LAW REVIEW 15109[1]
December 2015

Amend the SCRA To Preclude Predispute Binding Arbitration Clauses

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

1.5—USERRA arbitration
4.1—SCRA right to interest rate reduction upon mobilization
4.3—SCRA right to continuance and protection against default judgment
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On November 19, 2015, Senator Jack Reed (Democrat of Rhode Island) and Senator Lindsey Graham (Republican of South Carolina) introduced S. 2331, and the bill was referred to the Senate Veterans' Affairs Committee. The purpose and effect of the bill is described as follows: "To amend the Servicemembers Civil Relief Act (SCRA) to make invalid and unenforceable predispute arbitration agreements with respect to controversies arising under such Act and to preserve the rights of servicemembers to bring class actions under such Act, and for other purposes." I wholeheartedly endorse this bill, and I urge readers to contact their United States Senators and Representatives and urge them to sign on as co-sponsors and otherwise to support the enactment of this bill.

I invite the reader's attention to my Law Review 0839, published in August 2008. The title of the article is: "SCRA does not apply to arbitration proceedings, but it should." For your convenience, here is the entire text of that article:

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

Q: I recently returned from an 18-month recall to active duty for service in Iraq. Before the recall, I had a dispute with a local business that claims I owe them money. I deny that I owe them anything; the service they provided was shoddy and worthless. While I was in Iraq, the business took its claim against me to binding arbitration, claiming that in the fine print of the order form I had agreed to arbitration. Because I was in Iraq, I was unable to appear for the arbitrator's hearing. In fact, I was not even aware that the hearing was about to occur.

After I returned from Iraq, the business sued me in state court and got a judgment enforcing the arbitrator's award. I showed up for the court proceeding and insisted that I had a defense against the claim and that my military service had prevented me from putting on my case before the arbitrator. The judge would not listen to my arguments. He said that I had agreed to the arbitration, that the arbitrator had held a valid hearing, and that the arbitrator was not required to continue the hearing based on my being thousands of miles away serving our country at the tip of the spear. The judge turned the arbitrator's award into a state court judgment. Now, I guess that I must pay this unjust claim. If I don't, the business will seize my car or other property.

This is not fair. I heard somewhere that the Soldiers' and Sailors' Civil Relief Act (SSCRA) protected me from things like this while military service requires me to be far away. Help!

A: In 1917, after the United States entered World War I, a group of eminent legal scholars quickly drafted and Congress quickly enacted the SSCRA, to protect the rights of those who had volunteered or been drafted to go "over there" to fight "the war to end all wars." The original SSCRA expired in 1919, with the end of the wartime period of national emergency. In 1940, after World War II had broken out in Europe, Congress reenacted the SSCRA and made it permanent. The SSCRA served our nation reasonably well, but over the decades some of the provisions became obsolete because of changes that could not have been anticipated in 1917 or 1940.

In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), a long-overdue rewrite of the SSCRA. The SCRA is codified in the Title 50 Appendix of the United States Code, sections 501-596.

The SSCRA provided for continuances and default judgment protections in federal and state civil *judicial* proceedings. The SCRA expanded the applicability of those provisions to make them apply to *administrative* proceedings as well as judicial proceedings—a long-overdue and necessary change.

The SCRA drafters accomplished this expansion by means of an expansive definition of the word "court." "The term 'court' means a court *or an administrative agency* of the United States or of

any State (including any political subdivision of a State), whether or not a court or administrative agency of record." 50 U.S.C. App. 511(5) (emphasis supplied).

This language is certainly broad enough to cover federal, state, and local administrative agencies and boards and commissions and their proceedings. It is not broad enough, however, to cover arbitration proceedings. This is an oversight that Congress needs to correct. Your situation is an excellent illustration of the need for a legislative fix.

Congress enacted the Federal Arbitration Act (FAA) in the 1920s to facilitate arbitration of business-to-business disputes. Arbitration is certainly an appropriate way of resolving disputes between or among sophisticated business entities, like a dispute between a manufacturer and a company that provides raw materials or equipment for the manufacturer. Arbitration is not an appropriate way to resolve disputes between a business and its customers, a bank and its debtors, or an employer and its employees.

For the business, bank, or employer, arbitration of disputes is an everyday occurrence. For the individual customer, debtor, or employee, arbitration is a once-in-a-lifetime experience. For the arbitrator, the business, bank, or employer is a likely source of repeat business. The arbitrator has a real economic incentive to rule for the business, bank, or employer, in order to be selected again and again as the arbitrator. The arbitrator can simply ignore a statute like the SCRA and there is no remedy.

For example, let us say that Joe Smith has a credit card issued by Daddy Warbucks Bank (DWB), and the interest rate on the $4,000 balance is 29%. Smith is a Third Class Petty Officer (E-4) in the Coast Guard Reserve, and he is involuntarily called to active duty for a year. The call-up has adversely affected Smith's ability to meet his financial obligations, because his E-4 active duty pay is substantially less than the salary he had been earning in his civilian job. Under section 207 of the SCRA[3] Smith is entitled under these circumstances to have the interest rate reduced to 6% and capped at that level during Smith's active duty service.

The DWB credit card agreement fine print includes a provision mandating binding arbitration of any dispute between the bank and the debtor. After entering active duty, Smith applies to the bank to reduce the interest rate on the credit card to 6%. Pursuant to the arbitration clause, the bank refers Smith's request to an arbitrator selected by the bank. The arbitrator simply ignores the clear SCRA requirement to reduce the interest rate. Under current law, there apparently is no remedy for an arbitrator who flouts his or her obligation to apply a statute like the SCRA. When a trial court judge interprets a statute or a case law doctrine, the appellate courts are available to review the judge's conclusions of law. Findings of fact get great deference, but conclusions of law are reviewed *de novo* (as of new). But in arbitration no one reviews the

[3] 50 U.S.C. App. 527.

arbitrator's interpretations of the statute or legal doctrine. If the arbitrator misunderstands or even intentionally misconstrues the underlying statute, there simply is no remedy.

Let us say that a bank has systematically violated the SCRA, in a way that affects thousands of customers in an essentially identical manner. No single individual claim is for more than a few hundred dollars, but the cumulative amount of the claims runs into the tens of millions of dollars. This is the kind of situation where a class action lawsuit is necessary and appropriate. Without class action treatment, there is no practicable remedy, because the attorney fees and court costs will exceed the amount of any one claim. Businesses, banks, and employers seek to preclude class action lawsuits through the fine print in agreements that customers, debtors, and employees have no choice but to sign. S. 2331 would preclude this scam.

I strongly favor legislation that will render invalid and unenforceable binding "agreements" to submit future SCRA and Uniformed Services Employment and Reemployment Rights Act (USERRA) disputes to arbitration and that will preclude clauses that prevent class action treatment of disputes.