



# Fill the Gap Between You and Your Property Rights

## Emerging Issues in Title Insurance

August 12, 2015  
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## Overview

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- **Contemplating Risk at Origination**
- **Closing Protection Letter Indemnity**
- **Title Insurance Coverage**
  - Standard Provisions
  - Endorsements to Consider
- **Considerations after Closing**

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## Protecting Your Collateral Begins at Origination

### ▪ Allocations of Risks in a Loan Transaction

- Credit Risks → Lender
- Closing Table Risks → Title Insurance Underwriter
- Title Risks → Title Insurance Underwriter

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## Title Insurance Chronology



- Lender places a title insurance order by providing certain basic information to the Title Insurance Underwriter:
  - Borrower/Property Owner Name
  - Property Address
- The Lender does not typically have the legal description of the Property

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## Title Insurance Chronology



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- Using the information provided by the Lender, the Title Insurance Underwriter:
  - Reviews the Status of Title
  - Often provides the legal description of the Property
- This information is reflected in a Title Commitment, which sets forth title issues/defects that must be cleared in order to insure the contemplated security interest as a first priority lien

## Title Insurance Chronology



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- The Lender uses the Title Commitment to generate its closing instructions and determine whether to move forward with making the loan
- The Lender's Closing Instructions are prepared to direct the Closing Agent in its handling of the loan funds and advise of the Lender's expectations

## Title Insurance Chronology



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- The Closing Agent is often an authorized agent of the Title Insurance Underwriter
- The Closing Instructions set forth the Lender's requirements at the closing table
- The Closing Instructions act to shift the risk of closing issues to the Closing Agent

## Title Insurance Chronology



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- Often the Lender does not know the Closing Agent, but is entrusting the Closing Agent with large sums of money
- Given this risk, Lenders should obtain a Closing Protection Letter from the Title Insurance Underwriter
- The Closing Protection Letter shifts the risk of a Closing Agent's fraud or non-compliance with the Closing Instructions to the Title Insurance Underwriter

## Title Insurance Chronology



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- **The Closing Agent is required to:**
  - Comply with the Lender’s Closing Instructions
  - Obtain the borrower’s signatures on the Note and Security Instrument
  - Record the Security Instrument
  - Disburse the loan funds as set forth in the approved Settlement Statement
  - Collect a premium for the Title Insurance Policy

## Title Insurance Chronology



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- **After the Closing and after the Security Instrument is recorded the Title Insurance Underwriter will issue a Title Insurance Policy**
- **The Title Policy provides indemnity for:**
  - The validity and enforceability of the Security Instrument as a first lien on the Property
  - Adverse interests impairing the lien interest
  - Title to the Property being vested in someone other than the borrower

# Closing Protection Letters



The screenshot shows the FBI's Mortgage Fraud page. At the top, there is a navigation bar with the FBI logo, "FEDERAL BUREAU OF INVESTIGATION", and various menu items: CONTACT US, ABOUT US, MOST WANTED, NEWS, STATS & SERVICES, SCAMS & SAFETY, JOBS, and FUN & GAMES. A search bar is also present. Below the navigation bar, the page title is "Mortgage Fraud". A list of recent news items is displayed, including: "08.06.15 Settlement Agent Sentenced to Six Years in Prison in Multi-Million-Dollar Mortgage Fraud Scheme", "08.03.15 Jury Convicts Arizona Man of Mortgage Fraud Crimes", "08.03.15 Former Owner of Mortgage Lending Company Guilty of Bank Fraud", "07.30.15 Long Island Man Sentenced to 55 Months for Stealing More Than \$31 Million Dollars in a Wire Fraud Scheme Involving Sub-Prime Mortgages", "07.28.15 Myrtle Beach Man Enters Guilty Plea to Wire Fraud", "07.28.15 New York Man Sentenced in Million-Dollar Mortgage Fraud Scheme", "07.27.15 Essex County, New Jersey Man Sentenced to Two Years in Prison for His Role in \$5 Million Mortgage Fraud Scheme", "07.21.15 Conspirator Pleads Guilty in \$3.8 Million Mortgage Fraud Scheme", "07.21.15 North Royalton Man Sentenced to Nearly Three Years in Prison in Mortgage-Relief Scam", "07.21.15 Middleton Mortgage Broker Convicted of Bank Fraud", "07.16.15 Loan Officer Sentenced to More Than Two Years in Prison for Her Role in \$2.4 Million Mortgage Fraud", and "07.15.15 West Suburban Real Estate Broker Sentenced to 16 Months in Federal Prison in Mortgage Fraud Scam".

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# Closing Protection Letter

## Chicago Title Insurance Company

4170 Ashford Dunwoody Road, Suite 460, Atlanta, GA 30319 (404) 303-6300 Fax: (404) 303-6303

### STATEMENT OF SETTLEMENT SERVICE RESPONSIBILITY General Letter

Date: August 25, 2006

Re: [REDACTED]

To: [REDACTED]

Our Issuing Agent:  
Craig Long, L.L.C.  
Craig Long  
2450 Atlanta Highway, Suite 1904  
Cumming, GA 30040

Dear Sir/Madam:

When title insurance of CHICAGO TITLE INSURANCE COMPANY ("Company") is specified for your protection in connection with closings of real estate transactions in which you are to be the lessee or purchaser of an interest in land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by an Issuing Agent (an agent authorized to issue title insurance for the Company) or an Approved Attorney (an attorney who has been certified by the Company to perform title examinations and settlement services) and when such loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of such title documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you; or
2. Fraud of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with such closings to the extent such fraud affects the status of the title to said interest in land or the validity, enforceability or priority of the lien of said mortgage on said interest in land.

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## Closing Protection Letters

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- A CPL is an integral part of risk allocation at the closing table
- “The CPL is the means by which a title insurer ‘quell[s] a lender’s understandable fear of entrusting an unknown agent with large sums of money and important legal documents.’”

— *Regions Bank v. Stewart Title Guar. Co.*, 2015 WL 433486, at \*5 (D.S.C. Feb. 3, 2015) (quoting *F.D.I.C. v. Attorneys’ Title Ins. Fund*, 2014 WL 4384270, at \*4 (S.D. Fla. Sept.3, 2014))

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## CFPB Bulletin 2012-03

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- On April 13, 2012, the CFPB issued Bulletin 2012-03 regarding Service Providers, which includes closing agents
- Service Provider: “any person that provides a material service to a covered person of a consumer financial product or service”

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## CFPB Bulletin 2012-03



CFPB Bulletin 2012-03

Date: April 11, 2012

Subject: Service Providers

The Consumer Financial Protection Bureau ("CFPB") expects supervised banks and nonbanks to oversee their business relationships with service providers in a manner that

However, the mere fact that a supervised bank or nonbank enters into a business relationship with a service provider does not absolve the supervised bank or nonbank of responsibility for complying with Federal consumer financial law to avoid consumer harm. A service provider that is unfamiliar with the legal requirements applicable to the products or services being offered, or that does not make efforts to implement those

### A. Service Provider Relationships

The CFPB recognizes that the use of service providers is often an appropriate business decision for supervised banks and nonbanks. Supervised banks and nonbanks may outsource certain functions to service providers due to resource constraints, use service providers to develop and market additional products or services, or rely on expertise from service providers that would not otherwise be available without significant investment.

However, the mere fact that a supervised bank or nonbank enters into a business relationship with a service provider does not absolve the supervised bank or nonbank of responsibility for complying with Federal consumer financial law to avoid consumer harm. A service provider that is unfamiliar with the legal requirements applicable to the products or services being offered, or that does not make efforts to implement those requirements carefully and effectively, or that exhibits weak internal controls, can harm consumers and create potential liabilities for both the service provider and the entity with which it has a business relationship. Depending on the circumstances, legal responsibility may lie with the supervised bank or nonbank as well as with the supervised service provider.

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## Closing Protection Letters

- A CPL and a Title Policy are distinct and wholly separate in terms of the indemnity provided
- A CPL is an indemnity contract, which provides indemnity for a Closing Agent's:
  - Failure to follow the lender's closing instructions
  - Fraud or dishonesty in handling loan funds in connection with the closing

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## Closing Protection Letters

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- Provides indemnity for a lender's **actual loss**
  - Net realization calculation
    - The outstanding loan balance less the sales proceeds of the collateral property.
    - See *FD.I.C. v. First American Title Ins. Co.*, No. 13-15058, 2015 WL 1906139 (11th Cir. Apr. 28, 2015); *FDIC v. Property Transfer Services, Inc.*, 2013 WL 5535561, at \*16; *First American Title Ins. Co. v. Vision Mortgage Corp.*, 689 A.2d 154 (N.J. Super. Ct. App. Div. 1997).
    - Intended to make the lender whole

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## Recent CPL Trends

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- The FDIC as the receiver for failed banks is aggressively pursuing CPL indemnity based on closing agents' failure to comply with closing instructions, fraudulent appraisals and sham transactions
- The definition of actual loss has been decided by the 6<sup>th</sup> and 11<sup>th</sup> Circuits

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## Recent CPL Trends

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- The notice provision in the Florida form CPL, which requires notice within 90 days of the date of loss, will likely be decided in a current appeal pending in the 11<sup>th</sup> Circuit
  - FDIC v. Attorneys' Title Ins. Fund, Inc., Appeal No. 15-11466
- Title Insurers are trying to limit the scope of the CPL
  - To one property
  - To fraud on the part of the closing agent

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## CPL Takeaways

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- Request a CPL as part of the closing
- As part of the foreclosure process, review the loan for errors at the closing table

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# Title Insurance Policies

## LOAN POLICY OF TITLE INSURANCE

Issued by **Commonwealth Land Title Insurance Company**



Commonwealth Land Title Insurance Company is a member of the LandAmerica family of title insurance underwriters.

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the Insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
  - (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
  - (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the Insured has advanced or is obligated to advance;
8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named Insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as Insured, but only to the extent provided in the Conditions and Situations.

IN WITNESS WHEREOF, COMMONWEALTH LAND TITLE INSURANCE COMPANY has caused its corporate name and seal to be hereunto affixed by its duly authorized officer, the Policy to become valid when countersigned by an authorized officer or agent of the Company.

COMMONWEALTH LAND TITLE INSURANCE COMPANY

Attest:

Secretary



By:

President

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# Title Insurance Policies

- Secondary market sales require mortgages to be valid and enforceable first priority liens
- Secondary market purchasers allocate lien enforceability risks to originating/selling lender
- Shift the risk of title defects to the title insurer

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# Title Policy Endorsements

The screenshot shows the Fidelity National Title website with a navigation menu and a 'Resources' section. The 'Resources' section is expanded to show a list of 'ALTA Endorsements'. The list includes:

- ALTA Endorsement Form 1 - 06 Street Assessments
- ALTA Endorsement Form 2 - 06 Trust in Landing
- ALTA Endorsement Form 3 - 06 Zoning Unimproved Land
- ALTA Endorsement Form 3.1 - 06 Zoning - Combined Structure
- ALTA Endorsement Form 4 - 06 Condominium
- ALTA Endorsement Form 5 - 06 Planned Unit Development
- ALTA Endorsement Form 5.1 - 06 Planned Unit Development
- ALTA Endorsement Form 6 - 06 Variable Rate Mortgage
- ALTA Endorsement Form 6.2 - 06 Variable Rate Mortgage - Negative Amortization
- ALTA Endorsement Form 7 - 06 Manufactured Housing Unit
- ALTA Endorsement Form 7.1 - 06 Manufactured Housing - Conversion Loan
- ALTA Endorsement Form 7.2 - 06 Manufactured Housing - Conversion - Owner's
- ALTA Endorsement Form 8 - 06 Environmental Protection
- ALTA Endorsement Form 8.1 - 06 Environmental Protection
- ALTA Endorsement Form 9 - 06 Restrictions, Easements, Minerals - Owner's Policy Unimproved Land
- ALTA Endorsement Form 9.1 - 06 Restrictions, Easements, Minerals - Owner's Policy Unimproved Land
- ALTA Endorsement Form 9.2 - 06 Restrictions, Easements, Minerals - Owner's Policy Improved Land
- ALTA Endorsement Form 9.3 - 06 Restrictions, Easements, Minerals - Loan Policy
- ALTA Endorsement Form 9.4 - 06 Restrictions, Easements, Minerals - Owner's Policy Unimproved Land
- ALTA Endorsement Form 9.5 - 06 Restrictions, Easements, Minerals - Owner's Policy Improved Land
- ALTA Endorsement Form 10 - 06 Assignment
- ALTA Endorsement Form 10.1 - 06 Assignment and Debt Discharge
- ALTA Endorsement Form 11 - 06 Mortgage Modification
- ALTA Endorsement Form 12 - 06 Aggregation
- ALTA Endorsement Form 13 - 06 Leasehold - Owner's
- ALTA Endorsement Form 13.1 - 06 Leasehold - Loan
- ALTA Endorsement Form 14 - 06 Future Advance - Priority
- ALTA Endorsement Form 14.1 - 06 Future Advance - Knowledge
- ALTA Endorsement Form 14.2 - 06 Future Advance - Letter of Credit
- ALTA Endorsement Form 14.3 - 06 Future Advance - Reverse Mortgage
- ALTA Endorsement Form 15 - 06 Non-Imputation - Full Equity Transfer
- ALTA Endorsement Form 15.1 - 06 Non-Imputation - Additional Insured
- ALTA Endorsement Form 16.2 - 06 Non-Imputation - Partial Equity Transfer
- ALTA Endorsement Form 16 - 06 Massamine Financing
- ALTA Endorsement Form 17 - 06 Access and Entry
- ALTA Endorsement Form 17.1 - 06 Indirect Access and Entry
- ALTA Endorsement Form 18 - 06 Single Tax Parcel
- ALTA Endorsement Form 18.1 - 06 Multiple Tax Parcel
- ALTA Endorsement Form 19 - 06 Contiguity/Multiple Parcels
- ALTA Endorsement Form 19.1 - 06 Contiguity/Single Parcel
- ALTA Endorsement Form 20 - 06 First-Lien Multiple Parcel Transactions
- ALTA Endorsement Form 21 - 06 Creation/Right
- ALTA Endorsement Form 22.1 - 06 Location and Map

Fidelity National Title's Endorsement Manual includes a total of 61 endorsements



# Common Gaps in Coverage

- **Legal Description Issues**
  - Survey Coverage
  - Location of improvements
- **Condominium/PUD/Use Restrictions Issues**
  - The risk of compliance with covenants, conditions and restrictions





## Filling the Gaps: Endorsements

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### ▪ Legal Description Issues

- Remove any survey exclusion in the Title Policy
- Request a Location Endorsement (ALTA 22.1)
  - Provides coverage for loss arising from a variation in the street address and the location of improvements

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## Filling the Gaps: Endorsements

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### ▪ Legal Description Issues

- Request tax parcel coverage (ALTA 18-06)
  - Provides coverage in the event that the tax parcel identification number shown does not include all of the Land described in the policy or includes land not described in the policy
- Perform a survey at origination

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## Filling the Gaps: Endorsements

### ■ Condominium/PUD/Use Restrictions Issues

- Condominium and PUDs are governed by restrictions placed on the owners
- The Condominium Endorsement (ALTA 4) and PUD endorsement (ALTA 5) shift the risk of CC&R violations to the title insurer

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## Considerations After Closing

### ■ Continuation of Insurance

ALTA Loan Policy 1992

#### 2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

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## Considerations After Closing

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### ■ Continuation of Insurance

- Where there is an investor on a loan, after foreclosing a servicer may decide to quit claim the property to the investor after closing
- This quit claim may terminate the title policy

### ■ Solutions

- Review loan file for title issues before conveying title
- Acquire an owner's title policy after foreclosure

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## Considerations After Closing

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### ■ Timely Claims Submission

- One of the first things a title insurer reviews upon receiving a claim is whether the claim was timely
- The Title Policy allows an insurer to reduce its liability to the extent of the prejudiced cause by any untimely notice.

### ■ Solutions

- If the claim arises out of litigation, tender a claim as soon as possible
- Be diligent in reviewing loan files for title issues early in the foreclosure process

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## Considerations After Closing

### ■ Full Credit Bids

- At foreclosure, the lender has the option to full credit bid
- Title insurers have attempted to argue that a full credit bid reduces a lender's loss to zero since there is no outstanding amount due on the note

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## Considerations After Closing

### ■ Full Credit Bid—Recent Decisions Rejecting Full Credit Bid Rule

- Bank of Idaho v. First Am. Title Ins. Co., 156 Idaho 618, 622, 329 P.3d 1066, 1070 (2014) (“all payments made” under Section 2(c)(ii) do not include a full credit bid by the insured at a trustee's sale)
- Preservation Capital Consultants, LLC v. First Am. Title Ins. Co., 751 S.E.2d 256 (S.C. 2013) (declined to use the full credit bid as a bar to recovery)

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## Considerations After Closing

### ▪ Full Credit Bid—Recent Decisions Applying Full Credit Bid Rule

- Equity Income Partners LP v. Chicago Title Ins. Co., No. CV-11-1614-PHX-SMM, 2013 WL 6498144, at \*8 (D. Ariz. Dec. 11, 2013)
- “The Court finds that Plaintiffs' full-credit bids constitute payment under Paragraph nine of the Policies. Arizona statutes and precedent leave no doubt that when a lender acquires property pursuant to their full-credit bid, they are paying to themselves the entire amount of unpaid principal, interest, and associated fees—as a result, both the security interest and borrower's debt are extinguished.”

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## Questions?

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