Bulletin

February 2011 – No. 1/2011

Risk Alert

A joint publication of the Attorneys Fidelity Fund and the Attorneys Insurance Indemnity Fund (Association incorporated under S21 of Act 61 of 1973)

In this edition

Risk Manager's Column

In the November *Bulletin* 5/2010, on pages 5 and 6, we published an article about MVA undersettlements. Most of the cases discussed related to settlements made on behalf of minors. Recently, one such matter took an interesting turn!

The attorney acting on behalf of the *curator ad litem* assisting two minors, brought an action against the Road Accident Fund (RAF) on the basis of the common law rule of *restitutio in integrum*.

Briefly, the claim of the two minors had been undersettled with the RAF at the insistence of their mother. She advised her attorney that they had both fully recovered from their injuries and refused his recommendation that they be sent for medico-legal examinations. It subsequently transpired that the minors had indeed suffered serious brain injuries.

In the subsequent action against the RAF, the plaintiff alleged that contracts entered into by minors assisted by their guardians or by their guardians on their behalf and which negatively affect their rights, are void.

The RAF settled the matter on this basis and agreed to pay the minors their full damages.

Space permitting, I will discuss this matter in more detail in a future *Bulletin*.

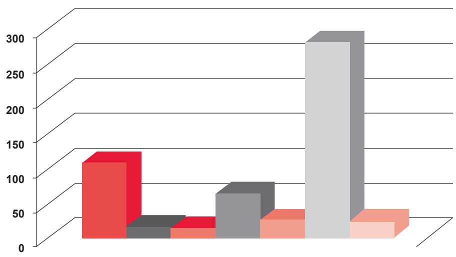
The Rules Regulating the **Conduct of the Proceedings of the Magistrates' Courts Act of South Africa,** were published in the *Government Gazette* 33487 on 23 August 2010 (GNR.740)

The commencement date was fixed at 15 October 2010 in *Government Gazette* 33620 of 8 October 2010 (GN 888).

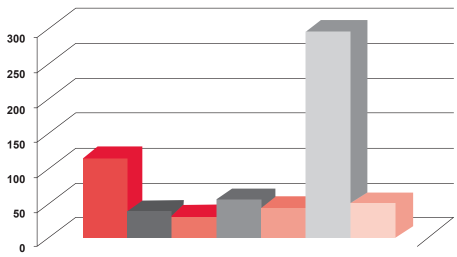
We would be pleased to have **practitioners' feedback on their experiences since the commencement of these rules.**

CLAIMS STATISTICS

Claims breakdown:
01 July 2008 – 30 June 2009



Claims breakdown:
01 July 2009 – 30 June 2010



MVA PRESCRIPTION
MVA UNDERSETTLEMENTS
GEN. PRESCRIPTION
LITIGATION
COMMERCIAL
CONVEYANCING
OTHER

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CLAIMS STATISTICS AS AT 30 SEPTEMBER 2010 (summary of incurred position*)

Insured year	Claim type description	% No of total	Count of claim number	Sum of total incurred	% Val of total
2010	Conveyancing	34.6%	44**	5 672 337**	39.00%
2009	Conveyancing	46.30%	308	38 028 296	53.40%
2008	Conveyancing	54.00%	357	45 197 478	44.50%
2007	Conveyancing	35.70%	144	14 650 382	22.30%
2010	MVA Prescription	18.90%	24**	3 525 000**	24.40%
2009	MVA Prescription	17.20%	116	10 463 694	14.70%
2008	MVA Prescription	18.70%	124	12 689 268	12.50%
2007	MVA Prescription	22.60%	91	16 395 746	24.90%
2010	MVA Under- settlements	7.60%	9**	1 551 000**	12.20%
2009	MVA Under- settlements	6.00%	39	5 301 790	7.40%
2008	MVA Under- settlements	2.70%	18	4 082 527	4.00%
2007	MVA Under- settlements	3.70%	15	6 497 579	9.90%
2010	Litigation	19.60%	25**	1 495 100**	10.30%
2009	Litigation	9.00%	60	4 355 511	6.10%
2008	Litigation	10.10%	67	7 055 167	6.90%
2007	Litigation	18.90%	76	11 575 199	17.60%

* The incurred position takes into account all amounts already paid out in respect of capital and costs as well as amounts reserved for probable payment.

** These figures show the situation only after the first quarter of 2010, whereas the figures for 2007 – 2009 are for full years as they looked at 30 September 2010.

Conveyancing

As can be seen from the above table, **conveyancing** has been in the limelight for the past four years.

This claim type seems to have reached a peak in 2008 and 2009 when it represented around **half** the claims notified to the underwriters, in both number and incurred value. It is still very early to predict how the 2010 year will look when it is mature, but the number of conveyancing claims as at 30 September 2010 was proportionally in line with the 2007 year, representing approximately **one-third** of all claims.

We are therefore cautiously optimistic that the exclusion of the majority of bridging finance-related matters will see a noticeable reduction in these conveyancing claims in the 2010 year of insurance.

The fact that one-third of all claims (in number and value) were notified to us by conveyancers is nonetheless cause for concern. It is clear that the underwriters will need to take further remedial action to address the problem, if this trend continues.

The board of the AIIF is considering the possibility of introducing penalty deductibles for conveyancing matters. In this regard, we have already issued several warnings to the profession, via the *Risk Alert Bulletin,* of the likelihood that the deductibles for these matters will be increased to the same level as those currently in place for prescribed MVA matters.

If any conveyancers have suggestions and/or risk management tips that could lead to a reduction in the number of conveyancing related claims, they would be very welcome.

Please read the article about "Red Flag Areas in Conveyancing Practice on our website (**www.aiif.co.za**)

MVA Prescriptions

In the early years of the scheme, **MVA prescriptions** led to a high proportion of the number of claims notified to the underwriters. The table above shows that, for the past three years such claims have occupied second place to conveyancing claims, by a substantial margin. It is interesting to note that, in the current year, the number of these claims is similar to the number of claims arising out of litigation problems.

Litigation

Litigation matters at one time occupied a significant slice of the claims pie, but they no longer played a major role in the 2008 and 2009 years, as is evident from the table above. In the first part of the 2010 year, these claims have again increased proportionately. The AIIF will need to monitor whether or not these claims continue to vie for second place in the remainder of the 2010 year.

Please also have a look at the article entitled "Litigation Do's and Don'ts" on our website.

MVA Undersettlements

Claims for the **under-settlement of MVA** matters although not significant in number, represent a fairly high percentage in terms of incurred value. (The amounts paid out in these matters are often higher than those for prescribed MVA claims.) We are continuing to monitor these claims. I refer readers to my article on this topic, which was published in the November *Risk Alert Bulletin* 5/2010 and which includes several case studies. I also refer to the case discussed briefly in my column on page 1 of this *Bulletin*.

Unauthorised Payments of Trust Money

We are currently also investigating more closely, the matters which involve **unauthorised payments of trust money** by practitioners, which is a trend that occurs across the various claim types, but mostly in conveyancing matters.

Year	Unauthorised Payments	Conveyancing	Other
2010 (Q1)	10	9	1
2009	67	54	13
2008	26	18	8

In the 2010 year, there are already 10 such claims, 9 of which arise out of conveyancing matters. In 2009 there were 67 such claims, 54 of which arose out of conveyancing transactions. In 2008, 18 of the 26 matters arose out of conveyancing instructions. Other areas in which these claims arise are litigation, commercial and matters involving trustees/executors/administrators.

Risk management tips

Topics in this series so far:

- Engagement Management (May 2010)
- Managing Client's Expectations (August 2010)
- Analysing the Facts and the Law (November 2010)
- Deciding on and Planning an Appropriate Strategy (Part One) (November 2010)

1. DECIDING ON AND PLANNING AN APPROPRIATE STRATEGY (PART TWO).

In advising client and deciding on a strategy, *inter alia* the following need to be carefully considered:

- Whether there may be more than one plaintiff and/or defendant.
- The possibility of a defendant/defendants becoming insolvent or absconding in the time it takes for a matter to come to trial.
- All possible causes of action that might arise from the facts.
- Timing.
- Resources.
- Strengths and weaknesses of client's case. (Be as objective as possible.)
- All external factors that might have an impact on the matter, such as availability of witnesses, possible court backlogs.

Once you and your client have decided on an appropriate strategy, an important consideration is whether or not you have/your firm has the appropriate legal knowledge, experience, resources and time to take the matter on. Some questions you might consider are the following:

- Could I delegate part or the whole of this matter to another staff member?
- Would my client object to this?
- How closely would I need to supervise?
- What if the matter requires action to be taken in another jurisdiction?
- Do we have a branch office there/Do we have a reliable correspondent? Does client understand what this will entail?

Risk management tips continued...

2. DEALING WITH A MATTER TRANSFERRED FROM ANOTHER ATTORNEY

Believe me! This is always risky even if the matter is transferred between attorneys in the same firm. It can be a professional indemnity claim waiting to happen.

The facts need to be checked, as do the legal issues. No assumptions should be made. The difficulty very often lies in trying to reconstruct the developments in the matter up to the time it is transferred.

If the client has cancelled the mandate of the previous attorney, because of dissatisfaction with the progress of the matter, there is a good chance that the file may well be chaotic and the previous attorney uncooperative.

We have had several claims where the attorney took over a matter with disastrous consequences. In two such matters:

The transferred file showed that the previous attorney (A) had lodged the claim and drafted and issued the summons against the RAF. There was no proof of service on file. The client told the new attorney (B) that A had advised him that the summons had been served. B did not double check with the RAF. The summons had in fact not been served and by the time B discovered this, the five-year period for the service of summons had lapsed.

In a similar matter, the claim became prescribed because the second attorney incorrectly assumed that the first attorney had lodged the claim with the RAF. Although there was a letter on file, addressed to the RAF and purporting to lodge the claim, for some reason it was never delivered. By the time the necessary enquiries were made, it was too late.

In the two cases discussed above, the practitioners were unaware that the clients' claims were close to prescription. However, we have dealt with numerous claims in which the practitioner agreed to take over a matter, being fully aware that prescription was imminent. This is risk management suicide! Of course the claimants usually end up successfully claiming against these attorneys.

TAKE NOTE!

- Avoid accepting transferred files wherever possible.
- Avoid accepting matters where prescription is imminent and/or there is insufficient time to take the necessary action.
- Make no assumptions about the matter.
- Check all facts and legal issues (the prescription date on the file cover may well be incorrect).
- Peruse the file very carefully and make the necessary enquiries (from client, the previous attorney and any other parties involved) before accepting the mandate.
- Conduct proper engagement management (see Bulletin 2/2010).
- Manage your client's expectations (see Bulletin 4/ 2010).
- Manage the matter.

3. IMPLEMENTING AND MANAGING THE STRATEGY

Now that you know your client and his/her expectations and have aligned your strategy accordingly, you are ready to implement the appropriate strategy.

In the broader sense, are procedures and structures in place in your practice, to facilitate the smooth implementation of your strategy? Are you confident that other staff members will be able to continue running your matter if there is an emergency? What if you suddenly fall ill?

Your practice should have its own standardised procedures and minimum operating standards (MOS) that will allow for a seamless transition where a matter is handled by another person. If there is such standardisation, then the margin for errors and misunderstandings is substantially decreased.

If your file is well managed, in accordance with your MOS, it becomes a much simpler matter for a colleague to pick up on what has been done and what must still be done to keep the matter on track, in line with your strategy.

3.1 Working Plans

Your MOS should make provision for a **Working Plan** for every matter.

Prepare a written plan for each matter. This should set out the procedures that need to be followed and the planned outcomes.

In drawing up your Working Plan, you might consider, inter alia :

- What needs to be done to achieve the desired and agreed outcomes.
- Timing issues such as imposed time limits (eg prescription, court rules) and problems that could affect timing.
- What occurrences/unknown or unexpected elements could alter the outcomes.
- Contingency plans.

There is always the chance of unforeseen circumstances affecting your strategy. Your instructions/ mandate and strategy may have to be adapted from time to time, which will also necessitate changes being made to your Working Plan.

If the Working Plan is communicated to client in appropriate layman's terms, s/he is less likely to feel alienated and will usually feel more involved in and in control of the matter. There is a better chance that the client will take some shared responsibility that will assist in the smooth running of the matter.

Practitioners very often explain to us that a matter has become prescribed or gone awry, because they have had difficulty in getting the necessary instructions, assistance and /or documents from their clients. If the client sees the bigger picture and understands the time limitations better, this problem can often be avoided. Client is more likely to co-operate and timeously provide you with whatever you request to ensure progress in the matter.

You may also find that one of the benefits of this approach is that client tends to telephone or e-mail less often with enquiries about progress.

As each step is "ticked off" both you and client (or anyone taking over the matter) can see how it is progressing and what further steps need to be taken.

3.2 Checks and Balances

Drafting of documents is an area in which there are often errors that lead to claims being made against practitioners. Surprisingly, problems often do not result from the attorney's lack of legal knowledge and expertise, but rather from errors that have crept in and not been picked up in time.

In one such matter the attorney (A) finalised the drafting of a complicated lease agreement and sent it to his client (the lessor) for signature. Luckily, the client noticed that A had put in a rental amount of Rx per month, instead of the substantially larger amount of Ry. The client drew A's attention to this error and the latter undertook to amend it. The client then signed the lease and sent it back to A, who unfortunately forgot to change the rental amount and sent it on to the lessee's attorney (B). B's client snatched at the bargain and signed the lease for the lesser amount. Thereafter, the lessee denied that the rental should have been a higher amount and the lessor had to apply for rectification of the agreement.

Practitioners need to introduce and adhere to stringent MOS in the drafting and checking of documents. The following points should be considered:

- Where a lengthy document or contract is being drafted and constantly amended, each new draft needs to be thoroughly checked anew, numbered and retained for record purposes.
- It might also be helpful for record purposes to write client's instructions on the draft to be amended.
- Some practitioners find it helpful to have a skeleton of the important dates, figures, and key words for each paragraph, to check the final draft against.
- Also it can prove useful to monitor the word count and track changes.
- It is a good idea to get a "fresh set of eyes" to check a document that you may have become too familiar with.
- No matter how much pressure is placed on you, do not take the risk of failing to give enough time to proof reading.

Once the properly checked final document is ready for submission or signature, the practitioner's vigilance must continue. S/he must ensure that it is properly signed and dated by the correct parties, without any amendments.

We have recently been advised of a matter in which the attorney sent documents to a purchaser, who made certain amendments to it before signature. The attorney failed to notice the changes, as did his client.

Every practice needs to ensure that the full responsibility for any given file does not fall onto the shoulders of only one person.

You might, for example, have a **centralised diary system** for your practice. You may perhaps have a system whereby both the secretary and the attorney keep a diary of the matters that need to come out of diary. Whatever your system, it needs to work effectively for you and your staff.

Likewise, it is an excellent idea to have a system of **file reviews or audits** to pick up any possible problem at an early stage. This will increase your chances of timeously discovering;

- inadvertent errors made in the handling of matters;
- bad practice habits and non-adherence to your MOS;
- dishonesty and
- matters that have not come out on the diarised dates or have been filed away without a new date.

Such an audit might well have prevented the following problems from occurring:

The attorney had particularly difficult particulars of claim to draft in a Magistrates' Court matter. She kept putting it off, but eventually applied herself and worked late one night finalising the draft that her temporary secretary had typed up for her. It was a huge relief to strike this document off her pre- holiday "to do" list. She then went on holiday and by the time she laid hands on the file again, the inevitable had happened and the claim had become prescribed without the summons having been served on the defendant.

We have come across numerous instances over the past year or two, where conveyancers have not diligently reviewed files and have left their conveyancing secretaries to run matters - with consequently disastrous consequences.

In one such firm, the secretary applied for bridging finance on several transactions, where neither of the parties had in fact requested such finance. She forged the signatures of the parties on the applications and that of the conveyancer on the undertakings. She then instructed the bridging financier to deposit the loan into her creditors' and her boyfriend's accounts

3.3 Delegation.

In the handling of a matter, it is very often necessary and practical to delegate either responsibility for the entire matter or certain portions of it to a junior colleague or one with expertise in a particular area of law. Your MOS should cater for this situation, and the following should be noted:

- Your client should be made aware of the delegation and of the delegate's contact details.
- Delegate in writing, setting out precisely what is being delegated and setting timelines.
- The delegation needs to be placed in context. The background, strategy and Working Plan must be provided to the delegate.
- The task delegated must be matched to the delegate's capabilities and capacity.
- Remember that you remain accountable to client in spite of the delegation.
- If necessary, the delegate should be trained and supervised in his/her performance of the task.
- Ensure that you keep the delegate updated on any new developments in the matter that may have an impact on his/her task.
- Set up contact times and take enough time to discuss the matter and answer any questions that may arise.
- Encourage the delegate to share ideas and information with you. Very often two heads are better than one.

3.4 File Notes and File Order.

A "Usable Trail" should be regarded as essential in any MOS.

To be effective, file notes should ideally :

- be as contemporaneous as possible and not be reconstructed at a later date.
- be dated, and signed and preferably record the time spent on the conversation.
- be legible, clear, concise and to the point.
- Include all significant issues that were covered in the discussion.

It goes without saying that files should be well ordered, chronological and complete. The file should be a comprehensive record of all work done and activities in the matter. Drafts should preferably be kept in separate sub-folders to avoid confusion.

If for any reason it becomes necessary for someone else to handle your matter (whether on a temporary or permanent basis) it is essential that the file is well ordered and that there are adequate file notes. All telephonic and face to face discussions must be recorded in writing and better still, immediately confirmed in a letter or e-mail.

If an attorney goes on leave, for example, it is a very precarious practice to simply chat about the matter to your "locum", who is unlikely to remember everything. Without written records and instructions, the "locum" may well make incorrect assumptions about the matter or fail to carry out an important step.

A company owned a property. One of the directors bought the property from the company and the firm of attorneys was instructed by the seller to collect payment of the purchase price and attend to the transfer of the property. There were a number of delays in the matter, and in the interim, both the conveyancer and paralegal attending to the matter left the practice. The file was handed over to another paralegal, who was advised by the departing conveyancer that the purchase price had been paid by the purchaser directly to the seller.

There was no record of this payment on file. There were no file notes to this effect either. When all transfer and other conveyancing costs had been paid, the property was transferred into the name of the purchaser. Only once the seller enquired after the proceeds of the sale, did it become apparent that the purchase price had in fact not been paid.

- **Not only is it difficult for a friendly colleague to know what is happening in the file in the absence of proper written notes, but it is fertile ground for an unfriendly colleague and past client or third party to make allegations of negligence that cannot be disputed because of a lack of any supporting documentation.**
- **Of course, another benefit of keeping comprehensive file notes is that they ensure that comprehensive attorney and client accounts and party and party bills of cost can be supported.**

Risk management tips continued...

- **It is surely negligent not to be in a position to collect full party and party costs awarded to your client because of a lack of file notes or missing documents.**

Many of the above ideas are strongly influenced by the course notes provided to me by LawCover Insurance (Pty) Limited in Sydney, Australia, when I recently attended a series of risk management workshops there. I acknowledge, with thanks, their kind permission to use their notes to assist me in drafting this article.

Ann Bertelsmann

RAF News

The amounts referred to in s17 (4) (c) of the Road Accident Fund Act 56 of 1996, as amended, were adjusted to R182 047.00 as from 31 October 2010 by notice 148 in GG 33677.

1. APPEAL TO THE CONSTITUTIONAL COURT BY LSSA AND THREE OTHERS

The appeal to the Constitutional Court was heard on the 12 August 2010. It is by now old news that judgment was handed down on 25 November 2010 and that the validity of sections 17 (4) (c) and 21 was upheld.

The good news for all is that the appellants were successful in persuading the Constitutional Court to strike down Regulation 5 (1) of the Road Accident Fund Act 56 of 1996, as amended.

The Honourable Moseneke DCJ held that:

"I am satisfied that the UPFS tariff* is incapable of achieving the purpose which the Minister was supposed to achieve, namely a tariff which would enable innocent victims of road accidents to obtain the treatment they require. UPFS is not a tariff at which private health care services are available; it does not cover all services which road accident victims require with particular reference to spinal cord injuries which lead to paraplegia and quadriplegia. The public sector is not able to provide adequate services in a material respect. It must follow that the means selected are not rationally related to the objectives sought to be achieved. That objective is to provide reasonable healthcare to seriously injured victims of motor accidents.

I may briefly add that, even if Regulation 5(1) were found to be rational, the tariff is in any event under-inclusive in relation to the healthcare needs of quadriplegic and paraplegic road accident victims and, for that reason would be unreasonable and thus in breach of section 27(1)(a) read together with section 27(2) of the Constitution.

Having reached this conclusion I need not resolve the balance of the constitutional complaints in relation to the tariff. I would accordingly strike down Regulation 5(1) and the Minister would be obliged to make a fresh determination."

**This is the Uniform Patient Fee Schedule, which is 300% to 500% lower than the tariff paid by the Workman's Compensation Commissioner.*

The Learned Judge held further:

"Nor do I intend to limit its retrospective application. The retrospective application to the date the Regulation took effect, will ensure that the liability of the Fund for healthcare needs of victims of motor accidents and in particular quadriplegics and paraplegics who fell victim to road accidents from the inception of the amendment up to the date of the order remains intact. The order is intended to afford victims of motor vehicle accidents compensation for medical treatment or health services to which they would have been entitled had the Amendment Act not been passed."

Therefore, the court struck down Regulation 5(1) with retrospective effect. The Fund will consequently be liable for the cost of healthcare needs for accident victims from the inception of the amending act in August 2008.

The judgment puts an end to much of the uncertainty experienced by RAF practitioners in the wake of the constitutional challenges on the amendments. It remains now for practitioners to make the best of the new system and to ensure that clients' rights are properly looked after. **In this regard, please ensure that you and your staff are familiar with the requirements of the amended act, particularly with regard to claims for general damages for serious injuries. NB. You may wish to read the article written on this topic by Nicolette Koch, for the November edition of De Rebus.**

As this is a new and therefore undeveloped area, we would appreciate practitioners' inputs on their experiences, to enable us to pass on information to others.

In this regard, please see the Letters to the Editor column on page 8

CONVEYANCING

SHARING OF FEES AND TOUTING

The Attorneys Fidelity Fund has requested that we draw your attention to the judgment in *The Law Society of the Cape of Good Hope v André Louis Nesbitt Berrangé*, which was delivered on 9 June 2005 in the CPD under Case no 3475/04.

The Cape Law Society made application for the suspension of Mr Berrangé for unprofessional conduct in breach of their Rule 14.6.1.1. The Rule provides:

"14.6 Sharing of fees

14.6.1 A member shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation, the result or potential result whereof is –

14.6.1.1 To secure for the member professional work solicited by an unqualified person; …"

After having entered into "marketing agreements" with Mr Berrangé , certain estate agents referred a large amount of conveyancing work to him and received substantial payments from his firm.

Desai J, (with Erasmus J concurring) concluded that the marketing agreements considered together with schedules of property transfers, invoices and the direct correlation between the marketing fees and the number of transfers referred had the potential of incentivising the referral of work by an unqualified person. He decided that this was "the most plausible explanation of the evidence, viewed in its totality."

He held that, on a balance of probabilities "the respondent **in fact** secured conveyancing work that was solicited by the agencies as a result of their marketing agreements and the understanding with regard to payment."

The Respondent was accordingly found to be in breach of the Rule and guilty of unprofessional conduct. The court ordered his suspension from practising for a period of two years and also ordered him to pay costs on the attorney and client scale.

Please note that the other three Law Societies agree that such conduct would amount to touting and would be regarded as unprofessional in their jurisdictions as well.

LETTERS TO THE EDITOR

Some time ago, we received the letter below:

I enjoy reading the monthly bulletins.

I, however have one suggestion to make, namely, is it not possible to use a type of **matt printing paper**, rather than the current **gloss printing paper**.

I usually read the bulletins under a fluorescent light in my office, which tends to shine if the bulletin is not held at the correct angle. For instance the yellow supplement to the De Rebus makes reading much easier. I have the same problem reading the De Rebus or any other glossy publication.

Best Regards.

At van Niekerk

Dear At

Thank you for your comments. You will have noticed that, starting with the November edition, we have been printing the *Bulletin* on Sappi's "triple green" paper, which is a matt, sustainable alternative to the previous glossy one.

Ann Bertelsmann

Editor/Risk Manager

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I have received several enquiries from practitioners who want to know where they can get hold of the 6th Edition AMA Guide. So far, we have established that the price is around R2590.00. One supplier is Medsien Medical Bookshop (051 436 95670). I am sure there are other suppliers. Please let me have details.

Ann Bertelsmann

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