

Fifth Circuit Continues Bankruptcy Sale Protections After Supreme Court MOAC Opinion

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On April 26, 2023, Miller Canfield alerted readers to the **Supreme Court opinion in *MOAC Mall Holdings, LLC v. Transform Holdco, LLC***. The *MOAC* decision may affect property sales in bankruptcy cases because it could weaken the protection provided by Bankruptcy Code section 363(m). Fortunately, a recent Fifth Circuit decision [1] may help put some of those concerns to rest.

Section 363(m) of the Bankruptcy Code protects people who buy or lease property from a bankruptcy estate. The section states that a sale or lease of estate property approved by a bankruptcy court remains valid even if the bankruptcy court's approval is later reversed or modified on appeal. As a result of this protection, purchasers often feel comfortable closing on sales before the appeal process has run (which can take years). There are conditions to this protection—the entity who bought or leased the property must have done so in good faith, and the authorization for the sale must not have been stayed pending appeal—but if those conditions are met, the transaction cannot be undone.

Prior to *MOAC*, many appellate courts viewed section 363(m) as jurisdictional. The argument was that, because the statute prevents a court from undoing a sale or lease transaction on appeal, an appellate court cannot grant effective relief in an appeal of such a transaction. Under the United States Constitution, if a federal court cannot grant any effective relief in a matter, it lacks jurisdiction over the matter. Thus, many appellate courts refused to hear appeals of bankruptcy sales order, believing that they lacked the authority to do so.

MOAC changed this. The Supreme Court held that, because relief can sometimes be granted, the statute does not deprive appellate courts of jurisdiction over bankruptcy sales. For instance, if the appellate court decides that a sale did not occur in good faith, it has the power to void the transaction. That appellate courts must now hear appeals of orders approving bankruptcy transactions raised concerns that bankruptcy sale and lease transactions may now be a bit less certain than they used to be.

The Fifth Circuit decision suggests that these fears may be exaggerated. The court wrote that "Section 363(m) is alive and well," and continued to bar challenges to good faith bankruptcy sales. Thus, the statute continues to provide the protections that it had prior to *MOAC*.

The Fifth Circuit opinion does include a practice tip. After *MOAC*, the Fifth Circuit noted that the protections of section 363(m) can be waived. Thus, to ensure that they do not inadvertently lose this valuable protection, parties to a bankruptcy sale that has been appealed should invoke section 363(m) in any briefs they file. Other than that cautionary note, it appears that good faith bankruptcy sales will continue to enjoy the protections they traditionally have.

Miller Canfield advises clients regarding their rights in bankruptcy cases (including asset purchase and sales) and related matters. Should you have any questions or wish assistance, please feel free to contact your Miller Canfield attorney or one of the authors of this alert.

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[1] *Swiss Re Corp. Sol'ns Am. Ins. Co. v. Fieldwood Energy III, L.L.C. (In re Fieldwood Energy LLC)*, ___ F.4th ___, No. 23-20104, 2024 WL 686207 (5th Cir. Feb. 20, 2024).