



# BURR ALERT

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## Judge Neil Gorsuch Lightens the Burden for Proving "Amount in Controversy" for Federal Jurisdiction

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When is a postage stamp like a lottery ticket? When purchased from Stamps.com according to one of its customers. Elizabeth Hammond of New Mexico filed a class action, seeking to recover the sum of \$31.98 each on behalf of approximately 300,000 customers.

The issue for Judge Neil Gorsuch's Tenth Circuit panel: *Can all those small claims tally up to the baseline \$5 million "amount in controversy" required to trigger federal jurisdiction under the Class Action Fairness Act?*

Yes, he answered, giving defendants an easier burden of proof to meet the "amount in controversy" under a rationale that can be applied equally to both class and individual claims. ***Hammond v. Stamps.com***, 844 F.3d 909 (10th Cir. December 20, 2016).

I deal with this issue all the time, typically asking a federal court to hear a case on behalf of an out-of-state defendant who has filed a Notice of Removal. The federal judge, having limited jurisdiction, wants me to convince him or her that the stakes are worth at least \$75,000.

Does this mean I have to prove "to a certainty" that the plaintiff's damages will exceed that sum? Or just that a "possibility" exists that the plaintiff (if successful) may be awarded that amount?

Judge Gorsuch weighed in, answering on the eve of his nomination to the U.S. Supreme Court. His opinion is both educational and entertaining.

Elizabeth Hammond sued Stamps.com alleging that she was duped by advertisements that failed to disclose that she had to pay a monthly *subscription fee* in addition to the cost of the stamps she printed. She alleged that at least 312,000 other customers were similarly situated, persons who canceled their account soon after incurring about \$32 each in fees. She sought punitive damages as well.

The judge in the district court declined jurisdiction, saying Stamps.com had not met its "burden" of showing that over \$5 million was "in controversy," having failed to demonstrate that all of the class members were deceived, when in fact some may have had other reasons for cancellation - injecting "commonality" into the jurisdictional equation.

This was error, the Tenth Circuit held, with Judge Gorsuch writing that the phrase "in controversy" is "heavily encrusted" with an "accepted meaning" that has grown up around it since the original 1800s statute that first authorized diversity jurisdiction. Quoting Justice Frankfurter, he said "if a word is obviously transplanted from another legal source, whether the common law or other legislation, *it brings the old soil with it.*"

That phrase, "in controversy . . . has never required a party . . . to show that damages 'are greater' or will *likely* prove greater 'than the requisite amount' specified by statute." Instead, a "more modest" standard should apply, whether "a fact finder *might* legally conclude" that damages may exceed the minimum." "As the U.S. Supreme Court has held, [to justify dismissal of the case] it must appear to *a legal certainty* that the claim is really for less than the jurisdictional amount."

Since the Hammond class members sought an average of \$31.98 in damages (plus punitive damages), and given the potential class size of 312,000, the Court accepted at least "the possibility that a jury might lawfully award relief between nearly \$10 Million and \$93 Million: 'a legal possibility that is more than enough to trigger federal jurisdiction.'" The district court was "mistaken" in requiring Stamps.com "to prove that a fact finder *would* (or *probably* would) find damages in excess of the statutory amount."

**"At the end of the day, even if it is highly improbable that the plaintiffs will recover the amounts Defendants have put into controversy, this does not meet the 'legally impossible' standard."**

"Amount in controversy" does not require mathematical precision, nor does it force a district judge to handicap a fight before the bout. "At this stage, we are just trying to decide the forum for the dispute, not liability or damages." A "more aggressive inquiry" should be reserved for the merits, in order to "keep cases from bogging down in mini-trials before they have even begun."

Judge Gorsuch noted the very real irony that "[s]uch an inquiry would, as well, force the proponent of jurisdiction to argue against himself . . . simply to get a foot in the door of the federal courthouse." In "no other arena" are such heavy demands imposed on a party seeking federal jurisdiction.

The Tenth Circuit's ruling came in a CAFA context, but this opinion is helpful just the same in all cases involving the phrase "amount in controversy."

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