

## Ch. 11 Sale Orders Can be Appealed Without a Stay of the Sale

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On Wednesday, the United States Supreme Court issued a unanimous opinion that federal courts can hear an appeal of a bankruptcy court order authorizing the sale of property, despite the failure of the objecting party to obtain a stay of the sale order. *MOAC Mall Holdings LLC v Transform Holdco LLC*, No. 21-1270. The Court determined that Section 363(m) of the Bankruptcy Code, which provides that an appeal of a bankruptcy court order cannot affect the validity of an approved sale to a good faith purchaser, is not jurisdictional – it does not prevent the review on appeal of a sale order authorized by the bankruptcy court and consummated by the parties in the absence of a stay. The case involved the assignment of a lease at the Mall of America by Sears Roebuck to Transform Holdco, an entity owned by former Sears CEO Eddie Lampert that purchased most of Sears' assets in 2019. Mall of America claimed that the transfer of the lease was improper because Transform had not provided "adequate assurance" that it could perform under the lease. Mall of America was unable to obtain a stay of the order approving the assignment and, in an argument first raised on a motion for reconsideration of the District Court's initial disposition of the appeal, the District Court and Second Circuit on appeal determined that they could not review the Bankruptcy Court's sale order since no stay was obtained. The Supreme Court vacated that judgment and remanded the case for future proceedings.

### What does this mean for Carter Ledyard Clients and Friends?

The Sears decision should not chill the interest of parties in seeking to purchase assets in bankruptcy cases. The Supreme Court's opinion did not specify what relief might be available to Mall of America when the case is remanded to the lower courts. Determining that Section 363(m) does not deprive the appellate courts of jurisdiction to review the sale does not change the plain language of Section 363(m) stating that "the reversal or modification on appeal of an authorization ... 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," especially for a purchaser or lessee that has no other relationship with the seller, unlike Eddie Lampert's Transform Holdco. The court merely recognized that in a given case an appeal may result in effective relief to the appealing parties even where the sale itself may not be challengeable. In so doing, it clarified an issue that had bedeviled the lower courts for many years.

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