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Maryland Court Rejects Stockholder Challenge to Sale of Terra Industries

Below is a copy of this memo written by [Stephen DiPrima](#) and [Garrett Moritz](#) of Wachtell Lipton:

Recently, in a thorough and well-reasoned opinion, the Maryland Circuit Court confirmed that directors of Maryland corporations who act in good faith and on an informed basis in connection with a sale-of-control transaction do not have personal liability exposure. The court threw out a stockholder suit alleging that Terra's directors had breached their fiduciary duties in connection with Terra's agreement to merge with CF Industries Holdings, Inc. *In re Terra Industries, Inc. Shareholder Litigation*, No. 24-C-10-001302 (July 14, 2010).

Beginning in early 2009, Terra rejected a series of hostile bids made by CF. In early 2010, CF purported to abandon its pursuit of the company. Shortly thereafter, Terra entered into a merger agreement with another company, Yara, at a price above CF's highest bid. The Yara agreement included a \$123 million termination fee. When CF returned with a substantial topping bid, Terra accepted CF's offer and terminated the Yara deal, and CF paid the \$123 million to Yara. Stockholder plaintiffs brought purported class action lawsuits alleging that Terra's directors should not have agreed to the Yara deal without first attempting to negotiate with CF. The plaintiffs sought damages at or above the value of the termination fee.

Maryland, like Delaware, recognizes a direct cause of action for failure to use good faith efforts to maximize stockholder value in the sale-of-control context. In rejecting plaintiffs' claims, the Terra court held that the directors had acted diligently in responding to CF's offer, that they had not breached any fiduciary duties, and that the result achieved by Terra's board precluded plaintiffs' claims. The court found, moreover, that plaintiffs' contention that Terra's board could have gotten CF to bid more without entering into a deal with Yara was based on "magical thinking."

In reaching this result, the Terra court followed principles developed in the Delaware courts on a number of important issues, including:

- that judicial scrutiny in the sale-of-control context is not a license for courts to second guess reasonable tactical choices that directors have made in good faith;
- that directors can fulfill their duties in this context by entering into a merger agreement with a single bidder, establishing a "floor" for the transaction, and then testing the transaction with a post-agreement market check; and
- that termination fees are a regular term in sale-of-control transactions, and that plaintiffs' attack on the 3% termination fee in this case was "totally baseless."

Terra should stand as an important precedent protecting directors of Maryland corporations who act in good faith and on an informed basis from litigation brought by the plaintiffs bar in the sale-of-control context.

Posted by broc at [8:17 AM](#)

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