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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94-7748

IN RE CONTINENTAL AIRLINES:

NATIONSBANK OF TENNESSEE, N.A., f/k/a NationsBank of Tennessee, as Collateral Trustee under a Secured Equipment Indenture and Lease Agreement dated March 15, 1987 ("NationsBank"); NEW JERSEY NATIONAL BANK, as successor by merger to Constellation Bank, N.A., f/k/a National State Bank of Elizabeth, N.J.; HARRIS TRUST AND SAVINGS BANK; and BOATMAN'S FIRST NATIONAL BANK OF OKLAHOMA, as First, Second and Third Priority Secured Equipment Certificates Trustees thereunder, respectively (the "Series Trustees" and, collectively with NationsBank, the "Trustees"),
Appellants

On Appeal from the United States District Court
for the District of Delaware
C.A. No. 93-195-JJF
(Bankruptcy Nos. 90-932 through 90-984)

Argued September 15, 1995

Before: SLOVITER, Chief Judge,
ALITO and SEITZ, Circuit Judges

(Filed February 7, 1996)

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OPINION OF THE COURT

SLOVITER, Chief Judge.

INTRODUCTION

Before us is an appeal by NationsBank of Tennessee (Collateral Trustee) and Jersey National Bank, Harris Trust and Savings Bank, and Boatman's First National Bank of Oklahoma (First, Second, and Third Priority Secured Equipment Certificate Trustees) are collectively referred to in this opinion as the "Trustees," from the order entered by the district court in the Chapter 11 bankruptcy proceeding of Continental Airlines, Inc., dismissing as moot three appeals by the Trustees. Those appeals were from orders of the bankruptcy court which 1) denied the Trustees' Renewed Motion for adequate protection, 2) confirmed Continental's revised second amended joint plan of reorganization, and 3) denied the Trustees' motion for the establishment of a cash deposit of \$123,479,287. In essence, the Appellant Trustees seek payment for an asserted administrative claim of approximately \$117 million against the reorganized company. The Appellee, Continental Airlines, Inc., defends the district court's mootness ruling and argues, in the alternative, that the underlying rulings of the bankruptcy court were correct as a matter of law and fact.

I.

FACTUAL AND PROCEDURAL HISTORY

Continental filed its Chapter 11 bankruptcy petition on December 3, 1990. The Appellant Trustees serve as successor Collateral and Series Trustees for certificate holders who had provided Continental with operating capital. The certificates were secured at the time of Continental's petition by a pool of 29 commercial aircraft with engines, and 81 additional jet engines which, we were advised, serviced about one-tenth

Continental's operating fleet. Under the Bankruptcy Code, the debtor in possession has most of the rights, powers, functions and duties of a trustee, see 11 U.S.C. § 1107(a), "may use property of the estate in the ordinary course of business without or a hearing." 11 U.S.C. § 363(c)(1).

Section 363(e) provides:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used . . . by the [debtor in possession], the court, with or without a hearing, shall prohibit or condition such use . . . as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e).

On February 21, 1991, First Fidelity Bank of New Jersey, predecessor to NationsBank as Collateral Trustee, filed a motion along with many other aircraft lessors and financiers alleging, inter alia, a decline in the value of the collateral and sought adequate protection under section 363(e). First Fidelity later withdrew from this motion but on June 28, 1991 it, and the predecessors of the other Appellant Trustees, filed a motion seeking similar relief. The bankruptcy court held an evidentiary hearing on the motion from September 3 through September 6, 1991 limited to the Trustees' assertion that they were entitled to adequate protection payments as a result of the collateral's petition decline in market value.

Continental argued, inter alia, that because the Trustees had not filed a motion for relief from the automatic stay, they were not entitled to an award of adequate protection under section 363(e). The bankruptcy court ruled on the Trustees' motion on August 27, 1992, rejecting that argument but finding as a fact, based on the "Blue Book" a publication issued by a company that appraises aircraft, that the market value of the collateral had not declined during the period at issue in the motion. In re Continental Airlines, Inc., 146 B.R. 536 (Bankr. D. Del. 1992) [hereinafter Continental I].

On August 14, 1992, approximately two weeks before the opinion in Continental was issued, the Trustees filed a motion under section 362(d) of the Bankruptcy Code to lift the automatic stay ("Lift-Stay Motion"). See 11 U.S.C. § 362(d). This section permits a creditor to move for relief from the automatic stay of delineated activities such as repossession of collateral, effected by section 362(a) of the Bankruptcy Code.

On September 14, 1992, the Trustees also filed a renewed motion for adequate protection for alleged decline in the collateral's value for the period after September 1991, when the original 1991 motion was argued ("Renewed Motion"). There were various hearings on the Renewed Motion between November 3, 1992 and February 5, 1993. Toward the end of that period, the Trustees filed a motion dated January 29, 1993, asking the bankruptcy court to establish a cash deposit of some \$123 million, of which \$117 million was attributable to alleged market decline, to preserve what the Trustees claimed was the administrative priority status of the Trustees' adequate protection claim if Continental emerged from bankruptcy as a reorganized debtor ("Deposit Motion").

During this period efforts to reorganize the debtor continued. On November 1992 Continental entered into an Investment Agreement under which the Investors (Air Canada Partners, L.P. and Air Canada) agreed and committed to an investment of \$450 million in the reorganized entity under a complex arrangement and subject to certain conditions. App. at 391 et seq. One of those conditions relevant to this proceeding was a limitation on the amount and nature of liabilities and administrative expense claims required to be assumed by or attributable to the reorganized company. App. at 408. On January 13, 1993 Continental filed a second amended joint plan of reorganization ("Plan") which referred to that Investment Agreement. The Plan provided, inter alia, for assumption of "allowable administrative claims" by the reorganized Continental. App. at 656.

The confirmation hearing was held for a number of days during the period from April 16, 1993 through April 16, 1993. The parties reached a settlement on April 12, 1993.

adequate protection due to use and/or maintenance of the collateral by Continental, issue relating to use decline (the impairment in value attributable to the use of collateral by the debtor in possession) is before us. The parties did not settle the Trustees' adequate protection claims based on decline in market value.

At the conclusion of the confirmation hearing on April 16, 1993, the bankruptcy court denied the Deposit Motion and the Renewed Motion. In a published opinion, the court held that it was necessary for the Trustees to have sought relief from the automatic stay to be entitled to adequate protection for market value decline; that therefore the Trustees were not entitled to adequate protection due to market decline until after the date of their Lift-Stay Motion, i.e. August 14, 1992; and that no decline in the market value of the collateral had taken place since that date. In re Continental Airline Inc., 154 B.R. 176 (Bankr. D. Del. 1993) [hereinafter Continental II]. Also on April 1993, the bankruptcy court signed the Confirmation Order. The court made a series of detailed findings of fact and conclusions of law underlying the Confirmation Order which will be referred to throughout this opinion when pertinent.

On April 20, 1993 the Trustees filed three notices of appeal to the district court from the bankruptcy court's denial of the Renewed Motion for Adequate Protection, its denial of the Deposit Motion, and its order confirming the Plan. Two days later the Trustees filed a motion for a partial stay of the consummation of the Plan ("Conditional Stay Motion"), but filed that motion in the district court, which referred them to the bankruptcy court. On April 26, 1993, the Trustees filed a stay request in the bankruptcy court. Because the bankruptcy judge was not available, the hearing on the motion was held the next day in the district court, which ruled that the Trustees were likely to prevail on appeal but denied the stay because the Trustees were "unable to post a bond satisfactory to the Court." App. at 1755-56. With no stay impeding implementation

Plan which had now been confirmed, the Investors proceeded to close the transaction making their promised investment.

On May 6, 1993 Continental filed a motion in the district court to dismiss Trustees' appeals as moot, which the district court granted on December 30, 1993. Trustees filed a motion for rehearing and reconsideration in light of the decision in Frito-Lay, Inc. v. LTV Steel Co., Inc. (In re Chateaugay Corp.), 10 F.3d 944 (2d Cir. 1993) [hereinafter Chateaugay II], which the court denied. The Trustees filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 158(d).

II.

DISCUSSION

A.

The merits issues on which the parties divide present interesting and challenging questions of first impression for this court, and some appear not to have been decided by any appellate court. The Trustees argue that neither the Bankruptcy Code nor any reliable precedent supports the bankruptcy court's holding that a creditor must file a motion to lift the automatic stay as a prerequisite to seeking adequate protection. They argue that this is a matter of law that this court can decide de novo even though the district court did not reach the issue. They further argue that the bankruptcy court's finding that there was no diminution in the market value of the Trustees' collateral after they filed their Lift-Stay Motion was clearly erroneous. Finally, they argue that the bankruptcy court erred as a matter of law in denying their motion for the establishment of a cash deposit.

Not surprisingly, Continental, as appellee, defends both the bankruptcy court's legal determination that the Trustees could not assert adequate protection claims based on an alleged market value decline during the period before they moved for relief from the automatic stay and its factual conclusion that there had been no substantial decline

the value of the collateral since the Lift-Stay Motion was filed. Finally, it argues that in any event the Trustees could not recover for adequate protection because the value of the collateral did not decline below its value on the petition date, which Continental contends is the relevant measure.

We would reach these issues only if we were satisfied that the district court erred in holding that the Trustees' appeals to it were moot, a decision as to which the parties vigorously disagree. Mootness vel non of the appeals before the district court is closely related to, if not indistinguishable from, the question whether the appeal to the district court is moot, an issue which Continental alludes to in its brief. For convenience, we will refer to mootness in the district court unless we state otherwise.

Continental does not contend that the appeals to the district court or to the Supreme Court were moot in the constitutional sense, implicating the case or controversy requirement of Article III, §1. See, e.g., Preiser v. Newkirk, 422 U.S. 395, 401-02 (1975). This is not a situation analogous to those where the appeals became moot because the law at issue was repealed, see Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414-15 (1972); where the subject of the election campaign controversy was no longer a candidate, see Golden v. Zwickler, 394 U.S. 103, 109-10 (1969); or the railroad whose application for tariff classification was contested withdrew that application, see A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329-30 (1961).

Indeed, as the Supreme Court has recently explained, an appeal is moot in the constitutional sense only if events have taken place during the pendency of the appeal that make it "impossible for the court to grant 'any effectual relief whatever.'" Church of Scientology v. United States, 506 U.S. 9, ___, 113 S. Ct. 447, 449 (1992) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)). An appeal is not moot "merely because a court cannot restore the parties to the status quo ante. Rather, when a court can fashion some form of meaningful relief,' even if it only partially redresses the grievances of the

prevailing party, the appeal is not moot." RTC v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.), 16 F.3d 552, 560 (3d Cir. 1994) (in banc) (quoting Church of Scientology, 113 S. Ct. at 450). Thus, in Isidor Paiewonsky Assocs. v. Sharp Properties, Inc., 998 F.2d 145, 152 (3d Cir. 1993), we concluded that because we could impose at least one of the remedies enumerated by the appellant, and thereby provide it "some effective relief," the appeal was not moot. That is not the issue in this case.

Instead, Continental invokes the broader interpretation of mootness applicable to bankruptcy cases, often referred to as "equitable mootness." See, e.g., Manges v. Seattle-First Nat'l Bank (In re Manges), 29 F.3d 1034, 1038-39 (5th Cir. 1994), cert. denied, 115 S. Ct. 1105 (1995); In re Specialty Equip. Cos., 3 F.3d 1043, 1048 (7th Cir. 1993); Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of Inland Steel Co. (In re Chateaugay Corp.), 988 F.2d 322, 325 (2d Cir. 1993) [hereinafter Chateaugay I]; Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co.), 960 F.2d 469, 471-72 (1st Cir.), cert. denied, 113 S. Ct. 304 (1992); First Union Real Estate Inv. Equity & Mortgage Invs. v. Club Assocs. (In re Club Assocs.), 956 F.2d 1065, 1069 (4th Cir. 1992); Central States, Southeast and Southwest Areas Pension Fund v. Central States Indus. Inc., 841 F.2d 92, 95-96 (4th Cir. 1988); In re AOV Indus., 792 F.2d 1140, 1147 (D.C. Cir. 1986); Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 796-797 (3d Cir. 1981). Under this widely recognized and accepted doctrine, the courts have held that "[a]n appeal should . . . be dismissed as moot when, even though effective relief conceivably be fashioned, implementation of that relief would be inequitable." Chateaugay I, 988 F.2d at 325.

In a trenchant discussion of the issue in a recent decision of the Seventh Circuit, the court noted that denominating the doctrine as "equitable mootness" is misleading. In re UNR Indus., 20 F.3d 766, 769 (7th Cir.), cert. denied, 115 S. Ct.

(1994). Judge Easterbrook, writing for the court, stated: "[t]here is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion." Id. (emphasis in original). Thus, although the discussions and application of the concept of "mootness" in bankruptcy cases by that court had previously encompassed what is referred to elsewhere as "equitable mootness," see Specialty Equip., 3 F.3d 1048; In re Andreuccetti, 975 F.2d 413, 418 (7th Cir. 1992), the court in UNR Industries stated it would now "banish 'equitable mootness' from the (local) lexicon." 20 F.3d 769. Instead, the court continued, "[w]e ask not whether this case is moot, 'equitable' or otherwise, but whether it is prudent to upset the plan of reorganization at this date." Id.

These "equitable" or "prudential" considerations focus on "concerns unique to bankruptcy proceedings." Manges, 29 F.3d at 1038. Whether termed "equitable mootness" or a prudence doctrine, we see no reason why this court should part company with our sister circuits in their adoption of this doctrine. If limited in scope and cautiously applied, this doctrine provides a vehicle whereby the court can prevent substantial harm to the interests of numerous parties.

The Trustees have not challenged the viability of the doctrine of equitable mootness or application of prudential considerations in bankruptcy cases, nor have they cited to a case in any circuit that rejects the concept. Instead, they rely most heavily on a decision of the Second Circuit holding that even though the reorganization plan of the bankrupt LTV Corporation had been confirmed, the appeal of tax lessors challenging the plan's failure to give their claims administrative priority was not moot. See Chateaugay II, 10 F.3d 944 (2d Cir. 1993). Significantly, the court in Chateaugay II did not depart from the doctrine, merely its application in that case. In fact, in RTC v. Best Products Co. (In re Best Prod. Co.), 68 F.3d 26, 29 (2d Cir. 1995), a more recent case from

Second Circuit, the court once again emphasized the language in Chateaugay I that although an appeal may not be moot in the sense of Article III of the Constitution, it may be deemed moot in bankruptcy cases because of "equitable considerations."

We have generally stated that we exercise plenary review of a district court's decision on mootness. See Northeast Women's Ctr., Inc. v. Keenan, 939 F.2d 57, 61 (3d Cir. 1991); International Bhd. of Boilermakers v. Keenan, 815 F.2d 912, 914 (3d Cir. 1987). In those cases our focus was on constitutional mootness. It is surprising, but we have not seen any discussion of our standard of review of a district court's determination that a bankruptcy appeal to it was moot for equitable or prudential reasons. Under ordinary review principles, we would review that decision for abuse of discretion. A particular case may also raise legal and/or factual issues interspersed with the prudential ones, and then the applicable review standard, plenary review if clearly erroneous, would apply.

B.

Factors that have been considered by courts in determining whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether a reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments. See Manges, 29 F.2d 1039; Rochman, 963 F.2d at 471-72.

The foremost consideration has been whether the reorganization plan has been substantially consummated, especially where the reorganization involves intricate transactions, see Rochman, 963 F.2d at 473-74 (performance under plan involved "numerous complex arrangements"); Roberts Farms, 652 F.2d at 797 (plan involved "many intricate

involved transactions" and reversal of plan's confirmation "would knock the props c
under" such transactions and "create an unmanageable, uncontrollable situation for
Bankruptcy Court"), or where outside investors have relied on the confirmation of t
plan, see Manges, 29 F.3d at 1039 (equitable mootness "protects the interests of no
adverse third parties who are not before the reviewing court but who have acted in
reliance upon the plan as implemented"); UNR Indus., 20 F.3d at 770 ("[b]y protecti
interests of persons who acquire assets in reliance on a plan of reorganization, a
increases the price the estate can realize ex ante, and thus produces benefits for
creditors in the aggregate"); Rochman, 963 F.2d at 474 (reorganization involved \$1.
billion in financing from 100,000 sources); Club Assocs., 956 F.2d at 1070 ("a numb
investors, who were not parties to this case, had committed new funds to the 'reeme
Club' with the expectation of receiving a preferred return on their investments").

"Substantial consummation" is defined in the Bankruptcy Code as: "(A) tra
of all or substantially all of the property proposed by the plan to be transferred,
assumption by the debtor or by the successor to the debtor under the plan of the bu
or of the management of all or substantially all of the property dealt with by the
and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2). In suc
instances, the strong public interest in the finality of bankruptcy reorganizations
particularly compelling.

The district court dismissed the appeals to it as moot based on the concl
set forth in its opinion dated December 30, 1993, that substantial consummation of
Plan had occurred, the Investors had already made their \$450 million investment int
reorganized entity, all elements of the Plan, except distributions to the unsecured
creditors, had been completed, and a reversal of the order confirming the Plan like
would put Continental back into bankruptcy. App. at 1873. The court also noted th

Continental had implemented the Plan following its approval by the court because the Trustees had failed to obtain a stay.

The Trustees do not challenge that there had been substantial consummation of the Plan by December 1993, when the district court dismissed the appeals as moot. They suggest that the Plan as their object is not to disturb the reorganization, but only to get payment from the reorganized Continental for their adequate protection claim measured by the market value of the decline of the collateral during bankruptcy, the line of cases upon which Continental relies is inapplicable. We cannot agree, because the rejection of the Trustees' claim is not the bankruptcy court was inextricably intertwined with the implementation of the Plan and the reorganization. See AOV Indus., 792 F.2d at 1148 (to evaluate mootness, court must "scrutinize each individual claim, testing the feasibility of granting the relief and the claim's potential impact on the reorganization scheme as a whole"). Thus, the Trustees' claim would avoid the effect of the substantial consummation of the reorganization plan so readily.

Inasmuch as Continental agrees that the issue is not constitutional mootness, but prudential mootness, we may assume that even after substantial or total consummation of the Plan and its reorganization, some effective relief would have been and still is available for the Trustees' claim. It is quite another matter in light of the substantial, indeed permanent and irrevocable, change in the status quo to determine that it would have been equitable for the court to reach the merits of the Trustees' claim. For the district court had based its decision on an unstayed bankruptcy reorganization plan, and many courts have based their prudential mootness decisions to decline to consider challenges to bankruptcy court orders on the ground that there has been substantial consummation of a plan of reorganization in reliance upon the court's unstayed confirmation order. See, e.g., Rochman, 963 F.2d at 475.

In Chateaugay I, the court noted that although the Bankruptcy Code only provides for a stay pending appeal in limited circumstances, there is a procedure under Bankruptcy Rule 8005 to seek to preserve the status quo and "[t]he party who appeals without seeking

avail himself of that protection does so at his own risk." 988 F.2d at 326. And in Manges, the court observed, under the descriptive title "Halting the Runaway Train: Motions to Stay," that "in many of the cases in which bankruptcy appeals were dismissed as moot, the appellants failed to seek a stay." 29 F.3d 1039.

Even the seeking of a stay may not be enough. The appellants in In re UN Industries had sought a stay, albeit unsuccessfully, at every opportunity; nonetheless, the court noted, "[a] stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." 20 F.3d at 770. Accord AOV Indus., 988 F.2d at 1144, 1146-47.

Shortly after the confirmation of the Continental Plan, the Trustees filed an Emergency Motion for Conditional Stay of Order Confirming the Plan pending their appeal to the district court. The condition the Trustees sought in lieu of a stay was the establishment of a segregated account for \$117 million, the full amount of their adequate protection claim, or alternatively at least \$22 million, which they claim was the amount of the decline in the value of the collateral. See App. at 1721. In response to the court's inquiry, they conceded that they were not willing to post any bond. The district court never required a supersedeas bond in the amount of \$450,000,000, as the dissent suggested. In fact, the district court tried to ascertain the amount of bond that would be reasonable, and the Trustees' general position was that they were "merely the fiduciaries of the money of their bondholders" and they suggested no lesser amount. App. at 1729.

Thus, as one of the reasons for its order denying the stay, the district court noted their unwillingness to post a bond satisfactory to the court. App. at 1756. e.g., Central States, 841 F.2d at 95 (appellant's failure to post bond to stay confirmation order basis for finding appeal moot). Because the failure to post the bond needed to get a stay permitted the consummation of the plan, this factor weighs heavily

favor of the district court's declination to delve into the merits of the Trustees' appeal.

The Trustees argue that this court has held that failure to obtain a stay does not necessarily render an appeal moot. The cases to which they refer are not apposite. In one, In re Joshua Slocum Ltd., 922 F.2d 1081 (3d Cir. 1990), the issue was the nature of the power of the bankruptcy court to excise a paragraph from a shopping center lease. There is no indication in Slocum that there had been any confirmation of a plan before or during the appeal.

In the more recent case to which the Trustees refer, Megafoods Stores, Inc. v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.), 60 F.3d 1031 (3d Cir. 1995), the appeal also presented a narrow landlord-tenant issue, i.e. the effect of confirmation of the landlord's plan on a tenant's right to pursue its appeal of the bankruptcy court's denial of its recoupment claim. In holding that it was not necessary for the tenant to seek a stay in order to pursue its right to appeal despite the confirmation in the interim, we noted the line of cases placing recoupment and setoff in a special category and stated, "although we recognize the importance of maintaining the integrity of confirmed plans from later attack, these unique circumstances permit the plan to be reopened and readjusted." Id. at 1036. Thus, neither Flagstaff nor Slocum address the equitable or prudential mootness at issue here.

The Trustees argue that they had no obligation to take steps to preserve the status quo through a stay because the Plan contained "a built-in mechanism for the [post-confirmation] disposition and payment of Disputed Administrative Claims." Appellant's Brief at 10. Assuming arguendo, as Continental does in its brief, that the Plan's provisions for post-confirmation payment of administrative claims to the extent they have been allowed by a "Final Order," App. at 656, 691, 1057, was applicable to a claim of the type and magnitude of that asserted by the Trustees, the availability of such a mechanism

does not allay all prudential and equitable concerns. The significant fact is that Trustees' claim was not "allowed" by the bankruptcy court before confirmation, and such disallowance was an essential factor in the Investors' decision to proceed to the transaction.

One of the concerns of the Investors that needed to be satisfied as a condition of their participation was that the total amount that would have to be paid for administrative claims could be distorted by a few large claims. These included, in particular, labor claims by airline pilots, large claims by Eastern Airlines, and the adequate protection claims of the Appellant Trustees. To limit their exposure, the Investment Agreement provided that the Investors' obligation to proceed with the arrangements was subject, inter alia, to the payments and obligations for administrative claims being no higher than a specified amount.

The bankruptcy court found in its detailed Findings of Fact, Conclusions and Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization that there was substantial, credible and uncontested evidence that the administrative claims payable at confirmation would be within the specified limit of the cap set forth in the Investment Agreement. It found that neither the pilots' claims nor the Eastern claims were entitled to administrative priority, and that the Trustees' adequate protection claims had no value as an administrative claim. It based its statutorily required determination that the Plan was feasible, see 11 U.S.C. § 1129(a)(11), in part on these findings. App. 1548-53.

High on the list of prudential considerations taken into account by courts in considering whether to allow an appeal following a consummated reorganization is the reliance by third parties, in particular investors, on the finality of the transaction. See Manges, 29 F.3d at 1039 ("[t]he concept of 'mootness' from a prudential standpoint protects the interests of non-adverse third parties who are not before the reviewing

but who have acted in reliance upon the plan as implemented"); Rochman, 963 F.3d at (similar). It seems to be uncontested that if the Trustees' claims at issue here had been approved as administrative claims, the total such claims would have greatly exceeded the cap specified by the Investors for that purpose. This would have given the Investors the option to withdraw; such withdrawal would have placed the entire Plan in jeopardy.

The district court specifically found, in dismissing the Trustees' appeal as moot, that the Investors had relied on the bankruptcy court's order and that there was an integral nexus between the investment and the success of the Plan. The court stated: "[t]he Investors relied on the unstayed Confirmation Order in making the \$450 million investment in Continental's Plan. It is clear that [the Trustees'] requested relief [in the form of a deposit of \$22 million to \$117 million for that administrative claim] would undermine the grounds which the Investors relied upon in making their investment and would require the dismantling of the entire Plan." App. at 1874. Although the Trustees argue that this finding is erroneous, there is support for it in the record.

At the hearing in April 1993 before the district court on the Trustees' motion for the conditional stay of the Confirmation Order, counsel for the Trustees stated that he had testimony that "as a matter of business judgment, it would be extremely unlikely that the investors to walk away from this deal if . . . a 22-million-dollar deposit was established." App. at 1727. The Trustees' counsel in effect challenged the Investors to assert otherwise, stating that inasmuch as the Investors' counsel were in court they should correct any assertions that he made. Id. Thereafter, the Investors' attorney rose to make clear the [I]nvestors' position, which is that if the relief is granted to [the Trustees] which they seek from the Court this morning [the stay conditioned on a deposit of some \$22 million to \$117 million], then we are not prepared to close the transaction." App. at 1744.

The representative of the Investors explained that in the airline business "there is a great sensitivity to cash and the capital structure of a reorganized entity and that the relief that the Trustees sought "could significantly impair the capital structure that would exist with respect [to] this reorganized airline." Id. at 174. He reviewed the negotiations that had occurred for the cap for administrative expenses liability, advised that the Investors had monitored on a monthly basis Continental's performance in that respect, explained that the Investors had insisted that the confirmation order address the issue of the Trustees' claim "because we want to make sure if we are putting our money in, we are getting the benefit of our bargain, which is a reorganized entity with a capital structure that we contemplated." App. at 1746. He concluded by stating unequivocally that if a stay were entered conditioned upon the granting of the Trustees sought, then his client "would not be prepared to close this transaction." Id. The Trustees' counsel did not thereafter argue that the Investors' counsel's statements were insufficiently probative, and therefore that suggestion here is less persuasive.

In response to this evidence of reliance, the Trustees now argue that when the Investors closed the transaction they were aware that they were taking a risk that the Trustees would be successful on appeal on the law or facts supporting their claim. The record shows, however, that all parties were well aware of the extensive legal precedent dismissing as moot appeals from unstayed consummated reorganizations. See App. at 1740 (references in the Investment Agreement); App. at 1729-30, 1741 (argument before the district court on the stay). In light of the long line of cases that recognize the prudential considerations that militate against upsetting expectations that formed an integral part of a complex reorganization, we decline to hold that the Investors were unreasonable in proceeding with their investment in reliance on the confirmation order. By the time the district court ruled, it was no longer possible to restore the parties

their earlier positions because the investment had been made, and the option to withdraw because the administrative claims exceeded the cap was no longer available to the Investors. See Specialty Equip., 3 F.3d at 1049 (claim held moot when its acceptance "would amount to imposing a different plan of reorganization on the parties").

The Trustees have not presented us with any arguments, other than the availability of the post-confirmation mechanism for administrative claims, which would weigh against all of the prudential considerations that dictate that this consummated reorganization must be left in place. Following confirmation, Continental was operated as a restructured company, and had entered into countless new relationships and transactions. To convince a court to take the action sought by the Trustees which would undermine the basis for the Investors' decision to proceed, the Trustees would have to proffer a powerful reason indeed. They have not even attempted to do so.

Our dissenting colleague does not disagree with the concept, unchallenged by any Trustee and universally accepted elsewhere, that equitable considerations may make it imprudent to upset a consummated reorganization plan. Nor do we understand the dissent to take issue with our identification of the five considerations relevant to application of that doctrine, by whatever name it is denominated. Instead, the dissent merely disagrees with application of that doctrine in this case, based on the dissent's view that the Investors factored the possibility of a reversal into their investment decision, and the dissent's "serious doubt" that the Investors banked on the 100% probability that the Trustees would recover nothing. Record support for the dissent's view has not been shown, and the district court, which was far closer to the parties and the events than we are, made a finding that there was such reliance by these Investors. See App. at 1874. In any event, the district court did not base that finding on any "100% probability" factor, and on the issue the dissent has created.

Even more important, the district court reached its conclusion based on more than one consideration, principally the facts that the reorganization plan was consummated, no stay was obtained, numerous other parties have changed their positions and numerous irrevocable transactions have since been completed as a result of the consummation of the Plan.

Without listing all of such transactions set forth by Continental in its brief, we note that among those are the distribution to unsecured creditors, the merger of Continental with debtors other than Continental with and into Continental, the investment of \$110 million in cash by Air Partners and Air Canada in the reorganized Continental, the transfer of Continental to foreign governments of various route authorities, and the assumption by the reorganized Continental of unexpired leases and executory contracts worth over \$5.0 billion. Thus, the "key issue" really is whether the district court abused its discretion in weighing the various equitable factors. While a judge on this court might reach a different equitable balance, we are not prepared to hold that the balance reached by the district court constituted an abuse of its discretion.

Under the circumstances presented here, we can see no prudential considerations that would support an attempt by an appellate court, district or court of appeals, to grant in this fashion even a limited remedy for the Trustees. That would necessarily entail imposing new debt on the reorganized company, which is a different entity than it was when the case was before the district court. Thus, we agree with the determination of the district court that the Trustees' claim was moot. We base our holding on our conclusion that it would be neither prudent nor equitable to grant the Trustees the relief they seek.

III.

CONCLUSION

For the reasons set forth we will affirm the order of the district court.

In Re: Continental Airlines
No. 94-7748

ALITO, Circuit Judge, dissenting:

The majority's decision in this case is disturbing. Much is at stake. The appellants (the "Trustees") have raised what the majority itself characterizes as "interesting and challenging questions of first impression for this court," some of "appear not to have been decided by any appellate court." Maj. Op. at 8. The district court ruled that the Trustees' arguments were likely to prevail on appeal. J.A. 17. The case is clearly not moot in the sense that the courts lack the ability to provide meaningful relief, and it seems obvious that the Trustees could receive at least some relief without undermining the plan of reorganization. Indeed, the plan itself contained a mechanism for providing such relief, and Continental represented in the bankruptcy that the Trustees would be paid under this provision if their claim was allowed. Despite all this, both the district court and the majority have refused to consider the Trustees' arguments and have thus left them without a decision on the merits by any Article III court. In producing this result, the majority relies on considerations of "prudence" and "equity," but in my view such considerations weigh strongly in favor of entertaining the Trustees' arguments.

The majority begins its analysis by identifying five factors that have been considered by other courts "in determining whether it would be equitable or prudent to reach the merits of a bankruptcy appeal." Maj. Op. at 14. These are: "(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." Id.

In this case, however, these five factors seem to boil down to basically one question, i.e., whether entertaining the Trustees' claim on the merits would upset any reasonable reliance interests. This is the essence of the third factor listed by the majority -- "whether the relief requested would affect the rights of parties not before the court." The fourth factor -- "whether the relief requested would affect the success of the plan" -- cannot justify the majority's decision to preclude the Trustees from getting any relief. (Whether or not the plan of reorganization would be imperilled if the Trustees were awarded the full measure of relief that they seek -- a matter of sharp dispute¹ -- the Appellants could plausibly argue that the Trustees cannot be given any relief without endangering the Plan.)

¹The district court wrote that "if the Court were to reverse the order confirming the Plan, it would likely put Continental back into bankruptcy." J.A. 1873. However, the Trustees argue:

It is difficult to conceive how a reorganization -- such as Continental's Plan -- that involved the restructuring of over \$71 billion in debt, and resulted in the loss of shareholder equity of \$610 million, could somehow become financially imperilled by the allowance of the Trustees' adequate protection claim. . . . Indeed, no single shred of evidence exists in the record to indicate -- or even suggest -- that Continental would be compelled to dismantle its Plan or to file for bankruptcy if the Trustees were to prevail on their adequate protection claim.

Appellants' Br. at 24 (emphasis in original; citations omitted).

plan.) And the remaining factors seem to be largely, if not entirely, subsumed within factors three and four.²

For these reasons, it seems to me that the key issue in this case is whether investors in NewCal (the "Investors") or others reasonably relied on the prediction that the Trustees would recover nothing on their claim.³ If they did, then it might be unfair to upset their reliance interests. If they did not, I see nothing unfair about entertaining that claim on the merits.

In considering the question of reliance, I will start with the Investors. Their plight looms large in the analyses of the majority and the district court. When the Investors decided to invest \$450 million in NewCal they knew or should have known that under the reorganization plan NewCal would be required to pay the Trustees' claim if it was ultimately allowed. Section 10.1 of the plan provided that NewCal would pay "Allowed Administrative Claims." **Moreover, in order to persuade the bankruptcy court to reject the Trustees' request that a cash reserve be established prior to confirmation to cover the claim, Continental argued that such a reserve was unnecessary because if the Trustees' claim was allowed it would be "an Allowed Administrative Claim which would be paid in accordance with the terms of Section 10.1 of the Plan." J.A. 1039.** In addition, v

²As the majority seems to recognize (see Maj. Op. at 14), the first factor (substantial consummation) is important in large part because investors and others are likely to have relied on a plan once this stage is reached. In addition, I would suggest that substantial consummation also marks the point at which the policy against disturbing a reorganization plan (factor four) comes prominently into play. The same would apply to be true of the second factor (the absence of a stay) since, as the majority notes (Maj. Op. at 15), the lack of a stay "permit[s] substantial consummation." Maj. Op. at 15. And as for the fifth factor ("the public policy of affording finality to bankruptcy court judgments"), if entertaining the Trustees' appeal would not upset reasonable reliance interests or undermine the reorganization, it is difficult to see why this public policy would be offended.

³Continental frames the central issue in similar terms, stating: "The relevant question . . . whether providing the requested relief would inequitably injure the interests of those whose actions in reliance upon the unstayed Confirmation Order resulted in substantial consummation." Appellee's Br. at 11.

Investors made their investment, the bankruptcy court's denial of the Trustees' claim already on appeal to the district court. Under these circumstances, any prudent investor in deciding whether to invest in NewCal on particular terms, would have taken into account the range and likelihood of possible outcomes in the Trustees' appeal, including the possibility that the appeal would be successful in whole or in part. No reasonable investor would have proceeded on the assumption that there was a 100% probability that the Trustees would recover nothing. Consequently, we would not be upsetting any reasonable reliance interests by holding that the Trustees' arguments should be considered on their merits.

In response to this argument, the majority writes:
The record shows . . . that all parties were well aware of the extensive legal precedent dismissing as moot appeals from unstayed consummated reorganizations. . . . In light of the long line of cases that recognize the prudential considerations that militate against upsetting expectations that formed an integral part of a complex reorganization, we decline to hold that the Investors were unreasonable in proceeding with their investment in reliance on the confirmation order.

Maj. Op. at 23.

If I correctly understand this passage, its reasoning is circular. According to the majority, it was reasonable for the Investors to rely on the Trustees' losing because the Investors had a reasonable basis for concluding that if they reasonably relied on the Trustees' losing the Trustees would lose. And of course the Trustees would lose because the Investors reasonably relied on the Trustees' losing because of the Investors' reasonable reliance on the Trustees' losing as a result of the Investors' reasonable reliance

The plain fact is that the Investors did not act reasonably or prudently when they relied on a calculation that there was a 100% probability that the Trustees' claim

completely fail.⁴ (Such reliance would have been no more reasonable than reliance on a calculation that there was a 100% probability that fuel prices would not increase or that any other contingency that might harm the company would not come to pass.) Instead, the Investors acted reasonably and prudently, they factored into their investment decision the possibility that the Trustees would be successful in whole or in part.⁵ And this is true of the other parties that relied on the plan. These parties, no less than the Investors, should have known that NewCal was obligated under section 10.1 of the plan to pay allowed administrative expenses and that Continental had obtained an important ruling from the bankruptcy court by representing that the Trustees' claim if allowed would be paid by NewCal under this provision.

In sum, entertaining the Trustees' claim on the merits would not upset any of the reasonable reliance interests. Nor would the mere act of entertaining those claims imperil Continental's reorganization. If the Trustees' claim was considered and then rejected on the merits (by no means a foregone conclusion), any threat to the reorganization

⁴The majority says that the "'100% probability' factor [is] an issue the dissent has created." Maj. Op. 25. However, this "factor" is implicit in the majority's reasoning. If a reasonable investor would have proceeded on the basis of the calculation that there was, let us say, a 50% probability the Trustees would ultimately recover something on their claim, then I fail to see how we would necessarily be upsetting a reasonable reliance interest by holding that the Trustees' claim had to be entertained on the merits.

⁵Although actual but unreasonable reliance interests are not relevant here, I must mention an aside that I seriously doubt that the Investors banked on a calculation that there was a 100% probability that the Trustees would recover nothing. The majority suggests that the district court made a "finding" that the Investors did so, but I am not sure that the majority has correctly interpreted what the district court wrote. The district court stated: "The Investors relied on the unstayed confirmation order in making the \$450 million investment in Continental's Plan." J.A. at 1874. This may mean no more than that the Investors, in deciding to commit the \$450 million, took into account the fact that the plan had been confirmed and had not been stayed. Taking these facts into account (which would certainly have been reasonable) is quite different from relying on a 100% probability that the Trustees' claim would be entirely unsuccessful. In any event, the district court meant to say the latter, neither the district court's opinion, Continental's brief, nor the majority's opinion cites any support in the record for this remarkable "finding."

be taken into account in framing the Trustees' relief. What the district court and majority have done -- throwing the Trustees out of court before the merits of their claims are even heard -- is unjustified and unjust.

I find it ironic that the majority invokes equity to support this result. As noted, Continental argued in the bankruptcy court that the Trustees' claim, if allowed, would be "an Allowed Administrative Claim which would be paid in accordance with the terms of Section 10.1 of the Plan." J.A. 1039. Now, Continental contends that the Trustees' claim, even if valid on the merits, should not be paid under this provision. Rewarding such a volte-face is not my idea of equity.

I am also concerned about the implications of this decision for future cases. The majority's decision may make it imperative for appellants in cases like this to seek a stay. If these appellants must post a bond in order to get a stay, then I question whether a stay is a realistic option in reorganizations of companies like Continental. And if a stay is not a realistic option in such cases, then bankruptcy judges will exercise a distressing measure of essentially unreviewable authority.

For these reasons, I respectfully disagree with the majority's decision. I would reverse the order of the district court and remand for a decision on the merits.

⁶In this case, Continental sought a supersedeas bond in the amount of \$450,000,000. J.A. at 1973. If a bond of anything approaching this magnitude is required in cases of this type in order to obtain a stay, then a stay may not be realistic.