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Derivative action in the jurisprudence of the Supreme Court and common courts

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Abstract:

In some jurisdictions, derivative action, i.e. an action of a shareholder on behalf of the company, remains one of the core instruments of corporate governance. Although in Poland - like in many other European jurisdictions - its use is relatively rare, the institution is not extinct. Despite the narrow interpretation of its statutory rules on potential defendants or types of remedies sought on behalf of a company, it typically operates in closely held corporations, in scenarios concerning horizontal conflicts between their shareholders. Depending on the ownership structure, derivative action may go far beyond the conventional protection of minority shareholders. As the jurisprudence shows, in Polish law this corporate governance tool is often utilized to overcome the corporate deadlock between two key shareholders. Moreover, it can also be successfully used by the majority to protect the interest of a company or even as an oppression tool against the minority. Due to, on the one hand, grossly unfavourable asymmetry of litigation risk for plaintiff and, on the other hand, well-developed mechanisms protecting against abuse, in the light of the examined cases there is little justification for the limitations on the scope of potential defendants or remedies sought.