

be maintained as a class action, see Me. R. Civ. P. 23(c)(1), and this court likewise has not yet done so under Federal Rule of Civil Procedure 23(c)(1), I treat it as a putative class action. See Doucette v. Ives, 947 F.2d 21, 30 (1st Cir. 1991). Accordingly, any projected attorney fees are to be prorated across the class. See Goldberg v. CPC Int'l, Inc., 678 F.2d 1365, 1367 (9th Cir.), cert. denied, 459 U.S. 945, 103 S. Ct. 259, 74 L. Ed. 2d 202 (1982); see also Spellman v. Meridian Bank, ___ F.3d ___, 1995 WL 764548, at *9 (3d Cir. Dec. 29, 1995).² The plaintiffs did not seek a specific dollar recovery for damages or attorney fees in their complaint. The burden is on the defendants, as the removing parties, therefore, to show that it is more likely than not that the recovery will exceed the jurisdictional amount as to each plaintiff, Gafford v. General Elec. Co., 997 F.2d 150, 159-60 (6th Cir. 1993); see also Burns v Windsor Ins. Co., 31 F.3d 1092, 1096 n.6 (11th Cir. 1994)³—*i.e.*, well

¹ (...continued)

analyze the jurisdictional question as if this were not a class action. As I understand it, the defendants argue that section 1367(a) provides for supplemental jurisdiction over claims asserted by members of the class other than the named representatives. Therefore, goes the argument, I must assess jurisdiction by considering only the representative plaintiffs and consequently must attribute all the attorney fees to them. That argument does not overcome the fact that the plaintiffs filed their complaint initially in state court as a class action and that it is within the plaintiffs' power to frame the nature of their complaint. It is true that ultimately the plaintiffs require judicial permission to proceed as a class action, but they have never purported to file individual claims. The "claims in the action" within the meaning of section 1367 are therefore the claims of these plaintiffs as representatives of the class. Thus the caselaw prorating the attorney fees across the class continues to be applicable.

² Two observations are appropriate. First, this is not a case like In re Abbott Labs., 51 F.3d 524, 526-27 (5th Cir. 1995), where the state statute awards the attorney fees exclusively to the representative parties. Second, attorney fees are not like punitive damages where "each plaintiff has an integrated right to the full amount of an award." Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1334 (5th Cir. 1995).

³ In St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938), the United States Supreme Court placed the burden on the plaintiffs in
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over \$40,000 in attorney fees per class member as prorated. The defendants simply have not met that burden. I therefore do not reach the supplemental jurisdiction arguments advanced by the defendants.

The plaintiffs' motion to remand is **GRANTED**.⁴

SO ORDERED.

DATED AT PORTLAND, MAINE THIS 15TH DAY OF MARCH, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

³ (...continued)

a removal action to show to a legal certainty that the sum claimed is for less than the jurisdictional amount, but that was a case where the plaintiffs had alleged in state court before removal an amount of damages that exceeded the jurisdictional amount and were trying to back away from their allegation. See also Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 5-6 (1st Cir. 1995). In a second category, where plaintiffs have specifically limited their recovery to less than the jurisdictional amount *before removal*, the Supreme Court has stated that removal is precluded. St. Paul, 303 U.S. at 290-91, 58 S. Ct. at 591, 82 L. Ed. 845. This case is in a third category—where no amount is alleged. Thus the moving party has the burden of demonstrating that the jurisdictional amount is satisfied.

⁴ At oral argument, the defendants maintained that I should decline to rule because there is also a remand action involving these plaintiffs now pending in federal court in Alabama with a motion to remand. Nevertheless, I construe the Judicial Panel on Multidistrict Litigation's rules as permitting me to rule and conclude that it is easier for me to determine the impact of Maine law on this individual case and to rule on the jurisdictional issue than to transfer it to the Multidistrict Panel, which has many other concerns.