OA 11-6-95 047

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 86,213

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, and STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Appellants/Cross-Appellees,

vs.

ASSOCIATED INDUSTRIES OF FLORIDA, INC., PUBLIX SUPERMARKETS, INC., NATIONAL ASSOCIATION OF CONVENIENCE STORES, INC., and PHILIP MORRIS, INC.,

Appellees/Cross-Appellants.

AMICUS CURIAE BRIEF OF WINE AND SPIRITS DISTRIBUTORS OF FLORIDA, INC. IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

On Direct Review of a Final
Order of the Second Judicial Circuit,
Certified for Immediate Resolution

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INTEREST OF *AMICUS CURIAE*

Amicus Wine and Spirits Distributors of Florida, Inc. is a voluntary trade association representing two of the three major wholesale distributors of alcoholic beverages within the State of Florida. For 49 years, the organization has functioned as an information gathering resource for its members, issuing reports identifying the amounts of sales of various alcoholic beverage products, and containing other information of interest to distributors of such products.

The Wine and Spirits Distributors of Florida, Inc. files this Brief in support of Appellees/Cross-Appellants, because the association's members are concerned that the arguments advanced by the State in support of § 409.910, Fla. Stat., jeopardize the rights of manufacturers and distributors of all legal, commercially popular, but potentially harmful products. While respecting the obligation of the State to expend funds under the Medicaid program, and to seek reimbursement from actually liable third parties, the Wine and Spirits Distributors of Florida, Inc. respectfully submits that third parties subjected to such liability must be guaranteed their full panoply of constitutional rights.

This Brief is filed with the written consent of all parties. Letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Wine and Spirits Distributors of Florida, Inc. adopt the Statement of the Case and Facts contained in the Brief for the Appellees/Cross-Appellants.

STATEMENT OF THE ISSUES

I.

DOES § 409.910, FLORIDA STATUTES, UNCONSTITUTIONALLY ENCROACH ON THE JUDICIARY'S EXCLUSIVE POWER TO PRESCRIBE RULES OF PROCEDURE IN CIVIL LITIGATION?

II.

WOULD RETROSPECTIVE APPLICATION OF § 409.910, FLA. STAT., VIOLATE DUE PROCESS OF LAW BECAUSE THE STATUTE IMPOSES NEW SUBSTANTIVE LEGAL BURDENS ON MANUFACTURERS AND CREATES NEW SUBSTANTIVE LEGAL RIGHTS FOR THE STATE?

SUMMARY OF THE ARGUMENT

The State's Brief, contending that § 409.910, Fla. Stat., is constitutional, proceeds as if the statute were openly and explicitly directed at the tobacco industry. That underlying presumption lends special credence to the constitutional counterarguments: a statute which is facially neutral, but covertly aimed at a particular target, suffers from a host of constitutional deficiencies and *at the least* requires exacting judicial review to ensure that all the laws of this State comport with fundamental guarantees of fairness, due process, and separation of powers among the branches of government.

If the tobacco industry can be targeted by the Legislature or the Governor, and subjected to substantial liability stripped of substantive defenses and established procedures for the conduct of litigation, all manufacturers of potentially harmful products are similarly at risk. *Via* § 409.910, *as amended*, the Legislature has invaded the exclusive province of this Court, and conferred an unprecedented advantage upon the State as a litigant. A statute which changes the courtroom rules for products liability defendants when the State is the plaintiff, making manufacturers in those cases uniquely handicapped among civil litigants, offends separation of powers, due process, and fairness principles.

Where the State's Medicaid expenditures *define* the State's economic injury, it is obviously relevant to consider which expenditures, for which recipients, are sought to be recovered. Whether a Medicaid recipient was adequately warned about the potential effects of a product, yet knowingly continued to use that product, or whether there were myriad other factors causing illness, is obviously relevant to third party liability. Whether a Medicaid recipient's medical conditions (and the State's expenses) are in fact *unrelated* to the use of a

particular manufacturer's product, is a quintessentially relevant factor in determining manufacturer liability. Therefore, is it logical, fair, or consistent with the Constitution, or the Rules of Civil Procedure, to exclude such relevant evidence from litigation against a manufacturer? It is not.

Rule 1.010, Fla.R.Civ.P. provides:

> These rules apply to all actions of a civil nature. . . .These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. . . .

(emphasis supplied); see also Article V, Fla. Const. In contravention, § 409.910, *as amended*, creates different rules for selected actions, and operates in a manifestly unjust manner.

Amicus submits that the circuit court was correct, and should be affirmed, in finding that the statute "impermissibly infringe[s] on the exclusive power of the judiciary to establish practice and procedure in Florida courts." Final Order, p. 2. The abrogation of affirmative defenses and the alteration of class action procedures are unconstitutional legislative acts which violate the separation of powers guarantee of Article II, § 3, and Article V, § 2(a), Florida Constitution. If those harsh provisions are upheld on any basis, anything other than prospective application would violate due process of law.

The abrogation of all relevant affirmative defenses and the institution of unique market share liability theories are legislative acts implicating and affecting manufacturers' substantive rights, and thus cannot be retrospectively applied consistent with due process of law. The court below correctly applied the law. Because the statute creates new substantive rights and imposes new legal burdens, only prospective application is constitutionally permissible. See Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995); Landgraf v. USI Film

Products, ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

ARGUMENT

I.

SECTION 409.910, FLA. STAT., *as amended*, UNCONSTITUTIONALLY ENCROACHES ON THE JUDICIARY'S ROLE IN FORMULATING PROCEDURES FOR CLASS LITIGATION

Section 409.910(9)(a) permits the State to maintain a form of class action to recover for expenditures on behalf of unnamed Medicaid recipients:

> In any action under this subsection wherein the number of recipients for which medical assistance has been provided by Medicaid is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients for which payment has been made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients. (emphasis supplied).

The statute invades the fundamental jurisdiction of the judiciary. The only branch of government with authority to dictate procedure in Florida courts is the judicial branch. See Article V, § 2, Fla. Const.:

> (a) The supreme court shall adopt rules for the practice and procedure in all courts. . . .

In accordance with Article V, this Court has defined detailed and specific rules of procedure for class action litigation, which, inter alia, require court approval:

> Before any claim or defense may be maintained on behalf of a class . . . the court shall first conclude that. . . .[there is numerosity of parties,

commonality of questions of fact or law, typicality of claims or defenses, and adequate representation by the class representative].

Rule 1.220(a), Fla.R.Civ.P. (emphasis supplied). In addition,

> A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that:
>
> (1) the prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:
>
> (A) inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate; or
>
> (3) the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other methods for the fair and efficient adjudication of the controversy. The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the

> respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class.

Rule 1.220(b), Fla.R.Civ.P. (emphasis supplied).

Other portions of the class action Rule are not quoted in this Brief, but subsections (c), (d), and (e) impose additional detailed procedures, which represent the judicial branch's special sensitivity to the need for safeguards in class representative litigation. The Legislature's venture into the same area, *via* § 409.910(9)(a), considers only the numerosity of the Medicaid recipients, and ignores the other considerations for class representation contained in Rule 1.220.

The State claims that "[t]hese provisions do not establish court procedure," Initial Brief p.14, and that "[t]here is simply no conflict between the 1994 Amendments and this Court's rules of procedure." Id. at 16. The State claims that litigation in which "the number of recipients for which medical assistance has been provided by Medicaid is so large as to cause it to be impracticable to join or identify each claim" (§ 409.910(9)(a)) is *not* a "class action" such as would be controlled by Rule 1.220, Fla.R.Civ.P.,[1] but instead is a "basic pleading prerogative enjoyed by all plaintiffs under Florida's rules of civil procedure," Initial Brief pp.

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[1] Oddly enough, the State must find it "practicable" to identify individual Medicaid recipients in order to pay their medical expenses, but for purposes of the litigation contemplated by § 409.910, identifying those same persons could be deemed "impracticable" at the whim of the State, without oversight by any court.

15-16, to "set up in the same action as many claims or causes of action...as the pleader has...." Id. at 15, citing Rule 1.110(g), Fla.R.Civ.P. (GENERAL RULES OF PLEADING -- Joinder of Causes of Action). That contention is as fallacious as the companion assertion that the State's cause of action is *not* on behalf of the Medicaid recipients.

First, the very purpose of the class action rule, R. 1.220, is to simplify pleading when simple joinder under Rule 1.110 is impracticable because of the multiplicity of claims of parties. A litigant may, of course, list each joined party under the provisions of Rule 1.110, and in fact that procedure is most common. In order to eliminate the burden of pleading each party's similar claim, the Rules permit "class" litigation, but only under the detailed procedures of Rule 1.220, as set forth above. If the State wishes to exercise the joinder prerogative of Rule 1.110, each of its claims for benefits paid for Medicaid recipients could be joined, but to do so without identifying for whom the individual benefits were paid would likely not comport with that Rule. If the State wishes to consolidate its multiple claims for reimbursement for expenditures on behalf of dozens, hundreds, or thousands of Medicaid recipients into a single action, it may do so, but only under the strictures of Rule 1.220 -- not under the legislative fiat of § 409.910(9)(a). Stereotypes -- even those created by statutes -- are not a substitute for compliance with the rule's procedure. Because a § 409.910 action could not meet the common questions of law or fact requirements for a class action, the statute sought to overrule the rule.[2] Judge Steinmayer properly rejected that effort.

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[2] The statute substitutes "substantially similar factual or legal issues" (§ 409.910(9)(b)) as part of its "market share theory" of recovery. It makes no attempt to require class members (Medicaid recipients) to have shared commonality of usage, injury, or treatment.

If the State is not "representing" a class of Medicaid recipients, but "merely asserting *its own claim* to recoup State funds," (Initial Brief p. 14, emphasis in original) a statute which permits such a claim with no obligation to link the State's expenditures to users of the defendant's product violates due process. This Court has never embraced the market share theory of liability, absent some meaningful proof that the product caused a specific injury. Compare Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). Nor has any court, anywhere in the nation, upheld a statutory market share liability theory applicable to any and all products, limited only by the proviso that the products involved be "substantially interchangeable among brands," and that "causation . . . may be proven by use of statistical analysis." § 409.910(9)(b). The gaps in proof of causation permitted by the challenged statute (were the recipients' injuries caused by the product?), and the arrogance of such an approach, are glaring. Market share liability has been justified for only a few products,[3] and this Court's adoption of it in Conley was limited to a single product (DES). Thus, even if the mass joinder of claims for expenditures for multiple Medicaid recipients is not a "class action" in every sense of the word, the State's

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[3] The market share liability concept was first applied to compensate victims of the drug DES (diethylstilbestrol), Sindell v. Abbott Labs, 607 P.2d 924 (Cal.), cert denied, 449 U.S. 912 (1980), and has only rarely been applied to other products. See Smith v. Cutter Biological, Inc., 823 P.2d 717 (Ha. 1991) (AIDS patient successfully argued that market share liability applied to manufactures of Factor VIII blood product); Morris v. Parke, Davis & Co, 667 F. Supp. 1332 (C.D. Cal. 1987) (market share theory imposed against diphtheria-pertussis-tetanus "DPT" vaccine manufacturer). The doctrine has more often been criticized, and limited to the DES situation, in which it was impossible to identify the manufacturer and in which all of the product, whoever the manufacturer, suffered the same defect. See generally Andrew B. Nace, Market Share Liability: A Current Assessment of a Decade-Old Doctrine, 44 Vand. L. Rev. 395 (1991) (noting that most courts have refused to extend market share liability to asbestos-related diseases or to vaccine-induced injuries).

individual claim against manufacturers, unless linked to those Medicaid recipients, suffers from an intolerable causation gap under § 409.910(9)(b), and violates due process of law. Discussing legal causation, Prosser & Keeton wrote:

> As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.

Prosser and Keeton on Torts, Fifth Ed., p. 264. The 1994 amendments to § 409.910 allow group third party responsibility to be imposed without proof of any connection between the Medicaid recipient's illness and a manufacturer's product. That statutory approach is symptomatic of due process injury:

> "[H]istory reflects the traditional and common sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was 'intended to secure the individual from the arbitrary exercise of the powers of government,' Hurtado v. California, 110 U.S. 516, 5277 [4 S.Ct. 111, 117, 28 L.Ed.232] (1884)." Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986).

Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 1069 n.10, 117 L.Ed.2d. 261 n. 10 (1992). The amendments' intrusion into the power of the judiciary to establish class action practice and procedure in Florida courts is not surprising. Absent the statute, the state could not meet the courts' rules. When a government is inclined to oppress, attempted subjugation of the judiciary may occur. It is then that there is a need and duty to protect judicial prerogatives. Judge Steinmayer did that, and his separation of powers conclusion should be affirmed.

II.

THE TRIAL COURT CORRECTLY CONCLUDED THAT § 409.910(1), FLA. STAT., *as amended*, MAY NOT BE RETROSPECTIVELY APPLIED

If the 1994 Amendments to § 409.910 pass constitutional muster, they cannot be applied retrospectively. Section 409.910(1), as amended, abrogates established legal doctrines, and creates new liabilities:

> **409.910 Responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable. --**
>
> (1) It is the intent of the Legislature that Medicaid be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are available, ~~discovered or become available after medical assistance has been provided by Medicaid~~, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, ~~and~~ subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources; such principles shall apply to a recipient's right to recovery against any third party, but shall not act to reduce the recovery of the agency pursuant to this section. The concept of joint and several liability applies to any recovery on the part of the agency. It is intended that if the resources of a liable third party become available at any time, the public

> treasury should not bear the burden of medical assistance to the extent of such resources. Common law theories of recovery shall be liberally construed to accomplish this intent.

Other amendments to the statutory scheme create treble damage liability (§ 409.910(19)) and a new cause of action "independent of any rights or causes of action of the recipient." (§ 409.910(6)(a)).

The trial court concluded that the statute's doctrinal changes could only act prospectively:

> The Amendments create new substantive rights and impose new legal burdens and therefore, as a matter of statutory construction and due process, the Amendments may only be applied prospectively -- specifically to conduct of potential defendants that occurred after the Amendments' effective date of July 1, 1994.

Final Order, p.3 (emphasis supplied). New substantive rules cannot be applied to conduct which occurred before the rules were known.

Florida law and federal law support Judge Steinmeyer's conclusion. Indeed, the statutory effective date ("July 1, 1994 or upon certification by the U.S. Department of Health and Human Services. . ., whichever is later" (§ 409.910(7)) compels a prospective, not retrospective, conclusion. State Dept. of Revenue v. Zuckerman-Vernon Corp., 354 So. 2d 353, 358 (Fla. 1977), and State Farm Mutual Auto Ins. Co. v. Laforet, 658 So. 2d 55, (Fla. 1995):

> The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate prospectively.

Even if a statute is expressly stated to be retroactive (which this one is not), "this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." State Farm, supra. See also Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995):

> We have held that a substantive law that interferes with vested rights -- and thus creates or imposes a new obligation or duty -- will not be applied retrospectively .... Statutes that relate only to procedure or remedy generally apply to all pending cases.

Id. at 477.

The State's effort to escape the substantive-right/prospective-only rule by calling the 1994 amendment "remedial in nature" (Initial Brief p. 21) reveals the weakness in its argument. If the amendments are remedial, they would apply to pending cases -- but there is no pending case here. If stripping a defendant of all traditional common law and equitable defenses is merely a "modification" of a remedy (Initial Brief p. 22), the cases offered by the State fail to support their position.[4] Florida Patient's Comp. Fund v. Von Stetina, 474 So. 2d 7783 (Fla. 1985), for example, found that a statute which only changes the form for enforcing a judgment does not impair existing rights:

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[4] Section 409.910(1) provides in pertinent part:

> . . . Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. . . .

> The Amendment does not alter the size of the judgment in favor of Von Stetina; rather it prescribes the method by which the judgment is to be paid.

Id. at 788. See also City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961) ("The subject statute is in no way directly concerned with the question of the compensation of a claim, or, from the claimaint's standpoint, the receipt of the benefits to which he has become entitled thereby."). However, the statutory amendments at issue here go to the heart of liability and the availability of any judgment. Indeed, the § 409.910(1) abrogation of all defenses "to the extent necessary to ensure full recovery" is specifically designed to secure a judgment for the State. Von Stetina and its antecedents actually support the view that these amendments are substantive, therefore they must be prospective.

Federal law confirms that conclusion, and underscores the concern for fairness which forms the foundation for the strong presumption against retroactivity:

> The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens or reasons after the fact.

Landgraf v. USI Film Products, ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The Court noted the constitutional basis for the principle:

> It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl.1 prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons

> of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, e.g., United States v. Brown, 381 U.S. 437, 456-462, 85 S.Ct. 1707, 1719-1722, 14 L.Ed.2d 484 (1965). The Due Process Clause also protects the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976).

Id., 114 S.Ct. at 1497.

Our State Constitution contains similar protections, including a prohibition against legislation targeted against an identifiable person or group of persons. See Article I, § 10, Florida Constitution ("No bill of attainder...shall be passed"). There is disturbing evidence that the Governor intended to use § 409.910 for "singling out disfavored persons and meting out summary punishment for past conduct." Landgraf, quoted supra. See Defendants' May 12, 1995 "Stipulation for Non Prosecution," unilaterally agreeing

> . . . to comply with the terms of the Executive order No. 95-109 dated March 28, 1995, limiting the applicability of Chapter 94-251, Section 4, Laws of Florida to only those defendants ". . . responsible for death and disease caused by tobacco products. . . ."

The language of the Appellants' Brief, p. 27, (Florida "has been forced to pay enormous sums"; it "has been compelled to subsidize the externalities of tobacco companies' activities, to the great detriment of the taxpayers") is typical of the "violent political excitements" which historically

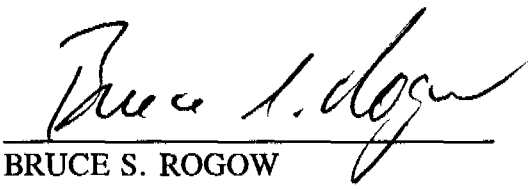
generated bills of attainder. Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 104 S.Ct. 3348, 3355, 82 L.Ed.2d 632 (1984). Thus, even if the statute does not satisfy the technical requirements for an unconstitutional bill of attainder under the federal or State Constitutions (specificity, punishment, no judicial trial), the Governor's stated intention to use it as a vehicle to punish only cigarette manufacturers, and the stridency of the effort to justify it, makes the statute's enactment, as well as its application, deserving of careful scrutiny.

That careful scrutiny can lead to only one fair conclusion. If the 1994 amendments do not violate state separation of powers, or federal and state due process principles, the statute can only be applied prospectively.

CONCLUSION

For the foregoing reasons, the decision below finding § 409.910(1), Fla. Stat., as amended, to be an unconstitutional violation of the separation of powers doctrine, and finding that retrospective application would violate due process of law, should be affirmed. *Amicus* respectfully requests that this Court reject Appellants/Cross-Appellees' arguments to the contrary, and grant any additional relief requested by the Appellees/Cross-Appellants in their Briefs to this Court.

Respectfully Submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing *Amicus Curiae* Brief in Support of Appellees/Cross-Appellants has been furnished to the following persons by Fed Ex this 26th day of September, 1995.

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