**Did the Decisions in *Mall of America* Create Uncertainty for Owners of Shopping Centers Concerning a Debtor's Ability to Assume and Assign a Retail Lease?**
***Can a "Unicorn Lease" Disrupt the Legal Standard for Lease Assignments in Bankruptcy?***

*"Not every assignment under § 365 is per se a § 363(m) sale."*[1]

Written by:
David R. Kuney[2]
Georgetown University Law Center; Washington, D.C.

On May 3, 2024, the U.S. District Court for the Southern District of New York handed down its decision and order, following the remand from the Supreme Court in the long-running dispute among Sears Holdings Corp., MOAC Mall Holdings, LLC and Transform Holdco LLC.[3] The remand decision by the district court is the fifth court decision in this four-year odyssey concerning the Mall of America and its former anchor tenant, Sears.

The MOAC legal odyssey will likely have widespread consequences. The number of retail bankruptcies has sharply increased in the past year.[4] Many of these bankruptcy cases involve national chain stores in major shopping centers and malls. The bankruptcy cases often lead to legal clashes between the debtor-tenant, which wishes to assign its valuable leases to new tenants, and the mall owner-landlord, which seeks to prevent the assignment of leases to less desirable new tenants, which can upset tenant mix and even violate reciprocal agreements with other tenants.

Congress had intended for the rights and obligations of both shopping center owners and tenants to be governed by a specific statutory regime known as the "Shopping Center Amendments."[5] Later, Congress further clarified the rights of landlords by imposing stricter requirements for the time period to assume a lease.[6] However, this clarity and predictability has been disrupted by the *MOAC* cases. The *MOAC* decisions contain important analyses of the

---

[1] *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.),* 616 B.R. 615 at 631 (S.D.N.Y. 2020).

[2] David Kuney is an adjunct professor at Georgetown University Law Center, where he teaches a course focusing on bankruptcy advocacy. He is the author of *Retail and Office Bankruptcy: Landlord/Tenant Rights* (ABI 2018) and *The Single Asset Real Estate Case* (ABI 2012), and he is a Fellow of the American College of Real Estate and the American College of Bankruptcy. Prof. Kuney authored an *amicus* brief in the Supreme Court in support of MOAC Mall Holdings on behalf of Hon. **Judith K. Fitzgerald** (ret.) and a group of prominent law professors (the "Law Professor's Brief").

[3] Decision and Order Dismissing Appeal as Moot for Lack of Remedy, Case 7:19-cv-09140 (hereafter "slip op." or "Remand Dec.").

[4] "Retailer bankruptcies rose to 26 last year, the highest number since 2020, according to Morgan Stanley. More than a dozen retailers have said they would close stores after entering bankruptcy proceedings so far in 2024, including Express, Rue21 and Ted Baker." Katie King, May 28, 2024, *Wall Street Journal*, "Bankruptcies Have Left More Stores Vacant, but the Space Doesn't Sit Empty for Long." But see the various comments to this article suggesting that the vacancies have been serious and long lived. "Kate, had you taken a jaunt to the many towns in the affluent suburbs north of Chicago before penning this, it would have had a far different tone," https://www.wsj.com/real-estate/commercial/bankruptcies-have-left-more-stores-vacant-but-the-space-doesnt-sit-empty-for-long-729ae976#comments_sector.

[5] The Bankruptcy Amendments and Federal Judgeship Act of 194, Pub. L. No. 98-353, 98 Stat. 333, effective July 10, 1984.

[6] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), H.R. Rep. 109-31(I), 87, 2005 U.S.C.C.A.N. 88, 153.

application and meaning of the Shopping Center Amendments and BAPCPA, and reflect disagreement and uncertainty over key issues that deal with the assumption and assignment statutory process.

- If the tenant fails to assume the lease within the statutory time period of 120 days, what is the meaning of the Code's provisions that say the lease is then "deemed rejected?" Does the real property revert to the landlord as the Code suggests?
- Is a long-term lease or a ground lease subject to the time periods for assumption?
- What is the meaning of the obligation of a debtor/tenant to provide adequate assurance of future performance when it seeks to assign its shopping center lease to a new tenant?
- Is the "assignment" of a lease properly viewed as a "sale" under § 363(b) of the Bankruptcy Code, and if so, is appellate review of a potentially wrong decision significantly limited by the provisions of § 363(m)?
- Is there an effective remedy for a landlord if, on appeal, an assignment is found to be inconsistent with the Code's requirements?

As of this date, the decisions in *MOAC* have resulted in both neutering the obligation to assume within the statutory period (with the consequence of a deemed rejection) and effectively impairing the obligations of the tenant to provide adequate assurance of future performance by a new tenant. District Court Judge McMahon insisted that the *MOAC* case is merely a "unicorn" and one not likely to repeat itself, but as of now, the legal precedents and rulings should be of concern to shopping center owners.

The purpose of this article is to identify the key rulings and their effects on mall owners, as well as to suggest some possible arguments that may be made in the upcoming appeal, which is headed back to the Second Circuit for the third time. If there is a larger lesson from the MOAC odyssey, it is that courts often misunderstand congressional intent — even the best of judges — and that efforts to limit appellate review only exacerbate the potential harm. And yet, determining what is effective appellate relief is elusive.

**The Statutory Framework**

The assumption and assignment of leases in a bankruptcy case is governed by a statutory regime set forth in 11 U.S.C. § 365, which deals generally with "executory contracts." Section 363 governs the sale of property of the estate and constitutes the general authority of a debtor to use its property and to sell its property "in the ordinary course" of its business. Section 363 also contains an express "mootness" provision, whereas § 365 does not. The *MOAC* decisions reflect the relationship and tension between these two sections.

The "assumption" of a lease (and executory contracts) is governed in general by 11 U.S.C § 365. Assumption is the statutory process whereby a debtor agrees to perform the obligations of the lease during bankruptcy and to cure pre-petition defaults.

Section 365(d)(4)(A) states that assumption must occur within 210 days of the bankruptcy filing, and if not, the lease is "deemed rejected" and the debtor is obligated to immediately surrender the leased property to the owner.[7] Assumption requires notice and a court

[7] "This provision is designed to remove the bankruptcy judge's discretion to grant extensions of the time for the retail debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of entry of the order of relief. Beyond that maximum period, the judge has no authority to grant further time unless the lessor has agreed in writing to the extension." H.R. Rep. 109-31(I), 86-87, 2005 U.S.C.C.A.N. 88, 152-53.

order, according to most cases. This notion of "deemed rejection" and the "duty to surrender" the property were major issues in the *MOAC* cases.

*Only* if there is first a valid assumption can the tenant then *assign* the lease to a third party. The legal requirements for the assignment of shopping center leases are governed by § 365(b)(3)(A). This section is known as the "Shopping Center Amendments" and defines what is meant by "adequate assurance of future performance." Under this statutory regime, Congress deliberately provided additional protection to mall owners to ensure that debtors did not make lease assignments that were injurious to the operation of the mall.[8]

Section 363(b) governs the ability of a debtor to sell or lease its property. Section 363(b) states that "[t]he Trustee . . . may use, sell, or lease, other than in the ordinary course of business, property of the estate."

Section 363(m) contains what was once considered a "mootness" provision, although most courts now agree that term is imprecise. Section 363(m) states that "[t]he reversal or modification on appeal of an authorization under subjection (b) or (c) of this section of a sale or lease 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 . . . unless such authorization . . . were stayed pending appeal." Because the result of an appeal cannot "affect the validity" of a sale, some available relief has sometimes been unclear.

A key threshold issue, however, and one that lingered in the *MOAC* cases, was whether § 363(m) was intended by Congress to govern the assumption and assignment of leases in § 365. Is § 365 a more specialized statutory regime, whose terms take priority over the general statements found in § 363? If it does apply, then the ability to unwind a judicially errant decision on lease assignments could prove to be difficult. This, then, is the core of the problem in the *MOAC* cases: What is the nature of the "effective relief" by an appellate court where a bankruptcy court makes a wrong decision?

**The Sears Bankruptcy and the Assumption and Assignment of the MOAC Lease**

On May 30, 1991, Sears entered into a long-term lease with MOAC as its anchor tenant in an iconic mall and entertainment venue known as the Mall of America in Minneapolis. The MOAC lease was an extremely favorable lease for Sears — "indeed, for a retail store, an almost unheard of lease — in exchange for anchoring the mall and building [with] its store at its own expense."[9] The lease ran for 100 years at an annual compensation package consisting of $10 in rent plus liability for taxes, insurance and common charges, but with no obligation to pay percentage rent.[10] "This effectively capped the total rent due for this massive property at $1 million to $1.2 million per year."[11] Sears had the right to "go dark" after completing 15 years of operation, at which point it was free to sublease any portion of its space and even to assign its

[8] The Shopping Center Amendments amended § 365 to further protect shopping center lessors by providing that, for purposes of paragraph (2)(B) of subsection (f) [pertaining to the assignment of a lease], adequate assurance of future performance "includes" adequate assurance that the "financial condition and operating performance of the proposed assignee . . . shall be similar to the financial condition of the debtor . . . at the time the debtor became the lessee," that any percentage rent will not decline substantially, that assumption or assignment is subject to all the 'lease' provisions, and that assumption or assignment will not disrupt any tenant mix or balance in such shopping center."

[9] Slip op. at 2.

[10] *Id.*

[11] *Id.*

lease without the consent of the landlord or any other tenant in the Mall, including the other anchor tenants for virtually any conceivable use.[12]

In October 2018, Sears filed for bankruptcy. Sears had hundreds of leases throughout the country, including its lease at the Mall of America. One of its principal goals in the bankruptcy was to monetize its leases by selling (that is, by assigning) its leases to new tenants — an opportunity that presented itself because many of its leases were very favorable to Sears and had many more years to run.

In the Sears bankruptcy, the assumption and assignment of the leases was to occur through a two-step process. The first step involved the bulk sale of Sears' assets, including the sale of certain "designation rights" to Transform Holdco LLC.[13] The sale of the designation rights was set forth in an asset-purchase agreement that was approved by the court in a § 363 sale order that gave Transform the designation rights for contracts identified as "designatable leases." Once Transform identified an assignee and gave notice to Sears, Sears was required to assume the lease and then assign it to Transform's assignee, Transform Leaseco, which was formed for the purpose of leasing, rather than operating, the properties owned by Sears.[14]

**Transform's Designation of the MOAC Lease, and MOAC's Objection to the Lease Assumption and Assignment**

On April 19, 2019, Transform gave notice that it intended to exercise its designation rights by having Sears assume the MOAC lease and then assign the MOAC lease to Transform (which would then reassign it to Leaseco). The district court viewed Transform's filing of the notice as the equivalent of Sears making a motion to assume the lease under § 365(d)(4).[15] The APA provided that the Sears lease would pass to Transform's designee "[o]n each Assumption Effective Date [and that] pursuant to section 365 of the Bankruptcy Code, Sellers shall assume and assign to the applicable Assignee any Designated Lease. . . ."[16] Thus, in the case of the Mall of America, the assumption and assignment occurred on the same day.[17]

MOAC objected to the notice of the assumption and assignment. It argued two things. First, it argued that "Leaseco/Transform" did not satisfy the requirements of § 365(b)(3) because its financial condition and operating performance were not similar to those of Sears in 1991.[18] Second, it argued that Leaseco's assumption of the lease would disrupt the mall's tenant mix or balance. It also was concerned that the proposed assignment did not identify the actual proposed occupant. Transform hoped to sublease the space to a future third party at a profit.

The bankruptcy court overruled the objections of MOAC. Judge Drain ruled that the proposed assignment did not harm the tenant mix, focusing mostly on the provisions of the lease

---

[12] *Id*. at 3.

[13] The sale of designation rights must be subject to the requirements of § 365. *In re Ames Dept. Stores Inc.,* 287 B.R. 112, 116 (Bankr. S.D.N.Y. 2002) (any disposition of a debtor's interest in leases is "subject to the requirements of section 365 of the Code." "Designation Rights have been described as 'the right to direct the Debtors to assume and assign . . . Unexpired Leases . . . to third parties *qualifying under the Bankruptcy Code,* after such non-end users locate ultimate purchasers of the Unexpired Leases." *Id*. at n.2 (emphasis added).

[14] Slip op. at 4.

[15] *Id*. at 7.

[16] *Id*. at 5.

[17] *Id*. at 5, n. 4.

[18] At times in its decision, the district court referred to the assignee as "Leaseco/Transform." The assignee from Sears was Transform, and the sub-tenant was Leaseco, Transform's subsidiary. *See* slip op. at 8.

that permitted Sears to assign the lease to whomever it wished, with only a few minimal conditions.

Judge Drain also concluded that Transform had given MOAC adequate assurance that the financial condition and operating performance of the proposed assignee was "similar" to the financial condition of the debtor at the time the debtor became the lessee, as required by § 365(b)(3)(A).[19] On Sept. 5, 2019, the bankruptcy court entered an assignment order, which authorized Sears to assign the lease to Transform.[20] Judge Drain's decision concerning Transform's financial condition was later found to be incorrect, thus making the assumption and assignment wrongful.

**MOAC Seeks a Stay of the Assignment, and Transform Waives Application of § 363(m)**

MOAC asked the bankruptcy court to stay the order pending an appeal by MOAC to the district court. MOAC told the bankruptcy court that without a stay, it could be argued that the appeal was moot because of § 363(m). Judge Drain stated that a stay was not necessary because the assignment of the lease was not governed by § 363, but rather by § 365, saying, "I can't imagine § 363(m) as far as the sale is concerned applying here," and "this is a § 365 order."[21]

Transform agreed and told the court that § 363(m) would not apply, stating, "I think we couldn't rely on § 363(m) for the purposes of arguing mootness because we have not closed on a transaction to assume and assign this lease."[22] The bankruptcy court agreed with counsel for Transform, saying "This is a § 365 order. It's an outgrowth of the sale. It's not a § 363(m), and they're not going to rely on § 363(m), which [respondent's counsel] just reiterated for the second time." Because the bankruptcy court relied on the representation of Transform's lawyer, it denied the request for a stay pending appeal. This lack of a stay would later change the outcome.

**District Court Rules that the Assignment Is Unlawful Because Transform Failed to Provide Adequate Assurance of Future Performance**

MOAC then filed an appeal to the district court, making the same two arguments: The assignment violated § 365(b)(3) because of the lack of adequate assurance of future performance due to both the change in tenant mix and the failure to meet the financial-condition test. The district court held that the assignment was inconsistent with § 365(b)(3)(A) — that is, the assignee did not meet the requirements for adequate assurance of future performance.

The key failure to provide adequate assurance of future performance focused on whether the assignee had the same financial capacity as the tenant when the lease was signed. Section 365(b)(3)(A) requires that "the financial condition and operating performance of the proposed assignee . . . shall be similar to the financial condition and operating performance of the debtor . . . as of the time the debtor became the lessee under the lease." That meant that Transform had to have the same financial strength as Sears did in 1991.

According to the district court, "Transform did not manage to demonstrate that its financial condition and operating performance were 'similar' to those of Sears in 1991."[23] Judge Drain used an "entirely different standard — one based not on financial similarity, but on

[19] *Sears Holdings,* 613 B.R. at 74.
[20] Slip op. at 8.
[21] Brief in Opposition [by Transform], at 3 (citing Pet. App. 21a), U.S. Supreme Court, Case No 21-1270.
[22] Brief for Respondent [Transform], U.S. Supreme Court, Case No. 21-1270, at 15-16.
[23] *Sears Holdings,* 613 B.R. at 75.

Transform's putative net worth or shareholder equity."[24] This was not a minor mistake, according to the district court. "Put otherwise, the Bankruptcy Court . . . read § 365(b)(3)(A) out of the statute, effectively rewriting it and overriding the express wishes of the legislature."[25] This was a key observation, because on remand after the Supreme Court ruled, Judge McMahon would find that despite this ruling that the lease assignment did not comply with the Code, there was no relief that an appellate court could provide.

The district court also held that the transfer did not violate § 365(b)(3)(D)'s requirement that the assignment not upset the tenant mix: "Neither the Sears Lease nor the REA contains any sort of "tenant mix" restriction with respect to the Sears Lease following the expiration of the Major Operating Period."[26] Thus, the district court read the statutory requirement of protecting tenant mix as providing no protection that was not within the four corners of the lease. The district court here ruled that this requirement was "independent" of the lease, unlike the requirement to protect tenant mix.[27]

On Feb. 27, 2020, the district court vacated Judge Drain's order that authorized the assignment to Transform.[28]

**Reconsideration by the District Court Vacates Its Earlier Order Due to § 363(m)**

Transform then moved for reconsideration before the district court and for the first time argued that § 363(m) deprived the district court of jurisdiction to hear the appeal. MOAC argued that the respondent had waived that argument and was judicially estopped. MOAC also argued that section § 363 was inapplicable because the lease transfer was governed by § 365.[29] MOAC pointed out that there was no reference to § 363(m) in the assignment order (although there was in the sale order).

The district court stated that it was "appalled by [the respondent's]" behavior but concluded that circuit precedent dictated that § 363(m) was jurisdictional, making waiver and *estoppel* unavailable. The absence of a stay meant that the district court could not reverse the wrong decision of the bankruptcy court: "Of course, it was thanks to Transform's representation that it would never rely on such an argument that there was no such stay."[30]

The district court also found that § 363(m) applied because the lease assignment constituted a sale or because it was "'inextricably intertwined' with the sale of Sears' assets." "[T]his Court concluded that the assignment of the Lease to Transform was, contrary to the belief of Transform and Judge Drain, a 'sale' governed by § 363(m), both as a matter of law and under the terms of the APA."[31]

The district court vacated its prior decision and dismissed the appeal. This now meant that the lease could be assigned *despite the failure to comply with the Shopping Center Amendments.*

---

[24] *Id*. Judge Drain relied on the notion that the assignee had a net worth or shareholder equity of $50 million, which, under the terms of the lease and a Reciprocal Easement Agreement (REA), was the value required for MOAC to relieve Sears of liability under the lease outside of bankruptcy.
[25] *Id.* at 77.
[26] *Id.* at 58.
[27] *Id*. at 76.
[28] *In re* Sears *Holdings Corp*., 613 B.R. 51, 60 (S.D.N.Y.), *order vacated on reh'g*, 616 B.R. 615 (S.D.N.Y. 2020), *vacated and remanded*, No. 20-1846-BK, 2023 WL 7294833 (2d Cir. Nov. 6, 2023).
[29] Pet. App. 45a-46a.
[30] Slip op. 10.
[31] Slip op. 11.

**Second Circuit Affirms the District Court: Appeal Is Moot Despite the Lack of Adequate Assurance as Required by § 363(m).**

The Second Circuit Court of Appeals summarily affirmed the dismissal.[32] The Second Circuit held that because the assumption and assignment was integral to a sale authorized under § 363(b), § 363(m) applied and rendered the appeal moot. Transform was not barred from relying on § 363(m) because it was jurisdictional, and hence it was not subject to waiver and judicial estoppel.

The Second Circuit held that "in the absence of a stay, § 363 limits appellate review of a final sale to 'challenges to the "good faith" aspects of the sale, *without regard to the merits of the appeal.*'" Thus, the Second Circuit permitted an improper assignment under the mistaken belief that assignments are immune from appellate review unless the appellant has obtained a stay of the assignment order.

**Supreme Court Grants *Certiorari* to Determine Whether § 363(m) Is Jurisdictional**

MOAC filed a petition for *certiorari* with the U.S. Supreme Court. The question presented was "[w]hether 11 U.S.C. § 363(m) imposes a jurisdictional limitation on appellate review of sale or lease orders issued by bankruptcy courts under 11 U.S.C. § 363(b) or (c)."

Transform stated the question presented somewhat differently, and included the issue of "[w]hether the order authorizing the sale and assignment of the leasehold interest is subject to § 363(m). . . ."[33] Transform also focused on the absence of any possible relief by questioning whether, "[w]holly apart from § 363(m) . . . Petitioner would have an effective remedy if the order approving the sale were overturned."[34]

MOAC's oral argument began with the waiver argument: "Transform had assured the bankruptcy court that it would not invoke Section 363(b) to defeat MOAC's appeal because Transform did not believe Section 363(m) applied. And Transform was right. The order under review (the 'Assignment Order') did not authorize a sale under § 363(b). The asset sale had already closed. Rather, the order authorized assumption and assignment of a lease under section 365(b)."[35] "Assumption and assignment occur under § 365. There's no reference to § 363. We're challenging the assumption and assignment, not the earlier sale."[36]

MOAC's reply brief set forth its theory of the correct remedy: "Vacatur of the Assignment Order, as the District Court originally ordered, would also vacate Sears' assumption

---

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

[33] Opp. to cert. pet. at i. *MOAC Mall Holdings LLC v. Transform Holdco LLT, et al.*143 S. Ct. 927 (2023) (No. 21-1270).

[34] Supreme Court Rule 24 permits a respondent some leeway in reshaping the question presented: "The phrasing of the questions presented need not be identical with that in the petition for a writ of *certiorari* or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents."

[35] Transcript of Oral Argument at 4, *MOAC Mall Holdings LLC v. Transform Holdco LLT, et al.*143 S. Ct. 927 (2023) (No. 21-1270). This view that the order under review was just the assignment and not the sale was key. MOAC also relied strongly on the terms of the APA, which preserved the right to contest the issue of adequate assurance. *Id*. at 8. Thus, it argued that it was not invalidating a "sale" but only the assumption and assignment. Thus, "that's why I say Transform was right initially to say that this is not an order . . . to which section 363(m) applies . . . ." *Id*.

[36] Tran. 9.

of the MOAC lease."[37] The district court order had stated that the assignment order "is vacated to the extent it approved the assumption and assignment of the Sears Lease."[38] "Without timely assumption of the lease by the debtor, the property would revert to MOAC [under 11 U.S.C. § 365(d)(4), which requires the debtor to 'immediately surrender the nonresidential real property if the lease is not timely assumed.']."[39]

The Supreme Court questioning at oral argument acknowledged that § 363(m) had been waived by Transform's statements to the court. Justice Jackson began the questioning by saying, "I'm interested in the fact that your recitation of the facts did not include the waiver that they continue to point to. . . . Isn't there a point in the procedural history of this in which your client, Transform, said we're not going to rely on § 363(m), and what do we do about that?"[40] It may be that because the waiver was so apparent that the related question of whether § 363(m) should be applied to an assignment of a shopping center lease under § 365 was not the focus of oral argument.

No member of the Court disputed that Transform had waived any rights under § 363(m). Instead, the principal concern was whether there was any effective relief. Justice Alito asked, "Suppose we agree with you on the jurisdictional question. What would happen on remand? Could the District Court simply vacate the assignment order?"[41] And then, "Why wouldn't it revert . . . to either Sears or the bankruptcy court?"[42] Justice Alito also was concerned that Sears had exited bankruptcy, "so is there still an estate?"[43]

Justice Gorsuch also noted that he was "struggling" with the relief issue, as were his colleagues. "[I]t's a little unusual to say a good faith purchaser of a bankruptcy asset might have to disgorge it, you know, some years later after perhaps the bankruptcy estate has been eliminated and the bankruptcy's discharged. So, you know, what do we do about that? Does every good-faith purchaser now take an asset subject to the possibility that it will be reverted to and a bankruptcy estate might have to re-emerge?"[44] He questioned whether there is any other instance in the bankruptcy laws where there is a "reversion of an asset . . . that a good-faith purchaser has taken on."[45] "[I]s there another example that you can think of where a good-faith purchaser [under] the bankruptcy laws . . . would have to disgorge an asset?"[46] "And so we're going to be scrambling to come up with some sort of rule to deal with that fact, okay, and I just want to know where on earth that could come from. . . ."[47]

Justice Kagan voiced a similar concern. She asked if in fact the assignment could not be undone [presumably even if § 363(m) was waived], and whether that makes the case "constitutionally moot."[48] "[I]f there is no unwinding to be done, what is left?"[49]

---

[37] Reply Br. for Petitioner at 12, *MOAC Mall Holdings LLC v. Transform Holdco LLT, et al.*143 S. Ct. 927 (2023) (No. 21-1270).
[38] *Id*.
[39] *Id.*
[40] Tran. 35-36.
[41] *Id*. at 9.
[42] *Id*. at 10.
[43] *Id*. at 11.
[44] *Id.* at 13.
[45] *Id*. at 14.
[46] *Id*. at 15, 19.
[47] *Id.* at. 19.
[48] *Id.* at 22.
[49] *Id*. at 23.

MOAC replied to the questions concerning the appropriate relief and argued that on remand, it "would be entitled to recover the property because the time to designate and assume and assign the lease has expired."[50] MOAC's counsel stated that under § 365(d)(4), the time to assume a lease expires after 210 days unless extended by consent, and that there was no such consent.[51] Following the expiration of this time period, "the lease is deemed rejected" and thus it "immediately reverts to the lessor."[52] MOAC pointed out that there were "two pieces of paper," an asset sale and an assignment, and when on remand the assignment order is "taken away," Transform has lost its right to the lease.[53] And, at the very least, "MOAC would be entitled to an assignee that satisfied the statutory standard, which would also protect the mall's interest."[54]

Eric Brunstad, arguing for Transform, argued that there was *no available relief* and that accordingly the case was moot: "There is no remedy that can be granted to them at this point."[55] He argued that the "sale transaction" — by which he meant the lease assignment — had closed on Oct. 4, 2019, "three years ago," and that the lease was no longer property of the estate, hence there was no basis for jurisdiction.[56] The only jurisdiction over Transform, he argued, would be an avoidance power, and the time period for seeking avoidance had already passed (citing §§ 549 and 550). He seemed to analogize to a judicial sale. Justice Sotomayor countered by saying that the sale order preserved the right to object, and "[t]hat's what you bought."[57]

**Supreme Court Holds that § 363(m) Is Not Jurisdictional and Remands the Case**

In a unanimous decision written by Justice Jackson, the Court laid to rest once and for all the view that § 363(m) is jurisdictional: "Section 363(m) takes as a given the exercise of judicial power over any authorization under § 363(b) . . . [and] plainly contemplates that appellate courts might 'revers[e] or modif[y]' *any* covered authorization with a proviso."[58] That is, a court's appellate power might not "accomplish all the appellant wishes" because the provision contains a "caveated constraint on the effect of reversal."[59] But this "caveated constraint" does not preclude this Court's review on the merits, nor the need for a determination of whether the effect of the relief will "affect the validity of the sale."

The Supreme Court never answered the question on the appropriate relief. Instead, it held that § 363(m) did not bar the assertion of waiver, and sent it back to the Second Circuit to re-examine the appeal and to decide on the merits.

The Supreme Court did not address the argument that § 365 was the exclusive section that governed lease assignments of shopping centers, and that therefore § 363(m) did not apply. If § 363(m) does not apply, then there should be no limit on appellate review that would bar invalidating the assignment and granting divestiture. But if it does apply, then even if it is not a full barrier to appellate review, it still leaves open the sometimes-perplexing issue of what is the nature of the effective relief that avoids the prohibitions against "affect[ing] the validity of the sale." The Court could have held that the more specific provisions of § 365(b)(3) take priority

---

[50] *Id*. at 6.
[51] *Id*. at 10.
[52] *Id*. at 10.
[53] *Id*. at 21.
[54] *Id.* at 6.
[55] *Id*. at 35.
[56] *Id*. at 35-36.
[57] *Id*. at 38.
[58] *MOAC Mall Holdings LLC v. Transform Holdco LLT,* 143 S. Ct. 927, 937 (2023).
[59] *Id*.

over the highly general statement of § 363(m) that merely refers to a "sale or lease."[60] The Supreme Court held in *RadLAX Gateway Hotel v. Amalgamated Bank*[61] that more specific Code sections govern over general provisions in the event of a conflict.

**Remand to the Second Circuit**

On remand, Transform argued that there was no effective remedy, because the bankruptcy court's jurisdiction had been "extinguished" when Sears sold the lease to Transform "and the lease left the estate."[62] The Second Circuit said that the Supreme Court had heard a similar argument, that it "disfavored those kinds of mootness arguments," and that in any event, relief was a merits issue and was not before them.[63]

The Second Circuit in its summary order stated that "Transform does not dispute that it waived any argument based on § 363(m)" and that "Transform has not provided adequate assurance of future performance as required by § 365(b)(3)(A)." "We thus vacate the District Court's judgment and remand the case for further proceedings. "The District Court's initial opinion charted a remedial course it might again consider on remand."[64]

**Remand to the District Court**

The parties then did additional briefing once the case was remanded back to the district court. MOAC argued that "in the absence of a valid assumption and assignment of the lease to Transform, the disposition of the lease is governed by Bankruptcy Code § 365(d)(4), which sets a strict deadline for debtors to assume or reject the lease."[65] Further, "with the vacatur of the Assignment Order, the Lease was not assumed or assigned within the statutory deadline (as extended) and the Lease reverts, by operation of Law, to MOAC."[66]

MOAC also argued that "section 365(d)(4) is not met or tolled when the debtor files a motion to approve a transaction within the statutory deadline and that transaction is either rejected or overturned on appeal, such that the debtor is provided with an unlimited future period to identify, negotiate, and seek approval of an entirely different transaction. That would eviscerate the 'firm, bright deadline' Congress intended in amending section 365(d)(4)."[67]

MOAC argued that the proper remedy was that the lease reverted back to it as landlord. It argued that the time to assume the lease was a "distant memory" and that "*vacatur* of the

---

[60] "When two provisions in a statute are in conflict, "a specific [provision] closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 302 (4th Cir. 2000) (internal quotation marks and citation omitted). *See also* Norman J. Singer, 2A *Sutherland Statutes and Statutory Construction* § 46:05 (6th ed.2000). Under this canon, § 365(b)(3)(C) controls because it speaks more directly to the issue, that is, whether a debtor-tenant assigning a shopping center lease must honor a straightforward use restriction. This construction is consistent with "the purpose[ ] Congress sought to serve." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co*., 464 U.S. 30, 36, 104 S. Ct. 304, 78 L.Ed.2d 29 (1983) (internal quotation marks and citation omitted). Congress's purpose is clear from the history (recited above) that culminated in the 1984 shopping center amendments to the Bankruptcy Code and from the language of § 365(b)(3)(C)." *In re Trak Auto Corp*., 367 F.3d 237, 243-44 (4th Cir. 2004).

[61] 566 U.S. 639 (2012).

[62] *MOAC Mall Holdings LLC v Transform Holdco LLC (In re Sears Holdings Corp.)*, Nos. 20-1846-bk.20-1953 bk. 2023 WL 8298433 (2d Cir. Nov. 6, 2023).

[63] *Id*. at *2.

[64] *Id*. at *1.

[65] Brief on Remand of MOAC Mall Holdings LLC, Case No. 19 CIV 9140 (CM), ECF Dkt. 66, p. 29. filed on Jan. 20, 2024.

[66] *Id*. at 30.

[67] *Id*. at 34.

assumption mean[t] that, as of the date the Court of Appeals affirmed the decision in *Sears I,* the Lease had to be deemed rejected."[68] It argued that under § 365(d)(4), a commercial lease is "deemed rejected" unless the lease is assumed within 120 days after the filing of the bankruptcy petition. This rejection should have meant that the lease now reverted back to MOAC as landlord.

Transform argued that the MOAC lease was not subject to § 365(d)(4) because it was not a "true lease" in economic terms.[69] Initially, Transform had requested that either "Transform may keep its property or, if the assignment is undone, the Lease reverts to the Trust."[70]

**The Remand Decision**

On remand to the district court, Judge McMahon stated that her earlier order of Feb. 27, 2020, which vacated the assumption and assignment to Transform, was "reinstated."[71] The district court held that the effect of the *vacatur* of the assignment was that Transform was not the owner of the property: "Transform cannot avoid the consequences of *vacatur* of the order that assigned the Lease to it. Transform no longer has title to the lease. That is law of the case. . . . So consider Transform divested of its title. It no longer owns the Mall of America Lease. *Vacatur* of the order authorizing the assignment took care of that."[72]

But the vacating of the assignment did not mean, said the court, that the assumption was untimely, or that the lease reverts to MOAC under § 365(d)(4). The district court agreed with Sears and held that § 365(d)(4) might not be applicable to commercial leases that have certain attributes, such as (a) being long-term, (b) providing for minimal rent and (c) where the tenant paid for the improvements:

> MOAC argues that *vacatur* of a court-approved assignment after the stipulated deadline had expired — even though the deadline was initially met — means that the Lease must be deemed forfeited. Perhaps that would be true if the terms of the Lease were different. . . . But when the terms of the lease, in economic substance, give all the landlord's rights to the tenant (albeit for a period of time), the Second Circuit has deemed that § 365(d)(4) will not be applied to work an inequitable forfeiture.[73]

The district court relied primarily on *Int'l Trade Admin. v. Rensselaer Polytechnic Inst.,*[74] in which the Second Circuit held that RPI's lease was not a true lease because the parties had imposed obligations and conferred rights "significantly different from the ordinary landlord/tenant relationship."[75] One of the key deciding factors was that it was triple-net lease in which the tenant made direct payment of taxes and operating expenses, and the "rent" was essentially "pre-paid in nature." "The Second Circuit held nothing more than the 'agreement should not be treated as a lease *for the purposes of § 365(d)(4).*"[76] "Therefore, the Second

---

[68] *Id.* at 31.
[69] *Id*.
[70] Supplemental Brief of Appellee Transform Holdco LLC, Case No. 7:19-cv-09140, ECF Dkt. 60, p. 45 filed on Jan. 5, 2024.
[71] Order Dismissing Appeal, slip op. 1, May 3, 2024.
[72] *Id.* at 23-24.
[73] *Id*. at 43.
[74] 936 F.2d 744 (2d Cir. 1991) ("*RPI*").
[75] *Id.* at 32.
[76] *Id*. at 750.

Circuit's holding in *RPI* should mean that the MOAC lease is also not a "true lease" and so is not subject to the strictures of § 365(d)(4)."[77]

In effect, the district court held that the word "lease" means one thing in some sections of § 365 and another in other sections of § 365. On appeal, this part of the ruling might be challenged on various grounds, including its potential deviation from a rule of statutory construction that a word or phrase is presumed to bear the same meaning throughout a statutory text.[78]

The district court further held that it was inequitable for MOAC to obtain a windfall and a right greater than it had outside of bankruptcy:

> It is inarguable that MOA has received all the benefits, financial and otherwise, to which it as Sears' landlord is entitled under the Code, consistent with the goals of Chapter 11. The store that Sears constructed, which was the essential and most significant aspect of the MOAC'S 'bargained for consideration" under the Lease, is still sitting at the Mall, and all the rent due thereunder prior to the Chapter 11 filing was pre-paid. *Vacatur* of the assignment to Transform on the ground that the latter failed to comply with § 365(b)(3)(A) means that MOAC has been protected from assignment to a disqualified entity. That protection, not forfeiture of the Lease, is the special protection to which a shopping center landlord is entitled under § 365(b)(3).[79]

Judge McMahon also disagreed with the notion that MOAC was entitled to have the lease assigned to a tenant, which complied with the Code's assurances of adequate protection. This was because the court held that Sears had, by the time of the remand, "emerged from bankruptcy, [so that] Sears can assign the Lease to pretty much whomever it wishes (aside from Transform), but that is because the bankruptcy is over, so the rule of § 365(b)(3) that disqualified Transform is no longer applicable."[80] In essence, Judge McMahon found that there was no further relief available, hence she dismissed the appeal of MOAC as moot.

**Further Appeal to the Second Circuit**

On May 10, 2024, MOAC filed its Notice of Appeal with the Second Circuit Court of Appeals from the remand decision. Upon its motion, the order of dismissal was stayed by Judge McMahon.

Transform is likely to argue that the district court correctly held that § 365(d)(4) was not applicable because the Sears lease was not a "true lease." As noted above, she relied primarily on an earlier Second Circuit opinion in *Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*,[81] which seemed to hold that certain the long-term leases are "not to be treated as leases for purposes of the Bankruptcy Code." MOAC pointed out, however, that Transform and Sears expressly sought assumption and assignment pursuant to § 365 and stipulated that the lease was a shopping center lease pursuant to section § 365(b)(3).[82]

---

[77] *Id*. at 34.
[78] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West 2012) at p. 170.
[79] Slip op. 35.
[80] *Id.*
[81] 936 F.2d 744 (2d Cir. 1991).
[82] MOAC letter to the District Court, May 10, 2024, ECF Dt. 85.

MOAC will likely challenge this. The ruling that § 365(d)(4) does not govern the Sears lease is open to fair dispute. Section 365(d)(4) does not contain any exception for long-term leases similar to Sears. *Colliers* supports the view that ground leases are subject to deemed rejection under § 365(d)(4). "Additionally, the leasehold mortgagee should be attentive to the fact that the ground lease may be rejected automatically if the ground lessee-borrower becomes the subject of a bankruptcy case and fails to move timely to assume the ground lease."[83] However, *Colliers* recognizes that some cases have held that a ground lease and sale back, or a "disguised security interest," might not be "true leases" that are governed by § 365(d)(4), citing to *In re PCH Assocs*.,[84] which Judge McMahon also cited.

**The Likely Outcome of the Appeal to the Second Circuit**

In granting a stay of her order dismissing the appeal, Judge McMahon noted that she had "wrestled mightily with the decision in this 'unicorn' of a case; I went back and forth several times before reaching a result. And while I think I reached the right result, I cannot and will not pretend that there is not an argument on the other side . . . [and that] there are sufficiently serious questions going to the merits of this appeal so that a properly secured stay pending an expedited appeal would serve the interest of justice."[85]

Judge McMahon's decision to stay her order of dismissal reflected in part her acknowledgment that the law was not clear. She stated that the effect of the reversal of the order permitting the assumption is "unclear." The court finally concluded with the notion that the case was a unicorn, and one that she hoped would never occur again:

> The effect of a court's rejection of an "assumption" motion, if timely made, on the right of a debtor to find a new assignee or correct the defect is unclear. "No case this Court knows of discusses the implications of a court's rejection of a timely motion to assume, or assume and assign, on future attempts to assume or assign the lease when the court's ruling was issued after the § 365(d)(4) deadline had elapsed. Such a case might well offer guidance about the situation facing me. If there is no such case, then this is just another way in which the Sears/MOAC/Transform mess is a unicorn — one that, one hopes, will never be seen again."[86]

**The Unresolved Question of § 363(m) and the Question of the "Unauthorized" Assignment**

An important issue that could affect the long-term consequences of the MOAC decisions is whether § 363(m) *ever* applies to assumption and assignment under § 365; if it does not, then do any of the limits on appellate review pertain? The Supreme Court took as implicit that § 363(m) applied to the statutory regime governing shopping center leases. It then found that Transform had waived its rights under § 363(m), thus leaving unresolved about the import of § 363(m) in those cases where there is no waiver. How does § 363(m) limit appellate review? Is there any effective relief in the non-waiver cases?

---

[83] 1 *Collier Lending Institutions & Bankruptcy Code* p. 2.05 (2023). *See also In re Eastman Kodak Company,* 495 B.R. 618, 622 (Bankr. S.D.N.Y. 2013) (ground lease assumption governed by § 365(d)(4)).
[84] *Liona Corp. v. PCH Assocs*. (*In re PCH Assocs*.), 804 F.2d 193, 201 (2d Cir. 1986).
[85] Order Granting MOAC's Motion for a Stay Pending Appeal, Case 7:19-cv-09140-CM, ECF Dkt. 95, pp. 3-4.
[86] Slip op. 43.

The *amicus* brief filed on behalf of Hon. Judith Fitzgerald (ret.) focused directly on the issue of whether § 363(m) applied to an assignment of leases under the Shopping Center Amendments in § 365. As Judge McMahon herself noted, "not every assignment under § 365 is *per se* a § 363(m) sale."[87] The *amicus* brief argued that it was unlikely that Congress intended that the Shopping Center Amendments could be defeated by an errant decision by a bankruptcy court, which would then be immune from appeal.

The legislative history for the Shopping Center Amendments was extensive and detailed the unsatisfactory treatment of commercial leases by the bankruptcy courts.[88] Congress was aware that the courts were not providing adequate assurance — and were often misinterpreting the Code and thus failing to achieve what Congress intended. Why then would Congress have intended to effectively neuter the protections by making improper judicial rulings immune from appeal?[89]

The Supreme court said § 363(m) could be waived. But the next case is not likely to involve a waiver, hence landlords who suffer an errant decision will be back to where the MOAC Odyssey began: confronting a statutory wrong but without a likely remedy. Another unresolved question concerning the application of § 363(m) is that it only applies to an "authorization" under § 363(b). But the effect of the ruling was that there was *not* a valid authorization under § 363. At several places, Transform has argued that "[t]he effect of setting aside the Transfer Order's authorization of the assignment would be just that: to render the transfer *unauthorized* by taking away the basis for the authorization. . . . By statutory design the reversal of the order authorizing the sale takes away the authorization, rendering the transfer "unauthorized" within the meaning of § 549."[90]

If the assignment is rendered "unauthorized," then does § 363(m) apply at all? In the analogous area of an order permitting financing under § 364, which has a similar mootness provision, courts have held that the mootness protection is lost if the financing is not "authorized."[91] Because cross-collateralization is not authorized, the mootness provision of § 364(d) did not apply.[92] "I am not sure that any sale which is authorized by a bankruptcy court, regardless of whether the underlying transaction violates the Bankruptcy Code, triggers statutory

---

[87] *Sears Holdings,* 616 B.R. at 631.

[88] *See* discussion of legislative history in *In re Trak Auto Corp.,* 367 F.3d 237, 242-43 (4th Cir. 2004) (citing 130 Cong. Rec. S8891 (daily ed. June 29, 1984) (statement of Sen. Hatch), *reprinted* in 1984 U.S.C.C.A.N. 590, 600.

[89] "The legislative history makes clear that Congress intended to provide significant advantages to commercial lessors which were not enjoyed by other creditors because Congress viewed lessors as decidedly different from other unsecured creditors." *See* 130 Cong. Rec. 20084, 20088 (1984), *reprinted in* 1984 U.S.C.C.A.N. 590, 598–99 (statement of Sen. Hatch)." *In re 1 Potato 2 Inc*., 182 B.R. 540, 542 (Bankr. D. Minn. 1995).

[90] Supplemental Brief of Appellee Transform Holdco LLC at 25 and 26, *In re Sears Holding Co.*, No. 19 CIV 9140 (S.D.N.Y.) ECF No. 60. This does not mean, however, as Transform argues, that § 549 governs here, which MOAC has also disputed.

[91] *See Matter of Saybrook Manufacturing Company,* 963 F.2d 1490 (11th Cir. 1992) ("By its own terms, section 364(e) [same as § 363(m)] is only applicable if the challenged lien or priority was authorized under section 364.").

[92] *See also Reynolds v. Serisfirst Bank (In re Stanford),* 17 F.4th 116, 126 (11th Cir. 2021) (Jordan, J., concurring) ("We held in *Saybrook Manufacturing* that § 363(m) does not bar appeal of a bankruptcy court's authorization of a financing order if the claim is that the Bankruptcy Code does not permit the type of financing being authorized."). *See also id*. at 127 ("In *Saybrook*, by contrast, the debtors engaged in a practice that the Bankruptcy Code does not authorize at all. This makes sense. Sections 363(m) and 364(e) provide that an error in the application of §§ 363 and 364 cannot affect certain transactions authorized by the Bankruptcy Code by an entity that has purchased, leased, or lent credit in good faith. Those sections do not shield from review unauthorized transactions that are couched as authorized transactions."); *Stanford v. ServisFirst Bank*, No. 2:19-CV-01901-ACA, 2020 WL 1508492, at *3 (N.D. Ala. Mar. 30, 2020), *aff'd sub nom*. *In re Stanford*, 17 F.4th 116 (11th Cir. 2021).

mootness."[93] While *Saybrook* has not been applied to cases such as MOAC, its unicorn nature may justify it.

Further, the majority rule that § 363(m) should be extended to cover assignments under § 365 may be resisted by the Supreme Court. One commentator suggests the rule that § 363(m) applies to lease assignments might not pass muster with the Supreme Court:

> However, in light of the U.S. Supreme Court's line of decisions applying the "plain meaning" of the Code, it is unclear if that court would affirm the circuit courts' rulings that § 363(m) applies to orders authorizing assignment of leases. It is not difficult to see, in light of recent "plain meaning" decisions, that the Supreme Court might hold that if Congress intended assignees of leases to have the protections extended to good-faith purchasers under § 363(m) or lenders under § 364(e), it would have included that protection in § 365.[94]

[93] *Id.; but see Weingarten Nostat Inc. v. Serv. Merch. Co*., 396 F.3d 737, 743 (6th Cir. 2005), adopting view that even an appeal from a nonconforming assignment is limited by § 363(m). "These decisions reason that since a lease is property of the estate, and the assignment of a lease for consideration is a sale under § 363, the mootness provisions of § 363(m) are necessarily triggered." These cases may suggest a circuit split that could support review by the Supreme Court. Judge McMahon, however, expressly distinguished *Weingarten* and said it was not controlling. 616 B.R. at 627.

[94] David B. Stratton, "Statutory Mootness and Appeals of Orders Authorizing Lease Assignments," *Am. Bankr. Inst. J.*, March 2005, at 42, 74.