

## **NY AND FEDERAL PRACTICE**

### 1) Glossary

- a) Answer – def's pleading, which responds to a complaint
- b) Arbitration – agreement to submit a controversy to extrajudicial resolution
- c) Bill of particulars – litigation paper in which P, upon demand, is required to amplify the allegations of the complaint
- d) Certiorari – special proceeding for judicial review after trial-type hearing
- e) Collateral estoppel – doctrine known as issue preclusion – when litigation attempts to retry an issue that has
- f) Complaint – P's pleading which gives def info on all material facts that are subject of P's causes of action
- g) Contribution – right of a joint tortfeasor, who has been found liable and paid P in full, to seek from other tortfeasors the amount of their equitable share
- h) Counterclaim – claim of def against P
- i) Cross-claim – against co-def
- j) Ex parte motion – motion made without notice to other party
- k) Forum non conveniens – power of court, on def's motion, to dismiss action where convenience of witnesses and interests of justice require that the action be heard in a court in a different state.
- l) Impleader – procedure where def joins another party in lawsuit on ground that other party may be liable to def in whole or in part (claim for indemnification or contribution)
- m) Indemnity – right of a vicariously liable def to bring 3<sup>rd</sup> party action against person who did it to seek 100% reimbursement
- n) Interlocutory papers – litigation papers served after P's summons and complaint (pleadings, motions, discovery notices)
- o) Long arm jx – allows jx over a nondomiciliary def where cause of action arises from a NY activity
- p) Mandamus to compel – special proceeding seeking judicial direction that an agency perform an act required by law
- q) Mandamus to review – special proceeding seeking judicial review of agency determination when no hearing required to be held
- r) MSJ – pretrial motion asking for judgment as a matter of law
- s) Notice of petition – part of initiatory process in a special proceeding
- t) OSC – accelerated motion on notice. Often contains a provision staying all further proceedings until determination of the motion is made.
- u) Personal jx – power of court to adjudicate claims for damages/injunctive relief against parties
- v) Petition – pleading of complaining party in a special proceeding
- w) Pleading – formal written statement of a party's claims or defenses
- x) Process – initiatory papers that are filed and served on def to invoke court's jx
- y) Prohibition – special proceeding to obtain judicial review of judicial action that grossly exceeds an officer's jx
- z) Provisional remedies – remedies that operate while the action is pending to prevent ineffectual judgments

- aa) Res judicata – doctrine known as claim preclusion – once claim brought to final conclusion, all other claims arising from it are barred
- bb) Special proceeding – procedure for speedy resolution of certain disputes
- cc) Subject matter jx – power of court to adjudicate particular types of claims
- dd) Summons – initiatory paper that notifies def that an action has been instituted against him that he is required to answer
- ee) Survival claim – cause of action that survives death of P – applies to all types of actions except divorce
- ff) Toll – extends time period within which a cause of action may be brought
- gg) Venue – county in which an action is brought
- hh) Wrongful death – claim that allows recovery for economic losses by the spouse and next of kin of decedent whose death was caused by def.

<b><u>NY Statutes of Limitations</u></b>		
<b>Period</b>	<b>Most important claims within period</b>	<b>Comments</b>
<b>20 years</b>	Action by state to recover real property; enforcement of judgments	
<b>10 years</b>	Action to recovery real property	Same as adverse possession
	Action by crime victim against <u>convicted</u> def for a <u>serious</u> crime	Period runs from date of conviction. Victim may also sue for damages for up to 3 years from the discovery of def's receipt of money or property from any source.
<b>7 years</b>	Action by crime victim against <u>convicted</u> def for any crime	Period runs from date of crime
<b>6 years</b>	Contracts (other than UCC Art 2-Sales)	Accrual on date of breach regardless of P's lack of knowledge
	Indemnity and contribution	Accrual on date of payment for which indemnity/contrib. is sought
	Fraud	P may sue within 6 years of commission of fraud or 2 years of discovery, whichever is longer
<b>5 years</b>	Action by victim of rape-related felony	Runs from date of crime. If def is prosecuted, victim gets extra 5 years from termination of criminal proceeding (regardless of conviction or acquittal)

<b>4 years</b>	Contracts – UCC Art 2-Sales	Breach of warranty claim accrues upon tender of delivery Not the date that a 3 <sup>rd</sup> party sells to P.
<b>3 years</b>	Personal injury based on negligence and strict products liability	Personal injury and property damages claims accrue on date original injury occurs. Toxic torts – injured caused by <u>latent effects</u> is computed from date of discovery of injury or when P should have discovered it, whichever is earlier.
	Property damage (including conversion and replevin)	
	Professional malpractice, other than medical malpractice	Accrues when work is completed.
<b>2.5 years</b>	Medical malpractice	Accrues on date of malpractice. Exceptions for continuous treatment (period runs from end of treatment) and “foreign objects” (1 year from discovery)
<b>2 years</b>	Wrongful death  (damages limited solely to distributee’s economic losses)	Runs from date of death, but it must also be shown that SOL on decedent’s underlying personal injury claim had not expired on the date of death.  If criminal proceedings on def, executor gets optional and independent 1 year period from termination of criminal proceedings.
<b>1 year, 90 days</b>	Personal injury and property damage claims against municipal def	P must also show she served a notice of claim on municipal def within 90 days of accident. Court can allow late service of claim
<b>1 year</b>	Intentional torts to the person	From date of intentional tort Exception: where person is entitled to commence action dies before the expiration of the SOL, cause of action survives and can be brought by a representative within 1 year of death.
<b>4 months</b>	Article 78 proceedings (certiorari or mandamus)	

<b>NY Provisional Remedies</b>						
<b>Provisional remedy</b>	<b>Type of actions that this remedy is available?</b>	<b>Ex parte order ok?</b>	<b>Order prior to service of process?</b>	<b>Papers needed to get order?</b>	<b>Undertaking needed?</b>	<b>Comments</b>
<b>Attachment</b>	P must be seeking \$ damages <u>and</u> 1 of 2 possible grounds exist: 1) def is unlicensed foreign corp or nondomiciliary or 2) def is about to conceal or remove assets from NY with intent to defraud creditors	Yes but P must make motion on notice (by OSC) to confirm the ex parte order within 10 days after levy on def's property if relying on 1) or within 5 days after levy if relying on 2)	Yes, provided summons is served within 60 days after order granted	Affidavit showing grounds for attachment and probability of success on the merits	Yes. Amount fixed by court to indemnify def for costs, etc if either def wins on merits or attachment was invalid. P's liability not limited to amount of bond if order was ex parte	P always has burden of proof on issue of validity of order
<b>Preliminary injunction</b>	1) when P seeks permanent injunction; or 2) where def is about to do an act rendering equity judgment ineffectual	Preliminary injunction, no. But motion may be made by OSC and include TRO to restrain def until motion on prelim.	Preliminary injunction, no. TRO, yes. OSC for prelim injunction may be served with summons and complaint	Affidavit showing grounds for prelim injun relief and probability of success on merits. TRO requires addtl showing of threat of immediate injury	Preliminary injunction, yes. TRO is court's discretion. Amount fixed by court to indemnify def for costs, etc if it is decided that P is not entitled to perm. injunc. relief	Not available in action seeking solely money damages. OK if complaint seeks both.
<b>Temporary receivership</b>	Property that is subject of equity action is in danger of destruction, loss of value or removal from state	No, unless parties agree in contract to ex parte appointment (i.e., in mortgage agreement)	Yes	Affidavit showing grounds for appointment of receiver	Yes, by receiver, that he will faithfully discharge duties	No available in action seeks solely money damages. (not common)

<b>Replevin</b>	Action to recover possession of chattel	Yes but P must make motion on notice to confirm the ex parte order within 5 days after sheriff seizes chattel	Yes	Affidavit showing probability of success on merits. If ex parte, must show threat of immediate loss of chattel	Yes, in amount that is at least twice the value of the chattel	P always has burden of proof on issue of validity of order. Def may prevent delivery of chattel to P by moving to have chattel impounded pending outcome of litigation
<b>Notice of pendency</b>	Action in which judgment will directly affect title, use, or possession of real property	No order required. Filing with county clerk is ex parte	Yes, provided summons is served within 30 days after filing of notice	File notice and copy of complaint with county clerk where realty is located	No	Narrowly construed. Duration of valid notice is 3 years from date of filing.

## **Subject matter jx** [SMJx]

- 1) SMJx = the authority to grant relief party seeks
  - a) May not be waived.
  - b) So can be raised at any time – even on appeal
- 2) Federal SMJx – either:
  - a) **Diversity** of citizenship when action commenced, or
    - i) Every P must be from different state from every def, and
      - (1) If one P and one def are citizens of the same state, no diversity.
      - (2) Corp – citizenship in state of incorporation and principal place of business (location of executive offices).
      - (3) Unincorp assoc – citizen of state of which any member is a citizen.
    - ii) Matter in controversy must exceed \$75,000, exclusive of interest and costs.
      - (1) Does not include value of def's counterclaim to meet this amount.
      - (2) But a permissive counterclaim (unrelated transaction to the claim) must have an independent jx basis and so must meet the amount.
    - iii) **Erie doctrine**
      - (1) Fed court in diversity case applies its own procedural law, but must apply the substantive law and conflict of law rules of the state it sits in.
        - (a) If unclear whether state law is substantive or procedural, use the outcome determinative test:
          - (i) State law that substantially determines outcome of litigation must be applied.
    - b) **Federal question.**
      - i) Action arises under Const., laws, or treaties of U.S.
      - ii) Must appear on complaint.
    - c) Supplemental jx
      - i) A court may hear claims that could not, by themselves, invoke federal question jx or diversity jx if the claims arise from a common nucleus of operative fact as that claim that invoked federal smjx.
      - ii) Includes pendent jx:
        - (1) If P has both state and fed claims, fed court has discretion to exercise pendent jx over the state claims if they both derive from a common nucleus of operative fact and are such that P would ordinarily expect to try them all together.
  - 3) NY courts
    - a) Supreme court
      - i) Court of general jx.
      - ii) State-wide, branches in every county
      - iii) May adjudicate all claims except those against the state of NY.

- b) Limited jx courts
    - i) County court - \$25k demand limit
    - ii) Civil court of city of NY - \$25k demand limit
    - iii) District courts - \$15k demand limit
    - iv) City courts
    - v) Small claims courts - \$5k demand limit
    - vi) Justice courts - \$3k demand limit
    - vii) Family court
    - viii) Surrogate's court
    - ix) Court of claims
  - c) NY Civil Practice Law and Rules applies only in supreme and county courts.
- 4) **Transfer in NY courts**
- a) Can be transferred to another court when it appears that the other court is the appropriate one to make the disposition of the matter.
  - b) Situations:
    - i) Original court lacked SMJx from inception of suit;
    - ii) Original court had SMJx but events after suit require transfer to court of wider jx for complete relief; and
    - iii) Original court had SMJx but court of lesser jx has ample authority to dispose of matter.
      - (1) Need consent of party adversely affected.
- 5) **Limitations on supreme court SMJx**
- a) **Forum non Conveniens**
    - i) Court may stay or dismiss the action if (upon motion of a party) it finds interests of substantial justice require an action be heard in another state.
    - ii) Court weighs the convenience of the court, P, and def.
      - (1) Unless the balance of factors favors def, P's choice should not be disturbed.
  - b) Foreign corps in NY cases
    - i) NY Business Corp Law allows a foreign corp without NY authority to commence case in NY but to continue, must pay all fees, taxes, and penalties for period it did business without authority.
    - ii) Any NY resident can sue foreign corp. But nonresident may not sue a foreign corp in NY unless the underlying action has a meaningful tie to the state.
  - c) Contractual choice of NY law
    - i) Enforceable if transaction involves at least \$1mil and contract contains an agreement by nonresident to submit to NY jx.

## **Statute of Limitations** [SOL] – in NY

- 1) In general:
  - a) Starts to run the time the cause of action accrues.
  - b) Date for determining whether commenced in time period:
    - i) All courts except for justice courts:
      - (1) Date of filing process with the clerk.
    - ii) Justice courts:
      - (1) Date of service.
  - c) Adding party after expiration of SOL
    - i) Timely commencement against original def will toll SOL against new party if:
      - (1) Both claims arise out of the same conduct
      - (2) Parties share liability, and
      - (3) New party knew or should have known that, but for P's mistake in identifying all parties, the action should have been brought against him.
  - d) Counterclaims
    - i) If counterclaim would have been timely as of date of P's commencement of action, then counterclaim is also timely.
  - e) Remedy sought determines the applicable SOL.
  - f) SOL must be raised either in pre-answer motion or affirmative defense in answer.
- 2) Time periods and situations the bar likes
  - a) See chart above.
- 3) Controlling the SOL
  - a) Court cannot change SOL.
  - b) Parties can agree to:
    - i) Shorten time to bring suit, if reasonable and agreed to before cause of action accrues.
    - ii) Extend time to bring suit if written agreement
  - c) Agreement to not raise SOL as defense, made before accrual of cause of action, is void.
- 4) **Tolling of SOL**
  - a) Def's absence under circumstances that prevent jx tolls the SOL during the absence.
  - b) Other situation:
    - i) Disability:
      - (1) At time cause of action accrued, SOL is tolled until disability is gone.



- ii) Infant:
    - (1) SOL tolls until reach age 18.
  - iii) Death:
    - (1) Claimant
      - (a) If it is a cause of action that survives, action can be brought by representative within the SOL or 1 year after death.
    - (2) Def
      - (a) Tolls SOL for 18 months.
- 5) **Borrowing statute**
- a) Claim accruing out of state in favor of a nonresident of NY is measured by both the foreign and local SOL.
    - i) Unless timely under both, the claim is barred.
  - b) Claim accruing out of state in favor of a resident of NY is measured by only the NY SOL.

### **Personal jx**

- 1) Due process requires (before state court can hear a case):
    - a) Basis of jx; and
      - i) Can be based on minimum contact between state and def so that state's jx over def does not offend traditional notions of fair play and substantial justice.
- (1) **Minimum contacts**
- (a) Court must find that def purposefully availed herself of the privilege of conducting activities in the state, invoking the benefits and protections of its laws.
  - (b) Def must also know or reasonable anticipate that her activities in the state render is foreseeable that she may be haled into court here.
- (2) **Fairness**
- (a) Jx must not offend the traditional notions of fair play and substantial justice.
  - (b) Factors:
    - (i) Whether claim arises from def's contacts with the state.
      - 1. If yes, likely that jx is fair and reasonable.
    - (ii) Def engages in systematic and continuous activity in state.
      - 1. Likely jx is fair and reasonable.
    - (iii) Convenience of def – don't want to put def at severe disadvantage.
    - (iv) State's legitimate interest in providing redress for its resident.
    - (v) P's interest in convenient and effective relief
    - (vi) Judicial system's interest in efficiency.

- b) Adequate notice and opportunity to defend.
  - i) As long as def reasonably should have known that he was person meant to be named, notice is sufficient.
  - ii) Satisfied by service of process.

2) Bases of personal jx

a) **Statutory bases of state court jx:**

- i) **Physical presence** of def in state at time of service
  - (1) Exceptions:
    - (a) When physical presence in state is the result of fraudulent enticement
    - (b) Immunity attached to physical presence
      - (i) This applies only to non-domiciliaries for voluntary presence in state for another proceeding.
- ii) **Doing business** within the state
  - (1) Test:
    - (a) Whether in state activity is sufficiently substantial to make unauthorized foreign corp amenable to suit in NY.
      - (i) Remember, all NY corps are always amenable to suit in NY.
    - (b) Requires permanence and continuity of corp activity in state, but need not be substantial in volume.
  - (2) Out-of-state parent or affiliate may be doing business through in-state subsidiary where there is a complete identity of stock ownership or interlocking corp structure.
- iii) **Domicile** of def in the state
  - (1) Actual domicile be in NY and continue at time of service of summons.
- iv) **Single act** or **long arm** jx
  - (1) Limited to a cause of action arising from the commission of certain acts by non-domiciliaries within the state.
  - (2) Bases of jx under long-arm statute:
    - (a) Transaction of business in NY – substantially less than “doing business”
      - (i) Includes the doing of an isolated act. The making of an in-state visit by def or his agent during which purposeful activity is carried on is enough.
      - (ii) Presence of def or agent is broadly defined. Phone calls or letters of a commercial nature made or sent into NY may be enough, as long as P’s cause of action is directly connected to those calls or letters.
    - (b) Tortious act in NY – occurrence of any act in state alleged to be tortious is enough.
      - (i) Mere fact that injury manifested itself in NY is not enough for jx.

- (c) Tortious act outside NY producing injury in NY
  - (i) May only be used if:
    1. Def regularly does or solicits business in NY, engages in some other persistent conduct in the state or derives substantial revenue from sales in state, or
    2. Def reasonably foresees the NY consequences of his tort and derives substantial revenues from either interstate or international commerce.
  - (d) Ownership or possession of NY real estate subjects owner or lessee to jx for lawsuits arising out of ownership or possession.
  - (e) Matrimonial actions or family court proceedings
    - (i) If P resides or is domiciled in NY at time demand is made and
      1. NY was wedded home of parties before separation, or
      2. Claim for support arises out of agreement made in NY, or
      3. Def abandoned P in NY, or
      4. Claim for support arose under NY law.
- (3) Where personal jx is based solely on long arm statute, appearance will not confer personal jx for causes of action not arising from this act.
- v) **Express consent** by contract or by designating an in-state agent to accept process
- vi) **Use of NY courts**
  - (1) If one not subject to personal jx sues in NY, his atty in that action is the agent upon whom summons in a separate action may be served by act party to the original action provided the other party's claim would be permissible as a counterclaim.
- vii) **Implied consent**
  - (1) Non-resident motorist statutes:
    - (a) Non-resident user who gets into accident in NY is subject to personal jx in NY.
    - (b) Non-resident owner of car in accident in NY also subject to personal jx in NY if car used for owner's business or with owner's permission.
- viii) **Appearance**
  - (1) Def confers personal jx by voluntarily appearing in the case.
- b) So if a basis exists, then def can be subject to service of process outside of NY.
  - i) So SOL won't toll while def is out of jx if long-arm statute applies.

3) **Types of jx**

a) **In personam**

- i) Court has power over person of a particular def.

b) **In rem jx**

- i) Court has power to adjudicate rights of all persons with respect to a particular item of property.
- ii) Court cannot exercise in rem jx over land not within its borders.

c) **Quasi in rem jx**

- i) Court has power to adjudicate rights of particular people with respect to specific property in court's control.
- ii) Cannot be based solely on attachment of def's NY property.
- iii) This will fill the gap where long arm statute does not provide personal jx.
- iv) So, if minimum contacts, including presence of property in NY, are present and long arm statute does not authorize personal jx, a quasi in rem action can be used.

4) **Commencing an action**

- a) By filing process with the court clerk (except for justice court).

b) **Service of process - NY**

- i) Is adequate if:
  - (1) It follows statutory procedure; and
  - (2) Is reasonably calculated to apprise interests parties of the pendency of the action.
- ii) Must be made to someone over 18, not a party to the action.
  - (1) Def's atty is not a party.
- iii) On a Sunday is void.
  - (1) On a legal holiday is allowed.
- iv) Ways to serve process:
  - (1) Personal delivery
  - (2) Leave and mail service
    - (a) Delivery to one of suitable age at def's actual place of business, dwelling, or usual place of abode, and
    - (b) First class mailing of a copy of the summons to def's last known residence or actual place of business
  - (3) Service upon a designated agent
  - (4) Nail and mail service
    - (a) Can't be used if can be done with due diligence by personal service or leave and mail service.
    - (b) Affixing must be followed by first class mailing to def's last known residence or actual place of business.

- (5) Expedient service
  - (a) Can only occur with court permission after ex parte application is made.
- c) Service on corps
  - i) All domestic corps and authorized foreign corps are always amenable to personal jx in NY, whether or not related to NY activities.
  - ii) NY corps
    - (1) Service accomplished by delivering summons to:
      - (a) Officer,
      - (b) Director,
      - (c) Managing or general agent,
      - (d) Cashier or assistant cashier, or
      - (e) Agent authorized to receive service.
      - (f) Alternatively, deliver duplicate copies to sec of state in Albany, who retains a copy and mails other to corp.
  - iii) Unauthorized corps
    - (1) Service accomplished by serving sec of state and mailing a copy to (or personally serving a copy outside NY on) an officer of the unauthorized corp.
- d) Service by first class mail
  - i) Mailing must contain an acknowledgment-of-receipt form, which def signs and returns to P within 30 days.
  - ii) If def fails to return it, P must then serve process one of the ways from above.
- 5) Service in rem
  - a) Personal service on def outside state
  - b) Service by publication – last resort.
    - i) Only use if other means cannot be used with due diligence.
    - ii) Published in 2 designated newspapers once a week for 4 consecutive weeks.

### **Appearance**

- 1) General appearance
  - a) By entering a general appearance, def consents to court's jx over him.
  - b) If served by summons with notice, def must serve notice of appearance or demand copy of the complaint.
  - c) If served by summons and complaint, def must respond by pleading or motion.
- 2) Curative appearance
  - a) Jx objection raised 2 ways:
    - i) Pre-answer motion to dismiss, or
    - ii) Answer with the affirmative defense.

- b) No curative appearance is made as long as these 2 options are open.
  - c) Def will make a curative appearance by failing to raise jx this way.
  - d) If def moves to dismiss on other grounds but not jx, he has waived any jx challenge.
- 3) Procedural ramifications
- a) If court denies motion to dismiss on jx, def cannot raise jx objection in answer.
    - i) Def can appeal ruling, though.
- 4) In rem appearance
- a) Def may make a limited appearance to the extent of the quasi in rem jx. So if def loses on the merits, judgment will be limited to the attached property.
    - i) But must appeal ruling on jx objection right away, not wait until conclusion on the merits.
- 5) Long arm appearance does not establish jx for other causes of action.

## **Venue**

- 1) General rule
- a) Refers to geographic location of court that may hear a case. Concerned with convenience.
    - i) Compared to jx, which refers to the power of a court to hear a case.
  - b) Fed rules – venue in fed court is proper in:
    - i) State where any def resides, if all defs resides in same state.
    - ii) State in which a substantial part of the events of the claim occurred, or a substantial part of the property that is the subject is situated.
    - iii) If there is no state that satisfies i) or ii) above:
      - (1) For actions based solely on diversity, state in which any def is subject to personal jx at time action is commenced.
      - (2) For actions not based solely on diversity, state in which any def may be found.
  - c) NY rules:
    - i) Suits involving title to real estate (local actions) must be filed in the county where some part of the realty is located.
    - ii) Transitory actions are to be commenced in the county where any one of the parties resides.
      - (1) Partnership – county where principal office is located or here one partner resides.
      - (2) Corp – NY and authorize foreign corps reside in county where principal place of business is located.

- (3) County
    - (a) Suits against city or county must be filed in the county where principal office is located.
    - (b) Except – suits against NYC must be filed in county where the cause of action arose.
  - (4) Neither party is a resident – venue is proper in any county.
- iii) Replevin suits are filed either in county of residence of any party or where personal property at issue is located.
- d) Can make an agreement on venue. Improper venue can also be waived.
- 2) Transfer of venue
  - a) Can occur even when venue is proper for convenience.
  - b) Law to apply:
    - i) If original venue was proper, apply law of state in which the transferor court sits.
    - ii) If original venue was improper, apply law of state in which the transferee court sits.
- 3) Change of venue
  - a) Change as of right
    - i) Def can demand change with or prior to answer.
      - (1) If P does not consent in 5 days, def must move within 15 days of notice of demand.
  - b) Discretionary change
    - i) Can be brought at any time based on impossibility of impartial jury, convenience of witnesses, or to serve ends of justice.
- 4) Consumer credit transactions
  - a) Proper venue is def's county of residence or county where transaction occurred.

### **Removal**

- 1) Action originally filed in state court can be removed to federal court if:
  - a) Case could have originally been filed in fed court; and
  - b) For cases removed based on diversity, no def is a citizen of the state where action was filed.
- 2) Only defs can remove.
  - a) If more than one def, all def must join in the petition for removal.
  - b) Removal is permitted if the non-diverse party is later dismissed from the action and there is now complete diversity.
  - c) Must be done within 30 days of complaint, or 30 days once it becomes removable.

## **Parties**

### **1) Mandatory joinder** (or compulsory joinder)

- a) A party should be joined if:
  - i) Complete relief cannot be given to existing parties in his absence;
  - ii) Disposition in his absence may impair his ability to protect his interest in the controversy, or
  - iii) His absence would expose existing parties to substantial risk of double or inconsistent obligations.
- b) If a party meets this, is amenable to process, and joinder will not destroy diversity or venue, he must be joined.
- c) If not:
  - i) Fed – court decides if action should proceed or be dismissed. Consider:
    - (1) Prejudice to parties and that party
    - (2) Can prejudice be reduced by shaping judgment
    - (3) Whether judgment in absence is adequate
    - (4) Whether P is deprived of adequate remedy if action is dismissed.
  - ii) NY - If necessary party who is omitted is beyond jx reach and is indispensable to maintenance of suit, then it is dismissed.
    - (1) **Necessary parties (in NY):**
      - (a) Joint obligors and obliges
      - (b) Corp in a derivative stockholder's suit
      - (c) Absent party claiming ownership of property sought to be recovered by P
      - (d) Member of joint venture not joined in a suit by another joint venturer against a 3<sup>rd</sup> joint venturer to impress a trust on assets allegedly belonging to the venturer
      - (e) Beneficiaries of a trust in an action by other beneficiaries against the trustee seeking an accounting

### **2) Permissive joinder**

- a) P or def may be joined if there is a common question of law or fact and if it arises out of the same transaction.
- b) If there is misjoinder, the improper party is dropped.

### **3) Class action suits**

- a) Factors to be considered on whether to allow class action:
  - i) Number in the class;
  - ii) Common question of law or fact;
  - iii) Fair and adequate representation of class members;
  - iv) Typicality of the representative's claims or defenses;
  - v) Superiority of the class action;
  - vi) Individual members' interest in individual control of separate actions, if any;
  - vii) Impracticability or inefficiency of separate actions;
  - viii) Nature and extent of other relevant pending litigation;
  - ix) Desirability of concentrating the litigation in one court; and



- x) Manageability of the class action.
  - b) No class action may be dismissed, discontinued, or compromised without court approval.
  - c) Due process requires that state class action statutes provide adequate protection of the interests of the entire class.
    - i) So if the interests of the litigating class members are adverse to the interests of the non-party class members, absentees will not be bound by the judgment.
- 4) **Third party practice**
- a) When 3<sup>rd</sup> party (T) is answerable to def if and only if def is held liable.
  - b) Procedure
    - i) Def may proceed against T after service of D's answer
  - c) Relationships of 3<sup>rd</sup> party actions
    - i) Contractual indemnity – when contract specifies indemnity
    - ii) Implied indemnity – vicariously liable def brings suit against person for whose misconduct he is answerable.
    - iii) Contribution
      - (1) Generally – any tortfeasor found liable can be required to pay the whole things, regardless of % fault. Tortfeasor may then seek contribution from other tortfeasors for any amount that 1<sup>st</sup> guy paid over his equitable share.
      - (2) Note – 3<sup>rd</sup> person found liable for an employee's injuries under NY WC Law cannot seek contribution from employer unless the injuries are grave.
      - (3) Not for breach of contract cases – that is indemnity
      - (4) Effect of release:
        - (a) If P releases one joint tortfeasor prior to trial in exchange for partial satisfaction, P may pursue the balance of her claim from others. However:
          - (i) Settling tortfeasor cannot seek or be subject to contribution;
          - (ii) Judgment in favor of P against non-settling tortfeasor will be reduced by the greater of:
            - 1. Amount paid for the release;
            - 2. Amount stipulate in the release; or
            - 3. Settling tortfeasor's equitable share of the fault; and
          - (iii) If more than 1 settled with P, reduction is made on an aggregate basis – verdict against non-settling def is reduced by total amount paid in settlement or total amount of their apportioned liability, whichever is greater.
  - d) Noneconomic loss limitation
    - i) If liability of any def is found to be less than 50% or less of total liability, that def's liability for noneconomic loss cannot exceed her relative culpability.
    - ii) If def is found liable for more than 50% of total loss, def can be held liable for the entire amount.

- iii) Limitation does not apply to intentional or reckless def, def who release hazardous substances, strictly liable where manufacturer is not a party, and liable b/c of car ownership or operation.
- 5) **Interpleader**
  - a) Available when a stakeholder is under obligation to pay certain money but there are conflicting claims. These can be joined in an action to determine where money should go.
  - b) Fed
    - i) Rule 22 – requires regular jx rules.
    - ii) Section 1335 – minimum diversity (only 1 different from def) and \$500 in issue. Venue proper where any claimant lives.
- 6) **Intervention**
  - a) Where person not joined wishes to become a party.
  - b) As of right:
    - i) Limited to where intervenor may be bound by judgment and his interests are inadequately represented by existing parties.
  - c) Permissive:
    - i) When he has a claim or defense containing a common question of law or fact with that being litigated.

### **Pleadings**

- 1) NY
  - a) To be sufficient, must give notice to court and adversary of material elements of each cause of action or defense asserted.
  - b) Party not limited to relief requested but may obtain any relief that the proof supports.
    - i) If legal remedy is adequate, court is prevented from granting equitable relief.
  - c) NY denies a jury trial where a demand for an injunction/equitable relief is joined with a demand for damages, if remedies arise from same transaction.
- 2) Fed
  - a) Follows notice pleading, rather than fact pleading, so less specificity is needed.

### **Verification**

- 1) Generally, verification of pleadings is optional.
- 2) Exceptions – when complaint must be verified:
  - a) Actions against co-obligors
  - b) Actions for goods sold or services rendered
  - c) Article 78 proceedings
  - d) Actions in which substantive statutes require it
- 3) If complaint is verified, answer must be verified.

- a) Answer must also be verified to complain charging common law fraud or fraudulent conveyance, in an action against a corp on a promissory note, or when dilatory defense is asserted.

### **Bill of particulars**

- 1) If party's pleading is deficient, opposing party may demand a bill of particulars.
  - a) A claim thus particularized is self-limited.

### **Motion practice**

- 1) Ex parte motions
  - a) There is either express authority or is based on necessity.
  - b) Orders granted ex parte generally not appealable. Move to vacate then appeal from that.
- 2) Motions on notice
  - a) Return date = time for hearing of the motion.
  - b) Motion must be served 8 days before hearing.
    - i) Response to motion then due 2 days before hearing.
    - ii) If motion served 16 or 21 days before hearing, response due 7 days before hearing and reply served day before hearing.
  - c) Most orders here are appealable.
- 3) Specific motions
  - a) Pre-answer motion to dismiss
    - i) NY bases for the motion:
      - (1) Documentary evidence defenses
        - (a) Waived if not brought
      - (2) Lack of SMJx
      - (3) Want of capacity to sue
        - (a) Waived if not brought
      - (4) Another action pending between the same parties on the same claim in another court
        - (a) Waived if not brought
      - (5) Affirmative defenses (i.e. res judicata, infancy or disability of moving party, SOL, statute of frauds)
        - (a) Waived if not brought
      - (6) Counterclaim not properly interposed
        - (a) Waived if not brought
  - (7) **Failure to state a cause of action**
    - (a) To make this determination, court looks at each COA, takes all of P's allegations as true, and then decides if there is a claim on which relief can be granted.

- (8) Lack of personal jx or in rem jx
- (9) Absence of a necessary party
- ii) Fed bases for the 12(b) motion:
  - (1) May be raised at any time:
    - (a) Lack of SMJx
  - (2) Must be raised in motion or answer or waived:
    - (a) Lack of personal jx
    - (b) Improper venue
    - (c) Insufficiency of process
    - (d) Insufficiency of service of process
  - (3) May be raised at any time before or at trial:
    - (a) Failure to state a claim
    - (b) Failure to join an indispensable party

### **Provisional remedies**

#### **1) Attachment**

- a) Jx founded solely on attachment of def's in-state property is unconstitutional.
- b) Available in any action where P demands money judgment in whole or part.
- c) Def must have attachable property within the state. Includes debts due to due that are past due or certain to become due without contingency.
- d) Statutory grounds for granting attachment:
  - i) Def is unauthorized foreign corp or nonresident of state
  - ii) Def is resident who cannot be personally served
  - iii) Def, with intent to defraud creditors or frustrate enforcement of judgment, disposed of or removed property from the state
  - iv) Action brought to enforce judgment with full faith and credit
  - v) Action is by felony victim to recover from convicted def who earns profit from crime
- e) See chart above.

#### **2) Preliminary injunction**

- a) Sought in action seeking a permanent injunction (which is the ultimate relief).
- b) P must show:
  - i) Inadequacy of legal remedies
  - ii) P has clean hands
  - iii) P must show his own clear right to ultimate relief, and
  - iv) Injury that is threatened must be imminent and irreparable.
- c) TRO made in def's absence
  - i) P must show notice to def would cause significant prejudice or a good faith effort was made to notify def.
- d) See chart above.

- 3) Receivership
  - a) Available in suits with specific subject matter when there is a danger that subject matter will be removed from state, lost, or destroyed.
    - i) So not available in cases for just money.
  - b) See chart above.
- 4) Notice of pendency
  - a) Only filed in action affecting title to or possession or use of real property.
    - i) Specific performance actions, constructive trust.
  - b) See chart above.
- 5) Replevin
  - a) See chart above.

### **Default and neglect to prosecute**

- 1) Default of def
  - a) P may seek default judgment.
- 2) Default by P
  - a) If P unreasonably neglects to proceed generally or delay prosecution of claim, or
  - b) Unreasonably fails to serve and file a notice of issue.
- 3) Relief from default
  - a) Must be made within 1 year after judgment or order.
  - b) Must show:
    - i) Reasonable excuse for the delay, and
      - (1) Newly discovered evid, fraud or misrep of adverse party, lack of jx, law office failure.
    - ii) Meritorious claim or defense as established by affidavit.
  - c) Def who is not personally served can open default if shown:
    - i) Less than 1 year that def had knowledge of judgment
    - ii) Less than 5 years from time judgment was entered
    - iii) Def did not have personal notice in time to defend, and
    - iv) He has meritorious defense to the action.

## **Disclosure and pretrial discovery**

- 1) Matters to be disclosed
  - a) CPLR (NY) requires disclosure of “all matters material and necessary in the prosecution or defense of an action regardless of burden of proof.”
    - i) So discovery of:
      - (1) Evid in chief,
      - (2) Facts leading to the discovery of admissible evid, and
      - (3) Facts, docs, or exhibits useful on cross-examination
  - b) Fed Rule 26 disclosure
    - i) Requires disclosure, without being asked, of information about their case to other parties. Discovery of any non-privileged matter that is relevant to any party’s claim or defense.
    - ii) Types:
      - (1) Initial disclosure
      - (2) Expert testimony
      - (3) Pretrial disclosures
  - c) Privileges apply
    - i) **Absolute**
      - (1) Atty-client
      - (2) Atty work product
      - (3) Self-incrimination
    - ii) **Qualified**
      - (1) Prima facie privileged but may be disclosed if court finds injustice or undue hardship
      - (2) Writings prepared for litigation by party (i.e., witness statement by insurance adjuster)
    - iii) No privilege for:
      - (1) Party’s own statement
      - (2) Name of witness obtained at scene by a party
      - (3) Insurance coverage
      - (4) Accident reports unless prepare by a police officer for criminal investigation where disclosure would interfere with investigation
      - (5) Films, photos, videos, tape recordings
  - d) Continuing duty of disclosure
    - i) Party must promptly amend or supplement response if incomplete when made and failure to amend would be misleading.
  - e) Motion to dismiss of MSJ automatically stays disclosure until motion is resolved, unless leave of court is sought.

## **Trial of actions**

- 1) Right to jury trial
  - a) Under NY law
    - i) In cases seeking judgment for money only and in ejectment, dower, waste, nuisance, replevin and to determine claims to realty.
    - ii) Const or statutory right to jury in divorce (adultery) actions, annulments, partition, incompetency.
  - b) Fed
    - i) Written demand for jury trial must be made in 14 days of pleading where jury-triable issue arose.
- 2) In NY - Jury is 6. Need 5 for a verdict. (civil)
- 3) **Res judicata**
  - a) Applies when there is final judgment on the merits by a court of competent jx in action between same parties on the same cause of action.
  - b) Bars relitigation of any issue actually decided.
- 4) **Collateral estoppel**
  - a) Issue preclusion
  - b) Applies when litigant tries to retry an issue that has been finally determined on the merits. When:
    - i) Issue is identical with the issue decided in the prior proceeding;
    - ii) Issue was necessarily decided in the prior proceeding; and
    - iii) Litigant had a full and fair opportunity to litigate the issue in the prior proceeding.
  - c) Affirmative use – against a losing party in the 1<sup>st</sup> proceeding to establish liability to a party in the second.
  - d) Defensive use – against a losing party in the 1<sup>st</sup> proceeding to defeat his claim against a party in the second.

## **Appeals**

- 1) Time
  - a) 30 days after service of judgment or order to be appealed. Cannot be extended.
- 2) Appeals as of right
  - a) To Appellate division
  - b) Final orders of appellate division appealed to the Court of Appeals
  - c) Final judgments of trial courts appealed directly to Court of Appeals when the only question is the constitutionality of fed or NY statute.
- 3) If not of right, leave must be sought.

### **Special proceedings**

- 1) Hybrid way of quickly getting relief. Plenary action and a motion.
- 2) Governed by CPLR art. 4

### **Arbitration**

- 1) Arbitration agreements must be in writing but need not be signed by either party.
  - a) A valid and enforceable agreement to arbitrate is an agreement that the decision of the arbitrator is final and not subject to review.
- 2) No review of arbitrator's action in appellate court.
  - a) Sole grounds for challenging award:
    - i) Corruption, fraud, or misconduct in procuring the award
    - ii) Partiality of arbitrator
    - iii) Arbitrator exceeded his powers or failed to make a definitive award within the scope of the controversy
    - iv) Failure to follow procedural rules.
- 3) Proceeding is not arbitrable if:
  - a) Matter at issue not embraced in arb agreement
  - b) Arb agreement was induced by fraud
  - c) Arb agreement is subject to condition precedent not yet fulfilled
  - d) Performance of underlying contract is prohibited by statute
  - e) Underlying claim is barred by SOL or res judicata

### **Article 78 proceedings**

- 1) Nature of proceedings governed by Art 78
  - a) **Certiorari**
    - i) Used to get judicial review of quasi-judicial administrative action after a hearing and determination made by an agency.
  - b) **Prohibition**
    - i) Used to obtain judicial restraint of administrative action in excess of lawful powers of the agency. Lies with a court only:
      - (1) If there is a clear legal right;
      - (2) Where the court acts or threatens to act without jx in a matter over which it has no power over subject matter or where it exceeds authorized power; and
      - (3) When directed to an inferior judicial tribunal.



c) **Mandamus**

- i) Seeks judicial direction that an agency perform an act or seeks review of agency determinations when no hearing was required to be held.
- 2) Art 78 may not be used to review when there is an available appeal, a right to seek release, or a determination made in a civil or criminal matter.
- 3) SOL – 4 months which runs from when the determination to be reviewed is final and binding.

**Enforcement of judgments**

- 1) Judgment may be enforced on any debt past due or yet to become due.

**Sister state and foreign country judgments**

- 1) Full faith and credit
  - a) Applies only to state court judgments, but recognition is required among state and federal courts.
    - i) Applies to administrative adjudications.
  - b) Requirements:
    - i) Rendering court must have had jx over parties and subject matter;
    - ii) Judgment must be final; and
      - (1) Non-final where amount of judgment is uncertain or where judgment is modifiable.
    - iii) Judgment must be on the merits.
- 2) Foreign country judgments are not entitled to full faith and credit.
  - a) Recognition usually done under comity.
- 3) Uniform Foreign Money-Judgment Recognition Act
  - a) Enacted in NY.
  - b) Includes any foreign judgment granting or denying recovery of a sum of money, other than a judgment for taxes, penal judgments, or judgments for alimony and child support.
    - i) Must be final and conclusive.
  - c) Defenses include foreign court did not have personal jx and judgment was made in system that does not provide impartial tribunals or no due process provided.

### **Interests and costs**

- 1) Pre-verdict interest
  - a) Interest accrues on claims for breach of contract and property damages from earliest date cause of action existed.
  - b) No pre-verdict interest on personal injury.
  - c) Wrongful death action, interest from date of decedent's death.
- 2) Post-verdict interest
  - a) All money actions (including personal injury) gets interest from date of verdict until entry of final judgment to date of payment.
- 3) Costs
  - a) Given to party with favorable judgment.

### **Uniform civil rules**