BARNES & THORNBURG LLP

ALERTS

U.S. Supreme Court Rules On Section 363(m) Of Bankruptcy Code, Potentially Reveals View On Equitable Mootness

May 2, 2023

Highlights

The Supreme Court held Section 363(m) is only a "statutory limitation" to accessing appellate relief in disputed bankruptcy sales that requires parties to take certain procedural steps to be effective

The Supreme Court also addressed mootness arguments and held that as long as parties have a concrete interest, however small, in the outcome of an appeal, the appeal should remain alive

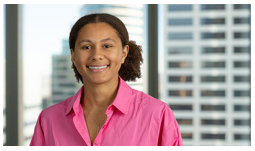
The ruling provides insight as to how the Supreme Court may tackle the controversial doctrine of "equitable mootness"

In *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. (2023), Justice Ketanji Brown Jackson's first Supreme Court opinion, the U.S. Supreme Court unanimously held that Section 363(m) of the Bankruptcy Code is not jurisdictional and, therefore, can be waived. In doing so, the justices potentially provided some insight into their views on a related bankruptcy and appellate topic – the doctrine of equitable mootness.

RELATED PEOPLE

Gregory G. Plotko
Partner
New York

P 646-746-2406
F 646-746-2001
gplotko@btlaw.com



Anne E. Parrish
Associate
Minneapolis

P 612-367-8740
F 612-333-6798
anne.parrish@btlaw.com

RELATED PRACTICE AREAS

Creditors' Rights, Restructuring and Bankruptcy

Private Credit

Notably, the Supreme Court held that Section 363(m) is only a "statutory limitation" to accessing appellate relief in disputed bankruptcy sales that require parties to take certain procedural steps to be effective. Section 363(m) provides that, "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."

The story of *MOAC Mall Holdings LLC* begins at the Mall of America, where Sears Holding Corp. leased real property from MOAC Mall Holdings LLC. MOAC objected to Sears' motion to assign its lease designation rights to another entity, Transform Holdco LLC, as part of Sears' Chapter 11 proceedings in the U.S. Bankruptcy Court for the Southern District of New York. The Bankruptcy Court overruled MOAC's objection and approved the assignment. MOAC appealed to the District Court but was denied a stay pending appeal.

While the District Court initially agreed with MOAC's position, at a rehearing of the appeal, it dismissed the appeal because of the Second Circuit's precedent that Section 363(m) was jurisdictional in nature. Accordingly, the District Court then held it did not have jurisdiction or the power to reverse the Bankruptcy Court's order approving the assignment. The Second Circuit affirmed the District Court's ruling, stating Section 363(m) "creates a rule of statutory mootness . . . which bars appellate review of any sale authorized by 11 U.S.C. 363(b) . . . so long as the sale was made to a good-faith purchaser and was not stayed pending appeal."

In its opinion, the Supreme Court disagreed with the Second Circuit's categorization of Section 363(m) as a jurisdictional limitation. Justice Jackson emphasized that for a statute to limit appellate jurisdiction, a clear congressional statement evidencing its intent must be present. The Supreme Court found nothing in Section 363(m) indicating clear congressional intent that it was jurisdictional or that this section was tied to the Bankruptcy Code's jurisdictional provisions. Instead, Justice Jackson describes it as a statute that "consists of a caveated constraint on the ***effect*** of a reversal or modification," meaning it is "a mere restriction on the effects of a valid exercise of [appellate] power when a party successfully appeals a covered authorization." (Emphasis added).

Impact on Equitable Mootness?

MOAC Mall Holdings LLC also provides an insight as to how the Supreme Court may tackle the controversial doctrine of "equitable mootness." Equitable mootness is a judge-made doctrine arising in bankruptcy cases that provides appellate courts with a justification to dismiss an appeal that challenges a reorganization plan's confirmation if the plan has been "substantially consummated," if the appellant did not diligently seek a stay, and if it would be inequitable to third parties to grant relief at such time.

In *MOAC Mall Holdings LLC*, Transform argued that the pending appeal was moot because no legal basis or vehicle was available for undoing the lease transfer at this point in time and therefore MOAC was not able to obtain any effectual relief irrespective of the 363(m) issue.

The Supreme Court approached Transform's mootness argument by first declaring its prior disfavor for limiting appellate review on mootness grounds and cited one of the court's prior decisions, *Chafin v. Chafin*, 568 U.S. 165 (2013), for the proposition that appellate review remains alive notwithstanding the fact that a successful reversal of a lower court order would not matter to effectuating the ultimate relief being sought. The court held that as long as the parties have a concrete interest, however small, in the outcome of litigation, the appeal could remain alive.

The court also stated it would not become a court of "first view" regarding whether or not relief truly remained legally available to the appellant and was not convinced the parties no longer had a "concrete interest" in the outcome of the appeal. Accordingly, the court remanded the case to the Second Circuit for further proceedings consistent with their opinion.

Based on this reasoning, the Supreme Court may, one day, apply similar reasoning to the doctrine of equitable mootness, and greatly limit the applicability of this doctrine to those instances to where a lower court has properly determined that the parties no longer have a "concrete interest" in the outcome of an appeal as opposed to considering whether a plan has been substantially consummated and third party may be impacted by a reversal. The next opportunity for the Supreme Court to tackle this issue appears to be coming up in the petition for writ of certiorari in *U.S. Bank N.A. v. Windstream Holdings, Inc., et al*. (No. 22-926).

For more information, please contact the Barnes & Thornburg attorney with whom you work, Gregory Plotko at 646-746-2406 or gregory.plotko@btlaw.com or Anne Parrish at 612-367-8740 or anne.parrish@btlaw.com.