

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

B.C. ENTERPRISES, INC., d/b/a ARISTOCRAT TOWING
and ARISTOCRAT TOWING, INC.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE

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This brief is submitted pursuant to the Court's order of March 10, 2011, directing the parties to submit supplemental briefs addressing the effect on this case of the recently-enacted Section 801 of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. 501 *et seq.* Section 801 became law on October 13, 2010, after the briefs in this case were filed.

Section 801 expressly authorizes the Attorney General to enforce the SCRA. It provides:

SEC. 801. ENFORCEMENT BY THE ATTORNEY GENERAL.

(a) CIVIL ACTION — The Attorney General may commence a civil action in any appropriate district court of the United States against any person who

(1) engages in a pattern or practice of violating this Act; or

(2) engages in a violation of this Act that raises an issue of significant public importance.

(b) RELIEF — In a civil action commenced under subsection (a), the court may

(1) grant any appropriate equitable or declaratory relief with respect to the violation of this Act;

(2) award all other appropriate relief, including monetary damages, to any person aggrieved by the violation; and

(3) may, to vindicate the public interest, assess a civil penalty —

(A) in an amount not exceeding \$55,000 for a first violation; and

(B) in an amount not exceeding \$110,000 for any subsequent violation.

(c) INTERVENTION — Upon timely application, a person aggrieved by a violation of this Act with respect to which the civil action is commenced may intervene in such action, and may obtain such appropriate relief as the person could obtain in a civil action under section 802 with respect to that violation, along with costs and a reasonable attorney fee.

Veterans Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864 (50 U.S.C. App. 597).

Section 801 applies in this case and is not impermissibly retroactive. As explained in the Brief for the United States as Appellee 13-32, the United States

has inherent authority to enforce the SCRA and seek damages for aggrieved servicemembers. Our brief relied on this Court’s decision in *United States v. Arlington County*, 326 F.2d 929 (4th Cir. 1964), which held that the United States had inherent authority to sue on behalf of servicemembers under the Soldiers’ and Sailors’ Civil Relief Act – the SCRA’s predecessor – because of its interest in the national defense. Section 801 simply codifies the Attorney General’s pre-existing authority.

Accordingly, application of Section 801 “to this particular case” would not be impermissibly retroactive under “the classical retroactivity analysis of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).”¹ See *Gordon v. Pete’s Auto Serv. of Denbigh, Inc.*, No. 09-2393, 2011 WL 490497, at *1-2 (4th Cir. Feb. 14, 2011). That is, application of Section 801 in this case would not have a retroactive effect in the disfavored sense of “affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.” See *Landgraf*, 511 U.S. at 278.

¹ The United States does not argue in this case that Section 801 could permissibly be applied retroactively, assuming *arguendo* that the United States had no inherent authority to enforce the SCRA before Section 801 was enacted. A statute that gives authority to sue to a party that did not previously have such authority may be impermissibly retroactive under the *Landgraf* test. See, e.g., *Hughes Aircraft Co. v. United States ex rel. Shumer*, 520 U.S. 939 (1997).

Section 801 has not changed the United States' enforcement authority, as exercised in this case. Accordingly, it may permissibly be applied in this case.²

CONCLUSION

As this Court has held, the United States has inherent authority to enforce the SCRA. It follows that Section 801 – which codifies that authority – does not have an impermissibly retroactive effect, if applied in this case.

Respectfully submitted,

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² Even assuming *arguendo* that the United States' inherent enforcement authority does not allow the United States to seek civil penalties, Section 801(b)(3)'s authorization of civil penalties does not make Section 801 impermissibly retroactive in this case. The *Landgraf* “inquiry is narrow, for it asks ‘not whether the statute may possibly have an impermissible retroactive effect in any case,’ * * * but specifically ‘whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense.’” *Gordon*, 2011 WL 490497, at *3. The United States has not sought a civil penalty in this case, so Section 801(b)(3)'s authorization of civil penalties has no bearing here. See *id.* at *5 (“We need not address whether attorney fees are available in this particular case, however, because no party has yet prevailed.”).

CERTIFICATE OF COMPLIANCE

I certify that this SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7). This brief was prepared using Word 2007 and contains 751 words of proportionately spaced text. The typeface is Times New Roman, 14-point font.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.

s/ Nathaniel S. Pollock _____
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Attorney

Dated: April 7, 2011

CERTIFICATE OF SERVICE

I certify that on April 7, 2011, an electronic copy of the SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE was transmitted to the Court by means of the appellate CM/ECF system and that eight hard copies of the same were sent by first class mail.

I further certify that the following counsel of record are CM/ECF participants and will be served electronically:

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