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Delaware Supreme Court Reverses Chancery Court's *Lyondell* Decision [¶8.1]

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Before the merger at issue in the case, Lyondell Chemical Company was the third-largest independent public chemical company in North America. Dan Smith was Lyondell's Chairman and CEO; Lyondell's other ten directors were independent and sophisticated businesspeople. Basell AF is a privately held Luxembourg chemical company owned by Leonard Blavatnik.

Beginning in April 2006, Basell indicated its interest in acquiring Lyondell multiple times, but Lyondell's board rejected Basell's offers as inadequate. In May 2007, a Basell affiliate filed a Schedule 13D with the Securities and Exchange Commission indicating its interest in possible transactions with Lyondell. The Lyondell board met immediately thereafter to consider the Schedule 13D but resolved to take no immediate action and to take a "wait and see" approach. Although the market was on notice that Lyondell was "in play," Lyondell drew no interest from any bidder.

On July 9, 2007, Blavatnik met with Smith to discuss an all-cash deal at $40 per share. Smith said that the price was too low, and Blavatnik raised his offer to $44-$45 per share. Smith predicted that the Lyondell board would reject the offer and advised Blavatnik to come back with his "best" offer, since Lyondell was not really on the market. Later that day, Blavatnik offered to pay $48 per share, with no financing contingency, but he imposed two conditions on this higher offer: Lyondell would have to sign a merger agreement by July 16 and agree to a $400 million break-up fee.

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Smith called a special meeting of the Lyondell board on July 10 to consider the Basell proposal. The board reviewed valuation material and directed Smith to seek a written offer from Basell. The board met again on July 11 and 12 to consider the proposal. Deutsche Bank Securities, Inc. was retained to serve as financial advisor for the transaction. The parties negotiated the terms of a merger agreement. At the board's request, Smith tried to negotiate better terms with Blavatnik, requesting a higher price, a go-shop provision, and a reduced break-up fee. Blavatnik was "incredulous" and—reiterating that he had offered his best price—reduced the break-up fee and refused Smith's other requests.

On July 16, recognizing the "blowout" price and substantial premium represented by Blavatnik's offer, the board considered Deutsche Bank's advice that no other entity was likely to top Basell's offer and unanimously approved the Basell proposal. The merger was approved by more than 99% of the voted shares four months later, during which period no other interested party came forward.

Plaintiff Walter E. Ryan, Jr. filed suit in Delaware in August 2007. Defendants moved for summary judgment. On July 29, 2008, the Court of Chancery granted summary judgment on all claims except two: whether Defendants had acted in good faith in fulfilling their *Revlon* duties and whether certain deal-protection measures were preclusive. The Supreme Court accepted the directors' application for certification of an interlocutory appeal in September 2008.

Although the Court of Chancery found that Ryan might have been able to prevail on a claim that the directors had breached their duty of care, Lyondell's charter contains an exculpatory provision under 8 *Del. C.* § 102(b)(7). The two issues remaining in the case thus turned on whether the directors breached their duty of loyalty, but—because the Court of Chancery determined that the board was independent and disinterested—the sole issue for the Supreme Court was whether the Lyondell directors were entitled to summary judgment on the claim that they had breached their duty of loyalty by failing to act in good faith.

The Supreme Court, per Justice Berger, held that the Court of Chancery had reviewed the existing record under a mistaken view of the applicable law in three ways.

First, by focusing on the two-month period following the filing of the Schedule 13D, the Court of Chancery imposed *Revlon* duties on the Lyondell directors before they had either decided to sell, or before the sale became inevitable. Although the directors had taken no actions under *Revlon* during the two months after the Schedule 13D was filed, their "wait and see" approach was an "entirely appropriate exercise of the directors' business judgment." The directors were not required to act under *Revlon* until July 10, 2007, when they began negotiating the sale of Lyondell.

Second, the Court of Chancery incorrectly read *Revlon* and its progeny as creating a set of requirements that must be satisfied during the sale process. The relevant timeframe for analysis of *Revlon* duties was the one week in which the Lyondell directors considered Basell's offer. During that week, the directors took many actions. Pointing to the single *Revlon* duty—to get the best price for the stockholders at a sale of the company—the Supreme Court noted that it would have been inclined to hold that the Lyondell directors had met their burden under *Revlon* during that single week. The Supreme Court held that no "court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control.'' Because the issue before the Court was not due care, and was only whether the directors had failed to act in good faith, the Supreme Court held that judgment was mandated in the directors' favor.

Third, the Court of Chancery improperly equated an arguably imperfect attempt to carry out *Revlon* duties with a knowing disregard of duties that constituted bad faith. Because *Revlon* imposes no legally prescribed steps for directors to follow, the Lyondell directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties. Only if the directors had knowingly and completely failed to undertake their duties would they have breached their duty of loyalty. Since the Lyondell directors were disinterested and independent, the Supreme Court held that ''the inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price.'' Because the Lyondell directors met several times to consider Basell's offer, were generally aware of Lyondell's value, solicited and followed the advice of their financial and legal advisors, attempted to negotiate a higher offer, and approved the merger agreement because it was simply too good not to pass along to the stockholders, the Supreme Court held that the Lyondell directors did not breach their duty of loyalty by failing to act in good faith.

The Supreme Court therefore reversed the Court of Chancery's decision and remanded the matter for entry of judgment in favor of the Lyondell directors.

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