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Allows U.S. attorney general to bring civil suits

President signs legislation to improve and enhance SCRA rights

ABA President Stephen N. Zack applauded passage last month of ABA-supported provisions to strengthen the ability of the U.S. attorney general to enforce rights under the Servicemembers Civil Relief Act (SCRA).

The provisions are part of P.L. 111-275 (H.R. 3219), the comprehensive Veterans' Benefits Act of 2010, which was signed by the president Oct. 13.

The SCRA, originally enacted in 2003, is designed to address personal and legal challenges faced by active-duty servicemembers over consumer, landlord-tenant, family property and business matters that result from repeated military mobilizations and overseas deployments. The act is intended to postpone or suspend certain civil obligations to enable servicemembers to devote full attention to duty and relieve stress on family members of those deployed servicemembers.

Zack emphasized that it is unacceptable that someone fighting in the Afghan desert should have to worry about foreclosure on a house or repossession of a car. The steps taken under the new law, he said, "will ensure that servicemembers and the Justice Department (DOJ) will have new options to pursue those who wronged them."

Title III of the new statute amends the SCRA to allow the U.S. attorney general to bring a civil suit in any U.S. federal district court against any violator of the SCRA. The act also codifies a private right of action to persons aggrieved by a violation of the act and authorizes recovery of reasonable costs and attorneys' fees. The provisions do not preclude or limit other remedies under law, including consequential and punitive damages.

Title III also strengthens protections for the military and their dependents in matters related to residential and motor vehicle leases and telephone service contracts.

The provisions reflect policy adopted in February 2009 by the ABA, which has a long history of fighting for the legal rights of military servicemembers. The report accompanying the policy emphasized that authorizing the attorney general to bring a civil action would go far both to redress major SCRA violations and serve notice on the worst offenders that those who flout its protection of service men and women may be called on to answer to the DOJ in federal court. The

See "Servicemembers," page 8

LEGISLATIVE BOXSCORE

| ABA LEGISLATIVE PRIORITY | HOUSE | SENATE | FINAL | ABA POSITION |
|--|--|--|---|---|
| <p>Independence of the Legal Profession. On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a "Red Flags Rule" that would include attorneys in the definition of "creditor" and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. The ABA filed a lawsuit against the FTC on 8/27/09 and a motion for partial summary judgment on 9/23/09 to block the Rule's application to lawyers. On 10/30/09, the court ruled that the FTC had exceeded its authority. The FTC appealed the decision and delayed implementation of the rule for all entities through 12/31/10. Amicus briefs in the appeal were filed 9/7/10.</p> | | | | <p>Opposes the application of the FTC's "Red Flags Rule" to lawyers. Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.</p> |
| <p>Health Care Law. P.L. 111-148 (H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation's health care system. The president held a Forum on Health Reform at the White House on 3/5/09. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p> | <p>Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09 and approved the bill on 5/19/09. House passed the final version of H.R. 3590 on 3/21/10 and the final version of H.R. 4872 on 3/21/10.</p> | <p>Senate passed H.R. 3590 on 12/24/09 and the final version of H.R. 4872 on 3/25/10.</p> | <p>President signed P.L. 111-148 (H.R. 3590) on 3/23/10 and P.L. 111-152 (H.R. 4872) on 3/30/10.</p> | <p>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478.</p> |
| <p>Judicial Independence. No cost-of-living adjustment was provided for federal judges for fiscal year 2010. S. 220 and H.R. 486 would create an inspector general for the judicial branch. S. 1653 and H.R. 3362 would authorize new federal judgeships.</p> | <p>H.R. 486 was referred to the Judiciary Cmte. on 2/9/09. H.R. 3362 was referred to the Judiciary Cmte. on 9/29/09.</p> | <p>S. 220 was referred to the Judiciary Committee on 1/13/09. Judiciary subc. held a hearing on S. 1653 on 9/30/09.</p> | | <p>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</p> |
| <p>Legal Services Corporation. A House draft bill includes \$440 million for the LSC in fiscal year 2011 and would lift a restriction on class actions. S. 3636 includes \$430 million and lifts a restriction on use of non-LSC funds. S. 718 and 3467 would reauthorize the LSC and lift several restrictions.</p> | <p>Judiciary subc. held LSC reauthorization hearings on 10/27/09 and 4/27/10. House Approps. subc. approved draft bill on 6/29/10.</p> | <p>S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09. Senate Approps. Cmte. approved S. 3636 bill on 7/22/10.</p> | <p>President signed P.L. 111-242 (H.R. 3081), a continuing resolution funding programs at current levels through 12/3/10.</p> | <p>Supports an independent, well-funded LSC. See page 7.</p> |

ABA expresses support for bills to assist foster youth

The ABA commended Reps. James R. Langevin (D-R.I.) and Fortney "Pete" Stark (D-Calif.) last month for introducing legislation to assist individuals in foster care.

Approximately 30,000 foster youth receive either Supplemental Security Income (SSI) or Old Age, Survivors and Disability Insurance (OASDI) benefits each month, but, according to Stark, state welfare agencies routinely make themselves the representative payee with control over the children's benefits. As a result, state welfare agencies take an estimated \$156 million from foster children each year, according to a Congressional Research Service analysis, and many children do not benefit from the funds or have the option to conserve funds to use when they leave the foster care system, he said.

H.R. 6192, the Foster Children Self-Support Act, would require states to screen all foster children for Social Security eligibility and assist them in applying for those benefits and developing a plan on how best to use the benefits to address the children's needs and improve their lives.

The provisions also provide for the conservation of Social Security funds in dedicated accounts that a child can access when leaving care to pay for things like housing, education, transportation or other life expenses.

"This bill would correct a longstanding injustice that has deprived thousands of foster youth of Social Security benefits and will provide some of the most vulnerable children with a chance to succeed," Stark remarked when introducing H.R. 6192 on Sept. 23.

The second bill, H.R. 6193, the Foster Youth Financial Security Act, would strengthen credit protection and take other steps to help youth in foster care make the transition to independent living. Through

creation of Individual Development Accounts, the bill would ensure that foster children receive Social Security benefits to which they are entitled by establishing certain requirements for how those accounts would be managed. Funds also would be authorized for a grant to a national coalition or consortium of private, non-profit organizations and other organizations focused on the needs of transitioning foster youth. This coalition would consult with other organizations experienced in service delivery, legal issues, financial asset management, and identity safeguarding.

In letters to Langevin and Stark,

ABA Governmental Affairs Director Thomas M. Susman emphasized that the bills implement important steps that are "vital to aiding many of our most vulnerable youth, who have been in foster care due to their abuse or neglect, to make successful transitions to adult independence." ■

Save the Date!

**ABA Day in Washington
April 12-14, 2011**

[http://new.abanet.org/
calendar/abaday/Pages/](http://new.abanet.org/calendar/abaday/Pages/)

Lillian Gaskin retires after 33 years

Lillian Gaskin, Senior Legislative Counsel in the Governmental Affairs Office, retired last month after 33 years.

Lillian joined the ABA staff in 1977 after serving as a deputy attorney general for the Commonwealth of Pennsylvania for four and a half years. At retirement, she was representing ABA policy positions in the following areas: insurance law, tort law, the administrative judiciary, attorneys' fees, elder law, health law, bioethics, selected litigation-related issues and the Social Security disability determination and appeals process.

Many of her efforts contributed to enactment of legislation. During the past year, she worked on health care reform, and the new law enacted in March contains several ABA-supported provisions.

Since 1991, Lillian has worked on ABA efforts to improve the justice system, including production in 1992 of the *ABA Blueprint for Improving the Civil Justice System* and development of the civil justice portions of the 1996 *ABA Agenda for Justice*. Within the past few years, she worked with the Standing Committee on Medical Professional Liability to develop ABA policies to foster better communications between doctors and patients and to promote patient safety. She also has provided staffing for numerous ABA committees and task forces within GAO, including the Task Force on Federal Agency Preemption of State Tort Laws, which brought a policy recommendation to the House of Delegates in August that was approved on a strong voice vote.



Lillian Gaskin

Flood insurance program extended for one year

President Obama signed legislation Sept. 30 to extend the National Flood Insurance Program (NFIP) for one year through Sept. 30, 2011 – the eighth short-term extension for the program in the past nine years.

The new law, P.L. 111-250 (S. 3418), continues the authority of the administrator of the Federal Emergency Management Agency (FEMA) to finance the program, which provides assistance to 5.5 million families and businesses.

In July, the House passed H.R. 5114, which would have reauthorized the NFIP for five years, and the Senate Banking, Housing and Urban Affairs Committee held a Sept. 22 hearing on reauthorization of the act. During the hearing, committee Chairman Christopher J. Dodd (D-Conn.) said that, in addition to providing in-

surance to help families and businesses recover from flood damages and mitigation assistance to help them avoid damages in the future, the act “provides a framework of responsible flood plain management, requiring safer, more environmentally sound development that limits Americans’ flood risks.”

The ABA, in policy adopted in February 2009, urges Congress to consider ways to strengthen the insurance financial infrastructure to deal with natural catastrophes through programs that includes availability of affordable insurance in areas highly exposed to catastrophes without competing with the private markets. The ABA policy, which supports NFIP reauthorization, cites specific changes that should be made in the program to put it on a sound actuarial basis. ■



COLLATERAL CONSEQUENCES: The ABA Criminal Justice Section (CJS) spent a day at the Newseum in Washington, D.C., Aug. 25 taping training videos that will be used with other materials to encourage prosecutors, defense lawyers and judges to become familiar with deportation consequences and other collateral consequences that have potentially significant implications for defendants. The training is being developed by the section's Padilla Task Force, established following the March 2010 Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. __ (2010), which ruled that defense counsel must advise clients if their potential pleas carry a risk of deportation. The featured event was “Padilla and Beyond: Scope and Implications of *Padilla v. Kentucky*,” a panel discussion before a live audience. Those appearing on the panel, moderated by former CJS Chair Prof. Stephen Saltzburg of George Washington University, included (from left): Scott Burns, executive director, National District Attorneys Association; D.C. private practitioner Margaret Love; Prof. Jack Chin, University of Arizona; Benita Jain, co-director of the Immigrant Defense Project in New York; Hon. Paul Fried, U.S. District Judge for the District of Columbia; Gwendolyn Washington, Civil Legal Services Division of the D.C. Public Defender Service; and CJS Chair Prof. Bruce Green, Fordham University.

Proposed FASB accounting standards spark ABA concerns

The ABA expressed concerns last month about disclosures by corporations that would be required under accounting standards being developed by the Financial Accounting Standards Board (FASB).

The proposed disclosures are part of a Revised Exposure Draft issued last July to make changes in the existing corporate accounting standards regarding loss contingencies. The ABA comments, filed Sept. 20 with the FASB by ABA President Stephen N. Zack, were prepared by leading members of the ABA Business Law Section with input from in-house and outside lawyers with a broad range of expertise and experience.

Zack noted that the ABA commends the FASB for addressing many of the previous comments submitted by the association on an initial exposure draft issued in 2008 and shares the FASB's goal of providing investors with meaningful and timely information regarding contingent liability. The association, however, continues to question the need for changes in the existing standards, he said.

"These concerns," according to the comments, "are based upon the significant prejudicial impact that certain proposed disclosures would have on companies and their investors without, in most cases, providing material information to users of the financial statements." Also of concern are the risks these disclosures would create for fundamental attorney-client privilege and work product protections, both as a result of the disclosures and because of the information auditors may seek in connection with the auditing of those disclosures.

The association also cautioned against requiring "disclosure of information that involves speculation or prediction regarding the outcome of litigation against the company and stressed that any disclosure regime must be based upon

the bedrock principle of materiality of the information to users."

According to the comments, if the FASB proceeds with its proposed changes, the ABA urges the board to adopt the following: a principles-based approach rather than a prescriptive approach to loss contingencies; greater protections for the attorney-client privilege; and other revisions to address the inherent uncertainty of litigation. The association also urged that the pro-

posed effective date be delayed by one year to Dec. 15, 2011, to allow companies to prepare for compliance.

The ABA recommendations, according to the ABA president, would accomplish the objectives of enhanced and timely information for investors without eroding fundamental attorney-client privilege and work product protections or creating unnecessary problems for companies. ■

EOIR drops call-in proposal

In response to concerns raised by the ABA and numerous immigration groups, the Executive Office of Immigration Review (EOIR) dropped plans last month to require an individual using the EOIR telephone call-in case information system to provide not only an alien registration number but also the date on his or her charging document.

The requirement, which had been scheduled to go into effect Oct. 4, was meant to establish a higher level of security for the respondents as part of a new upgraded system designed to help respondents, their representatives and families learn the current status of their proceedings. After re-evaluating the proposal, EOIR announced Sept. 21 that security considerations could be resolved operationally without additional user requirements.

ABA Governmental Affairs Director Thomas M. Susman emphasized in a Sept. 10 letter to EOIR that the policy would have had several unintended consequences on the ability of respondents and lawyers to retrieve information from the system.

Requiring the date on a charging document is problematic, he said, because many detained noncitizens do not have charging documents in their possession because the documents have not been issued or they may not be allowed to access their legal papers or personal possessions. In addition, when detainees are transferred from one facility to another, their legal papers frequently do not accompany them. ~~Others may not have the documents because of negligence of their attorneys, errors by the government, problems with mail delivery, or personal reasons.~~

Susman also pointed out that the automated case information system is often the initial tool used by attorneys and advocates screening for effective representation. If the proposal had become effective, the ABA, which uses the system every day to assist detainees seeking assistance in locating pro bono representation or pro se legal materials, would have been unable to help many individuals who do not know their case status.

Recent estimates show that 84 percent of the detained immigrants do not have legal representation.

The new requirement, Susman said, would have "dramatically" hindered noncitizens' access to counsel, particularly for detainees.

DOJ awards grants for prosecutor/public defender loan repayment

The Department of Justice (DOJ) awarded \$10 million in grants last month to provide loan repayment assistance for federal and state public defenders and state and local prosecutors under the new John R. Justice Prosecutors and Defenders Incentive Act.

The awards, which went to all 50 states and the District of Columbia, will benefit those who agree to remain employed as public defenders and prosecutors for at least three years.

The John R. Justice program was established by the Higher Education Act reauthorization legislation enacted in 2008 in response to understaffing of prosecutor and public defender offices. Such offices are unable to effectively recruit new lawyers in light of the crushing student loan debt that law students must assume and the comparatively low pay the public interest positions can offer.

ABA President Stephen N. Zack called the funding “a great step that rewards dedication to public service.” The ABA has been encouraging enactment of loan forgiveness and repayment assistance since first adopting policy in 1988.

“Prosecutors and public defenders are heroes in our criminal justice system,” Zack said. “That’s why the American Bar Association hails the release of millions in funding to relieve some of the student loan burden carried by these hard-working, very modestly paid lawyers.” Zack commended Sen. Dick Durbin (D-Ill.) for his work to ensure enactment and funding of the program.

“The John R. Justice program will strengthen our justice systems by helping to recruit and keep well-qualified and high-functioning prosecutors and public

defenders in civil service, where these systems and the communities they serve can benefit from their continued service,” according to Jim Burch, acting director of the Bureau of Justice Assistance (BJA), the office housed in the DOJ Office of Justice Programs that awarded the funds.

The Bureau of Justice Statistics (BJS), which developed the formula for distributing the funds, issued two reports Sept. 16: *State Public Defender Programs, 2007*, and *County-based and Local Public Defender Offices, 2007*. According to BJS, approximately 1,000 public defender offices in 49 states and the District of Columbia employed more than 15,000 litigating attorneys in 2007 and received nearly 5.6 million cases. Using the numeric caseload standard established by the National Advisory Commission on Criminal Justice Standards and Goals, the BJS concluded that the majority of public defender offices exceeds the maximum recommended number of cases per year per attorney. ■

Continuing resolution enacted

President Obama signed legislation Sept. 30 to fund federal programs at fiscal year 2010 levels through Dec. 3, 2010.

The continuing resolution, P.L. 111-242 (H.R. 3081) was passed after Congress did not complete action on the 13 regular appropriations bill for fiscal year 2011, which began on Oct. 1, 2010.

Congress is scheduled to return to Capitol Hill Nov. 15 for a lame-duck session after the Nov. 2 mid-term elections.

Judicial Vacancies/Confirmations — 111th Congress (as of 10/15/10)

| <u>Court</u> | <u>Current Vacancies</u> | <u>Pending Nominations</u> | <u>Confirmations</u> |
|---|--------------------------|----------------------------|----------------------|
| US Supreme Court (9 judgeships) | 0 | 0 | 2 |
| US Courts of Appeals (179 judgeships) | 20 | 13 | 11 |
| US District Courts (678 judgeships) | 84 | 35 | 30 |
| Court of International Trade (9 judgeships) | 0 | 0 | 0 |
| Totals | 104 | 48 | 43 |

Washington News Briefs

NATIVE HAWAIIANS: The ABA urged the Senate last month to pass bipartisan legislation that would allow indigenous Hawaiian people to choose a political framework that could be recognized by the U.S. government and serve their unique cultural and civil needs, including advocacy on their behalf on the federal and state levels. For 1,000 years prior to the overthrow of the Hawaiian monarchy, the Hawaiian people lived under an organized political framework governed by the rule of law with a written constitution. The U.S. government recognized Hawaii as a sovereign nation, but U.S. agents acting without official sanction orchestrated a coup against the sovereign state in 1893 and overthrew the kingdom's Queen Liliuokalani. One hundred years later, Congress acknowledged that the overthrow of the Hawaiian kingdom was illegal, and an apology issued by the U.S. government to the Native Hawaiian people included a foundation for reconciliation. H.R. 2134, the proposed Native Hawaiian Government Reorganization Act of 2010, passed the House in February and is still awaiting Senate action despite support by the White House, the Justice Department, Hawaii's congressional delegation, and the governor of Hawaii. In a Sept. 28 letter to all senators, ABA Governmental Affairs Director Thomas M. Susman emphasized that the framers of the Constitution, through the Indian Commerce Clause and the Treaty Clause, empowered Congress to maintain relations between the federal government and governments of indigenous people. The U.S. courts, he said, have specifically recognized that this power includes the power to re-recognize nations whose recognition has been terminated in the past.

ADMINISTRATIVE CONFERENCE: Paul R. Verkuil, chairman of the Administrative Conference of the United States (ACUS), announced Sept. 27 that the ACUS Council is ready to appoint public members to assist the conference in its mission of optimizing the performance of federal agencies by providing authoritative, nonpartisan legal advice and expertise on administrative law and federal regulatory procedures. The 40 public members will join 50 senior federal officials and administrative law experts as senior fellows to form the Conference, which was recently revived 15 years after Congress terminated the program because of budget concerns. Originally established in 1968, ACUS enjoyed bipartisan support and success in improving many government agency procedures and practices. "These 40 distinguished citizens, who together have hundreds of years of high-level experience in the government and private enterprise, have agreed to contrib-

ute their expertise and energies toward this project in collaborative governance. In a world where the news cycle runs at 100 mph and bloggers, pundits and politicians shout past each other, we are creating a forum where a politically balanced group of experts from the public and private sectors will team up to make government work better for everyone," Verkuil said. The ACUS Council is comprised of the chairman and 10 other members appointed by the president for three-year terms. The entire membership comes from federal agencies, independent regulatory boards or commissions, academia and the practicing bar. The ABA has long supported the work of ACUS, and the association's Section of Administrative Law and Regulatory Practice recently submitted a list of recommended study topics for the conference, including the development of an Agency Best Practices Forum.

LEGAL SERVICES CORPORATION (LSC): The Senate confirmed four nominees to the LSC Board of Directors Sept. 29, a move that completes confirmation for all positions on the bipartisan 11-member board. The new board members are: Harry Korrell III, a partner in the Seattle office of Davis Wright Tremaine LLP; Joseph Pius Pietrzyk, a priest in the parish of St. Thomas Aquinas in Zanesville, Ohio; Julie A. Reiskin, the executive director of the Colorado Cross-Disability Coalition; and Gloria Valencia-Weber, a professor specializing in Native American law at the University of New Mexico School of Law. The Board of Directors, chaired by John G. Levi, is currently accepting applications through Oct. 15 for a new LSC president to manage the day-to-day operations of the corporation, approve all grants and ensure oversight of the grants, and represent the LSC before Congress, executive agencies and other groups and organizations. The board also voted Sept. 21 to request \$516.5 million for its fiscal year 2012 appropriation, which is \$96.5 million more than the corporation's current appropriation of \$420 million. The proposed figure includes \$484.9 million for basic field grants to civil legal aid programs, \$6.8 million for innovative technology projects; \$1 million for loan repayment assistance to legal aid lawyers; \$19.5 million for LSC grants management and oversight; and \$4.35 million for the LSC inspector general.

Get the latest legislative news at the
ABA Governmental Affairs Office website:
www.abanet.org/poladv

ABA receives military families award



The ABA received the 2010 Support of Military Families Award last month for the exceptional support of military families provided by the association's Standing Committee on Legal Assistance for Military Personnel (LAMP). The award was presented by the National Military Families Association at a Capitol Hill ceremony Sept. 20. A current pro bono project sponsored by LAMP and the ABA Litigation Section cooperates with military legal assistance programs on a range of civil matters. ABA representatives and other honorees are from left: Sen. Daniel Akaka (D-Hawaii), chairman of the Senate Veterans' Affairs Committee; ABA President-elect Wm. T. Robinson III; ABA Executive Director Jack L. Rives; Michele Pearce, counsel, House Armed Services Subcommittee on Military Personnel, representing honoree Rep. Susan Davis (D-Calif.); LAMP Chair Adm. Don Guter (ret.); and Rep. Michael Michaud (D-Maine), chairman of the House Veterans' Affairs Subcommittee on Health.

Servicemembers civil relief

continued from front page

report also maintains that allowing successful litigants in SCRA enforcement cases to recover reasonable attorneys' fees will make equal access to justice a reality for servicemembers whose rights have been violated.

The SCRA provisions had also been introduced earlier as a separate bill, H.R. 2696, that was sponsored by Reps. Brad Miller (D-Ore.) and Walter Jones (R-N.C.).

Addressing other areas, the new Veterans' Benefits Act also includes a one-year reauthorization for the Homeless Veterans Reintegration Program and authorizes additional funding for programs dedicated to homeless women veterans and their children. Grants under the program will fund job training, counseling, placement services and child care.

The omnibus legislation also enhances employment and education opportunities for veterans, increase insurance limits, and help ensure compensation, pensions and other benefits. ■

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association's legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at <http://www.abanet.org/poladv/publications.shtml>. © 2010 American Bar Association. All rights reserved.

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