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Your Business is Owed Money. Now What?

Bankruptcy + Insolvency

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The Burdens of E-Discovery: Is a Solution on the Horizon?

Electronic Discovery + Records Management

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Death + Taxes**They May be Certain, but Applicable Laws are Ever Changing**

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Intellectual Property

Carla M. Perrotta 313.496.8472

Your Business is Owed Money. **NOW WHAT?**



As any business person knows, securing a sale – that is, convincing an individual or business to buy goods or services – is only half the battle. Getting paid is another challenge altogether. So, if your business is owed money, what are your options?

A creditor is often best served by working directly with a debtor to attempt to collect a debt. A debtor may be dealing with short-term cash flow issues and simply requires some sort of interim relief, such as extended payment terms or temporary price reduction, to work its way through a rough patch. However, before extending any sort of relief, a creditor must do its homework to make sure that a debtor's "temporary" problems are, in fact, temporary. As the old adage goes, when you're in a hole, stop digging.

STATE LAW REMEDIES

In the event that a negotiated resolution is not feasible, remedies are available under state law. Unfortunately, the reality for most creditors is that the only route to payment is through litigation. In some states, creditors are empowered to seek various forms of prejudgment attachment or garnishment of a debtor's assets.

Other types of relief are available under state law. Depending on the state, these include receiverships, assignments for the benefit of creditors and other forms of debt adjustment. Additional remedies include common law compositions and trust mortgages, which are similar to the statutory remedies, but are voluntary in nature and often involve less overhead and administrative cost. To the extent that a debtor has transferred assets to a third party, such assets may be recoverable if the transfer was fraudulent – that is, made for less than reasonably equivalent value by an insolvent debtor. The Uniform Commercial Code also offers unsecured creditors remedies, including the right to reclaim goods sold on credit in certain circumstances.

BANKRUPTCY

Bankruptcy, while intended to provide debtors with a fresh start, offers creditors a number of remedies. The U.S. Bankruptcy Code, which is federal law, allows creditors to force a debtor into bankruptcy (an involuntary bankruptcy) or a debtor may voluntarily seek protection from creditors. A business debtor may file under Chapter 7 of the Bankruptcy Code and liquidate its assets, or under Chapter 11 and reorganize.

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Once a debtor files (or is forced into) bankruptcy, an unsecured creditor is entitled to share in the pro rata distribution of the debtor's assets based on the priority of its claim. A creditor can, if appropriate, take certain proactive steps that may increase its chances of recovery, including: the reclamation of goods, seeking "critical" or "essential" supplier status, serving on the creditors' committee, asserting an administrative expense or other priority claim, and/or seeking assumption of its executory contract, to name a few. An experienced bankruptcy lawyer can assess a creditor's best points of leverage and course of action.

SOME PROACTIVE STEPS FOR THE FUTURE

Review Contracts Modify standard terms and conditions to provide your business with additional rights and remedies upon a party's non-payment.

Monitor Customers Monitor the financial health of customers. Be alert to warning signs such as delayed payment or financial reporting, layoffs and other cost-cutting measures.

Strengthen Position If a customer is financially distressed, consider changing to cash in advance terms or requiring a security interest in collateral.

While your business will inevitably be forced to deal with distressed customers, there are a number of steps that can be taken to strengthen your position. Miller Canfield helps creditors across the globe enforce claims in the United States and abroad. Call our office if you'd like some assistance.

THE ORIGINS OF BANKRUPTCY

While the concept of debt forgiveness can be traced back to the Old Testament, the term "bankruptcy" derives from the Latin words "bancus" (bench or table) and "ruptus" (broken) and relates to an Italian tradition of destroying the workbench of a tradesman who could not pay his debts. The English, under Henry VIII, decided to take it a step further and started imprisoning bankrupt individuals. In the U.S., bankruptcy is permitted by the Constitution (Article 1, Section 8, Clause 4) which authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States."

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The Burdens of E-DISCOVERY: IS A SOLUTION ON THE HORIZON?

The term “e-discovery” often sends a shudder down the spine of IT managers and in-house counsel, not to mention outside litigation counsel. This concern is well-founded, as *The Wall Street Journal* and *ABA Journal* both recently reported that e-discovery sanctions for lawyers have reached an all time high and companies have been hit with massive sanctions for e-discovery violations. Notwithstanding the risk and cost of sanctions, simply responding to e-discovery requests in the course of litigation can be a huge burden.

E-discovery refers to the preservation, collection, review, and production of electronically stored information (ESI) in the course of litigation. Almost two years ago, the Seventh Circuit E-Discovery Committee met for the first time in an effort to stem the tide of rising burdens and costs associated with e-discovery. This resulted in the Seventh Circuit E-Discovery Pilot Program in October 2009 and the issuance of the program’s “Statement of Purpose and Preparation of Principles.”

The principles cover three areas: (i) general discovery principles, (ii) early case assessment principles, and (iii) education principles. All of these principles were incorporated into a Standing Order Relating to the Discovery of ESI, which has been applicable for cases pending before 13 judges in the U.S. District Court for the Northern District of Illinois.

GENERAL DISCOVERY PRINCIPLES

The general discovery principles reflect the objectives of Rule 1 of the Federal Rules of Civil Procedure (the Federal Rules), which encourages the “just, speedy, and inexpensive determination of every action.” To meet these goals, the principles seek increased cooperation between counsel and more rigorous application of the proportionality standard set forth in Federal Rule 26(b)(2)(C).

EARLY CASE ASSESSMENT PRINCIPLES

The early case assessment principles provide more concrete guidelines for addressing the discovery issues that typically come before the courts in the form of motions for sanctions. These principles require the parties to meet and confer and specifically address

discovery of ESI. Prior to the initial status conference, the principles require the parties to discuss:

- (1) The identification of relevant and discoverable ESI
- (2) The scope of discoverable ESI to be preserved by the parties
- (3) The formats for preservation and production of ESI
- (4) The potential for conducting discovery in phases or stages as a method for reducing costs and burden
- (5) The procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence

If any of these issues cannot be resolved, the parties must present the issue to the court.

EDUCATION PRINCIPLES

The education principles acknowledge the overall impact of discovery of ESI on the litigation process. Due to this impact, the principles require all judges, counsel, and parties to familiarize themselves with “the fundamentals of discovery of ESI.” This means being familiar with the e-discovery provisions of the Federal Rules and the Advisory Committee Report on the 2006 Amendments to the Federal Rules and The Sedona Conference publications and those of other e-discovery organizations.

THE RESULTS OF PHASE 1

The Seventh Circuit issued a report in May 2010 regarding the perceived impact of the principles on e-discovery. The survey of both judges and practitioners revealed that, overall, the perception was that the principles “increased” or “greatly increased” both the level of attention paid to the e-discovery process and to the fairness of the discovery process itself. The program is now entering Phase 2, during which the geographic scope of the program will be extended to all federal cases in Illinois, Indiana, and Wisconsin and more data will be gathered regarding the program’s effectiveness.

If you have any questions about the Pilot Program or e-discovery in general, please give us a call.

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Death + Taxes\$

They May be Certain, but Applicable Laws are Ever Changing

Many people believe that once they have a will or trust in place, they can lock the document away in a safe and sleep easy knowing that their affairs are in order. The truth is, estate planning documents must be periodically reviewed to adapt to an individual's personal circumstances, as well as changes in the law. **Case in point:** the recently passed legislation extending the income tax rate cuts also has important implications for estate planning.

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Act). The Act makes significant, but temporary, changes to estate, gift, and generation-skipping transfer (GST) taxes. In light of the Act, it is important to review your estate planning documents and determine whether amendments are necessary.

Given the typical structure of many people's current estate planning documents, we foresee a number of serious, unintended consequences that may occur without proper planning and modifications:

SURVIVING SPOUSE MAY BE LEFT WITH NOTHING

Many married couples have trusts containing formula clauses allocating the amount of an estate that can be excluded from the estate tax, now \$5,000,000, to a trust called the "residuary trust" or "family trust" and allocating any amount in excess of the exclusion amount to a trust called the "marital trust." If not carefully planned and drafted in light of the new exclusion amount, this structure could lead to the surviving spouse being left with nothing.

SOME BENEFICIARIES MAY RECEIVE MORE, OR LESS, THAN INTENDED

Some trust documents provide that an amount equal to the GST tax exclusion be paid to or for the benefit of grandchildren, with the balance going to children (that is, the parents of the grandchildren). If death occurs when the \$5,000,000 exclusion is in effect, the grandchildren may receive far more than was intended. Similarly, some trusts use a formula that makes a charitable bequest in order to reduce estate tax to zero. In these instances, the charity may receive nothing.

PROACTIVE STEPS MUST BE TAKEN FOR PORTABILITY

The Act also provides for what is referred to as "portability." This means that if the full \$5,000,000 exclusion is not used at the death of the first spouse, the surviving spouse can use the remaining exclusion. However, the executor of the estate of the first spouse to

die must make an affirmative election on a timely filed estate tax return allowing the surviving spouse to avail himself, herself, or their estate of this unused exclusion. If that is your intention, your documents should affirmatively direct the executor to make this election.

Bottom line The increase in the estate tax, gift tax, and GST exclusions means that significant planning opportunities exist for individuals who are interested in transferring wealth and avoiding taxes. And risks abound for those who do not review existing planning documents.

A session with an estate planning attorney is very important to make sure that your objectives and the planning goals you have set for your family are accomplished.

Personal Services
Dawn M. Schluter 248.267.3249

A FEW HIGHLIGHTS OF THE ACT INCLUDE

- The estate tax exclusion is \$5,000,000 per individual in 2011 and 2012. Estate tax exclusion of \$5,000,000 was also made retroactive, effective January 1, 2010.
- The gift tax exclusion remains at \$1,000,000 for 2010, but increases to \$5,000,000 for 2011 and 2012.
- The estate and gift taxes are unified for 2011 and 2012, so the exclusion of \$5,000,000 may be used for lifetime gifts and at death.
- The maximum estate and gift tax rate is 35% effective January 1, 2010.



Some Risks, Many Rewards

While Challenges Exist, Mexico Remains Attractive to Foreign Business

While there is no doubt that foreign companies in Mexico should be concerned by issues such as narco-violence, corruption, and expatriate flight, these risks should be balanced against the tremendous opportunities that exist in Mexico. So, what is the true situation on the ground and what are the steps foreign companies can take to limit their risks?



NOT ALL OF MEXICO IS AFFECTED BY VIOLENCE

Mexico is, of course, a very big country and violence varies from region to region. Mexico City, as well as other key manufacturing centers such as Puebla, San Luis Potosi, Queretaro, Toluca, and Aguascalientes remain relatively insulated from the serious dangers afflicting other parts of the country. The drug wars are largely concentrated in the border areas and, recently, in Monterrey.

THE BUSINESS FUNDAMENTALS ARE POSITIVE

The business fundamentals in Mexico remain compelling

- The federal deficit is only 2.3% of the Mexican economy
- Mexico possesses an attractive exchange rate versus the dollar
- Mexico boasts relative labor peace
- Wages are attractive (average Mexican wages are only 14% more than Chinese wages)
- Road and rail transport from Mexico make just-in-time delivery requirements to the U.S. very feasible

POLITICS WILL DRIVE THE REFORM EFFORTS

While resolution of the drug violence may take some time, and the police forces and judiciary must be reformed, the Mexican government appears committed to dealing with these problems quickly and efficiently. Indeed, it must do so in order for Mexico to remain competitive with other emerging markets.

Congressional elections in Mexico this past summer nearly gave the PRI (the former ruling party) a majority and the PRI may regain the presidency in 2012. A major question mark for Mexico will be how the next government and president attempt to stem the violence and continue the reform efforts.

SHORT-TERM ADVICE FOR FOREIGN COMPANIES

- Plan to operate with fewer expatriate employees
- Hire excellent local managers and staff – invest time and money to get the best
- Understand where the unrest is located and craft your business strategy accordingly, including moving your facility if necessary

- Step up background checks, focus on training Mexican managers and staff and more fully integrate employees into headquarters' culture and activities
- Plan for the worst – disaster plans should include kidnapping and extortion scenarios
- Security plans must include protection for local hires

There are many good reasons to do business in Mexico. Indeed, a list published by Bloomberg of companies recently locating or expanding in Mexico (including Intel, Blackberry, Flextronic, Cessna, Polaris, and Whirlpool) demonstrates that Mexico remains attractive to many multi-national businesses. If you are thinking about establishing operations in Mexico, our firm can help you craft an effective business and legal strategy.

Mexico
Michele M. Compton 313.496.7916



Marie Alsace Galindo Joins Firm

Marie Alsace Galindo has joined our International Business practice. Marie is the only licensed-in-Mexico attorney certified by the State Bar of Michigan to advise on Mexican law. She is our international practice advisor for Mexican and Latin American legal and business issues. Her practice involves advising companies in structuring investment strategies, consulting on business opportunities, establishing and expanding operations in Mexico, and negotiating and documenting Mexico-related transactions.

Expanding Your Business to CANADA?

You Need to See the Forest and the Trees

The Canadian economy is growing briskly, particularly relative to the growth the U.S. is experiencing, and many U.S. companies looking for new opportunities are eyeing their northern neighbor.

Before setting up shop in Canada, there are a number of “big picture” issues that U.S. companies must consider:

- Do we incorporate a separate subsidiary in Canada?
- What are the corporate income tax rates in Canada?
- Are there any laws prohibiting us from starting a business in Canada?

Additionally, there are a number of secondary – albeit important – matters that companies should address before establishing operations in Canada. While focusing on the big picture may get the doors open, starting and maintaining a successful and profitable business in Canada requires a comprehensive understanding of important laws and regulations.

INCORPORATING JURISDICTION

Each of Canada’s ten provinces and three territories has the power to incorporate companies, similar to the right to incorporate in each of the 50 U.S. states. Unlike the U.S., Canada’s federal government also has this power. While provincial corporations are essentially on a par with federal corporations, there may be some administrative, legal and perceptual advantages to incorporating federally, especially for a company that will have locations in several provinces.

NON-RESIDENT DIRECTORS

Most Canadian jurisdictions require at least one Canadian resident on the board of directors of their corporations. The foreign company will have to find a Canadian resident prepared to take on that responsibility. Steps can be taken by the U.S. parent to assume many of the powers and liabilities of the directors, including the Canadian director. This makes it easier to recruit resident Canadian directors and for the U.S. parent to function with them. The most common step is for the U.S. parent, as the sole shareholder of the Canadian subsidiary, to enter into a “unanimous shareholder agreement,” which restricts the powers of the directors of the Canadian subsidiary to manage the business and affairs of the Canadian corporation. Under most Canadian corporation statutes, this restriction has the effect of transferring the

directors’ liabilities (including those of the resident Canadian director) relating to the exercise of the restricted powers to the parent corporation.

BUSINESS NUMBERS

Before conducting business, a Canadian company must apply to the federal government for a “Business Number.” This number, similar to a U.S. federal tax identification number, is used to identify the company for all federal taxes and remittances, including income tax, federal sales tax, employee tax deductions, and unemployment insurance premiums.

EMPLOYMENT LAWS

Foreign parent companies, especially U.S. companies, must understand and comply with Canadian employment laws, in particular those regarding termination of employment and applicable human rights legislation.

IMMIGRATION

If the U.S. parent intends to send any of its employees to perform services in Canada on behalf of the Canadian subsidiary or otherwise, it is important to ensure that they comply with Canadian immigration rules so they can enter Canada without being delayed or, worse yet, turned back at the border.

WORKERS’ COMPENSATION

All Canadian provinces have workers’ compensation boards. In Ontario, for example, it is mandatory that certain categories of companies insure their employees in order to carry on business.

MISCELLANEOUS AGREEMENTS

The foreign parent company should examine any contracts, rights or licenses it holds from other parties to ensure that they extend to Canada. These include franchise agreements or reseller agreements. Also, where the parent company itself holds intellectual property rights, rights should be granted by the parent to the Canadian subsidiary and applicable governmental registrations made. This is as much a matter of protecting the intellectual property and contractual rights of the U.S. parent as it is for the benefit of the subsidiary.

While this article touches upon some of the issues faced by foreign companies conducting business in Canada, it merely scratches the surface of issues that must be considered. What to do? If you are interested in doing business in Canada, please contact us for advice.



Canadian Corporate Law
Peter Math 647.259.6295

Non-Profit Fundraising: REGISTRATION REQUIRED



In an effort to curtail fraud and deceptive practices related to non-profit fundraising, Michigan and 39 other states require charitable organizations to register with the state before soliciting donations. While the vast majority of non-profits use donations for legal, appropriate, and effective purposes, a few bad apples can always spoil the bunch.

In Michigan, non-profits are licensed by the Michigan Attorney General and must comply with and register under the Charitable Solicitation Act (the Act). If unregistered, an organization and those involved in fundraising activities could face fines and criminal punishment under amendments to the Act that were approved in December 2010 and which took effect on March 30, 2011. Accordingly, non-profits and their leaders must be prepared to comply.

Significant changes to be aware of

- (1) A non-profit will be exempt from registering with the state if all of its fundraising will be conducted by volunteers and it expects to raise less than \$25,000 per year (an increase from the current \$8,000 limit). An organization must still register if using paid staff or a professional fundraiser to raise donations.
- (2) Non-profits must now register with the Michigan Attorney General to solicit donations, instead of only being licensed by the Attorney General to solicit donations. The registration will be valid for a period of 19 months, an increase from the current 12 months.
- (3) The amendments include a number of prohibited activities, many of which are intended to prevent misrepresentations. However, one amendment prohibits a person from soliciting a contribution on behalf of a charitable organization that is not registered. A violation of any of these prohibitions could result in a civil fine of up to \$10,000 per violation. This applies not only to non-profits, but also to their employees and agents, including directors, officers, and volunteers.
- (4) A person can also face criminal punishment for certain actions that are done "knowingly." Misdemeanors are

subject to up to six months in prison or a fine of up to \$5,000, while felonies are punishable by imprisonment of up to five years and a fine of not more than \$20,000. It is a misdemeanor if a person knowingly solicits contributions or operates as a non-profit in Michigan and the non-profit is not registered with the Michigan Attorney General.

(5) Certain clothing drop off boxes are covered by the amendments.

(6) The amendments allow local county prosecutors to prosecute individuals who violate the law, taking the burden off the Attorney General to prosecute these cases. This may result in greater enforcement of the Act and criminal prosecution of smaller infractions.

What does this mean for you and your non-profit? If you solicit contributions in Michigan, your non-profit must register with the Attorney General. If it is not registered, the non-profit

and individuals associated with it are subject to the serious civil and criminal penalties created by the Act.

If you want more information about Michigan's Charitable Solicitations Act, require assistance registering with the Michigan Attorney General, or have other questions about non-profits, please give us a call. Also, if your non-profit solicits in any other states, we can help you to determine if you need to register in those states, and assist you to file the appropriate paperwork.



Nonprofit + Charitable Organizations
Leo P. Goddeyne 269.383.5834

AN EMPLOYER BENEFIT

Employers May Now Require Employees to Receive Wages Through Direct Deposit or a Payroll Debit Card

Like typewriters and the three martini lunch, the traditional paper paycheck may soon be a business relic of the past. A recent amendment to the Michigan Payment of Wages and Fringe Benefits Act (the Act), empowers employers to require employees to receive wages through direct deposit or a payroll debit card. Previously, employers could only pay employees in this manner with the express consent of the employee.

What are the advantages for business? For one thing, paying via direct deposit or payroll debit card is administratively easy and simplifies account reconciliation. In addition, with direct deposit a business no longer has to deal with lost checks and the costs and burdens associated with voiding checks and issuing new ones. Finally, it is expensive to print and distribute checks and business productivity is often affected by employees taking time to deposit or cash checks.

In order to require the direct deposit or payroll debit card, an employer must:

- Provide the employee a written form that allows the employee the option to receive wages either by direct deposit or through a payroll debit card; and
- Provide the employee a written statement warning that the failure to return the form within 30 days will be presumed to indicate consent to receiving wages through a payroll debit card (if the employee was not already receiving wages through direct deposit).

If an employee elects to change from a payroll debit card to direct deposit, the employer must make the change within one payroll period after the employer receives the request and the employee provides the information necessary to implement the request. In addition, an employer cannot require an employee to pay any fees or costs incurred by the employer in connection with paying wages through direct deposit or a payroll debit card.

Wage payment laws vary state by state, so if you pay wages to employees outside of the State of Michigan, make sure the state you are paying wages in allows mandatory direct deposit before implementing a change. For guidance on this and other issues, please call our office.

AN EMPLOYER PAYING BY PAYROLL DEBIT CARD MUST PROVIDE THE FOLLOWING WRITTEN DISCLOSURES:

- The terms and conditions for use, including an itemized list of any and all fees
- The methods for accessing wages without charge
- A statement that if the card is used outside the specified network of ATMs, that both the payroll card issuer and operator of the ATM may impose charges
- The method to obtain free balance inquiries
- Notice that the employee has a right to change from a payroll debit card to direct deposit at any time

A PAYROLL DEBIT CARD MUST INCLUDE THE FOLLOWING CHARACTERISTICS:

- The employee may make at least one withdrawal or transfer without charge each pay period – but not more frequently than once a week – for any amount including the balance accessible through the card
- No changes in fees or terms of service without at least 21 days' written notice to the employee and the date that the changes are to take effect
- A method for the employee to make an unlimited number of balance inquiries without charge, either electronically or by phone
- Card must not be linked to any form of credit, including a loan against future pay or a cash advance on future pay

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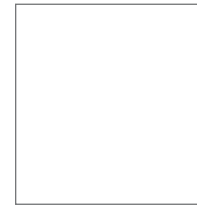
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RETURN SERVICE REQUESTED



GRAY EXPECTATIONS



In a typical “gray market” transaction, an individual or business may buy a product – often overseas – where it is available cheaply and import it legally to the target market. The product is then re-sold at a price high enough to provide a profit but under the normal market price. A recent U.S. Supreme Court decision will give copyright owners greater protection against the importation of such gray market goods.

In *Omega S.A. v Costco Wholesale Corp.*, a divided Supreme Court upheld the Ninth Circuit Court of Appeals’ ruling that the “first sale” defense to copyright infringement does not apply to goods that are protected by U.S. copyright, manufactured abroad and then imported to the U.S. without the authorization of the copyright holder.

The first sale doctrine allows purchasers of copyrighted goods to resell those goods without infringing the copyright owner’s rights. In other words, the copyright owner only controls the first sale of the goods. The Ninth Circuit, however, stated that the first sale defense only applies to copies made in the U.S. or sold in the U.S. with the copyright owner’s authority. The opinion stated that it would be inappropriate to apply U.S. copyright law to conduct that occurs entirely outside the U.S. Therefore, companies should have an easier time competing with secondary markets because copies made abroad are now outside the scope of a first sale defense.

The Supreme Court Upholds Protection Against “Gray Market” Goods

THE EXPECTATIONS

So, what does this decision mean for your company? As is often the case when dealing with legal issues, things are a bit gray and uncertain. The *Omega* decision does not set national precedent because it was a split decision. However, in light of the *Omega* case there are some practical steps that can be taken to make sense of the “gray”:

- G** Get your logos, designs, and labels copyrighted and incorporate them into your goods! By incorporating copyrighted items in your goods you extend copyright protection to your goods.
- R** Review your reseller agreements to make sure you are adequately protected.
- A** Alert dealers, customers, and potential customers of the existence of gray market goods and that they should be avoided.
- Y** Yield to no one. Vigorously defend your intellectual property.

Taking these actions will help protect your business against gray market goods. If you need more assistance, Miller Canfield’s intellectual property team is ready to provide you with clear and helpful advice to navigate you through the “gray expectations” of the law.

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QUESTIONS,
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