When the garden hose is the insurance policy

What's the call when damages exceed policy limits but defendant has assets?

By David J. Cook

She could see trouble. Her husband ran the car up the driveway and smashed through the garage door. He stumbled out of the car, bolted into the house and hid in the bathroom.

He wrecked the car. Worse, he was drunk, as always. The hood was crumpled. The headlight was smashed. Some gooey, gray matter covered the grill and bumper, and she could see the blood trail in the creases made when he ran over the bicycle rider. No skid marks. She imagined an ugly thud when at impact and crunch in rolling over the body. "When bones break, can you hear them snap?" she thought. "Who knows?" She could hear the sirens, and they were getting louder.

Get the hose!

What did she do? Got the garden hose and washed off the blood, flesh and brain tissues embedded in the car. Next, she called the insurance agent. After learning that the auto insurance had limits of $100,000, she called an attorney who advertised services for "asset protection." Lastly, she called the divorce attorney.

You enter stage right, file suit against everyone and learn, *quickly*, that the defendant's insurance's limits are in fact $100,000 and that the case is worth north of, say, $10 million. Before filing an answer, the insurance company's counsel offers the policy limits in exchange for a global release.

Been there? Now what do you do? The bicycle rider was 35, married, father of three and made about $240,000 a year. Oops, I forgot. Aspiring neurosurgeon. Harvard Medical School. Do you advise acceptance of the offer or take the case to trial? Or, do you bargain for more?

Getting more

This article gives you a roadmap for the "more." Despite the recent decline of real estate values, most real estate has doubled or tripled in value over the last 20 years, but correspondingly, insurance limits have not tracked this newfound wealth. Clearly, the nouveau riche need nouveau insurance. Over the last 20 years, personal injury awards doubled and tripled. Million-dollar verdicts are now routine. Even wrongful death judgments of less than seven figures 20 years ago look puny. However, even the most sophisticated investors, entrepreneurs and business people failed to upgrade their insurance to match their newfound wealth, leading to a gap between coverage and assets. This gap will mushroom into a crisis for the defendant facing a fi-

nancial implosion and for the plaintiff facing a catastrophic loss without financial recompense. Three small children become three sets of college tuition for both plaintiff's and defendant's families.

Getting started

The place to start is getting a statement of the defendant's assets and liabilities. The typical demand is that the defendant, including a non-defendant spouse, execute a financial statement under penalty of perjury. Does this work? Well, yes and no. This works because you have a starting point, but it doesn't work because criminal penalties for perjury are improbable, or impossible, and the likelihood of ferreting out assets, post settlement (assuming that you relied on the sworn statement) is remote at best.

Income-tax returns

Let's ratchet up the pressure. Demand and receive three years of prior federal and state tax returns for the parties and the non-defendant spouse, and three years worth of tax returns for any business (assuming it is a separate entity) and for any partially or totally owned business.

These records will give a greater range of information in laying out other assets that might have been fraudulently conveyed or hidden shortly after the incident. These assets may have formerly been in the name of the defendant, but are now hidden under the defendant's wife's or relative's name, or hidden in the name of a trust, corporation or limited liability company.

Refinancing and liens

Are the tax returns sufficient? Probably not. Your defendant might be a tax cheat, or worse a UBS customer with millions stashed in a Swiss bank account. Run a search through the county recorder for any recent real property refinancing or conduct a search with the Secretary of State for filings by a lender showing a personal property lien (i.e., UCC-1).

Assuming that you find that the defendant refinanced the home or business, the defendant probably provided the financial institution a detailed financial statement including a Uniform Residential Loan Application (URLA) or a detailed financial statement along with three years of real tax returns. In the negotiations over whether you would accept the policy limits, demand a waiver and authorization to compel these third-party banks and financiers to produce this information. With these documents in hand, you will confirm the claimed financial distress of the defendant or find a treasure map showing you the locale of assets which have been transferred, re-titled, sold or hidden. Moreover, you will find inconsistencies with the financial statement and putative tax returns provided to you as part of the settlement process.

Punitive damages

If this process fails, depending upon the status of the civil proceeding, you always have the power to discover the defendant's assets and liability upon a showing that the plaintiff might recover punitive damages under Civil Code section 3295 (c). This discovery likewise would be directed to any financier, financial institutions, the defendant's accountant or tax preparer, among others.

What you might find

With disclosures at hand, you might find something: real property, personal property (such as a car collection), property located overseas, interest in a limited liability company, stock accounts, an IRA, pension or retirement plan or interest in a trust. At this point, you make the following decision: negotiate for settlement in excess of the policy limits, or reject the offer and proceed to trial in the anticipation of scoring a judgment in excess of the policy limits and collecting the balance from the assets. Call this Plan "B."

Plan B

Let's talk about Plan B. Can you get a pre-judgment attachment to sequester the assets pending the judgment?
No. Code of Civil Procedure section 483.010(a) limits an attachment to a contract claim, express or implied and excludes most typical torts and certainly a wrongful death claim. (*Baker vs. Superior Court* (l983) 150 Cal.App.3d. 140, 146 to 147.)

What if the defendant fraudulently conveyed assets? Here, the defendant did you a big favor. Once the defendant committed a fraudulent conveyance, you have the right to recover the conveyance, pending the outcome of the main action. A tort claim has constituted a claim for purpose of launching a fraudulent conveyance claim. (See *Adams vs. Bell* (1936) 5 Cal.2d 697, 701.)

- You can launch the fraudulent conveyance action even though the main case is still pending because the fraudulent conveyance claim seeks to restore the fraudulent conveyed asset back to the estate of the debtor. (See Civ. Code, § 3439.07(a)(1).)
- You might land an injunction (§ 3439.07(a)(3)(A) or a receiver (§ 3439.0(a)(3)(B).)
- You can file suit to recover the real property and record a lis pendens. (See *Kirkeby vs. Superior Court* (2004) 33 Cal.4th 642.)
- You can engineer any other type of creative relief. (§ 3439.07(a)(3)(C).) A fraudulent conveyance includes even the transfer of an asset from one form to another if the purpose of the conveyance has been to make the property more difficult to reach. (Converting stock account into cash, even though held by the debtor, is a fraudulent conveyance because the judgment creditor bore a greater burden in reaching cash in

the hands of the defendant as opposed to a third-party financial institution. (See *In Re Bernard* (9th Circuit, 1996) 96 F.3d 1279.)

In short, as a plaintiff's lawyer, you should thank the defendant for committing a fraudulent conveyance, thereby entitling the plaintiff to impound assets.

Getting assets from the non-defendant spouse and/or children

Presume that you will roll down the path of Plan B but do recognize the non-defendant spouse and/or children are now your competitors to the defendant's dwindling estate. While the survivors of the defendant's wrongful acts are clearly victims of the defendant's crimes or negligence, the defendant's surviving spouse and/or children likewise see themselves as victims, too, and both groups of victims are vying for the same set of limited assets.

From the most macabre perspective, the non-defendant spouse and/or children likewise know where the bodies are buried, and this means that the defendant's survivors have the uphill battle. While family courts beckon the non-defendant spouse to salvage the family's future, the day of using a marital settlement agreement to fraudulently convey community property into separate property is over. (See *Mejia vs. Reed* (2003) 31 Cal.4th 657.) Even though a family law proceeding can no longer be used to launder assets, the non-defendant spouse may still seek to dissolve the marriage to shelter future income, a community property asset, from the money due the plaintiff. (See Fam. Code, § 910(a).) However, Family Code section 916(b) immunizes certain property received by a spouse if a money judgment is entered after the property division. While navigating through shoals of settlement, presume the defendant and spouse are in the throes of a divorce, in which any division, again, becomes part of compensation calculation.

Should you accept settlement in excess of policy limits?

The defendant wants to settle and offers recompense in excess of the policy limits. This is now a dangerous area because the negotiation process might impose upon the plaintiff's attorney the burden to insure that the plaintiffs are achieving the maximum recovery from the defendant's assets. Given the motivation of the defendant and his family, much less the limited tools available to ferret out information about the defendant, and the high likelihood of fraud in concealing assets, it is plaintiff's counsel that will bear the risk of failing to reach all of the defendant's assets and spawn the risk of a malpractice action by the plaintiff's family for failing to locate hidden or fraudulently conveyed assets. These risks are borne out in the family law court in which an aggrieved spouse sues the attorney for the failure to identify and marshal marital property.

The settlement agreement

Let's deal with the rudiments of the settlement agreement. What should the settlement look like? This question goes beyond drafting a settlement agreement with the standard releases because the plaintiff faces post settlement enforcement proceedings for years to come. If the plaintiff makes a deal with the defendant which might include a payment stream through the years (secured or otherwise) but dismisses the main action with prejudice, the court lacks the jurisdiction to enforce the settlement absent a clear and express reservation of jurisdiction. (See *Wacheen vs. Malis* (2002) 97 Cal.App.4th 429, 433.)

The next remedy is to file suit on the settlement itself, but leading to the burden, expense and delay of litigation without recompense duly at hand, which if unencumbered, walks out the door. (See *Renzo vs. Libarle* (2006) 137 Cal.App.4th 992) (Suit to enforcement settlement agreement).) (But, see also, *Wyzard vs. Goller* (1994) 23 Cal.App.4th 1183) (Deed of trust for benefit of the defense counsel trumps ensuing abstract of judgment for the judgment creditor).)

Plaintiffs have found themselves judicially kicked to the curb when they seek to enforce post dismissal (with prejudice) a breached settlement agree- ment. (*Viejo Bancorp vs. Wood* (1989) 217 Cal.App.3d 200.) Therefore, your remedy is found under Code of Civil Procedure section 664.6 by incorporating the terms of the settlement into a final judgment (not dismissal). By every term, we mean every common, semi-colon and period. The premium is to include every term, because, like the movies, you cannot fix a mediocre settlement by going back to the scraps you left on the floor in the editing room. The settlement is now a judgment, subject to res judicata, and collateral estoppel, and future judges will interpret the agreement through the prism of the Parole Evidence Rule, and general principals of contract drafting, including Civil Code section 1671. The Parol Evidence Rule is well and alive in California. (*Casa Herrera Inc. vs. Beydoun* (2004) 32 Cal.4th 336, 347.)

Filing a dismissal without prejudice

Your other option is to file a dismissal without prejudice with the right to move to reopen the action and proceed to enforce the settlement agreement under Code of Civil Procedure section 664.6. This is a common practice in the Los Angeles County and Kern County courts. Personally, I don't like it because plaintiff hands the defendant an opportunity to oppose the motion to reopen on any number of equitable grounds, including relief under Code of Civil Procedure section 473(b), or even broad equitable powers (See, *Rappleyea vs. Campbell* (1974) 8 Cal.4th 975.) leading to prospect that the court might deny relief,

or even revisit the settlement agreement itself. Recompense lies in the barrel of enforcement. Why turn over the power of enforcement to the person in the black robes? That's *your* job. Worse, compelling the plaintiff to reopen the proceeding means that the process of litigation has not ended which was the entire point of the settlement. Settlements incorporated into a judgment itself, with a mechanism of enforcement, avoid the risk that the court for whatever reason might deny reopening the case to facilitate enforcement.

You have now reached the plateau of working through a deal. Let's go through the other rudiment of issues arising in settlement:

Other issues arising during settlement discussions

The defendant owns real property and offers the plaintiff security in that property. Security in real property is obtained through a deed of trust that secures the debt. The upside is that the creditor may proceed with a non-judicial foreclosure in about 121 days. Whether the creditor or third party buys at the foreclosure sale, the debt is now discharged, which means the entire settlement is discharged. (See Code Civ. Proc., § 726(a) & (b).)

Absent a judicial foreclosure, the creditor needs to exercise great diligence to insure that a potential foreclosure sale will generate sufficient funds to pay off the secured debt or that creditor is satisfied by bidding in the debt for the property. In the event that the creditor acquires the property at the foreclosure sale, the creditor bears the burden of keeping the senior debt, taxes and insurance current and maintaining the property. In effect, the aggrieved plaintiff has exchanged the settlement funds for real estate.

Real estate security has its advantages. The threat of foreclosure might compel performance under the payment stream. A deed of trust gives the creditor priority over competing creditors and usually generates payment in a bona fide sale. Navigating real property security requires a current title report, an up-to-date very reliable appraisal, escrow as part of the settlement, and the services of outside counsel to insure that the documents are correctly drafted, executed and recorded. Paramount, if not tattooed on the forehead of counsel, is the closing title report evidencing your deed of trust, less an interloper with a deed of trust or grant deed issued by non-defendant spouse sabotages the settlement.

The value of the property declines

What happens when the equity in the real property declines (almost a certainty in 2009), and the debtor defaults under the settlement? Can the creditor proceed to enforce the judgment by levy and execution? The answer is that the creditor violates the "one form of action" rules and forfeits the real property security. (See, *In Re Kearns* (9th Circuit, BAP, 2004) 314 B.R. 819 for an excellent survey.) Moreover, the creditor cannot impose a predefault wavier upon the debtor. Such waivers are void. (*The Cadle Company vs. Harvey* (2000) 83 Cal.App.4th 927, 932.) The creditor is left with a judicial foreclosure under Code of Civil Procedure section 726(a) & (b) but which requires the filing of a separate action. Given that the creditor already has a judgment, filing a new action for a judicial foreclosure upon the security is going to raise many judicial eyebrows, including those of the appellate bench. Suffice it to say, tread carefully with real property.

From the viewpoint of 1999 real property, security was the balm of any weak settlement. From the viewpoint of 2009, and Riverside County, real property security is the bane of any settlement. Of course, this entire discussion of real property security is moot if the defendant stipulates to the entry of a money judgment only, in which judgment is entered and the plaintiff records abstracts of judgment, creating a lien on the real property (Code Civ. Proc., § 97.340). Money judgments have issues. The plaintiff bears the burden of a cash sale of the real estate through the sheriff, subject to the debtor's homestead exemption and the 90 percent rule (to the appraised value). (Code Civ. Proc., § 704.800(b).)

The title of the property matters

Real property held by the defendant and spouse as joint tenants is presumed to constitute separate property of each party. (See *May vs. May* (1968) 262 Cal.App.2d 668, 671-672.) Be sure to include a waiver of any separate property interest by the non-defendant spouse. Refusal to waive separate rights impedes any realistic deal because separate property is not subject to the claims of the plaintiff. (See – and memorize – Fam. Code § 1000(a) & (b). See also, *In Re Marriage of Bell* (l996) 49 Cal.App.4th 300, 309 (analysis of Section 1000(b)), and *In Re Marriage of Stitt* (l983) 147 Cal.App. 579, 588 to 589 (community not liable for fees arising from the tort of the spouse).) The separate property characterization is an asset protection device, and drafting any settlement agreement necessary includes a waiver.

Getting at the defendant's business

What if the defendant owns a business? How do we reach those assets? If the business consists of personal property, the standard remedy is a security agreement and filed financing statement, where the entity is incorporated. (*See,* U Com. Code, § 9203(a) & (b) and §§ 9301 and 9501.) The financing statement lapses in five years. (U Com. Code, § 9515.) A security interest in a bank account requires a control agreement. (U

Com. Code, §§ 9104, 9304, 9314 and 9327.)

A security interest in personal property, unfortunately, is only as good as the creditor's ability to physically manage, inventory, marshal and reach the assets, lest they disappear, which upgrades the creditor's vigilance. For fixtures, record the financing statement with the local county recorder. (U Com. Code, § 9501(a)(1)(B).) You should run a UCC search to correctly identify the business entity and actual owner, along with the search through the Secretary of State and confirm whether the asset is already encumbered. If a recorded copyright, the method of perfection is with the US Copyright Office. (*In Re Peregrine Entertainment Ltd.* (C.D. Cal., 1990) 116 B.R. 194.)

Other searches that may lead to useful information

Also consider searches through California State Board of Equalization (you will need the sales tax number), the P.U.C. (for any transportation entity), the contractors licensing board, the California Department of Alcoholic Beverage Control (for bars, restaurants, taverns, supermarkets and convenience stores), the County Clerk (for fictitious business name), the Securities and Exchange website (for public companies), the County Recorder's Office (correct spelling of names from grant deeds and deeds of trust, bulk sale notices, judgments and liens), and any specialty license (Department of Consumer Affairs, Real Estate or other licensing agencies.) Don't forget city and county licenses.

Collecting against corporations or limited liability companies

However, the probable battleground is not the mechanics of perfecting the security interest, but the issue if the business is in the name of another separate and distinct entity, such as a corporation or limited liability company, which is common. Granting a security interest by the corporation for the benefit of its corporate shareholder might well constitute a fraudulent conveyance under California Civil Code sections 3439.05 and 3439.04(a) because the corporation, or limited liability company, is receiving nothing of value in return. (See *In Re Image Worldwide (Leibowitz vs. Parkway Bank etc.)* (7thCircuit, 1998) 139 F.3d 574 (survey of cases).) If the corporation or limited liability files bankruptcy, the trustee might seek to avoid the guarantee and avoid the security interest as a fraudulent conveyance, and making this prospect perverse is that the debtor might have well initiated the bankruptcy proceeding for this precise result.

Bankruptcy

Bankruptcy is always part of the settlement discussions. Commonplace for years were plaintiff-creditors compelling the defendant to stipulate in a settlement that the underlying debt is non-dischargeable in an ensuing bankruptcy proceedings. Plaintiff's counsel would tout that the settlement agreement was "bankruptcy proof." However, the bankruptcy appellate panel disagreed and unceremoniously dumped the state court confession of "non dischargability." (*In Re Cole (Hayhoe vs. Cole)* (9th Circuit, BAP, 1998) 226 B.R. 647.) This is more than interesting collusion between drafters of a settlement agreement arising from personal injury and wrongful death actions seeking to goldplate settlement agreements. *Cole* states that only the bankruptcy judge can declare a debt non-dischargeable and that the parties cannot do it through a pre-bankruptcy filing settlement agreement.

Debts discharged in bankruptcy

Over the last 10 years, the bankruptcy courts have narrowed the scope of debts subject to non-dischargeability under Bankruptcy Code section 523(a)(6) (debts based on willful and malicious conduct are exempted from the bankruptcy discharge – suit in bankruptcy court must be filed within 60 days from date of first meeting of creditors.) The creditor must prove that the debtor intended to injure the creditor as opposed to negligence or even grossly negligent conduct, and that the debtor acted with subjective ill will to injure the creditors. (See *Carrillo vs. Su* (*In Re Su*) (2002) 290 F.2d. 1140, 1142 in which the court ruled that a personal injury judgment arising from a red-light jumper speeding through an intersection suffered by a pedestrian is not willful and malicious.) Infringing on a copyright requires a showing of both willfulness and malice. (See, *In Re Barboza* (9th Circuit, 2008) 545 F.3d 702.)

From the viewpoint of settlement drafting, and the potential that the defendant will file bankruptcy, the plaintiff cannot cantilever the settlement agreement into a confession leading the path to success in a non-dischargability proceeding. Even if the plaintiff succeeded in exempting the debt from the discharge, the plaintiff faces very long odds in collecting because the defendant has turned over all non-exempt assets to the bankruptcy trustee, leaving only a residual of exempt and unreachable assets. The punch line is that securing the settlement with assets therefore takes on a greater imperative.

Exceptions under the Bankruptcy Code

However, under our facts, Bankruptcy Code section 523(a)(9) excludes claims if the debtor was intoxicated from using alcohol, a drug or other substance. But watch out for the requirement to file the non-dischargability action within 60 days from the date the first meeting of creditors. (Bankruptcy Rule 4007(a).) The 60-day rule is cast in stone.

Leverage in the settlement agreement

The drafter of every settlement agreement seeks leverage to compel the debtor to make the payments as agreed. Leverage is found with accruing interest, and the standard number is 10 percent

under Civil Code section 3289(b); other settlement agreements provide for entry of judgment upon default.

Absent other forms of security, the entry of judgment upon default is your only leverage. When and if the debtor defaults, chances are that the debtor is facing either other financial obligations, such as taxes in which the competitors might encumber the debtor's assets before, or that the debtor concluded that liquidating unencumbered assets and moving to a more debtor friendly state is a better alternative to lifelong penury. (OJ Simpson being the personal embodiment of Florida's powerful exemption laws.)

While Justice Anthony Scalia rejected the race to the courthouse in *Grupo Mexicano de Desarrollo vs. Alliance Bond Fund* (l999) 527 U.S. 308, dump your wingtips, grab a pair of Nikes, and race to the courthouse to obtain the money judgment and record the abstracts.

Entering a judgment at default is too late

The problem you face is that by the time that the debtor defaults, and you have exhausted giving the debtor notices of default, the property is long gone and perhaps in the hands of the aggrieved spouse seeking to collect on a support or community property equalization judgment. Judgments should be entered upon settlement and not upon default. Entering a judgment upon default is too late. A debtor may prefer one creditor over another (Civ. Code, § 3432).

Always add an acceleration clause

By the way, don't forget to include an acceleration clause. Absent an acceleration clause, a creditor, facing a default in the stream of payments, is only entitled to recover the payments that are due.

Penalties for non-payment

Thinking of increasing the amperage by incorporating a stiff penalty in the event of default? Given the passage of the Inquisition, the next best remedy is compelling the defendant to stipulate to a large dollar judgment.

For example, the debtor stipulates to pay $72,000 in 12 equal monthly installments, but in the event of default suffers a net judgment of $100,000. Suffering a penalty of $28,000 debt would coerce even the most recalcitrant into payment. Is this a moment of oppression or what? That's what the Court of Appeal thought too. In *Sybron Corporation vs. Clark Medical Supply* (Second Appellate District, 1978) 765 Cal.App.3d 896, the court tossed the $100,000 award but ordered judgment to be entered for the unpaid balance of the settlement. *Sybron* still lives, thank you. (See *Greentree Financial Group vs. Execute Sports Inc.* (2008) 163 Cal.App.4th 495) Facing a claim for $45,000, the defendant agreed to pay $20,000 but defaulted on the first installment. The plaintiff sought to enter judgment for $61,232.50. The court held that $61,232.50 was a penalty in light of the stipulated amount of $20,000. The court viewed the $61,232.50 judgment as a penalty in comparison to the obligation to pay $20,000 under the settlement and rejected the comparison with the original contract in which the principal balance was $45,000 plus costs, interest and attorneys fees. (*Id*. at 499).

What plaintiff lawyers must consider when drafting settlement agreements

In drafting a settlement for a high value personal injury or wrongful death case, the drafter should consider the ramifications of *Greentree*. If the underlying case would produce a potential award of $10 million, but plaintiff is willing to accept, for example, $1million over a period of years payable at the rate of $100,000 per year, but stipulates the higher amount, and the debtor defendant defaults, leading to the $10 million stipulated judgment, under *Greentree,* the court would toss the judgment.

To put a human face on this problem is the following: the debtor defaulted, and the judgment creditor snares a judgment for $10 million and records an abstract of judgment. If the debtor seeks to sell real property, the creditor might score full payment. Even though the debtor signed his or her name to the deal, *Greentree* would wipe off the face of the face of the earth the $9 million recovery due the plaintiff.

Protecting your assets

Many publications, including the *Los Angeles Times*, carry ads for "asset protection," which is a moniker for fraudulent conveyance schemes. The debtor and conveyee consummate the fraudulent conveyance to prevent the creditor from easily reaching the fraudulently conveyed assets, and that the expense, burden, effort and risk in reaching the assets serve as a deterrent, except as to the most motivated. (Think zealot or fanatic). Before the blood and goo has congealed on the car's bumper, husband and wife are rearranging the assets over the kitchen table, a fact not readily apparent to the plaintiff or counsel. Fast-forwarding to the time of settlement and the execution of a broad-based release, the defendant's counsel is going to demand a truly global release whose scope might include claims other than the incident itself, such as a claim for a fraudulent conveyance through the rubric of "all claims," and "all persons" "all successors, assigns, representatives, family members, officers, directors etc." A global release might extinguish the fraudulent conveyance claims and serves as a complete bar to relief in the ensuing litigation, or levy, to reach those specific assets. The mechanism of that global release discharges the conveyee of any liability to unwind the fraudulent conveyance and as a matter of contract, at the hands of the plaintiff, makes the judgment debtor judgment proof. Through a global release, defendant might escape by paying pennies on the

dollar and cheat Plaintiff out of any recompense.

The Los Angeles freeways are teeming with drivers that have only $100,000 motor vehicle insurance policies but live in $1.5 million homes (well, before the crash, they were $2.5 million homes.) Sometimes these drivers cause terrible accidents that injure, maim and kill other drivers, passengers and/or pedestrians. Cases with a value of $2 million to $3 million are commonplace in nearly all personal injury cases where the discussion is coverage, policy limits and disclosure of assets. In choosing to settle with the defendant through a contractual agreement, plaintiff's counsel, as the drafter, must exercise the highest level of care in spelling out the rights and remedies under the agreement, and fully inform the client of the inherent risks of entering into the agreement. Plaintiff's counsel must explore every viable option to insure that the plaintiff will receive the recompense as the heart of the bargain.

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