3 Jurisdictional Questions After High Court Arbitration Ruling

By **Michael Gill and Andrew Spadafora** (April 20, 2022, 4:32 PM EDT)

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On March 31, the U.S. Supreme Court issued an opinion in Badgerow v. Walters that resolved a circuit split and effectively narrowed federal courts' jurisdiction over post-arbitration disputes.[1]

In a 2009 opinion, Vaden v. Discover Bank, the Supreme Court had ruled that federal courts have jurisdiction over petitions to compel arbitration under Section 4 of the Federal Arbitration Act if the court would have jurisdiction over the underlying dispute — the look-through approach.[2]

The 8-1 Badgerow majority refused to apply the look-through analysis in determining federal jurisdiction for an application to confirm or vacate an arbitral award under FAA Sections 9 and 10, and instead held that the application, standing alone, must involve a federal issue or meet the requirement for diversity jurisdiction.

Badgerow leaves many issues undecided.

This article will explore three of those issues: whether the Badgerow decision applies beyond Sections 9 and 10 of the FAA; how the decision affects analysis of federal question and diversity jurisdiction for sections of the FAA not subject to the look-through approach; and whether a federal court that has first asserted jurisdiction over a petition to compel arbitration under FAA Section 4 using the look-through approach can retain jurisdiction for subsequent disputes arising under other sections of the FAA.

Badgerow

Justice Elena Kagan's opinion for the majority relied on a key textual difference between FAA Section 4 and Sections 9 and 10. Because the FAA itself does not give a federal court jurisdiction over arbitration disputes, the court must have an independent jurisdictional basis to resolve the dispute.[3]

Vaden permitted courts to locate this jurisdictional basis for Section 4 motions to compel arbitration by looking through to the underlying controversy, relying on language in Section 4 granting the right to petition a federal district court "which, save for [the arbitration] agreement, would have jurisdiction" over the controversy.[4]

Because this jurisdictional language is absent from Sections 9 and 10, the court limited the look-through approach to Section 4. Jurisdiction over Section 9 and 10 petitions must therefore be apparent on the face of the petition alone without regard to the underlying dispute.[5]

The court rejected policy arguments made by the defendant below, and championed by Justice Stephen Breyer's dissent, that extending look-through beyond Section 4 would avoid complicated questions of diversity jurisdiction, and would provide federal courts more comprehensive control over the arbitration process.

The majority observed that the courts were fully capable of resolving complex questions of diversity jurisdiction for the other FAA provisions as they have always done, and that Congress had plausible reasons for granting federal courts a greater role in compelling arbitration than in confirming or vacating arbitral awards.[6]

Application of Badgerow to Other Sections of the FAA

While the court does not expressly state that Badgerow applies equally to applications to modify or correct an arbitration award under FAA Section 11, there can be little doubt it does. The court stated that it granted certiorari to resolve whether Vaden applies to an application to confirm, vacate or modify an arbitral award.[7]

Further, like Section 10, Section 11 specifies that a party may petition "the United States court in and for the district wherein the award was made," as opposed to the language in Section 4 that provides for petition to "any United States district court which, save for [the arbitration] agreement, would have jurisdiction under title 28."[8]

Similarly, Section 7, governing petitions to compel compliance with subpoenas issued in arbitration proceedings, contains language like that found in Sections 10 and 11, not Section 4.[9]

While Justice Breyer's dissent presumes the Badgerow decision also applies to applications for appointment of an arbitrator under FAA Section 5, an argument might be made that Section 5 applications can be brought before the same court as a petition under Section 4. Section 5 provides that upon application of either party, "the court shall designate and appoint an arbitrator or arbitrators or umpire."[10]

The reference in Section 5 to "the court" without any qualifier or description could be read as referring to the court described in the immediately preceding section, Section 4.

Further, in distinguishing Section 4 from Sections 9 and 10, the court notes that the preeminent purpose of the FAA was to overcome some courts' reluctance to enforce arbitration agreements, as opposed to enforcing arbitral awards.[11] Like a petition to compel arbitration, an application to appoint an arbitrator is directed at enforcing the agreement to arbitrate.[12]

Because Section 5 lacks the jurisdictional language of Section 4, however, it remains uncertain whether a court considering an application to appoint an arbitrator may still apply the look-through method.

Implications for Federal Jurisdiction

Because federal courts can no longer look to the underlying dispute between the parties to determine jurisdiction over petitions under the FAA Sections 7, 9, 10 or 11 — and maybe 5 — they must confront various jurisdictional issues arising on the face of those petitions.

Diversity Jurisdiction Rules

As Justice Breyer's dissent emphasized, courts will need to develop rules addressing both the $75,000 amount-in-controversy requirement and the identity of the relevant parties for diversity purposes. Although the majority rightly contended that courts have always faced these problems in diversity cases, they will arise more frequently now that the look-through

approach is limited to Section 4.

Determining whether an amount greater than $75,000 is at issue is often challenging when money damages are not directly involved, and several FAA sections present this problem.

For example, Section 5 permits a party, when necessary, to apply to the court for appointment of an arbitrator.[13] A federal court considering a Section 5 application based on diversity of citizenship would therefore have to decide how much the appointment of an arbitrator puts at stake.

The value to the claimant or the cost to the defendant of the entire underlying dispute would seem too high, while the cost of the arbitrator's services would seem too low. Though some courts have looked to the amount at issue in the underlying dispute on a Section 5 application, it is no longer certain after Badgerow that they may do this.[14]

Likewise, a federal court would have to assess the value of summoning a witness in order to assert diversity jurisdiction over a Section 7 petition. Courts considering the value of a Section 7 summons have not generated either clear rules or extensive case law, and have generally relied on good faith allegations of the value of the subpoenaed information in relation to the arbitral award sought.[15]

Because such allegations would require a court to look to the underlying dispute for the value of the subpoenaed information, it is not clear how the amount at stake in a Section 7 dispute can be established. If unable to look to the underlying dispute, a court may even deny it has diversity jurisdiction over attempts to compel a Section 7 subpoena response from a third party where no evidence shows that the controversy over the subpoena involves more than $75,000.[16]

Citizenship presents challenges as well.

In assessing Section 7 petitions, for example, some courts, such as the U.S. Court of Appeals for the Seventh Circuit in its 1996 decision in Amgen Inc. v. Kidney Center of Delaware County Ltd., look to the citizenship of the parties to the dispute in arbitration. Other courts, such as the U.S. District Court for the Eastern District of Michigan in its Jan. 26 decision in General Mobile Preferred LLC v. Roye Holdings LLC, focus on the applicant and the witness.[17]

The latter appears to be the majority view, which is arguably further supported by the court's restriction of the look-through approach.

Federal Question Jurisdiction Over FAA Section 10 and 11 Applications

Badgerow does not hold that Section 10 or 11 petitions may never raise federal questions, but it does suggest the Supreme Court views "quarrels about legal settlements" such as arbitral awards as contract disputes that typically involve only state law.[18] Even so, a party seeking to vacate or modify an award under Section 10 or 11 may raise issues that seem to clearly implicate federal law on the face of the petition.

For example, such petitions often claim that the arbitrators acted in manifest disregard of the law, or exceeded their powers, and when the underlying arbitration raises questions of federal law, a court addressing a Section 10 or 11 petition will necessarily have to consider those federal questions.[19]

Furthermore, even if a federal question was not raised by the arbitration itself, Section 10 permits vacatur in case of "misbehavior by which the rights of any party have been prejudiced."[20] A wide range of federal procedural or substantive rights may be implicated by the conduct of the arbitrators even if the arbitration itself encompassed only issues of state law, and allegations of such misconduct on the face of a Section 10 or 11 petition may therefore provide a basis for federal question jurisdiction.

Retention of Jurisdiction First Asserted Under Section 4

Badgerow considered a dispute that began in arbitration; neither party had petitioned the district court to compel arbitration. The case therefore does not resolve whether a Section 4 petition can be used as a jurisdictional "anchor," in Justice Breyer's words, to preserve the federal court's ability to address subpoena or post-award disputes over which it could not gain look-through jurisdiction.[21]

There was little dispute before Badgerow that "a court which orders arbitration [under Section 4] retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate" as restated recently by the U.S. Court of Appeals for the Second Circuit in its 2005 opinion Stolt-Nielsen SA v. Celanese AG.[22]

But the centrality of the textual argument in Badgerow and the absence of the relevant language in the other sections of the FAA may incline courts to reject the concept of Section 4 as a jurisdictional anchor. After all, if look-through jurisdiction is conferred only by the "save for the agreement" language of Section 4, policy arguments for permitting a court to retain jurisdiction once exercised will likely take a back seat.

Until the court rules on the issue, however, it will remain unclear whether cases extending jurisdiction gained under Section 4 to the rest of the FAA remain good law.

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[1] Badgerow v. Walters, 142 S. Ct. 1310 (2022).

[2] Vaden v. Discover Bank, 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009).

[3] Badgerow, 142 S. Ct. at 1314.

[4] Id. at 1317.

[5] Id. at 1314.

[6] Id. at 1321-1322.

[7] Id. at 1315.

[8] 9 U.S.C. §§ 4, 11.

[9] 9 U.S.C. § 7.

[10] 9 U.S.C. § 5.

[11] Badgerow, 142 S. Ct. at 1322.

[12] 9 U.S.C. § 5.

[13] 9 U.S.C. § 5.

[14] See, e.g., Allstate Vehicle and Prop. Ins. Co. v. Encarnacion, 2019 WL 2221603, at *3 (M.D. Ala. May 22, 2019).

[15] See, e.g., Wash. Nat'l Ins. Co. v. OBEX Grp. LLC, 958 F.3d 126, 135 (2d Cir. 2020); Maine Comm. Health Options v. Albertsons Cos., Inc., 993 F.3d 720, 723-724 (9th Cir. 2021).

[16] See, e.g., Zurich Ins. PLC v. Ethos Energy (USA) LLC, 2016 WL 4363399, at *2-*3 (S.D. Tex. Aug. 16, 2016).

[17] See Amgen, Inc. v. Kidney Ctr. of Del. Cty. Ltd., 95 F.3d 562, 567-568 (7th Cir. 1996) (the former); Wash. Nat'l Ins. Co., 958 F.3d at 134 and Gen. Mobile Preferred, LLC v. Roye Holdings, LLC, 2022 WL 252176, at *3 (E.D. Mich. Jan. 26, 2022) (the latter).

[18] Badgerow, 142 S. Ct. at 1317.

[19] See, e.g., Rodriguez-Rodriguez v. Doctor's Assocs., LLC, 2021 WL 1098263 (D.P.R. Mar. 19, 2021) (construing federal law of criminal forfeiture at issue in the underlying dispute in determining that arbitral award should be vacated pursuant to Section 10(a)(4) because the arbitrator exceeded her powers); In re Petrie v. Clark Moving & Storage, Inc., 2010 WL 1965801, at *5 (W.D.N.Y. May 17, 2010) (on cross motions to confirm and vacate an arbitral award, construing federal law at issue in underlying dispute in determining whether the arbitrator manifestly disregarded the law).

[20] 9 U.S.C. § 10(a)(3).

[21] Badgerow, 142 S. Ct. at 1326 (Breyer, J., dissenting).

[22] Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 573 (2d Cir. 2005); Amgen, 95 F.3d at 567; Maine Comm. Health, 993 F.3d at 725.