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The SCRA Forbids Non-Judicial Foreclosure of the Personal or Real Property of the Active Duty Service Member

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[Update on Sam Wright](#)

4.0—SCRA and SSCRA generally

4.3—Right to a continuance and protection against default judgment

4.6—Eviction and foreclosure protection

4.9—SCRA enforcement

Gordon v. Pete's Auto Service of Denbigh, Inc., 670 F. Supp. 2d 453 (E.D. Va. 2009); reversed sub nom. Gordon v. Pete's Auto of Denbigh, 637 F.3d 454 (4th Cir. 2011). Gordon v. Pete's Auto Service of Denbigh, Inc., 837 F. Supp. 2d 581 (E.D. Va. 2011); Gordon v. Pete's Auto Service of Denbigh, Inc., 838 F. Supp. 2d 436 (E.D. Va. 2012) (on remand).

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² 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 42 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.

Background on the SCRA

As Colonel Mark E. Sullivan described in detail in Law Review 116 (March 2004), President George W. Bush signed into law the Servicemembers Civil Relief Act (SCRA)³ in 2003, as a long-overdue update and rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I.

The SCRA has been amended several times since 2003. Perhaps the most important amendment was made by the Veterans' Benefits Act of 2010.⁴ That Act enacted a new SCRA section, as follows:

- (a) In general. Any person aggrieved by a violation of this Act may in a civil action--
 - (1) obtain any appropriate equitable or declaratory relief with respect to the violation; and
 - (2) recover all other appropriate relief, including monetary damages.
- (b) Costs and attorney fees. The court may award to a person aggrieved by a violation of this Act who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.⁵

What is a private right of action?

When Congress enacts a law giving rights to individuals, it usually includes a provision enabling those individuals to enforce those rights in federal court. Some enforcement provisions are called "private right of action" provisions. Section 4042 of title 50 provides an explicit private right of action, but that section was not enacted until 10/13/2010. Prior to that date, the SCRA and the SSCRA had no explicit private right of action provision. Among the courts that addressed the question, most held that there was an *implied* private right of action, but a few courts held the opposite. The enactment of section 4042 was necessary because some courts, including the district court in the *Gordon* case, have held that there was no implied private right of action, and that left affected service members without a remedy in some cases.

The *Gordon* decisions

Andre Gordon was an active duty sailor in the United States Navy. He was transferred to a Norfolk-based warship in March 2007, and he moved to the area with his wife. They signed a

³ Public Law 108-189, 117 Stat. 2835 (Dec. 19, 2003).

⁴ Public Law 111-275, 124 Stat. 2864, 2878 (Oct. 13, 2010).

⁵ 50 U.S.C. 4042. At the time of the 2010 enactment, and at the time the 4th Circuit decided the *Gordon* case in 2011, the citation for this section was 50 U.S.C. App. 597a. In 2015, the sections of title 38 of the United States Code were renumbered and the confusing and cumbersome "Appendix" was eliminated. Section 597a of the Appendix became section 4042. Please see Law Review 15115 (December 2015) for a conversion table showing the old numbering and new numbering of SCRA sections.

lease for an apartment in nearby Newport News, Virginia and moved in. Gordon informed the management of the apartment complex that he was on active duty and subject to deployment and that when he deployed his wife would return to her former home in Jacksonville, Florida. He also registered his vehicle (a 2002 Jeep Grand Cherokee) with the apartment management, and he listed his wife as his emergency point of contact.

Shortly after Gordon and his wife moved into their apartment, he was deployed, and she returned to Jacksonville. They continued paying rent for the apartment, in accordance with the lease, and they left the Jeep parked in the apartment complex parking lot. In May 2007, someone in the apartment management office noticed that the Jeep had a flat tire and requested Pete's Auto Service to tow the vehicle, which the company did. The company held the vehicle for just 35 days and then sold it to "cover" the costs for towing and storage. Neither the apartment management nor the automobile towing company made any effort to notify Gordon or his wife that the vehicle had been towed, and Gordon was not aware of the towing until he returned from deployment many months later.

Selling the vehicle without judicial authorization violated the SCRA. The pertinent section is as follows:

- (a) Liens.**
 - (1) Limitation on foreclosure or enforcement.** *A person holding a lien on the property or effects of a servicemember may not, during any period of military service of the servicemember and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement.*
 - (2) Lien defined.** For the purposes of paragraph (1), the term "lien" includes a lien for storage, repair, or cleaning of the property or effects of a servicemember or a lien on such property or effects for any other reason.
- (b) Stay of proceedings.** In a proceeding to foreclose or enforce a lien subject to this section, the court may on its own motion, and shall if requested by a servicemember whose ability to comply with the obligation resulting in the proceeding is materially affected by military service—
 - (1)** stay the proceeding for a period of time as justice and equity require; or
 - (2)**
 - (3)** adjust the obligation to preserve the interests of all parties. The provisions of this subsection do not affect the scope of section 303.
 - (4)**

(c) Misdemeanor. *A person who knowingly takes an action contrary to this section, or 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.⁶*

The SCRA gives the absent service member the right to a continuance and to default judgment protection in civil proceedings.⁷ If a party is permitted to use “self-help” and to foreclose on personal or real property without a court order, these SCRA protections can be rendered largely meaningless. Thus, section 3958 is very necessary. The SSCRA contained a similar provision prior to the enactment of the SCRA in 2003.

After he returned from deployment and learned what had happened to his Jeep, Gordon sued five defendants (including Pete’s Auto Service) in the United States District Court for the Eastern District of Virginia. The other four defendants were dismissed and only Pete’s remained.

After filing the suit, Gordon found it necessary to request a continuance when he was again deployed outside the United States. Instead of granting the continuance, Judge Rebecca Beach Smith, on her own motion, held that she did not have jurisdiction because the SCRA did not provide for a private right of action in federal court.⁸

Gordon appealed to the United States Court of Appeals for the 4th Circuit.⁹ As is always the case in the federal appellate courts, the case was assigned to a panel of three judges: Judge J. Harvie Wilkinson III, Judge Roger L. Gregory, and Judge James A. Wynn, Jr.¹⁰ Judge Wilkinson wrote the decision, and Judge Wynn and Judge Gregory concurred.

After Judge Smith dismissed the case for want of jurisdiction, but before the 4th Circuit addressed the case on appeal, Congress added section 4042 to the SCRA, providing an explicit private right of action in federal court. The principal issue on appeal was whether the new SCRA section should be given retroactive effect.

⁶ 50 U.S.C. 3958 (emphasis supplied). At the time the District Court and the 4th Circuit decided this case the citation was 50 U.S.C. App. 537. In 2015, the confusing and cumbersome “Appendix” to title 50 was eliminated and the sections were renumbered. Please see footnote 5.

⁷ 50 U.S.C. 3931, 3932, 3934, 3935.

⁸ Judge Smith held that the SCRA “is neither a substantive grant of civil immunity nor a cause of action for servicemembers, but is a procedural mechanism designed to *preserve* servicemembers’ legal rights and remedies, which would otherwise be prejudiced while they are absent and answering the call of duty.” (Emphasis in original.) Judge Smith cited *Davidson v. General Finance Corp.*, 295 F. Supp. 878 (N.D. Ga. 1968) for the proposition that there is no implied private right of action under the SSCRA and SCRA. She ignored more recent cases holding that there is an implied private right of action.

⁹ The 4th Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

¹⁰ Like me, Judge Wynn is retired from the Navy Reserve Judge Advocate General’s Corps. In 1990-93, we served together in Naval Reserve CINCLANTFLT 206 in Norfolk, Virginia.

When Congress enacts a new section of the United States Code or amends an existing section, it normally makes the change prospectively—applying starting on the date of enactment of the new or amended section. There is a presumption that new and amended laws apply only prospectively. If Congress wants a new provision to apply retroactively, it needs to express that intention clearly in the text of the enactment.¹¹ The 4th Circuit held: “A statute that only addresses which court shall have jurisdiction normally governs pending cases [pending at the time of enactment of the new provision] because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties.”¹²

The 4th Circuit opinion noted that Gordon could have brought his suit in Virginia state court and could have obtained relief in that court under Virginia’s common law tort of conversion. Accordingly, applying the 2010 amendment retroactively to the *Gordon* case (which arose in 2007, was filed in 2008, and was decided by the district court in 2009) was not unfair and that the 2010 amendment would be applied to the case.

***Gordon* on remand**

On remand, Pete’s Auto Service argued that it was not liable to Gordon because it had strictly complied with Virginia law about foreclosing on a vehicle for non-payment of towing and storage fees, but in an eloquent and scholarly opinion Magistrate Judge F. Bradford Stillman firmly rejected this proffered defense, as follows:

The plaintiff disputes whether Pete’s Auto Service strictly complied with the requirements of Virginia Code section 43-34, but this issue is not material to the defendant’s liability for conversion. Even assuming that Pete’s Auto Service complied fully with the procedures established by state law, it most certainly failed to comply with Section 307(a) of the SCRA, which required Pete’s to obtain a court order before enforcing its lien against Gordon’s vehicle. That Pete’s Auto Service may have mistakenly believed that it had a legal right to re-title the Jeep is of no moment. *See Morrisette v. United States*, 342 U.S. 246, 270 note 31. Because the defendant had no legal right to take title to the Jeep without first obtaining a court order, its acquisition of the vehicle constitutes the wrongful exercise of dominion or control over the plaintiff’s property, depriving the plaintiff of possession.¹³

¹¹ Article I, Section 9 of the United States Constitution provides, in pertinent part, as follows: “No Bill of Attainder or ex post facto Law shall be passed.” (Yes, it is capitalized just that way, in the style of the late 18th Century.) An ex post facto law is a *criminal* provision that makes unlawful conduct that was lawful when it was committed or that increases the penalty for an act after it has been committed. The prohibition of ex post facto laws does not apply to civil laws. Nonetheless, the prohibition does express the idea that it is fundamentally unfair to impose adverse consequences on a party for conduct that was lawful when committed.

¹² *Gordon*, 633 F.3d at 461.

¹³ *Gordon*, 837 F. Supp. 2d at 586.

Gordon sought punitive damages, contending that Pete's Auto Service had violated the SCRA willfully. The defendant filed a motion for summary judgment on the punitive damages question. Judge Stillman denied the summary judgment motion, holding that there was enough evidence for a reasonable jury to award punitive damages, in an eventual trial. Judge Stillman also reserved judgment on the question of whether Pete's could be ordered to pay Gordon's attorney fees.

Some months later, Judge Stillman granted Gordon essentially all the relief that he sought, including attorney fees for legal services provided by Gordon's attorney both before and after the 2010 enactment of the explicit private right of action provision in the SCRA. Judge Stillman also held, contrary to Judge Smith's 2009 ruling, that by far the majority rule prior to 2010 was that there was an implied private right of action under the SCRA and the SSCRA, citing several cases not cited by Judge Smith in 2009:

Moreover, even before section 802(b) was enacted on October 13, 2010, this Court had authority to award attorney's fees to a prevailing plaintiff under the SCRA. For one, where a private right of action is judicially implied, the Supreme Court has recognized that the court has "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284 (1998).

Thus, prior to the enactment of section 802(b), a federal court finding an implied private right of action under the SCRA already had "great latitude in awarding damages, including attorney's fees, especially considering the purposes of SCRA." *Clauer v. Heritage Lakes Homeowners Ass'n*, No. 4:09-cv-560, 2010 U.S. Dist. LEXIS 59462, 2010 WL 2465363, at *4 (E.D. Tex. June 3, 2010) (magistrate judge's report and recommendation), adopted, 2010 U.S. Dist. LEXIS 59560, 2010 WL 2465240 (E.D. Tex. June 16, 2010); see also *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, (1992) (noting that, in implying a private right of action, federal courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise").

In its November 2009 decision, this Court held that the pre-amendment SCRA did not include an implied private right of action for damages. *Gordon*, 670 F. Supp. 2d at 455-56 (citing *Davidson v. General Financial Corporation*, 295 F. Supp. 878, 881 (N.D. Ga. 1968)). Although that decision was reversed by the Fourth Circuit on appeal, the reversal was based entirely on the newly amended statute. See *Gordon*, 637 F.3d at 457-61. The Fourth Circuit did not decide whether an implied right of action for damages existed under the pre-enactment SCRA, simply assuming *arguendo* that it did not. See *id.* at 459 n.1.

This Court's November 2009 ruling, however, is not dispositive in any event. Prior to the October 2010 enactment of Section 802, most federal courts examining whether

particular provisions of the SCRA provided an implied private right of action had concluded that they did. *Compare Clauer*, 2010 U.S. Dist. LEXIS 59462, 2010 WL 2465363, at *4 (finding an implied private right of action under SCRA section 501, 50 U.S.C. App. 561); *Frazier v. HSBC Mortgage Services, Inc.*, No. 8:08-CV-02396-T-24, 2009 U.S. Dist. LEXIS 108930, 2009 WL 4015574, at *4-*5 (M.D. Fla. Nov. 19, 2009) (finding implied private right of action under SCRA section 207, 50 U.S.C. App. 527); *Hurley v. Deutsche Bank Trust Co.*, No. 1:08-CV-361, 2009 U.S. Dist. LEXIS 20261, 2009 WL 701006, at *4 (W.D. Mich. Mar. 13, 2009) (finding implied private right of action under SCRA section 207, 50 U.S.C. App. 527); *Linscott v. Vector Aerospace*, No. CV-05-682-HU, 2006 U.S. Dist. LEXIS 6287, 2006 WL 240529, at *5-*7 (D. Or. Jan. 31, 2006) (finding implied private right of action under SCRA section 307, 50 U.S.C. App. 537); *Cathey v. First Republic Bank*, No. 00-2001-M, 2001 U.S. Dist. LEXIS 13150, at *17-*19 (W.D. La. July 6, 2001) (magistrate judge's report and recommendation) (finding implied private right of action under SSCRA precursor to SCRA section 207, 50 U.S.C. App. 527), adopted, 2001 U.S. Dist. LEXIS 13195 (W.D. La. Aug. 13, 2001); *Martin v. Armstrong*, No. 3:97-CV-2784-D, 1998 U.S. Dist. LEXIS 22791, 1998 WL 1765716, at *3 (N.D. Tex. Sept. 21, 1998) (finding implied private right of action under SSCRA precursors to SCRA section 108, 50 U.S.C. App. 518, and SCRA section 302, 50 U.S.C. App. 532); *Moll v. Ford Consumer Finance Co.*, No. 97 C 5044, 1998 U.S. Dist. LEXIS 3638, 1998 WL 142411, at *2-*5 (N.D. Ill. Mar. 23, 1998) (finding implied private right of action under SSCRA precursor to SCRA section 207, 50 U.S.C. App. 527), with *McMurtry v. City of Largo*, 837 F. Supp. 1155, 1157-58 (M.D. Fla. 1993) (finding no implied private right of action under SSCRA precursors to SCRA section 202, 50 U.S.C. App. 522, and SCRA section 206, 50 U.S.C. App. 526); *Huftstetler v. Davies*, 309 F. Supp. 1372, 1374 (N.D. Ga. 1970) (finding no implied private right of action under SSCRA precursor to SCRA section 301, 50 U.S.C. App. 531); *Davidson*, 295 F. Supp. at 881 (finding no implied private right of action under SSCRA precursor to SCRA section 201, 50 U.S.C. App. 521). Notably, the only one of these other federal court decisions to address Section 307 of the SCRA, the provision at issue in this case, found that an implied private right of action for damages did exist. See *Linscott*, 2006 U.S. Dist. LEXIS 6287, 2006 WL 240529, at *5-*7 (addressing the defendant's enforcement of a mechanic's lien without first obtaining a court order, in violation of SCRA section 307, 50 U.S.C. App. 537).

Even in the absence of an implied private right of action, this Court had authority to award attorney's fees under equitable principles. In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), the Supreme Court addressed "the power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute." *Id.* at 164. The Supreme Court noted that "[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts," including the award of "costs 'as between solicitor and client'" to the extent "fair justice to the other party will permit." *Id.* at 164-65. As noted above, this Court expressly recognized an implied private right of action for equitable relief under the pre-amendment SCRA in its November 2009 decision. See *Gordon*, 670 F.

Supp. 2d at 455 n. 4. In granting equitable relief, federal courts have previously held that an award of attorney's fees is among the equitable remedies available under the SCRA. See, e.g., *Omega Industries, Inc. v. Raffaele*, 894 F. Supp. 1425, 1430-31 (D. Nev. 1995).

Thus, whether or not **Section 307 of the SCRA** contained an implicit private right of action for damages, this Court had authority to award reasonable attorney's fees to a prevailing plaintiff prior to the October 2010 enactment of **Section 802(b)**. The October 2010 enactment of **Section 802(b)** did nothing to change the substantive obligations of the defendant as they previously existed under the SCRA. See *Bradley*, 416 U.S. at 721. It did not impair any previously existing rights of the defendant, increase the defendant's liability for past conduct, or impose any new duties with respect to transactions already completed. See *Gordon*, 637 F.3d at 459 (citing *Landgraf*, 511 U.S. at 280). "Because attorney's fees were available, albeit under different principles, before passage of the statute, . . . there [is] no manifest injustice in allowing the fee statute to apply in [this] case. . . . [T]he award of statutory attorney's fees [does] not upset any reasonable expectations of the parties." See *Martin*, 527 U.S. at 360 (citing *Bradley*, 416 U.S. at 720-21) (citations omitted).

Accordingly, the Court finds that the attorney's fees issue in this case is "collateral" and "uniquely separable" from the primary cause of action against the defendant, and that, even before the statute was enacted, this Court had authority to award attorney's fees to the plaintiff if he prevailed on his SCRA claim. See *Landgraf*, 511 U.S. at 277-78.

Moreover, the Court notes that the plaintiff's successful SCRA claim has "vindicated a national policy of high priority." See *Bradley*, 416 U.S. at 719 n.27. See generally *supra* note 3. As a result, the Court concludes, as a matter of law, that the application of **Section 802(b) of the SCRA**, permitting the recovery of reasonable attorney's fees by a prevailing party under **Section 802(a)**, in this action is not impermissibly retroactive. Therefore, the Court will grant summary judgment to the plaintiff with respect to the defendant's liability for reasonable attorney's fees incurred by the plaintiff for legal services performed before the enactment of **Section 802(b)** on October 13, 2010.¹⁴

This case is now over. I congratulate attorney Rebecca S. Colaw, of Rebecca S. Colaw P.C. Suffolk, Virginia, and Andre Gordon himself, for bringing the district court case, for appealing the district court dismissal, for presenting oral arguments, and continuing the case on remand. Ms. Colaw also persuaded the United States Department of Justice to appear as amicus curiae (friend of the court) in the 4th Circuit in support of Gordon. Andrew Mitchell Hendrick and Robert John Haddad of the Virginia Beach law firm Shuttleworth Ruloff Swain Haddad & Morecock PC assisted Ms. Colaw on the district court matter before it was dismissed.

¹⁴ *Gordon*, 838 F. Supp. 2d at 445-47.