

THE SERVICEMEMBERS CIVIL RELIEF ACT AND FORECLOSURE

Hearing July 12, 2011

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Service Members Law Center and the Reserve Officers Association

The Reserve Officers Association (ROA) established the Service Members Law Center (SMLC) in June 2009, with Captain Samuel F. Wright, JAGC, USN (Ret.) as the Director.¹ The SMLC is entirely funded by ROA. Each month, the SMLC (Captain Wright) provides information to 400-500 service members, military family members, attorneys, employers, creditors, reporters, congressional staffers, state legislators, and others, concerning military-legal topics, especially the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). The SMLC provides information without regard to whether the person seeking the information is a member of or eligible to join ROA. The SMLC also filed an *amicus curiae* brief in the Supreme Court, in the case of *Staub v. Proctor Hospital*.

In 1997, ROA established the “Law Review” column in its magazine and on its website. We invite your attention to www.roa.org/law_review. You will find more than 750 articles about the SCRA, USERRA, UOCAVA, and other laws that are particularly pertinent to those who serve our country in uniform, as well as a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Each week, we add one or more new articles.

The Reserve Officers Association of the United States (ROA) is a professional association of commissioned and warrant officers of our nation's seven uniformed services, and their spouses. ROA was founded in 1922 during the drawdown years following the end of World War I. It

¹ You can find Captain Wright's biography at the end of this testimony.

was formed as a permanent institution dedicated to National Defense, with a goal to teach America about the dangers of unpreparedness. When chartered by Congress in 1950, the act established the objective of ROA to: "...support and promote the development and execution of a military policy for the United States that will provide adequate National Security."

The Association's 63,000 members include Reserve and Guard Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen who frequently serve on Active Duty to meet critical needs of the uniformed services and their families. ROA's membership also includes officers from the U.S. Public Health Service and the National Oceanic and Atmospheric Administration who often are first responders during national disasters and help prepare for homeland security.

ROA is a member of The Military Coalition, where it co-chairs the Tax and Social Security Committee. ROA is also a member of the National Military/Veterans Alliance and the Associations for America's Defense. Overall, ROA works with 75 military, veterans and family support organizations.

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The Reserve Enlisted Association is an advocate for the enlisted men and women of the United States Military Reserve Components in support of

National Security and Homeland Defense, with emphasis on the readiness, training, and quality of life issues affecting their welfare and that of their families and survivors. REA is the only Joint Reserve association representing enlisted reservists – all ranks from all five branches of the military.

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DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Reserve Officers and Reserve Enlisted Associations are member-supported organizations. Neither ROA nor REA nor the SMLC have received grants, subgrants, contracts, or subcontracts from the federal government in the past three years. All other activities and services of the associations are accomplished free of any direct federal funding.

The Total Force Policy

In 1973, Congress abolished the draft, and the Department of Defense (DOD) adopted the “total force policy” under which the services would rely to a greater extent upon the National Guard and Reserve in planning for military contingencies. Military capabilities that will be needed in a wartime scenario can be built up and maintained in the Reserve Components at a much lower price to the nation, as compared to the cost of maintaining the same or other individuals on full-time active duty, in peacetime as well as wartime.

The Reserve Components gradually transformed from a “strategic reserve” (available only for a contingency like World War III) to an “operational reserve” routinely called up for operations well short of World War III. When Iraq invaded and occupied Kuwait and threatened Saudi Arabia in August 1990, President George H.W. Bush “drew a line in the sand” and responded forcefully to protect Saudi Arabia and liberate Kuwait. As part of his response, he called up Reserve Components, in the first major Reserve Component mobilization since the Korean War.

The transformation from a strategic reserve to an operational reserve has fully matured since the terrorist attacks of September 11, 2001. As of July 5, 2011, 816,389 National Guard and Reserve personnel have been called

to the colors since September 11, 2001, including 94,333 currently activated. Some of these Reserve and Guard personnel have been called to duty several times in the last decade. Given the increasing frequency with which they are used, we need laws like the SCRA and USERRA to enable these individuals to transition quickly and seamlessly from a reserve status to full-time active duty and deployment, and then back to reserve status.

The many owe so much to the few

Since the end of the draft in 1973, the U.S. military has stressed quality over quantity. The U.S. military is not huge, as compared to some other militaries. What we lack in quantity, we more than make up in quality. U.S. military personnel are extraordinarily well motivated, qualified, trained, led, and equipped.

The entire U.S. military establishment, including the National Guard and Reserve, amounts to less than $\frac{3}{4}$ of 1% of the U.S. population. It is these few who have protected us all from a repetition of the horrors of September 11.

In a speech to the House of Commons on August 20, 1940, Prime Minister Winston Churchill said, "The gratitude of every home in our island, in our empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few."

These eloquent words about the Royal Air Force in the Battle of Britain could apply equally to the men and women of the United States armed forces today. May these words be read and remembered by banks, mortgage servicers, law firms, employers, and others who deal with service members.

Origin and Purpose of the SCRA

The United States entered "the war to end all wars" on April 6, 1917. Hundreds of thousands of young men (and a few thousand young women) answered the country's call to serve "over there" as "doughboys." Some

were drafted, some enlisted voluntarily, and some were called to active duty from the nascent Army Reserve, Army National Guard, Marine Corps Reserve, or Navy Reserve. Regardless of how they entered into uniform, they left behind civilian jobs, farms, businesses, mortgages, debts, lawsuits, and other important matters.

In April 1917, John Henry Wigmore was already an established legal scholar. He had been the Dean of the Northwestern University School of Law since 1901, and the first edition of *Wigmore on Evidence* was published in 1904. When our country joined the war, Wigmore volunteered for the United States Army Judge Advocate General's Corps and was commissioned a major, at the age of 54. In just six weeks, he drafted the law that came to be known as the Soldiers' and Sailors' Civil Relief Act (SSCRA).

Congress quickly enacted Major Wigmore's work into law, and that law served our country well through two world wars, the Korean War, and the Vietnam War. To explain the underlying purpose, in a 1917 subcommittee report, the House Military Affairs Committee wrote, "The Shylock, to whom his pound of flesh is dearer than patriotism, is not the only man against whom the soldier must be given relief."

By the time of the Persian Gulf War of 1990-91, it had become apparent that the law needed to be updated, because of the profound changes in our economy and legal system in the years since 1917. For example, under the SSCRA it was possible for a person entering military service to terminate a lease on premises (apartment, house, office, farm, etc.), but there was no provision for terminating a vehicle lease. In 1917, Major Wigmore could not conceive of the possibility of leasing an automobile, as a brand-new Model T only cost \$240 (or \$2,696 in today's dollars).

Today, as in 1917, entering active duty in the armed forces is a major life change. The individual often suffers a precipitous drop in income. For example, my late father was a young accountant at Peat Marwick Mitchell (a big-eight accounting firm) when he was drafted in May 1941. I don't know what Peat Marwick paid young accountants in 1941, but it must have been much more than the \$18 per month that my father earned as a Private in the Army.

Of course, military personnel are much better paid today, but so are civilians. Of the 816,389 National Guard and Reserve personnel called to the colors since September 11, 2001, more than a third have suffered a significant drop in income upon entering active duty. I personally have talked to many Guard and Reserve members who have six-figure civilian incomes but are junior enlisted members of the military.

Entering active duty often means that certain expensive “necessities” have suddenly become encumbrances—the apartment, the office, the leased Mercedes, the cell phone. The SCRA now permits the person entering active duty to terminate premise and vehicle leases and cell phone contracts.

In most cases, the individual will be hundreds if not thousands of miles away from his or her home and will be fully engaged with military duties. If someone sues the service member, the member may not even be aware of the lawsuit, much less have the opportunity to respond with his or her side of the story.

Most importantly, entering active duty means that the service member owes his or her entire attention to the military duties at hand. The major point of the SCRA, as well as USERRA, is to put civilian concerns out of the service member’s mind, to the maximum extent feasible, while the member is serving at the tip of the spear or training for such service.

This is a safety issue, for the individual service member and for his or her entire unit. If, for example, I am in the foxhole next to Josephine Smith, I should not have to worry that she is not paying full attention to her sector of the perimeter because she cannot put out of her mind her worry that her home thousands of miles away is likely to be foreclosed upon.

The Supreme Court has stated that the basic purpose of the civil relief statute is to “protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Five years later, the Supreme Court held that, “The Act must be read with an eye friendly to those who dropped their affairs to answer their country’s call.” *LeMaistre v. Leffers*, 333 U.S. 1, 5 (1948).

When Congress enacted the SCRA in 2003, to replace the SSCRA, Congress included an explicit statement of the purposes of the law: “The

purposes of this Act are—(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to service-members of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.” 50 U.S.C. App. 502.

SCRA in the Mortgage Foreclosure Context

The SCRA is codified in the “Appendix” of title 50 of the United States Code. The word “Appendix” is misleading, and no other title of the United States Code has an “appendix.” This appendix is just as much a part of the Code as any other part. The SCRA is codified at 50 U.S.C. App. 501-597b.

Let us discuss the hypothetical but realistic Josephine Smith, a third-class petty officer (E-4) in the Coast Guard Reserve. She is a college graduate with an annual income approaching six figures, but in the Coast Guard she is a junior enlisted service member. Thus, when she is called to the colors, she suffers a major loss of income.

Josephine has student loans, credit cards with outstanding balances, an automobile loan, and most importantly a mortgage on her home—all of these are financial obligations that she incurred *before* her call to active duty. Because her income has dropped significantly due to her call to duty, she is having difficulty keeping up with these obligations. It is certainly fair to say that her entry on active duty has “materially affected” her ability to meet her financial obligations.

“An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember’s spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent—(A) during the period of military service *and one year thereafter in the case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage*; or (B) during the period of military service, in the case of any other obligation or liability.” 50 U.S.C. App. 527(a)(1) (emphasis supplied).

“Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.” 50 U.S.C. App. 527(a)(2).

“The amount of any periodic payment due from a servicemember under the terms of the instrument that created an obligation or liability covered by this section shall be reduced by the amount of the interest forgiven under paragraph (2) that is allocable to the period for which such payment is made.” 50 U.S.C. App. 527(a)(3).

Upon her call to active duty, Josephine Smith gave written notice to each of her creditors, including providing a copy of her written Coast Guard orders, as required by 50 U.S.C. App. 527(b)(1). Each creditor, including the bank holding the mortgage on her home, has the opportunity to initiate an action in court to get relief from the requirement to reduce the interest rate to 6 percent. See 50 U.S.C. App. 527(c). In this case, no such relief may be granted, because it is clear that Smith’s ability to pay interest at a rate in excess of 6 percent per year has been materially affected by her entry on active duty.

A creditor who knowingly violates the requirement to lower interest rates to 6% is guilty of a federal misdemeanor and is subject to a substantial fine and imprisonment for up to one year. See 50 U.S.C. 527(e).

Petty Officer Smith is deployed to the Persian Gulf. Members of the Coast Guard and Coast Guard Reserve have been serving in that theater of operations for 21 years, since Saddam Hussein’s forces invaded Kuwait on August 2, 1990.

While deployed to the tip of the spear, Smith falls behind on home mortgage payments, and the bank holding the mortgage turns the matter over to a “foreclosure mill” law firm. Smith lives in one of the 27 states that permit *non-judicial foreclosures* on residential mortgages.

The loan document that Smith signed specifically authorizes non-judicial foreclosure, and such non-judicial foreclosure is permitted by state law. Nonetheless, it is unlawful under federal law (the SCRA) to conduct a non-judicial foreclosure in this instance, because Smith is a member of the armed forces on active duty.

“A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, *or within 9 months after*, the period of the servicemember’s military service except— (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or (2) if made pursuant to an agreement as provided in section 107 [50 U.S.C. App. 517].” 50 U.S.C. App. 533(c) (emphasis supplied).

“A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.” 50 U.S.C. App. 533(d).

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” United States Constitution, Article VI, Clause 2, commonly referred to as the “Supremacy Clause.” Yes, it is capitalized just this way, in the style of the late 18th Century.

Under the Supremacy Clause, the SCRA, which forbids non-judicial foreclosure on Smith’s home while she is on active duty and for nine months thereafter, supersedes the state law that authorizes such non-judicial foreclosure. The SCRA is a constitutionally valid federal statute, authorized by the “war powers clauses”—Article I, Section 8, Clauses 11-16.

The provision extending the prohibition on non-judicial foreclosure for nine months after the service member leaves active duty is subject to a “sunset clause” that expires on December 31, 2011. We strongly urge Congress to make this provision permanent and also to extend the nine months to 12, to make this period consistent with the 12-month period in 50 U.S.C. App. 527(a)(1)(A).

Because non-judicial foreclosure is prohibited in this situation, the bank initiates a judicial foreclosure proceeding in state court. Such an action is a civil action, like any other, and is subject to sections 521 and 522 of title 50 Appendix.

Let us assume that Petty Officer Smith, serving our country thousands of miles away in the Indian Ocean, becomes aware that a lawsuit has been filed against her back home. Pursuant to 50 U.S.C. App. 522(b)(2), she files (by mail or e-mail to the judge) a letter setting forth that her military duties materially affect her ability to appear for the civil trial and a letter from her commanding officer stating that her military duty prevents her appearance and that military leave is not authorized for her. Under these circumstances, the judge is *required* to grant a stay for at least 90 days. See 50 U.S.C. App. 522(b)(1).

If Petty Officer Smith's military duties continue to preclude her appearance, she may apply for and the judge may grant an additional stay under 50 U.S.C. App. 522(d). If the judge refuses to grant the additional stay, he or she is required to appoint counsel to represent Smith in the action. 50 U.S.C. 522(d)(2).

Alternatively, let us assume that Smith is not aware of the lawsuit filed against her back home. The time for her to file an answer to the lawsuit has passed, and she has not been heard from. Before getting a default judgment against Smith, the credit union needs to file an affidavit to the effect that Smith is, or is not, on active duty. 50 U.S.C. App. 521(b)(1). Filing a false affidavit is a federal crime, punishable by up to one year of imprisonment and a substantial fine. 50 U.S.C. App. 521(c).

Once it is established that Smith is on active duty, several procedural steps must be taken to ensure that her service to our country does not prejudice her rights in this pending civil lawsuit. First, the court must appoint an attorney to represent Mary's interests and to try to contact her. 50 U.S.C. App. 521(a)(2). If Smith cannot be contacted, the court shall grant a stay of at least 90 days. 50 U.S.C. App. 521(d).

DOD operates a *free* service to assist attorneys, creditors, etc. to determine whether a specific person is or is not currently on active duty. This information can be found at <https://www.dmdc.osd.mil/appi/scraHome.do>. If you input the individual's name, Social Security Number, and date of birth, this system will tell you, usually in a matter of seconds, that Josephine Smith is on active duty, or is not. It is essential that the attorney for the bank use this free service before he or she "robo-signs" an affidavit to the effect that Josephine Smith is not on active duty in the armed forces.

It should be noted that the Coast Guard (Smith's service) is in the Department of Homeland Security (DHS), not DOD, but the DOD free service checks for Coast Guard personnel, as well as personnel of the Army, Navy, Marine Corps, and Air Force. The Coast Guard is an armed force as defined by 10 U.S.C. 101(a)(4), just like the four DOD services. The Coast Guard is also specifically mentioned in the definitions section of the SCRA. See 50 U.S.C. App. 511(2)(A).

SCRA Is Not Limited to Involuntary or Overseas Service

Nothing in the SCRA limits its application to service members who have been involuntarily called to active duty. This law applies to every active duty service member, including but not limited to Reserve and National Guard personnel who have entered active duty voluntarily or involuntarily. The SCRA applies to officers and enlisted personnel of the regular military establishment, as well as Guard and Reserve personnel who have been called to the colors.

Some creditors, attorneys, and courts have incorrectly asserted that the SCRA only applies to service members serving in combat zones overseas. The location of the member may be an important factor in a court's decision on whether to grant a stay of proceedings under 50 U.S.C. App. 522, but it should be noted that a service member on active duty may be unable to attend a court proceeding on a particular date even if the courthouse is only ten miles from the member's place of duty.

To paraphrase General George S. Patton (George C. Scott) in my favorite movie, the active duty service member who "shovels manure in Louisiana" is serving at his or her appointed place of duty, just as much as the soldier at a forward operating base in Afghanistan. Under Article 86 of the Uniform Code of Military Justice (UCMJ), a service member who is absent from his or her appointed place of duty without proper authorization for even a few minutes is guilty of a military criminal offense and is potentially subject to incarceration.

Military personnel are not permitted to come and go as they please. A member attending a military school (including National Guard and Reserve members on active duty for training) is not permitted to miss any part of that school. If a military unit is participating in an exercise or undergoing an

inspection, a member of the unit will not be permitted to take leave on that day, even for purposes of an appearance in a civil court proceeding.

Conclusion

The purpose of the SCRA, as well as USERRA, is to spread some of the burden of the defense of our country over a broader base of the population, not just the $\frac{3}{4}$ of 1% who serve in uniform. If a mortgagee has to wait a few weeks to foreclose on a service member, that is a small sacrifice for the mortgagee to make, especially as compared to the sacrifices (sometimes the ultimate sacrifice) that service members make.

Captain Samuel F. Wright, JAGC, USN (Ret.)
Director, Service Members Law Center



Samuel F. Wright received his B.A. from Northwestern University (Evanston, Illinois) in 1973, majoring in Political Science. He received his J.D. (basic law degree) in 1976 from the University of Houston (Houston, Texas). He received his LL.M (advanced law degree) from Georgetown University (Washington, DC) in 1980.

Samuel F. Wright was commissioned an Ensign in 1973, via the Judge Advocate General's Corps Student Program. After graduating from law school and passing the Texas Bar Exam, he reported to active duty in January 1977, to attend the Naval Justice School (NJS). After completing NJS, he reported to his first duty station in March 1977, in the Claims Division, Office of the Judge Advocate General of the Navy. He specialized in the defense of tort claims alleging asbestos exposure in the construction and repair of ships by and for the Navy, and he was awarded a Navy Commendation Medal for that service.

He left active duty in March 1980 and affiliated with the Navy Reserve as a judge advocate. He performed reserve assignments with Personnel Mobilization Team (PMT) Richmond, PMT Norfolk, Volunteer Training Unit Law 0601, and CINCLANT Fleet 206. He performed active duty periods of varying duration at the Office of the Judge Advocate General, the A-12 Litigation Team, the National Committee for Employer Support of the Guard and Reserve (ESGR), the Naval Inspector General, United States Naval Forces Central Command, and the Reserve Forces Policy Board, for a total of 12 years of active duty. His military decorations include two Navy Commendation Medals, a Joint Service Commendation Medal, and a Meritorious Service Medal. He retired from the Navy Reserve in 2007.

Samuel F. Wright worked for the United States Department of Labor (DOL) for ten years, from September 1982 to September 1992. During that time,

he developed an interest and expertise in the Veterans' Reemployment Rights Act (VRRA), a law enacted by Congress in 1940, as part of the Selective Training and Service Act. Together with one other DOL attorney (Susan M. Webman), Wright drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991.

In 1994, Congress enacted the task force work product with only a few substantive changes, as the Uniformed Services Employment and Reemployment Rights Act (USERRA), a long-overdue rewrite of the VRRA. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, an attorney for ESGR, an attorney for the Office of Special Counsel (OSC), and an attorney in private practice.

In June 2009, Wright retired from private practice to join the full-time staff of the Reserve Officers Association (ROA), as the first Director of the Service Members Law Center. Each month, he assists 200-250 National Guard and Reserve members, employers, attorneys, reporters, congressional staffers, military family members, and others with questions and complaints concerning USERRA, the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are particularly pertinent to those who serve our country in uniform. He has also filed, on behalf of ROA, an *amicus curiae* (friend of the court) brief in the Supreme Court, in the case of *Staub v. Proctor Hospital*, the first reemployment rights case to make it to the nation's highest court since 1991.

Samuel F. Wright is also known in military circles for his efforts (began in 1976) to reform absentee voting laws and procedures for the benefit of military and overseas voters. He has recruited a cadre of more than 3,000 volunteers (mostly military retirees and reservists) to simplify absentee voting procedures and to provide military personnel sufficient time to return their ballots in time to be counted, no matter where the service of our country has taken them.