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ConAgra, Inc. v. Cargill, Inc., an Interpretive Essay: A Target Corporation May, But Need Not, Agree That Its Directors Serve as Auctioneers for Its Shareholders

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On March 7, 1986, the Nebraska Supreme Court decided *ConAgra, Inc. v. Cargill, Inc.* and issued a *per curiam* opinion.[1] In the majority were Chief Justice Krivosha and Justice Boslaugh, as well as two retired district court judges, Rist and Colwell. The latter two were sitting by assignment. Justice White, joined by Justices Shanahan and Grant, wrote the dissent.[2] With this decision, the Nebraska Supreme Court entered one of the most controversial areas of modern corporate law: deciding what is the proper role for the directors of a target corporation in a takeover struggle.[3]

Critics immediately attacked the opinion; others rushed to its defense. Both believed the court had decided that a corporation, through its corporate directors, did not have the power to pledge its directors' and officers' best efforts to effectuate a merger agreement prior to shareholder approval. Critics assailed the opinion. The court had eroded the concept of contract law.[4] Justice White, in dissent, stated that "it now appears that merger agreements, no matter how carefully

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1. 222 Neb. 136, 382 N.W.2d 576, *motion to amend op. over'd*, 223 Neb. 92, 388 N.W.2d 458, (1986).
2. On March 13, 1986, ConAgra filed a motion to "Correct and Amend Opinion and Order to Conform to Constitutional Requirements." This motion focused on the authority of the two district judges to hear the case and the propriety of their assignments by the Chief Justice. On June 13, 1986, the Nebraska Supreme Court, again *per curiam*, found that ConAgra's motion lacked merit. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).
3. *See generally* Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1146-47 nn. 1-2 (1984).
4. *Idea of Contracts Eroded in Nebraska Court Ruling*, Omaha World Herald, Mar. 14, 1986, at 10, col. 4.

drawn, are at best mere formalities, with no legal effect."[5] The "majority's interpretation of the law, from the standpoint of common sense and fair dealing, is clearly wrong."[6]

The court's defenders argued that the case provided directors with clear guidelines in these fast-paced takeover struggles. Fortunately, corporations could not "bargain away their obligation to tell shareholders of the best (takeover) bid at the time they go to the shareholders."[7] This clarity reflected the supposed simplicity of the court's understanding of a director's fiduciary duty. Directors were to single-mindedly make the shareholders' interests paramount over all other constituents, such as preferred shareholders, bondholders, creditors, employees, and consumers, of the corporate enterprise. Not even commitments in the best interest of the whole corporate enterprise, made at the time of the signing of the merger agreement, could restrict later directorial activity designed to advance the interests of one particular corporate constituent, the shareholders.

This Essay's interpretation is that *ConAgra* allows a corporation to pledge its directors' and officers' best efforts in a merger agreement and permits its directors to consider fairly the interests of all constituents of the corporate enterprise, including, but not limited to, the shareholders. *ConAgra*, properly understood, merely interpreted the "best efforts" clause in the ConAgra-MBPXL merger agreement. The court determined that this "best efforts" clause explicitly permitted the MBPXL directors to maximize the shareholders value by acting as auctioneers for their interests. The court's underlying premise for this holding is that a corporation, may, when there are no other concerned corporate constituents, make such a merger agreement.

THE CASE

ConAgra and Cargill, both Delaware corporations,[8] and both giant agribusinesses, are competitors. In 1978, both concluded that the best way to enter the profitable boxed beef industry was by acquiring publicly owned MBPXL, the second largest beef processor in the country.

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5. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 168, 382 N.W.2d 576 (1986) (White, J., dissenting).
6. Omaha World Herald, *supra* note 4.
7. Shortly after the release of this opinion, I was quoted in a Journal-Star (Lincoln, Nebraska) editorial as suggesting this result. I stated that the *ConAgra* opinion meant that corporate directors did not have the power to bind the corporation to use its best efforts to effectuate a merger prior to a shareholder vote. I now believe I overstated *ConAgra*'s implications. *Reaction is Split as Well*, Lincoln Journal-Star, Mar. 16, 1986, at 2C, col. 1.
8. The court perceived the issue of the directors' duties to the shareholders as an issue of corporate internal affairs, and therefore properly determined by Delaware law. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 137, 153, 382 N.W.2d 576, 577, 586 (1986).

ConAgra made the first move. In mid-summer 1978, its management began encouraging discussions with MBPXL's management. By August, both company presidents had signed a "letter of intent" proposing a merger of the two companies. MBPXL's board, however, renounced the proposed merger terms. ConAgra continued its efforts. At this point, Cargill actively joined the competition. From late August until the end of the year, both ConAgra and Cargill actively competed to acquire MBPXL.

ConAgra achieved the first agreement. On September 28 the ConAgra and MBPXL presidents signed a second letter of intent and the terms of the merger agreement were negotiated over the next several weeks. Nevertheless, Cargill continued its efforts. On October 17, however, the MBPXL board approved a merger agreement with ConAgra and a copy of the agreement was duly executed. Each MBPXL shareholder was to receive one share of ConAgra for each MBPXL share. The Agreement included the following:

> *Best Efforts.* The respective Boards of Directors and principal officers of each of ConAgra and MBPXL shall take all such further action as may be necessary or appropriate in order to effectuate the transactions contemplated hereby including recommending to their respective shareholders that the merger be approved; *provided however*, nothing herein contained shall relieve either Board of Directors of their continuing duties to their respective shareholders.[9]

The Agreement also included a provision that the MBPXL Board would (1) call a meeting of the shareholders on December 15, 1978, (2) submit the Agreement to a vote at such meeting, and (3) recommend that the shareholders vote approval of the agreement. Finally, it was a condition precedent to ConAgra's obligations under the Agreement that the merger be approved by the MBPXL shareholders "as provided in the Delaware General Corporation Law."[10]

Within one week of the signing of this ConAgra-MBPXL Merger Agreement, Mr. Howard Marcus approached Cargill to discuss selling his, and other family members', MBPXL stock. He was an important MBPXL stockholder and a corporate director. His father, Samuel, and his brother, Jerome, were significant shareholders as well as officers and directors. Approximately three weeks later, after further discussions, Cargill agreed to purchase MBPXL stock at $27 per share from thirteen MBPXL stockholders, including the Marcus family's. Through these agreements, Cargill acquired 21.9% of the MBPXL stock. The purchase agreements included the provision that Cargill would make a tender offer for any and all MBPXL shares at $27 per share.

On November 15, Cargill announced its stock purchase agreements

9. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 146-47, 382 N.W.2d 576, 582 (1986).
10. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 160, 382 N.W.2d 576, 590 (1986).

with MBPXL stockholders and the proposed tender offer. On November 16, the MBPXL board resolved to consider the Cargill offer.[11] On November 27, MBPXL's investment banker opined that the $27 offer from Cargill was superior to the ConAgra merger proposal. On December 5, the MBPXL board resolved that it could not recommend to its shareholders that they vote in favor of the ConAgra merger and that the shareholder meeting called for December 15 be cancelled. The Board also recommended to its shareholders that they accept the $27 per share Cargill offer.

By early January, the tender offer was completed and Cargill had gained control of MBPXL. ConAgra had commenced this lawsuit on November 21 in the midst of the economic struggle. The Nebraska district court found MBPXL and Cargill liable to ConAgra for breach of contract, tortious interference with a contract, or both. On March 7, 1986, the Nebraska Supreme Court held that neither MBPXL nor Cargill were liable.[12]

INTERPRETATION

This case was primarily a contract case, but, as the court noted, its "resolution turn[ed] upon a delicate interplay of principles of both contract and corporate law, neither wholly controlling the outcome."[13] There was no doubt that the merger itself could not be consummated without shareholder approval.[14] The debatable issue is whether MBPXL pledged, or under what circumstances it could pledge, its directors and officers to use their "best efforts" to effectuate the merger.

11. The MBPXL board also suspended the Marcus brothers from their responsibilities as officers and directors of MBPXL.

The *ConAgra* court clearly states that it is not focusing on whatever personal liability the MBPXL directors might have to ConAgra. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 156, 382 N.W.2d 576, 587 (1986). Two theories come to mind. First, as signatories on the Agreement, certain directors and officers agreed, personally, not to solicit higher bids. Under this theory, the stockholders that actively approached Cargill would be liable on the agreement, even if MBPXL is not liable for recommending a better offer made to it. *See* H. HENN & J. ALEXANDER, LAW OF CORPORATIONS 584 (1983). Second, one way of understanding the Merger Agreement is that MBPXL agreed that if there was no higher bid, its directors would use their best efforts to effectuate the merger with ConAgra. The condition was the nonexistence of a higher bid. Possibly, the Marcuses are liable for intentionally acting to prohibit that condition from being realized. *See* RESTATEMENT (SECOND) OF TORTS § 766 (1976).

12. After extensive discovery, the district court granted ConAgra's motion for partial summary judgment on the issue of liability. The court then conducted an extensive trial on the issues of proximate cause and damages. The Supreme Court reversed. It granted a partial summary judgment for MBPXL and Cargill on the issue of liability. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 158, 382 N.W.2d 576, 589 (1986).

13. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 153, 382 N.W.2d 576, 586 (1986).

14. DEL. CODE ANN. tit. 8, § 251 (1974).

The principal difference between the majority ("the court") and the dissent is the importance placed on the proviso to the "best efforts" clause of the Merger Agreement. This clause, which, as the court pointed out, was the result of extensive negotiation between the attorneys, provided that even though the MBPXL directors were to use their best efforts to consummate the merger, they were not to be relieved of their continuing duty to MBPXL shareholders. The court stated that there was no "greater duty owed to shareholders than advising them of the existence of a higher offer for their stock before asking them to approve a lower offer."[15] The court held that this duty legitimized the MBPXL directors' decision to cancel the scheduled shareholders meeting, which had been called to consider the ConAgra-MBPXL merger, and to recommend the acceptance of the Cargill tender offer.

Delaware corporate directors have, at all times, a fiduciary duty to the corporation. This properly means a duty to the corporate enterprise, that is, a duty of loyalty to all constituents of the corporation, including the common shareholders, preferred shareholders, bondholders, and perhaps even consumers, employees, and the public. In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court recently reaffirmed this proposition.[16] The Delaware Supreme Court upheld the validity of a corporation's self-tender for its own shares excluding a stockholder who was making a hostile tender offer for the same stock. Through the self-tender, Unocal aided the corporate enterprise to the disadvantage of one significant constituent, this important shareholder. The court held that the Unocal board had the power and, more importantly, the duty to oppose a takeover threat it reasonably perceived to be harmful to the corporate enterprise. The corporate enterprise, the court made clear, includes, but is not identical to, the shareholders.

This broad managerial power and flexibility, the traditional directorial prerogative, even allows management to bind a corporation to a best efforts clause in a merger agreement, which, concededly, must be approved by the shareholders before the actual merger can be consummated. This power is important for several reasons. First, broad managerial power is consistent with the usual power of corporate managers and directors, which permits them to contract for the corporation. It would be unduly confusing if managers and directors had this power only some of the time. Secondly, broad managerial power may be advantageous to the shareholders. Even in competitive bidding for corporate control, a corporation's power to bind itself to a specific agreement may be in the particular corporation's best interest. This ability is likely to induce an initially higher bid because of the

15. ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 155, 382 N.W.2d 576, 587 (1986).
16. 493 A.2d 946 (Del. 1985).

binding nature of the agreement. Even more certainly, this power to bind the corporation will be generally to shareholder advantage, for although in some situations particular shareholders might not receive a subsequently higher bid, initial offers should be more frequent and larger.[17] Third, it supports the multifaceted aspect of this fiduciary duty. The corporate directors' task is not an easy one, and often they are called upon to mediate fairly between competing corporate constituents. To do this adequately, directors should have the power to bind the corporation when such a committment is good, in balance, for the entire enterprise. Analogously, an important purpose of the directors' "business judgment" defense to a shareholders' derivative suit is to assure the directors the freedom to act responsibly towards all members of the corporate community and the public.

If the proviso in the ConAgra-MBPXL Agreement had referred to the directors' continuing duties to the corporation, it would not have added anything to the "best efforts" clause. Such a proviso would have been the lawyer's way of deferring the problem. The issue in this case would then have been whether MBPXL had the power to commit itself through its agents, that is, its directors and officers, to use its best efforts to consummate the merger? The answer to this question, if the directors use proper business judgment in making the decision, is yes.[18]

The clause in the *ConAgra* case, however, was not a mere "best efforts" clause, or even one in which the proviso referred to continuing duties to the corporation. The ConAgra-MBPXL Agreement conditioned MBPXL's pledge to have its directors use their best efforts to effectuate the merger on the directors' continuing duties to MBPXL shareholders. The court held that this duty required the directors to recommend, and to present, only the most competitive offer to the shareholders. In other words, ConAgra and MBPXL had agreed that the MBPXL directors would act as auctioneers of MBPXL for the benefit of the shareholders.[19]

17. *See generally* Coffee, *supra* note 3.

18. Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 741 F.2d 1555 (9th Cir. 1984), *rev'g* Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 550 F. Supp. 770 (N.D. Cal. 1982); *but see* Buxbaum, *The Internal Division of Corporate Governance*, 73 CAL. L. REV. 1671 (1985).

The *ConAgra* court relied on Great Western Producers Co-Operative v. Great Western United Corp., 200 Colo. 180, 613 P.2d 873 (1980), *aff'g* Great Western United Corp. v. Great Western Producers Co-Operative, 588 P.2d 380 (Colo. Ct. App. 1978). The *ConAgra* dissent correctly distinguishes it. *Great Western* held that the directors of a corporation which had pledged its best efforts to consummate a merger did not have to recommend shareholder approval when, and this is the important fact, "unanticipated events" had occurred. There were no unanticipated events in *ConAgra*.

19. The appropriate role for directors in a takeover struggle has been the subject of much informed and sophisticated debate. *See generally*, Coffee, *supra* note 3.

The court offered little support for this suggestion. It did not even use the word auctioneer. However, if the *ConAgra* court had waited a week before issuing its opinion, it could have premised its holding on language in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, decided by the Delaware Supreme Court on November 1, 1985, but for which no written opinion was published until March 13, 1986.[20] In *Revlon*, the board engaged in a variety of defensive tactics to avoid a hostile takeover by Pantry Pride. Among its efforts was an attempt to solicit Fortsmann Little & Company to take control of Revlon in a friendly arrangement. In order to induce Fortsmann to compete with Pantry Pride, Revlon's board agreed to deal exclusively with Fortsmann.

The court enjoined Revlon's defensive tactics, because, in the opinion of the *Revlon* court, the Revlon board had breached its duty to its shareholders. The court held that "obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action."[21] Under the circumstances:

> The Revlon board's authorization . . . was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.[22]

Revlon is not direct support for the *ConAgra* court's interpretation of the ConAgra-MBPXL Agreement. *Revlon*'s articulation of the directors' duties should be limited to the situation of that case. There was active competition for company control and it was manifest that Revlon would be at least partially liquidated by whomever ultimately gained control of the company. In this situation, the directors' duty to the corporate enterprise, as a whole, shrinks in comparison to their duty to one of the corporate constituents, the shareholders. Any broader reading of *Revlon* would lead to an unfortunate simplification of the directors' multifaceted obligations to all members of the corporate enterprise.

In the ConAgra-MBPXL Merger Agreement, the two corporations *agreed*, however, that the directors' duty to the shareholders would be paramount. The court understood this to mean that the parties had agreed that the directors had the duty to serve as auctioneers for the shareholders. This, the *Revlon* case tells us, may be a proper articulation of the directors' obligation.[23]

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20. 506 A.2d 173 (Del. 1986).
21. *Id.* at 182.
22. *Id.*
23. The *ConAgra* court describes the MBPXL board's actions as passive. When Cargill made its tender offer, the board, the court determined, was duty bound to consider it. This is what it means to be an auctioneer. There is no suggestion that

The court did not suggest that its articulation of the directors' role was either mandated or always desirable. It was merely an agreement which a corporation, in some circumstances, could make. This case, due to its circumstances, was an easy one. There was no articulated interest of any other corporate constituent other than the shareholders. If there had been other interests at stake, then the directors should have taken these other factors into account when they agreed with ConAgra on behalf of MBPXL to serve as auctioneers for the MBPXL shareholders. If there had been other concerned corporate constituents, it might have been improper for MBPXL to agree to allow its officers and directors to act as auctioneers for the interests of only one constituent, albeit an important one, the shareholders. Sensitivity in this area is particularly important because these other constituent groups may not have convenient methods, such as a stockholders' derivative suit, to assure that the directors are loyal to the entire corporate enterprise.

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the agreed duty to the shareholders implied that the MBPXL officers and directors had to actively solicit higher bids. *See*, Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 550 F. Supp. 770, 773, n.1 (N.D. Cal. 1982). This is proper, for such an active requirement would unduly jeopardize the residual duty owed to other corporate constituents.