

New Developments

Administrative & Civil Law

The Ghost of Major John Wigmore Returns—Congress Amends the Servicemembers Civil Relief Act (SCRA)*

I. Introduction

The U.S. Senate Subcommittee of the Committee on the Judiciary gathered for a rare Saturday morning hearing on 22 September 1917 to hear legal giants of their time—Secretary of War Newton D. Baker; Major John H. Wigmore, U.S. Army Judge Advocate General’s Corps; and Walter George Smith of Philadelphia, President of the American Bar Association. Secretary of War Baker began:

In a sentence, this bill [The Soldiers’ and Sailors’ Civil Relief Act] is intended to place our soldiers, who in a very short time, will be overseas in very large numbers, in a state of mind where they and their families will be relieved from the anxieties and solitudes which follow from legal complications at home to which they cannot give their attention. Secretary Baker knew that what kills or wounds servicemembers more than any enemy is loss of focus and concentration. Making this point he said:

Men who owe money, men whose families are likely to be embarrassed by inopportune pressure from creditors even for trifling sums, cannot be expected to have the same sort of freedom of mind as if they were relieved from that sort of stress.¹

Next up was the legendary scion of evidence, John H. Wigmore, who had drafted the bill before the committee. Committee Chair Lee Slater Overman, Democrat from North Carolina, a powerhouse in the Senate, but a student in the presence of Major (Professor) Wigmore, asked:

You are the author of a great book on evidence, the Dean of Northwestern School of Law, and now you are in the Judge Advocate General’s Office, under

appointment from civil life, with the rank of major?²

Waiting with a pregnant pause, the witness responded:

Yes, sir. I should like to say something on the need, and the power, and the method of the bill before you. The need is illustrated by this letter which came into our hands.³

Reading slowly, but powerfully, John Wigmore gave physical presence to the letter stating the case of a petitioner not present, yet beseeching his Congress:

I am not kicking on having to serve my country at this time and I expect to give my best in me in her behalf [T]he way things stand now I am stripped of everything I have and my business is destroyed, and I have no income whatever other than my business, and the moment I am gone that stops. I am not asking to be exempted; all that I ask is that my Government, who in a manner is breaking up my house and taking everything on earth I have, make some provision by which I can save my equities and take care of my family.⁴

As if lecturing his law class, the professor and Army major asked socratically, “What shall we do about this, gentlemen?”⁵

What Congress did about it was encompassed within the first Soldiers’ and Sailors’ Civil Relief Act of 1918 (SSCRA), drafted by Wigmore and the committee he led. By its own terms, it expired after the signing of the Armistice. As war clouds gathered in 1940, Congress reenacted the SSCRA almost verbatim with no expiration date. It has since been amended a number of times to update its provisions and to keep pace with developments in the law. Nevertheless, by 1990, with the onset of Operation Desert Shield and, later, Desert Storm, there was a major effort to completely rewrite the SSCRA to bring it in line with contemporary legal terminology and new financial services. Then-Representative Sonny Montgomery, Chairman of the U.S. House of Representatives Committee on Veterans’ Affairs, the congressional committee with legislative jurisdiction over the SSCRA, asked the

* This is an edited version of an article originally published in *The Federal Lawyer* as follows: Gregory M. Huckabee, *Our Past is Prologue—50 Years in the Legal Trenches*, FED. LAW., vol. 51, No. 4, May 2004, at 21–23, available at <http://people.usd.edu/~ghuckabee/scramain.htm> (last visited Jan. 11, 2011).

¹ *Soldiers’ and Sailors’ Civil Relief Bill: Hearings and Memoranda Before the Subcomm. of the Comm. on the Judiciary*, 65th Cong., 1st and 2d Sess. 9, 83–84 (1917).

² *Id.*

³ *Id.*

⁴ *Id.* See also H.R. REP. NO. 65-181, app. D, at 41 (1917) (reprinting the entire text of the letter).

⁵ *Id.*

Department of Defense (DoD) for legislative drafting assistance.

The DoD provided a four-officer judge advocate SSCRA Task Force composed of one JAG representative from each service. Together with congressional staff and assistance from the American Bar Association (ABA), they crafted what became the Servicemembers Civil Relief Act of 2003 (SCRA).⁶ Since 2003, Congress has continued to amend the SCRA to respond to judicial needs for clarification and greater articulation of civil legal protections for servicemembers and their families.

The most important amendment to the SCRA since 2003 is contained in House Report 3219 (as amended by the Senate), a 2010 provision creating a new title VIII to the SCRA. The purpose of the new title VIII is to clarify and enhance protections provided under the Act for servicemembers and their family members. The new title has two important sections, 801 and 802, which address private causes of action (PCOA).

II. The Problem

Although the SCRA of 2003 contains various sections that provide penalties for violations of the afforded protections, it did not specifically state who could bring an application for relief, nor did it specifically exclude private individuals from filing a private cause of action. Despite the intent of the DoD SSCRA Task Force to create a right to a personal cause of action by providing penalties for protection violations, the new title VIII clarifies what was always intended. Some courts considering this PCOA issue have found that such a cause of action exists under the SCRA, but other courts have disagreed.

In *Batie v. Subway Real Estate Corp.*,⁷ a servicemember alleged that Subway Corp. violated the SCRA by evicting him from two commercial properties while he was deployed to Afghanistan. After obtaining declaratory judgments in the State of Texas courts, Subway evicted the servicemember from the spaces under the lease. Batie subsequently filed suit in federal district court seeking relief from the declaratory judgments and sought compensatory and punitive damages for alleged SCRA violations. The U.S. District Court declined to overturn the state declaratory judgments stating “Congress envisioned that state courts—not federal district courts—would decide claims involving SCRA’s tenant protections during eviction proceedings.”⁸ The court interpreted the SCRA to mean that jurisdiction is not exclusive in federal court and that the Act does not compel federal adjudication in all cases implicating the statute’s provisions. The federal court denied the claim for

compensatory and punitive damages referring to the servicemember’s failure to cite any provisions of the SCRA authorizing damages. In addition, the court held that even if the servicemember maintains the SCRA as a basis for damages, “there is no provision in the SCRA that authorizes a private cause of action to remedy violations of the statute.”⁹ The servicemember’s claims were subsequently dismissed by the federal court.

Batie, however, filed a motion for reconsideration citing cases in which courts have interpreted certain sections of the SCRA to create a private cause of action. In view of the cases cited in Batie’s motion, the federal district court vacated its earlier decision and reinstated the complaint for further adjudication. The case subsequently settled before trial.

In another 2008 case, *Hurley v. Deutsche Bank Trust Company*,¹⁰ National Guard Sergeant James Hurley’s house was foreclosed upon and his dependent family members were evicted from the property after Sergeant Hurley became protected by the SCRA. The foreclosed property was subsequently sold to a third party while Sergeant Hurley was deployed to Iraq. On returning home and his release from active duty, Sergeant Hurley sued in federal district court in Michigan seeking damages for violation of his rights under the SCRA. The federal court ruled, however, that there is no “right of private cause of action” to enforce violations of the SCRA.

After significant motion practice, including a motion for reconsideration (which was denied) and a motion for certification of the interim ruling for appeal under 28 U.S.C. § 1292(b),¹¹ the district court reversed itself; vacated the opinion holding there was no private right of action for damages under the SCRA; entered summary judgment in favor of Sergeant Hurley and his wife against the mortgagee, the mortgage servicing company, and the law firm that handled the foreclosure action; and ruled that both compensatory and punitive damages were available under the SCRA. The *Hurley* case is ongoing. That it took two years just to decide whether or not a private cause of action existed provided compelling evidence to Congress that remedial legislation was needed to clarify what rights a servicemember had under the SCRA. The split in the U.S. district courts created uncertainty in how the SCRA might be enforced in the future. As a consequence, in many jurisdictions across the country, ambiguity involving the PCOA question impacted whether a servicemember could bring a private cause of action to vindicate protections under the SCRA. In response, Congress’ new title VIII seeks to provide guidance to the courts by expressly clarifying the purpose and intent of the SCRA, and unambiguously states

⁶ Pub. L. No. 108-189, 117 Stat. 2835, 50 U.S.C. App. 501–596 (2006).

⁷ 2008 WL 413627 (N.D. Tex. Feb. 15, 2008).

⁸ *Id.* at *6.

⁹ *Id.* at *7.

¹⁰ 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. Sept. 30, 2008).

¹¹ 28 U.S.C. § 1292(b) 2006).

that a private cause of action does exist to enforce its protections for servicemembers and their families.

III. The Fix

The House of Representatives gets credit for championing and refining draft legislation that the DoD had initially proposed to resolve this PCOA conflict.¹² House Report 3949 and its accompanying House Report 111-324 (which passed the House 398-2), contained the private cause of action provision that was ultimately incorporated into H.R. 3219 by Senate amendment. The new SCRA title VIII contains section 80, which authorizes the Attorney General to commence a civil action against any person who engages in a pattern or practice of violating the SCRA or who engages in a violation of the Act that raises an issue of significant public importance. Furthermore, it establishes the right of those persons individually protected by the Act to intervene in any action brought by the Attorney General and to receive injunctive and monetary relief, along with reasonable attorneys' fees and costs.

In addition, there is a new section 802 that clarifies that those persons individually protected by the Act have their own personal cause of action, independent of any enforcement action the Attorney General might initiate. Those servicemembers individually protected who bring their own private action may generally seek and obtain the same remedies available upon intervention in an action brought by the Attorney General, including equitable or declaratory relief and monetary damages

Both sections explicitly authorize awards of attorneys' fees and costs that support the underlying theme of the

amendment to the SCRA and ABA-stated goal: access to justice. The right to collect attorneys' fees will likely reduce litigation and induce settlements by those who might have previously refused to pay damages to servicemembers, hoping that the amount was too small to warrant the cost of litigation. The right to collect attorneys' fees would also bring the SCRA into line with similarly focused statutes such as the Uniformed Services Employment and Reemployment Rights Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Federal Truth in Lending Act, 42 U.S.C. 1983, title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act, and virtually every state unfair and deceptive trade practices and consumer protection statute. For further information, visit SCRA Online at <http://people.usd.edu/~ghuckabe/scramain.htm>. The ABA is also coming out in Spring 2011 with a new SCRA *Judges Benchbook*. Stay tuned for more SCRA development.

—Colonel (Ret.) John S. Odom, Jr., Judge Advocate, USAF. He is currently in private practice in Shreveport, Louisiana, and has extensive experience in SCRA litigation.

—Colonel Shawn Shumake, USA, Director of Legal Policy in the Office of the Under Secretary of Defense for Personnel and Readiness.

—Professor Gregory M. Huckabee, Lieutenant Colonel (Ret.). He is a former judge advocate who now teaches at the University of South Dakota and served as the Army representative and Chair of the Department of Defense SSCRA Task Force from 1991–1992.

¹² Private cause of action legislation was included in the Department of Defense's annual National Defense Omnibus Bill for Fiscal Year 2010. S. 1044, 111th Cong. § 513 (2010).