No. 08–40746

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Bank of New York Mellon Trust Company, N.A., as Indenture Trustee for the Timber Notes; Angelo Gordon & Co. LP, Aurelius Capital Management, LP, and Davidson Kempner Capital Management LLC; Scotia Pacific Company LLC; CSG Investments, Inc.; Scotia Redwood Foundation, Inc. — Appellants,

v.

Official Unsecured Creditors' Committee; Marathon Structured Finance Fund L.P.; Mendocino Redwood Company LLC; The Pacific Lumber Company; United States of America; California State Agencies — Appellees.

Direct Appeal from the United States Bankruptcy Court
for the Southern District of Texas, Corpus Christi Division
USBC No. 07-20027

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(2) The undersigned counsel of record certifies that the listed persons and entities (on the following pages) as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING EN BANC CONSIDERATION

This direct appeal from the bankruptcy court raises a question of exceptional importance to the establishment of "uniform Laws on the subject of Bankruptcies throughout the United States" (U.S. CONST. Art. I, § 8, Cl. 4): Can a secured creditor's objection to the bankruptcy court's confirmation order be denied appellate review based on the objection's so-called "equitable mootness" in a case where the secured creditor's objection is that the plan confirmation stripped it of its property interest in the debtor's collateral in a manner contrary to law?

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STATEMENT OF THE ISSUE

Whether so-called "equitable mootness" can preclude a court from resolving on the merits a secured creditor's appeal that its liens were stripped from its collateral contrary to law.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Scopac and its parent company, Palco, (along with other affiliated entities not relevant to this appeal) filed separate Chapter 11 bankruptcy petitions on January 18, 2007. Slip op. 3. On June 6, 2008, the bankruptcy court concluded that a plan to reorganize Scopac and Palco proposed by the Medocino Redwood Company ("MRC") and Marathon Structured Finance Fund, LP ("Marathon") was confirmable under 11 U.S.C. § 1129. Slip op. 6. That conclusion resulted in the bankruptcy court's entry of an order confirming the MRC/Marathon Plan on July 8, 2008.

Bank of New York Trust Company, N.A., ("Indenture Trustee") and certain noteholders filed timely notices of appeal of that confirmation order. The bankruptcy court certified the appeal for direct review in this Court pursuant to 28 U.S.C. § 158(d), and this Court granted direct review. The Court ordered expedited briefing, and the cause was argued on October 6, 2008. Meanwhile, MRC and Marathon rushed to consummate the plan, Appellants' efforts to obtain a

stay pending appeal were unsuccessful, and the MRC/Marathon Plan became effective.

On September 29, 2009, the panel (Jones, C.J., Owen, J., and Southwick, J.) issued a judgment and published opinion that affirmed in part and reversed in part the bankruptcy court's confirmation order, and remanded the case for further proceedings. The panel deemed several of the significant issues of bankruptcy law presented by Appellants to be "equitably moot."

STATEMENT OF FACTS

The MRC/Marathon Plan confirmed by the bankruptcy court reorganized two debtors—Scopac and Palco. In relevant part, it classified the various claims asserted by Scopac's creditors as follows:

- Class 5 ("Scopac Loan Claims") consisted of a $37.6 million secured claim against Scopac's assets by Bank of America, and was paid in full on the Plan's effective date, except for any allowable default interest, which was paid in 12 monthly installments;
- Class 6 ("Scopac Timber Note Secured Claims") consisted of an approximately $740 million debt to Noteholders secured by virtually all of Scopac's assets, and received $513.6 million and retention of a lien on the proceeds of a litigation trust;

- Class 8 (“Scopac Trade Claims”) consisted of nearly all of Scopac’s debt to creditors for goods, supplies, equipment, or services, and received their pro rata share of $500,000 and an interest in the proceeds of a litigation trust;
- Class 9 (“Scopac General Unsecured Claims”) consisted of nearly all of Scopac’s non-trade, unsecured creditors—predominantly Noteholders’ approximately $227 million deficiency claim after its Class 6 distribution—and received an interest in the proceeds of a litigation trust.

Before the bankruptcy court, and in their direct appeal to this Court, the Noteholders raised two related arguments that the classification and treatment of the claims against Scopac were contrary to law and rendered the Plan unconfirmable. (The Noteholders raised additional objections to the MRC/Marathon Plan that are not relevant to their petition for rehearing *en banc*.)

First, the Noteholders explained that the MRC/Marathon Plan improperly manipulated the classification of Scopac’s creditors in order to achieve plan confirmation, which requires that at least one impaired class of creditors vote in favor of the plan. See 11 U.S.C. § 1129(a)(10). The Plan, the Noteholders contended, artificially impaired Class 5, which received full repayment of its $37.6 million claim, and was “impaired” only because the plan proponents decided—despite access to more than $500 million in funds—to spread the payment of a *de*

minimis amount of default interest over the course of 12 months. The Plan also pursued a divide-and-conquer strategy with respect to Scopac's unsecured creditors, splitting them into two classes—Class 8 (trade claims) and Class 9 (general unsecured claims)—without a legitimate business justification. Class 5 and Class 8 voted in favor of the MRC/Marathon Plan; Class 6 and Class 9 voted to reject that plan.

Second, the Noteholders contended that—in addition to gerrymandering the classification—the Plan sweetened the deal for Scopac's unsecured creditors in Class 8 by providing them with a higher recovery that, because it lacked a valid business reason, was unfairly discriminatory to Class 9's similarly situated, legally indistinguishable creditors. Whereas Class 8 claimants received a cash payment equal to 75-90% of their claims *and* pro rata participation in Scopac's litigation trust, Class 9 claimants of identical legal priority received *only* the pro rata trust participation and *no* guaranteed cash payment.

After full briefing and argument, the panel's decision recognized that those are valid objections to the bankruptcy court's confirmation of the MRC/Marathon Plan. As the panel explained, "[t]he Noteholders raise significant objections to the plan's treatment of the Bank of America's claim in Class 5 and its division of unsecured claims with equal legal status into two voting classes, 8 and 9," slip op. 37, and "[t]he MRC/Marathon Plan treats unsecured claims in Classes 8 and 9

radically differently," *id.* at 39. Despite that view of the merits, the panel concluded that circuit precedent constrained it to "hold these . . . contentions equitably moot" and "to decline appellate review of th[ese] issue[s]." *Id.* at 38, 39.

ARGUMENT AND AUTHORITIES

The panel in this case recognized that "equitable mootness" is "a judicial anomaly"; it is "a kind of appellate abstention" that is inconsistent with federal courts' "'virtually unflagging obligation' to exercise the jurisdiction conferred on them." Slip op. 12 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 414 U.S. 800, 817 (1976)). The panel cited the well-reasoned criticism of equitable mootness by then-Judge Alito, see *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc) (Alito, J., dissenting), as well as Judge Easterbrook's explanation that the very idea of "equitable mootness" is a misnomer, see *In re UNR Indus.*, 20 F.3d 766 (7th Cir. 1994). Moreover, the panel noted the recent addition of procedures that now permit the certification of bankruptcy appeals for direct review by the courts of appeals, see 28 U.S.C. § 158(d)(2), and observed that "Congress's purpose may be thwarted if equitable mootness is used to deprive the appellate court of jurisdiction over a properly certified appeal." Slip op. 16.

Despite its evident skepticism, the panel concluded that this Court's precedents prevented its evaluation of "the *rationale* for equitable mootness," and instead bound it to apply a three-prong test for equitable mootness provided by *In*

re Manges, 29 F.3d 1034, 1039 (5th Cir. 1994). Slip op. 13 (emphasis added). Applying that test, the panel held that equitable mootness prevented it from providing any remedy to Scopac's overwhelmingly predominant secured creditor for the improper cram-down of a reorganization plan that ensured confirmation through the artificial impairment of one class of claims, the impermissible gerrymandering of another, and an unfair discrimination among classes of claims. See slip op. 37-39.

That conclusion did not keep the panel from emphasizing that courts should be "especially solicitous of the rights of secured creditors following confirmation." Slip op. 14. As the panel explained, "[s]ecured credit represents property rights that ultimately find a minimum level of protection in the takings and due process clauses of the Constitution" and that therefore "[f]ederal courts should proceed with caution before declining appellate review of the adjudication of these rights under a judge-created abstention doctrine." Slip. op. 20-21; see also *id*. at 22 n.19 ("Applying equitable mootness too broadly to disfavor appeals challenging the treatment of secured debt carries a price. It may promote the confirmation of reorganization plans, but it also destabilizes the credit market for financially troubled companies.").

When then-Judge Alito (writing for himself and five other judges) dissented from the Third Circuit's adoption of "the curious doctrine of 'equitable

mootness,'" he suggested another reason why so-called equitable mootness should not prevent appellate review of a secured creditor's appeal: As it did here, applying that doctrine can prevent *any* review by an Article III court of a secured creditor's claim that it was deprived of property interests in the debtor's collateral in a manner contrary to law. See *In re Continental Airlines*, 91 F.3d at 567-68, 571. The absence of such review is particularly troubling in this case. As the panel remarked, the confirmation order below raises "novel issues" and reflects "unusual, perhaps unprecedented decisions." Slip op. 18, 19. Before the ink was dry on the confirmation order, however, the plan proponents moved quickly to consummate their envelope-pushing reorganization plan—so quick, in fact, that Chief Judge Jones observed that debtors had "done about as speedy a job of trying to undermine [this Court's] appellate review as [she had] ever seen in nearly 25 years on the bench." Oral Argument Tr. 8.

Moreover, the panel correctly recognized that it is inconsistent with a statutory scheme that provides for the review of bankruptcy court decisions for an "equitable mootness" doctrine to "deprive the appellate court of jurisdiction" (slip op. 16) over the substantial claims of a secured creditor. Most recently, Congress streamlined the appellate examination of important cases (like this one) by creating a direct review process that expedites their presentation to the courts of appeals. See 28 U.S.C. § 158(d)(2). Appellate consideration of bankruptcy court decisions

is a critical part of Congress's efforts to "establish . . . uniform Laws on the subject of Bankruptcies," U.S. CONST. Art. 1, § 8, Cl. 4, and should not easily yield to a judge-created doctrine of abstention.

This Court, sitting *en banc*, should review this case and determine that so-called "equitable mootness" should not bar appellate review of a secured creditor's contention that a bankruptcy court impermissibly stripped its liens from a debtor's assets. As the panel's opinion suggested (but was foreclosed from holding by Circuit precedent), the peculiar "judge-created abstention doctrine" (slip op. 20-21) that declares review in certain such cases to be equitably moot is ill suited to the disposition of a secured creditor's appeal.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc.

Dated: October 12, 2009

Respectfully submitted,

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