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Delaware Supreme Court Reverses *Ryan v. Lyondell*, Provides Guidance on Application of *Revlon* and Director "Good Faith" Duties

The Delaware Supreme Court, in a unanimous *en banc* opinion, has reversed the Court of Chancery's denial of a motion for summary judgment filed by directors of a target corporation, Lyondell Chemical Co., and remanded the case with directions to enter judgment in the directors' favor. *Lyondell Chemical Co. v. Ryan,* No. 401, 2008 (Del. Mar. 25, 2009). The case has been closely followed since the Court of Chancery issued its opinion, which some practitioners found to be overly expansive in applying *Revlon* principles and in construing recent decisions respectively the directors' duty of good faith.

Claims in the case centered on the Lyondell board's process in considering and approving a merger with Basell AF. Between April, 2006 and May, 2007, Basell approached Lyondell on more than one occasion to express an interest in acquiring Lyondell. In May, 2007, Basell's parent corporation filed a 13D disclosing its right to acquire an 8.3% block of Lyondell from Occidental Petroleum. Lyondell's board quickly convened a special meeting, recognized that the company was "in play", and decided to take a "wait and see" approach. On July 9, 2007, Basell's CEO and Lyondell's CEO met to discuss an all cash deal at $40 per share. Capsulizing further events that day, Basell increased its offer to $44-$45 per share, and then, by evening, to $48 per share. The proposal was not subject to a financing contingency, but Basell insisted upon a $400 million break-up fee and a deadline of July 16, 2007 for a signed merger agreement. Between July 10 and July 16, Lyondell's board convened at least daily to discuss the transaction and to instruct its bankers to seek better terms. Ultimately, Basell agreed to reduce the break-up fee to $385 million, refused to accede to a go-shop provision, and, of course, held resolutely to its insistence on a $48 per share price. Armed in part with the advice of its bankers that the merger price was fair, if not a "home run" as one managing director claimed, Lyondell's board approved the transaction on July 16. On November 20, the stockholders approved the merger.

The Court of Chancery granted summary judgment on plaintiffs' claims that the merger price was grossly unfair, that the directors had a disabling financial interest, and that disclosure in the proxy materials was inadequate. The court declined, however, to enter summary judgment in the directors' favor on claims that they had breached their fiduciary duties *first*, under *Revlon*, by conducting a flawed merger negotiation process, and, *second*, by agreeing to unreasonable deal protection provisions. Because Lyondell's charter contained a Section 102(b)(7) provision, immunizing the directors from personal liability for damages for breach of the duty of care, and

since the Lyondell board was disinterested and independent, the sole issue was whether the directors are entitled to summary judgment on the claim that they breached their duty of loyalty by failing to act in good faith. The court concluded that plaintiffs could possibly establish their claim on a more complete record.

In reversing, the Delaware Supreme Court concluded that the trial court reviewed the record under a mistaken view of the applicable law. According to the Supreme Court, three factors contributed to that mistake. *First,* "the trial court imposed *Revlon* duties on the Lyondell directors before they either had decided to sell, or before the sale had become inevitable." *Second,* the trial court read "*Revlon* and its progeny as creating a set of requirements that must be satisfied during the sale process." *Third*, the trial court equated "an arguably imperfect attempt to carry out *Revlon* duties with a knowing disregard of one's duties that constitutes bad faith."

The Court of Chancery found the Lyondell board's failure to take action in the two months after Basell's parent filed a 13D in May, 2007, critical to its analysis of the board's good faith, concluding that the board's inaction was a "failing", characterized by "two months of slothful indifference." The Supreme Court flatly rejected that reasoning, pointing out that *Revlon* duties do not arise simply because a company is "in play" and that "[t]he time for action under *Revlon* did not begin until July 10, 2007, when the directors began negotiating" the merger.

The Supreme Court rejected the trial court's erroneous conclusion that directors must follow one of several courses of action to satisfy their *Revlon* duties. The Supreme Court held that there is only one duty under *Revlon* -- to obtain "the best price for the stockholders at a sale of the company." And in discharging that duty, there continues to be "no single blueprint" that the directors must follow.

The Supreme Court also faulted the trial court's analysis of whether the directors met their burden under *Revlon*. The appropriate inquiry, according to the Supreme Court, was not whether the directors had exercised due care but whether they had failed to act in good faith, a standard requiring the fiduciary to fail to act in the face of a known duty to act, demonstrating a conscious disregard of duties. Thus, the trial court approached the record from the wrong perspective, concluding that the directors' "unexplained inaction" prevented the court from finding that the directors had acted in good faith. The inquiry should have been whether the directors "utterly failed to attempt to obtain the best sale price." Even if the Lyondell directors did nothing to prepare for Basell's offer and did not even consider conducting a market check, such conduct did not amount to a breach of the duty of loyalty by failing to act in good faith.

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