

## **Senator Introduces Bill to Improve SCRA**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

4.3—Right to continuance and protection against default judgment

4.9—SCRA enforcement

On April 18, 2012, Senator Patty Murray (D-WA) introduced S. 2299, the proposed Servicemembers Rights Enforcement Improvement Act of 2012 (SREIA), on behalf of herself, Senator Mark Begich (D-AK), Senator Sheldon Whitehouse (D-RI), Senator John Rockefeller (D-WV), and Senator Daniel Akaka (D-HI). The bill was referred to the Senate Committee on Veterans' Affairs, which Senator Murray chairs.

If enacted, this bill would make several important improvements (discussed below) to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).<sup>3</sup> Congress enacted the SCRA in 2003, as a long-overdue

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup>BA 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](mailto:SWright@roa.org).

<sup>3</sup>This article covers the proposed SCRA improvements. Law review 1243 covers the proposed USERRA improvements.

rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which dates back to 1917. The SCRA is codified in the Appendix to title 50 of the United States Code, at sections 501-597b (50 U.S.C. App. 501-597b).

**Strengthen the affidavit requirement before a default judgment.**

Section 2 of the SREIA would amend section 201(b) of the SCRA [50 U.S.C. App. 521(b)] by strengthening the requirement for an affidavit showing that the defendant is, or is not, a member of the armed forces on active duty, before a default judgment can be entered against the defendant. This amendment would address a serious problem that has shown up in many of these cases. Let me offer a hypothetical but realistic example.

Let us say that Bob Jones has filed a civil suit (state or federal court) against Mary Smith. The time for Smith to file her answer has passed, and no answer has been filed. Jones can file a motion for default judgment and ordinarily he will receive a judgment for the full amount that he sought as Smith lost her right to contest the lawsuit because she failed to file an answer. But maybe Smith is on active duty in Afghanistan and is not even aware that she has been sued.

Before he can obtain a default judgment against Smith in these circumstances, Jones must file an affidavit averring under oath that Smith is not a member of the armed forces on active duty. If Smith is on active duty, a default judgment cannot lawfully be awarded, and several steps must be taken by the court to ensure that Smith is aware of the lawsuit and that her military service is not preventing her from offering a defense.

DOD operates a *free* service to assist attorneys, creditors, etc. to determine whether a specific person is or is not currently on active duty. If Jones inputs Smith's name, Social Security Number, and date of birth, this system will tell him (usually in a matter of seconds) that Smith is on active duty, or is not. It is essential that Jones or his attorney use this free service before he or she "robo-signs" an affidavit to the effect that Mary Smith is not on active duty in the armed forces.

There have been documented cases where lawyers and paralegals in "foreclosure mill" law firms have filed affidavits averring that a named defendant was not on active duty when in fact the defendant was on active duty. To address this problem, section 2 of the SREIA would add a new subsection (B) to 50 U.S.C. App. 521(b)(1), as follows:

(B) DUE DILIGENCE. Before filing the affidavit [to the effect that the defendant is not on active duty in the armed forces], the plaintiff shall conduct a diligent and reasonable investigation to determine whether or not the defendant is in military service, including a search of available records of the Department of Defense and any other information available to the plaintiff. The affidavit shall set forth in the affidavit all steps taken to determine the defendant's military status.

This provision would be most useful.

### **Retroactive application of private right of action under SCRA.**

A private right of action is the right to file suit in one's own name to enforce the requirements of a statute. Some statutes explicitly create a private right of action, and some statutes explicitly preclude a private right of action (choosing to rely on some other enforcement mechanism). When a statute neither explicitly creates nor explicitly precludes a private right of action, a court must determine whether there is an implied private right of action. Under the SCRA and the SSCRA, there was neither an explicit creation of a private right of action nor an explicit preclusion of a private right of action. There was a division of authority in the courts as to whether there was an implied private right of action.

On October 13, 2010, Congress enacted and President Obama signed Public Law 111-275, which made several changes to the SCRA. One of the changes was to add section 802, 50 U.S.C. 597a, which creates an explicit private right of action under the SCRA. The effective date of this change is the date of enactment—October 13, 2010.

Section 3 of the SREIA would backdate the effective date of section 802 to December 19, 2003, which was the date of enactment of the SCRA itself. This change would also be beneficial.

### **Issuance and service of civil investigative demands by Attorney General.**

Section 6 of the SREIA would amend section 801 of the SCRA, 50 U.S.C. App. 597, by adding a new subsection (d). That new subsection would give the Attorney General, through the Department of Justice (DOJ), the power to obtain information, documents, and testimony in SCRA investigations. This power would be most useful to DOJ in enforcing the SCRA.

### **Update – March 2022<sup>4</sup>**

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.<sup>5</sup> The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections.

The relevant sections cited throughout the article can be found as followed:

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<sup>4</sup>Update by Second Lieutenant Lauren Walker, USMC.

<sup>5</sup>*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra> (last visited Mar. 10, 2022).

50 U.S.C. App. § 521 discussing the protection of servicemembers against default judgments can now be found at 50 U.S.C. § 3931. Up to this date, 50 U.S.C. § 3931 has not been amended to include a provision of due diligence.

50 U.S.C. App. § 597a discussing private rights of action under the SCRA can now be found at 50 U.S.C. § 4042. Up to this date, the private right of action under the SCRA has not been backdated to December 19, 2003.

50 U.S.C. App. § 597 discussing enforcement by the Attorney General can now be found at 50 U.S.C. § 4041. Up to this date, 50 U.S.C. § 4041 has not been amended to give the Attorney General the power to obtain information, documents, and testimony in SCRA investigations.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.<sup>6</sup>

### **Please join or support ROA**

This article is one of 2,300-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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<sup>6</sup>Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

<sup>7</sup>Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

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