

Unsettled Questions Remain Under the SCRA

March 31, 2014

The Servicemembers Civil Relief Act (SCRA) protects active duty members of the military in civil actions, including foreclosures and collections. Section 533 of the Act applies to persons entering the military *after* incurring the obligation, affording a stay of proceedings and prohibiting foreclosure during service. Separately, section 521 protects service members from default judgments in their absence. Before a default can be entered, plaintiff must file an affidavit indicating whether the defendant is on active duty. If not, the case proceeds. If so, the court will appoint a guardian ad litem and may enter a stay. On October 13, 2010, the SCRA was amended to add a private right of action for any violation. That amendment, codified at section 597a, expressly permits an action for equitable and declaratory relief, as well as recovery of monetary damages, including attorney's fees. In December 2013, the Ninth Circuit Court of Appeals heard *Brewster v. Nationstar Mortgage*, which involved an alleged section 533 violation – Nationstar attempted to collect foreclosure fees incurred in an action that had been dismissed. Following briefing on that issue, the court requested supplemental briefing on two questions: (1) whether the section 597 cause of action applied retroactively, and (2) whether punitive damages were recoverable. Brewster relied on 597a to assert a private right of action; Nationstar asserted the amendment did not apply retroactively. While there is support for both positions, **courts are reluctant to find retroactive application of a statute without express legislative intent, and California's Central District has already found the private right of action was not retroactive for purposes of section 521's affidavit requirement.** Brewster also argued that punitive damages were available for willful violations and that the term "monetary damages" used in the statute was sufficiently expansive to encompass them. Nationstar argued there was no legislative history to support recovery of punitive damages, and that such damages were not listed among categories of recoverable damages in the statute. The Ninth Circuit declined to address retroactivity, finding Nationstar's conduct occurred after the amendment was adopted. However, the punitive damages fight is just beginning. The panel held the district court should make that determination on a more developed record. Because it remains unclear whether courts will give "monetary damages" a broad reading, the best bet is to ensure no violations occur – even technical violations of the SCRA – lest the lender, consumer creditor, servicer, or collector end up subject to punitive damages and public scrutiny for the perceived violation.

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