



**The Honorable William R. Sawyer  
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## **A FEW POINTS ON TOLLING IN BANKRUPTCY CASES**

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The practice of law is replete with time-based deadlines of all kinds and bankruptcy law practice even more so. Paradoxically, the automatic stay which arises pursuant to 11 U.S.C. § 362(a), prevents one from filing most civil actions and taking many other actions which are subject to deadlines, most notably, the statute of limitations. Just as one may not sit and stand at the same time, one may not act and be stayed simultaneously. The purpose of this article is to provide a refresher for the practitioner on common tolling problems and supply a guide to finding and understanding relevant tolling provisions.

**1. 11 U.S.C. § 108.** Section 108 of the Bankruptcy Code provides as follows:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of \_

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of \_

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable

nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of\_

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

This is probably the most familiar of the tolling provisions and the one practitioners look to first.

There are several things the practitioner should bear in mind. First, limitations periods in actions either against the debtor or by the debtor against others are tolled. Second, in addition to the filing of civil actions; notices, demands, and the performance of other acts are also tolled. Third, actions against co-debtors under sections 1201 and 1301 are also extended.

**2. Equitable tolling is alive and well.** As the Bankruptcy Code contains several tolling provisions, one may make a creditable argument that equitable tolling is not available in bankruptcy. Not so. The Supreme Court laid that argument to rest ten years ago in Young v. United States, 535 U.S. 43, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002).

In Young, the Supreme Court was faced with the question of: Is the three-year period dealing with whether taxes are priority and dischargeable tolled by intermediate bankruptcy filings? See 11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8)(A)(i). The Bankruptcy Code provides that taxes do not discharge if the return is due less than three years prior to the bankruptcy filing.

This suggests that the Internal Revenue Service should have three years to try and collect its

taxes before they can be discharged in bankruptcy. The problem arises where the debtor may have had one or more prior cases pending during the three-year look-back period. For example, assume that Joe Businessman files his tax return for the year 2000, on April 15, 2001. Assume further that Joe reported a liability in the amount of \$100,000, none of which he paid. Assume next that he filed a petition in bankruptcy pursuant to Chapter 11 on April 16, 2001 and that the case was pending until April 16, 2004, when it was dismissed because Joe could not get a plan confirmed. On April 17, 2004, Joe files another petition in bankruptcy, this time under Chapter 7 and he contends that his tax liability for 2000 is dischargeable because the return was due more than three years prior to the filing of the Chapter 7 petition.

If one were to read only the plain language, black letter law of the Bankruptcy Code, one would find that—prior to the enactment of BAPCPA in 2005—there were no tolling provisions explicitly applicable to the three-year look-back period of § 507(a)(8)(A)(I). Therefore, but for equitable tolling, one could avoid the payment of taxes by way of serial bankruptcy filings. In Young, the Supreme Court stated the following:

1. It is hornbook law that limitations periods are customarily subject to equitable tolling. 535 U.S. 43, 49.
2. Congress must be presumed to draft limitations periods in light of their background principles. Id. at 49-50.
3. This is doubly true when Congress is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and apply principles and rules of equity jurisprudence. Id. at 50.

The Supreme Court's findings in Young make it evident that equitable tolling applies in

bankruptcy. This means that in the case of Joe Businessman, the filing of his first case tolled the three-year period and the clock only started ticking again the day his case was dismissed. Thus, he would still be liable for 2000 taxes in his second case filed immediately upon the dismissal of his first case.

**3. Tolling under the hanging paragraph of § 507(a)(8).** Bankruptcy practitioners who do Chapter 13 cases are no doubt familiar with the now famous hanging paragraph of § 1325(a), but many may have forgotten about a less known hanging paragraph at the bottom of § 507(a)(8). That provision is as follows:

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

11 U.S.C. \_ 507(a)(8).

This hanging paragraph codifies the result in Young, involving a three-year lookback period, but goes further. It would include any tax under paragraph § 507(a)(8), but it also provides tolling if a taxpayer demands a hearing pursuant to 26 U.S.C. § 6330. The practice pointer here is that when a taxpayer is fighting off collection efforts by the Internal Revenue Service, yet hoping to discharge taxes in a future bankruptcy filing, one must bear in mind that the three-year look-back period will be tolled during the pendency of any proceedings resulting from a taxpayer's demand for an administrative hearing.

**4. Tolling pursuant to § 507(a)(8)(A)(ii).** Given the Supreme Court decision in

Young and the tolling provision under the hanging paragraph, one might reasonably wonder what is the point of the tolling provisions in § 507(a)(8)(A)(ii), which are as follows:

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of\_

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days[.]

One should first bear in mind that this tolling provision predates both BAPCPA's hanging paragraph addition and the Supreme Court's decision in Young. A second thing of interest here is that offers in compromise are mentioned here, while they are not explicitly mentioned in the hanging paragraph. It would not appear to be logical to toll the look-back period for periods in which an administrative hearing was demanded, but not while an offer in compromise was pending. This ambiguity may be of interest to practitioners.

### **CONCLUSION**

Just as one cannot sit and stand at the same time, one cannot act and be stayed simultaneously. This tension creates a need for tolling almost any period of limitation or deadline for one to act. The small number of statutes on this point do not fit together well and as a result, lead to ambiguities. Depending upon whether a narrow or broad construction of the relevant tolling provisions best suits a client's interest, a wide array of arguments are available to the practitioner.

