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Economic Experts: The Challenges of Gatekeepers and Complexity

BY GREGORY G. WROBEL AND ELLEN MERIWETHER

THE ARTICLES FOR THE THEME OF this issue of ANTITRUST discuss important aspects of current practice for working effectively with economic experts in antitrust litigation. The impact of lower court rulings as gatekeepers and the increasing complexity of economic theories and empirical models present dual challenges in preparing and presenting expert economic evidence.

Commentators sometimes depict opposing experts as counterweights who serve mostly to cancel each other out, with the court or jury left to decide the case on the facts. But economic experts have longstanding and central roles in antitrust cases. The resources and attention devoted to their opinions and supporting analysis show that the stakes are very high for parties to present expert evidence that not only is admissible but also persuasive to prevail on class certification, summary judgment, and trial.

Gatekeepers as Liberators or Guardians

ANTITRUST magazine provides continuing guidance on the role of economic experts in antitrust cases, including articles in the Summer 1996 issue, not long after the Supreme Court's 1993 ruling in *Daubert*, and a symposium in the Summer 2001 issue that focused on the emerging role of courts as gatekeepers.[1] The articles that follow in this issue continue this guidance, but also provide important data and a frame of reference to evaluate how lower court gatekeeper rulings have affected the role of economic experts in antitrust cases.

Prior to *Daubert*, federal courts required proof that expert evidence was based on methods that were generally accepted in a field of science. The *Manual for Complex Litigation, Fourth*, published in 2004 and previewed in an article in the Summer 2001 issue of this magazine,[2] discussed the reasons for the change to the gatekeeper approach embodied in *Daubert* and other Supreme Court cases:[3]

> *Daubert* explicitly rejected the *Frye* test, holding that the admissibility of expert testimony was governed by Rule 702, and that nothing in the language of the rule reflected an intent to incorporate "general acceptance" as a precondition to admission. "The drafting history [of Rule 702] makes no mention of *Frye*, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"[4]

The *Manual* describes the goals of the gatekeeper approach as:

> ensuring (1) that the subject of the expert testimony is scientific "knowledge" grounded "in the methods and procedures of science" and (2) that the testimony is relevant, i.e., it will assist the trier of fact in understanding the evidence or determining an issue in the case. According to *Daubert*, "[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."[5]

The *Manual* depicts the gatekeeper approach as a liberating shift from the *Frye* standard, allowing courts and juries to consider scientifically sound expert evidence even if the opinions and analytical support are not "generally accepted" in a particular field of science.[6] Andrew Gavil offered a more cautionary view, as editor for this magazine's 2001 symposium articles. He questioned whether "the preeminent role of expert opinion in antitrust analysis, fears of unreliable expert testimony, and powerful strategic incentives have combined to make *Daubert* a central feature of much antitrust litigation," perhaps to the point that "*Daubert* decisions will supplant summary judgment and judgment as a matter of law as the principal vehicle for developing and defining antitrust's core principles."[7]

Against this backdrop, in this issue economists James Langenfeld and Christopher Alexander provide important data on how courts have performed their gatekeeper role over the past ten years, as well as useful insights on what economic experts can do to survive *Daubert* challenges. They show that lower courts have erected significant new hurdles for economic experts to present their evidence to the trier of fact—in particular, experts testifying on behalf of plaintiffs.

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The article is a useful starting point for further in-depth study of the specific grounds on which lower courts have barred economic experts from testifying in antitrust cases, and of whether gatekeeper rulings have served to protect juries from unhelpful and potentially misleading "junk science," or may have supplanted the traditional role of the finder of fact to weigh the persuasive value of opposing expert evidence.

Economic Evidence for Class Certification

Economist Hal Singer highlights another emerging gatekeeper hurdle for plaintiffs in antitrust class actions: to provide economic evidence at the class certification stage that demonstrates, among other things, that the element of antitrust impact can be proven with predominantly common evidence. Singer offers a two-step framework, focusing first on whether there is a plausible economic theory that links challenged conduct to anticompetitive effects in the relevant market, and second on whether there is a market or business mechanism that transmits this anticompetitive effect to a large number of members of the proposed class.

Singer's article may be considered in the context of the increasing rigor that some circuit courts have imposed on plaintiffs to obtain class certification, which has led to greater need at the class certification stage for fully developed economic theories and models to support expert opinions, and increased application of these models using case facts.[8] For example, in *In re Hydrogen Peroxide*,[9] the Third Circuit stated that "the court must resolve all factual or legal disputes relevant to class certification," and this "obligation . . . extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it."[10]

This development has in turn triggered the routine use of *Daubert* motions in class certification proceedings.[11] Courts have dealt with *Daubert* and its appropriate role in class certification proceedings in a variety of ways.

Some courts, mindful that gatekeeper rulings are intended to protect the jury from exposure to unreliable evidence,[12] have determined that *Daubert* does not play a significant role in class certification—after all, there is no jury to protect. For example, in *In re Evanston Northwestern Healthcare Corp. Antitrust Litigation*, the district court noted that while the defendant's expert report "does include some misleading information and analysis," the court would not "undertake a *Daubert* analysis at this procedural juncture," but instead would give the report the weight it believes it is due.[13] In *In re Monosodium Glutamate Antitrust Litigation*,[14] the court stated that "[o]n a motion for class certification, the Court cannot, and indeed should not, engage in the [*Daubert*] analysis." Similarly, in *Dukes v. Wal-Mart Stores, Inc.*, the Ninth Circuit stated that "courts need not apply the full *Daubert* 'gate-keeper' standard at the class certification stage. Rather, a 'lower *Daubert* standard should be employed at this stage of the proceedings.'"[15]

Some courts take a middle course by applying *Daubert*

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only in a limited way.[16] A variation of this "middling approach" is to apply *Daubert*, but with a mind towards the issue at hand—i.e., whether the expert has proposed a methodology by which liability may be demonstrated with common evidence. Thus, in *Nichols v. SmithKline Beecham*, the district court stated that "[a]t this stage of the proceeding . . . 'the Court simply examines whether [the expert's] methodology, as proposed, will comport with the basic principles of econometric theory, will have any probative value, and will primarily use evidence that is common to all members of the proposed class.'"[17]

Still other courts engage in a full-blown *Daubert* analysis, subjecting expert testimony to the full scrutiny it would receive if the court were considering evidence for trial on the merits. In *American Honda Motor Co. v. Allen*, the Seventh Circuit stated that "when an expert's report or testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis . . . ."[18]

Surprisingly few circuit courts have addressed this issue to date, and only the Seventh Circuit appears to have ruled squarely on the gatekeeper standard to apply at the class certification stage.[19] Although the role of *Daubert* challenges at the certification stage of class action proceedings was a col-

The lesson for class action practitioners is that expert testimony may be held to a far more exacting standard than is required to satisfy any of the *Daubert* standards now applied at the class certification stage. For plaintiffs, this means that the expert must submit evidence that not only is admissible, but also meets the plaintiff's burden of persuasion on the elements of Rule 23.

lateral issue in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court did not squarely address that issue in its opinion reversing the Ninth Circuit's decision to certify the class.[20]

To some extent, the question of what *Daubert* standard, if any, courts should apply to expert evidence submitted at the class certification stage has been eclipsed by rulings in an increasing number of circuits[21] that require lower courts to weigh the evidence of opposing experts in determining whether the plaintiff has satisfied the predominance standard or other class certification standards. In these circuits, it is not sufficient that the plaintiff's expert evidence is admissible under whatever *Daubert* standard is applied; rather, to achieve class certification, the evidence must be strong enough to persuade, and must be more persuasive than the evidence offered by the opposing expert.

In *Hydrogen Peroxide*, for example, the district court applied a *Daubert* standard and found the expert's testimony sufficiently reliable to be admitted and to carry plaintiffs' burden to demonstrate the elements of Rule 23.[22] On appeal, the Third Circuit did not question this ruling, but nevertheless reversed the grant of class certification and instructed the district court to weigh the evidence of opposing experts to determine whether the plaintiff had met its burden under Rule 23, noting that, "[l]ike any evidence, admissible expert opinion may persuade its audience, or it may not."[23]

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Complexity of Economic Evidence

The past decade has brought continued evolution in economic theories and empirical analysis in the field of industrial organization economics. Academic economists and practicing experts have posited new theories and analytical models of dynamic markets, network markets, opportunistic conduct, competitive effects, antitrust injury, and other elements of antitrust claims. These theories and models are increasingly complex from a theoretical perspective and challenging to apply using actual market data.

Examples include post-Chicago theories of how market leaders may disadvantage or exclude smaller or less diverse rivals with exclusive dealing, bundled discounts, market share discounts, free or no-price products and services, and other unilateral conduct; theories on market definition and market power for technology and network markets; models for tracing anticompetitive effects of price fixing and other forms of collusion through multiple stages of distribution; models for tracing the anticompetitive effects of foreign cartel conduct on U.S. markets and customers; and models for merger simulations and upward pricing pressure to show the potential for unilateral anticompetitive effects from mergers among rival suppliers of differentiated products.

Industrial organization economists engage in lively and ongoing debate among themselves on the viability of these economic theories and models. The theoretical literature for these debates and the real-world applications in antitrust cases and government enforcement actions often are technical, mathematical, and laden with assumptions that are difficult to follow even for experienced antitrust practitioners, and even more so for courts and juries who encounter such material infrequently, if at all.

The complexity of business markets and the economic theories offered to explain how they function confront economic experts and antitrust counsel with growing challenges: they must present economic evidence that is theoretically sound and applied properly to the facts of the case to satisfy *Daubert* and Rule 702, but they must do so with testimony and work product that is understandable and convincing for the court and jury.

Antitrust counsel sometimes make light of these challenges with references to eyes glazing over at the sight of mathematical formulae in economic articles and reports. But practitioners must have a basic understanding of how economic experts develop regression models and other empirical tools, and apply these models using evidence from the case to define markets, determine whether defendants possess market power, demonstrate the presence or absence of anticompetitive effects, and estimate damages.

Roy Epstein provides a boost for those willing to climb the econometric learning curve. He offers a simple explanation of ordinary least squares multiple regression, a common tool for modeling and data analysis in antitrust cases.[24] Regression output often provides key analytical support for expert opinions about the elements of antitrust claims and defenses, and just as often is a key target for rebuttal and cross-examination.

The manner in which an economic expert constructs a regression model and applies the model to data for the case may determine whether the expert survives a *Daubert* challenge and how persuasive the expert's testimony and work

product are for the court or jury. In fact, the analysis of Langenfeld and Alexander shows that the most common grounds for challenges to economic experts are the empirical methodology employed and the sufficiency of data used for analysis, not flaws in the basic economic theory on which the methodology is based.

Christopher Yates and Belinda Lee, as well as Ian Simmons, discuss practice and procedure for working with and cross-examining economic experts against the backdrop of Rule 702 and *Daubert*. Yates and Lee also discuss how recent amendments to Rule 26 affect discovery obligations and tactics for testifying experts. In short, the protection that Rule 26 now affords to expert work product and communications with counsel may serve to focus expert discovery and depositions more on the final opinions and reports of testifying experts and less on the impeachment potential of preliminary drafts and interactions between experts and counsel.

Practice and procedure for economic experts in antitrust cases has evolved in important ways over the past ten years. Practitioners who take account of these developments will be better able to provide expert opinions that are based on sound economic theory, with supporting empirical models that account for and fit the fact evidence for the case, and do so in a manner that will assist and persuade the court and jury in deciding the merits of antitrust claims, defenses, and class certification motions. ■

[1] *See* Christopher B. Hockett & Frank M. Hinman, *Admissibility of Expert Testimony in Antitrust Cases: Does* Daubert *Raise a New Barrier to Entry for Economists?* Antitrust, Summer 1996, at 40; Peter Bronsteen, *My Day with* Daubert, Antitrust, Summer 1996, at 41; Roger D. Blair, *Lessons from* City of Tuscaloosa, Antitrust, Summer 1996, at 43; Andrew I. Gavil, Daubert *Comes of Age*, Antitrust, Summer 2001, at 6; Christopher B. Hockett, Geraldine M. Alexis & Christina M. Wheeler, Daubert *Redux: Revisiting the Admissibility of Expert Testimony in Antitrust Cases*, Antitrust, Summer 2001, at 7; Peter Bronsteen & Asim Varma, Daubert *Rules for Economists*, Antitrust, Summer 2001, at 14; Roger D. Blair & Jill Boylston Herndon, *Inferring Collusion for Economic Evidence*, Antitrust, Summer 2001, at 17; Jill E. Evans, *Scientific Expert Testimony and the* Manual for Complex Litigation 4th, Antitrust, Summer 2001, at 22; Deborah A. Garza, *Editor's Note*, Antitrust, Spring 2003, at 7; *Economists' Roundtable*, Antitrust, Spring 2003, at 8; *Interview with Judge Kathryn Vratil*, Antitrust, Spring 2003, at 19; *Interview with Judge Vaughn Walker*, Antitrust, Spring 2003, at 26; James A. Keyte, *A Risk-Averse Guide for Working with Non-Testifying Consultants or Experts*, Antitrust, Spring 2003, at 30; Robert A. Milne & Jack E. Pace, III, *Conspiratologists at the Gate: The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, Antitrust, Spring 2003, at 36; Robert F. Lanzillotti & James T. McClave, *Meeting the "Ambiguity" Test Under* Daubert, Antitrust, Spring 2003, at 44; Roger D. Blair & Jill Boylston Herndon, *Ambiguous Is Still Ambiguous*, Antitrust, Spring 2003, at 48; Gregory J. Werden, Luke M. Froeb & David T. Scheffman, *A* Daubert *Discipline for Merger Simulation*, Antitrust, Summer 2004, at 89; Lisa C. Wood, *Cross-Examining an Expert Economist at Trial*, Antitrust, Fall 2005, at 80; Lisa C. Wood, *Court-Appointed Independent Experts: A Litigator's Critique*, Antitrust, Spring 2007, at 91; Rosa Abrantes-Metz & Patrick Bajari, *Screens for Conspiracies and Their Multiple Applications*, Antitrust, Fall 2009, at 66.

[2] Evans, *supra* note 1.

[3] *See, e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

[4] Manual for Complex Litigation, Fourth, § 23.22 at 475 (2004) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993) (internal citations omitted)).

[5] *Id.* (quoting *Daubert*, 509 U.S. at 592–93).

[6] *See, e.g.*, Manual for Complex Litigation, Fourth, § 23.24 at 479 ("[W]here the expert's conclusion is drawn from a reliable methodology, however, the correctness of that conclusion is still an issue for the finder of fact. The original intent of Rule 702 in 1975 was to liberalize, not restrict, the admission of expert evidence.").

[7] Gavil, *supra* note 1.

[8] *See* William H. Page, *Introduction: Reexamining the Standards for Certification of Antitrust Class Actions*, Antitrust, Summer 2007, at 53; Ellen Meriwether, *Rigorous Analysis in Certification of Antitrust Class Actions: A Plaintiff's Perspective*, Antitrust, Summer 2007, at 55; Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, Antitrust, Summer 2007, at 61; Roger D. Blair & Christine Piette Durrance, *Economic Pitfalls in Antitrust Class Certification*, Antitrust, Summer 2007, at 69; John H. Johnson & Gregory K. Leonard, *In the Eye of the Beholder: Price Structure as Junk Science in Antitrust Class Certification Proceedings*, Antitrust, Summer 2008, at 108; Ian Simmons & Alexander P. Okuliar, *Rigorous Analysis in Antitrust Class Certification Rulings: Recent Advances on the Front Line*, Antitrust, Fall 2008, at 72; Donald Hawthorne & Margaret Sanderson, *Rigorous Analysis of Economic Evidence on Class Certification in Antitrust Cases*, Antitrust, Fall 2009, at 55; Paul E. Godek & Janusz A. Ordover, *Economic Analysis in Antitrust Class Certification:* Hydrogen Peroxide, Antitrust, Fall 2009, at 62; Robert E. Bloch & Scott P. Perlman, Reed v. Advocate Health Care: *Anatomy of Class Certification Proceedings in a Wage Conspiracy Case*, Antitrust, Summer 2010, at 63; John H. Johnson, Jesse David & Paul A. Torelli, *Empirical Evidence and Class Certification in Labor Market Antitrust Cases*, Antitrust, Fall 2010, at 60.

[9] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2009).

[10] *Id.*; *see also In re* IPO Securities Litig., 471 F.3d 24, 33, 41 (2d Cir. 2006) (requiring a "definitive assessment of Rule 23 requirements," including the resolution of relevant factual disputes).

[11] *See, e.g.*, *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154, 158 (S.D. Ind. 2009) (establishing schedule for combined briefing of *Daubert* and class certification motions).

[12] *In re* Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 616 (N.D. Cal. 2009) ("At the class certification stage of the proceedings 'robust gatekeeping' of expert evidence is not required."); *In re* Foundry Resins Antitrust Litig., 242 F.R.D. 393, 400 (S.D. Ohio 2007) ("The Court does note, however, the substantial body of case law cited by Plaintiffs as standing for the proposition that *Daubert* does not control in this context.").

[13] 268 F.R.D. 56, 77 (N.D. Ill. 2010).

[14] 205 F.R.D. 229, 234 (D. Minn. 2001).

[15] 474 F.3d 1214, 1227 (9th Cir. 2007). In its later en banc decision in the case, the Ninth Circuit did not disturb this earlier statement by the panel, but did state: "We are not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial. However, even assuming it did, the district court here was not in error." 603 F.3d 571, 603 n.22 (9th Cir. 2010), *rev'd on other grounds*, Wal-Mart Stores, Inc. v. Dukes, No. 10-277, slip op. at 14 (U.S. June 20, 2011). *See also In re* Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56, 77 (N.D. Ill. 2010) ("The court will not undertake a *Daubert* analysis at this procedural juncture.").

[16] *See, e.g.*, Thomas & Thomas Rodmakers v. Newport Adhesives & Composites, 209 F.R.D. 159, 162 ("It is clear to the Court that a lower *Daubert* standard should be employed at this stage of the proceedings."); Midwestern Mach. v. Northwest Airlines, 211 F.R.D. 562, 565–66 (D. Minn. 2001) ("The application of the *Daubert* test, however, is somewhat limited at the stage of class certification. *Daubert* is helpful to the extent that it can assist the Court in preventing the entrance of methodology so apparently flawed.").

[17] No. CIV A 00-6222, 2003 WL 302352 at *4 (E.D. Pa. Jan. 29, 2003); *see also In re* Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 170 (E.D. Pa. 2007), *rev'd on other grounds*, 552 F.3d 305 (3d Cir. 2009) ("[Court] will, therefore, structure [its] resolution of defendants' *[Daubert]* motion in light of our present procedural need. Because the evidence is here offered for the limited purpose of class certification, our inquiry is perhaps less exacting than it might be for evidence to be presented at trial."); *Midwestern Machinery*, 211 F.R.D. at 565–66 ("The application of the *Daubert* test, however, is somewhat limited at the stage of class certification—[i]t would be inappropriate, however, for a court to look beyond the methodology and critique the prospective results.")

[18] 600 F.3d 813, 815–16 (7th Cir. 2010); *see also* Columbus Drywall & Installation, Inc. v. MASCO Corp., No. 4-CV-3066, 2009 WL 856306 at *2–3 (N.D. Ga. Feb. 9, 2009) (admissibility of expert opinions in support of motion for class certification is governed by Rule 702; "[t]he overarching goal of *Daubert*'s gatekeeping requirement is to ensure that an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.") (internal quotation omitted).

[19] Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815 (7th Cir. 2010) ("[O]ther appellate courts have not directly addressed whether challenges to experts must be resolved prior to class certification.").

[20] Wal-Mart Stores, Inc. v. Dukes, No. 10-277, slip op. at 14 (U.S. June 20, 2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage . . . . We doubt that is so, but even if properly considered, [the expert's] testimony does nothing to advance respondents' case." (citation omitted).

[21] *See* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:12 (6th ed. 2009) ("Consensus is rapidly emerging among the United States Courts of Appeals. The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits have expressly adopted certification standards that require rigorous factual review and preliminary factual and legal determinations with respect to the requirements of Rule 23 even if those determinations overlap with the merits.").

[22] 240 F.R.D. 163, 170–72 (E.D. Pa. 2007).

[23] *See* 552 F.3d at 322, where the court stated: "Concluding Beyer's opinion was admissible, the court . . . appears to have assumed it was barred from weighing Ordover's opinion against Beyer's for the purpose of deciding whether the requirements of Rule 23 had been met. This was erroneous." *See also In re* New Motor Vehicles Antitrust Litig., 522 F.3d 6, 25 (1st Cir. 2008) (referring to *In re* Xcelera.com Sec. Litig., 430 F.3d 503 (1st Cir. 2005), the court stated that "the district court actively evaluated the testimony of two competing experts and preliminarily credited the plaintiffs' expert, a determination this court upheld—after surveying the expert testimony ourselves—on clear error review.").

[24] For other articles in ANTITRUST magazine that discuss economic theories and models used in antitrust litigation and enforcement actions, see Benjamin Klein, *An Economic Analysis of Microsoft's Conduct*, ANTITRUST, Fall 1999, at 38; Debra J. Aron & Steven S. Wildman, *Economic Theories of Tying and Foreclosure Applied—and Not Applied—in* Microsoft, ANTITRUST, Fall 1999, at 48; Gregory J. Werden, *A Perspective on the Use of Econometrics in Merger Investigations and Litigation*, ANTITRUST, Spring 2002, at 55; Michael L. Katz & Carl Shapiro, *Critical Loss: Let's Tell the Whole Story*, ANTITRUST, Spring 2003, at 49; David A. Weiskopf, *Merger Simulation*, ANTITRUST, Spring 2003, at 57; Oliver E. Williamson, *Economics and Antitrust Enforcement: Transition Years*, ANTITRUST, Spring 2003, at 61; Peter Boberg & Andrew Dick, *Regression Analysis*, ANTITRUST, Fall 2005, at 85; Susan C.S. Lee, James Nieberding & David A. Weiskopf, *Game Theory*, ANTITRUST, Spring 2006, at 98; Joseph P. Cook, *Auction Design and Collusion*, ANTITRUST, Summer 2006, at 89; Gregory K. Leonard & Lawrence Wu, *Assessing the Competitive Effects of a Merger: Empirical Analysis of Price Differences Across Markets and Natural Experiments*, ANTITRUST, Fall 2007, at 96; David A. Argue & Richard T. Shin, *An Innovative Approach to an Old Problem: Hospital Merger Simulation*, ANTITRUST, Fall 2009, at 49.

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