Supreme Court
of the United States

2022 BANKRUPTCY CASE REVIEW

LOU JONES

December 15, 2022

Thomas L. Shriner, Jr.
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
414-297-5601
tshriner@foley.com

Frank W. DiCastri
Reinhart Boerner Van Deuren, s.c.
1000 North Water Street, Ste 1700
Milwaukee, WI 53202
414-298-8356
fdicastri@reinhartlaw.com

CASE DECIDED IN THE LAST TERM

***Siegel v. Fitzgerald (In re Circuit City Stores, Inc.)*, 596 U.S. ____ (2022)**

A. Issue: Does the quarterly U.S. Trustee fee increase in the Bankruptcy Judgeship Act of 2017 (the "2017 Amendment") violate the Bankruptcy Clause's uniformity requirement?

B. Constitutional and Statutory Provisions at Issue:

1. The Bankruptcy Clause (Article I, Section 8, Clause 4):

   *The Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States.*

2. The 2017 Amendment (28 U.S.C. § 1930(a)(6)(B)):

   During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.

C. Facts:

1. Before 1978, bankruptcy judges were responsible for case administration, including appointing trustees and monitoring cases. Judges had administrative, supervisory, and clerical functions in addition to their judicial duties.

2. In 1978, Congress launched a trustee pilot program within the Department of Justice. The program was deemed sufficiently successful that it was made permanent in 1986. In 1986, Congress created the United States Trustee Program, overseen by the DOJ's Executive Office for United States Trustees ("EOUST").

47946196

3. But the UST Program only operates in 48 states. The six districts in Alabama and North Carolina fall under the Bankruptcy Administrator program, which is overseen by the Judicial Conference of the United States.

4. Key differences between the UST Program and the Bankruptcy Administrator program:

    a) Bankruptcy Administrator districts do not benefit from the centralized support and oversight of the EOUST. Each of the six Bankruptcy Administrator districts is independent, operating as a separate entity, headed by a Bankruptcy Administrator who is selected by the Court of Appeals for a 5-year term.
    b) The Bankruptcy Administrator program is funded by the judiciary's general budget, whereas debtors largely fund the UST Program through Chapter 11 quarterly fees based on quarterly "disbursements."
    c) Consequently, Bankruptcy Administrator districts were not required to pay quarterly fees.

5. In 1994, the Ninth Circuit holds that lack of uniformity in charging quarterly U.S. Trustee fees violates the uniformity provision of the Bankruptcy Clause. *St. Angelo v. Victoria Farms, Inc.*, 38 F. 3d 1525 (9th Cir. 1994).

6. In response, Congress enacts 28 U.S.C. § 1930(a)(7), which empowers, but does not require, the Judicial Conference to set fees in Bankruptcy Administrator districts that are equal to those imposed in U.S. Trustee districts. The Judicial Conference eventually does so.

7. January 1, 2018, the 2017 Amendment takes effect. It is designed to shore up the U.S. Trustee program, which was no longer self-sufficient following years of decline in bankruptcy filings. Among other changes, the maximum quarterly fee rises from $30,000 to $250,000. The changes apply to any disbursements made in any calendar quarter that begins on or after the date of enactment.

8. But the 2017 Amendment only applies to U.S. Trustee districts. Nine months later, the Judicial Conference applies the increased fees to Bankruptcy Administrator districts, but only to cases filed on or after October 1, 2018. The result:

    a) For nine months, debtors in U.S. Trustee districts are paying substantially higher quarterly fees than those in Bankruptcy Administrator districts.
    b) The higher U.S. Trustee fees apply to cases filed both before and after the date of enactment because they are triggered by "disbursements" made on or after the date of enactment.
    c) Even after the higher fees are applied to Bankruptcy Administrator districts, those fees only apply to cases filed (not all disbursements made) on or after the effective date of the change.

D. Fourth Circuit Facts:

1. In 2008, Circuit City files Chapter 11 in the Eastern District of Virginia, a U.S. Trustee district. Ten years later, when the 2017 Amendment takes effect, Circuit City's case is still pending.

2. Circuit City's liquidating trustee initially pays the increased fees ($632,000 in the first three quarters of 2018 alone, compared to $833,000 over the prior seven years), but changes course after the Western District of Texas declares the 2017 Amendment unconstitutional on grounds that it violates the Bankruptcy Clause, and is unconstitutionally retroactive. *In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019).

3. July 2019, the Bankruptcy Court for the Eastern District of Virginia rules that 2017 Amendment violates both the Bankruptcy Clause and the Uniformity Clause, but rules that the 2017 Amendment is "substantially prospective" rather than retroactive. The bankruptcy court relies substantially on the *Buffets* decision.

4. On certified direct appeal, the Fourth Circuit affirms in part (2017 Amendment is not unconstitutionally retroactive), and reverses in part (2017 Amendment does not violate the Bankruptcy Clause or the Uniformity Clause). Both decisions favor the U.S. Trustee.

E. Fourth Circuit Opinion:

1. Fourth Circuit notes immediately that the Fifth Circuit reversed the bankruptcy court's decision in *Buffets*, 979 F.3d 366 (5th Cir. 2020).

2. Because the Uniformity Clause only applies to taxes, and the U.S. Trustee fees are not taxes, the Uniformity Clause does not apply.

3. The 2017 Amendment is a substantive bankruptcy law, so the Bankruptcy Clause does apply.

4. To be constitutionally uniform, a law enacted pursuant to the Bankruptcy Clause must apply uniformly to a defined class of debtors, and be geographically uniform. *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457 (1982). However, a bankruptcy law may be uniform "and yet may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Gibbons*, 455 U.S. at 469. Congress may "take into account differences that exist between different parts of the country, and . . . fashion legislation to resolve geographically isolated problems."

5. As emphasized by the Fifth Circuit in *Buffets*, the Bankruptcy Clause forbids only "arbitrary" geographic differences. The 2017 Amendment does not draw an arbitrary distinction based on the residence of the debtors or creditors. "Instead, the distinction is simply a byproduct of Virginia's use of the Trustee program." 996 F.3d at 166. Congress was authorized to solve a shortfall in the program's funding with fee increases that apply solely to the underfunded districts.

6. Although the Ninth Circuit found that the establishment of separate Trustee and Bankruptcy Administrator districts was an "irrational and arbitrary" distinction for which there was "no justification," here the 2017 Amendment "does not suffer from any such shortcoming. Congress has provided a solid fiscal justification for its challenged action: to ensure that the U.S. Trustee program is sufficiently funded by its debtors rather than by taxpayers." 996 F.3d at 166-67.

7. The 2017 Amendment is not unconstitutionally retroactive. Congress intended the amendment to apply to all Chapter 11 cases, regardless of when they are filed. Even if this were unclear, the 2017 Amendment would have no "retroactive effect" because it applies only to future disbursements, which are triggered by conduct occurring after the law's effective date.

8. The Quattlebaum Dissent:

    a) The dual bankruptcy systems in the United States are "candidly and unapologetically nonuniform." Similarly, the imposition of quarterly fees in the two bankruptcy systems is not uniform. Many Chapter 11 debtors in U.S. Trustee Program districts pay more than similarly situated debtors in Bankruptcy Administrator districts. As a consequence, similarly situated creditors receive less in Trustee Program districts than in Bankruptcy Administrator districts.

    b) The majority's opinion "misses the forest for the trees." That the U.S. Trustee Program districts were the only underfunded districts is a consequence of Congress' having treated them differently in the first place, a decision that was based purely on geography.

    c) The 2017 Amendment is not a congressional attempt to "resolve geographically isolated problems," but rather is arbitrary and "financially damages unsecured creditors in every state other than Alabama and North Carolina." 996 F.3d at 175.

    d) "Accordingly, while the constitutionality of the two types of bankruptcy systems is not before the court, I would nonetheless hold that the [2017 Amendment], as applied to the Liquidating Trustee, violates the Bankruptcy Clause." *Id.*

F. Supreme Court Opinion (Justice Sotomayor for a unanimous Court):

1. The 2017 Amendment is subject to the Bankruptcy Clause's uniformity requirement.

    a) Nothing in the language of the Bankruptcy Clause suggests a distinction between substantive and administrative laws.
    b) Nor has the Supreme Court ever distinguished between substantive and administrative laws or suggested that the uniformity requirement would not apply to both.
    c) All courts to have considered this question to date have accepted that the 2017 Amendment is subject to the Bankruptcy Clause's uniformity requirement.
    d) Historic and modern congressional practice do not suggest that bankruptcy fees are exempt from the uniformity requirement.
    e) "The only difference between the States in which the fee increase applied and the States in which it was not required was the desire of those two States not to participate in the Trustee Program."

2. The 2017 Amendment violates the Bankruptcy Clause's uniformity requirement.

    a) The Court's previous interpretations of the uniformity requirement show that the Bankruptcy Clause offers Congress flexibility, but does not permit arbitrary geographically disparate treatment of debtors.
    b) Congress may enact geographically limited bankruptcy laws consistent with the uniformity requirement if it is responding to a geographically limited problem.
    c) On the other hand, Congress may not subject similarly situated debtors in different States to different fees because it chooses to pay the costs for some, but not others.
    d) Although Congress was responding to a budgetary shortfall that existed only in the Trustee Program districts, that shortfall existed only because Congress

itself had arbitrarily separated the districts into two separate systems with different cost funding mechanisms.

e) In other words, the budgetary shortfall stems not from an "external and geographically isolated need," but from Congress' own "artificial funding distinction."

3. The Court does not address the constitutionality of the dual scheme of the bankruptcy system itself, but only Congress' decision to impose different fee arrangements in the two systems.

4. Judgment reversed and remanded to Fourth Circuit to determine the appropriate remedy.

CASES ARGUED IN THIS TERM

I. ***Bartenwerfer v. Buckley*, Nos. 20-60021, 60023, 60024, 2021 WL 3560683 (9th Cir. Aug. 12, 2021). Argued December 6, 2022.**

A. Issue: Whether an individual may be subject to liability for the fraud of another that is barred from discharge in bankruptcy under 11 U.S.C. § 523(a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own?

11 U.S.C. § 523(a)(2)(A) provides:

> *A discharge under section 727, 1141, 1192, 1128(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—*
> *(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—*
> *(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.*

B. Factual Background:

1. Buckley purchased a home in San Francisco from David and Kate Bartenwerfer in 2008. Both sellers were on the title to the house, and had done substantial renovations prior to selling it. The Bartenwerfers were business partners under California law, meaning that each became the agent of the other within the scope of their business, sharing assets and liabilities, including liabilities for torts. In California, so long as one co-partner acts with the requisite fraudulent intent within the partnership's scope, and a third party relies on the misrepresentations to its detriment, all partners are equally liable for fraud, without further inquiry into each partner's knowledge or intent.

2. A jury found that Buckley reasonably relied on sworn representations and omissions that the sellers jointly made regarding the condition of the home. Following a 19-day trial (!), a jury found that the sellers failed to disclose material information in the sale of the property, and awarded damages to the buyer.

3. The sellers jointly filed for bankruptcy protection under chapter 7. The bankruptcy court found that the debts were non-dischargeable: David had committed actual fraud, and that determination is no longer disputed; his fraud was imputed to Kate because an agency relationship existed based on the sellers' partnership with respect to the remodeling project.

4. The Bankruptcy Appellate Panel affirmed as to David's debt, but vacated and remanded as to Kate's. The BAP held that Kate's debt was dischargeable unless Kate "knew or had reason to know" of David's fraud.

5. On remand, the bankruptcy court held a trial solely on that issue, found that standard unmet, and held that Kate's debt was dischargeable. The BAP affirmed.

6. Relying on *Strang v. Bradner*, 114 U.S. 555 (1885), the Ninth Circuit reversed. Applying *Strang's* discussion of partnership principles (one partner cannot escape liability on grounds that

another partner's misrepresentations were made without the former's knowledge), the Ninth Circuit found that the bankruptcy court applied the incorrect legal standard and found Kate's debt nondischargeable whether or not she knew of the fraud.

7. Kate sought certiorari, invoking a circuit conflict over the "knew or should have known" rule.

C. Petitioner Kate's Argument:

1. Section 523(a)(2)(A) only bars individual debtors from discharging debts obtained by their own fraud. When the individual lacks fraudulent intent, her debt is dischargeable.

    a) Bankruptcy offers a fresh start to honest debtors; discharge exceptions are limited to those "plainly expressed." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013). Section 523(a)(2)(A) does not "plainly" hold individual debtors responsible for their partners' fraud. The lack of a clear statement on this point is dispositive.

    b) The statute focuses on the "individual debtor," the only individual who could have "obtained" assets "by" fraud. "Obtained by" requires individual effort and "fraud" requires malintent.

    c) Other subsections of section 523 confirm this interpretation: subsections (B) and (C) focus on the individual debtor's intent, and seven other exceptions use passive-voice formulations (similar to "obtained by" fraud), but plainly target only the individual. Other subsections expressly refuse to discharge a "judgment," "order" and the like—clear efforts to incorporate others' conduct.

    d) This interpretation aligns with the Code's policy of relieving honest but unfortunate debtors.

2. The passive voice formulation "obtained by fraud" does not render the actor irrelevant. Other textual and contextual evidence show that only individual debtors can commit fraud. Congress did not need to mention the "individual debtor" in every subsection.

3. The modern Code is "debtor-friendly," and there is no reason to think the Code has grown more punitive over time, imposing sweeping responsibility for fraud, not just on "innocent" partners, but also spouses, agents, assignees and purchasers.

4. *Strang* does not dictate a different result. The 1867 Bankruptcy Act at issue in *Strang* expressly referred to "fraud . . . of the bankrupt" which, under Buckley's read, should have foreclosed the imputation of fraud from one to another. And *Strang* crafted a federal common law rule; judicial law-making was abrogated by *Erie R.R. Co. v. Tompkins*. In any event, Congress repealed the 1867 Act and repeatedly rewrote the fraud discharge provision. "Fresh start" would become the exception, not the rule, if *Strang's* reasoning lived on.

5. Other circuits reject the Ninth Circuit's view.[1]

D. Respondent Buckley's Argument:

1. Section 523(a)(2)(A) bars a debtor from discharging "any debt . . . for money . . . obtained by . . . actual fraud." It covers "any" and all such debts. The statute only asks (i) whether money or property was obtained by actual fraud and (ii) whether the debtor's liability arises therefrom. There is no unstated exception that allows discharge of *some* debts for money obtained by actual fraud—namely, where the fraud was perpetrated by the debtor's partner or

---

[1] *See, e.g., Sullivan v. Glenn*, 782 F.3d 378, 380 (7th Cir. 2015) ("Sullivan's 'debt not the debtor' theory is consistent with the language of the fraud exception to discharge, quoted above. But this just illustrates the limitations of literal interpretation of statutory language."). *See id.* at 381 ("In other words you can do nothing bad but still be denied a discharge in bankruptcy—no fresh start for the innocent. As Sullivan [the creditor-plaintiff] nostalgically remarks, 'Contrary to popular belief, bankruptcy was initially created for the benefit and protection of creditors, not debtors.' Yes, and debtors used to be sent to prison.").

agent without the debtor's knowledge (even though the debtor is liable for its partner's fraud under state law). This provision focuses on the character of the debt, not the culpability of the debtor.

2. *Strang* confirms the result. It rejected the argument that lack of knowledge is a basis to discharge a debt for the fraud of a co-partner. The 1867 Act required actual fraud "of the bankrupt" and *Strang* still determined that a debtor's vicarious liability for a partner's fraud *is* the actual fraud of the debtor for purposes of denying a discharge. Congress has since deleted the "of the bankrupt" language, which might have otherwise supported Kate's argument. *Strang* was not an exercise of judicial law-making, it was an exercise in statutory interpretation.

3. Respondent's reading reflects sound policy. Section 523(a)(2)(A) embodies a policy that protecting victims of fraud is more important than protecting debtors who are liable for defrauding them. This rule advances federalism, by deferring to state policy judgments about the circumstances in which a person should be held liable for a fraud perpetrated by another.

4. Petitioner abandoned the "knew or should have known" rule, showing that the Ninth Circuit was right to reject it. Kate now argues that knowledge is irrelevant and that § 523(a)(2)(A) does not apply if the individual debtor lacks any fraudulent intent herself or does not commit the fraud herself. She waived and forfeited that argument by failing to raise it below. No court of appeals has ever adopted this theory.

5. Other Code sections do not support adding an unwritten exception to § 523(a)(2)(A).

6. While Congress has made discharges more readily available over the years, it has also expanded the varieties of debts excepted from discharge. In 1867, there were only a few exceptions. By 1978, the list had grown to nine exceptions; currently § 523 includes 19 subsections.

47946196

E. Amici Arguments:

1. Congress' use of the phrase "actual fraud" signifies that loss of the discharge requires misconduct by the debtor, and not implied fraud. The Ninth Circuit's decision is contradicted by Supreme Court jurisprudence and is counter to the long-standing view that the discharge is central to the functioning of the American bankruptcy system and not only addresses a private need of the debtor but is a public necessity. (*Hon. Judith Fitzgerald, retired judges including Eugene Wedoff and certain law professors)*

2. The Ninth Circuit's rule threatens devastating consequences for innocent domestic partners, particularly victims of domestic violence. It is difficult to distinguish business relationships and personal ones. (*National Consumer Bankruptcy Rights Center and Professor Littwin)*

3. Section 523(a)(2)(A) does not implicate the "honest but unfortunate debtor" principle. It focuses not on the debtor's acts but on the nature of the debt. State law applies in bankruptcy unless federal law displaces it. *(Law Professors Lawrence Ponoroff and Rafael Pardo)*

4. Petitioner's argument finds no foothold in text, context, history, or sound bankruptcy policy. *(United States)*

F. Oral Argument Highlights:

1. Thomas: statute focuses on the debt, but Petitioner wants to focus on the debtor. Other provisions refer to the debtor; this statute does not. On the other hand, what if a child were a partner?

2. Kagan: Petitioner says Congress was careless, but the text goes against her.

3. Jackson: How does Petitioner get away from principles of vicarious liability?

4. Roberts: What happens when the debtor knew about it and did not say anything? And why did the trial last 19 days?

5. Kavanaugh: Code leaves state law in place. Petitioner: no, state law defines the debt, but not dischargeability.

6. Barrett: Respondent has a good argument on the text, but as a policy matter, why would Congress make it different in (a)?

II. ***MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holding Corp.)*, No. 20-1846(L), 2021 WL 5986997 (2d Cir. Dec. 17, 2021). Argued December 5, 2022.**

A. Issue: Whether Bankruptcy Code section 363(m) limits the appellate court's jurisdiction over any sale order or other order deemed "integral" to a sale order, such that it is not subject to waiver, estoppel or forfeiture, including when a remedy could be fashioned that does not "affect the validity of the sale"?

11 U.S.C. § 363(m) provides:

> *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.*

B. Factual Background:

1. Sears, a chapter 11 debtor, obtained bankruptcy court approval to sell a substantial portion of its assets to Transform pursuant to 11 U.S.C. § 363(b). The sale closed three days later, and the assets were conveyed to the buyer.

2. At the time, Sears leased a three-floor space in the Mall of America shopping center from MOAC. Sears' interest in the lease was not an asset transferred in the sale, but rather, the APA contemplated that Sears and Transform could, at a later date, seek court approval

to assign to Transform one or more leases, including the mall lease. No aspect of the sale order or APA was contingent on the successful assignment of any lease; instead, the APA provided that leases could be rejected by Sears, and acknowledged that the bankruptcy court might not approve a proposed assignment.

3. This was a two-step process because the Sears assets had to be sold quickly, or hundreds of Sears stores would have been forced to close and thousands of employees terminated. Consequently, Transform could not fully evaluate the economics of hundreds of store locations at the time of sale and had to defer the lease assumption process to a later date.

4. Months after the sale closed, Sears sought and obtained, over MOAC's objection, bankruptcy court approval to assign the mall lease to Transform pursuant to 11 U.S.C. § 365. MOAC appealed and sought a stay pending appeal, out of concern that Transform might argue on appeal that § 363(m) precluded appellate review of the order.

5. At the stay hearing, Transform told the bankruptcy court that § 363(m) did not apply to the order or appeal, which arose from an assignment request under § 365, and agreed that Transform would not raise a § 363(m) argument on appeal. The bankruptcy court relied on these statements in denying the stay request.

6. After full briefing on the merits in the appeal, the district court ruled in MOAC's favor, holding that Transform did not satisfy the statutory requirement that the assignee provide "adequate assurance of future performance" to the lessor.[2]

7. "Sandbagger!" Transform reversed course in a petition for rehearing, arguing for the first time that § 363(m) *did* apply, that it was a jurisdictional statute not subject to waiver, and that it deprived the district court of jurisdiction to hear the appeal. The district court stated that it was "appalled" by Transform's conduct, but nevertheless ruled "with deep regret," based on Second Circuit precedent, that § 363(m) deprived the court of jurisdiction. The Court of Appeals for the Second Circuit affirmed, finding that it was

[2] Section 365(b)(3) establishes heightened requirements for debtors seeking to assume and assign shopping center leases. Here MOAC argued that Transform could not satisfy these requirements because it was a non-retail entity that did not propose to occupy the premises, but rather to sublease the space to future subtenants.

bound by Second Circuit precedent. The court of appeals found that the § 365 order was "integral" to the sale based on language in both the sale and assignment orders. The court of appeals issued a stay pending appeal to the U.S. Supreme Court.

C. Petitioner MOAC's Argument:

1. The Supreme Court established a bright-line test in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), requiring courts to find a statute jurisdictional only if Congress has "clearly stated" that it is jurisdictional. Absent a clear congressional statement, courts are instructed to treat a statute as non-jurisdictional.

2. By its own terms, § 363(m) does not speak to the jurisdiction of appellate courts. Rather, it eliminates a remedy the appellate courts might provide *after exercising* their jurisdiction: if the appellate court reverses or modifies the appealed order, the underlying sale to a good faith purchaser will not be invalidated absent a stay pending appeal. A limitation on remedies is not jurisdictional.

3. The Second Circuit is in the minority: most circuit courts that have considered the issue have determined that § 363(m) is not jurisdictional.[3]

4. Jurisdictional issues are not subject to waiver, estoppel or forfeiture. Yet Transform expressly disavowed any § 363(m) argument, successfully defeated a stay on that basis, and took a "wait and see" approach on appeal, raising the issue only after losing on the merits.

5. Even if § 363(m) were jurisdictional, it would not extend to this case or preclude the relief MOAC sought on appeal: the order here was entered under § 365, not § 363. Granting MOAC relief by vacating the lease assignment would not "affect the validity" of the earlier asset sale, even if the former order says the latter is "integral" to the other and vice versa.

[3] *See, e.g., Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) ("*River West* is overruled [and] [a]ny other decision in this circuit that treats § 363(m) as making a controversy moot, rather than giving the purchaser or lessee a defense to a request to upset the sale or lease, is disapproved.").

a) The Second Circuit never analyzed independently whether reversing the assignment order would "affect the validity" of the sale.

b) The term "integral" is not used or defined in the Bankruptcy Code.

c) Focusing instead on the statutory language has led the majority of circuits to independently analyze whether any relief can be granted without invalidating the sale.

d) Here Sears and Transform contractually agreed that denial of a request to assume and assign a lease would not affect the validity of the sale. An appellate order having the same effect cannot affect the validity of the sale either.

D. Respondent Transform's Argument:

1. The bankruptcy court no longer has jurisdiction over the *res* because the property was transferred out of the Sears estate. And because no avoidance action could bring the *res* back into the estate at this point, overturning the order would provide no meaningful benefit to MOAC, and there is no case or controversy under Article III. The Court should dismiss the petition as moot.

2. The leases to be assigned to Transform under the "designation" process were expressly included as purchased assets under the APA. The sale under the APA included all assets that would ultimately be transferred to Transform.

3. The transfer order was entered under both §§ 363 and 365, and the bankruptcy court determined that the assumption and assignment of the designated leases were integral to the APA.

4. As for the "sandbagging," counsel for Transform was "mistaken" when he said that § 363(m) did not apply.

5. Section 363(m) is jurisdictional. It is the codification of former Bankruptcy Rule 805, which in turn was declaratory of existing case law in which many courts dismissed appeals of sale orders for lack of subject matter jurisdiction. Congress codified the rule in § 363(m).

E. Amici Arguments:

1. Effect of the ruling is that owners of commercial real property may have valuable leases assigned to new tenants in violation of the requirements set by Congress in § 365(b) and yet will be unable to obtain appellate review by an Article III court. Transform did not obtain "appellate immunity" because of the intervening step of buying designation rights. Mootness has been "weaponized" to preclude effective appellate review of plans and sales under § 363. "[B]ankruptcy law is developing with a notable lack of uniformity and without any Article III review despite the evident need for such." (*Hon. Judith Fitzgerald and certain law professors*)
2. Section 363(m) is not jurisdictional, it merely imposes a restriction on the remedies available to appellants. The doctrines of forfeiture, waiver, and estoppel apply. (*United States*)

F. Oral Argument Highlights:

1. Thomas: has had enough of the jurisdiction issue.
2. Multiple justices: what happens if the asset reverts to the estate? Will the good faith purchaser have to disgorge the assets? Can the court "undo" the assignment?
    a) Most likely a merits question to be addressed on remand.
    b) Possible remedies on remand: additional protection to ensure Transform complies with the tenant rules, or compensation paid to the mall.
    c) If a good faith purchaser is not a party to the appeal, it could assert § 363(m) as a defense. But not where GFP is party to the appeal. "Helpful" to Gorsuch.
3. Sotomayor: "totally confused" by Transform's argument. "Do you have anything to say about the question presented?"
4. Gorsuch: "deeply confused" by this case.
5. Barrett: why can't we just decide the jurisdictional question and send it back?
    a) Court didn't lose all jurisdiction when *res* left the estate. It would still have jurisdiction to decide the good faith purchaser question.

b) Transform argues GFP is the sole exception to the jurisdictional problem.

c) Roberts: courts "stretch it pretty far" in finding the possibility of relief to justify jurisdiction.

G. Talking Points:

1. Does it affect the "validity of the sale" if a right of first refusal is determined to encumber real property despite a § 363 sale?
2. Does it affect the "validity of the sale" if the § 363 sale order is stripped of its language relating to successor liability? What if the sale will not close without that language?

COURT OF APPEALS FOR THE SEVENTH CIRCUIT

***Archer-Daniels-Midland Co. v. Country Visions Coop. (In re Olsen)*, 29 F.4th 956 (7th Cir. 2022).**

A. Facts:

1. In 2007, Country Visions' predecessors/assignors acquired a right of first refusal on the Ripon Property. The ROFR was immediately recorded with the Register of Deeds for Fond du Lac County. It had a 10-year term.

2. The ROFR required the owner of the Ripon Property to promptly notify Country Visions, in writing, of any bona-fide third-party offer to purchase the Ripon Property. The notice had to include a copy of the offer, and be provided at least 15 days before the sale. When tendered, the notice constituted a written offer to sell to Country Visions. Country Visions could either exercise or waive its rights.

3. In December 2010, the Olsens—then-current owners of the Ripon Property—filed chapter 11 cases. In July 2011, certain creditors of the Debtors filed a Plan providing, among other things, for the sale of the Ripon Property "free and clear" of liens, claims and encumbrances pursuant to § 363(f). A confirmation hearing was ultimately set for August 30, 2011.

4. It is undisputed that Country Visions was never listed on Debtors' mailing matrix, and received no formal notice of the bankruptcy filings, the confirmation hearing or the proposed sale of the Ripon Property.

5. On August 12, 2011, a woman from "ADM Grain" sent an e-mail to ADM informing ADM that there was a ROFR on the Ripon Property. ADM took no action.

6. Country Visions learned that a sale of the Ripon Property was being considered. On August 19, it sent a letter to the Debtors and their counsel informing them of the ROFR and demanding notice of any proposed sale. The same correspondence was sent to bankruptcy counsel for the Debtors on August 23.

7. Also on August 23, counsel for Country Visions spoke with counsel for the Debtors. What they said to each other is disputed. Neither the Debtors nor ADM provided any formal notice to Country Visions after this correspondence and phone call.

8. Country Visions did not appear in the bankruptcy cases or attend the confirmation hearing. On August 30, 2011, the bankruptcy court entered the confirmation order without notice to Country Visions. The order purported to authorize sale of the Ripon Property "free and clear" of any liens, claims and encumbrances other than "Permitted Encumbrances" as defined in the APA.

9. Hours later, prior to the closing, counsel for the Debtors sent a title policy to counsel for ADM, which disclosed the ROFR. ADM took no action.

10. In 2015, ADM decided to sell the Ripon Property and other property to United Cooperative in a "package" deal. Upon learning of the sale, Country Visions contacted counsel for ADM, again alerting ADM of the ROFR and requesting a copy of the offer. In response, ADM and United attempted to separate the sale into two transactions, claiming that United offered $20 million for the Ripon

Property alone, and $5 million for three other parcels and other assets.

11. Country Visions asserted that the $20 million offer was a "sham," artificially inflated to hinder Country Vision's right to purchase, and declined to meet the stated purchase price. ADM and United later closed on the sale.

12. Country Visions sued ADM in state court, seeking specific performance of the ROFR. Following a 2018 trial, the state court found in favor of Country Visions, holding that the $20 million offer "was a sham at an arbitrarily inflated price" and that the price "was inflated for the purpose of preventing Country Visions from exercising its ROFR."

13. ADM moved the bankruptcy court in 2016 to reopen Debtors' long-closed bankruptcy cases, and thereafter asked the bankruptcy court to find that the ROFR was extinguished in the 2011 sale.

14. State court litigation proceeds to Wisconsin Supreme Court and back.

C. Bankruptcy Court opinion:

1. Upon a largely *sua sponte* Rule 60(b)(4) inquiry, the bankruptcy court found that Country Visions' right to due process was violated when the Debtors purported to sell free and clear without notice to Country Visions. Country Visions never received the statutory notice to which it was entitled, and any "actual notice" that Country Visions had was insufficient.

2. The information provided in the August 23 phone call was "ambiguous" in part because it included reference only to a "potential" sale, and one week's notice was insufficient.

3. ADM was not a "bona fide purchaser" because it had constructive notice of the ROFR, and twice received actual notice.

4. The confirmation order was void to the extent that it purported to sell free and clear of Country Visions' ROFR.

D. District Court opinion:

1. The district court affirmed, noting that ADM had only itself to blame for the result, and should have ensured compliance with the Bankruptcy Code and Rules if it wanted to ensure it was taking clean title.

2. District court criticizes ADM for its "stunning lack of candor" with the bankruptcy court.

E. Potential Issues for 7th Circuit:

1. Did the bankruptcy court lack personal jurisdiction over Country Visions?

2. Did the Debtors and ADM ever intend to sell free and clear of the ROFR because of the "Permitted Encumbrances" clause?

3. Even if they did so intend, could the Debtors sell free and clear of Country Visions' ROFR under § 363(f) in any event?

4. Was Country Visions' right to due process violated? Was any "actual notice" of Country Visions sufficient to satisfy the minimum requirements of due process? Was ADM a "bona fide purchaser"?

6. What role does § 363(m) play, if any? *See Edwards*, 962 F.2d 641 (7th Cir. 1992).

7. Was the ROFR an executory contract that was rejected by Debtors' Plan?

F. 7th Circuit opinion:

1. Parties devoted much time to the question whether Country Visions knew enough, before the 2011 sale, to supply it with the notice and opportunity for a hearing required by the Due Process Clause. We do not address that subject because statutory questions precede constitutional ones. This is a statutory case: if ADM did not buy the parcel in good faith, it loses no matter what the Constitution says about notice.

2. Clear the debtors proceeded in bad faith. "If anyone should be made to compensate Country Visions, it is the Olsens."

3. "[I]t is impossible to disagree with the bankruptcy and district judges that someone who has both actual and constructive knowledge of a competing interest, yet permits the sale to proceed without seeking the judge's assurance that the competing interest-holder may be excluded from the proceedings, is not acting in good faith." ADM does not contend that any of the findings below is clearly erroneous.

4. "Good faith purchasers enjoy strong protection under § 363(m). But ADM is not a good-faith purchaser. It must defend the state litigation."

5. NOTE: it is "unlikely" that a ROFR can be ignored in a § 363 sale.