

CPLR 204(b): Toll Will Not Be Granted Where Colorable Basis for Arbitration Is Lacking

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ARTICLE 2 — LIMITATIONS OF TIME

CPLR 204(b): Toll will not be granted where colorable basis for arbitration is lacking.

CPLR 204(b) tolls the statute of limitations for the period between a demand for arbitration and a final determination that there is no obligation to arbitrate. Section (b) is not explicitly qualified to apply only to well-founded, controvertible, demands for arbitration, but reason dictates that there be some such qualified use of the provision.

In *Watkins v. Holiday Drive-Ur-Self, Inc.*,¹ the court, since it found that there was no basis for believing that arbitration was available, refused to toll the statute of limitations. The plaintiff's actions, in demanding arbitration, are probably explained by a mistaken belief that the defendant's insurance carrier was a signatory to an agreement providing for arbitration.

The bar should thus note that a demand for arbitration must be made with care for if it is legally an empty request, made either through mistake or as a tactic to increase one's time to deal with a case, it will have no effect on the running of the statute of limitations. Thus, an attorney who allows the statute to expire during such a course of action may be subject to the danger of a malpractice suit.

CPLR 214: "Continuing practice" theory applied in attorney malpractice cases.

Generally, in a malpractice case, the statute of limitations runs from the time that the malpractice occurs² rather than from the time when it is discovered. However, various exceptions to the general rule have evolved.³ For example, in the medical field, the "continuing practice" theory has received Court of Appeals' endorsement.⁴ According to this theory, if treatment continues after the actual malpractice, the statute runs from the date of the last treatment. The rationale is that, where treatment occurs on more than an occasional visit and extends over a period of time, the relationship between patient and doctor must

¹ 29 App. Div. 2d 810, 287 N.Y.S.2d 730 (3d Dep't 1968).

² *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd without opinion*, 254 N.Y. 620, 173 N.E. 892 (1930); see 1 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶214.18 (1966) for a discussion of the problems raised when there are unknown injuries.

³ See McLaughlin, *Annual Survey of New York Law: Civil Practice*, 14 SYRACUSE L. REV. 347, 353-54 (1962).

⁴ *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).