

Illegal Non-Judicial Foreclosures on Service Member's House

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

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Q: I am an attorney in a small town in Michigan. I have two clients—a Soldier in the United States Army and his wife. I have never served in the military myself, and these military issues are so confusing. Help!

Let's call the Soldier Joe Smith. In 2006, Joe and his wife bought a house, using a mortgage obtained from ABC Bank. Joe was in the Army Reserve but not on active duty at the time. The standard mortgage documentation included a "deed of trust" in which Joe and his wife appointed a "trustee" who is authorized to "agree to" a non-judicial foreclosure at any time that the couple is more than two months behind on mortgage payments.

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 (VRRA—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 VRRA 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 VRRA 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.

In 2007, Joe was recalled to active duty and deployed to Iraq. After his one-year involuntary recall to active duty, Joe volunteered to stay on active duty long-term and transferred to the Regular Army. In September 2011, Joe was transferred to Fort Hood, Texas, for four months of training in preparation for a one-year assignment in Afghanistan.

Joe's wife, Josephine, accompanied her husband to Fort Hood to be with him during his four months of training. They locked up the Michigan house, leaving most of their furniture and other belongings there, and they lived in assigned military quarters at Fort Hood during Joe's training. At the end of December 2011, Joe completed his Fort Hood training and deployed to Afghanistan, and Josephine then drove back to Michigan to move back into the house.

When she arrived at the house, she was shocked to find all their furniture and belongings out on the yard, damaged beyond repair by the winter weather. The locks had been changed, and there were large padlocks blocking entrance to the doors and windows. Josephine hired a locksmith, at considerable expense, to gain access to her own house. Inside, she found that a contractor had "winterized" the house poorly and had caused great damage. The Smiths' losses, for damages to the house and belongings, are well in excess of \$200,000.

Upon investigation, we learned that ABC Bank had "assumed" that the Smiths had walked away from their mortgage, because there was no one home for many weeks in the fall of 2011. Although the Smiths were only one month behind on mortgage payments, the bank foreclosed, without a court order. All of these damages are the direct result of the foreclosure.

I understand that there is a federal law called the Soldiers' and Sailors' Civil Relief Act (SSCRA) and that you are an expert in that law. Have the Smiths' SSCRA rights been violated? Can I sue ABC Bank in federal court on their behalf?

A: In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), as a long-overdue rewrite of the SSCRA, which was originally enacted in 1917, when the United States entered World War I. The SCRA is codified at sections 501 through 597b of the Appendix to Title 50 of the United States Code (50 U.S.C. App. 501-597b).

I invite your attention to www.servicemembers-lawcenter.org. You will find 792 articles about the SCRA, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index^[1] and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

I retired from the Judge Advocate General's Corps of the Navy Reserve in 2007. In 2009, I retired from the private practice of law and joined the full-time staff of the Reserve Officers Association (ROA), as the first Director of the Service Members Law Center (SMLC). Each month, I receive and respond to upwards of 700 calls and e-mails from service members, military family

members, attorneys, employers, reporters, congressional staffers, and others, with questions about military-legal topics. I am here answering calls and e-mails during regular business hours and until 10 p.m. Eastern Time Monday and Thursday evenings. Most of the questions are about USERRA, but I also receive a considerable number of inquiries about the SCRA.

It seems clear that ABC Bank violated section 303 of the SCRA. That section provides as follows:

§ 533. Mortgages and trust deeds [Sec. 303]

(a) Mortgage as security. This section applies only to an obligation on real or personal property owned by a servicemember that--

(1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and

(2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

(b) Stay of proceedings and adjustment of obligation. In an action filed during, or within 9 months after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service--

(1) stay the proceedings for a period of time as justice and equity require, or

(2) adjust the obligation to preserve the interests of all parties.

(c) Sale or foreclosure. A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within 9 months after, the period of the service-member's military service except--

(1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or

(2) if made pursuant to an agreement as provided in section 107 [50 U.S.C. App. 517].

(d) Misdemeanor. A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by sub-section (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

50 U.S.C. App. 533.³

Because Joe and Josephine obtained the mortgage and signed the deed of trust at a time when Joe was not on active duty, and because Joe was on active duty at the time of the foreclosure, it was unlawful for ABC Bank to initiate a *non-judicial* foreclosure. The Department of Defense (DOD) operates a free service enabling attorneys, banks, and other creditors to learn easily that a named person (with a known date of birth and Social Security number) is or is not on active duty in the armed forces.

Section 303 of the SCRA makes it unlawful for bank to foreclose, without a court order, because the SCRA also provides procedural safeguards for service members in federal and state judicial and administrative proceedings.⁴ Your clients' case is an excellent example of the need for the rule against non-judicial foreclosures on active duty service members.

Section 303(c)(2) of the SCRA [50 U.S.C. App. 533(c)(2)] provides for non-judicial foreclosure in these circumstances "if made pursuant to an agreement as provided in section 107" [50 U.S.C. App. 517]. Section 107 provides that a service member may waive SCRA rights, but the section has multiple requirements (including type size of at least 12) that must be met if a waiver is to be effective. It is clear that your client Joe Smith has not effectively waived his SCRA rights.

Q: Does the SCRA provide a private right of action? Am I permitted to file suit in federal court on behalf of Joe and Josephine Smith? If I file suit on their behalf and win, do I get attorney fees?

A: Yes, to all three questions. Section 802 of the SCRA⁵ (50 U.S.C. App. 597a) creates an explicit private right of action in federal court. That section also provides for requiring the defendant to pay the attorney fees of the successful SCRA plaintiff.

³[The phrase "or within 9 months" in subsections (b) and (c) was added by P.L. 110-289, effective July 30, 2008. The "sunset" of the additional 9 month period of protection was extended to December 31, 2012 by S. 4508. That bill passed on December 22, 2010.]

⁴For example, under section 201(b) of the SCRA, 50 U.S.C. App. 521(b), the court must obtain from the plaintiff an affidavit to the effect that the defendant is not a member of the armed forces on active duty, as a condition precedent to granting a default judgment for the plaintiff. If the defendant is on active duty, section 201 of the SCRA provides several actions that must be taken before judgment can be entered against the defendant. The point of these safeguards is to ensure that the active duty defendant is in fact aware of the lawsuit and has had the opportunity to defend. A bank could make a mockery of these SCRA protections if it could bypass the judicial process altogether by means of *non-judicial* foreclosure.

⁵Section 802 was added by Public Law 111-275, effective October 13, 2010. Prior to 2010, the SCRA did not contain an explicit private right of action, but most of the courts that addressed the question found an implied private right of action.

It appears to me that your clients also have common law tort claims against the bank. Because these state law claims arise out of the same set of transactions and occurrences as the SCRA claims, you can bring these state law claims in federal court, along with your federal claims, under what is known as supplemental jurisdiction. *See* 28 U.S.C. 1367.

Good luck and thank you for undertaking to represent this military family. Please let me know how the case turns out.

Update – March 2022⁶

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, 2015.⁷ 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. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 533 discussing mortgages and trust deeds can be found at 50 U.S.C. § 3953. A notable change in 50 U.S.C. § 3953 is that the subsection (c) and (d) have increased the time from nine months to one year.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁸

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This article is one of 2,300-plus “Law Review” articles available at 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.

⁶Update by Second Lieutenant Lauren Walker, USMC.

⁷*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).

⁸Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

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.

If you are now serving or have ever served in any one of our nation’s eight⁹ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE

⁹Congress recently established the United States Space Force as the 8th uniformed service.