

THE PRIVATE RIGHT OF ACTION UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT

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In March 2009, R. Chuck Mason, a Legislative Attorney for the Congressional Research Service, prepared a paper¹ for members of Congress, analyzing whether Congressional action was necessary to explicitly create a private right of action under the Servicemembers Civil Relief Act (SCRA).² Mason concluded that “[m]ost courts considering the issue have found that a private cause of action exists under the SCRA,”³ but he cautioned that a then-recent case, “*Hurley v. Deutsche Bank Trust Company*, disagreed with decisions from U.S. district courts in Illinois, Louisiana, Oregon, and Texas, and found that a private cause of action does not exist under the act.”⁴ Mason suggested that Congressional action may be required to resolve the uncertainty as to whether servicemembers who believe their rights under the Act have been violated may sue to vindicate those rights.

This paper argues that the ambiguity that emerged in early 2009, when Mason wrote his paper, has now been resolved by reconsiderations by the courts that had held that no private right of action exists, creating a current consensus among the courts that have considered the issue. At this time, there is near unanimity among the courts that servicemembers may pursue a private cause of action to protect their rights under the SCRA.

REMEDIES UNDER THE SCRA

The SCRA was enacted in 2003 to extend and update the protections that had formerly been provided by the Soldiers and Sailors Civil Relief Act of 1940 (SSCRA). The act provides protection from certain civil and administrative proceedings and transactions for active-duty servicemembers. For example, 50 U.S.C. App. § 521 provides procedural protections against the entry of default judgments against servicemembers, § 527 provides that no debt incurred prior to entering military service bearing an original interest rate greater than 6% per year may bear

¹ R. Chuck Mason, “The Servicemembers Civil Relief Act (SCRA): Does It Provide for a Private Cause of Action,” a paper prepared by the Congressional Research Service for Members of Congress and Committees of Congress, March 23, 2009. The paper is published on the internet at http://assets.opencrs.com/rpts/R40456_20090323.pdf

² 50 U.S.C. App. § 501 *et seq.*

³ Mason at “Summary.”

⁴ *Id.*

interest greater than 6% during the term of the obligor's military service, § 531 prohibits the eviction of a servicemember or his dependents from their residence without a court order,⁵ and § 533 prohibits the foreclosure of a servicemember's property during his period of military service without a court order.

The act does not state that a servicemember may sue a creditor who violates the rights extended to the servicemember by the act. Certain sections of the act provide remedies for violations of the particular section: for example, a servicemember who has suffered a default judgment while on active duty is entitled to have the case reopened so that he can defend it if he applies for reopening of the case within 90 days of the end of his military service;⁶ and § 531⁷ and § 533⁸ each state that it is a misdemeanor to violate the eviction and foreclosure provisions of the respective sections. There is no remedy expressed for violation of other provisions of the act: for example, there is no stated recourse for a servicemember whose creditor violates the 6% interest rate limitation of § 527.

THE PRE-GWOT CASE LAW

In the aftermath of the Persian Gulf War and the Global War on Terrorism (GWOT), several servicemembers brought suit against their creditors for violating the SCRA. In the cases prior to GWOT, the courts held that a private right of action was implied in the SCRA.

Air Force reservist Gary Moll was mobilized for Operation Desert Storm. He provided a copy of his orders to Ford Consumer Finance Company ("Ford"), which failed to reduce the interest rate on his second mortgage from 10.25% to 6%. When he was demobilized, he sued Ford for violating the interest rate provisions of the Soldiers and Sailors Civil Relief Act (SSCRA). Ford moved to dismiss Moll's suit on the grounds that the act did not provide a private right of action to enforce the interest rate limitation provision. In *Moll v. Fort Consumer Finance Company, Inc.*,⁹ the United States District Court for the Northern District of Illinois found that Moll did have a right to sue under the act. The court applied the Supreme Court's opinion in *Cort v. Ash*,¹⁰ which stated a four-part test to determine whether a private right of

⁵ The protection against eviction applies only to a residence for which the monthly rent is less than \$2958 (in 2010). 50 U.S.C. App. at § 531(a)(1)(A)(ii).

⁶ *Id.* at § 521(g).

⁷ *Id.* at § 531(c).

⁸ *Id.* at § 533(B).

⁹ 1998 U.S. Dist. LEXIS 3638, 1998 WL 142411 (N.D. Ill. Mar. 16, 1998).

¹⁰ 422 U.S. 66 (1975).

action exists when Congress did include language explicitly providing for a private cause of action in the statute. Under the test, the following four factors are considered in determining whether an implied private right of action exists under a statute: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indication that Congress intended to create or deny such a remedy; (3) whether an implied remedy is consistent with the underlying purpose(s) of the statute; and (4) whether the cause of action is one traditionally relegated to state law.¹¹

The *Moll* court found that a private right of action exists, reasoning:

that Congress must have intended that a private right of action be available under § 526, “because otherwise the relief would [be] of no value at all.” 88 Cong.Rec. 5366 (1942). That is, if no private cause of action is implied, creditors could simply ignore the mandate of § 526 and then claim that they cannot be held responsible. Congress could not have intended such a result.¹²

Another Desert Storm veteran, Mel Marin, became ill as a result of his military service and he was unable to pay a car loan owed to TranSouth Financial Corporation. Marin sued TranSouth in the United States District Court for the Northern District of Texas, alleging that TranSouth violated § 531 of the SSCRA, which prohibits the creditor of a purchase-money contract from exercising its rights under the contract “except by action in a court of competent jurisdiction.”¹³ He also claimed that TranSouth violated § 518 of the SSCRA by disseminating adverse credit reports as a result of his failure to pay the debt.¹⁴ TranSouth moved to dismiss the case on the grounds that Marin did not have a private right of action to sue. In *Marin v. Armstrong*, the Court followed the *Moll* decision and denied the motion to dismiss.¹⁵

Stewart A. Cathey, an Army Reserve Lieutenant Colonel, was mobilized for service in Bosnia in 1996. Prior to mobilization, he had obtained financing for two convenience stores from First Republic Bank. His wife was a guarantor of the loans, which were cross-collateralized with their home. Cathey notified the bank of his military

¹¹ *Id.* at 78.

¹² 1998 U.S. Dist. LEXIS 3638 at *4.

¹³ *Marin v. Armstrong*, 1998 WL 1765716 (N.D. Tex, 1998) at *3.

¹⁴ *Id.*

¹⁵ *Id.* at *5.

service and provided it with a copy of his orders. The bank charged, and he paid, interest at a rate higher than 6% during his time overseas. When he returned, he demanded a refund of the overpaid interest, but the bank seized and moved to sell both stores. Cathey claimed that the stores had suffered setbacks as a result of his absence and he needed the refund as working capital to restore the stores to profitability. Cathey and his wife sued the bank in the United States District Court for the Western District of Louisiana for the refund. The court adopted the reasoning of *Moll* and found that the 6% interest rate cap applied to the note and Cathey had a right to sue for the refund, even though his non-servicemember wife was a co-maker of the note.¹⁶

Other courts also recognized a servicemembers right to sue under the SSCRA. Two state court decisions, *Hanson v. Crown Toyota Motors, Inc.*¹⁷ from Utah, and *Hampton v. Commercial Credit Corp.*¹⁸ from Montana, recognized a private right of action in state court. In *Engstrom v. First Nat'l Bank*,¹⁹ the U.S. Court of Appeals for the Fifth Circuit stated in dicta that the plaintiff could have brought a suit under the SSCRA.

CASE LAW DURING GWOT

The cases that have arisen from disputes during the Global War on Terrorism have had a more complicated background, however.

Jeffrey Linscott, was mobilized as a Major in the Air Force Reserve in December 2002, and his assignment extended through July 2003. Linscott owned and operated a helicopter flight service named JL Aviation, Inc. (“JLA”), which owned two helicopters, including a 1982 Bell Jet Ranger. Linscott was personally liable on the purchase-money notes for the helicopters.

JLA was a profitable business at the time Linscott was mobilized. JLA had contracted with Vector Aerospace an ACRO Aerospace, Canadian corporations, to overhaul the engine of the Jet Ranger helicopter. ACRO removed the engine and replaced it with a leased engine so that the helicopter could continue to operate during the overhaul. After ACRO returned the original engine and returned the temporary engine, JLA discovered that the overhauled engine not operational. Linscott refused to pay for

¹⁶ *Cathey v. First Republic Bank*, U.S. Dist. Lexis 13150 (W.D.La.2001).

¹⁷ 572 P.2d 380 (Utah 1997).

¹⁸ 176 P.2d 270 (Mont. 1946).

¹⁹ 47 F.3d 1459, 1462 (5th Cir. 1995).

the overhaul until ACRO produced a serviceable engine. While Linscott was on active duty, ACRO picked up the engine and took it to its overhaul facility “promising a quick turnaround so that a temporary engine would not be needed.”²⁰ Once it had the engine, ACRO claimed the engine was airworthy and refused to return it until JLA paid for the overhaul. It asserted a lien under Canada’s Repairers Lien Act.

Linscott sued ACRO in the United States District Court for the District of Oregon, claiming that it had violated § 537 of the SCRA, which prohibits a creditor from enforcing a lien on “the property or effects” of a servicemember. Linscott also claimed that ACRO violated the interest rate provisions of § 527 of the SCRA. The defendants moved to dismiss the case on the grounds that § 537 did not provide a private right of action or allow recovery of damages. The court followed the reasoning of *Moll* and found that there was a private right of action to sue under § 537.²¹

Army Reserve Lieutenant Colonel Leon Batie, Jr. was mobilized in 2002. He operated two Subway franchises in Dallas in premises that he leased from Subway Real Estate Corporation (“Subway”). When he deployed to Afghanistan, he left his brother with a power of attorney and the authority to run the restaurants. The brother failed to make the lease payments and Subway terminated the lease, asserted a lien on the property in the premises, and removed it. Subway also obtained a default judgment against Batie in state court, and moved the court to appoint the brother as Batie’s attorney-in-fact in the case, even though he was not an attorney. When he returned, Batie sued Subway in the United States District Court for the Northern District of Texas, claiming that Subway had violated his rights under SCRA.

Subway moved to dismiss the case on the grounds that Batie was required to exhaust his state court remedies and that he was, essentially, asking the federal court to engage in appellate review of the state court case. Subway also alleged that Batie did not have a private right of action to sue under the SCRA. In a decision issued on February 15, 2008, the federal court concluded that Batie was required to proceed in state court because there was “no reason why a Texas state court could not decide the federal questions presented” by the SCRA claims²² and that there was no private right of action under the SCRA.²³ Batie filed a motion for reconsideration, citing cases holding that the

²⁰ *Linscott v. Vector Aerospace*, 2006 U.S. Dist. LEXIS 6287, 2006 WL 240529 (D. Or. 2006) at *2.

²¹ *Id.* at *7.

²² *Batie v. Subway Real Estate Corp.*, 2008 WL 413627 (N.D. Texas, February 15, 2008) at *6.

²³ *Id.* at *8.

SSCRA created a private right of action. On March 12, 2008, the court vacated its prior decision dismissing the case.²⁴

Several months later, in *Hurley v. Deutsche Bank Trust Company*,²⁵ the United States District Court for the Western District of Michigan granted summary judgment in favor of a bank on the grounds that the plaintiff, Sergeant James B. Hurley of the Michigan National Guard did not have a private right of action to challenge the bank's foreclosure of his home that occurred while he was mobilized during Operation Iraqi Freedom. The court analyzed the SCRA under the four-part *Cort v. Ash* test, and concluded that Congress did not intend to create a private right of action because the plain language of the SCRA statute did not expressly create a private right to sue and that the statute expressly provides for criminal penalties, not civil liability, for those who knowingly violate the foreclosure and eviction provisions of the statute.²⁶ The Michigan court also relied on "instructive case law," citing the first *Batie* decision, even though that decision had already been vacated at that time.²⁷

The Hurleys moved for reconsideration. Curiously, it appears that the Michigan court carefully considered the leading cases, *Moll* and *Marin*, and the second *Batie* decision, for the first time on the motion for reconsideration, even though *Moll* and *Marin* predated the Hurley's case by a decade. In its second decision, issued on March 13, 2009, the court found that "Congress intended to confer a private right of action for a violation of [the mortgage foreclosure provisions of] § 533(c)" and the eviction-protection provisions of § 531(b).²⁸ The court even found that a right to recover punitive damages is implied in the statute.²⁹

In *Gordon v. Pete's Auto Service of Denbigh, Inc.*, Judge Rebecca Beach Smith of the U.S. District Court for the Eastern District of Virginia appeared, at first glance, to have ruled that a servicemember does not have a private right of action to sue under the SCRA. The case was brought by Andre Gordon, a sailor, who left his car parked at his apartment complex while he was deployed. The apartment complex had his car towed and then sold by Pete's Auto Service. When Gordon returned, he sued Pete's in federal court, alleging "conversion" and that Pete's violated the provisions of the SCRA that prohibited the enforcement of a lien. Although the complaint did not cite a specific section of the SCRA, the Court treated the complaint as alleging

²⁴ *Batie v. Subway Real Estate Corp.*, 2008 WL 5136636 (N.D. Texas, March 12, 2008).

²⁵ 2008 WL 4539478 (W.D. Mich. 2008).

²⁶ *Id.* at *6.

²⁷ *Id.*

²⁸ *Hurley v. Deutsche Bank Trust Company*, 2009 WL 701006 (W.D. Mich. 2009) at *4.

²⁹ *Id.* at *9-10.

that Pete's violated § 537 of the Act, which states: "[a] person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement."³⁰ The complaint did not allege that Pete's had a lien on Gordon's car or that Pete enforced a lien when it sold the car, so it is not surprising that the Court dismissed Gordon's SCRA claim. However, the Court wrote in dicta that "[n]o provision in the [SCRA]. . . grants a servicemember a separate cause of action for damages where another judicial or administrative proceeding or transaction has operated in his disfavor during his military service. The Act only allows the court to suspend, set-aside, or vacate such proceedings or transactions in order to protect the servicemember."³¹

It was not clear from the original *Gordon* decision whether Judge Smith meant that no servicemember has a right to sue under the SCRA or whether a plaintiff servicemembers may sue but may not seek money damages. In the memorandum opinion supporting the Court's order denying Gordon's motion for reconsideration, Judge Beach suggested that a servicemember may have the right to sue, but may seek only an equitable remedy.³² Thus, servicemembers in the Eastern District of Virginia may have SCRA rights of a different quality than servicemembers in other areas of the country: they probably have the right to sue under the SCRA but may not seek money damages arising from violations of their SCRA rights.

CURRENT STATUS OF THE PRIVATE RIGHT OF ACTION

At this time, almost all of the federal district courts which have considered whether a servicemember may sue to vindicate his rights under the SCRA have found a private cause of action. The confusion engendered by the first decisions in the *Batie* and *Hurley* cases has been resolved by the second decisions granting the servicemembers' motions for reconsideration in both those cases.

The current near unanimity of the courts has made legislative action to include language that explicitly provides for a private right of action to enforce the SCRA a lower priority. Nevertheless, on October 28, 2009, Representative Bob Filner of California, Chairman of the House Veterans' Affairs Committee, introduced H.R. 3949, which provides for a private right of action under the SCRA. Representative Brad Miller of North Carolina had already introduced H.R. 2696 on June 4, 2009, which also explicitly provided for a private right of action. The provisions of H.R. 2696 were incorporated into H.R. 3949, which passed the House of

³⁰ 50 U.S.C. app. § 537(a).

³¹ 670 F. Supp.2d at 455.

³² *Gordon v. Pete's Auto Service of Denbigh, Inc.*, Civil No. 4:08cv124, mem. op. at 5 (E.D. Va., Dec. 11, 2009).

Representatives on November 3, 2009 and was reported to the Senate, where it has been referred to the Senate Committee on Veterans' Affairs.

It now appears to be well-settled by the large majority of courts that Congress intended for servicemembers to have the right to sue in court to vindicate their rights under the SCRA, and the right has been extended to servicemember plaintiffs, even though Congress has not yet enacted legislation specifically providing for a private right of action. However, Judge Smith's decision in *Gordon* indicates that Congress may yet need to clarify the remedies available to servicemember plaintiffs for violations of the Act.

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