

The Sky is Not Falling: *Ryan v. Lyondell* and Lessons from Decisions Denying Pretrial Dispositive Motions in the Delaware Court of Chancery

In late July 2008, the Delaware Court of Chancery issued an opinion in *Ryan v. Lyondell Chemical Company*,¹ denying the director defendants' motion for summary judgment in a stockholder suit alleging that the directors breached their *Revlon* duties in approving a \$13 billion cash acquisition of Lyondell by Basell AF. The Court acknowledged that the director defendants were independent and not motivated by financial self-interest to approve the merger and also that the \$48 per share price "was undeniably a fair one and may well have been the best that could reasonably have been obtained in that market or any market since then."²

Fall 2008

Michael A. Pittenger is a partner and **Eve H. Ormerod** is an associate in the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. Portions of this article are drawn from materials previously prepared by other attorneys of Potter Anderson & Corroon with the permission of those attorneys. The views expressed are solely those of the authors and do not necessarily represent the views of the firm or its clients. This article was originally published in the Fall 2008 issue of *Deal Points*: The Newsletter of the Committee on Mergers and Acquisitions of the Business Law Section of the American Bar Association.

Nonetheless, the Court held that the director defendants had not carried their burden of proving entitlement to summary judgment on two of plaintiff's claims: (i) that the directors had breached their fiduciary duties under *Revlon* by not engaging in a reasonable sales process; and (ii) that the merger agreement's deal protection provisions were unreasonable under *Unocal*. The Court also explained that it could not rule out the possibility, in the context of a motion for summary judgment, that any such breaches could have constituted "a breach of the good faith component of the duty of loyalty."³ As a result, the Court declined to grant summary judgment in favor of the director defendants on the basis of a Section 102(b)(7) exculpatory provision in Lyondell's certificate of incorporation, which exculpated the directors from personal liability for breaches of fiduciary duty amounting solely to violations of the duty of care.

The outcry from the corporate bar was immediate and intense, and *Lyondell* has become one of the more controversial decisions of the Delaware Court of Chancery in recent memory. This article advances the admittedly minority view that the negative reaction is largely overblown. While the decision offers some helpful lessons for corporate practitioners, we posit that an opinion denying a motion for summary judgment (like an opinion denying a motion to dismiss at the pleading stage) is seldom the harbinger of a monumental shift in Delaware corporate law, particularly when premised on a finding that there are genuine disputes of material fact that need to be sorted out at trial or on a more developed record. *Lyondell* does not appear to be an exception to that general rule.

1313 North Market Street

P.O. Box 951

Wilmington, DE 19899-0951

(302) 984-6000

www.potteranderson.com

1 2008 Del. Ch. LEXIS 105 (July 29, 2008), *application to certify interlocutory appeal denied*, 2008 Del. Ch. LEXIS 125 (Aug. 29, 2008), *interlocutory appeal accepted*, No. 3175 (Del. Sept. 15, 2008).

2 *Ryan v. Lyondell Chem. Co.*, 2008 Del. Ch. LEXIS 105, at *118.

3 *Id.* at *48.

The Court of Chancery's Decision in *Ryan v. Lyondell*

When the potential transaction with Basell first materialized, Lyondell was a financially strong company that had not been actively evaluating strategic transactions. In the Spring of 2007, a Basell affiliate filed a Schedule 13D with the Securities and Exchange Commission, announcing that it had acquired the right to purchase an approximately 8% equity stake in Lyondell from Lyondell's largest stockholder and that Basell was interested in discussing potential transactions with Lyondell. The Lyondell board did not take any responsive action.

Lyondell's CEO, Dan Smith, thereafter conducted some preliminary negotiations with Basell's CEO, but the Lyondell board was largely unaware of those discussions. In the course of subsequent meetings between Smith and the President of Basell's parent company, Leonard Blavatnik, Mr. Blavatnik made an offer for Basell to acquire Lyondell in an all-cash transaction for \$48 per share (a price previously suggested by Smith in the preliminary negotiations). The offer was subject to Lyondell's signing a merger agreement within one week and agreeing to a \$400 million termination fee. Basell's offer represented a substantial premium – 45% over the closing price for Lyondell shares the last trading day before the Schedule 13D filing.

During a 50-minute meeting on July 10, 2007, Smith presented the Basell offer to the Lyondell board and the board engaged in preliminary discussions. The board met again on July 11 after Blavatnik indicated that Basell would need a firm indication of interest by that date. According to the minutes of that 45-minute meeting, “the [b]oard claims to have thoroughly considered the several aspects of the Basell Proposal, including: comparing the benefits to the Lyondell stockholders of the Basell transaction with those of remaining independent, the valuation of certain Lyondell assets, the process likely to be involved in a transaction with Basell, engaging the services of an investment bank to serve as a financial advisor for the Basell Proposal, and the impact of Basell's possible acquisition of Huntsman [another specialty chemical company] on its ability also to acquire Lyondell at some later date.”⁴

After the July 11 board meeting, Smith advised Basell that Lyondell was favorably inclined to pursue the transaction. Lyondell hired Deutsche Bank Securities, Inc. to serve as its financial advisor, and Deutsche Bank “work[ed] feverishly”⁵ over the course of several days to prepare its fairness opinion, while representatives of Lyondell and Basell negotiated a merger agreement and facilitated Basell's due diligence process. The Lyondell board did not seek to play an active role in the negotiations. The Lyondell board met again on July 12 for its previously scheduled regular meeting to discuss the routine business of Lyondell. That meeting included an executive session during which the board discussed the merits of Basell's proposal without members of Lyondell management, other than Smith, present.

At one point during the negotiations, Smith requested (i) an increase in Basell's offer price; (ii) a “go-shop” provision in the merger agreement to allow the board to seek other potential buyers for a period of forty-five days; (iii) a break-up fee of 1% during the go-shop period; and (iv) a reduction in the \$400 million break-up fee after the go-shop period ended. Those requests were rejected by Basell, other than an agreement to reduce the termination fee to \$385 million.

According to the Court, at a Lyondell board meeting on July 16:

⁴ *Id.* at *26.

⁵ *Id.* at *29.

After listening to the presentations of management and its legal and financial advisors and fully appreciating that Blavatnik was driving a very hard bargain vis-a-vis their fiduciary obligations in a sale scenario, the Board deliberated on the Merger. Thereafter, the Board voted unanimously to approve and recommend the Merger to the Lyondell stockholders. Basell's offer presented an opportunity for the stockholders to earn a substantial premium over the market price of Lyondell shares and, in the view of the Board, was simply too good not to pass along for their consideration.⁶

At a subsequent special meeting of stockholders held to vote on the merger agreement, the merger received near-unanimous stockholder approval.

Relatively soon after plaintiff filed suit in Delaware challenging the transaction, the defendants moved for summary judgment, relying primarily upon an evidentiary record that had been developed in connection with related preliminary injunction proceedings in Texas. The merger closed on December 20, 2007 prior to issuance of the Court of Chancery's opinion.

For purposes of the summary judgment motion, the Court emphasized that it was not permitted to weigh the evidence and was required to draw all reasonable inferences in favor of plaintiff. With regard to the plaintiff's *Revlon* claim, the Court held that the defendants could not satisfy their summary judgment burden in view of numerous factors from which the Court could draw a reasonable inference that the directors had violated their *Revlon* duties. Those factors included: (i) the entire deal was negotiated, considered, and agreed to in less than seven days, raising concerns about how hard the board really thought about the transaction and how carefully it sifted through the available market evidence; (ii) the board met to discuss the buyer's proposal for a total of no more than six or seven hours, suggesting the board did not carefully consider all of the alternatives available; (iii) after being put on notice by Basell's 13D filing, the board did not take any action (e.g., retaining an investment banker; asking management to prepare projections and valuations; conducting a formal market check) in anticipation of a possible proposal from Basell or another suitor; (iv) the board did not actually negotiate with Basell or actively participate in the sale process but accepted a deal already fully-negotiated by its CEO without its knowledge; and (v) the board did not conduct even a discrete and targeted market check to pitch a sale of the entire Company or the possibility of breaking it up into more valuable parts.

The Court acknowledged that "*Revlon* does not demand a perfect process" and that a board "has considerable latitude in structuring the sale process, provided that it acts with demonstrable diligence in the pursuit of the best transaction reasonably available."⁷ The Court also acknowledged that there was some evidence in the record to suggest that the board had a sufficient body of reliable evidence from which to judge the adequacy of the Basell proposal, including detailed financial analyses of Lyondell and the Basell proposal from both management and Deutsche Bank.⁸ Nonetheless, the Court explained that "it is difficult for the Court to conclude on this record, after giving Ryan the benefit of all reasonable inferences, that the process employed by the Board was a 'reasonable' effort to create value for the Lyondell

⁶ *Id.* at *34.

⁷ *Id.* at *58.

⁸ *Id.* at *59-62.

shareholders under these circumstances.”⁹

With respect to plaintiff’s challenges to the deal protection measures in the merger agreement, the Court held that the summary judgment record before it did not allow it to rule that the board’s full complement of deal protections were reasonable and proportionate under the circumstances. The Court explained that “[o]n summary judgment, without undisputed and sufficient evidence of either a proactive market check or that the Board, in fact, ‘knew’ that it had secured the best deal reasonably available to the stockholders, one cannot exclude the inference that the deal protections agreed to by the Board served no purpose other than to squelch even the remotest possibility of a competing bid that might have increased the price for the stockholders.”¹⁰ The Court further explained that:

[T]he Board did nothing (or virtually nothing) to confirm the superiority of the price but, nonetheless, it provided Basell a full complement of deal protections. Maybe the price was the “blowout” the Defendants proclaim it to have been – it certainly was a “fair” price – and maybe the deal protection measures were reasonable and proportionate to the risks that the deal would not materialize otherwise, but those conclusions cannot be reached on the current record on summary judgment where the Court is precluded from choosing between plausible inferences.

Although the Court found that defendants were not entitled to summary judgment on the *Revlon* and *Unocal* claims, the Court did grant the motion for summary judgment in defendants’ favor on plaintiff’s “structural loyalty” claims because the undisputed evidence showed that the members of the board were not motivated by self-interest to approve the merger and that the ten non-management directors were independent.¹¹

Notwithstanding the holding that a majority of the board was disinterested and independent, the Court declined on the basis of the limited summary judgment record to view the *Revlon* and deal protection claims solely as violations of the duty of care, thereby denying a defense under *Lyondell*’s Section 102(b)(7) exculpatory charter provision, which eliminated the directors’ liability for damages for breaches of the duty of care. For purposes of summary judgment, the Court could not rule out the possibility that the board’s failure to engage in a more proactive sale process may have constituted “a breach of the good faith component of the duty of loyalty” because the directors might have failed to act in the face of a known duty to act. The Court explained that the board “appears never to have engaged fully in the process to begin with, despite *Revlon*’s mandate.” The Court further explained:

The record, as it presently stands, does not, as a matter of undisputed material fact, demonstrate the *Lyondell* directors’ good faith discharge of their *Revlon* duties – a known set of “duties” requiring certain conduct or impeccable knowledge of the market in the face of Basell’s offer to acquire

⁹ *Id.* at *71.

¹⁰ The Court did offer, however, that “[r]easonable deal protections can serve numerous important purposes, including the fostering of deal certainty for both the target and the acquirer. Furthermore, deal protections can provide a rational economic incentive for a bidder to offer ‘top dollar’ for a target company—a benefit that is consistent with the target board’s *Revlon* objective—because it can be reasonably confident that its efforts will not be thwarted by a marginally more attractive jumping bid.” *Id.* at *73.

¹¹ *Id.* at *39-45.

the Company. Perhaps with a more fully developed record or after trial, the Court will be satisfied that the Board's efforts were done with sufficient good faith to absolve the directors of liability for money damages for any potential procedural shortcomings. With a record that does not clearly show the Board's good faith discharge of its *Revlon* duties, however, whether the members of the Board are entitled to seek shelter under the Company's exculpatory charter provision for procedural shortcomings amounting to a violation of their known fiduciary obligations in a sale scenario *presents a question of fact that cannot now be resolved on summary judgment*.¹²

In its conclusion, the Court of Chancery emphasized the limited and preliminary nature of its ruling:

The denial in part of the Lyondell Defendants' motion is driven more by the constraints of a summary judgment process than it is by our corporate law. The price – \$48 per share – was undeniably a fair one and may well have been the best that could reasonably have been obtained in that market or any market since then. When control of the corporation is at stake, however, directors of a Delaware corporation are expected to take context-appropriate steps to assure themselves and, thus, their shareholders that the price to be paid is the “best price reasonably available.” The Court cannot conclude on the limited record before it that, as a matter of undisputed material fact, the directors acted appropriately under the circumstances of this case. Whether that can be demonstrated for summary judgment purposes on a more complete record or at trial, of course, remains to be seen.¹³

In a subsequent decision denying defendants' application to certify an interlocutory appeal to the Delaware Supreme Court, the Court of Chancery offered some helpful clarification regarding the nature and scope of its ruling. For example, the Court explained that:

A fair reading of the [initial] Opinion, ... plainly reveals that the Court's concern about the application of a *Section 102(b)(7)* defense on this rudimentary summary judgment record is whether by taking no discernible action to prepare for a possible sale of the Company in light of the 13D filing, and then, later, by doing nothing (or virtually nothing) actively to confirm that Basell's offer really was the “best” deal reasonably available, the Defendants may have exhibited a “conscious disregard” for their known fiduciary obligations in a sale scenario. Thus, the Court did not apply an inappropriate concept or definition of “bad faith” in this context under the controlling Delaware Supreme Court precedents.... It simply denied a motion for summary judgment on a sparse preliminary injunction record where the facts, unfortunately, suggest an inference of conscious board

¹² *Id.* at *87-88 (emphasis added). In addition, the Court granted summary judgment in favor of defendants on plaintiff's disclosure claims, finding that the proxy materials disclosed, in a full and accurate manner, most of the material information to which the stockholders were entitled. While there existed one potentially material defect in the disclosure, it amounted, at worst, to a violation of the duty of care, for which the defendant directors could not be held liable for damages by reason of the *Section 102(b)(7)* exculpatory provision in Lyondell's certificate of incorporation.

¹³ *Id.* at *110.

inaction in the face of a known duty to act.¹⁴

Notwithstanding the Court of Chancery's declining to certify its decision for interlocutory appeal, the Delaware Supreme Court has accepted the appeal, and a decision on appeal is expected in the near future.

The Reaction to *Lyondell*

Almost immediately after the Court of Chancery's decision denying summary judgment in *Lyondell*, the decision became the subject of strong negative reactions by corporate practitioners and commentators – in articles, law firm client memos, and particularly in the “blogosphere.” The primary criticism has involved the view that the decision improperly conflates lack of due care and bad faith and either misconstrues Delaware Supreme Court precedent¹⁵ or foretells a drastic shift in Delaware fiduciary duty law pursuant to which conduct previously viewed as involving only a lack of due care is characterized as “so extreme” that it rises to the level of (a now significantly lower standard of) bad faith. It has been observed that “[t]he opinion upsets what most would say was settled Delaware law and, to the extent it is upheld, is likely to change the M&A deal process.”¹⁶ One commentator has even suggested that the decision shows that the only sure way for directors to avoid substantial risk of liability is to move away from using the corporate form for public companies, instead utilizing limited liability companies or other entity forms that allow managers to take greater advantage of contractual flexibility to limit or eliminate fiduciary duties.¹⁷

It is not the purpose of this article to provide a detailed substantive analysis of the *Revlon*, *Unocal*, and good faith aspects of the *Lyondell* decision, and there is certainly merit to some of the concerns that have been expressed about *Lyondell*. We posit, however, that the reaction to *Lyondell* has been greatly exaggerated. The decision was not a merits decision but rather one denying a motion for summary judgment. It should not be viewed as more than that.

The *Disney* Litigation

The intense negative reaction to *Lyondell* is reminiscent of the criticism and ominous predictions about the direction of Delaware corporate law that followed the Court of Chancery's 2003 opinion denying defendant's motion to dismiss in the well-known *Disney* litigation, which also dealt with the obligation of fiduciaries to act in good faith.

14 *Ryan v. Lyondell Chem. Co.*, 2008 Del. Ch. LEXIS 125, at *9-10.

15 *E.g.*, *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

16 Steven M. Davidoff, Catching up on M&A (Aug. 4, 2008), <http://dealbook.blogs.nytimes.com/2008/08/04/catching-up-on-ma/>.

17 Larry Ribstein, The diminishing role of due care waivers in Delaware (July 31, 2008), <http://busmovie.typepad.com/ideoblog/2008/07/the-diminishing.html>; Larry Ribstein, *Wood v. Baum* discussed on the Harvard Corporate Governance Blog (Aug. 5, 2008), <http://busmovie.typepad.com/ideoblog/2008/08/wood-v-baum-dis.html>; See also Larry Ribstein, *Ryan* and the irreducible indeterminacy of corporate law (Aug. 18, 2008), <http://busmovie.typepad.com/ideoblog/2008/07/the-diminishing.html>.

The facts surrounding the *Disney* saga are by now fairly well-known. Briefly stated, the litigation involved a derivative suit against Disney's directors and officers for damages allegedly arising out of the 1995 hiring and the 1996 termination of Michael Ovitz as Disney's President. Ovitz was employed by Disney for little more than a year before he was terminated. The termination resulted in a non-fault termination payment to Ovitz of roughly \$38 million in cash under the terms of his employment contract, as well as the immediate vesting of options to buy 3 million shares of Disney stock – termination benefits collectively valued at approximately \$140 million. The shareholder plaintiffs alleged that Disney's directors had breached their fiduciary duties both in approving Ovitz's employment agreement and in later allowing the payment of the non-fault termination benefits.

In 2003, the Court of Chancery declined to dismiss an amended complaint filed by plaintiffs, finding that it adequately alleged facts sufficient to overcome the presumptions of the business judgment rule at the pleading stage by calling into question the good faith of Disney's directors in making the challenged decisions.¹⁸ In that decision, Chancellor Chandler had held that, if true, the allegations of the complaint “imply that the defendant directors knew that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss.”¹⁹ If plaintiffs could make such a showing at trial, the Court held, the directors' conduct would fall outside the scope of the Section 102(b)(7) exculpatory provision in Disney's certificate of incorporation because such a provision does not apply to actions not in good faith or intentional misconduct.²⁰

After the Court of Chancery denied the motion to dismiss in *Disney*, many commentators speculated that the decision signified a fundamental shift in Delaware fiduciary duty law, that the distinction between lack of due care and bad faith had been hopelessly blurred, and that the risks of serving as a director of a Delaware corporation had been significantly heightened. Those “sky is falling” forecasts, however, proved to be inaccurate.

After the motion to dismiss was denied, the *Disney* litigation proceeded through discovery, culminating in a 37-day trial. After trial, Chancellor Chandler issued a 175 page post-trial opinion concluding that plaintiffs had failed to prove their claims.²¹ On appeal, the Delaware Supreme Court affirmed, finding that “the Chancellor's factual findings and legal rulings were correct and not erroneous in any respect.”²² With respect to the hiring of Ovitz and the approval of his employment agreement, the Supreme Court held that the Court of Chancery had a sufficient evidentiary basis from which to conclude, and had properly ruled, that the defendants had not breached their fiduciary duty of care and had not acted in bad faith.²³ As

18 See *In re The Walt Disney Co. Deriv. Litig.*, 825 A.2d 275 (Del. Ch. 2003) (hereinafter “*Disney I*”). The *Disney I* opinion focused on an amended complaint filed by plaintiffs after their initial complaint had been dismissed for failure to adequately plead breaches of fiduciary duty. See *Brehm v. Eisner*, 746 A. 2d 244 (Del. 2000). The Supreme Court's decision in *Brehm* expressly found that a majority of the Disney board (including Michael Eisner) was disinterested in the challenged transaction, and prohibited plaintiffs from relitigating that issue.

19 *Disney I*, 825 A.2d at 289.

20 *Id.* at 289-90 (citing 8 Del. C. § 102(b)(7)).

21 See *In re The Walt Disney Co. Deriv. Litig.*, 907 A.2d 693 (Del. Ch. 2005) (hereinafter “*Disney II*”).

22 *In re The Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 35 (Del. 2006) (hereinafter “*Disney III*”).

23 *Id.* at 47, 52, 56, 58, 60, 73.

to the ensuing no-fault termination of Ovitz and the resulting termination benefits pursuant to his employment agreement, the Supreme Court affirmed the trial court's holdings that the full board did not (and was not required to) approve Ovitz's termination, that Michael Eisner, Disney's CEO, had authorized the termination, and that neither Eisner nor Sanford Litvack, Disney's General Counsel, had breached his duty of care or acted in bad faith in connection with the termination.²⁴

Together, the decisions of the Delaware Supreme Court and the Court of Chancery provided important clarification regarding the nature and scope of the obligation of corporate fiduciaries to act in good faith, while at the same time putting to rest the speculation that the concepts of grossly negligent conduct (lack of due care) and bad faith had become virtually indistinguishable. The dire predictions that followed the denial of the motion to dismiss proved to be much ado about nothing.

Understanding the Standards Applicable to Motions for Summary Judgment and Motions to Dismiss

That the post trial and appellate decisions in *Disney* turned out differently than many commentators had predicted after the Court of Chancery's denial of the motion to dismiss is not surprising when one takes into account the stringent standards applicable to, and heavy burden a defendant must carry to succeed on, such a motion. A party moving to dismiss a complaint under Chancery Court Rule 12(b)(6) assumes the burden of proving that none of the facts alleged in the complaint, even if true, entitle the non-moving party to relief.²⁵ In adjudicating such a motion, the Court of Chancery accepts as true all well pleaded allegations of facts, draws all reasonable inferences in favor of the non-moving party,²⁶ cannot choose between two reasonable interpretations of ambiguous facts,²⁷ and cannot grant dismissal unless it appears certain that the non-moving party would not be entitled to relief under any set of provable facts.²⁸

As the Court of Chancery described in *Lyondell*, a similarly heavy burden rests with a party seeking summary judgment:

In order to prevail, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.... In considering the summary judgment record, however, the Court is not permitted to weigh the evidence, and all reasonable inferences from the record presented must be drawn in favor of the non-moving party to determine the existence *vel non* of disputed material facts. "[I]f from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears

²⁴ *Id.* at 70-73.

²⁵ *Disney I*, 825 A.2d at 285; *Balin v. Amerimar Realty Co.*, 1993 Del. Ch. LEXIS 279, *10 (Del. Ch. 1993).

²⁶ *Disney I*, 825 A.2d at 285; *Balin v. Amerimar Realty Co.*, 1993 Del. Ch. LEXIS 279, *10 (Del. Ch. 1993); *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1263 (Del. Ch. 1979); *Cohen v. Mayor and Council of Wilmington*, 99 A.2d 393, 395 (Del. Ch. 1953).

²⁷ *Vanderbilt Income and Growth Assoc., LLC v. Arvida/JMB Managers*, 691 A.2d 609, 613 (Del. 1996).

²⁸ *Cohen*, 99 A.2d at 394-95.

desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate.”²⁹

Thus, decisions denying motions to dismiss and for summary judgment are necessarily preliminary and limited, particularly where they turn on the existence of disputed facts or reasonable inferences that can be drawn from those facts in favor of the non-moving party. Indeed, throughout its opinion in *Lyondell*, the Court emphasized the restrictive nature of the summary judgment standard and the preliminary and necessarily limited nature of its ruling. The Court even included a footnote indicating that, based on the record before it, “the better inference, especially considering the potential consequences from losing the Basell Proposal, likely favors the Lyondell Defendants.”³⁰ The Court explained, however, that it was not permitted to “take the better inference on summary judgment to the exclusion of a less compelling, but still reasonable, inference.”³¹

The *Lyondell* decision, therefore, should be viewed in its proper procedural context, and when so viewed, we submit that the decision does not warrant the passionate critical reaction and dire predictions it has garnered. If the cautious tone of the opinion, the Court’s statement that the “better inference” seems to favor defendants, and the Vice Chancellor’s constant emphasis on the restrictive summary judgment standard are not enough to allay concerns that the opinion creates new law and will change the M&A deal process, the Court’s acknowledgement that its decision was “driven more by the constraints of a summary judgment process than it is by our corporate law”³² should suffice to dispel such concerns. So too should the Court’s subsequent decision on the application for interlocutory appeal, in which the Court observed, among other things, that:

[N]otwithstanding Defendants’ consternation over the outcome on their summary judgment motion, the reports of the death of *Section 102(b)(7)* (and the consequent possibility for the “resuscitation” of a *Van Gorkom*-esque liability crisis) in Delaware law are greatly exaggerated both with regard to the application of *Lyondell*’s exculpatory charter provision in this case, and certainly with regard to the application of a *Section 102(b)(7)* provision defense in any other case.³³

Thus, the *Lyondell* decision says far less about the future direction of Delaware corporate law than it does about the appropriateness of summary judgment on the limited and unique record presented to the Court in *Lyondell*. While the propriety of the Court’s denial of summary

²⁹ *Lyondell*, 2008 Del. Ch. LEXIS 105, at *38-39 (citations and footnotes omitted). See also Del. Ch. Ct. R. 56(c).

³⁰ *Id.* at *71 n.92.

³¹ *Id.*

³² *Id.* at *110.

³³ 2008 Del. Ch. LEXIS 125, at *34.

judgment on that record is a legitimate subject of debate,³⁴ the frequently-articulated fears that the decision portends a change to Delaware corporate law or will effectively require significant changes in M&A best practices seem largely unjustified given the nature of the decision and its procedural context – a view buttressed by the example of the *Disney* litigation.

Lessons Learned from *Lyondell*

If the negative reaction to *Lyondell* is in many respects unwarranted, that is not meant to suggest that the opinion is unimportant or cannot offer helpful lessons to corporate practitioners. Perhaps the most obvious lesson, and one taught by many opinions before *Lyondell* but still too often overlooked, is that the best way for directors to maintain the ability to effectively argue for the early dismissal of stockholder litigation challenging a board's decision to recommend a sale transaction is to employ well settled best practices. Those practices include:

- **Board's role under *Revlon*.** A board of directors has ultimate responsibility for the direction of any sales process and should play an active role in structuring the process and supervising management and the corporation's advisors in carrying out such a process. While management participation is generally important to an effective sales process, the CEO or other senior officers should not conduct critical negotiations before board involvement or without effective direction and oversight from the board. Allowing officers to negotiate material financial and structural terms of a transaction without effective board input will cause significant judicial skepticism, as it did in *Lyondell*.
- **Ensuring value maximization.** As part of a board's proactive role in any sales process, directors should carefully consider whether a particular process or single bidder negotiation has been designed and carried out, and any proposed change of control transaction structured, so that under the particular circumstances the board has a reasonable basis to conclude that a proposed transaction offers the highest value reasonably attainable for stockholders. In *Lyondell*, the Court found insufficient evidence in the summary judgment record from which it could conclude unequivocally that the *Lyondell* board complied with its known obligation under *Revlon* to do so.
- **Periodic strategic review.** Directors should periodically review the corporation's strategic position, the current M&A market, and the corporation's readiness to deal with unsolicited bids, and should request presentations by legal and financial advisors in connection with such periodic review. This will help ensure that the board is in a position to react quickly to market developments or unsolicited offers and also that directors are well versed about the acquisition environment and their fiduciary responsibilities in conducting a sales process

34 In two Court of Chancery decisions after *Lyondell* (one in the context of a motion to dismiss and one in the context of a motion for summary judgment), the Court granted judgment in favor of director defendants based on the companies' Section 102(b)(7) exculpatory provisions, notwithstanding plaintiffs' contentions that, on the preliminary record, the Court could not rule out that the directors' had acted in bad faith. See *McPadden v. Sidhu*, 2008 Del. Ch. LEXIS 123 (Del. Ch. 2008); *In re Lear Corp. S'holder Litig.*, 2008 LEXIS 121 (Del. Ch. 2008). Indeed, in *McPadden*, the Court had concluded on the basis of the complaint, it appeared that the director-defendants' actions in connection with a sales process "are properly characterized as either recklessly indifferent or unreasonable." *McPadden*, 2008 Del. Ch. LEXIS 123, at *35. The *McPadden* and *Lear* decisions make clear that Section 102(b)(7) remains an important and viable protection for corporate directors and that on an appropriate record, it remains available as a basis for dismissal or summary judgment prior to trial.

and approving a sale.

- **Proactive response to market developments.** Directors should respond proactively to market developments, like the Schedule 13D filing that played a significant role in the Court’s decision in *Lyondell*. Advance strategic planning, proactively responding to market developments, and ensuring that officers do not negotiate material terms with a prospective acquiror prior to any significant board involvement may help avoid a situation, such as that faced by the *Lyondell* board, in which a board is presented with a *fait accompli* that could have been prevented.
- **Single bidder strategy.** Directors should be particularly cautious when pursuing a single-bidder sale strategy. If directors possess a body of reliable evidence from which to evaluate the adequacy and fairness of a sale transaction in relation to potential alternative transactions, they may approve a sale without conducting a formal auction or a canvass of the market. The board should weigh the costs and benefits of such an approach, consider the sufficiency and reliability of information available to the board, determine the appropriateness of any deal protection measures in view of the decision not to conduct a multi-bidder process, decide whether the overall approach is reasonably designed to maximize value under the circumstances, and carefully document the board’s process and deliberations concerning all those matters.
- **Deal protection.** Directors and their advisors should not assume there is a one-size-fits-all approach to deal protection measures (e.g., that a termination fee is *per se* reasonable if it falls within the 2-3% range). Reliance on such “rules of thumb” can be dangerous, and whether a package of deal protection measures is reasonable in a particular case is always a contextually-specific inquiry.
- **Allow adequate time.** Adequate time should be allotted at scheduled board meetings for consideration of material matters. In *Lyondell*, the Court was skeptical that the board could have fully and effectively considered all the matters it claimed to have considered in the course of a handful of relatively short meetings.
- **Documentation and minutes.** It is important to create a well-documented, contemporaneous record of careful board deliberation, both leading up to and throughout a sales process. In stockholder suits challenging board action, minutes are often some of the most significant evidence, as was the case in *Lyondell*, where the Court’s skepticism about the reliability of minutes appears to have been a contributing factor to the denial of summary judgment. Minutes should be sufficiently detailed so that it is later possible for the directors to establish, or a neutral fact-finder to determine, the substance of matters discussed, the scope of the board’s deliberations, the information and any advice upon which the directors relied, the basis for any determinations made, and the approximate length of time spent considering matters of importance.

None of the foregoing practices should come as a surprise to corporate practitioners. Yet to one degree or another, the summary judgment record in *Lyondell* reflected potential deficiencies with respect to each, all contributing to the Court’s conclusion that, on the record before it, there were material questions of fact precluding the grant of summary judgment. Had the record been different as to some or all of these areas, the decision may well have come out differently.

Conclusion

To best understand *Ryan v. Lyondell* and its impact, it is important to keep in mind its procedural posture – a motion for summary judgment. The ruling was necessarily preliminary in nature and was based on a limited summary judgment record. The Court itself emphasized that the outcome was driven more by the stringent summary judgment standards than by substantive corporate law. With that in mind, the “sky-is-falling” reaction to the decision seems largely unwarranted. While there is room for debate about whether the Court properly denied summary judgment on the record presented, the decision should not be read – as many commentators have read it – as signifying a monumental shift in Delaware corporate law or as requiring changes in well established best practices in the M&A context.