

CPLR 3101(d): Appraisal Reports

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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 The repealed sections had allowed defendant to assert against the assignee of a contract (3019(c)) or the assignee of a promissory note or bill of exchange (3019(d)) a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.⁴⁹ 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.⁵⁰ The court, however, indicated other procedural rules under which the appraisals could

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

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

be admitted at the trial.⁵¹ Under these rules, disclosure of the appraisal is obtainable to impeach the credibility of the condemnor's expert witness, or where the appraisals constitute admissions against interest on the part of the condemnor, *i.e.*, statements which amount to a prior acknowledgement that a relevant fact is not as now claimed.

The Judicial Conference recommended the amendment of CPLR 3101(d) to "enable court rules to provide for free disclosure, in condemnation and real estate tax certiorari proceedings, of each party's appraisals and their bases."⁵² The reason for this amendment was to provide for the expeditious review and disposal of a great number of those cases by requiring the exchange of appraisal reports before trial. However, this amendment was vetoed by the Governor on the ground that this procedure would lead to a wide variance of court rules in this area.

CPLR 3106(a): Priority with respect to counterclaims.

Under prior law, many courts established their own rules as to the priority of the examination before trial. The first department had adopted as its rule an approach which gave the plaintiff priority in all cases except tort actions other than for fraud and conversion.⁵³ However, in the second department, the practice followed was that whoever served the notice for examination first, examined first, unless special circumstances dictated the contrary.⁵⁴

In superceding these court rules, CPLR 3106(a) permits a defendant to obtain disclosure of a party by mere notice within 20 days after the complaint is served. A plaintiff seeking disclosure under this section, however, must obtain leave of the court for an examination within this 20 day period. The defendant, therefore, has 20 days in which to obtain the first examination before trial unless the plaintiff obtains leave of the court to serve his notice of examination. The reason for this priority is to give the defendant a reasonable time to examine the complaint, to find out why he is being sued, and to plead or move to the complaint.⁵⁵

⁵¹ *Id.* at 480-81, 270 N.Y.S.2d at 707.

⁵² N.Y. Sess. Laws 1966, Legislative Reports, § 3101(e) (proposed change). See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.52a (1965).

⁵³ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3106.03 (1965). See Graziano, *Priority of Examination of Parties Before Trial—New Special Rule in the First Department*, 17 QUEENS B. BULL. 181 (1954).

⁵⁴ *Desiderio v. Gabrielli*, 284 App. Div. 976, 135 N.Y.S.2d 1 (2d Dep't 1954).

⁵⁵ *Van Valkenburgh, Nooger & Neville, Inc. v. John F. Rider Publisher, Inc.*, 24 App. Div. 2d 437, 260 N.Y.S.2d 691 (1st Dep't 1965). See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3106.02 (1965).