FirstLook

Issues and Developments in Insurance Law

STEPTOE & JOHNSON

Letter from the Insurance Company Team

It takes a nimble insurer to navigate around the landmines created by a consent judgment. This issue explores the challenges presented when a plaintiff and a defendant settle a claim, yet they agree that the plaintiff will only attempt to collect money from the defendant's insurance carrier. The assignment of a "bad faith" claim from the defendant to the plaintiff further complicates an insurer's ability to successfully litigate the matter.

A thoughtful and well-reasoned strategy is a prerequisite for an insurer. Consulting counsel experienced with the complexities of consent judgments is an important first step. While the articles presented herein do not address every possible issue related to consent judgments, they outline important legal concepts and provide helpful insight.

We are, of course, happy to field any calls or emails from you related to your specific situation. In the meantime, enjoy our "First Look" at consent judgments.

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NOT SO FAST!

IN THIS ISSUE

That Agreement Isn't Worth the Paper It's Printed On: Settlements, Consent Judgments, and Penn-America Insurance Co. v. Osborne

By James E. McDaniel

A settlement is in place. The parties to the litigation have executed an agreement that embodies their negotiations. Some walk away with a release. Others walk away with a check. Still others had their heart set on an assignment of claims against a third-party. Once the consideration changes hands, the parties submit a stipulation of dismissal, or the court enters a consent judgment. Does that mean the dispute is over? For most cases, it does. Occasionally, however, the dispute lives on or is inherited by a third-party against whom claims were assigned. This article explores the circumstances in which settlement agreements are subject to attack in West Virginia, either by the parties or by third-parties against whom they are sought to be enforced.

As a general matter, settlement agreements signal the end of a dispute. They are "highly regarded and scrupulously enforced, so long as they are legally sound."[1] Indeed, because "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement . . . it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy."[2] In West Virginia, parties to a settlement may only re-open it if they overcome the heavy burden of establishing that the settlement was the result of an accident, mistake, or fraud.[3] Given these high hurdles, it is the rare case that a litigant will be successful in directly challenging its own settlement agreement.[4]

But an agreement that resolves a matter among discrete parties does not necessarily fix the obligations of a non-consenting or non-party insurer. "Most attempts to resolve litigation without the consent of the defendant's liability carrier involve three components: (1) an assignment of the defendant's rights against his or her liability insurer to the plaintiff; (2) the plaintiff's covenant not to execute against the defendant's assets; and (3) a judgment establishing the defendant's liability and the plaintiff's damages."[5] Due to the potential that such agreements will arise from fraud or collusion, many courts "cast a suspicious eye" on them.[6]

Accordingly, a consent or confessed judgment against an insured party may be subject to attack when it is entered into without the participation of a relevant liability carrier. For instance, in West Virginia, "a consent or confessed judgment against an insured party is not binding on that party's insurer in subsequent litigation against the insurer where the insurer was not a party to the proceeding in which the consent or confessed judgment was entered, unless the insurer expressly agreed to be bound by the judgment."[7] This is because,

> **[w]hen dealing with consent judgments, courts must ensure that circumstantial guarantees of trustworthiness exist concerning the genuineness of the underlying judgment. The real concern is that the settlement may not actually represent an arm's length determination of the worth of the plaintiff's claim.[8]**

The judiciary's circumspect approach to consent judgments is especially heightened when the underlying agreement is coupled with a covenant not to execute. A covenant not to execute is an agreement by "which a party who has won a judgment agrees not to enforce it."[9] Such covenants are suspect because they come with perverse incentives. "When the insured actually pays for the settlement of the claim or when the case is fully litigated, the amount of the settlement or judgment can be assumed to be realistic."[10] But when an insured walks away from the agreement with no practical consequences, it has little reason to challenge the amount of the claim, and the accuracy of the judgment becomes questionable.

One potential circumstance is illustrated by *Penn-America Insurance Co. v. Osborne*,[11] which was decided by the Supreme Court of Appeals of West Virginia in 2017. There, the plaintiff was injured in a timbering accident while conducting work for his employer, H&H Logging Company, on land owned by Heartwood Forestland Fund, IV, Limited Partnership,

and leased by Allegheny Wood Products, Inc., for the purpose of harvesting timber.[12] The plaintiff sued his employer for deliberate intent and both Heartwood and Allegheny for negligent failure to inspect and/or maintain the land.[13] When it came time for the defendants to arrange the defense among their insurers, communications fell apart. H&H requested a defense from its commercial general liability insurer, Penn-America Insurance Company, but Penn-America declined to defend the case against H&H because deliberate intent claims were excluded under the relevant policy.[14]

For their part, Allegheny and Heartwood requested a defense from Allegheny's insurer, which accepted coverage. Some time later, Allegheny and Heartwood realized that H&H was contractually obligated to provide them a defense and wrote H&H to demand that it or Penn-America provide a defense. None of the parties ever notified Penn-America that Allegheny and Heartwood had requested a defense against the plaintiff's allegations. Nonetheless, Allegheny and Heartwood moved for leave to file a third-party complaint for a declaration that Penn-America had wrongfully failed to provide them a defense. The court never ruled on the motion, and the third-party complaint was never filed.[15]

Thereafter, without providing notice to Penn-America, the parties entered into a settlement agreement, stipulating that Penn-America had damaged Allegheny and Heartwood by breaching its contractual obligation to provide them a defense against the plaintiff's allegations.[16] The key aspects of the agreement are as follows:

> Allegheny and Heartwood consented to a $1,000,000.00 judgment for [the plaintiff's] leg injury, and they agreed to assign to [the plaintiff] any claims they may have had against Penn-America for failing to provide them a defense in the lawsuit. In return, [the plaintiff] covenanted not to execute on the $1,000,000.00 judgment against Allegheny and Heartwood. Instead, he would collect judgment from Penn-America by asserting his assigned claims.[17]

The plaintiff dismissed his lawsuit against Allegheny and Heartwood and filed a new lawsuit against Penn-America, seeking to recover $1,000,000 as relief for its alleged failure to provide a defense in the plaintiff's case against Allegheny and Heartwood.[18]

Ultimately, the Supreme Court of Appeals of West Virginia decided that "the consent judgment [was] not binding on Penn-America, and the assignment of claims to [the plaintiff was] void."[19] As to the enforceability of the consent judgment itself, the court adhered to its prior reasoning that a consent judgment coupled with a covenant not to execute is especially suspect and deserving of scrutiny. It further reasoned that "[n]one of the parties to the pre-trial settlement agreement had any motive to contest liability or an excessive amount of damages."[20] Moreover, the parties valued the claim at $1,000,000 by reference to Penn-America's coverage, not the plaintiff's actual injuries. Because "Penn-America was not a party to the lawsuit in which the consent judgment was entered," the judgment could not be binding on Penn-America.[21]

The assignment of bad faith claims by Allegheny and Heartwood fared no better. The Court found that the assignment was based on falsehoods, and that the parties' agreement bore the hallmark characteristics of fraud and collusion.[22] As the Supreme Court of Appeals summarized:

> [T]he facts underlying Mr. Osborne's assigned claims were misrepresented. Moreover, a $1,000,000.00 valuation of a lawsuit for an injured leg, without any cited evidence regarding permanency of the injury, permanent disability, severity, medical expenses, etc., hardly reflects a "serious negotiation on damages." Lastly, concealment also characterizes the pre-trial settlement agreement because the parties never notified Penn-America of their pre-trial settlement negotiations. Once Penn-America learned after-the-fact of the pre-trial assignment and covenant not to execute, it was prohibited from conducting discovery on the extent of Mr. Osborne's injuries and damages. Thus, through secretive means, Allegheny and Heartwood awarded Mr. Osborne a $1,000,000.00 windfall for his injured leg with Penn-America's money.[23]

In essence, the consent judgment entered by the putative insureds was ineffective to subject the insurer to liability or

exposure in a subsequent case brought by the plaintiff.

The reasoning of the Supreme Court of Appeals of West Virginia in *Penn-America* is the majority approach as to whether a consent or confessed judgment can be binding on a third party.[23] For those engaged in settling cases on behalf of their insureds, *Penn-America* counsels against using the settlement agreement as an instrument to foist liability onto a non-party, especially one that has not been given notice of the negotiations. Moreover, insurers against whom consent judgments are sought to be enforced should bear in mind that the enforcers face a steep uphill battle. The Supreme Court of Appeals of West Virginia, along with the majority of courts, looks askance on enforcing such judgments against non-parties.

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[1] *DeVane v. Kennedy,* 205 W. Va. 519, 534, 519 S.E.2d 622, 637 (1999).
[2] Syl. Pt. 6, *DeVane*, 205 W. Va. 519, 519 S.E.2d 622 (quoting Syl. Pt. 1, *Sanders v. Roselawn Mem'l Gardens*, 152 W. Va. 91, 159 S.E.2d 784 (1968)).
[3] Syl. Pt. 2, *Burdette v. Burdette Realty Improvement, Inc.,* 214 W. Va. 448, 590 S.E.2d 641 (2003) (quoting Syl. Pt. 7, *DeVane,* 205 W. Va. 519, 519 S.E.2d 622).
[4] *See, e.g., Burdette,* 214 W. Va. 448, 590 S.E.2d 641 (finding that a settlement agreement was unenforceable because a party to the agreement had repudiated his signature before the agreement left his attorney's office, thus resulting in no meeting of the minds).
[5] John K. DiMugno, *Consent Judgments and Covenants Not To Execute: Good Deals or Too Good to Be True? Part II: Practical Concerns About Collusion and Fraud*, 25 No. 1 INS. LITIG. REP. 5 (2003).
[6] *Id.*
[7] Syl. Pt. 7, *Horkulic v. Galloway*, 222 W. Va. 450, 665 S.E.2d 284 (2008).
[8] *Id.* at 460, 665 S.E.2d at 294 (quoting *Ross v. Old Republic Ins. Co.*, 134 P.3d 505 (Colo. App. 2006)).
[9] *Covenant*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[10] *Horkulic*, 222 W. Va. at 460-61, 665 S.E.2d at 294-95 (quoting *Ross*, 134 P.3d 505).
[11] 238 W. Va. 571, 797 S.E.2d 548 (2017).
[12] *Id.* at 573, 797 S.E.2d at 550.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 574, 797 S.E.2d at 551.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 575, 797 S.E.2d at 552.
[19] *Id.*
[20] *Id.* at 576, 797 S.E.2d at 553.
[21] *Id.* at 578-79, 797 S.E.2d at 555-56; *cf. Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007) (reasoning that the assignment of a bad faith claim may not be made when the insured enters a covenant not to execute as the insured was never actually exposed to an excess verdict that would support a bad faith claim against his insurer).
[22] *Penn-America*, 238 W. Va. at 579-80, 797 S.E.2d at 556-57.
[23] LITIGATION & PREVENTION OF INSURER BAD FAITH § 3:50 (3d ed. 2018) (referring to *Penn-America* as representative of the majority rule "that the consent or confessed judgment is simply not binding where the party from which indemnity is sought was not a party to the previous proceeding").

Insurance Policy Language Used to Challenge Consent Judgments with Covenants Not to Execute

By Meredith J. Risati

A tricky situation faced by insurers is challenging consent judgments coupled with covenants not to execute. An insured's desire to protect his or her personal assets makes entering into a covenant not to execute, and thereby settling without the consent of the insurer, compelling.[1] "The claimant's willingness to give the insured a covenant not to execute against the insured's assets is what makes settling without the insurer's consent so enticing to the insured."[2] If not for the protection afforded by the covenant, there would hardly be any reason for an insured to enter into such an agreement, which generally will require the entry of a judgment establishing liability against the insured, and typically the assignment of the insured's rights against his or insurer to the claimant, including breach of contract and bad faith claims.[3]

Given the potential liability faced by insurers, not only for the amount of the judgments but for potential breach of contract and statutory and common law bad faith claims, the question becomes what, if any, policy language can be used to attack these consent judgments with covenants not to execute? One theory that insurers have used to attack covenants not to execute is the "legally obligated to pay" language contained in most liability policies.[4]

The rationale behind this theory is that the insurer is not liable for the consent judgment because the insured, having executed the covenant not to execute, is no longer legally obligated to pay any amount to the claimant. As discussed below, only a minority of jurisdictions have accepted this argument. Furthermore, the minority rule has been overturned in some jurisdictions where it formerly controlled, evidencing a trend against this position.[5]

Minority Approach: Covenant Not to Execute Is a Release

In a minority of jurisdictions, insurance companies have successfully argued that consent judgments with covenants not to execute constitute a form of release, and therefore, the insured was no longer "legally obligated to pay" the judgment, a necessary condition under the policy to trigger the insurer's duty to indemnify.[6] In other words, because the insured is not legally obligated to pay the judgment, they have not sustained a loss under the terms of the policy.[7]

The leading case on the minority approach is *Freeman v. Schmidt Real Estate & Insurance, Inc.*[8] In *Freeman*, the insured settled an automobile collision suit with the claimant, and as part of that settlement, assigned his rights against the insurance agent, insurance agency, and insurance company to the claimant, confessed judgment and entered into a covenant not to execute on the judgment.[9] The claimant subsequently brought a suit against the agent, agency, and insurance company for breach of the duty to procure insurance for the insured.[10] Based on its predictions of how Iowa courts would rule,[11] the Eighth Circuit Court of Appeals determined that an insurance policy places no obligation on the on the insurer to pay because an insured protected by a covenant not to execute had no compelling obligation to pay, *i.e.* was not "legally obligated to pay" anything to an injured party. Therefore, because the insured did not suffer any damages, the claimant received no enforceable rights through the assignment.[13]

Majority Approach: Covenant Not to Execute Is a Contract

In the majority of jurisdictions that have considered the "legally obligated to pay" language, a covenant not to execute constitutes a contract, rather than a release, and the insured's tort liability remains, as well as the insurer's obligation to indemnify its insured.[14] Because the covenant not to execute merely operates as an agreement not to collect, rather than a release of liability, the insured remains legally obligated to pay, and the insurer must provide coverage under the policy.[15]

As previously stated, courts have been moving towards the majority rule by overturning prior precedent applying the minority rule. For example, in the recent case of *Brownstone Homes Condominium Association v. Brownstone Forest Heights, LLC*,[16] the Oregon Supreme Court overruled prior precedent[17] that had adopted the minority view. In so doing, the court recognized that its previous decision in *Stubblefield* was erroneous when it concluded that a covenant not to execute obtained in exchange for an assignment of rights effects a complete release extinguishing an insured's liability, as well as the insurer's liability.[18] The court held that the language "legally obligated to pay" was ambiguous, and therefore, was to be construed against the insurer.[19]

Although it has never addressed the issue directly, the Kentucky Supreme Court found the majority viewpoint persuasive when ruling on a similar issue in *Associated Insurance Service, Inc. v. Garcia*.[20] In *Garcia*, the claimants suffered grievous injuries after a wheelchair lift malfunctioned and crushed their legs when they were in the process of disembarking from a dinner cruise on the Star of Louisville (the "Star").[21] The claimants filed suit against the Star, whose marine insurer provided a defense under a policy with $1,000,000 limit of liability for amounts that the Star "shall have become legally liable to pay and shall have paid" to the claimants.[22] When the marine insurer became insolvent and unable to satisfy any judgment against the Star, the claimants and the Star agreed to arbitrate the dispute, and the Star agreed to arbitrate the amount of damages within a stipulated range, admit to liability, and assign any and all claims it had against the insurance agent and brokers who obtained the coverage to the claimants in exchange for the claimants' forbearance from collecting any judgment from the Star.[23]

In analyzing the validity of the assignment, the court considered the merits of the insurance agent and brokers' claims that because the assignment had no legal effect, as the Star suffered no damages because the agreement insulated

it from damages, it had no valid claim to assign.[24] In so doing, the court considered the majority and minority viewpoints from other jurisdictions, and found the majority viewpoint's distinction between a covenant not to execute and a release to be persuasive.[25] The court held that the assignment was valid because where "liability is not completely extinguished, the assignment is valid because the tortfeasor is still subject to some amount of liability."[26] Thus, if presented with the issue of the meaning of "legally obligated to pay" within the scope of a covenant not to execute and consent judgment, the Kentucky Supreme Court would likely follow the majority approach.

It is important to note that several jurisdictions have distinguished between releases and covenants not to execute. For example, the Iowa Supreme Court firmly held in *Red Giant Oil Co. v. Lawlor*,[27] that a covenant not to execute is a contract and not a release, such that the insured would have a remedy against the claimant if the claimant attempted to collect against him. Therefore, because the insured's tort remedy remains, and he is still legally obligated to the claimant, the insurer "must still make good on its policy promise to pay, if there is coverage."[28] However, in *Clock v. Larson,*[29] the Iowa Supreme Court distinguished *Red Giant*. In *Clock*, the claimant was injured when she fell from an unprotected catwalk in a barn.[30] The insurer provided a defense under a policy with $100,000 of liability coverage.[31] The insured claimed that he requested his agent to obtain a $1,000,000 umbrella liability policy with the insurer, but no policy was ever obtained.[32] The insurer provided a defense for the insured after the claimant brought suit against him; however, the insured still sued his agent and insurer for breach of contract and negligence for failure to procure the requested coverage.[33]

The claimant and the insured settled the underlying tort action, and under the terms of the agreement, the insured agreed to pay the claimant $110,000, the majority of which was paid by the insurance company, and assign his interest in the lawsuit against the insurer, in exchange for the claimant's agreement not to pursue any claim against the insured arising from the accident.[34] The claimant then attempted to proceed with the insured's lawsuit against the insurer as the insured's assignee.[35] The court recognized that *Red Giant* was different for two reasons: 1) the insurer in *Red Giant* had refused to provide a defense; and 2) the settlement in *Clock* was a release, as the claimant had agreed not to bring any other legal action against him.[36] Therefore, other than a small amount of the settlement paid by the insured to the claimant directly, there was no liability remaining on behalf of the insured.[37]

Conclusion

As these cases demonstrate, attempts to argue that the insurer is not "legally obligated to pay" following an insured's execution of a covenant not to execute with a consent judgment have been relatively unsuccessful. It is important to note, however, the different results that occur when comparing a full release with a covenant not to execute.

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[1] John K. DiMugno, *Consent Judgments and Covenants Not to Execute: Good Deals or Too Good to be True?: Part II: Practical Concerns About Collusion and Fraud*, 25 No. 1 INS. LITIG. REP. 5 (Jan. 5, 2003).
[2] *Id.*
[3] *Id.*
[4] Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation,* 47 DRAKE L. REV. 853, 858–59 (1999).
[5] *Id.*
[6] Sharon D. Stuart & Ashley L. Crank, The Tried, The True, and the New Defenses to Claims of Bad-Faith Failure to Settle, DRI FOR DEF., 60 No. 5 DRI FOR DEF. 56 (May 2018).
[7] Employment Practices Liability Insurance Still in Infancy, But Maturing Dynamically, BNA Employment Discrimination Report, Vol. 11 No. 17 (1998).
[8] 755 F.2d 135 (8th Cir. 1985).
[9] *Id.* at 136.
[10] *Id.*
[11] In *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 532 (Iowa 1995), the Iowa Supreme Court adopted the majority viewpoint, holding that covenant not to execute was an agreement, or contract, rather than a release, which left the insured still liable, and therefore "legally obligated" to the plaintiff.
[12] *Id.* at 138.
[13] *Id.*
[14] Plitt & Plitt, *supra* note 6.
[15] Stuart & Crank, *supra* note 7.
[16] 363 P.3d 467 (Or. 2015).
[17] *Stubblefield v. St. Paul Fire & Marine*, 517 P.2d 262 (Or. 1973).
[18] *Brownstone Homes*, 363 P.3d at 246.
[19] *Id.* at 245.
[20] 307 S.W.3d 58 (Ky. 2010).
[21] *Id.* at 59-60.

Denying Coverage May Result in a Bad Faith Claim by a Third-Party Assignee, but Failing to Timely Deny Coverage Has Much Larger Implications

by Benjamin L. Riddle

Since the Kentucky Supreme Court issued its opinion in *Associated Ins. Serv., Inc. v. Garcia*,[1] it has been abundantly clear that an insured tortfeasor may assign a claim against its insurance carrier to an injured third-party by means of a consent judgment and agreement to forbear execution in order to protect itself from liability. In fact, the Court in *Garcia* specifically endorsed the use of such assignments as a means to "provide a remedy to the injured party as well as the tortfeasor who has been negligently denied adequate insurance coverage."[2] In the unavoidable subsequent action against the insurance carrier, the injured third-party would merely have the burden of offering *prima facie* evidence that the amount of the fixed judgment was reasonable before making its arguments with regard to coverage.[3] Practically speaking, the insured tortfeasor could clearly meet its *prima facie* burden by notifying its insurance carrier of its intent to resolve the claim with the injured party and giving the insurance carrier one more chance to resolve the claim and eliminate risk.

More recently, in *Indiana Ins. Co. v. Demetre*,[4] the Kentucky Supreme Court provided putative insureds and third-party claimants with perhaps a greater remedy against insurance carriers which may have improperly denied coverage. In *Demetre*, Indiana Insurance Company's insured, Mr. James Demetre, was sued by a tenant for physical injuries which were allegedly the result of environmental factors arising from the condition of a piece of real property. There was no dispute that Mr. Demetre had informed Indiana Insurance's agent of the condition of the property, but there was a significant question as to whether the underwriters at Indiana Insurance were informed of the risk or intended to underwrite that risk. In response to the suit, Indiana Insurance provided Demetre with a defense in conjunction with a reservation of rights. Four months after the initial suit was filed, Indiana Insurance filed a declaratory judgment action seeking a determination as to coverage. In response, Demetre filed a first-party bad faith case against Indiana Insurance alleging breach of contract, violation of Kentucky's Consumer Protection Act and violation of Kentucky's Unfair Claims Settlement Practices Act. After more than two years of litigation, Indiana Insurance elected to settle the third-party claims for $165,000, and the declaratory judgment action was dismissed. Presumably, Indiana Insurance had eliminated all risk and foreclosed any possibility of liability against Demetre. Demetre, however, was not satisfied. After spending more than two years of his life in litigation and spending nearly $400,000.00 of in his own money in legal fees, Demetre continued to pursue his bad faith case against Indiana Insurance. Upon hearing the evidence at trial, the jurors awarded Mr. Demetre $3,425,000 in damages ($925,000 in emotional distress damages and $2,500,000 in punitive damages) as a result of Indiana Insurance's lack of a reasonable basis to delay a coverage determination; misrepresentation of facts or policy provisions; failing to respond in a reasonably prompt manner to Demetre's claim; failing to settle the third-party's claim in good faith; failing to provide a prompt, fair and equitable settlement after liability had become clear; engaging in false and deceptive practices prohibited by the Kentucky Consumer Protection Act and for its violation of the covenant of good faith and fair dealing implied in the subject policy.[5] In other words, Indiana Insurance got hit for $3.45 million dollars because it failed to deny or accept the claim at the outset of litigation.

Does an insurer open itself up to a bad faith claim like Mr. Demetre's by resolving a claim upon which it had previously denied coverage once it receives notice of the potential entry of a consent judgment? Does a putative insured have an obligation to inform its carrier of the assignment of a bad faith claim? Could a jury have returned the same verdict to an injured third-party who had accepted assignment of Demetre's bad faith claim? For now, those questions remain unanswered in Kentucky, but one thing is clear. It is critically important for carriers with coverage questions in Kentucky to engage counsel to provide definitive coverage opinions at the outset of a claim.

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[1] 307 S.W.3d 58, 64 (Ky. 2010), as modified (Feb. 3, 2010), as modified (Mar. 19, 2010).
[2] 527 S.W.3d 12.
[3] *Id.* at 68.
[4] 27 S.W.3d 12 (Ky. 2017).
[5] *Id.* at 33.

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