Western States Legal Trends

Welcome to the 2018 ACEC Western States Regional Conference Program!

We combed the published records of the Legislatures, Courts, and state Licensing Boards in the eight Western States participating in this regional conference searching for new legislation or decisions affecting the engineering profession and other design professions. Our mission was to identify trends and report on key decisions that will affect your business and professional liability risk in the coming year.

Please feel free to ask questions throughout the program, so that your comments and shared experiences will benefit your fellow attendees.

P. Douglas Folk, Clark Hill PLC

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Ongoing Threats to Professional Licensing

One of the most provocative trends facing engineering professionals in the Western states is the ongoing assault on professional licensing. The American Legislative Exchange Council and Institute For Justice, two libertarian-influenced advocacy organizations, have supported court challenges and proposed legislation that would either deregulate occupational and professional licensing, or create new statutory and constitutional rights for aggrieved persons or organizations to challenge licensing boards in court.

This has been a multi-pronged attack. In September 2017, the US House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law conducted public hearings on whether additional federal intervention in professional licensing was needed following the *North Carolina Board of Dental Examiners v. FTC* decision in 2015. Due to other more pressing issues, Congress has not initiated new legislative action to override state regulation of professional licensing.

At the state level, conservative governors and legislators are considering or enacting ALEC-inspired measures to weaken or restrict state professional licensing boards. **Arizona's** legislature passed **SB1437,** the "Right to Earn a Living Act", that imposes a duty on all state licensing boards to demonstrate a public health and safety requirement justifying any regulation that "on [its] face or in [its] effect limit[s] entry into a profession or trade." Persons claiming that they have been unfairly hindered by board action in the pursuit of a lawful trade or occupation can challenge the agency to revoke or modify its rule, seek new legislation, or defend a lawsuit seeking to have its rule invalidated. It is early days, but we expect new court challenges in Arizona to the Board's actions by disappointed applicants denied registration and persons dissatisfied with Board enforcement actions or rule-making. The additional cost, risk, and staff burdens of litigation under this new law could hinder the Board's important mission.

Arizona's Governor also issued **Executive Order 2017-03** requiring state agencies to conduct a review of state professional licensing requirements and report on whether the state imposes restrictions on occupational licensing that are greater than those in the majority of other states. The report can then be used as justification for further legislation rolling back professional licensing. Arizona's governor also sought to deregulate the geology and landscape architecture professions in 2017, solely based on the small number of registrants in each profession and a lack of understanding for their role in protecting public health, safety, and welfare.

This year, another **Arizona** legislator introduced **SCR1037**, which would place before voters a constitutional amendment declaring the practice of an occupation or profession a fundamental right that cannot be prohibited or regulated unless the agency demonstrates that such rule is "clearly necessary to protect the public health and safety." It is not certain whether the legislature will muster the necessary votes to pass this resolution, but ACEC of Arizona is opposing it.

In **Idaho**, **Executive Order 2017-06** requires state agencies to report by 1 July 2018 on the timeframes, costs, and requirements for issuing and renewing occupational and professional licenses. The processes, costs, and burdens of the licensing board's disciplinary authority must also be evaluated and recommendations made to the governor for their improvement, modification or elimination. This is another ALEC-inspired measure intended to reduce or remove occupational and professional licensing

laws. Several **Idaho lawmakers** have also announced a **Regulatory Reform Joint Subcommittee** with the mandate to find ways to streamline or eliminate the rules and regulations of the state's licensing boards and review the boards' regulatory framework for anti-competitive burdens.

Idaho's Board of Professional Engineers and Land Surveyors has already delivered its report complying with EO2017-06. After detailing its requirements for registration and providing all the experience data required by the governor, the Board concluded that,

> "The licensing provisions are in the public interest as engineers and land surveyors provide services that directly impact the public health, safety and welfare. The laws and rules establish minimum competency standards of education, examination, and experience for obtaining and retaining a license. The public and other licensees file complaints that are investigated and addressed with disciplinary actions when necessary. The licensees regulated by the statutes and rules are on record as supporting the current licensing framework as effective for the intended mission."

Nevada's legislature is in recess this year, but it considered **AB353** last year, which was another version of ALEC's "Right to Engage in a Lawful Occupation Act". While the measure died in committee last year, it tracked ALEC's model law provisions favoring voluntary certification over qualification-based licensure, and the imposition of restrictions on the state licensing board to take any action that could be construed as limiting competition for professional services.

Utah's legislature also enacted two ALEC-inspired measures in 2017. **HB94** directed the state Occupational and Professional Licensure Review Committee to:

- "consider whether state regulation of the occupation or profession is necessary to address a compelling state interest in protecting against present, recognizable, and significant harm to the health or safety of the public;
- "consider if the committee's recommendations would negatively affect the interests of members of the regulated occupation or profession, including the effect on matters of reciprocity"; and
- "recommend to the legislature any necessary changes to existing regulations … to ensure the regulations are narrowly tailored to protect against present, recognizable, and significant harm to the health or safety of the public."

SB212 revised the state's occupational and professional licensing laws to lay the groundwork for recognition of a person's unfettered right to practice any occupation or profession based on "personal qualifications" and state-recognized "certification" not amounting to traditional professional registration. While the state's **Occupational and Professional Licensure Review Committee** is also charged to consider the impact of deregulation on comity or reciprocity registrations for licensed Utah professionals, these values are not given any greater weight than the supposed benefits of deregulation.

Following the trend set in Arizona and elsewhere, the **Utah** legislature is currently considering **HB280**, which would require the state **Occupational and Professional Licensure Review Committee** to conduct a one-time written study of each occupational or professional license or certification that the agency administers "to ensure that state regulation of the occupation or professional … is narrowly

tailored to protect the health and safety of the public and does not consist of excessive, unnecessary, or outdated government interference."

As these direct challenges to occupational and professional licensing work their way through state legislatures and governors offices, ALEC has published another legislative template entitled **"The Collateral Consequences Reduction Act".** If enacted, this measure would impose strict limitations on a state professional licensing board's ability to deny or revoke registration for applicants convicted of a criminal offense absent specific findings that the board has an important public safety interest that trumps the individual's interest in licensure; that the disqualifying offense was substantially related to the state's interest in regulating the profession; and the potential for re-offense and harm of re-offense are more likely if the individual had the registration than if s/he did not.

This measure draws on the same policy arguments driving the nationwide "Ban the Box" movement to reduce the stigma of a criminal record for employment applicants. However, if this proposal results in new legislation restricting the regulatory role of state professional licensing boards, it will further erode the well-established system of state-based, professional licensing that has worked to protect the public health, safety, and wellbeing for more than 100 years.

California Holds Contractors Liable For Unpaid Subcontractor Wages

While it does not directly apply to engineers or other design professionals, they should take note of **AB1701**, which modified **California Labor Code § 218.7** effective 1 January 2018. Going forward, "direct contractors" on private works of improvements are liable to pay "any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under or for the direct contractor." (Labor Code § 218.7(a)(1)).

If a subcontractor fails to pay its employees' wages or union trust fund contributions, the general contractor will be required to make the payment directly, even if it has already paid the subcontractor in full. This new law empowers the Labor Commissioner to enforce claims for unpaid wages and interest against the direct contractor through an administrative action, a civil action, or citation. A third party owed fringe or other benefit payments or trust fund contributions may also sue the general contractor to enforce the subcontractor's obligation to its employees. And a joint labor-management cooperation committee may file a civil action for unpaid wages against a direct contractor upon thirty days' written notice by the committee.

The direct contractor also has the right to require disclosure of its subcontractors' payroll records and it may withhold all payments due the subcontractor if the subcontractor does not timely provide the information requested. Even so, the disclosure of its subcontractors' payroll records does not shield the direct contractor from liability for unpaid wages and benefits.

Due to prior court action seeking to hold project design professionals liable for unpaid subcontractor debts if they administer pay applications, engineers should consider implementing these protective measures in their contract documents and contractor payment application processes:

- Requiring subcontractors to submit time cards, pay stubs, and proof of payment to the general contractor ("direct contractor") to confirm that wages and benefits were paid, or else risk withholding of monthly draws or retention pending compliance;
- Requiring all subcontractors to indemnify the direct contractor and project design professional from any claims for unpaid wages or benefits under Labor Code §281.7; or
- Requiring subcontractor payment bonds for key trades.

Based on the express language of §281.7 and its context, we do not believe it imposes a comparable legal duty for project prime professionals in California to pay the wages and benefits of their sub-consultants' employees.

Statute of Repose Bars Claims By Government Agencies in Arizona

Arizona's statute of repose in **Ariz.Rev.Stat. § 12-552** cuts off contract-based claims arising from improvements to real estate (including warranty and indemnity obligations) eight years after substantial completion of construction. In a major case filed on behalf of a deceased construction worker who allegedly contracted mesothelioma from long-term exposure to asbestos while installing and repairing water pipes in the City of Phoenix, the Arizona Supreme Court held that the statute of repose applies to bar governmental agencies' claims for contractual indemnification against this liability. The decision was a major victory for proponents of the statute of repose as the court held the legislature expressly overrides both **Ariz.Rev.Stat. § 12-510** and the common law *nullum tempus ocurrit regi* doctrine, which historically exempted the government from statutory limitations on claims. ***City of Phoenix v. Glenayre Electronics, Inc.*, 242 Ariz. 139, 393 P.3d 919 (2017)**.

Implied Warranties And Attorneys' Fees Awards

The **Arizona** Supreme Court also raised the stakes in residential construction defect litigation by holding that the implied warranty of habitability and good workmanship is a warranty *implied by law* but *imputed into express contracts* for home construction. This implied warranty may be enforced against the homebuilder by both the initial and subsequent purchasers of the home and entitles the successful homeowner in a construction defect case to recover its attorneys' fees under **Ariz.Rev.Stat. § 12-341.01**.

In so ruling, the Court also disapproved prior decisions favorable to design professionals that had held that the contract attorneys' fee statute was not applicable to implied warranty claims. See *Sullivan v. Pulte Home Corp*., 231 Ariz. 53, 290 P.3d 446; *North Peak Const., LLC v. Architecture Plus, Ltd*., 227 Ariz. 165, 254 P.3d 404. Ariz. Rev. Stat. Ann. § 12-341.01(A). This victory could prove short-lived, however, as the homebuilding industry has introduced several bills in the Arizona legislature to overrule the *Sirrah* decision by amending the contract attorneys' fee statute to exclude implied warranty claims from its scope. ***Sirrah Enterprises, LLC v. Wunderlich*, 242 Ariz. 542, 399 P.3d 89 (2017).**

Tribal Sovereignty Keeps Litigation In Tribal Court

Any litigation involving Native American tribes and tribal officials is worth noting, and a (presently) unpublished decision of the **Utah Supreme Court** underscores the challenges facing a non-

Native business seeking protection against allegedly improper conduct by an Indian tribe. In this case, a Utah company located outside the boundaries of the Uintah and Ouray Reservation of the **Ute Indian Tribe** filed suit in Utah state court alleging that the Ute Tribe, named tribal officials, and other non-Native businesses doing business with the tribe conspired to extort bribes and illegally collude with competitors to exclude plaintiffs' companies from doing business with drilling companies developing oil and gas fields on tribal lands.

The plaintiffs alleged violations of state and federal laws, including the state Antitrust Act, tortious interference with economic relations, extortion, black-listing, and civil conspiracy. They sought damages and injunctive relief restraining the tribe and tribal officials from exercising their authority under the TERO ordinance to exclude the plaintiffs from entering tribal lands or doing business with drilling companies on tribal lands. When the state district court dismissed the action based primarily on tribal sovereign immunity considerations, the plaintiffs appealed to the **Utah Supreme Court**.

In a lengthy and well-reasoned decision, the Court concluded:

- The Ute Tribe had not waived its sovereign immunity, and it could not be sued in Utah state court on the plaintiffs' claims
- Tribal officials, in their official capacities, were not protected by sovereign immunity against an injunction action alleging they exceeded the tribe's jurisdiction
- Tribal officials, sued in their individual capacities for damages, were not shielded by tribal sovereign immunity
- The Ute tribe was not a necessary party to the plaintiffs' action against tribal officials
- The legal doctrine of "tribal exhaustion" required the plaintiffs to submit their claims against tribal officials to tribal courts for resolution
- Other elements of the plaintiffs' claims failed to state a cause of action for which Utah state courts could grant relief and would be dismissed.

The Supreme Court remanded back to the district court for a determination as to whether it would stay or dismiss those claims that must first be decided by tribal courts under the tribal exhaustion doctrine. The plaintiffs' claims against the tribal officials in their individual capacities were not dismissed, even though the tribe was immune from suit on those same claims, and federal law claims that tribal officials exceeded the Ute Tribe's jurisdiction, and their petition for injunctions against those violations also survived the tribe's dismissal.

Lessons Learned: This limited victory for a non-Native plaintiff alleging serious wrongdoing by tribal officials and abuse of tribal regulation of business permits and reservation access rights points up the growing recognition of tribal self-determination and respect for tribal sovereignty. Non-Natives doing business in Indian Country must take into account the legal systems, tribal governments, and business environment that are unique to each tribe and its reservation. Many tribes welcome non-Native businesses and administer tribal law fairly without regard to tribal membership; some do not. ***Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation,* 2017 WL 5166885 (2017).**

Contractual Liquidated Damages May Be Optional

The **Colorado Supreme Court** heard a novel challenge to a contractual liquidated damages clause and confirmed that it was enforceable even though the non-defaulting party could choose either to take the liquidated damages or recover its actual damages caused by the defaulting party's breach of contract.

This litigation involved contracts for the purchase of condominium units under construction that gave the seller the option to forfeit the buyer's deposit as liquidated damages for failure to close escrow, or terminate the contract and pursue a claim against the buyer for its actual damages. Several defaulting buyers who lost their deposits challenged the liquidated damages provision, alleging that the seller's option to sue for actual damages contradicted an intention to liquidate its damages.

The Court rejected that defense, holding that a liquidated damages provision is not invalid because it is optional, and it will be enforced if:

- The contracting parties intended to liquidate damages (i.e., they expressed that intention in their contract)
- The amount of the liquidated damages, considered at the time the contract was made, was a reasonable estimate of the presumed actual damages that a breach would cause
- It would be difficult, at the time the contract was made, to ascertain the amount of actual damages that would result from a breach.

Lesson learned: Liquidated damages provisions are frequently included in design and construction contracts. When properly structured and fairly enforced, they allow for the predictable valuation and allocation of risk. ***Ravenstar, LLC v. One Ski Hill Place, LLC,* 401 P.3d 552 (2017).**

Wins and Losses With Contractual Indemnities

As is the case in most such surveys, court cases involving contractual and common law indemnity principles demand a close reading as they shape our recommendations for contract negotiations and project management. In the past year, the Western states saw several important decisions that changed or affirmed important legal principles for indemnification.

The **California Court of Appeal** gave a second chance to a general contractor sued by an employee of a second-tier subcontractor for negligence after it failed to protect that employee from falling through an open skylight during construction. While the contractor's agreement with the first-tier subcontractor it sued for indemnification denied coverage for "claims [that] arise out of, pertain to, or relate to the active negligence or willful misconduct" of the general contractor, the Court held this exclusion did not cut off the right to indemnification for the partial fault of the first-tier subcontractor's employees. Summary judgment for the first-tier subcontractor was reversed and the general contractor was allowed to seek indemnification to the extent of its subcontractor's fault, consistent with **Cal.Civ.Code §2782.05**. ***Oltmans Construction Co v. Bayside Interiors, Inc.* 215 Cal. Rptr.3d 918, 10 Cal.App.5th 355 (2017).**

In an unpublished decision, the **Arizona Court of Appeals** illustrates how a properly-worded contractual indemnity can impose liability for damages and defense costs even though the indemnitor did not cause the loss. A grading contractor objected to the imposition of liability for a substantial portion of the settlements and arbitration awards against the general contractor in a series of residential construction defect cases. The subcontractor contended that it should not have to indemnify the general contractor—whom it defended in these cases—unless the general contractor proved that the subcontractor was negligent, and its negligence caused the damages awarded against the general contractor.

The Court of Appeals affirmed the trial court's decision for the general contractor, holding that a contractual indemnity of claims "arising out of or in connection with [subcontractor's] work performed for [general contractor] … regardless of any active and/or passive negligent act or omission of [general contractor]" only excludes liability for claims arising out of the general contractor's sole negligence or willful misconduct. The general contractor did not need to prove either negligence or causation to recover on the indemnity. ***Amberwood Development, Inc. v. Swann's Grading, Inc.*, 2017 WL 712269 (Ct. App. 2017).**

In a major decision clarifying **Arizona's** equitable indemnification law, the **Arizona Supreme Court** rejected *Restatement (First) of Restitution* §78 (Am. Law. Inst. 1937) as a controlling principle of Arizona's indemnity law. The case involved complicated facts in arising from a motor vehicle accident. After the counter clerk for a car rental agency neglected to have a driver initial a rental contract term declining the agency's supplemental liability insurance (SLI), this driver was involved in a serious accident with another motorist. The injured motorist sued the rental car driver, who consented to a judgment for $8 million in exchange for its much smaller insurance coverage and a covenant not to sue for the balance of the judgment. The car rental agency and SLI insurer refused to defend the driver because he never purchased the SLI coverage.

The injured motorist then sued the car rental agency and SLI insurer to enforce the stipulated judgment, and the SLI insurer paid out its policy limit of $970,000 in exchange for an assignment of the motorist's claim against the rental agency. The insurer then sued the agency to recover its loss of the SLI policy limit, claiming a right to equitable indemnity by the agency for its failure to obtain written declination of the SLI coverage. The **United States District Court for the District of Arizona** ruled for the SLI insurer, holding the agency liable to equitably indemnify the insurer under §78 of the *Restatement*.

On appeal, the **Ninth Circuit U.S. Court of Appeals** certified this indemnity question to the **Arizona Supreme Court** for a determination of Arizona law. The Supreme Court rejected the insurer's claim for equitable indemnification in the absence of joint and several liability to the original claimant, the injured motorist. The Supreme Court found that the SLI insurer was never obligated to indemnify the rental car driver for his liability to the injured motorist because the SLI coverage was never purchased. Therefore, the Court reasoned, it should not require indemnification for a "supposed obligation" discharged "in good faith" because that was inconsistent with Arizona's case law and §76 of the *First Restatement*, which required that the indemnitor and indemnitee be jointly liable to the claimant.

The Court also justified its decision by noting that the *Restatement Third of Restitution* published in 2011 rejected §78 of the *First Restatement,* and all but one of the other Arizona cases on the subject

required a finding of shared liability before enforcing a claim for equitable indemnification. ***Lesson Learned:*** This decision should reduce the number of cases against design professionals in which the project owner or one of the contractors attempts to set up the design professional and its insurer to pay a claim brought by a third party who could not otherwise sue the design professional. Unless there is a joint and several liability exposure to the original claimant, equitable indemnity should not be permitted. ***Knightbrook Insurance Company v. Payless Car Rental System, Inc.*** **2018 WL 769295 (2018).**

Regulation of Engineering Expert Witnesses

In a decision that surprised many, the **Arizona Board of Technical Registration** issued a Substantive Policy Statement stating that engineers acting as expert witnesses before Arizona courts are engaged in "engineering practice" as defined in that state's practice act and must be registered by the Board. The Board's substantive policy statements are advisory opinions interpreting its statutes and rules; they may not impose new legal standards in these opinions.

While this substantive policy statement appears to be correct and consistent with the Board's Rules of Professional Conduct that require registered engineers performing forensic services to seal their opinion reports as professional documents (AAC R 4-30-304(D)(2)), it has sparked controversy in the community and among expert witnesses who practice in Arizona courts without benefit of registration. Furthermore, the same logic would require expert witnesses in the other regulated professions must also be registered before testifying in Arizona courts. The Board has agreed to take another look at this policy statement in its Legislation and Rules Committee. The text of the policy statement follows:

BTR Substantive Policy Statement No. 17. Whether acting as an expert witness constitutes "engineering practice"

17. Whether acting as an expert witness constitutes "engineering practice" under Arizona statutes. (Eff. 10/24/2017)

SUBSTANTIVE POLICY STATEMENT

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes section 41-1033 for a review of the statement. "Engineering Practice" is defined in pertinent part by Arizona Revised Statutes § 32-101 as: …any professional service or creative work requiring engineering education, training and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work as consultation, research investigation, evaluation, planning, surveying as defined in paragraph 20, subdivisions (d) and (e) of this subsection, design, location, development, and review of construction for conformance with contract documents and design, in connection with any public or private utility, structure, building, machine, equipment, process, work or project.

SUBSTANTIVE POLICY STATEMENT

The Board interprets the definition of "professional service or creative work" as used in the definition of "Engineering Practice" to include acting as an expert witness as defined by Rule 702 of the Arizona Rules of Evidence.

Applicable Law: Arizona Revised Statutes § 32-101(11)
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Concluding Thoughts

We have provided this overview of the latest legal trends that are most likely to affect design professionals doing business in the Western United States this year, and to provide our recommendations for improving professional practices. Engineers who share our concerns about threats to the system of professional licensing that has served the US well for more than 100 years should get involved in their state member organizations and explain the mission professional standards of engineering to their governors and legislators. We must preserve and modernize our professional licensing rules because "Engineers make civilization possible!"

Thank you for attending the ACEC Western States Regional Conference for 2018.

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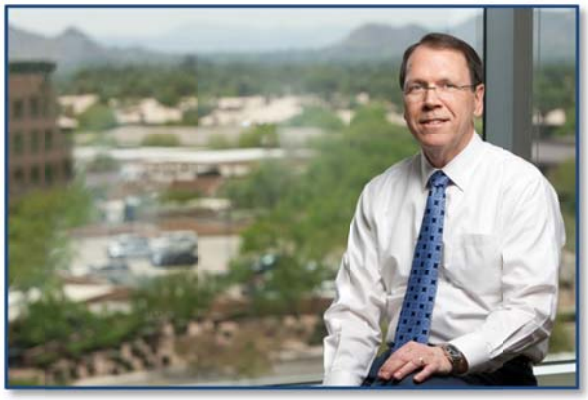

Doug serves business clients in architecture, engineering, geomatics, landscape architecture, construction, and other technology-driven industries as a vigorous advocate and trusted advisor. By drawing on his extensive experience in business transactions and commercial litigation, Doug developed practice specialties in construction law, professional liability defense, contracts and negotiations, risk management, administrative law, and government relations. Doug's team based in Clark Hill's Phoenix office represents a national clientele including ENR Top 500 Design Firms and Top 150 Global Design Firms in business transactions, professional licensing and disciplinary matters, and litigation involving transportation, infrastructure, mining, commercial and mixed use projects, master-planned communities, aviation, destination resorts, medical facilities, and manufacturing facilities.

Doug serves as a trusted advisor to his engineering clients, assisting in business strategy and risk management consulting, negotiating teaming agreements and contracts for P3 and other significant projects. Doug's team provides legal services in the formation and management of architectural, engineering, and construction companies, and their representation before state licensing boards. Doug supervises an active trial and appellate practice in the defense of professional liability claims, design and construction defect litigation, federal Board of Contract Appeals cases, OSHA citations, bid protests, lien and bond claims, professional licensing and disciplinary matters, and other business disputes across the USA. Doug has been a leader in advocating the use of 3D imaging, UAV's, BIM modeling, and new project delivery methods to reduce waste, errors, inefficiency, and disputes in design, fabrication, and construction.

Doug is a member and former chair of the ACEC Legal Counsel Forum and member of the ACEC Risk Management and International Committees. He also served four terms as the Public Member of Arizona's Board of Technical Registration. He is listed in the 2018 editions of Best Lawyers in America® for Construction Law and Litigation-Construction, and is the 2018 Construction Law Lawyer of the Year and Litigation—Construction Lawyer of the Year for Scottsdale, Arizona. Doug is also a Southwest Super Lawyer® for Construction Litigation and Professional Liability Defense.

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