

CLIENT ALERT

***Bernal v. Kohl's*: Seventh Circuit Holds That The AAA Gave Kohl's What It Bargained For, Not A Get-Out-Of-Arbitration-Free Card**

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If a party fails to comply with an arbitral forum's procedural requirements and the forum terminates the arbitration, did the party “refuse” to arbitrate under the Federal Arbitration Act (“FAA”)? The Seventh Circuit confronted this question in *Bernal v. Kohl's Corp.*,¹ where the American Arbitration Association (“AAA”) terminated arbitration proceedings because Kohl's failed to register its arbitration agreement in accordance with the applicable AAA rules.

After Petitioners moved to compel Kohl's to arbitrate, the Seventh Circuit held in a 2-1 decision that Kohl's failure to register its arbitration agreement did not constitute a “refusal to arbitrate” under the FAA. Dismissing the dissent's concern about creating a “get-out-of-arbitration-free” option for companies, the majority reasoned that arbitration agreements are creatures of contract and that the AAA arbitration had been completed in line with what the parties bargained for in their agreement.

We discuss the Seventh Circuit's decision and its implications below.

¹ *Bernal v. Kohl's Corp.*, No. 24-2806, 2026 WL 1193991 (7th Cir. May 1, 2026).

Background on the Federal Arbitration Act

The FAA authorizes a party aggrieved by another party's failure to arbitrate under a written agreement to petition a federal court to compel arbitration.² To do so, the party seeking to compel arbitration must establish three elements: (1) an enforceable written arbitration agreement; (2) a dispute falling within the agreement's scope; and (3) a refusal to arbitrate.³

In interpreting the third element, the Seventh Circuit has emphasized that the FAA does not provide an "unfettered right" to arbitrate—"all the law requires is that the parties arbitrate according to the terms of their agreement."⁴ Thus, unless the agreement provides otherwise, the Seventh Circuit presumes that parties intend to delegate authority to resolve intra-arbitration procedural disputes to the arbitrators, not the courts.⁵ Accordingly, a party does not "refuse to arbitrate" when the "arbitration starts and ends in a manner the arbitration agreement contemplated, even if the arbitrator does not ultimately reach a decision on the merits."⁶

Background on *Bernal v. Kohl's*

After purchasing products from Kohl's website, Petitioners Ana Bernal and three other Kohl's customers sought to arbitrate claims against Kohl's for using false and deceptive marketing practices in violation of California's consumer protection laws. An additional 54,491 claimants—all represented by the same counsel as Petitioners—sought to arbitrate identical claims against Kohl's.

Petitioners' claims were subject to Kohl's Terms and Conditions, which required customers to arbitrate any dispute with Kohl's, designated the AAA as the arbitral forum, and directed the arbitration to be conducted under the AAA's Consumer Arbitration Rules ("Rules").⁷ The Rules give the AAA exclusive authority to resolve any dispute related to the "interpretation, applicability, enforceability or formation of" the arbitration agreement.⁸ Under Rule 12, a company that identifies the AAA as its arbitral forum must register its agreement with the AAA and pay a fee.⁹ If a company declines to do so, Rule 12 provides that the AAA "will decline to administer" the arbitration, and the parties can submit their dispute to an appropriate court.¹⁰

Although Petitioners followed the process set forth in the Rules for initiating an arbitration, Kohl's did not register the agreement in accordance with Rule 12. Consequently, the AAA declined to administer the arbitration and terminated the proceedings. Petitioners then sued Kohl's in federal court and sought to compel arbitration under

² See 9 U.S.C. § 4; see also *Bernal*, 2026 WL 1193991, at *4.

³ *Bernal*, 2026 WL 1193991, at *4 (citation omitted).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at *1. Although the parties disputed which version of the Terms and Conditions applied to Petitioners' claims, the Seventh Circuit did not reach this issue.

⁸ *Id.*

⁹ *Id.* at *2.

¹⁰ *Id.*

the FAA, asserting that Kohl's failure to register the agreement amounted to a refusal to arbitrate.¹¹ The district court denied the motion to compel, reasoning that the parties had bargained for the AAA's discretion in applying its procedural rules, and that the AAA exercised that discretion when it terminated the proceeding after Kohl's failure to register the agreement.¹² Petitioners appealed.

The Seventh Circuit's Opinion

The Seventh Circuit affirmed the district court's denial of Petitioners' motion to compel in a 2-1 decision, holding that Kohl's did not refuse to arbitrate by declining to register the agreement.¹³ The Seventh Circuit characterized the Rule 12 registration requirement as a "forum-specific procedural gateway" matter.¹⁴ Kohl's compliance with this requirement—and the consequences of its noncompliance—were procedural questions within the AAA's authority, not the judiciary's.¹⁵ When the AAA resolved this procedural issue by declining to arbitrate, it ended the dispute in compliance with its Rules and the parties' agreement.¹⁶

In reaching this decision, the Seventh Circuit relied on its prior decision in *Wallrich*.¹⁷ In that case, the Seventh Circuit reversed a district court's order compelling Samsung to arbitrate and pay the AAA's administrative filing fees, holding that the parties there had delegated fee disputes to the AAA under its rules and procedures.¹⁸ Because the AAA terminated the arbitration pursuant to those rules and procedures, the Seventh Circuit declined to "disturb the AAA's judgment" and compel arbitration.¹⁹

As in *Wallrich*, the Seventh Circuit in *Bernal* held that Petitioners and Kohl's "bargained for the AAA's discretion over the registration of the agreement, including the consequences that would stem from Kohl's refusal to register the agreement."²⁰ The Seventh Circuit found further support in the Second Circuit's decision in *Frazier*²¹ and the Third Circuit's decision in *Hernandez*,²² both of which declined to disturb an arbitral forum's decisions regarding procedural issues. For the Seventh Circuit, the bottom line was that a "motion to compel arbitration is not a mechanism by which a party may seek court intervention to resolve intra-arbitration procedural disputes properly delegated to arbitrators."²³

¹¹ *Bernal v. Kohl's Corp.*, 749 F. Supp. 3d 971, 974 (E.D. Wis. 2024). Petitioners initially sued Kohl's in the Central District of California, but the case was later transferred to the Eastern District of Wisconsin based on a forum selection clause in Kohl's Terms and Conditions.

¹² *Bernal*, 749 F. Supp. 3d at 975-76.

¹³ *Bernal*, 2026 WL 1193991.

¹⁴ *Id.* at *6.

¹⁵ *Id.* at *6-7.

¹⁶ *Id.* at *6.

¹⁷ *Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609 (7th Cir. 2024).

¹⁸ *Id.*

¹⁹ *See id.* at 620.

²⁰ *Bernal*, 2026 WL 1193991, at *6.

²¹ *Frazier v. X Corp.*, 155 F.4th 87 (2d Cir. 2025).

²² *Hernandez v. MicroBilt Corp.*, 88 F.4th 215 (3d Cir. 2023).

²³ *Bernal*, 2026 WL 1193991, at *7.

Judge Kolar's Dissent

Judge Joshua P. Kolar dissented. Although he agreed with the majority on the underlying legal principles governing the case, he found that Kohl's decision not to register the agreement was "a conscious step to depart from its agreement to arbitrate."²⁴ Judge Kolar reasoned that in *Wallrich*-type cases involving fees, the AAA could offer the opposing party an opportunity to advance the fees. Thus, one party's refusal to pay never unilaterally blocked the AAA from exercising its discretion.²⁵ In contrast, Kohl's failure to register the agreement under Rule 12 wholly deprived Petitioners of their ability to arbitrate because the Rules provide no mechanism for a consumer to advance the arbitration after a business fails to register its agreement.²⁶ Given this distinction, Judge Kolar concluded that "the majority opinion stretches *Wallrich's* holding too far."²⁷ According to Judge Kolar, the majority opinion threatens to convert any bilateral agreement under the AAA's Consumer Rules into a "get-out-of-arbitration-free option for businesses."²⁸

Conclusion

In the wake of *Bernal*, companies facing mass arbitration claims and steep filing fees should assess whether their arbitration agreements and designated arbitral rules provide a procedural pathway for avoiding arbitration and defeating a motion to compel under the FAA. But companies considering this strategy must proceed with caution.

- First, while the Seventh Circuit's decision ended the arbitration in *Bernal*, it did not extinguish Petitioners' claims. Rather, the Seventh Circuit noted that "if the AAA declines to administer the arbitration due to the company's non-compliance with Rule 12, the rule provides that the parties can submit their dispute to an appropriate court."²⁹ Accordingly, companies considering this strategy must carefully weigh the pros and cons of litigating the claims in arbitration versus in an appropriate state or federal court.
- Second, the AAA may consider revising its Consumer Arbitration Rules to prevent companies from avoiding arbitration by simply declining to register the agreement. Litigants should carefully analyze the applicable arbitration rules and monitor them for changes.
- Third, other courts may follow the reasoning in Judge Kolar's dissent. While the Seventh, Second, and Third Circuits have declined to disturb an arbitral forum's decisions regarding procedural issues, other circuits may grant motions to compel arbitration where it appears that a company is seeking to convert a bilateral agreement to arbitrate into a unilateral option-to-arbitrate.
- Finally, Petitioners have filed a petition for rehearing *en banc*, and it remains to be seen whether the Seventh Circuit will agree to reconsider the majority's decision in *Bernal*. If the petition is denied, Petitioners may

²⁴ *Bernal*, 2026 WL 1193991, at *8 (Kolar, J., dissenting).

²⁵ *Id.* at *10.

²⁶ *Id.*

²⁷ *Id.* at *10.

²⁸ *Id.*

²⁹ *Bernal*, 2026 WL 1193991, at *2.

seek to appeal to the Supreme Court. Given the Supreme Court's recent willingness to take up FAA cases and the rise of mass arbitration, *Bernal* may not be the last word on federal courts' willingness to compel arbitration where a party chooses not to comply with the arbitral forum's procedural rules.

We will continue to monitor these developments closely.

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³⁰ The authors thank Associate Alexander Abraham for his contributions to this client alert.