

A CASE STUDY: *AIR PRODUCTS V. AIRGAS* AND THE VALUE OF STRATEGIC JUDICIAL DECISION-MAKING

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When is it appropriate for Delaware judges to act strategically? This case study documents and analyzes Air Products' \$5.8 billion unsuccessful, hostile offer for Airgas, reviewing the decisions made by the Delaware courts in adjudicating the most prominent takeover bid of 2010. The three court opinions in Air Products v. Airgas illustrate how Delaware courts strategically decide cases and the effect of this decision-making on the course of Delaware corporate law and Delaware's constituencies. The Airgas case ultimately provides a useful lesson for when, if ever, strategic considerations should influence the outcome of individual Delaware corporate law disputes.

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I. INTRODUCTION

On February 15, 2011, Chancellor William B. Chandler issued his eagerly awaited opinion deciding *Air Products & Chemicals, Inc. v. Airgas, Inc.*¹ The chief judge of the Delaware Chancery Court refused to order the redemption of the Airgas shareholder rights plan, a decision that would have cleared the path for Air Products' hostile offer for Airgas. Chancellor Chandler wrote that he made this decision against his own personal wishes. He wanted to rule differently but was bound to decide in Airgas's favor. Delaware Supreme Court precedent firmly centered the decision to redeem a shareholder rights plan with the Airgas board of directors rather than with the judiciary or shareholders.²

The *Airgas* decision was not surprising to many observers. While Delaware Chancery Court judges had been indicating for years that they were inclined to force the redemption of a shareholder rights plan in similar circumstances, the Delaware Supreme Court had signaled its contrary inclinations earlier in the fall of 2010. The Delaware Supreme Court had overturned Chancellor Chandler's first ruling in the case, which held that Air Products could amend Airgas's bylaws to move up the date of its shareholder meeting.³ The Delaware Supreme Court held

¹ *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011).

² *See id.* at 56–57 (“Although I have a hard time believing that inadequate price alone (according to the target’s board) . . . poses any ‘threat’ . . . under existing Delaware law, it apparently does. Inadequate price has become a form of ‘substantive coercion’ as that concept has been developed by the Delaware Supreme Court in its takeover jurisprudence . . . I am constrained by Delaware Supreme Court precedent to [rule in favor of Airgas].”).

³ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, C.A. No. 5817-CC, 2010 WL 3960599, at *1 (Del. Ch. Oct. 8, 2010).

otherwise,⁴ a signal that the court was perhaps in no mood to turn away from prior doctrine.⁵

The initial decision can be viewed as a judicial referendum on the value of the staggered board. The second is a judicial valuation of the shareholder rights plan. The outcome of both cases was dictated by the Delaware Supreme Court and its strategic decisions in *Airgas*⁶ and earlier cases. Chancellor Chandler also made the strategic decision to express his dissatisfaction with this ruling, rather than risk reversal. His opinion can also be seen as attempting to force the Delaware Supreme Court to clarify its doctrine and recognize the tension between the court's earlier rulings in *Unocal* and *Moran* and later cases such as *Selectica* which seemed to eviscerate the preclusiveness review contemplated by *Unocal* and its progeny.⁷

Strategic decision-making is nothing new. Remember *Marbury v. Madison*⁸? In Delaware, it is cabined by the competition for state charters. The *Airgas* decision is revealing because it ably shows the judicial strategies that underlie and drive Delaware's jurisprudence amid this competition. Delaware enjoys preeminence in the competition for state charters. But it often feels that this preeminence is precarious, and that an ill-considered decision can drive away corporations.

The actual holdings of both *Airgas* decisions were relatively unimportant. In the initial case, only a few hundred corporations were affected, and they could have tried to amend their charters to eliminate this problem or otherwise taken steps to mitigate the decision.⁹ In the shareholder rights plan case, the ultimate holding was quite

⁴ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1185 (Del. 2010).

⁵ See *infra* notes 75–91 and accompanying text.

⁶ *Airgas*, 8 A.3d at 1188–90.

⁷ See *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

⁸ 5 U.S. (1 Cranch) 137 (1803).

⁹ See *infra* notes 140–141 and accompanying text.

confined.¹⁰ In either instance, each holding can be doctrinally distinguished from other significant decisions and pitched as unique to the peculiar facts of the *Airgas* case.

The real value of *Airgas* is for the information it reveals on Delaware's strategy for continued dominance and the value of strategic decision-making in and of itself. At the extreme, a wrong decision would have risked driving corporations to charter outside Delaware, evoking Marty Lipton's famous 1988 memo in which he warned that the Delaware Chancery Court's decision in *City Capital Associates Ltd. Partnership v. Interco Inc.*¹¹ and its failure to enact a more effective takeover statute risked Delaware's preeminence.¹² Delaware strategically chose not to take this risk despite the relative unimportance of the *Airgas* case.¹³

Delaware's decision-making in *Airgas* was not senseless or Machiavellian. Rather, the *Airgas* decisions represented the culmination of twenty-five years of Delaware jurisprudence. Since the mid-1980s, the Delaware courts have been aggressively defining corporate law and doctrine. The Delaware courts have adopted a strategy of promulgating procedural standards and rules to govern board decisions and duties in the operation and sale of the corporation. These rules largely aim to eschew substantive review of board decisions and operations. The *Airgas* opinions can be viewed as a coda to this creative burst of judicial entrepreneurship.

Jurisprudential theory further categorizes Delaware's judicial decision-making. Delaware judges largely conform

¹⁰ See *infra* note 142 and accompanying text.

¹¹ *City Capital Assocs. Ltd. P'ship v. Interco Inc.*, 551 A.2d 787 (Del. Ch. 1988).

¹² Memorandum from Martin Lipton, Partner, Wachtell, Lipton, Rosen & Katz, to clients (Nov. 3, 1988) (on file with author).

¹³ Delaware's turn away from a liberated market for corporate control in the wake of *Interco* is detailed in Steven M. Davidoff, *Takeover Theory and the Law and Economics Movement*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW (Claire Hill & Brett McDonnell, eds., forthcoming 2012).

to two archetypes, the legal process model and the strategic model. The legal process model posits that judges decide cases from the law at hand using conventional judicial techniques to make decisions through logical reasoning. This view of judge decision-making is derived in large part from the work of H. L. A. Hart.¹⁴ Hart theorizes that judges are anything but political. Rather, judges decide cases based on the positive law. Gaps in the law are filled by judicial resort to the prior laws to dictate the result and new law.¹⁵ In contrast, the strategic theory of decision-making posits that judges decide cases by heeding the institutions and forces that can affect their status and goals.¹⁶ This is a species of the political model of judging, but with the political inquiry directed to exogenous forces. Strategic decision-making is informed by rational choice theory, as judges respond to incentives. Frank Cross illustrates this by providing the example of a circuit court judge who decides to issue a ruling against his or her ideological preferences in order not to be reversed.¹⁷

The *Airgas* opinions are a prism through which to view how the Delaware courts decide cases in the shadow of these forces and how Delaware courts fluctuate among modalities of judicial decision-making. *Airgas* also highlights the benefits of strategic decision-making as Delaware courts decide cases in heed to outside forces, and as lower court judges calculate how the Delaware Supreme Court will react. In making these decisions, judges assess the real-time risk of their decisions. Delaware decision-making thus involves

¹⁴ See generally H. L. A. HART, *THE CONCEPT OF LAW* (1961).

¹⁵ *Id.* at 138–44.

¹⁶ The bulk of scholarship on strategic decision-making has attempted to analyze the drivers of U.S. Supreme Court decision-making. See, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 90–94 (1997); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 112–27 (1998); WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 1–18 (1964).

¹⁷ Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1483 (2003). For another empirical study on how courts of appeals judges decide cases, see Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998).

more than a decision on “the facts” of the case at hand, or mere process-driven decision-making. Rather, it is heavily influenced by how and why judges view the broader impact of the case on the corporate community and on Delaware’s standing.

Strategic decision-making benefits Delaware. It allows Delaware courts to fine-tune jurisprudence not only to meet their needs, but for the wider corporate community. Strategic jurisprudence allows Delaware to look past endogenous decisional effects toward larger principles of law. It provides cohesiveness to Delaware law.

The *Airgas* decisions also show the perils of a strategic-minded Delaware. Strategic decision-making risks challenges under rule-of-law issues as the facts of each case become less determinative of a decision. In the lower courts, strategic decision-making can prevent the full airing of viewpoints, which is a hallmark of the Delaware courts. It also raises the danger that Delaware will be viewed as biased toward litigants who benefit from strategic decision-making. Given the bent of Delaware law, this is likely to be corporate managers and other corporate constituencies who can wield substantial economic power. Delaware therefore risks looking too pro-managerial in its decision-making.

This case study analyzes the *Airgas* case using it as a prism through which to examine strategic decision-making in the Delaware courts. It examines when it is appropriate and useful for Delaware judges to assume this mantle as opposed to process-based or other decision-making archetypes. The benefits and detriments of Delaware’s strategic decision-making and resultant jurisprudence are assessed.

II. AIR PRODUCTS’ HOSTILE OFFER FOR AIRGAS

On February 5, 2010, Air Products announced a hostile offer to acquire all of Airgas’s outstanding shares.¹⁸ Air

¹⁸ Press Release, Air Prods. & Chems., Inc., Air Products Offers to Acquire Airgas for \$60.00 Per Share in Cash (Feb. 5, 2010), *available at*

Products offered \$60 per Airgas share in cash, a 38% premium to the closing price of Airgas shares on the previous day.¹⁹ Airgas's rejection was swift and curt. On February 9, 2010, Airgas announced that its directors had unanimously rejected the Air Products offer. The offer "very significantly" undervalued the company and its "future prospects."²⁰ The rejection would commence a yearlong battle for the future of both companies.

In the face of a hostile bid, targets typically adopt a shareholder rights plan, commonly known as a "poison pill." Shareholder rights plans were created by the law firm Wachtell, Lipton, Rosen & Katz in the 1980s.²¹ The mechanics are complicated, but the net effect is to prevent a bidder from acquiring more than a threshold percentage of the company's stock without the approval of the target company's board.²²

Airgas already had a shareholder rights plan in effect at the time of Air Products' bid. Air Products would therefore need majority consent of the Airgas board to redeem the shareholder rights plan. If the Airgas board refused, Air Products' primary route to acquire the company would have to be to replace a majority of the Airgas board through a proxy contest. The newly reconstituted board would then redeem the shareholder rights plan. This was not news to Air Products. Since the advent of the shareholder rights plan in the mid-1980s, bidders have followed this tactic:

<http://www.airproducts.com/en/company/news-center/2010/0205-air-products-offer-to-acquire-airgas.aspx>.

¹⁹ *Id.*

²⁰ See Press Release, Airgas, Inc., Airgas Board of Directors Rejects Unsolicited Proposal from Air Products (Feb. 9, 2010), available at http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1505.

²¹ See Martin Lipton & Paul K. Rowe, *Pills, Polls and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. 1, 9–10 (2002). The first instance of a shareholder rights plan defense was in 1983 and was created to address the significant uptick in hostile bids occurring at the time. See Frank Allen & Steve Swartz, *Lenox Rebuffs Brown-Forman, Adopts Defense*, WALL ST. J., June 16, 1983, at 2.

²² See generally DALE A. OESTERLE, *THE LAW OF MERGERS & ACQUISITIONS* 514–18 (3d ed. 2005).

launch a proxy contest to maneuver around a shareholder rights plan.²³

In Airgas's case, though, such a feat would be more difficult, because the Airgas board was staggered, with only one-third of the board up for election in a given year.²⁴ Air Products would consequently have to initiate two successive proxy contests to elect a majority of Airgas directors. If Airgas stuck to its regular meeting schedule, this could take up to two years as Air Products waited for each annual meeting of Airgas shareholders.²⁵

Because of the costs that this required wait imposes upon bidders, a staggered board combined with a shareholder rights plan is often claimed to be a powerful antitakeover device, a term coined by Lucian Bebchuk, John Coates and Guhan Subramanian.²⁶ In a paper published in 2002, these three law professors found that the combination of a staggered board and shareholder rights plan did not, on average, produce increased offer premiums.²⁷ The authors also found that companies with a staggered board had an 8% to 10% difference in shareholder returns in the nine month period after a hostile bid is launched than companies without a staggered board.²⁸ The combination of a staggered board and shareholder rights plan appeared to provide little benefit and significantly reduced a firm's value.²⁹

²³ See Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 859–60 (1993).

²⁴ *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 60 n.29 (Del. Ch. 2011).

²⁵ The two year time frame assumed that Airgas did not postpone its annual meetings. Airgas traditionally held its annual meeting at the end of July or the beginning of August each calendar year. If Airgas stuck to this schedule, Air Products would have to wait about eighteen months.

²⁶ Lucian A. Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 890 (2002).

²⁷ *Id.* at 935–37.

²⁸ *Id.* at 937–39.

²⁹ *Id.* at 950.

Still, the staggered board has its defenders. As an initial matter, there is research which shows that the staggered board can create rather than destroy value by providing the board increased bargaining power.³⁰ Theoretically, analyzing the value of staggered boards is difficult due to endogeneity issues (i.e., companies may be self-selecting to have staggered boards based on internal corporate characteristics which instead drive the wealth effects of staggered boards). The endogeneity of the corporation throws into question any paper analyzing the staggered board's wealth effects.³¹

Practitioner conventional wisdom at the time of Air Products' offer was also that a staggered board was not an insurmountable barrier. Most targets would capitulate if the first election was lost. History provides anecdotal evidence to support this conclusion.³² There are only a few recorded instances of a company continuing to fight to a second proxy

³⁰ See Thomas W. Bates, David A. Becher & Michael L. Lemmon, *Board Classification and Managerial Entrenchment: Evidence from the Market for Corporate Control*, 87 J. FIN. ECON. 656, 676 (2008) (analyzing takeover activity between 1990 and 2002 and concluding that the staggered board did not have a significant effect on firm value).

³¹ See Esteban Afonso & Babajide M. Wintoki, *Explaining the Staggered Board Discount* (Oct. 4, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1927471> (finding that "staggered boards do not necessarily cause a loss of firm value after adoption but rather, are a symptom of other underlying factors that cause the market to impute a discount to the firm").

³² A commonly cited example is Willamette's fourteen-month resistance to a hostile offer by Weyerhaeuser. Willamette's board continued to reject Weyerhaeuser's bid even after a third of the Willamette board was replaced. The Willamette board eventually agreed to be acquired by Weyerhaeuser at a 16% premium to Weyerhaeuser's original bid. See Bill Virgin, *Weyerhaeuser Finally Wins; Willamette Gives In, Agrees to Be Bought by Rival for \$55.50 a Share*, SEATTLE POST-INTELLIGENCER, Jan. 22, 2002, at A1. A more recent example is Airtran's hostile offer for Midwest Air Group. Airtran won a short-slate proxy contest resulting in Midwest selling itself to TPG Capital and Northwest Airlines. See Russell Grantham, *AirTran Quits Fight for Midwest: Private Equity Firm Wins Milwaukee-based Carrier*, ATLANTA J.-CONST., Aug. 18, 2007, at 1C.

contest after losing the first to a hostile bidder.³³ Both academics and practitioners have defended the staggered board as providing the board with the ability and time to consider a hostile bid.³⁴ A staggered board in conjunction with a shareholder rights plan works to prevent short-term decision-making by allowing the board to consider long-term interests beyond immediate shareholder desires.³⁵ Finally, academics have defended the staggered board as a means to ensure director primacy, itself a social good.³⁶ Director primacy in its purist form posits that directors should have decision-making authority over shareholders. A staggered board contributes to board primacy by further centering corporate decision-making with the board.³⁷

In the case of Airgas, the question was whether Airgas's CEO and founder, Peter McCausland, and the other directors were utilizing a staggered board and shareholder rights plan to retain control against the wishes of Airgas shareholders. This type of entrenchment was cited by critics, who decried the wealth-destroying effects of a staggered board.³⁸ Countering this narrative was the fact that Airgas was a well-performing company, one that had experienced stock price appreciation greater than Air Products in nine of

³³ See Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1058 (2002).

³⁴ See Mark Gordon, *Takeover Defenses Work. Is That Such a Bad Thing?*, 55 STAN. L. REV. 819, 834–35 (2002).

³⁵ *Id.* at 835–36.

³⁶ See Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 807–09 (2002).

³⁷ See *id.*

³⁸ Adoption of a staggered board has been found to reduce share value. See James M. Mahoney & Joseph T. Mahoney, *An Empirical Investigation of the Effect of Corporate Charter Antitakeover Amendments on Stockholder Wealth*, 14 STRATEGIC MGMT. J. 17 (1993). Conversely, undoing the staggered board has been found to increase the value of company shares. See Re-Jin Guo et al., *Undoing the Powerful Anti-Takeover Force of Staggered Boards*, 14 J. CORP. FIN. 274 (2008); see also Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, *Staggered Boards and the Wealth of Shareholders: Evidence from Two Natural Experiments* (Nat'l Bureau of Econ. Research, Working Paper No. 17127, June 2011), available at <http://www.nber.org/papers/w17127>.

the ten years since 2000. The Airgas board and management also argued that Airgas was poised to dramatically increase its earnings as the company emerged from the impact of the recession.³⁹ Given Airgas's past performance, deference to the Airgas board's decision on its future path may have been appropriate.

On the same day Air Products announced its offer, it also filed litigation in a Delaware court, challenging the Airgas shareholder rights plan.⁴⁰ Hostile offerors typically bring litigation to obtain a judicial monitor for the target's conduct. A litigation claim allows the bidder to depose the target's executives and extract information while pursuing a public relations battle premised on this information. While litigation can serve a valuable purpose in a hostile offer, it is not commonly perceived as a viable means to force the target to accept the bidder's offer. Since the 1980s, the Delaware courts had refrained from actively intervening in the substance of a takeover contest to decide its outcome.⁴¹

One of the Airgas board's first responses was to preserve the board's flexibility in setting a meeting date. Effective as of April 7, 2010, the Airgas board amended Airgas's bylaws to provide the Airgas board the ability to delay its annual meeting.⁴² The bylaws had previously required that the annual meeting be held no more than five months after Airgas's fiscal year-end in March.⁴³ The change allowed the board to hold the meeting on its chosen date.⁴⁴ The effect

³⁹ See Press Release, Airgas Inc., Airgas Confirms Receipt of Unsolicited Proposal from Air Products (Feb. 5, 2010), available at http://www.airgas.com/content/pressreleases.aspx?PressRelease_ID=1501.

⁴⁰ See Verified Complaint, *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (C.A. No. 5249-CC).

⁴¹ See Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 260–61 (2007).

⁴² See *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 73 (Del. Ch. 2011).

⁴³ *Id.*

⁴⁴ *Id.*

was to push back the last possible date for Airgas's annual shareholder meeting from August to September.⁴⁵

Air Products' next step was expected given its need to circumvent Airgas's shareholder rights plan. On May 13, 2010, Air Products nominated three directors to the Airgas board. Air Products specifically stated in its press release announcing these nomination that the three directors were "independent" from both Airgas and Air Products. The chief executive officer of Air Products, John McGlade, asserted that the election of these directors would "send a clear message to the Airgas Board that their actions to date do not serve the best interests of Airgas shareholders."⁴⁶

Air Products also made two proposals to amend Airgas's bylaws.⁴⁷ The first of these proposed to amend Airgas's bylaws to prevent Airgas from reseating any director who was not reelected, except the chief executive officer. If the CEO was reelected, he could not be elected as the chairman of the Airgas board. Mr. McCausland was up for reelection at the upcoming annual meeting. The CEO exception would encourage shareholders who wanted Airgas to negotiate to vote for Air Products' nominees, safe in the assurance that it might not ultimately remove Mr. McCausland from the board because the board would reappoint him, but send a message. The exact content of such a message was unknown; after all, shareholders vote only yes or no on directors and do not provide their reasons. Air Products hoped a "no" vote would be interpreted as instructing the other directors to act independently of Mr. McCausland.

⁴⁵ While the issue never arose, Airgas likely would have exercised this option in part to avoid a proxy contest in August, when institutional shareholders tend to be difficult to reach.

⁴⁶ See Press Release, Air Prods. & Chems., Inc., Air Products Notifies Airgas of Proxy Solicitation at 2010 Annual Meeting (May 13, 2010), available at <http://www.airproducts.com/company/news-center/2010/0513-air-products-notifies-airgas-of-proxy-solicitation-at-2010-annual-meeting.aspx>.

⁴⁷ *Id.* See also Airgas, Inc., Proxy Statement (Schedule 14A), at 4-7 (May 13, 2010).

Air Products' second bylaw amendment proposal was more novel and significant. Air Products proposed to amend Airgas's bylaws to force it to hold its next annual meeting in January 2011.⁴⁸ As noted, previously Airgas had held its annual meetings in late July or early August. The date for Airgas's next meeting was not set, but under Delaware law, it could be no later than thirteen months after the previous one, in September 2011.⁴⁹ If Air Products' proposal was approved, the net effect would be that Airgas would have two director elections within four months. If approved, the bylaw would create a legal end-run around the staggered board, allowing Air Products to shorten the takeover process by nine to ten months.

Air Products' legal grounds for the amendment were clever.⁵⁰ The relevant Airgas charter provision read:

The Directors . . . shall be classified, with respect to the time for which they severally hold office, into three classes, as nearly equal in number as possible as shall be provided in the manner specified in the By-Laws . . . with the members of each class to hold office until their successors are elected and qualified. At each annual meeting of the stockholders of the Corporation, the successors to the class of Directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual

⁴⁸ See Press Release, Air Prods. & Chems., Inc., Air Products Notifies Airgas of Proxy Solicitation at 2010 Annual Meeting (May 13, 2010), available at <http://www.airproducts.com/company/news-center/2010/0513-air-products-notifies-airgas-of-proxy-solicitation-at-2010-annual-meeting.aspx>.

⁴⁹ See DEL. CODE ANN. tit. 8, § 211(c) (2010).

⁵⁰ The idea for this type of bylaw amendment had reportedly been circulating for several years prior to the announcement of the Air Products proposal and was reportedly first put forth by the Delaware law firm Morris, Nichols, Arsht & Tunnell. The prospect that Air Products would make this proposal had leaked to the market in March. See Steven M. Davidoff, *The Way Forward for Airgas*, N.Y. TIMES DEALBOOK (Mar. 19, 2010, 12:43 P.M.), <http://dealbook.nytimes.com/2010/03/19/the-way-forward-for-airgas/>.

meeting of stockholders held in the third year following the year of their election.⁵¹

One plain reading of the provision was that it required director elections to be held in a particular year and directors to serve a term until the next annual meeting. But no period of exact time was specified in the provision. One possible meaning of the provision was that directors did not have to serve a three-year term, but rather a term that expired in a particular year.

Existing rules of contract interpretation governed the reading of this provision. Prior Delaware courts had held that bylaws were a contract between shareholders and the company.⁵² Objective contract rules apply, and the court must first determine the plain meaning of the provision under the bylaws.⁵³ The odds thus appeared against Airgas if a Delaware court was forced to decide this issue. The question was reduced to what the term “annual” meant, and the bias was toward a shareholder-friendly interpretation. “Annual” in this light was likely to be a term expiring during the third calendar year, not a three-year term.

Air Products had another advantage. Airgas’s shares had experienced significant turnover in the weeks after Air

⁵¹ See Air Prods. & Chems., Inc., Proxy Statement (Schedule 14A), at 5–7 (May 13, 2010); Airgas, Inc., Amended and Restated Certificate of Incorporation, art. V, § 1 (amended through Apr. 7, 2010); see also Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 60 n.29 (Del. Ch. 2011).

⁵² See, e.g., CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 234 (Del. 2008) (“Bylaws, by their very nature, set down rules and procedures that bind a corporation’s board and its shareholders.”); Centaur Partners, IV v. Nat’l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990) (“Corporate charters and by-laws are contracts among shareholders of a corporation . . .”).

⁵³ See *Centaur Partners*, 582 A.2d at 928 (stating that when interpreting corporate charters and bylaws, “the general rules of contract interpretation are held to apply”); see also *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 338–39 (Del. Ch. 2008) (“[A] corporation’s bylaws and charter are contracts among its shareholders, and . . . the construction of a contract is purely a question of law Of course, the construction of the bylaw is a purely legal question only if the bylaw itself is unambiguous.”) (citing *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d, 810, 830 (Del. Ch. 2007)).

Products' offer announcement. A number of large institutional shareholders had sold their holdings, positions that were bought by hedge funds arbitraging the possibility of a successful acquisition. At one point, it was estimated that more than 50% of the Airgas shares were held by hedge funds.⁵⁴ These funds had an incentive to vote for any deal that provided sufficient return. This led Airgas to accuse these hedge funds of short-termism: The funds were interested only in a quick deal that provided them a short-term return at the expense of Airgas's long-term prospects.⁵⁵

Despite such concerns, it was not certain that these hedge funds would take any premium offered. In many recent transactions, hedge funds have opposed takeover deals as being underpriced.⁵⁶ The proxy advisory service Institutional Shareholder Services ("ISS") also argued that long-term investors no longer appeared to be invested in Airgas.⁵⁷ The long-term investors had largely sold their shares en masse to short-term holders.

On July 8, 2010, Air Products raised its offer to \$63.50 per share.⁵⁸ Air Products raised its bid again to \$65.50 on

⁵⁴ See *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 118–19 n.461 (Del. Ch. 2011) (estimating the profile of Airgas's shareholders as of Dec. 9, 2010); *id.* at 95 n.312.

⁵⁵ *Id.* at 109 ("The argument is premised on the fact that a large percentage (almost half) of Airgas's stockholders are merger arbitrageurs . . . who would be willing to tender into an inadequate offer because they stand to make a significant return on their investment even if the offer grossly undervalues Airgas in a sale.").

⁵⁶ This occurred in the 2010 proposed acquisitions of Cedar Fair Amusements by Apollo Management and Dynegy by Blackstone Group. See Steven M. Davidoff, *The End of Cedar Fair's Ride?*, N.Y. TIMES DEALBOOK (Feb. 11, 2010, 5:08 P.M.), <http://dealbook.nytimes.com/2010/02/11/the-end-of-cedar-fairs-ride/>; Michael Erman, *Hedge fund Seneca Capital opposes Dynegy deal*, REUTERS (Oct. 21, 2010, 9:36 P.M.) <http://www.reuters.com/article/2010/10/22/dynegy-seneca-idUSN2115853620101022>.

⁵⁷ *Airgas (ARG) — Is a Split Shareholder Base Only Half As Smart?* (Institutional S'holder Servs., Rockville, Md.), Dec. 10, 2010.

⁵⁸ Press Release, Air Prods. & Chems., Inc., Air Products Increases All-Cash Offer for Airgas to \$63.50 Per Share (July 8, 2010), *available at*

September 6, 2010 in anticipation of Airgas's annual meeting.⁵⁹ Air Products had timed its bid to precede ISS's forthcoming recommendation, another common tactic in hostile offers. ISS, by policy, will not change its recommendation within the five-day period before a shareholder meeting. Hostile bidders will raise their offers on the eve of a recommendation, knowing that ISS will not take into account any subsequent target response.

Airgas rejected Air Products' latest offer on September 8.⁶⁰ On that same day, ISS called Air Products' offer "below a full and fair price" and recommended that shareholders decline to tender into the offer. The proxy advisory service also recommended that shareholders vote against the bylaw amendment because "pulling the next annual meeting ahead by nine months would significantly impair the defensive value of the classified board, limiting the board's ability to negotiate the highest offer for shareholders." Airgas did not gain ISS's full endorsement. ISS recommended that the three nominated Air Products directors be elected to the Airgas board, on the basis that these new directors would attempt to ensure that Air Products "gets a seat at the table".⁶¹

<http://airproducts.com/company/news-center/2010/0708-air-products-increases-all-cash-offer-for-airgas.aspx>.

⁵⁹ See Press Release, Air Prods. & Chems. Inc., Air Products Increases All-Cash Offer for Airgas to \$65.50 Per Share (Sept. 6, 2010), *available at* <http://airproducts.com/company/news-center/2010/0906-air-products-increases-all-cash-offer-for-airgas.aspx>; see also Jeremy Lemer, *Air Products Raises its Bid for Airgas*, FIN. TIMES (Sept. 6, 2010, 11:54 PM), <http://www.ft.com/intl/cms/s/0/f9e122b4-ba07-11df-8804-00144feabdc0.html>.

⁶⁰ See Press Release, Airgas, Inc., Airgas Board of Directors Unanimously Rejects Revised Unsolicited Tender Offer from Air Products, (Sept. 8, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1582.

⁶¹ See Press Release, Air Prods. & Chems., Inc., Air Products Comments on ISS Recommendation that Airgas Shareholders Vote in Favor of All Air Products Nominees (Sept. 9, 2010), *available at* <http://airproducts.com/company/news-center/2010/0909-iss-recommendation-that-airgas-shareholders-vote-in-favor-of-air-products-nominees.aspx>.

Airgas shared ISS's concerns about the dynamic pressure created by an earlier meeting. A week earlier, on August 30, Airgas announced that it would make a commitment to hold its next shareholder meeting in June if the bylaw amendment proposal was defeated.⁶² The same day, Airgas publicly disclosed a letter sent to the Delaware Chancery Court asserting that the bylaw amendment was invalid.⁶³ The two actions were intended to create uncertainty around whether a January meeting would occur, and push shareholders to take the half-loaf of a June meeting.

Airgas shareholders rejected this proposal, and the September 15 meeting was a complete win for Air Products.⁶⁴ Air Products' three nominees were elected to the Airgas board. The bylaw amendment setting Airgas's meeting on January 15 was also adopted by a vote of 38,321,496 (44% of the outstanding shares) to 35,206,232 (41% of the outstanding shares).⁶⁵

The Airgas board met on September 23 and enlarged its board by one member, to ten directors. Mr. McCausland was unanimously reappointed to the board and John C. van Roden, Jr. named chairman of the board.⁶⁶ Air Products had requested that a special committee of independent directors be formed to consider the offer, but none was created. Later

⁶² See Press Release, Airgas, Inc., Airgas Commits to Hold Special Meeting of Stockholders on June 21, 2011 (Aug. 30, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1576.

⁶³ See Press Release, Airgas Inc., Airgas Responds to Air Products (Aug. 27, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1575; see also Steven M. Davidoff, *Airgas Rolls the Dice in Proxy Fight*, N.Y. TIMES DEALBOOK (Aug. 30, 2010, 2:23 PM), <http://dealbook.nytimes.com/2010/08/30/airgas-rolls-the-dice-in-proxy-fight/>.

⁶⁴ Airgas, Inc., Current Report (Form 8-K) (Sept. 15, 2010). See also Press Release, Air Prods. & Chems., Inc., Airgas Shareholders Support All Air Products Nominees and Proposals at Airgas Annual Meeting (Sept. 15, 2010), *available at* <http://www.airproducts.com/en/company/news-center/2010/0915-airgas-shareholders-support-air-products-nominees-and-proposals-at-airgas-annual-meeting.aspx>.

⁶⁵ Airgas, Inc., Current Report (Form 8-K), at 2-4 (Sept. 15, 2010).

⁶⁶ Airgas, Inc., Current Report (Form 8-K), at 2 (Sept. 17, 2010).

in October the board would meet again and the three new directors would join their colleagues to reject Air Products' offer.

Airgas promptly brought suit in Delaware court to overturn the bylaw amendment requiring a January meeting date. A trial was held the week of October 4, 2010, in Georgetown, Delaware, on the poison pill, while a hearing was held on October 8 to argue the bylaw amendment issue.⁶⁷ Chancellor Chandler ruled within two hours of closing arguments. The Chancellor began by stating that "by-laws are contracts among shareholders of a corporation and the general rules of contract interpretation are held to apply."⁶⁸ A court must defer to the common meaning of a term and "with any ambiguity in interpreting bylaws, 'doubt is resolved in favor of the stockholders' electoral rights.'"⁶⁹

Turning to the Airgas charter provision, Chancellor Chandler restated black-letter law that contract language that "may fairly be read to have more than one meaning" is ambiguous.⁷⁰ Chancellor Chandler next looked to the Merriam-Webster dictionary definition, which defined "annual" as "covering the period of a year."⁷¹ Chancellor Chandler did not find this dispositive; instead, he found the term "annual" as used in the Airgas charter provision to be ambiguous.

The remainder of the opinion was a straightforward application of black letter Delaware law on contracts and the shareholder franchise. In light of the ambiguity, the *Centaur Partners* case and other prior Delaware case law required Chancellor Chandler to favor a contract interpretation that

⁶⁷ The posture of the bylaw issue was a motion for judgment on the pleadings.

⁶⁸ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, C.A. No. 5817-CC, 2010 WL 3960599, at *3 (Del. Ch. Oct. 8, 2010).

⁶⁹ *Id.* The Chancellor then went on to hold that the bylaw was amendable by 50% of Airgas's shareholders. *See id.* at *5.

⁷⁰ *Id.* at *5.

⁷¹ *Id.* at *7 n.38; MERRIAM-WEBSTER DICTIONARY (online ed.), <http://www.merriam-webster.com/dictionary/annual>.

supported the shareholder franchise.⁷² Adopting the principle that Airgas's annual meeting cycle "can validly run on a calendar year basis," the Airgas charter provision permitted a calendar year interpretation of "annual." The requirement to favor an interpretation that enabled the shareholder franchise meant that the bylaw amendment was valid and not in conflict with Airgas's charter provision implementing a staggered board.⁷³

Chancellor Chandler concluded by addressing the policy considerations underlying the effect of his decision on the efficacy of the staggered board. He stated:

[P]laintiffs suggest that the common practice and understanding of staggered boards is that a "full term" is three years, and a conclusion that two "annual meetings" can be held in a four-month period would "destabilize the staggered boards of Delaware companies." This is not the case—it will not diminish the effectiveness of staggered boards. The common sense, ordinary language reading that an "annual meeting" must happen once every year comports with the clear terms of our statute, its policy rationale and our common law decisions. If corporate charters and bylaws have been written in a non-specific, open-ended fashion, it is not for this Court to twist their plain words to achieve a purported intent of the drafters. The solution is for drafters to employ clear and simple language to provide clarity and avoid ambiguity. This could easily be accomplished by corporate planners and draftsmen through such simple language.... In short, this is not the end of the world for staggered boards; it is an easy fix if it needs fixing.⁷⁴

⁷² See *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 929 (Del. 1990); see also *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335 (Del. Ch. 2008).

⁷³ Chancellor Chandler ended his analysis by finding that the bylaw did not conflict with Delaware statutory law on the subject. See *Airgas*, 2010 WL 3960599 at *11.

⁷⁴ *Id.* at *13.

The day after Chancellor Chandler's ruling, Airgas's stock price rose to \$69.78 from \$67.85.⁷⁵ The increased price reflected market sentiment that Air Products would raise its bid in order to obtain Airgas's consent to a takeover. Airgas responded by announcing its intention to appeal the decision.⁷⁶ The Airgas board also took steps to buttress its public position to counter arguments that it was seeking to entrench itself. On October 26, Mr. van Roden, chairman of the Airgas board, sent a letter to Mr. McGlade on behalf of all of the Airgas directors. In the letter, Mr. van Roden stated that Airgas was willing to negotiate with Air Products but that each of the directors believed that "the value of Airgas in any sale is meaningfully in excess of \$70 per share."⁷⁷ The letter was calculated to put Air Products on notice that the Airgas board still deemed Air Products' offer inadequate.

The statement was intended to meet accusations that the board was "just saying no" and refusing to sell at any price. Instead of blind resistance, the Airgas board could claim that it was acting to maximize value for shareholders, and was merely determining that minimum value. Airgas likely hoped that the Delaware court would frame Airgas's response as within the Airgas board's exercise of its business judgment rather than a breach of its duty of loyalty with the purpose of entrenching the board.

⁷⁵ Airgas shares closed trading at \$67.85 per share on Friday, October 8, 2010, the day Chancellor Chandler issued his opinion. On Monday, October 11, 2010, shares of Airgas closed at \$69.78 per share. See *ARG Historical Stock Quotes – Monday, October 11, 2010*, MARKETWATCH.COM, <http://www.marketwatch.com/investing/stock/ARG/historical?siteid=mktw&date=10%2F11%2F2010> (last visited May 2, 2012); *ARG Historical Stock Quotes – Friday, October 8, 2010*, MARKETWATCH.COM, <http://www.marketwatch.com/investing/stock/ARG/historical?siteid=mktw&date=10%2F8%2F2010> (last visited May 2, 2012).

⁷⁶ See Press Release, Airgas, Inc., Airgas to Appeal Delaware Chancery Court Ruling (Oct. 11, 2010), available at http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1598.

⁷⁷ See Press Release, Airgas, Inc., Airgas Sends Letter to Air Products, (Oct. 26, 2010), available at http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1601.

The appeal was heard by the Delaware Supreme Court on November 3, 2010. Justice Jack B. Jacobs was replaced at the last minute by Superior Court Judge William L. Witham Jr. because Justice Jacobs had been in a car accident on the way to the court. He was unable to sit in on the hearing.⁷⁸

A ruling by the Delaware Supreme Court was expected promptly after the hearing. If Airgas lost, it would have only a month to prepare and mail proxy materials in time for a January election. Two weeks went by without a ruling. As time passed, Airgas's stock price dropped as arbitrageurs weighed the possibility that the Delaware Supreme Court would overturn Chancellor Chandler's decision. On November 17, the Delaware court issued an order that Justice Jacobs would be substituted back into the case and Judge Witham removed.⁷⁹ The case would be resubmitted en banc without a new oral argument.

On November 23, the Delaware Supreme Court issued a unanimous opinion overturning Chancellor Chandler's holding. The court agreed with Chancellor Chandler that the charter provision was ambiguous.⁸⁰ The court diverged with the chancellor in its view of the applicable law. Instead of citing case law, which mandated interpretation of the ambiguity in favor of the stockholder franchise, the court instead proceeded to a straightforward application of contract law. The court stated that:

If there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required to determine the meanings the parties intended. Delaware courts often look to extrinsic evidence for the common understanding of

⁷⁸ See Steven M. Davidoff, *Court's Curious Decision on Airgas*, N.Y. TIMES DEALBOOK (Nov. 29, 2010, 5:09 PM), <http://dealbook.nytimes.com/2010/11/29/delaware-courts-curious-decision-on-airgas/>.

⁷⁹ See Order, *Airgas, Inc. v. Air Prods. & Chems., Inc.* (Del. Sup. Ct. Nov. 17, 2010) (No. 649), available at [http://www.delawarelitigation.com/uploads/file/int2E\(2\).pdf](http://www.delawarelitigation.com/uploads/file/int2E(2).pdf).

⁸⁰ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1189 (Del. 2010).

ambiguous language whether in a statute, a rule or a contractual provision.⁸¹

Applying this rule without the presumption in favor of the shareholder franchise, the court found persuasive industry practice and understanding of the charter provision. There was "overwhelming and uncontroverted extrinsic evidence" that the term "annual" meant a yearlong period.⁸² Fifty-eight of eighty-nine Fortune 500 Delaware corporations with staggered boards used the same formulation as the Airgas bylaw.⁸³ Seventy-nine percent of these companies stated in their proxies that their directors served three-year terms.⁸⁴ The *ABA Public Company Organizational Documents: Model Forms and Commentary* supported this view as well as a 1917 pamphlet titled, *Business Corporations Under the Laws of Delaware*.⁸⁵ Based on this evidence, the court held that the Airgas bylaw should be read to require that directors of staggered boards serve three-year terms. The bylaw amendment was in conflict with the charter provision and void. The opinion did not express any policy rationale for this decision, nor did it mention protection of the staggered board as driving this result.⁸⁶

The Delaware Supreme Court also did not rely on what appeared to be Airgas's most powerful argument. Twenty-nine companies in the Fortune 500 that had adopted staggered boards did use a three-year formulation while

⁸¹ *Id.* at 1190.

⁸² *Id.* at 1194.

⁸³ *Id.* at 1191.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1191-92.

⁸⁶ There was an undertone to the Delaware Supreme Court's opinion hinting at a view that deference to short-term shareholders in interpretation of this bylaw provision was not appropriate. But any conclusion on this matter appears preliminary. Short-term shareholders, code for hedge funds and arbitrageurs, may sell in the near future and may be seeking a short term gain, but they also may be more incentivized to say no since they are often sophisticated investors willing to bear the short-term risks associated with whether and when a takeover proposal will go through. Upon further study, the categorization of short- and long-term shareholders may not equate to the conventional wisdom.

sixty did not.⁸⁷ In its briefs to the court, Airgas had argued that if the Court upheld the lower court decision, it would “create two significantly different kinds of three-class staggered boards—those that serve three-year terms and those that do not.”⁸⁸ This would create two different governance structures for companies that Airgas alleged all thought had a uniform structure. While the Delaware Supreme Court’s rationale for not relying on this argument is unclear, the court may have not wanted to recognize that there were clear drafting differences between the two clauses.

Both Air Products’ and Airgas’s strategies shifted in the wake of the Delaware Supreme Court decision. On December 9, 2010, Air Products raised its offer to \$70 per share.⁸⁹ Air Products likely raised its price in response to a December 2 letter from Chancellor Chandler to the parties that questioned whether Air Products’ prior offer was its best and final one.⁹⁰ In response, Air Products asserted that this \$70 offer would be its best and final offer and that it would not wait until the summer to run a proxy contest to unseat another three directors on the Airgas board. Air Products’ position was an appeal to the market to force Airgas to negotiate a deal. It was also drafted to push forward Air Products’ litigation case. Air Products could claim that its offer was all cash, fully financed and not coercive. The only issue was whether the board could refuse to allow shareholders to accept this offer. If the Airgas board refused

⁸⁷ Plaintiff’s Opening Brief in Support of Their Motion for Judgment on the Pleadings at 24, *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (C.A. No. 5249-CC).

⁸⁸ *Id.* at 27.

⁸⁹ See Press Release, Air Prods. & Chems., Inc., Air Products Makes Best and Final Offer for Airgas; Increases All-Cash Offer to \$70 Per Share (Dec. 9, 2010), available at <http://airproducts.com/company/news-center/2010/1209-air-products-makes-best-and-final-offer-for-airgas.aspx>.

⁹⁰ Letter from William B. Chandler III, Chancellor, Del. Court of Chancery, to Counsel Representing Parties in Civil Action Nos. 5249-CC & 5256-CC (Dec. 2, 2010), available at <http://www.scribd.com/doc/44613571/Chandler-s-Letter-to-Airgas-and-Air-Products>.

to do so, shareholders would lose the opportunity to receive a premium for their shares.

This was important. The jurisprudence on takeovers was given birth during the 1980s takeover boom. Accompanying this boom was a surge in hostile offers and the invention of coercive tactics such as the two-tiered hostile offer. Delaware jurisprudence was drafted amid this maelstrom and intended to provide targets the ability to defend against coercive offers. A board's right to adopt a shareholder rights plan to defend against a potential threat such as a coercive offer had been established in *Moran v. Household International, Inc.* in 1985.⁹¹ The question remained in Delaware whether a board could "just say no" in the face of a non-coercive offer and adopt a preclusive shareholder rights plan solely on the basis of price. Doctrinally, it was uncertain whether any threat existed at all, and if one did, whether it justified adoption and maintenance of a shareholder rights plan.

Delaware Chancery Court judges had debated the issue for the decade leading up to the *Airgas* case. A number of the chancery court judges had intimated that a shareholder rights plan could be ordered redeemed in such circumstances. Less than a year earlier in *Yucaipa American Alliance Fund II, L.P. v. Riggio*,⁹² Vice Chancellor Leo E. Strine Jr. had written in a footnote that:

[T]here is a plausible argument that a rights plan could be considered preclusive, based on an examination of real world market considerations, when a bidder who makes an all shares, structurally non-coercive offer has: (1) won a proxy contest for a third of the seats of a classified board; (2) is not able to proceed with its tender offer for another year because the incumbent board majority will not redeem the rights as to the offer; and (3) is required

⁹¹ *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355–57 (Del. 1985).

⁹² *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010).

to take all the various economic risks that would come with maintaining the bid for another year.⁹³

In *eBay Domestic Holdings, Inc. v. Newmark*,⁹⁴ decided shortly after *Yucaipa*, Chancellor Chandler ordered the redemption of a shareholder rights plan adopted by a private company. The chancellor had applied *Unocal* to find that the adoption was unreasonable in relation to the threat posed.⁹⁵ The ruling was one of a few to order the redemption of a shareholder rights plan under *Unocal* since the *Interco* case.⁹⁶ In *eBay*, Chandler cited the *Yucaipa* decision approvingly and stated that Delaware judges must scrutinize shareholder rights plans to guard “against the overt risk of entrenchment and the less visible yet more pernicious risk that incumbents acting in subjective good faith might nevertheless deprive stockholders of value-maximizing opportunities.”⁹⁷

The chancery court opinions intimating that a Delaware court could order the redemption of a shareholder rights plan was countered by countervailing signs from the Delaware Supreme Court. In *Versata Enterprises, Inc. v. Selectica, Inc.*,⁹⁸ the Delaware Supreme Court affirmed a chancery court holding that permitted the trigger of a shareholder

⁹³ *Id.* at 351 n.229. See also Leo E. Strine Jr., *The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic “Just Say No” Question*, 55 STAN. L. REV. 863, 877–81 (2002) (analyzing the then-hypothetical situation and concluding that such a scenario must be resolved by the legislature, not the judiciary). Heightening the uncertainty, though, Vice Chancellor Strine had also included a footnote in the same opinion appearing to make the alternative argument. See *Yucaipa Am. Alliance Fund*, 1 A.3d 310 at 351 n.229.

⁹⁴ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

⁹⁵ See *id.* at 31–35.

⁹⁶ The other was *Grand Metropolitan Public Ltd. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988), which was effectively overruled by the Delaware Supreme Court. In *Quickturn Design Systems, Inc. v. Shapiro*, 71 A.2d 1281 (Del. 1998), the Delaware Supreme Court held a no-hand shareholder rights plan invalid under *Unocal*.

⁹⁷ *eBay Domestic Holdings, Inc.*, 16 A.3d at 31.

⁹⁸ 5 A.3d 586 (Del. 2010).

rights plan. In deciding the case, the Delaware Supreme Court stated that “the combination of a classified board and a Rights Plan do not constitute a preclusive defense.”⁹⁹ This dictum followed the Delaware Supreme Court’s decision in *Lyondell Chemical Co. v. Ryan*,¹⁰⁰ a ringing endorsement of board decision-making in the context of takeovers. In *Ryan*, the Delaware Supreme Court reversed Vice Chancellor John W. Noble’s ruling that directors breach their duty of loyalty in the consideration of the sale of the company “[o]nly if they knowingly and completely failed to undertake their responsibilities.”¹⁰¹ Interestingly, the Delaware Supreme Court did not even cite *Smith v. Van Gorkom*,¹⁰² the seminal case on directors’ duties in a takeover. The Delaware Supreme Court’s intent was still clear; unlike in the *Van Gorkom* case almost twenty-five years before, it would be loath to second-guess directors in the sale decision.

While the issue framed by the Air Products offer was of uncertain judicial outcome, Air Products’ strategy after losing the bylaw decision was puzzling. Air Products converted its financial offer into a litigation case. Air Products appeared to be placing the outcome of its offer with the Delaware courts. A positive ruling was an uncertain probability given the Delaware Supreme Court’s ruling on the bylaw portion of this case and its prior dictum. Air Products has not commented on this strategy, but perhaps, unwilling to raise its price, the company and its advisers could think of no other strategy to force Airgas to negotiate a transaction at a price acceptable to Air Products.

Airgas and its attorneys were no doubt aware of Air Products’ hamstrung strategy. Their communications were intended to establish that the board was not “just saying no” but rather rejecting the offer because of inadequate price. In a November 2 letter to Mr. McGlade, the Air Products CEO, the Airgas chairman of the board, Mr. van Roden, wrote that

⁹⁹ *Id.* at 604.

¹⁰⁰ *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009).

¹⁰¹ *Id.* at 243–44.

¹⁰² *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

“the board has unanimously concluded that it believes that the value of Airgas in a sale is at least \$78 per share, in light of our view of relevant valuation metrics.”¹⁰³ The communication was a significant problem for Air Products, which intended to appeal to Chancellor Chandler. If the three directors whom Air Products nominated thought that Air Products’ offer remained inadequate, this weakened the grounds for Air Products to argue that the shareholder rights plan should be redeemed. A vote to support the Air Products offer would have supported evidence of entrenchment by the other directors and provided Chancellor Chandler a basis to order the shareholder rights plan redeemed. Not only had all of the directors failed to recommend the Air Products offer, they had now stated a price the directors were willing to approve, further undermining an entrenchment argument. In the wake of the November 2 letter, the parties met on November 4 to discuss valuation positions but concluded by issuing a statement that the two had not reached any agreement and did not plan any future meetings.

On December 7, two days before Air Products raised its offer to \$70 per share, the three newly elected Airgas directors delivered a letter to the Airgas chairman complaining of their lack of independent representation. The three directors stated:

To be clear, at no time did any of us take the position that a \$78 offer price was the price of admission to having any discussions with Air Products, nor did we agree that \$78 was the minimum per share price at which Airgas might be purchased, and it would be wrong for you to insinuate otherwise to the Court. Given the circumstances under which we were elected, on matters central to shareholders assessing the Air Products offer and any future improvements

¹⁰³ See Letter from John van Roden, Chairman of the Board of Directors, Airgas, Inc., to John P. Clancy, Robert L. Lumpkins & Ted B. Miller Jr., Newly-elected Directors, Air Prods. & Chems., Inc. (Dec. 8, 2010) (quoting the November 2 letter), *reprinted in* Press Release, Airgas, Inc., Airgas Releases Board Letters (Dec. 13, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1610.

to it, we believe that Airgas has a responsibility to fairly and accurately present our views to shareholders.¹⁰⁴

Mr. van Roden replied the next day to dispute the allegations of the three directors. He threatened these directors with the possibility of a lawsuit alleging breach of fiduciary duties if they acted unduly to favor Air Products. Mr. van Roden stated, “[w]e request that you not take any action to interfere with the company’s defense of the claims that have been asserted against it or otherwise seek to assist Air Products in promoting its interests at the expense of the company’s shareholders.”¹⁰⁵

It appeared that there was more conflict on the Airgas board than the initial November 2 statement implied. The conflict culminated with Airgas’s announcement on December 13 that the nine Airgas independent directors had voted to hire Credit Suisse as an independent financial adviser for the all of the independent directors.¹⁰⁶ The three Airgas directors had already hired Skadden, Arps, Slate, Meagher & Flom LLP for independent legal advice.¹⁰⁷

The advisers went to work, and on December 22, Airgas’s board voted unanimously to reject what Air Products had called its “best and final” offer.¹⁰⁸ In rejecting Air Products’

¹⁰⁴ Letter from John P. Clancy, Robert L. Lumpkins & Ted B. Miller Jr., Newly-elected Directors, Air Prods. & Chems., Inc., to John van Roden, Chairman of the Board of Directors, Airgas, Inc. (Dec. 7, 2010), *reprinted in* Press Release, Airgas, Inc., Airgas Releases Board Letters (Dec. 13, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1610.

¹⁰⁵ Letter from John van Roden, *supra* note 103.

¹⁰⁶ Press Release, Airgas, Inc., Airgas Board of Directors Retains Third Independent Financial Advisor (Dec. 13, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1611.

¹⁰⁷ David Faber, *Open Warfare May Break Out on Airgas Board*, CNBC (Dec. 10, 2010, 4:29 PM), http://www.cnbc.com/id/40606664/Open_Warfare_May_Break_Out_on_Airgas_Board.

¹⁰⁸ Press Release, Airgas, Inc., Airgas Board of Directors Unanimously Rejects Revised Unsolicited Tender Offer from Air Products (Dec. 22, 2010), *available at* http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1612.

offer, the board relied on the financial analysis of Credit Suisse. Credit Suisse's analysis was based on Airgas's prior five-year projections which had been adjusted by management for actual results and the impact of Airgas' implementation of SAP technology.¹⁰⁹

The board's press release announcing this rejection took a softer tone than Airgas's prior rejections. It stated that "the Board unanimously concluded that the \$70 per share offer is clearly inadequate and that the value of Airgas in a sale, at this time, is at least \$78.00 per share, in light of the Board's view of relevant valuation metrics."¹¹⁰ The offer was now "clearly inadequate" instead of "grossly inadequate."

In the face of defeat, Air Products pressed ahead with its legal case. Air Products was assisted by a curious letter from Chancellor Chandler sent a few weeks earlier. In a letter dated December 2, 2010, he asked nine questions to the parties.¹¹¹ The questions focused on the factual grounds that would otherwise justify Chancellor Chandler ordering the shareholder rights plan redeemed. The tenor of the questions is clear from Chancellor Chandler's query that "[g]iven that this dispute appears to be about price and price alone, under what principle of Delaware corporate law should the Airgas stockholders be required to endure all of the risk that the Airgas board's valuation judgment is correct?"¹¹² Some public commentators thought that these questions indicated that Chancellor Chandler was leaning toward judicially ordering the shareholder rights plan redeemed.¹¹³ It also appeared that Chancellor Chandler was

¹⁰⁹ *Air Prods. & Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 88–89 (Del. Ch. 2011).

¹¹⁰ Press Release, Airgas, Inc., *supra* note 108.

¹¹¹ See Letter from William B. Chandler III, Chancellor, Del. Court of Chancery, to Counsel Representing Parties in Civil Action Nos. 5249-CC & 5256-CC (Dec. 2, 2010), *available at* <http://www.scribd.com/doc/44613571/Chandler-s-Letter-to-Airgas-and-Air-Products>.

¹¹² *Id.* at 3.

¹¹³ Steven M. Davidoff, *Air Products Goes Back to Court in Airgas Fight*, N.Y. TIMES DEALBOOK (Jan. 25, 2011, 10:36 A.M.), <http://dealbook.nytimes.com/2011/01/25/air-products-goes-back-to-court-in-airgas-fight/>.

annoyed at the Delaware Supreme Court's reversal. In his letter, he questioned the logic of the higher court's opinion, stating "that Airgas's 2011 annual meeting will now, under Delaware law, take place 'approximately' in September 2011."¹¹⁴

It was Chancellor Chandler's December 2 letter that triggered the dueling letters from the Airgas independent directors and the Airgas chairman. He issued a second missive on December 30 ordering discovery on certain matters, including "the facts regarding why the Airgas board has rejected the increased \$70 per share offer and why the Airgas board deems the \$70 offer to be inadequate at the present time."¹¹⁵

The actual trial on the Airgas matter began on January 24 and ended later that week. Final arguments occurred on February 8. The issue was starkly framed. Airgas had not put forth an alternative financial plan or transaction nor did it claim that the offer was coercive. The issue came solely down to price and the Airgas directors' belief that Air Products' offer was financially inadequate. Air Products had asserted that its offer was its "best and final" and that the hostile bidder would not wait another eight months to launch a second proxy contest. Other bidders had been known to abrogate such promises, but assuming that Air Products kept its word, the Airgas board would successfully block Air Products' bid unless Chancellor Chandler judicially ordered the shareholder rights plan redeemed.

Chancellor Chandler issued his decision on February 15, 2011, ruling against Air Products.¹¹⁶ The actual decision was notable for its rejection of the substantive coercion doctrine

¹¹⁴ Letter from William B. Chandler III, *supra* note 111, at 1.

¹¹⁵ Air Prods. & Chems., Inc. v. Airgas, Inc., C.A. No. 5249-CC, 2011 WL 383933, at *2 (Del. Ch. Jan. 24, 2011) (quoting Chancellor Chandler's Dec. 30, 2010 Letter Order).

¹¹⁶ Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 129 (Del. Ch. 2011).

put forth by Professors Gilson and Kraakman.¹¹⁷ This term, deemed “Orwellian” by Chancellor Chandler, refers to a board’s refusal to redeem a shareholder rights plan based solely on price considerations.¹¹⁸ Chancellor Chandler’s decision also definitively ended a waning doctrinal war among academics, practitioners and judges concerning the parameters of judicial oversight of the shareholder rights plan. Chandler also protested at having to rule as he did. After discussing *Selectica*, the Delaware Supreme Court bylaw case, and earlier Delaware law on the subject, including *TW Services, Inc. v. SWT Acquisition Corp.*,¹¹⁹ Chancellor Chandler stated:

I am thus bound by this clear precedent to proceed on the assumption that Airgas’ defensive measures are not preclusive if they delay Air Products from obtaining control of the Airgas board (even if that delay is significant) so long as obtaining control at some point in the future is realistically attainable.¹²⁰

Chancellor Chandler stated that while he was required to rule this way, he did not agree with the outcome.

Chancellor Chandler then held that the possibility of waiting and winning a second contest made the possibility of control realistically obtainable. The failure to wait so long was merely a business decision of Air Products. Airgas had argued that the business judgment rule should apply to the Airgas board’s rejection because it was made in good faith by three newly-elected Air Products nominees on the Airgas board.¹²¹ Chancellor Chandler rejected this argument and ruled that enhanced scrutiny under *Unocal* applied since “the Airgas board is taking defensive action in response to a

¹¹⁷ See Ronald Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 248 (1989).

¹¹⁸ *Air Prods. & Chems., Inc.*, 16 A.3d at 97.

¹¹⁹ C.A. Nos. 10427, 10298, 1989 WL 20290 (Del. Ch. Mar. 2, 1989).

¹²⁰ *Air Prods. & Chems., Inc.*, 16 A.3d at 115.

¹²¹ *Id.* at 93.

pending takeover bid, [and] the ‘theoretical specter of disloyalty’ *does* exist.”¹²²

Chancellor Chandler ultimately held that the shareholder rights plan as adopted was neither preclusive nor coercive since the Airgas board “believes in good faith that the offer price is inadequate by no small margin. Thus, the board is responding to a legitimately articulated threat.”¹²³ The shareholder rights plan was reasonable in relation to the threat posed, namely a mispriced offer. Chancellor Chandler quoted Vice Chancellor Strine’s language in *Yucaipa* and stated that this hypothetical was not applicable here as Airgas shareholders could call a special meeting to unseat the Airgas directors.¹²⁴

While Chancellor Chandler appeared to draw a very fine distinction without much meaning, it was all that was left of the judicial review process for takeover defenses generally and the shareholder rights plan specifically. Chancellor Chandler concluded by stating:

Directors of a corporation still owe fiduciary duties to *all stockholders*—this undoubtedly includes short-term as well as long-term holders. At the same time, 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 mechanisms in place to get around the shareholder rights plan—even a poison pill in combination with a staggered board, which no doubt makes the process prohibitively more difficult—have been in place since 1985, when the Delaware Supreme Court first decided to uphold the pill as a legal defense to an unwanted bid. That is the current state of Delaware law until the Supreme Court changes it.¹²⁵

That day, Air Products dropped its offer to acquire Airgas.¹²⁶

¹²² *Id.*

¹²³ *Id.* at 122.

¹²⁴ *Id.* at 127–28.

¹²⁵ *Id.* at 129

¹²⁶ See Press Release, Air Prods. & Chems, Inc., Air Products Withdraws Offer for Airgas (Feb. 15, 2011), *available at*

III. DELAWARE AND STRATEGIC DECISION-MAKING

A. Strategic Decision-Making Theory

The three *Airgas* opinions are revealing as to how Delaware judges strategically decide cases. Frank Cross classifies judicial decision-making into four theoretical categories: 1) political or attitudinal, 2) process-oriented (what he refers to as the legal model), 3) strategic, and 4) litigant-driven.¹²⁷ Each of these is not necessarily an exclusive categorization. Rather, these theories overlap as judges decide cases that can be typified by more than one theory. They are useful constructs for identifying principal motivations behind a judge's individualized thought processes and decision-making.

The strategic decision-making approach theorizes that judges are rational actors responding to incentives. Judges decide cases by catering to individual interests such as prestige or security. These interests vary depending on the judge's preferences and status. Both lower and higher courts may cater to interests that affect their well-being, whether it be an increased budget or enhanced prestige. Lower court judges may also cater to their superior court by deciding cases in order to avoid reversal.¹²⁸

None of these judicial decision-making models is exclusive. While studies of judicial decision-making find support for the political, process and strategic models, it does not mean that one predominates or that these studies are able to isolate the factors unique to each decision.¹²⁹ A

<http://airproducts.com/company/news-center/2011/0215-air-products-withdraws-offer-for-airgas.aspx>.

¹²⁷ See Cross, *supra* note 17, at 1460.

¹²⁸ See generally Pablo Spiller & Rafael Gely, *Strategic Judicial Decision-Making* (Nat'l Bureau of Econ. Res., Working Paper No. 13321, Aug. 2007). For a general discussion of what exactly is encompassed within the term "strategy", see Richard K. Neumann, Jr., *On Strategy*, 59 *FORDHAM L. REV.* 299 (1990).

¹²⁹ See Cross, *supra* note 17, at 1514–15. See also FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 16–21 (2007); Frank B.

process-driven decision that purports to logically decide a point can mask a strategically minded decision or an attitudinal one. Each of these models is nonexclusive and limited in typifying decision-making.

The application of the strategic theory of decision-making to Delaware must account for the *sui generis* nature of Delaware courts and corporate law jurisprudence. Delaware courts have wide authority to craft and adopt judicial rules. There are few constitutional or foundational rules that limit the courts' actions. Delaware's statutory code contains wide gaps for Delaware judges to craft rules and procedures to govern corporations. Even if there is a statute on point, there is a strong deference by the legislature to Delaware judges. It is rare that a judicial interpretation of a statutory rule is overturned or modified by the Delaware legislature. Delaware's law is judge-made, and judges are endowed with wide law-making discretion.

Delaware is unique in other ways relevant to its judicial decision-making. Precedent and *stare decisis* do play a role in Delaware courts, but it is constrained. Chancery court judges frequently debate issues and challenge the reasoning and basis for Delaware Supreme Court opinions.¹³⁰ Lower court decisions frequently diverge and set competing rules, conflicts that the Delaware Supreme Court often avoids resolving.¹³¹ Both the Delaware Supreme Court and the

Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 (2007); Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1451–86 (1998); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1 (2011).

¹³⁰ Indeed, this happened in *Airgas*. See *Air Prods. & Chems., Inc.*, 16 A.3d at 112, 113–16, 122–24, 126–29.

¹³¹ There are now three different chancery court decisions setting out divergent standards for the standard of review for going-private transactions pursuant to a tender offer. See *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397 (Del. Ch. 2010); *In re Cox Commc'ns, Inc.*

chancery court are quick to redefine cases and narrow prior precedent that meets objection among the corporate law community.¹³²

Delaware judges are a small, cohesive group. They can ably define the law and internally debate these issues. Outwardly, they derive significant prestige from their status as the leading corporate jurists of the land. They are often asked to lecture and speak as well as teach at prominent law schools.¹³³ The judges traditionally retire to lucrative careers with private law firms practicing corporate law.¹³⁴

More important than the judges' individual prestige, however, is what Delaware itself gains from their work. The numbers are well known. Delaware is home to more than

S'holders Litig., 879 A.2d 604 (Del. Ch. 2005); *In re Aquila Inc. S'holders Litig.*, 805 A.2d 184 (Del. Ch. 2002). In the most recent opinion, *CNX*, the Delaware Supreme Court declined to review the decision on interlocutory appeal. See *In re CNX Gas Corp. S'holders Litig.*, No. 333, 2010 WL 2690402 (Del. July 8, 2010).

¹³² A primary example is the case of *Omnicare*, which has been substantially narrowed by the chancery court since the Delaware Supreme Court's decision in *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003). See, e.g., *In re OPENLANE, Inc. S'holders Litig.*, C.A. No. 6849-VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011); Transcript of Oral Argument at 127, *Optima Int'l of Miami, Inc. v. WCI Steel, Inc.*, C.A. No. 3833-VCL (Del. Ch. June 27, 2008); *Orman v. Cullen*, 794 A.2d 5 (Del. Ch. 2002); see also Steven M. Davidoff, *The Long, Slow Death of Omnicare*, N.Y. TIMES DEALBOOK (Aug. 28, 2008, 4:22 PM), <http://dealbook.nytimes.com/2008/08/28/the-long-slow-death-of-omnicare/>.

¹³³ Chancellor Strine, for example, teaches or has taught at Harvard Law School, and the University of Pennsylvania and Vanderbilt University law schools. See *Judicial Officers of the Court of Chancery: Chancellor Leo E. Strine, Jr.*, DEL. STATE COURTS, <http://courts.delaware.gov/chancery/judges.stm> (last visited May 2, 2012).

¹³⁴ The Symposium for which this article was written honored Chancellor Chandler, who has taken a partner position with Wilson Sonsini. See Press Release, Wilson Sonsini Goodrich & Rosati, Delaware Chancellor William B. Chandler III to Join Wilson Sonsini Goodrich & Rosati (May 19, 2011), http://www.wilsonsonsinigoodrich.com/WSGR/Display.aspx?SectionName=news/051911_chandler.htm. Additionally, Vice Chancellor Lamb, the prior chancery court judge to retire, is currently a partner at Paul, Weiss. See *Stephen P. Lamb, Partner: Biography*, PAUL, WEISS, <http://www.paulweiss.com/stephen-p-lamb/> (last visited May 2, 2012).

50% of publicly traded companies and 63% of the Fortune 500.¹³⁵ Ninety-seven percent of companies undertaking initial public offerings choose to incorporate in Delaware or their home state.¹³⁶ Delaware benefits handily from these charters: more than one-fourth of its state revenue is derived from public incorporations.¹³⁷ This has sparked a debate about whether Delaware is racing to the top or the bottom to attract incorporations. Over the years, the debate has become more nuanced as academics recognize that competition may come vertically from the federal government, is much more complex than previously realized, and, in practice, may not even exist.¹³⁸ Whatever the truth is in this debate, Delaware must cater to corporations—and to those who make the incorporation decision—to attract and maintain their presence.

Delaware judges largely appear to follow the legal process model. The judges decide cases based upon the arguments before them and through adherence to traditional doctrinal reasoning techniques. The wide discretion afforded Delaware judges, combined with the desire on both an individual and state level to attract corporations, is a powerful brew. It not only provides Delaware judges with wide latitude for decision-making, but also incentivizes them to act in furtherance of their personal interests, as well as

¹³⁵ *Why Choose Delaware as Your Corporate Home?*, DEL. DIV. OF CORPS., <http://www.corp.delaware.gov/> (last visited May 2, 2012).

¹³⁶ Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1562 (2002).

¹³⁷ In 2001, Delaware collected total taxes of \$2.1 billion, \$586.7 million of which derived from corporation licenses. See Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 556 n.13 (2002) (citing U.S. CENSUS BUREAU, DELAWARE STATE GOVERNMENT TAX COLLECTIONS: 2001, available at <http://www.census.gov/govs/statetax/0108destax.html>).

¹³⁸ See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) (arguing that there is no state competition for charters and that Delaware has won); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (arguing that Delaware's primary competitive fear is federal preemption).

those of the state. Delaware is thus unique for the particular incentives it provides favoring strategic decision-making. While other models may come into play that fit the judge's decision-making, the *Airgas* cases illustrate how the strategic decision-making mantra can often trump these other models.

B. *Airgas* and Strategic Decision-Making

1. *Airgas* in Context

Air Products' hostile offer for Airgas was arguably the most prominent takeover transaction of 2010. The offer and litigation were covered copiously in the media and generated much practitioner and market commentary.¹³⁹ Yet both the offer itself and the litigation were relatively unimportant in terms of the development of Delaware jurisprudence. This is not to say that the case was not important for the future of Airgas and Air Products, but these are outcomes specific to the two companies.

A decision in favor of Air Products in the bylaw case would have had little impact on Delaware companies. Only eighty-nine Delaware companies in the Fortune 500 had staggered boards in place at that time.¹⁴⁰ Many of these companies had their annual meetings in the spring.¹⁴¹ The annual meeting for these companies could be moved up by only two to three months. If the Delaware Supreme Court had ruled in favor of Air Products, the companies with

¹³⁹ See, e.g., Jef Feeley & Phil Milford, *Air Products Drops Hostile Bid After Airgas Wins on Poison Pill*, BLOOMBERG (Feb. 16, 2011, 12:01 AM), <http://www.bloomberg.com/news/2011-02-15/air-products-loses-court-bid-to-invalidate-airgas-defense-against-takeover.html>; *Airgas, Inc.*, BOS. GLOBE, Dec. 10, 2010, at B8; Christopher Swann & Ian Campbell, *Shareholder Vote Pressures Airgas*, N.Y. TIMES (late ed.), Sept. 16, 2010, at 2; Harold Brubaker, *Air Products Goes Public in Bid to Buy Airgas*, PHILA. INQUIRER, Feb. 6, 2010, at A7; Jeffrey McCracken, *Air Products Launches \$5.1 Billion Bid for Rival*, WALL ST. J., Feb. 5, 2010, at B1.

¹⁴⁰ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1191 (Del. 2010).

¹⁴¹ See Bebhuk, Cohen & Wang, *supra* note 38, at 12.

staggered boards, fall meetings, and language in their charter or bylaws that mimicked *Airgas*'s could have also opted out of the decision by changing their charter or bylaw provisions. In fairness to these companies, though, such a change would likely be opposed by ISS and the other proxy advisory services making it difficult to implement. Alternatively, the boards of affected companies could simply have moved the annual shareholder meetings up to February or March until such an amendment occurred. The collective result is that the bylaw case would likely have had little widespread effect on Delaware companies no matter the outcome.

In the shareholder rights plan case, Chancellor Chandler's opinion was a doctrinal coda to matters that were largely settled twenty years ago. Even if the decision had been in favor of *Air Products*, it would not have effected a sea change in Delaware's takeover jurisprudence. The decision would have applied only to targets with a staggered board where a hostile bidder won a short slate and made a case that it could not wait another year to run a successive proxy contest. Hostile bids for targets with staggered boards occur infrequently and, as discussed in Part II, the target has almost always capitulated upon election of a short slate.¹⁴² The rarity of cases similar to *Air Products* is a reason why it took almost twenty years for the issues raised in *Time* and the efficacy of the "substantive coercion" doctrine to come to a head.

It could be another twenty to thirty years before a case that puts the issues so directly framed by the *Airgas* case before the courts. In this light, trying to discern any remnant of judicial will or ability to pull a shareholder rights plan in more extreme circumstances is meaningless after *Airgas*. Such a case would be unlikely to reach the court and, if it did, it would likely fall victim to the same strategic considerations as the *Airgas* litigation.

This does not mean the Delaware courts will remain wholly silent on the matter. The Delaware Supreme Court

¹⁴² See *supra* notes 32–33 and accompanying text.

regularly speaks through dictum to arrange and order the chancery court's doctrine and decision-making.¹⁴³ In the future, the supreme court may very well attempt to speak through dictum and suggest that it is (or is not) in agreement with Chancellor Chandler's view of supreme court doctrine. The chancery court may also attempt to push back against its view of the supreme court's jurisprudence on the matter through its own dictum or through extra-judicial speechmaking and writing by chancery court judges. However, the Delaware courts are unlikely to soon encounter a case like *Airgas* that so directly frames these issues.¹⁴⁴

2. Strategic Decision-Making in the *Airgas* Case

If the *Airgas* litigation is unimportant for its wider doctrinal implications, it is important for what it reveals about how Delaware courts strategically decide cases. This subsection explores the use of strategic decision-making in the two chancery court opinions and one supreme court opinion in the *Airgas* litigation.

a. The Bylaw Opinions

The Delaware Supreme Court unanimously declined to follow Chancellor Chandler's reasoning in overturning his bylaw opinion. Chancellor Chandler had followed prior case law, which applied traditional contract interpretation rules. The Delaware Supreme Court largely took the same route, but ignored the prior precedent relied on by Chancellor Chandler—precedent including cases, decided by the supreme court itself, which clearly dictated that bylaws should be interpreted to favor the shareholder franchise.¹⁴⁵ Without such a presumption, the next step in the contract

¹⁴³ See, e.g., *Sagarra Inversiones v. Cementos Portland Valderrivas*, 34 A.3d 1074, 1080–81 n.13 (Del. 2011).

¹⁴⁴ See, e.g., Brian J.M. Quinn, *Steele on Pills and the Intermediate Standard*, M&A LAW PROF. BLOG (Nov. 17, 2011), http://lawprofessors.typepad.com/mergers/takeover_defenses/.

¹⁴⁵ *Airgas, Inc. v. Air Prods. & Chems. Inc.*, C.A. No. 5817-CC, 2010 WL 3960599, at *3 (Del. Ch. Oct. 8, 2010).

interpretation process was to discern the parties' intent from extrinsic evidence.

The problem was that extrinsic evidence was thin, though where it existed it supported Airgas' position. The Delaware Supreme Court's opinion relied on ABA form books and other documents that appeared to be weak supportive evidence to find that the bylaw conflicted with Airgas' charter and was therefore void.¹⁴⁶ One detractor of the supreme court's bylaw opinion argued that the court was merely rewarding poor or sloppy drafting by lawyers.¹⁴⁷ Delaware courts had previously penalized parties for ambiguous or poor drafting, presumably to economically incentivize lawyers to draft clearly so as to avoid court disputes of this nature.¹⁴⁸ Additionally, the supreme court never addressed a fundamental tension in its reliance on this extrinsic evidence: namely, that these bylaws—a contract—had been drafted by management without any negotiation or input by stockholders. Yet the extrinsic evidence relied upon by the supreme court was self-servingly created by attorneys who regularly represented these companies/drafters.

In relying on weak extrinsic evidence and overturning a chancery court opinion, the Delaware Supreme Court decision appeared primarily focused on preserving the strength of the staggered board. The Delaware Supreme Court appeared strategically to take into account the possibility that a decision in favor of Air Products would be viewed by its corporate constituency as substantially

¹⁴⁶ Opening Brief of Plaintiff in Support of Their Motion for Judgment on the Pleadings at 3, *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (C.A. No. 5817), 2010 WL 3613583 [hereinafter *Airgas Opening Brief*].

¹⁴⁷ See Brian J.M. Quinn, *Airgas Bylaw Reversed by Delaware Supreme Court*, M&A LAW PROF. BLOG (Nov. 24, 2011), <http://lawprofessors.typepad.com/mergers/2010/11/airgas-bylaw-reversed-by-supreme-court.html> (the decision "seems like a victory for poor (or sloppy) drafting . . .").

¹⁴⁸ See Letter from Chancellor Chandler, *United Rentals, Inc. v. RAM Holdings, Inc.*, C.A. No. 3360-CC (Del. Ch. Dec. 13, 2007), available at http://lawprofessors.typepad.com/mergers/files/decision_re_coates_report.pdf.

weakening the staggered board defense. The decision to overturn the lower court was thus in accord with the supreme court's turn after *Interco* and Marty Lipton's famous memo.¹⁴⁹ In the wake of these events, the court proceeded to issue a number of pro-defense rulings, such as *Paramount Communications, Inc. v. Time Inc.*¹⁵⁰ and *Unitrin, Inc. v. American General Corp.*,¹⁵¹ which respectively repudiated *Interco*'s holding and limited the proportionality review mandated by *Unocal*.

In its briefs, *Airgas*, advised by Wachtell Lipton, argued that the bylaw case was fundamentally about the strength of the staggered board.¹⁵² The implication was that if the Delaware Supreme Court decided to uphold the bylaw, there was the risk of corporate flight proposed by Marty Lipton. A decision to uphold the bylaw would have risked protest from Delaware's corporate patrons and its prominence. The psychological perception of such risk may have been real regardless of the actual magnitude. Because of these concerns, the Delaware Supreme Court strategically decided to sidestep its precedent on the matter and rule in favor of *Airgas*. And it did so unanimously, perhaps in a show of strength designed to moot arguments that there was a weak basis for the decision.

The *Airgas* bylaw decision may have been driven by a second impetus. Delaware's takeover jurisprudence since *Time* and *QVC* has incorporated dual, arguably contrasting themes. Delaware courts have preserved the efficacy of the shareholder rights plan but also acted to keep the shareholder ballot box open as a theoretical means for a bidder to elect a sufficient number of directors to redeem the shareholder rights plan.¹⁵³ Delaware courts have thus acted to preserve the shareholder franchise as the ultimate check

¹⁴⁹ See *supra*, note 12.

¹⁵⁰ 571 A.2d 1140, 1153 (Del. 1989).

¹⁵¹ 651 A.2d 1361, 1382–89 (Del. 1994).

¹⁵² *Airgas* Opening Brief, *supra* note 146, at 2 (“Air Products’ tactic is unlawful, and would impermissibly undercut the classified boards of innumerable Delaware corporations.”).

¹⁵³ See *Grundfest*, *supra* note 23, at 858–59.

on director agents. While Delaware courts have acted to preserve the shareholder franchise, they have also defended the validity and effect of the staggered board in light of its statutory origins.¹⁵⁴ They have done so despite the barrier a staggered board creates to electing and replacing directors to redeem a shareholder rights plan. The Delaware Supreme Court's bylaw opinion can thus be seen as an attempt to preserve doctrinal coherence amid these two defining tensions.

There is a possible second strategic rationale for the Delaware Supreme Court's decision. The decision allowed the takeover battle for Airgas to continue. If the court had ruled differently, it likely would have cleared a path for Airgas to be taken over by Air Products or another party. More than 50% of Airgas's shares were held by arbitrageurs, and Airgas's shareholders had already elected three of Air Products' nominee directors. If Airgas was required to hold its annual meeting in January, it is likely that the Airgas directors would have been deprived of significant bargaining power both to negotiate a sale price and to say no to a sale. The justices may have also acted strategically to preserve the *status quo* and permit Airgas to continue to resist a bid that the company's board had deemed financially inadequate.

b. The Shareholder Rights Plan Opinion

The strategic nature of the court's decision-making was more apparent in the Delaware Supreme Court's bylaw decision than in Chancellor Chandler's shareholder rights plan opinion. Nonetheless, Chancellor Chandler's refusal to redeem Airgas' shareholder rights plan also illustrates how softer strategic considerations play into Delaware decisions. The primary strategic decision in Chancellor Chandler's shareholder rights plan opinion was related to the manner in which Chancellor Chandler wrote his opinion. The Chancellor had three options: 1) write the opinion as he did, 2) write it holding against Air Products but without a section

¹⁵⁴ See, e.g., *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010) (opinion of Vice Chancellor Strine).

protesting that the law should not dictate this result, or 3) hold for Air Products on the basis of what Chancellor Chandler thought the law should be and risk reversal by the Delaware Supreme Court.

Chancellor Chandler's decision appeared to be written as a strategic act to help Air Products on appeal. Chancellor Chandler's assertion that his finding was dictated by precedent appeared to be an invitation to the Delaware Supreme Court to finally settle the matter of the scope of *Unocal* review and its application to shareholder rights plans. Chancellor Chandler's opinion can thus be seen as strategically highlighting the fundamental tension between the initial premise of *Moran* and *Unocal* with the court's more recent decisions in *Unitrin* and *Selectica*.¹⁵⁵ Chancellor Chandler appeared to be attempting to force the Delaware Supreme Court to recognize this tension and perhaps revive a stronger interpretation of *Unocal* put forth by the Chancellor himself in his *Unitrin* opinion.¹⁵⁶ Alternatively, the Delaware Supreme Court would be forced to show its strategic side and confirm Chancellor Chandler's belief that in the wake of *Selectica* and prior supreme court precedent, there was no longer much substance left of *Unocal*'s preclusiveness prong.

Air Products refused to take Chancellor Chandler's bait to the Delaware Supreme Court. Air Products likely did not pursue this option because the company concluded that the Delaware Supreme Court, after its ruling in the *Airgas* bylaw opinion, was strategically inclined to rule for Airgas. If Air Products could not win in the lower court, it was unlikely to win in the Delaware Supreme Court due to the same considerations that led the court to overturn the chancellor's bylaw decision.¹⁵⁷

¹⁵⁵ See *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 604 (Del. 2010); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387 (Del. 1995).

¹⁵⁶ *In re Unitrin, Inc. S'holders Litig.*, C.A. Nos. 13656, 13699, 1994 WL 698483, at *9-11 (Del. Ch. Oct 13, 1994).

¹⁵⁷ It remains puzzling that, after expending such time and effort, Air Products did not at least make this one final exertion, which would have required little time and effort since much of the litigation brief had

Chancellor Chandler's decision also allowed him strategically to register his opprobrium for the Delaware Supreme Court precedent on the matter, and to reassert the separation between the chancery court and the Delaware Supreme Court. In 1994, Chancellor Chandler had decided differently in *American General Corp. v. Unitrin, Inc.*,¹⁵⁸ when he ruled for a more robust interpretation of *Unocal*, an interpretation that was rejected by the Delaware Supreme Court, which overturned his decision.¹⁵⁹ In *Airgas*, the precedent established by *Time* and *TW Services*—the two cases relied upon most heavily by the chancellor—was easily distinguishable.¹⁶⁰ *Time* involved a corporation that was pursuing a long-established alternative strategic plan that did not involve price considerations. *TW Services* was distinguishable as a case decided not by the Delaware Supreme Court but rather by a prior judge on the chancery court, albeit the esteemed Chancellor William T. Allen. There was no binding Delaware Supreme Court case on this issue. Chancellor Chandler refused to take this leap, likely because of the fear of reversal.

Chancellor Chandler's shareholder rights plan opinion can be seen as preserving the chancery court's status as the think-tank for Delaware jurisprudence. It was a strategic decision not to challenge the Delaware Supreme Court but to preserve the chancery court's expertise, distance the court from its parent, and perhaps push forward the development of Delaware doctrine. Delaware courts thus not only act toward wider constituencies as the Delaware Supreme Court did in the bylaw decision, but they can also act to order relationships between the chancery court and the supreme court.

already been developed. Given the large upside and low cost, even the small probability of success economically mitigated an appeal.

¹⁵⁸ See *In re Unitrin*, 1994 WL 698483.

¹⁵⁹ See *Unitrin*, 651 A.2d at 1367.

¹⁶⁰ See *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990); *TW Servs., Inc. v. SWT Acquisition Corp.*, C. A. Nos. 10427, 10298, 1989 WL 20290 (Del. Ch. Mar. 2, 1989).

IV. ASSESSING STRATEGIC DECISION-MAKING

The Delaware courts' strategic decision-making was more apparent in the bylaw case. Yet the bylaw decision was a weak case to support strategic decision-making. The actual impact of a decision upholding the chancellor's opinion appeared to be small. The bylaw case affected only a small portion of companies, and these companies could largely order around the decision's adverse effects. An adverse decision did risk poor publicity for Delaware among its constituencies, but given the minimal actual impact of the decision, it was likely that this publicity would soon fade away without real consequences.

The risk that the decision would cause corporations to charter outside of Delaware was also quite small, if not nonexistent. The race-to-the-top/race-to-the-bottom debate over how Delaware attracts charters appears to have little bearing on the current behavior of chartering corporations. Companies charter in their home state or in Delaware. Once chartered in Delaware, switching costs are substantial, and companies tend to stay in Delaware. While Delaware worries about its prominence, perhaps excessively, the risk of corporate flight in this case was minimal.

The negative effects of a strategic decision must be weighed against the uncertain gains. A strategic decision, one presumably made not fully on the merits of the case or law, creates uncertainty in the law, something corporate lawyers abhor. It erodes the rule of law as litigants cater to wider interests rather than to the matter at hand. This can create a political economy problem as interests realize that public lobbying can drive judicial decision-making. The losing litigant will cognitively conclude that an "unfair" result occurred because wider concerns dictated the result, rather than precedent and the facts. A strategic decision creates subjectivity in the law. This can come back to haunt the judiciary as personnel change and yet more subjectivity creeps into the court's decision-making.

In the bylaw decision, the negatives appeared to outweigh the gains from an overtly strategic decision. Rather than risk Delaware's preeminence, the Delaware Supreme Court

preferred to take the safer course. The *Airgas* case is thus revealing about how the Delaware Supreme Court assesses its corporate preeminence. The court appeared to adopt a strong version of the precautionary principle when it came time to assess the strength of the staggered board.¹⁶¹ While this may not be a race to the bottom, it illustrates how Delaware courts will protect core corporate law principles strategically embedded in its jurisprudence. It had the additional benefit of ensuring that the Delaware courts could not be criticized for weakening what was perceived as a core takeover defense.

The rationale that the Delaware Supreme Court used to act strategically to keep an open playing field is weak for a number of reasons. First, the court is substituting its judgment as to the proper price in place of the judgment of shareholders and directors, which Delaware courts avoid assiduously in the context of applying the business judgment rule.¹⁶² Second, making judgments on price places the court in the position of assessing the validity of a hostile bid with asymmetrical information. The court is unlikely to glean from the litigation process and its battle of “financial experts” the full information held by the company, hostile bidder, and even sophisticated shareholders. Third, the court is exposed to risks of a “wrong” decision. If the Delaware court predicts incorrectly, the court risks criticism from managers and shareholders, diminishing the court’s authority. *Airgas*’s stock price closed at \$89.88 on April 5, 2012,¹⁶³ showing that the Delaware Supreme Court may have been right to preserve the bidding competition and that the *Airgas* board was certainly correct in resisting Air Products’ \$70 per share bid. But there are a number of alternative instances where a company was wrong in assessing the

¹⁶¹ See generally CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

¹⁶² See, e.g., *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009).

¹⁶³ See *ARG Historical Stock Quotes – Monday, November 21, 2011*, MARKETWATCH.COM, <http://www.marketwatch.com/investing/stock/ARG/historical?siteid=mktw&date=11%2F21%2F2011> (last visited May 2, 2012).

hostile bid, such as in Yahoo's rejection of Microsoft's overtures.¹⁶⁴ Finally, the court may have acted to preserve the notion of director primacy embedded in Delaware law, but the court was simply interpreting a company's operating documents. In undertaking such an interpretation, Delaware courts should be neutral at best and favor shareholders as a matter of policy and as an economically minded default rule. In the latter case, such a rule is appropriate because it will ensure that management drafts corporate charters clearly and explicitly so that shareholders know the rights attached to their shares *ex ante*.

One way to look at the *Airgas* decision is as a *Rashomon* moment.¹⁶⁵ The Delaware Supreme Court viewed the case as involving the staggered board and ruled to affirm its strength. Chancellor Chandler viewed the case as involving shareholder voting and relied on Delaware precedent strongly endorsing the franchise. The difference led to the calculations both courts made in their decisions.¹⁶⁶

This is not to say that strategic decision-making is an absolute negative. To the contrary, it can be quite useful, if employed prudently. Strategic decision-making allows judges to keep the law coherent and prevents bad facts from pushing the law in the wrong direction. Strategic jurisprudence allows Delaware to look past the near-term

¹⁶⁴ See Loren Baker, *Bartz: Yahoo Should Have Accepted Microsoft's Offer*, SEARCH ENGINE JOURNAL (Sept. 11, 2009), <http://www.searchenginejournal.com/bartz-yahoo-should-have-accepted-microsofts-offer/13178/>.

¹⁶⁵ The famous Japanese movie tells the tale of three different witnesses to a murder. Each of their stories is completely different yet believed to be true by the teller. See Bosley Crowther, *The Screen in Review: Intriguing Japanese Picture, 'Rasho-Mon,' First Feature at Rebuilt Little Carnegie*, N.Y. TIMES, Dec. 27, 1951, at 31.

¹⁶⁶ See Interview with Myron T. Steele, Chief Justice, Delaware Supreme Court, *Delaware Courts: The Best Alternative For Business*, in METROPOLITAN CORP. COUNS., May 2, 2011, at 47, 50, available at <http://www.metrocorpcounsel.com/articles/13809/delaware-courts-best-alternative-business> ("*Airgas* attracted so much attention because it involved a fundamental, philosophical difference between the view that the board has to exercise its fiduciary duty for the entire shareholder base and the view that boards should step out of the picture and let the shareholders vote.").

decision toward larger principles of law and manage the long-term development of its jurisprudence. It permits Delaware to act strategically to cater to the wider corporate community. These strains of strategic decision-making largely come into play in a “soft manner” as judges act strategically over numerous decisions to shape doctrine.¹⁶⁷

Chancellor Chandler’s opinion illustrated another type of strategic decision-making that revealed how the Delaware lower and upper courts interact. His opinion walked a line between two competing interests: the issue of doctrinal development versus the desire and need to cater to wider constituencies. The Delaware Supreme Court was one of the constituencies that he was appealing to. The second opinion thus shows how the two Delaware courts interact and communicate with each other.¹⁶⁸

This is not the usual lower court/appellate court relationship in other jurisdictions and courts. The chancery court is the gatekeeper for Delaware’s corporate law and, though it is beneath the Delaware Supreme Court, it not only has wide latitude to act, but is a laboratory for Delaware’s corporate law. The chancery court judges largely develop their nuanced tones and craft and nurture doctrine. The Delaware Supreme Court does decide appeals from the chancery court, but rarely does it overrule the lower court. Most chancery court decisions are not even appealed.¹⁶⁹ The *Airgas* shareholder rights plan opinion was a strategic assertion of the court’s authority and expertise in light of what Chancellor Chandler perceived to be limited options.

Airgas also highlights the potentially differing approaches of the Delaware Supreme Court and Delaware Chancery Court. The case shows that the supreme court

¹⁶⁷ For a thematic discussion of the development of Delaware’s takeover jurisprudence, see STEVEN M. DAVIDOFF, *GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL AND THE PRIVATE EQUITY IMPLOSION* (2009).

¹⁶⁸ See Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999).

¹⁶⁹ William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success*, 2009 U. ILL. L. REV. 1, 33 (2009).

appears to be more reactive to the policy implications of a given case, and perhaps more protective, or perhaps overly protective, of the Delaware franchise. The supreme court's efforts to ensure that Justice Jacobs, a well-respected member of the supreme court who previously sat on the Chancery Court, was included in the deliberations, as well as the unanimous nature of this opinion, may further reflect this tendency.

The chancery court, a lower court, appears to be more attuned to the doctrinal implications of decisions. The chancery court generally applies these doctrinal teachings using the procedural mode of decision-making and utilizing doctrinal and economic analysis to decide cases. This approach contrasts strongly with that of the supreme court, which appears to be more likely to resort to strategic decision-making. However, even the chancery court is alert to the strategic and political leanings of the supreme court. While this is an area requiring more study, when strategic decision-making occurs in Delaware, it appears more naturally centered in the supreme court.¹⁷⁰

A Delaware Supreme Court reversal of the shareholder rights plan decision never occurred. It should be noted, however, that the shareholder rights plan case, unlike the bylaw case, was better suited for strategic decision-making. The parties could not contract around the decision; this would have created embedded Delaware law with real consequences.¹⁷¹ If the Delaware Supreme Court had reversed the lower court, this decision would not have had the risk an overtly strategic decision would have had. The Delaware Supreme Court decision on the shareholder rights plan would simply have implemented a strategy long set in

¹⁷⁰ The concept of differing judicial modalities was first suggested to me by Chancellor William B. Chandler III.

¹⁷¹ Delaware itself has shown its preference for privately-ordered solutions in developing its standards governing takeovers in conflicting-interest transactions. See Matthew D. Cain & Steven M. Davidoff, *Form Over Substance? The Value of Corporate Process and Management Buy-Outs*, 36 DEL. J. CORP. L. (forthcoming 2011), available at <http://ssrn.com/abstract=1653492>.

Chancery Court rightly deferred to the New York court because it otherwise would have risked corrupting Delaware law or directly challenging the federal government.¹⁷³

The points developed in this case study are based in part on the arguments of Professors Kahan and Rock, but suggest that judges can act strategically as a matter of course in Delaware jurisprudence. The *Airgas* case reveals the value and peril of strategic decision-making, which places at risk the court's reputational capital, but at the same time can allow Delaware to more ably steer its law. It has real value in preserving the court's doctrine and its direction. The grand arc of Delaware law over the last thirty years has been ordered by this strategic approach, itself quite valuable. Delaware's corporate law is based on the bedrock of long-term strategic considerations.

Knowing the mind of anyone is impossible, and categorizing modes of judicial decision-making is inherently difficult and not susceptible to proof. This is a limitation of this case study; it is inherently immodest and speculative on the motivations of Delaware judges acting in good faith. However, to the extent strategic judicial decision-making occurs, this case study offers a template for its use. Ultimately, Delaware judges should be careful about using strategic decision-making in an overt manner rather than to steer the overall arc of its law. The impact of the strategic decision must be weighed against the negative effects of such a decision. Overt strategic decision-making should be used only when the benefits outweigh the negatives, and sparingly. Delaware will no doubt once again face a case that raises wider strategic issues for its jurisprudence. The *Airgas* case provides one example of how judges deal with these issues and decide these cases providing an example for the judicious future use of strategic decision-making.

¹⁷³ *Id.* at 752–55.