

## CPLR 3019(c) and (d): Amendment

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Whether one should move under CPLR 3014 or under CPLR 3024(a) may be of importance in determining a party's right to appeal. Orders issued under a motion for a more definite statement (CPLR 3024(a)) are not appealable as of right (CPLR 5701(b)(2)). Permission to appeal is needed.<sup>44</sup> Therefore, if a motion based on the provisions of CPLR 3014 is treated as if made under CPLR 3024(a), it is not appealable as of right. However, if the 3014 motion is treated independently, then the motion may be deemed to affect a substantial right, from which appeal may be taken as of right under CPLR 5701(a)(2)(v).

The second department, in *Consolidated Airborne Sys., Inc. v. Silverman*,<sup>45</sup> declined to dismiss an appeal from an order denying defendant's motion to require the plaintiff to separately state and number his several causes of action. The court stated that this motion is made under CPLR 3014 and not under CPLR 3024.

In direct conflict with this decision is *Weicker v. Weicker*,<sup>46</sup> where the first department stated that motions made under CPLR 3014 are not specifically authorized but that motions may be made under CPLR 3024(a) for a more definite statement which would have the same practical effect as a motion to separately state and number.<sup>47</sup> Therefore, appeals from orders on motions to state and number separately must be treated as if the motions were made under CPLR 3024(a). Since a 3024(a) motion is only appealable by permission, and since in *Weicker* plaintiff had not obtained such permission, the court dismissed the appeal.

It would seem that since there is a marked similarity between CPLR 3014 and CPLR 3024(a) as to the practical effect of each motion, the courts should treat an appeal under either in the same manner. Since, by statute, appeals of CPLR 3024 motions are by permission only, appeals of motions under 3014 should be treated the same.<sup>48</sup>

#### *CPLR 3019(c) and (d): Amendment.*

The legislature has repealed CPLR 3019(c) and (d) and has redesignated former subdivisions (e) and (f) as subdivisions (c)

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<sup>44</sup> CPLR 5701(c).

<sup>45</sup> 23 App. Div. 2d 695, 257 N.Y.S.2d 827 (2d Dep't 1965). See *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 152 (1965).

<sup>46</sup> 26 App. Div. 2d 39, 270 N.Y.S.2d 640 (1st Dep't 1966).

<sup>47</sup> *Id.* at 40, 270 N.Y.S.2d at 641.

<sup>48</sup> It could also be argued that CPLR 3014 merely particularizes the various ways in which a pleading may be "vague or ambiguous" under CPLR 3024(a), and that, therefore, a motion made pursuant to the former is not a thing unto itself, but must be subject to the legislative limitations on the latter.

and (d). The repealed sections had allowed defendant to assert against the assignee of a contract (3019(c)) or the assignee of a promissory note or bill of exchange (3019(d)) a claim existing against the assignor at the time of assignment and belonging to the defendant before notification of the assignment.

Former subdivisions (c) and (d) were inconsistent with Sections 9-318(1) and 3-306 of the Uniform Commercial Code. Those sections permit the account debtor to assert a claim arising out of the same transaction regardless of when it accrued, and to assert any *other* claim as long as it accrued prior to *notification* of the assignment.

Since the Uniform Commercial Code establishes the substantive rules of claims and defenses against assignees of secured contracts (9-318(1)) and negotiable instruments (3-306), and since General Obligations Law § 13-105 regulates claims against an assignee in other situations, former sections (c) and (d) of CPLR 3019 were eliminated. The debtor is no longer restricted to asserting only those claims which *existed* against the assignor at the time of the assignment; it is only the time of notification which governs.

#### ARTICLE 31 — DISCLOSURE

##### *CPLR 3101(d): Appraisal reports.*

Under the disclosure provisions of CPLR 3101(d), any opinion of an expert or any material prepared for litigation is unobtainable unless the material sought can no longer be duplicated because of a change in conditions *and* the withholding of it will result in injustice or undue hardship.

It is questionable whether 3101(d) is applicable to trial as well as pretrial proceedings. Recently, it was held that the conditions of 3101(d) were applicable at the trial.<sup>49</sup> It appears that the general makeup of Article 31 warrants this conclusion since nothing in the article indicates any intention to distinguish between trial and pretrial proceedings.

The case involved a condemnation proceeding in which the claimants demanded disclosure of certain appraisals made by the City of New York. While holding that the provisions of CPLR 3101(d) were applicable at a trial as well as at pretrial proceedings, the court, nevertheless, found that the provision requiring "a change of conditions" was not met.<sup>50</sup> The court, however, indicated other procedural rules under which the appraisals could

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<sup>49</sup> *In re* Brooklyn Bridge Southwest Urban Renewal Project, 50 Misc. 2d 478, 270 N.Y.S.2d 703 (Sup. Ct. N.Y. County 1966).

<sup>50</sup> *Id.* at 480, 270 N.Y.S.2d at 706-07.