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NOTES

ON THE FACE OF IT? ESTABLISHING JURISDICTION ON CLAIMS TO COMPEL ARBITRATION UNDER SECTION 4 OF THE FAA

Leda Moloff*

Section 4 of the Federal Arbitration Act enables a party with an arbitration agreement to bring suit to compel arbitration if the dispute between parties is brought in court. The U.S. Courts of Appeals are split over how to establish jurisdiction when faced with a claim to compel arbitration. The disagreement centers on whether the court may “look through” to the underlying claim between parties to establish jurisdiction or whether establishment of jurisdiction must comply with the well-pleaded complaint rule, a rule requiring the petitioner to state the reason for jurisdiction on the face of their complaint to compel arbitration. This Note argues that those circuits requiring compliance with the well-pleaded complaint rule take the best approach.

INTRODUCTION

Today’s American contracts frequently contain mandatory arbitration agreements.1 These contractual clauses require parties to resolve disputes between them through arbitration, an alternative dispute resolution

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1. See Christopher R. Drahozal, In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act, 78 NOTRE DAME L. REV. 101, 102–03 (2002) (noting “[t]he widespread use of arbitration clauses in consumer and employment contracts, called the ‘consumerization’ of arbitration by [some scholars]”); Jean R. Sternlight, The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial, 38 U.S.F. L. REV. 17, 18 (2003) (“Companies providing a broad range of products and services are now using small print contracts of adhesion to require their customers, employees, business partners, and others to resolve any future disputes through binding arbitration, rather than through litigation. Buy a house or car, open a bank account, obtain insurance, order a computer, schedule termite extermination services, or secure a credit card, and the odds are high that you will be ‘agreeing’ to resolve all related future disputes through arbitration. . . . One study showed that the ‘average Joe’ in Los Angeles is now required to arbitrate disputes that arise with respect to one-third of the major transactions in his life.”); Imre S. Szalai, The Federal Arbitration Act and the Jurisdiction of the Federal Courts, 12 HARV. NEGOT. L. REV. 319, 321 (2007) (“Arbitration agreements are now ubiquitous in American society . . . .”).
mechanism. Arbitration garners praise for its efficiency, speed, and ability to provide parties with finality to their dispute.\(^2\) The Federal Arbitration Act (FAA), enacted by Congress in 1925, governs arbitration agreements.\(^3\) Congress deemed the FAA necessary in order “to place . . . arbitration agreement[s] ‘upon the same footing as other contracts’ [by ending] the judiciary’s longstanding refusal to enforce agreements to arbitrate.”\(^4\) The FAA also grew out of a congressional movement to relieve an overburdened judiciary through dispute resolution alternatives.\(^5\)

Following the FAA’s enactment, legal disputes erupted in the courts as parties attempted to clarify the new legislation.\(^6\) One such dispute arose regarding the establishment of federal jurisdiction under section 4 of the FAA. The resulting division in the courts’ interpretation of this section forms the basis of this Note.

Section 4 provides for a court to compel arbitration when a party fails, neglects, or refuses to comply with an existing arbitration agreement in “any United States district court which, save for such agreement, would

\(^2\) See infra notes 16, 17 and accompanying text. But cf. Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies’ Contracts 1 (N.Y.U. Law & Econ. Working Papers, Paper No. 70, 2006), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1074 &context=nyu/lawwp (analyzing results from a study of 2858 contracts, concluding that “sophisticated actors” are likely to preserve litigation as the dispute resolution mechanism, and noting that “[i]t is expected that the widespread belief about arbitration’s efficiency and with imposition of mandatory arbitration clauses in some standardized consumer transactions such as credit card and cellular phone contracts”).


\(^5\) Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 VA. L. REV. 265, 265 (1926) (“This statute is not an isolated change of an outworn rule of law. It is a single step in a movement of growing momentum. The movement finds its origin in the unfortunate congestion of the courts and in the delay, expense and technicality of litigation.”).

\(^6\) See George K. Foster, Courts Running into the Arbitration Act’s Limitations: The Supreme Court Could Help, but the Real Fix Is Up to Congress, NAT’L L.J., Nov. 26, 2007, at col. 1 (“As arbitration continues to grow in popularity as a means of resolving disputes, U.S. courts increasingly are being called upon to address issues relating to arbitration . . . .”); Szalai, supra note 1, at 322–23 (noting various legal disputes arising because of differing interpretations of the FAA).
have jurisdiction under Title 28."\(^7\) Although the FAA is a federal act, the U.S. Supreme Court has held that the FAA alone does not compel federal question jurisdiction. Rather, there must be some other independent jurisdictional basis for a federal court to hear the claim.\(^8\) Federal courts have interpreted this "independent basis" requirement in two ways. Some courts "look through" the claim to compel arbitration to the underlying dispute between parties when determining if subject matter jurisdiction exists. Other courts require the claim to compel arbitration to contain on its face an independent basis for federal jurisdiction, such as diversity of citizenship.

This issue arises in the following way. Two parties, X and Y, enter into an agreement to arbitrate disputes arising between them. An issue involving federal law—issue Z—arises between the two parties. Party X refuses to bring the issue to arbitration and instead brings the claim to court. When X brings issue Z to court, Y then challenges the suit with a claim to compel arbitration based on their prior agreement. Since the FAA does not provide an independent basis to establish federal jurisdiction, the question is whether issue Z can provide the necessary jurisdictional requirement for Y's petition to compel arbitration, or if section 4 requires an independent basis for jurisdiction, such as diversity of citizenship. There is a circuit split on this issue. Some circuits allow issue Z to establish jurisdiction over the claim to compel arbitration, while others require an independent jurisdictional basis. This means that in some circuits it is possible to choose to bring a claim to compel arbitration in either state or federal court, while in others the claim may only be brought in state court.

This Note examines the dueling approaches of the courts in their interpretation of section 4 of the FAA. Resolution of this issue is important because a court that looks to the underlying dispute between parties allows for an expanded definition of federal subject matter jurisdiction and also affects where a plaintiff can bring a petition to compel arbitration.\(^9\) Part I of this Note discusses the history of arbitration generally, the bases for federal jurisdiction, the history and purpose behind the well-pleaded complaint rule, and the historical context of the FAA's enactment. Part II analyzes the conflicting views among the circuits regarding this legal

8. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.").
9. See Cmty. State Bank v. Strong, 485 F.3d 597, 616 (11th Cir. 2007) (Marcus, J., concurring) (noting that resolution of this issue is important because looking through to the underlying claim "considerably expands federal court jurisdiction"); Szalai, supra note 1, at 322-23 ("This jurisdictional issue is of great interest because of its direct impact on the enforceability of arbitration agreements.").
debate. Part II.A discusses those circuits that interpret the plain language of the statute to allow the court to "look through" to the underlying claim to establish jurisdiction. This approach allows the party attempting to compel arbitration to determine jurisdiction by way of the underlying issue between parties. Part II.B discusses the circuits that interpret section 4 through a narrow reading of the well-pleaded complaint rule and require the face of the arbitration petition to state the reason for federal jurisdiction. Part III advocates for all courts to adopt the second interpretation of section 4 because it reinforces two longstanding procedural principles: the well-pleaded complaint rule, and the requirement that federal courts be of limited jurisdiction. Furthermore, Part III argues that congressional revision of section 4 of the FAA would provide the clearest resolution of this issue.

I. ARBITRATION'S USE AND HISTORY, FEDERAL COURTS' JURISDICTION, AND THE HISTORY OF THE FAA

This part examines the background and history behind this legal issue. Part I.A introduces the history and use of arbitration as a dispute resolution mechanism. Part I.B describes the procedure used by the judiciary to establish federal jurisdiction and summarizes the purpose of the well-pleaded complaint rule. Part I.C summarizes the history of the FAA and specifically analyzes the purpose of section 4 of the Act. This final subsection also addresses legal commentary that recommends congressional rewording of section 4.

A. Arbitration as a Dispute Resolution Mechanism

This section looks generally to arbitration as a mode of alternative dispute resolution. Part I.A.1 provides an overview of arbitration by describing its use in practice and its various advantages and disadvantages. Part I.A.2 traces the history of arbitration, particularly the historical judicial disinclination to uphold arbitration agreements. Part I.A.3 looks at the slow acceptance by the judiciary of arbitration as a valid dispute resolution mechanism in American courts, an acceptance which has evolved into today's highly deferential approach to arbitration agreements.

1. Overview

Arbitration functions as a way for parties to resolve disputes through confidential and informal proceedings. The arbitrator, an impartial third

10. See Alan Scott Rau et al., Arbitration 28 (Robert C. Clark et al. eds., 2d ed. 2002) (noting that the American Arbitration Association (AAA), created in 1926, provides resources and rules for parties entering into arbitration, and that over 194,000 arbitration cases were filed with the AAA in 2000). See generally Thomas E. Carbonneau, Arbitration in a Nut Shell 10 (2007) (outlining the general format of arbitration proceedings).
person, presides over the arbitration.\(^\text{11}\) The arbitrator usually follows a protocol including the following elements: "initiation, preparation, prehearing conferences, hearing, decision-making, and award."\(^\text{12}\) The parties usually confer authority upon the arbitrator to issue a decision binding all the parties following the hearing.\(^\text{13}\) If the parties want the arbitrator to reach a binding decision, they must all agree and are then contractually bound.\(^\text{14}\) A court will treat an arbitration agreement as a separate valid contract, even if it deems the general contract between the parties void or invalid.\(^\text{15}\) In other words, the arbitration clause still governs disputes between parties, notwithstanding the enforceability of the underlying contract.

Parties frequently choose arbitration to govern disputes because it provides an alternative to litigation's lengthy delays, expenses, and "[t]he failure . . . to reach a decision regarded as just when measured by the standards of the business world."\(^\text{16}\) Other advantages of arbitration over

\(^\text{11}\) See Martin Domke, Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration 1 (Gabriel Wilner ed., 2003); see also Stephen B. Goldberg et al., Dispute Resolution 210 (Erwin Chemerinsky et al. eds., 4th ed. 2003) (noting that arbitration is different from other alternative dispute resolution mechanisms because the arbitrator, as a neutral party, retains control over the proceedings).

\(^\text{12}\) John W. Cooley, The Arbitrator's Handbook § 1.1, at 2 (Anthony J. Bocchino et al. ed., 2d ed. 2005); see also Edward Brunet et al., Arbitration Law in America: A Critical Assessment § 2.2, at 31 (2006) (enumerating arbitration's steps as: (1) an agreement between the parties to use arbitration, (2) a dispute between these parties, (3) submission of the dispute to arbitrators, and (4) a confidential and final arbitral award); Goldberg et al., supra note 11, at 209 (noting that "[b]ecause arbitration is a private dispute resolution procedure, designed by the parties to serve their particular needs, it cannot be defined or described in a manner that will encompass all arbitration systems"); Jill I. Gross, Securities Mediation: Dispute Resolution for the Individual Investor, 21 Ohio St. J. On Disp. Resol. 329, 358 (2006). "'(1) [T]he parties choose to have a dispute or disputes decided by a third party, called an arbitrator; (2) the parties choose the arbitrator or a method for his or her selection; (3) the arbitrator hears the dispute; (4) the arbitrator makes a binding award; (5) the arbitrator's decision is, subject to very limited grounds of review, final and enforceable by State law in the same manner as a judgment . . . . Obviously, the fewer of the five characteristics listed are present, the less likely the process is to be called arbitration.'" Id. (quoting Ian MacNeil, American Arbitration Law: Reformation, Nationalization, Internationalization 7-8 (1992)).

\(^\text{13}\) See Carbonneau, supra note 10, at 10; Cooley, supra note 12, § 1.1.1, at 5 ("Awards are normally short, definite, and final as to all matters under submission. . . . Depending on the parties' pre-arbitration agreement, the award will be binding or non-binding."); American Arbitration Association, Arbitration & Mediation, http://www.adr.org/sp.asp?id=28749 (last visited Aug. 16, 2008) ("Awards are made in writing and are generally final and binding on the parties in the case.").

\(^\text{14}\) Carbonneau, supra note 10, at 11 ("By entering into an arbitration contract, the parties voluntarily abandon their right to judicial relief and, in effect, create a private system of adjudication that presumably is better adapted to their transactional needs.").

\(^\text{15}\) See Steven C. Bennett, Arbitration: Essential Concepts 60 (2002) ("As a result [of this separability], it is entirely possible to have a binding arbitration agreement, even when one of the central issues in the case is whether the substantive contract at issue is void.").

\(^\text{16}\) Cohen & Dayton, supra note 5, at 269; see also Bennett, supra note 15, at 6-8; Brunet et al., supra note 12, §§ 1.1-1.9, at 3-29; American Arbitration Association, supra
litigation include the confidentiality of the proceedings, the opportunity to select the arbitrator, greater flexibility, and greater affordability.¹⁷

On the other hand, many parties do not enter into arbitration agreements because they prefer dispute resolution through litigation. Some parties prefer litigation proceedings because of concerns regarding arbitration’s limitations on discovery proceedings, the need for preliminary relief, and an arbitration award’s binding—i.e., nonappealable—nature.¹⁸

2. Judicial Disfavor

Parties have used arbitration as a means of settling disputes for centuries.¹⁹ In England, “[i]t furnished almost exclusively the tribunals for the settlement of business disputes in the medieval period, and in [the eighteenth century] was practically the sole remedy open to English merchants.”²⁰ Arbitration came to the United States by way of England’s merchant trade.²¹

Historically, English courts refused to uphold arbitration agreements to avoid being ousted of jurisdiction.²² As merchants adopted the use of arbitration clauses in the United States, the American judiciary, in response, adopted English common law hostility toward arbitration agreements.²³ Prior to the twentieth century, American courts, like their English counterparts, were unreceptive to arbitration petitions that took parties outside of the courtroom to resolve disputes.²⁴ When parties brought petitions to compel arbitration before the court, judges simply refused to

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¹⁷. See CARBONNEAU, supra note 10, at 18–19.

¹⁸. BENNETT, supra note 15, at 8; see also COOLEY, supra note 12, §1.1.2, at 6 (noting that arbitration’s limitations include a lack of accountability of arbitrators and burdens from enacted legislation, among others).

¹⁹. See BENNETT, supra note 15, at 9 (“Arbitration is mentioned in Greek mythology and the Bible.”); Cohen & Dayton, supra note 5, at 266 (“The use of arbitration dates back to the earliest days of which we have historical knowledge.”).

²⁰. Cohen & Dayton, supra note 5, at 266; see also BENNETT, supra note 15, at 9 (noting arbitration’s establishment by maritime merchants); GOLDBERG ET AL., supra note 11, at 209 (“[Arbitration] was used as early as the thirteenth century by English merchants who preferred to have their disputes resolved according to their own customs (the law merchant) rather than by public law.”).

²¹. COOLEY, supra note 12, at 1.


²³. Szalai, supra note 1, at 325.

enforce them. This left plaintiffs with no alternative but to bring a lawsuit, which “the court would hear . . . without regard to the agreement to arbitrate.”

Despite arbitration being a private remedy, courts frequently exercise authority in arbitration disputes. Courts, “at a minimum, [have] the judicial power to enforce the agreement to arbitrate and to confirm and enforce an arbitral award.”

In sum, courts’ willingness to hear claims to compel arbitration evolved slowly following the FAA’s enactment.

3. Judicial Acceptance

After passage of the FAA in 1925, Congress appealed to the courts to shift from their longstanding antipathy toward arbitration agreements. This shift did not come immediately, however, reflecting the judiciary’s ingrained skepticism toward these agreements. It was not until the 1970s, a time when the Supreme Court upheld a number of international arbitration agreements, that “cracks in the Supreme Court’s antipathy toward arbitration agreements began to appear.” The Court noticed that arbitration worked particularly well with international disputes because it negated local prejudice and deincentivized hastily brought litigation. Following the Court’s initial support, a greater degree of deference for arbitration agreements followed: “Since the mid-1980s the Supreme Court has issued numerous decisions stating that arbitration should be looked upon with favor and that, with few exceptions, arbitration clauses should be enforced.”

Today, courts generally enforce arbitration agreements

25. Rau et al., supra note 10, at 58. Rau also notes that despite the fact that courts refused claims to compel arbitration, they generally enforced awards granted through arbitration. Id.

26. See Brunet et al., supra note 12, § 2.3(1), at 33.

27. Cmty. St. Bank v. Strong, 485 F.3d 597, 631 (11th Cir. 2007) (“[T]he legislative history of the FAA makes unmistakably clear that its purpose was ‘to ensure judicial enforcement of privately made agreements to arbitrate’ by ‘overru[ling] the judiciary’s longstanding refusal to enforce agreements to arbitrate.’” (second alteration in original) (quoting Dean Witter Reynolds, 470 U.S. at 219-20)). See generally Bennett, supra note 15, at 29, 32 (explaining that, thirty years after Congress’s adoption of the FAA, states adopted the Uniform Arbitration Act in an attempt to eradicate state antipathy toward arbitration, and that, in 2000, the National Conference of Commissioners on Uniform State Laws drafted the Revised Uniform Arbitration Act, incorporating developments in arbitration law).


29. Id. (mentioning Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), as one of several cases in the 1970s demonstrating a shift in attitude toward the FAA).

30. Id.

31. Stemlight, supra note 1, at 19; see also Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 Fordham L. Rev. 761, 776–77 (2002) (“The United States Supreme Court, followed loyally, and for the most part enthusiastically, by the lower federal courts, has made the strong preference for enforcement of arbitration clauses a matter of federal preemption, so broadly and firmly expressed as to make it nearly
between parties without their former prejudice, and frequently incorporate arbitration—and other forms of alternative dispute resolution—into regular court proceedings.\(^{32}\)

B. Establishing Federal Jurisdiction

This section analyzes the ways that courts recognize federal jurisdiction. The means of recognizing federal jurisdiction is the underpinning for the circuit split discussed in this Note. Part I.B.1 details how to establish federal jurisdiction generally, and under 28 U.S.C. § 1331, specifically. Part I.B.2 describes the well-pleaded complaint rule and how Supreme Court precedent establishes the rule’s purpose.

1. Limiting Federal Jurisdiction

Federal courts, unlike state courts, are courts of limited jurisdiction.\(^{33}\) Accordingly, a party may only establish subject matter jurisdiction in federal court in one of three ways: (1) pursuant to a unique statutory grant, (2) through federal question jurisdiction brought under 28 U.S.C. § 1331, or (3) by way of diversity jurisdiction under 28 U.S.C. § 1332(a).\(^{34}\)

Federal question jurisdiction only applies to claims that arise under Article III of the U.S. Constitution and through congressional statutory grant.\(^{35}\) Article III of the Constitution vests in the Supreme Court the impossible for even those state judges or state legislatures who might be so moved to exercise any restraining influence at all.”).

32. See Bennett, supra note 15, at 11–12; Teressa L. Elliott, Responsibility of the Courts in Motions to Compel Arbitration, 32 Ohio N.U. L. Rev. 89, 97 (2006) (noting three Supreme Court cases whose opinions indicate an “attitude of the Court towards arbitration in general [that] is strongly supportive of arbitration”).

33. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Nolan v. Boeing Co., 919 F.2d 1058, 1064 (5th Cir. 1990) (“The federal courts, of course, do not automatically possess the authority to hear and determine all types of actions conceivably covered by the Constitution. The provisions of Article III specify only the outer limits of federal subject matter jurisdiction.”).

34. See Ali Razzaghi, Dominguez-Cota v. Cooper Tire & Rubber Co.: A Convenient Forum for Addressing Subject Matter Jurisdiction, 74 U. Cin. L. Rev. 689, 692–93 (2005) (“An action may be litigated in federal court under § 1331 if the claim arises ‘under the Constitution, laws, or treaties of the United States.’ With this requirement fulfilled, the court would lack subject matter jurisdiction only if the claim is insubstantial and frivolous or if the claim is immaterial and solely made for the purpose of obtaining jurisdiction.” (quoting 28 U.S.C. § 1331 (2000))); Qian A. Gao, Note, “Salvage Operations Are Ordinarily Preferable to the Wrecking Ball”: Barring Challenges to Subject Matter Jurisdiction, 105 Colum. L. Rev. 2369, 2372–73 (2005).

35. See Kokkonen, 511 U.S. at 377 (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . .”); Delaware v. Van Arsdall, 475 U.S. 673, 692 (1986) (“In origin and design, federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art[icle] III and by congressional enactments pursuant thereto.”); Gao, supra note 34, at 2372 (“Federal courts . . . may only adjudicate cases that are within the judicial power as defined in the Constitution or awarded by congressional grant. Without such jurisdiction, the case must be dismissed.” (citing U.S. Const. art. III, §§ 1, 2, cl. 1; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978))).
judicial power to try "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." However, it was not until Congress passed the Act of 1875, now codified at 28 U.S.C. § 1331, that the lower federal courts were also granted "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Congress has the right to "establish priorities for the allocation of judicial resources in defining the jurisdiction of federal courts" when enacting legislation, leaving other issues to the state courts. Further, jurisdiction may "not . . . be expanded by judicial decree."

Right to relief in federal question jurisdiction has been deemed to exist only when "plaintiffs' right to relief depend[s] necessarily on a substantial question of federal law." Most cases arising under federal question jurisdiction are brought because federal law creates the cause of action, but the courts also may establish jurisdiction if the "right to relief depends upon the construction or application of the Constitution or laws of the United States." Federal courts assume cases are outside their jurisdiction, placing the burden on the party asserting jurisdiction to establish it.

2. The Well-Pleaded Complaint Rule

As stated above, Congress first vested federal question jurisdiction in the lower federal courts in 1875, and that statutory grant was later codified at 28 U.S.C. § 1331. Under section 1331, federal jurisdiction arises when

37. 28 U.S.C. § 1331 (2000). But see RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 886 (4th ed. 2005) (explaining that, just because there is congressional authorization, the claim will not always fall under § 1331, as exemplified by Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900), wherein, despite federal legislation regarding mining claims, suits were instead determined by looking to the "local customs or rules").
41. Id. at 809 n.5 (quoting Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 199 (1921)).
42. Kokkonen, 511 U.S. at 377; see also Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5th Cir. 2001) ("We must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum.").
43. See supra note 37 and accompanying text. See generally Donald L. Doemberg, There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 HASTINGS L.J. 597, 601 & n.16 (1987) (discussing the history of federal question jurisdiction and noting that Congress first allowed it through the Midnight Judges Act of 1801, which was later repealed, not to reemerge until the 1875 Act); Gao, supra note 34, at 2374 ("Congress might have placed federal question litigation in the federal courts as opposed to the state courts because of diverse considerations including faithfulness to Supreme Court rulings, responsiveness to Supreme Court supervision, less susceptibility to pressure from local interest groups, greater uniformity, and a higher likelihood of expertise in federal law.").
there is an issue of federal law. In other words, federal law must comprise some part of the claim in order to establish subject matter jurisdiction. Establishing jurisdiction also requires meeting the requirements of the well-pleaded complaint rule. This rule works in tandem with section 1331 by requiring that the face of the complaint indicate how the claim arises under federal jurisdiction.

a. History

The well-pleaded complaint rule evolved over more than a century of common law. In 1894 the Supreme Court dismissed Tennessee v. Union & Planters' Bank for lack of subject matter jurisdiction. Justice Horace Gray dismissed the case after holding that a plaintiff may not establish jurisdiction "arising under" federal law with an argument based on what the opposing party may include in its claim.

Later, in 1908, the Supreme Court decided the pivotal case of Louisville & Nashville Railroad Co. v. Mottley, further clarifying the Court's position on the rule of a well-pleaded complaint:

It is the settled interpretation . . . that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States.

44. 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); see MARCUS ET AL., supra note 37, at 871.

45. Christopher A. Cotropia, Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction, 33 Hofstra L. Rev. 1, 4 (2004) ("The Supreme Court interpreted ["arising under"], as it appears in Article III, to extend the constitutional grant of federal judiciary power to every case where federal law potentially forms an ingredient of a claim.").

46. See Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1247-48 (2004) ("Section 1331, the federal question grant, reads as broadly as the constitutional grant, and if it had been interpreted this broadly, any case with a potential federal question could have been brought in federal court. Supreme Court decisions make broad inroads into this reading of section 1331, the most important exception being the well-pleaded complaint rule, which eliminates the jurisdiction of the lower federal courts over many cases that nonetheless contain federal questions.").

47. Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

48. See id. at 464 (noting that "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws").

With this holding, the Court firmly established the requirement that a plaintiff must comply with the well-pleaded complaint rule to survive a motion to dismiss.

b. Recent Reaffirmation

More recently, the Supreme Court reaffirmed the role of the well-pleaded complaint rule when establishing federal jurisdiction: "We have long held that '[t]he presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.'"\(^{50}\)

In short, the well-pleaded complaint rule requires a claim brought in federal court to demonstrate federal jurisdiction on its face, barring a party from conferring jurisdiction by merely anticipating a federal element within the opposing party's defense or counterclaim.\(^{51}\)

C. History of the FAA

Today, arbitration clauses are governed by the FAA. This section summarizes Congress's intent underlying the FAA and specifically analyzes section 4 of the FAA. Part I.C.1 analyzes Congress's original intent in enacting the FAA. Part I.C.2 introduces section 4 of the FAA. Part I.C.3 considers the opinions of two legal scholars on rewriting section 4 to clarify its meaning.

1. Reasons for Enactment: The Original Intent of Congress

Congress enacted the FAA in an attempt to eliminate judicial antagonism toward arbitration.\(^{52}\) More specifically, the FAA was an effort to rectify the historical common law hostility toward arbitration agreements and the lack of state statutes requiring judicial enforcement of arbitration agreements.\(^{53}\) The FAA intended to put arbitration agreements on the same level as other

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51. See Taylor v. Anderson, 234 U.S. 74, 75–76 (1914) (stating that the complaint must be "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose"); Doernberg, supra note 43, at 599 (noting that "federal question jurisdiction does not exist unless the federal question appears in the 'right' place, that is, in the plaintiff's well-pleaded complaint").
52. See BENNETT, supra note 15, at 17 ("It is not an overstatement to say that the Federal Arbitration Act (FAA) is the single most important element of modern American arbitration law and policy."); supra note 4 and accompanying text.
53. See Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) (noting that, when enacting the FAA, Congress faced two main problems: "the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements"); Elliott, supra note 32, at 91 ("The United States Supreme Court stated that with the passage of the FAA, 'Congress declared a national policy favoring arbitration.'" (quoting Southland Corp., 465 U.S. at 10)).
contracts by providing a means of enforcement.\textsuperscript{54} The Act also functioned to take pressure off of an overburdened court system through the enforcement of these agreements to arbitrate.\textsuperscript{55}

The House report accompanying the Act further clarified the reason for the Act's enactment.\textsuperscript{56} First, the report indicated that the FAA resulted from American courts mirroring English courts' refusal to enforce arbitration agreements.\textsuperscript{57} The report further stated that the judiciary believed only an act of Congress could enable the judiciary to overcome what appeared to be unnecessary antagonism toward arbitration petitions.\textsuperscript{58} The report concluded that the Act "simply [declares] that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."\textsuperscript{59}

In accord with congressional intent, the Act enabled, and in fact required, courts to enforce arbitration agreements, a trend that they grudgingly accepted after its enactment.\textsuperscript{60} However, once courts began hearing arbitration issues, numerous conflicting interpretations of the FAA emerged. Some examples of these conflicts include: "whether the FAA is applicable in state court and preempts state laws; whether the FAA should mandate enforcement of arbitration clauses in employment or consumer contracts; the arbitrability of statutory claims under the FAA; and whether class-wide arbitration is permitted under the FAA."\textsuperscript{61} An additional conflict, which forms the basis of this Note, arose regarding how to establish federal jurisdiction for a petition to compel arbitration under section 4 of the FAA.

\textsuperscript{54} See Bennett, supra note 15, at 17.
\textsuperscript{55} See Brunet et al., supra note 12, § 2.4(2)(A), at 37 ("In short, [after enactment of the FAA] courts now had power to enforce valid arbitration agreements to arbitrate existing and future disputes by specific performance and to stay any pending litigation until the arbitration was concluded."); supra note 5.
\textsuperscript{56} See H.R. Rep. No. 96, at 1–2 (1924).
\textsuperscript{57} See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 & n.6 ("Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy ... was adopted ... by the American courts.").
\textsuperscript{58} See id. ("The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised [sic] the rule and recognized its illogical nature and the injustice which results from it.").
\textsuperscript{59} Id. Contemporaneous scholarship pointed to the Act providing "a new procedural remedy .... No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary. When the agreement to arbitrate is made, it is not left outside the law .... It is merely a new method for enforcing a contract ...." Cohen & Dayton, supra note 5, at 279.
\textsuperscript{61} Szalai, supra note 1, at 321–22.
2. Section Four

Section 4 of the FAA addresses the enforcement of arbitration agreements. The text of section 4 states, in pertinent part:

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

Courts were initially unclear whether FAA claims could be brought in state court since the FAA is a federal act. The Supreme Court in *Southland Corp. v. Keating* clarified this uncertainty. In *Southland*, the Court concluded that FAA claims can be brought in state court and therefore do not contain any additional limitations under state law. The Court also noted that, since state courts adjudicate an "overwhelming proportion of all civil litigation in this country," Congress must not have intended to "limit the Arbitration Act to disputes subject only to federal court jurisdiction." Rather, if the FAA intended to put arbitration agreements on the same footing as other contracts, it "would frustrate Congressional intent" if such claims could only be tried if the dispute was subject to federal jurisdiction.

The Court further clarified the jurisdictional parameters of the FAA in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* There, the Court concluded that the FAA requires an independent basis for jurisdiction because the Act does not confer federal question jurisdiction on its own. This holding led to the disputed issue addressed in this Note, which arises from the language of the statute. Specifically, the conflicting terminology at issue is that a party trying to compel arbitration "may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28." There are two competing

62. See Brunet et al., supra note 12, § 2.3(2)(A), at 34 (noting that agreements to arbitrate are enforced by the court after determining: (1) if the parties' agreement actually contained an agreement to arbitrate, (2) if the arbitration agreement was properly formulated, (3) if the dispute between parties came within the reach of the original agreement, (4) that no fraud existed, and (5) that the dispute could actually find resolution through arbitration).
64. See generally Drahozal, supra note 1.
66. Id. at 15–16.
67. Id. at 15.
68. Id.
70. See id. at 26 n.32; Brunet et al., supra note 12, at 37 ("The courts have concluded that the FAA does not create federal jurisdiction. Rather, federal jurisdiction depends upon diversity of citizenship or a claim arising under some other federal statute.").
interpretations of this clause. Federal district courts recognize jurisdiction under the FAA either broadly, by “looking through” to the underlying dispute, or narrowly, by adhering strictly to the well-pleaded complaint rule and requiring the face of the complaint to state the reason for jurisdiction.\textsuperscript{72}

3. Proposed Rewriting of Section 4

Some scholars propose resolving the differing interpretations of section 4 through congressional revision of its contentious language.\textsuperscript{73} First, Stephen J. Ware recommends congressional revision of section 4 that narrows the applicable jurisdiction in a claim to compel arbitration.\textsuperscript{74} Specifically, Professor Ware advocates for Congress to rewrite sections 1 and 2 of the FAA so that they apply in state or federal court, while the remaining sections (including section 4) only apply in federal court.\textsuperscript{75} Ware notes that having all but sections 1 and 2 apply exclusively in federal court “would both strengthen the contractual approach to arbitration law and clarify the scope of the FAA.”\textsuperscript{76}

Edward Brunet believes \textit{Southland} missed the point. Professor Brunet notes that “[t]here would unquestionably be federal subject jurisdiction under this statute if courts used the typical inquiry: subject matter jurisdiction exists because the basis of federal jurisdiction is predicated upon a federal statutory claim.”\textsuperscript{77} Brunet’s commentary revolves around

\begin{footnotes}
\textsuperscript{72} Compare Discover Bank v. Vaden, 396 F.3d 366, 367 (4th Cir. 2005) (holding that the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction), with Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 269 (2d Cir. 1996) (holding that “the nature of the underlying dispute . . . is not part of a ‘well-pleaded complaint’” so it does not support federal subject matter jurisdiction). Congress is currently contemplating a revision of the FAA, but the amendments proposed by Congress address concern over mandatory arbitration agreements. See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 2 (2007). The proposed amendments, however, do not address the jurisdictional issues that courts disagree upon, instead focusing only on concerns over fairness to all parties throughout the arbitration process. See id. § 4.

\textsuperscript{73} See \textit{BRUNET ET AL.}, supra note 12, at 1 (“The time is right for a complete reformulation of federal arbitration law . . . . The old FAA, passed in the Roaring Twenties, is completely outmoded.”); Foster, supra note 6 (advocating for “congressional overhaul of the FAA . . . so that there at last would be a modern, comprehensive federal arbitration law in the United States,” because the multitude of issues cannot all be solved by the Supreme Court).

\textsuperscript{74} \textit{BRUNET ET AL.}, supra note 12, at 346. Stephen J. Ware’s revision reads as follows: 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.

\textit{id.}

\textsuperscript{75} See \textit{id.} at 89–90, 125 (“A [r]evised FAA should continue to create no federal jurisdiction because experience has not . . . shown a significant or widespread problem with state court application of the FAA.”).

\textsuperscript{76} \textit{id.} at 126.

\textsuperscript{77} \textit{id.} at 320.
\end{footnotes}
whether a revised FAA should eliminate the independent-basis requirement for subject matter jurisdiction.\footnote{Id. at 321.} Brunet questions whether this type of revision benefits those claims to compel arbitration by both curing the anomaly of the legislation and “normaliz[ing] the construction of the FAA to that of a typical federal substantive statute.”\footnote{Id.} Brunet notes that to find subject matter jurisdiction inherent in the FAA would increase defendant forum shopping because of the increased availability of removal jurisdiction. On this point, Brunet notes that “[t]his right, however, may not necessarily be viewed as a negative development, because it is a countervailing way to neutralize the original choice of the state forum by the plaintiff.”\footnote{Id. at 322.}

In the end, Brunet concludes that despite the potential benefits, Congress need not revise the FAA for two reasons: (1) allowing federal subject matter jurisdiction to arise under federal law requires a compelling justification which may not be present in the context of the FAA, and (2) state court judges should continue to decide claims to compel arbitration because these claims generally include state contract interpretation.\footnote{Id. at 323.} Therefore, Brunet states that “while an anomaly, the lack of federal court subject matter jurisdiction for actions brought under the FAA is not enough of a problem to justify [an] amendment.”\footnote{Id. at 323.}

II. THE EXISTING CIRCUIT SPLIT: WHETHER THE COURTS SHOULD INTERPRET SECTION 4 OF THE FAA TO FIND FEDERAL JURISDICTION BASED ON THE UNDERLYING DISPUTE

This part discusses the legal debate over whether the language of section 4 of the FAA allows a court to “look through” the claim to compel arbitration to the underlying dispute to determine if subject matter jurisdiction exists, or if the petition to compel arbitration itself provides the basis for subject matter jurisdiction. On one side, the U.S. Courts of Appeals for the Fourth and Eleventh Circuits look to the “plain language” of section 4 of the FAA and, in doing so, “look through” the complaint to compel arbitration to establish jurisdiction. On the other side, some courts—most notably the U.S. Courts of Appeals for the Second and Seventh Circuits—require that, to follow the well-pled complaint rule, the reason for subject matter jurisdiction must be stated on the face of the complaint to compel arbitration. Part II.A examines the relevant Fourth and Eleventh Circuit decisions as well as legal scholarship in accord with those circuits’ approach. Part II.B analyzes two opinions on the other side of the debate that do not examine the underlying dispute to establish federal jurisdiction; this part also examines a concurring opinion from the Eleventh Circuit in accord with the latter approach.

78. Id. at 321.  
79. Id.  
80. Id.  
81. Id. at 322.  
82. Id. at 323.
A. The Fourth and Eleventh Circuits' Approach: "Looking Through" to the Underlying Dispute

This section will discuss opinions that establish federal subject matter jurisdiction by "looking through" to the underlying dispute between the parties. Both the Fourth and Eleventh Circuits have ruled that the well-pleaded complaint rule does not limit a finding of federal jurisdiction under section 4 of the FAA, although this is currently under review in the Eleventh Circuit. Part II.A.1 analyzes the Eleventh Circuit's holding in Community State Bank v. Strong, as well as the case on which it was based. Part II.A.2 examines the Fourth Circuit's 2005 and 2007 dispositions in Discover Bank v. Vaden. Part II.A.3 looks to legal scholarship in accord with this approach.

1. Eleventh Circuit: Community State Bank and Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians

The Eleventh Circuit's current approach is to look to the underlying dispute between parties as a basis for subject matter jurisdiction on claims brought under section 4 of the FAA. However, this precedent may now be in flux. Five months after handing down Community State Bank in April 2007, a case following the Eleventh Circuit's precedent of looking to the underlying dispute to recognize federal jurisdiction, the court granted a rehearing en banc and vacated the decision. This pending rehearing may reaffirm the precedent developed in the Eleventh Circuit or could instead align the circuit with the other side of this legal issue.

The now-vacated decision in Community State Bank relied on Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians (Tamiami III), an Eleventh Circuit decision that reaffirmed the circuit's precedent of looking through...
to the underlying claim to find subject matter jurisdiction under section 4 of the FAA. Adopting the language of *Tamiami III*, the court in *Community State Bank* interpreted section 4 as follows:

[Section 4] empowers a district court to issue an order compelling arbitration if the court, “save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . .” Thus, it is appropriate for us to “look through” [the] arbitration request at the underlying licensing dispute in order to determine whether [the] complaint states a federal question.91

The action in *Community State Bank* arose from a payday loan, a short-term high-interest loan that the lender expects the recipient to repay by the next payday.92 The respondent to this action, James E. Strong, took out a payday loan from Georgia Cash America, Inc., the petitioner.93 The terms of the promissory note included a clause that the loan agreement was subject to arbitration under the FAA.94

Strong did not repay the loan, but instead brought suit against the banks, asserting six causes of action under Georgia law.95 The causes of action all “essentially alleg[ed] that the loan [was] usurious and therefore unenforceable.”96 The defendants removed the case from state court to the U.S. District Court for the Northern District of Georgia.97 When the court permitted removal to district court, Strong moved to remand the case back to state court on the grounds that the case lacked federal jurisdiction and “that removal had been improvidently granted.”98 While that motion was pending, the defendant banks moved simultaneously to compel arbitration under the FAA.99 After considering the motions from both sides, the district court judge held in favor of Strong, remanding to state court on the grounds that the case was not removable.100

Contemporaneous to the above proceedings, the defendants also brought an independent motion in federal district court to compel arbitration and stay proceedings under the FAA.101 The defendants argued therein that

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92. See id. at 600.
93. See id. at 601. Petitioners noted that Georgia Cash America, Inc. provides payday loans on behalf of Community State Bank, another petitioner in the action that is chartered by the state of South Dakota. Id.
94. See id.
95. See id. at 601–02.
96. Id. at 602.
97. Id.
98. Id.
99. Id.
100. Id. at 602–03.
101. Id. at 603.
Strong's refusal to arbitrate "threatens [them] with severe injury." This petition before the court alleged federal jurisdiction pursuant to 28 U.S.C. § 1331 and section 4 of the FAA. Regarding this second petition, Strong moved to dismiss for lack of federal subject matter jurisdiction. The district court granted Strong's motion to dismiss, and the defendant banks appealed. The issue of where jurisdiction attaches is significant in this context because it potentially expands federal jurisdiction in frequently brought FAA disputes.

The district court applied the Tamiami III test to determine whether federal question jurisdiction existed on the section 4 claim: "[I]t is appropriate for us to 'look through' [the] arbitration request at the underlying . . . dispute in order to determine whether [the] complaint states a federal question." The Community State Bank court affirmed the district court's use of Tamiami III as precedent. Community State Bank further noted that Tamiami III looked to the textual language of section 4 to reach its holding by interpreting the statute's language of "save for such agreement" to mean "'save for [the arbitration] agreement,'" and that this interpretation "directs a district court to take subject matter jurisdiction over a § 4 petition if it would have subject matter jurisdiction over the dispute-to-be-arbitrated."

The defendant banks indicated in their petition that, as part of the arbitration proceedings, they would seek a ruling from the court declaring that the loan itself was lawful and that the loan's interest rate was governed by section 27 of the Federal Depository Insurance Act. Since the banks were bringing this claim pursuant to the Declaratory Judgment Act, the court considered whether the action to be declared upon arose under federal law (since a federal court can only hear declaratory judgment actions on federal issues). The court found that federal question jurisdiction existed over the declaratory judgment action because of the federal nature of potential section 27 claims and that the respondent could file under the federal Racketeer Influenced and Corrupt Organizations Act; therefore,

102. Id. at 604.
103. Id.
104. Id.
105. Id.
106. See id. at 615–16 (Marcus, J., concurring).
107. Id. at 606 (quoting Tamiami III, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999)).
108. See id. ("We read Tamiami III as holding that § 4 directs a district court to take subject matter jurisdiction over a § 4 petition if it would have subject matter jurisdiction over the dispute-to-be-arbitrated.").
109. Id. at 603 n.7, 606 (quoting 9 U.S.C. § 4 (2000)).
110. See id. at 600, 607 (citing 12 U.S.C. § 1831d (2000)).
111. See id. at 608. The Declaratory Judgment Act states, in relevant part, In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

because the court there will "‘look through’ under Tamiami III [to
determine whether the] action arises under federal law, the district court had
federal question jurisdiction over petitioners’ action to compel
arbitration."\footnote{112}

2. Fourth Circuit: Discover Bank v. Vaden

In accord with the Eleventh Circuit, the Fourth Circuit looks through to
the underlying claim between the parties to establish subject matter
jurisdiction. Discover Bank v. Vaden arose from a suit brought by Discover
Bank and its affiliate Discover Financial Services (collectively, Discover)
against Betty E. Vaden (Vaden) for nonpayment of her credit card
balance.\footnote{113} After Discover brought suit, Vaden filed a number of class-
action counterclaims against Discover.\footnote{114} Discover then brought an action
in federal court to compel arbitration of Vaden’s counterclaims under
section 4 of the FAA.\footnote{115}

The first time the Fourth Circuit heard Discover Bank v. Vaden (Vaden
I), it established federal subject matter jurisdiction under section 4 of the
FAA by looking to the underlying dispute between the parties.\footnote{116}
Discussing this point, the Vaden I court acknowledged that invoking section
4 of the FAA alone does not constitute federal subject matter jurisdiction,
so the court analyzed the underlying dispute between the parties to establish
federal jurisdiction.\footnote{117} The court noted the possibilities of approaching
the issue through either a "broad" or "narrow" view.\footnote{118} The broad view,
followed by the Eleventh Circuit in Tamiami III,\footnote{119} enables the court to
analyze the underlying dispute between parties to find federal subject matter
jurisdiction.\footnote{120} The narrow view, followed by the Second Circuit, requires
the face of the arbitration petition to state the reason for jurisdiction.\footnote{121}
After looking to both the text of section 4 and analyzing the two

\footnotesize
\begin{itemize}
\item \footnote{112. Cmty. State Bank, 485 F.3d at 612.}
\item \footnote{113. Vaden II, 489 F.3d 594, 597 (4th Cir. 2007), cert. granted, 128 S. Ct. 1651 (2008).}
\item \footnote{114. Id.}
\item \footnote{115. Id.}
\item \footnote{116. See Vaden I, 396 F.3d at 367 (‘‘[W]e do hold that when a party comes to federal
court seeking to compel arbitration, the presence of a federal question in the underlying
dispute is sufficient to support subject matter jurisdiction.’’); Ruling on Federal-Question
4, 4 [hereinafter Ruling on Federal-Question] (‘‘[T]he 4th Circuit has ruled on the issue,
siding with the 11th Circuit and offering a reasoned decision that expressly rejects [the U.S.
Court of Appeals for the Second Circuit].’’).}
\item \footnote{117. Vaden I, 396 F.3d at 368.}
\item \footnote{118. Id.}
\item \footnote{119. 177 F.3d 1212, 1223 n.11 (11th Cir. 1999) (holding that “it is appropriate for us to
‘look through’ Tamiami’s arbitration request at the underlying licensing dispute in order to
determine whether Tamiami’s complaint states a federal question”).}
\item \footnote{120. Vaden I, 396 F.3d at 369.}
\item \footnote{121. Id. at 368–69 (analyzing Westmoreland Capital Corp. v. Findlay, 100 F.3d 263 (2d
Cir. 1996)).}
\end{itemize}
approaches, the Vaden I court followed the broad approach set forth in Tamiami III.\textsuperscript{122}

\begin{itemize}
  \item[a.] Vaden I Textual Analysis

In its textual analysis of section 4, the Vaden I court evaluated three elements of the statute’s plain language.\textsuperscript{123} First, the court looked to the phrase “save for such agreement” in section 4.\textsuperscript{124} The court interpreted this phrase to mean that a court should find jurisdiction as if the claim to compel arbitration never existed.\textsuperscript{125} Second, the court found Congress’s broad reference to “Title 28” within the text of section 4 to mean that district courts could hear any case wherein the district court has jurisdiction over the underlying suit.\textsuperscript{126} As a final textual justification, the court looked to the phrase “controversy between the parties” and interpreted this as a reference to the general controversy, rather than the specific arbitration petition.\textsuperscript{127}

\item[b.] Vaden I Narrow View Analysis

Vaden I then turned to an analysis of the narrow view on this issue.\textsuperscript{128} The Vaden I court had two reasons for not following the narrow view. First, the court rejected the notion that looking to the underlying dispute does not conform to the well-pleaded complaint rule.\textsuperscript{129} Rather, the court pointed to the Declaratory Judgment Act, an act that allows federal courts to look to the “real controversy” between parties in a declaratory judgment action to realize jurisdiction.\textsuperscript{130} Vaden I reasoned that the Declaratory Judgment Act shows that courts interpret the well-pleaded complaint rule

\footnotesize{\textsuperscript{122} Id. at 369. The court further clarified, however:
To be clear, we do not imply that arbitration agreements should receive preferential treatment. No doors to federal court are open to those claims that are closed to others. We agree that in passing the FAA Congress did not intend to create federal jurisdiction . . . . We thus decline to eliminate § 1331 as a possible basis for federal jurisdiction over a petition to compel arbitration under § 4 of the FAA.


\textsuperscript{124} Id.; see also Ruling on Federal-Question, supra note 116, at 4.

\textsuperscript{125} Szalai, supra note 1, at 328–29.

\textsuperscript{126} Vaden I, 396 F.3d at 370; see also Ruling on Federal-Question, supra note 116, at 4.

\textsuperscript{127} See Vaden I, 396 F.3d at 370 (“This common understanding of the word ‘controversy’ must govern our interpretation unless Congress chooses to narrow the term. The text of § 4 requires us to consider jurisdiction as it arises out of the whole controversy between the parties. This necessarily entails looking beyond the arbitration petition alone.”); see also Ruling on Federal-Question, note 116, at 4–5.

\textsuperscript{128} See generally infra Part II.B.1 (discussing the narrow view).

\textsuperscript{129} Vaden I, 396 F.3d at 371.

\textsuperscript{130} Id.; see also Szalai, supra note 1, at 329; supra note 110 (reproducing the Declaratory Judgment Act’s text).}
too rigidly.\textsuperscript{131} Second, the court pointed to the fact that following the narrow view results in a severely restricted federal jurisdiction analysis.\textsuperscript{132} The court expressed concern that to hold otherwise only allows arbitration claims in federal court based on diversity jurisdiction, and this limiting circumstance goes against the ""congressional declaration of a liberal federal policy favoring arbitration agreements.""\textsuperscript{133}

c. Vaden I Consideration of Precedent

Additionally, the \textit{Vaden I} court analyzed Fourth Circuit precedent in \textit{Gibraltar, P.R., Inc. v. Otoki Group, Inc.}\textsuperscript{134} to support its conclusion that the court should analyze the underlying cause of action.\textsuperscript{135} In \textit{Gibraltar}, the court examined the underlying cause of action between the parties before determining if jurisdiction existed.\textsuperscript{136} The \textit{Vaden I} court found this relevant because, if the court decided to adopt the narrow view, it would allow for the opposite reasoning than that established through \textit{Gibraltar}'s precedent.\textsuperscript{137}

d. The Fourth Circuit's Reaffirmation of Vaden I

On remand from \textit{Vaden I}, the district court considered whether a federal question actually existed in the underlying claim.\textsuperscript{138} After finding that a federal question did exist, the district court denied Vaden's motion to dismiss.\textsuperscript{139} Vaden appealed, and in 2007 the Fourth Circuit again heard \textit{Discover Bank v. Vaden (Vaden II)}. In \textit{Vaden II}, the court analyzed both whether a federal question existed and whether the district court's holding compelling arbitration was proper.\textsuperscript{140} Affirming the district court's decision, the \textit{Vaden II} court again analyzed whether section 4 of the FAA provided federal courts with jurisdiction.\textsuperscript{141} \textit{Vaden II}, in accord with \textit{Vaden I}, held that the well-pleaded complaint rule did not apply and that the court

\textsuperscript{131. See \textit{Vaden I}, 396 F.3d at 371. The U.S. Court of Appeals for the Fourth Circuit noted that courts adopting the opposing approach were "moved by an understandable allegiance to the well-pleaded complaint rule." \textit{Id.} The court continued, "These cases rightly point out that, [t]he usual rules for determining federal question jurisdiction provide that a complaint will not avail a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." \textit{Id.} (quoting Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992)).

\textsuperscript{132. \textit{Id.} at 372.}

\textsuperscript{133. \textit{Id.} (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

\textsuperscript{134. 104 F.3d 616 (4th Cir. 1997).}

\textsuperscript{135. \textit{Vaden I}, 396 F.3d at 373.}

\textsuperscript{136. \textit{Gibraltar}, 104 F.3d at 618.}

\textsuperscript{137. \textit{Vaden I}, 396 F.3d at 373.}


\textsuperscript{139. \textit{Id.} at 639.}

\textsuperscript{140. \textit{Vaden II}, 489 F.3d 594, 597 (4th Cir. 2007), cert. granted, 128 S. Ct. 1651 (2008).}

\textsuperscript{141. \textit{Id.}}}
could "look through" to the underlying claim. The Vaden II court reached this conclusion by looking to the plain language of section 4: "the court would otherwise 'have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties.'" The court cited Vaden I and the Eleventh Circuit case Tamiami III as support for embracing this broad approach.

3. Legal Commentary in Agreement with This Approach

This section summarizes legal analysis by Imre S. Szalai of California Western School of Law. Like the Fourth and Eleventh Circuits, Professor Szalai concludes that the judiciary should look through to a party's underlying claim when determining subject matter jurisdiction.

To find specific support for his position, Szalai first analyzes the case law and then looks to numerous elements of the debate, including: (1) a textual analysis, (2) the legislative history of the FAA, (3) the principle that federal statutory claims are arbitrable, (4) the inconsistency of the "narrow" approach, (5) the consistency between the Vaden I court’s approach and the well-pleaded complaint rule, and (6) the relationship between the FAA and other contemporaneously enacted litigation.

First, Szalai states that, since being decided in 2005, Vaden I became "the leading opinion regarding this broad view of jurisdiction and § 4 of the FAA." He agrees with Vaden I that the "save for" clause addresses federal courts' limited jurisdiction. Szalai further supports this contention by pointing to a New York arbitration statute enacted in 1920, five years before the FAA was enacted. Szalai surmises that Congress

142. Id. at 607. In dissent, Judge Joseph R. Goodwin disagreed with the majority's approach, specifically noting that "'[o]ne of the keystones of this limiting construction [of section 1331] is the 'well-pleaded complaint rule' articulated by the Supreme Court in Louisville & Nashville R.R. v. Mottley and constantly reaffirmed by the federal judiciary.'" Id. at 609 (Goodwin, J., dissenting) (quoting Miller, supra note 49, at 1782).

143. Id. at 598 (quoting 9 U.S.C. § 4 (2000)). In dissent, Judge Goodwin disagreed with this procedural posture. He noted, "My disagreement with the majority opinion centers on its finding of 'arising under' jurisdiction in a counterclaim. Federal question jurisdiction cannot be predicated on federal issues that may arise later in an action by way of defense or counterclaim." Id. at 609.

144. Id. at 599.
145. See generally Szalai, supra note 1.
146. Id. at 325.
147. See generally Szalai, supra note 1. Professor Imre S. Szalai argues that opponents of arbitration, particularly those who oppose the arbitrability of statutory claims, may tend to gravitate to a restrictive view of jurisdiction that limits the opportunities for enforcement of arbitration agreements in federal court. In contrast, proponents of arbitration would seem to prefer a broader view of jurisdiction, providing for enforcement of arbitration agreements in federal court in a wider range of circumstances.

Id. at 324.
148. Id. at 329.
149. Id. at 338.
150. Id. at 337–38.
could have replicated the New York statute in the FAA if it wanted the
same jurisdictional outcome.\textsuperscript{151} Szalai notes,

Under the New York statute, an aggrieved party may petition the
“supreme court, or a judge thereof,” whereas under the FAA, the
aggrieved party may petition “any court of the United States which, \textit{save for such agreement}, would have jurisdiction . . . .” Why does this “save for” clause appear in the federal statute but not the New York statute? The difference in language likely arises from the difference between jurisdiction in state courts and federal courts.\textsuperscript{152}

In other words, Szalai concludes, the state statute did not require the “save for” clause because such language was superfluous.\textsuperscript{153}

Szalai’s analysis of the textual language also points to the phrase “controversy between the parties” of section 4. He argues that the Supreme Court in \textit{Moses H. Cone Memorial Hospital v. Mercury Construction Corp.}\textsuperscript{154} already determined that this phrase refers to the underlying dispute between the parties.\textsuperscript{155} Szalai further notes that \textit{Moses H. Cone} recognized that federal jurisdiction over an arbitration claim arises when the court already has jurisdiction over the underlying claim between parties.\textsuperscript{156}

Szalai concludes his textual analysis by arguing, like the court in \textit{Vaden I}, that the general reference to Title 28 includes federal question jurisdiction, and that this supports a broad view of section 4 because Congress did not point specifically to either section 1332 (diversity jurisdiction) or section 1331 (federal question jurisdiction) as the elements that would allow a federal court to recognize jurisdiction.\textsuperscript{157}

Szalai’s analysis of the legislative history of the FAA specifically references the 1954 amendments that changed the text of section 4 to “Title 28” from “judicial code.”\textsuperscript{158} While making these updates, Szalai argues, Congress deliberately decided to incorporate all of Title 28 rather than specifying diversity jurisdiction as the reason to find subject matter jurisdiction.\textsuperscript{159} Therefore, Szalai argues,

There was no indication that the 1954 change in terms from “judicial code” to “Title 28” would significantly alter the applicability or meaning of the FAA, which suggests that Congress at the time of the 1954 amendments believed that § 4 of the FAA . . . must have already covered

\begin{footnotes}
\item 151. \textit{Id.} at 342.
\item 153. \textit{Id.} at 340.
\item 154. 460 U.S. 1 (1983).
\item 155. See Szalai, \textit{supra} note 1, at 344.
\item 156. See id. at 347 (“To conclude, the term ‘the controversy between the parties’ in § 4 refers to the underlying dispute to be arbitrated, and, as recognized by the Supreme Court in \textit{Moses H. Cone}, jurisdiction to compel arbitration pursuant to § 4 exists when the district court would have jurisdiction over a suit on the underlying dispute to be arbitrated.”).
\item 157. \textit{Id.} at 352.
\item 158. \textit{Id.} at 356.
\item 159. \textit{Id.} at 357.
\end{footnotes}
federal question jurisdiction with its broad reference to the judicial code.160

Szalai also argues that the Vaden I court’s broad approach more accurately reflects both congressional and Supreme Court support of arbitration as a dispute resolution mechanism.161 Szalai connects the desire to support arbitration claims with a sound reason to use the Vaden I approach since it expands opportunities for enforcement.162

Additionally, Szalai favors interpreting section 4 broadly because the narrow approach leads to conflicting results.163 Szalai hypothesizes that, if a party does not comply with an arbitration agreement and brings an action in federal court based on the underlying federal question in dispute, the other party to the action could bring a counterclaim (in federal court) to compel arbitration.164 In contrast, if the same second party brought the arbitration claim, and the first party had not brought the original suit, the second party’s claim would be brought in state court since it does not present a federal question.165 In other words, Szalai prefers the Vaden I approach because “federal courts consider the underlying dispute to be arbitrated in assessing jurisdiction, regardless of the purported basis for jurisdiction, which seems to be a more inherently consistent approach.”166

Szalai also argues that the Vaden I broad approach does not conflict with the well-pleaded complaint rule.167 Szalai agrees with the Vaden I court’s analysis that “the well-pleaded complaint rule is not as ‘rigid’ as the [narrow view] line of cases portrays it to be.”168 Szalai also analogizes section 4 to the Declaratory Judgment Act, an act providing that courts should consider the underlying claim when analyzing jurisdiction: “Just as the well-pleaded complaint rule has been flexibly applied in connection with declaratory judgment actions, examining the underlying controversy to be arbitrated in order to determine whether jurisdiction exists over a petition to compel arbitration is consistent with the well-pleaded complaint rule.”169

Finally, Szalai looks to legislation enacted contemporaneously to the FAA to determine congressional intent. Szalai focuses on the Judiciary Act of 1925, which, like the FAA, arose from a congressional desire to relieve an overburdened court system.170 In his comparison, Szalai concludes that

160. Id.
161. See id. at 358 (“[T]he Supreme Court has since emphatically rejected its earlier cases treating federal statutory claims as non-arbitrable, and it is now well established that the FAA generally embraces federal statutory claims as arbitrable.”).
162. See id. at 359.
163. See id. at 361.
164. See id. at 360–62.
165. See id. at 360.
166. Id. at 364.
167. Id. at 364–65.
168. Id. at 365 (quoting Vaden I, 396 F.3d 366, 371 (4th Cir. 2005)).
169. Id. at 368.
170. See id. at 369 (“At the time these acts were passed, a docket crisis existed in the federal judiciary . . . .”).
"[t]his relationship . . . does not conclusively prove whether the Vaden or [narrow] approach is correct, but the broad Vaden view is arguably more consistent with the overall legislative efforts to deal with the overburdened judiciary than the narrow . . . view."\(^{171}\)

B. The Second and Seventh Circuits' Approach: Bound by the Well-Pleaded Complaint Rule

Part II.B addresses the other side of this debate. The Second and Seventh Circuits have both ruled that a party may not establish federal subject matter jurisdiction by "looking through" to the underlying dispute between the parties. Rather, these circuits require the claim to compel arbitration to state the reason for subject matter jurisdiction on its face. In other words, the complaint, according to these courts, must meet the well-pleaded complaint rule standard. Part II.B.1 looks to the Second Circuit's holding in *Westmoreland Capital Corp. v. Findlay*.\(^{172}\) Part II.B.2 analyzes the Seventh Circuit's holding in *Wisconsin v. Ho-Chunk Nation*.\(^{173}\) Part II.B.3 analyzes other circuits that appear to be in accord with the Second and Seventh Circuits. Finally, Part II.B.4 examines Judge Stanley Marcus's concurrence in *Community State Bank v. Strong*,\(^{174}\) which argues that the Eleventh Circuit should not look to the underlying claim to establish jurisdiction. *Community State Bank*, as noted in Part II.A.1, was recently vacated and will be reheard en banc by the Eleventh Circuit.\(^{175}\)

1. Second Circuit: *Westmoreland Capital Corp. v. Findlay*

The Second Circuit in *Westmoreland* looked to the face of the claim to compel arbitration to determine if federal question jurisdiction existed on the section 4 claim.\(^{176}\) *Westmoreland* arose following the failure of monetary investments made by George D. Findlay and John F. Joyce.\(^{177}\) Findlay and Joyce invested in a limited partnership of the Jaysons, the owners of Westmoreland, a financial planning and counseling corporation.\(^{178}\) Findlay and Joyce received their financial advice from Terry King, an employee of the Jaysons'.\(^{179}\) Findlay and Joyce lost essentially all of their investment after the stock they purchased proved to be valueless, and repayments of their loans were refused.\(^{180}\)

\(^{171}\) *Id.* at 372.
\(^{172}\) 100 F.3d 263 (2d Cir. 1996).
\(^{173}\) 463 F.3d 655 (7th Cir. 2006).
\(^{174}\) 485 F.3d 597 (11th Cir. 2007).
\(^{175}\) Cmty. State Bank v. Strong, 508 F.3d 576 (11th Cir. 2007).
\(^{176}\) *Westmoreland*, 100 F.3d at 269.
\(^{177}\) *Id.* at 264–65.
\(^{178}\) *Id.* at 264.
\(^{179}\) *Id.*
\(^{180}\) *Id.* at 264–65.
After losing their investment, Findlay and Joyce initiated arbitration proceedings. Westmoreland brought suit in the U.S. District Court for the Western District of New York, claiming that, under the three-year statute of limitations, the arbitration claim was time-barred. Findlay and Joyce brought a counterclaim, alleging that the district court did not have jurisdiction over Westmoreland’s suit, and sought to compel arbitration.

The district court dismissed Westmoreland’s suit on two alternative grounds. First, the court dismissed for lack of federal subject matter jurisdiction. Second, the court stated that, even with subject matter jurisdiction, it would still dismiss the claim to compel arbitration.

On appeal, the Second Circuit affirmed the district court on two grounds. First, the court said that, despite the textual language of section 4, the statute does not allow the court to look through the arbitration petition to find jurisdiction.

Second, the court stated that the complaint must comport with the well-pleaded complaint rule, which it failed to do in this case. The complaint did not comport with the well-pleaded complaint rule because it only “anticipate[d] that respondents’ answer would argue that their arbitration claims are meritorious under [federal law].”

a. Textual Language Analysis

In reaching its conclusion, the Second Circuit turned to the textual language of section 4. Initially, the court conceded that the language appears to confer jurisdiction in federal court based on the underlying claim, but did not find this conclusive after looking to Drexel Burnham Lambert, Inc. v. Valenzuela Bock, a case decided by the U.S. District Court for the Southern District of New York. The Westmoreland court explained that Valenzuela Bock analyzed the history of the FAA and Congress’s intent behind its enactment before holding that the Act intended to eliminate the common law’s rejection of arbitration petitions. Further, the Second Circuit noted that, if federal jurisdiction is established because of diversity of citizenship or an admiralty claim, the court is not divested of

181. Id. at 265.
182. Id.
183. Id.
184. Id. at 266.
185. See id. at 267.
186. Id. at 268.
187. Id. at 269.
189. See Westmoreland, 100 F.3d at 267 (“We are persuaded by Judge [Pierre] Leval’s opinion in Valenzuela Bock, which found, in a case in which the underlying claims were based on federal securities laws, that the text of § 4 does not confer federal question jurisdiction ‘where the claim of federal jurisdiction is not based on the petition itself, but rather on the federal character of the underlying dispute [in arbitration].’” (quoting Valenzuela Bock, 969 F. Supp. at 965)); see also Szalai, supra note 1, at 331 (“The Westmoreland court relied heavily on the reasoning of a district court opinion, Drexel Burnham Lambert, Inc. v. Valenzuela Bock.”).
190. Westmoreland, 100 F.3d at 267–68.
jurisdiction under a claim to compel arbitration because it does not fall under either option.\textsuperscript{191} Lastly, the court’s textual analysis turned to the FAA’s reference to “United States court” and interpreted this phrase to mean that the Act does not confer federal jurisdiction.\textsuperscript{192} Acknowledging that other courts interpret this phrase in just the opposite way, the \textit{Westmoreland} court again referenced \textit{Valenzuela Bock}. In accord with that case, the Second Circuit stated that it “would produce an odd distinction” if the court conferred federal jurisdiction with section 4 claims, since petitions regarding arbitral awards under sections 9 and 10 of the FAA are not allowed in federal court, except by way of diversity jurisdiction or an admiralty claim.\textsuperscript{193}

\textbf{b. Well-Pleaded Complaint Rule Analysis}

The \textit{Westmoreland} court also addressed the petitioner’s claim that section 4 amounts to a reversal of the well-pleaded complaint rule.\textsuperscript{194} In response, the Second Circuit noted that the well-pleaded complaint rule was well-established at the time of the FAA’s enactment.\textsuperscript{195} Therefore, the court explained, if Congress intended to rescind the well-pleaded complaint rule under the FAA, it would have done so explicitly.\textsuperscript{196} The \textit{Westmoreland} court reiterated that Congress intended to quell judicial hostility through the Act, not to change the purpose of the well-pleaded complaint rule.\textsuperscript{197} Following the above analysis regarding section 4, the court concluded that jurisdiction was lacking because the petitioner’s complaint did not state a basis for subject matter jurisdiction on its face.\textsuperscript{198}

2. Seventh Circuit: \textit{Wisconsin v. Ho-Chunk Nation}

In \textit{Ho-Chunk}, the Seventh Circuit, in accord with the Second Circuit, did not look to the underlying complaint to establish federal jurisdiction under a section 4 claim.\textsuperscript{199} The \textit{Ho-Chunk} court addressed a petition to compel arbitration between the State of Wisconsin and Ho-Chunk Nation (Ho-Chunk), a Native American tribe, for breach of a gaming compact.\textsuperscript{200} The U.S. District Court for the Western District of Wisconsin, finding that federal jurisdiction existed, appointed an arbitrator to the dispute.\textsuperscript{201} Ho-Chunk appealed the order appointing an arbitrator, claiming that the district jurisdiction under the FAA

court lacked jurisdiction and that Wisconsin did not state a cause of action.\textsuperscript{202}

In addressing the allegation that the district court lacked subject matter jurisdiction, the court explained that the plaintiff’s claim to compel arbitration must state the reason for federal jurisdiction in accord with the well-pleaded complaint rule.\textsuperscript{203} To establish federal jurisdiction, the court continued, federal law “must ‘create[]’ the cause of action,” and here, the only cause of action that governed Wisconsin’s complaint was to compel arbitration.\textsuperscript{204}

Rather than finding federal jurisdiction by analyzing the underlying complaint between the parties, the court looked to \textit{Minor v. Prudential Securities, Inc.},\textsuperscript{205} a prior Seventh Circuit decision. In \textit{Minor}, the court stated that “[a] strong body of caselaw has developed . . . holding that the nature of the underlying dispute [in arbitration] is irrelevant for purposes of subject matter jurisdiction, even on a motion to compel [arbitration] under section 4, i.e., the motion itself must invoke diversity or federal question jurisdiction.”\textsuperscript{206} Therefore, under \textit{Ho-Chunk}, the Seventh Circuit does not look to the underlying complaint between the parties in an arbitration petition, but instead only considers the face of the plaintiff’s complaint to determine jurisdiction.\textsuperscript{207}

The court then looked to the Indian Gaming Regulatory Act (IGRA) to see if reference to it in the plaintiff’s complaint to compel arbitration provided a basis for federal jurisdiction.\textsuperscript{208} The court found that IGRA did not contain a federal question and reiterated that the Seventh Circuit does not “look through to the underlying complaint in arbitration to ascertain whether subject matter jurisdiction obtains.”\textsuperscript{209}

Wisconsin argued that the arbitration clause in the compact specifically stated that arbitration issues would be raised in federal court in the Western District of Wisconsin.\textsuperscript{210} Despite this contractual stipulation, the court concluded that “neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction.”\textsuperscript{211}

Following consideration of the well-pleaded complaint rule requirement, the Seventh Circuit held that subject matter jurisdiction did not exist and therefore vacated the district court’s holding and remanded for the district court to dismiss.\textsuperscript{212}

\begin{footnotes}
\item[202.] See \textit{id.}
\item[203.] See \textit{id.} at 659.
\item[204.] \textit{Id.} (alteration in original) (quoting \textit{Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians}, 471 U.S. 845, 850–51 (1985)).
\item[205.] 94 F.3d 1103 (7th Cir. 1996).
\item[206.] \textit{Id.} at 1106.
\item[207.] See \textit{Ho-Chunk}, 463 F.3d at 659.
\item[208.] See \textit{id.}
\item[209.] \textit{Id.} at 660.
\item[210.] See \textit{id.} at 661.
\item[211.] \textit{Id.}
\item[212.] See \textit{id.} at 662.
\end{footnotes}
3. Other Circuits in Accord

Part II.B.3 looks to a number of other circuits that agree with the Second and Seventh Circuits on their section 4 jurisdictional analysis. In other words, these circuits appear to conclude that the underlying dispute between parties cannot form the basis for subject matter jurisdiction in a complaint to compel arbitration.

a. The U.S. Court of Appeals for the Third Circuit

The Third Circuit concluded in *Fox v. Faust* that federal jurisdiction does not exist unless the complaint shows federal jurisdiction “on the face.”213 Additionally, in *Virgin Islands Housing Authority v. Coastal General Construction Services Corp.*, the Third Circuit found that federal jurisdiction cannot compel arbitration unless “federal law creates the cause of action” or “the complaint poses a substantial federal question.”214 Therefore, the Third Circuit comports with the conclusion that the face of the complaint must state the federal cause of action in a petition to compel arbitration.

b. The U.S. Court of Appeals for the Sixth Circuit

The Sixth Circuit in *Smith Barney, Inc. v. Sarver*215 is also in accord with this side of the debate. In *Smith Barney*, the court held that the “federal nature of the underlying claims that were submitted to arbitration” does not supply an independent basis for federal jurisdiction.216 In other words, the court did not look through to the underlying issue between the parties to establish jurisdiction, but instead required the arbitration claim to contain an independent jurisdictional basis.

c. The U.S. Court of Appeals for the Ninth Circuit

Although the Ninth Circuit has not made a definitive holding on this issue,217 it will likely follow these other circuits. *Carter v. Health Net of California, Inc.*218 evidences the Ninth Circuit’s view. In *Carter*, the Ninth Circuit determined that “a petition to compel arbitration because the dispute falls within the scope of an arbitration clause, or to vacate an award because the arbitrators exceeded their powers under that clause, will turn on the interpretation of the clause, regardless of whether the actual dispute

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215. 108 F.3d 92 (6th Cir. 1997).
216. *Id.* at 94.
218. 374 F.3d 830 (9th Cir. 2004).
implicates any federal laws." Carter's language implies that, if the Ninth Circuit does rule on this issue, the court will not look to "whether the actual dispute implicates any federal laws," but instead will require the face of the complaint to provide for federal jurisdiction.

4. Community State Bank's Concurrence

Judge Marcus, in a concurrence, argued strongly against the Eleventh Circuit's interpretation of section 4 in Community State Bank. Judge Marcus's concurrence constitutes a comprehensive argument stating that the court should reconsider its precedent. Judge Marcus argued that Community State Bank's reasoning was erroneous and that the question posed was "ripe for en banc review by this Court or certiorari review by the Supreme Court." Since handing down Community State Bank in April 2007, the Eleventh Circuit granted a rehearing en banc and vacated the ruling on September 10, 2007. Therefore, the Eleventh Circuit could possibly change its current precedent on this issue after reconsideration. Judge Marcus's concurrence in Community State Bank focused on the reasons why he believed the court should have reversed its precedent on the issue.

Judge Marcus asserted that reconsideration of the issue was of particular importance for two reasons. First, the Eleventh Circuit's reasoning goes against that of numerous other circuits. Second, looking to the underlying claim unnecessarily expands the jurisdiction of federal courts.

Judge Marcus's argument regarding reconsideration of section 4 revolved around three issues: (1) that the Eleventh Circuit's interpretation conflicts with the well-pleaded complaint rule; (2) that the Eleventh Circuit's interpretation conflicts with the circuit's own precedent; and (3) that the Eleventh Circuit's interpretation contravenes the FAA's purpose, which

219. Id. at 836 (quoting Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 26 (2d Cir. 2000)).

220. Id. (quoting Greenberg, 220 F.3d at 26).

221. 485 F.3d 597, 614 (11th Cir. 2007) (Marcus, J., concurring). Judge Stanley Marcus concurred with the majority, rather than dissenting, because he believed the court was bound by the precedent set forth by the U.S. Court of Appeals for the Eleventh Circuit in Tamiami III. Further, Judge Marcus noted that he did not disagree with the outcome of the case because he believed it raised a federal question. Id. at 613–15. See generally Posting of Richard Bales to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2007/04/jurisdiction_ov.html (April 27, 2007) (noting that, although the Eleventh Circuit followed prior precedent, two judges "grudgingly followed the precedent, but argued that precedent was wrong").


223. See id. at 615 (noting that Tamiami III's stance puts the Eleventh Circuit "squarely at odds with at least four of our sister circuits, and aligns us with just one other circuit," and then listing precedents in the U.S. Courts of Appeals for the Second, Fifth, Sixth, and Seventh Circuits that have taken the opposing approach); supra Parts II.B.1–3.

224. Cmty. State Bank, 485 F.3d at 614–15 (Marcus, J., concurring) (arguing that, when Tamiami III was decided by the Eleventh Circuit, there were numerous federal issues that may have resulted in the court deciding too hastily on the interpretation of section 4 since the issue "considerably expands federal court jurisdiction").
requires submitting the dispute to arbitration, not the courts, and making the dispute "an ordinary contract action."\textsuperscript{225}

\textbf{a. Conflict with the Well-Pled Complaint Rule}

Judge Marcus argued that the Eleventh Circuit's reliance on \textit{Tamiami III} conflicts with the well-pled complaint rule. He pointed to the long history of the well-pled complaint rule and that it requires the face of a petitioner’s complaint to provide a reason for jurisdiction.\textsuperscript{226} In \textit{Community State Bank}, Judge Marcus did not see anything in the petitioner's complaint to trigger federal jurisdiction and specifically mentioned that arbitration petitions are contract claims.\textsuperscript{227} He also noted that the only allegations of a federal nature in the complaint are superfluous.\textsuperscript{228}

Looking to the contract claim issue, Judge Marcus argued that the court should view arbitration petitions as ordinary contract claims because "the right to compel arbitration is based on the parties' agreement to arbitrate, the district court . . . is limited to interpreting that agreement and may not adjudicate the substantive dispute."\textsuperscript{229}

Addressing the possible federal claim issue, Judge Marcus analyzed the petitioner's defense that referenced section 27 of the Federal Depository Insurance Act.\textsuperscript{230} However, Judge Marcus argued that this reference to section 27 was inadequate to find a federal question because the well-pled complaint rule does not permit the establishment of federal jurisdiction by anticipating a defense.\textsuperscript{231}

\textbf{b. Tension Regarding Section 4's Interpretation in the Circuit Courts}

Judge Marcus pointed to the tension between the court's reliance on \textit{Tamiami III} and case law inside and outside of the Eleventh Circuit.\textsuperscript{232} Judge Marcus referenced \textit{Commercial Metals Co. v. Balfour, Guthrie, & Co.}\textsuperscript{233} as an example of a sister circuit concluding that the court should not look through to the underlying dispute between the parties to establish jurisdiction.\textsuperscript{234} He asserted that the court should consider the example of

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225. Id. ("[T]he § 4 FAA petitioner’s very purpose in going to federal district court is to have an arbitrator, rather than any court, resolve the underlying dispute to be arbitrated . . . ").
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226. \textit{See id.}
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227. \textit{See id.} at 617.
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228. \textit{See id.}
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229. Id. at 618. Further, Judge Marcus referred to the Supreme Court's holding in \textit{Prima Paint Corp. v. Flood & Conklin Manufacturing Co.}, 388 U.S. 395, 403 (1967), which determined that the arbitration clause may be separated from the main contract between parties. Therefore, any claim referencing the validity of the contract is not for the court to decide, but rather an issue for the arbitrator. \textit{See id.} at 618, 622.
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230. \textit{See id.} at 621.
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231. \textit{See id.}
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233. 577 F.2d 264 (5th Cir. 1978).
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Commercial Metals because the decision "sensibly suggests that the appropriate dispute to which we ought to apply the well-pleaded complaint rule is the dispute to be resolved by the district court, not the dispute which will eventually be resolved by the arbitrator." Since resolution of the motion to compel arbitration did not alter the underlying issue between the parties, Judge Marcus concluded that the underlying dispute should not have factored into the court’s determination of appropriate jurisdiction.

Judge Marcus then pointed to a holding within the Eleventh Circuit, Baltin v. Alaron Trading Corp., in which the court analyzed a claim concerning sections 10 and 11 of the FAA. The Baltin court’s analysis concluded that federal jurisdiction did not exist because the well-pleaded complaint rule requires the cause of action to rest in federal law or its resolution to rely on federal law.

Looking to both Baltin and Commercial Metals, Judge Marcus agreed with what those opinions suggested—that the well-pleaded complaint rule should apply to the complaint before the court in a section 4 claim, not to the underlying dispute.

Judge Marcus then looked to the Eleventh Circuit’s reliance on Vaden I in reaching the conclusion that the court could look through to the underlying claim. In Vaden I, the Fourth Circuit concluded that, when drafting section 4, Congress could have limited “Title 28” to refer only to diversity jurisdiction, but chose not to, and therefore a broader interpretation follows congressional intent. Judge Marcus did not find this position compelling, asserting that the reference in section 4 to Title 28 could not logically be limited by Congress to diversity jurisdiction, since federal jurisdiction also includes admiralty jurisdiction and supplemental jurisdiction over counterclaims.

c. The FAA’s Purpose

Judge Marcus also disapproved of the Fourth Circuit’s analysis that the current Supreme Court policy to enforce arbitration agreements means that federal courts should favor finding subject matter jurisdiction when section 4 claims are presented. In criticizing this rationale, Judge Marcus argued

235. Id. Judge Marcus later noted that “[t]he FAA was designed to ‘make arbitration agreements as enforceable as other contracts, but not more so.’” Id. at 628 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).
236. Id. at 623–34.
237. 128 F.3d 1466 (11th Cir. 1997).
240. See Cmty. State Bank, 485 F.3d at 625 (Marcus, J., concurring).
241. Id.
242. See id. at 626–27.
243. Id.
244. Id. at 628.
that it goes against the purpose of the FAA and the intent of the Supreme Court. Judge Marcus asserted that, since federal courts are of limited jurisdiction, it does not make sense to infer establishment of jurisdiction, but rather only makes sense when Congress explicitly confers the right. Judge Marcus asserted that the Eleventh Circuit should consider section 4 petitions like they do any other contract and that Congress did not "intend to 'elevate [arbitration agreements] over other forms of contract.'" Judge Marcus emphasized that what arbitration petitions really hope to achieve is enforcement of an arbitration agreement, not resolution of the claim to be arbitrated. Therefore, Judge Marcus argued, "it is important to recognize that the denial of a federal forum in such a case is no tragedy, for in these situations no one has asked a federal court to resolve the 'real controversy between the parties."' In sum, a federal court does not need to enforce an "ordinary contract" dispute or address the underlying claim to be arbitrated.

\[d. Resolution Considerations\]

To resolve this dispute between the circuits, Judge Marcus recommended against adoption of the Fourth Circuit's interpretation of the statute. Judge Marcus recommended redrafting the pertinent part of section 4 to read: "[a] party seeking to compel arbitration may petition any district court which, notwithstanding the prior common law rule that prevented courts from specifically enforcing arbitration agreements, is otherwise vested of subject matter jurisdiction over the suit before the court." By interpreting the "save for" clause to mean that jurisdiction only vests based on the arbitration petition, Judge Marcus argued that the congressional purpose of the FAA is met. Thus, if Congress intended to reverse prior hostility by enacting the FAA, the statute still enables any court to compel arbitration agreements.

Turning to the "controversy between the parties" language of section 4, Judge Marcus indicated that the court should read this phrase as a

\[245. Id.\]
\[246. Id.\]
\[247. Id. at 629 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)). But see Prima Paint, 388 U.S. at 411 (Black, J., dissenting) (stating that arbitration agreements are more than contracts: "the Court approves a rule which is... contrary to the intention of the parties and to accepted principles of contract law—a rule which indeed elevates arbitration provisions above all other contractual provisions").\]
\[248. See Cmty. State Bank, 485 F.3d at 629–30 (Marcus, J., concurring).\]
\[249. Id. at 630.\]
\[250. Id.\]
\[251. Id. at 630–34.\]
\[252. Id. at 633.\]
\[253. Id. at 631 (noting that the FAA was enacted, according to the Supreme Court, to "'ensure judicial enforcement of privately made agreements to arbitrate' by 'overrul[ing] the judiciary's longstanding refusal to enforce agreements to arbitrate'" (alteration in original) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985))).\]
\[254. See id. at 632.\]
requirement to look to the actual arbitration petition before the court. Additionally, by following the Tamiami III approach in analyzing section 4 claims, Judge Marcus noted that the court frequently addresses the underlying claim to determine if federal jurisdiction exists. Doing so goes against the very purpose of having an arbitrator decide the dispute between parties. Judge Marcus pointed to the fact that since FAA petitioners cannot bring their underlying claim to court for adjudication, the court should not pass on the underlying issue for arbitration in any way.

Judge Marcus concluded by reiterating that the Eleventh Circuit should carefully reconsider its precedent. He asserted that the "short footnote" in Tamiami III does not amount to sufficient consideration of the issue to bind the circuit when other courts have given it far greater consideration.

III. FOLLOWING A NARROW READING OF THE WELL-PLEADED COMPLAINT RULE

Part II of this Note reviewed the current circuit split on the issue of how courts establish federal jurisdiction over section 4 claims to compel arbitration. The decisions reviewed in this Note interpret section 4 by either looking through to the underlying complaint between the parties or requiring the face of the complaint to state the reason for jurisdiction. This Note also considered applicable commentary in the legal community.

Part III advocates for resolution of this conflict through a narrow reading of the well-pleaded complaint rule, a rule that requires a complaint to establish federal jurisdiction on its face, not through the underlying claim. Part III.A argues that section 4 petitions are meant to resolve contractual disputes and therefore do not provide a persuasive reason for a court to establish federal jurisdiction. Part III.B maintains that the original intent of the legislature provides persuasive evidence that courts must still comply with the well-pleaded complaint rule on section 4 claims. Part III.C advocates that revision of the FAA by Congress may most effectively clarify the meaning of section 4 and other disputed sections of the FAA.

255. See id. at 632–33 (clarifying that suits brought as “embedded” claims are generally found to have jurisdiction over the claim to compel arbitration).
256. See id. at 616–17. On this point, Judge Marcus noted, As we noted in the majority opinion, determining whether Strong’s claims-to-be-arbitrated arise under federal law would require us to provide some answer to the very legal and factual questions that form the parties’ underlying dispute—a dispute which, under the clear policy of the FAA, is for an arbitrator to resolve. Id. at 634.
257. See id.
258. See id. at 635.
259. See id. at 635 n.17 (explaining further that the same footnote allowing the Eleventh Circuit to look to the underlying dispute between parties also enabled the court to do the same with a section 9 petition, and further stating that the language of section 4 cannot be applied to section 9).
A. Contract Enforcement as the Purpose Behind a Suit to Compel Arbitration

Judge Marcus convincingly argued in his concurrence to Community State Bank that a court should consider a suit to compel arbitration as a matter separate from the underlying dispute. Further, Judge Marcus emphasized that courts unnecessarily look to the underlying claim between parties when only a breach of contract claim requires resolution. In accord with Judge Marcus's argument, this Note advocates for a resolution to this debate recognizing that arbitration petitions lie in contract law enforcement. State courts are equipped to resolve contract claims, and the policy to resist expansion of federal jurisdiction is best served by not elevating enforcement of arbitration agreements above contract claims.

In this legal debate, only two circuits—the Fourth and Eleventh—have allowed the court to look through to the underlying claim to establish jurisdiction. The upcoming rehearing en banc of Community State Bank may result in a reconsideration of the Eleventh Circuit's precedent, especially since the majority of circuits ruled the other way on this issue. Creating an exception to the general rule that federal courts are of limited jurisdiction by allowing parties to bring section 4 petitions (that amount to state breach of contract claims) to federal court undermines the very limitation under which these courts operate.

Furthermore, a court analyzing an underlying claim when considering the appropriate jurisdiction may end up positing an analysis on that underlying claim in the process of establishing jurisdiction. In this way, a court may end up making a determination and passing judgment, implicitly or explicitly, on the very dispute for the arbitrator to decide. Since Congress intended for the FAA to empower and encourage courts to enforce arbitration as a means of resolving disputes, the judiciary should not address claims meant for the arbitrator. Rather, the court should only address the dispute bringing the parties to the courtroom—enforcement of the arbitration agreement.

Before enactment of the FAA, parties were uncertain whether their contract could include an arbitration agreement. Today, however, parties may include arbitration clauses knowing they "are as effective and binding as other types of contracts." Furthermore, arbitration clauses are generally agreed to be separate contracts from the main contract.

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260. See supra notes 235-40 and accompanying text.
261. See supra notes 247-50 and accompanying text.
262. See supra notes 247-50 and accompanying text.
263. See supra note 223 and accompanying text.
264. See generally supra Part I.B.1.
265. See supra note 257 and accompanying text.
266. See supra notes 248-50 and accompanying text.
268. Id.
269. See supra note 229.
means that, even if the main contract is void or invalid, the court will uphold the agreement to arbitrate.\textsuperscript{270} Parties bringing claims to compel arbitration hope to enforce what the courts see as separate contractual disputes. Therefore, interpretation of the arbitration agreement, as separate from the main agreement between the parties, is the only issue the court should consider. In the event that a court does not uphold an arbitration agreement and the underlying dispute does address a federal question, the parties can bring suit in the appropriate jurisdiction to resolve the underlying cause of action in the new complaint.

Allowing courts to look through to the underlying claim conflicts with the longstanding rule that federal courts are of limited jurisdiction.\textsuperscript{271} The most reasonable interpretation of the FAA reinforces both the well-pleaded complaint rule and the rule that federal courts are of limited jurisdiction. The alternative unnecessarily expands the jurisdiction of federal courts and gives too much weight to arbitration agreements. Arbitration claims need not be heard in federal courts if state courts can effectively provide relief. The end result, after all, is for the issue to be heard by an arbitrator. Resolving the claim in state court without "looking through" to the underlying claim allows the real dispute between parties to go to arbitration for dispute resolution and award.

B. Consistency with Original Congressional Intent

Looking to the original intent of Congress, the FAA does not explicitly or implicitly supplant the well-pleaded complaint rule. Rather, the House report accompanying the Act points to "an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy . . . was adopted . . . by the American courts."\textsuperscript{272} Given that the House report does not declare the Act to overturn the well-pleaded complaint rule—a rule established through thirty-seven years of Supreme Court precedent—and that Congress's stated intent was to abolish judicial antagonism toward arbitration agreements, there is compelling evidence that the Act intended to provide a remedy to parties seeking to compel arbitration, and nothing more.\textsuperscript{273} In fact, some legal scholarship at the time suggested that the newly enacted FAA simply provided a remedy for parties wishing to enforce arbitration agreements.\textsuperscript{274}

An argument against this narrow view of determining jurisdiction under the FAA is that the Supreme Court encourages enforcement of arbitration agreements, and therefore federal courts should favor the establishment of

\textsuperscript{270} See supra note 15 and accompanying text.
\textsuperscript{271} See supra note 33 and accompanying text.
\textsuperscript{273} See supra notes 195–97 and accompanying text.
\textsuperscript{274} See supra note 59.
Professor Szalai touts this theory by also pointing out that federal courts should recognize jurisdiction in order to be consistent with the Supreme Court’s policy favoring arbitration. This Note does not find this perspective compelling for two reasons: (1) state courts can resolve arbitration petitions without expanding federal jurisdiction, and (2) Congress enacted the FAA as a way to ensure that arbitration claims were treated the same as other contract enforcement claims. After years of animosity by the judiciary toward arbitration agreements, it makes sense that the Court initially needed to provide an explicit declaration that these claims should now be upheld. This declaration does not signify that arbitration agreements deserve special treatment beyond ordinary contract claims. Rather, the judiciary should consider these petitions alongside other contract claims.

Furthermore, the potential increase in forum shopping if the court looks to the underlying claim is an undesirable side effect given what the party bringing the arbitration petition hopes to achieve—resolution by an arbitrator, not a court. By enforcing arbitration agreements, the federal courts can continue to uphold Congress’s original goal of relieving an overburdened judiciary through enforcement of alternative dispute resolution methods.

C. Resolution Through Congressional Revision

Congressional revision of the Act may provide the most practical means of resolving this disagreement over the interpretation of section 4 as well as other interpretation issues arising under the FAA. Considering the numerous ongoing differences among the circuits in interpreting the FAA, revision by Congress to clarify the Act’s provisions is overdue. Congress should not continue to leave the courts to debate the original intent of section 4. The needs of today’s parties engaged in arbitration are different than those contemplated when Congress drafted the original Act. Congress has the ability to reconsider these needs, rather than letting the patchwork of judicial opinions fill in what the courts believe Congress intended. Although the Supreme Court could at some unknown time in the future resolve the conflict among the circuits, the solution more immediately lies with a clear answer from Congress.

275. See supra note 31 and accompanying text.
276. See supra note 161 and accompanying text.
277. See supra notes 245–47 and accompanying text.
278. See supra note 27.
279. See supra note 80 and accompanying text.
280. See supra notes 5, 55 and accompanying text.
281. See supra note 73 and accompanying text.
282. See supra note 72 (noting suggested amendments to the FAA).
283. Foster, supra note 6 ("Under the circumstances, it would seem fitting for the U.S. Supreme Court to grant petitions for writ of certiorari in cases that present opportunities to resolve the issues dividing these courts. Yet there is only so much the court could do to improve the present state of arbitration law, in light of limitations inherent in the Federal
CONCLUSION

Section 4 of the FAA requires clarification because of the ubiquitous use of arbitration agreements today. Application of the broad interpretation of this dispute unnecessarily expands federal jurisdiction. When determining whether to recognize jurisdiction, courts generally require the petitioner to state the reason for jurisdiction on the face of their complaint. Despite the Supreme Court's urging for the judiciary to enforce arbitration clauses, there is no compelling reason for the FAA to carve out an exception to the well-pleaded complaint rule. Section 4 petitions amount to contract disputes and therefore can be resolved in state court; there is no sound reason to expand the federal courts' limited jurisdiction. Therefore, the narrow interpretation, as followed by the Second Circuit in Westmoreland and the Seventh Circuit in Ho-Chunk, provides the best interpretation of section 4 of the FAA.

Arbitration Act (FAA), a statute first enacted more than 80 years ago. Accordingly, the time may be right for Congress to modernize the FAA and bring greater clarity and consistency to arbitration law in the United States."