



THE AIRGAS CASE

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WACHTELL, LIPTON, ROSEN & KATZ

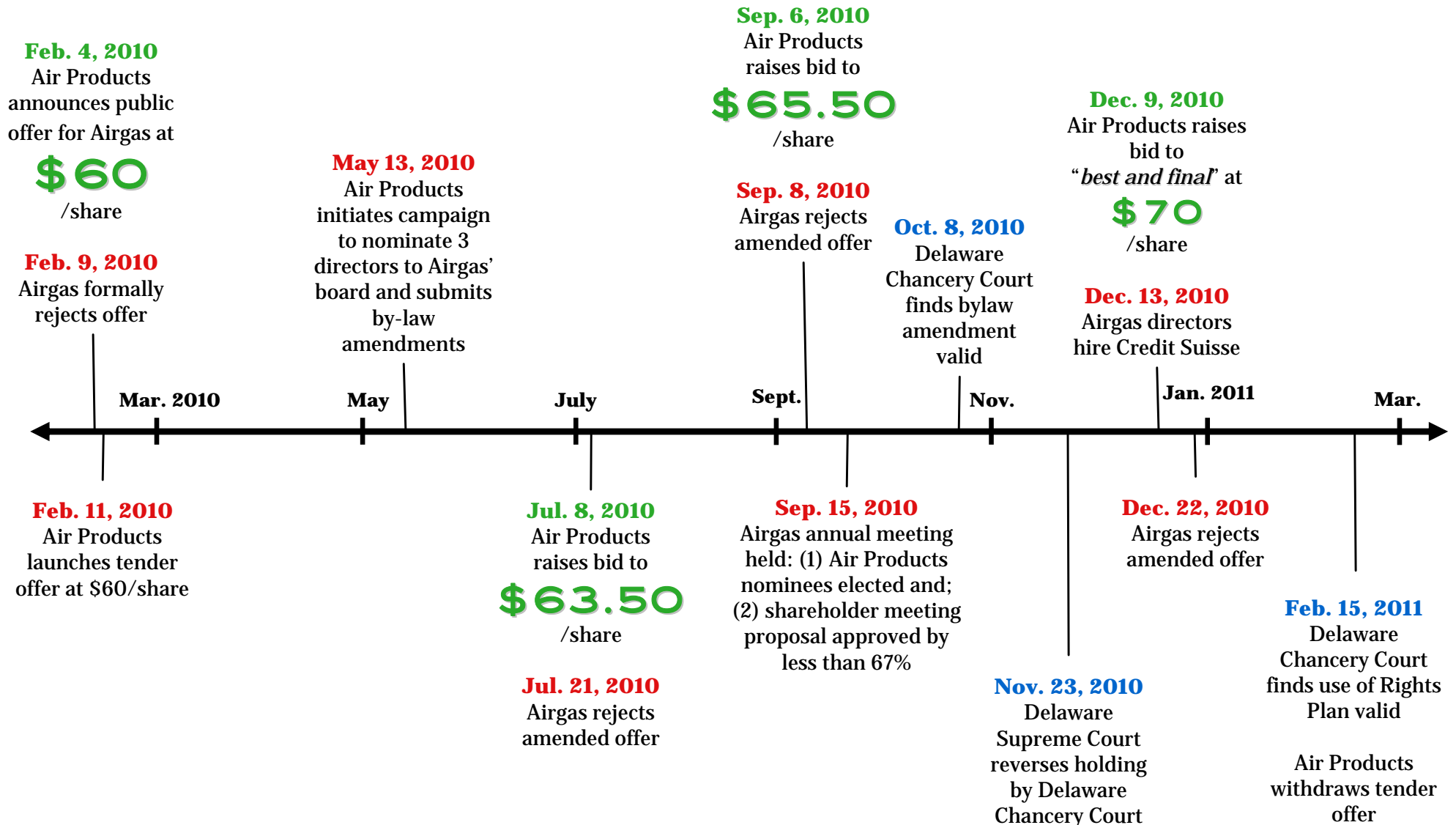
Harvard Law School
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X=Y?

X=Y?

X=Y?

CHRONOLOGY OF EVENTS



AIRGAS' HIGHEST TRADING PRICE POST-BID: \$80.59

AIRGAS' TRADING PRICE TODAY: \$ _____

(on December 27, 2011)

X = Y ?

"X"	<p><i>Each class serves until</i></p> <p>"third succeeding annual meeting"</p> <p><i>or</i></p> <p>"the annual meeting held in the third year following the year of their election"</p>
"Y"	<p><i>Each class serves for</i></p> <p>"a three-year term"</p> <p><i>or</i></p> <p>"term of three years"</p>

8 Del. Code § 141(d):

*"...the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election after such classification becomes effective, directors shall be chosen for a **full term**, as the case may be, to succeed those whose terms expire."*

"Clearly the 'full term' visualized by the statute is a period of three years — not up to three years." *Essential Enters. Corp. v. Automatic Steel Prods., 159 A.2d 288,290-91 (Del. Ch. 1960)*

Air Products' Position

AbitibiBowater Inc.	Agilent Technologies, Inc.	Air Products And Chemicals, Inc.
Airgas, Inc.	Allergan, Inc.	Amerigroup Corporation
AmeriSourceBergen Corporation	Apache Corporation	Autoliv, Inc.
Avery Dennison Corporation	Barnes & Noble, Inc.	Baxter International Inc.
Blogen Idec Inc.	BJ's Wholesale Club, Inc.	Blackrock, Inc.
C.H. Robinson Worldwide, Inc.	Cameron International Corporation	Capital One Financial Corporation
Celanese Corporation	Centene Corporation	CIGNA Corporation
Coca-Cola Enterprises Inc.	Commercial Metals Company	Coventry Health Care, Inc.
Danaher Corporation	Dean Foods Company	Dick's Sporting Goods, Inc.
Dole Food Company, Inc.	Dr Pepper Snapple Group, Inc.	Eastman Chemical Company
eBay Inc.	Fidelity National Financial, Inc.	Fluor Corporation
FMC Technologies, Inc.	GameStop Corp.	Group 1 Automotive, Inc.
Hertz Global Holdings, Inc.	Hess Corporation	Huntsman Corporation
Jacobs Engineering Group	Jarden Corporation	KBR, Inc.
Kellogg Company	L-3 Communications Holdings, Inc.	Liberty Global, Inc.
Liberty Media Corporation	Limited Brands, Inc.	Live Nation Entertainment, Inc. (LYV)
Masco Corporation (MAS)	Mastercard Incorporated (MA)	Mcdonald's Corporation (MCD)
Metlife, Inc.	Mohawk Industries, Inc.	Monsanto Company
Navistar International Corporation	Newell Rubbermaid Inc.	NII Holdings, Inc.
NRG Energy, Inc.	Owens Corning	Owens-Illinois, Inc.
Paccar Inc.	Principal Financial Group, Inc. (PFG)	Quest Diagnostics Incorporated (DGX)
Rockwell Automation, Inc. (ROK)	Rockwell Collins, Inc. (COL)	Ross Stores, Inc. (ROST)
Spectrum Group International, Inc. (SPGZ)	SPX Corporation (SPW)	SYSCO Corporation (SYI)
The Charles Schwab Corporation (SCHW)	The DIRECTV Group, Inc. (DTV)	
The Estee Lauder Companies Inc. (EL)	The Mosaic Company (MOS)	
The Western Union Company (WU)	Thermo Fisher Scientific, Inc. (TMO)	
TRW Automotive Holdings Corp.	United States Steel Corporation	
United Stationers Inc.	Universal Health Services, Inc.	
Unum Group	US Airways Group, Inc.	
Valero Energy Corporation	Virgin Media Inc.	
Visa Inc.	W.R. Berkley Corporation (WRB)	
WESCO International, Inc. (WCC)	Western Refining, Inc. (WNR)	



-  Third Succeeding Annual Meeting
-  Companies with provisions like those shaded yellow that simultaneously use "three year" language
-  Companies with "three year" provisions

*Two Del. companies employ staggered boards but use alternative formulations, thus are not included here.

“Trial judges are not free to ignore or rewrite appellate court decisions. Thus, for reasons explained in detail below, I am **CONSTRAINED** by Delaware Supreme Court precedent to conclude that defendants have met their burden under *Unocal* to articulate a sufficient threat that justifies the continued maintenance of Airgas’s poison pill.” [Opinion, p. 7.]

“Under Delaware law, the Airgas directors have complied with their fiduciary duties. [...] I am **CONSTRAINED** to deny Air Products’ and the Shareholder Plaintiffs’ requests for relief.” [Opinion, p. 11.]

“If Air Products is unwilling to wait another eight months to run another slate of nominees, that is a business decision of the Air Products board, but as the Supreme Court has held, waiting until the next annual meeting “delay[s]—but [does] not prevent—[Air Products] from obtaining control of the board.” I thus am **CONSTRAINED** to conclude that Airgas’s defensive measures are not preclusive.” [Opinion, p. 138.]

Selected Quotations

➤ “ Although I have a *hard time believing that inadequate price alone (according to the target’s board) in the context of a non-discriminatory, all cash, all-shares, fully financed offer poses any “threat” — particularly given the wealth of information available to Airgas’s stockholders at this point in time*—under existing Delaware law, it apparently does.”

[Opinion, p. 7.]

➤ “ **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.*”

[Opinion, fn. 480, pp. 138-139.]

➤ “ *In my personal view, Airgas’s poison pill has served its legitimate purpose ... [...]. In short, there seems to be no threat here—the stockholders know what they need to know about both the offer and the Airgas board’s opinion of the offer) to make an informed decision.*” [Opinion, p. 8.]

➤ “ [o]ur law should [] hesitate to ascribe rube-like qualities to stockholders. If the stockholders are presumed competent to buy stock in the first place, *why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?*” (quoting V.C. Strine in *Chesapeake, 2000.*) [Opinion, p. 96.]

“Poison Pill Primer”: the Anomaly

- **Mergers:** DGCL § 251 requires board approval
 - BJR

- **Tender Offers:** No statutory role for board
 - *Moran v. Household*: use of pill “evaluated when and if the issue arises” - *Unocal*
 - “Proxy out” → reasonableness of pill

Unocal Threats

Gilson & Kraakman:

- “**Substantive Coercion**” → risk that stockholders “will mistakenly accept an underpriced offer because they disbelieve management’s representations of intrinsic value”
- **Two Elements:** “(1) management must actually expect the value of the company to be greater than the offer—and **be correct** that the offer is in fact inadequate, and (2) the stockholders must reject management’s advice or “*believe* that management will not deliver on its promise.” [Opinion, p. 112]

Paramount v. Time:

- Stockholders might tender to Paramount “in ignorance or a mistaken belief of the strategic benefit which a business combination with Warner might produce”
- “a distortion of the *Unocal* process” for court to evaluate relative merits of long-term versus short-term investments goal for shareholders

Chesapeake v. Shore: stockholder access to information

Interco: “end stage” → pill’s only “purpose” is precluding stockholder choice

TW Services: the Key to the Puzzle

- **DECIDED:** **after** *Interco / Pillsbury*, **before** *Paramount*
- **ASKS:** Does duty of loyalty ever require a board to enter *Revlon* mode?
- **EXPLAINS:** *Interco / Pillsbury*: target boards endorsed break-ups that were “functional alternative to a sale . . .
- “. . . **NOT** involve circumstances in which a board had in good faith . . . elected to continue managing the enterprise in a long-term mode and not actively consider an extraordinary transaction of any type”
[AIRGAS]

Threat: “All About Value”

- **“Substantive Coercion”** and the arbs:
 - nearly half of stockholders are “**merger arbitrageurs**”
- only ***threat*** if offer is in fact “***inadequate***”
- **three new directors**: “*makes it even less likely that stockholders will disbelieve the board and tender into an inadequate offer*” [Opinion, p. 115, fn. 414.]
- **three new directors**: enhances credibility of inadequacy determination “*by something more confidence-inspiring than judicial review of the board’s business plan*” [Opinion, p. 116, fn. 419.]
- **“Articulated Risk”**: “*arbitrageurs with no long-term horizon in Airgas will tender, whether or not they believe with the board that \$70 clearly undervalues Airgas*” [Opinion, p. 415, fn. 414.]
- “*In this scenario, therefore, even the analysis urged by Gilson and Kraakman would seem to support the board’s use of the pill*” [Opinion, p. 116, fn. 419.]



WAS IT THE ARBS?

- Both sides' experts: arbs who bought below \$70 will tender “*regardless of the potential long-term value.*” [Opinion, p. 118.]
- “. . . I find sufficient evidence that a majority of stockholders might be willing to tender their shares regardless of whether it is adequate or not — thereby ceding control of Airgas to Air Products.” [Opinion, p. 118.]
- “This is a clear ‘**risk**’ under the teachings of *TW Services* and *Paramount* because it would essentially thrust Airgas into *Revlon* mode.” [Opinion, p. 119.]



Proportionality

- **not “coercive”:**
 - maintains status quo; no cram down
- **not “preclusive”:**
 - *Selectica / Airgas I*: not preclusive if required to win two proxy contests over two years
- **in “range of reasonableness”:**
 - independent directors acted in good faith
 - numerous outside advisors
 - believes offer price clearly inadequate
 - **three new directors**
 - Air Products’ directors testimony: (1) no reason to believe any breach of fiduciary duty, (2) management in best position to understand value, (3) would do same thing if shoe on other foot
 - Air Products could have run a slate promising to pull pill: **“three Lucian Bebchucks”**





THE AIRGAS PILL OPINION



You ain't nothin' but a hound dog

Cryin' all the time.

You ain't nothin' but a hound dog

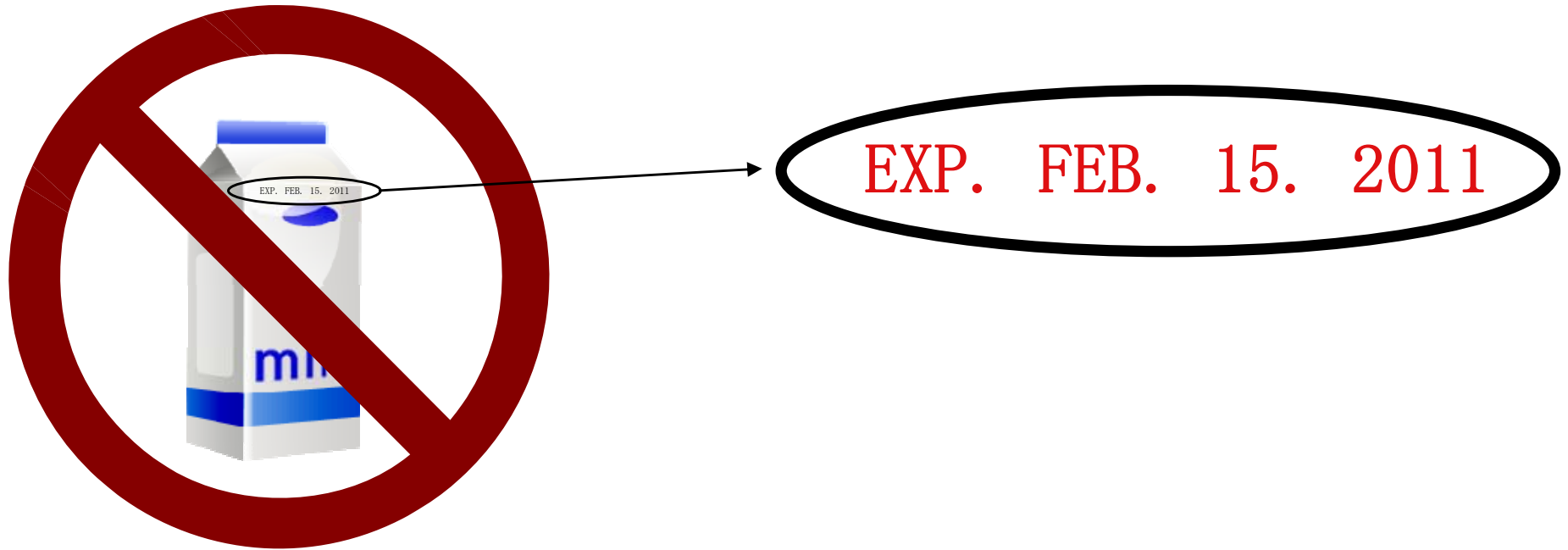
Cryin' all the time.

Well, you ain't never caught a rabbit

And you ain't no friend of mine.



What's it all about?



- “...in order to have any effectiveness, pills do not – and cannot – have a set expiration date”
- “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.”

"No wonder APD wanted to buy ARG. No wonder ARG resisted. *The Court got it right.*"



Source: Finance.Yahoo.com, accessed on January 4, 2012.