Warsaw's Wingspan over State Laws: Towards a Streamlined System of Recovery

Luis F. Ras

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol59/iss3/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
INTRODUCTION

THE WARSAW CONVENTION for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention")\(^1\) became part of the law of the United States on October 29, 1934.\(^2\) By the time the United States adopted the Warsaw Convention, most European nations had already become members.\(^3\) Today, most of the world's major countries adhere to its terms.\(^4\)

The text of the Convention was the work product of two international conferences\(^5\) and an interim committee of renowned international technical experts on aviation law.\(^6\)

---

\(^{1}\) The Convention has been codified at 49 U.S.C. § 1502 (1993).

\(^{2}\) The Convention was approved by the advice and consent of the United States Senate on June 15, 1934. 78 Cong. Rec. 11,582 (1934). President Franklin D. Roosevelt signed the Convention on October 29, 1934.

\(^{3}\) In re Air Crash Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1271 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991).


\(^{6}\) The interim committee was referred to by the acronym C.I.T.E.J.A., which stands for the French "Comité International Technique d'Experts Juridiques Aériens." See id.
The authors created the Convention at the dawn of the commercial aviation industry, which at that time required sound financial backing and insurance. The drafters' primary goals were to create common rules to regulate international air carriage, as well as limit the potential liability of commercial air carriers. The former goal has been especially important to the United States' continued assent to the Convention, since the United States has never been satisfied with the liability limits the provision has set.

7 At the time the authors drafted the Convention, commercial aviation was in its infancy. Only one regularly scheduled international flight from the United States existed and ran from Key West, Florida, to Cuba. See In re Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463, 1470 (D.D. C. 1985), aff'd, 829 F.2d 1171 (D.C. Cir. 1987), aff'd sub nom., 490 U.S. 122 (1989); Kreindler, supra note 4 at 11-2.

8 See Lockerbie, 928 F.2d at 1270-71; Floyd, 872 F.2d at 1467; Korean Air Lines, 664 F. Supp. at 1470.

9 Lockerbie, 928 F.2d at 1270; Floyd, 872 F.2d at 1467; Korean Air Lines, 664 F. Supp. at 1465. Courts have cited numerous other goals of the Convention, including: achieving uniformity as to documentation for tickets, waybills, and procedures for dealing with claims arising out of international air transportation. See Floyd, 872 F.2d at 1467 (citing Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw (Robert C. Horner & Didier Legrez trans., 1975)); Korean Air Lines, 664 F. Supp. at 1465.

10 One of the principal reasons the United States joined the Convention stemmed from its desire for uniform laws governing carrier liability and a measure of certainty in the application of those laws. Lockerbie, 928 F.2d at 1275; see also Reed v. Wiser, 555 F.2d 1079, 1086 (2d Cir.) (citing Hague Protocol to Warsaw Convention: Hearings Before the Comm. on Foreign Relations, 89th Cong., 1st Sess. 15, 19 (1965)), cert. denied, 434 U.S. 922 (1977).

11 See Korean Air Lines, 664 F. Supp. at 1465. The United States has grown increasingly dissatisfied with the Warsaw limitation over the years. Id. Many courts have questioned the necessity of any limitation given the continued growth of the commercial airline industry. See, e.g., Reed, 555 F.2d at 1079 (expressing the court's duty to enforce the treaties of the United States, regardless of whether they are wise or unwise). The emerging consensus is that the industry is no longer in need of special protection, and is capable of assuming the costs of the damages occasioned by its passengers. See Ray B. Jeffreys, Comment, The Growth of American Judicial Hostility to the Liability Limitations of the Warsaw Convention, 48 J. AIR L. & COM. 805, 830 (1983).

The United States' open hostility to the Convention's liability limitation has been constant since as early as 1935. See Korean Air Lines, 664 F. Supp. at 1465. This hostility has been a catalyst to the addition of several protocols and agreements to the Convention in an effort to increase the liability limitations. See generally id. at 1465-66, 1470.

In 1965, the United States' dissatisfaction culminated in its formal denunciation
The Convention, according to its own terms, applies to injuries or losses sustained in "all international transportation of persons, baggage, or goods performed by aircraft for hire." The essential bargain it embodies consists of shifting the burden of proof of the carrier's responsibility for such losses to the carrier in exchange for a low limitation of the carrier's liability.

It should be noted that the Convention was not intended to govern the entire relationship between air carriers and passengers. By its very title, it was only meant to unify certain rules relating to international transportation by air, and does not propose to unify all such rules. Thus, the Convention does not apply at all to those aspects of the passenger-carrier relationship it does not address. As to those aspects, the respective rights and liabilities of the passenger and carrier fall outside the scope of the Convention and are left to the local laws of member states.
The Convention's role as an instrument of internal U.S. law has undergone a noticeable transformation since the time it was approved by the United States Senate in 1934. A majority of the early decisions interpreting the Convention held that it did not create its own causes of action for damages, but instead merely created presumptions of liability against the carrier. However, today it is well settled that the Convention itself creates independent causes of action within the terms of Article 17 of the Convention and Warsaw claim was properly dismissed; thus, District Court erred in failing to reach state law claims), cert. denied, 470 U.S. 1059 (1985).

It is well settled that when the Convention is inapplicable to a claim, it does not serve as a bar to alternative theories of recovery. Id. at 135. Thus, the following types of occurrences commonly fall outside the scope of the Convention:

1. Those which do not constitute an accident within the terms of Article 17 of the Convention. See, e.g., Air France v. Saks, 470 U.S. 392 (1985) (passenger who became deaf because of alleged negligent maintenance and operation of aircraft's pressurization system was not a victim of an accident under the terms of Article 17); Abramson, 1739 F.2d at 131-33 (airline's alleged negligent refusal to help passenger suffering from hernia did not constitute an accident within the meaning of the Convention); Padilla v. Olympic Airways, 765 F. Supp. 835 (S.D.N.Y. 1991) (fall in airplane lavatory did not constitute accident).

2. Those that did not occur in the course of embarking or disembarking within the terms of Article 17. See, e.g., Buonocore v. Trans World Airways, Inc., 900 F.2d 8 (2d Cir. 1990) (death of passenger by terrorist attack in public area of airport was not in course of embarking or disembarking under Article 17); Martinez Hernandez v. Air France, 545 F.2d 279, 284 (1st Cir. 1976) (death of passengers by terrorist attack occurring after the passengers vacated the airplane did not occur in the course of disembarking), cert. denied, 430 U.S. 950 (1977).

3. Those which did not involve ticketed passengers within the terms of Article 17. See In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400 (9th Cir. 1983) (representatives of two decedents working as flight attendants on board accident aircraft did not have any right of action under the Convention and were instead limited to remedies provided by California workers' compensation statutes); In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980, 705 F.2d 85, 89 (2d Cir.) (carrier accepted passenger without delivering a passenger ticket), cert. denied, 464 U.S. 845 (1983); Sulewski v. Federal Express Corp., 749 F. Supp. 506 (S.D.N.Y. 1990) (aircraft mechanic was travelling as an employee rather than a passenger, and thus terms of Convention did not apply), aff'd, 933 F.2d 180 (2d Cir. 1991).

of action for damages for a passenger's personal injuries and wrongful death, and for claims of lost or damaged baggage or cargo. The United States Supreme Court has not addressed this issue directly, although it has ruled that the Convention operates as a self-executing treaty which does not require any implementing legislation by the signatories.

After leapng a conceptual hurdle to find that the Convention creates its own independent causes of action, courts have been forced to decide whether these causes of action can co-exist with state-law-based claims in cases falling under the scope of the Convention. Courts de-

(holding that Convention's Article 17 created its own independent causes of action), aff'd, 120 N.Y.S. 917 (N.Y. App. Div. 1953).

When the Southern District of New York once again passed on the issue, other courts followed suit. See Floyd, 872 F.2d at 1469 (referring to Komlos v. Compagnie Nationale Air France, 209 F.2d 436 (2d Cir. 1953) (holding that the Convention does not create its own independent cause of action), cert. denied, 348 U.S. 820 (1954); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.) (holding that the Convention does not create its own independent cause of action), cert. denied, 355 U.S. 907 (1957). These were the seminal decisions followed by courts around the country for two decades.

It was not until 1978, when Judge Lambert of the Second Circuit reversed his Noel opinion in Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978) (finding that Convention creates its own independent cause of action), cert. denied, 439 U.S. 1114 (1979), that the previous rule was decisively overturned. The new rule ushered in by Benjamins became the standard bearer for the Convention cause of action and is now the universal rule. See Floyd 872 F.2d at 1470 (Article 17 creates cause of action for personal injury); In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 415 (9th Cir. 1983) (Article 17 creates a cause of action for wrongful death founded in treaty law).

The United States Supreme Court has not expressly decided whether the Convention creates causes of action. Floyd, 872 F.2d at 1469. However, in Air France v. Saks, 470 U.S. 392, 408 (1985), the court implicitly recognized a Warsaw cause of action by stating in dicta that an airline could be held liable to the victim of an accident under Article 17.

Some courts would also hold that non-Warsaw federal causes of action should be available in actions falling within the scope of the Convention. See In re Air Disaster Near Honolulu, Hawaii on Feb. 24, 1989, 792 F. Supp. 1541 (N.D. Cal. 1989).
fine the issue as one concerning the exclusivity or non-exclusivity of the Warsaw cause of action. Those courts holding that the Warsaw cause of action is exclusive interpret the cause of action to preempt all state-based causes of action for cases falling within the scope of the Convention. Those courts holding that the Warsaw cause of action is not exclusive interpret the Convention to allow for the availability of state causes of action alongside Warsaw causes of action for cases falling within the scope of the Convention. The issue remains open, with the United States Supreme Court remaining silent on the question.\(^{24}\)

Part I of this Article will discuss the cases supporting the view that the Warsaw cause of action is not exclusive and thus does not automatically preempt all state-law-based causes of action (the "restrictive view"). Part II will discuss the substantive and procedural problems inherent in the restrictive view and review the cases supporting the position that the Warsaw cause of action is exclusive once a loss falls within the scope of the Convention (the "expansive view"). Under the latter view, all state causes of action are automatically preempted once such a loss occurs. Part III will discuss analogous problems in the gen-

---

\(^{24}\) See Onyeanusi v. Pan Am. World Airways, Inc., 952 F.2d 788 (3d Cir. 1992) (discussing whether the Convention provides exclusive cause of action which precludes state causes of action since the United States Supreme Court has declined to resolve the issue in two recent cases) (citing Floyd, 499 U.S. 530 (1991); Air France v. Saks, 470 U.S. 392 (1985)).
ler maritime law of the United States, and how courts have dealt with them.

This article makes the case that the Convention should be recognized as the exclusive source of a claimant’s right to recover once an action falls under its scope. Once triggered, actions falling under its scope should be decided under principles of federal common law uniformly developed by the federal courts in keeping with the Convention’s objectives.

The first way to accomplish this goal would be to declare the Convention’s cause of action to be exclusive, thus preempting all state-based causes of action (i.e. adopting the expansive view). The second way would be to allow plaintiffs to plead state-based causes of action while deciding those claims exclusively in terms of substantive federal common law. Both methods would be equally effective to ensure that the Convention effectuates its important goal of international and intranational uniformity in its systems of recovery and the law applicable to claims.

PART I. THE RESTRICTIVE VIEW: WARSAW AS A NON-EXCLUSIVE REMEDY

The case of *Benjamins v. British European Airways* solved the controversy over whether the Convention created its own independent causes of action for damages. It did not, however, put to rest the equally important issue of whether state causes of action were still available under the Convention. Plainly stated, the issue that presently divides the judiciary is whether the Convention automatically preempts state causes of action once the facts of a claim make it fall within the scope of the Convention.

---

25 572 F.2d 913 (2d Cir. 1978); see also supra note 19.
26 See generally *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991); *Benjamins*, 572 F.2d at 913.
27 See *Lockerbie*, 928 F.2d at 1273. The issue is not whether the Convention preempts state laws with which it is in direct conflict. *Id.; see also* *Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985). In such a situation, the Constitution’s Supremacy Clause would call for preemption of the state law cause of ac-
The difficulties in interpreting the Convention arise from the Convention itself. Several courts that have been forced to wrestle with this issue have identified the Convention's failure to squarely address it. The Convention does not expressly preserve state law causes of action. However, it does not expressly preempt state law causes of action either. In addition, it creates confusion by providing causes of action without expressly defining their role within the internal law systems of member states.

The federal district courts of the Eleventh Circuit have long wrestled with the issue of whether the Convention's remedies are exclusive. The majority of Florida District Court judges that have had occasion to review the issue have concluded that the cause of action created by the Convention is not exclusive. At least one Florida state court has followed this view as well.
The latest Florida District Court case to squarely address this issue is Clark. Clark involved a claim for the loss of cargo shipped from Guyana to England. Plaintiff Clark brought suit in the Eleventh Judicial Circuit Court of Dade County, Florida, asserting claims based solely on Florida state law. The defendant subsequently removed the action to the District Court for the Southern District of Florida, and plaintiff moved to remand the action back to state court.

The Court held that the cause of action created by the Convention was not meant to be exclusive, and remanded the action back to state court. Its reasoning focused on the language of Article 24(1) of the Convention, which provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set forth in the Convention." Three recent decisions from the District Court for the Southern District of Florida also fall into line with the majority. In Alvarez v. Aerovias Nacionales de Colombia, S.A., Calderon v. Aerovias Nacionales de Colombia, S.A. and Rhymes v. Arrow Air, Inc. the courts granted Plaintiffs' motions to remand their actions to state court. Plaintiffs in all three

---

1987); Eastern Airlines, Inc. v. King, 557 So. 2d 574 (Fla. 1990). The Third District Court of the State of Florida held that plaintiff could assert a cause of action for emotional distress under state law in a Warsaw Convention case. King, 556 So. 2d at 1031. The Supreme Court of Florida, however, decided that plaintiff had not pleaded sufficient facts to state a claim under state law, thereby making the preemption issue moot. Eastern Airlines, 557 So. 2d at 575-76 (holding that it was unnecessary to pass on issue of whether state cause of action was preempted by Convention cause of action for emotional distress recognized in Floyd because plaintiff had not plead sufficient facts to uphold state claim). In a later twist, the United States Supreme Court, on an appeal in the then-pending Floyd action, found that the Convention did not provide a cause of action for purely mental injury. Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991).

35 See Clark, 778 F. Supp. at 1210.
36 Id. at 1211.
37 Id.
38 Id. (citing Rhymes v. Arrow Air, Inc., 636 F. Supp. 737 (S.D. Fla. 1986)).
cases had brought their actions in state court and had exclusively based them on state causes of action. In the three respective decisions, the courts held that the Convention provides only an exclusive remedy, and not an exclusive cause of action. These conclusions were also based in large part upon the "however founded" language found in Article 24(1) of the Convention.

It is important to note that only one Florida District Court has gone on record in favor of the view that the Convention's causes of action are exclusive. The issue has been brought up only once in the Eleventh Circuit Court of Appeals. On that occasion, the Eleventh Circuit Court expressly declined to address the issue.

Several other district courts across the country have

---

42 An exclusive "remedy" would allow for the availability of state law claims subject (at least) to the Convention's $75,000 liability limitation. See Alvarez, 756 F. Supp. at 555; Calderon, 738 F. Supp. at 486; Rhymes, 636 F. Supp. at 740.

43 See Alvarez, 756 F. Supp. at 554; Calderon, 738 F. Supp. at 486 (stating that the Convention, rather than supplying an exclusive cause of action, provides only an exclusive remedy for such actions); Rhymes, 636 F. Supp. at 740.

44 District Judge Scott, sitting in Velasquez v. Aerovias Nacionales de Colombia, S.A., 747 F. Supp. 670, 676 (S.D. Fla. 1990) held that Warsaw causes of action for death and personal injury were exclusive. The court heard the issue on plaintiffs' motion for remand to state court, and the court denied plaintiffs' motion. See Clark, 778 F. Supp. at 1210-11 (Only Judge Scott has held that the Convention provides an exclusive cause of action.).


46 See Clark, 778 F.2d at 1210; Alvarez, 756 F. Supp. at 552 (citing Floyd, which declined to speculate on the issue of whether Warsaw entirely preempts state law causes of action once its provisions are triggered by an accident within the meaning of Article 17). However, the Floyd court held that Florida law is preempted to the extent that it conflicts with the cause of action under the Convention. Floyd, 872 F.2d at 1481. This part of Floyd's holding became moot when the Florida Supreme Court held in a related case that plaintiff King had failed to state any claim for emotional distress under Florida law. See King v. Eastern Airlines, Inc., 557 So. 2d 574, 578 (Fla. Dist. Ct. App. 1987); Floyd, 872 F.2d at 1480 n.18. It is unclear whether any of the Floyd plaintiffs were able to sufficiently state an emotional distress claim under Florida state law.
also held that a Warsaw Convention cause of action is not exclusive. There are two such decisions from District Courts in the Tenth Circuit.

In *Hill v. United Airlines* plaintiffs alleged causes of action for defendant's intentional misrepresentation as to the causes of delays on their flight. Although the *Hill* court did not spell out the exact basis of plaintiffs' claims, plaintiffs' causes of action were at least partially based on state laws. Defendant argued that all of plaintiffs' causes of action which were not based on the Convention should be dismissed. The court held the Convention, as a treaty, preempts only local laws which conflict with it.

Eight years later in *Morgan v. United Air Lines, Inc.* the court followed *Hill*. *Morgan* considered the more limited procedural issue of whether state choice of law rules should be preempted in a Warsaw Convention case in favor of federal common law choice of law rules. The court held that in diversity cases under the Convention, state choice of law principles should be used. Its holding however, was based on *Hill's* reasoning. *Morgan* stated in dicta that "state law claims are not completely preempted unless they conflict with the terms of the [C]onvention."

In *In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985*, plaintiffs brought Warsaw Convention claims against the carrier along with state law claims against the

---

48 *Id.* at 1049 (alleging the tort of intentional misrepresentation, and defendant brought a motion to dismiss arguing that the suit was controlled by the Convention); see also *id.* at 1054 (alleging a conflict between plaintiff's cause of action for misrepresentation and the Convention's rules of liability by defendant, and arguing that plaintiffs' right to damages, if any, must be found within the terms of the Convention itself).
49 The court elaborated on this point in further detail. See *id.* There is no requirement or prerequisite that plaintiffs state their cause of action in terms of the Convention. It is important to note that the court did find that the actions were under the scope of the Convention. *Id.* at 1056.
51 *Id.*
52 *Id.* at 1051.
carrier's agents. One of the principal issues before the court was whether the District court could exercise pendent jurisdiction over plaintiffs' state law claims against the carrier's agents. Plaintiffs' state law claims were for negligent service and maintenance of the aircraft. The court held that causes of action under the Convention preempted any aspects of other actions, "however founded", to the extent that such actions are in conflict with the Convention.

The Gander court recognized that Plaintiffs' state claims would fall under the scope and limitations of the Convention because they were against agents of the carrier and thus exposed the carrier to secondary liability. It is significant that despite this acknowledgement, the court allowed the state law claims to go forward. By recognizing the state law claims, the court effectively held that the Warsaw cause of action was not exclusive and thus did not automatically preempt all state laws.

Several decisions within the Ninth Circuit have also expressed support for the restrictive view. Johnson v. American Airlines, Inc. involved a claim for damage to a casket, theft of personal property, and damage to human remains during shipment. The court held that the Ninth Circuit did not recognize Warsaw as the exclusive remedy for claims within its scope. This pronouncement was in dicta, however, as the court also found that plaintiffs

54 Id. at 1206.
55 Id. at 1221 n.43.
56 Id. at 1221. Almost all courts that have passed on the issue of whether a carrier's agents are entitled to the protection of the Warsaw Convention limitation have uniformly accorded agents such protection. See, e.g., Reed v. Wiser, 555 F.2d 1079 (2d Cir.) (agents protected by Warsaw Convention liability limit), cert. denied, 434 U.S. 922 (1977); In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 776 F. Supp. 710 (E.D.N.Y.), aff'd in part and rev'd in part on other grounds, 928 F.2d 1267 (2d Cir. 1991); Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611, 613 (S.D.N.Y. 1955) (agents protected). But see Pierre v. Eastern Airlines, Inc., 152 F. Supp. 486, 489 (D.N.J. 1957) (agents of carrier not protected by treaty limitation).
57 Gander, 660 F. Supp. at 1222 (holding that it would exercise pendent jurisdiction over plaintiff's state law claims against carrier's agents).
58 834 F.2d 721 (9th Cir. 1987).
59 Id. at 723.
failed to state a claim under state law.\textsuperscript{60}

In \textit{In re Mexico City Aircrash of October 31, 1979}\textsuperscript{61} the Ninth Circuit Court of Appeals expressed its support for the restrictive view through its comment in dicta on the "however founded" language of Article 24(1). In the words of the court: "[t]he best explanation for the wording of Article 24(1) appears to be that the delegates did not intend that [sic] the cause of action created by the Convention to be exclusive."\textsuperscript{62} \textit{Mexico City} involved claims by Plaintiffs on behalf of airline employees killed in the crash of a Western jetliner en route to Mexico City. The main issue before the court was whether plaintiffs' claims should be governed by California's workers' compensation statute or, alternatively, the Warsaw Convention.\textsuperscript{63} Thus, the court was not passing on the exclusivity of Warsaw's cause of action, but rather the exclusivity of California's workers' compensation statute in governing Plaintiffs' recoveries for the wrongful death of their decedents.\textsuperscript{64}

The Northern District of California followed \textit{Mexico City}

\textsuperscript{60} \textit{Id.}
\textsuperscript{61} 708 F.2d 400 (9th Cir. 1983).
\textsuperscript{62} \textit{Id.} at 414 n.25.
\textsuperscript{63} \textit{Id.} at 404. Plaintiffs' decedents were all flight attendants employed by the defendant carrier at the time of the subject crash. \textit{Id.} at 403. Decedents Haley and Tovar were on duty aboard the subject flight and plaintiffs did not contest the fact that these decedents were aboard the flight in their capacities as employees. \textit{Id.} at 417. Plaintiff Dzida did challenge defendant's motion to dismiss on the grounds that his decedent was not on board the flight in her capacity as an employee. \textit{Id.} at 463. Although all plaintiffs apparently pleaded causes of action under the Convention, only plaintiff Dzida made the argument that his decedent was not travelling as an employee. \textit{Id.} at 417. Without such an argument, the Convention, which applies only to passengers, could not serve as a ground for a cause of action. \textit{Id.} at 416 (citing 49 U.S.C. § 1502, art. 17).
\textsuperscript{64} See \textit{id.} at 418 (determining that the Convention preempts exclusivity of California's workers' compensation law). The three cases before the court were those of decedents Haley, Tovar, and Dzida. \textit{Id.} at 405. The court ruled that plaintiffs Haley and Tovar were not entitled to a Convention cause of action. \textit{Id.} at 417. The court, however, reversed the district court's summary dismissal of plaintiff Dzida's Warsaw claim and remanded the matter for a factual inquiry to determine whether decedent could be considered a passenger, as required in order to have an action under the Convention. \textit{Id.} at 417-18. Consequently, none of the three cases presented the issue of whether a Warsaw Convention cause of action was exclusive and preempted all state-law-based causes of action once triggered.
This case involved causes of action under Warsaw, the Death on the High Seas Act, and the general maritime law for injuries arising out of the mid-air separation of an aircraft's cargo door and a portion of its fuselage.

Plaintiffs contended that the Convention did not preempt their claim for punitive damages under the general maritime law. The Court held that although the Warsaw cause of action was not exclusive, the scheme of recovery contemplated by the Convention did not allow for punitive damages (regardless of the substantive legal basis for the claim) absent a showing of wilful misconduct.

Courts in the Second Circuit have wavered on the question of Warsaw Convention's exclusivity. To date, few cases within the Second Circuit have touched on the subject. Of those, only Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp., has gone along with the restrictive view. Plaintiffs' claims in Tokio were for contribution and indemnity, and did not directly involve the issue of the Convention's exclusivity. The court stated in dicta that the Convention's draftsmen had not intended for the Convention cause of action to be exclusive.

---

66 Id. at 1542-43.
67 Id. at 1548.
68 Id. at 1548 n.15.
69 Id. at 1550. The Court did not expressly decide whether the Convention allows the recovery of punitive damages where there has been a showing of wilful misconduct.
70 617 F.2d 936 (2d Cir. 1980). The Second Circuit cases which follow the expansive view are discussed in Part II. infra.
71 Id. at 938. Plaintiff's insured had paid out on passenger claims which had been based on both state tort law and the Convention. Id. at 938. One of the issues before the court was whether plaintiff's insured could be considered a settling tortfeasor under state law in order to be released from liability for contribution and indemnity. Id. at 941-42. The issue whether the passengers' Warsaw Convention's claims against plaintiff's insured were exclusive or not did not affect the Tokio court's holding. Id. The court decided that whether or not the Warsaw claims were exclusive, plaintiff was entitled to protection from contribution and indemnity claims as a settling tortfeasor because the passenger claims settled by plaintiff's insured had included state tort claims. Id.
72 Id. at 941-42. The court in Halmos v. Pan Am. World Airways, Inc., 727 F. Supp. 122 (S.D.N.Y. 1989), provided yet another clear example of the judicial
A cursory review of the cases espousing the restrictive view reveals certain commonalities. For instance, the majority explicitly rely on the "however founded" language of Article 24(1) of the Convention to allow plaintiffs to resort to state causes of action in cases governed by the Convention. Article 24 states:

(1) In cases governed by articles 18 [goods and luggage] and 19 [delays] 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 [personal injury and death] 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.

Specifically, these courts interpret the "however founded" language to mean that actions for damages can be founded on the Convention or some other law.

These courts also agree with the principle that the Convention does not create exclusive causes of action, but preempts any local law that is inconsistent with its provisions. This result is mandated by the Constitution's confusion surrounding the Convention's status in the internal law of the United States. The court in Halmos, without expressing its reasoning, held that the Convention did not create an independent cause of action. Id. at 123. This holding came a full eleven years after the Second Circuit itself had definitively decided that the Convention created an independent cause of action. See Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978); supra note 19 and accompanying text.

See, e.g., Alvarez, 756 F. Supp. at 555 (noting that courts that rely on comments of official Convention delegates that desired to eliminate all reference to laws of the various sovereign nations fail to give the proper import to the Convention's "however founded" language).

Warsaw Convention, supra note 1, art. 24.


See Floyd, 872 F.2d at 1482 n.33. Courts adhering to the restrictive view do not consider the mere availability of state causes of action to be inconsistent the Convention. Thus, plaintiffs in these courts could be able to prove and recover damages available under state law, albeit subject to the Convention's liability limit. In cases where wilful misconduct is proven, damages could vary significantly depending on which state's laws were chosen. See, e.g., id. at 1479 (noting that state law causes of action are not uniformly available, and plaintiffs which could avail themselves of state law would be able to pursue state law causes of
Supremacy Clause, which invalidates state laws that conflict with a treaty.\textsuperscript{77} Lastly, courts adopting the restrictive view all implicitly or explicitly hold that the availability of such causes of action is consistent with the scheme of recovery established by the Convention.\textsuperscript{78}

The net result of the restrictive view is that it allows for state-law-based causes of action to be plead in state courts. This opens the door to forum-shopping for state laws that often have the potential to permit recovery of more generous or additional elements of damages. In most cases, the potential difference in recoverable damages is tempered by the Convention's liability limitation.\textsuperscript{79} The limitation, however, does not apply in cases of wilful misconduct.\textsuperscript{80} In addition, as will be discussed in the next section, such liberties can produce widely divergent results for different plaintiffs within the same litigation.\textsuperscript{81}

Such results undermine the Warsaw system's objectives of uniformity and predictability.

\textbf{PART II. THE EXPANSIVE VIEW: THE RATIONALE AND SUPPORTERS OF AN EXCLUSIVE CAUSE OF ACTION UNDER THE CONVENTION}

There is no shortage of legal problems to be addressed

\textsuperscript{77} See U.S. Const., art. VI, cl. 2.

\textsuperscript{78} See, e.g., Floyd, 872 F.2d at 1485 (declining to hold that Warsaw Convention cause of action is exclusive, and stating that the issue was "whether an award of... damages [under a state law cause of action] would conflict with the scheme of liability provided for in the Convention").


\textsuperscript{80} Warsaw Convention, supra note 1, art. 25. For a discussion of the willful misconduct exception, see Ospina v. Trans World Airlines, Inc., 975 F.2d 35 (2d Cir. 1992), cert. denied, 113 S. Ct. 1944 (1993).

\textsuperscript{81} See infra Part II.
in international aviation disasters where the structure and limits of the Convention do not apply.\textsuperscript{82} In fact, the transnational melange of passengers aboard today's commercial passenger aircraft can sometimes set the stage for a proverbial "judicial nightmare" in the wake of an unfortunate air tragedy.\textsuperscript{83} Courts faced with such cases must apply a potpourri of local laws to victims of the same accident.\textsuperscript{84}

The principal benefits of the Warsaw Convention system are derived from its efforts to create a uniform body of substantive aviation liability law applicable regardless of the place of injury, the domicile of the passenger or shipper, or the nationality of the airline involved.\textsuperscript{85} The Convention itself indicates the necessity for uniformity and the desire for a comprehensive set of rules in those areas where the signatories intended the Convention to apply.\textsuperscript{86} Its interest in uniformity does not stop at the United States border, but applies within the United States as well.\textsuperscript{87} Uniform rules of law allow carriers and passengers to be somewhat certain of their legal relationship with each other and enable them to act accordingly.\textsuperscript{88}

Several courts have explicitly recognized that the availability of state causes of action threatens the uniformity envisioned by the Convention.\textsuperscript{89} The problems can be

\textsuperscript{82} See Reed v. Wiser, 555 F.2d 1079, 1091-92 n.18 (2d Cir.), cert. denied, 434 U.S. 922 (1977); infra notes 86-87 and accompanying text.

\textsuperscript{83} See, e.g., Forsyth v. Cessna Aircraft Co., 520 F.2d 608 (9th Cir. 1975); In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975) (involving 203 suits by representatives of 337 decedents based mostly on products liability claims against American aircraft manufacturer of Turkish-owned aircraft that crashed in France; decedents on board were from 24 countries and 12 states of the United States, and claimants were from an additional two countries).

\textsuperscript{84} See Reed, 555 F.2d at 1091-92 n.18.

\textsuperscript{85} See Reed, 555 F.2d at 1090-91 (citing Committee Hearings on Adoption of the Hague Protocol); see supra note 11.

\textsuperscript{86} Floyd, 872 F.2d at 1488.

\textsuperscript{87} See Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, Inc., 737 F.2d 456, 459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); Floyd, 572 at 1488.

\textsuperscript{88} Reed, 555 F.2d at 1091.

\textsuperscript{89} See, e.g., In re Air Crash at Lockerbie, Scotland on Dec. 21, 1988, 928 F.2d 1267, 1275 (2d Cir.) (stating that it could not see how the existence of state law
many-fold. For example, carriers could be exposed to fifty separate and distinct causes of action for personal injury in this country alone.\textsuperscript{90} In addition, the possibility of asserting both federal and state causes of action for the same injury could create a situation where different procedural and substantive laws would apply to the same individual's case depending on the way the particular plaintiff chooses to structure his complaint.

The case of \textit{Rhymes v. Arrow Air, Inc.},\textsuperscript{91} provides a good illustration. In \textit{Rhymes} the court held that an action under the scope of the Convention could be brought in one of four ways: 1) plaintiff could bring his complaint in federal court on the basis of diversity jurisdiction; 2) plaintiff could file in federal court and allege his cause of action under the Convention alone, thereby triggering the court's federal question jurisdiction; 3) plaintiff could bring the action in state court under both state law and Convention causes of action; and 4) plaintiff could bring the action in state court based exclusively on state law.\textsuperscript{92}

In \textit{Morgan v. United Airlines, Inc.}\textsuperscript{93} the court dealt with the very choice of law problems alluded to in \textit{Rhymes}. This case made a distinction between the choice of law rules which would apply to cases\textsuperscript{94} brought under diversity jurisdiction,\textsuperscript{95} and those brought under the court's

\textsuperscript{90} This would be the case if courts around the country allowed state causes of action to proceed, as some do now. \textit{See supra} Part I. This raises the distinct possibility that a carrier could expose itself to separate and distinct causes of action in each state that allowed state causes of action to be asserted. \textit{See also} \textit{Lockerbie}, 928 F.2d at 1275 (noting that on airline's liability could vary widely based on where plaintiffs resided or chose to sue).

\textsuperscript{91} 636 F. Supp. 737 (S.D. Fla. 1986).

\textsuperscript{92} \textit{Rhymes}, 636 F. Supp. at 741.

\textsuperscript{93} 750 F. Supp. 1046 (D. Colo. 1990).

\textsuperscript{94} The court's reference was to actions falling under the scope of the Convention. \textit{See id.} at 1051-53.

\textsuperscript{95} State-law-based claims would rely on the court's diversity jurisdiction. \textit{Id.} at 1052.
federal question jurisdiction. The court held that Colorado's choice of law principles should be used in actions based on diversity, and implied that federal choice of law principles should be used in actions involving federal question jurisdiction. Thus, the availability of state law causes of action disturbs the uniformity of remedies available in actions falling under the Convention's scope. The availability of state law causes of action would also lead to difficulties in choosing the procedural law to be applied in the action.

Other important aspects of litigants' substantive rights could also be decided differently in cases arising out of the same disaster. For example, a court could agree to give a jury trial to plaintiffs who had plead a cause of action under the Convention while denying it to those who had not. State causes of action could also provide varying measures of damages or varying specifications of persons entitled to recover damages.

In view of the difficulties encountered with concurrent state and federal causes of action, several courts have concluded that the Convention is to be both the exclusive avenue of recovery and the exclusive remedy in the areas

---

96 Id.
97 Id. at 1052-53. Courts favoring the exclusivity of the Convention cause of action have seen the possibility of differing jurisdictional bases as a problem. See, e.g., Lockerbie, 928 F.2d at 1275 (commenting that the use of state substantive laws to construe the Convention coupled with an assertion of diversity jurisdiction could result in the inconsistent application of law to the claims before it).
98 Lockerbie, 928 F.2d at 1275. In a single case involving Convention-created and state-created causes of action that each allowed recovery for different elements of damages, there could be two distinct bodies of substantive law applicable to the same case. Id. at 1275. This would present the further problem of whether to apply federal choice of law rules to the Convention causes of action alone while applying state choice of law rules to the state causes of action at the same time; or applying the forum state's choice of law rules to all causes of action regardless of whether they are state-based or Convention-based, thereby treating the whole case as one arising under diversity jurisdiction. Id. at 1276.
100 See In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 414 n.25 (9th Cir. 1983).
101 The courts holding that the Warsaw Convention is only an exclusive remedy favor the restrictive view.
where it governs. In In re Air Disaster at Lockerbie the issue before the Second Circuit was whether plaintiffs could bring claims for punitive damages against the carrier. The court considered whether such claims could be recognized under state or federal law, and thus reached the issue of whether state law claims are preempted in actions governed by the Convention.

In the first part of its analysis, the court concluded that the Convention did not preserve state causes of action. It then went on to hold that the Convention impliedly preempts state law because its subject matter demands a degree of uniformity that would be frustrated by allowing state regulation in that area. The court reasoned that such regulation cannot fit within the Warsaw system, since state statutes can differ significantly as to the elements, measure, and distribution of damages.

Another recent case within the Second Circuit has also held that the Warsaw cause of action is exclusive. In Sassiouni v. Olympic Airways plaintiff claimed damages for being denied boarding due to the alleged over booking of his flight. The court held that plaintiff's cause of action was governed by Article 19 of the Convention, and that the Convention's cause of action provided the exclusive remedy for plaintiff's claim.

The Fifth Circuit has also come down on the side of the Convention's exclusivity. The case of Boehringer-Mannheim

---

102 See generally Floyd, 827 F.2d at 1482 n.33 (summarizing several cases that have addressed the issue of whether Warsaw is the exclusive cause of action in occurrences falling under its scope).
103 Lockerbie, 928 F.2d at 1269-70.
104 Id. at 1273.
105 Id. at 1273-74.
106 Id. at 1274-75.
107 Id. at 1278.
109 Id. at 539.
110 One earlier decision within the Second Circuit also supports the expansive view. See In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982) (holding that the Convention specifically and exclusively governs all claims for damages arising out of the death or injury of a passenger engaged in international air transportation), aff'd, 705 F.2d 85 (2d Cir.), cert. denied, 464 U.S. 845 (1983).
Diagnostics, Inc. v. Pan American World Airways, Inc.\textsuperscript{110} involved a shipper's action against the carrier for damage to cargo.\textsuperscript{111} The shipper brought a negligence action under Texas law coupled with an action based on the Convention.\textsuperscript{112} The Fifth Circuit denied plaintiff's claims for attorneys' fees, which were allowable under Texas law, and held that "the Warsaw Convention creates the controlling cause of action... [and] preempts state law in the areas covered."\textsuperscript{113}

In Abramson v. Japan Airlines Co., Ltd., the Third Circuit implied that it would hold that the Convention's cause of action is exclusive.\textsuperscript{114} This implication was merely dicta due to the fact that plaintiff's action did not constitute an accident within the meaning of the Convention and thus fell outside its scope.\textsuperscript{115}

The Third Circuit followed Abramson's reasoning in Onyeanusi v. Pan American World Airways, Inc. Onyeanusi involved a claim for damage to, and delayed arrival of, human remains.\textsuperscript{116} Plaintiff argued that the Convention did not apply because the human remains did not constitute "goods" under Article 1(1) of the Convention.\textsuperscript{117} The Court ruled that the Convention applied to plaintiff's claim, and that where the Convention applies, it is the exclusive remedy for actions against air carriers.\textsuperscript{118}

One case within the First Circuit has squarely addressed the issue. Diaz Lugo v. American Airlines, Inc.\textsuperscript{119} involved a passenger's claims arising from injuries sustained when a

\begin{itemize}
\item \textsuperscript{110} 737 F.2d 456 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985).
\item \textsuperscript{111} Id. at 457-58.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. at 459.
\item \textsuperscript{114} 739 F.2d 130 (3d Cir. 1984) (stating that actions could be brought under local law when there had been no "accident" within the meaning of the Convention, and that courts had similarly concluded that the Convention cause of action is only exclusive when it applies), cert. denied, 470 U.S. 1059 (1985).
\item \textsuperscript{115} Id. at 135.
\item \textsuperscript{116} 952 F.2d 788 (3d Cir. 1992).
\item \textsuperscript{117} Id. at 790.
\item \textsuperscript{118} Id. at 793.
\item \textsuperscript{119} 686 F. Supp. 373 (D.P.R. 1988).
\end{itemize}
flight attendant spilled coffee on her. The court ruled that the occurrence constituted an "accident" within the meaning of the Convention, thus triggering its terms.\textsuperscript{120} The court went on to dismiss those claims grounded in local law after holding that the Convention's limitation and theory of liability were exclusive where the Convention applied.\textsuperscript{121}

The United States District Court for the Northern District of Illinois has also had occasion to pass on the issue of Warsaw's exclusivity. In \textit{Harpalani v. Air India, Inc.} the court dismissed those claims that were based on theories other than the Convention.\textsuperscript{122} The court held that the Convention provides the exclusive remedy and preempts other state or federal law claims.\textsuperscript{123} The Warsaw Convention claims raised in this case were for denied boarding compensation, which the Seventh Circuit held was not compensable under the Convention in a later unrelated case.\textsuperscript{124}

One decision from the Southern District of Florida also aligns itself with the exclusivity view. \textit{Velasquez v. Aerovias Nacionales de Colombia, S.A.} involved plaintiff's motion to remand his action back to state court.\textsuperscript{125} Defendant Avianca's argument in opposition was that the actions were properly removable to the federal court because the Convention provided the sole cause of action under which the victim of an international air disaster could proceed.\textsuperscript{126} Plaintiff grounded his causes of action strictly in terms of the Florida Wrongful Death Act\textsuperscript{127} and made no reference to a federal cause of action in his complaints.\textsuperscript{128}

\textsuperscript{120}\textit{Id.} at 375.

\textsuperscript{121}\textit{Id.} at 376. The Convention applied in plaintiff's case because all of the conditions for a cause of action under Article 17 had been met. \textit{Id.}

\textsuperscript{122}622 F. Supp. 69 (N.D. Ill. 1985).

\textsuperscript{123}\textit{Id.}


\textsuperscript{125}747 F. Supp. 670 (S.D. Fla. 1990).

\textsuperscript{126}\textit{Id.} at 672.

\textsuperscript{127}FLA. STAT. ANN. §§ 768.16-27 (West 1993).

\textsuperscript{128}\textit{Velasquez}, 747 F. Supp. at 671.
The Velasquez court went on to recognize the Convention cause of action as exclusive. The court also noted that actions under the scope of the Convention could be brought in either state or federal court. Unlike the decisions made in other cases in the Southern District of Florida, however, the court explicitly stated that a Warsaw action brought in state court could be removed to federal court at the defendant's option.

One recent decision in the Northern District of California illustrates that the controversy over Warsaw's exclusivity is far from resolved within the Eleventh Circuit. In Jack v. Trans World Airlines the court came to the conclusion that the Convention's cause of action is exclusive based on its review of the 1928 working draft drawn up by CITEJA. The court further noted that Article 24(1) would have little purpose if it meant merely that the Convention's conditions and limits preempt inconsistent provisions of local law.

In sum, courts adhering to the exclusivity view agree that it is contrary to the Convention's liability scheme to allow plaintiffs to assert state-based causes of action in cases falling within the scope of the Convention. It is important to remember however, that the Convention

---

129 Id. at 676.
130 Id. at 677.
131 Id.
132 820 F. Supp. 1218 (N.D. Cal 1993). For a discussion of the Convention's drafting history, see supra notes 5-6. Most of the Warsaw Conference delegates had been members of CITEJA, and had participated in the Convention's drafting. Jack, 820 F. Supp. at 1224. The Court found that CITEJA's draft intended to require that suits be brought "on the basis of the Convention." Id. at 1223.
133 See, e.g., Lockerbie, 928 F.2d at 1276. The problem of allowing state law causes of action does not seem especially grave if one looks solely to the orderliness inherent in the Convention's presumption of airline liability and the limitation on recovery; however, this surface unity ignores both the lurking legal chaos and huge expenditure of time and money in litigation over choice of law, which would be inevitable if conflicting laws from various states were available. Id.; see also Boehringer, 737 F.2d at 459 (Convention impliedly preempts state causes of action); Velasquez, 747 F. Supp. at 676 (senseless to hold that the Convention allows separate state causes of action to supersede its exclusivity given its concern for uniformity).
does not set forth such particulars as the elements of damages recoverable under its causes of action. The Convention’s provisions must in effect be supplemented by the courts. Several of the courts that have considered this problem have held that federal common law should decide such issues.

The Convention’s goal of uniformity would clearly be advanced by establishing the Warsaw cause of action as exclusive. An additional solution is also possible if we borrow principles from U.S. maritime jurisprudence. Such a solution is discussed in the next section.

135 The Convention left certain matters such as the elements of damages to the municipal laws of member countries. See Lockerbie, 928 F.2d at 1274. This reference to local law refers to the national laws of member states and not the laws of a nation’s subdivisions. See id. (citing Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 855 (2d Cir.), cert. denied, 382 U.S. 816 (1965)). This scheme is also reflected in Article 28 of the Convention, which has been interpreted by United States courts as a rule of general competence. It gives jurisdiction to courts in this country and leaves the designation of an appropriate court in the United States up to United States municipal law. See Georgette Miller, Liability in International Air Transport 291 (1977).

136 See supra note 135.

137 The Convention is not a comprehensive and exhaustive code of legal rules that can be applied in exactly the same way in each member state. See, e.g., Block v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967) (stating that the Convention must be read in the context of the national legal systems of the member states), cert. denied, 392 U.S. 905 (1968); In re Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463 (D.D.C. 1985) (commenting that the Convention is not concerned with reciprocal treatment of nationals among member states, but rather the unification of rules relating to international air transportation), aff’d, 829 F.2d 1171 (D.C. Cir. 1987), cert. denied, 485 U.S. 986 (1988). Thus, the Convention does make room for member states to apply their own national laws. Such laws, however, should be national in breadth rather than being derived themselves from the principles of law of the member state’s subdivisions. See Lockerbie, 928 F.2d at 1274 (citing Mertens, 341 F.2d at 855).

Several courts have been faced with the problem of defining the substantive elements of damages recoverable under Convention-created causes of action. See, e.g., In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 415 (9th Cir. 1983) (finding that the Convention created a cause of action for wrongful death and left the questions of who would be entitled to assert the cause of action and their respective rights up to future courts to decide; suggesting that future courts refer to other federal statutes to fashion a federal common law); see also Lockerbie, 928 F.2d at 1278-79 (finding that Convention causes of action should be determined by reference to federal common law rather than a federal adoption of state law due to the need for national uniformity); In re Korean Air Lines Disaster of Sept. 1, 1983, 704 F. Supp. 1135, 1154 (D.D.C. 1988) (deciding that plaintiff’s claims for jury trial under Convention by reference to federal common law).
PART III. GETTING PAST THE DEBATE OVER AN EXCLUSIVE CAUSE OF ACTION: THE SEARCH FOR SOLUTIONS IN THE GENERAL MARITIME LAW OF THE UNITED STATES

Maritime jurists, like their aviation counterparts, have long been concerned with achieving uniformity of substantive laws and remedies.\textsuperscript{138} Thus, courts have traditionally recognized that it is necessary to apply federal maritime law to all maritime torts\textsuperscript{139} to preserve the uniformity of remedies and substantive law in admiralty.\textsuperscript{140} Uniformity provides the justification for exclusive federal admiralty jurisdiction.\textsuperscript{141}

The general maritime law of the United States is applicable to all non-statutory actions cognizable in admiralty.\textsuperscript{142} As a result, the substantive law applicable to maritime actions is the general maritime law, the rules of which are developed exclusively according to federal law.\textsuperscript{143} This applicability is true regardless of whether the action is brought in state or federal court and irrespective of whether the claim has been characterized in terms of state or federal law.\textsuperscript{144}

State courts are allowed to hear \textit{in personam} maritime

\textsuperscript{138} See, \textit{e.g.}, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 211 (1986) (holding that the application of state laws to maritime wrongful death actions would be as damaging to their uniformity as it is illogical).

\textsuperscript{139} The current test for whether an event triggers federal maritime law is discussed in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253-61 (1972).

\textsuperscript{140} Hall v. Zambelli, 675 F. Supp. 1023, 1025 (S.D.W. Va. 1988). Courts apply federal law regardless of how plaintiffs characterize the tort under the law. \textit{Id.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} Chelentis v. Luckenbach Steamship Co., 247 U.S. 372, 382 (1918).


\textsuperscript{144} See Chelentis, 247 U.S. at 382; Keefe, 867 F.2d at 1321 (holding that the same principles would have governed outcome of a case now in federal court if it had remained in state court); \textit{Exxon}, 767 F. Supp. at 1514.
causes of action by virtue of the "savings to suitors" clause found in 28 U.S.C. § 1333.\textsuperscript{145} Under the "savings to suitors" clause, rights and claims allowed by maritime law can be enforced through a remedy at law in tort or contract.\textsuperscript{146}

It is important to note, however, that the "savings to suitors" clause does not affect the application of substantive maritime law.\textsuperscript{147} Thus, a plaintiff cannot elect to have the defendant's liability measured by common law standards other than those of the maritime law.\textsuperscript{148} In the words of the United States Supreme Court: "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the states conform to governing federal maritime standards."\textsuperscript{149} Remedies created by state statutes are not enforceable in state court actions under the "savings to suitors" clause if the legislation contravenes an essential purpose expressed by an act of Congress, creates a material prejudice to the characteristic features of general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.\textsuperscript{150}

By contrast, aviation plaintiffs choosing to word their actions under state law can apply state substantive law to their claims in restrictive states.\textsuperscript{151} In those jurisdictions, state laws can provide their own different elements of damages\textsuperscript{152} subject only to the limitation that such recoverable damages not be inconsistent with the terms of the Convention.\textsuperscript{153} As discussed in Section I, this general

\textsuperscript{145} Offshore Logistics, 477 U.S. at 222-23.
\textsuperscript{146} Chelentis, 247 U.S. at 384.
\textsuperscript{147} Exxon, 767 F. Supp. at 1513.
\textsuperscript{148} Id.; see also In re Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990).
\textsuperscript{149} Offshore Logistics, 477 U.S. at 222-23.
\textsuperscript{151} See supra Part I.
\textsuperscript{152} Id.
\textsuperscript{153} Courts favoring the restrictive view hold that the availability of state law
guideline leaves far too much leeway for state-based causes of action to be asserted and ultimately contravenes the Convention's quest for uniformity.

Plaintiffs in federal maritime actions, like their counterparts in actions under the scope of the Convention, have sought to work their way around the strictures of federal law by wording a complaint strictly in terms of state law. In *Hess v. United States* for example, plaintiff brought an action for a maritime tort under the Oregon wrongful death statute.\(^{154}\) The Supreme Court held that the trial court was required to apply maritime law because tort actions for injury or death occurring upon navigable waters are within the exclusive reach of the maritime law.\(^{155}\)

Likewise, the Warsaw Convention should at least be recognized as the exclusive source of a plaintiff's right of recovery in actions under the scope of the Convention. Courts could apply federal common law crafted for the Convention regardless of whether the claims are worded in terms of state law or the Convention; and regardless of whether plaintiffs choose a federal district court or state court as a forum. This "reverse-Erie" principle could be borrowed from the general maritime law and applied to all actions governed by Warsaw.

Such a system would achieve the goals of uniformity that are so clearly a part of the Convention's raison d'être. This system also would eliminate the need for the current legal and philosophical battle over whether the Warsaw cause of action should be exclusive. Both state and federal courts would be bound to decide Warsaw cases based

---

\(^{154}\) 361 U.S. 314 (1960).

\(^{155}\) *Id.* at 318 n.7.
upon the development of a federal common law crafted to keep in line with the goals set forth in the Convention.

CONCLUSION

Considerable confusion surrounds the role of the Warsaw Convention within the United States' federal justice system. This confusion threatens to unravel the uniformity sought by the Convention's framers. Courts in this country should recognize the Convention as the exclusive source of a claimant's right of recovery and endeavor to create a system of federal common law principles that would clearly set forth a claimant's substantive and procedural rights. In the alternative, Congress should enact legislation to achieve the same ends.

State law causes of action cannot be allowed to exist independently within a system designed for uniformity. If they are accorded a place, they should only be allowed as a cosmetic alternative to pleading Warsaw causes of action. "Reverse-Erie" principles should apply when state-

---

156 The Convention can only be the exclusive source of a claimant's right to recover in actions under the scope of the Convention. Actions outside the scope of the Convention are clearly subject to state law. See supra note 17.

157 See supra note 135 for a discussion of decisions that have suggested the use of, or used, federal common law in an effort to create a uniform system of substantive and procedural rights to be applied in actions under the Convention. The United States Supreme Court has not addressed this issue with regard to the Convention. Id. The Court, however, has recommended the creation of federal common law to fill substantive gaps in the general maritime law. See Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (using federal common law principles to hold that a cause of action existed under the general maritime law for wrongful death; and determining that substantive questions such as the measure of damages and persons entitled to recover should be answered by creating federal common law that looked to federal maritime statutes for guidance).

158 Such legislation could take the form of implementing legislation that some courts have found to be sorely lacking in the Convention. See, e.g., Choy v. Pan American Airways, Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y.) (stating that the court did not understand how the Convention could create a cause of action without statutory assistance that it had not yet received).

159 The Supreme Court itself has suggested that aviation tort cases might benefit from uniform substantive and procedural laws, and that such actions should also be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases. See Executive Jet Aviation, Inc. v. Ohio, 409 U.S. 249 (1972).
based causes of action are pleaded in state court. If the state of the law remains otherwise, the courts that continue to allow the independent use of state law will create a system of recovery in which fortuitous results will be more common than predictable ones.