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Post-Sale Safety Improvements

by Kenneth Ross

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According to Professors Henderson and Twerski, the reporters for the *Restatement (Third) of Torts: Products Liability,* " . . . post-sale warnings are probably the most expansive area in the law of products liability." They go on to say that "[I]f you want to see people turn ashen white quickly, we recommend that you gather representatives from industry in a room and then flash the words 'post-sale warnings' on a screen." They further describe post-sale warnings as "timeless" and a "monster duty."

With this in mind, Henderson and Twerski and the members of the American Law Institute attempted to put some structure to the analysis of this duty and to make it clear under what circumstances this duty would apply.

The Restatement has three sections devoted to post-sale warnings. Section 10 provides four factors that must be established by the plaintiff to recover against a defendant for failing to issue post-sale warnings. This section makes it clear that, in certain circumstances, this post-sale duty may exist whether or not the product is defective at the time of sale. Therefore, such a duty might arise involving a product that was not defective at the time of sale, but due to improvements in technology, was, in comparison to products introduced into commerce at a later date, unreasonably dangerous.

The factors to be used in determining the presence or absence of a post-sale duty involve the balancing of risk versus the difficulty of finding those subjected to the risk and the difficulty they would have to act on the warning. This balancing test is the same as the analysis for negligence.

Section 11 deals with the duty to recall a product, and Section 13 deals with a successor manufacturer's responsibility to issue a post-sale warning. Section 11 says, in part, that a manufacturer cannot be held liable for a failure to recall a product unless it voluntarily decides to do so, and does it negligently.

With these sections in mind, the issue I want to discuss is whether a manufacturer either has a duty to warn prior customers of a post-sale safety improvement, or has a duty to offer the improvement to prior customers.

Products are always being improved. Whether it is a new safety feature developed to reduce a risk identified after sale or a new warning label or guard required by a new industry standard, the manufacturer must analyze whether this improvement could fall into the post-sale warning duty.

Let's first look at what the Restatement says. In Comment a to Section 10, it says:

> If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great.

Then in the reporters' notes to this comment, the reporters point out that it will be difficult for a plaintiff to prove each of the four factors enumerated in Section 10 if the warning is merely of the availability of a product-safety improvement.

With reference to any duty to recall a product that, due to safety advances, is subsequently manufactured in a way that has reduced avoidable risk, Section 11, Comment a states:

> Duties to recall products impose significant burdens on manufacturers. Many product lines are periodically redesigned so that they become safer over time. If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer.

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Post-Sale Safety Improvements

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In an illustration to Comment a, the Restatement describes the following situation:

> [The manufacturer] develops an improved model that includes a safety device that reduces the risk of harm to users. The washing machines sold previously conformed to the best technology available at time of sale and were not defective when sold. [The manufacturer] is under no common-law obligation to recall previously-distributed machines in order to retrofit them with the new safety device.

These statements and this illustration make it clear that there is no post-sale duty to recall where the product was not defective when sold. In contrast, regarding merely warning duties, Section 10 makes it clear that the product does not need to be defective at the time of sale for a post-sale duty to warn to arise.

So, where does this leave the manufacturer? Probably confused. Since a post-sale improvement is an "alternative design" and an admission that the product can be made safer, the plaintiff might argue that this improvement proves that the product without the improvement was defective when sold and that the improvement could have been developed much earlier. This, in effect, potentially turns the post-sale safety improvement into a situation where the manufacturer is fixing a defective product. Thus, the jury could hold that the manufacturer sold a defective product and was negligent for failing to warn the prior customers of this fix.

For example, in *Tabieros v Clark Equipment Co,* 944 P.2d 1279 (Haw. 1997), the Hawaii Supreme Court held that "a manufacturer has no duty to 'retrofit' its products with 'after-manufacture' safety equipment, although it may be found negligent or strictly liable for failing to install such equipment—or not otherwise making its product safer—existing at the time of manufacture."

To add to a manufacturer's uncertainty, there is a suggestion in a California case that even if the product is not defective at the time of sale, negligence for failure to conduct an adequate retrofit campaign may be assessed even when the product is not defective when sold. The California Court of Appeals in *Hernandez v Badger Construction Equipment Co.,* 28 Cal. App. 4th 1791 (1994), held the manufacturer negligent for not informing its prior customers that an optional safety device was now mandatory and not trying to retrofit old products without the safety device. The *Hernandez* court relying in part on *Balido v Improved Machinery, Inc.,* 29 Cal.App.3d 633 (1972) justified imposition of liability on the rationale that "Badger did not do 'everything reasonably within its power to prevent injury' to plaintiffs."

Thus, manufacturers should take no solace in the helpful language in the Restatement on safety improvements. There are many opportunities for plaintiffs to argue that the manufacturer should have done more. And, the manufacturer should be very mindful of these arguments when making significant improvements in safety. Assuming that the products in the field can be retrofitted with this new technology, the manufacturer should seriously consider offering such technology to prior customers. It will enhance safety for those customers who take the new technology and make any litigation more defensible where the customer refused the new technology.

Offering safety improvements to prior customers does not mean that they need to be given away for free. The customer would have paid for the safety feature now being offered as an improvement if it had been on the product originally. So, customers should pay for it now even though it is being offered later. And, a plaintiff might actually argue that providing a safety improvement for free constitutes evidence that the manufacturer is just really trying to fix a defective product.

Products evolve over time, and the law supports making safety improvements. So no manufacturer should shy away from making better and safer products. However, when doing so, the manufacturer should consult with experienced product safety counsel to help decide whether it is appropriate to offer the improvement to prior customers and how far to go so as not to be considered negligent. ■

The Outlook for Loss Control

by Pat Allen, CPC

Pat Allen, CPC, established Pat Allen Associates in New Orleans, Louisiana, in 1980 and focused solely on the nationwide recruitment of loss control engineers for the insurance industry. Allen received her business degree with honors from Pace University in 1968. Prior to executive search she spent 10 years in retail in the United States and Europe including several years at the American Embassy in Rome, Italy. Allen received her Certified Personnel Consultant designation in 1982. In 1990, she returned to her roots in the New York area.

Pat Allen Associates remains committed to personal, individualized searches based on attention to quality, timeliness, and professionalism. Visit www.patallen.com for its constantly changing, nationwide list of safety, loss control, HPR, and construction job openings.

Editor's note: Pat Allen presented this speech to the ISO, E&S Loss Control Executive Forum held in Anaheim, CA, on November 6, 2003.

In April 1999, I stood before this group in Hutchinson Island, Florida, and spoke about the current state of staffing in the loss control industry. I had never given a presentation before, and truthfully in 25 years of recruiting, I had never attended an ASSE conference or any industry meeting. I was only a voice on the phone. It was the managers from Reliance Insurance who convinced me to take that step. Today, more than half of the people who were in that room are not with us now. Most fell victim to the industry consolidation. At times, I wondered if I would weather the storm myself and I am sure half of you sitting here wondered the same. I wasn't really sure if anyone listened to what I said that day, but someone must have been because one of my statements spread from coast to coast like wildfire. What I said was that the insurance loss control pool, which once had 18,000 viable candidates was reduced overnight by almost 50 percent. This statement became the wake-up call for our industry and the reality that our candidate pool was in crisis and quickly disappearing hit home. It created such a stir that I promised myself that I'd be more careful about what I say to you this time.

For those of us with short memories, 1999 was the dawn of the Internet age and getting online was critical. The Internet made job searching a simple process. Internet job boards increased employees' awareness of immediate alternative career options while e-mail pink slips were making a debut as the newest form of layoffs. The daily rounds of re-engineering shook the loyalty of employees everywhere and at all levels.

Globalization was the major focus of the world. NAFTA contributed to the start of the mass exodus of manufacturing jobs outside of the United States. For every 500 manufacturing jobs lost to foreign soil, one safety manager's career was put in jeopardy. While this was going on, outsourcing and the unbundling of services were thriving in the loss control industry spurred on by the ever-present desire to increase income and reduce expenses. Field positions were evaporating and those who were left were doing more for less. IT and online reporting promised untold freedoms with more time in home-based virtual offices and increased productivity. However, the new method of preparing reports often became burdensome as companies and employees struggled to implement systems that never existed before. The sum total of these forces left a diminished applicant pool confused, depressed, and concerned about its survival.

From that point in 1999, some of these trends have continued to accelerate and most of the issues we faced 10 years ago have not gone away. But two new issues had a major impact on everyone. The first one was the surprise attack on the World Trade Center that raised the public's awareness of terrorism and hazard exposures. Corporate awareness of disaster recovery moved into the forefront. The second was the rapid decline of the stock market, which put additional pressure on underwriters to produce profits. It also reduced the value of 401Ks that postponed the retirement of many employees. Within the insurance industry, there are seven specific forces that shape the profile of today's applicant.

1. Consolidation continues to dominate our industry and the elimination of Reliance, IRI, Royal Sun Alliance, and, one of the biggest surprises, Kemper Insurance has put our dream of working in a secure environment on hold. The advance to only eight or 10 major players as predicted years ago moves closer to reality. The flood of talent released by these companies gave us a reprieve in the bench strength that we lacked over the last 10 years. Of the 85 Kemper engineers that were reengineered, 90 percent of them already had new positions in the insurance industry before their last day of work. This was due to a concerted effort on the part of Bob Hiltz and his loss control managers to

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make every effort to help place their people and to the desirability of the skills possessed by Kemper's engineering staff. They were gobbled up by an industry desperate for good people. Now, with the addition to our pool of about 175 Royal engineers who are mostly casualty driven, the market in my opinion is temporarily flooded.

2. The lack of systemic multi-line training programs by the insurance industry continued until just this last year. With the passage of time, the median age of the loss control professional advanced by five years, and the gap between the seasoned professionals and the younger candidates widened.

3. The rapid rise in the use of outside loss control services has fostered the emergence of three distinct groups: the empowered self-employed safety professional providing consultative services, the large fee companies, and the one-man shops concentrating on contract survey work. This coincided with the decline of in-house loss control departments. It is not unusual for an employee re-engineered on Friday afternoon to emerge on Monday morning as an independent many times with his or her old employer as his or her biggest client. From W-2s to 1099s overnight and one more expense off the books. Many consultants, reaching an age in their lives when career development was no longer the main priority, were tired of all the uncertainty, and welcomed the opportunity to negotiate packages and take control of their future and productivity goals. They welcomed the chance to integrate their skills with their business expertise. They have developed a direct client base and are providing personalized safety consulting in a workplace that they can impact. However, if they decide they want to work for a company again, it is almost always true that a loss control manager will gladly hire a proven consultant with proactive skills and good business sense. (So find one that wants to come in from the cold.) Until recently these independents have been busy and were reluctant to give up their new venture. However, we are starting to hear from more of them that their opportunities are drying up. They may be more receptive to the idea of returning to an insurance position with salary and benefits.

4. The one market that has experienced tremendous growth is undoubtedly the larger fee companies. Formerly contract employers, these companies are developing national loss control staffs with branch offices in most of the major cities. Some are hiring trainees and trainers for staff development. Quality control report reviewers are making sure the finished report meets higher standards. With this new talent in place, these companies are expanding from basic surveys to service and consulting providers. They realize that timeliness and quality have been their two biggest challenges, and they are working very hard at improving both. In the insurance industry, senior management has always looked for ways to take the cost out of doing business, and outsourcing has always been one solution. With their competitive pricing, fee companies are becoming a major threat to established loss control departments, and they are also becoming a viable career option. This industry has absorbed more applicants from our pool than any other. One reason is that they are very flexible and able to offer a broader range of options to

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potential candidates than their competition. Full-time positions with benefits and car allowances are commonplace. Part-time or 100 percent commission basis are also options. Many times, they are able to provide enough work in most geographic locations to justify an additional employee, eliminating the need for unwelcome relocations. As recruiters, we always thought the biggest problem for engineers transitioning to fee companies would be in the lack of technical challenge. But this has not been the case. The transition for many candidates is very difficult, and many do not make it at all. Productivity expectations are demanding and the range of reports and product lines is much more complex. Not much lead time is allowed, and new hires who fall behind schedule quickly find themselves out on the street. The situation is different for many traditional loss control managers and directors who have found that applying their experience in this arena works very well. They enjoy having the freedom of combining their management skills and technical knowledge with the ability to impact the bottom line of an organization. The migration of many well-thought-of professionals to this sector has helped to elevate the image of the fee company as an attractive career option. Whether or not fee companies will gain more ground and replace traditional loss control departments remains one of the biggest open questions. It is critical for insurance loss control managers to prove the value of their departments if they are to survive and prevent outside sources from replacing them. An outsourced report is only economical if it is accurate enough for its conclusions to be counted upon and insurance professionals have an ongoing commitment to their accounts and a

long-term goal of lowering losses. When an account is outsourced, this personal interest is gone. Until human behavior changes, there will always be a need for expert verification of the existing status of the insured. Another consideration with regard to fee companies is that we have started hearing from various managers that it may be time for them to start thinking about their replacement. Certainly, proven management and experience with outsourcing will be the major qualifications. If insurance companies do not revive working supervisor roles for younger consultants then the fee company sector may very well become the preferred management talent source of the future.

5. The emphasis on property/package underwriting drove loss control needs and staffing for the last four years. Carriers scrambled to find HPR engineers or qualified multi-line candidates with better-than-average property skills. This domination of the market by property-driven forces seriously reduced the demand for casualty-oriented service types. Years have passed since we did a search for industrial hygiene or ergonomics specialists. Even demand for casualty-driven field people has dried up. Only portfolio or account managers to handle the service to select national accounts penetrated the need for property specialists.

6. The number of nationwide insurers writing large national/global accounts diminished to only a handful. Meanwhile, the competition for middle-market business has become so intense that we all know it is only a matter of time until more companies fail. The downgrades by A.M. Best keep coming. Any training efforts at all by the carriers, whether nationwide or regional, were focused mainly on servicing small packages or BOP accounts that filled the needs of this growing market. At least these candidates have a broad enough foundation on which to build in all the lines of business.

7. Years ago, we had the enterprising workers comp carriers emerging as the newcomers to the insurance industry. Many of these have since fallen by the wayside and today it is the regional carriers and niche companies that are picking up the slack left by these and other industry consolidations. They are quickly spreading and increasing their geographic reach and share of business at a fast rate. Some of these companies have tripled their premiums in a few short years. They have been hiring loss control engineers at a consistent pace, including trainees. Regional companies, with their growth prospects, do represent an attractive career alternative. PEOs have become a specific, fast-growing niche market for the workers comp safety professional but to date seem unwilling to be competitive salary-wise. One final group, the TPA, is facing a potential growth opportunity due to the amount of run-off business that needs addressing. These may prove to be a developing arena for the loss control professional but we have not had enough exposure to determine their potential.

So what is the profile of the typical candidate we encounter today? I believe we have all had enough exposure in the last few years to know that they have two dominant attributes. They are recycled and graying. They also are at the higher end of your salary scales. It is possible that almost 50 percent of the loss control pool will surpass 55 years of age in the next six years. But because of the decline in their retirement plans, they will be working longer. The good news is they will still be active in our labor pool and provide much-needed experienced talent for the next 10 years.

Since 1993, the lack of training of college graduates has been key to a shortage of younger candidates. However, the best news is that companies are reinitiating structured training programs. This is our only hope and within three years our tired applicant pool should be flush with bright, young candidates. It usually takes longer than we think to train and shape a truly productive loss control engineer, so it could take longer. CNA, St. Paul, Travelers, and Wausau are only a few companies with aggressive training goals. I checked with placement counselors from several of the schools that offer degrees in occupational health and safety so that I could tell you where all these students have been finding employment in the last five years. Forty percent of the graduates went to private industry with the construction industry taking the largest share. Many went to small consulting companies with fewer than 40 employees, and 20 percent went to governmental positions. Twenty to 30 percent of their graduates were recruited and trained by the insurance industry. The numbers going to both insurance and manufacturing declined. The other 10 percent are still living off their parents and traveling around the world.

So it appears that a good number of recent graduates are a qualified addition to our loss control pool. But is this really true? The MTV generation has a short attention span. They are materialistic. They live at a hectic pace. To this generation, loyalty is a subjective concept. They keep their options open and make decisions based on the prospect of opportunity. As one college placement counselor put it, they change jobs readily and often for a variety of reasons. Their computers are constantly in touch with the Internet community, their instant messenger buddy lists are long, and their cell phones never stop ringing. Without a revitalized, dynamic, and viable career path, can the insurance industry really expect to corral this energy for the long term?

Public awareness of safety professionals has increased. When people I encounter ask me what specialty I recruit and I say "safety," I still get many inquisitive looks followed by "What's that?" But it happens less often now. TV ads such as Liberty Mutual's have done a lot to educate the consumer on the function of good safety professionals. Public awareness of hazard exposures, especially in the crisis related areas, coupled with security, terrorism,

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The Outlook for Loss Control

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and disaster preparedness has increased. As consumer products become more complicated, safety analysis becomes a more public issue.

Many professionals believe there has never been a greater opportunity for loss control in the business world than now. As businesses consolidate, automate, and streamline their operations, we find a greater demand for the loss control engineer's ability to insure that safety requirements are met. More corporate managers perceive the real value of loss control as an essential piece in keeping expenses down, including the cost of insurance coverage, terms, and pricing. Even in the middle market, a trend is emerging where these accounts are becoming more sophisticated and realize finally, that losses can be managed.

Many professionals believe there has never been a greater opportunity for loss control in the business world than now.

However, insurance loss control managers must prove the value of their departments. This is critical to the survival of their loss control departments. Senior management is still looking for ways to take the cost out of doing business, and outsourcing has always been a solution in that type of environment. But an outsourced report is only economical if it is accurate enough for its conclusions to be counted upon. An insurance loss control staff has an ongoing commitment to its accounts and a long-term objective of lowering losses. This cannot be done with poor reports. Momentarily, service and quality reports are still predominantly produced by in-house loss control departments but the better outside sources are closing the gap and are becoming an increasing threat to the survival of traditional loss control departments. From an underwriting point of view, loss control may be back in vogue again. We have been in a market where risk selection has become more important than risk improvement. But market forces have created a renewed focus on quality underwriting, and the use of loss control not only provides a good evaluation as to the worthiness of an account but also a more precise criterion for the calculation of premium. Until human behavior changes, there will always be the need for expert verification for the risk of the insured.

Today's loss control engineers still have an authentic commitment to their profession and to keeping people safe and losses under control. The best of them are not bean counters. They want to be engaged and a valued part of the team that makes the important decisions. As Richard Hughes stresses in his poignant work *Bringing Down the Safety Guy,* the loss of human contact is the loss of the soul of the safety profession. Underwriting surveys and service plans produced from desktop-based OSHA logs and loss records have a place, but they cannot replace the safety person's intimate connection to real faces and real-life circumstances.

Our safety professionals have not given up. In spite of all the negativity and obstacles that have been handed to them every day in our struggling industry, they are truly resilient and still dream of working for a company that appreciates them and lets them do their job. ■

Save the Date!

Plan now to attend the 60th Annual Meeting and Seminars **October 23-26, 2004,** in Los Angeles, CA.

Look for future issues of *Loss Control Quarterly* for more information about Loss Control Section-sponsored seminars.

Experience Modification Factors

by Christopher D. Conti, CPCU, CSP

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Experience modifiers are used in the pricing of workers compensation insurance (and other lines) to adjust the premium upward or downward based on the employer's claims history. The experience modification factor can be compared to your personal driving record in that you are charged more or less premium based on your past accident experience. Your claim experience modifies your future cost of coverage.

To be eligible for an experience modification factor, an employer must meet certain criteria. For example, in Louisiana, an employer must generate a two-year total of $10,000 of a three-year average of $5,000 in annual premium. Also, the insurance carrier must be an affiliate of NCCI, which most standard carriers as are many self-insured funds, though by no means all of them. An employer that meets these criteria will have an experience modification factor (mod) calculated every year.

The mod is a number that compares the accident experience of individual companies to all other companies in that state as well as in the industry. The mod is promulgated or calculated by the National Council on Compensation Insurance (NCCI). NCCI produces an Experience Modification Factor Worksheet. A copy is sent to the carrier that provides the workers comp coverage and the employer. The carrier will apply the mod to the premium calculation formula, so, mods impact premium cost.

Unity or having a mod of 1.00 indicates that your performance compared with your competitors is average and no surcharge or debit is assessed; however, no benefit or credit is given.

Debit mod is when an employer's number of and/or severity of accidents is higher than competitors and the cost of insurance will increase. *Expected losses* are the amount of claim dollars planned to be spent on injuries and is a compilation of all of the employer's experience. *Actual dollars* spent is used to compare your experience to all competitors. A modifier above 1.00 such as 1.01, 1.10, and 1.23, etc. or any number above 1.00 may result in an increase premium by 1 percent, 10 percent, or 23 percent, respectively.

Credit mod is when an employer's claim activity is better than industry competitors, and the cost of insurance may decrease. This is a modifier such as .99, .88, .75, etc., or any number below 1.00. The result is to decrease premium by 1 percent, 12 percent, or 25 percent, respectively.

There is a floor to the mod or a lowest possible mod so it won't get down to zero and probably never get below .50 even with perfect, no-accident experience. However, the cost savings of the best possible credit mod are significant and come in the forms of:

- lower insurance cost
- improved productivity as non-injured workers keep working
- lower internal cost called indirect cost (as dealing with claim adjusters)
- improved morale as a safe workplace will be a happier environment

The mod is calculated using employers' actual claim data for three of the past four years with the most recent past year not being included because some claims may have occurred close to the end of the policy year and may still be open.

Data Years Used in Mod Calculation

If your effective date of coverage is 1-01-03 (also called the normal anniversary rating date) your experience modification factor would use the claims data from the years of:

- 2003—experience modification factor uses claims from three of the four previous years.

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Experience Modification Factors

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- 2002—**No data used** as this is the most recent year and claims are not settled.
- 2001—Claims data are used—both closed and open (unsettled) claims with reserves (called incurred losses) have a negative impact on mod.
- 2000—Claims data are used—both open and closed data are used.
- 1999—Claims data are used—both open and closed data are used.

So, the 2003 experience modification factor used the data from 2001, 2000, and 1999. In 2004, the 1999 year falls off, and the 2002 year comes into the data mix.

In addition to promulgation of mods, the NCCI also establishes the base rates that insurance companies use to calculate premium. These are called manual rates and are the starting point in premium calculation. The next step is to divide payroll by 100 to establish payroll units.

Then the base rate is multiplied by the payroll units to determine manual premium. From there the manual premium is multiplied by the mod to arrive at standard or modified premium.

How the Mod Affects Premiums

Premium = Rate x Payroll/100 x Mod

Let's assume:

Rate = $8 for every $100 of payroll

Payroll, total annual payroll for workers doing the same job = $500,000

Mod for a given year = **1.00, 1.20, and .95**

This is a **unity mod:**
Rate x Payroll/100 x Mod = Premium
8.00 x 5000 x 1.00 = $40,000

This is a **debit mod:**
Rate x Payroll/100 x Mod = Premium
8.00 x 5000 x **1.20** = $48,000

This is a **credit mod:**
Premium = Rate x Payroll/100 x Mod
Premium = 8.00 x 5000 x .95 = $38,000

The $10,000 difference between a credit mod and a debit mod in this example goes straight to the bottom line to increase profit as the insurance expense is now reduced. This information on experience modification factors ignores all other techniques that underwriters may use to adjust premium such as schedule rating and premium discounts. ■

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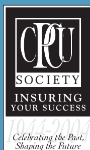

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