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Good Faith in *Revlon*-Land

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GOOD FAITH IN REVLON-LAND

The Delaware Supreme Court has set a very high hurdle for plaintiffs challenging directors' good faith in the sale of a company. In *Lyondell Chemical Company v. Ryan*, the court held that unconflicted directors could be found to have breached the good faith component of their duty of loyalty in the transactional context only if they "knowingly and completely failed to undertake," and "utterly failed to attempt" to discharge, their duties.¹

In this paper I argue that the *Lyondell* standard effectively imports into the transactional context the exacting standard previously applied in the oversight context—a move clearly aimed at substantially limiting directors' liability exposure for conscious disregard of duty. Part I of the paper traces the evolution of the good faith concept over recent decades, including the Delaware Supreme Court's acceptance in its 2006 *Disney* opinion of a formulation of non-exculpable bad faith conduct by unconflicted directors in the employment context involving "intentional" and "conscious" disregard of duty.² Part II contrasts this strict state of mind requirement with an even stricter standard applied later that year in *Stone v. Ritter* to establish bad faith in the board oversight context.³ I then turn to *Lyondell*, where the Delaware Supreme Court in 2009 extended the exacting standard of *Stone* to the transactional context.⁴ Commentary on *Lyondell* has suggested that the decision effectively forecloses monetary liability for unconflicted directors in the transactional context. I argue in Part III, however, that while the opinion undoubtedly limits directors' liability exposure, it is amenable to a reading that preserves some limited capacity for the good faith component of the duty of loyalty to discipline boards in the sale of a company.

I. WHAT IS "GOOD FAITH"?

While "good faith" in the corporate context has historically been associated with "honesty of purpose" in discharging one's duties,⁵ as a practical matter there was little reason to expend much effort fleshing out the concept before 1986, when the Delaware General Corporation Law (DGCL) was amended to include a new section 102(b)(7).⁶ In response to a perceived liability crisis resulting from a Delaware Supreme Court decision imposing personal liability on unconflicted directors for gross negligence in the sale of a company, the DGCL was amended to permit charter

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¹ See *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243–44 (Del. 2009). In its opinion, the court drew no distinction between "bad faith" and "failure to act in good faith." *Id.* at 240 n.8. Neither do I here.

² See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64–67 (Del. 2006).


⁴ *Lyondell*, 970 A.2d at 243–44.


provisions eliminating directors’ monetary liability for breaches of the duty of care. Rather than saying as much, however, the statute more broadly permitted exculpation for “breach of fiduciary duty,” and then carved out exceptions specifying fiduciary breaches that could not be exculpated—notably, breaches of the “duty of loyalty” and “acts or omissions not in good faith.”

This approach simultaneously suggested that good faith differed from care (only the latter being exculpable) and from loyalty (a separately enumerated exception), rendering uncertain the doctrinal status of good faith. In its 1993 opinion in Cede & Co. v. Technicolor, Inc., the Delaware Supreme Court suggested that good faith might represent its own distinct fiduciary duty, famously explaining that a shareholder could rebut the business judgment rule by showing that directors “breached any one of the triads [sic] of their fiduciary duty—good faith, loyalty or due care.” However, neither Cede nor any subsequent opinion by the Delaware Supreme Court would shed any light on what this third fiduciary duty would embrace. Indeed, the Court of Chancery never accepted the “triad” framework; Vice Chancellor Strine, in particular, missed no opportunity to emphasize its conceptual redundancy with the duty of loyalty.

In Nagy v. Bistricer, Strine dismissed the “so-called ‘duty of good faith,” rejecting the notion that a director could “simultaneously act in bad faith and loyally towards the corporation and its stockholders.” In Guttman v. Huang, he reiterated this position, criticizing both the “triad” framework for “separat[ing] the duty of loyalty from its own essence,” and section 102(b)(7) itself for “balkaniz[ing] the duty of loyalty” by enumerating distinct exceptions all of which in fact “illustrate conduct that is disloyal.”

Within a few years, the doctrinal association of good faith with a broad conception of loyalty would become clear. In Disney, the Delaware Supreme Court offered
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“conceptual guidance to the corporate community” in the context of litigation over the hiring and firing of Michael Ovitz, who allegedly received $130 million in severance for a single uninspired year as Disney’s president. While not straightforwardly addressing the “triad” framework, the court did explain that a care-based violation—that is, “fiduciary action taken solely by reason of gross negligence and without any malevolent intent”—cannot amount to bad faith, because section 102(b)(7) sharply distinguishes the two for exculpation purposes. The court then accepted a formulation of non-exculpable bad faith conduct articulated by Chancellor Chandler—“intentional dereliction of duty, a conscious disregard for one’s responsibilities.” This requirement that the lapse be “intentional” and “conscious” set a high hurdle, effectively rejecting calls for liability upon a showing of “reckless” disregard of duty. Yet the Disney standard clearly established that monetary liability could be imposed—notwithstanding a section 102(b)(7) charter provision—for bad faith conduct not involving financial conflicts of interest.

II. WHEN SHOULD DAMAGES BE AVAILABLE FOR BAD FAITH CONDUCT?

The Disney standard, however, was far from the last word on the duty of good faith in Delaware corporate law. In Stone v. Ritter, another 2006 decision addressing a board’s alleged failure to meet its oversight duties, the court clarified a number of fundamental issues. The court notably rejected the “triad” and established that good faith is a component of the duty of loyalty (for which it cited Vice Chancellor Strine’s opinion in Guttmann v. Huang). By rejecting the “triad” formulation, Stone brought to a close two decades of debate over the doctrinal status of good faith. Simply defining good faith as a branch of loyalty does not, however, resolve the distinct question of what the liability standard ought to be in any given context. Disney required an “intentional” and “conscious” disregard of duty in the employment context, but it remained to be seen how this standard might be applied in other circumstances. Stone began to answer this question as well, addressing the standard for oversight liability in a manner that would significantly impact the future development of good faith jurisprudence.

18. Id. at 64–65.
19. Id. at 66–67.
Concluding that the standard articulated by Chancellor Allen in his 1996 Caremark opinion is “fully consistent with” the Disney standard, the court held that “the lack of good faith” required for oversight liability is established by “a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists.”

Stone styled this approach as a situation-specific endorsement of a standard for oversight liability “consistent with” the more general Disney standard for bad faith conduct. However, it would not be long before the more stringent Stone/Caremark standard—requiring “sustained or systematic failure . . . such as an utter failure to attempt” to meet one’s duties—would effectively displace the Disney standard as the core test for bad faith conduct. This next stage in the evolution of good faith would occur in the transactional context, where the Delaware Supreme Court has held that once the sale, break-up, or change of control of a company is “inevitable,” the board’s duty becomes “maximization of the company’s value at a sale for the stockholders’ benefit.”

Lyondell involved a shareholder class action suit alleging that approval of the $13 billion merger of Lyondell Chemical Company with an acquisition subsidiary of Basell AF was tainted by the Lyondell board’s financial conflicts of interest, disclosure failures, and failure to discharge its duty under Revlon to maximize the value received by shareholders. In his July 2008 opinion, Vice Chancellor Noble granted the Lyondell directors’ motion for summary judgment with respect to the alleged financial conflicts of interest and disclosure failures. This meant that the plaintiff could overcome Lyondell’s section 102(b)(7) charter provision only by showing that the board failed to act in good faith in discharging its Revlon duty. Ultimately Noble denied the motion for summary judgment with respect to the Revlon claims, finding that “the Board’s failure to engage in a more proactive sale process may constitute a breach of the good faith component of the duty of loyalty as taught in Stone v. Ritter.”

Noble focused heavily on the Lyondell board’s inaction during a two-month period following the filing of a Schedule 13D with the Securities and Exchange

24. Stone, 911 A.2d at 369 (emphasis added) (quoting In re Caremark Int’l Inc. Derivative Litig., 968 A.2d 959, 971 (Del. Ch. 1996)).
25. Id.
28. Id. at *119.
29. Id. at *48.
30. Id. Noble also granted summary judgment with respect to claims that Basell aided and abetted the Lyondell board’s breaches of fiduciary duty, and denied plaintiff Ryan’s application for additional discovery. See id. at *112–19.
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Commission. The filing on May 11, 2007, disclosed a Basell affiliate’s right to buy a block of Lyondell stock—apparently putting the company “in play.” Characterizing the board as “indolent, making no effort to value the Company or to assess what options might be on the table if Basell (or another acquirer) made a move to acquire Lyondell,” Noble concluded that they “never made an effort to conduct a formal market check of any kind; instead, [the board] languidly awaited overtures from potential suitors reacting to [the] 13D filing.”

While acknowledging that “every transaction is different and every board confronts unique circumstances,” such that there is “no single blueprint” that a board must follow, Noble nevertheless read _Revlon_ and progeny as “suggest[ing] that in most instances a board contemplating a sale of control is duty bound to engage actively in the sale process.” The Lyondell board, however, had done essentially nothing during the two-month period before Basell offered to acquire the company on July 9, 2007, and Noble found “very little evidence that the Board actually negotiated . . . or actively participated in the sale process” before voting in favor of the deal. Citing to _Stone’s_ reiteration of the _Disney_ standard—permitting a finding of non-exculpable bad faith “[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities”—Noble explained that _Revlon_ represented “a known set of ‘duties’ requiring certain conduct or impeccable knowledge of the market in the face of Basell’s offer to acquire the Company.” Because the board “appear[ed] never to have engaged fully in the process to begin with,” and to have made “no discernible effort at salesmanship either before or after the Merger was announced,” Noble concluded that the defendants’ motion for summary judgment could not be granted because non-exculpable bad faith might be demonstrated.

In his August 2008 opinion denying the directors’ motion for certification of an interlocutory appeal to the Delaware Supreme Court, Noble clarified his understanding of the good faith standard following _Stone_. That he viewed the oversight and transactional contexts as fundamentally dissimilar was implicit in his denial of summary judgment, where he cited to _Stone’s_ reiteration of the _Disney_ standard, rather than to its endorsement of the more exacting _Caremark_ standard. As he would explain in the August 2008 opinion:

31. _Id._ at *18–19.
32. _Id._ at *21.
33. _Id._ at *65.
34. _Id._ at *51 & n.72 (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989)).
36. _Id._ at *86–87.
37. _Id._ at *84–85.
38. _Id._ at *87–88.
Unlike a Caremark scenario in which director bad faith misconduct can be exhibited by a sustained and systematic failure of oversight, in the sale context, it seems that the directors (more than likely) have only one shot. They either choose to engage diligently and faithfully in the sale process to discharge their fiduciary obligations toward the corporation and the shareholders, or they do not.

Here, Noble illuminates a critical step in his analysis of good faith in the Revlon context. Recall that in Stone, the court concluded that the Caremark standard is “fully consistent with” the Disney standard, and held that “the lack of good faith” required for oversight liability is established by “a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists.” Effectively Stone presented Noble with two options—the more plaintiff-friendly (but still demanding) Disney standard, requiring a showing of “intentional” and “conscious” disregard of one’s duties, or the less plaintiff-friendly Caremark standard, requiring a showing of “a sustained or systematic failure . . . such as an utter failure to attempt” to discharge one’s duties. Noble chose the former. The Delaware Supreme Court, however, would come to a different view of the appropriate application of good faith.

Notwithstanding Noble’s denial of the defendants’ motion for certification of an interlocutory appeal, the Delaware Supreme Court accepted the application and ultimately issued its opinion in March 2009. The court reversed, concluding that “[t]here is no evidence . . . from which to infer that the directors knowingly ignored their responsibilities, thereby breaching their duty of loyalty.” Consequently, the Lyondell directors were entitled to summary judgment on the Revlon claims. In her opinion for a unanimous en banc court, Justice Berger rejected Noble’s interpretation of Revlon and progeny, as well as his understanding of the applicable good faith standard after Stone.

Like Noble, the court cites to Stone for its formulation of the applicable good faith standard. Unlike Noble, however, who saw the oversight and transactional contexts as fundamentally dissimilar and adhered more closely to the Disney standard, the Delaware Supreme Court articulated a standard for the transactional context that is essentially derivative of the more demanding Caremark standard for oversight cases. Noting that “[i]n the transactional context, [an] extreme set of facts” would be required to establish bad faith, Justice Berger explained:

41. See supra notes 23–24 and accompanying text.
43. Id.
44. Id.
45. See id. at 244 n.36.
46. Id. at 243 (quoting In re Lear Corp. S’holder Litig., 926 A.2d 94 (Del. Ch. 2007)).
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Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty . . . . Instead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price.47

Just as Caremark suggested that “an utter failure to attempt to assure a reasonable information and reporting system exists”48 could establish bad faith in the oversight context, the court in Lyondell said that the issue in the transactional context is whether the directors “utterly failed to attempt to obtain the best sale price.”49 In Revlon cases, then, the court applies not the Disney standard, but a stricter one—effectively the Disney standard as refracted through Caremark in the Stone opinion. As Gordon Smith observed, “[t]he influence of Caremark is apparent here, and we know from experience that Caremark liability is almost unheard of in Delaware.”50

In addition to deriving too plaintiff-friendly a standard from Stone, the court found that Noble took from Revlon and progeny too exacting a duty of board conduct. Justice Berger explained that “Revlon duties do not arise simply because a company is ‘in play,’” but arise “only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control.”51 Consequently, the two months of inaction following the Schedule 13D filing were irrelevant to the Revlon analysis, which should have focused exclusively on the period following the commencement of negotiations.52 In evaluating the board’s actions, Noble erred by effectively mandating that the board follow one of three procedures—an auction, a market check, or demonstrating “impeccable’ market knowledge.”53 As Justice Berger reiterated, “there are no legally prescribed steps that directors must follow to satisfy their Revlon duties.”54 This meant that “the directors’ failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties.”55 Focusing solely on the brief period following the offer, observing that “no legally prescribed steps” are required, and applying the Stone/Caremark-based standard, the Delaware Supreme Court saw

47. Id. at 243–44 (emphasis added).
48. See supra note 24 and accompanying text.
49. Lyondell, 970 A.2d at 243–44 (emphasis added).
51. Lyondell, 970 A.2d at 242 (citing Paramount Commc’ns Inc. v. Time Inc., 571 A.2d 1140, 1151 (Del. 1990) and In re Santa Fe Pac. Corp. S’holder Litig., 669 A.2d 59, 71 (Del. 1995)).
52. See id.
53. Id. at 243.
54. Id.
55. Id.
“only one possible conclusion.” In that period, the board “met several times,” was “generally aware of the value of the company,” had financial and legal advisors on hand, and “attempted to negotiate a higher offer”—a record on which bad faith could not be found.

III. THE FUTURE OF GOOD FAITH IN REVLO-N-LAND

The Delaware Supreme Court’s Lyondell opinion has been widely interpreted as substantially limiting—if not practically eliminating—the ability to pursue monetary damages for bad faith conduct in the Revlon context, and perhaps beyond it. In prior work I have written in support of the Disney standard’s relatively strict state of mind requirement (i.e., that the disregard of duty be “intentional” and “conscious”), largely because a less rigorous requirement (say, “reckless” disregard of one’s duties) would risk “a slippery slope back into monetary damages for lesser forms of negligence—an outcome both the [business judgment rule] and section 102(b)(7) were devised to prevent.” This concern is particularly salient given that state of mind—whether the disregard of duty is intentional, reckless, or merely negligent—will almost always have to be inferred from actual conduct. However, it is far from obvious that a finding of bad faith would be justified only where directors “completely failed to undertake,” or “utterly failed to attempt” to discharge, their fiduciary duties—if by that we mean doing literally nothing at all in the face of a known duty to act. As Andrew Lund observes, “there are undoubtedly processes short of utter failures that might still evince conscious disregard of duties by directors.”

Does the Delaware Supreme Court’s opinion in Lyondell mean that bad faith disregard of duty can be found only where the directors in question do virtually nothing at all? There are certainly commentators who believe so. That the opinion sets out to establish an exceedingly high hurdle for plaintiffs is clear, particularly given the superlative language used. Having found that Revlon kicked in only when actual negotiations began—rendering the prior two-month period of inactivity irrelevant—the court could easily have justified summary judgment based on established Revlon principles and the Disney standard of “intentional” and “conscious”

56. Id. at 243–44.
57. Id. at 244.
59. See Bruner, supra note 7, at 1180–82; see also William T. Allen et al., Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem, 96 NW. U. L. REV. 449 (2002); Bainbridge et al., supra note 9, at 571; Griffith, supra note 9, at 29–33.
60. See Bruner, supra note 7, at 1179–80 n.229.
61. Lund, supra note 58, at 439.
62. See supra note 58.
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disregard.63 It is telling that the court chose to raise a hurdle that was already too high for the plaintiffs to clear.

Early indications from the Court of Chancery tend to recognize this. Recent opinions of Vice Chancellor Noble and Chancellor Chandler, addressing claims of bad faith failure to discharge Revlon duties, similarly incant the mantra of “no single blueprint” and “a reasonable decision, not a perfect decision”—well-established principles of Revlon review64—but now add Lyondell’s requirement that the directors must have “knowingly and completely failed to undertake,” and “utterly failed to attempt” to discharge, their duties.65 This standard certainly tends to invite dismissal based on little more than a recitation of a handful of actions taken by the board in the sale process (particularly given that Revlon and progeny mandate no specific actions in the first place).66 Chandler, in granting a motion for expedited preliminary injunction proceedings in another case, reflected that following Lyondell, “the shareholders’ only realistic remedy for certain breaches of fiduciary duty in connection with a sale of control transaction may be injunctive relief.”67

All of this said, however—and reiterating that I favor a demanding state of mind requirement—I do not consider it inevitable that Lyondell will literally foreclose non-exculpable bad faith in Revlon transactions not involving financial conflicts of interest. Good faith would appear to maintain some vitality where, as opposed to passively failing to pursue maximum price, directors actively pursue something else. It is worth recalling that Revlon itself involved such dynamics. In Revlon, the Delaware Supreme Court held that having entered a lock-up agreement with a favored bidder involving waiver of restrictive covenants in outstanding notes, and then bolstering the notes’ market value to avoid litigation, “the Revlon board could not make the requisite showing of good faith.”68

More pertinently, I believe that Lyondell is amenable to a reading permitting a finding of bad faith where the board has undertaken some action in connection with

63. See Lund, supra note 58, at 439 n.234.


66. See, e.g., Corti, 2009 Del. Ch. LEXIS 126, at *52–53.


68. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (emphasis added). Admittedly, the court does identify an element of financial conflict of interest, in that the directors’ actions “avoided personal liability to a class of creditors.” Id. at 184. In any event, this holding placed a constraint on language in Unocal permitting regard for “other corporate constituencies” in deploying defensive measures. Id. at 182; see also Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).
the sale, yet the board’s conduct taken as a whole nevertheless reveals a total lack of commitment to discharging its duties. Situations where directors “knowingly and completely failed to undertake,” and “utterly failed to attempt” to discharge, their duties represent a narrow set of cases indeed—particularly given the court’s insistence that “the directors’ failure to take any specific steps” cannot itself demonstrate this. The question for now, however, is whether it is literally a null set. It has been argued that the Lyondell standard effectively amounts to something like “irrationality” review. I am not convinced, however, that Lyondell’s standard must be interpreted to mean that only an outright irrational process permits a finding of bad faith in the sale of a company. To say that an “extreme set of facts” is required to find bad faith in the Revlon context is to suggest that a finding of bad faith may occur at least where there are extreme procedural shortcomings (and not only where there is no conceivable business justification for the actions taken).

I think it is also worth noting that the language used—“completely fail[ing] to undertake” and “utterly fail[ing] to attempt”—does not literally foreclose a finding of bad faith simply because some action was taken. Each formulation requires that the director at least minimally try—reflecting a continuing focus on genuine intent to discharge one’s duties. Had the court meant “utterly fail to act”—rather than “to undertake” or “to attempt”—it could have said so. A court applying Lyondell could reasonably find that directors knowingly, completely, and utterly failed to try to discharge their duties, even where some minimal action was taken in purported response to such duties.

IV. CONCLUSION

Lyondell imports into the transactional context the very high hurdle for a finding of bad faith previously applied in the oversight context. I have suggested that the Lyondell standard is amenable to a reading preserving some minimal capacity for the good faith component of the duty of loyalty to discipline boards in Revlon transactions. It is not remotely what proponents of a robust conception of good faith have sought. But in light of the degree of risk aversion historically prevailing among corporate directors, even this slight exposure may amount to something more than nothing.


71. Lyondell, 970 A.2d at 243.


73. See Bernard S. Black et al., Outside Director Liability, 58 STAN. L. REV. 1055 (2006).