

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Note

Fair Credit Reporting Act Changes Take Effect in September

The changes to federal consumer protection laws that are contained in the Omnibus Consolidated Appropriations Bill for Fiscal Year 1997¹ have been mentioned in several consumer law notes over the last six months.² Perhaps the most sweeping changes affecting the military legal assistance practice are those made to the Fair Credit Reporting Act (FCRA).³ The majority of these changes (and all of the changes discussed in this note) take effect on 30 September 1997.⁴ This allows the credit reporting agencies (CRAs) one year to adjust their procedures to comport with the new requirements. This note highlights some of the changes that are important to legal assistance practitioners.⁵

The FCRA provision relating to obsolete information in credit reports was the provision most in need of revision. The general rule is that adverse information contained in consumer credit reports becomes obsolete at ten years for bankruptcies and seven years for all other information.⁶ Currently, the FCRA prohibits CRAs from reporting obsolete information unless the consumer: (1) applies for life insurance or credit in a face amount of \$50,000 or more or (2) applies for employment with a salary of \$20,000 or more.⁷ This has been a major weakness in consumer protection because these low thresholds have enabled CRAs to include obsolete information in the credit reports of numerous consumers facing routine transactions, such as applying for a home mortgage or seeking a better job. The Consumer Credit Reporting Reform Act of 1996 (CCRRA) provides much needed relief by raising the dollar limits to \$150,000 for insurance and credit and \$75,000 for employment.⁸ The changes in the thresholds will help average income consumers, like soldiers, to recover from adverse credit information.

Another change that will benefit those who are trying to "clean up" their credit report is the fixing of the "reasonable fee" that CRAs can charge for a copy of the report. Congress has fixed that amount at \$8, beginning 30 September 1997.⁹ This price will be adjusted each January based on the consumer price index.¹⁰ Attorneys will have to remain cognizant of future changes in the price.

The Act also increases consumer access to their own credit information. Prior to the 1996 legislation, consumers were only entitled to disclosure of "the nature and substance" of the infor-

1. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

2. See, e.g., Consumer L. Note, *The Fair Debt Collection Practices Act Notice Provisions Amended*, ARMY LAW., Mar. 1997, at 16; Consumer L. Note, *What's in a Name?*, ARMY LAW., June 1997, at 44 n.26.

3. Consumer Credit Reporting Reform Act of 1996 (CCRRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (to be codified in 15 U.S.C. § 1681). The CCRRA amends The Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127 (1970).

4. CCRRA § 2420.

5. The CCRRA is the first major reform of the Fair Credit Reporting Act since its initial passage in 1970. *Debt Collection, Credit Reporting, Other Consumer Credit Laws Amended*, Report 746 (Consumer Credit Guide (CCH)), Oct. 22, 1996, at 1 (on file with author). Consequently, a complete treatment of all of these sweeping reforms is beyond the scope of this note. More complete coverage is available in *Credit Reporting Reform, Other Consumer Credit Changes Enacted*, Report 745 (Consumer Credit Guide (CCH)), Oct. 8, 1996, at 4-10 (on file with author) and *Fair Credit Reporting Amendments*, 16 NCLC Reports, Consumer Credit & Usury Edition 5 (Sept./Oct. 1996).

6. 15 U.S.C.A. § 1681c(a) (West 1982).

7. *Id.* § 1681c(b).

8. CCRRA § 2406 (to be codified at 15 U.S.C. § 1681c).

9. *Id.* § 2410 (to be codified at 15 U.S.C. § 1681j).

10. *Id.*

mation in their files with the CRA.¹¹ The new provision makes clear that the consumer is entitled to “all information” in their files, with the exception of any credit scores or risk predictors in the file.¹²

Some of the more technical aspects of the statute have changed as well. Congress added a definition of “adverse action” to the statute.¹³ While a detailed discussion of each provision of this definition is outside the scope of this note, having a definition is important. Taking adverse action based upon a credit report triggers certain requirements for users. Under current law, the user was simply told to notify the consumer and give him the name and address of the CRA that issued the report.¹⁴ Beginning 30 September 1997, the user must not only notify the consumer, but must also provide the name, address, and telephone number of the credit reporting agency; a statement that “the consumer [sic] reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken;” and notice of the consumer’s rights under the FCRA.¹⁵ These rights include obtaining a copy of a consumer report from the CRA free of charge within sixty days of the adverse action and disputing the accuracy or completeness of the report.¹⁶

The most significant (and perhaps most controversial¹⁷) change to the FCRA is the establishment of duties for those who provide information to the CRAs. Correcting inaccuracies in credit reports has been a fairly daunting task, because information will often reappear after it has been removed. The imposition of duties on providers of information, in addition to

the duties already placed on CRAs and users, is a step toward improving the situation.

The amendments in the CCRRA first establish a prohibition against providing information “if the person knows or consciously avoids knowing that the information is inaccurate.”¹⁸ Second, the amendments prohibit the furnishing of information to the CRAs if the person is notified by the consumer that the information is inaccurate and “the information is, in fact, inaccurate.”¹⁹ Third, all persons who “regularly and in the ordinary course of business” furnish information to the CRAs have an affirmative obligation to notify the CRA if they determine that information they have previously provided is incomplete or inaccurate and to cease providing the inaccurate information.²⁰ The notice of the error must include the corrections or additional information necessary to make the information accurate and complete.²¹ Finally, if the person who is providing information is notified by the CRA that the consumer disputes the information provided,²² that person must conduct a reasonable investigation and report the results to the CRA.²³ If the investigation reveals that the information is inaccurate or incomplete, the provider must notify all CRAs to whom that provider gave the information.²⁴ The provider of the information must complete all investigations, reviews, and reporting within thirty days from the date the CRA received its notice from the consumer.²⁵

The amendments also place additional duties upon CRAs. The procedures for investigating disputed entries on credit reports are formalized under the CCRRA. Within five business days,²⁶ the CRA must notify the person who provided the dis-

11. 15 U.S.C.A. § 1681g(a)(1).

12. CCRRA § 2408 (to be codified at 15 U.S.C. § 1681g).

13. *Id.* § 2402 (to be codified at 15 U.S.C. § 1681a).

14. 15 U.S.C.A. § 1681m.

15. CCRRA § 2411 (to be codified at 15 U.S.C. § 1681m). Although CRAs are normally referred to as “Credit Reporting Agencies” throughout the legislation, this section refers to them as “Consumer Reporting Agencies.”

16. *Id.*

17. *See Credit Reporting Reform, Other Consumer Credit Changes Enacted, supra* note 5, at 4.

18. CCRRA § 2413 (to be codified at 15 U.S.C. § 1681s-2).

19. *Id.*

20. *Id.*

21. *Id.*

22. *See infra* notes 27-28 and accompanying text.

23. CCRRA § 2413 (to be codified at 15 U.S.C. § 1681s-2).

24. *Id.*

25. *Id.* §§ 2409, 2413.

puted information to the CRA.²⁷ The notice must include all relevant information that is received from the consumer regarding the dispute.²⁸ The CRA must then reinvestigate the disputed information free of charge.²⁹ The CRA is required to complete this investigation within thirty days from the date they receive the notice of the dispute from the consumer.³⁰ After completing the investigation, the CRA must either record the current status of the information or delete the information.³¹ The CRA must also inform the consumer of the results of the investigation within five business days of completion.³²

Another change that should benefit consumers is that CRAs must follow new procedures before reinserting previously deleted information. Before reinsertion, the CRA must receive a certification from the provider of the information that the information is complete and accurate.³³ The CRA must then notify the consumer in writing within five business days of reinserting the information.³⁴ While these provisions will not necessarily prevent inaccurate information from reappearing, at least consumers will have affirmative notice of the problem before the information has an adverse impact on them.

As our society has become credit-driven, the importance of credit information has increased exponentially. All facets of a person's life, from his home to his job, can be impacted by this information. The 1996 amendments provide valuable tools for consumers to use in maintaining their credit reports, and legal assistance practitioners must use these tools effectively to protect their clients. Major Lescault.

Family Law Note

Retroactive Application of the Uniformed Services Former Spouses' Protection Act Clarified in Louisiana Case

The domestic relations laws of many states permit former spouses to return to court for partition of assets which were not disposed of in the original divorce proceedings. The passage of the Uniformed Services Former Spouses' Protection Act³⁵ (USFSPA) opened the door for thousands of such cases. Amendments to the USFSPA in February 1991, however, prohibit partition actions for omitted military pension benefits if the underlying divorce decree is dated prior to 25 June 1981, and if the decree does not either divide the pension or reserve jurisdiction to do so.³⁶

In the Fifth Circuit, a federal district court answered for the first time two specific issues surrounding partition actions: (1) the meaning of the jurisdictional restrictions of 10 U.S.C. § 1408(c)(4)³⁷ and (2) an interpretation of the language of 10 U.S.C. § 1408(c)(1).³⁸ In *Delrie v. Harris*,³⁹ the plaintiff petitioned for a partition of military retirement benefits thirty-three years after the divorce action. Roberta and Harry Harris were married in 1943 and divorced in Louisiana in 1963, after approximately nineteen years of overlap between the marriage and Mr. Harris' military career. Although they entered into a voluntary community property settlement, the court did not order, ratify, or approve a property settlement incident to the divorce decree. Neither the divorce decree nor the voluntary community property settlement provided for any division of the military retirement benefit. Mr. Harris resided in Oklahoma at the time of the petition for partition of military retirement benefits.

These facts raised two issues for the district court. First, does 10 U.S.C. § 1408(c)(4) impose a heightened personal

26. *Id.* Interestingly, the amendments use the term "business day" in a number of provisions but do not define the term. It may be logical to use the ordinary meaning of that term—a day that the company is open for business—but, ordinarily in consumer legislation, terms that limit time periods are defined. Therefore, attorneys should carefully watch the CFR and FTC staff commentaries for a definition of this term.

27. *Id.* § 2409 (to be codified at 15 U.S.C. § 1681i). *See supra* notes 23-25 and accompanying text for a discussion of the responsibilities of providers of information upon receipt of the notice of the dispute from the CRA.

28. CCRRA § 2409 (to be codified at 15 U.S.C. § 1681i).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. 10 U.S.C.A. § 1408 (West 1996).

36. *Id.* § 1408(c)(1).

37. This section of the USFSPA requires a court to establish jurisdiction over the service member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court; (B) his domicile in the territorial jurisdiction of the court; or (C) his consent to the jurisdiction of the court.

jurisdiction requirement on courts which are looking at USFSPA issues; second, what is the correct interpretation of the prohibition on partitions contained in 10 U.S.C. § 1408(c)(1)? With respect to the personal jurisdiction issue, Mr. Harris contended that his residence in Oklahoma at the time of the petition for partition precluded Louisiana from acting without his consent. The court, however, ruled that the statute's jurisdiction provision is related more to the court's subject matter jurisdiction and not particularly to the personal jurisdiction over the service member for each particular case.⁴⁰ Therefore, the court found that the Louisiana court had jurisdiction over the issue at the time of the divorce and that by appearing and defending in one action a defendant consents to jurisdiction over suits incidental to that action.⁴¹

The second issue, involving interpretation of the specific language of 10 U.S.C. § 1408(c)(1), was dispositive of the case. Mrs. Delrie (the former Mrs. Harris) argued that the parenthetical phrase "(including a court ordered, ratified, or approved property settlement incident to such decree)"⁴² limited the words "divorce, dissolution, annulment, or legal separation" so that unless a divorce included such a court ordered, ratified, or approved property settlement, the prohibition on partition was not effective. Mr. Harris argued that the parenthetical phrase merely illustrated the preceding words and did not limit them. The court found that the plain language of the statute and common sense supported Mr. Harris' interpretation.⁴³ At the time of the divorce in 1963, Louisiana courts recognized a military spouse's right to a share of military retirement benefits. The

amendment to the USFSPA prevents a relitigation of that right.⁴⁴

For the practitioner who advises military members and spouses, it is important to remember that the time to dispute jurisdiction to divide the military pension based on 10 U.S.C. § 1408(c)(4) grounds is at the original petition. As to the interpretation of the language in 10 U.S.C. § 1408(c)(1), which bars partition of cases decided prior to 25 June 1981, it remains a case of investigating the state domestic law. Louisiana signals a strict reading of the plain language of the statute, noting that it may work a financial hardship on many former military spouses.⁴⁵ Other jurisdictions do not necessarily apply the same strict reading and may be open to partition actions despite the language of the USFSPA amendment.⁴⁶ Major Fenton.

Tax Law Notes

Dependency Exemption for Children of Separated Parents

A recent tax court case demonstrates the different rules that apply when parents who are separated both want to claim their children as dependents on their tax returns. In order to claim someone as a dependent on a tax return, one must satisfy a five-part test. First, the dependent must earn less than the personal exemption amount.⁴⁷ This rule, however, does not apply if the dependent is a child of the taxpayer and is either: (1) under the age of nineteen or (2) under the age of twenty-four and a full-

38. This section of the USFSPA states:

A court may treat disposable retired pay payable to a member for pay periods beginning after 25 June 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C.A. § 1408(c)(1).

39. No. Civ. A. 97-0232, 1997 WL 266855 (W.D. La. May 8, 1997).

40. *Id.* at *3.

41. *Id.* at *2.

42. 10 U.S.C.A. § 1408(c)(1).

43. Louisiana state courts are split on this issue, as the *Delrie* court noted in citing *Meche v. Meche*, 635 So. 2d 614 (La. App. 3rd Cir. 1994). In *Meche*, a Louisiana circuit court adopted the same interpretation of the statute as argued by Mrs. Delrie. 635 So. 2d 614.

44. *Delrie*, 1997 WL 266855, at *4.

45. *Id.* at *5.

46. For example, Texas holds that its state domestic law constitutes a *built-in* reservation of jurisdiction to divide any omitted asset, including military retirement benefits. See *Walton v. Lee*, 888 S.W.2d 604 (Tex. Ct. App. 1994), *cert. denied*, 116 S. Ct. 190 (1995).

47. I.R.C. § 151(c)(1)(A) (West 1997). The personal exemption amount for 1996 is \$2,550. See Rev. Proc. 95-53, 1995-2 C.B. 445. The personal exemption for 1997 is \$2,650. See Rev. Proc. 96-59, 1996-53 I.R.B. 17.

time student.⁴⁸ Second, the dependent cannot have filed a joint tax return with a spouse.⁴⁹ Third, the dependent must either be related to the taxpayer or be a member of the taxpayer's household for the taxable year.⁵⁰ Fourth, the dependent must be a United States citizen or a resident of the United States, Canada, or Mexico.⁵¹ Finally, the taxpayer must have provided over one-half of the dependent's support.⁵²

When this five-part test is applied to married taxpayers who separate, the spouse who paid over one-half of a dependent's support would be entitled to the personal exemption for that dependent. Because of the extensive litigation between separating couples over who paid more than one-half of the support, Congress has provided a different rule which applies in certain circumstances.⁵³

When two taxpayers are divorced, legally separated under a decree of divorce or separate maintenance, or separated under a written agreement, § 152(e) of the Internal Revenue Code (I.R.C.) requires the application of a different rule. Rather than looking at which parent paid the most support, the determining factor is who had custody of the child for more than one-half of the year.⁵⁴ Thus, when a couple is divorced, legally separated under a decree of divorce or separate maintenance, or separated under a written agreement, the parent who had custody of the child for more than six months of the year will be entitled to claim the child as a dependent on his tax return. On the other hand, if a couple is not divorced, separated under a decree of divorce or separate maintenance, or separated under a written agreement, the parent who provided the most support for the child is entitled to the dependency exemption.

In *Correale v. Commissioner*,⁵⁵ the issue was whether or not the taxpayers were separated under a decree of separate maintenance. The couple was married on 9 August 1974 and had four children. In August 1994, the couple separated. There was no dispute that Mr. Correale paid over one-half of the support for the couple's four children during 1994. The couple petitioned the circuit court in Illinois for dissolution of their marriage. In August 1994, the court issued an order which awarded custody of two children to Mr. Correale and two children to Mrs. Correale. As of the close of 1994, the couple was not

divorced and had not entered into a written separation agreement. Thus, the only issue for resolution was whether the August court order meant that the couple was legally separated under a decree of separate maintenance. If they were separated under a decree of separate maintenance, I.R.C. § 152(e) would apply, and Mr. Correale would only be entitled to claim dependency exemptions for the two children who resided with him. If the couple was not separated under a decree of separate maintenance, however, Mr. Correale would be entitled to claim all four children as dependents, because he had paid over one-half of their support and I.R.C. § 152(e) would not apply. The tax court looked at Illinois law to determine whether the August court order was a decree of separate maintenance. Since Illinois law has separate statutes that apply to divorce and separation and because the couple had filed for a divorce, the tax court determined that the August court order was not a decree of separate maintenance.⁵⁶ Thus, I.R.C. § 152(e) did not apply, and Mr. Correale was entitled to claim all four children as dependents because he provided over one-half of the support for the children.

Legal assistance attorneys need to be cautious in this area as they advise separating couples who will be entitled to the dependency exemption. Also, attorneys should be aware that the written separation agreement legal assistance attorneys prepare will cause I.R.C. § 152(e) to apply. Depending on the client's specific circumstances, this may or may not be advantageous for the client. Lieutenant Colonel Henderson.

Nonmilitary Spouse's Joint Ownership of Personal Property Voids Soldiers' and Sailors' Civil Relief Act Personal Property Tax Protection

Legal assistance attorneys should advise their clients that the Soldiers' and Sailors' Civil Relief Act (SSCRA) only protects service members from multiple state personal property or ad valorem taxation.⁵⁷ Normally, individual personal property is taxed where it sits (situs).⁵⁸ The SSCRA provides the legal fiction that a military member's personal property which is titled solely in the name of the service member is sited in the state of domicile and can only be taxed by that state.⁵⁹ Further, the host state, where the service member is stationed on military orders,

48. I.R.C. § 151(c)(1)(B).

49. *Id.* § 151(c)(2).

50. *Id.* § 151(a).

51. *Id.* § 152(b)(3).

52. *Id.* § 152(a).

53. *Id.* § 152(e).

54. *Id.* § 152(e)(1)(A).

55. 73 T.C.M. (CCH) 2791 (1997).

56. *Id.*

may not tax a military member's personal property just because the domiciliary state did not tax the personal property.⁶⁰

In contrast to military members, a nonmilitary spouse receives no SSCRA protection from multiple state personal property taxation for property titled solely in the nonmilitary spouse's name or any property titled jointly in the names of the service member and the nonmilitary spouse.⁶¹ No reported appellate case has considered the issue of whether the SSCRA tax protections apply to nonmilitary spouses. Nonmilitary spouses can be taxed on their solely owned or jointly held personal property in the state where the property is physically located as well as in the state where the nonmilitary spouse is domiciled.⁶² Community property states, such as California, do not fit neatly into the traditional common law concepts of joint tenancy or tenancy in common ownership. The rights of husband and wife regarding title to personal property vary from state to state depending on how each state interprets its statutory community property system.⁶³

The most common problem area regarding personal property is whether a host state may tax motor vehicles titled jointly in the names of a military member and a nonmilitary spouse. The majority of states that utilize a personal property tax follow a policy of taxing jointly titled motor vehicles where one of the title holders is a military member.⁶⁴ The taxation formulas vary from state to state, ranging from half value to full value.⁶⁵ Only a few states do not attempt to tax jointly-held motor vehicles or other personal property owned in part by a military member and a nonmilitary spouse.⁶⁶

What does this mean for legal assistance clients? Attorneys should advise their clients to title their motor vehicles, camping trailers, and boats solely in the military member's name. The SSCRA tax protection statute (Section 514) was enacted in the 1940s, when women did not have equal property rights to men and most military spouses did not work outside the home. Today, it is not uncommon for a nonmilitary spouse to work outside the home, and two income military families are the norm. Congress has not extended the SSCRA tax protections

57. Soldiers' and Sailors' Civil Relief Act (SSCRA), ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 U.S.C. App. §§ 501-593 (1996)). Section 514 of the SSCRA, dealing with multiple state income and personal property taxation of service members, was added by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, ch. 581, § 17, 56 Stat. 777; and was subsequently amended further by ch. 397, § 1, 58 Stat. 722 (1944); Pub. L. No. 87-771, 76 Stat. 768 (1962); and Pub. L. No. 102-12, § 9(24), 105 Stat. 41 (1991) (codified at 50 U.S.C. App. § 574). As to personal property taxes, SSCRA § 514, states:

- (1) For the purposes of taxation in respect of any person, or of his personal property . . . by any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become a resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property . . . of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled . . . personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: provided, that nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction.
- (2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles).

58. SSCRA § 514.

59. *Id.*

60. *Dameron v. Brodhead*, 345 U.S. 322 (1953).

61. SSCRA § 514. This section provides no statutory protection against multiple state taxation of the income and personal property of nonmilitary spouses. *But cf.* SSCRA § 536 (explicitly setting forth SSCRA protections that apply to nonresident military spouses as to leases, mortgages, and contracts); *Brunson v. Chamberlina*, 53 N.Y.S.2d 172 (N.Y. Mun. Ct. 1945); *Wanner v. Glen Ellen Corporation*, 373 F. Supp. 983 (D. Vt. 1974). *See also* 1986 Op. Ariz. Att'y Gen. 111 (1986); Op. S.C. Att'y Gen. 3000 (1970); 1984-85 Op. Va. Att'y Gen. 363 (1984); 1976-77 Op. Va. Att'y Gen. 285 (1976).

62. 1983-84 Op. Va. Att'y Gen. 393 (1984).

63. 1976-77 Op. Va. Att'y Gen. (1976). 15 AM.JUR.2D *Community Property* § 1 (1964). The following states have adopted some sort of community property system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

64. *See* 1986 Op. Ariz. Att'y Gen. 111 (1986); Op. S.C. Att'y Gen. 3000 (1970); 1984-85 Op. Va. Att'y Gen. (1984); and 1976-77 Op. Va. Att'y Gen. 285 (1976).

65. *See Comment, State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act*, 36 MIL. L. REV. 123 (1967). The State of Virginia taxes the full value of personal property held in the joint names of a military member and the nonmilitary spouse. *See* 1976-77 Op. Va. Att'y Gen. 285 (1976).

66. 1989 Op. Miss. Att'y Gen (1989).

to nonmilitary spouses. Until Congress acts, military families should keep their taxable personal property titled solely in the military member's name, if they wish to avoid host state taxation. Lieutenant Colonel Conrad.

Criminal Law Note

Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers From Possessing Military Weapons

Introduction

Recent amendments to the Federal Gun Control Act of 1968 (GCA)⁶⁷ effectively prohibit certain service members from possessing weapons and ammunition which are essential to their military duties. Under the 1996 changes to the GCA, known as the Lautenberg Amendment,⁶⁸ it is now a felony for any person who has been convicted of a misdemeanor involving domestic violence to receive or possess firearms and ammunition which have moved in interstate commerce.⁶⁹ Likewise, it is a felony to sell or otherwise transfer firearms and ammunition to such persons.⁷⁰ Unlike other provisions of the GCA, the new law does not exempt military or law enforcement personnel.⁷¹

Consequently, if a soldier with a state or federal domestic violence conviction draws an M16A2 from the arms room, both he and the company commander may have committed felony offenses punishable by up to ten years in prison and a \$250,000

fine.⁷² Because implementing guidance from the Department of Defense or Department of the Army has not been promulgated,⁷³ this note defines the salient features of the new law and suggests an interim approach toward compliance.

Background

The original GCA disqualified certain categories of people from receiving firearms or ammunition that had traveled in interstate commerce⁷⁴ and imposed criminal liability for the sale or transfer of firearms to disqualified people.⁷⁵ The Lautenberg Amendment, effective 30 September 1996, retains the basic structure of the GCA but adds to the list of disqualified people "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence."⁷⁶

In expanding the scope of disqualified people, the Lautenberg Amendment also specifically limits a previous exemption which would have provided a haven for federal military and law enforcement personnel who have domestic violence convictions. The GCA formerly exempted from its prohibitions "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof."⁷⁷ However, the 1996 Act amended 18 U.S.C. § 925 to deny this "federal exemption" for individuals convicted of misdemeanors involving domestic violence.⁷⁸ Thus, the new disqualification applies to all service members, active and reserve. This is not a case of unintended consequences. Rather, the simultaneous amendment of § 925 demonstrates the

67. 18 U.S.C.A. § 921 (West 1994).

68. Omnibus Consolidated Appropriations Act of 1997 (Treasury Department Appropriations Act Section 658), Pub. L. No. 104-208, 110 Stat. 3009-1101 (1996) (codified at 18 U.S.C. § 921). The amendment is named after its sponsor, Senator Frank Lautenberg (D., NJ).

69. 18 U.S.C.A. § 922(g) (West Supp. 1997).

70. *Id.* § 922(d).

71. *See infra* note 74 and accompanying text.

72. 18 U.S.C.A. §§ 942(a)(2), 3571(b)(3).

73. The provisions of the GCA are made applicable under clause three of Uniform Code of Military Justice art. 134, "crimes and offenses not capital," to all people who are subject to the UCMJ. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(4). The lack of implementing regulations or directives has no effect on the enforcement of the GCA against military personnel. The statute contains no requirement for implementing regulations by states or federal agencies.

74. 18 U.S.C.A. § 922(g) (amended 1997) (disqualifying felons, fugitives, drug addicts, the mentally ill, illegal aliens, and persons who have been dishonorably discharged from military service).

75. *Id.* § 922(d) (amended 1997).

76. *Id.* §§ 922(d), 922(g).

77. *Id.* § 925 (amended 1997).

78. *Id.* It should be noted that the Lautenberg Amendment retains the exemption for personnel who are subject to a domestic violence restraining order based upon threat of physical harm under 18 U.S.C.A. §§ 922(d)(8) and 922(g)(8) (conditioning the prohibition on an order issued after notice and judicial hearing that specifically prohibits the use or attempted use of physical force against an "intimate partner or child," or includes a finding that the individual represents "a credible threat to the physical safety of a partner or child").

unambiguous legislative purpose of bringing military personnel within the scope of the new disqualification.

As a result of these amendments, the disqualified soldier, arms room personnel, and commanders may be exposed to criminal liability for the routine transfer of military weapons or ammunition for duty purposes. The criminal prohibitions of the Lautenberg Amendment are incorporated into the Uniform Code of Military Justice (UCMJ) by operation of article 134, clause three (“crimes and offenses not capital”).⁷⁹ Judge advocates must make commanders aware of these amendments to the GCA and encourage them to implement reasonable measures to protect themselves and their subordinates from potential criminal liability.

Conditions for Disqualification and Scope of Criminal Liability

Under the Lautenberg Amendment, any person convicted of a misdemeanor crime of domestic violence is prohibited from taking possession of any firearm or ammunition which has been transported in interstate or foreign commerce. The phrase “foreign commerce” has been interpreted in other contexts to permit extraterritorial application of the law.⁸⁰ The term “firearm” is defined broadly enough in the statute to encompass every weapon or potential weapon in the military inventory, from a starter pistol to an M1A2 Abrams Main Battle Tank.⁸¹ Any transfer of a firearm or ammunition to a disqualified person, whether for sale or temporary use, is prohibited.⁸² Both the person with the disqualifying conviction and the person who transfers, or causes the transfer of, the weapon are subject to criminal prosecution under the law.

The statute defines a “misdemeanor crime of domestic violence” as any offense that:

- (i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.⁸³

The Bureau of Alcohol, Tobacco, and Firearms elaborated upon the statutory definition, stating that “[t]his definition . . . includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery) . . . whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor.”⁸⁴ The scope of the disability is extremely broad. The definition of the victim includes any present or *former* spouse or member of the offender’s household, and the disability relates to all convictions both before and after the passage of the Act, no matter how old the conviction is.⁸⁵ Thus, under the Lautenberg Amendment, even if a soldier were convicted of committing a simple assault ten years ago upon a former spouse, that soldier is disqualified from drawing a weapon or ammunition.

Whether the conviction qualifies as a misdemeanor is to be determined under the law of the jurisdiction in which the proceedings were held.⁸⁶ A conviction is not considered valid for purposes of the firearm disability unless the accused was accorded, or knowingly and intelligently waived, the right to counsel and trial by jury (if applicable under the law of the jurisdiction).⁸⁷ If a previous conviction has been expunged or set aside, or if the person has been pardoned or accorded a full restoration of civil rights by the proper authority, the disability is removed.⁸⁸

The elements of the offenses under the Lautenberg Amendment differ according to who is being prosecuted. The disqual-

79. See *supra* note 73. Prior to the Lautenberg Amendment, the federal exemption under § 925 precluded prosecution of GCA violations under clause three of UCMJ art. 134. For an example of prosecution under a related provision of the federal criminal code, see *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978) (prosecution under art. 134 for violation of 18 U.S.C. § 842(h), possession of stolen explosives).

80. *Id.* § 922(g). See *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990) (finding the inclusion of the phrase “interstate or foreign commerce” sufficient to extend extraterritoriality to a child pornography statute).

81. See 18 U.S.C.A. § 921(a)(3) (defining firearms to include “any weapon (including a starter pistol) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive . . . or any destructive device”).

82. *Id.* § 922(d) (stating that it is unlawful to “sell or otherwise dispose of any firearm” to any disqualified person) (emphasis added).

83. *Id.* § 921(a)(33).

84. Letter from John W. Magaw, Director, Bureau of Alcohol, Tobacco, and Firearms, to All State and Local Law Enforcement Officials (Nov. 26, 1996) (on file with author) (containing no restriction on the date of the conviction).

85. See 18 U.S.C.A. §§ 922(d), 922(g) (containing no restrictions on the date of the conviction).

86. See *id.* § 921(a)(20).

ified person who receives or possesses a firearm is criminally liable under 18 U.S.C. § 922(g) only if the following elements are proven: (1) that the accused was convicted of a misdemeanor crime of domestic violence; (2) that the accused thereafter knowingly received or possessed a firearm or ammunition; and (3) that the firearm or ammunition had been transported in interstate or foreign commerce.⁸⁹ Courts have consistently held that the only mens rea element required for conviction under § 922(g) is that the accused had knowledge that the instrument possessed was a firearm.⁹⁰ Thus, any defense based upon an alleged mistake of fact or law concerning the existence or nature of the disqualifying conviction would generally not be viable.⁹¹

The culpability of the transferor depends upon a different standard of knowledge. In a prosecution under 18 U.S.C. § 922(d), the government must prove that (1) the accused transferred a firearm or ammunition to a certain person with a conviction for a misdemeanor crime of domestic violence and (2) at the time of the transfer, the accused knew or had reasonable cause to believe that the person had the disqualifying conviction.⁹² Thus proof that the accused had actual knowledge of the prior conviction, or some reasonable basis to suspect it, is necessary to establish liability for a prohibited transfer.

The “reasonable cause to believe” standard under § 922(d) has not been extensively litigated and is not defined in the statute. Existing case law suggests that the government must show

that the accused had personal knowledge of specific, credible information which would cause a reasonable person to suspect that the disqualifying condition exists.⁹³ Courts that have addressed the issue have engaged in a fact-specific analysis akin to the application of the “probable cause” standard in Fourth Amendment law.⁹⁴

In the commercial context, licensed firearms dealers are required by Treasury Department regulations to have all buyers complete a form certifying their eligibility to purchase a firearm under federal law.⁹⁵ Compliance with these procedures is normally sufficient to shield a seller from liability under § 922(d), even where the buyer falsely certifies his status.⁹⁶ Absent independent sources of information indicating that a buyer may be disqualified, the seller is entitled to rely upon the buyer’s responses on the official form.⁹⁷ Courts have specifically held that Congress did not impose on the transferor a general duty to conduct a background investigation before every transfer.⁹⁸

The standard of reasonable cause raises unique issues in the military context. By virtue of his position, the commander bears greater responsibility than a commercial dealer. Commanders have the authority and obligation to enforce the law within their commands.⁹⁹ Moreover, the commander’s duty to monitor the morale and welfare of the soldiers within his command, and his close daily supervision of his soldiers, may make it difficult for him to disavow knowledge of any conviction occurring after his assumption of command. Similarly, knowl-

87. *Id.* § 921(a)(33)(B)(i). Based upon these restrictions, a summary court-martial conviction or punishment imposed under Article 15, UCMJ, would not count as a disqualifying “conviction” under the Lautenberg Amendment. *See generally* United States v. Brown, 23 M.J. 149 (C.M.A. 1987) (holding that an Article 15 is not a “prior conviction” under MIL. R. EVID. 609); United States v. Rogers, 17 M.J. 990 (A.C.M.R. 1984) (holding that a summary court-martial in which the accused was not represented by counsel was not a “prior conviction” for impeachment purposes under MIL. R. EVID. 609(a)).

88. 18 U.S.C.A. § 921(a)(33)(B)(ii) states that a person shall not be considered convicted of the offense if the “conviction . . . has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored unless [the] pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”

89. *See* United States v. Mains, 33 F.3d 1222 (10th Cir. 1994).

90. *See* United States v. Field, 39 F.3d 15 (1st Cir. 1994) (relying on United States v. Freed, 401 U.S. 601, 607 (1971); *see also* United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988) (discussing knowledge elements under the GCA).

91. *See* United States v. Turcotte, 558 F.2d 893 (8th Cir. 1977) (mistake of law generally not a defense under § 922). Since Congress requires no proof of a mental state as to the first element of the crime, the defense of mistake as to the prior conviction is not generally available. *See generally* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.1(a) (1986) (“[I]gnorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged.”). However, a limited exception has been recognized where the accused reasonably relied upon an official government assurance that a previous conviction did not prohibit a sale under federal law. United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987).

92. 18 U.S.C.A. § 922(d) (West Supp. 1997). *See* United States v. Murray, 988 F.2d 518 (5th Cir. 1993).

93. *See, e.g.*, United States v. Xavier, 2 F.3d 1281 (3rd Cir. 1993); *Murray*, 988 F.2d 518; United States v. Garcia, 818 F.2d 136 (1st Cir. 1987).

94. *See Xavier*, 2 F.3d 1281; *Murray*, 988 F.2d 518.

95. *See* 27 C.F.R. § 178.124 (1996) (requiring that Treasury Form 4473 (U.S. Firearms Transaction Record) be completed by the customer before a firearm may be sold).

96. *See* Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532 (S.D. Ga. 1995); Jamison v. Dance’s Sporting Goods, Inc., 854 F. Supp. 248 (S.D.N.Y. 1994).

97. *Jamison*, 854 F. Supp. 248.

98. *See Knight*, 889 F. Supp. at 1538 (citing cases and legislative history to support the holding that § 922(d) does not impose a general duty to investigate).

edge of information contained in official military files may be imputed to the commander responsible for maintaining such files. While the Lautenberg Amendment does not strictly require commanders to conduct background investigations of every soldier, commanders have a duty to take reasonable steps to identify disqualified personnel and to inform their soldiers of the consequences of violating the law.

Advice to Practitioners

Commanders should take reasonable steps to ensure that they and their soldiers comply with the law. Since the novelty and severity of the law make self-reporting unlikely, commanders should implement some sort of screening process. This could be accomplished initially by briefing the unit on the meaning and effect of the law and requiring all assigned personnel to complete a form certifying their understanding of the law and their eligibility to receive weapons and ammunition.¹⁰⁰ The screening procedure could be included as a routine part of unit inprocessing.

Commanders should remind their personnel of the severe criminal penalties that might result from a false answer to the screening questions.¹⁰¹ In cases where the chain of command is aware of information indicating that a soldier may be disqualified, the commander should attempt to verify the facts by direct inquiry and, if necessary, a records review. Finally, a sign should be posted at the arms room reminding soldiers and arms room personnel that it is illegal for a soldier convicted of a misdemeanor of domestic violence to draw a weapon or ammunition.

Since its enactment, the Lautenberg Amendment has come under fire from critics within Congress and elsewhere¹⁰² who recognize the potentially harsh impact the Amendment may have on individuals in the military. A soldier who cannot lawfully possess a military weapon is unqualified for service and subject to administrative discharge, regardless of military occupational specialty.¹⁰³ Based on a single incident from years ago, career soldiers could thereby suffer loss of employment and retirement benefits after years of honorable service. The severity of this result is of special concern to the military services.

The strict application of the law to the military is also questionable in light of the circumstances surrounding the use of weapons in the military setting. Unlike a commercial sale, weapons issued in the military remain under the constructive control of the commander during training and deployment missions. Soldiers, unlike civilian law enforcement personnel, are not permitted to take their weapons home during nonduty hours. Soldiers remain under the personal supervision of the unit commander during periods when weapons are in their possession. Because of these conditions, it is extremely unlikely that a military weapon will be used in a crime of domestic violence.

Several amendments to the Lautenberg Amendment have been proposed to take into account the unique circumstances of military service and the disproportionately harsh results that the law can impose on service members. The President recently vetoed a proposal which would have limited the law to prospective application.¹⁰⁴ As of the writing of this note, a bill which would exempt the military from firearms prohibitions applica-

99. This obligation is rooted in the nature of command authority, the commander's role in the military justice system, and the commissioned officer's oath of office. See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, paras. 2-1b and 4-1 (30 Mar. 1988) (discussing the duties and responsibilities of commanders generally).

100. The form could include language such as:

- A. It is against the law for any soldier who has been convicted of a misdemeanor crime of domestic violence to possess a weapon or ammunition. The maximum penalty for violating this law is a fine of up to \$250,000 and imprisonment of up to ten years. A misdemeanor crime of domestic violence is a federal or state law misdemeanor which involves physical force or threatened use of a weapon by one family member against another. If you have any questions concerning the definition of a "misdemeanor crime of domestic violence" consult the commander prior to signing this form. _____ (initial).
- B. By signing this form, I certify that I have never been convicted of a misdemeanor crime of domestic violence. _____ (initial).
- C. I am not currently under a court order to refrain from contact with any person based upon a previous act or threat of violence to that person. _____ (initial).
- D. I will notify my commander if I am convicted of a misdemeanor crime of domestic violence in any court after signing this form. _____ (initial).

101. See UCMJ art. 107 (West Supp. 1996).

102. See, e.g., Bruce T. Smith, *Disarming the Soldier*, FED. LAW., May 1997, at 16.

103. Readiness to deploy to hostile environments is an inherent requirement in all specialties. Soldiers who are permanently disqualified to perform essential duties may be subject to discharge under U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, para. 5-3 (17 Oct. 1990).

ble by reason of a misdemeanor domestic violence conviction is gathering support in the House of Representatives.¹⁰⁵

Until modified, the Lautenberg Amendment remains the law. Judge advocates should advise commanders to take reasonable steps to protect their soldiers and to comply with the law. Since the statute authorizes the Secretary of the Treasury to grant individual exceptions on a case-by-case basis, some

soldiers may be able to have their disqualification removed.¹⁰⁶ Commanders should direct their disqualified soldiers to the Legal Assistance office for help in seeking to have their disqualification removed. Concerns regarding the implementation of interim measures should be raised through command and legal channels. Major Einwechter and Captain Christiansen.

104. On 13 May 1997, Congressman Barr proposed an amendment that would make “firearms prohibitions applicable by reason of a domestic violence misdemeanor conviction” not applicable if the conviction was obtained prior to 30 September 1996. 143 CONG. REC. H2590-04, *H2591 (1997). The proposal amended the Supplemental Appropriations, FY97, H.R. 1469, 105th Cong. (1997). H.R. 1469 was vetoed by President Clinton on 9 June 1997. 143 CONG. REC. D586-02 (1997).

105. On 9 January 1997, Congressman Stupak proposed an amendment that would “provide that the firearms prohibitions applicable by reason of a domestic violence misdemeanor do not apply” to the military. 143 CONG. REC. D183-01, *H153 (1997). As of 5 May 1997, the proposal, H.R. 445, 105th Cong. (1997), was still pending in the House of Representatives. 143 CONG. REC. H2168-03 (1997).

106. 18 U.S.C.A. § 925(c) (West Supp. 1997).