IN THE SUPREME COURT OF TEXAS

NO. 05-0303

THOMAS GRABER AND HOPKINS & SUTTER, PETITIONERS,

v.

RICHARD L. FUQUA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE WAINWRIGHT, joined by JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE WILLETT dissenting.

The question posed is whether federal or state law should provide the remedy to a debtor allegedly sued wrongfully in an adversary proceeding in bankruptcy court. The predicate conduct for the adversary proceeding occurred prior to the debtor's filing of the bankruptcy petition, and all of the alleged wrongful conduct occurred in the bankruptcy proceeding. The Court holds that on these facts the debtor may pursue a Texas common law malicious prosecution claim in state court for harm allegedly caused during federal bankruptcy proceedings. Because federal law occupies the field of bankruptcy, and Congress created an analogue in the Bankruptcy Code to malicious prosecution of an involuntary Chapter 11 bankruptcy, but not for the voluntary Chapter 7 bankruptcy

at issue here, I would not create a new claim for abuses in Chapter 7 bankruptcies that Congress saw fit not to create. Debtors have adequate recourse for abuse of the bankruptcy process in the Bankruptcy Code and Rules.

I am also concerned that the Court's holding undermines the uniformity mandated for bankruptcy law by the United States Constitution, as under the Court's rationale all fifty states could overlay their state remedies on the bankruptcy proceedings and multiply the controversy for years beyond the controlled confines of the federal bankruptcy process. I therefore respectfully dissent.

I. Background

In 1988, Richard L. Fuqua, an attorney, filed a voluntary bankruptcy petition under Chapter 7 in the Bankruptcy Court for the Southern District of Texas, McAllen Division. A year later, Thomas Graber and the law firm in which he is a partner, Hopkins & Sutter (referred to collectively as Graber), filed an adversary action in the bankruptcy proceeding on behalf of Sunbelt Savings (Sunbelt) alleging that Fuqua conspired with a client, Richard Aubin, and others to defraud Sunbelt in a pre-petition real estate transaction. Fuqua alleges that during discovery in the adversary proceeding, Graber provided false and intentionally misleading information about him and caused a criminal referral to be made to the United States Department of Justice regarding Fuqua's involvement in the real estate transaction.

The Department of Justice intervened in the adversary proceeding, and the bankruptcy judge stayed the proceeding during the criminal investigation. The investigation resulted in the indictment of Fuqua and Aubin for bank and tax fraud in 1992. In 1993, the bankruptcy court discharged Fuqua's debts, but the adversary proceeding remained pending in the bankruptcy court. After a 1994

trial in the U.S. District Court for the Northern District of Texas, Fuqua was acquitted of criminal wrongdoing. The civil adversary proceeding resumed upon resolution of the criminal trial. After a three-day trial in 1996, the bankruptcy court granted a directed verdict in favor of Fuqua. The bankruptcy court entered judgment against Sunbelt on May 13, 1997. The U.S. District Court of the Southern District of Texas dismissed Sunbelt's appeal of the bankruptcy judgment on September 8, 1998, and there was no appeal of that dismissal.

On September 7, 2000, Fuqua filed this state malicious prosecution action in the 93rd District Court of Hidalgo County, Texas. Fuqua alleged that Graber "knowingly, maliciously, and wantonly acted without probable cause in initiating or procuring the civil adversary proceeding, as well as the criminal proceeding, against Fuqua." The district court granted Graber's motion for partial summary judgment dismissing the criminal malicious prosecution claim based on the statute of limitations. In his third amended answer, Graber filed a plea to the jurisdiction, arguing that the district court lacked subject matter jurisdiction to hear Fuqua's civil malicious prosecution claim because the claim was preempted by federal bankruptcy law. The district court granted Graber's plea to the jurisdiction and dismissed the suit on November 25, 2002. Fuqua appealed.

The court of appeals held that Fuqua's malicious prosecution claim did not interfere with the bankruptcy court's jurisdiction, and therefore, the state court maintained concurrent jurisdiction unless it was preempted by the Bankruptcy Code. 158 S.W.3d 635, 646. On the latter point, the court of appeals determined that there was no express preemption language in the Bankruptcy Code and that state jurisdiction was not preempted by federal bankruptcy law. *Id.* Accordingly, the court of appeals reversed and remanded the case for trial. *Id.* at 647.

II. Parties' Arguments

Graber argues the court of appeals erred in holding that Fuqua's malicious prosecution claim was not preempted, complaining that even the court of appeals itself twice recognized that "a majority of courts that have considered the preemptive nature of bankruptcy law in the context of state tort claims alleging violations of the bankruptcy process have found such claims to be preempted." *Id.* at 641, 643-44. According to Graber, federal law preempts Fuqua's claim because section 105 of the Bankruptcy Code and rule 9011 of the Federal Rules of Bankruptcy Procedure provide the only remedies for abuse of the bankruptcy process. Allowing such claims in state court, Graber adds, would undermine the uniformity, free access, and finality Congress intended in the bankruptcy process.

Fuqua counters that Congress did not intend federal bankruptcy law to preempt his state malicious prosecution claim.[1] He points to a state court's concurrent jurisdiction over claims that do not affect distribution of the debtor's assets. He adds that section 105 and rule 9011 cannot occupy the field of malicious prosecution because they only provide sanctions, not damages, for abuse of the bankruptcy process. Fuqua further argues that under Graber's reasoning, Fuqua is without a remedy for his damages because a malicious prosecution cause of action does not accrue

[1] The elements to prove a malicious criminal prosecution are: (1) a criminal prosecution commenced against the plaintiff, (2) the defendant initiated or procured that prosecution, (3) the prosecution terminated in the plaintiff's favor, (4) the plaintiff was innocent of the charges, (5) the defendant lacked probable cause to initiate the prosecution, (6) the defendant acted with malice, and (7) the plaintiff suffered damages. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006).

The elements to prove the malicious prosecution of a civil claim are: (1) the institution or continuation of civil proceedings against the plaintiff, (2) by or at the insistence of the defendant, (3) malice in the commencement of the proceeding, (4) lack of probable cause for the proceeding, (5) termination of the proceeding in the plaintiff's favor, and (6) special damages. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996).

until the appeals process for the underlying suit has been exhausted. Fuqua admits that he did not seek sanctions or any other remedy in the bankruptcy court for the alleged abuse of process, but maintains he could not have pursued a claim against petitioners in bankruptcy court because Sunbelt's appeal of the adversary proceeding was not dismissed until September 8, 1998, ten years after he filed his bankruptcy petition and five years after his debts were discharged. The record, however, contains no indication that the bankruptcy court issued a final order, and no evidence was presented that the clerk closed the bankruptcy proceeding.

III. Federal Preemption of State Law

Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution: "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, if state law conflicts with federal law, the state law is preempted and "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The parties do not argue that federal law preempts state law expressly in this case. 158 S.W.3d at 639. *See Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). Graber asserts that federal bankruptcy law impliedly preempts state law, either (1) because the scheme of federal regulation is sufficiently comprehensive to support a reasonable inference that Congress left no room for supplementary state regulation (field preemption), or (2) because the state law actually conflicts with federal remedies (conflict preemption). *See id.*

"The purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Accordingly, to discern whether

Congress manifested a clear intent to preempt state claims arising from abuse of the bankruptcy process, we consider the statute's language and structure, the context of its enactment, and the purpose of the statute as a whole as revealed through our "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)).

IV. Federal Law Occupies the Field of Bankruptcy and Preempts State Law.

The U.S. Constitution gives Congress alone the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Congress passed the Bankruptcy Act of 1898 to govern bankruptcies, then overhauled and codified those statutes in 1978, and has since superceded much of the Bankruptcy Code of 1978 in the 1984 and 1986 amendments to the Code. Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. Tex. L. Rev. 487, 492 (1988). Congress granted jurisdiction over bankruptcy matters to the federal courts by sections 157 and 1334 of title 28 of the United States Code. *Celotex Corp. v. Edwards,* 514 U.S. 300, 307 (1995). This jurisdiction is exercised in the first instance by bankruptcy courts, which are divisions of federal district courts. *See Cox v. Zale Del., Inc.*, 239 F.3d 910, 917 (7th Cir. 2001).

Filing a bankruptcy petition vests broad and exclusive jurisdiction over the property of the debtor and his estate in the district court, and hence the bankruptcy court. *In re Garnett*, 303 B.R. 274, 277 (E.D.N.Y. 2003). Section 541(a)(1) defines the property of the estate to include "all legal

or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "This definition is unquestionably broad, its main purpose being to 'bring anything of value that the debtors have into the [bankruptcy] estate.'" *Lyon v. Eiseman (In re Forbes)*, 372 B.R. 321, 330-31 (B.A.P. 6th Cir. 2007) (alteration in original) (citing *Booth v. Vaughan (In re Booth),* 260 B.R. 281, 284-85 (B.A.P. 6th Cir. 2001)). These broad powers extend to both a debtor's estate and all transfers made within two years before the filing of the bankruptcy petition. *See* 11 U.S.C. §§ 541, 548(a)(1). All legal proceedings against the debtor or his estate are automatically stayed and subjugated to the bankruptcy proceeding. 11 U.S.C. § 362. The disposition of the debtor's property is governed by federal law, although a debtor's property interests are generally "created and defined by state law" unless a federal purpose requires otherwise. *Lyon*, 372 B.R. at 331 (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)).

In the absence of explicit preemptive language, Congress's intent to supersede state law fully may be inferred when the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," when the Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or when "the object sought to be obtained by federal law and the character of the obligations imposed by it may reveal the same purpose." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (citations omitted). This form of preemption is a federal defense to state law claims and implicates choice of

law rather than choice of forum.[2] *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391 (1986). Graber argues federal bankruptcy law impliedly preempts Fuqua's claims because the state law purports to regulate conduct "in a field that Congress intended the Federal Government to occupy exclusively," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), and because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).[3] The federal interest in and control of bankruptcy may truly be said to have completely "occupied the field."[4]

A. Congress Authorized the Award of Actual and Punitive Damages, Attorneys' Fees, and Costs to Parties, as Appropriate, for Violation of Bankruptcy Statutes and Rules and Malicious Prosecution in Bankruptcy Proceedings.

Fuqua concedes that an action based on a frivolous or groundless claim could be preempted by the Bankruptcy Code and Rules, but he contends the remedial scheme of the Bankruptcy Code and Rules is inapposite to the purpose and remedies of a malicious prosecution claim. Graber argues Congress intended to supercede state law in this field by designing adequate remedies in section 105 and rule 9011 to deter abuse of the bankruptcy process. Fuqua also concedes that section

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[2] Under our pleading rules, Graber's assertion of preemption as a plea to the jurisdiction was sufficient to apprise Fuqua of the character of proof he would need to address the preemption issue, whether it be defensive or jurisdictional in nature. TEX. R. CIV. P. 94. *See Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 n.8 (Tex. 1991).

[3] Congress has accommodated state police power to a limited degree in bankruptcy proceedings. For example, known as the "police power" exception to the automatic stay, the Bankruptcy Code states that filing a petition does not operate as a stay of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power, other than enforcement of a money judgment. 11 U.S.C. § 362(b)(4).

[4] The Court's indication that federal preemption of state law cannot be based on the absence of explicit preemption language in federal law (called "congressional silence") is curious. *See* ___ S.W.3d ___. Both the field and conflict preemption doctrines take effect only when such silence exists.

105 grants the bankruptcy court broad equitable powers, but urges that the section does not sufficiently address malicious prosecution. According to Fuqua, rule 9011 only addresses frivolous or groundless claims and mirrors Federal Rule of Civil Procedure 11, which has been held not to preempt state law actions for malicious prosecutions in federal court. *See U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 392-93 (3d Cir. 2002).

The authority bestowed on bankruptcy courts by federal law arms them with a broad array of remedies to regulate the conduct of parties, issue injunctive relief, and award sanctions and damages for maliciously initiating proceedings. The Bankruptcy Code "provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir. 2001). Other courts have concluded that this comprehensive system overrides state law claims for this type of abuse of the bankruptcy process.

"A debtor who believes a filing in bankruptcy is frivolous or a violation of the automatic stay occurred has a comprehensive scheme of remedies available in the federal courts. The existence of this comprehensive scheme precludes collateral attacks on such filings in state courts." *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259, 264 (D. Kan. 2001) (quoted in *Greene v. Young*, 174 S.W.3d 291, 302 n.7 (Tex. App–Houston [1st Dist.] 2005, pet. denied)). Sections 105(a) and 362(k) and rule 9011 provide effective remedies under federal law and authority for bankruptcy courts to enjoin violations of law and to award damages to debtors harmed by bad faith and abusive conduct in bankruptcy proceedings. 11 U.S.C. §§ 105(a), 362(k); FED. R. BANKR. P. 9011(b)-(c).

Section 105(a) empowers bankruptcy courts.

> *The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title*. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process*.

11 U.S.C. § 105(a) (emphasis added). Section 105 gave the bankruptcy courts "broad equitable powers to exercise [their] jurisdiction any time there is a threat to the successful rehabilitation of the estate." Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487, 497 (1988) (citing *In re Stuart Glass & Mirror, Inc.*, 71 B.R. 332, 335 (Bankr. S.D. Fla. 1987)). The last phrase–"to prevent an abuse of process"–was added in 1986 to affirm that bankruptcy courts may take any action on their own and make any necessary determination to prevent an abuse of process and expedite bankruptcy cases. *Id.* at n.219 (citing Senator Orrin Hatch who apparently made the only statement in legislative history concerning the amendment). Under section 105(a), the court may raise the issue of good faith in considering motions of the parties. *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 n.1 (5th Cir. 1986).

Under section 362(k), any individual injured by a willful violation of a stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k) (stating further that a good faith belief limits recovery to actual damages). Although this case does not concern violation of a bankruptcy stay, this section clearly shows that Congress considered the award of actual and punitive damages, in addition to fees and costs, and authorized ordering those awards as appropriate.

Rule 9011, analogous to Fed. R. Civ. P. 11, empowers bankruptcy courts to impose "an appropriate sanction upon the attorneys, law firms, or parties" that have presented to the court

pleadings, motions, or "other paper" containing allegations, factual contentions, or claims and defenses that generally have no evidentiary support and are not warranted by existing law.[5] Rule 9011 authorizes the award of reasonable expenses and attorneys' fees, monetary sanctions, or a penalty to the court. FED. R. BANKR. P. 9011(c).

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[5] Rule 9011 provides sanctions for frivolous and harassing filings:

> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances–
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> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
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> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
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> (1) How Initiated
> > (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). . . If warranted, the court may award to the party prevailing on the motions the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.
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> (2) Nature of Sanction: Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated . . . [t]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

FED. R. BANKR. P. 9011(b)-(c).

Fuqua asserts that "any sanctions ordered may be payable *solely* to the court and not the party subjected to the frivolous or groundless claim" (emphasis added). He argues this as another reason bankruptcy statutes and rules need to be supplemented by state law to provide recourse to debtors for harm caused them in bankruptcy adversary proceedings. This is incorrect, as the rule authorizes awards of sanctions and damages to parties in the proceeding. Rule 9011(c) expressly states that the court "may award *to the party prevailing* on the motion" reasonable expenses and attorneys' fees. FED. R. BANKR. P. 9011(c)(1)(A) (emphasis added). It also authorizes orders "directing payment *to the movant* of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id.* (c)(2) (emphasis added).

Fuqua's assertion that section 105 does not provide recovery of damages for maliciously bringing proceedings in bankruptcy is likewise off the mark. A number of courts have affirmed that section 105, although widely used for injunctive relief, authorizes the award of "any type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions'" of the Bankruptcy Code. *Hardy v. U.S. (In re Hardy)*, 97 F.3d 1384, 1389 (11th Cir. 1996) (citing 11 U.S.C. § 105(a)). *See also McTyeire v. Hunt (In re McTyeire)*, 357 B.R. 898, 903 (Bankr. M.D. Ga. 2006). Section 105 authorizes a bankruptcy court to order payment of actual and puntive damages as well as attorneys' fees and costs. *Manion v. Providian Nat'l Bank*, 269 B.R. 232, 241-42 (D. Colo. 2001) (affirming the bankruptcy court's order requiring a holder of void deeds of trust to pay actual damages and attorneys' fees in an adversary proceeding); *Moratzka v. Visa U.S.A. (In re Calstar, Inc.)*, 159 B.R. 247, 261 (Bankr. D. Minn. 1993) (awarding money damages

for a violation of the automatic stay and stating that punitive damages, although generally available under section 105, were not warranted in the case). Leal, 29 S. TEX. L. REV. at 496.

Section 303(i) also provides a close analogue to a Texas common law malicious prosecution claim, authorizing awards to debtors for reasonable attorneys' fees, costs, and actual or punitive damages when the court dismisses an involuntary petition. 11 U.S.C. § 303(i). Although section 303(i) only applies to involuntary cases, it once again affirms that Congress recognized the wide panoply of available remedies for abuse of process and then associated sanctions and awards with selected violations of the Code and the Rules. Congress provided sanctions for certain violations of Bankruptcy Code provisions, injunctive relief for some, actual damages for others, and punitive damages for a few. The provisions implicated by a debtor's claim of malicious prosecution, section 105 and rule 9011, both provide sanctions and damages upon proper proof.

Because Congress has provided a comparable, if not exact, counterpart in federal bankruptcy law to Fuqua's sought-after remedies, his argument that recoveries in bankruptcy law are woefully inadequate loses considerable steam. The existence of the remedial provisions cited "suggests that Congress has considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration*, 74 F.3d at 915 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252-54 (1993) (enforcement scheme in ERISA indicates Congress did not forget other remedies) and *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987) (ERISA remedies preempt others, even if some possible remedies are left out)). If a Texas common law claim packs more wallop than the bankruptcy relief, then Congress presumably intended to provide a more limited remedy for the malicious filing of an adversary proceeding in a voluntary bankruptcy. The

fundamental vacancy in Fuqua's argument is the unsubstantiated presumption that bankruptcy laws necessarily must provide equivalent levels of recovery to the state common law claim.

Fuqua contends that, were we to hold his state malicious prosecution claim preempted, he would have no remedy because the bankruptcy court has discharged his debts and no longer has jurisdiction over his case. Section 350(a) states that after the estate is fully administered and the court has discharged the trustee, "the court shall close the case." Further, according to the bankruptcy rules, a court "shall enter *a final decree* closing the case." FED. R. BANKR. P. 3022 (emphasis added).

Neither a discharge of debts nor a dismissal closes the case; on the contrary, a bankruptcy case is not closed, and the bankruptcy court retains jurisdiction, until the final decree is entered on the docket sheet. *See In re Union Home and Indus., Inc.*, 375 B.R. 912, 917 (B.A.P. 10th Cir. 2007); *Sherman v. Sec. & Exch. Comm'n (In re Sherman)*, 491 F.3d 948, 967 (9th Cir. 2007); *Greenfield Drive Storage Park v. Cal. Para-Prof'l Servs., Inc. (In re Greenfield Drive Storage Park*), 207 B.R. 913, 918 (B.A.P. 9th Cir. 1997); *Singleton v. Countrywide Home Loans, Inc. (In re Singleton*), 358 B.R. 253, 256 (D.S.C. 2006) (holding that dismissal of a bankruptcy case does not deprive the court of jurisdiction; it must be closed); *In re Hasan*, 287 B.R. 308, 311 (Bankr. D. Conn. 2002) (holding that a debtor's voluntary dismissal did not close the case and that the bankruptcy court retained jurisdiction to impose sanctions on the debtor); *In re A.H. Robins Co.*, 219 B.R. 145, 149 (Bankr. E.D. Va. 1998). *See also* 9 COLLIER ON BANKR. § 5009.01 (15th ed. 2006). Once the bankruptcy case is closed, there is no longer a bankruptcy estate, and there can no longer be "related to"

jurisdiction. 9 COLLIER ON BANKR. § 5009.01. As such, the bankruptcy court only then loses jurisdiction.

Graber states that there is no order in the record closing Fuqua's Chapter 7 case. Fuqua does not assert that a final order was issued and has presented no evidence that his bankruptcy case was ever closed. *See A.M.S. Printing Corp. v. Wernick (In re Wernick)*, 242 B.R. 194, 196 (Bankr. S.D. Fla. 1999); *Edwards v. Sieger (In re Sieger)*, 200 B.R. 636, 639 (Bankr. N.D. Ind. 1996). If his case remains open, the bankruptcy court retains jurisdiction, and Fuqua could petition that court for appropriate remedies. Moreover, if the bankruptcy case has in fact been closed, Fuqua could petition the court to reopen it "to accord relief to the debtor." 11 U.S.C. § 350(b). Fuqua has not persuaded me that he would have no relief in bankruptcy.

Ultimately, Congress, not the state courts, should decide what incentives and penalties are appropriate to address litigation conduct in the bankruptcy proceedings and when those incentives or penalties should be used. *See Gonzales v. Parks*, 830 F.2d 1033, 1036-37 (9th Cir. 1987).

B. The Court's Recognition of a State Common Law Malicious Prosecution Claim for Adversary Proceedings Conflicts with Congress's Decision Not to Create Such a Claim for Voluntary Chapter 7 Bankruptcies.

"[B]ankruptcy principles come from federal rather than state law." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (Easterbrook, J.) (citing *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (Posner, J.). In bankruptcy, "the debtor's protection and remedy remain[] under the Bankruptcy Act." *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974) (holding superceded in part by statute). The "delicate balance of a debtor's protections and obligations during the bankruptcy procedure" have been fixed, modified, overhauled, and set by Congress over more than a century,

eminating from explicit constitutional authority to make the bankruptcy laws. *Kokoszka*, 417 U.S. at 651.

Congress provided a roadmap to its intent in the relevant provisions of the Bankruptcy Code. It includes both voluntary and involuntary bankruptcies under Chapters 7 and 11. *See* 11 U.S.C. §§ 301, 303. In section 303, Congress promulgated a statutory analogue to state law malicious prosecution claims for abuse of bankruptcy proceedings in involuntary cases. *Id.* Section 303(i) provides for recovery of "any damages proximately caused," including actual and exemplary damages, by filing an involuntary petition in bad faith. *Id.* By its language, section 303(i) remedies include the damages that may be recovered under Texas common law for malicious prosecution**.** *See, e.g.*, *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 798 (Tex. 2006) (allowing mental anguish damages); *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995) (discussing sufficiency of the evidence for punitive damages). Courts have consistently held that section 303(i) preempts state law actions for malicious prosecution in involuntary bankruptcy proceedings.[6]

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[6] *See Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1089 (9th Cir. 2005); *Glannon*, 261 B.R. at 264; *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 123-28 (D. Md. 1995); *Mason v. Smith*, 672 A.2d 705, 708 (N.H. 1996); *Sarno v. Thermen*, 608 N.E.2d 11, 18 (Ill. App. Ct. 1992); *Gene R. Smith Corp. v. Terry's Tractor, Inc.*, 257 Cal. Rptr. 598, 600 (Cal. Ct. App. 1989).

A minority of courts have refused to adopt this reasoning. *See Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 52 (3d Cir. 1988) (reasoning that because section 303(i) is not available where debtor has converted a Chapter 7 proceeding to a Chapter 11 proceeding, it cannot be an exclusive remedy for abuse of process and malicious prosecution claims); *R.L. LaRoche, Inc. v. Barnett Bank of S. Fla.*, 661 So. 2d 855, 859-64 (Fla. Dist. Ct. App. 1995). However, *Paradise Hotel* has been distinguished as the minority view. *See Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998). Further, a subsequent member of the court that issued *R.L. LaRoche* identified the decision's minority status in light of the development of the law in this area and encouraged his court to recede from that position. *Mullin v. Orthwein*, 772 So. 2d 30, 31 (Fla. Dist. Ct. App. 2000) (Gross, J., concurring) (distinguishing other cases in line with it as not being based on conduct occurring in bankruptcy).

Importantly, for this case and Fuqua's claim, Congress did not similarly create a vehicle for recovery of "all damages proximately caused" or exemplary damages for voluntary Chapter 7 proceedings. Instead, Congress created remedies to recover attorneys' fees and costs as sanctions. The extensive remedial provisions for involuntary petitions indicate that Congress did not ignore but considered sanctions, equitable remedies, and compensatory and exemplary damages in the bankruptcy scheme. *MSR Exploration*, 74 F.3d at 913. Where Congress includes damages provisions in one section of a statute but omits them in another section of the same statute, we presume Congress acted intentionally and purposefully in the disparate inclusion or exclusion. *Clay v. U.S.*, 537 U.S. 522, 528 (2003); *Duncan v. Walker*, 533 U.S. 167, 173 (2001). In this context, Congress's creation of sanctioning tools, albeit broad, rather than damages, speaks loudly to Congress's intent for conduct constituting malicious prosecution in voluntary Chapter 7 proceedings. By allowing Fuqua's Texas common law prosecution claim to proceed for actions that occurred entirely in bankruptcy, the Court, in effect, creates a malicious prosecution claim for voluntary Chapter 7 bankruptcies that Congress saw fit not to create.

There is no provision comparable to a Texas malicious prosecution claim directed specifically at the voluntary filings of a debtor or an adversary proceeding instituted by a creditor. There are, however, many other remedial provisions in the Code that could apply. *See, e.g.*, 11 U.S.C. § 362(k) (willful violation of automatic stays); 11 U.S.C. § 707(b) (dismissal for "substantial abuse"); 11 U.S.C. § 930(a) (dismissal under Chapter 9); 11 U.S.C. § 1112(b) (dismissal under Chapter 11); 28 U.S.C. § 1927 (liability for excessive costs for "unreasonably and vexatiously" multiplying proceedings). And like 303(i), section 362(k) has been held to preempt state law abuse

of process claims for violations of an automatic stay. *See E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir. 2001) (preemption of jurisdiction); *Periera v. Chapman*, 92 B.R. 903, 908 (C.D. Cal. 1988); *Brandt v. Swisstronics, Inc. (In re Shape)*, 135 B.R. 707, 708-09 (Bankr. D. Me. 1992); *Koffman*, 182 B.R. at 123-28 (preemption holding based on both section 303(i) and section 362(k)); *Smith v. Mitchell Constr. Co.*, 481 S.E.2d 558, 561 (Ga. Ct. App. 1997). *See also Halas v. Platek*, 239 B.R. 784, 792 (N.D. Ill. 1999) (holding that because a claim for sanctions under section 362(k) is within the exclusive jurisdiction of federal courts, state court lacked subject matter jurisdiction over claim).

The existence of such an extensive remedial scheme indicates congressional intent for bankruptcy law to "occupy exclusively" the regulation of conduct amounting to malicious prosecution or abusive filings in the bankruptcy process. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). An overlay of fifty states' common law claims would damage or interfere with the federal scheme. In addition to the Bankruptcy Code's extensive remedial scheme indicating congressional intent, the constitutionally prescribed need for uniformity in the bankruptcy laws is a special feature that warrants preemption. *Id.*

C. The Required Uniformity of Bankruptcy Laws Mitigates Against Development of State Common Law Claims for Misconduct in Bankruptcy Proceedings.

The Constitution grants Congress the authority to establish "uniform Laws" on the subject of bankruptcies. U.S. CONST. art. I, § 8. Utilizing this power, Congress created comprehensive regulations on the subject of bankruptcy and vested original and exclusive jurisdiction over bankruptcy petitions in the federal district courts. 28 U.S.C. § 1334(a). Allowing state court actions

for abuse of the bankruptcy process conflicts with this goal of uniformity. "[T]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *See MSR Exploration*, 74 F.3d at 915.

There are several reasons to preclude these types of state common law claims to ensure the uniformity of bankruptcy law. First, Congress's authorization of certain penalties for frivolous filings in its pervasive promulgation of bankruptcy laws "should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits." *Gonzales*, 830 F.2d at 1036. Second, the ability to sue parties in bankruptcy in civil proceedings under state law that is inconsistent with the Bankruptcy Code would threaten the uniformity of federal bankruptcy law by potentially affecting parties' rights before the bankruptcy court. *See Gonzales*, 830 F.2d at 1035 (discussing a claim against debtor for maliciously filing a voluntary petition). Third, the threat of being sued in tort in state court could deter persons from exercising their rights in bankruptcy, for instance by making them reluctant to file an adversary proceeding. *See id.* at 1036; *MSR Exploration*, 74 F.3d at 916.

"While it is true that bankruptcy law makes reference to state law at many points, the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal." *MSR Exploration*, 74 F.3d at 916. Moreover,

> It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process . . . [T]he highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscore the need to jealously guard the bankruptcy

> process from even slight incursions and disruptions brought about by state malicious prosecution actions.

Id. at 914. Even what may be slight incursions could very well collectively and over time, with fifty different jurisdictions considering them, even in a well-intentioned fashion, undermine the uniformity and objectives of the federal bankruptcy system.

Fuqua argues that Congress intended state law to supplement this area of bankruptcy. I disagree and conclude that, based on the remedial scheme established and the need for uniformity, Congress intended to preempt state common law claims based on malicious proceedings in a bankruptcy case to avoid such claims presenting "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and to avoid undermining the constitutional mandate of "uniform Laws on the subject of Bankruptcies throughout the United States." *Hines*, 312 U.S. at 67. *See* U.S. CONST. art. I, § 8.

V. Preemption of Jurisdiction

Ordinarily, federal preemption operates as an affirmative defense to a plaintiff's state law claims, but does not deprive a state court of jurisdiction over those claims. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427 (Tex. 2005) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). There are, however, situations in which federal law may preempt conflicting state-court jurisdiction. *Longshoremen*, 476 U.S. at 388. *See also Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 547 (Tex. 1991). State court jurisdiction is affected only when Congress requires that claims be addressed exclusively in a federal forum. *Mills*, 157 S.W.3d at 425 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-45 (1959)). Whether a trial court has subject matter

jurisdiction is a legal question we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

> It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. Whether it has done so in a specific case is the question that must be answered when a party claims that a state court's jurisdiction is pre-empted.

Longshoremen, 476 U.S. at 388 (citation omitted). *See Mills*, 157 S.W.3d at 427; *Gorman*, 811 S.W.2d at 546. The United States Supreme Court refers to the divesture of state-court jurisdiction by federal law as "*Garmon* preemption." *Longshoremen*, 476 U.S. at 388-89, 391.

The bankruptcy courts' jurisdiction is established by sections 157 and 1334 of title 28 of the United States Code. *Celotex,* 514 U.S. at 307. Section 1334(a) states that "the district courts shall have original and exclusive jurisdiction of all cases under title 11," which refers to the bankruptcy petition itself. *Wood v. Wood (In re Wood),* 825 F.2d 90, 92 (5th Cir. 1987). Section 1334(b) states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Therefore, although Congress expressed its intent to create an exclusive federal forum with respect to cases "under title 11," "[i]n other matters arising in or related to title 11 cases, unless the Code provides otherwise, state courts have concurrent jurisdiction." *Sanders v. City of Brady (In re Brady, Tex., Mun. Gas Corp.)*, 936 F.2d 212, 218 (5th Cir. 1991).

The parties do not dispute that Fuqua's malicious prosecution claim, or the adversary proceeding upon which it is based, is anything more than merely "related to" a title 11 case, as opposed to a case "under title 11." Thus, this is not the type of case for which Congress provided

explicit forum-preempting language. *See, e.g.*, *Mills*, 157 S.W.3d at 427-28 (referring to the holding in *Gorman*, 811 S.W.2d at 547-49, that state courts have no jurisdiction over certain ERISA claims because 29 U.S.C. § 1132(e)(1) provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter. . . .").

The lack of explicit forum-preempting language regarding Fuqua's claim does not mean, however, that Congress did not intend to establish an exclusive federal forum for claims based on abuse of the bankruptcy process. "'[T]he presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" *Mills*, 157 S.W.3d at 428 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990)). For instance, in *Garmon*, the U.S. Supreme Court held that because Congress had enacted such a "complex and interrelated federal scheme of law, remedy, and administration" in the National Labor Relations Act, "due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 243-44 (citation omitted). Similarly, in *Longshoremen*, the Court held that neither state courts nor federal courts had jurisdiction to hear claims over which Congress intended the National Labor Relations Board to have exclusive jurisdiction. 476 U.S. at 390-91. But these cases dealt with the unique federal scheme of the National Labor Relations Act and Congress's intent that both state and federal courts "defer to the exclusive competence of the National Labor Relations Board" to avert "the danger of state interference with national policy." *Longshoremen*, 476 U.S. at 390 (quoting *Garmon*, 359 U.S. at 245).

Assuming, as the parties concede, that this claim is "related to" a bankruptcy case, the claim is one of many for which Congress declined to provide exclusive jurisdiction in the federal courts. *See* 28 U.S.C. §§ 1334(b), 157 (establishing the federal courts' original, but not exclusive, jurisdiction over "related to" matters and "core proceedings"). The jurisdictional scheme created by Congress thus prevents me from concluding that Congress intended to create an exclusive federal forum for the claims made in an adversary proceeding. Consequently, only a preemption argument related to the choice of law is viable.

VI. Conclusion

Because Congress created an extensive remedial scheme in the Bankruptcy Code to address abuse of process in bankruptcy proceedings, and because the constitutional goal of "uniform [bankruptcy] laws . . . throughout the United States" could be undermined by allowing state law malicious prosecution actions based on the filing of an adversary proceeding, I would hold that such a claim is preempted by federal bankruptcy law. Preemption operates in this case not to deprive the state court of jurisdiction, but as an affirmative defense to Fuqua's claims. Congress intended to supersede state law claims for malicious prosecution of the bankruptcy process, not to divest state courts of jurisdiction over such claims. I would affirm the court of appeals' judgment that the district court erred in dismissing this case for lack of subject matter jurisdiction, but I would reverse the court of appeals' judgment that a Texas common law malicious prosecution claim may be predicated on conduct that occurred entirely in the bankruptcy court and which the Bankruptcy Code's extensive remedial and sanction provisions address.

J. Dale Wainwright
Justice

OPINION DELIVERED: January 9, 2009