



Delaware Court Reaffirms the Poison Pill and Directors' Power to Block Inadequate Offers

Posted by Martin Lipton, Wachtell, Lipton, Rosen & Katz, on Thursday February 17, 2011

Editor's Note: [Martin Lipton](#) is a founding partner of Wachtell, Lipton, Rosen & Katz, specializing in mergers and acquisitions and matters affecting corporate policy and strategy. This post is based on a Wachtell Lipton firm memorandum, and relates to the decision of the Delaware Court of Chancery in the case of *Air Products & Chemicals, Inc. v. Airgas, Inc.*, which is available [here](#). Wachtell Lipton represented Airgas, Inc. in the matter.

Almost thirty years ago, our Firm announced there was a way — the poison pill — to level the playing field between corporate raiders and a board of directors acting to protect the interests of the corporation and its shareholders. Despite great skepticism about the pill in the legal and banking communities, the Delaware Supreme Court in 1985 agreed with us and affirmed that directors, in the exercise of their business judgment, could properly use the pill to protect the corporation from hostile takeover bids.

Since then, many have continued to criticize the pill, and hostile bidders and plaintiffs' lawyers have continued to litigate to constrain its use. Yesterday, in a historic decision, the Delaware Court of Chancery rejected the broadest challenge to the pill in decades. [Air Products & Chemicals, Inc. v. Airgas, Inc., C.A. No. 5249—CC \(Del. Ch. Feb. 15, 2011\)](#). The decision reaffirms the vitality of the pill. It upholds the primacy of the board of directors in matters of corporate control under bedrock Delaware law. It reinforces that a steadfast board, confident in management's long-term business plan, can block opportunistic bids. We represented the target, Airgas, and its board of directors.

The conduct of the Airgas board, the Chancellor concluded, "serves as a quintessential example" of these fundamental principles: if directors act "in good faith and in accordance with their fiduciary duties," the Delaware courts will continue to respect a board's "reasonably exercised managerial discretion." Directors may act to protect the corporation, and all of its shareholders, against the threat of inadequate tender offers. And they may act to protect against the special danger that arises when raiders induce large purchases of shares by arbitrageurs who are

focused on a short-term trading profit, and are uninterested in building long-term shareholder value.

The Chancellor could not have been clearer that “the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors.” And it is up to directors, not raiders or short-term speculators, to decide whether a company should be sold: “a board cannot be forced into *Revlon* mode any time a hostile bidder makes a tender offer that is at a premium to market value.” The Chancellor concluded: “in order to have any effectiveness, pills do not—and can not—have a set expiration date.” The poison pill lives.