PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY V. FORD: 120 YEARS OF SHENANIGANS DESIGNED TO DESTROY DIVERSITY JURISDICTION

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INTRODUCTION

It seems wrong that, with a mildly clever sham transaction, plaintiffs' lawyers may destroy one of the few grants of jurisdiction to U.S. District Courts authorized by the Constitution and enabled with the Judiciary Act of 1789.[1] Nevertheless, due to the lingering effects of a series of Supreme Court rulings, led by the 1885 decision in *Provident Savings Life Assurance Society v. Ford*, that may be the law.[2] Those hopeful of avoiding federal court may undermine the venerated work of the First Congress by assigning rights before filing suit. With a few hundred dollars and about an hour of work, plaintiffs can force out-of-state defendants to litigate in potentially biased state courts at the time a federal forum may be most needed, when plaintiffs so strongly believe in the advantages of a state court forum that they are willing to transfer legal rights in a manner some would label unscrupulous.[3]

Both Congress and the Supreme Court bear some responsibility

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1. Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (establishing diversity jurisdiction in the federal courts).

2. 114 U.S. 635 (1885).

3. As discussed in more detail *infra*, several types of transactions have been used to attempt to destroy diversity jurisdiction, including partial assignments, full assignments, and sham incorporations. A simple assignment can be drafted in a few minutes. The cost of incorporating in a defendant's home state is a few hundred dollars. At one website, for example, a basic incorporation package costs $273 ($199 economy incorporation package plus $74 Delaware state fee). *See* https://www.incorporate.com/doQuickQuote.do (last visited January 13, 2005).

for the manipulation of federal jurisdiction with inexpensive shenanigans. The mistakes of Congress are easy to spot. Congress prohibited the creation of diversity jurisdiction through sham transactions, but never enacted a statute prohibiting the destruction of diversity jurisdiction.[4] Even after a century of criticism from defendants and federal court judges for this oversight, there has been no legislative cure. There is little hope Congress will make changes any time soon.

The Supreme Court is also responsible for the current state of the law. Not only did the High Court fail to protect diversity jurisdiction from scheming manipulations when given the opportunities to do so, the Court did the exact opposite. With *Provident Savings* and other cases in the mid 1880s, the Supreme Court instructed federal courts to ignore last minute transfers of rights across state lines, whether or not they were affected substantially or even solely to destroy diversity jurisdiction.[5] *Provident Saving*s gave spurious plaintiffs the green light to destroy diversity jurisdiction at will.[6]

Since *Provident Savings* became law in 1885, the High Court has weakened its holding but has never expressly overruled the decision. Instead, the Court has only made references to its ability and duty to protect its jurisdiction and implied the old rule is antiquated and without life.[7] Consequently, few are certain what the current rule is. The confusion allows plaintiffs who believe in favorable state court treatment to execute a simple set of transactions to destroy a defendant's removal rights. In a legal landscape where hometown advantage, unique local procedural rules, and overworked state courts sometimes mean the difference between pre-trial defeat and post-trial victory, the destruction of diversity jurisdiction has serious consequences to modern day litigants.[8]

Following this introduction, Part I examines the important role of

4. *See* 28 U.S.C. § 1359 (2005).

5. As discussed in detail *infra*, those cases are Provident Savings Life Assurance Soc'y v. Ford, 114 U.S. 635; Carson v. Dunham, 121 U.S. 421 (1887); Leather Mfrs' Nat'l Bank v. Cooper, 120 U.S. 778 (1887); Oakley v. Goodnow, 118 U.S. 43 (1886).

6. *Provident Savings*, 114 U.S. at 639-40.

7. Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969).

8. The difference between state and federal court has obviously affected the outcome of cases. In fact, sometimes the difference between state and federal court dictates a complete change in the outcome of a case. *See*, *e.g.*, Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000). The case was filed in Texas state court, which at the time had no doctrine of forum non conveniens under which their actions could be dismissed. A federal court would likely have dismissed the case on that ground. *Id*.

European and early American historical procedural protections designed to protect those defending lawsuits away from home. Part II evaluates the sizable faults of *Provident Savings*, with the aid of hindsight, the many previously written critiques of *Provident Savings*, and the three related cases decided from 1885 to 1887. Part III addresses several 20th century decisions limiting *Provident Savings* which may signal the end for sham transactions designed to destroy diversity jurisdiction. The article concludes with a short note on how modern federal courts might finally push past the errors of *Provident Savings* and its progeny to prohibit the unfair practice of destroying diversity jurisdiction with last minute transfers.

PART I: HISTORICAL BACKGROUND

Before addressing the destruction of diversity jurisdiction through sham transfers, we might first address the thinking behind diversity jurisdiction itself. A broad understanding of the circumstances behind an issue is the key to fully understanding it. This historical review includes interesting aspects of American and European history and, more importantly, will exemplify the need for diversity jurisdiction (or some form of similar procedural mechanism to protect out-of-town litigants) in circumstances when a plaintiff attempts to circumvent the procedure.

A. The Historical Use of Procedural Protections for Foreign Litigants

The founding fathers, although intellectual giants, were not the inventors of the legal mechanisms used to protect non-local litigants from local prejudices. The idea is a surprisingly old one, and history is full of examples. In ancient Egypt, foreign merchants in commercial disputes were sometimes permitted to choose the judge that would hear their case, even a judge of their own nationality.[9] This was done so that foreigners could settle their dispute "in accordance with their own foreign laws and customs."[10] Egypt was not alone. As the primary beneficiaries of the unique Egyptian tribunals,[11] the Greeks instituted similar procedures in their city-based

9. COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 193 (MacMillan and Co. 1911).

10. *Id.* ("[T]he Greeks especially enjoyed these privileges on Egyptian territory. . . .").

11. The special Egyptian courts used by the Greeks were called "ξενικοί αγορανόμοι" or "foreign 'secretaries of the market.'" *Id.* (citing Rodière, *Du prèteur peregrine et de l'existence*