

## LAW REVIEW 17072<sup>1</sup>

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### **The Federal Servicemembers Civil Relief Act Does Not Apply to National Guard Members on Full-time National Guard Duty, but such Members May Have SCRA-type Rights under State Law.**

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Update on Sam Wright

- 1.1.3.3—USERRA applies to National Guard service
- 1.8—Relationship between USERRA and other laws/policies
- 4.0—SCRA generally
- 4.1—SCRA right to interest rate reduction upon entering active duty
- 4.9—SCRA enforcement

**Q: I am a Sergeant First Class in the Louisiana Army National Guard, and I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA). In Law Review 17036 (April 2017), you wrote that USERRA applies to National Guard members performing “full-time National Guard duty” but the SCRA does not apply to those members.**

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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 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<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. I have 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 35 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](mailto:SWright@roa.org) or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

I recently reentered full-time military service, and my full-time service qualifies as “full-time National Guard duty” under the criteria that you described in Law Review 17036. I am in some financial difficulty, with six overdue credit card accounts carrying interest rates varying from 20% to 29%. A National Guard judge advocate told me that, under the SCRA, a person entering or reentering full-time military service is entitled to have the interest rates on financial obligations incurred while not on active duty reduced to 6% and capped at that level during the active duty period.

Taking the judge advocate’s advice, I sent certified letters to the six banks, informing them that I have reentered active duty and demanding that my interest rate be reduced to 6%, in accordance with the SCRA. Five of the banks reduced the interest rate, as requested. One bank—let’s call it Daddy Warbucks Bank or DWB—refused to lower the interest rate. The DWB lawyer sent me a letter insisting that the SCRA does not apply to service members on “full-time National Guard duty.”

The National Guard judge advocate told me that the federal SCRA does not apply to National Guard members performing “full-time National Guard duty” but Louisiana law gives these Guard members similar rights, as a matter of state law. Is that correct?

A: Yes, what the National Guard judge advocate told you is true, and thank you for bringing this issue to my attention, thus giving me the opportunity to clarify what I wrote in Law Review 17036.

I adhere to what I wrote in the April article, that National Guard members performing “full-time National Guard duty” do not have SCRA rights under the federal statute. But in Louisiana the Legislature has adopted the federal SCRA as state law and has made the provisions of the federal SCRA apply to certain persons who do not have rights under the federal statute. Among those persons are National Guard members on “full-time National Guard duty.”<sup>3</sup> Here is the pertinent section of Louisiana law:

**§ 29:422. Enforcement of Servicemembers Civil Relief Act; Uniformed Services Employment and Reemployment Rights Act; notice requirements.**

- A.
  - (1) The provisions of the Servicemember’s Civil Relief Act (50 App. U.S.C. 501 et seq.) (SCRA) and the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. 4301 et seq.) (USERRA) are adopted and made a part of this Part, and all of the benefits, protections, and rights provided in SCRA and USERRA shall be applicable to all persons called to service in the uniformed

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<sup>3</sup> The Louisiana law also accords SCRA rights and USERRA rights to National Guard members on state active duty for Louisiana or other states.

services *as defined in R.S. 29:403* and shall be enforceable pursuant to the provisions of this Section.

- (2) The Department of Labor shall make available the following notice that every employer shall post in a conspicuous place in each employment establishment:
  - “If you are in the national guard, military reserves, or active in the military, you have certain protected employment and reemployment rights, freedom from discrimination rights, and civil relief rights under federal law 38 U.S.C. 4301 et seq. (USERRA) and 50 App. U.S.C. 501 et seq. (SCRA) and state law R.S. 29:401 et seq. (MSRA). If you feel that you have been discriminated against or denied such rights on account of your service in the uniformed services, contact the Employer Support Guard and Reserve Committee at 1-800-336-4590.”
- B. The district courts of this state shall have jurisdiction over proceedings involving the Servicemember’s Civil Relief Act (50 App. U.S.C. 501 et seq.) (SCRA) and the Uniformed Services Employment and Reemployment Rights Act, which shall be governed by the rules applicable to ordinary proceedings.
- C. The district and appellate courts shall give preference in scheduling such proceedings, upon the motion of any person in the uniformed services, or the person’s attorney, who presents certification that the person has performed service in the uniformed services or is in service in the uniformed services.
- D. Suits to enforce the provisions of this Part may be instituted in any court of competent jurisdiction and appropriate venue by the attorney general of Louisiana.<sup>4</sup>

The section quoted above refers to section 29:403 of the Louisiana Revised Statutes, and the pertinent subsection of that section is as follows:

(11) “Service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, *full-time national guard duty*, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty. “Service in the uniformed services” also means service in the armed forces of the United States pursuant to authorization by the United States Congress or presidential proclamation pursuant to the War Powers Resolution (50 U.S.C. 1541 et seq.). “Service in the uniformed services” also means state active duty by members of the national guard who are activated pursuant to a call of the governor of this state or of any other state as provided for by law.<sup>5</sup>

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<sup>4</sup> Louisiana Revised Statutes section 29:422 (emphasis supplied).

<sup>5</sup> Louisiana Revised Statutes section 403(11) (emphasis supplied).

Thus, under Louisiana law you may be entitled to make DWB reduce the interest rate to 6%. What you have is a state law claim that you can make in state court, rather than a federal law claim that you can make in federal court.

The pertinent section of the federal SCRA is as follows:

**§ 3937. Maximum rate of interest on debts incurred before military service**

- (a) Interest rate limitation.
  - (1) Limitation to 6 percent. An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent--
    - (A) during the period of military service and one year thereafter, in the case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage; or
    - (B) during the period of military service, in the case of any other obligation or liability.
  - (2) Forgiveness of interest in excess of 6 percent. Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.
  - (3) Prevention of acceleration of principal. The amount of any periodic payment due from a servicemember under the terms of the instrument that created an obligation or liability covered by this section shall be reduced by the amount of the interest forgiven under paragraph (2) that is allocable to the period for which such payment is made.
- (b) Implementation of limitation.
  - (1) Written notice to creditor. In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.
  - (2) Limitation effective as of date of order to active duty. Upon receipt of written notice and a copy of orders calling a servicemember to military service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.<sup>6</sup>
- (c) Creditor protection. *A court may grant a creditor relief from the limitations of this section if, in the opinion of the court, the ability of the servicemember to pay interest upon the obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of the servicemember's military service.*

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<sup>6</sup> 50 U.S.C. 3937 (emphasis supplied).

- (d) Definitions. In this section:
  - (1) Interest. The term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability.
  - (2) Obligation or liability. The term "obligation or liability" includes an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage.
- (e) Penalty. Whoever knowingly violates subsection (a) shall be fined as provided in title 18, United States Code, imprisoned for not more than one year, or both.

Under subsection (c), italicized above, DWB has the right to oppose your demand that the interest rate be reduced to 6%. The court can exempt the bank from the obligation to reduce the interest rate if the court finds that your ability to pay the higher interest rate was not "materially affected" by your reentry on active duty. For example, let us assume that just before you reentered active duty you were earning only \$25,000 per year in a part-time, minimum wage job. In that circumstance, your reentry onto full-time military service as a Sergeant First Class did not "materially affect" your ability to pay your financial obligations. Indeed, in that situation your reentry to full-time military service substantially improved your financial situation.