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ENVIRONMENTAL LIABILITY

COMMERCIAL TRANSACTIONS

This article focuses on contractual provisions for allocating environmental risks and liabilities in various types of purchase agreements. In the article, the authors identify basic contractual terms and conditions that can be used to allocate environmental risks and liabilities, discuss alternatives available to address these risks and liabilities, and provide examples of drafting techniques for key contractual provisions. The authors also discuss non-contractual techniques for allocating environmental risks and liabilities such as deed restrictions and environmental insurance.

Allocating Environmental Risks And Liabilities In Commercial Transactions

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I. Introduction

A. Overview

Experience makes clear that the environmental risks and liabilities faced by purchasers and sellers of businesses or real property can be substantial. But they are not always well understood or even identified prior to the transaction. These risks and liabilities arise from a myriad of federal and state statutes, their implementing regulations, local rules and ordinances, and the common law. Parties involved in buying or selling a business or real property are well advised to identify, evaluate, and allocate the environmental risks and liabilities associated with the transaction. Thus, it is imperative to understand the methods by which these risks and liabilities can be defined, limited, and ultimately allocated.

This article focuses on contractual provisions for allocating environmental risks and liabilities in various types of purchase agreements.[1] The article identifies basic contractual terms and conditions that can be used to allocate environmental risks and liabilities, discusses

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alternatives available to address these risks and liabilities, and provides examples of drafting techniques for key contractual provisions. It also discusses noncontractual techniques for allocating environmental risks and liabilities such as deed restrictions and environmental insurance.[2]

B. The Unique Nature of Each Transaction

At the outset, it is important to underscore that each company, property, and transaction is different. Thus, one should consider the following when drafting and negotiating provisions in purchase agreements for allocating and limiting environmental risks and liabilities:

- the purpose, timing, and structure of the transaction;
- the purchase price;
- the risk preferences and tolerances of each party to the transaction;
- the environmental legal requirements applicable to (1) the business, (2) the anticipated uses of the real property and (3) the transaction;
- the environmental conditions existing at the properties and facilities involved in the deal, including, where pertinent, at off-site properties owned and/or operated by parties to the deal and at off-site locations where substances from the facilities and/or properties were disposed or treated; and
- other pertinent deal-specific facts.

C. Sources of Legal Risks and Liabilities

A wide variety of federal and state statutes and their implementing regulations establish the principal sources of environmental legal risks and liabilities in a typical commercial transaction. In certain transactions, parties also may need to consider foreign, regional, county, and local environmental laws.

One federal environmental statute that should be considered in every transaction is the U.S. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly referred to as the ''federal superfund statute.''[3] CERCLA imposes strict, retroactive, and joint and several liability for any release or threatened release of hazardous substances to the environment that causes the incurrence of response costs.[4] Liability is for remediation and response costs, damages to natural resources, and health assessment costs.[5]

Other environmental statutes that create potential legal risks and liabilities for the subject business or real property include the following federal statutes and their state equivalents: Clean Air Act[6]; Clean Water Act[7]; Resource Conservation and Recovery Act[8]; Toxic Substances Control Act[9]; Emergency Planning and Community Right-To-Know Act[10]; Federal Insecticide, Fungicide, & Rodenticide Act[11]; Endangered Species Act[12]; and Coastal Zone Management Act[13].

These environmental laws establish extensive compliance mandates that impose broad ranging environmental management requirements for a business and its use of real property. Substantial penalties may be assessed for failures to comply with these mandates.

In addition, many other federal and state environmental statutes and the common law impose potential environmental liabilities and risks that may also need to be addressed in a commercial transaction.

II. Contract Provisions for Allocating and Limiting Environmental Risks and Liabilities

This section discusses contractual provisions that can be used in agreements of all types, including stock purchase agreements and purchase and sale agreements, to allocate and limit environmental risk. The form and structure of purchase agreements can vary considerably depending on a variety of factors, including the structure of the transaction, the nature of the target business or real property, and the preferences of the parties and their counsel. In addition, the scale and complexity of environmental provisions can vary considerably from one deal to the next. For instance, one would expect more limited environmental provisions in a stock purchase agreement for a recently established software company with one leased property than for a multinational manufacturing company with numerous owned properties and a long history of environmental issues. When it comes to environmental provisions, one size does not fit all.

A. Definitions

Defined terms are essential to any contract. The scope and specific meaning of defined terms serve to allocate and limit environmental risks and liabilities. In certain circumstances, definitions may incorporate elements of corresponding definitions found in applicable federal and/or state laws. Even the choice not to define certain terms can itself have an impact on the interpretation of the parties' obligations.

An initial drafting issue is whether to use definitions that are broad and generic in nature or definitions that are highly detailed and specific. The choice often relates to the scope and nature of the contract being drafted. Defined terms in purchase agreements include terms that are specific to environmental provisions (e.g., ''environmental laws,'' ''environmental liabilities,'' ''hazardous substances,'' or ''release''), as well as

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[1] It describes types of environmental provisions used in purchase agreements of all types, including stock purchase agreements, asset purchase agreements, merger agreements and real estate purchase agreements.

[2] A key action that a purchaser should take prior to acquiring a business or real property to allocate and limit environmental risks is to identify and evaluate these potential risks by conducting a thorough pre-transaction environmental due diligence investigation. That pre-transaction investigation is beyond the scope of this article.

[3] 42 U.S.C. §§ 9601 et seq. *Note:* Many states have enacted their own ''superfund statute'' which may establish requirements similar to those of the federal law.

[4] *Id.* § 9607(a).

[5] *Id.*

[6] 42 U.S.C. §§ 7401 et seq.

[7] 33 U.S.C. §§ 1251 et seq.

[8] 42 U.S.C. §§ 6901 et seq.

[9] 15 U.S.C. §§ 2601 et seq.

[10] 42 U.S.C. §§ 11001 et seq.

[11] 7 U.S.C. §§ 136 et seq.

[12] 16 U.S.C. §§ 1531 et seq.

[13] 16 U.S.C. §§ 1451 et seq.

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defined terms that are used throughout the agreement (e.g., ''governmental authorities,'' ''knowledge,'' ''legal requirements,'' ''material,'' ''permits,'' or ''real property'').

Short, simple contracts generally contain a few broad, generic, straightforward, and brief definitions. In contrast, a long, complex purchase agreement likely will contain a large number of definitions that are quite detailed. Even for detailed definitions, however, it is useful to have an introductory element of the defined term that is general in scope and that is intended to capture within its language the broad reach of the intended definition. Then, specific or detailed elements can be added with introductory phrases such as ''including but not limited to.''

B. Representations and Warranties

Environmental representations and warranties typically are made by the seller and are among the most important environmental contractual provisions.[14] The reasons are several. Environmental representations and warranties can:

(1) force the seller to disclose important information about the target business or real property, including: (a) confirming information obtained during due diligence; and (b) potentially providing new information not learned through due diligence, including information about predecessor operations, leased facilities, past violations of law, pending or threatened litigation or regulatory action, and releases of hazardous materials and off-site activities such as hazardous waste disposal;

(2) provide an information base for allocating risks and liabilities; and

(3) provide the purchaser with risk protection through indemnities based on breaches of the representations and warranties if such indemnities are part of the purchase agreement.

(1) Environmental Issues to be Considered when Negotiating Representations and Warranties

Representations and warranties are fact-specific and, thus, transaction-specific. Examples of questions that should be considered in developing environmental representations and warranties for a transaction include:

■ Are the facilities, properties and operations in compliance with environmental laws and other requirements? Have they always been?

■ Have all permits, approvals or authorizations necessary for the operation of the facilities or the use of real property been issued to the company? Are they properly posted, maintained and current and do they cover all operations and activities at such facilities and/or real property?

■ Are all hazardous materials used and all hazardous wastes generated by the facilities properly accounted for and stored, maintained, distributed, used and reported to appropriate authorities in accordance with all applicable laws and requirements?

■ Are all hazardous wastes transported off-site by registered and/or permitted hazardous waste transporters and disposed of or treated by permitted hazardous waste entities? Do the facilities prepare and maintain all reports, forms and other documentation necessary to the handling, storage, treatment and disposal of hazardous wastes used by the facilities?

■ Have all material safety data sheets (MSDS) necessary for the materials used by the facilities been obtained, filed and made available to people at the facilities as required by applicable laws and regulations?

■ Have all reports required to be prepared and/or submitted to any authority with respect to any environmental condition, activity, operation, or material been prepared and/or submitted?

■ Have any notices been received, orally or in writing, from any agency or person:

- alleging violations of any environmental laws, regulations or other requirements;
- alleging liability with respect to any environmental requirement or condition;
- demanding reimbursement or contribution or alleging responsibility with respect to cleanup of a hazardous waste disposal site or hazardous substance release site;
- requesting information with respect to any environmental matter associated with the facilities?

■ Does the seller know of any environmental liabilities, contingent or otherwise, associated with the facilities?

■ Have any on- or off-site releases of hazardous materials to, at or from the facilities or real property occurred? Are hazardous materials present in soils or groundwater at or beneath the facilities or real property?

■ Are or were there any underground storage tanks used by the facilities or at the real property?

■ Do any gasoline stations, dry cleaning establishments, or other commercial or industrial facilities that use or store volatile hazardous materials or petroleum products exist within ''x'' feet of the property and have they ever existed on or within ''x'' feet of the property?[15]

■ Has any vapor intrusion or migration testing been done within or beneath facilities on the property and, if so, what were the results?

■ Are the facilities subject to any statutory or regulatory transaction-triggered environmental obligations?

■ Do deed restrictions or lease obligations exist that govern or relate to hazardous materials, hazardous

[14] In the context of merger agreements, the parties often make reciprocal representations and warranties. When negotiating merger agreements, counsel should give careful consideration to whether the counterparty will maintain one or more viable entities that can indemnify its client for breaches of representations and warranties after the consummation of the merger.

[15] The distance selected should be based, in part, on the distance that contaminated vapors could migrate from the location of off-site contaminated groundwater and/or soil to the property.

wastes, environmental conditions, groundwater or other environmental matters at the facilities?

(2) Materiality, Knowledge, Survival and Disclosure Schedules

When negotiating representations and warranties, sellers often seek to limit the scope of the representations by methods such as the following: (1) including materiality qualifiers (which limit the representations and warranties to cover only material facts and circumstances), knowledge qualifiers (which limit the representations and warranties to the knowledge of certain individuals or groups within the seller company or to some other specific, identified knowledge) and/or a duration or survival period for such representations; and (2) drafting disclosure schedules as exceptions to such representations. The negotiation and drafting of these terms and conditions are often among the more controversial issues addressed when negotiating environmental provisions.

The use of materiality qualifiers in environmental representation and warranties can vary considerably from one deal to the next. In some cases, the materiality qualifier used for environmental representations and warranties may simply use the undefined term ''material.'' In other cases, the materiality qualifier may be a defined term used throughout the purchase agreement, such as ''Material Adverse Effect'' (*i.e.*, a liability that is significant enough to have a material impact on the business itself). In other cases, the environmental representations and warranties may use a materiality definition applicable only to environmental provisions in the purchase agreement. Examples of specific materiality concepts used in environmental provisions may include: (1) setting a threshold (i.e., a liability that, individually or in the aggregate, is not likely to exceed $''x''); or (2) tying materiality to the usage and meaning of these terms in various laws and regulations, such as the Securities and Exchange Act laws and regulations.

In some cases, parties establish a knowledge qualifier by naming a person or group of persons within a company whose actual knowledge becomes the definition of ''knowledge'' for the transaction. One obvious risk of using named people as the basis for determining the meaning of ''knowledge'' is that designated people may die, forget, or become unavailable. An important consideration for environmental representations and warranties is whether designated people include people who are likely to have knowledge of the day-to-day environmental issues of the business, such as environmental health and safety managers, facility managers or environmental consultants, or whether the designees are limited to high level corporate officers who may have minimal actual knowledge of the environmental issues identified in the representations and warranties section above.

Another important consideration is the term of the survival period for environmental representations and warranties. At the risk of stating the obvious, sellers typically will want the shortest duration possible and purchasers typically will want the longest duration possible. In some cases, the parties may agree to apply one survival period to all representations and warranties other than to certain excluded representations and warranties for which different survival periods are established. The different survival periods can be based on fact considerations, legal factors (such as statutes of limitations), and/or the relative bargaining leverage of the parties with respect to certain liabilities. A purchaser might pursue a longer survival period for environmental representations and warranties when it perceives significant environmental risk, or when there are specific concerns identified during due diligence. Special consideration should be given to survival periods for representations and warranties in real estate purchase agreements because, in most jurisdictions, such terms do not survive closing without express survival language.

Finally, environmental conditions at the seller's facilities may be inconsistent with the representations and warranties. For example, an underground storage tank might actually exist at a site, despite a representation in the agreement that no underground storage tanks exist. Rather than attempting to draft representations and warranties to address each individual situation, exceptions to the representations and warranties are commonly listed on a disclosure schedule to the purchase agreement. The purchaser will want any exceptions to the representations and warranties that are listed in disclosure schedules to be specific, factual and clear to avoid overly limiting or vitiating the specific representation to which the exception applies.

C. Covenants and Conditions Present

Purchase agreements are often executed prior to closing — sometimes many months prior to closing. Pre-closing covenants can be used (1) to ensure purchaser protection against adverse environmental consequences that might occur as a result of seller actions during the period between execution of the purchase agreement and the closing, and (2) to require that the parties take any actions necessary to effectuate the closing. Typical pre-closing environmental covenants require sellers: to maintain properties and facilities in good environmental condition; to keep permits current; to comply with applicable environmental laws and regulations; to keep purchaser informed of any change to environmental conditions; and to assist and cooperate in the transfer of permits to purchaser.

For a material breach of any pre-closing covenant by the seller, purchase agreements typically provide the purchaser the right to terminate the agreement or obligate the seller to cure before purchaser is required to close. In addition, a purchaser may want to include certain conditions precedent to its obligation to close. In particular, if permit transfer obligations are triggered as a result of the transaction, the purchaser will want the transfer of all permits to be a condition precedent. When the execution of the agreement and closing are contemporaneous, the parties should address permit transfer and other pre-closing items in a letter of intent or the like.

Another environmental covenant that parties may include in a purchase agreement is a covenant by the party who has cleanup obligations to complete the cleanup to the applicable cleanup standard and in compliance with any legal requirements or other agency requirements. If the cleanup is of short duration, the parties may prefer a pre-closing covenant, in which case the purchaser often will want the completion of such cleanup to be a condition precedent to its obligation to close. The applicable cleanup standard can be a standard established by law, regulation or agency guidance, or a contractual cleanup standard that may be stricter

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than the cleanup standard established by law or agency guidance. If the cleanup standard is established by law, regulation or agency guidance, the standard may change as the legal requirements change. Post-closing cleanup covenants are often considerably more complicated than pre-closing covenants as they often involve escrows, site access agreements, oversight and approval rights and dispute resolution provisions. Post-closing cleanup covenants may also include provisions for sharing identified post-closure responsibilities for cooperating in cleanup and compliance activities at a site. In many cases, post-closing cleanup obligations are more effectively addressed in standalone agreements that are executed contemporaneous with the closing.

D. Indemnities

Indemnities are an essential component to the allocation of environmental risks and liabilities because they establish which party is responsible for specified environmental liabilities and the extent of such responsibility.

(1) Breaches of Representations and Warranties

Typically, a stock or asset purchase agreement will contain a seller indemnity for any breaches of the representations and warranties provided by the seller. Without an indemnity for their breach, the representations and warranties are of limited value. This is one of the most common and important indemnities because it (1) provides a strong incentive for the seller to make accurate representations and complete disclosures, and (2) provides the purchaser with substantial protection against inaccurate or erroneous seller representations or seller's failure to disclose environmental liabilities. The scope of the indemnity may be limited by materiality and knowledge qualifiers, disclosure schedules and any applicable survival period(s). Although obvious, this fact underscores the importance of such qualifiers to the parties' negotiations.

(2) Indemnities for Liabilities Arising from Facility Operations

In addition to indemnities for breaches of representations and warranties, purchasers will often demand indemnities for manifest or latent liabilities associated with the seller's operations or resulting from seller's interest in real property, regardless of whether the existence of such liabilities constitutes a breach of the representations and warranties. Other types of environmental liabilities for which a purchaser often seeks indemnification include liabilities for: (1) releases of hazardous material at, on or beneath the property; (2) the presence of contamination on real property owned, leased, or operated by seller; (3) hazardous waste disposal on or off the property; (4) other potential off-site environmental liabilities; (5) tort claims, such as premises and product liability claims alleging exposure to asbestos, urea formaldehyde, mold, benzene, or other toxic materials; (6) natural resource damages claims; and (7) fines, penalties and capital expenditures associated with violations of law.

With respect to liabilities arising from the seller's operations pre-closing and from the purchaser's operations post-closing, often each party indemnifies the other for liabilities that arise from its specific operations. This approach is fairly straightforward in an asset sale when the purchaser relocates the seller's operations shortly after closing, or the purchaser operates the facility without using any of the materials, substances or chemicals that had been used by the seller. When the purchaser continues the seller's operations at the same location, however, the determination of who is responsible for a particular liability is likely more difficult. In such cases, extensive negotiations may be necessary to minimize ambiguities with respect to the allocation of these liabilities. Among the methods that can be used to address this issue are: having each party's liability be based on the percentage of time that the party operated the facility (for instance, this may be used for premises or product liability concerns)[16]; assigning the burden of proof for an indemnity claim to a specified party; specifically addressing which party is responsible for fines and penalties, costs of capital improvements or increased operation and maintenance costs incurred in connection with the resolution of such liabilities; and identifying which party is responsible for defending against such liabilities and providing oversight and consent rights for the other party. The determination of which method(s) are most appropriate largely depends on the type of liability in question.

If an indemnification provision allocates environmental liabilities based on a pre-closing/post-closing operations condition, the parties should consider whether the seller is liable for operations at the facility conducted by its predecessor. If the seller is responsible for the liability by operation of law or by contract, the purchaser is likely to resist assuming any portion of the liability (at least without some concession from the seller).

(3) Deductibles, Caps, and Survival Periods

Deductibles, caps, and survival periods are methods for allocating liabilities fairly precisely by establishing the specific financial amounts for which a party will be liable and the time within which indemnification for the specified amount is available. These methods can reduce uncertainties about potential future liabilities by simply imposing flat limits on the parties' liability up front, sometimes in exchange for compensation or price allowances in the agreement.

(4) Losses and Damages

The scope of losses and damages covered by an indemnity is of substantial importance in the allocation of environmental liabilities. Often, consequential damages, including lost profits or business opportunities, are specifically excluded from the indemnities. Indemnities also are generally limited to cover only liabilities to third parties and liabilities incurred due to government requirements.

E. Releases

When one or more parties to an agreement is unwilling to provide an indemnification for environmental liabilities, as is frequently the case with real estate purchase agreements, the parties often negotiate release and covenant not to sue provisions to allocate or limit such liabilities. Release provisions for environmental liabilities can range from a broad release for all environmental liabilities (which sellers often seek from purchasers of real estate) to intricate reciprocal releases in which each party releases the other for specific, limited

[16] This approach results in each person's percentage liability changing with the passage of time.

environmental liabilities. Although a release and covenant not to sue will prevent the releasor from pursuing a claim against the released party for matters subject to the release, it does not limit the released party's statutory liability and does not prevent third-party claims against the released party.

F. Purchase Price Adjustment, Cost Sharing, Escrows, and Financial Assurance Mechanisms

Many methods are available to allocate and limit environmental risks and liabilities, including the methods set forth below.

Unless contractually obligated to proceed (*e.g.*, after the expiration of the due diligence period under a purchase agreement), the purchaser often will attempt to negotiate a purchase price adjustment in the event environmental issues are identified during the due diligence period that were not accurately disclosed, identified, characterized, or quantified by the seller when the parties initially agreed on a purchase price.

The following mechanisms provide quantified monetary amounts to cover specified environmental liability costs. These mechanisms may be drafted as provisions within the purchase agreement or as standalone agreements executed at closing.

Cost sharing: Establish a specific dollar amount or a percentage amount that each party to the agreement will pay for specific environmental liability costs.

Escrow: An escrow account may be used to provide a specific amount of funds for payment of specific environmental liability costs if they are incurred. Escrows are typically funded from purchase price proceeds and used to back seller's indemnification obligations or to address seller's breach of any covenants or conditions in the purchase agreement.

Financial assurance mechanisms: The party that is obligated to cover environmental liability costs (e.g., the indemnitor) purchases a letter of credit, bond or other financial assurance mechanism that names the counter party (e.g., indemnitee) as the beneficiary and typically provides for the payment of environmental liability costs in the event of default by the obligated party.

III. Deed Restrictions

Deed and land use restrictions are often an important component of environmental covenants, indemnities or escrow provisions that require one party to clean up a contaminated property or restrict future use. A deed restriction can substantially limit the potential cleanup cost that a party would face if the property could otherwise potentially be developed for a use that would require a stricter cleanup standard. Some of the types of deed restrictions that parties might negotiate are:

- A deed restriction that prohibits use of the property for any residential, hospital, health care, child day care, school or other sensitive receptor use;
- A deed restriction that limits the use of the property to commercial or industrial use for fixed period of years; or
- A deed restriction that prohibits the use of groundwater beneath the property.

IV. Environmental Insurance

Environmental insurance provides parties with an additional method for limiting environmental liabilities. The more common types of environmental insurance available are:

Pollution Legal Liability (PLL) policies: These policies provide protection against third party environmental liability claims, including legal defense, bodily injury, and remediation costs. They can also provide protection against first party remediation costs for unknown pre-existing conditions and new releases.

Cleanup Cost Cap policies: These policies provide protection against cleanup cost overruns at sites subject to active remediation. Cleanup Cost Cap policies have become, however, increasingly difficult to obtain.

Blended PLL/Cost Cap policies: These are combined PLL and Cost Cap policies in which the total amount of insurance protection includes amounts allocated to each type of insurance protection with the PLL protection being decreased if reimbursement under the Cost Cap policy is required.

While environmental insurance is often an effective tool for limiting liability, parties should be cautious when structuring purchase agreements to reflect anticipated insurance coverage. Parties often have unrealistic expectations as to the potential scope of insurance coverage that may be available. In addition, insurance brokers and underwriters may show substantial interest initially, which can abate upon receipt and review of environmental reports, data and other information identified during the purchaser's due diligence. When environmental insurance is involved in a transaction, the party seeking insurance coverage should start the underwriting process at the earliest possible time and should incorporate contingencies into the purchase agreement to establish how environmental liabilities will be allocated in the event suitable environmental insurance is not available.

V. Conclusion

Environmental issues associated with businesses and the real property on which they operate can be as varied as the businesses themselves. Some issues present liability concerns. Others may not. Liabilities may extend far back into the chain of title. They could remain for many years after the transaction is concluded. Some issues may have fundamental impacts on the way the business operates, affect the value of the assets, or embroil a purchasing entity in years of costly litigation. Because environmental risk is always present in a transaction involving real property and frequently present in a transaction involving the purchase of a business or its assets, understanding the scope and significance of these liabilities prior to closing is essential. This enables the parties to evaluate and often quantify the risk and liabilities associated with the transaction. This understanding is indispensable to determining how that risk will be allocated among the parties.

These risks and liabilities cannot be avoided: they must be addressed. This article underscores that the methods for allocating risks are many and the selection of the best method requires a close evaluation of the transaction structure, environmental liabilities, and risk preferences of the parties. Understanding the alternative allocation tools available can provide parties with the means to manage known and unknown liabilities, avoid unnecessary surprises down the line, and allow the adoption of those protections and commitments the parties need to conclude the transaction. Transactions

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are more likely to run more smoothly, close on time, and result in fewer lawsuits when the parties:

- know the relevant environmental facts by performing a thorough due diligence on a reasonable schedule;
- plan ahead, understand risk preferences and choose a deal structure that reflects those preferences; and
- identify and allocate the environmental risks in a transparent process with appropriate disclosure, accurate knowledge of the environmental aspects of the business, and utilizing the contractual tools best suited to achieve the preferred risk balance.

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