

# LAW REVIEW 1118

## Fourth Circuit Holds New SCRA Private Right of Action is Retroactive

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

### 4.3—Right to Continuance and Protection against Default Judgment

### 4.9—SCRA Enforcement

***Gordon v. Pete's Auto Service of Denbigh, Inc., No. 09-2393 (4<sup>th</sup> Cir. Feb. 14, 2011).***

Section 802(a) of the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275, amended the Servicemembers Civil Relief Act (SCRA) and created an *explicit* private right of action, authorizing the service member aggrieved by an SCRA violation to file suit in federal court, in his or her own name and with his or her own lawyer, and to obtain injunctive relief, compensatory damages, attorney fees, and other relief. President Obama signed VBA-2010 on Oct. 13, 2010. Does this new provision apply to lawsuits arising from incidents that occurred prior to the date of enactment? Yes, according to the United States Court of Appeals for the 4<sup>th</sup> Circuit.[\[1\]](#)

When Congress enacts a law and creates a substantive right, it presumably intends that those whose rights have been violated will have the means to enforce their rights, for a right without a remedy is of little value. Some federal statutes explicitly create a private right of action, to enable those whose rights have been violated to obtain appropriate relief. Some federal statutes explicitly preclude a private right of action. For example, a violation of the National Labor Relations Act (an unfair labor practice by an employer or a union) can be remedied only by an action brought by the General Counsel of the National Labor Relations Board, and not by a private lawsuit.

Many federal statutes neither expressly create nor expressly preclude a private right of action. The SCRA was in this category until the 2010 amendment created an explicit private right of action.[\[2\]](#)

When a statute neither expressly creates nor explicitly precludes a private right of action, a court must determine (as a matter of statutory interpretation) whether there is an *implied* private right of action. Most courts that have addressed the question have held that there is an implied private right of action under the SSCRA or SCRA.[\[3\]](#)

In *Hurley v. Deutsche Bank Trust Co.*, 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. Sept. 30, 2008), Judge Gordon J. Quist of the United States District Court for the Western District of Michigan held that the SCRA does not state a private right of action. Judge Quist later reconsidered and decided that the SCRA does state a private right of action. *Hurley v. Deutsche Bank Trust Co.*, 2009 U.S. Dist. LEXIS 20261 (W.D. Mich. Mar. 13, 2009). Please see Law Review 0941 for a discussion of the *Hurley* case.[\[4\]](#)

Andre Gordon is an enlisted member of the United States Navy.[\[5\]](#) Gordon was assigned to duty in Norfolk, Virginia, and he and his wife signed a lease on an apartment in nearby Newport News. When he signed the lease, he explained that he was subject to deployment and that if he were deployed his wife would return to their prior residence in Jacksonville, Florida. On the lease, he identified his 2002 Jeep Cherokee, and he named his wife as his emergency contact.

When Gordon deployed, he left the Jeep in the parking lot of the apartment complex. In May 2007, while Gordon was still deployed, a representative of the apartment complex notified Pete's Auto Service of Denbigh, Inc. ("Pete's Towing") that the Jeep had a flat tire and requested that it be towed. Neither the apartment management nor Pete's Towing made any effort to contact Gordon or his wife. Pete's Towing held the vehicle for a month and then sold it to cover the "storage charges."

The SCRA provides members of the armed forces certain procedural protections to ensure that they do not lose valuable rights through a default judgment because they are unable, because of their service, to appear at judicial or administrative proceedings. A party like Pete's Towing could make a mockery of these

protections if it were permitted to bypass judicial proceedings. Accordingly, the SCRA provides: “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.” 50 U.S.C. App. 537(a)(1). Pete’s Towing violated this provision when it sold the Jeep to collect its “storage charges” without court order.

In December 2008, Gordon sued Pete’s Towing in the United States District Court for the Eastern District of Virginia. In November 2009, District Judge Rebecca Beach Smith held that the SCRA does not state a private right of action and dismissed Gordon’s suit on that basis. Gordon appealed to the 4<sup>th</sup> Circuit. President Obama signed VBA-2010 while this appeal was pending.

For purposes of this appeal, the 4<sup>th</sup> Circuit assumed without deciding that there was no implied private right of action under the SCRA prior to the 2010 amendment. The 4<sup>th</sup> Circuit held that the 2010 amendment should be applied to this case and reversed the dismissal of Gordon’s complaint and remanded the case back to the Eastern District of Virginia.

In a well-written decision written by Judge J. Harvie Wilkinson III, the 4<sup>th</sup> Circuit traced the history of the SSCRA and SCRA and cited case law to the effect that this statute should be liberally construed for those who serve our country in uniform: “We are mindful that the SCRA—like its predecessors—‘must be read with an eye friendly to those who dropped their affairs to answer their country’s call.’ *United States v. Onslow County Board of Education*, 728 F.2d 628, 636 (4<sup>th</sup> Cir. 1984) (quoting *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).”

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[1] The 4<sup>th</sup> Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

[2] Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), which dates back to 1917. It is interesting that it took almost a century (1917-2010) for Congress to make clear its intention on the private right of action question.

[3] 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 Corp.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. Mar. 16, 1998).

[4] You can find more than 800 Law Reviews at [www.roa.org/law\\_review](http://www.roa.org/law_review). You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[5] Like the Uniformed Services Employment and Reemployment Rights Act (USERRA), the SCRA applies to members of the regular armed forces, as well as National Guard and Reserve members.