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ASSET PROTECTION TRUSTS

What Are Creditors' Rights Against Asset Protection Trusts?

A well-designed and well-implemented asset protection trust may be difficult to pierce by a creditor whose claim did not exist when assets were transferred to the trust. But a poorly designed or maintained APT may be subject to challenge by creditors.

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Once viewed with skepticism by many members of the legal community, asset protection planning is now enjoying ever increasing levels of legitimacy. Individuals, perhaps motivated by reports of enormous sums awarded to seemingly unworthy plaintiffs or by the volatility of the current business climate, are becoming more interested in insulating themselves from such risks.

Along with the increased demand for asset protection services has come a corresponding array of innovative techniques being used by sophisticated planners. Outmoded asset protection techniques such as giving assets to relatives in order to thwart creditors have been discarded in favor of intricate asset protection trusts ("APTs") established in debtor-friendly countries such as the Cook Islands or Bermuda. The availability of asset protection trusts is no longer even limited to those willing to go offshore. Alaska and Delaware, for example, have enacted legislation allowing trust companies in those states to aggressively compete with their offshore counterparts. Other states are currently considering similar measures and are sure to follow suit.

Despite the popularity of APTs, if an APT is not properly established and maintained, there are a number of inroads that creditors can make in an effort to pierce the trust and access the underlying assets. This is particularly true of poorly designed trusts, such as ones in which the settlor has violated the applicable fraudulent conveyance statute or has been overly aggressive in retaining too much control over, or an interest in, the trust or its assets.

In the recent case of *Federal Trade Commission v. Affordable Media, LLC,* [1] the Ninth Circuit affirmed the district court's finding the settlors in contempt for refusing to repatriate the assets in their Cook Islands APT. The Ninth Circuit concluded that the settlors remained in control of their trust.

This article analyzes various methods and theories used by creditors in attacking an APT. Consideration of these issues should benefit those who face the challenge of breaking an asset protection trust, those who are considering establishing an APT, and those who want to ensure the effectiveness of an APT already in existence.

The typical APT structure

The first step in ascertaining a creditor's rights against an asset protection structure is to examine the structure itself. A typical APT is a trust that has one foreign trustee and sometimes one or two U.S. trustees. The trust is irrevocable and provides for discretionary distributions to its beneficiaries who are generally members of the settlor's family. Often, the trust has an additional party—a protector, who is given powers to veto distributions and trust investments. Another important function of the trust protector is the ability to hire and discharge the trustees. Because of these powers, the protector plays a crucial role in the APT structure. Some settlors are disinclined to relinquish the protector's authority to a third party. In these situations, it is

not uncommon for the settlor of an APT to serve as the protector, or at least to retain the ability to hire or discharge the protector.

An APT created by a U.S. settlor, and having U.S. beneficiaries, will almost always be a grantor trust for U.S. income tax purposes. [2] As a result, all earnings of the trust will flow through to the U.S. settlor's income tax return. Additionally, transfers of assets into the trust are usually structured as incomplete gifts for U.S. gift tax purposes in order to avoid imposition of the gift tax [3] yet still effectuate a complete transfer for state law retitling purposes.

Although a well-designed APT will avoid allowing the settlor to be a trust beneficiary, a settlor frequently will insist that he or she have the ability to benefit from the settlement. Alternatively, the trust may be structured to give someone other than the settlor (such as the trustee) the ability to expand the class of beneficiaries so as to include the settlor.

Last, a typical APT will likely be the owner of most, if not all, of the shares or interests in one or more closely held companies, regardless of whether such company is foreign or domestic. It is these closely held companies which often hold most of the assets of the structure. More often than not, the settlor will have a strong say in the management of this company.

Fraudulent conveyance law: An important weapon for creditors

The most powerful weapon a creditor wields when attacking an APT is based on the creditor's ability to claim that the settlor's conveyance or transfer into the trust was fraudulent. A fraudulent conveyance or transfer may generally be defined as a transaction by means of which the owner of real or personal property has sought to place such property beyond the reach of existing creditor demands. [4]

It is axiomatic that an individual has the right to dispose of property any way he wants, but when the effect of such a disposition is to prejudice or impede upon the rights of others, the specter of fraudulent conveyance is raised.

Sources of fraudulent conveyance law. Two major uniform fraudulent conveyance provisions have been promulgated by the National Conference of Commissioners on Uniform State Laws. The most recent of these two acts is the Uniform Fraudulent Transfer Act (UFTA) which, since its promulgation in 1984, has been adopted in 37 jurisdictions. UFTA was designed to revamp the Uniform Fraudulent Conveyance Act (UFCA), which was approved in 1918 and remains in effect in six jurisdictions, including the Virgin Islands.

States that have not enacted either of these uniform provisions rely on a body of common law derived primarily from the Statute of Elizabeth, enacted in England in the 16th century. In addition to state statutory and common law, fraudulent conveyance provisions are set out in section 548 of the federal bankruptcy code. The bankruptcy code provisions are quite similar to those found in UFTA.

Actual and constructive fraudulent intent

Present creditors. In determining whether the transfer of assets into an APT is fraudulent with respect to a creditor, it is critical to determine whether the creditor was a "present creditor" or a "future creditor" at the time the transfer was made. This distinction is important because a present creditor does not need to establish that the debtor subjectively intended the transfer to be fraudulent. The present creditor must only objectively demonstrate that the debtor engaged in a constructive fraud by transferring assets without receiving a reasonably equivalent value in exchange, and that the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. [5]

UFTA indicates that a present creditor is one who had a "claim" against the debtor before the debtor made the transfer. [6] A claim under UFTA is defined to include "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." [7] In other words, existing creditors are persons who have subsisting claims against the debtor at the time the transfer was made even though their claims may not have matured or been

reduced to judgment until after such conveyance. [8]

If the party contesting the transfer has the status of a present creditor, he must generally first establish that the transfer of assets into the trust was made without the transferor receiving a reasonably equivalent value in exchange. Normally, this does not present a problem for a creditor with respect to transfers into an APT because those transfers are usually made voluntarily and without consideration.

In the event the debtor claims that the transfer was made for reasonably equivalent value, the determination of whether adequate consideration was received is a question of fact. [9] It is clear that "reasonably equivalent value" does not mean exact mathematical equivalence; [10] however, there must be a reasonable equivalence between the purchase price and the value of the property received as a result of, and at the time of, the transfer. [11] Furthermore, the transferee's good faith with respect to the transaction is irrelevant to a determination of the adequacy of the consideration under UFTA. [12]

In addition to showing that the transfer was made for less than reasonably equivalent value, a present creditor must prove that the debtor was insolvent at the time of the transfer or that the debtor became insolvent as a result of the transfer. Under UFTA, as well as under the laws of most states, an individual debtor is deemed insolvent if either: (1) the sum of the debtor's debts is greater than all the debtor's assets at a fair valuation, or (2) the debtor is generally not paying his or her debts as they become due. [13]

For purposes of applying this solvency test, an "asset" is defined to mean all property of the debtor to the extent that it is not encumbered by a valid lien, except to the extent it is generally exempt under nonbankruptcy law, and except for property held in tenancy by the entireties when it is not subject to process by a creditor holding a claim against only one tenant. [14] Of course, for purposes of determining solvency, the debtor may not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors. Debts do not include obligations to the extent that they are secured by a valid lien on property of the debtor not included as an asset. [15]

Example. Assume that Jim, a resident of Florida, has the following financial situation:

Assets:

Cash $100

Securities 200

IRA 350*

Exempt equity in residence 150

Total assets $800

Liabilities:

Unsecured bank loan $350

Net Worth: $450

UFTA Solvency Net Worth: ($50)

* Assume that the IRA is exempt from creditors pursuant to Florida law.

In the above example, it may appear that Jim is quite solvent and could transfer some of his cash or securities into an APT and remain solvent. But upon closer analysis, Jim is already insolvent under UFTA because the value of the IRA and the exempt equity in the residence are not counted for purposes of determining solvency.

Therefore, under the UFTA solvency provisions, Jim is insolvent by $50.

Present or future creditor—a crucial distinction. If a creditor does not have the status of a "present creditor," a more challenging subjective standard must be met before the conveyance into the trust will be set aside. This standard can be met by either present or future creditors, provided the creditor can show that the debtor made the transfer with the actual intent to hinder, delay, or defraud any creditors of the debtor. [16] Most states also deem a transfer made or an obligation incurred without adequate consideration to be constructively fraudulent without regard to the actual intent of the parties, provided the creditor can show that the debtor did not receive a reasonably equivalent value in exchange for the transfer, and (1) the debtor was left, after the transfer or obligation, with unreasonably small assets for a transaction or the business in which he was engaged, or (2) the debtor *intended* to incur, or *believed* that he would incur, more debts than he would be able to pay.

In determining whether a debtor actually intended to hinder, delay or defraud creditors, courts may take into account various badges of fraud that attend a transfer of the debtor's property. This is particularly important because, absent an actual admission of fraud on the part of the debtor, it is extremely unlikely that direct evidence will exist in support of the creditor's claim of actual fraud. None of these factors is in itself determinative of a fraudulent transfer; however, the existence of one or a combination of a number of the factors may, depending on the particular circumstances surrounding the transfer, create a rebuttable presumption of a fraudulent transfer. The following is a non-exhaustive list of the various badges of fraud that a court may consider:

- Whether the transfer or obligation was to an insider;
- Whether the debtor retained possession or control of the property transferred after the transfer;
- Whether the transfer or obligation was disclosed or concealed;
- Before the transfer was made or obligation was incurred, whether the debtor had been sued or threatened with a suit;
- Whether the transfer was of substantially all the debtor's assets;
- Whether the debtor absconded;
- Whether the debtor removed or concealed assets;
- Whether the value of consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; or
- Whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Number of badges needed to prove fraud. While the courts seem never to have stated the minimum number of badges of fraud necessary to overturn a transfer, a careful application of the above factors to a typical APT structure would initially give creditors some solace. Specifically, an APT almost always is a trust having the family as beneficiaries—clearly insiders under UFTA. Moreover, as with most gifts, rarely does the debtor receive adequate consideration for the transfer. However, the other factors may not be as easily proven, depending on the settlor's actions post-transfer, the settlor's UFTA solvency post-transfer, and the timing and existence of the creditor's cause of action.

The well-advised settlor creating an APT would leave significant non-exempt assets remaining in his name post-transfer, will not conceal the existence of the APT structure or its assets, and will pay or resolve all his debts, claims, and causes of action outstanding at the time of the conveyance. If the settlor has followed these guidelines, it would seem to be a close case under UFTA for a future creditor—whose cause of action arises post-transfer—to establish that the settlor had actual intent to defraud such a creditor.

Although courts have found the requisite fraudulent intent in literally thousands of cases in which the creditor's claim or cause of action existed on the date of transfer, [17] only a mere handful of cases exist relating to claims of creditors whose claim or cause of action arose after the transfer, i.e., a future creditor. [18] Conversely, if the facts before a court involve debtor's concealment, insolvency, and lurking claims of creditors existing on the date of transfer, then the creditor should be able to convince the court the transfer was fraudulent.

Effect of a fraudulent conveyance

Once a transfer is found to be fraudulent, what is the remedy? The remedy afforded a creditor who is able to establish that the debtor's transfer into the APT was fraudulent is the ability to void the transfer to the extent necessary to satisfy the creditor's claim. However, a creditor has a problem if the creditor is unable to obtain jurisdiction over the APT as transferee, or its assets, or if the creditor's claim of fraudulent conveyance is time-barred under the governing law of another country and such country's law is determined to be the governing law.

Does the transferor/settlor have anything to lose? Many debtors facing a creditor problem see no downside to transferring assets to a trusted friend, relative, or maybe even an APT. The debtor may make the transfer hoping that it will withstand an attack as a fraudulent conveyance. If the transfer is not set aside, the debtor relies on the transferee to simply give the asset back once the creditor dilemma is resolved.

The debtor may rationalize that even if the transfer is set aside, he will certainly be no worse off than if he had done nothing. However, the debtor may have something else to lose. Specifically, if the debtor has to resort to bankruptcy to resolve and discharge his creditor problems, the debtor may lose the ability to obtain a discharge in bankruptcy if a fraudulent conveyance occurred. [19]

Additionally, upon receipt of the transfer, the transferees—who are often family members—may suffer a judgment against them for the value of the property received. At a minimum, such creditor's remedies against a transfer cause a relatively innocent party to become embroiled in the debtor's creditor problems and litigation. Last, attorneys or accountants who assist a debtor in a fraudulent conveyance may also become personally liable to the creditor for the value of the property which they assisted in fraudulently conveying. [20]

When is the creditor too late? In all common law jurisdictions, a suit to set aside a fraudulent conveyance must be instituted within the applicable statute of limitations, but what law applies? Are the limitations periods of the state of the debtor's residence applicable? (Such a statute of limitations is generally the later of four years from the date of transfer or one year from the date of the creditor's notice of the transfer.) Or is the applicable statute of limitations the often much shorter period of another jurisdiction, such as the Cook Islands, Bermuda or the Bahamas? Besides a shorter statute of limitations, many countries with asset protection legislation have statutes that bar claims of creditors whose claims did not exist on the date of the statute. The answer will depend on whether the APT's choice of law is respected.

Choice of law—will foreign law apply?

The determined situs of the APT is critical. A U.S. settlor wishing to avail himself of the generous advantages offered under the laws of a debtor-friendly foreign jurisdiction may be unpleasantly surprised when he finds instead that state law may be applied with respect to the trust and its assets.

Differences between the laws of the various asset protection jurisdictions and the laws of a given state are numerous and dramatic. For example, the Cook Islands statute requires that a fraudulent transfer be proved by a creditor beyond a reasonable doubt. This is a much higher burden of proof for the creditor to meet than the "preponderance of the evidence" or even a "clear and convincing" standard typically found in the United States. The Cook Islands also permit the use of self-settled spendthrift trusts. These trusts are routinely invalidated in most U.S. jurisdictions (except in Alaska and Delaware).

Foreign jurisdictions are likely to have significantly shorter limitations periods (than their domestic counterparts) in which creditors are permitted to challenge transfers as being fraudulent. For example, with respect to either present or future creditors, UFTA has an alternative limitations period of the greater of (1) four years from the date of transfer, or (2) one year from the date the creditor discovered the transfer or should have discovered the transfer. In contrast, the Cook Islands limitations period is immediate as to future creditors and generally two years as to present creditors, and the Cook Islands statute does not include a "known or should have known" definition.

A trust consisting of personal property will usually be construed in accordance with the rules of construction of the jurisdiction designated as the governing law in the trust instrument. This means that in situations when it is not possible to determine the intent of the settlor by reference to the trust instrument, a rule of law must

be used to fill what would otherwise be a gap in the instrument. [21] Similarly, matters regarding administration of the trust, such as the authority of the trustee to make certain investments and to take specific action with respect to the trust assets, will also be based on the law of the jurisdiction specified in the trust instrument. [22] Contrary to common belief, absent a specifically designated statute to the contrary, most foreign jurisdictions will give effect to judgments entered by U.S. courts either by treaty or through common law principles of comity.

Even though the settlor has the ability to designate which jurisdiction's law will govern the validity of the trust, a U.S. court may invalidate a trust's selection of governing law if the jurisdiction designated does not have a substantial relation to the trust, or if the application of its laws violates a strong public policy of the jurisdiction with which the trust has its most significant relationship. [23] In determining with which jurisdiction the trust has its most significant relationship, some of the factors that a U.S. court will likely consider include the degree to which it is necessary to protect the justified expectation of creditors, the basic policies underlying debtor-creditor law, and the ease in the determination and application of the law to be applied. [24]

It is not hard to imagine that a U.S. court could attempt to assert jurisdiction and apply U.S. law over a trust if the settlor, the beneficiaries, and one or more of the trustees are U.S. citizens and if some or all of the trust corpus remains in the U.S. It is also not difficult to formulate a strong public policy argument in favor of protecting the ability of creditors to satisfy judgments obtained against their debtors, especially if a fraudulent conveyance (as defined in the U.S.) has occurred. If, however, there is no U.S. trustee, and substantial assets outside the U.S. are administered by the foreign trustee and legitimate business reasons exist for the establishment of the trust, then a different result may occur.

The settlor's retention of control over the trust

A common paradox of asset protection planning is an individual's desire to surrender ownership of his assets in an effort to insulate them from creditors' attacks, yet simultaneously retain some degree of benefit and control over the very same assets. Trusts that attempt to accomplish this objective are frequently referred to as "self-settled trusts." As a result, even in the absence of a creditor's ability to establish that the debtor fraudulently transferred assets into an APT, it may be possible for the creditor to successfully argue that the settlor retained excessive levels of control over the trust, thereby violating the common law prohibition against self-settled spendthrift trusts. [25]

The Restatement (Second) of Trusts' position relating to excessive levels of control is widely recognized in both the U.S. and the United Kingdom, where—as a matter of public policy—an individual may not place assets out of the reach of creditors by simply transferring them to a trust in which the individual is also a beneficiary or otherwise has the ability to reacquire the trust corpus. Most of the well-known asset protection jurisdictions generally recognize the decisions of the U.K. and, absent legislation to the contrary, may invalidate a self-settled spendthrift trust. Furthermore, the highest court in that jurisdiction is the U.K. Privy Council, which also upholds the doctrine that self-settled trusts are not a shield against creditors.

In a departure from the common law doctrine against self-settled trusts, a handful of jurisdictions (such as the Cook Islands, the Cayman Islands, and Bermuda) have statutorily recognized the validity of self-settled spendthrift trusts. Nevertheless, the following list sets forth a number of rationales as to why a U.S. court could choose not to give effect to such foreign legislation in the context of an APT: [26]

- The foreign law adversely affects U.S. creditors;
- The nationality, residence, and economic activity of the settlor are in the United States, so U.S. law should be applied;
- A law upholding an asset protection self-settled trust is at odds with hundreds of years of history and is therefore not desirable or generally accepted;
- The settlor's creditors have a reasonable expectation that the settlor's assets would be available to satisfy his debts; in contrast, the settlor does not have a reasonable expectation that assets generally available to him should be protected from creditors' claims;
- An asset protection self-settled trust is contrary to the traditions of the international legal system;
- A state that enacted laws allowing a self-settled trust would likely create a conflict with the laws of other states; or
- The interest of the United States would be greater than the interest of the foreign country that enacted

such laws, assuming that the settlor resided in the U.S. and the trust had significant economic activity in the U.S.

Experienced asset protection planners recognize that a spendthrift trust may be ineffective as to creditors of the settlor if the settlor is endowed with the entire disposition and control of the trust property. [27] Consequently, planners often carefully limit the settlor's control over the trust assets, and restrict the extent to which the settlor can benefit from the trust. This is accomplished by precluding the settlor from serving as the trustee or even as a trust advisor, and by restricting the entitlement of the settlor to distributions in favor of named beneficiaries. Additionally, many APT structures do not include the settlor as a beneficiary.

In an effort to overcome the problems associated with the inability of the settlor to be a trust beneficiary, some trusts are structured so that the separate property of each spouse is held in that spouse's separate account within the trust for the benefit of the other spouse. It is unclear whether the reciprocal nature of this strategy could be challenged as a self-settled spendthrift trust.

Use of a U.S. trustee—could U.S. jurisdiction result?

A settlor desirous of obtaining the maximum asset protection will name a trustee who is not connected with the United States in any manner. The reason is that the presence of a trustee who has an excessive level of contact with the U.S. may subject the trustee, and therefore the trust, to the jurisdiction of U.S. courts, giving creditors jurisdiction to attack the underlying trust assets. It is less clear whether jurisdiction could arise if a domestic trustee was appointed, but subsequently resigned, leaving only a foreign trustee when litigation commences.

The United States may generally exercise adjudicative power with respect to a person if the relationship between the person and the U.S. is such as to make the exercise of jurisdiction reasonable. As a practical matter, the exercise of jurisdiction to adjudicate with respect to a thing or person is reasonable if, at the time jurisdiction is asserted, [28]

- The person is present in the territory of the U.S., other than transitorily;
- The person, whether natural or juridical, regularly carries on business within the U.S.;
- The person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity; or
- The person, whether natural or juridical, had carried on outside the U.S. an activity having a substantial, direct, and foreseeable effect within the U.S., but only in respect of such activity.

Therefore, U.S. jurisdiction over an APT is possible pursuant to the above tests.

Conclusion

A well-designed and well-implemented APT may be difficult to pierce by a creditor whose claim did not exist on the day of the transfer of assets into the trust. If, however, an APT is not well-designed and leaves the settlor insolvent, or if the trust is not properly implemented or not maintained correctly, a creditor—particularly a present creditor—has many arguments available to successfully attack such an APT. Thus, the answer to the question of whether an APT can be busted must be answered with the classic and time-honored lawyer's answer: it depends.

PRACTICE NOTES

Even if a creditor is unable to establish that the debtor fraudulently transferred assets into an APT, it may be possible for the creditor to successfully argue that the settlor retained excessive levels of control over the trust, thereby violating the common law prohibition against self-settled spendthrift trusts.

1

Federal Trade Commission v. Affordable Media, LLC, 179 F3d 1228 . This case will be analyzed in detail in an upcoming issue of Estate Planning.

2

I.R.C. Section 679.

3

Reg. 25.2511.

4

37 Am. Jur.2d *Fraudulent Conveyances* §1.

5

Uniform Fraudulent Transfer Act (UFTA) §5.

6

Id.

7

UFTA §1.

8

37 C.J.S. *Fraudulent Conveyance* §47.

9

In re Metropolitan Steel Fabricators, Inc., 191 BR 150 . See also generally, *In re Bay Plastics, Inc.*, 187 BR 315 .

10

In re WCC Holding Corp., 171 BR 972

11

In re Morse Tool, Inc., 148 B.R. 370 .

12

UFTA §4, Comment (2).

13

UFTA §2.

14

UFTA §1.

15

UFTA §2.

16

UFTA §4.

17

Zahra Spiritual Trust., 66 AFTR 2d 90-5491, 910 F2d 240, 90-2 USTC ¶50473 ; *Brown*, 71 AFTR 2d 93-1769, 820 F Supp 374, 93-2 USTC ¶50375 ; *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.*, 778 F Supp 1116 ; *In re Janz*, 432 NW2d 13 ; *Cinocco Realty*, 736 P2d 421 .

18

However, see Alperin, "Conveyance as Fraudulent Where Made in Contemplation of Possible Liability for Future Tort," 38 ALR 3d 597. Also see *Mandolini Co. v. Chicago Produce Suppliers*, 540 NE2d 505 ; *Bandas v. Emperor*, , 121 Misc 2d 192, 467 NYS2d 749, Medicare & Medicaid 33602 ; *U.S. Nat'l Bank of Omaha v. Rupe*, 296 NW2d 474 ; *Dep't of Public Welfare v. Thibert*, 279 NW2d 53 ; *Stauffer v. Stauffer*, 351 A2d 236 .

19

In Re Portnoy, 201 BR 685 .

20

A conspiracy to commit a fraudulent transfer or aiding and abetting in a fraudulent transfer are torts in some states. See *McElhanon v. Hing*, 728 P2d 256 728 P2d 273 *aff'd in part and vacated in part cert. den.* ; *Van Royen v. Lacey*, 277 A2d 13 ; *Joel v. Weber*, 197 App Div 2d 396, 602 NYS2d 383, 1993 WL 405232 ; and *Crowthers McCall Pattern, Inc. v. Lewis*, 129 BR 992 .

21

Restatement (Second) Conflict of Laws §224.

22

Restatement (Second) Conflict of Laws §§268 and 271.

23

Restatement (Second) Conflict of Laws §270.

24

Restatement (Second) Conflict of Laws §6.

25

Restatement (Second) of Trusts §156.

26

Restatement (Third) Foreign Relations §403.

27

76 Am. Jur. 2d *Trusts* §130.

28

Restatement (Third) Foreign Relations §421.

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