NORTON BANKRUPTCY LAW ADVISER

Monthly Analysis of Important Issues and Recent Developments in Bankruptcy Law

May 2023 Issue 5

MOAC MALL HOLDINGS LLC v. TRANSFORM HOLDCO LLC—THE SUPREME COURT'S SECOND REJECTION OF A JURISDICTIONAL STATUTORY INTERPRETATION THIS YEAR

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Writing for a unanimous court, Justice Jackson held in *MOAC Mall Holdings LLC v. Transform Holdco LLC* that 11 U.S.C.A. § 363(m)—a provision of the Bankruptcy Code that validates most bankruptcy court sale and lease orders notwithstanding reversal or modification on appeal, in absence of a stay—is not jurisdictional, and therefore may be subject to the doctrines of waiver, forfeiture, and the like.[1] Section 363(m) provides that, absent a stay pending appeal, the reversal or modification on appeal of an authorization to sell or lease property under § 363(b) or (c) does not affect the validity of such sale or lease so long as the entity that purchased or leased the property did so in good faith. The *MOAC Mall* case concerned the assignment of a lease

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in the Minnesota Mall of America from former department store giant Sears, Roebuck and Co., to the purchaser of substantially all of Sears' assets, Transform Holdco LLC. The Supreme Court granted review to resolve a circuit split between the Second and Fifth Circuits, which held that § 363(m) is jurisdictional and therefore not subject to waiver or forfeiture,[2] and the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, which held that the provision is not jurisdictional and only limits the remedy an appellate court may fashion.[3] Hewing to the "clear statement rule," the Supreme Court found no clear indication from Congress that it intended § 363(m) to be jurisdictional in nature. The Court rejected the purchaser's argument that the appeal was statutorily moot by virtue of § 363(m). The Court also gave short shrift to the purchaser's backup argument of constitutional mootness. Practitioners looking for insights into the Court's thinking with respect to the more elusive and controversial equitable mootness doctrine will be disappointed; the Court's concise analysis in *MOAC Mall* offers no guidance on that topic.

LEGAL BACKGROUND

Section 363(b) and (c) authorize the trustee or debtor in possession to use, sell, or lease property of the bankruptcy estate. The statutory provision at issue in *MOAC Mall*, *§* 363(m), offers bankruptcy court sale or lease orders this special protection from reversal or modification on appeal:

> 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.[4]

Section 363(m) is a statutory mootness provision that moots any appeal of an order authorizing the sale or lease of estate property when there was no stay pending appeal and the entity that purchased or leased the property did so in good faith. Statutory mootness differs from Constitutional and equitable mootness—the former requires impossibility of relief[5] and the latter considers whether third parties have detrimentally relied on the order or whether the transaction is too complex to unwind.[6]

Section 363(m) produced a circuit split. The Second and Fifth Circuits have held that § 363(m) is jurisdictional in nature and therefore not subject to waiver or forfeiture.[7] In contrast, the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have held that § 363(m) is not jurisdictional and only limits the remedy an appellate court may fashion.[8]

The assumption and assignment of contracts and leases, pursuant to Bankruptcy Code § 365, frequently accompanies a § 363 asset sale in bankruptcy. Section 365(f) provides that a contract or lease may be assigned, notwithstanding an anti-assignment provision in the agreement,

Managing Editor:
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Norton Bankruptcy Law Adviser (USPS 013-530), is published Monthly, 12 times per year by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Periodicals Postage is paid at Twin Cities, MN.

POSTMASTER: send address correspondence to Norton Bankruptcy Law Adviser, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

if the debtor in possession (i) cures or provides adequate assurance of prompt cure of certain defaults, (ii) compensates or provides adequate assurance of compensation for actual pecuniary loss resulting from such defaults, and (iii) irrespective of whether there have been defaults, provides adequate assurance of future performance under the agreement by the proposed assignee.[9]

With respect to a lease of real property in a shopping center, such as the Mall of America, the Bankruptcy Code, in § 365(b)(3), further specifies what constitutes adequate assurance of future performance—including consideration of the source of rent, the financial condition of the proposed assignee, the anticipated level of percentage rent, the applicability of radius and exclusivity provisions, and the tenant mix or balance.

On June 27, 2022, the Supreme Court granted certiorari to resolve the circuit split with respect to whether § 363(m) is jurisdictional.[10]

FACTS AND PROCEEDINGS BELOW

The facts of *MOAC Mall* are straightforward. After filing Chapter 11 in 2018, Sears sold substantially all of its assets to Transform Holdco LLC in 2019. Among the assets sold was the right to designate to whom a lease at the Minnesota Mall of America with landlord, MOAC Mall Holdings LLC, should be assigned. Transform designated the Mall of America lease for assignment to its wholly owned subsidiary and the landlord objected on the basis that Sears had failed to provide adequate assurance of future performance by the proposed assignee under the provisions of § 365 applicable to leases in shopping centers. The bankruptcy court approved the assignment. MOAC sought a stay pending appeal, which the bankruptcy court denied, noting that Transform had explicitly represented it would not invoke § 363(m) against MOAC in an appeal of the order approving the assignment.[11]

MOAC then appealed the assignment order. The district court initially agreed with the landlord and vacated the assignment order, concluding that Sears had failed to provide adequate assurance with respect to the assignment.[12] Transform then sought rehearing and argued, for the first time and in flagrant contradiction to its representations before the bankruptcy court, that § 363(m) deprived the district court of jurisdiction over the appeal because MOAC failed to obtain a stay pending appeal. MOAC countered that Transform had waived the § 363(m) argument; but applying binding Second Circuit precedent,[13] the district court held that § 363(m) is jurisdictional and therefore not subject to waiver. Accordingly, the district court dismissed the appeal as moot.

In a brief opinion, the Second Circuit affirmed, agreeing with the district court that under Second Circuit precedent, § 363(b) is a jurisdictional limit on an appellate court's review of any transaction that is integral to a sale authorized under § 363(b).[14]

ANALYSIS

Before the Supreme Court, Transform defended the Second Circuit's affirmance on the ground that § 363(m) is jurisdictional and thus could not have been waived in the proceedings below; Transform also argued Constitutional mootness—that it would be impossible for the Supreme Court to grant relief because the Mall of America lease had already been transferred out of the bankruptcy estate by assignment.[15]

The Court quickly dispatched of the Constitutional mootness argument. Transform posited that because the lease transfer was not avoided under section 549 (and the time for bringing such an action had expired), "no legal vehicle remains available for undoing the lease transfer, and therefore MOAC cannot possibly obtain any effectual relief" on appeal.[16] The Court noted that its precedent "disfavor[s] these kinds of mootness arguments," which confuse mootness with the merits.[17] Citing *Chafin*,[18] the Court reasoned that when a litigant's argument is not so implausible as to be insufficient to preserve jurisdiction,

the parties' prospects for success are not pertinent to the mootness inquiry and the Court need not "plumb[] the Code's complex depths" to assure itself that Transform is "correct about its contention that no relief remains legally available."[19]

Moving from constitutional mootness to statutory mootness, the Court delivered Transform another swift loss. First, the Court clarified that "directions to litigants that serve as preconditions to relief," "exhaustion requirements," and "statutory limitation[s] on coverage or . . . scope" may be "important and mandatory," but that "does not, in itself, make such rules jurisdictional."[20] The Court emphasized the "unique and sometimes severe consequences" attendant to the jurisdictional label—including that an "unmet jurisdictional precondition deprives courts of power to hear the case, thus requiring immediate dismissal," and that "jurisdictional rules are impervious to excuses like waiver or forfeiture," and even to the application of judicial estoppel.[21]

The Court observed that "jurisdictional rules pertain to the power of the court rather than to the rights or obligations of the parties" and that a provision should be treated as jurisdictional only "if Congress clearly states as much."[22] The premise of the so-called "clear statement rule" is that "Congress ordinarily enacts preconditions to facilitate the fair and orderly disposition of litigation and would not heedlessly give those same rules an unusual character that threatens to upend that orderly progress."[23] On the other hand, "Congress need not use magic words to convey its intent that a statutory precondition be treated as jurisdictional;" as "[t]raditional tools of statutory construction can reveal a clear statement."[24] Ultimately, "the statement must indeed be clear; it is insufficient that a jurisdictional reading is 'plausible,' or even 'better,' than nonjurisdictional alternatives."[25]

Applying these rules to § 363(m), the Court found nothing in the text of the statute that purports to govern a court's adjudicatory capacity.[26] Rather, the text of the statute "takes as a given the exercise of judicial power over any authorization under § 363(b) or § 363(c)," plainly contemplating that appellate courts might reverse or modify *any* authorization under those provisions, with the proviso that sometimes, "the court's exercise of power may not accomplish all the appellant wishes, because the reversal or modification of a covered authorization may not 'affect the validity of a sale or lease under such authorization' to a good-faith purchaser or lessee under certain prescribed circumstances."[27] The Court thus understood the provision as "a caveated constraint on the effect of a reversal or modification," explaining that "§ 363(m)'s constraints are simply inapplicable where the sale or lease was made to a bad-faith purchaser or lessee, or if the sale or lease is stayed pending appeal, or (for that matter) if the court does something other than 'revers[e]' or 'modif[y]' the authorization."[28] The Court reasoned that "given § 363(m)'s clear expectation that courts will exercise jurisdiction over a covered authorization, it is surely permissible to read its text as merely cloaking certain good-faith purchasers or lessees with a targeted protection of their newly acquired property interest, applicable even when an appellate court properly exercises jurisdiction."[29]

Looking beyond the text, the Court found the "[s]tatutory context further clinches the case" because "Congress separated § 363(m) from the Code provisions that recognize federal courts' jurisdiction over bankruptcy matters" and because § 363(m) does not contain any clear ties to the Code's other "plainly jurisdictional provisions."[30] Transform also argued that § 363(m) must be jurisdictional because it reflects "traditional principles of *in rem* jurisdiction" and because it borrows language from former Rule 805 of the Federal Rules of Bankruptcy Procedure, which was understood to be jurisdictional in nature; however, neither of these arguments persuaded the justices that § 363(m) contained a clear use by Congress of jurisdictional nomenclature.[31]

Because the Second Circuit's affirmance

"rested on the mistaken belief that § 363(m) is jurisdictional," the Court vacated the judgment and remanded for further proceedings.

LESSONS LEARNED AND PRACTICE POINTERS

For the landlord, MOAC, the ramifications of this decision are significant—the Transform subsidiary to whom the lease had been assigned would have stepped into Sears' place in a 70-year lease at the Mall of America. MOAC strenuously opposed the assignment, at least in part because the proposed assignee was not and never had been a retail operator and did not intend to operate a traditional anchor tenant retail establishment in the leased space. In the years after Sears filed bankruptcy (and the COVID pandemic took hold), other department store giants such as Neiman Marcus and JCPenney followed, exacerbating concerns among shopping center landlords like MOAC over the declining trends in mall traffic and the fate of anchor tenants.

Close readers will pick up on the Court's distaste for the litigation gamesmanship Transform engaged in by first disclaiming and then asserting § 363(m) only after losing before the district court.[32] Ultimately, however, the Court found no need to hang its decision on Transform's misconduct, relying instead on a straightforward analysis of the statutory text, buttressed by statutory structure and context.

MOAC Mall is the second bankruptcy case decided by the Court this year, following the February ruling in *Bartenwerfer*.[33] The *Bartenwerfer* decision, which was also unanimous, also began and ended with textual analysis of the Bankruptcy Code.

MOAC Mall is the second case decided by the Supreme Court this year that holds that a statutory precondition is not jurisdictional. A few weeks before *MOAC Mall*, the Court decided in *Wilkins v. United States*, holding that a 12-year statute of limitations in the Quiet Title Act was not jurisdictional.[34] *Wilkins*, authored by Justice Barrett, foreshadowed the justices' attitude toward Transform in *MOAC Mall*: as Justice Barrett noted in *Wilkins,* when a statutory precondition is jurisdictional, it cannot be forfeited or waived, the result being that "parties can disclaim such an objection, only to resurrect it when things go poorly for them on the merits."[35] A tactic that poses the "risk of disruption and waste" counsels against applying the jurisdictional label lightly "to procedures Congress enacted to keep things running smoothly and efficiently."[36] That logic favors finding that § 363(m) is not jurisdictional, as the provision avoids the wasteful disruption of approved sale and lease transactions to good faith purchasers in bankruptcy, which in turn serves to attract potential purchasers (and their much needed funding) to § 363 transactions.

Armed with *Wilkins* and *MOAC Mall*, practitioners fighting the sort of litigation gamesmanship that Transform engaged in have a strong hand to persuade trial courts that absent a crystal-clear statement from Congress, a statutory precondition is not jurisdictional in nature and is therefore subject to forfeiture, waiver, and judicial estoppel.

ENDNOTES:

[1]*MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. _____, 143 S. Ct. 927 (2023).

[2]*See, e.g.*, *Contarian Funds LLC v. Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231, 247 (2d Cir. 2010); *Official Comm. of Unsecured Creditors of Walker Cnty. Hosp. Corp. v. Walker Cnty. Hosp. Dist. (In re Walker Cnty. Hosp. Corp.)*, 3 F.4th 229, 234 (5th Cir. 2021).

[3]*See, e.g.*, *In re Energy Future Holdings Corp*, 949 F.3d 806, 820 (3d Cir. 2020); *Brown v. Ellmann (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); *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC)*, 872 F.3d 892, 896 n.4 (9th Cir. 2017); *Reynolds v. Servisfirst Bank (In re Stanford*), 17 F.4th 116, 122 (11th Cir. 2021).

[4]11 U.S.C.A. § 363(m).

[5]*Church of Scientology of Cal. v. United*

States, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992).

[6]*United States Tr. v. Official Comm. of Equity Sec. Holders (In re Zenith Elecs. Corp.)*, 329 F.3d 338, 340 (3d Cir. 2003).

[7]*See, e.g.*, *In re WestPoint Stevens, Inc.*, 600 F.3d at 247; *In re Walker Cnty. Hosp., Corp.* 3 F.4th at 234.

[8]*See, e.g.*, *In re Energy Future Holdings Corp.*, 949 F.3d at 820; *In re Brown*, 851 F.3d at 622-23; *Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d at 603; *In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 896 n.4; *In re Stanford*, 17 F.4th at 122.

[9]11 U.S.C.A. § 365(f)(1)-(2).

[10]*MOAC Mall Holdings LLC v. Transform Holdco LLC*, 142 S. Ct. 2867 (2022).

[11]*See In re Sears Holdings Corp.*, 616 B.R. 615, 618-22 (S.D.N.Y. 2020).

[12]*In re Sears Holding Corp.*, 613 B.R. 51, 79 (S.D.N.Y. 2020).

[13]*See In re WestPoint Stevens, Inc.*, 600 F.3d at 248; *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 105 F.3d 837, 838-40 (2d Cir. 1997).

[14]*MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, Nos. 20-1846-bk, 20-1953-bk, 2021 WL 5986997, at *2 (2d Cir. Dec. 17, 2021).

[15]*MOAC Mall Holdings*, 143 S. Ct. at 934.

[16]*MOAC Mall Holdings*, 143 S. Ct. at 934.

[17]*MOAC Mall Holdings*, 143 S. Ct. at 935.

[18]*Chafin v. Chafin*, 133 S. Ct. 1017, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013).

[19]*MOAC Mall Holdings LLC*, 143 S. Ct. at 935.

[20]*MOAC Mall Holdings LLC*, 143 S. Ct. at 935-36 (internal quotation marks and citations omitted).

[21]*MOAC Mall Holdings LLC*, 143 S. Ct. at 936.

[22]*MOAC Mall Holdings LLC*, 143 S. Ct. at 936 (internal quotation marks omitted) (citing *Henderson v. Shinseki*, 562 U.S. 428, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011); *Elsevier v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010); *Boechler v. Commissioner*, _____ U.S. _____, 142 S. Ct. 1493, 212 L. Ed. 2d 524 (2022)).

[23]*MOAC Mall Holdings LLC*, 143 S. Ct. at 936 (citing *Wilkins v. United States*, 598 U.S. _____, 143 S. Ct. 870, 215 L. Ed. 2d 116 (2023)).

[24]*MOAC Mall Holdings LLC*, 143 S. Ct. at 936 (internal quotation marks omitted) (quoting *Boechler*, 142 S. Ct. at 1497).

[25]*MOAC Mall Holdings LLC*, 143 S. Ct. at 936 (quoting *Boechler*, 142 S. Ct. at 1499).

[26]*MOAC Mall Holdings LLC*, 143 S. Ct. at 936.

[27]*MOAC Mall Holdings LLC*, 143 S. Ct. at 937.

[28]*MOAC Mall Holdings LLC*, 143 S. Ct. at 937.

[29]*MOAC Mall Holdings LLC*, 143 S. Ct. at 937.

[30]*MOAC Mall Holdings LLC*, 143 S. Ct. at 937 (citing 28 U.S.C.A. §§ 1334, 157 & 158).

[31]*MOAC Mall Holdings LLC*, 143 S. Ct. at 938-40.

[32]*See, e.g.*, *MOAC Mall Holdings LLC*, 143 S. Ct. at 936 (describing Transform's conduct as "egregious").

[33]*See Bartenwerfer v. Buckley*, 598 U.S. _____, 143 S. Ct. 665, 214 L. Ed. 2d (2023). The Court has heard argument but not yet rendered its opinion in another bankruptcy case, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, and has denied petitions in two more, *Cucker Interactive, LLC v. Pillsbury Winthrop Shaw Pittman, LLP* and *Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Cooperativa de Ahorro y Credito Abraham Rosa*, leaving the cert petitions for three more bankruptcy cases pending at this time, *Buckner v. U.S. Pipe & Foundry Co.*, *Spring Valley Produce v. Forrest*, and *Highland Capital Mgmt., L.P. v. NextPoint Advisors, L.P.*

[34]*Wilkins v. United States*, 598 U.S. _____, 143 S. Ct. 870, 215 L. Ed. 2d 116 (2023).

[35]*Wilkins v. United States*, 143 S. Ct. 870 at 876.

[36]*Wilkins v. United States*, 143 S. Ct. 870 at 876.

