Shareholder Police Power: Shareholders' Ability to Hold Directors Accountable for Intentional Violations of Law

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This article is about the duty of corporate directors to obey the law and how shareholders can hold boards accountable for their illegal acts. It is based on an assumption that there are situations in which it is rational, strictly from a profit-maximizing standpoint, for companies to violate the law. The article surveys numerous internal and external constraints that limit directors' decisionmaking authority and impose on directors a duty to obey the law. The author concludes that knowing violations of law should create a presumption of bad faith under Delaware's fiduciary duty principles, but they should not per se be deemed to breach the directors' duty of care. Thus, shareholder-plaintiffs who can prove that directors acted illegally and caused damages to the corporation that exceed related gains should be entitled to monetary relief on behalf of the corporation from the director-defendants. Shareholders therefore have the opportunity, or perhaps the responsibility, to enforce the social norm of lawful behavior through derivative litigation.

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