SUPREME COURT OF ARIZONA

Supreme Court No. CV-11-0006-CQ
Ninth Cir. Case No. 09-15808
D.C. No.s CV-07-03259-PHX-SMM (Lead)
and CV-08-505-PHX-SMM (Consol.)

ALFRED ALBANO, an unmarried man; et al.,

Plaintiffs-Appellants,

v.

SHEA HOMES LIMITED PARTNERSHIP,
an Arizona limited partnership; et al.,

Defendants-Appellees.

QUESTIONS CERTIFIED TO THIS COURT ON
FEBRUARY 3, 2011 BY THE
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF

PUBLIC JUSTICE

SUPPORTING PLAINTIFFS-APPELLANTS

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Table of Contents

Table of Citations

Cases

Statutes

Rules

Other Authorities

I. Introduction

The class action mechanism has long provided an elegant solution to a vexing problem: affording a means of judicial recourse for common claims held by a large number of people. *Andrew S. Arena, Inc. v. Sup. Ct. in and for County of Maricopa*, 163 Ariz. 423, 425, 788 P.2d 1174, 1176 (1990) ("Class actions were developed to provide a convenient method of litigating claims involving large numbers of people."). Handling such claims in the aggregate provides the opportunity for efficient resolution for both plaintiffs and class members (the prospect of class-wide relief if they succeed on the merits) and defendants (the prospect of class-wide peace if they succeed on the merits). Pursuing multiple claims collectively through class action litigation allows comprehensive relief for widespread harms, consistent with the Arizona Constitution's requirement of equal access to justice. *Arnold v. Arizona Dep't of Health Servs.*, 160 Ariz. 593, 607, 775 P.2d 521, 535 (1989) ("our citizens must be allowed to maintain class actions so they will have appropriate access to the judicial system"); *Reader v. Magma-Superior Copper Co.*, 110 Ariz. 115, 117, 515 P.2d 860, 862 (1973) (acknowledging the "need for viable class action relief within our judicial system").

Like the federal judiciary and many other states, Arizona authorizes use of the class mechanism through its rules of civil procedure. Rule 23, *Arizona Rules of*

Civil Procedure, empowers the trial court, in its discretion, to utilize the class mechanism when all of its prerequisites have been satisfied by the party seeking representative resolution. In appropriate cases, the class mechanism serves as "a practical tool for resolving multiple claims on a consistent basis at the least cost and with the least disruption to an overloaded judicial system." *Andrew S. Arena*, 163 Ariz. at 425, 788 P.2d at 1176. The class action mechanism under Rule 23 has enabled Arizona courts to afford an avenue of judicial recourse for widely held claims of statutory violations and consumer fraud. *See, e.g., ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98, ¶14, 50 P.3d 844, 848 (Ct. App. 2002) (reversing failure to certify consumer class seeking statutory damages); *London v. Green Acres Trust*, 159 Ariz. 136, 143, 765 P.2d 538, 545 (Ct. App. 1988) (consumer fraud claims certified).

Given its essential role in providing for the effective resolution of claims widely held by Arizona residents, once the Rule 23 class mechanism is invoked it ought be given the opportunity to work. But the promise of Rule 23 is thwarted if those holding the common claim are forced to take individual action to protect their rights – such as by intervening or by filing individual suits ***before*** the possibility of a class-wide resolution has run its course in an already filed putative class action case. *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000) ("If all class members were required to file claims in order to insure the limitations period

would be tolled, the point of Rule 23 would be defeated."); *see generally,* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* ("Wright & Miller") §1795, at 51 (3d ed. 2005) ("In the absence of tolling, the members [of the putative class] would be led to file individual actions prior to the denial of class certification and this would produce the multiplicity of suits that Rule 23 was designed to avoid.").

It is at this point, then, that the interests advanced by Arizona's Rule 23 intersect with the interests advanced by Arizona's statutes of limitations and repose against the assertion of stale claims. Absent harmonization, application of the State's statutes of limitation and repose would force the absent member of the putative class to press his or her claims individually out of an abundance of caution lest, for whatever reason, those claims not be resolved on a class-wide basis in the putative class action. This is precisely the rationale behind the United States Supreme Court's adoption of the class action tolling rule in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983).

Because the Court's decision in this case could have far-reaching implications for class action and consumer protection litigation generally, the issues presented are extremely important to investors, consumers and the other constituencies of Public Justice, P.C. ("Public Justice"). Public Justice therefore

appreciates the opportunity to file an *amicus* brief in this action, to bring into focus the unique perspective of the absent class member. From that perspective, Public Justice respectfully submits that (a) the reasoning underlying the class action tolling rule in *American Pipe* supports the recognition of the same class action tolling rule in Arizona, and (2) the same reasoning calls for application of the Arizona class action tolling rule to both its statutes of limitation and its statutes of repose, without the need to categorize the rule as either "legal" or "equitable" in nature, because in both instances the interests of the statutes and the class action tolling rule are consistent.

II. Certified Question One

The first certified question accepted by this Court is essentially whether tolling of the sort recognized under *American Pipe* should be recognized under Arizona state law. *Albano v. Shea Homes Ltd. P'ship.*, 634 F.3d 524, 540-41 (9th Cir. 2011). Although this Court has suggested as much in analogous situations, *Arizona Department of Revenue v. Dougherty*, 200 Ariz. 515, 523, ¶ 25, 29 P.3d 862, 869-70 (2001), it should now confirm that the individual claims of putative class members are indeed tolled during the pendency of a putative class action concerning the same subject matter against private defendants. Such a rule promotes judicial economy under Rule 23, without undermining the interests protected by Arizona's statutes of limitation. *Bright v. United States*, 603 F.3d

1273, 1288 (Fed. Cir. 2010) (class action tolling "suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations").

While generally disfavored as a hindrance to the resolution of claims on the merits, Arizona's statutes of limitations do serve the salutary purpose of protecting against "the unexpected enforcement of stale claims against persons who have been thrown off their guard by want of prosecution." *Hall v. Romero*, 141 Ariz. 120, 126, 685 P.2d 757, 763 (Ct. App. 1984). A timely filed putative class claim, however, provides the defendant with notice of the claims of both the plaintiff/class representative and the members of the putative class ***before*** expiration of the limitations period, allowing the defendant to take whatever steps it deems prudent and necessary to defend those claims. Class claims alleged within the applicable limitations period are by definition not "stale." Suspending the time for the assertion of an individual claim until class certification is resolved in a timely filed putative class case therefore does not conflict with the underlying purpose of Arizona's statutes of limitation. *Accord, Crown, Cork*, 462 U.S. at 353 ("Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification."); *Joseph*, 223 F.3d at 1167 ("Tolling the limitations period

while class certification is pending does not compromise the purposes of the statutes of limitation and repose.").

The Supreme Court in *American Pipe* conducted precisely such a comparative interest analysis. The Court realized that forcing putative class members to intervene or file their own suit "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. The Court then considered the purpose of statutory limitations periods as "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence is lost, memories have faded and witnesses have disappeared." *Id.* at 554 (quoting *R.R. Tels. v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).[1] Because the putative class representative had necessarily brought the claims of the entire class to the notice of the defendant within the statutory time period, the tolling rule did not frustrate any of the policies behind the limitations statute. *Id.* at 554-55.

Adopting a class action tolling rule to allow the class mechanism the opportunity to work would place Arizona squarely within the mainstream of

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[1] Statutes of limitation "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' " *United States v. Kubrick,* 444 U.S. 111, 117 (1979) (quoting *Railway Express Agency*, 321 U.S. at 349).

American jurisprudence. *Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340, 354 (Md. 2006) ("The wide majority of states with class action rules similar to Fed. R. Civ. P. 23 have followed *American Pipe* and endorsed a class action tolling rule.").[2] Most importantly from Public Justice's perspective, the *American Pipe* class action tolling rule is fair to the absent class member, who can confidently await the class certification determination without being forced to intervene or file suit simply to preserve his or her individual claim. *See generally,* Wright, & Miller, *supra*, §1800, at 263 ("The only logical rule under the current provision [of Rule 23] is that the commencement of the class suit tolls the statute for all persons who might be bound by the judgment.").[3]

One additional wrinkle to address is the date such *American Pipe* tolling commences. The Supreme Court has made clear that tolling begins on the date the putative class action is filed. *American Pipe*, 414 U.S. at 553 ("[T]he

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[2] *See, e.g. Philip Morris*, 905 A.2d at 354 n.8 (collecting cases from Ohio, Arkansas, Utah, Hawai'i, Kansas, Idaho, Alaska, Alabama, Pennsylvania, Illinois and Oregon); *see also, e.g., Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 251 (Mont. 2010) (adopting the class action tolling rule and rationale of *American Pipe*); *Grimes v. Housing Auth. of the City of New Haven*, 698 A.2d 302, 307 (Conn. 1997) (same).

[3] A distinct interest analysis may be required when the second suit is itself a putative class action filed after the initial putative class action is dismissed without reaching the propriety of class certification in the first case. Because the situation is not raised in this case or by the questions certified by the Ninth Circuit, the Court need not reach that issue at this time, particularly absent further briefing.

commencement of the original class suit tolls the running of the statute for all purported members of the class . . . .") (emphasis added); *see also Arivella v. Lucent Techs., Inc.* 623 F. Supp. 2d 164, 179 (D. Mass. 2009) ("[U]nder *American Pipe*, a statute of limitations is tolled for a putative plaintiff's claim from the initiation of the class action to which the plaintiff is a potential class member until the denial of a motion for class certification."); *Hall*, 141 Ariz. at 126, 685 P.2d at 763 ("[The *American Pipe*] rule provides that commencement of a class action tolls the applicable statute of limitations for individual suits, as to all members of the class, until the class is certified.").

The Ninth Circuit, however, in its first question to this Court asks whether tolling should commence with the "***filing of a motion for class certification*** in an Arizona court." *Albano*, 634 F.3d at 540 (emphasis added). Postponing the commencement of tolling until the date of the class certification motion is not only contrary to *American Pipe* and all of its progeny, it would place the absent class members in an intolerable position. The date on which such a motion is filed (of which the absent class member is not notified) can vary greatly for any number of reasons -- pretrial motions practice, disparate scheduling orders, discovery disputes, court congestion, excusable or inexcusable procrastination, etc. -- none of which affects the underlying rationale for relieving the putative class member from the need to act to preserve his or her own claim during the pendency of a putative

class action case. Nor can the absent class members readily detect whether the timing in filing the motion for class certification was or was not accomplished "[a]s soon as practicable" under Rule 23(c)(1). How many weeks or months into the putative class litigation could the absent class members safely wait before intervening or suing separately to preserve their individual claims? If they guessed incorrectly, the absent class members could find their individual claims time-barred due to delays in filing the motion for class certification that they could not possibly be expected to anticipate, implicating their due process rights to notice before their claims are adversely affected by the putative class action. *But see Crown, Cork*, 462 U.S. at 350 (class action tolling allows class members to "rely on the existence of the [class suit] to protect their rights").

If the goal of the class action mechanism is to avoid the need for unnecessary and duplicative individual actions (and it is), then *American Pipe* tolling must commence on the date the putative class case itself is filed – a clear and easily ascertainable threshold not subject to the vagaries of the pre-motion practice or potentially inconsistent equitable factors. *Arivella*, 623 F. Supp. 2d at 178-79 (refusing to graft a "reasonableness" or "diligence" requirement onto *American Pipe* tolling analysis).

III. Certified Questions Two and Three

The Ninth Circuit next asks whether Arizona's tolling doctrine should apply to Arizona's statutes of repose (more specifically, Ariz. Rev. Stat. (§12-552) no less than to its statutes of limitation, and if so, whether an Arizona court should "weigh the equities" to determine whether and to what extent the action is tolled. *Albano*, 634 F.3d at 540-41. In its decision, the Ninth Circuit canvases the pertinent case law, much of which focuses first on classifying the *American Pipe* tolling rule as either "legal" or "equitable" in nature. *Id.* at 534-38. Many of these courts then allow the label to determine the tolling rule's effect on a statute of repose: if the tolling is deemed "legal" in nature, it is said to trump a statute of repose; if "equitable," it does not. *See, e.g., Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (finding *American Pipe* tolling to be a form of "legal" tolling, and thus equally applicable to statutes of limitation and repose) (citing *Joseph*, 223 F.3d at 1167-68 and *Arivella*, 623 F. Supp. 2d 177-78). Federal courts within the Ninth Circuit apply *American Pipe* tolling to statutes of repose. *See, e.g., Maine State Ret. Sys.*, 722 F. Supp. 2d at 1166. Beyond the Ninth Circuit, most federal courts nationwide agree that *American Pipe* tolling is "legal" in character. *See Arivella*, 623 F. Supp. 2d at 177-78 (collecting cases).

Public Justice, however, respectfully suggests an alternative approach to classifying the class action tolling rule as "legal" or "equitable" and simply letting that label dictate the rule's effect on statutes of repose. Indeed, this Court has consistently eschewed such elevations of form over substance. *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, 328, ¶40, 223 P.3d 664, 672 (2010) (rejecting as "unduly formalistic" attempt to determine application of Arizona's economic loss doctrine based on label given claim); *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986) (court looks beyond label given claim to determine whether it arises out of contract for purposes of fee award).[4] Instead, this Court should apply the *American Pipe* tolling rule to statutes of repose because doing so is both (a) consistent with the purposes of repose and (b) essential to protect the interests of the absent class members.

Statutes of repose are legislative antidotes to the discovery rule otherwise applicable to the accrual of the cause of action for limitations purposes, providing a defendant with protection regardless of the diligence *vel non* of the plaintiff in

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[4] The Court should be particularly leery of such a formalistic approach here, where courts have differed on whether *American Pipe* tolling rule is itself either "legal" or "equitable" in character. *Albano*, 634 F.3d at 535 (citing cases). To complicate matters further, an inarguably "legal" tolling rule can have equitable underpinnings, and vice-versa. *See, e.g., Doe v. Roe*, 191 Ariz. 313, 325, ¶ 41, 955 P.2d 951, 963 (1998) (Arizona's statutory provision for "unsound mind" tolling is "premised on equitable principles similar to those that underlie the discovery rule").

discovering his or her claim. *Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, 501, ¶28, 88 P.3d 565, 571 (Ct. App. 2004) (statute of repose "sets a period of time within which claims must be brought regardless of when the cause of action may accrue"). At bottom, the statute of repose establishes a bright-line deadline before which the defendant must receive notice of the claim. *Arivella*, 623 F. Supp. 2d at 177 ("[T]he purpose of a statute of repose is to demarcate a period in which a plaintiff must place a defendant on notice of his or her injury, regardless of whether the plaintiff himself is aware that he has suffered an injury."); *see, e.g., Valley Nat'l Bank of Ariz. v. Kohlase*, 182 Ariz. 436, 439, 897 P.2d 738, 741 (Ct. App. 1995) (purpose of statute of repose is to give notice of intent to pursue action against recipient). As the Appellees themselves note, "the most distinguishing characteristic of a statute of repose is that it establishes an outside date for bringing an action instead of a variable period of time during which a plaintiff must assert a claim." Brief of Appellees (Shea Homes Parties) ("Shea Brief"), at 3 n.1 (April 4, 2011) (citing *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1049 (9th Cir. 2008)).

Application of the *American Pipe* class action tolling rule does not at all undermine this underlying purpose of a statute of repose. When a putative class action suit has been filed during the period of repose, the putative class member's claims have necessarily been asserted ***before*** the repose deadline, and the defendant has thereby necessarily received notice of the claims ***within*** the period

contemplated by the statute of repose. *American Pipe,* 414 U.S. at 550 (when a putative class action is filed, "the claimed members of the class *st[and] as parties to the suit* until and unless they receive[ ] notice thereof and cho[o]se not to continue" (emphasis added)); *see also* Shea Brief, at 9 ("By its plain meaning, the Statue of Repose establishes an absolute bar to claims falling ***outside*** the time periods specified." (emphasis added)). As the U.S. Supreme Court has recently reiterated, Rule 23 is a procedural mechanism akin to traditional joinder, by which the claims of many may be asserted at once through a single filing:

> A class action, no less than traditional joinder (of which it is a species), merely enables a ... court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties legal rights and duties intact and the rules of decision unchanged.

Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co., ___ U.S. ___, ___, 130 S.Ct. 1431, 1443 (2010).

The filing of a putative class action thus accomplishes the "exact same goal" as the statute of repose: placing the defendant on notice of the claims within the period of repose, regardless of when the claim accrued for limitations purposes. *Arivella*, 623 F. Supp. 2d at 177; *see also Joseph*, 223 F.3d at 1167 ("Tolling the limitations period while class certification is pending does not compromise the purposes of statutes of limitation or repose.").

From the perspective of the absent class member, extending class action tolling rule to statutes of repose is absolutely critical. Indeed, tolling the individual claims for limitations purposes but not for repose purposes would obviate the whole objective of the *American Pipe* tolling rule, because the reprieve from forced individual intervention or lawsuit would gradually dissipate as the repose deadline approached – which could conceivably be a very rapid approach, depending upon how late in the period of repose the putative class case was filed.

The class action tolling rule adopted by the Court therefore must be applied equally to statutes of limitation and to statutes of repose – not because the class action tolling rule is more appropriately classified as "legal" rather than "equitable" in character, but also because the salutary objectives of the *American Pipe* class tolling rule are advanced only if the risk to the absent class member of the running of ***both*** the statute of limitation and the statute of repose is eliminated until the possibility of a cost-effective, class-wide resolution is foreclosed. Otherwise, the absent class member could still be forced to file suit before class certification is resolved, at the risk of losing his or her claim. In the words of the United States Supreme Court, The result would be "a needless multiplicity of

actions – precisely the situation that [Rule] 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork*, 462 U.S. at 351.[5]

Finally, a discretionary weighing of "equitable" factors by the trial judge to determine whether the statute of repose is tolled in any given putative class case would again introduce intolerable uncertainty from the perspective of the absent class member, who is in no position to know what those equitable considerations might be in a particular case, or how compelling a given judge might view them. Nor does the absent class member have insight into (let alone control over) diligence or reasonableness factors, such as whether the class motion is being brought by the putative class representative "as soon as practicable" under Rule 23(c)(1). Likewise undeterminable are the prospects for class certification in any given case or type of case. Yet under the approach advanced by Appellees, an

[5] There is nothing unique about the particular statue of repose at issue in this case, A.R.S. § 12-552, that alters the analysis. Section 12-552(A) by its express terms does not bar claims that are "initiated" within the period of repose, which can certainly be said of the claims of putative class members alleged in the aggregate within that time period. Moreover, the repose afforded by Section 12-552 is (a) limited to claims "based in contract," and (b) extended by an additional year in case of latent defects discovered during the final year of the period of repose. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 239-40, ¶¶ 6-14, 159 P.3d 547, 549-51 (Ct. App. 2006). Thus, the legislative desire for repose is not so overwhelming that it trumps all other considerations. Certainly the statute does not purport to trump the Court's own rules of civil procedure governing the manner in which a claim for judicial relief is asserted (individual or aggregate); to the contrary, §12-552's preemptive effect expressly extends only to "other statute[s]" -- not to the Court's rules of civil procedure. A.R.S. § 12-552(A).

incorrect guess by the absent class member could be fatal to his or her individual claim. Even if there were a lack of diligence or other misconduct by the putative class representatives or their counsel, there is no reason to punish the absent class member by sacrificing his or her individual claim. The only workable application of the class action tolling rule consistent with the rationale behind *American Pipe* is the bright-line extension of the tolling from the date the putative class case is filed to the date the class certification is denied. *Arivella*, 623 F. Supp. 2d at 179 ("There is nothing subjective about *American Pipe*; all that is left for this Court is simple math.").

Appellees' fear of a "slippery slope" is misplaced. Shea Brief, at 24. The bright-line rule of *American Pipe* is the very antithesis of a slippery slope; it provides the courts, the parties and the absent class members with clear and objectively ascertainable dates by which action must be taken to assert a timely alleged putative class claims on an individual basis. And because the class tolling rule presupposes the assertion of claims ***within*** the statutory period of repose, nothing prevents the defendant from, in turn, asserting timely claims for contribution or indemnity within the period of repose as well. *Evans Withycombe*, 215 Ariz. at 240, ¶13, 159 P.3d at 550.[6] Indeed, if anything produces a slippery

[6] *See* Shea Brief, at 21-22 (expressing concern that tne class tolling rule could somehow deprive defendant of the ability to assert such claims against (continued...)

slope, it would be a holding by this Court that permits the trial judge in his or her unfettered discretion to disregard the class tolling rule for reasons not known to or predictable by the absent class members.

IV. Conclusion

Adoption of the *American Pipe* class action tolling rule is essential if the class mechanism under Arizona's Rule 23 is to remain a viable means of adjudicating widely held claims premised on the alleged common conduct of a defendant. Adoption of class action tolling rule is also consistent with the underlying purposes of both Arizona's statutes of limitation and of repose, because it presupposes the filing of a timely putative class action that affords the defendant notice of the claim within both statutorily prescribed periods.

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subcontractors, suppliers, etc.). To the extent Appellees are concerned that the hypothetical filing of a suit on the last day of the period of repose would prevent them from timely asserting a claim for contractual indemnity against third-parties under *Evans Withycombe*, 215 Ariz. at 240, 159 P.3d at 550, their complaint is with the effect of *Evans Withycombe*'s holding, not with the class action tolling rule, for the result would be the same whether or not the last-day lawsuit was filed as a putative class action.

Respectfully submitted this 8th day of April, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(b)(1), *Arizona Rules of Civil Appellate Procedure*, I certify that the foregoing brief is:

X Proportionately spaced, has a typeface of 14 points or more and contains 4578 words, or is

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__ Handwritten, and does not exceed 12 pages.

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ORIGINAL and seven (7) copies of the foregoing Amicus Curiae Brief filed April 8, 2011 with:

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