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THE WARSAW CONVENTION BEFORE THE
SUPREME COURT: PRESERVING THE
INTEGRITY OF THE SYSTEM

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FOR THE FIRST fifty years of the Warsaw Convention's history, there were no United States Supreme Court decisions construing it.¹ Indeed, until the mid 1960's, only a handful of federal appellate decisions addressed Warsaw issues.² Recently, the applicability and enforceability of specific Warsaw provisions have been much litigated, and in the Court's last two completed terms three Warsaw cases have been heard.³

These recent Supreme Court decisions construing the Warsaw Convention sent a clear message to the lower courts that the Court will not permit the Convention's

² Less than a dozen cases decided before 1965 address Warsaw issues.
provisions governing carrier liability to be amended or circumvented through judicial decisions based upon broad considerations of social policy. Although each of these three decisions begins from the literal language of the Convention, the difficult questions of the parties' intent which these cases pose could not be answered on the basis of the Convention's language alone. Thus, policy has not been, and cannot be, entirely avoided. The policy which the Supreme Court's recent decisions, viewed collectively, seem to reflect is a condemnation of judicial activism and a requirement that any novel or dramatic change in the Convention's implementation come from the political branches.

Although the Warsaw Convention has long been enforced and is almost universally adhered to, it has been the focus of much criticism in the United States. The Convention establishes internationally uniform rules to govern the air carriage of passengers, cargo, and baggage. These rules include ceilings on carrier liability which, at least from the perspective of the American legal and economic systems, appear quite low. A series of political efforts by the United States to raise the liability ceiling has been only partially successful.

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4 The Warsaw Convention is a multilateral treaty governing international aviation to which more than 120 nations, including the United States, now adhere. Franklin Mint, 466 U.S. at 248.


6 Convention participants have discussed and agreed upon increases in the Convention's liability ceilings at three separate international conferences: the 1955 Hague Conference, the 1971 Guatemala City Conference, and the 1975 Montreal Conference. In each case the Senate failed to ratify the proposed amendments. See 129 CONG. REC. 2279 (daily ed. Mar. 8, 1983) (Senate vote declining to ratify Montreal Protocols incorporating the Guatemala Protocol); Tompkins, supra note 5, at 26; Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497, 514-16 (1967) (discussing U.S. inaction on Hague Protocol) [hereinafter cited as Lowenfeld & Mendelsohn]. Since 1966 the major international air carriers have adhered to the Montreal Agreement, a voluntary arrangement (promoted by the State Department) which raises the liability ceiling to $75,000 in the case of death or personal injury claims arising from flights serving the United States. See 31 Fed. Reg. 7302 (1966). See generally Lowenfeld & Mendelsohn, supra this note, at 550.
Criticisms of the Convention are not limited to the political arena. Assaults on the Warsaw liability system also have been made in the courts. Much litigation during the past two decades concerns the applicability of the Warsaw system to international flights and related ground activities, the interpretation and enforceability of its liability ceilings, and the establishment of prerequisites for liability.

The Supreme Court's recent decisions have clarified and enforced the Convention's liability ceilings and the Convention's prerequisites for liability. Thus, two avenues by which the lower courts had circumvented the Convention's "conditions and limits" have now been closed. Issues concerning the extent of the Warsaw system's applicability and the interrelated question of the exclusivity of its remedies have now become the means by which some lower courts have sidestepped the Convention. These issues are also the major areas where clarification from the Supreme Court is much needed.

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10 See infra notes 13-61 and accompanying text.

11 See infra notes 62-80 and accompanying text.

12 Warsaw Convention, supra note 1, art. 24(1). For the text of article 24, see infra note 91.
I. THE CONVENTION'S LIABILITY CEILINGS

A. The Franklin Mint Decision

*Trans World Airlines, Inc. v. Franklin Mint Corp.* was the first Supreme Court opinion to construe the Warsaw Convention. It concerned the question of whether the Convention's liability ceilings (stated in gold francs) remain enforceable in the absence of legislation setting an official price for gold. The Court overturned a Second Circuit decision which had held the Warsaw limits prospectively unenforceable, and the Supreme Court upheld a Civil Aeronautics Board ("CAB") regulation which set limits by reliance upon the last official price of gold.

The Second Circuit's decision could be viewed as the culmination of almost two decades of growing judicial hostility toward the Convention's liability ceilings. Unlike earlier courts which circumvented the ceilings by narrowly construing the treaty and requiring strict adherence with its letter, the Second Circuit in *Franklin Mint* made little pretense of merely interpreting the Convention's language. Instead, the court declared the Convention's limits unenforceable as the result of legislation whose framers had never expressed any intention of modifying the Convention.

The Second Circuit's efforts to deny that it had overstepped the bounds of the judicial function and engaged in policymaking, only confirmed that it had done so. The court's claim that it was merely carrying out the Congres-

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14 Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982).
17 *Franklin Mint*, 690 F.2d at 311.
19 See *Franklin Mint*, 466 U.S. at 252-53.
sional purpose by invalidating a CAB regulation of long standing was belied by the court's enforcement of the limit in the case before it. The court candidly explained that its ruling "was not clearly foreshadowed" and should be given only prospective effect. Therefore, the court stated, "Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling."22

The Supreme Court's reversal began from the uncontested ground that "[l]egislative silence does not abrogate a treaty,"23 but the Court's holding went much further. The Court reasoned that since neither legislative history nor the relevant statutes referred to the Convention, the repeal of the law setting an official price for gold was unrelated to the Convention. Hence, the Convention's liability limits remain enforceable in United States courts.24 The Court concluded that the CAB's decision to continue using the last official price of gold to convert the Convention's limits "was consistent with domestic law and with the Convention itself, construed in light of its purposes, the understanding of its signatories, and its international implementation since 1929."25

As Justice Stevens' dissent noted, there is a considerable leap from the conclusion that the Convention's liability ceilings remain enforceable to the conclusion that the CAB has properly implemented them.26 The dissent argued that since the ceiling is stated in gold and the official price of gold has been abolished, the literal language of the Convention could be given effect only by converting

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20 Franklin Mint, 690 F.2d at 312.
21 Id. at 311-12.
22 Id. at 312. Prospective versus retroactive effect has long been acknowledged as a criterion for distinguishing legislative rulemaking from adjudication. See Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908) (Holmes, J.); 2 K. Davis, Administrative Law Treatise § 7.2 (1979).
23 Franklin Mint, 466 U.S. at 252 (citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982)).
24 Id. at 253.
25 Id. at 261.
26 Id.
gold into dollars through use of the market price of gold.\textsuperscript{27} Deference to a CAB regulation is misplaced, Justice Stevens further argued, because the CAB has no more power to alter or to amend a treaty than does the Court.\textsuperscript{28}

Thus, what the majority characterized as a conflict between the political branches and the judiciary requiring judicial restraint instead can be viewed, as the dissent shows, as a conflict between executive implementation of the treaty and its letter, exacerbated by bureaucratic and legislative inertia.\textsuperscript{29} Precisely such conflicts and inertia give birth to judicial activism. Whatever the merits of the dissent's constructional arguments, had they been accepted by the majority, the decision likely would have forced United States and international reconsideration of the Warsaw system.

CAB regulations substantially similar to those challenged in \textit{Franklin Mint} had been in effect for decades.\textsuperscript{30} Because of United States dominance in international aviation, those regulations in practice had made the Warsaw ceilings workable after the demise of an official price for gold despite the lack of a new (and ratified) international agreement substituting special drawing rights ("SDR's") or some other uniform conversion factor for gold.\textsuperscript{31} Had

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{27}] \textit{Id}. at 275-76, n.5. The dissent stated:
\begin{quote}
The drafters of the Convention would surely have agreed that the "least covert of all modes of knavery . . . consists in calling a shilling a pound, that a debt of one hundred pounds may be cancelled by the payment of one hundred shillings." J.S. Mill, \textit{Principles of Political Economy} 486 (1936). Basically, TWA invites us to call a dime a dollar, in order to cancel a debt of 80,000 dollars by the payment of 80,000 dimes.
\end{quote}
\begin{flushright}
\textit{Franklin Mint}, 466 U.S. at 276-77.
\end{flushright}
\item[\textsuperscript{28}] \textit{Franklin Mint}, 466 U.S. at 283, n.13.
\item[\textsuperscript{29}] Thus the dissent argues that "instead of enforcing the Convention's liability limitation, the Court has rewritten it." \textit{Id}. at 287.
\item[\textsuperscript{30}] See \textit{id}. at 247-51; 14 C.F.R. §§ 221.38(j), 221.175, 221.176 (1977).
\item[\textsuperscript{31}] The Warsaw Convention signatories proposed to substitute SDR's for gold in the protocols adopted in Montreal in September of 1975. \textit{See} Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on Oct. 21, 1929, as Amended by the Protocol, Done at The Hague on Sept. 28, 1955, \textit{reprinted in} A. \textit{Lowenfeld, Aviation Law}, Documents Supp. 991, 996 (2d ed. 1981). The majority in \textit{Franklin Mint} pointedly observes that, while the United States had supported the change
\end{enumerate}
\end{footnotesize}
the Court adopted either the decision below or the dissent's position, *Franklin Mint* would have amounted to United States renunciation of the Warsaw Convention's uniform ceilings through judicial action.

In Justice Stevens' view, such a consequence would flow from the language of the treaty itself. In the majority's view, the result would have represented the use (or abuse) of judicial power to force action on hard questions. In either case, immediate action by the political branches would have been necessary to save or to restructure the Warsaw system in order for it to survive. Given the failure of prior revisions to the Convention to win Senate approval, the prospects for immediate action of this kind would not have been good. Thus, *Franklin Mint* may best be viewed not as a return to strict constructionalism, but rather as a victory for the status quo.

**B. Prejudgment Interest: Mahfoud**

Given a fixed and enforceable liability ceiling, a host of difficult issues arise concerning precisely what that ceiling limits. In particular, the Warsaw Convention does not specify whether its liability ceilings encompass attorneys' fees, costs, or interest. The letter and history of the treaty provide only limited assistance in resolving these issues. Nor are the separation of power concerns, so important in *Franklin Mint*, of much relevance to these issues since they do not raise any arguably "political" questions. Rather, these issues focus on whether and to what extent, in a case arising under the Warsaw Convention, a court may look to state law or traditional equitable powers of the judiciary to shape a remedy.

*Eastern Airlines, Inc. v. Mahfoud* is the first case to raise these questions before the Supreme Court. In *Mahfoud* and signed Protocol No. 4, the Senate had not yet consented to its ratification which "left the CAB with the difficult task of supervising carrier compliance with the Convention's liability limits without up-to-date guidance from Congress." *Franklin Mint*, 466 U.S. at 250.

32 See supra note 6.

Certiorari was granted to resolve a conflict among the circuits as to whether the liability ceiling of the Warsaw Convention, as modified by the Montreal Agreement, precludes the award of prejudgment interest that results in a total award exceeding the ceiling. Following argument, an equally divided Supreme Court affirmed per curiam the lower court's decision allowing such interest on the basis of traditional equitable powers.

_Mahfoud_ is admittedly a hard case. The language of the Convention itself is not dispositive, and neither its drafting history nor the history of the Montreal Agreement addresses the issue of prejudgment interest. Although the Warsaw Convention does contain explicit exceptions to the ceilings and prejudgment interest is not among these, the real question is whether prejudgment interest should be viewed as an exception at all. The practical construction given by the parties to the Convention is a relevant consideration. Unfortunately, a lack of international uniformity exists in the treatment of subjects such as prejudgment interest.


The conflicting decisions arose from the same accident, the June 24, 1975 crash of Eastern Air Lines Flight 66 on approach to JFK International Airport. In _O'Rourke v. Eastern Air Lines, Inc._, 730 F.2d 842 (2d Cir. 1984), the Second Circuit ruled that the liability limitation was absolute and prejudgment interest, available under state law, could not be awarded in excess of the limitation. The Fifth Circuit, first in _Domangue v. Eastern Air Lines, Inc._, 722 F.2d 256, 263-64 (5th Cir. 1984), then in _Mahfoud_, 729 F.2d 777 (5th Cir. 1984), held that prejudgment interest could be awarded in addition to the $75,000 limitation.

The Warsaw Convention, supra note 1, article 22(1) allows the carrier and passenger to agree to a higher limit by "special contract." Absent such an agreement the Convention states only two circumstances where its limitation may be exceeded: (1) where the carrier fails to deliver to the passenger the ticket required by the Convention or (2) where the carrier caused the damage by its "willful misconduct." _Warsaw Convention, supra_ note 1, arts. 3(2), 25.


as attorneys’ fees and interest in cases arising under the Convention which subsequent discussions among the parties have failed to redress.\textsuperscript{39}

The Convention does not create a comprehensive, all-embracing scheme of regulation to govern all aspects of claims arising in international air transportation. Rather, the treaty contemplates that its provisions will be implemented within the framework of the domestic law of each of the signatory nations.\textsuperscript{40} In the United States the courts must decide whether the source of this law is state or federal. The circuit courts which have addressed the question now agree that the Convention itself creates a federal cause of action independent of state law.\textsuperscript{41} The question posed by \textit{Mahfoud} thus becomes whether a court adjudicating a Warsaw claim should adopt or be guided by state law concerning the availability of prejudgment interest or whether instead it should fashion a nationwide federal rule.\textsuperscript{42} In other words, the question is whether the court should lay down a uniform rule of “federal common law” on this subject.

The mere presence of a federal interest does not require a federal solution.\textsuperscript{43} At least one commentator has argued that there is, or should be, a general presumption that the court should apply state law in federal question cases to resolve issues where Congress has neither provided specific substantive law nor directed that federal law

\textsuperscript{39} See Lowenfeld & Mendelsohn, \textit{supra} note 6, at 507-09, 561-63, 567-69.

\textsuperscript{40} The following issues are left to domestic law: questions of procedure, standing to sue and respective rights in injury and death claims, the effect of contributory negligence, the type of carrier default equivalent to willful misconduct, and the method of calculating the two-year limitation period for damage actions. \textit{Warsaw Convention}, \textit{supra} note 1, arts. 21, 24(2), 25(1), 28(2), 29(2).


be used. While perhaps use of the term “presumption” is too strong, case law indicates at least a preference for adopting state law as the rule of decision. Where Congress has at best been ambiguous on the choice of law, the proponent of the uniform federal rule bears the burden of explaining why a federal rule is necessary.

In *Mahfoud* two relatively strong arguments in favor of national uniformity exist. First, because implementation of the Warsaw Convention affects United States relations with foreign nations who entered into an agreement with the United States as sovereign (and not with the individual states), these issues are “uniquely federal in nature” and should not be left to “divergent and perhaps parochial” state rulings. Second, a federal rule is necessary to protect the Warsaw ceilings from state interference, particularly in light of the antipathy shown by state and federal judges alike to rigorous enforcement of the ceilings.

The problem with the first argument, although it has force, is that it proves too much. Courts have used state law to decide issues in Warsaw cases without dire consequences. For example, the Convention leaves the question of capacity to sue in a wrongful death case to the domestic law of the parties. The liability ceilings, how-

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46 The proponent has the burden because such decisions have a direct impact on the distribution of power between the state and federal governments. See *Mishkin*, *supra* note 42, at 811-14.
48 See *id.* at 425.
51 A dispute of this nature arose in *Mahfoud* which the trial court resolved on the
ever, go to the very heart of the Warsaw bargain,\textsuperscript{52} and the need for uniformity in their implementation may be greater.

The second argument, protecting the liability ceilings from state interference, goes back at least in part to the question of the treaty’s intent. If a state statute selectively required the payment of prejudgment interest in Warsaw cases but in no others, such a statute clearly would be inconsistent with the Convention because the statute’s sole purpose would be to raise liability ceilings. Yet where a state statute requires that damages in all tort actions be calculated and then interest awarded from the date of the complaint, the question is far less clear.

The Fifth Circuit cited such a state statute\textsuperscript{53} in \textit{Domangue v. Eastern Air Lines, Inc.},\textsuperscript{54} a case which the court followed in \textit{Mahfoud}. Nonetheless, the Fifth Circuit did not purport to rely on the statute. Instead, the court referred to decisions arising under Title VII and in admiralty (\textit{i.e.}, under federal law) for the proposition that “the award of prejudgment interest on unliquidated claims is left to the discretion of the court.”\textsuperscript{55} Thus, the court in a sense was laying down a rule of federal common law, but the “rule” announced was simply that the courts have equitable dis-

\textsuperscript{52} The creation of a presumption of carrier liability in return for a ceiling on liability has been referred to as “the essential bargain” of the Convention. Lowenfeld & Mendelsohn, supra note 6, at 500. See I SHAWCROSS & BEAUMONT ON AIR LAW ¶ VII(4) (4th ed. 1984).


\textsuperscript{54} 722 F.2d 256, 262 (5th Cir. 1984).

\textsuperscript{55} \textit{Id.} at 263.
cretion to make such awards in excess of the Convention limits. This result honors neither the preference for adopting state law nor the countervailing interest of national uniformity.

Prejudgment interest is relatively unusual, particularly in tort cases, and is often discretionary where permitted. In contrast, postjudgment interest is universal and mandatory. Thus, we tend to view prejudgment interest more as a component of damages. As such, prejudgment interest should be subject to the Convention's liability ceilings. Having judges deciding whether to award prejudgment interest on a case-by-case basis using equitable factors, such as those alluded to by the Fifth Circuit in Domangue, reinforces this view. Obviously, such principles present a means for circumventing the liability ceiling.

National uniformity is a legitimate but often overstated concern in choosing between adoption of state law or creation of federal common law. In the case of the Warsaw Convention in particular, the importance of national uniformity has been greatly stressed. In the administration of treaties affecting our relations with foreign nations, this concern is probably greater, and the corresponding interest of federalism favoring the adoption of state law is weaker.

Unfortunately, the parties' briefs in Mahfoud focused almost entirely on whether the Warsaw Convention intended to prohibit prejudgment interest. The briefs did

56 See, e.g., 28 U.S.C. § 1961 (1982), which states in pertinent part: "Interest shall be allowed on any money judgment in a civil case recovered in a district court."
57 See Domangue, 722 F.2d at 263-64.
58 See Note, supra note 42, at 1529-31.
not address the broader policy issue of whether a nationwide federal rule is necessary. Thus, while the practical consequence of the Court’s per curiam affirmance by split decision is that uniformity is not presently required, we have yet to have the Court’s considered opinion on the important questions of federalism in Warsaw Convention enforcement which Mahfoud posed.

II. THE CONVENTION’S PREREQUISITES FOR LIABILITY: AIR FRANCE V. SAKS

In *Air France v. Saks*, the Court clarified the prerequisites for carrier liability in cases of personal injury or death occurring in the course of international transportation subject to the Warsaw Convention’s liability rules. The decision addresses the narrow question of the meaning of the term “accident” in article 17, and the court resolves this question on the basis of traditional principles of construction and interpretation. Like *Franklin Mint*, however, the decision in *Saks* also stands as a warning against judicial revisions to the treaty based upon broad considerations of social policy.

Notwithstanding the oft stated “high duty of the common carrier,” a plaintiff was required at common law to prove negligence in order to establish a carrier’s liability for personal injury to its passengers. The practical difficulties of such proof in the case of an accident occurring in the course of international air transportation were apparent to the Warsaw draftsmen. Accordingly, they es-

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63 Id. at 1340.
64 Id. at 1340-45.
66 In transmitting the Convention to the Senate, the Secretary of State explained: “The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.” Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Cer-
established a presumption of carrier liability for any injury caused by an accident on board an aircraft. The liability system remained fault-based, as do the state law causes of action under which injuries on board domestic flights are adjudicated.

Under the Warsaw system the presumption of carrier liability could be rebutted by an affirmative showing that the carrier acted with due care. Under pressure of a United States threat to renounce the treaty, air carriers have agreed to waive this defense in the case of international flights serving the United States. This same agreement, known as the Montreal Agreement, raises the Convention's liability ceiling on such flights.

Article 17 of the Convention governs air carrier liability for passenger injuries. It states that the carrier shall be liable for such injuries "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The proper construction of this provision is the question which the Court decided in Saks. In Saks the plaintiff alleged a hearing loss resulting from cabin pressurization changes but through discovery found no evidence of any abnormality in the functioning of the pressurization system. The district court granted the carrier's motion for summary judgment, but the Ninth Circuit reversed. The circuit court held that "a showing of malfunction or abnormality in the aircraft's operation is not a prerequisite for liability under the Warsaw Convention." It claimed to find support for this conclusion in


\[67 \text{ See Lowenfeld & Mendelsohn, supra note 6, at 500.}\]

\[68 \text{ See Warsaw Convention, supra note 1, art. 20(1).}\]

\[69 \text{ See Montreal Agreement, supra note 34. See generally Lowenfeld & Mendelsohn, supra note 6, at 497.}\]

\[70 \text{ Warsaw Convention, supra note 1, art. 17.}\]

\[71 \text{ Saks, 105 S. Ct. at 1340.}\]

\[72 \text{ Saks v. Air France, 724 F.2d 1383, 1384 (9th Cir. 1984), rev'd 105 S. Ct. 1338 (1985).}\]
the Montreal Agreement and the case law applying it. Through the waiver of the due care defense, the court reasoned, the Montreal Agreement imposed "absolute liability on airlines for injuries caused by air travel."[73]

The Supreme Court rejected the Ninth Circuit's construction of article 17. The Court held that "liability under article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[74] The decision's reasoning was based primarily on the text of the Convention itself which (1) distinguishes between "accident" and "occurrence" and (2) "refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury."[75]

The Court also rejected the Ninth Circuit's reading of the Montreal Agreement. In its analysis of the effects of the Montreal Agreement on article 17, the Court evoked the theme of judicial restraint in a manner reminiscent of Franklin Mint:

Our duty to enforce the "accident" requirement of Article 17 cannot be circumvented by reference to the Montreal Agreement of 1966 . . . . It is true that one purpose of the Montreal Agreement was to speed settlement and facilitate passenger recovery, but the parties to the Montreal Agreement promoted that purpose by specific provision for waiver of the Article 20(1) defenses. They did not waive other provisions in the Convention that operate to qualify liability, such as the contributory negligence defense of Article 21 or the "accident" requirement of Article 17 . . . . [W]e decline to employ [the] similarity [between the "due care" defense and the "accident" requirement] to repeal a treaty provision that the Montreal Agreement on its face left unaltered.[76]

The Ninth Circuit's decision had dramatically extended prior law and had created a direct conflict with the Third

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73 Id. at 1988.
74 Saks, 105 S. Ct. at 1345.
75 Id. at 1341-42 (emphasis in original).
76 Id. at 1346.
Circuit.\textsuperscript{77} The Ninth Circuit’s reasoning relied upon dicta from cases concerning terrorism and hijacking\textsuperscript{78} to support policy arguments concerning risk allocation.\textsuperscript{79} The consequence of this position, had it been upheld, would have been to expand greatly the duty of the international air carrier. In essence, it would have converted the Warsaw Convention into a form of travel insurance.\textsuperscript{80} By reversing the Ninth Circuit, the Court preserved the integrity of the Warsaw system.

### III. Applicability and Exclusivity of the Warsaw System

As discussed, the viability of the Convention’s prerequisites for liability and its damage ceilings has been reaffirmed and the integrity of the Warsaw system protected in \textit{Franklin Mint} and \textit{Saks}. These conditions and limitations, however, are of little consequence if conduct actionable under the Warsaw Convention can also form the basis for an independent state law claim. Accordingly, the courts generally have concluded that the Warsaw cause of action and its limitations on liability are exclusive “when [the Convention] applies.”\textsuperscript{81} What if a plaintiff injured in

\textsuperscript{77} See DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978).
\textsuperscript{79} Saks, 724 F.2d at 1386-87.
\textsuperscript{80} In presenting the preliminary draft of the Convention, Mr. Devos, the Convention’s Reporter, explained: “The Convention does not set up a system of compulsory insurance.” \textit{Minutes, Second International Conference on Private Aeronautical Law, Warsaw, October 4-12, 1929} 46 (R. Horner & D. Legrez, trans. 1975) [hereinafter cited as \textit{Warsaw Minutes}].
\textsuperscript{81} Abramson v. Japan Airlines Co., 739 F.2d 130, 134 (3d Cir. 1984) \textit{cert. denied}, 105 S. Ct. 1776 (1985). When the Second Circuit in \textit{Benjamins} reversed itself to hold that the Convention creates causes of action for wrongful death and for damage to baggage, it also held that the Convention is “the universal source of a right of action.” Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978). Similarly, the Fifth Circuit has held “that the Warsaw Convention creates the cause of action and is the exclusive remedy.” Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 458 (5th Cir. 1984) \textit{cert. denied}, 105 S. Ct. 951 (1985). The Ninth Circuit appears to follow a slightly different rule. It has held that the Convention preempts state law to the extent
connection with international air travel is unable to establish a cause of action under the Warsaw Convention; may he then proceed with a state law claim? This issue was raised belatedly by the plaintiff in Saks, but the Supreme Court refused to address it, stating that it was unclear whether the issue had been presented to the court below. This issue was also posed by Abramson v. Japan Air Lines Co., in which certiorari was recently denied. Such questions of the “applicability” of the Convention are the subject of some confusion in the courts, and clarification is much needed.

The confusion begins with the use of the term “applicability.” A statement that a statute or treaty does not apply to particular facts has two separate and legally distinct meanings. First, it can mean that facts necessary to show subject matter jurisdiction under the statute or treaty are absent. Second, it can mean that the plaintiff is unable to show facts necessary to prevail on the merits of a claim under such statute or treaty. Only in the absence of jurisdictional facts necessary to show that a claim is subject to the Convention, should claims based on state law be permitted.

The issue is one of preemption. By virtue of article VI of the United States Constitution, treaties such as the Warsaw Convention are part of the supreme law of the

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that the application of state law would circumvent the Convention’s limitations on carrier liability. In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 418 (9th Cir. 1983); In re Aircrash in Bali, Indonesia on Apr. 22, 1974, 684 F.2d 1301, 1308 (9th Cir. 1982). However, the Ninth Circuit suggests that state law claims may co-exist with the Convention’s causes of action, but the state law claims would be subject to the limitations of the Convention. Aircrash in Bali, 684 F.2d at 1311, n.8; Mexico City Aircrash, 708 F.2d at 414, n.25.

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82 Saks, 105 S Ct. at 1347.
84 See, e.g., Schmidkunz v. Scandinavian Airlines System, 628 F.2d 1205 (9th Cir. 1980) (injuries sustained on a moving walkway in the common passenger area of a terminal were not in the course of “embarking”); MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971) (the Convention was not applicable to a passenger’s fall in a baggage area since she was no longer “in the course of disembarking”).
land. Within constitutional limits federal law may preempt state law by so stating in express terms. State law also may be preempted implicitly by a statute or treaty which establishes a comprehensive federal scheme of regulation or touches a field in which the federal interest is so dominant that intent to preempt can be assumed. Even where the treaty does not completely displace state regulation, state law is preempted where it actually conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." A mere "hypothetical or potential conflict," however, is not sufficient to warrant preemption.

Article 24 of the Convention contains an apparently express preemption provision. This article provides that in cases "covered by" the Convention's liability provisions "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Yet "[e]ven unambiguous statements of statutory intent require analysis to determine the scope of the pre-emption clause." Two issues of statutory interpretation must be resolved to determine when the Convention preempts state law. First, what does it mean to say that a

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89 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
91 (Emphasis added). Warsaw Convention, supra note 1, article 24 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 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.
case is “covered by” the Convention’s liability provisions? Second, assuming a case is so covered, to what extent are the “conditions and limits” to which it is subject incompatible with the use of state law? The Convention’s text provides only a partial answer to these questions. Thus, while article 24 indicates an intention to preempt, defining its scope requires resort to the principles of analysis employed in implicit preemption cases.

As noted, article 24 contemplates a two-step inquiry: (1) a determination of coverage and (2) an application of the Convention’s terms and conditions. In accordance with the analysis of “applicability” offered above, the determination of “coverage” should be equated with the analysis of facts relevant to subject matter jurisdiction. Where subject matter jurisdiction under the Convention exists, an action for damages must be brought within its framework. Otherwise, the Convention’s fundamental purpose of “regulating in a uniform manner”\textsuperscript{93} international air carrier liability and the “essential bargain”\textsuperscript{94} on which that regulation is founded are both frustrated.

Article 1 provides the basic definition of the Convention’s coverage. It begins: “This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire.”\textsuperscript{95} The broad intent of this provision is clear from its language—the Convention is to regulate international air transportation among its signatories while leaving domestic air transportation to be governed by domestic law.\textsuperscript{96}

In order to apply the Convention’s rules governing carrier liability, it is necessary to know not only the transportation to which the Convention’s rules apply, but also

\textsuperscript{93} The Warsaw Convention, \textit{supra} note 1, at preamble, states in pertinent part: “Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier . . . .” \textit{See also} Franklin Mint, 466 U.S. at 247, 256.

\textsuperscript{94} \textit{See supra} note 52.

\textsuperscript{95} Warsaw Convention, \textit{supra} note 1, art. 1.

when that transportation begins and ends. The rules defining the period of liability for death or injury to passengers differ from the liability rules for damage to baggage or goods. In the former case, the carrier is liable where the events giving rise to liability "took place on board the aircraft or in the course of any of the operations of embarking or disembarking." In the case of goods and baggage, the Convention governs the carrier's liability for damage while the carrier is "in charge of" the baggage or goods. The placement of these definitions in chapter 3 of the Convention stating liability rules, instead of in chapter 1 defining its scope, appears to be largely an accident of the drafting process. Had they been placed in chapter 1, perhaps some of the confusion concerning the Convention's "applicability" could have been avoided.

Where an injury occurs to a passenger outside the scope of the transportation to which the Convention applies, domestic law governs any claim which is brought. Thus, where passengers are injured in terminal areas, jurisdiction under the Convention depends on whether the passengers were in the course of embarking or disembarking. In some cases, the main practical consequence of such a finding is whether the claim is subject to the Convention's liability ceiling. In others, however, a finding of no subject matter jurisdiction under the Convention may mean that the plaintiff can obtain no relief at all in

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97 Warsaw Convention, supra note 1, art. 17.
98 Id. art 18.
99 The earlier drafts of the Warsaw Convention contained a single liability provision governing both injury to persons and damage to goods or baggage which simply stated: "[t]he carrier shall be liable for damage sustained during carriage ...." The "period of carriage" for purposes of this and other liability provisions was stated in a separate article. See Warsaw Minutes, supra note 80, at 264-65. During the Warsaw conference, these articles were amended in part to establish different periods of coverage for the different liability cases. Id. at 205-06.
100 See, e.g., Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975) cert. denied, 429 U.S. 890 (1976); MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971).
the forum where the action is brought.\footnote{See Schmidkunz v. Scandinavian Airlines System, 628 F.2d 1205, 1207 (9th Cir. 1980).}

In contrast to the clauses in articles 17 and 18 which state the duration of the transportation to which the Convention applies, the other provisions of chapter 3 state "conditions and limits" on liability.\footnote{Warsaw Convention, supra note 1, art. 24(1). The French word "conditions" used in article 24 might be better translated as "terms" or "basis." See Calkins, The Cause of Action Under the Warsaw Convention, 26 J. Air L. & Com. 217, 225-26 & n.21 (1959). See also Benjamins v. British European Airways, 572 F.2d 913, 918 (2d Cir. 1978) (arguments are inconclusive as to whether "conditions," "basis," or "terms" provides the best interpretation of the delegates' meaning).} These provisions define the plaintiff's cause of action, the defenses available, and the ceilings on liability. These articles both reduce the plaintiff's burden of proof and limit the carrier's liability. This is the "essential bargain"\footnote{See supra note 52.} of the Convention. Permitting a plaintiff to maintain an action based on state law when he is unable to show facts satisfying the requirements for a claim under the terms of this "bargain" frustrates the Convention's purpose, both by making its conditions one-sided and by undermining international uniformity.

For example, article 29 provides a two-year statute of limitations. Suppose a flight from Paris to New York crashes, and the estate of a passenger is able to bring suit in a forum which has a three-year statute of limitations for wrongful death actions. If the estate waits more than two years to file suit, it has no claim under the Convention. Should the estate then be permitted to file a state law claim which would not be subject to the Convention's liability ceiling? Permitting such an action would not only make article 29 a nullity, it also would provide plaintiffs with a means of circumventing the liability ceiling whenever a forum is available whose local law contains a limitations period longer than two years.

A similar analysis applies to the prerequisites for liability stated in article 17. Should a passenger injured on board an international flight be permitted to pursue a
state law claim if he is unable to show that his injury was caused by an accident and therefore has his Warsaw claim dismissed? This is the issue raised by Abramson v. Japan Air Lines Co. If such actions are permitted, article 17 becomes purely a statement of jurisdictional requirements instead of the statement of a substantive liability rule which its framers intended. In the case of most serious injuries, this would produce the anomaly of a carrier arguing that an injury must have been caused by an accident in order to be able to rely on the Convention's liability ceiling.

This argument for the preemptive effect of article 17's accident requirement finds further support in article 25 of the Convention. Article 25 states that a carrier is not entitled to assert the provisions of the Convention "which exclude or limit his liability, if the damage is caused by his willful misconduct." First, article 25 apparently contemplates that the plaintiff's action in cases of willful misconduct will otherwise be subject to the Convention—e.g., must comply with its venue and statute of limitations requirements. Second, article 25 suggests that where damage is caused by carrier misconduct which is not willful, the carrier may rely on the liability ceiling and other provisions of the Convention.

Consider article 25's application to the following hypothetical which is similar to the facts of Abramson. A passenger on an international flight feels chest pains and signals for the flight attendant. The signal goes unnoticed for fifteen minutes because the flight attendants are serving dinner. The passenger suffers a heart attack which a doctor subsequently testifies could have been avoided by promptly giving the passenger oxygen and a place to lie down. Did the flight attendant's behavior amount to "willful misconduct"? If so, the passenger may bring an action against the carrier under the Convention based upon such misconduct, and the action will not be subject


\[106\] Warsaw Convention, supra note 1, art. 25.
to the liability ceiling of article 22 or the accident require-
ment of article 17. If the behavior is not found to be will-
ful, however, article 25 implies that the passenger must show that the flight attendent’s failure to respond consti-
tuted an accident which caused the heart attack and that the passenger’s recovery, if any, is subject to the liability ceiling. In each case, the claim of the hypothetical passen-
er remains subject to the Convention. This result is con-
trary to Abramson where the court, having found no accident, held that the passenger’s claim was not subject to the Convention at all.\footnote{Abramson, 739 F.2d at 134.}

The ticketing requirements of the Convention also sup-
port the conclusion that the Convention’s substantive provisions are intended to preempt local law. Article 3 provides that a carrier may not rely on the liability ceilings if it fails to deliver to the passenger a ticket including the specified notices but implies that the provisions of the Convention shall otherwise apply.\footnote{Warsaw Convention, supra note 1, art. 3 states: A passenger ticket . . . shall contain . . . [a] statement that the trans-
portation is subject to rules relating to this convention . . . . [I]f the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.} This provision nulli-
fies a specific limitation of the Convention under certain circumstances but leaves the claim otherwise subject to the Convention.

Even the few exceptions to the liability ceilings in the current Convention have been criticized by the parties to the Convention. At the conference held in Guatemala City to negotiate revisions to the Warsaw scheme, there was much discussion of establishing a truly “unbreakable” ceiling on carrier liability.\footnote{See, e.g., International Civil Aviation Organization, International Conference on Air Law, Guatemala City, February-March 1971, vol. I, Minutes (Doc. 9040-LC/167-1) 15, 18-20, 65-66, 135-44 (1972) [hereinafter cited as Guatemala Minutes]. See also Mankiewicz, Warsaw Convention: The 1971 Protocol of Guatemala City, 20 AM. J. COMP. L. 335, 337 (1972).} In these discussions the lim-
ited exceptions contained in articles 3 and 25 were criti-
cized because of the uncertainty they engender. The proposed revisions adopted at Guatemala City and Montreal (but not ratified by the United States) reflect this concern by eliminating article 25 entirely and amending article 3 to remove the notice exception to the liability ceiling.

The exception created by the Abramson court is potentially much broader. It would permit state law claims when facts establishing subject matter jurisdiction under Warsaw are present but liability under the Convention is precluded. The widespread application of such a rule would pose a threat to the continued workability of the Warsaw system.

CONCLUSION

The recent Supreme Court decisions addressing Warsaw Convention issues have protected the Convention's integrity against arguments which would have undermined its liability ceilings and prerequisites for liability. These decisions raise important questions concerning the separation of powers and federalism which have not always been clearly articulated. Whether separate state law claims may still arise out of international transportation subject to the Convention is an issue that the Supreme Court has not yet addressed. In this article's analysis, any such claim relating to passenger injury or death or to baggage or cargo loss must be preempted by the Convention's limitations and conditions. Otherwise, the Supreme Court's recent decisions could become nullities, and the Warsaw Convention's underlying purpose of obtaining international uniformity would be frustrated.

See, e.g., Guatemala Minutes, supra note 109, at 15, 141, 168-73.