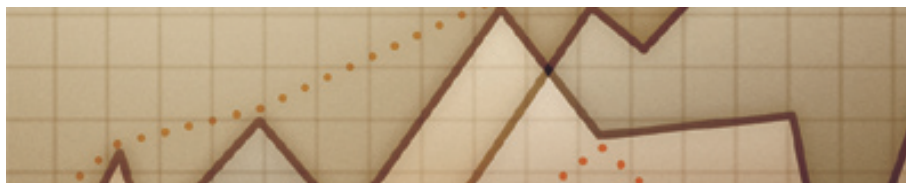


## CORPORATE LAW ALERT



Attorneys in SHB's Corporate Law Practice concentrate their practices in mergers and acquisitions, joint ventures, strategic alliances, securities matters, private equity and financing transactions, commercial finance and banking and the general representation of publicly held and private entities.

Our corporate finance attorneys are experienced in all aspects of corporate transactions, including private placements, mergers, acquisitions and divestitures, joint ventures, distributorships, public offerings, tender offers, venture capital financing, equity and debt restructuring, project finance, workouts, corporate governance and general corporate law.

Our banking and commercial law attorneys counsel local, national and international financial institutions and corporate borrowers on loan transactions and regulatory issues and are nationally recognized experts in various areas of commercial law.

If you have questions about the *Lyondell* decision, please contact

Timothy J. Kuester  
816-559-2184  
tkuester@shb.com



### **LYONDELL CHEMICAL CO. V. RYAN: DELAWARE SUPREME COURT LIMITS DIRECTORS' PERSONAL LIABILITY FOR CLAIMS OF BAD FAITH FAILURE TO COMPLY WITH *REVLON* DUTIES**

Taking into account the realities of today's M&A transactions, the Delaware Supreme Court has dismissed claims that a chemical company's directors failed to act in good faith in connection with events that ultimately led to the company's sale. *Ryan v. Lyondell Chem. Co.*

In a ruling issued March 25, 2009, Delaware's high court reversed the Court of Chancery's denial of a summary judgment motion filed by Lyondell's directors. Considering plaintiff's claim that the Lyondell directors failed to act in good faith, the chancery court found that the "unexplained inaction" on the directors' part could give rise to a reasonable inference that they consciously ignored their fiduciary duties. The Delaware Supreme Court disagreed.

#### **What the Board Did When It Sold the Company to Basell AF**

In April 2006, Basell AF approached Lyondell and expressed an interest in buying it. Lyondell's board determined that Basell's offer was inadequate and that the company was not for sale. A year later, a Basell affiliate filed a Schedule 13D with the SEC, disclosing that it had acquired the right to purchase an 8.3 percent block of Lyondell stock and further disclosing its intention to approach Lyondell about a possible change-of-control transaction. At that time, Lyondell was a strong and viable company and not otherwise up for sale. The Lyondell board discussed the Schedule 13D filing and decided to take a "wait and see" approach.

On July 9, 2007, the two companies' CEOs met to discuss Basell's offer to acquire Lyondell in an all-cash transaction valued at \$40 per share. After explaining that the \$40 price was too low, Lyondell's CEO suggested that Basell come back with its best and final offer, since Lyondell was not otherwise on the market. Later that day, Basell offered \$48 per share, with no financing contingency, but contingent on Lyondell's agreement to a \$400-million breakup fee.

## CORPORATE LAW ALERT

APRIL 2009

The Lyondell board met to discuss the offer. After determining that it was interested in pursuing the offer, the board retained a financial adviser and instructed the CEO to negotiate a higher price if possible, as well as a “go-shop” provision and a reduced breakup fee. Although Lyondell’s CEO was able to obtain a slight reduction of the breakup fee (\$385 million), he was unsuccessful in obtaining a go-shop provision or an increase in the purchase price. Basell also insisted that the deal be concluded by July 16, 2007 (less than one week later), or not at all.

On July 16, Lyondell’s board met and heard presentations from its financial and legal advisors.

According to the financial advisors, the \$48 per share consideration was fair to Lyondell shareholders. One advisor went so far as to say the \$48 per share purchase price was “an absolute home run.” The financial advisors also identified other potential acquirers and explained why they believed none would top Basell’s offer. The board unanimously approved the merger, and shareholder approval followed four months later, with 99 percent of shares voted.

After unsuccessfully attempting to enjoin the merger, plaintiff Walter Ryan filed the Delaware action in August 2007. Defendants filed a summary judgment motion which was granted on all claims except two, one of which was whether the defendant directors acted in good faith in fulfilling their *Revlon* duties. Lyondell and its board appealed.

### **When Are a Board’s *Revlon* Duties Triggered?**

Contrary to the chancery court, the supreme court found that Basell’s Schedule 13D filing in April of 2006 did not trigger the Lyondell board’s *Revlon* duties. According to the court, *Revlon* duties do not arise simply because a company is put “in play.” Instead, the company must “embark on a transaction – on its own initiative or in response to an unsolicited offer – that will result in a change of control.”

The court found that the wait-and-see approach the Lyondell board adopted in response to Basell’s Schedule 13D filing was an “entirely appropriate exercise of the directors’ business judgment.” Not until the board determined to pursue Basell’s offer did its *Revlon* duties kick in. At that point, the board was required to conduct negotiations in a good faith effort to obtain the best price for Lyondell shareholders.

### **What a Board Must Do to Fulfill Its *Revlon* Duties**

In its ruling, the chancery court indicated that a board must follow one of several courses of action to fulfill its *Revlon* duties, that is, the directors “must confirm that they have obtained the best available price either by conducting an auction, by conducting a market check, or by demonstrating ‘an impeccable knowledge of the market.’”

The supreme court flatly rejected this view, stating, “[t]here is only one *Revlon* duty – ‘to [get] the best price for stockholders at a sale of the company.’” The supreme court also stated that “[n]o court can tell directors exactly how to accomplish that goal ... there is no single blueprint that a board must follow to fulfill its duties.”

**CORPORATE LAW  
ALERT**

APRIL 2009

The supreme court stated that it would be inclined to hold that the Lyondell directors did fulfill their *Revlon* duties, based on the record facts, including the numerous board meetings held after *Revlon* was triggered, the board's reliance on financial and legal advisors, the quality of the price obtained ("an absolute home" run), the active price negotiations the CEO conducted after receiving Basell's first offer of \$40 per share, and the later unsuccessful attempts to negotiate a higher price and less onerous deal-protection provisions.

**The Interplay of Good Faith and Revlon**

Like most companies, Lyondell's charter contained an exculpatory provision under section 102(b)(7) of the Delaware General Corporations Law. As a result, Ryan's personal liability claims against the individual Lyondell directors could succeed only if the directors acted in bad faith.

According to the supreme court, the correct inquiry was whether the undisputed facts would support an inference that the board had "intentionally fail[ed] to act in the face of a known duty to act." The court noted that, although the directors elected to "do nothing" upon Basell's Schedule 13D filing, the board had no duty at that time to do anything. And once the Board decided to pursue Basell's offer, it did not "do nothing" in the face of its *Revlon* duties. According to the court, to the extent the board's actions in maximizing the price to shareholders were inadequate, such inadequacies would at most constitute a breach of the duty of care, which would be subject to the section 102(b)(7) exculpatory provision in Lyondell's charter.

The plaintiff cited the board's acquiescence to Basell's demand for a "fast track" negotiation schedule as evidence of bad faith. The supreme court disagreed, pointing out that (i) the Lyondell board was active, sophisticated and generally aware of the company's value in light of market conditions; (ii) they had no reason to believe that other bidders would top Basell's offer; (iii) Lyondell's CEO successfully negotiated the price from \$40 to \$48 per share; and (iv) the board reasonably relied on the opinions of its financial advisors who called the price a "blowout" or "home run" price.

Accordingly, the board's decision to comply with the one-week negotiation schedule did not rise to the level of bad faith.

*Lyondell* is important for two reasons. First, the decision recognizes that every transaction is different, and it establishes a fiduciary duty standard that is realistic and consistent with market realities. Due to a variety of factors, many deals must be negotiated and consummated within a matter of days or weeks. Requiring boards to explore auction possibilities or conduct pre-signing market analyses may be good practice in some cases, but in many transactions, such measures are not feasible and could be counterproductive.

Secondly, the court's decision should discourage plaintiffs' attorneys from using bad faith claims as a way around charter provisions that expressly exculpate directors from individual liability for breaches of the duty of care. Now, directors need only fear personal liability in those egregious cases where a director intentionally disregards a known duty to act. ■