(8) Employee Retirement Plan, (Continued)

On January 1, 1997, the Association adopted a 401(k) plan whereby employees were permitted to contribute up to 25% of annual salary. On January 1, 2002, the Association amended the existing 401(k) plan to be a 401(k) Safe Harbor Plan. The Association contributed 4% of each eligible participant's base compensation, with contributions totaling $32,834 and $33,991 in 2003 and 2002, respectively. Employee benefits vested at 100%, regardless of years of service. Employee contributions to the 401(k) Safe Harbor Plan were limited to $12,000 and $11,000 in 2003 and 2002, respectively, as defined by the Internal Revenue Service.

(9) Contributions to Law-Related Organizations

Contributions to law-related organizations for the year ended December 31, consist of the following:

	2003	2002
In-kind contributions:		
Public Law Center	$ 49,752	3,600
Constitutional Rights Foundation of Orange County	35,394	24,260
Charitable Fund	12,531	9,822
Total in-kind contributions	97,677	37,682
Cash contributions:		
Public Law Center	632,000	85,000
Constitutional Rights Foundation of Orange County	22,000	44,800
Orange County Bar Foundation	3,000	5,000
Volunteers in Parole, Inc.	12,000	12,000
Council on Aging	3,000	3,000
Other	-	500
Total cash contributions	672,000	150,300
Total contributions	769,677	187,982
Less funds received from members	(22,396)	(25,398)
Net contributions made	$747,281	162,584

During the year ended December 31, 2002, the Association provided at no charge a portion of its conference center to the Public Law Center. The Association determined the fair value of this contribution to be $3,600. This amount has been reflected as an in-kind contribution and an accrued liability as of December 31, 2002.

(9) Contributions to Law-Related Organizations, (Continued)

At December 31, 2001, the Association made an unconditional promise to provide at no charge a portion of its building to the Public Law Center, a nonprofit law-related organization, for the calendar year 2002. The lease agreement between the Association and Public Law Center expired on December 31, 2002 and the Association began providing the use of the building on a month-to-month basis. The Association determined the fair value of this contribution to be approximately $50,000 for the year ended December 31, 2003, based on comparable rental costs in the area. This amount has been reflected as an in-kind contribution and rental income for the year ended December 31, 2003.

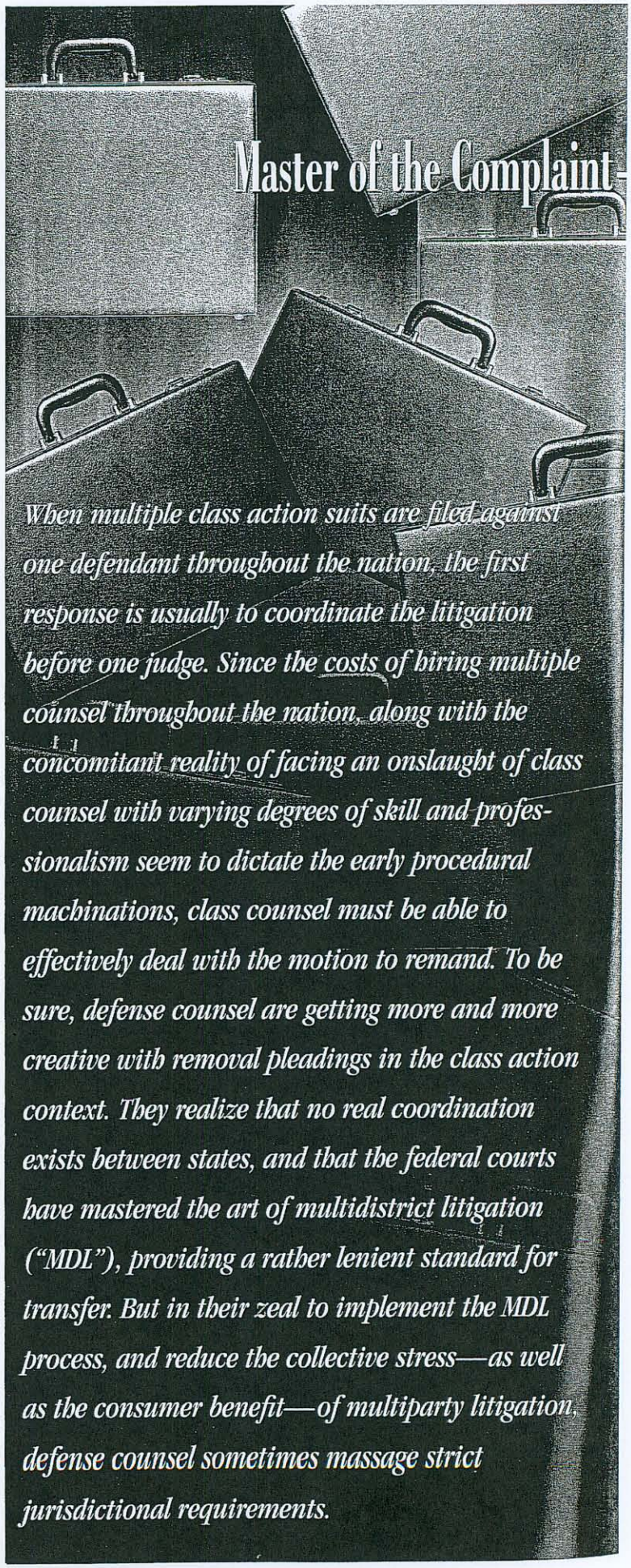
The Association made an in-kind contribution in the form of office facilities and administrative services to the Constitutional Rights Foundation of Orange County, a nonprofit law-related organization. The Association determined the fair value of this contribution to be approximately $35,000 and $24,000 in 2003 and 2002, respectively, based on comparable rental costs in the area.

The Association made an in-kind contribution in the form of office facilities and administrative services to the Charitable Fund, a not-for-profit organization under common operational control of the Association. The Association determined the fair value of this contribution to be approximately $12,500 and $10,000 in 2003 and 2002, respectively, based on comparable rental costs in the area.

The amounts reflected in the accompanying financial statements as in-kind contributions to the Constitutional Rights Foundation of Orange County and the Charitable Fund are offset by like amounts included in rental income.

(10) Net Assets

	2003	2002
Unrestricted net assets:		
Unrestricted, designated for future moving expense	$ 40,000	-
Unrestricted, invested in property and equipment	35,765	952,632
Unrestricted, designated for note receivable	274,111	-
Unrestricted, available for programs	1,270,620	1,244,118
Total unrestricted net assets	1,620,496	2,196,750
Permanently restricted net assets:		
Restricted for endowment fund	4,000	4,000
Total net assets	$1,624,496	2,200,750



The Role of Class Counsel

by Aashish Y. Desai

The Jurisdiction v. Transfer Issue

Class actions provide special problems for jurisdiction: aggregation of claims to meet the amount in controversy, resolution of substantial federal questions, and federal preemption are but a few of the challenges on a remand motion. However, many defendants will simply ask a court to transfer the case and then let the transferee court address jurisdiction. *Stewart v. May Dept. Store Co.*, No. 02-2772, 2002 U.S. Dist. LEXIS 24249, at *7 (E.D. La.Dec. 16, 2002). This helps the defense because once transferred, the momentum of the litigation will shift and militate against remand.

While the temptation is great for a district court to transfer the case and let someone else decide the crucial issues, class counsel must point out that without jurisdiction, a court lacks power to do anything. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998) (Article III jurisdiction is always an antecedent question). In fact, the accepted practice in the Ninth Circuit is to rule on remand motions before deciding motions to transfer. *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F.Supp. 1186, 1188-89 (N.D.Cal. 1997) (court weighing a motion to transfer is not required to postpone rulings on other motions merely because an MDL transfer motion is pending); *Johnson v. America Online, Inc.*, 2002 WL 1268397 (N.D.Cal. Mar. 21, 2002); *Smith v. Mail Boxes, Etc. USA, Inc.*, 191 F.Supp.2d 1155, 1157 (E.D.Cal. 2002). This practice is consistent with the wishes of the Judicial Panel on Multidistrict Litigation ("JPML") who has issued Panel Rule 1.5: "The pendency of a motion . . . before the Panel concerning transfer or remand . . . does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court." *State of Rio De Janeiro of the Federated Republic of Brazil v. Philip Morris, Inc.*, 239 F.3d 714, 715 (5th Cir. 2001) (upholding rule that district court should rule on remand before transfer order becomes effective). So the first line of attack for class counsel is jurisdiction, after which the merits of the remand motion can be addressed.

Removal Standard

A defendant may remove any civil case—including class actions—over which the United States district courts would have original jurisdiction. *See* 28 U.S.C. §1441(a). Courts should construe removal statutes strictly. *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). And the defendant seeking removal bears the burden of establishing federal subject matter jurisdiction. *Ahearn v. Charter Township of Bloomfield,* 100 F.3d 451, 453-54 (6th Cir. 1996). Of course, under the supplemental jurisdiction doctrine, if at least one of the plaintiff's claims is removable, then any purely state law claim in the case may also be removed. *See* 28 U.S.C. §§1367, 1441(c). Defendants can remove a case on two primary theories: Diversity jurisdiction and federal question jurisdiction. Each has its traps.

Diversity Jurisdiction

To bring or remove a case to federal court based on diversity jurisdiction, the parties must be completely diverse from one another and the matter in controversy must exceed $75,000. 28 U.S.C. §1332(a). Most removal issues do not question whether the parties are diverse from one another; rather it is the second prong that is challenged in class action settings. The requirement that the amount in controversy be greater than $75,000.00 must be "narrowly construed so as not to frustrate the congressional purpose behind it: To keep the diversity caseload of the federal courts under some modicum of control." *Packard v. Provident Nat'l Bank,* 994 F.2d 1039, 1044-45 (3rd Cir. 1993). Moreover, as the party asserting jurisdiction, defendants bear the burden of proving that jurisdiction is proper. *Id.* at 1045.

The Disgorgement and Constructive Trust Claims

Defendants often contend that by requesting that they disgorge all of their allegedly ill-gained funds into a constructive trust for the benefit of all of the class members, plaintiffs have created a common and undivided trust among the putative class members such that any one class member could recover all of the "ill-gotten profits" or "wrongfully obtained money" of the defendants. As authority for this proposition, defendants often cite to *In re Microsoft Corp. Antitrust Litig.*, 127 F.Supp.2d 702 (D.Md. 2001). It is readily apparent from a review of the relevant case authority that there is disagreement among the courts regarding whether a request for disgorgement creates a common and undivided interest and consequently whether the interest can be aggregated for purposes of determining the amount in controversy. See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (finding that a disgorgement plea did not trigger the non-aggregation exception); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255 (11th Cir. 2000) (same); *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418 (2nd Cir. 1997) (finding same); *McCoy v. Erie Ins. Co.*, 147 F.Supp.2d 481 (S.D.W.Va. 2001) (same); *but see Durant v. Servicemaster Co.*, F.Supp.2d 744 (E.D.Mich. 2001) (finding plea for disgorgement allowed plaintiffs' claims to be aggregated).

However, the majority view and, most importantly, the view of the Ninth Circuit is that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs." *In re Ford Motor Co./Citibank,* 264 F.3d 952, 961 (9th Cir. 2001). *Ford* held that "despite the cloak of collectiveness, the plaintiffs' disgorgement claim was not aggregable for jurisdictional purposes because the claim remains on behalf of separate individuals for the damage suffered by each due to the alleged conduct of defendant." *Id.* Defendants cannot evade *Ford* by re-characterizing what is, in effect, a request for aggregation as an argument to satisfy the amount in controversy requirement for federal jurisdiction.

In fact, in most consumer antitrust or unfair competition cases, class counsel should stress that each class member separately paid the artificially high prices to the defendants for product, drug or service; and each seeks to enforce his or her own right to recoup that money from them. Of particular import, the court should be aware that each class member could have brought suit on his or her own behalf: No collective right exists and "prior to litigation, no group status or common interest was involved." *Aetna U.S. Healthcare, Inc. v. Hoechst*

Aktiengesellschaft, 54 F.Supp.2d 1042, 1050 (D.Kan. 1999). To hold that by simply requesting disgorgement, plaintiffs could bring their state claims before a federal court, or that a defendant could remove such claims, would completely undermine the general rule that plaintiffs' claims in a class action may not be aggregated.

Moreover, unjust enrichment remedies do not provide a generalized recovery of a fixed fund for the class. Instead, each class member is entitled to their portion of the defendant's profits which resulted from the wrongdoing to that particular plaintiff. *Aetna,* 54 F.Supp.2d at 1050; *Ford Motor*, 264 F.3d at 961-62. Disgorged funds should, generally, be apportioned among the individual claimants rather than being treated as a single collective right in which putative class members have an undivided interest. *Id.* While the damages are admittedly based on a defendants' profits and sales, each recovery is an individual right and constitutes an individual interest. *Id.* Indeed, the notion that a class representative would individually be entitled to keep "billions of dollars" for himself or herself from a successful prosecution of a case is absurd.

Unjust Enrichment and Injunction Claims

Defendants also may argue that the consolidated unjust enrichment claim, which usually seeks the disgorgement of "millions of dollars" of "ill-gotten gains," satisfies the amount in controversy requirement. Implicit in this argument is that the cost of an injunction running in favor of just one plaintiff would exceed the $75,000.00 amount in controversy requirement. The Ninth Circuit, however, disagrees with both of these positions. *Ford Motor,* 264 F.3d at 960-62. The rationale mirrors that regarding the disgorgement and constructive trust argument above—namely, that these claims are not aggregable for jurisdictional purposes because they remain on behalf of separate individuals for the damage suffered by each due to the alleged conduct of the defendant.

Federal Question Jurisdiction

Another avenue for jurisdiction is federal question. The 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. *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392 (1987). Plaintiff is "master of his or her complaint" and is free to decide what law he or she will rely upon. Plaintiff may omit a meritorious federal claim if that is his or her choice. *Caterpillar,* 492 U.S. at 392. Because the complaint is usually clear as to whether federal law creates the basis for relief, defendants try to read between the lines and argue either substantial federal question or complete preemption.

Most class counsel would, therefore, benefit from an allegation in the complaint which clearly states not only that the amount sought for each class member is under $75,000, but that no claim is brought pursuant to federal law. This should be enough under the bedrock principle that the allegations of the complaint control for purposes of determining the jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 294 (1938) ("the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal . . . if he [plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove"); *Carpenter v. Wichita Falls Indep. Sch. Dist.,* 44 F.3d 362, 366 (5th Cir. 1995) (plaintiff has the right to avoid federal jurisdiction and preclude removal by relying exclusively on state law). Furthermore, absent clear Congressional intent to create removal jurisdiction, the prudent approach is to remand to state court. *Metropolitan Life Ins. Co. v. Taylor,* 107 S.Ct. 1542, 1548 (1987).

Substantial Federal Question

Despite this well-settled principle, defendants argue that the complaint raises claims that are "necessarily federal in character," to which the right to relief depends upon the resolution of a "substantial question of federal patent law." Under Ninth Circuit law, a claim is "necessarily federal" when it falls within the express terms of a statute granting federal courts exclusive jurisdiction over the subject matter of the claim. *Brennan v. Southwest Airlines Co.,* 134 F.3d 1405, 1409-10 (9th Cir. 1998).

Similarly, a claim raises a substantial question of federal law when its resolution requires reference to or interpretation of federal law.

Duncan v. Stuetzle, 75 F.3d 1480 (9th Cir. 1996). The Ninth Circuit in *Duncan* held that to show that the plaintiff's claims required resolution of a substantial federal question, the defendant "must show that resolution of a federal [trademark] law question is essential to *each* of the alternative theories in support of *any one* of the three causes of action in the complaint. Stated another way, if a single state-law based theory of relief can be offered for each of the three causes of action in the complaint, then the exercise of removal jurisdiction was improper." *Id.* at 1485 (emphasis in original). The Ninth Circuit then analyzed each of the plaintiff's claims and concluded that removal was improper after determining that there was a state law theory of recovery for each claim. *Id.* at 1490-91. Accordingly, the class members' claims only raise a substantial question of federal law if their validity turns on the interpretation or application of federal law.

For example, this author is aware that in pharmaceutical antitrust class actions, defendants have creatively argued that the class members' claims require the resolution of substantial questions of federal patent law because the allegations of wrongdoing are based on conduct in obtaining and enforcing their patent rights. In other words, the defendants argue that the class cannot prove their state law claims without resolving questions of federal patent law. However, the class members can establish a violation of their state Cartwright Act claims without reference to the "construction of federal patent law standards." To prevail on a cause of action under the Cartwright Act for a combination in restraint of trade, a plaintiff is required to establish "the formation and operation of the conspiracy; the illegal acts done pursuant thereto; a purpose to restrain trade; and the damage caused by such acts." *G.H.I.I. v. MTS Inc.,* 147 Cal.App.3d 256, 265 (1983). Thus, the monopolization claim is much broader than the patent issue, which is helpful but not essential to the antitrust theory.

The United States Supreme Court in *Christianson v. Colt Industries Corporation,* 486 U.S. 800 (1988), held that the antitrust claims against a manufacturer did not "arise under" the patent statutes. The court said the thrust of the plaintiff's monopolization claim was that the defendant "embarked on a course of conduct to illegally extend its monopoly position" with respect to various patents—namely, that the defendant made "false assertions" in its letters

and pleadings despite its knowledge that its patents were invalid under the law. *Id.* at 810-11. The defendant argued that "the validity of the patents is an essential element of petitioners' prima facie monopolization theory and the case 'arises under' patent law." *Id.* at 811. The Supreme Court, however, held that "the well-pleaded complaint rule, however, focuses on claims, not theories . . . and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim 'arises under' patent law." *Id.* at 811 (emphasis supplied).

Complete Federal Preemption

The final argument for jurisdiction is the doctrine of "complete preemption" under federal law. Federal preemption is generally a defense, which alone would not support removal. *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63 (1987). A further corollary to the well-pleaded complaint rule, however, "is that Congress may so completely preempt an area that any civil complaint raising from this select group of claims is necessarily federal in character." *Id.* at 63-64. When federal law entirely occupies a particular field, that occupation "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987). Stated differently, removal jurisdiction exists when a plaintiff's state law claims arise out of events or circumstances within a field entirely occupied by federal law. Such preemption is extremely rare. *Hendricks v. Dynegy Power Marketing, Inc.,* 160 F.Supp.2d 1155, 1158 (S.D. Cal. 2001). Even when federal law preempts state law, a state law claim may not be removed unless federal law also supplants it with a federal claim. *Young v. Anthony's Fish Grottos, Inc.,* 830 F.2d 993, 997 (9th Cir. 1987) (federal law must both completely preempt the state law claim and supplant it with a federal claim).

The Supreme Court first developed this doctrine in the context of the *Labor Management Relations Act. Avco Corp. v. Machinists,* 390 U.S. 557 (1968). But this argument has been most effective under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* ("ERISA"), even if the claims seemingly have precious little to do with health care benefits. *See, e.g., Davis v. SmithKline Beecham*

Clinical Labs., Inc., 993 F. Supp. 897 (E.D.Pa. 1998). Defendants usually argue that the class seeks to "usurp the role of plan fiduciaries" and to "interfere with the web of ERISA-governed relations" simply by requesting relief that may have some relationship to medical or drug costs. However, simple consumer protection claims that do not involve issues of coverage or benefits for plan beneficiaries and participants should not be recast into federal causes of action. *Davis* can be distinguished because the plaintiffs' complaint explicitly sought relief on behalf of persons who paid for clinical laboratory tests performed as self-insurers, patients or contributors to "ERISA welfare benefit plans." *Id.* at 899. Obviously, class definitions for most consumer class actions should avoid any reference to benefit plans or ERISA, unless the case actually involves coverage or benefit claims. Class counsel should also be aware that courts are required to decide ERISA preemption based upon the claims of the named plaintiff, not the prospective class members. *Berthelot v. Stallworth,* No. 99-3618, 2000 U.S. Dist. LEXIS 1933, at *7 (E.D.La. Feb. 17, 2000). The fact that future claims of some class members may relate to ERISA does not establish ERISA preemption of the named plaintiff's claims. *Jamb v. California Physicians Service,* No. C-93-2962 MHP, 1996 U.S. Dist. LEXIS 1477, at *13 (N.D.Cal. Feb. 6, 1996). This provides yet another reason to carefully screen and interview potential class representatives before naming them in a complaint.

Conclusion

Successfully fighting a removal can make the difference between advancing the class members' claims to settlement or being thrown out of court on a motion to dismiss. Not all cases, however, belong in state court and there are many advantages in federal court, ranging from attorneys' fees (percentage of the benefit) to open discovery (FRCP 26) for class counsel. So filing a motion to remand should be a thoughtful decision. However, as class counsel, you have the ability to file your action in the forum of choice. Remember, class counsel is the "master of his or her complaint." OCBA

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