13 Loy. J. Pub. Int. L 189

Loyola Journal of Public Interest Law
Fall 2011

Comment

WHERE CAN I GO FROM HERE? DETERMINING THE AMOUNT IN CONTROVERSY FOR DIVERSITY JURISDICTION IN POST-AWARD CASES UNDER THE FEDERAL ARBITRATION ACT

Joshua W. Christie

INTRODUCTION

Arbitration agreements are a part of nearly everyone's life, and many people might not even realize it. They are prevalent in almost every type of agreement ranging from commercial, construction, consumer and employment, to government, labor, and international contracts. [1] Although at one time, courts were hostile to arbitration and other forms of alternative dispute resolution, they have become increasingly accepting of it as a cure for the problems facing today's over-litigious society. [2] As one scholar has put it, “Arbitration is . . . faster, cheaper, and probably fairer to all, while preserving a continuing relationship between the parties in contemplation of future dealings: all now in the “public interest.” [3]

In accord with the growing acceptance of arbitration, the Federal Arbitration Act (“FAA”) created a means of enforcing arbitration agreements by the federal courts. [4] When an ***190** arbitration agreement exists between parties, the act grants federal courts authority to compel parties to arbitrate as well as the power to confirm, vacate, or modify arbitration awards under certain circumstances. [5] In 1984, the United States Supreme Court held that the FAA applies in state courts, thus limiting the States' authority to regulate arbitration agreements. [6] This highly criticized decision has been met with much hostility from state courts, and parties who are unable to gain federal jurisdiction may have to face unpredictable circumstances if forced to proceed in state courts. [7] Because arbitration is such a common part of everyday dealings and parties may face unpredictability in state court, it is important that parties have uniform guidelines regarding when their cases may be heard in federal court under the Act. [8] Unfortunately, the circuit courts are currently split regarding how the amount in controversy requirement is met for post-arbitration motions to vacate, confirm, or modify awards. [9]

Although the FAA specifically states how federal jurisdiction is established for actions to compel arbitration, curiously there is no reference to how jurisdiction is attained in any of the three sections involving post-arbitration actions after an award has been decided. [10] Instead, the statute simply empowers the court to act without instructions of how parties may obtain jurisdiction. [11] This lack of guidance is partially to blame for why federal courts are not currently in agreement as to how to determine the amount in controversy. When given no guidance, courts should look to the default rules contained in the diversity jurisdiction statute. [12]

***191** For example, parties A and B enter into an agreement to arbitrate any future disputes arising from their professional relationship. A takes B to arbitration, claiming $100,000 in damages, and the arbitrator finds in favor of A, but awards only $50,000. If A or B wish to appeal to the federal court to confirm, vacate, or modify the award, there should be a clear rule about whether the court would have jurisdiction to hear their case. Unfortunately, the current result will depend on which federal circuit the aggrieved party chooses to bring their appeal. Some circuits will deny jurisdiction because the arbitrator's award

was less than $75,000. [13] Other circuits will uphold jurisdiction only if the party requests remand for further arbitration with a claim of greater than $75,000. [14] Still yet, some circuits will uphold jurisdiction because the original claim was for more than the minimum jurisdictional amount of $75,000. [15]

Under a unified federal court system, it is unacceptable that there are three approaches to determining whether diversity jurisdiction exists in any type of case. The passage of the FAA was deeply rooted in a policy favoring efficiency with a Congressional goal of encouraging use of arbitration as widely as possible. [16] This policy of efficiency is threatened by continued confusion about where and how jurisdiction might be established. It is long-settled that to gain diversity jurisdiction in federal courts, the amount in controversy is to be determined based on the face of the complaint. [17] Thus, in order to further congressional policy of limiting federal court jurisdiction while also avoiding inconsistencies that will deter arbitration, federal courts should adopt the American Guaranty approach to determining if diversity jurisdiction exists. Under this approach, courts will determine the amount in controversy as the diversity jurisdiction statute mandates, based on the face of the ***192** complaint. [18]

This comment proposes that the American Guaranty approach is the best method for determining the amount in controversy in post-arbitration motions to confirm, vacate, or modify awards. Section I will provide an overview of the FAA and the statutory language that confers jurisdiction on the federal courts. Section II will discuss how the amount in controversy requirement is met under the diversity jurisdiction statute, along with the policy of limiting federal court jurisdiction. Section III will provide an in depth analysis of the current circuit split with regards to approaches for determining the amount in controversy in post-arbitration proceedings. It will also examine the state of flux in Ninth Circuit jurisprudence on the issue. Section IV will make the novel proposal that jurisprudence has overlooked the simplicity of the Ninth Circuit's guidance in American Guaranty--that "it is the amount in controversy that determines jurisdiction," [19] and this amount should be determined based on the face of the pleadings. Finally, section V will justify the approach by addressing its furtherance of congressional policy, as well as how the approach addresses the concerns posed by critics of the current approaches.

I. THE FEDERAL ARBITRATION ACT

The FAA, [20] enacted in 1925, "establish[es] and regulates the duty to honor an agreement to arbitrate." [21] Since 1984, both federal and state courts have held the FAA applicable. Legislation that empowers federal courts normally confers its own independent federal jurisdiction. However, the FAA has been described as an "anomaly" because it does not in itself confer federal-question jurisdiction. [22] Instead, parties wishing to utilize the FAA must present another basis for establishing federal subject matter jurisdiction. [23] Unfortunately, the statutory ***193** language gives little guidance on how parties should establish this independent federal jurisdiction.

A. Actions to Compel Arbitration

Although this comment focuses on post-arbitration proceedings, it is important to understand how the FAA grants federal courts the power to compel a party to arbitrate. According to section 4, covering failure to arbitrate under agreement:

> 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. [24]

Thus, the plain language of the statute makes clear that a party wishing to compel a dispute to arbitration may petition any United States district court that, in the absence of the agreement, would have jurisdiction under the federal diversity jurisdiction statute. [25] This is important because the plain language of the sections covering post-arbitration actions is silent on the issue. [26]

B. Post-Arbitration Actions to Confirm, Vacate, or Modify Awards

Although a final arbitration award is binding between the parties, either side may wish to petition the courts to have the award confirmed, vacated, or modified. [27] Sections 9 through 11 of the FAA address these types of proceedings. These sections are designed to advocate the finality of an award by maximizing the chances of confirmation while severely limiting the court's power ***194** to vacate or modify the award. [28]

Section 9 of the Act covers motions to confirm arbitration awards. [29] It states that if the parties have agreed that a judgment of a court shall be entered upon an award made pursuant to the arbitration, they may apply to the court so specified in their agreement for an order confirming the award within one year after the award is made unless it is vacated or modified under other sections of the FAA. [30] If no court was specified in the agreement, then application may be made to the United States court in the district where the award was made. [31]

If a party seeks to vacate an arbitration award, section 10 of the FAA states:
(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be ***195** made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. [32]

Thus, section 10 authorizes federal courts to vacate awards that were procured under a defined set of limited circumstances. [33] Furthermore, this section empowers federal courts with the discretion to direct a rehearing by the arbitrators after they have vacated the original award. [34]

Finally, section 11 of the FAA, which covers actions to modify or correct arbitration awards, states:
In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. [35]

Similar to section 10, this section also empowers the court to take action against an arbitration award under a narrow set of circumstances. [36]

In sum, sections 9 through 11 of the FAA reveal two key points: (1) federal courts are empowered to confirm, vacate, or ***196** modify arbitration awards under circumstances designed to uphold the finality of the award, [37] and (2) the statute is silent as to how federal jurisdiction is established for these types of proceedings. Since the statute is silent, courts should therefore look to the diversity jurisdiction statute for guidance. [38]

II. ESTABLISHING FEDERAL DIVERSITY JURISDICTION

A party who wishes to litigate in federal court based on diversity jurisdiction must establish two prerequisites: (1) diversity of citizenship and (2) an amount in controversy that exceeds $75,000. [39] This comment focuses on cases where the diversity requirement has been met, but the amount in controversy is at issue. Although the federal diversity jurisdiction statute makes it clear that the amount in controversy must exceed $75,000, the rules do not provide clear guidance on how that sum is to be calculated. [40] This lack of direction plays a part in the current confusion surrounding post-arbitration actions.

Additionally, the United States Supreme Court has asserted that "[t]he intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts." [41] Congressional intent to restrict federal jurisdiction in diversity cases is further evidenced by periodic increases of the minimum amount in controversy since federal courts were first granted diversity jurisdiction by the Judiciary Act of 1789. [42] According to ***197** the United States Supreme Court, Congress' reason for these increases was to lower the caseload of diversity jurisdiction cases being brought before federal courts. [43]

Opposing the policy of limiting federal court jurisdiction is the "virtually unflagging obligation" of federal courts "to exercise the jurisdiction given them" when the prerequisites for diversity jurisdiction are met. [44] When determining the amount in controversy there is an assumption that the sum claimed by the plaintiff is made in good faith. [45] This assumption controls, and the amount claimed is used unless it appears to a legal certainty that the claim is really for less than the minimum jurisdictional amount. [46] However, neither the inability of a plaintiff to ultimately recover the minimum jurisdictional amount (i.e. a jury award for less), nor the presence of a valid defense to the claim ousts the court of jurisdiction. [47] If however, from the face of the pleadings, it is legally certain that the plaintiff was never entitled to recover the minimum jurisdictional amount, the suit will be dismissed. [48] Thus, courts must balance the policy of limited jurisdiction with their unflagging obligation to exercise jurisdiction under the assumption that the amount claimed was made in good faith.

Applying these principles to cases brought under the FAA ***198** after an arbitration award has been rendered forces the court to conduct the balancing act discussed above. Congressional commitment to limiting federal jurisdiction as well as the court's obligation to enforcing that limitation is clear. [49] At the same time, it is well-established judicial policy to maintain jurisdiction based on the amount of the plaintiff's claim unless, from the face of the pleadings, it is legally certain that the plaintiff will be

unable to recover the requested amount.[50] A case brought under the FAA falls squarely between these two complementary yet competing policies. The court must balance these policies to determine, on the face of the pleadings, whether the amount in controversy is the award rendered in arbitration or if they can look through the arbitration award to the plaintiff's original claim. This balancing act has led to the varying results among the federal circuits discussed below.

III. DETERMINING THE JURISDICTIONAL AMOUNT IN CONTROVERSY FOR POST-ARBITRATION ACTIONS

Although guidance for determining the amount in controversy for a motion to compel arbitration is clearly set forth in the statute, the lack of guidance for determining the amount in post-award actions has left federal courts split over the issue.[51] The circuits have generally used three different approaches to calculating the amount in controversy for the purposes of the federal diversity statute. These have come to be known as the award approach, the demand approach, and the remand approach.[52] Although the justification for each approach viewed separately is compelling, the confusion created by the varying ***199** standards is unacceptable under a unified federal court system.[53] A prime example of this confusion can be found by examining the history of decisions within the 9th Circuit.

This section will begin with an examination of the different approaches and the justification for each. It will then conclude with an analysis of the Ninth Circuit's difficulty deciding between the award and demand approaches.

A. Three Approaches to Determining the Amount in Controversy

1. The Award Approach

Under this approach, courts decide whether the amount in controversy requirement is met based solely on the amount of the arbitrator's award.[54] Federal courts have tended to use this approach when the lone remedy sought is confirmation or vacation of an award.[55] For example, in Ford v. Hamilton Investments, Inc., the district court denied Ford's motion to vacate and granted Hamilton's motion to confirm the award.[56] The original claim was greater than $50,000 (the minimum requirement for diversity jurisdiction at the time); however, the award was less than $30,000.[57] On appeal, the Sixth Circuit remanded the case to the district court for dismissal for want of jurisdiction.[58] The court held that, "[a] claim for vacation of an arbitral award [for less than the minimum jurisdictional amount] is not sufficient for diversity jurisdiction."[59]

The Eleventh Circuit also adopted the award approach in Baltin v. Alaron Trading Corp.[60] In this case, Alaron sued the Baltins in Illinois state court over a brokerage dispute seeking damages of almost $70,000.[61] However, the arbitration ***200** agreement between the parties stipulated that the dispute would be arbitrated in Florida, and the Baltins successfully petitioned the Illinois state court to compel arbitration in Florida.[62] After a Florida arbitrator awarded Alaron $36,284.36,[63] the Baltins filed a motion to vacate the award in Florida federal court.[64] This motion was dismissed by the district court based on the forum selection clause in the arbitration agreement.[65] On appeal, the Eleventh Circuit held that the court lacked subject-matter jurisdiction over the petition to vacate.[66] Following the lead of the Sixth Circuit in Ford, the court did not look beyond the arbitrator's award, which was below the $50,000 minimum amount required for diversity jurisdiction.[67]

The award approach has come under heavy criticism for its potential to be inconsistent with the court's exercise of jurisdiction in a motion to compel arbitration.[68] In comparing the approaches one court characterized the award approach as the least appealing of the three.[69] As stated supra, in section I(A), federal courts have jurisdiction over a motion to compel arbitration

if the requirements of Title 28 are met. [70] Thus, for motions to compel arbitration, courts look to the amount claimed in the underlying cause of action that would be arbitrated. [71] Courts that follow the award approach would therefore apply two separate tests depending on whether the party is seeking to compel arbitration or filing a post-arbitration motion. It is foreseeable that this approach could result in jurisdiction over a motion to compel, yet no jurisdiction over a motion to confirm, vacate, or modify an award arising from the same claim. [72]

***201** For example, in Baltin the petitioner originally compelled arbitration in state court based on the arbitration agreement. If Baltin had instead removed the case to federal court, he likely would have gained the same result-a grant of the motion to compel arbitration in Florida. If the case unfolded in the same way, the Eleventh Circuit would thus deny jurisdiction to vacate an arbitration award that they had previously compelled to arbitration in the first place. It is inconsistencies like these that other approaches attempt to avoid. [73]

2. The Demand Approach

Although historically the most common approach utilized by courts was the award approach, recent decisions reflect a trend in the direction of following the demand approach. [74] Under the demand approach, the amount in controversy is determined by the amount sought in the underlying arbitration regardless of the amount of the award rendered as a result of arbitration proceedings. [75]

Recently, the District of Columbia Circuit adopted the demand approach in a case where the party was solely seeking to confirm an arbitration award. [76] In Karsner v. Lothian, the plaintiff originally sought damages totaling over $100,000 from the defendant, a mutual funds broker-dealer. [77] During the arbitration proceeding, plaintiff settled her claims for $47,000. [78] Defendant then filed a motion to confirm the arbitration settlement under section 9 of the FAA. [79] The district court granted the motion, and the jurisdictional issue was raised on appeal by a third party intervenor attempting to overturn the district court's ruling. The intervenor claimed that the amount in ***202** controversy was not met because the award was only $47,000. [80]

On appeal, the D.C. Circuit Court gave a thorough analysis of the three approaches to determining the amount in controversy. The court sharply criticized the award approach for its potential to be inconsistent with the court's exercise of jurisdiction in a motion to compel arbitration. [81] Under the award approach, it is foreseeable that a court may have jurisdiction over an action to compel, yet no jurisdiction over an action to confirm, vacate, or modify an award arising from the same claim. [82] This inconsistency could deter parties from arbitrating because "it effectively punishes parties for choosing arbitration instead of litigation." [83]

Turning to the demand approach, the Karsner court stated favorably that it "has merit and has recently been applied by [the Ninth [84] and First [85] Circuits]." [86] In Bull HN Info. Sys. v. Hutson, the First Circuit noted that the demand approach recognizes the connection an action to compel arbitration shares with subsequent actions to confirm, vacate, or remand awards. [87] The Bull HN court analogized the facts of its case [88] to a situation where a jury in a federal diversity case returns a verdict for a plaintiff, but for an amount below $75,000. [89] In such a case, diversity jurisdiction would still exist. [90] If an arbitration proceeding were to begin with an amount in controversy exceeding $75,000, but result in an award lower than that ***203** amount, stripping the court of jurisdiction would undermine "federal policies in favor of arbitration." [91] The Karsner court thus elected to follow the rationale set out in Bull HN and adopted the demand approach. "[U]nlike the award approach, the demand approach permits the district court to exercise jurisdiction coextensive with the diversity jurisdiction that would have otherwise been present if the case had been litigated rather than arbitrated." [92]

In addition to the circuits mentioned above, the Ninth Circuit has also elected to follow the demand approach.[93] The Ninth Circuit's rationale will be discussed below in the subsection addressing its wavering history concerning the topic.

3. The Remand Approach

In a hybrid of the demand and award approaches, courts in the First, Sixth, Seventh, and Eleventh Circuits follow what has become known as the remand approach when a post-award action is coupled with a request for further relief.[94] Under this approach, "the amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, provided the plaintiff is seeking to reopen the arbitration."[95] In discussing this approach, this section will look specifically at the Sixth and Eleventh Circuits, which have adopted the award approach but subsequently applied the remand approach also.

As discussed supra, in Ford v. Hamilton Investments, Inc, the Sixth Circuit held that a motion to vacate an award for less than the jurisdictional amount was not sufficient for jurisdiction even though the original amount requested in arbitration was higher.[96] In its ruling, the court noted that although Ford asked for more than the jurisdictional amount in his original complaint, ***204** he was not seeking to reopen the arbitration in his motion to vacate.[97] Thus, the court hinted that the remand approach might have been applied if the circumstances had been different, but it was not until thirteen years later that this became reality.[98] Citing Ford in 2007, the Sixth Circuit held that where a petitioner seeks to reopen arbitration, the amount in controversy includes the amount at stake in the arbitration.[99]

Like the Sixth Circuit, the Eleventh Circuit hinted early on that it might have applied the remand approach if the petitioner had pleaded differently, and it recently followed through on the promise. As discussed supra, in Baltin v. Alaron Trading Corp., the court held that jurisdiction was lacking in a petition to vacate an award amounting to less than the jurisdictional minimum.[100] In its holding the Eleventh Circuit similarly pointed out that the petitioners "did not request an award modification that would provide the Baltins with money. "Instead, the Baltins sought merely to reduce or eliminate the arbitration award against them."[101] Thus, the court set up the scenario where it could later apply the remand approach. Eight years later, in Peebles v. Merrill Lynch, Pierce, Fenner, & Smith, it did.[102]

In Peebles, the arbitration panel issued a zero dollar award in favor of Merrill Lynch.[103] In Florida state court, Peebles filed a motion to vacate coupled with a request that the case be remanded to arbitration under a new panel.[104] Merrill Lynch subsequently removed the case to federal court.[105] Apparently trying to take advantage of state laws regarding the motion to vacate, Peebles opposed the removal, claiming that diversity jurisdiction was lacking due to the zero dollar award.[106] The ***205** United States District Court for the Southern District of Florida held that the minimum amount in controversy was met, and the case was appealed to the Eleventh Circuit.[107]

In support of his argument, Peebles cited Baltin's holding that the amount in controversy is always the amount of the arbitration award, not the amount sought in the underlying action.[108] Conversely, Merrill Lynch claimed that because of the request to reopen arbitration the amount in controversy was satisfied by the sum in Peebles' statement of claim.[109] The Eleventh Circuit focused on the maximum remedy sought in distinguishing the two cases. It noted that in Baltin the maximum remedy sought was vacation of the arbitration award against the petitioners that did not exceed the minimum jurisdictional amount.[110] In contrast, Peebles' motion to vacate included a request to reopen arbitration where the potential damages amounted to $2,000,000.[111] The court held that "a federal court has subject matter jurisdiction where a party seeking to vacate an arbitration award is also seeking a new arbitration hearing at which he will demand a sum which exceeds the amount in controversy for jurisdiction purposes."[112]

The remand approach does well to address one of the primary concerns posed by those who oppose utilizing a strict award approach - that parties may be punished for choosing arbitration depending on the results. Remand approach jurisdictions acknowledge that the maximum award sought in a motion to vacate still may reach the jurisdictional minimum, even for a zero dollar award. By allowing for jurisdiction in cases where remand is sought, the potential that a party may be punished is largely alleviated. [113] The combination of award and remand approach utilized by the Sixth and Eleventh Circuits ***206** most closely resemble this comment's proposed standard, the American Guaranty approach.

B. Wavering in the Ninth Circuit

The Ninth Circuit is a prime example of the need for adopting one approach followed by all federal courts. The potential that parties might be faced with uncertainty of how courts will rule within the same circuit, is an unacceptable inconsistency under a unified system of federal courts.

Jurisprudence within the Ninth Circuit has been in flux over this issue since 1934, just years after the FAA was passed, when the court made its ruling in American Guaranty Co. v. Caldwell. [114] In American Guaranty, the federal court first became involved when Caldwell sought to confirm an arbitration award of $32,500 in state court. [115] American Guaranty removed the case to federal court and brought a motion to vacate. [116] At this stage, neither party raised any jurisdictional issues because the award of $32,500 was above the jurisdictional minimum of the time, set at $3,000. [117] The district court ultimately vacated the award and directed the matter to be reheard by arbitration pursuant to the law. [118] At the conclusion of the second proceeding, the arbitrators directed that neither party take any award as a result of the action. [119] In the same district court where the motion to vacate was earlier filed, Caldwell then brought a motion to vacate the zero dollar award and order a new arbitration proceeding. [120] After a number of hearings and over American Guaranty's objections, the court vacated the arbitrator's zero dollar award on the grounds that one arbitrator was impartial and improperly appointed; however, the court refused to grant Caldwell's request for a new proceeding. [121]

After losing at the district level, American Guaranty appealed to the Ninth Circuit, contending that the district court ***207** was without jurisdiction when it vacated the zero dollar award because zero dollars does not meet the minimum required amount in controversy. In what would become a source of much debate, the court upheld the vacatur of the zero dollar ruling, holding "It is the amount in controversy which determines jurisdiction, not the amount of the award." [122] This decision has been considered by many to be the original adoption of the demand approach. [123]

One district court within the Ninth Circuit has rejected outright the notion that the American Guaranty ruling applies to all cases. [124] In Goodman v. CIBC Oppenheimer & Co., Goodman asked for over $3,000,000 in damages but was awarded only $74,030.75 by the arbitration panel. [125] Goodman brought a motion to vacate the award under section 10 of the FAA, but the court held that it lacked subject matter jurisdiction to hear the case. [126] The court ruled that the "most widely followed" approach to determining the amount in controversy is the award approach used in the Sixth and Eleventh Circuits. [127] In response to Goodman's argument that American Guaranty controlled, the court distinguished the two cases and held that the American Guaranty ruling ultimately rested upon the fact that the court had previously gained jurisdiction in the motion to vacate the award that was greater than the jurisdictional minimum. The Goodman court thus distinguished its case because the motion to vacate the $74,030.75 was the first time the court was hearing any motion on the claim. [128]

A few years following this narrow interpretation of American Guaranty by a district court, the Ninth Circuit revisited the issue in Luong v. Circuit City Stores. [129] The Luong court agreed with ***208** the district court's interpretation of American Guaranty and refused to maintain jurisdiction of a motion to vacate a zero dollar arbitration award. [130] In a holding nearly opposite to

the debated holding in American Guaranty, the Luong court stated, "[T]he matter in controversy for the purposes of diversity jurisdiction . . . is the amount awarded in the arbitration proceeding, not the sum claimed in the underlying action." [131] In his dissenting opinion, one judge harshly criticized the majority, claiming "[T]he rule my colleagues adopt makes no sense." [132] Contrary to the majority opinion, Judge Kozinski claimed that there were alternative rulings in American Guaranty: the amount in controversy was met, and the court had retained jurisdiction from the earlier motion. [133] The majority's ruling that American Guaranty was based on retaining jurisdiction reduced the statement that "it is the amount in controversy that determines jurisdiction" to idle chatter when it was meant to be a statement of law. [134]

The Luong holding quickly became a moot point, however, when the Ninth Circuit withdrew its opinion and issued another in its place. [135] In the new opinion, the court found federal-question jurisdiction on alternative grounds, but did not address the issue of meeting the amount in controversy all together. [136]

Soon after the second Luong decision, however, the Ninth Circuit reversed course again, opting to follow the demand approach. In fact, the court specifically waited until the second Luong decision was final before ruling in the following case. [137] In 2005, in Theis Research, Inc. v. Brown & Bain, the court once again followed the demand approach guidance offered in American Guaranty. [138] The party sought to vacate a zero dollar award when the damages sought in their original complaint were ***209** over $200 million. [139] In Theis, the Ninth Circuit held that it is the original amount in controversy, not the amount of the arbitration award which determines the amount in controversy for diversity jurisdiction purposes. [140]

The Ninth Circuit has a history of swaying back and forth between the demand and award approaches. The main catalyst of this uncertainty lies in differing interpretations of the court's statement in American Guaranty that "[i]t is the amount in controversy which determines jurisdiction, not the amount of the award." [141] The meaning of this statement will be examined in the following section.

IV. THE AMERICAN GUARANTY APPROACH TO DETERMINING THE AMOUNT IN CONTROVERSY

After reviewing the circuit split, this author proposes that the best approach to determining the amount in controversy is based on the plain language of American Guaranty. As discussed in the previous subsection, courts in the Ninth Circuit have battled with the words, "It is the amount in controversy which determines jurisdiction, not the amount of the award." [142] In its narrowest reading, the award approach proponents have held the words to be passing dicta in a case where the court retained jurisdiction over the proceeding from a previous ruling. [143] In the broadest sense, the Ninth Circuit has recently adopted the demand approach, holding that the guidance of American Guaranty dictates that the amount in controversy in the underlying arbitration should always guide the amount in controversy search. [144] The true meaning of the holding from American Guaranty, however, falls somewhere in-between.

While clearly rejecting the award approach, one argument is that the American Guaranty court "apparently left the reader to infer that the amount originally sought in arbitration is the ***210** 'amount in controversy' under § 1332." [145] On the contrary, however, this author proposes that the court did not leave its words open to inference. Rather, it can reasonably be determined that the court meant exactly what it said - that it is the amount in controversy that determines jurisdiction. As discussed supra in section II, the amount in controversy is determined from the face of the pleadings. [146] Additionally, it is assumed that the amount claimed by the plaintiff was made in good faith, and courts will not dismiss a case for want of jurisdiction without a legal certainty that the plaintiff is not entitled to the amount requested. [147] In American Guaranty, the motion to vacate the zero dollar arbitration award also included a request for rehearing on Caldwell's original claim of $32,500. [148] On the face of the pleading (in this action, Caldwell's motion to vacate) the amount in controversy was above the minimum required for jurisdiction and

the court maintained jurisdiction accordingly. [149] Thus, the American Guaranty ruling was similar to the remand approach as described by the Sixth and Eleventh Circuits. [150]

The words of American Guaranty should be read according to their plain meaning: the court held that the amount in controversy should guide the court in determining whether the requirement is met. Interpreted literally under the American Guaranty approach, this author proposes that the amount in controversy should be determined based upon the amount requested on the face of the pleadings as per the federal diversity jurisdiction statute, 28 U.S.C. 1332(a). This standard most closely resembles the approaches taken in the Sixth and Eleventh ***211** Circuits, where the courts acknowledge that when the pleadings request that the case be remanded for further arbitration, the amount in controversy may be more than the amount of the award. [151] By taking away the labels (demand, award, remand) and instituting a bright line rule for determining the amount in controversy, federal courts will remove the current state of confusion and uphold long-standing congressional and judicial policy.

Adoption of the American Guaranty approach would be a beneficial step both for parties who enter into arbitration agreements and also for those federal courts lost in the disarray of the current circuit split. The approach is justified on many levels: it is the best interpretation of the language of the FAA, it enforces longstanding judicial and congressional policy, it does not conflict with the court's power to compel arbitration under section 4 of the FAA, and it does not punish those who choose arbitration over litigation.

A. In the Absence of Jurisdictional Language, Title 28 Governs

Perhaps the most convincing argument in favor of the American Guaranty approach is the plain language of the FAA. The Act generally does not address jurisdiction. [152] The sections that cover post-arbitration actions to confirm, vacate, or modify awards are completely silent as to how jurisdiction is attained. [153] Furthermore, the only section to specifically address jurisdiction does so as a modifier, instructing courts to set aside the arbitration agreement and consider grounds for federal jurisdiction according to the Title 28. [154] Since the other sections of the FAA are generally silent on jurisdiction, courts must therefore also look to the diversity jurisdiction statute for guidance. Under the diversity jurisdiction statute, the amount in controversy is determined from the face of the pleadings. [155] In ***212** accordance with Title 28, courts utilizing the American Guaranty approach will only determine the amount in controversy in post-arbitration proceedings based on the pleadings. Therefore, the American Guaranty approach is most consistent with plain language of the FAA construed in conjunction with Title 28.

B. Enforcement of Congressional Intent: Limiting Federal Court Jurisdiction

As discussed above, post-arbitration proceedings to confirm, vacate, or modify awards leave courts to face competing policy issues. On one side is the congressional commitment to limiting the jurisdiction of federal courts. The United States Supreme Court has expressed its dedication to serving this goal. [156] On the other side is the court's unflagging obligation to retaining jurisdiction based on the assumption that a plaintiff's request for relief is made in good faith. [157] By adopting the American Guaranty approach, the court will reach an appropriate balance of these two goals.

First, the goal of limiting federal court jurisdiction will be served because not all post-arbitration claims will have federal court jurisdiction, even though they might have maintained jurisdiction for a motion to compel the original claim. The demand approach would undermine this goal because all post-arbitration motions would be adjudicable if the court's original arbitration amount was high enough. This is too broad and does not comport with the goal of limiting jurisdiction. The American Guaranty approach limits the demand approach in this regard. For example, in those cases where the party is solely requesting that an award be vacated or confirmed, with no further requests, the face of the pleadings must exceed $75,000. Under the American Guaranty approach, the court's ruling will resemble the award approach because, barring a request to remand the case for further arbitration, the amount in controversy will only be the amount of the arbitration award. Thus the American Guaranty

approach does what the demand approach does not; it limits federal court jurisdiction in accordance with longstanding ***213** congressional intent.

Second, the American Guaranty approach balances congressional intent with its own commitment to the assumption that a party's request is made in good faith. By basing its ruling on what the party requests on the face of the pleadings, courts will not have any conflicts with achieving these goals. After an arbitration award is rendered, those cases where the amount in controversy is greater than $75,000 will be evident based on the face of the pleadings: either the motion will be to vacate or confirm an award over that amount, or the party will be requesting remand for further arbitration where the amount in controversy still exceeds the minimum. Incorporating the remand approach in these cases helps to further this goal. By limiting federal jurisdiction while maintaining it when the requirements are met, the American Guaranty approach strikes the appropriate balance between two important policies.

C. Addressing the Issue of Inconsistency with the Court's Power to Compel Arbitration

A great deal of weight has been placed on the potential for inconsistency resulting when a court grants a motion to compel arbitration but then loses jurisdiction to vacate or confirm the award it compelled the parties to reach. [158] For example, district court D grants Party A's motion to compel arbitration, basing jurisdiction on a $100,000 damages claim against Party B. If the arbitration results in an award of $70,000 for A, the same district court D may no longer have jurisdiction to hear a request to confirm, vacate, or modify the award. As a result, strict award approach circuits would never grant jurisdiction, remand approach circuits would grant jurisdiction only if the motion was accompanied by a request to remand back to arbitration, and demand approach circuits would always have jurisdiction. Similar to the remand approach, under the proposed American Guaranty approach, district court D would retain jurisdiction if more than $75,000 was in controversy on the face of the pleadings. Ultimately, even under the American Guaranty approach, there still remains a potential for cases when district court D no longer has jurisdiction following arbitration that it ***214** earlier compelled. These situations might arise when district court D compels arbitration, the award is less than $75,000, and either party appeals to district court D to confirm the award or vacate it without a request for remand.

In response to this concern, there are two potential trains of thought. First, some courts have acknowledged the potential for conflict and stayed cases following a motion to compel, pending arbitration. [159] Second, a motion to compel and a post-award motion are in fact two separate proceedings, and there is no potential for conflict.

1. Courts Already Address the Issue by Staying Cases Pending Arbitration

Correctly stated by the court in Karsner, “The award approach would apply two different jurisdictional tests depending on the action petitioner seeks, resulting in jurisdiction over a petition to compel arbitration of a claim but not necessarily over a petition to confirm/vacate an arbitration award arising from the same claim.” [160] The same potential for conflict would exist when applying the remand approach. Many demand approach proponents champion this fear as their primary justification for rejecting the award approach (and consequently, the remand approach). [161]

To combat the possibility of inconsistency, some award approach courts have turned to yet another hybrid version of the demand approach. [162] In these cases, when a court grants a motion to compel arbitration and stays the case pending the arbitration, circuits have recently applied the demand approach. In such a case, diversity jurisdiction is maintained even if the amount of the actual award is lower than $75,000. [163] In Choice Hotels Int'l, Inc. v. Shiv, the parties filed motions in federal court ***215** following a final award by an arbitrator of less than $75,000. [164] In this case, however, Choice Hotels had initially filed a claim opposing arbitration that the court rejected, and instead granted Shiv's motion to compel. [165] Perhaps foreseeing potential conflicts with jurisdiction for issues arising from the resulting arbitration, the lower court decided to stay the case pending arbitration. [166] After the arbitrator rendered judgment for Choice Hotels in an amount less than $75,000, Choice Hotels

sought to reopen the case in the same federal court asking that the award be confirmed. [167] Shiv opposed claiming that the court lacked jurisdiction to confirm an award under the minimum required amount, but the district court rejected this argument and confirmed the award. [168]

On appeal, the Fourth Circuit made its ruling based on the face of the complaint, rather than addressing the three other approaches by name. [169] The black letter rule is to determine the amount in controversy "based on the complaint itself" unless it appears that the complaint was not made in good faith. [170] The court explained, "[e]vents occurring subsequent to the institution of a suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." [171] Because the district court stayed the case and then reopened it to confirm the award, the court determined the amount in controversy from the face of the pleadings and upheld the award's confirmation. [172]

The Fourth Circuit's holding in Choice Hotels strengthens the argument that the American Guaranty approach is proper. By staying the case when a party brings a motion to compel arbitration, the court ensured that it would not confront the potential inconsistency with its original grant of jurisdiction. The ***216** court's focus on the complaint itself hints that if the case had never been brought to compel arbitration, jurisdiction might have been lacking. By not labeling the case within any of the established approaches (award, demand, or remand), the Fourth Circuit's holding was in line with the American Guaranty guidance that it is the amount in controversy that determines jurisdiction.

2. Post-Award Actions and Requests to Compel are Separate Proceedings and Therefore Cannot be Inconsistent

As an alternative to the solution proposed above, an argument can be made that there is actually no potential for conflict because pre and post-arbitration proceedings are distinct proceedings. In bringing either type of action to a federal court, the purpose is distinctly different. A pre-arbitration motion to compel may never be brought at all. It is only necessary when there is a dispute covered by a valid agreement, and one party is refusing to honor its promise to arbitrate under the agreement. [173] Essentially, a motion to compel is a breach of contract action where the remedy sought for the breach is an order to proceed to arbitration. Conversely, post-arbitration motions are no longer breach of contract disputes. Instead, they are based on the FAA's grant of power to confirm awards when diversity jurisdiction exists or to vacate or modify awards that were achieved through unacceptable means such as fraud or deceit. [174]

A closer look at the FAA lends further justification to the theory that pre and post-arbitration actions are separate, posing no potential conflicts to jurisdiction. First is their placement. The Act does not address jurisdiction in a separate section pertaining to all pre and post-arbitration actions. Instead, the Act addresses jurisdiction for a motion to compel in section 4, and then separately addresses each motion to confirm, vacate, and modify separately, and not until sections nine through eleven. [175] Second, the Act specifically states how jurisdiction is achieved for motions to compel. [176] Conversely, there is no mention of this in ***217** the sections regarding post-arbitration proceedings. [177] Thus, an inference can be made that the two types of actions were meant to be distinct.

The differing reasons for bringing pre-versus post-arbitration actions to federal court, combined with the structure and language of the FAA provide compelling evidence that the two types of proceedings are distinct. Therefore, there is no potential for conflict when a court grants a motion to compel, but then loses jurisdiction to hear post-arbitration motions.

D. Parties are not Punished for Choosing Arbitration

Both scholars and judges have criticized the award approach (and by extension the remand and proposed American Guaranty approaches) for its potential to punish parties who choose to arbitrate rather than litigate. [178] They argue that a party may be punished by choosing to arbitrate because he may be deprived of federal court jurisdiction under certain circumstances, when

if he had litigated his case would have been "determined at the good faith filing of the complaint." [179] This in turn would be a deterrent to arbitration in contravention of policies behind the FAA. [180]

Contrary to this argument, adoption of the American Guaranty approach neither punishes parties who arbitrate nor discourages arbitration. As discussed above, parties who arbitrate under the American Guaranty approach will rarely be devoid of federal jurisdiction in cases where they might have once been able to obtain it. [181] In those cases when a party is unable to bring its post-arbitration action in federal court, it will be because the amount in controversy requirement is not met on the face of the pleadings. It can hardly be called "punishment" to treat parties bringing actions under the FAA the same as all other parties seeking to obtain federal diversity jurisdiction under Title 28.

***218** Furthermore, the current circuit split regarding the amount in controversy is a deterrent to all parties wishing to utilize arbitration. Uncertainty as to how a case will proceed after an award is rendered discourages arbitration as a whole, and is clearly not in accordance with the policy rationale behind the FAA. Adopting the American Guaranty approach would provide a uniform rule across the circuits and encourage arbitration in a positive way.

V. CONCLUSION

28 U.S.C § 1332(a) provides a unified scheme for all federal courts to determine whether diversity jurisdiction exists. The FAA establishes authority for federal courts to enforce arbitration agreements and confirm, vacate or modify them in certain circumstances. However, it does not explain how federal jurisdiction is to be established. These two pieces of legislation should therefore complement each other and must not conflict. Applying different standards to determine the amount in controversy will deter the use of arbitration agreements by creating uncertainty for those parties who choose to arbitrate. The current state of flux is in direct opposition to the policy of efficiency and widespread use of arbitration agreements underlying the FAA. The proposed American Guaranty approach best interprets the plain language of the FAA and furthers congressional policy of limiting federal court jurisdiction while also avoiding inconsistencies that will deter arbitration. Therefore, federal courts should adopt the American Guaranty approach to determine whether diversity jurisdiction exists in post-arbitration-award proceedings.

Footnotes

1 See American Arbitration Association, http://www.adr.org (last visited Mar. 1, 2011).

2 Rodolphe J. A. DeSeife, Solving Disputes Through Commercial Arbitration 3-4 (1987).

3 Id. at 4 (emphasis added).

4 See 9 U.S.C. §§ 1-14 (2006); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

5 9 U.S.C. §§ 4, 9-11 (2006).

6 Southland v. Keating, 465 U.S. 1 (1984).

7 See Thomas Burch, Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief, 31 Fla. St. U. L. Rev. 1005, 1014 (2004).

8 See Edward Brunet et al., Arbitration Law in America A Critical Assessment 33 (2006) ("[W]hen cooperation or relationships break down or disputes over the arbitration process arise, the arbitration may founder unless relief is available through the courts under applicable arbitration law.").

9 Circuits decide any of three ways: the demand, reward, and remand approaches. See infra, Section III.

10 9 U.S.C. §§ 4, 9-11 (2006).

11 Id. §§ 9-11.

12 See 28 U.S.C. §1332(a) (2006 & Supp. 2010).

13 The award approach; followed by the Sixth and Eleventh Circuits, as well as the Western District of Texas, the Northern District of Texas, the Middle District of Alabama, and the Northern District of Illinois. See infra, Section III(A).

14 The remand approach; followed by the First, Sixth, Seventh, and Eleventh Circuits. See infra, Section III(B).

15 The demand approach; followed by the First, Ninth and D.C. Circuits. See infra, Section III(C).

16 See Southland v. Keating, 465 U.S. 1 (1984).

17 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

18 See infra, Section IV.

19 American Guaranty Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934).

20 9 U.S.C. §§ 1-14 (2006).

21 Imre S. Szalai, The Federal Arbitration Act and the Jurisdiction of the Federal Courts, 12 Harv. Negot. L. Rev. 319, 325 (2007) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).

22 Id. at 326 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32).

23 Id.

24 9 U.S.C. § 4 (2006) (emphasis added).

25 Id. See also 28 U.S.C. § 1332(a) (2006 & Supp. 2010).

26 9 U.S.C. §§ 9-11.

27 See Edward Brunet et al., Arbitration Law in America A Critical Assessment 35 (2006).

28 Id. at 47.

29 See 9 U.S.C. § 9.

30 Id.

31 Id.

32 Id. § 10.

33 Id.

34 Id.

35 Id. § 11.

36 Id. § 11.

37 See id. §§9-11; see also Edward Brunet et al., Arbitration Law in America A Critical Assessment 47 (2006).

38 See 28 U.S.C. §1332(a) (2006 & Supp. 2010).

39 Id. § 1332(a).

40 Id. § 1338; see also Rebecca Hild, Federal Diversity Jurisdiction in the Fifth Circuit: Meeting the Amount in Controversy, 61 Baylor L. Rev. 296, 296 (2009).

41 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938) (emphasis added).

42 In 1789 the amount needed to exceed $500. 1 Stat. 73, § 11 (1798).
1887 = $2000. 24 Stat. 552 (1887).
1911 = $3,000. 36 Stat. 1087 (1911).
1958 = $10,000. 72 Stat. 415 (1958).
1988 = $50,000. 102 Stat. 4642 (1988)
1996 = $75,000. 28 U.S.C. §1332(a) (2000).
See Hild, supra note 40, at 297.

43 Id. (citing Snyder v. Harris, 394 U.S. 332, 339-40 (1969)).

44 DBS Corp. v. Reid Constr. Co., 2010 WL 3806415, at *3 (E.D. Tenn. 2010) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (emphasis added)).

45 St. Paul Mercury Indem. Co., 303 U.S. at 288 (citing Peeler v. Lathrop, 48 F. 780 (5th Cir. 1891)).

46 St. Paul Mercury Indem. Co., 303 U.S. at 288-89 (citing Wetmore v. Rymer, 169 U.S. 115, 122 (1889) (quoting Barry v. Edmunds, 116 U.S. 550 (1886) ("It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them")).

47 St. Paul Mercury Indem. Co., at 288 (citing Smithers v. Smith 204 U.S. 232 (1891), Interstate B & L Ass'n v. Edgefield Hotel Co., 109 F. 692 (C.C.D. S.C. 1901)).

48 Cases involving removal and amount in controversy often must grapple with how to determine the amount in controversy. See St. Paul Mercury Indem.Co., 303 U.S. at 288 (1938) (citing Vance v. Vandercook Co., 170 U.S. 468 (1901)).

49 St. Paul Mercury Indem. Co., 303 U.S at 288.

50 Id. at 289.

51 See American Guaranty Co. v. Caldwell, 72 F.2d 209 (9th Cir. 1934); Karsner v. Lothian, 532 F.3d 876 (D.C. Cir. 2008); U-Save Auto Rental of Am., Inc. v. Furlo, 608 F. Supp. 2d 718 (S.D. Miss. 2009); Theiz Research, Inc. v. Brown & Bain, 400 F.3d 659 (9th Cir. 2005); Bull HN Info. Sys. v. Hutson, 229 F.3d 321 (1st Cir. 2000); Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320 (11th Cir. 2005); Sirotzky v. New York Stock Exchange, 347 F.3d 985 (7th Cir. 2003).

52 See Christopher L. Frost, Welcome to the Jungle: Rethinking the Amount in Controversy in a Petition to Vacate an Arbitration Award Under the Federal Arbitration Act, 32 Pepp. L. Rev. 227, 228 (2005); See also Tracey B. Frisch, Judicial Approaches to the Amount-in-Controversy Requirement for Diversity Jurisdiction in Arbitration Cases, 64 Disp. Resol. J. 20, 20 (2010).

53 See Frost, supra note 52, at 228; Frisch, supra note 52 at 20.

54 See Frost, supra note 52, at 228.

55 Frisch, supra note 52, at 22 (noting the exception of Karsner v. Lothian, 532 F.3d 876 (D.C. Cir. 2008).

56 Ford v. Hamilton Investments, Inc., 29 F.3d 255, 257 (6th Cir. 1994).

57 Id.

58 Id. at 260.

59 Id.

60 Baltin v. Alaron Trading Corp., 128 F.3d 1466 (11th Cir. 1997).

61 Id. (At the time, the required minimum for diversity jurisdiction was greater than $50,000.)

62 Id.

63 Id. at 1468.

64 Id.

65 Id.

66 Baltin, 128 F.3d at 1467 (The court also upheld the dismissal on alternate grounds).

67 Id. at 1472.

68 Karsner v. Lothian, 532 F.3d 876, 882-83 (D.C. Cir. 2008).

69 Id.

70 9 U.S.C. § 4 (2006).

71 Karsner, 532 F.3d at 882 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32 (1983); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995); Webb v. Investacorp, Inc., 89 F.3d 252, 257 (5th Cir. 1996)).

72 Karsner, 532 F.3d at 883 (citing Frost, supra note 52, at 261-62).

73 Additionally, an argument can be made that although appearing inconsistent at first glance, there is no inconsistency because the two types of actions are separate proceedings. See infra, Section IV(B)(1).

74 See Karsner, 532 F.3d at 883; Bull HN Info. Sys. Inc. v. Hutson, 229 F.3d 321 (1st Cir. 2000); Theis Research, Inc. v. Brown & Bain, 400 F.3d 659 (9th Cir. 2005).

75 Karsner, 532 F.3d at 882; See also American Guaranty Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934); Bull HN Info. Sys., Inc., 229 F.3d at 328-30 (applying demand approach to bifurcated arbitration proceeding).

76 Karsner, 532 F.3d at 883.

77 Id. at 881.

78 Id.

79 Id.

80 The third party was not attempting to affect the amount of the settlement. Instead they were attempting to overturn another part of the judgment. Since the district court rejected their petition to intervene, they appealed on the decision on jurisdictional grounds. Id. at 882.

81 Id. at 882-83.

82 Id. at 883 (citing Frost, supra note 52, at 261-62).

83 Frisch, supra note 52, at 22; see also Frost, supra note 52, at 254-55 (2005).

84 Theis Research, Inc. v. Brown & Bain, 400 F.3d 659 (9th Cir. 2005).

85 Bull HN Info. Sys. Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000).

86 Karsner, 532 F.3d at 883.

87 Bull HN Info. Sys. Inc., 229 F.3d 321 at 329.

88 The party initially petitioned the court to compel arbitration. The court granted arbitration, an award was rendered, and the party then petitioned the same court to vacate the award. Bull HN Info. Sys. Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000).

89 Id.

90 Id.

91 Id.

92 Karsner v. Lothian, 532 F.3d 876, 884 (D.C. Cir. 2008) (quoting Bull HN Info. Sys. Inc., 229 F.3d at 329 (internal quotations omitted)).

93 Theis Research, Inc. v. Brown & Bain, 400 F.3d 659, 662 (9th Cir. 2005).

94 Frisch, supra note 52, at 22 (citing Mitchell v. Ainbinder, 214 Fed. Appx. 565 (6th Cir. 2007); Peebles v. Merill Lynch, Pierce, Fenner & Smith, Inc., 431 F.3d 1320 (11th Cir. 2005); Sirotzsky v. New York Stock Exch., 347 F.3d 985 (7th Cir. 2003); Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321 (1st Cir. 2000).

95 Sirotzky v. New York Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003).

96 Ford v. Hamilton Investments Inc., 29 F.3d 255, 260 (6th Cir. 1994).

97 Id.

98 Mitchell v. Ainbinder, 214 Fed. Appx. 565, 566 (6th Cir. 2007).

99 Id.

100 Baltin v. Alaron Trading Corp., 128 F.3d 1466 (11th Cir. 1997).

101 Frost, supra note 52, at 246 (quoting Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 n. 16 (11th Cir. 1997)).

102 Peebles v. Merill Lynch, Pierce, Fenner & Smith, Inc., 431 F.3d 1320 (11th Cir. 2005).

103 Id.

104 Id. at 1324.

105 Id.

106 Id.

107 Id.

108 Peebles, 431 F.3d 1320 at 1325.

109 Id.

110 Id.

111 Id.

112 Id.

113 Parties who choose arbitration will be unable to gain federal court jurisdiction for actions seeking solely to vacate or confirm an award for less than the jurisdictional minimum. This is not a potential punishment, but rather the same result any party should expect when adjudicating a claim for under the requisite amount. See infra, Section IV(C).

114 American Guaranty Co. v. Caldwell, 72 F.2d 209 (9th Cir. 1934).

115 Id. at 210.

116 Id. at 211.

117 Id.

118 Id. at 210.

119 Id.

120 American Guaranty Co., 72 F.2d at 211.

121 Id.

122 Id. (emphasis added).

123 Frost, supra, note 52, at 240-41 (2005). The comment will suggest infra, that American Guaranty did not suggest a strict demand approach, and the proper standard should follow its plain language direction that the amount in controversy determines jurisdiction under Title 28.

124 Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180 (C.D. Cal. 2001).

125 Id. at 1184.

126 Id.

127 Id.

128 Id.

129 Luong v. Circuit City Stores, 356 F.3d 1188 (9th Cir. 2004).

130 Id.

131 Id. at 1195 (emphasis added).

132 Id. at 1197 (Kozinski, J., dissenting).

133 Id. (Kozinski, J., dissenting).

134 Id. at 1197 (Kozinski, J., dissenting) (quoting American Guaranty Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934)).

135 Luong v. Circuit City Stores, 368 F.3d 1109 (9th Cir. 2004).

136 Id.

137 Frisch, supra note 52, at 20.

138 Theis Research, Inc. v. Brown & Bain, 400 F.3d 659 (9th Cir. 2005).

139 Id. at 662.

140 Id.

141 American Guaranty Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934).

142 Id.

143 Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180, 1184 (C.D. Cal. 2001).

144 Theis Research, Inc., 400 F.3d at 662.

145 Goodman, 131 F. Supp. 2d at 1184 (The court decided to follow the award approach, disregarding the American Guaranty Co. court's clear guidance that it is not the amount of the award that determines jurisdiction (see American Guaranty Co. 72 F.2d at 211)).

146 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

147 Id. at 289 (citing Wetmore v. Rymer, 169 U.S. 115, 122 (1889).

148 American Guaranty Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934).

149 It is important to note that the American Guaranty court went on to explain that it also retained jurisdiction from the action vacating the previous award of $32,500. Id. at 211-12. Despite debate over whether this was the true holding, this comment's proposal is based on a belief that the court would have reached the same ruling even if the motion to vacate the zero dollar award was the first motion brought before the court in the suit.

150 See Mitchell v. Ainbinder, 214 Fed. Appx. 565 (6th Cir. 2007); Peebles v. Merill Lynch, Pierce, Fenner & Smith, Inc., 431 F.3d 1320, 1323 (11th Cir. 2005).

151 See supra notes 84, 100.

152 9 U.S.C. §§4, 9-11 (2005); Discover Bank v. Vaden, 396 F.3d 366, 369 (4th Cir. 2005).

153 9 U.S.C. §§ 9-11.

154 "United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action." 9 U.S.C. §4.

155 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

156 See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005); see also St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

157 St. Paul Mercury Indem. Co. 303 U.S. at 288 (citing Peeler v. Lathrop, 48 F. 780 (5th Cir. 1891)).

158 Karsner v. Lothian, 532 F.3d 876, 883 (D.C. Cir. 2008).

159 Frisch, supra note 52, at 22 (citing Choice Holtels Int'l, Inc. v. Shiv Hospitality, L.L.C., 491 F.3d 171 (4th Cir. 2007); U-Save Auto Rental of Am., Inc. v. Furlo, 608 F. Supp. 2d 718 (S.D. Miss. 2009)).

160 Karsner, 532 F.3d at 883 (emphasis added).

161 See Frost, supra note 52, at 261-62.

162 Frisch, supra note 52, at 22.

163 Id. (citing Choice Hotels Int'l, Inc. v. Shiv Hospitality, L.L.C., 491 F.3d 171, 176 (4th Cir. 2007); see also U-Save Auto Rental of Am., Inc. v. Furlo, 608 F. Supp. 2d 718, 723-24 (S.D. Miss. 2009)).

164 1. Choice Hotels Int'l, Inc. v. Shiv Hospitality, L.L.C., 491 F.3d 171, 176 (4th Cir. 2007).

165 Id.

166 Id.

167 Id.

168 Id.

169 Id. (citing Horton v. Liberty Mut. Ins. Co., 376 U.S. 348, 353 (1961).

170 Choice Hotels Int'l, Inc., 491 F.3d 171 at 176.

171 Id. (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938).

172 Id.

173 9 U.S.C. § 4 (2006).

174 9 U.S.C. §§ 9-11.

175 9 U.S.C. §§ 4, 9-11.

176 9 U.S.C. § 4.

177 9 U.S.C. §§ 9-11.

178 See Karsner v. Lothian, 532 F.3d 876, 883 (D.C. Cir. 2008); Frost, supra note 52, at 254-55.

179 Frost, supra note 52, at 254.

180 Id.

181 See supra, section IV(C).

13 LYJPIL 189

End of Document