

Corporate & Financial Weekly Digest

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Delaware Chancery Court Upholds Airgas's Poison Pill

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The Delaware Chancery Court recently upheld the use of a shareholder rights plan, or “poison pill,” by Airgas, Inc. (Airgas) to ward off a hostile takeover attempt by Air Products and Chemicals, Inc. (Air Products). The Chancellor’s decision came after a lengthy hostile take-over battle waged by Air Products during which it made an all cash tender offer for all outstanding shares of Airgas. Air Products’s initial offer was priced at \$60 per share and ultimately was raised to a final offer of \$70 per share. Airgas’s board unanimously concluded that the Air Products offer was inadequate, even after Air Products was able to have three of its own nominees elected to the board, and refused to remove its poison pill.

In a lengthy opinion, Chancellor Chandler concluded that the Airgas board’s refusal to remove its poison pill was proper and not in breach of the board members’ fiduciary duties. Chancellor Chandler analyzed the reasonableness of the Airgas’s board decision to keep the pill in place under the heightened standard set by the Delaware Supreme Court in 1985 in *Unocal Corp. v. Mesa Petroleum Co.*, rejecting Airgas’s argument that the business judgment rule should apply because there was “overwhelming evidence” of the directors’ independence and good faith. Nevertheless, even under the heightened standard set forth in *Unocal*, which applies because of the “omnipresent specter” that a board may act in its own interests in a takeover situation, Chancellor Chandler concluded that the Airgas board acted reasonably.

Applying the *Unocal* standard, Chancellor Chandler concluded that Airgas demonstrated that it “had reasonable grounds for believing a danger to corporate policy and effectiveness existed” and that the steps it took in response to that threat were reasonable. In particular, the court determined that the board acted in good faith in responding to the offers from Air Products. In reaching this conclusion, the court pointed out that the board is comprised primarily of outside directors, including directors nominated by Air Products who ultimately agreed with the decision to keep the pill in place, and that it relied on the advice of several independent financial advisors in determining to reject the offer. Although noting that he believed the Airgas pill had served its legitimate purpose by giving the board time to express its view to stockholders on the merits of the tender offer, Chancellor Chandler held that the board’s determination to reject the offer based solely on its conclusion that it was for an inadequate price was reasonable under current Delaware law. ([Air Products and Chemicals, Inc. v. Airgas, Inc., Civ. Action Nos. 5249-CC, 5256-CC \(Del. Ch. Feb. 15, 2011\)](#))

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