

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.²³⁹ As illustrated by *Miller v. Cosmopolitan Insurance Co.*,²⁴⁰ 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,²⁴¹ the appellate division confirmed the award and reduced it by the amount of the overpayments.²⁴²

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.²⁴³ As such, the rules governing the commencement and prosecution of a special proceeding²⁴⁴ are usually applicable.²⁴⁵ One exception is that a notice of petition must be served at least twenty days before the petition is noticed to be heard.²⁴⁶ A shorter period was considered to be unrealistic.²⁴⁷

In *Dickerson v. Jensen*,²⁴⁸ 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.²⁴⁹

²³⁹ CPLR 7511(c). See 8 WK&M ¶ 7511.23.

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

²⁴¹ 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).

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

²⁴³ CPLR 7804(a).

²⁴⁴ See generally CPLR art. 4.

²⁴⁵ 8 WK&M ¶ 7804.01.

²⁴⁶ CPLR 7804(c).

²⁴⁷ FIFTH REP. 753.

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

²⁴⁹ CPLR 403(d).