This is the Case.tm outline for New York Practice.

It was my private notes for the class I took in 2000. Some stuff on it may be wrong. By using it, you agree to not hold me responsible for any losses that you have.

1) Subject matter jurisdiction of New York courts: not waiveable
   a) Federal Claims can be brought in state courts, provided there is no explicit reason why they shouldn't be
   b) Specialized courts[1]: there was controversy as to whether or not an amendment to make new cases divertible to specialized courts was retroactive, depriving ongoing cases of jurisdiction
      i) Certain divorce cases may fail for lack of Subject Matter Jurisdiction if they don't comply with a residency requirement
         (1) Surrogates court; when the lawsuit directly effects an estate, it is an abuse of discretion not to transfer to the surrogates court
   c) Amount in controversy
      i) Some courts have limited amounts in controversy requirements. If the amount is above the maximum amount in controversy, they will allow the Plaintiff to amend (they have just enough jurisdiction to allow the amendment)
2) Jurisdiction of New York Courts
   a) Constitutional Limitations on Defendant: has to be a sufficient connection between Defendant and New York to establish a jurisdictional basis
      i) Requires *International Shoe*-type minimum contacts
      ii) Must be reasonable foreseeability:[2]
         (1) Must reach out affirmatively
            (a) Negligence, as a tort is not affirmatively reaching out into a jurisdiction
            (b) Intentional torts is affirmatively reaching out to a jurisdiction[3]
         (2) Note: there might be a time when contacts are sufficiently regular and continuous to give a state (based on its long-arm statute) jurisdiction over non-related contracts
         (3) Examples
            (a) libel: defendants reach out into one state where the publication in sold, so Plaintiff's have a choice of **one** state to sue in[4] -- long-arm statute excludes libel
   b) New York law limits jurisdiction
      i) Note, if there is an order of attachment that isn't served within 60 days the order of attachment is void. see 5)a)i) below on page 22
         (1) If the levy based on the order of attachment fails there is personal jurisdiction, a levy can fail if one of the requirements for a levy (such as the defendant is no longer a domiciliary) ceases to be true
      ii) Waivers
         (1) Cross-claims are not a waiver of jurisdictional arguments[5]
         (2) assertion of counterclaims that arise from the complained of transactions are not waiver of jurisdictional arguments
         (3) if jurisdiction is based on long-arm jurisdiction, an appearance doesn't waive jurisdiction with respect to claims not based on long-arm jurisdiction[6]

1 NY Constitution Art. 6 § 7B
If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.

2 Volkswagen
3 National Inquirer

6 CPLR 302

iii) New York General Jurisdiction[7]

(1) **Saturday and Sunday service**

(i) Service on Sunday is void

(ii) Service on Saturday to a Sabatarian is void, and a crime[8]

(2) Humans:

(a) Jurisdiction over humans who are not physically in New York at the moment

(i) NY domiciled humans are under New York jurisdiction, measured at time process is served for general jurisdiction purposes (still can get them under long-arm jurisdiction)

1. Regularly doing business might be enough, but coming to the state twice a month is not

(ii) People who consistently come to New York State – still in flux

1. Coming to the state twice is not enough[9] (court found other basis for jurisdiction)

(iii) Tagging jurisdiction (when someone just happened to be in the state when process is served)

1. Rule: usually good (one purposefully avails themselves of jurisdiction)

2. Exceptions to tagging jurisdiction

a. Can't falsely entice into jurisdiction[10] -- but if they were already coming to New York it is good service

b. People subpoenaed into the state are not voluntarily in the state, and for policy reason people are encouraged to come to New York to testify

c. Classes of people who might not voluntarily be in the state

i. service on arrestees is good service (even though they might not be voluntarily in a place)

ii. can serve a witness in court

3. Exceptions to exception: if there is already another basis for someone being in the state, (e.g. a New York domiciliary or good long-arm jurisdiction, it doesn't really mater the circumstances which brought them into the state)

(3) Partnerships: partners carry the partnership like a hump

(a) NY partnerships there is now a statute which permits one to file with the Secretary of state

(b) Can otherwise serve a partner by serving the name partner in the same way that you would serve an individual

(c) Suits against individual partners

(i) As a matter of law, you could always just sue the partnership and then sue all of the partners

(ii) collaterally estopped because you have already beaten the partnership you can't sue them dually

(iii) may be worth suing individual partners in order to get at their personal assets

Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section

7 CPLR 301

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

8 General Business Law § 13

Whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.

(4) Corporations

(a) NY corporations are New Yorkers (can serve via secretary of state)

(b) the regular consistent doing of business makes a corporation present in NY

(i) court uses a *simple pragmatic test*[11]: if you have office, employees, etc. here one is physically present in NY

1. possible elements

a. bank accounts are alone not enough (unless all of a company's business is done through one account)

b. Telephone number not enough

c. Mere listing in a telephone directory not enough[12]

(ii) regular consistent doing of business

1. **mere solicitation rule isn't enough:** solicitation of business by an agent is not enough to be the regular consistent doing of business [13]

a. procuring orders by the company itself is the regular consistent doing of business[14]

b. selling tickets to a tour (even with a confirmation) is not enough (maybe), since tort duties arise at the start of the tour[15]

c. acting as a travel agent under today's standards is not enough[16]

d. note: a subsidiary of a corporation may cross the line to solicitation plus because it may be acting like a department of a corporation

e. when activities are carried out not by employees of the a corporation, but by its agents whose business it is to solicit, a "business solicitation business" will be subject to jurisdiction[17]

2. conduct of agent can mean that one is doing business in New York – tort duties only arise when the contract begins

(c) Tagging: Does not work because officers of a corporation don't carry cooperation on back like hump

(5) Subsidiaries of corporations as basis for jurisdiction over the corporation: depends on what the corporation is doing and the relationship between the parent and the sub)

(a) If the parent treats the sub as a **mere department** it is enough for jurisdiction

(b) If the parent is a stockholder in the sub is not enough

(c) Mere control without a parent-subsidiary relationship is not enough[18] (e.g. subsidiary in NJ, but doing business in NY)

(6) Jurisdiction by consent (note: choice of law and choice of forum are different

(a) Explicitly

(i) Designation of agency[19] good for three years

(ii) By a consent clause in a contract. Contracts of adhesion for choice of form won't be enforced.

(b) People can waive their challenges to jurisdiction

iv) New York Long-Arm jurisdiction[20]

(1) Five part test for long-arm jurisdiction (all must be met)[21]

(a) that defendant committed a tortious act outside State[22]

(b) that the cause of action arises from that act[23]

(c) that the act caused injury to a person or property within the State[24]

(d) that defendant expected or should reasonably have expected the act to have consequences in the State[25]

(e) that defendant derived substantial revenue from interstate or international commerce. [26]

(2) Borrowing statutes: application foreign statute of limitations to New York actions when the defendant is a foreigner

(a) NY will apply the shorter statute of limitations if the cause of action accrued outside of the state to a non-resident Plaintiff[27]

(b) Application of the borrowing statute when the cause of action could not have been commenced in the other state

(i) 2nd circuit said that New York law would be clear, and would apply the shorter statute[28]

(ii) Court of appeals said that was wrong, and wanted a bright line rule: a bright line rule and says that they declare, that the cause of action accrues where the Plaintiff is --- they are not going to count contacts – the question of what the claim accrues is New York matter in all cases

(3) If the contract or transaction or duty arises in New York the court can take jurisdiction over it[29]

(a) If significant part of a contract is negotiated in New York it can become a New York contract. However, the more that the negotiations took place in New York, because of chance, the more likely that New York is precluded because of constitutional limitations.

(b) Non-resident an agent in suing his principal may not rely on his own behavior as a basis for long-arm jurisdiction irregardless of whether the performance is outside NY

(4) Lawyers are agents, and their actions are based on what the client does – check this

A person may be designated by a natural person, corporation or partnership as an agent for service in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon. The writing shall be filed in the office of the clerk of the county in which the principal to be served resides or has its principal office. The designation shall remain in effect for three years from such filing unless it has been revoked by the filing of a revocation, or by the death, judicial declaration of incompetence or legal termination of the agent or principal.

20 CPLR 302(a)(1)

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: transacts any business within the state or contracts anywhere to supply goods or services in the state

27 CPLR 202

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the law place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state laws of the state shall apply.

(c) Stream of commerce issues

(i) Subsidiaries and agencies: if a dummy corporation is controlled, the issue is control, and whether or not the New York corporation controls the dummy

(ii) Constitutional limitations (*Asahe*)

1. *Asahe*: simply putting something into the stream of commerce isn't enough to mean that there is jurisdiction by the form of its ultimate destination, and to hold that there would be is unfair

a. O'Conner: unconstitutional to have jurisdiction

b. Brennan: could be jurisdiction if it wasn't fortuitous

2. Knowledge: interlocking directorships with common officers, where the Defendant knew where the products would be going (even if 5%) is a basis for jurisdiction[30]

3. mass torts: 4th department has hinted that in mass torts the constitutional limitations might not apply if there is a jurisprudence of mass torts which exists everywhere.

(d) Telephonic negotiations

(i) Merely doing business for years over the phone is not enough to establish longarm jurisdiction[31]

(ii) Using a telephone to order an agent to act as if someone is here (e.g. someone bidding for someone in an action) is enough to establish long-arm jurisdiction [32]

(iii) Stock broker: will long to whether or not it is part of an ongoing action or not, however usually the courts will find jurisdiction since New York is the *financial capital of the world*[33] -- even if it is just one transaction at issue, it can be part of a bigger case

1. Where the out of state customer is **selling** stock through a New York broker, they are more likely to find jurisdiction

2. if someone deals directly with a New York office rather than through a broker or a representative Long-Arm jurisdiction is more likely[34]

(iv) lease of equipment: will have to look to total relationship, and whether the performance of the lease is to be in NY. Even if the pick-up and return of the goods is in NY, the question is still where the lease is to be performed

(v) alternatives to typical New York view (check whether or not actual)

1. one's business is so international that they would expect to have contracts within New York

2. has regulation business relationship with NY

(e) malpractice

(i) doctor's conduct for malpractice takes place where the treatment occurred

(ii) if the revenue wasn't earned in NY, there is no long-arm jurisdiction

(iii) HMO: may look to where the contract is formed

(f) Arising out of – e.g. proximate cause

(i) No jurisdiction if indirect (e.g. no jurisdiction where soliciting letter resulted in defamation – too many intermediate steps)[35]

(ii) If the cause of action in New York only arises from negligence somewhere else there is no jurisdiction[36]

(g) Supplying goods

(i) Irony (usually in small goods transaction): New York sometimes holds that it won't enforce foreign judgments New Yorkers based on the fact that someone supplied goods (at least once) into New York[37]

(ii) Lending: Usually jurisdiction goes from where the *borrower's* domicile is

(iii) Medical: only where treatment is, not where the doctor ships goods to

(h) Torts: if the cause of action arises from a Tort committed in NY, than New York has jurisdiction[38] -- or if someone commits a tort outside New York which effects people inside New York provided that they expect it to enter New York in some fashion[39]

(i) Commercial torts (e.g. interference with a business relationship):

1. look at what the employee was doing for there to be long arm jurisdiction[40]

(4) Real property: In persona jurisdiction on the basis of ownership in real property[41]:

(a) if the cause of action arises out of the defendant's use of real property in New York – there is long arm jurisdiction no matter where the defendant is

(i) can be used as an alternative to *in rem* jurisdiction where the defendant has stopped using the property

v) in rem jurisdiction for out of state defendants: under *Shaffer* there has to be some time of minimum contacts with the state no matter what kind of contacts one is talking about

(1) in rem: action to quiet title

(a) marriage is a *res*

(2) *quasi in rem* type I: "the real property is the subject of the action" and we have competing claims to the property – the action is "it belongs to me not you"

(a) For *quasi in rem* purposes there has to be an levy before the summons see 5)a)i) below on page 22

(3) *quasi in rem* type II: the thing in New York is unrelated to the cause of action, but jurisdiction on the basis of this thing in NY. (e.g. attach your bank account, to the extent of the bank account

company's contractual relations with the state can't be directly attached (e.g. creating a direct

(b) but this is overruled by *Rush v. Savchuk*, **in that the sence of a policy won't necessarily jurisdiction, but may be indicative**

38 CPLR 302(a)(2)

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act

39 CPLR 302(a)(3)

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

- regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
- expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

41 CPLR 302(a)(4)

owns, uses or possesses any real property situated within the state.

(c) bank accounts: court of appeals holds that a bank account may only be one factor[43], but merely a bank account isn't enough (there may, however, be a connection between the bank account and the cause of action)

(d) For *quasi in rem* purposes there has to be an levy before the summons

c) Fiduciary shield doctrine as jurisdictional bar (no jurisdiction over corporate officers if the officer is acting on behalf of the corporation)

i) Court of appeals says that New York has never adopted this doctrine[44], but someone could have acted as an individual

(1) In terms of the substantive law of Torts: doesn't apply at all (corporate employee is individually liable for torts they commit whether or not the corporation is derivatively liable as well). However, one can still be subject to jurisdiction and not liable substantively.

ii) 2nd Cir: New York has adopted the doctrine

2) statutes of limitations

a) Excuse of failures: court usually always excuse failures to meet deadlines[45]

i) Law office failure: now courts are reluctant, but can grant[46]

b) difference between conditions precedent and a statute of limitations: if something is part of a contractual right, it is not a statute of limitations (For example a Warsaw convention is part of a right – if the 2 years has run can't recommence it is not a statutes of limitations)

c) Borrowing statutes: application foreign statute of limitations to New York actions when the defendant is a foreigner

i) NY will apply the shorter statute of limitations if the cause of action accrued outside of the state to a non-resident Plaintiff[47]

ii) Application of the borrowing statute when the cause of action could not have been commenced in the other state

(1) 2nd circuit said that New York law would be clear, and would apply the shorter statute[48]

(2) NY court of appeals said that was wrong, and wanted a bright line rule: a bright line rule and says that they declare, that the cause of action accrues where the Plaintiff is --- they are not going to count contacts – the question of what the claim accrues is New York matter in all cases

d) limitation by contract: distinguish between a statute of limitations and a condition precedent

i) contract

(1) can shorten

(2) can only lengthen once cause of action has accrued but must be for specific period, can't say that statute of limitations is frozen until notice[49]

(3) contractual construction: general rule is that if the period is created in the same part that creates the right it is a condition precedent

ii) tort: no one knows but people assume that the statute of limitations can be lengthened

iii) estoppel of statute of limitations

(1) acknowledgement of debt will restart the statute of limitations

(2) writing acknowledging the debt can have nothing inconsistent with a promise to pay (must be unconditional promise to pay the underlying debt)

(3) part payment: partial payment must be clear that it is an [illegible]ment of the debt

45 CPLR 2004

Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

(4) crazy estoppel

(a) threats

(b) reliance

iv) equity actions are subject to laches: statute of limitations for contribution is six years, but defendant may show that it is unreasonable to be called for contribution 12 years after the incident

v) relation back when multiple parties are involved[50]

(1) new claims

(a) however, if new claims that the defendant might on notice of are added in an amended complain, the action relates back to the filing[51]

(b) original action must be valid

(2) new parties: generally no relation back generally no, as statute of limitations is seen from the defendant's point of view

(a) if the defendant is already part of the litigation, the claim will relate back to the date which the party joined the suit

(b) no one will be deemed to have adequate notice, if the new claim arises from another transaction

e) day count issues

i) February 29 rounds to February 28th

ii) Time of day doesn't count

iii) Statute of limitations will run out on the anniversary date

f) tolls on statute of limitations : What tolls do is to stop the clock for whatever time the toll is applicable, it doesn't count in the running of the statute

i) types of tolls

(1) infancy: [52]

(a) in general, until the Plaintiff reaches the age of 18, for a maximum of three years after he reaches 18 (21)

(b) exception for medical malpractice: Exception to which it doesn't apply: medical malpractice – 10 year maximum regardless of whether or not the person is above or below 18, and relation back doctrine doesn't apply

(i) Ten years begins to run from the day the cause of action accrues

(c) note: if there is an injury to a fetus, it begins to run from the date of birth

(2) death toll: if the Plaintiff dies, add 18 months for the relatives to sue[53]

(3) insanity: Have to show inability to function in society – whether or not judicial declaration[54]. Amnesia doesn't work

(a) applies as long as the disability exists. When stop begin insane, the regular statute, up to a maximum of three years begins to accrue , and **ten years maximum altogether**

50 CPLR 203(f)

Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

52 CPLR 208

- … years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time w commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event firs
- … less than three years, the time shall be extended by the period of disability. The time within which the action must be commenc provision beyond ten years after the cause of action accrues, except, in any action other than for medical, dental or podiatric malpra under a disability due to infancy.
- This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape.

53 CPLR 210(a)

Death of claimant. Where a person entitled to commence an action dies before the expiration of the time within which the action must be action survives, an action may be commenced by his representative within one year after his death.

(i) It is the shorter of the period of incompetence + statute of limitations or 10 years.

(b) incompetent people can sue through a guardian

(4) Estoppel: threats or underhanded stalling in negotiations

(5) Fraud

(6) Absence toll: virtually useless

(a) If the only way to get jurisdiction over the defendant is to serve in NY, and the defendant is outside of New York after the action accrues for more than four months time then the statute of limitations is tolled until he comes back in[55]

(i) Constitutional problems in setting up general jurisdiction over non-New York actions

(b) False name: if unknown to the Plaintiff, the statute it tolled[56]

(7) "do over statute" – 6 months tolls

(a) if the first action was commenced timely and dismissed not on the merits, the Plaintiff may refile the action within six months unless the case was[57]

(i) Defining dismissal

1. termination of an "as of right appeal" – but court of appeals says that a discretionary appeal might good enough

2. have to look to another state's law if the original suit was in another state

(b) second suit can be under a different legal theory (so long as the defendant has notice during the statute of limitations), but the same events

(c) when it will apply

(i) Wrong Plaintiff

(ii) No subject matter jurisdiction due to lack of diversity -- for example could be filed in federal court

(iii) No subject matter jurisdiction due to failure to exhaust administrative remedies and comply with administrative procedures (such as paying tax before filing an article 78 procedure)

(iv) Statute of limitations ended

(v) Wrong Plaintiff (wrong capacity) when the Plaintiff lacked standing

(d) exceptions -- when it won't apply: if the first dismissal is for the excepted reasons, then one cannot use the do-over statute

(i) no personal jurisdiction over defendant

(ii) dismissal for failure to prosecute

(iii) final judgement on merits

(iv) failure to show up to discovery

(v) Voluntarily discontinued

g) Equitable defenses of laches functions with regard to equity

h) Statute of limitations for individual subject matters

i) Judgments: 20 years

ii) Adverse possession: 10 years

iii) Claims against the government: 1 year 90 days

[illegible]ars

v) Contracts matters express or implied

vi) Goods [illegible] services

(a) Statute of limitations (court will look at whether you have a UCC remedy or a strict product liability

---

57 CPLR 205(a)
If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

remedy). So, court will look to whether or not it is a product liability action or a contract action

(i) Non-sales of goods are 6 years

(ii) UCC: 4 years as per UCC 2-725

1. UCC 4 year rule will run from **sale itself**, even in torts

2. privity: Sale is defined as tender by the defendant to the next person in the chain of distribution[58] (each defendant gets his own suit)

(iii) defining sales of goods

1. free placemats (with ads) are services[59]

(b) equity: 6 years

(2) Installment contracts

(a) Installment contracts may begin to run as each payment accrues

(b) But if there is an acceleration clause, statute begins at time of the demand[60]

(3) Breach of contract occurs when someone in bad faith terminates the contract

(a) Commissions are a measure of damages, and the breach occurs at the time of the bad faith cancellation[61]

vi) Intentional torts: 1 year from injury, except if criminal action brought

(1) interference with a contract : at the time of the actual injury

(2) From time of injury

(3) CPLR 215 has a list of intentional torts(which is not exhaustive): [62]

(4) Three possible statute of limitations

(a) **Normal**: 1 year

(b) If there are any **criminal charges**, it is 1 year from the end of criminal proceedings no matter what their outcome[63]

(c) if the defendant is **convicted** of the crime, statute of limitations is seven years from the crime[64]

vii) Negligence and unintentional torts: 3 years

(1) From time of injury

(2) Might be able to case professional malpractice as personal injury (e.g. architect screws up and someone breaks their legs)

viii) Fraud:

(1) time

(a) Six years from fraud[65]

(b) Or two years from discovery, [66] whichever is longer

CPLR 215(3)

an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special d right of privacy under section fifty-one of the civil rights law;

63 CPLR 215.8

Whenever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence fr this section arises, the plaintiff shall have at least one year from the termination of the criminal action … to commence the civil action, notw which to commence such action has already expired or has less than a year remaining.

64 CPLR 213-b

… an action by a crime victim, or the representative of a crime victim, … may be commenced to recover damages from a defendant con subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime.

66 CPLR 203(g)

Time computed from actual or imputed discovery of facts. .. where the time within which an action must be commenced is computed fron discovered or from the time when facts could .. have been discovered, .. the action must be commenced within two years after such actu within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

(i) Clock starts when Plaintiff has sufficient facts to suggest that he may have been defrauded, assuming ordinary intelligence

(2) Definition of fraud

(a) Constructive fraud is for six years, and constructive fraud is defined as not having scientar (guilty knowledge)

(b) Courts frown on calling a breach of contract a fraud

ix) Conversion: 10 years: Conversation begins at time of demand[67]

x) Assault, defamation, and privacy actions: 1 year (215)

xi) Article 78: 4 months from the time the determination becomes final and binding

xii) Mandamus: 4 months when it becomes binding

(1) If a judge is refusing to do something, it is a continuing harm

xiii) Wrongful death : 2 years but only if the diseased had a non-time-barred cause of action for the underlying tort

(1) Exception for criminal action – 1 year from termination of prosecution, not matter when the crime occurred, or the disposition of the trial court – cause of action relates back to the termination of criminal actions

xiv) Statutory actions: 3 years [68]

xv) product liability: 3 years (court will look at whether you have a UCC remedy or a strict product liability remedy)

(1) clock runs from time of the injury[69]

(a) Where they can't tell when the injury accrued, it is from time of discovery or from time of Plaintiff's last use[70]

(2) discovery of a foreign object that is not a chemical compound, fixation device, or prosthetic aid or device – statute of limitations within one year of such discovery[71] (can do either the normal statute of limitations or the special statute of limitations for the 2.5 year statute of limitations)

(3) Time of injury accrual[72]

xvi) exposure to substances: 3 years from injury or its discover (but see UCC 4 years from time of sale)

(1) defining exposure: direct, indirect, ingestion, inhalation, etc.[73]

(2) defining substance

(a) things that are substances

(i) microwaves are a substance

(ii) blood transmitted by sexual intercourse is a substances

(iii) blood is a substance

..the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of ex shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligen been discovered by the plaintiff, whichever is earlier.

68 CPLR 214(2)

The following actions must be commenced within three years…
2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215;

69 CPLR 214(c)

71 CPLR 214-a codifying Flannigan v. Mt. Eden

- An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or fa that
- where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within o discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. For the purpose nuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining condition. For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthe

73 see n. 69

(b) things that are not substances

(i) sounds is not a substance

(ii) cold air is not a substance

(iii) computer keyboard is not a substance

(3) two injury rule where the exposure will create a greater and greater disease

(a) three years from the injury – discovery has to have occurred after the 1986 enactment

(b) basic two injury rule: can waive the first injury and sue outside the statute of limitations

(c) two injury rule as applied

(i) courts seem to find separate and distinct injuries (e.g. diseases and later cancer and perhaps death) which allows the later suit on a separate cause of action[74]

(4) new science: if science discovers casualty between a toxin an illness: can bring within one year of the discovery of the cause[75] but within five years of the injury[76] -- can't sue on something that Plaintiff knew existed and chose to let all statute of limitations run.

(5) Discovery runs from when Plaintiff discovers the symptoms and that they need medical help, not necessarily the cause of the symptoms if the symoms are really something wrong with the Plaintiff (e.g. a T-shaped utiris) –

(a) E.g. statute of limitations begins to run at time of discovery that blood was HIV-infected, not at time of discovery of symptoms

xvii) Malpractice:

(1) Non-medical: 3 years (but the court of appeals has effectively changed it to six years since the court is concerned not with the legal theory but with the remedy, especially if one is seeking a tort remedy) -- might be able to bring PI case because a professional screwed up

(a) Criteria for determining whether someone is a professional

(i) Graduate degree

(ii) Licensure

(iii) Governing body

(b) Examples

(i) Yes

1. lawyers (see next section)
2. architects
3. engineers
4. psychologists are not doctors (fear that it could bring in faith healers and guidance counselors)[77]

a. when you are dealing with mental illness only people who count are psychiatrists

(ii) Maybe

1. insurance broker – depends on where sued, because in New York County they are not professionals

(iii) no:

1. exterior walls consultant
2. people who call themselves professionals

(c) Legal or other malpractice: 3 years – no matter what the underlying theory of recovery is[78] -

78 CPLR 214(6)

The following actions must be commenced within three years ..an action to recover damages for malpractice, other than medical, dental
regardless of whether the underlying theory is based in contract or tort

(i) legislature amended this in 1996, but didn't say whether limiting statute of limitations was done retroactively

(ii) courts gave the litigators whose claims were extinguished one year to bring suit[79]

(2) Medical, dental, or architectural: 2.5 years

(a) Personal covered

(i) Psychologists don't count

1. when you are dealing with mental illness only people who count are psychiatrists

(ii) hospitals and administrators: If medical personal don't supply competence personnel, or establish proper emergency room rules normal 3 year state applies[80].

(iii) Negligent hiring of doctor is negligence, not malpractice (but the court of appeals says that in practice, the hospital might turn around and sue the doctor)

(b) Determining whether what a doctor does is professional malpractice or general malpractice

(i) Two tests (might have to look at the act, and see whether the act was begun before treatment began or after (e.g. dropping a hotplate before treatment begins)

1. minority: any fool should know

a. if you need an expert to explain it, it is malpractice, if a lay jury could understand it is negligence

2. majority and court of appeals: nature of the duty[81]

a. if the conduct has a substantial relationship to medical treatment it is malpractice[82]

b. failure to communicate about medical things is malpractice, because it requires knowledge

(ii) examples

1. misfiling AIDS test

a. AD1: part of medical care is giving the correct diagnosos

b. AD2: clerical error, and therefore negligence

2. failure of doctors to communicate in referral is ordinary negligence

3. SC: declining to treat a crazy person and the person kills someone is malpractice

(c) Determining when medical malpractice accrues

(i) General rule: action accrues at the time of the bad act (statute of limitations is 2.5 years)[83]

(ii) Exceptions:

1. discovery of a foreign object that is not a chemical compound, fixation device, or prosthetic aid or device – statute of limitations within one year of such discovery[84] (can do either the normal statute of limitations or the special statute of

limitations for the 2.5 year statute of limitations)

a. discovery is defined discovery of facts that would lead you to discover the foreign object (ie lump in body for 14 years being unreasonable)

b. foreign object is defined as things that don't go in the body --

i. things that don't belong in the body, but are errors is diagnosis and hence normal medical malpractice (i.e. IUD[85] or stitches that are in the wrong place,[86] leaving a temporary mold in the nose[87])

2. continuous treatment doctrine [88]: applies to doctors and lawyers (can sue people who are no longer affiliated with a firm)

a. old rule: accrual postponed until last treatment

b. new rule: tolls running of statute of limitations during period of continuous treatment. Statute of limitations begins running at the last scheduled appointment. ***Statute of limitations is immediately suspended until treatment is concluded***

i. exceptions for estoppel for misreprensation (narrow)

ii. Can't be misdiagnosis

iii. Termination is defined as the last scheduled (not actual visit) – even if appointment is broken.[89] But if Plaintiff made an appointment with another doctor, the relationship would be deemed to be ended at that point. This is looked at from the point of view of the patient

iv. Must be treatment for the same condition that gave rise to the act or omission.

v. Unrelated injuries that are a part of the treatment (e.g. failure to communicate about allergy to recovery room resulting in a broken arm) are not continuous treatment for the same condition

c. Defining treatment (women get screwed)

i. Must be treating for the condition that resulted from the act or omission (not something else)[90]

ii. Mere prescription is not treatment (doctor must see the patient)[91]

iii. Must be treatment, not concerns of the hospital staff[92] (not anticipation of harm on the part of the patient, and hence no continuity)

iv. Routine physicals are not treatment – including checking on an IUD [93]

v. Must actually see the patient (even if the patient opts to be treated over the phone)[94]

vi. Failures to diagnose during a routine treatment are not continuous treatment[95] -- can still sue for damage happened during the past 2.5 years, by the initial omission is time-barred

vii. But if there is a known problem, it is treatment

viii. Has to be treatment, not merely a concern

ix. "come back in six months and we will see what has happened to the lump" is treatment

x. failure to treat at a certain point is negligence, and continuous visits are continuous treatment ("I am not going to fix you now, but I am going to fix you later, so come back" is continuous treatment and the statute of limitations runs from the last scheduled appointment)

xi. if the child is the Plaintiff, it statute of limitations from the time the child is born, not the time of injury, b/c the baby cannot sue until the baby is born

d. episodic is defined as if there is a gap between the continuous treatments, they are deemed to episodic

i. treatment for terminal conditions that the doctor caused are really episodes, and not continuous events

e. Defining *continuous* treatment

i. Split: If the patient didn't know that the doctor removed a fallopian tube, and the doctor still treated for sterility, then it isn't continuous treatment b/c he continued to treat the symptoms of infertility, not the actual disease(2nd department) [infertility seemed 2b treated as a symptom] – but if doctor treats symptoms of cancer it is continuous treatment (1st department)

ii. treatment for terminal conditions that the doctor caused are really episodes, and not continuous events

iii. improper medical tests of other patients (e.g. husbands) are not treatment (omissions are at the time of the test), but tests of pregnant woman (and baby) are continuous treatment But, test of woman and baby gets benefit of treatment doctrine.

iv. **Pregnancy** is different than complications that come after the pregnancy: Pregnancies are a discrete event even though an overall condition might be effecting the patient a whole. Each pregnancy is a different event.

v. If there underlying condition is undiscovered, but there is general treatment for the symptoms, there is no continuous treatment. Must be treatment for discovered ailment. (treatment for effects of descended testicle are different from any treatment of a continuous treatment)

vi. If an ailment is episodic, statute of limitations runs from omission

vii. If the patient is not seeing the doctor in the interim, it is not continuous treatment

viii. Policy: don't want to discourage doctors from reconsidering their decisions based on the threat of litigation

ix. Multiple professionals: Multiple doctors or lawyers: if the doctors have a close business relation (e.g. partners) then associated doctors will qualify for the continuous treatment exception

x. Just because two groups always refer to patients to each other in the course of business doesn't mean they are the same group. However, the reviewing court didn't reach the issue[96]

3) satisfaction of the statute of limitations

a) supreme and county courts (modern) – challenges need to be raised by defendant otherwise waived

i) filing of summons and complaint, or summons and default notice is the crucial moment for the statute

(1) Plaintiff then has 120 days to serve it

(2) Short statutes of limitations: if the statute is 4 months of less service can only be made within 15 days after the statutes of limitations expires

(3) date of service will relate back to date of filing, so long as it is within g120 days (ie if the last day of the statue is one 6/1 and the filing takes place on that day, service is made within 120 days is ok)

(a) failure to buy a new index number was jurisdictional – parties can't stipulate out of it (must buy a new number if recommencing)[97]

(i) not including an index number might be jurisdictionally okay (if not objected to) because the power of the courts hinges on the purchase of an index number[98]

(b) an order to show cause in an article 78 proceeding doesn't might be a proper way to commence an action

(4) differences between copy served and copy filed are not fatal

(a) just has to conform in all important aspects

(b) slight difference in the name of a corporation (if it is the name of a building makes a difference)

(c) substantial indenticality is okay

(5) pre-case discovery: must buy a new number for the real case

ii) if the Plaintiff can't serve within 120 days despite efforts, can ask court for relief – based on a five part test

(1) is a Supreme Court in Nassau county which said that there is a 5 part test - *Mccullough v. Ruggiano*

(a) How long the delay (how far beyond 120 days are we)

97 CPLR 305(a)

Summons; supplemental summons. A summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff's address,
and also shall bear the index number assigned and the date of filing with the clerk of the court.
A third-party summons shall also specify the date of filing of the third-party summons with the clerk of the court. The summons in an actio credit transaction shall prominently display at the top of the summons the words "consumer credit transaction" and, where a purchaser, b defendant, shall specify the county of residence of a defendant, if one resides within the state, and the county where the consumer credit is within the state. Where, upon order of the court or by stipulation of all parties or as of right pursuant to section 1003, a new party is joine joinder is not made upon the new party's motion, a supplemental summons specifying the pleading which the new party must answer sh the court and served upon such party.

(b) Excuse for the delay

(c) Whether the defendant has been prejudiced by the delay

(d) Whether the Plaintiff is already in default at the time the application is made

(i) The statute only talks in terms of a defendant moving to dismiss when they have been served beyond the statutory period

(ii) If you are getting close to that 120 days you can make the application for relief

(iii) If you ask the judge to extend before you have served process, there will be no one on the other side - it would be *ex parte* at that time

1. Would show all of this due diligence
2. There is no one to say that this is not due enough
3. Whether the defendant has show merit to his case
   a. failure to serve one defendant, was a failure to show prejudice[99]
      i. Prejudice is defined as is prejudice from the delay is prejudice from the time of one to the delay, and evidence has been lost, and there is a harm by this delay - and one is harmed on the ability to defend on the merits
4. no automatic dismissal

iii) note: nail and mail and serve and mail statutes, the completion of those requirements effects only the answering time, not the statute of limitations

b) lower courts

i) "service system" – filing is not what matters, it is the service

ii) if the Plaintiff delivers the summons to the sheriff where the defendant is (or files with the county clerk in the city of NY), it automatically extends the statutes of limitations by 60 days[100]

iii) in the civil court a failure to file is not jurisdictional

c) past practice

i) supreme court and county court (old pre 1992-1998)

(1) if the Plaintiff didn't file proof of service within 120 days the action was deemed dismissed – no ability of the court to grant relief

(2) but, if the Plaintiff failed to file proof of service in the first 120 days, he had a second 120 days to start anew, with the payment of a filing fee – and the second action would relate back to the first

(a) failure to buy a new index number was jurisdictional

(3) cases commenced before 1/1/98 are commenced upon the filing of a summons and complaint – check this

ii) overlapped cases are covered under the old law, and they have an addition 120 days to file[101]

iii) between July 1 to Dec 31 1992 a Plaintiff could commence under either method

(1) if you commenced by serving, you were required to file by Dec 31 1992 otherwise it was deemed to be dismissed – court found that it did not have the power to grant retroactive relief

iv) before 1992 service was required

100 CPLR 203(b)(5)

In an action which is commenced by service, a claim asserted in the complaint is interposed against the defendant or a co-defendant unit defendant when: the summons is delivered to the sheriff of that county outside the city of New York or is filed with the clerk of that county York in which the defendant resides, is employed or is doing business, or if none of the foregoing is known to the plaintiff after reasonable county in which the defendant is known to have last resided, been employed or been engaged in business, or in which the cause of actio defendant is a corporation, of a county in which it may be served or in which the cause of action arose; provided that:

(1) there was a question as to whether the court could extend the 120 days with which to file

(2) if you misfiled you would get an extra 120 days to try again

4) commencement of action – this is what *interposes* the claim

a) Note: in government situations there may be a notice of claim statute which may require notice of the defendant immediately after the claim accrued

b) Means of commencement

i) Normal: Commencement by filing: commenced by filing with the clerk

(1) In inferior jurisdiction courts, commencement by service is the way things work

ii) Extraordinary: commencement by an order to show cause and provisional relief, provided that the summons is served in 30 days[102] or 60 when attachment is involved.[103] With a lis ntice of pendency, notice constitutes commencement[104]

(1) Order to show cause doesn't shift burden of proof

(2) Note: in federal system, must notify the other sides unless there is a danger of destruction

(3) Must have standing[105]

(4) Leaves blank spaces for date the motion is returnable on (court will determine)

(5) Order to show cause might ask for a modification of service

(a) Could direct personal service, which is different than personal delivery

(b) *Personal delivery* refers to delivery in hand not service

(6) One needs an *emergency affidavit* – in the New York metro area

(a) Have a right to see judge

(7) Required to tell the court whether or not this is your first application for first relief[106]

(8) Note: if the interim relief is granted (e.g. Temporary Restraining Order), than the order to show cause acts just like a motion

(a) After the interim relief is granted, it acts like a notice of motion

(i) Needs to be served on opposite party

(ii) It will go onto the calendar

(iii) The method of service may be changed by an order to show cause

ummons

1) Jurisdictionally defeating not to have an index number (but maybe not if the copy served in the defendant doesn't have an index number)

102 CPLR 203(b)(3)

3. an order for a provisional remedy other than attachment is granted, if, within thirty days thereafter, the summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, or, where the defendant dies within thirty days after the order is granted and before the summons is served upon the defendant or publication is completed, if the summons is served upon the defendant's executor or administrator within sixty days after letters are issued; for this purpose seizure of a chattel in an action to recover a chattel is a provisional remedy; or

CPLR 6213

An order of attachment granted before service is made on the defendant against whom the attachment is granted is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, except that a person upon whom the order of attachment is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity. If the defendant dies within sixty days after the order is granted and before the summons is served upon him or publication is completed, the order is valid only if the summons is served upon his executor or administrator within sixty days after letters are issued. Upon such terms as may be just and upon good cause shown the court may extend the time, not exceeding sixty days, within which the summons must be served or publication commenced pursuant to this section, provided that the application for extension is made before the expiration of the time fixed.

CPLR 203(b)(4)

4. an order of attachment is granted, if the summons is served in accordance with the provisions of section 6213; or

106 CPLR 2217

(b) Affidavit on ex parte motion. An ex parte motion shall be accompanied by an affidavit stating the result of any prior motion for similar re
if any, that were not previously shown.

(1) The question of whether it matters whether or not the copy filed with the defendant doesn't have an index number and is later amended to include the index number has not been dealt with yet

d) Means of service

i) Service on a human 308.1[107] – service is a non-delegable duty of the attorney.[108]

(1) Note: can serve in foreign state if there is a basis for jurisdiction there under § 313[109]

(2) Personal service

(a) Defects in process

(i) Wrong person

1. Server giving it to the wrong person in a group: AD cases say good service, as there is notice, but it isn't settled yet

2. Wrong person served b/c the target lied: bad service unless there is a plot[110]

(ii) Service resister

1. Has to be in vicinity of resister

a. Split of authority as to whether leaving it in driveway is okay

2. Has to be real resistance

3. Children cannot be resisters

(iii) Wrong abode

1. because of trial separation: good service since statute says dwelling place

2. wrong abode because of failure to renew license – waiver of service. But not waiver of jurisdiction

3. can't leave with a neighbor even though it is the same dwelling place

(iv) corporation and office problems

1. if a party sues someone they designate their lawyer as agent for service of process (used to be that the lawyer had to announce)

2. corporate ownership – non-present ownership of a company doesn't make the company an agent for service on the owner[111]

3. service at place of business

a. serving a hospital to serve a doctor is not proper (analogy made to serving a lawyer by serving the court)[112]

(v) joint tortfeasors are not agents for each other

(vi) serving people in incorrect capacity

1. must give a person one copy for each capacity they are being served under

a. AD3rd: one summons and complaint can be used when suing someone individually and as a partner of a corporation

(3) Service by mail

(a) Has to include postage, and an acknowledgement of service to be sent back

(b) If the Defendant refuses service, he will have to pay for an alternative means of service

107 CPLR 308.1

Personal service upon a natural person shall be made by delivering the summons within the state to the person to be served

109 CPLR 303

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction

(4) Leave and mail
  (a) Have to leave with someone of suitable age
    (i) Suitable age is 15, maybe 12 (as a 12 year old can get working papers)
    (ii) can leave with the gatekeeper or doorman, or whoever controls access to the building
  (b) And mail to abode or personal place of business, but the letter has to be discreet and not have the name of a lawyer on it
  (c) Jurisdictional default in civil court to put incorrect or no zipcode

(5) Nail and mail – 308.4[113]
  (a) As a prerequisite must attempt conventional means of service
    (i) , at least 3 times, but 4 is better and 2 is never enough
    (ii) have to ask neighbor
  (b) must affix to door in a way that will stick, and can't shove under door

(6) Serving agent for service of process 308.3[114]
  (a) if a party sues someone they designate their lawyer as agent for service of process (used to be that the lawyer had to announce)

(7) Hague convention" Must be good service in both New York and in foreign country (even through some countries require that service be by government agents)

(8) at direction of the court": everything fails (for more than one week) court can provide mechanism of service, but this can't supercede Hague convention

(9) service on non-humans
  (a) corporations
    (i) domestic corporations: will designate secretary of state as agent for service of process (BCL 306) (two copies: one to secretary of state, one for the state and one for the corporation)
      1. note: BCL 306 allows people to serve corporations in other manners
    (ii) foreign corporations : serve one copy on the secretary of state, and mail another to the corporation to their last known address (BCL 307)
      1. can't leave with a person on suitable age and discretion
      2. can't use substituted service
      3. court modified relief
        a. old rule: could ask court for relief if unable to sue
        b. new rule: 311(b)[115], which is similar to 308.5
    (iii) mistaking a domestic corporation for a foreign [illegible]oration: 3rd department says it is the same thing (e.g. has the same effect)

113 CPLR 308.4

where service cannot be made, it can be made by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" …

114 CPLR 308.3

Personal service upon a natural person shall be made by delivering the summons within the state to the agent for service of the person to be served designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of section two hundred thirty-two of the domestic relations law;

115 CPLR 311(b)

If the person to be served is a foreign corporation within the one hundred twenty days allowed by section three hundred six-b of this article or with the provisions of subdivision (a) of this section or any other law, service upon the corporation may be made in such manner, and proof of such form, as the court, upon motion without notice, directs.

1. mistaking a foreign corporation for a domestic corporation is fatal, and there are due process concerns there – have to follow BCL 307 to the letter

(iv) hard for corporations to resist, because there is a definition of delivery

(v) authorization to accept service : objective reasonableness test

1. if someone lies about whether or not they are authorized to accept service it is still good service[116] (process server has the right to rely on what people say)
2. if someone says that they are authorized to accept subpoenas but not service, and they are served, it is still good service, b/c they knew what to do with them[117]
3. must give to a managing agent or someone authorized to accept service (no receptionists with no supervisory capacity)[118]
4. when a store is a franchise: depends on whether a reasonable person could tell whether or not a store is a franchise or company-owned

(b) partnerships – 310

(i) can only serve any partner[119] – must be by personal service on a natural person (308) (says can only be served on someone in charge -- 310)

(ii) can often serve a partnership in the same way that you would serve a corporation (310b[120] is the moral equivalent of leave and mail)

(iii) courts held that 310(d) is not irrelevant (after a battle of statutory maxim found that the legislature was trying to expand the servability)[121]

(c) government

(i) clerk of the county

1. CPLR will govern no matter what the local rules are

e) After filing, Plaintiff must serve the defendant [122]

i) The Plaintiff has 120 days in which to make service of process and file proof with the clerk, and the defendant can move to dismiss on the grounds that the defendant hasn't complied with the statute – or with improper service

119 CPLR 310(a)

Personal service upon persons conducting a business as a partnership may be made by personally serving the summons upon a defendant thereof

120 CPLR 310(b)

(b) Personal service upon said partnership may also be made within the state by delivering the summons to the managing or general ag person in charge of the office of the partnership … and by either mailing the summons to the partner thereof intended to be served by firs known residence or to the place of business of the partnership. Proof of such service shall be filed within twenty days with the clerk of the summons; service shall be complete ten days after such filing; proof of service shall identify the person to whom the summons was so de time of day and place of service.

121 CPLR 310(d)

Personal service on such partnership may also be made by delivering the summons to any other agent or employee of the partnership a receive service; or to any other person designated by the partnership to receive process in writing, filed in the office of the clerk of the cour is located.

122 CPLR 306-b

- Service of the summons and complaint, summons with notice, or of the third- party summons and complaint shall be made within their filing
- provided that in an action or proceeding where the applicable statute of limitations is four months or less, service shall be made not date on which the applicable statute of limitations expires

de upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action with good cause shown or in the interest of justice, extend the time for service.

(1) **when the statute of limitations less then four months service must be within fifteen days after the expiration of the statute of limitations**

(a) If the defendant fails to serve and file proof of service Defendant can dismiss

(b) Plaintiff has 120 days from the date of dismissal to file a new action (can do as many times as possible)

(2) If the statute of limitations has expired, Plaintiff receives only one additional extension

(3) filing of proof of service:

(a) failure to file doesn't void the service

(b) failure to file changes the time which the defendant can answer (clock doesn't begin to run until it is filed)

(i) substituted services don't necessarily have to be in order 308.2,4[123]

ii) Requirements for summons

(1) Name – can fail for want of jurisdiction

(a) Fictitious names can be used with permission of the court

(b) If, the defendant already knows who the Plaintiff is, then it isn't jurisdictional to fail to comply with fictitious name requirements)

(c) Serving right person, but wrong party is ministerial[124]

(i) If the defendant knew than there is no prejudice

(2) Typeface: ministerial -- 12 point type

(3) Basis for venue: ministerial

(4) "object notice" or statement of the complaint is a jurisdictional defect[125]

(a) courts seem to be holding that a broad statements is okay

ii) service of process requirements

(1) Process can never be served on a Sunday

(a) Service on a sat if is served maliciously on a sabarian

(b) It is actually a crime to knowingly serve a sabatarian

(2) Methods

(a) Personal service: Usually can't convert a third party into your process server (e.g. server giving summons to son to give to third party)[126]

(b) Leave and mail: delivery of summons to a person of suitable age and discretion, and mailing of summons to the last known residence[127]

f) If the server doesn't know that someone is improper, it is bad service

5) Provisional remedies -- see constitutional limitations 5)b) below on page 28

a) Types of provisional remedies

i) **attachment**

(1) purpose:= there is a worry that Defendant will dispose of all the assets to avoid paying me at the end of the case when defendant win.

127 CPLR 308(2)

delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place ..the per and

- by either mailing the summons to the person to be served at his or her last known residence
- or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearin confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney the person to be served

… within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twent mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitat the date, time and place of service

(a) For *quasi in rem* purposes there has to be an levy before the summon see 5)a)i) above on page 22

(2) requirements

(a) need to be entitled to a money judgement[128]

(b) must meet equitable requirements

(i) Balance of equities

(ii) Continuing need

(iii) Likelihood of success on merits

(iv) Posting of bond

(v) Appeal to the court's sense of fairness that the Plaintiff will be hurt more if an attachment isn't granted by mistake, than the defendant will be if an attachment is granted by mistake

(vi) Lack of harm to society from a wrong decision

1. It is all a question of what is the harm from a mistake

a. To the extent that you can demonstrate in your moving papers that the harm to you is coming to an end, you will get it

2. Balancing of the equities

a. That otherwise the lawsuit would be non-economical

(c) categories of possible things to attach

(i) Foreign non-qualified business in New York

1. Basis for *quasi in rem* jurisdiction

2. If they later become authorized they it doesn't matter

(ii) Non-domiciliary residing in the sate

(iii) Hiding defendant

(iv) When the action is brought by the victim of a crime against the person who committed the crime.

(v) Intent of the defendant is to defraud creditors or frustrate enforcement of judgement – has to be really defrauding creditors, not just spending money

(vi) Cause of action based on a judgment

(vii) Attachment in aid of arbitration

1. Grounds: may be that the attachment may be rendered ineffectual[129]

2. Split in authority as to whether or not one has to show the other ground

a. AD1 (goes both ways)

b. 7502 provides that the only ground for attachment is that without the attachment the award maybe rendered ineffective

c. 2nd cir: court of appeals have to show the other elements[130]

(3) Things that can be attached[131]

(a) Debts

(i) Must be due or will certainly come due

(ii) rent

1. Obligations to pay future rent outside New York can't be attached

a. Rent based on land: right to receive rent is a property right, but it is not an in-state property right

2. Rent is not a future right as shit can happen[132]

(b) Garnishment of vested rights is possible, if the right and garnishee exists in NY

(i) Attacher takes the position of the atachee

(ii) the creditor will step into the shoes of the debtor

1. if it turns out that the debtor would get nothing, it doesn't matter

2. whatever rights there are one can step into them

(c) bank accounts

(i) at foreign banks are not attachable

1. AD1: not a New York debt – there is some controversy

2. Federal courts go the other way

3. No word from court of appeals

(ii) At out state banks are attachable

1. Out of state bank accounts are attachable, because they are a debt

(iii) if the account has a zero balance: levy by service is only on the amount in the account at the moment of service, but if there is $1, it includes everything that comes in afterwards is subject to the attachment – when the Sheriff levied by service, than after accrued obligations becomes part of the attachment

(d) Letters of credit – can't attach

(i) can't attach letters of credit, because it would take away the incentive of the debtor to ship

(ii) this is not a currently existing right with a value, here the right is contingent

(e) Any property that can be assigned or transferred

(i) personal injury cause of action can't be assigned – (proceeds can)

(ii) some pension rights can't be assigned or transferred

(4) Procedure

(a) If it isn't served within 60 days, the order of attachment is void

(i) Order of attachment is a direction to the sheriff

(b) Bond is required

(i) Statue says that there is a minimum of 500 to the bond

1. Court determines value of bond

(ii) purpose

1. Bond Protects the defendant so that the defendant will have something to turn to if the Plaintiff has no assets

2. Bond is to protect the sheriff

a. Protect the sheriff's fees (a percentage of what he attaches)

b. Protect the sheriff from any lawsuits

c. If it is a high number for the attachment, it will probably be a high number for the bond

(c) Don't have to identify assets

(d) methods of obtaining attachment -- **note first to attach has priority**

(i) first step is attachment

1. order of attachment without notice[133]

a. Plaintiff prepares an order of attachment – you walk that order into court and the judge signs the thing, and it goes to the sheriff

i. Courts reluctant to do this

b. Statute requires that within one day of the sheriff levying that a full set of papers must be served on the defendant

c. Getting an order of attachment by Ex-parte is quite hard, Have to show truly extenuating circumstances

2. order of attachment on notice[134]

a. using an order to show cause might have a TRO

(ii) second step: levy is defined as order to sheriff – have to tell sheriff where the goods are

1. Land: Sheriff goes to clerk to file claim (people who buy from owner take with cloud on title)

2. Personal property

a. Can levy by seizing and taking it away (rare)

i. Defendants care, but garnishees might not care

ii. If one demands that the sheriff seize, another bond is necessary

b. Levy by service (usually with a garnishee):

i. Sheriff serves the holder, and says that the holder is now the agent of the sheriff

ii. Says that they have forbidden them from paying the defendant

c. Requirements of levy

i. Levy – only need to levy first if the attachment is a basis of jurisdiction

ii. Motion to confirm : within 5 days of the levy. If attaching for *quasi in rem* jurisdiction must make motion to confirm in 30 days to move to confirm

iii. Service has to be made within 60 days and after the levy

iv. Motion to perfect : within 90 days of the Levy by service on things other than land need to be perfected within 90 days or the levy is void. (if the levy is not timely perfected than levy is void, service is no good because the service isn't after a valid levy, because the service isn't any good, the service isn't within 60 days of the order) – note there still can be personal jurisdiction.

d. Types of perfection of levy

i. Voluntary relinquishment : If the garnishee turns it over voluntarily it perfects

ii. Commence a proceeding against the garnishee to turn it over to the sheriff - -within 90 days (don't have to be in 90 day increments)

iii. **Make a motion for the extension of time** to perfect the levy

(5) Attachment is annulled if the action does the following[135]

134 CPLR 6210

Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of section 6214. The contents of the order of attachment granted pursuant to this section shall be as provided in subdivision (a) of section 6211.

135 CPLR 6224

An order of attachment vacated upon the action in which it was granted abates or is discontinued, or a judgment entered therein in favor of the defendant. In the last specified case a stay of proceedings suspends the effect of the annul vacating of the judgment revives the order of attachment.

(a) abates[136]

(b) discontinued[137]

(c) judgement in favor of Plaintiff is satisfied[138]

(i) reversal or vacating of judgement revives order of attachment[139]

(d) judgement in favor of Defendant [140]

(i) stay of proceeding suspends effect of annulment

(ii) if it turns out that the Plaintiff is not entitled to relief, than the Plaintiff is going to have to pay damages to the defendant

1. expenses lost as a result of the attachment – includes atty's fees

2. note: if attachment is used to obtain *quasi in rem* jurisdiction, but defendant was right on the merits – it is considered a failure on the merits

3. can get whatever damages that can be proven – even if the attachment was on a small property

ii) preliminary injunction (Article 63)= to prevent the defendant from taking the object at issue out of the jurisdiction. So if there is a victory it is not a souvenir.

(1) requirements

(a) reasons for preliminary injunction

(i) When it appears that defendant threatens to do an action in violation in Plaintiff respecting the subject of the action

(ii) Can't get an injunction over money

1. Can't get an injunction to stop people or banks from spending money

(b) If the action seeks a permanent injunction , you have the basis for a preliminary injunction

(c) Has to be for a pending lawsuit (can't get before commencement)

(i) Can't get the injunction by serving the order that you ultimately get

(d) Proper service, whether or not it is an order to show cause

(e) Bond

(i) No minimum bond (unlike attachment) – but there must be some bond otherwise will be overturned on appeal

(ii) Bond is the amount of possible liability – and it can limit defendant's liability

1. Optional hearing on bond under 6312(c)[141]

(f) Equitable principles used: If all they are talking about is who might pay who damages, equity will not grant the injunction

(i) AD2: Has to be on the undisputed facts

(ii) Legislature: mere fact that you raise an issue of fact is not enough to raise an injunction

1. But some department don't follow the law from the legislature

a. Injunctions come up in area of restrictive covenants on working

b. They say that the injunction against working has to be reasonable

141 CPLR 6312(c)

(c) Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. I shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

(iii) Must have more powerful showing for a mandatory injunction or an order to compel someone to do something

(g) Government can get injunction over obscene things[142]

(i) Needed to have a hearing to tell if it was constitutional

(2) Remedies

(a) Costs

(b) Interest – because of the injunction couldn't sell and get money

(c) Can't get diminution in market value

(i) Atty's fees: But for the injunction there would have been no litigation

iii) *Yellowstone* injunction[143]: commercial lease injunction for the purpose of determining whether or not someone is in violation of the lease

(1) Commercial lease (statutory provision for residential)

(2) Notice of default for

(3) And short of vacating can cure default

(4) Doesn't apply for rent – only for other default (e.g. big signs)

iv) Temporary restraining order

(1) Can be granted even before the other side is heard

(2) uses

(a) Can be granted in labor disputes

(b) Can get a restraining order against the government -- but you can't get one against the government from doing certain actions,

(3) If you invite the government to the court, than the court says that it can grant it – not specifically I the statute

v) Receivership

(1) Have to be that the property we are talking about in the subject of the action

(2) Application for appointment of receiver has to be on noticed

(a) Courts will enforce contractual provisions that waives notice of appointment of receivership

(3) No times rules about when the action has to be commenced

(4) Can't sue a receiver without the court's permission

vi) notice of pendency (*lis pendens*) – notice of pendancy (anyone who takes property with filed notice of pendancy takes – actual notice doesn't matter, what matters is what is filed)

(1) defined: Take notice and complaint and notice of pendancy, and file with county clerk. Puts the notice that you have a claim, and unless the claim is dramatically less than the value of the property, it makes the property unsaleable

(a) No motion required

(b) No bond required

(c) Constitutional issues: CT. v. Dorr: doesn't effect this so it is constitutional as this is an action over this specific property

(2) Mechanics

(a) Can file a notice of pendancy before you commence an action, a copy of the complaint must be attached to the notice (in putting the world on obligation that you have a claim, you have an obligation to tell the world what that claim is)

(b) Must serve within 30 days of filing. If the complaint isn't served, than the notice of pendancy is void

(c) The defendant can put up a double bond and cure the lis pendance

(3) requirements

(a) only on real property

(i) Only can be filed when the action effects the title to, the possession, use, or enjoyment of that real property (so there is no CT v. Dorr problem)

(b) Cases says that the Plaintiff must be claiming some sort of right, title, or interest

(i) E.g. cases where the lawsuit is to enjoin a nuisance (e.g. erection of glue factory)– notice of pendancy can't be used

(ii) Victims of breach of Contract for the sale of stock in a corporation that owns real property cannot file a lis pendance because it is a stock for the sale of stock [144]

1. Co-op shares: : SC New York County: -- still hazy issue (where purchaser wasn't buying a home) still can't file a lis pendance

(iii) Suits for return of deposit can't sue, because it is a lawsuit for money

(c) Mechanics lien is like a notice of pendency

(4) Good for three years

(a) Can't be renewed retroactively

(b) Court can cancel if there is no prosecution[145]

vii) Seizure of chattel = I claim I own it.

(1) Can do by motion – typically by order to show cause containing a temporary restraining order

(2) Plaintiff can put up a double bond twice the value of the property

(a) But they have to convince the court that it is a unique good

(b) The more one inflates the value, the higher the bond

viii) Sequestration in matrimonial case[146]

b) Constitutional limits on provisional remedies

i) wage garnishment case without hearing is unconstitutional[147].

ii) Summary seizure without judicial intervention unconstitutional[148]

iii) *ex parte* seizure okay if before a judge[149]

iv) must be before a judicial officer[150]

v) Can't have attachments against property that is unrelated to the cause of action[151] -- and Plaintiff does have an interest in not having clouded property

6) Responses to service

a) Stipulation of receipt of service: If you don't have the words "***or move***" in a stipulation to extend time to answer, you have waived the right to a pre-answer motion, you may have waived the right to a quick motion (by operation of law, your time to answer is coextensive with the time to move – if the word 'to move' is struck out, it might be moved)

b) Can request an *ex parte* motion for additional time: Can go to court to get an *ex parte* motion to grant a motion to extend time – when you don't know what rights are being waived

c) Time to respond

145 CPLR 6514(a)

Mandatory cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519.

146 NY Domestic Relations Law § 243

Where a judgment … If he or she fails to give the security, or to make any payment required by the terms of such a judgment or order, wh given therefor, or to pay any sum of money for the support and maintenance of the children or the support and maintenance of the spous action, or for counsel fees and expenses which he or she is required to pay by a judgment or order, the court may cause his or her perso profits of his or her real property to be sequestered, and may appoint a receiver thereof. The rents and profits and other property so seque time to time, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires; and to pay the sums of money required, the court, on application of the receiver, may direct the mortgage or sale of such real property by the conditions as it may prescribe, sufficient to pay such sums.

i) deadlines

(1) In hand in New York: 20 days after service

(2) Substitute service, with an agent for service: 30 days after service

(3) **if service is made by leave and mail, or by nail and mail, the defendant has to appear 40 days after proof of service**

ii) When the clock starts

(1) After substituted service under 308.2 or 308.4 which requires two acts, the Plaintiff must file proof of service 20 days after the second act, and service is complete 10 days after notice of service is filed, but there is really no way to know when it has begun to run

(2) As a practical matter assume that it was filed the day it was served

(3) If the Plaintiff serves only a notice, the time limit on the defendant's response (20 days) only starts when the Defendant responds with demand for complaint (which often comes with a notice of appearance)

iii) Motions to dismiss for lack of jurisdiction

(1) Appearances or motions

(a) Appearance: No real reason for special appearance, because you can move to dismiss

(b) Motions

(i) Motion to dismiss the complaint – failure to state a cause of action or cause of action is barred by the statutes of limitations.

(ii) Any other motion is a motion that extends the time to answer is a motion to correct the complaint

(iii) If it is saying 'oh court, make them do it better' -- or a motion to strike portions of the complaint, because they contain scandalous and predjudicail matters

(2) If the case still exists after the answer to the motion to dismiss the answer is due ten days after service of a copy of the order that determines the motion

(3) Motions to dismiss for lack of *in rem* jurisdiction might better be made as a summary judgment (although there are no longer special appearances, once can make an appearance to contest the basis of in rem jurisdiction)

(a) A failure to prefect a levy is actually would destroy jurisdiction

(4) one can assert the defense of **lack of personal jurisdiction** in one of two ways (but if you don't and if you appear it is waved)

(a) either a **pre-answer motion**[152] to dismiss on these grounds (recent statutory amendment)

(i) bad service: it has to be asserted in the motion or lack of jurisdiction, if must make a motion for judgement on that defense in 60 days – defendants often just let defense like that sit there until the statutes of limitations

1. Plaintiff could serve them again (would raise the same defense

2. Plaintiff could move to strike the defense, to littigate the issue now

(ii) If there is a deault judgment, the judgment is vacated, and the defendant has 20 days to answer the complaint

1. however, the defendant should move to vacate the judgement and dismiss the complaint on the grounds on lack of jurisdiction, otherwise he has waived his defense of lack of jurisdiction

152 CPLR 3211(b)

Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the g
jurisdiction of the subject matter of the cause of action

(i) If the case still exists after the answer to the motion to dismiss the answer is due ten days after service of a copy of the order that determines the motion

(b) as an **affirmative defense in one's answer**

(i) caveat: by making a motion to dismiss on any other ground without challenging jurisdiction simultaneously, you have waived your ability to challenge jurisdiction

(5) if the Plaintiff fails to state a cause of action, and amends his claim, the defense of improper jurisdiction is waived, unless the amended complaint includes a second form of jurisdiction (e.g. now alleging long-arms)

(a) asserting a counterclaim may be waiver of jurisdictional, unless the act arises out of the same transactions as the original claim

(b) cross claims are not a waiver of jurisdictional arguments[153]

iv) appearance does not waive jurisdictional challenges, simply means that one agrees to litigate the jurisdictional issues in NY

7) venue and forum selection

a) NY is improper venue (can't transfer between states)

i) forum non: court can't raise sua esponte. In the interests of substantial justice, the action should be held someplace else – and the only remedy is to dismiss the action – can't transfer – discretionary

(1) will look at the convenience of witnesses, etc.

(2) the state's interest will be looked at.

(3) An action can be dismissed because an another state has a greater interest[154]

(a) Other conflicts principles will apply (e.g. ease of translation), policies of the foreign country

(4) existence of another competent forum is another factor to dismiss, but it is not the sine qua non

(a) they may look at whether or not the foreign courts will enforce

ii) New York is proper venue, but action is in wrong county 501-513 of CPLR

(1) At least one party must have proper venue[155] if venue provisions conflict

(2) Categories

(a) Definition of residence: Residency is defined as bone fide intent to stay in the same place for some length of time, for some residence. If they move the day before it is not proper venue.

(i) If there is a use of an apartment in connection with monthly business purposes – this s not a residence

(b) will issues: administrators are deemed a resident of where the trust was created as well as where they actually reside[156]

(c) actions against parties and special proceedings are covered in 505-6

(d) Corporation: desident where its principle office is located

(i) Railroads or common carriers: can also sue where incident arose

(ii) Unincorporated business: where anyone of the actions actually arose

155 CPLR 502

Where, because of joinder of claims or parties, there is a conflict of provisions under this article, the court, upon motion, shall order as the p this article as to at least one of the parties or claims.

156 CPLR 503(b)

Executor, administrator, trustee, committee, conservator, general or testamentary guardian, or receiver. An executor, administrator, truste general or testamentary guardian, or receiver shall be deemed a resident of the county of his appointment as well as the county in which

(e) Real property: the proper venue is the county where the venue is located

(f) Personalty: either the county where the thing is located or the county of residence of any of the parties

(g) In a consumer credit transaction, the proper place is the place where the defendant lives

(h) Otherwise proper venue is not the location of the incident, it is where the parties are

(i) Assignees: the residence of where the original assignor at the time of the original assignment[157]

(j) If no one lives in New York, than you can sue in any country

(k) Government

(i) Usually where the statute specifies, but the courts hold that this is not jurisdictional

(ii) The important thing about suing the government is that where all other things being equal for a slip and fall that took place in Brooklyn, one can't sue in Nassau County

(3) Discretionary venue changing[158] but there is a presumption that all other things being equal the court should keep jurisdiction (inconvenient county)

(a) there is no time limit – the longer you wait, the less likely that the court will grant your motion

(i) AD: there is a mistaken belief that the statute says that the action ought to be tried where the cause of action arose. This is wrong. The Appellate division has said

(a) Have to ; one has to give details, must say who the witnesses are and who they are going to testify about[159]

(i) Have to demonstrate how witnesses would be inconvenienced

1. Court will only look at non-party witnesses
2. **Experts** are a very low priority – if they are being paid, it isn't inconvenient for them
   a. If they are a mixed witness (for example a treating witness) they are to be treated as a fact witness)

(4) Mandatory Venue-changing procedure: With or before service of the answer, Serve with a 'demand to change the place of trial" Selecting an alternate country

(a) Standing: third parties may challenge, but there is some dispute as to whether they can really challenge

(b) Details of witnesses and why the venue should be changed

(c) Timing: Defendant makes demand to change venue[160] as of right

(i) 15 days later the defendant can move to have the action specified where he deems the action proper

157 CPLR 503(e)

In an action for a sum of money only brought by an assignee other than an assignee for the benefit of creditors or a holder in due course of a negotiable instrument, the assignee's residence shall be deemed the same as that of the original assignor at the time of the original assignment.

158 CPLR 510(3)

The court, upon motion, may change the place of trial of an action where:
1. the county designated for that purpose is not a proper county; or
2. there is reason to believe that an impartial trial cannot be had in the proper county; or
3. the convenience of material witnesses and the ends of justice will be promoted by the change

160 CPLR 511(c)

The defendant shall serve a written demand that the action be tried in a county he specifies as proper. … the defendant may move to cha
fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of
defendant.
Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days aft
an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.

(ii) if Plaintiff agrees five days later then no motion needed

(iii) if Plaintiff disagrees within 5 days and shows why is choice is proper, Defendant cannot proceed in target county (If the Plaintiff hasn't served such an affidavit, the Defendant can move in either county where the action is pending, or the county that the defendant has selected as the proper county)

(d) truthfulness: all these rules are waved, if defendant lies about where Plaintiff lives

b) forum selection clauses: forum selection clauses are important considerations, but the court has discretion

i) court can not dismiss when the parties contract contains a form selection clause and the action is over $1,000,000[161]

ii) consent to jurisdiction and choice of forum are different[162]

(1) NY courts won't transfer claims

iii) Differences between New York and federal system

(2) NY: will enforce unless there is something morally wrong

(3) Federal: forum selection clause is but one of the considerations

8) pleading

a) complaint:

i) Lawyer must sign each motion in ink

ii) must state some cause of action that if true entitles the Plaintiff to relief

(1) have to allege facts

(a) notice pleading: have to allege with enough particularity to give notice (as practical matter want to be as little notice of the facts as possible, but there may be some reasons for hyperbole)

(2) do not have to allege jurisdiction of the court

(3) facts allege subject matter jurisdiction and personal jurisdiction should be allege

(4) should state venue

iii) rule: must plead with enough particularity with respect to the incidents that were complained of

iv) exception: requirements of specific pleading

(1) with fraud must show how defrauded

(2) can plead with specificity – rather than just saying "on various dates" [163]

(3) Plaintiff can (if he wants) set fourth items alleged in UCC claim, and dates[164]

(4) **Contractors** have to plead that they are licensed contractor if they are a contractor and suing about something that is related to their work as a contractor

v) **Verification**[165]

(1) Plaintiff may, at any time verify the complaint

(a) Required verifications

(i) Complaints against an officer of a not-for-profit
es that it must be verified

161 CPLR 327(B)

Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

GEN OBLIG § 5-1402

…any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any
a choice of New York law has
- is a contract… of a tra
than one million dollars, and
- …agrees to submit to the jurisdiction of the courts of this state.

163 CPLR 3016(f)

Sale and delivery of goods or performing of labor or services. In an action involving the sale and delivery of goods, or the performing of lab
of materials, the plaintiff must set forth in
defendant by his verified answer shall indicate specifically those items he disputes and whether in respect of delivery or performance, rea

(ii) Itemization – if one attaches to the pleading a detailed description of everything that they did, under 3016f, if one does that, than the complaint has to be verified[166]

(iii) against co-obligor

(iv) art 78

(v) matrimonial complaints

(2) Verification is defined as a paragraph that says that the Plaintiff has read its complaint, and they swear that it is true

(a) If the defendant never appears and one is going to take a default judgment, one of the pieces of paper that are required is an affidavit that the allegations are true, but if you have a verified complaint, you don't need it

(3) When lawyers can verify the complaints

(a) If the client is in another county

b) Possible responses

i) Answer

(1) Possible answers

(a) Admit

(b) Deny: can deny large allegations of which some are true (whole paragraph)

(i) When a simple denial won't give notice to P as to what someone is saying, one needs to include it in an affirmative defense – e.g. a denial of debt, doesn't put Plaintiff on notice that the defendant is going to rely on the statute of limitations

(c) No knowledge – a.k.a. "DKI"

(2) General denial is discouraged

(3) Can contain affirmative defenses (e.g. no jurisdiction, etc.)

(a) Non-exhaustive list in statute[167]

(i) Arbitration and award[168]

(ii) illegality [169]

(iii) fraud[170]

(iv) *Res judicata* [171]

(v) Statute of frauds[172]

(vi) Statute of limitations[173]

(b) Don't have to give evidence that supports the defense

(c) Don't have to give too much information

(d) Don't have to give specific facts that support the affirmative defense -- and too much information (including statute relied upon might be wrong)

(e) Tort limitations under article 16 sometimes have to be alleged in answer (split)

(i) 2nd department says **no** b/c it isn't a defense

(ii) 3rd and 5th say that it is a matter of fairness

(4) counterclaim

(a) limitations on counterclaim

167 CPLR 3018

(a) Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, ex pleading is permitted they are deemed denied or avoided.

(b) Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of dan fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party c res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

(i) must be same parties (court may conclude that they are so unrelated that no jury could understand the issues)

(ii) capacity

1. can only counterclaim in the capacity in which the Defendant is sued
2. can only counterclaim against the Plaintiff in the capacity that they sued the defendant
3. exceptions: with a closely held corporation, general rule is that it has to be in the same capacity

(b) there is no such thing in New York (unlike federal court) as a compulsory counterclaim , however they can still be barred by RJ or CE

(c) Counterclaims: in the defendant's answer

(i) If a counterclaim is[174]

1. Transactional relationship
   a. Transactionally related: than the counterclaim will relate back for statute of limitations purposes to the date of the filing (or service in a lower court) of the action
   b. Transactionally related but timebared: counterclaim can be interposed regardless of timeliness, but only as a set-off or neutralization
2. No transactional relationship
   a. Not transactionally related: no relation back, must stand on its own
      i. May also be waiver of jurisdiction
   b. Not transactionally related but timebarred: out of luck

(ii) transactionally related to the claim of the Plaintiff, than the counterclaim will relate back for statute of limitations purposes to the date of the filing of the action[175] --

1. If it arises out of the same transaction, occurrences, or series of occurrences, the defendant can assert that counterclaim, but **only as a setoff** (this might have something to do with a jurisdiction question)

(iii) asserting a counterclaim may be waiver of jurisdictional, unless the act arises out of the same transactions as the original claim

(iv) defining transactional relations: New York courts interpret whether or not something is related "very narrowly"

1. examples
   a. automatically renewed contracts are separate contracts
   b. Breach of contract is not related to fraudulent inducement

(v) Unity of interest: If two defendants are related in interest, a counterclaim against one, will relate back to the complaint against the other

1. If one sues one of them on time, and the other one too late, the second one will relate backwards to the first

174	Time barred by statute	Not timebarred by statute
Transactional relationship	counterclaim can be interposed regardless of timeliness, but only as a set-off or neutralization	the counterclaim will relate back to the date of the filing (or service in a lower court) of the action
No Transactional relationship	out of luck	no relation back, must stand on its own (original pleading subject to defense)

175 CPLR 203(f)

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless (1) the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

2. Defining unity of interest – three standards of the *Brock* test. (all must be met)
   a. does the liability of the two defendant arise out of the same event
   b. united of interest – service on A amounts to notice to B (warning B to prepare his case)
      i. "rise or fall test" – neither one has a defense without the other
      ii. when there is vicarious liability[176]
   c. B knew or should have been brought against him as well as against A, but for an excusable mistake of identifying the parties – if there is no prejudice there is no need to show that the mistake is excusable[177]
      i. there is no prejudice there is no need to show that the mistake is excusable[178]
      ii. has to be a mistake, can't be a tactical decision
      iii. can't be a mistake as to law – has to be a mistake as to identity
3. simple joint tortfeasors are not included

(5) verification of answer required
   (a) Answer has to be verified any time the complaint is
   (b) actions involving fraud
   (c) when complaint alleges corporation didn't pay written debt instrument (but complaint doesn't need to verify)[179]
   (d) Where the answer pleads a defense not involving the merits the answer is required to be verified
      (i) Statute of limitations
      (ii) Statute of frauds
      (iii) Lack of jurisdiction

ii) Default
iii) Move to dismiss[180]
iv) Move for more definite statement [181]
v) Move to strike scandalous material: extends time to answer by 10 days
vi) Cross-claims (parties on the same side of the V)
   (1) Doesn't have to relate to the original cause of action, but courts might require it as a matter of equity
   (2) Responses to cross-claims
      (a) If there is no answer, the statute deems the cross-claim to be denied
         (i) **there is a rule only in the civil court of the city of New York** that unless a reply is demanded, no reply is necessary to a counterclaim, and the allegations are deemed denied
      (b) Otherwise general rules relating to claims apply

c) Amendments at the trial level[182]
   i) Amendment of complaint
      (1) As of right
         (a) Must be early enough in the action – within 20 days after service of a pleading[183]

(b) When answer must be verified. An answer shall be verified: 2. in an action against a corporation to recover damages for the non-payr other evidence of debt for the absolute payment of money upon demand or at a particular time.

179 CPLR 3020(b)(2)

183 See CPLR 3025(a) n. 226

(b) Or within any time Before the period responding to it expires[184]

(c) Or within 20 days of service of a pleading responding to it expires[185]

(d) Amendments to restating the name of the defendant

(i) If the defendant that one intended to sue is the defendant that was served, than one would be allowed to amend as of right no matter the statute of limitations, provided that they were notice[186]

(2) By permission

(3) By motion

ii) Amendment of answer

(1) As of right

(a) At any time before the period for responding to it expires

(b) Therefore, if there is an answer without a counterclaim, it is 20 days

(c) Within 20 days of service of a response to an answer

(2) By permission

(3) By motion

(a) Granted With liberality even if it has been a long time, unless the otherwise has some prejudice running from the delay

(i) Some times the defendant is made to pay the Plaintiff costs (since the time that they were on notice of sufficient facts)

(ii) Prejudice: court won't grant leave to amend if the new story is incredible

(iii) Can't change too story too much: Court won't grant leave to amend if all the preparation for the litigation has been over one theory, and new complaint is too far removed in time, and under a new theory[187]

(4) Timeliness: Second department and the 3rd department have said that waiting too long is a mere irregularity, but the others apply a strict rule

(5) Can't make up new facts at the end of the day and go to the jury

iii) Amendments of the complaint to conform to the proof

(1) If the jury wants to award more, can amend to conform to the proof (e.g. when the jury award more) – it is an abuse of discretion not to allow such an amendment[188]

iv) Complaint at appellate level

(1) Shouldn't matter what label the Plaintiff put on complaint, so long as the fact stay the same[189]

(2) Other cases: if it is a new theory (ie new constitutional theory) – ie making new law (Court of appeals is saying that you should not complain to the higher court when it hasn't been developed earlier)

9) motions to dismiss cause of action § 3211[190]

a) has to be made before the answer§ 3211[191]

i) If the case still exists after the answer to the motion to dismiss the answer is due ten days after service of a copy of the order that determines the motion

(1) Everyone must be served this motion because it won't be binding on them on them

b) Motions to dismiss stay discovery[192] -- if the judge wants it

i) as part of some judges rules some judges say otherwise

ii) a blanket rule might not be an exercise of discretion

c) grounds for motion to dismiss

i) defense is founded up documentary evidence[193]: must be made as a pre-answer motion or as an affirmative defense – if neither of these, than it is waved

(1) court could let you amend as per its discretion

(2) documentary evidence

(a) defense is based on a document that proves that the complaint is wrong

(b) affidavits don't count

ii) motion to dismiss for subject matter jurisdiction

(1) never ever waved[194]

iii) Motion to dismiss for lack of personal jurisdiction[195]

(1) Can be waived if one makes a motion to dismiss on any grounds, and doesn't include lack of personal jurisdiction

(a) Bad service

(i) if the basis to dismiss for lack of jurisdiction is that service is bad, -- and it is the only ground can make a pre-answer motion to dismiss, or can assert as an affirmative defense, statute requires that you make a motion for judgment on that defense within 60 days of asserting it, and if you don't, you have waived it

(2) Can be combined with other motions

(a) Idea is that if bad service is the claim, you want to know about it early

(b) Statute forces you to litigate at the beginning of the case

iv) party doesn't have legal capacity to sue[196]

(1) either as a pre-answer motion or as an affirmative defense in the answer

(2) foreign corporation not authorized to do business in NY, but is doing business regularly in New York it can't sue in New York courts—BCL § 1312[197]

(a) business is defined as (different than for jurisdiction) to be barred, the kind of business has to be a regular doing of substantial business in New York -- continuous activities that are essential to corporate business

v) *another action pending* in a court of any state or the US[198]

(1) may make such order as justice requires

(2) recent cases don't look at race to the courthouse, but look at this as more like a *forum non* issue

vi) arbitration and aware, collateral estoppel , discharge, etc., statute of frauds, statute of limitations, (sounds like summary judgment) [199]

193 CPLR 3211(a)(1)
Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: a defense is founded upon documentary evidence

194 CPLR 3211(a)2)
Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the court has not jurisdiction of the subject matter of the cause of action

195 CPLR 3211(a)(8)
Motion to dismiss cause of action: the court has not jurisdiction of the person of the defendant

196 CPLR 3211(a)(3)
Motion to dismiss cause of action. the party asserting the cause of action has not legal capacity to sue;

197 NY BCL 1312
A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless a [illegible] been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition

198 CPLR 3211(a)(4)
Motion to dismiss cause of action. there is another action pending between the same parties for the same cause of action in a court of an court need not dismiss upon this ground but may make such order as justice requires; or

199 CPLR 3211(a)(5)

(1) raised as a pre-answer motion or affirmative defense

(2) this is mostly based on intrinsic facts: same list that appears in pleadings dealing with 3018 with the affirmative defense

vii) with respect to a counterclaim that it might not be properly interposed[200]

(1) can only counterclaim in the capacity in which sued

(2) often happens when people waive counterclaims in a lease

viii) pleading fails to state a cause of action[201]

(1) claim detection: if a cause of action can be spelled out from the four corners of the pleading than no motion lies[202]

(a) *Rovello*: as long as the complaint states a claim on its face, the Plaintiff need not come forward with affidavits or other proof, unless the court elects to treat it as one for summary judgement, so if it doesn't elect it can't even consider the Defendant's affidavits

(i) note court must give notice if it is going to treat the motion to dismiss as a summary judgement motion[203]

(ii) *On the 4 corners of the complaint, the complaint states a cause of action, no matter how improbable we will deny the motion to dismiss*

(iii) If it fails to state a cause of action, we will look at the affidavits and exhibits – if they say things that are enough to make it a coa, we will deny the motion to dismiss. – if you havn't said the magic words,

(b) if the parties put in papers, they look at the papers. – court may consider papers[204]

(i) if the parties put in papers, court looks at papers

1. If the defendant succeeds in demonstrates that a material allegation of fact isn't so, than court will dismiss the complaint

(ii) *Guggeinhem*: if the defendant can demonstrate that an allegation is false, and without that certain things being true, there is no action, than the court will grant summary judgement

1. If the defendant submits papers, the court may elect to treat as a summary judgement motin

10) amended pleadings[205]

a) Lawyer must sign each motion in ink

b) if the amended pleading alleges something that is **transactaionlly related** to the original pleading, the date of the pleading relates back to the original pleading

c) if the original pleading **does not specify** the transaction, any amended pleadings do not relate back to the date of the original pleading[206]

d) leave to replead[207] -- are entitled to one before the answer is due

200 CPLR 3211(a)(7)
Motion to dismiss cause of action: the pleading fails to state a cause of action

Motion to dismiss cause of action. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds

203 CPLR 3211(c)
Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

207 CPLR 3211(e)

i) can only make one motion for it once for it

ii) can also make in the complaint

(1) whether the court can grant it sua esponte there is a split of authority on whether or not people ask for things, whether they should get it or not

iii) you can also amend as of right, while the motion is pending, and fix whatever they are saying is wrong

11) additional parties

a) joinder

i) permissive joinder of Plaintiffs

(1) Common of law or fact[208] -- are there too many individual issues? (if they are exactly the same is okay)[209]

(a) Would it promote efficiency

(2) prejudice to parties: e.g. whether or not the jury would infer that Defendant must have done something wrong by the very presence of a multiple Plaintiffs[210]

ii) permissive joinder of defendants: persons who that the claims is asserted, jointly, severally, or in the alternative[211]

(1) must come out of the same transaction or occurrence, or series of transactions or occurrences

(2) theories of permissive joinder of def

(a) **alternative liability** (Summer v. Tice-type case: where it is difficult to tell which *present* defendants committed the tort)

(i) but if not every conceivable tortfeasor could be brought before the court, alternative liability is not a proper cause of action[212]

(ii) if records exist to show which tortfeasor was responsible, can't join

(b) **concerted action** liability

(i) where parties agree to commit the torts (such as a drag race) and the Plaintiff is injured

(ii) examples

1. **concerted action must be illegal and notorious** lobbying together is not concerted action[213]

2. if you could show that the parties conspired to suppress information it may be different

(c) **conscious parallelism** liability: (by Michigan court): one parties does (or does not do something because the other doesn't – e.g. a business practice or peer pressure)

(d) **market share liability**: if the Plaintiff can prove that they were injured by a product, the companies will be responsible in the percentage that the sold in the national market at the time of the use of the product[214] -- even if Defendant can show that they are not the direct cause of liability (e.g. different pill used) than Defendant still liable, provided that they followed the same course (e.g. manufacturing at the same time) as the other defendants[215]

(i) needs to be a national market

Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. …

208 CPLR 1002(a)
Plaintiffs. Persons who assert any right to relief jointly, severally, or in the alternative arising out of the same transaction, occurrence, or series of transactions or occurrences, may join in one action as plaintiffs if any common question of law or fact would arise.

211 CPLR 1002(b)
Defendants. Persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise.

212 Iawitz (Des case)

(ii) needs to be a defined amount of time

(iii) Defendants to be the ones in control of the product

(iv) Needs to be common types of injuries

(3) evidence can come from any party against any other party

iii) permissive joinder of Plaintiff

(1) alternative liability: two or more persons don't know who as between them should sue as Plaintiff

(a) even if the claim of each is exclusive to the others, is allowed

iv) compulsory joinder: action will be dismissed if someone is missing and the court can't afford complete relief

(1) examples of incomplete relief

(a) if not joining the parties would subject parties others to prejudice and/or multiple liabilities (e.g. dispute over rescission of house payment that could leave one spouse subject to multiple liabilities)[216]

(b) if people's rights will be effected beyond their capacity as shareholders, they must be joined (e.g. housing cooperative)

(c) just because someone might an important witness don't make them a necessary party

(i) guarantors or factors are NOT necessary parties

(2) there is no *quid pro quo* for compulsory joinder

(a) cannot dismiss on the condition that the defendant agrees to be served in another jurisdiction[217]: court may allow action to proceed without the parties agreeing to be subject to jurisdiction – only when justice requires

(b) cannot be excused if the defendant agrees to waive a jurisdictional or statute of limitations

(3) criteria for excuse of compulsory joinder[218] -- when the court will allow a case to proceed when a defendant who is not subject to jurisdiction (or can't be joined) will not voluntarily enter the case

(a) Plaintiff has another effective remedy[219] -- if the action was dismissed on account of the non-joinder

(b) Whether prejudice which would accrue to the defendant or the person not joined

(c) Whether and by Who can have avoided the prejudice and could be avoided in the future

(i) E.g. If you could have done sued b4 the statute of limitations ran, but if you hadn't discovered the existence of the other party, or that party's role in the events, than that party is less likely to be compulsory joined

(d) What the feasibility of protective provision

(e) Whether an effective judgement could be rendered if the parties were not joined

ii) Misjoinder is **not** a grounds for dismissal[220]

When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the juris
shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, m
proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

217 CPLR 1001(b)

220 CPLR 1003

b) severance
   i) Court can drop a party on motion[221]
   ii) Court can drop a party sua esponte[222]
   iii) Court can drop at any stage upon such terms as may be just[223]
   iv) Court can require that an action be proceeded with seperately[224]

c) Consolidation of case: fusing two or more actions, and fusing them into one[225]
   i) Court will often deny as prejudicial
   ii) Order could include a change of venue
   iii) If they are pending in lower and higher courts, the removal is from the lower court to the higher court

d) Addition
   i) If you can act early, you can add a party (e.g. within 20 days or before responsive pleading)[226], otherwise, can act by stipulation[227]
   ii) Times to add party[228]
      (1) Leave of the court[229]
      (2) By stipulation of all parties who have appeared[230]
      (3) Once, withing 20 days after service of the original summons (as of right)[231]
      (4) At any time before the period for responding to the summons expires[232]
      (5) Within 20 days after service of a pleading responding to it[233]

e) Substitution of party at death – normally automatic dismissal, unless new party is not substituted in a reasonable period of time(note: time is only one of the criteria)[234] -- will look to whether the delay is reasonable an non-prejudicial[235]
   i) Plaintiff can ask the court to appoint a representative

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any
responding to it expires, or within twenty days after service of a pleading responding to it.

227 CPLR 1003

Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court all
without that party under the provisions of that section. Misjoinder of parties is not a ground for dismissal of an action. Parties may be adde
action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service o
at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it. Pa
the court, upon motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may or
party severed and proceeded with separately.

Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section.
Misjoinder of parties is not a ground for dismissal of an action. Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it. Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

225 CPLR 602

Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, m
issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
(b) Cases pending in different courts. Where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and
consolidate it or have it tried together with that in the supreme court. Where an action is pending in the county court, it may upon motion, remove to itself an action
pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court.

226 CPLR 3025(a)

233 See CPLR 1003 n. 227

234 CPLR 1005

(a) ... If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties.
(b) Devolution of rights or liabilities on other parties. Upon the death of one or more of the plaintiffs or defendants in an action in which t
survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on t
proceed.

235 See CPLR 1005 n. 234

ii) Death has to noted on action

iii) Anything the court does after death of the party is void

iv) Exceptions

(1) If the representative: if the logical representative is already an active party, the action isn't stayed and void

(2) If the dead party (e.g. governor, mayor, etc.) is only a nominal party

f) Class actions – article 9

i) Reasons

(1) pros

(a) Can aggregate small claims

(b) More manageable

(c) Can be litigation over what the appropriate class is

(d) Might reduce prejduice --as if one loses one case, there is chance of collateral estoppel problem

(2) Cons

(a) Court approval of settlements

(b) Notice to class

ii) Types of class actions

(1) Money damages

(a) Opt-in – cannot include non-residents (or people without jurisdiction), as they don't have the opportunity to opt-out

(b) Opt-out

(i) Must give non-residents the opportunity to opt out (due process issue)[236]

(2) Equitable

(a) Don't need to give parties the option to opt out (can still bind)[237]

iii) Requirements for certification

(1) Numerousity of Plaintiff's [238]

(a) Small claims on the part of many defendants may be a reason for it[239]

(2) Commonality of law and fact[240] --

(a) State courts are more conservative than the federal in certifying, if there are differing facts between the Defendants

(b) But if common issues predominate the state court will certify[241]

(c) Smoker and tobacco don't represent individual issues

(d) Note: under *Agent Orange*: Weinstein certified based on a common defense[242]

(3) Class representation: Adequate representation[243]

(a) Adequately funded

(b) Adequate counsel -- especially for people who didn't hire lawyers

(c) **Can't be titular Plaintiff** [244]

(4) Superiority -- given the totality of the circumstances, a class action is the superior way of resolving this lawsuit[245]

238 CPLR 901

One or more members of a class may sue or be sued as representative parties on behalf of all if:

i. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
ii. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
iii. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
iv. the representative parties will fairly and adequately protect the interests of the class; and
v. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a cla penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

iv) Note: under *Agent Orange*: Weinstein certified based on a common defense[246]

v) When members of the class are not subject to jurisdiction

vi) Class action against government (Don't need a class action because of *stare decisis*)

vii) Class action is still going to be permitted when the government entity has failed to purpose relief to protect the class, or if they are indigent

g) Intervention – as of right and permissive

i) As of right: representation of intervening party by the parties to the suit is or may be inadequate[247]

(1) No intervention as of right

(a) Where the is a claim that the defendant won't do anything is no intervention as of right

(2) Intervention as of right possible

(a) Where someone isn't technically bound, but they would be adversely effected (e.g. suit to end cars in NYC, the parking garages could intervene)

(i) Doesn't matter whether the binding law would be foreign or New York law[248]

(b) The parties are not really different parties

(c) Two arms of the city are suing each other to get judicial blessing [249]

(d) If the supposed intervenors are allegedly represented by the government[250]

ii) permissive[251]: common question of law or fact (or same transaction)

(1) won't allow

(a) insurance companies are generally not allowed to intervene, because the jury would find out that the defendant is insured. Insurance companies are still not bound by the outcome

(b) if there is a possibility undue delay, the court won't allow[252]

(c) merely a possibility of less money available at some point, if anyone could intervene

(2) will allow

(a) where the is a possibility of fraud (and low value), the interested parties will be allowed to intervene

(b) insurance companies can intervene in insurance cases where there is a question of the insurance company being held to pay twice and the insurer had no lien on the proceeds (infant settlement where all damages were for pain and suffering)

(i) but intervention by insurance will be denied where the insurer already has **a lien on monies**[253]

h) "third party practice" or "impleader"[254] – must be based on same theory of liability (e.g. tort, contract)

247 CPLR 1001(a)(2)

Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action: When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment;

251 CPLR 1013

...tted to intervene in any action when a statute of the state confers a right to intervene in the ... the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall cons... will unduly delay the determination of the action or prejudice the substantial rights of any party.

254 CPLR 1007

i) "it is the logical relationship of the claims which will determine whether the relationship is appropriate"[255]

(1) "if they could have been consolidated" is a rule of thumb

(2) statute says that it is a person who is or maybe liable for a part of the Plaintiff 's claim (fraud is defined as misrepresentation, knowingly false, made in order that someone relies)

(3) As long as there is a relationship between the claim that you are making and the claim being made against you

ii) Flavors of impleader Contribution and indemnification

(1) Contribution: where both parties contributed to the tort (ok if D2 contributed to D1's fault, but if D1 claims that D2 was the one at fault, there is no contribution)[256]

(a) Contribution only applies in tort

(b) A wrongdoer who settles can not have contribution sought against him[257]

(c) Can only implede people who had some duty to the defendant

(i) Can't implede successive tortfeasors

1. Dunks can't implede bars because *usually* bars under the dram shop act, don't owe a duty to drunks to keep them from hitting cars[258]
   a. Seller can seem contribution from drunk
2. Can't implede hospitals, unless they owed duties to the impleder
3. If it is a question of apportioning fault, can implede, but if it is a question of apportioning injury can't implede [259]
4. If someone "set it up" that something would happen, it is still one injury

(ii) Successive injuries

1. Malpractice is different than lack of informed consent
2. Referring lawyers 1st lawyer wants to implede 2nd lawyer for malpractice (even though successive independent tortfeasor)
3. Note: primary tortfeasor will be liable for everything, unless the secondary tortfeasor committing a different tort (even on review)

(d) Defining mutually exclusive v. contributory harm

(i) If it is mutually exclusive wrongs, can't implede

(ii) If it is two different harms, can't implede

1. Loss of legal rights is a different cause of action

(iii) A lawyer falling victim to a fraud (e.g. supposed to be guarding against it) can be impled by the fraudsters

(iv) Lawyers can be impead based on any duty they owed to the Plaintiff, even by those who cause the injury

(e) Statute of limitations for contribution is six years –

After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, by filing pursuant to section three hundred four of this chapter a third-party summons and complaint with the clerk of the court in the county in which the main action is pending, for which a separate index number shall not be issued but a separate index number fee shall be collected. The third-party summons and complaint and all prior pleadings served in the action shall be served upon such person within one hundred twenty days of the filing. A defendant serving a third-party complaint shall be styled a third-party plaintiff and the person so served shall be styled a third-party defendant. The defendant shall also serve a copy of such third- party complaint upon the plaintiff's attorney simultaneously upon issuance for service of the third-party complaint on the third-party defendant.

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxic resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procu person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exer

258 General Obligation Law 11-101(1) Dramm Shop Act

259 Contino v. Lucille Roberts

(i) contribution claim can be brought on a claim of either that the new party owed and breached a duty to either the Plaintiff or the Defendant – doesn't have to be that there was a duty breached to the party that wishes to implede – check this

(f) see damages section 5)a)i) above on p. 22

(2) Indemnification -- where there is a contract or operation of law such as vicarious liability –

(a) Difference between indemnification and 100% contribution is that someone else was at fault

(b) Auto accidents: Insurance company cannot implede driver of another car because it changes from the contract action against the insurance company, but it mucks it up

(c) Defendant can implede the third party on a different theory than the Plaintiff's theory: who is or may be liable for all claims against that defendant

(d) Settlement doesn't waive claims for indemnification

(e) **no such thing as partial indemnification** [260]

(3) can contract out of tort liability., but can't delegate non-delegable duties

12) Interpleader: claimants have to be subject to New York jurisdiction

a) Requirements

i) Claimants are subject to jurisdiction

(1) There is a process by which jurisdiction can be waved after a waiting period, which is complicated

ii) Must be a fund – not a possibility of a fund

iii) There is no possibility of multiple liability

b) Types of interpleader

i) Defensive Interpleader -is defined as where the Plaintiff sue and defendant puts money into a fund (bringing in additional parties)

(1) Describes situation, and what the def's should be made to put into their complaint

(a) S must serve all possible def, and serve all possible new defendant with the prior pleading

(b) Failure to serve earlier pleading is not jurisdiction[261]

(2) No need for court order

ii) Offensive Interpleader is defined as when Defendant's (stakeholder) puts money into a fund, in the hope a *res judicata* effect

(1) No need for court order

c) Interpleader is still okay, if the claims are not identical[262] -- as long as it appears that the claim are, or may be mutually exclusive (that only one of the claimants should prevail)

d) can't commence an Interpleader action unless both of the claimants are subject to the jurisdiction of the courts of NY

i) defensive interpleader

e) results

i) usual pro-ration of claims – rather than a race

13) Assignment to judges – now stays with same judge throughout. CCJP is defined as Compressive Civil Justice Plan

a) assignment is triggered when a *request for judicial intervention (RJI) is filed* (including a note of issue)

b) rules

i) Later judges were given choices for rules to use, and later the choices were narrowed, which made for uniformity –

ii) Uniformity is now an important thing in NY, which fills in the details in the CPLR

c) Guidelines for time

262 CPLR 1006(d)

It is not ground for objection to interpleader that the claims of the several claimants or the titles on which their claims depend do not have a identical but are adverse to and independent of one another, or that the stakeholder avers that he is not liable in whole or in part to any or

i) Expedited – 8 months
ii) Standard – 12 months
iii) Complex litigation: 14 months

d) Specialized parts
i) City part – where the city in a defendant
ii) Matrimonial parts
iii) Commercial part – competing with federal courts
(1) Six judges (separate clerks office)
iv) Auto part

14) Motions: are applications for an order see Order to Show cause 4)b)ii)on page 18

a) Ways of making motion
i) Notice of motion: "please take notice… on… I will ask the court for the motion"
(1) Notice of motion is the jurisdictional paper, other papers are the appendix to the motion (affidavits and memorandum of law)
(2) Motion must be served on adversary: Original must filed with office of the clerk, and clerk will set for motions on return date

b) What court reviews
i) Court usually only has the motion before them, not the whole file
ii) The court cannot take judicial notice just because it is in the court file

c) Service of non-cross motion paper and interlocutory papers
i) Lawyer must sign each motion in ink
ii) Times to respond: New York counts calendar days (Fed courts biz days) but rolls forward if on a day (AD4) the clerk's office is closed: judges may grant leave, and the parties can negotiate (not jurisdictionally deficient if return date is wrong)
(1) Excuse of failures: court usually always excuse failres to meet deadlines[263]
(a) Law office failure: now courts are reluctant, but can grant[264]
(2) Ordinary Basic times to respond (prescribed period)
(a) Notice of motion must be filed **eight days before it is to be heard**[265] **(13 if by mail)**
(b) Response is to be filed at least two days before it is to be heard[266] -- reply period doesn't change
(i) requires that all papers be filed with court before return date[267]
(ii) If the case still exists after the answer to the motion to dismiss the answer is due ten days after service of a copy of the order that determines the motion
(3) Extraordinary
(a) *if the notice of demands a response* in seven days
(b) notice must be served in 12 days[268] (17 if by mail)
(c) response seven days before[269] (won't change if by mail)

263 CPLR 2004
Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, u and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

265 CPLR 2214(b)
(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits shall be served at least seven day motion served at least twelve days before such time so demands; whereupon any reply affidavits shall be served at least one day before

267 N.Y.Ct.Rules, § 202.8(a)
All motions shall be returnable before the assigned judge, and all papers shall be filed with the court on or before the return date.

(d) reply affidavit is 1 day[270] (won't change if by mail)

(i) requires that all papers be filed with court before return date

iii) Add-on times for various types of service -- **note reply period does not change**

(1) If personally delivered to the lawyer or dropped at the office[271] or residence:[272] 0 days

(2) Mail: 5 days[273]

(3) Fax

(a) Not even the court can allow service by fax unless there is consent

(b) *the designation of a fax phone number in the address block shall constitute consent* – I fone includes the fax number in the address block of a paper served or filed

(i) we don't really know what an address block is, letterhead is not an address block (SC Rockland County)

(4) Overnight mail[274]: one day

(5) Electronic service[275] -- 0 days (will be repealed)

iv) Content of replies: can't be bare bones motions or replies (AD1, 2 says not allowed)

(1) Do not assume that you can put new material into the reply

v) Cross motion –[276]

(1) No supporting papers needed

(2) timing

(a) at least 3 days before the return date - could be mailed

(b) But AD2: if you are serving by mail, you have to have five days

(3) Need to serve on all parties

(4) Content: motion relief by some other party on opposing or same side

d) usually can only get what applied applied for as long as relief is not dramatically different from what was requested

15) discovery

a) interaction with disciplinary rules: disciplinary rules are not law, and **the only people you can't talk to are people who by the speech bind the corporation, or who conduct minds**[277]

---

271 CPLR 2103(b)(3)

if the attorney's office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box; or

272 CPLR 2103(b)(4)

by leaving it at the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorn residence unless service at the attorney's office cannot be made; or

273 CPLR 2103.2

by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at that attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper an the prescribed period; or

274 CPLR 2103.6

night delivery service at the address designated by the attorney for that purpose or, if non last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed overnight delivery service for overnight delivery prior to the latest time designated by the overnight delivery service for overnight delivery. prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the p delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state; or

275 CPLR 2103.7 -- temporary

by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts consent. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronica

276 CPLR 2215

At least three days prior to the time at which the motion is noticed to be heard, a party may serve upon the moving party a notice of cross without supporting papers. Relief in the alternative or of several different types may be demanded; relief need not be responsive to that de

b) when representation begins and who is represented
   i) notice of filing a claim doesn't trigger representation of city employees can talk to some state employees, if they aren't represented by counsel (if the atty general hasn't appeared after a notice of intention to file a claim)
   ii) being an employee of a party doesn't make you an employee unless it is a corporation

16) attorney-client privilege
   a) absolute (not discoverable or admissible unless waived)
   b) only applies to communications, not to facts
      i) only giving of legal advise
   c) has to be intented to be confidential
      i) billing issues are not privilidged
   d) work-product privilidge (has to be something unique to what lawyers do)
      i) lawyer goes out and finds witnesses – not work product, has to reflect legal analysis and strategy
   e) qualified privilege in material created for litagation
   f) material created for litigation is a qualified privilege. – if it is reproducible, it is privileged(e.g. grossly unfair) -- major area is in surveillance tapes
      i) cases: only **applies to things intended to be used at trial** needs to be discoverable (as they are entitled to investigate it
         (1) **Plaintiff can only get it until after they have been deposed** (so they can't tailor it)
      ii) Outtakes are discoverable -- but there is a question of when outtakes are discoverable
         (1) Outtakes are discoverable on demand so say Two AD divisions say that by leaving out the provision about "when" information compelled by a lawyer, but not entered into evidence, is obtainable on demand

17) summary judgement
   a) court doesn't decide factual issues, looks to see whether or not there are any factual issues
      i) Stupid defendant tricks
         (1) negligence is an issue of fact unless no rational juror could conclude otherwise (e.g. not as issue of fact if the Defendant did something *really* stupid)
         (2) *Attractive nuisance cases* where the Plaintiff does something really stupid and sues anyway are not issues of fact
      ii) allegations made in the affidavit which contradict a prior sworn statement are incredible as matter of law (oh yes, I remember what happened now)
      iii) affidavits by lawyer don't count as facts (but can be used to organize)
         (1) affidavits by lawyer don't count (because they wouldn't be admissible as testimony)
            (a) affidavits that organize are okay
         (2) only can put in events that the attorney witnessed
      iv) definition of "safe" (storage) was a matter for jury – even if two juries could come to opposite conclusions on what a safe is
   b) if the court elects to treat a motion to dismiss as a motion for summary judgement must give notice
      i) defining adequate notice
         (1) COA: *Malovin v. Rosahoo*: 1st department right because even when the court doesn't have to give formal notice, and it is clear and the parties recognize
            (a) if it is clear and the parties recognize that there are only legal issues, than the court doesn't have to give notice
               (i) if both sides ask, the court doesn't have to give notice
            (b) if both sides lay bear their proofs, the court doesn't have to give notice
   c) timing

i) earliest: only after issue has be joined (readied for trial).

(1) with respect to the complaint: Motion can't be made until there is an answer – different than federal system

(2) court can a maximum date, that is no earlier than 30 days after the filing of the note of issue[278]

(2) exceptions: when Plaintiff can begin case on motion for SJ[279] in lieu of their complaint

(a) case begins with a motion for SJ

(b) subject matters that cases can be on motion for summary judgement

(i) can only be made upon

1. judgment

a. if something was fully litigated, can file transcript rather than judgment

2. instrument for payment of money only

a. generally speaking this is commercial paper

b. instrument for payment of money only is defined as it is something where the only thing that the Plaintiff has to do to establish a prima facia case and prove that the defendant hasn't paid

i. if the notes themselves are promises to pay they can be handled by Sj, but if they are subject to a large agreement, than they are not allowed

ii. separation agreement is not allowed

iii. court of appeals want to make it easier

c. if there is proof required that any legally imposed duties (ie lawyer's duty to work for a fee) than it won't fall under 3213

(3) if motion is being made w/ respect to the counterclaim, it can't be made until there has been a reply to the counterclaim

ii) latest

(1) judge can set a last date for motions for summary judgment that cannot be earlier than 30 days after the note of issue is served and filed (note of issue says the case is ready for trial, and puts it on trial calendar)

(a) if the judge doesn't set it, the default is 120 days after note of issue is filed

(2) late motions –

(a) can file motion of *late with leave of the court on [illegible]ause shown*

(i) some judges define good cause to relate to why the motion is late

(ii) other judges define good cause to relate to the merits

(b) [illegible] court can allow late depositions after the note of issue

b) number

i) statutory limit on the number of motions for summary judgment, but frowned on

278 CPLR 3212(a)

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

279 CPLR 3213

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise

ii) exception: if made at beginning of case, can make it later (e.g. new discovery)

c) burdens in summary judgement : on moving party show the absence of material fact

i) when the moving part fulfills his burden, the opponent establishes typically that there is a dipute as to the fact

(1) Won't decide credibility issues [280]

(2) Bald, conclusory assertions, even if believable are not enough[281]

ii) Opponent of summary judgement must lay bare his proofs

iii) evidence considered

(1) inadmissible material

(a) evidence precluded by the Dead-man's statute can be used **to oppose** the motion things that are inadmissible due to a dead man's statute can be put in an affidavit[282] -- but evidence precluded by the Dead-man's statute can't be used to support the motion for summary judgement

(b) hearsay: (Might be able to use to oppose motion for summary judgement)

(i) general rule is that if you can't testify to it at trial you can't put it in

(ii) if you identify who the source is in the affidavit, and you can explain why you can't get an affidavit from the source, it is enough to defeat SJ, but not to get it

iv) who can be granted summary judgement – motion for summary judgement searches the record

(1) either party can be granted summary judgement

(2) a decision to grant summary judgement, may mean a decision to grant it to the other partys

18) ends of the action

a) dismissal for failure to prosecute

i) Statute requires that you serve the defendant with a demand that they reseume the case and place in on the trial calendar in 90 days

(1) If they fail to respond to the demand by placing the trial calendar in 90 days, one can move to dismiss

(a) Have to show that there was an effort to serve the lawers

(2) Court **may** dismiss -- doesn't have to

(a) Court of Appeals says that it only means that it is in the power of the court to dismiss

ii) If it is already on the trial clalendar, then if the Plaintiff goes to sleep, you can apply without giving the Plaintiff 90 day notice

b) Discountinuance

i) Plaintiff discontinuing action:[283]

(1) Can do as of right at the beginning of the case by the earlier of the time at any time before a responsive pleading is served, or within 20 days of a service of the pleading (20 days goes by after service, with no answer). There is an absolute right if done within that time period

ii) The right is absolute, and It has caused injustice in the matrimonial area – and the TROs will not be in effect anymore

(1) Defining who is a party to the action

(a) AD4: Plaintiff sues Defendant, and Defendant impledes 3rd party. Defendant and 3rd party defendant reach agreement, and defendant wants to

283 CPLR 3217(a)(1)

(a) Without an order. Any party asserting a claim may discontinue it without an order
1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court; or

discontinue the third party complaint. If it isn't done as of right, it has to be a stipulation signed by the attornies of record for all parties. The Plaintiff didn't agree. AD4 holds that it means that the Plaintiff isn't a party to the proceeding against the 3rd party defendant

iii) Can do by consent

iv) Can do by court order

19) settlement: after Plaintiff settles with one party, the remaining defendants have to pay the judgement, but they get deducted from that the judgement the **larger** of the **amount that that settling defendant settled for** or the **amount that the jury ascribes as settling defendant is responsibility** [284]

a) methodology

i) if a tortfeasor settles in good faith, the verdict against the non-settling totfeasor will be reduced by whichever of these things is highests

(1) the amount stipulated in the release

(a) parties can stipulate out of limitations on settlement (15-108 limitations)

(2) the consideration paid in the release

(a) multiple defendants

(i) must aggregate settlement amount of defendants who settle[285]

1. if for some of the settlers the settlement figure is higher than their pro ratta share of the verdict, and for others the opposite, the could court should reduce the verdict by the higher of the **aggregate all of the settler's pro ratta shares** v. **settlements**[286]

2. deduct Plaintiff's share after doing aggregation[287]

(ii) if one defendant settles long before trial, the jury is not asked to ascribe fault to them[288]

(b) complex settlements: court looks not at what the Plaintiff is to pay, but what they have paid

(3) the settling torfeasor's equitable share of the damages as found by the trier of fact

ii) d-max[stc*d,c] where d is damages as found by jury, stc is settling tortfeasors equitable share as found by jury, and c is consideration paid by settling tortfeasor

b) defining settlement for purposes of allocation

i) post judgments are not subject to 15108

ii) post-verdict settlement don't count

iii) agreement as to responsibility, but not amount of damages (waiting for jury) – do count

iv) high-low (for example capped and floor – no less than and no more) is a settlement and 15108 does count

20) making settlements binding – confession of judgement [289]

a) If one goes into court with a confession of judgment and the court will enter judgment

b) Payment is only a defense to execution of a judgment that is confessed: Just Can't execute on the stuff that is already paid – but the judgment still exists

21) upon loss of the motion

a) motions that can be made

i) motion to resettle the order – technical error that makes it impossible to comply with decision

284 General Obligation Law 15-108(a)

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(1) Can be made on appeal

(2) Can't be used to effect substantive change[290]

ii) Motion to reargue -- If the judge was wrong, and the decision was stupid,

(1) Not to reharsh the old argument

(2) If it is a motion to re-argue, the denial of a motion to reargue is not appealable as of right

(3) Time: CPLR: Siegel – court should read in 30 day limit (but still open question)

(a) Caselaw said that the court had the power to overlook in the interest of justice

iii) Motion to renew – can be made any time:[291] where there is a change in the law

(1) 2221 d/e – enacts the common law[292]

(2) where a motion is truly a motion to renew, the order that decides that motion is appealable – regardless of outcome

22) Appeals – in State system almost everything can be appealable

a) Appeal of right of virtually every order

i) If no order can ask for a writ of mandamus (art 78) – order had to be given to render things appealable

ii) Judges have the obligation to issue an order that can be appealed (on the request of any party)

(1) Can't deprive of the right to make a motion

(2) But some judges still have rules saying that a request has to be made

iii) Defining decisions and orders

(1) If it doesn't say "order" it is a decision, which needs to be ordered. A decision is not binding.

(2) "settle order" – it won't be an order until someone settles one – they want the winning side to prepare a formal document called an order

(3) procedure for settling orders

(a) time[293]

(i) where the settlement is directed by the court, it must be submitted within 60 days

(b) Need to give five days notice of a "settlement of order"

(c) If served by mail (settlement order) 10 days notice

(d) abandonment of orders: Failure to submit the order in 60 days shall be deemed to be an abandonment of the motion or actin unless for good cause shown

(i) Abandonment – does it result in an ungranting of the motion (e.g. the motion for summary judgment should be denied)

1. because there was an abandonment there will be a reconsideration of the motion

a. AD2 if it is discretionary, it will be treated as if it is made for first time

b. AD1: criticized – go to trial on SJ

(4) Notice of entry

(a) Need to include that the order was entered by the clerk of the court.

(i) If you don't include the right date, the appellate clock doesn't start to tick

292 CPLR 2019(a)

A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:
1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and
2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.

293 N.Y.Ct.Rules, § 202.8(a)

Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be presented to the judge who signed the decision, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

(b) If you have a signed order, a copy of signed order needs to go to adversary with an **notice of entry** – which makes it effective

(i) The date that matters for compliance and appeals is the date of service on the loser -- Notice of appeal filed within 30 days of service

a. If served by mail 35 days

b. If served by overnight mail 31 days

c. If by fax (without consent) 30 days

b) If there is no record, but there is an order

i) AD1: appealable

ii) AD2: not appealable order

23) Sanctions

a) Sanctions for maintaining frivolous defense – not contempt of court[294][295]

i) Procedure

(1) A request for sanctions is not a motion, but a suggestion

(2) No counterclaim

(3) Parties are entitled to heard only if the court does not have direct knowledge of the events

(4) Criteria the court uses

(a) There are decisions where the court has said in deciding the amount of sanctions (not costs), they will take into consideration how experienced the lawyer is, how much money they are making and whether they are partner or not.

(b) A young associate is less culpable

ii) Sanctions for slap suits.

(1) SLAP suit: suing for defamation to drop the lawsuit if they drop the opposition.

(2) Note, conceivably, if commence a lawsuit and the other side moves for summary judgement and they win, I could be subject to sanctions.

iii) Usually lawyers have to pay sanctions, but this depends on other factors

iv) Limits on sanctions:

(1) The rule provides that sanctions cannot exceed $10,000 for incident of specific conduct (could be multiple incidents)

(a) Sanctions go to fund

(2) Up to 25k for failing to appear at a meeting[296]

(3) Can award costs : -- go to victim

(a) in the amount that the victim of the frivolous conduct can prove that it costed them. Sanctions = is to deter; Cost = what can prove it will cost them.

b) Court doesn't have inherent power to sanction unless given by the legislature[297]

24) Default judgements

a) Making

iii) If seeking damages that are a "sum certain" or a sum which by calculation will be made certain, all you have to do is to assemble to the appropriate papers list of papers is in statute – can go to clerk

(1) Sometimes that the clerk is far behind

iv) If it isn't something that is certain, then the court can't enter judgment, you have to do it my motion

(1) Court may issue a default than and then have an inquest (one-sided)

b) vacating[298]

i) excusable default – has to be made within 1 year of copy of judgment (and writen notice) or order

(1) Even though service may have been proper, there was no actual notice until it was too late

(a) E.g. delay in service from the secretary of state

(2) Need to also to a meritorious defense

(a) Newly discovered evidence would have produced a different result, and which could have been discovered in time

ii) If the claim is that they were never served, you don't need to show an excuse, nor the merits

25) Damages

a) Methodology of tort reform

i) Tort limitations under article 16 sometimes have to be alleged in answer (split)

(1) 2nd department says **no** b/c it isn't a defense

(2) 3rd and 5th say that it is a matter of fairness

iii) Juries apportion loss without regard to impecunious defendants[299]

(1) Liability is defined as money responsible for

(2) Culpability is defined as percentage of fault

(3) If there is multiple torts there might an adjustment[300] -- courts split

(4) No exceptions for violence, if the actual tortfeasor isn't being sued (– **must plead in complaint if there is an exception to tort reform** (article 16)[301]

iv) things that are not subject to tort reform

(1) Economic loss (e.g. pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss, wrongful death) – joint and several liability as usual

(2) Intentional tort damages don't count[302]

(a) **Note: exception to tort reform** --Doesn't apply to any person held liable to auto accident cases (70%)Exceptions to exception; where **the defendant is a police car or a fire truck**

(i) Will apply to the fire truck

(ii) Won't apply to the ambulance

v) Non-economic loss (e.g. pain and suffering) – in personal injury claims

(1) When apportioning liability subtract the assignment of culpability that the Plaintiff is held culpable for

(2) If the defendant is found to be 50% or less liable (don't count Plaintiff's share of fault), then severally liable for his share in damages

(a) Fault of Parties not a party to suit to a lack of personal jurisdiction (can get court-ordered service), give due diligence is not subtracted

(b) (if P can get jurisdiction of T1, but not T2, T1 must carry T2's share) -- doesn't actually have to be a part the case, **just have to be shown that he is subject to jurisdiction** (this will help to get T1's relative share down)

(c) if T2 has settled, he is insulated

(i) If the other tortfeasors have been sued by the Plaintiff, the Defendant has a right of contribution[303] -- **note: doesn't include indemnification for negligence**

302 CPLR 1601.5
The limitations set forth in this article shall:5. not apply to actions requiring proof of intent.

303 CPLR 1401
Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers' compe compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the sam property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rend from whom contribution is sought.

1. Sued tortfeasor can cross-claim, counterclaim, or impldede[304] for the amount over and beyond the amount paid[305]

(ii) Methodology of tort reform – must plead in complaint if there is an exception to tort reform (article 16)

1. Determine total amount of damages that are covered under section (e.g. non-intentional tort damages)[306]

a. Fault of Parties not a party to suit to a lack of personal jurisdiction, give due diligence is not subtracted

2. Determine percentage of culpability for all Plaintiff's and defendants (e.g. ask jury) – **in determining whether or not someone's fault is above or below 50% do not count Plaintiff's fault**

a. If the defendant is found to be 50% or more liable (don't count Plaintiff's share of fault), then jointly and severally liable for his share in damages

i. Fault of Parties not a party to suit to a lack of personal jurisdiction (can get court-ordered service), give due diligence, is not subtracted (if P can get get jurisdiction of T1, but not T2, T1 must carry T2's share) – doesn't actually have to be a part the case, just have to be shown that he is subject to personal jurisdiction (this will help to get T1's relative share down)

ii. if T2 has settled, he is insulated

Index

304 CPLR 1403
A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action.

305 CPLR 1402
The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.