

Re. Several Issues Concerning Secured Claims in An Insolvency Case by Prof. Nam-Geun YOON

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- Suppose that the business of the Bankrupt Lessee is liquidated (*i.e.*, not reorganised or rehabilitated).

Operating Lease

- From the perspective of the creditors to the Lessor
 - The leased property is deemed as belonging to the capital of the Lessor.
 - Suppose that leasing the property to a specific lessee (in our context, the Bankrupt Lessee) generates no more earnings.
 - The creditors to the Lessor are likely to demand the Lessor to utilize the leased property so that the Lessor can gain earnings. That is, the creditors would demand the Lessor:
 - to terminate the leasing contract with the Bankrupt Lessee;
 - to salvage the leased property; and
 - to lease the same property to another lessee who can afford the lease payments.

Operating Lease

- From the perspective of the creditors to the Bankrupt Lessee.
- The creditors of the Bankrupt Lessee are likely to demand the Receiver (Trustee) in Bankruptcy to immediately stop the outflow of cash.
- To meet such demand, the Receiver is likely to:
 - to terminate the leasing contract with the Lessor;
 - to return the leased property to the Lessor; and
 - to stop lease payments.

Operating Lease

- The preference of the creditors to the Lessor is almost coincide with that of the creditors to the Bankrupt Lessee. It is very natural to deem an operating lease as an unfulfilled executory contract.

Capital or Finance Lease

- From the perspective of the creditors to the Lessor
 - A typical creditor to the Lessor would be a commercial bank or investors that provided a debt finance to the Lessor, which, in turn, provided a finance to the Bankrupt Lessee to enable it to procure the relevant equipment (i.e., the leased property).
 - The creditors to the Lessor are likely to demand the Lessor to collect and recover as much as cash from the Bankrupt Lessee so that it can repay the principal and interests to the creditors.
 - Neither the Lessor nor its creditors deem the leased property as belonging to the capital of the Lessor. They want to salvage the leased property just for the purpose of liquidating it.

Capital or Finance Lease

- From the perspective of the creditors to to the Bankrupt Lessee
 - Both of the Bankrupt Lessee and its creditors are likely to deem the leased property as belonging to the capital of the Bankrupt Lessee. In other words, the property should have continuously generated the earnings of the Bankrupt Lessee, if it had not gone bankrupt.
 - In general, the creditors of a bankrupt expects that any assets belonging to the capital of the bankrupt are liquidated for the purpose of distributing cash to the creditors. However, such expectation of the creditors is subordinated to the security interest on the relevant asset.

Capital or Finance Lease

- In a society where such characteristic of capital or finance lease, while emphasizing the purpose of the lease rather than the forms of contract, constitutes a common sense of the financial institutes, as well as of the lawyers, the leased property would be deemed as security interest for the benefit of the Lessor. If the proceeds gained by the Lessor by liquidating the leased property exceeds the amount of the remaining lease payments, the surplus must be returned to the Receiver.