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MOORE V. LIBERTY NATIONAL LIFE INSURANCE CO., 267 F.3d 1209 (11th Cir. 2001)

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FACTS

Four African-American policyholders filed a class action suit in federal district court claiming that Liberty National Life Insurance Company (Liberty National) engaged in discriminatory practices from 1940 to the mid-1970s.[1] They contended that Liberty National sought out low income African-Americans and sold them industrial life insurance policies with higher premiums and fewer benefits than those sold to whites.[2] Plaintiffs alleged claims under 42 U.S.C. § 1981 and a number of state laws.[3]

In response, Liberty National moved for judgment on the pleadings and the district court granted the motion.[4] The district court held that the § 1981 claim was barred by the Alabama statute of limitations because the plaintiffs failed to "alleg[e] fraudulent concealment with sufficient particularity to toll the statute of limitations."[5] Plaintiffs then filed a motion to alter or amend the judgment and sought leave to amend their complaint.[6] Plaintiffs included in the new complaint specific allegations of fraudulent concealment and added claims under 42 U.S.C § 1982, "which prevents racial discrimination in the maintenance of property."[7] The district court granted both motions.[8] The court also decided that the two-year statute of limitations would be tolled under Alabama law if these specific allegations were true."[9]

Liberty National argued that even if the complaint did not violate the statute of limitations, Alabama's common law rule of repose, "which bars any suit arising out of any event more than twenty years old," would bar plaintiffs' civil rights claims.[10] In response, the court determined that the state rule of repose did not apply to plaintiffs' federal civil rights claims.[11] It decided that absolute rules of repose are not essential components of federal causes of action, thus "applying them to federal civil rights claims is unnecessary and improper."[12] However, the court also found that statutes of

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[1] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1212 (11th Cir. 2001).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1213.
[10] *Id.*
[11] *Id.*
[12] *Id.*

limitations are necessary features of any cause of action. Moreover, because Section 1981 does not contain a statute of limitations, federal courts are forced to borrow the appropriate limitations period from state law.[13] The court also rejected Liberty National's claim that Section 1981 and Section 1982 frustrate the purposes of Alabama's scheme of insurance regulation and hence are reverse-preempted by the McCarran-Ferguson Act.[14]

Liberty National then filed an interlocutory appeal, and the district court certified the following question for consideration: "Whether Alabama's 20 year common law rule of repose bars the Plaintiffs in this action from pursing federal claims under 42 U.S.C. § 1981 and § 1982?"[15]

HOLDING

The United States Court of Appeals for the Eleventh Circuit held that Alabama's common law rule of repose did not apply to plaintiffs' Section 1981 and Section 1982 civil rights claims and that the McCarran-Ferguson Act did not mandate the reverse-preemption of the claims.[16]

ANALYSIS

The court, in an opinion written by Circuit Judge Wilson, reviewed the district court's denial of the judgment on the pleadings *de novo*.[17] It first examined whether 42 U.S.C. § 1988(a)[18] requires that Alabama's rule of repose be applied to plaintiffs' Section 1981 and Section 1982 claims.[19] Alabama's common law rule of repose bars claims that come about from

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[13] *Id.*

[14] *Id.*; McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2001).

[15] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1213 (11th Cir. 2001).

[16] *Id.* at 1212.

[17] *Id.* at 1213.

[18] The text of 42 U.S.C. § 1988(a) states,

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

[19] Moore, 267 F.3d at 1214.

events that are more than twenty years old.[20] Although the rule is similar to a statute of limitations, it is distinct and independent.[21] The only element in the rule of repose is time.[22] Circumstances are not considered in its application.[23]

Liberty National claimed that the repose doctrine should be applied to plaintiffs' Section 1981 and Section 1982 claims.[24] The court noted that the Supreme Court has mandated "'a three-step process' [for] determining the rules of decision applicable to [Federal] civil rights claims."[25] First, courts should review the relevant civil rights statute for deficiencies which would make it impossible to effect.[26] If the court finds such a deficiency, it should look to the common law of the forum state and borrow the appropriate state rule.[27] Finally, courts can apply the state common law only if it "is not inconsistent with the Constitution and laws of the United States."[28]

Liberty National argued that the lack of a rule of repose in the civil rights statutes made them deficient and that Alabama's rule of repose should be applied.[29] In *Felder v. Casey*,[30] the Supreme Court held that when looking to see whether the civil rights statute is deficient, a court should consider "(1) whether the absent provision is among the 'universally familiar' aspects of litigation; and (2) whether the provision is 'indispensable to any scheme of justice.'"[31] The Court of Appeals found that statutes of repose are rare in federal law and are not "universally familiar" aspects of litigation.[32]

The court found this controversy to be analogous to that of *Felder*, in which a Wisconsin statute required that plaintiffs seeking to sue a state entity notify the defendant of intent to sue and request relief within 120 days of the injury.[33] "If relief [was] denied, the plaintiff then ha[d] six months to bring

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[20] *Id.* at 1213.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 1214.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1215.
[30] Felder v. Casey, 487 U.S. 131 (1988) (holding a state notice of claim statute to be inapplicable to plaintiff's 42 U.S.C. § 1983 claim).
[31] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1215 (11th Cir. 2001) (quoting *Felder*, 487 U.S. at 140).
[32] *Id.*
[33] *Id.*

suit in state court."[34] The plaintiff in *Felder* brought a 42 U.S.C. § 1983 claim against the City of Milwaukee nine months after the incident giving rise to the claim occurred.[35] The Wisconsin Supreme Court rejected the claim for failure to comply with the time limit established by the notice of claim statute.[36] The United States Supreme Court reversed, holding that notice of claim statutes were neither "universally familiar" to federal causes of action nor indispensable prerequisites to litigation.[37] Furthermore, the court found that Congress did not intend for the court to borrow such a rule under Section 1988.[38] Here, the Court of Appeals did not find the absence of a rule of repose a deficiency in need of remedy by borrowing from state law, however, it did find the absence of a statute of limitations in Section 1981 and Section 1982 to be such a deficiency.[39]

To identify the correct state statute of limitations to apply to plaintiff's civil rights claims, the Court of Appeals looked to guidelines provided by the Supreme Court.[40] "[A] state's general or residual statute of limitations for personal injury torts should be borrowed for application to federal civil rights claims arising under the Reconstruction-era Civil Rights Acts."[41] When borrowing a state statute of limitations, federal courts should use only as much as is needed to effect that limitations period.[42] "Only the length of the limitations period, and the closely related questions of tolling and application, are to be governed by state law."[43] Application of additional distinct state limitations, such as a rule of repose, would contradict the mandate to borrow only what is needed to effect the state statute of limitations.[44]

Liberty National argued that a repose doctrine was integral and "closely related" to the state statute of limitations.[45] It further contended that the rule of repose cannot be separated from the statute of limitations.[46] However, the Court of Appeals disagreed, citing distinct differences between statutes of limitations and statutes of repose.[47] "A statute of limitations

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[34] *Id.*
[35] *Id.*
[36] *Id.* at 1215-16.
[37] *Id.* at 1216.
[38] *Id.* at 1217.
[39] *Id.* at 1216.
[40] *Id.*
[41] *Id.* (citing Owens v. Okure, 488 U.S. 235, 250-51 (1989)).
[42] *Id.* at 1217 (citing West v. Conrail, 481 U.S. 35, 39-40 (1987)).
[43] *Id.* (quoting Wilson v. Garcia, 471 U.S. 261, 269 (1938)).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

normally governs the time within which legal proceedings must be commenced after the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action."[48]

The court stated that for Liberty National to prevail on its claim, it would have to demonstrate that the two statutes, "despite their distinctions, are interdependent."[49] The court found that the rule of repose and the statute of limitations are not interdependent because they are triggered by entirely distinct events.[50] Therefore, it was not necessary to apply the statute of repose to affect the applicable state statute of limitations.[51] The court declined to consider Liberty National's claim that Alabama's statute of limitations barred plaintiffs' claims, stating that the issue was not ripe for review.[52]

Finally, the Court considered whether the McCarran-Ferguson Act mandates preemption of plaintiffs' Section 1981 and Section 1982 claims.[53] "The McCarran-Ferguson Act states that '[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.'"[54] The court noted that "[t]he Act thus bars the application of federal law if (1) the federal statute at issue does not 'specifically relat[e] to the business of insurance'; (2) the state statute at issue was 'enacted . . . for the purpose of regulating the business of insurance;' and (3) application of the federal statute would 'invalidate, impair, or supersede' the state statute."[55]

Liberty National claimed that when applied, Section 1981 and Section 1982 interfered with Alabama's own anti-discrimination insurance statute, which stated,

> No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity, or in the dividends or other benefits payable thereon or in any other of the terms and conditions of such contract.[56]

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[48] *Id.* at 1218 (citing Bradway v. Am. Nat'l Red Cross, 992 F.2d 298, 301 (11th Cir. 1993)).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1220.
[53] *Id.*
[54] *Id.* (quoting McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2001)).
[55] *Id.* (quoting Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999)).
[56] ALA. CODE § 27-12-11 (2001).

Liberty National argued that Alabama bans discrimination against those with equal expectation of life but permits other types of discrimination which have an actuarial basis.[57] The court responded that Section 1981 and Section 1982 do not "specifically relate to the business of insurance" and that the state statute at issue did.[58] Therefore the main issue was whether application of Section 1981 and Section1982 would "invalidate, impair or supersede" the state statute.[59]

The court then turned to definitions provided by the United States Supreme Court.[60] "Invalidate 'means to render ineffective, generally without providing a replacement rule or law,' while supersede generally 'means to displace (and thus render ineffective) while providing a substitute rule.'" [61] Impair means that "when federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application."[62]

The Court of Appeals found that Section 1981 and Section 1982 did not "invalidate" or "supersede" the Alabama statute by directly contradicting the terms of the state statute or rendering it impossible to effect or implement.[63] Instead, they proscribed different, though possibly overlapping conduct.[64] Liberty National failed to demonstrate that Section 1981 and Section 1982 frustrated any state policy when applied to insurance contracts, because they did not show that it is the policy of Alabama to encourage or condone racial distinctions with respect to life insurance.[65]

The court next discussed *NAACP v. American Family Mutual Insurance Co.*,[66] in which the Court of Appeals of the Seventh Circuit found that Fair Housing Act provisions banning "redlining" in setting insurance rates are not reverse-preempted by the McCarran-Ferguson Act because there was no state decision, regulation, or statute "requiring redlining, condoning that practice, . . . or holding that redlining . . . does not violate state law."[67]

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[57] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1220-21 (11th Cir. 2001).
[58] *Id.* at 1220.
[59] *Id.*
[60] *Id.* at 1221.
[61] *Id.* (quoting Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999)).
[62] *Id.* (quoting *Humana*, 525 U.S. at 310).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 1222.
[66] NAACP v. Am. Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992) (holding that the McCarran-Ferguson Act applies to federal civil rights statutes when they directly conflict with state insurance law).
[67] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1222 (11th Cir. 2001) (quoting *NAACP*, 978 F.2d at 297).

The Seventh Circuit had noted that the State did not intervene in the case to argue that the federal law at issue would frustrate its scheme of insurance regulation.[68] Similarly, in this case, the State of Alabama did not intervene.[69]

Additionally, in *SEC v. National Sec., Inc.*,[70] the Supreme Court "upheld the SEC's authority (against a McCarran-Ferguson Act challenge) to block an insurance company merger approved by the Arizona regulatory authorities."[71] The Court had found that Arizona had not ordered something that the Federal Government sought to prohibit.[72] It had allowed respondents to go forward with the merger, rather than requiring them.[73] The state had decided that the merger satisfied the state's insurance guidelines, while the federal government prohibited this merger for different reasons.[74] The Court had noted that Arizona's action was not an unambiguous command that the merger go forward; rather, it was simply a grant of permission.[75] Therefore, because Arizona's actions did not amount to an order to merge, the federal action blocking the merger was not construed as inconsistent with Arizona's regulatory scheme.[76]

In this case, the Court of Appeals found "no inconsistency between the state's interest in preventing 'unfair discrimination' between individuals with similar life expectancies" and the national interest in preventing racial discrimination under Section 1981 and 1982.[77] Because Liberty National did not demonstrate that the federal statutes impinged on any declared state policy in the insurance context, the McCarran-Ferguson Act did not require the reverse-preemption of plaintiffs' Section 1981 and Section 1982 claims.[78]

CONCLUSION

In 1944, the Supreme Court, in *United States v. South-Eastern Underwriters Ass'n*,[79] "established that insurance companies transacting business across state lines [are] subject to federal regulation under the

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[68] *Id.*
[69] *Id.*
[70] SEC v. National Sec., Inc., 393 U.S. 453 (1969).
[71] *Moore*, 267 F.3d at 1222.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* (quoting *Nat'l Sec., Inc.*, 393 U.S. at 463).
[77] *Id.* at 1223.
[78] *Id.*
[79] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (establishing that the Commerce Clause could be used to regulate the business of insurance and that that the Sherman Antitrust Act applied to insurance companies).

Commerce Clause"[80] and are "subject to attack under the Sherman Antitrust Act."[81] In response to the *Southeastern Underwriters* decision, Congress passed the McCarran-Ferguson Act.[82] In doing so, Congress wanted to preserve the states' traditional role of regulating and taxing the business of insurance and to provide limited protection for the insurance industry from antitrust actions.[83]

Despite the economic impetus for the McCarran-Ferguson Act's adoption, the text of the statute requires a reverse preemption of federal law *whenever* a federal law does not "specifically relate to the business of insurance," yet "invalidate[s], impair[s], or supersede[s]" a state statute "enacted . . . for the purpose of regulating the business of insurance."[84] Therefore, it is unclear whether federal civil rights statutes, not relating to the business of insurance, can be applied to insurance discrimination. Do federal civil rights statutes "invalidate, impair, or supersede" state insurance regulations and policies in a given jurisdiction?

The Second Circuit Court of Appeals considered the issue in *Spirt v. Teachers Ins. & Annuity Ass'n*.[85] The case concerned whether the McCarran-Ferguson Act prohibited the application of Title VII to the use of sex-segregated mortality tables in retirement plans.[86] The Second Circuit explored the legislative intent of Congress in enacting the McCarran-Ferguson Act and concluded that in Congress only meant to preserve the states' historical rights to regulate and tax insurance.[87] It found that Congress did not intend to interfere with the application of subsequently enacted federal civil rights statutes.[88] Other circuits, however, have not adopted the Second Circuit's reasoning or its legislative history approach.[89] Other courts that have taken up the question have based their decisions on narrower grounds, instead choosing a "plain statement" approach that has

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[80] Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 420 (4th Cir. 1984) (finding no state law which conflicted with or which was impaired by the Civil Rights Acts of 1866 and 1871 or the Fair Housing Act and concluding that therefore the McCarran-Ferguson Act's reverse preemption provision did not apply).
[81] Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1064 (2d Cir. 1982) (concluding that it was not Congress' intent for the McCarran-Ferguson Act to preempt the application of federal civil rights statutes to insurance discrimination).
[82] *Mackey*, 724 F.2d at 420.
[83] *Id.*
[84] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1220 (11th Cir. 2001) (quoting McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2001)).
[85] *Spirt*, 691 F.2d 1054.
[86] *Id.* at 1056-57.
[87] *Id.* at 1065.
[88] *Id.*
[89] *Id.*

narrowed the definition of "impair" to allow the application of civil rights statutes in an increasing number of situations.[90]

In *Mackey v. Nationwide Ins. Cos.*,[91] the United States Court of Appeals for the Fourth Circuit considered whether claims of "redlining" by an insurance company, brought under the Civil Rights Acts of 1866 and 1871[92] and the Fair Housing Act,[93] were precluded by the McCarran-Ferguson Act.[94] In deciding that they were not, the court stated that it found no state law with which the Civil Rights Acts or the Fair Housing Act would conflict.[95] The silence of the state on the issue of civil rights permitted the application of the federal civil rights laws.[96] The court declined to consider the broader question raised in *Spirt* of whether the McCarran-Ferguson Act prohibited the application of all federal civil rights laws.[97] The court held only that the McCarran-Ferguson Act did not apply in the situation before it.[98]

In *NAACP v. American Family Mutual Ins. Co.*,[99] the United States Court of Appeals for the Seventh Circuit directly criticized the holding in *Spirt* and instead embraced a "plain statement" approach to the McCarran-Ferguson Act.[100] The court held that the McCarran-Ferguson Act does apply to civil rights statutes.[101] However, when analyzing Wisconsin insurance statutes, the court only found laws consistent with that of the Fair Housing Act.[102] The court held that consistent state statutes did not fulfill the McCarran-Ferguson requirement that the federal statute "invalidate, impair, or supersede" a state statute.[103] "American Family needs to show that the Fair Housing Act conflicts with state law. Duplication is not conflict."[104] The decision put the burden of demonstrating conflict on the defendant insurance company.[105] In addition, the court recognized that "[n]othing in this conclusion permits federal law to displace states' choices about the proper conduct of the business of insurance. If Wisconsin wants to authorize

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[90] *Id.*
[91] Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984).
[92] 42 U.S.C. §§ 1981, 1982, 1985(3) (2003).
[93] 42 U.S.C. § 3601, *et seq.* (2003).
[94] *Mackey*, 724 F.2d at 420.
[95] *Id.* at 421.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] NAACP v. American Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992).
[100] *Id.* at 294.
[101] *Id.* at 295.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable."[106]

Moore takes the reasoning of *American Family* further by focusing less directly on the statutes themselves and instead on the principles of the state insurance anti-discrimination statute and the federal Civil Rights Act.[107] In Moore, the court found that the two principles were "complementary."[108] Consequently, the McCarran-Ferguson Act did not require the preemption of the federal statute.[109] The court also clarified the definition of impairment.[110] According to *Moore*, impairment requires a direct conflict between statutes or between the federal statute and a policy integral to the state's regulatory scheme.[111] The burden is on the defendant insurance company to demonstrate such a conflict, including in some cases that it is in fact the policy of the state to encourage or condone a certain type of insurance discrimination.[112]

Moore and the line of decisions from which it descends do not establish directly that all federal civil rights statutes can be applied to insurance discrimination claims.[113] However, the application of the McCarran-Ferguson Act's reverse preemption has become progressively narrower. "Courts have consistently rejected the McCarran-Ferguson Act defense in race-based discrimination cases despite comprehensive state regulatory schemes and laws prohibiting discrimination in insurance."[114] The cases have recognized only one situation in which state insurance law would preempt a federal civil rights statute: a situation in which a state has expressly stated a policy or regulation which allows a certain type of discrimination or in which a state expressly limits the remedies for a certain type of discrimination.[115] However, this situation has yet to arise and be applied by any court.

For civil rights plaintiffs, these decisions forebode that in almost all situations, federal civil rights statutes will be applicable to insurance discrimination actions, thereby providing plaintiffs with more options and remedies to pursue. In addition, the application of federal civil rights statutes acts as somewhat of an equalizer between states whose own insurance anti-

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[106] *Id.* at 297.
[107] Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1223 (11th Cir. 2001).
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1221.
[111] *Id.*
[112] *Id.* at 1222.
[113] *Id.*
[114] Dehoyos v. Allstate Corp., No. SA-01-CA-1010-FB, 2002 WL 1491650, *3 (W.D. Tex. 2002).
[115] *Dehoyos*, 2002 WL 1491650 at *3.

discrimination statutes may vary in breadth and available remedies. For defendant insurance companies to combat the application of federal civil rights statutes to insurance discrimination claims, they must show a direct conflict between state and federal laws or they must demonstrate that a federal civil rights law would impair a stated state policy goal.

Courts continue to recognize that states which do expressly state that they intend insurance discrimination to be exclusively their own providence will render the federal civil rights statues ineffective against insurance companies in that state. This gives state legislatures the ability to keep federal civil rights statues from being applied to insurance in their state. In practice, however, doing so by exempting some or all types of insurance discrimination from interference would be politically unpopular and therefore difficult to accomplish. Nevertheless, the act of expressly limiting remedies for insurance discrimination to the exclusion of federal civil rights laws could very possibly be a threat to federal civil rights laws as they apply to the business of insurance.

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