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## 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](mailto:agoolsby@hunton.com), [Gary Thompson](#) at (804) 788-8787 or [gthompson@hunton.com](mailto:gthompson@hunton.com), [Steven Haas](#) at (804) 788-7217 or [shaas@hunton.com](mailto:shaas@hunton.com) or your Hunton & Williams LLP contact.

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