CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JONATHAN S. METCALF *v.* MICHAEL FITZGERALD ET AL.
(SC 20227)

Robinson, C. J., and Palmer, McDonald, D'Auria, Kahn and Ecker, Js.*

Syllabus

The plaintiff brought an action in Superior Court, seeking to recover damages from the defendants under state law. The plaintiff, who had previously filed a bankruptcy petition in the United States Bankruptcy Court, asserted claims of vexatious litigation and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the defendants' actions during the bankruptcy proceeding. The plaintiff claimed, inter alia, that, after he filed his bankruptcy petition, one of the defendants initiated an adversary proceeding in the Bankruptcy Court on the basis of certain alleged improprieties that the plaintiff had committed in connection with the bankruptcy proceeding. After the plaintiff presented evidence to contradict the allegations against him, the Bankruptcy Court dismissed the adversary proceeding. In the present action, the trial court dismissed the plaintiff's state law vexatious litigation and CUTPA claims, concluding that it lacked subject matter jurisdiction over those claims because they were preempted by federal bankruptcy law. The trial court rendered judgment dismissing the plaintiff's action, from which the plaintiff appealed. *Held* that the trial court properly dismissed the plaintiff's state law vexatious litigation and

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Kahn and Ecker. Although Justice McDonald was not present when the case was argued before the court, he has read the briefs and appendices and listened to a recording of oral argument prior to participating in this decision.

CUTPA claims for lack of subject matter jurisdiction, those claims having been preempted by federal Bankruptcy Code provisions relating to sanctions for abuse of process: although there was no provision in the Bankruptcy Code that explicitly precluded the plaintiff's vexatious litigation and CUTPA claims and, thus, those claims were not expressly preempted by the Bankruptcy Code, the plaintiff's claims were implicitly preempted, as Congress enacted a comprehensive bankruptcy scheme, inclusive of provisions for sanctions and remedies for abuse of the bankruptcy process, so as to occupy the entire field of penalties and sanctions, leaving no room for state law to supplement federal bankruptcy law, and the federal interest in uniformity was so dominant that federal law was assumed to preclude enforcement of state laws that threaten the uniformity and finality of the bankruptcy process for both debtors and creditors; moreover, the plaintiff could not prevail on his claim that, because a successful cause of action for vexatious litigation or unfair trade practices under state law affords relief that potentially is more extensive than that contemplated under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, such a cause of action falls outside of the field that Congress intended to occupy, as the difference in remedies did not warrant an inference that Congress intended to permit independent abuse of process actions outside the bankruptcy process; furthermore, although compliance with both the Bankruptcy Code and state law would not be impossible, permitting parties to bring abuse of process actions in state court would hinder Congress' objective of uniformly defining the scope and availability of remedies for abuse of the bankruptcy process.

Argued March 29—officially released September 3, 2019

Procedural History

Action to recover damages for, inter alia, vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the motion to dismiss filed by the defendant Myles H. Alderman, Jr., et al. and rendered judgment for the defendants, from which the plaintiff appealed. *Affirmed*.

Bruce L. Elstein, with whom was *John J. Ribas*, for the appellant (plaintiff).

Joshua A. Yahwak, for the appellees (named defendant et al.).

Cristin E. Sheehan, with whom were *Timothy J. Holzman* and, on the brief, *Robert W. Cassot*, for the appellees (defendant Alderman & Alderman, LLC, et al.).

Opinion

D'AURIA, J. In this appeal, we are asked to determine whether the United States Bankruptcy Code provisions permitting bankruptcy courts to assess penalties and sanctions preempt state law claims for vexatious litigation and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff, Jonathan S. Metcalf, brought state law claims against the defendants, Michael Fitzgerald, Ion Bank (bank), Myles H. Alderman, Jr., and Alderman & Alderman, LLC (law firm), for alleged vexatious litigation and for unfair and deceptive business acts or practices during the plaintiff's underlying bankruptcy proceeding. The plaintiff appeals from the trial court's granting of the motion to dismiss filed by Alderman and the law firm, for lack of subject matter jurisdiction on the ground that federal bankruptcy law preempts the claims. The trial court determined that the outcome of the motion was controlled by the Appellate Court's decision in *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, 86 Conn. App. 596, 862 A.2d 368 (2004), cert. denied, 273 Conn. 909, 870 A.2d 1079 (2005). The court in *Lewis* held that the Bankruptcy Code preempted CUTPA and vexatious litigation claims for alleged abuse of the bankruptcy process. Id., 605–607. The plaintiff contends that the court in *Lewis* did not properly evaluate each of the three types of preemption by which Congress manifests its intent to preempt state law and failed to consider the relevant Bankruptcy Code provisions. See 11 U.S.C. § 105 (2012); Fed. R. Bankr. P. 9011. We disagree and affirm the judgment of the trial court.

The following facts, as set forth in the plaintiff's complaint, and procedural history are relevant to our review of the plaintiff's claim. The plaintiff's business, Metcalf Paving Company, filed a chapter 11 bankruptcy petition in 2009. See 11 U.S.C. § 1101 et seq. (2012). The Metcalf Paving Company bankruptcy thereafter was converted

to a case under chapter 7 of the Bankruptcy Code. See 11 U.S.C. § 701 (2012). The plaintiff then filed individually for bankruptcy under chapter 7. The bank, one of the plaintiff's creditors in the bankruptcy proceeding, subsequently commenced an adversary proceeding against the plaintiff under §§ 523 (a) and 727 (a) (7) of the Bankruptcy Code. Under these provisions, the bank objected to the discharge of the plaintiff's debt, asserting, among other allegations, that the plaintiff had failed to deliver a check, failed to provide documents, failed to disclose a website that he allegedly used for a new business, took possession of expensive machinery, unlawfully transferred property, destroyed property of the estate, defrauded creditors, and fraudulently withheld information from the chapter 7 trustee. In response, the plaintiff presented evidence to the Bankruptcy Court to contradict the allegations and moved for summary judgment. Upon reviewing the plaintiff's evidence, the bank moved to dismiss the adversary proceeding. The Bankruptcy Court granted the motion to dismiss.

The plaintiff subsequently commenced this action in the Superior Court. In his complaint, the plaintiff set forth claims for vexatious litigation against all the defendants, and CUTPA claims against Fitzgerald and the bank. In support of the vexatious litigation claims, the plaintiff alleged that the defendants had initiated the adversary proceeding without probable cause and with malice, maintained the proceeding without probable cause and with malice, and, as a result, caused him to suffer damages. The plaintiff claimed that the defendants knew or should have known that the allegations they made during the adversary proceeding were without factual merit and were barred by the applicable statute of limitations. In support of the CUTPA claims, the plaintiff alleged that Fitzgerald and the bank repeatedly engaged in unfair and deceptive acts or practices

during the bankruptcy proceeding, and that their conduct had been so frequent as to constitute a general business practice. The plaintiff claimed damages that included attorney's fees, losses from an inability to manage his business affairs, emotional distress, expenditures of time, effort and resources, and injuries to his business and professional reputation. The plaintiff alleged that he was entitled to damages and costs under the common law, double damages and treble damages under Connecticut's vexatious litigation statute, General Statutes § 52-568, and punitive damages and attorney's fees under CUTPA. See General Statutes § 42-110g.

Alderman and the law firm moved to dismiss the vexatious litigation claims on the ground that the claims arose from conduct that allegedly had taken place within a bankruptcy proceeding and were, therefore, preempted by the Bankruptcy Code. The trial court agreed, granted the motion to dismiss the vexatious litigation claims and, on its own motion and for the same reason, dismissed the remaining counts of the complaint, including the CUTPA claims, for lack of subject matter jurisdiction. The trial court cited *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, supra, 86 Conn. App. 596, in support of its decision.

In *Lewis*, the Appellate Court held that bankruptcy law preempted state law CUTPA and vexatious litigation claims. Id., 605–607. The Appellate Court reasoned that "[t]he exclusivity of federal jurisdiction over bankruptcy proceedings, the complexity and comprehensiveness of Congress' regulation in the area of bankruptcy law and the existence of federal sanctions for the filing of frivolous and malicious pleadings in bankruptcy must be read as Congress' implicit rejection of alternative remedies such as those the plaintiff seeks." Id., 605. Accordingly, the court in *Lewis* remanded the

case to the trial court with direction to dismiss the action. Id., 607.

Upon the trial court's dismissal of the present action, the plaintiff timely appealed to the Appellate Court. The appeal was then transferred from the Appellate Court to this court. See General Statutes § 51-199 (c); Practice Book § 65-1.

On appeal, the plaintiff's sole claim is that the trial court incorrectly concluded that federal bankruptcy law preempted his state law claims for vexatious litigation and violations of CUTPA.[1] Specifically, the plaintiff argues that this court should not follow the holding in *Lewis* because that court failed to conduct a proper preemption analysis. Additionally, the plaintiff argues that his state law claims are neither expressly nor implicitly preempted and do not conflict with Congress' objectives in the Bankruptcy Code. We disagree.

We begin with our well established standard of review for reviewing a trial court's decision on a motion to dismiss: "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to

[1] Count seven of the plaintiff's complaint alleged that Fitzgerald and the bank violated CUTPA. Fitzgerald and the bank moved to dismiss counts eight through thirteen of the complaint, which alleged vexatious litigation. On its own motion, the trial court dismissed the CUTPA claim on the same ground as it dismissed the vexatious litigations claims—lack of subject matter jurisdiction.

In his brief to this court, the plaintiff did not specifically identify or analyze the CUTPA claim but, rather, referred to it only generally by stating that the "vexatious litigation claims *and the like* were not intended to be preempted by the Bankruptcy Code and its rules" and that, "[a]ccordingly, it should be held that *no claim brought here* was preempted or intended to be preempted by the federal rules applicable." (Emphasis added.) Although the plaintiff's brief is imprecise, because the defendants have not argued that the plaintiff has waived the CUTPA claims, we consider the plaintiff's argument as applying to both the vexatious litigation claims and the CUTPA claims.

dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

Turning to the legal principles at issue, we note that the supremacy clause of the United States constitution; see U.S. Const., art. VI, cl. 2; provides that federal law "shall be the supreme Law of the Land; and the Judges in every [S]tate shall be bound thereby, any Thing in the Constitution or Laws of any [S]tate to the Contrary notwithstanding. . . . Under this principle, Congress has the power to pre-empt state law." (Citation omitted; internal quotation marks omitted.) *Arizona* v. *United States*, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

The bankruptcy clause of the United States constitution grants Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." U.S. Const., art. I, § 8, cl. 4. District courts of the United States have "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334 (a) (2012). Through title 11 of the United States Code, Congress provided "a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *Eastern Equipment & Services Corp.* v. *Factory Point*

National Bank, 236 F.3d 117, 120 (2d Cir. 2001); see 11 U.S.C. § 101 et seq. (2012). As for sanctions for abuse of the bankruptcy process, the Bankruptcy Code provides a variety of remedies. See, e.g., 11 U.S.C. § 105 (a) (2012) (authority to prevent abuse of process);[2] 11 U.S.C. § 303 (i) (2) (2012) (bad faith filing of involuntary petitions);[3] 11 U.S.C. § 930 (a) (2) (2012) (dismissal for unreasonable delay);[4] see also Fed. R. Bankr. P. 9011 (b) and (c) (sanctions for frivolous and harassing filings).[5] The question before this court is whether the Bankruptcy Code preempts vexatious litigation and CUTPA actions brought in state court that provide for penalties and sanctions, as well as damages for abuse of process.

[2] Section 105 (a) of title 11 of the 2012 edition of the United States Code provides: "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."

[3] Section 303 (i) of title 11 of the 2012 edition of the United States Code provides in relevant part: "If the court dismisses a petition under this section other than on consent of all petitioners and the debtor . . . the court may grant judgment . . . (2) against any petitioner that filed the petition in bad faith for . . . (A) . . . any damages proximately caused by such filing; or (B) punitive damages."

[4] Section 930 (a) of title 11 of the 2012 edition of the United States Code provides in relevant part: "After notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (2) unreasonable delay by the debtor that is prejudicial to the creditors . . . ."

[5] Rule 9011 of the Federal Rules of Bankruptcy Procedure provides in relevant part: "(b) 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 . . . (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 . . . . (c) 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. . . ."

This court has explained that there are three types of preemption: (1) express preemption, whereby Congress has through clear statutory language manifested its intent to preempt state law; (2) implied preemption, whereby Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law (occupy the field preemption); and (3) conflict preemption, whereby state law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives. See, e.g., *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 592–93, 89 A.3d 841 (2014); see also *English* v. *General Electric Co.*, 496 U.S. 72, 78–79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). The plaintiff contends that the Bankruptcy Code does not preclude his state court claims under express, implied, or conflict preemption. He further argues that this court should overrule the Appellate Court's holding in *Lewis* that the Bankruptcy Code preempts these claims because the Appellate Court failed to properly address the three types of preemption. Had it done so, according to the plaintiff, the court would have concluded that federal bankruptcy law does not preempt the state law claims at issue.

Before addressing the three types of preemption in turn, it is important to note that the question of preemption turns on Congress' intent. We therefore "begin as we do in any exercise of statutory [construction] with the text of the provision in question, and move on, as need be, to the structure and purpose of the [federal law] in which it occurs." (Internal quotation marks omitted.) *Air Transport Assn. of America, Inc.* v. *Cuomo*, 520 F.3d 218, 221 (2d Cir. 2008).

I

Regarding express preemption, the plaintiff argues that the Bankruptcy Code does not contain an express

provision preempting the causes of action brought in this case. We agree. "Express preemption occurs when 'Congress . . . withdraw[s] specified powers from the [s]tates by enacting a statute containing an express preemption provision.' " *Trikona Advisers Ltd.* v. *Chugh*, 846 F.3d 22, 35 (2d Cir. 2017); accord *Arizona* v. *United States*, supra, 567 U.S. 399. An express preemption provision "expressly directs that state law be ousted to some degree from a certain field." *Assn. of International Automobile Manufacturers, Inc.* v. *Abrams*, 84 F.3d 602, 607 (2d Cir. 1996). We find no provision of the Bankruptcy Code that explicitly precludes a state law CUTPA or vexatious litigation claim.[6]

This conclusion is not at odds with the conclusion the Appellate Court reached in *Lewis*.[7] The court in *Lewis* did not evaluate express preemption because the parties did not raise the issue. The defendant in *Lewis* argued that bankruptcy law preempted vexatious litigation and CUTPA claims under the theory of implied

[6] As an example of express preemption, the Medical Device Amendments of 1976, 21 U.S.C. § 360c et seq. (2012), provides in relevant part that, "[e]xcept as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." 21 U.S.C. § 360k (a) (2012); see also *Mullin* v. *Guidant Corp.*, 114 Conn. App. 279, 285, 970 A.2d 733, cert. denied, 292 Conn. 921, 974 A.2d 722 (2009).

[7] Having determined that Congress impliedly preempted the state law claims by occupying the field, the court in *Lewis* did not need to analyze express preemption. See *Resolution Trust Corp.* v. *Diamond*, 18 F.3d 111, 125 (2d Cir.) (not addressing conflict preemption after holding that express preemption applied), vacated on other grounds sub nom. *Pattullo* v. *Resolution Trust Corp.*, 513 U.S. 801, 115 S. Ct. 43, 44, 130 L. Ed. 2d 5 (1994); *Depot, Inc.* v. *Caring for Montanans, Inc.*, Docket No. 16-74-M-DLC, 2017 WL 3687339, *5 (D. Mont. February 14, 2017) (not reaching issue of conflict preemption because plaintiffs' claims were expressly preempted). In the present case, we analyze all three types of preemption to add clarity and because the parties addressed each of them on appeal in this court.

preemption (occupy the field). See *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, supra, 86 Conn. App. 600. The court, therefore, did not reach the issue of express preemption.[8] "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial." *Southport Congregational Church-United Church of Christ* v. *Hadley*, 320 Conn. 103, 119 n.21, 128 A.3d 478 (2016); see id. (declining to address risk of loss provision raised for first time in brief).

Express *preemption* is not the only method by which Congress can address the role that state law plays in bankruptcy—it can affirmatively utilize state law and has done so. For example, § 522 of the Bankruptcy Code expressly permits debtors to choose either the bankruptcy property exemption scheme under federal law or the nonbankruptcy property exemption schemes available under state law. See 11 U.S.C. § 522 (b) (2012); see also *In re Pruitt*, 401 B.R. 546, 554 (Bankr. D. Conn. 2009). The plaintiff interprets Congress' utilization of state law as evidence that Congress "clearly intended for the bankruptcy courts to abstain from hearing certain matters involving state law and interests." We agree that when Congress affirmatively permits the operation of state law, state law can play a role. However, the operation of state law is conditional upon Congress' inclusion of state law. "State [l]aw has a role to play in bankruptcy only if Congress affirmatively permits

[8] Neither the parties nor the trial court in *Lewis* performed a separate analysis of the three types of preemption. The defendant in *Lewis* argued generally, in its motion for summary judgment, that bankruptcy law preempted state law claims. The trial court granted the defendant's motion for summary judgment, stating that "[the] court is preempted by federal law from acting on a claim intended to sanction a party for its participation in a bankruptcy proceeding." *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, Superior Court, judicial district of Waterbury, Docket No. X06-CV-96-0154801-S (January 22, 2003) (34 Conn. L. Rptr. 5, 7), rev'd, 86 Conn. App. 596, 862 A.2d 368 (2004), cert. denied, 273 Conn. 909, 870 A.2d 1079 (2005).

it." *In re Pruitt*, supra, 554. Here, Congress did not affirmatively permit state law actions for abuse of the bankruptcy process, and, consequently, we conclude that the plaintiff's argument fails.

II

Second, the plaintiff argues that Congress did not intend to occupy the field of sanctions and remedies for abuse of the bankruptcy process. The plaintiff states that, by enacting the Bankruptcy Code, Congress intended only to provide a uniform and orderly administration of bankruptcy estates and payments to creditors. As to his claims for vexatious litigation, specifically, he contends that permitting such state law claims would not affect the equitable distribution of a debtor's assets, and, therefore, they are not preempted. We disagree.

To determine whether Congress has occupied a field, we look to the overriding purpose of bankruptcy law to infer Congress' intent. "[A]bsent an explicit statement that Congress intends to preempt state law, courts should infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the [s]tates to supplement federal law . . . ." (Internal quotation marks omitted.) *Barbieri* v. *United Technologies Corp.*, 255 Conn. 708, 717, 771 A.2d 915 (2001). "[O]ften, an [a]ct of Congress may touch a field of law 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." *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120.

We conclude that the Bankruptcy Code impliedly preempts the plaintiff's state law CUTPA and vexatious litigation claims for two main reasons: (1) Congress legislated so comprehensively as to occupy the entire field of penalties and sanctions for abuse of the bankruptcy process, leaving no room for state law to supple-

ment; and (2) the federal interest in uniformity is so dominant that we assume it precludes enforcement of state laws that threaten the uniformity and finality of the bankruptcy process for debtors and creditors alike.

A

We agree with the defendants that Congress has occupied the field of penalties and sanctions for abuse of the bankruptcy process, thereby implicitly preempting state law CUTPA and vexatious litigation claims. Our conclusion is consistent with the majority of federal as well as state courts that have analyzed whether the Bankruptcy Code occupies the field of penalties and sanctions. These courts have concluded that, because Congress has enacted such a comprehensive statutory scheme, inclusive of provisions for sanctions and remedies for abuse of the bankruptcy process, Congress has implicitly occupied the field, leaving no room for state law. See id., 121 (concluding that preemption precludes state law damages claims for violating automatic stay provision of Bankruptcy Code because Congress created lengthy, complex and detailed Bankruptcy Code to achieve uniformity); *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996) (precluding state law claim for malicious prosecution because "the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal"); *Astor Holdings, Inc.* v. *Roski*, 325 F. Supp. 2d 251, 262 (S.D.N.Y. 2003) (barring state law claims for filing papers in bankruptcy proceeding in bad faith or for improper purpose because Bankruptcy Code contains remedies for misuse of process, and "thus such misuse is governed exclusively by that Code"); *Glannon* v. *Garrett & Associates, Inc.*, 261 B.R. 259, 263 (D. Kan. 2001) ("the Bankruptcy Code permits no state law remedies for abuse of the bankruptcy provisions"); *Raymark Industries, Inc.* v. *Baron*, Docket No. CIV 96-7625, 1997 WL 359333, *10 (E.D. Pa. June 23, 1997) (justifying pre-

emption on ground that Congress expressed intent that bankruptcy matters be handled in federal forum by placing bankruptcy jurisdiction exclusively in district courts); *Koffman* v. *Osteoimplant Technology, Inc.*, 182 B.R. 115, 125 (D. Md. 1995) (holding that state law tort actions are preempted by Bankruptcy Code); *Idell* v. *Goodman*, 224 Cal. App. 3d 262, 271, 273 Cal. Rptr. 605 (1990) (holding that malicious prosecution action was preempted by federal law because "[t]he existence of federal sanctions for the filing of frivolous and malicious bankruptcy pleadings must be read as an implicit rejection of state court remedies"); *Smith* v. *Mitchell Construction Co.*, 225 Ga. App. 383, 386, 481 S.E.2d 558 (1997) (" 'state tort suits are preempted by the federal Bankruptcy Code' "), cert. denied, Docket No. 597C1344, 1997 Ga. LEXIS 858 (Ga. October 3, 1997); *Sarno* v. *Thermen*, 239 Ill. App. 3d 1034, 1047, 608 N.E.2d 11 (1992) (precluding state law conspiracy claim arising out of involuntary bankruptcy proceeding); *Longnecker* v. *Deutsche Bank National Trust Co.*, Docket No. 12-2304, 2013 WL 6700312, *4 (Iowa App. December 18, 2013) ("we conclude the federal bankruptcy code preempts Iowa tort claims premised on litigants' conduct in bankruptcy court"); *Mason* v. *Smith*, 140 N.H. 696, 701, 672 A.2d 705 (1996) (holding that plaintiff's state law tort claims based on allegedly wrongful filing of involuntary bankruptcy petition were impliedly preempted by Bankruptcy Code); *Stone Crushed Partnership* v. *Kassab Archbold Jackson & O'Brien*, 589 Pa. 296, 314, 908 A.2d 875 (2006) (concluding that sanctions in Bankruptcy Code provide inference that Congress intended to preempt state law remedies for frivolous claims in field of bankruptcy).

For example, in *Eastern Equipment & Services Corp.*, the plaintiff-debtor brought state law claims in the United States District Court alleging that, during the bankruptcy proceeding, creditors wilfully violated

the automatic stay provision of the Bankruptcy Code by pursuing foreclosure actions in state court. *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 119. The District Court granted the creditors' motion for judgment on the pleadings, concluding that the Bankruptcy Code preempted the state law claims, which should have been brought in the Bankruptcy Court. Id. On appeal, the United States Court of Appeals for the Second Circuit explained that a conclusion of preemption was compelled by (1) Congress' establishment of bankruptcy jurisdiction exclusively in the district courts under 28 U.S.C. § 1334 (a), (2) Congress' creation of a lengthy, complex and detailed Bankruptcy Code to achieve uniformity, (3) the constitution's grant to Congress of exclusive power over bankruptcy law, and (4) the Bankruptcy Code's provision of several remedies designed to deter the misuse of the bankruptcy process. Id., 121.

In a case that is directly on point with the present case, the United States Court of Appeals for the Ninth Circuit in *MSR Exploration, Ltd.*, addressed the question of whether federal law preempts state law malicious prosecution actions for events that had occurred in connection with Bankruptcy Court proceedings. *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 912. In *MSR Exploration, Ltd.*, the plaintiff debtor filed a chapter 11 bankruptcy proceeding. Id. In response, the defendant creditors filed claims against the debtor, to which the debtor objected. Id. The Bankruptcy Court entered an order disallowing the creditors' claims. The debtor did not pursue abuse of process sanctions or penalties in the Bankruptcy Court. Id. Instead, the debtor brought a state law malicious prosecution action in the United States District Court. Id.

The Ninth Circuit concluded that the Bankruptcy Code preempted the state law action for two main reasons. Id., 913. "First, Congress has expressed its intent

that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts . . . .'' Id. Second, the complex, detailed, and comprehensive Bankruptcy Code demonstrates Congress' intent to provide uniform and centralized adjudication of all of the rights and duties of debtors and creditors alike. Id., 914. ''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.'' (Citations omitted.) Id. Accordingly, the Ninth Circuit concluded that the malicious prosecution action should have been brought in the Bankruptcy Court and upheld the District Court's determination that it lacked subject matter jurisdiction over the action. Id., 916.

We agree with the holdings of the majority of courts that have analyzed the issue and concluded that the Bankruptcy Code occupies the field of penalties and sanctions for abuse of the bankruptcy process. The plaintiff, however, disputes our conclusion and argues that a closer analysis of the Bankruptcy Code provisions that permit penalties and sanctions reveals that Congress did not intend to preempt his state law claims. Performing the analysis the plaintiff advocates for only further supports our conclusion that Congress occupied the field of penalties and sanctions.

We first examine 11 U.S.C. § 105,[9] which grants bankruptcy courts broad equitable powers to ''implement

[9] Section 105 (a) of title 11 of the 2012 edition of the United States Code provides: ''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

the provisions of Title 11 and to prevent an abuse of the bankruptcy process." *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1997), citing *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9th Cir. 1996), and *In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1089 (10th Cir. 1994). The grant of equitable powers under § 105 broadly authorizes bankruptcy courts to issue *any* process, order, or judgment necessary to prevent abuse of the bankruptcy process. Congress did not limit or carve out from this broad grant a vexatious litigation exception for the states to legislate within. In practice, bankruptcy courts have sanctioned parties for vexatious litigation under that very provision. In *In re Volpert*, supra, 497, for example, the United States Court of Appeals for the Seventh Circuit upheld a Bankruptcy Court's imposition of a $1000 sanction against an attorney who had "abuse[d] the judicial process." Id., 501. *In re Volpert* illustrates that bankruptcy courts have the authority, and in practice use that authority under § 105, to achieve a purpose similar to that of a state law remedy. *In re Volpert* supports our conclusion that Congress intended to occupy the field of penalties and sanctions for abuse of the bankruptcy process and left no room for state law to operate. Additionally, we are reassured by the fact that the Bankruptcy Code provides remedies for the kind of abuse of process of which the plaintiff complains. The plaintiff is not left without a remedy, even after the bankruptcy proceeding concludes.[10]

The plaintiff argues that, because a cause of action for vexatious litigation under Connecticut law provides relief that is different from the sanctions contemplated

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."

[10] Bankruptcy policy provides for cases to be "reopened on motion of the debtor . . . ." Fed. R. Bankr. P. 5010. By opening the case, the Bankruptcy Court has discretion to "administer assets [and] to accord relief to the debtor . . . ." 11 U.S.C. § 350 (b) (2012).

under 11 U.S.C. § 105, it falls outside the field that Congress intended to occupy. We agree that the penalties and damages available under a successful state law claim for vexatious litigation are potentially more extensive than those available under the Bankruptcy Code. In Connecticut, a plaintiff can recover double damages for an action brought without probable cause, and treble damages for an action brought with malicious intent to vex and trouble. General Statutes § 52-568. Similarly, CUTPA permits a plaintiff to recover actual and punitive damages. General Statutes § 42-110g (a).

In contrast, 11 U.S.C. § 105 grants bankruptcy courts the discretion to issue any judgment necessary to prevent abuse of the bankruptcy process. Although Congress' grant of such discretion is broad, the practical effects of it may be that bankruptcy courts impose sanctions less frequently, and for lesser dollar amounts, than if the bankruptcy provisions more closely mirrored the language of the Connecticut statutes. But this potential distinction in frequency and in kind does not warrant an inference that Congress did not contemplate penalties and sanctions. Rather, § 105 indicates that Congress indeed considered penalties and sanctions, and adopted a statutory scheme. "[I]t 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." *Gonzales* v. *Parks*, 830 F.2d 1033, 1036 (9th Cir. 1987).

Another provision furnishing bankruptcy courts with authority to issue penalties and sanctions is rule 9011 of the Federal Rules of Bankruptcy Procedure. See footnote 5 of this opinion. Under rule 9011 (b) and (c), a court may sanction parties who file documents in bad faith or for an "improper purpose, such as to harass or to cause unnecessary delay or . . . cost . . . ." Fed. R. Bankr. P. 9011 (b) (1). The plaintiff analogizes rule

9011 to rule 11 of the Federal Rules of Civil Procedure[11] and argues that, on the basis of their similarity, rule 9011 does not preempt a state law vexatious litigation action. And it is true that the language of the two rules is nearly identical. The plaintiff correctly points out that the 1993 advisory committee notes to rule 11 provide that the rule "does not preclude a party from initiating an independent action for malicious prosecution or abuse of process." Fed. R. Civ. P. 11, advisory committee notes, 28 U.S.C. app., p. 783 (2012). Additionally, the 1983 advisory committee notes to rule 7001 of the Federal Rules of Bankruptcy Procedure, which pertains to adversary proceedings, provide that the bankruptcy rules "either incorporate or are adaptations of most of the Federal Rules of Civil Procedure." Fed. R. Bankr. P. 7001, advisory committee notes, 11 U.S.C. app., p. 723 (2012). The plaintiff therefore argues that, because the rules are similar, this court should conclude that rule 9011 incorporates the advisory committee notes from rule 11, permitting a party to bring an independent vexatious litigation or abuse of process action. We are unpersuaded.

Although courts often look to advisory committee notes for interpretive guidance; e.g., *In re Old Carco, LLC*, 406 B.R. 180, 209 n.40 (Bankr. S.D.N.Y. 2009); they do not constitute binding authority. *In re Bressler*, 600 B.R. 739, 744 (S.D.N.Y. 2019) (discussing advisory committee notes to rules 4004 and 4007 of the Federal Rules of Bankruptcy Procedure). Committee notes are a product of the rules advisory committee, not Congress.

[11] Rule 11 (b) of the Federal Rules of Civil Procedure provides in relevant part: "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . ."

United States v. *Vonn*, 535 U.S. 55, 64 n.6, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002). And while advisory committee notes can be "a reliable source of insight into the meaning of a rule"; (internal quotation marks omitted) *Hall* v. *Hall*, U.S. , 138 S. Ct. 1118, 1130, 200 L. Ed. 2d 399 (2018); the insight here speaks to rule 11, not rule 9011. Rule 9011 is silent as to the application or inclusion of the advisory committee note. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns* v. *United States*, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991). Here, in the context of the Bankruptcy Code, congressional intent is clear—the creation of "a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120; see 11 U.S.C. § 101 et seq. (2012). Given this clear intent, it would be contrary to textual and contextual evidence that Congress intended to permit independent abuse of process actions outside the bankruptcy process.

In view of the provisions that address penalties and sanctions for abuse of the bankruptcy process, namely, 11 U.S.C. § 105 and rule 9011, it is clear that Congress occupied the field by legislating comprehensively as to penalties and sanctions for abuse of that process. Accordingly, we conclude that Congress impliedly preempted state law CUTPA and vexatious litigation claims.

The Appellate Court in *Lewis* came to the same conclusion, and we agree with Judge DiPentima's cogent analysis in that case. The Appellate Court explained that "[t]he code contains remedies for the misuse of the [bankruptcy] process . . . ." (Internal quotation marks omitted.) *Lewis* v. *Chelsea G.C.A. Realty Partnership*,

L.P., supra, 86 Conn. App. 602. "Although it is true that the federal remedies provided for in the bankruptcy context do not offer the substantial damages available under Connecticut's vexatious litigation statute and CUTPA, that is an insufficient basis on which to preclude preemption." Id., 603–604. "The exclusivity of federal jurisdiction over bankruptcy proceedings, the complexity and comprehensiveness of Congress' regulation in the area of bankruptcy law and the existence of federal sanctions for the filing of frivolous and malicious pleadings in bankruptcy must be read as Congress' implicit rejection of alternative remedies . . . ." Id., 605.

B

In addition to concluding that Congress implicitly preempted state law actions by occupying the field of bankruptcy law, we conclude that, in that field of law, the federal interest is so dominant that federal law is assumed to preclude enforcement of state laws on the subject. E.g., *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120. Nothing less than the constitution of the United States persuades us that Congress' interest in uniformity in the bankruptcy process is so dominant as to preempt collateral attacks through state law vexatious litigation and CUTPA claims. The constitution grants Congress the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States . . . ." U.S. Const., art. I, § 8, cl. 4. As described by Justice Joseph Story, the reasons for conferring bankruptcy power upon the United States "result from the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the states. It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its

own local interests and pursuits. Under such circumstances no uniformity of system or operations can be expected. . . . There can be no other adequate remedy than giving a power to the general government to introduce and perpetuate a uniform system." 2 J. Story, Commentaries on the Constitution of the United States (2d Ed. 1851) § 1107.

We approach the question of uniformity within the bankruptcy process cognizant of the fact that state courts can be hesitant to conclude that federal law preempts state law claims. On this point, the United States Supreme Court has stated that federal regulation "should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1968). Yet, against this backdrop, state courts have concluded, as we do, that permitting state law claims for abuse of the bankruptcy process threatens the uniformity of the bankruptcy system. See, e.g., *Smith* v. *Mitchell Construction Co.*, supra, 225 Ga. App. 386 ("[a]llowing state tort actions based on allegedly bad faith bankruptcy filings . . . would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme . . . threaten[ing] the uniformity of federal bankruptcy law"); *Mason* v. *Smith*, supra, 140 N.H. 700 ("[a]llowing plaintiffs to pursue alternative remedies in state courts for wrongful filings would frustrate the uniformity of bankruptcy law intended by Congress by allowing each [s]tate to establish its own definition of 'bad faith' with regard to the filing of involuntary petitions").

Our concerns with respect to the uniformity of bankruptcy law are twofold. First, state courts evaluating

claims that involve abuse of the bankruptcy process would need to develop adjudication standards for matters such as probable cause, bad faith, and malicious prosecution, to name a few. Those standards may be different from, and at odds with, the standards that have developed in the bankruptcy courts. See *Sarno* v. *Thermen*, supra, 239 Ill. App. 3d 1044 (explaining that it would be inconsistent with Congress' intent for state courts to develop different, more liberal tradition of bad faith for malicious prosecution purposes than that developed in federal system). It is foreseeable that states might disagree over the extent of an available remedy for abuse of process and the standard to be met. "State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating." *Gonzales* v. *Parks*, supra, 830 F.2d 1035. Varying standards for recovery from state to state would serve to undermine the federal interest in uniformity.

Second, permitting state law actions would allow parties to collaterally attack the bankruptcy process, threatening the finality of the proceedings as well as the ability of the parties—debtors and creditors alike—to make a fresh start once the bankruptcy proceeding concludes. One of the overriding purposes of the Bankruptcy Code is to provide debtors with a fresh start. "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibili-

ties consequent upon business misfortunes." *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554–55, 35 S. Ct. 289, 59 L. Ed. 713 (1915); accord *In re Renshaw*, 222 F.3d 82, 86 (2d Cir. 2000).

Creditors benefit as well by having "a single forum where debts and priorities can be determined in an orderly manner, a forum where those debts can be collected in whole or (more likely) in part." *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 916. The potential threat of state court actions following on the heels of a bankruptcy proceeding may well interfere with the necessary actions that creditors take within the bankruptcy process. Id. "[T]he mere threat of state tort actions could prevent individuals from exercising their rights in bankruptcy, thereby disrupting the bankruptcy process." *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 121, citing *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 913–16. For example, the threat of a state law action could deter a creditor from filing an adversary proceeding in the Bankruptcy Court challenging the discharge of a debt. We face that exact circumstance in the present case. The threat is then compounded when the state law action provides for substantial damage awards, as is also the case at hand. See, e.g., *Idell* v. *Goodman*, supra, 224 Cal. App. 3d 269 ("[t]he additional risk that substantial damage awards in state courts would create a material disincentive to those seeking to use the bankruptcy laws only exacerbates the problem" [internal quotation marks omitted]). Both of these uniformity concerns fortify our conclusion that the Bankruptcy Code impliedly preempts state law CUTPA and vexatious litigation claims. The Bankruptcy Code provides the forum, incentives, penalties, and sanctions that apply uniformly to debtors and creditors nationwide.

In response, the plaintiff urges this court to adopt the minority approach for evaluating implied preemption articulated by the Supreme Court of Texas in *Graber* v. *Fuqua*, 279 S.W.3d 608 (Tex.), cert. denied, 558 U.S. 880, 130 S. Ct. 288, 175 L. Ed. 2d 136 (2009). In *Graber*, the court considered whether the Bankruptcy Code preempted a state law malicious prosecution claim that arose out of an adversary action in a bankruptcy proceeding. Id., 609–10. Similar to the facts of this case, in *Graber*, a law firm had initiated an adversary proceeding against a debtor who had filed a voluntary chapter 7 petition in the Bankruptcy Court. Id. The petition resulted in a criminal investigation, an indictment for bank fraud and tax fraud, and then ultimately a trial in state court in which a jury found the debtor not guilty on all charges. Id., 610. The debtor then sued the law firm in state court, alleging civil malicious prosecution. Id. The law firm argued that the court lacked subject matter jurisdiction because federal bankruptcy law preempted the state law claim. The trial court agreed and granted the motion to dismiss the action. Id. On appeal, the Texas Supreme Court held that Congress did not intend for the Bankruptcy Code to preempt a state law malicious prosecution claim. Id., 620.

The Texas Supreme Court in *Graber* approached the preemption issue by analyzing each provision in the Bankruptcy Code to determine whether Congress intended to occupy the field of sanctions and penalties. The court reasoned that where Congress "custom-built" certain provisions of the Bankruptcy Code—unique provisions without analogues in general federal litigation—those provisions are more likely to preempt state law causes of action because Congress "built" or created a unique remedial provision. Id., 612–13. Conversely, the court reasoned, where Congress imported provisions from existing federal law without any significant changes, preemption of state law causes of action is "improbable," and those provisions should incorporate common practices under those existing federal laws.

Id., 613. The court concluded that 11 U.S.C. § 105 and rule 9011 do not preempt state law claims for malicious prosecution because they are imported from existing federal law and represent Congress' implicit acceptance of state law malicious prosecution claims.[12] Id. Although that is still a minority view, some courts, in light of *Graber*, similarly have held that the Bankruptcy Code does not preempt state law causes of action providing damages for abuse of the bankruptcy process. See, e.g., *U.S. Express Lines, Ltd.* v. *Higgins*, 281 F.3d 383, 393 (3d Cir. 2002) (holding that state law claim for malicious prosecution was not preempted); *R.L. LaRoche, Inc.* v. *Barnett Bank of South Florida, N.A.*, 661 So. 2d 855, 857 (Fla. App. 1995) (concluding that federal bankruptcy law did not preempt state law abuse of process and malicious prosecution claims).

We disagree with the minority approach to the preemption analysis. Notably, the court in *Graber* did not cite any case law as authority for categorizing provisions of federal law as either "custom-built" or imported when determining whether those provisions are more or less likely to preempt state law causes of action. Rather, the court effectively adopted its own "custom-built" method to analyze individual provisions of the Bankruptcy Code. By adopting this analysis, the court failed to consider the structure and purpose of the Bankruptcy Code and, consequently, failed to recognize that Congress legislated so comprehensively as to occupy the entire field of regulation. See, e.g., *Longnecker* v. *Deutsche Bank National Trust Co.*, supra, 2013 WL 6700312, *6 (rejecting *Graber* approach and determining that state court did not err in "ruling, consistently

[12] The Texas Supreme Court decided *Graber* by a five to four margin. The dissenters concluded, as we have and as the Appellate Court did in *Lewis*, that federal law occupied the field and that permitting state law actions for malicious prosecution would undermine the uniformity of bankruptcy law mandated by the United States constitution. See *Graber* v. *Fuqua*, supra, 279 S.W.3d 620–21 (Wainwright, J., dissenting).

with the majority of state and federal courts, that it lacked subject matter jurisdiction over claims alleging abuse of bankruptcy proceedings"); *PNH, Inc.* v. *Alfa Laval Flow, Inc.*, 130 Ohio St. 3d 278, 285, 958 N.E.2d 120 (2011) (rejecting *Graber* approach and concluding that federal law preempts state law causes of action for misconduct of litigants in bankruptcy proceedings), cert. denied, 565 U.S. 1262, 132 S. Ct. 1764, 182 L. Ed. 2d 533 (2012).

Like the substantial majority of federal and state courts that have concluded that the Bankruptcy Code preempts state law claims for abuse of process, we conclude that Congress clearly has "considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 915. As previously stated, Congress decides what penalties are appropriate within the bankruptcy process, not state courts. *Gonzales* v. *Parks*, supra, 830 F.2d 1036. Accordingly, we interpret Congress' grant of exclusive jurisdiction over bankruptcy petitions to the district courts, and the federal interest in uniform laws on bankruptcy, as occupying the field and implicitly rejecting state law claims for abuse of process.

III

Finally, the plaintiff argues that there is little similarity between the penalties, sanctions, and damages available under Connecticut law for his CUTPA and vexatious litigation claims, and the sanctions for abuse of process available under the Bankruptcy Code. The plaintiff asks this court to conclude that, because the remedies are different, there is no conflict, and, therefore, his claims are not preempted.[13] We agree with the

[13] Courts addressing the issue of preemption that we are faced with in the present case often combine the analysis for occupy the field preemption and conflict preemption, both of which are types of implied preemption, without significant distinction. See, e.g., *Eastern Equipment & Services Corp.* v. *Factory Point National Bank*, supra, 236 F.3d 120–21; *MSR Explora-*

plaintiff that state law actions are not in conflict with bankruptcy law because a party can comply with both state and federal law. However, we conclude that those actions are still preempted under a conflict preemption analysis because they are an obstacle to accomplishing Congress' purpose within the Bankruptcy Code.

"Conflict preemption exists when compliance with both state and federal law is impossible, and a subset of conflict preemption referred to as obstacle preemption applies when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . State law is in irreconcilable conflict with federal law, and hence preempted by federal law, when compliance with the state statute would frustrate the purposes of the federal scheme." (Internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 593, quoting *Sosnowy* v. *A. Perri Farms, Inc.*, 764 F. Supp. 2d 457, 464 (E.D.N.Y. 2011). Therefore, we must determine whether compliance with state and federal law would be impossible and then consider whether the plaintiff's vexatious litigation and CUTPA claims would be an obstacle to Congress' objectives.

We agree with the plaintiff that compliance with both the Bankruptcy Code and Connecticut law would not

tion, Ltd. v. *Meridian Oil, Inc.*, supra, 77 F.3d 913–15, *Lewis* v. *Chelsea G.C.A. Realty Partnership, L.P.*, supra, 86 Conn. App. 601–605. As a practical matter, it often will be the case that, when Congress has occupied the field, a state law cause of action likely will obstruct Congress' purpose, resulting in conflict preemption. We note that courts often have held that if one kind of preemption exists, the others need not be addressed. See, e.g., *Resolution Trust Corp.* v. *Diamond*, 18 F.3d 111, 125 (2d Cir.) (not addressing conflict preemption after holding that express preemption applied), vacated on other grounds sub nom. *Pattullo* v. *Resolution Trust Corp.*, 513 U.S. 801, 115 S. Ct. 43, 44, 130 L. Ed. 2d 5 (1994); *Depot, Inc.* v. *Caring for Montanans, Inc.*, Docket No. 16-74-M-DLC, 2017 WL 3687339, *5 (D. Mont. February 14, 2017) (not reaching issue of conflict preemption because plaintiffs' claims were expressly preempted). Because the plaintiff in the present case sets forth arguments unique to conflict preemption that warrant separate analysis, we have not combined our analysis of these two types of implied preemption.

be impossible. "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, supra, 373 U.S. 142. Connecticut's vexatious litigation statute strives to deter parties from bringing claims without probable cause and with malicious intent. See General Statutes § 52-568. CUTPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. See General Statutes § 42-110b (a). To comply with Connecticut law, a party need only refrain from bringing claims without probable cause, and compete fairly and without deception. Obviously, no provision in the Bankruptcy Code mandates that a party bring claims without probable cause or compete unfairly or deceptively. Connecticut law can be enforced without impairing the federal superintendence. Therefore, the state statutes do not conflict with the Bankruptcy Code such that it would be impossible to comply with both.

However, our obstacle preemption analysis implicates many of the same factors that drove our implied (or occupy the field) preemption analysis and leads us to conclude that the plaintiff's state law abuse of process actions are preempted. Congress enacted the Bankruptcy Code inclusive of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights. Permitting parties to bring abuse of process actions in state court hinders Congress' objective of uniformly defining the scope and availability of remedies for abuse of the bankruptcy process.

We can imagine a myriad of claims that would lend themselves to vexatious litigation actions, including debtors' petitions, creditors' claims, disputes over reorganization plans, and disputes over pending discharges, to name a few. If such claims were not preempted by federal law, redress for them would depend on the law

of the state in which the plaintiff brought the action. *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, supra, 74 F.3d 914. "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." (Internal quotation marks omitted.) *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417, 426 (6th Cir. 2000). Accordingly, the plaintiff's state law CUTPA and vexatious litigation claims are in conflict with the Bankruptcy Code provisions regarding sanctions for abuse of process and, thus, are preempted. The trial court properly dismissed these claims for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other justices concurred.

MARINELIS SENA, ADMINISTRATRIX (ESTATE OF TYRONE O. TILLMAN), ET AL. *v.* AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC., ET AL.
(SC 19971)

Robinson, C. J., and Palmer, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 28-13 [a]), "[n]either the state nor any political subdivision of the state . . . complying with or attempting to comply with [civil preparedness statutes] or any order or regulation promulgated pursuant to [those statutes] . . . shall be liable for the death of or injury to persons . . . as a result of any such activity."

The plaintiff, both individually and as administratrix of the estate of the decedent, T, sought to recover damages from, among others, the defendant city alleging, inter alia, that the city was negligent in responding to a medical emergency involving T. Specifically, the plaintiff alleged that the city had improperly failed to dispatch a fire truck with an emergency medical technician in response to T's emergency call and

had impeded prompt arrival of an ambulance by allowing snow to remain in certain public roadways following a statewide winter snowstorm. Before the storm began, the city's mayor declared a state of emergency and activated the local emergency operations center. Shortly thereafter, the governor declared a statewide civil preparedness emergency pursuant to statute (§ 28-9). Snowfall during the storm was so significant that both city and state roads were temporarily closed to the public, and plowing and ambulance service were temporarily suspended. After the storm, clearing roads proved unusually difficult, and the city requested that the state summon the assistance of the National Guard, which arrived the following day. Two days after the storm concluded, only certain roads were open to emergency vehicles and several hundred secondary roads, including the road on which T lived, remained impassable. On that day, T called 911 complaining of severe breathing difficulty. An ambulance arrived approximately twenty minutes later and subsequently transported T to the hospital, where he was pronounced dead. Three days after the storm concluded, at least one lane was open on each of the city's roads. The city's emergency operations center maintained command over storm response and snow removal for approximately five days after the storm passed and remained staffed for approximately three days thereafter. More than one month later, the governor issued an executive order ending the statewide civil preparedness emergency. The plaintiff subsequently commenced the present action, and the city filed a motion for summary judgment, claiming immunity pursuant to § 28-13. The trial court denied that motion, concluding that there was a genuine issue of material fact as to whether the city was still actively experiencing a civil preparedness emergency at the time of the city's response to T's emergency call, and the plaintiff appealed. *Held*:

1. This court had subject matter jurisdiction over the city's appeal, as the trial court's denial of the city's motion for summary judgment constituted a final judgment because the city's motion was based on a colorable claim that § 28-13 (a) affords the city sovereign immunity from actions taken in response to declared emergencies; although the plain text of § 28-13 (a) does not clearly define the nature of the immunity afforded under that statute, an examination of relevant legislative history indicated that the legislature had intended that statute to extend the state's own sovereign immunity, including both its immunity from suit and liability, to political subdivisions such as the city.
2. The trial court improperly denied the city's motion for summary judgment on the basis of the court's conclusion that a genuine issue of material fact existed as to whether the city was still actively experiencing a civil preparedness emergency at the time of T's death, the trial court having incorrectly concluded that immunity under § 28-13 applies only during a civil preparedness emergency; the city's command and control of storm response and snow removal, including decisions regarding snow plowing and the circumstances in which a fire truck should respond to

an emergency call, unambiguously fell within the statutory (§ 28-1 [4]) definition of civil preparedness, which explicitly includes measures taken in preparation of, during, and following major disasters and emergencies, and, therefore, evidence relating to whether the civil preparedness emergency had ended at the time of the city's response to T's emergency medical call did nothing to contradict the ample evidence in the record that the city was still engaged in activities afforded immunity by § 28-13 at that time.

Argued October 18, 2018—officially released September 3, 2019

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful death of the named plaintiff's decedent as a result of the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, denied the motion for summary judgment filed by the defendant city of Bridgeport, and the defendant city of Bridgeport appealed. *Reversed*; *judgment directed.*

J. Christopher Rooney, with whom were *Alan Bowie* and, on the brief, *Anne Peterson*, for the appellant (defendant city of Bridgeport).

Alan Scott Pickel, with whom, on the brief, was *Anthony L. Cenatiempo*, for the appellees (plaintiffs).

Opinion

ROBINSON, C. J. This appeal requires us to consider the nature and scope of the immunity provided to the state and its political subdivisions by General Statutes § 28-13 (a)[1] for actions taken in connection with a civil

[1] General Statutes § 28-13 (a) provides: "Neither the state nor any political subdivision of the state nor, except in cases of wilful misconduct, the agents or representatives of the state or any political subdivision thereof nor any member of the civil preparedness forces of the state nor any person authorized by such civil preparedness forces or by any member of such civil preparedness forces complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state nor any person employed by or authorized to assist any agency of the

preparedness emergency declared by the governor pursuant to General Statutes § 28-9,[2] which, in the present case, related to a blizzard that occurred in February, 2013. The defendant city of Bridgeport (city)[3] appeals[4] from the trial court's denial of its motion for summary judgment in the present case, which was commenced by the plaintiff, Marinelis Sena, both individually and as administratrix of the estate of Tyrone O. Tillman.[5] The operative complaint alleges, inter alia, that the city was negligent in (1) not following its usual practice of sending a fire truck with an emergency medical technician in addition to an ambulance to render medical care to Tillman when he experienced severe breathing difficulty on February 11, 2013, and (2) preventing the ambulance from arriving promptly by allowing snow to remain on certain public roadways. On appeal, the city claims, inter alia, that it was immune for its actions

federal government in the prevention or mitigation of any major disaster or emergency, shall be liable for the death of or injury to persons or for damage to property as a result of any such activity. The Attorney General shall appear for and defend the state, any political subdivision of the state and the agents or representatives of the state or any political subdivision thereof or any member of the civil preparedness forces of the state or any other person exempted from liability for his acts under this section in any civil action brought for the death of or injury to persons or for damage to property as a result of any civil preparedness activity."

[2] General Statutes § 28-9 (a) provides in relevant part: "In the event of serious disaster, enemy attack, sabotage or other hostile action or in the event of the imminence thereof, the Governor may proclaim that a state of civil preparedness emergency exists, in which event the Governor may personally take direct operational control of any or all parts of the civil preparedness forces and functions in the state. Any such proclamation shall be effective upon filing with the Secretary of the State. . . ."

[3] The plaintiff also named American Medical Response of Connecticut, Inc., and two of its employees, Brian Walts and William T. Ostroff, as defendants. These additional defendants are not participating in the present appeal.

[4] The city appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[5] For the sake of simplicity, we refer to Sena in both capacities as the plaintiff.

pursuant to § 28-13, and that the trial court improperly determined that a genuine issue of material fact existed as to whether the civil preparedness emergency remained in effect on the date of Tillman's death. We conclude that (1) an appealable final judgment exists because the city's claims of immunity pursuant to § 28-13 implicate an extension of the state's sovereign immunity to the city, and (2) the trial court should have granted the city's motion for summary judgment because there was no genuine issue of material fact with respect to the applicability of § 28-13. Accordingly, we reverse the judgment of the trial court.

The record reveals the following relevant facts[6] and procedural history. On February 8 and 9, 2013, a blizzard, verified by the National Weather Service, occurred in nearly all of southern Connecticut. In anticipation of the blizzard, on February 7, 2013, at 1 p.m., representatives from the city's various departments and the local emergency preparedness board convened a meeting of the Bridgeport Emergency Planning Group, which was held at the city's emergency operations center (EOC). At that meeting, the members from the city's departments reviewed the city's emergency preparedness plan, designated representatives who would attend civil emergency planning sessions, and began to identify essential personnel who would be assigned during the expected emergency.

On February 8, 2013, beginning at 7 a.m., the city began to implement its emergency preparedness plan. Full operations at the EOC were initiated that morning, and numerous city officials conducted a conference

[6] Given the summary judgment posture of this appeal, we present the facts in the light most favorable to the nonmoving party, which, in the present case, is the plaintiff. See, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018); *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 337, 179 A.3d 201 (2018); *Doe* v. *West Hartford*, 328 Conn. 172, 191, 177 A.3d 1128 (2018).

call with the statewide emergency operations center in order to ensure that the city's storm response was coordinated with the state's efforts. At 11 a.m., Mayor Bill Finch held a press conference and announced his intention to declare a civil preparedness emergency for the city, which included the institution of a citywide ban on driving so that plows could keep the roads clear. At 11:45 a.m., Governor Dannel Malloy held a press conference and declared a civil preparedness emergency pursuant to § 28-9.[7] Shortly thereafter, the EOC activated its response at level 4 and assumed centralized control over the city's response to the blizzard.[8]

By 5 p.m. on February 8, 2013, Governor Malloy had issued a statewide travel ban of all vehicles on any state road. By 8 p.m., snowfall was so severe that the EOC determined that it was unsafe for all vehicles other than

[7] A copy of Governor Malloy's letter to Secretary of the State Denise Merrill declaring a state of emergency pursuant to § 28-9 was attached as an exhibit to the city's motion for summary judgment. Governor Malloy ended that state of civil preparedness emergency and rescinded Executive Order 30, which also pertained to the February storm, on March 18, 2013, through Executive Order 33. Executive Order 33 also ended the civil preparedness emergency previously declared by Governor Malloy on October 27, 2012, in anticipation of Hurricane Sandy, and rescinded Executive Orders 21 through 28, which also pertained to Hurricane Sandy.

[8] An affidavit from Scott Appleby, the city's director of Emergency Management and Homeland Security, describes level 4 as "a 'full scale' response during which time the EOC takes complete control over the planning for and response to the emergency. . . . The goal at a full scale response is to centralize command and control over storm response in the hands of a unified command in one location. This group has overriding authority over department heads, who in general were sent home due to storm conditions. This control would include dispatching police, fire and ambulances in response to [911] calls. . . . Because the emergency call center is just down the hall, we have a supervisor from that area of the building permanently in the EOC room. In the case of this storm, Assistant Fire Chief Dominic Carfi (or his replacement) became the liaison with the call center and would give them instructions on how to handle calls. Occasionally, the supervisor from the emergency call center would come to us to discuss an issue or seek advice. The call center could also contact police and fire battalion chiefs by radio or telephone for instructions and an update on whether units could respond."

plows to be on the city's roads. Whiteout conditions later that night required the recall of all plows. The EOC then restricted the response of municipal fire and police departments. Decisions regarding whether those departments would respond to reported emergencies were made by their representatives at the EOC, rather than by emergency communications employees. William Schietinger, the representative at the EOC from the city's ambulance contractor, American Medical Response of Connecticut, Inc. (AMR), similarly suspended ambulance service temporarily because of whiteout conditions. As visibility improved, the EOC decided that AMR could resume providing ambulance service, and, at 3 a.m. on February 9, 2013, plows returned to the streets.

Beginning midday on February 9, 2013, the EOC shifted its attention from storm response to snow removal. The snow removal process was unusually difficult because snow accumulation reached a level higher than the typical dump truck with plow attached could move, and many cars had not been removed from public streets, despite the parking bans in effect. This resulted in vehicles having to be dug out and towed before streets could be plowed. Because of the substantial snow accumulation, the EOC requested that the state send national guard personnel and equipment to assist with snow removal and emergency responses. That additional snow removal equipment did not begin to arrive until February 10, 2013. Given the paralyzing snow accumulation, most of the city's residents were confined to their homes.

The limited ability of the fire and police departments to respond to calls for assistance continued in the wake of the storm because most police and fire stations had not yet dug out. On February 10, 2013, at 2 a.m., Brian Rooney, the city's fire chief, and Dominic Carfi, a deputy fire chief who had been the fire department's represen-

tative at the EOC during the storm, determined that, in the case of medical emergencies, the only response would be through AMR because it was not physically possible for the city's fire trucks to leave the stations. Carfi conveyed that decision to the city's 911 emergency communications employees via their supervisor. Once fire headquarters was cleared of snow by approximately 10 a.m. that day, the fire department was able to use a limited number of four wheel drive sport utility vehicles that could be driven on plowed streets to respond to emergencies. In consultation with AMR's representative in the EOC, a deputy fire chief who had relieved Carfi would authorize the dispatch of one of these sport utility vehicles to emergency medical calls depending on road conditions, the location of the call, and the severity of the medical condition.

On Monday, February 11, 2013, twelve front end loaders arrived and provided assistance in the clearing of the city's primary roads. However, city offices remained closed, no regular city employees reported for work, and schools would remain closed for the remainder of the week. As of 8 p.m. that day, a citywide driving ban remained in effect, and only 100 roads were open to emergency vehicles. Most of those were primary roads. Several hundred secondary roads were still closed or impassible, and tow trucks were still in the process of removing abandoned vehicles.

At approximately 7:18 p.m. on February 11, 2013, Tillman called 911 complaining of severe breathing difficulty. At 7:27 p.m., AMR dispatched an ambulance to assist Tillman. The fire department did not respond. According to an affidavit submitted by Scott Appleby, the city's Director of Emergency Management and Homeland Security, Stevens Street, on which Tillman lived, had not yet been plowed at that time. Brian Walts and William T. Ostroff, emergency medical technicians employed by AMR, reached Tillman at 7:36 p.m. and

rendered emergency care until 8:04 p.m. Tillman was subsequently transported to a local hospital, where he was pronounced dead upon arrival.

The efforts to clear at least one lane on each of the city's roads continued until February 12, 2013. It took an additional week for the city's roads to be cleared to the point where traffic could pass normally. The EOC maintained command over storm response and snow removal through February 14, 2013, after which operational control over the various city departments, including the fire department, was returned to the normal operating procedure. The EOC remained staffed and active through February 17, 2013, at which point the operational period ended, the response was terminated, and the EOC was vacated by all personnel except Appleby.

The plaintiff subsequently brought the present action against the city, AMR, Ostroff, and Walts. In counts twenty and twenty-one of the operative complaint, the plaintiff claims the city negligently failed to follow the local emergency service plan and permitted a highway defect to exist pursuant to General Statutes § 13a-149. On September 27, 2016, the city moved for summary judgment on immunity grounds. On November 16, 2016, the plaintiff filed an objection to that motion together with an accompanying memorandum of law.

On March 8, 2017, the trial court issued a memorandum of decision denying the city's motion for summary judgment. The trial court first rejected the city's argument that the present action is barred by common-law governmental immunity. The trial court next addressed the city's argument that it is absolutely immune from liability pursuant to § 28-13. The trial court concluded that, although the city had met its initial burden of producing evidence sufficient to support a judgment in its favor on the issue of § 28-13 immunity, the plaintiff

had submitted evidence contradicting the city's evidence concerning whether the city was still experiencing a civil preparedness emergency at the time of Tillman's death. The trial court also observed that the relevant statutes do not prescribe how to determine when an emergency has ended for purposes of § 28-13 immunity and suggested that a "workable 'end date' is needed." Accordingly, the trial court concluded that, on the basis of the evidence before it, the city could not invoke the protections of § 28-13 immunity because a genuine issue of material fact existed as to whether the city was still actively experiencing a civil preparedness emergency at the time of Tillman's death. This appeal followed. See footnote 4 of this opinion.

On appeal, the city argues that the trial court incorrectly concluded that the end date of a civil preparedness emergency has statutory significance under § 28-13, and incorrectly concluded that there was a genuine issue of material fact concerning the issue of § 28-13 immunity. The plaintiff disagrees and also argues that the trial court's denial of the city's motion for summary judgment does not constitute an appealable final judgment.

I

As a threshold issue, we must determine whether the trial court's denial of the city's motion for summary judgment is a final judgment over which we have subject matter jurisdiction.[9] Relying on *Shay* v. *Rossi*, 253 Conn. 134, 749 A.2d 1147 (2000), overruled on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003), the city argues that there is an appealable final

[9] Prior to oral argument in this appeal, we ordered, sua sponte, that the parties file supplemental briefs addressing the following question: "Is the order denying the . . . city's motion for summary judgment, which claimed that the city was immune from liability pursuant to . . . § 28-13 (a), a final judgment such that the Supreme Court has jurisdiction over the appeal? See *Vejseli* v. *Pasha*, [282 Conn. 561, 923 A.2d 688] (2007)."

judgment because its motion for summary judgment was grounded on a colorable claim that § 28-13 grants the city and its police and fire departments sovereign immunity for actions taken in response to declared emergencies. In response, the plaintiff relies on *Vejseli* v. *Pasha*, 282 Conn. 561, 923 A.2d 688 (2007), and contends that we lack jurisdiction over the city's appeal because the city's motion for summary judgment under § 28-13 was founded on governmental, rather than sovereign, immunity. Additionally, the plaintiff argues that an issue of material fact still exists regarding whether the city was undergoing a state of emergency at the time of Tillman's death and, thus, whether the immunity afforded by the statute applies. We agree with the city and conclude that the trial court's denial of its motion for summary judgment was an appealable final judgment because § 28-13 extends the state's sovereign immunity to political subdivisions, such as municipalities.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review is plenary. . . .

"Neither the parties nor the trial court . . . can confer jurisdiction upon [an appellate] court. . . . The right of appeal is accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met. . . . It is equally axiomatic that, except insofar as the legislature has specifically provided for an interlocutory appeal or other form of interlocutory appellate review . . . appellate jurisdiction is limited to final judgments of the trial court." (Citation omitted; internal quotation marks omitted.) *Ledyard* v.

WMS Gaming, Inc., 330 Conn. 75, 84, 191 A.3d 983 (2018); see also General Statutes § 52-263.[10]

"As a general rule, an interlocutory ruling may not be appealed pending the final disposition of a case. . . . We previously have determined [however] that certain interlocutory orders have the attributes of a final judgment and consequently are appealable under . . . § 52-263. . . . In *State* v. *Curcio*, [191 Conn. 27, 31, 463 A.2d 566 (1983)], we explicated two situations in which a party can appeal an otherwise interlocutory order: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them.[11] . . .

"The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal. . . . Thus, a bald assertion that the defendant will be irreparably harmed if appellate review is delayed until final adjudication . . . is insufficient to make an otherwise interlocutory order a final judgment. One must make at least a colorable claim that some recognized statutory or constitutional right is at risk. . . .

[10] General Statutes § 52-263 provides: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict, except in small claims cases, which shall not be appealable, and appeals as provided in sections 8-8 and 8-9."

[11] Neither party argues that the first prong of the *Curcio* test is applicable to the present appeal.

"In *Shay* v. *Rossi*, supra, 253 Conn. 165–67, we concluded that [t]he nature of sovereign immunity is such a right. It protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable. Therefore, unless the state is permitted to appeal a trial court's denial of its motion to dismiss, filed on the basis of a colorable claim of sovereign immunity, the state's right not to be required to litigate the claim filed against it would be irretrievably lost.

"We have in the past phrased the underlying rationale of the doctrine of sovereign immunity in theoretical terms. For example, in *Horton* v. *Meskill*, 172 Conn. 615, 623–24, 376 A.2d 359 (1977), we noted, as . . . Justice [Oliver Wendell Holmes, Jr.] wrote: A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . . The modern rationale for the doctrine, however, rests on the more practical ground that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property. . . . This rationale suggests that the doctrine protects the state from unconsented to litigation, as well as unconsented to liability.

"Although we have never explicitly delineated this particular aspect of the doctrine in final judgment terms, our sovereign immunity cases implicitly have recognized that the doctrine protects against suit as well as liability—in effect, against having to litigate at all. In *Bergner* v. *State*, 144 Conn. 282, 286, 130 A.2d 293 (1957), we recognized the distinction between immunity from suit and from liability, and held that a statutory waiver of sovereign immunity constituted a

waiver of suit and provided a remedy to enforce such liability as the general law recognizes. . . . [T]he state's waiver of its immunity from liability only arises after a prior determination that it has waived its immunity from suit, and that a waiver of immunity from suit does not necessarily imply a waiver of immunity from all aspects of liability.

"Thus . . . the state's sovereign immunity right not to be required to litigate at all, as opposed to its right not to be ultimately subjected to liability, is analogous to that facet of the criminal defendant's constitutional double jeopardy right not to be tried twice for the same offense. Because that constitutional right includes the right not even to be tried for the same offense, the denial of a motion to dismiss criminal charges, filed on the basis of a colorable claim of double jeopardy, is an immediately appealable final judgment under the second prong of *Curcio*. . . . Similarly, therefore, in a civil case the denial of a motion to dismiss, filed on the basis of a colorable claim of sovereign immunity, must be regarded under *Curcio* as an immediately appealable final judgment." (Citation omitted; footnotes added and omitted; internal quotation marks omitted.) *Vejseli* v. *Pasha*, supra, 282 Conn. 568–71; see also *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (partial denial of defendants' motion for summary judgment, which had colorable claim of absolute immunity for participation in judicial and quasi-judicial proceedings, constituted appealable final judgment for same reason that rejection of colorable claim of sovereign immunity gives rise to immediately appealable final judgment, namely, to protect against threat of suit).

Within our final judgment jurisprudence, we have held that judgments affecting a right of governmental immunity are treated differently under the second prong of *Curcio* than those affecting a right of sovereign

immunity. "[W]hereas [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss . . . the doctrine of governmental immunity implicates no such interest. . . . Indeed, we expressly have recognized that, [u]nlike the state, municipalities have no sovereign immunity from suit. . . . Rather, municipal governments have a limited immunity from liability. . . .

"Governmental immunity, which applies to municipalities, is different in historical origin, scope and application from the sovereign immunity enjoyed by the state. A suit against a municipality is not a suit against a sovereign. Towns have no sovereign immunity, and are capable of suing and being sued . . . in any action. . . . Municipalities do, in certain circumstances, have a governmental immunity from liability. . . . But that is entirely different from the state's sovereign immunity from suit. . . . Accordingly . . . municipalities are immune from liability only, and not from suit. . . .

"Because municipalities are immune from liability, but not from suit, the concerns that justify the availability of an immediate appeal from the denial of a motion to dismiss based on sovereign immunity are not implicated in the context of governmental immunity. Put differently, municipalities have no immunity from suit that potentially might be rendered meaningless without the opportunity for immediate appellate review before being forced to defend, even successfully, a case at trial. . . . Accordingly . . . the denial of a motion to dismiss or to strike based on governmental immunity is not an appealable final judgment under the second prong of *Curcio*." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Vejseli* v. *Pasha*, supra, 282 Conn. 572–75.

In contrast to *Shay*, a case in which there was no dispute that the defendants' claim of sovereign immu-

nity was colorable; *Shay* v. *Rossi*, supra, 253 Conn. 168; the parties in the present case disagree as to whether the city has presented a colorable claim of sovereign immunity. In determining whether a claim is colorable for purposes of whether a "decision constitutes a final judgment that provides this court with jurisdiction to consider the merits of that decision," we emphasize that a "colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . ." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 209, 990 A.2d 853 (2010). "For a claim to be colorable, the defendant need not convince the . . . court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Emphasis in original; internal quotation marks omitted.) *In re Santiago G.*, 325 Conn. 221, 231, 157 A.3d 60 (2017).

Although it is now axiomatic that a political subdivision may not ordinarily claim sovereign immunity as a defense to a claim against it; see, e.g., *Vejseli* v. *Pasha*, supra, 282 Conn. 572; the city contends that the trial court's denial of its motion for summary judgment is an appealable final judgment because § 28-13 extends to it the state's sovereign immunity under the circumstances of this case. We, therefore, turn to § 28-13 to determine the nature of the immunity afforded to political subdivisions. This presents a question of statutory construction.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other

statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *In re Henrry P. B.-P.*, 327 Conn. 312, 324–25, 173 A.3d 928 (2017).

We begin with the text of § 28-13 (a), which provides: "Neither the state *nor any political subdivision* of the state nor, except in cases of wilful misconduct, the agents or representatives of the state or any political subdivision thereof nor any member of the civil preparedness forces of the state nor any person authorized by such civil preparedness forces or by any member of such civil preparedness forces complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state nor any person employed by or authorized to assist any agency of the federal government in the prevention or mitigation of any major disaster or emergency, shall be liable for the death of or injury to persons or for damage to property *as a result of any such activity*. The Attorney General shall appear for and defend the state, *any political subdivision of the state* and the agents or representatives of the state or any political subdivision thereof or

any member of the civil preparedness forces of the state or any other person exempted from liability for his acts under this section in any civil action brought for the death of or injury to persons or for damage to property *as a result of any civil preparedness activity*." (Emphasis added.)

By its plain language, the statute provides that several actors, including political subdivisions of the state, shall not be "liable for the death of or injury to persons or for damage to property as a result of any such activity." "[S]uch activity" refers to "complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . ." General Statutes § 28-13 (a). The statute unambiguously provides immunity to political subdivisions for death or injury to persons that result from, inter alia, attempted compliance with chapter 517 of the General Statutes. What is unclear from the plain language of the statute, however, is the nature of that immunity. Because the statute uses the word "liability," it could reasonably be interpreted as implicating governmental immunity—an immunity from liability, but not from suit. But the statute could also reasonably be read as conferring statutory immunity akin to sovereign immunity—an immunity from suit as well as liability. That reading finds support in the second half of § 28-13 (a), which requires the attorney general to "appear for and defend" political subdivisions. That dedication of state resources in the form of representation by the attorney general to matters typically handled by the corporation counsel of a political subdivision can reasonably be read as an attempt to shield political subdivisions from the cost and defense of lawsuits altogether. Because the statute is susceptible to more than one reasonable

interpretation, we conclude that it is ambiguous and, therefore, consider extratextual evidence of legislative intent, including the statute's legislative history and the policy objectives the statute was intended to implement. See *In re Henrry P. B.-P.*, supra, 327 Conn. 324–25.

The relevant legislative history, although scant, supports the city's argument that § 28-13 immunity constitutes an extension of sovereign immunity to political subdivisions. The statutory scheme at issue, which was originally enacted in 1949, addressed civil defense concerns and contemplated new forms of warfare, including the atomic bomb. See Conn. Joint Standing Committee Hearings, Judiciary, 1950 Spec. Sess., pp. 6–7. Wesley A. Sturges, a former administrator of the State Defense Council, testified before the Judiciary Committee during a 1950 public hearing concerning the reenactment of the statutory scheme, and opined as follows on the issue of immunity: "My other suggestion concerns [the provision of the] bill which has to do with granting of immunity to personnel engaged in Civil Defense Service and except for cases of [wilful] misconduct there should be no liability as to tort liability or under the [c]ivil [d]efense law. I recommend you consider that the [s]tate and political subdivisions make available defense counsel for these personnel members. It is well to say he shall not be liable for acts necessary in performance of duty but the opportunity for suit still obtains. When a suit is brought against me it costs me money and I believe it is worthy of consideration as a check for costs and payment for services." Id., pp. 7–9. Sturges' testimony highlighted the concern that suits might still be brought against civil defense personnel by requesting that the cost of representation in such a suit be borne by the state, effectively protecting personnel from one of the key costs of litigation. This testimony suggests that the legislature intended the lan-

guage at issue to address the difficulties faced by civil defense personnel as a result of such suits, even in cases in which people are ultimately immune from liability, thus indicating that the early intent of the legislation was to provide immunity from suit altogether.[12] See *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 314, 819 A.2d 260 (2003) ("[I]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or purposes for which the legislature used the language in question." [Internal quotation marks omitted.]); see also, e.g., *State* v. *Bush*, 325 Conn. 272, 290–91, 157 A.3d 586 (2017); *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 351 and n.11, 21 A.3d 737 (2011).

Legislative history from debates on certain alterations to the statutory scheme in 1979 resolves any lingering questions as to the legislature's intentions. In 1979, the legislature aligned the definitions of state law with the federal statutory scheme, in order to allow for a seamless response from federal, state, and local forces under a unity of command.[13] On the immunity provision

[12] Although this testimony could also be read to suggest that the early intent of the legislation was merely to provide immunity from liability, given that Sturges appears to have suggested that the opportunity for suit "still obtains," we decline to adopt such a reading because there is no colloquy suggesting that Sturges used "liability" and "suit" as terms of art, as contemplated by subsequent case law. This buttresses our more purposive interpretation of his testimony.

[13] The proponent of the relevant bill in the House of Representatives, Representative Michael R. Colucci, described the change as follows: "The intent of this bill is to align the [s]tate laws with the [f]ederal laws. The Disaster Relief Act of [1974] . . . has become the guideline in dealing with natural disasters and [General Statutes (Rev. to 1979) § 28-1] is amended by the addition of 'or a disaster' following the phrase 'by any such attack.' This is added purely for clarification purposes. Further, [the bill] inserts

specifically, a proponent of the relevant bill in the Senate, Senator Clifton A. Leonhardt, remarked: "[W]hat this [b]ill basically would do is bring certain aspects of our [c]ivil [p]reparedness [s]tatutes into line with federal statutes and federal guidelines in five areas. First of all, the [b]ill would distinguish between major disasters on the one hand and emergencies on the other so that the [state] could qualify for federal aid in emergencies that are less than federal disasters; less than major disasters. *It would also clarify that civil preparedness personnel, including federal employees, are protected from liability for actions related to their civil preparedness actions*." (Emphasis added.) 22 S. Proc., Pt. 7, 1979 Sess., p. 2121. Senator Leonhardt then expanded on what it meant to be "protected from liability" in an exchange with Senator Russell Lee Post, Jr.

"Senator Post: [Am] I correct Senator Leonhardt, that a person now who is authorized by the [s]tate as the result of a snowstorm occurring anywhere in the country, could come onto your property . . . and do damage, and *you would not have the right to sue them*? . . .

"Senator Leonhardt: As long as they are executing a civil preparedness function and they're not engage in a situation of [wilful] misconduct. That's the case. . . .

"Senator Post: If a person . . . is authorized by the [s]tate [and] comes onto your property and does damage, *it's not that that person is held harmless by the [s]tate and would recover any expenses of suit, but rather the property owner under this, has no recourse against the [s]tate or the town or any local official, operating under this [provision]?* Is that correct?

two new definitions for major disasters and emergency, while repealing the old definition for disaster. Again, this is done to align [f]ederal and [s]tate legislation. Having [f]ederal and [s]tate legislation say the same thing facilitates the administration of these laws." 22 H.R. Proc., Pt. 5, 1979 Sess., p. 1648.

"Senator Leonhardt: [*That*] *is correct. And I think this is very much in keeping with the long-standing tradition that in situations of civil emergency, the* [*s*]*tate has certain extraordinary powers that have to be executed and this statute is not changing the concept there at all*, except to extend it to federal officials who are assisting the [s]tate. *We're really building on a very long-time, well established concept and only saying that the same, very same concepts that we, for a long time had for local and state officials we're now going to extend to federal officials* who come into the [s]tate . . . at our request, to help us in times of civil emergency." (Emphasis added.) Id., pp. 2127–29.

This colloquy establishes that the bill's proponent in the Senate believed that the statute, as it previously existed, included the "very long-time, well established concept" that the immunity provided in the statute was immunity from suit and not from liability alone. Given the ambiguity of the statutory text, this language suggests that the legislature intended to provide to certain federal officials the same immunity from suit that it believed political subdivisions already enjoyed under the statute. Moreover, this construction is consistent with the purpose of the 1979 amendments to the statute, namely, bolstering a seamless unity of command whereby political subdivisions and local officials may be effectively conscripted into service on the state's behalf at the order of the governor. In such a situation, it is entirely reasonable that the legislature would wish to provide these local actors with the same immunity from suit that the state itself enjoys. See, e.g., *Cahill* v. *Board of Education*, 187 Conn. 94, 101–102, 444 A.2d 907 (1982) (municipal boards of education are "agents of the state responsible for education in the towns" entitled to sovereign immunity if board's "action would operate to control the activities of the state or subject it to liability"); see also *Vejseli* v. *Pasha*, supra, 282

Conn. 575 n.12. Although the city does not possess common-law sovereign immunity, it is clear from the salient legislative history that the legislature intended for § 28-13 to provide political subdivisions, like the city, with immunity from suit and not just immunity from liability. We conclude, therefore, that § 28-13 extends the state's sovereign immunity, including both its immunity from suit and liability, to political subdivisions. Accordingly, we further conclude that the city has a colorable claim of sovereign immunity, and, therefore, the trial court's denial of the city's motion for summary judgment constitutes a final judgment over which we have jurisdiction.

II

We now consider whether the trial court properly denied the city's motion for summary judgment on the basis of its determination that a genuine issue of material fact existed as to whether the civil preparedness emergency was still in effect on the date of the allegations of the plaintiff's complaint. The city's principal contentions are that the trial court improperly construed the statutes at issue and that the dispute of fact identified by the trial court, namely, whether the civil preparedness emergency was still in effect, is not a dispute of *material* fact. The plaintiff argues in response that the trial court properly construed the statutes, insofar as the city's failures to follow its local emergency service plan and to clear its roads are not activities for which the city is afforded immunity under § 28-13, and that, even if such activities are covered by § 28-13, the trial court correctly concluded that an issue of material fact still exists. We conclude that the trial court improperly construed the nature and scope of § 28-13 immunity and also incorrectly determined that there remains a genuine issue of material fact pertaining to the application of § 28-13 immunity.

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy [this] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45] . . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016).

Given our conclusion in part I of this opinion that § 28-13 represents an extension of the state's sovereign immunity to political subdivisions, we note that it is well established that "[s]overeign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we

exercise de novo review. . . . In so doing, we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 64–65, 23 A.3d 668 (2011). Accordingly, our standard of review over the trial court's legal construction of the statutory immunity provided for in § 28-13 is plenary.

As previously stated, our construction of a statute is governed by § 1-2z. See, e.g., *In re Henrry P. B.-P.*, supra, 327 Conn. 324–25. As we observed in part I of this opinion, by its plain language, § 28-13 (a) provides a number of actors, including political subdivisions of the state, with immunity from suit "for the death of or injury to persons or for damage to property *as a result of any such activity*," with "such activity" defined as "complying with or attempting to comply with this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . ." (Emphasis added.) General Statutes § 28-13 (a). The statute unambiguously affords political subdivisions immunity for death or injury to persons that *result* from the "activity" delineated in § 28-13.

Our conclusion that this "activity" includes the EOC's command and control of storm response and snow removal, as well as decisions made during that process, such as those regarding which streets to plow and whether to send a fire truck in response to an emergency, finds further support in the plain text of § 28-13 (a). The first sentence of § 28-13 (a) immunizes political subdivisions, such as the city, from suit for the "death of or injury to persons or for damage to property" that results from "complying with or attempting to comply with this chapter or any order or regulation promul-

gated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . .'' The second sentence of § 28-13 (a) executes the immunity provided by the first sentence by requiring the attorney general to ''appear for and defend'' those entities and individuals described in the first sentence ''in any civil action brought for the death of or injury to persons or for damage to property as a result of any *civil preparedness activity*.'' (Emphasis added.)

General Statutes § 28-1 (4) defines civil preparedness broadly to include ''*all those activities and measures designed or undertaken* (A) *to minimize or control the effects upon the civilian population of major disaster or emergency*, (B) to minimize the effects upon the civilian population caused or which would be caused by an attack upon the United States, (C) *to deal with the immediate emergency conditions which would be created by any such attack, major disaster or emergency*, and (D) to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by any such attack, major disaster or emergency. *Such term shall include, but shall not be limited to, (i) measures to be taken in preparation for* anticipated attack, major disaster or emergency, including the establishment of appropriate organizations, operational plans and supporting agreements; the recruitment and training of personnel; the conduct of research; the procurement and stockpiling of necessary materials and supplies; the provision of suitable warning systems; the construction and preparation of shelters, shelter areas and control centers; and, when appropriate, the nonmilitary evacuation of the civilian population, pets and service animals; (ii) *measures to be taken during* attack, major disaster or emergency, including the enforcement of passive defense regula-

tions prescribed by duly established military or civil authorities; the evacuation of personnel to shelter areas; the control of traffic and panic; and the control and use of lighting and civil communication; and (iii) *measures to be taken following* attack, major disaster or emergency, *including activities for firefighting; rescue, emergency medical, health and sanitation services*; monitoring for specific hazards of special weapons; unexploded bomb reconnaissance; essential debris clearance; emergency welfare measures; and immediately essential emergency repair or restoration of damaged vital facilities." (Emphasis added.) The scope of activity included within § 28-13 is broad, as the types of activity listed in § 28-1 (4) include, but are not limited to, measures to be taken "in preparation for," "during," and "following" a major disaster or emergency.[14] General Statutes § 28-1 (4). Measures undertaken "to minimize or control the effects upon the civilian population of major disaster or emergency" and measures taken "following [a] major disaster or emergency," such as "activities for firefighting" and "rescue, emergency medical, health and sanitation services"; General Statutes § 28-1 (4); unambiguously include the EOC's command and control of storm response and snow removal, as well as decisions made during that process, such as decisions regarding which roads to clear and the circumstances in which a fire truck should respond to an emergency call.

The trial court concluded, however, that § 28-13 affords various state entities immunity from liability

[14] In emphasizing the breadth of the immunity afforded by § 28-13, we note that the activity prescribed by the statute includes "complying with *or attempting to comply with* this chapter or any order or regulation promulgated pursuant to the provisions of this chapter, or pursuant to any ordinance relating to blackout or other precautionary measures enacted by any political subdivision of the state . . . ." (Emphasis added.) Our broad interpretation of § 28-13 immunity is bolstered by the legislature's decision to immunize political subdivisions for even *attempting* to comply with the statutory scheme at issue.

only *during* a civil preparedness emergency. In so concluding, the trial court relied on the catchline of § 28-13: "Immunity from liability. Penalty for denial of access to property during civil preparedness emergency." We observe, however, that catchlines such as this one "are prepared, and from time to time changed, by the Revisors [of the General Statutes] and are intended to be informal brief descriptions of the contents of the [statutory] sections. . . . These boldface catchlines should not be read or considered as statements of legislative intent since their sole purpose is to provide users with a brief description of the contents of the sections." Preface to the General Statutes, p. vii; see also *Clark* v. *Commissioner of Correction*, 281 Conn. 380, 389 n.14, 917 A.2d 1 (2007). We conclude, therefore, that the trial court incorrectly concluded that § 28-13 immunity applies only *during* a civil preparedness emergency. Instead, as we have discussed, § 28-13 immunity, by the plain language of the statute, applies to the activities discussed in the statute, which include measures to be taken "in preparation for," "during," and "following" a major disaster or emergency. General Statutes § 28-1 (4).

Despite its construction of the statute, the trial court nevertheless concluded that the city had "met its [initial] burden of putting forth evidence sufficient to support a judgment in its favor on the ground of § 28-13 (a) immunity" and pointed to the following evidence to support its conclusion: (1) evidence showing that a civil preparedness emergency was declared for the state by Governor Malloy pursuant to § 28-9, and for the city by Mayor Finch, on February 8, 2013; (2) the testimony of Appleby that the EOC was in full operation by 8 a.m. on February 8, 2013, despite neither Governor Malloy's nor Mayor Finch's having yet officially declared a civil preparedness emergency; (3) evidence showing that, although snow stopped falling around noon on February

9, 2013, the EOC retained command and control of storm response and snow removal through February 14, 2013, and remained staffed and active through February 17, 2013, when the operational period ended, response was terminated, and the office was vacated by all personnel except Appleby; (4) a declaration from the United States Department of Homeland Security's Federal Emergency Management Agency that federal disaster aid had been made available to the state to supplement state, tribal, and local recovery efforts in the area affected by a severe winter storm and snowstorm from February 8 through 11, 2013; (5) evidence demonstrating that the relevant "incident period" occurred between February 8 and 12, 2013, and that a "major disaster" had been declared on March 21, 2013; and (6) the testimony of Brenda M. Bergeron, principal attorney for the Division of Emergency Management and Homeland Security within the Connecticut Department of Emergency Services and Public Protection, that Governor Malloy's declaration of a civil preparedness emergency was still in effect on February 11 and 12, 2013, and was not formally revoked until March 18, 2013, pursuant to Executive Order No. 33.

The trial court observed, however, that "the plaintiff has presented evidence contradicting the [city's] evidence with respect to whether [it] was still experiencing a civil preparedness emergency, for purposes of § 28-13 (a) immunity, at the time of [Tillman's] death." As contradicting evidence, the trial court cited the following: (1) "[w]ith respect to Mayor Finch's declaration, Appleby initially testified that he believe[d] it was revoked on February 16, 2013, but then subsequently stated that the EOC time line for the operational period designated a termination of the emergency operations response on February 17, 2013," and also testified "that he was unaware of any official declaration by [Mayor Finch] revoking the state of emergency"; (2) "with

respect to the city's . . . fire response protocol during the period in question, Appleby testified that, late in the day on February 8, 2013, the EOC issued a directive . . . that response of the police and fire departments would be restricted," Carfi testified "that the fire response protocol restriction was lifted prior to the evening of February 11, 2013," and Rooney testified that "fire engines and fire trucks could get out and respond to calls [on February 11, 2013], if necessary." (Internal quotation marks omitted.) We conclude that none of these facts is "[a] material fact . . . which will make a difference in the result of the case." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191–92, 177 A.3d 1128 (2018).

First, with respect to Appleby's testimony regarding the revocation of Mayor Finch's declaration, any dispute concerning the date of the revocation is not material because February 16 and 17, 2013, both came *after* the events at issue in this case. Most saliently, the revocation of Mayor Finch's declaration does nothing to dispute the ample evidence in the record showing that the city was "complying with or attempting to comply with [the civil preparedness statutes] or any order or regulation promulgated pursuant to the [the civil preparedness statutes]" on the date that the conduct at issue occurred. Specifically, the record contains evidence that the EOC retained command and control of storm response and snow removal through February 14, 2013, and remained staffed and active through February 17, 2013, evidence that a civil preparedness emergency was ongoing at that time pursuant to Governor Malloy's declaration, and evidence that efforts to clean city roads continued until at least February 12, 2013. Second, whether the partial lifting of the fire response protocol restriction occurred prior to the date of the allegations in the plaintiff's complaint likewise does not give rise to a material fact because that distinction does

nothing to contradict the ample evidence in the record that the city was still engaged in activities afforded immunity by § 28-13 on the date relevant to the plaintiff's allegations. Consequently, we conclude that the trial court incorrectly concluded that the city had failed to meet its ultimate burden of showing the absence of a genuine issue of material fact. The trial court, therefore, improperly denied the city's motion for summary judgment.[15]

The judgment is reversed and the case is remanded with direction to grant the city's motion for summary judgment and to render judgment thereon.

In this opinion the other justices concurred.

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[15] In her brief, the plaintiff also raises two constitutional issues, arguing that, if this court concludes "that immunity under § 28-13 is solely determined by the existence of a civil preparedness emergency, the statute is unconstitutional as applied." Because we do not conclude that the application of § 28-13 immunity is solely determined by the existence of a civil preparedness emergency, we need not address the plaintiff's constitutional claims. See, e.g., *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 813, 12 A.3d 852 (2011) (court has "duty to eschew unnecessarily deciding constitutional questions" [internal quotation marks omitted]).