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Issues Regarding the Servicemembers Civil Relief Act (SCRA)

50 U.S.C. App. 501, et. seq.

The SCRA is not new; it was originally enacted as the Soldiers and Sailors Civil Relief Act in 1940. Congress enacted substantial amendments and renamed the Act in 2003. A relatively substantial body of case law developed throughout the country between the original enactment in 1940 and the amendment in 2003. It is important to remember when looking for guidance in the case law for issues that arise now under SCRA that the 2003 amendments were both substantial and substantive; meaning that case law interpreting the old version of the statute may not translate directly to SCRA.

Who Is Covered?

SCRA provides protections in civil proceedings to members of the military. The list of covered persons is found in 50 U.S.C. App. 511:

> Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty;
>
> Members of the National Guard who have been called to active duty for over 30 days; and
>
> Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

It is not safe to assume that if you hold court in an area far removed from a military installation you do not need to know about SCRA. Military families covered by the Act live throughout the state, especially since it has become more common in the last 15 years or so for members of our National Guard to be called to active duty.

Waiver of Protections

Section 517 of the SCRA provides that "a servicemember may waive any of the rights and protections provided by this Act," specifically including the rights and protections provided in sections 521 and 522 discussed below. Except for explicitly designated cases, there are no

additional provisions in the SCRA relating to the waiver generally. So, for example, unless the case involves one of the designated issues, there is nothing indicating that the waiver must be in writing or that it be executed at any particular point in time.

However, for the case types set out in 50 U.S.C. App. 517(b), the waiver must be in writing (that must be in at least 12 point type) and it must be made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. These agreements are those dealing with the modification or termination of a contract, lease, bailment, or any obligation secured by a mortgage, deed of trust or lien. They also are agreements relating to the repossession, foreclosure or forfeiture of property that is security for any obligation or was purchased or received under a contract or lease.

You Don't Have to Know It All

SCRA is comprehensive legislation. Fortunately, issues for district court judges arise most frequently under only two sections in the Act; section 521, which provides protections for servicemembers who have not made an appearance in a civil case, and section 522 which applies when a servicemember specifically requests a stay of proceedings.

Section 521

Actions Required Whenever a Defendant Has Not Made An Appearance in a Civil Case

This is the section that has caused the most recent concern throughout the state because it applies to all civil proceedings in district court (there are no exceptions) and the law puts the burden on the court to ensure the required procedures are followed. The section applies only when a servicemember has not made an appearance, so you will not have a party in front of you requesting protection.

Summary of 521

The section is straightforward. It applies to all civil proceedings in which a defendant does not make an appearance. Before a court can enter any kind of order or judgment – whether temporary or final – the court must require that plaintiff file an affidavit indicating whether or not defendant is in the military. If defendant is in the military, the court cannot enter an order until the court appoints a lawyer for defendant. The lawyer can request, or the court can enter without a request, a stay of proceedings for a minimum of 90 days. The stay must be granted if requested by the attorney and the court determines that defendant may have a meritorious defense to the claim against him that cannot be presented without the presence of the defendant, or if the attorney has been unable to locate defendant or otherwise determine if a meritorious defense exists.

Issues Arising Out of 521

Even though the statute is short and straightforward, it has raised a number of questions as judges and other court personnel attempt to apply the law. The following are examples of issues I have heard recently. I have attached a copy of the statute to this manuscript. Because there are no court opinions in NC addressing these and many other issues arising out of the practical application of these requirements, judges should refer to the specific language in the statute when trying to decide how to proceed.

1. Does this section actually apply to all civil cases in district court?

   Yes. The law states that the affidavit must be provided in any civil action – specifically including custody cases – before any kind of order or judgment can be entered. This includes, along with every other civil proceeding, 50B and 50C cases, absolute divorce cases, juvenile proceedings, and small claims appeals.

2. Does signing an Acceptance of Service Constitute an appearance?

   I think so. Appearance simply means an act by a defendant that indicates an acceptance of the personal jurisdiction of the court. An Acceptance of Service is for that precise purpose. NC appellate courts have adopted a broad interpretation of appearance, *Judkins v. Judkins,* 113 NC App 734 (1994)("Other than a motion to dismiss for lack of jurisdiction, virtually any action constitutes a general appearance."); and *Williams v. Williams,* 46 NC App 787 (1980)(attorney's participation in discussion with judge and plaintiff's counsel in chambers constituted an appearance).

3. What about motions to modify? If defendant made an appearance at the initial hearing, do we need to worry about the affidavit at the time of modification?

   This is a question that does not have a clear answer and I have found no case law at all on point. On the one hand, NC law never has required that a plaintiff re-establish personal jurisdiction by serving a motion to modify by Rule 4 service. And, if a defendant relocates to another state after the initial order is entered, he/she cannot raise a lack of minimum contacts as a defense to a motion to modify. Once personal jurisdiction is acquired, the court keeps it over defendant until the case ends.

   If the concept of "appearance" in SCRA is the same as the concept of "appearance" in relation to personal jurisdiction, then there should be no requirement that a defendant who made an appearance in the initial proceeding receive the protections of section 521 in a modification proceeding.

On the other hand, the SCRA contains no definition of appearance and the clearly stated intent of section 521 is to protect the interests of servicemembers who have no actual knowledge of the civil proceeding. While it generally is the responsibility of any litigant to keep up with pending litigation, motions to modify arguably are separate and apart from the litigation that was originally pending. A servicemember may have no reason to expect a motion to modify support or alimony. The same can be said for Rule 60 motions in any civil case. As requiring the Affidavit for these proceedings would further the purpose of SCRA, I am not confident our appellate courts will say it is not required.

4. Does the Affidavit have to be filed with the complaint?

   Not unless your Chief Judge has adopted a local rule requiring that the Affidavit be filed at the time the complaint is filed. The SCRA requires the affidavit before the entry of a temporary or final order or judgment.

5. Can the plaintiff testify rather than submit an Affidavit?

   No. Section 521 requires that the statement, declaration, verification or certificate be in writing. It can be in any written format (so it can be included in the Complaint, for example) as long as the writing is "subscribed and certified or declared to be true under penalty of perjury."

6. What does the Affidavit have to say?

   Plaintiff must say whether or not defendant is in the military and state the facts that support his/her belief. It is up to you as judge to determine whether the facts offered are sufficient to support plaintiff's belief. It is common for plaintiffs to use a website maintained by the US Department of Defense to determine military status. *See* www.dmdc.osd.mil/appj/scra/. This will work if plaintiff has sufficient information about defendant, such as birth date and social security number. It may be inconclusive if plaintiff does not have that information.

   There is no requirement that plaintiff use this website or check directly with the Department of Defense. So, it is possible for plaintiff to offer other facts that will satisfy you as judge that he/she has a basis for the assertion about whether defendant is or is not in the military.

   The statute requires that the plaintiff file the affidavit. I believe an attorney can file on a client's behalf, but the affidavit must contain only allegations and statements within the personal knowledge of the person who actually signs the affidavit.

7. What if Plaintiff doesn't know defendant's military status?

The plaintiff has an obligation to try to obtain the required information, so the affidavit should show that plaintiff conducted a reasonably thorough search. If you are convinced plaintiff tried to find out but could not, the case can proceed as usual. However, you have the option of requiring plaintiff to post a bond to cover any damage resulting to the servicemember if it is later determined he/she was entitled to the stay.

8. Does the affidavit have to be filed before the court enters an ex parte DVPO or an ex parte custody order?

   I have found no case law addressing this point. An ex parte order clearly is a temporary order and the SCRA specifically states the Affidavit must be filed before any temporary order is entered. Also, our appellate court has noted on a number of occasions that DVPOs have significant collateral consequences – often must greater than any other type of civil judgment – on a defendant, so the need for protection for military personnel is particularly important in these cases. These two points together indicate that it would be good practice to obtain the affidavit from plaintiff when it is possible to do so.

   However, I am not confident an appellate court would say that a trial court cannot enter an emergency order of protection because of the lack of an affidavit. It probably is safe to assume that the requirements of the Act will be met by ensuring that the Affidavit is filed by the time of the return hearing on the ex parte.

9. Role of appointed counsel

   If the affidavit or other information establishes defendant is in the military, the court cannot enter any type of temporary or final order until the court appoints "an attorney to represent the defendant." 50 App. USCA 521(b)(2). The Act says nothing else about the role of the lawyer or how the lawyer is to be paid.

   The explicit provisions of section 521 indicate that the role of the attorney is to attempt to locate the servicemember and advise the servicemember of the right to request a stay of proceedings pursuant to section 521(d) described below. If the lawyer is unable to locate the servicemember, the attorney must request a stay of proceedings on his/her behalf.

   There is nothing in SCRA indicating a legislative intent to afford all military personnel court-appointed counsel to represent the servicemember in the underlying civil proceedings. Rather, the intent appears to be to help the servicemember access the protections of the SCRA and the role of counsel should be limited to that purpose. However, because NC law generally does not recognize the concept of a limited appearance in a civil case, see e.g. *Perkins v. Sykes*, 233 NC 147 (1951)(attorney impliedly agrees to handle case until termination; can withdraw only with leave of court

after giving adequate notice to client), the court needs to enter an order allowing the attorney to withdraw from the case when the work is completed.

10. Should lawyer be appointed at ex parte DVPO, custody or 50C hearing?

    See remarks above dealing with the Affidavit at the ex parte stage. The explicit language of the SCRA requires that an attorney be appointed before any temporary or final order or judgment is entered. Obviously, the attorney appointed for defendant has no right to be present at or to be notified of the ex parte proceeding. So, as with the affidavit, it would be a good practice to, where possible, appoint the lawyer at the time the ex parte order is entered. In that case, the lawyer can appear at the return hearing. Appointment at the ex parte stage may help avoid an additional continuance that will be required if counsel is not appointed until the return hearing.

    On the other hand, until we have appellate court guidance indicating otherwise, ex parte emergency protection should not be denied based on the lack of an affidavit or inability to appoint counsel. Given the nature of the proceedings and the fact that a servicemember is no more at risk for collateral consequences of the ex parte order than is any other defendant, I believe it is likely that appellate courts would interpret the section 521 requirements to apply only at the return hearings rather than at the ex parte stage.

11. How is the lawyer paid?

    Unfortunately, the SCRA does not address this issue and there is no provision in NC statutes either. The general rule is that attorney fees cannot be ordered as part of damages or court costs unless there is specific statutory authority. *Davis v. Kelly*, 147 NC App 102 (2001). There are a number of district court proceedings where attorney fees are authorized, and I believe the cost of the SCRA attorney can be included in an award in those cases when the award is entered in accordance with the statute authorizing the fees. Examples include:

    GS 6-21.1: Personal injury or property damage cases where judgment for plaintiff is $10,000 or less.
    GS 50-13.6: Counsel fees in custody and child support cases
    GS 50-16.4: Counsel fees in alimony and postseparation support cases
    GS 50B-3: Attorney fees to either party when court enters a DVPO
    GS 50C: attorney fees to either party when court enters a civil no-contact order

    For your consideration: There is recent unpublished opinion from a court in Connecticut, *Wells Fargo v. Pederson*, 58 Conn. L. Rptr. 124 (2014), where the court decided that the role of an appointed attorney in a SCRA case is similar to that of a GAL.

Because Connecticut law allows GAL fees to be assessed as part of court costs – as does NC law, see GS 7A-305(d)(7), the court held that the trial court had authority to order either party or both to pay the attorney fees.

I'm not sure what the appellate courts will say about this argument. On the one hand, the primary job of the lawyer is to locate the defendant and report back to the court. This supports the argument that the lawyer actually is simply performing a task for the court and should be treated similarly as a GAL with regard to pay. On the other hand, the SCRA attorney clearly has an obligation to offer legal advice to the client regarding his/her rights under the SCRA. This indicates more of a lawyer-client type relationship rather than a GAL relationship.

12. When do I have to grant a stay for a servicemember who has not made an appearance?

Section 521(d) provides that the court must grant a stay for a minimum of 90 days if the court determines that:

(1) There may be a defense to the action and a defense cannot be presented without the presence of defendant; or
(2) After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

The provisions for granting a stay when a servicemember requests one are in Section 522, discussed below. The SCRA provides that section 521 and 522 are mutually exclusive rather than cumulative, meaning if the service member requests a stay pursuant to 522, he/she is not entitled to the protections of 521. *See* section 522(e). Similarly, when considering a stay for a defendant who has not made an appearance, the court does not need to consider the provisions of section 522. *See* section 521(e) and (f).

13. Does a stay mean I can't do anything in the case?

That is unclear because the SCRA does not define 'stay'. It clearly means the court cannot proceed with the case but it is not clear that it means the court has no authority to act in any way. For example, G.S 1-75.12, which allows a court to issue a "stay" when a case involving the same parties and the same subject matter also is pending in another state, provides that after entering the stay, the trial court maintains jurisdiction to "modify the stay order or taker such actions as the interest of justice require." This indicates that a stay does not by definition mean the court necessarily loses all jurisdiction to act. In addition, courts in other states have allowed the entry of temporary orders to protect children while the stay is in place, holding that a stay does not mean a court loses all jurisdiction. *See e.g., Lenser v. McGowan*, 191 SW3rd 506 (Arkansas 2010)("the stay of the Civil Relief Act does not freeze a case in permanent limbo and leave a … court

without authority to act at all;" entry of a temporary custody order upheld because child's life is not "in suspended animation" until servicemember returns).

14. If an order is entered without following the SCRA requirements, is the order void?

    Failure to follow the requirements of section 521 clearly is legal error. *See Harris v. Harris*, 922 NE2d 626 (Indiana 2010)(judgment reversed on appeal and remanded for new trial). However, cases in other states indicate that orders and judgments entered without the SCRA protections are not void and not automatically subject to being set aside upon motion by the servicemember. *See e.g In re KB*, 298 SW3rd 691 (2009)(failure to follow procedures makes order voidable not void); *Krumme v. Krumme*, 636 P2d 814 (1981)(same under old version of act).

    Section 521(g) allows the court to set aside a judgment entered when a servicemember made no appearance in an action but only if the servicemen requests that the judgment be set aside no later than 90 days after his/her release from military service and can show he/she:

    (A) Was materially affected by reason of military service in making a defense to the action; and
    (B) Has a meritorious defense to the civil action.

    If the servicemember cannot meet this burden, the order or judgment is valid and enforceable regardless of whether the court complied with section 521 requirements or not.

Section 522

Procedure When Servicemember Requests a Stay

Summary of 522

This section applies only when you have a servicemember asking you for protection in the form of a stay of proceedings. There is no right to appointed counsel when the court is considering the servicemember's request for an initial stay of a minimum of 90 days. Rather, counsel does not need to be appointed unless the court denies a request for an additional stay following the granting of the first. Section 522(d).

1. When can the servicemember ask for the stay?

Section 522(a) allows the member to request a stay at any point in any civil proceeding if at the time of the request, he/she is in the military or is within 90 days after leaving the military.

2. When do I have to grant the stay?

Section 522(b) is less discretionary than was the Soldiers' and Sailors' Civil Relief Act. Therefore, you must be careful not to rely on case law before 2008 in interpreting this part of the SCRA. It may be instructive and otherwise helpful, but the statute you will be interpreting is significantly different.

The SCRA now provides that the court may on its own motion, but **shall** upon application of the servicemember, stay the proceeding for a minimum of 90 days if the conditions in the statute are met. Section 522(b). That means that if a servicemember requests a stay and you determine the conditions have been met, a stay for a minimum of 90 days must be entered.

The conditions are set out in Section 522(b)(2). The court must receive an application for a stay that includes:

(A) A communication setting out facts stating the manner in which the current military duty requirements of the servicemember materially affect his/her ability to appear and stating a date when the servicemember will be available to appear; and

(B) A communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the communication.

Unlike the pre-2003 version of the law, the SCRA does not appear to give the court the discretion to determine whether military duty actually does or does not materially affect the ability of the servicemember to appear. Rather, if the servicemember makes that allegation and offers facts to support it, the court must accept it and grant the stay as long as the communication from the commanding officer also complies with the statute.

3. How many stays can a servicemember request?

   Section 522(d) allows a servicemember who has been granted an initial stay to request an additional stay. The section contains no limit on the number of requests a servicemember can make but the section appears to allow the court more discretion in determining whether to grant additional time than it does for the initial request. The servicemember can request the additional stay "based on continuing material effect of military duty on the servicemember's ability to appear," and the servicemember must provide the same communications as required for the initial stay request.

   An attorney must be appointed "to represent the servicemember in the action of proceeding" if the court refuses to grant a request for an additional stay. Section 522(d)(2). The role of counsel is in this section is less clear than in the Section 521 proceeding. The servicemember already knows about the action and has made requests for protection pursuant to the SCRA. It may be that the role of the attorney is limited to renewing the servicemember's request for additional time and asking the trial court to reconsider but it is possible to argue that the SCRA intends a more comprehensive role for the lawyer at this stage.

United States Code Annotated
Title 50 Appendix. War and National Defense (Refs & Annos)
Servicemembers Civil Relief Act
Act Oct. 17, 1940, C. 888, 54 Stat. 1178, as Amended Dec. 19, 2003, Pub.L. 108-189, SEC. 1, 117 Stat. 2835 (Refs & Annos)
Title II. General Relief (Refs & Annos)

50 App. U.S.C.A. § 521
Formerly cited as 50 App. USCA § 520

§ 521. Protection of servicemembers against default judgments

Effective: January 28, 2008

Currentness

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) Appointment of attorney to represent defendant in military service

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to

represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) Defendant's military status not ascertained by affidavit

If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act [sections 501 to 515 and 516 to 597b of this Appendix].

(4) Satisfaction of requirement for affidavit

The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

(c) Penalty for making or using false affidavit

A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in Title 18, United States Code, or imprisoned for not more than one year, or both.

(d) Stay of proceedings

In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that--

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

(e) Inapplicability of section 202 procedures

A stay of proceedings under subsection (d) shall not be controlled by procedures or requirements under section 202 [section 522 of this Appendix].

(f) Section 202 protection

If a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding under section 202 [section 522 of this Appendix].

(g) Vacation or setting aside of default judgments

(1) Authority for court to vacate or set aside judgment

If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that--

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) Time for filing application

An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.

(h) Protection of bona fide purchaser

If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act [sections 501 to 515 and 516 to 597b of this Appendix], that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment.

CREDIT(S)

(Oct. 17, 1940, c. 888, Title II, § 201, as added Pub.L. 108-189, § 1, Dec. 19, 2003, 117 Stat. 2840; amended Pub.L. 110-181, Div. A, Title V, § 584(a), Jan. 28, 2008, 122 Stat. 128.)

Notes of Decisions (205)

50 App. U.S.C.A. § 521, 50 App. USCA § 521
Current through P.L. 114-49 approved 8-7-2015

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50 App. U.S.C.A. § 522
Formerly cited as 50 App. USCA § 521

§ 522. Stay of proceedings when servicemember has notice

Effective: January 28, 2008

Currentness

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section--

(1) is in military service or is within 90 days after termination of or release from military service; and

(2) has received notice of the action or proceeding.

(b) Stay of proceedings

(1) Authority for stay

At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

(2) Conditions for stay

An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

(c) Application not a waiver of defenses

An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

(d) Additional stay

(1) Application

A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.

(2) Appointment of counsel when additional stay refused

If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.

(e) Coordination with section 201

A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201 [section 521 of this Appendix].

(f) Inapplicability to section 301

The protections of this section do not apply to section 301 [section 531 of this Appendix].

CREDIT(S)

(Oct. 17, 1940, c. 888, Title II, § 202, as added Pub.L. 108-189, § 1, Dec. 19, 2003, 117 Stat. 2842; amended Pub.L. 108-454, Title VII, § 703, Dec. 10, 2004, 118 Stat. 3624; Pub.L. 110-181, Div. A, Title V, § 584(b), Jan. 28, 2008, 122 Stat. 128.)

Notes of Decisions (447)

50 App. U.S.C.A. § 522, 50 App. USCA § 522
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