

# PREVENTING AND DEFENDING LONG TERM CARE LITIGATION

Expert Risk Mitigation and Defense Strategies for Nursing Home and Assisted Living Facility Providers

January 31 – February 1, 2012  
The Conrad | Miami, FL

## Network with an exceptional in-house faculty of long term care experts including:

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*And many more...*

## A View from the Bench: Formulate your long term care litigation strategies based on how judges are interpreting evidence and arguments. Hear from:

**The Honorable Thierry Patrick Colaw**  
Judge, Superior Court, Orange County  
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**The Honorable James L. Robart**  
District Judge, U.S. District Court,  
Western District of Washington (Seattle, WA)

**The Honorable Keith J. Sickendick**  
Administrative Law Judge, Departmental Appeals Board,  
Office of the Deputy Secretary, United States Department  
of Health and Human Services (Washington, DC)

## Distinguished Co-Chairs:

**Timothy J. Cesar**  
Vice President of Legal- Litigation  
Brookdale Senior Living  
(Milwaukee, WI)

**Donna J. Fudge**  
Partner  
Fudge & McArthur, P.A.  
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**Our expert faculty of senior in-house counsel, top outside defense litigators, and renowned federal and state jurists will provide you with the practical advice you need to fight the uphill battle against an aggressive plaintiffs' bar adept at advancing novel and innovative theories of liability:**

- **Develop** defenses to combat arbitrary or excessive punitive damages and **minimize** the potential for jury verdicts rooted in aroused emotions
- **Prevent** regulatory violations from being used as a template for recovery in civil litigation, particularly costly class actions
- **Mount** a winning defense in established areas of liability including falls cases, medication errors, pressure ulcers and infectious disease litigation
- **Coordinate** a litigation strategy between in-house and outside counsel to minimize exposure to civil and criminal prosecution and whistleblowers' suits arising from allegations of abuse and neglect
- **Secure** and **enforce** compliant arbitration agreements in the face of legal and emotional roadblocks specific to long term care

## New this year: TWO interactive half day sessions designed to give you the edge in long term care litigation

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### **A** Pre-Conference Boot Camp: Regulatory Fundamentals for Long Term Care Litigators

In the wake of several huge paydays for plaintiffs' firms premised on regulatory violations and a surge of False Claims Act cases, the spotlight is on the nursing home industry like never before. Prepare for the next wave of litigation with an analysis of the key regulatory developments affecting industry.

### **B** Post-Conference Mock Jury Focus Group: Trial Skills and Jury Communication Drill Down

Learn proven effective methods of neutralizing jurors' biases and hone your trial skills after watching how a live jury panel responds to plaintiff and defense arguments in a mock long term care jury panel, moderated by **The Honorable B. Waugh Crigler**, Magistrate Judge, Western District of Virginia (Charlottesville, VA).

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**Kippy L. Wroten**

Founder and Shareholder  
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## Gain the competitive advantage in increasingly high-stakes and complicated long term care litigation at the only long term care defense conference that brings you a supreme in-house presence on the faculty, the top defense firms, and renowned federal and state jurists from around the country...

The exorbitant verdicts against long term care providers keep coming... \$677 million awarded in California... \$193 million in Pennsylvania... \$90 million in West Virginia... In this minefield of emotional hot-button issues, more and more juries have been sending a message to industry with staggering punitive damage awards. At **American Conference Institute's 2<sup>nd</sup> Edition of its acclaimed Long Term Care Litigation** conference, an experienced faculty of renowned litigators and judges will guide you through every stage of a long term care case to help you limit exposure and to mount a rigorous and complete defense to combat unprecedented theories of liability. The conference culminates with esteemed plaintiffs' and defense counsel going head-to-head and putting the advanced trial strategies shared over the course of the conference to the test in front of a federal judge and mock jury in the new **Post-Conference Mock Jury Focus Group: Trial Skills and Jury Communication Drill Down**.

**\$1270 per bed, per year.\*** This is what a leading industry report estimates claims against a nursing home for malpractice will cost on average. With over 1.5 million Americans currently living in a nursing home as of 2010, **the amount of potential liability is staggering**. Faced with increasingly aggressive tactics from the plaintiffs' bar and amplified scrutiny by the public and the government, there is simply no room for error. Defense lawyers and corporate counsel must have measures in place to demonstrate compliance and avoid costly litigation in the first place in order to mount a complete and formidable defense in this high-stakes arena if forced to do so.

**Learn how to craft the most effective theories and defenses from over fifteen in-house counsel responsible for handling long term care cases on behalf of the country's top facilities and a panel of leading judges.**

At this in-depth strategy session on the nuances of long term care litigation, attendees will gain the tools to execute a bulletproof defense based on the expertise of top judges and in-house experts from **Brookdale Senior Living, Evergreen Healthcare, Extencicare, HCR ManorCare, Signature HealthCare** and many more. This is the leading defense forum designed for both networking and sharing sophisticated strategies to turn a long term care case in your favor and combat an aggressive plaintiffs' bar looking for the next big payday. As class action suits premised on regulatory violations and end-runs around the corporate liability doctrine become increasingly common, don't miss the **Pre-Conference Boot Camp: Regulatory Fundamentals for Long Term Care Litigators**, designed to give you expert insight into the dense thicket of regulations governing nursing homes that might be the basis for the next hundred million dollar law suit.

In the increasingly costly and ruthless battle of long term care litigation, not a moment can be lost. Don't delay - register now by calling 1-888-224-2480, faxing your registration form to 877-927-1563, or logging onto to [www.AmericanConference.com/LTCLitigation](http://www.AmericanConference.com/LTCLitigation).

\* Long Term Care, 2010 General Liability and Professional Liability Actuarial Analysis, August 2010, AOM Corporation

### WHO YOU WILL MEET:

- In-House Counsel for Long Term Care facilities including:
  - Skilled Nursing Homes
  - Assisted Living Residences
  - Hospitals and Health Care Systems
  - Hospices
- Litigation attorneys specializing in long term care defense
- Regulatory attorneys specializing in long term care
- Risk management and insurance professionals specializing in long term care coverage
- Clinicians and trial-tested expert witnesses

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# PRE-CONFERENCE BOOT CAMP

Monday, January 30, 2012

1:00 p.m. – 4:30 p.m. (Registration opens at 12:00 p.m.)

## Regulatory Fundamentals for Long Term Care Litigators

### *Brian T. McGovern*

Attorney at Law  
Cadwalader, Wickersham & Taft LLP (New York, NY)

### *James S. Mathis*

Former Chief Compliance Officer  
Omnicare, Inc. (Nashville, TN)

### *Barbara L. Miltenberger, J.D., R.N.*

Partner  
Husch Blackwell LLP (Jefferson City, MO)

### *Brian R. Purtell*

Partner  
DeWitt, Ross & Stevens (Madison, WI)

Post-healthcare reform, the spotlight is on nursing home and long term care facilities more than ever before. Plaintiffs have realized that civil lawsuits premised on regulatory violations can lead to a huge payday. In this session, leading regulatory lawyers and compliance experts will give you a comprehensive analysis of the key regulatory developments affecting the nursing home industry to help you prepare for the next wave of litigation.

- Key takeaways from the OIG's 2011 work plan: preparing for intense scrutiny of whether claims were medically necessary, sufficiently documented, and coded correctly
- How plaintiffs are using the regulatory push for greater transparency to increase damages: What to watch out for in terms of liability including F-tags, CFRs, Five-Star, and MDS 3.0
  - Proactively spotting red flags from MDS database information now publically available to plaintiffs' attorneys targeting "problem nursing homes" under public records laws
- Analyzing the likelihood of jurors confusing evidence of regulatory violations, even trivial ones, with proof of negligence
  - The rise of class actions in lieu of personal injury suits and how to avoid them
- Survey of recent statutory and legislative developments and changes in guidelines issued by CMS
  - Complying with the complex requirements of Medicare and Medicaid auditing
  - What information must the nursing home provide to continue to qualify for Medicare and Medicaid?
- Using statutory claims to increase the potential jury verdict in routine negligence cases: The crisis of residents' rights statutes or private rights of action for damages
- Keeping surveys and other quality assurance documents out of evidence
  - What you can do to make sure surveys are not used to provide a template for a civil lawsuit
  - Maintaining a sense to the jury of the context under which the survey was take
- Navigating the negligence, regulatory, and criminal intersection in an LTC case: Coordinating strategies with regulatory and fraud and abuse specialists to cover the collateral consequences and form a bulletproof defense

## DAY ONE: TUESDAY, JANUARY 31, 2012

### 7:15 **Registration and Continental Meet-and-Greet Breakfast**

### 8:15 **Co-Chairs' Opening Remarks**

#### *Timothy J. Cesar*

Vice President of Legal- Litigation  
Brookdale Senior Living (Milwaukee, WI)

#### *Donna J. Fudge*

Partner  
Fudge & McArthur, P.A. (St. Petersburg, FL)

### 8:30 **In-House Think Tank Session I: Proactively Preventing Costly Litigation and Strengthening the Provider Defense**

#### *Jonathan D. Allred*

Vice President & General Counsel  
Evergreen Healthcare (Vancouver, WA)

#### *Mark S. Beckel*

General Counsel  
Country Villa Health Services (Los Angeles, CA)

#### *Stephanie A. Griffin*

Chief Compliance Officer  
LaVie Care Centers (Tampa, FL)

#### *Laura Lally*

Vice President, Claims Management  
Caring Communities Shared Services (Chicago, IL)

#### *Kristine Morimoto*

Vice President of Risk Management  
Aegis Living (Redmond, WA)

#### **Moderator:**

#### *Norris Cunningham*

Partner  
Hall Render Killian Heath & Lyman PC (Indianapolis, IN)

#### Spotting the red flags from an in-house perspective that will impact litigation downstream

- Training and document retention strategies for nurses and other professionals who handle increasingly onerous paperwork requirements
- Credentialing procedures and policies to avoid inability to defend situations
  - Tips for mastering the excluded persons list process
- Heading quality of care cases off at the pass
  - Combating staffing requirements claims through adequate supervision: a look at what staffing ratios have come under fire in recent class actions
  - Doing more with less resources in light of the unprecedented 11% Medicare budget cuts
- Managing expectations when communicating with residents and families about sensitive emotional hot button issues about long term and end of life care
- Having a plan in place for coping with adverse outcomes
- Forming a social media policy to mitigate risk of litigation from communications by employees
- Structuring a unique compliance and insurance program based on the size of your organization
  - The challenges and benefits of self-insurance



- Making the case against corporate liability: why the skilled nursing duty of care is a non-delegable duty
- Developing a good reputation and fostering positive public relations to increase favorable public perception pre-suit

## 9:45 Morning Networking Break

### 10:00 Prevailing Against the Latest Plaintiffs' Claims: Emerging Strategies for Class Actions in the Nursing Home Context

*Kirkman T. Dougherty*

Partner

Hardin, Jesson & Terry, PLC (Fort Smith, AR)

*James A. Napoli*

Partner

Hanson Bridget LLP (San Francisco, CA)

*Kippy L. Wroten*

Founder and Shareholder

Wroten & Associates (Irvine, CA)

- Surveying recent class actions throughout the U.S.: has *Lavender v. Skilled Nursing* created a feeding frenzy?
  - Using recent Supreme Court rulings to challenge class certification
  - What does the *Dukes* case mean for long term care defendants?
- Tracking new trends in a still developing area of law
  - Is staffing an individual right and if so, is it enforceable?
- Challenging the claimed "Well Defined Community Interest"
  - Standing and class certification: exploring the individual analysis required to prove adequacy of care
  - Survey of state statutes providing added rights and formulating arguments to block liability based upon them
- Protecting the Due Process rights of the long term care operator
- Attacking plaintiffs' use of anecdotal evidence to breathe life into claims: the impact of *Dukes*
  - Challenging the use of sampling and the use of licensing and certification documents
  - Understanding the government's rights and responsibilities under the mandates of the Administrative Procedures Act and ensuring government adherence to the statute
- Defense class actions: the next "offense"

### 11:15 Using New Science to Develop Winning Defense Strategies in Tried and True Areas of Liability: Medication Errors, Pressure Ulcers, and Falls Cases

*W. Bruce Baird*

Member

Gwin Steinmetz Baird, PLLC (Louisville, KY)

*Bonnie-Lou Binnig, CHC*

Chief Compliance Officer

Vanguard Healthcare Services, LLC (Brentwood, TN)

*Ami L. DeMarco*

Partner

Purcell & Wardrope, Chartered (Chicago, IL)

*Mark B. Hartig*

Founding Shareholder

McCumber, Daniels, Buntz, Hartig, & Puig P.A. (Eagleville, PA)

- Examining the new theories of liability plaintiffs are using in negligence cases against LTC and nursing home providers
  - Survey of recent case law focusing on Florida, California, Louisiana and New York decisions
- Building a defense in a case alleging medication error
  - How the signs of dementia or other cognitive decline can be confused with overdose
  - Putting steps in place to avoid common medication errors and adverse drug interactions
- Understanding the clinical circumstances under which pressure sores are unavoidable to preclude a finding of liability
  - Combating jurors' sympathy when seeing graphic ulcer pictures
- Mounting an effective failure to thrive defense in an infectious disease or skin breakdown case
- Taking a realistic approach to the science of death
- Using the frequency of falls in the elderly to defend in a falls case
  - When can a single fall constitute negligence?
  - Determining who is at high risk to suffer a fall
  - Instituting fall prevention plans
- Cross-examining nurse and clinical expert witnesses

## 12:30 Networking Lunch

1:45 – 3:45

### Masters Level Trial Litigation Strategies: Forging a Bulletproof Defense Against an Increasingly Aggressive Plaintiffs' Bar

#### 1:45 Combating and Limiting Excessive Punitive Damages Awards Against Long Term Care Providers

*Bradley L. Kelly*

Founder

Law Office of Brad L. Kelly, P.C. (Bethesda, MD)

*Richard M. Sebek*

Shareholder

Banker Lopez Gassler P.A. (Tampa, FL)

- What is punitive conduct? Tips on rebutting Plaintiffs' attempts to seek punishment for mere negligent conduct
- Stopping the trickle before it becomes a flood: Using the Rules of Civil Procedure to filter out improper claims for punitive damages
- Debunking expert testimony to bolster punitive allegations
- Tips for impeaching and discrediting plaintiffs' experts
  - Researching frequent testifiers and the tactics they are likely to take
- Diminishing the potential for jury verdicts rooted in aroused emotions in long-term care cases
- Recognizing attitudinal divides between plaintiff and defense oriented jurors in voir dire
- Challenging the plaintiff's case through discovery and setting up the provider's defenses
  - Fighting the potential for an emotional response with the trier of facts through pre-trial motion practice with the trier of the law
  - Avoiding shock value through the use of pictures
  - Painting a picture of the plaintiff in a wrongful death case
- Debunking negative public perceptions surrounding widespread negligence or mistreatment in long term care facilities and nursing homes

2:45 **Defending Charting Errors and Omissions: Going Beyond the Basics to Overcome Holes in the Chart**

*Paul W. McCartney*

Partner

Rendigs, Fry, Kiely & Dennis, L.L.P. (Cincinnati, OH)

*Danny Newman*

Partner, Co-Chair, Long Term Care Practice Group

Reminger Co., L.P.A. (Cincinnati, OH)

*John E. Wade*

Member

Brunini, Grantham, Grower & Hewes PLLC (Jackson, MS)

- Using the chart as a whole to show evidence of good care
- The imperativeness of training nursing and medical staff to document properly and meticulously to prevent litigation
  - Defeating the “it’s not my job” mentality
- Overcoming the mantra “if you didn’t chart it, you didn’t do it”
  - Deflating jurors unrealistic expectations at trial by explaining standards of documentation in the medical field
  - Arguments and exhibits to highlight time spent actually caring for patients
  - Demonstrating that there is no such thing as a perfect chart
  - Clarifying that a lack of notation may be an innocent omission and not evidence of negligence

3:45 **Afternoon Networking Break**

4:00 **Minimizing Fraud & Abuse Risk in the Long Term Care Setting: Preparing for Unprecedented Scrutiny**

*Jason E. Bring*

Partner

Arnall Golden Gregory LLP

*Gabriel Imperato*

Managing Partner

Broad and Cassel (Forth Lauderdale, FL)

In its 2011 action plan, the OIG has come out swinging against skilled nursing facilities. There will be increased audits for nursing homes and skilled nursing facilities to determine the quality and necessity of services rendered. Prepare to have your records reviewed with a fine-tooth comb and used against you in subsequent litigation, including civil and criminal prosecution, whistleblowers’ suits, and even class action suits.

- What sort of actions are being watched for False Claims liability or being deemed “worthless services”?
- Examining the rise in whistleblowers and government enforcement in the face of increasing scrutiny and oversight post-healthcare reform
  - How plaintiffs are using the transparency provisions of the Elder Justice Act under healthcare reform to their benefit
- Defenses to show that billing is proper
  - Determining whether providers are billing properly
  - Has there been proper supervision?
- Managing relationships with employees in an area with high turnover to prevent disgruntled workers from turning into plaintiffs and whistleblowers

- Thinking beyond the medical staff: How social service workers, MDS, admissions, and activities staff can work for or against you
- Exploring the potential for criminal liability for directors and officers and other high-level long term care staff
  - When does a civil wrong become criminal in this context?

5:00 **Conference Adjourns to Day Two**

**DAY 2: WEDNESDAY, FEBRUARY 1, 2012**

7:30 **Continental Meet-and-Greet Breakfast**

8:15 **Co-Chairs’ Opening Remarks**

8:30 **View from the Bench: The Judicial Perspective on Litigating a Long Term Care Case**

*The Honorable Thierry Patrick Colaw*

Judge, Superior Court, Orange County

(Santa Ana, California)

*The Honorable James L. Robart*

District Judge, U.S. District Court,

Western District of Washington (Seattle, WA)

*The Honorable Keith J. Sickendick*

Administrative Law Judge, Departmental Appeals Board,

Office of the Deputy Secretary, United States Department of Health and Human Services (Washington, DC)

Moderator:

*Barb Duffy*

Partner

Lane Powell (Seattle, WA)

Do not miss this unique opportunity to learn from distinguished federal and state judges the legal theories and defenses they have found most effective when deciding a long term care case. Come prepared with your most pressing questions to get the most out of this session. Learn how to craft the arguments that will turn a long term care case in your favor.

10:00 **Morning Networking Break**

10:15 **Securing and Enforcing Arbitration Agreements in the Face of Emotional and Legal Roadblocks Specific to Long Term Care**

*Christy Tosh Crider*

Shareholder and Long Term Care Practice Group Leader

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC (Nashville, TN)

*Donna Fudge*

Partner

Fudge & MacArthur (St. Petersburg, FL)

*Bonnie Helfgott Krisztal*

Corporate Counsel

Extendicare Health Services, Inc. (Milwaukee, WI)

*Leonard Milcowitz*

Arbitrator

Milcowitz & Lyons, P.A. (Clearwater, FL)

- Drafting arbitration agreements that will comply with both state and federal arbitration law requirements
  - Minimizing the risk of litigation through proper formatting
  - Can states do an end run around the FAA?
- Selecting an arbitrator who understands the emotional and legal issues specific to long-term care and elder law
- What do arbitrators find beneficial?
- Explaining the benefits and process of arbitration to families
  - Training nursing home admissions staff on offering arbitration to families
  - Touting the benefits: Privacy, flexibility, and limited expenses compared with trial
  - The resident's right to opt out
- Understanding how the Congressional movement to remove arbitration agreements standard to most large chains will change the face of the industry

### 11:15 **In-House Think Tank Session II: Proactively Preventing Costly Litigation and Strengthening the Provider Defense**

*Caroline J. Berdzik*  
Assistant General Counsel  
Care One, LLC (Fort Lee, NJ)

*Timothy J. Cesar*  
Vice President of Legal- Litigation  
Brookdale Senior Living (Milwaukee, WI)

*Theresa Creagh*  
General Counsel  
Grane Healthcare (Pittsburgh, PA)

*Shannon Drake*  
Assistant General Counsel  
UHS- Pruitt Corporation (Norcross, Georgia)

*Lynn Fieldhouse*  
Associate General Counsel- Litigation  
Signature Healthcare (Louisville, KY)

*Jeffrey T. Royer*  
Former Associate General Counsel- Litigation Group  
HCR ManorCare (Toledo, OH)

*Beverly B. Wittekind*  
Vice President and General Counsel  
The Ensign Group (Mission Viejo, CA)

#### **Moderator:**

*William J. Mundy*  
Member  
Burns White LLC  
(West Conshohocken, PA and Cherry Hill, NJ)

#### Choosing and working closely with outside counsel in litigation

- What criteria are providers using to select outside counsel to represent them?
- Forecasting a realistic budget to work within despite spiraling litigation and insurance costs
- The big picture: harmonizing the efforts of the client provider, law firm counsel, and insurance defense attorneys while protecting individual interests
- Exploring alternate dispute resolution: how to make the determination when arbitration or mediation is the best recourse for a nursing home dispute
- Case studies: success stories of defense techniques that providers have used when being slammed on civil and criminal suits stemming from one claim
- Effective defenses to corporate liability claims
- Choosing a corporate representative to be your face at trial
- Preparing medical staff to answer questions at deposition and trial

### 12:30 **Conference Adjourns for Networking Lunch for Mock Jury Participants**

## POST-CONFERENCE MOCK JURY FOCUS GROUP

Wednesday, February 1, 2012

### Trial Skills and Jury Communication Drill Down

1:30 p.m. – 4:30 p.m. (Registration opens at 12:30 p.m.)

*J. Brian Jackson*  
Partner  
McGuire Woods (Charlottesville, VA)

*Robert W. Carter, Jr.*  
Attorney at Law  
Law Offices of Robert W. Carter, Jr. (Appomattox, VA)

#### Trial Moderator:

*The Honorable B. Waugh Crigler*  
Magistrate Judge, Western District of Virginia  
(Charlottesville, VA)

At trial, the jury has the final say, and the jury has spoken loudly over the course of the last year. As previously unprecedented verdicts like *Lavender* become increasingly common, it is more crucial than ever to hone your trial advocacy skills and litigation techniques based on current juror perception of the nursing home industry. In this highly insightful session, renowned plaintiffs' and defense counsel will actually put on a mini-trial before a distinguished judge and a randomly selected jury, based on a detailed, real-world nursing home abuse fact pattern. Attendees will have an insider's view of the jurors' deliberations to see what themes resonate with the jury and how minute differences in presentation turn a case in your favor. Reevaluate your own tactics and litigation team training approach based on what resonated with the jurors.

# PREVENTING AND DEFENDING LONG TERM CARE LITIGATION

Expert Risk Mitigation and Defense Strategies for Nursing Home and Assisted Living Facility Providers

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**PLUS**, don't miss the in-depth and interactive sessions that will give you the litigation expertise to truly set yourself apart from the competition:

**Pre-Conference Boot Camp:**  
Regulatory Fundamentals for Long Term Care Litigators

**Post-Conference Mock Jury Focus Group:** Trial Skills and Jury Communication Drill Down

## REGISTRATION FORM

### PRIORITY SERVICE CODE

TM-MPE

ATTENTION MAILROOM: If undeliverable to addressee, please forward to:  
**Counsel, Litigation Counsel, Long Term Care Counsel**



Can be recycled

CONFERENCE CODE: **884L12-MIA**

YES! Please register the following delegate for **Preventing and Defending Long Term Care Litigation**

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I would like to receive CLE accreditation for the following states: \_\_\_\_\_ . See CLE details inside.

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### Hotel Information

**American Conference Institute** is pleased to offer our delegates a limited number of hotel rooms at a preferential rate. Please contact the hotel directly and mention the "ACI: Long Term Care" conference to receive this rate:  
Venue: Conrad Miami  
Address: 1395 Brickell Avenue, Miami, FL, 33131, USA  
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