



# STATE OF CALIFORNIA CONSTRUCTION LAW COMPENDIUM

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## **I. INTRODUCTION**

California construction defect litigation is, by and large, governed by two statutory schemes. The first, the Right to Repair Act (Cal. Civil Code, §§896 – 945.5), came into effect on January 1, 2003, and is commonly referred by its legislative bill, SB 800. The Act defines what constitutes a construction defect in California by establishing “functionality standards,” the violation of which is actionable as a matter of law. The Right to Repair Act applies to original construction intended to be sold as an individual residence where the purchase agreement is signed on or after January 1, 2003.

The second statutory scheme, the Davis-Stirling Common Interest Development Act (Cal. Civil Code, §§1375-1375.1), is commonly referred to as the “Calderon Procedures” and applies to common interest developments such as apartment complexes and Homeowner’s Association claimants. These procedures require prefiling dispute resolution process between homeowners associations and common interest development builders (general contractors, all subcontractors, design professionals, and insurers of all potentially liable parties).

## **II. ACTIONABLE CLAIMS IN CONSTRUCTION DEFECT LITIGATION**

### **A. Strict Liability**

Under the strict liability doctrine, construction defect plaintiffs may recover damages without having to prove breach of duty. Rather, they need only show that a “mass-produced consumer item” is defective and that the “defect” proximately caused injuries. *Del Mar Beach Club v. Imperial Contracting Co.*, (1981) 123 Cal.App.3d 898. The Right to Repair Act sets forth about 45 functionality standards, a violation of each constitutes an actionable claim. The standards are divided into seven categories: (1) water intrusion issues, (2) structural issues, (3) soil issues, (4) fire protection issues, (5) plumbing and sewer issues, (6) electrical system issues, and (7) a catch-all category regarding other areas of construction. If the violation of a standard causes damage to a manufactured product, or if the manufactured product causes damage to other building components, those damages are recoverable under Cal. Civil Code § 896(g)(3)(D).

Potential strict liability defendants in construction defect cases include builders of mass-produced homes, developers of building sites, manufacturers of component parts, material suppliers, and, in some circumstances, subcontractors.

### **B. Negligence**

Where an injury occurs due to negligent construction of a residence, a negligence cause of action may lie. Proof of negligence in the construction defect context requires that plaintiff demonstrate that the defendant fell below established professional standards or failed to meet building code requirements. As such, the standard of care required in the construction of a home must, in most cases, be established by expert testimony. *Miller v. Los Angeles County Flood Control Dis.* (1973) 8 Cal.3d 689, 703.

In 2000, the California Supreme Court held that there could be no cause of action for negligence against a developer, contractor or subcontractor without some proof of consequential damage. *Aas v. Superior Court* (2000) 24 Cal.4<sup>th</sup> 627. Pursuant to *Aas*, a construction defect plaintiff could not sue a builder for a defect *unless* there had been actual bodily injury or damage to property. The Right to Repair Act expressly superseded *Aas* by allowing claims where there is no resultant or consequential damage other than the defect itself. As discussed above, however, these causes of action are based on statutory strict liability.

### C. Breach Of Warranty

A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity. The warranty may be express or implied.

Breach of Express Warranties - Contracts involving real property often contain warranties regarding conditions of the property. An express warranty is an affirmation of fact or promise made by the seller to a buyer that relates to the items sold and becomes part of the basis of the bargain. See Cal. Uniform Comm. Code § 2313. A seller's obligation to a buyer for breach of warranty is one of strict liability. *Basin Oil Co. v. Baash-Ross Tool Co.*, (1954) 125 Cal.App.2d 578, 596 (where a breach of warranty is established, liability is imposed entirely independent of the question of negligence on the part of the seller).

Breach of Implied Warranties – Implied warranties are based on implied representations rather than promises and may be created by statute or case law. California courts have long maintained that builder and seller of new construction are bound by an implied warranty that the completed structure was designed and constructed in a reasonably workmanlike manner. *Windham At Carmel v. Mountain Ranch* (2003) 109 Cal.App.4<sup>th</sup> 1162; see also *Pollard v. Saxe & Yolles Dev't. Co.*, (1974) 12 Cal.3d 374, 380. Because of the “new construction” component, it has been held that privity of contract must exist between the plaintiff and the original builder or seller before a cause of action for breach of implied warranty may be sustained. However, stringent privity is not an express requirement for enforcement of the California Civil Code §900 fit and finish warranty. Traditionally, the doctrine of implied warranty has not been applied to design professionals, *i.e.*, architects and engineers.

### D. Breach Of Contract

The written purchase agreement of the sale of a home generally contains a number of provisions that may give rise to a breach of contract cause of action. A breach of contract action may also arise from breach of a design contract. *Bayuk v. Edsun* (1965) 236 Cal.App.2d 309. As indicated above, causes of action for breach of express warranties are routinely asserted in construction defect litigation. In addition, contracts between developer, contractor and subcontractor may also give rise to breach of contract actions and, as explained below, form the basis for indemnity claims and cross-claims.

Breach of contract causes of action seeking redress for injury to real property have been recognized in California. In those cases the accrual of the breach of contract action is governed by the discovery rule. *Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.app.4<sup>th</sup> 112, 119-

120 (the accrual of plaintiff's cause of action is postponed until plaintiff either (1) actually discovers his injury and its negligent cause, or (2) could have discovered injury and cause through the exercise of reasonable diligence.) The statutes include a limitation of 4 years for breach of written agreement, 3 years for damage to real property, and 2 years for personal injury caused by breach of contract construction defect.

Emotional distress damages are not recoverable under breach of contract theory where breach did not cause physical injury and the alleged emotional distress arose solely from property damage. *Erlich v. Menendez* (1999) 21 Cal.4<sup>th</sup> 543; *see also* Cal. Civil Code §§ 3300, 3301, 3333.

#### E. Misrepresentation And Fraud

Intentional misrepresentation about construction defects and nondisclosure about such defects are actionable as damage claims. In California, the essential elements of a cause of action by intentional misrepresentation are: (1) the defendant made a representation as to a past or existing material fact, (2) the representation was false, (3) the defendant must have known that the representation was false when made (or must have made the representation recklessly without knowing whether it was true or false), (4) the defendant made the representation with an intent to defraud the plaintiff, (5) plaintiff was unaware of the falsity of the representation and must have acted in reliance therein, and (6) as a result of the reliance, plaintiff sustained damage. In the construction defect context, intentional misrepresentation has been successfully invoked against developers who file misleading information with the Department of Real Estate and those who sell property without disclosing known defects.

#### F. Indemnity

The California Supreme Court has described the general principles of indemnity as “the obligation resting on one party to make good a loss or damage another has incurred.” The right to seek indemnification may arise from two general sources: (1) by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances, and (2) in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case.

Causes of action for indemnity and contribution are routinely alleged in construction defect litigation. Builders and contractors sued by homeowners for construction defect customarily cross-claim against subcontractors, seeking indemnity to the extent of their liability. *Eichler, supra*.

The California Supreme Court ruled recently in *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4<sup>th</sup> 541 that parties to a construction contract may assign one party responsibility for the other's legal defense when a third-party claim is made. The *Crawford* opinion stands for the proposition that a contractual duty to defend arises as soon as such claims are made and may continue until they have been resolved.

Under a subcontract in which subcontractor agrees to “defend any suit or action” against the general contractor, founded upon any claim growing out of the execution of the subcontractor’s work, the subcontractor’s obligation is to provide a defense to a construction defect action against the general contractor as soon as the action is brought, regardless of any later determination that the subcontractor was not negligent. In short, the *Crawford* opinion made it clear that the subcontractor's duty to defend does not require a final determination of the issues.

### III. PRE-LITIGATION PROCEDURES

#### A. Pre-litigation procedures under the Right to Repair Act

A significant aspect of the Right to Repair Act is the establishment of a pre-litigation process under which a builder is given the right to repair a defect before a lawsuit can be started. The homeowner triggers the statutory process by submitting a written claim to the builder. The Act prescribes a timetable to which the builder must strictly adhere in repairing the problem. Although builders are unlikely to force a repair on an unwilling homeowner, builders may obtain a stay of court action until the repair has been completed under Civil Code § 930(b). If the builder does not comply with the statutory guidelines and time frames, the homeowner can begin litigation. All statutes of limitations are tolled once the pre-litigation process is initiated.

If the builder has not adhered to the statutory process, or if the repairs are not adequate, then the homeowner may then file suit or initiate other legal proceedings, i.e., arbitration. The Right to Repair Act was clarified in 2014 by the California Court of Appeal in Cynthia Burch vs. Superior Court, 223 Cal.App.4th (Cal.App.2d Dist 2014). In that case, Burch challenged an order granting summary adjudication in favor of Premier Homes, LLC (Premier Homes), Custom Home Builders, Inc. (Custom Home Builders), Scott Warren, and Daniel Sahar in a construction defect action. The defendants argued that the Right to Repair Act (Civ. Code, § 895 et seq.) provided the exclusive remedy for a homeowner seeking damages for construction defects and precluded common law causes of action for negligence and breach of implied warranty.

The court held that the Right to Repair Act does not provide the exclusive remedy for a homeowner seeking damages for construction defects that have resulted in property damage and that a homeowner can pursue common law claims.

#### B. Pre-litigation procedures under Calderon

Civil Code §§1350-1378, known as the Calderon Procedures, require a special dispute resolution process that must be followed before the filing of a civil action by a homeowner’s association against a builder for construction defects. The Legislature expanded the dispute resolution process in 2002 to include all subcontractors, design professionals, and insurers of all potentially liable parties. The Calderon Procedures have different timing for pre-litigation procedures and necessarily involve a dispute resolution facilitator.

#### C. Table Comparison: Right to Repair & Calderon Pre-litigation Timeline

<b>Time</b>	<b>Right to Repair</b>	<b>Calderon Procedures</b>
Before applicable SoL Run	Homeowner serves notice of claim to start the process. CC §910	Service of Notice of Commencement of Legal Proceedings CC §1375(c)
14 days after receipt of notice	Builder must acknowledge receipt of the notice in writing CC § 913	
Within 25 days of service of notice		Date by which builder must give written request to association to meet with board of directors CC § 1375(d)
Within 10 days of builder's request for a meeting		Builder meets with board of directors CC § 1375(d)
Unspecified, but before inspection	Builder must: coordinate inspection date with homeowner, provide proof of liability insurance, notify subcontractors, manufacturers, and/or insurance carriers about the date of inspection, and tell the homeowner who will attend the inspection CC § 916	
14 days after builder's acknowledgement of notice	Builder must complete the initial inspection and testing. CC § 916	
60 days from receipt of notice		Deadline for builder to give association access to relevant construction files and plans, CC §1375(e)(1) and give written notice by certified mail to potentially responsible subcontractors, design professionals, and insurers. CC § 1375(e)(2)
Within 3 days of the initial inspection	Builder must notify the homeowner that it requires a second inspection and state the reasons CC § 916	
Within 40 days of the initial inspection	If requested, builder must complete second inspection and meet all requirements of first inspection, CC § 916	

Within 30 days of initial inspection or requested second inspection	Builder offers to repair or offers cash payment CC §§ 917, 929	
Within 10 days from builder's notice to subcontractors		Deadline for subcontractors and design professionals to provide Statement of Insurance to association and builder CC § 1375(e)(2)
Within 20 days from builder's notice to subcontractors		Deadline for parties to meet and confer to select a dispute resolution facilitator 1375(f)(1)
Within 30 days after builder's offer	Homeowner must respond to the offer to repair by authorizing builder to proceed, requesting names of three additional contractors, or requesting mediation. CC §§ 918-919	
Within 10 days from before case management meeting with dispute resolution facilitator		Deadline for dispute resolution facilitator to disclose potential conflicts CC § 1375(f)(2)
Within 100 days from service of notice		Initial case management meeting with dispute resolution facilitator CC § 1375(f)(1), parties agree to case management statement, deadline to provide date compilation of scope of work of each individual contractor
The later of 14 days of homeowner's authorization of repair / selection of contractor or 5 days of obtaining permit	Builder must schedule the repair to begin at a mutually convenient date. CC § 921	
Within 20 days of the homeowner's request for alternative contractors	Builder may conduct another noninvasive inspection to permit proposed alternative contractors to view site. CC § 918	

Within 35 days of homeowner's request for alternative contractors	Builder must give homeowner the names of up to three alternative contractors. CC § 918	
Date set by dispute resolution facilitator		Deadline by which builder may submit a written settlement offer; statement that builder has sufficient funds for the offer; and a summary of testing results. Builder may request a meeting with the board to discuss the offer. CC § 1375(k)(1)(A)
Within 10 days from the builder's offer		Deadline by which association's board of directors to meet regarding builder's settlement offer. CC § 1375(k)(1)(C)
Within 20 days of the builder giving the names of alternative contractors	Homeowner must authorize builder, original contractor, or alternative contractor to do repairs or request mediation. CC §§ 918-919	
Within 15 days of homeowner's request for mediation	Hold 4 hour mediation session. At conclusion, homeowner must authorize repair. CC § 919	
If builder's offer accepted – as soon as practicable after that		Association must inform members of settlement, including specific information set forth at CC § 1375.1(a)
If builder's offer is rejected, no later than 15 days before association files lawsuit		Association must hold meeting open to everyone in the association. Builder must pay the cost of sending the settlement offer to the association members 15 days before meeting, and cost of meeting (3 dollars per member). CC § 1375(k)(1)(D)
180 days (or less, if so specified in notice) from date of service of notice		Statute of limitations tolling period ends. (may be



		extended upon agreement) CC § 1375(c)
Within 7 days of completion of mediation	Builder must schedule the repair to begin on a mutually convenient date. CC § 921	
Complete repairs within 120 days	Builder must make every effort to complete the repairs within 120 days. CC § 921(b)	
After repairs are completed and before action can be filed	Homeowner must request mediation in writing (if no prior mediation) before filing action. CC § 928	
Within 15 days of homeowner's request	Post-repair mediation must take place. CC § 928	
At completion of pre-litigation procedures	Homeowner may file action or other proceeding. CC §§ 910, 933	

#### IV. CASH OFFERED IN LIEU OF REPAIR

A builder cannot obtain a release of any kind from the homeowner in exchange for the repairs. Thus, a homeowner can still bring a lawsuit against the builder for the inadequate repairs. However, builders may offer the homeowner cash instead of repair to settle the dispute. In this case, the builder can obtain a reasonable release for the cash payment. No cash may be offered in lieu of repairs under the Calderon Procedures.

#### V. DAMAGES

##### A. Economic Loss Doctrine

The economic loss doctrine precludes tort recovery in the absence of personal injury or property damage. Contract damages are dependant upon the bargain between the contracting parties, where damages for unintentional torts depends on whether the injury to persons or property was foreseeable. *Aas v. Sup. Ct.*, *supra*, 24 Cal.4<sup>th</sup> at 635-636, 646, 650. In *Aas*, the California Supreme Court explained that under the economic loss rule, “appreciable, nonspeculative, present injury is an essential element of a tort cause of action.” “Construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses ... do not comfortably fit the definition of ‘appreciable harm’ ... an essential element of a negligence claim.” *Aas, supra*, at 646.

As noted above, *Aas* has since been superseded by the passage of the Right to Repair Act. Now, proof of actual damage to real property is not required for most of the stated actionable defects. If a claim for damages is made under The Act, the homeowner is entitled to damages for the reasonable value of repairing any violation of the standards defined under the The Act, the reasonable costs of repairing any damage caused by the repair efforts, the reasonable cost of

repairing and rectifying any damages resulting from the failure to meet the standards, the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of business, and reasonable investigative costs for each established violation.

#### B. Economic Waste

Damages for economic waste are recoverable in California. When a contractor performs in accordance with the building specifications and the usefulness of intended improvements is not seriously impaired, the contractor has substantially performed. However, in some cases, deviations from the standards cannot be remedied without causing serious injury to the remainder of the improvements. If corrective work requires a major remodeling, and destruction of a valuable and functional portion of the work causes unreasonable and unjustified economic waste, recovery is authorized. The measure of damages for economic waste is the diminution in the value of the improvements caused by the defects, and not the cost of repair. *Hansen v. Covell* (1933) 218 Cal. 622, 625.

#### C. Delay Damages

Homeowners are entitled to damages for losses suffered because completion of the project was delayed beyond the completion date provided in the contract. The damages are based on a cause of action for a breach of the contract. The measure of damages is the rental value of the property, or other value of the loss of the use of the property, during the period of delay. *Amerson v. Christman* (3d Dist. 1968) 261 Cal.App.2d 811, 824-25. In addition, California courts also allow for any other losses that are foreseeable and naturally result from the damage caused to the owner's property, including lost profits during the period repairs are being performed. *Diamond Springs Lime Co. v. American River Constructors* (3d Dist. 1971) 16 Cal.App.3d 581, 598-99.

#### D. Emotional Distress Damages

California courts have held that homeowners cannot ordinarily recover damages for emotional distress or mental suffering arising from the contractor's breach of contract or negligence in the performance of a construction contract. *Erlich, supra*, at 561. These damages cannot be recovered based on the contractor's simple negligence. *Soto v. Royal Globe Ins. Co.* (4<sup>th</sup> Dist. 1986) 184 Cal.App.3d 420, 434. Furthermore, as a general rule in California, emotional distress damages cannot be recovered based solely on injury to property; however, these damages may be recoverable if it can be shown that the contractor committed certain types of fraud, intentional misconduct, or acts in bad faith. *Shaffer v. Debbas* (4<sup>th</sup> Dist. 1993) 17 Cal.App.4<sup>th</sup> 33, 43-44.

#### E. Recovery For Investigative Costs

The Right to Repair Act specifically provides for recovery for investigative costs. (Cal. Civil Code § 944.) In addition, investigatory costs are recoverable under California Civil Code, Section 3333. *Stearman v. Homes* (4<sup>th</sup> Dist. 2000) 78 Cal.App.4<sup>th</sup> 611. Section 3333 provides

that the measure of damages is the amount that will compensate for all the detriment proximately caused by the breach. The expenses incurred by a party in having professionals investigate construction deficiencies in order to formulate an appropriate repair plan are inclusive of the costs of remedying the defects and are recoverable as part of the cost of repair. *Stearman, supra*, at 624-25.

## **VI. AFFIRMATIVE DEFENSES:**

The Act sets forth specific affirmative defenses available to builders (Cal. Civil Code § 945.5), which include:

- (a) damages caused by an “unforeseen act of nature”;
- (b) defects caused by ordinary wear and tear, alterations, misuse, abuse or neglect;
- (c) damages caused by the homeowner, his/her agent or employee; and
- (d) defects barred by the statute of limitations.
- (e) builder has obtained a valid release that covers the party asserting the defense
- (f) to the extent that the builder’s repair successfully corrected the claimed violation

Builders are limited to these affirmative defenses under the Right to Repair Act. All other applicable affirmative defenses apply to all other building industry related parties and Calderon claims.

## **VII. STATUTES OF LIMITATIONS**

The Right to Repair Act made significant reforms to the statutes of limitations. Prior to The Act, a homeowner had 10 years to sue for latent (hidden or unknown) defects and 4 years for patent (apparent by reasonable inspection) defects. Now, all claims must be brought within 10 years following “substantial completion” unless otherwise specified. There are shorter time frames for certain violations, i.e., 2 years for untreated wood posts, 4 years for plumbing and electrical systems, and 5 years for painting claims.

## **VIII. OPT-OUT PROCEDURES**

A builder can “opt-out” of the statutory process by putting a “non-adversarial” or “non-litigation” clause in his/her contract. This clause must provide the equivalent or greater protection for the homeowner than what is set forth in The Act. These alternative procedures are binding even if they are not successful in resolving the dispute or if the results are not favorable to the builder. If the builder decides to put these alternative procedures in his/her sales contract, he/she must notify the homeowner at the time the contract is signed. If the builder opts out, he is not afforded the pre-litigation protections of The Act, even if his non-adversarial or non-

litigation clause is invalidated; there are no safe harbor provisions or guidelines for the opt out clause. Civil Code §914.

## **IX. IMMUNITY FOR THIRD PARTIES**

The Right to Repair Act makes certain third-party “qualified” persons immune to liability. Certified inspectors, registered professionals, engineers, licensed general contractors or licensed architects who provide “independent quality review of the work of improvement” are immune, unless that person causes damage to the home due to negligence or willful misconduct.

Additionally, Civil Code § 916(e) of the Act requires builders to give notice of inspection to those it intends to hold responsible for construction defect claims. It is crucial that builders comply with this section to preserve their defense and indemnity rights against subcontractors and insurers.

## **X. MECHANIC’S LIENS**

California contractors and material suppliers have a powerful tool to collect money when a property owner or general contractor fails to pay bills in a timely fashion: a mechanic's lien. Mechanics’ Liens are governed by California Code of Civil Procedure Section 3109 *et seq.* One of the most important aspects of filing a Mechanics’ Lien claim is providing a preliminary 20-day notice:

### **A. The Preliminary 20-Day Notice**

Prior to recording a mechanic’s lien, prior to filing a stop notice and prior to asserting a claim against a payment bond, a claimant is required to provide a Preliminary 20-Day Notice (Civil Code § 3097). The Preliminary 20-Day Notice (Private Work) must be served to all legal parties on a project (Customer, Owner, General Contractor, Lender) within 20 days after first furnishing construction related labor, services, equipment or materials.

“(1) A general description of the labor, service, equipment, or materials furnished, or to be furnished, and an estimate of the total price thereof.

(2) The name and address of the person furnishing that labor, service, equipment, or materials.

(3) The name of the person who contracted for purchase of that labor, service, equipment, or materials.

(4) A description of the jobsite sufficient for identification.

(5) The following statement in boldface type:

### **“NOTICE TO PROPERTY OWNER**

“If bills are not paid in full for the labor, services, equipment, or materials furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being so improved may be placed against the property even

though you have paid your contractor in full. You may wish to protect yourself against this consequence by (1) requiring your contractor to furnish a signed release by the person or firm giving you this notice before making payment to your contractor, or (2) any other method or device that is appropriate under the circumstances. Other than residential homeowners of dwellings containing fewer than five units, private project owners must notify the original contractor and any lien claimant who has provided the owner with a preliminary 20-day lien notice in accordance with Section 3097 of the Civil Code that a notice of completion or notice of cessation has been recorded within 10 days of its recordation. Notice shall be by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing. Failure to notify will extend the deadlines to record a lien.”

(Civil Code § 3097(c)).

#### B. Other Important Timelines and Requirements

There are strict procedures and timelines governing mechanics’ liens in both private and public projects:

- A Mechanics Lien may not be recorded until the claimant has finished furnishing labor, services, equipment or materials to the project. (Civil Code §3116).
- When the owner records a valid Notice of Completion (i.e., a proper Notice of Completion recorded within ten days after actual completion of work on the project). (Civil Code §3093).
- A prime contractor in direct contract with the owner must record his lien and/or serve stop notice within sixty (60) days of the recording of the Notice of Completion. (Civil Code §3115). All others must record their liens and/or serve stop notice within thirty (30) days of the date the Notice of Completion is recorded. (Civil Code §3116).
- Where no Notice of Completion has been recorded, but the project has actually been completed: All claimants must record their liens and/or serve stop notice within ninety (90) days from the date of actual completion. (Civil Code §3115, 3116).
- Any of the following will be deemed to be the equivalent of actual completion with respect to private works), which triggers the ninety (90) day period within which to record lien and/or serve stop notice:

Occupation or use of the work of improvement by the owner or his agent, accompanied by a cessation of labor thereon;

Acceptance of the work of improvement by the owner or his agent; or

A cessation of labor for a continuous period of sixty (60) days, or a cessation of labor for a continuous period of thirty (30) days if the owner files a Notice of Cessation. (Civil Code §3086).

- If the owner, after a thirty (30) day continuous cessation of labor, records a Notice of Cessation, this is equivalent to the recording of a Notice of Completion. (Civil Code §3092). In that case, the prime contractor has sixty (60) days, and all other claimants have thirty (30) days, within which to record their liens. (Civil Code §3115, 3116).

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