Volume 55
Issue 2 *Good Faith After Disney*

Article 11

January 2011

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VOLUME 55 | 2010/11

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Deconstructing *Lyondell*: Reconstructing *Revlon*

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I. INTRODUCTION

Delaware takeover law is bounded by two bedrock rules: (1) in the purchase or sale of a company, independent directors' decisions are protected by the business judgment rule, unless the directors acted in bad faith; and (2) in a sale, all selling directors are obligated to seek and obtain the best price for their shareholders. These two rules are the products of two leading cases: *Smith v. Van Gorkom*[1] and *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*[2] *Van Gorkom* was a misstep, corrected by the Delaware legislature.[3] *Revlon* was judicially constructed from a fierce takeover battle in which one bidder was favored over another.[4]

These rules are simply stated, readily understandable by directors and shareholders, and the protections afforded actions taken in good faith have the force of moral imperatives.[5] Both rules were both fully enunciated by 1986[6] and have been explicated

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1. 488 A.2d 858 (Del. 1985). The court found that the board had not acted in an informed manner in the sale of Trans Union, had been grossly negligent in failing to inform itself of the value of Trans Union, and thus was not entitled to the protection of the business judgment rule. *Id.* at 874. The novelty of the case was that the board was independent and without financial interest in the outcome of the sale and the directors were all experienced in business. *See id.* at 889, 895. This result disturbed the business and legal communities.

2. 506 A.2d 173 (Del. 1986). In the sale of Revlon, the court found that the Revlon directors had breached their duty of care by agreeing to deal exclusively with one bidder and to grant cancellation fees to that bidder, effectively ending an active auction for the company by Pantry Pride. *Id.* at 184–85. The court effectively held that the board's duty is to obtain the best price for the shareholders. *See id.* at 185. The auction began as a hostile takeover by Pantry Pride, and Forstmann Little & Co. was the bidder favored by management and the board. *Id.* at 175–76. In a level playing field, Pantry Pride paid $58 a share against Forstmann's best bid of $57.25. *Id.* at 178. The bidding started at $42 per share. *See id.* at 176, 181.

3. Del. Code Ann. tit. 8, § 102(b)(7) (2001). Section 102(b)(7) of the Delaware Corporation Code was enacted in 1985. It states in pertinent part that a Delaware corporation may adopt in its charter:

   > [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) [f]or 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.

   Id. The effect of section 102(b)(7) was to eliminate the duty of care in actions against directors for money damages. *Id.* Following its enactment, charter provisions of Delaware corporations were universally amended to eliminate such liability to the extent permitted by the statute.

4. *Revlon*'s so-called "best price rule" also applies when there is only one bidder, and then becomes process-oriented. The distinction to be drawn here is between substance and process. Process involves the steps taken to prepare to make a decision. *See* Melvin Aron Eisenberg, Corporations and Other Business Organizations 562 (9th ed. 2005). In this case, the decision was as to the value of the company to be sold.

5. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), is the seminal case setting out directors' oversight duties. Chancellor Allen raises the protection of the business judgment of independent directors from a "mere" judge-made rule to a moral imperative. "Indeed, one wonders on what moral basis might shareholders attack a good faith business decision as 'unreasonable' or 'irrational.'" *Id.* at 968.

6. *See supra* notes 1–3 and accompanying text.

through cases too numerous to count over practically two-and-a-half decades of global corporate mergers that have recast the size and scope of corporate enterprises. There is some inherent tension between these two rules, but it was not readily noticeable until *Lyondell Chemical Co. v. Walter E. Ryan, Jr.*[7] *Lyondell* arises as a case because of the legislative overruling of *Van Gorkom* and is the counterpart to *Van Gorkom*, both factually (the sale of the company by the CEO) and intellectually (questionable knowledge of the value of the business by an independent board, not motivated by self-interest). Logically, *Lyondell* (or a case like it) should have arisen two or three months after the enactment of section 102(b)(7), raising the question of the meaning of "good faith."[8] But it took almost twenty-five years for that question to be brought to the Delaware Supreme Court.[9]

The delay probably comes from the fact that, after the enactment of section 102(b)(7), plaintiffs seeking damages consistently pleaded that directors acted in bad faith, in lieu of claiming that the directors were grossly negligent,[10] but absent self-dealing, the defense of good faith proved to be a formidable shield.[11] Bad faith was

7. 970 A.2d 235 (Del. 2009). The Delaware Court of Chancery opinion is *Ryan v. Lyondell Chemical Co.*, No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008). References in this article to *Lyondell* are references to the Delaware Supreme Court opinion, unless otherwise noted. The tension is between the requirement of excellence, obtaining the best price, and bad faith, the utter failure to act. The middle ground is virtually excluded and the requirement of obtaining the best price (including setting up procedures to do so) severely suffers.

8. There is no statutory definition for the meaning of good faith. *See infra* note 11.

9. *Lyondell* was heard as an interlocutory appeal from a motion to dismiss the complaint. *Lyondell*, 970 A.2d at 237. The appeal was granted to decide whether the case should continue with full-blown discovery, followed by a trial. The Chancery Court had denied the interlocutory appeal, see *Ryan*, 2008 WL 2923427, at *24, but the Delaware Supreme Court took the case, obviously to truncate discovery and the trial process. *See Lyondell*, 970 A.2d at 237.

10. Such pleading was the only avenue open to plaintiffs. Good faith, however, is an affirmative defense. *See* Emerald Partners v. Berlin, 726 A.2d 1215, 1223–24 (Del. 1999) (holding that "good faith" under section 102(b)(7) as an affirmative defense must be pleaded by the defendant directors); *see also* McMullin v. Beran, 765 A.2d 910, 926 n.79 (Del. 2000) (citing *Emerald Partners*, 726 A.2d at 1223–24). The definition of "good faith" was not worked out in these merger cases, showing that it rarely, if ever, got that far. *See infra* note 11.

11. The first definitional case was *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006), which was about executive compensation, i.e., the hiring and firing of Michael Ovitz. *Id.* at 35. The element of "intent," which the *Disney* case used to distinguish gross negligence from bad faith was not enunciated in merger cases. Instead, in the merger cases, bad faith was viewed as irrational acts or those beyond reason. As Chancellor Allen observed in *In re RJR Nabisco, Inc. Shareholders Litigation*, CIV. A. No. 10389, 1989 WL 7036, at *13 n.13 (Del. Ch. 1989), "such limited substantive review as the rule contemplates (i.e., is the judgment under review 'egregious' or 'so beyond reason,' etc.) really is a way of inferring bad faith" (citations omitted). The Delaware Supreme Court equated irrationality with bad faith. In *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243, 1246 (Del. 1999), the Delaware Supreme Court said that "the presumptive validity of a business judgment is rebutted in those rare cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any grounds other than bad faith.'" *Id.* at 1246 (quoting *In re* J.P. Stevens & Co., Inc. 542 A.2d 770, 780–81 (Del Ch. 1988)); *see also* Gagliardi v. Tri Foods Int'l, Inc., 683 A.2d 1049 (Del. Ch. 1996) (commenting on the formidable shield against damages that the good faith defense provides to directors). Chancellor Allen stated, "There is a theoretical exception . . . that holds that some decisions

equated with irrationality, which may be impossible for a plaintiff to prove. There has been lengthy litigation over allegations of bad faith, but directors were advanced their defense costs and ultimately prevailed.[12]

The chancery court opinion in *Lyondell* is the first case to address bad faith after *In re Walt Disney Co. Derivative Litigation*[13] in the merger context. Plaintiffs sought to use claims of bad faith as a newly honed sword to explore bad faith in the context of *Revlon* duties, opening up settled law in the guise of a fresh approach to director liability. The Delaware Supreme Court saw the threat to directors and blunted the sword, holding in *Lyondell*, that independent directors are not liable and there are no actionable claims against them in the sale of a company, unless the plaintiffs plead with particularity the basis for showing that "those [independent] directors utterly failed to obtain the best sale price."[14] The Delaware Supreme Court in *Lyondell* effectively truncated the litigation process to avoid a full trial in which the defense of good faith would be heard.

The *Lyondell* decision is totally process-oriented. It seeks and requires judicial economy, e.g., the avoidance of full-blown trials. Indeed, it sets up the basis for dismissal at the pleading stage prior to discovery. As such, it bares the tension between the insulation of business judgment and the judicial scrutiny of director implementation of the *Revlon* best price rule in cases where the plaintiffs seek damages. In so doing, it eviscerates the *Revlon* best price rule with respect to all damage claims and orphans the numerous damage cases decided over twenty-five years that dealt with the duty of directors to get the best price for their shareholders in a sale.

Lyondell is a sea change, as recognized in *Police & Fire Retirement Systems of Detroit v. Bernal*, where the court states that, after *Lyondell*, "the shareholders' only realistic remedy for certain breaches of fiduciary duty in connection with a sale of the control transaction may be injunctive relief."[15] Until *Lyondell*, directors and shareholders understood that, unlike the business judgment rule (which precludes examination of directors' decision making process), *Revlon* required judicial scrutiny of the reasonableness of the board's decisions and process.[16] In other words, pre-*Lyondell*,

may be so 'egregious' that liability for losses they cause may follow even in the absence of proof of conflict of interest or improper motivation. The exception, however, has resulted in no awards of money judgments." *Id.* at 1051–52.

12. *See, e.g.*, *Gagliardi*, 683 A.2d at 1052.

13. 906 A.2d 27 (Del. 2006).

14. *Lyondell*, 970 A.2d at 244. From this holding, mere conclusory statements of bad faith will not suffice. The words "utter failure" were first used by Chancellor Allen in *Caremark* in defining and the limiting liability of directors in oversight cases. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996). Oversight cases are the most difficult cases for plaintiffs to prevail, according to Chancellor Allen. *See id.*

15. Police & Fire Ret. Sys. of Detroit v. Bernal, No. 4663-CC, 2009 WL 1873144, at *3 (Del. Ch. June 26, 2009).

16. *See In re* Netsmart Technologies, Inc. S'holders Litig., 924 A.2d 171 (Del. Ch. 2007). Vice Chancellor Strine states: "Although linguistically not obvious, this reasonableness review is more searching than

damage claims would be entertained, discovery allowed, and trials permitted to explore the sale process, including the board's choices.

Lyondell is best understood as expressive of Delaware's commitment to the insulation of independent directors from liability in connection with the sales process.[17] Directors are assured that they will not face draconian liability or have to defend themselves against bad faith claims, unless their conduct "utterly failed."[18] What is missing in *Lyondell* is an expression of appropriate conduct for directors, leaving us with the thought that any feeble or fumbling effort will not constitute an "utter failure." Worse, *Lyondell* rides roughshod over the expression of the various modes of acceptable conduct, a range of conduct tested in innumerable situations over twenty-five years. *Revlon* is the most flexible of rules: the board's duty is to obtain the best price in a sale, which can range from an auction for all comers to the selection of one bidder, without a market test, depending on the board's reasons and the reasonableness of the board's actions.[19] No claims, other than claims of an utter failure, will now be actionable for damages.

Revlon is too important to be left in ruins. *Revlon* must be reconstructed so that injunctions are not the only prescriptive basis in which to monitor the reasonableness of directors charged with the duty to get the best price. Indeed, injunctions may be helpful, but they are disruptive and difficult to obtain in the middle of the action because courts are truly put in the position of second-guessing directors' business decisions.[20] Moreover, the threat of damage claims helps focus the board on fulfilling its duties.

The easy *Revlon* cases are those in which there are competing bidders. Under *Revlon*, the board cannot favor one bidder over another. Favoritism is easy to detect. And indifference, even a stupor, will promote shareholders' interests where competition is robust. Indeed, in a bidding war, the board should get out of the way and not change any rules in the middle of the contest, unless a change in the rules unequivocally promotes the bidding contest without detriment to any one bidder.

rationality review, and there is less tolerance for slack by the directors." *Id.* at 192. *NetSmart* is an injunction case, which puts Strine in the position of correcting director behavior. His observation about "less tolerance for slack" also bares some of these conflicts with the business judgment rule. *See id.* The business judgment rule as modified by section 102(b)(7) is the predominant rule, but that should not mean that the rule of *Revlon* asserts little or no influence.

17. This commitment is enunciated in section 102(b)(7) of the Delaware Corporation Code. *See* Del. Code Ann. tit. 8, § 102(b)(7) (2001); *see, e.g.*, *Police & Fire Ret. Sys. of Detroit*, 2009 WL 1873144.

18. *See Lyondell*, 970 A.2d at 244. Revlon duties are now equated with oversight duties, subject to the "utter failure" standard. *See supra* note 14 and accompanying text.

19. *See In re* Amsted Indus. Inc. Litig., No. 8224, 1988 WL 92736 (Del. Ch. Aug. 24, 1988) (the leading case holding that alternatives to auction procedures are acceptable).

20. That is, unless the chancery court changes the standards for injunctive relief because no damage remedy is available. *See Police & Fire Ret. Sys. of Detroit*, 2009 WL 1873144, at *6. Injunctive cases require fast and immediate action, which is a stress on the judicial system and not always the best way to decide complex issues where the board has latitude. The board is directly involved in merger situations and the involvement is meant to be more "hands on" than in matters of (standard or typical) business operations, the ordinary subject of the oversight cases.

The situation where there is only one bidder at the outset, and no other bidder surfaces during the process, is a different matter. Here, the board must act with care and promote readily available options for other bidders to intervene at any stage of the process. The real question would be whether the board's actions intentionally impaired the process by discouraging competing bids. This is quite different from looking at whether there has been an "utter failure." There are a significant number of cases in which the process was intentionally impaired.[21]

This article will address the reasons for the *Lyondell* holding, deconstructing the case and then attempting to reconstitute (reconstruct) *Revlon*, which has needed careful review for a long time. There has been an inordinate insensitivity to the role of lock-ups[22] in the sales process, clearly evident in *Lyondell*. Indeed, *Lyondell* has made the sales process opaque rather than transparent, and has not promoted clear directives of acceptable behavior for directors.[23] Accordingly, Part II of this article, *Lyondell* Deconstructed, will present the *Lyondell* case in detail, relying on the fact-finding of the Delaware Chancery Court. This Part also examines the review of the board's decision-making process by the Delaware Supreme Court, focusing on the facts considered important by the court, noting the facts ignored, and, in effect, deconstructing the case. Also in Part II, *Van Gorkom*, the earlier case where issues of bid price were central to the opinion, will be considered to show how *Van Gorkom* prompted the best price rule of *Revlon*. From this analysis, which explores the tension between *Lyondell* and *Revlon*, Part III, Reconstructing *Revlon*, will discuss the development of the *Revlon* rule over the past twenty-five years, particularly the development of the rules dealing with lock-ups, which sometimes promote and often hinder realization of the best price. In Part III, the rationale for lock-ups as part of the sales process is explored.

The thesis of this article, explained in Part III, is that the standardization of certain forms of lock-ups have rendered the pursuit of the best price difficult and filled the process with needless pitfalls. It is the negotiation of lock-ups that appeared to preclude other bidders and thus prompted the Delaware Court of Chancery in *Lyondell* to opt for a full trial to explore the sales process. In Part III, I propose adjustments and simplifications to lock-ups and encourage the early distribution of company valuation materials, namely earnings projections. Early distribution of

21. *See, e.g.*, *In re* Netsmart, 924 A.2d 171 (injunction granted for failure to canvass industry bidders). See also *Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009), as a variation on the theme of protecting the management's interests where insiders favored a recapitalization over an outright sale. Independent directors may often favor one set of bidders over another or try to assure the first bidder that the deal will be done because the management favors one bidder over the other, although the directors have no economic stake in the outcome. This is impermissible.

22. For a definition of lock-ups, *see infra* notes 74–75 and accompanying text.

23. Part of the difficulty the chancery court had in dealing with the *Revlon* requirement of the best price was the effect of the lock-ups. *See* Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008). The Delaware Chancery Court notes that plaintiff complains that the deal protection devices "essentially 'locked up' this transaction" and the court denied the defendants' summary judgment to examine the lock-up. *Id.* at *3 n.11 and accompanying text. The *Lyondell* Supreme Court opinion did not address the lock-ups.

projections will promote both transparency and the *Lyondell* imperative of judicial efficiency, while enhancing the board's ability to obtain the best price in a sale of control.

II. *LYONDELL* DECONSTRUCTED

Lyondell and *Van Gorkom* are factually similar cases. This is no surprise, although twenty-five years separate them. We like to think that boards have grown more knowledgeable and the marketplace more sophisticated over the years. But all that has changed is the size of the deals, not the human motivations behind the deals.[24] Both Trans Union and Lyondell were controlled by imperial CEOs who demanded a compliant board. Jerome Van Gorkom, the CEO of Trans Union, chose to sell his company to Jay Pritzker (the head of a vast, privately held corporate empire) because Van Gorkom was of retirement age and was seeking a considerable premium for his stock. In addition, Trans Union, a public company, was no longer able to benefit from the investment tax credit on its equipment purchase of railcars.[25] An inability to use this credit would render Trans Union non-competitive and decrease its stock price.[26] Pritzker was seeking the company's steady cash flow and could utilize the investment tax credit to shelter the company's income.[27]

The men shook hands on a deal, including a lock-up—in this case, a stock option, the most potent of lock-ups.[28] Both men were consummate deal makers and considered their word to be their bond. Van Gorkom then presented the deal to the board, with only hours to act.[29] The board accepted Van Gorkom's assurances of value, without independent verification or discussion. Van Gorkom delivered the company to Pritzker at the agreed-upon price of $55 per share, despite the interest of Kohlberg, Kravis, Roberts & Co. (KKR) at $60 per share.[30] The fact that there was an opportunity for a possible higher price, which was discouraged, inflamed members of the Delaware Supreme Court and resulted in a 3-2 decision holding the independent directors personally liable for blindly following Van Gorkom's recommendation.[31]

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24. *Van Gorkom*, involving the sale of Trans Union, was approximately a $750 million transaction. *See* Smith v. Van Gorkom, 488 A.2d 858, 866–67 (Del. 1985). Lyondell was a $13 billion transaction. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 239 (Del. 2009). The deal dynamics at work were the same, as will be noted.

25. *See Van Gorkom*, 488 A.2d at 864.

26. *See id*. at 864–65.

27. *See id*. at 864–66.

28. In practice, the potency of the stock option resides in the fact that at the time of grant it usually contains a spread between the exercise price (often the pre-merger trading price) and the deal price at the time of announcement, usually a 20% or more premium on the pre-merger announcement trading price. If a competing bidder then offers more than the deal price, the value of the option increases. This spread and the increase effectively discourage the competing bidder.

29. *See Van Gorkom*, 488 A.2d at 867–68.

30. *Id.* at 868–69, 884.

31. *Id.* at 874, 893. KKR needed certain members of the management to agree to continue in the business. Van Gorkom discouraged a key manager from making such a commitment. *Id.* at 885.

Dan F. Smith, Chairman and Chief Executive Officer of Lyondell, chose to sell Lyondell to Leonard Blavatnik, the Chairman of Access, a private holding company that was the parent company of Basell, a Luxembourg company and a "global leader in polyolefin technology, production, and marketing."[32] Smith's motives were more complex than Van Gorkom's because he probably did not intend to retire at the time Blavatnik, through Access, purchased an 8.3% stake in Lyondell held by Occidental.[33] But at the moment of Access's Schedule 13D filing with the Securities and Exchange Commission (SEC) to report its purchase of the Occidental block, it was clear that Lyondell was in play and Smith could lose control. Indeed, shortly after Access filed its Schedule 13D—within three days—Apollo Management, a private equity group (a counterpart to KKR, then known as a leveraged buy-out firm), approached Smith to sponsor a management-led leveraged buyout of Lyondell. Smith "flatly rebuffed" Apollo.[34] The nominal reason was a conflict of interest. More apparent was the fact that Smith was deleveraging Lyondell and probably did not want to run a highly leveraged company when he was of retirement age because changes in the economy could result in severe losses, which would reduce the value of the company and his nest egg.[35] This conservatism was sound. The leveraged Lyondell ultimately filed for bankruptcy.[36]

Smith immediately approached Blavatnik after the 13D filing, much the same way Van Gorkom approached Pritzker, deal-maker to deal-maker. Smith insisted on $48 per share. Blavatnik countered with lesser numbers, but Smith told him that nothing less than $48 would get his recommendation or the board's approval, although he had not spoken to the Lyondell board.[37] Blavatnik met the bid and insisted on an array of lock-ups, including a 3% break-up fee of $400 million, and assured Smith that the financing was fully in place.[38] The two men agreed.

On July 10, 2007, Smith then took the deal to the board and told the members, as Van Gorkom had similarly told his board, that there were only a few days to make the decision.[39] Although this was the first time that the board had heard of the deal, the time constraints were real. Blavatnik had entered into a deal to buy Huntsman Chemical in June and Apollo had intervened and placed a superior bid on the table on July 4.[40] Blavatnik had to counter or terminate the contract with Huntsman Chemical.

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32. *See* Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 WL 2923427, at *4 (Del. Ch. July 29, 2008).

33. *Id*. at *4 n.17 and accompanying text; *see Van Gorkom*, 488 A.2d at 866 ("It is noteworthy in this connection that he [Van Gorkom] was then approaching 65 years of age and mandatory retirement.").

34. *See Ryan*, 2008 WL 2923427, at *5 n.21 and accompanying text.

35. *See id*. at *6 nn.25–27 and accompanying text.

36. *See Chemical Unit Files for Bankruptcy*, N.Y. Times, Jan. 7, 2009, at B4.

37. *See Ryan*, 2008 WL 2923427, at *5–6.

38. *Id.* at *6, 8.

39. *See id*. at *6–8 nn.29–41 and accompanying text.

40. *Id.* at *6.

Blavatnik agreed to the $48 price for Lyondell at the end of the day on July 9 and asked for a firm commitment from the Lyondell board by the end of the day on July 11 to meet his deadline to drop or raise his bid for Huntsman Chemical.[41]

The Lyondell board gave Blavatnik his asked-for assurances of the acceptability of the $48 per share price. Thereafter, the board attempted some renegotiation through Smith as their negotiator, but Blavatnik made only cosmetic adjustments to his offer. Indeed, Blavatnik told Smith that they had a deal on price and terms, and that he should stick to it. The agreement with Smith and the board's assurances had given Blavatnik the high moral ground, and Smith told the board there was no movement and the deal was too good to lose.[42] This "too good to lose" refrain, also used by Van Gorkom, was the threat of liability to shareholders for rejecting a very good deal.[43] The Lyondell board's actions and decisions took place over a seven-day period in which an investment banking firm was hired to pass on the fairness of the price. On July 16, 2007, the board adhered to its forty-five minute decision on July 11 to give Blavatnik a prompt, definitive agreement.[44] Nonetheless, it is difficult to fault the board. The board believed that it acted responsively and responsibly to the constraints of the deal presented and that it received a good price. When presented with the deal, the board followed the well-trod path set out by *Revlon* and its progeny, of bringing in an investment bank and obtaining a fairness opinion.

The class action complaint of the Lyondell shareholders alleged that the directors had breached their duty of care, loyalty, and candor and put their personal interests ahead of the shareholders. The Delaware Court of Chancery rejected all claims, except those directed at the process by which the directors agreed to sell the company and the use of deal protection provisions in the merger agreement.[45] The chancery court saw indolence in the board's actions because of the decision of the board to "wait and see" in May, after the 13D filing by Access and Smith's presentation to the board on July 10 of a $48 per share offer.[46] The Delaware Supreme Court rightly corrected the chancery court by noting that the *Revlon* rule, the best price rule, did not become operative until the board decided to sell the company in July.[47] The chancery court was disturbed by the board's inaction until then, but the failure was

41. *Id.*

42. *See id.* at *7–8. Smith would walk away on the closing of the deal with a payout of close to $100 million, including the benefit of a significant acceleration of stock options, triggered by the sale, providing him with a significant retirement package. He was motivated to get a high price, once he chose to sell, but he wanted to pick his buyer, as the rejection of Apollo shows. There were allegations that he would continue as CEO of Lyondell. *See* Lyondell Chemical Co., Definitive Proxy Solicitation Material, Merger or Acquisition 41 (Form DEFM14A) (Schedule 14A) (Oct. 12, 2007). The Chancery Court points out that the vesting of options "does not create a *per se* impermissible interest in the transaction." *See Ryan*, 2008 WL 2923427, at *10 n.53 and accompanying text. But it shines a light on Smith's behavior.

43. *See* Smith v. Van Gorkom, 488 A.2d 858, 868–69 (Del. 1985).

44. *See Ryan*, 2008 WL 2923427, at *7–8.

45. *See id.* at *3, 11.

46. *See id.* at *5–6, 12–14.

47. *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 241–44 (Del. 2009).

on the part of Smith, e.g., not telling his board of his negotiations with Blavatnik.[48] And that failure was not raised by the plaintiffs in the case as an independent claim against Smith.[49] The board's failure to satisfy its *Revlon* duty was its reliance on the CEO, which is understandable human error, correctable by the courts by pointedly disapproving of such behavior. If there was a single missed opportunity in the supreme court opinion, it was the court's failure to chastise the board for relying on the CEO as the negotiator after it learned of the $48 deal, the obvious product of secret negotiations.

The failure of this case is not only about the human error of choosing the wrong negotiator. It is structural as well, and goes to the systematic insensitivity on the part of the Delaware courts to acknowledge the impediments to best price realization posed by deal lock-ups[50] and the necessity of access to valuation information, mainly company projections of earnings, to allow the bidding process to freely and properly function.

First, as to valuation information,[51] Wall Street had the following information for Lyondell based on reported earnings: the discounted cash flow showed a range of value between $30 and $39 per share; a leveraged buyout (LBO) analysis showed a range of value between $32.25 and $38.50 per share. The Wall Street information was the information in the public filings of Lyondell with the SEC.[52] On the other hand, Lyondell management and the board had much more robust information as to the company's value based on Lyondell's business plans and projections. These numbers showed discounted cash flow values ranging between $37 and $47 per share, and an LBO analysis of values ranging between $44.75 and $51.50 per share, and liquidation values of about $58.50 per share.[53]

The $48 price per share that Smith sought from Blavatnik is about the mid-point in Smith's LBO value analysis and was obviously made available to Blavatnik in the negotiations. No other putative acquirer had such valuation information, and as a result, the $48 bid, a 45% premium over the unaffected Lyondell trading price, had to appear to outsiders to be on the high side given the Wall Street information, a blow-out price. The chancery court comments on this apparent disconnect between appearance and reality in the first paragraph of the opinion, appropriately so, this

48. *See Ryan*, 2008 WL 2923427, at *5, 12–16.

49. *Compare id.* at *10 n.59 (stating that the plaintiff did not challenge the directors' independence from Smith and thus the court concluding that "it is not necessary to consider in any detail whether Smith's personal financial interest . . . amounted to a breach of his duty of loyalty"; and going on further to state that the ten independent directors, independent from Smith, were solely responsible for the decision and dismissed the duty of loyalty claims), *with* Lawrence Lederman, Disney *Examined: A Case Study in Corporate Governance and CEO Succession*, 52 N.Y.L. Sch. L. Rev. 557, 579–81 (2007–08).

50. For a definition of lock-ups and a discussion of their use, *see infra* notes 74–80 and accompanying text.

51. The valuation information is reported in *Ryan*, 2008 WL 2923427, at *8.

52. *See id.*

53. *See id.*

being a *Revlon* case about obtaining the best price.[54] In other words, the ball was hidden from all of the other possible players.[55]

This lack of information was a real impediment to the bidding process, but would not be necessarily fatal, if not for the break-up fee, which was preclusive but appeared to be well within the *Revlon* parameters. The break-up fee was $385 million on a $13 billion deal, about 3%.[56] Compare this to the Huntsman deal where Blavatnik had negotiated a $200 million break-up fee on a $10 billion deal, or less than 2%.[57] There is an apparent reason for the difference. The Huntsman family was personally, heavily invested in the deal and did not want to preclude topping bids. The strategy worked, as shown by Apollo's bid. Blavatnik learned his lesson from that Apollo bid and pushed it to the limits in *Lyondell*, seeking a $400 million break-up fee. Blavatnik now sought to preclude others from bidding.

In Blavatnik's favor then, against other putative bidders, was the $385 million break-up fee, plus the benefit of the 8.3 million shares he had purchased from Occidental.[58] Those shares were purchased at a substantial discount to his offer price for Lyondell and had a built-in gain of, conservatively, $200 million.[59] In addition, Blavatnik benefitted from the $200 million in break-up fees from Huntsman, a total of $800 million or $3.20 a share on the Lyondell stock.

The powerful effect of this money is easy to see, if you attempt to game the bidding process for Lyondell and look at the way the potential players had to look at the contest. A decent overbid would be $50 per share, if the players all had the same information, which was the high end of Lyondell's LBO value. A $49 bid is weak and allows Blavatnik to bid $50, which would probably be the winning bid. For the challenger, it is best to go directly to $50 per share, if that is your best bid, rather than bid at all and lose the company. A $50 bid would force Blavatnik to pay more than $50, e.g., $51, the top end of a projected purchase price. Such a bid would be prohibitive, unless the deal is essential for corporate survival, which it would not be in Lyondell's case because Lyondell was a conglomeration of companies, not a pure play in its industry with a commanding market position in any of its businesses. The prospective bidder at $50 per share had to look at Blavatnik's position before making

54. *Id.* at *1.

55. The problem of lack of information is inherent in those situations in which a bidder is selected without a so-called "market check," the furnishing of valuation information to selected bidders. Such valuation information becomes available, if at all, only at the time of the distribution of proxy material, months after the deal has been signed, and by that time the time advantage discourages other bidders because regulatory and financing hurdles have already been cleared. To then stop the music requires a very hefty premium to overcome deal uncertainty. Paramount lost out to Warner because it had not received antitrust approval at the time it decided to compete with Warner. The hefty price could not stop a deal that was certain to close. *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1990).

56. *Ryan*, 2008 WL 2923427, at *1.

57. *Id.* at *7 n.33.

58. *Id.* at *4 n.17.

59. *See* AI Chemical Investments LLC et al., General Statement of Beneficial Ownership (Schedule 13D) (May 11, 2007), which shows Lyondell shares purchased at $32.1130 per share.

a bid. Blavatnik, with his $3.20 per share advantage, could easily reach $51 and still only be paying $48 per share. Considering such fire power, it would not make sense to compete. If you do not count the gain on the 8.3% of the shares held by Blavatnik or his $200 million break-up pay out from Huntsman, the $385 million break-up fee is worth $1.50 per share. The potential bidder at $50 per share pays the cost of the break-up fee and is, in reality, paying $51.50 a share, the absolute top of the LBO value analysis. The air at such altitude is very rarified and would leave most bidders breathless. This gaming analysis shows the reason that even a 3% break-up fee can, on the margin, be preclusive to outside, competing bidders.[60]

Smith and the board knew of the preclusive effects of the break-up fee, along with the non-public disclosure of the internal valuation of Lyondell. [61] The fee was in the so-called "customary range." The board could well understand that this break-up fee was used to leverage Blavatnik into paying the mid-point of the range of value. From Blavatnik, they extracted a "no financing out" clause, which means that Blavatnik took the risk of obtaining financing and would have to pay a significant termination fee (a so-called "reverse break-up fee") if he wanted to terminate the deal.[62] These "reverse" fees have provoked litigation.[63] And considering the amount of the break-up fee, as well as the unavailability of valuation information to any other potential bidders, Lyondell could not expect to see another bid from anyone in the industry or from an LBO player.[64]

This brings us to a consideration of *Revlon*.[65]

III. RECONSTRUCTING *REVLON*

Van Gorkom was a *Revlon* case before *Revlon*. The focal point in the *Van Gorkom* case was the best price for shareholders. The legal issues posed were about the duty of care, the process of getting to the best price, and whether the best price was obtained.

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60. The plaintiff conceded that none of the deal protections "standing alone" were preclusive, but argued that the cumulative effect was to preclude other bids. *See Ryan*, 2008 WL 2923427, at *16. The court took the cumulative effect argument seriously and it was a basis for denying the board summary judgment. *See id.*

61. *See id.* at *6–7. The board tried to reduce the fee but Blavatnik resisted, and thus relied on the "blowout" price. *See id.* at *7. Reflecting on the deal protections, despite the price, the chancery court observes "maybe someone—a knowledgeable someone—had material doubts about whether the price itself would scare off any potential poacher." *Id.* at *17 n.103.

62. *See id.* at *6–7. The deal certainty, preclusive lock-ups, granted to Blavatnik required him to assure Lyondell that there was also certainty of the deal closing; which meant "no financing outs" and a hefty reverse break-up fee.

63. *See, e.g.*, Hexicon Specialty Chems. Inc., v. Huntsman Corp., 965 A.2d 715 (Del. Ch. 2008); United Rentals, Inc. v. Ram Holdings. Inc. 937 A.2d 810 (Del. Ch. 2007). These cases show that reverse fees are common and are meant to discourage buyers from walking away.

64. Apollo, which had shown early interest and had been rejected by Smith, was now fully engaged with the Huntsman acquisition. *See Ryan*, 2008 WL 2923427, at *13. The break-up fee assured certainty of outcome, that Blavatnik was the buyer.

65. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

In other words: Had this board tested the market, understood the value of the company, and acted diligently to allow an opportunity for a competing bid? The Delaware legislature closed off the issues of care with the enactment of section 102(b)(7).[66] In response, the Delaware Supreme Court announced the duty to obtain the best price in *Revlon* the way courts always do, by insisting that it was inherent in the fiduciary duties of directors, not based on the duty of care. What was new about *Revlon* was that it opened up the ability of the courts to examine the reasonableness of the sales process followed by directors.[67] In a real sense, the *Van Gorkom* case was a false start, or was declared such by the legislature, and *Revlon* was a brilliant repositioning to deal with the same issues.

Revlon arose out of the hostile takeover bid for Revlon made by MacAndrews & Forbes Holding, Inc. (through its subsidiary, Pantry Pride). The hostile bid was sharply contested by Revlon, which first launched an exchange offer for its Senior Subordinated Notes ($47.50 principal amount at 11.75% interest) for each share of Revlon, up to ten million shares.[68] The purpose of this self-tender was to leverage Revlon to the point where it would cease to be attractive to the hostile bidder. That tactic, however, did not work. In a brilliant financial move, Ronald O. Perelman, who controlled MacAndrews & Forbes, lowered the price of his offer to account for the reduction in equity. The Revlon board then sought a "white knight" in the form of the leveraged buy-out firm Forstmann Little & Co. In the ensuing bidding contest between Forstmann and Perelman, the court found that the Revlon directors had breached their duty of care by agreeing to deal exclusively with one bidder and to grant cancellation fees to that bidder, effectively ending an active auction for the company by Pantry Pride.[69] The court held that the board's duty is to obtain the best price for its shareholders. The auction began as a hostile takeover by Pantry Pride, but Forstmann Little Co., the so-called "white knight," was the bidder favored by management and the board. In a level playing field, Pantry Pride ultimately paid $58 a share against Forstmann's best bid of $57.25. The bidding started at $42 per share.[70]

The Delaware Supreme Court insisted on a level playing field and no favoritism. The board's duty was to obtain the best price for its shareholders, without regard to any other factors.[71] The court was careful, as it developed the law, to say that the

66. *See* Del. Code Ann. tit. 8, § 102(b)(7) (2001).

67. *See Revlon*, 506 A.2d at 173. *Revlon* cleared the path to examine negotiations and valuations, rather than solely defensive actions of directors enunciated in the Unocal takeover contest. *Id. Unocal* can be read broadly to cover director actions in sales of company control, but Revlon, in more specific terms, monitors such sales process. *Compare* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), *with Revlon*, 506 A.2d at 173.

68. *Revlon*, 506 A.2d at 177.

69. *See id.* at 184–85.

70. *See id.* at 175, 179–80.

71. *Id.* at 185.

> [W]e must conclude that under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment, and followed a course that ended the auction for Revlon, absent court intervention, to the ultimate

process chosen to obtain the best price was up to the directors,[72] but that the end result of the process, or its sole purpose, was the best price, without favor to any bidder.[73]

With such clarity, moral as well as legal, little should impair the board's vision. But lock-ups did, in fact, add a very confusing element that clouded transparency in bidding contests. To understand the confusion, you have to ask three fundamental questions about lock-ups: (1) What are they?; (2) How do they work?; and (3) Why are they necessary?

Lock-ups are any device that impedes a competing bidder, such as stock options, break-up fees, or agreements that allow the original bidder to force a merger vote by the target's shareholders or cause the seller to withhold material valuation information about the company from other bidders.[74] They are negotiated at the time the deal is negotiated and they are demanded by the buyer to help preclude competing bids, in essence, to "lock up" the deal. The buyer seeks to craft lock-ups as close to preclusive as possible, and the seller uses the ability to grant such semi-preclusive arrangements to facilitate its negotiations for the best price.[75]

Lock-ups first developed in the latter part of the 1970s at the time when the merger market became active and investment banking firms had the ability to find a competing bidder for a company subject to a hostile takeover within ten calendar days.[76] The awareness of a ready, highly competitive market for companies induced buyers to seek lock-ups. Early lock-ups were draconian, such as crown jewel options, which gave the buyer the right to purchase selected valuable assets of the seller at a favorable price in the event a competing bid prevails. As a result, the competitor would be able to buy the castle, but the crown jewels would be gone, taken by the original bidder. Options on large blocks of stock were also used, to be purchased with a subordinated note at a very favorable interest rate. The benefit of the stock option was that, as the competitor raised the price for the target, the competitor ratcheted up the

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> detriment of its shareholders. No such defensive measure can be sustained when it represents a breach of the directors' fundamental duty of care. (citation omitted). In that context the board's action is not entitled to the deference accorded it by the business judgment rule.

Id.

72. *See In re* Amsted Indus. Inc. Litig., No. 8224, 1988 WL 92736 (Del. Ch. Aug. 24, 1988) (holding that alternatives to auction procedures are acceptable).

73. *See Revlon*, 506 A.2d at 185.

74. *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994) (discussing various types of lock-ups); *see also* Jeffrey J. Haas, Corporate Finance in a Nutshell 460–67 (2004).

75. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 926–27, 930–33 (Del. 2003) (discussing preclusion).

76. Ten calendar days was the required duration of a tender offer under the Williams Act, adopted in 1968, and before that by the New York Stock Exchange for listed companies. The SEC amended the statutory ten day period in 1980 when it adopted the first set of changes to the Williams Act and initiated the twenty business day rule. Until 1980, so-called "white knights" were readily found and encouraged by investment firms to launch a competing bid within ten calendar days. *See* 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 11.5(3)(B) 233 (4th ed. 2002).

purchase price and gave the original buyer a huge windfall.[77] Both of these kinds of lock-ups were disapproved by the Delaware courts. Under *Revlon*, the courts began regulating the kinds and the extent to which lock-ups could be granted.[78]

The courts examined lock-ups on a case-by-case basis, striking down lock-ups that were deemed preclusive, and created in the process a comfort zone or safe harbor for the various arrays of lock-ups utilized, including the piling up, one on top of another, of the customary forms of lock-ups used in addition to break-up fees. A break-up fee of 3% of the equity purchase price (exclusive of debt being assumed) became a safe harbor out of this process and was used and approved in dozens of cases by the Delaware Chancery and Supreme Courts.[79] Indeed, in *Lyondell* the Supreme Court did not quarrel with the lock-ups. They were so deceptively ordinary as to not deserve or provoke comment.[80]

The question is: If the courts have to monitor lock-ups (and have chosen to do so) in the sales process where the goal of the process is to obtain the best price, why tolerate lock-ups?[81] They add considerable costs and reduce the proceeds available to shareholders. There is no doubt that the shareholders pay the cost of lock-ups and are hurt by the failure to disseminate valuation information made available to a selected bidder. If the lock-up precludes bidders (such as Apollo in *Lyondell*), it reduces the price to shareholders. And if there is a competing bid, a lock-up reduces the amount of that competing bid because all buyers have to calculate all potential costs layered on the purchase price in making their bids. The conventional answer in support of lock-ups is that buyers will not negotiate for the purchase, if the first buyer is merely a stalking horse for other bidders. The buyer must cover its costs and also feel that being first offers an advantage, otherwise the buyer will not play, e.g., by setting a floor price. Stated succinctly, this conventional answer holds that if the courts were to ban lock-ups, they would be discouraging an important economic activity that is beneficial to shareholders. Indeed, in this line of argument, a 3% break-up fee is a small price to pay for the merger premium being made available to shareholders.

This conventional answer is largely spurious. There may be good reason to cover the buyer's costs, even with a rule of thumb measure such as 1% of the equity purchase price. But there is little evidence that there would not be a merger market without

77. In practice, and in my professional experience, the stock options were not exercised. The competing bidder would pay the "spread"—the difference between the exercise price and the purchase price for the company—to the losing bidder.

78. *See Paramount*, 637 A.2d at 34.

79. *See, e.g.*, McMillan v. Intercargo Corp., 768 A.2d 492, 505 (Del. Ch. 2000); Matador Capital Mgmt. Corp. v. BRC Holdings, 729 A.2d 280, 291 n.15 (Del. Ch. 1998).

80. The ordinary or common nature of lock-ups is argued in *Police & Fire Retirement System of Detroit v. Bernal*, No. 4663-CC, 2009 WL 1873144, at *2 (Del. Ch. June 26, 2009).

81. The chancery court sees this case as arising from "the intersection of two fundamental tenets of Delaware law," an intersection of *Revlon* duties and the permissiveness of lock-ups as addressed in *Unocal* and *Omnicare*. *See* Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 WL 2923427, at *2–3 nn.9–12 (Del. Ch. July 29, 2008).

lock-ups.[82] Indeed, every hostile takeover is undertaken without any protections on the part of the target as well as the hostile bidder, and necessarily invokes the search for competing bidders who will be given access to the company's most privileged valuation information and generous break-up fees.[83] Few believe that so-called "white knights," subsequent bidders, need the break-up fees to enter the bidding. The fee is simply a leg up. But when the original hostile bidder wins, which is often enough, the fee is a cost borne by the shareholders. Perhaps the fee for the original bidder should be called the origination fee, which is a sound way of looking at it.

The competitive bidding process (including auctions) raises the one important reason for lock-ups: to give the board control of the sale process. From this position, the board can assure the selected bidder that the board will be able to reward the bidder that follows the rules set out by the board. In other words, break-up fees and lock-ups permit the board to control a bidding or auction process and reward the bidder whose price has had some market test. The reward is definiteness of outcome, that is, assurance that if the process is fully followed the anticipated deal will result.

This reason for tolerating, even promoting, the use of lock-ups requires refinement because lock-ups are meant to impede further bidding and are a cost to stockholders. Where the board has not marketed the company and has not held an auction in which buyers compete, there is little reason to reward the bidder for more than its expenses. If the bidder is open to this (and agrees to a marketing opportunity because the bidder believes that it has offered a blow-out price, such as Blavatnik claimed in *Lyondell*), then something like 1% of the equity as a break-up fee is justified. Where the board conducts an auction and assures the competitors that the best price will be selected, then a much larger break-up fee of 3%, 4%, or even 5% is justified because the purpose of the auction is to get the best price at the auction, usually with sealed bids to provoke the best price from the most aggressive bidder, and then drop the hammer. After an active auction, the break-up fee is the hammer.

In other words, the bidder earns the lock-up. Where the first bidder is selected and the board both believes that they have found the best buyer without a market test, and wants to induce a bid, a small break-up fee, a fee under 1%, may be justified. Seller (and possibly buyer) believes that the price will withstand competition or there will be no competition and, as a result, there is no reason to grant more fees.[84] The small fee announces a negotiated transaction and does not place obstacles in the way

82. Indeed, the Lyondell board proposed a break-up fee of 1% during a "go shop" period in which Lyondell could actively seek prospective buyers, but this approach was easily rejected because Smith had lost negotiating leverage and the courts have approved 3% break-up fees in situations without "go shop" provisions. *See id.* at *7.

83. The irony of Blavatnik's break-up fee is that he initially positioned himself as a hostile bidder, upon filing the Access 13D, and did not need a fee as inducement. His play in seeking the break-up fee was to get a preclusive fee. If he had made a hostile bid without a break-up fee, his 8.3% stock advantage would have justified the payment of a 3% fee to the competing bidder, to level the playing field. *See id.* at *4–5. Different circumstances require the use of judgment.

84. There is also no reason to approve restrictions on dissemination of confidential valuation information to bidders who sign confidentiality agreements, before or after they make a bid. Limiting information only to so-called "superior bidders" requires bidders to take a leap of faith, which impairs the free market.

of other potentially competing bids. If the buyer is open to a real market test, then a higher fee (or intermediate fee) is justified. And where the buyer has offered the best price in an auction, then the highest break-up fee is justified.

This change of emphasis, treating lock-ups as earned (and largely abusive where there is no market check), sets an easy standard for the board to follow. The question the board must answer is: Did the buyer earn the lock-up? Judgment may be called into question, but if the question is addressed, then there is no basis for liability. The *Lyondell* standard of "utter failure" to seek the best price can easily be addressed, as can the question of whether the independent board intentionally impaired the bidding process.[85] Making the buyer earn the fee puts the power in the hands of the board, which has the duty to get the best price. For too long, the lock-up has been viewed as a consolation prize and not as an integral part of the sales process. A graduated fee schedule gives the board the necessary instructions on promoting the best price.

IV. CONCLUSION

Lyondell is expressive of the Delaware court's commitment to the insulation of independent directors from personal liability in connection with the sale of companies. The case makes it extremely difficult to plead bad faith claims against directors involved in the sales process, unless the plaintiff pleads facts showing an "utter failure" to promote the best price in a sale. The "utter failure" standard equates the *Revlon* best price standard with the oversight cases under *Caremark*, which is a regressive development. What is missing in *Lyondell* is any expression of the appropriate conduct for directors. The first missed opportunity was the failure to prohibit management from taking the lead in the negotiation and sale of the company. The second was the failure to address the role of lock-ups in the sale process, whether they are intentionally being used to impair the sales process or to promote it. Valuation information is important for competitive bidding, and break-up fees and restraints on the distribution of such information severely inhibits the bidding process.[86] In *Lyondell*, the break-up fees were preclusive, considering both the value of the company known to the marketplace and the amount of the break-up fee in relation to reasonable bids based on that valuation information. The company's projections showed that there was a robust opportunity for an auction.[87]

The Delaware Supreme Court's holding in *Lyondell* forces an examination of *Revlon*. If there are no defined duties that directors must satisfy, other than the general obligation to get the best price for shareholders, and the directors cannot be called to task with damages, then all the cases reviewing the reasonableness of the

85. *See supra* Part I.

86. The Lyondell board attempted to create an incentive in favor of shopping (and distributing valuation information) by limiting the break-up fee before a shopping period to 1%. The proposal was rejected by Blavatnik and there were no judicial constraints in the case law that would encourage the Lyondell directors to insist on such a limiting approach. *See Ryan*, 2008 WL 2923427, at *7.

87. *See supra* notes 51–54 and accompanying text.

sales processes that boards have engaged in for the last twenty-five years are basically abandoned and the race-to-the-bottom accusations about the Delaware courts are relevant and reinvigorated. The Delaware courts are common law courts working within a statutory framework. In damage cases, they must re-examine *Revlon*. For twenty-five years, they have tried to promote vigor in the sale of companies; now vigor need not be shown, when any fumbling or feeble effort will suffice to avoid an "utter failure."

The best approach to *Revlon* is to examine those impediments (e.g., lock-ups and dissemination of valuation information) to vigorous competition between bidders, justified on the basis of promoting and directing competition for the benefit of shareholders. Currently, break-up fees and other lock-ups are regarded as something that the bidder demands to induce the bid. There are some costs to bidders being first, but nothing justifies break-up fees regarded as "customary" when there has been no market check. Out-of-pocket expenses may be appropriate, but little more, and the withholding of valuation information disserves any claim that the directors are subject to a duty to seek the best price. A change of the casual attitude towards lock-ups has to be made, a change to require the bidder to earn the break-up fee and put the board in the position of rewarding market-enhancing behavior which promotes the best price for shareholders. This will mean a graduated fee schedule. Such a schedule instructs the board on its role and will reinvigorate the sales process under *Revlon*. It will also create standards against which "utter failure" can easily be judged, placing the court in a position to determine whether the board intentionally impaired the bidding process by withholding information or granting grossly improvident lock-ups.

The most difficult situations that boards face are those in which they enter into a definitive agreement with a bidder in which there has been no market check and there is a disparity between the valuation information known to the company and known to the market. In those cases, the board's duty is to place no impediments on other bidders—that is, with low break-up fees that are largely limited to expenses, and while giving any bidder the right to seek and obtain the valuation information given to the first bidder—and without complex limitations on what constitutes a superior bid. If that baseline is achieved, *Revlon* will again be the vehicle for ensuring that directors obtain the best price, expressive of directors' duties in a sales situation.