

“Play Now, Arbitrate Later”—“Not So Fast,” Ninth Circuit Says

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Last week, the Ninth Circuit Court of Appeals [found](#) that Roblox Corporation waived its right to compel arbitration of a putative class representative’s claims. This was because Roblox initially attempted to litigate those claims in court, despite using a number of common litigation tactics that typically do not constitute a waiver.

Key Takeaways

- The Ninth Circuit found that filing a comprehensive motion to dismiss on the merits before seeking arbitration was inconsistent with the right to arbitrate—even though such motions typically do not constitute waiver.
- Companies should consider expressly delegating the question of waiver to an arbitrator in their arbitration agreements to avoid having courts decide this issue.
- A dissenting opinion strongly criticized the majority, suggesting the ruling expands the waiver doctrine beyond existing precedent, which could invite further appellate review.

What Happened?

- The class representative’s daughter was a user of the video game system, Roblox. He discovered that an adult had sent her inappropriate messages through the game and filed suit on a putative class action against Roblox in California state court on that basis and asserted seven causes of action.
- Roblox then removed the action to federal court under the Class Action Fairness Act. The plaintiff moved to remand the action, and when that was denied, Roblox filed a “comprehensive” motion to dismiss, seeking dismissal of all claims on several grounds.

- The plaintiff amended his claims several times and roughly a year later, Roblox sought to dismiss the operative complaint and compel the claims to arbitration. The plaintiff opposed, and Roblox sought limited discovery to support its arbitration motion, which the court permitted. Roblox then re-filed its motion to compel arbitration.
- **The district court ultimately denied the motion on multiple grounds**, including on the basis of waiver, finding that its attempt to seek a merits-based dismissal constituted an act inconsistent with the right to arbitrate. Roblox then appealed.

Litigate Before Arbitrate = Waiver

The Ninth Circuit affirmed on appeal, finding that Roblox had knowledge of its right to arbitrate and acted inconsistently with that right by first attempting to litigate the claims in court. For companies relying on arbitration provisions, this holding underscores the risk of engaging in substantive litigation before invoking arbitration rights.

For instance, and even though Roblox did not know what particular arbitration agreement the plaintiff had entered into (largely because he had refused to produce information), the Ninth Circuit found that Roblox should have moved to compel earlier and then sought discovery if it needed to find the exact arbitration agreement the plaintiff had agreed to.

The court further found that Roblox acted inconsistently with its right to arbitrate by litigating the action on the merits. Specifically, the court faulted Roblox for removing the case to federal court and litigating a motion to remand. This is particularly significant because the Ninth Circuit cited no cases for the proposition that removal of an action to federal court constitutes an act inconsistent with a right to arbitrate—potentially creating new exposure for parties who routinely remove class actions under CAFA before seeking arbitration.

The court also found that Roblox had moved to dismiss the lawsuit “on the merits” and attempted to distinguish this type of motion to dismiss from non-dispositive motions to dismiss (like for lack of personal jurisdiction). As the court stated: “[s]eeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum.”

The Dissent Sees Things Differently

According to the dissent, the majority opinion found a waiver in situations that it had never addressed before. As the dissent noted, “we’ve never held that parties must move to compel, and then, if necessary, seek discovery under the Federal Arbitration Act to avoid waiver of an arbitration right.”

Additionally, the dissent rejected the majority’s attempt to distinguish the type of motion to dismiss that was filed as a basis to support waiver, stating: “...while Roblox probably could have filed its motion to compel arbitration

from the get-go, we have never said that filing a non-jurisdictional motion to dismiss categorically constitutes waiver.”

Finally, the dissent categorically rejected the notion that removal of a case to federal court constitutes waiver of a right to arbitrate.

What Does this Ruling Mean for You?

A waiver of a right to arbitrate should be the exception, not the rule, and under the Federal Arbitration Act (FAA), any doubts should be resolved in favor of arbitration.

However, a waiver is also one of the stronger defenses to a motion to compel arbitration and one that courts tend to latch onto when argued by the non-moving party. This decision serves as a cautionary tale for companies and their counsel: know your arbitration rights and assert them promptly.

Parties can try to avoid this result in one of two ways:

1. First, parties can expressly delegate the question of waiver to an arbitrator, and not a court, to decide.
2. Second, parties can, and should, arbitrate first and litigate second to avoid a similar result that befell Roblox.

That does not mean avoiding removal when it is appropriate. Contrary to the Ninth Circuit’s decision, numerous district and circuit courts have found that removal does not constitute waiver of a right to arbitrate—and for good reason. While the FAA confers no subject matter jurisdiction on federal courts, parties may prefer to gain the FAA’s protections in federal, as opposed to state, court.

Companies operating in the Ninth Circuit should now carefully weigh the benefits of federal court removal against the potential risk of an arbitration waiver finding. Elsewhere, removal remains a generally safe option, but this decision may influence waiver arguments nationwide.

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