EXCLUSIVITY OF THE WARSAW CONVENTION’S CAUSE OF ACTION: THE U.S. SUPREME COURT REMOVES SOME OF THE EXPANSIVE VIEWS FOUNDATIONS IN ZICHERMAN v. KOREAN AIR LINES CO., LTD.

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I. FACTUAL BACKGROUND

On September 1, 1983, Korean Air Lines Flight KE007 left Alaska’s Anchorage International Airport bound for Seoul, South Korea.1 En route, the plane strayed into Soviet airspace and was shot down by a Soviet SU-15 interceptor aircraft over the Sea of Japan.2 The location of the wreckage placed the flight more than three-hundred nautical miles off course.3 All 269 passengers were killed including Muriel Kole.4

Marjorie Zicherman and Muriel Mahalek, Kole’s sister and mother, respectively, sued Korean Air Lines in the U.S. District Court for the Southern District of New York.5 They based part of their suit on Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention).6 The Judicial Panel on

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* J.D. 1997.
2 Id.
3 Id. The nautical or geographic mile contains 6,080 feet, as opposed to 5,280 feet in a regular mile, BLACK’S LAW DICTIONARY 992 (6th ed. 1990).
4 Zicherman, 116 S. Ct. at 631.
5 Id.
6 Article 17 of the Warsaw Convention provides the rule of liability for the death or injury of passengers. The official American translation of Article 17, as employed by the Senate when it ratified the Convention in 1934, reads as follows:
   The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The authentic French text of Article 17 reads as follows:
   Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.
Multidistrict Litigation transferred Zicherman and Mahalek's case along with all other federal court actions arising out of the disaster to the U.S. District Court for the District of Columbia for trial on the common issues of liability. The jury for the consolidated case found that the "willful misconduct" of the flight crew caused the crash and awarded $50 million in punitive damages to the plaintiffs. Normally damage recovery under the Warsaw Convention is limited to $75,000 under the Montreal Agreement which modified the Warsaw Convention. However, where willful misconduct is found, Article 25 lifts this cap on damages.

The Court of Appeals for the District of Columbia Circuit affirmed the jury's finding of willful misconduct, but set aside the punitive damages award, holding that such damages are not recoverable under the Warsaw Convention. The Judicial Panel on Multidistrict Litigation then remanded the individual cases back to their courts of origin to determine the amount

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9 Warsaw Convention, supra note 6. The text of Article 25(1) of the Warsaw Convention as ratified by the Senate in 1934 provides as follows:

The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to misconduct.

Le transporteur n'aura pas le droit de se prevaloir des dispositions de la presente convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'apres la loi du tribunal saisi, est considéré comme equivalente au dol.

of compensatory damages.\(^\text{11}\)

At Zicherman and Mahalek’s trial in the District Court for the Southern District of New York, Korean Air Lines moved for a determination that the Death on the High Seas Act (DOHSA) limited dependent survivor’s recovery to pecuniary losses.\(^\text{12}\) The district court denied the motion.\(^\text{13}\) According to the court, where a treaty such as the Warsaw Convention conflicts with a prior statute such as DOHSA, the treaty prevails.\(^\text{14}\) Relying on *In re Air Disaster at Lockerbie, Scotland*,\(^\text{15}\) the court held that in construing the Warsaw Convention, federal courts must look to, apply, and develop federal common law.\(^\text{16}\) Since the court found that the Warsaw Convention has as its underlying purpose the awarding of a full recovery in cases where there has been a finding of willful misconduct,\(^\text{17}\) it held that the plaintiffs could recover damages for their loss of society, which are non-pecuniary in nature.\(^\text{18}\)

On appeal, the Second Circuit agreed that federal common law governs causes of action under the Warsaw Convention.\(^\text{19}\) The circuit court disagreed, however, with the district court’s application of federal common law which would apply a different rule to accidents on the high seas than to accidents on land, such as the crash in *In re Air Disaster at Lockerbie, Scotland* (Lockerbie).\(^\text{20}\) Since a uniform law should govern all Warsaw Convention cases, according to the circuit court, general maritime law,\(^\text{21}\) which was already the established rule for accidents on land under the

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\(^{12}\) *In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073, 1078 (S.D.N.Y. 1992); Death on the High Seas Act, 46 U.S.C. §§ 761-768. A pecuniary loss is a loss of money, or of something by which money or something of money value may be acquired. BLACK’S LAW DICTIONARY, supra note 3, at 1131; see also THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 465-80 (1994).

\(^{13}\) *Korean Air Lines*, 807 F. Supp. at 1078.

\(^{14}\) Id. at 1088.


\(^{16}\) *Korean Air Lines*, 807 F. Supp. at 1078; *Lockerbie*, 928 F.2d at 1278-79.

\(^{17}\) *Korean Air Lines*, 807 F. Supp. at 1087-88.

\(^{18}\) Id. at 1080-88.

\(^{19}\) Zicherman v. Korean Airlines Co., Ltd., 43 F.3d 18, 21-22 (2d Cir. 1994).

\(^{20}\) Id.

\(^{21}\) General maritime law is a branch of federal common law that furnishes the rule of decision in admiralty and maritime cases in the absence of preemptive legislation. SCHOENBAUM, supra note 12, at 95.
Lockerbie case, should determine the damages recoverable. However, because only dependents may recover damages for loss of society under general maritime law, the court of appeals vacated the award, holding that Muriel Mahalek was not a dependent of the decedent, and remanded the case back to the district court to determine whether Marjorie Zicherman was a dependent.

The U.S. Supreme Court granted certiorari, and on January 16, 1996, the Court handed down its decision in Zicherman v. Korean Air Lines Co., Ltd. (Zicherman). Unlike the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit, the Supreme Court refused to recognize or create a federal common law applicable to all cases under Article 17 of the Warsaw Convention. The Court held that in a suit brought under Article 17 of the Warsaw Convention, an air carrier is liable only for those damages recoverable under the law that would normally govern in the absence of the Warsaw Convention. Under the Court's interpretation, Article 17 of the Warsaw Convention merely limits the amounts of damages recoverable under the law applicable under the forum's choice of law rules. Since the plane crashed on the high seas beyond a marine league from the shore of any state, the crash fell within the scope of the Death on the High Seas Act (DOHSA), which does not allow the recovery of loss-of-society damages. Thus, the Court reversed the plaintiffs' recovery for their loss of society.

22 Zicherman, 43 F.3d at 21-22.
23 Id. at 22.
24 Zicherman, 43 F.3d at 22.
27 Id.
28 Id. at 636.
29 Id. at 637.
30 A marine league is a measure of distance commonly employed at sea, being equal to one-twentieth part of a degree of latitude, or three geographical or nautical miles. BLACK'S LAW DICTIONARY, supra note 3, at 967.
II. LEGAL BACKGROUND

A. History of the Warsaw Convention

The Warsaw Convention governs the international carriage of passengers, baggage, and cargo by air and limits the liability of international air carriers. The Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929. The interim Comite International Technique d'Experts Juridique Aeriens (CITEJ), a permanent committee of air law experts created by the Paris Conference, did the work on drafting the Warsaw Convention. With over 120 signatories, the Warsaw Convention is one of the most widely recognized international agreements today. Two main policies underscore the Warsaw Convention. First, realizing that air travel traverses national boundaries and involves varying languages, customs and legal systems, its drafters wanted to provide some uniform laws for international air transport. Second, the Convention's drafters limited the liability of the air carriers to 125,000 francs or approximately 8,300 dollars to help promote the growth of an industry in its infancy.

The United States did not participate in the original drafting of the Warsaw Convention by the CITEJ; however, the United States acted quickly thereafter. The Senate consented to the Convention on June 15, 1934, and the United States officially joined the treaty on October 29th of that year. Because improvements in air safety in the years following the Warsaw Convention's creation allowed air carriers to obtain low cost insurance, many

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34 Id.
37 Lowenfeld & Mendelsohn, supra note 33, at 499.
38 Id. at 498.
39 Boulee, supra note 36, at 503.
of its signatories, including the United States, began to believe that air carriers no longer needed special protection.\textsuperscript{40} Thus, the parties to the treaty met at the Hague in 1955 to consider its revision.\textsuperscript{41} The result was the Hague Protocol which increased the limit on air carrier damages to \$16,600.\textsuperscript{42} However, the United States opposed the new limit on damages believing that it was still too low and refused to adhere to the Protocol.\textsuperscript{43}

Because it seemed unlikely that the U.S. Senate would ever ratify the Hague Protocol, and without the Protocol's ratification U.S. citizens would remain subject to the \$8,300 limit of the original 1929 Convention, the United States gave its notice of denunciation of the Warsaw Convention on November 15, 1965.\textsuperscript{44} However, a Department of State press release issued that same day stated that the United states would consider withdrawing its denunciation if the Warsaw Convention's signatories would agree to increasing the limit on liability in international air transport to around \$100,000 per person.\textsuperscript{45} In response, the other contracting states called a special meeting in Montreal to convince the United States to withdraw its impending denunciation.\textsuperscript{46} A compromise resulted in the Montreal Agreement which raised the limit on air carrier liability to \$75,000.\textsuperscript{47} As a quid pro quo for the United State's acceptance of a limit less than \$100,000,\textsuperscript{48} the Montreal Agreement abolished the negligence standard of the original Warsaw Convention and replaced it with a new policy of liability without fault on the part of the carrier.\textsuperscript{49} This theoretically would provide for quicker and less expensive settlements, with less money going to litigation.\textsuperscript{50} Because of the compromise, the United States withdrew its notice of denunciation of the Warsaw Convention on May 13, 1966.\textsuperscript{51}

\textsuperscript{40} Id. at 504.
\textsuperscript{41} Id. at 503.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Lowenfeld & Mendelsohn, supra note 33, at 551.
\textsuperscript{45} Id. at 552.
\textsuperscript{46} Boulee, supra note 36, at 504.
\textsuperscript{47} Id.
\textsuperscript{48} Lowenfeld & Mendelsohn, supra note 33, at 590-591.
\textsuperscript{49} Giumella, supra note 35, at 2; Boulee, supra note 36, at 504.
\textsuperscript{50} Lowenfeld & Mendelsohn, supra note 33, at 600.
\textsuperscript{51} Boulee, supra note 36, at 504.

The Warsaw Convention has caused confusion in the United States because it does not explicitly address what types of damages a party may recover against an air carrier, who has the right to bring suit or what are the rights of the parties who are allowed to bring suit.\(^52\) The Warsaw Convention merely places conditions on the air carrier's liability and a cap on the amount of recoverable damages.\(^53\) The grey areas in the Warsaw Convention are due to the fact that most of the delegates at the Warsaw Conference were civil law attorneys.\(^54\) In civil law countries, the Warsaw Convention does not cause any confusion because the general law of civil liability in contract or tort automatically provides a cause of action that fills in its grey areas.\(^55\)

Most common law countries have dealt with the problem by enacting special legislation that implements the Convention and provides a cause of action which fills in its grey areas.\(^56\) In the United States, on the other hand, Congress has failed to provide legislation to implement the Warsaw Convention.\(^57\) However, the Supreme Court has held that the Warsaw Convention operates as a self-executing treaty which does not require any implementing legislation by the signatories.\(^58\) Thus, ever since the Warsaw Convention's ratification, U.S. courts have struggled with the question of how they should fill in the Warsaw Convention's grey areas.

C. Recognition That the Warsaw Convention Created a Cause of Action

In the 1950s, two federal court cases in the Second Circuit avoided the problem of filling in the Warsaw Convention's grey areas by holding that the Warsaw Convention did not create an independent cause of action.\(^59\) In


\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id. at 161; GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 231-32 (1977).

\(^{56}\) MANKIEWICZ, supra note 35, at 161.

\(^{57}\) Id. at 162; see Lowenfeld & Mendelsohn, supra note 33, at 519.


\(^{59}\) Lowenfeld & Mendelsohn, supra note 33, at 517-518.
Komlos v. Compagnie Nationale Air France (Komlos), the court held that the
effect of the Warsaw Convention was merely to create a presumption of
liability against the air carrier, leaving it to local law to grant the right of
action.\textsuperscript{60} The Court of Appeals for the Second Circuit implicitly affirmed
this part of the Komlos opinion by not addressing the question on appeal.\textsuperscript{61}
A few years later, the Court of Appeals for the Second Circuit expressly
endorsed the Komlos rule in Noel v. Limea Aeropostal Venezolana (Noel).\textsuperscript{62}
In subsequent Warsaw Convention cases, U.S. courts either assumed or
decided that a claim must be founded on some law other than the Warsaw
Convention itself.\textsuperscript{63}

Eventually, the Second Circuit reversed itself in Benjamins v. British
European Airways (Benjamins).\textsuperscript{64} The U.S. Court of Appeals for the
Second Circuit recognized that its holding in Noel had become the rule not
only in the Second Circuit, but also in others as well.\textsuperscript{65} Nonetheless, after
considering the French text of Article 24, the methods Britain and Canada
used to implement the Warsaw Convention, and the benefits of the
Multidistrict Litigation Act, the Second Circuit reversed its rule under
Noel.\textsuperscript{66} Although the U.S. Supreme Court has not addressed this issue
directly,\textsuperscript{67} the Second Circuit's conclusion that the Warsaw Convention
creates a cause of action is universally accepted.\textsuperscript{68} However, the question
of how a court should fill in the Warsaw Convention's grey areas once again
became a problem.

\textsuperscript{60} 111 F. Supp. 393, 401 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir.
1953).
\textsuperscript{61} P.P.C. Haanappel, The Right to Sue in Death Cases Under The Warsaw Convention,
\textsuperscript{62} 247 F.2d 677 (2d Cir. 1957), cert. denied, 355 U.S. 907 (1957).
\textsuperscript{63} Lowenfeld & Mendelsohn, supra note 33, at 519.
\textsuperscript{64} 572 F.2d 913 (2d Cir. 1977).
\textsuperscript{65} Id. at 919.
\textsuperscript{66} Id. at 918-19.
\textsuperscript{67} Luis F. Ras, Warsaw's Wingspan Over State Laws: Towards a Streamlined System of
\textsuperscript{68} Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airlines, Inc., 737 F.2d
456 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); In re Mexico City Aircrash of
October 31, 1979, 708 F.2d 400, 412 (9th Cir. 1983).
D. Restrictive and Expansive Views on Whether the Warsaw Convention's Cause of Action is Exclusive

After Benjamins, courts have also struggled to decide whether the Warsaw Convention's cause of action is exclusive or non-exclusive. Neither the Warsaw Convention itself nor any congressional act expressly mandates that the Convention preempts state law claims. It is clear that the Warsaw Convention preempts state laws with which it is in direct conflict because of the Supremacy Clause of the U.S. Constitution. However, the exclusivity issue is whether the Warsaw Convention goes one step further and implicitly preempts all state law causes of action when the state claim falls within the scope of the Convention.

The non-exclusivity or restrictive approach interprets the Warsaw Convention to allow state causes of action alongside Warsaw Convention causes of action for cases falling within the scope of the Convention. Most of the courts holding that the Warsaw Convention's cause of action is not exclusive rely on the "however founded" language of Article 24(1). The text of Article 24 as ratified by the Senate in 1934 provides as follows:

(1) In the cases governed 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 case 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. (emphasis added).

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69 Ras, supra note 67, at 591-92.
70 Id. at 499.
71 U.S. Const. art. VI.
72 Id.
73 Ras, supra note 67, at 591-92.
74 The official French text of Article 24 reads as follows:

(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.
The courts adopting the non-exclusivity approach argue that the "however founded" language of Article 24(1) means "whether founded on the Warsaw Convention or some other law."\(^7\) Under this interpretation, the Warsaw Convention merely provides the exclusive remedy and preempts inconsistent remedies provided for under state law causes of action.\(^6\) Therefore, a plaintiff can use a state law cause of action in areas covered by the Warsaw Convention, but the damages recovered by the plaintiff cannot exceed the Warsaw Convention's cap on damages.

From a practical standpoint, when a passenger dies in an air crash, the $75,000 cap is quickly reached under the plaintiff’s non-Warsaw Convention causes of action.\(^7\) Thus, under the restrictive approach, courts often avoid the debate over how to fill in the Warsaw Convention's grey areas.\(^7\) However, in cases such as Zicherman where "willful misconduct" is found and the cap on the amount of recoverable damages is lifted, the Warsaw Convention’s grey areas once again become a problem even for the restrictive approach.

Courts adhering to the exclusivity or expansive approach focus on the Warsaw Convention's purpose of uniformity rather than the text of the Convention.\(^7\) According to the exclusivity approach, the subject matter addressed by the Warsaw Convention demands uniformity vital to national interests such that allowing state regulation would frustrate national purposes.\(^8\) Thus, the scheme of the Warsaw Convention is so pervasive that a court may infer that Congress implicitly preempted all state law in the

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\(^{76}\) See Alveraz v. Aerovias Nacionales de Colombia S.A., 756 F. Supp. 550, 554 (S.D. Fla. 1991) (distinguishing exclusive remedy of the Warsaw Convention from the suggestion that it provides the exclusive cause of action).

\(^{77}\) Ras, supra note 67, at 498.

\(^{78}\) See id.


\(^{80}\) See Lockerbie, 928 F.2d at 1274-75.
areas covered by the Convention.\textsuperscript{81}

To justify their conclusion, the courts that have adopted the exclusivity approach describe a parade of horrors that would occur if state law causes of action were allowed alongside Warsaw Convention causes of action. According to the exclusivity approach, allowing state law causes of action would destroy certainty because an air carrier could predict neither the choice of law rules nor the substantive law that a court would apply in cases falling within the scope of the Warsaw Convention.\textsuperscript{82} Moreover, allowing state law causes of action would destroy uniformity because inconsistent verdicts could be reached in separate cases for similarly situated passengers on the same flight.\textsuperscript{83} Further, allowing state law causes of action would open the floodgate for forum shopping.\textsuperscript{84}

Since it would not make much sense to hold that the Warsaw Convention preempts all state law causes of action arising under it due to the interests in national uniformity and then to adopt state law to fill in the Warsaw Convention's grey areas, some courts that have adopted the exclusivity approach have held that federal common law should decide such issues.\textsuperscript{85} The U.S. Supreme Court has remained silent on the question of whether the Warsaw Convention's cause of action is exclusive.\textsuperscript{86} However, in Zicher-\textsuperscript{man}, the Court rejected the Second Circuit's holding that federal common law supplied the compensatory damages to be applied in an action under the Warsaw Convention cases.\textsuperscript{87}

III. ANALYSIS

In Zicher-\textsuperscript{man}, the U.S. Supreme Court was faced with the problem of filling in one of the Warsaw Convention's grey areas—what damages are

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 1275.

\textsuperscript{83} Id. at 1275-76.

\textsuperscript{84} Valasquez, 747 F. Supp. at 676.


\textsuperscript{86} The U.S. Supreme Court has twice declined to answer the question as to whether the Warsaw Convention provides the exclusive cause of action for cases falling within its scope. See Floyd v. Eastern Airlines, Inc., 499 U.S. 530 (1991); Air France v. Saks, 470 U.S. 392 (1985).

recoverable under Article 17. In answering that question, a unanimous Court held that Article 17 of the Warsaw Convention permits compensation only for those damages that would apply in the absence of the Warsaw Convention under the forum's choice of law rules.  

Although the Court did not address the exclusivity of the Warsaw Convention, its interpretation of the Warsaw Convention removes some of the foundations supporting the expansive approach. In reaching its conclusion, the Court relied on the language of Article 24, the negotiating and drafting history of the CITEJA, and the post-ratification understanding of the contracting parties.  

In interpreting the meaning of "dommage" as used in the official French text of Article 17 of the Warsaw Convention, the Supreme Court relied heavily on the language of Article 24. According to the Court, "damage," in its broadest sense, applies to an extremely wide range of phenomena for which no legal system in the world would provide tort compensation. Thus, the court concluded that the term "dommage" embraces only "legally cognizable" harms.  

The next question is under which legal system "legally cognizable" is to be defined. According to the Court, there are only two thinkable answers to this question. First, "dommage" could mean those harms that French law, in 1929, recognized as legally cognizable, which included not only "dommage materiel" (pecuniary harm) but also "dommage moral" (non-pecuniary harm, including loss of society). In rejecting this alternative, the Court found it implausible that the contracting parties intended to adopt the precise rule applied in France about what is a legally cognizable harm by their mere use of the French language.  

The second alternative, according to the Court, is that Article 17 leaves it to adjudicating courts to specify what harm is cognizable. The most natural reading of Article 24, according to the Court, is that, in an action brought under Article 17, the Warsaw Convention does not affect the substantive questions of who may bring suit and what damages they may be
compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states.\textsuperscript{97}

The Supreme Court also found support for its conclusion that domestic law determines the damages a party can recover under the Warsaw convention in the negotiating and drafting history and the post-ratification understanding of the contracting parties. First, after examining the drafting history of the Comite International Technique d’Experts Juridiques Aeriens des Experts (CITEJA), which did the preparatory work for the two conferences that produced the Warsaw Convention, the Supreme Court concluded that the Convention did not resolve the questions of who may recover, and what compensatory damages they may receive, but rather left the answers to these questions to “private international law” (conflict of laws).\textsuperscript{98} Second, since some countries have adopted domestic legislation to govern the types of damages recoverable in a Convention case, the Court concluded that the post-ratification conduct of the contracting parties illustrates that domestic law governs the recoverable damages.\textsuperscript{99}

After holding that the domestic law selected by the courts of the contracting states determines the types of damages recoverable under the Warsaw Convention, the court discussed which particular law of the United States would provide the governing rule. Although the Supreme Court has the power to implement a self-executing treaty,\textsuperscript{100} the Court refused to develop a federal common law rule to apply to all Warsaw Convention causes of action stating that this is a job for Congress.\textsuperscript{101} Instead, the Court held that Articles 17 and 24(2) provide nothing more than a pass-
through, authorizing courts to apply the law that would govern in the absence of the Warsaw Convention under the forum’s choice of law rules.102

IV. CONCLUSION

Those arguing in favor of exclusivity claim that making the Warsaw Convention’s cause of action non-exclusive undermines the Convention’s purposes of uniformity and certainty. To justify implicitly preempting all state law causes of action falling within the scope of the Convention, the exclusivity approach describes the parade of horrors that would occur if state law causes of action are allowed alongside Warsaw Convention causes of action. However, under the Supreme Court’s interpretation of the Warsaw Convention, the forum court must turn to the law applicable under its choice of law rules to determine what damages are available under Article 17. This interpretation allows the entire parade of horrors in cases involving the Warsaw Convention’s wrongful death provision—Article 17: Air carriers will not be able to predict the applicable law in a wrongful death case against it; families of victims can forum shop; also, different courts can reach inconsistent verdicts for the families of victims involved on the same flight. Thus, although the Supreme Court did not expressly address whether the Warsaw Convention provides the exclusive cause of action for actions falling within the Convention’s scope, its reasoning in Zicherman removes some of the foundations underlying the exclusivity approach’s arguments in favor of implicit preemption of state law causes of action.

102 Id. at 635-36.