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# Exclusivity and the Warsaw Convention: *In Re Air Disaster at Lockerbie, Scotland*

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# EXCLUSIVITY AND THE WARSAW CONVENTION: *In Re AIR DISASTER AT LOCKERBIE, SCOTLAND*

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## I. INTRODUCTION

On December 21, 1988, Pan American Flight 103 left London's Heathrow Airport bound for John F. Kennedy Airport in New York.<sup>1</sup> The Boeing 747 exploded in midair over Lockerbie, Scotland, killing all 259 people aboard.<sup>2</sup> A terrorist organization had defeated the Pan American security systems and planted the bomb that caused the fatal explosion.<sup>3</sup>

The relatives and personal representatives of those who died on Flight 103 sued Pan American World Airways, Inc. ("Pan Am") and the two Pan Am subsidiaries that had provided the flight with

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1. *In re Air Disaster in Lockerbie, Scotland*, 733 F. Supp. 547, 548 (E.D.N.Y. 1990), *aff'd*, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 331 (1991).

2. *Id.* at 549.

3. *See In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1269 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 331 (1991).

security.<sup>4</sup> The Judicial Panel on Multidistrict Litigation consolidated the cases in the Eastern District of New York for coordinated pretrial proceedings.<sup>5</sup>

The plaintiffs asserted state law wrongful death claims against Pan Am seeking both compensatory and punitive damages for Pan Am's alleged wilful misconduct.<sup>6</sup> Pan Am moved for partial summary judgment on all punitive damage claims on the grounds that the Convention for the Unification of Certain Rules Relating to International Transportation by Air<sup>7</sup> ("Warsaw Convention") bars punitive damages.<sup>8</sup> For the purpose of ruling on the motion, the district court assumed Pan Am had committed wilful misconduct and that the applicable state law permitted punitive damages.<sup>9</sup> The district judge granted the motion and dismissed plaintiffs' claims for punitive damages.<sup>10</sup>

The plaintiffs appealed the decision to the United States Court of Appeals for the Second Circuit, arguing that the Warsaw Convention does not provide the exclusive cause of action and that damages should be determined in accordance with local law. The court of appeals affirmed the district court's decision, holding: (1) the Warsaw Convention preempts state law causes of action where

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4. *Id.*

5. *In re Air Disaster at Lockerbie, Scotland*, 709 F. Supp. 231, 232 (J.P.M.L. 1989). Eighteen actions pending in four federal districts were consolidated in the Eastern District of New York pursuant to 28 U.S.C. § 1407, as all actions shared factual questions concerning the cause or causes of the explosion of Flight 103. *Id.*

The appeal before the Second Circuit was actually the consolidated appeal of cases that arose from two separate international flight disasters: the December 1988 explosion of Pan Am Flight 103 over Lockerbie, Scotland and the September 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan. *Lockerbie*, 928 F.2d at 1269. The district courts in each of the cases faced the same questions of law, but reached opposite conclusions. *Id.* Because these issues are largely "independent of any factual situation," the circuit court of appeals consolidated the cases for the purposes of this appeal. *Id.* Only the facts of the Lockerbie disaster will be presented in this Note. For the facts of the Karachi hijacking, see *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Int'l Airport, Pakistan* on Sept. 5, 1986, 729 F. Supp. 17, 18 (S.D.N.Y. 1990).

6. 733 F. Supp. at 549. "The majority of complaints assert[ed] diversity and not federal question jurisdiction." Petition for Writ of Certiorari at 4, *Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 91-259).

7. Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (1936), reprinted in note following 49 U.S.C.A. § 1502 (West 1976) [hereinafter Warsaw Convention]. The parties conceded that because Flight 103 involved international transportation, the actions were governed by the Warsaw Convention. *Lockerbie*, 928 F.2d at 1269.

8. 733 F. Supp. at 548.

9. 928 F.2d at 1269.

10. *Id.*

the injury falls within the scope of the Convention; and (2) the Warsaw Convention does not allow recovery of punitive damages. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 331 (1991).

The Warsaw Convention is a multilateral treaty that governs the liability of international air carriers.<sup>11</sup> It has two primary goals. The first is to limit the potential liability of international air carriers in the event of accidents and lost or damaged cargo.<sup>12</sup> The second is to establish uniform rules for governing claims arising out of international transportation.<sup>13</sup>

In view of these goals, the Supreme Court of the United States has interpreted Article 17<sup>14</sup> of the Warsaw Convention as declaring the carrier liable "only when three conditions are satisfied: (1) there has been an accident, in which (2) the passenger suffered [death, wounding, or any other bodily injury], and (3) the accident took place on board the aircraft or in the course of . . . embarking or disembarking."<sup>15</sup> These conditions are important because they ensure uniformity in Warsaw Convention litigation by restricting recovery to those cases where the conditions are satisfied.

11. Warsaw Convention, *supra* note 7, art. 1. The Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." *Id.*

12. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984); INTERNATIONAL CONFERENCE ON AIR LAW AFFECTING AIR QUESTIONS, MINUTES, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, October 4-12, 1929, Warsaw 13 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter *WARSAW MINUTES*]; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

13. *Franklin Mint*, 466 U.S. at 256; Lowenfeld & Mendelsohn, *supra* note 12, at 498. See *WARSAW MINUTES*, *supra* note 12, at 85, 87.

14. The complete text of Article 17 is as follows:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, *supra* note 7, art. 17.

15. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1494 (1991). The authentic text of the treaty is in French, and thus must be interpreted. See Warsaw Convention, *supra* note 7, art. 36. The drafting parties to the Convention represented many different languages, legal systems, and commercial practices. To promote the Convention's goal of uniformity, they chose one language and one legal system with which to work, hoping to reduce the divergences associated with drafting an agreement in multiple languages and systems. Although no "official" English translation of the treaty exists, the United States Senate used an unofficial translation when it ratified the Convention in 1934. See *Floyd*, 111 S. Ct. at 1493. The Supreme Court of the United States has characterized this text as "the official American translation." *Air France v. Saks*, 470 U.S. 392, 397 (1985). The "official American" translation can be found in the note following 49 U.S.C.A. § 1502 (West 1976).

This Note examines whether the Warsaw Convention preempts state law claims when the injury alleged is one for which the Convention also provides a cause of action. The Second Circuit Court of Appeals held that it does,<sup>16</sup> but other courts have reached the contrary conclusion.<sup>17</sup> This Note argues that allowing the Warsaw Convention to preempt state law causes of action gives the treaty too narrow an application. The Convention's dual goals of uniformity and limitation of air carriers' liability are best achieved by allowing plaintiffs to bring a claim based either on the treaty or on state law, while at the same time limiting recovery according to the terms and conditions of the Warsaw Convention. This interpretation is consistent with the language of the Convention, the intentions of the signatory countries, and judicial precedent within the United States.

## II. BACKGROUND

A two-edged sword,<sup>18</sup> the Warsaw Convention makes it easier for injured parties to bring claims because the air carrier is presumed liable,<sup>19</sup> but it limits damages by placing an absolute cap on the amount plaintiffs may recover.<sup>20</sup> When, however, plaintiffs

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16. *Lockerbie*, 928 F.2d at 1273.

17. See, e.g., *In re Mexico City Air crash of October 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (delegates did not intend the Convention's cause of action to be exclusive); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1221 (W.D. Ky. 1987); *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737, 740 (S.D. Fla. 1986) (Convention does not provide exclusive cause of action, but does provide exclusive remedy); *Alvarez v. Aerovias Nacionales de Colombia, S.A.*, 756 F. Supp. 550, 555 (S.D. Fla. 1991) (Convention creates exclusive remedy, not exclusive cause of action); *Calderon v. Aerovias Nacionales de Colombia*, 738 F. Supp. 485, 486 (S.D. Fla. 1990), *appeal dismissed for lack of jurisdiction*, 929 F.2d 599 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 376 (1991) (may state cause of action solely on state law theory); *Perkin Elmer v. Trans Mediterranean Airways, S.A.L.*, 107 F.R.D. 55, 61 (E.D.N.Y. 1985). But see *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985) (Convention creates the controlling cause of action); *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670, 675 (S.D. Fla. 1990) (Convention provides the exclusive cause of action); *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983) (Convention exclusively governs any and all claims).

18. See *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1263 (9th Cir. 1977), *cert. denied*, 431 U.S. 974 (1977).

19. Warsaw Convention, *supra* note 7, art. 17. Article 17 creates a presumption that relieves the plaintiff of the burden of proving certain issues, such as negligence and causation. *Lockerbie*, 928 F.2d at 1279.

20. The Warsaw Convention originally limited damages to 125,000 *poincaré francs* (\$8,300). Warsaw Convention, *supra* note 7, art. 22. The United States became so dissatisfied with this low recovery limit that on November 15, 1965, it filed a formal notice of de-

choose to bring their claims based on state law instead of the Warsaw Convention,<sup>21</sup> the effect of the treaty is unclear.<sup>22</sup> This confusion is partially explained by the judicial treatment of the Convention. Originally, the courts interpreted the Convention as providing no independent cause of action.<sup>23</sup> Today, however, courts universally agree that it does provide a cause of action when certain conditions are met.<sup>24</sup> Whether a state law cause of action can coexist with a cause of action under the Convention remains to be clarified.

The Convention itself adds to the confusion because it does not explicitly address what types of damages a party may recover against an international air carrier;<sup>25</sup> it simply places conditions<sup>26</sup>

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nunciation, to become effective six months thereafter. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp 1152, 1154 (D.N.M. 1973). This and other dissatisfactions resulted in the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol ("Montreal Agreement"), whereby the international air carriers that serve the United States agreed to raise the liability limit to \$75,000 and waive the availability of the due care defense of Article 20. See Agreement CAB 18,900, Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, reprinted in note following 49 U.S.C.A. § 1502 (West 1976); Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle*, 25 TEX. INT'L L.J. 127, 131 (1990). The Montreal Agreement is not a treaty, but rather a private accord by which the air carriers agree to a system of absolute liability. See *Air France v. Saks*, 470 U.S. 392, 407 (1985); Lowenfeld & Mendelsohn, *supra* note 12, at 586-96.

As a result of the Montreal Agreement, the United States withdrew its notice of denunciation on May 14, 1966. *Burnett*, 368 F. Supp at 1154 n.1. The Executive Order approving the Montreal Agreement can be found in 31 Fed. Reg. 7302 (1966).

21. See, e.g., *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737, 741 (S.D. Fla. 1986).

22. When the state law is in direct conflict with the Warsaw Convention, the treaty must prevail under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI. See *Lockerbie*, 928 F.2d at 1273. When the cause of action is based on state law and the Convention does not provide a cause of action, then the "plaintiff plainly may institute" a suit without a problem of preemption. *Id.* at 1273. (citing *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 134 (3rd Cir. 1984) (the occurrence which caused the injury was not an "accident" within the meaning of Article 17)). The court in *Lockerbie* explicitly stated that these two aspects were not at issue in the case before it; the court was only concerned with "whether state causes of action are preempted when the state claim alleged falls within the scope of the Convention." 928 F.2d at 1273. Accordingly, this is the issue addressed by this Note.

23. *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957).

24. See, e.g., *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

25. *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 857 n.12 (N.Y. 1974); GEORGETTE MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS* 125 (1977).

26. See *supra* note 15 and accompanying text.

on the carrier's liability and a cap<sup>27</sup> on the amount of recoverable damages. State statutes, on the other hand, increasingly specify types of damages a plaintiff may recover.<sup>28</sup> To recover those damages specifically allowed by the state statutes, injured parties, like the plaintiffs in *Lockerbie*,<sup>29</sup> may wish to base their claims on state law rather than the Convention.<sup>30</sup>

From a practical standpoint, when the passenger dies in an aircrash, the \$75,000 cap is quickly reached, and the debate over what types of damages are recoverable becomes moot. Many accidents occur on international flights, however, that do not involve aircrashes. In these instances, the passenger is likely to suffer only a minor injury, such as a broken hand or a sprained ankle. For these types of injuries, the damage cap is less likely to be reached. Thus, a plaintiff, in order to be fully compensated for his injury, may seek specific damages under state law, damages that are neither expressly allowed nor expressly barred by the Convention.<sup>31</sup> *Lockerbie* precludes all future plaintiffs in the Second Circuit from seeking such damages because that decision interprets the Convention as providing the exclusive cause of action, at least where the passenger suffers a death, wounding, or other bodily injury<sup>32</sup> and leaves the issue of damages to be decided by federal common law of tort.<sup>33</sup>

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27. See *supra* note 20 and accompanying text.

28. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney Supp. 1992); FLA. STAT. ANN. § 768.21 (West 1986); KY. REV. STAT. ANN. § 411.130 (Baldwin 1971); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MO. ANN. STAT. § 537.090 (Vernon 1988); IND. CODE ANN. § 34-1-1-2 (Burns 1986); MICH. STAT. ANN. § 27A.2922 (Callaghan 1988); N.C. GEN. STAT. § 28A-18-2(b) (1991).

29. In *Lockerbie*, the plaintiffs sought punitive damages, a state statutory remedy available in cases of wilful misconduct. Petition for Writ of Certiorari at 10, *Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 91-259). See N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(b) (McKinney Supp. 1992).

30. The plaintiff may also desire to try his case in a state court rather than in a federal forum.

31. For example, a plaintiff may seek to recover damages for negligent infliction of mental distress under state law. If the conditions of Article 17 are met, then the carrier is presumed liable, and therefore, a plaintiff should be able to recover damages. See *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1494 (1991). One of the conditions is that the passenger must suffer a death, wounding, or other bodily injury. Warsaw Convention, *supra* note 7, art. 17. This condition would preclude the recovery of damages in a state law action for negligent infliction of mental distress where the plaintiff sustained no physical injury. See *Floyd*, 111 S. Ct. at 1502.

32. *Lockerbie*, 928 F.2d at 1278.

33. *Id.* at 1278-80. After deciding that state law causes of action were preempted by the Convention, the *Lockerbie* court considered what law must be applied in deciding claims before it. *Id.* at 1279. The court concluded that the federal common law of tort should be

### III. EXCLUSIVITY

Neither the Convention itself nor any congressional act expressly mandates that the Convention preempts state law claims.<sup>34</sup> An understanding of the judicial treatment of the Convention is a necessary step in an analysis of this issue. In addition, we must consider the intent of the drafters and the document itself to determine whether the Convention preempts state law causes of action.

#### A. *Judicial Interpretation of the Warsaw Convention*

Until the late 1950s, courts generally held that the Convention did not create a cause of action; the treaty simply limited the liability of the air carrier. Thus, a plaintiff had to bring his claim under some other law, usually state law. This early view is largely attributable to two Second Circuit decisions:<sup>35</sup> *Komlos v. Compagnie Nationale Air France*,<sup>36</sup> and *Noel v. Linea Aeropostal Venezolana*.<sup>37</sup> These decisions were sharply criticized by commentators who felt the requirement of an independent cause of action would needlessly hamper claims under the Convention.<sup>38</sup>

Eventually, the Second Circuit, reversed itself in *Benjamins v. British European Airways*,<sup>39</sup> finding that the treaty did create a cause of action.<sup>40</sup> Plaintiffs were no longer required to find an independent basis for their suit. The *Benjamins* court reasoned that the goal of uniformity could "better be achieved by making federal

applied to determine such issues as what are the elements for a given cause of action and what kinds of damages are recoverable. *Id.*

34. *Lockerbie*, 928 F.2d at 1273.

35. "The Second Circuit had spoken twice, the Supreme Court had denied certiorari, and in all subsequent American Warsaw cases it was either assumed or decided that the claim must be founded on some law other than the Convention itself." Lowenfeld & Mendelsohn, *supra* note 12, at 519.

36. 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954). The Second Circuit reversed the district court decision, but did not disturb the lower court's determination that the Convention did not create a cause of action. *See* 209 F.2d 437-40.

37. 247 F.2d 677 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957).

38. *See* G. Nathan Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 323, 333 (1959) ("the language in the [*Komlos* and *Noel*] cases is dangerous"); Lowenfeld & Mendelsohn, *supra* note 12, at 518 ("[i]f the *Noel* case stood . . . the alleged simplicity of bringing a Warsaw Claim had disappeared").

39. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

40. 572 F.2d at 919.

as well as state courts accessible to Convention litigation."<sup>41</sup> Today, the conclusion in *Benjamins* is universally accepted.<sup>42</sup>

*B. Debate over Whether the Warsaw Convention Provides the Exclusive Cause of Action*

After recognizing that a plaintiff could choose between causes of action based on either the treaty or state law, the Second<sup>43</sup> and Fifth<sup>44</sup> Circuit Courts of Appeal have closed the door on state claims by interpreting the treaty as providing the exclusive cause of action.

In *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airlines, Inc.*,<sup>45</sup> the plaintiff brought two claims against Pan Am, one based on the Warsaw Convention, and another based on state negligence law, to recover for damaged cargo.<sup>46</sup> The district court for the Southern District of Texas found the defendant liable on both claims and awarded attorney's fees as provided by Texas law.<sup>47</sup> On appeal, the United States Court of Appeals for the Fifth Circuit considered "whether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law."<sup>48</sup> The court's framing of the issue is flawed because it presumes that if the Convention created an independent cause of action, then that cause of action preempted all others.

The *Boehringer* court summarily explained that, "In examining the minutes and documents from the meetings resulting in the Convention, we find the delegates were concerned with creating a uniform law to govern air crashes, dehors national law."<sup>49</sup> From the statement of Sir Alfred Dennis, the British delegate to the Convention, that Article 24 "excludes recourse to common law' for a

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41. *Id.*

42. *See, e.g.,* *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airlines, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied* 469 U.S. 1186 (1985); *In re Mexico City Aircrash* of October 31, 1979, 708 F.2d 400, 412 (9th Cir. 1983).

43. *Lockerbie*, 928 F.2d at 1273.

44. *Boehringer*, 737 F.2d at 459.

45. 737 F.2d 456 (5th Cir. 1984), *cert. denied* 469 U.S. 1186 (1985).

46. *Id.* at 458.

47. *Id.*

48. *Id.*

49. *Id.*

cause of action,"<sup>50</sup> the court reasoned that the treaty created an independent cause of action, and hence, a "controlling cause of action."<sup>51</sup> The logic of the *Boehringer* court is muddled and can only be followed if one accepts that court's framing of the issue.

The *Boehringer* court then addressed whether the Convention preempted state law. Acknowledging that Congress had not expressly preempted state law in this area,<sup>52</sup> the court considered whether Congress intended the Convention to "regulate [the] subject [of air carrier liability] so pervasively that [the Convention] completely occupies the field" thereby implicitly preempting state law.<sup>53</sup> Without explaining why it viewed the Warsaw Convention as regulatory, or how the Convention pervasively occupied the field, the court concluded that Congress had non-expressly preempted the field.<sup>54</sup> The *Boehringer* court ruled that the Warsaw Convention preempted state law causes of action and reversed the trial court's award of attorney's fees.<sup>55</sup> Other courts have recognized the Convention's preemption of state law only in very narrow contexts. In *In re Mexico City Aircrash of October 31, 1979*,<sup>56</sup> the heirs and personal representatives of airline employees who had died in a plane crash, brought claims under the Warsaw Convention against the airline.<sup>57</sup> The trial judge dismissed their actions, ruling that employees killed on the job were limited to the exclusive remedies provided by the California workers' compensation statutes.<sup>58</sup> On appeal, the Ninth Circuit followed *Benjamins* in recognizing that the Warsaw Convention provides an independent cause of action for wrongful death.<sup>59</sup> The Ninth Circuit held that the Warsaw Convention preempted the California statute only to the extent that the workers' compensation statute attempted to create an exclusive remedy for the death of an employee.<sup>60</sup> This court, unlike the *Boehringer* court,<sup>61</sup> limited the preemption to that portion of

50. *Boehringer*, 737 F.2d at 459 (citing WARSAW MINUTES, *supra* note 12, at 213).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. 708 F.2d 400 (9th Cir. 1983).

57. *See id.* at 402-04.

58. *Id.* at 404. The flight originated in Los Angeles, California. *Id.* at 403. Additionally, Los Angeles was the principle place of business for the defendant, Western Airlines. *Id.* at 404 n.4.

59. *Id.* at 411-12.

60. *Id.* at 418.

61. In *Boehringer*, the Fifth Circuit concluded that the Convention implicitly pre-

California law which was in direct conflict with the Convention.

The debate over exclusivity is perhaps nowhere more sharply focused than it is in the southern district of Florida. In *Rhymes v. Arrow Air, Inc.*,<sup>62</sup> the district court held that the Warsaw Convention does not provide the exclusive cause of action, but it does provide the exclusive remedy, thereby preempting any "portion of the state remedy that is in conflict [with the Convention]."<sup>63</sup>

After the *Rhymes* decision, three other cases in the southern district of Florida addressed the same question. The district court in *Calderon v. Aerovias Nacionales de Colombia*<sup>64</sup> accepted the analysis of *Rhymes*, while the court in *Velasquez v. Aerovias Nacionales de Colombia* rejected *Rhymes*, reaching the opposite conclusion.<sup>65</sup> In *Alvarez v. Aerovias Nacionales de Colombia*,<sup>66</sup> the district court considered the analyses of both *Rhymes* and *Velasquez*. After finding the *Velasquez* analysis inadequate,<sup>67</sup> the *Alvarez* court reached the same conclusion as *Rhymes*, that the Convention provided the exclusive remedy, not the exclusive cause of action.<sup>68</sup> *Calderon*, *Velasquez*, and *Alvarez* all arose from the same air crash, the January 25, 1990 crash of Avianca Flight 52.<sup>69</sup> All three cases involved suits removed from state court to federal court on the grounds that the Convention provided the exclusive cause of action,<sup>70</sup> and in all three cases, the plaintiffs moved to remand the cases back to state court. The motions to remand received disparate results,<sup>71</sup> which highlights the need for the resolution of the exclusivity issue.

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empted all Texas law in the field of air carrier liability. See *supra* notes 52-54 and accompanying text.

62. 636 F. Supp. 737 (S.D. Fla. 1986).

63. *Id.* at 741.

64. 738 F. Supp. 485, 486-87 (S.D. Fla. 1990), *appeal dismissed for lack of jurisdiction*, 929 F.2d 599 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 376 (1991).

65. 747 F. Supp. 670 (S.D. Fla. 1990).

66. 756 F. Supp. 550 (S.D. Fla. 1991).

67. *Id.* at 555 ("Velasquez did not discuss the 'however founded' language from Article 24(1), except in a footnote . . .").

68. *Id.*

69. *Calderon*, 738 F. Supp. at 486; *Velasquez*, 747 F. Supp. at 671; *Alvarez*, 756 F. Supp. at 551.

70. *Calderon*, 738 F. Supp. at 486; *Velasquez*, 747 F. Supp. at 671; *Alvarez*, 756 F. Supp. at 551.

71. *Calderon*, 738 F. Supp. at 487 (motion to remand back to state court granted); *Velasquez*, 747 F. Supp. at 679 (motion to remand denied); *Alvarez*, 756 F. Supp. at 556 (motion to remand granted).

IV. *IN RE AIR DISASTER AT LOCKERBIE, SCOTLAND: THE DECISION*

The *Lockerbie* court began its analysis by noting that while *Benjamins* clearly held that the Warsaw Convention does provide a cause of action, it left open the question as to whether state law claims are still available under the treaty.<sup>72</sup> The court acknowledged that neither the treaty itself nor any act of Congress expressly addresses the preemption issues.<sup>73</sup>

Trying to avoid ruling on an issue not properly before it, the *Lockerbie* court stated that it was only deciding whether a state law cause of action is preempted when a cause of action is available to the plaintiff under the Warsaw Convention itself.<sup>74</sup> In its analysis, the court relied on both the *Boehringer* and *Mexico City Aircrash* opinions.<sup>75</sup> It also relied heavily on the subsequent actions of other signatory nations to the Convention.<sup>76</sup> "England, Canada, and Australia have all enacted implementing statutes that make an Article 17 action the exclusive remedy for claims governed by the Convention."<sup>77</sup> "The way the other parties have viewed the Convention, its emphasis on uniformity, and the need for a single, unified rule on such points as . . . punitive damages lead [the *Lockerbie* court to believe] that the Convention should be interpreted as making all actions—other than those not based on the Convention—exclusive under it."<sup>78</sup> The *Lockerbie* court feared that the existence of state law causes of action would result in "a

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72. *Lockerbie*, 928 F.2d at 1273. Whether the *Benjamins* court left that question open or not is arguable. That court said that the goal of uniformity could "better be achieved by making federal as well as state courts accessible to Convention litigation." *Benjamins*, 572 F.2d at 919. One way to interpret this language is that the *Benjamins* court intended continued recognition of state law causes of action. Alternatively, if the court intended that all future actions be based on the Convention, state courts would still be available to the plaintiffs. This interpretation of the above quote is also logical, but given that courts had spent more than two decades believing the Convention did not provide a cause of action, it is unlikely that the *Benjamins* court would have eliminated state law causes without any discussion of the point. Hence, the better interpretation of the language is that the *Benjamins* court envisioned the continued recognition of state law actions.

73. 928 F.2d at 1273.

74. *Id.*

75. *Id.* at 1273-74.

76. *Id.* at 1274.

77. *Id.* See Carriage by Air Act, 1932, 22 & 23 Geo. 5, ch. 36, § 1(4) (Eng.); Carriage by Air Act, R.S.C., ch. C-26 § 2(5) (1985) (Can.); Civil Aviation (Carrier's Liability) Act, 1959-1973, § 12(2), 2 AUSTR. ACTS P. 643, 645 (1974) (Austl.). The Carriage by Air Act of 1932 was repealed in 1961 when the United Kingdom enacted a new Act. See Carriage by Air Act, 1961, 9 & 10 Eliz. 2, ch. 27 § 3 (Eng.); MILLER, *supra* note 25, at 229.

78. 928 F.2d at 1274.

trial court [being] forced to apply differing law from several states to various plaintiffs,"<sup>79</sup> making the application of the Warsaw Convention "even more complex"<sup>80</sup> and resulting in "inconsistent application of law to the same accident."<sup>81</sup> The court concluded that the Convention preempts state law on the principle that national interests create such a need for uniformity that to allow state regulation "would create potential frustration of national purposes."<sup>82</sup>

## V. ANALYSIS

The cases cited by the *Lockerbie* court actually add little support for its decision. The court, itself, concedes that the *Boehringer* opinion is not an "in-depth analysis,"<sup>83</sup> thus, any reliance placed on that decision can add only minimum support.

The *Lockerbie* court relies on footnote twenty-five of the *Mexico City Aircrash* case when it states, "The Ninth Circuit has also rebutted the idea that a cause of action may be founded on some law other than the Convention."<sup>84</sup> The point of the *Mexico City Aircrash* footnote, however, is that "the delegates did not intend . . . the cause of action created by the Convention to be exclusive."<sup>85</sup> Footnote twenty-five is very lengthy, and the *Lockerbie* court seems to have taken a portion of the footnote out of context

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79. *Id.* at 1275.

80. *Id.*

81. 928 F.2d at 1276. The court was motivated by its belief that the choice of law problems associated with recognizing state law causes of action would consume scarce judicial resources. *See id.*

The court's decision, however, will not result in the elimination of inconsistent application of the law to the same accident. The definition of "international travel" can lead to the application of the Warsaw Convention in purely domestic flights, where it is normally inapplicable. For example, if an international traveler is on board a domestic flight that crashes, then all other passengers will sue outside the Convention, but the international traveler's recovery will be limited by the Convention, thus resulting in absurd consequences. *See, e.g., Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982) (domestic flight from New Orleans to New York).

82. 928 F.2d at 1275 (*citing* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

83. 928 F.2d at 1273 ("without [an] in-depth analysis, [that] court ruled that Texas law was preempted").

84. *Id.* at 1274.

85. *In re Mexico City Aircrash* of October 31, 1979, 708 F.2d 400, 414 n.25 (9th Cir. 1983). *Mexico City Aircrash* was factually unique in that a state compensation law purported to establish the exclusive remedy for the death of an employee, thus attempting to preempt the Warsaw Convention. The Ninth Circuit held that the state law was preempted only to the extent that the law attempted to limit the recovery allowed by the Convention. *Id.* at 418.

to support a proposition for which the case does not stand.

### A. *The Warsaw Convention*

Absent from *Lockerbie's* analysis of the preemption issue is a detailed discussion of the Convention itself. As the United States Supreme Court has said, we must "begin . . . with the text of the treaty and the context in which the written words are used."<sup>86</sup> A review of the history and an analysis of the Convention itself suggest that the Warsaw Convention was not intended to provide the exclusive cause of action.

In the 1920s, the airline industry faced many uncertainties in dealing with the legal systems of the many countries that it serviced. The drafters of the Convention set out to reduce these uncertainties by establishing a liability system that would apply to all international flights.<sup>87</sup> The two basic goals of the Convention were: (1) "to establish uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation"; and (2) "to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo."<sup>88</sup> The establishment of such a liability system was essential to promote the fledgling airline industry.<sup>89</sup>

Although the drafters did intend the Convention to govern the liability of air carriers in all cases to which it was applicable,<sup>90</sup> the drafters did not intend to dictate all aspects of resulting law suits. For example, Article 22 allows the issue of "periodical payments" to be decided by "the law of the court to which the case is submitted."<sup>91</sup> Article 25 provides that the Convention's limit on liability would not apply if damages caused by "such default . . . as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."<sup>92</sup> Articles 28 and 29 provide that questions of procedure and formulas for

86. *Air France v. Saks*, 470 U.S. 392, 397 (1985).

87. Warsaw Convention, *supra* note 7, art. I ("shall apply to all international transportation").

88. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991) (citing *WARSAW MINUTES*, *supra* note 12, at 37, 85, 87).

89. See *WARSAW MINUTES*, *supra* note 12, at 13 ("Common rules to regulate international air carriage have become a necessity.").

90. Warsaw Convention, *supra* note 7, art. 17.

91. *Id.* art. 22.

92. *Id.* art. 25.

calculating the period of limitation, respectively, shall be governed by "the law of the court to which the case is submitted."<sup>93</sup> Articles 21 and 24(2) make similar references.<sup>94</sup> The Convention's acceptance of local law in these examples is evidence that the drafters were not absolutely opposed to the application of common law in Warsaw Convention cases.

At trial, questions arise that are not specifically addressed by the Convention. What law determines the elements for a given cause of action, and what law determines who may recover in the event of a passenger's death are common examples. A court that hears a Warsaw Convention case must nonetheless decide these issues. Where the drafters failed to address such issues, and where the Convention expressly provides for the application of local law in some areas but nowhere expressly precludes its application in others, local law is the logical choice to answer these unaddressed questions.<sup>95</sup> This view is consistent with the terms of the treaty which readily endorse application of local law.<sup>96</sup>

The language of the Convention itself suggests that it did not intend to provide the exclusive cause of action. Article 24<sup>97</sup> suggests that any action, "however founded," must be brought subject to the conditions and limitations of the treaty. Sir Alfred Dennis, a British delegate to the Convention, believed that the "however

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93. *Id.* arts. 28, 29.

94. *Id.* arts. 21, 24 (Article 21 refers to contributory negligence, while Article 24 concerns who may file suit under the Convention).

95. *See Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) ("[i]t seems clear that the Warsaw Convention left this issue, as it did other[s], . . . to the internal law of the parties to the Convention").

The Latin maxim, *expressio unius est exclusio alterius*, might suggest the Convention intended to endorse local law only in those areas expressly stated and therefore, local law should not be used to determine any other issues. This conclusion, however, ignores that certain issues, such as damages, are not addressed by the Convention. The court hearing the case must nonetheless decide these issues. The Latin maxim is supposed to assist one in interpreting an instrument, but its application here would be unwise because it would leave issues undecided.

96. *See supra*, notes 91-94 and accompanying text.

97. The complete text of Article 24 is as follows:

(1) In the cases covered by [A]rticles 18 and 19 [damage to goods and delay in transportation,] any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention. (2) In the cases covered by Article 17 [death and bodily injury] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, *supra* note 7, art. 24 (emphasis added).

founded" language of Article 24 "touches the very substance of the Convention, because this excludes recourse to common law."<sup>98</sup> Some may believe that Sir Dennis's remark indicates that the Convention was intended to provide the exclusive cause of action, but his statement must not be read in isolation. At an early stage of the negotiations on a portion of Article 24 (the portion that eventually became Article 25), Sir Dennis also said:

[W]e believe that it is indispensable to specify which law will decide, whether in such and such case, the carrier is or is not liable. We propose . . . that it be the law of the country where the contract was concluded . . . . We believe that this Convention must leave certain conditions . . . [to] the law which the contracting parties know the best . . . [and that is] the law of the country where the contract was concluded.<sup>99</sup>

At a minimum, these comments suggest that Sir Dennis's first comment should not be given absolute weight. The ultimate text of the Convention shows that Sir Dennis and the other delegates were not absolutely opposed to the application of national law.<sup>100</sup> Hence, a better explanation of the "however founded" language of Article 24 is that the delegates believed the Convention's liability scheme should govern all causes of action, no matter how founded. The Ninth Circuit agrees that "[t]he best explanation for the wording of [A]rticle 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive. For example, in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation."<sup>101</sup>

### *B. The Warsaw Convention Provides the Exclusive Remedy*

While the Convention does not provide the exclusive cause of action, it does condition and limit the liability of the international air carrier in those cases where it is applicable.<sup>102</sup> Thus, regardless

98. WARSAW MINUTES, *supra* note 12, at 213.

99. *Id.* at 64.

100. See *supra* notes 91-94 and accompanying text.

101. *In re Mexico City Aircrash* of Oct. 31, 1979, 708 F.2d 400, 414 n.25 (9th Cir. 1983).

102. *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 134 (3rd Cir. 1984), *cert denied*, 470 U.S. 1059 (1985); *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737, 740 (S.D. Fla. 1986). The Convention does not apply to all international transportation cases. See WARSAW MINUTES, *supra* note 12, at 84-86. Article 25 provides that in the case of "wilful misconduct," the Convention's limitation on liability will not be available to the carrier, and the law of the court to which the case is submitted will determine whether the conduct is deemed inten-

of the basis for the cause of action, no liability will attach unless the three conditions<sup>103</sup> are satisfied, and in no event will the recovery under the Convention exceed \$75,000.

Some courts have expressed this same view by drawing a distinction between an exclusive remedy and an exclusive cause of action. In *Rhymes v. Arrow Air, Inc.*,<sup>104</sup> the district court for the Southern District of Florida held that the Convention does not provide the exclusive cause of action, but does provide the exclusive remedy.<sup>105</sup> The *Rhymes* court was able to achieve the Convention's dual goals of limiting the liability of the air carrier and creating uniformity in handling claims that arise out of international air transportation. Allowing the plaintiff to state a cause of action based solely on state law permits the plaintiff to pursue the action in state court and precludes the defendant from removing it to federal court.<sup>106</sup> Elimination of the state law cause of action is not necessary to achieve the goals of the Convention because Article 17 ensures uniformity by restricting the carrier's liability to those cases where its three conditions are satisfied, while Article 22 places an absolute cap on damages.

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tional. See Warsaw Convention, *supra* note 7, art. 25. The delegates well understood that where the Convention was inapplicable, the law of the nation would apply. Mr. Pittard, the Switzerland delegate, emphasized the point when he asked: "Has the scope of this article been well understood in the sense that if one does not apply the Convention in these cases, one will apply the common law?" Mr. Ripert, of France, expressed the understanding of all when he replied: "Naturally!" WARSAW MINUTES, *supra* note 12, at 85-86.

At another point, Mr. DeVos, the reporter for the Convention, announced a proposal of the Czechoslovak delegate for an additional article which provided: "In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply." WARSAW MINUTES, *supra* note 12, at 176. Mr. DeVos responded: "I want to remark that this was provided for . . . I believe therefore, that this provision would be of no use." *Id.* These comments by the delegates show that not only did they believe that the Convention would not apply to all cases, they also well understood that in such cases, local law would govern.

103. See *supra* note 15 and accompanying text.

104. 636 F. Supp. 737 (S.D. Fla. 1986).

105. *Id.* at 740-41.

106. *Id.* at 741. "The mere pleading of a federal statute or treaty as a defense will not be enough to invoke federal jurisdiction through removal if a federal cause of action does not appear on the face of the well pleaded complaint." *Id.* (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)). In *Rhymes*, the plaintiff stated his cause of action solely on state law, and the defendant removed the case to federal court. The plaintiff petitioned to remand his case to the state court on the grounds that the defendant had improperly removed the action. The federal court granted the plaintiff's motion for remand, recognizing that if removal were allowed "whenever a federal defense is raised to a state cause of action, the dockets of the federal bench would become inundated with a flood of state litigation." *Id.* at 742.

That the Convention should condition and limit liability for any cause of action is also consistent with the decisions of the French courts, which have held that the liability limitations of the Convention are exclusive and that a plaintiff cannot circumvent those limits by renouncing contractual rights and suing under a negligence theory.<sup>107</sup>

*C. The Warsaw Convention Preempts State Laws to the Extent They Conflict with the Convention's Remedies*

Of course, if the Warsaw Convention provides the exclusive remedy, then, as a treaty of the United States, it must preempt inconsistent state law remedies. For example, if the Warsaw Convention precludes the award of punitive damages, as indeed many courts have concluded,<sup>108</sup> then a state law providing for punitive damages would be preempted to the extent it attempted to interfere with the treaty's exclusivity of remedies.<sup>109</sup> Many courts support this view of preemption.<sup>110</sup>

The preemption theory applied by the *Lockerbie* court is one of implied preemption whereby Congressional intent to preempt state law is inferred from a scheme of federal regulation whose

107. See MILLER, *supra* note 25, at 237.

108. *Lockerbie*, 928 F.2d at 1284-87; *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483-85 (1989), *reversed on other grounds*, 111 S. Ct. 1489 (1991). This Note does not consider the *Lockerbie* court's analysis of the punitive damages issue.

109. This would be true at least to the point that the state law attempted to punish the defendant. Most courts that have considered it have found that the Warsaw Convention is entirely compensatory in tone and structure. See *Floyd*, 872 F.2d at 1483-85; *Lockerbie*, 928 F.2d at 1280-87; *In re Air Crash Disaster at Gander, Newfoundland*, 684 F. Supp. 927, 931 (W.D. Ky. 1987). Some states, however, view punitive damages as purely compensatory, while other states view them as part penal and part compensatory. *Lockerbie*, 928 F.2d at 1270. To the extent that these damages are compensatory, they would not be in conflict with the Convention.

110. See, e.g., *Floyd*, 872 F.2d at 1480 ("Convention preempts any state law which is inconsistent with it"); *Mexico City Aircrash*, 708 F.2d at 418 ("preempts the exclusivity of the California . . . statute . . . [because it] purported to limit the recovery allowed by the Convention"); *Rhymes*, 636 F. Supp. at 741 ("Convention will preempt the portion of the state remedy that is in conflict"); *Alvarez*, 756 F. Supp. at 556 ("Convention's exclusive remedy may indeed serve to preempt inconsistent and contradictory provisions of the plaintiff's state law theory"). But see *Boehringer* 737 F.2d at 459 ("preempts [all of] state law in the areas covered"); *Stanford v. Kuwait Airlines Corp.*, 705 F. Supp. 142, 143 (S.D.N.Y. 1989) ("Convention exclusively govern[s] the rights and liabilities of the parties"); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd* 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983), *reh'g denied*, 464 U.S. 978 (1983) ("Convention specifically controls and exclusively governs any and all claims").

"subject matter demands uniformity vital to national interests."<sup>111</sup> The *Lockerbie* court inferred a Congressional "preference for uniform, international rules" from the Senate's approval of the Warsaw Convention.<sup>112</sup> The court believed that "[t]he existence of differing laws in various states . . . would frustrate the Convention's aims of uniformity and certainty in the application of those international rules."<sup>113</sup> Perceiving a "potential frustration of national purposes,"<sup>114</sup> the court concluded that the Convention impliedly preempted state law causes of action.

The application of the implied preemption theory is not reasonable in this case. Congressional intent to supersede state law may be inferred when the subject matter "demand[s] exclusive federal regulation in order to achieve uniformity vital to national interests."<sup>115</sup> The question is whether uniformity in regulating the liability of the international air carrier is vital to national interests, and if so, whether regulating the liability of international air carriers "demands exclusive federal regulation" in order to achieve this uniformity.

Certainly, there are strong national interests in the promotion and maintenance of an international transportation system, but do these interests require complete uniformity in the regulation of air carrier liability? The Convention itself goes a long way toward ensuring uniformity in Warsaw Convention cases, as no carrier will be liable unless the terms and conditions are satisfied.<sup>116</sup> In addition, the Convention places an absolute cap on the liability of the carrier.<sup>117</sup> Were it not for the cap on damages and the conditions for liability, then complete uniformity might be needed to promote "national interests."

The drafters of the Convention did not appear to demand complete uniformity in the regulation of air carrier liability. The

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111. *Lockerbie*, 928 F.2d at 1275.

112. *Id.* at 1278. The Warsaw Convention is a treaty that was actually drafted by other nations, as the United States was not a participant. See WARSAW MINUTES, *supra* note 12, at 5-10 (listing the countries represented and their delegates). The Convention attempted to limit the liability of air carriers in order to promote what was then a fledgling industry of international air transportation.

113. *Lockerbie*, 928 F.2d at 1278.

114. *Id.* at 1275 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

115. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

116. See *supra* notes 14-15 and accompanying text.

117. See *supra* note 20 and accompanying text.

Convention attempts to limit the liability of air carriers for certain injuries<sup>118</sup> arising out of certain accidents.<sup>119</sup> It expressly provides for the application of local law to determine certain legal issues<sup>120</sup> while failing to address many others.<sup>121</sup> If by its own terms it readily endorses local law, then one cannot reasonably conclude that complete uniformity was the intent of the drafters.

Furthermore, regulating the liability of international air carriers does not "demand exclusive federal regulation" in order to achieve uniformity. As described above, the treaty itself provides a strong basis for uniformity by dictating the conditions under which a carrier will be liable and placing an absolute cap on damages. Since the treaty was ratified in 1934,<sup>122</sup> these conditions and limitations have resulted in the development of an extensive international transportation system. In light of how well the national interests have been served, it is not reasonable to conclude that the regulating the liability of international air carriers "demands exclusive federal regulation" in order to promote "national interests."

Inferring a Congressional intent to preempt state laws is especially suspect when the Senate's ratification of the treaty is compared with the actions of other signatory countries. "England, Canada, and Australia have all enacted implementing statutes that make an Article 17 action the exclusive remedy for claims governed by the Convention."<sup>123</sup> Those three countries participated in the Warsaw Convention, while the United States did not.<sup>124</sup> England, Canada, and Australia took additional legislative action on the subject by enacting "enabling" statutes, while the United States did not. The two responses to the Convention suggest that Congress viewed the treaty differently because they chose not to enact enabling statutes to make the Convention the exclusive cause of action. In addition, Congress had a golden opportunity to reshape

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118. Warsaw Convention, *supra* note 7, art. 17 (death, wounding, or other bodily injury).

119. *Id.* (accident must occur on board the aircraft or in the course of embarking or disembarking the flight).

120. See *supra* notes 91-94 and accompanying text.

121. See *supra* note 95 and accompanying text.

122. *Floyd*, 111 S. Ct. at 1493.

123. 928 F.2d at 1274. The *Lockerbie* court found particular significance in the fact that "Australia and Canada, the two nations whose law is closest to our own, have applied a single substantive law to actions under the Convention." *Id.* Their "enabling" statutes, however, explain why they have applied "a single substantive law" to such actions.

124. See *supra* note 112 and accompanying text.

the liability of the international air carrier when the United States denounced the Convention in 1965,<sup>125</sup> but instead, it withdrew its denunciation after the international air carriers agreed to a higher liability limit. The responses of Congress suggest that the *Lock-  
erbie* court's application of implicit preemption is unreasonable.

The proper theory of preemption is that which is based on the Supremacy Clause of the United States Constitution. The treaty should preempt only those contradictory state laws to the extent that they are inconsistent with the treaty.<sup>126</sup> State law claims, however, may not necessarily conflict with the limitations and conditions of the Convention and, therefore, should not be preempted. Application of the Supremacy Clause as a theory of preemption is consistent with the spirit of the treaty that expressly endorses local law.<sup>127</sup>

## VI. CONCLUSION

*Lockerbie* presents the controversial issue of whether the Warsaw Convention provides the exclusive cause of action available to a passenger who has been injured during an international flight. The decision reveals a split in the federal courts, a split that is unlikely to be resolved soon since the Supreme Court has recently declined to review the *Lockerbie* decision.<sup>128</sup>

Although uniformity is an important concern of the Convention, *Lockerbie* carries this goal beyond that which was envisioned by its drafters. The Convention's dual goals of uniformity and limitation of air carriers' liability are best achieved by allowing the plaintiff to bring a claim based either on the treaty or on state law, yet limiting his recovery according to the terms and conditions of the Warsaw Convention. Thus, the Convention should not provide the exclusive cause of action, but it should control the available remedies. This view is consistent with the language of the Conven-

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125. See *supra* note 20 and accompanying text.

126. "[W]here Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation Comm'n*, 461 U.S. 190, 204 (1983) (emphasis added). Here the "federal law" is a treaty, and thus the treaty must prevail as the supreme law of the land. U.S. CONST. art. VI.

127. See *supra* notes 91-95 and accompanying text.

128. In re Air Disaster at Lockerbie, Scotland, *sub nom.* Rein v. Pan American World Airways Inc., 112 S. Ct. 331 (1991). The Supreme Court has also declined to address the issue on two other occasions. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1502 (1991); *Air France v. Saks*, 470 U.S. 392, 408 (1985).

tion, the intentions of the signatory countries, and judicial precedent within the United States.

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