

James B. Hurley's Saga Continues

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4.3—SCRA Right to Continuance and Protection Against Default Judgment

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***Hurley v. Deutsche Bank Trust Company Americas*, 610 F.3d 334 (6th Cir. 2010).**

Hurley is a very recent decision of the United States Court of Appeals for the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) under the Servicemembers Civil Relief Act (SCRA). Congress enacted the SCRA in 2003 as a long-overdue recodification of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which can be traced back to 1917.

Plaintiff James B. Hurley was enlisted member of the Michigan Army National Guard since September 1984. In September 1994, he purchased a home in Hartford, Michigan. In September 2003, he borrowed \$95,000 and executed a mortgage on the property as security

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

for the loan. In 2004, he was mobilized and deployed to Iraq, and he fell seriously behind in payments on the loan.

Defendants Deutsche Bank Trust Company Americas (Deutsche Bank) and Orlans Associates PC (Orlans) (a law firm in Troy, Michigan that “provides legal representation in mortgage foreclosures, bankruptcies, and real estate related matters” according to the firm’s website) conducted a sheriff’s sale on the property, after giving notice by publication. Deutsche Bank placed the highest bid of \$70,000 and obtained a sheriff’s deed to the property. (Deutsche Bank eventually sold the property for \$76,000.)

In order to make the sheriff’s sale occur, a paralegal at Orlans signed an affidavit stating, “The undersigned, being first duly sworn, states that upon investigation he is informed and believes that none of the persons named in the notice attached to the sheriff’s deed of mortgage foreclosure, nor any person on whom they or any of them were dependent, were in the military service of the United States at the time of the sale or for six months prior thereto.”

The paralegal who signed the affidavit was deposed for this lawsuit. In his deposition, he acknowledged that he had conducted no investigation whatsoever before averring under oath that Mr. Hurley was not on active duty in the armed forces. As instructed by Orlans’ attorneys, the paralegal routinely signed such affidavits and never considered the possibility that the named mortgagor might actually be on active duty, as Mr. Hurley was.

If a plaintiff files a civil suit and the defendant does not make a timely answer, the plaintiff can ask the court for a default judgment, which will normally be granted. As a condition precedent to obtaining a default judgment against any defendant, it is necessary to file an affidavit averring that the defendant is not on active duty in the armed forces of the United States.

The Servicemembers Civil Relief Act (SCRA) Website offer a free service to inform attorneys and others whether a specific named person is or is not on active duty in the armed forces. Please see <https://scra-w.dmdc.osd.mil/scra/#/home>. Anyone can determine in just a few minutes, and for no charge, whether a specific named person is or is not on active duty. Before affixing your “robo signature” to an affidavit attesting that a named person is not on active duty, you should at least utilize this free service to find out. There are also commercial services available that will do a records search to ascertain whether or not an individual is on active military duty.

Let this case serve as a reminder that there is an important reason to require the affidavit to the effect that the named defendants are not on active duty and that one should not sign such an affidavit without first having definitively determined that the named persons are not on active duty. There are potential federal criminal sanctions for knowingly filing a false affidavit. Case law has found that failure to conduct a reasonable investigation into the facts of an affidavit that turns out to be incorrect constitutes “knowingly filing a false affidavit.” Conducting a computer search on the SCRA Website takes less than 30 seconds, a fact that would be material in any case in which the nature and extent of the creditor’s investigation into the military status of the defendant became an issue.

On May 3, 2005, the defendants initiated eviction proceedings against Sergeant Hurley and all other occupants of the property, which required Sergeant Hurley to appear in the Van Buren County District Court in South Haven, Michigan on May 13, 2005. On the May 6 proof of service for the eviction action, the process server wrote, “according to spouse, Hurley is in the military in Iraq.” This note apparently did not cause the defendants (plaintiffs in the eviction action) and their counsel to reconsider the veracity of the paralegal’s affidavit to the effect that James B. Hurley was not in military service. In fact, the Orlans’ paralegal subsequently filed another affidavit in the eviction proceeding stating that Mr. Hurley was not in the military.

“The May 13, 2005 hearing was adjourned to June 6, 2005. Sergeant Hurley’s mother, Valla Hurley, who was living at the Property, claims that she made an appearance at the second hearing to inform the court that Sergeant Hurley was in Iraq. According to Ms. Hurley, Defendants’ counsel took her to a conference room and told her that she must vacate the Property and that Defendants would pay her \$1,000 if she left voluntarily. Ms. Hurley alleges that Defendants’ counsel told her that the matter would be adjourned for 30 days, at which time she could come back and discuss the matter with the judge. Ms. Hurley left the courthouse without appearing before a judge; she was under the impression that a hearing had been scheduled for 30 days later and that Defendants’ counsel would relay this information to the judge.” *Hurley*, slip opinion at page 4. Judge Clark, who presided over the eviction proceeding, later testified that he did not recall having been informed that an individual was present in the courthouse on behalf of James B. Hurley.

On May 2, 2007, James B. Hurley and his wife filed suit against Deutsche Bank and Orlans in the United States District Court for the Eastern District of Michigan. On March 3, 2008, Deutsche Bank filed a motion to change the venue to the Western District of Michigan, and Orlans joined in the motion. On April 17, 2008, the court granted the motion and transferred the case to the Western District of Michigan, where it was assigned to Judge Gordon J. Quist.

A *private right of action* is the right to bring a lawsuit in one’s own name and with one’s own attorney. Some federal statutes explicitly create a private right of action, and some statutes explicitly disclaim a private right of action, usually when some other enforcement mechanism is provided (like a lawsuit brought by the Attorney General in the name of the United States). Still other laws neither expressly provide for nor explicitly disclaim a private right of action. In such a circumstance, a court must determine, as a matter of statutory interpretation, whether there is an *implied private right of action*.

As drafted in 1917, and as amended many times over the decades, the SSCRA neither expressly created nor explicitly disclaimed a private right of action, and when Congress enacted the SCRA in 2003 it did not clarify this ambiguity. Several courts that have addressed this issue have found an implied private right of action under the SCRA and the SSCRA. See, e.g., *Linscott v. Vector Aerospace*, 2006 U.S. Dist. LEXIS 6287 (D. Ore. Jan. 31, 2006); *Cathey v. First Republic Bank*, 2001 U.S. Dist. LEXIS 13195 (W.D. La. Aug. 13, 2001); *Marin v. Armstrong*, 1998 U.S. Dist. LEXIS 22792 (N.D. Tex. Aug. 31, 1998); *Moll v. Ford Consumer Finance Co.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. Mar. 16, 1998).

Deutsche Bank and Orlans argued that the SCRA does not create a private right of action and that the Hurley lawsuit should be dismissed on that basis. Judge Quist initially agreed with that argument. *Hurley v. Deutsche Bank Trust Co.*, 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. Sept. 30, 2008). Six months later, Judge Quist reconsidered and decided, contrary to his early holding, the SCRA does provide an implied private right of action. *Hurley v. Deutsche Bank Trust Co.*, 2009 U.S. Dist. LEXIS 20261 (W.D. Mich. Mar. 13, 2009). In addition, Judge Quist entered summary judgment in favor of Mr. Hurley and against the defendants and ruled that punitive damages were available in an action for damages under the SCRA.

As part of the mortgage documents that he signed in 1994, James B. Hurley executed a rider entitled "Arbitration of Disputes," and that rider stated: "All disputes, claims, or controversies arising from or related to the loan evidenced by the Note, including statutory claims, shall be resolved by binding arbitration, and not by court action, except as provided under [specified exclusions]. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act (9 U.S.C. 1-14)."

On May 21, 2009, more than two years after Hurley filed this lawsuit in the Eastern District of Michigan, Orlans filed a motion to compel arbitration. On June 23, 2009, Judge Quist denied the motion to compel arbitration, holding that Deutsche Bank and Orlans had waived their right to enforce the arbitration clause by waiting more than two years to file the motion to compel arbitration. On July 22, 2009, Orlans filed a timely notice of appeal to the Sixth Circuit, but Deutsche Bank did not join in the appeal. On July 1, 2010, in this case, the Sixth Circuit affirmed Judge Quist's holding that the defendants had, by their delay, waived the right to enforce the arbitration rider. The Sixth Circuit found that after summary judgment had already been granted in favor of Hurley, he would be substantially prejudiced by any order at this point compelling arbitration of his claims against Deutsche Bank and Orlans.

This appellate decision represents progress, but this case is not yet over, although it has been six years since James B. Hurley was called to the colors in July 2004. I call upon Deutsche Bank and Orlans to do the right thing and bring this long-overdue case to a close by compensating Mr. Hurley for the damages done to him by Deutsche Bank's and Orlans' SCRA violations.