

**DELAWARE SUPREME COURT INVALIDATES BYLAW PROVISION
THAT WOULD HAVE SHORTENED TERMS OF STAGGERED BOARD**

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Late last month, the Delaware Supreme Court reversed an October 2010 Delaware Court of Chancery ruling and held that an ambiguous staggered board charter provision was intended to provide that each class of directors serve three-year terms, thus thwarting a hostile bidder's attempt to hold an annual meeting – and potentially replace a majority of the board – less than four months after directors were last elected. The Delaware Supreme Court's ruling suggests that the court will give ambiguous annual meeting charter provisions a practical review, which should come as welcome news to the many Delaware corporations that may have similar staggered board provisions in their charters.

The Delaware Court of Chancery had decided that a bylaw amendment proposed by Air Products and Chemicals, Inc. ("Air Products") that would result in the annual stockholder meetings of Airgas, Inc. ("Airgas") being held seven months in advance of their historical dates was valid under Airgas's governing documents and Delaware law.¹ In reversing, the Delaware Supreme Court acknowledged that "[p]ractice and understanding in the real world" were relevant given the ambiguities in the Airgas charter and, citing "uncontroverted extrinsic evidence" regarding the intended meaning of the charter, held that the bylaw amendment was inconsistent with the charter and therefore invalid under Delaware law.²

The case, set amidst Air Products' heated takeover battle for control of Airgas, centered around a bylaw amendment to move Airgas's annual stockholder meetings, which were historically held in August, up to January, which would have resulted in the 2011 annual stockholder meeting being held barely four months after the 2010 annual meeting. The bylaw provision required each new class of directors to be elected "for a term expiring at the annual meeting of stockholders held in the third year following the year of their election," and the Court of Chancery interpreted the ambiguous terms in favor of the stockholder franchise in finding that "annual" means "once every year," not every 12 months.

Although the Delaware Supreme Court agreed with the Court of Chancery that the Airgas charter language was ambiguous, it cited "overwhelming extrinsic evidence" to reverse the lower court. The Delaware Supreme Court reviewed not only Airgas's nearly 25-year practice of holding its annual meetings approximately 12 months apart, but also industry practice and other commentary, to conclude that the language used in Airgas's charter was intended to provide that each class of directors serve three-year terms. The Delaware Supreme Court concluded that the bylaw amendment was inconsistent with the Airgas charter (and therefore invalid under Delaware law) because it materially shortened the directors' full three-year term that the Airgas charter required and would have resulted in a de facto removal of directors without the required supermajority vote.

¹ *Airgas, Inc. v. Air Products and Chemicals, Inc.* (Del. Ch. Oct. 8, 2010), available at <http://www.wcsr.com/resources/pdfs/AirgasvAirProducts.pdf>. Our October 2010 client alert discussing the ruling is available at <http://www.wcsr.com/resources/pdfs/cs101810.pdf>.

² *Airgas, Inc. v. Air Products and Chemicals, Inc.* 2010 Del. LEXIS 585 (Nov. 23, 2010).

Contact Information

If you have any questions regarding the recent Delaware Supreme Court case, please contact Sudhir N. Shenoy (<http://www.wcsr.com/SudhirShenoy>), the principal drafter of this client alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/profSearch?team=corporateandsecurities>.

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