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INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



Augusta v. Keehn & Associates: Delay and Taking Steps in Superior Court Inconsistent with Right to Arbitrate Results in Waiver of Right to Arbitrate

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In a [published decision](#) issued by the California Court of Appeal, Fourth Appellate District, Division One, the Court of Appeal addressed the issue of whether the trial court properly dismissed a petition to compel arbitration of a legal malpractice claim on the ground that the plaintiff/former client had waived his right to arbitrate. *Augusta v. Keehn & Associates*, 11 C.D.O.S. 2935. The Court of Appeal affirmed the finding of waiver.

The case arose out of alleged malpractice in the handling of securities litigation and alleged bankruptcy-related advice. The retainer agreement between the attorney and client contained a binding arbitration clause covering “any issue or controversy with the firm.” The client filed the legal malpractice complaint in the Superior Court and then, six and a half months later, filed a petition to compel arbitration. During that time, the former client served discovery on the defendant attorney, engaged in meeting and conferring about the attorney’s discovery responses, noticed the attorney’s deposition, and filed two motions to compel discovery.

The Court of Appeal stated the following with respect to the applicable test for waiver:

‘There is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. [Citations.]’ [Citation.] While engaging in litigation of the matter may be inconsistent with an intent to invoke arbitration, ‘the party who seeks to establish waiver must show that some prejudice has resulted from the other party’s delay in seeking arbitration.’ ” (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1363-1364; §§ 1281, 1281.2.)

The Court of Appeal went on to explain that the client’s delay in seeking discovery, and conduct during the delay, manifested an intent not to arbitrate. There was also prejudice to the attorney defendant because the client “used the court’s processes to obtain formal discovery not available in arbitration, and then [] refused to reciprocate in discovery.”