

NY PRACTICE

I. Subject Matter Jurisdiction ⇒ the power of court to adjudicate particular types of claims

A. Competence

1. Supreme Court (SC) – the only court that has *general (can hear anything), original subject matter jurisdiction*
 - a. Branch per county – the particular county is a question of venue
 - b. If any one of the Supreme Court has jurisdiction, they all do
2. SC – the only court in NY with full **equity jurisdiction & unlimited monetary jurisdiction** Other civil courts have limited monetary jux.
3. Non-residency of the parties in NY & the lack of relationship of the claim to NY do not deprive the court of jurisdiction – BUT, the court has discretion, upon D’s motion, to dismiss an action because of **forum non conveniens** (⇒ the power of court, upon D’s motion, to dismiss an action because convenience require that the action be heard in a different state)

B. Exceptions to Supreme Court’s General Jurisdiction

1. Federal law confers exclusive jurisdiction on federal courts – (i) bankruptcy; (ii) patents; (iii) copyrights
2. Claims for money damages in tort or contract *against the State of NY* (not government subdivisions like Counties, Cities, School Districts)– those cases must be brought in the NY Court of Claims (if there are 2 Ds, one of which is the State of NY, you might have to bring case in 2 courts)

C. The Supreme Court has Exclusive Subject Matter Jurisdiction Over:

1. *Matrimonial actions (divorce, separation annulments)*
2. *CPLR Article 78 proceedings* – judicial review of administrative actions
3. *Declaratory judgment actions* (⇒ judicial declaration of the rights and obligations of the parties to an actual controversy before one of them engages in conduct that could cause liability)

D. Other Courts – other courts are characterized by limited monetary jurisdiction (not covered in BAR)

E. Appeals process: Supreme Court → Appellate Division → NY Court of Appeals

II. Statute of Limitations (S/L) ⇒ fixed period of time within which a lawsuit *must* be commenced

A. General Concepts

1. S/L – affirmative defense, must be raised by D; **begins to run when the cause of action accrues**, meaning, when the injury occurs
 - a. Personal injury & property damage – general rule is date of injury (not discovery of the injury)
 - b. Breach of contract – general rule is date of the breach (not discovery of the breach)
 - c. NOTE: the S/L for an infant’s injury in utero begins to run from date of birth
2. Satisfying S/L – action must be commenced no later than the last day of the prescribed period of limitations:
 - a. *Supreme & County Courts* – process (summons & complaint, or summons with notice) must be *filed* on or before the last day of S/L
 - b. *All other courts* – process must be served on D on or before the last day
3. Computation of S/L (& any other time period in the CPLR) – exclude the day upon which the triggering event occurs & begin counting the next day (or business day). Accident June 1, 2000. Last day for commencing is June 1, 2003 for SOL.
4. *Important periods of limitation:*

<i>Period</i>	<i>Important Claims</i>	<i>Comments</i>
20 years	Action of Judgment	
10 years	(1) Action to recover realty	Same period as adverse possession
	(2) action by crime victim against convicted D	Period runs from date of conviction – victim may also sue for damages for up to 3 years from the discovery of D’s receipt of money or property from any source
6 years	(1) Non-UCC contracts	Accrual on date of breach regardless of P’s lack of knowledge
	(2) Indemnity & contribution	Accrual on <i>date of payment</i> for which indemnity or contribution is sought
	(3) Fraud	P may sue within 6 years of commission of fraud, or 2 years of discovery (actual or imputed), whichever is longer
	(4) Equity actions (rescission, reformation, accounting)	

<i>Period</i>	<i>Important Claims</i>	<i>Comments</i>
4 years	UCC Contracts (Article 2 – Sales)	Breach of warranty claim accrues upon tender of delivery
3 years	(1) Personal injury based on negligence and strict products liability	Personal injury and property damage claims accrue on date original injury occurs.
	(2) Property damage (including conversion and replevin)	No discovery rule applies except in cases of toxic substances.
	(3) Professional malpractice (other than medical malpractice)	
2 ½ years	Medical, dental, and podiatric malpractice	Cause of action generally accrues on date of malpractice. Exceptions for <i>continuous treatment</i> (period runs from end of treatment) & “foreign objects” (one year from discovery if insufficient time under regular rules).
2 years	Wrongful death. (statutory cause of action in favor of decedent’s distributees where D’s tortious conduct caused death; damages limited solely to distributees’ economic losses)	Two years runs from date of death, except it must ALSO be shown that statute of limitations on decedent’s underlying personal injury claim had not expired on date of death.
		If criminal proceeding is brought against D, executor gets optional and independent one-year period from termination of criminal proceedings (regardless of whether conviction or acquittal)
1 year	Intentional torts to the person (e.g. assault, battery, false imprisonment, defamation)	
4 months	Article 78 proceedings	

B. Medical Malpractice

- 2 ½ year S/L from the date of the malpractice – applicable to doctors, dentists, podiatrists, nurses & hospitals (including respondeat superior vicarious liability claim against the doc and hospital)
 - BUT, not every claim involving a hospital is medical malpractice – it might be negligent hiring (ordinary negligence = 3 yr SOL starting on the date of the injury), etc.
- EXCEPTIONS to the 2 ½ year S/L:
 - Continuous treatment doctrine** – If Doc continues to treat patient, P gets 2 ½ years from the termination of treatment (must relate to the same original condition that gave rise to the malpractice in the first place)
 - Foreign object doctrine** – if the doctor is responsible for introducing a foreign object (i.e. clamps, sponges, but NOT chemicals, prosthetic devices, or fixation devices like pacemakers) into P’s body and leaves it behind, P has option of:
 - 2 ½ years from date of operation; OR
 - 1 year from date P discovers**, or, with reasonable diligence, should have discovered (whichever period is longer)
 Notes: a. Cancer is not a foreign object; b. if med mal with pacemaker, etc, you have 2 ½ yrs from installation.

C. Other Professional Malpractice

- 3 year S/L for malpractice
 - S/L runs *from the termination of the particular services in which the malpractice occurred* (for architects, - date the building was completed, for accountants & attorneys - date of delivery of work product to client)
 - NOTE: for professional malpractice, 3 yr S/L is the same regardless of the underlying theory (tort or contract)
 - Personal Injury Plaintiff gets 3 yrs from the date of injury, regardless of when the building was completed
- Suing for personal injury more than 10 years after building was completed**
 - P must serve *notice of claim* on the architect or engineer at least 90 days before suit
 - P may obtain discovery from potential D during the 90 day waiting period, AND
 - After suit is commenced, D may move to dismiss & *the burden will be on P* to make an immediate evidentiary showing of “substantial basis” to believe D’s negligence was proximate cause of injuries

D. Products Liability

- Causes of actions for defective products**
 - Negligence** – 3 year S/L, runs from date of injury, as against all Ds in the chain of distribution
 - Strict products liability** – same as for negligence
 - Breach of warranty** – 4 year S/L (under UCC), runs from date of each D’s delivery or sale of product (consider for each when (i) manufacturer sold to wholesaler, (ii) wholesaler sold to retailer, & (iii) retailer sold to consumer)
 HYPOTHESIS: Assume Manufacturer sold a scooter to Wholesaler in 2000, Wholesaler sold it to Retailer in 2001, Consumer bought it in 2002, and it injured Consumer in 2004. Consumer's negligence and strict products liability claims will expire against all Ds in 2007 Consumer's breach of warranty claims expire: Against Manufacturer – 2004; Wholesaler – 2005; Retailer - 2006
- Indemnity & contribution claims**

- 6 year S/L, runs from date of *actual payment of the judgment* for which indemnity or contribution is sought
HYPO: Assume Consumer is injured by a product in 1996. Consumer gets a judgment against Retailer that is paid in full on May 1, 2004. Retailer's claim for indemnity or contribution against Wholesaler and/or Manufacturer will expire after May 1, 2010.

3. 'Discovery rule' in cases of exposure to Toxic substances

- a. "Toxic substance" – any inherently harmful toxin that has latent or slow-developing effects (asbestos, HIV)
- b. *Exposure* – includes any sort of assimilation into one's body or property, including implantation
- c. 3 year S/L begins to run when the *injury is discovered* by P, or should have been discovered with reasonable diligence, whichever is earlier.
HYPO: Assume Dr. Kevorkian injects some medicine into Joe on May 1, 2000. Cancer, traceable to the medicine, is first discovered by Joe on July 1, 2005. Joe's action in negligence and/or strict products liability against the manufacturer of the medicine expires after July 1, 2008
- d. NOTE: the discovery rule is inapplicable to claims of medical malpractice, where the S/L is 2 ½ years
HYPO: Thus, Joe's action in medical malpractice against Dr. Kevorkian expires after Nov 1 2002.

E. Tolls & Extensions ⇒ extends the applicable period of time (S/L) within which a cause of action may be brought

1. D's absence

- a. D wasn't in NY when cause of action accrues – S/L doesn't begin to run until D comes to NY; OR
- b. D is in NY when cause of action accrues, but D thereafter leaves the state & is continuously absent for at least 4 months – then toll applies to the entire period of absence (i.e. gone for 6 months = 6 month toll)
- c. UNLESS, P has a basis of personal jurisdiction over the absent D, such that process could be validly served on D outside NY (i.e. Long Arm Jux), the toll for absence **IS NOT** available

2. P's infancy or insanity (legal disability)

- a. Infants (under 18) or insane P – may sue within regular S/L through a competent adult representative, OR get the benefit of a toll (until the disability is removed e.g. infant reaches 18 or insanity ends)
 - (i) Original S/L was 3 or more years – 3 year S/L from the removal of disability
 - (ii) Original S/L was less than 3 years – original S/L
- b. Exception – 10 year maximum from date of accrual applicable to
 - (i) medical malpractice for infants
HYPO: Assume 3-year-old infant is injured by medical malpractice on January 10, 2000. Claim against doctor becomes time-barred after January 10, 2010.
 - (ii) insanity - Claims of insane ps, regardless of nature of cause of action, become time-barred after 10 years from date of accrual, when relying on toll for insanity.
- c. Caveat: In medical malpractice cases, the continuous treatment toll and infancy toll are separate tolls. Do not add the tolls together when computing the statute of limitations. If both tolls are applicable, run each toll separately and determine if the action is timely under either toll.
HYPO: Assume Dr. Seuss commits medical malpractice on three-year-old Bartholomew on January 10, 2000, and continued to treat him for the same condition until January 10, 2012. Bartholomew's action is timely up through July 10, 2014. Under the infancy toll, the action expired in January 2010. But the continuous treatment toll operates independently to give any eligible patient, including an infant, up to 2½ years from termination of the treatment. So if both infancy and continuous treatment tolls both apply, you run each separately, and see which is better.

3. Tolls for death

- a. *Potential P's*:
 - (i) **Wrongful death cause of action** ⇒ tort claim for the pecuniary damages (economic loss only) of decedent's statutory distributees (surviving spouse, children, etc.)
 - (a) S/L is 2 years from the date of death, but
 - (b) Must show the at the time of death, decedent's underlying personal injury claim would be timely.
 - (ii) **Survival claim** ⇒ any cause of action (not limited to torts) P could've brought if he were still alive; recoverable damages include damages incurred by P prior to death (e.g., pain & suffering)
 - If, on the date of death, the underlying claim would still be timely, then get either (i) time remaining on the S/L; or (ii) 1 year from the date of death, whichever is longer
HYPO: Assume auto accident on June 1, 2002, in which B's negligence caused R's eventual death on May 1, 2005. The last date for timely commencement of an action for R's pain and suffering is May 1, 2006. The last date for timely commencement of an action for R's wrongful death is May 1, 2007.
 - b. *Potential D's* – if D dies at any time before S/L expires, 18 months are always added to relevant S/L
- 4. Effect of Dismissal – 6-month Grace Period**
- a. If NY action (NY courts or NY federal district court) is timely commenced, but is thereafter dismissed before trial, AND at the time of dismissal the S/L has either expired or has less than 6 months remaining, P gets 6 months from date

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- of dismissal to re-file the same action & serve process on the same D
- b. NOT applicable if:
- (i) Dismissal on the merits
 - (ii) Voluntary discontinuance by the P (he dropped the lawsuit)
 - (iii) Dismissal for P's neglect to prosecute (P dragging things out)
 - (iv) *Dismissal for lack of personal jurisdiction* – NOTE: distinguish from dismissals for lack of *subject matter* jurisdiction, in which case P does get the 6 month grace period
HYPOS: If the dismissal was due to lack of diversity of citizenship, you get 6 month grace period. If the dismissal was due to a defect in the form of the summons – NO. Or due to improper service of process - NO Or due to out-of-state service in a case where long-arm jurisdiction was lacking – NO.

F. "Borrowing Statute"

1. When a cause of *action arises outside NY*, a choice of law problem is presented if the S/L of the other state is different from that of NY –intended to *prevent forum shopping by non-resident P's seeking longer S/L in NY*:
 - a. Non-resident P of NY when out-of-state claim arose – NY will apply the S/L of the state where the cause of action arose IF it is *shorter* than that of NY. If longer, NY will apply the NY period.
 - b. Resident P of NY when out-of-state claim arose – NY will *always* apply the NY S/L, regardless of other state's S/L
2. Based on *residence* and NOT domicile

III. Jurisdiction over the particular case

A. Overview

- 3 additional jurisdictional elements must be satisfied in order for a court to render a valid judgment (i.e. a judgment can be enforced in NY & entitled to full faith & credit in other states):
 - a. *Proper commencement of the action*
 - b. *Valid proper service of process on the D*
 - c. *Proper basis of jurisdiction over the person or property involved in the action*

B. Commencement Procedures (if Q says "duly commenced", ignore)

1. Lower Civil Courts –action is commenced by *proper serving of process on D*
2. Supreme Court & County Court – action is commenced by *filing* process with the court clerk (i.e. County Clerk, not the Supreme Court Clerk) & payment of a fee (purchase of an index number).
3. *Service of Process* on D
 - a. Process must be served on D *within 120 days* of filing with the court
 - b. Court has discretion to extend the 120 days upon request (i) for good cause (P has been exercising due diligence), or (ii) the interest of justice (whatever the court feels – i.e. Act of mercy)
 - c. NOTE: if D wants to challenge, D must *move to dismiss for untimely service*
HYPO: Assume P was injured by D in an auto accident on March 1, 2000. She files process in an action against D on March 1, 2003, and process is served on D on June 25, 2003. Has P complied with the statute of limitations? YES

C. Form of Process ⇒ initiatory papers that are filed and then served on D to invoke the court's jurisdiction

1. ***Summons & Complaint***; OR
 - a. ***Summons*** ⇒ initiatory paper that notifies D that an action has been instituted against him and that D is required to answer at the place and time named
 - b. ***Complaint*** ⇒ P's pleading which gives D information on all material facts and material facts and transactions that are the subject of P's cause of action
2. ***Summons with Notice (Easier to do, but will have to follow up later with a complaint)***:
 - When the summons is not accompanied by a complaint, it must have sufficient "notice" inscribed on the face of the summons or on a 1-page attachment – notice consists of:
 - (i) Brief statement of the ***nature of the action*** ("This is an action for breach of contract", etc.)
 - (ii) Nature of the ***relief sought*** (damages, injunction, declaratory judgment, etc.)
 - (iii) If seeking monetary damages, specific ***amount of the damages***, but not allowed to specify amount of damages for personal injury or wrongful death.
NOTE: A summons without a complaint or notice is a naked summons and is therefore a defect in personal jurisdiction and subject to dismissal.

D. Methods of Serving Process

1. Basic Points
 - a. Process may be served by any person at least 18 years old, provided he's *not a party* to the action (i.e. P's lawyer or spouse can serve, but not P himself)
 - b. Process may be served on any day of the week, including holidays, *except* Sundays or Saturday if D is a Sabbath-

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- observer & P knows it (innocent service on such a D isn't a defect)
- c. *Defective service is a ground for dismissal* – statutory methods must be followed precisely.
2. **Natural persons – traditional methods**
- a. **Personal delivery to D** – it's complete upon process server's tender of summons directly to D. Tender to D's son is not proper even if the son gives it to the D.
- b. **Leave & Mail** –
- (i) Requirements – (1) Process server may deliver process to person of *suitable age* & discretion at D's *actual* dwelling place or actual place of business; PLUS (2) mail a copy by regular first class mail to D at D's place of business or last-known residence (e.g. can mail to home and deliver to business or vice versa)
- (ii) 2 steps must be performed within 20 days of each other; service is complete 10 days after proof of service is filed
- (iii) If there are 2 Ds, **EACH ONE** must be mailed (separate mailings) & delivered a separate copy;
- (iv) If a doorman blocks the process server, then the lobby become *outer boundary of D's dwelling place*.
- c. **Affixing & Mailing (“nail & mail”)** –
- (i) Requirements – (1) Process server must first exercise *due diligence* (several attempts on different days at different times) in attempting to serve D directly or to leave process with a person of suitable age & discretion; if not then (2) process server may affix process to the door of D's actual dwelling place or actual place of business; PLUS (2) mail a copy by regular mail to D at D's place of business or last known residence
- (ii) Affixing & mailing must be performed within 20 days of each other; service is complete 10 days after proof of service is filed (affidavit of service – if using affix and mail, you spell out the due diligence).
- Failure to file proof of service is not a jurisdictional defect. Only effect is that D's response time is postponed. Proof of service is not required to meet the 120 day period for service. No proof of service required if you use Personal Delivery to D (but most people do it anyway).
- d. **Expedient service** – if the foregoing methods of service are not practical, P may make an ex parte motion to the court for an order allowing an improvised method (need *prior* court approval but need not show due diligence). Publishing in newspaper is not valid unless you get a court order that allows you to do it.
- e. **Agent specifically designated by D to receive process.**
3. **Infants & mentally incapacitated**
- a. **Infants** – Can serve to (i) *Parent of an infant* (ii) *Guardian* (iii) *any person who has legal custody* (iv.) *if infant married, the adult spouse with whom the infant resides.*
- (i) Under 14 – his name goes on the summons but process is served on an eligible adult (a parent, guardian, any person having legal custody, or an adult spouse)
- (ii) 14 & above – process must be served on eligible adult & infant
- b. **Mentally incapacitated persons** –
- (i) Court appointed a guardian – the guardian must be served AS WELL AS the incapacitated person
- (ii) NO court-appointed guardian – D is served just like any other D, & the court will later appoint a *guardian ad litem*
4. **Service outside NY**
- a. Same methods for service is used when D is located outside NY (assuming basis for out-of-ct service)
- b. Following may serve process:
- (i) Any NY resident authorized under NY law;
- (ii) Anyone authorized to serve process by the laws of the jurisdiction where service is made; or
- (iii) Any attorney licensed in the jurisdiction where service is made
- HYPO: In a NY case, assume D, in CA, is served by a 17-year-old process server, who is licensed under CA law, by the affix-and-mail method, which is not recognized by CA law. Is service valid? YES
5. **Corporations – traditional methods**
- a. **Personal delivery** – to any one of the following: (i) officer; (ii) director; (iii) designated agent, (iv) managing agent (one with supervisory responsibility); or (v) cashier/assistant cashier
- HYPO: Assume P's process server walks into the headquarters of Ink, Inc., and leaves process with the receptionist, who later hands it to the president of Ink, Inc. A second copy is mailed to Ink, Inc. at headquarters. NO valid service! Leave and Mail not allowed for service to corps.
- b. **Service on the NY Secretary of State** –
- (i) *Domestic corporation* (incorporated in NY) or *Registered foreign corporation* – deliver 2 copies to the NY Secretary of State (secretary retains one copy and mails the other to the corporation)
- (ii) *Unlicensed foreign corporation* – deliver 1 copy to the Secretary PLUS P must mail 1 copy to the corporation by *certified mail*
- c. NOTE: *leave & mail* or *nail & mail* are not a valid method of serving process on a corporation
6. **Non-traditional method – Service by first-class Mail PLUS acknowledgment**
- a. Mail process to D by first-class mail (must contain 2 copies of a statutory acknowledgment form with SASE) – service is effective *only IF D signs & returns the form to P within 30 days* after D receives the mailed process. If D does not

cooperate and return the form, the service by mail is not effective. If D refuses to acknowledge receipt, D must pay the expenses for the 2nd different service of process.

- b. NOTE: may be used regardless of whether D is within or outside NY;
 - (i) Can NOT use against infants & mentally incapacitated persons;
 - (ii) D's return of the acknowledgment form is *not* a concession that the ct has jurisdiction – he can still challenge jurisdiction by motion or in the answer

E. Basis of Jurisdiction Over D's Person (i.e., Basis Jurisdiction)

1. **Physical Presence** – D must only be physically present in NY at the time of service, even if he's a non-domiciliary & the cause of action has nothing to do with NY.
HYPO: Assume D, a NJ domiciliary runs over p in NJ. One day D comes to NY for the first time in her life to visit Grant's Tomb, and p's process server tags D on the steps of the monument. Valid personal jurisdiction? YES
2. **Doing business in NY** –
 - a. **Domestic corporation or Registered foreign corporation** – subject to personal jurisdiction in NY on any claim whatsoever, no matter where in the world the claim arose
 - b. **Unlicensed foreign corporation** – 'doing business' in NY requirement: **at the time the action is commenced, the corporation's employees or agents are in NY, engaging in commercial activity for the corporation on a continuous, regular, & systematic basis** (most likely factor is maintaining an office in NY)
 - (i) Service of process can be made either inside or outside of NY
 - (ii) Insufficient contacts – mere sales; advertising; transient presence of a corporate officer
HYPO: Assume M & M Corp., a PA corporation, that is not licensed in any other state, injures P in PA. P could sue M & M in NY if M & M is "doing business" in NY. No need to show any relationship between the plaintiff's claim and the State of NY.
HYPO: Assume Ink Inc., a DE corporation that is not licensed in any other state, manufactures widgets (in DE) that are sold in NY by independent retailers. Ink advertises in the NY media but has no offices in NY. One day, the president of Ink comes to NY to attend a trade show, and P, who was injured by an Ink product in PA, has process served on the president while she is here. Has personal jurisdiction been acquired over Ink for P's NY action? **NO!**
No continuous regular activity by the corporation's agents. Transient presence by a corporate officer is not enough.
3. **Domicile in NY** – place a person intends to remain indefinitely & is treated as the principal home; service of process can be made anywhere in the U.S. regardless of where claim arose (distinguish from *residence*, which is only the place where a person lives for a fair amount of time with some degree of permanency (a person can have multiple residences)).
4. **Long-arm jurisdiction CPLR 302** (⇒ allows jurisdiction over a nondomiciliary D where the cause of action arises from a NY activity) – "minimum contacts" standard of jurisdiction that allows for out-of-state service conferring personal jurisdiction on the basis of certain acts by D that have a sufficient connection with NY (look to claim itself and not the person):
 - a. **Transaction of business in NY** – requires much less than the 'doing business' standard; one transaction that is cause of action is enough (e.g. substantial negotiations are enough)
HYPO: Assume Pete Rose (of OH) reads an ad in the Cincinnati Gazette for a casino manager to work (in OH) for Trump Casinos, a NY company. Pete comes to NY for 1 day for an interview with Trump, during which substantial negotiations take place. At the end of the day, Pete signs a contract, and for the next 3 years manages the casino in OH, never again setting foot in NY. Trump sues Pete in NY, alleging breach of the contract, and serves process on Pete in OH. Jurisdiction? **YES!!**
HYPO: What result on all of the above facts except that the contract was not actually signed by Pete in NY but was mailed to Trump from OH? **YES!** There were substantial negotiations (but claim must be based on these negotiations)
HYPO: Would the above facts sustain jurisdiction over Pete in NY--if process is served on Pete in OH--for an action by Selig for negligence based on an auto collision that occurred in OH? **NO.**
 - b. **Contract made outside NY to supply goods or services in NY** – the contract must be economically significant (simply, one-shot order made by telephone/mail/internet from an out-of-state buyer, or offering to pay *money* to NY seller isn't enough) The contract must be economically significant, such as an agreement by D to ship a sizeable quantity of merchandise to NY or to perform in a Broadway play.
HYPO: Assume Buyer in MA makes a telephone call to NY Seller to order some goods. Buyer agrees to send check for the goods upon their delivery. NY Seller ships them to MA Buyer, who refuses to pay. Does Seller have a basis of long-arm jurisdiction over Buyer for a non-payment action in NY? **NO.**
 - c. **Tortious act within NY** – driving negligently, making fraudulent statements during a negotiation in NY (NOTE: *defamation claims* are excluded from both of the tortious claims categories (c) & (d))
 - d. **Tortious act outside NY which causes injury in NY** (*the injury must originate here*), PLUS **additional link** between D & NY – any of following 3 links is sufficient:
 - (i) D regularly *solicits business* in NY; OR
 - (ii) D is deriving *substantial revenue* from goods used or services rendered in NY; OR

(iii) D could *reasonably foresees consequences in NY*, PLUS D is deriving *substantial revenue from interstate commerce* (*due process* requires that D purposely targeted NY in his interstate commerce) –

- NOTE: medical services are *inherently local in nature*, even when the doctor is a well-known specialist who attracts many out-of-state patients

(e.g., D manufactures a defective product in Wisconsin and it explodes in NY)

HYPO: Assume that in a transaction in Boston, MA, P of NY buys a car from R, a Boston retail dealer who advertises only in MA and neighboring RI. The car was manufactured by M in VT. M's cars are sold by independent retailers in all 50 states, including 7% in NY. P's car blows up in NY. P sues R and M in NY, serving process out of state. Jurisdiction over both R and M? YES against M, but not against R because R's sales efforts are not directed towards NY.

NOTE: To constitute "injury in NY" the injury must originate here. E.g., injury to a New Yorker while she is in Hoboken, NJ, followed by suffering in NY hospital will not qualify. For a commercial tort, e.g., fraud, conversion, theft of trade secrets, NY is the situs of injury only if P suffers direct financial effects in NY, e.g., loss of NY customers or sales. If P's sales are lost in some other state, there is no injury in NY even if P is a NY corporation.

e. **Ownership, Use or Possession of NY Realty**

* *GENERAL POINTS about the long-arm statute:*

- (1) Covers all types of Ds (individuals, corps, LLPs, etc)
 - (2) Acts giving rise to jurisdiction can be performed by D himself *or* by his agent or employee
 - (3) Even if D dies, decedent's estate representative can be served outside NY
 - (4) P can use the same methods of service on D outside NY as would be used for service in NY
- NOTE: always discuss (i) whether one of the non-long-arm jurisdiction categories (presence, domicile, doing business) applies; (ii) whether one of the long-arm categories apply (more than one can apply), & then (ii) whether assertion of jurisdiction would satisfy constitutional due process, which is satisfied ***if P's claim arises out of conduct by D which is so purposefully directed at NY that D reasonably should anticipate being sued in a NY court***

5. **Non-resident motorist statute** – confers jurisdiction over an accident claim arising from a **non-domiciliary** motorist's use of an auto on a NY roadway (overlaps (c) above, but has 2 unique features:
 - (i) Unique method of service: P serves process on D by serving 1 copy on the NY Secretary of State PLUS mailing a 2nd copy to D by certified mail to D's out-of-state residence
 - (ii) **Car owner** – specifically allows jurisdiction over the car's owner, if the car was driven in NY with the owner's permission (under long-arm statute, the owner is covered only if his *agent* drove the car)
6. **Consent** – parties to a contract may consent in advance to personal jurisdiction in NY in a "forum selection clause" (e.g. "any dispute relating to the contract shall be resolved in NY courts") Such clause is generally enforceable in absence of fraud, overreaching, or unreasonableness.

F. **Matrimonial Jurisdiction**

HYPO: Tom and Nicole were married in NJ in 1998. They moved to NY in July 2000. In August 2000, Nicole abandoned Tom in NY and moved to CA, to live there permanently. Could Tom obtain proper jurisdiction in NY for an action for divorce if commenced in May 2001, followed by service of process on Nicole in CA? YES. For Basis, P just needs to be a domicil. of NY.

1. **Divorce, separation, or annulment**

- a. Supreme Court – only court to have subject matter jurisdiction for a matrimonial action
- b. Personal jurisdiction NOT necessary for – *divorce, separation, or annulment*
- c. Requirement – P spouse is a domiciliary of NY (the theory is that if P is a domiciliary, the 'marital status' is located in NY, & the NY court therefore has power over the status)
- d. NOTE: in matrimonial action, can NOT use (i) leave & mail, or (ii) nail & mail without a court order.

2. **Monetary Support – matrimonial long-arm statute** required

- P spouse is a resident of NY, long-arm jurisdiction can be acquired over D spouse if :
 - (i) NY was the matrimonial domicile of parties prior to separation;
 - (ii) D abandoned P in NY;
 - (iii) D's monetary obligation accrued under an agreement executed in NY; OR
 - (iv) D's monetary obligation accrued "under the laws of NY" (catchall category)

3. **"Durational residency requirements"**

- a. Statutory condition precedent to matrimonial actions of divorce, etc (does not apply to monetary support actions):
 - (i) BOTH parties are NY residents when action is commenced, AND the grounds for the matrimonial action arose in NY – NO period of prior residence is required; OR
 - (ii) EITHER party has been a NY resident for a continuous period of *at least 2 years* prior to the action; OR
 - (iii) EITHER party has been a NY resident for a continuous period of *at least 1 year* prior to the action, AND NY has a

-
- prior link to the marriage, including
 - (a) Marriage took place in NY;
 - (b) NY was the matrimonial domicile at some point; or
 - (c) Grounds for the action (e.g. abandonment) took place in NY
 - b. Failure of providing residency requirements – D’s proper defense is to file a motion for *failure to state cause of action* (defense on the merits and not lack of subject matter jurisdiction)

IV. Venue

- A. Regulates the proper county for purposes of trial – P choose venue (specifies it in the summons), & must conform to 2 rules:
 - 1. *Action in that affect title or possession to real property* – county in NY in which the real property is located
 - 2. *All other actions* – any county in which *any party resides* (**residence** key factor) at the time the action is commenced (if one none of the parties resides in NY, then *any* county would be proper)
- B. Change of venue
 - 1. *Improper Venue (matter of right)* – Not a jurisdictional defect, & not a basis for dismissal; D’s remedy is:
 - a. Serving a demand (with or prior to answer) on P for change of venue to a proper county designated by D
 - b. If P concedes, change of venue to the proper venue is automatic
 - c. If P objects or doesn’t respond, D must make a motion for change of venue & D’s motion must be granted as a *matter of right* if P has chosen an improper county & D has designated a proper one
 - 2. *Discretionary Ground* – based on impossibility of impartial trial, or convenience of witnesses

V. Defendant’s Response

A. Response to Summons & Complaint

- 1. **D’s Methods of responding** (& thereby avoid default):
 - a. **Serve an answer** – D’s pleading, which responds to P’s complaint, OR
 - b. **Motion to dismiss** the complaint under CPLR 3211
 - c. **Corrected motion** – for a more definite statement or strike unnecessary prejudicial matter from complaint
- 2. **Pleadings** ⇒ the formal written statement of a party’s claims or defenses (complaint, answer, reply, third party complaint, petition):
 - a. **Answer** ⇒ the D’s pleading, which respond to a complaint & consists of
 - (i) **Denials** of the allegations D wishes to contest, &
 - (ii) **Affirmative defenses** (S/L, lack of jurisdiction, P’s contributory negligence) – affirmative defenses not raised in the answer are waived (subject only to D’s possible amendment of the pleadings)
 - (iii) **Counterclaims** ⇒ a claim of D against P, may be asserted in an answer
 - (iv) **Cross-claim** ⇒ in a multi-D case, D may assert any cross-claim against any other D
 - b. **Reply** – P’s pleading in response to a counterclaim; consists of denials & affirmative defenses (but can not assess another counterclaim)
 - NOTE: any litigation papers must be served on all parties who appear in the action
- 3. **Serving interlocutory papers, including the answer**
 - a. **Interlocutory Papers** ⇒ all litigation papers after P’s initial service of process (e.g. answer, other pleadings, motions, discovery notices)
 - b. Service of interlocutory papers – regular or first-class mail, fax, (personal delivery not required). Served on Attorney.
 - NOTE: service of an interlocutory paper by mail is deemed **made upon mailing, not receipt**
- 4. **Time limits for serving the answer**
 - a. If service was by **personal deliver within NY** – 20 days of the delivery
 - b. If service was by first class mail PLUS acknowledgment (this is rare) – D’s return acknowledgment is merely a notification of D’s receipt of process, & is not a pleading; D must serve an answer 20 days from D’s return of the acknowledgment
 - c. If service under any other circumstances – D has 30 days after service is complete
HYPO: Assume D was served with process by personal delivery in OH on March 1, 2000. What’s the last timely date for D’s service of the answer? Must drop answer in the mailbox no later than midnight March 31, 2000
- 5. **Pre-answer Motion to dismiss (CPLR 3211)**
 - a. Grounds – D may move to dismiss a cause of action, prior to service of the answer (**DOWNFALL**):
 - (i) **Documentary evidence** – as the basis for a defense (legally operative document like a mortgage, deed or contract)
 - (ii) **Other action** – pending between the same parties on the same cause of action
 - (iii) **Want of capacity** – P is an infant suing without a proper representative, etc.
 - (iv) **Non-joinder of a necessary party** – co-maker of a promissory note, etc.
 - (v) **Failure to state a cause of action** – even if all of the allegations are deemed to be true, the substantive law doesn’t

recognize the cause of action (*P is entitled to every favorable inference that can be drawn from the allegations of the complaint, & the motion should be denied if there's any basis for relief under the substantive law*); always discuss the elements of underlying cause of action

- (vi) **Affirmative defenses** – there are 9 of them, as specified by CPLR (**SPARERIBS**):
- (a) **S**tatute of limitations
 - (b) **P**ayment – D has paid the debt already, etc.
 - (c) **A**rbitration – the dispute has already been resolved
 - (d) **R**elease – they've already settled
 - (e) **E**stoppel (collateral) – issue preclusion
 - (f) **R**es judicata – claim preclusion
 - (g) **I**nfancy (of D)
 - (h) **B**ankruptcy discharge
 - (i) **S**tatute of frauds:
- (vii) **Lack of personal jurisdiction** – this includes:
- (a) Lack of basis jurisdiction; (b) Improper service of process; (c) Defective form of the summons
- (viii) **Lack of subject matter jurisdiction**
- b. Procedural aspects of pre-answer motion to dismiss:
- (i) Motion is made before service of the answer
 - (ii) Making the motion suspends D's time to answer – if motion is denied, D must serve the answer within 10 days
 - (iii) Optional – D could (a) make 3211 motion; or (b) include defense in answer as affirmative answers. You can make only one 3211 motion, but it can include all grounds.
 - (iv) Waiver – a motion to dismiss one of 3211 grounds does not preclude raising any of the other grounds in the answer EXCEPT lack of personal jurisdiction (remember, that includes: (i) lack of basis; (ii) improper service of process, & (iii) defective form of the summons)
 - (a) NOTE: personal jurisdiction defenses can be preserved by:
 - Before serving the answer, include lack of personal jurisdiction in a 3211 motion; OR
 - Make no 3211 motion on any ground, & instead, include lack of personal jurisdiction in affirmative defense in the answer
 - (b) WARNING: For pleading *improper service of process*, the objection will nonetheless be waived if D does not follow-up motion for summary judgment on this ground within 60 days after serving the answer
 - (v) Additional waiver issues – affirmative defenses that aren't raised in the answer are waived, & the only hope is to amend the answer –
 - BUT, there are **3 defenses that are NEVER waived** (can be raised at any point in the litigation):
 - *Non-joinder of a necessary party*
 - *Failure to state a cause of action*
 - *Lack of subject matter jurisdiction*

B. Responses to Summons with Notice

1. D's Method of Responding

- a. *Demand for the complaint*; OR
 - b. *Notice of appearance*
- NOTE: both are simple (1-page) responses, & have the effect of requiring P to serve the complaint within 20 days; *neither is a waiver of jurisdictional objections because D is simply avoiding default (after P serves the complaint, D may still object to the court's personal jurisdiction)*

2. Time limits

- a. D's time limit for responding is the same as a response to a summons & complaint (20 days if process by personal delivery, or 30 days if by any other method of service)
- b. P has 20 days to serve the complaint
 - (i) If P makes timely service of the complaint – D has 20 days from such service to (i) either serve an answer to the complaint, or (ii) make a 3211 motion to dismiss
 - (ii) If P fails to meet the 20 days time limit to serve the complaint – D may *move to dismiss the action* based on P's noncompliance, which is a form of *neglect to prosecute*
 - P's defense to such a motion are – (a) give a reasonable excuse for the delay, AND (ii) make an evidentiary showing that there is merit to the cause of action (established by an affidavit of merit from P or witnesses)
 - NOTE: After P serves the complaint, D may still object to the court's personal jurisdiction. Neither a demand for the complaint nor a notice of appearance is a waiver of jurisdictional objections.

C. Amendments of Pleadings

- 1. *Matter of Right* – each party is entitled to amend his pleading *once* as a matter of right (i.e. without judicial permission); the party can put anything into the pleading that could've been in the original

- a. P can amend his complaint at any time up to 20 days after D serves the answer
- b. D can amend the answer up to 20 days after D serves the answer
2. *Judicial Discretion* – after the period for free amendment has expired or the party has used up the free amendment, then up to court’s discretion
 - *An amendment is generally allowed* –as long as the opponent suffers no incurable prejudice (opponent has the burden of showing a detrimental change of position as a result of the delay (i.e. loss of evidence, witness died))

VI. Third Party Practice, Contribution & Indemnification

A. Third Party Practice (Impleader)

1. **Impleader** ⇒ procedural whereby D joins another party to the lawsuit on the ground that the other party may be liable to D in whole or in part (usually claim is for indemnity or contribution)
 - Enables D to join the other part as a 3rd party D (TPD) – D is technically referred to as a 3rd party P
2. Mechanics of impleading a TPD – court order NOT required (D may implead TPD at any time after D serves the answer to the complaint)
 - a. Joining TPD, by:
 - (i) File – with the court a summons & 3rd party complaint; and
 - (ii) Service – within 120 days of the filing, serve a copy of the summons, 3rd party complaint, & all prior pleadings on (a) the TPD, & (b) P
 - b. TPD answer – must serve on D, P, & all other parties in the action (TPD’s time limit for answering is same that applies to an ordinary D – 20 or 30 days depending on where & how TPD was served)
 - c. After TPD is joined – P may amend his complaint to assert a claim directly against TPD, thereby making TPD an additional D in P’s action
 - (i) Within 20 days after P was served with 3rd party answer – no need for judicial permission
 - (ii) If P waits beyond 20 days – need court permission for such an amendment
 - NOTE: for S/L purposes, the “*relation-back*” concept” allows P’s added claim against TPD to be deemed interposed on the date that D filed the impleader papers with the court PROVIDED P’s claim is *based on the same facts as the impleader claim* (e.g., same auto accident)
 HYPO: Assume Rachel, Monica and Phoebe collided on June 1, 2000. Rachel sues Monica for her injuries on April 1, 2003, and Monica impleads Phoebe for contribution on May 1, 2003. On August 1, 2003, Rachel seeks permission to amend her complaint to assert a claim for her injuries against Phoebe. Is Rachel’s claim against Phoebe time-barred? **NO**. Rachel gets the benefit of a “relation-back” concept. For S/L purposes, P’s added claim against TPD will be deemed interposed on the date that D filed the impleader papers with the court PROVIDED P’s claim is based on the same facts as the impleader claim, e.g., same auto accident. Thus, regardless of when P actually asserts her related claim against TPD, the amendment will RELATE BACK FOR S/L PURPOSES TO THE DATE THAT D IMPEADED TPD.

B. Indemnity ⇒ a right of D to bring a 3rd party action against the person whose misconduct he is answerable for and seek 100% reimbursement

1. *Contractual Indemnity* – e.g. subcontractor usually indemnifies the general contractor for any losses subcontractor incurs
2. *Implied-in-law indemnity*
 - a. *Products liability*;
 - b. *Vicarious liability* – in NY, car owner is vicariously liable for damages caused by negligent driving of another who had owner’s permission to drive the car – owner is entitled to indemnity from driver

C. Joint and Several Liability – each tortfeasor is liable to the P for the full amount. (Multi-state and NY rule). P can seek to obtain the entire judgment from just one D if he wishes.

D. Contribution ⇒ right of a joint tortfeasor, who has been found liable and paid P in full, to seek from other tortfeasors the amount that exceeds his equitable share

1. Rules – (i) Multistate, contribution not available when tort is intentional; (ii) NY, contribution covers *all* torts
2. **Asserting contribution (or indemnity)**
 - a. *Cross-claims* – Ds asserting *cross-claims* against each other (if P originally joined tortfeasors as co-Ds)
 - b. *Impleader* – D can *implead* the outsider as TPD (if P has omitted him)
 - c. *Suit* – tortfeasor can sue TPD in a separate action (however, findings of fact and % of fault in Action 1 are not binding in this action)
3. **Equal shares v. equitable shares**
 - a. *Minority view* (equal shares) – the contribution shares are always equal in amount, regardless of their % fault
 - b. *NY & multistate (equitable shares)* – the amount of contribution depends on their percentage of fault (*pure comparative degrees of fault*); the amount of contribution to which a tortfeasor is entitled is the excess paid by him over & above his equitable share of the judgment

- If one co-D is insolvent, D cannot compel the other D's to pay more than their equitable share.
- If the co-D's are insolvent, D can be required to pay the full 100% of the judgment, even if his equitable share is less than that (contribution affect only rights among D's; not change P's rights).

4. Substantive Law Rule for contribution

- a. A right to contribution exists whenever TPD breached a duty in tort which *contributed to or aggravated the damages* for which D may be held liable to P – TPD may be held liable for contribution even if TPD has no direct liability to P
HYPO: P, a building owner, installed a fire alarm system manufactured by A, and entered into a written contract with B to provide monitoring services. The contract with B limited B's liability to gross negligence. In a fire at P's building, the alarm system failed, and B negligently reported it too late to avoid catastrophic damages. P sues A in products liability and A impleads B for contribution based on B's negligence. B can be held liable to A in contribution even though B is not liable to p because of the exculpatory clause in the contract because his tort aggravated the damages.
 - b. **EXCEPTION – workers' compensation cases**, an employee can sue a 3rd person who's partially at fault for the accident, but is barred from seeking contribution from P's employer UNLESS P sustained a "grave injury" (e.g. death, total loss of arm, leg, hand, nose, ear, index finger, multiple fingers, deafness, paralysis, total blindness – NOT loss of thumb, tips of 3 fingers, or blindness in 1 eye)
 - (i) Multistate – 3rd person D *never* has a right of contribution from P's employer,
 - (ii) NY – 3rd person D has a right to contribution from P's employer, if there's grave injury
- NOTE: *S/L for contribution is 6 years, & begins to run from the date of payment for which contribution is sought*

E. Settlements in Cases Involving Multiple Tortfeasors

1. Pre-trial release of 1 tortfeasor (i.e., a settlement) in partial satisfaction of a claim does NOT discharge liability of the other tortfeasors, & P can sue the other D's for the balance (Multi-State and NY rule).
2. **Reduction formula** – any judgment against a non-settling tortfeasor must be reduced by EITHER the amount of the settlement OR the settling tortfeasor's equitable share of the fault, whichever is *larger*
NOTE: So the entered judgment against the other Ds is reduced by the above.
3. **Effect of settlement on contribution claims (barred)** – a pre-trial settlement extinguishes contribution claims by & against the settling party (non-settling D **cannot** seek contribution from a settling D)
4. **Effect of settlement on indemnity claims (no effect)** – BUT, settlement does not extinguish claims of indemnity by & against the settling tortfeasor (indemnification claims are not defeated by contribution claims)

F. CPLR Article 16 (Pure NY law)

1. NY Rule that modifies the law of joint & several liability – in **personal injury claim**, a joint tortfeasor whose fault is found to be *50% or less* can't be required to pay P more than his own equitable share of **P's non-economic damages** (e.g. pain & suffering, emotional disturbance, mental anguish, loss of consortium, wrongful death)
 - a. Any D found liable for 51% or more of total liability is jointly & severally liable for the entire judgment
 - b. Article 16 reduces P's rights, & eliminates D's need for contribution from other D's
HYPO: Assume J.Lo is injured by a product that exploded inside her house. The product was manufactured by Aguilera Inc. ("A"), and it contained a component part made by Britney Enterprises ("B"). J.Lo sues both A and B for \$100,000 for pain and suffering, \$50,000 for medical expenses, and \$50,000 for property damage to her house. The jury returns an itemized verdict, which awards all of the above damages, finding A 60% at fault and B 40% at fault. With respect to the claim for property damage, what is the proper judgment to be entered against A? Against B? **50k judgment against each of them.** With respect to the award for medical expenses, what is the proper judgment to be entered against A? Against B? **50k judgment against each of them.** With respect to the award for pain and suffering, what is the proper judgment to be entered against A? Against B? **100k judgment against A and 40k judgment against B**
2. EXCLUSIONS from Article 16 – the following are subject to full joint & several liability for all damages:
 - a. Tortfeasors who acted with **intent or reckless** disregard for the safety of others
 - b. Tortfeasors who are liable for releasing a **hazardous substance** into the environment
 - c. **Drivers & owners of motor vehicles other than police & fire vehicles** (this protects government D's)

VII. Motion Procedure

- A. Motions ⇒ an application for an order of the court; a request for some type of preliminary or incidental relief
- B. **Motions on Notice** ⇒ motion that requires notice to be given to the adversary
 1. Moving party must serve other party
 - a. *Notice of motion* – a single piece of paper that advises adversary of the nature & timing of the motion
 - b. *Supporting affidavits* – attached to the notice of motion; show why the motion should be granted
 2. Motion is 'made' – when the motion papers are 'served' on the other party (e.g. deposited in mailbox)
 3. **Return date & timing**
 - a. *Return Date* (hearing date) – day upon which the motion papers are presented to the court; the moving party must serve the motion papers *at least 8 days before* the return date (or mailed 13 days before)

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- b. All motion papers must be filed with the court no later than the return date (court begins deliberating)

4. **Order to show cause**

- a. Accelerated motion on notice – it's a preliminary order, signed by the judge, directing the adversary to "show cause," on a date specified by the judge, why the motion should NOT be granted (BASICALLY, the judge, rather than the party, is giving the notice of motion)
- b. Reasons for moving to show cause rather than the ordinary notice of motion:
 - (i) *Statute* which governs the particular motion requires it;
 - (ii) *Accelerates the return date* where exigent circumstances make the usual 8 day advance notice too long to wait for judicial assistance – the judge can specify a return date that's sooner than the 8 day
 - (iii) *Judge* can grant immediate *stay of the proceedings* or a TRO

Procedure: The moving party drafts the order to show cause and submits it to a judge, along with the supporting affidavits for the underlying motion. The judge will set the return date in the order and will specify the method of service on the adversary (usually personal delivery). E.g., a proposed order to show cause is signed by the judge on May 1, 2003, and it states, "Let D show cause on May 5, 2003 why an order should not be granted requiring him to produce documents x, y and z." After the order to show cause is signed, the order and the underlying motion papers are then served on the opponent. The opponent may then submit opposition papers on the return date.

C. **The Deciding Order**

- 1. Court's decision – must be embodied in a written ORDER signed by the court & the prevailing party (movant or opponent) serves a copy on the losing party
- 2. Effect of service of the copy of the order:
 - a. Gives *effect to the order*; &
 - b. *Starts* the running of the 30 day time limit for an *appeal* of the order
- 3. NOTE: NY allows an **immediate appeal for interlocutory orders** to the App Div as a matter of right, within 30 days of any order that results from a motion on notice

D. **Ex Parte Motion** ⇒ motion made without notice to the other party

- 1. No notice is given to the adversary – moving party goes straight to court with the motion papers & requests an order granting the relief sought
- 2. Need *express statutory authorization* – very rare
- 3. **NO appeal** on ex parte motion – remedy is to make a *motion on notice to vacate the ex parte order*; if that motion is denied, the aggrieved party can appeal that denial of the motion to vacate

VIII. Motion for Summary Judgment

A. **Motion for Summary Judgment** ⇒ a pretrial motion that can be made by any party asking the court for judgment as a matter of law; requires that the court find that no genuine issue of fact exists requiring a trial

HYPO: Assume Matt, who slipped and fell outside Katie's place of business, sues Katie for negligence. Immediately after process has been served, may Matt properly move for summary judgment on the issue of Katie's liability? NO. Answer has not been served yet. May Katie move for summary judgment on the ground that the accident was entirely Matt's fault? NO. Answer has not been served yet.

- 1. *No genuine issue of material fact* requiring a trial – the moving party is contending that reasonable persons cannot differ, & that he's therefore entitled to judgment as a matter of law
- 2. Made *after answer* is served – need to discuss the element of underlying cause of action
- 3. Moving party – must *submit evidence in the form of affidavits* by people who have actual knowledge of the facts, documents, or other discovery materials
- 4. Opponent party – defeats the motion with same type of evidence, showing that there is a triable issue of fact
 - a. If the opponent can't produce opposing evidence, the court can either *deny the motion* or *grant a continuance (adjournment)* to permit additional evidence to be obtained
- 5. Court review – if the court concludes, upon **searching the record** (reviewing all evidence in the record)
 - a. "Boomerang effect" – court may grant summary judgment to the opponent, even if the opponent didn't make a cross-motion
 - b. Denial of summary judgment – case resumes its normal progression
 - c. BUT, if the only fact issue concerns the amount of damages, the court can grant P summary judgment with respect to liability, & order an immediate trial on the issue of damages
- 6. Time limit
 - a. First – when answer served
 - b. Last – up to 120 days after note of issue has been filed unless there is good cause

B. **Pre-Answer Motions for Summary Judgment**

- 1. Prior to service of the answer (2 situations):

- a. **Pre-answer Motion for Summary Judgment** – D’s pre-answer motion to dismiss for failure to state a cause of action can be **converted by the court** into summary judgment, thereby deciding the case on the basis of facts, rather than on the face of the pleadings, provided:
 - (i) Parties have submitted *factual affidavits* in connection with the motion to dismiss
 - (ii) Court must give *notice* to the parties of this conversion in order so they can submit more evidence
- b. **Motion for summary judgment in lieu of a complaint**
 - (i) Actions – P may move for summary judgment at the same time he serves process by accompanying the summons with motion papers for summary judgment. Only works with the following:
 - (a) *Instrument for the payment of money only. Instrument must contain an unconditional promise to pay money* (e.g. promissory note or negotiable instrument)
 - (b) *Action on an out-of-state judgment*
 - (ii) Procedure – P must serve D, along with the summons, a notice of motion for summary judgment with supporting documentation & affidavits; return date can be no sooner than the date D would have to respond to service of process (i.e. 20 days (if personal service on D in NY) or 30 days (when service is complete for other types of service))

IX. Provisional Remedies ⇒ remedies that operate while the action is pending to prevent ineffectual judgments

– All provisional remedies require a Court Order – except for a *Notice of Pendency*

A. Attachment – provides security interest to P while action is pending

1. **Grounds** – enforcement of a **money judgment** against D, AND either D is
 - a. **Unlicensed foreign corporation or a non-domiciliary of NY**, OR
 - b. About to **conceal & remove assets from the state with intent to defraud** creditors or frustrate the enforcement of a judgment
2. **Sheriff’s levy**
 - a. Real property – filing order of attachment with county clerk where real property is located
 - b. Personal property (tangible (e.g. a car) or intangible (e.g. debt owed to D such as a bank account)
 - (i) Actual seizure; or
 - (ii) Constructive seizure – sheriff *levies upon the property* of D, imposing a *lien* on the property pending the outcome of the action (delivers order of attachment to person holding the personal property – D or a *garnishee*, a 3rd person who owes a debt to D or who is in possession of tangible personal property belonging to the D)
 - c. Delivery of levy imposes the lien. Lien gives P a security interest in the property that is superior to any subsequent lienholder – the lien serves as an injunction against the transfer of the personal property
3. **Procedure**
 - a. **Motion** – can be made (i) on notice, or (ii) ex parte (if ex parte, there has to be a prompt hearing after the seizure to give the D an opportunity to contest the attachment)
 - b. **Order before process of service** – YES, provided summons is served within 60 days after order granted
 - c. **Requirements** –
 - (i) Affidavits in support of the motion which show grounds for attachment (unlicensed foreign corp or about to conceal assets); and
 - (ii) Affidavits must show probability of success on the merits of P’s cause of action
 - (iii) **Undertaking** – bond required in order to indemnify D for any damages/expenses that might be caused by attachment (D gets damages if (i) the attachment was wrongful, or (ii) D wins the case on the merits)
 - d. **Ex parte motion – special requirements**
 - (i) If granted, P makes a **motion on notice (by order to show cause) to confirm the ex parte order of attachment** after the sheriff levies on the property – mitigates due process concerns.
 - (ii) **Time limits** – requirements for the follow-up motion to confirm (or else the ex parte order is void):
 - (a) *Unlicensed foreign corporation or a non-domiciliary of NY* – no later than 10 days after levy
 - (b) *D is about to conceal & remove assets from the state* – no later than 5 days after the levy

HYPOTHETICAL: On September 1, 2000, Carmela commenced an action against Tony on 2 causes of action: 1. to recover damages for fraud allegedly committed by Tony two years ago when he induced Carmela to sell Tony all of Carmela’s stock in a real estate corporation in Westchester County; 2. alternatively, to rescind the transaction and reacquire her stock in the corporation. Tony, who lives in NY, has threatened to sell all of the stock in the corporation to Silvio, who lives in NJ, and to flee the state unless Carmela immediately discontinues the action. Do sufficient grounds exist for an ex parte order of attachment and levy on Tony’s NY bank account? **YES**. She is seeking money damages and there is evidence of a threat of fleeing NY with the assets.

What if the action also names Paulie as a co-defendant, alleging his joint participation in the fraud? Paulie lives in NJ. Assume John, who lives in NY, is indebted to Paulie. **YES**. You can get order of attachment

against Paulie. She is seeking money damages and Paulie is a non-dom.

B. Preliminary Injunction – maintain the status quo while an action is pending

1. Grounds – **equity** action (**NO actions solely for money damages**) where P seeks either:
 - a. *A permanent injunction*, OR
 - b. *D threatens to harm P's interests* in the subject matter of the action
2. Procedure
 - a. *Motion* – **ONLY** made motion on notice (by *order to show cause*); NO ex parte motion
 - b. *Order before process of service* – can be served with/after, the summons & anytime up to final judgment
 - c. *Requirements* –
 - (i) Affidavits showing grounds for equitable relief, including a *threat of irreparable injury*
 - (ii) Affidavits must show probability of success, on the merits, of the cause of action
 - (iii) *Undertaking* – bond required in order to indemnify D for damages if it's later determined that a preliminary injunction shouldn't have been granted.
3. **Temporary restraining order** (TRO) – used in a case involving the threat of immediate injury, to maintain the status quo while the motion for the preliminary injunction is pending (immediate injunctive relief). Two steps for a TRO:
 - a. Make a *motion for preliminary injunction by order to show cause*
 - b. In *order to show cause*, judge can include a TRO. You then serve this on the D along with the supporting affidavits for the preliminary injunction motion.

C. Temporary Receivership – court appoints a person to manage property in D's possession

1. Ground – **equity** claim (**NO actions solely money damages**) in which:
 - a. *Specific property* is the subject matter of the action, AND
 - b. *Danger that D will injure or destroy the value* of the property while the action is pending
2. Procedure
 - a. *Motion* – ONLY made motion on notice; NO ex parte motion
 - b. *Order before process of service* – YES
 - c. *Requirements* –
 - (i) Affidavits showing grounds for appointment of receiver
 - (ii) *Undertaking* – yes, by receiver, for faithful discharge of duties

D. Seizure of a Chattel – insure enforcement of a judgment awarding possession of the chattel

1. Ground – action for **replevin** (recover possession of chattel – personal property)
2. Impoundment – sheriff seizes the chattel & retains custody of it (impoundment) pending outcome of case
3. Procedure
 - a. *Motion* – can be made by (i) on motion, or (ii) ex parte
 - b. *Order before process of service* – YES
 - c. *Requirements* –
 - (i) Affidavits must show that P will probably succeed on the merits of the cause of action
 - (ii) *Undertaking* – yes, bond in amount at least twice the value of chattel
 - d. Ex parte motion – special requirements
 - (i) Must show a *threat of immediate loss* of the chattel
 - (ii) If granted, make follow-up *motion on notice (by order to show cause)* to confirm the ex parte order – no later than 5 days of seizure

E. Notice of Pendency (Lis Pendens) – filing notice of pendency gives record notice to any potential buyers or mortgages that any interest they acquire will be subordinate to that of P

1. Ground – **equity** action, in which **the judgment will have a direct effect on REAL property** (e.g. title, possession, or use of real property, for example ejectment, partition, specific performance to sell property, mortgage foreclosure)
2. Procedure
 - a. *Motion* – NO court order required
 - b. *Filing before process of service* - YES, provided summons is served within 30 days after filing notice
 - c. *Requirements* –
 - (i) Files a notice of pendency with the County Clerk of the county where the real property is located – this is what gives record notice of the pendency of P's action, & gives P a lien on the real property
 - (ii) NO affidavits required
3. NOTE: narrowly construed
 - a. Duration of valid notice is 3 years (may be extended on motion but extension must be obtained prior to expiry because you can't get a second one from the same COA (exception: mortgage foreclosures))
 - b. If a notice is improperly filed, D can file a motion to cancel the notice of pendency

HYP0: Recall Carmela's action against Tony t reacquire her stock in the real estate corporation. Assume that the corporation's

only asset is a parcel of real property in Westchester County. Does Carmela have sufficient grounds for filing a notice of pendency? **NO**. Relief Carmella is seeking is the re-transfer of the stock, not seeking title to the property in any way. NOTE: If Carmela shows grounds for more than one provisional remedy, the court has discretion to require Carmela to elect between those remedies to which she would otherwise be entitled.

X. Trial Procedures and Res Judicata

A. Placing a case on calendar – by filing a *note of issue* (stops discovery), and serve copy to other parties

B. Right to trial by jury

1. Civil jury consists of 6 jurors – 5 out of 6 is enough for a verdict
2. Party entitled to a jury obtains one by demanding a jury in the *note of issue* (if no demand is made, the right to jury is waived) – a non-party can file a demand for trial by jury separately
3. Right to trial by jury :
 - a. *Action seeking solely money damages*
 - b. *Replevin* (suing to recover possession of a chattel)
 - c. *Claim for real property*
 - d. *Annulment of marriage*
 - e. *Divorce action* – on the issue of the *grounds* for divorce (e.g., facts of adultery), BUT not for child custody or monetary relief

C. Res judicata (claim preclusion)

1. Purposes – avoid & prevent needless re-litigation of the same claim
2. NY’s “transactional approach” to claim preclusion – when a claim is brought to a final judgment on the merits, all other claims by P against that D arising out of the same transaction are barred, even if based on different theories or if seeking a different remedy
HYPO: Valentine was employed by Wilpon for 2 years without being paid. Valentine sues for breach of contract, but loses on the ground that the contract is unenforceable due to the statute of frauds. Can Valentine thereafter bring a second action against Wilpon for quantum meruit--the value of the services rendered? **NO**. Barred by res judicata (same issue)

D. Collateral estoppel (issue preclusion)

1. Purpose – avoids & prevents the need for re-litigation of specific fact issues that were decided in a prior proceeding upon a 3-part showing:
 - a. Issue in the former proceeding & current proceeding is identical;
 - b. Issue was actually litigated & decided in the former proceeding; and
 - c. Party against whom issue preclusion is asserted had a full & fair opportunity to litigate the issue in the former proceeding
2. NOTE: issue preclusion cannot be used **against** someone who wasn’t a party in the prior action
HYPO: Larry and Curly, passengers in a car driven by Mo, were both seriously injured in a collision allegedly caused by Mo. Larry sues Mo for negligence, seeking substantial damages, and wins. In Curly’s separate action against Mo, would Larry’s judgment provide a basis for summary judgment in Curly’s favor on any issues? **YES**, on the issue of Mo’s negligence
HYPO: Change the facts to assume that Larry lost in his action, based on a specific finding that Mo was not negligent. Would Mo be entitled to summary judgment dismissing Curly’s action? **NO**. Curly wasn’t a party in the first action.

XI. Special Proceedings

1. Speedy, streamlined procedures, akin to motion practice, to obtain a judgment as a final resolution (e.g. probate of a will, election disputes, summary proceeding by a landlord for eviction, dissolution of a corporation, habeus corpus, enforcement of an arbitration agreements, Article 78, etc.)
2. Requirements – must be authorized by statute
3. Incorrect filing – courts will convert special proceedings into an action, & vice versa
4. Procedure:
 - a. Petitioner (≈ P) files petition (≈ complaint) in county clerk and pay for index #
 - b. P serves on Respondent (by the same methods used to serve process):
 - (i) *Petition*; &
 - (ii) *Notice of petition* – advises respondent to serve an answer & appear on specified return date for the hearing (the return date can be no sooner than 8 days from the service of process – if need an accelerated return date, can initiate the special procedure with an *order to show cause*)
 - c. Affidavits are usually served by both parties to the petition – all pleadings & affidavits are submitted to the court on the return date for decision by the court (decision process similar to summary judgment)

XII. Arbitration

A. Overview

1. Private procedure, based on contract, for binding resolution of disputes (*NY public policy favors arbitration*)
2. Arbitrators aren't bound by substantive law or the rules of evidence, & may do justice as they see fit & scope of judicial review is extremely narrow

B. **Judicial Gatekeeping** – scope of judicial review is extremely narrow, & limited to 5 'threshold issues':

1. *Did the parties agree to arbitrate?* – must be written agreement; need not be mutual; agreement to arbitrate must be clear, explicit and unequivocal
2. *Is the dispute within the scope of the arbitration clause?* – typical broad clause “all disputes or claims arising out of or in connection with this contract shall be resolved by arbitration”
3. *Is the arbitration clause valid?* – invalid only if induced by (i) fraud; (ii) duress; (iii) coercion (iv) contrary to public policy
– NOTE: the *doctrine of severability* holds that the validity of the arbitration clause, as distinct from the contract in which it appears, is severable from the question of the validity of the overall contract
HYPO: Assume Leno sues Letterman for damages for fraud and breach of a written contract in which they agreed to share their jokes. Letterman moves for an order to stay the action and compel arbitration on the ground that the agreement between them contained an arbitration clause requiring that any dispute arising from the contract must be submitted to arbitration. Leno asserts that the agreement to arbitrate is unenforceable because the overall contract was induced by fraud. NO. Leno loses because of doctrine of severability. Validity of an arbitration clause as compared to the validity of the overall contract is severable
4. *Is there an express condition precedent to arbitration, & has it been complied with? I.e. Construction contract says to submit dispute to architect first*
 5. S/L – can be decided by court

C. Bringing threshold issue to court

1. In a pending action – D should *move for stay of action and the compel arbitration*
2. If the proponent of arbitration serves a *notice of intention to arbitrate* – opponent must commence a *special proceeding for a stay of arbitration*, in which he can raise one of the 5 threshold issues

D. **Judicial Review of Arbitration awards** – grounds for vacating the award:

1. *Corruption, fraud or misconduct in the arbitration proceeding;*
2. *Partiality or bias of an arbitrator who was chosen to be neutral;* or
3. *Arbitrator has exceeded his powers* – almost always fails, because an arbitrator isn't bound by substantive law or the rules of evidence (virtually unlimited powers, including equitable remedies)
– BUT, in NY arbitrators can't award punitive damages

XIII. CPLR Article 78 Proceedings

A. Judicial review of action (or inaction) by governmental or quasi-governmental (i.e., *corporations such as IBM*) officers or bodies of any kind – brought in Supreme Court

B. **Grounds for an Article 78 proceeding:**

1. **Mandamus to compel** – seek performance of an act required by law (an act which no discretion is involved)
HYPO: Assume that the president of a corporation of which S is a shareholder has refused to convene an annual meeting of shareholders. Could S bring a mandamus proceeding against the president and/or the corporation? **YES**
2. **Prohibition** – proceeding to stop a judicial officer from exercising power that exceeds his lawful jurisdiction
 - a. This is reserved for *grossly improper exercise of jurisdiction*
 - b. Remedy for *routine error of jurisdiction* is an appeal with in the same action
3. **Certiorari** – proceeding to challenge the results of a “trial-type” hearing conducted by an administrative agency (i.e., testimony was taken under oath with a right of cross-examination) (PO is fired – they have a quasi-property right)
– Standard of review – *substantial evidence. Results are upheld if agency determination supported by subst. evidence*
4. **Mandamus to review** – review of any administrative action not covered by 1.-3., agency determinations made without a trial-type hearing (e.g., liquor license denied, application for gun permit denied, etc.)
– Standard of review – *arbitrary & capricious. Results are upheld unless agency determination was A&C.*

C. Procedure

1. Supreme Court has exclusive jurisdiction (so you can sue the State here, not the Court of Claims – see below)
2. S/L – 4 months from receipt of notice of act being challenged.
3. Type of relief:
 - a. *Declaratory* (annulling agency's determination) or *injunctive* (e.g. reinstating civil servant's job) relief
 - b. Money damages are recoverable in Article 78 IF they're *incidental to the main relief being sought* (though the Court of Claims is the only place to recover monetary damages for contract or tort)

NY PRACTICE – ESSAY QUESTIONS

I. QUESTION – 33 (& PARTNERSHIP/AGENCY)

- A. Issue whether a complaint against a NY corporation may be dismissed on the ground of forum non conveniens
- B. Issue of long arm jurisdiction over D
- C. Issue whether one transacting business in New York through an agent is subject to NY jurisdiction

II. QUESTION – 63

- A. Issue whether a claim for (i) contribution will enable a third-party to (ii) recover against a village, in circumstances where the plaintiff would have no right of recovery directly against the village
- B. Whether statute of limitations applying to actions for wrongful death will be tolled by the infancy of a beneficiary who becomes the personal representative of the decedent
- C. Statue of limitation for indemnification
- D. Whether a tortfeasor who has been *released* is subject to a claim for *indemnity*

III. QUESTION – 38 (& CORPORATIONS)

- A. Breach of duty of care issue
- B. Whether articles of incorporation (limiting liability) shield directors from liability for breach of duty of care
- C. Priority of claims in corporate dissolution .

IV. QUESTION – 54 (& REAL PROPERTY)

- A. Whether P's underlying claim "affected" title in order to allow filing of a *notice of pendency*
 - 1. Definition, purpose, appropriateness of *notice of pendency*
 - 2. Action of foreclosure analysis
- B. Whether commencing suit more than 30 days after filing a *notice of pendency* renders the notice void

V. QUESTION – 54 (& NY PRACTICE)

- A. Minor issue relating to enforcing judgment – whether title to land was convey before judgment is docketed
 - 1. CPLR – judgment creditor may only execute the judgment against real property owned by the debtor on the date that the judgment was docketed

VI. QUESTION – 28 (& REAL PROPERTY)

- A. Whether court has jurisdiction over out-of-state defendants (since 1 year after cause of action)
 - 1. Defamation action – long-arm statute provides for service in tort actions arising in the state, except as to a cause of action for defamation of character (D wins)
 - 2. Assault action – long-arm statute jurisdiction applies
- B. Whether applicable statute of limitations apply (P wins)
 - 1. S/L for defamation – 1 year (***BUT S/L tolled if defendant is absence from state***) (P wins)
 - 2. S/L for assault – 1 year (*here S/L is NOT tolled because jurisdiction through long-arm statute was obtainable*) (D wins)

VII. QUESTION – 64 (& CONTRACTS/SALES)

- A. Commence special proceeding to obtain a stay of arbitration

VIII. QUESTION – 98 (& TORTS & WILLS)

- A. Non-resident owner of a motor vehicle involved in an accident in NY is subject to NY jurisdiction solely by virtue of ownership (if the use was with express or implied permission)
- B. There is jurisdiction over the vehicle's operator (also, there is long-arm jurisdiction over persons committing tortuous acts within NY)
- C. Which courts should the action be brought
 - 1. Supreme Court – general jurisdiction over all action, except those where NY is defendant
 - 2. Court of Claims – jurisdiction over all claims against state of NY (must file notice of claim within 90 days)

IX. QUESTION – 5 (& TORTS & EVIDENCE)

- A. Whether P's action for medical malpractice was timely
 - 1. S/L is 2 & ½ years – cause of action accrues when (i) complained-of act occurs, or (ii) there is continuous course of treatment of the patient by the physician
- B. Effect on co-D for contribution and indemnification when P executes a release to one of the D
 - 1. Contribution barred from a D released by P
 - 2. Indemnification is no longer available *unless in contractual and vicarious liability* situations
 - 3. Thus cross-claim get no longer stand

X. QUESTION – 59 (& REAL PROPERTY)

- A. Issue are the jurisdiction of a county court and the durational requirements of a notice of pendency

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1. Jurisdiction – actions respecting real property located within that county
 2. Duration – Notice of Pendency is cancelled automatically if P fails to serve the summons and complaint upon D within 30 days of grant of Notice

XI. QUESTION – 10 (& DOMESTIC RELATIONS)

- A. Whether a material issue of fact remains for trial
 1. SJ is granted – *only if upon all evidence the court can conclude that there is no issue of fact requiring trial*

XII. QUESTION – 3 (& TORTS & FEDERAL JURISDICTION)

- A. Whether cause of action was timely (1 year 29 days)
 1. Negligence – 3 years
 2. Intentional Torts – 1 year (*but for survival action where P died within one year S/L – time is extended for 1 year from the date of death*)
 3. Wrongful Death Action – 2 years (same within 2 years of date of death if P died within S/L)

XIII. QUESTION – 6 (& CONTRACTS)

- A. When summary judgment may be granted (*motion to dismiss X's complaint with prejudice*)
 1. SJ – upon the affidavits, documents, depositions, and other submitted proof, court concludes as a matter of law that there is *no material issue of fact requiring trial*
- B. Whether SJ can be granted to a non-moving party
 1. Generally only moving parties are granted SJ, BUT if court concludes that non-moving party is entitled to SJ, the court may grant such relief in the absence of a cross-motion
- C. Whether S/F defense may be asserted
 1. D is required to affirmatively plead Statute of Fraud defense in his first responsive pleading – if failed the defense is waived

XIV. QUESTION – 12 (& CONFLICT OF LAWS & FEDERAL JURISDICTION)

- A. When a motion may be dismissed on grounds of *forum non conveniens*
 1. No time limit for making *forum non conveniens* – but D's chances for success on the motion will decrease as pretrial proceedings progress
 2. If court finds that interests of justice require an action to be stayed or dismissed so that the action may be heard in a more appropriate forum, court may dismiss on any *conditions that may be just*
- B. Whether *collateral estoppel* applies
 1. Collateral estoppel – court considers whether D had a full & fair opportunity to litigate each issue in the prior action, so that precluding D from litigating the same issue in subsequent does not deprive D of right to a hearing

XV. QUESTION – 18 (& TORTS)

- A. What is the S/L for an action of indemnification (which is the duty to pay debts on behalf of others)
 1. 6 years, measured from the date the payment is sought
- B. Whether a joint tortfeasor may be subject to a claim for indemnification subsequent to a settlement
 1. Contribution – barred
 2. Indemnification – NOT barred (can seek complete indemnification)

XVI. QUESTION – 35 (& SECURED TRANSACTIONS & CONTRACTS)

- A. What remedies are available to a secured creditor when a debtor defaults
 1. Action to replevy – seek *Ex Parte Seizure of Chattel* by showing the court by affidavit
 - a. P is entitled to possession of the chattel that D is wrongfully holds
 - b. Value of chattel
 - c. There is no defense against P
 - d. P will probably prevail on the merits
 - e. Chattel may become unavailable or be impaired
 - f. P must post an undertaking (x2 of value) & motion to confirm the seizure must be made within 5 days after the seizure with notice to D

XVII. QUESTION – 44 (& TORTS & CONTRACTS)

- A. Whether court can exercise jurisdiction
 1. Personal Jurisdiction – long-arm-jurisdiction: *D commits a tortious act outside the state which causes injury within the state, if D "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce"*
 2. Subject Matter Jurisdiction – if it has authority to grant relief that party is seeking
 3. Method of service

XVIII. QUESTION – 40 (& CONFLICT OF LAWS & FEDERAL JURISDICTION)

- A. Whether a court has power or discretion to order a new trial on the basis of newly discovered evidence, where the evidence

consists of expert testimony which was not available at the time of trial

1. Party may obtain relief from a judgment upon application to the court that rendered the judgment “*upon such terms as may be just*”, provided that there is (i) **newly discovered** evidence which “probably” would have produced a different result if introduced at trial, and which (ii) **could NOT have been discovered** in time to move for a new trial when the verdict was entered

XIX. QUESTION – 72 (& CONFLICT OF LAWS & FEDERAL JURISDICTION)

- A. Whether a release from P prevents one from seeking indemnification
 1. **Contribution** (arises among joint-tort feorsors who share culpability for an injury to P and whose liability may be equitably apportioned among them according to fault) – BARRED
 2. **Indemnification** (flows from either a contractual or other relationship between the actual wrongdoer and another and invokes a shifting of the loss) – **NOT barred** (can seek complete indemnification)
- B. How to apportion a judgment that has been partially satisfied by pretrial settlement
 1. Judgment in favor of the plaintiff against unrelated tortfeasors will be reduced by the greatest of
 - a. *The amount paid for the release or stipulated in the release*; OR
 - b. *The proportionate share of the total injury attributable to the released tortfeasor*

XX. QUESTION – 101 (& CONFLICT OF LAWS & FEDERAL JURISDICTION)

- A. What the S/L is for an injury occurring outside NY in an action brought in NY under strict products liability theory – since the cause of action accrued in State X and the action is being brought in NY
 1. Which State under borrowing statute
 - a. Shortest limitations period shall apply
 - b. However, if cause of action accrued in favor of NY resident, then appropriate NY S/L applies
 2. S/L
 - a. Strict Products Liability in tort – 3 years (accrues at the time of injury)
 - b. Products Liability under warranty theory (UCC) – 4 years (accrues from the date of delivery)

XXI. QUESTION – 9 (& TORTS)

- A. What is the S/L for negligent tort
 1. Personal injuries – 3 years S/L
 2. Toll is NOT allowed if theoretically the long-arm statute is available (don’t care if P knew or not)
- B. How to apportion a judgment that has been partially satisfied by pretrial settlement
 1. Judgment in favor of the plaintiff against unrelated tortfeasors will be reduced by the greatest of
 - a. *The amount paid for the release or stipulated in the release*; OR
 - b. *The proportionate share of the total injury attributable to the released tortfeasor*
 2. If D’s liability is \$50,000 and only has \$10,000 – then P can only collect \$10,000 and can seek no additional contribution from the other tortfeasor

XXII. QUESTION – 17 (& CONSTITUTIONAL LAW & TORTS)

- A. Whether and how to appeal the decision of the administrative hearing
 1. May commence Article 78 proceeding to obtain review of the administrative action
 2. Article 78 proceeding is in the nature of certiorari – court will determine only whether the department’s determination is, on the record, supported by substantial evidence
 3. Must be filed for review within 4 months of the administrative determination
 4. Burden of proof on the petitioner

XXIII. QUESTION – 49 (& TORTS)

- A. S/L of products liability (both the negligence & strict liability theories) – 3 years
- B. Whether Lessor has a cause of action for indemnity or contribution against the Manufacturer
 1. Lessor’s negligence – consider Manufacturer’s contribution
 2. Strict products liability – consider indemnification from Manufacturer
- C. S/L for impleader claim – 6 years (regardless of theory of liability) from the date of payment or a judgment or settlement
- D. Whether Lessor’s settlement bars bringing action against Manufacturer for contribution or indemnity
 1. **Contribution** (arises among joint-tort feorsors who share culpability for an injury to P and whose liability may be equitably apportioned among them according to fault) – BARRED
 2. **Indemnification** (flows from either a contractual or other relationship between the actual wrongdoer and another and invokes a shifting of the loss) – **NOT barred** (can seek complete indemnification)

XXIV. QUESTION – 53 (& DOMESTIC RELATIONS)

- A. Whether a Plaintiff herself can serve process on a defendant out of state
 1. Service outside of the state may be made in the same manner as service within the state
 2. Service can NOT be made by one who is a party to the action

XXV. QUESTION – 83 (& DOMESTIC RELATIONS)

- A. Whether motion for change of venue is proper
1. Venue rules concern *convenience* rather than competence to hear a case – means that improper venue in a court of competent jurisdiction does not affect the validity of the judgment
 2. D may make a motion for change of venue “as of right” by serving prior to or contemporaneously with the answer
 - a. If P does not respond within 5 days, D may, within 15 days make a motion to the court for change
 3. Motion must be made in the original county – but if the plaintiff makes no objection to the demand, the motion may be made in the county to which transfer is sought

XXVI. QUESTION – WW2 Q1 (& CONTRACTS/SALES)

- A. Issues whether there are grounds for long arm jurisdiction