

# Publications

## U.S. Supreme Court to Take on Sears Lease Dispute with Mall of America

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The Supreme Court has agreed to hear a dispute between Mall of America and Transform Holdco LLC as to whether a lease Transform acquired at a bankruptcy sale can be challenged after that sale has closed. Sections 363(b)(1) and 363(m) of the Bankruptcy Code are at play here. Section 363(b)(1) generally permits a bankruptcy trustee, after notice and hearing, to use, sell, or lease property that belongs to the bankruptcy estate outside of the ordinary course of business. Section 363(m) protects good faith purchasers at these bankruptcy sales, and states that the reversal or modification on appeal of a Section 363 bankruptcy sale does not affect the validity of that sale where the purchaser purchased the property in good faith, unless the sale was stayed pending appeal.

Specifically at issue is to what extent an appellate court can modify a Section 363 lease or sale where the lease or sale has already closed and was not stayed pending appeal. The view espoused by the Second Circuit Court of Appeals in the case being heard by the Supreme Court (*In re Sears Holdings Corp.*, 2021 U.S. App. LEXIS 37358 (2nd Cir. 2021)) is that Section 363(m) creates a jurisdictional limitation on appellate courts in this circumstance, and only allows for review of a lease or sale to challenge the “good faith aspect” of the transfer. The Second Circuit further held that an appellate court cannot review a specific transaction that occurred under Section 363, absent a stay, where doing so would affect the validity of the sale at large. According to the Second Circuit, these jurisdictional limitations reflect Congress’s “uniquely important interest in assuring the finality” of Section 363 sales. However, the U.S. Supreme Court petitioners argue that only the Second and Fifth Circuits take this strict jurisdictional view, and that the Supreme Court should scrutinize its legitimacy.

Now, the Supreme Court has agreed to consider the legitimacy of the Second Circuit’s jurisdictional limitations.

Any person or business that is considering purchasing bankruptcy estate property should take note: Section 363 leases or sales may become more vulnerable to unraveling by appellate courts if the Supreme Court provides a carve out allowing for such appellate

authority. Please reach out to your Vorys attorney with any questions or concerns as to how this potential ruling may impact your negotiation strategy as a purchaser of property in a bankruptcy case.