SIMPSON THACHER

INSURANCE LAW ALERT

JULY/AUGUST 2013

This Alert discusses recent decisions relating to the enforcement of arbitration provisions, general liability coverage for construction defect claims and the consequences of an insurer's breach of the duty to defend. We also report on rulings relating to untimely notice, the statute of limitations for reinsurance-related claims and enforcement of a consent to settlement provision. Finally, we summarize recently-enacted legislation affecting insurance and reinsurance dealings related to Iran. Please "click through" to view articles of interest.

- ***Insurer That Breaches Duty to Defend Could Not Rely On Policy Exclusions to Avoid Indemnity Obligations, Says New York Court of Appeals***

  New York's highest court ruled that an insurer that breached its defense obligations could not subsequently rely on policy exclusions in denying indemnity. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2013 WL 2475869 (N.Y. June 11, 2013). *Click here for full article*

- ***Pennsylvania Appellate Court Endorses Heightened Standard in Deciding Whether Insurer Defending Under Reservation Must Indemnify Settlement***

  A Pennsylvania appellate court ruled that an insurer's duty to indemnify an underlying settlement in a case it is defending under a reservation of rights turns on whether the insurer acted in bad faith in rejecting settlement offers. *Babcock & Wilcox Co. v. American Nuclear Insurers*, 2013 WL 3456969 (Pa. Superior Ct. July 10, 2013). *Click here for full article*

- ***United States Supreme Court Rules That Arbitration Agreements Can Prohibit Class Action Arbitration***

  The United States Supreme Court ruled that the Federal Arbitration Act does not allow a court to invalidate a contractual waiver of class arbitration on the ground that a plaintiff's cost of arbitrating a statutory claim would exceed its potential recovery. *American Express Co. v. Italian Colors Restaurant*, 2013 WL 3064410 (U.S. June 20, 2013). *Click here for full article*

- ***Assignee of Ceding Insurer's Rights May Not Enforce Reinsurance Contract Arbitration Provision, Says Illinois Court***

  An Illinois federal district court ruled that a non-party to a reinsurance agreement who was assigned the cedent's rights under the contract may not enforce the contract's arbitration provision. *Pine Top Receivables of Illinois, LLC v. Banco De Seguros Del Estado*, 2013 WL 2574596 (N.D. Ill. June 11, 2013). *Click here for full article*

- ***New York Court Dismisses Reinsurance Claims as Untimely***

  Holding that breach of contract claims accrued shortly after a ceding insurer provided its reinsurer with notice of loss, a New York court ruled that reinsurance claims were barred by the applicable six-year statute of limitations. *Superintendent of Financial Services of the State of New York v. Guarantee Ins. Co.*, 2013 N.Y. Misc. LEXIS 2442 (N.Y. Sup. Ct. June 10, 2013). *Click here for full article*

- ***West Virginia Reverses Course on General Liability Coverage for Construction Defect Claims***

  Abrogating prior precedent, the West Virginia Supreme Court ruled that defective workmanship that causes bodily injury or property damage is an "occurrence" under a commercial general liability policy. *Cherrington v. Erie Ins. Property and Casualty Co.*, 2013 WL 3156003 (W. Va. June 18, 2013). *Click here for full article*

- ***Connecticut Supreme Court Addresses Scope of General Liability Coverage for Faulty Workmanship Claims***

  The Connecticut Supreme Court ruled that defective construction that causes damage to non-defective property may constitute an "occurrence" triggering general liability coverage, but that if the property damage resulted from work performed by the insured (rather than a subcontractor) it is excluded from coverage by a "your work" exclusion. *Capstone Building Corp. v. American Motorists Ins. Co.*, 2013 WL 2396276 (Conn. June 11, 2013). *Click here for full article*

- ***Fifth Circuit Rules That Pollution Buy-Back Provision Makes Notice A Condition Precedent to Coverage***

  The Fifth Circuit ruled that a policyholder forfeited excess coverage for pollution claims by failing to provide notice within the thirty-day period specified in a buy-back clause, regardless of whether the insurer was prejudiced by the delay. *Starr Indem. & Liability Co. v. SGS Petroleum Service Corp.*, 2013 WL 3013873 (5th Cir. June 18, 2013).
  Click here for full article

- ***New Legislation Prohibits Insurers from Engaging in Certain Underwriting, Insurance and Reinsurance Activities Related to Iran***

  Recently-enacted economic sanctions prohibit certain underwriting, insurance and reinsurance activities related to Iran. For more information on this legislation, click here.

Duty to Defend Alerts:

Insurer That Breaches Duty to Defend Could Not Rely On Policy Exclusions to Avoid Indemnity Obligations, Says New York Court of Appeals

New York's highest court ruled that because an insurer breached its defense obligations, it could not subsequently rely on policy exclusions to deny indemnity coverage. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2013 WL 2475869 (N.Y. June 11, 2013).

An attorney who was sued for malpractice turned to his malpractice insurer for defense and indemnity. The insurer refused to defend. The underlying claimant made a settlement demand for an amount significantly below the malpractice policy limit. The insurer rejected the settlement demand. Thereafter, a default judgment that exceeded policy limits was entered against the insured. The underlying claimants, as assignees of the attorney's rights against the insurer, sued for breach of contract and bad faith refusal to settle. The insurer claimed that coverage was unavailable by virtue of two policy exclusions. The claimants argued that by breaching its duty to defend, the insurer was bound, up to its policy limit, to pay the default judgment.

A New York trial court dismissed the bad faith claim, but ruled in the claimants' favor on the breach of contract claim. The intermediate appellate court affirmed, holding that the two policy exclusions were inapplicable. The New York Court of Appeals affirmed on different grounds.

The New York Court of Appeals ruled that by breaching its duty to defend, the insurer lost its right to rely on the exclusions in contesting its indemnity obligations. The court held that the insurer breached its defense obligation and was therefore obligated to "indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify." The court reasoned that this rule "give[s] insurers an incentive to defend the cases they are bound by law to defend," and also avoids "unnecessary and wasteful litigation, if an insurer, having wrongfully abandoned its insured's defense, could then require the insured to litigate the effect of policy exclusions on the duty to indemnify." The ruling appears to expand prior case law which held that an insurer that wrongfully disclaims defense or indemnity may litigate "only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment." (citing *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004)). Importantly, however, the court noted possible exceptions to this general rule, including for example, a coverage denial based on public policy grounds (*e.g.*,

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harm caused by the policyholder's intentional conduct).

With respect to the bad faith claim, the New York Court of Appeals ruled that an insurer's rejection of a settlement offer for less than policy limits does not, without more, establish bad faith, even if a judgment in excess of policy limits is subsequently rendered. Bad faith refusal to settle requires a showing that the insurer knew or should have known that the claims were worth more than the policy limit, which was not alleged in the present case.

Pennsylvania Appellate Court Endorses Heightened Standard in Deciding Whether Insurer Defending Under Reservation Must Indemnify Settlement

Addressing an issue of first impression, a Pennsylvania appellate court ruled that a defending insurer's duty to indemnify an underlying settlement turns on whether the insurer acted in bad faith in providing a defense under a reservation of rights and/or in rejecting settlement offers. *Babcock & Wilcox Co. v. American Nuclear Insurers*, 2013 WL 3456969 (Pa. Superior Ct. July 10, 2013). The ruling vacates a trial court decision that endorsed a more lenient standard under which an insurer's indemnity obligations turned on whether a settlement was "fair and reasonable."

The coverage dispute arose out of bodily injury and property damage claims against Babcock & Wilcox. American Nuclear Insurers ("ANI"), Babcock's general liability insurer, defended under a reservation of rights. Babcock ultimately settled the claims over ANI's objection and then sought reimbursement from ANI. ANI argued that Babcock had forfeited its right to reimbursement by violating the policy's consent to settlement clause. In contrast, Babcock contended that ANI breached its duty to consent to a reasonable settlement and was obligated to indemnify any fair, good faith settlement. The trial court sided with Babcock, holding that ANI must reimburse Babcock for all "fair and reasonable" settlement costs. Under this standard, a jury determined that the underlying settlement was fair and non-collusive, resulting in a $95 million judgment against ANI. The appellate court reversed.

The appellate court emphasized the distinction between an insurer that provides a defense under a reservation of rights (as ANI did here), and an insurer that denies a defense altogether. Because the former scenario does not, without more, constitute a breach of contract or bad faith, the court held that an insurer does not forfeit its right to enforce a consent to settlement clause absent an independent showing of bad faith. The court stated:

> [W]hen an insurer tenders a defense subject to a reservation, the insured may choose either of two options. It may accept the defense, in which event it remains unqualifiedly bound to the terms of the consent to settlement provision of the underlying policy. Should the insured choose this option, the insurer retains full control of the litigation, consistently with the policy's terms. In that event, the insured's sole protection against any injuries arising from the insurer's conduct of the defense lies in [ ] bad faith …. Alternatively, the insured may decline

> the insurer's tender of a qualified defense and furnish its own defense … [i]n this event, the insured retains full control of the defense, including the option of settling the underlying claim under terms it believes best. Should the insured select this path, and should coverage be found, the insured may recover from the insurer the insured's defense costs and the costs of settlement, to the extent that these costs are deemed fair, reasonable, and non-collusive.

The appellate court vacated the trial court order and remanded the case for a factual determination of whether Babcock had rejected ANI's defense and whether ANI acted in bad faith in declining to settle. ANI is represented by Simpson Thacher partners Andrew Amer and Michael Garvey.

Arbitration Alerts:

United States Supreme Court Rules That Arbitration Agreements Can Prohibit Class Action Arbitration

The United States Supreme Court ruled that the Federal Arbitration Act does not allow a court to invalidate a contractual waiver of class arbitration on the ground that a plaintiff's cost of arbitrating a statutory claim would exceed its potential recovery. *American Express Co. v. Italian Colors Restaurant*, 2013 WL 3064410 (U.S. June 20, 2013).

Merchants filed a class action against American Express, alleging violations of the federal antitrust laws. American Express moved to compel individual arbitration in accordance with a consumer agreement provision that required all disputes to be arbitrated and that forbade class action arbitration. In opposing arbitration, the merchants argued that the cost of proving the antitrust claims would exceed any potential recovery under the antitrust statutes. A

New York federal district rejected this argument and dismissed the lawsuit. The Second Circuit reversed and remanded, finding the class action waiver unenforceable because the merchants "would incur prohibitive costs if compelled to arbitrate" individually. The United States Supreme Court reversed.

The Supreme Court held that an agreement to arbitrate must be enforced unless it is "overridden by a contrary congressional demand." No such mandate existed here, the Court explained, because the antitrust laws "do not guarantee an affordable procedural path to the vindication of every claim." More specifically, the Court reasoned that although the federal antitrust laws create certain rights to facilitate individual enforcement (such as treble damages), the statutes make no mention of class action or an intent to preclude a waiver of class action proceedings. The Court also declined to apply a "judge-made exception" to the Federal Arbitration Act to invalidate the arbitration agreement on the basis that it prevented the "effective vindication" of statutory rights. The Court stated, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right* to *pursue* that remedy." In this respect, the court contrasted a class action waiver with contractual clauses that explicitly forbid the assertion of statutory rights and/or impose excessive filing fees so as to make access to enforcement impracticable. The ruling, together with *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that

the FAA preempts state law which bars enforcement of a class action waiver) (discussed in May 2011 Alert), leaves little doubt as to the enforceability of arbitration clauses that preclude class arbitration.

Assignee of Ceding Insurer's Rights May Not Enforce Reinsurance Contract Arbitration Provision, Says Illinois Court

An Illinois federal district court ruled that a non-party to a reinsurance agreement who was assigned the cedent's rights under the contract may not enforce the contract's arbitration provision. *Pine Top Receivables of Illinois, LLC v. Banco De Seguros Del Estado*, 2013 WL 2574596 (N.D. Ill. June 11, 2013).

Pine Top Insurance Company entered into several reinsurance treaties with Banco De Seguros. Pine Top, after being placed in liquidation, entered into a purchase agreement with Pine Top Receivables ("PTR"). The purchase agreement assigned to PTR "all rights, title, benefit and interest in the debts [under the reinsurance treaties] … absolutely and with full title." The agreement further provided that it "shall not be construed as a novation or assignment of the Policies." Following execution of the purchase agreement, PTR demanded Banco to submit to arbitration to resolve outstanding debts under the reinsurance policies. When Banco refused to arbitrate, PTR sought to compel arbitration. The court granted Banco's motion to dismiss.

The court ruled that the purchase agreement, rather than the reinsurance treaties, controlled the scope of PTR's rights, and that the language of the purchase agreement did not convey to PTR the right to compel arbitration. The court also rejected the argument that Banco was equitably estopped from opposing arbitration by relying on certain provisions in the reinsurance treaties in its affirmative defenses to PTR's breach of contract claim. Under the equitable estoppel doctrine, a party may not selectively enforce certain policy terms against a non-signatory, while denying the benefit of other policy terms. The court side-stepped the question of whether Illinois law recognizes equitable estoppel doctrine (Illinois federal and state courts are divided), and ruled that even assuming the theory applied, it did not prohibit Banco from opposing arbitration. The court reasoned that the parties stood on "equal footing" because both could "rely on the Policies to establish the debts that Plaintiff is authorized to collect under the Purchase Agreement, but neither is otherwise bound to the terms of the Policies."

The decision highlights importance of contractual language. The court emphasized that the parties could have included language allowing the transfer of all policy rights (including arbitration) had they intended to do so.

Statute of Limitations Alert:

New York Court Dismisses Reinsurance Claims as Untimely

Holding that breach of contract claims accrued shortly after a ceding insurer provided its reinsurer with notice of loss, a New York court ruled that reinsurance claims were barred by the six-year statute of limitations. *Superintendent of Financial Services of the State of New York v. Guarantee Ins. Co.*, 2013 N.Y. Misc. LEXIS 2442 (N.Y. Sup. Ct. June 10, 2013).

The dispute arose out of a reinsurance treaty between Guarantee Insurance Company and Whiting National Insurance Company, in liquidation. The New York Liquidation Bureau first sent reinsurer Guarantee a notice of loss in 1994. Guarantee disputed the claims and offered a commutation payment to discharge all present and future claims. The Bureau

declined the offer. In 2001, Guarantee made another commutation proposal, which was also declined. The parties continued to correspond regarding possible commutations, but no agreement was reached and no payments were made. In 2007, the Bureau informed Guarantee that it did not anticipate any future claims under the reinsurance treaty. In 2009, the Bureau notified Guarantee that it owed over $2 million for all losses paid in the post-liquidation period. In 2010, after a period of investigation, Guarantee denied all liability on several bases including a statute of limitations defense. The Bureau filed suit and the court granted Guarantee's motion to dismiss.

The court ruled that the claims were time barred under New York's six-year statute of limitations. The court explained that in an insurance coverage action, the limitations period begins to run when the insured files a claim or gives notice of loss and the insurer has been afforded a reasonable opportunity to investigate the loss. Applying this standard, the court determined that the claims against Guarantee accrued at the latest in 2002, at which point Guarantee had been "presented with bills and whatever proof it had demanded, and had ample to time to review the files." At that time, when Guarantee did not pay the claims, it breached its contractual obligation, thereby triggering the statute of limitations. Therefore, the court concluded the claims alleged in the 2010 lawsuit against Guarantee were untimely as a matter of law.

The decision serves as an important reminder of the stringent enforcement of statute of limitations requirements. In dismissing the claims as time-barred, the court rejected the notion that ongoing discussions between the parties operate to toll the statute and/or that a formal repudiation of payment is necessary to start the statute of limitations. Similarly, the court dismissed the argument that the 1994 and 2001 billings were "interim bills" pending the exhaustion of Whiting's reserves.

Construction Defect Alerts:

West Virginia Reverses Course on General Liability Coverage for Construction Defect Claims

Abrogating prior precedent, the West Virginia Supreme Court ruled that defective workmanship that causes bodily injury or property damage is an "occurrence" under a commercial general liability policy. *Cherrington v. Erie Ins. Property and Casualty Co.*, 2013 WL 3156003 (W. Va. June 18, 2013).

Homeowners filed suit against a contractor, alleging negligent construction, breach of fiduciary duty, fraud and misrepresentation. When Erie, the contractor's general liability insurer, denied coverage, the contractors brought a coverage action against Erie. A West Virginia circuit court granted Erie's motion for summary judgment, concluding that allegations of faulty workmanship did not constitute an "occurrence" under the policy, and that even if they did, coverage was precluded by several policy exclusions. The West Virginia Supreme Court reversed.

Citing to an emerging trend, the West Virginia

Supreme Court ruled that defective workmanship falls within the meaning of the term "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court reasoned that defective workmanship was accidental because it was unexpected and unintended by the contractor. The court rejected application of several policy exclusions, including a "your work" exclusion that precluded coverage for the faulty work performed by the policyholder. The court held that the subcontractor exception to the exclusion applied because virtually all of the defective work at issue was performed by subcontractors. The court's decision overturns a trilogy of West Virginia Supreme Court cases denying general liability coverage for faulty workmanship claims.

Connecticut Supreme Court Addresses Scope of General Liability Coverage for Faulty Workmanship Claims

Addressing an issue of first impression, the Connecticut Supreme Court ruled that defective construction that causes damage to non-defective property may constitute an occurrence triggering general liability coverage. However, the court further held that if the property damage resulted from work performed by the insured (rather than a subcontractor), it is excluded from coverage by a "your work" exclusion. *Capstone Building Corp. v. American Motorists Ins. Co.*, 2013 WL 2396276 (Conn. June 11, 2013).

Capstone served as the general contractor for a construction project. In connection with the project, Capstone procured general liability insurance from a predecessor of American Motorists. Several years after the project's completion, numerous construction defects were discovered, leading to litigation against Capstone. American Motorists declined to defend Capstone on the basis that the claims were outside the scope of coverage. Capstone ultimately settled the claims and then sued American Motorists alleging breach of contract and bad faith.

The Connecticut Supreme Court issued several significant rulings relating to the scope of coverage for construction defect claims:

Occurrence: The court reasoned that "because negligent work is unintentional from the point of view of the insured … it may constitute the basis for an 'accident' or 'occurrence' under the plain terms of the commercial general liability policy." In so ruling, the court rejected the notion that defective work falls outside the scope of general liability coverage because it is "in some sense volitional."

Property Damage: The court held that general liability coverage is not limited to damage to third party property and extends to physical injury to, or loss of use of, the insured's own non-defective property. However, the court ruled that the following construction defect-related claims do not allege "property damage": the escape of carbon monoxide, without more, from defectively installed chimneys; building code violations; poor quality control; and the use of defective components. The court also held that there is no property damage unless faulty construction caused damage to other, non-defective property. Damage to defective work itself is not property damage.

"Your Work" Exclusion: The court stated that the "your work" exclusion eliminates coverage for any property damage caused by an insured's own work. However, the court held that the "subcontractor exception" operates to restore coverage if the policyholder demonstrates that the property damage arose from work performed by subcontractors.

The court also addressed insurer bad faith and the scope of damages for a breach of the duty to defend. The court held that bad faith is actionable only if there has been a denial of benefits under the policy. Therefore, a bad faith claim cannot be based merely on an insurer's failure to investigate. The court stated, "[u]nless the alleged failure to investigate led to the

denial of a contractually mandated benefit in this case, the plaintiffs have not raised a viable bad faith claim." Additionally, the court held that where, as here, an underlying global settlement resolves multiple claims (some of which may be covered by the policy and others which may be subject to policy exclusions), the policyholder bears the burden of "proving that the settlement is reasonable in proportion to claims that, considered independently, the insurer had a duty to defend."

Notice Alert:

Fifth Circuit Rules That Pollution Buy-Back Provision Makes Notice A Condition Precedent to Coverage

Affirming a Texas district court decision, the Fifth Circuit ruled that a policyholder forfeited excess coverage for pollution claims by failing to provide notice within the thirty-day period specified in a buy-back clause, regardless of whether the insurer was prejudiced by the delay. *Starr Indem. & Liability Co. v. SGS Petroleum Service Corp.*, 2013 WL 3013873 (5th Cir. June 18, 2013).

Starr Indemnity provided an umbrella policy to SGS Petroleum for liability in excess of $2 million. Although the policy contained an absolute pollution exclusion, the parties negotiated a pollution buy-back. The buy-back restored coverage for pollution-related claims "provided that the assured establishes that … the following conditions have been met: …. the discharge, dispersal, release or escape was reported in writing to these underwriters within 30 days after having become known to the assured."

On November 7, 2010, a pollution event occurred while an SGS Petroleum employee was conducting operations at a chemical plant. Because the initial estimate for clean-up costs was between $600,000 and $1 million, SGS Petroleum did not inform Starr of the incident. SGS later learned that the costs exceeded $2 million, and thus provided notice of the event to Starr on January 5, 2011. Starr denied coverage on the basis of the thirty-day notice provision. In ensuing litigation, a Texas district court granted Starr's summary judgment motion and the Fifth Circuit affirmed.

In dismissing SGS Petroleum's coverage claims, the Fifth Circuit rejected that notion that all late notice defenses require a showing of prejudice to the insurer. The court recognized that specific policy language controls the presence/absence of a prejudice requirement. In this context, the court distinguished general notice provisions (*i.e.*, "as soon as practicable," that have been held under Texas law to require a showing a prejudice) with negotiated, time-specific notice provisions that make notice "an essential part of the bargained-for exchange." The court also concluded that the language of the buy-back was unambiguous and made notice within thirty days a condition precedent to pollution coverage. Finally, the court ruled that Starr's position as an excess carrier was irrelevant to the notice analysis, stating that there is "no basis for applying a different rule to excess carriers when interpreting the meaning of a contractual provision."

LEGISLATION ALERT:

New Legislation Prohibits Insurers from Engaging in Certain Underwriting, Insurance and Reinsurance Activities Related to Iran

In recent years, the U.S. government has significantly increased and expanded economic sanctions targeting Iran. Of particular interest to the insurance and reinsurance industry, the National Defense Authorization Act of 2013, effective July 1, 2013, includes a section styled as the Iran Freedom and Counter-Proliferation Act ("IFCPA"). The IFCPA authorizes the imposition of sanctions on U.S. and foreign insurers and reinsurers that knowingly provide underwriting services or insurance or reinsurance for (i) any activity with respect to Iran that would be

sanctionable under other legislation, (ii) any activity in the energy, shipping, or shipbuilding sectors of Iran, (iii) the sale, supply or transfer to or from Iran of certain metals and other materials, (iv) any person designated by the U.S. government as being involved in Iran's proliferation of weapons of mass destruction or Iran's support for international terrorism or (v) any Iranian persons included on the Office of Foreign Assets Control's ("OFAC") Specially Designated Nationals and Blocked Persons list. The statute defines "knowingly" to include any activity of which a company knew or should have known. Sanctions may not be imposed on companies that exercised due diligence in establishing and enforcing official policies, procedures and controls to ensure compliance with the IFCPA.

Recent press reports indicate that the New York Department of Financial Services ("DFS") is investigating the insurance industry's compliance with the IFCPA and others aspects of the Iran Sanctions Act regime. According to reports, the DFS has asked a number of U.S. and foreign-domiciled companies for information related to compliance with the IFCPA, including requests for copies of relevant compliance policies and procedures, written explanations for how the companies comply with the IFCPA in various circumstances, details regarding refusals to pay on certain claims, and lists of insureds engaged in business in Iran.

Insurers and reinsurers subject to the DFS's reach should continue to monitor U.S. economic sanctions laws and implement policies, procedures and controls designed to assure compliance with the evolving and expanding scope of U.S. economic sanctions. Insurers and reinsurers must continually monitor new rules and regulations and implement dynamic and flexible compliance policies and procedures. Additionally, with the continued interest of the DFS in these issues, insurers and reinsurers should prepare for scrutiny from both federal agencies tasked with enforcing sanction laws (such as the State Department and OFAC) as well as state regulatory agencies that purport to have jurisdiction.

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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