

Waiver of Rights Under the SCRA

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4.0—SCRA Generally

In 2011, the Service Members Law Center (SMLC) received and responded to 5,405 inquiries. 3,384 of them (62.6%) were about the Uniformed Services Employment and Reemployment Rights Act (USERRA), while only 234 of them (4.3%) were about the Servicemembers Civil Relief Act (SCRA). This does *not* mean that USERRA is 14 times as important as the SCRA. I suspect that USERRA predominates among our inquiries because most of the 745 articles published in our Law Review Library are about USERRA and because I helped to write USERRA. Without downgrading the importance of USERRA, I want to emphasize the importance of the SCRA, and we will be having more articles about that law. As I become more familiar with the SCRA, I am becoming more comfortable fielding inquiries about it.

The origin of the SCRA is even older than the origin of USERRA. While USERRA can be traced back to the Selective Training and Service Act of 1940, the SCRA can be traced back to the Soldiers' and Sailors' Civil Relief Act (SSCRA), originally enacted in 1917.

The United States entered "the war to end all wars" on April 6, 1917. Hundreds of thousands of young men (and a few thousand young women) answered the country's call to serve "over there" as "doughboys." Some were drafted, some enlisted voluntarily, and some were called to active duty from the nascent Army Reserve, Army National Guard, Marine Corps Reserve, or Naval Reserve. Regardless of how they entered into service, they left behind civilian jobs, farms, businesses, mortgages, debts, lawsuits, and other important matters.

In April 1917, John Henry Wigmore was already an established legal scholar. He had been the Dean of the Northwestern University School of Law since 1901, and the first edition of *Wigmore on Evidence*, an encyclopedic survey of the development of the law of evidence, was published in 1904. When our country joined the war, Wigmore volunteered for the United States Army Judge Advocate General's Corps and was commissioned a major, at the age of 54. In just six weeks, he drafted the law that came to be known as the SSCRA.

Congress quickly enacted Major Wigmore's work into law, and that law served our country well through two world wars, the Korean War, and the Vietnam War. To explain the underlying purpose, in a 1917 subcommittee report, the House Military Affairs Committee wrote, "The Shylock, to whom his pound of flesh is dearer than patriotism, is not the only man against whom the soldier must be given relief."

By the time of the Persian Gulf War of 1990-91, it had become apparent that the law needed to be updated, because of the profound changes in our economy and legal system in the years since 1917. For example, under the SSCRA it was possible for a person entering military service to terminate a lease on premises (apartment, house, office, farm, etc.), but there was no provision for terminating a vehicle lease.

Today, as in 1917, entering active duty in the armed forces is a major life change. The individual often suffers a precipitous drop in income. For example, my late father was a young accountant at Peat Marwick Mitchell (a big-eight accounting firm) when he was drafted in May 1941. I don't know what Peat Marwick paid young accountants in 1941, but it must have been much more than the \$18 per month that my father earned as a Private in the Army.

Of course, military personnel are much better paid today, but so are civilians. Of the 846,494 National Guard and Reserve personnel called to the colors since September 11, 2001, more than a third have suffered a significant drop in income upon entering active duty. I personally have talked to many Guard and Reserve members who have six-figure civilian incomes but are junior enlisted members of the military.

Entering active duty often means that certain expensive "necessities" have suddenly become encumbrances—the apartment, the office, the leased Mercedes, the cell phone. The SCRA now permits the person entering active duty to terminate premise and vehicle leases and cell phone contracts.

In most cases, the individual will be hundreds if not thousands of miles away from his or her home and will be fully engaged with military duties. If someone sues the service member, the member may not even be aware of the lawsuit, much less have the opportunity to respond with his or her side of the story.

Most importantly, entering active duty means that the service member owes his or her entire attention to the military duties at hand. The major point of the SCRA, as well as USERRA, is to put civilian concerns out of the service member's mind, to the maximum extent feasible, while the member is serving at the tip of the spear or training for such service.

This is a safety issue, for the individual service member and for his or her entire unit. If, for example, I am in the foxhole next to Jane Smith, I should not have to worry that she is not paying full attention to her sector of the perimeter because she cannot put out of her mind her worry that her home thousands of miles away is likely to be foreclosed upon.

The Supreme Court has stated that the basic purpose of the civil relief statute is to "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Five years later, the Supreme Court held that, "The Act must be read with an eye friendly to those who dropped their affairs to answer their country's call." *LeMaistre v. Leffers*, 333 U.S. 1, 5 (1948).

When Congress enacted the SCRA in 2003[1], to replace the SSCRA, Congress included an explicit statement of the purposes of the law:

The purposes of this Act are—(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and (2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 U.S.C. App. 502.

Those who drafted the SCRA realized that the landlord, the creditor, or others might be tempted to try to trick the service member into waiving his or her valuable SCRA rights. Accordingly, section 107 of the SCRA provides important safeguards against inadvertent or imprudent waivers of valuable rights. That section provides as follows:

§ 517. Waiver of rights pursuant to written agreement [Sec. 107]

(a) In general. A servicemember may waive any of the rights and protections provided by

this Act. Any such waiver that applies to an action listed in subsection (b) of this section is

effective only if it is in writing and is *executed as an instrument separate from the obligation*

or liability to which it applies. In the case of a waiver that permits an action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed *during or after the servicemember's period of military service [not before].* The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.

(b) Actions requiring waivers in writing. The requirement in subsection (a) for a written waiver applies to the following:

(1) The modification, termination, or cancellation of—

(A) a contract, lease, or bailment; or

(B) an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage.

(2) The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that—

(A) is security for any obligation; or

(B) was purchased or received under a contract, lease, or bailment.

(C) Prominent Display of Certain Contract Rights Waivers. Any waiver in writing of a right or protection provided by this Act that applies to a contract, lease, or similar legal instrument must be *in at least 12 point type*.

(D) Coverage of periods after orders received. For the purposes of this section—

(1) a person to whom section 106 [50 U.S.C. App. §516] applies shall be considered to be a servicemember; and

(2) the period with respect to such a person specified in subsection (a) or (b), as the case may be, of section 106 [50 U.S.C. App. §516] shall be considered to be a period of military service.

50 U.S.C. App. 517 (emphasis supplied).

If you have questions about your rights under the SCRA, USERRA, or other laws, related to your military service, please call me at 800-809-9448, extension 730, or e-mail me at SWright@roa.org. As the Director of the SMLC, I am here taking calls and e-mails during regular business hours and until 2200 Eastern Time on Thursdays. The point of the Thursday evening availability is to enable Reserve and Guard personnel to call me from the privacy of their own homes, outside their civilian work hours. While you are at work, you should be concentrating on the duties of your job, not your personal legal issues. You should be especially careful about using your employer's telephone, computer, e-mail system, or time to complain about your employer or to seek information about your rights with respect to that employer. Accordingly, I am willing to contribute my Thursday evenings to provide you the opportunity to call outside your work hours.

[1] The SCRA is codified in the Appendix of title 50 of the United States Code, at sections 501 through 597b (50 U.S.C. App. 501-597b)