The Complete Preemption Removal Doctrine and the Montreal Convention Are in an Uncomfortable *Pas de Deux*

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A mysterious thing, the "complete preemption removal doctrine" has challenged if not befuddled courts and attorneys for decades. If you have not come across it before you may be wondering exactly what it is. And if you have come across it, you may still be scratching your head, confused by it. You're not alone. Often, the aviation practitioner will encounter the doctrine when a lawsuit is filed in state court, and the claims are subject to the treaty known as the 1999 Montreal Convention (Montreal).[1] The treaty "applies to all international carriage of persons, bag-

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1 Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, T.I.A.S. No. 13,038, 2242

gage or cargo performed by aircraft for reward."[2] A plaintiff typically prefers to litigate these claims in state court. A defendant typically removes the case, and the plaintiff typically seeks a remand.

There is a large and profound disagreement amongst the federal courts over whether the doctrine applies to Montreal claims. Until the Supreme Court addresses the issue, there will continue to be a hodgepodge of conflicting decisions.

Some of the confusion results from the title, "complete preemption removal doctrine." The word "preemption" has a specific meaning to American practitioners which we will discuss shortly. "The use of the term 'complete preemption' is unfortunate since the complete preemption removal doctrine is not a preemption doctrine but rather a federal jurisdiction doctrine."[3] The doctrine of complete preemption is a distinct doctrine. Nevertheless, we cannot really understand complete preemption without having a solid foundation in "ordinary preemption." Courts often note that practitioners conflate ordinary preemption, including conflict preemption, with the doctrine of complete preemption.

Assuming there is no diversity or state action jurisdiction, whether remand is granted depends on whether the district court believes the complete preemption removal doctrine applies. It is crucial that a district court "get it right." An improper denial of a motion for remand means the case procedurally stays in the district court when the court has no original jurisdiction. Without original jurisdiction, everything the district court does is as if it never happened. Subject matter jurisdiction cannot be created by consent or inaction.[4] If at any time before final judgment it appears that a district court does not have subject matter jurisdiction, the case is to be remanded.[5] No court wants to expend the considerable time and effort to develop a case only to learn later that it never had federal question jurisdiction. Human nature being what it is, this concern should normally weigh heavily on a district court to interpret Montreal in a fashion that supports the granting of a motion for remand.

U.N.T.S. 350 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention or Montreal].

2 *Id.* art. 1(1).

3 Lister v. Stark, 890 F.2d 941, 945 n.1 (7th Cir. 1989).

4 Gibson v. Chrysler Corp., 261 F.3d 927, 948 (9th Cir. 2001).

5 28 U.S.C. § 1447(c).

The Problem

Those of us who enjoy lowbrow comedy in movies, including the authors, fondly remember the movie *Airplane*,[6] where passengers on a flight from Los Angeles to Chicago who ate fish became seriously ill from food poisoning. As luck would have it, the pilots also ate fish, leaving the aircraft in the hands of Otto the inflatable autopilot and Elaine, a flight attendant, until Ted Striker, a former combat fighter pilot with a severe case of PTSD, fear of flying, and a "drinking problem" was convinced to take over.[7] Striker landed the aircraft, but not without shearing off the landing gear (but he got the girl, Elaine).

Now, imagine that happening in real life on a United flight from Los Angeles to Chicago (where United Airlines is headquartered), and many of the affected passengers are booked on a connecting flight to London. Those passengers are traveling under an international contract of carriage, and their rights are subject to the conditions and limitations of Montreal. A very able aviation lawyer signs them up and files suit against United in state court in Cook County, Illinois, alleging negligence and other state law claims.

A diligent aviation defense lawyer is called to defend United. The first thing she says, "We must get this case to federal court. I think the plaintiffs' lawyer is pleading around Montreal, so the case can stay in state court." The next morning, she files a notice of removal, claiming that under the complete preemption removal doctrine, the claim is a federal claim because, regardless of how the claim is pled, it must arise under Montreal since the treaty supplants all state law tort claims. The plaintiffs' lawyer says, "Wait a minute. I don't think so." The following morning, he files a motion to remand.

The fight is joined. Either she is right, or he is right. Both can't be right. This article considers who has the better argument.

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6 (Paramount Pictures 1980).

7 Dr. Rumack's character, played by actor Leslie Nielsen, is best remembered for his response to the line, "Surely, you can't be serious!" "Yes, I am. And stop calling me Shirley."

A Summary of Plain Vanilla Ordinary Preemption

A broad overview of the garden variety forms of ordinary preemption breaks down generally into express preemption and implied preemption. And within implied preemption there are the specific subcategories of field and conflict preemption. "Ordinary" preemption is not "complete" preemption and is not grounds for removal. Where a claimant asserts a state claim based solely on state law, ordinary preemption is pled as an affirmative defense. The courts that have declined to apply the doctrine of complete preemption to Montreal usually base their decision on the belief that Montreal presents only conflict preemption.

With express preemption, Congress has "expressly" stated its intent to preclude state laws that fall within the scope of the preemption. An aviation practitioner encounters express preemption only twice. First is the Airline Deregulation Act of 1978 (ADA),[8] which expressly preempts states from enacting or enforcing a law, regulation, or other provision having the force and effect of law related to a "price, route, or service" of an air carrier. The typical matter a court wrestles with regarding express preemption is not the fact of preemption itself, but whether the matter itself falls within the zone of the subject expressly preempted.[9]

Second is the General Aviation Revitalization Act of 1994 (GARA).[10] GARA states that no civil action for damages arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or a component part manufacturer when the aircraft or component was first delivered to the first purchaser more than eighteen years before the accident. There are exceptions, but the gist of GARA is a federally mandated statute of repose.[11]

The power of Congress to preempt state law derives from the Supremacy Clause of Article VI of the Constitution, which, as every first-year law student knows, provides that the laws of the United States "shall be the supreme law of the land . . . any Thing in the Constitution or Laws of any state to the Contrary notwith-

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8 49 U.S.C. § 41713(b)(1).

9 Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998); Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998).

10 49 U.S.C. § 40101.

11 Campbell v. Parker-Hannifin Corp., 82 Cal. Rptr. 2d 202 (Ct. App. 1999).

standing."[12] Importantly, when determining whether a state law is preempted pursuant to the Supremacy Clause, a court "starts with the assumption that the historic police powers of the State [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[13]

Let's repeat that: when considering a federal statute, the presumption is *against* a finding of preemption. This is a feature of our complex federalism, going to the foundations of the Constitution and the 1787 Constitutional Convention debates and state ratifying conventions and legislatures. As we shall see, the presumption does not necessarily apply to the interpretation of a treaty.

Abdullah v. American Airlines, Inc., an example of an implied preemption case, dealt specifically with a category of implied preemption identified as field preemption which, according to *Abdullah*, occurs where federal law thoroughly occupies the legislative field in question, federal regulation of the field is pervasive, or where state regulation of the field would interfere with Congressional objectives. In *Abdullah,* the field in question was aviation safety. The *Abdullah* court held that federal law so thoroughly occupied the field of aviation safety that state law was preempted, noting the federal standard preempting state law is found in 14 C.F.R. § 91.13(a), which provides: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." Under *Abdullah*, for example, a state claim alleging violation of the high duty of care of a common carrier would be preempted.

On the other hand, *Sikkelee v. Precision Airmotive Corp.*[14] is an example of conflict preemption. "There are two types of conflict preemption: (1) impossibility preemption, where compliance with both federal and state duties is impossible;[15] and (2) obstacle preemption, where compliance with both laws is possible, but state law poses an obstacle to the full achievement of federal purposes."[16] Conflict preemption is an affirmative defense.[17]

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12 U.S. Const. art. VI, cl. 2.

13 Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 375 (3d Cir. 1999).

14 907 F.3d 701 (3d Cir. 2018).

15 "The question for 'impossibility' [preemption] is whether the private party could independently do under federal law what state law requires of it." PLIVA, Inc. v. Mensing, 564 U.S. 604, 620 (2011).

16 *Sikkelee*, 907 F.3d at 709.

17 *In re* Vehicle Carrier Servs., 846 F.3d 71, 84 (3d Cir. 2017).

In *Sikkelee,* the defendant manufacturer argued it could not be held liable in a state tort lawsuit for its failure to use safety wire to secure the bolts that held together the two halves of its carburetor – the throttle body and float bowl. The manufacturer argued the type certificate for the carburetor specified the use of hex nuts and lock-tab washers and the manufacturer could not deviate from the specifications of the type certificate that had been approved by the FAA. Over a dissent, the majority wrote that conflict preemption did not apply unless the manufacturer could present "clear evidence that the FAA would not have approved a change." The majority relied upon *Wyeth v. Levine*,[18] a decision of the Supreme Court dealing with warning labels for pharmaceutical drugs issued by brand-name manufacturers and approved by the FDA. Under the FDA regulatory scheme, a brand name drug manufacturer may modify its warnings without prior approval by the FDA, subject to the power of the FDA to countermand the change. The so-called "Changes Being Effected" (CBE) in the regulatory structure of the FDA, upon which the court in *Sikkelee* based its conclusion, does not exist in the regulatory structure of the FAA.

Complete Preemption Is a Distinct Doctrine

Complete preemption, as contrasted to ordinary preemption, not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal.[19] Interestingly, a federal court's grant of a motion to remand, a jurisdictional decision that necessarily concludes that complete preemption is not applicable, does not preclude a state court from finding that the state law cause of action is preempted by federal law.[20]

The Supreme Court explained in *Beneficial National Bank v. Anderson*[21] that the complete preemption removal doctrine applies when Congress "intend[s] the federal cause of action to be exclusive." *Beneficial* was originally a state court claim under a common law usury theory and a state usury statute. The lawsuit was brought against nationally chartered banks for allegedly

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18 555 U.S. 555 (2009).

19 Schmeling v. NORDAM, 97 F.3d 1336 (10th Cir. 1996).

20 *Lister*, 890 F.2d 941.

21 539 U.S. 1, 10 n.5 (2003).

charging excessive interest. The defendants removed the case, arguing the federal National Bank Act ("NBA") completely preempted the state law claims. Procedurally, after differing opinions between the district court and circuit court, the Supreme Court in *Beneficial* ruled the case was properly removed under the complete preemption removal doctrine because the subject federal statute "provided the exclusive cause of action for the claim asserted" and "set forth procedures and remedies governing that cause of action."[22]

To repeat: *Beneficial* establishes a two-prong test for complete preemption: (1) does the "statute" provide the exclusive cause of action for claims that fall within its scope; and (2) does the statute set forth the procedures and remedies that govern the exclusive cause of action? To date, the Supreme Court has not considered whether a claim under Montreal satisfies the two-prong test established by *Beneficial*.

Besides *Beneficial*, there are just two other instances where the Supreme Court has found the complete preemption removal doctrine to be applicable. In the 1968 case of *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists & Aerospace Workers*,[23] an employer filed suit in state court alleging it had a valid contract with the defendant union that required the union to submit grievances to binding arbitration. The case was removed, and the Supreme Court eventually held the removal was proper because regardless of how the claim was pled, Section 301 of the Labor Management Relations Act (LMRA) entirely displaced any state cause of action for violation of contracts between an employer and a labor organization.[24]

The final example is an action subject to the Employee Retirement Income Security Act (ERISA). In *Metropolitan Life Insurance Co. v. Taylor*,[25] General Motors had set up an employee benefit plan subject to ERISA and insured by Metropolitan Life. After General Motors terminated an employee's benefits under the plan, the employee brought state law breach of contract and tort claims in state court. The case was removed, the defendants arguing the employee's claims were completely preempted by Section 502(a) of ERISA. The Supreme Court found that the ju-

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22 *Id.* at 8.
23 390 U.S. 557.
24 *Id.* at 560–62.
25 481 U.S. 58 (1987).

risdictional language of Section 502(a) was similar to the language of Section 301 of the LMRA, the provision that the Supreme Court found to have completely preempted the state causes of action in *Avco*.[26]

Note that the Supreme Court in *El Al Israel Airlines Ltd. v. Tseng*,[27] as discussed *infra*, has already decided that the Warsaw Convention is an exclusive remedy. This would apparently satisfy the first prong of *Beneficial*. But *Tseng* is not a complete preemption removal case. As a consequence, a number of courts construe *Tseng* to be a conflict preemption case.

Under Montreal, Rules of Procedure Are Controlled by the Court that Is "Seized" with the Case

The intricate rules of American federalism determine whether there is federal question jurisdiction. Whether a district court has original jurisdiction to hear a case, either because it is initially filed in federal court or because it was first filed in state court and then removed to district court, is a question of American domestic law.

Article 33(4) of Montreal states: "Questions of procedure shall be governed by the law of the court seized of the case." This provision would seem to defer to the removal and remand procedures of our federal system, not to mention doctrines such as *forum non conveniens*.

Removal and remand in the United States is a mixed bag of subject matter jurisdiction and procedure. Under Montreal, a court must have both treaty jurisdiction and domestic subject matter jurisdiction.[28] Treaty jurisdiction arises from Article 33 of Montreal, which authorizes suit to be brought within certain fora, and will be discussed later. Subject matter most often arises under either 28 U.S.C. § 1331 (federal question jurisdiction) or 28 U.S.C. § 1332 (diversity jurisdiction).

Article III of the U.S. Constitution provides that "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." Title 28, Section 1331 of the U.S. Code provides: "The district courts

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26 *Id.* at 65–67.

27 525 U.S. 155 (1999).

28 Campbell v. Air Jamaica, Ltd., 863 F.2d 1 (2d Cir. 1988).

shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Title 28, Section 1441(a) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Under Section 1441, a case that originally could have been brought in federal court based on federal question jurisdiction may be removed from state court, but the removal statute is strictly construed against removal jurisdiction, and the removing party has the burden of establishing that removal was proper. Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.[29]

Generally, to determine whether a claim arises under federal law, a court examines the "well-pleaded" allegations of the complaint and ignores potential defenses. A suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or the Constitution. Generally, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.[30]

An exception to the well-pleaded complaint rule is the complete preemption removal doctrine. The doctrine applies when the preemptive force of a statute is so extraordinary that it converts an ordinary common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.[31] Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law, even if pleaded in terms of state law, because the claim is nevertheless a federal claim.

> The corollary of the well-pleaded complaint rule is the artful-pleading doctrine, which will not allow a plaintiff to defeat federal subject-matter jurisdiction by artfully pleading his complaint so as to make his claims appear to arise under state law

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[29] Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).
[30] *Beneficial*, 539 U.S. at 6.
[31] Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

> when they are in fact based upon federal law (citation omitted). A court will construe such a complaint as raising the federal claim it attempts to avoid. 'The artful-pleading doctrine includes within it the Doctrine of Complete Preemption,' according to which 'certain federal statutes are construed to have such 'extraordinary' preemptive force that state-law claims coming within the scope of the federal statue are transformed, for jurisdictional purposes, into federal claims – i.e., completely preempted.' (citation omitted). Thus understood, the doctrine of complete preemption, where it is held to apply, allows for a finding of federal jurisdiction based on the defendant's invocation of preemption, without regard to the plaintiff's complaint.[32]

Under the well-pleaded complaint rule, assuming the complete preemption removal doctrine does not apply, a federal defense of preemption will exist to a state claim where the federal statute has preemptive effect. But a federal preemptive defense is not sufficient to remove a case. This is true even if the defense is anticipated in the complaint, and if the federal preemption defense is the only question at issue. The preemption is pled as an affirmative defense.[33]

Montreal Exists to Assure Uniformity Amongst the Signatories

The Montreal Convention succeeds the 1929 Warsaw Convention[34] (Warsaw), but Warsaw is still an extant treaty. It remains in force where countries have ratified Warsaw but one or both of those countries have not ratified Montreal. It is helpful to remember that Montreal is considered an update to Warsaw. Montreal incorporates many of Warsaw's substantive provisions, and the basic purposes and structure and theme of Montreal parallels Warsaw. Courts have routinely relied upon case law under War-

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32 Singh v. N. Am. Airlines, 426 F. Supp. 2d 38, 42 (E.D.N.Y. 2006).

33 Oganesyan v. Am. Airlines Cargo, 2013 U.S. Dist. LEXIS 169841, at *6–8 (C.D. Cal. Nov. 26, 2013).

34 Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention or Warsaw].

saw to interpret analogous provisions of Montreal.[35] Generally, the courts accept decisions interpreting Warsaw as controlling in Montreal cases, and persuasive in cases where there has been a modification of the language in Warsaw. The Supreme Court cases cited here are Warsaw cases, and many of the lower court opinions are also Warsaw cases.

The primary purpose of Warsaw was to foster uniformity in the laws governing international air carrier liability.[36] Uniformity was necessary so airlines could raise capital, to provide a foundation for insurance rate determinations, and to reduce inconsistent outcomes.[37] To maintain uniformity, Warsaw provided an exclusive remedy for injuries incurred during international transportation.

Between 1929 and 1999, there were several amendments to Warsaw. For purposes of our analysis here, the most important of these is Montreal Protocol Number 4, which became effective in the United States in March of 1999, and which will be discussed in further detail later (Protocol Number 4 is not to be confused with Montreal). The various amendments were superseded by Montreal.

Montreal was ratified by the United States Senate in 2003. One hundred thirty-nine nations plus the European Union have joined the ranks of Montreal signatories.[38] This is a large majority of the 193 International Civil Aviation Organization (ICAO) Member States. ICAO is a specialized agency of the United Nations linked to the Economic and Social Council (ECOSOC) that came into being on April 4, 1947, with ratification of the Chicago Convention.[39] In the aftermath of World War II, ICAO came into being in recognition that

> [T]he future development of international civil aviation can greatly help to create and preserve friend-

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35 Narayanan v. British Airways, 747 F.3d 1125, 1127 (9th Cir. 2014).

36 Zicherman v. Korean Air Lines Co., 516 U.S. 217, 219 (1996).

37 *In re* Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1275 (2d Cir.), *cert. denied,* 502 U.S. 920, 116 L. Ed. 2d 272, 112 S. Ct. 331 (1991).

38 *Convention for the Unification of Certain Rules for International Carriage by Air: List of Parties*, INT'L CIVIL AVIATION ORG., https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf.

39 Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter Chicago Convention].

> ship and understanding among the nations . . . [and] to avoid friction and to promote that co-operation between nations . . . the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner . . . .[40]

The Preamble to Montreal states that the purposes of the treaty are to: (a) modernize and consolidate Warsaw and related instruments; (b) recognize the significant contribution of Warsaw to the harmonization of private international air law; (c) ensure protection of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution; (d) reaffirm the orderly development of international air transport operations in accordance with the Chicago Convention; and (e) demonstrate that the signatory nations to Montreal believe that collective State action for further harmonization and codification of certain rules governing international carriage by air through Montreal is the most adequate means of achieving an equitable balance of interests. Montreal concerns much more than bodily injury and death claims, but this article will focus on those claims alone, which naturally are the claims of most profound impact on human lives.

If your contract of carriage – your "ticket" in common parlance – is for transportation between two signatories to Montreal, your rights and remedies arise under Montreal. Remember, it is the ticket, not the flight, that determines if you are traveling on an international contract of carriage. You may be flying from Los Angeles to Chicago to make connections to London, but if something happens on the domestic leg of your itinerary, you are still considered to be traveling on an international contract of carriage.[41] Technically, the term "International Carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination . . . are situated [in the territories of two different signatories to Montreal, or if the departure and destination are in the same signatory if there is a stopover in another country].[42]

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40 *Id.* pmbl.

41 Stratis v. E. Air Lines, Inc., 682 F.2d 406 (2d Cir. 1982).

42 Montreal Convention, *supra* note 1, art. 1(2).

Article 17 of Montreal provides: "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The word "accident" is not defined, but the Supreme Court has construed the word to mean that liability under Article 17 arises if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger.[43] The term "accident" is not a tort term. There is no need for a claimant to prove fault against the air carrier.

Article 21 regulates compensation in case of death or injury to passengers. The article, as originally drafted, provided that for damages sustained by a passenger "not exceeding 100,000 Special Drawing Rights" (SDRs), the air carrier shall not be able to limit its liability. The Special Drawing Right or "paper gold" is equivalent in value to a basket of various currencies established by the International Monetary Fund, a specialized agency of the United Nations. The value of a Special Drawing Right is adjusted periodically to account for inflation or deflation. 100,000 Special Drawing Rights is currently worth about $133,040 U.S. Dollars. The limits of liability set by Article 21 are reviewed and potentially adjusted every five years. Effective December 28, 2019 the limits were adjusted to 128,821 SDRs, equaling approximately $170,038, although the exact conversion is adjusted constantly.

With one exception, the air carrier has no affirmative defense to claims under 100,000 SDRs. There is a presumption of carrier liability subject to the claimant proving her damages arose from an "accident." The plaintiff, of course, has the burden of proving the value of her damage. The one exception falls under Article 20, which reserves to the air carrier the right to prove that the claimant's damage was fully or partly due to the claimant's own acts or omissions. Article 20 is a comparative fault provision: "the carrier shall . . . be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger."

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43 Air France v. Saks, 470 U.S. 392 (1985).

The right of the plaintiff to recover damages from the air carrier is unlimited as to amount, although for amounts in excess of 100,000 SDRs the air carrier "shall not be liable for damages . . . to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omissions of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party."[44]

Article 33 specifies where a Montreal action can be brought. The jurisdiction for an action for damages in case of bodily injury or death is limited to the territory of one of the State Parties where: (a) the air carrier is domiciled; (b) the principal place of business of the air carrier; (c) the place of business of the air carrier through which the contract of carriage was made; (d) before the court at the place of destination; or (e) in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which the carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

Article 33 seems to concern itself with both personal and subject matter jurisdiction. It does not distinguish between federal and state courts as Americans understand the term. Article 33 addresses itself to geographic location.

Article 35 specifies a statute of limitations. The right to damages is lost if an action is not brought within two years, calculated from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which carriage stopped. The method of calculating the period shall be determined by the law of the court seized of the case.

The courts that have concluded Montreal is not the exclusive cause of action, despite the foregoing rather comprehensive provisions, rely upon the language of Article 29:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether

44 Montreal Convention, *supra* note 1, art. 21(2)(a), (b).

> 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 without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or other non-compensatory damages shall not be recoverable.

Compare this language to the predecessor language found in Article 24 of Warsaw:

> 1. In the cases covered by Article 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.

Many courts have interpreted "in contract or in tort or otherwise" to mean that Montreal preserves a claimant's right to sue under state law. However, those interpretations are purely textual, without resort to the negotiating history or decisions from sister signatories.[45] Moreover, those courts have not addressed whether the "Recodification Rule" affects the interpretation of Article 29. The Recodification Rule assesses whether the purpose of a recodification was to revise, codify, and enact without substantive changes to the prior law.[46]

Other courts, which may reach beyond a textual analysis to the drafting history, construe the language as bolstering, not diluting, Montreal's preemptive effect,[47] and the term "however founded" to mean "however pleaded."[48]

Article 29 preserves to local law the determination of who may bring suit for damage, and the nature of the damages recoverable, subject to the limits of liability, the prohibition against recovery

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[45] Serrano v. Am. Airlines, Inc., 2008 U.S. Dist. LEXIS 40466 (C.D. Cal. May 15, 2008).

[46] Coleman v. Windham Aviation, Inc., 2005 WL 1793907 (R.I. Super. Ct. July 18, 2005); Cass v. United States, 417 U.S. 72 (1974).

[47] Fadhliah v. Société Air France, 987 F. Supp. 2d 1057 (C.D. Cal. 2013).

[48] Jack v. Trans World Airlines, Inc., 820 F. Supp. 1218 (N.D. Cal. 1993).

of punitive damages, and subject to the conditions and terms of Montreal ("without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights"). The United States has not enacted enabling legislation to implement a national standard establishing who may sue and what are their rights. Those matters have been left to the law of the states to decide.

Treaties Are Not Interpreted the Same as Federal Statutes

Let's turn now to how treaties are interpreted as contrasted to a federal statute. With a federal statute, the presumption is that because of the historic police powers of the states, Congress does not intend to preempt state law unless its intent is clear and manifest. With a treaty, the analysis is quite different.

The United States Supreme Court states: "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."[49] An interpretation should be "consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts. In interpreting a treaty, it is proper, of course, to refer to the records of its drafting and negotiation."[50] When interpreting a treaty, "[t]he analysis must begin . . . with the text of the treaty and the context in which the written words are used" (citations omitted).[51] "Other general rules of construction may be brought to bear on difficult or ambiguous passages" (citation omitted).[52]

"Moreover, 'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties'" (citations omitted).[53] "Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history . . . and the postratification understanding of the contracting parties."[54]

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49 *Saks*, 470 U.S. at 399.
50 *Id.* at 400.
51 *Id.* at 396–97.
52 E. Airlines v. Floyd, 499 U.S. 530, 535 (1991).
53 *Id.*
54 *Tseng*, 525 U.S. at 167.

The Executive Branch has made known its views on the exclusiveness of Warsaw. As noted below, in its amicus curiae in *Tseng*,[55] the Executive Branch represented to the Supreme Court its belief that Warsaw (and now presumably Montreal*)* provides the exclusive remedy for injury suffered in international air travel. The Supreme Court said: "Respect is ordinarily due the reasonable views of the Executive Branch concerning meaning of an international treaty."[56]

The deference accorded the Executive Branch when interpreting treaties is contrary to the approach courts take when considering the opinion of the Executive Branch on the preemptive effect of a federal statute. There, no deference is given the Executive Branch. "Specifically, [an agency's views] as presented in an amicus brief are 'entitled to respect' only to the extent [they] ha[ve] the 'power to persuade.' "[57] The weight a court accords the position taken by a federal agency depends on the thoroughness, consistency, and persuasiveness of the views presented by that agency.[58]

The Supreme Court Rules that Warsaw Is the Exclusive Remedy

The Supreme Court decision in *Tseng* remains central to consideration of whether the complete preemption removal doctrine applies to Montreal. Although *Tseng* is a Warsaw case, the basic structure of Warsaw is repeated in Montreal. There is a potentially significant difference, however, as noted above, in the language used in Article 29 of Montreal contrasted to the language in Article 24 of Warsaw.

The claimant in *Tseng* brought suit, claiming damages for being "emotionally traumatized and disturbed" by an intrusive body search before being allowed to board the aircraft. She alleged assault and false imprisonment but did not allege bodily injury. To be compensable under Warsaw/Montreal, there are three requirements: (1) an accident as defined by *Saks*; (2) bodily injury as defined by *Floyd*, meaning emotional injury without physical in-

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55 Supplemental Brief for the United States as Amicus Curiae, El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) (No. 97-475), https://www.justice.gov/osg/brief/el-al-israel-airlines-v-tsui-yuan-tseng-supplemental-amicus-brief.

56 *Tseng*, 525 U.S. at 168.

57 Sikkelee v. Precision Airmotive Corp., 822 Fed.3d 680, 694 (3d Cir. 2016).

58 *Id.*

jury is not enough; and (3) the accident must occur aboard the aircraft or during the course of embarking or disembarking as described by Article 17. In *Tseng,* the Supreme Court ruled there was no "accident" and there was no "bodily injury" although the incident occurred during the act of embarking.

The Supreme Court had to decide whether claimant Tseng's state law claims survived despite that she was in the process of embarking under Article 17, and even though Tseng had no viable cause of action under Warsaw. The Court considered Article 24 of Warsaw and noted that it specified that cases covered by Article 17 may "only be brought subject to the conditions and limits set out in the Convention." The Court also added: "That prescription is not a model of the clear drafter's art. We recognize that the words lend themselves to divergent interpretation."[59]

The Supreme Court wrote:

> The cardinal purpose of the Warsaw Convention . . . is to achieve uniformity of rules governing claims arising from international air transportation.[60]
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> . . . .
>
> For the reasons stated, we hold 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.[61]

In other words, Warsaw is the exclusive remedy for a passenger who suffers an injury from an accident when the passenger is flying under an international contract of carriage, assuming that the passenger is on board the aircraft or in the course of any of the operations of embarking or disembarking.

The original version of Warsaw Article 24 read:

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,

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59 *Tseng*, 525 U.S. at 168.
60 *Id.* at 169.
61 *Id.* at 176.

> without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Remember, it is Article 17 that allows "passengers" to recover for damages resulting from an "accident."

The Supreme Court in *Tseng* observed that Montreal Protocol No. 4, ratified by the Senate on September 28, 1998 (now supplanted by Montreal),

> . . . amend[ed] Article 24 to read, in relevant part: "In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention . . . ." Both parties agree that, under the amended Article 24, the Convention's preemptive effect is clear: The treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty. Revised Article 24, El Al urges and we agree, merely clarifies, it does not alter, the Convention's rule of exclusivity.[62]

In an effort to preserve her state law claims, claimant Tseng argued that revised Article 24 provides for preemption not earlier established. Her incident occurred in 1993, before Montreal Protocol No. 4 was ratified by the Senate. In other words, Tseng argued that preemption did not exist until revised Article 24 came into force. She pointed out that "federal preemption of state law is disfavored generally, and particularly when matters of health and safety are at stake."[63] The Supreme Court responded: "Tseng overlooks in this regard that the nation-state, not subdivisions within one nation, is the focus of the Convention and the perspective of our treaty partners. Our home-centered preemption analysis, therefore, should not be applied, mechanically, in construing our international obligations."[64] (Justice Stevens, in dissent, wrote that a treaty, "like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear."[65])

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62 *Id.* at 174–75.

63 *Id.* at 175.

64 *Id.*

65 *Id.* at 181 (Stevens, J., dissenting).

The Executive Branch submitted an *amicus curiae* in support of El Al's claim that Montreal was the exclusive remedy. The Supreme Court wrote:

> Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty (citations omitted). ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure.[66]

Tseng addressed the exclusivity of Warsaw. *Tseng* was decided four years before the Supreme Court in *Beneficial* established the two-prong test for the complete preemption removal doctrine. Although *Tseng* was a removal case, the removal in *Tseng* was based upon the fact that El Al was a government-owned entity at the time and hence a foreign state.[67] The Supreme Court did not consider whether the complete preemption removal doctrine was applicable to Warsaw. On the other hand, the Supreme Court did not need to directly address the doctrine.

Despite the Holding of **Tseng***, Many Courts Conclude Montreal Claims Are Not Removable*

That would seem to settle the troubling question of whether Montreal is the exclusive remedy. But not so fast. As already mentioned, many courts read *Tseng* as a conflict preemption case, not a complete preemption removal case, and therefore not supporting the application of the doctrine to Montreal. And as *Beneficial* instructs, "exclusive" should not necessarily be construed as equivalent to complete preemption.

In *Serrano v. American Airlines, Inc.*,[68] a case not for publication but nevertheless an excellent counterpoint to consider, the district court concluded that when *Tseng* said that recourse to local law is precluded when her claim does not satisfy the condi-

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[66] *Id.* at 168–69. *See also* Carey v. United Airlines, 255 F.3d 1044 (9th Cir. 2001).

[67] 28 U.S.C. § 1603(a); 28 U.S.C. § 1441(d).

[68] 2008 U.S. Dist. LEXIS 40466.

tions for liability under the Convention means that recourse to local law *is permitted* when the claim does satisfy the conditions of liability under the Convention. *Serrano* further stated this reasoning is consistent with the language of Article 29 of Montreal, which provides 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 . . . ."[69] The court accordingly granted the claimant's motion for remand.

The reasoning of *Serrano,* like most cases considering a motion for remand under Montreal, reads as if it is a traditional interpretation of a federal statute. But Montreal is a treaty, not a statute. When confronting a federal statute, the presumption is that Congress did not intend to preempt state laws unless the intent of Congress is "clear and manifest." By contrast, a treaty is to be liberally construed to achieve the shared expectations of the signatory nations, and it is appropriate and perhaps necessary to consider the drafting history and the practical construction of the treaty by the signatory nations. *Serrano* did not consider the drafting history of Montreal, nor did it consider decisions from courts outside the United States.

Serrano also did not discuss the impact of the supplemental language added to Article 29 of Montreal. The original formulation of Article 24 in Warsaw stated that an action for damages "however founded, may only be brought subject to the conditions and limits set out in the Convention." Article 29 in Montreal added "whether under this Convention or in contract or in tort or otherwise."

As the Supreme Court noted in *Tseng,* the original formulation of Article 24 was not a model of drafting clarity. The additional language of the updated Article 29 was added after *Tseng* was decided, a decision that held Warsaw is the exclusive remedy for damages from bodily injury sustained by a passenger flying under an international contract of carriage.

Was the language added to Article 29 intended to clarify and confirm the holding of *Tseng*? In other words, was the addition of "whether under this Convention or in contract or in tort or otherwise" after the phrase "however founded" intended to clarify that, regardless of how a claim is pled (whether in tort or contract

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69 *Id.* at *7 (citing Montreal Convention art. 29).

or otherwise), that Montreal remains the exclusive remedy? Or, as some courts believe, was the additional language intended for the first time to authorize tort and contract claims to be pursued alongside a Montreal Article 17 claim for damages arising from an "accident?" Presumably, the answer depends ultimately upon the "shared expectations of the contracting parties."[70]

Serrano disagreed with the majority in *Husman v. Trans World Airlines, Inc.*,[71] a Warsaw case, predating Article 29 of Montreal (and the "accident" predating Montreal Protocol No. 4). The majority wrote in *Husman* that the claimant's "state law cause of action . . . [was] completely preempted by the Warsaw Convention."[72] *Serrano* sided with the dissent, which wrote: "[t]he state courts are . . . open to preemption defenses . . . [but the majority] does not indicate why the preemption created by the Warsaw Convention is the kind that allows a defendant to evade the well-pleaded complaint rule."[73]

Serrano is generally representative of what is sometimes characterized as the majority point of view. *Husman* represents the minority rule.[74]

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70 *Saks*, 470 U.S. at 399.

71 169 F.3d 1151 (8th Cir. 1999).

72 *Id.* at 1153.

73 *Id.* at 1154 (Arnold, C.J., dissenting).

74 Those courts that agree with the *Serrano* decision include: (1) *Oganesyan v. Am. Airlines Cargo*, 2013 U.S. Dist. LEXIS 169841 (C.D. Cal. Nov. 26, 2013) (similar to *Serrano*, holding that "[t]he Supreme Court in *Tseng* actually held 'the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law *when her claims do not satisfy the conditions for liability under the Convention.*' . . . (emphasis added)."); (2) *Greig v. U.S. Airways Inc.*, 28 F. Supp. 3d 973 (D. Ariz. 2014) (where the court agreed that defendants misinterpreted *Tseng* and *Carey* by conflating complete preemption and conflict preemption); (3) *Jensen v. Virgin Atl.*, 2013 U.S. Dist. LEXIS 42080 (N.D. Cal. Mar. 25, 2013); (4) *Nankin v. Cont'l Airlines, Inc.*, 2010 U.S. District LEXIS 11879 (C.D. Cal. Jan. 29, 2010); (5) *Anaya v. City of Los Angeles*, 2019 U.S. Dist. LEXIS 230877 (C.D. Cal. Nov. 1, 2019); (6) *Cosgrove-Goodman v. UAL Corp.*, 2010 U.S. Dist. LEXIS 54825 (N.D. Ill. June 2, 2010); (7) *Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co.,* 522 F.3d 776, 785–86 (Warsaw's exclusivity provisions only operate as an affirmative defense and state law fills the "interstices" of Warsaw); (8) *Narkiewicz-Laine v. Scandinavian Airlines Sys.*, 587 F. Supp. 2d 888, 890 (N.D. Ill. 2008) (conditions and limits of Montreal are only defenses, and provide no basis for federal question subject matter jurisdiction); (9) *Fournier v. Lufthansa German Airlines*, 191 F. Supp. 2d 996, 1003 (N.D. Ill. 2002) (same); (10) *Rogers v. Am. Airlines, Inc.*, 192 F. Supp. 2d 661, 663 (N.D. Tex. 2001) (the delicate balance between state and federal courts cautions against a finding that

The court in *Fadhliah v. Société Air France*,[75] like *Serrano*, also from the Central District of California, but unlike *Serrano*, relied heavily upon the negotiating and drafting history of Montreal as well as the opinions of the Executive Branch and the post-ratification understanding of the sister signatories. *Fadhliah* concluded that the proper interpretation of Article 29 was that Montreal completely preempted claims that fall within its scope.[76]

The plaintiff in *Schoeffler-Miller v. Northwest Airlines, Inc.*[77] sustained injury when deplaning from an international flight. She filed suit in Illinois state court, alleging only common law negligence. Northwest Airlines timely removed the lawsuit whereupon the plaintiff filed her motion to remand. The plaintiff argued that any preemption under Montreal was only an affirmative defense, not supporting removal. Northwest Airlines contended that the "artful pleading" doctrine was applicable because federal law, namely Montreal, completely preempted plaintiff's state-law tort claim. The court agreed with the airline and denied

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the field of international air travel is so completely preempted that any claim relating to the area is necessarily federal in character); (11) *Distribuidora Dimsa v. Linea Aerea del Cobre Sa.*, 976 F.2d 90, 93 (2d Cir. 1992) (liability limitations of Warsaw are an affirmative defense); (12) *Shah v. Kuwait Airways Corp.,* 653 F. Supp. 2d 499, 502 (S.D.N.Y. 2009) (same conclusions but under Montreal); (13) *Zatta v. Société Air. Fr.*, 2011 U.S. Dist. LEXIS 66552 (C.D. Cal. June 21, 2011); (14) *Nelson v. Alaska Airlines*, 2008 U.S. Dist. LEXIS 138260 (N.D. Cal. Oct. 15, 2008); (15) *Mozingo v. Japan Airlines Co.*, 432 F. Supp. 3d 1194 (S.D. Cal. 2020); (16) *Sun Coast Merch. Corp. v. Hecny Transp., Inc.*, 2021 U.S. Dist. LEXIS 32544 (C.D. Cal. Feb. 22, 2021); and (17) *Gamson v. British Airways, PLC*, 46 F. Supp. 3d 86 (D.D.C. 2014).

Those courts that agree with *Husman* or the minority point of view include: (1) *Knowlton v. Am. Airlines, Inc.*, 2007 U.S. Dist. LEXIS 6882 (D. Md. Jan. 31, 2007) (Montreal provides jurisdictional removal); (2) *Schoeffler-Miller v. Nw. Airlines, Inc.*, 2008 U.S. Dist. LEXIS 93851 (C.D. Ill. Nov. 17, 2008) (finding jurisdictional removal); (3) *In re Air Crash at Lexington, Ky.*, 501 F. Supp. 2d 902 (E.D. Ky. 2007) (if a state law claim falls under Montreal, then it is completely preempted); (4) *Schaefer-Condulmari v. US Airways Group, Inc.*, 2009 U.S. Dist. LEXIS 114723 (E.D. Pa. Dec. 8, 2009); (5) *Husman v. Trans World Airlines, Inc.*, 169 F.3d 1151 (8th Cir. 1999); (6) *Singh v. N. Am. Airlines*, 426 F. Supp. 2d 38, 48 (E.D. N.Y. 2006) (Montreal completely preempts state law claims); (7) *Fadhliah v. Société Air Fr.*, 987 F. Supp. 2d 1057 (C.D. Cal. 2013); and (8) *Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218 (N.D. Cal. 1993).

75 987 F. Supp. 2d 1057 (C.D. Cal. 2013).

76 *Id.* at 1064.

77 2008 U.S. Dist. LEXIS 93851 (C.D. Ill. Nov. 17, 2008).

the motion to remand, ruling that plaintiff's state-law tort claim was completely preempted by Montreal.[78]

Is the Majority Point of View Consistent with the Drafting History and the Interpretation of the Treaty by Sister Signatories?

The analysis of almost all cases that decline to apply the complete preemption removal doctrine feels incomplete because they have not adhered to the rules of interpretation of treaties as established by *Air France v. Saks*, *supra*, and *Eastern Airlines v. Floyd*, *supra*. These courts have not accorded due deference to the Executive Branch. In other words, these courts interpreted Montreal as a typical domestic process of statutory construction, not as an interpretation of a treaty, a different analysis. *Saks* and *Floyd* make it clear that a treaty such as Montreal is to be liberally construed to be consistent with the shared expectations of the parties to the treaty. To that end, any treaty interpretation should be consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts. Few, if any, of the courts that have granted remands have even considered these factors before reaching their conclusions. Instead, in a circular process, they begin citing their fellow courts as authority when those courts never achieved a complete analysis.

What do we know of the negotiation history of Montreal, in particular Article 29? Here is what the Chairman of the Montreal Conference had to say about Article 29:

> The purpose behind Article 2[9] was to ensure that, in circumstances in which the Convention applies, it was not possible to circumvent its provisions by bringing an action for damages in the carriage of passengers, baggage and cargo in contract or in tort or otherwise. Once the Convention applied, its conditions and limits of liability were applicable.[79]

The pronouncement by the Chairman would seem directly on point about the purpose of adding "whether under this Conven-

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78 *Id.* at *10.

79 1 INT'L CIVIL AVIATION ORG., INTERNATIONAL CONFERENCE ON AIR LAW, Doc. 9775-DC/2, at 235 (1999).

tion or in contract or in tort or otherwise" to Article 29. It was not, as the court in *Serrano* said, to carve out state law remedies, but was instead to clarify that Montreal was the exclusive claim for damages when the Convention applies. And according to the Supreme Court in *Tseng*, Montreal applies when an injury is suffered while aboard the aircraft or during embarking or disembarking from the aircraft.

The court in *Schaefer-Condulmari v. US Airways Group, Inc.*,[80] in its decision denying remand, referred to an "explanatory note" submitted to the United States Senate during the ratification proceedings that stated: "the Convention and its limits shall be applicable to all actions for damages arising in the carriage of passengers, baggage and cargo . . . ."[81] The note explained that air carriers could not be "held liable outside the Convention under any alternative tort or contract law theories . . . ."[82]

The court in *Fadhliah*, in denying remand, relied in part upon the statement of John Byerly, Deputy Assistant Secretary of State for Transportation Affairs, which was submitted to the Senate during the ratification proceedings. Byerly was of the opinion that Article 29 meant that Montreal was the exclusive remedy. Byerly further believed exclusivity was in accord with the United Kingdom's courts' post-ratification interpretation of Article 29.[83]

When the Honorable Jeffrey Shane, Under Secretary for Policy, U.S. Department of Transportation, presented Montreal to the Senate for ratification on July 29, 2003, he stated that Montreal "retains the important improvements brought about by Montreal Protocol Number 4, which became effective in the United States in March 1999."[84] The important improvements brought by Montreal Protocol Number 4 found their way into Article 29. Presumably, one of those improvements was to clarify the exclusivity of Montreal.

With regard to decisions from sister signatories, the Supreme Court itself noted in *Tseng* that the British House of Lords, in *Sidhu v. British Airways plc*,

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80 2009 U.S. Dist. LEXIS 114723 (E.D. Pa. Dec. 8, 2009).

81 *Id.* at *24.

82 *Id.* at *24–25. *See* Philip Weissman, *The Warsaw and Montreal Conventions: Ending the Complete Preemption Debate*, 30 Air & Space Law., Issue 3, 2017, at 12.

83 *Id.*

84 S. Exec. Rep. No. 108-8, at 14 (July 29, 2003).

> [C]onsidered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an 'accident' . . . . Reviewing the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed to 'ensure that, in all questions relating to the carrier's liability, it is the provisions of the [C]onvention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action.'[85]

The Supreme Court added: "Courts of other nations bound by the Convention have also recognized the treaty's encompassing preemptive effect."[86]

In construing Montreal as the exclusive remedy, the British House of Lords has plenty of company. The Supreme Court of Canada wrote:

> The key provision at the core of the *Montreal Convention*'s exclusive set of rules for liability is Article 29. This provision makes clear that the *Montreal Convention* provides exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. Article 29 establishes that in relation to claims falling within the scope of the *Montreal Convention*, "any action for damages, however founded" may only be brought "subject to the conditions and such limits of liability as are set out in this Convention."
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> . . . .
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> The limitation in Article 29 of the *Montreal Convention* applies to "any action" in the carriage of passengers, baggage or cargo, "for damages, however founded, whether under this Convention or in contract or in tort or otherwise." There is no hint in

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85 *Tseng*, 525 U.S. at 175 (citing Sidhu v. British Airways plc, [1997] A.C 430, [1997] 1 All ER 193 (U.K.)).

86 *Id.*

> this language that there is any intention to exempt any "action for damages" in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. . . .[87]

The Supreme Court of New South Wales is in accord:

> The liability of the carrier under the *Montreal Convention* in respect of personal injury suffered by a passenger "is in substitution for any civil liability of the carrier under any other law in respect of the injury . . ." Article 29 of the *Montreal Convention* further provides that 'in the carriage of passengers . . . "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." Hence, the *Montreal Convention*, as given force of law by the *Carriers' Liability Act*, provides the **exclusive** remedy for the plaintiff against Qantas arising out of his international carriage by air, to the exclusion of any contract or other common law cause of action (citations omitted).[88]

It would seem that the "shared expectations" of the contracting parties to Montreal is that the exclusive remedies provided by the treaty are not to be "circumvented" with claims sounding in tort, contract, or "otherwise." Whether it is the Supreme Court or not, it would be helpful to the current conundrum if the next court considering a motion to remand would incorporate into its analysis the factors the Supreme Court long ago identified as necessary to a proper interpretation of any treaty.

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87 Thibodeau v. Air Canada, [2014] 3 S.C.R. 340, 2014 S.C.J. 67 (Can.).

88 Kern v. Qantas Airways Ltd. [2015] NSWSC 1565, para. 39 (Austl.). *See also* Stott v. Thomas Cook Tour Operators Ltd. [2014] UKSC 15 (U.K.); Povey v. Qantas Airways Ltd. [2005] HCA 33, (2005) 223 C.L.R. 189 (Austl.).

Conclusions and Thoughts

A primary purpose of Montreal is to achieve uniformity amongst the nations that have ratified the treaty. Can uniformity be achieved by permitting state law to be applied to an international aviation claim, even if the limits of liability of Montreal apply as an affirmative defense? That is questionable. Even if the damage limits under Article 21 are enforced through an affirmative defense, the defendant air carrier would still be required to defend a plethora of state statutory and common law claims, limited only by the imagination of plaintiff's counsel. That would require expenditure of fees and costs by the carrier to defend those claims, whether they are pled as contract, assault and battery, or other common variety torts. Those are costs that would not be incurred to litigate the occurrence of an "accident." Compelling carriers to incur those defense costs in the United States when those costs would not be incurred in other nations would seem to be antithetical to the pursuit of uniformity.

Those courts that hold complete relief under Montreal can be achieved by allowing Montreal to be pled as an affirmative defense have not reconciled how an affirmative defense can negate a primary element of a cause action under Montreal. The primary element in a Montreal claim is whether the claimant has suffered an injury because of an "accident." The court in *Mozingo v. Japan Airlines*, *supra*, although granting a motion to remand, noted that a court may exercise federal question jurisdiction where a federal right or immunity is an element and an essential one of the plaintiff's cause of action. Proof of an "accident" is an essential element of a Montreal cause of action.

The word "accident" appears in Article 17 of Montreal, although it is not defined. The Supreme Court gave it a definition: "We conclude 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."[89] This is not a negligence standard. There is not a requirement to prove that a defendant air carrier failed to satisfy the reasonable person standard of care.

If a claim for injury or death for an international carriage is pled as a state law claim in state court, the case removed and

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[89] *Saks*, 470 U.S. at 405.

remanded, the federal court holding the defendant air carrier may plead Montreal as an affirmative defense, the state court would upon remand necessarily be confronted with determining the scope of preemption under Montreal. If Montreal is indeed the "exclusive remedy" then the state court should either dismiss the case or allow the plaintiff to amend her complaint to state a Montreal claim. But if the state court allows an amendment to plead Montreal, then a federal claim would appear on the face of the complaint, making the case removable. That result would be a roundabout waste of time and resources.

It is not necessary to achieve "uniformity" for all claims under Montreal to be litigated in federal court. The purpose of Montreal can be achieved when both state and federal courts have the capacity to hear Montreal claims. But that is not the point when considering the complete preemption removal doctrine. That doctrine is a unique feature of American federalism. In accordance with Montreal, any "questions of procedure shall be governed by the law of the court seized of the case."[90] The complete preemption removal doctrine is a jurisdiction doctrine, but it is thoroughly wrapped inside American procedural rules. Under *Beneficial National Bank,* if Montreal is the "exclusive remedy" and if Montreal establishes the procedures and remedies that govern that exclusive cause of action, then the complete preemption removal doctrine would seemingly mandate a defendant's right to remove pursuant to 28 U.S.C. §§ 1331, 1441.

Montreal Article 29 provides that local law determines "who are the persons who have the right to bring suit and what are their respective rights." Although it could do so if it so chose, Congress has not passed enabling legislation to implement Montreal. Congress has not created a uniform federal remedy for recovery under Montreal. Congress has a power that has not been exercised. Does this mean in the United States that Montreal does not establish the "procedures and remedies that govern the exclusive cause of action" that is necessary for removal under *Beneficial National Bank*? Considering the rather comprehensive liability and compensatory scheme under Montreal, that would seem unlikely. But until this point is addressed directly, we are left to speculate.

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90 Montreal Convention, *supra* note 1, art. 33(4).

Those courts that hold Montreal presents only conflict preemption are not particularly satisfying analytically. They may be correct, but until our hunger for a proper analysis is satiated, we will continue to want another helping of court opinion until we find one that satisfies us.

What would that opinion look like? It would analyze the "shared expectations" of the treaty parties rather than clear congressional intent as was done in *Greig v. U.S. Airways Inc.*[91] It would give "respect" to the "reasonable views of the Executive Branch with regards to the meaning of the treaty," rather than only "weight" based upon the thoroughness, consistency, and persuasiveness of the view, as is done with a traditional preemption analysis. It would discuss whether the uniformity at the heart of Montreal is served if state tort claims can be pursued in tandem with Montreal. It would discuss not just the text of Article 29, but the context within which Article 29 falls, the drafting history of Montreal, considering that treaties must be liberally construed to achieve the purposes of the shared expectations of the treaty parties. It would address directly whether Montreal is not only the exclusive remedy but whether it also provides the procedures and remedies that govern that exclusive cause of action, thus whether the two-part test of *Beneficial National Bank* has been triggered.

Without these things, our analytical methodology remains incomplete. The complete preemption removal doctrine and Montreal will forever continue to circle each other in a never-ending *pas de deux*.

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[91] 28 F. Supp. 3d 973 (D. Ariz. 2014).