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Lyondell: A Victory for Corporate Directors in the Delaware Supreme Court

A recent decision by the Delaware Supreme Court in *Lyondell Chemical Co. v. Ryan* made several important clarifications about the nature of the fiduciary duties that corporate directors owe in connection with the sale of Delaware corporations. These duties – commonly known as "*Revlon* duties" – require that corporate directors attempt to obtain the best price available when selling the company.

The Delaware Supreme Court's decision in *Lyondell* is important because it confirms that (1) a board of directors' duties under *Revlon* do not arise simply because a corporation is "in play"; rather, *Revlon* duties apply only when a company embarks on a transaction that will result in a change of control; (2) there is no set blueprint a board of directors must follow to fulfill its *Revlon* duties; and (3) an imperfect attempt by a corporate board to carry out its *Revlon* duties does not necessarily constitute "bad faith" by the directors.

Background

In May 2007, SEC filings indicated that affiliates of Basell AF S.C.A., a privately held company, had acquired the right to purchase a significant stake in Lyondell Chemical Company, a publicly traded Delaware corporation. As a result, and given a past history of interest in Lyondell by Basell, Lyondell's board of directors determined that the company was "in play."

From May until July 2007, the Lyondell board adopted a "wait and see" approach and, according to the trial court in the case, did not conduct a market check to "arm themselves with specific knowledge about the

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present value of the company." In July, Basell made an offer to buy Lyondell for US$40 per share, which was subsequently increased to US$48 per share after discussions with Lyondell's CEO. The offer was presented to Lyondell's board of directors, who considered the offer together with valuation material prepared by Lyondell management. The board decided that it was interested in pursuing the transaction and instructed Lyondell's CEO to negotiate a merger agreement with Basell. Lyondell retained an investment bank to act as its financial adviser, which determined that the proposed merger price was fair. The bank's managing director characterized the offer as "an absolute home run," and the Lyondell board voted to approve the transaction and recommended it to its stockholders. In November 2007, the transaction was approved by more than 99 percent of the voted shares.

Notwithstanding the apparent "home run" result for Lyondell stockholders, some stockholders filed a class action lawsuit alleging, among other things, that the Lyondell directors had not fulfilled their *Revlon* duties. The trial court declined to dismiss the case on summary judgment, concluding that the Lyondell directors may not have met their fiduciary duties under *Revlon.* (Please see our Corporate Alert from August 2008 for more information on the trial court's decision.) The Lyondell directors subsequently appealed the trial court's decision to the Delaware Supreme Court.

The Delaware Supreme Court's Findings

The Delaware Supreme Court reversed the trial court's decision, granting a victory to Lyondell's directors and in doing so confirming several key points of Delaware law as it relates to duties under *Revlon*.

First, the court stated that *Revlon* duties do not arise simply because the company is "in play." Rather, the duties arise only "when a company embarks on a transaction – on its own initiative or in response to an unsolicited offer – that will result in a change of control." The court concluded that the "wait and see" approach adopted by Lyondell's board in response to the SEC filings was an "entirely appropriate exercise of the directors' business judgment" and that the time for action under *Revlon* did not begin until the directors began negotiating the sale of Lyondell in July.

Second, the court reiterated its prior holding that there is only one *Revlon* duty – "to [get] the best price for its stockholders at a sale of the company." The court said that no court could tell directors how to accomplish that goal, because in each case the corporation will be facing a unique combination of circumstances, many of which will be outside of the directors' control. Accordingly, the court affirmed that there is no "single

blueprint" that a board must follow to fulfill its *Revlon* duties.

Third, the court concluded that an imperfect attempt by a corporate board to carry out its *Revlon* duties does not necessarily constitute "bad faith" by the directors. Rather, bad faith will be found "where a fiduciary fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." The court determined that the factual record in *Lyondell* clearly establishes that the directors did not act in bad faith. In reaching that determination, the court cited the fact that the board met several times to consider Basell's premium offer, that they were generally aware of the value of their company and knew the chemical company market, that they solicited and followed the advice of legal and financial advisers, that they attempted to negotiate with Basell and that they approved the merger agreement believing it was too good a deal not to pass along to the stockholders for consideration.

Lessons From the Delaware Supreme Court's Decision in *Lyondell*

- ***Revlon* still applies.** Corporate directors continue to have a fiduciary duty to maximize the value of the company for stockholders when negotiations for a sale of the corporation have begun.

- ***Revlon* duties do not apply as immediately as many may have previously thought.** *Revlon* duties do not apply simply because a company is "in play." They apply only when a company "embarks on a transaction" that will result in a change of control.

- **There is no set *Revlon* blueprint.** After *Lyondell,* corporate boards may discharge their *Revlon* duties without being constrained by a perceived need to follow a set *Revlon* blueprint. Rather, they have some latitude to exercise business judgment in discharging their *Revlon* duties in light of the facts and circumstances of their company's situation.

- **Plaintiffs will have a harder time winning "bad faith" claims against corporate directors.** *Lyondell* makes it clear that an imperfect attempt by a corporate board to discharge its *Revlon* duties does not automatically lead to a claim for "bad faith" against the directors.

For more information about this case and its

implications for your company, please contact your principal Squire Sanders lawyer or any of the lawyers listed in this Alert.