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Civil Procedure - Supreme Court's Vaden Decision regarding Federal Question Jurisdiction Does Not Apply to Diversity Jurisdiction - Northport Health Services of Arkansas, LLC v. Rutherford, 605 F.3d 483 (8th Cir. 2010)

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**CIVIL PROCEDURE—SUPREME COURT’S *VADEN*
DECISION REGARDING FEDERAL QUESTION
JURISDICTION DOES NOT APPLY TO DIVERSITY
JURISDICTION—*NORTHPORT HEALTH SERVICES
OF ARKANSAS, LLC V. RUTHERFORD*, 605 F.3D 483
(8TH CIR. 2010)**

28 U.S.C. §§ 1331 and 1332(a) establish the scope whereby United States District Courts have original jurisdiction over disputes.¹ While § 1331 provides district courts with federal question jurisdiction, § 1332(a) provides district courts with original jurisdiction over actions between citizens of different states where the amount in controversy exceeds \$75,000.² Although the statutes’ plain language appear to be straightforward, determining whether federal question jurisdiction or diversity jurisdiction exists in petitions to the district courts pursuant to § 4 of the Federal Arbitration Act (“FAA”) has proven to be the opposite.³ In

¹ 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 1332(a) (2006) (providing federal district courts with jurisdiction over cases between citizens of different states). Subject matter jurisdiction is considered an “absolute requirement.” 21 C.J.S. *Courts* § 20 (2010) (explaining subject matter jurisdiction generally). Moreover, when a court takes a case without proper subject matter jurisdiction, any decision it renders is void. *Id.* The correctness of the court’s decision, the soundness of the plaintiff’s cause of action, or the plaintiff’s apparent right to recovery are not relevant in determining whether a district court has subject matter jurisdiction because the district court may *only* acquire jurisdiction pursuant to the United States Constitution. *Id.*; see also U.S. CONST. art. III, § 2, *amended* by U.S. CONST. amend. XI. (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . between Citizens of different States . . .”); 28 U.S.C. §§ 1331, 1332(a) (codifying requirements for federal subject matter jurisdiction).

² 28 U.S.C. § 1331; 28 U.S.C. § 1332(a). The amount in controversy’s purpose under § 1332(a) is to limit the amount of cases that can be heard by federal courts. See 28 U.S.C.A. § 1332(a) (2005), David D. Siegel, *Commentary on 1996 amendment of section 1332*. Unlike diversity jurisdiction, federal question jurisdiction is not limited by the amount in controversy requirement. See 28 U.S.C. § 1331.

³ See *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1268 (2009) (ending circuit split regarding determining federal question jurisdiction in § 4 petitions). See also 9 U.S.C. § 4 (2006) (giving district courts authority to compel arbitration if §§ 1331 or 1332(a) are met). A party may petition a United States district court to enforce an arbitration agreement if “save for such agreement, [the district court] would have jurisdiction under Title 28.” 9 U.S.C. § 4. Compare *Cnty. State Bank v. Strong*, 485 F.3d 597, 600 (11th Cir. 2007) (“Under the binding law of this circuit, a district court has federal question jurisdiction over a § 4 petition to compel arbitration if the underlying dispute to be arbitrated itself states a federal question.”), with *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 268 (2d Cir. 1996) (holding district court lacks jurisdiction merely because underlying claim raises federal question).

Northport Health Services of Arkansas, LLC v. Rutherford,⁴ the United States Court of Appeals for the Eighth Circuit considered whether the Supreme Court's decision in *Vaden*, which settled a circuit split for determining federal question jurisdiction in § 4 petitions, applied to the determination of diversity jurisdiction in § 4 petitions.⁵ The Eighth Circuit held that *Vaden* only addressed federal question jurisdiction and did not implicitly apply to diversity jurisdiction.⁶

Wayne Rutherford and Tresa Robinson ("representatives"), representing the estates of Donna Faye Snow and Isaac Rutherford, filed separate state tort law claims against Northport Health Services of Arkansas, LLC ("Northport") and two nursing home administrators in state court.⁷ Northport, but not the nursing home administrators, subsequently filed federal actions to force arbitration under § 4 of the FAA.⁸ Northport asserted that the federal district court had jurisdiction to compel arbitration based on diversity of citizenship.⁹ The representatives did not contest the diversity of citizenship allegations and the federal district court granted Northport's petition to order arbitration.¹⁰

Subsequently, the Supreme Court made an important decision regarding the FAA in *Vaden v. Discover Bank*.¹¹ Based on the *Vaden* decision, the representatives moved to vacate the district court's order to compel arbitration.¹² The district court granted the representatives' motions based on the Supreme Court's reasoning in *Vaden*.¹³ Northport

⁴ 605 F.3d 483 (8th Cir. 2010).

⁵ *Id.* at 487-88 (presenting background and case's main issue).

⁶ *Id.* at 486.

⁷ *Id.* at 485. "Northport" was the collective name the court employed to refer to Northport Health Services of Arkansas, LLC and its two affiliates—all of whom were sued by the representatives. *Id.* Northport managed two nursing homes in Arkansas. *Id.* The state tort law claims arose from incidents that occurred after Rutherford and Snow were admitted to Northport. *Id.* Notably, the state law claims were filed separately and were not consolidated until Northport appealed. *Id.* at 485-86 & n.1.

⁸ *Id.* at 485.

⁹ *Rutherford*, 605 F.3d at 485. Northport alleged that it was an Alabama citizen and the plaintiffs were Arkansas citizens. *Id.*

¹⁰ *Id.* (setting forth initial circumstances leading to issue in case).

¹¹ *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Northport Health Services of Arkansas, LLC v. Rutherford*, 605 F.3d 483, 485-86 (8th Cir. 2010) (noting the *Vaden* decision rendered after district court's order to compel arbitration).

¹² See *Rutherford*, 605 F.3d at 485-86. ("Relying on *Vaden*, the representatives moved to vacate the orders . . . arguing that a federal court does not have *diversity* jurisdiction over a § 4 petition to compel arbitration . . . part of a pending state court action that includes one or more non-diverse parties not named in the § 4 petition.").

¹³ See *id.* at 485-86 (discussing district court's decision to vacate orders compelling arbitration).

appealed the district court's decision to vacate its original orders to compel arbitration.¹⁴ Unpersuaded by the representatives' reasoning, the Eighth Circuit reversed the district court's decisions to vacate its earlier orders to compel arbitration.¹⁵

Title 9 of the United States Code enacts the Federal Arbitration Act.¹⁶ Section 2 of Title 9 explains that a provision in a contract that is evidence of a party's transaction in commerce to settle a dispute arising out of such contract through arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁷ Although § 2 broadly allows parties to compel arbitration if there is a written provision in the contract, § 4 limits the federal district courts' abilities to enforce such arbitration agreements.¹⁸ More specifically, § 4 requires a federal court to have jurisdiction to establish jurisdiction based on complete diversity or a federal question.¹⁹

¹⁴ *Id.* at 486.

¹⁵ *Id.* at 485-86.

¹⁶ Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006) (governing use of arbitration for disputes in United States). The FAA's purpose is to guarantee that arbitration agreements are upheld under the explicit terms agreed to by the parties. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989) ("[T]he FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms."); *see also Vaden*, 129 S. Ct. at 1271 (explaining FAA's purpose as favoring national system to enforce arbitration). *But see* Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 826 (2010) (distinguishing between Congress's purpose in passing FAA from Court's interpretation of FAA). Professor Moses asserts that since the 1980s the Supreme Court has relied on current policy preferences favoring arbitration instead of following its previous decisions regarding arbitration. *Id.* 842-43. Moreover, Moses asserts that many of the Court's recent decisions fly in the FAA's face, congressional intent, and the Act's original purpose. *See id.* As such, the Court has created its own policy regarding arbitration. *Id.* Moses alleges that the Court erroneously concluded that: "[t]here is a strong federal policy favoring arbitration . . . [s]ubstantive rights are as well protected in arbitration as in litigation . . . [a]rbitral tribunals are readily capable of handling the factual and legal complexities of statutory claims." *Id.* at 843.

¹⁷ 9 U.S.C. § 2 (2006).

¹⁸ 9 U.S.C. § 4 (2006) (authorizing federal jurisdiction to enforce arbitration clauses if the court has jurisdiction under Title 28). Specifically, § 4 states the district "court shall hear the parties, and upon being satisfied that the making of the agreement . . . the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* However, such an order from the district court may only be made once it is determined that the United States district court has original jurisdiction. *Id.* "[S]ection 4 . . . should be read just like that of section 2 in accordance with the Act's overall purpose of overturning the judiciary's hostility to enforcing agreements to arbitrate." Richard A. Bales & Jamie L. Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, 80 U. COLO. L. REV. 89, 110 (2009).

¹⁹ 9 U.S.C. § 4 (2006) ("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 . . ."); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008) (stating FAA "bestow[s] no federal

Diversity jurisdiction rests on two issues: (1) whether there is diversity between the parties, and (2) whether the amount in controversy exceeds \$75,000.²⁰ Before *Vaden*, all circuit courts determined the former issue by looking solely at the parties named in the § 4 petition to compel arbitration, regardless of any non-diverse parties in an underlying state action that are unnamed in the arbitration agreement.²¹ Regarding the latter

jurisdiction but rather requir[es] an independent jurisdictional basis”); Bales & Ireland, *supra* note 18, at 89 (explaining that FAA bestows arbitration enforcement directly to federal courts); *see also* 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); 28 U.S.C. § 1332 (2006) (providing federal jurisdiction over civil matters between citizens of different states over \$75,000). Sections 1331 and 1332 under Title 28 provide the only two mechanisms that allow plaintiffs to bring suit in the United States district court. *See* 28 U.S.C. §§ 1331, 1332. The two sections differ in that § 1331 broadly requires that the dispute arise under federal laws, while § 1332 requires the parties to a dispute be from different states and the amount in controversy be above \$75,000. *Compare* 28 U.S.C. § 1331, *with* 28 U.S.C. § 1332. Parties often desire to use the FAA pursuant to § 1331 or § 1332(a) to sue in federal court because state courts are more likely to avoid enforcement of the arbitration agreement pursuant to that state’s contract law. Bales & Ireland, *supra* note 18, at 89.

²⁰ *See* 28 U.S.C. § 1332 (codifying diversity jurisdiction); *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 526 F.3d 1170, 1172 (8th Cir. 2008) (citing *Capitol Indem. Corp. v. Russellville Steel Co.*, 367 F.3d 831, 835 (8th Cir. 2004) (“[J]urisdiction exists if there is complete diversity of citizenship and the amount in controversy is greater than \$75,000.”)). The central issues that arise concerning diversity jurisdiction are different than the issues that arise concerning federal question jurisdiction. *Compare Advance Am.*, 526 F.3d at 1172 (identifying diverse citizenship and amount in controversy as issues of diversity jurisdiction), *with Vaden v. Discover Bank*, 129 S. Ct. 1262, 1272 (2009) (discussing the “longstanding well-pleaded complaint rule” under federal jurisdiction issue). The well-pleaded complaint rule states that, for a district court to exercise jurisdiction pursuant to a federal question, the plaintiff’s complaint must contain a claim based on federal law regardless of any anticipated defenses or counterclaims. *Vaden*, 129 S. Ct. at 1272; *see also Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (holding defendant’s counterclaim—compulsory or otherwise—does not subject defendant to federal jurisdiction); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (“[A] suit arises under [federal law] only when the plaintiff’s statement of his own cause of action shows that it is based upon those [federal] laws . . .”). Additionally, a complaint that rests on state law may be characterized as “arising under” federal law and subject to removal to federal court if the governing law that the complaint is based upon is exclusively federal. *See Vaden*, 129 S. Ct. at 1273 (explaining how a complaint based upon state law may arise under federal law). Nevertheless, removal to federal court is not appropriate when it rests solely on a defendant’s counterclaim based on state law, even if such counterclaim may be recharacterized as “arising under” federal law. *Id.*; *see also* 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3722.2 (4th ed. 2010) (stating state law cause of action may be recharacterized as a “federal claim for relief”).

²¹ *See Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92-93 (4th Cir. 2005) (affirming district court’s enforcement of arbitration agreement for state-law claims); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1106 (9th Cir. 2002) (holding jurisdiction was proper because alleged non-diverse party not named in § 4 petition); *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 842 (7th Cir. 1999) (adopting Second Circuit’s position that “parties” refers to parties named in § 4 petition); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 945-46 (11th Cir. 1999) (holding diversity jurisdiction proper because parties were diverse and no indispensable parties

issue, courts universally examine the broader state court action to see if the “value at stake in the arbitration” exceeds \$75,000 on its own.²² Although all circuit courts agreed on how to determine diversity jurisdiction in FAA petitions to compel arbitration, prior to *Vaden*, a circuit split existed over how to determine federal question jurisdiction.²³ The majority of circuit courts held “that the text of FAA § 4 should not be interpreted to mean that a federal court has subject matter jurisdiction over an action to compel or stay arbitration merely because the underlying claim raises a federal question.”²⁴ On the other hand, the Eleventh and Fourth Circuits ruled that § 4 actually directs the district court to “look through” the petition to the

existed regarding petition); *Doctor’s Assocs., Inc. v. Hamilton*, 150 F.3d 157, 161 (2d Cir. 1998) (“As with any federal action, diversity of citizenship is determined by reference to the parties named in the proceedings before the district court, as well as any indispensable parties who must be joined pursuant to Rule 19 of the Federal Rules of Civil Procedure.”) (quoting *Doctor’s Assocs., Inc. v. Distajo*, 66 F.3d 438, 445 (2d Cir. 1995)); *First Franklin Fin. Corp. v. McCollum*, 144 F.3d 1362, 1364 (11th Cir. 1998) (holding diversity jurisdiction existed between parties to § 4 petition); *Distajo*, 66 F.3d at 446 (“A district court should not consider the citizenship of strangers to the arbitration contract, since they are not ‘parties’ [to] the suit arising out of the controversy within the meaning of the FAA.”). See also FED. R. CIV. P. 19 (governing situations where third parties to action *must* be joined in that action). First, a person must be joined if “in that person’s absence, the court cannot accord complete relief among existing parties.” FED. R. CIV. P. 19(a)(1)(A). Second, a person must be joined if (1) that person claims an interest concerning the action, and (2) continuing the action without that person would either impair his ability to uphold his interests or would “leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.” FED. R. CIV. P. 19(a)(1)(B)(i-ii). In *McCollum*, there were three parties to the initial state court action. 144 F.3d at 1364. However, only two of the parties were parties to the district court action to compel arbitration. *Id.* The Eleventh Circuit stated, “[i]t is perfectly consistent, therefore, for removal jurisdiction to lack in one [action], but subject matter jurisdiction to be present in the other [action].” *Id.*

²² *Advance Am.*, 526 F.3d at 1174; see also *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1106-08 (9th Cir. 2010) (holding plaintiff’s reasonable belief that damages would exceed \$75,000 satisfied amount in controversy requirement).

²³ Compare *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 268 (2d Cir. 1996) (abrogated by *Vaden*, 129 S. Ct. 1262) (holding district court lacks jurisdiction merely because underlying claim raises federal question), and *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 986-88 (5th Cir. 1992) (abrogated by *Vaden*, 129 S. Ct. 1262) (holding federal jurisdiction must be independently established), and *Giangrande v. Shearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 473 (D. Mass. 1992) (holding FAA does not establish federal jurisdiction on its own), and *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 964-65 (S.D.N.Y. 1988) (abrogated by *Vaden*, 129 S. Ct. 1262) (concluding FAA on its own does not create federal jurisdiction), with *Cnty. State Bank v. Strong*, 485 F.3d 597, 606 (11th Cir. 2007) (“Under the FAA, any party to such an agreement may seek to compel any dispute that falls within the scope of the agreement upon a showing that the other party has ‘fail [ed], neglect[ed], or refus[ed]’ to participate in arbitration of it.”), and *Discover Bank v. Vaden*, 396 F.3d 366, 371 (4th Cir. 2005) (finding *Westmoreland* line of cases unpersuasive).

²⁴ See *Westmoreland*, 100 F.3d at 268 (relying on numerous similar holdings); see also sources cited *supra* note 23 (identifying various circuits in majority and minority).

underlying claim when determining whether a federal question exists.²⁵

After the Fourth Circuit's *Vaden* decision, the Supreme Court granted certiorari to resolve the circuit split.²⁶ The Roberts Court focused on "whether district courts, petitioned to order arbitration pursuant to § 4 of the FAA, may 'look through' the petition and examine the parties' underlying dispute to determine whether federal-question jurisdiction exists over the § 4 petition."²⁷ The Court held that federal courts should determine jurisdiction by "looking through" a § 4 arbitration petition to the underlying controversy between the parties.²⁸ By "looking through" the § 4 petition, a district court may only subject a defendant to § 1331 jurisdiction if the *plaintiff's* claim arises under federal law or may be characterized as arising under federal law.²⁹ The Court noted that the petitioner reasonably

²⁵ See *Strong*, 485 F.3d at 606 (disagreeing with majority of circuits); *Vaden*, 396 F.3d at 369 (4th Cir. 2005) ("We are convinced that this language directs courts to look through the arbitration agreement so to assess questions of subject matter jurisdiction.").

²⁶ *Vaden*, 129 S. Ct. at 1270 (announcing reason for granting certiorari and identifying circuit split). In *Vaden*, Discover Bank filed a complaint in Maryland state court to recover past debts from Vaden. *Id.* at 1268. Vaden filed a counterclaim that alleged that Discover's charges, late fees, and interest all violated Maryland law. *Id.* Discover filed a § 4 arbitration petition pointing to an arbitration provision in the cardholder agreement it had with Vaden. *Id.* The United States District Court for the District of Maryland ordered arbitration. *Id.* The Fourth Circuit remanded, pursuant to Vaden's first appeal. *Id.* On remand, the defendant conceded that her Maryland-law counterclaims were preempted by federal law and the district court ordered arbitration once again. *Id.* The Fourth Circuit affirmed the district court's second order for arbitration. *Id.*

²⁷ *Id.* at 1270. The second issue before the Court was: "[M]ay a district court exercise jurisdiction over a § 4 petition when the petitioner's complaint rests on state law but an actual or potential counterclaim rests on federal law?" *Id.* at 1268. The Court held that the actual controversy, as framed by the parties, was not subject to federal jurisdiction because it was precipitated by a state law claim that did not arise under federal law. *Id.* at 1275.

²⁸ *Id.* at 1273 (announcing Court's conclusion regarding first issue). The Court reasoned that "[t]he phrase 'save for [the arbitration] agreement' 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." *Id.*; see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (describing the FAA as "something of an anomaly"). While the FAA "creates a body of federal substantive law" by "regulating the duty to honor an agreement to arbitrate," it does not establish independent federal question jurisdiction. *Moses H. Cone*, 460 U.S. at 25 n.32. As a result, the Court rejected petitioner's argument not to look beyond the § 4 petition because to do so would ignore the language in § 4 requiring an independent basis for federal jurisdiction. *Vaden*, 129 S. Ct. at 1273. In addition to § 4's telling language, the Court also criticized the non-look through approach for having "curious practical consequences." *Id.* at 1275. The "non-look through" approach advocated by the petitioner would permit a district court to entertain a § 4 petition only when a claim based on federal question jurisdiction was already before the court, but would not accommodate a § 4 petitioner "who *could* file a federal-question suit in . . . federal court, but who has not done so." *Id.* On the other hand, the *Vaden* Court explained that the "look through" approach would allow a petitioner to request a federal court to force arbitration without having to formally initiate a federal question suit or formally remove a claim based on federal question. *Id.*

²⁹ See *Vaden*, 129 S. Ct. at 1273 (stating federal jurisdiction cannot exist based on

displayed that a § 4 petition to compel arbitration does not seek adjudication on the merits, and the purpose of § 4 is to have an arbitrator resolve the underlying dispute.³⁰ Despite the reasonableness of the petitioner's argument, the Court explained that because § 4 directs a district court to determine if it would have jurisdiction *independent of the arbitration agreement*—meaning jurisdiction must have grounds under §§ 1331 or 1332—the district court must look to the underlying dispute and not the § 4 petition dispute.³¹

In *Rutherford*, the United States Court of Appeals for the Eighth Circuit analyzed the Supreme Court's *Vaden* decision and other § 4 cases to determine whether the “look through” approach extends to subject matter jurisdiction based on diversity.³² As an initial matter, the Eighth Circuit explained that *Vaden* did not directly control the issue at hand.³³ As such, the representatives' motions to vacate the district court's orders to compel arbitration distorted the Court's *Vaden* decision.³⁴ Additionally, the representatives misapplied the Eighth Circuit's decision in *Advance America Servicing of Arkansas, Inc. v. McGinnis*,³⁵ which adopted the “look through” approach to amount in controversy disputes.³⁶ While it's

defendant's anticipated defense or counterclaim).

³⁰ See *id.* at 1274 (outlining petitioner's main arguments why courts should not look through to underlying dispute). The petitioner agreed with the majority of the federal circuit courts stating that the district court should merely decide whether to enforce the agreement and not look to the underlying dispute. *Id.*

³¹ See *id.* The petitioner argued that § 4's language, namely the “save for” clause, which requires an independent basis for jurisdiction, bears no weight in light of the longstanding “ouster” explanation. *Id.* at 1273-74. The “ouster” explanation, as set forth by the majority of circuit courts that rejected the “look through” approach, is a traditional view that district courts took regarding arbitration agreements. *Id.* at 1274. Specifically, “courts traditionally viewed arbitration clauses as unworthy attempts to ‘oust’ them of jurisdiction; accordingly, to guard against encroachment on their domain, they refused to order specific enforcement of agreements to arbitrate.” *Id.*

³² *Northport Health Servs. of Ark., LLC, v. Rutherford*, 605 F.3d 483, 485-86 (8th Cir. 2010).

³³ *Id.* at 488. The Eighth Circuit pointed out that the Court in *Vaden* “carefully defined the issues and limited its holding to § 4 petitions based upon federal question jurisdiction.” *Id.* *Northport* only alleged federal jurisdiction based on diversity and not federal question jurisdiction. *Id.*

³⁴ *Id.* The representatives ignored the specific nature of the circuit split that *Vaden* sought to rectify and argued that *Vaden* “resolved a broad conflict . . . by adopting the ‘look through’ approach for . . . diversity jurisdiction as well as federal question jurisdiction.” *Id.* at 488-89. Additionally, the representatives asserted that the manner in which the “look through” approach is applied to federal question petitions should likewise be applied to diversity petitions. *Id.* at 489.

³⁵ 526 F.3d 1170 (8th Cir. 2008).

³⁶ See *Rutherford*, 605 F.3d at 489 (discussing *Advance America*). In *Advance America*, the Eighth Circuit instructed the district court to look through *only to* “the value at stake in the arbitration” but not to the entire controversy as structured by the parties. 526 F.3d at 1174. The

true that *Vaden* could have implicitly distinguished *Advance America*, the Eighth Circuit concluded that to do so would ignore the Supreme Court's *Moses H. Cone* decision—a case that “is factually on all fours with [this case].”³⁷

Not only are courts reluctant “to assume that the Court implicitly overruled an earlier precedent,” but the Eighth Circuit pointed to many clues in *Vaden* suggesting that the Court did not intend to overrule *Moses H. Cone sub silentio*.³⁸ The Eighth Circuit noted that the *Vaden* Court cited to *Moses H. Cone* approvingly, limited its analysis to the federal question issue, and cited to circuit cases that created the § 4 federal question dispute but not to the § 4 diversity jurisdiction cases.³⁹ So that its decision would not have the practical consequence of “severely contracting pre-existing § 4 diversity jurisdiction,” the Supreme Court in *Vaden* limited its holding to the district courts “entertaining § 4 petitions ‘only when a federal-question suit is already before the court, when the parties satisfy the requirements for diversity-of-citizenship jurisdiction, or when the dispute over arbitrability involves a maritime contract.’”⁴⁰ Additionally, the Court in

Eighth Circuit in *Rutherford* admitted that:

If the nature of the “look through” is the issue-and without question some type of look through is needed to determine the amount in controversy for diversity jurisdiction purposes-the look through we conducted in *Advance America* is comparable to the look through unsuccessfully urged by the dissenting Justices in *Vaden*.

605 F.3d at 489. However, in *Advance America* the Eighth Circuit did not extend the look through beyond the amount in controversy. See *id.* at 489 (“In *Advance America* we looked through only to ‘the value at stake in the arbitration’ sought to be compelled, not to ‘the whole controversy as framed by the parties’ in a parallel state court action.”).

³⁷ *Rutherford*, 605 F.3d at 489-90 (“The fundamental flaw in the representatives’ contention that *Vaden* implicitly overruled prior circuit court diversity jurisdiction decisions (favorably cited in *Advance America*) is that it ignores the underlying facts and the Supreme Court’s decision in *Moses H. Cone*.”). In *Moses H. Cone*, the Court stated that the independent basis of federal jurisdiction was diversity of citizenship. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 7, 25 n.32. A court is obligated to consider the issue of subject matter jurisdiction *sua sponte* when it believes it may be lacking. *Rutherford*, 605 F.3d at 490.

³⁸ See *Rutherford*, 605 F.3d at 490. “The Supreme Court ‘does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.’” *Id.* (quoting *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000)).

³⁹ *Id.* The Court’s mention of federal question cases but not diversity cases “was not likely inadvertent because the circuit court opinions adopting the look through approach to federal question issues cited their earlier no-look-through diversity decisions approvingly.” *Id.*; see also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions.”).

⁴⁰ See *Rutherford*, 605 F.3d at 490 (quoting *Vaden*, 129 S. Ct. at 1275); see also *supra* note 28 and accompanying text (describing the impractical consequences of “non-look through”

Vaden relied on the well-pleaded complaint rule—a traditional principle of federal question jurisdiction—in adopting the “look through” approach.⁴¹ In light of *Vaden*’s discussion of traditional principles, the Eighth Circuit noted that “[a] traditional principle of diversity jurisdiction is that it cannot be defeated by a non-diverse joint tortfeasor who is not a party to the federal action, unless that party is indispensable under Rule 19.”⁴² Ultimately, because the Eighth Circuit found that *Vaden* did not directly control, and its decision in *Advance America* was not overruled in light of *Moses H. Cone*, the court refused to extend *Vaden* to § 4 petitions based on diversity jurisdiction.⁴³

While the representatives argued persuasively to extend *Vaden* to diversity jurisdiction, the Eighth Circuit’s decision not to apply *Vaden* to *Rutherford* was supported with prudent reasoning.⁴⁴ As an initial matter—and perhaps most importantly—if the Supreme Court wanted *Vaden* to extend to diversity jurisdiction it would have and *should have* explicitly stated such.⁴⁵ Without such an explanation, the Court was more likely implying that § 4 *did not* apply to diversity jurisdiction rather than implying that § 4 *did* apply to diversity jurisdiction.⁴⁶ Although the representatives’ reasoning was sound, their assertion that *Vaden* overruled previous case law holding that the district court should only look to the parties in the federal action to compel arbitration was not convincing because *Vaden* did not overrule such cases.⁴⁷

In addition to the Eighth Circuit’s sound reasoning, the *Vaden* Court’s rationale for adopting the “look through” approach for § 4 federal question disputes does not exist to the same extent in § 4 diversity

approach).

⁴¹ *Rutherford*, 605 F.3d at 490 (explaining Supreme Court’s reasoning in *Vaden*); see *Vaden*, 129 S. Ct. at 1270 (explaining well-pleaded complaint rule).

⁴² *Id.* at 490-91.

⁴³ *Id.* at 491 (“[W]e conclude that diversity of citizenship is determined in these cases by the citizenship of the parties named in the proceedings before the district court, plus any indispensable parties who must be joined pursuant to Rule 19.”).

⁴⁴ See *supra* notes 32-34, 36-42 and accompanying text (examining Eighth Circuit’s reasoning not to extend *Vaden* to diversity cases).

⁴⁵ See *supra* notes 38-39 and accompanying text (describing Court’s holding in *Vaden* as careful and limited in scope). While it is possible that the Supreme Court could extend a principle without explicitly stating as much, certain cases and clues suggested that the Court did not wish to do so in this case. See *supra* notes 34, 36-37 (exploring Court’s reasons not to extend *Vaden* to diversity cases).

⁴⁶ See *supra* notes 32-34, 36-42 and accompanying text (analyzing *Vaden*’s application to *Rutherford*).

⁴⁷ See *supra* notes 36-39 and accompanying text (explaining why *Vaden* did not overrule *Advance America* as representatives argued).

jurisdiction disputes.⁴⁸ The traditional differences between diversity and federal question jurisdiction create practical differences between federal question jurisdiction and diversity jurisdiction.⁴⁹ The crux of federal question jurisdiction is whether the plaintiff's cause of action is based on federal law.⁵⁰ Simply stated, in applying the "look through" approach to federal jurisdiction, a court determines—by looking through the petition—whether the plaintiff's claim is predicated on a question arising under federal law.⁵¹ However, applying this same approach to questions of diversity jurisdiction is more difficult because of the potential for compulsory counterclaims, joinder under Rule 19, the amount in controversy requirement, and problems arising from state citizenship determinations.⁵² Although looking through to the entire controversy to determine if the underlying dispute is based on federal law makes sense, especially in the wake of the Court's reasoning in *Vaden*, such logic may not extend to § 4 petitions based on diversity jurisdiction.⁵³

Ultimately, the Eighth Circuit utilized sound logic and wisely refused to extend *Vaden* to diversity cases because it would have stifled the purposes behind the FAA—to “‘overcome judicial resistance to arbitration,’ and to declare ‘a national policy favoring arbitration of claims that parties contract to settle in that manner.’”⁵⁴ In fact, because the Eighth Circuit did not adopt the look through approach, the existence of a non-diverse party that is not part of the specific arbitration agreement does not

⁴⁸ Compare *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274-76 (2009) (stating reasons for adopting “look through” approach in federal question cases), with *Rutherford*, 605 F.3d at 490-91 (stating reasons why *Vaden* did not apply to diversity jurisdiction).

⁴⁹ 28 U.S.C. § 1331 (2006); 28 U.S.C. § 1332(a) (2006); see also *supra* notes 1, 2, 19 and accompanying text (comparing requirements of §§ 1331 with 1332).

⁵⁰ See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (announcing well-pleaded complaint rule); see also *Vaden*, 129 S. Ct. at 1272 (analyzing the well-pleaded complaint rule); *supra* note 19 (examining the main issues regarding federal question jurisdiction).

⁵¹ See *Vaden*, 129 S. Ct. at 1273 (“A federal court may ‘look through’ a § 4 petition to determine whether it is predicated on an action that ‘arises under’ federal law; in keeping with the well-pleaded complaint rule . . . however, a federal court may not entertain a § 4 petition based on the contents, actual or hypothetical, of a counterclaim.”).

⁵² See *supra* notes 19-21 and accompanying text (discussing requirements for diversity jurisdiction, Rule 19, and counterclaims).

⁵³ See *Vaden*, 129 S. Ct. at 1274-75 (discussing reasons for adopting non-look through approach); *supra* notes 19-20 and accompanying text (identifying complexities regarding diversity jurisdiction).

⁵⁴ See *Vaden*, 129 S. Ct. at 1271 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) and *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)); *supra* note 16 and accompanying text (describing purpose behind FAA). If *Vaden* extended to diversity jurisdiction cases, the district court in *Rutherford* would have been correct in dismissing the case for lack of subject matter jurisdiction. See *Rutherford*, 605 F.3d at 486 (announcing holding of case).

defeat diversity jurisdiction in a district court in the Eighth Circuit.⁵⁵ As a direct result, federal district courts in the Eighth Circuit will be able to compel arbitration if the parties agreed to arbitrate, the parties are citizens of different states, and the parties meet the amount in controversy.⁵⁶ The Eighth Circuit's decision is especially significant because state courts "are far more likely than federal courts to use state contract law doctrines to avoid enforcing arbitration agreements."⁵⁷

The Eighth Circuit's prudence, nevertheless, does not necessarily resolve the issue of whether *Vaden*'s holding should be extended to diversity jurisdiction. Not only is the Supreme Court's decision in *Vaden* less than two years old, the Eighth Circuit's *Rutherford* decision is less than a year old.⁵⁸ Just as a circuit split developed in the § 4 federal question petitions leading to *Vaden*, a circuit split may result after the Eighth Circuit's decision in *Rutherford*. In light of the reasonableness of the representatives' argument, another circuit may be persuaded to extend *Vaden*'s holding to diversity jurisdiction.

Joseph D. Picozzi

⁵⁵ See *supra* notes 16, 54 and accompanying text (discussing reasons for FAA and *Rutherford*'s impact on federal court's ability to compel arbitration).

⁵⁶ See 28 U.S.C. § 1332(a) (2006) (authorizing federal courts jurisdiction over diverse citizens that meet amount in controversy); 9 U.S.C. § 4 (2006) (giving district courts jurisdiction authority to compel arbitration if §§ 1331 or 1332(a) are satisfied); see also *supra* notes 19-20 and accompanying text (discussing requirements for diversity jurisdiction, Rule 19, and counterclaims).

⁵⁷ Bales & Ireland, *supra* note 18, at 89.

⁵⁸ See generally *Vaden*, 129 S. Ct. at 1262 (filing decision March 9, 2009); *Rutherford*, 605 F.3d at 485-92 (filing decision in case May 14, 2010).

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