ment, due to an infringement of legal stability. And we need to have a retrial, not sue for damages as torts.

However, you can see some exceptions in the case that (a) one party has an intention that infringes on the other party's right, and (b) disturbs taking part in a suit by omission or commission, or (c) cheats a court by making a false statement and giving false evidence. Because this is just to "get a judgment by fraud". This doctrine was made by Supreme Court 3rd P. B., July 8, 1969 Case No. (O) 906 of 1968, 23 (8) MINSHU1407 and Supreme Court 1st P. B., September 10, 1998 Case No. (O) 1211 and 1212 of 1993, 189 SAISHU-MIN 743.

In this case, the Supreme Court also refers to "the binding force of a final and conclusive judgment" called "Kihan-ryoku". But I think this case is not related to this binding force ("Kihan-ryoku"). And I guess the Supreme Court is sending the message that it is cautious about bringing the matter up again. At this time, the case that Xs filed was indeed "bringing a matter up again".

5. Criminal Law and Procedure

Hosono v. Japan
Supreme Court 1st P.B., May 31, 2010
Case No. (a) 1462 of 2007
1508 SAIBANSHO JIHO 3

Summary:

A case in which the Supreme Court acknowledged the certified public accountant (CPA) who belongs to the auditing firm which had entered into an audit contract with a company, as a co-principal along with a representative director and others in this company, in the submission of misstated half-yearly report and securities report.

Reference:

Securities and Exchange Act, Article 197, Paragraph 1, Item 1, and Article 198, Item 6 (currently, Financial Instruments and Exchange Act,

Article 197, Paragraph 1, Item 1, and Article 197-2, Item 6).

Facts:

A representative director *A* and others in a company limited *B* borrowed 6 billion yen from *B*, and, by using this money, bought 2 million shares of this company's stock through the silent partnership that *C* manages and foreign banks according to *C*'s suggestion. *A* issued two sheets of personal check for 3 billion yen, and put in them to *B*. In turn, the accounting procedure in which 6 billion yen was paid back with them was carried out in *B*. And, in facing an interim audit of *B*, *A* asked for *C*'s cooperation, and agreed with *C* on the camouflage in which *B* deposited 6 billion yen with the company limited *D* that *C* ran, and entrusted its use to *D*, by depositing the two sheets of personal check for 3 billion yen with *D*. Moreover, the predated contract of deposit for consumption was made out. The date before the end of the half-year period was shown on that contract. *C* acknowledged that *A* had no funds for squaring up the two sheets of personal check for 3 billion yen, and was not going to present this check for payment. Later, in the half-yearly settlement, *B* drew up a misstated half-yearly report, and submitted it to the Director of the Kanto Local Finance Bureau. In that report, "6 billion yen" was recorded as "money deposited," and the interim balance sheet to which an annotation was added for the "important content of the assets" was included. The annotation read, the "money deposited, 6 billion yen, is a deposit of funds with a buy-out fund business corporation on the basis of the contract of deposit for consumption." Furthermore, *A* asked for *C*'s cooperation, and they agreed that *A* would buy the stock of the company limited *E* that *C* ran, at two hundred fifty thousand yen a share, by using *A*'s own money, and that, upon the face of the document, *B* pretended to buy this stock for 6 billion yen and pay for it by the two sheets of personal check for 3 billion yen that *B* deposited with *D*. And, *A* and the *E*'s shareholders including *C* agreed that these shareholders including *C* sold 2,100 shares of the *E*'s stock to the company that *A* effectively controls for a total price of 525 million yen, and that this company sold *B* 2,600 shares of its own stock that included company-owned ones for the amount of 6 billion yen. *A* paid those shareholders a total of 475 million yen of the said total price. Later, in the settlement of accounts, *B* drew up a misstated securities report, and

submitted it to the Director of the Kanto Local Finance Bureau. That report contained the balance sheet in which "*E* Co., Ltd.: 6 billion yen" was listed as the "stock of an affiliated company" in the "main contents of the assets and liabilities."

A defendant *X* was one of the senior partners in the auditing firm *F* which had entered into an audit contract with *B*, and also held the position responsible for the audit of *B*.

In the judgment of the first instance (Tokyo District Court, March 24, 2006), the court acknowledged *X* as a co-principal in the submission of misstated half-yearly report and securities report. And, since in the original judgment (Tokyo High Court, July 11, 2007) the court dismissed *X*'s appeal, *X* made a final appeal to the Supreme Court.

Opinion:

Final appeal dismissed.

According to the above-mentioned facts, the contract of deposit for consumption between *B* and *D* is a camouflage, and the two sheets of personal check for 3 billion yen were not delivered over to *D* in order that *D* utilizes the resources of 6 billion yen. Therefore, it is acknowledged that *B* did not deposit the property of 6 billion yen with *D*, and that the entry on money deposited in the half-yearly report is the false one of an important item. And, the two sheets of personal check for 3 billion yen were delivered over to *D* on the premise that this check would not be presented for payment, and actually, in buying the *E*'s stock, this check was not used as the means to pay for that. Therefore, it is acknowledged that *B* did not acquire *E*'s stock for 6 billion yen, and that the entry on acquisition cost of this stock in the securities report is the false one of an important item.

X, a CPA, was one of the senior partners in the auditing firm at that time, and also held the position responsible for the audit of *B*. However, asked for advice by *A* on buying the *B*'s stock from a stock speculator, *X* recognized that (a) *A* used 6 billion yen that *A* borrowed from *B* to buy 2 million shares of the *B*'s stock, that (b) since *A* was incapable of raising 6 billion yen in actuality, the two sheets of personal check for 3 billion yen were of no value, that (c) the contract of deposit for consumption was made out just for the camouflage in which *B* deposited 6 billion yen with *D*, and that (d) the *E*'s stock was not bought in exchange for the two

sheets of personal check for 3 billion yen, but by using *A*'s money, at two hundred fifty thousand yen a share. Moreover, *X* gave *A* and others advice and approval on the accounting procedure for the 6 billion yen that had been disbursed from B. Though in a position to redress the false entry, *X* didn't reflect *X*'s own recognition in an audit opinion, and gave a "useful opinion" to the interim financial statements in the misstated half-yearly report and a "clean opinion" to the financial statements in the misstated securities report. These facts show that *X* recognized that *A* would submit these misstated half-yearly report and securities report to the director of a local finance bureau, and conspired with *A* and *C* toward this scheme. Therefore, the original decision in which the court acknowledged *X* as a co-principal in the submission of the misstated half-yearly report and securities report is in the right.

Editorial Note:

This is the first publicized case of the Supreme Court in which the court acknowledges an auditor in the Securities and Exchange Act as a co-principal in the submission of a misstated half-yearly report and securities report and hands down the imprisonment-with-labor sentence (though with its suspension in this case).

In recent years, massive corporate scandals involving auditing firms and their CPAs have beset Japanese society. Above all, the Kanebo and Livedoor scandals were infamous for bringing about huge losses and significant financial damage. In these scandals, CPAs played integral roles in perpetrating accounting violations, which has led to a deep distrust of corporate accounting in this country. Up to the present, CPAs had assumed the burdensome social responsibility of keeping tabs on corporate activities, and thus enjoyed professional respect and occupational prestige. But, in those scandals, CPAs were finally condemned to imprisonment with labor for their frauds. In this way, recently, the courts have taken a tough line with this sort of criminal. We can observe the same line in the case presented above also.

As noted before, the court acknowledged the said CPA as a co-principal in this case. In view of the facts, this co-principal can be classified as a co-conspirator. Since a CPA is not a legal submitter of the half-yearly report and securities report, this judgment entails the theoretical question

whether the said CPA can be regarded as a person who has used another principal's act as his/her own tool to commit a crime. In the law of precedent, such a person is judged as a co-conspirator. According to the fact finding in the original instance, recognizing the false entry, *X* not only expressed a "clean opinion," but also cooperated with the accounting procedure for the cover-ups and provided a virtual guarantee that this procedure can endure audit. And, *X* gave out advice in structuring a scheme for the cover-ups. Thus, since *X* played an active and crucial role, not a passive role such as ignoring the false entry, the court seems to have regarded *X* as a co-conspirator.

6. Commercial Law

X v. Y
Supreme Court 3rd P.B., March 16, 2010
Case No. (ju) 1154 of 2010
2078 HANREI JIHO 155; 1323 HANREI TAIMUZU 114;
1346 KINYU SHOUJIHANREI 38

Summary:

This is the case where the retirement benefits for ex-director which were approved at the shareholder's meeting had been paid in the form of a pension for years.

The company (defendant, appellee) decided to discontinue the pension benefits for the retired directors because of the deteriorating management and financial condition, and abolished the internal rule of the pension benefits at the director's meeting after collecting the majority of the ex-directors' agreements. In the course of the treatment, the company unilaterally suspended the pension payments for the ex-director (plaintiff, appellant) who did not agree with the amendment. The case is whether the company can cut out the benefits even for the director who disagreed. In this regard, the Supreme Court held that the company cannot extinguish the retired pension benefits claim without having the counterparty's consent.