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Products Liability—Effect of Advertising on Warning Given—*Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Ct. App. 1964)

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PRODUCTS LIABILITY—EFFECT OF ADVERTISING ON WARNING GIVEN—*Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Ct. App. 1964).

Chloromycetin, the trade name for chloramphenicol, is a wide spectrum antibiotic developed and exclusively manufactured by Parke-Davis and Company. The drug was first presented on the market in 1949. Three years after its introduction, the Food and Drug Administration conducted an investigation into reports of connection between the use of chloromycetin and aplastic anemia,¹ a frequently fatal condition. The report by the Food and Drug Administration stated that the connection established between aplastic anemia and the drug was found to be sufficiently important “ . . . to warrant a warning on the label, or packages of the drug and the recommendation that chloramphenicol not be used indiscriminately or for minor infections.”² A specified cautionary warning for circulars or packages and labels was prescribed.³ Parke-Davis immediately complied with the Food and Drug Administration’s directive as to labeling. In addition, letters were mailed to 200,000 physicians, warning them of the dangers in the use of this drug. Thereafter, Parke-Davis conducted an intensive advertising and promotional campaign. This advertising “played down” the dangers of the drug and gave assurances that “Side effects occur infrequently with chloromycetin and, when encountered, are generally unusually mild for this type of therapy.”⁴ In addition,

¹ Aplastic anemia is defined in MALOY, MEDICAL DICTIONARY FOR LAWYERS 48 (3d ed. 1960), as “. . . a rare type of anemia in which bone marrow cells do not manufacture white blood cells (leukocytes) in sufficient numbers to equal their destruction.”

² *Love v. Wolf*, 226 Cal. App. 2d 378, 383, 38 Cal. Rptr. 183, 185 (Ct. App. 1964).

³ “(TO APPEAR AT TOP OF CIRCULAR)

“Certain blood dyscrasias (aplastic anemia, thrombocytopenic purpura, granulocytopenia and pancytopenia) have been associated with the administration of Chloromycetin. It is essential that adequate blood studies be made when prolonged or intermittent administration of this drug is required. Chloromycetin should not be used indiscriminately or for minor infections.

“(ON THE LABEL)

“WARNING: Blood dyscrasias may be associated with intermittent or prolonged use and it is essential that adequate studies be made.”
Id. at n.2.

⁴ *Id.* at 398, 38 Cal. Rptr. at 195. From another advertisement of Parke-Davis came the statement: ““In no case have we seen any evidence of depression of the hemopoietic system resulting in aplastic anemia or agranulocytosis. We are now certain that Chloromycetin is effective with very minimal untoward side effects.”” *Ibid.*

Parke-Davis's salesmen, called "detail" men, ". . . extolled the virtues of chloromycetin, and minimized its dangers."⁵

The plaintiff had been consulting the defendant doctor. In September of 1958 she complained of a sore gum and the doctor prescribed chloromycetin. In November of the same year, the doctor again prescribed chloromycetin for the plaintiff, this time for treatment of bronchitis. Neither of these conditions was serious enough to warrant the prescription of this drug and on both occasions the prescription was refilled several times. The plaintiff developed a condition which was diagnosed in the spring of 1959 as aplastic anemia. The evidence showed that the doctor's prescription of chloromycetin had been influenced by Parke-Davis's advertising.

Plaintiff brought an action for damages against the prescribing doctor, Parke-Davis and Company, and the pharmacist who filled and refilled the prescription. While the jury's verdict was in favor of the pharmacist,⁶ the plaintiff recovered a judgment in the sum of 334,046 dollars against the doctor on the basis of negligence in prescribing chloromycetin and against Parke-Davis on the basis of negligence in failing to give an adequate warning. This was reversed on appeal⁷ due to misconduct at the trial by the counsel for the plaintiff. However, the California District Court of Appeal held that there was substantial evidence to support the verdict against each of these two defendants and a new trial was required against them. The purpose of this article is to discuss the possible bases for liability of the manufacturer in a case such as this.

I. NEGLIGENCE OF PARKE-DAVIS

Because the record failed to establish negligence in the manufacture of the drug and it showed that the drug was found uncontaminated,⁸ the court said that "negligence, if any, would have to be predicated upon evidence that the company failed adequately to warn of the dangers of its use."⁹ The duty of manufacturers to warn of latent dangers inherent in their products is well established.¹⁰

⁵ *Id.* at 399, 38 Cal. Rptr. at 195.

⁶ *Id.* at 382 n.1, 38 Cal. Rptr. at 184 n.1.

⁷ *Id.* at 382, 38 Cal. Rptr. at 184.

⁸ *Id.* at 394, 38 Cal. Rptr. at 192.

⁹ *Ibid.*

¹⁰ For an excellent discussion of the duty to warn, see Dillard and Hart, II, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. Rev. 145 (1955).

Prior to the decision in *Love*, the liability of manufacturers of products which were non-negligently made, in the sense that they contained no contaminants and were made as the manufacturer intended, had been based either on the failure to adequately warn of dangers inherent in the product¹¹ or the breach of either an implied or an express warranty contained in advertising or promotional material.¹²

Contrary to the cases holding the manufacturer liable for a failure to adequately warn, the warning given in the literature sent to the medical profession by Parke-Davis complied with the requirements of the Food and Drug Administration directive and, standing alone, would have been adequate to warn of the dangers involved in prolonged use of chloromycetin. But, since Parke-Davis had "played down" the dangers originally warned against, the court in *Love* held that a jury would be warranted in finding that they had negligently caused the warning to be withdrawn or cancelled.¹³

While it is an established rule that "An assurance of safety, as well as a failure to warn of danger, may be negligence,"¹⁴ *Love* appears to be the first decision to recognize that such assurances of safety, in the form of advertising and promotional material and statements, when rendered concurrent with or subsequent to a warning, may cancel or withdraw the warning of danger. This result is both sound and logical. A warning given by a manufacturer should not absolve the manufacturer of liability when the major content of the advertisement which contains the warning is assurance that the product is safe for use. Nor can the consumer be expected to give proper heed to a warning from the manufacturer when the manufacturer's personal representatives assure him that new evidence indicates that the product is safe. In situations such as these, the dominant impression given to the consumer is that the goods are safe, and even though the required warning is contained in the advertising or has been previously given, the manufacturer has not adequately fulfilled his duty to warn of dangers inherent in the use of his product.

¹¹ *E.g.*, *Roberts v. United States*, 316 F.2d 489 (3d Cir. 1963); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962); *Tingey v. E. F. Houghton & Co.*, 30 Cal. 2d 97, 179 P.2d 807 (1947).

¹² *E.g.*, *Inglis v. American Motors Corp.*, 30 Ohio Op. 2d 181, 197 N.E.2d 921 (Ohio Ct. App. 1964) *aff'd* 3 Ohio St.2d 132, 209 N.E.2d 583 (1965); *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

¹³ *Love v. Wolf*, 226 Cal. App. 2d 378, 400, 38 Cal. Rptr. 183, 196 (Ct. App. 1964).

¹⁴ 2 HARPER & JAMES, TORTS § 28.7 at 1548 (1956).

Love therefore stands for the proposition that a warning, adequate in itself, may be cancelled or withdrawn by subsequent advertising and promotion inconsistent with the original cautionary statements.

II. BREACH OF IMPLIED WARRANTY

Although there appears to be a logical basis for imposing liability for breach of an implied warranty in this case, the court in *Love* rejected this approach. Under the law in effect in California at the time *Love* was decided,¹⁵ an implied warranty that the drug was of merchantable quality would have arisen from the sale by Parke-Davis, a seller of goods of that description, of the drug chloromycetin.¹⁶ This warranty would be in effect unless there was a warning of the dangers involved. However, "an adequate warning of danger given to those normally expected to use a particular drug absolves the manufacturer from any liability in warranty."¹⁷

Thus, if Parke-Davis had given no warning of dangers inherent in the use of chloromycetin, an implied warranty that the drug was safe for use in the treatment of diseases would have existed. However, the court held in *Love* that the subsequent advertising and promotion cancelled or withdrew the warning. The warning being cancelled and withdrawn, the implied warranty would presumably still exist. Therefore, due to the negation of the warning, breach of an implied warranty could arguably have been the basis of the liability of Parke-Davis to the plaintiff.

The Uniform Commercial Code has been adopted recently by California.¹⁸ Therefore, some consideration of the probable effects of the Uniform Commercial Code warranty provisions upon a situation such as that in *Love* is necessary.

The concept of implied warranties of merchantability is greatly expanded and clarified under section 2-314.¹⁹ It defines some of the

¹⁵ The Uniform Sales Act was the law in California until the Uniform Commercial Code became effective Jan. 1, 1965.

¹⁶ UNIFORM SALES ACT § 15(2) provides: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

¹⁷ *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 350, 29 Cal. Rptr. 322, 328 (Ct. App. 1963). In *Magee* the drug manufacturer was absolved from liability in an action for wrongful death resulting from administration of its drug because a sufficient warning had been given to the physician who had administered the drug to the decedent.

¹⁸ CAL. COMM. CODE §§ 1101 to 10104.

¹⁹ Section 2-314 provides: "(1) Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in

meanings of merchantability, but as stated in comment 6²⁰ to that section, it “. . . does not purport to exhaust the meaning of ‘merchantable’ nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law.”

In the fact situation existing in *Love*, Parke-Davis was a merchant of goods of the kind sold. Therefore a warranty of merchantability would be implied in the contract for the sale of chloromycetin. In order for a drug of this nature to be merchantable, it would have to be fit for the ordinary purposes for which drugs are used. Such ordinary purpose would presumably be the continued administration of the drug until the condition being treated was cured. If that is the case and chloromycetin was not fit for that ordinary purpose, it appears that an action for breach of an implied warranty of merchantability under section 2-314(2)(c) could have arisen.

Section 2-315²¹ establishes implied warranties of fitness for a particular purpose. If the drug was to be used for a specific purpose different from the usual purpose for which such a drug would be used, and Parke-Davis had reason to know of such a use, a warranty under this section would arise. Such a particular purpose

a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade.” UNIFORM COMMERCIAL CODE § 2-314.

²⁰ UNIFORM COMMERCIAL CODE § 2-314, comment 6.

²¹ Section 2-315 provides: “Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purposes.” UNIFORM COMMERCIAL CODE § 2-315.

involving a drug of this nature might be its use in treating a disease for which it would not usually be administered, or an unusually prolonged duration of treatments with the drug. The meaning of particular purpose is explained in comment 2 to section 2-315.²²

Section 2-316²³ is a new concept in statutory provisions regarding warranties, and creates strict prerequisites for the effectiveness of disclaimers. In order for an implied warranty of merchantability to be excluded or modified under this section, "merchantability" must be specifically mentioned.²⁴ The cautionary statements given by Parke-Davis, even if they would have satisfied the duty to warn, would not have been sufficient to exclude or modify the implied warranty of merchantability under this section because "merchantability" was not specifically mentioned. In contrast to implied warranties of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but it must be in writing and conspicuous.²⁵

Section 2-317²⁶ requires that any express or implied warranties be construed as consistent and cumulative. In a situation such as that in *Love*, any express warranties created by the advertising and statements of the "detail" men and implied warranties of merchantability and fitness for a particular purpose arising out of the sale of the drug by Parke-Davis would be consistent with each other and therefore cumulative in effect.

²² UNIFORM COMMERCIAL CODE § 2-315, comment 2, states: "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains."

²³ UNIFORM COMMERCIAL CODE § 2-316(2) provides: "Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"

²⁴ UNIFORM COMMERCIAL CODE § 2-316, comment 3.

²⁵ UNIFORM COMMERCIAL CODE § 2-316, comment 4.

²⁶ UNIFORM COMMERCIAL CODE § 2-317 provides, in part: "Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant."

III. STRICT LIABILITY

If the warning given was actually withdrawn or cancelled by the subsequent promotional campaign, the court could very well have imposed strict liability. Strict liability is liability without fault for damage resulting from a defect in the product of which the consumer is not aware.²⁷ Strict liability is based on social considerations which encourage manufacturers to exercise the greatest care possible, and when a loss due to injury does occur its burden is shifted from the injured plaintiff to those engaging in the hazardous business. Strict liability is a reasonably recent development in the law of products liability and has rapidly expanded in recent years.²⁸

What constitutes a "defect" in a product justifying the imposition of strict liability? It has been suggested that the criterion for establishing that an article is "defective" for purposes of strict liability is synonymous with the criterion of merchantability set forth in section 2-314(2)(c) of the Uniform Commercial Code.²⁹ The Restatement of Torts indicates that strict liability would not be imposed for injuries resulting from a useful but dangerous drug, where proper directions had been given. "Such a product, properly prepared, and *accompanied by proper directions and warning*, is not defective. . . ."³⁰

Under the criterion of the Restatement, the injury resulting to plaintiff Love would have been due to a defect in chloromycetin.

²⁷ RESTATEMENT (SECOND), TORTS § 402 A (1965), provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

²⁸ See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

²⁹ See Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 700 (1965). UNIFORM COMMERCIAL CODE § 2-314 is set forth in note 19, *supra*.

³⁰ RESTATEMENT (SECOND), TORTS § 402 A, comment *k* at 353-54 (1965). (Emphasis added.)

The cancellation of the warning would render the dangers inherent in the drug a defect, justifying the imposition of strict liability.

The California Supreme Court in *Greenman v. Yuba Power Prod., Inc.*,³¹ declared that all that was necessary to establish the liability of the manufacturer of a power tool was that the plaintiff prove that he was using the product in a way in which it was intended to be used and was injured as a result of a defect in design and manufacture of which plaintiff was not aware.³² The court in *Love* stated that strict liability has not been applied to a failure adequately to warn of the dangers inherent in the use of a drug.³³ However, if strict liability has been imposed for injuries resulting from defects unknown to the plaintiff in the case of a power tool, there is no sound reason why the same rule should not apply in the case of a drug, which comes into intimate bodily use. If, as the *Love* court held, the subsequent advertising and promotional campaign cancelled and negated the warning statements, the decision in *Greenman* would have justified the imposition of strict liability upon Parke-Davis.

IV. EXPRESS WARRANTY UNDER THE UNIFORM COMMERCIAL CODE

In addition to the Code sections covering implied warranties, the section covering express warranty may be applicable to a situation like that in *Love* and is therefore worthy of consideration.

Section 2-313(1)(a)³⁴ of the Code provides for the creation of

³¹ 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The plaintiff was injured when a piece of wood he was working on flew out of a "Shop-smith" electric power tool, which had been warranted to be safe. It has been stated in 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16A(1), at 442.1-42.2 (1964), that *Greenman* is the most important decision in the area of products liability since *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), (disclaimer ineffective against plaintiff injured by defect inherent in automobile purchased for her by her husband), and perhaps the most important since *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), (privity of contract between manufacturer of automobile and injured plaintiff not essential to recovery).

³² *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

³³ *Love v. Wolf*, 226 Cal. App. 2d 378, 402, 38 Cal. Rptr. 183, 197-98 (Ct. App. 1964).

³⁴ UNIFORM COMMERCIAL CODE § 2-313(1)(a) provides: "(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the

express warranties by affirmation or promise. The Code does not, however, require that these affirmations or promises be made directly to the plaintiff, or someone in privity with him. Comment 2 to section 2-313³⁵ expressly provides that the question of privity is left to the established and developing lines of case law. It would therefore appear that a court, following the provisions of the Code, could find a drug company liable to a patient for the breach of an express warranty made directly to his doctor. In the case of a prescription drug, it would be impossible to expect the warranty to be made directly to the patient, as the patient usually does not know what drug is prescribed nor the dangers inherent in its administration.³⁶

Under section 2-313, the affirmations or promises must be such as become part of the basis of the bargain. Comment 1³⁷ to that section states that " 'Express' warranties rest on 'dickered' aspects of the individual bargain. . . ." These "dickered" aspects are elements of the negotiation leading to the contractual agreement.

Section 2-313(2)³⁸ establishes that no particular language or "words of art" are required to make an express warranty. In addition, the intent of the seller to make a warranty is not necessary. The determination of what constitutes "puffing" is, as under the previous law, left for the courts.

A feature of the express warranty under the Code which did not exist under the previous law is that the precise time the affirmation or promise was made is not material.³⁹ Under the Code

bargain creates an express warranty that the goods shall conform to the affirmation or promise." This is comparable to UNIFORM SALES ACT § 12, which provides: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

³⁵ UNIFORM COMMERCIAL CODE § 2-313, comment 2.

³⁶ In the case of a prescription drug, a warning as well as a warranty, as in *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (Ct. App. 1963) is sufficient if given to the physician.

³⁷ UNIFORM COMMERCIAL CODE § 2-313, comment 1.

³⁸ UNIFORM COMMERCIAL CODE § 2-313(2) provides: "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

³⁹ UNIFORM COMMERCIAL CODE § 2-313, comment 7.

an additional assurance made to the buyer after the sale may still constitute an express warranty. This section may have particular relevance in a situation like the present if the advertisements or statements of the "detail" men induced the doctors to administer drugs which had been purchased previously. That the affirmations or statements of fact came after the sale would not prevent the creation of an express warranty.

The statements of the "detail" men of Parke-Davis as to the safety of chloromycetin could be considered to be affirmations forming part of the basis of the bargain under section 2-313(1) (a). When dealing with physicians these statements could well be included in the "dickered" aspects of the transaction. While Parke-Davis solicited reliance upon their statements, they undoubtedly had no intention to make an express warranty that chloromycetin was absolutely safe. However, such intention is not required for the creation of an express warranty, nor are such express words as "warrant" or "guarantee."

In addition to the statements by the "detail" men, it is possible to construe statements in advertising as affirmations constituting express warranties under section 2-313. Statements in advertising materials have been held to create express warranties in numerous cases.⁴⁰

If *Love* were to be decided under the Code, it is likely that either the statements by the "detail" men of Parke-Davis or those contained in the advertising material, or both, would be held to constitute express warranties, giving the plaintiff a cause of action under the Code for the injury resulting from the breach.

V. CONCLUSION

The area of products liability has been rapidly expanding in recent years. Included in this expansion has been an increasing tendency to hold manufacturers liable to those injured by using their products. This trend toward strict liability is thought to cause the manufacturers to exercise greater care in their manufacturing processes and to shift the loss due to injury from the injured party to those engaging in the business which has caused the injury. This burden may then be shifted, by means of a commensurate increase in the price of the product, to the consumers of the product as a whole.

⁴⁰ *E.g.*, *Inglis v. American Motors Corp.*, 30 Ohio Op. 2d 181, 197 N.E.2d 921 (Ohio Ct. App. 1964) *aff'd* 3 Ohio St.2d 132, 209 N.E.2d 583 (1965); *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

While the decision in *Love* reaches the same result, liability in a case such as this need not be predicated upon the inadequacy of warning or negligence in promotion. Liability in such a situation should be based upon strict liability of the manufacturer or upon breach of warranty, thereby eliminating the burden upon the plaintiff of proving negligence and placing an affirmative duty on the manufacturer to assure that latent defects in their products will not harm consumers. A decision on one of these bases would be more consistent with the current trends in the law of products liability.

The most important aspect of the decision in *Love* is the holding that a subsequent advertising and promotional campaign may cancel a warning that has been given of dangers inherent in a product. This should serve as a caveat to manufacturers that when they seek to induce the purchase of their products by means of assurances of safety inconsistent with warnings which have been given, the warnings may be cancelled.

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