



THE SERVICEMEMBERS CIVIL RELIEF ACT AND FORECLOSURE

Hearing July 12, 2011

**Captain Samuel F. Wright, JAGC, USN (Ret.)
Director, Service Members Law Center
Reserve Officers Association**

Service Members Law Center and the Reserve Officers Association

The Reserve Officers Association (ROA) established the Service Members Law Center (SMLC) in June 2009, with Captain Samuel F. Wright, JAGC, USN (Ret.) as the Director.¹ The SMLC is entirely funded by ROA. Each month, the SMLC (Captain Wright) provides information to 400-500 service members, military family members, attorneys, employers, creditors, reporters, congressional staffers, state legislators, and others, concerning military-legal topics, especially the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). The SMLC provides information without regard to whether the person seeking the information is a member of or eligible to join ROA. The SMLC also filed an *amicus curiae* brief in the Supreme Court, in the case of *Staub v. Proctor Hospital*.

In 1997, ROA established the "Law Review" column in its magazine and on its website. We invite your attention to www.roa.org/law_review. You will find more than 750 articles about the SCRA, USERRA, UOCAVA, and other laws that are particularly pertinent to those who serve our country in uniform, as well as a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Each week, we add one or more new articles.

The Reserve Officers Association of the United States (ROA) is a professional association of commissioned and warrant officers of our nation's seven uniformed services, and their spouses. ROA was founded in 1922 during the drawdown years following the end of World War I. It

¹ You can find Captain Wright's biography at the end of this testimony.

National Security and Homeland Defense, with emphasis on the readiness, training, and quality of life issues affecting their welfare and that of their families and survivors. REA is the only Joint Reserve association representing enlisted reservists – all ranks from all five branches of the military.

Executive Director

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DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Reserve Officers and Reserve Enlisted Associations are member-supported organizations. Neither ROA nor REA nor the SMLC have received grants, subgrants, contracts, or subcontracts from the federal government in the past three years. All other activities and services of the associations are accomplished free of any direct federal funding.

The Total Force Policy

In 1973, Congress abolished the draft, and the Department of Defense (DOD) adopted the “total force policy” under which the services would rely to a greater extent upon the National Guard and Reserve in planning for military contingencies. Military capabilities that will be needed in a wartime scenario can be built up and maintained in the Reserve Components at a much lower price to the nation, as compared to the cost of maintaining the same or other individuals on full-time active duty, in peacetime as well as wartime.

The Reserve Components gradually transformed from a “strategic reserve” (available only for a contingency like World War III) to an “operational reserve” routinely called up for operations well short of World War III. When Iraq invaded and occupied Kuwait and threatened Saudi Arabia in August 1990, President George H.W. Bush “drew a line in the sand” and responded forcefully to protect Saudi Arabia and liberate Kuwait. As part of his response, he called up Reserve Components, in the first major Reserve Component mobilization since the Korean War.

The transformation from a strategic reserve to an operational reserve has fully matured since the terrorist attacks of September 11, 2001. As of July 5, 2011, 816,389 National Guard and Reserve personnel have been called

were drafted, some enlisted voluntarily, and some were called to active duty from the nascent Army Reserve, Army National Guard, Marine Corps Reserve, or Navy Reserve. Regardless of how they entered into uniform, they left behind civilian jobs, farms, businesses, mortgages, debts, lawsuits, and other important matters.

In April 1917, John Henry Wigmore was already an established legal scholar. He had been the Dean of the Northwestern University School of Law since 1901, and the first edition of *Wigmore on Evidence* was published in 1904. When our country joined the war, Wigmore volunteered for the United States Army Judge Advocate General's Corps and was commissioned a major, at the age of 54. In just six weeks, he drafted the law that came to be known as the Soldiers' and Sailors' Civil Relief Act (SSCRA).

Congress quickly enacted Major Wigmore's work into law, and that law served our country well through two world wars, the Korean War, and the Vietnam War. To explain the underlying purpose, in a 1917 subcommittee report, the House Military Affairs Committee wrote, "The Shylock, to whom his pound of flesh is dearer than patriotism, is not the only man against whom the soldier must be given relief."

By the time of the Persian Gulf War of 1990-91, it had become apparent that the law needed to be updated, because of the profound changes in our economy and legal system in the years since 1917. For example, under the SSCRA it was possible for a person entering military service to terminate a lease on premises (apartment, house, office, farm, etc.), but there was no provision for terminating a vehicle lease. In 1917, Major Wigmore could not conceive of the possibility of leasing an automobile, as a brand-new Model T only cost \$240 (or \$2,696 in today's dollars).

Today, as in 1917, entering active duty in the armed forces is a major life change. The individual often suffers a precipitous drop in income. For example, my late father was a young accountant at Peat Marwick Mitchell (a big-eight accounting firm) when he was drafted in May 1941. I don't know what Peat Marwick paid young accountants in 1941, but it must have been much more than the \$18 per month that my father earned as a Private in the Army.

purposes of this Act are—(1) to provide for, strengthen, and expedite the national defense through protection 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.” 50 U.S.C. App. 502.

SCRA in the Mortgage Foreclosure Context

The SCRA is codified in the “Appendix” of title 50 of the United States Code. The word “Appendix” is misleading, and no other title of the United States Code has an “appendix.” This appendix is just as much a part of the Code as any other part. The SCRA is codified at 50 U.S.C. App. 501-597b.

Let us discuss the hypothetical but realistic Josephine Smith, a third-class petty officer (E-4) in the Coast Guard Reserve. She is a college graduate with an annual income approaching six figures, but in the Coast Guard she is a junior enlisted service member. Thus, when she is called to the colors, she suffers a major loss of income.

Josephine has student loans, credit cards with outstanding balances, an automobile loan, and most importantly a mortgage on her home—all of these are financial obligations that she incurred *before* her call to active duty. Because her income has dropped significantly due to her call to duty, she is having difficulty keeping up with these obligations. It is certainly fair to say that her entry on active duty has “materially affected” her ability to meet her financial obligations.

“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.” 50 U.S.C. App. 527(a)(1) (emphasis supplied).

“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 servicemember’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].” 50 U.S.C. App. 533(c) (emphasis supplied).

“A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (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(d).

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” United States Constitution, Article VI, Clause 2, commonly referred to as the “Supremacy Clause.” Yes, it is capitalized just this way, in the style of the late 18th Century.

Under the Supremacy Clause, the SCRA, which forbids non-judicial foreclosure on Smith’s home while she is on active duty and for nine months thereafter, supersedes the state law that authorizes such non-judicial foreclosure. The SCRA is a constitutionally valid federal statute, authorized by the “war powers clauses”—Article I, Section 8, Clauses 11-16.

The provision extending the prohibition on non-judicial foreclosure for nine months after the service member leaves active duty is subject to a “sunset clause” that expires on December 31, 2011. We strongly urge Congress to make this provision permanent and also to extend the nine months to 12, to make this period consistent with the 12-month period in 50 U.S.C. App. 527(a)(1)(A).

Because non-judicial foreclosure is prohibited in this situation, the bank initiates a judicial foreclosure proceeding in state court. Such an action is a civil action, like any other, and is subject to sections 521 and 522 of title 50 Appendix.

It should be noted that the Coast Guard (Smith's service) is in the Department of Homeland Security (DHS), not DOD, but the DOD free service checks for Coast Guard personnel, as well as personnel of the Army, Navy, Marine Corps, and Air Force. The Coast Guard is an armed force as defined by 10 U.S.C. 101(a)(4), just like the four DOD services. The Coast Guard is also specifically mentioned in the definitions section of the SCRA. See 50 U.S.C. App. 511(2)(A).

SCRA Is Not Limited to Involuntary or Overseas Service

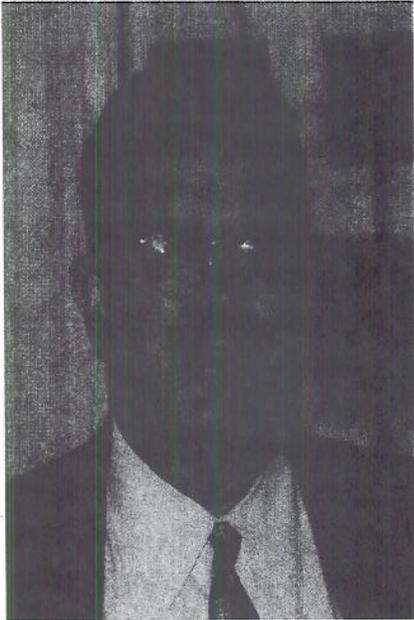
Nothing in the SCRA limits its application to service members who have been involuntarily called to active duty. This law applies to every active duty service member, including but not limited to Reserve and National Guard personnel who have entered active duty voluntarily or involuntarily. The SCRA applies to officers and enlisted personnel of the regular military establishment, as well as Guard and Reserve personnel who have been called to the colors.

Some creditors, attorneys, and courts have incorrectly asserted that the SCRA only applies to service members serving in combat zones overseas. The location of the member may be an important factor in a court's decision on whether to grant a stay of proceedings under 50 U.S.C. App. 522, but it should be noted that a service member on active duty may be unable to attend a court proceeding on a particular date even if the courthouse is only ten miles from the member's place of duty.

To paraphrase General George S. Patton (George C. Scott) in my favorite movie, the active duty service member who "shovels manure in Louisiana" is serving at his or her appointed place of duty, just as much as the soldier at a forward operating base in Afghanistan. Under Article 86 of the Uniform Code of Military Justice (UCMJ), a service member who is absent from his or her appointed place of duty without proper authorization for even a few minutes is guilty of a military criminal offense and is potentially subject to incarceration.

Military personnel are not permitted to come and go as they please. A member attending a military school (including National Guard and Reserve members on active duty for training) is not permitted to miss any part of that school. If a military unit is participating in an exercise or undergoing an

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Samuel F. Wright received his B.A. from Northwestern University (Evanston, Illinois) in 1973, majoring in Political Science. He received his J.D. (basic law degree) in 1976 from the University of Houston (Houston, Texas). He received his LL.M (advanced law degree) from Georgetown University (Washington, DC) in 1980.

Samuel F. Wright was commissioned an Ensign in 1973, via the Judge Advocate General's Corps Student Program. After graduating from law school and passing the Texas Bar Exam, he reported to active duty in January 1977, to attend the Naval Justice School (NJS). After completing NJS, he reported to his first duty station in March 1977, in the Claims Division, Office of the Judge Advocate General of the Navy. He specialized in the defense of tort claims alleging asbestos exposure in the construction and repair of ships by and for the Navy, and he was awarded a Navy Commendation Medal for that service.

He left active duty in March 1980 and affiliated with the Navy Reserve as a judge advocate. He performed reserve assignments with Personnel Mobilization Team (PMT) Richmond, PMT Norfolk, Volunteer Training Unit Law 0601, and CINCLANT Fleet 206. He performed active duty periods of varying duration at the Office of the Judge Advocate General, the A-12 Litigation Team, the National Committee for Employer Support of the Guard and Reserve (ESGR), the Naval Inspector General, United States Naval Forces Central Command, and the Reserve Forces Policy Board, for a total of 12 years of active duty. His military decorations include two Navy Commendation Medals, a Joint Service Commendation Medal, and a Meritorious Service Medal. He retired from the Navy Reserve in 2007.

Samuel F. Wright worked for the United States Department of Labor (DOL) for ten years, from September 1982 to September 1992. During that time,