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United States: Bankruptcy Code § 363(m) Is Now Up For Interpretation At The U.S. Supreme Court

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by [David A. Warfield](#), [Brian Hockett](#), [Katie Kraft](#) and [Douglas Lang](#)

Thompson Coburn LLP



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On June 27, 2022, the U.S. Supreme Court granted certiorari in *MOAC Mall Holdings LLC v. Transform Holdco LLC* (21-1270) to resolve a Circuit split over whether section 363(m) of the Bankruptcy Code limits appellate jurisdiction over bankruptcy sale orders or simply limits the appellant's remedies on such appeals. Given the now decades-long trend toward resolving Chapter 11 cases through asset sales, including assignments of leases and contracts, the Supreme Court's decision may provide clarity to a vitally important part of modern Chapter 11 practice.

The case arises out of the Sears bankruptcy. Before it filed bankruptcy in 2018, Sears leased retail space at the Mall of America in Minneapolis, Minnesota, from MOAC Mall Holdings LLC. In the course of its Chapter 11 case, Sears sold substantially all of its assets to Transform Holdco LLC in a Section 363 sale. As part of the sale, Transform acquired "designation rights" to hundreds of leases for which Sears was the lessee, including Sears' \$10/year lease at the Mall of America. These "designation rights" permitted Transform to designate which of the old Sears leases that Transform wished to acquire. Two months after the sale to Transform closed, Sears and Transform jointly requested the bankruptcy court to assign the Mall of America lease to Transform. MOAC Mall Holdings objected to the assignment, arguing that Transform could not provide "adequate assurance of future performance" as required by Section 365(b)(1)(C). The bankruptcy court overruled MOAC's objection and approved the assignment of MOAC's lease to Transform. MOAC appealed to the district court.

Initially, the district court ruled in MOAC's favor and disallowed the assignment. However, Transform requested a rehearing, arguing for the first time (and contrary to the position it took before the bankruptcy court) that Section 363(m) deprived the district court of jurisdiction to hear MOAC's appeal. Section 363(m) states:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Reversing course, the district court agreed with Transform on the motion for rehearing that Section 363(m) was jurisdictional and not subject to waiver, and the district court dismissed the appeal. The Second Circuit affirmed the district court, holding that Section 363(m) is a limit on appellate jurisdiction, and unless the sale order is stayed, the appellate court can only review challenges to the purchaser's "good faith." Several other Circuits had previously held that Section 363(m) does not limit appellate jurisdiction but merely limits the remedies available to the appellant on appeal.

The bankruptcy community will be watching the Supreme Court's decision carefully because the decision will affect how interested parties rely on sale orders and other orders integral to the sale. Resolution of the case will likely require the Supreme Court to expand on its already considerable body of case law on statutory construction. Moreover, the result in this case will doubtlessly affect appeals from financing orders, see 11 U.S.C. § 364(e), and appeals from the sale of grain from a grain storage facility, see 11 U.S.C. § 557(g), both of which contain language similar to Section 363(m).

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

AUTHOR(S)



David A. Warfield
Thompson Coburn
LLP



Brian W. Hockett
Thompson Coburn
LLP



Katie E. Kraft
Thompson Coburn
LLP



Douglas Lang
Thompson Coburn
LLP



