

WHEN DUTY CALLS



THE IMPACT OF MILITARY SERVICE ON LITIGATION

BY GRANT A. WALSH, KELLY C. GANZBERGER,
AND CHRISTIANNE L. EDLUND

The Servicemembers Civil Relief Act (SCRA) contains substantive and procedural protections for military personnel whose ability to honor their contractual commitments and to defend themselves in civil proceedings is compromised by military service. Today, more than ever, the military is dependent on the National Guard and Reserve as a key component of its strategic war plans. Congress has periodically updated the SCRA to meet the changing needs of those involved in these contractual relationships. The most recent revisions are contained within the Veterans' Benefits Act of 2010, which provides more expansive protections and clarifies that service members have the ability to bring a private cause of action against those who violate the SCRA.

The SCRA has two stated purposes: "(1) to provide for, strengthen, and expedite the national defense through protec-

tion 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."¹ The U.S. Supreme Court has held that when courts interpret and apply the SCRA, "the Act should be read with an eye friendly to those who dropped their affairs to answer their country's call."² Yet even with these protections, service members and their families continue to encounter expensive and lengthy legal battles to enforce their rights under the SCRA. As a result of *Batie v. Subway Real Estate Corp.*,³ and other similar SCRA cases, Congress recently amended the SCRA to strengthen the rights afforded under its protection.



One of the most difficult obstacles service members encountered when attempting to enforce their rights under the SCRA is that the statute did not contain a specific private right of action that allows for the recovery of damages.⁴ In cases around the country, service members have been faced with answering lengthy dispositive motions on this issue, driving up their litigation costs and effectively preventing many service members from having their day in court. Although recent case law shows that service members are successful in arguing to courts that a private right of action under the SCRA exists, the journey to get to that point is unnecessarily burdensome and unduly expensive for the service members and their families.⁵

In response to these litigation road blocks, on June 4, 2009, Rep. Bradley Miller of North Carolina introduced House Resolution 2696, the Servicemembers' Rights Protection Act.⁶ The bill sought to amend the SCRA to (1) explicitly state that there is a private cause of action in the SCRA, and (2) authorize the U.S. attorney general to bring a civil action in U.S. district courts to enforce violations of the SCRA.⁷ H.R. 2696 was incorporated into H.R. 3949, the Veterans' Small Business Assistance and Servicemembers Protection Act of 2009.⁸ The U.S. House of Representatives voted and approved H.R. 3949 on Nov. 3, 2009.⁹ Shortly thereafter, the bill was received by the Senate and incorporated by amendment to H.R. 3219, the Veterans' Bene-

fits Act of 2010.¹⁰ President Barack Obama signed the Veterans' Benefits Act of 2010 into law on Oct. 13, 2010.¹¹

Rep. Miller cited three recent SCRA cases in support of the bill.¹²

Batie v. Subway Real Estate Corp.

In *Batie v. Subway Real Estate Corp.*, Lt. Col. Leon Batie, Jr., an Army reservist and former Subway franchisee, alleged that the real estate arm of Subway violated Section 532 of the SCRA when it terminated Lt. Col. Batie's two Subway store subleases and initiated forcible entry and detainer actions, without first obtaining an SCRA-required court order, while he was deployed to Afghanistan in 2005 in support of Operation Enduring Freedom.¹³ Lt. Col. Batie filed suit in the Northern District of Texas, Dallas Division, seeking compensatory and punitive damages for Subway's violations of the SCRA.¹⁴ The court initially dismissed Lt. Col. Batie's SCRA claims, stating "there is no provision in the SCRA that authorizes a private cause of action to remedy violations of the statute."¹⁵ However, the court vacated its earlier decision and reinstated Lt. Col. Batie's complaint upon motion for reconsideration, citing cases where courts have found the SCRA creates a private cause of action.¹⁶ After Lt. Col. Batie won partial summary judgment against Subway for violations of the SCRA in a Dallas County district court, and the two eviction



Seeking Nominations

DEADLINE: January 15, 2011

For more information on the nominations process, visit www.texasbar.org or call Holly Priestner at (512) 480-8014.

Dan Rugeley
Price Award

Lola Wright
Foundation Award

Outstanding 50-Year
Lawyer Award

Outstanding Law
Review Article

Ronald D. Secret
Outstanding
Trial Lawyer Award

Samuel Pessarra
Outstanding
Jurist Award



judgments against him were dismissed during bill of review proceedings in Dallas County courts at law, the case was settled — just weeks before Lt. Col. Batie redeployed to the Middle East.¹⁷

Cathey v. First Republic Bank

In *Cathey v. First Republic Bank*, Lt. Col. Stewart Cathey, an Army reservist, alleged First Republic Bank violated Section 526 of the SCRA when the bank refused to reduce Lt. Col. Cathey's interest rate to the SCRA-mandated rate of 6 percent per year when he was called to active duty in Bosnia and refused to refund interest rate charges collected in violation of the SCRA.¹⁸ Although Lt. Col. Cathey's entity, Stewart A. Cathey & Sons, Inc., was the principal obligor under the note with the bank to finance a gasoline station and convenience store, Lt. Col. Cathey and his wife were required to sign the note individually as co-makers.¹⁹ Lt. Col. Cathey and his wife were also required to sign personal guarantees for the note and execute a collateral mortgage note on their personal residence as additional collateral for the loan.²⁰ When Lt. Col. Cathey returned from Bosnia and challenged the bank regarding the overcharged interest and alleged that it caused the failure of both stores, the bank foreclosed on the stores and subsequently purchased the stores at a heavy discount at a post-foreclosure sheriff's sale.²¹ The bank also foreclosed on the Catheys' personal home.²²

The Catheys sued the bank in U.S. district court in Monroe, La., for violating the SCRA by failing to reduce the applicable interest rate.²³ On summary judgment motion, the bank asserted that the SCRA does not provide a right of action for private persons.²⁴ Again, the court summarily rejected this argument, stating that "[it] would lead to an absurd conclusion to say that the Congress enacted a fairly elaborate legislative scheme to protect service members in a variety of ways and then throw their claims out of federal court when they sued to enforce their rights and collect damages when violation of their rights cause them damages ... [if] they could not be sued, why bother obeying the law?"²⁵ Shortly after the court denied the bank's summary judgment motion, the case settled for \$2.35 million.²⁶

Hurley v. Deutsche Bank

Finally, in *Hurley v. Deutsche Bank*, Sgt. James Hurley, a National Guard reservist, alleged Deutsche Bank violated Sections 516 and 533 of the SCRA when it foreclosed on his personal residence while he was deployed in Iraq.²⁷ Although the redemption period was stayed due to his deployment under the SCRA, his wife and children were evicted from their home, and his home was sold to a third party.²⁸ Sgt. Hurley sued the bank in U.S. district court in Michigan, alleging multiple violations of the SCRA.²⁹ Yet again, the bank moved for summary judgment, and the court found that no private right of action existed under the SCRA.³⁰ Upon a motion for reconsideration, relying in part on the court's legal conclusions in *Batie v. Subway Real Estate Corp.*, the court reversed itself and found that the soldier could assert a private cause of action for most of the SCRA claims.³¹ The court further held that an award of punitive damages for SCRA violations is allowed under the statute.³² Sgt. Hurley's lawsuit is ongoing.³³

THE VETERANS' BENEFITS ACT OF 2010

The Veterans' Benefits Act of 2010 amends the SCRA to include a new title, "Civil Liability,"³⁴ which includes three sections. First, Section 801 authorizes the U.S. attorney general to enforce the SCRA by bringing legal actions in U.S. district courts.³⁵ The new section defines monetary damages to be assessed against violators, up to \$55,000 for first-time violators, and \$110,000 for subsequent violations.³⁶ Next, Section 802 explicitly provides that a person has a private right of action for violations of the SCRA.³⁷ The new section also states that a court may award costs and attorney's fees to the prevailing party, a provision that will enable service members to retain experienced counsel who might otherwise be unable or unwilling to take on such representation due to the substantial costs of long and drawn out litigation battles.³⁸ Lastly, Section 803 states that rights and protections afforded under new Sections 801 and 802 do not limit or exclude additional rights that are available to the service member under state and federal laws.³⁹ Notably, the revisions leave in place the existing criminal penalties for SCRA violations.⁴⁰



TLPP

Texas Legal Protection Plan

Legal Issues? We've got you covered.

Texas Legal Protection Plan (TLPP) is a non-profit group legal insurance plan created through the State Bar of Texas in 1972.

TLPP offers attorneys a smart and trusted partnership to help build, grow and manage their business.

Check us out online! www.tlpp.org

Contact TLPP for more information:

Mary Regalado-Poole
Attorney Services

(512) 327-1372 x115 Office • (512) 327-0163 Fax
mpoole@tlpp.org

7500 Rialto Boulevard
Building 1, Suite 120 • Austin, TX 78735



CONCLUSION

Since the Civil War, Congress has recognized that Americans who provide military service should be protected when their duties interfere with pre-service obligations originally incurred as civilians. As a result, over the past 140 years, Congress has enacted various statutes, including the SCRA, which suspend or limit the financial or legal obligations of soldiers and sailors while they are actively serving in the military, to ensure that they can devote their full energies and attention to the important national responsibilities they have undertaken. With the recent passage of the Veterans' Benefits Act of 2010, Congress continues to demonstrate a desire to strengthen and expand service members' rights by creating a private right of action and increased penalties for violations of the SCRA.

NOTES

- 50 U.S.C. App. §502.
- Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).
- Batie v. Subway Real Estate Corp.*, No. 3:07-CV-1415-M, 2008 U.S. Dist. LEXIS 11458 (N.D. Tex. Feb. 15, 2008). Grant A. Walsh and Kelly C. Ganzberger of Mullin Law, P.C., served as counsel for Lt. Col. Leon Batie, Jr. in his litigation against Subway Real Estate Corp.
- 50 U.S.C. App. §§501 et. seq.
- Servicemembers' Rights Protection Act: Hearing on H.R. 2696 before the Committee on Veterans' Affairs, 111th Cong. (2009) (statement of John S. Odom, Jr., partner, Jones, Odom, Davis & Politz, L.L.P.).
- Servicemembers' Rights Protection Act, H.R. 2696, 111th Cong. (2009).
- Id.*
- Veterans' Small Business Assistance and Servicemembers Protection Act of 2009, H.R. 3949, 111th Cong. (2009).
- Id.*
- 156 Cong. Rec. S7659 (daily ed. Sept. 28, 2010) (joint explanatory statement for H.R. 3219, as amended).
- Veterans' Benefits Act of 2010, H.R. 3219, 111th Cong. (2nd Sess. 2010).
- Veterans' Small Business Assistance and Servicemembers Protection Act of 2009: Hearing Before the Subcommittee on Economic Opportunities, 111th Cong. (2009) (statement of Rep. Brad Miller, N.C., citing Congressional Research Service Report R40456, published March 23, 2009).
- Batie v. Subway Real Estate Corp.*, No. 3:07-CV-1415-M, 2008 U.S. Dist. LEXIS 11458, at *2-3 (N.D. Tex. Feb. 15, 2008).
- Id.*
- Id.* at *21-22.
- Batie v. Subway Real Estate Corp.*, No. 3:07-CV-1415-M, 2008 U.S. Dist. LEXIS 102539, at *1-3 (N.D. Tex. March 12, 2008).
- Karen Robinson-Jacobs, "Subway, soldier settle Dallas franchise dispute," *Dallas Morning News*, Jan. 5, 2010, available at http://www.dallasnews.com/shared-content/dws/bus/stories/010510dnbusubway.3ce6a5d.html#slcgm_comments_anchor.
- Cathey v. First Republic Bank*, Civil Action No. 00-2001-M, 2001 U.S. Dist. LEXIS 13150, at *1-8 (W.D. La. July 6, 2001).
- Id.*
- Id.*
- Id.*
- Id.*
- Id.* at *17-19.
- Id.*
- Servicemembers' Rights Protection Act: Hearing on H.R. 2696 before the Committee on Veterans' Affairs, 111th Cong. (2009) (statement of John S. Odom, Jr., partner, Jones, Odom, Davis & Politz, L.L.P.).
- Hurley v. Deutsche Bank*, Case No. 1:08-CV-361, 2008 U.S. Dist. LEXIS 80526, at *3-7 (W.D. Mich. Sept. 30, 2008).
- Id.*
- Id.*
- Id.* at *15-19.
- Hurley v. Deutsche Bank*, Case No. 1:08-CV-361, 2009 U.S. Dist. LEXIS 20261, at *12-13 (W.D. Mich. March 13, 2009), reconsideration denied, 2009 U.S. Dist. LEXIS 33654 (W.D. Mich. Apr. 21, 2009).
- Id.*
- Hurley v. Deutsche Bank*, 610 F.3d 334 (6th Cir. 2010) (affirming district court's order denying motion to compel arbitration).
- Veterans' Benefits Act of 2010, H.R. 3219, 111th Cong. (2nd Sess. 2010).
- Id.*
- Id.*
- Id.*
- Id.*
- A person may be charged with a misdemeanor for knowingly violating certain sections of the SCRA. See 50 U.S.C. App. §§§§532(b)(1), 533(d)(1), 535(h)(1), 536(e)(1), 537(c)(1).

The State Bar of Texas, Asian Pacific Interest Section held its 14th Annual Conference & Retreat: *Revitalization and Resolution* on April 16-18, 2010 in Austin, Texas.

APIS gratefully acknowledges the generous support of our sponsors:

DIAMOND

Locke Lord Bissell & Liddell • LLP Vinson & Elkins LLP
Shore Chan Bragalone DePumpo LLP

PLATINUM

Baker Botts L.L.P. • Haynes and Boone, LLP
Munck Carter, LLP

GOLD

Alix Partners	Dell
Alston & Bird LLP	Fulbright & Jaworski L.L.P.
Andrews Kurth LLP	Greenberg Traurig, LLP
Bracewell & Giuliani LLP	Jackson Walker L.L.P.
Curtis Mallet, Prevost-Colt & Mosle, LLP	Weil, Gotshal & Manges LLP
	Winstead PC

SILVER

Austin Asian American Bar Association	Jackson Lewis LLP
Brown McCarroll L.L.P.	K&L Gates LLP
Dallas Asian American Bar Association	Larson Newman & Abel, LLP
Dow Lohnes PLLC	McGehee Chang, Barnes
Gibson, Dunn & Crutcher LLP	Sidley Austin LLP
Hamilton & Terrile, L.L.P.	Slater & Matsil, L.L.P.
FosterQuan, LLP	Wiley Rein LLP

WWW.TEXASAPIS.ORG

2009-2010 Chair: Cindy Lin, *Curtis, Mallet-Prevost, Colt & Mosle LLP*
2010-2011 Chair: Michele Wong Krause, *The Wong Krause Law Firm*



GRANT A. WALSH

is a shareholder at Mullin Law, P.C. in Richardson, where he is managing director of litigation and dispute resolution.



KELLY C. GANZBERGER

is an attorney with Mullin Law, P.C., where her practice focuses on franchise regulatory compliance and commercial litigation.



CHRISTIANNE L. EDLUND

is an attorney with Mullin Law, P.C., where her practice focuses on franchise regulatory compliance, trademark and copyright protection, and commercial litigation.