LexisNexis Practice Guide: DISTRICT OF COLUMBIA CONTRACT LITIGATION

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THE BEGINNING OF THE CHAPTER

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Chapter 1

Applicable Law, Jurisdiction, and Venue

I. Practical Guidance

§ 1.01 Topical Overview.

The District of Columbia ("D.C.") court system—an amalgamation of federal and state-like courts—reflects the rich but tumultuous history of the District itself. Since D.C. was created by act of Congress in 1790, cut from sections of Virginia and Maryland (the Virginia section was retroceded in 1846), Congress has treated the District as territory, a municipal corporation, a federal agency, and a state. Much of D.C.'s historical legislation was drafted and passed by Congress. To this day, Congress maintains some control over the District's legislative operations (any permanent, non-emergency bill may be effectively vetoed by joint resolution of the U.S. House of Representatives and Senate, signed by the President of the United States) and its judicial system (the Senate confirms D.C.'s judges). As a result, locating and identifying the applicable law—Congressional statutes, local statutes, actions of federal and local authorities, and federal and local court decisions—can be challenging.

Attorney's Tip: "Finding the Law in the District of Columbia: An Excerpt," authored by James C. McKay, Jr., and reprinted in the D.C. Bar's publication, Washington Lawyer, January 2016, can be a helpful guide to the various sources of D.C. law. (At the time of this printing, Mr. McKay serves in the Office of the Attorney General for the District of Columbia.)

This chapter will provide an overview of the District's sources of law. The District of Columbia was carved from the land of its neighboring states, Maryland and Virginia. The District of Columbia Organic Act of 1801, which formally placed D.C. under the control of the U.S. Congress, organized the District into two counties: The Virginia part of the District, which included the city of Alexandria, was named Alexandria County; the Maryland part, which included the city of Georgetown, was named Washington County. By statute, the common law of each county followed the common law of the state that ceded its land: Virginia common law in Alexandria County and Maryland common law in Washington County. [*United States v. Robertson Terminal Warehouse, Inc.*, 575 F. Supp. 2d 210, 221 (D.D.C. 2008).] The city of Washington existed at the center, and other cities, including the port city of Georgetown, retained their charters. Congress had prohibited "the erection of the public buildings otherwise than on the Maryland side of the river Potomac." [Act of Mar. 3, 1791, ch. 17, Stat. 3 (1971)]. This prohibition was later relaxed. [See App. 1, 1862 Map of Washington, D.C.] After much of the southwest portion of D.C. was retroceded to Virginia in 1846 by an act of Congress, leaving only the Maryland portion, the District—now comprised of Washington County only—adopted the com-

mon law of Maryland. [*United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1042 (D.C. Cir. 2011).] In 1871, Congress eliminated the individual charters of the cities of Washington and Georgetown, combining them both into the existing Washington County. It also renamed the "Territory of Columbia" to the "District of Columbia." [*District of Columbia Organic Act of 1871*, ch. 16 Stat. 419 (1871).] The entirety of the city thus became known as Washington, District of Columbia.

D.C. now follows Maryland common law that existed as of February 29, 1801. (Under its Declaration of Rights, Maryland is governed by English common law in effect as of 1776.) [*Robertson Terminal*, 575 F. Supp. 2d at 222 (citing *Khalifa v. Shannon*, 945 A.2d 1244, 1253 (Md. 2008) and Md. Decl. Rights Art. 5(a)). The D.C. Court of Appeals has made clear that the common law of Maryland, "the source of the District's common law . . . [is] an especially persuasive authority when the District's common law is silent." *Napoleon v. Heard*, 455 A.2d 901, 903 (D.C. 1983); *Forrest v. Verizon Commc's., Inc.*, 805 A.2d 1007, 1012 n.12 (D.C. 2002) (same, citing *Napoleon*).]

Although D.C. adopted Maryland common law as of 1801, the D.C. Court of Appeals has declared that the common law was not *frozen* as of that date, and, like any common law, the courts may alter it. [*Linkins v. Protestant Episcopal Cathedral Foundation*, 187 F.2d 357, 361 (D.C. 1950).] "Although [w]e ordinarily turn to the common law of Maryland for guidance when there is no District of Columbia precedent on an issue, we are not obliged to do so." [*Schoonover v. Chavous*, 974 A.2d 876, 882 n.5 (D.C. 2009) (quotation marks and citations omitted) (quoting *George Washington Univ. v. Scott*, 711 A.2d 1257, 1260 n.5 (D.C. 1998)); *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1257 (D.C. 2018) ("Although we look to Maryland common law for guidance where there is no District of Columbia precedent on an issue, we are persuaded . . . [that the rule in] . . . the Restatement of Contracts . . . is thus the better approach.").] Furthermore, when interpreting common law borrowed from Maryland, the D.C. courts will often take into account changes that the Maryland courts have made since. Where Maryland common law does not definitively answer a question, research into English common law may be required.

Moreover, not only are there similarities in the laws of the District, Maryland, and Virginia (including the doctrine of contributory negligence, though D.C. now limits contributory negligence for pedestrians and bicyclists), courts in the District will routinely look to the law of these "sister" jurisdictions.

This chapter will provide the practitioner with a roadmap to subjects such as contract interpretation, choice of law, personal jurisdiction, forum selection, and

forum non conveniens, among others matters that affect contract litigation in the District. It will also provide attorney tips, case briefs, and warnings about possible challenges.

§ 1.02 District of Columbia Court System and Rules Past and Present.

§ 1.02[1] History of D.C. Courts. In the Court Reorganization and Criminal Procedure Act of 1970, which became effective on February 1, 1971, Congress enacted comprehensive changes to the District of Columbia court system—changes designed to enable it to function as broadly and effectively as the court systems of the 50 states. Before the Reorganization Act passed, Congress had concluded there was a crisis in the judicial system of the District of Columbia: Not only had caseloads become unmanageable, but the existing court system was taking too long to try and dispose of matters of both national concern and of strictly local cognizance. [*Palmore v. United States*, 411 U.S. 389, 408 (1973).] The dual court system that existed at the time in D.C., with statutory restrictions on the jurisdiction of the local courts in civil matters, was needlessly complicated and often inefficient. [*Andrade v. Jackson*, 401 A.2d 990, 992 (D.C. 1979).] It was often impossible for one tribunal to adjudicate all the claims of the parties in a single action. [*Andrade*, 401 A.2d at 992.]

Until the Reorganization Act, the unique mix of local and federal jurisdictions in the major District of Columbia courts raised questions about their status within the federal system. Since February 9, 1893, the D.C. trial court had been the Supreme Court of the District of Columbia, and its appellate court had been the Court of Appeals for the District of Columbia. In 1927, the U.S. Supreme Court declared that the Court of Appeals and the Supreme Court of the District of Columbia would be fully equal to their counterpart U.S. circuit courts of appeals and U.S. district courts. [*FTC v. Klesner*, 274 U.S. 145, 158 (1927).]

In 1934, Congress also made changes to bring the federal jurisdiction of the District's courts in line with the other U.S. district and circuit courts. The Supreme Court of the District of Columbia became the U.S. District Court for the District of Columbia, and the Circuit Court of the District of Columbia became the U.S. Court of Appeals for the District of Columbia Circuit (known as the D.C. Circuit). Both courts still maintained federal and local jurisdiction over the District of Columbia. (The name of the federal district court in D.C. can be confusing, because such courts are usually called the "U.S. District Court for the District of X," where X is the name of the district. In D.C., however, the district is called the District of Columbia, which would result in the court being called the "U.S. District Court for the *District of* the District of Columbia. Thankfully, cooler and less-redundant heads prevailed.)

When the Reorganization Act took effect on February 1, 1971, the D.C. court system was forever changed: The federal courts in the District of Columbia, as

part of a movement to "home rule," shed their local jurisdiction. The Reorganization Act alleviated the federal courts from a "smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city." [*Palmore v. United States*, 411 U.S. 389, 408–09 (1973).] As a result, the federal courts would be confined to federal jurisdiction, like their counterpart trial and appellate courts throughout the country.

Congress combined D.C.'s then-existing local courts to create the Superior Court of the District of Columbia, which would hear local civil and criminal matters: those "distinctively local controversies" that would have little impact beyond the local jurisdiction (though the full expansion of the Superior Court jurisdiction did not go into effect until August 1, 1973). [*Palmore*, 411 U.S. at 409.] Congress also established the District of Columbia Court of Appeals as the District's sole appellate court, which would hear all appeals from the Superior Court. The District of Columbia court system would thus serve as the District's "state" courts. [*M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).]

Equally important, the District of Columbia Court of Appeals would become the highest court of the District. The Reorganization Act eliminated the authority of the U.S. Court of Appeals to review judgments of the D.C. Court of Appeals and provided that the Supreme Court of the United States would review final judgments and decrees of the D.C. Court of Appeals. [28 U.S.C. § 1257.]

Warning: In *M.A.P. v. Ryan*, the Court of Appeals announced its policy regarding precedential value of decisions of the U.S. Court of Appeals for the District of Columbia Circuit: (1) decisions of the U.S. Court of Appeals for the District of Columbia Circuit issued before February 1, 1971, constitute the case law for the District of Columbia; (2) decisions of the Circuit Court before February 1, 1971, may not be overruled by a division of the D.C. Court of Appeals, and may only be overruled by a court sitting en banc; and (3) although the D.C. Court of Appeals is not bound by decisions of the D.C. Circuit issued on or after February. 1, 1971, those decisions are "entitled to great respect." [*M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).]

D.C. Case Brief: The first important test of the changes in the Reorganization Act occurred in *M.A.P. v. Ryan*. [*M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971).] The case involved a juvenile defendant who maintained that he had a constitutional right to a probable cause hearing. His attorneys cited a D.C. Circuit case, *Brown v. Fauntleroy*, as the basis for the constitutional right to the hearing. [*Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971).] The Reorganization Act took effect on February 1, 1971, and *Brown* was decided on February 29, 1971. That meant the District of Columbia Court of Appeals

was required to determine a threshold question: whether it was bound by the D.C. Circuit's post-Reorganization Act decision. [*M.A.P.*, 285 A.2d at 312.] After reviewing changes in the titles and responsibilities of various District of Columbia courts dating back to 1941, the D.C. Court of Appeals determined that because *Brown* was decided after the Reorganization Act took effect, it was not bound to follow *Brown*, "although, of course, we recognize that it is entitled to great respect." The fact that *Brown* was decided on "federal constitutional grounds by a federal circuit court of appeals for this jurisdiction" was not outcome-determinative, the court held, noting that other high *state* courts (and the Seventh Circuit) had rejected that argument and instead recognized that until a federal constitutional question is answered by the U.S. Supreme Court, state courts may exercise their own judgment. [*M.A.P.*, 285 A.2d at 312.] The Court of Appeals also noted that the overriding purpose that emerged from the Reorganization Act was to put the District of Columbia's judicial system on equal footing with those of the several states. The Court of Appeals then concluded that the D.C. Circuit had "erroneously decided" *Brown*, and that it "should not be followed." [*M.A.P.*, 285 A.2d at 313.]

§ 1.02[2] History of the D.C. Rules of Procedure. The appellate rules in the District of Columbia Court of Appeals are the D.C. Rules of Appellate Procedure. These rules are similar but not identical to the Federal Rules of Appellate Procedure. [D.C. Code § 11-743 (2001) (rules of court).] The rules of civil and criminal procedure in the Superior Court are the D.C. Rules of Civil Procedure and the D.C. Rules of Criminal Procedure. These are essentially modifications to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, which by statute the Superior Court is required to adopt, though the rules can be (and always are) modified with the approval of the Court of Appeals. [D.C. Code § 11-946 (2001) (rules of court).] In both instances, the D.C. rules follow the federal rules and subsequent amendments and include comments explaining the differences; however, changes to the D.C. rules may lag a year or two behind changes to the federal rules. The Superior Court may adopt and enforce other rules as necessary, without the approval of the District of Columbia Court of Appeals, as long as they do not modify the Federal Rules. [D.C. Code § 11-946 (2001).] However, because there is no counterpart in the Superior Court to the "Local Rules" of the various U.S. district courts, such modifications are written directly into the D.C. rules. [*See*, *e.g.*, Rule 12-I regarding motions practice.] Furthermore, when applying the D.C. rules, D.C. courts hew closely to federal court decisions regarding similar federal rules. "When a local rule and a federal rule are identical, or nearly so, [D.C. Courts] will construe the local rule in a manner consistent with the federal rule to the extent possible under binding precedent, and [D.C. Courts] will look to federal

court decisions interpreting the federal rule as persuasive authority in interpreting the local rule." [*Montgomery v. Jimmy's Tire & Auto Ctr., Inc.*, 566 A.2d 1025, 1027 (D.C. 1989) (citing *Simpson v. Chesapeake & Potomac Tel. Co.*, 522 A.2d 880, 884 n.4 (D.C. 1987) ("Decisions interpreting analogous federal rules provide guidance to the court in interpreting our local rules.")). In fact, although the law of evidence in the District is based on the common law, when making decisions regarding evidence, it is routine for judges to simply cite the Federal Rules of Evidence.

§ 1.03 Maryland Common-Law Influence on District of Columbia.

Courts in the District of Columbia may refer to Maryland common law in the absence of D.C. law to the contrary. [*Griffin v. Acacia Life Ins. Co.*, 925 A.2d 564, 576 n.30 (D.C. 2007).] Indeed, via D.C. Code § 45-401, D.C. has adopted Maryland common law by statute:

> The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.

Furthermore, the Maryland common law (as explicitly stated in the state's 1776 Constitution and its Declaration of Rights) incorporates the common law of England as it existed on July 4, 1776. However, as in the District of Columbia, Maryland courts are free to determine whether English common law should be made applicable under the circumstances. [*See generally* Garrett Power, Adoption of English Law in Maryland (free download at http://ssrn.com/abstract=1836645 and https://digitalcommons.law.umaryland.edu/mlh_pubs/25/).]

§ 1.04 Objective Law of Contract Interpretation and Construction.

§ 1.04[1] General Contract Law. The District follows the objective law of contract interpretation and construction. Where a contract's language is "clear and definite," the court adheres to the "objective law" of contracts and interprets the contract as a matter of law. [*Brown v. Union Station Venture Corp.*, 727 A.2d 878, 881 (D.C. 1999).] That is, it will rely on the contract's terms to provide "the best objective manifestation" of the parties' intent. [*1010 Potomac Assocs. v. Grocery Mfrs. of Am. Inc.*, 485 A.2d 199, 205–06 (D.C. 1984) (citing *Bolling Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 475 A.2d 382, 385 (D.C. 1984)).] However, if the provisions of the contract are ambiguous, "the ambiguity raises a genuine issue of material fact," and the interpretation becomes a question for

a factfinder. [*Rastall v. CSX Transp., Inc.*, 697 A.2d 46, 51 (D.C. 1997) (quoting *Kass v. William Norwitz Co.*, 509 F. Supp 618, 623–24 (D.D.C. 1980).]

When interpreting a contract, the first step is to determine what a reasonable person in the position of the parties would have thought that the disputed language meant. [*Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009); *see 1010 Potomac Assocs.*, 485 A.2d at 205.] The writing must be interpreted "as a whole, giving a reasonable, lawful, and effective meaning to all its terms," and the court must try to ascertain the meaning "in light of all the circumstances surrounding the parties at the time the contract was made." [*Potomac*, 485 A.2d at 205–06, n.7.]

Extrinsic evidence may be used to "determine the circumstances surrounding the making of the contract." However, extrinsic evidence may not be used to show the "parties' subjective intent" unless the contract language is ambiguous. [*Potomac*, 485 A.2d at 205.]

A contract is ambiguous if it is "reasonably or fairly susceptible of different constructions or interpretations." [*Yazdani v. Access ATM*, 941 A.2d 429, 432 (D.C. 2008) (forum-selection clause was not ambiguous) (quoting *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983)).] It is not ambiguous merely because the parties do not agree on its proper interpretation. [*Sacks v. Rothberg*, 569 A.2d 150, 154–55 (D.C. 1990) (citing *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983), and *Scrimgeour v. Magazine*, 429 A.2d 187, 189 (D.C. 1981)).] To determine whether a contract is ambiguous, the court examines the document on its face, giving the contractual language its plain meaning. [*Sacks v. Rothberg*, 569 A.2d at 154 (quoting *Kass v. William Norwitz Co.*, 509 F. Supp 618, 625 (D.D.C. 1980); *Akassy v. William Penn Apartments Ltd. P'ship*, 891 A.2d 291, 299 (D.C. 2006) (no ambiguity in use of contractual term "rent").] Contractual ambiguity will be generally construed against the drafter. [*Steiner v. American Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1261 (D.C. 2018) (ambiguous covenants not to compete are construed against employer).]

Cross Reference: *See* Chapter 3, *Interpretation, Modification, Waiver, Estoppel, and Rescission*, § 3.06[5] (Contra Proferentem—Construing Ambiguous Language Against Drafter).

For further discussion of contractual ambiguity, see Ch. 2, *Elements and Pleading the Case*, § 2.03, and Ch. 3, *Interpretation, Modification, Waiver, Estoppel, and Rescission*, § 3.05.

§ 1.04[2] Court of Appeals Review of Contract Ambiguity. On appeal, the question of whether a contract is ambiguous is a question of law reviewed *de novo*. [*Dist. No. 1-Pac. Coast Dist., Marine Engr's Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 274 D.C. 2001); *Sacks v. Rothberg*, 569 A.2d 150, 154 (D.C. 1990) (citing *Dodek v. CF 16 Corp.*, 537 A.2d 1086 (D.C.

1988)).] If the Court of Appeals determines that a contract provision is ambiguous, its review of the trial court's determination of the proper interpretation, which the Court of Appeals views as a finding of fact, remains limited: It will reverse a lower court's interpretation only if the interpretation is "plainly wrong or without evidence to support it." [*Waverly Taylor, Inc. v. Polinger*, 583 A.2d 179, 182 (1990) (citing D.C. Code § 17-305(a) (1989)).]

II. Choice Of Law

§ 1.05 Choice-of-Law Contractual Provisions Generally.

In any action for breach of contract, the attorney must ascertain whether there is more than one state is involved and, if so, which state's laws should govern (choice of law) *and* where the matter should be heard (forum). In such instances, the District of Columbia is considered a state. [*See, e.g.*, *Garcia v. AA Roofing Co.*, 125 A.3d 1111, 1115, 1118 (D.C. 2015) (motion to dismiss on basis of forum non conveniens should not have been granted, in part because District of Columbia was not a "seriously inconvenient forum"); *Parker v. K&L Gates, LLP*, 76 A.3d 859, 870 (D.C. 2013) (applying D.C. procedural law).]

Choice-of-law provisions and forum-selection clauses are especially useful when parties are located in different jurisdictions or when the contract requires a party to perform its obligations in a state other than where it is located. These clauses provide parties an additional degree of certainty about the law that may be applied and about which court may be called upon to apply it, and they provide parties with information about how to construe the contract's provisions, whether during performance or in the event of a dispute. In choice-of-law matters, the Court of Appeals considers or applies the law of a foreign jurisdiction "as either declared by its legislature, or by its highest court." [*Atkins v. Industrial Telecommunications A'ssn.*, 660 A.2d 885, 891 (D.C. 1995) (citing *King v. Order of United Com. Travelers of Am.*, 333 U.S. 153 (1948)).]

§ 1.06 Choice-of-Law Conflicts.

Resolution of a choice-of-law issue depends on whether the jurisdictions' laws present no conflict, a false conflict, or a true conflict. [*Barimany v. Urban Pace LLC*, 73 A.3d 964, 967 (D.C. 2013).]

1) In a "no conflict" situation, the laws of the different jurisdictions are identical or would produce the identical result for the facts presented. [*USA Waste of Md., Inc. v. Love*, 954 A.2d 1027, 1032 (D.C. 2008).]

2) A "false conflict" arises when the policy of one jurisdiction would be advanced by application of its law, and the policy of the other jurisdiction would not be advanced by application of its law. [*District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995) (quoting *Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985)).]

3) A "true conflict" arises when both states have an interest in the application of their own law applied to the facts of the case. [*Herbert v.*

District of Columbia, 808 A.2d 776, 779 (D.C. 2002).] In this situation, the law of the forum (i.e., D.C.) "will be applied unless the foreign state has a greater interest in the controversy." [*Kaiser-Georgetown Cmty.*, 491 A.2d at 509 (citing *Biscoe v. Arlington County*, 738 F.2d 1352, 1360 (D.C. Cir. 1984), *overruled on other grounds by Burkhart v. Washington Metro Area Transit Auth.*, 112 F.3d 1207, 1216 (D.C. Cir. 1997)).]

A choice-of-law provision helps a court "discern the parties' intent" when the parties "dispute the meaning of a particular phrase in an agreement," because "the fact that the parties themselves chose to have the agreement interpreted under a particular jurisdiction's laws may help the court discern how the parties intended" to resolve a dispute. [*Debnam v. Crane Co.*, 976 A.2d 193, 199 (D.C. 2009).]

Absent an enforceable choice-of-law provision, the court applies another state's law when the following two conditions obtain:

(1) the state's interest in the litigation is substantial; and

(2) "application of District of Columbia law would frustrate the clearly articulated public policy of that state." [*Herbert v. District of Columbia*, 808 A.2d 776, 779 (D.C. 2002) (quoting *Kaiser-Georgetown Cmty.*, 491 A.2d at 509)).]

⛒ **Attorney's Tip:** When addressing the law applicable to breach of warranty claims, especially in tort, courts typically consider a choice-of-law clause in a contract to have diminished significance. A choice-of-law provision is less significant in such situations because, under traditional tort-law concepts, the law of the jurisdiction where the injury occurs generally is a more-significant factor. [*Debnam v. Crane Co.*, 976 A.2d 193, 199 (D.C. 2009).]

Additionally, explicit choice of law provisions are not impenetrable; requirements like personal jurisdiction still apply. If neither the plaintiff nor the defendant reside within D.C. when the District is selected as a forum, the court may view a forum selection clause with greater scrutiny than a state comparatively would. [*Faw v. Q.T. Transp., Inc.*, 2020 D.C. Super. LEXIS 4, 18–19 (2020)]. This principle will be discussed in further detail in § 1.19.

§ 1.07 Governmental Interest Analysis.

When a contract is silent on the matter, the court conducts a "governmental interest" analysis to determine which jurisdiction's law controls the interpretation and enforcement of the contract. [*Adolph Coors Co. v. Truck Ins. Exch.*, 960 A.2d 617, 620 (D.C. 2008); *see Holmes v. Brethren Mut. Ins. Co.*, 868 A.2d 155, 157 n.2 (D.C. 2005); *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198, 202 (D.C. 1997); *see Cardenas v. Muangman*, 998 A.2d 303, 311–312 (D.C. 2010)

(loss of consortium claim was properly dismissed under Virginia law because "in the District of Columbia an action for the loss of consortium was governed by the law of the state where the marriage was domiciled"); *Williams v. Williams*, 390 A.2d 4, 5–6 (D.C. 1978) (governmental interest analysis "requires us to evaluate the governmental policies underlying the applicable conflicting laws and to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review").] This analysis requires consideration of several factors:

(1) the place of contracting;

(2) the place of negotiation of the contract;

(3) the place of performance;

(4) the location of the subject matter of the contract;

(5) the residence and place of business of the parties; and

(6) in the case of insurance contracts, the principal location of the insured risk. [Restatement (Second) of Conflict of Laws §§ 188, 193 (1988); *see Vaughan*, 702 A.2d. at 200–03 (citing favorably Restatement (Second) of Conflict of Laws §§ 187, 193 (1988)).]

Under the governmental interest analysis, when an application of law would advance the policy of one state, but not of the other state, a "false conflict" appears and the law of the interested state prevails. [*Biscoe v. Arlington County*, 738 F.2d 1352, 1360 (D.C. Cir. 1984).]

Choice of law questions are subject to de novo review. [*Adolph Coors Co. v. Truck Ins. Exch.*, 960 A.2d 617, 620 (D.C. 2008) (citing *Vaughan*, 702 A.2d at 200 (D.C. 1997)).]

District of Columbia cases have cited favorably two sections in the Restatement of Conflict of Laws when applying the governmental-interest test. [*See, e.g.*, *Adolph Coors Co.*, 960 A.2d at 620–621.] The Restatement sections are as follows:

(1) Section § 187: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in the agreement directed to that issue." [*See* Restatement (Second) of Conflict of Laws § 187(1) (1988).]

(2) Section § 193: "The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant

relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied." [*See* Restatement (Second) of Conflict of Laws § 193.]

D.C. Case Brief: In *Adolph Coors Co. v. Truck Insurance Exchange*, Coors Brewing Co. sought to overturn a Superior Court summary judgment that excused Truck Insurance Exchange (TIE) from having to defend a class action lawsuit in the District of Columbia. [*Adolph Coors Co. v. Truck Ins. Exch.*, 960 A.2d 617 (D.C. 2008).] The Superior Court ruled that the duty-to-defend law of Colorado, where the insurance company was headquartered and conducted its principal business, should apply. The Court of Appeals agreed, noting that Coors was incorporated and had its principal place of business in Colorado, TIE was incorporated and headquartered in California, and TIE lacked any relationship with the District of Columbia. Furthermore, correspondence between the parties indicated that the parties negotiated and finalized the insurance contract and performed their contractual obligations in Colorado. Moreover, the parties agreed on a "Colorado Amendatory Endorsement" to the insurance policy, presumably for the purpose of complying with Colorado law. The Court concluded that Colorado had a more "significant relationship" to the Coors-TIE insurance transaction than the District of Columbia or any other jurisdiction. [*Adolph Coors Co.*, 960 A.2d at 620–621 (D.C. 2008); *see* Restatement (Second) of Conflict of Laws § 188(1).]

Attorney's Tip: When choice of law issues involve a tort, and no state's law has been chosen, the courts apply a governmental interests analysis, and look to the four factors enumerated in the Restatement (Second) of Conflict of Laws § 145, comment (d): (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship is centered. [*District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995) (citing *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 40–41 (D.C. 1989)).]

D.C. Case Brief: In *Wright v. Sony Pictures*, the plaintiff, a citizen of Virginia, and the defendant, a corporation incorporated in Delaware and operating primarily in California, disputed which jurisdiction's law should apply. [*Wright v. Sony Pictures Ent., Inc.*, 394 F. Supp. 2d 27 (D.D.C. 2005).] The plaintiff argued that Virginia law should govern whether the prospective liability waiver that he signed should bar his claims for negligence and infliction of emotional distress. The defendant countered that District of Columbia law should apply because all the conduct at issue occurred within its borders. The Court of Appeals first determined whether there was any conflict between Virginia and District of Columbia law

regarding the application of prospective liability waivers. In Virginia, prospective liability releases were forbidden and unenforceable in all instances. [*See Hiett v. Lake Barcroft Cmty. Ass'n.*, 418 S.E.2d 894, 896 (Va. 1992).] The District of Columbia, on the other hand, did not have a clearly articulated public policy against prospective liability waiver. [*See Jaffe v. Pallotta TeamWorks*, 374 F.3d 1223, 1226–27 (D.C. Cir. 2004).] Because the forum's choice-of-law rules control in a diversity action, the Court of Appeals applied the District of Columbia's choice-of-law rules to determine which jurisdiction's law to apply. Different issues may require differing analyses, so the particular choice-of-law rule to apply depends on the specific issue. [*See Jaffe*, 374 F.3d at 1227.] Here, although the plaintiff's claims arose in tort, the application of a prospective liability waiver was fundamentally a contract issue, and the District of Columbia's choice-of-law rules for contracts applied. In resolving the contract question, the Court of Appeals applied D.C. law because it had the "more substantial interest in the resolution of the issue." [*Coulibaly v. Malaquias*, 728 A.2d 595, 606 (D.C. 1999) (quoting *Fowler v. A & A Co.*, 262 A.2d 344, 348 (D.C. 1970)).]

Attorney's Tip: In cases involving choice-of-law for car-accident insurance coverage, courts will focus on "the location of the automobile insured," not on the location of the accident. That is because, in an insurance contract, the insurer's obligations are paramount and the contractual expectation of the insured is to be covered irrespective of the random location of the accident. [*Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198, 201–02 (D.C. 1997).]

III. Personal Jurisdiction

§ 1.08 Plaintiff's Burden to Establish Personal Jurisdiction.

A court must have personal jurisdiction to impose a personal liability or obligation on a defendant. Usually, personal jurisdiction can be acquired only over someone subject to the territorial jurisdiction of the court. [*Eric T. v. National Med. Enters.*, 700 A.2d 749, 758–59 (D.C. 1997) (quoting *Kulko v. California Super. Ct.*, 436 U.S. 84, 91 (1978)).]

⛒ **Attorney's Tip:** The mere filing of motions in court does not provide a basis for asserting personal jurisdiction over the moving defendants. [*Lammers Kurtz v. United States*, 779 F. Supp. 2d 50, 53 (D.D.C. 2011) (there is no need for "special appearance" by defendant to challenge personal jurisdiction).]

A plaintiff has the burden of establishing that a trial court has personal jurisdiction over a nonresident defendant. [*Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001).] The court relies on two legal principles to decide whether that burden has been met:

(1) the exercise of personal jurisdiction must be authorized by the District's long-arm statute; and

(2) the exercise of personal jurisdiction must "comport with the requirements of due process." [*Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1130 (D.C. 2012).]

§ 1.09 Long-Arm Statute.

The District of Columbia's long-arm statute authorizes a court to exercise personal jurisdiction over a nonresident person who acted directly or through an agent, where the person meets any of the following seven categories of activity:

(1) the person transacts any business in the District;

(2) the person contracts to supply services in the District;

(3) the person causes tortious injury in the District of Columbia by an act or omission in the District;

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

(5) the person has an interest in, uses, or possesses real property in the

District;

(6) the person contracts to insure, or act as a surety for or on, any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District at the time of contracting, unless the parties otherwise provide in writing; or

(7) the person has a marital or parent-child relationship in the District. [D.C. Code § 13-423(a)(1)–(7) (2001) (personal jurisdiction based on conduct).]

When jurisdiction over a person is based solely on these categories, D.C. law only permits claims to be asserted in the D.C. courts for relief arising from the acts enumerated. [D.C. Code § 13-423(b) (2001).] Furthermore, when applying the long-arm statute to on the basis of a marital or parent-child relationship (category (7)), the statute permits the exercise of personal jurisdiction "if there is any basis consistent with United States Constitution for the exercise of personal jurisdiction." [D.C. Code § 13-423(a)(7)(E) (2001).]

When applying the long-arm statute to a nonresident defendant, the statute allows for "the exercise of personal jurisdiction over nonresident defendants to the fullest extent permissible under the due process clause of the United States Constitution." [*Companhia Brasileira*, 35 A.3d at 1130–31 (citing *Environmental Rsch. Int'l, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 811 (D.C. 1976) (en banc) (noting that both Maryland and Virginia had reached the same conclusion regarding their long-arm statutes).]

§ 1.10 Due Process Clause—Minimum Contacts.

The U.S. Supreme Court has held that due process permits a court to exercise personal jurisdiction over a nonresident defendant if the defendant has "certain minimum contacts" with the forum state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " [*See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940).] The court may assert personal jurisdiction over a nonresident defendant when a statute authorizes service of process and that service is consistent with due process. [*Mouzavires v. Baxter*, 434 A.2d 988, 990 (D.C. 1981) (en banc) (per curiam) (plurality opinion) (citing *International Shoe*, 326 U.S. at 316–317).]

When the "transacting business" prong of the District's long-arm statute is coextensive with the Due Process Clause, the court's personal-jurisdiction analysis merely requires it to consider whether any business that a defendant transacted in the District is sufficient to permit the court to conclude that "the assertion of personal jurisdiction comports with due process." [*Mouzavires*, 434 A.2d at 993 (citing *International Shoe*, 326 U.S. at 317).] In other words, the

court must determine whether, through business contacts within the District of Columbia, a defendant has established such minimum contacts that the plaintiff's lawsuit does not "offend 'traditional notions of fair play and substantial justice.'" [*Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 330–31 (quoting International Shoe, 326 U.S. at 316).]

§ 1.11 Purposeful Availment.

A critical inquiry in determining personal jurisdiction is whether the defendant "purposefully directed its activities at District residents." [*Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 329 (D.C. 2000) (en banc).] The Due Process Clause keeps the court from subjecting an individual's liberty interest from any binding judgments when the person has established no meaningful "contacts, ties, or relations." [*Burger King v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).]

The "purposeful availment" requirement ensures that the court will not force a defendant into its jurisdiction solely as a result of "random, fortuitous, or attenuated contacts . . . or of the unilateral activity of another party or a third person." [*Burger King*, 471 U.S. at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).] Jurisdiction is proper only when the contacts between the defendant and the court "proximately result" from actions that the defendant alone has taken to "create a 'substantial connection' with the forum State." [*Burger King*, 471 U.S. at 475 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).]

The Due Process Clause also requires that individuals must have fair warning that a particular activity in which they engaged "may subject [them] to the jurisdiction of a foreign sovereign." [*Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).] This gives a "degree of predictability" to the legal system, which allows potential defendants to structure their primary conduct so that they have some minimum assurance about whether that conduct will subject them to litigation in a particular jurisdiction. [*World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).]

The minimum contacts analysis is not a "mechanical test" in which the court applies "talismanic jurisdictional formulas" to determine whether it may properly exercise personal jurisdiction over any defendant. Rather, the court must always weigh the facts of each case to determine whether personal jurisdiction "would comport with fair play and substantial justice." [*Burger King*, 471 U.S. at 478, 485–86.]

§ 1.12 Types of Personal Jurisdiction.

§ 1.12[1] D.C. Recognizes Specific and General Personal Jurisdiction. District of Columbia courts recognize two types of personal jurisdiction:

(1) specific personal jurisdiction, where the cause of action arises out of or relates to a defendant's conduct in the District; and

(2) general personal jurisdiction, where the defendant has a continuous and systematic presence in the District even if the cause of action does not arise from its conduct in the District. [*Family Fed'n for World Peace and Unification v. Hyun Jin Moon*, No. 2011 CA 003721 B, 2013 D.C. Super. LEXIS 10, *25 (D.C. Super. Ct. Oct. 28, 2013), *aff'd in part, rev'd on other grounds*, 129 A.3d 234 (D.C. 2015); *see Hughes v. A.H. Robins Co.*, 490 A.2d 1140, 1143–48 (D.C. 1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 (1984).]

When the court rules on personal jurisdiction without an evidentiary hearing, it "ordinarily demands only a prima facie showing of jurisdiction by the plaintiffs." However, when the court takes evidence or makes a ruling regarding personal jurisdiction, then a "heightened preponderance of the evidence standard" applies. [*Companhia Brasileira Carbureto de Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1135 n.9 (D.C. 2012) (quoting *Mwani v. Bin Laden*, 417 F.3d 1, 6 (D.C. Cir. 2005)).]

A plaintiff must provide the court with a specific factual basis for the exercise of personal jurisdiction. Conclusory statements do not constitute a prima facie showing necessary to carry the burden of establishing personal jurisdiction. [*First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378–79 (D.C. 1988) (appellant's statement that "'the continuous transfer of massive sums of money' through PIBC accounts in the District 'was a calculated and intentional projection of UNEXCO's check-kiting business into the District of Columbia'" was considered conclusory); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 787 (D.C. 1983) (party listed 13 private defendants in complaint, all nonresidents of the District, but alleged no contacts with the District for 10 of them, "beyond the bald speculation that these ten were 'alleged co-conspirators'"; court considered party's statement conclusory.)]

§ 1.12[2] General Jurisdiction—"Doing Business." On its face, District Code § 13-334(a), relating to foreign corporations, appears to relate only to service of process:

> 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, or, when he is absent and can not be found, by leaving a copy at the principal place of business in the District, or, where there is no such

> place of business, by leaving a copy at the place of business or residence of the agent in the District, and that service is effectual to bring the corporation before the court.
>
> [D.C. Code § 13-334(a) (2001) (service on foreign corporations).]

The Court of Appeals, however, has long used § 13-334(a) as a means of conferring jurisdiction over "foreign corporations doing substantial business in the District of Columbia". [*Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 233 (D.C. 2006) (quoting *Guevara v. Reed*, 598 A.2d 1157, 1159 (D.C. 1991)).] A foreign corporation that transacts consistent regular business activity within the District is subject to the general jurisdiction of the D.C. courts, on proper service, and not merely for conduct that takes place within the District; the court will determine whether there is "any continuing corporate presence in the forum state directed at advancing the corporation's objectives." [*AMAF Int'l Corp. v. Ralston Purina Co.*, 428 A.2d 849, 851 (D.C. 1981).] For example, to confer jurisdiction, a defendant corporation must purposely avail itself of the privilege of conducting activities within the District, and the defendant's continuing contacts must provide clear notice that it is subject to legal action in the District. [*AMAF Int'l*, 428 A.2d at 851–52.]

It may be difficult to determine personal jurisdiction over business conducted through intermediaries or separate corporate identities. To establish personal jurisdiction for business conducted through an "alter-ego", there must be sufficient evidence of unity of ownership or control to "pierce the corporate veil"; and without such evidence of domination or control cannot be established over the parent corporation. [*Jackson v. Loews Wash. Cinemas, Inc.*, 944 A.2d 1088, 1095–96 (D.C. 2008).] However, indirect business results in personal jurisdiction through specific jurisdiction by long arm statute, not general jurisdiction and thus, the alter ego approach will be discussed in greater detail in the following chapters. [*Jackson*, 944 A.2d at 1092–93 (D.C. 2008).]

§ 1.12[3] Specific Jurisdiction—"Transacting Business." As noted above [*see* § 1.09.], the District of Columbia's long-arm statute provides another means of obtaining personal jurisdiction over nonresident defendants. The statute preamble in pertinent part states that 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 transacting any business in the District of Columbia. [D.C. Code § 13-423(a) (2001); *Gonzalez Internacional de Elevadores S.A.*, 891 A.2d 227, 233–34 (D.C. 2006).] The Court of Appeals has interpreted the "transacting any business" provision to be coextensive with the Due Process Clause of the Fifth Amendment. [*Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 325–26 (D.C. 2000) (en banc) (citing *Environmental*

Research International, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 81011 (D.C. 1976)).]

To confer personal jurisdiction, the nonresident defendant's conduct and connection with the District must be such that he should "reasonably anticipate being haled into court there," in other words he must be given "fair warning." [*Shoppers Food Warehouse*, 746 A.2d at 328–29.] For specific jurisdiction to apply under D.C. Code § 13-423(b), there must be a "discernible relationship" between the claims raised and the business transacted in the District. [*Shoppers Food Warehouse*, 746 A.2d at 329.] The claims must "relate to" or have a "substantial connection with" the acts forming the basis for jurisdiction. [*Shoppers*, 746 A.2d at 328 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985); *see*, generally, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).]

The District's totality-of-the circumstances approach contrasts with stricter jurisdictions, which require a direct "causal relationship" between the defendant's contacts with the plaintiffs in regard to the forum. [*Maryland Digital Copier v. Litigation Logistics, Inc.*, 394 F.Sup. 3d 80, 93–94 (D.D.C. 2019).]

Notably, in 2017, the Supreme Court in *Bristol-Myers Squibb Co v. Superior Court*, rejected California's generous "sliding scale approach" in evaluating jurisdiction, ruling that it overreached established precedent. [*Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781–82 (2017).] As a consequence, the District's totality-of-circumstances approach has come under fire, with some judges in D.C's federal district court describing D.C. law as "incompatible with existing Supreme Court precedent interpreting the limits of the Due Process Clause." [*Maryland Digital Copier*, 394 F. Supp. 3d at 93–94.] This has resulted in a number of dismissals due to a lack of personal jurisdiction, with courts instead requiring direct causal relationships between the defendant's contacts within the District and the plaintiff's injury. [*Maryland Digital Copier*, 394 F. Supp. 3d at 93–94 (case dismissed due lack of causal relationship between defendant's contacts and failure to pay, resulting in a lack of personal jurisdiction); *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 26–27 (D.D.C. 2017) (holding that a direct causal relationship is required for jurisdiction in order to prevent the blurring of the distinction between general and specific jurisdiction); *Cockrum v. Donald J. Trump for President, Inc.*, 319 F. Supp. 3d 158, 175–77 (D.D.C. 2018) (holding that specific jurisdiction depends on contacts that the "defendant himself" created within the forum in case specific matters).]

When a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit in the forum, the "fair warning" requirement is satisfied in the following contexts:

(1) The defendant has "purposefully directed" his activities at residents of the forum. [*Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984)).]

(2) The litigation results from alleged injuries that "arise out of or relate to" those activities. [*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *see Burger King*, 471 U.S. at 472 (1985).]

(3) The contacts proximately result from actions "by the defendant himself" that create a "substantial connection" with the forum. [*Burger King*, 471 U.S. at 475 (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).]

(4) The defendant who purposefully has directed her activities at forum residents, seeking to defeat jurisdiction, does not present "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." [*Burger King*, 471 U.S. at 477.]

(5) A state generally has a "manifest interest" in providing its residents with a "convenient forum for redressing injuries inflicted by out-of-state actors." [*Burger King*, 471 U.S. at 473 (citing *McGee*, 355 U.S. at 223)).]

D.C. Case Brief: In *Gonzalez v. Internacional de Elevadores, S.A.*, the plaintiff-appellant argued that the defendant corporation, IDESA, had sufficient contact with the District of Columbia that it would be reasonably foreseeable that it could be haled into court in the District. [*Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.2d 227, 234 (D.C. 2006).] As evidence of IDESA's business transactions in the District, the appellant cited the deposition testimony that a company used IDESA's equipment in several building projects in the District, and that the company's inventory included elevator parts that IDESA supplied, which were then used to service its elevator maintenance contracts, including those in the District of Columbia. In an earlier case, *Cohane v. Arpeja-California, Inc.*, the Court of Appeals had held that the trial court may properly exercise personal jurisdiction over a nonresident defendant when the defendant has directly shipped goods into the District and sold them to District retailers. [*Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 159 (D.C. 1978).] The deposition testimony in Gonzalez, however, fell far short of establishing the type of direct-shipping activity that undergirded the decision in *Cohane*. [*Gonzalez*, 891 A.2d at 234–35.] The court explained that unsubstantiated assumptions about where a product may have been used could not be the basis for exercising personal jurisdiction over a nonresident corporation. The connection between IDESA and the District was tenuous because the defendant did not distribute parts

to "a region that includes the District of Columbia." Rather, at some time in the past, the defendant supplied another company with parts, and those parts "may or may not have been used in the District." [*Gonzalez*, 891 A.2d at 235.] That did not constitute an affirmative act establishing minimum contacts with the District sufficient to enable the appellant to bring suit in the District. On the contrary, IDESA's contacts with the District of Columbia were merely "random, isolated [and] fortuitous." [*Gonzalez*, 891 A.2d at 235 (quoting *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 327 (D.C. 2000)).] Therefore, the court could not conclude that IDESA transacted business in the District within the meaning of the long-arm statute, and the trial court did not have personal jurisdiction. [*Gonzalez*, 891 A.2d at 235.]

Attorney's Tip: In *Gonzalez*, the plaintiff argued that personal jurisdiction could be exercised over the defendant under theories of "alter ego" and "apparent authority." [*Gonzalez v. Internacional de Elevadores S.A.*, 891 A.2d 227, 232, 236 (D.C. 2006).] The Court of Appeals disagreed. It held that, in order to pierce the corporate veil under an alter-ego theory, "there must be a unity of ownership and interest." [*Gonzalez*, 891 A.2d at 237 (citing *Camacho v. 1440 Rhode Island Ave. Corp.*, 620 A.2d 242, 248 (D.C. 1993)).] The Court noted that there are no precise guidelines for determining when to pierce the corporate veil; however, in making that determination, it considered factors such as "whether corporate formalities have been disregarded, and whether there has occurred an intermingling of corporate and personal funds, staff, and property." [*Gonzalez*, 891 A.2d at 237 (citing *Vuitch v. Furr*, 482 A.2d 811, 816 (D.C. 1984)).] This test is generally used to reach an individual behind a corporation as well as to pierce the corporate veil between two corporations, such as between parent and subsidiary corporations. [*Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr. Ltd. P'ship*, 90 F. Supp. 2d 15, 23 n.6 (D.D.C. 2000).] Thus, when affiliated parties are alter egos of a corporation over which the Court of Appeals has personal jurisdiction, the "corporation's contacts may be attributed to the affiliated party for jurisdictional purposes." [*Shapiro, Lifschitz & Schram*, 90 F. Supp. 2d at 22.] Here, however, the alter-ego theory did not apply because the entities did not share any employees, equipment, or office space; they had separate bank accounts, held their own corporate meetings, and paid their own taxes. [*Gonzalez*, 891 A.2d at 237.] In addition, no detrimental reliance was shown under a theory of apparent authority. [*Gonzalez*, 891 A.2d at 238–39.]

§ 1.13 Motions to Dismiss for Lack of Personal Jurisdiction.

§ 1.13[1] General Requirements. A motion to dismiss for lack of personal

jurisdiction is filed pursuant to Civil Rule 12(b)(2). [*See*, *e.g.*, *Family Fed'n for World Peace and Unification v. Hyun Jin Moon*, 2013 D.C. Super. LEXIS 10, 25 (D.C. Super. Ct. Oct. 28, 2013); *Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp 157, 165 (D.D.C. 2017); *see* D.C. Super. Ct. Civ. R. 12(b)(2).] Generally, every defense to a claim for relief in any pleading must be asserted in the responsive pleading (e.g., the answer) if one is required. However, a party may assert the following defenses by motion: "(1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) [Omitted]; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join a party under Rule 19." [D.C. Super. Ct. Civ. R. 12(b).]

§ 1.13[2] Resolving Personal Jurisdictions Issues First. As a general rule, "[w]hen confronted by both a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for failure to state a claim or for summary judgment, the federal district courts routinely . . . resolve personal jurisdiction before addressing a dispositive motion on the merits." [*Hawkins v. W.R. Berkley Corp.*, 889 A.2d 290, 293–94 (D.C. 2005) ("the trial court erred in declining to determine whether there was personal jurisdiction over Berkley before granting summary judgment on the merits"); *Yazdani v. Access ATM*, 941 A.2d 429, 432–33 (D.C. 2008) (holding that the rule to resolve personal jurisdiction before addressing dispositive questions of merit is generally applied, but not absolute. Affirmed the trial court's decision to bypass the question of personal jurisdiction to use a less burdensome method of dismissal); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998).] However, this rule is not absolute. A determination on "'[j]urisdiction is vital only if the court proposes to issue a judgment on the merits.'" [*Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).]

➧ **Cross Reference:** 2 Moore's Federal Practice, Ch. 12, *Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing*, § 12.30.

Logic compels initial consideration of the issue of jurisdiction over the defendant: A court without such jurisdiction lacks power to dismiss a complaint for failure to state a claim. The functional difference that "flows from the ground selected for dismissal likewise compels considering jurisdiction and venue first." Dismissal for lack of jurisdiction or for improper venue "does not preclude a subsequent action in an appropriate forum, whereas a dismissal for failure to state a claim may" be made "with prejudice," thus precluding the plaintiff from refiling the claim in any court, including one with proper jurisdiction. [*Hawkins v. W.R. Berkley Corp.*, 889 A.2d 290, 293 (D.C. 2005)

(quoting *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) (en banc)).]

⚒ **Attorney's Tip:** The Court of Appeals will not *always* address personal jurisdiction first. For instance, in *Hawkins v. W.R. Berkley Corp.*, the D.C. Court of Appeals noted that the First Circuit sustained a district court's dismissal of the complaint in a RICO action for failure to state a claim without addressing the motion to dismiss for lack of personal jurisdiction. [*Hawkins*, 889 A.2d at 293 (citing *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34 (1st Cir. 1991)).] The First Circuit panel noted that the "courts should ordinarily satisfy jurisdictional concerns before addressing the merits of a civil action." But the panel said it does not need to apply the rule mechanically because the district court's subject matter jurisdiction was plain. [*Hawkins*, 889 A.2d at 293 (citing *Feinstein*, 942 F.2d at 40) ("[T]hose defendants who raised both jurisdictional and substantive defenses to the suit lodged no complaint about the court's determination as to how it might most expeditiously dispose of the pending motions.")).]

§ 1.13[3] Reasonableness Analysis. Courts make a "reasonableness analysis" when they consider whether an out-of-state defendant could have expected to face legal action in the District of Columbia. [*Tom Brown & Co. v. Francis*, 608 A.2d 148, 152 (D.C. 1992); *see Asahi Metal Indus., Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987).] The D.C. Court of Appeals will determine whether the foreign court's exercise of jurisdiction is consistent with the state's long-arm statute and the constitutional requirements of due process." [*Tom Brown*, 608 A.2d at 150–51 (interpreting Maine's long-arm statute to require that a defendant show it would be at a "severe disadvantage" if it were required to defend in D.C.)]

The reasonableness analysis considers the following five factors:

(1) the burden on the defendant;

(2) the interests of the forum state;

(3) the plaintiff's interest in obtaining relief;

(4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and

(5) the shared interest of the several states in furthering fundamental substantive social policies.

[*Asahi*, 480 U.S. at 113.]

§ 1.13[4] Counterclaims. Filing a counterclaim operates as a waiver of an objection to personal jurisdiction. [*Charlton v. Mond*, 987 A.2d 436, 440 (D.C. 2010).] The waiver does not depend on whether the counterclaim was

permissive. For instance, in *Charlton v. Mond*, the Court of Appeals found that the appellee's position lacked merit where he argued that he had "no choice but to file a counterclaim . . . to avoid res judicata and statute of limitations issues." [*Charlton*, 987 A.2d at 441.]

Nevertheless, in *Charlton* the Court of Appeals was convinced there was no waiver. [*Charlton*, 987 A.2d at 441.] The court noted that in every case it could find that has addressed this issue, defendants raised a jurisdictional defense after counterclaiming, unlike the defendant in *Charlton*, who objected to the court's lack of jurisdiction before filing a counterclaim. In addition, the trial court erred when it denied the defendant's original motion to dismiss. The defendant could have properly moved to dismiss for lack of personal jurisdiction concurrently with filing a counterclaim without affecting a waiver. [*Charlton*, 987 A.2d at 440.]

The Court suggested that a denial of a motion to dismiss preserves the jurisdictional issue on appeal, even when the defendant counterclaims in the interim. Therefore, a defendant that first claims a lack of jurisdiction and later files a counterclaim has effectively registered a dissent to the court's jurisdiction. The defendant in *Charlton* did not consent to the court's power over his person by counterclaiming because he only did so after he had moved to dismiss for lack of personal jurisdiction. [*Charlton*, 987 A. 2d at 440–41.]

§ 1.14 Government Contacts Exception.

§ 1.14[1] History of Government Contacts Exception. *Companhia Brasileira Carbureto de Calcio v. Applied Indus. Materials Corp.* provides a compelling explanation of the government-contacts exception to the requirement of personal jurisdiction. [*Companhia Brasileira Carbureto de Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127 (D.C. 2012).] In 2001, three Brazilian producers sued a group of domestic producers and their foreign parents in the U.S. District Court for the District of Columbia, alleging that the domestic producers had fraudulently induced the U.S. International Trade Commission to impose duties on them. In 2010, the District Court dismissed the suit, concluding that it lacked personal jurisdiction over the defendants due, in part, to the government-contacts principle. The D.C. Circuit affirmed the District Court's decision in large part but concluded that the state of the government-contacts principle was unsettled under District of Columbia law. Thus, it certified this question to the Court of Appeals: "Under District of Columbia law, does a petition sent to a federal government agency in the District provide a basis for establishing personal jurisdiction over the petitioner when the plaintiff has alleged that the petition fraudulently induced unwarranted government action against the plaintiff?" [*Companhia Brasileira*, 35 A.3d at 1130.]

As this chapter indicates [*See* § 1.09.], the District of Columbia's long-arm statute generally permits the exercise of personal jurisdiction over nonresident defendants to the fullest extent permissible under the due process clause of the U.S. Constitution. [*Companhia Brasileira*, 35 A.3d at 1130–31 (citing *Environmental Research Int'l, Inc. v. Lockwood Greene Eng's, Inc.*, 355 A.2d 808, 810–11 (D.C. 1976); *see International Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945).]

Nonetheless, in *Environmental Research International, Inc. v. Lockwood Greene Engineers*, the Court of Appeals recognized a "government contacts" exception under which courts in the District of Columbia will refrain from exercising personal jurisdiction, even though the requirements of due process and the long-arm statute otherwise would be satisfied. Recognizing the "unique character of the District as the seat of national government and . . . the correlative need for unfettered access to federal departments and agencies for the entire national citizenry," the court held that "entry into the District of Columbia by nonresidents for the purpose of contacting federal governmental agencies is not a basis for the assertion of in personam jurisdiction." The court noted that "[t]o permit our local courts to assert personal jurisdiction over nonresidents whose sole contact with the District consists of dealing with a federal instrumentality not only would pose a threat to free public participation in government, but also would threaten to convert the District of Columbia into a national judicial forum." [*Environmental Research*, 355 A.2d at 813.]

§ 1.14[2] Fraud Effect on Government Contacts Exception. The Court of Appeals in *Companhia Brasileria* acknowledged, as other courts have suggested, a possible exception to the government-contacts principle: Individuals could lose the protection of the government-contacts exception and thereby become subject to personal jurisdiction based on their contacts with federal agencies, because they fraudulently petitioned the government. [*Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1131 (D.C. 2012); *see, e.g.*, *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 787 (D.C. 1983) (affirming dismissal for lack of personal jurisdiction based on government-contacts exception but stated, in dictum, that "[a] different case might be presented had [the plaintiff] made credible and specific allegations in the district court that the companies had used the proceedings as an instrumentality of the alleged fraud").]

The court in *Companhia Brasileria* noted that, although it had not addressed the possibility of a fraud exception head on, some of its decisions "may have implicitly narrowed the scope of the government contacts doctrine" by concluding that the First Amendment provides the "only principled basis" supporting it. [*Companhia Brasileria*, 35 A.3d at 1131 (citing *Rose v. Silver*, 394 A.2d 1368, 1374 (D.C. 1978)).] Furthermore, it noted that the U.S. Supreme Court had held,

in other circumstances, that at least some fraudulent petitions were not protected by the First Amendment. [*Companhia Brasileria*, 35 A.3d at 1131 (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511–15 (1972)).]

As a result, the Court of Appeals suggested that fraudulent petitions to government agencies did not fall within the government-contacts exception. [*Companhia Brasileria*, 35 A.3d at 1131–32 (quoting *Companhia Brasileira Carbureto de Calicio v. Applied Indus. Materials Corp.*, 640 F.3d 369, 373 (D.C. Cir. 2011) (certifying question of fraudulent petitions to D.C. Court of Appeals)).] The court said that nothing in its previous decisions held or was intended to imply that individuals who entered the District of Columbia to fraudulently induce unwarranted government action against others, and succeeded in doing so, should be able to avoid defending their actions in the District "by cloaking themselves in the government contacts doctrine. Such fraud does not warrant our protection." [*Companhia Brasileira*, 35 A.3d at 1133.]

Fraud, the Court of Appeals emphasized, was a "substantive evil," and those who abuse administrative or judicial processes "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" [*Companhia Brasileira*, 35 A.3d at 1133 (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).] The court explained:

> Thus, it does not offend the First Amendment to recognize a fraud exception to the government contacts doctrine. To the extent that other rationales, such as due process concerns, continue to underpin the doctrine, a fraud exception does not offend those principles either. There is nothing unfair about subjecting individuals who have committed such fraud in the District of Columbia to the jurisdiction of our courts. Having come here to seek the "benefits and protection" that the adoption of their fraudulent petitions would have provided, such individuals cannot fairly cry foul when they are summoned before our courts.
>
> [*Companhia Brasileira*, 35 A.3d at 1133–34.]

Warning: Although *Companhia* held that the government-contacts exception doctrine may not apply when a plaintiff commits fraud to seek unwarranted governmental action against another, it admitted there was a "legitimate concern" that recognizing a fraud exception to the doctrine could expose the District of Columbia to an "unrelenting wave" of litigation and, if applied loosely, "could largely negate the government-contacts exception." [*Companhia Brasileira*, 35 A.3d at 1134 (quoting *Companhia Brasileira Carbureto de Calicio*, 640 F.3d at 373.] Yet, the court explained that it trusted the trial courts would use the "many tools at their disposal to determine whether the exercise of personal jurisdiction is appropriate in a

given case." [*Companhia Brasileira*, 35 A.3d at 1134.]

In addition, the court noted that cases in which a fraud exception to the government-contact principle applied "should be rare indeed." [*Companhia Brasileria*, 35 A.3d at 1134.] Individuals who petition the government for redress or favor should not be forced to defend civil actions in the District of Columbia simply based on *unfounded* allegations of fraud. However, the court determined that this concern may be addressed, at least in part, by holding plaintiffs to strict adherence to standards of pleading. A plaintiff seeking to overcome the government-contacts doctrine must allege true fraud and that the agency actually relied on the fraudulent information in making its decision. When allegations of personal jurisdiction are challenged by invoking the government-contacts exception, the court emphasized, a plaintiff "will have to come forward with evidence supporting his well-pled allegations of fraud . . . With the rigorous pleading requirements (that) we adopt today" and with the trial court's ability to "'inquire . . . into the facts as they exist[,]' we have reason to hope that our decision will not, in practice, negate the government contacts exception." [*Companhia Brasileira*, 35 A.3d at 1135 (quoting *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)).]

In practice, usage of the fraud exception laid out in *Companhia Brasileria* has likewise been narrowly applied. The District Court in *Sharp v. Hisense* interpreted the exception to only apply in actual allegations of fraud; mere unbalanced views or false statements failed to qualify. Additionally, the Court ruled that the adverse governmental action that was provoked from the alleged fraud, had to be targeted specifically against the plaintiff-an indirect negative side effect was insufficient to trigger the exception. [*Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp 157, 171 (D.D.C. 2017).]

§ 1.15 Full Faith and Credit, and Comity.

§ 1.15[1] Full Faith and Credit. Under the Full Faith and Credit Clause and its applications, the judgments of any U.S. state, territory, or possession are recognized in all other U.S. courts. [*See, e.g.*, *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 98 A.3d 998, 1000 (D.C. 2014); *Rollins v. Rollins*, 602 A.2d 1121, 1122 (D.C. 1992); *see also* U.S. Const., Art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").] This principle applies to the District of Columbia. [*J.J. v. B.A.*, 68 A.3d 721, 726 (D.C. 2013); *see*, *e.g.*, *Suydam v. Ameli*, 46 A.2d 763, 764 (D.C. 1946).] The U.S. Supreme Court has emphasized the importance of the Full Faith and Credit Clause in enforcing judgments uniformly across the country. [*Baker v. GMC*, 522 U.S. 222, 232 (1998).]

A judgment that is not final will not qualify for full faith and credit in the District; additionally, orders frequently subject to modification such as custody or child support may be effectively treated as non-final and subsequently disregarded. [*Rollins v. Rollins*, 602 A.2d 1121, 1123 (D.C. 1992) (Maryland order terminating father's child support obligations under separation agreement was not final order); see § 1.22 (discussion of finality); *J.J.*, 68 A.3d at 728 n.7 (holding that because child support and custody orders are "often subject to modification", they are held to be "non-final for the purpose of applying the Full Faith and Credit Clause").]

§ 1.15[2] Comity. Comity is "the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and/[or] judicial decisions of another, not as a matter of obligation, but out of deference and respect" and is commonly used when Full Faith and Credit does not apply, such as foreign laws, non-final decisions, or maintaining unofficial policies, [*Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002) (alteration in original) (holding that the Florida bar had absolute immunity "for conduct related to their performance of disciplinary functions, conducted in the District of Columbia, where equivalent District bar disciplinary agents would be entitled to such immunity in our courts"); see *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered. Bank*, 98 A.3d 998, 1001 (D.C. 2014).] In *Franchise Tax Board v. Hyatt*, the Supreme Court held that not only can a state not be sued in its own state courts without its consent, it also cannot be sued in the courts of another state without that consent. [*Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019).] *Franchise Tax Board* overruled *Nevada v. Hall*, which held that the Constitution did not prohibit one state's courts from asserting jurisdiction over another sovereign state. [*Franchise Tax Bd.*, 139 S. Ct. at 1490 (overruling *Nevada v. Hall*, 440 U. S. 410 (1979)).] "The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is 'implied as an essential component of federalism.'" [*Franchise Tax Bd.*, 139 S. Ct. at 1498.]

§ 1.15[3] Effect of Concurrent Jurisdiction; Antisuit Injunction. When concurrent jurisdiction exists, each forum is ordinarily free to proceed to judgment, at least until the rules of *res judicata* apply. [*Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996) (citing *Laker Airways Ltd. V. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (1984)); *see*, *J.J. v. B.A.*, 68 A.3d 721, 727 (D.C. 2013) ("the courts of one state may not, in the absence of adequate justification, prevent the courts of another state from adjudicating controversies over which the courts of the second state have jurisdiction").]

On the other hand, it is well settled that courts, under proper equitable circumstances, may issue injunctions preventing parties from prosecuting actions in other states. [*Auerbach*, 685 A.2d at 406.] Nevertheless, "the exceptional nature of the remedy has caused courts to inquire closely into whether adequate grounds for the relief existed in particular cases." [*Auerbach*, 685 A.2d at 406.] "An injunction prohibiting a party from bringing suit concurrently in another state with jurisdiction over the matter "bears a very heavy burden of justification." [*J.J.*, 68 A.3d at 727 (quoting *Auerbach*, 685 A.2d at 409).] "Only in extraordinary cases should the remedy be available . . . where it is needed to prevent manifest wrong and injustice." [*J.J.*, 68 A.3d at 727–28 (quoting *Auerbach*, 685 A.2d at 409).]

The Court of Appeals has construed the D.C. Circuit's decision in *Laker Airways* [*Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. 1984).] to hold that the only proper grounds on which a foreign antisuit injunction may be issued are as follows:

(1) to protect the forum's jurisdiction; and

(2) to prevent evasion of the forum's important public policies. [*Auerbach*, 685 A.2d at 407.]

Because the effect of an antisuit injunction is to "restrict the foreign court's ability to exercise its jurisdiction," it may invite reciprocal action in kind. "Only in the most compelling circumstances does a court have discretion to issue an antisuit injunction." The test in each case is whether "the injunction is required to prevent an irreparable miscarriage of justice." [*Laker Airways*, 731 F.2d at 927.] The "possibility of an 'embarrassing race to judgment' or potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings." Specifically, although injunctions may be "necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum," antisuit injunctions "should not be issued for lesser reasons, especially when requested before a judgment in the forum jurisdiction." [*Auerbach*, 685 A.2d at 407; (quoting *Laker Airways*, 731 F.2d at 928–29) (internal quotation marks omitted).]

Therefore, the Court of Appeals held that, in the District of Columbia, concerns such as duplication of parties and issues, the expense and effort of simultaneous litigation in two courts, and the danger of a race to judgment and inconsistent adjudications, ordinarily *will not* be grounds to restrain a party from proceeding with a suit in a court having jurisdiction over the matter. [*Auerbach*, 685 A.2d at 409.] These concerns are better addressed through a motion for dismissal for *forum non conveniens*. [*Auerbach*, 685 A.2d at 409; *see* § 1.18 (discussion of forum non conveniens).]

D.C. Case Brief: In *Auerbach v. Frank*, a defendant law firm in the District of Columbia sought appellate review of a Superior Court decision that enjoined the firm from proceeding with a declaratory-judgment action in Maryland. The underlying action involved claims for breach of contract and termination of a co-counseling agreement between the law firms. [*Auerbach v. Frank*, 685 A.2d 404, 405–06 (D.C. 1996).] Granting the antisuit injunction, the Superior Court had reasoned that although "parallel proceedings . . . should ordinarily be allowed to proceed simultaneously," antisuit injunctions are permissible to avoid "an irreparable miscarriage of justice." [*Auerbach*, 685 A.2d at 406 (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–927 (D.C. Cir. 1984)).] Because the two cases "most obviously . . . arise out of the same origin," the trial court held that "notings of fairness and reasonableness dictate that defendants . . . be enjoined from rosecuring the Maryland action." [*Auerbach*, 685 A.2d at 406.] Because the issue raised in the Maryland action (survival of a co-counseling contract) would necessarily arise in the District proceeding as an affirmative defense. Permitting the defendants to prosecute the Maryland action would work a hardship on the plaintiffs by forcing them to intervene in that action and file a counterclaim consisting of claims already asserted in the District suit. "This unreasonable and needless hardship" alone, the court found, warranted granting the antisuit injunction. Finally, "the Maryland action unnecessarily create[d] multiplication of litigation, thereby wasting judicial and party resources and risking inconsistent adjudications." [*Auerbach*, 685 A.2d at 406.]

The Court of Appeals reversed. It concluded that the trial court abused its discretion, noting that the plaintiffs' motion for injunctive relief made the conclusory assertion that the Maryland complaint constituted " 'forum shopping' by the defendants and [was] designed to harass the Plaintiffs," yet in granting the injunction, the trial-court judge made no factual finding to this effect. [*Auerbach*, 685 A.2d at 409.] In addition, in denying the defendants' later motion for a stay of the injunction, the judge adverted to the "red flag" of forum shopping, implying that the defendants would suffer prejudice by having to litigate the case in the District of Columbia. The Court of Appeals held that this implication could not substitute for a finding by clear and convincing evidence that the defendants brought the Maryland action *with the intent* to harass the plaintiffs, and that the reasons cited by the judge were "precisely those we have concluded are insufficient to support an injunction absent exceptional circumstances." [*Auerbach*, 685 A.2d at 409.] The court explained that an antisuit injunction should truly be a "measure of last resort designed to avert manifest injustice." That, in turn, required the plaintiffs to bring any such considerations of hardship,

duplication of time and expense, and inconsistent judgments, to the attention of the Maryland court (not the D.C. Court) in motions for appropriate relief. [*Auerbach*, 685 A.2d at 409.]

IV. Forum Selection Clauses

§ 1.16 Forum Selection Clauses Generally.

§ 1.16[1] Modern Rule Under *Forrest*. Historically, American courts disfavored forum selection. However, such clauses are now *prima facie* valid in many jurisdictions, including D.C., and will be enforced unless the resisting party shows she did not have reasonable notice of the existence of the clause, or that the clause is "unreasonable" under the circumstances. [*Forrest v. Verizon Commc'ns Inc.*, 805 A.2d 1007, 1010 (D.C. 2002) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)); *see also*, *King Carpentry, Inc. v. 1345 K St. SE, LLC*, 262 A.3d 1105, 1109 (D.C. 2021) (citing *Forrest*).] In *Forrest*, the Court of Appeals adopted this modern rule for the District of Columbia. Actual notice of the forum selection clause is not required. Although, "'as a threshold matter, the validity of a forum selection clause . . . depends on whether the existence of the clause was reasonably communicated to the plaintiff,'" reasonable communication does not require actual awareness. [*Forrest*, 805 A.2d at 1010 (quoting *O'Brien v. Okemo Mt.*, 17 F. Supp. 2d 98, 103 (D. Conn. 1998)).] Generally, "absent fraud or mistake, one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not." [*Forrest*, 805 A.2d at 1010 (quoting *Nickens v. Labor Agency of Metro. Washington*, 600 A.2d 813, 817 n.2 (D.C. 1991)).]

§ 1.16[2] Proving that Forum Selection Clause Is Unreasonable. To demonstrate that a forum selection clause is unreasonable, a party must show any of the following:

(1) the clause was induced by fraud or overreaching;

(2) the contractually selected forum is so unfair and inconvenient, for all practical purposes, as to deprive the plaintiff of a remedy or its day in court; *or*

(3) enforcement would contravene a strong public policy of the forum where the action is filed. [*Forrest*, 805 A.2d at 1012 (citing *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 463 (Md. 1997)).]

⊠ **Attorney's Tip:** The "unreasonableness exception to the enforcement of a forum-selection clause refers to the inconvenience of the chosen forum *as a place for trial*, not to the effect of applying the law of the chosen forum." [*Forrest*, 805 A.2d at 1012 (emphasis added) (quoting *General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 809 F. Supp. 1306, 1314 (S.D. Ohio 1993), aff'd, 29 F.3d 1095 (6th Cir. 1994)).]

The rationale most often used to support enforcing a forum-selection clause

is that it "comports with traditional concepts of freedom of contract and recognizes the present nationwide and worldwide scope of business relations which generate potential multi-jurisdictional litigation." [*Forrest*, 805 A.2d at 1012 n.13 (quoting *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990); *see Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991) (forum-selection clause was enforceable in part because party "retained the option of rejecting the contract with impunity").]

Courts can enforce a forum-selection clause independent of issues of personal jurisdiction [*Yazdani v. Access ATM*, 941 A.2d 429, 431 (D.C. 2008); *see also The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (noting, in an admiralty case, that the "historical judicial resistance to any attempt to reduce the power and business of a particular court . . . has little place" in the modern era and "reflects something of a provincial attitude regarding the fairness of other tribunals.").] Conversely, even if the trial court has personal jurisdiction over the defendant, it can dismiss the action to enforce the forum-selection clause. [*Yazdani*, 941 A.2d at 431; *see*, *Overseas Partners, Inc. v. Progen Musavirlik Ve Yonetim Hizmetleri, Ltd. Sikarti*, 15 F. Supp. 2d 47, 51, 55 (D.D.C. 1998) (personal jurisdiction over defendants was established, but claims were properly dismissed because of forum-selection clause).]

§ 1.17 Typical Challenges and Responses to Forum Selection Clauses.

Parties disputing the fairness of a forum-selection clause may resort to the following challenges and responses:

(1) *Challenge*: A District of Columbia court is supposed to provide protections to local business owners who have been defrauded inside their own establishments by agents of foreign corporations without forcing them to travel to distant forums to attain redress. *Response*: A sweeping argument like that, and its "logical corollaries," would invalidate most such clauses. [*Yazdani v. Access ATM*, 941 A.2d 429, 431 n.2 (D.C. 2008).]

(2) *Challenge*: The forum selection clause is ambiguous, and the ambiguity should be resolved against the party that drafted the contract. *Response*: A " 'contract is ambiguous when, and only when, it is . . . reasonably or fairly susceptible [to] different constructions or interpretations, or of two or more different meanings." [*Yazdani*, 941 A.2d at 432 (quoting *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983)) (omission in original).] For example, a forum selection clause containing the language "venue *for any action* arising out of this Agreement shall be in Houston, Harris County, Texas" is not ambiguous. [*Yazdani*, 941 A.2d at 432 (emphasis in original).]

(3) *Challenge*: When a party disavows a contract, it cannot simultaneously

rely on the contract's forum-selection clause. *Response*: A forum-selection clause is a "condition precedent to suit under the contract," and is "severable from the contract." [*Yazdani*, 941 A.2d at 432 (quoting *Marra v. Papandreou*, 216 F.3d 1119, 1125 (D.C. Cir. 2000)).] Furthermore, a dismissal under a forum-selection clause is a non-merits dismissal, permitting a party to re-file in the proper jurisdiction. [*Yazdani*, 941 A.2d at 433 (citing *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1012 (D.C. 2002)).] In fact, the Court of Appeals has specifically approved of a D.C. Circuit decision that called a forum-selection clause a "condition precedent to suit under the contract, binding equally on both parties." [*Yazdani*, 941 A.2d at 432 (quoting *Marra v. Papandreou*, 216 F.3d 1119, 1125 (D.C. Cir. 2000)).] Repudiation of the contract only relieves the duties under the contract but does not repudiate the forum-selection clause—unless it is specifically directed at the clause itself. [*Yazdani*, 941 A.2d at 432.]

(4) *Challenge*: A party is no longer suing under the written contract but instead is asserting other claims that make the forum selection clause inapplicable. *Response*: The Court of Appeals has followed other courts that have held that non-contract claims that "involve the same operative facts as a parallel breach of contract claim fall within the scope of a forum selection clause." [*Yazdani*, 941 A.2d at 432 (citing *Forrest*, 805 A.2d at 1014); *see also Marra*, 216 F.3d at 1124 & n.4.]

(5) *Challenge:* A party seeks to contest the court's personal jurisdiction over her and contends that the court cannot enforce the forum-selection clause without first determining that she is properly before the court. [*Yazdani*, 941 A.2d at 432.] *Response*: As a general rule, as noted elsewhere in this chapter, when a court is confronted by a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for failure to state a claim or a motion for summary judgment, the court routinely resolves personal jurisdiction before addressing a dispositive motion on the merits. [*Yazdani*, 941 A.2d at 432 (quoting *Hawkins v. W.R. Berkley Corp.*, 889 A.2d 290, 293 (D.C. 2005)).]

However, this rule is not absolute: "A determination on "'[j]urisdiction is vital only if the court proposes to issue a judgment on the merits.'" [*Yazdani*, 941 A.2d at 433 (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007)).]

When the court's decision will not serve as a judgment on the merits, such as in a dismissal on *forum non conveniens* grounds, it may bypass questions of subject-matter and personal jurisdiction if "considerations of convenience, fairness, and judicial economy so warrant." [*Sinochem*, 549 U.S. at 432.] The

Court of Appeals has adopted this analysis, concluding that, even if the forum selection clause is enforced, "an appellant can still have his day in court." [*Yazdani*, 941 A.2d at 433 (quoting *Forrest*, 805 A.2d at 1012.]

D.C. Case Brief: In *Forrest v. Verizon Communications Inc.*, an attorney appealed a Superior Court judgment dismissing his purported class action, based on a forum-selection clause, that he filed against an Internet service provider for breach of contract, negligent misrepresentation, and violation of consumer protection laws. [*Forrest v. Verizon Commc'ns Inc.*, 805 A.2d 1007, 1009 (D.C. 2002).] His service agreement with the Internet service provider contained a forum selection clause limiting suit to Virginia, where class actions were not recognized. The Court of Appeals upheld the Superior Court decision that the Virginia clause was reasonable and enforceable. The Court of Appeals explained that had the attorney read the agreement, he would have discovered the forum-selection clause. And although Virginia did not permit class action suits, the attorney had other options to seek relief, including cancelling the agreement. The court added that the class-action argument was "in reality a complaint against the effect of applying Virginia law and we see no basis to unilaterally condemn in this regard the legal system of our neighboring state." It concluded that the trial court did not err when it held that the forum selection clause was not unreasonable. [*Forrest*, 805 A.2d at 1012–13.]

§ 1.18 *Forum Non Conveniens*.

"The 'purpose of the doctrine of *forum non conveniens* . . . is to avoid litigation in a *seriously inconvenient forum* rather than to ensure litigation in the most convenient forum.'" [*Hechinger Co. v. Johnson*, 761 A.2d 15, 20 (D.C. 2000) (quoting *Cresta v. Neurology Ctr., P.A.*, 557 A.2d 156, 161 (D.C. 1989). (emphasis and omission original)).] The District of Columbia, like many other jurisdictions, has its own *forum non conveniens* statute. [D.C. Code § 13-425 (2001).] Under this statute, when a court finds that "in the interest of substantial justice" another forum should hear an action, the court may stay or dismiss the action in whole or in part on any just conditions. [*Crown Oil and Wax Co. of Delaware v. Safeco Ins. Co. of America*, 429 A.2d 1376, 1380 (D.C. 1981); *Medlantic Long Term Care Corp. v. Smith*, 791 A.2d 25, 28 (D.C. 2002).] A decision about whether to dismiss for *forum non conveniens* is "committed to the sound discretion of the trial court." [*Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 156 (D.C. 1978).]

Although it reviews *forum non conveniens* determinations only for abuse of discretion, the Court of Appeals "appl[ies] 'close scrutiny' to the specific factors identified and evaluated by the trial court" in granting a motion to dismiss for *forum non conveniens*. [*Medlantic*, 791 A.2 at 29 (quoting *Smith v. Alder Branch*

Realty Ltd., 684 A.2d 1284, 1287 (D.C. 1996).] Only after the court is satisfied that the trial court took the proper factors into account does it adopt the deferential approach in determining whether the trial court's decision falls within the "broad discretion" committed to it. [*Smith*, 684 A.2d at 1287.]

The denial of a motion to dismiss on the ground of *forum non conveniens* is not an immediately appealable order as of right. [*Rolinski v. Lewis*, 828 A.2d 739, 742 (D.C. 2003) (en banc) (overruling cases to the contrary).] When reviewing a dismissal on the basis of *forum non conveniens*, the Court of Appeals accepts as true the factual allegations of the complaint. [*Garcia v. AA Roofing Co.*, 125 A.3d 1111, 1113 (D.C. 2015); *Nixon Peabody LLP v. Beaupre*, 791 A.2d 34, 36 (D.C. 2002).]

§ 1.19 Factors to Determine Convenience of Litigants and Forum.

§ 1.19[1] Both Private Interest and Public Interest Factors Are Considered.

The trial court should be guided by weighing enumerated "private interest factors" which affect the convenience of the litigants, and "public interest factors," which affect the convenience of the forum as articulated by the Supreme Court. [*Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 10 (D.C. 1986); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), *superseded by statute on other grounds as stated in American Dredging Co. v. Miller*, 510 U.S. 443, 448 n.2 (1994).]

§ 1.19[2] Private-Interest Factors. The private-interest factors that the Court of Appeals has set forth are as follows:

(1) the plaintiff's choice of forum;

(2) the convenience of parties and witnesses;

(3) the ease of access to sources of proof;

(4) the availability and cost of compulsory process; and

(5) the enforceability of any judgment obtained. [*Nixon Peabody LLP v. Beaupre*, 791 A.2d 34, 37 (D.C. 2002) (citing *Future View, Inc. v. Criticom, Inc.*, 755 A.2d 431, 433 (D.C. 2000)).]

Unless the balance of these private factors strongly favors the defendant, the court should rarely disturb a plaintiff's choice of forum. [*Gulf Oil*, 330 U.S. at 508 ("plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy").]

§ 1.19[3] Public-Interest Factors. The public-interest factors that the Court of Appeals has set forth are as follows:

(1) the clearance of foreign controversies from congested dockets;

(2) the adjudication of disputes in the forum most closely tied to the dispute; and

(3) the "avoidance of saddling courts with the burden of construing a foreign jurisdiction's law." [*Nixon Peabody LLP v. Beaupre*, 791 A.2d 34, 37 (D.C. 2002) (citing *Future View, Inc. v. Criticom, Inc.*, 755 A.2d 431, 433 (D.C. 2000)).]

The trial court must "evaluate the contacts with the [relevant] jurisdictions in the light most favorable to the nonmoving party." [*Garcia v. AA Roofing Co.*, 125 A.3d 1111, 1114 (D.C. 2015) (quoting *Medlantic Long Term Care Corp. v. Smith*, 791 A.2d 25, 32 (D.C. 2002)).] Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. [*Medlantic*, 791 A.2d at 29; *see Coulibaly v. Malaquias*, 728 A.2d 595, 601 (D.C. 1999) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).]

Thus, in most cases, a defendant who invokes the doctrine of *forum non conveniens* bears the burden of demonstrating the reasons why dismissal is warranted. [*Coulibaly*, 728 A.2d at 601.] However, where neither party resides in the District, *and* the plaintiff's claim has arisen in another jurisdiction that has more substantial contacts with the cause of action, the burden shifts to the plaintiff. [*Neale v. Arshad*, 683 A.2d 160, 163 (D.C. 1996); *see Dunkwu v. Neville*, 575 A.2d 293, 295 (D.C. 1990) (quoting; *Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 10–11 (D.C. 1986)); *Mills*, 511 A.2d at 10–11.] To avoid dismissal in such a case, the plaintiff must then show some reasonable justification for instituting the action in the District rather than in a state with which "the defendant or the res, act or event in suit is more significantly connected." [*Mills*, 511 A.2d at 11 (quoting *Pain v. United Tech. Corp.*, 637 F.2d 775, 784 (1980), *overruled on other grounds by Piper Aircraft v. Reyno*, 454 U.S. 235 (1981)).] It is important to note that the Court of Appeals has found burden-shifting appropriate "only where there is virtually no link to this jurisdiction." [*Coulibaly*, 728 A.2d at 604.]

In *Medlantic*, the Court of Appeals rejected any *per se* rule that would prohibit the application of the doctrine of *forum non conveniens* whenever one of the parties is a District of Columbia resident. [*Medlantic*, 791 A.2d at 29; *see Carr v. Bio-Medical Applications of Wash., Inc.*, 366 A.2d 1089, 1093 (D.C. 1976) ("[S]uch an immutable rule is unwarranted and would severely undermine the trial court's broad discretion in such matters").] However, the court emphasized that a plaintiff's residency in the District is "an extremely significant factor favoring the exercise of jurisdiction by the courts of the District." [*Medlantic*, 791 A.2d at 29 (quoting *Jimmerson v. Kaiser Found. Health Plan*, 663 A.2d 540, 544 (D.C. 1995)).]

§ 1.20 Standard of Appellate Review.

The Court of Appeals has jurisdiction to hear appeals from "final orders and judgments" of the Superior Court of the District of Columbia. [*Rolinski v. Lewis*, 828 A.2d 739, 745 (D.C. 2003); *Crown Oil & Wax Co. of Delaware v. Safeco Ins. Co. of America*, 429 A.2d 1376, 1379 (D.C. 1981); *see* D.C. Code § 11-721(a)(1) (2001).] For further discussion of finality, see § 1.22.

The jurisdiction of the court is defined by statute. [D.C. Code § 11-721(a)(1) (2001) (orders and judgments of Superior Court).] The Court of Appeals is authorized in civil cases to permit an interlocutory appeal when the trial judge states in writing that the ruling in question "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation or case." [D.C. Code § 11-721(d) (2001).]

A party must ordinarily raise all claims of error in a single appeal following final judgment on the merits; this rule serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the authority initially asked to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the trial judge, as well as the special role that the trial judge plays in the judicial system. [*Rolinski v. Lewis*, 828 A.2d 739, 745 n.8 (D.C. 2003) (en banc).]

In addition, the rule aligns with the sensible policy of "[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." [*Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *see*, *DiBella v. United States*, 369 U.S. 121, 124 (1962) (noting that the policy requiring finality discourages "undue litigiousness and leaden-footed administration of justice").] The rule also serves the important purpose of promoting efficient judicial administration. [*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).]

Normally, an order or judgment is considered final "only if it 'disposes of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered.'" [*In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (quoting *McBryde v. Metro. Life Ins. Co.*, 221 A.2d 718, 720 (D.C. 1966)).] An order that denies a motion to dismiss ordinarily does not meet the standard of finality and "usually is not immediately appealable," because it does not terminate the action but instead allows it to proceed. [*Heard v. Johnson*, 810 A.2d 871, 876 (D.C. 2002).]

Attorney's Tip: The denial of a motion to dismiss a complaint for lack of personal jurisdiction over the defendant is not immediately appealable as

of right. [*Rolinski v. Lewis*, 828 A.2d 739, 746 (D.C. 2003) (en banc).]

§ 1.21 Reviewing Motion to Dismiss *Forum Non Conveniens*.

The Court of Appeals follows a two-step process when reviewing a ruling on a motion to dismiss for *forum non conveniens*.

First, the court independently evaluates the pertinent factors, although not *de novo*, by applying scrutiny to the specific factors that the trial court identified and evaluated. [*Nixon Peabody LLP v. Beaupre*, 791 A.2d 34, 37 (D.C. 2002); *see Garcia v. AA Roofing Co.*, 125 A.3d 1111, 1113 (D.C. 2015) ("When reviewing a dismissal on the basis of *forum non conveniens*, we accept as true the factual allegations of the complaint.").] D.C. has adopted the factors in the *forum non conveniens* analysis of the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*. [*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (*superseded by statute on other grounds*, 28 U.S.C. § 1404(a)).] For further discussion of the factors, see § 1.19.

The trial court uses its sound discretion over whether to dismiss an action for *forum non conveniens*. [*Medlantic Long Term Care Corp. v. Smith*, 791 A.2d 25, 28 (D.C. 2002).] When the balancing of all relevant public and private interest factors has been considered, and that balancing is reasonable, the trial court's decision deserves substantial deference. [*Nixon Peabody*, 791 A.2d at 37–38 (citing *Eric T. v. National Med. Enters.*, 700 A.2d 749, 754 (D.C. 1997)).] Notwithstanding that the court gives the trial court deference in deciding a motion to dismiss on the grounds of *forum non conveniens*, such deference is not unlimited. [*Dunkwu v. Neville*, 575 A.2d 293, 294 (D.C. 1990); *see also*, *Garcia*, 125 A.3d at 1115–18 (Court of Appeals reversed trial court's order of dismissal based on forum non conveniens because of trial court's "incomplete or partially erroneous analysis").]

Second, once the Court of Appeals determines that the trial court took "the proper factors into consideration," the Court will examine whether the trial court "abused its broad discretion." [*Nixon Peabody*, 791 A.2d at 37 (reversal appropriate only when trial court abused its discretion).] Although a clear showing of abuse of discretion is required to reverse trial court rulings regarding *forum non conveniens,* such rulings nevertheless receive closer scrutiny than most other exercises of discretion. [*Dunkwu v. Neville*, 575 A.2d at 294 (citing *Jenkins v. Smith*, 535 A.2d 1367, 1370 (D.C. 1987) (en banc)); *Blake v. Professional Travel Corp.*, 768 A.2d 568, 572 (D.C. 2001); *see Garcia v. AA Roofing Co.*, 125 A.3d 1111, 1115 (D.C. 2015).] Appellate review of a ruling on a *forum non conveniens* motion "does not allow the trial court the margin of error that the term 'discretion' ordinarily signifies." [*Jacobson v. Pannu*, 822 A.2d 1080, 1083 (D.C. 2003).]

D.C. Case Brief: In *Garcia v. AA Roofing Co.*, a D.C. homeowner filed a

suit in the Superior Court against a Virginia contractor for "shoddy work" in replacing a roof [*Garcia v. AA Roofing Co.*, 125 A.3d 1111, 1112 (D.C. 2015).] When the trial court dismissed the suit on the basis of *forum non conveniens*, the homeowner appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals held that the trial court failed to consider facts as pleaded in the complaint and its attachments in the light most favorable to plaintiff. The trial court emphasized that the defendant's allegedly false representations were made in Virginia, the roof-repair contract was executed in Virginia, and the allegedly unworkmanlike repairs were made in Virginia. But the court failed to mention: (1) the appellant's allegations that the appellee sent correspondence and made phone calls from his office in the District of Columbia to urge appellant to hire the roofing company and to secure an estimate from the appellee for roof work on appellant's residence; (2) that the roofing company held itself out as a "local roofing company in Washington, D.C." when it was not; and (3) the plaintiff's allegation that the defendant roofer "regularly and systematically" performed roofing services in the District of Columbia. [*Garcia*, 125 A.3d at 1115.]

The Court of Appeals also rejected the trial court's emphasis on whether D.C. was the more convenient forum, holding that "[t]he purpose of the doctrine of *forum non conveniens* . . . is to avoid litigation in a seriously inconvenient forum, rather than to ensure litigation in the most convenient forum." [*Garcia*, 125 A.3d at 1114 (quoting *Hechinger Co. v. Johnson*, 761 A.2d 15, 20 (D.C. 2000)) (emphasis original).]

Warning: Denials of *forum non conveniens* motions to dismiss are not immediately appealable. [*Rolinski v. Lewis*, 828 A.2d 739, 742 (D.C. 2003) (en banc); *see* § 1.23 (collateral order doctrine).]

§ 1.22 Finality as a Requirement for Appeal.

The lack of finality is a bar to appellate jurisdiction. [*Dyer v. William S. Bergman & Assocs.*, 635 A.2d 1285, 1288 (D.C. 1993).] The requirement of finality serves the important policy goals of preventing "the unnecessary delays resultant from piecemeal appeals" and "refrain[ing] from deciding issues which may eventually be mooted by the final judgment." [*Crown Oil & Wax Co. of Del. v. Safeco Ins. Co. of America*, 429 A.2d 1376, 1379 (D.C. 1981).]

Usually, an order or judgment is deemed to be final only if it "disposes of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered." [*In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (quoting *McBryde v. Metro. Life Ins. Co.*, 221 A.2d 718, 720 (D.C. 1966)).] For example, the denial of a motion to dismiss a complaint for lack of personal jurisdiction over the defendant is not immediately

appealable as of right. [*Rolinski v. Lewis*, 828 A.2d 739, 746 (D.C. 2003); *see Crown Oil*, 429 A.2d at 1379 (noting the policy when determining finality, takes into consideration "the smooth functioning of the judicial system" quoting *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 69, 92 L. Ed. 1212, 68 S. Ct. 972 (1948)).] An order that denies a motion to dismiss in a *forum non conveniens* challenge also ordinarily does not meet this standard of finality and usually is not immediately appealable. [*Rolinski*, 828 A.2d at 742 (D.C. 2002).]

An order only partially dismissing a plaintiff's claims generally cannot be immediately appealed. For a judgment to be appealable it "must be final as to all the parties, the whole subject matter, and all of the causes of action involved." [*West v. Morris*, 711 A.2d 1269, 1271 (D.C. 1998) (quoting *Davis v. Davis*, 663 A.2d 499, 503 (D.C. 1995); D.C. Code § 11-721(a)(1) ("The District of Columbia Court of Appeals has jurisdiction of appeals from . . . all final orders and judgments of the Superior Court"); *see* D.C. App. R. 28(a)(5) (requiring that a party's principal appellate brief include "an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing th[e] court's jurisdiction on some other basis"); *accord Blue v. D.C. Pub. Sch.*, 764 F.3d 11, 15 (D.C. Cir. 2014) (U.S. Court of Appeals cannot review partial dismissal, absent specific exceptions, where other claims still remain); *Robinson-Reeder v. Am. Council on Educ.*, 571 F.3d. 1333, 1336–37 (D.C. Cir.) (dismissal of only some claims was not a final, appealable order).] As the Court of Appeals has clarified, "[t]o be reviewable, a judgment or decree must not only be final but also complete, that is, final not only as to all parties, but as to the whole subject matter and all the causes of action involved." [*District of Columbia v. Davis*, 386 A.2d 1195, 1198 (D.C. 1978).]

An order is final only if it "disposes of the whole case on its merits so that the [trial] court has nothing remaining to do but to execute the judgment or decree already rendered." [*West*, 711 A.2d at 1271 (quoting *Camalier & Buckley, Inc. v. Sandoz & Lamberton, Inc.*, 667 A.2d 822, 825 (D.C. 1995)); *McDiarmid v. McDiarmid*, 594 A.2d 79, 81 (D.C. 1991) (noting that "any remaining trial court task must be purely ministerial").] "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." [*Trilon Plaza Co. v. Allstate Leasing Corp.*, 399 A.2d 34, 37 (D.C. 1979) (citations omitted) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).]

For instance, in *Dyhouse v. Baylor*, the D.C. Court of Appeals held that it did not have jurisdiction over the plaintiff's appeal because the case had only been dismissed against one defendant and "an order disposing of claims against fewer than all of the parties is not appealable." [*Dyhouse v. Baylor*, 455 A.2d 900, 900–01 (D.C. 1983)] And in *McDiarmid v. McDiarmid*, the Court of Appeals held, in a matrimonial dispute, that an order granting a wife's complaint for divorce, entitling her to alimony, child support, and joint custody (with her

erstwhile husband) of her minor son, determining and setting values for marital assets, and holding that each party would receive 50 percent of those assets, was *not* a final order, because "the trial court failed to make any actual distribution of these martial assets or to determine which assets were to be received by which party, as the statute [D.C. Code § 16-910(b) (1989)] contemplates." [*McDiarmid*, 594 A.2d at 80.] Likewise, an order permitting a third party to intervene, under Rule 24, is not a final judgment that may be appealed. [*McBryde v. Metropolitan Life Ins. Co.*, 221 A.2d 718, 720 (D.C. 1966).]

There are, however, exceptions. For example, under Super. Ct. Civ. R.54(b) a trial court can enter a final judgment even if there are still pending claims "upon a finding that there is no just reason to delay the appeal and upon an express direction for entry of judgment." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128 n.2 (D.C. 2015). Furthermore, under the collateral-order doctrine [See § 1.22 (discussion of doctrine).], some rulings "that do not conclude the litigation nonetheless are sufficiently conclusive in other respects that they satisfy the finality requirement." [*Rolinski v. Lewis*, 828 A.2d 739, 746 (D.C. 2003) (en banc).]

Of course, the courts may permit interlocutory appeals. Where a Superior Court judge believes "that the ruling or order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the ruling or order may materially advance the ultimate termination of the litigation or case," that judge "shall so state in writing in the ruling or order." D.C. Code § 11-721(d) (2001). In such circumstances, the Court of Appeals "*may* thereupon, *in its discretion*, permit an appeal to be taken from that ruling or order, but only if the appeal is filed within ten days of the order. [D.C. Code § 11-721(d) (2001) (emphasis added).] The appeal will be heard in parallel with the Superior Court proceedings, unless the trial court or the Court of Appeals orders a stay. Interlocutory appeals are also available in cases of injunctions, the appointment of receivers, guardians, or the like, and affecting the possession of property. [D.C. Code § 11-721(a)(2) (2001).]

§ 1.23 Collateral Order Doctrine.

Under the collateral order doctrine, a "small class" of orders that do not conclude the litigation are nevertheless "sufficiently conclusive in other respects" so as to satisfy the finality requirement. These orders are immediately appealable even though they do not terminate the action. [*Rolinski v. Lewis*, 828 A.2d 739, 746 (D.C. 2003) (en banc) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).]

The Supreme Court has held that orders denying motions to dismiss on the ground of *forum non conveniens* are not immediately appealable under the collateral order doctrine. [*Van Cauwenberghe v. Biard*, 486 U.S. 517, 527–29

(1988).] The District of Columbia follows this Supreme Court decision. [*Rolinski*, 828 A.2d at 742 (overruling its prior decisions in *Frost v. Peoples Drug Store*, 327 A.2d 810, 812–813 (D.C. 1974) and *Jenkins v. Smith*, 499 A.2d 128 (D.C. 1985) (en banc) (per curiam)).]

The trial court's order falls within the "small class" of decisions excepted from the final-judgment rule only where it meets all of the following criteria:

(1) it conclusively determines the disputed question;

(2) it resolves an important issue that is completely separate from the merits of the action; and

(3) it would otherwise effectively be unreviewable on appeal from a final judgment. [*Van Cauwenberghe*, 486 U.S. at 522 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).]

The Supreme Court, in *Van Cauwenberghe*, applied that three-part test to orders denying motions to dismiss on the ground of *forum non conveniens* and held that such orders were not immediately appealable under the collateral order doctrine. The Court said the question of the convenience of the forum was not " 'completely separate from the merits of the action,' and thus is not immediately appealable as of right." [*Van Cauwenberghe v. Biard*, 486 U.S. 517, 527–29 (1988) (quoting *Coopers & Lybrand*, 437 U.S. at 468).]

§ 1.24 *Forum Non Conveniens* Action Requires Available Alternative Forum.

A requirement for application of the doctrine of *forum non conveniens* is the availability of an alternative forum in which plaintiff's action may more appropriately be entertained. [*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947) ("[The doctrine] presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them"); *Mobley v. S. Ry. Co.*, 418 A.2d 1044, 1047–48 (D.C. 1980) ("[I]f a plaintiff's choice is challenged, the trial court should be guided by the criteria set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert*.) (citing *Gulf Oil Corp.*, 330 U.S. 501 at 508).] Another tribunal cannot be considered available to a plaintiff if the plaintiff's cause of action would be barred there by the statute of limitations. The burden lies with the defendant to show that no statute of limitations is applicable in the other tribunal that would renders that court ineligible to serve as an alternative forum. [*Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 13 (D.C. 1986).]

If a plaintiff's case is time-barred in the proposed alternative forum, then dismissal for *forum non conveniens* would completely foreclose judicial resolution of the plaintiff's claim. [*Mills*, 511 A.2d at 13.] Such a result would contravene the strong policy favoring the trial of a case on the merits. [*Mills*, 511

A.2d at 13 (citing *Alexander v. Polinger Co.*, 496 A.2d 267, 269 (D.C. 1985); *Starling v. Jephunneh Lawrence & Assocs.*, 495 A.2d 1157, 1159 (D.C. 1985); *Durham v. District of Columbia*, 494 A.2d 1346, 1351 (D.C. 1985); *Moradi v. Protas, Kay, Spivok & Protas, Chartered*, 494 A.2d 1329, 1332–33 (D.C. 1985)).]

In the interest of justice, therefore, a court must retain such a case, no matter how inappropriate the forum may be, unless it accepts the defendant's stipulation that she will not raise the defense of statute of limitations in the proposed alternative forum. [*Mills*, 511 A.2d at 13 (citing Restatement (Second) of Conflict of Laws § 84 cmt. C (1988)).] The court must retain the case even when "the statute of limitations prevailing in the proposed alternative forum has already run at the time plaintiff initially files his action in the forum of his choice"; whether the alternative forum was available when the plaintiff commenced his action is irrelevant. [*Mills*, 511 A.2d at 13 & n.6.] Rather, the question is whether the alternative forum will be available at the time of dismissal. [*Mills*, 511 A.2d at 13 (citing *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245–49 (5th Cir. 1983); *Schertenleib v. Traum*, 589 F.2d 1156, 1161, 1164 (2d Cir. 1978)).]

A defendant's stipulation to waive any statute-of-limitations defense in the alternative forum renders that forum available for the purposes of *forum non conveniens* analysis. [*Mills*, 511 A.2d at 13–14 (citing *Veba-Chemie*, 711 F.2d at 1245–49 (availability of alternative forum was premised on defendant's submission to jurisdiction there)).]

A defendant may waive the statute of limitations in the alternative forum after it already has run, because it is a personal privilege. [*Mills*, 511 A.2d at 14 n.7; *see Hunter-Boykin v. George Wash. Univ.*, 132 F.3d 77, 79–80 (D.C. Cir. 1998) (waiving statute of limitations using tolling agreement).] And the court may condition dismissal upon the defendant's waiver of the limitations period. [*Kaiser Found. Health Plan, Inc. v. Rose*, 583 A.2d 156, 160 (D.C. 1990); *Moattar v. Foxhall Surgical Assocs.*, 694 A.2d 435, 447 (D.C. 1997) (citing *Kaiser Found. Health Plan, Inc.*); *Mills*, 511 A.2d at 14 (approving of a conditional dismissal); see D.C. Code § 13-425 ("When any District of Columbia court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss such civil action in whole or in part on any conditions that may be just.").]

§ 1.25 Forum Shopping.

§ 1.25[1] Forum Shopping Cannot Nullify *Forum Non Conveniens* Doctrine. The D.C. Court of Appeals has noted that "such solicitude for plaintiff's selection of forum where an appropriate alternative is unavailable may have the unfortunate effect of tempting a calculating plaintiff to wait

deliberately for the statute of limitations to run in the appropriate and convenient forum before bringing an action in a forum inconvenient for an adversary or most likely to yield the optimum judgment for the plaintiff." [*Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 14 (D.C. 1986) (citations omitted).]

Because "[s]uch maneuvering would practically nullify the doctrine of forum non conveniens" due to "the ease with which the doctrine could be circumvented," the D.C. Court of Appeals has adopted the view of the Fifth Circuit, which permits a "conditional dismissal":

> Perhaps if the plaintiff's plight is of his own making—for instance, if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum—the court would be permitted to disregard [the presumption favoring plaintiff's choice of forum] and dismiss . . . Forum non conveniens is sensitive to [a] plaintiff's motive for choosing his forum, at least in the extreme case where his selection is designed to " 'vex,' 'harass' or 'oppress' the defendant."

[*Mills*, 511 A.2d at 14 (quoting *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))).]

To counter attempts by plaintiffs to forum shop by rendering an alternative forum unavailable, the court can dismiss the case, conditioned upon certain criteria being met in the alternate jurisdiction—for instance, waiver of the statute-of-limitations defense, acceptance of the waiver by the alternate jurisdiction, and acceptance of jurisdiction by the new court. [*See*, *e.g.*, *Mills*, 511 A.2d at 15 (conditional dismissal based on *forum non conveniens*, requiring formal waiving of statute of limitation defenses).]

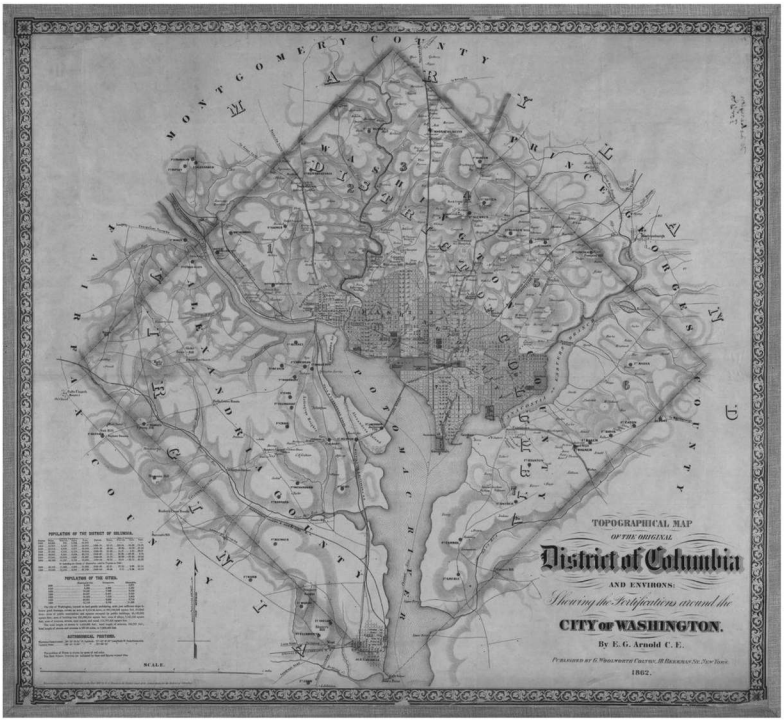
[*See* [2], below (discussion of conditional dismissal).]

§ 1.25[2] Conditional Dismissal. A trial court may use a "conditional dismissal" to check forum shopping by plaintiffs who, through their own action or inaction, render an alternative forum unavailable. [*Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 14–15 (D.C. 1986); *see* D.C. Code § 13-425 (2001) ("When any District of Columbia court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss such civil action in whole or in part on any conditions that may be just.").] The conditional nature of the dismissal "obviates the need for extensive inquiry into the alternative forum's law regarding limitation of actions since, if the courts in the alternative forum refuse to accept the defendant's waiver of all statute of limitations defenses, the plaintiff is still ensured a forum by the conditional nature of the dismissal" and "will channel the litigation to the more appropriate forum while helping to ensure that the alternative forum is, indeed, available to the plaintiff." [*Mills*, 511 A.2d at 14.]

D.C. Case Brief: In *Mills v. Aetna Fire Underwriters Insurance Co.*, the plaintiff store owner, Mills, sought additional compensation from her property loss insurer after a fire. [*Mills v. Aetna Fire Underwriters Ins. Co.*, 511 A.2d 8, 9 (D.C. 1986).] Mills sought to sue in Virginia, where the prescribed time limit expired, and then commenced her action in the District of Columbia. Defendant Aetna filed for dismissal under *forum non conveniens*, contending that to defend the action in the District would be time-consuming and burdensome. Concluding that conditional dismissal was "particularly advisable in the case," the Court of Appeals noted that Aetna had not contended, and the record did not suggest, that Mills deliberately allowed a statutorily prescribed time limit to expire in Virginia before commencing her action in the District of Columbia in order to harass Aetna or to take advantage of favorable law in the District. The Court therefore held that an unconditional dismissal would in effect "set Mills adrift in a sea of doubt as to whether her claim would ever be heard on the merits." The Court did not analyze any aspects of the effect of Virginia's statute of limitations on the case, but instead employed the conditional dismissal to assure Mills a forum to hear her case. The court emphasized that if the conditions of the dismissal were satisfied—that Aetna stipulated to waive any statute of limitations defense in Virginia and that the Virginia courts accept the waiver and exercised jurisdiction over the case—the action would proceed in Virginia, which Aetna argued was the proper forum. Furthermore, "the citizens of the District of Columbia [would] be protected from the burdens that unjustifiably would be imposed on them were the controversy to proceed to trial" there. [*Mills*, 511 A.2d at 15.]

Appendix 1

District of Columbia Contract Litigation
1862 Map of Washington, D.C.



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