

dant's own previous act and intentionally abandons the change of such danger into the result of death, he/she is liable for the homicide by omission. In this case, what matters is "the intent after omission."

In this judgment, this intent after omission is recognized as follows: the defendant caused a concrete threat to the patient's life due to reasons within his control, despite the fact that in the hotel into which the patient was taken, the defendant was fully entrusted by the patient's relatives, who were believers of the defendant, to perform treatment for the patient suffering from a serious illness. Considering that at that time, the defendant was aware of the patient's serious condition and had no reason to believe that he was able to save the patient's life, the defendant was responsible for having the patient immediately receive the necessary medical treatment for keeping him alive. Nevertheless, with willful negligence, the defendant left the patient to die without having him receive the necessary medical treatment. Therefore, it is reasonable to construe that the defendant committed homicide by omission, and also caused death through aggravated abandonment as a co-principal with the patient's relatives, who lacked murderous intent.

This recognition has a serious fault. It is the lack of clarity as to whether the defendant foresaw the victim's death at the time of the abandonment of the necessary medical treatment for keeping him alive. If such unclarity is one of the requirements for homicide by omission, you cannot distinguish homicide by omission from the abandonment causing death by omission. Thus, the subjective element for homicide by omission should be as strict as possible.

## 7. Commercial Law

### **Live door v. Nippon Broadcasting System**

Tokyo High Court, March 23, 2005

Case No. (*ra*) 429 of 2005

1899 HANREI JIHO 56; 1173 HANREI TAIMUZU 125;

1214 KINYU SHOJI HANREI 6

**Summary:**

The Court found that the warrant issuance plan by Nippon Broadcasting System was “grossly unfair” and approved the appeal of *Livedoor* (Creditor) for the preliminary disposition to stop an warrant’s issuance.

**Reference:**

Commercial Code, Articles 280-10 and 280-39, Paragraph 4.

**Facts:**

Fuji Television Network (“Fuji TV”), which is the parent company of Nippon Broadcasting System (“Nippon Broadcasting”), announced its tender offer for all the outstanding shares of Nippon Broadcasting in order to acquire the exclusive managerial rights over Nippon Broadcasting on January 17, 2005. An internet service provider called Livedoor (Creditor), which then already held about 5 % of the outstanding shares of Nippon Broadcasting, purchased additional Nippon Broadcasting shares through an after-hours off-exchange trading system operated by Tokyo Stock Exchange; TOSTNET1, in the midst of the tender offer, and consequently became to hold about 35 % of the outstanding shares of Nippon Broadcasting. After that, Livedoor continued to purchase the shares of Nippon Broadcasting. On February 23, 2005, the board of directors of Nippon Broadcasting decided to issue a number of warrants (*shin kabu yoyakuken*) to Fuji TV. The warrants, if exercised, would have given Fuji TV majority control and diluted to about 17 % Livedoor’s stake, which by that time had increased to about 42 %.

In response, on May 17, Livedoor alleged that this warrant’s issuance was illegal because of “gross unfairness” and appealed the preliminary disposition to stop the warrant’s issuance. Tokyo District Court approved this appeal. Nippon Broadcasting immediately objected to the preliminary injunction, which was rejected by Tokyo District Court. Nippon Broadcasting appealed to Tokyo High Court against the decision.

The case mainly deals with the permissibility of the warrant’s issuance in this M & A situation as a defending tactics.

**Opinion:***Claim dismissed on the merit.*

Where there exists a conflict of the managerial control, if the warrants were issued chiefly in order to dilute the specific shareholders' stakes or to maintain and ensure the managerial control of the incumbent manager or the specific shareholders supporting them, such an issuance can be, as a rule, interpreted as "grossly unfair."

The warrant's issuance for the main purpose of the maintenance of managerial control can not be permissible because such an issuance by the directors would breach the fiduciary duty to the shareholders who are the owners of the company. Therefore, in view of the protection of the whole shareholders' interests, if there are some special reasons to justify the warrant's issuance, exceptionally, even the warrant's issuance for its main purpose of the maintenance of the managerial control can not be interpreted as an "unfair" issuance.

For example, a hostile bidder would not be worth being protected, (1) if he acquired the shares in order to raise their value and then after sold them to those who are related to the company (so-called "green-mailer"); (2) if he temporarily controlled the management of the company in order to transfer the intellectual properties, the know-how, the secrets of the business, the business connections, the customers and so on to himself or to the group companies; (3) if he acquired the shares in order to appropriate the assets of the company as a security for a loan or a resource for the payment after controlling the management of the company; and (4) if he controlled the management of the company for the purpose of getting large distributions by the interests acquired via selling a large sum of the assets, such as real estate and securities which are not directly related to the business of the company. Furthermore, because such a hostile bidder would harm the other shareholders, only if necessary and proper, the directors may issue the warrants for the main purpose of the maintenance of the managerial control of the company.

Accordingly, where there is a conflict concerning managerial control, and the warrants for the purpose of the maintenance of the managerial control are issued, the appeal for the preliminary disposition to stop the warrant's issuance should be approved. However, from the viewpoint

of the protection of the whole shareholders' interests, if there are some special reasons to justify the warrant's issuance, for example, if the company shows that a hostile bidder does not reasonably intend to manage the company, and acquisition of the managerial control by him might bring the company damage difficult to recover, the preliminary injunction of the warrant's issuance affecting who has the managerial control can not be permissible.

### **Editorial Note:**

In the M & A context, when there is a conflict concerning managerial control, the issuance of the new shares to the third parties was sometimes so far used in Japan in order to dilute a hostile bidder's stake. In this case, the courts took the main purpose rule (*shuyo mokuteki rule*) that the issue of the new shares for the purpose of the dilution of the specific shareholders' stakes and the maintenance of the control of the incumbent managers was an unfair issuance. However, it is not clear whether this rule can apply to the warrant's issuance.

The case of March 23, 2005 importantly clarified that this rule could apply to the case of the warrant's issuance, as well and the bidder's appeal was approved. Furthermore, it is meaningful that the four categories of the justified warrant's issuance were provided from the viewpoint of the whole shareholders' interests.

## **8. Labor Law**

### **X v. Kansai Medical College**

Supreme Court 2nd P.B., June 3, 2005

Case No. (*jyu*) 1250 of 2002

1900 HANREI JIHO 168; 1183 HANREI TAIMUZU 231

### **Summary:**

In a law suit in which the father of a deceased trainee doctor demanded the payment of the difference between the minimum wage