

A Pill of a Swan Song

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By David Marcus

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Chancellor William B. Chandler III's Feb. 15 opinion finding for Airgas Inc. in a case where Air Products and Chemicals Inc. sought to force Airgas to redeem its poison pill is one of the most remarkable decisions from a Delaware court in many years.

The ruling was the most important decision on the poison pill since the mid-1990s, and it effectively ended Air Products' yearlong pursuit of its industry rival, a hostile bid whose length, intensity and occasional vitriol were reminiscent of the classic takeover battles of the 1980s and 1990s. It may also serve as a coda to Chandler's quarter-century on the bench, most of which has been spent on the Court of Chancery, since the judge is entitled to retire with a full pension and has been rumored to be contemplating making that move.

The case gave Chandler the rare opportunity to consider a body of doctrine that has developed largely in his time as a judge, and he took full advantage with a 153-page opinion in which he commented on the case law, evaluated the enormous body of legal scholarship on it and questioned the wisdom of the result that Delaware law dictated in the case.

Air Products withdrew its \$5.9 billion, \$70 per share cash bid within hours of the opinion's release, depriving the Delaware Supreme Court of a chance to comment directly on it. But that court was very unlikely to find for Air Products, and Chandler's opinion seemed aimed more at his judicial successors than at his current superiors.

The question at the heart of the case was quite clear, Chandler wrote: "In the context of a hostile tender offer, who gets to decide when and if the corporation is for sale?" Can the target board persist in using a poison pill to prevent shareholders from taking an offer the board thinks is inadequate even after it has lost a proxy fight? Or must the shareholders at some point be allowed to make up their own minds?

The judge was equally clear about his response: "In my personal view, Airgas's poison pill has served its legitimate purpose." The pill, Chandler wrote, "has given the Airgas board over a full year to inform its stockholders about its view of Airgas's intrinsic value and Airgas's value in a sale transaction." And, he emphasized in italics, "It has given Airgas more time than any litigated poison pill in Delaware history -- enough time to show stockholders four quarters of improving financial results, demonstrating that Airgas is on track to meet its projected goals."

Nevertheless, Chandler said that Delaware precedent compelled him to rule for Airgas. He pointed particularly to *Versata Enterprises Inc. v. Selectica Inc.*, a decision last fall in which the Delaware Supreme Court held that the combination of a staggered board and a poison pill is perfectly legal. The high court also emphasized that point in ruling that Airgas shareholders could not compel the company to hold its 2011 annual meeting in January, just four months after the 2010 annual meeting -- a holding that reversed Chandler's decision on the issue. Chandler couldn't resist making a snide dig at the Supreme Court's reasoning in a footnote, but he got the message.

As he came to the end of the opinion, Chandler nodded to the two great antagonists in the debate over the poison pill, Lucian Bebchuk of Harvard Law School and Martin Lipton, the lawyer most closely identified with the pill, whose firm, Wachtell, Lipton, Rosen & Katz, represented Airgas.

Chandler literally brought Lipton into the opinion by quoting from a law review article in which Lipton wrote, "The incidence of a target's actually saying 'never' is so rare as not to be a real-world problem," words Chandler quoted in the opinion and to which he replied: "Well, in this case, the Airgas board has continued to say 'no' even after one proxy fight."

The composition of that board was the critical fact in the case. "Air Products got what it wanted," Chandler wrote. "Its three nominees got elected to the Airgas board and then questioned the directors about their assumptions. (They got answers.) They looked at the numbers themselves. (They were impressed.) They requested outside legal counsel. (They got it.) They requested a third outside financial advisor. (They got it.) And in the end, they joined in the board's view that Air Products' offer was inadequate. John Clancey, one of the Air Products Nominees, grabbed the flag and championed Airgas's defensive measures, telling the rest of the board, 'We have to protect the pill.' "

And so did Chandler, despite his raft of reservations.