

By Senator Posey

24-1038-07

See HB 743

1 A bill to be entitled
 2 An act relating to duties, powers, and
 3 liabilities of trustees; amending s. 660.417,
 4 F.S.; revising criteria for investments in
 5 certain investment instruments; amending s.
 6 660.46, F.S.; conforming cross-references to
 7 changes made by the act; amending s. 736.0802,
 8 F.S.; specifying additional trust property
 9 transactions not voidable by a beneficiary;
 10 revising certain disclosure and applicability
 11 requirements; broadening authority for
 12 investing in certain investment instruments;
 13 excusing trustees from certain compliance
 14 requirements under certain circumstances;
 15 amending s. 736.0808, F.S.; revising provisions
 16 relating to powers to direct; providing
 17 additional criteria and requirements relating
 18 to grants of powers to trustees to direct,
 19 consent to, or disapprove investment actions;
 20 specifying absence of liability of trustees for
 21 certain losses; specifying absence of trustee
 22 obligations to perform certain activities
 23 relating to investment under certain
 24 circumstances; subjecting trust advisors to
 25 jurisdiction of state courts under certain
 26 circumstances; amending s. 736.0816, F.S.;
 27 defining the term "mutual fund" for certain
 28 purposes; amending s. 736.1008, F.S.; revising
 29 limitations on proceedings against trustees;
 30 providing additional limitations; amending s.
 31 736.1011, F.S.; providing construction relating

1 to trustee drafts of exculpatory terms in a
2 trust instrument; providing an effective date.

3
4 Be It Enacted by the Legislature of the State of Florida:

5
6 Section 1. Subsection (3) of section 660.417, Florida
7 Statutes, as amended by section 18 of chapter 2006-217, Laws
8 of Florida, is amended to read:

9 660.417 Investment of fiduciary funds in investment
10 instruments; permissible activity under certain circumstances;
11 limitations.--

12 (3) The fact that such bank or trust company or an
13 affiliate of the bank or trust company owns or controls
14 investment instruments shall not preclude the bank or trust
15 company acting as a fiduciary from investing or reinvesting in
16 such investment instruments, provided such investment
17 instruments:

18 (a) Are held for sale by the bank or trust company or
19 by an affiliate of the bank or trust company in the ordinary
20 course of its business of providing investment services to its
21 customers and do not include any such interests held by the
22 bank or trust company or by an affiliate of the bank or trust
23 company for its own account.

24 (b) Are sold primarily to accounts for which the bank
25 or trust company is ~~not~~ acting as a fiduciary, or are not sold
26 to accounts for which the bank or trust company is acting as a
27 fiduciary upon terms that are normally less ~~not more~~ favorable
28 to the buyer than the terms upon which they are normally sold
29 to accounts for which the bank or trust company is not acting
30 as a fiduciary.

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1 Section 2. Paragraphs (a) and (e) of subsection
2 (1) and subsection (9) of section 660.46, Florida Statutes,
3 as amended by section 19 of chapter 2006-217, Laws of Florida,
4 are amended to read:

5 660.46 Substitution of fiduciaries.--

6 (1) The provisions of this section shall apply to the
7 transfer of fiduciary accounts by substitution, and for those
8 purposes these provisions shall constitute alternative
9 procedures to those provided or required by any other
10 provisions of law relating to the transfer of fiduciary
11 accounts or the substitution of persons acting or who are to
12 act in a fiduciary capacity. In this section, and only for its
13 purposes, the term:

14 (a) "Limitation notice" has the meaning ascribed in s.
15 736.1008(6)(~~4~~).

16 (e) "Trust disclosure document" has the meaning
17 ascribed in s. 736.1008(6)(~~4~~)(a).

18 (9) Unless previously or otherwise barred by
19 adjudication, waiver, consent, limitation, or the provisions
20 of subsection (8), an action for breach of trust or breach of
21 fiduciary duties or responsibilities against an original
22 fiduciary in whose place and stead another trust company or
23 trust department has been substituted pursuant to the
24 provisions of this section is barred for any beneficiary who
25 has received a trust disclosure document adequately disclosing
26 the matter unless a proceeding to assert the claim is
27 commenced within 6 months after receipt of the trust
28 disclosure document or the limitation notice that applies to
29 the trust disclosure document, whichever is received later. In
30 any event, and notwithstanding lack of adequate disclosure,
31 all claims against such original fiduciary which has complied

1 with the requirements of s. 736.1008 are barred as provided in
2 chapter 95. Section 736.1008~~(6)~~~~(4)~~(a) and (c) applies to this
3 subsection.

4 Section 3. Subsections (2) and (5) of section
5 736.0802, Florida Statutes, are amended to read:

6 736.0802 Duty of loyalty.--

7 (2) Subject to the rights of persons dealing with or
8 assisting the trustee as provided in s. 736.1016, a sale,
9 encumbrance, or other transaction involving the investment or
10 management of trust property entered into by the trustee for
11 the trustee's own personal account or which is otherwise
12 affected by a conflict between the trustee's fiduciary and
13 personal interests is voidable by a beneficiary affected by
14 the transaction unless:

15 (a) The transaction was authorized by the terms of the
16 trust;

17 (b) The transaction was approved by the court;

18 (c) The beneficiary did not commence a judicial
19 proceeding within the time allowed by s. 736.1008;

20 (d) The beneficiary consented to the trustee's
21 conduct, ratified the transaction, or released the trustee in
22 compliance with s. 736.1012;

23 (e) The transaction involves a contract entered into
24 or claim acquired by the trustee when that person had not
25 become or contemplated becoming trustee; ~~or~~

26 (f) The transaction was consented to in writing by a
27 settlor of the trust while the trust was revocable; ~~or-~~

28 (g) The transaction is one described in s.
29 736.0816(1), (3), or (6).

30 (5)(a) An investment by a trustee authorized by lawful
31 authority to engage in trust business, as defined in s.

1 658.12(20), in investment instruments, as defined in s.
2 660.25(6), that are owned or controlled by the trustee or its
3 affiliate, or from which the trustee or its affiliate receives
4 compensation for providing services in a capacity other than
5 as trustee, is not presumed to be affected by a conflict
6 between personal and fiduciary interests provided the
7 investment otherwise complies with chapters 518 and 660 and
8 the trustee complies with the disclosure requirements of this
9 subsection.

10 (b) A trustee who, pursuant to authority granted in
11 this subsection, invests trust funds in investment instruments
12 that are owned or controlled by the trustee or its affiliate
13 shall disclose the following to all qualified beneficiaries:

14 1. Notice that the trustee has invested trust funds in
15 investment instruments owned or controlled by the trustee or
16 its affiliate.

17 2. The identity of the investment instruments.

18 3. The identity and relationship to the trustee of any
19 affiliate that owns or controls the investment instruments.

20 (c) A trustee who, pursuant to authority granted in
21 this subsection, invests trust funds in investment instruments
22 with respect to which the trustee or its affiliate receives
23 compensation for providing services in a capacity other than
24 as trustee shall disclose to all qualified beneficiaries, the
25 nature of the services provided by the trustee or its
26 affiliate, and all compensation, including, but not limited
27 to, fees or commissions paid or to be paid by the account and
28 received or to be received by an affiliate arising from such
29 affiliated investment.

30 (d) Disclosure required by this subsection shall be
31 made at least annually unless there has been no change in the

1 method or increase in the rate at which such compensation is
2 calculated since the most recent disclosure. The disclosure
3 may be given in a trust disclosure document as defined in s.
4 736.1008, in a copy of the prospectus for the investment
5 instrument, in any other written disclosure prepared for the
6 investment instrument under applicable federal or state law,
7 or in a written summary that includes all compensation
8 received or to be received by the trustee and any affiliate of
9 the trustee and an explanation of the manner in which such
10 compensation is calculated, either as a percentage of the
11 assets invested or by some other method.

12 (e) This subsection shall apply as follows:

13 1. This subsection does not apply to qualified
14 investment instruments or to a trust for which a right of
15 revocation exists.

16 2. For investment instruments other than qualified
17 investment instruments, paragraphs (a), (b), (c), and (d)
18 shall apply to irrevocable trusts created on or after July 1,
19 2007, which expressly authorize the trustee, by specific
20 reference to this subsection, to invest in investment
21 instruments owned or controlled by the trustee or its
22 affiliate.

23 3. For investment instruments other than qualified
24 investment instruments, paragraphs (a), (b), (c), and (d)
25 shall apply to irrevocable trusts executed on or after July 1,
26 2007, which are not described in subparagraph 2. and to
27 irrevocable trusts executed prior to July 1, 2007, only as
28 follows:

29 a. Such paragraphs shall not apply until 60 days after
30 the statement required in paragraph (f) is provided and no
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1 objection is made or any objection which is made has been
2 terminated.

3 (I) An objection is made if, within 60 days after the
4 date of the statement required in paragraph (f), a super
5 majority of the eligible beneficiaries deliver to the trustee
6 written objections to the application of this subsection to
7 such trust. An objection shall be deemed to be delivered to
8 the trustee on the date the objection is mailed to the mailing
9 address listed in the notice provided in paragraph (f).

10 (II) An objection is terminated upon the earlier of
11 the receipt of consent from a super majority of eligible
12 beneficiaries of the class that made the objection or the
13 resolution of the objection pursuant to this subparagraph.

14 (III) If an objection is delivered to the trustee, the
15 trustee may petition the court for an order overruling the
16 objection and authorizing the trustee to make investments
17 under this subsection. The burden shall be on the trustee to
18 show good cause for the relief sought.

19 (IV) Any qualified beneficiary may petition the court
20 for an order to prohibit, limit, or restrict a trustee's
21 authority to make investments under this subsection. The
22 burden shall be upon the petitioning beneficiary to show good
23 cause for the relief sought.

24 (V) The court may award costs and attorney's fees
25 relating to any petition under this subparagraph in the same
26 manner as in chancery actions. When costs and attorney's fees
27 are to be paid out of the trust, the court, in its discretion,
28 may direct from which part of the trust such costs and fees
29 shall be paid.

30 b. The objection of a super majority of eligible
31 beneficiaries under this subparagraph may thereafter be

1 removed by the written consent of a super majority of the
2 class or classes of those eligible beneficiaries that made the
3 objection.

4 (f)1. Any time prior to initially investing in any
5 investment instrument described in this subsection other than
6 a qualified investment instrument, the trustee of a trust
7 described in subparagraph (e)3. shall provide to all qualified
8 beneficiaries a statement containing the following:

9 a. The name, telephone number, street address, and
10 mailing address of the trustee and of any individuals who may
11 be contacted for further information.

12 b. A statement that, unless a super majority of the
13 eligible beneficiaries objects to the application of this
14 subsection to the trust within 60 days after the date the
15 statement pursuant to this subsection was delivered, this
16 subsection shall apply to the trust.

17 c. A statement that, if this subsection applies to the
18 trust, the trustee will have the right to make investments in
19 investment instruments, as defined in s. 660.25(6), which are
20 owned or controlled by the trustee or its affiliate, or from
21 which the trustee or its affiliate receives compensation for
22 providing services in a capacity other than as trustee, and
23 that the trustee or its affiliate may receive fees in addition
24 to the trustee's compensation for administering the trust.

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26 A statement by the trustee is not delivered if the statement
27 is accompanied by another written communication other than a
28 written communication by the trustee that refers only to the
29 statement.

30 2. For purposes of paragraph (e) and this paragraph:

31 a. "Eligible beneficiaries" means:

1 (I) If at the time the determination is made there are
2 one or more beneficiaries as described in s. 736.0103(14)(c),
3 the beneficiaries described in s. 736.0103(14)(a) and (c); or

4 (II) If there is no beneficiary described in s.
5 736.0103(14)(c), the beneficiaries described in s.
6 736.0103(14)(a) and (b).

7 b. "Super majority of the eligible beneficiaries"
8 means:

9 (I) If at the time the determination is made there are
10 one or more beneficiaries as described in s. 736.0103(14)(c),
11 at least two-thirds in interest of the beneficiaries described
12 in s. 736.0103(14)(a) or two-thirds in interest of the
13 beneficiaries described in s. 736.0103(14)(c), if the
14 interests of the beneficiaries are reasonably ascertainable;
15 otherwise, two-thirds in number of either such class; or

16 (II) If there is no beneficiary as described in s.
17 736.0103(14)(c), at least two-thirds in interest of the
18 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
19 interest of the beneficiaries described in s. 736.0103(14)(b),
20 if the interests of the beneficiaries are reasonably
21 ascertainable; otherwise, two-thirds in number of either such
22 class.

23 c. "Qualified investment instrument" means a mutual
24 fund, common trust fund, or money market fund described in and
25 governed by s. 736.0816(3).

26 d. An irrevocable trust is created upon execution of
27 the trust instrument. If a trust that was revocable when
28 created thereafter becomes irrevocable, the irrevocable trust
29 is created when the right of revocation terminates.

30 (g) Nothing in this chapter is intended to create or
31 imply a duty for the trustee to seek the application of this

1 subsection to invest in investment instruments described in
2 paragraph (a), and no inference of impropriety may be made as
3 a result of a trustee electing not to invest trust assets in
4 investment instruments described in paragraph (a).

5 (h) This subsection is not the exclusive authority for
6 investing in investment instruments described in paragraph
7 (a). A trustee who invests trust funds in investment
8 instruments described in paragraph (a) is not required to
9 comply with paragraph (b), paragraph (c), or paragraph (f) if
10 the trustee is permitted to invest in such investment
11 instruments pursuant to subsection (2) or any other law that
12 would authorize the investments described in paragraph (a).

13 Section 4. Section 736.0808, Florida Statutes, is
14 amended to read:

15 736.0808 Powers to direct.--

16 (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the
17 trustee may follow a direction of the settlor that is contrary
18 to the terms of the trust while a trust is revocable. For
19 purposes of this section, the acts of the settlor of a trust
20 while the trust is revocable shall be treated as acts of a
21 trust advisor.

22 (2) The terms of a trust instrument may confer on a
23 person one or more powers and discretions of a trust advisor
24 which may be exercised or not exercised, in the best interests
25 of the trust, in the sole and absolute discretion of the trust
26 advisor whose actions are binding on all other persons. A
27 trust advisor may be granted the power to direct, consent to,
28 or disapprove any investment action of the trustee, any
29 distribution of trust assets, and any modification or
30 termination of the trust. For purposes of this section,
31 investment actions of the trustee include, but are not limited

1 to, acquisition, retention, purchase, sale, exchange, tender,
2 encumbrance, or other transactions affecting ownership or
3 rights of trust property and the investment and reinvestment
4 of principal and income of the trust.

5 ~~(3)(2)~~ If the terms of a trust confer on a person one
6 or more powers and discretions of a trust advisor ~~other than~~
7 ~~the settlor of a revocable trust the power to direct certain~~
8 ~~actions of the trustee, the trustee shall act in accordance~~
9 ~~with an exercise of the power unless the attempted exercise is~~
10 ~~manifestly contrary to the terms of the trust or the trustee~~
11 ~~knows the attempted exercise would constitute a serious breach~~
12 ~~of a fiduciary duty that the person holding the power owes to~~
13 ~~the beneficiaries of the trust. The trustee shall not be~~
14 liable, individually or as a fiduciary, for any loss that
15 results from compliance with a direction of the trust advisor;
16 for any loss that results from a failure to take any action
17 that requires prior approval of the trust advisor if the
18 trustee timely sought but failed to obtain that authorization;
19 or for any failure to correct, address, or pursue redress
20 against the trust advisor for any breach of trust or other act
21 of the trust advisor in the exercise or failure to exercise
22 the power of the trust advisor. The trustee is also relieved
23 from any obligation to perform investment or suitability
24 reviews, inquiries, or investigations or to make
25 recommendations or evaluations with respect to any investments
26 to the extent the trust advisor had authority to direct
27 investment actions of the trustee. This subsection does not
28 apply to a trust advisor appointed by the trustee unless the
29 trust was revocable at the time of appointment, and the
30 trustee who appointed the trust advisor was also the settlor
31 of the trust.

1 ~~(3) The terms of a trust may confer on a trustee or~~
2 ~~other person a power to direct the modification or termination~~
3 ~~of the trust.~~

4 (4) A person, other than a beneficiary, who holds a
5 power to direct is presumptively a fiduciary who, as such, is
6 required to act in good faith with regard to the purposes of
7 the trust and the interests of the beneficiaries. The holder
8 of a power to direct is liable for any loss that results from
9 breach of a fiduciary duty.

10 (5) By accepting an appointment to serve as a trust
11 advisor of a trust that is subject to the laws of this state,
12 the trust advisor submits to the jurisdiction of the courts of
13 this state even if investment advisory agreements or other
14 related agreements provide otherwise, and the trust advisor
15 may be made a party to any action or proceeding if issues
16 relate to a decision or action of the trust advisor.

17 Section 5. Subsection (3) of section 736.0816, Florida
18 Statutes, is amended to read:

19 736.0816 Specific powers of trustee.--Except as
20 limited or restricted by this code, a trustee may:

21 (1) Collect trust property and accept or reject
22 additions to the trust property from a settlor, including an
23 asset in which the trustee is personally interested, and hold
24 property in the name of a nominee or in other form without
25 disclosure of the trust so that title to the property may pass
26 by delivery but the trustee is liable for any act of the
27 nominee in connection with the property so held.

28 (3) Acquire an undivided interest in a trust asset,
29 including, but not limited to, a money market mutual fund,
30 mutual fund, or common trust fund, in which asset the trustee
31 holds an undivided interest in any trust capacity, including

1 | any money market or other mutual fund from which the trustee
2 | or any affiliate or associate of the trustee is entitled to
3 | receive reasonable compensation for providing necessary
4 | services as an investment adviser, portfolio manager, or
5 | servicing agent. A trustee or affiliate or associate of the
6 | trustee may receive compensation for such services in addition
7 | to fees received for administering the trust provided such
8 | compensation is fully disclosed in writing to all qualified
9 | beneficiaries. As used in this subsection, the term "mutual
10 | fund" includes an open-end or closed-end management investment
11 | company or investment trust registered under the Investment
12 | Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended.

13 | (6) Borrow money, with or without security, and
14 | mortgage or pledge trust property for a period within or
15 | extending beyond the duration of the trust and advance money
16 | for the protection of the trust.

17 | Section 6. Section 736.1008, Florida Statutes, is
18 | amended to read:

19 | 736.1008 Limitations on proceedings against
20 | trustees.--

21 | (1) Except as provided in subsection (2), all claims
22 | by a beneficiary against a trustee for breach of trust are
23 | barred as provided in chapter 95 as to:

24 | (a) All matters adequately disclosed in a trust
25 | disclosure document issued by the trustee, with the
26 | limitations period beginning on the date of receipt of
27 | adequate disclosure.

28 | (b) All matters not adequately disclosed in a trust
29 | disclosure document if the trustee has issued a final trust
30 | accounting and has given written notice to the beneficiary of
31 | the availability of the trust records for examination and that

1 any claims with respect to matters not adequately disclosed
2 may be barred unless an action is commenced within the
3 applicable limitations period provided in chapter 95. The
4 limitations period begins on the date of receipt of the final
5 trust accounting and notice.

6 (2) Unless sooner barred by adjudication, consent, or
7 limitations, a beneficiary is barred from bringing an action
8 against a trustee for breach of trust with respect to a matter
9 that was adequately disclosed in a trust disclosure document
10 unless a proceeding to assert the claim is commenced within 6
11 months after receipt from the trustee of the trust disclosure
12 document or a limitation notice that applies to that
13 disclosure document, whichever is received later.

14 (3) When a trustee has not issued a final trust
15 accounting or has not given written notice to the beneficiary
16 of the availability of the trust records for examination and
17 that claims with respect to matters not adequately disclosed
18 may be barred, a claim against the trustee for breach of trust
19 based on a matter not adequately disclosed in a trust
20 disclosure document accrues when the beneficiary has actual
21 knowledge of the facts upon which the claim is based or actual
22 knowledge of the trustee's resignation, repudiation of the
23 trust, ~~or~~ adverse possession of trust assets, or termination
24 of the trust and is barred as provided in chapter 95.

25 (4) Notwithstanding subsection (1), subsection (2), or
26 subsection (3), all claims by a beneficiary against a trustee
27 shall be barred 10 years after the date of the act or omission
28 of the trustee complained of. The running of the 10-year
29 period is tolled by the minority of the beneficiary entitled
30 to sue during any period of time in which a parent, guardian,
31 or guardian ad litem does not exist, has an interest adverse

1 to that of the minor, or is adjudicated to be incapacitated to
2 sue.

3 (5) The failure of the trustee to take corrective
4 action shall not be construed as a separate act or omission
5 and shall not be construed to extend any period of limitations
6 otherwise established by law, including, but not limited to,
7 the limitations established by this section.

8 ~~(6)(4)~~ As used in this section, the term:

9 (a) "Trust disclosure document" means a trust
10 accounting or any other written report of the trustee. A trust
11 disclosure document adequately discloses a matter if the
12 document provides sufficient information so that a beneficiary
13 knows of a claim or reasonably should have inquired into the
14 existence of a claim with respect to that matter.

15 (b) "Trust accounting" means an accounting that
16 adequately discloses the information required by and that
17 substantially complies with the standards set forth in s.
18 736.08135.

19 (c) "Limitation notice" means a written statement of
20 the trustee that an action by a beneficiary against the
21 trustee for breach of trust based on any matter adequately
22 disclosed in a trust disclosure document may be barred unless
23 the action is commenced within 6 months after receipt of the
24 trust disclosure document or receipt of a limitation notice
25 that applies to that trust disclosure document, whichever is
26 later. A limitation notice may but is not required to be in
27 the following form: "An action for breach of trust based on
28 matters disclosed in a trust accounting or other written
29 report of the trustee may be subject to a 6-month statute of
30 limitations from the receipt of the trust accounting or other
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1 written report. If you have questions, please consult your
2 attorney."

3 ~~(7)(5)~~ For purposes of this section, a limitation
4 notice applies to a trust disclosure document when the
5 limitation notice is:

6 (a) Contained as a part of the trust disclosure
7 document or as a part of another trust disclosure document
8 received within 1 year prior to the receipt of the latter
9 trust disclosure document;

10 (b) Accompanied concurrently by the trust disclosure
11 document or by another trust disclosure document that was
12 received within 1 year prior to the receipt of the latter
13 trust disclosure document;

14 (c) Delivered separately within 10 days after the
15 delivery of the trust disclosure document or of another trust
16 disclosure document that was received within 1 year prior to
17 the receipt of the latter trust disclosure document. For
18 purposes of this paragraph, a limitation notice is not
19 delivered separately if the notice is accompanied by another
20 written communication, other than a written communication that
21 refers only to the limitation notice; or

22 (d) Received more than 10 days after the delivery of
23 the trust disclosure document, but only if the limitation
24 notice references that trust disclosure document and:

25 1. Offers to provide to the beneficiary on request
26 another copy of that trust disclosure document if the document
27 was received by the beneficiary within 1 year prior to receipt
28 of the limitation notice; or

29 2. Is accompanied by another copy of that trust
30 disclosure document if the trust disclosure document was
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1 received by the beneficiary 1 year or more prior to the
2 receipt of the limitation notice.

3 ~~(8)(6)~~ This section applies to trust accountings for
4 accounting periods beginning on or after ~~July~~ January 1, 2007
5 ~~2008~~, and to written reports, other than trust accountings,
6 received by a beneficiary on or after ~~July~~ January 1, 2007
7 ~~2008~~.

8 Section 7. Subsection (2) of section 736.1011, Florida
9 Statutes, is amended to read:

10 736.1011 Exculpation of trustee.--

11 (2) An exculpatory term drafted or caused to be
12 drafted by the trustee is invalid as an abuse of a fiduciary
13 or confidential relationship unless the trustee proves that
14 the exculpatory term is fair under the circumstances and that
15 the term's existence and contents were adequately communicated
16 directly to the settlor. An exculpatory term is not drafted or
17 caused to be drafted by the trustee within the meaning of this
18 subsection when the trustee provides exculpatory language to
19 the person drafting the trust instrument which the trustee
20 requests or requires to be contained in the trust instrument.

21 Section 8. This act shall take effect July 1, 2007.
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