SUPREME COURT OF THE UNITED STATES

No. 07–773

BETTY E. VADEN, PETITIONER *v.* DISCOVER BANK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[March 9, 2009]

CHIEF JUSTICE ROBERTS, with whom JUSTICE STEVENS, JUSTICE BREYER, and JUSTICE ALITO join, concurring in part and dissenting in part.

I agree with the Court that a federal court asked to compel arbitration pursuant to §4 of the Federal Arbitration Act should "look through" the dispute over arbitrability in determining whether it has jurisdiction to grant the requested relief. But look through to what? The statute provides a clear and sensible answer: The court may consider the §4 petition if the court "would have" jurisdiction over "the subject matter of a suit arising out of the controversy between the parties." 9 U. S. C. §4.

The §4 petition in this case explains that the controversy Discover seeks to arbitrate is whether "Discover Bank charged illegal finance charges, interest and late fees." App. 30. Discover contends in its petition that the resolution of this dispute is controlled by federal law—specifically §27(a) of the Federal Deposit Insurance Act (FDIA), 12 U. S. C. §1831d(a) (setting forth the interest rates a state-chartered, federally insured bank may charge "notwithstanding any State constitution or statute which is hereby preempted"). Vaden agrees that the legality of Discover's charges and fees is governed by

the FDIA.* A federal court therefore "would have jurisdiction . . . of the subject matter of a suit arising out of the controversy" Discover seeks to arbitrate. That suit could be an action by Vaden asserting that the charges violate the FDIA, or one by Discover seeking a declaratory judgment that they do not.

The majority is diverted off this straightforward path by the fortuity that a complaint happens to have been filed in this case. Instead of looking to the controversy the §4 petitioner seeks to arbitrate, the majority focuses on the controversy underlying that complaint, and asks whether "the *whole* controversy," as reflected in "the parties' state-court filings," arises under federal law. *Ante*, at 16 (emphasis added). Because that litigation was commenced as a state-law debt-collection claim, the majority concludes there is no §4 jurisdiction.

This approach is contrary to the language of §4, and sharply restricts the ability of federal courts to enforce agreements to arbitrate. The "controversy" to which §4 refers is the dispute alleged to be subject to arbitration. The §4 petitioner must set forth the nature of that dispute—the one he seeks to arbitrate—in the §4 petition seeking an order to compel arbitration. Section 4 requires that the petitioner be "aggrieved" by the other party's "failure, neglect, or refusal . . . to arbitrate under a written agreement for arbitration"; that language guides the district court to the specific controversy the other party is unwilling to arbitrate.

That is clear from the FAA's repeated and consistent

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*Vaden has conceded that the FDIA completely pre-empts her state-law counterclaims. See 489 F. 3d 594, 604, n. 10 (CA4 2007). What is significant about that concession is not Vaden's agreement on the jurisdictional question of complete pre-emption (which we need not and do not address), cf. *ante*, at 19, but rather her agreement that federal law—the FDIA—governs her allegation that Discover's charges and fees are illegal.

use of the term "controversy" to mean the specific dispute asserted to be subject to arbitration, not to some broader, "full flavor[ed]" or "full-bodied" notion of the disagreement between the parties. *Ante*, at 17, and n. 16. In §2, for example, the "controversy" is the one "to [be] settle[d] by arbitration" and the one "to [be] submit[ted] to arbitration." 9 U. S. C. §2. In §10(a)(3), it is a ground for vacating an arbitration award that the arbitrator refused to hear evidence "pertinent and material to the controversy"—obviously the "controversy" subject to arbitration, or the arbitrator's refusal to consider the evidence would hardly be objectionable. In §11(c), an award may be modified if "imperfect in matter of form not affecting the merits of the controversy"—again, necessarily the controversy submitted to arbitration, and therefore the subject of the award.

There is no reason to suppose "controversy" meant the controversy subject to arbitration everywhere else in the FAA, but something quite different in §4. The issue is whether there is jurisdiction to compel arbitration to resolve a controversy; why would the pertinent controversy for assessing jurisdiction be anything other than the same one asserted to be subject to arbitration?

The majority looks instead to the controversy the state-court litigation seeks to resolve. This produces the odd result of defining "controversy" more broadly than the §4 petition itself. Discover's petition does not seek to arbitrate its state-law debt-collection claims, but rather Vaden's allegation that the fees Discover has been charging her (and other members of her proposed class) violate the FDIA. See App. 30. The majority does not appear to question that there would be federal jurisdiction over a suit arising out of the subject matter of that dispute. The majority finds no jurisdiction here, however, because "a federal court could not entertain Discover's state-law debt-collection claim." *Ante*, at 20, n. 19. There

is no jurisdiction to compel arbitration of a plainly federal controversy—the FDIA dispute—because there is no jurisdiction to compel arbitration of the debt-collection dispute. But why Discover should have to demonstrate federal jurisdiction over a state-court claim it does not seek to arbitrate is a mystery. Cf. *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 19–21 (1983) (affirming federal-court jurisdiction over a §4 petition seeking to arbitrate only one of two disputes pending in state-court litigation); *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 218–221 (1985) (when litigation involves multiple claims, only some of which are covered by an arbitration agreement, district court must compel arbitration of the covered claims if so requested).

The majority's approach will allow federal jurisdiction to compel arbitration of *entirely* state-law claims. Under that approach the "controversy" is not the one the §4 petitioner seeks to arbitrate, but a broader one encompassing the "whole controversy" between the parties. *Ante*, at 16. If that broader dispute involves both federal and state-law claims, and the "originating" dispute is federal, *ibid.*, a party could seek arbitration of just the state-law claims. The "controversy" under the majority's view would qualify as federal, giving rise to §4 jurisdiction to compel arbitration of a purely state-law claim.

Take this case as an example. If Vaden had filed her FDIA claim first, and Discover had responded with a state-law debt-collection counterclaim, that suit is one that "could be litigated in federal court." *Ante*, at 15. As a result, the majority's approach would seem to permit Vaden to file a §4 petition to compel arbitration of the entirely state-law-based debt-collection dispute, because that dispute would be part and parcel of the "full flavor[ed]," "originating" FDIA controversy. *Ante*, at 16, 17. Defining the controversy as the dispute the §4 petitioner

seeks to arbitrate eliminates this problem by ensuring that the *actual dispute* subject to arbitration is federal.

The majority's conclusion that this controversy "is not one qualifying for federal-court adjudication," *ante*, at 19, stems from its mistaken focus on the existing litigation. Rather than ask whether a court "would have" jurisdiction over the "subject matter" of "a" suit arising out of the "controversy," the majority asks only whether the court *does* have jurisdiction over the subject matter of a *particular* complaint. But §4 does not speak of actual jurisdiction over pending suits; it speaks subjunctively of prospective jurisdiction over "the subject matter of a suit arising out of the controversy between the parties." 9 U. S. C. §4. The fact that Vaden has chosen to package the FDIA controversy in counterclaims in pending state-court litigation in no way means that a district court "would [not] have" jurisdiction over the "subject matter" of "a suit" arising out of the FDIA controversy. A big part of arbitration is avoiding the procedural niceties of formal litigation; it would be odd to have the authority of a court to compel arbitration hinge on just such niceties in a pending case.

By focusing on the sequence in which state-court litigation has unfolded, the majority crafts a rule that produces inconsistent results. Because Discover's debt-collection claim was filed before Vaden's counterclaims, the majority treats the debt-collection dispute as the "originating controversy." *Ante*, at 16. But nothing would have prevented the same disagreements between the parties from producing a different sequence of events. Vaden could have filed a complaint raising her FDIA claims before Discover sought to collect on any amounts Vaden owes. Because the "originating controversy" in that complaint would be whether Discover has charged fees illegal under federal law, in that situation Discover presumably *could* bring a §4 petition to compel arbitration

of the FDIA dispute. The majority's rule thus makes §4 jurisdiction over the same controversy entirely dependent upon the happenstance of how state-court litigation has unfolded. Nothing in §4 suggests such a result.

The majority glosses over another problem inherent in its approach: In many if not most cases under §4, no complaint will have been filed. See *Hartford Financial Systems, Inc.* v. *Florida Software Servs., Inc.*, 712 F. 2d 724, 728 (CA1 1983) (Breyer, J.) ("Normally, [§4] motions are brought in independent proceedings"). What to "look through" to then? The majority instructs courts to look to the "full-bodied controversy." *Ante*, at 17, n. 16. But as this case illustrates, that would lead to a different result had the state-court complaint not been filed. Discover does not seek to arbitrate whether an outstanding debt exists; indeed, Discover's §4 petition does not even allege any dispute on that point. See App. 28–41. A district court would therefore not understand the §4 "controversy" to include the debt-collection claim in the absence of the state-court suit. Under the majority's rule, the FDIA dispute would be treated as a "controversy" qualifying under §4 before the state suit and counterclaims had been filed, but not after.

The far more concrete and administrable approach would be to apply the same rule in all instances: Look to the controversy the §4 petitioner seeks to arbitrate—as set forth in the §4 petition—and assess whether a federal court would have jurisdiction over the subject matter of a suit arising out of that controversy. The controversy the moving party seeks to arbitrate and the other party will not would be the same controversy used to assess jurisdiction to compel arbitration.

The majority objects that this would allow a court to "hypothesiz[e] discrete controversies of its own design," *ante*, at 16, in an apparent effort to find federal jurisdiction where there is none. Not so. A district court

entertaining a §4 petition is required to determine what "a suit" arising out of the allegedly arbitrable controversy would look like. There is no helping that, given the statute's subjunctive language. But that does not mean the inquiry is the free-form one the majority posits.

To the contrary, a district court must look to the specific controversy—the concrete dispute that one party has "fail[ed], neglect[ed], or refus[ed]" to arbitrate—and determine whether *that* controversy would give rise to a suit under federal law. District courts do that sort of thing often enough; the exercise is closely analogous to the jurisdictional analysis in a typical declaratory judgment action. See *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 19 (1983) (jurisdiction over a declaratory judgment action exists when, "*if* the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question" (emphasis added)). Looking to the specific controversy outlined in Discover's §4 petition (whether its fees violate the FDIA), it hardly requires "dream[ing]" to conceive of a lawsuit in which Vaden would claim the FDIA has been violated and Discover would claim it has not. *Ante*, at 18.

Nor would respondents' approach allow a §4 petitioner to simply "recharacterize" or "manufacture" a controversy to create federal jurisdiction. *Ante*, at 17. All of the established rules of federal jurisdiction are fully applicable in scrutinizing whether a federal court would have jurisdiction over a suit arising out of the parties' underlying controversy.

For example, a federal question must be presented by the specific controversy the §4 petitioner seeks to arbitrate, not by some hypothetical federal issue "lurking in the background." *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, 117 (1936). A district court could not compel arbitration of a state-law dispute by pointing to a

potential federal defense that the §4 petitioner is not seeking to arbitrate, because the "claim itself must present a federal question" to arise under federal law. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 672 (1950). Nor could a district court compel arbitration of a dispute that, though not federal in character, could lead to the filing of a federal counterclaim, for "a counterclaim . . . cannot serve as the basis for [federal] jurisdiction" of the state-law dispute itself. *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, 831 (2002).

Accordingly, petitioners may no more smuggle state-law claims into federal court through §4 than they can through declaratory judgment actions, or any other federal cause of action. To the extent §4 brings some issues into federal court in a particular case that may not be brought in through other procedural mechanisms, it does so by "enlarg[ing] the range of remedies available in the federal courts[,] . . . not extend[ing] their jurisdiction." *Skelly Oil*, *supra*, at 671.

That is why the majority's recital of the basic rules of federal-court jurisdiction in Part II of its opinion is beside the point: No one disputes what those rules are, and no one disputes that they must be followed under §4 in deciding whether a federal court "would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties." The issue is instead *what* suit should be scrutinized for compliance with those rules. In defining "controversy" by reference to existing litigation, the majority artificially limits the reach of §4 to the particular suit filed. The correct approach is to accord §4 the scope mandated by its language and look to "a suit," arising out of the "subject matter" of the "controversy" the §4 petitioner seeks to arbitrate, and determine whether a federal court would have jurisdiction over such a suit.

The majority concludes by noting that state courts are obliged to honor and enforce agreements to arbitrate.

Ante, at 20. The question here, however, is one of remedy. It is a common feature of our federal system that States often provide remedies similar to those under federal law for the same wrongs. We do not, however, narrowly construe the federal remedies—say federal antitrust or civil rights remedies—because state law provides remedies in those areas as well. Cf. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief").

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Discover and Vaden have agreed to arbitrate any dispute arising out of Vaden's account with Discover. Vaden's allegations against Discover have given rise to such a dispute. Discover seeks to arbitrate that controversy, but Vaden refuses to do so. Resolution of the controversy is governed by federal law, specifically the FDIA. There is no dispute about that. In the absence of the arbitration agreement, a federal court "would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties," 9 U. S. C. §4, whether the suit were brought by Vaden or Discover. The District Court therefore may exercise jurisdiction over this petition under §4 of the Federal Arbitration Act.