

**MOAC MALL HOLDINGS LLC
V. TRANSFORM HOLDCO LLC**

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INTRODUCTION

Trust is integral to an adversarial system. When a party disclaims the use of a procedural tool, only to later evoke that tool to blindsides the appellate process, the integrity and efficiency of the legal system is damaged. This bait-and-switch behavior is central to *MOAC Mall Holdings LLC v. Transform Holdco LLC* (“MOAC”).

In *MOAC*, the U.S. Supreme Court answered whether Bankruptcy Code (“Code”) Section 363(m) “limits the appellate courts’ jurisdiction over any [court] sale order or order demand ‘integral’ to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.”¹ Stated differently, the Court determined whether Section 363(m) is jurisdictional and therefore “impervious to excuses like waiver or forfeiture[?]”² Or whether Section 363(m) is non-jurisdictional and

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1. Petition for Writ of Certiorari, *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S.Ct. 927 (2023) (No. 21-1270).

2. *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S.Ct. 927, 936 (2023).

therefore subject to waiver or forfeiture? The U.S. Supreme Court held that Section 363(m) is not jurisdictional.

I. FACTUAL BACKGROUND

In 2018, Sears, Roebuck, and Co. (“Sears”) filed for Chapter 11 bankruptcy.³ Sears opted to self-administer its bankruptcy estate as a debtor-in-possession.⁴ By self-administering, Sears retained some “statutorily qualified powers to dispose of” property in its bankruptcy estate.⁵ One power was the right to “use, sell, or lease, other than in the ordinary course of business, property of the estate.”⁶ Sears evoked this power by selling assets to respondent Transform Holdco LLC (“Transform”).⁷ One asset sold to Transform was the right to “designate to whom a lease between Sears . . . and some landlord should be assigned.”⁸ Essentially, the right prescribes that “if Transform duly designated an assignee, Sears had to assign the lease to [that] designee.”⁹

Designation rights were valuable to Transform. Transform planned to use designation rights to control potentially lucrative leases in Sears’ bankruptcy estate,¹⁰ would allow Transform to sublease them to third-party tenants and earn a profit.¹¹ Sears’ lease with Mall of America, a premier shopping mall in Minnesota, was one such potentially lucrative lease. Transform designated that Sears’ Mall of America lease (“Lease”) be assigned to one of Transform’s wholly owned subsidiaries.¹²

3. *Id.* at 933.

4. *Id.*

5. *Id.*

6. *Id.* (citing 11 U.S.C. § 363(b)(1)).

7. See *In re Sears Holding Corp.*, 616 B.R. 615, 618 (S.D.N.Y. 2020), *vacated and remanded*, No. 20-1846-BK, 2023 WL 7294833 (2d Cir. Nov. 6, 2023) (noting Transform Holdco LLC is a web of entities that was created by former executives of Sears, including former Sears CEO Eddie Lampert, to “try to recapture and market Sears’ assets.”).

8. *MOAC Mall Holdings LLC*, 143 S.Ct. at 933 (citing *In re Sears Holding Corp.*, 616 B.R. at 619).

9. *Id.* See also *In re Sears Holding Corp.*, 616 B.R. at 619 (“Among the bundle of assets purchased by Transform pursuant . . . were . . . Designation Rights for contracts identified as ‘Designatable Leases.’ ‘Designation Rights’ are the right to designate to whom a lease between Sears (or an affiliate, such as Kmart) and some landlord should be assigned. Because [Transform] had purchased Designation Rights, once it identified an assignee, Sears was required . . . to assign the lease to [Transform’s] chosen assignee.”).

10. *In re Sears Holding Corp.*, 616 B.R. at 619.

11. *Id.*

12. *MOAC Mall Holdings LLC*, 143 S.Ct. at 933.

Petitioner MOAC Mall Holdings LLC (“MOAC”), the entity that leases space to tenants in Mall of America, objected to this assignment. MOAC argued that Sears “had failed to provide the requisite adequate assurance of future performance by Transform” as required by Code Section 365.¹³ The Bankruptcy Court disagreed with MOAC and approved Sears’ assignment of the Lease to Transform by a court sales order.¹⁴

At a crossroads, MOAC worried that Code Section 363(m) limited or even barred an appeal of the Bankruptcy Court’s sale order containing the Lease assignment.¹⁵ To avoid this problem, MOAC turned to Section 363(m)’s safe harbor provision, which allows a court to reverse or modify a sale order if the order of the “sale or lease [was] stayed pending appeal.”¹⁶ MOAC requested that the Lease assignment be stayed. In its denial of MOAC’s stay request, the Bankruptcy Court “emphasized that Transform had explicitly represented that it *would not* invoke Section 363(m) against MOAC’s appeal.”¹⁷

Following the Bankruptcy Court’s denial of the stay request, MOAC appealed the Lease assignment to the District Court. Initially, the District Court agreed with MOAC on the merits, finding that Transform had not provided adequate assurance of future performance under Section 365 and vacated the Lease assignment.¹⁸ Transform sought a rehearing. At the rehearing, Transform backtracked its previous disclaimer that it would not raise a Section 363(m) objection.

For the first time, and contrary to its previous position, Transform argued that Section 363(m) “deprived the District Court of jurisdiction” to provide relief to MOAC.¹⁹ The District Court was “appalled” by Transform’s bait-and-switch but noted that the Second Circuit’s precedent “bound” the court to “treat Section 363(m) as

13. *Id.* (“§ 365 of the Code prohibits assignment of the unexpired lease to anyone without ‘adequate assurance of future performance by the assignee[.]’” (citing 11 U.S.C. § 365(f)(2)(B))).

14. *Id.*

15. *Id.* See also 11 U.S.C. § 363(m) (“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.”).

16. 11 U.S.C. § 363(m).

17. *MOAC Mall Holdings LLC*, 143 S.Ct. at 934 (emphasis added).

18. *Id.*

19. *Id.*

jurisdictional”²⁰ and was therefore required to dismiss MOAC’s appeal. The Second Circuit affirmed. Despite its bait-and-switch tactics, Transform emerged victorious.²¹

II. ISSUE

MOAC’s petition to the U.S. Supreme Court asked the Court whether Code Section 363(m) “limits the appellate courts’ jurisdiction over any sale order . . . such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.”²² To petitioner, MOAC, a favorable ruling from the Supreme Court would classify Section 363(m) as non-jurisdictional and open the possibility that Transform had waived its right to bring a Section 363(m) argument once Transform disclaimed it would not raise Section 363(m) against MOAC’s appeal. To respondent, Transform, a favorable ruling from the Supreme Court would classify 363(m) as jurisdictional and thus deprive an appellate court’s power to fashion or modify a court sale order in circumstances where a party seeks appellate review.²³

III. CIRCUIT SPLIT

Prior to *MOAC*, the Courts of Appeals did not agree on the jurisdictional nature of Code Section 363(m). In the Second and Fifth Circuits, Section 363(m) is jurisdictional, and therefore a failure to obtain a stay bars to appellate review.²⁴ Conversely, in the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, Section 363(m) is not jurisdictional,²⁵ meaning that an appellate court may reverse or modify a court-ordered sale to the extent that the reversal or modification “does not affect the validity of the sale.”²⁶

20. *Id.*

21. *Id.*

22. Petition for Cert., *supra* note 1.

23. *MOAC Mall Holdings LLC*, 143 S.Ct. at 936.

24. See *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 247 (2d Cir. 2010); *In re Walker Cnty. Hosp.*, 3 F.4th 229, 234 (5th Cir. 2021); see also *MOAC Mall Holdings LLC*, 143 S.Ct. at 934 (noting that Section 363(m) is jurisdictional in the Second Circuit and thus was “not subject to waiver or judicial estoppel”).

25. See *In re Energy Future Holdings Corp.*, 949 F.3d 806, 820 (3d Cir. 2020); *In re Brown*, 851 F.3d 619, 622–23 (6th Cir. 2017); *Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019); *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 896 n.4 (9th Cir. 2017); *In re Stanford*, 17 F.4th 116, 122 (11th Cir. 2021).

26. 11 U.S.C. § 363(m).

IV. SUPREME COURT RULING

In *MOAC*, the U.S. Supreme Court unanimously held that Code Section 363(m) is not jurisdictional. The Court offered three justifications to support its decision.

A. *Clear-Statement Rule*

The jurisdictional label “carries with it unique and sometimes severe consequences.”²⁷ Enforcing jurisdictional rules typically leads to the waste of judicial resources and unfairness to litigants.²⁸ The Court noted that Congress “ordinarily enacts preconditions to facilitate the fair and orderly disposition of litigation” and would not give rules “an unusual character that threatens to upend that orderly process.”²⁹ As such, the Court continued its application of the Clear-Statement Rule, which treats a provision as jurisdictional only “if Congress ‘clearly states’ as much.”³⁰

The Court concluded that “nothing” in Code Section 363(m) “purports to ‘gover[n] a court’s adjudicatory capacity.’”³¹ Given that Section 363(m) “contemplates” a scenario where an appellate court “reverse[s] or modifie[s] any covered authorization,” the Court reasoned that Congress intended for appellate courts to have jurisdiction over authorized sale orders.³²

B. *Statutory Limitation, rather than Jurisdictional*

Focusing on the “good faith” language of Section 363(m), the Supreme Court noted that Section 363(m) provides “targeted protection” to good faith purchasers of property through a court-ordered sale even when an “appellate court properly exercises jurisdiction.”³³ The Court reasoned that if Congress envisioned appellate courts modifying sale orders through Section 363(m), then Section 363(m) operates more like a “statutory limitation”³⁴ that

27. *MOAC Mall Holdings LLC*, 143 S.Ct. at 936.

28. *See Fort Bend Cnty., Texas v. Davis*, 139 S.Ct. 1843, 1849 (2019) (noting the sometimes “[H]arsh consequences” of enforcement of jurisdictional rules, including waste of judicial resources and unfairness to the litigants).

29. *MOAC Mall Holdings LLC*, 143 S.Ct. at 936.

30. *Id.* (citing *Boechler, P.C. v. Comm’r of Internal Revenue*, 142 S.Ct. 1493, 1497 (2022)).

31. *Id.* at 931 (citing *Henderson ex rel. Henderson v. Shinseki*, 131 S.Ct. 1197, 1202 (2011)).

32. *Id.* at 937 (emphasis original).

33. *Id.*

34. *Arbaugh v. Y&H Corp.*, 126 S.Ct. 1235, 1237 (2006).

requires a party to take “certain procedural steps at certain specified times”³⁵ rather than a strict jurisdictional bar on the appellate review process.

C. *Statutory Context Within the Code*

Section 363(m) stands apart from other provisions in the Code that “recognize federal courts’ jurisdiction over bankruptcy matters.”³⁶ Further, the Court notes that Section 363(m) has no “clear tie to the Code’s plainly jurisdictional provisions.”³⁷ Therefore, the Supreme Court reasoned that Congress did not intend for Section 363(m) to be jurisdictional.

V. IMPLICATIONS

Although *MOAC* addressed a fairly narrow and technical aspect of the Bankruptcy Code by holding that Section 363(m) is not jurisdictional, the Supreme Court introduces two practical consequences.

A. *(Potential) Lack of Finality in Court-Ordered Sales*

Bankruptcy is rarely an enjoyable, painless experience. Sacrifices, risks, and losses lurk in the shadows as a bankrupt debtor administers its estate. As a lifeline, the Code offers respite through court-ordered sales that maximize the value of a bankrupt’s assets. However, this lifeline requires willing buyers to purchase assets from an entity that struggled in the months and years leading up to its bankruptcy. Risk is abundant in these sales. In short, limiting risk in court-ordered sales helps bankrupt debtors and willing buyers alike.

By holding that Code Section 363(m) is not jurisdictional, the Supreme Court has opened the possibility that future court-ordered sales in every Circuit will experience more appellate scrutiny than in the past. More appeals mean more risk. More risk means less willingness from potential buyers to purchase assets out of a bankrupt’s estate. Prior to *MOAC*, the influential Second and Fifth Circuits had held that Section 363(m) was jurisdictional.³⁸ By holding

35. *Henderson ex rel. Henderson*, 131 S.Ct. at 1203.

36. *MOAC Mall Holdings LLC*, 143 S.Ct. at 937.

37. *Id.* at 937–38 (providing the following example, 11 U.S.C. § 305(c) “directs that certain judicial order are ‘not reviewable by appeal or otherwise by the court of appeals’ under § 158(d)”).

38. *MOAC Mall Holdings LLC*, 143 S.Ct. at 929 (“The District Court determined that Second Circuit precedent bound it to treat § 363(m) as jurisdictional and

to the contrary in *MOAC*, the Supreme Court fundamentally changed the risk profile of assets in court-ordered sales in two extremely popular Chapter 11 bankruptcy court venues.³⁹ Time will tell just how impactful *MOAC* is to Section 363(m) sales.

Still, with this increased uncertainty comes some stability. As the Supreme Court pointed out, Section 363(m) contains a prescription for when reversal or modification of court-ordered sales may not “effect the validity of a sale or lease.”⁴⁰ This scenario protects a “*good faith purchaser or lessee* under certain prescribed circumstances.”⁴¹ While far from an iron-clad guarantee that issues will not arise on appeal of a court-ordered sale, such parameters provide potential buyers a framework for assessing the risk of purchasing assets out of a bankrupt’s estate.

Another stabilizing feature of *MOAC* includes the confirmation that Section 363(m) is waivable. Transform’s belated challenge to jurisdiction caused a stir in the appellate process and threatened to render years of efforts worthless. Here, although Transform prevailed, its antics came at the cost of its integrity. Following *MOAC*, parties must be conscientious that a failure to bring a timely jurisdiction challenge under Section 363(m) may lead to its waiver.

B. *Continued Disdain for Bait-and-Switch Tactics*

Dishonest conduct may initially be confined to small acts, but research shows that the frequency of dishonest conduct increases over time if left unchecked.⁴² Therefore, it is no surprise that courts lament

dismissed the appeal.”); *In re Walker Cnty. Hosp.*, 3 F.4th 229, 234 (5th Cir. 2021) (“And fatal means fatal: challenges to authorized bankruptcy sales are dismissed when the party challenging the sale has not sought a stay. This result is made unmistakable by our precedent.”).

39. See Lawrence V. Gelber & Erik Schneider, *Location, Location, Location – How to Choose a Bankruptcy Venue*, DAILY DISTRESSED ASSET CENT. (Dec. 8, 2022), <https://www.dailydac.com/where-to-file-bankruptcy> (noting that many large chapter 11 bankruptcies are filed in New York, which is located in the Second Circuit); see also Akiko Matsuda, *Texas Leads in Commercial Bankruptcy Filings in First Half of 2023*, WALL ST. J. (July 13, 2023), <https://www.wsj.com/articles/texas-leads-in-commercial-bankruptcy-filings-in-first-half-of-2023> (“U.S. Bankruptcy Courts in Texas attracted about 40% of the country’s commercial chapter 11 filings in the first six months of [2023], solidifying the state’s lead as the most popular restructuring destination for failed companies.”). Texas is located in the Fifth Circuit.

40. 11 U.S.C. § 363(m).

41. *MOAC Mall Holdings LLC*, 143 S.Ct. at 937 (emphasis added).

42. See Brett Beasley & Christopher Adkins, *What Dishonesty Does to Your Brain*, NOTRE DAME DELOITTE CENTER FOR ETHICAL LEADERSHIP, <https://ethicalleadership.nd.edu/news/what-dishonesty-does-to-your-brain-why-lying-becomes-easier-and-easier/> (last visited Mar. 5, 2024) (explaining that the brain

behavior from a party that leads court proceedings in one direction, only to blindside everyone when that party conveniently switches their argument when times get tough. Here, throughout the proceedings of *MOAC*, courts voiced their displeasure with Transform's abrupt switch in its argument after losing on the merits and its blatant bait-and-switch antics.

The District Court "was 'appalled' by Transform's gambit of waiting to invoke Section 363(m) until after losing the merits of the appeal."⁴³ The District Court even went so far as to claim that Transform's bait-and-switch was an "appropriate situation for the application of judicial estoppel."⁴⁴ The Supreme Court likewise labeled Transform's behavior "egregious"⁴⁵ and displayed impatience with Transform's arguments supporting its own behavior, calling these arguments "creative"⁴⁶ while dispelling the arguments' convoluted nature.⁴⁷

While the U.S. Supreme Court is not attacking creative arguments *per se*, the Court is certainly expressing displeasure with a party that has baited the courts and its opposing party only to emerge victorious due to its own egregious behavior. Moving forward, practitioners would be wise to avoid such bait-and-switch antics even when such a strategy may yield results at the cost of a party's integrity.

CONCLUSION

The U.S. Supreme Court's decision in *MOAC* settled a long-standing circuit split on the jurisdictional nature of Code Section 363(m) and drew attention to the perils of bait-and-switch strategies. In all, *MOAC* stands for the proposition that while it will take time to evaluate *MOAC*'s impact on the value of assets in court-ordered sales and on the frequency of Chapter 11 bankruptcies filed in the Second and Fifth Circuits, one thing is certain: winning at the cost of your integrity carries a price greater than money can measure.

becomes "desensitized to dishonesty over time, making it easier to tell a lie when we do so over and over again").

43. *MOAC Mall Holdings LLC*, 143 S.Ct. at 934 (citing *In re Sears Holding Corp.*, 616 B.R. at 624–25).

44. *In re Sears Holding Corp.*, 616 B.R. at 627.

45. *MOAC Mall Holdings LLC*, 143 S.Ct. 938.

46. *Id.*

47. *See id.* at 938–39 (explaining that Transform's arguments do not seem to even "reflect what Transform wishes to see").