DOES THE AUTOMATIC STAY OF THE BANKRUPTCY CODE TRIGGER THE ILLINOIS SAVINGS STATUTE?: WHY THE ILLINOIS SUPREME COURT NEEDS TO ADDRESS THE ISSUE

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I. INTRODUCTION

As the practice of law becomes more complex, lawyers find themselves highly specialized and unacquainted with other areas of law, which can lead to problems when two areas of law intersect. Many tort litigators[1] are unfamiliar with federal bankruptcy law; and the overlap between these areas of law causes constant problems for a trial lawyer. One reason for this confusion is the automatic stay of the Bankruptcy Code.[2] Civil litigators need to understand how it works to stay tort claims, how and when it should be lifted and how it affects the plaintiff's statute of limitations period for filing a claim. This paper assumes a basic understanding of these concepts and thus I will not address them in detail. Instead, the focus of the paper is the Illinois Supreme Court's decision in *Garbe Iron Works, Inc. v. Priester*.[3] *Garbe* held that a plaintiff's state court statute of limitations period is stayed by the automatic stay of the bankruptcy code upon the petition of the debtor defendant for bankruptcy. Therefore, when the debtor defendant emerges from bankruptcy, a plaintiff will have the total number of days that the automatic stay was in place added to, and extending, the regular statute of limitations period to file their underlying claim.[4]

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1. The arguments herein apply to all claims, not just torts, but for the sake of simplicity I will refer to tort claims herein.
2. 11 USC § 362 (2006).
3. Garbe Iron Works, Inc. v. Priester, 457 N.E.2d 422 (1983).
4. *Id.* This decision extends the time a plaintiff can file a claim in state court long after the debtor has emerged from bankruptcy, and although the practical consequences of filing a claim years

In this paper I will argue that the plain language, legislative intent and policy arguments favor the interpretation that 11 U.S.C § 108(c) of the Bankruptcy Code does not include the automatic stay, § 362. This would mean that the plaintiff's state court statute of limitations period is not tolled by the debtor defendant filing for bankruptcy in contradiction to the *Garbe* decision. Furthermore, I argue that that the Illinois Savings Statute[5] is the type of statute referred to in §108(c) and thus could serve to toll plaintiff's statute of limitations period. However, I argue that the Illinois Savings Statute is not a "defined savings statute"[6] and thus it will only toll plaintiff's statute of limitations period while the defendant debtor is in bankruptcy if it specifically incorporates the automatic stay of the Bankruptcy Code. I believe it does not.

Finally, in 2008, the Central District of Illinois decided the *Kakkanathu* case, in which the court adopted the arguments of the majority jurisdictions and held that § 108(c) does not incorporate the automatic stay of the bankruptcy code through the suspension clause.[7] Therefore, there is currently a discrepancy between the state and federal jurisdictions in Illinois giving further urgency to the necessity of revisiting the *Garbe* decision.

II. BASIC CONCEPTS IN THE TORT/BANKRUPTCY NEXUS

The first question a tort practitioner, both plaintiff and defense counsel, has to ask when a complaint is to be filed, or has been filed, against a debtor in bankruptcy is whether the claim is a pre-petition claim or a post-petition claim. The petition date is the date the debtor files for bankruptcy, and if the plaintiff's claim "accrued" before the petition date, then it is a pre-petition claim. When the complaint was filed is irrelevant to the determination of when the claim accrues—the question of when a claim "accrues" is actually more complicated and differs depending upon whether it is a tort claim, a contract claim, a third-party complaint for contribution or any other claim. Analyzing when a claim accrues is a paper in and of itself; however, to avoid being compendious I will assume herein a basic personal injury tort claim has been filed, and in that case the claim accrues on the date of injury.[8] If the date of injury is before the date of the

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after the debtor emerges from bankruptcy probably deter the practice of doing so, it is important for the court to readdress this issue and, I believe, overturn the *Garbe* decision.

5. 735 ILL. COMP. STAT. 5/13-216 (2010).

6. Although section 108(c)(1) refers to "suspension" of time limits, this section "does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes." Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1073 (2d Cir. 1993).

7. Kakkanathu v. Rohn Indus., Inc., No. 05-1337, 2008 WL 681485 (C.D. Ill. 2008).

8. *In Re* Pettibone Corp., 110 B.R. 848 (Bankr. N.D. Ill. 1990).

bankruptcy petition, then the plaintiff has a pre-petition claim.[9] Pre-petition claims are subject to the automatic stay of the Bankruptcy Code while post-petition claims are allowed to proceed.[10] I will only be referring to pre-petition claims herein as post-petition claims are not stayed by the automatic stay of the bankruptcy code and therefore not affected by the *Garbe* decision.

When the automatic stay is in place, any claim filed by the plaintiff is technically in violation of the stay, and the plaintiff can be held in contempt of the bankruptcy court.[11] Furthermore, under Illinois law, the tort claim is void *ab initio*, as if the complaint never existed, and therefore it has no legal existence.[12] In such a scenario, plaintiff's counsel needs to file a motion for relief from the automatic stay in the Bankruptcy Court in order to obtain permission from the judge to file the state court complaint before filing the actual state court claim.[13] However, given the demands of high volume legal practice, this optimal scenario does not always happen. That is, a plaintiff's counsel does not always conduct due diligence to determine if the defendant has filed for bankruptcy, but instead plaintiff's counsel often files the tort complaint and then receives notice of the bankruptcy proceeding from the defense counsel when the defendant seeks to enforce the automatic stay. The plaintiff must then bring a motion in the bankruptcy court to have the automatic stay lifted and if the bankruptcy court decides to lift the automatic stay, it can do so in two ways: it can lift the automatic stay and the plaintiff can then re-file the state court complaint[14] or the bankruptcy court can lift the automatic stay retroactively from the date the plaintiff filed the initial complaint in state court, thus legitimizing or ratifying the complaint.[15]

For the remainder of this paper, I will use the following hypothetical scenario for illustration. Plaintiff was injured in a tort action on March 5, 2005, and the defendant debtor filed the bankruptcy petition on January 5, 2007. The plaintiff's statute of limitations expires on March 5, 2007, and the debtor remains in bankruptcy for two years until January 5, 2009. Due to the lack of diligence, the first time the plaintiff files his complaint is

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9. 11 U.S.C. § 262(a)(1)-(3) (2006).
10. § 362(a)(1).
11. Lewis J. Heisman, Annotation, *Violation of Automatic Stay Provisions of 1978 Bankruptcy Code (11 U.S.C.A. § 362) as Contempt of Courts*, 57 A.L.R. Fed. 927 (1982).
12. *In re* Benalcazar, 283 B.R. 514, 521 (Bankr. N.D. Ill. 2002); Matthews v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984).
13. § 362(d).
14. Because the original tort claim is void *ab initio*, the plaintiff cannot merely have the stay lifted and then proceed with the case, he first must re-file the case. § 362.
15. Bankruptcy judges will usually do the latter to save the time, money, and hassle of plaintiff having to re-file in state court. *In re* Pleasant, 320 B.R. 889 (Bankr. N.D. Ill. 2004).

March 1, 2009, a full two years after the tort claim statute of limitations has expired. The timeline is as follows:

March 5, 2005: Plaintiff is injured
January 5, 2007: Defendant files for bankruptcy
March 5, 2007: Plaintiff's tort statute of limitations period expires
January 5, 2009: Defendant emerges from bankruptcy
March 1, 2009: Plaintiff files his complaint

In this scenario the tort statute of limitations had expired two years before plaintiff even filed his suit, and therefore the plaintiff will have to argue that the statute of limitations was tolled while the debtor was in bankruptcy. If successful this argument would give the plaintiff the total amount of time the automatic stay was in effect to augment the tort statute of limitations.

The plaintiff may argue that the Illinois Savings Statute[16] tolls the statute of limitations, but this would be a case of first impression. The court would need to determine whether the automatic stay of the Bankruptcy Code triggers the Illinois Savings Statute.[17] The reason no Illinois court has addressed this issue is because in 1983 the Illinois Supreme Court held in *Garbe Iron Works, Inc. v. Priester* that the automatic stay of the Bankruptcy Code tolls all Illinois statute of limitations without ever referencing the Illinois Savings Statute.[18] Therefore, under *Garbe,* the automatic stay tolls the tort statute of limitations for the amount of time the automatic stay was in effect.[19]

What follows is an analysis of why *Garbe* was wrongly decided and why the Illinois Supreme Court should reconsider *Garbe* so that they could address the real issue, whether the Illinois Savings Statute is triggered by the automatic stay of the Bankruptcy Code, which I believe it is not. Such a result would reduce the amount of time that a plaintiff has to file claims against defendant debtors to thirty days after the lifting or termination of the automatic stay and allows for a more efficient manner of wrapping up a bankrupt entity.

16. 735 ILL. COMP. STAT. 5/13–216 (2010).
17. *Id.*
18. Garbe Iron Works, Inc. v. Priester, 457 N.E.2d 422 (Ill. 1983).
19 *Id.*

III. *GARBE IRON WORKS, INC. v. PRIESTER*

A. The First District Appellate Court's Decision

In *Garbe* the plaintiff filed its action against Priester, National Precast, Inc., and other parties, to foreclose a mechanics' lien.[20] The filing of the complaint for foreclosure was in violation of the automatic stay.[21] Four and a half months later, the bankruptcy court entered an order modifying the automatic stay to permit plaintiff to re-file and pursue his suit to attempt foreclosure the mechanics' lien and the plaintiff did so, however, the statute of limitations for the mechanics' lien cause of action had expired.[22] In *Garbe*, the automatic stay was lifted on December 20, 1980, while the two-year statute of limitations for the mechanics' lien claim expired on February 2, 1981. The plaintiff's suit was filed March 16, 1981[23] and the state court proceedings were stayed one hundred and thirty-three days by the automatic stay from the bankruptcy court.[24] It is obvious that the thirty days provided by § 108(c)(2)[25] had expired by March 16, 1981, and therefore the plaintiff needed to rely on the theory that the statute of limitations was tolled for one hundred and thirty-three days while the defendant was in bankruptcy, and that the tolling provided plaintiff one hundred and thirty-three days after the two year statute of limitations ran to file a suit under § 108(c)(1).[26] Thus the dispositive issue for the First District Appellate Court was whether the automatic stay operated to toll the passage of the statutory time for filing the suit.[27]

In support of its position plaintiff cited § 108(c) of the Bankruptcy Act, which states:

> . . . if applicable law, an order entered in a 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 1301 of this title [11 U.S.C.S. sec. 1301], 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—

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20 *Id.* at 423.
21 *Id.*
22. Garbe Iron Works, Inc. v. Priester, 443 N.E.2d 204. 204–05 (Ill. App. Ct. 1982). I am citing the appellate court's decision for the facts of the case.
23. *Id.* at 205.
24. *Id.*
25. Section 108(c)(2)of the Bankruptcy Act provides that a creditor has 30 days after notice of the termination or expiration of the stay to file their complaint.
26 *Id.*
27. *Id.*

> (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, or 1301 of this title [11 USCS sec. 362, 922, or 1301], as the case may be, with respect to such claim." [28]

The language emphasized has been the source of controversy and has come to be known as the "suspension clause." At the time of the decision, this issue had not been decided by the courts of Illinois, and the *Garbe* court held that the language, "the end of such period, *including any suspension of such period"* of §108(c)(1), included the tolling of the statute of limitations by the automatic stay of the Bankruptcy Code.[29]

The appellate court reasoned that the "language of § 362(a)(1) of the Bankruptcy Act is unequivocally clear that the petitioner in bankruptcy is to be protected from all forms of judicial proceedings including the mere 'issuance or employment of process . . . .'"[30] The *Garbe* appellate court felt that its decision was supported by the legislative history of § 362(a)(1) which states:

> Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. The commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1). The scope of this paragraph is broad. All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings. Proceedings in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals.[31]

The court held that the language of the automatic stay stays the state court proceeding, and therefore the time period that the state court proceeding is stayed is incorporated into § 108(c)(1) through the suspension clause, thus extending the statute of limitations period for filing the state court claim.[32] I discuss below why this is an improper analysis of the plain language of the statutes.

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28. 11 U.S.C. § 108(c) (Supp. II 1978) (emphasis added).
29. *Garbe*, 443 N.E.2d at 205. This was the court's holding; however, the defendants did not bring the best arguments before the court.
30. *Id.* at 206 (citing 11 U.S.C. §. 362(a)(1) (1978)).
31. H.R. REP. NO. 95-595, at 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6297.
32. *Garbe Iron Works, Inc*., 443 N.E.2d at 205.

B. The Illinois Supreme Court's Decision

The case was brought before the Illinois Supreme Court on the same issue.[33] The Illinois Supreme Court affirmed the appellate court holding § 108(c) of the Bankruptcy Act to be dispositive.[34]

When the case got to the Illinois Supreme Court, the defendants proffered additional arguments against the appellate court's reasoning. "The defendants argued that § 108(c)(1) should have no application because it is only triggered when a particular statutory scheme," *outside of the Bankruptcy Code itself*, "provides for the suspension of a limitation period," and that Illinois does not have a separate statute that provides for a suspension when a bankruptcy is pending.[35] The basis for the defendant's argument that § 108(c) did not include the Bankruptcy Code's automatic stay was a legislative statement that § 108(c)(1) includes any "special suspensions" of limitation periods, and special suspensions are those other than ones provided by the Bankruptcy Code.[36] However, the *Garbe* court felt that "[n]owhere . . . do the legislative statements or the committee notes indicate that the application of § 108(c)(1) is limited to such [special] situations, and to so hold would require a strained construction of that section and defeat its apparent purpose."[37] The *Garbe* court continued:

> that 108(c)(1) "includes" special statutory provisions suspending limitations otherwise applicable implies a broader purpose than that attributed to it by defendants. While not entirely free from doubt, the intent of sections 108(c)(1) and (2) seems to be to extend the period within which a creditor may act by the greater of (1) the period granted by a particular statutory scheme, (2) the period during which action has been stayed by the Bankruptcy Act, or (3) 30 days after notice of the termination of the stay. [38]

The court is making an acceptable statutory analysis based upon linguistic interpretation, although one I disagree with. The *Garbe* court itself points out that it was "not entirely free from doubt" when it made its decision.[39] In 1982 there were not many decisions in other jurisdictions on this issue, however, there has been a lot of analysis since 1982 from other

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33. Garbe Iron Works, Inc. v. Priester, 457 N.E.2d 422 (Ill. 1983).
34. *Id.*
35. *Id.* at 425. It is right here that the Illinois Supreme Court could analyze whether the Illinois Savings Statute applies to toll the statute of limitations period.
36. *Id.* at 425–26.
37. *Id.* at 426.
38. *Id.* at 425.
39 *Id.*

state and federal courts. I believe the Illinois Supreme Court would reconsider this issue in light of the other jurisdictions' analysis.

In summary, this is where Illinois law stood as of 1982. It was held that § 108(c)(1) included the period of time that the automatic stay was in place to extend the plaintiff's pertinent statute of limitations periods.[40] The ruling does not seem to have been challenged in Illinois in thirty years during which time the Illinois Appellate courts have "upheld" the *Garbe* decision.[41] However, I believe the Illinois Supreme Court should address the following key issues of: (1) whether *Garbe* was incorrectly decided; (2) whether the Illinois Savings Statute, 735 ILCS 5/13-216, is the type of statute referenced in the suspension clause of § 108(c)(1); and (3) if it is, then is the Illinois Savings Statute activated by the automatic stay of the Bankruptcy Code. That would be the correct way to address this issue, and the Illinois Supreme Court should rule on these issues to clarify them for all practitioners.

IV: THE MAJORITY INTERPRETATION: OTHER FEDERAL AND STATE JURISDICTIONS

Most legal commentators and courts in other jurisdictions have pointed out that *Garbe* is the minority interpretation of § 108(c)(1).[42] That is, other state and federal courts that have had to analyze the suspension clause of § 108(c)(1) and apply it to their state's statutes of limitation statutes and have held that the language in §108(c)(1) means that a plaintiff has until the end of his normal statute of limitations period plus the addition of any stays or injunctions, *but not including the actual bankruptcy stay itself.*[43]

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40 *Id.* at 422.

41. Chicago Whirly Inc., v. Amp Rite Elec. Co., 710 N.E.2d 45 (Ill. App. Ct. 1999); Flynn v. Allis Chalmers Corp., 634 N.E.2d 8 (Ill. App. Ct. 1994); Pittman v. Manion, 570 N.E.2d 1169 (Ill. App. Ct. 1991).

42 2 COLLIER ON BANKRUPTCY ¶108.04[2] n.17 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

43. *Collier on Bankruptcy* discusses this issue and lists the following courts that have held the majority opinion (including the Central District of Illinois): Husman v. Trans World Airlines, Inc., 169 F.3d 1151 (8th Cir. 1999); Simon v. Navon, 116 F.3d 1, 38 (1st Cir. 1997); Rogers v. Corrosion Prods., Inc., 42 F.3d 292 (5th Cir.); Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993); Kakkanathu v. Rohn Indus., Inc., No. 05-1337, 2008 WL 681485 (C.D. Ill. 2008); Hazel v. Van Beek, 954 P.2d 1301 (Wash. 1998); Thurman v. Tafoya, 895 P.2d 1050 (Colo. 1995); Raikes v. Langford, 701 S.W.2d 142 (Ky. Ct. App. 1986); Howard v. Howard, 670 S.W.2d 737 (Tex. App. 1984).

The only case cited in *Colliers* supporting the minority interpretation is the Illinois Supreme Court *Garbe* decision.[44] Reviewing some of these cases is useful to see why the Illinois Supreme Court's interpretation is incorrect, as many of these cases analyze the legislative intent of both § 108 and § 362, the plain language of the statutes, the public policy and history of the statutes. All analysis favors the majority interpretation.

A. Plain Language Analysis

In *Grotting v. Hudson Shipbuilders, Inc.*, the court had to address whether the suspension clause of § 108(c) incorporated the automatic stay of the Bankruptcy Code and commenced by analyzing the plain language of the statutes:

> There is no language either in the Automatic Stay [§ 362] provision or the Extension of Time provision [§ 108(c)] of the Bankruptcy Code that suspends a statute of limitations from running. The Automatic Stay provision merely prohibits a cause of action from being commenced against a debtor. The Extension of Time provision merely provides an extra 30 days to file a claim if the claim's limitation period expired before the automatic stay was lifted. Since neither the Stay provision nor the Extension provision suspend a statute of limitations from running, the language in Section 108(c)(1) referring to 'any suspension of such period' means those non-bankruptcy law tolling periods such as minority or incompetency of a plaintiff.[45]

In *Aslanidis v. United States Lines, Inc.*,[46] the Second Circuit Court of Appeals held that §108(c):

> only calls for applicable time deadlines to be extended for 30 days after notice of the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date . . . [The section] does not operate in itself to stop the running of a statute of limitations; rather, the language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes.[47]

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44. My research turned up two cases that also hold this minority view: Lawrenson v. Global Marine, Inc., 869 S.W.2d 519 (Tex. App. 1993) and Major Lumber Co. v. G & B Remodeling, Inc., 817 S.W.2d 474 (Mo. Ct. App. 1991).
45. Grotting v. Hudson Shipbuilders, Inc., 85 B.R. 568, 569 (Bankr. W.D. Wash. 1988).
46. Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993).
47. *Id.*

In reaching this conclusion, the *Aslandis* court relied on the plain meaning of the statute, its legislative history and the treatment thereof by other courts, particularly that of the *Grotting* court. [48]

Finally, the Fifth Circuit cut to the chase on a plain language argument:

> [w]e base our decision on the plain words of the statute and find that §108(c) does not create a separate tolling provision. The statute plainly states that for the time period to be suspended, other federal or state law must mandate it and then be incorporated through § 108(c). Otherwise, a party must file suit within the thirty-day grace period after the end of the stay. We need not and do not reach the legislative history and policy arguments. [49]

Compare the *Grotting*, *Aslandis* and *Rogers* decisions described above to the *Garbe* appellate court's analysis of the plain language of the statute. The *Garbe* appellate court underscored that § 108(c)(1) states that the underlying statute of limitations runs until "the end of such period, including any suspension of such period."[50] The *Garbe* appellate court held that the language of the automatic stay tolls the state court proceeding, and therefore the time period that the state court proceeding is stayed is incorporated into § 108(c)(1) through the suspension clause, thus extending the statute of limitations period for filing.[51] However, I believe this is an improper reading of the plain language of the statutes. The language of § 362(a) clearly states that it acts to stay the "actual proceedings" in state court; however, the issue before the *Garbe* appellate court was whether the automatic stay operates to stay the state's statute of limitations "period" from running and the language of § 362 is silent on that issue.[52]

The difference between a "proceeding" and a "period" is not merely semantics. The automatic stay acts to stay the proceeding because the purpose of the Bankruptcy Code is to give the debtor relief from the numerous creditors that are attempting to bring claims against the debtor to recover their money, which has nothing to do with the "period" of the statute of limitations.[53] There simply is no language in § 362 that states that the automatic stay acts to suspend any statute of limitations periods for filing underlying claims, and therefore to incorporate § 362's stay of a

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48. The legislative history makes evident that §108(c)(1) refers to only "special suspensions" that are found in non-bankruptcy provisions such as the Internal Revenue Code.
49. Rogers v. Corrosion Prods., Inc., 42 F.3d 292, 297 (5th Cir. 1995) (citations omitted).
50 Garbe Iron Works, Inc. v. Priester, 443 N.E.2d 204, 205 (Ill. App. Ct. 1982).
51. *Id.*
52 11 U.S.C. § 362(a) (2010).
53 Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915).

"proceeding" into § 108(c)(1)'s stay of a statute of limitations "period" is an incongruous application.

B. Legislative Intent

If the *Garbe* appellate court's reasoning was correct regarding the language of the statute, then should not § 362 just have express language tolling applicable non-bankruptcy statutes of limitations? In fact, the older version of § 362 did have language that directly suspended statutes of limitation and the exclusion of such language in the revised statute should serve as evidence of the intent of the legislature to have § 362 not toll the state court's statute of limitations periods.[54] The *Grotting* court felt so, and in its analysis of the legislative intent and history of § 362, pointed out that the provisions of the predecessor statute to § 362 expressly provided for the "suspension" of any statute of limitations during the pendency of bankruptcy proceedings.[55] Therefore "Congress could have similarly provided [the same] in the new statute."[56] An Illinois court analyzed a similar issue before the revised bankruptcy code came out in 1978.[57] Before 1978, the automatic stay, § 362, and the savings provision of the bankruptcy code, § 108(c), were both contained in the same section which contained express language tolling the statute of limitations.[58]

In *In re Baird*, the court addressed the same issue and held that the *Grotting* interpretation of § 108(c) is more compatible with the legislative history of the Section, which states that:

> [s]ubsection (c) extends the statute limitations for creditors. Thus, if a creditor is stayed from [commencing] or continuing an action against the debtor because of the bankruptcy case, then the creditor is permitted an additional 30 days after notice of the event by which the stay is terminated, whether that event be relief from the automatic stay under proposed 11 U.S.C. § 362 or 1301, the closing of the bankruptcy case (which terminates the stay), or the exception from discharge of the debts on which the creditor claims.[59]
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> The House amendment adopts Section 108(c)(1) of the Senate amendment which expressly includes any special suspensions of statutes of limitation periods on collection outside bankruptcy when assets are under the

54. Grotting v. Hudson Shipbuilders, Inc, 85 B.R. 568 (Bankr. W.D. Wash. 1988).
55. *Id.* at 569.
56. *Id.* at 570.
57. Levine v. Unruh, 240 N.E.2d 521, 521–24 (1968).
58. *Id.*
59. H.R. REP. NO. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6275.

> authority of a court. For example, Section 6503(b) of the Internal Revenue Code suspends collection of tax liabilities while the debtor's assets are in the control or custody of a court, and for six months thereafter.[60]

The *Baird* court felt that given this legislative history, it is clear that the legislative intent of § 108(c)(1) did not suspend the running of a statute of limitations, and that the "reference in Section 108(c)(1) to 'suspension' is not to the effects of the Bankruptcy Code itself, but to other, specialized 'suspension' statutes, such as the Internal Revenue Code section cited in the legislative history."[61]

C. Public Policy

Many of these same courts have espoused public policy arguments for holding that the automatic stay should not toll underlying state court statute of limitation periods. The *Grotting* court pointed out:

> [t]he interpretation that the applicable statute of limitations is not tolled by the Automatic Stay in bankruptcy comports best with expeditious and fair administration of a bankrupt's estate. The parties have more certain knowledge of when claims will expire, and the potential claims period is not unduly extended because of the length—which may be great in complex cases—of the bankruptcy proceedings.[62]

In addition, the *Grotting* court underscored that:

> a claimant is not unfairly precluded from ever asserting a claim against a debtor in bankruptcy because each claimant (1) may move the Bankruptcy Court to lift the stay…; (2) file after the bankruptcy proceedings terminate, if the applicable statute of limitations still has time to run; or (3) file during the 30-day period following a lifting of the stay or termination of the bankruptcy proceedings [if the statute of limitations had run].[63]

The intent of § 108(c) was to preserve a minimum thirty-day window for filing in cases where the statute of limitations runs while the bankruptcy is proceeding.

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60. 124 CONG. REC. 11, 109 (Sept. 28, 1978).
61. *In re* Baird, 63 B.R. 60, 63 (Bankr. W.D. Ky. 1986).
62. Grotting v. Hudson Shipbuilders, Inc, 85 B.R. 568, 570 (Bankr. W.D. Wash. 1988). In cases in which the bankruptcy proceeding lasts a couple years and the statute of limitations expires near the end of the bankruptcy, the plaintiff would still have quite a bit of time to file his compliant after the end of the bankruptcy proceeding, thus extending the potential claims period against the debtor years after the bankruptcy proceeding terminated.
63. *Id.*

To buttress this line of reasoning, the *Aslanidis* court added an additional public policy argument for the majority holding, stating:

> policies [of fairness and prevention of surprise, that are the basis of statutes of limitations] . . . must on occasion give way so as to permit vindication of a plaintiff's rights, and tolling may be appropriate where particular external forces beyond a claimant's power to control disable plaintiff from suing . . . But such a tolling rationale does not apply in the bankruptcy arena because plaintiffs have advance knowledge of when claims are to expire and may act to protect themselves . . . Such was the case here. Aslanidis was not caught off-guard when the 30-day limitations period [of § 108(c)(2)] began to run; rather, by applying . . . for a waiver of the stay, he himself set that clock ticking.[64]

The *Garbe* court erred in its interpretation of § 108(c)(1) and that it never considered the plain language, legislative intent and policy arguments articulated in the other jurisdictions.[65]

V. ILLINOIS' INTERNAL CONTRADICTION BETWEEN STATE AND FEDERAL COURT

The plain language, legislative intent and public policy rationales all disfavor the *Garbe* decision. Given the arguments enunciated by other jurisdictions as persuasive authority, and the trend to the majority position, the Illinois Supreme Court should correct this error.[66] If the time was ever ripe for the Illinois Supreme Court to do so, it is now, because in 2008 the Central District of Illinois analyzed this very same issue on a federal tort claim and came to the exact opposite conclusion as the Illinois Supreme Court in *Garbe*.[67]

In *Kakkanathu v. Rohn Indus., Inc.*, the Central District Court held:

> [a]lthough section 108(c)(1) refers to "suspension" of time limits, this section "does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes." The *Aslanidis* court suggests that "if Congress had intended for § 108(c) to

64. Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1074 (2d Cir. 1993). Also holding the majority opinion are Simon v. Navon, 116 F.3d 1 (1st Cir. 1997) and Nativo v. Grand Union Co., 717 A.2d 429 (N.J. Super. Ct. App. Div. 1998).

65. *See* Garbe Iron Works, Inc. v. Priester, 457 N.E.2d 422 (Ill. 1983).

66. *Id.*

67. *See* Kakkanathu v. Rohn Indus., Inc., No. 05-1337, 2008 WL 681485, at *4 (C.D. Ill. 2008).

> operate as a tolling provision it would have expressly provided for such a suspension of time limits."[68]

The *Kakkanathu* court adopted the public policy arguments from *Grotting, Aslanidis* and other courts, and also pointed out that although the Seventh Circuit has not directly addressed this issue, at least one bankruptcy court in the Seventh Circuit similarly applied *Aslandis.*[69] Therefore, at present, there are two Illinois decisions contrary to *Garbe,* one in the Central District and one in the Northern District Bankruptcy Court. This creates great confusion in Illinois, *i.e.*, an Illinois lawyer has to understand that in state court the automatic stay tolls the statute of limitations pursuant to *Garbe,* but in federal court the automatic stay is not incorporated into the suspension clause of §108(c)(1), and therefore it does not apply to toll statute of limitations periods. Thus in federal court an Illinois plaintiff only has 30 days to file his complaint after the lifting of the automatic stay if the statute of limitations expired while the automatic stay was in place.

If this does not create enough confusion for Illinois practitioners, one should also consider the *dicta* of *In re Pettibone Corp.*,[70] which held that "[b]y operation of [§108(c)(1)], running of the two-year period…was suspended during the pendency of Pettibone's reorganization stay. The Illinois Supreme Court [*Garbe*] has ruled that such is the effect on the Illinois statute of limitations."[71] The footnote to this proposition states:

> [i]t must be observed that the Illinois Supreme Court did not cite or discuss §13-216 [the Illinois Savings Statute]. The [*Garbe*] opinion could be read to be a construction of 11 U.S.C. §108(c) as tolling the Illinois statute of limitations, an interpretation at variance with federal court authority. However, §13-216 by its terms has the very effect that the Supreme Court found by other reasoning.[72]

The *Pettibone* court is saying that even though the *Garbe* case was wrongly analyzed, the *Garbe* court would have come to the same conclusion by holding that the Illinois Savings Statute is the type of statute referred to in the suspension clause of §108(c). The reasoning of this line of thought is as follows. Even if the *Garbe* decision was wrongly decided, because §108(c)(1) clearly allows for other state statutes to toll the statute

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68. *Id.* at *10 (citations omitted).
69. *See, e.g., In re* Confidential Investigative Consultants, Inc., 178 B.R. 739 (Bankr. N.D. Ill. 1995).
70. *In re* Pettibone Corp., 110 B.R. 848 (Bankr. N.D. Ill. 1990), *vacated and remanded* by Pettibone Corp. v. Easley, 935 F.2d 120 (7th Cir. Ill. 1991).
71. *Id.* at 854.
72. *Id*.

of limitations, and because Illinois has one such statute, *i.e.*, the Illinois Savings Statute,[73] that statute would have the same effect. This is a major presumption, and it is something that I believe the Illinois Supreme Court needs to decide. Furthermore, this is an assumption I disagree with for the reasons I discuss below.

VI. A PROPOSED SOLUTION

In summary, as of 2010, Illinois' practitioners have three different possible sets of rules to analyze this issue, which accounts for the confusion. That is, the Illinois Supreme Court has one ruling, *Garbe*, the Central District of Illinois has the exact opposite ruling, *Kabbanathu*, and the *Pettibone* case states, in *dicta*, a third option.[74] Given this discord, the Illinois Supreme Court should decide three issues for Illinois practitioners:

1. Was the *Garbe* decision wrong in its holding that the "suspension" language of §108(c)(1) included the automatic stay itself?

2. If the Illinois Supreme Court believes it was wrong in light of the analysis that has surfaced since the *Garbe* decision, and therefore decides to over rule *Garbe*, then question #2 would be: Whether the Illinois Savings Statute, 735 ILCS 5/13-216, is the type of statute that the suspension clause of §108(c)(1) refers to? I believe it is, and I believe the court would hold accordingly.

3. That would leave the court with the third and final question: Does the automatic stay of the Bankruptcy Code, §362, trigger the Illinois Savings Statute, 735 ILCS 5/13-216?

The final question is the consequential one. If the answer to question number three is "yes" then in essence the court would reach the same conclusion that it reached in the *Garbe* case with one more step, however, the decision would be a cleaner decision that comports with the other jurisdictions on question number one and has a basis in statutory interpretation, legislative history and logic. However, I do not believe the court needs to address this issue just to make the outcome more analytically consistent with the other jurisdictions. I believe the answer to question three is "no" which changes Illinois law so that statutes of limitation

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73. 735 ILL. COMP. STAT. 5/13-216 (2010).

74. If anyone needs to be convinced about how confusing this issue can be, all she needs to do is read Robert H. Bowmar, *Bankruptcy Section 108(c): Is the "Suspension" Question Still in Suspension?*, 106 COM. L.J. 395, 411 (2001).

periods are no longer tolled by the duration of the automatic stay, and therefore, if a limitation period for filing a claim against a debtor expires while the automatic stay is in effect, plaintiff will only have thirty days after the lifting or termination of the automatic stay to file his compliant. The last part of this paper will explain why the Illinois Supreme Court should rule "no" on question three.

A. Should the Automatic Stay of the Bankruptcy Code, § 362, Trigger the Illinois Savings Statute, 735 ILCS 5/13-216?

Because the *Garbe* court read into § 108(c)(1) the concept that the automatic stay tolls Illinois statutes of limitations from running, there has been no reason for any other Illinois court to analyze whether the Illinois' Savings Statute is the type of statute the "suspension" clause refers to.[75] Assuming, *arguendo*, that the Illinois Supreme Court overrules *Garbe* based upon the analysis *supra*, and then decides that the Illinois Savings Statute is the type of statute the "suspension clause" refers to, the next step is to analyze the Illinois Savings Statute to see if it is triggered by the automatic stay. This step is necessary because even if the suspension clause incorporates the Illinois Savings Statute, the Illinois Savings Statute does not define an amount of time a statute of limitation is to be tolled.[76] That is, the Illinois Savings Statute is not a "defined savings statute," it is an open ended savings statute that operates by incorporating other statutes, orders or injunctions.[77]

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75. Garbe Iron Works, Inc. v. Priester, 457 N.E.2d 422 (Ill. 1983).

76. 5/13-217.

77. If one does some Lexis research, they will note the second case listed in the notes section of 735 ILL. COMP. STAT. ANN. 5/13-216 (LexisNexis 2011) states pretty clearly that the "Bankruptcy Code's automatic stay of proceedings against insolvent organizations, which became effective when it filed its bankruptcy petition (11 U.S.C. § 362 (a)) was not the type of stay referred to in this section." *In re* Liquidation of Medicare HMO, Inc, 689 N.E.2d 374 (Ill. App. Ct. 1997). This seems to be the answer to the question; however, if one reads the case one realizes that the blurb regarding the holding is wrong and the real holding of the case had nothing to do with this issue. In *Liquidation of Medicare HMO*, the court held, "there is no issue concerning the tolling of the applicable statute of limitations. The Director's lawsuit against Katten Muchin was timely commenced within the applicable statute of limitations." *Id.* at 384. The plaintiff was trying to apply 735 ILL. COMP. STAT. ANN. 5/13-216 to a "voidable preference," which is a monetary transfer of a debtor made within four months of the filing for bankruptcy. *Id.* at 379. These transfers are deemed voidable because they give an unfair advantage to a certain class of creditors or policyholders. *Id.* at 380. However, this four-month period does not fix the time to seek a remedy for a wrong; it establishes what the wrong is. Therefore, it is not a statute of limitations and 735 ILL. COMP. STAT. 5/13–216 is not triggered. *Liquidation of Medicare HMO* had nothing to do with §362. Schmidt v. Crowell-Collier Pub. Co.,110 N.E.2d 464 (Ill. App. Ct. 1953) is also not on point. It discusses *the debtor's* ability to bring suits and 5/13-216 was not applicable because there was no stay or injunction against the debtor. *See id.*

The Illinois Savings Statute's "Stay of Action" states: "When the commencement of an action is stayed by injunction, order of a court, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limit for the commencement of the action."[78]

Therefore, if one believes that the automatic stay of the Bankruptcy Code is a "statutory prohibition" against the commencement of the state court action, then the Illinois Savings Statute would toll the statute of limitations for that amount of time. This is where the analysis can get a little confusing. That is, the Illinois Savings Statute cannot toll the Illinois statute of limitations itself simply because the court holds that the automatic stay is the type of statutory prohibition that the Illinois Savings Statute refers to. This is due to the fact that federal law, *i.e.*, the Bankruptcy Code, § 108(c) has defined how long a party can file against the debtor.[79] Therefore, even if an Illinois court felt that the automatic stay triggered the Illinois Savings Statute, the federal law, § 108(c) would preempt the Illinois Savings Statute.[80] Given these facts, a plaintiff needs to prove both steps, *i.e.*, that the automatic stay triggers the Illinois Savings Statute and that the Illinois Savings Statute is the type of statute referred to in § 108(c)(1) of the Bankruptcy Code.[81]

Only one other jurisdiction, the New York Superior Court, has analyzed whether a very similar open-ended savings statute is triggered by the automatic stay. The court stated:

> [t]he more difficult question relates to the interplay of the automatic stay of the Bankruptcy Code and CPLR 204 (a) which provides: "Where the commencement of an action has been stayed by a court or by a statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced.[82]

The defendants in *Zuckerman* claimed that the automatic stay created a "condition precedent" to the commencement of suit and not an absolute statutory prohibition because the automatic stay is not an "absolute statutory prohibition" to proceed on a case because the plaintiff can bring a motion to have the stay lifted.[83] Defendants further argued that because the plaintiff had the ability to satisfy the condition precedent, the toll only occurred from the time of the plaintiff's application to the court to modify

78. 5/13-216.
79. 11 U.S.C. § 108(c) (2006).
80 *Id.*
81 *Id.*
82. *Zuckerman v. 234-6 W. 22 St. Corp.*, 645 N.Y.S.2d 967, 969 (N.Y. App. Div 2001).
83. *Id.* at 970.

the stay until the court actually does modify the stay and lets plaintiff proceed with his claim.[84] Nevertheless the court concluded:

> under the plain language of § 204 . . . the filing of the petition under chapter 11 by the Owner resulted in a tolling for the entire period of the stay specifically imposed by the Bankruptcy Code. There is nothing in the wording of § 204 or in the case law that warrants the restricted interpretation advanced by the Owner.[85]

This was a bad decision because the defendant's "condition precedent" is an insightful argument, linguistically accurate and reached via a logical analysis. In addition, the defendant's argument remedies the problem of a negligent plaintiff who misses the statute of limitations deadline from being saved by the mere fortuity that the defendant was in bankruptcy for a certain period of time.

Furthermore, there is Illinois case law consistent with the "condition precedent" theory, from courts that have analyzed the Illinois Savings Statute in other situations in which they had to decide whether a certain order, injunction or stay triggers and the Illinois Savings Statute.[86] These courts have held that the tolling of a statute of limitations is normally restricted to those situations in which a plaintiff has been prevented from pursuing his cause of action *through no fault of his own*.[87] Given this precedent for what should activate the Illinois Savings Statute, consider the analysis of the *Aslanidis* court, *supra*:

> such a tolling rationale does not apply in the bankruptcy arena because plaintiffs have advance knowledge of when claims are to expire and may act to protect themselves . . . Such was the case here. Aslanidis was not caught off-guard when the 30-day limitations period [of section

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84. *Id.*

85. *Id.* at 971.

86 Illinois Bell Tel. Co. v. Allphin, 326 N.E.2d 737 (1975); Plooy v. Paryani, 275 Ill. App. 3d 1074 (Ill. App. Ct. 1st Dist. 1995).

87. *Allphin*, 326 N.E.2d 737; *Plooy*, 275 Ill. App. 3d 1074. There does seem to be a consistent theme in Illinois whereby the Savings Statute does not apply if the plaintiff has the ability to bring the suit he is seeking to have tolled. *See* Leitch v. New York Central Railroad. Co., 58 N.E.2d 16 (1944). Since a suit for use and occupation would not have interfered with the assignee's possession of the property, the court held that such a suit had not been prohibited in the condemnation proceeding. Thus, the court held that the condemnation proceeding did not toll the statute of limitations in the present case and the lessor's action against the assignee was time barred. *Cf. In re* Werner, 386 B.R. 684, (Bankr. N.D. Ill. 2008) ("When a court order bars a plaintiff from taking discovery, and the facts that might be discovered are those that must be known before filing a complaint so that the plaintiff does not run afoul of Rule 11, that discovery stay 'work[s] to prohibit' that plaintiff from commencing an action. The statute of limitations is therefore tolled during the period that the discovery stay is in effect.")

> 108(c)(2)] began to run; rather, by applying . . . for a waiver of the stay, he himself set that clock ticking.[88]

Illinois courts have made clear that the language of the Illinois Savings Statute applies to statutes, orders or injunctions that bar the commencement of a claim through no fault of plaintiff's own, but as the *Aslanidis* court made clear, in regards to the automatic stay of the Bankruptcy Code, a plaintiff has remedies available to lift the stay or wait for the 30-day window after the stay's termination to file a claim.

The most convincing arguments why the Illinois Savings Statute is *not* triggered by the automatic stay of the Bankruptcy Code are the same arguments that support the conclusion that the suspension clause does not include the automatic stay. If the Illinois Supreme Court reads the Illinois Savings Statute to include the automatic stay, then the court will simply have reached the same result that it did in the *Garbe* case when it incorrectly held that the suspension clause of § 108(c)(1) included the automatic stay. This would be in contradiction to all the arguments listed *supra* regarding the plain language of both § 108(c) and § 362, the legislative intent of § 362 and the public policy concerns. Furthermore, if the Illinois Supreme Court does believe the Illinois Savings Statute includes the automatic stay, then Illinois will continue to be in the minority of jurisdictions that have resolved this issue. In addition, Illinois would still have the inequitable result that a plaintiff's statute of limitations may be tolled for long durations of time preventing a bankrupt person or entity from wrapping up its affairs; and finally, Illinois will still be left with different outcomes between the state and federal courts.

VII. CONCLUSION

I contend that the Illinois Supreme Court's 1982 decision, *Garbe Iron Works, Inc. v. Priester,* which held that a plaintiff's underlying statute of limitations period is stayed upon the petition of the defendant debtor for bankruptcy and commencement of the automatic stay, should be overturned by the Illinois Supreme Court. As discussed herein, the language of § 362(a) clearly states that it acts to stay the "actual proceedings" in state court, however there is no language that states that it operates to stay the plaintiff's statute of limitations "period" from running. Furthermore, neither the language of the automatic stay nor the extension of time provision, *i.e.*, § 108(c), of the Bankruptcy Code that suspends a statute of limitations from running, indicate that the automatic stay operates to stay

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88. Also holding the majority opinions are Simon v. Navon, 116 F.3d 1 (1st Cir. 1997) and Nativo v. Grand Union Co., 717 A.2d 429 (N.J. Super. Ct. App. Div. 1998).

the underlying proceeding, whereas the predecessor of § 362 had express language that did state exactly that. In addition, the public policy arguments make clear that the automatic stay should not stay the underlying statute of limitations, an interpretation that "comports best with expeditious and fair administration of a bankrupt's estate;" and while tolling of a statute of limitations "may be appropriate where particular external forces beyond a claimant's power to control disable plaintiff from suing . . . such a tolling rationale does not apply in the bankruptcy arena because plaintiffs have advance knowledge of when claims are to expire and may act to protect themselves."[89] Finally, the legislative intent also favors reconsidering *Garbe* because there is evidence that the legislature did not intend the "suspension clause" of § 108(c) to include the provisions of Bankruptcy Code itself, but instead other, specialized 'suspension' statutes, such as the Internal Revenue Code.

Not only does a thorough linguistic, historic and policy analysis of § 362 and § 108 favor over turning *Garbe*, but there are also very practical reasons for the Illinois Supreme Court to reconsider the *Garbe* decision, including the fact that in 2008, the Central District of Illinois analyzed this very same issue on a federal tort claim and came to the opposite conclusion than the Illinois Supreme Court did in *Garbe;* furthermore the Illinois Bankruptcy Court for the Northern District articulated a third interpretation, in *dicta*, that can only serve to confuse Illinois practitioners. If the Illinois Supreme Court were to re-address the *Garbe* decision and overturn the same, the court will still have to decide whether the suspension clause of §108(c) of the Bankruptcy Code includes the Illinois Savings Statute, which I believe it does. Finally, the court would have to decide whether the Illinois Savings Statute is triggered by the automatic stay of the Bankruptcy Code, hopefully I have shown herein that it should not be so triggered. Reading the automatic stay of the Bankruptcy Code into section §108(c) creates a legal mobius circle in the logic and policy of the Bankruptcy Code, and reaching the same result by holding that the automatic stay triggers the Illinois Savings Statute would change none of the practical consequences for Illinois litigators.

89. Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1074 (2d Cir. 1993).