OLR RESEARCH REPORT

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APPLICABILITY OF STATUTES OF LIMITATIONS TO THE STATE

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You asked for a summary of *State v. Lombardo Bros. Mason Contractors*, 307 Conn. 412 (2012). You also wanted to know in which other states the doctrine of nullum tempus occurrit regi still applies. Much of the information in response to the second question comes from a website that addresses this issue, http://web.uslaw.org/wp-content/uploads/2013/08/Nullum_Tempus_Compendium_of_Law.pdf.

SUMMARY

Under the common law doctrine of nullum tempus occurrit regi (no time runs against the king), states may bring actions for damages that would otherwise be barred by the applicable statute of limitations. Under the doctrine, a state is not bound by a statute of limitation unless the statute expressly mentions the state by name. In *State v. Lombardo Bros.*, the Connecticut Supreme Court unanimously held that this doctrine is part of the Connecticut common law and that the state could proceed with an action for damages against contractors of the UConn law school library, notwithstanding the statute of limitations that would otherwise apply. It also held that the public works commissioner lacked statutory authority to waive this immunity by contract, as he had done in this instance.

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The doctrine remains in force with few or no limitations in 11 states: Arizona, Mississippi, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

In 20 states, the doctrine applies subject to substantial limitations. The most common limitation, which applies in Alabama, Delaware, Idaho, Indiana, Iowa, Maine, New Mexico, and Ohio, generally applies to the state, but not its political subdivisions.

The following 15 states have substantially or entirely abolished the doctrine by legislation or court decision: Colorado, Florida, Georgia, Kentucky, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New York, North Dakota, South Carolina, South Dakota, West Virginia, and Wisconsin.

We have found no relevant statutes or case law on the doctrine in Alaska or Hawaii. In Utah, we have found no statutes or case law on the doctrine, but two decisions on adverse possession suggest that the doctrine continues to be in force (*Nyman v. Anchor Dev., L.L.C.,* 73 P.3d 357, 360 (Utah 2003); *Estate of Higley v. State, Dep't of Transp.*, 238 P.3d 1089 (Utah 2010)).

STATE V. LOMBARDO BROS. MASON CONTRACTORS

Facts and Trial Court Decision

In this case, the state commenced an action against Lombardo Brothers Mason Contractors, Inc. and 27 other defendants to recover damages for the allegedly defective design and construction of the UConn Law School library. The library was intended to last for 100 years or more and the state retained Gilbane, a construction management firm, to work with the architect in the later stages of design to ensure construction-related input in the design process.

Construction on the library began in 1994 and was completed in 1996. Soon thereafter, water began entering the library and the state notified the defendant contractors of the problem, which grew worse over time. In 2000, the state retained a forensic engineering firm that uncovered numerous defects in the building, including:

1. improper design and installation of windows and other building elements;

2. improper design and construction of the exterior cavity wall;

3. inadequate waterproofing of the structural steel and outside face of the building;

4. inadequate relieving angles used to support the exterior stone façade; and

5. inadequate design of the heating, ventilation, and air conditioning system.

The state incurred more than $15 million in costs to fix these problems and in March 2008 commenced the action to seek reimbursement from the defendants.

The defendants raised motions to strike or for summary judgment, primarily relying on applicable statutes of limitation and repose (the latter specify the period of time during which a cause of action can arise). One defendant (Gilbane) also argued that the state had contractually waived its rights under the nullum tempus rule by agreeing to be bound by the seven-year period of repose set forth in CGS § 52-584a.

In response, the state argued that it was immune from the statutes of limitation and repose under the doctrine of nullum tempus. It argued that, any purported waiver of immunity in the contract with Gilbane was not binding on the state because the statute that allows the Department of Public Works to enter into contracts (CGS Rev. 1993 § 4b-99) does not expressly or by implication authorize such a waiver.

The trial court concluded that:

1. the doctrine does not shield the state from the statutes of limitation and repose;

2. the doctrine is not part of the Connecticut common law; and

3. Gilbane was entitled to enforce the seven year repose provision in its contract, although the decision did not address the state's argument the department lacked the statutory authority to enter into that provision of the contract.

SUPREME COURT CASE

Arguments

The state appealed the decision to the Supreme Court. It renewed its arguments that the (1) state is immune from statutes of limitation and repose pursuant to the doctrine of nullum tempus and (2) commissioner lacked the authority to contractually waive that immunity.

Various defendants countered that:

1. the doctrine had never been adopted in Connecticut;

2. the state is immune from some statute of limitations but not the statute of repose, which they argued applied to the state by necessary implication and which vested in them a right to be free of liability under the due process clause of the state constitution;

3. CGS § 4-61(a), which authorizes actions against the state arising from certain public works contract disputes, waives the doctrine by necessary implication; and

4. the doctrine serves no just or useful purpose in a modern legal system and the court should abolish it.

Gilbane also argued that the commissioner had authority to bind the state to a contractual limitation period. Alternatively, it argued that the state's tort claims were barred by the limitation of remedies provision in the contract.

Decision

Nullum Tempus and Connecticut Common Law. The court first addressed the issue of whether the doctrine has been recognized as part of the state's common law. The trial court had found that there were no reported cases using the term nullum tempus and that the rule was incompatible with the legislative policies underlying the statutes of limitation and repose.

The court instead agreed with the state's position that the rule has been long a part of common law and is so fundamental that only the legislature can abrogate it. The court found a series of Connecticut cases

that held that statutory provisions limiting rights cannot be construed to apply to the state unless the statutes, expressly or by necessary implication, provide otherwise. The first of these cases, *State v. Shelton,* 47 Conn. 400, 404-406 (1879), held that this principle applied to statutes of limitation for bringing actions. Shortly thereafter, the Connecticut Supreme Court held that it is "elementary law that a statute of limitations does not run against the state, the sovereign power" (*Clinton v. Bacon*, 56 Conn. 506, 517 (1888)). More recently, in S*tate v. Goldfarb,* 160 Conn. 320, 323 (1971), the court recognized that a political subdivision of the state, acting in its governmental capacity was not impliedly bound by the ordinary statute of limitations. Similarly, the Appellate Court held that the State Board of Education, as a state agency, is not subject to a statute of limitations unless declared to be so by the legislature, (*Joyell v. Commissioner of Education,* 45 Conn. App. 153, 177, cert. denied, 243 Conn. 910 (1997)).

In this case, the Supreme Court rejected the defendant's arguments that the (1) doctrine has never been applied as a holding in any Connecticut appellate case and (2) court should abolish the doctrine to adapt the common law to the changing needs of society. The court found the first argument meritless and that even it were true, the common law consists of "universally accepted usages and customs" as well as adjudications. With regard to the second argument, the court noted that its authority to modify sovereign immunity was less than its ability to modify other aspects of common law. Because sovereign immunity and nullum tempus have common historical and doctrinal underpinnings, the court declined to abolish the latter judicially. Moreover the court concluded that nullum tempus was necessary to protect the state's fiscal well-being.

It also cited decisions from other states, including a 2004 case from Maryland that found that most states continue to recognize the doctrine (*Baltimore County v RTKL Associates, Inc.,* 846 A.2d 433 (Md. 2004), discussed below).

Application by Necessary Implication. The court next addressed the defendants' argument that the statutes of repose apply to the state by necessary implication. In the context of sovereign immunity, the court had previously held that for a statute to apply to the state by necessary implication, this must be the statute's only possible interpretation (*Envirotest Systems Corp. v. Commissioner of Motor Vehicles*, 293 Conn. 382 (2009)). The court found that the text of the statutes in question did not support this interpretation. It also rejected the defendants' argument that a necessary waiver could be inferred by the policies that under the statutes of repose. The defendants relied on judicial decisions in other

states that distinguished statutes of repose from statutes of limitation. But the Connecticut court noted that it had rejected this distinction in *Baxter v. Sturm, Ruger & Co.,* 230 Conn. 335 (1994).

The court next distinguished this case from *State v. Goldfarb,* which it described as the only case in which it had held that a statutory limitations period for bringing an action applied to the state. In that case, the court held that the statute in question (CGS § 45-205 (Cum. Sup. 1967)) was not a statute of limitations but rather imposed a condition that had to have been met to enforce a right of action.

The court also rejected the defendants' claim that the legislature waived nullum tempus by necessary implication by adopting CGS § 4-61, which provides a limited waiver of sovereign immunity. It found that the defendants had identified nothing in the section's text or legislative history to support their assertion that it was intended to abrogate the doctrine of nullum tempus. The court noted that most of the courts in other states that had addressed the issue of whether an abrogation of sovereign immunity mandated the abolition of the state's exemption from statutes of limitation found that this was not the case.

Ability of the Commissioner to Waive Nullum Tempus. The state's contract with Gilbane had a clause that stated that any statutory period of repose applied to the professional work Gilbane performed. The court concluded, following *Envirotest*, that even if the commissioner entered into the contract intending to waive the state's ability to bring an action after the repose period, he did not have authority to do so and thus this provision was not enforceable. In *Envirotest*, the court held that the power to negotiate a contract does not, by necessary implication, grant the power to waive the state's sovereign immunity. According to the court, that decision was consistent with a long line of cases recognizing that government officials cannot waive sovereign immunity, contractually or otherwise, in the absence of explicit legislation authorizing them to do so. According to the court, it is up to the legislature to decide whether the doctrine of nullum tempus is sound policy and to weigh the interests the doctrine serves relative to those served by the enforcement of contractual repose provisions.

Contractual Limit on Remedies. Gilbane's contract specified and limited its liability to the department for losses, damages, and expenses. The contract stated that its provisions provided the "sole and exclusive" remedies for causes of action arising out of or in connection with the contract. Gilbane argued that this provision made the state's tort claims legally insufficient. The court disagreed, finding that the contract's language with respect to remedies clearly and unambiguously reserves to the state the right to pursue tort claims against Gilbane.

THE NULLUM TEMPUS DOCTRINE IN OTHER STATES

States Where the Doctrine Still Applies

Table 1 identifies the states where the doctrine has been adopted in statute or held by the courts to apply in most or all cases (in Mississippi, the state constitution also incorporates the doctrine).

Table 1: States Where Nullum Tempus Generally Applies

State	***Statute or case***	***Notes***
Arizona	Ariz. Rev. Stat. § 12-510	
Mississippi	Miss. Const. Art. 4, § 104, Miss. Code Ann. § 15-1-51	There is a seven-year limitation on judgment liens in favor of the state or its political subdivisions unless there is action on the lien or notice is refiled during this period.
New Hampshire	*State v. Lake Winnipesaukee Resort,* 977 A.2d 472 (N.H. 2009)	
North Carolina	*Rowan County Bd. Of Educ. v. U.S. Gypsum Co.*, 418 S.E.2d 648 (N.C. 1992)	
Oregon	Ore. Rev. Stat. § 12.250	

Table 1 (continued)

State	***Statute or case***	***Notes***
Pennsylvania	*Commonwealth v. Rockland Construction Co.*, 448 A.2d 1047 (Pa. 1982)	The state Appellate Court has held that a government can contractually waive the doctrine (*Selinsgrove Area School District v. Lobar, Inc.*, 29 A.2d 137 (Pa. Commw. Ct. 2011)).
Rhode Island	*Searle v. Laraway,* 27 R.I. 557 (1906)	The doctrine does not apply to municipalities with regard to collecting property taxes0 (*Ramsden v. Ford*, 143 A.2d 697 (R.I. 1958))
Tennessee	*Hamilton Cnty. Bd. of Educ. v. Asbestospray Corp.,* 909 S.W.2d 783 (Tenn. 1995)	
Vermont	*State v. Weeks,* 4 Vt. 215 (1832).	
Virginia	Va. Code Ann. § 8.01-231	
Wyoming	*Mountain View/Evergreen Improvement & Serv. Dist. v. Brooks Water & Sewer Dist.*, 896 P.2d 1355, 1359 (Wyo. 1995)	

States That Have Limited the Scope of the Doctrine

Applicable to the State but not Political Subdivisions. In Alabama, Delaware, Idaho, Indiana, Maine, and Ohio the doctrine applies to the state but not to its political subdivisions, such as cities. Table 2 lists the relevant cases. As discussed below, Iowa and New Mexico have related provisions.

Table 2: States Where *Nullus Tempus* Applies to the State Only

State	***Decision***
Alabama	*Board of School Com'rs of Mobile* Co. v. Architects Group, Inc., 752 So.2d 489, 491 (Ala. 1999)
Delaware	*Mayor and City Council of Wilmington v. Dukes*, 157 A.2d 789 (Del. 1960)
Idaho	*Elmore Cnty. v. Alturas Cnty.* 37 P. 349, 350 (Ida. 1894) and *Bannock Cnty. v. Bell*, 65 P. 710, 712 (Ida. 1901)
Indiana	*City of East Chicago v. East Chicago Second Century, Inc.*, 908 N.E.2d 611 (Ind. 2009), *State v. Stuart*, 91 N.E. 613, 615 (Ind. 1910)
Maine	*State v. Crommett*, 116 A.2d 614 (Me. 1955), *Inhabitants of Topsham v. Blondell*, 82 Me. 152 (1889)
Ohio	*Ohio Dept. of Transportation V. Sullivan,* 38 Ohio St. 3d 137 (1988)

In Iowa, a statute of limitations does not run against the state unless specifically provided by statute (*Fennelly v. A-1 Machine & Tool Co.*, 728 N.W. 2d 163, 168 (Iowa 2006)). On the other hand, subdivisions of the state, such as municipalities and counties, are subject to the general statute of limitations unless they bring an action regarding a public or governmental activity, as opposed to a private or proprietary activity (*Chi. & N.W. Ry. v. City of Osage*, 176 N.W.2d 788, 791 (Iowa 1970)).

In New Mexico, statutes of limitation generally do not apply to actions on behalf of the state, unless (1) a statute specifically subjects the state to them or (2) the government consents to be bound by a statute of limitations (*State v. Roy*, 68 P.2d 162, 164 (N.M. 1937)). But this rule only applies when the state is the sole and real party in interest (*Roy*, 68 P.2d at 164). The statute will run against county, school districts, and other political subdivisions, unless they are deemed to be an arm of the state because of the particular governmental functions or purposes involved. *Bd. of Ed., Sch. Dist. 16, Artesia, Eddy Cnty. v. Standhardt*, 458 P.2d 795, 801 (N.M. 1969).

Limitations Based on Type of Governmental Action. Arkansas, California, Illinois, Kansas, Louisiana, Maryland, Michigan, Nevada, New Jersey, Oklahoma, Texas, and Washington impose other limitations on the scope of the rule. In some cases these states also distinguish between the state and its subdivisions.

In Arkansas, the statutes of limitation do not apply to the state or its political subdivisions when they seek to enforce a public right (*Arkansas Dep't of Environmental Equality v. Brighton Corp.*, 102 S.W.3d 458 (Ark. 2003), *Alcorn v. Arkansas State Hosp.*, 367 S. W. 2d 737 (Ark. 1963)). But they do apply to counties, cities, and school districts when enforcing their private or proprietary rights (*Jensen v. Fordyce Bath House*, 190 S. W. 2d 977 (Ark. 1945)).

In California, the doctrine applies (see *Marin Healthcare District v. Sutter Health*, 103 Cal. App. 4th 861, 873 (2002)) with several limitations. Notably, the law imposes a 10-year statute of limitations for actions commenced by the state with respect to real property (Cal. Code of Civ. Proc. § 315). In addition, counties and municipalities can only use the *nullum tempus* doctrine when they are seeking to vindicate their public rights (as opposed to their private rights), such as recovering public land to which they hold title (*City of Los Angeles v. County of Los Angeles*, 9 Cal. 2d 624, 627 (1937)).

Similarly, in Illinois, the state and its political subdivisions are not subject to statutes of limitation when they assert a right belonging to the general public (*City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874 (Ill. 1983)). Government claims that benefit only the government or some small and distinct subsection of the public are not immune. *Id.* Illinois courts consider three factors when determining whether a governmental entity is asserting a public or private right: (1) the effect of the interest on the public; (2) the obligation of the governmental entity to act on behalf of the public; and (3) the extent to which public funds must be spent. *People ex rel. Department of Labor v. Tri State Tours, Inc.* 795 N.E.2d 990, 993 (1st Dist. 2003).

In Kansas, the doctrine applies to only some functions performed by the state and its subdivisions. Kan. Stat. Ann. § 60-521 provides that the statutes of limitation apply to public bodies in the same way as they apply to private parties, except for actions to recover (1) real property or any interest in property or (2) from any former officer or employee for his or her own wrongdoing or default in performing his or her duties. The Kansas Supreme Court has held that because the statute omits reference to governmental functions, the statute of limitations only runs against the state when it acts in a proprietary function (*State Highway Com. v. Steele*, 528 P.2d 1242, 1244 (Kan. 1974)). The state Supreme Court held that "governmental functions are those which are performed for the general public with respect to the common welfare for which no compensation or particular benefit is received, while proprietary functions are exercised when an enterprise is commercial in character or

is usually carried on by private individuals or is for the profit, benefit or advantage of the governmental unit conducting the activity" (*Kan. Pub. Employees Retirement Sys. v. Reimer & Koger Assocs.*, 941 P.2d 1321, 1336 (Kan. 1997)).

In Louisiana, the statutes of limitation do not apply against the state, but state agencies and municipalities are not considered "the state" (*Flowers, Inc. v. Mrs. Lucy Reid Rausch, Clerk of Court, Parish of St. Tammany and Collector of Revenue, State of Louisiana,* 364 So.2d 928, 932 (La. 1978)).

In Maryland, the state and its agencies are not subject to statutes of limitation (*Baltimore County v. RTKL Associates, Inc.* 846 A.2d 433 (Md. 2004)). On the other hand, the state's political subdivisions are subject to a governmental/proprietary test, in that counties and municipalities are subject to the statute of limitations if the action arises from the exercise of a proprietary or corporate rather than governmental function (*Anne Arundel County v. McCormick*, 594 A.2d 1138 (Md. 1991)). In addition, in *Baltimore County*, the court found that the doctrine does not apply to counties filing actions for breach of contract.

In Michigan, the statutes of limitation for personal actions apply equally to personal actions brought in the name of the state or its officers or for the state's benefit (Mich. Comp. Laws Ann. § 600.5821). For example, actions brought by a government plaintiff to enforce a contract are not covered by the doctrine, but those brought against property (*in rem* proceedings) are provided immunity under the doctrine (*City of Detroit v. 19675 Hasse*, 671 N.W.2d 150, 161 (Mich. 2003)). In addition, the statutes of limitation do not apply to actions brought in the name of the state, its political subdivisions, or its officers or otherwise for the benefit of the state or its political subdivisions to recover the cost of maintenance, care, and treatment of people in state institutions.

In Nevada, the doctrine generally does not apply, except for actions brought in the state's name or for its benefit to recover real property Nev. (Rev. Stat. § 11.255).

In New Jersey, the state and other governmental units are generally subject to a 10-year statute of limitations in bringing actions (N.J. Stat. Ann. § 2A:14-1.1 *et seq*). But this limit does not apply in several areas, notably with regard to actions based on "willful misconduct, gross negligence or fraudulent concealment in connection with performing or furnishing the design, planning, supervision or construction of an improvement to real property."

In Oklahoma, statutes of limitation do not bar a suit by a governmental entity acting in its sovereign capacity to vindicate public rights. *State ex rel. Schones v. Town of Canute*, 858 P.2d 436 (Okla. 1993), citing *Okla. City. Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988). The test for determining whether a public or private right is involved is whether the right affects the public generally or only affects a limited class of individuals within the political subdivision. The latter case involved an action for recovery of damages allegedly caused by defendants' negligent design and construction of part of a municipal water system. In this case, the court held that the statutes of limitation did not apply because authority was acting in its sovereign capacity to protect vested public rights.

In Texas, the general statutes of limitation do not apply in actions involving governmental affairs, where the political subdivision represents the public at large, or involving the state in its exercise of its sovereignty (*Jackson v. Nacogdoches County*, 188 S.W.2d 237 (Tex. Civ. App. Dallas 1945)). Examples of actions not barred by the statute of limitations include an action by a county to recover the purchase price of school lands or funds on deposit in a closed bank (*Delta Cty. v. Blackburn*, 93 S.W. 419 (Tex. 1905); *Linz v. Eastland Cty.*, 39 S.W.2d 599 (Tex. 1931)). On the other hand, actions involving the private rights of a governmental subdivision are subject to the statutes of limitation. For example, in *Cow Bayou Canal Co. v. Orange County*, 158 SW 172 (Tex. Civ. App. 1913), the court held that an action by the county against a canal company to recover disbursements for bridge repair required by the construction of a canal was subject to the statute of limitations. Similarly, an action by the county against a former tax collector and his bondsmen for fees alleged to have been unlawfully retained was also subject to the statute of limitations (*McKenzie v. Hill County*, 263 S.W. 1073 (Tex Civ. App. 1924)). In addition, cities and other municipalities are generally not covered by the doctrine of *nullum tempus.*

In Washington, statutes of limitation generally do not apply against the state (Washington Code of Civil Procedure § 4.16.160). But the state is subject to a six-year statute of limitations for actions brought in its name or for its benefit that arise from construction, alteration, repair, design, planning, survey, or engineering of improvements upon real property. (Washington Code of Civil Procedure § 4.16.160). In addition, the statutes of limitations apply to counties, municipalities, and quasi-municipalities.

States that Have Abolished the Doctrine

Table 3 describes states that have entirely or substantially eliminated the doctrine by legislation or decision of their state supreme courts.

Table 3: States Where Nullum Tempus Entirely or Substantially Eliminated

State	*Statute or Decision*	*Notes*
Colorado	*Colo. Springs v. Timberlane Assoc.*, 824 P.2d 776, 783 (Colo. 1992) (municipalities) *Shootman v. DOT*, 926 P.2d 1200, 1206 (Colo. 1996) (state)	
Florida	Fla. Stat. Ann. § 95.011	
Georgia	Ga. Code Ann. § 9-3-1	
Kentucky	Ky. Rev. Stat. § 413.150	Does not apply to actions relating to real property
Massachusetts	Mass. Gen. Laws. c. 260, § 18	Statutes of limitations also apply to municipalities, see *City of Boston v. Nielson*, 26 N.E.2d 366, 367 (1940).
Minnesota	Minn. Stat. § 541.01	
Missouri	Rev. Stat. Mo. § 516.360	
Montana	Mont. Code Ann. § 27-2-103	Statutes of limitation also apply to municipalities, see *Tin Cup Water and/or Sewer District vs. Garden City Plbg. & Htg., Inc.*, 200 P.3d 60 (2008)
Nebraska	Neb. Code § 25-218	Statutes of limitation do not apply to claims for revenue, which the Supreme Court has interpreted to include all public moneys the state collects and receives, from any source and in any manner (*State v. Stanton County*, 161 N.W. 264, 266 (Neb. 1917))
New York	N.Y. C.P.L.R. § 201	

Table 3 (continued)

State	***Statute or Decision***	***Notes***
North Dakota	N.D.Cent.Code. § 28–01–023	
South Carolina	S.C. Code Ann. § 15-3-620	Also see *State ex. rel. Condon v. City of Columbia*, 528 S.E.2d 408 (S.C. 2000).
South Dakota	S. Dak. Cod. Laws § 15–2–2	No statute of limitations or repose applies against a government entity seeking to recover damages from any person who has failed to warn the governmental entity of known defects in any product the vendor provides the entity or its contractor.
West Virginia	W.V. Rev. Stat. § 55-2-19	Also see *State ex. Rel. Smith v. Kermit Lumber and Pressure Treating Co.* , 488 S.E.2d 901 (W.Va. 1997)
Wisconsin	Wis. Stat. Ann. § 893.87	Statute of limitations does not apply in the case of a person who (1) commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property or (2) expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee (Wis. Stat. Ann. § 893.89).

HYPERLINK

Nullum Tempus Compendium of Law, USALaw Network, Inc.

http://web.uslaw.org/wp-content/uploads/2013/08/Nullum_Tempus_Compendium_of_Law.pdf (last visited December 12, 2013)

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