

February 2011

Delaware Court Refuses to Enjoin Poison Pill

On February 15, 2011, Chancellor William B. Chandler III of the Delaware Court of Chancery issued his long-awaited decision in *Air Products & Chemicals, Inc. v. Airgas, Inc.*, on whether to require Airgas to redeem its stockholder rights plan (or “poison pill”) in the face of an unsolicited, all-cash/all-shares tender offer made by Air Products. The court refused to enjoin or otherwise require the target company to redeem the poison pill and dismissed the breach of fiduciary duty claims brought against its directors. The court held that, under existing Delaware law, the board of directors of a Delaware corporation is not obligated to maximize value in the short term, including in response to a hostile takeover, so long as it acts reasonably and in good faith under the *Unocal* standard.

The court’s post-trial, 153-page opinion culminated in a nearly 16-month-long takeover battle. At issue was whether Airgas had to redeem its rights plan and let its stockholders decide whether to accept Air Products’s “best and final” offer. The court held that Airgas’s directors had acted reasonably and proportionately in adopting and retaining the poison pill as a defense to what they perceived as a threat in the form of an inadequate price. However, even though Chancellor Chandler ruled in favor of the Airgas defendants, he

expressed his “personal view” that Air Products’s offer no longer constituted a legal “threat” and that the “poison pill had served its legitimate purpose.” For that reason, he was inclined to let stockholders decide whether to tender their shares to Air Products or continue to invest in Airgas’s long-term strategy. He concluded, however, that he was “constrained” under Delaware Supreme Court precedent to recognize an inadequate price as a cognizable threat and, therefore, could not enjoin the operation of the poison pill under the circumstances:

Although I have a hard time believing that inadequate price alone (according to the target’s board) in the context of a non-discriminatory, all-cash, all-shares, fully financed offer poses any “threat”—particularly given the wealth of information available to Airgas’s stockholders at this point in time—under existing Delaware law, it apparently does.

Thus, Chancellor Chandler concluded that, under existing Delaware precedent, “the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors.”

The court emphasized that, in resisting a hostile takeover,

directors will be subject to intermediate scrutiny under the *Unocal* test and cannot “just say never”:

This case poses the following fundamental question: Can a board of directors, acting in good faith and with a reasonable factual basis for its decision, when faced with a structurally non-coercive, all-cash, fully financed tender offer directed to the stockholders of the corporation, keep a poison pill in place so as to prevent the stockholders from making their own decision about whether they want to tender their shares—even after the incumbent board has lost one election contest, a full year has gone by since the offer was first made public, and the stockholders are fully informed as to the target board’s views on the inadequacy of the offer? If so, does that effectively mean that a board can “just say never” to a hostile tender offer?

The answer to the latter question is “no.” A board cannot “just say no” to a tender offer. Under Delaware law, it must first pass through two prongs of exacting judicial scrutiny by a judge who will evaluate the actions taken

by, and the motives of, the board. Only a board of directors found to be acting in good faith, after reasonable investigation and reliance on the advice of outside advisors, which articulates and convinces the Court that a hostile tender offer poses

a legitimate threat to the corporate enterprise, may address that perceived threat by blocking the tender offer and forcing the bidder to elect a board majority that supports its bid.

If you have any questions about this decision or other corporate

law matters, please contact [Allen Goolsby](#) at (804) 788-8289 or agoolsby@hunton.com, [Gary Thompson](#) at (804) 788-8787 or gthompson@hunton.com, [Steven Haas](#) at (804) 788-7217 or shaas@hunton.com or your Hunton & Williams LLP contact.

Hunton & Williams Offices

Atlanta

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, Georgia 30308-2216
(404) 888-4000

Austin

111 Congress Avenue
Suite 1800
Austin, Texas 78701-4068
(512) 542-5000

Bangkok

34th Floor, Q.House Lumpini Building
1 South Sathorn Road
Thungmahamek, Sathorn
Bangkok 10120
Thailand
+66 2 645 88 00

Beijing

517-520 South Office Tower
Beijing Kerry Centre
No. 1 Guanghai Road
Chaoyang District
Beijing 100020
PRC
+86 10 5863 7500

Brussels

Park Atrium
Rue des Colonies 11
1000 Brussels, Belgium
+32 (0)2 643 58 00

Charlotte

Bank of America Plaza
Suite 3500
101 South Tryon Street
Charlotte, North Carolina 28280
(704) 378-4700

Dallas

1445 Ross Avenue
Suite 3700
Dallas, Texas 75202-2799
(214) 979-3000

Houston

Bank of America Center
Suite 4200
700 Louisiana Street
Houston, Texas 77002
(713) 229-5700

London

30 St Mary Axe
London EC3A 8EP
United Kingdom
+44 (0)20 7220 5700

Los Angeles

550 South Hope Street
Suite 2000
Los Angeles, CA 90071-2627
(213) 532-2000

McLean

1751 Pinnacle Drive
Suite 1700
McLean, Virginia 22102
(703) 714-7400

Miami

1111 Brickell Avenue
Suite 2500
Miami, Florida 33131
(305) 810-2500

New York

200 Park Avenue
New York, New York 10166-0091
(212) 309-1000

Norfolk

500 East Main Street
Suite 1000
Norfolk, Virginia 23510-3889
(757) 640-5300

Raleigh

One Bank of America Plaza Suite 1400
421 Fayetteville Street
Raleigh, North Carolina 27601
(919) 899-3000

Richmond

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

San Francisco

575 Market Street
Suite 3700
San Francisco, California 94105
(415) 975-3700

Washington

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1500

© 2011 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.