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### Japan's love for derivative actions: Irrational behaviour and non-economic motives as rational explanations for shareholder litigation

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## **Japan's Love for Derivative Actions: Irrational Behavior and Non-Economic Motives as Rational Explanations for Shareholder Litigation**

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**ABSTRACT**

*Not long ago, there was a consensus in the legal academy that the Japanese were irrational litigants. As the theory went, Japanese people would forgo litigating for financial gain because of a cultural obsession with maintaining social harmony. Based on this theory, it made perfect (but economically irrational) sense that Japanese shareholders let their U.S.-transplanted derivative action lay moribund for almost four post-war decades, while at the same time the derivative action was a staple of shareholder litigation in the United States.*

*The 1980s brought a wave of law and economics to the scholarship of Japanese law, which largely discredited the cultural explanation for Japan's (economically irrational) reluctant litigant. In this new academic era, reasonable minds could disagree as to whether the efficiency of settlement or high cost of litigation explained the dearth of litigation in Japan. However, the assumption that the Japanese litigant was economically motivated and rational (i.e., that they would litigate only when the financial benefit from doing so exceeded the cost) was virtually beyond reproach.*

*In the early 1990s, the number of derivative actions in Japan skyrocketed. Japanese shareholders suddenly found themselves as strange bedfellows with their American counterparts as the only shareholders of listed companies in the world that utilized the derivative action on a regular basis. This extraordinary change in the behavior of Japanese shareholders has largely been understood through the lens of the economically motivated and rational shareholder litigant.*

*This Article challenges the assumption that the dramatic increase in Japanese derivative actions can be understood solely through the narrow lens of the economically motivated and rational shareholder. Using original empirical and case study evidence, this Article demonstrates that in Japan, neither shareholders nor attorneys stand to gain significant financial benefits from derivative actions. To the contrary, this Article suggests that the non-economic motives (i.e., political and environmental motives and veiled extortion) and irrational behavior of Japanese shareholders, (i.e., the use of inaccurate mental heuristics, self-serving bias, and herding behavior) are critical for providing an accurate explanation for one of the most dramatic increases in shareholder litigation in recent times. This revelation further suggests that the leading literature on*

*shareholder litigation—which forms the basis for the current understanding of shareholder litigation in the United States—is flawed, as it overlooks the critically important role that non-economic motives and irrational behavior play in driving shareholder lawsuits.*

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## I. INTRODUCTION

Not long ago, there was a consensus in the legal academy that the Japanese were irrational litigants. As the theory went, Japanese people would forgo litigating for financial gain because of a cultural obsession with maintaining social harmony.<sup>1</sup> Based on this theory, it

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1. In the 1960s, Takeyoshi Kawashima, a sociology of law expert at the University of Tokyo, published his seminal article on the “culturally irrational” Japanese litigant which—until it was later challenged in the 1980s—provided the leading explanation for Japan’s dearth of civil litigation. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41, 41–72 (Arthur von Mehren ed., 1963). According to J. Mark Ramseyer and Minoru Nakazato, “[t]he classical explanation for low litigation levels in Japan hinges on cultural differences . . . . [I]n Japan litigation threatens a national obsession with consensus and harmony. . . . Even when financial gains are large [the Japanese] sacrificed financial gain for social conformity.” J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 91–92 (1999). According to Mark West,

[T]hose scholars who have studied the Japanese legal system as a comparative model have all too often resorted to simplistic cultural theories to explain differences. The belief that Japanese people have a unique and inherent aversion to litigation is remarkably pervasive among scholars and laypersons in Japan, and for that matter all over the world. It is widely believed that the Japanese dislike conflict, strive to maintain group cohesiveness, and above all avoid any action that might disturb that mysterious, peculiarly Japanese concept of *wa*, or harmony.

Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1439–40 (1994) [hereinafter West, *Pricing of Shareholder Derivative Actions*] (citations omitted). See generally YOSIYUKI NODA, AN INTRODUCTION TO JAPANESE LAW 165–66 (Anthony Angelo trans., 1976); Bruce E. Aronson, *Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case*, 36 CORNELL INT’L L.J. 11, 15–16 (2003) (discussing whether Japanese cultural values influence Japan’s litigation

made perfect (but economically irrational) sense that Japanese shareholders let their U.S.-transplanted derivative action lay moribund for almost four post-war decades while at the same time the derivative action was a staple of shareholder litigation in the United States.<sup>2</sup>

The 1980s brought a wave of law and economics to the scholarship of Japanese law, which largely discredited the cultural explanation for Japan's (economically irrational) reluctant litigant. In this new academic era, reasonable minds could disagree as to whether the efficiency of settlement or high cost of litigation explained the dearth of litigation in Japan. However, the assumption that the Japanese litigant was economically motivated and rational (i.e., as classical economic rational choice theory predicts that they would litigate only when the financial benefit from doing so exceeded the cost) was virtually beyond reproach.<sup>3</sup>

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rate); Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31, 33–36 (2006) (discussing cultural, institutional, and political explanations for low litigation rates in Japan).

2. See West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1437–41 (discussing how the shareholder derivative suits remained relatively unused in Japan for its first forty years and the predominant explanation was a theory of cultural aversion to conflict); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 58 (1991) (discussing the history of shareholder suits in the United States).

3. In the 1980s, John Haley, Mark Ramseyer, and Takao Tanase each developed theories that have evolved into the leading explanations for Japan's historical dearth of civil litigation. Although each theory provides a different explanation, they all assume that Japanese litigants are economically rational (i.e., that they ultimately decide whether to sue based on a narrow *ex ante* financial cost-benefit analysis). See RAMSEYER & NAKAZATO, *supra* note 1, at 91–99 (analyzing data from traffic accidents and concluding that economic analysis guides the legal decisions of Japanese tort victims and their heirs); John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 366–67 (1978) (arguing that no evidence suggests that Japanese parties will accept settlements less economically beneficial than the anticipated economic gain from suit due to an aversion to lawsuits); Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 111–18 (1988) (supporting the proposition that the Japanese are economically rational litigants and discussing other reasons for the low litigation rate); Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 290 (1989) (discussing how Japanese societal institutions shape financial incentives); Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990) (discussing how nonconfrontational compensation systems influence Japanese incentives to litigate). Tom Ginsburg and Glenn Hoetker's recent research on Japanese civil litigation generally supports the common assumption of the economically rational Japanese litigant. See Ginsburg & Hoetker, *supra* note 1, at 56–57 (rejecting the hypothesis that cultural factors play a major role in Japanese litigation rates and concluding that the economic incentives for litigation are underexplored).

In the early 1990s, the number of derivative actions in Japan skyrocketed.<sup>4</sup> Japanese shareholders suddenly found themselves as strange bedfellows with their American counterparts as the only shareholders of listed companies in the world that utilized the derivative action on a regular basis.<sup>5</sup> This extraordinary change in the behavior of Japanese shareholders is largely understood through the narrow lens of the economically motivated and rational shareholder litigant. Specifically, a consensus has emerged that the number of derivative actions has dramatically increased in Japan because the exorbitant fee for filing a derivative action was largely eliminated in 1993.<sup>6</sup> As the theory goes, since 1993, economically

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4. Derivative actions are lawsuits normally brought by corporate shareholders on behalf of the corporation asserting claims that the corporation has not pursued on its own. Theoretically, the corporation (through the board of directors) should enforce its own claims. However, in certain instances, especially in claims against corporate management (in which there is often a conflict of interest), the corporation is unlikely to act on its own. For this reason, many countries allow shareholders to sue on the corporation's behalf to enforce its claim—which is normally related to a breach of duties owed by directors to the company. From 1950 to 1985, in all of Japan, there was on average less than one derivative action per year and not a single successful derivative action. In 1986, the *Mitsui Mining* decision was Japan's first successful derivative action. By the end of 1992, there were thirty-one derivative actions pending before Japanese courts. In 1993, the number of derivative actions more than doubled with eighty-four cases pending before Japanese courts. Shiro Kawashima & Susumu Sakurai, *Shareholder Derivative Litigation in Japan: Law, Practice, and Suggested Reforms*, 33 STAN. J. INT'L L. 9, 17–18 (1997). From 1996 to 2009, there were over 1,000 derivative actions filed in Japan. For the complete unpublished statistics provided to the Authors by the Supreme Court of Japan, see *infra* Appendix A, Table 1.

5. See Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385, 1463 (2006) (discussing the growth in Japanese derivative suits following the cut in filing fees and permitting recovery of U.S.-style attorneys' fees); see also REINIER R. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 175 (2d ed. 2009) (noting that the United States has a high incidence of shareholder litigation and that shareholder litigation is becoming more frequent in Japan); XIAONING LI, *A COMPARATIVE STUDY OF SHAREHOLDERS' DERIVATIVE ACTIONS* 13, 303 (2007) (noting that derivative actions play a major role in the United States, while in the United Kingdom and Germany they are rarely applied); ARAD REISBERG, *DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE* 223–28 (2007) (discussing that the United States has a higher rate of derivative suits relative to other countries, and observing that Japanese shareholders have brought more derivative suits in recent years).

6. According to Tomotaka Fujita, a leading corporate law professor at Tokyo University, "[A]lthough the small number of derivative actions has sometimes been erroneously attributed to the general anti-litigation sentiment among the Japanese people, the litigation fee became recognized as the real determining factor." Tomotaka Fujita, *Transformation of the Management Liability Regime in Japan in the Wake of the 1993 Revision*, in *TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA* 16 (Hideki Kanda et al. eds., 2008); see also KRAAKMAN ET AL., *supra* note 5, at 174–75 ("[M]odest Japanese procedural reform sparked an explosion in derivative suits in the early 1990s . . ."); REISBERG, *supra* note 5, at 225 (asserting that changes in Japanese law in late 1993 made it easier to bring derivative suits); Aronson, *supra* note 1, at 24 (discussing the rise in derivative suits after a revision to the Commercial Code in 1993

motivated and rational Japanese shareholders have utilized derivative actions because the financial benefit of doing so has exceeded the cost.

This Article challenges the assumption that the dramatic increase in Japanese derivative actions can be understood solely through the narrow lens of the economically motivated and rational shareholder. Using original empirical and case study evidence, this Article demonstrates that the norm in Japan is that neither shareholders nor attorneys stand to gain significant direct financial benefits from pursuing derivative actions. To the contrary, our empirical evidence suggests that in most cases it is economically irrational for shareholders and attorneys to pursue derivative actions in Japan (i.e., the risk adjusted *ex ante* *financial* cost of pursuing a derivative action normally outweighs the *direct* financial benefit). This finding gives rise to a conundrum: if it is normally economically irrational to pursue derivative actions in Japan, how has Japan become a world leader in derivative litigation?

This Article attempts to solve this conundrum by expanding the narrow lens of classical economic rationality to consider the possibility that *non-economic motives* and *irrational behavior* may provide valuable insights into the dramatic increase in derivative litigation in Japan. Our case study, empirical, and econometric analyses demonstrate that social activists seeking political (non-economic) benefits are the single largest force driving derivative litigation in Japan. In addition, the *sokaiya*,<sup>7</sup> which often have strong

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reduced filing fees for derivative suits); Cheffins & Black, *supra* note 5, at 1463 (discussing how growth in Japanese derivative suits began after Japan cut filing fees and permitted the recovery of attorneys' fees); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2115 (2001) [hereinafter Milhaupt, *Creative Norm Destruction*] (discussing the rise in shareholder derivative litigation after procedural barriers were removed in 1993); Mark D. West, *Information, Institutions, and Extortion in Japan and The United States: Making Sense of Sokaiya Racketeers*, 93 NW. U. L. REV. 767, 783 (1999) [hereinafter West, *Information, Institutions, and Extortion*] (commenting that investors only recently began using the shareholder derivative suit as a result of the 1993 Commercial Code amendment that reduced filing fees).

7. According to Mark West,

Although *sokaiya*—literally 'general meeting operators'—take several forms, a *sokaiya* typically is defined as a nominal shareholder who *either* attempts to extort money from a company by threatening to disrupt its annual shareholders' meeting *or* works for a company to suppress opposition at the meeting. Surprisingly, Japanese executives pay *sokaiya* despite the fact that payment can result in civil and criminal liability not only for *sokaiya*, but for the executive as well.

West, *Information, Institutions, and Extortion*, *supra* note 6, at 767. It should be noted that over the last fifteen years, various attempts to stop payments to *sokaiya* have been made in Japan including: (a) a stronger attitude of the police against antisocial groups



ties to the *yakuza* (Japanese mafia), have pursued a significant number of derivative actions in Japan. We suggest that the *sokaiya* are willing to engage in prima facie economically irrational derivative actions because such litigation enhances their reputation for extortion, which ultimately provides them with *indirect* economic gains. These findings are important because most of the leading literature on shareholder litigation erroneously assumes that shareholders rationally decide to sue based solely on a narrow ex ante analysis of the *direct financial cost and benefit* of bringing a shareholder action.

We note that based on a wider definition of “rationality”—which assumes that rational behavior is any behavior that increases an actor’s overall level of well-being—the reputational, indirect-economic, and politically motivated derivative actions engaged in by social activists and *sokaiya* would be seen as “rational.” Behavioral law and economics scholars normally rely on this wider, utility-maximizing, definition of rationality which to date has received scant attention in the shareholder litigation literature. This Article demonstrates that the failure to integrate this wider view of rationality into the shareholder litigation literature has led to a myopic understanding of why shareholders sue because it neglects to account for non-economic motives and thus fails to accurately explain a significant portion of shareholder litigation in Japan (and, we suspect, everywhere else).

Perhaps more interestingly, even based on a wider “utility-maximizing” definition of rationality, a substantial portion of Japan’s derivative litigation remains inexplicable in that it appears to be

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in Japanese society (including *sokaiya*); (b) more support by the police to defend executives against *sokaiya*; and (c) changes in law to prohibit *sokaiya* behavior. Perhaps, the most important legal change was the one made to the Commercial Code in 1997 which currently is Article 970 of Companies Act which provides as follows:

- (1) When any one of the persons listed in Article 960(1)(iii) to (vi) or any other employee of a Stock Company gives property benefits on the account of such Stock Company or its Subsidiary Company in relation to the exercise of a right of a shareholder, such person shall be punished by imprisonment with work for not more than three years or a fine of not more than three million yen.
- (2) The provisions of the preceding paragraph shall also apply to a person who has, knowingly, received the benefits set forth in that paragraph or caused such benefits to be given to a third party.
- (3) The provisions of paragraph (1) shall also apply to a person who has requested the person prescribed in that paragraph to give to him/her or a third party the benefits set forth in that paragraph on the account of a Stock Company or its Subsidiary Company in relation to the exercise of a right of a shareholder.

Kaisha-hō [Companies Act], Law No. 86 of 2005, art. 970 (Japan), *translated in Companies Act (Part V, Part VI, Part VII and Part VIII)*, JAPANESE L. TRANSLATION (Apr. 1, 2009), <http://www.japaneselawtranslation.go.jp/law>.

driven by purely irrational behavior. Putting aside social activist and *sokaiya* driven litigation, the remaining universe of derivative litigation in Japan appears to be driven by shareholders and attorneys engaging in “utility-decreasing” behavior that is against their own self-interest. Such purely irrational behavior by shareholder litigants and their attorneys has rarely been explored. In an attempt to unravel this apparent mystery, we rely on well-established behavioral economics research and our empirical evidence to provide a number of possible explanations (e.g., the use of inaccurate mental heuristics, self-serving bias and herding behavior) for these otherwise inexplicable shareholder suits. By doing so, we demonstrate that an understanding of behavioral irrationality is critical to provide an accurate explanation for one of the most dramatic increases in shareholder litigation that the world has experienced in recent times.

Ultimately, this Article advances the literature in three ways. First, it provides an accurate picture of the forces that drive derivative litigation (which is the primary form of shareholder litigation) in the world’s third largest economy.<sup>8</sup> Second, it suggests that the leading literature on shareholder litigation is flawed because it is based on an outdated definition of rationality and underestimates the importance of non-economic motives and irrational behavior as drivers of shareholder litigation.<sup>9</sup> Third, it suggests that the substantial body of literature that claims economically motivated and rational lawyers drive derivative litigation in the United States should be reexamined in light of the evidence that non-economically motivated and irrational shareholders—as demonstrated in the case of Japan—have the potential to dramatically influence the rate of shareholder litigation.<sup>10</sup>

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8. In postwar-Japan there has been very little securities fraud litigation. Also, Japan has no opt-out class action mechanism, and only since 1998 has its civil procedure allowed for multiple plaintiffs to “opt-in” to an action. See MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1896, art. 30, para. 3 (Japan), translated in *Code of Civil Procedure*, JAPANESE L. TRANSLATION (Apr. 1, 2009), <http://www.japaneselawtranslation.go.jp/law> (“A person who shares common interests with a plaintiff or defendant of a pending suit but who is not a party to the suit may appoint that plaintiff or defendant as a party to stand as a plaintiff or defendant on his/her behalf as well.”); see also West, *Information, Institutions, and Extortion*, *supra* note 6, at 783 (“Japan has no opt-out class action mechanism, and only since 1998 has it had an ‘option’ action for multiple plaintiffs.”).

9. See *infra* Part II (analyzing current legal theory that relies on the assumption of rationality in investor behavior).

10. One of the leading articles which has often been cited to support this argument is Romano, *supra* note 2, at 61–62 (presenting empirical results regarding the low prospects for financial recovery for shareholder plaintiffs).

The importance of these advancements in the literature is heightened by the timing of this Article. In the last five years, China and Germany, which are both civil law countries and rank in the world's five largest economies, have reformed their corporate laws to provide for a derivative action.<sup>11</sup> As this Article will explain, some features of Japan's litigation regime that are rooted in its civil law tradition increase the cost of derivative actions and therefore, based purely on a financial cost-benefit analysis, may make it economically irrational for Japanese shareholders to sue.<sup>12</sup> To some extent, these civil law features also exist in Germany and China, which suggests that an accurate understanding of Japan's experience can provide valuable insights into how the derivative action may develop in these two critically important economies. In China's case, Japan's experience can shed light on suggestions made by some pundits that the derivative action, as a Western legal transplant, cannot take hold in a society built on non-litigious "Asian values."<sup>13</sup> With respect to the United States, the recent financial crisis has resulted in a dramatic restructuring of market regulations and renewed oversight of private shareholder litigation.<sup>14</sup> Japan's experience suggests that it would be

11. The derivative action was only introduced into German corporate law as the new Article 148 of the Stock Corporation Act in 2005 by the Law for Corporate Integrity and the Reform of Shareholder Suits. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT, Teil 1 [BGBl. I] at 1089, *as amended by Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts* [UMAG] [Law for Corporate Integrity and Shareholder Suits], Sept. 22, 2005, BUNDESGESETZBLATT, Teil 1 [BGBl. I] at 2802, § 148 (Ger.). The Chinese derivative action was made available for the first time in 2006 under Article 152 of the Company Law of the People's Republic of China (*Zhonghua Renmin Gongheguo Gongsifa*). *Zhonghua Renmin Gongheguo Gongsifa* [Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) 2005 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 42 (China). For an overview of the derivative action in Germany and China, see LI, *supra* note 5, at 193-301.

12. See *infra* Part VI.

13. LI, *supra* note 5, at 276-78 (discussing whether Chinese tradition with its cultural distaste for litigation will have an effect on the application of the derivative action in China); see also MATHIAS M. SIEMS, *CONVERGENCE IN SHAREHOLDER LAW* 217 (2008) (discussing how the use of derivative suits in China is growing despite arguments that Chinese legal culture is not based on individual rights); Tan Lay Hong, *Corporate Governance Issues in PRC Companies*, 21 *COMP. L.* 87, 92 (2000) ("China has historically operated under a disciplinary (rather than a legal or adjudicative) system which focuses on maintaining order, achieving common objectives rather than on preserving individual rights.")

14. See Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 *WM. & MARY L. REV.* 1749, 1752-53 (2010) (noting that the recession has led to calls for reform from legal scholars and politicians); Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n, Address at the U.S. Chamber of Commerce: SEC Reform After Dodd-Frank and the Financial Crisis (Dec. 14, 2011), *available at* <http://www.sec.gov/news/speech/2011/spch121411dmg.htm> (describing the SEC's work and objectives for further regulation in the wake of the enactment of the Dodd-Frank Act).

prudent for American legislators and the judiciary to consider the potential significance of non-economic motives and irrational behavior as important drivers of shareholder litigation when deciding on how to structure and implement these reforms.

This Article proceeds as follows. Part II highlights the flaw in the assumption that shareholder litigants are economically motivated and rational actors and describes how this flawed assumption forms the foundation of the leading scholarship on derivative actions. Part III explains how the evolution of the derivative action in Japan is largely understood through the narrow lens of the economically motivated and rational shareholder litigant, and sets out several testable hypotheses to determine whether this view is accurate. Part IV tests the hypotheses laid out in Part III against the extensive empirical and case study data collected on Japanese derivative actions and by doing so, demonstrates that a number of significant empirical findings cannot be understood solely through the narrow lens of the economically motivated and rational shareholder litigant. Part V explains how non-economic motives are the primary driver of derivative actions in Japan and draws on research from behavioral law and economics to suggest a number of reasons that some Japanese shareholders appear to be irrationally pursuing derivative actions. Part VI concludes by suggesting some useful lessons that Japan and other countries can gain from the realization that non-economic motives and irrational behavior can play a significant role in shareholder litigation.

## II. THE FLAWED ASSUMPTION OF THE ECONOMICALLY MOTIVATED AND RATIONAL SHAREHOLDER LITIGANT AND ITS APPLICATION TO DERIVATIVE ACTIONS

### A. *The Theory of the Economically Motivated and Rational Shareholder Litigant Is Fundamentally Flawed*

When will shareholders sue? A seemingly logical assumption is that shareholders will only sue when the financial benefit of suing exceeds the cost. This assumption forms the foundation of almost all domestic and comparative analyses that attempt to explain the forces that drive shareholder litigation.<sup>15</sup> Unfortunately, the assumption is erroneous.

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15. See *infra* Part II.B (arguing that the theory of the economically motivated and rational shareholder litigant forms the foundation of derivative actions scholarship).

The reason why the assumption is erroneous is simple. Shareholders are human beings (or, in the case of corporate shareholders, controlled by human beings), and human behavior is not solely driven by rational decisions based on a financial cost-benefit analysis. This may seem like common sense but, as is all too often the case in academia, in trying to understand shareholder litigation, academics have largely replaced common sense with high theory.

In this instance, the high theory comes in the form of the “rational choice theory,” which is rooted in the classical law and economics movement. According to classical rational choice theory, human behavior is easily predictable, as all human decisions are made rationally in a manner that will maximize the individual’s financial wealth.<sup>16</sup> Apply classical rational choice theory to shareholder litigation and it axiomatically follows that shareholders will only sue when the financial benefit of suing exceeds the cost.

Outside the realm of shareholder litigation, it is obvious and well documented that classical economic rational choice theory neither accurately explains nor correctly predicts a significant amount of human behavior.<sup>17</sup> Every day, millions of people explicitly act to reduce (not maximize) their wealth by donating money to charity. Every day, millions of people irrationally pour billions of dollars into

16. In their watershed article, Russell Korobkin and Thomas Ulen explain that there are many ways in which classical law and economics scholars define “rational behavior.” However, the most common definition used by neoclassical law and economics scholars in the context of corporate law is premised on the idea of “wealth maximization: that actors will attempt to maximize their financial well-being or monetary situation.” Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1066 (2000).

17. See Korobkin & Ulen, *supra* note 16, at 1055–56 (noting that credible experimental evidence show that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory); see also Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1169–70 (2003) (discussing how heuristics influence human choices); Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 501–06 (1979) (discussing bounded rationality and the behavioral theory of the business firm); Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, *Behavioral Decision Theory*, 28 ANN. REV. PSYCHOL. 1, 1–2 (1977); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 227–30 (1973) (discussing biases and the availability heuristics); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130 (1974) (discussing cognitive biases that stem from reliance on judgmental heuristics); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1108–09 (2010) (discussing irrational decisions and cognitive biases in the context of class actions). See generally JOHN M. DOWLING & YAP CHIN-FANG, MODERN DEVELOPMENTS IN BEHAVIORAL ECONOMICS 19–106 (2007) (discussing bounded rationality, risk aversion, heuristics, and other behavioral economics concepts that influence human behavior).

slot machines when they know these machines only pay out a portion of the money that is poured into them. Every day, countless people decide to spend their hard-earned money in a shop or restaurant, not because they have actual knowledge that it provides the best value for their money, but because it is full of customers. None of these common behaviors would be predicted by the classical economic rational choice theory, as they are not rational actions taken solely to maximize the individual's financial wealth.

However, it is certain that these behaviors (and a litany of others) regularly occur on an enormous scale, and the reason they occur is far from a mystery. Each of these common behaviors has a logical explanation supported by a plethora of research from cognitive psychology. The philanthropist is likely driven by the altruistic (non-economic) pleasure of supporting a cause in which she believes.<sup>18</sup> The gambler is likely driven by the self-serving bias or fallacy that she will "beat the odds."<sup>19</sup> The consumer is likely relying on a tenuous mental heuristic that the presence of many customers in a business establishment ensures that the business provides optimal value for money spent.<sup>20</sup>

For more than a decade, numerous legal scholars have acknowledged the shortcomings of classical economic rational choice theory—a theory that has come to be seen by many as an outdated relic of the Chicago school of economics.<sup>21</sup> This has led to the development of the field of behavioral law and economics, which incorporates research pioneered by cognitive psychology into the classical rational choice theory to provide a more complete explanation for how and why people respond to the law by considering non-economic motives and irrational behavior.<sup>22</sup> However, for reasons that are not entirely clear, the classical rational choice theory (which fails to properly account for non-economic motives and irrational behavior) persists as the bedrock of almost all

18. In their recent research, David Ribar and Mark Wilhelm found that donations seem to be motivated by the joy of giving. David C. Ribar & Mark O. Wilhelm, *Altruistic and Joy-of-Giving Motivations in Charitable Behavior*, 110 J. POL. ECON. 425 (2002). For an overview of the behavioral economics research on charitable giving, see DOWLING & YAP, *supra* note 17, at 341–48.

19. See DOWLING & YAP, *supra* note 17, at 36, 39, 346 (discussing gamblers' tendencies to ignore statistical probabilities, make riskier decisions with their winnings, and make economically irrational decisions in attempts to recover their losses).

20. See *id.* at 44 ("[C]onsumers are unwilling or do not have the time to search for the lowest price.").

21. Korobkin & Ulen, *supra* note 16, at 1055–56 (illustrating that individuals often act in ways that are incompatible with the traditional concept of rationality).

22. See generally CASS R. SUNSTEIN, *BEHAVIORAL LAW AND ECONOMICS* (2000) (using cognitive psychology and behavioral economics to analyze law by looking at how people actually behave).

leading literature on shareholder litigation, while the advancements of behavioral law and economics are largely ignored. The literature specifically focusing on shareholder derivative actions illustrates this point.

B. *The Theory of the Economically Motivated and Rational Litigant Is the Foundation of Derivative Actions Scholarship*

Over the past three decades, almost all of the definitive publications analyzing derivative actions have relied on the assumption that shareholders rationally decide whether to sue based solely on an ex ante analysis of the financial costs and benefits of pursuing a derivative action. In the 1980s, Daniel Fischel and Michael Bradley, in their watershed article *The Role of Liability Rules and The Derivative Suit in Corporate Law*, assume that the ex ante evaluation of whether a derivative action is “a positive net value project” axiomatically determines whether a derivative action will be pursued.<sup>23</sup> In the 1990s, Roberta Romano, in her now iconic article *The Shareholder Suit: Litigation without Foundation?*, similarly assumes that shareholders rationally determine whether to bring derivative actions based on an ex ante evaluation of “the cost of bringing a lawsuit [versus] . . . the shareholder-plaintiff’s pro rata benefits.”<sup>24</sup> In the 2000s, Brian Cheffins and Bernard Black’s award-winning article, which analyzes how derivative actions in several jurisdictions impact the liability of outside directors, concludes that private shareholders normally only sue when it maximizes the shareholder’s “expected recovery, making due adjustments for time, risk, and expense.”<sup>25</sup> Most recently, Arad Reisberg, in his leading text *Derivative Actions and Corporate Governance*, adeptly canvasses almost every conceivable issue with respect to derivative actions, but leaves the assumption that “a litigant will commence an action only when the expected value of the litigation is equal to or greater than

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23. See Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 271–72 (1986) (“If the action appears to be a positive net value project because of the possible recovery of attorneys’ fees, an attorney will pursue it regardless of its effect on the value of the firm.”).

24. Romano, *supra* note 2, at 55.

25. Cheffins & Black, *supra* note 5, at 1476. It should be noted that although Cheffins and Black assume that private shareholders *normally* only sue when the direct financial benefit of litigation exceed the cost they do insightfully acknowledge that the only real litigation risk that outside directors face is in rare situations where idiosyncratic plaintiffs have the non-financial motive to “send a message” to directors. In this respect, Cheffins and Black’s important “send a message” litigation finding supports our general argument that non-monetary factors must be understood to accurately explain what drives shareholders to sue. *Id.* at 1465–69.

zero” largely untouched.<sup>26</sup> In short, the assumption that economic motives and rational behavior are the sole determinants of whether shareholders will pursue derivative actions is the foundation upon which the leading scholarship on derivative actions is built.

The principal prediction that flows from the assumption of the economically motivated and rational shareholder litigant is that, regardless of the jurisdiction, very few shareholders will pursue derivative actions. This prediction is based on two general rules that form the legal starting-point in every jurisdiction that provides shareholders with a derivative action: (1) the shareholder pursuing a derivative action is *prima facie* responsible for the financial cost of pursuing the action (the “Shareholder Risk Rule”); and (2) if the derivative action succeeds, any award flowing from the derivative action will normally be made to the company—the consequence of which is that a shareholder-plaintiff will only benefit from a successful derivative action to the extent that the award to the company causes an increase in the value of the shareholder-plaintiff’s shares (the “Shareholder Benefit Rule”).<sup>27</sup> The logical implication of these two universal rules is that economically motivated and rational shareholders will only pursue a derivative action if, based on an *ex ante* cost–benefit analysis, the financial cost of pursuing a derivative action is less than the expected increase in the value of the shareholder-plaintiff’s shares should the action succeed.

Considering the high cost of derivative litigation and the small stake that most shareholders own in companies, such a cost–benefit analysis leads to the conclusion that it normally will be economically irrational for a shareholder to pursue a derivative action, even when a successful result is guaranteed.<sup>28</sup> This is particularly true in the case of shareholders of listed companies, as they normally own a miniscule percentage of the listed company’s shares and the liquidity of listed shares often makes exit a cost-effective substitute for derivative litigation. Once you factor in the high probability that the derivative action will fail in court,<sup>29</sup> the obvious prediction is that in all jurisdictions derivative actions will be scarce, particularly in listed companies.

Historically, this prediction is generally correct. In spite of the availability of derivative actions in virtually all common law and

26. REISBERG, *supra* note 5, at 224.

27. LI, *supra* note 5, at 5–6; REISBERG, *supra* note 5, at 222–23.

28. LI, *supra* note 5, at 5–6; REISBERG, *supra* note 5, at 222 (discussing how free riders, a lack of direct remedy, and other factors normally make it economically irrational for a shareholder to pursue derivative suits); Cheffins & Black, *supra* note 5, at 1463 (discussing procedural factors and practical considerations that deter shareholders from litigating claims).

29. Romano, *supra* note 2, at 60.



many civil law countries, derivative litigation is an infrequent affair worldwide—particularly in the case of listed companies.<sup>30</sup> This dearth in derivative litigation has persisted in the face of facilitative corporate law reforms that have seen a number of common law jurisdictions codify their derivative actions law and the recent introduction of the derivative action in two of the world's largest economies.<sup>31</sup> The most commonly cited exception to the global paucity of derivative litigation is the United States, where historically derivative actions have been pursued far more frequently than in any other country.<sup>32</sup>

There is considerable academic debate over whether the relatively high rate of derivative litigation in the United States has been a boon or bust for American corporate governance.<sup>33</sup> However,

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30. KRAAKMAN ET AL., *supra* note 5, at 175 (discussing how derivative litigation is available but rarely used in many countries); LI, *supra* note 5, at 5–6 (discussing the weak economic incentives that shareholders normally have to pursue derivative actions and why very few derivative actions are brought in most jurisdictions except for in the US); REISBERG, *supra* note 5, at 222 (discussing how derivative litigation is rarely rational for shareholders); Cheffins & Black, *supra* note 5, at 1463 (“[A] combination of loser pays rules, lack of scope for lawyers to claim attorneys’ fees, and the company’s right of recovery make shareholders reluctant to step forward.”); William Kaplan & Bruce Elwood, *The Derivative Action: A Shareholder’s “Bleak House”?*, 36 U. BRIT. COLUM. L. REV. 443, 444 (2003) (discussing procedural and practical deficiencies of derivative suits); Lang Thai, *How Popular Are Statutory Derivative Actions in Australia? Comparison with United States, Canada and New Zealand*, 30 AUSTL. BUS. L. REV. 118, 123 (2002) (discussing the relative dearth of derivative actions in Australia, Canada and New Zealand compared to the United States).

31. See Harald Baum & Dan W. Puchniak, *The Derivative Action: An Economic, Historical and Practice Oriented Approach*, in *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH* (Dan W. Puchniak et al. eds., forthcoming 2012); Donald C. Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection: Derivative Action in the People’s Republic of China*, in *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH*, *supra*; Dan W. Puchniak, *The Complexity of Derivative Actions in Asia: An Inconvenient Truth*, in *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH*, *supra*.

32. LI, *supra* note 5, at 13 (citing that the derivative action is more popular in the United States than in any other country); KRAAKMAN ET AL., *supra* note 5, at 175 (citing higher incidence of shareholder litigation in the United States); REISBERG, *supra* note 5, at 224, 228 (noting the commonality of derivative suits in the United States); Cheffins & Black, *supra* note 5, at 1462–63 (discussing how procedural differences in the United States lead to more derivative actions compared to other countries); Thai, *supra* note 30, at 123.

33. John Coffee and Donald Schwartz have argued that derivative actions in the United States play an important role in deterring directors from breaching their duties and punishing breaches. John C. Coffee & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 302–09 (1981). Conversely, Roberta Romano has argued that the principal beneficiaries of the derivative litigation appear to be attorneys who benefit from fees generated through quick settlements with directors under their D&O liability insurance coverage—while at the same time providing shareholders with no obvious gains. Romano, *supra* note 2, at 57, 84. Jonathan Macey and Geoffrey Miller, have

there is little disagreement that the reason the United States has historically had a relatively high rate of derivative litigation is because of unique features in its derivative actions regime which tip the financial cost–benefit analysis in favor of pursuing derivative actions.<sup>34</sup> This consensus in the literature has reinforced the assumption that rational decision making based purely on financial cost–benefit considerations is the primary determinant of whether derivative actions will be pursued.

The characteristic of America's derivative actions regime that is most often credited with uniquely tipping the financial cost–benefit analysis in favor of pursuing derivative actions is the pervasiveness of contingency fee agreements.<sup>35</sup> Almost all derivative litigation involving listed companies in the United States is conducted under contingency fee agreements (which traditionally have been either not allowed or heavily restricted in most other countries), rendering

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provided a counter to Romano's argument by suggesting that "strike suit litigation is relatively uncommon." They argue that defendants, as repeat players in shareholder litigation, are unlikely to settle suits because that would merely make them the target of more strike suits in the future and plaintiffs' attorneys are also unlikely to bring strike suits due to their substantial economic risks. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs Attorney's Role in Class and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 78 (1991). For a more recent evaluation of the effect of derivative actions on American corporate governance, see LI, *supra* note 5, at 121–25; Erickson, *supra* note 14, at 1752–55 (discussing whether derivative actions are being replaced by more modern methods such as securities class actions, government investigations, and listing standards of national stock exchanges).

34. KRAAKMAN ET AL., *supra* note 5, at 175 ("The higher incidence of shareholder litigation in the United States is best explained by the presence of a specialized plaintiffs' bar that emerged out of a unique combination of contingency fees, discovery mechanisms, pleading rules, generous attorney's fee awards, and the absence of the 'loser pays' rule."); REISBERG, *supra* note 5, at 223–28 (arguing that the existence of common funds and contingency fee arrangements contribute to the high incidence of derivative suits in the United States); Cheffins & Black, *supra* note 5, at 1462–63 (stating that more shareholder derivative actions are pursued in the United States because of no Loser Pays Rule and the permissibility of contingency fees).

35. See Curtis J. Milhaupt, *Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169, 184–85 (2004) [hereinafter Milhaupt, *Nonprofit Organizations*] ("This U.S. 'private attorney general' model rests on procedural rules that establish fee arrangements for plaintiffs' attorneys."); see also KRAAKMAN ET AL., *supra* note 5, at 175 (asserting that contingency fees are one reason that the United States has higher rates of derivative litigation); REISBERG, *supra* note 6, at 226–28 (discussing how contingency fees contribute to the relatively high rates of derivative suits in the United States); SIEMS, *supra* note 13, at 212 (noting the decreased financial risks for shareholders bringing derivative suits because of contingency fees, since no lawyers' fees arise if the suit is unsuccessful); Cheffins & Black, *supra* note 5, at 1393–94 (arguing that the United States has more derivative suits compared to many other countries because in the United States plaintiffs' attorneys are entrepreneurs who seek out legal violations rather than waiting passively for litigants to come to them).

nugatory the chilling effect of the Shareholder Risk and Benefit Rules.<sup>36</sup>

In standard contingency fee agreements, the shareholder and attorney agree that the attorney will assume the financial cost of pursuing the derivative action and will only be compensated on a fixed percentage of the amount recovered should the derivative action be successfully litigated or settled.<sup>37</sup> Such agreements shift the financial risk of pursuing a derivative action from the shareholder-plaintiff to the attorney, but still allow the shareholder-plaintiff to benefit according to the Shareholder Benefit Rule.<sup>38</sup> By creating an arrangement in which shareholder-plaintiffs have no direct downside financial risk and obvious potential financial gain, the U.S. contingency fee system provides economically motivated and rational shareholders with a strong incentive to take part in derivative litigation. However, shifting the risk to attorneys logically raises another related and critically important question: why do American attorneys enter into contingency fee agreements to pursue derivative actions, assuming they are also economically motivated and rational?

From an economic rational choice perspective, there are three primary reasons that American attorneys retained under contingency fee agreements are considerably better positioned than shareholders to accept the financial risk of pursuing derivative actions. First, attorneys compensated under contingency fee agreements can be almost certain that if they successfully litigate or settle a derivative action, their financial risk will be rewarded because of the “common fund doctrine” developed by U.S. courts.<sup>39</sup> According to this doctrine, when there is a monetary award or settlement resulting from a derivative action, it is paid into a common fund.<sup>40</sup> The contingency fee that the attorney agrees to with the shareholder-plaintiff (normally 20 to 30 percent of the amount recovered) is treated as a first charge on the common fund.<sup>41</sup> This contrasts starkly with the Shareholder

36. See REISBERG, *supra* note 5, at 226–28 (discussing how attorneys’ fees are contingent on the case being successfully litigated or on settlement of the case thus lowering risk for plaintiffs); Cheffins & Black, *supra* note 5, at 1398, 1405–06, 1427–28, 1435, 1455, 1461 (noting contingency fee agreements in shareholder suits, while permitted in the United States, are restricted in countries such as the United Kingdom and Australia, and are prohibited in other countries, including Germany, France, and formerly Japan).

37. For a detailed consideration of the U.S. contingency fee system, see generally HERBERT M. KRITZER, *RISK, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* (2004).

38. LI, *supra* note 5, at 178.

39. *Id.* at 177; REISBERG, *supra* note 5, at 227.

40. REISBERG, *supra* note 5, at 227.

41. *Id.* For an in-depth discussion of the common fund doctrine, see Carol G. Hammett, *Attorneys’ Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CALIF. L. REV. 164 (1972).

Benefit Rule which, as explained above, normally limits the benefit for shareholder-plaintiffs to the *potential* increase in the value of their shares.<sup>42</sup> Thus, shareholder-plaintiffs face considerably more risk than American attorneys when they choose to accept the financial burden of derivative litigation—which is normally why they do not. Indeed, empirical evidence confirms that when a U.S. derivative action succeeds, there is normally no significant increase in the relevant listed company's share price and therefore, no financial benefit to the shareholders.<sup>43</sup> However, in such successful derivative actions attorneys often receive millions of dollars in contingency fees from the common fund, which justifies their risk for pursuing derivative actions.<sup>44</sup>

Second, U.S. courts normally allow attorneys to receive contingency fees in derivative actions when the company does not receive tangible monetary relief, but nevertheless is deemed to “substantially benefit” from the litigation.<sup>45</sup> This is an exception to the general contingency fee rule that normally limits the payment of contingency fees to tangible relief.<sup>46</sup> The “substantial benefit” doctrine is a boon for attorneys, as empirical evidence suggests that non-monetary relief is commonly the end result of U.S. derivative litigation.<sup>47</sup> In most circumstances, economically motivated and

42. See *supra* note 28 and accompanying text.

43. In Romano's oft-cited event study she found no statistically significant change in a company's stock price when a derivative action settles. As very few derivative actions succeed at trial and most settle, a settlement is the most likely way in which shareholder-plaintiffs succeed in U.S. derivative actions. Romano suggests that the reason for the insignificant result is likely because of the typically minimal value of derivative action settlements. Romano, *supra* note 2, at 67.

44. See *id.* at 69 (showing the development of attorneys' fees in shareholder suit payouts over time); see also Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 541 (1991) (discussing methods of payment for plaintiffs' attorneys).

45. In such cases, attorneys receive contingency fees not on a percentage basis from the common fund but based on the “lodestar method” from the benefiting company. A “substantial benefit” may include the nullification of an election of directors, cancellation of a disadvantageous contract or transaction, obtaining an injunction against mismanagement, or making some procedural changes. JAMES D. COX & THOMAS L. HAZEN, *CORPORATIONS* 466–67 (2d ed. 2003) (noting the “substantial benefit” requirement and potential recoveries that satisfy the requirement); DEBORAH A. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE* § 6:15 (2003) (detailing the requirement that the plaintiff's actions provide some tangible benefit for the corporation, usually pecuniary benefit); see also, LI, *supra* note 5, at 177; REISBERG, *supra* note 5, at 227 (discussing how “substantial benefit” to the corporation can result from judgments or settlements); Cheffins & Black, *supra* note 5, at 1394 (noting that corporations will generally pay plaintiff's attorneys' fees if the settlement agreement recites that the suit has conferred “substantial benefit” on the corporation).

46. REISBERG, *supra* note 5, at 226–27.

47. See Romano, *supra* note 2, at 61 (noting that only around 50 percent of settlements result in a monetary recovery).

rational shareholders are especially unlikely to accept the financial risk of derivative litigation to pursue non-monetary relief as such relief further decreases the likelihood that shareholder plaintiffs will benefit through an increase in the value of their shares.<sup>48</sup>

Third, directors and officers (D&O) liability insurance promotes quick settlements in derivative actions, making them extremely attractive for attorneys compensated under contingency fee agreements.<sup>49</sup> Obviously, the less time a contingency fee attorney spends on a given action, the lower the opportunity cost is for pursuing that action. In addition, settling under D&O liability insurance avoids the risk of a director not having the financial resources to satisfy a judgment at trial and of the attorney receiving nothing in an unsuccessful trial.<sup>50</sup> The incentive for director-defendants to quickly settle a derivative claim dovetails with that of contingency fee attorneys. Director-defendants benefit from quick settlements because they can ensure that such settlements fall within the scope of their D&O insurance (normally purchased for them by the company)<sup>51</sup> and thus avoid the risk of being held personally liable at trial.<sup>52</sup> Additionally, the quicker a director-defendant can settle an action, the less negative publicity she will likely suffer.<sup>53</sup> Some academics argue that in spite of their popularity, such quick settlements do not benefit the long-term performance of U.S. companies, as they increase the cost of D&O liability insurance which is ultimately passed onto shareholders.<sup>54</sup> Regardless of whether this

48. *Id.* at 63 (stating that structural settlements in shareholder suits seem to provide inconsequential gains).

49. DEMOTT, *supra* note 45, § 6:3; LI, *supra* note 5, at 179 (discussing directors' incentives to settle as a possible conflict of interest).

50. *See* Cheffins & Black, *supra* note 5, at 1396 (noting that directors' personal assets are not a part of settlements funded by D&O coverage); Romano, *supra* note 2, at 57 (arguing that litigation introduces the risk of personal liability for the defendant and the risk of no attorneys' fees for plaintiffs' counsel, giving both powerful incentive to settle).

51. *See* Cheffins & Black, *supra* note 5, at 1396 (discussing how companies purchase D&O insurance to cover litigation expenses, settlement funds, and directors' liability); Romano, *supra* note 2, at 57 ("[A]ll states permit corporations to purchase D&O liability insurance for their executives, and policies can cover losses that cannot be indemnified.").

52. *See* Romano, *supra* note 2, at 57 ("For an individual defendant, a settlement entails no personal expenditures, while if the claim is litigated, there is some probability, however small, of being liable with no reimbursement.").

53. There are two reasons for this: (1) protracted litigation is likely to attract more media attention; and (2) in a court approved settlement other shareholders are estopped from bringing a similar claim which would likely have negative financial and publicity effects. *Id.* at 57 n.1.

54. *See id.* at 57 ("A corporation's insurance premium may well rise following a lawsuit, but this cost is borne by all of the shareholders, rather than the litigating parties.").

normative claim is correct, the potential for quick settlements clearly provides an additional powerful incentive for economically motivated and rational American attorneys to pursue derivative actions.

In addition to the “game-changing” effect of the U.S. contingency fee system, there are a number of other unique features of the American derivative action regime that have historically tipped the financial cost–benefit analysis in favor of pursuing derivative actions. The general rule in U.S. litigation is that each party is responsible for its own litigation costs.<sup>55</sup> In most other countries, the opposite rule applies: the losing party is required to pay a portion of the successful party’s costs (the “Loser Pays Rule”).<sup>56</sup> From an economic rational choice perspective, the absence of a Loser Pays Rule in the United States is particularly important in incentivizing derivative litigation.<sup>57</sup> As explained above, it is normally economically irrational for shareholders in derivative litigation to shoulder even their own litigation costs, which makes derivative litigation in a Loser Pays Rule system even more economically irrational.<sup>58</sup> In addition, America’s wide scope for pre-trial discovery and strict enforcement of financial disclosure for listed companies reduces the potential cost of pursuing derivative actions.<sup>59</sup> On the benefit side of the equation, the prevalence of substantial D&O liability coverage in listed U.S. companies provides “deep-pockets” to satisfy awards or settlements resulting from derivative actions, while the relatively large damage awards given by U.S. courts make it possible for economically

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55. DEMOTT, *supra* note 45, § 6:3 (observing that a plaintiff’s attorney will receive nothing unless the suit is successful or settles); LI, *supra* note 6, at 179; REISBERG, *supra* note 5, at 226 (“In the US, the general rule is that each party is responsible for his own attorney’s fees.”); Cheffins & Black, *supra* note 5, at 1393 (“[L]itigants in the U.S. pay their own legal expenses, regardless of whether they win or lose in court.”).

56. See Cheffins & Black, *supra* note 5, at 1393 (“Other countries generally require the losing side to pay at least some of the successful party’s legal costs, which deters some claims.”).

57. KRAAKMAN ET AL., *supra* note 5, at 175 (asserting that the absence of a Loser Pays Rule is one reason for the higher incidence of derivative litigation in the United States); REISBERG, *supra* note 5, at 226; Cheffins & Black, *supra* note 5, at 1463 (discussing how a Loser Pays Rule deters shareholder suits).

58. See *supra* text accompanying notes 27–38.

59. See KRAAKMAN ET AL., *supra* note 5, at 175 (asserting that discovery mechanisms contribute to the higher incidence of derivative litigation in the United States); West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1466–68 (discussing how securities laws regulating disclosure and discovery decrease the costs of derivative actions in the United States by providing shareholders with mechanisms to obtain relevant information).

rational litigants to reach into the insurance company's "deep-pockets."<sup>60</sup>

In sum, derivative action scholarship is premised on the assumption that shareholders and attorneys are economically motivated automatons that pursue derivative litigation rationally. As the theory goes, they will only pursue a derivative action when the financial benefit is greater than the cost. This assumption is used to explain both the global dearth in derivative actions and their idiosyncratic frequency in the United States. The idea that shareholders or attorneys driven by non-economic motives may sometimes pursue derivative actions when the *direct* financial cost of pursuing a derivative action clearly exceeds the financial benefit has received scant attention in the literature. Similarly, the idea that the shackles of bounded rationality may be causing shareholders or attorneys to irrationally pursue derivative actions against their self-interest has (to our knowledge) never been explored. From this perspective, to claim that non-economic motives and irrational behavior may actually be the main drivers of derivative litigation in Japan, as this Article does in Part IV below, turns the current scholarship on its head.

### III. APPLYING THE ASSUMPTION OF THE ECONOMICALLY MOTIVATED AND RATIONAL SHAREHOLDER LITIGANT TO JAPAN

#### A. *The Rational Explanation for the Absence of Shareholder Litigation in Post-War Japan*

Long before Commodore Perry's black ships arrived in Edo Bay on July 8, 1853, Japan had a vibrant economy and sophisticated legal system.<sup>61</sup> However, the arrival of the black ships sparked a chain of events that resulted in Japan looking to the West to reform all aspects of its society, including its legal system, during the Meiji Era (1868–1926).<sup>62</sup> During this period, the Japanese government adopted the pillars of its current legal system by implementing a series of codified laws modeled substantially on German Civil Law.<sup>63</sup> As part of this monumental reform, the Diet passed the Commercial Code (Law No. 49 of 1899), which was divided into five books. Book II codified Japanese corporate law. From its enactment in 1893 until the

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60. Cheffins & Black, *supra* note 5, at 1396, 1415, 1429, 1455, 1464, 1476; see West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1502 (detailing the increase in Japanese companies provided D&O liability insurance).

61. GERALD MCALINN, *JAPANESE BUSINESS LAW 2–8* (2007).

62. *Id.* at 9.

63. *Id.* at 10.

new Company Law (Law 86 of 2005) went into effect on May 1, 2006, Book II of the Commercial Code (the "Commercial Code") was the primary piece of legislation governing corporations in Japan.<sup>64</sup>

Considering its German roots, it is not surprising that the original version of the Commercial Code did not contain a derivative action.<sup>65</sup> Rather, the derivative action found its way into Japanese corporate law following Japan's surrender in World War II when the Allied Forces occupied the country.<sup>66</sup> From 1946 to 1950, as part of a larger effort of the American led forces to democratize Japan, members of the Supreme Commander for the Allied Powers (SCAP) worked with prominent Japanese legal scholars to revise the Commercial Code.<sup>67</sup> In 1950, using American corporate law as a model, Japan substantially reformed its corporate law to provide several new shareholder protections.<sup>68</sup> This included reforms permitting derivative actions, set out in Articles 267 through 268-3 of the Commercial Code (the "Article 267 Derivative Action").<sup>69</sup>

The establishment of the Article 267 Derivative Action was regarded as one of the reform's most important features, as it appeared to provide a formidable weapon to protect the rights of minority shareholders.<sup>70</sup> Specifically, it allowed any shareholder who held at least one share continuously for six months to demand that a corporation act to enforce a director's duties.<sup>71</sup> If the corporation

64. CCH JAPANESE BUSINESS LAW GUIDE 10-101, 10-510 (Luke Nottage ed., 2008).

65. However, as Mark West notes,

Before 1950, Japan had . . . a rather weak substitute [for the derivative action which it], borrowed from Germany during Japan's Meiji Period (1868–1926), by which shareholders holding not less than one-tenth of the capital of the corporation could require the auditors of the corporation to bring suit against directors. The mechanism was rarely used, perhaps because those shareholders who held ten percent of a corporation's capital could enforce their rights through informal means of control. In addition, sparsity of use may also be attributed to strict rules regarding security for expenses and, as a further deterrent, a provision that if the suit failed, shareholders would be liable for damages to the company.

West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1444–45; *see also* Kawashima & Sakurai, *supra* note 4, at 13–14 (providing background of the introduction of modern commercial law in Japan during the Meiji Period).

66. West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1444–46.

67. *Id.*

68. *Id.*; *see also* Kawashima & Sakurai, *supra* note 4, at 14–15.

69. SHŌHŌ [COMM. C.] 1899, arts. 267–268(3) (Japan); Kawashima & Sakurai, *supra* note 4, at 15.

70. *Id.* at 14; *see also* Lester N. Salwin, *The New Commercial Code of Japan: Symbol of Gradual Progress Toward Democratic Goals*, 50 GEO. L.J. 478, 487 (1962) (describing Japan's modernization of its corporate law and the amendment permitting derivative suits).

71. Kawashima & Sakurai, *supra* note 4, at 15–16.



failed to act after thirty days, the shareholder had the right to initiate an action against the director in the name of the company.<sup>72</sup>

The drafters of Article 267 had two stated objectives. The first objective was to provide an effective compensatory mechanism for shareholders in circumstances where a director's breach of duties injured the corporation (and therefore, indirectly, its shareholders), but the corporation decided not to sue.<sup>73</sup> As in many other jurisdictions, the drafters felt that such a compensatory mechanism was necessary because often corporations decided not to sue a wrongdoing director where the wrongdoing director either directly or indirectly controlled the company.<sup>74</sup> The second objective was to improve the efficiency of Japanese corporate governance by providing a mechanism to deter controlling directors from breaching their duties by making them aware that they could no longer do so with impunity.<sup>75</sup>

Despite its lofty goals and American pedigree, the Article 267 Derivative Action lay moribund for the first thirty-five years of its existence.<sup>76</sup> In the five years following its enactment, there was not a single court decision involving an Article 267 Derivative Action.<sup>77</sup> From 1950 to 1985, in all of Japan, there was on average less than one derivative action per year and not a *single* successful derivative action.<sup>78</sup> The comatose state of the Japanese derivative action stood in stark contrast to its vibrant American ancestor. From the late 1960s to the late 1980s approximately 19 percent of U.S. public corporations experienced a derivative action.<sup>79</sup> Indeed, empirical evidence suggests that significantly more derivative actions are regularly filed in a single year in the state of Delaware alone than

72. Shareholders could forgo the waiting period and act immediately in cases where they could establish that the thirty day waiting period might cause the corporation irreparable injury. *Id.* at 16. Under Article 847 of the new Company Act 2005 the waiting period has been extended to sixty days. See HIROSHI ODA, JAPANESE LAW 253 (3d ed. 2009); see also *Kaisha-hō* [Companies Act], Law No. 86 of 2005, art. 847 (Japan), translated in *Companies Act (Part V, Part VI, Part VII and Part VIII)*, JAPANESE L. TRANSLATION (Apr. 1, 2009), <http://www.japaneselawtranslation.go.jp/law>.

73. Kawashima & Sakurai, *supra* note 4, at 15.

74. *Id.*

75. *Id.*

76. *Id.* at 17.

77. *Id.*

78. According to Kawashima & Sakurai, "approximately twenty cases were litigated between 1950 and 1985." *Id.*

79. According to Romano's study that examined a random sample of 535 U.S. public corporations between the late 1960s and 1987, 19 percent of these public corporations experienced a derivative suit—some of them on several occasions. Romano, *supra* note 2, at 58–59.

were cumulatively filed during the first thirty-five years in post-war Japan.<sup>80</sup>

Initially, as if possessed by the infamous Kipling quote, “Oh, East is East and West is West, and never the twain shall meet,”<sup>81</sup> several Japanese and foreign comparative law scholars viewed the enormous disparity between the rate of derivative actions in the United States and Japan as perfectly natural.<sup>82</sup> While academics appeared (and still appear) fervently to cling to the assumption of the economically rational *Western* shareholder litigant, under the guise of Japan’s “mysterious” Confucian culture they were (and sometimes still are) quick to blindly embrace the inherent “cultural irrationality” of Japanese shareholder litigants.<sup>83</sup> To these academics, it made perfect (but economically irrational) sense that Japanese shareholders would forgo bringing derivative actions for financial gain because of their cultural obsession with maintaining social harmony.<sup>84</sup> As the theory went, it was only natural that irrational *wa*-seeking (harmony-seeking) Japanese shareholders would let their U.S. transplanted derivative action lay moribund for almost four

80. The estimates vary on the number of derivative actions filed per year in Delaware. Two recent studies suggest that approximately forty derivative actions are filed per year in the state of Delaware. Randall Thomas and Robert Thompson found that in 1999 and 2000 approximately forty derivative suits per year were filed in the Delaware Court of Chancery. Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1762 (2004). Similarly, Kenneth Davis found about 294 suits filed over more than seven years or about forty suits filed per year. Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 418 (2008). These numbers have led scholars to conclude that “the number of derivative suits has declined markedly in recent years.” Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299, 305 (2008). Even these reduced numbers suggest that more derivative actions are filed in Delaware per year than were filed in Japan during the three and a half decades between 1950 and 1985—during which time there were approximately twenty actions. Kawashima & Sakurai, *supra* note 4, at 17.

81. RUDYARD KIPLING, *THE BALLAD OF EAST AND WEST* (1889), *reprinted in* 10 *THE WORKS OF RUDYARD KIPLING* 66 (Echo Library ed., 2012).

82. According to West, “explaining away low derivative litigation rates in Japan is quick and easy if they can be attributed to cultural values without undertaking a substantive analysis, or if culture is used to explain away all differences for which one cannot find other explanations. The cultural explanation permeates the logic of scholars both within and outside Japan.” West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1440; *see also* Ginsburg & Hoetker, *supra* note 1, at 33 (explaining that many think the Japanese litigate less than other advanced nations as a matter of cultural preference).

83. For examples of academics clinging to the idea of the rational Western shareholder litigant, see *infra* Part II.B. For past and current accounts of Japanese culture being cited as an important potential factor in determining Japan’s rate of shareholder litigation, see West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1439–40; *see also* REISBERG, *supra* note 5, at 226; SIEMS, *supra* note 13, at 216–17.

84. West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1439–40.

post-war decades, while at the same time it was a staple of economically rational shareholder litigation in the United States.<sup>85</sup>

The 1980s brought a wave of law and economics to the scholarship of Japanese law which largely discredited the cultural explanation for Japan's economically irrational reluctant litigant. John Haley, in his now classic article *The Myth of the Reluctant Litigant*, began the assault on the cultural theory by providing evidence that at certain times in Japanese history, such as the interwar period (1918–1939), litigation rates in Japan were high.<sup>86</sup> Based on this fact alone, the previously watertight assertion that ancient Japanese culture was solely responsible for Japan's low rate of litigation became porous. In a series of articles that followed, Mark Ramseyer poked more holes in the cultural theory, including the succinct, but powerful claim that the cultural theory was little more than a tautology.<sup>87</sup> He correctly observed that citing Japan's low rate of litigation as evidence of its non-litigious culture and then claiming that Japan's non-litigious culture explains its low rate of litigation was not "terribly informative."<sup>88</sup> Such obvious defects in the cultural theory rapidly made it cannon fodder for any academic looking to publish another article.

Haley and Ramseyer were quick to fill the academic void left by the largely debunked cultural theory. Haley suggested that Japan's dearth in litigation was caused by its costly and inefficient legal system.<sup>89</sup> As his theory goes, economically rational potential Japanese litigants more often resolved their disputes out of court because it is less costly and more efficient than litigation in Japan.<sup>90</sup> Ramseyer countered Haley's thesis by suggesting that it was the economic *efficiency* (not the inefficiency) of Japan's legal system that

85. *Id.*

86. *See generally* Haley, *supra* note 3. Haley is not normally described as being part of the law and economics tradition. However, his view of Japanese shareholders as economically rational actors illustrates how his thinking at the time was influenced by the classical rational choice theory.

87. J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 607 (1985); *see* Ginsburg & Hoetker, *supra* note 1, at 34–35 (discussing Ramseyer's theory on the lack of litigation in Japan).

88. Ramseyer, *supra* note 87, at 607. Ramseyer disagreed with the way in which the cultural theory was presented. However, he posited a new theory in his article based upon the interconnection between Japan's non-litigious ethos and institutional barriers to litigation. *Id.* at 609–12.

89. Haley, *supra* note 3, at 378–89; *see* Ginsburg & Hoetker, *supra* note 1, at 34 (discussing Haley's perspective).

90. Haley, *supra* note 3, at 389–90.

explained its dearth of litigation.<sup>91</sup> He argued that unique features of Japan's legal system made its court decisions extremely predictable.<sup>92</sup> Therefore, economically rational potential litigants normally decided not to litigate because, based on a financial cost–benefit analysis, it is economically irrational to litigate when both parties can accurately anticipate the court's decision.<sup>93</sup> Takao Tanase, a highly respected Japanese legal scholar, disagreed with both Haley and Ramseyer. He suggested that Japan's political elite, in an effort to keep disputes out of court, provided a number of alternative forums for dispute resolution, making it economically irrational for most potential Japanese litigants to resolve their disputes through the courts.<sup>94</sup>

Although several decades have passed, preeminent legal scholars still grapple with determining which one of these three leading, yet incongruent, theories most accurately explains the historical paucity of litigation in Japan.<sup>95</sup> However, what has been sorely overlooked in the literature is that these three ostensibly diametrically opposed theories are in fact premised on the same fundamentally flawed assumption—that potential litigants rationally decide whether to sue based purely on an ex ante financial cost–benefit analysis.<sup>96</sup> In short, in responding to the obvious logical flaws in the debunked cultural theory, these three prominent scholars inadvertently introduced a more subtle flaw into Japanese legal scholarship: the assumption of the economically motivated and rational litigant.

Not long after Haley, Ramseyer, and Tanase's debate, their blind assumption of the economically motivated and rational shareholder litigant seeped into the scholarship of Japanese derivative actions. Mark West, in his watershed 1994 article, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, not only accepts the assumption of the economically motivated and rational litigant,

91. RAMSEYER & NAKAZATO, *supra* note 1, at 93–94 (noting the predictability of Japan's unique institutional features makes settlement more likely); see Ginsburg & Hoetker, *supra* note 1, at 34–35 (explaining Ramseyer's perspective).

92. Ramseyer & Nakazato, *supra* note 1, at 94; see Ginsburg & Hoetker, *supra* note 1, at 34–35 (explaining Ramseyer and Nakazato's view of the unique features in the Japanese legal system).

93. Ramseyer & Nakazato, *supra* note 1, at 92–93.

94. Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651, 679–87 (1990).

95. See Ginsburg & Hoetker, *supra* note 1, at 52–57 (discussing the three leading theories on the issue).

96. According to Ginsburg and Hoetker, their analysis suggests “that both procedural incentives to litigate and attorney availability matter, and matter a good deal, relative to other institutional factors. Perhaps more important, however, are underexplored relationships between the economy and litigation.” *Id.* at 14–15. Their conclusion essentially conforms to the approach of using the classical economic lens of the rational litigant to understand litigation in Japan.

but emphatically embraces it.<sup>97</sup> West boldly asserts that “viewing the Japanese litigant as a rational entity subject to economic incentives” is required for properly understanding derivative litigation in Japan.<sup>98</sup> Indeed, West’s reasoning reads like a page out of a classical economic rational choice theory textbook. As he explains, “[S]hareholders make decisions regarding derivative litigation just as they make any other decision: add up the [financial] benefits, deduct the costs, and if the result is positive after factoring in individual preferred levels of risk, bring suit.”<sup>99</sup>

The specific legal features that West highlights to explain the historical paucity of derivative litigation in post-war Japan are familiar. West essentially recites all of the primary reasons (outlined above) that in most jurisdictions—with the notable exception of the United States—derivative litigation is normally economically irrational. Specifically, he notes that under Japan’s post-war derivative actions regime: (1) shareholders were *prima facie* responsible for the cost of derivative litigation but only stood to benefit *pro rata* through the potential increase in the value of their shares (i.e., Japan applied the Shareholder Cost and Benefit Rules);<sup>100</sup> (2) the rules governing attorneys’ fees required the payment of a fee prior to litigation—eliminating the possibility of a U.S.-style contingency fee system;<sup>101</sup> (3) a “Loser Pays Rule” for litigation generally required the losing party to pay the successful party’s court costs;<sup>102</sup> (4) weak pre-trial discovery rights and lax enforcement of corporate financial disclosure increased the cost of derivative litigation;<sup>103</sup> and (5) the absence of D&O liability coverage and modest court awards limited the potential benefits of derivative

97. West, *Pricing of Shareholder Derivative Actions*, *supra* note 1.

98. *Id.* at 1507.

99. *Id.* at 1456–57. West goes on to argue that “it is simply unnecessary to invent makeshift cultural arguments when a more accurate, rational, economic explanation is readily available.” *Id.* at 1507.

100. *Id.* at 1456–57.

101. According to West,

[I]n the United States, high attorneys’ fees charged on a contingency basis encourage attorneys to seek out potential derivative suit plaintiffs. In effect, the benefit to attorneys makes up for the low recoverable damages. In Japan, however, the rules regarding attorneys’ fees makes such fees a cost that affects both shareholders and attorneys. Because attorneys’ fees must be paid before the litigation begins, and reimbursement by the corporation even to successful plaintiffs is questionable, shareholders have little incentive to bring suit. Japanese attorneys are likewise discouraged from undertaking derivative litigation because other forms of litigation are at least as profitable.

*Id.* at 1456–57.

102. *Id.* at 1463.

103. *Id.* at 1466.

litigation.<sup>104</sup> In short, in post-war Japan, similar to most other countries (except for the United States), the Shareholder Cost and Benefit Rules normally made derivative actions *prima facie* economically irrational and the absence of U.S.-style contingency fees foreclosed the possibility of avoiding the chilling effect of these rules. In the same vein, the combination of a Loser Pays Rule and other cost-enhancing and benefit-reducing legal features made derivative litigation, which was already normally economically irrational, even more financially absurd.

West highlights one additional and ostensibly unique feature of Japan's post-war derivative actions regime that further added to the economic irrationality of pursuing derivative actions. According to Japan's Law on the Fee of Civil Lawsuits, prior to filing a civil claim, all plaintiffs must purchase a revenue stamp (*inshi*) and attach it to the claim.<sup>105</sup> The fee levied by the court for the revenue stamp is determined by the nature of the claim.<sup>106</sup> In claims where the economic benefit to the plaintiff is deemed "calculable," the stamp fee is calculated on a sliding scale contingent on the amount of damages claimed (e.g., about \$31,000 for a \$10 million claim and \$210,000 for a \$100 million claim).<sup>107</sup> In claims where the economic benefit to the plaintiff is deemed "incalculable," the amount of the stamp fee is set at a nominal fixed flat rate (¥13,000, or about \$130).<sup>108</sup> In the case of both calculable and incalculable claims, if the plaintiff succeeds in the claim then the stamp revenue fee is reimbursed to the plaintiff by the defendant.<sup>109</sup>

104. *Id.* at 1502–03.

105. *Id.* at 1463.

106. Fujita, *supra* note 6, at 17.

107. For the approximation of the filing fees, we use the amount stated in Kenji Utsumi's article in yen and then convert them at the exchange rate of ¥100 per dollar. Although the amount is not precise and the rate of the yen fluctuates, the purpose is to provide the reader with a rough estimate of the cost of the fee. Kenji Utsumi, *The Business Judgment Rule and Shareholder Derivative Suits in Japan: A Comparison with Those in the United States*, 14 N.Y. INT'L L. REV. 129, 132–33 (2001). For descriptions of how the stamp fee is calculated, see ODA, *supra* note 72, at 254; Fujita, *supra* note 6, at 16–17; West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1463–64. It should be noted that it is relatively common in civil law countries to calculate court fees based on the amount of damages claimed. In fact, the current system that applies to derivative actions in China is remarkably similar to the stamp fee system that applied to pre-1993 Japanese derivative actions. LI, *supra* note 5, at 294–95.

108. Minji-sosho-hoyou-ho [Law on the Fee of Civil Lawsuits], Law No. 40 of 1965, art. 4, para. 2 (Japan), *translated in Act on Costs of Civil Procedure*, JAPANESE L. TRANSLATION (Nov. 18, 2009), <http://www.japaneselawtranslation.go.jp/law>; Kaisha-hō [Companies Act], Law No. 86 of 2005, art. 847, para. 6 (Japan), *translated in Companies Act (Part V, Part VI, Part VII and Part VIII)*, JAPANESE L. TRANSLATION (Apr. 1, 2009), <http://www.japaneselawtranslation.go.jp/law>.

109. West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1464.

Prior to 1993, Japanese court officials classified all Article 267 Derivative Actions as “calculable claims.”<sup>110</sup> As such, before filing a derivative action, plaintiff-shareholders had to pay a substantial stamp fee that increased according to the amount of damages claimed.<sup>111</sup> West asserts that this stamp fee system was the “death knell” for derivative litigation in post-war Japan.<sup>112</sup> There is no doubt that requiring plaintiff-shareholders to pay a potentially significant stamp fee added another cost to derivative actions, which increased the likelihood of them being economically irrational. However, as explained above, even without the stamp fee there was normally no rational reason in post-war Japan for economically motivated shareholders to pursue derivative actions.<sup>113</sup>

In sum, the derivative action was scarcely used during the first thirty-five years of its existence in post-war Japan. Based on the assumption of the economically motivated and rational shareholder litigant, this was entirely predictable. As was the case in many countries (excluding the United States), the chilling effect of the Shareholder Benefit and Cost rules, absence of U.S.-style contingency fees, and a host of other cost-enhancing and benefit-reducing legal features made derivative litigation patently irrational for almost all economically motivated Japanese shareholders. The explanation provided by the classical economic rational choice theory, that shareholders in Japan would only pursue derivative actions when the direct financial benefit exceeded the cost, *appeared* to make perfect sense—until, suddenly, it did not.

*B. Japan's Explosion of Derivative Actions: (Mis)Understood  
Through the Lens of the Economically Motivated  
and Rational Shareholder Litigant  
and Its Testable Hypotheses*

In the late 1980s, the rational economic lens through which so many scholars started to view Japanese derivative actions suddenly began to blur. At first, it seemed like little more than innocuous media hype arising out of the “massive publicity” that the derivative action received from the 1986 *Mitsui Mining* decision and the 1990 U.S.–Japan Structural Impediments Initiative negotiations.<sup>114</sup> As

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110. ODA, *supra* note 72, at 254; Fujita, *supra* note 6, at 16–17.

111. West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1463–64.

112. *Id.* at 1463.

113. *See supra* text accompanying note 28.

114. West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1499–500; *see Mizuno v. Ariyoshi (Mitsui Mining)*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 29, 1986, 1194 HANREI JIHŌ [HANJI] 33, *aff'd*, Tōkyō Kōtō Saibansho [Tokyo High Ct.]

explained in Part V below, these two events had a *de minimis* impact on the economic rationale for pursuing derivative actions, but the media attention proved powerful.<sup>115</sup> The derivative action, which had been seen as an obscure and impotent artifact of the American occupation, came to be perceived as an important tool for shareholder activism and corporate governance reform.<sup>116</sup> Then, perception became reality.

In the early 1990s, empirical evidence revealed what the narrow lens of rational economics could not foresee. With no obvious change in the cost–benefit structure of the derivative action, presumptively economically motivated and rational Japanese shareholders began to sue.<sup>117</sup> It began in 1990 with a handful of derivative actions per year—when historically a single derivative action was a banner year.<sup>118</sup> By the end of 1992, there were 31 derivative actions pending

July 3, 1989, 1188 JUNKAN SHŌJI HŌMU [SHŌJI HŌMU] 36, *aff'd*, Saikō Saibansho [Sup. Ct.] Sept. 9, 1993, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 4814 (Japan).

115. See *infra* Part V.

116. According to Kawashima & Sakurai,

The tide began to turn with the judgment in Mitsui Mining issued by the Tokyo District Court in 1986. . . . The court's treatment of Mitsui's mismanagement in 1986 sparked heightened interest in the derivative suit mechanism and opened the door to increased shareholder activism. . . . Since the late 1980s, the derivative suit mechanism has been at the forefront of the debate surrounding Japanese corporate law. Its prominence led to the 1993 reform of the Commercial Code, which, in turn, brought about a sudden increase in the number of derivative suits filed.

Kawashima & Sakurai, *supra* note 4, at 17–18 (citation omitted). The first book devoted entirely to derivative action—a mass-marketed account of the derivative litigation explosion—was written and published by the editors of *Nihon Keizai Shinbun* (Japan's version of the *Wall Street Journal*) in spring 1993. NIHON KEIZAI SHINBUN, KABUNUSHI NO HANRAN [SHAREHOLDER REBELLION] (Nihon Keizai Shinbun ed., 1993).

117. See *infra* Part V.C.

118. Based on a search conducted on May 31, 2011 on the LEX/DB Internet Database of Japanese case law there were seven reported derivative actions filed between January 1990 and November 1993 (i.e., when the stamp fee regulations were amended). Comparing the DA Database (for a description of the DA Database, see text accompanying notes 152–53) with the number of actions filed it appears that approximately one out of every six actions that is filed ends up being a reported decision. See *infra* Appendix A, Table 1, Appendix B, Table 1. Therefore, we can estimate that approximately forty actions were filed during this period. This makes sense considering that thirty-one actions were pending at the end of 1992. Here is a list of the actions filed between 1990 and the 1993 stamp fee reduction: Hamada v. Nakano (*Chukyo Bank Case*), Nagoya Chihō Saibansho [Nagoya Dist. Ct.] Jan. 20, 1997, 1600 HANJI 144 (Japan); Nichi-Bei Shoji KK v. Anonymous Party (*Japan Aviation Elecs. Indus. Case*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] June 20, 1996, 1572 HANJI 27 (Japan); Suzuki v. Yasuda (*Janome Sewing Mach. Co. Case*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] July 8, 1994, 1750 HANJI 40 (Japan); Yoshitake v. Todani (*Nihon-Sunrise Case*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 31, 1994, 1354 SHŌJI HŌMU 134, *settled in* Tōkyō Kōtō Saibansho [Tokyo High Ct.] Sept. 21, 1993, 1480 HANJI 154 (Japan); Asai v. Iwasaki (*Nikkō Sec. Case*), Tōkyō Chihō Saibansho [Tokyo



before Japanese courts—more than the total number of derivative actions that were brought in the first three and a half postwar decades.<sup>119</sup> In 1993, the number of derivative actions more than doubled, with 86 cases pending before Japanese courts.<sup>120</sup> Over the next five years, derivative actions filed and pending in Japanese courts continued to rise, peaking in 1999 with 95 new actions filed and a total of 222 actions pending.<sup>121</sup> From 2000 to 2009, the number of new actions filed per year declined slightly but maintained a previously unimaginable high average rate of 73.7 new actions filed per year.<sup>122</sup> In total, what started out as media-hype in the late 1980s has transformed into well over 1,000 derivative actions against directors and statutory auditors of Japanese companies.<sup>123</sup>

The statistics may appear a bit dry, but the revelation is astounding: “non-litigious” Japan now competes with Delaware for the title of the jurisdiction with the highest frequency of derivative litigation in the world.<sup>124</sup> This competition has left ardent supporters of the cultural theory deafeningly silent. It has caused most pundits, who blindly accept the assumption of the economically motivated and rational shareholder, to cobble together a shaky financial cost-benefit story in an attempt to explain the cataclysmic change in the behavior of Japanese shareholders.<sup>125</sup> Admirably, West has neither remained silent nor blindly accepted the assumption of the economically motivated and rational shareholder litigant. To the contrary, in his

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Dist. Ct.] Aug. 11, 1992, 1610 HANJI 116, *rev'd*, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 30, 1993, 109 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌBAN SHŌJI] 70 (Japan); Imamura v. Muraki (*Cemedine Case*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 18, 1992, 144 SHIRYŌBAN SHŌJI 115 (Japan); Ikenaka v. Tabuchi (*Nomura Sec. Case*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 13, 1992, 54 MINSHŪ 1798 (Japan); Rosenhof v. Moriya (*Tokyo Cruise Ship Case*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 26, 1995, 1549 HANJI 125 (Japan).

119. HIDEYUKI KOBAYASHI & TSUYOSHI HARA, KABUNUSHI DAIHYO SOSHO: ZENHANREI TO RIRON O SHIRU [SHAREHOLDER DERIVATIVE ACTION: KNOW ALL CASES AND THEORIES] 3 (1996) (Japan).

120. For the unpublished statistics provided to the Authors by the Supreme Court of Japan, see *infra* Appendix A, Table 1.

121. *Infra* Appendix A, Table 1.

122. *Infra* Appendix A, Table 1.

123. *Infra* Appendix A, Table 1.

124. This fact has been almost completely overlooked in the literature. For example, Leslie Cooney states that, “[w]hile somewhat on the rise in Japan, derivative actions are still rather infrequent because of low economic awards in the litigated as well as the settled case.” Leslie Larkin Cooney, *A Modality for Accountability to Shareholders: The American Way?*, 28 OKLA. CITY U. L. REV. 717, 717 (2003).

125. KRAAKMAN ET AL., *supra* note 5, at 174–75; REISBERG, *supra* note 5, at 225; Aronson, *supra* note 1, at 24; Cheffins & Black, *supra* note 5, at 1463; Fujita, *supra* note 6, at 16–17; Milhaupt *Creative Norm Destruction*, *supra* note 6, at 2115; West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1441–44; West, *Information, Institutions, and Extortion*, *supra* note 6, at 783.

often cited 2001 article, he departs from his original zeal for the assumption of the economically motivated and rational shareholder litigant by admitting that non-economic motives and irrational behavior likely have played some role in Japan's orgy of derivative litigation.<sup>126</sup> However, West still clings to his original claim that when considering both the motivation of shareholders and the attorneys which represent them, economic motives and rational behavior remain the main drivers of derivative litigation in Japan (as well as the United States).<sup>127</sup>

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126. In his 1994 article, West strictly adhered to the assumption of the rational litigant and largely assumed that Japanese shareholder litigants were driven solely by an ex ante financial cost-benefit analysis. As stated by West:

[D]ecisions on whether to bring derivative actions are primarily determined not by culture, but by economics. Essentially, by creating cost-benefit incentives, legal rules effectively set prices for actions. When making behavioral choices, rational actors will choose the action that has the lowest price relative to that action's available substitutes. This idea can be separated into two central claims, each of which is premised on this 'price story' . . . . Thus, beginning in 1990, an increase in derivative litigation of all sorts . . . occurred. The most appealing explanation for this increase is the price story, specifically, the benefit side of the cost-benefit price equation. Stated simply, more shareholders sued because suing suddenly became potentially more rewarding. . . . Generally, shareholders make decisions regarding derivative litigation just as they make any other decision: add up the benefits, deduct the costs, and if the result is positive after factoring in individual preferred levels of risk, bring suit.

West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1441-42, 1456-57, 1498. West specifically argues that irrational behavior by shareholders did not have any meaningful effect on the rise of derivative litigation in Japan. In his words,

Though the 'publicity effect' could be viewed as a kind of 'groupthink,' an irrational decision making process, a better explanation is that publicity lowers agency costs, specifically the costs of acquiring information about one's legal rights as a shareholder. In the United States, where derivative actions are relatively abundant, the common-law system and relatively easy access to legal professionals perform this publicity function; in Japan, the press fulfills that role. Thus, the publicity preceding the derivative action increase in Japan further indicates the validity of the price story.

*Id.* at 1500.

127. In his 2001 article, West acknowledges that economically motivated behavior cannot account for all derivative litigation in Japan. As he explains, "some suits appear to reflect little or no obvious individual economic motivation for any party" and "some plaintiffs clearly appear to be suing for nonmonetary reasons." However, West ultimately concludes that rational lawyers motivated by attorneys' fees are "the driving force behind Japanese derivative litigation." West claims that non-economic motives and irrational behavior provides merely a "residual explanation" that accounts for a handful of derivative actions that cannot otherwise be fully explained through classical economic rational choice theory. Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351, 354, 372, (2001) [hereinafter West, *Why Shareholders Sue*].

Let us start with the shaky story told by the masses and then move to the more interesting story provided by West. As told by the vast majority of pundits, the explanation for the enormous increase in the rate of derivative litigation in Japan is clear and simple. The story begins in March 1993, with the Tokyo High Court's decision in the *Nikkō Securities* case.<sup>128</sup> In that case, the Court accepted the shareholder-plaintiff's argument that the stamp fee for filing derivative actions should be a nominal fixed rate (and not the prevailing rate based on the amount of damages claimed) because the economic benefit for shareholder-plaintiffs in derivative actions is "incalculable."<sup>129</sup> In November 1993, following the Tokyo High Court's reasoning, the Diet revised Article 267 of the Commercial Code to make it clear that all derivative actions were "incalculable" claims.<sup>130</sup> This amendment effectively lowered the stamp fee for filing derivative actions from a potentially substantial amount based on the amount of damages claimed to a nominal fixed rate of ¥8,200 (about \$82).<sup>131</sup>

Tomotaka Fujita, a leading University of Tokyo corporate law professor, proclaims that the 1993 amendment lowering the stamp fee for derivative actions was unquestionably "one of the most influential events in the history of the Japanese corporate governance regime."<sup>132</sup> He goes on to point out that although Japan's non-litigious culture has sometimes erroneously been used to explain the dearth of derivative actions, "the litigation fee became recognized as *the* real determining factor" in the rise of derivative actions.<sup>133</sup> The assumption underlying this consensus view is that the 1993 reduction in the stamp fee tipped the ex ante financial cost-benefit analysis in favor of pursuing derivative actions in Japan.<sup>134</sup> In other words, as

128. *Asai v. Iwasaki (Nikkō Sec.)*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 11, 1992, 1610 HANJI 116, *rev'd*, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 30, 1993, 109 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌBAN SHŌJI] 70 (Japan). An appeal to the Supreme Court was denied.

129. ODA, *supra* note 72, at 254; Fujita, *supra* note 6, at 16–17; Kawashima & Sakurai, *supra* note 4, at 20.

130. See sources cited *supra* note 129.

131. See sources cited *supra* note 129. After the law was further amended in 2003, the nominal fixed rate was increased from ¥8,200 (about \$82) to ¥13,000 (about \$130). Minji-sosho-hoyou-ho [Law on the Fee of Civil Lawsuits], Law No. 40 of 1965, art. 4, para. 2 (Japan), *translated in Act on Costs of Civil Procedure*, Japanese L. Translation (Nov. 18, 2009), <http://www.japaneselawtranslation.go.jp/law>.

132. Fujita, *supra* note 6, at 15.

133. *Id.* at 16 (emphasis added).

134. Cheffins and Black assert a similar view: "Japan is an exception to the pattern; derivative litigation is common. The growth in derivative suits after Japan cut filing fees and permitted the recovery of U.S.-style attorneys' fees highlights the impact of the various constraints on derivative litigation existing in the other countries we have considered." Cheffins & Black, *supra* note 5, at 1463.

the economic rational choice theory would predict, post-1993 Japanese shareholders rationally pursued derivative actions because the financial benefit exceeded the cost (where previously the opposite was true). This post-1993 “economically motivated and rational shareholder claim” provides the first testable hypothesis.

The story told by West in his 2001 article is more methodical and persuasive than the consensus view, but as demonstrated in the next Part, it ultimately misses the mark. West begins his story with the familiar claim that the 1993 reduction in the stamp fee explains “much of the increase in [derivative actions] filed.”<sup>135</sup> He further suggests that the burst of Japan’s economic bubble in the early 1990s may also account for some of the increase in derivative actions.<sup>136</sup> Specifically, West argues that the steep decline in the Japanese market likely decreased the transaction cost of pursuing derivative actions by making it easier to establish damages resulting from directors’ misconduct.<sup>137</sup> These two preliminary arguments mundanely track the post-1993 economically motivated and rational shareholder hypothesis.

West’s story, however, takes a refreshingly insightful turn. He acknowledges that the dramatic increase in derivative actions is “intriguing given the continuing [post-1993] lack of shareholder incentives to sue.”<sup>138</sup> In fact, West admits that his extensive empirical analysis of Japanese derivative actions points to a lack of clear financial incentives for pursuing derivative litigation in Japan.<sup>139</sup> As he explains, “some suits appear to reflect little or no obvious individual economic motivation for any party,” and “some plaintiffs clearly appear to be suing for nonmonetary reasons.”<sup>140</sup> Unfortunately, West’s story does not end with non-economic motives or irrational behavior as its main actors.

Although West’s empirical evidence arguably appears to suggest otherwise, his 2001 article retreats to the safe, familiar and predictable ground of the economically motivated and rational shareholder–attorney theory. Based on the limited empirical evidence available in 2001, West claims that non-economic factors provide merely a “residual explanation” that accounts for a handful of derivative actions that cannot otherwise be fully explained through economically motivated and rational behavior.<sup>141</sup> He claims that similar to the United States, rational lawyers motivated by attorneys’

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135. West, *Why Shareholders Sue*, *supra* note 127, at 353.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 372–73.

140. *Id.*

141. *Id.* at 372.

fees are “the driving force behind Japanese derivative litigation.”<sup>142</sup> Somewhat surprisingly, West makes this claim while at the same time acknowledging that Japanese attorneys lack the high-powered economic incentives provided by U.S.-style contingency fees.<sup>143</sup> However, he claims that “Japanese attorneys can profit based on . . . up-front retainer provisions.”<sup>144</sup> West also places considerable stock in a group of what he describes as “elite attorneys” (the *Kabunushi Onbuzuman*) who have found a way to act together to diversify the risk of derivative litigation and turn a handsome profit.<sup>145</sup> In short, West’s central argument is that attorneys acting rationally based purely on an ex ante financial cost–benefit analysis are driving derivative litigation in Japan. The “economically motivated and rational attorney claim” is the second testable hypothesis.

Finally, there are several events that have occurred post-1993 that a number of prominent scholars suggest fundamentally altered the financial cost–benefit equation for pursuing derivative actions in Japan. Such events range from the ostensibly watershed *Daiwa Bank* decision to the current global financial crisis.<sup>146</sup> Assuming that shareholders or lawyers rationally decide to pursue derivative actions based on an ex ante financial cost–benefit analysis, one would expect the rate of derivative litigation to closely track changes in Japan’s institutional structure that impact the financial costs and benefits of pursuing derivative actions. The “financial tracking claim” is the third testable hypothesis.

Taken together, these three testable hypotheses form the core claims that have been used to maintain the assumption that economically motivated and rational actors drive derivative litigation in Japan. As will be demonstrated in the next Part, based on what (to our knowledge) is the most extensive empirical analysis ever undertaken on the Japanese derivative action, there is little support for any of these three hypotheses.

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142. *Id.* at 354.

143. *Id.* at 381–82.

144. *Id.* at 381.

145. *Id.* at 369–70.

146. See Aronson, *supra* note 1, at 18–21 (providing an in-depth analysis of the *Daiwa* case); Ginsburg & Hoetker, *supra* note 1, at 57 (claiming that the state of Japan’s economy may have an important impact on its rate of civil litigation).

IV. PUTTING THE HYPOTHESES OF THE ECONOMICALLY MOTIVATED  
AND RATIONAL JAPANESE DERIVATIVE LITIGANT TO THE TEST

A. *Testing the Economically Motivated and Rational  
Shareholder Hypothesis: Do Shareholders Financially  
Benefit from Derivative Actions in Japan?*

At first blush, the simplicity and intuitive logic of the economically motivated and rational shareholder hypothesis is enchanting. As the theory goes, prior to 1993, expensive stamp fees normally made the financial cost of Japanese derivative litigation greater than the benefit. After 1993, nominal stamp fees normally made the financial benefit of Japanese derivative litigation greater than the cost. The sharp rise in post-1993 derivative actions demonstrates that Japanese shareholder litigants are economically motivated and rational—that they only sue when the financial benefit exceeds the cost. This neatly packaged answer for why derivative litigation has increased in Japan is difficult for pundits to resist.<sup>147</sup>

The careful reader, however, will likely be less tempted. On its face, the economically motivated and rational shareholder hypothesis suffers from two significant logical gaps. First, as outlined above, although the stamp fee was reduced in 1993, the rate of derivative litigation started to sharply increase approximately three years earlier in 1990.<sup>148</sup> This critically important fact has been almost entirely glossed over in the literature. Indeed, West's empirically exhaustive 2001 article allocates a mere single sentence to explain the substantial pre-1993 increase in derivative litigation and fails to mention or incorporate any analysis of the pre-1993 increase in his primary explanation for the rise of derivative litigation in Japan.<sup>149</sup>

147. The shareholders hypothesis is not normally set out in such explicit terms. Normally, the stamp fee is cited as having caused or led to an increase in the rate of derivative actions. In the vast majority of cases, there is no mention or suggestion that part of the increase may be the result of non-economic motives or irrational behavior. In this sense, it is fair to say that pundits have, for the most part, implicitly accepted the assumption of the economically motivated and rational shareholder litigant. KRAAKMAN ET AL., *supra* note 5, at 174–75; REISBERG, *supra* note 5, at 225; Aronson, *supra* note 2, at 24; Cheffins & Black, *supra* note 5, at 1463; Fujita, *supra* note 6, at 16; Milhaupt, *Creative Norm Destruction*, *supra* note 6, at 2115; West *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1441–44; West, *Information, Institutions, and Extortion*, *supra* note 6, at 783. Indeed, West in his 1994 article explicitly accepted the assumption of the economically motivated and rational shareholder and rejected the argument that even part of the rise in derivative litigation may be the result of economic irrationality. See West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1501.

148. See *supra* notes 6, 117–23 and accompanying text.

149. West, *Why Shareholders Sue*, *supra* note 127, at 380. It should be noted that in his 1994 article West explicitly acknowledged the pre-1993 rise in derivative

The pre-1993 cases alone provide convincing evidence that something other than the reduction in the stamp fee has played a significant role in driving derivative litigation in Japan.

Second, the mere fact that there is a correlation between the rate of derivative litigation and the reduction in the stamp fee tells us little. As every undergraduate statistics student learns in their first lecture, correlation does not equal causation. There are a myriad of explanations that may account for the increase in derivative actions following the 1993 reduction in the stamp fee which have little or nothing to do with the fee reduction. Indeed, there is evidence to suggest that the pre-1993 increase in derivative actions may actually have caused the stamp fee to be reduced—turning the claim that the fee reduction caused the increase in derivative actions on its head.<sup>150</sup> In Part V, this Article will explain the forces that likely drove the pre-1993 cases and which may have brought about the reduction in the stamp fee. However, at this juncture, the salient point is that, without even delving into the details, the logical foundation of the economically motivated and rational shareholder hypothesis appears shaky.

The true devil for the economically motivated and rational shareholder hypothesis, however, is in the empirical details. Our empirical analysis of over 200 reported decisions and 1,000 filed actions between 1986 and 2009 reveals a fact that cannot be understood solely through the lens of the economically motivated and rational shareholder hypothesis: even after the 1993 stamp fee reduction, Japanese shareholders do not appear to benefit financially from derivative litigation.<sup>151</sup> From an economic rational choice perspective, this fact renders any discussion of the reduction in the stamp fee (or for that matter, any other cost associated with derivative litigation) essentially moot. If shareholders do not stand to benefit financially from derivative litigation, then according to the economic rational choice theory they will not sue. This is particularly true in Japan, where the reduced stamp fee is non-zero, there is a Loser Pays Rule for court costs, and there historically has not been a U.S.-style contingency fee system—all of which means that Japanese shareholders must endure significant financial risk in order to pursue

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litigation. West, *Pricing Shareholder Derivative Actions*, *supra* note 1, at 1493–501. However, he did not include an analysis of such cases in his 2001 article. West, *Why Shareholders Sue*, *supra* note 127, at 353.

150. This view is supported by Kawashima & Sakurai. In their view, “since the late 1980s, the derivative suit mechanism has been at the forefront of the debate surrounding Japanese corporate law. Its prominence led to the 1993 reform of the Commercial Code, which, in turn, brought about a sudden increase in the number of derivative suits filed.” Kawashima & Sakurai, *supra* note 4, at 17 (citation omitted).

151. See *infra* Appendix B, Tables 1–7.

a derivative action. In short, if the conclusion that Japanese shareholders normally do not benefit financially from derivative litigation is correct, the economically motivated and rational shareholder hypothesis must fail.

The obvious starting point for analyzing whether shareholders financially benefit from derivative actions is to examine their success rate in court. To do this, we collected information from several Japanese databases on reported derivative actions filed between the 1993 stamp fee reduction and the end of 2009.<sup>152</sup> This information was then combined to create “the DA Database.” The DA Database contains a total of 174 reported derivative actions and to our knowledge has the widest scope of available information on Japanese derivative actions during this period. Out of the 174 reported derivative actions, 26 actions had no reported final result (i.e., they had not been dismissed, withdrawn or settled and there was no reported judgment in favor of either the plaintiff or defendant). As such, these 26 actions were excluded from the analysis as their success rate is yet to be determined. Several empirical tests were then conducted on the remaining 148 actions to determine the success of shareholder-plaintiffs in Japanese courts.<sup>153</sup>

The empirical tests suggest that Japanese shareholder-plaintiffs rarely succeed in court. Out of all the reported derivative actions with final results, only 9.5 percent of the actions resulted in a judgment for the plaintiff at trial.<sup>154</sup> The chance of succeeding at trial was even more dismal for shareholders of listed companies, who succeeded in only 5 percent of derivative actions filed.<sup>155</sup> The abysmal performance of derivative shareholder-plaintiffs in court is further evidenced by

152. Raw data was collected on reported derivative actions from several sources. First, a list of reported derivative actions and relevant information on each action was collected from the legal journal *Shiryōban shōji hōmu*. Specifically, information from two charts, *Shuyona Kabunushi-Daihyo-Sosho Ichiran-hyo*, 291 SHIRYOBAN SHŌJI 103, 103 tbl. (2008) (Japan); 309 SHIRYOBAN SHŌJI 92, 92 tbl. (2009) (Japan), containing information on reported derivative actions was merged into a single Excel spreadsheet. The *Shiryōban shōji hōmu* is widely regarded as the most extensive source of reported derivative actions in Japan. West, *Why Shareholders Sue*, *supra* note 127, at 357. Then, on March 1, 2010 a search was conducted on the LEX/DB Internet TKC Corporation and the NIKKEI Telecom twenty-one web-databases to supplement the Excel spreadsheet with additional reported cases and information. Finally, on March 1, 2010, a search was conducted on the website of *Kabunushi Onbuzuman* (Shareholders Ombudsman) (KO) to gather information on which actions in the Excel spreadsheet database were KO actions. KABUNUSHI ONBUZUMAN (SHAREHOLDERS OMBUDSMAN), <http://kabuombu.sakura.ne.jp> (last visited Dec. 26, 2011) [hereinafter KO WEBSITE] (Japan). The final Excel spreadsheet containing the information from the above searches is referred to in this paper as the “DA Database.”

153. For detailed statistics on the results of the actions filed, see *infra* Appendix B, Table 1.

154. *Infra* Appendix B, Table 1.

155. *Infra* Appendix B, Table 1.



the fact that 58 percent of actions involving listed companies ended in the court either finding in favor of the defendant or dismissing the action.<sup>156</sup> A further 6.7 percent of derivative actions involving listed companies were withdrawn by shareholder-plaintiffs—this normally occurs in response to an adverse court ruling.<sup>157</sup>

Even in the rare cases in which a derivative action succeeded, the financial benefit to shareholders was marginal. The average amount awarded to listed companies in successful derivative actions was equivalent to a 2.5 percent increase in the company's share price.<sup>158</sup> This is a paltry sum considering that in listed companies only one out of every twenty derivative actions succeeds and shareholder-plaintiffs often own only a small amount of shares.<sup>159</sup> Such a miniscule chance of success, and negligible returns even when an action succeeds, suggest that it is normally economically irrational for Japanese shareholders to accept the financial risk of derivative litigation for the remote chance of succeeding at trial.

Japanese shareholder-plaintiffs are not alone in their remote chance of succeeding at trial. According to Romano's often cited empirical study on shareholder litigation in the United States, it is extremely rare for U.S. shareholder-plaintiffs to succeed at trial.<sup>160</sup> Rather, in the United States, the majority of shareholder actions against listed companies end in settlements.<sup>161</sup> Romano's empirical study found that 65 percent of shareholder actions resulted in a settlement.<sup>162</sup> She further suggests that such settlements rarely benefit shareholders and are primarily driven by economically motivated and rational attorneys who exploit the U.S. contingency fee system to benefit handsomely from derivative litigation.<sup>163</sup> However, as Japan has historically lacked a U.S.-style contingency fee system, settlements could conceivably be more beneficial for shareholders in Japan than they are in the United States.<sup>164</sup> If this is the case, in spite of their abysmal fortunes at trial, Japanese shareholder-

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156. *Infra* Appendix B, Table 1.

157. *Infra* Appendix B, Table 1.

158. For relevant statistics, see *infra* Appendix B, Table 2.

159. *Infra* Appendix B, Table 1.

160. Romano, *supra* note 2, at 60.

161. *Id.*

162. *Id.*

163. *Id.* at 84–85. Several leading scholars support the theory that rational attorneys driven by contingency fees are a significant reason for the relatively high rate of derivative litigation in the United States. See, e.g., KRAAKMAN ET AL., *supra* note 5, at 175; REISBERG, *supra* note 5, at 226–27; Cheffins & Black *supra* note 5, at 1393–94; West, *Why Shareholders Sue*, *supra* note 127, at 351; see also *supra* note 45.

164. Jon Choy, *Japan's Legal System on the Stand*, 35 JAPAN ECON. INST. REP., Sept. 2000, at 1; West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1456–57; West, *Why Shareholders Sue*, *supra* note 127, at 365.

plaintiffs may be pursuing derivative actions to reap the financial rewards of settlement.

Unfortunately for shareholder-plaintiffs in Japan, when it comes to benefiting from settlements they again appear to be an unlucky lot. Based on the DA Database, only 27 percent of derivative actions ended in a settlement—considerably lower than the settlement rate in the United States.<sup>165</sup> Still, the mere fact that shareholder-plaintiffs in Japan are less likely to receive a settlement than U.S. shareholders does not in itself suggest that settlements are irrelevant. From an economically motivated and rational shareholder perspective, the critical question is: do such settlements normally provide a financial benefit greater than the cost of derivative litigation? The paltry amounts that have been received by companies in derivative action settlements strongly suggests that the answer to this question is “no.” Based on the DA Database, on average the sum received by listed companies in settlements amounted to a theoretical increase of ¥0.2 (about \$0.002) per share, or the equivalent of a 0.05 percent increase in their stock price.<sup>166</sup> It is inconceivable that such miniscule settlements could provide an incentive for economically motivated and rational shareholders to incur the financial risk of derivative litigation.

In spite of shareholders' abysmal record in court and the history of paltry settlements, it is theoretically possible that they may still receive financial benefits from derivative litigation if the market views such litigation as a positive event for the financial future of the company involved in the action. The mere act of filing a derivative action may be viewed as a positive economic event by shareholders because of its ability to inspire corporate governance reform or deter corporate insiders from engaging in future wealth-reducing behavior—even if such actions normally do not result in any significant direct monetary gains for the company. Assuming this is the case, economically motivated and rational Japanese shareholders may be filing derivative actions to reap the stock price gains that flow from improving the company's expected future performance.

To examine whether there is any empirical support for this view, an event study was conducted using the standard methodology to measure the stock price effects of filing a derivative action.<sup>167</sup> The event study was conducted on all of the derivative actions in the DA Database that involved listed companies and that were filed before

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165. *Infra* Appendix B, Table 1.

166. For detailed statistics on the results of settlements, see *infra* Appendix B, Table 3.

167. Romano, *supra* note 2, at 65–66; West, *Why Shareholders Sue*, *supra* note 127, at 358.

the end of 2006. As with similar event studies, twenty-one of the selected actions were then excluded because the historical stock price data was unobtainable as a result of companies being merged or delisted.<sup>168</sup> Table 4 in Appendix B shows the results of the event study on eighty-six listed Japanese companies—which we believe is the largest such study ever conducted on Japanese companies.<sup>169</sup>

According to our regression analysis, the filing of a derivative action in Japan does not result in statistically significant stock price movements.<sup>170</sup> This suggests that shareholders do not expect to receive any financial gains from improved corporate performance as a result of filing derivative actions. It also confirms the earlier empirical findings that shareholders do not expect to receive any significant direct financial benefits in the form of payments to the company resulting from derivative actions. These results are unsurprising considering the low success rate of derivative actions and the marginal amount recovered in settlements—not to mention the time that management must divert away from running the business to deal with derivative litigation.

Other event studies were conducted using various periods of time and data points in the DA Database to determine whether there were any statistically significant stock price reactions to Japanese derivative litigation. The only statistically significant result uncovered was with respect to the effect that settlements had on the stock price of listed companies. Specifically, on the day of and the day after settlement there was a statistically significant increase in a company's stock price.<sup>171</sup> This makes sense. When a derivative action is terminated, it saves the company's management from protracted litigation and avoids the potential negative publicity of a trial. Also, a settlement payment to the company, however small, should be viewed positively by the market. The statistically significant finding also confirms the earlier stated empirical evidence that the amount awarded in settlements is normally marginal. Although settlements result in a statistically significant stock price increase, the amount of the increase was only 2.6 percent in a company's stock price over the two-day period.<sup>172</sup> This amount is unlikely to motivate an economically motivated and rational shareholder who would have to incur the cost of four derivative actions (as only 27 percent, or

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168. West, *Why Shareholders Sue*, *supra* note 127, at 358.

169. West's study considered fifty-one actions and Romano's study sixty-six actions. *Id.*

170. See *infra* Appendix B, Table 4.

171. For detailed statistics on the stock price reaction to settlements, see *infra* Appendix B, Table 5.

172. *Infra* Appendix B, Table 5.

approximately one in four actions end in a settlement) to receive such modest gains.

In sum, there is no empirical evidence to support the economically motivated and rational shareholder hypothesis. Shareholders rarely succeed in derivative actions and even when they reach a settlement or are successful at trial the amount that they recover is negligible. In fact, according to our event study, shareholders do not even expect derivative actions to either directly or indirectly result in stock price gains. These empirical results are unsurprising. Two smaller event studies conducted by West and Fukuda on Japanese derivative actions arrived at the same general conclusion.<sup>173</sup> Romano's seminal event study on derivative actions in the United States reached a similar conclusion.<sup>174</sup> What is surprising is that in the face of such empirical evidence, the economically motivated and rational shareholder hypothesis is still thought to provide the primary explanation for the high rate of derivative litigation in Japan.<sup>175</sup>

*B. Testing the Economically Motivated and Rational Attorney Hypothesis: Do Economically Motivated and Rational Attorneys Drive Derivative Litigation in Japan?*

The empirical evidence that shareholders do not financially benefit from derivative actions substantially weakens the argument that Japanese derivative litigation can be understood solely through the lens of economic motives and rational behavior. However, even after acknowledging in his 2001 article that shareholders do not financially benefit from derivative litigation, West still maintains that economic motives and rational behavior explain the vast majority of derivative litigation in Japan.<sup>176</sup> As explained above, at the core of West's argument is his economically motivated and rational attorney hypothesis.<sup>177</sup> According to this hypothesis, similar to in the United States, rational attorneys motivated by attorneys' fees are the primary drivers of derivative litigation in Japan.<sup>178</sup>

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173. Fujita, *supra* note 6, at 18; West, *Why Shareholders Sue*, *supra* note 127, at 357-64; *see also, e.g.*, Mitsuo Fukuda, *Kabunushi Daihyo Soshō ha Ko-pore-to Gabanansu no Shudan to Shite Yuko ka* [Are Derivative Suits an Efficient Corporate Governance Tool?], in GENDAI NO KIN'YU TO SEISAKU [MODERN FINANCE AND POLICY] 347 (Hiroshi Kosano & Yuzo Honda eds., 2000) (Japan).

174. Romano, *supra* note 2, at 84-85.

175. *See supra* Part III.B.

176. West, *Why Shareholders Sue*, *supra* note 127, at 380-82.

177. *See id.*

178. *Id.*

West's economically motivated and rational attorney hypothesis has two flaws, one logical and one empirical. The logical flaw is rooted in the fact that unlike American attorneys, Japanese attorneys that represent shareholder-plaintiffs are normally not compensated on a U.S.-style contingency fee basis.<sup>179</sup> To the contrary, the common practice in Japanese derivative litigation is for attorneys to require shareholder litigants to pay two fees: (1) an upfront nonrefundable retainer (*chakushukin*) based on the amount of damages claimed; and (2) a "success fee" (*hoshukin*) based on the amount of damages actually received.<sup>180</sup> The precise amount of these two fees has historically been determined by a fee schedule published by the Japanese Federation of Bar Associations (the "Fee Rules").<sup>181</sup> Although it has never been mandatory for attorneys to strictly follow the Fee Rules, all available evidence suggests that attorneys either follow the Fee Rules to the letter or closely approximate them.<sup>182</sup> On April 1, 2004, the Fee Rules were amended to explicitly provide attorneys and clients with the authority to set their own fee arrangements.<sup>183</sup> However, even after the 2004 amendment, the former Fee Rules still normally provide the default terms for attorneys' fees in derivative litigation.<sup>184</sup>

The fact that attorneys in Japan require shareholder litigants to pay a nonrefundable retainer presents a logical problem for West's claim that attorneys drive shareholder litigation. In such a system, if a shareholder is unwilling to pay the initial retainer, then a derivative action will not be pursued. As explained above, this is fundamentally different from the United States where shareholders normally participate in derivative litigation without incurring any direct financial costs. Indeed, in a system like Japan's (which is similar to the systems in most other countries),<sup>185</sup> where shareholders must decide whether to incur direct financial costs prior to pursuing a derivative action, it is the shareholders—not attorneys—who ultimately drive derivative litigation.

West fails to directly address this logical gap in his economically motivated and rational attorney hypothesis. The only relevant point

179. Choy, *supra* note 164, at 1; West, *Pricing Shareholder Derivative Actions*, *supra* note 1, at 1456–57; West, *supra* note 99 at 365.

180. West, *Why Shareholders Sue*, *supra* note 127, at 365.

181. For the standard fee schedule, see *infra* Appendix C, Table 1.

182. *Id.*

183. See DAINI TOKYO BAR ASS'N, <http://niben.jp/consul/cost.html> (last visited Dec. 26, 2011) (Japan). For detailed rules, see Daini Tokyo Bar Ass'n, *Associate Compensation Bylaws*, KAWARAZAKI ATT'Y L. FIRM, <http://www.asahi-net.or.jp/~ZI3H-KWRZ/law2fee0.html> (last visited Dec. 26, 2011) (Japan).

184. *Id.*

185. See *supra* note 36 (noting that unlike the United States, most countries do not permit contingency fee arrangements).

that West raises in his 2001 article with respect to the upfront retainer fee is that in some cases “elite attorneys” allow shareholders to pay a reduced retainer fee of ¥300,000–¥500,000 (about \$3,000–\$5,000)—that is substantially lower than the amount prescribed by the Fee Rules.<sup>186</sup> However, this does not explain why presumably economically motivated and rational shareholders, who do not stand to benefit from derivative litigation and may potentially be held liable for the defendant’s court costs, would be willing to pay such a fee. As demonstrated in the previous Part, the evidence in Japan indicates that economically motivated and rational shareholders will not pay such a fee because they do not stand to benefit financially from derivative litigation.<sup>187</sup> West’s failure to provide an explanation as to how attorneys can drive litigation when it is shareholders who must first decide to pay a significant fee to commence an action, fatally damages his economically motivated and rational attorney hypothesis.

However, even putting aside this fatal error, empirical evidence further suggests that the economically motivated and rational attorney hypothesis is flawed. The DA Database provides little evidence to support the claim that economically motivated and rational attorneys have a financial incentive to actively pursue derivative litigation in Japan.<sup>188</sup> To the contrary, the empirical evidence suggests that even if attorneys decided to work on a pure contingency fee basis—which, as explained above, is the only arrangement under which one can claim that attorneys truly drive derivative litigation—they would likely avoid derivative actions in Japan because of their poor prospect for success.<sup>189</sup> For economically motivated and rational attorneys to choose to be compensated on a contingency fee basis, there must be a reasonable chance of succeeding in the action. As explained in detail below, for the average attorney (i.e., a non-Activist Attorney) the rate of success in Japanese derivative litigation is even more abysmal than for the average shareholder.<sup>190</sup> This empirical evidence suggests why even after the Fee Rules were relaxed in 2004, derivative actions in Japan still normally do not proceed on a contingency fee basis.

To measure the success rate for attorneys, derivative actions were divided in the DA Database into two groups based on two distinct categories of plaintiff attorneys: (1) “Activist Attorneys,” whom West refers to as “elite attorneys”; and (2) “Passive Attorneys,”

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186. West, *Why Shareholders Sue*, *supra* note 127, at 369.

187. See *supra* Part IV.A.

188. See text accompanying notes 191–96.

189. See text accompanying notes 191–96.

190. See *infra* Appendix B, Table 1.

whom West refers to as “non-elite attorneys.”<sup>191</sup> Activist Attorneys are defined as attorneys who represent shareholder-plaintiffs in their capacity as members of the *Kabunushi Onbuzuman* (Shareholders Ombudsman) (KO)—a non-profit organization aimed at “reforming Japanese management practices to incorporate the views of ordinary shareholders and citizens.”<sup>192</sup> Passive Attorneys are defined as attorneys who represent shareholder-plaintiffs in a capacity other than as a member of the KO (i.e., as regular “for-profit” attorneys). Out of the 148 derivative actions in the DA Database with a reported final result, shareholder-plaintiffs were represented by Activist Attorneys in 20 percent of the actions and by Passive Attorneys in 80 percent of the actions.<sup>193</sup>

The difference in the rate of success between the Passive Attorneys and Activist Attorneys is dramatic. In derivative actions undertaken by Passive Attorneys the success rate was abysmal. Passive Attorneys settled only 16.9 percent of their cases and succeeded at trial in 9.3 percent of their cases—which amounts to a combined success rate of 25.2 percent of actions filed.<sup>194</sup> Based on available evidence, this rate of success appears to be considerably lower than in other types of civil litigation in Japan.<sup>195</sup> This suggests that economically motivated and rational Passive Attorneys would likely only choose to work on derivative actions if they were offered an upfront retainer by shareholders and had no other more profitable work available. Indeed, West’s results confirm that only the most desperate Passive Attorneys are willing to take a chance on derivative litigation and “those that do usually remain in closet sized offices.”<sup>196</sup> In short, the empirical evidence suggests that economically motivated and rational Passive Attorneys have an incentive to avoid, not drive, derivative litigation in Japan.

Conversely, the success rate for Activist Attorneys is astonishingly high. Activist Attorneys settled 66.7 percent of their cases and succeeded at trial in 10 percent of their cases—which amounts to a combined success rate of 76.7 percent of actions filed.<sup>197</sup> At first blush, this suggests that at least for Activist Attorneys, the economically motivated and rational attorney hypothesis makes

191. West, *Why Shareholders Sue*, *supra* note 127, at 369–70.

192. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 178.

193. *Infra* Appendix B, Table 1.

194. *Infra* Appendix B, Table 1.

195. In 2008, based on available evidence, it appears that the combined success rate for plaintiffs in civil monetary claims was approximately 60 percent. See 1 JUDICIAL STATISTICS YEARBOOK CIVIL AND ADMINISTRATIVE CASES tbl. 19 (2008), available at <http://www.courts.go.jp> (describing the number of cleared cases in the district courts, separated by categories and how they were cleared).

196. West, *Why Shareholders Sue*, *supra* note 127, at 371.

197. *Infra* Appendix B, Table 1.

sense. Indeed, the overall success rate, and particularly the high rate of settlement for Activist Attorneys is strikingly similar to Romano's findings in her seminal article on U.S. shareholder litigation.<sup>198</sup> Romano concluded that economically motivated and rational attorneys, who are motivated by lucrative fees, are a major driver of derivative litigation in the United States.<sup>199</sup>

Unsurprisingly, West's economically motivated and rational attorney hypothesis is mainly built on the high success rate of Activist Attorneys.<sup>200</sup> He suggests that Activist Attorneys, who have "great shot selection" for picking money making cases, seek out derivative litigation in Japan to obtain the large fees that such actions offer.<sup>201</sup> West further explains how the "organizational structure chosen by the [Activist Attorneys] leads to profit maximization."<sup>202</sup> Specifically, he suggests that Activist Attorneys use the KO organizational structure to pool their resources and diversify risk, which provides them with a sound financial basis to rationally pursue derivative litigation.<sup>203</sup>

West's analysis would be correct if it were not for the fact that Activist Attorneys conduct derivative litigation in their capacity as members of a nonprofit organization.<sup>204</sup> Therefore, their motivation is clearly not to profit directly from derivative litigation. The fees generated from the successful derivative actions are used to cover the organizations' operating expenses and fund its various activities that range from campaigns to improve shareholders meetings, lobbying for legislative reform, filing shareholder proposals, and of course, conducting derivative actions.<sup>205</sup>

Aside from the fact that the KO is a nonprofit organization, West's claim, that the KO organizational structure "leads to profit

198. Romano's empirical study found that 65 percent of shareholder actions resulted in a settlement. Romano, *supra* note 2, at 60.

199. *Id.* at 84.

200. West, *Why Shareholders Sue*, *supra* note 127, at 369–70.

201. *Id.*

202. *Id.* at 370.

203. *Id.*

204. *Information About the Kabunushi Onbuzuman (Shareholders Ombudsman)—The Purpose, Activities and Organization of the Association and Activities for the Organization*, KABUNUSHI ONBUZUMAN (SHAREHOLDERS OMBUDSMAN), <http://kabuombu.sakura.ne.jp/archives/guidance.html> (last visited Dec. 26, 2011) [hereinafter *KO Purpose*] (Japan).

205. Milhaupt, *Nonprofit Organizations*, *supra* note 35 at 178–81; see KO WEBSITE, *supra* note 152 (providing recent news updates on the activities of the organization); see also *About Kabunushi Onbuzuman (Shareholders Ombudsman): Its Goals and Activities*, KOJI MORIOKA, [http://www.zephyr.dti.ne.jp/~kmorioka/about%20KO\\_e.html](http://www.zephyr.dti.ne.jp/~kmorioka/about%20KO_e.html) (last visited Dec. 26, 2011) [hereinafter *KO Charter*] (Japan) (describing the objectives and operations of the *Kabunushi Onbuzuman* (Shareholders Ombudsman)).



maximization,” is not supported by the empirical evidence. First, as West acknowledges, Activist Attorneys normally charge retainer rates that are well below the market rate—a function of their nonprofit agenda.<sup>206</sup> Second, derivative actions filed by Activist Attorneys on average claim one-tenth of the damages of other derivative actions and settle for one-fifth of the amount of settlements concluded by Passive Attorneys.<sup>207</sup> This suggests that Activist Attorneys may be achieving a high rate of settlement because they are more concerned with the message sent by a settlement than monetary gains. This suggestion is confirmed by the fact that many of these settlements entered into by Activist Attorneys involve not only cash payments by wrongdoing directors but also commitments from the company to implement specific mechanisms to prevent the conduct from recurring.<sup>208</sup>

In sum, West’s economically motivated and rational attorney hypothesis is flawed. It overlooks the critical fact that shareholders, not attorneys, are the gatekeepers of derivative litigation in Japan. Shareholders must normally decide to pay a nonrefundable retainer fee before an action will be filed, a fundamentally different approach than U.S. derivative litigation. The theory does not account for the empirical evidence suggesting that economically motivated and rational Passive Attorneys will avoid, not pursue, derivative litigation because of their abysmal success rate. It also fails to account for the fact that Activist Attorneys act on behalf of a nonprofit organization and conduct their actions in a manner suggesting that they are not motivated by profits. On all accounts, the claim that economically motivated and rational attorneys drive derivative litigation in Japan is dubious.

*C. Testing the Financial Tracking Hypothesis: Does the  
Rate of Derivative Actions Track Changes in  
Their Financial Costs and Benefits?*

Assuming that shareholders and attorneys rationally decide to pursue derivative actions based on an ex ante financial cost–benefit analysis, the rate of derivative litigation should closely track changes in Japan’s institutional structure that impact the financial costs and benefits of pursuing derivative actions. In other words, if rational profit-seeking shareholders and attorneys are driving derivative litigation, the rate of derivative actions should increase as they

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206. West, *Why Shareholders Sue*, *supra* note 127, at 369.

207. For detailed statistics amounts of damages claimed and settlements, see *infra* Appendix B, Tables 6–7.

208. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 180.

become more profitable and decrease as they become less profitable. However, since the 1993 reduction in the stamp fee, empirical evidence suggests the opposite. The rate of derivative litigation over the past decade has declined in spite of a number of post-1993 modifications to Japan's derivative actions regime that arguably make Japanese derivative litigation more profitable.<sup>209</sup> This is yet another piece of evidence that suggests something other than profit is driving derivative litigation in Japan.

The first major change in the cost structure of post-1993 derivative actions relates to orders by Japanese courts for shareholder-plaintiffs to post security for expenses. According to Articles 267(6) and (7) of the Commercial Code (now Article 847(7) and (8) of the Company Law of 2005), upon a defendant's motion, in the course of a derivative action Japanese courts can order plaintiff-shareholders to post security for expenses.<sup>210</sup> For the defendant to succeed in such a motion they must establish on a *prima facie* basis that the derivative action was filed in "bad faith."<sup>211</sup> Several prominent scholars claim that after the rate of derivative litigation increased in the early nineties, Japanese courts began to more freely award security for expenses in order to deter strike suits.<sup>212</sup> The ease with which Japanese courts awarded security for costs was widely regarded as a significant financial barrier to derivative litigation in the post-1993 period following the reduction in the stamp fee.<sup>213</sup> Then, in 1997, the Osaka High Court issued what many academics view as a watershed judgment that "served to check a growing tendency by courts to grant liberally defendants' motions for security for expenses."<sup>214</sup> Several prominent scholars opined that the tightening of security for expense awards "set an important precedent for further expanding the use of shareholder derivative suits."<sup>215</sup>

Empirical evidence from the DA Database only partially confirms the widely understood role played by security for expenses in the post-1993 era.<sup>216</sup> Indeed, in the period immediately following the reduction of the stamp fee until the date of the Osaka High Court watershed decision, the Japanese courts awarded security for

209. See *infra* Part IV.C; *Infra* Appendix A, Table 1.

210. Fujita, *supra* note 6, at 21.

211. *Id.*; Utsumi, *supra* note 107, at 137.

212. Aronson, *supra* note 1, at 25–26; Fujita, *supra* note 6, at 21; Kawashima & Sakurai, *supra* note 4, at 41–45.

213. Aronson, *supra* note 1, at 24–25. See generally Fujita, *supra* note 6, at 21–22 ("Defendants of a derivative action almost always seek the said bond, and the order is often, if not always, granted.")

214. Aronson, *supra* note 1, at 25–26.

215. *Id.*

216. For detailed statistics on actions in which security for expenses was ordered, see *infra* Appendix B, Table 8.

expenses in 30.4 percent of derivative actions filed.<sup>217</sup> After the Osaka High Court decision the percentage of derivative actions in which courts awarded security for expenses plummeted to 7.3 percent.<sup>218</sup> Thus, the DA Database confirms the general understanding that the Osaka High Court decision ushered in a more restrictive use of security for expenses, which arguably increased the profitability of derivative litigation. However, contrary to the economically motivated and rational shareholder theory and the predictions of several prominent academics, the number of derivative actions filed in the decade following the Osaka Court's watershed decision did not increase. To the contrary, it declined.

The second hallmark event in Japan's post-1993 derivative actions cost-benefit structure was the 2001 *Daiwa Bank* decision.<sup>219</sup> In *Daiwa Bank*, the Osaka District Court awarded damages of \$775 million in a derivative action—sixty-six times higher than the previous record.<sup>220</sup> Leading academics and reporters suggested that the “Daiwa shock” may lead to a flood of derivative actions.<sup>221</sup> Indeed, Japanese companies rushed to purchase or increase their D&O liability insurance.<sup>222</sup> From an economically motivated and rational choice perspective, the Daiwa shock should have produced a sharp increase in derivative litigation.<sup>223</sup> Again, the reality contradicts what the economically motivated and rational choice theory predicts. Since the time of the *Daiwa Bank* decision, the number of derivative actions filed has slightly declined.<sup>224</sup>

217. *Infra* Appendix B, Table 8.

218. *Infra* Appendix B, Table 8.

219. Aronson, *supra* note 1.

220. West, *Why Shareholders Sue*, *supra* note 127, at 352.

221. According to Aronson:

[T]he Daiwa Bank Case also provides evidence of a shareholder derivative system functioning to a surprising degree like the U.S. system during the transformation of the American corporate governance model during the 1980s. The derivative lawsuit system, specifically the potential for ‘big’ cases to be transmitted through and amplified by the formal legal system and exert an impact on corporate practices, is arguably the least likely element of the U.S. transformation to appear in Japan under current theory. We must reconsider theories of comparative corporate law in order to account for changes occurring in Japanese corporate governance and the new importance of law in Japan.

Aronson, *supra* note 1, at 57.

222. *Id.*

223. This is buttressed by the fact that an optional statutory cap on management liability that was inserted into Japanese corporate law after the *Daiwa* decision has hardly been adopted by any companies—which was one of the only reasons some pundits suggested that litigation may not spike after *Daiwa*. Cheffins & Black, *supra* note 5, at 1460; Fujita, *supra* note 6, at 25. Indeed, there has yet to be a case in which the liability cap has been relied on.

224. See *infra* Appendix A, Table 1.

Finally, some leading scholars suggest that the steep decline in the Japanese market likely decreased the transaction cost of pursuing derivative actions by making it easier to establish damages resulting from director misconduct.<sup>225</sup> From an economically motivated and rational choice perspective, this suggests that in the years that the Japanese market was at its lowest point and declined most sharply there should have been a proliferation in derivative litigation. Again, such a prediction based on the economically motivated and rational choice theory has proven incorrect. In 2003 and 2009, the Japanese stock market declined sharply and hit post-bubble lows at approximately 25 percent of its 1989 bubble peak.<sup>226</sup> However, in each of those years the number of derivative actions filed in Japan was similar, if not lower, than in most other years.<sup>227</sup>

In sum, from an economically motivated and rational choice perspective, the three most significant events in the post-1993 cost-benefit structure of Japanese derivative litigation all point to an expected increase in the number of derivative actions filed. According to the economically motivated and rational choice theory, the combined effect of all three of these events should have caused a surge in derivative litigation during the past-decade. In fact, the opposite happened. This should not surprise. As demonstrated above, even with the changes in the cost-benefit structure of derivative litigation, Japanese derivative actions still do not *financially* benefit either shareholders or attorneys.<sup>228</sup>

The conclusion is simple. There is scant evidence that those who participate in Japanese derivative actions are driven by profits. To the contrary, it appears that even though shareholders and attorneys normally do not gain significant financial benefits from derivative litigation they still decide to sue.

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225. West, *Pricing Shareholder Derivative Actions*, *supra* note 1, at 1498. See generally Ginsburg & Hoetker, *supra* note 1, at 56-57 (noting that the increase in the 1990s is mostly attributable to economic decline).

226. See *Historical Chart: Nikkei Index*, MSN MONEY CAN., <http://ca.moneycentral.msn.com/investor/charts/chartdl.aspx?symbol=JP%3a100000018&CP=0&PT=11> (providing a historical chart showing that in 2003 and 2009 the Japanese stock market declined sharply and hit post-bubble lows at approximately 25 percent of its 1989 bubble peak).

227. See *infra* Appendix A, Table 1.

228. See *supra* Part IV.A-B.

V. PROVIDING A RATIONAL EXPLANATION FOR NON-ECONOMICALLY  
MOTIVATED AND IRRATIONAL DERIVATIVE LITIGATION IN JAPAN

A. *Demarcating the Boundaries Between Rational and  
Irrational Behavior*

According to the classical economic rational choice theory, any behavior that does not *directly* maximize an actor's *financial* wealth is irrational.<sup>229</sup> Thus, in the context of derivative litigation, it is irrational for a shareholder or attorney to pursue a derivative action if, based on an *ex ante* financial cost–benefit analysis, the cost of a derivative action outweighs the benefit.<sup>230</sup> According to this definition, as demonstrated above, it is normally irrational to pursue derivative actions in Japan.

Although this realization is academically important, it is not terribly helpful for providing a more accurate understanding of what precisely drives derivative litigation in Japan. To provide such an understanding, particular types of non-economically motivated and irrational behaviors, which help to explain why Japanese derivative litigation is regularly pursued, need to be explored. The starting point for such an analysis is to recognize that there are two relatively distinct categories of shareholder–attorney behavior: (1) quasi-rational behavior; and (2) purely irrational behavior.

Quasi-rational behavior is behavior that does not directly maximize an actor's financial wealth but which nevertheless increases the actor's overall level of well-being because, in a global sense, the benefit derived from the behavior is greater than the cost. For example, in a narrow sense, giving money to charity is economically irrational from the perspective of the classical economic rational choice theory as it is a financial wealth reducing behavior. However, it is likely that the philanthropist's overall well-being is enhanced by philanthropy because the altruistic benefits gained from donating are greater than the reduction in her well-being caused by the financial loss. Such behavior is labeled “quasi-rational” because although the action is irrational in a narrow financial sense it is still in the actor's self-interest to undertake the action.

Purely irrational behaviors are those behaviors which do not benefit the actor's overall level of well-being in the sense that the global costs of the behavior outweigh its benefits (i.e., such behavior is not in the individual's self-interest). The field of behavioral law and

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229. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (citing GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976)).

230. See *supra* Part II.

economics has been instrumental in explaining why people engage in such utility-reducing behaviors. The most prominent explanation for a considerable amount of purely irrational behavior comes from Herbert Simon's theory of bounded rationality.<sup>231</sup> According to this theory the ability for individuals to act rationally (i.e., in a way that maximizes what is in their self-interest) is limited by the information they have, their limited cognitive abilities, and the finite amount of time they have to make decisions.<sup>232</sup> As a result of such limitations, which Simon coined "bounded rationality," individuals often engage in suboptimal or utility-decreasing behavior.<sup>233</sup> For example, people often decide to spend their hard earned money in shops or restaurants because they are full of customers. Most people engage in such behavior because they rarely have the time, information or ability to compare the value offered by all competing businesses.<sup>234</sup> However, the use of such a mental heuristic can often lead a customer into receiving a suboptimal amount of value for the amount of money spent.

When analyzing derivative litigation in Japan through the lens of quasi-rational and purely irrational behaviors, a large portion of seemingly inexplicable derivative litigation makes sense. In fact, according to the empirical evidence, it appears that a majority of derivative litigation can be directly traced to quasi-rational and purely irrational behavior. This is in stark contrast to attempting to understand derivative litigation in Japan solely through the lens of economically motivated and rational behavior which, as demonstrated above, has at best, a limited predictive value, and at worst, is terribly misleading.

### B. *Quasi-Rational Behavior Drives Derivative Litigation in Japan*

At first blush, the fact that there are no obvious direct financial incentives for pursuing derivative actions in Japan may suggest that litigants do not benefit from such actions. In fact, the opposite is true. A significant portion of Japanese derivative actions ultimately benefit the litigants who pursue them. However, the benefits that many

231. Herbert A. Simon, *Rational Choice and the Structure of the Environment*, in *MODELS OF MAN: SOCIAL AND RATIONAL* 261, 270–71 (1957). See generally DOWLING & YAP, *supra* note 17, at 35–106 (exploring the effects of bounded rationality on behavioral patterns); Korobkin & Ulen, *supra* note 16, at 1075–90 (analyzing the complexity and ambiguity of decision making that lead most humans to make choices that do not maximize expected utility).

232. DOWLING & YAP, *supra* note 17, at 35–37; Korobkin & Ulen, *supra* note 16, at 1075–76.

233. DOWLING & YAP, *supra* note 17, at 35–37; Korobkin & Ulen, *supra* note 16, at 1075–76.

234. DOWLING & YAP, *supra* note 17, at 44.

derivative litigants receive are not *monetary* benefits that *directly* flow from the derivative action itself. Rather, these litigants pay an economic price to use derivative actions as a tool to receive a myriad of economic and non-economic benefits that indirectly flow from derivative litigation.<sup>235</sup> Ultimately, based on a wider definition of rationality, these seemingly “irrational” litigants may be seen as engaging in “rational” behavior in the sense that by pursuing derivative litigation they advance their overall well-being.

Based on our review of over 200 reported decisions, 1,000 actions filed, and numerous discussions with leading Japanese academics and attorneys, three groups of litigants emerge who repeatedly pursue derivative actions in Japan for the primary purpose of receiving such non-economic or indirect-economic benefits: (1) Activist Attorneys, (2) *sokaiya*, and (3) environmentalists.<sup>236</sup> These three groups of litigants account for a major portion of the market for derivative actions in Japan and have been involved in an even larger percentage of high-profile derivative actions.<sup>237</sup>

The most significant portion of derivative actions driven by quasi-rational litigants are those involving Activist Attorneys. As explained in the previous Part, Activist Attorneys represent shareholder-plaintiffs in their capacity as members of the *Kabunushi Onbuzuman* (Shareholders Ombudsman) (KO).<sup>238</sup> From the time it was founded in 1996, the KO has been a non-profit organization with a fierce political agenda.<sup>239</sup> The organization was founded by a group of 150 lawyers, accountants, and academics in response to the government’s use of taxpayer money to bail out corporate lenders.<sup>240</sup> According to its charter, the objective of the KO is to exercise shareholders’ legal rights, improve corporate information disclosure, and serve as a voice for the expression of shareholder opinion.<sup>241</sup> Its published materials express an even broader political agenda: “[M]onitoring corporate activities, criticizing antisocial acts by corporations . . . [and promoting] those corporations that improve working conditions, practice philanthropy, protect the environment, employ the handicapped, promote gender-equality, and engage in full disclosure of their activities.”<sup>242</sup>

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235. See *infra* Part V.B.

236. See *infra* Part V.B.

237. See *infra* Part V.B.

238. See *supra* notes 191–93 and accompanying text.

239. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 178–81 (discussing the KO’s history as a non-profit and its success in bringing derivative suits); *KO Charter*, *supra* note 205, art. 2; KO WEBSITE, *supra* note 152.

240. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 178–79; *KO Charter*, *supra* note 205, art. 2; KO WEBSITE, *supra* note 152.

241. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 178–79.

242. *KO Charter*, *supra* note 205, art. 2; KO WEBSITE, *supra* note 152.

To achieve its vast political agenda, the KO undertakes a litany of activist activities, which include running a website and telephone hotlines, lobbying the government for legislative reforms, organizing shareholder voting campaigns, and filing shareholder proposals.<sup>243</sup> However, the most powerful weapon in the KO's arsenal is its use of derivative actions against corporations who oppose its suggested reforms and political agenda.<sup>244</sup> In order to facilitate such actions the KO holds a portfolio of 300 shares and has a number of shareholders and Activist Attorneys as regular members.<sup>245</sup>

The scale of the KO's impact on Japan's market for derivative actions cannot be understated. In the post-1993 period, actions brought by the KO's Activist Attorneys accounted for half of all reported settlements and a quarter of successful derivative actions.<sup>246</sup> In addition, KO attorneys have litigated a disproportionate number of high-profile derivative actions cases.<sup>247</sup> The role of the KO in Japan's derivative actions market has not gone unnoticed. Milhaupt describes the KO's use of derivative actions "as arguably the most important corporate law enforcement agent in . . . Japan."<sup>248</sup> West also acknowledges that the KO "dominates the market [for derivative actions], has no recognizable equal, and has litigated several of the more high profile cases in Japan."<sup>249</sup>

KO cases are clearly motivated by politics, not profits. Its charter makes it clear that its goal is political activism.<sup>250</sup> From its inception, any fees received by senior attorneys working on KO cases have been donated back to the organization in order to fund its various activist campaigns.<sup>251</sup> The amount KO attorneys charge shareholder litigants is normally substantially below the market rate.<sup>252</sup> In spite of the complexities of incorporating a non-profit organization in Japan, the

243. *KO Charter*, *supra* note 205; KO WEBSITE, *supra* note 152.

244. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 179 (discussing the KO's successful use of derivative suits).

245. *Id.*

246. *Infra* Appendix B, Table 1.

247. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 179 ("Given the legal nature of its work, specialist members in the form of elite attorneys are the core of the organization."); *KO Charter*, *supra* note 205; KO WEBSITE, *supra* note 152.

248. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 170–71.

249. West, *Why Shareholders Sue*, *supra* note 127, at 369.

250. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 179 (outlining the KO's political goals and non-profit status); *KO Charter*, *supra* note 205. See generally KO WEBSITE, *supra* note 152.

251. Some of the junior lawyers receive small amounts of remuneration for working on cases but this is no different from any other non-profit organization. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 179.

252. West, *Why Shareholders Sue*, *supra* note 127, at 369.



KO officially changed its corporate status to a non-profit organization in 2003.<sup>253</sup>

The KO's non-profit motivation is evident in the manner in which its Activist Attorneys conduct derivative litigation. The cases they choose to litigate always have a clear political agenda matching the organization's goals.<sup>254</sup> As explained previously, Activist Attorneys on average claim one-tenth the amount of damages and settle for one-fifth the amount when compared to other derivative actions.<sup>255</sup> This suggests that Activist Attorneys may be achieving a high rate of settlement because they are more concerned with the message sent by a settlement than monetary gains. This hypothesis is confirmed by the fact that many of the settlements entered into by Activist Attorneys require commitments from the company to improve corporate governance.<sup>256</sup> In short, Activist Attorneys acting on the KO's behalf demonstrate that quasi-rationality is a major force driving derivative litigation in Japan.

The *sokaiya* have long played an infamous role in Japanese corporate governance. With their strong ties to the *yakuza* (the Japanese mafia), the *sokaiya* have historically used various means, including threats to disclose sensitive corporate information and disrupt annual general meetings, to extort payments from Japanese companies.<sup>257</sup> Over the past several decades, the *sokaiya* have been extremely successful in their corporate extortion, extracting hundreds of millions of dollars from Japan's most venerable blue-chip companies.<sup>258</sup>

The DA Database also suggests that the *sokaiya* utilize derivative actions as a tool for extortion. *Sokaiya* involvement was identified in approximately 5 percent of derivative actions filed.<sup>259</sup>

253. *KO Purpose*, *supra* note 204.

254. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 180–81 (discussing KO's derivative suit settlements); *KO Charter*, *supra* note 205. See generally KO WEBSITE, *supra* note 205.

255. See *infra* Appendix B, Tables 6–7.

256. Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 180.

257. See West, *Information, Institutions, and Extortion*, *supra* note 6, at 767 (discussing the history of the *sokaiya* in extorting payments from Japanese companies).

258. See West, *Why Shareholders Sue*, *supra* note 127, at 374–75 (noting that the *sokaiya*'s use of threats and settlements “can help *sokaiya* reap significant rewards”). See generally West, *Information, Institutions, and Extortion*, *supra* note 6, at 768–69 (discussing survey's finding that “of two thousand firms . . . seventy-seven percent had paid *sokaiya*”).

259. The Authors approximated the percentage of cases that were brought by *sokaiya* by crosschecking the names of the plaintiffs in the DA Database against names of well-known *sokaiya*. Although Japanese corporate law specialists generally agree on which plaintiffs are *sokaiya* there is obviously no official list of *sokaiya* because, like members of any criminal organization, a person acting as a *sokaiya* will most often want to conceal or deny their identity to the general public. The Authors were

Normally, the *sokaiya* own a minimal amount of shares and therefore choose to incur the financial cost of hiring an attorney with no realistic chance of achieving a direct financial benefit from the derivative action.<sup>260</sup> However, the court serves as a potential forum for the *sokaiya* to disclose sensitive corporate information, and raises the possibility of the company discretely “paying-off” the *sokaiya* to rid itself of the nuisance suits.<sup>261</sup> Thus, quasi-rational extortion accounts for another portion of the market for Japanese derivative litigation.

Environmentalists make up the final group of litigants that bring derivative suits for quasi-rational motives. Litigants with environmental motives were found in about 2 percent of the actions in the DA Database.<sup>262</sup> Most commonly, these actions have involved cases brought by environmentalists-turned-shareholders against the directors of electric power companies for their decisions to build nuclear power plants.<sup>263</sup> The fee paid by the environmentalists to pursue a derivative action is “economically irrational” in a narrow

conservative in generating their list of which plaintiffs were *sokaiya* (i.e., if the plaintiffs were not widely viewed as *sokaiya* among Japanese corporate law specialists they were not considered to be *sokaiya*). It should be noted that the Authors have received anonymous feedback that the amount of *sokaiya*-linked cases may be much higher than estimated (i.e., greater than 5 percent) as certain plaintiffs which we did not label as *sokaiya* actually may be *sokaiya* and that *sokaiya* may have been involved in cases where the parties' names were not reported (which in Japan is more common than in many other jurisdictions). Due to the opaque and uncertain nature of the evidence the Authors considered these anonymous comments but chose to maintain the more conservative estimate of *sokaiya* involvement (i.e., not counting plaintiffs as *sokaiya* where the affiliation was uncertain and excluding all cases in which parties' names were not reported) due to the opaque nature of the evidence.

260. According to the Tokyo District Court a “so-called *sokaiya* is a person who holds a small number of shares in some corporations in order to extort money [on some pretext] . . . .” *Tōkyō Chihō Saibansho* [Tokyo Dist. Ct.] Aug. 28, 1965, 7 KAKYŪ SAIBANSHO KEIJI SAIBAN REISHŪ [KAKEISHŪ] 1712 (Japan). As a *sokaiya* must only hold a single share to file a derivative action for the purpose of extortion (i.e., with the hope of receiving an under-the-table personal payment to abandon the derivative action brought on behalf of the company) there is no need for them to own more than a single share. In fact, owning more than a single share would be against the *sokaiya*'s self-interest as it would increase the cost for them to engage in extortion without any additional payoff.

261. See West, *Why Shareholders Sue*, *supra* note 127, at 375 (noting that high response costs and potential public release of information lead corporations to pay to get rid of nuisance suits).

262. The Authors approximated the percentage of cases that were brought for environmental motives by calculating the percentage of cases in the DA Database that were brought for a purely environmental motive (e.g., where the plaintiff purchased a share in an electric power company after the decision was made to build a nuclear power plant to provide the plaintiff with standing to sue the company's directors). Such cases made up approximately 2 percent of cases in the DA database.

263. West noted these cases. West, *Why Shareholders Sue*, *supra* note 127, at 372. The DA Database suggests that there have been more since his article.

sense (as such environmentalists generally hold a miniscule amount of shares and no environmental cases have succeeded thus far)<sup>264</sup>, but likely makes sense from a publicity perspective, as the lawsuits bring attention to their cause.<sup>265</sup>

Based on the reported cases in the DA Database, the three groups of quasi-rational litigants account for more than a quarter of derivative litigation in Japan. It is extremely likely that there are significantly more derivative actions in which plaintiffs are driven by quasi-rational motives—but the precise number of such plaintiffs is difficult to determine, as quasi-rational motives are often only known to the plaintiffs themselves. Based on this evidence alone, there is no doubt that behavior, which classical economic rational choice adherents describe as “irrational,” has been a major driver of derivative litigation in Japan. It also demonstrates that non-economic motives, which have received scant attention in the comparative shareholder litigation literature, play a vitally important role in derivative litigation in Japan.

### *C. Purely Irrational Behavior as a Potential Driver of Derivative Litigation in Japan*

Derivative litigation is exceedingly complex. Indeed, months were invested in this Article for data collection, case reviews, and regression analysis to develop an accurate picture of the forces that drive derivative litigation in Japan. There is little chance that any shareholder or attorney contemplating pursuing a Japanese derivative action would spend a fraction of this time to figure out their statistical probability of success. Indeed, this Article suggests that even highly skilled legal scholars fundamentally misperceive Japanese derivative actions as being profitable—when in fact, they normally are not.<sup>266</sup> In such a complex decision making environment, in which the actual probability of success is opaque, the forces of “bounded rationality” loom large.

Decision researchers have identified the complexity of a decision as the leading reason that actors abandon thorough cost-benefit

264. The Authors reviewed all of the environmental cases in the DA Database and performed an additional search in the LEX/DB database on October 12, 2011 to confirm that, at least in terms of reported cases, there is no environmentally motivated derivative action that has succeeded (i.e., all cases have failed where the plaintiff has purchased a share in a company to pursue a derivative action for a purely environmental motive). The Authors are also unaware of any environmentally motivated unreported derivative action that has succeeded.

265. The Authors ran electronic searches on Japanese newspaper databases on October 11, 2011 and found that the environmentally motivated derivative actions cases generated a significant number of published stories in the Japanese news media.

266. See *supra* Part III.B.

analyses in favor of more simplified decision making strategies (which are commonly referred to as “mental heuristics”).<sup>267</sup> Although simplified decision-making strategies may result in sub-optimal decisions, they are commonly used because actors lack the time, cognitive ability, or information to conduct a more thorough analysis (i.e., the actors have “bounded rationality”). Thus, behavioral law and economics predicts that when actors face a complex decision, they will commonly rely on a mental heuristic that results in irrational behavior.<sup>268</sup>

One of the most common mental heuristics that actors rely on when faced with complex decisions is the “availability heuristic.”<sup>269</sup> According to cognitive research, the availability heuristic commonly causes actors to overestimate the relevance of salient or memorable events.<sup>270</sup> Instead of making their decisions based on the actual probability of an event occurring, they base their decisions upon the probability of the event occurring according to their memory.<sup>271</sup> Such a mental shortcut can often lead to sub-optimal decisions, as events that are vivid or well publicized leave the actor with the impression that the event is more likely to occur than actual statistical probability would suggest.<sup>272</sup>

There are several pieces of evidence that suggest that a portion of derivative litigation in Japan is the result of irrational behavior by shareholders and attorneys who were misguided by the “availability heuristic.” In 1986, the Tokyo District Court’s *Mitsui Mining* decision was a vivid event that drastically altered the public’s view of

267. See Korobkin & Ulen, *supra* note 16, at 1077–78 (discussing evidence showing that the complexity of a decision is the leading cause of departures from complete cost-benefit analysis).

268. See *id.* (discussing people’s deviations from rational choice theory when confronted with complex decisions).

269. *Id.* at 1085–91.

270. See Korobkin & Ulen, *supra* note 16, at 1087; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163, 163–64 (Daniel Kahneman et al. eds., 1982).

271. See Korobkin & Ulen, *supra* note 16, at 1087 (discussing studies on the availability heuristic, such as the impact of media coverage, on people’s estimates of the number of deaths from various causes); Tversky & Kahneman, *supra* note 270, at 163–64 (noting that people’s decisions are often influenced by the strength of association, i.e., the familiarity of a given event).

272. See Korobkin & Ulen, *supra* note 16, at 1087 (“This mental shortcut can often lead to estimates that approximate statistical probabilities, as memorable events can be memorable precisely because they are common.”); Tversky & Kahneman, *supra* note 270, at 163–64 (arguing that when availability is influenced by factors that are not related to the actual frequency of a particular event, the use of this heuristic will lead to systematic biases).

derivative litigation.<sup>273</sup> The decision was widely seen as a sea-changing event, as it was the first time in Japanese history that a court found in favor of a plaintiff in a derivative action.<sup>274</sup> The media hype and academic fervor surrounding the decision were enormous.<sup>275</sup> It quickly transformed the Japanese derivative action from an obscure and impotent artifact of the American occupation to being *perceived* as an effective tool for increasing shareholder wealth and improving corporate performance.<sup>276</sup> The revived status of the derivative action was made clear in 1990, when it captured the spotlight in the high-level U.S.–Japan Structural Impediments Initiative negotiations—which further increased the positive image of derivative litigation.<sup>277</sup> The interest in derivative actions reached a fever pitch in the spring of 1993 when the first book devoted entirely to derivative actions—a mass-marketed account of the derivative

273. See West, *Pricing Shareholder Derivative Actions*, *supra* note 1, at 1499–500 (noting the massive publicity generated by the *Mitsui Mining* decision and the potential implications of such a “publicity effect”).

274. Kawashima & Sakurai, *supra* note 4, at 17–18; West, *Pricing Shareholder Derivative Actions*, *supra* note 1, at 1499–500.

275. See West, *Pricing Shareholder Derivative Actions*, *supra* note 1, at 1499–500 (“massive publicity”). Prior to the 1993 reduction in the stamp fee, there were a number of publications that illustrate the important impact that the *Mitsui Mining* decision had on the psyche of the legal community and wider public in Japan. See Hiroshi Haruta, *Kabushiki-sogo-hoyu-kisei to kogaisha-houjinkaku–Mitsui Kozan jiken to genko-hosei (ge)* [Regulation on Cross-Shareholding and Legal Personality of Subsidiary: Mitsui Mining Co. Case and Current Legal Regime], 1206 SHŌJI HŌMU 12 (1990) (Japan); Hiroshi Haruta, *Kabushiki-sogo-hoyu-kisei to kogaisha-houjinkaku–Mitsui Kozan jiken to genko-hosei (jo)* [Regulation on Cross-Shareholding and Legal Personality of Subsidiary: Mitsui Mining Co. Case and Current Legal Regime], 1205 SHŌJI HŌMU 2 (1990) (Japan); Hideki Kanda, *Mitsui Kozan jiken ni kansuru rironteki-mondai* [Theoretical Problems in Mitsui Mining Co. Case], 1082 SHŌJI HŌMU 2 (1986) (Japan); Mitsuo Kondo, *Jikokabushikisyutoku to torishimariyaku no sekinin–Mitsui Kozan jiken kousoshin hanketsu wo megutte* [Stock Repurchase and Liability of Directors: High Court’s Judgment on Mitsui Mining Co. Case], 1190 SHŌJI HŌMU 51 (1989) (Japan); Toshihiko Seki, *Kogaisha niyoru oyakaisha-kabushiki no shutoku/baikyaku kara shojita songai to oyakaisha no torishimariyaku ni taisuru daihyo-sosho–Mitsui Kozan jiken hanketsu* (Tokyo Chisai showa 61. 5. 29) *ga shisa-suru aratana ronten* [Damages Due to Purchase and Sale of Shares in Parent Corporation by a Subsidiary, and Derivative Action against Directors of Parent Corporation: New Points suggested by the Judgment in Mitsui Mining Co. Case (Tokyo District Court on May 29 of 1986)], 869 JURIST 88 (1986) (Japan); Souich Shida, *Kanzen-kogaisha niyoru oyakaisha-kabushiki no shutoku ni kanyoshita oyakaisha no torishimariyaku no songaibaisho-sekinin–Mitsui Kozan jiken hanketsu* [Liability of Parent Corporation’s Directors Who Purchased Shares in the Parent by the 100 Percent Subsidiary: Mitsui Mining Co. Case], 62 WASEDA HŌGAKU 137 (1987) (Japan).

276. *Supra* note 275; see Kawashima & Sakurai, *supra* note 4, at 17–18 (detailing the increase in derivative suits following *Mitsui Mining*).

277. See West, *Pricing of Shareholder Derivative Actions*, *supra* note 1, at 1499–500 (stating that shareholder rights generally, and derivative actions specifically, were a “focus of discussion” in the United States–Japan Structural Impediments Initiative negotiations).

litigation explosion—was published by the editors of *Nihon Keizai Shimbun* (the Japanese equivalent of the *Wall Street Journal*).<sup>278</sup>

However, despite the media hype and reversal in public perception, the *Mitsui Mining* decision had scant impact on the economic reality of derivative litigation in Japan. It did nothing to change the Shareholder Cost and Benefit Rules, Loser Pays Rule or lack of U.S.-style contingency fees. The court's decision merely required nineteen directors to pay approximately \$30,000 each to the multi-billion dollar Mitsui Mining conglomerate—an amount that had no material impact on the company's profitability or stock price.<sup>279</sup> The decision was immediately appealed, and thus within months any marginal impact that the successful judgment may have had on the financial cost-benefit calculus for pursuing derivative litigation was thrown into doubt.<sup>280</sup> Moreover, the shareholder-plaintiff who brought the *Mitsui Mining* action only owned a token amount of shares, which ensured that he never directly profited from the action.<sup>281</sup> As such, in reality, the *Mitsui Mining* decision confirmed that derivative litigation was not a viable tool for shareholders to make profits and perhaps was only useful for grabbing media attention. Following the *Mitsui Mining* decision, the stark economic reality of Japan's derivative action was dramatically different from the image depicted in the media of the derivative action as a profit maximizing corporate governance mechanism.

Even though the media-hype was misguided, the *Mitsui Mining* decision's impact on the Japanese psyche proved important. Following the media-hyped decision, derivative litigation increased sharply.<sup>282</sup> This appears to be a classic example of the powerful effect of the “availability heuristic.” Although, the financial cost-benefit reality of profiting from derivative litigation barely changed, the altered view of the derivative action in the minds of shareholders and attorneys led them irrationally to sue. Indeed, the reliance of

278. NIHON KEIZAI SHINBUN, *supra* note 116.

279. Mizuno v. Ariyoshi (*Mitsui Mining*), Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 29, 1986, 1194 HANJI 33, *aff'd*, Tōkyō Kōtō Saibansho [Tokyo High Ct.] July 3, 1989, 1188 SHŌJI HŌMU 36, *aff'd*, Saikō Saibansho [Sup. Ct.] Sept. 9, 1993, 47 MINSHŪ 4814 (Japan); *see also* Kawashima & Sakurai, *supra* note 4, at 17–18 (“The court held the management liable, finding that the loss resulted from the management's actions in violation of the Article 210 provision prohibiting the corporate repurchase of shares.”).

280. *Mitsui Mining*, Tokyo Dist. Ct., 1194 HANJI 33.

281. *See also* Kawashima & Sakurai, *supra* note 4, at 40 (discussing that shareholder-plaintiff in *Mitsui Mining* acquired shares only after finding misconduct, and only brought suit to become famous so that he would make more fees as an attorney in the future).

282. Kawashima & Sakurai, *supra* note 4, at 17–18 (noting the increase in suits after the *Mitsui Mining* decision).

shareholders and attorneys on the “availability heuristic” provides a credible explanation for the sharp increase in pre-1993 derivative litigation—an explanation which has largely been overlooked in the literature.

Although the *Mitsui Mining* decision sparked an irrational exuberance for derivative litigation in Japan, the success of Activist Attorneys has kept the fire alive. As explained earlier, Activist Attorneys are extremely successful derivative litigants.<sup>283</sup> In addition, the KO organization magnifies the success of Activist Attorneys through its active publicity-seeking activities.<sup>284</sup> Such publicity seems to have fabricated the impression, even among leading academics, that derivative actions are profitable ventures. Indeed, West has concluded that the KO organization is profit maximizing and that there “is profit to be found” by engaging in derivative litigation in Japan.<sup>285</sup>

However, as explained above, in terms of profitability, the success rate of Activist Attorneys is little more than smoke and mirrors. The manner in which Activist Attorneys conduct these derivative actions may result in success which creates the impression of profitability—but the attorneys do not actually profit. They conduct derivative actions as would be expected by attorneys acting for a non-profit organization—accepting below market retainers, claiming below market damages and accepting below market settlements—in the furtherance of a political agenda.<sup>286</sup> The public has scant knowledge of these facts, and indeed, they were largely unknown to the majority of academics before the empirical analysis for this Article was conducted. As such, the false impression of profitability propagated by the KO further amplifies the likelihood of irrational litigation based on the availability heuristic.

A small survey conducted by West in 2001 provides some tentative empirical evidence that the availability heuristic may be creating irrational exuberance in shareholder-plaintiffs.<sup>287</sup> The survey was conducted on ten individual shareholder-plaintiffs who were pursuing derivative actions against directors of large public

283. See *supra* text accompanying note 197.

284. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 179–81 (discussing various publicity seeking activities that the KO have engaged in to promote their political agenda).

285. West, *Why Shareholders Sue*, *supra* note 127, at 370–71 (noting that the KO organizational structure chosen by the leads to profit maximization).

286. See Milhaupt, *Nonprofit Organizations*, *supra* note 35, at 179–81 (outlining the non-profit behavior of the KO).

287. See West, *Why Shareholders Sue*, *supra* note 127, at 373 (finding that all ten shareholder-plaintiffs interviewed believed that they would obtain a large settlement and would incur no monetary costs).

corporations.<sup>288</sup> West asked the shareholder-plaintiffs to evaluate their chance of success.<sup>289</sup> Although, as West notes, such a small informal survey is hardly scientific, the answers provided by the shareholder-plaintiffs are telling.<sup>290</sup> One hundred percent of the shareholder-plaintiffs indicated that they expected to win or obtain a large settlement from their derivative action.<sup>291</sup> Based on the DA Database, the shareholder-plaintiffs' perceived rate of success is approximately 200 percent higher than what the empirical evidence suggests the actual success rate is.<sup>292</sup> Thus, the shareholder-plaintiffs' belief that they would either win or receive a large settlement is unsupported by our empirical evidence.

An alternative explanation for these shareholders' irrational exuberance, based on a common phenomenon observed by cognitive psychologists, is that the plaintiff-shareholders may be irrationally engaging in derivative litigation as a result of an "overconfidence bias."<sup>293</sup> Even when actors know the actual probability of a particular event, which theoretically is possible for the shareholder-plaintiffs (but unlikely), actors tend to predict that they will perform better than average.<sup>294</sup> Of course, definitively proving that the plaintiff-shareholders in West's limited survey were either irrationally acting on the availability heuristic or overconfidence bias is impossible. However, their answers do leave the distinct impression that their decision to pursue derivative litigation was at least partially irrational.

Finally, Professor Mitsuo Kondo, who is widely considered Japan's top derivative actions scholar, suggested in a recent interview that the dramatic increase in derivative litigation in the 1990s was "a kind of fashion," and the slight decline over the last decade has occurred because the "fashion boom has gone away."<sup>295</sup> Kondo's insightful comments raise the prospect that yet another type of

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *See infra* Appendix B, Table 1.

293. Korobkin & Ulen, *supra* note 16, at 1091–95; *see also* Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 & n.22 (1998) ("[P]eople are often unrealistically optimistic about the probability that bad things will happen to them."); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 806 (1980) (finding that students rate their own chances of positive events higher than average, and rate negative events below average).

294. Korobkin & Ulen, *supra* note 16, at 1091–92.

295. The interview was done by Masafumi Nakahigashi for the purpose of our joint project on derivative actions in Japan. Interview by Masafumi Nakahigashi with Mitsuo Kondo, in Osaka, Japan (Feb. 23, 2010).



irrational behavior may account for at least a portion of the rate of derivative litigation in Japan.

Recently, a significant amount of research in behavioral economics suggests that irrational herding behavior may be responsible for a wide array of difficult to explain behaviors, from cultural fads and fashion, to stock market bubbles.<sup>296</sup> According to this theory, the occurrence of a single event may cause a subtle shift in behavior that other actors successively copy, thus resulting in a significant irrational trend that occurs without a corresponding change in the economic value of that behavior.<sup>297</sup> Although herding behavior theory has yet to be applied in the context of litigation, Kondo's observation appears to coincide with this theory—especially considering the highly publicized events in the late 1980s that immediately preceded the upsurge in derivative litigation in Japan.

In sum, it is difficult to estimate the exact percentage of Japan's market for derivative actions that can be attributed to purely irrational behavior. However, there is enough available evidence to confidently suggest that purely irrational behavior has played more than a marginal role in driving derivative litigation in Japan. More investigation is needed, but it is clear that the lens of irrationality must be used to accurately understand Japanese derivative litigation.

#### VI. VALUABLE LESSONS FROM AN UNDERSTANDING OF NON-ECONOMICALLY MOTIVATED AND IRRATIONAL SHAREHOLDER LITIGANTS

The point is simple: non-economic motives and irrational behavior are major drivers of derivative litigation in Japan. This is an important academic discovery, as much of the literature on shareholder litigation is built on the erroneous assumption that non-economic motives and irrational behavior are of little consequence. The idea that shareholder litigation may thrive on a significant scale with a disregard for direct financial gains, or even when such litigation is against the plaintiff's (and plaintiff-attorney's) self-interest, opens up a new field of scholarship to explore.

This is not to suggest that the financial costs of litigation do not matter. Obviously, if the cost is exorbitantly high, it will likely

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296. See ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 149–53 (2000) (suggesting that herd-like behavior causes an “information cascade,” whereby one actor's choice influences others, ultimately impacting mispricing in financial markets).

297. See Sushil Bikhchandani et al., *Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 1014 (1992) (“[C]ascades can cause individuals to converge on the wrong decision . . . because an initial cascade may aggregate very little information.”).

prevent non-economically motivated derivative actions from occurring as the cost of achieving the non-monetary reward may be too high. However, this Article provides evidence indicating that even when a jurisdiction's shareholder litigation framework does not make it rational to sue (i.e., when suing may be against both the shareholder's and attorney's self-interests) there is still the potential for a significant amount of litigation to occur. This suggests that the common approach of viewing shareholder litigation solely through the narrow lens of economic motives and rational behavior should be abandoned and replaced with a wider lens that includes non-economic motives and irrational behavior.

On a more pragmatic note, the revelation that non-economic motives and irrational behavior are driving Japanese derivative actions poses important difficulties for reform. If non-economic motives drive derivative litigation then it is not enough to merely tweak the financial cost-benefit structure of a country's derivative action regime to achieve the appropriate level of derivative litigation to promote good corporate governance. In a similar vein, if irrational behavior drives derivative litigation then the public *perception* of the derivative action may be just as important (if not more important) than its actual regulatory design or economics.

The realization that non-economic motives and irrational behavior may drive derivative litigation also has powerful implications for Germany and China. These two leading economies have both recently implemented derivative actions.<sup>298</sup> As a result of their shared civil law heritage with Japan, they both have features (e.g., litigation fees that are contingent on the amount of damages claimed, a Loser Pays Rule, limited pre-trial discovery, and limited use of contingency fees) that, from an economically motivated and rational choice perspective, suggest their new derivative actions will be impotent.<sup>299</sup> However, Japan's experience suggests otherwise. This Article demonstrates that even in an environment where the direct financial benefit of derivative litigation is outweighed by its cost, derivative actions can still prove to have a powerful effect on corporate governance and society as a whole.

Finally, the United States may want to consider the possibility that its derivative actions scholarship deserves a second look. The nearly universal focus on how various legal rules and institutional factors affect the financial cost-benefit calculus for shareholder litigation may have left some important stones unturned. The role of non-economic motives in driving Japanese derivative litigation also suggests that large contingency fee payments, often seen as critical to

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298. *Supra* note 11.

299. *See supra* notes 11–13 and accompanying text.

the viability of America's derivative litigation regime,<sup>300</sup> may be unnecessary. Finally, the growing battle between Main Street and Wall Street suggests that an American version of the KO may soon bring a wave of non-economically motivated derivative actions to its shores.

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300. Baum & Puchniak, *supra* note 31.

**APPENDIX A**  
**TABLE 1**

株主代表訴訟年別件数

Number of Cases of Shareholders' Derivative Actions in Japan

	高裁 High Court			地裁 District Court			合計 Total		
	新受 Newly Filed	既済 Proceeding Ended	未済 On Proceeding	新受 Newly Filed	既済 Proceeding Ended	未済 On Proceeding	新受 Newly Filed	既済 Proceeding Ended	未済 On Proceeding
平成5年 1993年	N/A	N/A	10	N/A	N/A	76	N/A	N/A	86
平成6年 1994年	N/A	N/A	10	N/A	N/A	129	N/A	N/A	139
平成7年 1995年	N/A	N/A	14	N/A	N/A	148	N/A	N/A	162
平成8年 1996年	12	13	13	68	66	150	80	79	163
平成9年 1997年	11	9	15	88	66	172	99	75	187
平成10年 1998年	17	18	14	73	59	186	90	77	200
平成11年 1999年	15	11	18	95	77	204	110	88	222
平成12年 2000年	31	29	20	84	99	189	115	128	209
平成13年 2001年	28	26	22	66	87	168	94	113	190
平成14年 2002年	9	9	22	78	105	141	87	114	163
平成15年 2003年	N/A	N/A	N/A	85	76	150	N/A	N/A	N/A
平成16年 2004年	N/A	N/A	N/A	78	100	128	N/A	N/A	N/A
平成17年 2005年	N/A	N/A	N/A	70	91	107	N/A	N/A	N/A
平成18年 2006年	N/A	N/A	N/A	72	77	102	N/A	N/A	N/A
平成19年 2007年	N/A	N/A	N/A	70	50	122	N/A	N/A	N/A
平成20年 2008年	N/A	N/A	N/A	64	46	140	N/A	N/A	N/A
平成21年 2009年	N/A	N/A	N/A	70	42	168	N/A	N/A	N/A

(出典) 最高裁調べの司法統計 (2010年3月5日現在)

Source: Judicial Statistics by Supreme Court (last updated Mar. 5, 2010)

The numbers in the table are approximate numbers reported by the Supreme Court which may possibly be amended by additional reports in the future.

No data is available for numbers of newly filed cases and cases ending before 1995.

For 2002, the numbers of High Court cases do not include those cases filed in the month of April.

All of the cases before the High Court are appeals of decisions rendered by the District Court.

The High Court stopped keeping statistics on the number of actions filed in 2002.

From 1950 to 1992, the Supreme Court did not keep statistics on derivative actions.

**APPENDIX B**  
**TABLE 1**  
**Results of Derivative Actions Filed**

**Results of Japanese derivative actions from 1993 to 2009**

	Total number of derivative actions with result information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
<b>Overall</b>	148	27.027%	9.459%	16.216%	39.189%	8.108%

	Total number of derivative actions with both result and exact filing date information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
1993–1997	55	40.000%	5.455%	21.818%	21.818%	10.909%
1998–2001	44	13.636%	9.091%	22.727%	45.455%	9.091%
2002–2009	37	27.027%	5.405%	5.405%	56.757%	5.405%
<b>Total</b>	136	27.941%	6.618%	17.647%	38.971%	8.824%

**KO Cases**

	Total number of derivative actions with result information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
<b>Overall</b>	30	66.667%	10.000%	0.000%	20.000%	3.333%

	Total number of derivative actions with both result and exact filing date information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
1993–1997	15	73.333%	6.667%	0.000%	20.000%	0.000%
1998–2001	4	25.000%	25.000%	0.000%	50.000%	0.000%
2002–2009	9	77.778%	0.000%	0.000%	11.111%	11.111%
<b>Total</b>	28	67.857%	7.143%	0.000%	21.429%	3.571%

**TABLE 1**  
**Results of Derivative Actions Filed (continued)**

<b>Non-KO Cases</b>						
	Total number of derivative actions with result information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
<b>Overall</b>	118	16.949%	9.322%	20.339%	44.068%	9.322%
	Total number of derivative actions with both result and exact filing date information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
1993–1997	40	27.500%	5.000%	30.000%	22.500%	15.000%
1998–2001	40	12.500%	7.500%	25.000%	45.000%	10.000%
2002–2009	28	10.714%	7.143%	7.143%	71.429%	3.571%
<b>Total</b>	108	17.593%	6.481%	22.222%	43.519%	10.185%
<b>Listed Company Cases</b>						
	Total number of derivative actions with result information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
<b>Overall</b>	119	30.252%	5.042%	16.807%	41.176%	6.723%
	Total number of derivative actions with both result and exact filing date information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
1993–1997	44	45.455%	2.273%	22.727%	20.455%	9.091%
1998–2001	34	14.706%	8.824%	26.471%	44.118%	5.882%
2002–2009	34	26.471%	2.941%	2.941%	61.765%	5.882%
<b>Total</b>	112	30.357%	4.464%	17.857%	40.179%	7.143%

**TABLE 1**  
**Results of Derivative Actions Filed (continued)**

<b>Unlisted Company Cases</b>						
	Total number of derivative actions with result information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
<b>Overall</b>	29	13.793%	27.586%	13.793%	31.034%	13.793%

  

	Total number of derivative actions with both result and exact filing date information	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "J for D"	Percentage of derivative actions with result "Withdrawal"
1993–1997	11	18.182%	18.182%	18.182%	27.273%	18.182%
1998–2001	10	10.000%	10.000%	10.000%	50.000%	20.000%
2002–2009	3	33.333%	33.333%	33.333%	0.000%	0.000%
<b>Total</b>	24	16.667%	16.667%	16.667%	33.333%	16.667%

Source: DA Database. See *supra* note 123.

The year stated in the chart refers to the filing year

Twenty-six actions were excluded from the DA Database for this analysis as their success/failure has yet to be determined

Twelve cases did not have an exact filing date and were therefore not included in the "sub-period" calculations

174 observations in the raw data in the DA Database

148 observations with results available

136 observations with results available and with a filing date for the sub-periods

**TABLE 2**  
**Average Per-Share Recovery in Judgment for Plaintiff**  
**(Listed Companies Only)**

The Average Per-Share Recovery in J for P									
Company Name	Filing Date	Result Date	% Recovery of Claimed	Amount Claimed	Amount Recovery in J for P	Shares Outstanding	Per Share Recovery	Stock Price	Per Share Recovery/ Stock Price
HAZAMA (CORPORATION)	10/1/1993	12/22/1994	100.00%	14,000,000	14,000,000	321,076,000	0.044	4150	0.00001
YAKULT HONSHA CO LTD	8/6/1998	12/16/2004	10.39%	65,000,000,000	6,754,000,000	175,910,000	38.395	1742	0.02204
MITSUBISHI OIL	2/24/1999	4/25/2002	2.00%	9,000,000,000	180,000,000	1,514,507,271	0.119	204	0.00058
DUSKIN CO., LTD.	2003-4-4 and 2003-5-2	2/12/2008	50.40%	10,602,000,000	5,343,000,000	67,394,823	79.279	1754	0.04520
APAMANSHOP HOLDINGS CO., LTD.	10/5/2006	10/29/2008	96.92%	130,000,000	126,000,000	1,033,822	121.878	2070	0.05888
Average Per Share Recovery for listed company with 'J for P' result							47.943		
Average Per Share Recovery Divided by Stock Price								0.02534	

Source: DA Database. See *supra* note 123.

There were 12 observations in the DA Database that had an amount stated for recovery in cases where there was a J for P

6 observations were unlisted and 6 observations were listed

We did not have access to the number of outstanding shares for unlisted companies and therefore they were not included

The stock price data was retrieved from the Thomson Reuters Datastream Database



**TABLE 3**  
**Average Per-Share Recovery in Settled Cases**  
**(Listed Companies Only)**

The Average Per Share Recovery in Settled Cases								
Company Name	Settle Date	Amount Recovery/Amount Claimed	Amount Claimed	Amount Recovery if Settled	Shares Outstanding	Per Share Recovery	Stock Price	Per Share Recovery/ Stock Price
OBAYASHI CORP	1/27/1999	8.73%	229,000,000	20,000,000	745,173,000	0.0268	541	0.00005
COSMO SECURITIES	4/7/2000	0.19%	69,869,000,000	130,000,000	423,601,000	0.3069	271	0.00113
KALINA CORP	12/20/2000	8.00%	500,000,000	40,000,000	961,312,000	0.0416	317	0.00013
DAIWA BANK	12/10/2001	0.23%	110,000,000,000	250,000,000	2,743,837,000	0.0911	92	0.00099
TAKASHIMAYA	4/21/1997	106.25%	160,000,000	170,000,000	305,044,000	0.5573	1420	0.00039
SUNTOMO CORP	3/15/2001	0.21%	200,400,000,000	430,000,000	1,064,462,000	0.4040	791	0.00051
NOMURA SECURITIES (three suits)	10/27/1998	43.18%	890,000,000	380,000,000	1,962,977,000	0.1936	890	0.00022
AIKINOMOTO CO. INC	10/30/1998	100.00%	120,000,000	120,000,000	646,445,000	0.1848	1102	0.00017
DAICHI KANGYO BANK	2/25/2000	12.70%	1,000,000,000	127,000,000	3,505,384,000	0.0362	870	0.00004
HTACHI LTD	12/21/1989	43.10%	232,000,000	100,000,000	3,337,894,000	0.0300	1640	0.00002
KOBE STEEL, LTD.	4/5/2002	87.57%	354,000,000	310,000,000	2,867,549,000	0.1081	53	0.00024
MITSUBISHI MOTORS CORP.	12/22/2003	15.29%	1,177,000,000	180,000,000	1,483,438,000	0.1213	219	0.00055
TOKYO STYLE CO., LTD.	10/17/2005	10.00%	1,000,000,000	100,000,000	102,507,000	0.9755	1415	0.00069
Average per share recovery in settled cases						0.2367		
Average stock price							739.31	
Average amount claimed			29,686,230,769.23					
Average amount recovery if settled				181,307,692				
Percentage of amount recovery in amount claimed				33.30%				
Per share recovery divided by stock price								0.00053

Source: DA Database. See supra note 123.

There were 13 observations in the DA Database for which historical stock price information and the amount of the settlement could be obtained.

We did not have access to the number of outstanding shares for unlisted companies and therefore they were not included.

**TABLE 4**  
**Event Study on Stock Price Reaction**  
**to Derivative Actions Filed**

<b>The stock price reaction to a derivative action being filed (from 1993-2006)</b>				
Average Abnormal Returns on Lawsuit Filing (86 lawsuits): Overall				
Day or Event Window	Market-Adjusted Return (%)	t	p-value	% positive
Day before lawsuit filed	-0.048	-0.155074	0.877131	46.51
Day lawsuit filed	0.258	1.137451	0.258546	50.00
Day after lawsuit filed	0.020	0.070510	0.943953	45.35
Day of suit and day after	0.278	0.656764	0.513107	44.19

*Source:* DA Database. See *supra* note 123.

This study follows West, *Why Shareholders Sue*, *supra* note 127, by using window [-300, -61], 240 trading days beginning 300 days before the event date for the estimation period.

This study applied the most commonly used market model.

The historical stock price data was retrieved from the Pacific-Basin Capital Markets (PACAP) Database.

No statistically significant results were found.

**TABLE 5**  
**Event Study on Stock Price Reaction**  
**to Derivative Actions Settled**

**The stock price reaction to a settlement (overall/from 1993 to 1997/from 1998 to 2001/from 2002 to 2009)**

Average Abnormal Returns on Settlement (17 lawsuits): Overall				
Day or Event Window	Market-Adjusted Return (%)	t	p-value	% positive
Day before the settlement result	-0.312	-0.416962	0.682247	35.29
Day of settlement result	1.062	2.942200	0.009564	76.47
Day after the settlement result	1.516	2.313597	0.034315	58.82
Two days after the settlement result	-0.151	-0.218063	0.830137	58.82
CAR [-1,1]	2.266	1.788218	0.092692	58.82
CAR [0,2]	2.427	2.551146	0.021354	64.71

*Source:* DA Database, *see supra* note 123.

This study follows West, *Why Shareholders Sue*, *supra* note 127, by using window [-300, -61], 240 trading days beginning 300 days before the event date for the estimation period.

This study used the most commonly used market model.

The historical stock price data was retrieved from the Pacific-Basin Capital Markets (PACAP) Database.

The statistically significant results are highlighted in gray above.

**TABLE 6**  
**Average Amount of Damages Claimed**  
**(1993–2009)**

	Average Amount of Damage Claimed	In million (Japanese Yen)	Number of Observations
<b>For All Cases</b>			
Overall	24,193,793,976	24193.7940	166
<b>For Successful Cases ("Settlement" or "J for P")</b>			
1993–2009	12,321,352,642	12321.3526	53
<b>For "J for P" Cases</b>			
1993–2009	8,895,053,077	8895.0531	13
<b>For Cases with KO</b>			
1993–2009	3,095,864,865	3095.8649	37
<b>For Cases Without KO</b>			
1993–2009	30,479,631,250	30479.6313	128

*Source:* DA Database. *See supra* note 123.

174 observations in the DA Database.

166 observations specified an exact amount of damages claimed.

**TABLE 7**  
**Average Amount of Settlement**  
**KO vs. Non-KO**

KO vs. Non-KO: Percentage of the Average Amount of Settlement with All Observations				
Company Name	Filing Date	Result Date	Amounts Claimed	Amount Recovery if Settled
HAZAMA (CORPORATION)	10/1/1993	12/6/1996	30,000,000	45,000,000
OBAYASHI CORP	6/28/1994	1/27/1999	229,000,000	20,000,000
KAJIMA CORP	7/20/1994	12/20/2000	500,000,000	40,000,000
TAKASHIMAYA NOMURA SECURITIES (three suits)	8/16/1996 5/2/1997	4/21/1997 10/27/1998	160,000,000 880,000,000	170,000,000 380,000,000
AJINOMOTO CO. INC	7/15/1997	10/30/1998	120,000,000	120,000,000
GREEN CROSS PENTA-OCEAN CONSTRUCTION CO., LTD.	8/9/1996 8/14/2003	3/13/2002 5/30/2010	24,000,000,000 222,000,000	100,000,000 88,000,000
KOBE STEEL, LTD.	6/27/2006	2/10/2010	200,000,000	88,000,000
HITACHI ZOSEN CORP.	3/22/2006	12/21/2009	800,000,000	200,000,000
SUMITOMO METAL INDUSTRIES, LTD.	6/19/2006	3/30/2010	7,670,000,000	230,000,000
OBAYASHI CORP.	6/25/2008	6/1/2009	1,281,000,000	200,000,000
<b>Average Amount Claimed with KO</b>			<b>3,007,666,667</b>	
<b>Average Amount Recovery with KO</b>				<b>140,083,333</b>

**TABLE 7 (continued)**  
**Average Amount of Settlement**  
**KO vs. Non-KO**

**KO vs. Non-KO: Percentage of the Average Amount of Settlement with All Observations**  
**(continued)**

Company Name	Filing Date	Result Date	Amounts Claimed	Amount Recovery if Settled
COSMO SECURITIES	7/15/1994	4/7/2000	69,869,000,000	130,000,000
DAIWA BANK	11/27/1995	12/10/2001	110,000,000,000	250,000,000
SUMITOMO CORP	4/8/1997	3/15/2001	200,400,000,000	430,000,000
DAI-ICHI KANGYO BANK	7/16/1997	2/25/2000	1,000,000,000	127,000,000
HITACHI LTD	3/31/1998	12/21/1999	232,000,000	100,000,000
KOBE STEEL, LTD.	1/21/2000	4/5/2002	354,000,000	310,000,000
MITSUBISHI MOTORS CORP.	3/12/2001	12/2/2003	1,177,000,000	180,000,000
TOKYO STYLE CO., LTD.	8/25/2003	10/17/2005	1,000,000,000	100,000,000
JAPAN AIRLINES	12/17/1999	5/17/2001	110,000,000	0
NIPPON SHARYO		7/16/2009	320,000,000	60,000,000
TOKYO SYOGIN	5/10/1995	1/23/2004	6,990,000,000	6,000,000,000
N/A	5/9/2000	4/19/2004	410,000,000	100,000,000
NIKKEI INC.	6/4/2003	12/20/2004	9,420,000,000	20,000,000
<b>Average Amount Claimed Without KO</b>			<b>30,867,846,154</b>	
<b>Average Amount Recovery Claim Without KO</b>				<b>600,538,462</b>

Source: DA Database. See *supra* note 123.  
174 observations in the DA Database.  
Includes all actions with available settlement information.

**TABLE 8**  
**Statistics in Actions Where the Court Orders**  
**the Plaintiff to Post a Bond**

**The Percentage of Derivative Actions in Which the Court Ordered the Plaintiff to Post a Bond**

	Total number of derivative actions with bond order information	Number of derivative actions in which the court ordered the plaintiff to post a bond	Percentage of derivative actions in which the court ordered the plaintiff to post a bond
Overall	171	24	14.035%

	Total number of derivative actions with bond order and filing date information	Number of derivative actions in which the court ordered the plaintiff to post a bond	Percentage of derivative actions in which the court ordered the plaintiff to post a bond
1993–Nov 1997	56	17	30.357%
Dec 1997–2009	96	7	7.292%
Total	152	24	15.789%

**For those cases with KO**

	Total number of derivative actions with KO and with bond order information	Number of derivative actions with KO in which the court ordered the plaintiff to post a bond	Percentage of derivative actions with KO in which the court ordered the plaintiff to post a bond
Overall	37	2	5.405%

  

	Total number of derivative actions with KO and with bond order and filing date information	Number of derivative actions with KO in which the court ordered the plaintiff to post a bond	Percentage of derivative actions with KO in which the court ordered the plaintiff to post a bond
1993–Nov 1997	16	2	12.500%
Dec 1997–2009	19	0	0.000%
Total	35	2	5.714%

**TABLE 8 (continued)**  
**Statistics in Actions Where the Court Orders**  
**the Plaintiff to Post a Bond**

<b>For those cases without KO</b>			
	Total number of derivative actions without KO and with bond order	Number of derivative actions without KO in which the court ordered the plaintiff to post a bond	Percentage of derivative actions without KO in which the court ordered the plaintiff to post a bond
Overall	133	22	16.541%
	Total number of derivative actions without KO and with bond order and filing date information	Number of derivative actions without KO in which the court ordered the plaintiff to post a bond	Percentage of derivative actions without KO in which the court ordered the plaintiff to post a bond
1993–Nov 1997	39	15	38.462%
Dec 1997–2009	77	7	9.091%
Total	116	22	18.966%



**TABLE 8 (continued)**  
**Statistics in Actions Where the Court Orders**  
**the Plaintiff to Post a Bond**

Results for cases with bond order		Percentage of derivative actions with result "Settlement" or "J for P"	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "D"	Percentage of derivative actions with result "Withdrawal"
Total number of derivative actions with bond order and result information	Percentage of derivative actions with result "Settlement" or "J for P"	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "D"	Percentage of derivative actions with result "Withdrawal"	
Overall	21	16.67%	16.67%	0.00%	66.67%	8.33%	8.33%
Total number of derivative actions with bond order, result information and filing date information							
1993-Nov-1997	17	23.529%	23.529%	0.000%	52.941%	11.765%	11.765%
Dec-1997-2009	7	0.000%	0.000%	0.000%	100.000%	0.000%	0.000%
Total	24	16.667%	16.667%	0.000%	66.667%	8.333%	8.333%
Results for cases without bond order							
Total number of derivative actions with bond order and result information	Percentage of derivative actions with result "Settlement" or "J for P"	Percentage of derivative actions with result "Settlement"	Percentage of derivative actions with result "J for P"	Percentage of derivative actions with result "Dismissed"	Percentage of derivative actions with result "D"	Percentage of derivative actions with result "Withdrawal"	
Overall	122	40.164%	29.508%	10.656%	6.537%	45.902%	7.377%
Total number of derivative actions with bond order, result information and filing date information							
1993-Nov-1997	37	56.575%	46.649%	8.108%	8.108%	27.027%	8.108%
Dec-1997-2009	74	29.720%	21.622%	8.108%	6.757%	55.405%	8.108%
Total	111	38.739%	30.631%	8.108%	7.207%	45.596%	8.108%

Source: JDA Database, see supra note 123.  
 The year stated in the chart refers to the filing year  
 152 of 174 observations in the JDA Database had information regarding whether a bond was ordered.  
 The table includes all listed and unlisted firms with required information available.

TABLE 9

## The Average Length of a Derivative Action

Average length (number of days) from the filing date to the result date (130 observations)	1058.18
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**For cases with bond order**

Average length (number of days) from the filing date to the result date (24 obs)	<b>865.67</b>
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Average length (number of days) from the filing date to the bond order date (24 obs)	339.71
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Average length (number of days) from the bond order date to the result date (24 obs)	525.96
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**For cases without bond order**

Average length (number of days) from the filing date to the result date (104 obs)	<b>1098.63</b>
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**For different results: Settlement, J for P, Dismissed, J for D, and Withdrawal**

Average length (number of days) from the filing date to settlement (36 obs)	1207.33
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Average length (number of days) from the filing date to J for P (9 obs)	1649.78
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Average length (number of days) from the filing date to Dismissed (24 obs)	614.00
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Average length (number of days) from the filing date to J for D (52 obs)	1151.12
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Average length (number of days) from the filing date to Withdrawal (9 obs)	517.56
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*Source:* DA Database, *see supra* note 123.

The table includes all listed and unlisted firms from the DA Database with required information available.

**APPENDIX C**  
**TABLE 1**

**Suggested Attorneys' Fees Pursuant to Post-1994 Fee Rules**

Plaintiff's Damages	Estimated Retainer Fee	Estimated Success Fee
Up to ¥3 million (about \$30,000)	8%	16%
¥3 million (about \$30,000) to ¥30 million (about \$300,000)	5%	10%
¥30 million (about \$300,000) to ¥300 million (about \$3 million)	3%	6%
Over ¥300 million (about \$3 million)	2%	4%

*Source:* Daini Tokyo Bar Association (<http://niben.jp/consul/cost.html>).

On April 1, 2004, the Fee Rules were abolished. However, even after 2004, the former Fee Rules still normally provide the default terms for attorneys' fees in derivative litigation (see table above).