

# Power to receive performance

## 1. Who has the 'power' to receive?

- creditor, his agent, receiver (when the creditor is in bankruptcy)
- pledgee (where credit is offered as a pledge)
- (apparent or true) possessor of a negotiable instrument, documentary credit
- possessor of a receipt issued by the creditor: Art. 471
- those who have the appearance of an agent (distinct from ostensible authority)
- appearance of an assignee
- invalid collection order or assignment order
  - 96Da44747 (assignment order)
  - 94Da59868 (Yonhap Comm.)
  - [www.kci.go.kr](#)

## 2. Protecting the debtor

- Debtor who performed in good faith and without negligence shall be absolved. Article 470.
- Debtor may seek recovery of payment made in error (Arts. 742, 744)
  - 2000Da23006: The debtor who paid negligently (upon erroneous advice of lawyers) successfully claimed (alleging its own negligence) return of the payment from the recipient.

## 3. Protecting the creditor

- creditor may sue *either* the recipient who received the

performance (which was validly done by the debtor in good faith) *or* the debtor who made the invalid payment to the recipient.

- the debtor who paid in good faith will be discharged as long as he was not negligent
- **Creditor suing the recipient:** 98Da61593 (survivors of a car accident received the insurance payment and then received an additional payment of 42 million KRW from the aggressor) The insurer sues the survivors. Insurer alleges unjust enrichment or, alternatively, tort:
- For the Insurer's claim to be successful, the Insurer must prove that
  - 1) the aggregate total amount received by the survivors exceeded the loss sustained or inherited by the survivors
  - 2) the aggressor made the payment in good faith and without negligence. In order to prove this, the plaintiff must show either that the aggressor did not know that the insurance payment was made to the survivors or that the aggressor believed that the insurance payment did not fully compensate and his 'additional' payment would not be over-compensation.
  - 3) (for a tort claim to succeed) the survivors were at fault (either deliberately received the money knowing that they were not entitled or that they were negligent in believing that they were entitled to receive the additional payment)
- If the Insurer fails to prove the validity of the aggressor's payment, the Insurer's claim against the Insured will fail (because, in that case, the Insurer would have sustained no loss as the aggressor's payment does not discharge the aggressor's obligation to the insurer).
- If the insurance company had sued the aggressor (debtor)

rather than the survivors who received the payment, would it have had a better chance of recovering?

▪ **Creditor suing the debtor in tort:** 87Daka546

- A and B are competing creditors who have claims against C.
- C has 5.8 million KRW credit claimable from D.
- A attached C's claim against D. B also attached C's same claim.
- B applied for and got an assignment order purporting to transfer C's claim (against D) to B. B sued D on relying on the invalid assignment order. D did not contest the validity of the assignment order. Upon judgment in favour of B, D promptly paid to B, purporting to discharge its debt to C.
- A sued D for payment of the debt (relying on an assignment order, which is equally invalid). When it emerged that the assignment order was invalid, A modified the claim and sued D in tort and sought damage (resulting from the loss incurred by D's collusive discharge of debt).
- The court allowed A's tort damage claim.

▪ Query:

- If the **assignment order** is invalid, does A have any ground to allege a "loss"?
- In theory, however, if D was negligent in discharging its debt or if D was in bad faith, D's payment would not have the effect of extinguishing D's debt and thus it cannot be said that A suffered any 'loss'.
- A could have freshly applied for a **collection order** (authorising A to claim against D) and bring a claim against D with the proceeds to be divided up between attachment creditors.
- But the court apparently ignored these theoretical

niceties and allowed A's tort claim against D probably on the weight of the evidence showing collusion between B and D.