No. 09-2393

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANDRE GORDON,

Plaintiff-Appellant

v.

PETE'S AUTO SERVICE OF DENBIGH,

Defendant-Appellee

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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INTRODUCTORY STATEMENT

Following oral argument, the Court "direct[ed] the parties and the amicus United States to file supplemental briefing * * * on the question of whether or not the application of Section 802 of the Service[m]embers' Civil Relief Act [SCRA] to the plaintiff in this case is an impermissibly retroactive one." DE No. 42 (Oct. 28, 2010). Section 802 of the SCRA provides:

> SEC. 802. PRIVATE RIGHT OF ACTION.
>
> (a) IN GENERAL.—Any person aggrieved by a violation of this Act may in a civil action—
>
> (1) obtain any appropriate equitable or declaratory relief with respect to the violation; and
>
> (2) recover all other appropriate relief, including monetary damages.
>
> (b) COSTS AND ATTORNEY FEES.—The court may award to a person aggrieved by a violation of this Act who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

Veterans Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2877 (to be codified at 50 U.S.C. App. 597a).

The United States argued in its *amicus* brief and at oral argument that the version of the SCRA in effect at the time of the conduct at issue in this case contained an implied, federal private cause of action for damages to enforce 50 U.S.C. App. 537. Should the Court agree with that contention, there would be no need for it to also consider whether the recently-enacted Section 802 of the SCRA may be applied retroactively to the conduct at issue in this case. Moreover, as explained during oral argument, the position of the United States is that the new law "clarified" the SCRA generally and Section 537 in particular, by making express what was already implied: that servicemembers may "claim relief under" Section 537 by suing for damages. See, *e.g.*, 156 Cong. Rec. H7334 (daily ed. Sept. 29, 2010) (explanatory statement issued by the House and Senate

Committees on Veterans' Affairs) (Section 802 is intended to "*clarify* that a person has a private right of action to file a civil action for violations under the SCRA") (emphasis added). Because Section 802(a) did not change but only "clarified" the law previously in effect, by definition it has no retroactive effect at all, and may properly be applied in this case. See *Brown* v. *Thompson*, 374 F.3d 253, 259-261 & n.6 (4th Cir. 2004) (concluding that a statutory amendment that "merely clarified the meaning" of the Medicare Secondary Payer Act was not impermissibly retroactive).

At oral argument, however, the Court requested additional briefing to determine whether the case can be resolved by applying the express cause of action provided in Section 802, and indicated that it may want to decide this case without resolving the implied private cause of action issue. If the new law would have no impermissible retroactive effect *even if* the pre-October 13, 2010, SCRA did not contain an implied private cause of action, then the Court may resolve the case without deciding the implied private cause of action issue.[1] Accordingly, this brief addresses the question whether, assuming there is no implied private right of action

[1] Conversely, if the Court concludes that Section 802 *is* impermissibly retroactive and therefore may not be applied in this case, it will then be necessary for the Court to determine whether 50 U.S.C. App. 537 may be enforced in federal court through an implied private cause of action.

to enforce 50 U.S.C. App. 537, the express private right of action in Section 802 may properly be applied retroactively to the conduct that gave rise to this litigation.

As explained below, the position of the United States is that Section 802(a), which provides an express private right of action for damages for violations of the SCRA, permissibly applies retroactively in this case. Section 802(a) does not change the rights, liabilities, or obligations of the parties in this case, but only adds a private right of action to sue in federal court. For that reason, its effect in this case is essentially a *jurisdictional* one, and so its application is not impermissibly retroactive. It would be premature for this Court to decide whether the new costs and attorney's fees provision, Section 802(b), may permissibly be applied retroactively as no costs or fees have been awarded in this case. Should the Court nevertheless decide that question, it should hold that applying Section 802(b) retroactively in this case would be impermissible.

DISCUSSION

1. Analytical Framework

In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Supreme Court set out the test for determining whether the normal presumption against retroactivity applies in a particular case. Pursuant to *Landgraf*, this Court must first determine whether "Congress has expressly prescribed the statute's proper reach." *Id*. at 280. If it has not, this Court must decide whether applying the

statute in this case would have a retroactive effect in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." *Id*. at 278. If the answer is yes, the Court applies the presumption against retroactivity by construing the statute as inapplicable to the conduct in question "absent clear congressional intent" that the statute should apply. *Id*. at 280. The *Landgraf* test has been consistently applied both by the Supreme Court and this Court. See, *e.g.*, *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37-38 (2006); *Ward* v. *Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172-175 (4th Cir. 2010).

Here, it is clear that Congress has not expressly prescribed the temporal reach of Section 802 of the SCRA. It is therefore necessary to determine under step two of the *Landgraf* analysis whether application of Section 802 in this case would be impermissibly retroactive; *i.e.*, whether it would attach new legal consequences to events occurring before its enactment. This inquiry requires a "commonsense, functional judgment," *Martin* v. *Hadix*, 527 U.S. 343, 357 (1999), which "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations,'" *id.* at 358 (quoting *Landgraf*, 511 U.S. at 270).

This Court's opinion in *Ward* makes clear that the retroactive effect inquiry is a narrow one: whether the statute attaches new legal consequences to the

particular conduct at issue in the case at hand, *not* whether the statute may possibly have an impermissible retroactive effect in any case. The question is "whether the statute, *if applied to this case*, would operate retroactively." *Ward*, 595 F.3d at 173 (emphasis added); see also *id.* at 172 (courts must "'determine whether the new statute would have a retroactive effect' *if applied to the case at hand*") (citing *Landgraf*, 511 U.S. at 280) (emphasis added). See also *Landgraf*, 511 U.S. at 280 (defining a particularized inquiry focused on "whether it would impair rights *a party possessed* when he acted [or] increase *a party's liability* for past conduct") (emphasis added); *Fernandez-Vargas*, 548 U.S. at 37 ("[W]e ask whether applying the statute *to the person objecting* would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'") (emphasis added).

Accordingly, *Landgraf* requires the court to determine whether application of Section 802 attaches new legal consequences to the particular conduct or event at issue in the case at hand, not whether it would do so in any SCRA case. In each case, the question will be whether application of Section 802 of the SCRA attaches new legal consequences to the particular conduct or event at issue. Thus, in *Ward*, this Court applied the presumption against retroactivity because "[a]pplying the [new] statute *here* would reach back to alter the legal consequences of * * * events taking place before the statute went into effect" and "application of the statute *here*

would disrupt the rights and duties *of the parties*." 595 F.3d at 173-174 (emphases added).

Moreover, the retroactive effect of each subsection of Section 802 must be analyzed separately. As the Supreme Court explained in *Landgraf*, "there is no special reason to think that all the diverse provisions of the [Civil Rights Act of 1991] must be treated uniformly" for purposes of determining retroactive effect. 511 U.S. at 280. And, in *Landgraf*, the Court analyzed the retroactive effect of each of the various provisions of Section 102 of the Act separately. *Id.* at 280-282. Sections 802(a) and 802(b) are distinct provisions that have very different and wholly separate effects on the rights, liabilities, and obligations of the parties in this case. Accordingly, under *Landgraf*, the retroactive effects of Section 802(a) and 802(b) must be analyzed separately.

2. Section 802(a)

In the instant case (assuming *arguendo* that no *implied* private cause of action exists to enforce 50 U.S.C. App. 537), the inquiry regarding the applicability of Section 802(a) depends on a comparison between the defendant's rights, liabilities, and duties under (1) state conversion law and (2) the express private right of action created by the new federal statute. This comparison reveals that the rights, liabilities, and duties of the parties have not changed in any substantive way with the addition of Section 802(a); *i.e.*, the SCRA cause of action made explicit

by Section 802(a) did not increase defendant-appellee Pete's Auto's liability for its conduct here. Rather, it simply afforded plaintiff-appellant Gordon an additional forum – a federal forum – in which he could bring his claim for the wrongful taking of his automobile. The new legislation did not alter the substantive right created by the previously existing Section 537(a).

Generally, conversion "is the exercise * * * [of] dominion or control over the property of another in denial of, or inconsistent with, his or her rights therein." See 7 Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, *The American Law of Torts* § 24:1 (1990). Consistent with the general rule, the Virginia Supreme Court has defined conversion as tort that "encompasses 'any wrongful exercise or assumption of authority . . . over another's goods, depriving him of their possession; [and any] act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it.'" *PGI, Inc.* v. *Rathe Prods., Inc.*, 576 S.E.2d 438, 443 (2003) (citation omitted). Because he is a servicemember, Gordon has a federal right under Section 537(a) – enforceable in a Virginia conversion action – not to have property taken pursuant to a lien without a court order during his military service, or 90 days thereafter. See, *e.g.*, *Testa* v. *Katt*, 330 U.S. 386 (1947) (pursuant to the Supremacy Clause, state courts cannot refuse to apply federal law). See also *Petersburg Cellular P'ship* v. *Board of Supervisors of Nottoway Cnty.*, 205 F.3d 688, 701 (4th Cir. 2000) (citing *Testa* for the proposition

that "[i]t is, of course, well understood that Congress may, through the exercise of enumerated powers, enact federal laws that state courts must apply"). Indeed, in *McCorkle* v. *First Pennsylvania Banking & Trust Co.*, 459 F.2d 243 (4th Cir. 1972), this Court dismissed a case involving federal rights that, because of particular precedent applicable in that case, were not actionable in federal court. *Id.* at 251. This Court then had the "cheerless task of informing the parties that their contest must be started over in the arena of the state courts." *Ibid.* But, noting that the case "hinges on federal law," the Court explained that, pursuant to *Testa*, "the state court will still be bound to follow federal law in deciding this case." *Ibid.*

When Pete's Auto towed and sold Gordon's vehicle without obtaining a court order, it assumed authority over Gordon's property and deprived him of possession of that property. This assumption of authority was "wrongful" because, whatever state law generally allows, federal law establishes that the vehicle could not permissibly be taken absent a court order. Moreover, Section 537(c)(2) clearly preserved Gordon's right to seek remedies, including monetary damages, in a Virginia conversion claim. And, as Pete's Auto's attorney conceded at oral argument, monetary damages are available in a Virginia conversion claim. See *Rathe Prods., Inc.*, 576 S.E.2d at 443-444. Accordingly, the conduct at issue in

this case gave Gordon a cause of action for damages against Pete's Auto in a Virginia wrongful conversion action.

If the same conduct that is at issue in this case occurred after October 13, 2010, Gordon would also have an *express* federal cause of action for damages against Pete's Auto. Section 802(a) of the SCRA allows persons "aggrieved by a violation of [the SCRA]" to bring a civil action and, if successful, obtain, among other specified forms of relief, "appropriate relief, including monetary damages." See SCRA Section 802(a)(2), Pub. L. No. 111-275, 124 Stat. 2877 (to be codified at 50 U.S.C. App. 597a). Because his vehicle was taken without a court order in violation of Section 537, Gordon would clearly be "aggrieved by a violation of [the SCRA]" and could therefore sue for "monetary damages" in federal court. The new law also makes clear that Gordon could bring a state-law conversion claim in the same suit. See SCRA Section 803, 124 Stat. 2877 ("Nothing in section * * * 802 shall be construed to preclude or limit any remedy otherwise available under other law, including consequential and punitive damages.").

Accordingly, the addition of an express cause of action in Section 802(a) of the SCRA did not attach new legal consequences to the conduct at issue in this case. Before and after the enactment of Section 802(a), it was and is illegal for a lienholder to take a servicemember's property without a court order while the servicemember is in a period of military service or for 90 days thereafter. And

state courts were (and still are) bound to give effect to the right created by Section 537 in a conversion action in which monetary damages are available. The rights, liabilities, and duties of the parties are thus unchanged.

Assuming *arguendo* that there is no implied private cause of action to enforce Section 537, the only change effected by Section 802(a) in this case is that now plaintiff-appellant Gordon has a cause of action to vindicate his Section 537 right in federal court. This is essentially a *jurisdictional* change, and therefore does not have an impermissibly retroactive effect. In *Landgraf*, 511 U.S. at 274, for example, the Supreme Court explained that it has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." The reason this type of statute does not "have a retroactive consequence in the disfavored sense," *Fernandez-Vargas*, 548 U.S. at 37-38, is that it "speak[s] to the power of the court rather than to the rights or obligations of the parties," *Landgraf*, 511 U.S. at 274 (citation omitted). See also *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 577 (2006) (stating that, if a statute merely "changes the tribunal that is to hear the case, * * * no retroactivity problem arises because the change in the law does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed'") (citations omitted); *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 951 (1997)

(explaining that a statute "merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties," and thus has no impermissible retroactive effect). Accordingly, Section 802(a) has no impermissible retroactive effect, as applied to this case.

3. Section 802(b)

In addition to the declaratory, equitable, and monetary relief specified in Section 802(a) of the SCRA, Section 802(b) allows an aggrieved person who prevails in an action brought under Section 802(a) to recover costs and a reasonable attorney's fee. See p. 2, *supra*. Because this Court's order is not limited to Section 802(a), we address the retroactive application of Section 802(b) to this case as well.

The district court dismissed the complaint in this case on the ground that the SCRA does not contain an implied private right of action for *damages*. Accordingly, it would be premature for the Court to determine whether Section 802(b) applies retroactively to this case. Unless Gordon subsequently prevails on his SCRA claim and moves for attorney's fees and costs, Section 802(b) would not be implicated in this case. As indicated, Section 802(b) applies only to "a person aggrieved by a violation of this Act who prevails in an action brought under subsection (a)."

We nevertheless address the retroactive application of Section 802(b) to this case, should the Court decide to reach the issue. Under the analysis described above, whether Section 802(b) has an impermissible retroactive effect in this case depends upon whether attorney's fees and costs are available under Virginia law in a wrongful conversion action in state court. Our research shows that Virginia law does not provide for an award of attorney's fees and costs in conversion actions. Rather, the Virginia Supreme Court has stated that it is a "strong adheren[t]" to the "American rule": *i.e.*, absent a statutory or contractual provision to the contrary, a prevailing party may not recover attorney's fees. *Nusbaum* v. *Berlin*, 641 S.E.2d 494, 501 (2007); see also *Lannon* v. *Lee Conner Realty Corp*., 385 S.E.2d 380, 383 (1989); *Gilmore* v. *Basic Indus.*, 357 S.E.2d 514, 517 (1987).

There is no contract between the parties in this case regarding attorney's fees and costs, and our research has revealed no Virginia statute providing for an award of attorney's fees and costs in state conversion actions. Accordingly, under the analysis discussed above, awarding Gordon attorney's fees and costs pursuant to Section 802(b) for conduct that predated the effective date of that Section would have an impermissible retroactive effect within the meaning of *Landgraf*. Unlike Section 802(a), application of Section 802(b) to this case would attach new legal consequences to events occurring before its enactment – *i.e.*, liability for attorney's fees and costs. See *Montcalm Publishing Corp.* v. *Virginia*, 199 F.3d 168, 173

(4th Cir. 1999) (declining to apply an attorney's fees provision retroactively); see also *Davis* v. *United States Dep't of Justice*, 610 F.3d 750, 755 (D.C. Cir. 2010) (holding that enactment of the OPEN Government Act of 2007 did not permit the plaintiff to recoup attorney's fees that would not have been available before the Act's passage), petition for cert. pending, No. 10-661 (filed Nov. 16, 2010).

CONCLUSION

The United States' principal contention in this case is that the provision of the SCRA at issue here, 50 U.S.C. App. 537, contained an implied private cause of action for damages. It follows that the newly-enacted Section 802(a) that made that cause of action express does not have an impermissibly retroactive effect. But this Court could also resolve this case by assuming *arguendo* that there is no implied private right of action to enforce 50 U.S.C. App. 537. It should then hold that, for the reasons set out in this brief, application of Section 802(a) to the conduct at issue in this case would nonetheless not have an impermissible retroactive effect. There is no need for the Court to decide at this time whether application of Section 802(b) in this case would have an impermissible retroactive effect. Should the Court nevertheless decide that issue, it should hold that applying Section 802(b) retroactively in this case would be impermissible.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a), that this SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 3223 words of proportionately spaced text.

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
NATHANIEL S. POLLOCK
Attorney

Dated: November 29, 2010

CERTIFICATE OF SERVICE

I certify that on November 29, 2010, an electronic copy of the SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL 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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