The Misleading Legacy of Tseng: Removal Jurisdiction under the Montreal Convention

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MONTREAL CONVENTION

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I. INTRODUCTION

Following a highly debated and often inconsistent history in the lower federal courts, in 1999, the Supreme Court proclaimed that the Warsaw Convention created an exclusive cause of action and provided the sole remedy to passengers injured in international air transport.¹ That same year, the International Civil Aviation Organization (ICAO) promulgated the Montreal Convention, establishing unified rules to replace the various agreements of the Warsaw System in international aviation regulation.² However, the Montreal Convention represented a stark shift in policy for the international aviation legal regime. Whereas the Warsaw Convention was birthed at the advent of the aviation industry and reflected States’ interests in promoting industry growth by limiting carrier liability, the Montreal Convention codified a new emphasis on protecting passenger rights.³ While much of the language of the two treaties is identi-

³ See discussion infra Part III.B.
cal, and while the Montreal Convention has attempted to clarify ambiguities in the Warsaw Convention, questions still remain as to the scope of actions and remedies available under the Montreal Convention. One subtle yet critical issue arising from the debate pertains to the jurisdiction of federal courts. In particular, federal courts have struggled to interpret the language of *El Al Israel Airlines, Ltd. v. Tseng* in the face of a plaintiff's motion to remand a case originally removed from state court on the basis of complete preemption. Complicating the matter is the fact that the United States now operates under a hybrid system in which the Montreal Convention has superseded the Warsaw Convention in most, but not all, cases. Consequently, courts that viewed *Tseng* as opening the door for removal of claims arising out of international air carriage under the older Warsaw System have carried this interpretation over to the modernized Montreal Convention. However, other courts narrowly construe the scope of the treaties, allowing passengers to bring artfully pleaded state law claims in lieu of federal claims, thereby avoiding the conditions and limits of the treaties and remaining in state court.

This article attempts to resolve the dispute. Part II presents a discussion of preemption, distinguishing between the effects of conflict preemption and the "complete preemption" doctrine. Part III introduces the Warsaw and Montreal Conventions, briefly comparing their historical development and the parallel provisions of the two treaties. Part IV reviews the Supreme Court's landmark decision *El Al Israel Airlines, Ltd. v. Tseng*, while Part V illustrates the divergent interpretations of the Conventions in light of *Tseng*. Finally, Part VI attempts to reconcile the split of authority regarding complete preemption in international aviation litigation in favor of the passenger by focusing on the provisions of the newer Montreal Convention and its passenger-centric themes.

II. THE FEDERAL PREEMPTION DOCTRINE

A. FEDERAL LAW AS THE "SUPREME LAW OF THE LAND"

The basis for the preemption doctrine is the Supremacy Clause of the Constitution, which states:

4 525 U.S. 155.
5 See discussion infra Part III.B.
6 See discussion infra Part V.B.
7 See discussion infra Part V.A.
By virtue of this provision, every federal law has the power to preempt state law. But this provision is not as broad-sweeping as it may seem. Courts confronted with the task of applying both state and federal law are directed to disregard state law in favor of the federal rule only if the two are in direct conflict—that is, only where applying state law would necessitate violating federal law. Thus, scholars have asserted that the Supremacy Clause actually provides three separate rules of judicial interpretation.

First, the rule of applicability makes valid federal law part of the same body of jurisprudence as state law. Second, the rule of priority declares that within that body of jurisprudence federal law is "supreme." Finally, "a global non obstante provision" directs "courts not to apply the traditional presumption against preemption "in determining whether federal law contradicts state law."

The canonical interpretation of the Supremacy Clause was originally delivered in Osborn v. Bank of the United States, in which the Supreme Court held that a claim "arises under" federal law so long as a question of federal law "forms an ingredient of the original cause." But federalism concerns caution against preemption of state laws unless Congress has demonstrated its in-
tent for a statute to have such effect. Courts have struggled to determine when and where this intent truly exists, as the next section reveals.

B. THE EVOLUTION OF FEDERAL PREEMPTION

Early preemption jurisprudence generally held that congressional action in a field automatically preempted all state law in that field. In making this determination, courts looked to the scope of the statutory scheme to determine the breadth of the "field" Congress intended to occupy. The broader a court's interpretation of a field, the more state law was displaced by federal law and vice versa. Field preemption could be expressed or implied by Congress, and courts even held deliberate silence to constitute Congress's intent to prohibit state legislation of a particular subject. Thus, courts were initially unwilling to apply state law "in coincidence with, as complementary to or as in opposition to, federal enactments." Since every act of Congress necessarily inhabits some "field," federal legislation was seen as having an exclusive effect which "ipso facto supersede[d] existing state legislation on the same subject." Gradually, the Court's approach shifted from merely defining the field Congress intended to occupy (with a general presumption of preemption) to conducting an investigation as to whether Congress actually intended legislation to have a preemptive effect on state law. Eventually, this inquiry was codified as a two-pronged test through which the Court found federal law preempted state law where (1) Congress intended

17 Varville Furniture, 237 U.S. at 604 ("[S]tate law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.").
19 S. Ry., 296 U.S. at 446; see also Carter v. Carter Coal Co., 298 U.S. 238, 299–300 (1936) (recognizing that congressional power to regulate local interests automatically denies the states that same power).
such result (2) but limited to the extent state law actually conflicted with federal law.\textsuperscript{22} Under the first prong, congressional intent to preempt state law may still be expressly stated or may be inferred by the court.\textsuperscript{23} However, the strong presumption against preemption has been a common maxim of the Court.\textsuperscript{24} Under the second prong, state law is considered to conflict with, and is therefore nullified by, federal law either when "compliance with both federal and state regulations is a physical impossibility"\textsuperscript{25} or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{26} It should be noted that congressional intent is antecedent to statutory conflict in the Court’s preemption analysis. Indeed, the Court noted, "[W]e have consistently emphasized that the first and fundamental inquiry in any preemption analysis is whether Congress intended to displace state law."\textsuperscript{27} Accordingly, neither the absence nor the presence of state law on a subject has been found to support an implication of preemption by subsequent federal legislation.\textsuperscript{28} Likewise, the comprehensive nature of federal legislation is not dispositive as to the preemptive intent of Congress.\textsuperscript{29}

C. The “Complete Preemption” Doctrine

Unlike the substantive preemption described above, “complete preemption” is a facially procedural doctrine.\textsuperscript{30} Whereas a court conducts substantive preemption analysis to determine when and whether to apply federal law in lieu of state law on the

\begin{footnotes}
\item[23] Nelson, supra note 9, at 226–27.
\item[26] Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); see also Perez v. Campbell, 402 U.S. 637, 652 (1971) (The Supremacy Clause invalidates “any state legislation which frustrates the full effectiveness of federal law.”).
\item[27] Wardair Can., Inc. v. Fla. Dep’t of Revenue, 477 U.S. 1, 6 (1986).
\item[30] Lister v. Stark, 890 F.2d 941, 943 n.1 (7th Cir. 1989) ("The use of the term 'complete preemption' is unfortunate, since the complete preemption doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine.").
\end{footnotes}
same subject, complete preemption analysis is conducted to de-
termine whether a federal court has jurisdiction to hear claims
removed from state court. The plaintiff, as master of the com-
plaint, may choose the forum in which to bring his claims and
may assert whichever claims he chooses. In fact, it is com-
monly recognized that trial courts in a plaintiff’s home state pro-
vide the plaintiff with the most sympathetic recourse for
justice. To combat this “home-field advantage,” a defendant sued in state court may remove the case to federal court, but
only upon showing that the federal court had original jurisdic-
tion over the case in the first place. Since state courts are
courts of general jurisdiction whose ability to hear cases runs
concurrent to that of federal courts, the mere preemption by
federal law of some of the claims in a plaintiff’s complaint does
not automatically provide a basis for removal jurisdiction. Fur-
thermore, under the well-pleaded complaint rule, defendants
cannot generally remove a case by asserting federal subject
matter jurisdiction as a defense.

Complete preemption, however, allows the defendant to re-
move a case—notwithstanding the plaintiff’s jurisdictionally in-
sufficient pleading—on the basis that the claims are
“necessarily” and “exclusive[ly]” federal. In such cases, a civil
defendant will invoke complete preemption as an affirmative de-
fense in order to justify removal of his case to a “friendlier” fed-
eral forum. The result is that the federal “court will
recharacterize the plaintiff’s state cause of action as a federal

32 The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913); 14B CHARLES
ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND
PROCEDURE § 3721 (4th ed. 2009).
(10th Cir. 1973) ("It is for the plaintiffs to design their case as one arising under
federal law or not, and it is not within the power of the defendants to change the
character of plaintiffs’ case by inserting allegations in the petition for removal.").
ing WRIGHT, MILLER & COOPER, supra note 32, § 3721).
36 Id.; WRIGHT, MILLER & COOPER, supra note 32, § 3522.
37 Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (To be sure, a plaintiff
“may avoid federal jurisdiction by exclusive reliance on state law.”).
38 Id. at 398–99.
39 Kazucky v. Sw. Airlines Co., 109 F.3d 349, 351 (7th Cir. 1997) (“When federal
law creates an exclusive remedy for some wrong, displacing any remedy that the
states may have created for it, a suit to redress that wrong necessarily arises under
federal law.”).
40 See supra note 34 and accompanying text.
claim for relief, making removal proper on the basis of federal
question jurisdiction.”

1. Finding Complete Preemption

Although the procedural effect of complete preemption is
quite well-settled, courts are widely divided on the substantive
issue of finding complete preemption where state and local laws
run concurrently. In Metropolitan Life, the Supreme Court ar-
ticulated that the “touchstone” for finding complete preemp-
tion is “the intent of Congress.” It further noted:

[O]ur decision should not be interpreted as adopting a broad
rule that any defense premised on congressional intent to pre-
empt state law is sufficient to establish removal jurisdiction. The
Court holds only that removal jurisdiction exists when, as here,
“Congress has clearly manifested an intent to make causes of ac-
tion . . . removable to federal court.” In future cases involving other
statutes, the prudent course for a federal court that does not find
a clear congressional intent to create removal jurisdiction will be
to remand the case to state court.

The resulting test—whether Congress intended a claim to be
removable—created ambiguity as to the scope of the complete
preemption doctrine that lasted for more than fifteen years.

However, the Court recently changed its focus from the “remov-
ability” of a claim to whether Congress intended that a federal
cause of action be exclusive. Thus, “[w]hen [a] federal statute
completely pre-empts [a] state-law cause of action, a claim which

42 WRIGHT, MILLER & COOPER, supra note 32, § 3722.2 (concluding that the wide “divergence among lower federal courts as to the contexts in which com-
plete preemption is applicable . . . indicated that the Supreme Court cases on the
subject had failed to create clear rules for identifying completely preempted
claims”).
44 Id. at 67–68 (Brennan, J., concurring).
45 Compare, e.g., Ry. Labor Executives Ass’n v. Pittsburgh & Lake Erie R.R. Co.,
858 F.2d 936, 940 (3d Cir. 1988) (complete preemption applies where Congress
not only preempts state law, but also supplies a replacement cause of action
through which plaintiffs might seek redress for the alleged injury), and Willy v.
Coastal Corp., 855 F.2d 1160, 1165 (5th Cir. 1988) (same), with, e.g., Deford v.
Soo Line R.R. Co., 867 F.2d 1080, 1084–85 (8th Cir. 1989) (the complete pre-
emption rule turns on the breadth of the preemptive provision), and Graf v. El-
gin, Joliet & E. Ry. Co., 790 F.2d 1341, 1347 (7th Cir. 1986) (same).
46 Beneficial Nat’l Bank v. Anderson, 539 U.S. 1, 6–8 (2003); see also Gil
comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law" and is removable under 28 U.S.C. § 1441.47

2. Federalism Concerns Arising From Complete Preemption

"Congress's mere act of creating a federal right and eliminating all state-created rights in no way suggests an expansion of federal jurisdiction so as to wrest from state courts the authority to decide questions of pre-emption under the [relevant federal statute]."48 While "the question respecting the extent of the powers actually granted [to the federal government] is perpetually arising, and will probably continue to arise,"49 the Court has very narrowly construed federal legislation related to "traditional state interest[s]."50 Indeed, the Court has limited the regular application of the complete preemption doctrine to the fields of ERISA, NLRA, NBA and Tribal claims.51 Yet recent application of the complete preemption doctrine has resulted in sweeping elimination of passengers’ state law claims against international air carriers, including claims that admittedly fall beyond the scope of the governing national law.52 Specifically, the Supreme Court was persuaded that the Warsaw Convention's "comprehensive scheme of liability rules" and "emphasis on uniformity" preempted a plaintiff's claims for psychosomatic and psychological injuries arising out of an invasive security search.53

As noted by University of Michigan Assistant Professor of Law Gil Seinfeld, removal jurisdiction "helps prevent state court hostility to claims grounded in federal law from undermining the purposes these laws are intended to serve, and it helps to secure uniformity in the interpretation and application of federal

47 Anderson, 539 U.S. at 8.
48 Id. at 19 (Scalia, J., dissenting)
50 E.g., Head v. N.M. Bd. of Exam'rs in Optometry, 374 U.S. 424, 445 (1963) (recognizing protection of consumers as an area of traditional state concern).
51 WRIGHT, MILLER & COOPER, supra note 32, § 3722.2.
53 Tseng, 525 U.S. at 169.
Ironically, the Court was not facing a removal jurisdiction challenge in *Tseng*, and thus complete preemption was not at issue in the case. However, the *Tseng* Court’s decision has been interpreted to stand for the proposition that the Montreal Convention and the Warsaw System completely preempt state law in cases arising out of international aviation. Before evaluating the merit of this premise, it is valuable first to examine the provisions of the treaties in question.

### III. THE WARSAW SYSTEM AND THE MONTREAL CONVENTION

#### A. THE WARSAW CONVENTION—ESTABLISHING A SYSTEM OF UNIFORMITY

With more than 135 signatories, the Warsaw Convention established a universal system of rules for regulating international air travel. The Convention was originally adopted in 1929, following two meetings of the International Aviation Law Conference in Paris and Warsaw. Established during the infancy of commercial aviation, the Convention had two primary objectives: (1) to establish a system of uniformity for ticketing and claims in international air transport, and (2) to limit the liability of air carriers in order to prevent large personal injury and wrongful death suits from crippling the burgeoning industry. Indeed, in the preamble of the Convention, the signatories “recognized the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier.”

Chapter I of the Warsaw Convention establishes the scope of the treaty, limiting its applicability to “international transportation,” which is defined as any flight departing from the territory of one party to the convention and arriving in the territory of another party to the convention, or departing and arriving in the territory of one country where there is an agreed stopping point.

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54 Seinfeld, *supra* note 46, at 542.
55 See, e.g., *Knowlton*, 2007 WL 273794, at *4 (recognizing that the *Tseng* Court did not address removal jurisdiction under the complete preemption doctrine, but interpreting the adaptation of *Tseng* as having a completely preemptive effect in international aviation cases).
58 *Id.*
point in the territory of another country. In Chapter III, the Warsaw Convention establishes the rules defining international air carrier liability with respect to: injuries sustained by persons; loss, destruction, or damage to baggage or goods; and damage due to delay. Specifically, Article 17 imputes liability to air carriers for “damage sustained in the event of the death or wounding of a passenger . . ., if the accident which caused the damage . . . took place on board the aircraft or in the course of . . . embarking or disembarking.” Article 18 assigns liability to the carrier for damage to checked luggage and goods sustained while the carrier is in possession of the luggage or goods. Under Article 19, a carrier is liable for damage to passengers, luggage, or goods caused by delay. Article 20 relieves a carrier of liability under Articles 17, 18, and 19 if the carrier can show it took “all necessary measures” to avoid the accident, even if the damage was caused by negligent pilotage. Article 21 of the Convention reduces a carrier’s liability in the event a passenger’s injuries are attributable to the passenger’s own contributory negligence. Article 22 originally set the monetary limits for the liability of the air carrier at $8,300 for each passenger, $17 per kilogram for checked baggage and goods, and $332 per carry-on bag. However, Article 25 eliminates the protections and limitations on liability for carriers established under the Convention where an injured party could show his injuries were caused by the willful misconduct of the carrier or one of its agents or employees acting within the scope of employment.

60 Id. art. 1.
61 See id. arts. 17–19.
62 Id. art. 17.
63 Id. art. 18.
64 Id. art. 19.
65 Id. art. 20. Scholars caution against the literal interpretation of this provision, since harm would never occur if a carrier literally took all the necessary measures to prevent it. Thus, this provision has been interpreted as requiring those “reasonable measures that prudent foresight would have envisaged.” I.H. PH. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 123 (8th ed. 2006).
66 Warsaw Convention, supra note 1, art. 21.
67 The Convention utilized French francs as the baseline currency. See id. art. 22. Thus, the limits on liability were actually set at 125,000 ff per passenger, 250 ff per kilogram, and 5,000 ff per carry-on bag. Id. art. 22. The values listed above are the whole-number conversions of these values based on 1929 currency rates. See Janice Cousins, Note, Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within A Terminal, 45 FORDHAM L. REV. 369, 370 n.9 (1977).
68 Warsaw Convention, supra note 1, art. 25.
Finally, Article 24 of the Warsaw Convention establishes the exclusive nature of the Convention's provisions. It states:

1. In the cases covered by articles 18 and 19 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 the provisions of the preceding paragraph 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. 69

Following its entry into force in February of 1933, the Warsaw Convention suffered numerous attacks, first by air carriers for being too restrictive; 70 later by nations for imposing unacceptably low limits on personal injury claims. 71 Subsequent amendments to the Convention attempted to resolve these and other issues, but many were not signed or ratified by all States party to the original Convention. 72 Additional private agreements were established, but they too had limited scope and applicability. 73 Consequently, the Warsaw Convention evolved into a series of multi-lateral agreements and non-binding arrangements, applying different rules to different circumstances under different national and international laws.

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69 Id. art. 24.
70 Giemulla & Schmid, supra note 57, intro. ¶ 2.
71 Id.
72 Compare the Hague Protocol, Protocol to Amend the Warsaw Convention, Sept. 28, 1955, 478 U.N.T.S. 371, with the Montreal Convention, supra note 2. The increases in liability limits proposed by the Hague Protocol were so far below the limits proposed by the United States that it renounced the Warsaw Convention entirely in 1965, but withdrew its renunciation following the increases in liability established by the Montreal Agreement. See also Protocol to Amend the Warsaw Convention, Mar. 8, 1971, ICAO Doc. 8932/2, 10 I.L.M. 613 [hereinafter Guatemala Protocol] (signed by 21 States); cf. Additional Protocol No.1 (2, 3, 4) to Amend the Warsaw Convention, Sept. 25, 1975, ICAO Docs. 9145–48 [hereinafter Montreal Protocol No. 1 (2, 3, 4)]. Proposed in 1975, the United States did not ratify Protocols 1, 2, and 4 until 1999, and has never ratified Protocol 3. In contrast, Germany has not ratified Protocol 4, but German courts have ruled on it at least once, where the parties agreed to grant the court jurisdiction over the matter. See Giemulla & Schmid, supra note 57, intro. ¶ 12.
73 For example, the Montreal Convention only applied to the carriage of passengers to and from the United States, and to stopovers in U.S. territory. See Giemulla & Schmid, supra note 57, intro. ¶ 8.
B. The Montreal Convention—Putting the Passenger First

By 1997, the ICAO had begun the task of creating a uniform system of liability rules to replace the patchwork Warsaw System.\textsuperscript{74} During the May 1999 International Conference on Air Law, participants finalized the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention),\textsuperscript{75} which, upon entry into force, would supersede the Warsaw System\textsuperscript{76} between all signatories to the new treaty, as well as for all international flights originating and terminating in the United States.\textsuperscript{77} The Montreal Convention was immediately viewed as a successful codification of U.S. international-air-carriage-policy objectives.\textsuperscript{78}

Like the Warsaw Convention, Chapter I of the Montreal Convention defines the scope of the treaty. The language and effect of Article 1, including the definition of “international carriage” is essentially unchanged.\textsuperscript{79} Similarly, Chapter III sets out the conditions for carrier liability and establishes the limits on compensation for damages. However, the language and the effect of the provisions of Chapter III are substantially different than in the original Warsaw Convention. Article 17 establishes carrier liability for death or bodily injury to passengers and damage to checked and unchecked baggage—but distinguishes between “accident[s] . . . on board the aircraft or in the course of any of the operations of embarking or disembarking” that cause personal injury and “event[s] . . . on board the aircraft or during any period within which the checked baggage was in the charge of the carrier” that cause damage to baggage.\textsuperscript{80} Article 18 imputes liability to carriers “in the event of the destruction or loss of or damage to, cargo” caused by an “event” during “carriage by air.”\textsuperscript{81} Article 19 describes the liability of a carrier for damages caused by delay of passengers, baggage, or cargo, and provides

\textsuperscript{75} Id.
\textsuperscript{76} This includes the original 1929 Convention, “any of its amendments and related instruments, and as a practical matter . . . the private inter-carrier agreements.” Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Cf. id. art. 17(1)–(2).
\textsuperscript{81} Id. art. 18(1).
for carrier exoneration only where the carrier took all reasonable steps to avoid such damages.82

Under Article 21, the strict liability of carriers for personal injury claims is limited to 100,000 Special Drawing Rights (SDR), a substantial increase from the limits of the Warsaw Convention.83 Further, carriers may be subject to unlimited fault-based liability for injuries in excess of 100,000 SDR, but may avoid such claims by showing the passenger’s injury was solely due to the negligence or other wrongful act or omission of a third party.84 Article 22 limits the allowable recovery for claims under Article 19 (delay) to 4,150 SDR and further limits the carrier’s exposure for damage to baggage to 1,000 SDR.85 For damage to cargo under Article 18, carrier liability is capped at 17 SDR per kilogram.86 None of the limits of Article 22 apply if the passenger can prove the damage resulted from an intentional or reckless act of the carrier.87 Finally, under Article 20, the carrier may escape liability under any Article to the degree it proves the passenger was contributorily negligent in causing the injuries sustained.88

Article 29 of the Montreal Convention parallels Article 24 of the Warsaw Convention, creating an exclusive effect on claims arising under concurrent law. It reads:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention . . . . In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.89

The Montreal Convention currently has ninety-three signatories90 and supersedes the Warsaw Convention in States that have

82 Id. art. 19.
83 Id. art. 21; see also Giemulla & Schmid, supra note 57, intro. ¶ 11.
84 Montreal Convention, supra note 2, art. 21(2).
85 Id. art. 22(1)–(2).
86 Id. art. 22(3). This limit may be lifted if the passenger declares a value greater than that allowed. Id.
87 Id. art. 22(5). Intentional or reckless behavior of the carrier’s servants or agents may impute liability where the servant or agent acted within the scope of his or her employment. Id.
88 Id. art. 20.
89 Id. art. 29.
adopted both treaties.\(^9\) "Like its predecessor, the Montreal Convention’s purpose is to promote uniformity in the laws governing airliner liability for the ‘international carriage of persons, baggage or cargo performed by aircraft.’\(^9\)\(^2\) However, since the aviation industry has “matur[ed] into a powerful, . . . insurable business,” the Montreal Convention foregoes the Warsaw Convention’s emphasis on protecting air carriers in favor of a regime that balances the interest of passengers in equitable recovery for injuries sustained with the interests of businesses in predicting exposure to liability.\(^9\)\(^3\) Nevertheless, the emphasis on uniformity pervading both treaties continues to influence courts’ interpretations of the preemptive effects of the treaties’ provisions.

IV. THE MISLEADING LEGACY OF EL AL ISRAEL AIRLINES, LTD. V. TSENG\(^9\)\(^4\)

A. BACKGROUND & PROCEDURAL HISTORY

Tsui Yuan Tseng sued El Al Israel Airlines (El Al), a foreign corporation owned by the state of Israel,\(^9\)\(^5\) for personal injury sustained during an “intrusive security search”\(^9\)\(^6\) conducted by El Al personnel in the El Al terminal at JFK Airport, and further alleged property damage for loss to her luggage conducted during the search.\(^9\)\(^7\) Tseng alleged she was physically sick and upset

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\(^9\)\(^1\) Montreal Convention, \textit{supra} note 2, art. 55.


\(^9\)\(^5\) Brief for Plaintiff-Appellant Tsui Yuan Tseng at 1, Tseng v. El Al Isr. Airlines, Ltd., 122 F.3d 99 (2d Cir. 1997) (No. 96-7447).

\(^9\)\(^6\) "The term ‘security search’ refers to an intrusive search of a passenger’s body initiated after a routine check by metal detector and questioning have led airline personnel to deem a passenger a security risk." \textit{Tseng}, 122 F.3d at 101. In this case, Tseng was instructed to remove her jacket, shoes and sweater, and to lower her jeans to mid-hip level. Brief for Plaintiff-Appellant, \textit{supra} note 95, at 3. Thereafter, a female security guard manually searched Tseng, including the touching of her breasts and groin, in the presence of at least one male security guard. \textit{Id.} at 4. Her belongings were also searched in a separate room beyond her observation. Tseng v. El Al Isr. Airlines, Ltd., 919 F. Supp. 155, 157 (S.D.N.Y. 1996). The search lasted approximately ten to fifteen minutes, and the entire detention lasted more than one hour. Brief for Plaintiff – Appellant, \textit{supra} note 95, at 3. Ultimately, Tseng was cleared and was allowed to board the plane. \textit{Id.} at 5.

\(^9\)\(^7\) \textit{Id.} at 1.
throughout her flight to Tel Aviv as a result of the preceding
search and that throughout her month-long visit to Israel she
was "emotionally disturbed."98 Tseng also alleged, upon arrival
in Tel Aviv, she was unable to locate numerous personal items
that had been in her luggage and that items of her clothing
were stained and damaged as a result of the search.99 After re-
turning to the United States, Tseng visited her family physician
who, over the course of "a few months,"100 treated Tseng for
headaches, upset stomach, ringing in her ears, nervousness, and
sleeplessness allegedly resulting from emotional distress over
the airport security search.101

Tseng filed suit in the Supreme Court of the State of New
York.102 El Al removed the case to the U.S. District Court for the
Southern District of New York under 28 U.S.C. § 1441(d)103 on
the ground that El Al was a "foreign state" as defined under 28
U.S.C. § 1603.104 The district court held that the personal inju-
ries sustained by Tseng were the result of an "accident" as de-
fined by Article 17 of the Warsaw Convention, and thus, El Al
was not liable, since recovery for psychosomatic manifestations
of emotional injuries is not permitted under the Convention.105
The district court further held that the damage to Tseng’s lug-
gage was also a result of an "accident" and limited El Al’s liability
to $1,034.90 pursuant to Article 22 of the Warsaw Convention.106

On appeal, the Second Circuit affirmed in part and reversed
and remanded in part, holding first that, because "accident"
does not include the normal operation of the aircraft or the pro-
cedures followed by airline personnel in the normal course of
air travel, Tseng’s injuries did not fall within the scope of Article

98 Tseng, 122 F.3d. at 101.
100 Brief for Plaintiff-Appellant, supra note 95, at 6.
102 Brief for Plaintiff-Appellant, supra note 95, at 1.

Actions removable generally . . . Any civil action brought in a State
court against a foreign state as defined in section 1603(a) of this
title may be removed by the foreign state to the district court of the
United States for the district and division embracing the place
where such action is pending.

104 As defined by § 1603, a "foreign state" includes a corporation in which a
foreign state holds a majority ownership interest, and which is not "a citizen of a
State of the United States."
105 Tseng, 919 F. Supp at 158 (citing E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552
(1991)).
106 Id. at 160.
17 of the Warsaw Convention.\textsuperscript{107} Consequently, the Second Circuit held that the Warsaw Convention did not preclude Tseng’s state-law claims because the events giving rise to the injury fell outside the Convention’s protection of carriers.\textsuperscript{108} The United States Supreme Court granted certiorari and reversed.\textsuperscript{109} The Warsaw Convention preempts personal injury actions under state law, even if the injuries are not compensable under the Convention.\textsuperscript{110}

B. Opinion of the Court

1. Majority

The majority opinion began its analysis by focusing on Article 24 of the Warsaw Convention.\textsuperscript{111} Turning to the original French text of the provision, the Court determined “les cas prévus à l’article 17”—literally translated to “the cases anticipated by Article 17”—referred to all \textit{personal injury claims} arising out of accidents that occur on board an aircraft or during the processes of embarking or disembarking.\textsuperscript{112} Furthermore, the Court found that the reference to Article 17 merely distinguished claims for personal injury from those for damage to luggage (under Article 18) or goods (under Article 19).\textsuperscript{113} Recognizing the provision itself was somewhat ambiguous, the Court turned to precedent to support its interpretation.

In \textit{Zicherman v. Korean Air Lines Co.},\textsuperscript{114} the Court previously determined that the drafters of the Warsaw Convention established rules for determining when a carrier was liable for injuries it caused a passenger but left to state law the “determination of the compensatory damages available to the suitor.”\textsuperscript{115} In \textit{Tseng}, the Second Circuit had interpreted \textit{Zicherman} to mean that “the [Warsaw] Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law . . .”.\textsuperscript{116} Writing for the \textit{Tseng} Court,

\footnotesize
\textsuperscript{107} Tseng v. El Al Isr. Airlines, Ltd., 122 F.3d. 99, 103 (2d Cir. 1997).
\textsuperscript{108} Id. at 107–08.
\textsuperscript{110} Id. at 176.
\textsuperscript{111} Id. at 167.
\textsuperscript{112} Id. at 167–69.
\textsuperscript{113} Id. at 168.
\textsuperscript{114} 516 U.S. 217 (1996).
\textsuperscript{115} See Tseng, 525 U.S. at 170 (citing Zicherman, 516 U.S. at 231).
\textsuperscript{116} Id. at 156 (discussing Tseng v. El Al Isr. Airlines, Ltd., 122 F.3d 99, 107 (2d Cir. 1997)).
Justice Ginsburg explained that Zicherman instead stood for the proposition that the Warsaw Convention determines whether or not liability exists by imposing conditions for recovery. The Court then endeavored to interpret how to determine whether liability exists under the Convention by examining the liability provisions in light of the treaty's "complementary purpose[s]." As the minutes from the Second International Conference on Private Aeronautical Law suggest, the drafters of the Warsaw Convention sought to "achiev[e] uniformity of rules governing claims arising from international air transportation" in order to strike a balance between passenger interests—in recovering for personal injuries—and airline interests—in limiting liability. The Court concluded that "allow[ing] passengers to pursue claims under local law when the Convention does not permit recovery . . . would encourage artful pleading by plaintiffs" in an attempt to avoid the Convention's limits by pleading claims in exclusively state-law terms. Predictability in assessing exposure to liability, the Court opined, would be best maintained by leaving to the signatories the function of adjusting liability limits under the Warsaw Convention. Consequently, the Court held "that the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention" and reversed the decision of the Second Circuit.

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117 See id. at 170.
118 Id.
119 See E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991). Early drafts submitted to the conference at Warsaw proposed carrier liability "in the case of death, wounding, or any other bodily injury suffered by a traveler." Second International Conference on Private Aeronautical Law Minutes, October 4-12, 1929, Warsaw 264 (Robert C. Horner & Didier Legrez trans., 1975). The final version of Article 17 substantially narrowed airline liability to encompass only bodily injury caused by an "accident." See id. at 205. The Court found this highly persuasive, stating, "It is improbable that, at the same time the drafters narrowed the conditions of air carrier liability in Article 17, they intended, in Article 24, to permit passengers to skirt those conditions by pursuing claims under local law." Tseng, 525 U.S. at 173.
120 Tseng, 525 U.S. at 170.
121 Id. at 171.
122 Id. at 171 n.12.
123 Id. at 176.
2. Justice Stevens's Dissent

In his dissent, Justice Stevens distinguished between personal injury claims arising out of accidents and personal injury claims arising out of "non-accidents." After agreeing with the Court that Article 24 preempts state law personal injury claims arising out of accidents, he then criticized the majority's over-reliance on the Warsaw Convention's uniformity goal to justify its holding that non-accident claims were similarly preempted.211 Pointing to the clear language of Article 25, Justice Stevens argued that the majority's broad interpretation of the Convention's preemptive effect was undercut by the Convention's simultaneous relegation of "willful misconduct" cases to state law.212 By allowing the diverse regimes of the States party to the Convention to govern the cases arising out of a carrier's willful misconduct, he posited, the drafters clearly had not contemplated preemption of all state-law claims within the Convention's scope.213 Furthermore, Justice Stevens recognized that the number of "non-accident" personal injury cases was expectedly small, and thus, allowing local law to govern such cases would not have the disruptive effect on uniformity predicted by the majority.214

V. TURMOIL IN THE LOWER COURTS—COMPLETE PREEMPTION IN LIGHT OF TSENG

Scholars and courts alike have recognized that the issue of complete preemption supporting removal jurisdiction was not before the Tseng Court.215 Nevertheless, subsequent decisions by lower courts have, at times, relied upon Justice Ginsburg's opinion in Tseng to support their conclusion that removal jurisdiction is proper in cases where the claims asserted by the plaintiff arise out of international air transportation.216 By framing the issue in Tseng as whether the "Warsaw Convention 'provides the exclusive cause of action for injuries sustained during international air transportation'" and then answering in the affirma-

124 Id. at 177–80 (Stevens, J., dissenting).
125 Id. at 178.
126 Id. at 180.
127 Id. at 179.
129 See infra note 149.
tive, the Court opened the door for future judges to read the decision as a justification for complete preemption in international air transport cases. Indeed, "[n]umerous courts of appeals have now acknowledged that a preemptive federal regulatory regime must provide the exclusive cause of action for a particular harm in order for the rule to take hold." Because cases addressing the Montreal Convention are sparse, the common law principles that evolved under the Warsaw Convention remain instructive. The following section illustrates the growing split of authority regarding removal jurisdiction under the Montreal Convention, and its predecessor the Warsaw Convention.

A. COURTS IN THE 2ND, 5TH, 7TH, AND 9TH CIRCUITS HAVE REJECTED COMPLETE PREEMPTION

Recent decisions in the district courts of the Second, Fifth, Seventh, and Ninth Circuits reject the idea of removal jurisdiction under the complete preemption doctrine. A Seventh Circuit Court of Appeals case, Wolgel v. Mexicana Airlines, predates but is not overruled by Tseng. Here, it serves as the cornerstone example for those courts permitting plaintiffs to bring state-law claims for injuries arising out of international air carriage.

Joseph and Edythe Wolgel each purchased a roundtrip ticket from Mexicana Airlines for travel between Chicago, Illinois, and Acapulco, Mexico. On April 17, 1981, after confirming their reservations, the couple arrived at O'Hare Airport and presented their tickets and luggage to the ticket agent but were

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130 Carey v. United Airlines, 255 F.3d 1044, 1051 (9th Cir. 2001).
132 Serrano, 2008 WL 2117239, at *3 (citing Shah v. Virgin Atl. Airways, Ltd., 473 F. Supp. 2d 591, 596 (S.D.N.Y. 2007) ("Although the Warsaw Convention no longer applies to claims arising after the effective date of the Montreal Convention, the case law developed under the Warsaw Convention is still regarded as applicable in the interpretation of equivalent language in the Montreal Convention.").
134 See infra notes 135–51 and accompanying text.
135 821 F.2d 442 (7th Cir. 1987).
136 Id. at 443.
“bumped” because there were no seats available on the flight.\textsuperscript{137} Shortly thereafter, the Wolgels submitted a claim for boarding compensation, which Mexicana refused.\textsuperscript{138} Five years following the incident, the Wolgels filed claims in Illinois state court for breach of contract, tortious breach of a contractual relationship, and discriminatory bumping in violation of the Federal Aviation Act.\textsuperscript{139} Mexicana, a corporation wholly owned by the government of Mexico, removed the case under 28 U.S.C. § 1441 and then moved to dismiss the claim, asserting that the action was barred by the Warsaw Convention’s two-year statute of limitations.\textsuperscript{140} The district court granted Mexicana’s motion and dismissed the claim, and the Wolgels timely appealed.\textsuperscript{141}

The Seventh Circuit Court of Appeals reversed the decision of the district court, finding the Wolgels’ claims fell outside the scope of the Warsaw Convention and holding that the Convention does not preempt causes of action beyond its scope.\textsuperscript{142} In its decision, the Seventh Circuit examined the language of Article 19, which provides, “the carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.”\textsuperscript{143} Determining that the Convention was silent as to whether claims arising from the “total nonperformance of a contract” fell within the term “delay,” the court looked to the drafting history of Article 19.\textsuperscript{144} The court then concluded such claims did not arise under the Convention, citing the consensus among the delegates at the Second International Diplomatic Conference on Private Aeronautical Law that “there was no need for a remedy in the Convention for total nonperformance of the contract, because in such a case the injured party has a remedy under the law of his or her home country.”\textsuperscript{145} The court considered the Wolgels’ claims to have arisen directly

\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id. The Wolgels’ claims arose under § 404(b) of the Act, which prohibited air carries from imposing “any unjust discrimination or any undue or unreasonable prejudice or disadvantage” upon any person. 49 U.S.C. app. § 1374(b) (1982) (repealed 1983).
\textsuperscript{140} Wolgel, 821 F.2d at 443; see Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (1982).
\textsuperscript{141} Wolgel, 821 F.2d at 443.
\textsuperscript{142} Id. at 446.
\textsuperscript{143} Id. at 444.
\textsuperscript{144} Id.
\textsuperscript{145} Id. (citing Second International Conference on Private Aeronautical Law, Minutes October 4–12, 1929, Warsaw, supra note 119, at 76–77 (remarks of Mr. Ripert)).
from the discriminatory bumping and not from any consequent delay.\textsuperscript{146} Since the Warsaw convention does not provide a cause of action for discriminatory bumping, the court held the claims were not barred by the Convention’s statute of limitations.\textsuperscript{147} Therefore, the court looked to state law to determine the appropriate limitations period, and subsequently held that Illinois’ five-year “catch-all” provision was “most appropriate.”\textsuperscript{148} Consequently, the Seventh Circuit reversed and remanded the decision of the district court.\textsuperscript{149}

Despite the fact that \textit{Wolgel} preceded \textit{Tseng}, the \textit{Tseng} decision did not overrule \textit{Wolgel}. Courts have continued to rely on \textit{Wolgel} as representing the proposition that claims outside the scope of the Warsaw Convention may be brought in state courts if state law gives rise to a cause of action.\textsuperscript{150} However, this line of cases has been criticized as an unjustified departure from the completely preemptive effect of \textit{Tseng}, as illustrated below.\textsuperscript{151}

\begin{itemize}
  \item \textsuperscript{146} \textit{Wolgel}, 821 F.2d at 445.
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} at 446; see 735 ILL. COMP. STAT. 5/13-205 (2009).
  \item \textsuperscript{149} \textit{Wolgel}, 821 F.2d at 446.
  \item \textsuperscript{150} \textit{See, e.g.,} Serrano v. Am. Airlines, Inc., No. CV 08-2756 AHM (FFMx), 2008 WL 2117239, at *6 (C.D. Cal. May 15, 2008) (rejecting the idea that the preemptive effects of the Warsaw and Montreal Conventions necessitate complete preemption); O’Callaghan v. AMR Corp., No. 04 C 4005, 2005 WL 1498870, at *1 n.1 (N.D. Ill. June 8, 2005) (breach of contract claim was not preempted by the Warsaw Convention because the “claim [ought] damages only for the nonperformance of the contract, not for any injury that occurred because of that nonperformance”); Dorazio v. UAL Corp., No. 02 C 3689, 2002 WL 31236290, at *2 (N.D. Ill. Oct. 2, 2002) (Warsaw Convention did not completely preempt state law); Fournier v. Lufthansa German Airlines, 191 F. Supp. 2d 996, 1003 (N.D. Ill. 2002); Rogers v. Am. Airlines, Inc., 192 F. Supp. 2d 661, 671 (N.D. Tex. 2001) (remanding case because uniformity in the context of the Warsaw Convention “relates to the remedy available, not to the forum adjudicating the remedy”); \textit{see also} Donkor v. British Airways Corp., 62 F. Supp. 2d 963, 970 (E.D.N.Y. 1999) (because defendants failed to establish plaintiff’s claims were preempted by the “substantive scope” of the Warsaw convention, removal was improper).
  \item \textsuperscript{151} \textit{See} Marotte v. Am. Airlines, Inc., 296 F.3d 1255, 1261 (11th Cir. 2002) (dismissing plaintiff’s state law claims as time-barred under the Warsaw Convention after case was removed from Florida state court); \textit{see also} Knowlton v. Am. Airlines, No. RDB-06-854, 2007 WL 273794, at *5 (D. Md. Jan. 31, 2007) (persuaded by the reasoning of those cases finding in favor of preemption); Singh v. Am. Airlines, 426 F. Supp. 2d 38, 45 (E.D.N.Y. 2006) (denying remand because “the [Warsaw] Convention completely preempts those claims which fall within its scope”).
\end{itemize}
THE MISLEADING LEGACY OF TSENG

B. COURTS IN THE 2ND, 4TH, 8TH, AND 11TH CIRCUITS HAVE PERMITTED COMPLETE PREEMPTION

The decision in Husmann v. Trans World Airlines, Inc.\(^{152}\) illustrates the general analysis undertaken by federal courts in the Second,\(^{153}\) Fourth, Eighth, and Eleventh Circuits permitting removal jurisdiction on the basis of complete preemption.

While boarding a Trans World Airlines (TWA) flight from London, England, to St. Louis, Missouri, Robert Husmann tripped over luggage and injured himself.\(^{154}\) One day later, on October 6, 1991, Husmann arrived at his destination, but did not file suit until April 17, 1997.\(^{155}\) Husmann filed his complaint against TWA in Missouri state court, alleging injuries under Missouri tort law.\(^{156}\) TWA removed the case to federal district court, pursuant to 28 U.S.C. § 1441, on the basis of federal question jurisdiction.\(^{157}\) TWA argued that Husmann's state law claims were completely preempted by the Warsaw Convention, and thus the case was removable, notwithstanding the "well pleaded complaint rule."\(^{158}\) The district court denied Husmann's motion to remand the case for lack of subject matter jurisdiction and granted TWA's motion for summary judgment, finding Husmann's claims were time-barred by the Warsaw Convention's two-year statute of limitations.\(^{159}\) Husmann timely appealed.\(^{160}\)

The Eighth Circuit Court of Appeals affirmed the decision of the district court, holding that state law causes of action are completely preempted by the Warsaw Convention.\(^{161}\) In its decision, the majority relied heavily on decisions by the Second\(^{162}\) and Fifth\(^{163}\) Circuits. Specifically, the majority found that the

\(^{152}\) 169 F.3d 1151 (8th Cir. 1999).

\(^{153}\) Singh, 426 F. Supp. 2d at 38, facially appears to overrule Donkor, 62 F. Supp. 2d at 963, but Donkor should be read to support the proposition that removal is proper only where the removing party carries its burden of establishing that the plaintiff's state law claims are completely preempted, and thus Donkor is not in conflict with Singh.

\(^{154}\) Husmann, 169 F.3d at 1152.

\(^{155}\) Id.

\(^{156}\) Id.

\(^{157}\) Id.

\(^{158}\) Id.; see Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

\(^{159}\) Husmann, 169 F.3d at 1151–52.

\(^{160}\) Id. at 1152.

\(^{161}\) Id. at 1153.


\(^{163}\) Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996).
other circuits had accurately concluded that “allowing state causes of action for death and injuries suffered by passengers on international flights would frustrate” the “announced goals of the Warsaw Convention”—namely uniformity and certainty in the law governing international air carrier liability. The majority also noted the Supreme Court’s decision in Tseng as reinforcing, if not controlling, the Eighth Circuit’s findings. It further relied on the Court’s holding in Tseng—“the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation”—to rebut the dissent’s criticism of the majority’s failure to follow the well-pleaded compliant rule. Since the court found Husmann’s claims did fall within the scope of the Warsaw Convention, it held they were completely preempted by federal law, and thus, removal was proper. Consequently, the Eighth Circuit held Husmann’s claims against TWA were time-barred by the Convention’s two-year statute of limitations and affirmed the decision of the district court.

VI. RESOLVING THE ISSUE IN FAVOR OF THE PASSENGER

The Court in Tseng did not confront a complete preemption defense and consequently, did not address the issue of whether removal jurisdiction was proper under the complete preemption doctrine. Nevertheless, the Court’s choice of language has led litigators and judges to disregard this fact, instead focusing on the Court’s analysis of the exclusivity of the Warsaw Convention. Since Warsaw Convention jurisprudence substantially influences the interpretation of the Montreal Convention, this error has carried over to the new regime. The result is a dangerous overstepping by the federal courts into cases more appropri-

164 Husmann, 169 F.3d at 1153.
165 Id. at 1153 n.5.
166 Id.
167 Id. at 1153. The court also noted, despite TWA’s multiple bankruptcy filings, that the statute of limitations on Husmann’s claims was neither tolled under Mo. Rev. Stat. § 516.120 (1994) (five year statute of limitations), nor under the Warsaw Convention, because state statutes of limitation are not tolled during bankruptcy, see 11 U.S.C. § 108(c)(2) (action must be commenced within thirty days after notice of termination of bankruptcy stay), and because the Warsaw Convention’s statute of limitations is “not subject to tolling.” Husmann, 169 F.3d at 1153–54 (quoting Fishman v. Delta Air Lines, Inc., 192 F.3d 138, 143 (2d Cir. 1998)).
ately litigated in state courts. This trend can be reversed, however, by appropriately narrowing the interpretation of two key elements of the Montreal Convention—the causes of action it provides and the recovery it allows.

A. SCOPING THE CAUSE OF ACTION—INSIDE OR OUTSIDE THE TREATY REGIME

The language of the Montreal Convention enumerates three exceptions to the Convention under which a passenger may bring a claim against a carrier. Thus, by its own words, the Convention declares it is not the exclusive cause of action for passengers sustaining damages at the hands of an international air carrier. Further, commentators have noted that the Montreal Convention only supersedes other bases for claims for damages "typically related to air carriage . . . and which can be predicted to a certain extent by those who consciously expose themselves to the dangers of air travel." Though federal courts are often touted as being superior to state courts in the practice of uniform interpretation and application of federal law, this advantage is lost when the federal law provides an explicit limitation on the application of state law. In the case of the Montreal Convention, Article 29 extends the conditions and limitations for claims related to "passengers, travel baggage and goods" to bases for claims which may fall outside the Convention. National law therefore applies to any event resulting in damage which does not fall within the scope of the Convention (e.g., failure to perform a contract of carriage). Thus, uniformity is achieved with respect to predicting a carrier's exposure to liability. The Montreal Convention, in providing a strict limitation on liability, whether founded in federal or state law, ensures even state courts will effectively and uniformly apply the Convention. Beyond the strict limits, a carrier has no justifiable interest in limiting its liability, since the damages in such circumstances are preventable. But determining whether or not

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169 "[A]ny action for damages, however founded, whether . . . in contract or in tort or otherwise . . . ." Montreal Convention, supra note 2, art. 29 (emphasis added).

170 Giemulla & Schmid, supra note 57, art. 29 ¶ 3.

171 See, e.g., Seinfeld, supra note 46, at 543–44.

172 Giemulla & Schmid, supra note 57, art. 29 ¶ 6.

173 Id. art. 29 ¶¶ 4–5.

174 To remove the cap on liability, a plaintiff must either prove the injury was caused by fault on the part of the carrier or that the carrier acted willfully. Mon-
a specific action falls within the scope of the Convention is not the aim of this paper. Merely pointing out that some causes of action are recoverable despite falling outside the scope of the convention supports the premise that removal jurisdiction does not exist where a passenger’s claims are pled completely in state law terms. In such cases, defendants may certainly move to dismiss the plaintiff’s claims on the ground of conflict preemption but should not be allowed to manipulate this defense to establish removal jurisdiction where none exists.

B. How Exclusive is “Exclusive”—State Law Remedies

The Montreal Convention provides for the unification of certain rules related to international aviation. It is not necessarily seen as unifying all rules related to international aviation. With respect to liability, the Convention establishes a unified system of rules regarding passenger claims for personal injury, wrongful death, loss or damage to baggage, loss or damage to goods, and injuries resulting from delay. The Convention establishes the conditions for such claims, and sets limits on a claimant’s recovery when the conditions are met. The Convention further recognizes defenses for willful misconduct and allows for exoneration if a carrier can prove the claimant or a third party was contributorily negligent. Finally, the Convention prohibits recovery of “punitive, exemplary or any other non-compensatory damages.”

Clearly these limits effectuate the goals of uniformity and predictability by harmonizing the recovery schemes of the States party to the Convention. A carrier’s interests could undoubtedly be undermined by a regime that allowed plaintiffs to select a jurisdiction in which to seek recovery, for example, where non-compensatory damages were likely to bring a windfall. By limit-
ing recovery under Article 21, and then again under Article 29, the Montreal Convention provides state courts with a roadmap for calculating a plaintiff's damages in cases arising under the Convention, but leaves to state law the process of navigating to the final recovery. "Since Article 29 is only intended to ensure the exclusive application of the liability regime of Articles 17 to 19, conversely this means that there is no longer any justification for a limitation on liability where the prerequisites of these provisions are not fulfilled." Furthermore, while Article 29 categorically proscribes recovery for non-compensatory damages, it remains to be seen whether damages meant to compensate an injured party in excess of his or her pecuniary losses will be permissible. Regardless, a plaintiff must demonstrate the requisite fault or willful misconduct of the carrier in order to lift the cap imposed by Article 21. Furthermore, even the Supreme Court has recognized that the method of calculating the plaintiff's award is dependent upon state law. Thus, courts should not imply a completely preemptive regime from the holding in Tseng. Since not all state-law claims are preempted in the first place, it would be erroneous to interpret congressional intent to establish removal jurisdiction based solely on the Montreal Convention's limits on state-law recovery rules.

VII. CONCLUSION

Despite the emphasis on uniformity in the arena of international aviation regulation codified in the Warsaw and Montreal Conventions, courts should not interpret the treaties to have a completely preemptive effect. In cases where plaintiffs assert claims against international carriers caged in state-law terms, defendants should not be able to remove the cases from state court by merely asserting federal preemption of state law as a defense. If all the claims asserted by the plaintiff are preempted by one of the treaties, such assertions may justify the defendant's motion to dismiss for failure to state a claim under Rule 12 of the Federal Rules of Civil Procedure. This is sufficient recourse to en-

181 Giemulla & Schmid, supra note 57, art. 29 ¶ 15.
183 Montreal Convention, supra note 2, arts. 21 ¶ 1, 22 ¶ 5.
sure fairness in the proceedings, and equally balances the passenger’s right to compensation with the carrier’s interest in protecting itself from excessive liability. Further limitations on a passenger’s right to assert state law claims in the courts of his home state undermine the protective goals of the Convention and encourage the expansion of a doctrine that the Supreme Court has substantially limited since its inception.
Comments