

## New Developments

### Administrative & Civil Law

#### Veterans' Benefits Act of 2010 Amends Servicemembers Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act

In its final months, the 111th U.S. Congress passed the Veterans' Benefits Act of 2010 (VBA).<sup>1</sup> The VBA made four substantive amendments to the Servicemembers Civil Relief Act (SCRA),<sup>2</sup> effective 13 October 2010. The VBA also made two clarifying amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA);<sup>3</sup> both USERRA amendments are effective retroactively. Additionally, the 111th Congress also passed the Helping Heroes Keep Their Homes Act of 2010,<sup>4</sup> which extended the "sunset" provision of a portion of the SCRA related to stays of proceedings and adjustment of obligations related to mortgages.

#### Amendments to the SCRA

The VBA amends the SCRA in four ways that significantly benefit servicemembers. The amendments provide servicemembers with additional or clarified rights in terminating residential leases, terminating telephone service contracts, seeking attorney general enforcement of the SCRA, and enforcing SCRA rights via a private cause of action. Also, just before the end of calendar year 2010, the Helping Heroes Keep Their Homes Act of 2010 extended until 31 December 2012, the provision of the SCRA that created a nine-month period following active duty during which a servicemember may seek a stay of proceedings involving a mortgage or trust deed.

#### Terminating Residential Leases

A servicemember's right to terminate a residential or motor vehicle lease under the SCRA is governed by 50 U.S.C. App. § 535.<sup>5</sup> The VBA amends this section to make clear that the lessor of a premises may not charge an early termination fee to a servicemember or dependent who terminates a residential lease under the SCRA.

<sup>1</sup> Pub. L. No. 111-275, 124 Stat. 2865 (2010) [hereinafter VBA].

<sup>2</sup> 50 U.S.C. App. §§ 501–597b (2006).

<sup>3</sup> 38 U.S.C. §§ 4301–4335 (2006).

<sup>4</sup> Pub. L. No. 111-346, 124 Stat. 3622.

<sup>5</sup> The word "residential" was and remains defined in a manner that includes premises occupied or intended to be occupied by a servicemember or a servicemember's dependents for residential, professional, business, agricultural, or similar purposes. See 50 U.S.C. App. § 535(b) (2006).

Formerly, § 535(e) did not state whether an early termination fee could be imposed for residential lease terminations. It did state that no early termination fee could be charged for a motor vehicle lease terminated under the SCRA. A reasonable argument could have been made that such a fee was authorized for residential leases, under the rule of *expressio unius est exclusio alterius*.<sup>6</sup> The VBA amendment to § 535(e) ends the ambiguity, unequivocally declaring that an early termination fee is not authorized for residential lease terminations under the SCRA.

#### Terminating Telephone Service Contracts

The portion of the SCRA providing telephone service contract termination rights to servicemembers was first enacted in 2008.<sup>7</sup> This section (50 U.S.C. App. § 535a), provides termination rights to servicemembers who receive "orders to deploy outside the continental United States for not less than 90 days or for a permanent change of duty station within the United States . . ." Under a technical reading of the 2008 version, servicemembers who received permanent change of station orders for overseas assignments such as Germany or Korea were not entitled to invoke these rights. Additionally, the 2008 version of § 535a applied only to cellular telephone service, provided no relief to servicemember dependents (or servicemembers using phones on dependents' contracts), and provided no right to regain a telephone number after returning from a deployment.

The VBA amendment to § 535a simplifies the circumstances under which a servicemember may invoke § 535a. Section 535a now applies when a servicemember "receives military orders to relocate for a period of not less than 90 days to a location that does not support the contract." It now applies to "land line," as well as cellular phone contracts.

For cellular phone contracts, a dependent may terminate a contract under § 535a if the servicemember is a beneficiary of the contract and could terminate it, if the contract were the servicemember's.<sup>8</sup> Similarly, a servicemember may terminate a cellular phone contract for all members of the servicemember's contract plan who relocate with the servicemember to an area unsupported by the contract.

<sup>6</sup> "The expression of one thing is the exclusion of another," a traditional canon of statutory construction. See *United States v. Holt*, 22 M.J. 553, 556 n.2 (A.C.M.R. 1986).

<sup>7</sup> Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145 (codified at 50 U.S.C. App. § 535a (2006)).

<sup>8</sup> Presumably most, if not all, land line contracts do not include an early termination fee. For a land line phone contract that includes an early termination fee, the contract should be in the servicemember's name to ensure a right to terminate under § 535a without an early termination fee.

The new § 535a provides a servicemember who terminates a telephone contract because of relocation to an unsupported area the right to regain the terminated telephone number, per a request made within ninety days of return, if the relocation is for three years or less. The new § 535a also provides additional information regarding the termination process. Termination requires a written or electronic request to the service provider, including the termination date and a copy of the servicemember's orders. The termination notice is to be delivered "in accordance with industry standards for notification of terminations . . . ."

### **Attorney General Enforcement of the SCRA**

The VBA added a new section to the SCRA, codified at 50 U.S.C. App. § 597, explicitly authorizing the Attorney General to commence a civil action in U.S. District Court against any person who engages in a pattern or practice of violating the SCRA or who violates the SCRA in a way that raises an issue of significant public importance. Section 597 authorizes equitable and declaratory relief regarding the violation. It also authorizes all other appropriate relief, including money damages, to a person aggrieved by the violation. A court also may assess a civil penalty of up to \$55,000 for a first violation and up to \$110,000 for a subsequent violation.

Section 597 also offers an aggrieved person the opportunity to seek intervention in an action brought by the Attorney General. An aggrieved person who intervenes may obtain the relief that would be available in a private civil action. If the aggrieved person prevails, an award of costs and a reasonable attorney fee also is expressly authorized.

The Department of Justice has already brought lawsuits against large mortgage lenders for violating the SCRA by failing to obtain judicial approval for foreclosures.<sup>9</sup> The Department of Justice has settled two lawsuits for a total of over \$22 million for the servicemembers who were foreclosed upon without court approval.<sup>10</sup>

### **Private Right of Action**

The VBA also added a new section to the SCRA, codified at 50 U.S.C. App. § 597a, explicitly stating that any person aggrieved by an SCRA violation may bring a civil action to obtain appropriate equitable, declaratory, or other relief, including damages. Before the VBA amendment, courts routinely had found an implied private right of action existed under the SCRA, but the issue often led to extensive

<sup>9</sup> See Press Release, U.S. Dep't of Justice, Justice Department Settles with Bank of America and Saxon Mortgage for Illegally Foreclosing on Servicemembers (May 26, 2011), available at [http://www.justice.gov/usao/txn/PressRel11/SCRA\\_Settlement\\_pr.html](http://www.justice.gov/usao/txn/PressRel11/SCRA_Settlement_pr.html).

<sup>10</sup> *Id.*

litigation, delaying proceedings on the merits and likely increasing attorney fees for the servicemember.<sup>11</sup> Section 597a settles the matter.

The private right of action set forth in § 597a is buttressed by new § 597b, also created by the VBA. Section 597b clarifies that the creation of sections 597 and 597a does not preclude or limit remedies otherwise available under other law, including consequential and punitive damages. Thus, § 597b unambiguously preserves existing case law based on the implied right of action. Additionally, § 597b makes it clear that consequential and punitive damages awards for SCRA violations are not inconsistent with congressional intent behind the SCRA.

### **Extension of Enhanced Post Active Duty Mortgage Stays and Adjustments**

Section 533 of the SCRA provides for stay of proceedings, adjustment of obligations, and court orders as a condition precedent to foreclosures for pre-service mortgages and deeds of trust under certain conditions. Protections afforded by § 533 originally extended through military service and for actions filed within ninety days thereafter.<sup>12</sup> As of 30 July 2008, the protections afforded by § 533 were extended to include actions filed within nine months following service.<sup>13</sup> The extension from ninety days to nine months was set to expire on 31 December 2010, at which time the protections afforded by § 533 would have reverted to actions filed during or within ninety days following service.<sup>14</sup>

On 29 December 2010, Congress extended the sunset provision of § 533 through 31 December 2012. Thus, a servicemember seeking the protections afforded by § 533 may continue to do so by filing his action up to nine months following service.

<sup>11</sup> See, e.g., R. CHUCK MASON, CONG. RESEARCH SERV., R40456, THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): DOES IT PROVIDE FOR A PRIVATE CAUSE OF ACTION? (2009), available at <http://www.fas.org/sgp/crs/misc/R40456.pdf>. The one decision cited in the Congressional Research Service report finding no private cause of action, *Hurley v. Deutsche Bank Trust Co.*, ultimately was vacated by the district court after extensive litigation of the issue including a motion for reconsideration and a motion for certification to take an interlocutory appeal. See *Hurley v. Deutsche Bank Trust Co.*, No. 1:08-CV-361, 2009 WL 701006 (W.D. Mich. Mar. 13, 2009).

<sup>12</sup> Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2203, 122 Stat. 2654.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

## Amendments to USERRA

The VBA amended two USERRA definitions. It also created a test program under which the Secretary of Labor will refer some USERRA claims against federal executive agencies to the Office of Special Counsel (OSC) for investigation and enforcement, as appropriate.

Section 701 of the VBA amends 38 U.S.C. § 4303(2) which defines “benefit,” “benefit of employment,” and “rights and benefits.” Formerly, these benefit-related terms did not include wages or salaries. Now they do.<sup>15</sup>

Section 702 of the VBA amends 38 U.S.C. § 4303(4), which defines “employer.” The USERRA definition of employer already included a successor in interest. The VBA amendment adds an additional subsection providing six factors to consider in determining whether an entity is a successor in interest to an employer. These six factors are: substantial continuity of business operations; use of the same or similar facilities; continuity of work force; similarity of jobs and working conditions; similarity of supervisory personnel; and similarity of machinery, equipment and production methods. The VBA amendment specifies that an entity’s notice or awareness of a pending claim is irrelevant. This amendment may have been prompted by the experiences of mobilized servicemembers employed by government contractors.<sup>16</sup>

The VBA refers to sections 701 and 702 as each being a “clarification.” Section 701 is titled “Clarification that USERRA Prohibits Wage Discrimination against Members of the Armed Forces,” and § 702 is titled, “Clarification of the Definition of Successor in Interest.” Because Congress viewed sections 701 and 702 as providing clarification of existing statutory definitions, rather than new substantive rights, both provisions are retroactive. Both provisions “apply to—(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act; and (2) all actions or complaints filed under such chapter 43 that are pending on or after the date of the enactment of this Act.”<sup>17</sup>

<sup>15</sup> The purpose of this amendment is unclear, but it may have been to clarify the accepted principle that USERRA prohibits wage discrimination against servicemembers and prospective servicemembers. See *Veterans’ Benefits Act of 2010: Summary of Provisions* 8, U.S. SENATE COMM. ON VETERANS’ AFFAIRS, [veterans.senate.gov/upload/final\\_bennies\\_summary.docx](http://www.veterans.senate.gov/upload/final_bennies_summary.docx) (last visited Feb. 13, 2012).

<sup>16</sup> See Captain Samuel F. Wright, *Law Review 1075: Congress Clarifies the Application of USERRA to Successors in Interest*, RESERVE OFFICER ASS’N, [http://www.roa.org/site/PageServer?pagename=law\\_review\\_1075](http://www.roa.org/site/PageServer?pagename=law_review_1075) (last visited Feb. 13, 2012).

<sup>17</sup> VBA, *supra* note 1, §§ 701(b) and 702(b).

Section 105 of the VBA creates a three-year test program for referring some USERRA claims by federal government employees to the OSC. Under the test program, OSC will receive and investigate all claims arising under federal executive agencies in cases where the OSC has jurisdiction over related claims. Additionally, the Secretary of Labor will refer half of the USERRA claims against federal executive agencies to the OSC.<sup>18</sup>

## Conclusion

The VBA amendments to the SCRA provide important new substantive and procedural rights to servicemembers and their dependents, as well as clarifying some preexisting SCRA rights. The VBA amendments to USERRA provide clarification in certain cases, and will potentially expedite cases filed with the Department of Labor for investigation and enforcement. Congress has repeatedly shown its willingness to amend the SCRA to extend and clarify servicemembers’ and dependents’ rights. Amendments to USERRA are far less common than are SCRA amendments, but as the VBA illustrates, Congress will amend USERRA, as well as the SCRA, if it perceives the need. Legal assistance attorneys should continue to note means by which the SCRA and USERRA might best be improved and provide recommendations for future legislation through their technical chains of command.<sup>19</sup>

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<sup>18</sup> The Office of Special Counsel (OSC) will receive all Uniformed Services Employment and Reemployment Rights Act (USERRA) claims filed by federal executive agency employees where the final digit of the complainant’s social security number ends with an odd digit. For federal executive employees who lack social security numbers, OSC will receive those in which the Department of Labor’s case file ends with an odd digit.

<sup>19</sup> Legal assistance attorneys are reminded that they should not take action which could be viewed as legal representation of a servicemember when the servicemember desires to pursue relief pursuant to USERRA. U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6e(2)(a) (21 Feb. 1996) (pointing out that taking such action could prevent the Department of Justice from taking action on behalf of the servicemember).