

# The ElderLaw Report

Volume X, Number 5

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December 1998

## GOING TO COURT TO IMPROVE SPOUSAL BENEFITS Part II: Medicaid's Income Rules

By Ron M. Landsman

The 1988 "Spousal Impoverishment" amendments to the federal Medicaid law were intended to improve the financial welfare of millions of citizens whose spouse's nursing home care is paid for in part by Medicaid. As reviewed briefly in the previous article in this two-part series, that law appears to be largely successful in alleviating poverty in many thousands of cases. (See "Going to Court to Improve Spousal Benefits, Part I: Medicaid's Resource Rules," *The ElderLaw Report*, Vol. X, Nos. 1/2, September 1998, page 1.)

In Medicaid, as in other financial planning contexts, resources and income both contribute to financial welfare, and each must be analyzed separately in understanding any one person's situation. The earlier article addressed the impact of the procedures for securing higher allowances—by agency, or court order—on the resource side. The present article addresses the income aspects of Medicaid.

Recognizing that the standard rules it set forth for protecting community spouses' income would not always be appropriate, Congress included two distinct mechanisms for obtaining relief from these rules, one an administrative procedure, the other judicial. The judicial procedures with respect to income have been as widely misunderstood or ignored as those for resources. The Health Care Financing Administration (HCFA) letter, which confused even advocates well informed about the structure of Medicaid as to the resource rules, rippled over to the income side.

The purpose of this article is to review these misunderstood or unfairly maligned provisions as they apply to income, extract Congress's intent, show the appropriateness of their use, correct false impressions of HCFA explanations of these provisions, and increase their use by providing practical guidance to practitioners. (These income orders need not be issued by a domestic relations court and bear little relation to domestic relations proceedings; they are thus different from so-called QDROs (qualified domestic relations orders), which change the underlying ownership of income and which are significant in income-cap states, since they may bear on eligibility *vel non*.)

### *The Basic Income Rules*

Congress improved spouses' welfare mostly by securing additional income for the nursing home resident's spouse who was still living in the couple's home or apartment. Formerly, this "community" spouse—most community spouses are women—received income support only if she qualified for SSI benefits. She is now allowed to retain a portion of the institutionalized spouse's income, to increase her total income up to 271 percent—and perhaps as high as 422 percent—of the maximum SSI benefit, at current levels. She is never required to use her own income to cover the cost of the institutionalized spouse's care, no matter how great her income, so long as she spends it fast enough to meet the resource test for one month. 42 U.S.C. §§ 1396r-5(c)(2) ("at time of application"), 1396r-5(c)(4) (separate treatment of resources after one month of eligibility).

Unlike the resource rules, which imposed impoverishment on many spouses who could have avoided it prior to the Spousal Impoverishment amendments, the income rules were an unalloyed improvement. They do not require the institutionalized spouse to pay all of his income for his own care; if the community spouse does not have enough money of her own to attain a basic needs standard (see below), the "spousal income deduction" from the institutionalized spouse's cost of care is available for her to spend on herself. And, unlike the resource amendments, the income rules impose no cap on how much income the community spouse can receive from her own sources (private retirement benefits, state pensions, SSA, Civil Service, etc.).

Income was treated differently than resources by Congress. There are subtle but significant differences between assets or resources and retirement income: the former can be transferred to another with few or no tax consequences; the latter usually cannot. Whether the income benefit is a government program such as Social Security or Civil Service annuities, private pension

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plans governed by the Internal Revenue Code, or other forms of private annuities, the law establishing the program or defining tax treatment of the private benefit makes it impossible to convey to the spouse or anyone else the right to the income stream during the principal retiree's lifetime. (See, e.g., the assignment rules with respect to Social Security and Civil Service retirement benefits, 42 U.S.C. § 207(a) and 5 U.S.C. §§ 8345(j) and 8346(a), respectively.)

That difference in structure corresponds to the different rules. Resources are put into a single pot, and interspousal transactions are freely permitted, exactly as in federal estate and gift taxes. Income is not so combined. Only the institutionalized spouse's own income is considered available to pay the cost of his own care. The community spouse's income is not added to that of the institutionalized spouse or "deemed" available, in SSI terms (see HCFA, State Medicaid Manual (SMM) § 3261.1). The cost of care for which the institutionalized spouse is responsible begins with his income, from which there are specific Medicaid deductions. There are no additions.

But relatively low-income community spouses enjoy the protection of a "basic needs" standard, misnamed an "allowance," as well as a housing needs ("shelter") standard, also misnamed an allowance. The two are combined, subject to a cap, to create the "minimum monthly

maintenance needs allowance," or MMMNA. If the community spouse's income is less than her MMMNA, the difference is the spousal income allowance or deduction. That amount is deducted from the institutionalized spouse's income in determining what he must contribute toward the cost of his care.

The "basic needs" component, adjusted annually based on the federal poverty level, applies to every community spouse in the nation. It is now \$1,357 per month, adjusted every July 1. The shelter cost component is equal to allowable housing costs above 30 percent of the basic standard (30 percent of \$1,357 is \$408; this figure also changes every July with the new basic needs amount). The allowable costs are what home buyers call "PITI" (principal and interest on a mortgage (or rent or condo fees), real property taxes, and homeowners insurance), plus a standard utility allowance. The basic and shelter components are added together, subject to the inflation-adjusted cap. That cap is now \$2,019, and will rise to \$2,049 on January 1, 1999; it is adjusted every January 1 based on the change in the consumer price index between the two preceding Septembers (42 U.S.C. §§ 1396r-5(d)(3)(C), 1396r-5(g) (1998 Supp.)).

### Procedures for Increased Income Allowances

As with the resource rules, Congress recognized that the standard income rules would work an injustice in some cases:

The Committee recognizes that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affecting a particular community spouse. The bill therefore provides [for court orders].

H.R. Conf. Rep. No. 100-105 (II), *reprinted in* 1988 U.S.C.C.A.N. 892; *accord* H.R. Conf. Rep. No. 100-661, *reprinted in* 1988 U.S.C.C.A.N. 1039, 1042.

Congress provided two mechanisms by which a community spouse could gain relief from the limitations of the income protection provisions, analogous to the two procedures for changing the resource allowance. They look like the familiar procedures for "fair hearings" (42 U.S.C. § 1396a(a)(3), following *Goldberg v. Kelly*, 397 U.S. 254 (1970)) and judicial review of administrative action, as under the federal Administrative Procedure Act, 5 U.S.C. § 702, but they are not the same. Rather, each is presented in the respective definitions of the income allowance as an alternative to the standard allowance, and each is determined under a different standard designed to be an exception to the general rule.

**"Fair Hearing" Revisions.** Substantively, a community spouse who believes that the needs standard is inadequate may seek an increase through an administrative hearing. The spouse who can show at the hearing that she needs income "above the level otherwise provided by" the needs allowance "due to exceptional circumstances resulting in

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significant financial duress" is entitled to an increased needs level. The administrative law judge (ALJ) is to set a higher standard "adequate to provide such additional income as is necessary." 42 U.S.C. § 1396r-5(e)(2)(B). This standard is so fact-based that it appears to have generated little judicial review.

The needs level set at an administrative hearing is an exception to the general rule for determining needs levels based on the two statutory standards (basic and shelter allowances). Section 1396r-5(d)(2)(A) provides that, "except as provided in" an administrative fair hearing order setting the MMMNA under Section 1396r-5(e)(2)(B), the needs allowance is to be determined using the two other standards (basic plus shelter), subject to the cap; that is the standard rule for all community spouses. 42 U.S.C. § 1396r-5(d)(3).

Two administrative review provisions in the Spousal Impoverishment amendments first provide for the familiar ALJ "fair hearing" review of the initial decision and then grant ALJs authority to apply a different rule in revising the needs standard. The first subsection permits either spouse to obtain fair hearing review of an initial determination of the spousal income allowance or the amount of income "otherwise available" to the community spouse. This puts into issue every aspect of the caseworker's calculation of the spousal income deduction and allowance under the standard formula. 42 U.S.C. § 1396r-5(e)(2)(A)(i) and (ii). The next subsection contains the provision for *revision*—in addition to *review*—of the minimum needs standard through administrative hearings. Plainly, the ALJ is given two very different tasks to perform with respect to income allowances—review of application of the standard rules and establishment of a different and possibly higher MMMNA, under a different standard, one not available to the Medicaid caseworkers and potentially resulting in a higher income allowance. These two distinct ALJ procedures support the basis for securing an income allowance revision, under a different standard, as well as review.

**Judicial Orders Awarding Income.** The judicial or court order provisions for income follow the same structure as the judicial provisions for resources, but with one distinction that is sensitive to the fundamental difference between the nature—and Congress's treatment—of resources and income. That difference, noted above, is that resources can be transferred, while income usually cannot. Thus, Congress pooled resources, but elected not to pool income through deeming.

Congress provided relief for the spouse who believes that neither the income allowance determined under the standard formula nor that resulting from an administrative hearing would be sufficient: she can obtain a court order awarding income. The order must be "against an institutionalized spouse for monthly income for the support of the community spouse . . ." Where there is such an order, "the community spouse monthly income allowance for the

spouse shall be not less than the amount of the monthly income so ordered." 42 U.S.C. § 1396r-5(d)(5).

The court order trumps all other calculations—no matter what the needs level or the spouse's otherwise-available income—and sets a minimum standard for the income allowance. "Except as provided in paragraph (5)" (i.e., the court order provision), the income allowance is determined using the needs level less the spouse's own income, the formula in Section 1396r-5(d)(2).

The judicial income remedy, like that for resources, requires a judicial order with mandatory operation: the income order requires the payment of income, the resource order requires the transfer of resources. The Spousal Impoverishment income rules, following general practice with respect to government retirement benefits and most private pensions, recognize that each spouse retains the right to his or her own income: the community spouse's income is never considered available to the institutionalized spouse to pay the cost of his or her care, nor is the institutionalized spouse's income available to the community spouse except to the extent that the local Medicaid agency establishes a spousal income deduction greater than \$0. Thus, a court order respecting income must require the payment of a monthly amount to the community spouse to have any operation at all. The Spousal Impoverishment rules require the local Medicaid agency to set the income allowance at an amount no less than a court has awarded.

Congress had similarly elected to restrict the alternative relief of judicial orders covering resources to those orders requiring affirmative action—that is, the transfer of resources from one spouse to another. But there was confusion over whether judicial orders addressing resources were to operate even if no formal transfer were required by the order itself because the property was already owned by the community spouse. Many states failed to distinguish between court support orders requiring the transfer of resources and those merely declaring that the plaintiff community spouse was entitled to retain all that she already owned as her community spouse resource allowance (CSRA). In the face of this confusion, HCFA issued a clarification that at first only added to the confusion.

### HCFA's Interpretation

HCFA issued a "Dear State Medicaid Directors" letter August 17, 1994. As described in Part I of this series (pages 4 and 5), the letter emphasized that the statute contemplated orders *transferring* resources, not declaratory orders *finding* what the CSRA itself should be. In an accompanying staff memo dated August 16, the agency correctly noted that establishing the CSRA as such was an administrative function in which courts got involved only on direct judicial review after exhaustion of administrative remedies.

The communications made it quite clear that the agency was distinguishing between declaratory orders where the community spouse already owned the resources that she sought to have protected, which have no effect under the

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ISSN: 1047-7055

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statute, and orders that result in actual transfers: the amount that is transferred sets a minimum CSRA level. As noted in Part I (page 5), state officials and advocates for the elderly shared this confusion. Both groups thought the rules meant that exhaustion of administrative remedies was required in *all* cases (with state officials lauding this interpretation and elder advocates condemning it). Sally Richardson, then director of the Medicaid Bureau, wrote to those who inquired that this was a misinterpretation. The statute required that resources actually be “*transferred* under an actual court support order. . . .” (This exchange of letters is quoted more fully in Part I of this series, on page 5.)

One writer, then New York State Medicaid agency chief Sue Kelly, also asked whether, if exhaustion were required for resource orders,

the establishment of the community spouse income allowance is also similarly limited. In other words, is the State only required to accept a court-ordered support for monthly income for the community spouse, if after exhausting the administrative remedy (fair hearing on the computation of the community spouse monthly income allowance), either spouse sought recourse to the courts?

Director Richardson was direct in rejecting the exhaustion of administrative remedies argument for income orders:

You also asked whether the requirement for States to deduct the amount of court-ordered spousal support applies only if the appeal to the court occurs after exhausting administrative remedies to increase the community spouse’s maintenance allowance. We believe the same principle applies . . . . [S]ection 1396r-5(d)(5) makes it clear that, in situations in which a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the monthly income allowance under the formula cannot be less than the amount ordered by the court. Thus, when a State calculates the community spouse monthly income allowance, it must take into account any existing court support order. [Sally K. Richardson to Sue Kelly, December 8, 1994, at 2 n.14.]

As with the resource rules, this allocation of responsibilities is coherent, if not compelling; Congress could have done it in other ways, but it chose this approach. The allocation and the resulting procedures provide a somewhat complicated but appropriate structure, permitting spouses to turn to administrative proceedings or the courts to obtain application of different standards in appropriate cases. A number of somewhat subtle details bear special note and confirm Congress’s awareness of how it was allocating very specific responsibilities.

• Congress wanted to provide relief from the general nationwide rules, whose capacity for taking individual variations into account was limited. The standard formulas’ only variations were for housing costs and pre-admis-

sion wealth (for income and resources, respectively). Plainly, more could be involved, and yet few if any other entitlement programs give substantial discretionary authority to low-level employees.

Congress could create such a system only if it could find decision makers whose institutional position would give a substantial guarantee of sophistication. A caseworker’s task is relatively simple: determine each of a number of values, and then combine them by an arithmetic formula; caseworkers would not do. ALJs and local judges were the appropriate people to turn to—the ones who might well review Medicaid matters anyway.

- Some standards were required, but not all had to come from Congress. The standard the lawmakers provided for ALJs includes decisions of what constitutes “unusual circumstances,” “significant financial duress,” and how much income could be generated by a given amount of resources. The standard for local judges assumes that they will have even more discretion, applying local-law standards for support between spouses, taking into account that one spouse has public benefits.
- Congress reasonably decided that all court orders affecting minimum resource and income allowances should be affirmative orders that require action by the institutionalized spouse, not mere declaratory orders. Thus, income orders, which always require the action of payment by the institutionalized spouse or a guardian, need no further elaboration given the decision to treat income separately.
- Congress *was* careful to keep the core administrative role separate from the others, although the line gets quite close. Neither an income nor a resource order determines a standard or allowance *as such*. In each case, the judicial order is one of four sources from which to draw the appropriate standard; in each case, the community spouse gets the highest of the four alternatives. To be sure, no spouse will seek a judicial order if she thinks it will not be higher, and none would rely on it if it were not. In neither case does a court determine the income or resource allowance *as such*, but the amounts in question can become the allowance if no other appropriate number is higher.
- Congress quite carefully and properly identified the role for administrative fair hearing orders: the ALJ does not address the spouse’s own income, but rather reviews her needs to see what she requires (see above). The higher income allowance flows as a result. The statute neatly fits in the ALJ order as a substitute needs determination.

By contrast, court orders establish the ultimate income allowance in the form of a mandatory payment to the community spouse. In making its determination, the court can and should take into account the spouse’s existing income, as well as her level of needs. The statute includes the judicial order as a substitute income allowance determination *if* it is the highest of the four alternatives.

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#### State Operation Under the Spousal Income Provisions

State-to-state variation in this area underscores the reality that state implementation of rights and benefits under a system of federal structure and standards fails to achieve uniformity, even on otherwise-mandatory provisions. An informal survey of practitioners active in the Medicaid area reveals that state compliance is patchy. Roughly speaking, there are states in full compliance (including some whose regulations are silent but that comply pursuant to direct federal authority), states that limit what benefits their courts may provide, and states that are silent or erroneously limit application.

The best place to start a review of state implementation is with New York, not least because it asked and received answers to its questions about HCFA’s interpretation of the CSRA and spousal income provisions, and procedurally sculpted its rules to conform to what HCFA requires and what it permits. The New York program was not entirely happy with these mandatory features, in particular the widespread resort to court orders directing the payment of income to the community spouse. It recognized that federal law required it to accept such orders, but it also recognized that the federal law did not itself dictate the standards that judges were to use in issuing support orders. The state Medicaid program then litigated the question of what standard the courts should use, and eventually persuaded the Court of Appeals that the judicial standard should be essentially the same as the standard for administrative hearings to revise income allowances: neither resources nor income was to be awarded except under unusual circumstances to avoid significant financial duress. Where a spouse could persuade a court that he or she needed resources or income under this standard, he or she would be entitled to such an order, and that order would indeed set the income allowance minimum. But if the spouse could not carry the day with a court under this significantly harsher standard, he or she would fail to obtain a court order authorizing the transfer of resources or awarding income to increase the community spouse’s resources or income allowance, respectively.

In *Schachner v. Perales*, 85 N.Y.2d 316, 624 N.Y.S.2d 558, 648 N.E.2d 1231 (1995), the family court awarded income to the community spouse, effective January 1, 1991, and the state Medicaid agency promptly gave the institutionalized spouse a spousal income deduction, as the state and federal statutes both provide that “the [spousal income] allowance shall not be less than the amount of court-ordered support.” *Id.* at 322. The court went on to deny the institutionalized spouse’s attempt to obtain a fair hearing order on the same basis (which would have given him more retroactive treatment), agreeing that a child’s education and a private high school and college were not an element of a spousal allowance (there is a separate family allowance for other dependents), nor did they constitute an exceptional cir-

cumstance. The court recognized that its Medicaid program could not ignore state court orders, but it also believed that Congress had failed to impose any requirement that state courts use any particular standard, either more or less generous than the administrative hearing standard in 42 U.S.C. § 1396r-5(e)(2)(B).

In *Gombrecht v. Gombrecht*, 86 N.Y.2d 47, 629 N.Y.S.2d 190, 652 N.E.2d 936 (1995), the Court of Appeals went further. It affirmed a decision holding that the standard for spousal income orders would be drawn in part from the federal Medicaid standard—an amount sufficient to allow the community spouse to avoid poverty, not to maintain the spouse’s prior standard of living or lifestyle. Moreover, partly importing the ALJ standard, it required that there be a showing of exceptional circumstances to obtain the amount sought. Affected community spouses then attacked that decision in federal court. *Jenkins v. Fields*, No. 95 Civ. 9603 (JSM), 1996 Medicare & Medicaid Guide (CCH) ¶ 44,198 (S.D.N.Y. May 1, 1996). The plaintiffs argued, in essence, that Congress intended to require the states to provide a forum utilizing a more lenient standard than that for ALJs. The court disagreed. It held that Congress did not want to be the one taking income away from the few spouses who had obtained greater benefits under state law, but while it thus permitted courts to apply more lenient standards it did not require them to do so.

**Full-Compliance States.** Some states have complied more or less fully with rules Congress provided, typically by regulations adopting the federal statutory language in 42 U.S.C. § 1396r-5(d)(5) and applying them as written, according to experienced practitioners who provided information on their state’s practices. The New Jersey regulation says plainly, “if a court has entered an order [following the language of Section 1396r-5(d)(5)] and the amount of the order is greater than the amount of the community spouse deduction, the amount so ordered shall be used in place of the community spouse deduction.” NJAC § 10:71-5.7(f). But New Jersey practitioner Thomas D. Begley, Jr., reports he knows of no court orders on income, and thus of no compliance issues. Scott Severns of Indiana says his state’s manual is equally clear (“the monthly spousal allocation cannot be less than the court ordered support,” ICES § 3455-15-10-10), and widely used. Similarly, Idaho’s Michael Wytychak III relates that in his state, if the court-ordered amount is more than the amount calculated under the standard allowance, “the support amount ordered by the court must be used as the CSA,” IDAPA Table 16.03.05616.11.

**Compliance Without Regulations.** While Oklahoma’s regulations do not address the question, Lee Holmes reports that separation orders relying on the federal Medicaid provisions are routinely accepted. Mr. Holmes notes, however, that two recent cases are under scrutiny by the Department of Human Services’ general counsel.

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**Compliance But Limited Judicial Authority.** Connecticut is in compliance, but following the New York model it has attempted to limit the availability of the underlying court order. John Kearns notes that the Connecticut Medicaid Manual reflects compliance in establishing the spousal allowance deduction as the larger of the amount set under the standard formula (MMMNA less spouse's other income) or the amount of an appropriate court order. But effective October 1, 1992, the commonly used probate court orders are ineffective unless they find that the additional income is required to "prevent financial duress." Conn. UPM 5035.50 B.1.b.-d. Henry Cavallera reports that Nevada also follows New York, permitting a court to order additional income only upon a finding of "exceptional circumstances resulting in significant financial duress" and after notice to the state welfare administrator, who may intervene. Even then, a decree entered under this section "may not be binding on the welfare division . . . in making determinations under the state plan for Medicaid." NRS § 123.259(4) and (6)-(8).

**Noncompliance or Erroneous Compliance.** Other states make no attempt to comply, or appear to attempt to comply but make a variety of subtle errors. Louisiana makes no attempt to comply. La. Medicaid Eligibility Manual § I-1537.3. Joel Mendler reports there are few if any such orders. Similarly, Julia Merkt in Texas says her state's regulations are silent on judicial orders respecting income, and that the only orders used are QDROs. Minnesota attempts to comply, but an error significantly reduces the amount available from what it should be. According to Rolf T. Nelson, equivalents to the federal provisions are contained in both statute and manual. Minn. Stat. § 256B.058, subd. 2(e) (community spouse income allowance "shall not be less than the amount of the monthly income ordered"). But the MDHS Combined Manual, para. 18.31, inadvertently treats the court order for income as a substitute for the MMMNA determination, not the income allowance. It thus directs caseworkers to "use the court-ordered figure as the maximum amount," but only if it is higher than the needs allowance cap. Similarly, it sets as the income allowance the amount of the needs allowance or the court order *less* the community spouse's income. If Minnesota courts are making findings based on their views of the MMMNA rather than the actual income allowance, the results are the same, if doctrinally inappropriate.

The oddest result is in Maryland, which adopts federal statutory terms as its regulations and has the language of Section 1396r-5(d)(5) in its Code of Maryland Regulations (COMAR) § 10.09.24.10-1(C)(8). After initially complying with out-of-state court orders respecting resources, the

state adopted a series of positions for one applicant in an attempt to ward off complying with a D.C. Superior Court order awarding income to the D.C. spouse of a D.C. domiciliary then residing in a Maryland nursing home. Maryland first said exhaustion was required, that out-of-state court orders did not have the same standing as orders from the courts of the home state, and that only pre-Medicaid orders were covered by Section 1396r-5(d)(5). The first ALJ swept away those arguments, but held that "some" exhaustion was required: the Medicaid program did not have to establish an income allowance no less than the court order until the spouse had provided all the information relevant to a spousal income order under the standard rule (including housing costs or an ALJ revision based on a finding that unusual circumstances threatened the spouse with severe financial duress). *In re McGhee*, OAH Docket No. 94-004463-DHMH-PGEO. While appealing that decision, Mrs. McGhee filed a second application, including all the information that might be relevant under any of the three possible standards. A second ALJ, agreeing that Mrs. McGhee met all the requirements established by the first ALJ, then held that the income allowance could not be less than the court-ordered amount of income, but that this had no effect where there was no income allowance based on either the standard or the ALJ provisions. Since no income order was required, there was nothing that had to be "not less than" the court order, and benefits were accordingly denied again. *In re McGhee*, OAH Case No. 94-DHMH-PG-10-416953. Appeals are pending in both *McGhee* decisions.

### Conclusion

Some of the disarray in the court-ordered income rules is understandable, but much is not. To be sure, given the lack of guidelines from Congress, state courts may well find themselves at sea in attempting to allocate income between the community and institutionalized spouses. Indeed, to some extent they should, for Medicaid continues to have a home state element to it. But the lack of standards can mean variation from county to county, or from time to time in one county, depending on who is on the bench. Underlying that confusion are regulations that fail to adopt the appropriate federal standards, some inadvertently, some not, including those that contumaciously refuse to accept even the basics of the federal law.

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