CASE COMMENT: GREENMAIL, JAPANESE STYLE

Curtis J. Milhaupt

Abstract

This comment analyzes the *Janome Sewing Machine* case, a high profile 2006 judgment of the Supreme Court of Japan on the personal liability of corporate directors for engaging in an elaborate scheme to repurchase company shares held by an undesirable shareholder with links to organized crime. The litigation offers insight into a rather dark period in Japanese corporate history and provides a platform for considering larger questions about Japan's institutional incentive structures and law enforcement climate. While the conduct at issue in the case, typically known as "greenmail," seems to have abated in Japan, critics may argue that it has been replaced by its white collar equivalent—short-term oriented private equity and hedge fund activism. Thus, the comment concludes with a reference to a more recent, controversial decision of the Japanese Supreme Court, *Bull-Dog Sauce*, endorsing as a valid defensive measure target management's large-scale payoff to a Wall Street investment fund to thwart its tender offer for the firm.

Author

Parker Professor of Comparative Corporate Law; Fuyo Professor of Japanese Law, Columbia Law School. Michael Druckman, JD class of 2013, provided helpful assistance in the preparation of this comment. This Comment is based on the author's contribution to a commemorative volume in honor of Prof. Harald Baum entitled *Business Law in Japan—Cases and Comments*, edited by Christopher Heath et al. (2012).

INTRODUCTION

Investopedia defines "greenmail" as "[a] situation in which a large block of stock is held by an unfriendly company. This forces the target company to repurchase the stock at a substantial premium to prevent a takeover."[1] The website notes, "[n]ot unlike blackmail, this is a dirty tactic, but it's very effective."[2]

Greenmail takes different forms around the world. In Japan, at least in the past, it was the lifeblood of a class of professional corporate extortionists known as a *sokaiya* (総会屋), which literally means "one who makes a living off of annual shareholder meetings." That obscure term will make sense when one learns that the stock-in-trade of the *sokaiya* is to threaten corporate management—threaten to disrupt the annual shareholders meeting by asking embarrassing questions in a rude and persistent manner, to reveal the dirty laundry of the company or its executives, or, as the Investopedia definition suggests, to amass a block of stock with which to make life miserable for target management in the hopes of being bought off by the target company.

In 2006, the Supreme Court of Japan rendered a major decision on greenmail, Japanese style.[3] This high profile case involved *sokaiya* Mitsuhiro Kotani and his extortionate dealings with the directors of Janome Sewing Machine Co. Ltd. and Saitama Bank at the end of Japan's bubble period. Shareholders of Janome filed a derivative suit against five directors of the company for massive losses sustained by the firm as a result of the board's attempts to buy Kotani's silence and dissuade him from transferring a large block of Janome stock to an organized crime group.[4] Reporting on the derivative suit in 1993, the *New York Times* said the litigation "provides an ominous look into corporate mores" in Japan, referring to widespread "improper payments to shady investors or underworld characters."[5]

Filling in all the background on organized crime and its relations with corporate Japan—particularly in the boom years of the 1970s and 80s—would occupy too much space in this short Comment. For present purposes, suffice it to say that during the period covered by the events in this case, Japan had a serious problem with organized crime, and Japanese corporate officials routinely paid off actors linked to organized crime in the hopes that they

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[1] *Greenmail*, INVESTOPEDIA, http://www.investopedia.com/terms/g/greenmail.asp (last visited Oct. 30, 2011).

[2] *Id.*

[3] Saikō Saibansho (最高裁判所) [Sup. Ct.] Apr. 10, 2006, Hei 15 (ju) no. 1154, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ (最高裁判所民事判例集) [MINSHŪ] 1273 [hereinafter *Janome*].

[4] For background on corporate extortion in Japan, see, e.g., Mark D. West, *Information, Institutions, and Extortion in Japan and the United States: Making Sense of* Sokaiya *Racketeers*, 93 NW. U. L. REV. 767 (1999) [hereinafter West, *Information, Institutions, Extortion*].

[5] James Sterngold, *In Japan, a Plundered Company*, N.Y. TIMES, Nov. 9, 1993, at D1.

would keep quiet and go away.[6] An ongoing scandal at Olympus Corporation has raised the specter that corporate linkages to organized crime continue to this day.[7] The practice was so prevalent that provisions of the corporate law contained in the Commercial Code were amended to prohibit payments in connection with the exercise of shareholder rights.[8] Lawful or not, as the *Janome* case illustrates, sometimes corporate efforts to buy the silence of greenmailers went spectacularly awry.

The Supreme Court's decision in the *Janome* case is too rich and juicy to boil down to its holding, not to mention that it is one of the longest and most factually complex opinions by the Japanese Supreme Court I have seen. I begin by providing an extensive summary of the opinion, retaining as much of its original flavor as possible, and quoting the opinion verbatim with respect to the key holdings of the case. Then I offer some reflections on the legal issues presented in the case and the larger significance of the litigation for the Japanese legal system. I conclude by tying the *Janome* greenmail case to a more recent decision of the Japanese Supreme Court that suggests greenmail may be alive and well in Japan even today, albeit in a more dressed up and twenty-first-century kind of way.

I. THE SUPREME COURT'S OPINION[9]

A. The Facts

A[10] [Mitsuhiro Kotani] is a well-known stock speculator. *Company B* [Janome Sewing Machine Company] is a company that manufactures and sells

[6] West, *Information, Institutions, Extortion*, *supra* note 4.

[7] Olympus Corporation hid more than $1.5 billion of investment losses during the tenure of two company presidents. Kana Inagaki & Phred Dvorak, *Panel Slams Olympus in Accounting Scandal*, WALL ST. J. (Dec. 6, 2011, 8:10 PM), http://online.wsj.com/article/SB10001424052970204770404577081452413196164.html. Although there was considerable media speculation that organized crime figures were involved, a report by an outside investigative committee "did not find any involvement of antisocial forces." Olympus kabushiki gaisha daisansha-iinkai (オリンパス株式会社第三者委員会) [Olympus Corporation, Third Party Committee], Chosa-houkokusho, youyakuban (調査報告書要約版) [Investigation Report Summary] 14 (2011).

[8] Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527 (2001) at 573–77 [hereinafter West, *Puzzling Divergence*].

[9] *Janome*, *supra* note 3. An English translation of the judgment is available at http://www.courts.go.jp/english/judgments/text/2006.04.10-2003.-Ju-.No..1154.html [hereinafter *English Opinion*]. The summary in the text is based primarily on the English translation, with significant stylistic modifications to improve readability while retaining the structure and key passages of the original Japanese judgment.

[10] Pseudonyms are frequently used in place of the actual names of litigants in Japanese judicial opinions.

sewing machines and sewing instruments; its stock is listed on the first section of the Tokyo Stock Exchange. The case arose when a shareholder of *Company B* filed a shareholder derivative suit against five directors and managers of *Company B, Y1, Y2, Y3, Y4*, and *Y5*, for breach of the duties of care and loyalty and for offering a benefit "in respect of the exercise of shareholder rights" in violation of the Commercial Code, Art. 294-2, para. 1.

A and the companies he controlled acquired roughly 35 million shares of *Company B*. To make these and other share purchases, a firm controlled by *A* borrowed 145.6 billion yen (approximately $1.5 billion), 96.6 billion of which was from *Finance Company Q*, a member of *Group P*. Of the 96.6 billion yen borrowed, 50 billion yen was secured by 17.4 million shares of *Company B*. Through this acquisition, *A* and companies controlled by him became the largest shareholders of *Company B*. *A* demanded a seat on the board. Due to his large holdings, he was installed as a company director.

A's acquisition of large amounts of stock alarmed the management of *Company B* because association with *A*, a stock speculator, would harm *Company B*'s reputation. Aware of management's concern, *A* demanded that *Company B* purchase the shares in his possession at a high price. Specifically, *A* suggested that *Company B*, *Bank C* and others form a new company that would acquire the shares of *Company B* and would assume the 96.6 billion yen loan *A* had borrowed to finance the acquisition of the shares. *Bank C* rejected this plan as a thinly veiled attempt to sell the shares to *Company B* at a high price. Instead, *Bank C* covertly planned for *Group P* to purchase the 17.4 million shares used as security for the loan.

When *A* discovered *Bank C*'s plan he asked the president of *Company B* to inform *Group P*'s leader of *A*'s intention to create a new company. However, *Company B*'s president failed to do so. *A* therefore blamed the president for humiliating him, and pressured the president into signing a pledge. The pledge, addressed to *A*, stated, "*Company B* will take responsibility for financing or purchasing the 17.4 million shares of *Company B* in your possession." *A* was able to convince *Group P*'s leader to cancel plans to purchase the stock by showing him the signed pledge.

On July 29, 1989, *A* implied to *Company B*'s management his intention to sell *Company B*'s shares, in conjunction with the pledge, to a person related to an organized crime group. Although management pleaded with *A* to abandon this plan, *A* informed them that he had assigned all of his *Company B* shares to a company affiliated with *Organized Crime Group U*. *A* stated, "The new shareholder will come to *Company B* and also go to *Bank C*. You will be in trouble, anyway." *A* demanded 30 billion yen in exchange for "cancelling" the sale. On August 4, *A*, who had still not received the money, threatened *Company B*'s management, stating, "Two hit men have come from Osaka." Over the next week, the five *Company B* directors who were defendants in the suit moved to meet *A*'s demands. A *Company B* affiliate borrowed 30 billion yen from an affiliate of *Bank C* in a series of secured loan transactions. The sum thus borrowed was then lent to an affiliate of *A*.

After he had received the 30 billion yen, *A* did not cease his harassment of *Company B* and *Bank C*. He continued to pressure them to assume the 96.6 billion yen loan, which was currently held by *Finance Company Q*. Because of the pledge that *Company B*'s president had, under duress, given to *A*, *Company B* agreed to assume part of the loan by assessing the share price from 3,400 to 3,500 yen per share for the 17.4 million shares held as collateral on the loan. The reassessment was achieved through a complex set of secured loan transactions that ultimately resulted in *Company B*'s affiliates borrowing 60 billion yen, which was then lent to an *A* affiliate. *A* used the money to pay back part of the 96.6 billion yen owed to *Finance Company Q*.

A again threatened to sell his stock to another shareholder unfavorable to the management of *Company B* and continued to pressure *Company B* to purchase the rest of his shares. In response, a *Company B* director formulated a policy (the "Policy") whereby *Company B* and an affiliate of the director, *Company S*, would purchase 37.5 million shares of the *Company B* shares held by *A* at 5,000 yen per share one year in the future. *A* also would be provided with a loan of 187.5 billion yen to repay the loans of companies controlled by *A*. A second *Company B* director obtained the rest of the directors' approval of the Policy. Pursuant to the Policy, *Company S* entered into a contract of promise for sale whereby *Company S* would purchase 34.5 million shares from *A*'s affiliate at 172.5 billion yen. Through a series of secured loan transactions that took place on May 24, 1990 and June 14, 1990, *Company B*'s affiliates and subsidiaries borrowed 100.6 billion yen, which they subsequently lent to *A*. *A* used this to repay his and his affiliates' loans; thus, *Company B* in effect assumed a significant portion of *A*'s outstanding loans.

A was arrested for manipulating the price of another company's shares in July 1990. He subsequently resigned from *Company B*'s board. Because of the arrest, the companies under *A*'s control went bankrupt, and payments to *Company B*'s affiliates stopped. Having lost its reputation for its reported association with a stock speculator, *Company S* began the composition procedure.[11] This made it impossible for *Company S* to purchase *Company B*'s shares. In the end, some of *Company B*'s subsidiaries went bankrupt, and *Company B* incurred a total loss of 93.9 billion yen.

Appellant brought a shareholder derivative lawsuit against *Y1*, *Y2*, *Y3*, *Y4*, and *Y5*, asserting primarily two causes of action: 1) that management breached its duty of loyalty and due care, and 2) that it offered a benefit to a shareholder in violation of Article 266, para.1, item 2 of the Commercial Code.

B. The Lower Court's Ruling

The Tokyo High Court found a breach of the duties of care and loyalty on the grounds that appellees had erred in signing the pledge and providing a 30 billion loan that was unlikely to be repaid.[12] The court, however, found no negligence because the appellees were entrapped by *A* and determined they had no option but to prevent damage to the company: "In light of *A*'s cunning

[11] A type of bankruptcy procedure that existed in Japan at the time.

[12] Tōkyō Kōtō Saibansho (東京高等裁判所) [Tōkyō High Ct.] Mar. 27, 2003, Hei 13 (ne) no. 2835, 1172 KIN'YŪ SHOJI HANREI (金融・商事判例) [KINYŪ HANREI] 2 (2008).

and violent threat, it was unavoidable that the appellees, as ordinary managers of a company at that time, made such determination."[13] Moreover, the court ruled that the assumption of loans and furnishing of security to fund repurchases of shares held by *A* did not constitute negligence: "Considering that it was necessary to regain *Company B*'s shares from *A* and assign the shares to loyal shareholders as soon as possible, and also regain the 30 billion yen taken by extortion as soon as possible, they discussed a possible method to achieve these purposes."[14]

The court found no violation of Article 266, para. 1, item 2 of the Commercial Code. The court held that "in reality, *Company B* was deprived of 30 billion yen by extortion"[15] and did nothing more than furnish loans and offer security to its affiliates.

C. The Supreme Court's Ruling

The Supreme Court overruled the High Court judgment, on the following grounds:

1. Payment of Money in Response to *A*'s Extortion

(a) Responsibility for the Breach of the Duties of Loyalty and Due Care of a Prudent Manager

A had no intention from the beginning to repay the 30-billion-yen loan he had obtained. Therefore, it seemed difficult for the appellees to recover the full amount of the loan. Furthermore, the payment to *A* could not be justified because there was no reason to pay it. The appellees argue that *A* threatened to assign the shares in his possession to a company affiliated with an organized crime group, and they feared that people associated with the crime group would interfere with *Company B*'s management, ruining the company.

The court, however, did not accept the appellees' argument. The company's shares are publicly listed and freely traded in the securities market, and it is thus unable to prevent people from acquiring its shares simply because the management deems such people undesirable:

> Therefore, only where such undesirable shareholders make unreasonable demands by abusing their status of shareholder, the company's management must take appropriate measures in accordance with laws and regulations. . . . [I]t cannot be said that it was impossible to expect the appellees to notify the police of *A*'s actions or take other appropriate measures.

[13] *English Opinion*, *supra* note 9.

[14] *Id.*

[15] *Id.*

> Therefore, the appellees' negligence cannot be denied on the grounds that the appellees had no option but to accept *A*'s unreasonable demand and offer to pay a huge amount of money . . . or agree to the payment of money.[16]

(b) Responsibility for the violation of the prohibition against providing a benefit in respect of the exercise of shareholder rights[17]

The assignment of shares is the transfer of the status of shareholder and cannot be regarded as the "exercise of shareholder rights." Thus, even if a company provides a benefit to a person as consideration for the assignment of shares, the company's act cannot necessarily be regarded as providing benefit prohibited under Article 294-2, para. 1 of the Commercial Code.[18] Nevertheless, if the company provides a benefit to any person as consideration for assignment of shares from shareholders whom it deems undesirable, for the purpose of preventing these undesirable shareholders from exercising their votes and other shareholder rights, this should be deemed as providing a benefit "in respect of the exercise of shareholder rights."

In this case, *Company B* believed *A*'s statement that he had sold a large amount of *Company B*'s shares to the crime group's affiliated company, and it feared that people related to the crime group would interfere with *Company B*'s management as a large shareholder. To prevent their interference, *Company B* offered an unjustifiably huge amount of money, about 30 billion yen, to *A* through a bypass loan to repurchase those shares. Thus, *Company B* should be deemed to have provided a benefit "in respect of the exercise of shareholder rights . . . ."[19]

2. Assumption of Loans and Furnishing of Security (the Policy)

(a) Responsibility for the breach of the duty of loyalty and the duty of due care of a prudent manager

It is obvious that the assumption of loans was designed to satisfy *A*'s intention to sell *Company B*'s shares in his possession at a high price and never benefited *Company B*. There was no need for *Company B* to cooperate in making arrangements for the assumption of loan debts. Furthermore, not only was the assessed share price of 5,000 yen per share extremely high, it was also set through stock price manipulation or other maneuvers. It was also obvious that if *Company S*, or companies controlled by *A* went bankrupt, it would be extremely difficult to repay their loans, and if *Company B*'s affiliated

[16] *English Opinion*, supra note 9.

[17] Shōhō (商法) [Shōhō] [Comm. C.] art. 266, para. 1, no. 2.

[18] *Id.* art. 294-2, para. 1.

[19] *English Opinion, supra* note 9.

companies became insolvent, *Company B* would have no choice but to assume their debts. Considering all these circumstances, the Policy was highly likely to cause *Company B* to incur a significant loss.

Therefore, the appellees should not have accepted *A*'s unreasonable demand. At the minimum, they should have avoided taking the measures included in the Policy. It cannot be said that it was impossible to expect the appellees to notify the police of *A*'s actions or take other appropriate measures. Consequently, the appellees' negligence cannot be denied by determining that it is understandable that the appellees formulated or agreed with the Policy, and assumed loans and furnished security.

(b) Responsibility for the violation of the prohibition against offering a benefit in respect of the exercise of shareholder rights

While the Policy formally designated *Company B*'s affiliated companies as the parties to provide the loans, the assumption of loan debts and furnishing of security according to the Policy were, in effect, *Company B*'s providing of a vast benefit via its affiliated companies. First, *Company B* and its subsidiaries furnished their real estate as security. Second, if *Company B*'s affiliated companies became insolvent, *Company B* would have no choice but to assume their loan debts. Moreover, the Policy was employed, under circumstances where *A* implied his intention to sell *Company B*'s shares to *Bank K*, etc., in an attempt to prevent potential shareholders, who would acquire shares from *A*, from exercising shareholder rights and to prevent *A* from exercising his influence as a large shareholder. Thus, the assumption of loans and furnishing of security under the Policy should be deemed to have been conducted "in respect of the exercise of shareholder rights. . . ."[20]

The Supreme Court reversed the Tokyo High Court's judgment and remanded the case for further examination of the amount of loss that should be indemnified by the appellees.

D. The Aftermath

In 2008, the Tokyo High Court found the five defendant directors of Janome liable for 58.3 billion yen (about $600 million) in damages.[21] The amount of damages is certainly eye popping, particularly by Japanese standards, and considering that it is *personal* liability on the part of the directors. Not surprisingly, some Japanese commentators viewed the judgment

[20] *English Opinion, supra* note 9.

[21] Tōkyō Kōtō Saibansho (東京高等裁判所) [Tōkyō High Ct.] Apr. 23, 2008, Hei 18 (ne) no. 2075, 1292 KIN'YŪ SHOJI HANREI (金融・商事判例) [KINYŪ HANREI] 14 (2008).

as harsh.[22] Mr. Kotani underwent one of the largest personal bankruptcies in Japanese history and received a seven-year jail sentence for his activities.[23]

II. COMMENT

The *Janome* case presented the Japanese Supreme Court with two rather straightforward legal issues. The first is whether providing loans with little or no prospect of repayment in response to the extortionate demands of a greenmailer with links to organized crime constitutes a breach of the director's duty of care of a good manager and duty of loyalty under the Commercial Code. The Tokyo District Court and Tokyo High Court determined that the directors of Janome had "no choice" but to make the payments, and thus it could not be said that they had acted intentionally or negligently in violation of their duties. The Supreme Court, by contrast, held that the directors did have a choice: they could have notified the police or taken "other appropriate action." Precisely what other actions would have been "appropriate" is anyone's guess, but the Supreme Court's message is clear: whatever the directors might have done, they should not have done this. In this respect, the Supreme Court's holding has parallels in another famous derivative suit—the Daiwa Bank derivative litigation[24]—in which the Osaka District Court found the directors liable for failing to notify U.S. bank regulatory authorities of massive unauthorized trading losses that had occurred in their New York branch. Like the *Daiwa Bank* case, the *Janome* holding is a strong statement that corporate directors in Japan are obliged to obey the law, regardless of extenuating circumstances that may render compliance damaging to the firm's reputation or may jeopardize its market position.

The second legal issue is whether the series of loans to Kotani and his web of companies by Janome and its affiliates constitute a violation of the Commercial Codes' prohibition against payment of benefits "in relation to the exercise of shareholder rights." The Tokyo High Court had adopted the rather formalistic position that in these loan transactions Janome was deprived of money by extortion and was simply extending credit to its affiliates. As with its ruling on the breach of duty issue, the High Court's ruling is based on the view that the Janome directors are the victim, not the perpetrator. The Supreme Court's finding of a violation on these facts seems rather unremarkable, particularly given that the Commercial Code's prohibition against payments of benefits to a shareholder was enacted precisely to combat the widespread

[22] *See, e.g.*, Ujishima Shin (牛島信), *Janome Mishin daihyososho no imi* (蛇の目ミシン代表訴訟の意味) [*Implications of the Janome Derivative Litigation*], TOYO KEIZAI (東洋経済) [ORIENTAL ECONOMIST], June 14, 2008, at 46.

[23] Sterngold, *supra* note 5, at D3.

[24] Ōsaka Chihō Saibansho (大阪地方裁判所) [Ōsaka Dist. Ct.] Sept. 20, 2000, Hei 7 (wa) no. 11994, Hei 8 (wa) no. 4676, Hei 9 (wa) no. 1939, Hei 10 (wa) no. 8677, Hei 10 (wa) no. 9278, 1047 HANREI TAIMUZU (判例タイムズ) [HANTA] 86.

practice of corporate officials paying off organized-crime-linked (or to use the common Japanese euphemism "anti-social") shareholders.[25] To conclude that such payments fall outside the Commercial Code's scope because they were made as a result of extortionate demands, were made by affiliates, were thinly disguised as loans, or were made with the intention of preventing the exercise of shareholder rights by inducing a transfer of the shares into other hands, would eviscerate the statutory provision.

So much for the law. Well, not so fast. Let's return to the question of whether the Janome directors breached their duty of care and duty of loyalty to the corporation in the way they tried to fend off Mr. Kotani's threats. As noted above, their method of dealing with Kotani as a *sokaiya* racketeer was widespread in Japan at the time. *Sokaiya* were having a field day in bubble era Japan, and many a corporate executive was lying awake at night in a cold sweat fearing precisely the scenario that played out in this case. To be sure, the amounts of money involved in the *Janome* case are shocking: a $300 *million* payoff to a greenmailer? A *billion* dollar "loan" to a web of shady companies? Only in Japan, and only in the Japan of gold-flaked sushi, multi-trillion yen white elephant real estate developments, and country club memberships trading like stocks. In other words, only in a Japan that no longer exists.

The point is, at the time, this was business as usual. And while the directors were clearly acting in their own self-interest (self-*defense* may be the more appropriate term, thinking of those "two hit men who have come from Osaka"), they were also doing what they thought was best for the corporation—preserving its reputation and preventing the company from falling under the control of characters with god-only-knows what kind of business model.[26] No doubt this is the line of thinking that motivated the District Court and the High Court to find only a facial violation of the duties of care and loyalty, with no liability on the part of the directors.

In this same vein, what does the Janome directors' calculus say about the Japanese legal system and its enforcement mechanisms? This case, whose facts, again, are not particularly unusual for 1980s Japan, involves presumably rational business people making a determination that the benefits to the firm of complying with the greenmailer's demands (avoiding the reputational hit, conserving managerial time and energy, and so on) exceeded the costs of complying. Let's repeat the out-of-pocket costs for emphasis—in the ball park of $1 billion. By implication, the directors' cost/benefit analysis played out quite differently when they considered the alternative course of action—the one the Supreme Court found them liable for not pursuing—stiffing Mr. Kotani and notifying the police (or taking some other "appropriate" action).[27]

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[25] *See* West, *Puzzling Divergence*, *supra* note 8, at 576.

[26] A Yakuza-run sewing machine company is a rather amusing thought experiment.

[27] For other arguments along this line, see Matsunaka Manubu (松中学), *Shitesuji no mono kara kyohaku wo ukete kin'in no kofu saimu katagawarito wo teian kettei shita torishimariyakura no sekinin* (仕手筋の者から脅迫を受けて金員の交付・債務肩代わり等を提案・決定した取締役らの責任) [*Responsibilities of Directors Who Proposed and*

The implicit calculus of the Janome directors does not inspire great confidence in the Japanese police and prosecutorial establishment, at least when it comes to organized crime.

Sometimes, foreign observers of Japan get carried away with the distinctiveness of the Japanese people and the uniqueness of their society and culture. But let's face it, this is truly bizarre stuff... Or is it? The best explanation for this behavior is the one Mark West provided—it is the information, stupid.[28] *Sokaiya* thrive in opaque institutional environments. If all relevant information about a firm is already impacted in stock price, a *sokaiya* knows nothing that could harm the corporation. The market for secrets dries up. And by extension, where the stock market is informationally efficient, the purchase of a large block of Janome shares by a known criminal organization—Mr. Kotani's trump card throughout this sordid mess—would result in a massive decline in the price of the stock, hardly something that would benefit the new purchaser.

The *sokaiya* problem seems to have largely abated in Japan, and thus hopefully, the *Janome* case is the Supreme Court's first and last word on corporate payments to a professional greenmailer. (More on this point below.) Why has it abated? Part of the answer may be suggested by the comments immediately above: Japan's institutional environment has improved in the two decades since the conduct in this case took place. Corporate disclosure is better, regulatory oversight is tighter, and yes, thanks to this and other shareholder derivative suits, Japanese managers recognize that they have legal obligations to all their shareholders and cannot run the corporation as a personal fiefdom. More informational efficiency means less room for *sokaiya* shenanigans. In addition and quite importantly, organized crime in Japan has probably suffered from many of the same ailments afflicting legitimate Japanese firms—an ageing and declining population, falling asset prices, and aversion to risk.[29]

EPILOGUE

So greenmailing in this rather blatant form has declined, but what of other forms? Some may argue that greenmail still takes place in Japan, except that characters like Mr. Kotani have been replaced by Wall Street types like Warren Lichtenstein of the aggressive hedge fund, Steel Partners. Foreign and domestic investment funds made quite a target of Japanese management in the first decade of the 2000s.

Decided Payment of Money and Assumption of Debt under Duress by Greenmailer], 1885 JUNKAN SHŌJI HŌMU (旬刊商事法務) [SHŌJI HŌMU] 49, 53–54 (2009).

[28] West, *Information, Institutions, Extortion*, *supra* note 4.

[29] For more on the yakuza as entrepreneurs, see Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000).

Consider another Japanese Supreme Court decision rendered about one year after the *Janome* case, but stemming from a corporate dispute that took place in the mid-2000s. In *Bull-Dog Sauce*,[30] Steel Partners sued to invalidate a defensive measure adopted by the management of a quaint maker of sauces for Japanese comfort food in response to Steel's efforts to shake up the company's business model. Under the defensive measure, Steel Partners was paid about 2.3 billion yen (roughly $25 million) at the behest of management to, in essence, make it go away.[31] The Supreme Court said this was fine, since the company's shareholders approved the defensive plan from which the payment resulted.[32] In response to the case, many Japanese firms announced their intention to adopt similar defensive measures.[33] As one Japanese corporate law scholar noted, this reaction to the *Bull-Dog Sauce* case could make Japan "a heaven for 'greenmailers.'"[34] It appears that in Japan, as on Wall Street, the line between greenmail and a legitimate takeover defensive measure is quite fuzzy at times.[35] How do you say, *"Plus ça change, plus c'est la même chose"* in Japanese?

[30] Saikō Saibansho (最高裁判所) [Sup. Ct.] Aug. 7, 2007, Hei 19 (kyo) no. 30, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ (最高裁判所民事判例集) [MINSHŪ] 2215 [hereinafter *Bull-Dog Sauce*].

[31] Technically, the payment resulted from the firm's shareholder rights plan, approved by over 80% of the shareholders (that is, virtually every shareholder except Steel Partners). Under the plan, each share except those held by Steel Partners was entitled to receive three additional shares. Steel Partners was provided with the cash equivalent of those additional shares. For commentary on the case, see Curtis J. Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations, and Communities—A Comment on Haley's View of Japanese Law*, 8 WASH U. GLOB. STUD. L. REV. 345 (2009).

[32] *Bull-Dog Sauce, supra* note 30, at 2224–25.

[33] Kenichi Osugi, *Recent Reform of Japan's Corporate Law in an International Context: Who Have Participated in the Reforms, and How?*, 53 JAPANESE Y.B. INT'L L. 320, 335 (2010).

[34] *Id.*

[35] Consider the famous Delaware corporate law case Cheff v. Mathes, 199 A.2d 548 (Del. 1964), in which management was not found liable for breach of fiduciary duty in approving payment of a premium over market price to purchase a block of shares from an undesirable shareholder.