DIRECTOR LIABILITY

Reactions and Overreactions to *Ryan v. Lyondell Chemical Co.*

Some commentators have suggested that the recent Chancery Court Lyondell decision will impact deal practice and put directors at risk for money damages. In the following article, the authors disagree with that interpretation, indicating that the decision does not change Delaware law nor increase the risk of director liability. Rather, the key feature of the decision is the procedural posture of the case—a motion for summary judgment.

by J. Travis Laster and Steven M. Haas

On July 29, 2008, Vice Chancellor John W. Noble of the Court of Chancery of the State of Delaware issued his decision in *Ryan v. Lyondell Chemical Co.*, in which he declined to grant summary judgment in favor of defendant directors on *Revlon* claims.[1] Some have suggested that *Lyondell* is a significant, must-read decision that will impact deal practice and which ultimately puts directors at risk for money damages in the *Revlon* setting.[2] These authors disagree. In many respects, the opinion does not break new ground. It does not merit any meaningful change in existing deal practice, and it does not suggest any heightened risk of liability for Delaware directors. To be sure, aspects of *Lyondell* can be criticized. But, at the same time, the decision reduces risk for directors by making clear that stock option acceleration resulting from a transaction is not a basis for a duty of loyalty claim.

Rather than deal planners, the practitioners who should pay the most attention to this case are corporate litigators, because it illustrates the relative difficulty of resolving post-closing liability litigation compared to pre-closing injunction litigation. Although a stockholder plaintiff can continue to pursue a lawsuit post-closing even after an injunction has been denied, plaintiffs who have had their arguments rejected in a detailed injunction decision rarely press their cases through trial. But without the benefit of such a decision, directors likely will have to wait until trial for a balanced and thorough judicial evaluation of the plaintiffs' claims. While every case is different, clients may well be better served by going through the short-lived intensity of an injunction proceeding with its resulting and typically case-dispositive impact on settlement leverage, rather than suffering the attrition of a post-closing liability case and trial.

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Background

Lyondell Chemical Co. was a Delaware corporation listed on the New York Stock Exchange and the third-largest independent, public chemical company in North America. In April 2006, Basell AF, a potential strategic acquirer controlled indirectly by Bernard Blavatnik, approached Lyondell about an acquisition. Lyondell's CEO, Dan F. Smith, informed Blavatnik that Lyondell was not for sale, but that the board always was willing to consider proposals. This led to Basell expressing interest in an acquisition within a range of $26.50 to $28.50 per share. The Lyondell board rejected the offer as inadequate, and the discussions ended. At the time and continuing through 2007, Lyondell's performance was strong and the company was financially viable.

In May 2007, Lyondell learned that a Basell affiliate had entered into an agreement with Lyondell's second largest stockholder to acquire 8.3 percent of the company's outstanding shares. Immediately afterwards, the Basell affiliate filed a Schedule 13D announcing the acquisition. Lyondell's stock price reacted favorably, increasing by approximately 11 percent to around $37 per share. The Lyondell board, however, decided not to respond to Basell's move, preferring to wait and see if any suitors came forward. Within three days, Apollo Management,

L.P. approached Smith about a potential leveraged buyout, but Smith rebuffed the solicitation, apparently because he and other members of management were leery of the conflicts of interest it would create. No other interested parties emerged.

In June and early July, Smith met with Basell's representatives to discuss a potential transaction. During those discussions, Smith suggested that a price of $48 per share would be justified. Blavatnik countered with a price of $40 per share, but Smith responded that, while he would convey any serious offer to the Board, he viewed $40 as too low. Blavatnik then increased his proposal to $44 to 45 per share. Smith again responded that he would convey any serious offer to the Board, but that he viewed the price as too low. Smith then asked Blavatnik to make his best offer. The next day, Blavatnik told Smith that Basell would acquire Lyondell for $48 per share in cash if Lyondell would sign a merger agreement within six days and agree to a $400 million break fee. Blavatnik also stated that the offer would not be subject to a financing contingency. Smith agreed to take this proposal to the Board.[3]

Up to this point, the Lyondell Board was largely unaware of Smith's meetings and communications with Blavatnik and Basell. The board was composed of 11 members, consisting of Smith and 10 indisputably independent, outside directors.

Smith called a special meeting of the Board for the next day, July 10. The Board considered the Basell proposal for about 50 minutes, then reconvened on July 11, when it was scheduled to hold a regular meeting. The Board discussed the proposal for approximately 45 minutes, then directed Smith to negotiate a deal with Basell.

Smith promptly informed Blavatnik that the Board was favorably disposed to a transaction. It was only at this point that Lyondell retained Deutsche Bank as its financial advisor to render a fairness opinion on the deal. Deutsche Bank thus did not have any significant involvement in the negotiations over price or structure. Nor did Deutsche Bank or any other financial advisor play a role in structuring the process. Although Deutsche Bank compiled a list of potential acquirers, they were instructed not to solicit any competing offers for the company.

The Board met again on July 12 and discussed the Basell proposal in executive session without management present. Between July 13 and 15, Lyondell management and their advisors negotiated the merger agreement. On July 15, Smith went back to Blavatnik and sought improvements in the deal terms. Except for agreeing to reduce the termination fee from $400 million to $385 million, Blavatnik rejected Smith's proposals. Board materials were distributed to the Lyondell directors later that day. During a meeting on July 16, the Board discussed the merger agreement, received a fairness opinion from Deutsche Bank, and approved the transaction. The deal price of $48 per share fell within the middle of Deutsche Bank's range of fairness.

The final merger proposal offered a 45 percent premium to Lyondell's pre-announcement market price. The merger agreement contained a common no-shop provision that was coupled with a fiduciary out, as well as a termination fee equal to 3 percent of the company's equity value and 2 percent of its enterprise value. The full termination fee would be payable if the Lyondell Board withdrew its recommendation in favor of a competing proposal or Lyondell's stockholders voted down the merger and another deal was consummated within 12 months. At a special meeting called to consider the merger agreement, the transaction received the approval of 65.8 percent of the Company's outstanding common stock and over 99 percent of the shares voted at the meeting.

The Court of Chancery's Opinion

Walter E. Ryan, Jr., a Lyondell shareholder, brought suit alleging disclosure violations and breaches of the duty of loyalty.[4] Ryan did *not* pursue a pre-closing injunction application in the Court of Chancery. He instead participated in the efforts of another stockholder plaintiff to obtain a pre-closing injunction in Texas. It was only after closing that Ryan moved forward in Delaware. With several important exceptions, the Court of Chancery denied the defendants' motion for summary judgment and held that Ryan could proceed to trial on his claims.

First, the Court rejected allegations that Lyondell's directors were interested in the transaction solely based on the fact that their stock options would vest as a result of the merger. Ryan pointed out that because of accelerated vesting, the Lyondell directors stood to gain anywhere from $233,000 to $3.75 million. Vice Chancellor Noble dismissed this argument without any detailed consideration of the time value of the acceleration or the avoidance of risk of forfeiture. He first pointed out the general rule that "[t]he vesting of stock options in connection with a merger does not create a *per se* impermissible interest in the transaction."[5] He then held that, notwithstanding acceleration, the directors were not treated any differently from other stockholders and did not receive any special benefit because their options were paid out at the deal price. In a footnote, he noted that a possible exception to the general rule might be found if "a board surreptitiously grants itself valuable stock options on the eve of a merger"[6] This "exception" similarly gives no weight to the benefits of acceleration or avoiding the risk of forfeiture. *Lyondell* thus largely rejects option acceleration as a matter of law as a basis for asserting director interest in a merger.

Second, the Court granted summary judgment against Ryan on his disclosure claims. Vice Chancellor Noble viewed Ryan's disclosure arguments as a "veritable cornucopia of unsupported complaints and allegations."[7] The one exception, however, was Deutsche Bank's failure to note in its discounted cash flow analysis that it ignored the discount rate used by Lyondell management and substituted its own, higher rate, which resulted in a lower range of values for the company. Vice Chancellor Noble observed that such information might be material but concluded that the alleged disclosure violation, at most, constituted a breach of the duty of care, and therefore the directors were exculpated from liability under the Section 102(b)(7) provision in Lyondell's charter. In a footnote, Vice Chancellor Noble observed that the defendants also could make a "compelling argument that all of Ryan's disclosure claims ought to be barred by the doctrine of *laches*," because he had not pursued them prior to closing.[8]

Despite these victories for the defendants, Vice Chancellor Noble held that Ryan's loyalty claims based on the sale process survived summary judgment. Drawing all reasonable inferences in favor of the plaintiff, he concluded it was possible to find that the board acted in bad faith by failing to employ a process reasonably designed to obtain the best price reasonably available for the stockholders. Vice Chancellor Nobel explained that "a board contemplating a sale of control is duty bound to engage actively in the sale process."[9] The Lyondell Board, however, approved the merger after spending "a total of no more than six or seven hours" of deliberation during a seven-day period. The Board failed to gather meaningful information prior to agreeing to the sale and failed to contact any other potential buyers. Distinguishing the Lyondell Board's actions from Delaware precedents that upheld post-signing market checks, Vice Chancellor Noble wrote that at the summary judgment stage, the board had "not satisfactorily demonstrated an assiduous balancing of its 'single bidder strategy' with an effective and relatively unencumbered post-signing market check."[10] Vice Chancellor Noble also accepted the inference for purposes of summary judgment that the board's inability or unwillingness to successfully negotiate for more target-friendly deal protection terms could support a finding of bad faith. In Vice Chancellor Noble's words, "one cannot exclude the inference that the deal protections agreed to by the Board served no purpose other than to squelch even the remotest possibility of a competing bid that might have increased the price for the stockholders."[11]

As a result of these findings, Vice Chancellor Noble also rejected the defendant-directors' argument that the *Revlon* claims were barred by Section 102(b)(7). "[T]his is a board of directors," he wrote, "that appears never to have engaged fully in the process to begin with, despite *Revlon's* mandate. Thus, the good faith aspect of the duty of loyalty may be implicated, which precludes a Section 102(b)(7) defense to Ryan's *Revlon* and deal protection claims."[12]

A Mixed Bag of Rulings

Lyondell's grants of summary judgment are quite helpful to defendant directors and reduce the risk of merger-related director liability. In particular, *Lyondell*'s ruling on stock option acceleration

largely eliminates as a matter of law the ability of a plaintiff to claim that directors are interested in a transaction as a result of accelerated vesting, even if the number of options that accelerate is quite large and hence the benefits in terms of the time value of money and eliminated risk of forfeiture are significant. The analysis of disclosure issues continues the recent Delaware trend towards insisting that disclosure claims be litigated prior to closing, rather than in a post-closing liability action. It therefore indicates that defendants routinely should pursue *laches* defenses against disclosure allegations and move for summary judgment when plaintiffs did not seek pre-closing injunctive relief.

Lyondell's denial of summary judgment with respect to *Revlon* claims, however, has generated strong reaction from the legal community. The most obvious potential criticism of *Lyondell* is that the Court declined to defer to the business judgment of an experienced and independent board of directors in a context where the board secured a meaningful premium and agreed to relatively customary deal-protection measures. As the Court noted, "[t]he undisputed evidence shows that the members of the Board were not motivated by self-interest to approve the Merger."[13]

Practitioners must recognize, however, that the *Lyondell* opinion was driven by its procedural posture, which was a decision on summary judgment. The summary judgment standard requires the court to draw "all reasonable inferences… in favor of the non-moving party" and allows dismissal only when there is "no genuine issue as to any material fact."[14] Vice Chancellor Noble mentioned this repeatedly, starting on the first page of the opinion and again and again when he declined to adopt arguments made by the defendants.

In this regard, *Lyondell* stands in sharp contrast to the majority of Delaware M&A opinions that are decided on motions for preliminary injunctions. In that context, the court must determine whether the plaintiff has a reasonable probability of success on the merits (in addition to evaluating irreparable harm and the balance of hardships). This assessment of the plaintiff's likelihood of success frequently leads the court to evaluate the record as presented (consisting of deposition testimony and documents) to determine which side has the better argument.[15] At the summary judgment stage, by contrast, the inference goes to the non-moving party, so if the plaintiff has a rational theory and some evidence to support it, even if on balance the theory is quite unlikely to prevail, the court must side with the plaintiff and deny the motion. Vice Chancellor Noble himself called attention to this distinction between preliminary injunctions and summary judgment.[16]

It is highly unlikely that a Delaware court would have enjoined the Lyondell transaction.[17] While a Delaware opinion might have criticized aspects of the board's process, a Delaware court would not have blocked a merger that was approved by a disinterested and independent board, which represented a significant cash premium to market, and where there was no higher alternative available. An injunction decision thus would have been written and perceived as a clean win for the defendant directors and would not have generated the reaction that Vice Chancellor Noble's decision has received. Because of the different procedural posture, transactional planners should *not* view *Lyondell* as a good case for judging how board process and deal protection measures will be reviewed in the injunction context or, more importantly, at trial.

It also is important to recognize that aspects of the Lyondell Board's process raised concerns when viewed in light of Delaware precedent. Although the board was disinterested and independent, the case in many respects resembles the CEO-driven fact patterns of earlier decades. Beginning in the 1980s, the Delaware courts repeatedly criticized directors who were not active during a potential change of control and who deferred to CEO-centric processes. Looking back from 1995, Chancellor William T. Allen wrote that "perhaps one of the clearest messages repeatedly affirmed by the Delaware Supreme Court's corporate law jurisprudence from 1985 forward is that outside directors may not blindly rely upon a strong CEO without risk."[18] Under this well-established case law, a "board of directors . . . may not avoid its active and direct duty of oversight in a matter as significant as the sale of corporate control."[19] "[D]irectors cannot be passive instrumentalities during merger proceedings."[20] They must provide "serious oversight"[21] and

their fiduciary duties require that they "take an active and direct role in the context of a sale of a company from beginning to end."[22] These obligations are not limited to management buyouts or conflict situations but rather apply to all potential change of control transactions.[23]

Vice Chancellor Noble's decision applies this precedent in a straightforward fashion in the context of a motion for summary judgment. The Lyondell CEO ran the process and was well out in front of the Board. The directors did not gather information about the value of the transaction or probe the market for competing offers. Their financial advisor, Deutsche Bank, was not hired until after the price was established and was charged only with preparing a fairness opinion. While these process flaws would not be enough for a stockholder-plaintiff to obtain an injunction stopping a premium deal when there is no higher competing bid, the optics of a CEO-dominated process in the context of summary judgment can sometimes raise questions that necessitate a trial where the court can weigh evidence.

The defendants' principal arguments in favor of summary judgment were likewise the type of evidentiary arguments that would be likely to prevail versus an injunction application or at trial. For example, they argued that a 45 percent premium was a blowout bid that they would have been foolhardy to ignore. But while a premium of that magnitude sounds impressive, it also permits the contrary inference that the company was undervalued, and it suggests that a different auction process involving competitive dynamics might have generated a fuller price. Lyondell's financial strength also meant that it was not under pressure to agree to a fast deal. The fact that the premium fell in the midst of Deutsche Bank's valuation range gave further support to the inference that the premium standing alone was not dispositive and that a higher price might have been obtained. On a motion for summary judgment, a court is not permitted to choose between the competing inferences, even if one side of the argument appears much stronger.

At trial, Vice Chancellor Noble will balance the CEO-dominated process against other quite positive factors. The board members, for example, had substantial business expertise and thus likely were knowledgeable about Lyondell and the value of the Company. Vice Chancellor Noble will be able to take into account their knowledge and familiarity when judging the abbreviated time frame in which the Board acted, particularly where the directors were not personally interested in the transaction. He could give significant weight to the CEO's rejection of Apollo's leveraged buyout overture due to his apparent concern about conflicts of interest, a fact that bolsters his credibility and the reasonableness of the Board's reliance on him. Vice Chancellor Noble also can take into account the fact that Basell's attempted acquisition of Huntsman had been jumped by a topping bid, which probably caused Basell to want to move quickly and created greater risk that the Board might lose the deal if they did not act fast. Vice Chancellor Noble also can consider whether the directors recognized in July 2007 that the credit markets were weakening, which would have made an all-cash offer more appealing and provided the Board with an additional incentive to move quickly.

At trial, we believe this balancing process should result in a decision for the defendants. At the summary judgment stage, the Court was not permitted to weigh this evidence. The different procedural posture thus produced the different outcome.

Lyondell as a Source of M&A Guidance

Lyondell is not a good precedent for M&A guidance, because it appears to call into question practices that likely are to be upheld in the injunction or post-trial setting. Likewise, as one might expect in a 73-page opinion, *Lyondell* contains dictum that could be read as inconsistent with Delaware precedent and M&A practice. Practitioners should not overreact to these comments.

One example is the Court's treatment of a post-signing market check. A traditional method for satisfying *Revlon* duties is to agree to a transaction and then test it with a post-agreement market check. Under this approach, the combination of the announcement of a transaction and the opportunity for a competing bidder to emerge is deemed sufficient so long as the merger agreement contains

a reasonable fiduciary out to permit the board to respond to unsolicited acquisition proposals, the time period is adequate for a bid to emerge, the target is not otherwise hobbled by other defensive measures, and there are not other contextual factors that would prevent a topping bid from emerging or potentially succeeding. Language in *Lyondell* could be read as raising the bar for using a "single-bidder" strategy by referring to it as a "*limited exception* to the active sale process generally contemplated by *Revlon*"[24] requiring that the directors have "*impeccable knowledge* of the market."[25]

Because of the procedural context of the motion for summary judgment, the Court was not in a position to balance the various deal protection measures in the specific context of Lyondell as an entity to determine whether the "single-bidder" strategy was reasonable. This is particularly true for the plaintiff's argument that because of the abbreviated time frame in which the Board acted and the lack of any Board involvement in the transaction prior to the CEO's presentation of a fully priced proposal, the directors were not in a position to sign off on the single bidder route. On a motion for summary judgment, all the Court could say was that on those facts, the post-agreement market check was not dispositive as a matter of law.

Lyondell should not, however, be read as requiring a formal auction. Nor should it be read as calling into question the post-agreement market check procedure. *Lyondell* merely holds that a board must have a reasonable basis for believing that a particular method of maximizing value is reasonable and appropriate. Indeed, the decision suggests that had the directors done somewhat more, the Court might have viewed the inference the plaintiff requested as unreasonable. For example, if the directors had quietly contacted two or three likely suitors prior to executing the agreement with Basell, the Court might have held differently.

A more serious criticism, however, is the Court's focus on the absence of a go-shop provision in the Lyondell merger agreement. The Court observed as part of its analysis that Lyondell "was not able to negotiate successfully for a post-signing go-shop period and, thus, did nothing post-signing to confirm that a better price could not have been obtained."[26] If this language is read as merely a contextual comment on the overall structure of the Lyondell merger agreement, then it does not raise any significant issues. If, however, it is construed to mean that Delaware courts increasingly are looking to the presence of go-shops as evidence of an effective post-signing market check, then the language is misguided. Delaware courts have repeatedly approved of post-agreement market checks that did not allow the target corporation to make outgoing calls.

The presence or absence of a go-shop provision also should depend on whether the acquirer is a strategic or a financial bidder. Go-shops were largely a product of a "seller's market" during the recent M&A boom driven by ample liquidity and acquisitive private equity firms. The provisions actively encourage topping bids and thus decrease deal certainty. Financial buyers are more likely to agree to a go-shop because a particular target is rarely essential to their business model. Strategic buyers are in a different position. A strategic acquirer who believes that the "fit" of a particular target is critical to the acquirer's business strategy is highly unlikely to agree to a go-shop period. A perceived go-shop requirement therefore would penalize strategic buyers, who would be more reluctant to agree to such a provision. Strategic buyers would be at a disadvantage both in the bidding process, when they would not be in a position to agree to a go-shop provision the target wanted, and in subsequent litigation, where a no-go-shop deal would be more at risk. The ironic result is that strategic bidders likely would pay less because they would face greater risk of deal failure. The Delaware courts are well aware of these types of issues, and we therefore do not believe that *Lyondell* should be read as creating an implicit go-shop requirement.

There also are other aspects of the *Lyondell* Court's discussion that can be questioned. For example, the Court's characterization of Lyondell's shareholder rights plan as a "transaction cost" for a topping bidder to overcome is a misnomer, given how rights plans operate.[27] The opinion also asks whether deal protection measures should be evaluated under *Unocal*.[28] This is unhelpful doctrinally, particularly if it re-opens an issue on which the Delaware Supreme Court has spoken and held

squarely that defensive measures in a merger agreement, regardless of whether *Revlon* applies to the deal overall, must be assessed under *Unocal*.[29] These aspects of *Lyondell*, however, are dicta.

The *Lyondell* Court does not appear to have intended to make new law on any of these issues. If anything, these comments from *Lyondell* are likely another consequence of the summary judgment standard. Rather than being able to weigh the totality of the evidence, the Court was limited to considering what the Board did not do based on the arguments made by the plaintiff. The post-trial ruling should eliminate any ambiguity on these points.

Lyondell as a Source of Director Liability

Lyondell also does not create any additional risk of liability for directors. Although the Court denied the motion for summary judgment, the Lyondell directors face risk only in the sense that there is always some possibility, however slight, that something can go wrong at trial. Vice Chancellor Noble repeatedly indicates that the plaintiff's claims are weak. Most importantly, he rejects any structural duty of loyalty claim, finding that "[t]he undisputed evidence shows that the members of the Board were not motivated by self-interest to approve the Merger."[30] Moreover, Vice Chancellor Noble states the merger price was "undeniably a fair one"[31] and asks rhetorically what the damages could then possibly be.[32] This is not the first time Vice Chancellor Noble has questioned whether shareholders can recover anything beyond a "fair price," even when the process is faulty.[33]

The procedural posture of the case combined with the lack of any action by Lyondell's Board also explains why Vice Chancellor Noble was not comfortable granting summary judgment based on the Section 102(b)(7) provision. In *Emerald Partners v. Berlin*,[34] the Delaware Supreme Court reversed a pre-trial grant of summary judgment to directors in a transaction being reviewed under the entire fairness test. The Supreme Court noted that "[s]uch a provision bars any claim for monetary damages against director defendants solely based on the board's alleged breach of its duty of care but does not provide protection against violations of the fiduciary duties of either loyalty or good faith."[35] The Supreme Court then held that, "when entire fairness is the applicable standard of judicial review, a determination that the director defendants are exculpated from paying monetary damages can be made only after the basis for their liability has been decided."[36]

Key features of a *Revlon* claim resemble the aspects of an entire fairness claim that led to the Supreme Court's holding in *Emerald Partners*. As in the entire fairness context, directors have the burden of proof under *Revlon*. And as in the entire fairness context, directors can breach their so-called *Revlon* duties by violating their duty of loyalty, including the subsidiary duty of good faith, or their duty of care. *Emerald Partners* appears to suggest that the parsing between a care and good faith for purposes of Section 102(b)(7) generally should take place at trial. It would have created unnecessary reversal risk for Vice Chancellor Noble to invoke Section 102(b)(7) at the summary judgment stage, when he can readily do so after hearing the witnesses and reviewing the evidence. Once again, the key to understanding *Lyondell* is the procedural posture of the case.

Litigation Implications

Lyondell is a reminder that summary judgment is difficult to obtain in breach of fiduciary duty cases. Because of the procedural standard, the Court cannot evaluate competing theories or weigh evidence, and a summary judgment decision is most likely to result in a win for the plaintiffs. In a pre-closing injunction hearing, by contrast, the Court can make a more nuanced assessment of the record. Although plaintiffs who lose an injunction decision can continue to pursue their claims after closing, pressing forward towards trial is an unappetizing prospect once a court has weighed and rejected the plaintiffs' theories in a thoughtful decision.

The impact of a preliminary injunction decision on settlement leverage often is case dispositive. The risk of such a decision and the prospects of tying a settlement to the deal closing create powerful dynamics for resolving cases during the injunction phase. The compressed time frame of an injunction proceeding typically favors the defendants, which enhances settlement leverage. In the absence of decision denying a preliminary injunction, by

contrast, plaintiffs have little incentive to moderate their demands, particularly in the post-closing environment. There is no pending closing to drive settlement, and there is no time pressure to limit discovery or constrain the case. As *Lyondell* shows, a motion for summary judgment is likely to produce a win for the plaintiffs.

Lyondell stands as a reminder that corporate litigators should focus on the injunction phase as an optimal time to resolve M&A litigation. While it is a common reaction for defendants to oppose an application for an expedited pre-closing injunction hearing, depending on the facts of the case it may *not* be in their ultimate interest to avoid such a proceeding. Pre-closing litigation instead may offer the best opportunity to resolve the case. Even if the case does not settle, a victory in a preliminary injunction decision should reduce substantially the threat posed by the litigation during the post-closing phase.

Conclusion

The *Lyondell* decision does not change Delaware law, nor does it increase the risk of director liability. The key feature of the decision is the procedural posture of the case. Ruling on a motion for summary judgment, Vice Chancellor Noble was not able to weigh the evidence, draw inferences, and make the type of fact-based rulings that practitioners typically find in Delaware M&A opinions. *Lyondell* is therefore not a good decision for M&A practitioners to rely on to assess how particular deal provisions will perform in the injunction context or at trial. Don't overreact to *Lyondell.*

NOTES

1. *Ryan v. Lyondell Chem. Co.*, C.A. No. 3176-VCN, mem. op. (Del. Ch. July 29, 2008).
2. *See, e.g.,* Sheri Qualters, "Breach Case in Company Sale Survives," *National LJ* (Aug. 11, 2008) (*quoting* various practitioners).
3. *See Lyondell*, slip op. at 15–16.
4. Walter E. Ryan, Jr., is the same stockholder plaintiff whose lawsuits generated decisions on option backdating in *Ryan v. Gifford.* He is not the same stockholder plaintiff who produced *Ryan v. Tad's Enterprises.*
5. *Id.* at 28.
6. *Id.* at 28 n.53.
7. *Id.* at 58.
8. The Court's emphasis on bringing disclosure violations claims early followed the Court of Chancery's recent decision in *In re Transkaryotic Therapies, Inc*., 2008 WL 2699442 (Del. Ch. June 19, 2008).
9. *Lyondell,* slip op. at 34–35.
10. *Id*. at 43.
11. *Id*. at 51.
12. *Id*. at 54. The court dismissed the plaintiff's disclosure claims, finding that they arose from a breach of the duty of care and therefore were barred by Section 102(b)(7).
13. *Id.* at 7.
14. *Id*. at 25–26.
15. Although there is language in several Delaware decisions indicating that courts should not evaluate fact disputes at the injunction stage, the reality is that the reasonable probability of success standard necessarily requires an evaluation of the record, even though it is not fully developed.
16. *See id.* at 43 n.90, 50 n.100, and 63 n.129.
17. The plaintiff may have recognized this likelihood since he sought an injunction in a Texas court rather than in the Court of Chancery.
18. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1141 (Del. Ch.), *aff'd*, 663 A.2d 1156 (Del. 1995).
19. *Mills Acquisition Co. v. MacMillan, Inc.*, Del. Supr., 559 A.2d 1261, 1281 (Del. 1988).
20. *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989).
21. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1265 (Del. 1989).
22. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993).
23. *Paramount Comm., Inc. v. QVC Network, Inc*., 637 A.2d 34, 44 (Del. 1994).
24. *Lyondell*, slip op. at 35 (emphasis added) (*citingBarkan v. Amsted Indus*., 567 A.2d 1279 (Del. 1989)).
25. *Id*. at 56 (emphasis added).
26. *Id*. at 2.
27. *Id*. at 21 n.36.
28. *Id*. at 48 n.96.
29. *See Omnicare, Inc. v. NCS Healthcare, Inc*., 818 A.2d 914, 929–930 (Del. 2003) (holding that defensive measures in merger agreement were subject to *Unocal* scrutiny even if *Revlon* were inapplicable); *Paramount Comm., Inc. v. Time Inc.*, 571 A.2d 1140, 1151 n.15 (Del. 1989) (same); *see alsoMcMillan v. Intercargo Corp.*, 2000 WL 516265, at *10 n.62 (Del. Ch. Apr. 20, 2000) (same); *see generally* Leo E. Strine, Jr., "Categorical Confusion: Deal Protection Measures In Stock-For-Stock Merger Agreements," 56 *Bus. Law.* 919 (2001).
30. *Lyondell*, slip op. at 7.
31. *Id*. at 72; *see also id*. at 6.
32. *Seeid*. at 39 n.82.
33. *See Oliver v. Boston Univ.*, C.A. No. 16570, slip op. at 7 n.239 (Del. Ch. Apr. 14, 2006).
34. *Emerald Partners v. Berlin*, 787 A.2d 85 (Del. 2001).
35. *Lyondell*, slip op. at 94.
36. *Id*.