Protecting Your Award from Appellate Challenge

September 13, 2016 – 2:00 pm – 3:00 pm ET

PROGRAM SUMMARY

Speakers: Jeffrey Aiken, Esq.

By agreeing to arbitrate a dispute, parties have elected to accept an expedited process with a very limited basis on which to overturn an award on appeal. This, of course, does not mean that a disgruntled party might not launch a challenge to an award. There are, however, steps you can take to “bullet proof” an award from appellate challenge. This 60-minute webinar shows you the way.

AGENDA

2:00 p.m. Welcome and Introduction of Speakers (5 minutes)

2:05 p.m. “Bullet Proof” Your Award (45 minutes)
   The primary Federal Arbitration Act reversal grounds;
   Non-statutory grounds;
   Preventative pre-hearing measures;
   Arbitrator hearing involvement – how much is too much?;
   Application of the award standard;
   Effective use of evidentiary standards and award recitals;

2:50 p.m. Conclusion and Questions (10 minutes)

3:00 p.m. Evaluation (5 minutes)

3:05 p.m. Adjourn
Jeffrey P. Aiken, Esq.

**Profession**
Attorney, Arbitrator, Mediator - Construction, Surety, Commercial, Information Technology

**Work History**

**Experience**
Over 40 years experience in contract preparation and dispute resolution focusing on: construction of single-family homes, condominiums, subdivision developments, commercial and industrial facilities (such as atomic power and anaerobic wastewater treatment plants, shopping centers, Denver airport, office buildings), surety bond claims, and general commercial and information technology systems contracting and disputes. Handled over $250 million of contested general commercial matters as a party representative or arbitrator (including management of 2.9 million documents in a single case), covering merger and acquisition disputes, closely held business dissolution, fiduciary duties, real estate, natural gas distribution, and Uniform Commercial Code claims. Handled over $300 million of real estate, financing, mergers and acquisitions, and general business transactions. Current member of the Board of Directors of AMICA Mutual Insurance Company, Lincoln, Rhode Island. Past chair of the IT and E-commerce Committee and board member and past chair of the Construction and Public Contract Section of the State Bar of Wisconsin. Visiting Professor at various Business and Law Schools in Hungary (Fall Program, 2008-2011). Adjunct Professor of Construction Law at University of Wisconsin Law and Engineering Schools (2011-present). Chosen as one of Wisconsin's Top 50 lawyers (2005) and named to Super Lawyer List (2006-2011) by Wisconsin Super Lawyers Magazine; named a Top 10 Construction Lawyer by the Daily Reporter (2006); included in The Best Lawyers in America in Litigation - Construction Law (2012).

**Alternative Dispute Resolution Experience**
Over 30 years ADR experience involving over $200 million of claims. American Arbitration Association arbitrator since 1974, and on construction and commercial panels since 1993, including current large & complex claim panel, with experience as lead arbitrator in three-member panels. Private party representative in arbitration recovery of over $10 million in close corporation dissolution, and party representative in an arbitration hearing spanning six months involving an IT system implementation dispute.

**Alternative Dispute Resolution Training**
AAA,Imposing Sanctions in Arbitration: Just How Far Can You Go? 2015; AAA Take the Initiative! Your Obligation to be a Proactive Arbitrator 2015; Introducing New Commercial Rules, 2014 (AAA Webinar);Five Ways to Reduce the Cost of Construction Arbitration, 2014 (AAA Webinar); What's a Respondent Like You Doing in a Place Like This? Confronting Arbitrability and Jurisdiction Issues in Arbitration, 2013 (AAA Webinar); Arbitrator Ethics & Disclosure (ACE003), 2012 (AAA); Arbitrator Boundaries: What are the Limits of Arbitrator Authority?, 2011

The AAA provides arbitrators to parties on cases administered by the AAA under its various Rules, which delegate authority to the AAA on various issues, including arbitrator appointment and challenges, general oversight, and billing. Arbitrations that proceed without AAA administration are not considered "AAA arbitrations," even if the parties were to select an arbitrator who is on the AAA’s Roster.
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**Jeffrey P. Aiken, Esq.**

Neutral ID : 125370

**Professional Licenses**


**Professional Associations**

American Bar Association (ADR Section; Construction Industry Section; Litigation Section; Fidelity and Surety Law Committee); American College of Mortgage Attorneys (Past Board of Regents; Past Program Chair; Past State Chair); State Bar of Wisconsin (ADR Section; Technology and E-Commerce Committee, Past Chair; Construction and Public Contract Law Section, Board, Past Chair; ADR Committee, Past Liaison; Standard Legal Opinion Committee, Past Chair); International Mediation Institute (IMI) Certified Mediator. Adjunct Prof. University of Wisconsin Law School ("Construction Law" - 2010-present) and School of Engineering (CEE 491, "Legal Aspects of Engineering"-2011-present).

**Education**

Marquette University (BA, cum laude-1969; JD, cum laude-1972).

**Publications and Speaking Engagements**


Awards and Honors


Citizenship

United States of America

Languages

English

Locale

Whitefish Bay, Wisconsin, United States of America
ARBITRATOR HEARING PARTICIPATION ELECTION

Case # ____________________

Arbitrator Hearing Participation Options

The rules of the American Arbitration Association (the “AAA Rules”) governing this proceeding provide, in part: “[t]he arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution and may direct the order of proof...and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”

Commercial arbitrators are trained that, while they may ask questions of witnesses if some evidence or testimony does not fit his or her professional experience, they should “rarely ask questions about some point not raised by the parties” such that, if a party fails to raise a point which the arbitrator may deem pertinent to its claim or defense, an arbitrator is often dissuaded from doing so.

The cannon of ethics of the AAA and American Bar Association (the “Ethics Code”) acknowledge that conduct of the arbitrators “may be governed by agreements of the parties” and that the Ethics Code “does not take the place of or supersede such agreements.”

Canon IV(G) of the Ethics Code provides that “[w]hen an arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses and request documents or other evidence.”

Canon VI(C) of the Ethics Code provides that “[i]t is not proper at any time for an arbitrator to inform anyone of the decision in advance of the time it is given to all parties.”

As a result of the foregoing, an arbitrator may, in his or her discretion, act (a) in a predominantly passive manner, deciding the dispute solely upon the information submitted by each party without questioning witnesses or providing feedback on the evidence as it is being presented (i.e. “Passive Involvement”); or (b) in accordance with the AAA Rules and Ethics Codes whereby the arbitrator refrains from raising points not raised by the parties, providing any indication of a forthcoming decision based on the evidence presented or legal positions being taken at that point in the proceeding or otherwise engaging in conduct which might later be argued is evidence of inherent bias (i.e. “Limited Involvement”).

The arbitrator appointed in this matter, Jeffrey P. Aiken, (the “Arbitrator”) will engage in Passive or Limited Involvement consistent with the AAA Rules and Ethics Code unless the parties to this arbitration (though their respective counsel) waive requirement.

Upon request of all parties and their agreement to the following provisions of this instrument, the Arbitrator is willing to engage in active questioning of witnesses and communications with all counsel (in the presence of each other) during the course of the hearing regarding questions he has concerning (or difficulty he has in understanding or accepting) the viability, validity, veracity or sufficiency of evidence or a party’s legal position, all in an effort to assist each counsel in presenting
their best case from a factual and legal point of view as comprehended by the Arbitrator at that point in the proceeding (i.e. “Active Involvement”).

The parties desire to have the Arbitrator engage in Active Involvement during the hearing and are willing to waive subsequent claims of bias, lack of independence or other inappropriate conduct on the part of Arbitrator under the AAA Rules or Ethics Code due to questions or comments made in conjunction with such Active Involvement;

**Designation of Arbitrator Involvement & Waiver of Claims**

The parties (by their respective counsel) hereby request the Arbitrator to engage in Active Involvement during the hearing and irrevocably waive any and all claims of bias, prejudice, lack of independence or inappropriate conduct of the Arbitrator under the AAA Rules or Ethics Code as a result of any questions, comments or opinions expressed in conjunction with such Active Involvement and further irrevocably waive the requirement for Arbitrator to engage in Passive or Limited Involvement.

Dated as of this ____ day of ______________, 20__.

Claimant (by its counsel): __________________________

___________________________(print name)

Respondent (by its counsel):

___________________________

___________________________(print name)
ORDER ON HEARING PROTOCOLS

The following Order is issued on the Arbitrator’s own initiative to facilitate the efficient presentation of evidence at the hearing in this matter pursuant to the provisions of (check as applicable): [ ] Rule 32 of the Construction Arbitration Rules of the American Arbitration Association (the “Construction Rules”); [ ] Rule 30 of the Commercial Arbitration Rules of the American Arbitration Association (the “Commercial Rules”); [ ] Article 16 of the International Dispute Resolution Arbitration Procedures (the “ICDR Rules”).

1. **General Standard For Arbitration**: “Arbitration is by no means a new device; in 320 B.C., Aristotle said, ‘The arbitrator looks to what is equitable, the judge to what is law; and it was for this purpose that arbitration was introduced, namely, that equity might prevail.’ Rhetoric, bk. 1, ch. 13.” Goldmann Trust v. Goldmann, 26 Wis. 2d 141, 153, 131 N.W.2d 902, 909 (1965) (dissenting opinion). Accordingly, Rule 43 of the Commercial Rules and Rule 45 of the Construction Rules each provide: “The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...”. Consequently, if this dispute is subject to either the Commercial or Construction Rules, the
evidentiary presentations should appropriately address any equitable considerations in addition to the strict provisions of the law.

2. **Sequestration of Witnesses:** A prospective witness will be sequestered upon request of opposing counsel absent good cause for allowing such witness to attend the hearing prior to his/her testimony.

3. **Evidentiary Objections:**
   
   (a) Because the failure to receive evidence can be a ground for vacating an award under certain circumstances, the Arbitrator will allow the introduction of all relevant and material evidence even though repetitive or otherwise objectionable on technical legal grounds; however, it should be kept in mind that the repetitive evidence is no more persuasive than the initial evidence.

   (b) Objections to evidence should be addressed to the Arbitrator, not opposing counsel.

   (c) Leading questions and those calling for hearsay are permissible on direct examination to facilitate the efficient development of specific items of evidence; however, the Arbitrator will take this into account in weighing the evidence so presented.

4. **Documents & Witness Examination:**
   
   (a) If an item of evidence is contained in a document, counsel should point that out to the Arbitrator at the appropriate time during the examination of a witness and refrain from having the witness read the passage or entry out loud. The Arbitrator can read it faster than the witness can say it. It is recommended that if follow up questions relate to a given passage
or entry, it is preferable to simply ask the follow up question allowing the witness sufficient time to read the passage or entry to himself/herself.

(b) If an item of evidence is in a document that counsel wants to introduce, absent a valid objection from opposing counsel, the offering counsel can simply direct the Arbitrator’s attention to that item without the need for identification by a witness because the document will speak for itself in nearly all cases. For example, if an expert witness has a CV or report, counsel should simply ask the Arbitrator to make note of whatever portions are deemed important without the need for redundant testimony from the witness.

5. **Cumulative Evidence:** Counsel should endeavor to avoid repetitive or otherwise cumulative evidence. Per the above, if an item is in writing, there is generally no need for a witness to testify as to the same thing.

6. **Hearing Attire & Decorum:** Counsel and witnesses may appear in business casual attire. The Arbitrator will be doing so. Counsel and their respective clients are expected to at all times be cordial and professional.

7. **Communications with Arbitrator:** All reasonable efforts should be made to avoid any *ex parte* communication (of even pleasantries or other small talk) with the Arbitrator during hearing sessions or breaks in those sessions. Counsel shall advise their witnesses of this requirement as well. This is intended to avoid a later claim of undue influence by one party as an arguable ground for vacating the final award.

8. **Arbitrator Involvement:** Rule 30 of the Commercial Rules and Rule 32 of the Construction Rules both provide: “Witnesses for each party shall...submit to questions from the arbitrator...” and “[t]he arbitrator, exercising his or her discretion, shall conduct the
proceedings with a view to expediting the resolution of the dispute...”. AAA arbitrators are trained that, while they may ask questions of witnesses if some evidence or testimony does not fit his or her professional experience, they should “rarely ask questions about some point not raised by the parties” such that, if a party fails to raise a point which the arbitrator may deem pertinent to its claim or defense, an arbitrator is often dissuaded from doing so. The cannon of ethics of the AAA and American Bar Association (the “Ethics Code”) acknowledge that “[w]hen an arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions...” [Canon IV(G)] ; yet, “[i]t is not proper at any time for an arbitrator to inform anyone of the decision in advance of the time it is given to all parties” [Canon VI(C)] although conduct of the arbitrators “may be governed by agreements of the parties” and the Ethics Code “does not take the place of or supersede such agreements.”

As a result, an arbitrator may, in his or her discretion: (a) act in a predominantly passive manner, deciding the dispute solely upon the information submitted by each party without questioning witnesses or providing feedback on the evidence as it is being presented (“Passive Involvement”); or (b) questioning witnesses solely on points raised by the parties but without providing any indication of a forthcoming decision (“Limited Involvement”). If counsel believes any question by the Arbitrator posed to a witness or counsel is improper for any reason, an immediate objection shall be made specifying the ground for such objection; otherwise such objection shall be deemed waived. The Arbitrator in this proceeding will engage in Passive or Limited Involvement unless the parties stipulate in writing that he may engage in “Active Involvement” and that by doing so the parties agree that such Active Involvement will not later
be asserted as a basis for a claim of arbitrator bias, lack of independence or other inappropriate conduct (such as raising an issue not raised by one of the parties or providing an indication of a forthcoming decision) which might serve as a ground for challenging the final award. “Active Involvement” is defined to include active questioning of witnesses and communications with respective counsel (in the presence of each other) by the Arbitrator during the hearing regarding questions he has concerning (or difficulty he has in understanding or accepting) the viability, validity, veracity or sufficiency of evidence or a party’s legal position being taken, in an effort to assist each counsel in presenting their best case from a factual and legal point of view as comprehended by the arbitrator at that point in the proceeding.

21. **Effect of this Order:** This order shall remain in effect until modified or amended by subsequent order of the Arbitrator.

   Dated this ____ day of _________________, 20__.

   By:____________________________________________
       _____________, Arbitrator
Jeff Aiken’s Responses to Follow Up Questions

Protecting Your Award From Appellate Challenge

The following are the questions we didn’t cover...:

In what way are employment arbitration awards different? Why disclaimer at beginning? I am an employment law arbitrator! I have no idea how employment awards are different. The disclaimer was added because I also have no idea how they are similar, having had absolutely no involvement with employment arbitrations over my career. Therefore, I am not in a position to say what, if any, portions of my presentation would be applicable to such an award. I do know that there is a Fair Labor Standards Act although I am unfamiliar with its provisions. While I have had experience with NASD and NYSE arbitrations as a neutral, it was decades ago and for that reason did not feel it appropriate to suggest the applicability of my points to those awards.

What if one party agrees to a pre-hearing stipulation to allow arbitrator to question and be active, but other party does not? What do you do? I would refrain from active involvement and become relatively stoic. Would you be willing to share your stipulations that you ask parties to consider (your forms you mentioned)? These have been furnished to Cindy at the AAA for distribution.

What are the "CPI Standards" to which speaker referred, as being different from the "just and equitable" standard? I misspoke, it is the CPR (Corporate Prevention & Resolution) rules for non-administered arbitration proceedings. I believe it was known as the CPI years ago. In any event, these rules provide in section 10.1: “The Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.” The rules can be found online at: https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2007%20CPR%20Rules%20for%20Non-Administered%20Arbitration.pdf

With regard to recommended stipulation on questioning, wouldn't it be better to have parties agree that arbitrator may do this? Yes, it would be and that is the reason for the written stipulation which will only be effective is both parties agree. Because, in all probability, the parties have never thought of this, I believe it is appropriate for an arbitrator to bring up the subject for their consideration.

How does the speaker feel about "net awards"? If, by this, you mean the one-line standard award of who wins how much, if anything, I have no problem with them at all. That said, my experience suggests the parties want to know why they win or lose which requires some form of reasoned award.

What about refusing to hear evidence on account of discovery violations by a party? I have never encountered this issue. If I do in the future, I will probably receive the evidence making it clear I will give it such weight as I deem appropriate in light of the violation (in order to minimize the chance that a complete refusal could serve as an arguable basis for appeal). I might also consider affording some form of relief to the other party.
What do "still exist to the hands" mean? I do not understand this phrase. If I said it, then it is an instance where I really didn't know what I was talking about – in which case I apologize.

How do you bullet proof a standard award? I do not believe a standard award is subject to the same risk of appellate challenge due to the inability of a party to show what the arbitrator did or did not rely upon. That said, it might be (and probably is) wise to still include some of the general recitals to further bolster the finality of the award.

Does Mr. Aiken always ask for the Stipulation that will allow him to ask questions or is this case by case when there is some suspicion that it might be needed? Depending on the nature of the arbitration I will generally seek such a stipulation. Obviously, an arbitration on documents only would not call for such a stipulation absent some unique circumstances.

Is there a written decision in Kevlar that we can find and review? None that I am aware of. If you find one, please let me know.

Big difference IMHO between an arb saying "I'm not clear about the point you are trying to make here" vs. "Sorry, but I just don't buy that" I agree completely. The former still allows a party to proceed with an argument or legal theory which is simply inapplicable whereas the latter allows an arbitrator to explain why so the party can go to “Plan B” in hopes of presenting the best case they have – even though they might still not prevail.

Even without the waiver you are now discussing, do you believe it would have been risky to ask BOTH SIDES’ lawyers to brief the economic loss doctrine as it applies to these facts? Maybe, but that would potentially open up entirely new set of briefs and responsive briefs, possibly triggering a request for additional evidentiary submissions. In my opinion at the time, the parties adamant refusal to agree to my acting as an “active” arbitrator forfeited their right and opportunity to get the advantage of my pre-existing knowledge of our state’s law. Had these out-of-state lawyers engaged local counsel, they undoubtedly would have learned early on that there was no tort claim or defense available. They might also have learned that contributory fault can apply to contract based claims as well as those in tort.

Why would I effectively threaten the parties that I will not ask clarifying questions that occur to me if they won't waive, in advance, certain claims? Seems to invite situation where I tie my hands if the parties won't agree. Isn't good judgment in questioning the better strategy? Unquestionably, good judgment in questioning is always necessary even if one is an active arbitrator. As I believe I pointed out in the slides in the oral presentation, an arbitrator does have the right to ask questions regardless of a formal stipulation. The purpose of the stipulation is to afford the opportunity to ask questions and comment on the evidence or theory in the presence of both parties without triggering a claim on appeal that I was prejudiced against a party by asking questions beyond what one might later determine to have been necessary to simply clarify submitted evidence. Finally, I don't threaten anything. I merely point out the alternative styles of arbitrator involvement, emphasizing my responsibility to “get it right” the first time because of the limited grounds for appeal (which many party reps may not be aware of) and then let them make the decision.

Seems like you would want some involvement to get the facts particularly if it is not clear, but it is up to the lawyers to put on their case. I ask questions after the witness is done or after all the cross so as not
to give benefit to one party to see what I am thinking. This is generally my approach as well although, to avoid wasting time, I will oftentimes interrupt if the evidence is redundant or completely off base.

I once had a co-arbitrator tell me I should not describe testimony and indicate that I did not credited it, and why -- because "you run the risk that the witness will submit an affidavit saying, "I never said that." I think that is wrong-headed; do you agree? Generally, no -- especially if there is a transcript of the proceedings. In any event, the main point is that if one includes recitals as I suggest regarding credibility and weight of the evidence, what one witness may say does not seem to move the needle much if at all in terms of improving one’s appeal prospects.

What are your thoughts on creating an opportunity for party appeal in failing to follow the AAA rules that the parties specifically incorporated in their contract? For example, extending award deadline, excepting additional evidence, where the commercial fast track rules set out that the award shall issue within a set time and no added proofs will be accepted and the parties' agreement incorporates the fast track rules. I strictly adhere to the time frames provided under the rules unless the parties formally stipulate to an extension. I had a situation a number of years ago where a panel withheld issuance of their award unless I agreed to an increase in one of their member’s hourly compensation following completion of the hearing. I refused because that violated the AAA rules. I ended up appealing to the 7th Circuit which essentially dodged the entire issue although I felt that the arbitrator’s conduct invalidated the award.

If an arbitrator’s award exceeds the amount of the demand (upon which the filing fee with AAA was based) is this grounds for vacating the award? I do not know, frankly. If I recall correctly, the AAA may collect an additional fee as a condition for releasing the award but I’m far from certain on this.

If the arbitrator bases a decision on a point not argued by the parties without raising the issue at the hearing, does the arbitrator not allow the parties an opportunity to point out where the arbitrator might be wrong? Certainly, yes. That said, I don’t believe that as an arbitrator I am bound to act as a lawyer for either or both counsel and if they don’t touch a key point that is dispositive and I know the law, I believe I am entitled to use my knowledge to achieve that “just and equitable” result despite the absence of input from them. Maybe a touch arrogant on my part. If, on the other hand, there is an issue they do not raise which I am concerned about but do not know the answer to, I will bring it up and ask for their input – especially when it comes to their proposed application of the evidence to that legal issue.

What should an arbitrator do if neither attorney in the case realizes or perhaps doesn't want to raise the issue that the contract which had the arbitration clause was an illegal contract? E.g. an illegal kick back arrangement between two health care providers. There is a multiple issue here. First, if the contract is illegal because of (for example, an illegal kick back arrangement), that does not render the arbitration clause unenforceable as I understand the current state of the law in most jurisdictions. As for addressing the illegal nature of the compensation arrangement as an impermissible kick back, which neither party mentions, I would raise this if the parties agreed I could act as an “active”. If not, I would be quite for a change and apply the law as I understood it.

Do you ever allow further briefing or motions for consideration on a point of law that one party believes you misconstrued or on facts they contend were incorrectly determined? I have never had that situation. Once my award is issued, I believe I lose jurisdiction over the proceeding except to possibly to
correct mathematical errors. Even if that were not the case, and I'd check it before doing anything in this type of situation, I would probably not allow for “reconsideration” which would be tantamount to an appeal thereby delaying the finality of the award which is the antithesis of the arbitration objective.

Does the speaker ever feel like he is pulling the wool over the reviewing judge's (or court's) eyes when he "bulletproofs" his awards? As a former trial and appellate court judge (in your state!) I admit to at least a small amount of surprise in his exposition of this point. I don't believe I am “pulling the wool” over anyone’s eyes if my recitals are accurate (i.e. truthful). If they are, then I am at a complete loss as to how an appellate court feels it can second-guess how I have evaluated witness credibility from tone of voice, physical demeanor and the like. If an appeal is to delve into such matters, it is protracting the arbitration process and escalating the cost. The fundamental purpose of my recitals is to point out to an appellate court factors bearing on my award which the appellate judge or counsel on the appeal may fail to recognize.

Why were you so emphatic about your suggestions only applying for arbitrations that allow leeway on what is just and equitable? It seems to me that most of your points, except the proposed language specifically about power to act equitably, apply to any arbitration. That may be. Please see my response to the first unanswered question above.

How do you discern whether an attorney is not prepared, or deliberately not asking a question of a witness for which he knows and doesn't want to hear the answer? I guess through experience. Whatever the reason, if I feel an question should be answered so I have the information pertinent to a given issue, I will ask it – which an arbitrator is entitled to do as pointed out in the presentation.

Am I correct that if I ask for counsels' input on whether they want me to tell them I don't understand or buy their argument, that their decision needs to be unanimous? You are correct. And wouldn't a waiver of bias be deemed unconscionable when signed before the hearing begins? I seriously doubt it when the waiver is based on what the parties agreed I should do. Again, the waiver relates to a later assertion of bias based on the questions I ask or comments I make regarding their positions – thereby affording them an opportunity to address my concerns/opinions to assist each side in putting forth their best case in light of the “just and equitable” standard.
Click here to go to the Commercial Arbitration Rules

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Effective 10/1/13

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