rule in Coleman should apply whenever a prior inconsistent statement is offered, regardless of whose witness is testifying.43

appeal that the failure of the trial judge to issue a limiting instruction sua sponte was plain error. The government countered that appellant's silence at trial was a tactical choice and, therefore, a waiver of any objection. Noting that the record was silent as to any tactical choice by appellant, the court rejected the government's contention, stating that appellant's use of the contradiction on recross-examination negated any claim that he chose to avoid calling the jury's attention to an embarrassing piece of evidence. Id. at 298-99.

40. Id. at 298-99. The court relied on Bartley v. United States, 319 F.2d 717, 719 (D.C. Cir. 1963), which cited Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019 (1954), for the rule that a limiting instruction is required both at the time the evidence is offered and in the final charge to the jury. A careful reading of the Wheeler opinion, however, does not reveal this language. In fact, the issue of sua sponte instructions was not the primary focus of the case. Thus, the Bartley court's reliance on Wheeler may have been misplaced.

41. 385 F.2d at 299. The court could have reached the same decision without relying on Coleman, given its finding that the jury's possible reliance on the contents of the prior statements was sufficiently prejudicial to require reversal. Id. at 300 n.15.

42. The government had urged that the witness was, in fact, a defense witness when the government introduced the prior statements. Consequently, the interpretation of § 14-102 requiring an immediate sua sponte instruction for prior statements used to impeach one's own witness would not be applicable. To reach this conclusion, the government argued that the defense had raised a new matter by questioning the witness about the prior statements during cross-examination. The court rejected this argument, noting that the government had initially raised the issue of the prior statements during its direct examination. 385 F.2d at 299.

43. Id. at 300. The court limited this requirement to extrajudicial statements by non-party witnesses. Id. Under D.C. law, statements by a party are admissions, admissible as substantive evidence as an exception to the hearsay rule. See, e.g., Smith v. United States, 312 A.2d 781 (D.C. 1973) (testimony by police officer that he heard defendant threaten a witness). See generally Trial Manual, supra note 3, at 15.20-22. Admissions are the statements or conduct of a party, or his representative, which are offered into evidence against him. See McCormick, supra note 1, at § 262; 4 Wigmore, supra note 23, at § 1048; Fed. R. Evid. 801(d)(2) & Adv. Comm. Notes. They are admissible as substantive evidence under the theory that any relevant conduct by a party can be used as evidence against him. "A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." Morgan, supra note 31, at 266.
Although Jones has been subsequently cited for the proposition that an immediate sua sponte instruction is required whenever a prior inconsistent statement is offered to impeach a witness's credibility, this rule was subsequently expanded to include an instruction for any evidence offered for a limited purpose. In United States v. McClain, evidence of prior fights between the defendant and his wife was introduced to show malice. No limiting instruction was given at the time the evidence was offered and none was requested. The majority reasoned that the prejudice resulting from unrestricted use of this prior bad acts evidence created a plain error exception to the rule requiring requests for instructions during the trial. Rather than reversing solely on the finding of substantial prejudice, the court relied upon Jones to hold that "whenever evidence is admitted only for a limited purpose, it is plain error, in the absence of manifest waiver,

In the federal courts, admissions by a party-opponent are also admissible for the truth of the statement but are defined as non-hearsay. Fed. R. Evid. 801(d)(2). See, e.g., United States v. Dimitroff, 541 F.2d 629, 632 (6th Cir. 1976)(defendant's affidavit); United States v. Velarde, 528 F.2d 387, 389 (9th Cir. 1975), cert. denied, 425 U.S. 914 (1976)(statement made by defendant to police officer at time of arrest). For a discussion of other forms of non-hearsay, see note 23 supra.


45. 440 F.2d 241 (D.C. Cir. 1971).

46. The government sought to elicit this testimony during its direct examination of defendant's daughter. Following an objection by the defense, the court ruled that this evidence of prior acts of violence was not admissible. The government was later permitted to introduce this evidence over objection by defense, however, because the defense had questioned the witness during cross-examination about altercations between her parents. Id. at 242-44.

47. Evidence of prior bad acts is not admissible as substantive evidence because of the prejudice resulting from the jury's inference that the defendant tends to act in conformity with those prior acts. However, prior acts evidence may be introduced as evidence of motive or intent, accident, absence of mistake, common scheme or plan, or identity if its probative value outweighs prejudice to the defendant. See Drew v. United States, 331 F.2d 85, 89-90 (D.C. Cir. 1964). See also Tinsley v. United States, 368 A.2d 531 (D.C. 1976); Light v. United States, 360 A.2d 479 (D.C. 1976). See generally Trial Manual, supra note 3, at 15.23-35. Cf. Fed. R. Evid. 404(b) & Adv. Comm. Notes (prior acts evidence may be introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

48. The dissent, written by Judge MacKinnon, questioned whether the introduction of prior bad acts evidence without a limiting instruction resulted in any prejudice to the defendant. He first stated that the prior bad acts evidence actually showed that defendant and his wife fought infrequently, not frequently. He added that it was not prejudicial if defense counsel made it possible for this evidence to be introduced. 440 F.2d at 247-48.

49. For a determination of manifest waiver the court required an explicit statement that the particular instruction was not desired and a clear showing on the record that the waiver was made for tactical reasons. Id. at 245. See United States v. Francisco, 410 F.2d 1283,
to omit an immediate cautionary instruction." McClain, therefore, created a per se rule requiring reversal for any failure of the trial court to sua sponte limit the use of multi-purpose evidence.

This broad rule sets the District of Columbia Circuit Court apart from other federal jurisdictions. Rather than requiring an immediate sua sponte instruction for any evidence offered for a limited purpose, the other federal courts prefer to make case-by-case determinations of prejudice sufficient to justify such an instruction. Perhaps aware of its radical position, the District of Columbia Circuit has rarely invoked its own rule, instead distinguishing McClain as involving evidence and circumstances more prejudicial than presented in subsequent cases.

50. 440 F.2d at 246. Judge Bazelon found the case at bar to be identical to the problem presented in Jones. Id. Although the degree of prejudice may be indistinguishable, the type of prejudice is not. Jones involved the use of a prior statement to impeach the credibility of the government's own witness. The purpose of the limiting instruction was to avoid the inadvertent admission of hearsay. In McClain, the evidence offered was specific instances of prior conduct. In that case, the purpose of the limiting instruction was to prevent the jury from drawing inferences about the character of the defendant.


52. See, e.g., United States v. Freeman, 514 F.2d 1314, 1317 & n.18 (D.C. Cir. 1975)(potential prejudice of hearsay testimony concerning identity less obvious); United States v. Lee, 509 F.2d 400, 406-07 & n.17 (D.C. Cir. 1974), cert. denied, 420 U.S. 1006 (1975)(evidence of prior convictions and prior guilty plea for unrelated offense less prejudicial because instruction in final charge related to specific evidence); United States v. Fench, 470 F.2d 1234, 1241 (D.C. Cir. 1972), cert. denied, 410 U.S. 909 (1973)(evidence of prior suspicious acts not as inflammatory); United States v. Mizzell, 452 F.2d 1328, 1330 (D.C. Cir. 1971)(evidence involved prior legal conduct of complainant, not defendant's prior bad conduct). See also United States v. Thomas, 459 F.2d 1172, 1174-75 (D.C. Cir. 1972)(per curiam)(evidence admitted for multiple purposes, not single purpose as in McClain). Even Judge Bazelon, the author of the McClain opinion, has acknowledged its erosion. See United States v. Freeman, 514 F.2d 1314, 1317 n.18 (D.C. Cir. 1975); United States v. Henson, 486 F.2d 1292,
The Court of Appeals for the District of Columbia, however, agreed with the McClain court's conclusion that a broad sua sponte rule was the more effective way to prevent substantial prejudice. Accordingly, in Lofty v. United States, the District of Columbia Court of Appeals adopted this federal rule by applying it to prior inconsistent statements. In Lofty, as in Coleman and Jones, the government introduced prior statements to impeach its own witness. Although no immediate instruction was requested or given, the court gave a final charge to the jury, instructing it to consider the prior statements only in evaluating the credibility of the witness, not as evidence of the defendant's guilt. On appeal, the majority reversed, citing Coleman as requiring an immediate sua sponte instruction. Additionally, the court relied on McClain to hold that the omission of an immediate sua sponte instruction whenever any evidence was admitted for a limited purpose was plain error. Thus, Lofty suggests that the court created a per se rule of plain error in the District of Columbia for failure of the trial court to issue a sua sponte limiting instruction for any evidence introduced for a limited purpose. Nonetheless, the Court of Appeals, in a case involving prior conviction evidence, limited rather than followed the Lofty holding.

In Dixon v. United States, the government introduced evidence of the defendant's prior larceny conviction, limiting its use to impeachment purposes. A limiting instruction was not requested at any time by counsel, nor was any given until the trial judge's final charge to the jury. On appeal, the defendant, relying on Lofty, argued that lack of an immediate sua


54. Id. at 100. The jury must not have found these final instructions to be sufficiently clear. During their deliberations, the jurors asked for further instructions regarding the use of the prior statements. Id. at 101.
55. Appellant urged on appeal that the failure to give an immediate sua sponte instruction to the jury was plain error, not curable by the instructions in the final charge. Id.
56. Id. By relying on McClain, the court went beyond the narrow factual situation presented under § 14-102 and the narrow Coleman rule. In this, the court may have been indicating its dissatisfaction with Coleman's effect on preserving the rights of the defendant.
58. The jury was instructed that it could only consider the prior conviction as evidence of defendant's truthfulness while testifying, not as evidence of his guilt. Id. at 91 n.4. This evidence is permissible for impeachment purposes "only if the criminal offense (A) was punishable by death or imprisonment in excess of one year . . . or (B) involved dishonesty or false statement (regardless of punishment)." D.C. CODE ANN. § 14-305(b)(1) (1973). Cf.
sponte instruction was plain error. Rejecting this contention, the court reasoned that although *Lofty* had properly followed the *Coleman-Jones* rule requiring an immediate sua sponte instruction for statements used to impeach one’s own witness, its holding was not controlling in all cases.\(^{59}\)

Since a sua sponte instruction is the exception to the general rule obligating counsel to request a limiting instruction, the court concluded that the necessity for the instruction would be determined on an ad hoc basis.\(^{60}\)

Although prior inconsistent statements could sufficiently confuse the jury as to require an immediate instruction, the court reasoned that this was not the case with prior conviction evidence which does not directly contradict the witness’s testimony.\(^{61}\)

Despite *Dixon’s* narrow reading of *Lofty*, suggesting that a further expansion of the sua sponte obligation was improper,\(^{62}\) Judge Kelly in *Johnson I* relied on *Lofty* to create yet another sua sponte obligation. In *Johnson II*, Judge Yeagley not only struck down this new requirement, but also definitively overruled the *Lofty* requirement of sua sponte instructions for all multi-purpose evidence.

**II. THE DEMISE OF AN ABSOLUTE SUA SPONTE OBLIGATION**

When the District of Columbia Court of Appeals first considered the case of *Johnson v. United States*, prior law did not clearly establish whether an immediate sua sponte limiting instruction was required for all evidence admitted for a limited purpose. Judges Kelly and Mack deemed *Lofty* to be controlling,\(^{63}\) despite the *Dixon* court’s limitation. Since *Johnson* involved the government’s use of a prior inconsistent statement to impeach an adverse witness rather than one of its own, the *Lofty* interpretation of section 14-102 did not strictly apply. In its decision to

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\(^{59}\) *FED. R. EVID. 609* (permits discretion of trial judge for felony convictions not involving dishonesty or false statement).

\(^{60}\) *Id.* at 98-99.

\(^{61}\) *Id.* at 99. By contrast, in urging that *Lofty* be overruled, the government argued that prior conviction evidence was substantially more prejudicial than prior inconsistent statements. Petition for Rehearing, *supra* note 17, at 4.


\(^{63}\) In *Johnson II*, dissenting Judges Kelly and Mack retreated from this position. Instead, they argued, consistent with their majority decision in *Johnson I*, that the limiting instruction was necessary to prevent jury confusion that would result from the use of the prior statement, regardless of whose witness was being impeached. 387 A.2d 1084, 1091 (Kelly, J., dissenting).
reverse, however, the court avoided this obstacle by relying on *Lofty*'s rationale rather than its facts. It reasoned that the *Lofty* limiting instruction sought to prevent the jury from using the content of the prior statement as evidence of defendant's guilt. Although the jury could presume that substantive evidence was being offered when a party impeached its own witness, the majority, citing *Jones*, concluded that this danger was present whenever any prior inconsistent statement was offered. To support this conclusion, the court relied on dicta in *Dixon* that prior inconsistent statements were more confusing to the jury than evidence of a prior conviction. Accordingly, the court held that an immediate instruction, sua sponte, was necessary to limit the prior inconsistent statement offered by a party to impeach an adverse witness. This new sua sponte obligation, however, was short-lived.

Judge Yeagley in *Johnson II* focused on restricting the plain error exception to the Rule 30 requirement that counsel request instructions during the course of the trial. Noting that *Johnson I*'s reliance on *Lofty* had excessively broadened the scope of the exception and that *Dixon* was more analogous because it involved the government's use of evidence against an adverse witness, the majority relied on *Dixon* rather than *Lofty* to reach its decision that an immediate sua sponte instruction was not required. Additionally, the majority overruled *Lofty* "to the extent that it conferred on the trial court an absolute sua sponte obligation to issue an immediate cautioning instruction whenever evidence is brought in which is admissible only for a limited purpose."

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64. The dissent offered the argument, rejected by the majority, that the relationship between counsel and its own witness could mislead the jury regarding the nature of the evidence being offered. 356 A.2d at 641.
65. Id.
66. Id. at 641-42. See text accompanying note 61 supra.
67. The majority presumed that the verdict of guilty resulted from the jury's use of the statement as substantive evidence of the defendant's guilt. Id. at 641 n.4. This fact formed the basis of their dissenting argument in *Johnson II* that failure to limit immediately the use of the evidence resulted in substantial prejudice. See note 73 and accompanying text infra.
68. 387 A.2d at 1087. The court failed to note that the basis of the *Dixon* distinction was the type of evidence being offered, not the relationship between the witness and the attorney introducing the evidence. See note 61 and accompanying text supra.
69. 387 A.2d at 1087. It is questionable whether *Lofty* ever stood for this broad proposition since the facts involved only prior inconsistent statements under § 14-102. Despite subsequent decisions that have avoided *Lofty*'s broad rule, see *Simmons v. United States*, 364 A.2d 813, 818 (D.C. 1976); *Watts v. United States*, 362 A.2d 706, 711 n.11 (D.C. 1976)(en banc); *Dixon v. United States*, 287 A.2d 89, 97 (D.C.), *cert. denied*, 407 U.S. 926 (1972), the majority may have decided that explicitly overruling *Lofty*'s broad holding was necessary to avoid any future decisions similar to *Johnson I*. 
ate sua sponte instruction under section 14-102 would still be required, the decision effectively eliminates the trial judge's obligation to give this instruction.

The divergent decisions authored by the two Johnson panels may derive from their respective applications of the plain error rule. The majority, in finding the final charge to the jury to be sufficient, did not analyze the danger of the jury using the prior statements as substantive evidence and the concomitant prejudice to Johnson. By contrast, the dissent, in a detailed analysis of the facts and circumstances of the trial, noted that the statements used to impeach Allen were not only the sole evidence implicating Johnson in the crime, but were also improperly emphasized by the government in its closing argument. The jury, the dissent reasoned, must have considered the statements substantively in order to have reached a verdict of guilty. Since this was sufficiently prejudicial to Johnson's right to a fair trial, the dissent concluded that the trial court's failure to use an immediate sua sponte instruction to mitigate this danger was plain error.

These conflicting approaches raise the question of whether the Johnson II majority was correct in not finding plain error. To resolve this question, it is necessary to analyze the facts in Johnson under the test for plain error: whether the error was "so clearly prejudicial to substantial rights as to jeopardize the very fairness of the trial." Application of this standard requires, by review of the record as a whole, an examination of the

70. 387 A.2d at 1087 n.5.
71. The majority accomplished this result by stating, subsequent to its assurances of the continued validity of the § 14-102 instruction, that such an instruction was not absolutely required. Instead, any sua sponte instruction should be limited to including essential principles of law in the final charge. The court specifically mentioned the basic elements of the offense charged and the standard of proof to be applied. It did not, however, intend this to be an exclusive list. The court reasoned that these and other principles of law were more necessary to ensure basic fairness than limiting instructions. Id. at 1088.

Nonetheless, the Coleman-Jones rule requiring an immediate sua sponte instruction may still be binding. Since Jones and Coleman were decided before the effective date of the Court Reorganization Act, see note 34 supra, these decisions are still precedent unless overruled or expressly not followed by the D.C. Court of Appeals en banc. Johnson II was an implicit, not explicit, refusal to reaffirm the rule of these cases.

72. Rather than analyze whether failure of the trial court to issue an immediate sua sponte instruction substantially prejudiced Johnson's rights, the court briefly stated that, upon review of the record, it found the limiting instruction included in the final charge to be sufficient. 387 A.2d at 1089.
75. See, e.g., United States v. Jennings, 527 F.2d 862,868-69 (5th Cir. 1976); United
strength or weakness of the government's case, the materiality of the evidence in question, the possible damaging effect of the evidence, and the efforts used to mitigate that effect. Although there was evidence in Johnson to show that a robbery had been committed, Allen's prior statement was the only evidence directly inculpating Johnson. Since it went to the issue of guilt, the statement was material as well as inflammatory. Furthermore, as the only substantive evidence, it was indicative of the weakness of the government's case. Unless properly limited, its admission potentially jeopardized Johnson's right to a fair trial. Nonetheless, the majority concluded that the final charge to the jury was sufficient to prevent prejudice, without analyzing the possible mitigating effect of an immediate sua sponte instruction as required by the plain error rule.

The court reached its conclusion of insufficient prejudice despite prior rulings that limiting instructions included only in the final charge are inadequate to limit the prejudicial impact of prior statements. Commentators and judges agree that if limiting instructions are to neutralize the impact of damaging evidence, they should be given at the time the evidence is offered. Timely instructions, directed to a specific piece of evidence, have maximum immediate impact on the jurors, mitigate improper consideration of the evidence during the course of the trial, and prevent the prosecution from making improper references to the evidence in its summation. Because limiting instructions given only in the final charge do not relate specifically to the evidence in question and are included with all of the

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77. See, e.g., United States v. DeLaMotte, 434 F.2d 289, 294 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971)(no plain error where prior conviction evidence, admitted without a cautionary instruction, added nothing material to the case); Osborn v. United States, 391 F.2d 115, 118 (10th Cir. 1968)(no plain error where evidence contained nothing of substance which could prejudice the defendant if improperly considered).

78. See, e.g., United States v. Lipscomb, 425 F.2d 226, 227 (6th Cir. 1970)(plain error where prior inconsistent statement, admitted without a cautionary instruction, contained substantive elements that government was required to prove).

79. See, e.g., DeCarlo v. United States, 422 F.2d 237, 240 n.1 (9th Cir. 1970)(no plain error where final charge sufficient to mitigate effect of prior statements).

80. The evidence offered at trial indicated that the victim was unable to identify Johnson as one of the actors in the robbery. See Johnson v. United States, 356 A.2d 639, 640, rev’d, 387 A.2d 1084 (D.C. 1978)(en banc). See also Brief for Appellant, supra note 73, at 16.
other instructions which must be given to the jury, they have little, if any, impact. This suggests, contrary to the majority's conclusion, that an immediate instruction in *Johnson* could have prevented either the jury or the government from improperly using the substance of the prior statement.

The majority's misapplication of the plain error rule must be evaluated in light of challenges to the overall effectiveness of limiting instructions. There is some authority supporting the theory that jurors are able to follow limiting instructions. The majority of jurists and commentators, although recognizing that such an instruction is necessary because it "furthers, rather than impedes the search for truth," assert that jurors are unable to perform the "mental gymnastic" of limiting the use of the evidence. Based on this rationale, the majority could have reasoned that, despite the damaging impact of the statement, plain error was not committed because a limiting instruction would have been useless to overcome prejudicial impact. By stating that the final charge was sufficient to remedy the prejudicial effect of Allen's prior statement, however, the *Johnson* court implicitly conceded the effectiveness of limiting instructions. Accordingly, it should have found, in light of authority that links effective-

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82. *See, e.g.*, United States v. Sisto, 534 F.2d 616, 625 (5th Cir. 1976)(a properly instructed jury is able to follow a limiting instruction). Furthermore, there is a presumption that jurors can and do follow instructions. *See* Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963); United States v. Harris, 211 F.2d 656, 659 (7th Cir.), *cert. denied*, 348 U.S. 822 (1954); Bates v. United States, 327 A.2d 542, 547 (D.C. 1974). *See generally* 1 *Weinstein & Berger*, supra note 8, at ¶ 105[05]. *But see* E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 105 (1956)(use of limiting instructions fosters inconsistent attitude toward jury "treating them at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects").


84. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440, 453 (1949)(Jackson, J., concurring)("naive assumption that prejudicial effects can be overcome by instructions to the jury [which] all practicing attorneys know to be unmitigated fiction"); United States v. Bussey, 432 F.2d 1330, 1334-35 (D.C. Cir. 1970)("it blinks reality to think that . . . the jury was capable of the 'mental gymnastic' of disregarding this evidence in 'any respect' except as to the one purpose permitted by the trial court"); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932)("mental gymnastic which is beyond, not only [the jury's] powers, but anybody else's"); Morgan, * supra* note 82, at 103 ("to expect a jury actually to go through the process of separating the inadmissible evidence from the admissible and to eliminate its effect from their conscious minds . . . is to expect the impossible"). *Cf.* Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 753-54 (1959)(instructions to disregard tend to sensitize jurors in liability cases). *See generally* Note, The Limiting Instruction—Its Effectiveness and Effect, 51 Minn. L. Rev. 264 (1966).
ness of limiting instructions to their timeliness, that the admission of the prior statement without an immediate sua sponte instruction was plain error.

The majority's failure to analyze its application of the plain error standard, coupled with its emphasis on judicial economy, indicates that the Johnson II court gave controlling weight to this latter factor in reaching its decision. In contrast to prior decisions holding that an immediate sua sponte limiting instruction for prior inconsistent statements offered against one's own witness was the most efficient way to preserve the interests of justice and judicial economy, Johnson II suggests that judicial economy and efficiency are best preserved by determining plain error on a case-by-case basis.85 The decision implies that a per se rule of plain error allows unnecessary retrials by permitting the attorney to create error through deliberate inaction.86 Furthermore, application of the per se rule is potentially overbroad. Relying on the per se rule, a court may require a retrial when, under a plain error analysis, there has been no prejudice to substantial rights. This could occur in cases where there is sufficient other evidence of guilt, or where the evidence goes to a material issue. By contrast, the case-by-case approach requires analysis of each factual situation and an actual determination of substantial prejudice,87 thereby limiting reversals and retrials to instances when plain error truly exists.

The Johnson II court may also have wanted to enhance the speed and flow of the trial by eliminating unnecessary interruptions. In Coleman, the District of Columbia Circuit Court saw no burden in requiring an immediate instruction for prior inconsistent statements of one's own witness. Since the trial judge must make a finding of surprise before permitting the prior statement, a warning instruction could easily be issued at that time.88

85. It could also be argued that Johnson II will impair rather than improve judicial economy. By eliminating the per se rule for limiting instructions, the decision permits judicial discretion to determine whether an instruction is required and, therefore, a greater possibility for judicial error. Consequently, although the number of unnecessary retrials may be reduced, Johnson II may cause an increase in the number of appeals.


87. 387 A.2d at 1089.

88. 371 F.2d at 346. Assuming that the § 14-102 requirement for a limiting instruction is still valid, see note 71 supra, this would still be true. See also notes 31-32 supra.
With other kinds of multi-purpose evidence, however, an immediate instruction is more burdensome since the need for an instruction is not always obvious when evidence is offered. Under the broad Lofty rule, the trial would be transformed into a series of bench conferences to make these determinations. Although the need for many of these conferences may be obviated by the prepared attorney who informs the judge in advance that an instruction may be necessary, the flow of the trial would still be interrupted by repeated admonishments from the bench regarding the proper use of the evidence. Rather than prevent prejudice to the defendant, the absolute sua sponte obligation may actually interfere with the coherent presentation of the defense. By eliminating this obligation, Johnson II will predictably reduce the number of these interruptions. Additionally, by reversing the effect of Coleman, the Johnson II rule places responsibility for requesting limiting instructions on the attorney. Under these circumstances, waiver would be presumed if counsel made no request. This not only avoids interference with the attorney's tactical objectives, such as preventing the emphasis of unfavorable evidence to the jury, but also conforms with traditional notions of the adversary system which places primary responsibility for preserving the rights and interests of the parties with the attorney, not the judge.

Johnson II's elimination of a per se sua sponte instruction will result in the inadvertent admission of hearsay. This prejudice to the defendant's right to a fair trial may outweigh benefits derived from the increase in judicial economy and efficiency. Although the District of Columbia adheres to the orthodox rule that prior inconsistent statements can be used only for impeachment purposes, there is a growing trend permitting the limited admissibility of these statements as substantive evidence. Advocates of this limited admissibility offer two rationales. First, since the declarant is usually on the witness stand subject to cross-examination, the reliability and veracity problems inherent in extrajudicial statements are eliminated. Second, proponents maintain, the prior statement is more reliable than the statement made while on the stand because it is made

90. See Dixon v. United States, 287 A.2d at 98.
91. Id.
92. This presumption would avoid any determinations of whether counsel had, in fact, manifestly waived the instruction. See note 49 supra.
closer to the time of the occurrence when the memory is more likely to be accurate. These rationales have been incorporated into Rule 801(d)(1)(A) of the Federal Rules of Evidence allowing prior inconsistent statements "given under oath subject to the penalty of perjury at trial, hearing or other proceeding" to be admissible as nonhearsay substantive evidence. Although the District of Columbia Court of Appeals has not adopted the federal rule, Johnson II may be an implicit acknowledgement of its premise that permitting jurors to consider the contents of prior statements does not cause undue prejudice.

Johnson II thus emerges as a decision enhancing the judicial process without additionally burdening the rights of the parties. Its merits, however, may be undermined by its flawed application of the plain error rule. Johnson II incorrectly ruled that the general limiting instruction included in the final charge adequately mitigated the effect of a prior statement so prejudicial that plain error standards would have required an immediate sua sponte limiting instruction. By finding no substantial prejudice when Johnson's right to a fair trial had been unduly impaired, the Johnson II court has steepened the requirements for showing plain error. Consequently, the task of proving plain error will now be more difficult, and arguably impossible, when there is a failure to issue an immediate sua sponte instruction limiting the use of prior inconsistent statements.

III. Conclusion

Johnson II eliminates the prior per se obligation on the District of Columbia trial court to issue an immediate instruction, sua sponte, limiting the use of prior inconsistent statements. In so doing, the decision promotes

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95. See United States v. De Sisto, 329 F.2d 929, 933 (2d Cir.), cert. denied, 377 U.S. 979 (1964); Asaro v. Parisi, 297 F.2d 859, 863-64 (1st Cir.), cert. denied, 370 U.S. 904 (1962); McCormick, supra note 94, at 577. See also Ordover, Surprise! That Damaging Turncoat Witness is Still With Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A) and 403, 5 Hofstra L. Rev. 65 (1976)(prior inconsistent statements should be admitted substantively since they are beneficial to the prosecution).


97. Fed. R. Evid. 801(d)(1)(A) would not apply to Johnson because Allen's prior statement was not made under oath. See text accompanying note 95 supra. The D.C. Court of Appeals, however, has acknowledged the conflict between D.C. law and the federal rules in a case prior to Johnson, see Parker v. United States, 363 A.2d 975, 977-78 (D.C. 1976), and has recently given indirect approval to Fed. R. Evid. 801(d)(1)(A) and its rationale. See Forbes v. United States, 390 A.2d 453, 456-58 (D.C. 1978).

judicial efficiency and economy. To reach this result, however, the *Johnson II* majority found that the failure to limit immediately the use of a highly prejudicial statement was not plain error—an arguably incorrect application of the law. By focusing on whether any limiting instruction was given, rather than analyzing the prejudicial impact of the prior statement, as suggested by the dissent, *Johnson II* may permit errors that substantially prejudice a party's right to a fair trial. *Johnson II*, therefore, achieves judicial economy by compromising a defendant's right to a fair trial.

The *Johnson II* holding will also allow the inadvertent admission of hearsay in those situations when counsel does not request an immediate instruction, subverting settled District of Columbia law prohibiting the use of prior inconsistent statements as substantive evidence. This implicit challenge to the District law, however, is consistent with the federal rules which recognize the reliability of some prior inconsistent statements. Consequently, rather than indirectly allow this admission of prior statements through elimination of the obligation of an immediate sua sponte limiting instruction, the District of Columbia Court of Appeals should expressly recognize prior inconsistent statements as an exception to the hearsay rule.99

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99. In order to effect such a change in existing common law, the D.C. Court of Appeals must render a decision *en banc*. See M.A.P. v. Ryan, 285 A.2d 310 (D.C. 1971) and note 34 *supra*; D.C. CODE ANN. § 11-946 (1973). If enacted as an amendment or addition to the D.C. Code, it must be passed by Congress.

Principles defining the jurisdiction of a forum state over *in personam* actions against nonresident defendant corporations have an amorphous quality which eludes convenient judicial tests and repeatedly relegates jurisdiction contests to the bothersome category of legal questions resolvable only on an *ad hoc* basis. The permissible scope of jurisdiction over foreign corporations is customarily established by state long-arm statutes.

1. The traditional basis for jurisdiction is the presence of the parties or property involved in the action within the territorial boundaries of a state and its courts. Territorial power is expressed in three procedural categories of jurisdiction — *in personam*, *in rem*, and *quasi in rem*. *In personam* jurisdiction is traditionally established by personal service of process effected while the defendant or some qualified representative is physically within the boundaries of the state whose courts are asserting jurisdiction. *See*, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958). The physical presence element of *in personam* jurisdiction has been liberalized, however, to include such things as citizenship, *Blackmer v. United States*, 284 U.S. 421, 438 (1932); domicile, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); and consent, *Hess v. Powliski*, 274 U.S. 352, 356 (1927). *In rem* jurisdiction is asserted to determine rights in property capable of seizure by the state. *See*, e.g., *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). *Quasi in rem* jurisdiction is similarly based upon the power to seize a defendant’s property within a state’s territorial authority, but is asserted to adjudicate claims unrelated to that property. The most common examples of *quasi in rem* proceedings are attachment and garnishment. *See*, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Harris v. Balk*, 198 U.S. 215 (1905); *Seider v. Roth*, 17 N.Y. 2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *Quasi in rem* actions were substantially limited in *Shaffer v. Heitner*, 433 U.S. 186 (1977), when the Court rejected state court jurisdiction based solely upon the presence of a defendant’s property. The Court held that where property is neither the subject matter of the litigation nor in some way related to the cause of action, due process precludes a binding judgment unless there has been a showing of other ties among the defendant, the state, and the litigation. The sufficiency of these other ties is evaluated according to the “minimum contacts” standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which prescribes the jurisdictional limits of *in personam* actions against nonresident defendant corporations. *See* *Shaffer v. Heitner*, 433 U.S. at 207-12; note 4 infra.


3. The assertion of *in personam* jurisdiction over foreign corporations is predicated upon the existence of a statute providing for valid service of process. These “long-arm” statutes typically permit service upon corporations doing business in the forum state; however, no precise rules have been developed to infallibly identify what conduct complies with such a standard. State legislatures have adopted a wide variety of permissible bases for proper service. *See*, e.g., *CAL. CIV. PROC. CODE § 395.5* (West 1973) (“A corporation . . . may be sued in the county where the contract is made or is to be performed, or where the
which in turn are subject to various constitutional limits. Simplified, the prerequisites dictate that a corporate defendant must be doing business in, and maintaining contacts with, the forum state to a degree sufficient to insure that jurisdiction will not offend due process. Accordingly, in

obligation or liability arises, or the breach occurs; or . . . where the principle place of business of such corporation is situated . . . . “); FLA. STAT. ANN. § 47.051 (West Supp. 1978) (service permitted when nonresident corporation is “doing business” within the state); IOWA CODE ANN. § 617.3 (West Supp. 1979) (“transacting business” standard for proper service); N.Y. CIV. PRAC. LAW § 302(a)(1) (McKinney 1972) (service permitted when nonresident “transacts any business within the state”).

Judicial construction of the intended coverage of these long-arm statutes has been equally varied. Compare Phillips v. Hooker Chem. Corp., 375 F.2d 189 (5th Cir. 1967) and Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966) (Florida and Louisiana long-arm statutes extend jurisdiction to full limits of due process protections) with Davis v. Triumph Corp., 258 F. Supp. 418 (E.D. Ark. 1966) (Arkansas long-arm statute construed more narrowly than the permissible coverage of due process).

4. The Supreme Court has devoted considerable attention to the establishment of guidelines describing the due process restrictions on state jurisdiction over nonresident corporations. In its landmark decision, International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Court held that in order to subject a foreign corporation to in personam jurisdiction, the due process clause demands that the defendant have certain minimum contacts with the forum state such that maintenance of the suit would not offend traditional notions of “fair play and substantial justice.” Id. at 320. This minimum contacts test was subsequently applied in McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957), to uphold California long-arm jurisdiction over a Texas insurance company whose only contacts with the state of California consisted of transactions conducted by mail between the company's Texas office and policyholders in California. The Court found that “[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State . . . .” 355 U.S. at 223. The Court further clarified the minimum contacts test in Hanson v. Denckla, 357 U.S. 235 (1958), when it held that “[i]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Id. at 253. See generally Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts — From Pennoyer to Denckla: A Review, 25 U. CHI. L. REV. 569 (1958); Sobeloff, Jurisdiction of State Courts Over Nonresidents in Our Federal System, 43 CORNELL L.Q. 196 (1958); Developments in the Law: State-Court Jurisdiction, 73 HARV. L. REV. 909 (1960).

5. Prior to International Shoe, there existed two major theories of state jurisdiction over foreign corporations. The “consent” theory premised jurisdiction upon the state's right to impose, as a condition of transacting business within its borders, a requirement that nonresident corporations appoint an agent to receive service of process. The “presence” theory argued that “[a] foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.” See, e.g., Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264, 265 (1917). Eventually, both theories merged into a “doing business” basis for personal jurisdiction — a standard adopted by numerous state long-arm statutes. See Kurland, supra note 4, at 577-86. When the Supreme Court defined the due process limitations on state court jurisdiction in International Shoe, the statutory “doing business” standard was construed in some states as a basis for jurisdiction synonymous with the permissible coverage under due process. See note 3 supra. See generally Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U. ILL. L.F.
resolving questions of jurisdiction, attention is focused primarily upon the substantiality of a defendant's contacts with the forum state, and to a lesser extent, upon the character of those contacts.6

In the District of Columbia, this predominantly quantitative analysis for establishing in personam jurisdiction has been complicated by an additional element uniquely relevant to that jurisdiction — a "government contacts" exception. As it was first articulated during the Second World War,7 this principle recognized that the accumulation of new commercial and regulatory responsibilities by the federal government would inevitably draw nonresident corporations into the District of Columbia exclusively to entertain government relationships. In the interest of preserving unfettered access to federal agencies, courts have consistently held that entry into the District of Columbia by nonresidents solely for the purpose of contacting the government was not a basis for the assertion of in personam jurisdiction.8 With the protection of the government contacts exception, representatives of foreign corporations could comfortably refuse service of process in the District of Columbia, so long as their activities were confined to governmental liaison. When contested in litigation, courts invariably quashed service in such circumstances, even when the defendants' relations with the government were predominantly commercial.9

As recently as 1976, the government contacts exception was endorsed as a "long-standing and still vital doctrine."10 That vitality, however, has clearly not survived the treatment of two recent cases. In apparent contradiction of prior doctrine, these cases tested the exception against two statutory bases of jurisdiction, and in both instances, upheld jurisdiction over

7. See Mueller Brass Co. v. Alexander Milburn Co., 152 F.2d 142 (D.C. Cir. 1945); notes 58-63 and accompanying text infra.
the respective corporate defendants. Because the District of Columbia enforces two distinct long-arm statutes, the assertion of jurisdiction over a nonresident will depend, in part, upon which is employed. Section 13-334 of the District of Columbia Code permits service of process on foreign corporations "doing business" in the District, regardless of the situs of the claim; section 13-423 applies a "transacting any business" standard to claims arising from the defendant’s contact with the District.

Construing the "doing business" standard in a 1977 wrongful death action against a British corporation, the United States District Court for the District of Columbia refused to quash service effected at the Washington office of a subsidiary of defendant, Rolls-Royce Ltd. Plaintiff in Ramamurti v. Rolls-Royce Ltd., a resident of the state of Washington, sought diversity jurisdiction in her complaint alleging that defective Rolls-Royce aircraft engines had caused the death of her husband in the crash of an Indian Airlines jet in India. In responding to the complaint, Rolls-Royce moved to dismiss for lack of personal jurisdiction. Assuming that

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12. Compare D.C. CODE ANN. § 13-334(a) with § 13-423(a)(1) (1973). While no intrinsic difference is expressed by the dissimilar statutory language, legislative intent and judicial application indicate that the section 13-334 “doing business” standard encompasses a more narrow range of activities than the “transacting . . . business” test of section 13-423, so that the requisite corporate contacts for District of Columbia jurisdiction are less substantial in actions brought pursuant to the latter. See notes 91-94 and accompanying text infra.
13. D.C. CODE ANN. § 13-334(a) (1973) provides the following basis for personal jurisdiction: “In an action against a foreign corporation doing business in the District, process may be served on the agent of the corporation or person conducting its business . . . and that service is effectual to bring the corporation before the court.”
14. D.C. CODE ANN. § 13-423 (1973) provides in pertinent part: “(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 — (1) transacting any business in the District of Columbia . . . .”
15. Ramamurti v. Rolls-Royce Ltd., 454 F. Supp. 407 (D.D.C. 1978). Service of process on Rolls-Royce Ltd. was attempted through service on a clerical employee of the Washington D.C. office of Rolls-Royce, Inc., a Delaware corporation which is a wholly-owned subsidiary of Rolls-Royce Holdings North America, Ltd., a Canadian corporation. The latter is itself a wholly-owned subsidiary of defendant Rolls-Royce Ltd., a corporation organized under English law. Id. at 409. The court refused to entertain the suggestion that the defendant and Rolls-Royce, Inc., upon whom service was effected, occupied a separate corporate existence. Judge Sirica acknowledged that an agency relation existed to link the two, and that “[t]he business conduct here by [Rolls-Royce, Inc.] is not its own business, but that of the parent corporation.” Id. For jurisdictional purposes, the parent company is said to be doing business in the forum state through its subsidiary if the subsidiary “is merely an agent" or “its separate status is formal only.” Id. (citing 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1069 (1969)).
17. Id. at 408. Seeking jurisdiction on different grounds, the plaintiff also named as
service could be effective against it as the parent corporation of a District of Columbia office. Rolls-Royce argued, nonetheless, that its activities were protected from local jurisdiction by the government contacts exception.

In his opinion in *Rolls-Royce*, Judge Sirica acknowledged that much of the applicable precedent supported the defendant's motion for dismissal. The Rolls-Royce Washington, D.C. office was primarily engaged in responding to technical inquiries from federal agencies operating equipment designed or manufactured by the defendant. The office was not authorized to solicit, negotiate, or contract for sales of Rolls-Royce products. This narrow governmental liaison function had frequently been held, in remarkably similar circumstances, to be an insufficient basis for the assertion of personal jurisdiction. Without distinguishing such cases, Sirica invoked dicta from two related opinions to conclude that the government contacts exception would not preclude jurisdiction based upon Rolls-Royce's local activities. In his view, the exception had been limited recently to contacts with the federal government that involve uniquely gov-

defendants Indian Airlines Corp., Air India, Inc. and Aerospatiale, the aircraft manufacturer. *See id.* at 412-13.


19. Because questions of amenability to personal jurisdiction in a diversity action are determined by reference to the law of the forum state, Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963), federal court jurisdiction would be precluded by a successful government contacts argument.

20. In discussing Rolls-Royce's characterization of its Washington activities as those of a liaison office established to deal solely with federal agencies, Sirica noted that "[e]ntry into the District in such circumstances has frequently been held to be an insufficient basis for the assertion of personal jurisdiction." 454 F. Supp. at 410-11.

21. *Id.* at 410. The Washington office was primarily responsible for continuing support services and technical assistance connected with the sale of Rolls-Royce Pegasus jet engines to the U.S. Marine Corps. Communications maintained with the Marine Corps were intended to insure that parts and service requirements were being met, to provide information of advanced developments related to the engine, and to capitalize on opportunities to sell more of the engines.


ernmental functions — those legislative, diplomatic, or lobbying activities not customarily associated with strictly commercial ventures. Sirica noted that Rolls-Royce’s activities would have unquestionably satisfied the statutory “doing business” standard if its local office had dealt similarly with private purchasers instead of government agencies. Consequently, he found it not “unseemly” to subject corporations to personal jurisdiction in the District of Columbia when their contacts with the forum involve substantial commercial relations with the federal government acting in its proprietary, as opposed to its governmental, capacity.

In a contemporaneous case before the District of Columbia Court of Appeals, the government contacts exception was tested against the section 13-423 “transacting any business” standard of Washington’s other long-arm statute. In Rose v. Silver, a Connecticut corporation was sued for breach of a contractual obligation to compensate an attorney for conducting negotiations on its behalf before the Food and Drug Administration (FDA). Pursuant to the agreement, the attorney was to contact the FDA, and if necessary, initiate litigation in an effort to permit marketing of certain of the corporation’s antibiotic products. Having fulfilled these obligations, the attorney filed an action for unpaid fees and consequential damages. The trial court dismissed the case, concluding that the plaintiff had relied “exclusively on his own actions in the District of Columbia, not any act of the defendants performed by them within the jurisdiction of the court.”

25. Id. at 412. The opinion admits that certain of Rolls-Royce’s Washington functions did involve contacts with the government in a nonproprietary role, e.g., reporting noise characteristics of its jet engines to the Federal Aviation Administration. Nonetheless, Sirica found that Rolls-Royce did a substantial amount of business in Washington which involved commercial contacts with the government as a purchaser of its products.

26. See note 107 infra.


30. Id. at 1369. The FDA had acted to revoke official certification of Masti-Kure, a veterinary drug manufactured by the defendant, on grounds that the product’s effectiveness had not been adequately proven. The defendant sought to keep Masti-Kure on the market until the FDA took final action on its preliminary notice of decertification.

31. Plaintiff, as defendant’s attorney before the FDA, was successful in obtaining a preliminary injunction permitting the marketing of defendant’s controversial drug product. However, the agreed-upon remuneration was allegedly not forthcoming. Id.

32. Id. at 1372. This language suggests the rule established in Hanson v. Denkla, 357 U.S. 235 (1958), which denied that the independent “unilateral activity” of a contractor in a forum state could be imputed to an out-of-state defendant for the purpose of obtaining personal jurisdiction. Id. at 253. Accord, Environmental Research Int’l, Inc. v. Lockwood Greene Eng’rs, Inc., 355 A.2d 808, 812 (D.C. 1976) (en banc) (“plaintiff cannot rely on its
On appeal, the trial court's conclusions were rejected in favor of a finding that the contractual agreement gave rise to a clear agency relationship between the parties—that the corporate defendant exercised sufficient control over its forum state agent to satisfy the section 13-423 standard of "transacting . . . business" in the District. Nevertheless, the defendant argued that the government contacts exception precluded personal jurisdiction since the relevant activities in the District of Columbia were confined to negotiations with a federal agency. The same precedent which disturbed the Rolls-Royce court again appeared to support a dismissal. The court retained jurisdiction, however, by distinguishing the prior law as an application of the inapposite section 13-334 "doing business" standard which requires more systematic and continuous contacts for jurisdiction than the "transacting . . . business" standard applicable to the instant case. Because the latter test permits the extension of jurisdiction to the full limits of due process, the court reasoned that whatever due process underpinnings had existed to support a government contacts exception were now absorbed by a traditional due process analysis. Finding that the activities of the defendant's attorney in the District of Columbia were sufficient contacts to withstand a conventional due process attack on jurisdiction, the court concluded that the same activities need not be tested again by some additional due process dimension in the government contacts principle—the principle subsumes due process.

Unwilling to fully dissolve this recently "vital" doctrine, the Rose court found precedent for preserving a limited government contacts exception based upon a first amendment right to petition the government for redress of grievances without the threat of being subjected to suit. Accordingly, the court concluded that the first amendment provides the sole

own activities, rather than those of a defendant, to establish the requisite minimal contacts for personal jurisdiction."

33. 394 A.2d at 1371.
34. Id. at 1372.
35. Id. at 1373 (citing, among others, Fandel v. Arabian Am. Oil Co., 345 F.2d 87 (D.C. Cir. 1965), and Mueller Brass Co. v. Alexander Milburn Co., 152 F.2d 142 (D.C. Cir. 1945)).
36. See text accompanying notes 96-101 infra.
37. See notes 91-92 and accompanying text infra.
38. 394 A.2d at 1373-74.
39. Id. at 1373.
basis for exempting a foreign corporation from District of Columbia jurisdiction when its contacts are within the coverage of the long-arm statute and are sufficiently substantial to withstand a traditional due process attack. The corporate defendant was afforded the opportunity to raise a first amendment defense on remand in the trial court, but because the issue had never been specifically addressed in a jurisdictional context, the court of appeals admitted that consideration of the redefined government contacts exception would "require virtually a fresh inquiry." By framing the exception as a doctrine grounded exclusively in the first amendment, the *Rose* court explicitly imposed a constraint established implicitly by the *Rolls-Royce* governmental-proprietary distinction. Together, the two cases reflect a drastic narrowing of a principle which, in prior years, was embraced as a vastly more expansive exception to District of Columbia jurisdiction.

I. PROTECTING THE CARPETBAGGERS: THE EVOLUTION OF A GOVERNMENT CONTACTS EXCEPTION

Three stages of application preceded last year's assaults on the government contacts principle. In its incipient stage, the as yet unnamed principle emerged from repeated judicial refusals to interpret section 13-334's "doing business" standard as a basis for extending jurisdiction to nonresident newspaper corporations maintaining correspondents in the District of

42. 394 A.2d at 1374.
43. The fresh inquiry did not materialize in the D.C. Court of Appeals' denial of the defendant's petition for an en banc rehearing, where the only significant discussion of the *Rose* opinion came from Judge Harris' dissent. Harris characterized the *Rose* court's treatment of the government contacts exception as esoteric, and in conflict with the opinion in *Environmental Research Int'l, Inc. v. Lockwood Greene Eng'r's, Inc.*, which had also suggested a first amendment basis for the exception. According to Harris, *Rose* intimated that the exception should be limited to protecting first amendment freedoms of speech and press, rather than the equally strong right to petition the government for a redress of grievances. This, he says, is contrary to both law and reason. See *Rose v. Silver*, No. 12555, slip op. at 533-L n.6 (D.C. Mar. 1, 1979) (denial of petition for rehearing en banc) (Harris, J. dissenting). *Rose* made no such limitations, however, and Harris' suggestions reflect a peculiar misreading of the opinion. *Rose* quotes with approval Harris' majority opinion in *Lockwood Greene*, explicitly referring to the "redress of grievances" rationale for the exception. 394 A.2d at 1374. In thus shifting the exception's premise exclusively to the first amendment, *Rose* observed that:

Only a few cases have discussed the First Amendment issue in this context [of the government contacts exception], as it pertains to free speech and a free press.[citations omitted] None to our knowledge has done so with reference to the right 'to petition the Government for a redress of grievances.' Thus, consideration of the government contacts principle henceforth will require virtually a fresh inquiry.

*Id.*
Columbia. Because of Washington's uniquely prolific production of news, the exclusion of newspapers from the reach of District of Columbia courts was considered necessary to encourage vigilant reporting of events, and an essential attribute of a free press. In a second stage, a broadly-based exception to jurisdiction was endorsed as a defense available to nonresidents whose contacts in the District of Columbia were limited to relations with the government in virtually any capacity. At this level, legal analysis in jurisdictional disputes usually went no further than to characterize a particular defendant's conduct as confined to government contacts, and to dismiss accordingly. A third stage emerged in the aftermath of the 1970 passage of the section 13-423 "transacting...business" standard to complement the "doing business" language of the existing long-arm statute. Application of the government contacts principle under the new statute has suggested a narrowing of the exception—a suggestion adopted later with less caution by Rolls-Royce and Rose.

A. First Amendment Antecedents

The difficulties inherent in any jurisdiction question are further complicated in the District of Columbia by the unique character of the forum as the seat of national government. Among other things, the federal government is an awesome commercial consumer, a veritable papacy of paternal regulatory functions, and inevitably, a national center for the generation of news. These characteristics attract nonresidents to the District of Columbia in special circumstances which may not justify the assertion of personal jurisdiction. The District of Columbia Circuit confronted this problem in Neely v. Philadelphia Inquirer Co. It held that employment of a Washington correspondent was an insufficient basis for subjecting a nonresident

45. In Neely v. Philadelphia Inquirer Co., 62 F.2d 873 (D.C. Cir. 1932), the following is stated: "As the seat of national government, Washington is the source of much news of national importance, which makes it desirable in the public interest that many newspapers should maintain vigilant correspondents here." Id. at 875.
46. See notes 53-55 and accompanying text infra.
50. 62 F.2d 873 (D.C. Cir. 1932). This action for libel applied D.C. CODE ANN. § 24-373 (1929), the predecessor to the current long-arm statute, id. § 13-334; however, both sections apply the same "doing business" standard for personal jurisdiction.
newspaper corporation to District of Columbia jurisdiction. Because Washington is a source of considerable news, the court saw a public interest in preventing inhibitions on news gathering there. Subsequent cases have conclusively settled that nonresident newspaper corporations maintaining Washington correspondents are not "doing business" within the meaning of the District's long-arm statute, and consequently, are not subject to valid service of process.

Confined as they were to statutory construction and policy arguments, the newspaper cases never specifically suggested a constitutional basis for denying jurisdiction. While it is somewhat doubtful that the cases actually intended to proffer any such implications, they were, nonetheless, colorfully imbued with first amendment drama by successor courts. In Margoles v. Johns, a libel action brought in the District of Columbia against a Wisconsin newspaper, Neely and its progeny were cited with two Fifth Circuit cases suggesting that assertions of jurisdiction in such circumstances require a greater than normal showing of contacts with the forum state. Such a showing was thought to be essential "because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts." The interpolation of first amendment elements from the newspaper cases was eventually invoked as the foundation of the government contacts exception. Moreover, as precursors of the exception, the newspaper cases provided subsequent courts with the crucial attachment of jurisdictional significance to the unique features of Washington as a judicial forum.

51. 62 F.2d at 875. The court also expressed its fear that the imposition of jurisdiction in this case would subject "nearly every important newspaper in the nation" to legal service of process in Washington. Id. A similar reservation was expressed much later in cases construing the government contacts exception. See Siam Kraft Paper Co. v. Parsons & Whittemore, Inc., 400 F. Supp. 810, 812 (D.D.C. 1975) (jurisdiction based upon government contacts would convert the U.S. District Court for the District of Columbia into a national judicial forum). Accord, Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc., 355 A.2d 808, 813 (D.C. 1976) (en banc).


54. Id. at 946. See New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966); Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966).

55. Walker v. Savell, 335 F.2d 536, 544 (5th Cir. 1964).


57. See Mueller Brass Co. v. Alexander Milburn Co., 152 F.2d 142, 143 (D.C. Cir. 1945) (quoting Neely with the suggestion that relations between federal agencies and nonresidents were not dissimilar from out-of-town newspapers operating news gathering offices in the District of Columbia).
B. *Mueller and its Followers: The Blind Leading the Blind*

At mid-century, as the federal government moved with less restraint into its role of commercial consumer, a new community of nonresidents appeared in Washington. Particularly during wartime, representatives of foreign corporations established offices in the District in order to maintain various relations with the government as a purchaser. Testing such contacts as a basis for personal jurisdiction, the District of Columbia Circuit in *Mueller Brass Co. v. Alexander Milburn Co.*\(^{58}\) quashed service delivered to a Washington agent of defendant, a Michigan manufacturer of military equipment.\(^{59}\) The defendant was a large defense contractor whose sales to the government accounted for virtually all of its production. The Washington agent, upon whom process was served, was primarily engaged in maintaining ties with various government agencies for reports, directives, and allocations pertinent to the company's production requirements.\(^{60}\) Additionally, the agent was responsible for soliciting "comparatively small" purchases in the District of Columbia,\(^{61}\) although he was not expressly authorized to personally consummate such transactions.\(^{62}\) Characterizing these activities as a customary feature of liaison with federal agencies, and essential to the efficient conduct of defendant's work for the government, the court found such contacts did not constitute "doing business" within the meaning of the long-arm statute.\(^{63}\)

In assessing the sufficiency of the defendant's government contacts, *Mueller* relied solely upon the newspaper cases as precedent for its sweeping jurisdiction exception.\(^{64}\) The court suggested that Washington's status as a peculiar source of news is analogous, for purposes of asserting jurisdiction, to the "manifold respects in which the federal government touches [private] business concerns."\(^{65}\) The *Mueller* analogy is convincing, how-

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58. 152 F.2d 142 (D.C. Cir. 1945).
59. The plaintiff, a Maryland corporation, sought diversity jurisdiction in an action for breach of contract. No part of the contract was negotiated or intended for execution in the District of Columbia. *Id.* at 142.
60. *Id.* at 143. *See* text accompanying note 69 supra.
61. Factual findings indicated that the defendant's agent devoted "less than 5% of his time" to private sales of products in the District of Columbia. *Id.*
63. 152 F.2d at 144. The Washington agent's solicitation functions were found by the court to be incidental to his presence there. *Id.* According to the rule established in Frene v. Louisville Cement Co., 134 F.2d 511, 515 (D.C. Cir. 1943), such casual or occasional solicitation functions would not alone be considered a basis for jurisdiction.
64. 152 F.2d at 143-44.
65. *Id.* at 144.
ever, only when the government liaison activity is of the nature of insuring compliance with regulatory or other requirements unique to dealings with government. Otherwise, the relationship is indistinguishable from ordinary buyer-seller negotiations. Accepting, for example, that Washington presents newsgatherers with unusual requirements meriting recognition in the rules of jurisdiction, there is nothing similarly unique about nonresident corporations present in the city to maintain commercial relationships with purchasers coincidentally representing the government. An identical presence established to deal with private purchasers has never been considered a basis for excepting nonresidents from District of Columbia jurisdiction.

On the other hand, a foreign corporation might maintain a presence in the District of Columbia solely to provide, for example, noise characteristics of its aircraft engines as required by the Federal Aviation Administration. This situation is clearly different in terms of justifying a jurisdiction exception comparable to that enjoyed by newspapers.

Conceivably, the Mueller court intended a more limited application of the government contacts exception than its broad language suggests. The Mueller facts describe simply the presence of a Washington agent dealing with government agencies with respect to "reports, allocations and directives relating to materials for production . . . ." If this description refers to the administrative functions required of wartime contractors, then the government contacts exception was given distinctly limited ambitions by the Mueller court. The court invited expansive applications, however, by failing to include any precise limiting language. Later courts took a

66. See, e.g., 41 C.F.R. § 50-201.501 (1977) (contractors engaged by the federal government must maintain and make available to the Secretary of Labor various employee records).

67. In Ramamurti v. Rolls-Royce Ltd., 454 F. Supp. 407, 410 (D.D.C. 1978), Judge Sirica observed that, without question, "were these activities [of Rolls-Royce in Washington] descriptive of relations with private purchasers rather than with instrumentalities of the federal government, they would constitute the doing of business within the meaning of" the long-arm statute.

68. Compliance with such FAA requirements was, in fact, part of the function of the Rolls-Royce office in Washington. See note 25 supra.

69. 152 F.2d at 144. It is unclear to what extent these represent regulatory requirements rather than portions of an ongoing sales relationship. Some subsequent courts apparently thought the distinction was unimportant. See text accompanying notes 71-78 infra.

70. The Mueller opinion expressly retreated from drawing precise parameters for the exception:

A basic concept of sufficient precision to yield certain results in all cases of this sort has not yet been formulated. The reported opinions on the subject [of what constitutes 'doing business'] are multitudinous, the facts are of almost infinite variety, and the rules used by the courts in resolving the disputes differ. We are not required to attempt a definition of fundamentals in the case before us.

152 F.2d at 145.
broad view of the factual setting in Mueller to conclude that jurisdiction was automatically barred by a simple showing that contacts within the forum were exclusively, or principally, between the defendant and the federal government. In Traher v. De Havilland Aircraft of Canada, Ltd., for example, a personal injury action arising from an airplane crash in Montana, the District of Columbia Circuit found that defendant’s government liaison office in Washington was not a basis for jurisdiction in the District of Columbia. The office was responsible for maintaining relations with various federal agencies regarding aircraft sales by the defendant to the government, and did not solicit business from anyone other than the government. In granting the defendant’s motion to quash service, the court relied exclusively upon a rather simplistic synopsis of Mueller, with the observation that “the instant case . . . is strikingly similar in its facts.” The factual similarity is not obvious, however, if any significance can be given to Mueller’s reference to “reports, allocations, and directives” as descriptive of a particular character of government contacts protected from jurisdiction. Such contacts are arguably limited to dealing with the administrative idiosyncracies of association with the government. The activities of defendant’s Washington office in Traher were described with considerably less specificity, but its functions appeared to go beyond those enumerated in Mueller. In Traher, the defendant’s employee in the District of Columbia was characterized as a liaison or contact man responsible for gathering information about the government’s “requirements,” as well as soliciting purchases from the Department of Defense and other federal agencies. The factual discrepancies with Mueller ignored by the Traher court exhibit supine acceptance of an unsupported view that government contacts of any kind qualify for an exception to jurisdiction in the District of Columbia. With few exceptions, other courts were equally inat-

73. Id. at 230. The facts of Traher made it model precedent for a dismissal in Rolls-Royce; however, in finding to the contrary, Judge Sirica chose not to cite, distinguish or overrule Traher. See text accompanying notes 113-14 infra.
74. Referring to Mueller, the court said only that there, “the governmental contacts of the defendant were held insufficient to provide a basis for service in a suit brought by a plaintiff not involved in those contacts.” 294 F.2d at 231.
75. Id.
76. 294 F.2d at 230 (“employee’s principal duties are to transmit to appellee [defendant] information about the United States Government’s requirements and to keep in contact with Government agencies”).
77. See text accompanying note 73 supra.
tentive either to factual discrepancies with Mueller, or to the intended purpose and scope of a government contacts exception.\textsuperscript{78}

Before 1970, the expansive view of the government contacts exception led to invocations of Mueller in cases premised upon a great variety of relationships with federal entities. There were common threads, however, and among those accented was the fact that while contacts were maintained with federal agencies regarding government purchases from defendants, the principal function of the Washington offices was not solicitation.\textsuperscript{79} The solicitation issue generated the first apparent disaffection with an expansive Mueller rule. In Raymond v. Anthony,\textsuperscript{80} the district court refused to quash service delivered to defendant's Washington agent because the latter's dealings, although exclusively with the federal government, involved considerable attention to soliciting government purchases.\textsuperscript{81} Raymond expressly distinguished Mueller as a case involving only limited attention to the solicitation of sales.\textsuperscript{82} Later, in Fandel v. Arabian American Oil Co.,\textsuperscript{83} the district court accepted a motion to quash service effected at a Washington government relations office maintained principally to deal with the State Department, diplomatic missions, and other organizations interested in the Middle East where defendant had commercial interests.\textsuperscript{84} In significant dictum,\textsuperscript{85} however, the court noted

\textsuperscript{78.} But see Raymond v. Anthony Co., 233 F. Supp. 305 (D.D.C. 1964) (jurisdiction asserted where defendant's contacts exclusively with the government involved considerable attention to solicitation of purchases); notes 80-82 and accompanying text infra.

\textsuperscript{79.} See, e.g., Traher v. De Havilland Aircraft of Can., Ltd., 294 F.2d 229, 230 (D.C. Cir. 1961), cert. denied, 368 U.S. 954 (1962); Mueller Brass Co. v. Alexander Milburn Co., 152 F.2d 142, 143 (D.C. Cir. 1945); Weisblatt v. United Aircraft Corp., 134 A.2d 713, 715 (D.C. 1957). In these cases, it was also characteristic that the cause of action was unrelated to the defendant's activities in the District, and the Washington office lacked authority to bind the defendant in contract.


\textsuperscript{81.} Id. at 306-07. In addition, the Washington agent dealt with problems or difficulties arising from previous sales of the defendant's products. This, in conjunction with his solicitation functions, was considered sufficient to meet the "doing business" prerequisite for long-arm jurisdiction. 233 F. Supp. at 307. The court relied upon Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943), which established a basis for jurisdiction in solicitation plus a regular and continuous course of business activity. Id. at 515.

\textsuperscript{82.} 233 F. Supp. at 306-07.

\textsuperscript{83.} 231 F. Supp. 572 (D.D.C. 1964), aff'd, 345 F.2d 87 (D.C. Cir. 1965).

\textsuperscript{84.} The defendant in Fandel was a Delaware corporation engaged in the production, refining, and sale of oil in Saudi Arabia. The Washington office had no commercial function, except to the extent that it could have been considered a public relations organization indirectly advancing the business opportunities of the defendant. 345 F.2d at 88.

\textsuperscript{85.} Fandel was extensively cited in Ramamurti v. Rolls-Royce Ltd., 454 F. Supp. 407, 411 (D.D.C. 1978), as a basis for narrowing the government contacts exception. See text accompanying note 23 supra.
that the office's limited function was "not quite like the company whose agents in Washington are seeking contracts, either with our own Government or with other governments represented in Washington." Fandel and Raymond represent distinct departures from earlier applications of the government contacts exception. In Traher and elsewhere, the solicitation of sales to the government was considered merely a part of the defendants' government contacts, and thus exempt as a basis for jurisdiction. After Fandel, however, it appeared that the government contacts inquiry would be required to go beyond a simple characterization of a defendant's conduct in the District of Columbia as confined to relations with the government. The clear implication was that certain kinds of government contacts were never intended to be a basis for inoculating nonresidents against District of Columbia jurisdiction.

C. A Longer Arm for District Jurisdiction: Section 13-423

From the subtle inferences of the newspaper cases to the credulous inflation of the Mueller rule, the epigenesis of the government contacts exception occurred wholly within the purview of the section 13-334 standard for jurisdiction. A new dimension was added to the exception in 1970 when Congress passed a second District of Columbia long-arm statute to complement the existing section 13-334 "doing business" standard for jurisdiction. Unlike its elder partner which applies generally to all actions brought in the District of Columbia against nonresident corporations, the new section 13-423 is relevant only in claims arising from the defendant's activities in Washington. Legislative history indicates that section 13-423 was intended to expand the bases of District of Columbia jurisdiction as well as modes of service, to conform to those provided by the adjacent states of Maryland and Virginia. The statute's "transacting any business" standard has been interpreted by the courts of those states as an extension of personal jurisdiction over nonresident defendants to the

86. 345 F.2d at 89.
88. See, e.g., Weisblatt v. United Aircraft Corp., 134 A.2d 713, 715 (D.C. 1957) (Washington office did not "solicit business from anyone in this District other than agencies of the government").
90. See notes 13-14 supra.
permissible limits of due process.\textsuperscript{92} For two reasons, this interpretation has insured that the coverage of section 13-423 will be considerably less restrictive than that of its still enforceable predecessor. First, the “doing business” standard of section 13-334 was never interpreted as extending to the furthest reach of constitutional limitation, and in fact, courts expressly stopped short of that mark.\textsuperscript{93} Second, because section 13-423 applies only to claims arising from the defendant’s Washington activities, an assertion of jurisdiction under this statute automatically assumes a substantial contact with the forum. Consequently, due process will demand less substantial additional contacts under the new long-arm statute than would be necessary in claims unrelated to the forum.\textsuperscript{94} Unrelated claims brought pursuant to section 13-334 must necessarily face more narrow jurisdictional limits.\textsuperscript{95}

Considering the dissimilarities in the two long-arm statutes, the traditional government contacts exception would conceivably operate differently under the new version. In a section 13-334 claim unrelated to a defendant’s District of Columbia activities, government contacts may be an insubstantial basis for jurisdiction, while the same contacts might be fully adequate to meet the less stringent section 13-423 standard. The courts predictably stumbled with the possibility that the potency of the exception might depend upon which statute was employed.\textsuperscript{96} or more spe-


\textsuperscript{93} In Fandel v. Arabian Am. Oil Co., 345 F.2d 87 (D.C. Cir. 1965), for example, the court’s interpretation of section 13-334 concluded with the reminder that “[w]e are construing what a statute does, and not determining what the furthest reach of legislative power could be consistent with constitutional limitations.” \textit{Id} at 89.

\textsuperscript{94} See Grevas v. M/V Olympic Pegasus, 557 F.2d 65 (4th Cir. 1977), cert. denied, 434 U.S. 969 (1977) (where plaintiff’s injuries did not arise from defendant corporation’s activities in the forum state, contacts between the corporation and the state must be fairly substantial before \textit{in personam} jurisdiction may be imposed without offending due process).

\textsuperscript{96} At one time, the U.S. District Court for the District of Columbia apparently failed to recognize that two different long-arm statutes existed in the District of Columbia. In
cifically, upon whether or not the cause of action was related to the District of Columbia. The District of Columbia Court of Appeals split on this issue in *Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, a contract action brought by a Washington consulting firm against a Massachusetts corporation. The defendant was engaged in negotiations to provide engineering services related to the development of a waste treatment facility in Pennsylvania, but required a construction grant from the Environmental Protection Agency. Plaintiff offered and contracted to assist in preparing the grant application and expediting its processing by the EPA. Before the alleged breach of the parties’ agreement, defendant’s personnel visited Washington to consult with officials of the EPA. The court considered whether these visits to the District of Columbia were sufficient contacts to create a basis for jurisdiction according to the section 13-423 “transacting any business” standard. Citing *Mueller* as support, a majority of the court refused jurisdiction, but a well-reasoned dissent insisted that the Mueller exception was inapplicable in a section 13-423 case in which the cause of action arises from the defendant’s contacts in the District of Columbia. The dissent asserted that government contacts are sufficiently substantial to permit jurisdiction under a due process analysis of the new statutory standard. The majority, dismissing this argument, believed “that had Congress intended to abrogate the Mueller Brass principle in enacting the present long-arm statute [section 13-423], it thereby would have been placing an impermissible burden on the first amendment ‘right of the people . . . to petition the Government for a redress of grievances.’”

This particular constitutional recitation was without precedent among

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98. *Id.* at 810.

99. Plaintiff also argued that since it was performing services in the District on behalf of defendant, its own transactions there constituted a proper basis for personal jurisdiction over defendant. The court disagreed and suggested that acceptance of that proposition would effectively eliminate the protections afforded to nonresidents by the due process clause. *Id.* at 812-13. *See* note 32 *supra*.

100. *Id.* at 813-14.

101. *Id.* at 816-17. This view was later embraced by the *Rose* court which expressly declared its section 13-423 analysis to be inapplicable to section 13-334 cases. 394 A.2d at 1374 n.6.

102. 355 A.2d at 813 n.11. The court endorsed the view that the liberally construed minimum contacts requirement must yield when the assertion of jurisdiction threatens the free exercise of first amendment rights.
the suggested rationales of Mueller. Framed in this way, the government contacts exception acquired an inviolable constitutional character unrelated to the particular long-arm statute exercised or to the situs of a plaintiff's claim. By emphasizing the first amendment, the court guaranteed that subsequent attempts to reconcile Mueller, and to apply the exception within explicable boundaries, would be wrought with confusion. The first amendment may offer a plausible explanation for denying personal jurisdiction premised, as in Lockwood Greene, solely upon a defendant's negotiations in the District of Columbia for assistance from a federal agency. But the same constitutional argument does not support the exception granted in Traher to protect a continuing relationship of commercial exchange with government purchasers. Rather, a government contacts exception in such a purely commercial setting could only be justified by a determination that commerce with the government is an inherently insubstantial basis for personal jurisdiction in actions unrelated to the District. Under this traditional due process analysis of the substantiality of a defendant's contacts, the situs of the plaintiff's claim and the long-arm statute employed could determine, as the Lockwood Greene dissent argued, when the exception is applicable. This analysis would also serve to reconcile the Mueller devotees as cases in which contacts solely with the government did not constitute a sufficiently substantial basis for extending jurisdiction over claims wholly unrelated to the forum, pursuant to the more restrictive section 13-334 and the greater due process demands in unrelated actions.

In debating the applicability of the government contacts exception in cases brought pursuant to the District of Columbia's new long-arm statute, the Lockwood Greene court moved awkwardly toward identifying an acceptable rationale for the exception — a step never undertaken with conviction by predecessor courts. Mueller's oft-quoted rule had been expanded to deny jurisdiction over an entire community of nonresidents whose business in Washington included everything from simple observation and information gathering to serious trading with the government.

103. Similar intimations are discernible in another section 13-423 case, Siam Kraft Paper Co. v. Parsons & Whittemore, Inc., 400 F. Supp. 810, 812 (D.D.C. 1975), where the district court identified the exception as applicable to contacts involving "uniquely governmental activities" — a description which impliedly excludes proprietary functions, and proposes a more complicated formula than the traditional due process test for substantiality of contacts. This language was cited by Judge Sirica as a basis for narrowing the government contacts exception in Ramamurti v. Rolls-Royce Ltd., 454 F. Supp. 407, 411 (D.D.C. 1978).


105. See text accompanying note 101 supra.
The first amendment-due process controversy in *Lockwood Greene* was, at the very least, an indication that the government contacts exception would ultimately be reunited with its long disconnected rationale.

II. THE ROLLS-ROYCE - ROSE DIPTYCH

The government contacts exception which emerged from *Lockwood Greene* was an invertebrate doctrine in need of a conclusive theoretical backbone and clearly delineated boundaries describing precisely which associations with government would be exempt as bases of personal jurisdiction. *Rolls-Royce* satisfies the latter need but effectively ignores the former by providing, in guidebook fashion, a simple mechanical device for determining the applicability of the exception. In testing for substantial commercial relations with the government in its proprietary, rather than governmental capacity, Judge Sirica was able to uphold jurisdiction over Rolls-Royce based on the activities of its Washington office. The office maintained a relationship with a government purchaser of Rolls-Royce products, and acting in that proprietary capacity, the government was not unlike any private commercial consumer. This similarity to the commerce of private parties—an affiliation which traditionally lacks peculiar exceptions to personal jurisdiction—constitutes Sirica's basis for narrowing the *Mueller* exception to contacts involving uniquely governmental functions.

To further clarify the governmental-proprietary distinction, the opinion distinguished Rolls-Royce's activities in the District of Columbia from the "legislative, lobbying or diplomatic" functions still protected from jurisdiction by Sirica's newly limited, yet still viable, government contacts exception. The continued exclusion of such functions expresses the only principled basis for the existence of any special jurisdictional exception in the District of Columbia. If the foundation of such an exception is, as the ancestral newspaper cases insist, that the unique characteristics of the District of Columbia should be reflected by avoiding jurisdiction as an

107. The court stated:
   
   There is no question that, were these activities descriptive of relations with private purchasers rather than with instrumentalities of the federal government, they would constitute the doing of business within the meaning of section 334(a). Rolls-Royce's local activities—conducted by RRI—are regular, systematic, and continuous; constitute a substantial corporate presence here; and are obviously directed at advancing the corporate objectives of Rolls-Royce.

*Id.* at 410.

108. *Id.* at 412.
109. *See* notes 50-57 and accompanying text *supra.*
impediment to free access to the forum, then clearly only those unique features deserve exceptional treatment. To the extent that nonresident businesses are attracted to Washington solely by a government market for their products, the District is indistinguishable from any other jurisdiction populated by large mercantile enterprises. Accordingly, there is no defensible reason to provide singular legal protections to merchants supported by government purchases.

The message of *Rolls-Royce* is clear, and its contribution to the elimination of confusion is undeniable. But the reasoning by which Judge Sirica arrived at the result is largely unspoken. Ironically, the cases selected to support jurisdiction over Rolls-Royce — including *Fandel* and *Lockwood Greene*¹¹⁰ — had each dismissed jurisdiction over their respective defendants on the basis of the government contacts exception. Judge Sirica focused instead on the limiting innuendo in those cases, and in particular, the conclusion in *Fandel* that the government contacts cases constitute a “recognition that Washington presents many business organizations with special needs for a continuous and ponderable physical presence there, which needs are not those customarily associated with strictly commercial operations . . . .”¹¹¹ The conclusion is perceptive, but the opinion fails to reconcile the contradictions of the prior law. Judge Sirica neither overruled, nor explicitly limited *Mueller*. He referred to the case simply as a broad exposition of an exception which “has been invoked most recently in more limited contexts.”¹¹² *Traher* was never cited, despite its indistinguishable factual circumstances and unmistakably contrary results.¹¹³ Like those of Rolls-Royce’s Washington office, the defendant’s activities in *Traher* were devoted to preserving a continuing sales relationship with government purchasers of aircraft-related equipment and service. *Traher* and *Rolls-Royce* both arose from aircraft accidents unrelated to the District of Columbia or to the defendant’s activities there, and both were brought pursuant to the section 13-334 long-arm statute. But in contrast to the *Rolls-Royce* holding, the District of Columbia Circuit acknowledged the government contacts exception in *Traher* as a basis for quashing service.¹¹⁴

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¹¹⁰ Also included was Siam Kraft Paper Co. v. Parsons & Whittemore, Inc., 400 F. Supp. 810 (D.D.C. 1975). *See* note 103 *supra*.

¹¹¹ 454 F. Supp. at 411 (citing *Fandel* v. Arabian Am. Oil Co., 345 F.2d 87, 89 (D.C. Cir. 1965)) (emphasis deleted). *See* notes 83-86 and accompanying text *supra*.

¹¹² 454 F. Supp. at 411.

¹¹³ *See* text accompanying notes 72-75 *supra*.

¹¹⁴ *Traher* was cited in Rolls-Royce’s memorandum in support of a motion to quash, and Judge Sirica was inexplicably remiss in ignoring this irreconcilable holding by a higher
The omissions in the *Rolls-Royce* reasoning are disturbing because the efficacy of prior government contacts cases is left unclear. Moreover, while Judge Sirica’s guidebook formula for applying the exception can be implemented with minimal confusion in future cases, his rationale is unfortunately couched in nonspeak. In a somewhat imperfect fashion, the missing rationale was supplied by the District of Columbia Court of Appeals in *Rose*. The *Rose* case was, of course, factually very different from *Rolls-Royce* in that the former was premised upon distinctly noncommercial activities in Washington — litigation by the defendant’s attorney before the Food and Drug Administration.115 Also in contrast to *Rolls-Royce*, *Rose* was a section 13-423 action related to, and in fact, synonymous with the defendant’s activities in the District of Columbia. Despite the distinctions, the two cases parallel each other in applying a dramatically deflated government contacts exception to refuse the defendants’ motions to quash. In holding that the traditional government contacts exception did not protect the defendant from District jurisdiction under the new, more permissive section 13-423 analysis, the *Rose* court portrays the exception as a doctrine erected from both due process and first amendment principles.116 Due process does not permit assertions of jurisdiction based solely upon government contacts under the more restrictive long-arm statute, and the first amendment prevents jurisdictional intrusions upon government contacts directed toward a redress of grievances before the federal government. However, the *Rose* court reasoned that since section 13-423 extends jurisdiction to the permissible limits of due process, the statutory analysis would absorb all due process elements of the government contacts exception, and a defendant reachable under the long-arm statute would be limited to a first amendment argument as the only remaining remnant of the jurisdiction exception.117

Basing the exception upon this two-pronged rationale successfully distinguishes *Mueller* and the other section 13-334 cases as due process analyses in which government contacts were found not sufficient to fulfill the restrictive “doing business” standard. *Rose* describes these earlier cases as espousing a government contacts principle designed to protect nonresidents against claims by third parties based on transactions unrelated to the nonresident’s special governmental purpose in the District.118 The court

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115. See notes 29-31 and accompanying text *supra*.
116. 394 A.2d at 1373-74.
117. *Id.* at 1374.
118. *Id.* at 1374 n.6.
added that since the section 13-423 standard applied in Rose refers specifically to claims arising from a business connection in the District, its decision would not affect earlier government contacts analyses in unrelated claims brought by third parties. There are, however, some noticeable imperfections in this reconciliation of the prior law. The suggested differentiation between the District of Columbia's long-arm statutes is directly contrary to the majority opinion in Lockwood Greene which argued that the government contacts exception is unrelated to the situs of the claim, or to the statute employed.119 Furthermore, the Rose court never adequately defended the due process prong of its rationale for the exception. The court said only that each of the earlier government contacts cases involved an insufficiently "systematic and continuous course of conduct" in the District.120 While this may be descriptive of the minimal contacts established by Fandel's Middle East information office,121 it certainly does not describe the obvious sales posture maintained in Traher.122

The reasoning flaws present in both Rose and Rolls-Royce do not destroy the essentially identical propositions advanced by the two cases. On the surface, the holdings seem irreconcilable. Applying Judge Sirica's reasoning in Rose, it would seem that litigation by the defendant's attorney before the FDA would constitute precisely the kind of "lobbying" effort exempted from jurisdiction by dictum in Rolls-Royce. But by providing the defendant with an opportunity to proceed with a first amendment defense, Rose does not necessarily contradict Rolls-Royce's lobbying exception. To the extent that such a defense succeeds, the two cases describe the same government contacts exception — Rolls-Royce in the form of a mechanical test, and Rose styled by constitutional rationales. In homogenized fashion, the remaining government contacts exception will apply only to nonresidents whose activities in the District of Columbia are confined to relations which are unique to the business of government. The exception will protect such activities as lobbying for legislative or administrative action and the gathering of information for the purpose of complying with federal regulations unrelated to any commercial relationship between the defendant and the government. Nor would the situs of the claim be of any significance. In a section 13-334 action unrelated to the defendant's government contacts, jurisdiction over claims based on these activities will be precluded by the governmental-proprietary distinction. Under section 13-

119. See text accompanying notes 100-02 supra.
120. 394 A.2d at 1373 (quoting Environmental Research, Int'l, Inc. v. Lockwood Greene Eng'rs, Inc., 355 A.2d 808, 813 n.10 (D.C. 1976) (en banc)).
121. See notes 83-86 and accompanying text supra.
122. See notes 72-77 and accompanying text supra.
423, jurisdiction based on such activities will either fail under a due pro-
cess attack, or succumb to the protections of the first amendment.

Among the implications of this more systolic government contacts ex-
ception is the likelihood that a large number of foreign corporations will
now be subject to suit in the District of Columbia by virtue of their hereto-
fore protected relations with federal entities. 123 Earlier courts expressed
their fear of such an eventuality as a partial basis for preserving the older,
more expansive exception. 124 Judge Sirica dismissed these fears because of
the “adequate mechanisms” of both federal and local law insuring that
defendants will not be required to litigate in an inconvenient forum. 125
Regardless of the effectiveness of these mechanisms, the new government
contacts exception is unlikely to stem the continued growth in the number
of nonresidents in the District of Columbia pursuing relations with the
federal government. Undoubtedly, the most immediate impact of the new
exception will appear in the form of more congested Washington court
calendars. This potentiality, however, does not outweigh the policy con-
siderations which militate in favor of providing plaintiffs with a forum in
which to pursue their claims. Particularly where the party defendant is an
alien corporation like Rolls-Royce Ltd., a broadly enforced government
contacts exception could completely foreclose a plaintiff from pursuing an
action in a court of the United States. The revised exception will minimize
that possibility.

III. CONCLUSION

*Rolls-Royce* and *Rose* have returned the government contacts exception
to its historical antecedents and effectively repudiated the applications
which followed the newspaper cases. The newspaper cases stood for the
proposition that the rules of procedure and jurisdiction in the District of
Columbia should take into account the unique characteristics of that fo-
rum as they affect nonresidents. This rule was incorporated into an overly
broad government contacts exemption in *Mueller*, and the resulting excep-
tion to jurisdiction, poorly stated and without identifiable limits, became


(D.D.C. 1975); Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc., 355
A.2d 808, 813 (D.C. 1976) (en banc) (to permit jurisdiction based solely upon government
contacts “would threaten to convert the District of Columbia into a national judicial fo-
rum”).

the convenience of parties and witnesses, in the interest of justice”); D.C. CODE ANN. § 13-
423 (1973) (actions may be stayed or dismissed where interests of justice dictate a more
appropriate forum).
the basis for a thirty-year reign of the unfounded jurisdictional exclusion of virtually all government associations. Returning to the rationality of the newspaper cases, *Rolls-Royce* and *Rose* propose that only unique characteristics of the District of Columbia be recognized as bases for exceptions to jurisdiction — that associations with government are unique only in a nonproprietary setting where protected by the constitutional right to petition the government for a redress of grievances. That conclusion represents the long-awaited linkage between the exception and its rationale.

In the aftermath of *Rolls-Royce* and *Rose*, three untreated issues remain. There is first the problem of reconciling, limiting, or overruling prior case law. The *Rose* opinion attempted to distinguish *Mueller* and its followers as applications of an inapposite statute, but that explanation is a clear contradiction of an earlier holding by the same court in *Lockwood Greene*. *Mueller* also runs afoul of the governmental-proprietary distinction in *Rolls-Royce*, and Judge Sirica offered no explicit indication of the continued efficacy of that or other similar cases. A second issue yet to be resolved is the largely undeveloped first amendment defense identified in *Rose*. The success of this defense seems inevitable, particularly in factual settings similar to that in *Rose*. A firm judicial endorsement of the defense would establish a successor to the old government contacts exception, and a corollary to the *Rolls-Royce* test. Finally, a reconciliation of *Rolls-Royce* and *Rose* will ultimately be attempted by a District of Columbia court. It is inconceivable that the two would be found in substantial conflict, but certain anomalies remain to be resolved. Preeminent among these is the notion that government contacts may be a satisfactory basis of jurisdiction under one long-arm statute, but not under the other. *Rose* endorsed such a distinction, while *Rolls-Royce* relied, without discriminating, upon cases construing both statutes. Hopefully, the next treatment of the government contacts exception can correct these structural defects, and erect in their place a formula free from contradictions, yet loyal to the important groundwork laid by these two cases.

Dean M. Dilley