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Bankruptcy Law - Third Circuit Requires Strict Compliance with Thirty Day Rule in Section 362(e) of Bankruptcy Code and Bankruptcy Rule 4001(b)

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BANKRUPTCY LAW—THIRD CIRCUIT REQUIRES STRICT COMPLIANCE WITH THIRTY DAY RULE IN SECTION 362(e) OF BANKRUPTCY CODE AND BANKRUPTCY RULE 4001(b)

Wedgewood Investment Fund, Ltd. v. Wedgewood Realty Group, Ltd. (1989)

When a debtor files for protection from creditors under the Bankruptcy Code,[1] all collection or enforcement actions by creditors are automatically stayed by section 362 of the Bankruptcy Code.[2] A secured creditor on whose loan the debtor has defaulted will not be able to foreclose on his interest in the debtor's property without first obtaining relief from the automatic bankruptcy stay.[3] The court will grant the creditor relief from the stay, unless the debtor is providing adequate protection for the secured party's claim, or the property securing the loan is necessary for the debtor's reorganization.[4] When Congress reformed the bankruptcy laws, it found that court delays in hearing mo-

1. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1988 & West Supp. 1989) [hereinafter Bankruptcy Code].

2. *Id.* § 362(a). Section 362(a) reads in pertinent part as follows:

> Except as provided in subsection (b) of this section, a petition filed [under the Bankruptcy Code] operates as a stay, applicable to all entities, of—
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> . . . .
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> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; . . . .

Id. There are exceptions to the stay provisions for actions involving criminal enforcement and some administrative proceedings. *Id.* § 362(b). The injunctive provisions of section 362(a) have the purpose of protecting the debtor's assets from "piecemeal liquidation" and are broad in scope, providing for a continuance of business or an orderly liquidation. L. KING & M. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 1031-32 (1985).

3. 11 U.S.C. § 362(a)(4)-(5) (1988) (acts to create, perfect or enforce security interests are prohibited after commencement of bankruptcy case). A secured creditor may request relief from the stay pursuant to section 362(d), which, if granted, will allow the secured creditor to proceed with its state law foreclosure action. *Id.* § 362(d); *see also* L. KING & M. COOK, *supra* note 2, at 1033.

4. 11 U.S.C. § 362(d) (1988). The court may grant the secured creditor relief if one of the two following conditions of section 362(d) is met:

tions to lift the automatic stay were having adverse consequences on debtors and secured creditors.[5] Congress therefore mandated strict time constraints within which the court must act; failure to act would result in automatic termination of the stay.[6] The United States Court of Appeals for the Third Circuit in *Wedgewood Investment Fund, Ltd. v. Wedgewood Realty Group, Ltd.*,[7] held that these time constraints must be strictly observed and that a waiver of these constraints by a secured party will only be found where there is clear creditor action.[8] The court also found that a bankruptcy court could reimpose a stay which had lapsed by using its general injunctive powers.[9] The Third Circuit found that a

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(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
(2) with respect to a stay of an act against property under subsection (a) of this section, if—
(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.

Id.

Adequate protection under section 361 of the Bankruptcy Code is designed to compensate parties with interests in property for decreases in the value of their interest during the bankruptcy. 11 U.S.C. § 361; Miller & Bienstock, *Adequate Protection in Respect of the Use, Sale or Lease of Property*, 1 BANKR. DEV. J. 47 (1984). Where the debtor is not providing adequate protection, a creditor may obtain relief from the stay as to that property not being protected. 11 U.S.C. § 362(d)(1). Property is not being adequately protected when the debtor fails to effectively compensate the creditor for loss in value of its collateral. Crocker Nat'l Bank v. American Mariner Indus., Inc. (*In re* American Mariner Indus., Inc.), 734 F.2d 426, 432-33 (9th Cir. 1984). This will include a secured creditor's right to repossess, and prevents the debtor and other creditors from reaping a windfall from the secured creditor's money or collateral. *See id.* at 435. *But see* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 382 (1988) (right to immediate foreclosure not protected under adequate protection).

Section 362(d)(2) may provide an alternative basis for relief from the stay. This section first requires a showing that the debtor has no equity in the property. 11 U.S.C. § 362(d)(2)(A). If the debtor has no equity in the property, the debtor must show that the property is necessary for an effective reorganization to prevent relief from being granted. *Id.* § 362(d)(2)(B). This requires "not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*." *Timbers*, 484 U.S. at 375-76.

5. Bankruptcy Reform Act of 1978, H.R. REP. No. 595, 95th Cong., 2nd Sess. 175 (1977) [hereinafter HOUSE REPORT], *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6136 ("Too often today, court delay in handling requests for relief amounts to a complete denial of relief.").

6. These time constraints are found in both the Bankruptcy Code and Bankruptcy Rules. 11 U.S.C. § 362(e) (1988) (governing time constraints for initial hearing and preliminary hearing); FED. BANKR. R. 4001(b) (if order on relief from stay motion not entered within 30 days of final hearing, stay will terminate automatically).

7. 878 F.2d 693, 698 (3d Cir. 1989) ("court failed to observe the stringent time constraints . . . resulting in termination of the automatic stay").

8. *Id.* at 698 (waiver only found where "creditor takes some action which is inherently inconsistent with adherence to the time constraints").

9. *Id.* at 700-02. The bankruptcy court draws its general injunctive powers

strict enforcement of the time constraints was the intent of Congress and should be enforced as such.[10]

Wedgewood Investment Fund, Ltd. (Wedgewood) held two purchase money notes of Wedgewood Realty Group, Ltd. (Realty) secured by purchase money mortgages on Realty's property.[11] Upon default by Realty on the notes, Wedgewood commenced a foreclosure action in state court to recover the real estate.[12] Prior to a hearing on the foreclosure action, Realty filed a petition for relief under Chapter 11 of the Bankruptcy Code which automatically stayed the state court proceedings.[13]

Soon after the bankruptcy filing, Wedgewood moved for relief from the stay in order to proceed with its foreclosure action.[14] It filed its motion on July 20, 1988, and the first hearing held on the motion was on September 27, 1988.[15] At the close of the hearing both Wedgewood and Realty indicated they had completed their respective arguments.[16] On October 3, 1988, however, Wedgewood delivered a letter to the bankruptcy judge which argued a new case relevant to Wedgewood's motion for relief.[17] The bankruptcy court then granted Realty until Oc-

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from section 105(a) of the Bankruptcy Code which states: "The court may issue any order, . . . that is appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (1988). An order issued under this section may also be issued *sua sponte*. *Id.* For a discussion of the powers conferred by section 105(a) and its general injunctive powers, see *infra* notes 43-51 and accompanying text.

10. *Wedgewood*, 878 F.2d at 696-98.

11. *Id.* at 695. The notes were for an amount in excess of $1,365,000 and were secured by Realty's property in Florida. *Id.* This property constituted all of Realty's assets. *Id.*

12. *Id.* The foreclosure action was commenced on June 3, 1988 and a hearing was scheduled for July 1, 1988. *Id.*

13. *Id.* On June 30, 1988, Realty filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey. *Id.* Under section 362(a), the foreclosure action was automatically stayed as of that date. *Id.* Chapter 11 allows a debtor to continue to operate its business with protection from creditors if there is a hope of successful reorganization. United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983).

14. *Wedgewood*, 878 F.2d at 695. Wedgewood moved pursuant to section 362(d) for relief from the stay, but the court's opinion is not concerned with the substantive merits of the claim for relief. *Id.* The bankruptcy court eventually denied Wedgewood's motion for relief and continued the effect of the stay as to Wedgewood. *Id.* at 696.

15. *Id.* at 695. Although the hearing was originally scheduled for August 15, 1988, it had been continued at the request of both parties and the court. *Id.*

16. *Id.* At the conclusion of the hearing, the court asked both parties if they wanted to submit proposed findings of fact or conclusions of law, and both declined. *Id.* Counsel for Wedgewood indicated that she was "ready to shoot the dice" and was prepared to "sign off." *Id.* These statements turned out to be important to the court's analysis on the nature of the September 27 hearing, whether it was preliminary or final. *Id.* at 698.

17. *Id.* at 695. The day after the September 27 hearing, Wedgewood delivered copies of the exhibits presented at trial, and also submitted a letter directing the judge's attention to certain portions of the transcript. *Id.* On

tober 26, 1988 to respond to Wedgewood's letter.[18]

On November 14, 1988, Wedgewood notified the court that it considered the automatic stay as having terminated pursuant to Federal Bankruptcy Rule 4001(b) because the court failed to enter an order on the motion for relief within thirty days of the September 27 hearing.[19] The bankruptcy court rejected this assertion because it felt that Wedgewood's supplemental letter effectively carried the hearing date to October 26, a date within the thirty day time limit.[20] On November 23, 1988, the bankruptcy court entered an order continuing the stay against Wedgewood, which was subsequently upheld by the district court on appeal.[21]

In *Wedgewood*, the Third Circuit first had to decide whether the stay terminated automatically as a result of the bankruptcy court's alleged failure to observe the time constraints.[22] Judge Rosenn, writing for the majority, began by looking at the legislative history behind Congress' imposition of time constraints on bankruptcy court rulings on relief from stay motions.[23] The court acknowledged that the primary purpose of the stay provisions of the Bankruptcy Code is to protect the debtor and to provide a "breathing spell."[24] The court further noted that the Bankruptcy Code seeks to protect the interests of secured creditors by allowing them to obtain relief from, or a modification of, the stay where

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October 3, Wedgewood delivered a second letter to the judge which argued the relevance of a new case to the motion for relief and provided more support for its position. *Id.*

18. *Id.* Realty requested and received time to respond to Wedgewood's supplemental letter, and the bankruptcy judge gave Realty until October 26, 1988. *Id.* Although Wedgewood did not contest the granting of additional time to respond, it was not informed that Realty would have 20 days to respond, a response date more than 30 days from the September 27 hearing. *Id.*

19. *Id.* at 696.

20. *Id.* The court said it had to wait until the final submissions by the parties before it could make a final decision on the motion for relief from the stay. *Id.*

21. *Id.* The court denied the motion on the merits of Wedgewood's motion for relief from the stay and continued the effect of the stay. *Id.*

22. *Id.* at 696.

23. *Id.*; *see* HOUSE REPORT, *supra* note 5, at 344, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6300. The House Report states that the time constraints provide a protection not available under prior law to secured creditors. *Id.* The Senate Report takes a similar posture on section 362(e) of the Bankruptcy Code. Bankruptcy Reform Act of 1978, S. REP. No. 989, 95th Cong., 2d Sess. 53 [hereinafter SENATE REPORT], *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5840. Both reports consider a failure to observe the time constraints as resulting in automatic termination of the stay. *Id.*; HOUSE REPORT, *supra* note 5, at 344, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6300.

24. *Wedgewood*, 878 F.2d at 696; SENATE REPORT, *supra* note 23, at 54, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5840 ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts . . . and all foreclosure actions.").

the creditor has made the requisite showing.[25] When reforming the bankruptcy laws, the court observed, Congress found that secured creditors and debtors were being prejudiced by court inaction and delays on relief from stay actions.[26] The court also found that Congress streamlined the procedure on relief from stay actions, and, among other reforms, set up time limits within which the bankruptcy court would have to act.[27] The *Wedgewood* court concluded that Congress envisioned that any failure by a bankruptcy court to observe these time limits would result in automatic termination of the stay.[28]

The *Wedgewood* court then outlined the procedural aspects of relief from stay motions. Within thirty days of the creditor filing the motion for relief from the stay, the bankruptcy court must hold a hearing on that motion.[29] If that hearing is a preliminary one, the court must issue a preliminary ruling at its conclusion and schedule a final hearing within thirty days.[30] If the hearing held is a final hearing, the court has thirty

25. *Wedgewood*, 878 F.2d at 697 (section 362(d) permits secured creditor to request that court grant it relief from stay). For the text of section 362(d) and a discussion of what it requires a creditor to show to obtain relief from the stay, see *supra* note 4 and accompanying text.

26. *Wedgewood*, 878 F.2d at 697 ("[U]nnecessary delays and adverse effects on the bankrupt estate's assets and the rights of secured creditors . . . ha[ve] historically been occasioned by inaction of the bankruptcy courts . . . .").

27. *Id.* The time limits which were established can be found first in section 362(e):

> (e) Thirty days after a request under subsection (d) of this section for relief from the stay . . . such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing . . . . A hearing under this subsection may be a preliminary hearing . . . . If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

11 U.S.C. § 362(e) (1988). In conjunction with these time limits the Federal Bankruptcy Rules provide further that the stay will terminate within 30 days of the final hearing if an order continuing the stay is not entered within that time. FED. BANKR. R. 4001(b). "The intent of the rule is to prevent a continuance of the stay solely due to court inaction." 8 COLLIER ON BANKRUPTCY ¶ 4001.04 (15th ed. 1989).

The procedure was also streamlined into a one issue motion practice instead of the traditional adversary proceeding requiring a complaint and answer. *Id.* at ¶ 4001.03. The only issue at a hearing on a motion for relief from stay will be whether the stay should be continued in order to shorten the time involved. *Id.*; *see also* HOUSE REPORT, *supra* note 5, at 344, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6300.

28. *Wedgewood*, 878 F.2d at 697. For a discussion of whether this result is fair to the debtor, see *infra* notes 73-77 and accompanying text.

29. *Wedgewood*, 878 F.2d at 697.

30. *Id.* A preliminary hearing requires at least that the bankruptcy judge hear evidence from both sides and make a finding on whether the debtor may prevail. *In re* Marine Power & Equip. Co., 71 Bankr. 925, 928 (W.D. Wash. 1987). A pre-hearing conference with a judge and both sides is not sufficient.

days in which it may continue the stay pending a final decision or issue a final decision on the continuance of the stay.[31] The court stated that "[t]hese time constraints are an essential underpinning to the automatic stay provisions of the Code."[32] Thus, the court concluded, a failure to observe any of the applicable time constraints will result in the stay terminating automatically as a matter of law.[33]

With the law and supporting policy established, the court addressed the key legal determination of the lower courts: when the final hearing took place.[34] The Third Circuit, contrary to the bankruptcy court, found the September 27 hearing to be the final hearing.[35] The conduct of both the court and the parties during and after the hearing was considered dispositive.[36] Because an order on the stay was not issued within thirty days of September 27, the court held that the stay terminated automatically.[37] Even assuming that the September 27 hearing was only preliminary, as the bankruptcy court found, section 362(e) was still violated, according to the *Wedgewood* court, because the bankruptcy court failed to issue a preliminary ruling and schedule a final hearing.[38]

Realty attempted to show that Wedgewood waived the time constraints by its submission of a letter to the bankruptcy judge with supplemental legal argument.[39] The Third Circuit entertained this argument

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Id. The court must also make a preliminary finding on continuance of the stay and schedule a final hearing for the hearing to be preliminary. *Wedgewood*, 878 F.2d at 697.

31. *Wedgewood*, 878 F.2d at 697-98.

32. *Id.* at 698.

33. *Id.* at 697.

34. *Id.* at 698. The Third Circuit concluded that the hearing of September 27, 1988 was final despite the fact that the bankruptcy court had characterized it as preliminary. *Id.*

35. *Id.* (court considered preliminary and final hearings to have merged and would consider September 27 hearing as final). Section 362(e) provides for this result: "A hearing under this subsection may be the preliminary hearing, or may be consolidated with a final hearing . . . ." 11 U.S.C. § 362(e) (1988).

36. *Wedgewood*, 878 F.2d at 698. Three factors influenced the court's decision on this matter: (1) both parties advised the court on September 27 that they were ready for a final ruling; (2) the court failed to issue a preliminary order; and (3) the court did not schedule nor did either party request that the court schedule a final hearing. *Id.*

37. *Id.* Thirty days from the September 27 hearing was October 26, and because no order continuing the stay was made within that period, section 362(e) was violated. *Id.*

38. *Id.* According to the Third Circuit, the bankruptcy court failed to proceed properly on two grounds, assuming it was correct that the September 27 hearing was preliminary. *Id.* First, no preliminary ruling was issued at its conclusion as required by the Bankruptcy Code. 11 U.S.C. § 362(e) (1988). In addition, the court failed to hold a final hearing within 30 days of the preliminary hearing. *Wedgewood*, 878 F.2d at 698.

39. *Wedgewood*, 878 F.2d at 698-99. The debtor had argued that this was a waiver, because it required a response which would postpone the time when the judge could make a final ruling. *Id.* at 699.

but found the law to require a clear waiver by Wedgewood which would be "inherently inconsistent" with the imposed time constraints.[40] The court looked at the nature of the submissions by Wedgewood and their length, and noted that because a proper response could have been made within the time constraints, no waiver was evident.[41] The inevitable result, according to the *Wedgewood* court, was that the stay terminated as to Wedgewood.[42]

The *Wedgewood* court still had to address the second issue raised by Realty: whether the bankruptcy court had the power, through its general injunctive powers, to reimpose the stay after its lapse.[43] This was a question of first impression in the Third Circuit, requiring the court to reconcile conflicting bankruptcy court decisions within the circuit addressing the scope and applicability of the court's equitable powers when faced with conflicting statements by Congress.[44] The court examined the two conflicting lines of authority and decided to follow the one which would allow the court to reimpose the stay.[45] The court recognized the concern of the opposing line of cases, drawn from the legislative history of the automatic stay provisions, which disapproved of a circumvention of legislative will by a broad interpretation of the bank-

40. *Id.* The court looked at a series of decisions on waiver of the time constraints and found that clear creditor action was required. *See, e.g.*, Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982) (implied waiver where creditor attends final hearing outside 30 day limit without objection); *In re* McNeely, 51 Bankr. 816, 821 (Bankr. D. Utah 1985) (creditor failed to schedule hearing within 30 day period, resulting in waiver); *In re* Small, 38 Bankr. 143, 147 (Bankr. D. Md. 1984) (filing of discovery request necessitating reply outside 30 day period results in waiver by that creditor).

41. *Wedgewood*, 878 F.2d at 699. The bankruptcy court could have ordered a response and provided a decision within the 30 day period. *Id.* The court's actions were the sole cause of the delay. *Id.* In addition, Wedgewood could not know of the extended response period so as to agree to its effect. *Id.*

42. *Id.*

43. *Id.* These powers are contained in section 105(a) of the Bankruptcy Code which provides that the "court may issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (1988). Realty argued that this section would allow the bankruptcy court to issue an order reimposing the stay even after its lapse through inadvertence of the bankruptcy court. *Wedgewood*, 878 F.2d at 699-700.

44. *See Wedgewood*, 878 F.2d at 699-700. *Compare In re* Willbet Enter., Inc., 43 Bankr. 90, 92-93 (Bankr. E.D. Pa. 1984) (court cannot order appointment of professional under section 105(a) where Congress has determined that none should be appointed) *with* Spagnol Enter. v. Atlantic Fin. Fed. Sav. Assoc., 33 Bankr. 129, 131 (W.D. Pa. 1983) (court may continue stay where it has lapsed inadvertently under section 362(e) by using section 105(a)) *and In re* Clark, 69 Bankr. 885, 892-93 (court found that even if there was lapse in stay, court has power to reinstate through section 105(a)), *aff'd in relevant part*, 71 Bankr. 747 (Bankr. E.D. Pa. 1987).

45. *Wedgewood*, 878 F.2d at 701. The *Wedgewood* court stressed, however, that reimposition of the automatic stay through section 105(a) would be appropriate only when requested by the debtor and not ordered by the court *sua sponte*. *Id.*

ruptcy court's injunctive powers.[46] The Third Circuit considered the legislative history behind the injunctive power provisions to be stronger than that behind the automatic stay provisions regarding time constraints.[47] The court found that the bankruptcy court's injunctive powers could be used to reimpose a stay which lapsed because of the court's own inaction.[48] The *Wedgewood* court reasoned that secured creditors would not be harmed because the stay would be reimposed only if the debtor meets standards more stringent than those governing what a creditor would need for relief from the stay.[49] That fault would lie with the bankruptcy court in such a case was important to the court's recon-

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46. *Id.* at 700. The general principle behind this line of cases is that a bankruptcy court may not authorize something through its equitable powers which "Congress had explicitly considered and limited." *In re* Dominelli, 788 F.2d 584, 586 (9th Cir. 1986) (bankruptcy court not authorized to impose creditor's legal expenses on debtor in chapter 7 through section 105(a)). The courts following this approach hold that Congress' imposition of time constraints mandate strict adherence and preclude the use of the court's equitable powers. *In re* Marine Power & Equip. Co., 71 Bankr. 925, 929-30 (W.D. Wash. 1987). "In extraordinary circumstances the equitable powers of this Court may be utilized to prevent injury or correct errors, but nullification of the stay termination resulting from the operation of § 362(e) is not one of them." *Id.* at 930 (quoting *In re* Wood, 33 Bankr. 320, 322-23 (Bankr. D. Idaho 1983)). The *Marine Power* court felt that "[t]o [reimpose the stay] is to judicially legislate and avoid clear and expressly stated congressional intent." *Marine Power*, 71 Bankr. at 929 (quoting *Wood*, 33 Bankr. at 322). These courts considered the statutory language of section 362(e) to be the controlling law, and did not want a broad interpretation of section 105(a) to circumvent it. *Wedgewood*, 878 F.2d at 700.

47. *Wedgewood*, 878 F.2d at 701. "Congress clearly envisioned that section 105(a) would be available to issue an injunction on a case-by-case basis in situations expressly excepted from the automatic stay under section 362(a)." *Id.* As evidence of this intent, the court relied on the fact that section 105(a) was available to the court to enjoin those proceedings which Congress had expressly removed from the scope of the automatic stay. *Id.* Because the court could find no express intent on the part of Congress to preclude the use of section 105(a), it determined that it could be used to reimpose the stay. *Id.*

48. *Id.* at 700-01. The court determined the procedure for reimposing the stay is similar to seeking an injunction:

> In order to obtain section 105(a) injunctive relief, the debtor, in accordance with Bankruptcy Rule 7065 and Fed. R. Civ. P. 65 has the burden of demonstrating to the court the following: substantial likelihood of success on the merits, irreparable harm to the movant, harm to the movant outweighs harm to the nonmovant, the injunctive relief would not violate public interest.

Id. Reimposition of the stay will only be allowed "when the equities support such action" and the above standards for relief are met. *Id.* at 701.

The Fifth Circuit supports this position. *See In re* Martin Exploration Co., 731 F.2d 1210, 1214 (5th Cir. 1984).

49. *Wedgewood*, 878 F.2d at 700. Because section 105(a) standards must be met, a more stringent standard is set for reimposition of the stay. *See id.* at 700-01. This will prevent any harm to the creditor, because the debtor would have been entitled to a continuance of the stay but for a timely order. *See id.* at 701. For a discussion of the standard for relief under section 362(d) as compared with that required under section 105(a), see *supra* note 4 and accompanying text.

ciliation of the apparent conflict between sections 105(a) and 362(e).[50] In the instant case, this analysis was of no avail to Realty because the court found that Realty did not properly pursue it below.[51]

The court in *Wedgewood* followed the clear congressional mandate regarding time constraints on relief from stay motions.[52] Court inaction, due to overcrowding and outdated procedure, was the reason behind the enactment of the time limits.[53] Congress had changed and streamlined the procedure for the express purpose of protecting secured creditors.[54] It recognized the need for quick repossession where the debtor was not effectively using the property and could not provide adequate protection.[55] The Third Circuit, therefore, advanced express congressional policy in its opinion in *Wedgewood*.

Although the opinion does not change or expand the substantive requirements of section 362(e)'s thirty day time constraint,[56] the court

50. *Wedgewood*, 878 F.2d at 701. The court stated, "To deny consideration of relief under section 105(a) where the automatic stay has terminated because the court, through no fault of the debtor, has failed to issue a timely order effectively strips a debtor of all protection." *Id.*

51. *Id.* at 702. In *Wedgewood*, Realty did not apply to the bankruptcy court for section 105(a) relief, but only raised the issue on appeal. The record below did not support the granting of such relief. *Id.*

52. HOUSE REPORT, *supra* note 5, at 175, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6136.

> Creditors may obtain relief from the stay if their interests would be harmed by the continuance of the stay. The bill enunciates the standards for relief, and further provides that unless the court acts quickly, the relief is automatic on request by a creditor. Too often today, court delay in handling requests for relief amounts to a complete denial of relief.

Id. (footnotes omitted). The court described the time constraints contained in section 362(e) as an "essential underpinning to the automatic stay provisions of the Code." *Wedgewood*, 878 F.2d at 698.

53. *See* HOUSE REPORT, *supra* note 5, at 175, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6136. Congress noted that court delay had effectively denied relief to secured creditors. *Id.* One circuit court has considered court overcrowding an insufficient basis for the reimposition of a lapsed stay through section 105(a). *See In re* Looney, 823 F.2d 788, 792-93 (4th Cir.), *cert. denied*, 484 U.S. 977 (1987). In *Looney*, the court had acknowledged it had the power under section 105(a) but found that an overcrowded docket was not a proper basis for using that power. *Id.*

54. HOUSE REPORT, *supra* note 5, at 344, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6300. Section 362(e) was intended to provide protection for secured creditors not available previously. *Id.*

55. SENATE REPORT, *supra* note 23, at 52-53, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5838-39. The Senate Report, in discussing section 362(e) found that the bankruptcy laws provided too safe a haven for "single asset apartment type cases." *Id.* at 53, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5839. Non-operating real estate entities would receive strict scrutiny in section 362 cases. *Id.* The Senate also added that section 362(d) actions should be given calendar priority so as not to prejudice the rights of secured creditors. *Id.*

56. Three other circuits in looking at section 362(e) have formulated almost identical schedules to the one set forth in *Wedgewood*. In the Eleventh Circuit the

does provide clear guidance on what will be considered a waiver of these time constraints.[57] Waiver of the time constraints was a major argument of the debtor in the instant case.[58] Realty had argued that the post-hearing letter by Wedgewood was an implied waiver, and both the bankruptcy court and district court on appeal had agreed.[59]

The Third Circuit's strict construction of what will be considered an implied waiver requires clear creditor action inconsistent with the time constraints of the Bankruptcy Code and Rules.[60] The effect of *Wedgewood* can be seen in a recent decision of a bankruptcy court in the Third Circuit.[61] In *In re City Wide Press, Inc.*, the bankruptcy court went through a detailed procedural history in its opinion for the express purpose of showing waiver by the party seeking relief from the stay.[62] Because of the tough stance taken by the *Wedgewood* court, the bankruptcy courts in the Third Circuit may be as cautious as the *City Wide* court in handling section 362 cases.

The court, in *Wedgewood*, did recognize that court inaction may be the cause of harm to an innocent debtor.[63] Accordingly, the court affirmed the power of the bankruptcy court to issue an injunction to reimpose the stay where it has lapsed because of the time limits.[64] This alternative is not available on a regular basis, and the debtor must show that equitable relief is required.[65] The court is left with the necessary flexibility to be equitable in specific cases, but it may not circumvent

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court found that section 362(e) and Federal Bankruptcy Rule 4001 set up three thirty-day periods which governed relief from stay procedure. Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982). This schedule was followed by both the Fifth and Fourth Circuits. *See In re* Looney, 823 F.2d 788, 792-93 (4th Cir. 1987) (citing *In re* Martin Exploration Co., 731 F.2d 1210, 1213 (5th Cir. 1984) (citing *Borg-Warner*, 685 F.2d at 1308)). All three use a schedule similar to the one found in *Wedgewood*. *See Wedgewood*, 878 F.2d at 697.

57. *Wedgewood*, 878 F.2d at 698-99.

58. *Id.*

59. *Id.* Both courts found the post-hearing submissions to have pushed back the effective date of the final hearing to October 26. *Id.* They had considered the submission to be a waiver of the 30 day rule. *Id.* The Third Circuit, however, required a clearer indication of waiver. *Id.* at 698.

60. *Id.* at 698-99. The court found that the bankruptcy court could have ordered a response to the letter of Wedgewood within the 30 day period so no implied waiver was shown. *Id.* at 699.

61. *In re* City Wide Press, Inc., 102 Bankr. 431 (Bankr. E.D. Pa. 1989).

62. *Id.* at 432-34. In *City Wide*, the procedural history took more than two pages to complete, and the judge detailed almost every action by the moving creditor. *Id.*

63. *Wedgewood*, 878 F.2d at 701. The bankruptcy court in *Wedgewood* was the sole cause of the delay and the resulting termination of the stay. *Id.*

64. *Id.*

65. *Id.* The debtor must meet the section 105(a) standards for an injunction which require a greater showing than a creditor would need for relief from the stay. *Id.*

congressional policy by widespread use of section 105(a).[66] The court termed this a "safety net" for the debtor.[67]

An important implication for bankruptcy practitioners in the Third Circuit will be how to handle section 105(a) motions to reimpose the stay.[68] The motion for reimposition of the stay must come from the debtor and not from the court *sua sponte*.[69] The debtor must meet all of the procedural and substantive requirements of an injunction in the federal system.[70] These modifications of section 105(a) will protect both the debtor and creditor and advance the congressional scheme.[71]

The reasoning of courts which refuse to allow section 105(a) to be invoked, where the inadvertence of counsel or the court has caused section 362(e) to be triggered, has been criticized as harsh and wooden.[72] *Wedgewood* demonstrates that it is manifestly unfair for bankruptcy courts not to consider the use of section 105(a) where it will facilitate the rehabilitation of the debtor.[73]

This safety net provided by section 105(a) tempers any harsh results which a strict application of section 362(e) would otherwise bring about.[74] Absent the section 105(a) safety net, a minor procedural foulup could cause the debtor to lose a necessary asset where, if a timely order had issued or a hearing been held, the stay would have continued.[75] Because the bankruptcy court will only use section 105(a) to

66. *Id.* The court found that the "interplay between section 362 and section 105 advances rather than undermines Congressional objectives . . . ." *Id.*

67. *Id.*

68. *See id.* at 700-01.

69. *Id.* at 701. "The relief under section 105(a), however, is neither automatic nor may it be imposed *sua sponte* by the court." *Id.* The bankruptcy court may only issue injunctions in accordance with the bankruptcy rules which allow injunctions only "on application of a debtor, trustee or debtor-in-possession." FED. BANKR. R. 7065; *see In re* Looney, 823 F.2d 788, 792 (4th Cir. 1987).

70. These requirements are more fully set forth at *supra* note 49. The court found that these requirements are necessary to prevent any harm to the creditor. *Wedgewood*, 878 F.2d at 701.

71. *Wedgewood*, 878 F.2d at 701. The court found that the "interplay between section 362 and section 105 advances rather than undermines congressional objectives by protecting the interests of both the creditor and debtor." *Id.* The creditor is protected by limiting the occasions where section 105(a) is applicable, and the debtor is protected by allowing the use of section 105(a) to reimpose the stay in proper circumstances. *Id.*

72. *In re* Clark, 69 Bankr. 885, 893 (Bankr. E.D. Pa. 1987).

73. For an example of such unfair treatment, see *In re* Wood, 33 Bankr. 320, 321 (Bankr. D. Idaho 1983) (debtor denied section 105(a) relief allegedly would have been able to formulate plan and provide adequate protection).

74. A bankruptcy court in the Third Circuit which approved of the use of section 105(a) to reinstate a lapsed stay, found the reasoning of the opposing line of cases to be "admittedly harsh, and . . . wooden." *In re* Clark, 69 Bankr. 885, 893 (Bankr. E.D. Pa. 1987).

75. Two cases where a procedural foulup caused a lapse in the stay are examples of the extreme hardship which can be caused where there is no section 105(a) safety net.

reimpose the stay where the stay would have been continued anyway, there is no harm to the creditor.[76] By requiring a strict application of section 362(e), while allowing an expanded section 105(a) safety net, the court has fashioned a workable and fair approach to the procedural aspects of relief from stay motions.

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In *In re Marine Power Equipment Company* the court failed to hold a timely hearing, and the secured creditor, the United States, was able to foreclose on 28 tugs and barges valued at 53.6 million dollars. 71 Bankr. 925, 927 (W.D. Wash. 1987). The district court would not even consider a modification of the requirements of section 362(e) even for "an apparent good reason." *Id.* at 929.

Marine Power relied on the decision in *In re Wood* for its conclusion that section 105(a) cannot be used to ameliorate section 362(e). *Id.* at 929-31. In *In re Wood*, although the counsel for the debtor inadvertently failed to make a hearing request and the court considered the result harsh, the court refused to consider using section 105(a), because it found that to do so was improper judicial legislating. 33 Bankr. 320, 322 (Bankr. D. Idaho 1983). This resulted even though the debtors were allegedly able to provide adequate protection and formulate a workable plan. *Id.* at 321.

76. *Wedgewood*, 878 F.2d at 701.