On February 15, 2011, Chancellor William B. Chandler III, of the Delaware Court of Chancery, issued the much-anticipated, post-trial decision in the long-running takeover battle between Air Products & Chemicals, Inc. (“Air Products”) and Airgas, Inc. (“Airgas”). For nearly a year, the Airgas board of directors had relied on a shareholder rights plan to ward off an unsolicited Air Products offer that was believed by the Airgas board to undervalue the company. During that time, Air Products launched a public tender offer with a steadily increasing offer price and Airgas regularly countered, in the form of SEC filings and press releases, that the offer price was inadequate. The result was a very public litigation saga.

The Court’s lengthy 153-page opinion in *Air Products & Chemicals, Inc. v. Airgas, Inc.* rules in favor of Airgas and its board of directors and essentially tackles the fundamental corporation law question of “who gets to decide when and if the corporation is for sale?” The Court ultimately concluded, based on nearly 25 years of existing Delaware Supreme Court precedent in this area, that “the answer must be that the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors.” A brief overview of the decision, highlighting key facts and relevant aspects of the Court’s holding, follows.

**Background**

In February 2010, Air Products launched a public tender offer for all outstanding shares of Airgas stock. After several price bumps and offer extensions, the tender offer stood at a “best and final offer” of $70 per share. The Airgas board maintained unanimously that Airgas was worth at least $78 per share in a sale transaction and, in any event, far more than the $70 per share offered by Air Products.

To that end, the Airgas board utilized, in addition to its classified board and other takeover defenses, a shareholder rights plan with a 15 percent triggering threshold to ward off the unwanted offer. Air Products and certain shareholder plaintiffs sought the removal of these defenses to Air Products’ hostile tender offer.

As a part of its takeover efforts, Air Products nominated a slate of three directors for election at the Airgas 2010 annual meeting. In addition, Air Products proposed three bylaws designed to aid its takeover attempt, including a bylaw that would accelerate the Airgas annual meeting date to January of each year. In response, the Airgas board amended its bylaws to allow the delay of the 2010 annual meeting. On September 15, 2010, Airgas’ 2010 annual meeting was held, and all three Air Products’ nominees to the Airgas board were elected, and all three Air Products’ bylaw proposals were adopted.

On December 21, 2010, the Airgas board unanimously, including Airgas’ nominees, rejected Air Products’ “best and final” $70 offer as inadequate. After a weeklong trial and a supplemental evidentiary hearing, the Court issued its ruling.
The Opinion

The Court described the “fundamental question” presented by this case as whether “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, [may] 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 if . . . the stockholders are fully informed as to the target board’s views on the inadequacy of the offer?” And, “if so, does that effectively mean that a board can ‘just say never’ to a hostile tender offer?”

The Court answered the latter question in the negative, stating that “a board cannot ‘just say no’ to a tender offer.” Rather, under Delaware law, a board must first pass through the two prongs of exacting judicial scrutiny required by the well-known Unocal standard of review, under which a judge will evaluate the actions taken by, and the motives of, the board. According to the Court, under Unocal only a board of directors found to be acting in good faith, after reasonable investigation and reliance on the advice of outside advisors, may address the perceived threat of a hostile tender offer by blocking the offer and forcing the hostile bidder to elect a board majority of directors that supports its bid.

Under the first prong of Unocal, the Court found that the Airgas board was comprised of a majority of outside independent directors who relied upon “not one, not two, but three outside independent financial advisors in reaching its conclusion that Air Products’ offer [was] ‘clearly inadequate.’” Indeed, one of Airgas’ independent advisors opined that the fair value of Airgas as of January 26, 2011, was “in the mid to high seventies, and well into the mid eighties.” Thus, the Court found that the Airgas board reasonably believed that Air Products’ offer was inadequate and, coupled with the fact that a majority of Airgas’ stockholders would likely tender into the inadequate offer, posed a legitimate threat.

The Court next concluded that maintaining Airgas’ defensive measures was a reasonable response to that threat. In addressing this question, the Court relied upon the Delaware Supreme Court’s recent decision in Versata Enterprises, Inc. v. Selectica, another rights plan decision, in finding that Airgas’ defensive measures did not render a successful proxy contest for the control of Airgas “realistically unattainable.” Rather, the combination of Airgas’ rights plan and a classified board worked only to delay, not prevent, a successful proxy contest for control of the Airgas board. In making this finding, the Court noted that Air Products had “already run one successful slate of insurgent [directors].” The Court found that the Airgas board’s decision to maintain its defensive measures was a reasonable response to the threat posed by Air Products’ inadequate offer.

The Court thus concluded that the Airgas board met its burden under Unocal to articulate a legally cognizable threat and prove its defensive measures fell within a range of reasonable responses proportionate to that threat. Air Products’ and the shareholder plaintiffs’ requests for relief were therefore denied, and all claims asserted against defendants were dismissed with prejudice.

Conclusion

Although the Court upheld Airgas’ continued use of its shareholder rights plan, the Chancellor expressed his “personal view” that Airgas’ rights plan had already served its legitimate purpose. The Chancellor pointed out that the rights plan, combined with Airgas’ classified board, had allowed the company over a full year to inform its stockholders about its view of Airgas’ intrinsic value.
Further, it had given the Airgas board a full year to express its views to its stockholders on the purported opportunistic timing of Air Products’ repeated advances and to educate its stockholders on the inadequacy of Air Products’ offer. This delay was, according to the Chancellor, longer “than any litigated poison pill in Delaware history.”

Personal views notwithstanding, the Chancellor was “constrained” to follow Delaware Supreme Court precedent, holding clearly that a law-trained Court must not substitute its business judgment for that of the board. The Chancellor noted that “[t]rial judges are not free to ignore or rewrite appellate Court decisions.” Thus, because “the Delaware Supreme Court has recognized inadequate price as a valid threat to corporate policy and effectiveness . . . and also made clear that the selection of a time frame for achievement of corporate goals . . . may not be delegated to the stockholders,” the Chancellor applied Unocal’s heightened scrutiny, and upheld the board’s continued use of the Airgas rights plan.

Ultimately, the Court of Chancery’s decision may be read as an endorsement of the past 25 years of applicable Delaware case law. Starting with the Delaware Supreme Court’s 1985 decision in Moran v. Household International, Inc., the use of a shareholder rights plan has been recognized as a valid takeover defense. With nearly unwavering consistency, the Delaware Courts have scrutinized the use of shareholder rights plans under the Unocal standard of review, and upheld their use by independent, well-informed boards responding reasonably to legitimate threats posed by hostile bidders.