QUESTIONS FOR THE RECORD
Senate Judiciary Committee
"Access to Justice for Those Who Serve"
March 27, 2014
Senator Amy Klobuchar

Question for John S. Odom, Jr., Maj. Gen. Andrew Davis, and Ian DePlanque

A number of federal agencies have a role in upholding the rights of our service members.

How can we improve agency collaboration and coordination to ensure that our service members get the protections in the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act?

Response of Col John S. Odom, Jr.

My primary area of practice is SCRA-related, so I will confine my response to that portion of the question.

Agency collaboration and coordination are a starting point but certainly are not the complete solution. No level of coordination between agencies will solve the problems our servicemembers face when bad actors force their claims into mandatory, pre-dispute arbitration. When that happens and the servicemembers discover how much out-of-pocket expense is involved merely to invoke and pursue mandatory arbitration over what might be an amount that is less than the cost to arbitrate the matter, they are just going to abandon all efforts to enforce their SCRA rights. That is yet another reason that mandatory pre-dispute arbitration clauses should be disallowed under the SCRA.

From my perspective, the efforts of the DoJ, CFPB and banking regulators to investigate and bring to justice violators of servicemembers' SCRA rights have resulted in some monumentally large settlements, but I have continuing questions about how much of that money actually percolates down to the troops' pockets. As a private attorney, I am still a big believer in the rights of an individual to seek justice from a jury in a trial. I know that the settlements I have obtained for my clients account for significantly larger damage payments than those negotiated in the various OCC and DoJ settlements, but that's probably just in the nature of working one-on-one as opposed to working an issue from an industry-wide standpoint.

There will always be a need for close collaboration between the DoD and the various agencies that seek to enforce SCRA rights on behalf of servicemembers (DoJ, CFPB, FTC, OCC and others) to make the agencies outside of DoD aware of trends in SCRA violations that legal assistance officers see on a daily basis. Armed Forces legal assistance attorneys should remain vigilant to help spot new trends in SCRA violations and to report those through appropriate channels so that federal enforcement agencies can be made aware of what is happening to servicemembers in the field and can take action to protect the rights of those servicemembers.

Senate Judiciary Committee Hearing
Subcommittee on Oversight, Federal Rights, and Agency Action Subcommittee on the
"Access to Justice for those who Serve"
Questions for the Record Submitted by Senator Al Franken

Questions for Colonel Odom

In your written testimony, you wrote, "The prevalence of forced arbitration agreements embedded in virtually every mortgage instrument and credit card agreement has caused many of our servicemembers who have disputes with creditors to be denied access to a federal or state court for resolution of their complaint." You also pointed out that a lot of servicemembers will abandon their cases instead of incurring the filing fees and costs associated with arbitration. Could you elaborate on your recommendation that we eliminate pre-dispute arbitration for SCRA claims?

Response of Colonel John S. Odom, Jr.

None of the protections of the SCRA apply to anyone until they either enter the Armed Forces or, in the case of certain members of the Guard and Reserve, receive their orders notifying them of impending mobilization to active duty. For example, the typical 19-year old college student who receives a credit card application in the mail which contains a mandatory arbitration clause embedded in the agreement in very small type may have absolutely no clue that several years later, he or she may enlist in the Armed Forces. At the point in time when they receive the credit card or the card application application (many of which provide that by using the card for the first time, the user agrees to all the terms of a multi-page contract), they are not protected by the SCRA but as soon as they go into the Armed Forces they are protected by the Act. It simply is not fair to deny those persons the full range of protections found in the SCRA – the most important of which may well be the right to bring an action against violators in an appropriate court and seek justice from a court or a jury – because of a pre-dispute arbitration clause.

More importantly, as I pointed out in my written testimony, the provisions of the SCRA simply do not apply to private arbitration proceedings. Suppose Sergeant Snuffy's rights are violated by a creditor under a contractual agreement containing a pre-dispute mandatory arbitration clause. Assume further that Sergeant Snuffy invokes the arbitration clause, pays the $450 filing fee with the American Arbitration Association, nominates an arbitrator and pays that person several thousand dollars as a deposit to satisfy a condition for the designated arbitrator accepting the appointment. Then before the scheduled date for the arbitration the Army dispatches Sergeant Snuffy somewhere on the globe to go fight terrorists and he cannot attend the arbitration hearing. Under that scenario, the SCRA cannot be invoked to bring about a mandatory stay of the proceedings until such time as the servicemember can be present to participate. The obvious lack of fundamental fairness that such a realistic hypothet raises is sufficient by itself to justify my strong opposition to pre-dispute mandatory arbitration clauses when the contract subsequently becomes subject to the SCRA.

The proposal that if, once the dispute has arisen, the parties mutually agree to arbitration seems to be imminently fair. Otherwise, I am unalterably opposed to pre-dispute mandatory arbitration clauses.