

LAW REVIEW 941

(Web Only)
4.9—SCRA Enforcement

Does the SCRA Create a Private Right of Action?

By Captain Samuel F. Wright, JAGC, USN (Ret.)

***Hurley v. Deutsche Bank Trust Co.*, 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. Sept. 30, 2008).**

When Congress enacts a statute and creates rights for certain classes of persons, it presumably intends for those persons to have some means of enforcing their rights, because a right without a remedy is of little value. A private right of action is the right to initiate a civil action in court, in one's own name and with one's own attorney.

Some federal statutes explicitly create private rights of action, while other federal statutes explicitly preclude private rights of action, because the statute provides some other enforcement mechanism (such as an action brought by the Attorney General in the name of the United States, as plaintiff).

Other federal statutes neither explicitly create nor preclude private rights of action. In such a situation, it is necessary for a court to determine, as a matter of statutory construction, whether there is an *implied* private right of action.

In 1917, shortly after the United States entered World War I, Congress enacted the Soldiers' and Sailors' Civil Relief Act (SSCRA) to protect the civil rights and financial interests of those who were called to the colors, whether by draft, voluntary enlistment, or mobilization from the National Guard or Reserve. The original SSCRA expired in 1919, at the end of the period of emergency necessitated by World War I. Congress reenacted the SSCRA in 1940 and made it permanent after World War II.

The SSCRA served our nation well, but by the time of the first Gulf War (1990-91) some of its provisions had become outdated. In the 1990s, judge advocates from the five armed forces comprehensively reviewed the SSCRA and drafted a new proposed law. In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), a long-overdue rewrite of a law going back to 1917.

Neither the SSCRA nor the SCRA expressly created or expressly precluded a private right of action, but most courts that have addressed the question have found an implied private right of action. *See, e.g., Moll v. Ford Consumer Finance Co.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. Mar. 16, 1998); *Marin v. Armstrong*, 1998 U.S. Dist. LEXIS 22792 (N.D. Tex. Aug. 31, 1998); *Cathey v. First Republic Bank*, 2001 U.S. Dist. LEXIS 13195 (W.D. La. Aug. 13, 2001); and *Linscott v. Vector Aerospace*, 2006 U.S. Dist. LEXIS 6287 (D. Ore. Jan. 31, 2006).

In *Hurley v. Deutsche Bank Trust Co.*, 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. Sept. 30, 2008), the United States District Court for the Western District of Michigan (Judge Gordon J. Quist) held that the SCRA does not create a private right of action. Judge Quist's informally published decision is considered *interlocutory* (not final) because it did not resolve all pending issues between the plaintiffs and the defendants.

Under the Federal Rules of Civil Procedure, interlocutory decisions cannot be appealed from the District Court to the Court of Appeals, except in unusual circumstances and with leave of court. James B. Hurley, through his attorney, applied to Judge Quist for leave to file an interlocutory appeal to the United States Court of Appeals for the 6th Circuit.

Instead of granting Mr. Hurley leave to file an interlocutory appeal, Judge Quist reconsidered and rescinded his Sept. 30, 2008 decision. Because the case was not final in the District Court, Judge Quist had the authority and the discretion to reconsider and rescind his earlier decision and to write a new and superseding decision. In *Hurley v. Deutsche Bank Trust Co.*, 2009 U.S. Dist. LEXIS 20261 (W.D. Mich. Mar. 13, 2009), Judge Quist held (contrary to his earlier decision) that the SCRA does create a private cause of action.

I would like to congratulate and thank attorney John S. Odom, Jr. (a retired Colonel in the Air Force Reserve and life member of ROA) for his excellent work on this case—assisting Hurley’s attorney. Colonel Odom (John.Odom@jodplaw.com) is the nation’s foremost expert on the SCRA and SSCRA, and he involves himself in these cases all over the country. Most of the time, including this time, his involvement is *pro bono* (for the public good and without compensation).

Because it is possible that another court will hold (as Judge Quist initially held) that the SCRA does not create a private right of action, ROA will push for an amendment explicitly creating a private right of action and eliminating all doubt on this important question.

Update: December 2015

As explained in Law Review 15115, the editors of the United States Code (U.S.C.) recently eliminated the “Appendix” of title 50 of the Code, and the Servicemembers Civil Relief Act (SCRA) can now be found in title 50 at sections 3901 and following.