

**NOT FOR PUBLICATION
UNTIL RELEASED BY THE
SENATE COMMITTEE ON THE JUDICIARY**

**STATEMENT OF
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BEFORE THE
SENATE JUDICIARY SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS AND
AGENCY ACTION
ON
MARCH 27, 2014**

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Chairman Blumenthal, Ranking Member Hatch, and distinguished members of this Subcommittee, as a legal assistance attorney in the United States Navy, I am honored and humbled to have the privilege of representing the Navy's Judge Advocate General's Corps and the servicemembers we support.

I am a civilian legal assistance attorney, who, like all uniformed and civilian legal assistance attorneys, works to support and enhance sailor and mission readiness by addressing their legal readiness issues. From my practice I am constantly reminded that our national defense begins with the individual servicemember. There is and has to be a great deal of focus on the military training and equipment that will be applied in battle. It is important to remember that the servicemember is not a machine that can be programmed, fueled, launched and repaired. Servicemember mission readiness must include the legal, financial, medical, and familial issues that are part of the human element. Denial or inattention to the human elements of readiness can impact the servicemember negatively, affecting focus, morale, dedication, and in the end - success and survival. My office focuses on the legal needs of the servicemember.

One of the best protections the law provides the servicemember is the Servicemember's Civil Relief Act (SCRA). The Act contains 60 statutory sections that among other rights and benefits provide for the: reduction of interest rates, termination of certain contracts, stay of civil proceedings, reopening of default judgments, tolling of the statute of limitations, and court intervention prior to action to foreclose or repossess property.

Working with the SCRA I have seen its impact on the servicemember, the military family, and the businesses that engage in commerce with the servicemember. I have learned that our national defense comes at a cost to everyone. The servicemember risks her life and faces the uncertainty of the diverse defense needs of the Nation. The servicemember's family deals with frequent moves, fear and anxiety over dangerous duties, deployments, and the possibility of prolonged absences. Individuals engaged in commerce manage the cost associated, with the risk that the servicemember may be unable to comply with an obligation due to military duty or that additional costs may be incurred in transactions with the military. The SCRA provides the men and women of our armed forces flexibility in their private lives enabling them to provide service to the nation without being penalized and distracted by their inability to comply with some civil matters. In providing this flexibility and protection the SCRA strikes a balance between individual rights and the nation's need for a mission ready fighting force.

The SCRA embodies a public policy extending and protecting the rights of servicemembers that dates back to at least the civil war where Congress acknowledged that a focused servicemember is vital to successful mission accomplishment. This public policy and its implications for the nation's defense can be thwarted by the application of one provision of the SCRA. Section 517 of the SCRA allows the servicemember to waive any and all rights provided by the Act. It sets forth the conditions for this waiver, but in comparison to many other statutes that establish a policy protecting a national interest, the SCRA does not expressly and specifically prohibit the prospective use of the waiver or any other law that would act as a waiver. The laws of many states require that a valid and enforceable waiver be voluntarily executed with an understanding of the rights being waived and the facts that give rise to the right.

This knowledge requirement is especially important for the servicemember who may be called to serve at any moment in response to national or international developments. The use of prospective waivers removes the element of knowledge and makes the waiver unenforceable.

The application of waiver requirements found in state law is not an effective defense for servicemembers. Young sailors and soldiers do not have the financial resources or legal understanding to argue the law. They are trained to follow orders and regulations. The prospective waiver on its face appears to be lawful. For Example: Section 535 of the SCRA allows a servicemember to terminate a lease any time after she receives orders to deploy in 90 days or more or for permanent change of station (PCS). The servicemember who signs a prospective waiver with a landlord and then receives orders to deploy or PCS may not know the law or challenge the waiver. This servicemember will follow the landlord's direction that she waived her rights under the SCRA and comply with the written contract. This servicemember will be subject to additional costs and penalties that could: prohibit her from terminating the lease, expose her to financial risk from the vacant property, add transportation costs, substantially increase living expenses, and/or prevent her from sending her family home to a more secure and supportive environment. The emotional stress placed on the servicemember and her family from this housing situation can be devastating. Most of our servicemembers will follow the terms of the contract and waiver to their detriment. The fact that prospective waivers are unenforceable does not matter to the young servicemember when she does not know the truth.

Individuals and companies employing the prospective waiver seek to avoid the risks and cost of conducting business with the men and women of the military. There are two primary reasons for this: they believe that the law as applied in their case against is unfair and/or that the servicemember does not need to use the law.

The perception that the application of a given law in a given case may be unfair is not unusual and in fact may be correct in some cases. The application of the SCRA, at times, may appear unfair, as is true with many of the statutes and regulations imposed on an industry to effectuate national policy. However, when the policy objective of the law is a national priority, the needs of the nation must prevail over the individual. The avoidance of the rights afforded servicemembers under the SCRA through waiver, arbitration, or declaration remove the balance imposed by the SCRA and shift the burden for mission readiness to the individual servicemember. Once this burden is shifted, the commanding officer can no longer issue an order to deploy knowing that the civil legal matters of his servicemembers are protected during the deployment. The members of her unit will have to address the: distractions of law suits, loss of property, and denial of rights. The use of the waiver effectively places command and control of this aspect of readiness in the hands of the individual or company seeking to enforce the waiver.

When an individual or company evaluates the rank, duties or status of a servicemember and determines that for this individual the SCRA should not apply, they fail to understand the importance of every individual in the armed forces. Each servicemember is part of a unit and that unit is an integral part of the command's overall mission. There are no superfluous

members of a command or mission. An E-3 is a junior ranking enlisted servicemember. This individual may be trained to maintain any number of complex offensive or defensive systems on a ship. One such defensive system is the close in weapons system (CIWS) that protects our warships. It detects incoming threats and propels a wall of bullets to destroy the threat. This E-3 is important to the command's mission and the ship's defense. Distractions to this individual can result in faulty maintenance and weapon malfunction. The cook is a position in the military that may not be considered an element of combat; however, that cook may prepare meals for 500 sailors on a ship. That cook is critical to the command's mission. The health and morale of an entire command can be impacted by one cook. If he is distracted due to legal issues and makes a mistake he can give those 500 people food poisoning. A company or individual cannot be allowed to select a servicemember and determine that because of his rank or position he should have fewer rights than others.

The application of prospective waivers under the SCRA's waiver provision has the potential to undermine the entire Act and the national policy it supports. It is a natural function of an effective business to want to control costs. However, if the use of the prospective waiver is considered an acceptable means to control costs, the provision will be employed and deployed by all types of businesses: mortgage lenders, banks, credit unions, sub-prime lenders, automobile dealerships, motor vehicle leases, furniture merchants, service contract companies, storage facilities, and others. Any entity that disagreed with the application of the law could require a waiver. When one company obtains an advantage because of the waiver, then others will follow. Once the market is saturated with waivers in contracts the election is no longer voluntary and the impact on the SCRA is disastrous. A company or individual should not be allowed to undermine this important policy and determine that their needs are more important than either the servicemember's rights or the nation's defense.

We do our best to educate servicemembers on their rights and to protect servicemembers when their rights are violated. It is important that the SCRA is clarified to allow a waiver only after the event giving rise to the right for which the waiver is sought exists and is understood by the servicemember.