

## CPLR 7804(c): Notice of Petition Must Be Served at Least Twenty Days Before Hearing Date

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*CPLR 7511(c): Case illustrates practicality of modification order.*

An application to vacate an arbitrator's award is deemed to include a motion to modify and correct the award on the ground that there was a miscalculation of figures by the arbitrator.<sup>239</sup> As illustrated by *Miller v. Cosmopolitan Insurance Co.*,<sup>240</sup> modification is a very useful device when vacation is considered to be too extreme a remedy.

In *Miller* the arbitrator had included an award for medical payments despite the fact that the uninsured motorist endorsement in plaintiff's policy unequivocally provided that damages recoverable at arbitration were not to include such payments. Rather than vacate the award or remand the matter to the arbitrator,<sup>241</sup> the appellate division confirmed the award and reduced it by the amount of the overpayments.<sup>242</sup>

In situations where an item listed in the arbitrator's award is clearly improper and the error can easily be rectified, the approach taken in *Miller* obviates the additional expenditure of time and money by the parties.

*CPLR 7804(c): Notice of petition must be served at least twenty days before hearing date.*

An article 78 proceeding is a special proceeding.<sup>243</sup> As such, the rules governing the commencement and prosecution of a special proceeding<sup>244</sup> are usually applicable.<sup>245</sup> One exception is that a notice of petition must be served at least twenty days before the petition is noticed to be heard.<sup>246</sup> A shorter period was considered to be unrealistic.<sup>247</sup>

In *Dickerson v. Jensen*,<sup>248</sup> the notice of petition was served thirteen days before the hearing date. Accordingly, the court held that the failure of the petitioners to afford a full twenty days constituted a jurisdictional defect.

It should be noted that if the need arises, a party can shorten the twenty-day period by utilizing an order to show cause.<sup>249</sup>

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<sup>239</sup> CPLR 7511(c). See 8 WK&M ¶ 7511.23.

<sup>240</sup> 33 App. Div. 2d 917, 307 N.Y.S.2d 592 (2d Dep't 1970).

<sup>241</sup> See, e.g., *Weiss v. Metalsalts Corp.*, 15 App. Div. 2d 46, 222 N.Y.S.2d 7 (1st Dep't 1961), *aff'd without opinion*, 11 N.Y.2d 1042, 183 N.E.2d 913, 230 N.Y.S.2d 32 (1962).

<sup>242</sup> See also *Cruzado v. MVAIC*, 24 App. Div. 2d 743, 263 N.Y.S.2d 484 (1st Dep't 1965).

<sup>243</sup> CPLR 7804(a).

<sup>244</sup> See generally CPLR art. 4.

<sup>245</sup> 8 WK&M ¶ 7804.01.

<sup>246</sup> CPLR 7804(c).

<sup>247</sup> FIFTH REP. 753.

<sup>248</sup> 33 App. Div. 2d 890, 307 N.Y.S.2d 559 (4th Dep't 1969).

<sup>249</sup> CPLR 403(d).