# *A Circuit Split on a Question of Federal Jurisdiction: When seeking to confirm or vacate an arbitration award, is federal question jurisdiction to be determined from the face of the petition, or may a district court "look through" the petition and consider the nature of the underlying dispute?*

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**Introduction**

Arbitration is a popular forum for dispute resolution, but enforcement of an arbitration award may require that it be confirmed by a court in the form of a judgment. The Federal Arbitration Act (FAA), provides in 9 U.S.C. § 9, that parties may specify the court in which a petition to confirm shall be filed, or if they do not, "then such application may be made to the United States court in and for the district within which such award was made."[2] Sections 10 and 11, governing petitions to vacate or to modify an award, also refer only to "the United States court in and for the district wherein the award was made. . . ." But neither the parties' agreement nor the FAA statutes can guarantee that a federal district court will have federal question jurisdiction to confirm, vacate, or modify an arbitration award.

Notably, parties to an arbitration are free to agree to seek to confirm or vacate an award in state courts, thus, avoiding issues of federal jurisdiction. However, because the FAA does not itself confer federal jurisdiction, federal district courts have jurisdiction to entertain petitions brought under the Act only if an independent basis for federal jurisdiction exists. In that regard, the FAA has been called "something of an anomaly" in the realm of federal legislation, because it bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute.[3] A conflict between the circuits has arisen as to whether federal question jurisdiction should be determined from the face of a petition brought under the FAA—similar to any complaint brought in federal court—or whether, in this context, courts should "look through" the petition to the underlying controversy in arbitration.

The conflict arises from *Vaden v. Discover Bank*, 556 U.S. 49 (2009), which construed § 4 of the FAA, governing petitions to compel arbitration. Based on the unique language of that statute, the majority of a divided Court held that district courts may "look through" a petition to compel arbitration and consider the nature of the underlying dispute when deciding if federal question jurisdiction exists. However, the federal circuit courts of appeals are divided as to whether *Vaden's* "look through" approach also applies to petitions brought under other sections of the FAA, §§ 9-11 petitions to *confirm*, *vacate*, or *modify* arbitration awards.[4]

**The Vaden Decision**

*Vaden* originated with a "garden variety" state-law contract action.[5] Discover Bank sought to recover past due charges from Betty Vaden, a credit card holder. She counterclaimed, alleging that the bank's claims violated state law, and invoked an arbitration clause in the credit card agreement. Discover Bank then filed a § 4 petition in the United States District Court for Maryland to compel arbitration of the plaintiff's counterclaims.[6] Discover Bank argued that the § 4 petition arose under federal law because Vaden's state law counterclaims were preempted and governed by § 27(a) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d(a) (2012).[7] Vaden eventually agreed with that preemption argument. The district court and a divided Fourth Circuit found that federal question jurisdiction existed to compel arbitration. The Fourth Circuit also found that because complete federal preemption existed, it trumped the familiar well-pleaded complaint rule, i.e., the rule that federal question jurisdiction must appear on the face of the complaint, and courts cannot look to a federal defense or a counterclaim when assessing federal jurisdiction.[8] The Supreme Court granted certiorari to resolve an existing circuit split on how to determine if federal question jurisdiction exists when a case is initiated through a § 4 petition to compel arbitration.[9]

The Supreme Court looked to the pertinent statute for the answer. Title 9 U.S.C. § 4 provides, in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, *save for such agreement*, would have jurisdiction under title 28, in a civil action or in admiralty of *the subject matter of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . (emphasis supplied).

Focusing on the terms of the statute ("[t]he text of § 4 drives our conclusion. . . ."), the Court held that the district court was required to "look through" the § 4 petition to the parties' underlying substantive controversy to determine federal question jurisdiction.[10]

> The phrase "save for [the arbitration] agreement" [in § 4 of the FAA] indicates that the district court should assume the absence of the arbitration agreement and determine whether it "would have jurisdiction under title 28" without it. Jurisdiction over what? The text of § 4 refers us to "the controversy between the parties." The phrase, the Fourth Circuit said, and we agree, is most straightforwardly read to mean the "substantive conflict between the parties."[11]

But that conclusion alone was not enough to affirm the Fourth Circuit. An important part of the *Vaden* analysis was to reaffirm the familiar well-pleaded complaint rule, which requires that federal question jurisdiction must appear on the face of a complaint, *not* in a defense, and *not* in a counterclaim.[12] Because Discover's complaint was based on state law, and federal law only governed Vaden's *counterclaim*, the Court found that the well-pleaded complaint rule precluded the exercise of federal jurisdiction: "[u]nder the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim and thus does not provide a key capable of opening a federal

court's door."[13] The Court therefore reversed the Fourth Circuit decision, for lack of federal question jurisdiction.

Thus, *Vaden* only decided how to determine federal jurisdiction in a petition to *compel* arbitration, under the unique text of 9 U.S.C. § 4.[14] It remains an unanswered question, with a developing conflict among the circuits, whether the "look through" approach should also apply to petitions to confirm, vacate, or modify an arbitration award, under §§9–11 of the FAA.

**The Circuit Split**

The First and Second Circuits, and most recently, the Fourth Circuit, apply *Vaden* to all petitions brought under the FAA, while the Third and Seventh Circuits have limited *Vaden* to its original context, § 4 petitions to compel arbitration.[15]

In *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.*, 852 F.3d 36 (1st Cir. 2017), the First Circuit applied the "look through" approach to cases brought under §§ 9–11 of the FAA.[16] Although those statutes do not contain the "save for such agreement" language found in § 4, the First Circuit found the difference in the statutory text to be irrelevant, finding as a policy matter that the "look through" approach should be applied because it is "the only approach available that provides broad federal court jurisdiction over proceedings to enforce awards."[17]

Similarly, in *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372 (2d Cir. 2016), the Second Circuit held that pursuant to the principles established in *Vaden,* district courts may look through petitions brought under § 10 of the FAA to determine federal question jurisdiction.[18] *Doscher* recognized tension between the fact that § 4 appears to speak to federal jurisdiction, by virtue of the "save for" clause, despite the fact that it is well-established that the FAA itself does not provide a basis for federal jurisdiction. The court resolved that tension by concluding that a court must make an "ordinary" jurisdictional inquiry, looking to the underlying substantive dispute with respect to all remedies under the Act, not just § 4.[19] And like the First Circuit, *Doscher* found it intolerable that some, but not all, attempts to confirm or vacate an arbitration award might find a federal forum. That reasoning effectively turns a blind eye to the well-pleaded complaint rule, reaffirmed so forcefully in *Vaden*.

Most recently, in *McCormick v. America Online, Inc.,* 909 F.3d 677 (4th Cir. 2018), the Fourth Circuit aligned itself with the cases discussed above, concluding that "if the underlying claim is one that otherwise could be litigated in federal court, the § 10 or § 11 motion can likewise be resolved in federal court.[20] That court avoided the fact that the language in § 4 that was critical to the *Vaden* decision was absent in § 10 and § 11, by saying that § 4 is a "procedural gate to arbitration," and that if the federal court has jurisdiction to compel an arbitration, that jurisdiction extends to a later petition to review the award under §§ 10 and 11, even if a no petition to compel arbitration had ever been filed.[21]

Conversely, the Third and Seventh Circuits have refused to extend *Vaden* beyond the § 4 context, and have rejected the notion of a "look through" approach when considering petitions to vacate an arbitration award.[22] *Goldman v. Citigroup Global Markets, Inc.*, 834 F.3d 242 (3d Cir. 2016), held that "§ 4 of the FAA should be read differently than § 10 for jurisdictional purposes."[23] Finding the "save for" language in § 4 to be critical (as did *Vaden* itself), the Third Circuit conducted an extensive analysis and concluded that "Neither the textual nor practical considerations noted by the Court in *Vaden* apply in a case relying on § 10 of the FAA. Section 10 lacks the critical "save for such agreement" language that was central to the Supreme Court's *Vaden* opinion."[24]

Similarly, *Magruder v. Fidelity Brokerage Services, LLC,* 818 F.3d 285 (7th Cir. 2016), rejected the "look through" approach to determine federal question jurisdiction over petitions to vacate arbitration awards. Noting that federal litigants typically may not return to federal court to enforce a contractual settlement agreement (unless the settlement was entered as a judgment or the federal district court reserved jurisdiction to enforce it),[25] *Magruder* reasoned that denying the "look through" approach for petitions to vacate an arbitration award—and relegating those parties to pursue their remedy in state court—would "harmonize the law of arbitration with the law of contracts."[26]

**Pros and Cons of Extending the Look-Through Approach**

Statutory text is always the starting point for statutory interpretation, and certainly the language of § 4, governing motions to compel arbitration, differs from the language of § 9, governing motions to confirm, and § 10, governing motions to vacate.

Nonetheless, supporters of the "look through" approach beyond the § 4 context have argued that "[a]pplying the 'look through' approach [to § 9 and § 10 petitions] prevents the absurdity of an interpretation that permits parties to file motions to compel in federal court where the underlying dispute raises a federal question, but precludes them from seeking the same federal court's aid under the FAA's other provisions."[27] But perhaps "absurdity," like beauty, is in the eyes of the beholder.

That approach, inviting all comers in to federal district court, despite the fact that the FAA alone cannot support jurisdiction, and where a federal question is not shown on the fact of the petition, fails to consider the wave of unanswered questions that would then arise. For instance, if district courts should "look through" petitions to confirm or vacate arbitration awards, how far back should they look? The Supreme Court itself was split on the issue of which controversy the district courts should look to under § 4 of the FAA.[28] Moreover, what if there are multiple underlying controversies? Is *Vaden* applicable to determine questions of diversity jurisdiction or only federal question jurisdiction? Notably, a party that is foreclosed from bringing a petition to confirm or vacate in federal court has a recourse, in state court. Therefore, in our view, enforcing the well-pleaded complaint rule in this context, and requiring that federal jurisdiction be shown on the face of the petition, might exclude some cases from a federal forum, but would be consistent with other situations where federal courts simply do not have jurisdiction over a particular case.

**Conclusion**

In our view, *Vaden's* textual analysis limits its reach to § 4 petitions to compel arbitration, because the statutes and the policy concerns in cases seeking to confirm or vacate an award are significantly different. Indeed, some courts have stated that in enacting the FAA, the "central federal interest" was enforcement of agreements to arbitrate, not the review of arbitration decisions.[29] Given the existing circuit split, lawyers involved in arbitrations might reasonably advance either side of this argument in circuits that have not yet weighed in, but eventually the Supreme Court may have to resolve this important question of federal question jurisdiction.


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**Endnotes:**

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[2]9 U.S.C. § 9 (2012), provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

[3]*Vaden v. Discover Bank* 556 U.S. 49, 59 (2009) (citations omitted).

[4]*Compare Goldman v. Citigroup Glob. Mkts., Inc.,* 834 F.3d 242, 254 (3d Cir. 2016) (declining to apply *Vaden* to questions of federal question jurisdiction over motion to vacate arbitration award brought under § 10 of the FAA), *and Magruder v. Fidelity Brokerage Servs., LLC*, 818 F.3d 285, 288 (7th Cir. 2016) (holding district courts may not look through actions brought under §9 and § 10 of the FAA), *with McCormick v. America Online, Inc.*, 909 F.3d 677 (4th Cir. 2018) (when determining subject-matter jurisdiction over § 10 and § 11 motions, courts should look to the nature of the underlying claim in dispute, just as is done with respect to § 4 petitions to compel arbitration); *Ortiz-Espinosa v. BBVA Secs. of P.R., Inc.,* 852 F.3d 36 (1st Cir. 2017) ("[T]he look through approach cannot be limited to § 4 petitions to compel") *and Doscher v. Sea Port Grp. Secs., LLC,* 832 F.3d 372, 388 (2d Cir. 2016) (holding the look through approach may be applied to determine federal question jurisdiction over actions brought under § 10 of the FAA).

[5]*Vaden*, 556 U.S. at 54.

[6]*Id.* at 54-55.

[7]*Id.*

[8]*See Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.,* 463 U.S. 1, 27-28 (1983).

[9]*Vaden,* 556 U.S. at 57.

[10]*Id.* at 53.

[11]*Id*. at 62–63 (alteration in original); *see also* § 9 U.S.C. § 4.

[12]*See id.* at 60–62.

[13]*Id.* at 66.

[14]*Id*. at 62 (emphasis added).

[15]*See supra* note 4.

[16]*Ortiz-Espinoza,* 852 F.3d at 47; *see also* 9 U.S.C. §§ 9–11 (2012).

[17]*Ortiz-Espinoza,* 852 F.3d at 45-46.

[18]*Doscher,* 832 F.3d at 388.

[19]*Id.* at 384, 388. The Second Circuit later refused to extend *Vaden's* "look through" approach to cases alleging diversity jurisdiction. *Hermes of Paris, Inc. v. Swain,* 867 F.3d 321 (2d Cir. 2017) (holding *Vaden* inapplicable because it only decided the issue of how to determine if federal question jurisdiction was present).

[20]*McCormick, supra,* 909 F.3d at 679

[21]*Id.* at 682-83.

[22]*See generally Goldman*, 834 F.3d at 242; *Magruder*, 818 F.3d at 285.

[23]*Goldman,* 834 F.3d at 254.

[24]*Id.* at 253.

[25]*Magruder*, 818 F.3d at 288 (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

[26]*Id.*

[27]*Doscher,* 832 F.3d at 387.

[28]*Vaden,* 556 U.S. at 67–68. Although the *Vaden* Court unanimously agreed to "look through" the § 4 petition, four dissenting justices argued that the majority should have looked to "the specific controversy the § 4 petitioner [sought] to arbitrate," rather than the broader controversy the state-court litigation sought to resolve. *Id.*

[29]Goldman, 834 F.3d at 254 (quoting *Minor v. Prudential Sec., Inc.,* 94 F.3d 1103, 1107 (7th Cir. 1996).