

Appeals of Bankruptcy Sales and Other Appellate Issues in Bankruptcy

*A review of the latest bankruptcy appellate decisions, including MOAC Mall Holdings LLC v.
Transform Holdco LLC and its anticipated effect on the finality of sale orders*

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MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288 (2023)

Summary: Section 363(m) is not jurisdictional.

Background

This case arose out of Sear, Roebuck and Co.'s bankruptcy. Under 11 U.S.C. § 363(b)(1), Sears sold most of its assets to Transform Holdco LLC and obtained an order from the bankruptcy court approving the sale. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 292 (2023). Through this sale, Sears transferred to Transform the right to designate the assignees of leases between Sears and its landlords. *Id.* This case focused on a lease between Sears and MOAC Mall Holdings LLC, which leases retail space in the Mall of America. *Id.* at 293.

When Transform designated its wholly owned subsidiary as the assignee of Sears's lease with MOAC, MOAC objected under § 365, which required Transform to provide adequate assurance of future performance of the lease. *Id.* The bankruptcy court overruled the objection and entered an order approving the assignment (the "Assignment Order"). *Id.*

Fearing § 363(m) might foreclose an appeal of the Assignment Order, MOAC moved for a stay of the Assignment Order. *Id.* at 293-94. The bankruptcy court denied the request for stay, finding that the Assignment Order did not qualify as an authorization contemplated by § 363(m). *Id.* at 294. Notably, Transform represented that it would not invoke § 363(m) if MOAC appealed the Assignment Order.

MOAC appealed the Assignment Order to the district court. *Id.* The district court found that Transform had not provided the adequate assurance required under § 365. *Id.* Transform moved for rehearing, and contrary to its prior representation, argued that § 363(m) deprived the district court of jurisdiction over MOAC's appeal. *Id.* While it disapproved of Transform's about-face on § 363(m), the district court determined that binding Second Circuit precedent required the district court to dismiss MOAC's appeal of the Assignment Order for lack of jurisdiction. *Id.* The Second Circuit affirmed the district court's holding and MOAC appealed to the Supreme Court.

Holding

The Supreme Court began by addressing Transform's argument that MOAC's appeal was moot because there was no legal vehicle available through which MOAC could return the lease to Sears's bankruptcy estate. *Id.* at 295. The Supreme Court held that Transform failed to demonstrate that MOAC lacked a "concrete interest" in vacatur of the Assignment Order, and therefore rejected Transform's mootness argument. *Id.* at 296.

The Court then turned to § 363(m). The Court noted that this case exemplified the importance of the distinction between jurisdictional and non-jurisdictional preconditions to relief. *Id.* at 297-98. "Jurisdiction," under the Court's precedents, refers to "the power of the court rather than the rights or obligations of the parties." *Id.* at 298. Statutory requirements are only considered "jurisdictional" if Congress "clearly states" as much. *Id.*

Looking to § 363(m)'s text, the Court concluded that nothing in § 363(m)'s text purported to limit a court's adjudicatory authority. *Id.* at 299. The Court reasoned that § 363(m) contemplates the possibility of an appellate court reversing or modifying an order under § 363, but that the reversal or modification may not accomplish the appellant's wishes. *Id.* In other words, § 363(m) does not address an appellate court's jurisdiction over appeals of sale orders, but rather supplies a constraint on the effect of the appellate court's ruling. *Id.* Because § 363(m) reads as a simple statutory limitation on the effect of an appeal of a sale order, it is plainly not jurisdictional. *Id.* at 300. The Court noted that § 363(m)'s context confirms this holding because it does not reference the Code's jurisdictional provisions. *Id.*

The Court also rejected Transform's argument that because § 363(b) sales are an exercise of a bankruptcy court's *in rem* jurisdiction, once the property is sold under § 363(b), the bankruptcy can no longer reach the property *in rem* because it is no longer property of the estate. *Id.* Under this reading, § 363(m) codifies this limitation on bankruptcy court's *in rem* jurisdiction. *Id.* However, the Supreme Court explained that § 363(m)'s text belies such a reading because the text confirms that appellate courts can adjudicate the validity of sale orders concerning property that has already left the estate. *Id.* at 302-03.

Because it concluded that § 363(m) is not jurisdictional, the Supreme Court vacated the Second Circuit's holding. *Id.* at 304-05.

Subsequent Developments:

The case is now pending before the Second Circuit on remand. *See In re Sears Holding Corp.*, Case No. 20-1846 (2d. Cir.). The parties are currently briefing the necessity of remand to the district court for resolution of the case based on the Supreme Court's ruling.

MOAC Holdings has only impacted one published decision so far. *See In re Jersey City Cmty. Hous. Corp.*, No. 21-15863-JKS, 2023 WL 3250267, at *2 n.6 (D.N.J. May 4, 2023). There, a party withdrew its argument that § 363(m) deprived a reviewing court of jurisdiction over a sale order absent a stay. *Id.* Still, the district court determined that the sale order was statutorily moot and not subject to reversal or modification on appeal. *Id.* at *7.

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