Case: Air Products v. Airgas
Interview of Theodore N. Mirvis; Wachtell Lipton Rosen & Katz
Interviewed by: Paul Fioravanti, Jr.; Prickett Jones & Eliott
October 22, 2018, Wilmington DE

#00:00:00#

MR. FIORAVANTI: Ted Mirvis, thank you for spending some time with us to talk about the Airgas – Air Products case in the Delaware Court of Chancery and the Delaware Supreme Courts in 2010.

MR. MIRVIS: My pleasure.

MR. FIORAVANTI: What was your role in the Airgas case? #00:00:24#

MR. MIRVIS: I got involved in the matter, as I recall, rather late. I knew about the matter in the office; it had been going on for a period of time. I wasn't involved in the discovery at all. It was billed as a potential just-say-no case; nobody knew how it was going to play out. But it had a very interesting charter/bylaw issue. And I got involved in that as a primary focus relatively late. I think not in the briefing in the Court of Chancery, but I was the designated person to argue that motion in the Court of Chancery, which, of course, only became ripe and I think we only filed the case against the bylaw after Airgas lost the vote on the three directors and on the bylaw at the annual meeting.

MR. FIORAVANTI: And as a prelude to that, there was the announcement of the tender offer back in February, and then, Air Products announced that it was going to run a slate and it was also going to run some bylaw proposals. The lawyers on both sides, and I think your side, representing Airgas, wrote a letter to the Chancellor in August indicating that there was a bylaw issue that could become ripe and that you would want expedited treatment in the event that it was adopted at the annual meeting in September. There was a letter from the other side also indicating that they, too, believed that there should be expedited treatment. And, sure enough, the outcome of the vote was that the bylaw had passed by a plurality; just under a majority of the outstanding shares. And your side was ready to go almost immediately. #00:02:21#

MR. MIRVIS: Mm-hmm.

MR. FIORAVANTI: What was your primary argument? I mean the bylaw, just to set it up for the viewers, the bylaw had indicated that the next annual meeting of stockholders would be in January 2011, which would have been about four months after the previous year's meeting, which was in September. And your argument was what is referred to as the classic X equals Y argument before the Chancellor. #00:02:48#

MR. MIRVIS: Well, that's what it developed into. I think our initial position was we had a staggered board;

directors serve and divide into three classes, which was just one of the limited number of options that you have under 141(d) of the Delaware General Corporation Law. And the directors were entitled to sit for the terms to which they were elected. And we thought the notion of defanging the staggered board by holding a second annual meeting within a matter of four months from the prior annual meeting just didn't make any sense. And it took a while, I think to drill down into what you call the X versus Y, but when we did a study of every Fortune 500 company incorporated in Delaware that had a staggered board, we found something that was if not surprising, at least interesting. The Delaware statute - 141(d) - uses a lot of words to say you can have a staggered board. It's very prolix, if that's the right word, in its formulation. And what we had found in looking at each and every one of these charters that basically Delaware companies with staggered boards used one of two formulations. They either said that when the board is elected, it shall serve until the third succeeding annual meeting, which we called X. Or, the directors shall each serve for a term of three years. And Air Products' position, which we, of course, didn't see until we saw their answering brief, was that X didn't equal Y; that there was a big difference between those two. They conceded that if the Airgas charter had said directors serve

for a term of three years, that their bylaw would be invalid as inconsistent with the charter. But they argued that because Airgas used the formulation that the directors serve until the third succeeding annual meeting, they were free under Section 211 of the statute to advance the annual meeting, not within the same calendar year, but once the ball in Times Square dropped on January 2, they could – the shareholders could cause by plurality vote the next annual meeting to occur promptly thereafter, thereby putting up for election two-thirds of the board within four months. We thought – I thought that was nuts. Creative, but impossible; it couldn't be right.

MR. FIORAVANTI: In your arguments to the Court of Chancery, and later on, to the Supreme Court, you led largely with a policy argument about how other corporations had implemented their charter provisions with respect to staggered boards. And you also used, interestingly, you used Air Products' own charter provision with respect to its staggered board and how it represented that provision in its SEC filings, which was consistent with your argument. #00:06:19#

MR. MIRVIS: Yes, and directly inconsistent with theirs. And we created a chart, which I actually had by the time of argument in the Delaware Court of Chancery; not for the briefing, but in the time of argument, this chart. I don't know whether you can see it, but it's enshrined in the –

wherever things get enshrined in Dover. Because we reproduced it in our brief in the Delaware Supreme Court. And all we did was, we had looked at all Fortune 500 companies incorporated in Delaware that had staggered boards with three classes. And they fell into three categories. Either they said, as Airgas had did, that the directors served to the third succeeding annual meeting. Or, and those are the ones in yellow. Or, they said flat out in the charter, directors served for three-year terms, and which even Air Products agreed that their bylaw would be invalid. Or, they had our charter language, third succeeding annual meeting, but in the description in the SEC filings, they said directors, therefore, serve for a term of three years. And Air Products, happily enough, fell into that category shown in red. So, here we had Air Products saying that X didn't equal Y when their charter and their SEC filings made it clear that they thought X did equal Y. And you said – you referred to that as a policy argument. It was partly a policy argument, but I viewed it as more of a plain construction argument. You know, the basic doctrine as we understood it was charters are contracts. They should be interpreted as contracts. If they are ambiguous, you should refer to the intent of the framers. We argued, as did Air Products, as everyone in contract cases, that they were not

ambiguous. They argued it was unambiguous their way. We argued it was unambiguous our way. Well, that's what lawyers do.

MR. FIORAVANTI: The Chancellor found it ambiguous. #00:08:26#

MR. MIRVIS: Yes, and so did the Supreme Court. But our point was, when you construe a charter, while we say it's like a contract, it's obviously not like a contract. It's not the result of two people like this sitting across a table with differing interests and different points of view hammering out language. It's a totally unilateral contract; it's written by the company. There's not – the stockholders aren't on the other side of the table. Nobody is on the other side of the table. And the second principle that we thought was very important is the doctrine that the statute is a part of every contract. So, when you read a contractual provision in a charter that deals with a staggered board, to us, it only made sense to read it against the statutory language that the charter provision was concretizing for that particular company. And the statutory language, of course, came out of 141(d). And while, as I said, there's lots of words in 141(d), the key word is the statute says the director shall sit for a full term. And there was an opinion by Chancellor Seitz in the Delaware Supreme Court—I'm sorry, the Delaware Court of Chancery, but it was Chancellor Seitz that said, "The full

term visualized by the statute means a term of three years." So, that's where we created the notion that building on Chancellor Seitz's interpretation of the statute that's saying until the third succeeding annual meeting meant the same thing as saying for a term of three years.

MR. FIORAVANTI: And that opinion was back in the late 1950s, early 1960s, but it was a case that figured prominently both in the Court of Chancery and certainly was relied upon by the Supreme Court in your favor. And there really had not been much development of the law on that issue in the interim. #00:10:20#

MR. MIRVIS: Correct. The argument – I almost said gambit – the argument presented by Air Products was, as I said, creative. As far as I knew, it had never been advanced before. Now, being new doesn't mean wrong, obviously. But it flew in the face of what we thought were, in part, policy considerations, but even before you got to policy, just the plain words of the statute. The policy argument what we were making was companies – and we thought this chart proved it – Delaware companies with staggered boards had a very clear understanding of what they thought they had. They thought they had boards in which each of their directors would serve for three-year terms. And they didn't think it mattered whether they used the formulation until the third succeeding annual

meeting or for a term of three years. And we proved that through this chart. And that was really, I don't think ever really disputed. Air Products' argument was this is not a case about staggered boards at all; this is a case about the power of the stockholders to set an annual meeting. And they said under Section 211 of the statute, the shareholders can, by bylaw, advance an annual meeting. Well, that's, as a general proposition, undoubtedly so. But what happens when that idea collides with – and we think we showed a collision with 141(d) of the statute and the charter in the case of a staggered board with directors serving for a three-year term.

MR. FIORAVANTI: The Chancellor didn't see it your way, and he pointed out in his opinion that because he found the charter provision to be ambiguous, he had to construe it in favor of the shareholder franchise, which in his view meant that the stockholders should be permitted to elect directors at the next – in light of the bylaw, which would have been in January. You, obviously, disagreed with that. But in the Supreme Court argument, I didn't hear that issue addressed, and I certainly didn't see it in the opinion. #00:12:47#

MR. MIRVIS: The Supreme Court, like the Court of Chancery, contrary to our primary argument, found the language in our charter ambiguous. In the Court of Chancery, there was a footnote in the briefing by Air Products that referenced the

notion that if a charter is ambiguous, it should be construed – and I think the words are something very close to this – it should be construed in favor of the stockholder franchise. Now, that sounds like plain, you know, apple pie. And the notion of that is very powerful. If the charter is ambiguous, and you don't know how to interpret it, you should interpret it in favor of the stockholder franchise because after all, the charter is deemed to be a contract between, and in somewhat of a legal fiction between the corporation and the stockholders for the benefit of the stockholders. Our point was that that principle, which we did not take issue with at all, was irrelevant for two reasons. Number one, not ambiguous, and we lost that. But number two, it didn't give you the answer in this case, or it certainly didn't give you the Air Products answer because the stockholder franchise, from our point of view, was being furthered by the construction we proposed because our construction ensured that when the stockholders of Airgas had elected directors for a three-year term; they were going to serve a three-year term, not a term of two years and six months, or potentially even less by virtue of the idea of using the 211 power to advance the annual meeting. So, we thought at best that principle gave rise to a draw between the two sides. We didn't think it favored the Air Products decision. Indeed, you will see in the

Supreme Court; they make both statements. They make the statement that the contract is ambiguous, and they cite the settled doctrine that in case of an ambiguous charter, it should be construed in favor of the stockholders. That doesn't mean it should be construed in favor of the stockholders who had voted to approve the bylaw. What about the stockholders who had elected the directors thinking they would serve a three-year term? That was our point.

MR. FIORAVANTI: Were you surprised the Supreme Court didn't address that issue at all? #00:15:03#

MR. MIRVIS: Well, I think it addressed it in—

MR. FIORAVANTI: Didn't address it directly?

MR. MIRVIS: It didn't address it directly, I was about to say, it addressed it in typical Delawarean fashion. No, it did not address it directly. It did not surprise me. I didn't think that doctrine had anything to do with our position, and certainly not with our appeal. Because – and it wasn't only that we were saying it wasn't ambiguous. We were not, from our position, relying on quote/unquote extrinsic evidence or parol evidence, as you might if you have a contract that's ambiguous, then you introduce that did the parties intend? We weren't talking so much about what Airgas intended; we were talking about what did the statute intend? And this is, while it might be a contract, it's not a contract

written in a vacuum. It's a contract that was obviously designed to implement the words of the statute. So, until you understood the words of the statute, you couldn't possibly understand the charter. And the words of the statute had been authoritatively construed by Chancellor Seitz in *Essential Enterprises*.

MR. FIORAVANTI: Let's take a short detour from the law to some of the practicalities and dynamics of the litigation. One, this was expedited litigation, at least the first trial was expedited, maybe not in a preliminary injunction fashion, but it was set down for trial in six months. The bylaw was certainly highly expedited. The argument was held, I believe, on the last day of the trial on the pill case, you argued it in the morning, and the court ruled later that day. Did you find out about it on the way back to New York on the train? #00:16:55#

MR. MIRVIS: No. I actually – and this will probably get edited out, but I will tell the story anyway. So, the Chancellor graciously scheduled the argument in Georgetown for 8 a.m. on a Friday morning. I'm a Sabbath observer, I needed to be back – or I very much wanted to be back in New York before sundown on Friday. So, by scheduling it at 8 a.m., that facilitated that, and I got back before the Sabbath began and I didn't know when the Sabbath stated that there had been a

decision. And I don't use any electronic devices, so I didn't hear about the decision. So, I went to synagogue the next morning, and as luck would have it, at the same synagogue was the largest single arb in the stock, Isaac Corre, then of Eton Park. I may have this slightly mixed up, but I don't think so. And he told me he is also a Sabbath observer and he told that after the Sabbath started, his phone started ringing off the hook. I think, at that point, he owned something like nine percent of Airgas. I knew that during the day the stock price of Airgas had traded down, which our side took as a good sign that the arbs viewing the argument thought that we were going to win. I mean, you know, nobody knows who wins until the gavel comes down. So, the short answer to your question is, no, I did not know I had lost for sure until the following day, and I didn't read the decision until after sundown on Saturday. I was quite surprised that I lost. But I always knew whoever won or lost; the case was going to the Supreme Court and—

MR. FIORAVANTI: And you took an expedited appeal? #00:18:43#

MR. MIRVIS: Yes, we did.

MR. FIORAVANTI: That got briefed, you show for oral argument in Dover, a five-judge panel en banc. And you don't have five Supreme Court Justices. #00:18:58#

MR. MIRVIS: No, we didn't.

MR. FIORAVANTI: Tell me about that.

MR. MIRVIS: So, I was sitting at the – as I unfortunately always do – or often do – on the appellant side with my local counsel, Don Wolfe, of Potter Anderson. And in walks the five members of the Delaware Supreme Court. I think we probably knew it was going to be en banc by that point, so we knew we would have all five. But I remember looking at the Justices as they walked in and saying, well, someone is missing; I am not sure exactly who it is. And then, I realized that Justice Jacobs isn't there, and there is a Justice I have never – don't have no idea who he is.

MR. FIORAVANTI: Now, you're admitted pro hac vice, but you're a regular practitioner in this court; you interact with the Delaware Supreme Court. So, it's not like you're a pilgrim; you're like a regular member of the bar. #00:19:51#

MR. MIRVIS: I appreciate that, but I didn't know who this was. So, I thought, well, what happens if I get a question from this Justice, I won't – so, I turned to Don Wolfe, I said, who is that? Or maybe I wrote him a note; I don't remember. And he said to me; I don't know. So, I'm thinking, oh, great. My own local counsel, my Delaware counsel doesn't know who this mystery judge is in a case that, at least to my small part of the world, was kind of important. I

guess you probably know the story. Subsequently, we learned that Vice Chancellor Jacobs had been involved in a what thankfully was nothing more than a fender-bender accident on the way to court and couldn't get there on time, so there was a, I don't know, an order entered appointing Judge Witham to be the fifth member of the court. Later, I think I have this right; before the case was decided, an order was issued by the Delaware Supreme Court appointing Justice Jacobs to be one of the five judges hearing the case in place of Judge Witham. That, of course, caused all kind of tealeaf reading, et cetera, as to what that meant. And whenever someone asks me, I say, it didn't mean a thing. It didn't mean anything anybody could ever figure out, so, just forget about it. But that was one of the charms of this case.

MR. FIORAVANTI: And that's one where you wouldn't pick that up by reading the opinion because the opinion has Justice Jacobs as part of the en banc court. #00:21:27#

MR. MIRVIS: Mm-hmm.

MR. FIORAVANTI: Something else happened leading up to the argument. And for a bit of history, in addition to prevailing on their bylaw proposals, Air Products also had three of its nominees elected to the board. And in between Chancellor Chandler's ruling on the bylaw and the Supreme Court argument, Airgas sent a letter to Air Products, which it

also made public, indicating that the board unanimously concluded that Air Products' most recent offer of $65.50 a share was, quote, grossly inadequate. That included the three nominees of Air Products to the board. How did that make you feel going into the Supreme Court argument? #00:22:29#

MR. MIRVIS: Well, we knew that was going to be – the fact that the three Air Products' nominees had, after hiring their own lawyers, hiring their own investment bankers, getting up to speed on the company, had determined that Air Products' own bid of $65.50 was grossly inadequate; we thought that was going to be an important fact in the pill case. I actually didn't know which way it was going to cut because I think it does cut both ways, but it was going to be an important fact. It wasn't directly relevant to the bylaw case. It was indirectly relevant because what it said to the observer was; I think it, in some ways, it didn't favor our position on the bylaw because what it said to the court was, you don't have to be afraid that if you allow another meeting to occur in January that you will be dooming this company to a sale at an inadequate price because three of the new directors have already said $65.50 is not adequate, or is, in fact, grossly inadequate. So, even if you allow another annual meeting to occur in January, and Air Products appoints three new independent directors, although, at that point, I don't

think anybody thought they were going to pick three really independent people again. They weren't going to make that mistake. They were going to do what Chancellor Chandler in later pill opinion suggested, which was appointing three – nominating three Lucian Bebchuk's to the board. But that fact did find its way into the Supreme Court opinion. I don't actually remember whether we had mentioned it in our brief. I wouldn't be surprised if we did because it was a recent event and it was part of an updating of the story of what's gone on in the matter. But I thought, actually, if anything, it was not helpful to our position on the bylaw. I didn't think it helped us on the bylaw at all. And I'm not saying it hurt us, but marginally, it was not a helpful fact. It's certainly nothing that came up, or that was talked about at argument.

MR. FIORAVANTI: Did you change your strategy or legal approach in the Supreme Court any differently from what you did in Chancery? #00:24:52#

MR. MIRVIS: I think the argument became more refined in the Supreme Court, as it often does. We had the benefit of the Chancellor's opinion, which told us how a well-respected jurist viewed the situation. It was the first time, you know, briefing from opposing parties is often similar to ships passing in the night. Having the Chancellor's opinion gave us something more concrete to focus on because obviously,

we thought that the first thing the Delaware Supreme Court Justices getting this case would do would be read the Chancellor's opinion. And so, we had a, in some degree, a target to shoot at. And we were very cognizant of the standard of the review, which we had thought – I don't think it was disputed; it should in effect de novo because it was construction of a contract is a matter of law. So, we didn't think that there was going to be a thumb on the scale against us from the mere fact that we lost below, but you know, losing to someone – losing before Chancellor Chandler is not exactly a feather in your cap when you're in the Supreme Court.

MR. FIORAVANTI: After the Supreme Court reversed the Chancellor – essentially reopened the record – and there was additional discovery, there were additional experts, there was another trial – essentially another trial. And he ultimately concluded that the directors had not breached their fiduciary duty by not redeeming the pill. Do you believe that the bylaw opinion influenced that decision at all? #00:26:31#

MR. MIRVIS: I don't think that it influenced the decision. I think it made the decision possible. And what I mean by that is if the bylaw decision had come out the other way, so that Air Products was going to get a second annual meeting in January, I have no basis to say this other than my own pure speculation; I don’t think there would have been a

second trial because in that case, the court could have said, look, why should I have a trial and make a decision on whether the board is required as fiduciary duty to redeem the pill when the bidder will have had an opportunity to elect two-thirds of the board in a very short period of time? Indeed, notice that the only thing that sort of undergirds my speculation is the fact that there was no decision in the pill case, which was fully tried, while the bylaw case was on appeal. I think it would have made very little practical sense for the court to have delved into the pill issue for two reasons, while the bylaw case was on appeal. Number one, if there was an affirmance in the bylaw case, then I think it was our view, and I don't know what the court's view was; that the pill issue – the just say no issue would never have been reached. Number two, the pill case was litigated in the middle of a flux because the price was raised after the trial. Indeed, the very first day of the trial, the CEO of Air Products testified that whatever the bid was at the time, I'm thinking it was 63 or... was not necessarily the highest price Air Products was willing to pay. Now, when I heard that in the courtroom that day, I thought the Chancellor was going to stand up and say, well, then, why are we here? Why are you asking me to order the directors to redeem the pill in favor of a bid that you not only say, you argue is not the most

you're willing to pay. Why would I ever do that? Or why would a board ever be expected to do that – to pave the way for a bid that's not the highest price that even this bidder is willing to pay? So, that's why I think the bylaw decision of the Supreme Court – I mean a lot has been said that you know, it was the handwriting on the wall, and if Air Products couldn't even win the bylaw issue, how could it possibly win the pill issue? I don't agree with that. I think the pill issue was very discrete and very different. I don't think there is really very much, if anything, in the Supreme Court opinion on the bylaw that reflected on the pill issue. There had been a Delaware Supreme Court opinion in Selectica, shortly before, which had accepted the idea that a staggered board and a pill could live in the same house, which was the basic attack on what we were doing. But not the bylaw decision. I don't think the bylaw decision, I don't think influenced the result of the pill case, but I do think it made the pill case – ripe isn't the right word, but it made the pill case more justiciable.

MR. FIORAVANTI: What also prompted the Chancellor's letter in December to say is this your last best and final price? And I think he locked them in at $70 a share—

#00:30:17#

MR. MIRVIS: Right. But we read that letter to mean look, he was sort of saying, look, I'll do it again, but I'm not doing it three times. So, if you have more money, if you're willing to pay more, put it on the table now. And that's why they put out their, quote, best and final $70 offer and that was the subject of the second trial.

MR. FIORAVANTI: Ted, one more question on the pill case. Were you surprised that Air Products did not take an appeal? #00:30:45#

MR. MIRVIS: Yes, very surprised. For the simple reason that having spent what, 14, 15 months pursuing Airgas? Okay, so they lost in Chancery on the pill case. It's not like they had nothing to say. Why not throw in another brief, spend it – it would have been expedited – spend another two, three, four weeks litigating, and see what the Delaware Supreme Court thought. It was also what's surprising was the speed by which they withdrew. I don't think a human being could have finished reading the Chancellor's opinion before they withdrew. And it struck me at the time, I never had this confirmed, that they had it on a tripwire. If they were going to lose, they were out of there. No, I perfectly well understand why companies at some point say, enough is enough; I am turning my attention to other subjects, going back to minding my own business, running my business, thinking of other acquisitions – that's all fine.

But I'm not going to say I was disappointed that they didn't appeal. It would have been a fun argument in the Supreme Court, no doubt. We had our brief – you know, when you're on the target side of a case, you go to court, you argue, and you come back, and you write a brief as if you have lost. Because a raider only has to win once. The target's got to win every time. So, we had our brief in the Supreme Court fully written, and it could have been filed in a matter of days – or one day – had the Chancellor come out the other way on the pill and we would have filed it right away and asked for a stay pending appeal because the greatest danger you have when you lose a pill case, which there have only been a couple, but it's Interco sort of engraved this on everyone's mind, is if the court orders the pill redeemed, then you don't get that stayed, you could be bye-bye before you have a chance to get heard in the big court.

MR. FIORAVANTI: Ted Mirvis, thanks for your time. I really appreciate it.

MR. MIRVIS: Appreciate it – it was fun. Thank you.

MR. FIORAVANTI: Thank you.

#00:32:48#

###