IN RE STANFORD: ELEVENTH CIRCUIT RULES 11 U.S.C. § 363(M) MOOTS APPEALS FROM ANY SALE AUTHORIZED BY THE BANKRUPTCY COURT, NOT JUST THOSE PROPERLY AUTHORIZED BY THE CODE

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In *In re Stanford*, the United States Court of Appeals for the Eleventh Circuit held that an appeal from a completed sale of property authorized by the bankruptcy court—but not necessarily proper under the Bankruptcy Code—was statutorily moot under 11 U.S.C. § 363(m).[1] In affirming the United States District Court for the Northern District of Alabama's dismissal, the Eleventh Circuit reasoned that because credit bids are a practice authorized by the Code under § 363(k), and because the appellants challenged a specific use of the practice instead of the practice of the credit bid practice generally, § 363(m) applied to the debtors' appeal.[2] Thus, the appeal was statutorily moot because (1) the debtors filed to attain a stay of the sale from the bankruptcy court, and (2) the creditor was a "good faith purchaser" under the Bankruptcy Code.[3]

As the Eleventh Circuit summarized, "the facts [of this case] are complicated and the procedural history is tangled."[4] The appellants, Robert Stanford Sr. and his wife Frances Stanford, were debtors in a bankruptcy proceeding.[5] Together, they owned a company named the American Printing Company, Inc. ("APC"), which was also a debtor in a separate bankruptcy proceeding.[6] Prior to filing for bankruptcy, both the Stanfords and APC had secured separate loans from ServisFirst bank, serving as guarantors for the other.[7] In order to secure their loan, the Stanfords offered certain real property as collateral.[8] According to ServisFirst, the Stanfords and APC collectively owed $12.2 million.[9]

After both the Stanfords and APC filed for bankruptcy, APC, in a separate bankruptcy proceeding, received permission from the bankruptcy court to obtain a "debtor-in-possession loan from ServisFirst of up to $13.2

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[1] *In re* Stanford, 17 F.4th 116, 126 (11th Cir. 2021).
[2] *Id.* at 123.
[3] *Id.* at 126.
[4] *Id.* at 119.
[5] *Id.*
[6] *Stanford*, 17 F.4th at 119.
[7] *Id.*
[8] *Id.* at 119–20.
[9] *Id.* at 119.

million. That amount would 'roll up' the $12.2 million in debt that APC owed or had guaranteed and provide APC an additional $1 million of working capital."[10] Later in the Stanfords' personal bankruptcy proceeding, the bankruptcy court approved the sale of the Stanfords' real property to ServisFirst "'via a credit bid of $3.5 million' under 11 U.S.C. § 363(k)."[11] The bankruptcy court, in authorizing the sale, "expressly found that ServisFirst was 'a good faith purchaser under Section 363(m) of the Bankruptcy Code.'"[12]

After the bankruptcy court entered an order approving the sale, the Stanfords moved to amend and stay the sale order on the grounds that "ServisFirst's roll-up loan to APC had paid off their own debts to ServisFirst and, therefore, had eliminated ServisFirst's lien on their real property."[13] The bankruptcy court ultimately denied this motion, concluding that "APC's roll-up loan simply 'rolled up' all of APC's obligations as a borrower and as a guarantor, making APC an obligator or co-obligator on all debt owed to ServisFirst without eliminating the Stanfords' obligations to ServisFirst."[14] The Stanfords then "appealed the sale order and the order denying their motion to amend the sale order to the district court. . . . [and] petitioned the bankruptcy court to stay the sale pending the appeal."[15] The bankruptcy court "granted a stay conditioned on the posting of a $1.5 million supersedeas bond, which the Stanford did not post[,]" and thus the property was ultimately deeded to ServisFirst.[16]

After the sale was completed, "ServisFirst moved the district court to dismiss the Stanfords' appeal as moot as moot under 11 U.S.C. § 363(m)."[17] The district court granted the motion to dismiss, reasoning

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[10] *Id.*

[11] *Stanford*, 17 F.4th at 120. The Stanfords' filed a motion asking the bankruptcy court to approve the sale of the property under 11 U.S.C. § 363(b) allowing for the sale of their property outside the normal course of business because "[t]he Stanfords knew that ServisFirst planned to purchase the property with a credit bit against the Stanfords' obligations to ServisFirst." *Id.* However, the bankruptcy court's order approving the sale was authorized under 11 U.S.C. § 363(k). *Id.*

[12] *Id.*

[13] *Id.* Specifically, the Stanfords argued that (1) "APC's roll-up loan had converted ServisFirst's pre-petition claims against the Stanfords and APC into post-petition administrative expense claims against APC alone[;]" (2) "because ServisFirst never required them to execute a guaranty of the roll-up loan obligations, they had no remaining pre-petition obligations to ServisFirst[;]" and (3) that "ServisFirst no longer held a lien on their property and was no longer a secured creditor that could make a credit bid for that property." *Id.*

[14] *Stanford*, 17 F.4th at 120.

[15] *Id.*

[16] *Id.* at 121

[17] *Id.*; *see* 11 U.S.C. § 363(m) ("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

that "because the Stanfords were unable to obtain a stay or prevent the sale from being completed, it lacked authority to grant effective relief under the Bankruptcy Code" and therefore the appeal was moot.[18] The Stanfords then appealed the district court's dismissal to the Eleventh Circuit, arguing that § 363(m) was inapplicable because: (1) "Section 363(m) shields from review only transactions specifically authorized by the Bankruptcy Code, not transactions authorized by bankruptcy courts" and (2) "ServisFirst was not a good faith purchaser because its purportedly invalid credit bid did not provide any value."[19]

Despite the case's "tangled" and "complicated" nature, the Eleventh Circuit reduced the issues presented on appeal to a single question: "in light of our inability to undo a complete sale to a good faith purchaser under Section 363(m), can we grant the debtors any relief in this appeal?"[20] To this question, the court simply answered, "no."[21]

On appeal, the Eleventh Circuit reviewed the lower courts' conclusions of law *de novo* and factual findings under the "clear error" standard.[22] The court began its analysis with a summary of the facts and procedural history, [23] and placed a particular emphasis on the fact that the Stanfords "raised the possibility that ServisFirst's roll-up loan to APC had paid off their own debts to ServisFirst and, therefore, had eliminated ServisFirst's lien on their real property" *after* final approval of the sale.[24] Following a brief discussion of the "variety of flavors" of mootness for bankruptcy appeals, [25] the court determined that this appeal was of the statutory mootness flavor, which "is not based on the impossibility or inequity of relief, but the preclusion of relief under a statute."[26]

Turning to the Stanfords' arguments, the Eleventh Circuit began its inquiry "with the plain language of Section 363(m)'s text"[27]—language

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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.").

[18] *Stanford*, 17 F.4th at 121.

[19] *Id.* at 122. ServisFirst's argued in response that "the district court properly applied Section 363(m) as a 'flat rule' mooting any appeal of a sale that was authorized by the bankruptcy court, not stayed and consummated" and "that it bid on the property in good faith, citing the bankruptcy court's express findings to that effect." *Id.*

[20] *Id.* at 119.

[21] *Id.*

[22] *Id.* at 121.

[23] *See Stanford*, 17 F.4th at 119–21.

[24] *Id.* at 120 (making note of the fact that the Stanfords took exception to the sale only *after* it was completed several times throughout the opinion).

[25] *Id.* at 121 (listing the "flavors" as "constitutional, equitable, and statutory").

[26] *Id.* at 122.

[27] *Id.* at 122.

which, according to the court, "unambiguously support[ed] ServisFirst's position."[28] Section 363(m) provides that "[t]he reversal or modification on appeal of an authorization under [§§ 363(b)–(c)] . . . 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."[29] The court reasoned that this language "makes it clear that all 'authorizations' are covered [under § 363(m)], not just those that may be *proper* under the Code."[30] Additionally, the court reasoned the phrase "unless such authorization . . . were stayed" is conditional and thus "establishes that Section 363(m) moots appeals from any authorization of a sale by a court, because a court order—unlike a Code provision—can be stayed."[31] To further support this interpretation of § 363(m), the court referenced its prior decision from *In re The Charter Company*,[32] where it rejected the similar argument "that Section 363(m) shields only sales *properly* authorized under the Code."[33] Instead, the court in *Charter* held that "'[t]here is nothing in the language of section 363(m) to suggest that such an exception exists' and that the language 'states a flat rule governing all appeals of section 363 authorizations.'"[34]

The Eleventh Circuit also rejected the Stanfords' reliance on *In re Saybrook Manufacturing Co., Inc*, which concerned "a 363(m)-like provision mooting appeals from orders approving new loans to debtors" found in 11 U.S.C. § 364.[35] In *Saybrook*, the court addressed whether the appeal of a bankruptcy court order was moot under §364 where this provision did not permit the challenged "cross-collateralization" practice at issue.[36] The Eleventh Circuit reversed the district court's dismissal "because, rather than challenging the propriety of a single transaction, the appeal challenged the property of cross-collateralizations generally."[37] According to the Eleventh Circuit, here, the Stanfords' failure to "challenge the credit bid mechanism itself" was fatal to their argument.[38] Instead, they only challenged a "specific transaction involving a credit bid."[39] The

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[28] *Id.* (citing Ga. Advoc. Off. v. Jackson, 4 F.4th 1200, 1211 (11th Cir. 2021)) (explaining that a statute should be read according to its plain language).
[29] *Stanford*, 17 F.4th at 119 (quoting 11 U.S.C. § 363(m)).
[30] *Id.* at 122–23 (emphasis in original).
[31] *Id.*
[32] *In re* The Charter Co., 829 F.2d 1054 (11th Cir. 1987).
[33] *Stanford*, 17 F.4th at 123.
[34] *Id.* (alteration in original) (quoting *Charter*, 829 F.2d at 1056).
[35] *Id.* (citing *In re* Saybrook Mfg Co., Inc., 963 F.2d 1490, 1495 (11th Cir. 1992)).
[36] *See id.* (citing *Saybrook*, 963 F.2d at 1491–92).
[37] *Id.* (citing *Saybrook*, 963 F.2d at 1496).
[38] *Id.*
[39] *Stanford*, 17 F.4th at 123.

Eleventh Circuit found the Stanfords' appeal distinguishable from *Saybrook* because the Stanfords were not "challenging the propriety of credit bids generally, or even credit bids using disputed liens."[40] Thus, the court held that § 363(m) applied to the Stanfords' appeal.[41]

The Eleventh Circuit also rejected the Stanfords' argument that ServisFirst acted in bad faith.[42] The court noted two factors that must be present for § 363(m) to apply: "(1) the failure of the appellant to obtain a stay of the sale order and (2) a sale transacted with 'an entity that purchased or leased [the] property in good faith.'"[43] On the issue of good faith, the Eleventh Circuit recognized that, although "limited" in its ability to do so, an appellate court can review whether a buyer acted in good faith when determining statutory mootness under § 363(m).[44]

In determining that ServisFirst did act in good faith, the court applied a clear error standard of review to the bankruptcy court's factual findings and ultimately concluded that the bankruptcy court's express finding of good faith was not clearly erroneous.[45] First, the Eleventh Circuit determined that there was no evidence that "ServisFirst engaged in fraudulent behavior."[46] Second, the court held that "ServisFirst's credit bid offered sufficient value to support the bankruptcy court's fact-finding, irrespective of the roll-up loan's alleged effect on ServisFirst's lien[,]"[47] and reasoned that the fact that a lien is in dispute is not dispositive in determining whether a lien is without value.[48] While the court recognized that the Stanfords' claim that insufficient value or consideration is relevant to the good faith inquiry, it ultimately concluded that there was sufficient evidence to support the bankruptcy's determination that ServisFirst was a good faith purchaser.[49]

In *In re Stanford*, the Eleventh Circuit held that an appeal of a credit bid purchase under 11 U.S.C. § 363(k) authorized by the bankruptcy court

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[40] *Id.*
[41] *Id.*
[42] *Id.* at 124.
[43] *Id.* at 123 (alteration in original).
[44] *Id.* (relying on similar holdings from the First, Second, Third, Fifth, Seventh, and Ninth Circuits).
[45] *Stanford*, 17 F.4th at 121, 124.
[46] *Id.* at 124. To this point, the court found that the Stanfords did not allege that the creditor bid a lien that did not exist, only that they bid a lien "that had been extinguished by its roll-up loan to APC in attempt to satisfy a single debt twice." *Id.*
[47] *Id.*
[48] *Id.* "[S]ome courts have explicitly held that a disputed lien can be used to credit bid under Section 363(k)." *Id.* at 125 (citing *In re* Charles St. Afr. Methodist Episcopal Church, 510 B.R. 453, 458 (Bankr. D. Mass. 2014); *In re* Mia. Gen. Hosp., Inc., 81 B.R. 682, 687–88 (S.D. Fla. 1988)).
[49] *Stanford*, 17 F.4th at 124.

was moot under § 363(m) because (1) the debtor's failed to obtain a stay order and (2) there was sufficient evidence that the creditor was a good faith purchaser.[50] Thus, the court answered the question of "if Section 363(m) applies, does it preclude the kind of relief that the Stanfords are seeking, thereby mooting their appeal from the bankruptcy court's order authorizing the sale" in the affirmative.[51] In his concurrence, Judge Jordan was not so eager to separate this case from *Saybrook*, but admitted that this case was not "the right case in which to address the tension (or conflict) between *Charter Company* and *Saybrook Manufacturing* or to decide whether the rationale of *Saybrook Manufacturing* applies to § 363(m)."[52]

This case's significance is found in future litigants, and bankruptcy practitioners, who might find themselves in the "right" case to address the issues presented by Judge Jordan. It is not at all uncommon for bankruptcy judges to yield a tremendous amount of discretion when deciding heavily contested issues in bankruptcy court. This case serves as yet another example of the role that clever lawyering, and crafty arguments, can play in bankruptcy proceedings. In the absence of clear legal guidance, the art of effective persuasion can win the day. It is well resolved that litigation is an inherently risky endeavor, and situations such as this, when there is no clear legal guidance to which the judges can point to when rendering decisions, only further emphasize that point.

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[50] *Id.* at 126.

[51] *Id.*

[52] *Id.* at 127 (Jordan, J., concurring) ("As noted, §§ 363(m) and 364(e) share similar (and in some ways identical) language. It seems to me incongruous to say that the validity of an underlying authorized transaction *cannot* be reached on appeal under § 363(m) absent a stay (*Charter Company*), and at the same time say that the validity of an underlying authorized transaction *can* be reached under §364(e) (*Saybrook Manufacturing*) . . . . On balance, I'm just not sure that the two cases can be easily distinguished.").