

A Brief History of Piercing the Corporate Veil

Mark Cohen
The Cohen Law Group, P.C.
1942 Broadway, Suite 314, Boulder, CO 80302
110 Snyder Street, PO Box 617, Nederland, CO 80466
Boulder (303) 546-7937 Nederland (303) 258-0561
mark@cohenslaw.com
www.cohenslaw.com

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“The Mists of Metaphor”

The entire area of law is “enveloped in mists of metaphors.”

- “Alter ego”
- “Instrumentality”
- “Sham”
- “Dummy”
- “Alias”
- “Denuding”

“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”

Berkey v. Third Ave. Ry. Co., 155 N.E. 58 (N.Y. 1926) (Cardozo)

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When the Issue Arises

The issue arises most of ten when a plaintiff seeks to impose liability on shareholders of an insolvent corporation, but may also arise in other contexts:

- Jurisdiction
- Venue
- Tax Liability
- Validity of Service of Process
- Statutes of Limitation

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Early History

The idea that people might come together to form a distinct legal entity is not new:

- Code of Hammurabi (c. 2083) B.C. recognized "societies."
- Romans allowed for formation of collective bodies by imperial fiat. (Beginning of idea that government must sanction formation of entity).
- Guilds, Churches.
- British overseas trading companies, monopolies such as British East India Company (1600) and Hudson's Bay Company (1670).
- Joint Stock Companies

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Corporations in America

- In 1837, Connecticut enacted the first general incorporation statute. (Early corporations only did business in one state)
- With railroads, corporations wanted to operate in more than one state.
- *In Paul v. Virginia*, 75 U.S. 168 (1868), the Court held that a state can regulate a foreign corporation within its borders, but cannot prevent it from doing business in that state.
- Small states liberalized incorporation laws in what Justice Brandeis later called a "race to the bottom."

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Corporations in America

In 2006, 5,841,000 corporations filed tax returns in the United States

That was up from 3,717,000 in 1990.

874,816 new corporations formed in U.S. in 2008

Statistical Abstract of the United States for 2010, Tables 728, 748

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Corporation Defined

One common definition: "An association of persons created under law and regarded as being a separate legal entity with capacity of continuous existence."

A corporation is "an artificial being, invisible, intangible and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

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Characteristics of Corporations

1. Limited Liability
2. Transferability of Shares
3. Judicial Personality (Capacity to sue and enter into contracts, etc.)
4. Indefinite Duration

The Latin word for body is "corpus." A corporation is a separate body.

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The Growth of Limited Liability

- The principle of limited liability is relatively new. Early corporations did not arise from a desire for limited liability, but from a desire to facilitate a perpetual succession of individuals in a single enterprise.
- Joint stock companies could make calls on shareholders for money to pay debts, and creditors could assert this power directly against shareholders by a process similar to subrogation.
- 1855, England adopts Limited Liability Act.
- California did not recognize limited liability until 1928

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Limited Liability in America

"I weigh my words carefully when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times... It substitutes cooperation on a large scale for individual, cut-throat, parochial competition. It makes possible huge economy in production and trading... It means... the only possible engine for carrying on international trade on a scale commensurate with modern needs and opportunities."

Nicholas Butler Murray, President of Columbia University, Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York, November 16, 1911.

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Perception

Perception – It is nearly impossible to pierce the corporate veil. Because limited liability holds such an esteemed place in our law, courts frequently opine that their power to pierce the veil should be exercised "reluctantly," "cautiously," or only in "exceptional circumstances."

A Colorado Example:

"Insulation from individual liability is an inherent purpose of incorporation; only extraordinary circumstances justify disregarding the corporate entity to impose personal liability." *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003).

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Reality

Reality – Courts will pay homage to the "exceptional circumstances" tradition, but do what they believe is right.

An analysis of nearly 1,600 reported decisions revealed that courts pierced the corporate veil more than 40% of the time. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L.Rev. 1036 (1991).

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The Risk of Doing Business with a Corporation

There is always a risk in doing business with a corporation. Use of symbols such as "Inc." or "Corp." are a warning – notice to creditors – that shareholders do not accept unlimited personal liability. The risk may be small if the corporation is sound, but not all corporations prosper.

- 33,822 business bankruptcies in 2008.
- In 2008, 966,647 firms went out of business.

Data is from the Statistical Abstract of the United States for 2010, Table 748

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Development of the Piercing Doctrine

When a plaintiff has a valid cause of action against an insolvent corporation, the Court must weigh two competing values. The first is society's desire to uphold the principle of limited liability, and the second is the desire to achieve an equitable outcome.

Early decisions relied on equitable principles, and typically involved allegations of fraud. See, *Booth v. Bunce*, 33 N.Y. 139 (1865)

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Trivia

First use of "veil" may have been *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173, 179 (1839).

First use of "piercing the veil" may have been in a 1912 law review article. I.M. Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L.Rev. 496 (1912).

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Beyond Fraud

- *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417 (1892) (Notice to the incorporators was notice to the corporation itself).
- *J.J. McCaskill Co. v. U.S.*, 216 U.S. 504 (1910) (Corporate president’s actual knowledge of an act was attributed to corporation so corporation could not “evade its responsibilities.”).
- *U.S. v. Reading Co.*, 253 U.S. 26 (1920) (Gov’t brought suit under an antitrust statute. Railroad had established elaborate corporate structure of subsidiaries and holding companies. Characterizing a coal company as an “instrumentality” of the railroad, the Supreme Court declared it would “look through the forms to the realities of the relationship between the companies as if the corporate agency did not exist.”

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General Rule

If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

U.S. v. Milwaukee Refrigerator Transit Co., 142 F. 247 (C.C.E.D. Wisc. 1905).

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A Remedy – Not a Cause of Action

Most Courts hold that piercing the corporate veil is an equitable remedy – **not** a cause of action.

“Piercing the corporate veil is an equitable remedy, requiring balancing of the equities in each particular case.” *Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485 (Colo. App. 2001); See also, *Equinox Enterprises, Inc. v. Associated Media Inc.*, 730 SW2d 872 (Tex. App. 1987)

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Theories of Piercing the Corporate Veil

The *Milwaukee Refrigerator* rule focused on the harm to the plaintiff. Some courts did not like this because they felt it too vague. They began to focus on the relationship between the owners of the corporation and the corporation itself. Various tests and theories emerged.

- Alter ego
- Instrumentality
- Sham
- Totality of Circumstances
- Public Policy

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“Alter Ego” v “Instrumentality”

Courts tend to use these interchangeably. I believe the term “alter ego” originally focused on the relationship between the corporation and its shareholders while “instrumentality” focused on relationship between a parent and subsidiary.

Frederick J. Powell described an “instrumentality” test in his study, *Parent and Subsidiary Corporations* (1931).

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Sham to Perpetuate a Fraud Theory

Colorado does not treat this as a separate theory, but some states do.

In *Gibraltar Sav. v. L.D. Brinkman Corp.*, 860 F.2d 1275 (5th Cir. 1988), the Court held that a creditor was not entitled to pierce the corporate veil where evidence supported a “sham to perpetuate fraud” theory, but case was tried on an “alter ego” theory.

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Violation of Public Policy Test

Colorado has not explicitly recognized this as a separate theory, but there is language in *Fink v. Montgomery Elevator of Colorado*, 421 P.2d 735 (Colo. 1966), about using a corporate to “defeat public convenience.”

- Violation of Statutes
- Violation of Public Policy

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Piercing the Veil in Colorado

Gutheil v. Polichio, 86 P.2d 972 (Colo. 1939).

We are of the opinion that the following deduction is inescapable: That A. H. Gutheil's association with The Star Investment Company was so close and exclusive that it strips the company of its corporate cloak and leaves him standing in its place, holding in one hand the 'accredited agency' of his wife to do whatever he deemed best for her and himself, and in the other hand, the minute book of the corporation with the opportunity of making whatever entries were necessary to meet a given situation. In such cases the courts 'will disregard the fiction of corporate entity apart from the members of the corporation when it is attempted to be used as a means of accomplishing a fraud or an illegal act.' 14 C.J. 61.

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Piercing the Veil Colorado

Fink v. Montgomery Elevator Co. of Colorado, 421 P.2d 735 (Colo. 1966).

“The applicable rule in such a case is that in order to hold stockholders liable for corporate obligations, it must be shown **either** that the corporate entity was used to defeat public convenience, or to justify or protect wrong, fraud or crime, **or** that the situation in question was one which justified application of the alter ego doctrine.”

“To establish the alter ego doctrine it must be shown that **(1)** the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; **(2)** that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and **(3)** to adhere to the doctrine of corporate entity would promote injustice or protect fraud.”

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Piercing the Veil in Colorado

Leonard v. McMorris, 63 P.3d 323 (Colo. 2003)

Typically, a court will not allow the corporate veil to be pierced, except in certain factual circumstances. The court considers a variety of factors to determine whether the corporate form should be disregarded including:

(1) whether the corporation is operated as a separate entity, (2) commingling of funds and other assets, (3) failure to maintain adequate corporate records, (4) the nature of the corporation's ownership and control, (5) absence of corporate assets and undercapitalization, (6) use of the corporation as a mere shell, (7) disregard of legal formalities, and (8) diversion of the corporation's funds or assets to noncorporate uses.

Note: The terms "alter ego" and "instrumentality" do not appear in this decision.

Note: McMorris factors are not exclusive. The 10th Circuit has a list of ten factors. *Ziegler v. Inabata of America, Inc.*, 316 F.Supp.2d 908 (D.Colo. 2004). For a more detailed list, see *Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil*, 45 POF3d 1.

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Piercing the Veil in Colorado

In re Phillips, 139 P.3d 639 (Colo. 2006). Establishes a 3-part test:

Part 1

To determine whether piercing the corporate veil is appropriate, the court must first inquire into whether the corporate entity is the alter ego of the shareholder. Only then will actions ostensibly taken by the corporation be considered acts of the shareholder.

An alter ego relationship exists when the corporation is a "mere instrumentality for the transaction of the shareholders' own affairs, and there is such unity of interest in ownership that the separate personalities of the corporation and the owners no longer exist."

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Piercing the Veil in Colorado

In re Phillips, 139 P.3d 639 (Colo. 2006). Establishes a 3-part test:

Part 2

The court's second inquiry is whether justice requires recognizing the substance of the relationship between the shareholder and corporation over the form because the corporate fiction was "used to perpetrate a fraud or defeat a rightful claim."

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Piercing the Veil in Colorado

In re Phillips, 139 P.3d 639 (Colo. 2006). Establishes a 3-part test:

Part 3

Third, the court must evaluate whether an equitable result will be achieved by disregarding the corporate form and holding the shareholder personally liable for the acts of the business entity.

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Piercing the Veil in Colorado

Summary of Phillips 3-Part Test

1. Determine whether alter ego relationship exists;
2. Was corporation used to perpetrate a fraud or defeat a rightful claim;
3. Determine whether piercing the veil will achieve an equitable result

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Question: After *Phillips*, does the ruling in *Fink* that a court may pierce the corporate veil if the corporation was used to defeat public convenience, or to justify or protect wrong, fraud or crime, still apply, or does Colorado now look only at the alter ego analysis?

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McMorris Factors - Informalities

“Standing alone, informalities in the conduct of a corporate business do not form a basis for piercing the corporate form.”

Contractors Heating & Supply Co. v. Scherb, 432 P.2d 237 (Colo. 1967).

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McMorris Factors – Undercapitalization

Carpenter Paper Co. of Nebraska v. Lakin Meat Processors 435 N.W.2d 179 (Neb. 1989).

CPA testified for plaintiff and based his testimony on a study done by Robert Morris & Associates. According to CPA, in determining adequate capitalization of corporations, he found that as to the ratio of assets to debt, the corporations in the upper quartile of the Robert Morris study would have a ratio of 2.7 to 1, the middle quartile 1.8 to 1, and the lower quartile 1 to 1. Lakin Meat, in 1976, had a ratio of .65 to 1. Using the debt to net worth test, he said that corporations in the upper quartile would normally be found to have such a ratio of .6 to 1 and those in the lower quartile 5.1 to 1. Lakin Meat had a ratio of 7.32 to 1. Based on these tests, it was his opinion that Lakin Meat was thinly capitalized. However, on cross-examination, he gave the opinion that it was grossly inadequately capitalized based on the fact that it ran an overdraft of \$100,000 in the bank for 6 years.

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Burden of Proof in Colorado

Phillips: “A claimant seeking to pierce the corporate veil must make a clear and convincing showing that each consideration has been met.” Citing, *Contractors Heating & Supply Co.* 432 P.2d 237 (1967).

But See:

McCallum Family L.L.C. v. Winger, 221 P.3d 69 (Colo. App. 2009), holding that *Phillips* was “dictum” and is not binding. The proper burden of proof is preponderance of the evidence pursuant to § 13-25-127(1): “Any provision of the law to the contrary notwithstanding and except as provided in subsection (2) of this section, the burden of proof in any civil action shall be by a preponderance of the evidence...”

Question: Does the statute apply to a court’s decision to employ an equitable remedy?

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Applicability to Non-Shareholders

The remedy is not restricted to imposing liability on shareholders. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69 (Colo. App. 2009)

• *LaFond v. Basham*, 683 P.2d 367 (Colo. App. 1984) (Defendant was officer and director, not a shareholder).

• A corporate entity may be disregarded and corporate directors may be held personally liable if equity so requires. *Rosebud Corp. v. Boggio*, 561 P.2d 367 (Colo. App. 1977).

• *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009) (Remedy employed to impose liability on LLC manager).

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Applicability to Non-Shareholders

The doctrine has also been used to impose liability on:

- Creditors
- Optionees
- Spouses
- Significant Others

(Email me for cites)

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Jury Trial

“The issue of whether the corporate veil can be pierced is equitable and, thus, there was no right to a jury trial as to that issue.” *Straub v. Mountain Trails Resort, Inc.*, 770 P.2d 1321 (Colo. App. 1988).

But it is not error to submit issue to jury. *Geringer v. Wildhorn Ranch, Inc.*, 706 F.Supp. 1442 (D.Colo. 1988).

Also, jury trial is allowed in a direct action against corporate official. See, *Hoang v. Arbess* 80 P.3d 863 (Colo. App. 2003).

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Reverse Piercing

Reverse piercing seeks to disregard the corporate fiction and allow liability to be imposed on the corporation for acts of a shareholder.

Colorado recognizes reverse piercing. *In re Phillips*, 139 P.3d 639 (Colo. 2006).

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LLC's

§ 7-80-107, C.R.S. Application of corporation case law to set aside limited liability

(1) In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

(2) For purposes of this section, the failure of a limited liability company to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the limited liability company.

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Don't Put All Your Eggs in One Basket

Other relevant theories:

- Agency
- Civil Conspiracy
- Estoppel
- Fraud
- Fraudulent Transfer
- Statutes
- Trust Fund Doctrine
- Unjust Enrichment
- Breach of Fiduciary Duty
- Defective Incorporation
- Misrepresentation by Corporate Official
- Personal Guaranty
- No Notice of Separate Entity

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Misrepresentation by Corporate Official

Drake, an corporate officer, assured plaintiff there were no problems with corporation. Court held that whether Drake could be liable under alter ego theory, he was liable because he committed a tort against plaintiff. *B&K Distributing, Inc. v. Drake Bldg. Corp.*, 654 P.2d 324 (Colo. App. 1982).

"To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations." *Snowden v. Taggart*, 17 P.2d 305 (Colo. 1932).

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When a provider of goods or services is afraid to require a personal guaranty because doing so might "blow the deal," consider inserting a clause such as this:

"The person signing on behalf of Buyer/Lessee represents that it is solvent and that it has the present ability to make payment as required by this Contract."

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While an officer of a corporation cannot be held personally liable for a corporation's tort solely by reason of his or her official capacity, an officer may be held personally liable for his or her individual acts of negligence even though committed on behalf of the corporation, which is also held liable. Moreover, that a defendant is at all times acting on behalf of the corporation does not relieve the defendant of liability. And the corporate veil need not be pierced where a tort action is brought against an officer or director and the elements of the tort are proved.

Hoang v. Arbess, 80 P.3d 863 (Colo. App. 2003). See also, *Sanford v. Kobey Bros. Const. Corp.*, 689 P.2d 724 (Colo. App. 1984).

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Statutory Claims

§7-108-403(1), C.R.S.

(1) A director who votes for or assents to a distribution made in violation of [section 7-106-401](#) or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating said section or the articles of incorporation if it is established that the director did not perform the director's duties in compliance with [section 7-108-401](#). In any proceeding commenced under this section, a director shall have all of the defenses ordinarily available to a director.

In *Paratransit Risk Retention Group Ins. Co. v. Kamins*, 160 P.3d 307 (Colo. App. 2007), the Court held that sole remaining creditor could assert claim directly against directors under this statute. See also, *Ficor, Inc. v. McHugh*, 639 P.2d 385 (Colo. 1982); *Kim v. Grover C. Coors Trust*, 179 P.3d 86 (Colo. App. 2007) (Shareholder may maintain a personal action if the director's conduct violates a duty to the shareholder and causes him or her injury that is not suffered by other shareholders).

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Statutory Claims

§ 7-106-401. Distributions to shareholders

(1) A board of directors may authorize, and the corporation may make, distributions to its shareholders subject to any restriction in the articles of incorporation and subject to the limitations set forth in subsection (3) of this section.

(3) No distribution may be made if, after giving it effect:

- (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or
- (b) The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

Note: Read the entire statute.

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Common Law Claims

Alexander v. Anstine, 152 P.3d 497 (Colo. 2007).

"Under the common law, when a corporation becomes insolvent, a duty arises in its directors and officers to the corporation's creditors."

FN9. A 2006 amendment to the Colorado Revised Statutes, which does not apply to this case, states that directors and officers of corporations owe no fiduciary duties to the corporation's creditors. [§ 7-108-401\(5\), C.R.S.](#) (2006). We express no opinion on whether this provision applies where a corporation is insolvent.

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Final Exam

Piercing the corporate veil is a:

- A. Medical procedure
- B. Boulder based rock bank
- C. Equitable remedy
- D. Ceremonial dance of the Utes

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