

*Foster v. The Town and Country Trust, et al.* (motion to dismiss, claim alleging breach of directors' fiduciary duties in connection with the sale of REIT and duty to auction and seeking to enjoin the acquisition)

In *Foster v. The Town and Country Trust, et al.* [<sup>1</sup>], Plaintiff Lee Foster ("Foster") sought to represent a class of shareholders of Town and Country Trust (the "Trust") to enjoin the proposed acquisition of the Trust by Magazine Acquisition LP, a Morgan Stanley Real Estate and Onex Real Estate joint venture, pursuant to an acquisition agreement calling for a cash out of public shareholders for \$33.90 per share. Foster alleged that the value was too low and sought the injunction.

At the heart of Foster's complaint was the assertion that the defendant directors had violated their fiduciary duties to the Trust by entering the acquisition agreement before testing the market to determine an appropriate price at which to begin a formalized bidding process for the Trust. Foster set forth four bases in an attempt to support his claim that the Trust had prematurely entered the acquisition agreement. First, Foster objected to the Trust's financial advisor not being instructed to canvas the marketplace prior to entering into the acquisition agreement, although Foster acknowledged that no such legal requirement existed. Second, Foster claimed that the Trust did not obtain "feelers" in the marketplace, something Foster asserted to be required under Maryland corporate principles set forth in *Jasino v. The Rouse Co., et al.* [<sup>2</sup>] Third, Foster asserted that the directors' decision to adopt the acquisition agreement should not be afforded the business judgment rule protection because there was no business purpose for failing to perform a pre-agreement market check. Lastly, Foster claimed that the Trust had not used a process that would allow for an appropriate post-agreement market check to be conducted.

The Court disagreed completely with Foster's arguments. Citing to *Jasino*, which Foster proffered in support of his claims, the Court stated that the board is entitled to the presumption of the business judgment rule under Maryland law so long as its actions are reasonable and that an acquisition agreement is entered into after arms-lengths negotiations, even if there has been no pre-agreement "shopping." The Court agreed with the *Jasino* decision where it stated that Maryland did not require an auction when a decision was made to sell a corporation. It stated that while a market-check of the Trust's board's decision to enter into an acquisition agreement may be needed, the board was free to lock up an attractive deal and use post-agreement methods to do so. Further, the Court stated that, while it may never appropriately favor one buyer over another for selfish reasons, as occurred in *Revlon, Inc. v. McAndrews and Forbes Holdings, Inc.* [<sup>3</sup>], a corporation may favor one over another if, in good faith, it believes shareholder interests would thereby be advanced. In dismissing Foster's action for failing to state a claim upon which relief could be granted, the Court noted that the bidding for the Trust did not stop once the Trust had entered into the acquisition agreement. Rather, the

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<sup>1</sup> 2006 WL 991000 (Md. Cir. Ct.).

<sup>2</sup> 2004 WL 3135516 (Md. Cir. Ct.).

<sup>3</sup> 506 A.2d 173 (Del. Super. 1986).

Court noted that the acquisition price had in fact risen substantially since that time as a result of the bidding that subsequently occurred.