ORIGINAL

IN THE SUPREME COURT OF OHIO

PNH, INC. and RONALD CREATORE	)	**APPEAL NO.: 10-1430**
	)	
Appellants,	)	
	)	**ON APPEAL FROM THE**
vs.	)	**MAHONING COUNTY COURT,**
	)	**SEVENTH APPELLATE DISTRICT**
ALFA LAVAL FLOW, INC.	)	
	)	
Appellee.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, PNH, INC. AND RONALD M. CREATORE

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FILED
AUG 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR GREAT GENERAL INTEREST

This case raises the substantial constitution question of whether state tort claims such as abuse of process and tortious interference by and against non-debtors arising from a bankruptcy adversarial proceeding are preempted by the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) under the Supremacy Clause of the U.S. Constitution. Despite Congressional intent that such claims not be preempted by the Bankruptcy Code the Seventh District Court of Appeals held such claims preempted. In doing so, however, the appellate court candidly recognized:

> The Bankruptcy Code does not explicitly prohibit state law tort claims that arise from bankruptcy proceedings. Thus, the question to be resolved in this appeal is whether Congress impliedly preempted such claims. **This is an issue of first impression for this court. Neither this district, nor the Ohio Supreme Court, has addressed this question. Courts across the county – both state and federal – are divided on this issue.** See Para. 29 of the Court of Appeal's Opinion ("Opinion") attached as Appendix A. [Emphasis added].

The split authority on this question arises from disparate application of the Supremacy Clause to these traditional state tort claims in the bankruptcy context. "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). When there is a conflict between state and federal law and the Supremacy Clause is invoked, state laws are left "without effect" and are displaced with federal law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The preemption issue "is an important one as it represents a conflict between the states' traditional authority to provide tort remedies to their citizens, and Congress' express Constitutional authority to establish 'uniform Laws on the subject of Bankruptcies throughout the United States.'" *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115 (1995) quoting *Silkwood v. Kerr-*

McGee Corp., 464 U.S. 238, 248 (1984) and U.S. Const. art. I, § 8, cl. 4.

Because the Supremacy Clause's preemptive effect results in citizens being deprived of their traditional state tort remedies, the U.S. Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 449 (2005) quoting *Medronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Therefore, the standard for applying preemption is a high one; it is presumed that federal law does not preempt state law unless Congress' intent to do so is "clear and manifest". *Id.* Answering the instant constitutional question requires an in-depth analysis of whether Congress clearly intended the Bankruptcy Code to displace applicable state tort law for claims arising in a bankruptcy adversarial proceeding between two non-debtors. Here, the court of appeals failed to analyze Congress' intent with regard to the specific claims at issue.

While the constitutional question presented here is a matter of first impression for this Court, many other state's highest courts have recognized its importance and have recently examined the scope of the Bankruptcy Code's preemption of their state's laws.[1] Most notably, in *Graber v. Fuqua*, 279 S.W.3d 608 (Tex. 2009), the Texas Supreme Court found that the Bankruptcy Code did not preempt the Texas tort claim of malicious prosecution which arose from actions taken in a bankruptcy adversarial proceeding. In its holding, the Texas Supreme Court acknowledged the difficulty of applying the Supremacy Clause:

> To be sure, "it is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide," and this case is

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1 *Christian v. Mason*, 148 Idaho 149 (2009) (Idaho Supreme Court); *Collett v. Collett*, 270 Neb. 722 (2005) (Nebraska Supreme Court); *Megal Deve. Corp. v. Shadof*, 286 Wis.2d 105 (2005) (Wisconsin Supreme Court); and *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, L.L.P. 598 Pa. 296 (2006) (Pennsylvania Supreme Court).

> no exception. When faced with such a difficult case, we must err in favor of the states. *Id.* at 620 quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-1 (1947).

Several states have already recognized the need to provide clarity on this issue.[2] We urge this honorable Court to provide the same type of critical guidance to Ohioans regarding this complex constitutional question.

Whether the Bankruptcy Code preempts state tort claims is not only an important constitutional question, but also a matter of great public interest. Bankruptcy filings in the State of Ohio are on the rise. During the 12 month period ending on March 31, 2010, over 72,000 bankruptcy cases were commenced in Ohio's Bankruptcy Courts, 11,000 more than the previous 12 months.[3] Non-debtors may become involved in these thousands of cases in a variety of ways, such as by voluntarily filing a claim or involuntarily being named in an adversary complaint. Preemption, as applied by the court of appeals here, deprives these non-debtor participants of their opportunities to seek redress for tortious conduct occurring before and/or during the bankruptcy case. Preemption of these claims does not just deprive Ohio courts of jurisdiction; it bars the injured party from asserting these state law claims in any forum.

In effect, the court of appeals application limits Ohioans to only those remedies expressly set forth in the Bankruptcy Code. Such remedies may be sufficient when the injured party is a debtor, as Congress provided specific remedies in the Bankruptcy Code for debtors. However, non-debtors like the injured parties here, either do not qualify for the remedies provided by the Bankruptcy Code or there simply are no effective remedies for them in the Bankruptcy Code. Considering the shear

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2 As the Seven District recognized here Ohio's Fifth District Court of Appeals implicitly adopted the position Appellants advocate herein. See *Dever v. Lucas,* 174 Ohio App.3d 725, 2008-Ohio-332, 884 N.E.2d 641.

3 See Table F and F-2 at http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx.

number of bankruptcy cases now commenced in Ohio it is of great public interest that Ohio laws protect Ohio's citizens in the bankruptcy process when the Bankruptcy Code does not.

This case raises a substantial constitutional question regarding the scope of the Bankruptcy Code's preemptive effect on traditional state tort claims arising from bankruptcy proceedings. The overreaching preemption found by the court of appeals is contrary to Congress' intent and unjustifiably deprives Ohio non-debtors of their their only true recourse - Ohio's state tort claims.

II. STATEMENT OF THE CASE AND FACTS

This is an appeal by the Appellants, Ronald Creatore ("Creatore") and PNH, Inc. ("PNH") stemming from the dismissal of their abuse of process and tortious interference claims against Appellee, Alfa Laval Flow, Inc. ("Alfa Laval") for lack of subject matter jurisdiction. The claims are based on Alfa Laval's abuse of process and tortious interference before and during the bankruptcy case of Girton, Oakes & Burger, Inc. ("GO&B").

Alfa Laval sold food and beverage processing equipment to GO&B, its Ohio distributor. The distribution arrangement was not exclusive and GO&B quietly manufactured and sold its own products under its private label, BuyPEP. In early 2003, Creatore, president of GO&B, learned that his fellow GO&B shareholders and officers, William Sayavich ("Sayavich") and David Barnitt ("Barnitt"), committed financial malfeasance with respect to GO&B's secured lender, Provident Bank ("Provident"). As a result, Creatore terminated both Sayavich and Barnitt and placed Alfa Laval on notice of the confidentiality and non-compete provisions of the Close Corporation Agreement ("CCA") entered into by Creatore, Savavich and Barnitt.

Meanwhile, GO&B owed Alfa Laval in excess of $1,000,000.00 and Provident threatened collection proceedings. Alfa Laval executives met with Creatore to discuss GO&B's delinquent

invoices and to present a plan to minimize the impact on Alfa Laval if Provident called GO&B's loan. Alfa Laval's proposal required Creatore to agree not to compete with Alfa Laval. Creatore refused to accept Alfa Laval's proposal. Instead Creatore purchased the Provident loans through PNH, an entity he incorporated solely for that transaction.

At the same time, Barnitt and Sayavich contacted Alfa Laval and, at its behest, and in violation of confidentiality provisions in the CCA, disclosed confidential information to Alfa Laval including the existence of GO&B's competing product line and Creatore's intended loan purchase. Despite Alfa Laval's non-exclusive arrangement with GO&B, Alfa Laval became very upset about GO&B's competing product line. Barnitt and Sayavich knew Creatore was purchasing the Provident Loan and that the sale was scheduled to close on April 23, 2003. Again, in violation of the confidentiality provisions of the CCA, Barnitt's attorney informed Alfa Laval's attorney of the closing date. Less than one hour after PNH closed on the loan purchase, Alfa Laval filed an involuntary bankruptcy petition against GO&B in the U.S. Bankruptcy Court for the Northern District of Ohio, Case No. 03-41957.

Although Alfa Laval, as a creditor of GO&B, had the legal right to initiate the involuntary bankruptcy proceeding, ultimately it abused the bankruptcy process to further its unlawful ulterior purposes -- namely to eliminate Creatore as a competitor. Alfa Laval immediately sought and had appointed a Gap Interim Trustee, Mark Beatrice ("Beatrice"), and Creatore lost operational control of GO&B. Creatore then began competing on his own. Alfa Laval in turn sought injunctive relief against Creatore in the GO&B Bankruptcy by misappropriating the covenant not to compete GO&B had with Creatore. The Bankruptcy Court refused to entertain the motion, indicating to Alfa Laval that only Beatrice as Trustee of GO&B, could seek such relief on behalf of GO&B and then, only

through the filing of a properly authorized adversarial complaint.

Nevertheless, the next day, Alfa Laval filed an adversarial complaint naming Beatrice on behalf of GO&B, as a co-plaintiff alongside itself. Alfa Laval's adversarial complaint, although purportedly brought by Beatrice as Trustee, was in fact brought at the insistence of Alfa Laval, written by Alfa Laval, and executed only by Alfa Laval's attorney. Neither Beatrice nor an attorney on his behalf executed the adversarial complaint. With the adversarial complaint filed, Alfa Laval again without Beatrice's signature filed a second improper motion seeking to enjoin Creatore from competing. In essence, Alfa Laval, a **non-debtor** to the bankruptcy, improperly used a bankruptcy adversarial proceeding to attempt to eliminate another **non-debtor**, Creatore, from competing against it. Beatrice eventually declined to pursue Alfa Laval's request to enjoin Creatore from competing and Beatrice settled the adversarial complaint. Alfa Laval refused to participate in the settlement, but dismissed its complaint "without prejudice."

On May 11, 2005, Creatore filed the complaint at issue herein against Alfa Laval in the Mahoning County Court of Common Pleas, asserting claims for abuse of process and tortious interference. Over three years later in late October 2008, Alfa Laval moved to dismiss the Complaint for lack of subject matter jurisdiction. The trial court granted the motion to dismiss, finding Creatore's claims were preempted by the Bankruptcy Code. On June 29, 2010, the Seventh District Court of Appeals affirmed the trial court's decision on subject matter jurisdiction and held the remaining issues moot. Creatore and PNH now appeal to his Court to hear and resolve this issue.

III. ARGUMENT IN SUPPORT OF APPELLANTS' PROPOSITION OF LAW

Proposition of Law: State causes of action, including tortious interference and abuse of process, that arise from actions taken by and against non-debtors in Federal Bankruptcy Court are not preempted by the Bankruptcy Code.

A. Congress did not Intend for the Bankruptcy Code to Preempt State Tort Claims by and Between Non-Debtors.

The Supremacy Clause states in relevant part: "this Constitution, and the laws of the United States which shall be made in pursuance thereof… shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. When there is a conflict between state and federal law and the Supremacy Clause is invoked, state laws are left "without effect" and are preempted with federal law. *Maryland* at 746. Generally, preemption occurs in one of the following ways: express preemption, field preemption or conflict preemption. *See*, e.g., *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 51 (3d Cir. 1988) and *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383 (3d Cir. 2002). Here the court of appeals correctly recognized that the Bankruptcy Code does not *expressly* preempt state tort law.

Instead, the court of appeals reached its erroneous decision by applying field preemption. Para. 29 of the Opinion. Field preemption occurs when Congress has clearly demonstrated its intent to fully occupy the field of regulation. *Id.* "The question whether a certain state action is preempted by federal law is one of Congressional intent. The purpose of Congress is the ultimate touchstone." *Pilot Life Ins. v. Dedeauz*, 481 U.S. 41, 44 (1987). Clear evidence of Congress' intent is found in its purpose for the Bankruptcy Code, to provide honest debtors with a fresh start. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). More specifically, its central purposes include the expeditious and equitable distribution of the assets of the debtor's estate and the "centralized resolution of **purely bankruptcy issues**." *In re Gandy*, 299 F.3d 489, 495 and 498 (5th Cir. 2002). [Emphasis and Underlining Added]. Therefore, the field Congress intends to occupy with the Bankruptcy Code and thus the scope of its preemption is limited by these purposes.

Notably, none of the parties to this suit were debtors in the GO&B bankruptcy proceeding.

Moreover, the state tort claims Creatore asserted against Alfa Laval in this suit have **no effect** on the debtor or the administration of its estate. Even if Creatore were to win a sizable judgment against Alfa Laval, the judgment would in no way impact the GO&B estate. The Bankruptcy Court even recognized this disconnect, explaining "Debtor Girton, Oakes & Burger… is not a party to the State Court Case, and the State Court Case does not affect any property of the estate." March 20, 2009 order from GO&B Bankruptcy Case, Case No. 03-41957.

The claims between non-debtors asserted here have no effect on the debtor, its estate or any other purely bankruptcy issue. Therefore, the claims do not encroach upon the field Congress intended to occupy within the Bankruptcy Code and are not preempted.

B. Congress Expressly Provided State Courts Concurrent Jurisdiction to Adjudicate Civil Proceedings Related To The Bankruptcy Code and Bankruptcy Proceedings.

As in this case, when Congress has not explicitly preempted a field one must consider factors such as whether: (1) the area requires national uniformity, (2) there is evidence of Congressional design to preempt the field, or (3) the state law actually and directly conflicts with the federal law. *KVUE v. Austin Broad. Corp.*, 709 F.2d 922 (5th Cir. 1983). In 28 U.S.C. §1334, Congress clearly evidenced its intent to allow state tort remedies for those harmed by tortious conduct "related to" or "arising in" a bankruptcy case. 28 U.S.C. §1334 establishes and determines the parameters of jurisdiction of federal courts over bankruptcy matters and states in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts **shall have original <u>but not exclusive</u> jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.** [Emphasis and Underlining Added].

Exclusive jurisdiction under 28 U.S.C. §1334(a) is narrowly reserved for cases "under title 11" including: who may be a debtor (11 U.S.C. § 109); involuntary petitions (11 U.S.C. § 303); the automatic stay of proceedings against the debtor and estate property (11 U.S.C. § 362) and other matters under the Bankruptcy Code.[4] These matters are specifically central or "core" to the bankruptcy process because each "invokes a substantive right provided by title 11 or a proceeding that by its nature could only arise in the context of a bankruptcy case." *In re: Willcox & Gibbs, Inc.*, 314 B.R. 541, 544 (Bankr. D. Del., 2004). A bankruptcy court has "**original and exclusive** jurisdiction" over these "core" proceedings. 28 U.S.C. § 1334(a). [Emphasis Added].

Conversely, bankruptcy courts have **limited power** to hear a proceeding that is not "core." *Jungkunz v. Fifth Third Bank* (1994), 99 Ohio App.3d 148. "Non-core" proceedings are those proceedings, "otherwise **related to** a case under title 11." *Int'l Total Serv., Inc. v. Garlitz*, 8th Dist. No. 90441, 2008-Ohio-3680, at ¶10. [Emphasis added]. The standard test for determining "related to" jurisdiction is "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *French v. St. Rita's Med. Ctr.*, 2008 WL 3822278, 2 (N.D.Ohio). If a case fails to meet the minimum requirement of "related to" jurisdiction, the bankruptcy court has no jurisdiction, let alone, exclusive jurisdiction. Accordingly, bankruptcy courts have, "original **but not exclusive**" jurisdiction over "non-core" proceedings. 28 U.S.C. § 1334(b). [Emphasis Added].

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4 Other "core" matters include: notice of the bankruptcy to creditors (11 U.S.C. § 342); the use, sale and lease of estate property (11 U.S.C. § 363); the handling of executory contracts and unexpired leases (11 U.S.C. § 365); the filing and allowance of claims and expenses (11 U.S.C. § 501 - 503); the priority of creditors and claims (11 U.S.C. § 507); exemptions (11 U.S.C. § 522); the effect of a discharge (11 U.S.C. § 524); determining property of the estate (11 U.S.C. § 541); turnover of property of the estate (11 U.S.C. §§ 542 - 543); liens on property of the estate (11 U.S.C. §§ 544 - 546) and, preferences, fraudulent transfers, and post-petition transactions (11 U.S.C. §§ 547 - 549).

The Northern District of Illinois Bankruptcy Court used this very analysis when it remanded to an Illinois state court a claim of malicious prosecution arising out of an adversarial proceeding. *In re: Tan,* 1999 WL 253108 (Bankr.N.D.Ill.). The *Tan* Court held:

> Forest Partners is not a debtor... Thus, the malicious prosecution suit is not an administrative matter that can exist only in the context of a bankruptcy case; **it is not a proceeding arising in a case under title 11...** Forest Partners' **state law malicious prosecution claim against the Defendants is not related to the Debtor's bankruptcy.** Overlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of its assets among creditors... Even should Forest Partners prevail in this suit and obtain a judgment for more than $30 million, not one penny of its judgment would go to the Debtor's bankruptcy estate. Therefore, even under the more lenient "conceivable effect" test of other circuits, **Forest Partners' suit is not "related to" a proceeding under title 11.** *Id.* at 4. [Emphasis added, internal citations and quotations removed].

Like the *Tan* case, a bankruptcy court's jurisdiction for the claims asserted here, if it even exists at all, would at best, be concurrent with state court jurisdiction as "related to" a proceeding under title 11 according to 28 U.S.C. 1334(b). Considering that Congress gave state courts jurisdiction over these claims, it is unlikely that it held the inconsistent intent to preempt the law upon which they are based.

In fact, Congress intended for bankruptcy courts to respect state law by abstaining from hearing certain matters involving state law and interests. 28 U.S.C. § 1334(c)(1) states that:

> Nothing in this section prevents a district court... in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

If a bankruptcy court is asked to apply state law, it should, and sometimes must, defer to the state court. *Matter of Bradey, Texas Mun. Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991). "Bankruptcy Courts should be reluctant to entertain questions which may be equally well resolved elsewhere." *First State Bank and Trust Co. v. Sand Springs State Bank,* 528 F.2d 350, 354 (10th Cir. 1976).

Congress' instruction to bankruptcy courts to defer to state courts further evidences its intent *not* to preempt state claims that are not "core" to the bankruptcy process.

Despite Congress' express grant of concurrent jurisdiction to state courts over "non-core" bankruptcy matters in 28 U.S.C. 1334(b), the appellate court here found preemption based on the reasoning set forth in *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (C.A.9, 1996) 74 F.3d 910. In *MSR Exploration*, the Ninth Circuit Court of Appeals found that state tort claims for malicious prosecution arising from the creditor's filing of claims in the MSR Exploration, Ltd. bankruptcy case were preempted by the Bankruptcy Code. *Id.* at 916. The filing and allowance of claims and expenses is unquestionably a "core" proceeding under11 U.S.C. § 501 – 503. The *MSR Exploration* court reasoned that "Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction **exclusively** in the district courts as an initial matter." *Id.* at 913. [Emphasis Added]. The court there also found that the Bankruptcy Code "demonstrates Congress' intent to create a **whole system under federal control**..." and "[b]ankruptcy law does require **uniformity**..." Id. at 914. [Emphasis Added]. All of the remaining cases the Seventh District relied on to support its decision, including *Stone Crushed* and *In Re Miles*[5], also involved "core" proceedings and similarly relied on the reasoning found in *MSR Exploration*.

We do not dispute the reasoning set forth in *MSR Exploration* holds true for "core" proceedings. For such matters, Congress did grant bankruptcy courts exclusive jurisdiction under 28 U.S.C. 1334(a). This grant of exclusive jurisdiction naturally creates uniformity and a system exclusively under federal control for *purely bankruptcy issues*. *MSR Exploration* correctly

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5 *Stone Crushed,* 598 Pa. at 300 involved the discharge of a debt and *In Re Miles*, 430 F.3d 1083, 1092 (9th Cir. 2005) involved the filing of an involuntary petition.

recognized Congress' intent as it related to the "core" matter before it. However, this reasoning does not apply to "non-core" proceedings. Congress clearly did not grant bankruptcy courts exclusive jurisdiction over "non-core" matters; rather it expressly gave concurrent jurisdiction to the state courts. 28 U.S.C. 1334(b). Logically, if these "non-core" civil proceedings can be tried in state courts, then Congress did not intend for bankruptcy courts to have exclusive jurisdiction, to create an entire system under federal control, or for absolute uniformity on all matters *related to* bankruptcy.

Here, the appellate court disregarded evidence of Congress' intent for "non-core" matters as revealed by 28 U.S.C. 1334(b) and erred in applying the *MSR Exploration's* preemption analysis of a "core" proceeding. Congress' true intent was for state courts to maintain concurrent jurisdiction over a wide range of bankruptcy-related matters, such as tort actions by and between non-debtors arising from actions that occurred in a bankruptcy case. Congress did not intend to preempt such matters.

C. The Bankruptcy Code Provides No Adequate Remedy to Creatore and PNH for Alfa Laval's Actions in the GO&B Bankruptcy Proceedings.

The absence of a corresponding federal remedy typically indicates Congress' intent to not preempt a state law remedy. The U.S. Supreme Court has held that "the lack of evidence of congressional intent to bar state common-law remedies takes on added significance in light of Congress' failure to provide any federal remedy for persons harmed by such conduct." *Silkwood* at 251. Given this, "Congress must demonstrate its intent to preempt such remedies in clear and certain terms." *Maryland*, 451 at 746. In other words, where Congress has neither expressly preempted state remedies nor provided alternative federal remedies, it must have intended the preservation of state law remedies.

Alfa Laval and the appellate court rely on two sections of the Bankruptcy Code, 11 U.S.C. § 105 and Rule 9011 of the Federal Rules of Bankruptcy Procedure, for the proposition that federal

remedies are available to the injured parties here. An examination of these provisions reveals that neither is remedial in nature.

11 U.S.C. § 105(a) states in relevant part: "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." While this provision gives bankruptcy courts the power to impose sanctions to prevent abuses of the bankruptcy proceedings, the sanctions must be "necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." *Id.* Such powers do not include the ability to pass judgment on the torts at issue here and the authority to compensate a party for the damages caused by such tortious conduct.

Similarly, Rule 9011 addresses frivolous or groundless claims, but again provides no remedy to the aggrieved party. Section (c) (2) of Rule 9011 states in relevant part that a "sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct." "[T]he purpose of Bankruptcy Rule 9011 is to award the *minimal sanction* that will probably deter an attorney's wrongful conduct." *Keiter v. Stracka*, 192 B.R. 150, 157 (S.D. Tex. 1996).

Furthermore, because Rule 11 of the Federal Rules of Civil Procedure is incorporated by Rule 9011 into the Bankruptcy Code, case law on Rule 11 is applicable to Rule 9011. *In Re Kouterick*, 167 B.R. 353 (Bkrtcy.D.N.J., 1994). When Congress incorporated the Federal Rules of Civil Procedure into the Bankruptcy Code it brought with it the case law interpreting them, including the case which uniformly hold that Rule 11 does not preempt state law abuse of process claims and similar torts. See e.g. *Ideal Instruments, Inc. v. Rivard Instruments, Inc.* (N.D. Iowa, 2007), 245 F.R.D. 381; *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1491 (8th Cir. 1994) (explaining that "Rule 11 is not a complete substitute for an abuse of process type cause of action"); *U.S. Express Lines*, 281 F.3d at 393 (stating that "the Federal Rules of Civil Procedure do not preempt claims for abuse

of process and similar torts providing relief for misconduct in federal litigation").

The *Graber* court, too, points out that abuses of process occurring in standard civil litigation in federal district court are historically and uniformly remedied by state law claims of abuse of process and malicious prosecution in state court. Graber, 279 S.W. 3d at 612. The *Graber* held that "Congress did not intend for a state malicious prosecution claim to be preempted "simply because the claim arose out of the filing of an adversary action in a bankruptcy proceeding" as opposed to arising in a standard civil proceeding in a district court. Id. at 609-10. *Graber* also held that when Congress imported the Federal Rules of Civil Procedure through Bankruptcy Rules 7001-7087 "it simultaneously imported federal law's existing remedial schemes." *Id.* at 612-3.

In its young life, *Graber* has already been adopted as "persuasive authority" on the exact issue involved here. In *In re: Fornaro*. 402 B.R. 104 (Bkrtcy D.N.J., 2009) the United States Bankruptcy Court for New Jersey cited to portions of *Graber*, explaining:

> Based on **persuasive authority**, the Court believes that Ms. Fornaro's counterclaim for **malicious prosecution is not preempted by the Bankruptcy Code**. The Court agrees with a recent Texas Supreme Court case decision, holding that malicious prosecution suits are not preempted, even though the claim arose in a bankruptcy action. *See Graber v. Fuqua,* 52 Tex. Sup.Ct. J. 249, 279 S.W.3d 608, 2009 WL 51570 (Tex.2009). In a 5-4 decision, the *Graber* court found **no evidence of congressional intent in the Bankruptcy Code or Rules to preempt malicious prosecution claims based on conduct in an adversary proceeding**. *Id.* at 614, 2009 WL 51570 *5. The majority held: "[T]he only broad provisions that apply to adversary proceedings-Rule 9011 and section 105(a)-evidence not an intent to preempt, but rather an intent to **preserve the existing framework of federal procedure that does not preempt state malicious prosecution claims**. In light of the well-established general rule that federal law does not preempt malicious prosecution claims predicated on conduct in federal court, we are unable to find the requisite evidence of an intent to preempt these same claims in bankruptcy."*Id.* at 616, 2009 WL 51570 *7. The court continued, "**Because Congress was silent on the matter, we see no reason to discontinue state law's historic function of providing common law remedies for misconduct in federal court**." *Id.* at 620, 2009 WL 51570 *11. Ms. Fornaro's counterclaim for malicious prosecution, therefore, is not preempted by federal law. *Id.* at *110*. [Emphasis added].

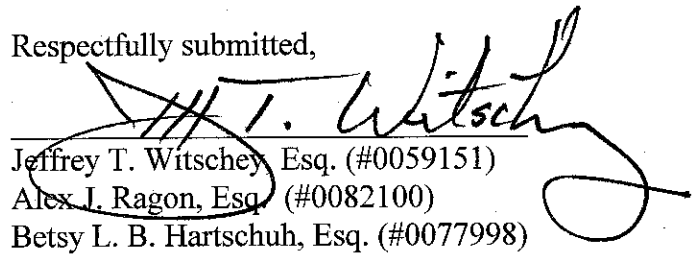
The *Graber/Fornaro* analysis fits the instant case with precision and its well reasoned and detailed analysis should be followed as persuasive authority.

Taking 11 U.S.C. § 105 and FRBP 9011 either individually or together only occupies the narrow field of providing sanctions - not damages - to deter future abuses of the bankruptcy process. Unlike these provisions, Ohio's claims for abuse of process and unfair business competition were created to redress and compensate a party harmed by such torts. Available remedies include: compensatory damages, mental and physical suffering, loss of earnings, medical expense, embarrassment, humiliation, loss of personal property and freedom, loss of consortium and punitive damages. *Donohoe v. Burd* (1989, S.D. Ohio), 722 F. Supp. 1507, 1522 judgment aff'd 923 F. 2d 854 (6th Cir. 1991), *Zimmer v. Yant* 1987 WL 26298 (Ohio App. 10 Dist.) at *2. Accordingly, the Ohio torts brought in this case fall well outside the "field" Congress intended to occupy through the sanctions available in 11 U.S.C. § 105 and Rule 9011.

IV. CONCLUSION

In determining the important constitutional question of preemption, it is presumed that federal law does not preempt state law unless Congress' intent to do so is "clear and manifest." *Bates*, 544 U.S. at 449. Here, the Seventh District Court of Appeals erred in finding that the Bankruptcy Code preempts traditional state tort claims arising in a bankruptcy proceeding. Congress' intent in implementing the Bankruptcy Code conclusively shows that the state tort claims of abuse of process and tortious interference are not preempted by the Bankruptcy Code. Appellants request that this Court accept jurisdiction in this case so that this substantial constitutional question will be reviewed on its merits and the court of appeals' decision remedied.

Respectfully submitted,



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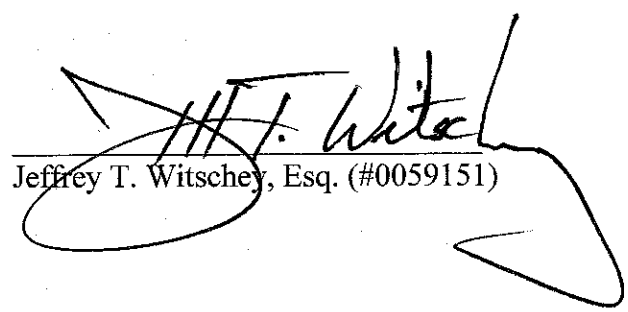

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STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
)
MAHONING COUNTY) SS: SEVENTH DISTRICT

PNH, et al.,	)	
	)	CASE NO. 09 MA 41
PLAINTIFFS-APPELLANTS/, CROSS-APPELLEES,	)	
	)	
- VS -	)	JUDGMENT ENTRY
	)	
ALFA LAVAL FLOW, INC.,	)	
	)	
DEFENDANT-APPELLEE/ CROSS-APPELLANT.	)	

For the reasons stated in the opinion rendered herein, Appellants' assignments of error are meritless. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio is affirmed. Costs taxed against Appellants.

Mary DeGenaro

JUDGES.

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 29 2010
FILED
ANTHONY VIVO, CLERK

EXHIBIT
A

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PNH, et al.,	)	CASE NO. 09 MA 41
PLAINTIFFS-APPELLANTS/ CROSS-APPELLEES,	)	
- VS -	)	OPINION
ALFA LAVAL FLOW, INC.,	)	
DEFENDANT-APPELLEE/ CROSS-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 05 CV 1695.

JUDGMENT: Affirmed.

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CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 29 2010
FILED
ANTHONY VIVO, CLERK

JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: June 29, 2009

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs and their oral arguments before this court. Plaintiff-Appellants/Cross-Appellees, PNH, Inc. and Ronald Creatore appeal the judgment of the Mahoning County Court of Common Pleas that dismissed their claims against Defendant-Appellee/Cross-Appellant Alfa Laval, Inc. (incorrectly identified as Alfa Laval Flow, Inc.) for lack of subject matter jurisdiction. Appellants also appeal the trial court's subsequent decision, issued during a limited remand from this court, which denied their Civ.R. 60(B) motion to vacate the dismissal order. Finally, Appellants challenge the trial court's denial of their motions to amend the complaint and to compel discovery.

{¶2} Upon review, Appellants' arguments are meritless. The trial court properly dismissed the case for lack of subject matter jurisdiction because Appellants' abuse of process and tortious interference claims are preempted by federal bankruptcy law. The trial court did not abuse its discretion by denying Appellants' subsequent Civ.R. 60(B) motion. Appellants' arguments regarding the trial court's denial of their motion to amend and motion to compel discovery are moot based upon our conclusion that their claims were properly dismissed.

{¶3} Alfa Laval filed a cross-appeal in this matter, in which it challenges the trial court's January 8, 2008 denial of its motion for summary judgment regarding Appellants' tortious interference and abuse of process claims. The cross-appeal is also moot based upon our resolution of this appeal in Alfa Laval's favor. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶4} In 2000, Appellant Ronald Creatore, William Sayavich, and David Barnitt formed a holding company called U.S. Sanitary Corporation for the sole purpose of purchasing all the stock of a fitting/valves distribution company called Girton, Oakes and Burger. Creatore through a Living Trust, Sayavich and Barnitt entered into a Close Corporation Agreement (CCA) with USSC, which among other things, contained confidentiality and non-compete provisions. Creatore, Barnitt and Sayavich were the sole

shareholders of USSC, with Creatore having a 49% ownership interest, Sayavich a 33% interest, and Barnitt an 18% interest.

{¶5} The purchase of GO&B was financed by a loan from Provident Bank to GO&B and USSC. The sale became final in 2001 and the three became employees of GO&B: Creatore as President, Barnitt as CFO and Sayavich as the head of sales and marketing. Subsequently, pursuant to the authority granted to him by the CCA, Creatore terminated Barnitt and Sayavich, alleging the two had committed financial malfeasance with regard to the Provident loan.

{¶6} Appellee Alfa Laval's business includes the manufacture and sale of components and parts to the food and beverage sanitary processing industry. Prior to the incidents which gave rise to this lawsuit, GO&B was a distributor for Alfa Laval's products in the Ohio, New York and Western Pennsylvania areas. GO&B was not bound by any exclusive distribution arrangement with Alfa Laval and thus GO&B began quietly producing a competing private-label line of products called "BuyPep."

{¶7} By 2003, GO&B owed Alfa Laval in excess of $1,000,000. Provident Bank was threatening foreclosure on the Provident loan. Alfa Laval executives met with Creatore to discuss their concerns. Alfa Laval presented Creatore a plan to minimize the impact on Alfa Laval if Provident Bank were to call its loan and foreclose on GO&B. Alfa Laval proposed that it: (1) assume GO&B's customer base; (2) establish preference over GO&B's assets; (3) transfer GO&B's market share to another of Alfa Laval's distributors; and, (4) obtain a non-compete covenant against Creatore preventing his competition against Alfa Laval and its distributors. Ultimately, Creatore did not accept those options and instead decided to purchase the Provident loan through a company he created for that sole purpose, PNH, Inc., the other Appellant in this action. PNH is an acronym for Provident Note Holder.

{¶8} According to Appellants, a disgruntled Barnitt and Sayavich contacted Alfa Laval and at Alfa Laval's behest and in violation of the confidentiality provisions of the CCA of which Alfa Laval was purportedly aware, disclosed confidential information about GO&B, including information about the competing BuyPep line, and Creatore's plan to

purchase the Provident loan. Appellants also allege that Barnitt's attorney told Alfa Laval's attorney about the closing date of the loan sale, and that Barnitt and Sayavich began covertly helping Alfa Laval plan an involuntary bankruptcy filing against GO&B.

{¶9} Just hours after PNH closed on the Provident loan purchase, Alfa Laval, along with two other GO&B creditors, filed an involuntary bankruptcy petition against GO&B in The United States Bankruptcy Court for the Northern District of Ohio (Case No. 03-41957). Once in the bankruptcy court, pursuant to a motion by Alfa Laval, a Gap Interim Trustee was appointed and took over management of GO&B, thereby forcing Creatore to relinquish any operational control he had over the company. As the bankruptcy proceeded, Creatore formed another company called Diversified Process Components, Inc., which produced a product line that competed with Alfa Laval's.

{¶10} Alfa Laval subsequently motioned the bankruptcy court to enjoin Creatore and Diversified Process Components from competing with Alfa Laval. The bankruptcy court refused to entertain the motion, finding that only the Trustee could seek such relief on behalf of GO&B and only after filing an adversary complaint.

{¶11} On May 29, 2003, Alfa Laval filed an adversary complaint in the bankruptcy court, naming itself and the Trustee as co-plaintiffs and PNH, Creatore, and several other Creatore-affiliated companies as co-defendants. The adversary complaint listed numerous alternative claims including diversion of corporate assets and opportunities, and preferential and fraudulent transfers, and requested a temporary restraining order. It also sought equitable subordination of the secured interests of PNH purchased from Provident Bank. The Trustee did not initially sign the adversary complaint, but later ratified it. Appellants claim that Alfa Laval, through its attorneys, hounded and bullied the "malleable" Trustee to pursue the adversary complaint, and that Alfa Laval wrongfully used the adversary proceeding for an improper purpose, i.e., to eliminate Creatore and his new company from competing with Alfa Laval. Further, Appellants allege that Alfa Laval improperly misappropriated the name, power and authority of the Trustee and committed other violations of bankruptcy law and procedure during the adversary proceeding.

{¶12} The Trustee eventually entered into a compromise settlement agreement with Appellants with regard to the adversary proceeding. After a hearing, the bankruptcy court, in an order dated July 3, 2003, approved the compromise settlement agreement. The bankruptcy court weighed various criteria in deciding the settlement agreement was fair and equitable. Among other things, the court ruled that "[b]ased upon [ ] prior testimony, the allegations contained in the complaint, and the arguments of counsel at the hearing on the Motion, the Court found that the adversary complaint presents colorable claims which are the exclusive right of the Trustee herein to assert, with some chance of success as to many of these claims." Alfa Laval refused to sign the compromise settlement agreement.

{¶13} On May 11, 2005, Appellants filed the complaint giving rise to this appeal against Alfa Laval in the Mahoning County Court of Common Pleas, alleging defamation, tortious interference and abuse of process. Appellant Creatore had previously brought the defamation and tortious interference claims against Alfa Laval and several Alfa Laval executives in a previous action: *Sayavich v. Creatore v. Girton Oakes & Burger, Inc., et. al,* Mahoning County Court of Common Pleas No. 03-CV-1081. However, Creatore voluntarily dismissed the claims against Alfa Laval, without prejudice on May 25, 2004.[1]

{¶14} In the present case, Alfa Laval filed a motion to dismiss Appellants' claims, or alternatively, a motion for more definite statement on September 9, 2005, which was overruled by the trial court. Alfa Laval then filed an answer with affirmative defenses. On December 18, 2006, Alfa Laval filed a motion for summary judgment on all Appellants' claims, or alternatively a motion in limine. Appellants responded. Both sides sought the

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1 Case No. 03-CV-1081 eventually went to trial on two remaining claims: Creatore's defamation and breach of contract claims against Barnitt. The breach of contract claim alleged that Barnitt shared information with Alfa Laval regarding Creatore's competing BuyPep line, in violations of the non-disclosure provisions of the CCA. At the close of evidence, the trial court granted a directed verdict on the breach of contract claim. The defamation claim, which concerned Creatore's allegations that Barnitt fabricated a story that Creatore had planned a bankruptcy "bust-out" of GO&B and had set up a competing company as a plan to leave Alfa Laval with a $1,000,000 uncollectable account, went to the jury. The jury found in favor of Creatore on the defamation claim, initially awarded zero damages, but after being ordered by the trial court to further deliberate on damages, the jury awarded Creatore $25,000. Barnitt appealed and Creatore cross-appealed. In an opinion styled *Sayavich v. Creatore,* 7th Dist. No. 07 MA 217, 2009-Ohio-5270, this court affirmed the judgment of the trial court. (DeGenaro, J., dissented in part).

assistance of bankruptcy experts who provided opinions about whether violations of bankruptcy law and procedure had occurred during the GO&B bankruptcy case. On January 7, 2008, the trial court issued a judgment entry granting Alfa Laval's motion for summary judgment on the defamation claim and denying it on the abuse of process and tortious interference claims.

{¶15} The case was muddled by discovery disputes. Several motions to compel and motions for protective orders were filed by both sides. Appellants sought leave to file an amended complaint, which was overruled.

{¶16} On October 29, 2008, Alfa Laval filed a motion to dismiss Appellants' remaining claims for lack of subject matter jurisdiction. The trial court held a hearing on that and other motions on January 13, 2009 and both filed post-hearing briefs. On February 2, 2009, the trial court granted Alfa Laval's motion to dismiss, agreeing that Appellants' claims were preempted by federal bankruptcy law.

{¶17} Appellants filed a notice of appeal on February 27, 2009. Alfa Laval filed a notice of cross-appeal on March 5, 2009. This court granted Appellants' motion for a limited remand to pursue a Civ.R. 60(B) motion in the trial court. Appellants filed the 60(B) motion on April 28, 2009, which the trial court overruled on May 8, 2009. Appellants filed a supplemental notice of appeal from that judgment entry on June 2, 2009.

Bankruptcy Law Preemption

{¶18} In their first of three assignments of error, Appellants assert:

{¶19} "The trial court erred in finding it did not have jurisdiction over Plaintiffs' state law claims of tortuous [sic] interference, abuse of process and unfair business competition on the basis of federal bankruptcy law preemption."

{¶20} Appellants challenge both the trial court's initial dismissal of their claims, and the trial court's subsequent denial of their motion to vacate the court's judgment of dismissal. Although Appellants inter-mingle arguments regarding the initial dismissal and the denial of the Civ.R. 60(B) motion, for ease of analysis, we will address these rulings separately.

Initial Dismissal

{¶21} Appellate review on a dismissal for lack of subject matter jurisdiction is de novo. *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 936, 746 N.E.2d 222. Further, in determining whether the trial court properly dismissed the case for lack of subject matter jurisdiction, the trial court, and hence a reviewing court are not limited to an examination of the allegations in the complaint, but rather have the authority to consider any pertinent evidentiary material in the record. *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 50, 749 N.E.2d 825.

{¶22} As indicated, at the time of dismissal two of Appellants claims remained: tortious interference with a contract and abuse of process. With regard to the tortious interference claim, Appellants alleged that Alfa Laval had knowledge of the terms of the Close Corporation Agreement (CCA) between Creatore, Sayavich, Barnitt and USSC, and interfered with the CCA by soliciting Sayavich and Barnitt to reveal confidential information protected thereby. Appellants further alleged that the information Alfa Laval wrongly procured from Sayavich and Barnitt caused Alfa Laval to file the involuntary bankruptcy petition against GO&B, which in turn caused Appellants damages.

{¶23} More specifically, Appellants alleged in their answers to interrogatories:

{¶24} "Defendant was in possession of the CCA at the time Defendant solicited Sayavich and Barnitt to violate the clear terms of that contract. Defendant used the information unlawfully solicited in violation of this contract and as a pretence and excuse to then force GO&B into Bankruptcy immediately after Plaintiffs purchased approximately 1.5 million dollars of GO&B debt. All of these actions were done under false pretenses and were intended to financially ruin Plaintiffs."

{¶25} The abuse of process claim concerned Alfa Laval's conduct in filing and pursuing the adversary complaint against Appellants during the GO&B bankruptcy proceedings. More specifically, Appellants alleged that the adversary complaint was wrongfully used to obtain an improper objective, i.e., to prevent Appellant Creatore from operating a separate business in competition with Alfa Laval. In their answers to interrogatories, Appellants more specifically alleged that: "[i]n an effort to preclude

Creatore and GO&B from lawfully competing against Alfa Laval, [Alfa Laval] filed an involuntary bankruptcy petition against GO&B and subsequently perverted this process by fabricating allegations against GO&B and Creatore and prepared an adversarial complaint for filing in the Bankruptcy Court to eliminate GO&B and Creatore as competitors. [Alfa Laval] then intentionally misrepresented information about Creatore's character to the Trustee to get the Truustee [sic] to pursue such false allegations."

{¶26} Alfa Laval filed a motion to dismiss both claims based on lack of subject matter jurisdiction, arguing the claims were preempted by federal bankruptcy law. The trial court granted the motion in a February 2, 2009 judgment entry which stated in its entirety:

{¶27} "Because this court lacks subject matter jurisdiction, regarding the claims of the Plaintiff, the Motion to Dismiss of the Defendant, Alfa Laval Flow, Inc. is hereby granted. This court finds that the remedies available to the Plaintiffs are exclusive to those provided by bankruptcy law and procedure. This court finds that the state law claims, such as those herein and presented, have been preempted. The complaint is therefore dismissed."

{¶28} State law is preempted under the Supremacy Clause of the United States Constitution in three circumstances. Clause 2, Article VI, United States Constitution. The first circumstance, often termed "express preemption," means that "Congress can define explicitly the extent to which its enactments preempt state law." *English v. General Electric Co* (1990), 496 U.S. 72, 78, 110 S.Ct. 2270, 110 L.Ed.2d 65. The other two circumstances encompass forms of implied preemption, i.e., "field preemption" and "conflict preemption." Field preemption means "in absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." Id. at 79. Conflict preemption is where "state law is preempted to the extent that it actually conflicts with federal law." Id. Congressional intent is paramount in determining whether federal law preempts state law. *California Fed. Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 280, 107 S.Ct. 683, 93 L.Ed.2d 613.

{¶29} The Bankruptcy Code does not explicitly prohibit state law tort claims that arise from bankruptcy proceedings. Thus, the question to be resolved in this appeal is whether Congress impliedly preempted such claims. This is an issue of first impression for this court. Neither this district, nor the Ohio Supreme Court, has addressed this question. Courts across the country—both state and federal—are divided on this issue. The majority position holds that such claims are preempted under a field preemption theory, and Alfa Laval urges this court to follow this line of decisions. The seminal case, often cited by other courts, is the Ninth Circuit's *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (C.A.9, 1996), 74 F.3d 910. In *MSR Exploration*, debtor-plaintiffs brought a state law claim of malicious prosecution against creditor-defendants for filing creditor's claims during bankruptcy proceedings. The federal district court dismissed the claims on the basis that the court lacked subject matter jurisdiction because the action was preempted by bankruptcy law. On appeal, the Ninth Circuit affirmed the dismissal. Id. at 916.

{¶30} The court provided several reasons for its determination that the cause of action was preempted. First, the court opined that Congress' intent to preempt the field is demonstrated by the fact that bankruptcy matters fall under the exclusive jurisdiction of federal courts. Id. at 913.

{¶31} Second, the court noted that "a mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code, 11 U.S.C. Sec. 101 et seq., demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike. 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. 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.

{¶32} "Debtors' petitions, creditors' claims, disputes over reorganization plans, disputes over discharge, and innumerable other proceedings, would all lend themselves to claims of malicious prosecution. Those possibilities might gravely affect the already

complicated processes of the bankruptcy court. * * * Of course, the opportunities for asserting malicious prosecution claims would only be limited by the fertility of the pleader's mind and by the laws of the state in which the proceeding took place." Id. at 914.

{¶33} Third, the court noted that need for uniformity in bankruptcy proceedings was so important historically that the framers of the United States Constitution were persuaded to expressly grant Congress the power "to establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." Id., quoting Clause 4, Section 8, Article I, United States Constitution.

{¶34} Finally, the court expounded upon the fact that the Congress has created specific remedies to prevent misuse of the bankruptcy process, including Fed.R.Bankr.P. 9011 (frivolous and harassing filings); Section 105(a), Title 11, U.S.Code (authority to prevent abuse of process); Section 303(i)(2), Title 11, U.S.Code (bad faith filing of involuntary petitions); Section 362(h), Title 11, U.S.Code (willful violation of stays); Section 707(b), Title 11, U.S.Code (dismissal for substantial abuse); Section 930, Title 11, U.S.Code (dismissal under Chapter 9); and Section 1112, Title 11, U.S.Code (dismissal under Chapter 11). This suggested to the court that "Congress has considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration* at 915, citing *Mertens v. Hewitt Assoc.* (1993), 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (enforcement scheme in ERISA indicates Congress did not forget other remedies); *Pilot Life Ins. Co. v. Dedeaux* (1987), 481 U.S. 41, 54, 107 S.Ct. 1549, 1556-57, 95 L.Ed.2d 39 (ERISA remedies preempt others, even if some possible remedies are left out); and *Gibson v. Prudential Ins. Co.* (C.A.9, 1990), 915 F.2d 414, 418.

{¶35} Most jurisdictions have adopted the position as set forth in *MSR Exploration*. See, e.g., *Casden v. Burns* (N.D.Ohio 2007), 504 F.Supp.2d 272 (shareholder's claim that corporate officers' breached fiduciary duty by deciding to file bankruptcy petition preempted); *In re Miles* (C.A.9, 2005), 430 F.3d 1083 (claims by debtor and debtor's relatives against creditors, their attorneys and legal staff for alleged bad faith conduct in

filing involuntary bankruptcy petitions preempted); *Lewis v. Chelsea G.C.A. Realty Partnership, L.P.* (2004), 86 Conn.App. 596, 862 A.2d 368 (federal preemption in field of bankruptcy deprives Connecticut courts of jurisdiction to hear state law unfair trade practices claim which asserted that an action brought in federal bankruptcy court was improper); *Glannon v. Garrett & Assoc., Inc.* (D.Kan.2001), 261 B.R. 259 (state law claims based on filing of involuntary bankruptcy petition, adversary proceeding and violation of automatic stay preempted); *Shiner v. Moriarty* (Pa.Super.Ct.1998), 706 A.2d 1228 (state law tort claim against creditors, their attorneys, and law firm for filing various improper bankruptcy papers preempted); *Raymark Industries, Inc. v. Baron* (E.D.Pa. June 23, 1997), No. 96-7625, unreported (debtor's state law tort claims against creditors arising from creditors' filing of an involuntary bankruptcy petition preempted); *Mason v. Smith* (1996), 140 N.H. 696, 672 A.2d 705 (state tort action against creditors who instituted involuntary bankruptcy proceeding preempted); *Koffman v. Osteoimplant Technology., Inc.* (D.Md.1995), 182 B.R. 115 (debtor's claims of abuse of process and malicious prosecution against creditors who instituted involuntary bankruptcy proceeding preempted); *Edmonds v. Lawrence Natl. Bank & Trust Co.* (1991), 16 Kan.App.2d 331, 823 P.2d 219 (abuse of process and malicious prosecution claims arising from defendant's filing of complaint to revoke plaintiffs' discharge granted by bankruptcy court preempted); *Idell v. Goodman* (1990), 224 Cal.App.3d 262, 273 Cal.Rptr. 605 (malicious prosecution action by a debtor against a creditor for "improperly" objecting to the discharge of the debtor's fiscal obligations preempted); *Smith v. Terry's Tractor, Inc.* (1989), 209 Cal.App.3d 951, 257 Cal.Rptr. 598 (debtor's claims of abuse of process and malicious prosecution against creditors who instituted involuntary bankruptcy proceeding were preempted by federal law); *Gonzales v. Parks* (C.A.9, 1987), 830 F.2d 1033 (abuse of process claim regarding filing of a bankruptcy petition preempted).

{¶36} Notably, the Sixth Circuit Court of Appeals also favors preemption. See *Pertuso v. Ford Motor Credit Co.* (C.A.6, 2000), 233 F.3d 417. In *Pertuso*, bankruptcy debtors brought a purported class-action suit against their secured creditor in federal court asserting Ohio common-law claims for unjust enrichment and an accounting. More

specifically, the debtor-plaintiffs challenged the creditor's conduct in the bankruptcy court with regard to a reaffirmation agreement. The Sixth Circuit, citing *MSR Exploration*, held those claims were preempted by bankruptcy law as Congress had preempted the field. Id. at 425-426. The court continued:

{¶37} "As [the defendant] correctly points out, the [the plaintiffs'] state law claims presuppose a violation of the Bankruptcy Code. Permitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. at 426, quoting *Bibbo v. Dean Witter Reynolds, Inc.* (C.A.6, 1998), 151 F.3d 559, 562-563.

{¶38} A recent Pennsylvania Supreme Court case, *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien* (2006), 589 Pa. 296, 908 A.2d 875, follows the majority rule as well. In *Stone Crushed Partnership,* one of the plaintiffs, James Jackson, had partnered with several of the defendants to form Granite Partners One, Ltd. In a situation similar to that in the case at bar, Granite defaulted on its loan obligations and Jackson, seeking to avoid foreclosure, formed a separate partnership called Stone Crushed Partnership (Stone) to assume Granite's debt. Stone was essentially Jackson acting in accordance with the protection afforded to a limited partnership entity. Granite's remaining partners, defendants Archbold and O'Brien put Granite into bankruptcy by instituting Chapter 11 bankruptcy proceedings. While in bankruptcy, Stone instituted an adversary action against the debtor Granite and the non-debtors Archbold and O'Brien. Granite, Archbold and O'Brien in turn filed counterclaims against Stone and Jackson, which were dismissed by the bankruptcy court.

{¶39} Stone and Jackson then brought suit in Pennsylvania state court alleging state law claims of abuse of process and wrongful use of civil proceedings arising from the counterclaims filed in the adversary proceeding. Summary judgment was granted in favor of Archbold and O'Brien and the Pennsylvania Supreme Court affirmed, following the majority of courts and holding that the state law claims were preempted by federal bankruptcy law. The court noted that even though a state law action would have provided

greater remedies than those available in the Bankruptcy Code, the plaintiffs' claims were nonetheless preempted. *Stone Crushed Partnership* at 314-315. *Stone Crushed Partnership* is factually very similar to the present case, and we find it telling that Appellants did not attempt to distinguish it.

{¶40} Instead, Appellants urge us to adopt the minority position and to conclude that state law tort claims are not preempted. However, the overwhelming weight of authority is against that position, and moreover, decisions favoring the minority view are often fractured.

{¶41} For instance, in a recent 5-4 Texas Supreme Court decision, *Graber v. Fuqua* (Tex.2009), 279 S.W.3d 608, a slim majority of the court held that a state law malicious prosecution claim concerning an adversary complaint filed during the course of a Chapter 7 bankruptcy proceeding was not preempted by federal law. Id. at 610. A strong dissent concluded the opposite, stating that "Debtors have adequate recourse for abuse of the bankruptcy process in the Bankruptcy Code and Rules." Id. at 621 (Wainwright, J., dissenting). The dissent expressed its concern that the majority's holding "undermines the uniformity mandated for bankruptcy law in the United States Constitution, as under the [majority'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." Id. (Wainwright, J., dissenting).

{¶42} Although a divided panel from the Fifth District implicitly favored the minority rule in *Dever v. Lucas*, 174 Ohio App.3d 725, 2008-Ohio-332, 884 N.E.2d 641, there was a dissent in that case as well. *Dever* involved malicious prosecution and abuse of process claims which arose from a bankruptcy proceeding. The trial court granted defendants' Civ.R. 12(B)(6) motion and dismissed both claims. Plaintiffs appealed the majority's analysis centered on whether the plaintiffs' complaint stated claims for malicious prosecution and abuse of process. Id. at ¶29, 42. The majority did not directly address preemption, apparently because the issue had not been raised.

{¶43} The dissent concluded the claims should have been dismissed for lack of

subject matter jurisdiction, noting that subject-matter jurisdiction may be raised sua sponte by the court at any stage of the proceedings, including for the first time on appeal. Id. at ¶46-47 (Delaney, J., dissenting). The dissent continued:

{¶44} "I agree with other jurisdictions that have determined that the Bankruptcy Code and Federal Rules of Civil Procedure, specifically Section 105, Title 11, U.S.Code and Fed.R.Civ.P. 11, preempt state-law claims of malicious prosecution and abuse of process for conduct that occurred in bankruptcy proceedings.

{¶45} "As recently recognized by the Supreme Court of Pennsylvania in *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien* (2006), 589 Pa. 296, 908 A.2d 875, parties could be deterred from exercising their rights in bankruptcy if, by filing a bankruptcy action, they risk being faced with a state-court lawsuit and liability for substantial damages, citing *Gonzales v. Parks* (C.A.9, 1987), 830 F.2d 1033, 1036. It is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized. Id. at 308, 908 A.2d 875. * * * Accordingly, I would affirm the trial court's dismissal of the complaint, albeit on different grounds." *Dever* at ¶48-51 (Delaney, J., dissenting).

{¶46} This analysis is persuasive. We share the concerns of many other courts that state tort actions which presuppose bankruptcy law violations could undermine the uniformity of the bankruptcy process. In addition, parties could be deterred from exercising their rights in bankruptcy if, by filing a bankruptcy action, they risk being faced with a state-court lawsuit and liability for substantial damages. Moreover, the Bankruptcy Code contains many remedies for improper conduct during a bankruptcy proceeding. Section 303(i), Title 11, U.S.Code authorizes sanctions for involuntary bankruptcy petitions filed in bad faith which includes costs, reasonable attorney fees, damages proximately caused by the filing and punitive damages. Section 105(a), Title 11, U.S.Code provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate * * * *to prevent an abuse of process*." (Emphasis added.) Rule 9011 of the Federal Rules of Bankruptcy Procedure provides sanctions for frivolous

and harassing filings. The fact that Congress provided remedies for bad faith conduct and abuse of process in a bankruptcy proceeding evinces its intent that state law tort claims arising from misuse of those proceedings are preempted.

{¶47} Appellants argue that even if we side with the majority of courts on the overarching preemption issue, that their claims are somehow unique and therefore factually distinguishable from the above cases, thus making preemption unwarranted. First, with respect to their abuse of process claim, which centers on the adversary complaint, Appellants contend the adversary proceeding was not a "core proceeding" under Section 1334(a) and that therefore the bankruptcy court had only concurrent jurisdiction over the claim, which according to Appellants, makes preemption unwarranted. Appellants cite *In re Wolverine Radio Co.* (C.A.6, 1991), 930 F.2d 1132, in support of this argument. However, *Wolverine* is not on point. There the Sixth Circuit held that a proceeding brought by a Chapter 11 debtor to determine the Michigan Employment Security Commission's authority to transfer the debtor's experience rating to an assignee of purchaser of the debtor's assets and to determine assignee's liability under the Michigan Employment Security Act was a "core proceeding," over which the district court had exclusive jurisdiction. Id. at 1143-1144.

{¶48} Moreover, as Alfa Laval points out, *MSR Exploration* and its progeny turned on the detailed, highly complex laws governing bankruptcy in concluding preemption, not on whether the claims of abuse during the bankruptcy process concern a "core proceeding." In other words, conspicuously absent from the analyses of those courts is any discussion of whether or not the proceedings were "core." *Stone Crushed Partnership* involved an adversary dispute between non-debtors, something Appellants would characterize as "non-core," yet the Pennsylvania Supreme Court nonetheless found preemption.

{¶49} Second, Appellants argue that because none of the parties to the state court litigation in the instant case were debtors in the bankruptcy court action that preemption is improper. However, several of the cases favoring preemption concerned state court suits involving non-debtors. See, e.g., *Stone Crushed Partnership,* and *In re*

Miles, supra. For instance, *In re Miles* involved a suit brought in California state court against a creditor by the relatives of several bankruptcy debtors for alleged bad faith filing of a bankruptcy petition. None of the relatives sought damages for involuntary bankruptcy petitions filed against them personally. Despite the fact that the case involved purely non-debtors, the Ninth Circuit found the state law claims preempted by federal bankruptcy law. Id. at 1091.

{¶50} Third, Appellants make a timing argument with respect to their tortious interference claim. Namely, they argue that this claim arose prior to Alfa Laval filing the involuntary bankruptcy petition against GO&B and that the claim cannot be preempted for this reason. However, an analogous argument was raised and rejected in *Casden*, 504 F.Supp.2d 272, supra. *Casden* involved a shareholder suit where one of the claims alleged that the corporate officers' decision to file a voluntary Chapter 11 bankruptcy petition constituted a breach of fiduciary duty. Among other things, the shareholder-plaintiff argued that the claims should not be preempted by federal bankruptcy law because the alleged breach of fiduciary duty occurred *prior* to any filing in the bankruptcy court. The federal district court rejected this argument. The court reasoned that the claim for breach of fiduciary duty could not accrue until such time as damages occurred, and that any alleged damages could not have occurred until the Chapter 11 bankruptcy petition was filed. Id. at 281, citing, inter alia, *Kunz v. Buckeye Union Ins. Co.*, 1 Ohio St.3d 79, 81-82, 437 N.E.2d 1194 (finding tort cause of action accrued as of date that damages were incurred, and not earlier date when duty was breached.)

{¶51} The federal district court continued:

{¶52} "When, as here, injury to shareholders might never occur, and thus plaintiff's claim would not accrue, if at all, until after the company files its bankruptcy petition, and accrual of the claim depends on what happens in the Bankruptcy Court, the potential future claim would interfere sufficiently with the bankruptcy process to trigger preemption." *Casden* at 282, citing *Pertuso* and *MSR Exploration.*

{¶53} This logic can be applied here. Appellants argue that the tortious interference occurred prior to the bankruptcy filing and therefore should not be

preempted. However, any damage from the alleged tortious interference did not occur until Alfa Laval filed the involuntary bankruptcy petition. In order to succeed on their tortious interference claim, Appellants would necessarily have to prove that the bankruptcy was filed in bad faith. Cf. *Casden* at 280. Numerous courts have held that state law claims based on the bad faith filing of an involuntary bankruptcy petition are preempted. See, e.g., *In re Miles*, *Glannon*, *Raymark Industries*, *Mason*, *Koffman*, *Smith*, supra. Even the majority in *Graber*, which concluded there was no preemption of a state law claim arising from an adversary proceeding, signaled in dicta that a state law claim based upon the bad faith filing of an involuntary petition would be preempted. *Graber* at 65 ("it is more likely that Congress considered the need to deter misuse of the unique involuntary petition process it created, and more likely that it intended section 303(i) to be the exclusive remedy.")

{¶54} Finally, Appellants argue in their Reply Brief that a 2005 United States Supreme Court case, *Bates v. Dow Agrosciences, LLC* (2005), 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687, supports their argument against preemption. In their view, *Bates* narrowed federal law preemption to situations where Congress's intent to preempt is "clear and manifest." In *Bates,* the United States Supreme Court held that certain state law claims were not preempted by the Federal Insecticide, Rodenticide and Fungicide Act (FIRFA). The Court further ruled that "in areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" Id. at 449, quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447.

{¶55} *Bates* is not entirely on point because it does not deal with preemption under the Bankruptcy Code, but rather under FIRFA. Further, bankruptcy law is far from an area of "traditional state regulation." Moreover, even applying the clear and manifest standard to the case at hand, Congress's intent to preempt the entire field of bankruptcy law meets that standard.

{¶56} Thus, based on the foregoing, we conclude the trial court properly dismissed Appellants' claims for lack of subject matter jurisdiction as they were preempted by federal bankruptcy law. The first part of Appellants' first assignment of error is meritless.

Ruling on the Civ.R. 60(B) Motion

{¶57} Appellants also appeal the trial court's ruling on the Civ.R. 60(B) motion, which denied their motion to vacate the court's judgment of dismissal. As aforementioned, following the trial court's dismissal of this case for lack of subject matter jurisdiction, Appellants filed a motion for relief from the automatic stay in the bankruptcy court. After a hearing, the bankruptcy court denied the motion for relief from stay as moot since the state trial court action had already been dismissed. In the body of the opinion, the bankruptcy court did state "The Court finds that the automatic stay is not applicable to the State Court Case. Debtor Girton, Oakes & Burger ("Debtor") is not a party to the State Court Case, and the State Court case does not affect any property of the estate."

{¶58} Upon motion of Appellants, we granted a limited remand so that Appellants could pursue a Civ.R. 60(B) motion in the trial court, in light of the bankruptcy court decision. In that motion, Appellants claimed the bankruptcy court's ruling warranted the trial court to vacate its judgment of dismissal. The trial court denied the motion and Appellants filed a supplemental notice of appeal from that judgment.

{¶59} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must demonstrate that: "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151, 1 O.O.3d 86, 351 N.E.2d 113.

{¶60} The five listed grounds in Civ.R. 60(B) are as follows: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment." Civ.R 60(B).

{¶61} A trial court's ruling on a Civ.R. 60(B) motion is reviewed for an abuse of discretion. *Riesbeck v. Indus. Paint and Strip*, 7th Dist. No. 08 MO 11, 2009-Ohio-6250, at ¶17, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶62} Here the trial court did not abuse its discretion by denying the motion. The bankruptcy court's decision does not justify vacating the dismissal order and reinstating the case for several reasons. First, the bankruptcy court's ruling on Appellants motion for relief from the automatic stay is not dispositive of the preemption issue. Federal bankruptcy law preemption and violations of the automatic stay are two separate and distinct legal concepts. With regard to the automatic stay, the Bankruptcy Code mandates a stay in further judicial proceedings against the debtor until a bankruptcy dispute is resolved. Section 362(a)(1), Title 11, U.S.Code, provides that, unless the action falls under one of the exceptions listed in subsection (b), the filing of a bankruptcy petition operates as a stay of "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim *against the debtor* that arose before the commencement of the case under this title." (Emphasis added.)

{¶63} Thus, the automatic stay protects bankruptcy debtors from most types of suits filed against them during the course of the bankruptcy proceeding. By contrast, preemption relates to certain types of state law *claims*, which may or may not involve the debtor as a defendant, that conflict with federal law, either implicitly or explicitly. See

English, 496 U.S. at 78, supra.

{¶64} Appellants focus on the bankruptcy court's declaration that "the State Court Case does not affect any property of the estate," to justify their position that preemption of their claims was unwarranted. However, Appellants take that statement out of context; it was made by the bankruptcy court pursuant to its ruling on Appellants' motion for relief from the automatic stay. The bankruptcy court's full statement on this topic in its judgment entry was as follows: "The Court finds that *the automatic stay is not applicable to the State Court Case.* Debtor Girton, Oakes & Burger ("Debtor") is not a party to the State Court Case, and the State Court case does not affect any property of the estate." (Emphasis added.)

{¶65} Moreover, the bankruptcy court stated during the hearing on the motion for relief from stay that it believed the trial court was correct in dismissing the present case for lack of subject matter jurisdiction:

{¶66} "[J]ust to make sure that it is very clear, the allegations in the State Court case that the Court has read appear to go to the good faith of the filing [of the involuntary bankruptcy petition] by Alfa Laval, which I think has long passed and is not something that another creditor can assert to begin with, and I think the allegations with respect to the filing of the adversary proceeding are also not for this creditor to assert, and to the extent that the Trustee had any of those concerns, I think those concerns have been waived or ratified.

{¶67} "So I think that *the State Court was correct that the State Court does not have jurisdiction* over *at least most of the allegations that are, that have been asserted in the State Court suit.*" (Emphasis added.)

{¶68} The bankruptcy court then ruled that the automatic stay does not apply to the present suit and denied Appellants' motion for relief as moot because this case had already been dismissed by the trial court. Thus, the bankruptcy court's ruling does not support Appellants' motion to vacate the dismissal. If anything, it actually supports the trial court's decision to dismiss the case for lack of subject matter jurisdiction.

{¶69} Finally, as Alfa Laval notes, Appellants failed to argue precisely how they

were entitled to relief from judgment under any of the listed grounds in Civ.R. 60(B). They cited to sections (1), (2) and (5) in their motion, but offered no explanation as to how or why they were entitled to relief under those sections. For all of these reasons, the trial court properly denied Appellants' Civ.R. 60(B) motion.

{¶70} Based on the foregoing, the trial court properly dismissed Appellants' claims for lack of subject matter jurisdiction, and the court did not abuse its discretion in denying the subsequent Civ.R. 60(B) motion. Accordingly, Appellants' first assignment of error is meritless.

Appellants' Remaining Assignments of Error

{¶71} In their second and third assignments of error, Appellants assert, respectively:

{¶72} "The state trial court erred in denying plaintiff's motion to amend their complaint to add a claim for unfair competition and unfair trade practices."

{¶73} "The trial court erred in denying Plaintiff's motion to compel the production of documents withheld by the Defendant under a claim of attorney-client privilege and work product."

{¶74} Based upon our resolution of Appellants' first assignment of error, which concludes the trial court correctly dismissed all of Appellants' claims, these assignments of error are moot and we decline to address them.

Alfa Laval's Cross-Appeal

{¶75} Alfa Laval filed a cross-appeal in this matter, in which it assigns two errors:

{¶76} "The trial court erred when it failed to grant summary judgment in favor of Alfa Laval concerning the tortious interference claim."

{¶77} "The trial court erred when it failed to grant summary judgment in favor of Alfa Laval concerning the abuse of process claim."

{¶78} Here, Alfa Laval attempts to challenge the trial court's January 8, 2008 denial of Alfa Laval's motion for summary judgment on Appellants' tortious interference and abuse of process claims. Because we have resolved this appeal in Alfa Laval's favor, we decline to discuss the merits of Alfa Laval's cross-assignments of error; these

issues are moot.

Conclusion

{¶79} All of Appellants' arguments are meritless. The trial court properly dismissed the case for lack of subject matter jurisdiction because Appellants' abuse of process and tortious interference claims are preempted by federal bankruptcy law. The trial court did not abuse its discretion by denying Appellants' subsequent Civ.R. 60(B) motion. Appellants' arguments regarding the trial court's denial of their motion to amend and motion to compel discovery are moot based upon our conclusion that their claims were properly dismissed. Alfa Laval's cross-appeal is also moot based upon our resolution of this appeal in Alfa Laval's favor. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., *concurs.*

Donofrio, J., *concurs.*

APPROVED:

Mary DeGenaro

JUDGE MARY DeGENARO