

A SHORT INTRODUCTION TO THE CIVIL LAW OF BRIBERY

A Practical Guide from the 2TG Commercial Fraud Team

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Introduction

This *Short Introduction* considers the civil causes of action for bribery. The UK criminal law of bribery is primarily governed by the Bribery Act 2010. The civil law of bribery is, however, a product of the common law. Although the threat of criminal penalties will no doubt deter corruption, the civil law may, in practice, provide a greater degree of deterrence than the criminal law, especially given the very few prosecutions which have successfully been brought under the Bribery Act 2010 and the civil law's draconian remedies for bribery.

The courts have long considered the giving and receiving of bribes to be a practice which is injurious to the proper working of commercial transactions and damaging to society generally. In *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC), Lord Templeman (at p. 330) described bribery as “an evil practice which threatens the foundations of any civilised society”. This helps explain why the courts have been prepared to fashion severe remedies for bribery claims, which go beyond those normally available for fraud claims.

A succinct and helpful definition of a bribe was given by Leggatt J in *Anangel Atlas Compania Naviera SA v Ishkawajima-Harima Heavy Industries* [1990] 1 Lloyd's Rep 167, 171, when he stated that a bribe constitutes: “A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal”.

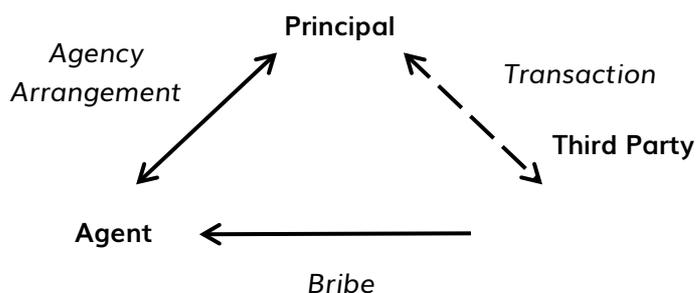


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The basic 'bribery situation' involves a tripartite arrangement between: (i) a principal, (ii) his agent, and (iii) a third party with whom the principal wishes to transact. Often, the agent will be the employee of the principal. This arrangement can be shown in the following manner:



For the sake of convenience, the terms 'principal', 'agent' and 'third party' are used in this *Short Introduction* to describe this standard situation, albeit the factual matrix of any particular case may be significantly more complex.

It can be seen from Leggatt J's definition that the underlying 'evil' of a bribe is the secrecy of the payment from the third party to the agent. The agent's receipt of a commission or inducement from a third party gives rise to a potential conflict between the agent's personal interest (in receiving the inducement) and the best interests of his principal in its dealings with the third party. As a principal is entitled to be confident that his agent will act wholly in his best interests, any commission or inducement received by the agent should be disclosed to his principal so that the principal has the opportunity to make fully informed decisions in respect of its dealings with the third party. In the absence of such disclosure, the principal will be unaware of this potential conflict of interest and thus cannot be sure that he will receive from his agent the disinterested advice to which he is

entitled (*Ross River Ltd v Cambridge City FC* [2008] 1 All ER 1004 at [204] per Briggs J).

The most obvious cause of action for bribery is the tort of bribery and the associated restitutionary claim for the bribe, which is available against the agent and third party. It is important to understand, however, that bribery will normally give rise to multiple, overlapping causes of action. Moreover, the underlying mischief (an undisclosed conflict of interest tainting the advice given to a principal) is not confined to true 'bribery' situations and may be discussed by the courts in the context of other causes of actions (see, for example, the analogies drawn between bribery and dishonest assistance in *UBS v Kommunale Wasserwerke Leipzig* [2017] EWCA Civ 1567). This explains some of the confusion which is evident in this area of the law as judgments may refer to a number of causes of action in the same sentence.

In this *Short Introduction*, beyond the tort of bribery and the associated restitutionary claim, we focus on the action for breach of fiduciary duty (often available against an agent) and the claim for dishonest assistance (often available against the third party) arising out of a bribery situation. These two causes of action are of particular interest in potentially providing the victim with a remedy not restricted to the amount of the bribe or compensation, but extending to the profits made by the agent or third party, and also giving the victim a proprietary claim to the bribe itself. However other causes of action may be open to the principal, including:

- a. The torts of deceit, conspiracy and/or inducing breach of contract;

- b. An action for breach of contract against the agent; and/or
- c. Claims for breach of trust and/or knowing receipt.

Whilst the above causes of action will normally not add much to claims for the tort of bribery, restitution, breach of fiduciary duty and dishonest assistance, they may sometimes have advantages. For example, a claim in contract may be able to rely on a specific provision dealing with the consequences of bribery; in cross-border cases, different causes of action may be subject to different applicable laws (which may be more advantageous to the victim); limitation may be an issue in relation to some causes of action but not others.

Tort of Bribery

The tort of bribery is a unique tort. It is often said that a tort claim arising out of bribery is essentially an action in the tort of deceit. However, for a claim in bribery to be made out, there need not be any false representation to the principal; nor need there be any reliance; nor does there need to be a finding of dishonesty on the part of the agent or third party. It is therefore best to think of a tort claim in bribery as a special form of fraud where there is no representation to, or reliance by, the principal (see *Petrograde Inc v Smith* [2000] Lloyd's Rep 486, 490 per David Steel J).

Tort of Bribery: What must be shown?

The three classic constituents of bribery were set out by Slade J in *Industries and General Mortgage Co Ltd v Lewis* [1949] All ER 573, 575, and are discussed in turn below.

Requirement One: Payment to the Agent of the person with whom he is dealing

It is necessary to show that:

- a. there has been some 'bribe' from the third party to the principal's agent; and
- b. the agent receiving the bribe (or the agent to whose order the bribe is paid) has some role, but not necessarily a decisive role, in the decision making process as regards the dealings between the third party and the principal.

These matters will normally be self-evident in a classic bribery case.

Although the payment of money remains the paradigm form of a bribe, the courts take a wide approach and a bribe will encompass the conferring of any advantage or benefit that gives rise to a real possibility of a conflict between an agent's personal interest and his duty to his principal (see *Fiona Trust v Privalov* [2010] EWHC 3199 at [73]).

Given that the test of whether there is a real possibility of a conflict of interest is a matter of fact to be applied in the particular circumstances of a case, the form that a bribe may take is potentially limitless. However a few points should be noted:

- a. The law recognises that some *de minimis* gifts or benefits are too small to create a real possibility of conflict of interest and, as such, will not constitute a bribe (*The Parkdale* [1897] P 53, 58-9). The application of this test will be highly fact, and context, specific; what may be seen as an effective bribe to a junior employee may be considered *de minimis* in the case of a high level executive.

- b. The benefit or inducement does not have to be given personally to the agent. Frequently the actual recipient of the bribe is a connected corporate entity or a family member of the agent (e.g. the offer of a job for the agent's offspring could constitute a bribe). As the test is merely whether the inducement gave rise to the real possibility of a conflict of interest, the bribe does not necessarily have to enrich the agent.
 - c. The benefit or inducement does not need to have been *transferred* from the third party to the agent (or the appointed recipient), but may be the promise or expectation of a benefit held out by the third party. For example, in *Panama South Pacific Telegraph v India Rubber* (1875) LR 10 Ch App 515, 528, Mellish LJ held that an agent's reasonable expectation, albeit not a certainty, of obtaining a favourable sub-contract from the third party was sufficient to constitute a bribe.
 - d. The payment need not be linked to a particular transaction; it is sufficient that the relationship between agent and principal remained tainted with bribery at the time of the relevant transaction. For example, in *Novoship v Mikhaylyuk* [2012] EWHC 3586 (Comm) Christopher Clarke J held that a corrupt relationship which arose in the context of one set of ship charters tainted another set of ship charters, even though there was no evidence that the other set of charters was not at market value. This conclusion was upheld on appeal (*Novoship v Nikitin* [2014] EWCA Civ 908).
- a. Defendants to bribery actions sometimes classify payments made to the agent as loans. However, even if the loan constituted a genuine (as opposed to a sham) transaction, this is still likely to give rise to a conflict of interest on the agent's part. There would be an obvious benefit to the agent if the loan was on better terms than would otherwise be commercially available to him. Even if the loan was on commercial terms, the agent's very indebtedness would still likely give rise to a conflict of interest, bearing in mind the lender's rights under the loan agreement and the agent's potential need to request forbearance from the lender.
 - b. The alleged bribe may be said by the defendants to be payment for services rendered, or goods supplied, by the agent or a connected party. If the payment was above market rates, it would obviously be considered a benefit capable of constituting a bribe in any event. However, where the payment was seemingly at (or below) market rates and arguably conferred no net benefit upon the agent or any connected party, there are conflicting *dicta* as to whether the payment would still necessarily constitute a bribe. In *Airbus Operations v Withey* [2014] EWHC 1126 (QB), HHJ Havelock-Allan QC commented (at [92]) that, as the secrecy of the payment was the real menace, the Court should not be led into making judgments as to whether a market price was paid for any services rendered, meaning that the very fact of the undisclosed payment constituted a bribe. On the other hand, in *BFS Group v Foley* [2017] EWHC 2799 (QB), Foskett J accepted (at [95]) the logic of the argument that, if no net benefit was received or objectively intended in respect of the impugned payment, this may constitute a basis

A frequently encountered issue is whether any advantage or benefit capable of constituting a 'bribe' has actually been conferred on the agent. For example:

for concluding that the payment was not a bribe. It may be that the real distinction is between payment for goods and payment for (personal) services: payment for personal services supplied by an agent will almost always give rise to some benefit; as it will usually be difficult to say that, "but for" providing those services, the agent could still have made at least the same money.

Requirement Two: The Third Party makes the payment knowing that the payee is the Agent of the person with whom he is dealing

It is necessary for the claimant to show that the third party knew about the benefit or inducement and that the recipient of the benefit or inducement was, in fact, the agent of the principal with whom he was dealing (or the agent's appointed recipient). The claimant needs to prove that the third party either had actual knowledge of this connection, or that any lack of actual knowledge was due to wilful blindness; constructive knowledge would not be sufficient (see *Logicrose Ltd v Southend United Football Club* [1988] 1 WLR 1256, 1261; approved in *UBS* at [113]).

As such, one potential (although uncommon) defence to a bribery claim is that the third party considered the recipient of the inducement to be an independent contractor and not an agent of the person with whom he was dealing. However, if the third party subsequently becomes aware of the connection between the recipient of the inducement and the principal, an otherwise innocent gift will be reclassified as a bribe if the principal is not informed of the same (see *Grant v Gold Exploration & Development Syndicate* [1900] 1 QB 233).

Requirement Three: The payment is not disclosed to the Principal

The evil of a bribe is that the benefit is given to the agent without the knowledge of his principal. It is not necessary for the principal to prove that the agent and the third party actively concealed the bribe; nor is it relevant that the agent and/or the third party believed that the principal was aware of the inducement. The central defence to a bribery claim is therefore that there was full disclosure of the benefit/inducement to the principal. Partial disclosure will not suffice. This gives rise to the factually sensitive question of what will constitute full disclosure in an individual case.

As a matter of legal principle, for a defence of 'full disclosure' to be made out by an agent, the disclosure must be such as to enable the principal to understand the implications of the arrangements between his agent and the third party. In relation to the agent (who will almost always be a fiduciary), the burden of proof is on the agent to establish full disclosure; the position in relation to the burden of proof as between the principal and third party (who will not be a fiduciary) is less clear.

Where the principal is a body corporate, issues can arise as to whom disclosure should be made. In *Ross River* (at [214] to [217]) Briggs J suggested that disclosure by an agent would normally need to be made to someone higher in the company hierarchy or to the directing mind(s) and will of the company – so a director, for example, should make any disclosure to the Board. In *BFS Group* (at [29]) Foskett J suggested that, for an employee further down the corporate hierarchy, the correct avenue of disclosure would be to their boss.

What does *not* need to be proved?

It does not need to be proved that the briber or the agent acted with a corrupt motive or otherwise acted in bad faith (see *Ross River* at [218]). This is irrebuttably presumed. Therefore even if the payment was made to the agent with a purely philanthropic purpose (for example, allowing the agent's family member to have medical treatment abroad) a corrupt purpose will be irrebuttably imputed to the payment unless it is revealed to (or known by) the principal.

Equally, it is unnecessary to show that there was any intention to influence the agent or that the agent was, in fact, influenced by the bribe. Once the constituent features of a bribe are made out, the court will irrebuttably presume that the agent was influenced by the bribe (see *Hovenden & Sons v Milhof* (1900) 83 LT 41, 43 (CA) *per* Romer LJ). Accordingly, it is not a defence to a claim that an agent's actions were not in fact influenced by a bribe.

Remedies for Tort of Bribery

When the constituent elements of a bribe are made out the agent and the third party are jointly and severally liable to the principal for the amount of the bribe. It is not necessary for the principal to show that it has suffered any loss to be entitled to this remedy.

The conceptual basis for the principal's right to claim the bribe has been a matter of judicial discussion and does not remain entirely settled. Romer LJ in *Hovenden & Sons* stated (at p.43) that, in a bribery situation, the court will irrebuttably presume that the price paid by the principal in the impugned transaction was inflated by the amount of the bribe (such that the principal is treated as

having suffered a loss which will sound in compensatory damages). Where the principal has suffered a loss in excess of the bribe, he can claim that loss. However in the Privy Council case of *Mahesan v Malaysia Government Officers' Cooperative Housing Association* [1979] AC 374, 411 *per* Lord Diplock, the action for the bribe itself (as opposed to for any loss) was said to be an action in restitution (unjust enrichment).

That an action in restitution lies against the third party for the amount of the bribe is initially counter-intuitive, as the third party had not been enriched by the bribe (which he has paid away). The availability of this cause of action against the third party appears to be based on the presumption that the third party (acting commercially) will only have paid a bribe to the agent in order to receive a benefit from the principal which will cause him to be enriched by *at least* the extent of the bribe.

A principal cannot claim both for restitution of the bribe and for compensatory damages in tort; it must elect between the two remedies. The need to elect between a claim in tort and restitution will be of importance in circumstances where the loss caused to the principal by entering into the transaction is greater than the amount of the bribe paid to the agent. However it may be difficult for a principal to prove and/or quantify its loss (whether immediately or at all). Accordingly, the principal may elect between a claim for restitution of the bribe and a claim in tort for compensatory damages at any time before final judgment is given (*Mahesan* at p.383 *per* Lord Diplock).

There is also some support for the proposition that an account of profits is available in the tort of bribery (see *Fiona Trust* at [71]), despite the general

rule that an account of profits is not available in a personal tort claim, save in exceptional cases (see *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086). It remains to be seen whether the tort of bribery is so 'exceptional' as to permit an account of profits as a remedy. The absence of this remedy in tort will not normally matter in practice, as the principal will usually be able to claim an account for breach of fiduciary duty and/or dishonest assistance (see below).

Consequences of bribery on contractual relations

Bribery, if established, has important consequences for the principal's contractual relations:

- a. **The agent:** Bribery entitles a principal to terminate the contract of agency without notice (*Bulfield v Fournier* (1895) 11 TLR 282). Moreover, the agent will lose any right to remuneration that he has received, or may receive, as part of the impugned transaction (see, for example, *Imageview Management Ltd v Jack* [2009] 2 All ER 666 (CA)). The principal is also likely to have a claim for breach of contract against the agent for any losses.
- b. **The third party:** The existence of a bribe will render the impugned contract(s) with the third party voidable at the option of the principal. Moreover in making rescission of the impugned contract with the third party, the principal need not give credit for the amount of the bribe, even if this is obtained from the agent or his appointed recipient (see *Logicrose per Millett LJ*). Indeed in many cases no contract will arise at all as the third party will know that the agent (acting corruptly) has no authority to enter into the contract on behalf of his principal.

Other Causes of Action: Agent's Breach of Fiduciary Duty

Whether an agent will be held to owe fiduciary duties to his principal will depend on the facts of the individual case. There may well be borderline cases, a full discussion of which is outside the scope of this guide. However, in a paradigm bribery situation, it will be apparent that the agent owes fiduciary duties to his principal. In deciding whether an agent owes fiduciary duties in the context of a bribery claim, the concept of a fiduciary relationship is to be applied "*in a very loose, or at all events a very comprehensive, sense*" and is not necessarily to be restricted to the archetypical fiduciary situations (*Reading v The King* [1949] 2 KB 232, 236 (CA) *per Asquith LJ*).

By accepting or agreeing to the bribe without disclosing this arrangement to his principal, the agent will be in breach of the fiduciary duty of loyalty to his principal in that he will have (at least) allowed a realistic possibility of a conflict between his self-interest and his duties to his principal to arise (see *Bristol & West BS v Mothew* [1998] Ch 1, 18 *per Millett LJ*).

Equitable compensation

A claim for breach of fiduciary duty may give rise to equitable compensation. An award of equitable compensation may be superior to the claim for damages in common law in that, when awarding compensation in equity, the court will apply a simple 'but for' test to the principal's losses flowing from the breach of duty, and will not apply the common law principles of causation and remoteness (see *Murad v Al-Saraj* [2005] EWCA Civ 959 at [72] – [73]).

Account of profits

A claim for breach of fiduciary duty also provides the opportunity for a principal to seek an account of profits against the fiduciary who is in breach of duty. This means that a principal may be able to disgorge a profit made by his agent in breach of fiduciary duty even if the principal has suffered no loss from the impugned transaction. However, in most bribery cases, the agent is unlikely to make any 'profit' from the impugned transaction over and above the amount of the bribe, which would be recoverable by way of the restitutionary claim described above.

A fiduciary's liability to account for a secret profit does not depend upon any notion of causation; it is sufficient that the profit falls within the scope of the fiduciary's duty of loyalty to the principal (see *Novoship v Nikitin* [2014] EWCA Civ 908 at [96]). It is irrelevant that the principal would never have made the profit itself, or that 'but for' the breach the fiduciary could still have made the profit. In taking an account of profits the fiduciary may be able to prove that he should be given some allowance for his services and disbursements (see *Murad* at [88]). However in circumstances where a finding of dishonesty is made against the agent, the courts are very unlikely to exercise their equitable discretion to provide such an allowance.

Proprietary claim to the bribe

The question of whether a principal may have a proprietary (as opposed to a personal) remedy for breach of fiduciary duty against his agent in respect of the agent's receipt of a bribe has been a matter of intense legal debate and inconsistent judgments. The availability of a proprietary remedy would assist a principal in situations where the bribe received by the agent has appreciated in

value, where the principal wishes to trace the bribe into other property and/or where the agent is insolvent (as the principal will be entitled to the bribe ahead of the agent's unsecured creditors).

In *Lister v Stubbs* (1980) 45 Ch D 1, the Court of Appeal held that a proprietary remedy was not available to a principal as against his bribed agent. The decision in *Lister* was subject to significant criticism, not least in the Privy Council case of *AG for Hong Kong v Reid* [1994] 1 AC 324, where it was held that bribes received by a corrupt policeman were held on trust for his principal, so that they could be traced into properties which he had purchased in New Zealand.

Lister was formally overturned and *Reid* affirmed in the Supreme Court decision of *FHR European Ventures v Cedar Capital Partners* [2014] UKSC 45. The Supreme Court accepted that the rule of equity, that where an agent acquires a benefit which came to his notice as a result of his fiduciary position or pursuant to an opportunity which results from his fiduciary position he is treated as having acquired it on behalf of his principal, applies to the receipt of bribes (see *FHR* at [7] and [50]). This means that a proprietary remedy will be available to a principal against an agent in an action for breach of fiduciary duty arising out of the receipt of a bribe.

The Supreme Court's decision rested on two main planks:

- a. Due to the inconsistencies between the numerous past judgments on this point, there was no clear and consistent line of authority against providing a principal with a proprietary remedy in this context.

b. Numerous practical and policy considerations militated in favour of granting the principal a proprietary remedy, in particular: the effect that bribery has in undermining trust in the commercial world (see *FHR* at [42]); the difficulty of maintaining subtle distinctions between causes of action if a proprietary remedy was not generally available (see *FHR* at [35]); and the desirability of consistency in the remedies available between different common law jurisdictions (see *FHR* at [45]).

Whether certain property or monies can be said to represent the bribe payments, and as such are amenable to a proprietary claim, will depend on the rules of tracing. The rules of tracing fall outside the scope of this *Short Introduction*. Nevertheless, it is worth noting that the Privy Council has confirmed in *The Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35 that it may be possible to trace value even where payments have not been made chronologically (so-called 'backwards tracing'), or where monies have been paid through an overdrawn account, if there can be said to be a 'coordinated scheme'.

Dishonest Assistance

In addition to its claims against the third party in restitution or tort, the principal may also have a claim against the third party for dishonest assistance.

To make out a claim of dishonest assistance against a third party in this context it is necessary to show:

- a. A breach of fiduciary duty by the agent;
- b. That the third party assisted or induced the agent's breach of fiduciary duty; and

c. That the third party acted dishonestly (in the sense of not acting as an honest person would in the circumstances).

(see *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 392 *per* Lord Nicholls).

The focus of a claim in dishonest assistance is the 'dishonest' nature of the third party's actions. The test for dishonesty has recently been confirmed by the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67 as being an objective one. It requires the court to ascertain the defendant's state of knowledge or belief as to the facts and then to determine whether the defendant's conduct was honest by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must subjectively appreciate that what he has done is, by those standards, dishonest.

In assessing dishonesty in this context, the court looks at whether the Defendant had the requisite knowledge about the transaction to render his participation dishonest. The requisite 'knowledge' is either:

- a. Knowledge that the transaction is one in which the third party cannot honestly participate; or
- b. Suspicion that the transaction is one in which the third party cannot honestly participate combined with a conscious decision not to make inquiries which may result in knowledge

(see *Abou-Rahmah v Abacha* [2007] 1 Lloyd's Rep 115 (CA) at [14] and [16] *per* Rix LJ; at [73] *per* Arden LJ; and at [95] to [97] *per* Pill LJ); *Barlow Clowes v EuroTrust* [2006] 1 WLR 1476 (PC) at [28] *per* Lord Hoffmann).

In practice, whilst it is perfectly possible for a 'briber' to be liable for the tort of bribery without being dishonest, this is rare - a briber will in most cases also be liable for dishonest assistance, as well as the tort of bribery, given the objective nature of the tort of dishonesty.

Equitable compensation

Equitable compensation is available as a remedy in dishonest assistance against the third party. As with a claim for equitable compensation for breach of fiduciary duty, in a claim for dishonest assistance, common law rules of causation do not apply. A court will not attempt to assess the precise causative significance of the dishonest assistance in respect of either the breach of fiduciary duty or the resulting loss. Rather, it is only necessary to identify what breach of trust or duty was assisted, and what loss may be said to have resulted 'but for' that breach of trust or duty (see *Grupo Torras v Al-Sabah (No 5)* [2001] Lloyd's Rep PN 117 (CA) at [119]).

Account of profits

A bribe will normally be paid in the expectation of a profit greater than the amount of the bribe. In *Novoship v Nikitin*, the Court of Appeal confirmed that an account of profits may also be available as a remedy in a dishonest assistance claim. This was justified on the basis that, in order protect the integrity of fiduciary relationships, dishonest assisters should be stripped of the profits made from their actions. In doing so the Court of Appeal followed certain Australian authorities and a series of English first instance decisions.

The Court of Appeal held, however, that there were important differences between an account of

profits as against a fiduciary and an account of profits against a dishonest assistant:

- a. As against a dishonest assistant, the court will apply a common law test of causation, looking at whether the dishonest assistance, as opposed to any other factor (such as changes in market prices, luck or skill), constituted the real or effective cause of the third party's profits, as opposed to merely an 'opportunity' to make a profit (see *Novoship* at [114]). The position is therefore very different to that for the fiduciary, where there is no causation requirement as such (see above). Thus, an account of profits may not be available if it is established that (beyond the amount of the bribe) the effective cause of the profits was an advantageous movement in market prices, even if the contract would never have been entered into 'but for' the bribe; and
- b. An account of profits is a discretionary remedy and may be withheld by a court if such a remedy would be a disproportionate response to the particular form and extent of the third party's wrongdoing (see *Novoship* at [119]). What precisely this means in practice, however, is not clear. If the underlying policy is to strip a dishonest assistant of his profit, it is difficult to see why this can ever be disproportionate.

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