Wiley Rein LLP

EXECUTIVE SUMMARY

Developments Affecting Professional Liability Insurers | April 2015

Borrowing Funds from Client Does Not Constitute Professional Services and Profit Exclusion Bars Coverage for Accountant's Failure to Repay Client

Applying Oregon law, the United States District Court for the District of Oregon has held that an insurer had no duty to defend or indemnify an accountant for a lawsuit alleging breach of contract and breach of fiduciary duty for the accountant's failure to repay funds to a client owed under promissory notes because the accountant's acts and omissions at issue did not constitute professional services. *Navigators Ins. Co. v. Hamlin*, No. 6:14-cv-196 (D. Or. Mar. 10, 2015). The court also held that the profit exclusion barred coverage because the client sought the return of funds from the accountant, to which the accountant was not legally entitled. Wiley Rein represented the insurer.

A client retained the insured accountant to assist with valuation issues in her divorce. Through that work, the insured and the client became friends, and the insured later borrowed $660,000 from the client and agreed to repay the funds plus interest as set forth in various promissory notes. The insured failed to pay amounts owed on the notes and, as a result, the client filed suit against the insured

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Delaware Trial Court: "Final Adjudication" Exclusion Trumps "No Loss" Argument

A Delaware trial court has concluded that a *qui tam* settlement was a covered "Loss," declining to decide whether the settlement constituted uninsurable restitution. *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015). The court also held that a professional services exclusion did not bar coverage. The court did not determine whether Delaware or Nebraska law applied, finding no conflict in the two states' laws, but applied "general principles of contract construction."

The insurer issued a policy to a polling and consulting company affording management, fiduciary and employment liability coverage parts. The insured was sued by the United States Government in a *qui tam* action, alleging it knowingly mischarged the government by billing labor to a cost-based contract when the labor was actually performed to fulfill other contracts. The insured sought coverage, and the insurer paid $8.7 million in defense expenses

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ALSO IN THIS ISSUE

Contract-Related Breach and Negligence Damages Constitute "Loss"; Coverage Precluded by Warranty Exclusion

A federal district court in Oregon has held that damages awarded against an insured for breach of contract and negligence in connection with its performance under a software development contract constituted "loss" under an E&O policy but were excluded from coverage by the policy's warranty exclusion. *Travelers Prop. Cas. Co. of Am. v. ServerLogic Corp.*, 2015 WL 920419 (D. Or. Mar. 3, 2015).

The insured software developer contracted with a customer to create a custom point-of-sale software system. After multiple failed attempts to resolve problems with the software, the customer terminated the agreement and initiated arbitration against the insured, alleging breach of contract and negligence in failing to perform under the contract. The arbitration panel ultimately found for the customer. The insured sought coverage for the arbitration award under its E&O policy, which provided coverage for "loss" that "arises out of '[the insured's] product' provided to others or '[the insured's] work' provided or performed for others." The policy also contained a warranty exclusion precluding coverage for "any cost or expense incurred . . . to perform or complete '[the insured's] work.'"

In the coverage litigation that followed, the court held that the damages awarded in the arbitration constituted "loss" within the scope of coverage under the policy because they "ar[ose] out of" the policyholder's product or work as required under the policy. In this regard, the court recognized that under Oregon law, "arising out of" means "originat[ing] from, [] incident to or hav[ing] a connection with," and found that the loss at issue "at the very least" had a connection to the insured's work or product.

The court also held, however, the loss was barred from coverage by the policy's warranty exclusion, which applied to "any cost or expense" incurred "to perform or complete '[the insured's] work.'" In this regard, the court found that the damages awarded were the result of the insured's failure to perform or complete the contracted for software development and implantation work and as such, fell squarely within the ambit of the exclusion. Pointing to other exclusions in the policy, such as those related to defects in the insured's own work, compliance with warranties and cost overruns, the court further found that the policy evidenced

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Eleventh Circuit Holds No Coverage for Online Banking Theft

The United States Court of Appeals for the Eleventh Circuit, applying Georgia law, has held that no coverage exists under a business owner's policy for the online theft of funds from an insured's bank account. *Metro Brokers, Inc. v. Transportation Ins. Co.*, 2015 WL 925301 (11th Cir. Mar. 5, 2015). In so holding, the Eleventh Circuit concluded that coverage was precluded for the online theft both because the electronic transfers did not fall within the policy's forgery provision, and the policy contained an exclusion for losses caused by malicious code.

The insurer issued a business owner's policy to the insured, a real estate brokerage firm. The policy contained a forgery provision, providing specified coverage for loss "resulting directly from 'forgery' or alteration of, on, or in any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain," and defined "forgery" as "the signing of the name of another person or organization with intent to deceive." The policy also contained a malicious code exclusion, precluding coverage for loss "caused directly or indirectly" from "malicious code," which was defined in the policy to include, among other things, "computer viruses." The insured real estate brokerage firm maintained bank accounts with a third-party bank and used that bank's online system to make payments from its accounts. Thieves logged into the bank's online system with login credentials they obtained

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Civil Theft Award Not Covered by D&O Policy or CGL Policy

A federal court in Florida has held that neither a D&O insurer nor a CGL insurer has a duty to indemnify the policyholder for a final judgment award that includes treble damages for civil theft. *Twin City Fire Ins. Co. v. CR Technologies, Inc.*, 2015 WL 1055382, (S.D. Fla. Mar. 11, 2015). In so holding, the court concluded that an award for civil theft is a "restoration of ill-gotten gains" that does not constitute "Loss," and that civil theft is not insurable as a matter of public policy.

A claimant filed the underlying suit against the policyholder, a software and communications service provider, for allegedly breaching a rental agreement and refusing to return the claimant's software systems. Due to the jury's finding that the policyholder committed civil theft, the court trebled the verdict amount pursuant to Florida law. The policyholder's D&O insurer subsequently filed the coverage action, seeking a declaration that it had no duty to indemnify the policyholder for the final judgment award. In response, the claimant filed a counterclaim against the D&O insurer for declaratory relief and additionally filed a third party complaint against the policyholder's general liability insurer for indemnification of the final judgment. The parties filed cross-motions for summary judgment.

In analyzing whether the insurers had to indemnify the policyholder for the final judgment, the court first concluded that the award was not a covered "Loss" under the D&O policy because: 1) as a matter of Florida law, the "restoration of ill-gotten gains" does not constitute "Loss"; 2) civil theft is not insurable as a matter of public policy; and 3) the policy expressly excluded the

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Duty to Defend Does Not Encompass Affirmative Claims

Applying Texas law, a federal district court has held that a professional liability insurer's duty to defend an insured attorney against a former client's claims does not encompass fees and costs incurred by the attorney in prosecuting an affirmative fee claim against the client. *Charla G. Aldous, P.C. v. Darwin Nat'l Assurance Co.*, 2015 WL 1037489 (N.D. Tex. Mar. 9, 2015).

The insured lawyer, along with two other attorneys, sued a former client to recover fees. The client counterclaimed for breach of fiduciary duty, duress, breach of contract, fraud, and professional negligence. The lawyer sought coverage from her professional liability insurer. The insurer agreed to the insured's choice of counsel, subject to a detailed reservation of rights, which explained that the insurer would be responsible for one-third of defense counsel's fees and expenses, which the insurer allocated to the defense of the client's counterclaims. The insurer specifically disclaimed any obligation to cover work performed by defense counsel in connection with the insured's affirmative claims for fees. Pursuant to this agreement, the insurer paid approximately $500,000 over the course of the litigation. The three attorneys ultimately won their lawsuit against the client. The final judgment included an award of $532,381.93, representing the attorneys' fees and costs incurred in the defense of the counterclaims. In light of that award, the insurer requested reimbursement from the insured. The insured refused and filed suit against the insurer, asserting claims for breach of contract, violations of Texas Insurance Code § 542, and declaratory relief. The insurer counterclaimed for declaratory relief, unjust enrichment, money had and received, and breach of contract.

In ruling on the parties' cross motions for summary judgment, the court held that the insurer was entitled to judgment on the insured's breach of contract claim for three reasons. First, the court agreed with the insurer that it had no obligation to pay any fees or expenses related to the prosecution of the attorney's affirmative fee claim, in part because it was not necessary for the insured to prevail on her claim in order to

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No Coverage for Prosecuting an Affirmative Counterclaim

A Massachusetts federal court has held that an insurer was not required to prosecute an insured's affirmative counterclaims under a duty to defend policy. *Mt. Vernon Fire Ins. Co. v. VisionAid, Inc.*, No. 13-12154 (D. Mass. Mar. 10, 2015).

A former officer brought suit against his former employer for alleged wrongful termination. The employer tendered the suit to its employment practices liability insurer, which appointed counsel to represent the employer. The employer subsequently asked the insurer to prosecute a counterclaim for misappropriation of funds. The insurer declined to do so, maintaining that the policy afforded specified coverage only for claims brought against an insured—not by an insured.

In the ensuing coverage action, the court granted summary judgment to the insurer. In so holding, the court rejected the insured employer's argument that the counterclaim was "integral to the defense" of the wrongful termination claim brought by the claimant, finding that the insurer only had a duty to defend claims, not a duty to prosecute claims. The court also observed that "the majority of both federal and state cases to consider this issue have found that an insurer's duty to defend does not include an obligation to prosecute counterclaims for affirmative relief." While some states recognize a limited exception to this rule if the counterclaim was "inextricably intertwined" with the defense of a covered claim, the court noted that such a limited exception only applies, if at all, where the counterclaim was "necessary to defeat" the covered claim such that appointed counsel would need to establish each of the elements of the counterclaim to negate the claim it was defending. ■

Lawyer's "Don't Ask" Policy on Associate Misconduct Leads Court to Apply Prior Knowledge Exclusion

The Appellate Division of the New Jersey Superior Court has held that a prior knowledge exclusion barred coverage for a malpractice lawsuit against an attorney and the firm at which he was employed, where related ethics complaints had been filed prior to the issuance of the policy. *Imperium Ins. Co. v. Porwich*, 2015 WL 807630 (N.J. Super. Ct. App. Div. Feb. 10, 2015).

The insured was a three-person law firm, solely owned by one of the attorneys who employed the two others as associates. However, one of the "associates" was listed as a partner on the firm's website, was listed on the firm's letterhead, and could bring in clients and access the firm's trust account. Prior to the firm's application for professional liability insurance, this associate was the subject of an ethics committee complaint and reprimand relating to errors that allowed a client's claim to be dismissed with prejudice.

In the application for the policy, the firm owner answered "no" to the question whether "you are aware of any incident, circumstances, acts, errors, omissions, or personal injuries that could result in a professional liability claim against any attorney of the firm or its predecessors irrespective of the actual validity of the claim?" The firm owner testified that he did not ask the associate whether he knew of any such actions and had no system in place to monitor his associate's work. After the policy was issued, the client filed a legal malpractice action against the associate and the firm alleging they negligently allowed his claim to be dismissed.

The firm's professional liability policy barred coverage for claims arising out of "any act, circumstance or event committed, omitted, or occurring prior to the Policy Period if, on or before the Effective Date, the Named Insured knew of or could have reasonably foreseen that such act, circumstance or event could give rise to a claim against any of you." The court held this

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Finding of Fraud for ERISA Violation Implicates Fraud Exclusion

The Pennsylvania Superior Court has held that a fraud exclusion bars coverage for a suit in which the trial court found that the insured committed fraud and the court's ruling was upheld on appeal. *Cigna Corp. v. Exec. Risk. Indem. Co.*, 2015 WL 836933 (Pa. Super. Ct. Feb. 27, 2015).

Employees of the insured sued the insured for violation of the Employee Retirement Income Security Act (ERISA) for alleged misrepresentations made to the employees concerning conversion of their pensions from a defined benefit plan to a cash balance plan. The employees alleged that the insured misled plan participants into believing that the conversion would not result in a decrease in benefits. The trial court found that the insured made misrepresentations regarding the conversion and held that the insured's misrepresentations constituted fraud. The appellate court affirmed the trial court's fraud finding.

The insured sought coverage under a fiduciary liability policy for the underlying action, and several insurers denied coverage based on an exclusion barring coverage for deliberately fraudulent or criminal acts or omissions (the "Fraud Exclusion"). In the coverage litigation that followed, the court held that the Fraud Exclusion barred coverage for the underlying matter. The court reasoned that the trial and appellate courts in the underlying action made express determinations that the insured's conduct was fraudulent under federal law, and the court observed that the insured's intentionally misleading statements also were also fraudulent under Pennsylvania law. The court rejected the insured's argument that the fraud exclusion did not apply because the policy provided broad coverage for wrongful acts. The court held that it could not "read the wrongful acts provision as negating the fraudulent acts exclusion" as "the fraudulent or criminal act exclusion operates as an exception to the more general wrongful acts provision."

The court also held that the trial court's finding of fraud constituted a "final judgment" and triggered the fraud exclusion. The court explained that, where a trial court makes an express determination of fraudulent conduct, that finding constitutes a "final judgment" unless and until it is reversed on appeal, which it was not. ■

Contract-Related Breach and Negligence Damages Constitute "Loss"; Coverage Precluded by Warranty Exclusion *continued from page 2*

an intent by the parties to exclude damages of the type at issue here. And, according to the court, the negligence claim did not alter this result because the arbitration panel had concluded that the negligence and breach of contract awards were duplicative, and not cumulative, and because the phrase "any cost or expense" indicated that the applicability of the exclusion did not turn on the type of underlying claim or cause of action.

Additionally, the court held that the policy did not cover costs taxed against the insured in the arbitration. In this regard, the court pointed out that while the policy provided that it covered "costs taxed against the insured," it was only with respect to "that part of the judgment we pay." Because the insurer had no duty to pay any part of the judgment, it was not obligated to pay for any interest or attorney fees under the supplementary payments provision. ■

Eleventh Circuit Holds No Coverage for Online Banking Theft *continued from page 2*

from an employee of the insured using a key-logger computer virus. The thieves authorized over $188,000 in payments from a client escrow account to several other bank accounts. The insured filed a claim under the policy, seeking coverage for the unrecovered amounts stolen from its bank accounts. The insurer denied coverage, citing the policy's forgery provision and malicious code exclusion. In this subsequent coverage action, the district court granted summary judgment in favor of the insurer, and the insured appealed.

On appeal, the Eleventh Circuit held that the policy's forgery provision did not provide coverage for the stolen funds. The court held that the electronic fund transfers by the thieves did not involve a "check, draft, promissory note, [or] bill of exchange," nor did the transfers constitute a "written promise, order or direction to pay" that was "similar" to the enumerated instruments. Specifically, the court observed that both federal and Georgia law distinguish electronic fund transfers from traditional banking transfers made by check, draft, or bill of exchange, citing the federal Electronic Transfer Fund Act and the Georgia Uniform Commercial Code. In addition, the court found that the theft did not involve the "signing of [a] name," even though the policy provided that electronic signatures would be considered the same as handwritten signatures, because there was no evidence that the login credentials constituted a "signature." In so holding, the court declined to apply *Allstate Insurance Co. v. Renshaw*, 258 S.E.2d 744 (Ga. Ct. App. 1979), which held that the theft of an insured's bank card and PIN constituted a "forgery" under the homeowner's policy at issue because that policy did not define "forgery."

The appellate court also concluded that coverage was precluded by the policy's malicious code exclusion. In so holding, the court rejected the insured's argument that the computer virus did not in fact "cause" its loss because of the intervening conduct of the thieves. The court concluded that the broad, unambiguous language of the exclusion precluded coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." ■

Duty to Defend Does Not Encompass Affirmative Claims *continued from page 3*

successfully defend the client's counterclaims. Second, the court held that the insured's representation to the court in the underlying litigation that the fees and costs incurred in the defense of the client's counterclaims totaled $668,068.38 judicially estopped her from seeking a different sum from the insurer. Third, the court held that the insurer's deduction of certain of fees and expenses in accordance with its billing guidelines did not constitute a breach of the duty to defend. The court noted that the policy established that the insurer's determination of the reasonableness of claim expenses would be "conclusive" and observed that the insurer's deductions did not appear to be arbitrary.

Next, the court granted summary judgment in favor of the insured on the insurer's breach of contract claim, which alleged that the insured's refusal to reimburse the insurer after receiving the judgment against her client constituted an impairment of the insurer's subrogation rights under the policy. The court held that Texas's anti-subrogation rule—which precludes an insurer from suing its insured on the contract—applied to bar the breach of contract claim.

By contrast, the court held that the anti-subrogation rule did not preclude the insurer's claim for money had and received, which likewise sought recovery from the insured for the portions of the judgment representing the fees it had paid. The court held that the insurer is entitled to such recovery, but concluded that summary judgment was not warranted because the insurer had not conclusively established the amount of its recovery.

Finally, the court held that genuine issues of fact remained as to the insurer's claim for negligent misrepresentation based on certain statements by the insured, including her statement that "any fees and expenses recovered will be reimbursed to the carrier." ■

Delaware Trial Court: "Final Adjudication" Exclusion Trumps "No Loss" Argument

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and for a related employee retaliation claim. The insured also sought coverage for a $10.58 million settlement with the government. The insurer denied coverage for the settlement on the basis that it either constituted fines, penalties, or multiplied damages, which were expressly carved-out of the definition of covered "Loss," or restitution of overpayments by the government to the insured, which is uninsurable as a matter of public policy.

The court found that the settlement constituted "Loss" because "Loss" was defined to include "settlements." The court reasoned that the policy's inclusion of a "Fraud/Ill-Gotten Gains Exclusion" helped "inform the Court as to the intent of the parties." The exclusion barred coverage for Loss, including defense expenses, in connection with any claim "brought about or contributed to in fact" by any "profit or remuneration gained by any Insured to which such Insured is not legally entitled" "as determined by a final adjudication in the underlying action or in a separate action or proceeding." The court concluded that this exclusion "shows that [the insurer] contemplated coverage for restitution and specifically decided that reimbursement for restitution would only be precluded upon a final adjudication that the money Plaintiff received was actually restitution." The court further noted that "[a]s the drafter of the Policy, [the insurer] could have precluded coverage of all settlements but it did not." The court determined that it did not need to decide whether restitution was insurable as a matter of public policy because, even if the settlement here was for restitution, the policy's "Fraud/Ill-Gotten Gains Exclusion" required a "final adjudication."

The court also declined to apply the policy's exclusion for claims "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged act, error or omission in connection with the Insured's performance of or failure to perform professional services for others for a fee, or any act, error or omission relating thereto." The court reasoned that "[a]s drafter of the Policy, [the insurer] had the opportunity to specifically define 'professional services' and failed to do so." The court therefore interpreted "professional services" narrowly to include polling and consulting services but not billing practices. The court reasoned that the exclusion's lead-in language was "too broad to give meaningful effect to coverage under the Policy" and therefore found that the professional services exclusion did not apply.

The court determined, however, that a contractual liability exclusion may apply and may require some allocation of the settlement at issue. ■

Lawyer's "Don't Ask" Policy on Associate Misconduct Leads Court to Apply Prior Knowledge Exclusion

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exclusion barred coverage for the malpractice lawsuit. The court noted that "you" in the policy included both the insured firm and any attorney employed by the firm and that the term "Named Insured" included both the firm as an entity and the individual attorneys employed by the firm. Accordingly, the allegedly negligent associate's subjective knowledge that his actions would lead to a malpractice claim against the firm triggered the exclusion and precluded any duty by the insurer to defend or indemnify the firm or the associate.

The court emphasized, however, the "distinctive facts of this case," which involved a three-person firm, with an associate held out as a partner, and a firm policy of not asking associates about potential claims. Under those unique circumstances, the court held, the firm owner could not reasonably rely on his lack of personal knowledge of the associate's actions to defeat the clear terms of the policy. The court did not specify, however, which of these distinctive facts was determinative or how the outcome would have differed in other circumstances. ■

Borrowing Funds from Client Does Not Constitute Professional Services and Profit Exclusion Bars Coverage for Accountant's Failure to Repay Client *continued from page 1*

for breach of contract and breach of fiduciary duty. The insurer defended the insured under a reservation of rights and filed a declaratory judgment action seeking a determination that it had no duty to defend or indemnify the insured.

The court agreed with the insurer, concluding that the insurer had no duty to defend or indemnify the insured in connection with the client's suit. First, the court held that the suit did not allege an act or omission in the performance of "professional services." The policy defined "professional services" as services as an "accountant or accounting consultant [or] [I]investment [A] dviser." Investment Adviser means "any insured who provides financial, economic or investment advice, including personal financial planning and investment management services, provided that the Investment Adviser does not include any Insured while involved in the bartering, purchase or sale of securities, insurance products or other investment products." The court held that the insured was not acting as an accountant when he entered into the transactions with the client and that the insured was not acting as an "investment adviser" because he was involved in the sale of investment products—the promissory notes—to the client.

Second, the court held that the profit exclusion barred coverage for the suit. The profit exclusion bars coverage for any claim "based on or arising out of the insured gaining, in fact, any personal profit or advantage to which the Insured is not legally entitled." The court rejected the argument that "not legally entitled" is synonymous with illegal and held that, when the insured failed to repay amounts under the promissory notes, he was "not legally entitled" to those amounts.

Although the client attempted to avoid the exclusion by couching the insured's conduct as a breach of fiduciary duty, the court reasoned that the profit exclusion was triggered regardless, because the breach of fiduciary duty claim was based on the same underlying fact of the insured's failure to repay amounts due under the promissory notes. Finally, the court noted that its interpretation was consistent with the purpose of an accountant's professional liability policy, which "does not provide coverage for [the insured's] personal debts." ■

Civil Theft Award Not Covered by D&O Policy or CGL Policy *continued from page 3*

treble damages portion of the final judgment from its definition of "Loss" as a "multiple portion of [a] multiplied damage award." The court further held that, even if the final judgment award met the definition of "Loss" in the D&O policy, the express terms of the policy's "criminal act or willful violation" exclusion, the "gain of profit or advantage" exclusion, and the "breach of contract" exclusion each barred coverage for a civil theft award. Finally, the court held that the Crime Coverage Part of the D&O policy did not provide coverage for a judgment based on the policyholder's own acts of civil theft.

The court also rejected the claimant's argument that the D&O insurer was estopped from denying coverage. The court stated that it had already concluded that the judgment award was not covered under the policy, and "[e]stoppel may not be used to create coverage beyond the terms upon which the parties agreed . . . ."

In addition, the court held that the general liability policy likewise did not provide coverage. The court stated that an award for civil theft is not "property damage" because it does not involve "physical injury" or "loss of use" to tangible property, and that civil theft is not an "occurrence" or "accident" because it requires a finding of intent. ■

SPEECHES/UPCOMING EVENTS

ABA National Legal Malpractice Conference
KIMBERLY A. ASHMORE, Moderator
Timing is Everything: Notice, Priors, and Tails
April 9, 2015 | Washington, DC

ACI's 9th National Forum on ERISA Litigation
KIMBERLY M. MELVIN, Speaker
In-House Panel on Fiduciary Liability: Underlying Exposures and Coverage Issues, Placing and Underwriting Insurance, Future Needs, and Strategic Litigation and Settlement Considerations
April 14, 2015 | Chicago, IL

PRIMA 2015 Annual Conference
BENJAMIN C. EGGERT, Speaker
- **Drones are Coming: Are You Ready for Unmanned Aircraft?**
- **The Amended ADA: Implications for Human Resources**

June 7-10, 2015 | Houston, TX

ACI's 2nd National Forum on Insurance Allocation
LAURA A. FOGGAN, Panelist
State of Existing Allocation Law, With a Focus on Asbestos, Environmental, and Other Long-Tail Claims
June 25-26, 2015 | Chicago, IL

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