



# The Servicemembers Civil Relief Act (SCRA): Does It Provide for a Private Cause of Action?

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## Summary

Congress has long recognized the need for protective legislation for servicemembers whose service to the nation may compromise their ability to meet obligations and protect their legal interests. The purpose of the Servicemembers Civil Relief Act is to provide for, strengthen, and expedite the national defense by protecting servicemembers, enabling them to “devote their entire energy to the defense needs of the Nation.” The SCRA protects servicemembers by temporarily suspending certain judicial and administrative proceedings and transactions that may adversely affect their legal rights during military service.

Various sections of the SCRA include provisions providing for penalties for violations of the afforded protections. The act does not specifically state who may bring an application for relief, nor does it specifically exclude private individuals from filing a cause of action. Most courts considering the issue have found that a private cause of action exists under the SCRA. However, a recent opinion from the United States District Court for the Western District of Michigan, *Hurley v. Deutsche Bank Trust Company*, disagreed with decisions from U.S. district courts in Illinois, Louisiana, Oregon, and Texas, and found that a private cause of action does not exist under the act.

While the U.S. Supreme Court has not ruled on whether a private cause of action exists under the SCRA, the Court has dealt with the issue of an implied cause of action under other statutes. In *Cort v. Ash*, the Court established a four-part test for determining if a private cause of action exists under a particular statute. However, in *Alexander v. Sandoval*, it appears that the Court has adopted a single-factor test rather than the four-part test.

The split in the U.S. district courts creates uncertainty in how the act may be enforced in the future. In many jurisdictions across the country it may be unclear whether a servicemember has the right to bring a private cause of action for violations of the SCRA. This ambiguity is likely to persist if the courts continue to reach different conclusions on the right to bring a private cause of action. The current ambiguity provides options for Congress. Congress may provide guidance to the courts by clarifying the purpose and intent of the act. A bill introduced in the 110<sup>th</sup> Congress would have done so. Or Congress may want to amend individual sections of the act or the act in its entirety with language that explicitly states whether a private cause of action exists. However, Congress also has the option to not act and allow the courts to interpret the SCRA, as they have in the past, with the possibility that the issue will be resolved by the U.S. Supreme Court.

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## Introduction

Congress has long recognized the need for protective legislation for servicemembers whose service to the nation may compromise their ability to meet obligations and protect their legal interests. During the Civil War, Congress enacted an absolute moratorium on civil actions brought against soldiers and sailors. During World War I, Congress passed the Soldiers' and Sailors' Civil Relief Act of 1918,<sup>1</sup> which did not create a moratorium on legal actions against servicemembers, but instead directed trial courts to apply principles of equity to determine the appropriate action to take whenever a servicemember's rights were involved in a controversy. During World War II, Congress essentially reenacted the expired 1918 statute as the Soldiers' and Sailors' Civil Relief Act of 1940, and then amended it substantially in 1942 to take into account the new economic and legal landscape that had developed between the wars. During consideration of the amendments in the 87<sup>th</sup> Congress, Congressman Overton Brooks (D-LA) stated,

This bill springs from the desire of the people of the United States to make sure as far as possible that men in service are not placed at a civil disadvantage during their absence. It springs from the inability of men who are in service to properly manage their normal business affairs while away. It likewise arises from the differences in pay which a soldier received and what the same man normally earns in civil life.<sup>2</sup>

Congress enacted amendments on several occasions during subsequent conflicts, including 2002 when the benefits of the SSCRA were extended to certain members of the National Guard.<sup>3</sup> In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA) as a modernization and restatement of the SSCRA and its protections.<sup>4</sup>

The SCRA is an exercise of Congress's power to raise and support armies (U.S. Const. Art. I, sec. 8, cl. 12) and to declare war (Art. I, sec. 8, cl. 11).<sup>5</sup> The purpose of the act is to provide for, strengthen, and expedite the national defense by protecting servicemembers, enabling them to "devote their entire energy to the defense needs of the Nation" by providing for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect their legal rights during military service.<sup>6</sup> Forgiving of all debts or the extinguishment of contractual obligations on behalf of servicemembers who have been called up for active duty is not required, nor is absolute immunity from civil lawsuits provided. Instead, the act provides for the suspension of claims and protection from default judgments. In this way, it seeks to balance the interests of servicemembers and their creditors, spreading the burden of national military

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<sup>1</sup> 40 Stat. 440 (1918).

<sup>2</sup> H.Rept. 108-81, at 33 (April 30, 2003) (quoting statement by Congressman Overton Brooks (D-LA) on the floor of the House during consideration of amendments in 1942 to the SSCRA. 87 Cong. Rec. H 5553 (June 11, 1942)).

<sup>3</sup> P.L. 107-330, 116 Stat. 2820 (December 6, 2002) (extending benefits of SSCRA to members of the National Guard called up by their respective state governors to support federal efforts during national emergencies, including the war against terrorism).

<sup>4</sup> P.L. 108-189, 117 Stat. 2835 (December 19, 2003) (One of the amendments effected by P.L. 108-189 is the change in the name of the act from Soldiers' and Sailors' Civil Relief Act (SSCRA) to Servicemembers Civil Relief Act (SCRA). The name was changed to the more inclusive SCRA "because soldiers, sailors, marines and airmen are collectively referred to as "servicemembers" in other statutes" (H.Rept. 108-81, at 35 (April 30, 2003)). Therefore, all of the historical and legal background of this act makes reference to SSCRA instead of SCRA. For ease of discussion, the term "SCRA" will be used to refer to both the SSCRA and the SCRA.

<sup>5</sup> *Dameron v. Brodhead*, 345 U.S. 322 (1953).

<sup>6</sup> 50 U.S.C. app. § 502.

service to a broader portion of the citizenry.<sup>7</sup> In *Engstrom v. National Bank of Eagle Lake*, the United States Court of Appeals for the Fifth Circuit acknowledged the balancing required when it stated “[a]lthough the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims.”<sup>8</sup>

Many of the SCRA provisions are especially beneficial for Reservists activated to respond to a national crisis, but many provisions may be useful for career military personnel.<sup>9</sup> One of the measures that affects many who are called to active duty is the limit on the interest rate that may be charged on debts incurred prior to a person’s entry into active duty military service. Other measures protect military families from being evicted from rental or mortgaged property; from cancellation of life insurance; from taxation in multiple jurisdictions; from foreclosure of property to pay taxes that are due; and from losing certain rights to public land. In order to receive protections afforded under the SCRA, servicemembers are generally required to provide notice of their desire to invoke the protection. For example, with respect to the interest rate limitation, the servicemember is required to provide written notification to the creditor with a copy of his/her orders establishing a period of active duty service.<sup>10</sup>

Individuals and/or entities that violate specified sections of the SCRA may be subject to penalties. With the exception of the section pertaining to the interest rate limitation in Title II,<sup>11</sup> only the sections in Title III (addressing rent, installment contracts, mortgages, liens, assignments, and leases) include a penalty provision.<sup>12</sup> The provision generally consists of two parts, the first classifying the violation as a misdemeanor and the second preserving other remedies and rights. The section addressing evictions, for example, states that a “person who knowingly takes part in an eviction or distress ... or attempts to do, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.”<sup>13</sup> The section further states that the “rights and remedies provided ... are in addition to and do not preclude any remedy for wrongful conversion (or wrongful eviction) otherwise available under the law to the person claiming relief ... including any award for consequential and punitive damages.”<sup>14</sup>

The importance of servicemembers knowing and understanding their rights is evidenced by the requirement in the act that all servicemembers be provided written notice of their rights by the Secretary of each of the armed services.<sup>15</sup> In the event that a servicemember feels that he/she is not receiving the statutory protections, the servicemember may request assistance from military legal assistance officers, civilian lawyers, and in some circumstances the United States

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<sup>7</sup> For a more in-depth analysis of the SCRA, see CRS Report RL34575, *The Servicemembers Civil Relief Act (SCRA): An Explanation*, by R. Chuck Mason.

<sup>8</sup> *Engstrom v. First Nat’l Bank*, 47 F.3d, 1459, 1462 (5<sup>th</sup> Cir. Tex. 1995).

<sup>9</sup> See James P. Pottorff, *Contemporary Applications of the Soldiers’ and Sailors’ Civil Relief Act*, 132 Mil. L. Rev. 115, 118 (1991) (noting that many protections are ordinarily unavailable to career servicemembers because they enter into most major financial obligations, such as mortgages, while on active duty).

<sup>10</sup> 50 U.S.C. app. § 527(b)(1).

<sup>11</sup> See Section 207 (Maximum rate of interest on debts incurred before military service) (10 U.S.C. 50 app. § 527).

<sup>12</sup> See Sections 301 (Evictions and distress), 302 (Protection under installment contracts for purchase or lease), 303 (Mortgages and trust deeds), 305 (Termination of residential or motor vehicle leases), 305a (Termination or suspension of contracts for cellular telephone service), 306 (Protection of life insurance policy), and 307 (Enforcement of storage liens) (10 U.S.C. 50 app. §§ 531, 532, 533, 535, 535a, 536, and 537).

<sup>13</sup> 50 U.S.S. app. § 531(c)(1).

<sup>14</sup> 50 U.S.C. app. § 531(c)(2).

<sup>15</sup> 50 U.S.C. app. § 515.

Department of Justice (DOJ).<sup>16</sup> The DOJ Civil Rights Division will investigate specific complaints and, if necessary, institute legal proceedings to protect the rights of servicemembers. The DOJ Civil Rights Division filed its first lawsuit under the SCRA on December 10, 2008, alleging a towing company in Norfolk, Virginia participated in unlawful enforcements of storage liens.<sup>17</sup> The act does not specifically state who may bring an application for relief, nor does it specifically exclude private individuals from filing a cause of action. Most courts considering the issue have found that a private cause of action exists under the SCRA. However, a recent opinion from the United States District Court for the Western District of Michigan, *Hurley v. Deutsche Bank Trust Company*, disagreed with decisions from U.S. district courts in Illinois, Louisiana, Oregon, and Texas, and found that a private cause of action does not exist under the act.

## Application of the SCRA in the U.S. District Courts

In *Moll v. Ford Consumer Finance Company, Inc.*, the United States District Court for the Northern District of Illinois held that a private cause of action exists under the provision limiting the amount of interest that may be charged on debt incurred prior to service.<sup>18</sup> Moll, a reservist in the United States Air Force, was ordered to active duty in support of the Persian Gulf War in 1991. Upon activation, he contacted Ford and requested that the interest rate on his car loan be reduced from a variable rate of 10.25% to 6% as provided for under SCRA and provided all documentation requested by Ford.<sup>19</sup> Ford failed to adjust the interest rate and continued to charge 10.25% on the loan. Moll filed an action alleging Ford violated the SCRA and received unlawful interest subject to penalties under the Illinois Interest Act.<sup>20</sup> Ford moved to dismiss the action arguing that Moll failed to state a claim, contending that a private cause of action does not exist under the SCRA, and that because the loan was secured by a mortgage, the loan is exempt from the Illinois Interest Act.<sup>21</sup>

The court acknowledged that a private cause of action is not explicit in the act and turned to a four-part test, created by the United States Supreme Court in *Cort v. Ash*,<sup>22</sup> to determine if a private cause of action exists even though it is not expressly provided for in the statute. The *Cort* factors are: (1) does the statute create a federal right in favor of the plaintiff; (2) is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy; (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) is the cause of action one traditionally relegated to state law, so that it would be inappropriate to

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<sup>16</sup> See The United States Department of Justice, Civil Rights Division, Safeguarding the Rights of Servicemembers and Veterans website (available at <http://www.usdoj.gov/crt/military/index.html>).

<sup>17</sup> Press Release, Department of Justice, Press Release, Justice Department Sues Towing Company for Violating the Servicemembers Civil Relief Act (December 10, 2008) (The Justice Department alleges that Earnest Cooper and Aristocrat Towing located in Norfolk, Virginia violated the SCRA by towing and then selling a servicemember's vehicle without a court order. The complaint also alleges that the defendants may have injured other servicemembers by enforcing storage liens on their vehicles without court orders in violation of the act.) (Press release available at [http://www.usdoj.gov/crt/housing/documents/bc\\_press\\_12-10-08.pdf](http://www.usdoj.gov/crt/housing/documents/bc_press_12-10-08.pdf).)

<sup>18</sup> *Moll v. Ford Consumer Fin. Co.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. March 16, 1998) (finding a private cause of action exists under § 526 of the SSCRA, codified at 50 U.S.C. app. § 527).

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 3 (Illinois Interest Act, 815 ILCS § 205/6).

<sup>21</sup> *Id.* (The court dismissed the claim for penalties under the Illinois Interest Act on the basis that the state law does not encompass violations of Federal Law. *Id.* at 16).

<sup>22</sup> *Cort v. Ash*, 422 U.S. 66 (1975).

infer a cause of action based solely on federal law.<sup>23</sup> However, the court further stated the Supreme Court has “retreated from this four-factor approach and has focused primarily on the legislative intent of the statute – the second factor.”<sup>24</sup> The court, focusing on the legislative intent of the act, the second *Cort* factor, stated that the interest limitation was “designed to give relief to military persons called into service.”<sup>25</sup> The court determined that the act confers a benefit on a servicemember that is not otherwise available to private citizens and therefore a private cause of action must be intended “because otherwise the relief would [be] of no value at all.”<sup>26</sup> Finally, the court addressed the remaining *Cort* factors and found that the act creates a federal right in favor of Moll; the interest rate limitation is consistent with the purpose of the act to provide servicemembers with relief in meeting their financial obligations; and that it is not an area of law traditionally relegated to state law, rather it is grounded in Congress’ right to raise and maintain armed forces of the United States.<sup>27</sup> Finding a private cause of action with respect to the interest rate limitation section of the act, the court denied Ford’s motion to dismiss.

The United States District Court for the Northern District of Texas, in *Marin v. Armstrong*,<sup>28</sup> found an inferred private cause of action in two separate sections of the SCRA. In *Marin*, the servicemember claimed that as a result of illness from military service he was unable to fulfill his obligations on debt he owed for the purchase of a car.<sup>29</sup> He alleged that he informed TranSouth, the holder of the loan, of his inability to make payments on the obligation and requested that they toll his obligation until his health allowed him to make payments.<sup>30</sup> Marin further alleged that TranSouth not only failed to toll his obligation, but that it continued to violate the SCRA by harassing him, sending collection letters, and taking adverse credit action against him.<sup>31</sup> TranSouth moved to dismiss the action on the basis that the SCRA does not provide for a private cause of action, rather it provides only defensive relief for servicemembers, and that even if it did, Marin is not entitled to relief because the act does not relieve him of his duty to make payments on the obligation.<sup>32</sup>

The court agreed that Marin did not have an automatic right to toll his obligation under the installment contract, but that after receiving notice of his inability to meet his obligation, TranSouth was required to seek a judicial remedy in a court of competent jurisdiction and failed to do so as required by the act.<sup>33</sup> The court, citing the rationale of *Moll*, stated that “Congress must have intended a private cause of action to exist” to enforce these two sections of the act.<sup>34</sup> The court questioned TranSouth’s assertion that the act be viewed as a defensive measure, stating that if that were the case, a creditor could “simply ignore” provisions of the act and the

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<sup>23</sup> *Cort* at 78.

<sup>24</sup> *Moll* at 9 (citing, e.g., *Sutter v. Artist M.*, 503 U.S. 347, 364 (1992); *Thompson v. Thompson*, 484 U.S. 1274, 1279 (1998)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 14 (quoting 88 Cong. Rec. 5366 (1942)).

<sup>27</sup> *Id.* at 14.

<sup>28</sup> *Marin v. Armstrong*, 1998 U.S. Dist. LEXIS 22792 (N.D. Tex. August 31, 1998).

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 9 (§ 531 of the SSCRA, codified at 50 U.S.C. app. § 532).

<sup>31</sup> *Id.* at 3 (§ 518 of the SSCRA, codified at 50 U.S.C. app. § 518).

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Marin* at 12.



servicemember would be unable to bring a cause of action.<sup>35</sup> The court acknowledged that a criminal penalty did exist for violations of the act, but that such penalty provided no relief to the servicemember and that a “result that fails to make the servicemember whole defies the purpose of the statute.”<sup>36</sup> The court further stated that “without a private cause of action there would be no way for a servicemember to ensure that his rights were protected under the section. Creditors and insurers could simply ignore the provisions of the section without repercussion.”<sup>37</sup>

In *Cathey v. First Republic Bank*,<sup>38</sup> the United States District Court for the Western District of Louisiana found an implied private cause of action under the provision prohibiting a creditor from changing the terms of credit when the act has been invoked by a servicemember and the provision limiting the amount of interest that may be charged on debt incurred prior to service. Cathey, a lieutenant colonel in the United States Army Reserve, alleged that First Republic Bank failed to lower the interest rate on two separate loans after he was ordered to active duty and that the bank modified the terms of the credit agreement after he invoked protections under the act. The loans in question were signed by Cathey and his wife, individually and jointly, to finance the construction of two gasoline/convenience stores.<sup>39</sup> As required by the act, Cathey provided a copy of his military orders to the bank prior to entering active duty.<sup>40</sup> However, the bank continued to charge an interest rate in excess of the 6%.<sup>41</sup> Upon his return from active duty, he demanded a cash refund of the overpaid interest from the bank and alleged that they would only refund the interest with additional concessions on the loans.<sup>42</sup> The bank refused to refund the overpaid interest, despite repeated demands by the Catheys, individually and through the armed services, and proceeded to seize and sell both stores.<sup>43</sup>

First Republic Bank argued that the Catheys were not entitled to the interest rate reduction because the loans were signed by each of the Catheys, as well as their corporation, and as such are not covered by the SCRA.<sup>44</sup> The court dismissed this argument and stated: “while it is the serviceman who is provided interest rate protection under the [SCRA] and not his co-makers, the result is the same. Interest on that obligation may not be charged in an amount in excess of the statutory rate of 6% per annum.”<sup>45</sup> The defendants also claimed that a private cause of action did not exist and that, in effect, the SCRA is a right without a remedy.<sup>46</sup> The court disagreed with this claim and instead agreed with and adopted the reasoning of *Moll*.<sup>47</sup> The court, quoting the plaintiff, stated: “[It] would lead to an absurd conclusion to say that 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

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<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.* at 13 (finding a private cause of action under § 531 of the SSCRA).

<sup>37</sup> *Id.* at 13 (finding a private cause of action under § 518 of the SSCRA).

<sup>38</sup> *Cathey v. First Republic Bank*, 2001 U.S. Dist. LEXIS 13195 (W.D. La. August 13, 2001).

<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 5.

<sup>44</sup> *Id.* at 11.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.*



violation of their rights cause them damages.”<sup>48</sup> The court declined to determine the proper remedy for the plaintiffs, as the issue was not before the court, and limited its finding to the existence of a private cause of action under the SCRA.<sup>49</sup>

In *Linscott v. Vector Aerospace*,<sup>50</sup> the United States District Court for District of Oregon found an implied private cause of action for a violation of the prohibition against foreclosure or enforcement of liens during any period of military service.<sup>51</sup> Linscott, a major in the Air Force Reserve, alleged that Vector Aerospace, a Canadian company doing business in the United States, violated the SCRA by wrongfully asserting a lien on his property while he was on active duty.<sup>52</sup> Vector performed an overhaul on a helicopter engine, and upon completion of the work, Linscott alleged that the engine work was defective and refused to pay for the work until it was completed correctly.<sup>53</sup> Vector retook possession of the engine and promised a quick turnaround so that a temporary engine would not be needed.<sup>54</sup> However, once Vector had possession of the engine, it claimed that the work was completed satisfactorily and refused to return the property until the outstanding bills were paid.<sup>55</sup> Linscott provided a copy of his orders to Vector and notified the company that they were in violation of the act by asserting a lien on his property, but Vector stated that it was entitled to a lien under Canada’s Repairers Lien Act and that the SCRA did not apply in Canada.<sup>56</sup> The court disagreed and found the act applicable to Vector based on its assertion of a lien on the helicopter engine while doing business in the United States.<sup>57</sup>

The court then turned its focus to the question of whether a private cause of action exists under the section prohibiting foreclosure or enforcement of a lien while the servicemember is on active duty. The defendant argued that the section does not provide a private cause of action. Linscott argued that in other cases, courts have found an inferred private cause of action in other sections of the act, and that the court should find a private cause of action in the section in question.<sup>58</sup> The court cited the reasoning under *Moll*, *Marin*, and *Cathey* as being applicable to the current dispute.<sup>59</sup> The court reasoned that under the *Cort* analysis, “the most important inquiry ... is whether Congress intended to create the private remedy sought by the plaintiffs,”<sup>60</sup> and that the “legislative intent factor clearly favors plaintiffs. There is no indication that in enacting and renewing the Act, Congress intended to create rights without remedies.”<sup>61</sup> The court concluded, after completing the *Cort* four-part analysis, that a private cause of action exists for a violation of the prohibition against foreclosure or enforcement of a lien.

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 19.

<sup>50</sup> *Linscott v. Vector Aero.*, 2006 U.S. Dist. LEXIS 6287 (D. Or. January 31, 2006)

<sup>51</sup> *Id.* at 21.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.* at 14.

<sup>59</sup> *Id.* at 19.

<sup>60</sup> *Id.* (quoting *Suter v. Artist M.*, 503 U.S. 347, 364 (1992)).

<sup>61</sup> *Id.*

In *Batie v. Subway Real Estate Corp.*,<sup>62</sup> a servicemember alleged that Subway Corporation violated the SCRA by evicting him from two commercial spaces while he was deployed to Afghanistan.<sup>63</sup> After obtaining declaratory judgments in the State of Texas courts, Subway evicted the servicemember from the spaces under lease. Batie filed suit in the federal district court seeking relief from the declaratory judgments and for compensatory and punitive damages for the alleged violations of the SCRA. The U.S. district court declined to overturn the state declaratory judgments, stating “Congress envisioned that state courts—not federal district courts—would decide claims involving SCRA’s tenant protections during eviction proceedings.”<sup>64</sup> The court interpreted the act to mean that jurisdiction is not exclusive in federal court and that the act does not compel federal adjudication of all cases implicating the statute’s provisions. Denying the claim for compensatory and punitive damages, the court referred to the failure of the servicemember to cite any provisions in the SCRA authorizing damages.<sup>65</sup> Further, the court found that, even if the servicemember maintains the SCRA as a basis for damages, “there is no provision in SCRA that authorizes a private cause of action to remedy violations of the statute.”<sup>66</sup> The servicemember’s claims were dismissed by the court. However, Batie filed a Motion for Reconsideration citing cases in which courts have interpreted certain sections of the SCRA to create a private cause of action.<sup>67</sup> In light of the precedent cited by Batie’s motion, the court vacated its earlier decision and reinstated the complaint for further adjudication.<sup>68</sup>

In contrast, the United States District Court for the Western District of Michigan, in *Hurley v. Deutsche Bank Trust Company*,<sup>69</sup> stated that “the SCRA affords certain rights to servicemembers, but a private cause of action is not among them.”<sup>70</sup> Hurley asserted multiple violations of the SCRA and a separate claim of conversion under state law against Deutsche Bank related to the foreclosure, eviction, and subsequent sale of his primary residence while he was deployed to Iraq.<sup>71</sup> The defendants asserted that the SCRA sections cited by Hurley did not expressly create a private cause of action, nor could one be inferred because the penalty provisions provide an adequate means of enforcement.<sup>72</sup> Additionally, the defendant argued that the SCRA merely

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<sup>62</sup> *Batie v. Subway Real Estate Corp.*, 2008 U.S. Dist. LEXIS 11458 (N.D. Tex. February 15, 2008).

<sup>63</sup> The servicemember claimed Subway violated the SCRA procedures, in two different proceedings before state courts, by failing to: (1) properly serve plaintiff; (2) appoint an attorney for plaintiff; (3) notify the court of plaintiff’s status as a U.S. serviceman or his deployment abroad; (4) apprise plaintiff of the eviction notice; and (5) stay proceedings pending plaintiff’s return from deployment.

<sup>64</sup> *Batie* at 17.

<sup>65</sup> Sections addressing rent, installment contracts, mortgages, liens, assignments, and leases under Title III do contain language discussing consequential and punitive damages as an appropriate form of a remedy, though none of these sections would apply to a commercial lease or eviction from commercial space.

<sup>66</sup> *Batie* at 22.

<sup>67</sup> See Batie Motion for Reconsideration of Order Dismissing Claims Against Subway Real Estate Corporation with Prejudice, Civil Action No. 3-07CV-1415M, citing *Marin v. Anderson*, 1998 WL 1765716 (N.D. Tex. September 21, 1998).

<sup>68</sup> *Batie v. Subway Real Estate Corp.*, 2008 U.S. Dist. LEXIS 102539 (N.D. Tex. March 12, 2008).

<sup>69</sup> *Hurley v. Deutsche Bank Trust Company*, 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. September 30, 2008).

<sup>70</sup> *Id.* at 19.

<sup>71</sup> The servicemember claimed violations of the SCRA by (1) conducting a foreclosure by advertisement (50 U.S.C. app. §§ 516(a) and 533(c)), (2) allowing the redemption period to run (U.S.C. app. § 526(b)), (3) evicting the plaintiff’s family from the property (50 U.S.C. app. § 531), and (4) selling the property to a bona fide purchaser (50 U.S.C. app. § 521(h)).

<sup>72</sup> *Hurley* at 15.

preserves private causes of action that exist independent of the act.<sup>73</sup> The court found that none of the sections cited by Hurley expressly provided for a private cause of action,<sup>74</sup> and turned to the question whether the SCRA created an implied private cause of action. Relying on *Cort*, the court utilized the four-part test for determining whether the statute created an implied private cause of action. The court held that the “plain language of the SCRA, coupled with instructive case law, persuades the Court that the SCRA does not imply a private cause of action for damages for foreclosure, redemption, eviction, or sale to a [bona fide purchaser].”<sup>75</sup> The court ruled in favor of the defendants with respect to claims under the SCRA, but allowed the claim of conversion under Michigan state law to proceed. Shortly after the decision, Hurley filed a Motion for Reconsideration, citing the decision by the U.S. District Court for the Northern District of Texas to vacate its decision in *Batie*, thereby allowing a private a cause of action under the SCRA to proceed. In denying the motion, the court stated that *Batie*, as an out-of-circuit case, was only instructive and that it was not required to adhere to it then or now.<sup>76</sup>

While the majority of U.S. district courts that have ruled on the question have found an implicit private cause of action under the SCRA, the *Hurley* decision illustrates that the issue is not settled in federal trial courts. The issue has not been considered by a U.S. court of appeals and therefore precedent has not been established for the lower courts to follow. It remains unclear how a court of appeals might resolve such a question.

## Legal Standard: Finding of a Private Cause of Action

In the absence of action by federal courts of appeals, the U.S. Supreme Court has not ruled on whether a private cause of action exists under the SCRA. However, the Court has dealt with the issue of an implied cause of action under other statutes, and that precedent has guided the district courts in their determination of whether a private cause of action exists under the SCRA. In *Cort v. Ash*,<sup>77</sup> the Court addressed the issue whether private individuals have the right to sue for injunctive relief under 18 U.S.C. § 610, a criminal statute prohibiting corporations from making contributions or expenditures in connection with federal elections. The Court held that individuals did not have a private cause of action under 18 U.S.C. § 610 and that the Federal Election Campaign Act<sup>78</sup> authorized the Federal Election Commission to receive citizen complaints in future disputes. The Court created the four-part test, discussed above. However, in *Alexander v. Sandoval*,<sup>79</sup> a more recent decision, the Court appears to have abandoned the four-part test in favor of a single factor analysis. The question in *Alexander* was whether a private citizen may sue to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964.<sup>80</sup> The Court held that a private cause of action does not explicitly exist under the statute and that the statutory intent does not support an implied cause of action.<sup>81</sup> The Court stated that statutory intent to

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 16.

<sup>75</sup> *Id.* at 17.

<sup>76</sup> *Hurley v. Deutsche Bank Trust Company*, 2008 U.S. Dist. LEXIS 92872 (W.D. Mich November 14, 2008).

<sup>77</sup> *Cort v. Ash*, 422 U.S. 66 (1975).

<sup>78</sup> P.L. 92-225, 86 Stat. 3 (February 7, 1972).

<sup>79</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>80</sup> P.L. 88-352, 78 Stat. 241 (July 2, 1964).

<sup>81</sup> *Alexander* at 293.

create not just a private right but a private remedy, the second factor of the *Cort* analysis, is determinative, and that without it, a cause of action does not exist and that courts may not create one, no matter how desirable it might be.<sup>82</sup> The Court focused solely on the statutory intent, and not the three other *Cort* factors, in its determination that a private cause of action does not exist under Title VI of the Civil Rights Act.

However, it does not appear that the precedential weight and persuasiveness of the opinions of the district courts finding that a private cause of action exists under SCRA, based upon the *Cort* decision, are undermined by the *Alexander* decision. The district court in *Moll*, while acknowledging the *Cort* analysis, focused on the legislative intent factor in its determination that a private cause of action exists under the SCRA. The subsequent district court decisions, discussed above, followed the analysis and rationale of *Moll*, and thus were arguably following the *Alexander* analysis.

## Congressional Action

In the 110<sup>th</sup> Congress, S. 2787, The National Defense Authorization Act for Fiscal Year 2009, was introduced containing language that, if enacted, would have established a new title addressing civil liability and enforcement of the SCRA, partially addressing some of the issues raised in the cases discussed.<sup>83</sup> The bill would have authorized the Attorney General to file a civil action in any appropriate United States District Court when a reasonable belief existed that an individual or group was engaged in, or has engaged in, a pattern or practice of conduct in violation of the SCRA. An action could also be filed if a denial of protections raised an issue of general public importance. The language also authorized judicial relief in the form of monetary damages, including actual and punitive damages, to a servicemember, dependent, or any other person protected by the SCRA. The court could also impose a civil penalty to “vindicate the public interest.” While the proposed language did not explicitly state that a private cause of action existed under the SCRA, it did provide for intervention by private citizens when the case had been filed by the Attorney General. The bill stated that damages, including actual and punitive damages, are authorized forms of relief in a civil action filed by the Attorney General. It is unclear if courts would construe this to mean that damages are available for all violations of the SCRA, not only those under Title III, through a private cause of action.

The split in the U.S. district courts creates uncertainty in how the act may be enforced in the future. In many jurisdictions across the country it may be unclear whether a servicemember has the right to bring a private cause of action for violations of the SCRA. This ambiguity is likely to persist if the courts continue to reach different conclusions on the right to bring a private cause of action. The current ambiguity provides options for Congress. Congress may provide guidance to the courts by clarifying the purpose and intent of the act. A bill introduced in the 110<sup>th</sup> Congress would have done so. Or Congress may want to amend individual sections of the act, or the act in its entirety, with language that explicitly states whether a private cause of action exists. However,

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<sup>82</sup> *Id.* at 286.

<sup>83</sup> S. 2787, 110<sup>th</sup> Cong., 2<sup>nd</sup> Sess., § 541 (2008) (Senator Levin stated, for himself and Senator McCain, “As is the case with any bill that is introduced by request, we introduce this bill for the purpose of placing the administration’s proposals before Congress and the public without expressing our own views on the substance of these proposals. As chairman and ranking member of the Armed Services Committee, we look forward to giving the administration’s requested legislation our most careful review and thoughtful consideration.” 154 Cong. Rec. S 2234 (March 31, 2008)).

Congress also has the option not to act and allow the courts to interpret the SCRA, as they have in the past, with the possibility that the issue will be resolved by the U.S. Supreme Court.

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