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CASENOTES

Collateral Estoppel in Potentially Changing Fact Situations: *Dracos v. Hellenic Lines, Ltd.*

Collateral estoppel doctrine allows a party to estop the opposing party from relitigating issues determined in a prior action. When an issue is fully and fairly litigated, a prior judgment is conclusive with respect to that issue in all subsequent suits on different causes of action. Estoppel may be asserted either offensively or defensively. Defensive collateral estoppel prevents a plaintiff from relitigating an issue that has already been resolved in the defendant's favor;¹ offensive collateral estoppel allows a plaintiff to establish a part of his case without relitigating issues already resolved in his favor.² Both defensive and offensive collateral estoppel benefit litigants and the courts by eliminating unnecessary litigation and promoting judicial consistency and finality.³ The Fourth Circuit, in *Dracos v. Hellenic Lines, Ltd.*,⁴ articulated a rule which could substantially reduce these benefits by making it more difficult for plaintiffs to successfully assert collateral estoppel. The *Dracos* court held that the mere possibility of change in controlling facts between the first and subsequent actions is sufficient to make offensive collateral estoppel unavailable. The *Dracos* rule gives district courts broad discretion to bar offensive collateral estoppel upon a showing by the defendant that controlling facts *may* have changed.⁵

Since issues frequently arise in which controlling facts are subject to change, this rule considerably restricts collateral estoppel's applicability and narrows its beneficial impact on judicial consistency, judicial finality, and avoidance of unnecessary litigation. A rule better designed to maximize offensive collateral

1. *Blonder-Tongue Laboratories v. University of Ill. Found.*, 402 U.S. 313 (1971).

2. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

3. *Blonder-Tongue*, 402 U.S. at 328-29.

4. 762 F.2d 348 (4th Cir.) (en banc), cert. denied, 106 S. Ct. 311 (1985).

5. *Id.* at 353.

estoppel's benefits, and applicable to defensive collateral estoppel as well, would permit relitigation of previously determined issues only when the defendant shows actual material change in controlling facts. Mere possibility, or even probability, of change would be insufficient to bar collateral estoppel.

I. THE *Dracos* CASE

Nicholas Dracos, chief engineer aboard a Greek ship, the *Hellenic Star*, was found dead in the ship's refrigerator hold on May 14, 1977. Maria Dracos, administratrix of her husband's estate, brought a wrongful death action against Hellenic Lines, Ltd., her husband's employer, under the Jones Act.⁶ Maria, her deceased husband, and Hellenic were all Greek citizens; jurisdiction, therefore, depended solely on whether Hellenic's contacts with the United States were sufficient to make it an employer subject to the Jones Act.⁷

Maria attempted to estop litigation of the jurisdictional issue concerning Hellenic's United States contacts.⁸ Her assertion of offensive collateral estoppel was based on *Hellenic Lines Ltd. v. Rhoditis*,⁹ which had been decided twelve years earlier. In *Rhoditis*, the Supreme Court held that Hellenic was an employer for purposes of the Jones Act and therefore subject to the judicial process of the United States.¹⁰ However, the *Dracos* court held that the twelve year lapse between these actions made *Rhoditis* inapplicable, rejected Maria's assertion of collateral estoppel, and concluded that subject matter jurisdiction was lacking.¹¹

On appeal, the Fourth Circuit panel held that the district court decision was within that court's "broad discretion" to bar offensive collateral estoppel.¹² The panel also affirmed the district judge's holding that "earlier adjudication reflected the status of the defendant only as it existed several years prior to the

6. 46 U.S.C. § 688 (1982). The Jones Act creates a right of action for injury to or death of a seaman.

7. *Dracos*, 762 F.2d at 350.

8. *Id.* at 352.

9. 398 U.S. 306 (1970).

10. *Id.* at 310.

11. *Dracos*, 762 F.2d at 351-53.

12. *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392, 1397 (4th Cir. 1983). District courts have greater latitude in barring offensive collateral estoppel than defensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-33 (1979).

accrual of the cause of action"¹³ Following reargument en banc, the Fourth Circuit affirmed the panel decision.¹⁴

The *Dracos* dissent argued that the majority's approach unduly restricted offensive collateral estoppel by placing the burden of proving no change in material facts on the plaintiff. Instead, the district court should have required the defendant to demonstrate that controlling facts had changed, to overcome the "presumptive collateral estoppel effect" of the *Rhoditis* decision.¹⁵ Under this theory a showing of actual material change—not mere possibility of change—is a precondition to relitigation.

II. THE *Dracos* COURT'S MISTAKEN RELIANCE ON *Parklane Hosiery Co. v. Shore*

In *Parklane Hosiery Co. v. Shore*,¹⁶ the Supreme Court granted district courts broad discretion to bar offensive collateral estoppel. Although *Dracos* involved offensive estoppel, the *Dracos* court erred in applying *Parklane* because the cases are dissimilar in important respects. The principal issue in *Parklane* was whether to apply offensive collateral estoppel when there is not mutuality between the parties—not changed facts. A brief discussion of the mutuality requirement's role in collateral estoppel doctrine will be helpful in understanding the *Dracos* court's error.

Prior to *Parklane*, offensive collateral estoppel applied only when mutuality of parties existed. Mutuality has two elements: 1) both the party asserting and the party opposing estoppel must have been parties to the prior litigation, or they must be in privity with a party;¹⁷ and 2) both parties in the second action

13. *Id.* at 1397.

14. 762 F.2d at 353.

15. 705 F.2d at 1399 (Murnaghan, J., dissenting).

16. 439 U.S. 322 (1979).

17. In general, privity refers to those persons who, though not parties to the prior litigation, are bound by its outcome. Wright, Miller, and Cooper identify three categories of privity. First are those persons

who were not formal parties to the first litigation but who participated so extensively that they assumed a de facto role as parties. . . .

A second major concept is found in a variety of rules that extend preclusion to persons who somehow were represented in the first litigation. . . . Trustees, executors, statutory representatives in death and survival actions, and guardians are familiar examples. . . .

A third set of principles traditionally embraced by the privity label arises as much from the needs of property law as from the values of preclusion by

must be bound by the prior litigation.¹⁸ Since those not involved in the prior litigation could not assert estoppel against those who were, the mutuality requirement significantly limited estoppel's applicability.

The Supreme Court initiated an assault on the mutuality requirement in *Blonder-Tongue Laboratories v. University of Illinois Foundation*.¹⁹ In *Blonder-Tongue*, the Court eliminated the mutuality requirement for defensive collateral estoppel. It hoped to expand defensive collateral estoppel's use to increase its beneficial impact on judicial consistency, judicial finality, and unnecessary litigation.²⁰

Eight years later, *Parklane* ended the mutuality requirement for offensive estoppel.²¹ However, it recognized that when no mutuality of parties exists, offensive estoppel poses problems not present in the defensive context. First, offensive estoppel encourages unnecessary litigation by creating an incentive for potential plaintiffs to await the outcome of earlier litigation in

judgment. In some circumstances, persons holding successive interests in the same property or claim can preclude each other.

18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4448 (1981) (footnotes omitted).

18. *Id.*; see also *Montana v. United States*, 440 U.S. 147, 153 (1979).

19. 402 U.S. 313 (1971). Ostensibly, the Court decided *Blonder-Tongue* on the narrow question "whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid." *Id.* at 327. Nevertheless, *Blonder-Tongue* set the stage for the Court's more dramatic application of collateral estoppel in *Parklane* in which the Court approved offensive, non-mutual collateral estoppel. See *Parklane*, 439 U.S. at 329-33 (1979).

The mutuality requirement had long been criticized. In an early leading case, the California Supreme Court eliminated the mutuality requirement for defensive assertions of collateral estoppel. *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 812, 122 P.2d 892, 894-95 (1942). That court reasoned, "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend." *Id.* at 812, 122 P.2d at 895.

20. *Blonder-Tongue*, 402 U.S. at 328-30.

21. *Parklane*, 439 U.S. at 329-33. *Parklane's* threshold question was "whether . . . the petitioners can be precluded from relitigating facts resolved adversely to them in a prior equitable proceeding with another party under the general law of collateral estoppel." 439 U.S. at 326. The issue for which estoppel was sought had been litigated and finally determined in a previous action by the SEC against the defendants. *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). Responding affirmatively, the Court approved the use of offensive collateral estoppel in this stockholder's class action against a corporation, its officers, directors, and stockholders, to preclude the question of whether the defendants had issued a materially false and misleading proxy statement. See 439 U.S. at 324-25. Thus, the Court opened the way for plaintiffs in federal actions to assert collateral estoppel offensively against defendants who had the previous opportunity to fully and fairly litigate the issue in question.

hope that the results will be favorable to their cause. Second, the offensive context has greater potential for unfairness to the defendant in three specific instances: 1) the defendant who was sued for nominal damages in the prior action may have little incentive to defend vigorously; 2) prior judgments may be inconsistent with each other; and 3) later actions may afford defendants procedural opportunities unavailable in previous litigation.²² In such cases or when for "other reasons" it is unfair to defendants, the *Parklane* Court granted district courts "broad discretion" to bar offensive estoppel.²³

None of the *Parklane* criteria is present in *Dracos*. Since Maria Dracos's claim arose twelve years after *Rhoditis*, she could not have joined in the earlier litigation. Moreover, the three fairness criteria specifically identified by the Supreme Court are not present: lack of incentive for vigorous defense in the first action, inconsistent prior judgments, and new procedural opportunities.

The *Dracos* court also fails to identify any "other reasons" offensive estoppel would be unfair to the defendant in this context. Arguably, possible change in material facts might qualify as an "other reason." However, while actual material change in controlling facts would clearly make collateral estoppel unfair, *Hellenic* made no such showing in *Dracos*. The court did find *potential* for change; however, potential change suggests only *potential* for unfairness. Hence, the district court exceeded even *Parklane's* broad discretion which requires some unfairness to defendant arising from offensive estoppel.²⁴

In holding that district courts possess broad discretion to bar offensive estoppel when controlling facts may have changed, the *Dracos* court gives *Parklane* a broader reading than is appropriate. *Parklane's* broad discretion was intended to cure problems arising from and unique to offensive collateral estoppel when no mutuality exists between the parties.²⁵ However, the problems raised by potentially changing facts are not unique to the offensive context. When facts upon which an earlier decision relied change materially, that decision will not support estoppel whether offensive or defensive, mutuality or no mutuality. No

22. *Parklane*, 439 U.S. at 331.

23. *Id.*

24. *Id.*

25. *Id.* at 329-31.

apparent reason exists for allowing broad discretion in the offensive context but not in the others.

III. APPORTIONING THE BURDEN OF PROOF WHEN CONTROLLING FACTS ARE SUBJECT TO CHANGE

Since *Parklane* addresses only offensive collateral estoppel, reliance on its broad discretion to address changing fact situations necessarily yields a rule inapplicable in the other contexts in which collateral estoppel arises. A better standard would apply equally in each of collateral estoppel's possible contexts—offensive or defensive, mutuality or no mutuality.

Choosing the proper standard for making collateral estoppel available in changing fact situations is best conceived as a burden of proof problem arising in each context. The issue is whether the bare possibility of change is sufficient to bar collateral estoppel and to shift the burden of proof to the party asserting estoppel.²⁶ The *Dracos* court's resolution of this issue clearly inhibits accomplishment of Supreme Court policy objectives without providing counterbalancing benefits.²⁷

26. Though not its main focus, the Fourth Circuit dealt briefly with the burden of proof issue raised by the dissent. In support of its decision, the majority cited *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449 (1st Cir. 1963). In *United Shoe*, plaintiff asserted estoppel under section 5 of the Clayton Act, 15 U.S.C. § 16 (1982), which established a kind of statutory offensive collateral estoppel well prior to *Parklane*. It permits a final judgment in favor of the United States to be used as *prima facie* evidence by any other party in another action as to all issues determined in favor of the government—that is, to all issues which the defendant was estopped from relitigating against the government.

Alleging violations of the Sherman Act, *International Shoe* brought suit against *United Shoe* for treble damages. Plaintiff attempted to use as *prima facie* evidence for its claim a previous decree from *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 259 (D.D.C. 1953), *aff'd*, 347 U.S. 521 (1954), which held that the defendant had violated the Sherman Act. The *United Shoe* court held that estoppel did not apply because of the passage of time. 315 F.2d at 459.

United Shoe, however, is distinguishable from *Dracos* for three reasons. First, in *United Shoe* the statute of limitations prevented antitrust action prior to December 14, 1952. The case upon which plaintiff relied for estoppel, though decided in February 1953, had closed evidence in June 1951. Thus, the events upon which the previous decision was based occurred outside the limitations period. *Id.* at 455. No such statute of limitations issue existed in *Dracos*. Second, the *United Shoe* court made sufficient inquiry to determine that there had been a significant change in controlling facts making estoppel inappropriate. *Id.* at 458. Third, *United Shoe* was decided prior to *Blonder-Tongue* and *Parklane* in which the Supreme Court freed collateral estoppel from the mutuality requirement. *Parklane* is a strong signal that the Court expects a less grudging application of collateral estoppel. Thus, *United Shoe* is a weak foundation upon which to support the *Dracos* decision.

27. *Dracos*, 762 F.2d at 354 (Murnaghan, J., dissenting); *Dracos*, 705 F.2d at 1400

A. Montana v. United States

The *Dracos* dissent advocated a presumption in favor of collateral estoppel which would place the burden of proof with respect to changed facts on the party opposing estoppel. *Montana v. United States*²⁸ is an example in which the Supreme Court implied such a presumption in the defensive context. The Court identified three factors relevant to determining collateral estoppel's applicability: first, whether the issue in the prior action was substantially the same; second, whether changes in controlling facts or law necessitate relitigation; and third, whether other special circumstances bar estoppel.²⁹

(Murnaghan, J., dissenting). See also A. WRIGHT, C. MILLER, & E. COOPER, *supra* note 17, at § 4417. Significant scholarly authority exists suggesting that mere potential for change in material facts is insufficient to bar collateral estoppel. For example, the *Restatement (Second) of Judgments* states:

[I]n the absence of a *showing of changed circumstances*, a determination that, for example, a person was disabled, or a nonresident of the state, in one year will be conclusive with respect to the next as well. In other instances *the burden of showing changed or different circumstances should be placed on the party against whom prior judgment is asserted.*

RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1980) (emphasis added).

The *Restatement* does, however, recognize instances in which "the bearing of the first determination is so marginal because of the separation in time and other factors negating any similarity that the first judgment may properly be given no effect." *Id.* (emphasis added). The key term is "and other factors." In *Dracos* there was no showing of factors beyond the mere passage of time and the possibility of alterations of material facts. See 762 F.2d at 352-53. The *Dracos* dissent, citing the *Restatement* asserts, "Where some time has passed, but not so much time that the first determination can rationally be deemed impertinent—our case—the *Restatement* places the burden upon the party opposing the application of collateral estoppel to show that change has in fact occurred." 705 F.2d at 1400 (Murnaghan, J., dissenting).

Similarly, Wright, Miller, and Cooper, state that one of the fundamental problems for issue preclusion theory arises because "[s]uccessive suits may present similar questions that grow out of a continuing course of conduct that involves new historic facts rather than continuing consequences of acts or transactions that were complete at the time of the first suit." A. WRIGHT, C. MILLER, & E. COOPER, *supra* note 2, at § 4417. The question of preclusion should be treated differently depending on the circumstances. For example, for some issues "the probability of change is so low that no effort to show a change will be tolerated" and for others "the probability of change is so great that the first finding has no preclusive effect whatever." *Id.* (emphasis added).

Dracos involved a set of facts which only *may* have changed. Wright, Miller, and Cooper suggest that, despite possible factual changes, the preservation of issue preclusion is of value. This suggests that *Dracos* deserved treatment appropriate to an action falling between the two extremes. "Between these poles, the first finding may be given some level of merely presumptive effect." *Id.* Under this rule, the *Dracos* court should have rejected preclusion only if material facts were shown to have changed sufficiently to make estoppel inappropriate.

28. 440 U.S. 147 (1979).

29. *Id.* at 155.

The second factor is at issue in *Dracos*. Rather than allowing relitigation on the mere possibility of change, the *Montana* Court required that the United States show material alteration of facts "essential" to the prior judgment. When it failed to do so,³⁰ the Court gave the prior decision estoppel effect.³¹ Without expressly addressing whether mere possibility of change is ever sufficient to bar estoppel, the court took the approach recommended by the *Dracos* dissent.

B. *Dracos* and Supreme Court Policy Goals

Montana suggests a rather liberal standard favoring application of collateral estoppel in the changing fact situation when appropriate. This is consistent with *Blonder-Tongue* and *Parklane*, both of which broke down barriers to expand collateral estoppel's use. In *Blonder-Tongue*, the Supreme Court explicitly identified two policy goals favoring expansion of collateral estoppel doctrine: judicial economy and avoiding the burden needless relitigation places on litigants.³² A third underlying policy goal—judicial consistency—is implicit in *Blonder-Tongue*.³³ *Dracos* conflicts with each of these policy objectives by encouraging unnecessary relitigation of previously determined issues.

1. *Needless litigation*

The *Dracos* standard restricts collateral estoppel doctrine severely. It is so low that it provides virtually no meaningful restraint on unnecessary litigation. Under *Dracos*, the trial judge may place the burden of disproving changed facts on the party asserting offensive collateral estoppel. However, the mere possibility of changed facts exists in nearly every situation. As the Third Circuit has observed, "Rare would be the case in which

30. *Id.* at 159.

31. *Id.* at 162.

32. 402 U.S. at 328-29.

33. "The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Blonder-Tongue*, 402 U.S. at 328. See also A. WRIGHT, C. MILLER, & E. COOPER, *supra* note 17, at § 4417. The point of this criticism is that judicial judgments should be consistent with one another as far as possible. For example, a decision in which a party is an employer for purposes of the Jones Act followed by another decision in which he is not creates an aura of inconsistency and chance. Not only do such results strike an observer as inherently unfair, they suggest a lack of competence and predictability in the judicial process.

counsel could not conjure up some factual element that had changed between adjudications."³⁴

The *Dracos* standard encourages frivolous challenges. A party opposing estoppel always has an incentive to point out the possibility that circumstances have changed and to demand that the other party prove otherwise. This places an extra burden on judicial resources and allows district courts to impose relitigation costs on the party asserting estoppel without a showing that the prior decision is no longer applicable.³⁵

Such unnecessary relitigation is harmful not only because it is burdensome to litigants and to the judicial system, but also because it can result in inconsistent judgments. In *Blonder-Tongue* and *Parklane*, the Supreme Court sought to minimize the potential for inconsistent judgments resulting from relitigation by expanding the applicability of collateral estoppel. Inconsistent judgments raise significant fairness issues and suggest an aura of chance inappropriate to the judicial process.

Dracos illustrates the problem well. Its jurisdictional determination conflicts, of course, with *Rhoditis* without establishing any changed circumstances that would justify the different result. It is also inconsistent with findings in another case involving Hellenic Lines which was decided while the *Dracos* appeal was pending. In *Papaioannou v. Hellenic Lines, Ltd.*,³⁶ a Hellenic employee brought a negligence action under the Jones Act.³⁷ The same jurisdictional issues arose in that case as in *Dracos*, but the court chose to give *Rhoditis* a presumptive col-

34. *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974). The Third Circuit recognized the potential problem that changing facts situations create for collateral estoppel doctrine in *Kraftco*. In that action, Scooper Dooper brought suit against Kraftco for alleged Sherman Act violations. That same issue had previously been litigated and decided in Kraftco's favor in *National Dairy Prods. Corp. v. Milk Drivers & Dairy Employees Union Local 680*, 308 F. Supp. 982 (S.D.N.Y. 1970).

In response to Kraftco's assertion of defensive collateral estoppel, Scooper Dooper argued changed circumstances precluded estoppel. To this, the court responded:

It is well settled that changed factual circumstances can operate to preclude the application of collateral estoppel. . . . Carried to its extreme, the concept . . . could totally undermine the application of collateral estoppel. Rare would be the case in which counsel could not conjure up some factual element that had changed between adjudications.

494 F.2d at 846. To avoid such an extreme result, the court required a showing that controlling facts were "vitally altered" between the first and second judgments before requiring relitigation and its accompanying drain on judicial resources.

35. Compare *Montana v. United States*, 440 U.S. 147, 155 (1979).

36. 569 F. Supp. 724 (E.D. Pa. 1983).

37. 46 U.S.C. § 688 (1982).

lateral estoppel effect as the *Dracos* dissent had urged. "Hellenic may rebut this presumption by producing evidence of changed circumstances that would have altered the Supreme Court decision in *Rhoditis*. However, Hellenic has not produced sufficient evidence to support its claim that circumstances have changed" ³⁸

2. *Absence of offsetting benefits*

In the face of these policy concerns, the *Dracos* majority offers no justification for placing the burden of proving that facts have not changed on the party asserting estoppel. The majority approach hampers Supreme Court objectives without providing offsetting benefits.

The majority rule protects the party opposing estoppel from being burdened by a decision no longer applicable because of changed facts; however, that protection is available without sacrificing Supreme Court policy objectives. The presumptive collateral estoppel approach of the *Dracos* dissent promotes judicial economy and consistency without placing an undue burden on the party opposing estoppel. It merely requires a showing that the previous facts are no longer applicable before that party gets a second day in court. There would have been no injustice in requiring Hellenic to make such a showing as a prerequisite to relitigation, particularly since it probably had convenient access to evidence relating to its United States contacts.³⁹

It is appropriate to place the burden of relitigation on the party opposing estoppel to assure that challenges based on changed facts are substantial. The party opposing estoppel should plead changed facts with specificity. If the pleading is inadequate, the court should apply estoppel without further litigation burden. If the pleading is adequate, the party opposing estoppel must be prepared to offer proof. The issue would be relitigated only if the proof of material change is not rebutted. In contrast, *Dracos* allows the party opposing estoppel to require its opponent to prove a negative, simply by postulating that facts may have changed since the earlier court action, and invites relitigation without a showing of material change.

38. *Papaioannou*, 569 F. Supp. at 729.

39. *Dracos*, 705 F.2d at 1401 (Murnaghan, J., dissenting).

IV. CONCLUSION

The *Dracos* court erred in holding that the district court had broad discretion to bar offensive collateral estoppel when controlling facts are subject to possible change. There are no case precedents to support that decision and substantial arguments to the contrary. First, the *Dracos* decision does not meet either of the *Parklane* criteria for exercise of broad judicial discretion in refusing offensive estoppel: opportunity to join the previous litigation and unfairness to the defendant. Second, the *Dracos* decision conflicts with collateral estoppel's policy goals as enunciated in *Blonder-Tongue*: judicial economy, sparing the parties the burden of relitigating issues previously determined, and judicial consistency. Third, while *Montana* recognizes that changed circumstances may make collateral estoppel inappropriate, the Court's approach suggests the need to explore relevant facts in sufficient depth to determine if material change has occurred before barring estoppel. The *Dracos* rule allows relitigation without such a determination. Finally, the *Dracos* rule is peculiarly applicable to offensive collateral estoppel. It does not apply to defensive estoppel, which makes little sense in the changed facts context.

A more defensible rule gives a prior decision presumptive collateral estoppel effect until the party opposing estoppel shows material change in controlling facts. Under it, Supreme Court policy objectives for both offensive and defensive collateral estoppel are maximized without injustice to the opposing party.

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