No. 12-98

In the Supreme Court of the United States

ALBERT A. DELIA, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

E.M.A. (BY AND THROUGH HER GUARDIAN AD LITEM, DANIEL H. JOHNSON), WILLIAM EARL ARMSTRONG AND SANDRA ARMSTRONG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Does the anti-lien provision of the federal Medicaid laws, 42 U.S.C. § 1396p(a), preempt North Carolina General Statutes Section 108A-57, which purports to create a lien upon any tort settlement received by a Medicaid recipient from a third-party up to one-third of the settlement?

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STATEMENT

1. North Carolina, like all other States, voluntarily participates in the federal Medicaid program. As a result, the State of North Carolina has expressly agreed to be bound by the terms of that federal program. *See, e.g.,* 42 U.S.C. § 1396a; N.C. Gen. Stat. §§ 108A-54, -56.

The federal Medicaid program limits a State's ability to impose a lien upon the property of a Medicaid beneficiary. Specifically, the federal Medicaid Act authorizes such a lien in two narrowly defined circumstances: (1) a court has entered a judgment finding that benefits have been incorrectly paid to a beneficiary or (2) a beneficiary who owns real property is receiving inpatient services at a medical facility and certain specific requirements are met. 42 U.S.C. § 1396p(a)(1). This federal anti-lien provision states:

> *No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan*, except –
>
> > (A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or
> >
> > (B) in the case of the real property of an individual * * * who is an inpatient in a * * * medical institution [and the patient] cannot reasonably be expected to be discharged from the medical institution and to return home * * * *

42 U.S.C. § 1396p(a)(1) (emphasis added).

2. Respondent Emily M. Armstrong[1] is a twelve year old girl who lives with her parents in Taylorsville, North Carolina. As a result of malpractice by the physician who delivered her at birth, Emily is deaf, blind, unable to sit, walk, crawl or talk and suffers from mental retardation and a seizure disorder. Pet. App. 5a. Based on her extensive pain and suffering, loss of enjoyment of life, loss of earning capacity and future medical expenses, Emily incurred damages far in excess of $42 million as a result of her physician's malpractice. *See* 4th Cir. J.A. 179-80.

In February 2003, Emily's guardian ad litem brought a malpractice action against Emily's treating physician and others in North Carolina state court. Despite Emily's catastrophic injuries, a settlement of $2.8 million was agreed upon at a mediation conference. This negotiated amount was significantly influenced by considerations of limited available medical malpractice insurance coverage and the challenges generally associated with collecting a judgment from the limited assets of an individual. Based on all of the surrounding circumstances, the state superior court judge

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[1] Emily's full name is set out in the published opinion of the district court, as well as published opinions of the North Carolina appellate courts in the underlying tort action. *See, e.g.,* 722 F. Supp. 2d 653; *Armstrong v. Barnes,* 614 S.E.2d 371 (N.C. Ct. App.), *discr. review denied,* 621 S.E.2d 173 (N.C. 2005); *see also North Carolina Dep't of Health & Human Servs. v. Armstrong,* 690 S.E.2d 293 (N.C. Ct. App. 2010) (abating state court action during pending federal action). Pursuant to Fourth Circuit Local Rule 25(c)(3)(C), however, Emily was referred to by her initials "E.M.A." in all filings before the Fourth Circuit.

concluded that the settlement agreement "is fair and just, is in the best interest of the minor plaintiff Emily M. Armstrong, and is in all respects reasonable and proper." 4th Cir. J.A. 134.

Following the filing of the medical malpractice action by Emily's guardian ad litem, Petitioner North Carolina Department of Health and Human Services ("NC DHHS") asserted a statutory lien on any settlement proceeds resulting from that action. NC DHHS based its claim of lien upon N.C. Gen. Stat. § 108A-57(a) which provides:

> [T]he State * * * shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance * * * * Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but *the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered.*

N.C. Gen. Stat. § 108A-57(a)(emphasis added). NC DHHS made its assertion of a statutory lien: (1) even though there was no "judgment of a court on account of benefits incorrectly paid on behalf of" Emily, *see*

42 U.S.C. § 1396p(a)(1)(A), and (2) even though Emily owns no real property nor is she an inpatient in a medical facility, *see* 42 U.S.C. § 1396p(a)(1)(B). As a result of NC DHHS' purported lien, the state superior court judge directed that one-third of the settlement payment (i.e., the sum of $933,333.33) be paid to the Clerk of Court and placed in an interest bearing account "until such time as the actual amount of the lien owed by Emily Armstrong to [NC DHHS] is conclusively judicially determined." 4th Cir. J.A. 230; *see* Pet. App. 4a.

3. Following the entry of the state superior court order, Emily and her parents brought the present action in federal district court, seeking a declaratory judgment that the lien by NC DHHS was preempted by the federal Medicaid Act, 42 U.S.C. § 1396p(a). The complaint alleges that NC DHHS' assertion of a lien is inconsistent with the anti-lien provision of the federal Medicaid laws and this Court's decision in *Arkansas Dep't of Health & Human Servs. v. Ahlborn,* 547 U.S. 268 (2006). 4th Cir. J.A. 13. The complaint prays that the court declare N.C. Gen. Stat. § 108A-57 to be unconstitutional. 4th Cir. J.A. 18. The district court proceeded to stay discovery pending the appeal before the North Carolina Supreme Court in *Andrews v. Haygood,* 57A07-2, which raised similar challenges to the North Carolina statute. Pet. App. 74a.

On December 12, 2008, the North Carolina Supreme Court rendered its decision in *Andrews v. Haygood,* 669 S.E.2d 310 (N.C. 2008), *cert. denied,* 129 S. Ct. 2792 (2009). Relying upon a presumption that state statutes are constitutional, the North

Carolina Supreme Court, in a 4-3 decision, held that N.C. Gen. Stat. § 108A-57 is not preempted by federal law. Pet. App. 96a. The North Carolina Supreme Court distinguished this Court's decision in *Ahlborn* in that the *Ahlborn* decision involved a stipulation by the parties as to the reasonable value of the plaintiff's total claim for damages. Pet. App. 93a ("*Ahlborn* thus controls when there has been a prior determination or stipulation as to the medical expense portion of a plaintiff's settlement.").

In *Andrews,* the North Carolina Supreme Court concluded that N.C. Gen. Stat. § 108A-57 "comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements." Pet. App. 95a. The majority in *Andrews* opined that allowing NC DHHS to take one-third of all tort settlements without having to determine the actual proportion between various categories of damages would "promot[e] efficiency in Medicaid reimbursement." Pet. App. 95a. Justice Hudson, joined by Justices Brady and Timmons-Goodson, dissented. She reasoned that "*Ahlborn* is binding upon this Court, and its reasoning and holding compel the conclusion that the application of N.C. Gen. Stat. § 108A-57 here, without any further determination of how the settlement proceeds were allocated among different types of damages alleged by plaintiff, would be contrary to federal law." Pet. App. 101a (Hudson, J., dissenting).

The federal district court below adopted the reasoning of the majority in *Andrews* and granted summary judgment in favor of NC DHHS. Citing footnote 18 of this Court's decision in *Ahlborn*, the

district court reasoned that the *Ahlborn* decision leaves open the possibility that a State could "'adopt[] special rules and procedures for allocating tort settlements.'" Pet. App. 84a (quoting *Ahlborn,* 547 U.S. at 288, n.18). According to the district court, "North Carolina has adopted such a statutory scheme, which provides a reasonable method for ascertaining the State's medical reimbursements, while still protecting the interests of Medicaid recipients * * * *"

4. The Fourth Circuit reversed the district court, concluding that the irrebuttable presumption created by N.C. Gen. Stat. § 108A-57 is inconsistent with the *Ahlborn* decision. Pet. App. 52a (noting that *Ahlborn* cautions that if state rules and statutes provide a formula for allocating a settlement between past medical expenses paid by Medicaid and other categories of damages, States "must afford a mechanism permitting beneficiaries to rebut such a presumption"). The Fourth Circuit noted that "under the circumstances in this case, North Carolina's statutory presumption must be subject to adversarial testing." Pet. App. 53a. The Fourth Circuit concluded "the one-third cap on the state's recovery imposed by the North Carolina third-party liability statutes is in fatal conflict with federal law." Pet. App. 5a.

ARGUMENT

Petitioner contends that the Fourth Circuit erred in its construction of Medicaid's anti-lien provision. While there is a direct conflict between the Fourth

Circuit and the North Carolina Supreme Court on this issue, that conflict is of limited importance and will likely be resolved (either through the state supreme court reconsidering its decision or through state legislative amendments) in the near future without the necessity for intervention by this Court. The Fourth Circuit correctly concluded that the irrebuttable presumption created by the state statute at issue runs afoul of both the federal Medicaid Act and this Court's decision in *Ahlborn*. Further review is not warranted.

I. THE LIMITED SPLIT OF AUTHORITY DOES NOT WARRANT REVIEW BY THIS COURT AT THE PRESENT TIME.

The Petition correctly notes that the decision of the Fourth Circuit is in direct conflict with the decision of the North Carolina Supreme Court in *Andrews v. Haygood,* 669 S.E.2d 310 (N.C. 2008), *cert. denied,* 129 S. Ct. 2792 (2009). The split on this issue, however, is not substantial and does not merit review by this Court.

Consistent with this Court's decision in *Ahlborn*, two circuit courts and one state supreme court have held that Medicaid's anti-lien statute precludes States from enacting statutes that arbitrarily and irrebuttably allocate settlement proceeds as being payment for past medical expenses when, in actuality, those payments were made in order to compensate a tort victim for pain and suffering (and similar damages). *E.M.A. v. Cansler,* 674 F.2d 290 (4th Cir. 2012); *Tristani v. Richman*, 652 F.3d 360, 377-78 (3d Cir. 2011); *In re E.B.*, 2012 W. Va. LEXIS

314 (W. Va. 2012); *accord Southwest Fiduciary, Inc. v. Arizona Health Care Cost Containment Sys. Admin.,* 249 P.3d 1104, 1109 (Ariz. Ct. App. 2011); *Bolanos v. Superior Court*, 87 Cal. Rptr. 3d 174, 180 (Cal. Ct. App. 2008); *Lugo v. Beth Israel Med. Ctr.*, 819 N.Y.S.2d 892, 896 (N.Y. App. Div. 2006). The North Carolina Supreme Court has held to the contrary. *Andrews v. Haygood,* 669 S.E.2d 310 (N.C. 2008), *cert. denied,* 129 S. Ct. 2792 (2009); *accord Russell v. Agency for Healthcare Admin.,* 23 So. 3d 1266 (Fla. Dist. Ct. App. 2010); *Scharba v. Everett L. Braden, Ltd.*, 2010 U.S. Dist. LEXIS 40200 (M.D. Fla. 2010).

The North Carolina Supreme Court, of course, is not required to follow a decision by the Fourth Circuit construing federal law. *See, e.g., Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.,* 189 S.E.2d 266, 269 (N.C. 1972). Nevertheless, the North Carolina Supreme Court almost universally falls in line with Fourth Circuit decisions relating to the construction of a federal statute. *See, e.g., Tillman v. Commercial Credit Loans, Inc.,* 655 S.E.2d 362, 369 (N.C. 2008) (adopting Fourth Circuit holding that arbitration agreement that is unconscionable may not be enforced); *Pender County v. Bartlett,* 649 S.E.2d 364, 380 (N.C. 2007) (adopting Fourth Circuit holding that vote dilution claim under Section 2 of the Voting Rights applies only to majority-minority districts), *aff'd,* 556 U.S. 1 (2009); *Watson v. American Nat'l Fire Ins. Co.,* 425 S.E.2d 696, 697 (N.C. 1993) (adopting Fourth Circuit construction of federal regulation); *Brooks v. McWhirter Grading Co.,* 281 S.E.2d 24, 34 (N.C. 1981) (adopting Fourth Circuit construction of OSHA

regulation); *see also In re Search Warrants,* 683 S.E.2d 418, 426 (N.C. Ct. App. 2009) ("Although we are not bound by federal decisions regarding constitutional rights, we find the Fourth Circuit's reasoning persuasive * * * *"), *discr. review denied,* 694 S.E.2d 201 (N.C. 2010); *Housecalls Home Health Care, Inc. v. State*, 682 S.E.2d 741, 745 (N.C. Ct. App. 2009) ("While we are not bound by decisions of the Fourth Circuit, we find [its] reasoning * * * persuasive * * * *"), *discr. review denied,* 690 S.E.2d 697 (N.C. 2010); *State v. Wheeler,* 688 S.E.2d 51, 56 (N.C. Ct. App.) ("We find the Fourth Circuit's analysis * * * informative and instructive in our consideration of the present case."), *discr. review denied,* 701 S.E.2d 677 (N.C. 2010).

The divided decision (4-3 split) of the North Carolina Supreme Court in *Andrews* and the two lower court decisions that have followed *Andrews* appear to be aberrations.[2] The North Carolina Supreme Court is likely to correct its erroneous decision after considering the Fourth Circuit's opinion and the recent criticisms of *Andrews*. *See In re E.B.,* 2012 W. Va. LEXIS 314, at *64; Note, *A Post-*Ahlborn *Analysis of the Supreme Court of North*

[2] The North Carolina Supreme Court's decision appears to largely be the product of unfortunate timing. Two months after this Court issued the *Ahlborn* decision, the North Carolina Supreme Court in *Ezell v. Grace Hosp., Inc.,* 631 S.E.2d 131 (N.C. 2006), ruled that NC DHHS has a broad right of subrogation under N.C. Gen. Stat. § 108A-57(a). Remarkably, the North Carolina Supreme Court's ruling does not even cite to the *Ahlborn* decision. *See* Pet. App. 25a-26a. The court's ruling in *Ezell* appears to have greatly influenced the majority opinion in *Andrews*. *See* Pet. App. 96a.

Carolina's Decision in Andrews v. Haygood, 2 Charlotte L. Rev. 525, 542 (2010).

Subsequent to the Fourth Circuit's decision in the present case, NC DHHS has actively asserted liens under N.C. Gen. Stat. § 108A-57 in state court. *See, e.g., Race v. Evenflo Co.,* Case No. 09 CvS 4913 (N.C. Superior Court, Onslow County). If NC DHHS continues its practice of pursuing such liens in state court, the North Carolina Supreme Court will have ample opportunity to either re-affirm or overrule the *Andrews* decision. Moreover, the North Carolina Supreme Court will have the opportunity to reconsider *Andrews* in the context of the present dispute. In 2007, NC DHHS filed an action in state court against Respondents and requested an order directing disbursement of the funds being held by the court. *See North Carolina Dep't of Health & Human Servs. v. Armstrong,* 690 S.E.2d 293 (N.C. Ct. App. 2010). The North Carolina Court of Appeals held that NC DHHS' action should be abated. *Id.* Presumably, NC DHHS will move to re-activate that state court proceeding after the federal district court reaches an allocation.

Even if the North Carolina Supreme Court were to decline to reconsider *Andrews*, the issue may well be mooted if the North Carolina General Assembly were to enact clarifying legislation. Numerous commentators have urged the North Carolina General Assembly to do so. *See, e.g.,* Note, *A Post-*Ahlborn *Analysis*, *supra,* at 542; J. Saxon, *Medicaid "Liens" on Personal Injury Judgments and Settlement: The* Ahlborn *and* Ezell *Decisions*, Soc. Servs. L. Bulletin, No. 41, July 2006, at 18. Those

pleas have greater force in light of the decision below.

II. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S OPINION IN *AHLBORN*.

Petitioner's suggestion that review is necessary to correct an error in the decision below rings hollow. Pet. 13-19. The Fourth Circuit's opinion is consistent with both the federal Medicaid Act and this Court's decision in *Ahlborn*.[3]

In *Ahlborn*, this Court emphasized that Medicaid's anti-lien provision precludes States from

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[3] Petitioner implies that NC DHHS will, on occasion, "consent to compromise" with respect to the allocation of a tort settlement. Pet. 17. Pursuant to S. Ct. R. 15.2, Respondents dispute this statement. Prior to January 2011, NC DHHS' own manual stated that NC DHHS will *never* accept less than one-third of a tort settlement in satisfaction of its lien. NC DHHS, Third Party Recovery Manual, p. 17 ("*There is no circumstance in which a Medicaid lien can be waived.*"). It continues: "There is no authority in either Federal or State law to authorize Medicaid to compromise liens." *Id.* In a section entitled "Frequently Asked Questions," NC DHHS reiterates this position:

> QUESTION: My client has very severe injuries and will need very expensive medical care for the rest of his life. Would the Medicaid program consider reducing or waiving its lien so that my client will receive more money from the settlement?
>
> ANSWER: We do not waive or compromise liens.

Id. at 20.

recovering more than the "portion of a settlement that represents payment for medical care." 547 U.S. at 282. The Court concluded that States may not "demand reimbursement from portions of the settlement allocated or allocable to nonmedical damages." *Id.* at 291. States are simply given "a priority disbursement *from the medical expenses portion alone*." *Id.* (emphasis added). The Fourth Circuit's decision faithfully follows this Court's pronouncements in *Ahlborn*.[4]

As the Fourth Circuit recognized, N.C. Gen. Stat. § 108A-57 creates an arbitrary, irrebuttable presumption with respect to the allocation between past medical expenses and other categories of damages. Such a presumption, however, has no basis in reality. *See, e.g.,* Pet. App. 20a. Moreover, because the presumption is irrebuttable, the formula (even if it were well-grounded) will result in the State recovering more than the "portion of a settlement that represents payment for medical care" in many individual cases. 547 U.S. at 282. The Fourth Circuit appropriately held that North Carolina's one-third cap does not satisfy *Ahlborn*.

Petitioner attempts to attack the Fourth Circuit's straight-forward application of the *Ahlborn* decision by relying on a December 23, 2009 letter from Mary Justis to Congressman Howard Coble. Pet. 17-18;

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[4] In *Ahlborn,* this Court assumed without deciding that the Medicaid Act authorizes States to impose a lien on tort settlements received from third-parties – but only with respect to the portion of the settlement that is attributable to medical expenses paid by the Medicaid program. 547 U.S. at 283-84.

Pet. App. 139a-42a. In that letter, Ms. Justis concludes that NC DHHS does not appear to have disregarded directives from the Centers for Medicare and Medicaid Services. Her conclusion is based largely upon her understanding that the United States Supreme Court "affirmed" the North Carolina Supreme Court's decision in *Andrews* by denying certiorari. Pet. App. 141a. Ms. Justis, who is a registered nurse and holds a Masters in Business Administration, is neither an attorney nor a judge. Pet. App. 142a. Her erroneous legal conclusion as to the effect of this Court's denial of certiorari is not entitled to deference as NC DHHS suggests. *See* Pet. 18.

The Fourth Circuit's decision was correctly decided. Review is not warranted to correct an error below.

III. THE PETITION RAISES AN ISSUE THAT WILL HAVE MINIMAL IMPACT OUTSIDE OF NORTH CAROLINA.

The issue raised by the petition has only a minimal impact upon a handful of jurisdictions at best. Subsequent to this Court's decision in *Ahlborn,* numerous States amended their lien statutes to conform to that decision. Pet. App. 47a-48a; *see Price v. Wolford,* 608 F.3d 698, 706 (10th Cir. 2010); *Burtsell v. Toumpas*, 2012 U.S. Dist. LEXIS 65636, *11 (D.N.H. 2012); *E.D.B. v. Clair*, 987 A.2d 681, 686 n.5 (Pa. 2009); *Bolanos v. Superior Court,* 87 Cal. Rptr. 3d 174, 176 (Cal. Ct. App. 2009). Nevertheless, Petitioner argues that certiorari should be granted because he believes that the Fourth Circuit's

decision creates "ongoing uncertainty over the viability of other statutory provisions" throughout the country. Pet. 21. Such concerns are unfounded.

The petition notes that five other States have a statutory cap similar to North Carolina. Pet. 19. Four of these States set their cap at 50 percent. One (Minnesota) uses one-third. Simply because these five States have not yet revised their statutes to conform to the *Ahlborn* decision, however, does not give rise to an issue of such importance as to merit plenary review by this Court. Moreover, the assertion that the petition raises an issue important to other States is belied by the fact that *no* State has filed an amicus brief urging the Court to grant review in this case.

In an effort to bolster the significance of the question presented, Petitioner relies upon a string citation of 26 state statutes which he opines may not withstand scrutiny under the Fourth Circuit's decision. Pet. 19-20. These statutes, however, simply provide a generic statement, consistent with 42 U.S.C. § 1396a, that acceptance of Medicaid benefits constitutes an assignment of rights with respect to third parties. A close examination of the listed statutes reveals that none would be preempted under the Fourth Circuit's reasoning below.

IV. THE PETITION IS A POOR VEHICLE FOR RESOLVING THE ISSUE PRESENTED.

Two separate factors make the present petition a poor vehicle for resolving the question presented.

First, Medicaid's anti-lien statute permits a lien only in two narrow circumstances: (1) a court has entered a judgment finding that benefits have been incorrectly paid to a beneficiary or (2) a beneficiary who owns real property is receiving inpatient services at a medical facility and certain specific requirements are met. 42 U.S.C. § 1396p(a)(1). Neither of these circumstances is applicable here. As this Court observed in *Ahlborn*, "[r]ead literally and in isolation, the anti-lien prohibition contained in § 1396p(a) would appear to ban even a lien on that portion of the settlement proceeds that represents payment for medical care." 547 U.S. at 284. In *Ahlborn,* the Court assumed without deciding that Congress in fact intended 42 U.S.C. § 1396p(a) to be broader than its literal language: "[W]e assume, as do the parties, that the State can * * * demand as a condition of Medicaid eligibility that the recipient 'assign' in advance any payments that may constitute reimbursement for medical costs." 547 U.S. at 284.

In deciding whether N.C. Gen. Stat. § 108A-57 is preempted by Medicaid's anti-lien provision, Pet. i, the Court should first determine whether the reach of § 1396p(a) is in fact broader than the literal language of the words chosen by Congress. Although this issue falls within the scope of the question presented, the issue, however, was not argued before or ruled on by the lower courts. *See* Pet. App. 19a n.4. The fact that this threshold issue was not adequately developed below makes the present petition less than an ideal vehicle for determining the question presented.

Second, the Fourth Circuit's decision merely remands the matter to the district court for "an evidentiary hearing at which the district court shall determine the proper amount of DHHS's Medicaid lien." Pet. App. 55a. Until that evidentiary hearing is conducted, it is impossible to determine whether Petitioner's lien will ultimately be any less than the $933,333.33 it is currently claiming. At the evidentiary hearing before the district court, Petitioner will attempt to convince the district court that the proper amount of NC DHHS' Medicaid lien should still be one-third of the total settlement. Pet. 9 & n.2. Thus, the petition may ultimately present a question that is merely an academic exercise. Until such time as the parties know whether NC DHHS' lien will ultimately be set at a sum less than the lien amount provided in N.C. Gen. Stat. § 108A-57, consideration of the constitutionality of the North Carolina statute by this Court would appear to be premature and unnecessary.

CONCLUSION

The petition for writ of certiorari should be denied.

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