Spring 2014
Catherine Sharkey – Torts 2 – Outline

1) **DEFAMATION**
   a) **Generally**
      i) Prost – Defamation
         (1) Honor – "Good Name" – Social status within society
            (a) Individual identifies with normative characteristics of a social role and personally receives the regard and estimation that society accords that role
            (b) Not based on equal playing field, not market based (fixed)
         (2) Dignity – Protection of private personality – "human worth"
            (a) Rules of civility, fluid and unfixed
            (b) *See Connelly v. McKay* (rejecting Π's claim even though there was a community of truck drivers who would have reacted negatively to the statements, and Π proved damages, court unwilling to recognize truck drivers as a community)
         (3) Property – Goodwill or reputation in the marketplace – Fruit of personal exertion
            (a) Even playing field – you get out what you put in – capital within the community – like trademarks
   b) **Elements** – Published, defamatory, statement of or about Π, resulting in damages

c) **Publication**

i) **RST § 577 – Publication**

(1) Communication intentionally or by negligence to one other than the Π

(2) Intentionally and unreasonably fails to remove defamatory matter that he knows is exhibited on his property/under his control – liability for continued publication

(a) *See Hellar v. Bianco* (CA 1952) (leaving poster in bathroom)

ii) *Doe v. Gonzaga University* (WA 2001) (Student accused of sexual misconduct)

(1) Rule – Defamation must be published to another person

(a) **Intra-corporate communications** are not "published" (qualified immunity)

(b) Limitation – When comments are made outside ordinary scope of employment – not privileged even if they are to other employees

(c) Limitation – Privilege can be lost if Δ makes intra-corporate statements with common law malice (ill-will)

iii) **Compelled Self Publication**

(1) Where originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement

(a) *Lewis v. Equitable Life Assurance* (MN 1986) (Π compelled to disclose he was discharged for gross insubordination)

iv) **Single Publication Rule**

(1) RST § 577A – Publication of a defamatory statement in a single issue of a publication, although it consists of thousands of copies is one publication giving a single COA (one edition of a book/newspaper/broadcast/etc.)

(2) Republication – Separate aggregate publication from original on a different occasion that is not merely delayed circulation

(3) *Firth v. State of NY* (NY 2002) (holding website "hits" are not new publications and addition of unrelated report to website is not republication)

(4) Policy – Stale claims, lots of COA from one act, harassment of Δs, lots Π maintain a single suit for the whole thing

v) **Third Parties** (Libraries) – requires both knowledge of what was published and discretion over whether to withhold publication (distributor vs. publisher liability)

d) **Communications Decency Act (CDA, 1996)**
   i) **CDA § 230(c)(1)** – No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider
      (1) *Zeran v. America Online* (4th Cir. 1997) (holding that distributors/publishers are both immunized by CDA *inter alia* rejecting Π's argument that Δ should incur liability after being put on notice about the content and failing to remove)
      (2) *Blumenthal v. Drudge* (DDC 1998) (holding that AOL took no part in creation or editing of Drudge's content even though contract contemplated they could – immune under CDA)
      (3) *Fair Housing Council of San Fernando Valley v. Roommates.com* (9th Cir. 2008) (holding that online form where Δ created questions and answer choices made Δ a content provider outside the CDA immunity)
         (a) Users could not choose to not answer the questions
         (b) Majority ties to "development" or "development in part"
         (c) Correcting spelling, removing obscenity, or trimming length is inside CDA
         (d) Dissent – Congressional intent to immunize, question of discrimination isn't being argued, information is provided by users, § 230(e) has specific exemptions for IP, & federal criminal laws, does not mention FHA
   ii) **Policy** – Minimize government intrusion and incentivize self-regulation
      (1) *Stratton v. Prodigy* (NY 1995) (holding Prodigy liable as a publisher rather than requiring the "knowledge" standard for distributors)

e) **Defamatory Communication**
   i) **RST § 559 – Defamatory Communication** – Communication that tends to harm the reputation of another to lower his estimation in the community or deter 3rd parties from associating with him
      (1) Cmt. e – Statement is defamatory only if it prejudices Π in the eyes of a substantial and respectable minority of members in a community, but not if it offends some individual(s) with sufficiently peculiar views
   ii) **Of or About the Π**
      (1) *Muzikowski v. Paramount Pictures* (7th Cir. 2003) (holding that Π must show a reasonable person would make the connection between a fictional character & Π)
         (a) *Hardball* character, fiction disclaimer is not dispositive, must show parallelism indicating actual reference, not just loosely based upon
      (2) *E. Hulton & Co. v. Jones* (EU 1910) (holding the standard is strict liability – if people make the reference then the standard is met regardless of intent)
   iii) **Doctrine of Innocent Construction**
      (1) *Lott v. Levitt* (7th Cir. 2009) (holding that statements indicating people had been unable to replicate Π's data were to be construed as unable to reproduce the result using different methods rather than trying to reproduce his experiment)

iv) **Opinion**
   (1) *Wilkow v. Forbes* (7th Cir. 2001) (holding that Δ's critical statements regarding Π's actions during bankruptcy which exploited the "new value" exception to gain priority over secured creditors were opinion and thus not actionable)
   (2) Couching statements of fact as opinion doesn't immunize them ("In my opinion X is a liar" = "X is a liar") (*Milkovich v. Lorain Journal* (1990))

v) **Libel vs. Slander**
   (1) Generally – Libel is written, slander is spoken
      (a) RST § 568A – Broadcasting of defamatory matter by radio or TV is libel whether or not it is read from a manuscript
      (b) RST § 568(3) – Factors (libel/slander): Area of dissemination, deliberate & premeditated character of publication, persistence of defamation
      (c) *Matherson v. Marchello* (NY 1984) (holding that statements falsely suggesting a sexual relationship with Π's wife spoken over the radio were libel though not in print – dissemination)
      (d) *Varian Medical Systems v. Delfino* (CA 2003) (holding that internet bulletin board posts about former employer are libel like other written publications)
   (2) Libel *per se* – Something that is plainly libelous
   (3) Libel *per quod* – Something that requires explanation to be libelous
   (4) Slander *per se* – Slander which does not require a showing of special damages
   (5) Defamation *per se* – Not requiring special damages – Commission of a criminal offense, infection with venereal disease, inability to perform or want of integrity in discharge of public office, fornication or adultery, words that prejudice a party in trade, profession or business
      (a) *Yonaty v. Mincolla* (NY 2012) (holding that statements suggesting someone is gay are not defamatory *per se*)

f) **Damages**

i) **Libel** – Does not require proof of special damages

ii) **Defamation/Slander *per se*** – Do not require proof of special damages

iii) **Slander** – Requires proof of special damages

iv) **Special Damages**

(1) Loss of marriage/hospitable gratuitous entertainment, preventing a servant/bailiff from getting a place, loss of customers by tradesman, preventing Π from receiving something he would have otherwise received

(2) *Terwillinger v. Wands* (NY 1858) (holding no damages for things that don't affect Π's character in the community – "natural and ordinary consequence")

(a) Π claimed damages based on depression caused by Δ's claim Π was forcing someone to have sex with him

(3) *Zeran v. Diamond Broadcasting* (10th Cir. 2000) (holding emotional distress is not a form of special damages – radio broadcast encouraging harassing phone calls to Π – "Ken" – reasoning that listeners didn't connect to "Ken Zeran")

(4) *Ellsworth v. Martindale-Hubbel Law Directory* (ND 1938) (holding that Π needn't produce specific witnesses to testify they stopped working with Π to prove special damages when Δ erroneously published a low rating for Π lawyer)

v) **General Damages** – Damages that do not correlate well to $ – *e.g.*, reputational harm

(1) *Faulk v. Aware* (SC-NY 1962) (affirming large general/punitive damages award based on expert testimony that actors like Π make between $150k-$500k)

(2) *Faulk v. Aware* (App. Div. NY 1963) (reduced award by 60-90% reasoning expert estimates were not based on comparable performers because Π made much less than the estimates cited by experts)

g) **Defenses**

i) **Truth (*see Masson*)**

(1) At common law, truth is always a defense – Inaccuracy alone is insufficient so long as there is **substantial truth**

(a) Minor inaccuracies don't amount to falsity if the basic gist remains true (*Masson v. New Yorker Magazine* (1991))

(2) Quotations that **materially change** the meaning of what was said (*e.g.*, taken out of context) are not protected

(a) Must analyze all statements in the context they are used

(3) *Auvil v. CBS 60 Minutes* (9th Cir. 1996) (holding that animal data is sufficient for estimating carcinogen risk in humans against Π's argument that, though individual statements were true, the overall message was not → notably Δ claimed Alar was more potent in children based on higher consumption/mass)

(4) *Price v. Stossel* (9th Cir. 2010) (holding that the proper comparison is between meaning of the quotation as published (by Δ) and meaning of the words as uttered – concluding that video quote of Π's statement **materially changed** the meaning of Π's words – *i.e.* **taken entirely out of context**)

(5) *Dworkin v. Hustler Magazine* (9th Cir. 1989) (holding that obvious parodic article containing "statements of fact" were actually opinion when taken in context of the parodic nature of the article)

(6) *Masson v. New Yorker Magazine* (1991) (holding that deliberate alteration of words Π utters is not "falsity" under *Sullivan* unless the alteration materially changes the meaning of the statement – journalist writes quotes based on notes rather than recording)

ii) **Privilege**

(1) Self-Defense

(a) What was said to Δ was defamatory (not privileged, untrue)

(2) Absolute

(3) Qualified

(a) Privilege is lost if: (1) exceed the privilege by going beyond the duty, or (2) publish with express malice

(b) Elements: (1) Public/private duty to communicate, (2) communication warranted by occasion/exigency

(c) *Watt v. Longston* (Euro 1930) (holding that statements between employees re another employee's conduct were privileged, but not statements to the employee's wife)

iii) **Public Sphere Privilege**

(1) Litigation Privilege – Absolute privilege for legal proceedings & reports of same

(a) Absolute privilege for judicial officers, attorneys, witnesses, parties, jurors, legislators, witnesses (RST § 586)

(b) *Kennedy v. Cannon* (MD 1962) (holding that litigation privilege protects statements *in a judicial proceeding*, thus statements made in newspaper in response to statements by prosecution re criminal trial were not privileged)

(c) *Craig v. Stafford Construction Co.* (CT 2004) (holding citizen complaints re cop are made to quasi-judicial body with process so they are privileged – policy to encourage citizen complaints)

(2) Record Libel

(a) Fair and accurate reports of official public proceedings or meetings dealing with matters of public concern (RST § 611)

(i) Report must be accurate and complete, or a fair abridgment

(ii) Cmt. f – Reports of a judicial proceeding must be complete – can't report evidence from one day and omit later evidence that vindicates Δ

(iii) Privilege is absolute – only look to the accuracy of the statement

(b) *Medico v. Time, Inc.* (3rd Cir. 1981) (holding that FBI documents concerning investigation of Π WRT organized crime are a report of official action/proceeding reasoning that they are not substantively different from a civil complaint)

(c) *Brown & Williamson Tobacco v. Jacobson* (7th Cir. 1983) (TV report based on FTC investigation/report overstepped privilege – One thing to say B&W adopted some ideas of a campaign to target young people which ended 1y later – another to claim they are currently enticing kids to smoke by associating with sex, drinking and marijuana)

(3) Fair Comment

(a) Privilege for "fair comment" on issues of public concern

(i) *E.g.*, criticism of a book (covered) vs. criticism of author (not)

(b) Qualified – False statements of fact can recover on showing of malice (CL), statements of opinion are absolutely privileged

(c) *Ollman v. Evans* (DC Cir. 1984) – Factors to determine statement of fact

(i) Contains "core meaning" understood by audience

(ii) Proposition is "verifiable" by objective tests

(iii) Context creates inference that statement is factual

(iv) Broader context stresses fact/narrative vs. editorials/reviews

(d) *Hepps* – Statements of opinion relating to a matter of public concern which do not contain a provably false factual connotation receive full constitutional protection

iv) **Constitutional Privilege**

(1) Analysis

(a) Public officials can't recover damages in defamation without actual malice

(i) Knowledge or reckless disregard to the truth of the statement (by C&C)

(b) Public figures can't recover damages in defamation without actual malice

(i) Public figures are persons of general prominence or someone who "thrusts him/herself to the forefront" of a public controversy (*Wolston*)

(ii) Involuntary – PF through no action of their own

1. Must pursue conduct that foreseeably will result in PF, controversy must actually arise, Π becomes a central figure, *before* defamation

(iii) All-Purpose – PF for all issues/contexts

(iv) Limited-Purpose – Person who injects themselves into a public controversy → PF for that context and not others

1. Must voluntarily assume the role, issue must exist, and be and remain a PF *before* the defamatory statement (*Liddy*)

(c) Actual Malice

(i) Reckless misstatements of evidence to make them more convincing can rise to actual malice (*Westmoreland*)

(d) Private persons can't recover on matter of public concern without showing negligence (*Gertz*) and that statements are false (*Hepps*)

(i) To get presumed/general damages, must show actual malice

1. *Dun & Bradstreet* – Private-Π, matter not of public concern → presumed/punitive damages allowed

(ii) NOTE: *Res ipsa loquitur* can approximate strict liability

1. Negligence opens the door to invasive discovery about Δ's conduct

(e) Policy

(i) Public officials/figures have better access to self-help

(ii) Persons seeking public office/persons in the public sphere invite attention and comment

(f) *Sullivan* – Public officials suing over criticism of their official conduct

(g) *Butts* – Public figures suing in defamation suing media-Δ

(h) *Gertz* – Private figure suing media-Δ re communist conspiracy

(i) *Dun & Bradstreet* – Private figure suing non-media Δ not of public concern

(j) *Hepps* – Private figure suing media Δ in matter of public concern

(2) *New York Times v. Sullivan* (1964)

(a) Qualified privilege for statements about public officials by critics of his official conduct

(b) Escape hatches – Advertisement not "of or about Π," substantial truth

(c) Policy – Avoid "chilling effect" – concerns about using defamation to approximate the result of the Sedition Act (outlawing statements criticizing government)

(3) *Curtis Publishing v. Butts* (1967)

(a) Πs are public *figures*, not officials – means of position or thrusting one's self into the "vortex" of a public controversy

(b) Note – Sedition Act reasoning is nonexistent here, argument that they have ways/means to protect themselves

(4) *Westmoreland v. CBS* (SDNY 1984)
  (a) Π-commander in Vietnam suing over report claiming Π was distorting intelligence to substantiate his optimistic reports of the war
  (b) Facts show Δ conducted extensive research
  (c) Held: Effort to confirm previously formed suspicion is not actual malice (*i.e.* selective research), but Δ cannot recklessly misstate evidence to make it more convincing → triable issue of fact re malice
(5) *Sharon v. Time* (SDNY 1984)
  (a) Δ article that was a "stinging indictment" of Sharon (Π) regarding leadership in Israel over one of their conflicts
  (b) Mostly absolute privilege as direct report of government report
  (c) Actual Malice – Π is public figure, actual malice is subjective standard at the time of publication by C&C
    (i) Journalist was previously on probation for falsifying info
    (ii) Some witnesses were never questioned about info attributed to them
    (iii)Can't use source shield laws in defamation case
  (d) Outcome – Statements false, but no actual malice → $1 damages, Time found negligent but not reckless
(6) *Gertz v. Robert Welch* (1974)
  (a) Π represented family in wrongful death case against cop, Δ published story claiming Π was part of a communist conspiracy to frame the cop
  (b) Holding negligence standard for special damages and actual malice for general/presumed damages by private-Π
(7) *Dun & Bradstreet v. Greenmoss Builders* (1985)
  (a) Bogus credit report authored by 17y/o intern
  (b) Held: Not a matter of public concern, only the individual Π and their customers, presumed/punitive damages allowed without actual malice
(8) *Wells v. Liddy* (4th Cir. 1999)
  (a) Book written suggesting DNC was involved in getting prostitutes for foreign dignitaries, Δ-Liddy repeated statements in the book at public engagements
  (b) Π-secretary to dude whose office was raided by Δ and others re Nixon
  (c) Issue – Is Π a public figure?
    (i) Π interviewed by FBI, mentioned in papers, subpoenaed, some media exposure (letter to editor, spoke to reporters a couple of times) → not a PF
    (ii) Media exposure was self-help in response to statements naming her as part of the conspiracy
(9) *Philadelphia Newspapers v. Hepps* (1986)
  (a) Stories claiming Π and Π's company were involved in organized crime
  (b) Held: Where media-Δ publishes speech of public concern, private Π can't recover without showing the statements were false
(10) *Milkovich v. Lorain Journal Co.* (1990)
  (a) Π coach of school wrestling team involved in brawl, Δ column claims Π lied during hearing re whether Π incited the fight through his behavior (author attended meet but not hearing)
  (b) Held: Opinion alone does not immunize statements
    (i) *Hepps* – Statements not provably false

(ii) *Falwell* – Statements that can't be reasonably interpreted as stating actual facts about an individual
(iii) *Sullivan/Butts/Gertz* culpability requirements

h) **Modern Defamation**

i) *Obsidian Finance Group v. Cox* (9th Cir. 2014)
(1) Issue: Application of *Gertz* to non-media-Δ (blogger)
(2) Δ blogger with history of making outlandish claims to induce payoffs for removal
(a) Made accusations that bankruptcy trustee committed fraud, money-laundering, etc. – judge threw out all (opinion) but tax evasion claim
(3) Held: *Gertz* is not limited to institutional press, punts on issue of public concern because court finds that *this* is a matter of public concern → need negligence
(a) Allegation that someone is committing a crime is public concern
(b) Must show negligence, no presumed damages without actual malice
(4) Test to determine opinion/fact
(a) Tenor of the work negates impression that Δ asserts objective fact
(b) Whether Δ used figurative/hyperbolic language negating impression
(c) Whether statements may be proven true/false

ii) **Libel in Fiction**
(1) Disclaimer alone is never dispositive
(2) Basic issue is "of and concerning Π" – Prove enough similarity to ID Π and enough difference to show defamation
(a) Description of the character must be so closely akin to the real person that the reader, knowing Π, would have no difficulty linking the two (*Carter-Clark*)
(b) When a book is fiction, publisher can rely on established writer's investigation rather than require publisher to engage in independent research
(3) Measured from perspective of those that know Π (*Carter-Clark*)
(a) If Π is PF, then measured from perspective of general public (*Batra*)
(4) *Carter-Clark v. Random House* (NY 2003)
(a) Book "Primary Colors" based on the Clinton campaign
(b) Scene with person who heads library literacy program where woman trips and candidate saves her, then cuts to scene suggesting she and candidate sexed
(c) Really, Clinton visited library where Π worked – she is not a librarian and does not run a literacy program – only similarity is some physical attributes
(i) All stipulate no sex
(d) Held: Similarities insufficient to make the connection to Π
(5) *Geisler v. Petrocelli* (2d Cir. 1980)
(a) Held: Advertised work of fiction, but was of and concerning Π – same name, physical description and Π was the lead character in the book (12(b)(6))
(b) Π/Δ worked at Mason Charter publishing – Δ later publishes book re transsexual tennis player on female circuit – storyline has people rigging matches so that character could win, character engages in fraud/sex etc.
(6) *Batra v. Wolf* (NY 2008)
(a) Arising out of Law and Order Episode
(i) Episode surrounds scandal in Brooklyn Supreme Court involving judge accepting bribes for preferential treatment

(ii) True story was dude gets busted for bribes, offers to rat on BK attorney appointment thing – rat wears wire with Batra but doesn't get anything
(b) Character and Π have same first name, ethnicity, occupation, appearance
(c) Held: Π was limited public figure, so analyze from perspective of general public who knows him – denied motion to dismiss

(7) *New Times v. Isaacks* (TX 2004)
(a) Judge & district attorney sue paper/staff for publishing satirical article
(b) Judge ordered 13y/o thrown in juvy for 10d (released at 5d) for writing "scary story" school assignment (got 100% + extra credit) – depicted shooting teacher + 2 kids – principal reported
(c) Δ wrote "onion" story attributing some false quotes to judge and ADA by name – judge demanded apology, they wrote a snarky one, judge sued
(d) Issue: Whether the charged portions would be reasonably understood to be assertions of fact rather than satire/parody
(e) Actual Malice – Author *knows* what they are saying is untrue (in parody), question is whether the publisher knew/strongly suspected the article was misleading or presented a substantially false impression
(f) Remanded for further fact finding

i) **Remedies**
i) **Injunction** – Typically not granted due to Constitutional speech restrictions
ii) **Retraction**
(1) At CL, considered a mitigation of damages, can block punitive
(2) Some states limit Π to special damages if they don't first request and Δ refuse
iii) **Reply Statute** – Requirement that a public figure be given a free opportunity to reply in the same forum
iv) *Burnett v. National Enquirer* (CA 1983) (holding that retraction statute is limited to "newspapers' where immediate dissemination of news limits ability to check sources)
v) Leval suggests a no-money/no-fault libel suit to vindicate reputation by finding falsity
(1) No *Sullivan* malice requirement, finding of falsity mitigates damages often
(2) *Sullivan*/*Gertz* subject press to invasive discovery that would be avoided

j) **Policy**
i) Schauer argues that the shilling effect of legal liability is not empirically sound
(1) Looks to Australia where he claims they have no *Sullivan*, but robust press
(2) Looks at states pre-*Sullivan* that adopted the same rule and neighbors speculating that there was no noticeable effect
(3) Argument that libel insurance, and low overall cost of litigation explains this
ii) Weaver argues that other countries are adopting *Sullivan*, but used bullshit data
iii) *Dow Jones & Co. v. Gutnick* (Aus. 2002)
(1) Holding that Aus. courts can exercise PJ based on where people download the defamatory material – not where it is uploaded to servers
(2) Argument that Π will sue where Π has a good reputation and the suit will have some value so Δ knows quite well where they will be subject to suit
iv) *Ehrenfeld v. Mahfouz* (NY)
(1) Holding no PJ over a person who sued a NY resident in UK and whose contacts stem entirely from the suit

(2) NY long-arm statute requires Δ to conduct business transactions in the state thereby purposefully availing himself of the laws of NY → Didn't happen

v) NYC Passes "Libel Terrorism Act" – Requires *Sullivan* protection to recognize foreign judgment against a US Δ (Federal SPEECH Act is same)

2) **PRIVACY**

a) **Generally – Prosser**

i) Intrusion on seclusion/solitude, or into Π's private affairs

ii) Public disclosure of embarrassing private facts about Π

iii) Publicity which places Π in a false light in the public eye

iv) Appropriation, for Δ's advantage, of Π's name or likeness

v) **Warren/Brandeis**

(1) Limitations

(a) Doesn't apply to oral communication without special damages

(b) Same privileges as defamation

(c) Subject to privilege for matters "of the public interest"

(d) Truth is not a defense

(e) Malice/ill-will is not required

(f) Right ceases on voluntary publication

b) **Intrusion Upon Seclusion**

i) **RST § 652B** – One who intentionally intrudes, physically or otherwise, upon the solicitude or seclusion of another, or his private affairs/concerns, is liable if the intrusion would be highly offensive to a reasonable person

(1) Intrusion into a private place, conversation or matter

(2) In a manner highly offensive to a reasonable person

ii) **Cases**

(1) *Nader v. General Motors* (NY 1970)

(a) Interviews with acquaintances possibly defamation if intended to disparage Π's character, but not invasion of privacy

(b) Sending prostitutes and harassing phone calls maybe IIED, not invasion

(c) Wiretapping/eavesdropping/overzealous public surveillance states claim for invasion of privacy

(2) *Galella v. Onassis* (2d Cir. 1973) (limited injunction after Δ eluded Secret Service, bribed doormen, sexed up servant to gain access to Π – harassment/invasion)

(3) *Shulman v. Group W Productions* (CA 1998) (Π videoed by crew during rescue from car accident. Held: Triable issue whether Π's privacy was invaded when crew recorded conversations using microphone and accompanied on helicopter)

(4) *Dresnick v. American Broadcasting* (7th Cir. 1995) (investigative journalists gain access to Eye Center through trickery – "testers" – Argument about Δ doing something that Π wants (customer) while also doing their journalism)

(a) *Compare* – Woman seduced wants sex, woman sexed by medical impersonator doesn't – or restaurant wants customers, but homeowner doesn't want phony meter reader

(b) Testers entered an office open to the public

(5) *Dietemann v. Time* (9th Cir. 1971) (holding invasion of privacy when Δ-journalist entered *Π's home* where Π sold snake-oil based on entry into private residence)

(6) *Food Lion Inc. v. Capiral Cities/ABC* (4th Cir. 1999) (Δ-journalists fraudulently obtained jobs in meat department to investigate really shady practices. Held: violation of duty of loyalty, and trespass because consent was vitiated by trickery (*but see Desnick*), and conflict of interest between employers)

c) **Disclosure of Private Facts**
   i) **RST § 652A** – Give publicity to a matter concerning the private life of another is subject to liability if the matter publicized is
      (1) Highly offensive to a reasonable person and
      (2) Not of legitimate concern to the public
   ii) Cmt. a – Publicity means the matter is made public by communicating to the public at large, or so many persons that the matter is public knowledge
   iii) Cmt. b – No liability when Δ publicizes information which is already public
   iv) **Cases**
      (1) *Sidis v. F-R Publishing Corp.* (2d Cir. 1940)
         (a) Child prodigy fades to obscurity, described in New Yorker biographical thing
            (i) Article dissected intimate details of his personal life contrasted with the lengths Π went *to avoid public scrutiny* – "ruthless exposure"
         (b) Held: What happened to Π is a matter of public interest – truthful comments on dress, speech, habits, and ordinary aspects of personality = no liability
         (c) Note – Warren/Brandeis specifically say that private life, habits, acts, relations of an individual which have no bearing on fitness for office are off limits
      (2) *Haynes v. Alfred A. Knopf* (7th Cir. 1993) (holding that revelations about Π being a drunk womanizer in the past – though later reformed – are about misconduct, not intimate details of his private life → no liability)
         (a) Story was part of a larger story about a historical time period
         (b) Book got a lot of praise (relevant?)
      (3) *Shulman v. Group W Productions* (CA 1998) (holding that newsworthiness privilege attaches to involuntary public figures – car crash was a legitimate concern of the public including her statements to rescuers, etc.)
      (4) *Cox Broadcasting v. Cohn* (1975) (holding that newsworthiness privilege extends to all matters released in public records – no liability for publishing name of rape victim published in the indictment)
      (5) *Florida Star v. B.J.F.* (1989) (holding no liability for publishing lawfully obtained police report re Π being robbed and raped)

d) **False Light**
   i) **RST § 652A** – Give publicity to a matter concerning another that places them in false light results in liability if
      (1) The false light would be highly offensive to a reasonable person and
      (2) The actor had knowledge/reckless disregard as to the falsity of the matter
   ii) **Cases**
      (1) *Time v. Hill* (1967)
         (a) Δ characterizes a new play as a "reenactment" of actual events that happened to Π/family when they were held hostage
         (b) Facts supported conclusion of negligence or recklessness, requires knowledge or reckless disregard for truth → remand
      (2) *Cantrell v. Forest City Publishing* (1974)
         (a) Δ wrote article with made up quotes from Π, took unauthorized photos of her home, interviewed her kids – DC denied punitive holding no *malice*
         (b) App ct. reversed damages thinking this was no *Sullivan* malice → reversed

e) **Right of Publicity**

i) **RST § 652C – Appropriation of Name/Likeness**

(1) One who appropriates the name or likeness of another for his own use/benefit is subject to liability for invasion of privacy

(2) Cmt. b – Not just commercial appropriation

ii) **NY Civil Rights Law §§ 50-51**

(1) § 50 – Right of privacy – For advertising purposes, or for purposes of trade, the name, portrait, or picture of any living person

(2) § 51 – Exemplary damages if done knowingly

iii) **Cases**

(1) *Zacchini v. Scripps-Howard Broadcasting* (1977) (holding Δ appropriated Π's human cannonball act when they videoed it and put it on TV – state interest to encourage Π's entertainment, broadcasted entire act, case is about controlling dissemination of Π's work)

(a) Dissent – News broadcast (but says not the same for a sports broadcast?)

(2) *Twist v. TCI Cablevision* (MO 2003)

(a) Tony Twist hockey enforcer, name used for gangster character in *Spawn* comic – some on the record statements by Δ that it was named after Π, and some advertising at hockey games (Spawn pucks, etc.)

(b) Elements – Use Δ's name as a symbol of his identity, without consent, and with intent to obtain commercial advantage

(i) Name refers to Π, and evidence they marketed to hockey folk thus seeking commercial advantage of using Π's name

(c) 1st Am. – Balance expressive/commercial character – "predominant use"

(i) Use was not parody or comment about Π, metaphorical reference to Π is not expressive enough → commercial

(3) *Comedy III Productions v. Saderup* (CA 2001) (holding 3-stooges t-shirt with exact picture of 3-stooges infringes right of publicity)

(4) *Finger v. Omni Publications* (NY 1990)

(a) Δ used Π's family photo with their 6 kids in fertility article on artificial insemination though Π's kids were not inseminated this way

(b) Held: Article is matter of public interest about fertility and the picture is relevant to that topic

(5) *Carson v. Here's Johnny Portable Toilets* (6th Cir. 1983) (infringed Π's right of publicity with "Here's Johnny" toilets – catch phrase part of Π's identity)

(6) *Factors v. Pro Arts* (2d Cir. 1978) (holding that right of publicity survives death and "In Memory of" Elvis poster infringed Π's assigned rights and not privileged as celebrating newsworthy event) *but see Memphis Development Foundation v. Factors* (6th Cir. 1980) (holding right doesn't survive death – how long will it last? Taxes? 1st Am.? etc.)

(a) 2d Cir. subsequently abandoned *Factors*, CA legislature recognizes right of publicity for life + 70y

iv) **Whitman – Cultures of Privacy**
  (1) Comparison between Euros (Dignity) and American (Liberty) concepts of privacy
    (a) Americans share private info more frequently while Euros find it taboo
    (b) Euros protect consumer data, credit reports, workplace privacy, civil disco, shield criminal Δ from public exposure, etc. more
    (c) But Euros are looser about stuff like public nudity and government intrusion
    (d) *See Sipple* – Outed gay dude that saved the president – killed himself eventually after he was disowned by family – argued he was already out in SF
      (i) In France, outing yourself to one community doesn't put you out to the world – photos taken of someone in public can't be published without consent if focused on a single person and not a group

v) **Cases**
  (1) *Boring v. Google* (3d Cir. 2010) (holding trespass, but no invasion of privacy when Google took pictures of Π's home/pool from their private driveway down a private road for Google Maps)
    (a) Seclusion/Publicity to private life – Court finds no person of ordinary sensibilities would feel shame/humiliation by this behavior
  (2) *Turner v. American Car Rental* (CT 2005) (holding no invasion of privacy when rental company used GPS to monitor when Π was speeding in rental car – no expectation when on public highway, but unfair trade practices for not informing Π of automatic withdrawal for *every* infraction)

3) **PRODUCT LIABILITY**

a) **Privity**

i) *Winterbottom v. Wright* (Euros 1842) (holding that tort duty extends only to parties to the K when Δ negligently maintained a stagecoach for Π's employer based on floodgates concerns)

ii) **Tort vs. K Remedies**

(1) Punitive damages

(2) K may be poorly drafted prompting tort suit

(3) Different statute of limitations

(4) Often both are available – Malpractice (tort) + breach of K (privity)

iii) *Huset v. J.I. Case Threshing Machine*

(1) Exceptions to the privity requirement

(a) Negligence of manufacturer/vendor that is imminently dangerous to life/health during the preparation of an article intended to preserve, destroy/affect life

(b) Owner's negligence causing injury to an invitee using a defective appliance

(c) One who sells/delivers an article he knows is imminently dangerous to life/limb without notice of the qualities is liable for injuries that could have been prevented

b) **Strict Liability**

i) *Macpherson v. Buick Motor Co.* (NY 1916) (holding Δ liable to third party-Π for defective wheel which crumbled during use – reasoning that the defective wheel was inherently dangerous and Δ knew/wanted 3rd parties to be using it)

(1) Required Δ's negligent conduct – note *res ipsa loquitur*-type reasoning

ii) *Escola v. Coca-Cola Bottling Co.* (CA 1944) (Traynor Concurring)

(1) Analogy to contaminated food – Δ expects/desires Π to use the product and Π cannot/will not inspect it (information costs)

(2) Product of mass-manufacturing and supply chains makes it impossible for Π to adequately inspect goods

(3) Policy – Deterrence, cheapest cost avoider, loss spreading

iii) **RST § 402A**
   (1) (1) Sell product in defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm caused if
      (a) (a) Δ is engaged in the business of selling the product and
      (b) (b) it is expected to/does reach the user without substantial changes
   (2) (2) Applies through (a) seller is not negligent, and (b) no privity
iv) **Consumer Expectations Test**
   (1) Defect – Condition not contemplated by user that is unreasonably dangerous
   (2) Unreasonably Dangerous – Dangerous beyond that contemplated by the ordinary consumer with ordinary knowledge common to the community
v) **RTT § 2** – Product is defective when, at time of sale/distribution, it contains a manufacturing, design, or warning defect
   (1) (a) Manufacturing Defect when product departs from intended design even if no negligence in preparation/marketing
   (2) (b) Design Defect when foreseeable risks of harm posed could have been reduced/avoided through reasonable alternative design where omission of the alternative renders the product not reasonably safe
   (3) (c) Warning Defect when foreseeable risks could have been reduced/avoided by reasonable instruction/warning and omission of instruction/warning renders the product not reasonably safe

c) **Economic Loss Rule**

i) **Policy**

(1) Don't allow Π to make an end-run around the K

(2) K represents a voluntary assignment of risk

(3) Three Classes

(a) Product liability economic loss rule

(b) Privity of K economic loss rule

(c) 3rd party situations

(4) Exceptions

(a) Professional services – Lawyers, doctors, insurance agents, etc.

(b) Fraudulent inducement, sometimes negligent misrepresentation

ii) *Seely v. White Motor Co.* (CA 1965)

(1) Δ sold truck through dealer to Π, defective suspension, attempted repairs, but truck eventually flips causing damage to the truck and lost profits to business

(2) Held: Economic Loss Rule bars collection in tort for losses other than injuries to person or to property other than the defective product (floodgates concerns)

(3) Held: Π can collect damages amounting to price paid for truck (repossessed by Δ) and lost profits to business based on express warranty of manufacturer

(a) Warranty: "Free from defects in material/workmanship under normal use"

(b) No privity required between Π/Δ reasoning like product liability

(c) Π doesn't need to rely on warranty to collect (consumer expectations)

iii) *Casa Clara Condominium Assn. Inc. v Charley Toppino and Sons Inc.* (Fla. 1993)

(1) Π sues Δ for high-salt concrete that is corroding the rebar in their homes resulting in cracks in the walls

(2) Held: Economic Loss Rule forecloses tort remedies when K remedy is appropriate

(a) Π's only claim is disappointed expectations WRT the purchased concrete

(b) Court argues that "other" materials besides the concrete are still part of the product and thus blocked by the ELR

(c) Note: In this case there is no privity between Π/Δ but Π is pursuing K remedies against others in other actions

iv) *Tiara Condominium v. Marsh & Mclennan* (FL 2013)

(1) Π retains Δ to get storm insurance – Δ gets $50mil coverage, Π's building pummeled in a storm

(a) Π relies on Δ's statement that limit was *per occurrence* and not *total* and invested $$$ in rebuild which insurance denied

(2) Purpose of ELR is prevent end-run around K with tort – Prevents economic losses when Δ hasn't committed breach of duty beyond breach of K

(3) Held: ELR applies only in product liability cases → Limitation on floodgates is that tort must be entirely independent of the K remedies available (*i.e.* can't have contemplated the specific circumstances and allocated risk)

(a) Here the negligence claim is independent of the K due to Δ's misrepresentation of facts which Π relied on

4) **ECONOMIC HARMS**
   a) **Fraud**
      i) **Analysis** – Paradigmatic exception to the ELR, prove by C&C evidence
         (1) Elements
            (a) False statement
            (b) Made knowingly/recklessly WRT the truth
            (c) Intended to be material/induce reliance
            (d) Π relies on
            (e) Causation/damages
         (2) Motive for engaging in fraud is irrelevant (*Pasley*)
         (3) Π does not need to show gain to Δ (*Pasley*)
      ii) *Pasley v. Freeman* (Euros 1789)
         (1) Π-merchant asks Δ about financial condition of T – relied on Δ's intentional misstatements resulting in damages when T defaulted
         (2) Δ was not part of the transaction, seemingly disinterested
         (3) Majority – Δ can tell the truth or say nothing
            (a) Note: Δ could face defamation if he disparages T's financial situation
         (4) Dissent – No privity, T's creditworthiness is a matter of opinion
            (a) Note: If Δ had made an oral guarantee, would have been barred by statute of frauds – strange result to allow collection here
      iii) **Puffing**
         (1) Determine whether statements could be discovered through reasonable investigation and whether the information is equally available to both parties
         (2) Determine whether Π would be prudent in relying on the statements
         (3) *Vulcan Metals v. Simmons Manufacturing* (2d Cir. 1918)
            (a) Δ sold IP in vacuum cleaners to Π
               (i) Representations about quality of the cleaners – "puffing" – arm's length deal between equals, Π should have investigated for themselves
               (ii) Representations about Δ never marketing/selling product – fraudulent misrepresentation – Π would want to know this and couldn't discover it
                  1. Held: Burden on Δ to show that Π saw/understood statement in K that contrasted oral representation that machines weren't sold before

iv) **Non-Disclosure**
  (1) RST § 551 – No duty to disclose except facts basic to transaction (Π knows Δ is mistaken, and Δ has a duty – custom, special relationship, etc. – to disclose)
    (a) (2)(b) – Partial disclosure invokes duty to disclose completely
    (b) (2)(c) – Duty to update Π within reason once disclosure is made and circumstances change
  (2) *Swinton v. Whitinsville Savings Bank* (MA 1942)
    (a) Analogous to "no duty to rescue" rule
    (b) Δ sold house to Π with termites – knew but didn't disclose
    (c) Held: Arm's length deal, failure to reveal is insufficient
  (3) *Laidlaw v. Organ* (1817)
    (a) Δ merchant buys tobacco from Π before news of the war being over and prices skyrocketing
    (b) Held: No duty to disclose info when equally available to both parties
  (4) Kronman – No disclosure when knowledge is the product of costly, proactive search – duty to disclose when Π is mistaken, Δ knows, and info was by happenstance

v) **Causation**
  (1) Materiality – RST § 538 – (a) Reasonable man would attach importance to the fact or (b) Δ knows/should know Π regards the fact as important in his decision
    (a) *TSC Indus. v. Northway* (1976) (holding omitted fact is material if substantial likelihood a reasonable shareholder would find it important in voting)
    (b) *Basic v. Levinson* (1988) (holding *TSC* applies to Rule 10b-5 actions)
  (2) Loss Causation
    (a) *Basic* – "Fraud on the market" – Price of company's stock is determined by available material information regarding the company – Misleading statements defraud purchasers then even if they don't directly rely on statements
  (3) *Edington v. Fitzmaurice* (1885)
    (a) Π advanced money to Δ-company based on solicitation/representations by Δ
    (b) Some claims thrown out, knowing falsity was statements that money was going to be used to invest back into company, but was really just to settle the company's debts
      (i) When Π advances $, the first thing he wants to know is what it will be used for
  (4) *Laborers Local 17 Health and Benefit Fund v. Philip Morris* (2d Cir. 1999)
    (a) Π-fund for union member health care sues to recover increased cost due to tobacco related illnesses (note: not suing on behalf of members)
    (b) Proximate cause – Must be direct link between injury asserted and injurious conduct – Π's complaint is an economic harm to a third party → barred
    (c) Directness Test – Look back from Π's injury at links in chain of causation
    (d) Foreseeability Test – Look forward from Δ's act to determine if outcome is foreseeable at t=0

b) **RTT – Unintentional Infliction of Economic Losses (§§ 1-5)**

i) **§ 1 – Generally**

(1) (a) No general duty to avoid unintentional infliction of economic loss

(2) Note: Underlying rationales – (1) No end-run around K assignment of risk, and (2) Concerns about unlimited liability (need limiting principle – concern about liability disproportionate to culpability)

(3) **Note**: RTT authors hold that if (1) there is no K, and (2) there is no concern about unlimited liability – there is no ELR for a pure negligence claim, *but see 534*

ii) **§ 3 – Preclusion of Tort Liability Arising from K (ELR)**

(1) There is no liability in tort for EL caused by negligence in performing/negotiating a K between parties

(2) Note

(a) When parties are not in privity, ELR doesn't apply

(b) When parties are in privity, Δ is liable for torts outside the scope of the K (*e.g.*, neg. misrep. Of time limit to exercise stock options to employee is outside employment K)

(c) Negligent inducement is not a tort claim (rescission/restitution, or promissory estoppel are more appropriate)

(d) Fraudulent inducement is a tort claim

(e) Tort may arise between parties indirectly linked by K through 3rd party, but not if Ks between P1/2 and T contemplate allocation of risk

iii) **§ 4 – Professional Negligence Resulting in Economic Loss**

(1) Professionals are subject to liability for EL caused by negligent performance of an undertaking to serve a client

(2) Note: Requires formal training/licensing, internal code of conduct, complex discretionary judgments in carrying out work (lawyer, doctor, accountant, insurance agent, architect) – Presumption of equal bargaining fails here

iv) **§ 5 – Negligent Misrepresentation**

(1) (1) One who, acting in the course of their business, or in an interested transaction, supplies false info. to others, is subject to EL if Δ didn't use reasonable care

(2) (2) Liability is limited to loss suffered (a) by people Δ intends to supply info to, and (b) through reliance on the info in a transaction Δ intends to influence

(3) (3) Liability of Δ under public duty to supply info extends to loss suffered by any class of person for whom the duty is created in any transaction it is intended to protect

(4) (4) Recovery subject to comparative responsibility

(5) (5) No liability for neg. misrepresentation during negotiation/performance of K

v) **§ 6 – Negligent Performance of Services**

(1) (1) One who, acting in the course of their business, or in an interested transaction, performs a service for others is subject to EL caused by Δ's failure to use reasonable care

(2) (2) Limited to loss suffered (a) by people Δ is performing service for, and (b) through reliance on it in a transaction the actor intends to influence

(3) (3) Subject to comparative responsibility

(4) (4) No liability for neg. in the course of negotiation/performance of K

c) **Analysis of ELR Problems**
   i) Consider the parties: K-parties? 3rd party? Strangers?
   ii) Consider the two policy rationales: (1) deference to K, (2) concern about unlimited liability/disproportionate losses
   iii) Professionals exception (consider limitations in 3rd party setting (*Ultramares*))
   iv) Limitations on negligent misrepresentations or performance of services
      (1) Make statement or perform service to someone resulting in EL
      (2) And Π is the person Δ made the statement to/performed the service for
      (3) And Δ intended for Π to rely on Δ's statement/service to influence a transaction

d) **Liability for Professional Negligence**
   i) *Ultramares Corporation v. Touche* (NY 1931)
      (1) Δ accountants negligently reported Fred Stern & Co. as financially stable
         (a) Provided copies of report to Stern knowing they would show to banks
      (2) Δ owed duty not to fraudulently report due to knowledge it was going to others
      (3) Floodgates concerns limit extending duty to negligent misrepresentation
      (4) *Glanzer v. Shepard* – Negligently weigh beans, give report to Π – liability
         (a) Distinguish – Close relationship between Π/Δ in *Glanzer*
      (5) Here, service was for the benefit of Stern to use in developing business, Π is a collateral beneficiary – Without fraudulent misstatement, no liability
   ii) Notes
      (1) Restatement (majority) – Liability imposed on suppliers of commercial information to third parties who are actually (specifically) foreseen as the users of the information for a particular purpose
      (2) *Rosenblum* – Third parties can recover for auditor negligence when their reliance on the audit report was reasonably foreseeable by the auditor

e) **Tortious Interference with Contract**
   i) **RST § 766** – Intentionally and improperly interfering with the performance of a K
      (1) Δ must have knowledge of the K
      (2) No liability for *negligent* interference with K
   ii) **Policy** – Allow the intentional interference claim in addition to K claim because intentional interference is a tort that is independent of the K
   iii) *Lumley v. Gye* (Euros 1853) (holding tortious interference when Δ induced Lumley to break her exclusive singing K with Π)

f) **Tortious Interference with Prospective Advantage**
   i) Consider: The two policy rationales are not implicated → you know you're only damaging one party usually, and there is no K to speak of between Π/Δ or Π/T for that matter
   ii) *Tarleton v. M'Gawley* (Euros 1783) (Δ shot at and killed some locals who were going to trade with Π's representative because the locals owed Δ $ → liability)
   iii) *People Express Airlines v. Consolidated rail Corp.* (NJ 1985)
      (1) Δ negligence caused chemical spill from railway car resulting in evacuation of the area including Π's commercial airline which was forced to shut down
      (2) Held: Identifiable class of Πs must be *particularly foreseeable* – types of persons/entities comprising the class
         (a) Certainty/predictability of presence, approximate # of members, type of economic expectations disrupted

g) **Public Nuisance**
   i) *Anonymous* (1536) (holding that general nuisance doesn't give a COA, Π must have a special injury above that of the general public – Δ blocked a highway Π used)
   ii) *532 Madison Ave. Gourmet Foods v. Finlandia Center* (NY 2001)
      (1) Partial building collapse resulting in closure of several blocks in NYC for several weeks – some business closed for longer than others
      (2) Public nuisance – Conduct that is a substantial interference with a common right of the public, interfering with use of a public space, or endangering or injuring property, health, safety, or comfort of a considerable # of people
         (a) Private Π must have a special injury beyond everyone else
      (3) Held: Π failed to show special injury
   iii) *Camden County Board of Chosen Freeholders v. Beretta* (3d Cir. 2001) (holding that Π couldn't maintain a public nuisance claim against Δ-gun manufacturers when causal chain to gun crimes was so attenuated)
   iv) Note: "Fisherman Exception" – Allowing claims by some Π when there is a common natural resource that no one has dominion over (direct harm to Π's proprietary interest – as opposed to indirect effects like contaminating a hotel's beach)

h) **RTT – Unintentional Infliction of Economic Loss (§§ 6-7)**
   i) **§ 7 – EL from Injury to 3rd Person or Property Not Belonging to Π**
      (1) Π can't recover for EL caused by (a) unintentional injury to another or (b) unintentional injury to property in which Π has no proprietary interest
      (2) Fishermen Note – (1) Π can get EL when Δ damages ship if Π works the ship and shares in the profits; (2) Π can get EL when Δ contaminates water killing fish because Π's loss is special compared to general nuisance
   ii) **§ 8 – Public Nuisance Resulting in Pure Economic Loss**
      (1) Δ's tortious conduct harms/obstructs a public resource/property is subject to EL of Π if Π's losses are distinct in kind from those of all other affected community
      (2) Note: Nuisance can't be used for a product liability case, nuisance considers dangerous conditions, not channels of distribution

i) **Policy**
   i) Sharkey argues that in the K situation, you consider separate torts only when there is fiduciary/professional relationship or there is a special relationship that stems from the public interest (substantial risk of harm to person or property)
      (1) Akin to "endangered consumer" vs. "disappointed consumer"

j) **Unfair Competition**

i) **RST – Factors**

(1) Nature of Δ's conduct

(2) Δ's motive

(3) Nature of the intervention

(4) Relationship between Π/Δ

ii) *Mogul Steamship v. McGregor, Gow & Co.* (1889)

(1) Δ ship owners formed cartel to block Π from servicing Chinese ports (low price and offered customers rebates for shopping within the cartel)

(2) Held: Individual acts weren't illegal, so the aggregate wasn't either

(a) Intentional efforts to mess over a specific Π would be actionable

(b) Price war is fine, but Δ couldn't commit fraud, misrepresentation, intimidation

(3) Dissent – Δ's rates were below the sustainable rate, unfair trade practice

iii) *INS v. AP* (1918)

(1) Δ shut out of access to war news due pro-German sympathies so they started paraphrasing news from Π, sending it by telegraph to west coast and publishing

(2) Held: Liability for Δ when Δ reaps where Δ has not sown – news is gathered by Π at a substantial cost – Δ misappropriates it and publishes without incurring cost of collection

(3) Dissent – News facts are public domain, IP is recognized in IP statutes

iv) *NBA v. Motorola* (2d Cir. 1997)

(1) Holding that *INS* "Hot News" did not apply to transmission of real-time NBA game scores and info to pagers (Π's business is presentation/broadcast of games)

(2) Factors

(a) Π generates/gathers time-sensitive info at a cost, & Δ's use is free riding

(b) Δ is in direct competition with Π, and Δ's free riding would kill Π's incentive to produce the product/service such that its quality/existence are threatened

v) *Barclays Capital v. Theflyonthewall.com* (2d Cir.) (holding no liability for Δ's reporting of Π's B/H/S stock report before day trading begins because Δ's reports were a collection of facts which were attributed properly to Π)

vi) *Ely-Norris v. Mosler Safe* (2d Cir. 1925) (holding that Δ's safes which looked like they had an explosion chamber but did not was unfair business practice – liability to Π because Π had a patent so every customer of Δ was a loss to Π)

(1) *Reversed, Mosler Safe v. Ely-Norris* (1926) (holding that the damages were speculative because there were other manufacturers who had explosion chambers)

vii) **§ 43(a) Lanham Act** – COA to anyone who may be damages against a false designation of origin or any false representation in connection with trademarks

5) **PREEMPTION**
   a) **Generally**
      i) Express – Positive preemption provision written into statute
      ii) Implied
         (1) Field – Legal regulation occupies the field so there is no space for state law
            (a) Consider: Does this particular issue fall within the occupied field?
         (2) Conflict – Federal/State law can co-exist so far as they are not in tension
            (a) Impossibility – Direct conflict between laws so federal trumps
            (b) Obstacle – State law undermines the federal scheme's purpose
      iii) Policy Topics
         (1) Role of Congress, Agency, and Courts
   b) **Cases – Field**
      i) *Cipollone* (Holding cigarette warning PL claim is preempted by federal labeling reqs)
   c) **Cases – Express**
      i) *Riegel v. Medtronic* (2008) (holding state tort claims for medical device design defects are preempted by MD amendments to FDCA express preemption prohibiting different requirements/warnings)
   d) **Cases – Implied (Impossibility and Obstacle)**
      i) *Geier v. American Honda Motor Co.* (2000)
         (1) Holding that state PL tort action that would require air bags in cars was preempted by Federal Motor Safety Act rules that were created to encourage a variety of passive safety devices in cars to determine the most optimal device
         (2) Note: Statute has express preemption clause and savings clause removing CL tort
         (3) Dissent finds airbags are generally agreed to be superior, and criticizes deference to an "interim" agency regulation
      ii) *Williamson v. Mazda* (2011) (holding that PL tort suit claiming defective lap-only belts in rear interior seat of car was not preempted by FMSA when purpose of standard allowing the belts was cost-consideration at the time the standard was made with knowledge that the cost would eventually come down)
         (1) Issue: What is a "significant regulatory objective"
         (2) Concern: Agency positions tend to change with the political tide
      iii) *Wyeth v. Levine* (SCUSA)
         (1) Π injured when PA injected Phenergen into her artery against 6 warnings on the product – product labeling is regulated by FDA/FDCA
         (2) Π claim is that Δ's drug is unreasonably dangerous to use for "IV push" method
         (3) Impossibility is not present because FDA/CBE rule allows Δ to change the warning then apply to FDA – Δ bears responsibility for warning content at all times
         (4) Obstacle – FDA claims it was setting floor/ceiling, but never got notice/comment on the preemption issue because it changed after the comment period (political), moreover, why have the CBE mechanism in the first instance?
         (5) Held: Not preempted absent *clear evidence* the FDA would not have approved the label change
         (6) Alito Dissenting – Should yield to FDA risk-utility decision making

iv) *PLIVA v. Mensing* (2011) (holding that failure to warn for generic manufacturer is preempted by FDCA because CBE does not apply to generics, rejecting FDA argument that liability would encourage adverse event reporting)
v) *Mutual Pharma v. Bartlett* (2013) (holding that generic design defect claim was preempted because the generic couldn't change the drug composition – in particular rejecting the "stop selling" argument)
vi) *Zoegenix v. Patrick* (D. Mass. 2014)
(1) AG mandate to stop the sale of "Zohydro" – opiate time-release drug without anti-abuse deterrent mechanisms
(2) For this drug, the FDA advisory panel recommended against approval
(3) Reasoning – FDA endorsed the drug as safe and effective, AG order treaded upon the FDA's charge, *citing Geier* (undermine ability to make drugs available)

e) **<u>Cases – Parallel Requirements/Enforcement – "Second Wave"</u>**
i) *Stengel v. Medtronic* (9th Cir. 2013) (upholding common law negligence based on failure to notify FDA of adverse events stemming from use of the device when statute required these updates)
ii) *Fulgenzi v. PLIVA* (6th Cir. 2013) (liability to Δ when they failed to update their generic drug label after the FDA approved a label change on the branded reasoning that they could have, and had a duty to, update their label)
iii) *Buckman v. Plaintiffs' Legal Committee* (2001) – Regulatory consultant made false statements to the FDA to get approval for bone screws – held that "fraud on the FDA" based on violation of the MDA/FDCA was preempted
iv) *Ogden v. Bumble Bee Foods* (CA 2012)
(1) CA food misbranding law that incorporates federal law by reference (and thus is identical in substance to the federal law)
(2) Π extensively citing to FDA warning letters to show the COA in state court does not present an obstacle to the FDA policy