Case: Airgas, Inc v. Air Products and Chemicals, Inc.
Taping Date & Location: April 17, 2018, PennLaw, Philadelphia
Participants:
William B. Chandler, III
former Chancellor of the Court of Chancery
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FIORAVANTI: Chancellor Chandler, it really is a privilege to talk to you about one of the more interesting and famous cases in Delaware corporate law history, the Air Products and Airgas case. It's not often that lawyers get an opportunity to discuss cases with the judge that presided over the case and rendered the decision, particularly in the Court of Chancery. So thank you for giving us the opportunity to do so, and the generosity of your time.

CHANDLER: You're welcome, Paul.

FIORAVANTI:
With a little bit of background on the case, in 2009, Air Products approached Airgas to acquire the company. In particular, John McGlade from Air Products, approached Peter McCausland who was the founder and chairman and CEO of company in the fall of 2009, to acquire the company. The companies were in the same line of business but they were a little bit different. Air Products was more of a larger industrial supplier of gas and other related products, and Airgas was more of a smaller, bottled business. So there were clearly synergies at play with this potential transaction. It started out with a sixty dollar all-stock offer, then it was changed in December of 2009 to a sixty-two dollar all cash offer. And at this point, Airgas refused to engage. Airgas had several defensive mechanisms that were in play. It had a classified board, it had a poison pill, and it also had a charter provision that required a supermajority vote for certain business combinations with interested stockholders unless other conditions were approved, including having a majority of the board--the disinterested board--vote in favor of it. And in addition, the company had not opted out of Section 203, the anti-takeover statute. Fast forward to February of 2010, which was the first time there was any public word on any type of potential transaction. It was coupled with litigation and the announcement of an offer by Air Products in February of 2010. And at that time they had changed the offer to sixty dollars per share, all cash. [00:03:10] Previous sixty-two dollar offer, I believe was, up to half of it in cash and half of it in stock. The main allegation of the complaint was that Airgas had engaged in what was referred to as a just-say-no strategy and unwilling to engage with Air Products. So to set the stage, you have the law firms of Cravath Swaine

& Moore, and Morris Nichols, Arsht and Tunnell on the side of Air Products. And you had Wachtell, Lipton, Rosen and Katz and Potter, Anderson and Corroon on behalf of Airgas. Were you familiar with the lawyers that were involved in the case?

CHANDLER: Oh yes. I mean, those are all firms that regularly practice in the Court of Chancery, so they're all familiar players and I was personally familiar with all of them.

FIORAVANTI: Now, at the time the court was, and currently is to this day, a five member court--the Court of Chancery, right? How do cases get assigned? This case gets filed on approximately February 4th, I believe, 2010. You're the chancellor presiding over the five member court. How do cases get assigned?

CHANDLER: Well there's no real science to this, I don't think. [00:04:28] Maybe there is now, I can't speak for what it's like now. But before me and now, and when I became chancellor, the process was fairly simple. Each day you get a list of cases that have been filed in the court, and you literally have five people you can give them to starting with yourself. So it would pretty much be by a random process that I would just dole out the cases to the five of us. You have to do it a little bit carefully, though because you don't want to give someone another appraisal case after you've just given them an appraisal case. You want to be a little careful about that. But aside from that, it's pretty random. So I would assume on that given day in February when this complaint was filed along with a dozen others, perhaps, I would have simply gone down the list and assigned each case to a different judge and this one fell on my watch.

FIORAVANTI: Did you have any knowledge of the background of the case at all, other than just the complaint when it came in?

CHANDLER: No, I would have just been aware of the complaint. I hadn't seen anything in the news or had been following the case in any way like that.

FIORAVANTI: Well at this point you had what I would consider to be a little bit of a throwback to the hostile takeover days where you had two big corporations engaged in litigation. What would you do in those circumstances, recognizing that this was not a case where you were going to have a complaint filed and it was going to get settled in the very near future?

CHANDLER: Well, you wait for the parties and the counsel to come to you. You don't reach out--or I didn't, at least. I would wait for them to come to me about whether they wanted to engage in a scheduling conference or how they wanted to conduct the litigation. And so I would have waited to hear from counsel about this particular case.

FIORAVANTI: And shortly after the Air Products complaint was filed, there was stockholder litigation that was filed as well on behalf of Airgas stockholders. Did that--and I believe there was a motion to expedite filed at that time as well. You ultimately denied the motion to expedite that case. What was your thinking about not expediting litigation at that time?

CHANDLER: [00:06:39] Well, as I recall, I mean, it was a fairly fluid situation and I thought it looked premature for me to start scheduling a trial. I think I was asked to schedule the trial, it was late February, early March, and I think I was asked to schedule it in ninety days, like May or June, we should have a trial with all the discovery, all the expert discovery, all the briefing, and an actual trial and testimony in ninety days. And it struck me as potentially a total waste of time and effort to do that given the fluid nature of the whole transaction. Air Products had made it very clear. It was clear in the pleadings and it was clear in the press, that Air Products was willing to negotiate a higher price. It was also clear that they were going to launch a proxy contest and seek to remove some of the directors of the Airgas board in order to convince that board to remove those defensive measures and let the tender offer [00:07:37] process go forward. So with all of that sort of in flux, it didn't seem appropriate for me to start scheduling a trial. Now what I did when I denied it, I did go ahead and tell them I'll give you a trial. I'll give you a trial in late September or early October. Here's your pick, any of these four weeks, last two weeks of September, first two weeks of October, you pick your poison, which week do you want to be in Georgetown for this trial and you're welcome. I knew that the annual meeting had been set for September 15th, so I knew that if this proxy fight took place as it was being threatened, that we would have some result from that election on September 15th and the trial would be immediately after that, which suggested to me that it might all go away, which is why I did it strategically that way--this might all be resolved after that election. If not, then I was giving them a fairly prompt trial. A case that was filed in February and tried in September is fairly prompt. If it's not expedited, it's the next best thing.

FIORAVANTI: Air Products then announces its proxy contest I believe it's in May. But there's a little bit of a twist, because in addition to nominating three directors, there are some bylaws that are proposed, including one that would move the annual meeting to January of the following year. Did that play into your mind about scheduling or what you anticipated what would be happening next?

CHANDLER: [00:09:11] It didn't really play into the scheduling. I knew that that was likely to be one of the issues that I would have to confront if that bylaw was in fact adopted by the shareholders. But it didn't affect the scheduling or really the way I looked at the case at that point.

FIORAVANTI: Now they have the annual meeting in September of 2010. At this point the offer I think had gone up twice, and I believe at the time of the annual meeting it had gone up to about 65.50, all cash, I believe.

CHANDLER: That's right.

FIORAVANTI: And as a result of the election, all three Air Products nominees are elected. That includes the ouster of the chairman and CEO, Mr. McCausland from the board of directors.

CHANDLER: Peter McCausland. But the board put him back on immediately after the election. They replaced and put him back on the board, not as the chairman but on the board anyway.

FIORAVANTI: They expanded the board by one seat and re-appointed him. Did that surprise you at all?

CHANDLER: No, it didn't really surprise me. I'd seen a very similar kind of action in an earlier case in my career. And so I thought here's the founder, here's the guy who's probably the most knowledgeable guy about this company. You'd want him on your board because of the institutional knowledge that he had. So it didn't surprise me at all.

FIORAVANTI: One of the interesting things about the proxy contest was the approval of the bylaws, including the one in particular that moved up the annual meeting to January of 2011. There had been a letter written to the court prior to the annual meeting, essentially giving Your Honor a heads up that this may be the subject of litigation immediately after the annual meeting. And in fact, that's what happened. How did you handle the bylaw issue?

CHANDLER: [00:11:06] Well, once I knew that it was going to be coming at me... I mean, I knew that it was likely to if it was adopted because in the proxy campaign, Airgas had made it very clear to their shareholders, this bylaw is invalid and illegal under Delaware law and so you'd be well advised not to vote for it. Air Products had similarly said this is a valid bylaw, we're going to move the meeting to January of every year and you should vote in favor of it. Because if you do you're sending a clear signal to the board of Airgas that you want them to negotiate with us to reach a deal and a price that’s reasonable. So I knew that they had teed this issue up. And so sure enough after the election when the shareholders had adopted this new bylaw moving their annual meetings to January, I knew that I was going to have to confront it. And shortly, I think after the meeting, Airgas

actually filed, I believe was Airgas who filed a declaratory judgment action challenging the legality of the bylaw. So what I did was react the way I think I should have reacted, which is to say, fine. We're going to combine that with the trial on the pill issue--on the pill case. So we'll have both of those heard together. You've picked the first week of October--October 4th to the 8th. So brief the bylaw issue and get your witnesses ready for the rest of the case and we'll do it all in the week of October 4th to 8th which is what we did. And the bylaw debate, I'll call it, which is really what it was, the debate between Airgas and Air Products over that bylaw, took place on Friday, October the 8th. And as I recall it took almost all day for the lawyers--the two lawyers who were arguing which was Mr. Bornstein from Cravath and Mr. Mirvis from Wachtell Lipton.

FIORAVANTI: And in true Court of Chancery fashion you issued an opinion later that day. So you had obviously been working on your opinion, you had been thinking about the issues for quite some time. What was your thinking in trying to get the opinion out on the bylaw issue immediately?

CHANDLER: [00:13:08] Well, I knew that whichever way I ruled it didn't matter which way I ruled--that it was going to be appealed. Both sides had signaled that to me, that was how important this issue was to them. So I knew that if it was going to be appealed, and if in fact the bylaw was going to be upheld and a meeting was going to be held in January of 2011 and it's October now, that's a lot for a company to do to get itself ready for another annual meeting in only four months time. There are all kinds of notice requirements and so on that have to be complied with. And if you're going to build into that an appeal to the Delaware Supreme Court, I knew that it was important for me, the trial court, to get a decision out so that the Supreme Court would have some time to think about this, have some briefing and argument, and make a decision that was a nice reasoned decision. So it was incumbent on me, I thought, to try to accelerate the decision making at the trial court level to facilitate that appeal to the appellate court. Which is why I had the opinion pretty much ready to go before the argument on the eighth. I tweaked it a little bit after the argument was over, which ended around four o'clock, and I think the opinion went out seven or eight o'clock that evening.

FIORAVANTI: Was there anything in the oral argument that affected your decision making or... other than what you call the tweaking of the opinion?

CHANDLER: The only thing that I did in the opinion after the argument because basically the briefs had done a terrific job of setting up the issue and the legal positions of the parties. So I knew what they were. And the argument really wasn't different than what those briefs had set up. So that enabled me to have the opinion pretty much in place. The one thing I did was try to address one argument that Mr Mirvis.... And Mr. Mirvis and Mr.

Bornstein are well known to the court. They're both exemplary advocates, they're truly gifted oral advocates. And Mr. Mirvis repeated an argument multiple times to me during that afternoon, which I'll refer to as the X=Y argument. And so I felt like I had to address it in some direct way. So I added some part to the opinion--a footnote to the opinion, in which I tried to address Mr. Mirvis's X=Y argument. And really, for the benefit of the audience here, the students that are here, Mr. Mirvis made a powerful argument to me that there were two ways in which you could address the terms of a staggered board. One way, in a charter or a bylaw, you could refer to it as the director on a staggered board serves for a term of three years. That's one way you can say it. And that's unmistakably clear. You serve a term of three years. The other way you could say it, he said, and he thought they were equivalent, is to use the locution that a director's term shall expire at the annual meeting in the third year following the year of their election. Expire at the annual meeting in the third year following the year of the election. And Mr. Mirvis's argument for Airgas was that those two locutions X and Y say the very same thing, they are equal. And that was the argument that I tried to address in the footnote. And interestingly it became part of the argument in the Supreme Court. [00:16:30] My view was they're not the same locutions, X and Y are different letters of the alphabet, these words are different words, and they suggest different things. The Supreme Court saw it just the opposite. The Supreme Court saw it as X is Y, those words mean the same thing. And they looked to extraneous evidence, they looked to the way it was commonly understood, they looked to an ABA form book for example, to see how you would read this language. And that's how they came out. And they came out differently than me for that reason. I looked to the ambiguity in those words and used a default, and that default was I invoke the policy of Delaware, which is whenever words are ambiguous in a charter or in a bylaw, if they're ambiguous and they touch upon the stockholders' right to vote or the stockholder franchise, we have a rule that says a judge should construe that ambiguity in the way most favorable to the stockholder franchise. And I invoked that policy to say there's this ambiguity if I invoke that policy, then I come out in favor of saying this is a different way of expressing it, and the election that's held in January of 2011 falls in the third year of the 2008 directors, so it qualifies under the language and isn't inconsistent with Airgas's charter. And that policy--just for those that are interested--that policy is a longstanding policy and it's based on a very fundamental proposition and that fundamental proposition is that the shareholder franchise is the ideological underpinning of the very legitimacy of directorial power on which the legitimacy of directorial power is in fact rests or is based. And so it was that principle that I invoked that led me to my conclusion. [00:18:21] The Supreme Court used a different analysis and came out a different way but that's how it ended.

FIORAVANTI: There are a couple of interesting side notes to the Supreme Court argument that don't come through in the opinion. One is the composition of the panel of

the Supreme Court that heard the argument and then the other is a blog from a well known corporate law commentator that came out I believe the morning of or the morning before the oral argument.

CHANDLER: Those are two interesting little anecdotes. And the first one we found out that the panel or the en banc court that heard the oral argument on November the 3rd which is the day after the general election on November 2. And on November 3rd 2010, the day after the general election, the argument was held in the Supreme Court at eleven AM. But at 10:55 AM the Supreme Court entered an order appointing a superior court judge, Judge Witham in Kent County, to sit on this bylaw appeal. So when the lawyers, Mr. Bornstein, Mr. Mirvis and all their entourage go into the Supreme Court for the oral argument, they're fully expecting to see the en banc Supreme Court, but instead they see this one individual who none of them know, who Judge Witham is. With all due respect, he's a great judge on our Superior Court but he doesn't really hear many corporate cases on appeal in the Supreme Court. So he isn't a well known figure in that way. So they're all scratching their heads wondering who this guy is sitting on the end of the bench for this argument. Now the way the story ends, two weeks later, on November the 14th, Judge Witham recused himself from the Supreme Court hearing in that case. And one hour later the Supreme Court entered an order indicating that we're going to reconsider the case on the briefs without any further oral argument and with the original en banc court which included Justice Jack Jacobs. And the reason why Justice Jacobs had not been there originally is that in route to the oral argument he had a fender bender. Fortunately he wasn't work--no one was hurt. But he couldn't make it to the oral argument in time which is why the Supreme Court, to avoid having all these lawyers leave and not be able to have their argument, drafted for the moment, a Superior Court judge to sit in the chair and fill that seat. And then later they recommitted the case to the full en banc court with Justice Jacobs and that was on November the 14th, roughly two weeks later. And then a week later on November 23rd, they entered their opinion in a reversing my decision with that full en banc court. So that's that side story. The other side story is about Lucian Bebchuk who's a famous professor at Harvard who's written a lot on staggered boards. And he has a blog and he blogged on the very morning of the oral argument about how in fact Airgas had found a new way that he hadn't thought of, a way around the poison pill, a way around that effective staggered board. And it was through the device of moving the annual meeting. And the interesting thing is, Mr. Bornstein for Cravath, the lawyers for Air Products, thought that this blog was exactly what they needed, it was like evidence that proved their point that this was a valid way to avoid the poison pill in this instance and future transactions could use it. [00:21:51] Mr. Mirvis on behalf of Airgas said that it would be exhibit A at the trial if he ever had another trial because he thought it was perfect evidence for Airgas. Why? Because it proved his point that this dispute wasn't about the annual meeting or when you could schedule an annual meeting or how

you could schedule it, but it was all about staggered boards and how staggered boards can be used effectively under Delaware law. So they both, to me it was striking how each of them could see the very same blog by Lucian Bebchuk and interpret it so wildly differently and divergently from each other. So that's the two little anecdotes on the argument.

FIORAVANTI: There's one other anecdote that is thrust into the appeal at that point which you did not have the benefit of when you issued your opinion or through the trial. And that is the three Air Products nominees had since joined the board. And on October 26th there is a letter that is publicly filed, a copy of which is sent to you, and a copy of which is sent to the Supreme Court while the Supreme Court is considering the appeal. Did the letter surprise you?

CHANDLER: I'm not sure it surprised me. I mean, I was interested in it because it made it clear that the entire board--now including the three nominees from Air Products--the party trying to take over Airgas, agreed with the directors of Airgas that the offer of $65.50 was, in their words, quote grossly inadequate, unquote. I can't be sure what effect that had on the Supreme Court in their analysis. I mean it does refer to it in the opinion, so they obviously were aware of it and thought it was noteworthy because they wouldn't have put it in the opinion if they didn't. But what effect it had on their reasoning or their thinking about on the appeal, I'm not sure. For me, it didn't have any effect, it just simply meant ok, the three guys that have joined have now considered all the evidence and they agree with their fellow directors that this in an inadequate offer. That was going to make it critical to me what happens on the bylaw. If there's going to be another annual meeting there's going to be potentially three new directors added to this mix. [00:24:23] But that won't be enough to change the board's mind, because now the three Air Products directors have joined with the Airgas directors. So it sets up sort of a conundrum for Air Products. They could win another election in only four months time, but still not be able to change the direction in having the pill redeemed. If in fact the bylaw was not validated and there wasn't going to be a January meeting, then what does Air Products do? So it puts a lot of pressure on both parties at this point.

FIORAVANTI: [00:24:57] Prior to the opinion from the Delaware Supreme Court, you had held trial on the pill, and you held oral argument on the meeting bylaw. But you hadn't scheduled oral argument post-trial argument on the pill.

CHANDLER: Right.

FIORAVANTI: What was your thinking about scheduling at that time? Were you of the view that if your decision on the bylaw were affirmed, that this might all go away and you don't have to wrestle with what we'll talk about in a little bit, is pretty difficult decision.

CHANDLER: Well that's precisely my thinking. [00:25:34] I mean, speaking for me--I don't know about all trial judges--but this trial judge learned the virtues of patience. Don't rush, don't force things, wait, things can happen that will change and redirect things. So give them a time, give them a chance for those things to happen or play out. And here I saw a lot of fluidity, a lot of things happening. These directors were not only writing to Air Products and saying your offer's inadequate, forget it, but they were also reaching out. Mr. Roden, the lead director for Airgas, I was aware of the fact that he was reaching out to Mr. McGlade at Air Products and having a discussion and a negotiation. So I thought there's no reason for me to rush a decision when these folks might be able to resolve this themselves. There was also the bylaw possibility, that it could be upheld, there could be an election. That might change the leverage effects and enable this to be resolved. Saving me from having to decide it for them. Because I'm a big fan of letting people make their own decisions and solve their own problems rather than some stranger in a black robe. So that's precisely why I was taking my time and not rushing to get a decision out in the pill case.

FIORAVANTI: Supreme Court opinion comes out--it's December 2nd--and you write a letter, and you make your life a lot more complicated. What was the purpose of the letter and the timing of the letter?

CHANDLER: Well the letter was timed because the Supreme Court's decision came out right before Thanksgiving. Right before Thanksgiving--the Thanksgiving holiday, I get the decision saying there's not going to be a January meeting. So now I've now got to go back and think, ok, I've got to decide... The trial we had, all the evidence is in... By the way, while this is going on, while we're waiting for the decision from the Supreme Court, my clerk and I are writing the facts from that trial so that we are telling the story of what we had heard. Because my experience has always been as you write and tell the story factually, it'll write its own conclusion for you. Those facts will drive you to a conclusion. And so I wanted to get all those facts sorted out. So while we were doing that--and then when the Supreme Court's decision came down--my next thought was all right, then I need to get people to be serious about specific facts. And as I remembered the trial, Mr. McGlade from Air Products had testified on the stand in front of me that $65.50, your honor, that's just the floor. That's just the floor. Well that implies to me that there's a ceiling and you haven't reached it yet. And so if this is not your final offer, I want to know what your final offer is before I decide whether the other side's demonstrated that there was a threat. So the letter was really designed to smoke out the parties on a variety of issues

that I needed to get anchored before I put out any final decision on whether this was legal or not under Delaware law. [00:28:39] I needed to have fixed points. One of them was what is your final offer and tell me what that is before I have to make this decision. So that was the reason for the December 2nd letter.

FIORAVANTI: Along those lines I've heard that there was a document that had been inadvertently produced in the litigation that indicated Air Products might be willing to go to 70 dollars a share. The document was clawed back by Air Products in discovery, but appears may have been communicated to you in a letter by the Airgas side. Do you have any recollection of that, and if so, did it affect your view at all during the trial or your opinion-drafting process?

CHANDLER: Well I don't have any specific recollection of it, but what it would have done, it would have fortified my view that I needed to force them to take a final position on the price. Because as I mentioned, I already knew that they had signaled during the trial--Air Products had signaled to me this isn't all we're willing to pay, we're willing to pay more. So if there was a document like that--and I think there probably was--I have some vague memory of this claw back problem, it would have just confirmed in my own mind--there's more money that Air Products is willing to put on the table; I need to force them to whatever that is before I decide the matter. And you know, the stock in Airgas had gone up and down, at least on the $65.50 offer. After my October 8th decision on the bylaw the stock price went up. It went up to almost 70 dollars. After the Supreme Court's decision it fell back down, it fell down below the 65.50 to 63 and 64 dollars. That was the market reacting to these decisions and predicting what it might mean for whether Air Products would go further and make a higher offer or whether this whole deal would just go away. But I thought that the reason I needed to get certainty around these issues was that was important to me. And of course, when I wrote the December 2nd letter, you're right, it made my life a lot more complicated because Airgas immediately wrote back--Mr. Mirvis--well, Your Honor, you can't decide this case based on what you heard in October because Air Products has now indicated and they raised their price, they raised the price to 70 dollars. And so he said you can't decide it. You heard a trial on 65.50, that's all moot now. And you can't hear a trial on 70 because there's no way to be sure that that's really their final offer. We think that there's probably a higher offer than that. So it's premature to have a trial on anything else. So it made life very complex and very complicated. And as you know, what I did was I scheduled another supplemental hearing--evidentiary hearing--in January to take additional evidence around the 70 dollar price to make sure that it was the best and final, there was going to be no further bids. And that that was what the deal was going to be judged by, whether it was a threat or not based on that price.

FIORAVANTI: When that happened you opened up the door to a lot more discovery, not just the three new directors--

CHANDLER: Experts -

FIORAVANTI: Experts, proxy solicitors, bankers... Did you anticipate... Certainly there was a fight over the scope of discovery and you decided that because of the nature of the case that there was going to be broad discovery.

CHANDLER: Sure. Well I knew that the three new directors from Air Products that had been elected to the board had insisted that they wanted their own financial advisors, and the board gave them what they wanted. Not only a new financial advisor, Credit Suisse, but they gave them a new legal advisor. Skadden Arps was hired to assist those three new directors. So I knew that that was going to implicate more depositions, more testimony at this evidentiary hearing. And I knew that they were the proxy experts that they were going to call in to testify. And I had already heard from the valuation experts in the October trial--Dan Fischel from the University of Chicago was for one side, and I think Dean Hubbard from Columbia was the valuation expert for one of the other sides. So I fortunately didn't have to rehear from them but I was presented with more experts on valuation from Credit Suisse for example and their analysis that they had done for the three directors, the three insurgent directors. And two of those three insurgent directors, as I recall, also testified.

FIORAVANTI: As of the time of the supplemental hearing had you in your mind reached a tentative conclusion as to how you were going to rule on the case?

CHANDLER: So I would answer that by saying you know, as I told you, I was getting the facts written and the story told, and by the middle of November before the Supreme Court's decision, I was leaning in favor of Air Products, of ruling in favor of Air Productsand requiring the board of Airgas to redeem the pill and allow the tender offer and allow the shareholders to choose. That's to where I was kind of tilting towards that. That changed dramatically after the evidentiary hearing in January where I heard from two of the three directors who had been put on the board by Air Products and heard their testimony and heard the testimony of their financial advisor from Credit Suisse. That completely put me in the camp of coming out the way I did and writing the opinion the way I did.

FIORAVANTI: It seemed from your opinion that you were most persuaded by John Clancey among the three.

CHANDLER: Yes

FIORAVANTI: It was Mr. Lumpkins, Mr. Miller, and John Clancey.

CHANDLER: He was very persuasive, very credible. And the two CEO's in this case were very credible. I mean, Mr. McCausland, the founder of Airgas, was a very credible and persuasive witness. And he came into court everyday. Everyday he sat through the trial from beginning to end and never left or took a break at all. He stayed right with us throughout the entire matter. He came in--I remember he had a bow tie on every day, different bow tie. And Mr. McGlade was there for a couple of days, I think. But Mr. Clancey was a very impressive witness and Mr. DiNunzio I think from Credit Suisse was another very powerful witness. So those folks had a real effect on me and the credibility and the way they persuasively explained how they had analyzed all the financial metrics of Airgas and had come to the conclusion that it was a company that was worth--in their view, and they were saying 78 dollars and north of that at least. And of course, that's one of the ironies too for me, is that [00:35:31] you know, the delay that occurred between the trial and the Supreme Court appeal was actually in retrospect, a very good thing. That delay allowed several things to happen. It allowed those independent directors to get in there and really look at the numbers and really do a deep dive, get their own expert and validate everything that they thought when they first arrived on the scene as a board member of Airgas. It allowed that to happen. It allowed Airgas to get stronger and stronger. You know, the longer this takeover effort took, the stronger Airgas became as a company. Because it was recovering from the recession and it was a company that was a small company in a way. So it got stronger and stronger as time went along which helped its position and its case that it was worth a lot more than what it was being offered back in February of 2010.

FIORAVANTI: Were you surprised that the three new directors felt so strongly about the value of the company? Because that seems to really have been the turning point for you, which we'll get to in a little bit in your opinion.

CHANDLER: I guess I was surprised in a way. I was impressed with how much conviction they had. I mean they had been on this board since September, when they got elected on September the 15th. But they really jumped into it head first. They got Credit Suisse involved and I was impressed with how much learning they had done to get up to speed. I was impressed, too, with how much the other Airgas directors had really brought them into the fold. Hadn't treated them at arms length and kept them at bay but really had brought them in and helped educate them about this company, its really excellent five year plan that it had and how it was executing on that plan and reaching every milestone that it was expecting to reach ahead of time, actually. That was all very impressive to me. So yeah, I was happily surprised in a way, how persuasive those directors were.

FIORAVANTI: Let's get to the opinion writing process. You mentioned earlier that you were starting to put down the facts in late fall, early winter of 2010 anticipating that you would be writing an opinion. Then you had the supplemental hearing. Then you were really getting down to brass tacks and having to write the opinion and do the legal analysis following the supplemental hearing. Describe for us that process internally. You had two law clerks at the time?

CHANDLER: Yes but one really worked with me on this case because this isn't the only case. Because a Court of Chancery has multiple balls to keep in the air at the same time.

FIORAVANTI: The parties think that it's the only case.

CHANDLER: Yeah, the parties and the lawyers think that it's the only case but you actually have a lot more going on so you're trying to manage the rest of your docket, so I had one clerk who helped me on this and the other clerk trying to help me with the rest of my docket. And we began writing this together. And I worked back when I was on the Court of Chancery and I think the Chancellor before me and the Chancellor after me, all follow this motto, which is: we're a fairly close working group, we rely on each other a lot, we talk to each other a lot. If we've got problems or issues that we're wrestling with we don't mind helping out each other. And so I'm sure that I reached out to Chief Justice Strine and I'm sure I reached out to my other colleagues to say here's what I'm struggling with, here's what I'm wrestling with, what do you think? [00:39:00] And so that's sort of the process. Now that doesn't happen in every case. That happens in cases that are, you know, are really difficult and complex and have some novelty. Where if you run up into a case where you've got to distinguish or maybe you've got to follow a decision by your colleague, you want to talk to your colleague about it and see if they can help you figure out ways to manage it or confront it, or ignore it and just what you can do. So that would epitomize the writing of this decision. It's like all the others in that vein.

FIORAVANTI: You had mentioned to me in a conversation years ago that one of the most important things for the Chancellor is to... and I'm paraphrasing, but to manage the jurisprudence so that there is a consistency along the lines of the court so that there is a collegiality and the other members of the court understand where the jurisprudence is going. Is this one of those cases where it's particularly important to do so?

CHANDLER: That's precisely right. Because we're all conscious of the fact that if we have differing decisions going out it leads to unpredictability, it creates uncertainty. Transactional lawyers don't know what to do or how to plan it right because now you have these different decisions. That would be a very unwholesome thing to happen for our

jurisprudence and for our courts as an institution. Our reputation's really built on a few things: speed, impartiality, predictability, and certainty are sort of the core ingredients to the success of this institution and the reason it has the reputation it has. So we're always conscious of that, all five of us on that court are always conscious of that. And that's why that kind of conversation and dialogue that I'm describing was typical.

FIORAVANTI: Along those lines, in August of 2010 one of your colleagues had a poison pill case--the Yucaipa case. And he wrote in footnote 229: there 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 (that happened here) (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 (check box two) (3), is required to take all the various economic risks that would come with maintaining the bid for another year (check box three). [0041:37] Both sides had to wrestle with that in their post-trial argument. You addressed it head on in your opinion. Did you discuss with then Vice Chancellor Strine his thinking on those lines when he issued the opinion in August of 2010, recognizing that that was before the results of the meeting were known, before the views of the new directors were known, and before the Supreme Court issued its opinion on the bylaw.

CHANDLER: So Marshall McLuhan is right here so we could ask him. No, I'm sure I had conversations about this, I'm certain of that. I am certain that we all read each other's opinions, so I was aware of his decision, Yucaipa. And I was familiar with the fact that, you know, he's addressed this issue in law review articles, in Stanford and others, and a colleague he had with some of the other professors about it. So I'm cognizant of all of that and aware of it and I don't want to sit here today and say that I interrogated him about it before I wrote my opinion, but I probably did have conversations around it.

[Chief Justice Strine's voice off screen] I would just say in the beginning and this voice off the screen is Leo Strine, is I remember talking with the Chancellor several times about this. I think the question, the trilogy, goes back to the Chancellor's point about the importance of facts because really embedded in that opinion was the assumption that the stockholders elected three new people to represent them, they believed the offer was good for them but the incumbent--that's a reference to the incumbent board majority. And I think the Chancellor... we had a little bit of a flip here, and that that hypothetical has a different twist when the three people who were elected and … the Chancellor and I also discussed what their platform was which I'm sure you may get to. His platform was a little bit different than just let the bid proceed.

CHANDLER: I mean, their platform, they ran three independent directors and it was on the basis of these folks will go in and make an independent judgment. They'll take a fresh look and advise you shareholders what you should do. So you should listen to them because we're appointing independent people. They could have taken a different tack. I mean, Air Products could have said we're sending in three nominees and their job is to redeem the pill and to convince all the other directors to redeem the pill. But they didn't do that. They took.... p,robably, for a strategic reason because if they had tried to do that they probably wouldn't have got the shareholders to vote in favor of it. That's what a lot of the institutional investors said later is that they wouldn't have voted for a slate like that. So that was strategic but it had an ironic effect. And I'm sure Air Products wasn't pleased that their three directors came out they way they came out but that's the game they played.

FIORAVANTI: In reading the opinion, particularly your recitation of the facts, which you said you had started to write in the fall, early winter... It appears that you were really struggling with how you were going to come out on this case. You had a hard time believing that an inadequate price alone represents a threat. It was clear that Airgas had been given more time than any other litigated poison pill case in the history of the Delaware Court of Chancery. There had been sixteen months since the offer was made public. There appeared to be, you said there appeared to be no threat here, that the stockholders have all of the information that they need to know whether to make the decision to accept the offer or not. Yet you went on to say that you were compelled by precedent to accept that inadequate price alone can be a valid threat to corporate policy and effectiveness. What is it in the case law that drove you to that view?

CHANDLER: Well, I don't want to take everyone on a long doctrinal excursion but I think there were decisions from our Supreme Court--and I had been reversed in one of them, Unitrin-- [00:46:02] where I think they made it fairly clear that they accepted the proposition that an inadequate price could constitute substantive coercion and that stockholders could mistakenly tender into an offer, not listen to their board of directors and not pay attention to what their board was advising them, not being as informed as those directors, and make a decision that was an erroneous decision because of that. So to me, that's where the doctrine led me, was that that was the inescapable conclusion that that could constitute an actionable basis for saying there was substantive coercion. So that's how I came out. I'm following what I thought. I'm a trial judge, I'm not an appellate judge. I don't get to the make the law, I don't get to create law. I have to follow it and apply it to the best of my ability. That's what I was thinking I was doing there.

FIORAVANTI: And you ultimately found that the board had satisfied its obligations under Unocal/Unitrin?

CHANDLER: I did.

FIORAVANTI: At the time that you issued your decision--this is a case where you had a large amount of the stock had moved because you had a tender offer that was commenced a year prior to your decision. And it had moved into the hands of arbitrageurs. That's an issue that was raised in the case, and it's an issue that you took on in your opinion. Did that weigh in your decision making process--that is, a stockholder who may have owned at the time of the meeting in September when the price was 65.50, that was the offer that was being made. Those stockholders could have gotten 65.50 for their stock if they had just sold into the market, or even better. So a lot of the stock was in the hands of arbitrageurs. I don't know what the percentage was but clearly a large amount was and there were institutions and that argument was made to you. So how did that affect your view in assessing the equities of the case?

CHANDLER: [00:48:06] Well, first of all, the CEO and chairman and founder of Airgas testified unequivocally at the hearing that if the offer was allowed to go forward a majority would probably tender into it because they were mostly arbs. They were short termers, they didn't care about the long term value of Airgas. They cared about one thing. They had bought at X, they can sell at Y, they want to take that, move onto the next deal. And he described it very crisply in his testimony that that's exactly where they were at this moment. Now of course, the stockholders who had sold to those arbs were the long term stockholders of Airgas and they had decided, I guess, that this was the best long term value that they wanted. And so they decided to cash out, but the experts that were called by each side, both Airgas and Air Products, put on proxy experts who testified absolutely consistently that the shareholder profile of Airgas now was dramatically different than what it was in February of 2010, and that it was a majority of that stock was held by arbs and hedge funds who had no interest whatsoever in the long term future of Airgas and could care less about what it would be worth a year from now. And so for me, that was the telling point that I thought I could craft an opinion that said here's an occasion where the court can take cognizance of that fact to make a decision that the board has a long term outlook but the unique profile of these shareholders don't, and that is, I think something unusual in our case law that maybe it's the only case like this that I'm aware of, where that finding helped support the conclusion that there was a threat and that the response to it was reasonable. Because the threat was that even though the stockholders were fully informed, they wouldn't listen to the board because of their short term interests.

FIORAVANTI: In your opinion you identified some important doctrinal issues toward the conclusion of your opinion. Those were: can a board just say no? If so, when? How should the enhanced adjudication standard of review be applied? What are the limits of the pill?

And then the ultimate question as you stated it, can a board just say never? Did you see your opinion as something that was fundamentally changing doctrine at the time you were writing it?

CHANDLER: [00:50:44] No. No, I thought I was a applying well accepted doctrine. I think it was applying it to the unique facts that I was presented with. I didn't think I was changing our law. I went out of my way in the opinion, in fact, to try to point out my own sort of unhappiness the way our law was described and has been described because I thought it could be improved and be more candid and open and frank. If this was our law, fine, but be open and candid about how it works and how it applies, particularly with respect to, as you know, the preclusiveness argument. So I wrote the opinion with sort of that respectful critique a bit, but I didn't think I was making new law or changing the doctrine. So I think the answer is that a board of directors can just say no. But it isn't just saying no, they have to withstand scrutiny under an enhanced standard of review, which means a judge is going to look at exactly how well informed that board was. Did they have an adequate, informed basis to make their judgment? And then did they respond in a way that was reasonable? So it's not easy to just say no. A board can just say no, but it has to be able to meet that exacting standard to do it. So that's the point. [00:52:02] Yes, you can say no, but it's not just saying no. You have a lot of work to do and a lot of arduous journey to go through to be able to get to the end of the road with that just say no.

FIORAVANTI: Now you went out of your way also in your conclusion to say that this case does not endorse just say never. Some folks didn't see it that way.

CHANDLER: Well that's sort of a soundbite kind of thing for people to say that. I mean, the reality is, if in this case Air Products had made an offer of 70 dollars back in February of 2010, we probably wouldn't be sitting here having this conversation. You know, they waited until December of 2010. As I said, Airgas had gotten to be a stronger company, all these things had happened. If they had come in at a higher offer earlier, we wouldn't be here probably. But my point is, you know, if enough money is put on the table, you know, even a board that's convinced that there's a great company with a great future, there's a point at which you cannot resist, you just cannot once the price gets high enough it will have to give. That's just the market, the way the market works and the way the pressures of the market work. Doesn't have anything to do with the law, that's just human nature that's going to work that way. So there's never going to be a you can just say never and you'll never have to cave to a price. You will eventually if it's high enough.

FIORAVANTI: This case was by my calculation the next to last trial that you held in the Court of Chancery before you retired in June of 2011. You have written opinions after the

Airgas opinion, but the actual trial was the second to last trial. I think the last trial was a small books and records trial. Was that weighing on your mind as you wrote your opinion?

CHANDLER: That I was going to be retiring from the court? Eventually it did. I mean, by December of 2010, January of 2011, I knew I wasn't going to be on the court a whole lot longer. I didn't know a precise date but it was pretty clear to me that I was nearing the end of my tenure. So it influenced me some in terms of--for me--I don't want to speak for all trial judges. But judges are careful are venting their spleen in opinions that are going to go up on appeal, and I was fully confident this one was going to go up on appeal. It didn't but I thought I would. So you have to be a little careful, a little judicious about that. But when you're a short termer, it frees you up. You have a certain freedom, a certain liberating feeling that you get from knowing that you're out the door and you can say some things that maybe you wouldn't say otherwise. Respectfully, of course.

FIORAVANTI: There's a footnote 480 in your opinion that I'd like you to read aloud for us and tell us...

CHANDLER: You want me to read this? Ok. Our law would be more credible if the Supreme Court acknowledged that its later rulings have modified Moran and have allowed a board acting in good faith and with a reasonable basis for believing that a tender offer is inadequate, to remit the bidder to the election process as its only recourse. The tender offer is in fact precluded and the only bypass of the pill is electing a new board. If that is the law, it would be best to be honest and abandon the pretense that preclusive action is per se unreasonable.

FIORAVANTI: Not something that you would have written earlier in your career?

CHANDLER: Probably not quite that way but again, as I said, I have no problem with the decision. I think the decision is correct and it wouldn't matter to me how it came out in the Supreme Court. But I do think it's helpful if the Supreme Court knows that sometimes the doctrine needs a little trimming, a little pruning, a little clarifying to be less than... Sometimes you can get disingenuous in the way the law develops, and that's not healthy or wholesome in my view. [00:56:16]

FIORAVANTI: In my reading and rereading of this opinion several times, I got the impression that you were fully anticipating that this case would go up on appeal and that you were flagging issues for the Supreme Court, in addition to what's referenced in footnote 480 and for clarity on the doctrine and to decide some of these issues. Was that something that you expected? I think you said yes. And what did you anticipate the court would do and were you surprised that no appeal was taken?

CHANDLER: Well, I have no idea what the Supreme Court would do. I was totally surprised by the bylaw decision. That caught me completely off guard, I didn't expect that. So I wasn't going to hazard any guess how they would come out on this part of the case. But it, as I said earlier, wouldn't have mattered to me, I'm heading out. Even if they had remanded, which is a trial judge's nightmare, that they remand it to you so you get to do it again, it wouldn't have hurt me because I was on my way out as you know.

FIORAVANTI: Well, it would have been a nightmare for your successor.

CHANDLER: My successor, right, or Chancellor Strine would have inherited this whole mess. But I think that I did try to give them an opportunity to take on some of these issues that had sort of been talked about in conferences and written about. I teed all of that up thinking if they're going to take it up, let them pick what they want. And unfortunately, Air Products decided to walk away and so there was no appeal.

FIORAVANTI: You did receive some criticism in academia for the opinion but ultimately I'm going to give you the last word on whether you feel you were vindicated?

CHANDLER: Well how can I not be able to feel vindicated because you know, all during this trial, too, you should know, there was rumors that there was another bidder and that's why the stock price kept getting higher than the bid from Air Products. Because there were rumors among the arbs and the hedge funds that there was another gas company interested and they were in the wings waiting to swoop in. So what ultimately happened though is Airgas was sold. Its price as a stock price went up to a hundred dollars within six or eight months after this trial its stock price was a hundred dollars a share. It was eventually sold to Air Liquide for 143 dollars a share. So I feel happy for those stockholders who hung on and not for those arbs and hedge funds who sold out right away.

FIORAVANTI: Your Honor, thank you so much for your time, I really appreciate it discussing this important case with us here at the University of Pennsylvania School of Law.

CHANDLER: Thank you, Paul.

FIORAVANTI: Thank you.

[00:59:10 end of video]