Corporations, Securities & Antitrust

Lyondell Chemical Co. v. Ryan: The Duty of Good Faith Comes to *Revlon*-Land

*By Robert T. Miller**

Section 102(b)(7) of the Delaware General Corporation Law authorizes Delaware corporations to include in their certificates of incorporation a provision eliminating the personal liability of directors for breaches of their duty of care but not for, among other things, breaches of their duty of loyalty or actions taken not in good faith.[1] The Delaware General Assembly enacted this provision[2] to quell the crisis caused by the Delaware Supreme Court's decision in *Smith v. Van Gorkom*,[3] and nowadays all well-advised Delaware corporations have such provisions in their certificates. Hence, shareholder-plaintiffs often cannot recover damages (and their lawyers cannot earn fees) in suits based on alleged breaches of the board's duty of care. An unintended but foreseeable consequence of the prevalence of 102(b)(7) provisions is that plaintiffs (and their attorneys) have a strong incentive to recast claims based on an alleged breach of the board's duty of care as claims based on breaches of the board's duty of good faith.[4]

This dynamic has played out in a variety of settings. In the *Disney* cases, the alleged wrongdoing by the defendant board concerned an ordinary business decision—the hiring and subsequent firing of a senior executive.[5] At least arguably, the board had breached its duty of care by not informing itself of all the material facts reasonably available regarding the executive's employment agreement before approving it or again before terminating him and obligating the company to pay an enormous severance. But such claims, even if true, would have been blocked by the company's 102(b)(7) provision, and so the plaintiffs argued that the board's alleged derelictions were so extreme that they amounted to conduct not in good faith—a claim that would *not* have been blocked by the 102(b)(7) provision.[6] Similarly, in *Stone v. Ritter*, the alleged wrongdoing was a failure of oversight—a failure by the defendant board to detect and prevent conduct by junior employees that subjected the company to liability.[7] Once again, the allegation naturally sounded in negligence as a breach of the board's duty of care, and, once again, the plaintiffs argued that the board's alleged dereliction was so extreme that it amounted to conduct not in good faith and so not shielded by the 102(b)(7) provision.[8]

The argument common to these two cases trades on an ambiguity in the concept of *bad faith*.[9] As Chancellor Chandler recognized in *Disney*, many quite different kinds of wrongful conduct can reasonably be said to be in bad faith.[10] As the Delaware Supreme Court later said, grossly negligent conduct can be labeled as being in bad faith[11]—presumably because, for example, the conduct is blameworthy. That, however, cannot be the sense demanded by Section 102(b)(7), for then all breaches of the duty of care would also be breaches of the duty of good faith, and Section 102(b)(7) provisions would accomplish nothing. Hence, bad faith in the relevant sense must include something more than gross negligence. The Delaware Supreme Court identified two other kinds of such conduct: (a) "conduct motivated by an actual intent to do harm" to the corporation,[12] and (b) "intentional dereliction of duty, a conscious disregard for one's responsibilities."[13] Conduct of the first kind would be especially hard to prove because it would seem to demand direct proof about a director's subjective intention. Not surprisingly, therefore, the latter kind of conduct—intentional dereliction or conscious disregard of duty—has become the focus of bad-faith claims.

But given these clarifying definitions from the Delaware Supreme Court, it would seem that it should be difficult for a plaintiff whose case is really based on a breach of the duty of care to recast the case as involving a breach of the duty of good faith. A breach of the duty of care requires grossly negligent conduct. A breach of the duty of good faith by "intentional dereliction" or "conscious disregard" (like the Delaware Supreme Court, I use these terms interchangeably) would require *not only* grossly negligent conduct *but also* actual knowledge on the part of the agent director that his or her conduct was in fact grossly negligent. There is a kind of *scienter* element to the claim. It would seem, therefore, that plaintiffs alleging a breach of the duty of good faith by intentional dereliction or conscious disregard would have to allege, in addition to facts suggesting gross negligence, some additional facts that would permit an inference that the directors had a certain state of mind, i.e., that they knew what they were doing was grossly negligent.

In this context, the Delaware Court of Chancery (Vice Chancellor John W. Noble) took up *Ryan v. Lyondell Chemical Co.*,[14] a case in which the plaintiffs, following the pattern of *Disney* and *Stone*, yet again attempted to argue that an alleged breach of the board's duty of care was in fact a breach of the board's duty of good faith. This time, however, the context was *Revlon*-land, i.e., a situation in which the board had agreed to a change-of-control transaction (in fact a cash-out merger) and so had triggered its *Revlon* duties.[15] The essential question was whether conduct by the board that, at least arguably, had breached its *Revlon* duty of care had also breached its *Revlon* duty of good faith—in other words, whether in breaching its duty of care in a *Revlon* context the board had acted not only with gross negligence but actually knew that it was doing so. The company had a Section 102(b)(7) provision in its certificate of incorporation, and so if all the plaintiffs could prove was a breach of the duty of care, then the case would be over and the defendants would have prevailed.[16]

On the limited record that existed at the time, Vice Chancellor Noble denied the defendant directors' motion for

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summary judgment (*Lyondell I*).[17] The directors then moved for certification of an interlocutory appeal to the Delaware Supreme Court, and the Vice Chancellor produced another lengthy opinion denying this motion (*Lyondell II*).[18] The Delaware Supreme Court then took the extraordinary step of accepting the interlocutory appeal, and it reversed the Chancery Court on all issues and remanded with instructions to enter judgment for the defendants (*Lyondell III*).[19] In Section I below, I describe the facts of the case, at least as they were assumed to be for purposes of the defendants' summary judgment motion. In Section II, I briefly summarize the key doctrines under *Revlon* and its progeny. In Section III, I examine the opinions of the Chancery Court and the Supreme Court together, analyzing them to determine why the two courts disagreed as to whether the facts in *Lyondell* permitted an inference that the board had acted in conscious disregard of its *Revlon* duties. Finally, in Section IV, I make some concluding observations.

I. Factual Background in *Lyondell Chemical Co. v. Ryan*

In early 2007, Lyondell was the third-largest independent, publicly-traded chemical company in North America.[20] The company was strong financially, had paid down several billion dollars in debt in accordance with its strategic plan, and was active in acquiring other companies.[21] On May 11, 2007, however, an affiliate of Basell AF, a privately-held Luxembourg company controlled by Leonard Blavatnik, filed a Schedule 13D with the Securities and Exchange Commission disclosing that it had acquired the right to purchase from Occidental Petroleum, Lyondell's second-largest stockholder, a block of Lyondell shares aggregating about 8.3 percent of the total outstanding Lyondell stock.[22] Blavatnik had in the past expressed an interest in acquiring Lyondell,[23] and the Schedule 13D disclosed that Blavatnik remained interested in a possible transaction with Lyondell.[24] As Vice Chancellor Noble would later say, the filing of the Schedule 13D was, and was understood by the Lyondell board to be, a "signal to the market that Lyondell was 'in play.'"[25]

Although the Lyondell board convened a special meeting promptly after the filing of the Schedule 13D,[26] the directors decided to take a "wait and see" approach[27]—that is, the board "decided . . . that no immediate response was required and that it would await the reaction of the market and Lyondell's major shareholders to Blavatknik's move."[28] In particular, the board neither took steps to put the company up for sale nor erected any defenses to fend off a hostile offer.[29] The company's chief executive officer, Dan Smith, soon received an inquiry from Apollo Management, L.P. concerning whether Lyondell's management would be interested in a management-led leveraged buyout of the company, but Smith rejected the proposal because he and other members of Lyondell's management viewed such transactions as too fraught with conflicts of interest for both management and the board.[30]

Throughout this period—that is, after the filing of Basell's Schedule 13D and from mid-May to late-June of 2007—Smith had some preliminary contacts with a subordinate of Blavatnik at Basell, but Smith and Blavatnik's conflicting travel schedules prevented their arranging a meeting.[31] The board itself, however, made "no effort to value the Company or to assess what options might be on the table *if* Basell (or another acquirer) made a move to acquire Lyondell"[32]—conduct (or more accurately, an omission) that Vice Chancellor Noble would later describe as "indolent"[33] and "unexplained inaction."[34]

On June 26, 2007, however, it appeared that Blavatnik had lost interest in Lyondell because Basell announced that it had entered into an agreement to acquire specialty chemicals maker Huntsman Corporation.[35] When Hexion Specialty Chemicals, Inc., one of Apollo's portfolio companies, overtopped this bid,[36] Blavatnik again turned his attention to Lyondell, and on July 9 he met with Smith, who pressed him to make his best offer immediately.[37] By the end of the day, Blavatnik offered to acquire Lyondell for $48 cash per share, provided that Lyondell also agreed to a $400 million breakup fee and that a merger agreement was signed within seven days.[38] At the time Blavatnik had filed the Schedule 13D, Lyondell's shares had been trading at about $33 per share,[39] and so the $48 per share price represented an approximate 45 percent premium to the undisturbed price.

After that, events moved very quickly. On July 10, the Lyondell board met, discussed Blavatnik's offer, and instructed Smith to obtain a written offer from Blavatnik and more information regarding his financing even though his offer was not contingent on the availability of financing.[40] Blavatnik promptly complied, but since under the Basell-Huntsman merger agreement he had only until July 11 to match or exceed Hexion's topping offer, Blavatnik asked that the Lyondell board provide a firm indication of interest in his proposal by the end of that day.[41] On July 11, the Lyondell board met again, decided it was interested in Blavatnik's offer, and authorized the retention of Deutsche Bank Securities, Inc., as its financial advisor for the potential transaction.[42] Basell then bowed out of the bidding for Huntsman, and Huntsman terminated its merger agreement with Basell.[43] In the next few days, the parties and their counsel negotiated a merger agreement, Basell conducted due diligence, and Deutsche Bank worked on a fairness opinion.[44] Meanwhile, on July 12, the Lyondell board met again and authorized Smith to seek improved terms from Basell,[45] which he did in a request to Blavatnik on July 15 seeking an increase in the price, a go-shop provision,[46] and a reduced breakup fee.[47] Blavatnik, noting that he had already been asked for and produced his "best and final" offer, flatly refused, although he did eventually agree to reduce the breakup fee from $400 million to $385 million.[48]

On July 16, the Lyondell board met again and received presentations from management and its financial and legal advisors.[49] Lyondell's counsel explained that, although the proposed merger agreement prohibited Lyondell from soliciting other offers for the company after signing (that is, there was no go-shop), it did contain a standard fiduciary-out clause that would allow the company to receive and consider unsolicited offers superior to the terms offered by Basell.[50] Deutsche Bank offered its opinion that the transaction was fair to Lyondell and its stockholders from a financial point of view.[51] In fact, Deutsche Bank noted that the deal price of $48 exceeded the value of the company as computed in some of its financial models, and the bank's managing director offered the view that the price was "an absolute home run."[52] Deutsche Bank also explained why it believed that no other parties would be interested in acquiring Lyondell at a higher price.[53] The Lyondell board then voted to approve the merger.[54]

After the agreement was announced on July 17, 2007,[55] no other parties offered to acquire Lyondell. At a special meeting held on November 20, 2007, the Lyondell stockholders approved the merger with more than 99 percent of the shares voted,[56] and the merger was consummated on December 20, 2007.[57]

II. Fiduciary Duties in Revlon-Land

When the board of directors of a Delaware corporation decides to pursue a change-of-control transaction, it enters *Revlon*-land.[58] Less colloquially, the board's fiduciary duty changes from the preservation of the company as a corporate entity to the maximization of the value of the company at a sale for the benefit of the stockholders.[59] The key questions regarding the board's so-called *Revlon* duty[60] are thus (a) under what circumstances the duty is triggered, and (b) what exactly the board must do to comply with that duty.

A. What Triggers Revlon

Ordinarily, the decisions of a board of directors, even to decline a merger proposal, are reviewed under the business judgment rule.[61] The board's fiduciary duty changes—that is, *Revlon* is triggered—only when a company embarks on a transaction (either on its own initiative or in response to an unsolicited proposal from another party) that will result in a change of control,[62] typically a cash-out merger. What triggers *Revlon*, therefore, is a certain kind of *decision* by the board.

This has not always been perfectly clear. *Revlon* itself concerned a leveraged, cash-out, bust-up merger, and in that case the Delaware Supreme Court spoke about the change in the board's fiduciary duty occurring when "it became apparent to all that the break-up of the company was inevitable" and the board "recogni[zed] that the company was for sale."[63] This language made it seem as if changes in circumstances beyond the board's control could trigger *Revlon*. The court inadvertently confirmed this view a few years later in the *Time-Warner* case.[64] In that case, Chancellor Allen in the opinion below gave exactly the correct analysis: it was the board's decision to pursue a change-of-control transaction that triggered *Revlon*.[65] The Supreme Court, however, although stating that Chancellor Allen's "conclusion [was] correct as a matter of law,"[66] declined to follow it. Rather, it "premise[d] [its] rejection of the plaintiff's *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board . . . made the dissolution or the breakup of the corporate entity inevitable, as was the case in *Revlon*."[67] This was a muddle and a mistake, and just four years later, in *Paramount v. QVC*, the Supreme Court returned to this issue and expressly adopted the standard Chancellor Allen had articulated in his opinion in *Time-Warner*.[68]

Historically, the most important issue concerning the triggering of *Revlon* has been whether the transaction the board has embarked upon does indeed effect a change of control. Most famously, after holding that the cash-out merger in *Revlon* triggered the change in fiduciary duties now named for the case, the Delaware Supreme Court went on to hold that although a stock-for-stock merger in which control of the combined entity remained in the market did *not* work a change of control and so did *not* trigger *Revlon*,[69] a stock-for-stock merger in which the combined entity was controlled by a controlling stockholder *did*.[70] In *Lyondell*, there was never any question that, if Basell acquired Lyondell, the transaction would be a cash merger and thus involve a change of control. The issue in *Lyondell*, therefore, was not *whether Revlon* was triggered but *when*, i.e., at what point in the sequence of events leading to the sale of control did *Revlon* start to apply. I shall return to this issue in Section III below.

B. The Content of Revlon

Once *Revlon* is triggered, the board has a fiduciary obligation to get "the best price for the stockholders at a sale of the company."[71] The Delaware Supreme Court has elaborated on this standard, holding that the "key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[72] The inquiry thus has both procedural aspects (concerning whether the board was adequately informed before making a decision) and substantive aspects (concerning "the reasonableness of the substantive merits of [the] board's action").[73] In this latter aspect, *Revlon* review thus goes beyond the ordinary business judgment rule, which concerns only the decision-making processes of the board and not the substantive merits of its decisions.[74]

The Delaware courts have never been quite clear, however, as to the exact standard of care to which directors will be held in performing their duty under *Revlon*—i.e., whether it is a gross negligence standard or a simple negligence standard.[75] The argument for the former is that such is the standard under the ordinary business judgment rule.[76] The argument for the latter is that review under *Revlon* is supposed to be "enhanced" judicial scrutiny[77] and so a ratcheting up of the level of care required is appropriate.[78] The language of the various opinions does little to settle this issue, for although the courts speak of the directors' *Revlon* duty in terms of *reasonability*,[79] which may seem to imply a simple negligence standard ("reasonable" being the opposite of "negligent"), nevertheless the ordinary business judgment cases also speak in such terms,[80] and there the standard is clearly one of gross negligence.[81] However this may be, although the Delaware Supreme Court has often urged boards to be especially diligent in fulfilling their duties under *Revlon*,[82] the court has also emphasized that in reviewing the board's performance under *Revlon* the Chancery Court "should be deciding whether the directors made a reasonable decision, not a perfect decision," and so "if a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination."[83] Perhaps as a result of such language, in practice the standard under which courts have reviewed the performance of boards under *Revlon* has tended towards gross negligence.

In applying *Revlon*, the Delaware courts have generally focused on whether the board reasonably believes that a transaction it has approved and recommended to its shareholders represents the best value reasonably available for the company. Not surprisingly, therefore, the inquiry has often concerned such things as whether the board conducted an auction for the company or some more-limited form of market check,[84] what kinds and how much information the board had about the value of the company (including valuation studies prepared by management or outside financial advisors),[85] what actions the board may have taken to encourage (or discourage) competing offers for the company,[86] whether the board negotiated aggressively with potential buyers,[87] and whether the board favored one bidder over another to the detriment of its shareholders.[88] In keeping with the trend towards applying the *Revlon* duty of care in a gross negligence sense, however, the Delaware Supreme Court has stated that "there is no single blueprint that a board must follow to fulfill is duties,"[89] and the Court of Chancery has often relied on this statement in concluding that a board's sales process has not violated *Revlon*.[90]

III. Good Faith in Revlon-Land

Since, as I noted above, Lyondell's certificate of incorporation included a Section 102(b)(7) provision, the issue in the case was not whether the Lyondell directors had breached their duty of care under *Revlon* but whether they had breached their duty of good faith—whether they not only breached their duty of care but knew they were breaching it, i.e., *consciously disregarded* it. Thus, while conceding that his initial opinion "perhaps did not expound in sufficient detail upon [his] reasons for denying the directors protection" under the 102(b)(7) provision, nevertheless Vice Chancellor Noble said in *Lyondell II* that his "concern about the applicability of a Section 102(b)(7) defense . . . is whether . . . the [directors] may have exhibited a 'conscious disregard' for their known fiduciary obligation in a sale scenario" under *Revlon*.[91] Likewise, the Supreme Court said that "the issue is whether the directors failed to act in good faith," which would be the case "if a fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[92]

Thus agreeing on the law, the Chancery Court and the Supreme Court reached opposite results. How, then, did that happen? There is a twofold answer. Less importantly, the Chancery Court erroneously concluded that the Lyondell board's *Revlon* duties were triggered earlier than they in fact were, and, examining conduct by the board during this earlier period under *Revlon*, the Chancery Court found a violation. The Supreme Court, holding that *Revlon* was not triggered till later in time than Chancery supposed, naturally found there could be no violation of *Revlon* based on events prior to its triggering. More importantly, there was a significant—and largely tacit—disagreement between the Chancery Court and the Supreme Court about when it is permissible for a court to infer from the (alleged) fact that a board has breached its *Revlon* duty of care that the board *consciously disregarded* that duty. I shall call these two issues the *triggering issue* and the *inference issue*, and I treat them seriatim.

A. The Disagreement About the Triggering Issue

In explaining in *Lyondell II* his holding in *Lyondell I* denying the directors summary judgment on the plaintiff's claim that they consciously disregarded their *Revlon* duties, Vice Chancellor Noble wrote, "There is where the 13D filing in May 2007 and the subsequent two months of (apparent) Board inactivity become critical," for

> the Directors made *no apparent effort* to arm themselves with *specific knowledge* about the present value of the Company in the May through July 2007 time period, despite *admittedly knowing* that the 13D filing in May 2007 effectively put the Company "in play" . . . . It is these facts that raise the specter of "bad faith."[93]

If the Lyondell board could have violated its *Revlon* obligations starting when Basell's Schedule 13D was filed, the implication, of course, is that the board's knowledge (or perhaps the market's knowledge) that there was a reasonable probability that the company may be sold in the foreseeable future (i.e., that Lyondell was "in play") triggered the Lyondell board's *Revlon* duties.

This conclusion is certainly the most surprising aspect of the Chancery Court's opinion. As I explained above in Section II.A, the Delaware Supreme Court has repeatedly said that what triggers *Revlon* is the board's decision to embark upon a change-of-control transaction. An announcement by a third party, whether publicly or privately, whether in a Schedule 13D or otherwise, that it is interested in acquiring the company is not a decision by the board to sell control. For twenty years prior to *Lyondell*, this issue was, it appears, well-settled in Delaware law. For, all the way back in the *Time-Warner* case, Paramount had argued that the announcement of Time's merger agreement with Warner had put Time in play and that this fact triggered the Time board's *Revlon* duties.[94] Both Chancellor Allen in his opinion below[95] and the Delaware Supreme Court rejected this view, the Supreme Court stating explicitly that "we decline to extend *Revlon*'s application to corporate transactions simply because they might be construed as putting a corporation 'in play' or 'up for sale.'"[96]

Not surprisingly, therefore, the Supreme Court disposed of this issue quite quickly in *Lyondell III*, referring to its holding in *Time-Warner* and stating that "[t]he problem with the trial court's analysis is that *Revlon* duties do not arise simply because a company is 'in play.'"[97] Rather, the "duty to seek the best available price applies 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."[98] Since *Revlon* was not triggered, the board's decision not to respond to Basell's Schedule 13D and to adopt a wait-and-see approach was reviewable only under the business judgment rule and "was an entirely appropriate exercise of the directors' business judgment."[99]

B. The Disagreement About the Inference Issue

The Supreme Court's reaffirming its *Time-Warner* holding that a company's being "in play" does not trigger the board's *Revlon* duties mooted the issue in *Lyondell* of whether the board's conduct between the filing of Basell's 13D and its decision to pursue a transaction with Basell satisfied those obligations. The question remained, however, as to whether the facts as disclosed in the complaint permitted an inference that, after it had decided to sell the company and so triggered *Revlon,* the Lyondell board had consciously disregarded its duty to take reasonable steps to get the best price for the company reasonably available.[100]

Clearly, Vice Chancellor Noble was inclined to believe that, on the facts as he was required to understand them for purposes of the defendants' summary judgment motion, it was quite possible that the directors had breached their *Revlon* duty of care.[101] On appeal, the Supreme Court noted that it was not inclined to agree that the directors had breached even their duty of care but that it would not have reversed a ruling denying the directors summary judgment on this issue.[102] This disagreement between the courts, however, is a relatively minor point. The key issue in the whole case, in my view (for neither court so formulates it), is *whether the court may permissibly infer from the mere fact that a board breached its* Revlon *duty of care that it consciously disregarded that duty*. The Chancery Court believed that, at least sometimes, this inference was permissible, perhaps if the breach of the duty of care looks sufficiently egregious. The Delaware Supreme Court's opinion stands for the proposition that (with a very limited exception discussed below) this inference is impermissible.

One reason for this disagreement between the two courts is that Vice Chancellor Noble insisted on thinking about breaches of a board's *Revlon* duties as falling on a spectrum from less serious violations to more serious violations. For example, in *Lyondell II*, he writes that

> on a motion for summary judgment, it is not necessary (or prudent) for the Court to determine precisely where, on these facts, the line falls between exculpable [i.e., under a Section 102(b)(7) provision], "bad faith" conduct (i.e., gross negligence amounting only to a violation of the duty of care) and a non-exculpable, knowing disregard of the directors' known fiduciary obligations in a sale scenario.[103]

Although based on the Delaware Supreme Court's discussion of directorial good faith in *Disney*,[104] viewing gross negligence and conscious disregard of duty as points along a spectrum is not the best way of conceptualizing the problem.

The reason is that the spectrum metaphor encourages the running together of at least two quite different things: (a) the degree of negligence involved in the breach (e.g., in standard law-and-economic terms, just how much less is *B* than *LP*),[105] and (b) whether the board *knew* that it was being negligent in committing the breach. These are separate issues. For example, it is possible for a board to do something very negligent indeed (*B* very much less than *LP*) without knowing that its action is negligent; in such a case, the board would breach its duty of care but would not consciously disregard that duty and so would not breach its duty of good faith. Conversely, it is also possible for the board to do something only slightly negligent (*B* only slightly less than *LP*) and nevertheless know that its action is negligent; in such a case, the board breaches its duty of care and, by consciously disregarding that duty, breaches its duty of good faith as well. While thus separate, however, the two issues of (a) the degree of negligence, and (b) the board's knowledge of its negligence, are often related in that, generally speaking, the higher the degree of negligence involved in the breach of the duty of care, the more likely it is that the board knew that its conduct was negligent. That is, the more negligent a person is being, the more likely it is that he realizes he is being negligent.

Now, the inference from the proposition that (a) a certain action involves a high degree of negligence, to the proposition that (b) the particular actor performing the action knew that the action was negligent is sometimes appropriate in the common law of torts.[106] As I indicated above, however, the Delaware Supreme Court in *Lyondell III* effectively held that the inference is generally *not* permissible in a *Revlon* context: the mere fact that the board violated its *Revlon* duty of care will not, without more, support an inference that the board was *consciously disregarding* that duty. The court may not infer conscious disregard solely on the basis of even an egregious breach of the duty of care. Presumably some additional evidence about the board's state of mind—some kind of plus factor, like a smoking-gun email—would be needed to support an inference that the board *knew* that it was not complying with its *Revlon* duties.

There is, however, one important but very limited exception to this conclusion. For, after holding that "if the directors failed to do all that they should have under the circumstances, they breached their duty of care"[107] and not their duty of good faith, the court added that, with respect to a potential breach of the duty of good faith by a possible conscious disregard of duty, "the inquiry should have been whether [the] directors utterly failed to attempt to obtain the best sales price."[108] The clear implication is that, if the directors *utterly fail even to attempt* to get the best price, then an inference that they consciously disregarded their duty of care would be permissible. The theory here seems to be that only on the most extreme sets of facts imaginable will the court permit the inference of conscious disregard—that is, only when the board did nothing at all to fulfill its duty of care will the violation of that duty, standing alone, permit an inference that the board consciously disregarded its duty. In all other circumstances, presumably some additional evidence (e.g., something directly related to the directors' state of mind) will be required.

There is an important analogy here to the Delaware Supreme Court's directorial oversight jurisprudence. In *Stone v. Ritter*,[109] which expressly approved the Chancery Court opinion in *Caremark*,[110] the court held that directors would be liable for failing to monitor the activities of corporate employees only if, *either* "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations."[111] "In either case," the court held, "imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."[112] On the most natural reading of this language, the idea is that, if the directors utterly fail to implement a reporting or information system, then the court may infer that the directors were consciously disregarding their duties and so find a violation of the duty of good faith.[113] The purpose of this rule seems to be to allow a finding of director liability on truly extreme facts such as those in *Francis v. United Jersey Bank,*[114] where the defendant director did literally nothing at all to monitor the business. Thus, as under *Stone*, so under *Lyondell*: there is a very limited way of moving from a violation of the duty of care to a violation of the duty of good faith—not a failure, even an egregious one, to fulfill the duty of care but only *an utter failure even to attempt* to comply with the duty of care will support an inference to conscious disregard of that duty and so a breach of the duty of good faith.

Why would the Delaware Supreme Court adopt a rule, first in *Stone* in the oversight context and now in *Lyondell* in the *Revlon* context, that, the extreme case of utter failure aside, the inference common in tort law from highly negligent behavior to knowledge of such negligence on the part of the tortfeasor will be blocked in Delaware corporate law? The rationale offered by the Supreme Court in *Lyondell* is cryptic. Referring to its own often-quoted holding in *Barkan* that "there is no single blueprint that a board must follow to fulfill its duties"[115] under *Revlon*, the court writes that because "there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties," "the directors' failure to take any specific steps during the sales process could not have demonstrated a conscious disregard of their duties."[116] The most natural reading of this, I think, is that, since there is no step the board is always required to take to satisfy *Revlon*, no particular omission could ever be a violation of the duty of care and so, *a fortiori*, not a conscious violation of that duty so as to constitute bad faith.

If this is its meaning, then the argument is fallacious, for the *Barkan* holding about the absence of a blueprint required to be followed by boards in all cases is merely a recognition of the fact that change-of-control transactions occur in a wide variety of evolving circumstances,[117] and given this wide and ever-changing variety of circumstances, there is no action such that, in every case, the board must take that action. Rather, in different circumstances, different actions will be required. Hence, in given circumstances, a board's failure to take a particular action may breach its *Revlon* duty of care, even though, in other circumstances, omitting that action would not breach its duty.[118] This is quite different from saying, as the court's argument in *Lyondell* seems to assume, that in every case, while some action or other may be required, there is no particular action that is required—in other words, the circumstances *never* dictate which actions are required, but rather, in every circumstance, the board will have a choice of several actions that will satisfy its *Revlon* duties, none of these being individually required. *That* is a much stronger claim than the holding in *Barkan.*[119]

If the Supreme Court's rationale for the rule in *Lyondell* fails, there may be a better one. In ordinary tort cases, when we infer knowledge from conduct, there is often also evidence to suggest why the tortfeasor would want to harm the victim.[120] There is no analogue in the *Revlon* situations at issue here. For here we are considering cases in which there is no allegation that the directors are engaged in self-dealing or otherwise interested in the transaction. In those situations, the business judgment rule would be defeated immediately, and the directors would be required to prove that the transaction is entirely fair to the corporation and its shareholders.[121] The rule at issue, therefore, applies only in very limited circumstances—the cases in which, when not affected by self-interest, directors nevertheless knowingly breach their duty of care. Since the usual reasons for such a breach are absent here, such cases are presumably very rare. In all probability, therefore, an inference to conscious disregard is more likely to be wrong than right. Hence, allowing such inferences to defeat motions to dismiss or motions for summary judgment would tend on balance to produce wasteful litigation, and allowing such inferences in final judgments would tend on balance to produce erroneous results. It may well make sense, therefore, to block such inferences entirely, to hold, in other words, that absent some additional evidence directly bearing on the directors' state of mind, evidence showing a breach of the duty of care, no matter how egregious, will not support an inference of conscious disregard of duty. The Delaware Supreme Court's rule—which allows the inference only in the most extreme circumstances, i.e., when the board utterly fails even to attempt to comply with its obligations—thus cabins the inference to a very small set of cases where it is likely to be correct.

IV. Concluding Observations

The Delaware Supreme Court's decision in *Lyondell* thus carries forward the holdings in *Disney* and *Stone* limiting actions based on an alleged violation by a board of its duty of good faith. As I noted at the outset, in all these cases the claim of bad faith was only minimally plausible and was primarily designed by plaintiffs and their attorneys to circumvent the protection offered directors under the corporation's Section 102(b)(7) charter provision. To the extent that the argument for 102(b)(7) provisions eliminating personal liability for directorial breaches of the duty of care is convincing, protecting the efficacy of such provisions by strictly limiting claims of directorial bad faith not involving self-dealing or other interested conduct is very strong, and such claims should be permitted only in the most extreme cases.

Indeed, perhaps they should not be permitted at all, at least in *Revlon* contexts. For, when directors not motivated by a conflict of interest and not otherwise interested in the change-of-control transaction at issue consciously disregard their fiduciary duties in approving a sale of the company, the danger is that the target corporation shareholders will be harmed by receiving too low a price for their shares. In such cases, however, the shareholders of the *acquiring corporation* will receive a corresponding benefit—their company will in effect purchase the target company on the cheap. For diversified shareholders invested in a broad array of companies, this will be a wash: sometimes they will be harmed by directors consciously disregarding their fiduciary duties in *Revlon* contexts, and sometimes they will be benefited.[122] If directors are subject to liability for conscious disregard of their duties, however, many cases will be brought, including many that the directors will win, albeit at considerable expense—an expense that will be borne by the corporation and so by the shareholders under provisions of the Delaware General Corporation Law that allow corporations to indemnify directors for such unsuccessful suits.[123] If all this is right, then the only net beneficiaries of such suits may be the attorneys who bring them.

Endnotes

1 More precisely, Section 102(b)(7) provides that a Delaware corporation's certificate of incorporation may contain

> [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under §174 of [the Delaware General Corporation Law]; or (iv) for any transaction from which the director derived an improper personal benefit.

Del. Code. Ann. tit. 8, §102(b)(7) (2009).

2 65 Del. Laws c. 289 (1986).

3 488 A.2d 858 (Del. 1985). For the now-standard criticisms of the opinion, see Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Law. 1437 (1985). *See generally* E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 Bus. Law. 399 (1987). All of the states (but not the District of Columbia) have enacted provisions more-or-less analogous to Section 102(b)(7). *See* Mark A. Sargent & Denis R. Honabach, D & O Liability Handbook (2009) (citing and discussing the laws of various states).

4 Assuming that the challenged transaction has been completed and so cannot be addressed by equitable means (e.g., an injunction), a board protected by a Section 102(b)(7) provision is effectively immune. Malpiede v. Townson, 780 A.2d 1075, 1093 (Del. 2001) (holding that a complaint that unambiguously and solely asserts only a due care claim is dismissible once the corporation's Section 102(b)(7) provision is invoked).

5 *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 699-740 (Del. Ch. 2005).

6 *Id.* at 750-756.

7 Stone v. Ritter, 911 A.2d 362, 365-366 (Del. 2005).

8 *Id.* at 367.

9 It is plausible, but not quite conceptually necessary, that conduct "not in good faith" is the same as conduct "in bad faith." In *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009), the Delaware Supreme Court, although noting that the concepts have been distinguished in other contexts, decided to use the terms interchangeably, at least for the purposes of the case at hand. *Id.* at 240 n.8. I shall do likewise.

10 *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 753-756 (Del. Ch. 2005) (discussing various meanings of "bad faith" in the context of directors' fiduciary duties), *aff'd*, 906 A.2d 27 (Del. 2006).

11 *In re* Walt Disney Co. Derivative Litig, 906 A.2d 27, 64-65 (Del. 2006).

12 *Id.* at 64 (holding that "fiduciary conduct motivated by an actual intent to do harm" is "classic, quintessential bad faith"). Compare the famous formulation from *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and *in the honest belief that the action taken was in the best interests of the corporation*" (emphasis added). *Id.* at 812.

13 *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006).

14 2008 WL 2923427 (Del. Ch.).

15 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).

16 2008 WL 2923427, at *11 (Del. Ch.) (Ryan's claims regarding alleged breaches by the board of its *Revlon* duties "relate primarily to the Board's fiduciary duty of care, and on summary judgment the Court cannot conclude that Ryan would be unable to prove a breach of that duty at trial. If he only succeeded in that endeavor, however, the Lyondell stockholders would not be entitled to money damages, the only remedy now otherwise available [the merger had already closed, making equitable relief impossible], because Lyondell had an exculpatory charter provision adopted in accordance with 8 *Del. C.* §102(b)(7). Accordingly, Ryan can only prevail on his *Revlon* claims by overcoming the protection afforded to the Board by Lyondell's exculpatory charter provision; in other words, . . . Ryan must demonstrate that the Board either failed to act in good faith in approving the Merger or otherwise acted disloyally.") (footnotes omitted).

17 2008 WL 2923427 (Del. Ch.).

18 2008 WL 4174038 (Del. Ch.).

19 970 A.2d 235 (Del. 2009).

20 *Id.* at 237.

21 *Lyondell I* at *4.

22 *Lyondell III* at 237; *see also Lyondell I* at *4.

23 *See Lyondell I* at *4 (describing Basell's expression of interest in acquiring Lyondell in 2006 and the Lyondell board's rebuffing of the offer).

24 *Lyondell III* at 237; *Lyondell I* at *5.

25 *Lyondell I* at *5.

26 *Id.*

27 *Lyondell III* at 237.

28 *Lyondell I* at *5.

29 *Lyondell III* at 242.

30 *Id.* at 237; *Lyondell I* at *5.

31 *Lyondell I* at *5.

32 *Id.*

33 *Id.*

34 *Lyondell II* at *4,

35 *Lyondell III* at 237; *Lyondell I* at *6.

36 *Lyondell III* at 237; *Lyondell I* at *6. The Hexion-Huntsman transaction, too, would lead to litigation in Delaware. *See* Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008), as well as my discussion in Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 Cardozo L. Rev. 99, 147-155 (2009).

37 *Lyondell III* at 237-238; *Lyondell I* at *6.

38 *Lyondell III* at 237-238; *Lyondell I* at *6.

39 *Lyondell III* at 237; *Lyondell I* at *5.

40 *Lyondell III* at 238; *Lyondell I* at *6.

41 *Lyondell III* at 238; *Lyondell I* at *6-7.

42 *Lyondell III* at 238; *Lyondell I* at *7.

43 *Lyondell III* at 238; *Lyondell I* at *7.

44 *Lyondell III* at 238; *Lyondell I* at *7.

45 *Lyondell III* at 238; *Lyondell I* at *7.

46 That is, a provision that would authorize Lyondell, post-signing, to solicit other offers to acquire the company on terms superior to those in the Basell-Lyondell merger agreement. *See Lyondell III* at 238 n.2. *See generally* Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 Bus. Law. 729 (2008).

47 *Lyondell III* at 238; *Lyondell I* at *7.

48 *Lyondell III* at 238; *Lyondell I* at *7. As Vice Chancellor Noble notes, the breakup fee was about three percent of the equity value of the transaction and about two percent of the enterprise value. *Lyondell I* at *8 n.35.

49 *Lyondell III* at 238; *Lyondell I* at *8.

50 *Lyondell III* at 238; *Lyondell I* at *8.

51 *Lyondell III* at 238-239; *Lyondell I* at *8.

52 *Lyondell III* at 238-239. In particular, Deutsche Bank used two sets of financial projections in its analyses: more bullish projections prepared by management and more conservative ones based on a consensus of industry analysts. Under the more bullish management projections, the discounted cash flow and leveraged-buyout analyses yielded values of $37 to $47 per share and $44.75 to $51.50 per share, respectively. Using the more conservative analyst projections, the values were $30 to $39 per share and $32.25 to $38.50 per share. The highest value obtained came from a sum-of-the-parts comparable company analysis made with certain *pro forma* adjustments. *See Lyondell I* at *8. Probably the key point here is that, under what is usually the most important form of analysis (the discounted cash flow analysis) and using the most bullish assumptions (management's cash flow projections), the value of the company did not reach the deal price. *See generally* Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 Cardozo L. Rev. 99, 167-169 (2009) (discussing importance of discounted cash flow models in valuing corporate acquisitions and citing sources related thereto). The richness of the $48 per share was abundantly confirmed by subsequent events, for about a year after the deal closed, the combined company, now called LyondellBasell Industries, sought Chapter 11 bankruptcy protection, largely because of the immense amounts of debt it took on to fund the acquisition. Ana Campoy and Marie Beaudette, *Lyondell's U.S. Arm in Chapter 11*, Wall St. J. Online, Jan. 6, 2009, *available at* http://online.wsj.com/article/SB123127968554958711.html. In fact, the company's unsecured creditors in bankruptcy challenged the secured loans Lyondell took to fund the merger as fraudulent transfers. *See* David McLaughlin, *Lyondell Creditors Seek Probe of Merger*, Wall St. J., Mar. 11, 2009, at B2; David McLaughlin, *Lyondell Creditors Seek Approval to File Lawsuit Over $22B Buyout*, Daily Bankruptcy Review, June 17, 2009. The company, as debtor-in-possession, subsequently settled the suits against its lenders, but the secured creditors objected to the settlement. Andrew Longstreth, *Lyondell Creditors Vow to Fight Chemical Company's 'Outrageous and Reprehensible' Settlement of Fraudulent Conveyance Claims Against Bank Lenders*, AmericanLawyer.com, Dec. 7, 2009. As this article goes to print, the matter is still being litigated in the bankruptcy court in the Southern District of New York. Andrew Longstreth, *Creditors Lose Another Battle in Lyondell Bankruptcy*, AmericanLawyer.com, Jan. 20, 2010.

53 *Lyondell III* at 238; *Lyondell I* at *8.

54 *Lyondell III* at 238; *Lyondell I* at *8.

55 *Lyondell I* at *9.

56 *Lyondell III* at 239; *Lyondell I* at *9.

57 *Lyondell I* at *9. The consummation of the merger was key to this case because, once the merger was completed, the Court of Chancery would virtually never grant equitable relief undoing the merger. *See* Gimbel v. Signal Cos., 316 A.2d 599, 603 (Del. Ch. 1974), *aff'd* 316 A.2d 619 (Del. 1974) (noting the impracticability of "unscrambling the eggs"), which leaves monetary damages from the directors as the only potential remedy—a remedy from which the directors are shielded by the 102(b)(7) provision if the breach was of the duty of care but not if the breach was of the duty of good faith.

58 *See generally* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985). The origin of the picturesque term "*Revlon*-land" is obscure. It was definitely in common use among mergers-and-acquisitions lawyers as early as 1993 when Viacom's attorney used it in oral argument before the Delaware Supreme Court in *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), earning a rebuke from Justice Andrew Moore (who had authored the *Revlon* opinion) to the effect that "the Court doesn't use those kinds of terms" (*quoted in* Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After* QVC *and* Technicolor: *A Unified Standard (and the End of* Revlon *Duties?)*, 49 Bus. Law. 1593, 1593 (1994)). Justice Moore notwithstanding, the Delaware Court of Chancery occasionally uses the term, even in its written opinions. *E.g.*, ACE, Ltd. v. Capital Re Corp., 747 A.2d 95, 107 (Del. Ch. 1999) (V.C. Strine).

59 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985); Paramount Commc'ns., Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1993); *Lyondell III* at 242.

60 Although mergers-and-acquisitions lawyers commonly refer to *Revlon* duties (in the plural), the Delaware courts, at least after some initial confusion, have emphasized that there is only one duty under *Revlon*, to wit, to take reasonable steps to get the best price reasonably available for the stockholders. *E.g., Lyondell III* at 242 ("There is only one *Revlon* duty.").

61 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1148-1150 (Del. 1989).

62 *E.g., In re* Santa Fe Pac. Corp. S'holders Litig., 699 A.2d 59, 71 (Del. 1995); Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 46-48 (Del. 1993).

63 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

64 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

65 1989 WL 79880, at *23 (Del.Ch.) ("[A] corporate transaction that does represent a change in corporate control does place the board in a situation in which it is charged with the single duty to maximize current share value.").

66 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989).

67 *Id.*

68 Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 46-48 (Del. 1993). Acknowledging some of the questionable language in its precedents, the Supreme Court insisted that it "does not follow, however, that a 'break up' must be present and 'inevitable' before directors are subject to enhanced judicial scrutiny and are required to pursue a transaction that is calculated to produce the best value reasonably available to the stockholders." *Id.* at 46. Rather, such scrutiny and such an obligation apply "when there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation." *Id. See also* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1288 (Del. 1988) (stating that "in a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders"); Barkan v. Amsted Indus. Inc., 567 A.2d 1279, 1286 (Del. 1989) (stating that "the general principles announced in *Revlon* . . . govern this case and every case in which a fundamental change of corporate control occurs or is contemplated").

69 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

70 Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1993). *See also In re* Santa Fe Pac. Corp. S'holders Litig., 699 A.2d 59, 71 (Del. 1995) (complaint that alleged that target board was firmly committed to a stock-for-stock merger with potential acquirer and failed to allege that control of target company would not remain in the market failed to state a claim under *Revlon*).

71 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

72 Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1993). The court also held that, contrary to the rule in the ordinary business judgment context, the burden of proof on these issues rests with the defendant board. *Id.* ("The directors have the burden of proving that they were adequately informed and acted reasonably.").

73 *Id.*

74 E.g., in *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), the Delaware Supreme Court stated that, although "in making business decisions, directors must consider all material information reasonably available, and . . . the directors' process is actionable only if grossly negligent," *id.* at 259, nevertheless "substantive due care . . . [is] a concept . . . foreign to the business judgment rule," for courts "do not measure, weigh or quantify directors' judgments" and "do not even decide if [such decisions] are reasonable." *Id.* at 264. Hence, in the business judgment context, "[d]ue care in the decisionmaking context is *process* due care only." *Id.*

75 In dicta in *Lyondell I*, Vice Chancellor Noble asserts confidently that the standard is gross negligence ("The Court's ordinary measuring sticks for violations of the duty of care (i.e., gross negligence) and the duty of loyalty (e.g., impermissible interest, lack of independence, or 'bad faith') still apply.") in the *Revlon* context, but he cites no authority for this proposition. *Lyondell I* at *12 n.70.

76 *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[U]nder the business judgment rule director liability is predicated upon concepts of

gross negligence."); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) ("We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.").

77 *E.g.,* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1993) (discussing "enhanced judicial scrutiny of a sale or change of control transaction").

78 E.g., the Delaware Supreme Court has said that, in seeking to maximize value for the shareholders in a *Revlon* context, "the directors must be especially diligent." Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1993).

79 *E.g.,* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1993) (stating that enhanced judicial scrutiny under *Revlon* includes a "judicial examination of the reasonableness of the directors' action in light of the circumstances then existing").

80 E.g., in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), the court stated that, under the business judgment rule, the "determination of whether a business judgment is an informed one turns on whether the directors have informed themselves, prior to making a business decision, of all material information *reasonably* available to them." *Id.* at 872 (emphasis added; internal quotation marks omitted).

81 *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) ("We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.").

82 *E.g.,* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1993).

83 *Id.* at 45.

84 *E.g., id.* at 44 (mentioning auctions and canvassing the market).

85 *E.g.*, Barkan v. Amsted Indus. Inc., 567 A.2d 1279, 1287 (Del. 1989) (holding that directors need not conduct a market check if they have a reliable basis for believing that the transaction accepted represents the best price reasonably available).

86 *E.g., In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 199 (Del. Ch. 2007) (finding a violation of *Revlon* because the board solicited offers only from private equity buyers and neglected to consider strategic acquirers).

87 *E.g.,* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1276-1277 (Del. 1988) (faulting the board for not attempting to negotiate an increase in the price offered by a bidder).

88 *Id.* at 1281 (faulting the board for permitting an auction process that was "clandestinely and impermissibly skewed in favor" of one bidder who "repeatedly received significant material advantages to the exclusion and detriment" of another bidder "to stymie, rather than enhance, the bidding process").

89 Barkan v. Amsted Indus. Inc., 567 A.2d. 1279, 1286-1287 (Del. 1989).

90 *E.g., In re* Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691 (Del. Ch. 2001) (denying a preliminary injunction to plaintiff, who alleged that the board had breached its *Revlon* duties, although the board approved the sale of the company without performing a market check and relied only on a post-signing go-shop provision).

91 *Lyondell II* at *1.

92 *Lyondell III* at 243.

93 *Lyondell II* at *2 (emphases in original).

94 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1151 (Del. 1989).

95 Paramount Commc'ns, Inc. v. Time, Inc., 1989 WL 79880, at *21-*25 (Del.Ch.).

96 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1151 (Del. 1989).

97 *Lyondell III* at 242.

98 *Id.*

99 *Id.*

100 In *Lyondell I*, the Vice Chancellor does not clearly distinguish between alleged violations of *Revlon* occurring in the two periods, saying, for example, that the "record does not demonstrate that the Board engaged in an active sales process; in fact, to the contrary, it made no discernible effort at salesmanship either before or after the Merger was announced." *Lyondell I* at *18. Similarly, in *Lyondell II*, the Vice Chancellor faults the Lyondell board not only for inaction following the filing of Basell's Schedule 13D but because it "did *nothing* (or virtually nothing) pre-signing to confirm that a better deal could not be obtained . . . did nothing (or virtually nothing) to negotiate Basell's offer . . . and . . . did nothing (or virtually nothing) post-signing to verify that a better deal could not have been obtained." *Lyondell II* at *1 (emphases in original). This may make it sound as if, in the Vice Chancellor's view, the board violated (and perhaps consciously disregarded) its *Revlon* duties *both* during period from the filing of the 13D to the decision to sell the company *and* during the period from that decision to the execution of the merger agreement. In *Lyondell II*, however, the Vice Chancellor concentrates heavily on the earlier period. *See Lyondell II* at *2 (stating that in inferring bad faith conduct by the board, "the 13D filing in May 2007 and the subsequent two months of (apparent) Board inactivity become critical"). Indeed, the Vice Chancellor concedes that "[i]n the seven days during which the board considered Basell's offer, the Defendants' argument may be correct that only their duty of care is implicated," *Lyondell II* at *4, but he never actually says that the facts concerning the board's conduct during this latter period do *not* support an inference that the board consciously disregarded its *Revlon* duties during this period. Rather, he seems to try to piggy-back a claim of conscious disregard during the later period onto a claim of conscious disregard during the earlier period, stating that it is "these facts [about the period following the filing of the 13D] that raise the specter of 'bad faith' . . . which, in turn, colors the Court's view . . . of the directors' later 'negotiations' with Basell." *Lyondell II* at *2. Given all this, it is unclear just what the Vice Chancellor would have said had he come to the Supreme Court's view regarding when the board's *Revlon* duties had actually been triggered.

101 Thus, he says, "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." *Lyondell I* at *19.

102 *Lyondell III* at 243.

103 *Lyondell II* at *4.

104 *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64-67 (Del. 2006) (discussing various kinds of fiduciary misconduct as falling along points "on a spectrum").

105 I refer, of course, to the Hand formula in which *B* is the cost of a precaution that will avert a loss costing *L* that would, absent the precaution, come about with probability *P*. United States v. Carroll Towing, Inc., 159 F.2d 169, 173 (2d Cir. 1947). *See generally* Richard A. Posner, Economic Analysis of Law 167-171 (7th ed. 2007).

106 *See* W. Page Keeton et al., Prosser and Keaton on Torts 36 (5th ed., 1984).

107 *Lyondell III* at 243.

108 *Id.* at 244.

109 *Stone v. Ritter*, 911 A.2d 362 (Del. 2005).

110 *In re Caremark Int'l Inc. Derivative Litig.,* 698 A.2d 959 (Del. Ch.1996).

111 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2005).

112 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2005).

113 That is, the text quoted from *Stone* says that a violation of the duty of good faith may occur in the oversight context in either of two ways (i.e., utter failure to implement an information and reporting system *or* a conscious failure to utilize such a system once implemented), but only in its description of the latter does the court mention consciousness on the part of the board. When the text goes on to say that "in either case" imposition of liability requires a showing that the board knew it was not discharging its fiduciary obligations, I read the text as meaning that, when the board utterly failures to implement an information and reporting system, it follows that (i.e., it may be inferred that) the board knew it was violating its duty.

114 432 A.2d 814 (N.J. 1981) (holding liable for officer's looting of the company a director who never attended meetings, never reviewed financial statements, and lacked even a rudimentary understanding of the corporation's business). Compare *ATR-Kim Eng Financial Corp. v. Araneta*, 2006 WL 3783520 (Del.Ch.) (same for directors who failed to take any steps to monitor officer and controlling shareholder and prevent his self-dealing). See my discussion of this and related issues in Robert T. Miller, *Wrongful Omissions by Corporate Directors:* Stone v. Ritter *and the Process Model of the Delaware Business Judgment Rule*, 10 U. Pa. J. Bus. & Emp. L. 783 (2008).

115 Barkan v. Amsted Indus. Inc., 567 A.2d. 1279, 1286 (Del. 1989).

116 *Lyondell III* at 243.

117 The very next sentence in *Barkan*, after the famous language about the absence of a single blueprint, is as follows: "A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of the evolving techniques and financing devices employed in today's corporate environment." Barkan v. Amsted Indus. Inc., 567 A.2d. 1279, 1286 (Del. 1989).

118 *E.g., In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 199 (Del. Ch. 2007) (finding a violation of *Revlon* because, in the particular circumstances of a small-cap company, the board had neglected to solicit offers from strategic acquirers, a step that might not have been required if the target were a large-cap company).

119 The distinction is difficult to draw clearly in English but easy to see in a formalized language such as those used in philosophical logic. The difference is that between, (a) "There is no action x such that, in every circumstance y, the board is required in y to perform x," and (b) "In every circumstance y, there is no action x such that, the board is required in y to perform x." In symbols, this is the difference between (a) $\neg\exists x\forall y(Fxy)$, and (b) $\forall y\neg\exists x(Fxy)$, which are logically equivalent to (a′) $\forall x\exists y\neg(Fxy)$, and (b′) $\forall x\forall y\neg(Fxy)$. Clearly, (b) implies (a), but (a) does not imply (b). Compare: "No one is the father of everyone" (an instance of (a)) and "Everyone has no father" (an instance of (b)). Inferring (b) from (a) is the kind of fallacy logicians call an *operator shift*.

120 *E.g.,* Lambrecht v. Schreyer, 152 N.W. 645 (Minn. 1915) (holding that the intent of the alleged tortfeasor could be inferred when one of two neighbors who "had not been on good terms for some time" struck the other neighbor's horse, causing a runaway and resulting injuries).

121 *E.g.,* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995) (noting that when a majority of directors are affected by actual self-interest in the challenged transaction, the court will review the transaction under the entire-fairness standard).

122 Obviously, the argument in the text is analogous to the well-known argument about securities fraud actions under Rule 10b-5. *E.g.,* Richard A. Booth, *The End of Securities Fraud Class Action As We Know It,* 4 Berkeley Bus. L.J. 1 (2007); David D. Friedman, Law's Order 34-35 (2000). The germ of the argument goes back at least to Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. Chicago L.Rev. 611, 640 (1985).

123 Del. Code. Ann. tit. 8, §145 (2009) (authorizing corporations to indemnify directors and officers for certain expenses).