

# LAW REVIEW 942

(Web only)

## 4.9—SCRA Enforcement

### Attorney Fees under the SCRA

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

In Law Review 0941, I explained that the Servicemembers Civil Relief Act (SCRA) neither expressly creates nor expressly precludes a private right of action, for the servicemember to enforce his or her SCRA rights by suing the landlord, creditor, insurer, or other party that is violating the SCRA, but most courts that have addressed this issue have held that there is an implied private right of action. If the servicemember cannot enforce his or her rights by bringing a lawsuit in his or her own name, these important rights will probably go unenforced. Most of the time, SCRA rights are enforced (if at all) by civil actions filed by servicemembers against SCRA violators.

To file and maintain such a lawsuit, the servicemember will need an attorney, in almost all cases. I generally agree with the ancient maxim that, “A man who represents himself has a fool for a client.” Moreover, the servicemember will often be deployed to the tip of the spear and will thus be unavailable to file and prosecute a lawsuit.

Don’t expect this kind of representation from a military legal assistance attorney. Judge advocates and Department of Defense civilian attorneys assigned as legal assistance attorneys can give you advice about the SCRA and other laws and can draft letters and other documents for you, but with certain very limited exceptions legal assistance attorneys are not authorized to represent military personnel and their family members in civilian courts.

In some places, there is available an Expanded Legal Assistance Program (ELAP). Military legal assistance attorneys may represent in court military clients, in cases involving systematic landlord abuse of military tenants or consumer scams that specifically target military personnel. Representation through ELAP is discretionary and not an entitlement. In most cases, you will need to retain a civilian lawyer to enforce your SCRA rights.

In many SCRA lawsuits, the servicemember’s lawyer is providing representation on a *pro bono* basis (for the good of the public, and with no compensation for the lawyer). The services and military associations like ROA should honor private attorneys who go “above and beyond the call of duty” by donating their valuable time to vindicate the rights of those who serve our country in uniform, but servicemembers should not have to depend upon the charitable instincts of lawyers, and lawyers do need to make a living, just like everyone else in our society.

The “American Rule” on attorney fees is that each party to a lawsuit is responsible for paying his or her or its own attorney, unless there is a statute that authorizes the court to order the losing party to pay the prevailing party’s attorney fees. In 1976, Congress enacted the Civil Rights Attorney’s Fee Awards Act of 1976, 42 U.S.C. 1988. That statute provides for civil rights plaintiffs to be awarded attorney fees, upon prevailing. The losing defendant is ordered to pay the attorney fee as part of the remedy. (If the defendant prevails, the plaintiff is not required to pay the defendant’s attorney fees.) This law only applies to actions brought under certain enumerated sections of title 20 and title 42 of the United States Code. The 1976 enactment of this law played a major role in making civil rights laws more than an empty promise.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), to replace the Veterans’ Reemployment Rights (VRR) law, which can be traced back to 1940. Section 4323(h)(2) of USERRA [38 U.S.C. 4323(h)(2)] provides that a federal court hearing a USERRA case may order the losing employer to pay the prevailing claimant’s attorney fees.

Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers’ and Sailors Civil Relief Act (SSCRA), which can be traced back to 1917. Neither the SSCRA nor the SCRA has ever provided authorization for a court to order the losing defendant to pay the prevailing plaintiff’s attorney fees. ROA will push for Congress to

enact such a provision in order to give servicemembers access to legal representation in enforcing their SCRA rights.

**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.