

Use It or Lose It: US Supreme Court Unanimously Holds in *MOAC Mall Holdings LLC v. Transform Holdco LLC* That 363(m) Protections Can Be Waived

Update

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The U.S. Supreme Court recently issued its latest bankruptcy opinion in *MOAC Mall Holdings LLC v. Transform Holdco LLC*, holding that the Bankruptcy Code's rule against invalidating 363 sales after appeal is not an iron-clad jurisdictional bar, but rather a mere statutory limitation.[1]

The holding resolves a circuit split in favor of a weaker interpretation of section 363(m), a section that offers finality to buyers in the fast-paced world of bankruptcy sales. Section 363(m) provides that a sale to a good-faith buyer cannot be invalidated once effective, even if the sale is subsequently reversed or modified on appeal.[2]

Before *MOAC*, circuit courts were split on the mechanism of section 363(m). Courts such as the Second Circuit—and the influential New York bankruptcy courts—read section 363(m) to deprive judges of jurisdiction to consider requests to invalidate certain sales. Others, such as the Third and Eleventh Circuits, read the section as depriving courts of a means for offering relief, without affecting the court's underlying jurisdiction.[3]

This technical distinction can make a difference. A court with jurisdiction has flexibility, including the ability to consider defenses raised by the parties. But a lack of jurisdiction is fatal. Jurisdictional failures are “impervious to excuses like waiver or forfeiture” and must be raised by the court *sua sponte* even if the parties fail to address the defect.[4] *MOAC* resolves this split by holding section 363(m) to be a statutory limitation that is subject to waiver, estoppel, and other legal excuses.

MOAC arose from the bankruptcy of storied retailer Sears, Roebuck and Co. (“Sears”). In 2019, as part of the bankruptcy, Sears used section 363 of the Bankruptcy Code to sell most of its assets to Transform Holdco LLC

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(“Transform”). Those assets included the right to designate the assignment of Sears’ low-rent lease at the Mall of America to a party of its choice.[5]

Transform planned to use this right to assign the lease to its subsidiary, and then to sublease the space to new tenants at a profit.[6] MOAC Mall Holdings LLC—the landlord and lessor at the Mall of America—opposed this plan. MOAC wanted another big-box retailer to “preserve the character” of Mall of America and to prevent defaults under its co-tenancy provisions in other leases.[7] MOAC objected to the assignment and argued, among other things, that the Transform subsidiary taking assignment could not provide adequate assurance of future performance under the lease, as required by section 365(b)(3) of the Bankruptcy Code. Judge Robert Drain of the United States Bankruptcy Court for the Southern District of New York Southern overruled MOAC’s objections and entered an order (the “Assignment Order”) assigning the lease to Transform’s subsidiary.

MOAC sought to stay the Assignment Order while it appealed the order to the United States District Court for the Southern District of New York. MOAC argued that the stay was necessary because an appeal would otherwise be rendered moot by section 363(m). As the District Court later recounted, Judge Drain was “skeptical that any stay was necessary.”[8] Transform—in the catbird seat after a victory on the Assignment Order—agreed. Section 363(m) applied to sales or leases, and Transform argued to Judge Drain that the intermediate transfer to the Transform subsidiary was not a “sale or a lease” for the purpose of 363(m).[9] Transform also represented that if an appeal was filed, it would not rely on 363(m).[10] The Bankruptcy Court subsequently denied the stay and the assignment went effective.

On appeal before Judge Colleen McMahon, she ultimately concluded in a 43-page opinion that the Bankruptcy Court erred in granting the assignment to Transform’s subsidiary. She vacated the Assignment Order.

Immediately following the vacatur, Transform sought to overturn their appellate loss by filing a motion for rehearing. In the motion for rehearing, Transform raised the new argument that the District Court lacked jurisdiction to overturn the Assignment Order under section 363(m)—in reversal of its prior statements.[11]

Judge McMahon, who confessed that she was “appalled” by this 11th-hour U-turn, nonetheless ruled in favor of Transform with “great regret.”[12] In another setting, she wrote, such a reversal would result in the denial of Transform’s motion for rehearing, because “the failure to raise a known argument while a case is under adjudication precludes the granting of a motion for rehearing/reargument.”[13]

But Judge McMahon ruled that her hands were tied by Second Circuit precedent and concluded that section 363(m) is considered a jurisdictional bar on the power of her court, and that she therefore lacked the power to hear and

decide MOAC's appeal. The Second Circuit affirmed her decision, and the Supreme Court granted certiorari.

The Supreme Court addressed the case and the circuit split in its April 19, 2023, *MOAC* opinion. Justice Jackson reiterated that Courts should only treat a provision as jurisdictional if Congress clearly states as much. While no "magic words" are necessary, Congress's statement must be clear and not merely "plausible" or "better" than nonjurisdictional alternatives.^[14]

Justice Jackson found no such statement in the plain text of section 363(m). The language of section 363(m) does not address a court's authority or curtail the jurisdiction of the district courts. Rather, it sets forth a set of conditions that when met, prohibit a court from reversing or modifying an otherwise authorized bankruptcy sale.^[15]

Justice Jackson continued that reading the section in the context of the wider Bankruptcy Code supports this conclusion. Section 363(m) is separated from the provisions that recognize federal courts' jurisdiction over bankruptcy matters (28 U.S.C. §§ 1334(a)–(b), (e)).^[16] "That § 363(m) issues directions does not suffice to make it jurisdictional, as the Court routinely holds statutory commands nonjurisdictional notwithstanding emphatic directives."^[17]

Transform's arguments were insufficient to sway the Supreme Court to the contrary. Ultimately, "[s]ection 363(m) is what matters, and Congress has not clearly stated that the provision is a limit on judicial power, rather than a mere restriction on the effects of a valid exercise of that power when a party successfully appeals a covered authorization."^[18]

Potential purchasers of assets in chapter 11 sales should take note of Justice Jackson's guidance. In some circumstances, it may not be clear if section 363(m) applies to the transaction. For example, as Bracewell as previously written, the Fifth Circuit considers anything "integrally linked" to the "sale or lease" to be covered by section 363(m). Other circuits take a less inclusive view. Additionally, certain conduct may disqualify a party from claiming to be a "good-faith purchaser" who can claim section 363(m) protections. Buyers should take care that they do not waive the broader protections of section 363(m) when navigating these issues.

^[1]*MOAC Mall Holdings LLC v. Transform Holdco LLC*, No. 21-1270, 2023 WL 2992693 (U.S. Apr. 19, 2023) (hereinafter referred to as the *MOAC*)

^[2]The full text of 11 U.S.C. § 363(m) is: "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."

^[3]See *MOAC*, at n. 3 (describing the circuit split).

[4] *Id.* at *6.

[5] *Id.* at *3.

[6] *In re Sears Holdings Corp.*, 616 B.R. 615, 619 (S.D.N.Y. 2020) (hereinafter referred to as *Sears Holding Corp.*)

[7] *Id.* at 620.

[8] *Id.* at 621.

[9] *Id.* at 622.

[10] *Id.*

[11] *Id.* at 626.

[12] *Id.* at 618, 625.

[13] *Id.* at 618.

[14] MOAC at *2 (internal citations and quotations omitted).

[15] *Id.* at *7.

[16] *Id.* at *8.

[17] *Id.* at *2.

[18] *Id.* at *9.