



# Armed Forces and Forced Arbitration

Despite Efforts, the Fine Print Still Casts a Shadow on Financial Protections for Military Members

## **Acknowledgments**

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## Introduction

**P**redatory lending is a widespread problem affecting millions of consumers. The practice of offering and executing loan and credit products frequently involves the use of a variety of unfair, fraudulent, deceptive, and discriminatory acts and practices, some of which may be legal, but are generally not in the best interest of borrowers. Due to unique circumstances, the U.S. military in particular has compelling reasons for shielding its service members from unscrupulous financial products and services.

In a 2006 report prepared for Congress, the Department of Defense found that predatory lending was a prevalent practice that caused turmoil in the military community.<sup>1</sup> Most notably for this report, the DoD observed that predispute binding mandatory arbitration clauses, present in most lending and credit contracts, inhibited service members' ability to resolve disputes and seek remedies for lenders' misconduct.<sup>2</sup> Forced arbitration and other predatory terms in lending contracts also interfered with special legal protections afforded to service members.<sup>3</sup> "Service members need to have ... judicial remedies through the courts for redress," the DoD report said.<sup>4</sup>

Two major laws protect military members in many of their dealings with consumer loan and credit products: the Military Lending Act (MLA) and the Servicemembers Civil Relief Act (SCRA). The MLA, which passed in 2006 in response to the DoD report, curbs many unsavory financial practices directed at service members, and even included a ban on forced arbitration in certain lending contracts. The SCRA meanwhile protects military members from specific civil obligations while deployed or on active-duty. The law reduces the rate of interest to 6 percent for debts incurred before entering active duty; stays civil and administrative proceedings; protects against default judgments, evictions, mortgage foreclosures, and repossessions of property; and provides the ability to terminate residential and automobile leases. The SCRA does not limit arbitration clauses.

The MLA and SCRA provide critical protections for service members, but they are insufficient to adequately ensure that service members maintain their rights to seek legal redress in court when harmed by unlawful or risky lending practices, particularly when forced arbitration clauses are present in the contracts for the services. The DoD's implementing regulations for the MLA narrowed the law's application to a limited range of products. Consequently, many categories of financial services fall outside of the MLA's scope and protections, allowing lenders to insert forced arbitration clauses in the terms

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<sup>1</sup>Department of Defense, Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents (Aug. 9, 2006), <http://1.usa.gov/rVdafq>.

<sup>2</sup> DoD report, at 7-8, 21, and 46.

<sup>3</sup> Id.

<sup>4</sup> DoD report at 46.

and conditions of numerous loans and credit products. Meanwhile, the SCRA leaves many of its protections vulnerable to consumer contracts with arbitration clauses.

### **Service Members, Targets of Exploitative Financial Products**

While consumers generally are vulnerable to unscrupulous credit and loan products, service members are viewed as a worthwhile pursuit for lenders engaging in financial mischief. Military bases, for example, are prime targets for lenders hawking questionable high-interest, short-term loan and credit transactions such as payday loans, retail installment loan products and rent-to-own financing contracts.<sup>5</sup>

As the federal Consumer Financial Protection Bureau has noted:

- Lenders are aware that service members are required to maintain good finances.
- Service members' military pay is consistent and reliable and may be garnished.
- Young military families are just beginning to make significant financial decisions.
- Service members often relocate leading to unexpected expenses and inadequate resources.<sup>6</sup>

Among other findings, the Department of Defense report found that predatory lenders target military consumers through their "ubiquitous presence around military installations"; that the predatory financial products often include high fees and interest rates or "pack excessive charges into the product," along with the effort to hide the real costs; and that the lenders' practice is to "take advantage of borrower's inability to pay the loan in full when due and encourage extensions through refinancing," which comes with added fees but little or payment on the principal.<sup>7</sup>

Military members, required to maintain bank accounts for direct deposit, are also targets for loan and credit transactions that compel automatic access to borrowers' accounts.<sup>8</sup> Further, the military allotment system, which permits service members to pay for loans and purchases through an automatic system, is an appealing feature for lenders because they can receive payment directly from the federal government, a reliable source.<sup>9</sup>

Some lenders exist for the military only. Known as military installment loan companies, they are strategically positioned around military installations, and on the Internet, where they offer high-interest, small loan products exclusively to service members.<sup>10</sup> They are

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<sup>5</sup> See, DoD report.

<sup>6</sup> Consumer Financial Protection Bureau website, last viewed on Sept. 18, 2012, <http://1.usa.gov/pSZFfq>.

<sup>7</sup> DoD report at 4.

<sup>8</sup> Jean Ann Fox, *The Military Lending Act Five Years Later, Impact on Servicemembers, the High-Cost Small Dollar Loan Market, and the Campaign against Predatory Lending*, at 49 (May 29, 2012), <http://bit.ly/KU942e>.

<sup>9</sup> See, DoD report at 7. See, also, Fox, at 64 (May 29, 2012), <http://bit.ly/KU942e>.

<sup>10</sup> DoD report, at 17.

notorious for evading state consumer protection enforcement by claiming to service nonresident military members.<sup>11</sup>

The DoD documented numerous examples of burdensome debt that impaired members' ability to serve due to high-cost financial transactions. For example, it noted that financial issues accounted for 80 percent of security clearance revocations and denials for Navy personnel, while the number of security clearances for sailors and marines denied or revoked because of financial problems increased 1600 percent between 2000 and 2005.<sup>12</sup>

Indeed, observers have suggested that protecting service members from high-risk financial transactions rises to the level of a national security interest. Congressionally chartered organization the Fleet Reserve Association, which services personnel and veterans of the Navy, Coast Guard and Marine Corp., said that "service members experiencing debt related stress may be less focused on the mission and compromise not only his or her safety, but also that of the entire unit"(u)nregulated predatory lenders" endangered national security because."<sup>13</sup>

The DoD essentially agreed with the assessment, concluding that predatory loans "undermine troop readiness, morale, and quality of life."<sup>14</sup> The gravity of the impact of predatory lending on the U.S. military necessarily directs attention to remedies available to service members affected by the bad practices.

#### **Forced Arbitration "Deprives Service Members of Their Day in Court"**

"Service members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver is not a matter of "choice" in take-it-or-leave-it contracts of adhesion." – U.S. Department of Defense, 2006<sup>15</sup>

Predispute binding mandatory arbitration clauses, or forced arbitration, are inserted in consumer contracts and require individuals to resolve disputes with companies in a private setting, outside of court. Typical non-negotiable consumer contracts identify the arbitration provider, raising questions of bias for private arbitrators who rely on major corporations for repeat business, and the location for the arbitration. Arbitration decisions are rarely

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<sup>11</sup> DoD report, at 17-18.

<sup>12</sup> DoD report, at 86-87.

<sup>13</sup> Fleet Reserve Association, *Point Paper on Predatory Lending*, 2007.

<sup>14</sup> DoD report, at 45.

<sup>15</sup> DoD report, at 7-8.

appealable, even when arbitrators disregard relevant facts or laws when reaching their decisions.

Many contracts with forced arbitration clauses also prohibit individuals from pursuing their claims in class actions, which allows companies to insulate themselves from valid consumer claims. The ban on class actions in many consumer contracts effectively permits companies to escape critical consumer laws and regulations because it eliminates a major mechanism for consumers to seek accountability for corporate misconduct.

In its 2006 report, the Department of Defense observed that “most predatory lenders require borrowers to waive their rights to go to court to resolve disputes and instead submit borrowers to private adjudication through mandatory arbitration.”<sup>16</sup> The federal agency emphasized throughout the report that service members need to have “judicial remedies through the courts for redress.”<sup>17</sup>

In 2006 congressional testimony, a Florida Legal Aid lawyer also concluded that high-cost loan contracts as a matter of norm included forced arbitration clauses.<sup>18</sup> The provisions “deprive service members of their day in court and limit their remedies. No one should have to sign that they will not sue a lender for illegal practices and will not join a class action lawsuit,” she said.<sup>19</sup>

The emergence of forced arbitration and class action bans in consumer contracts stems from the U.S. Supreme Court’s consistently broad interpretations of the Federal Arbitration Act (FAA), which has led to limited state law protections. In its most recent significant decision, *AT&T Mobility v. Concepcion*, the Court upheld a corporation’s attempt to prohibit its customers from participating in class actions.<sup>20</sup>

AT&T Mobility inserted a forced arbitration clause and class action ban in its customer contracts. The Court held that the FAA preempted state laws that prohibited class action bans in forced arbitration clauses.<sup>21</sup> As a result, most courts are applying *Concepcion* broadly as a “get out of class actions free” card.<sup>22</sup> Instead, consumer claims are forced into

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<sup>16</sup> DoD report, at 46.

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

<sup>18</sup> Written Testimony of Lynn Drysdale, Staff Attorney, Jacksonville Area Legal Aid, Jacksonville, Florida Before the Senate Committee on Banking, Housing, and Urban Affairs, at 5 (Sept. 14, 2006). <http://1.usa.gov/PgvoTi>.

<sup>19</sup> *Id.* at 5 and 21.

<sup>20</sup> 131 S. Ct. 1740 (2011).

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

<sup>22</sup> Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 Or. L. Rev. 703, 708 (2012).

individualized arbitration for small-dollar claims, such as those for consumer fraud and consumer debt, which typically are more suitable in class actions.<sup>23</sup>

Even before *Concepcion* was decided, the Department of Defense had taken note of the FAA's impact on state laws. It observed how the broad interpretation of the FAA limited states' ability to protect their residents from forced arbitration and consequently, their ability to seek redress in court.<sup>24</sup>

In the military, forced arbitration is especially burdensome for those who are unable to pay costs associated with expensive arbitration proceedings; or to travel to locations which are chosen by the lender. For a mobile population like the military, these terms make it even more difficult for aggrieved service members to obtain a fair resolution of their claims.

## I. Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act, which generally protects military members from certain civil obligations while deployed or on active-duty, presents is an example of a federal law that is specifically undermined by forced arbitration provisions in consumer contracts.<sup>25</sup> The SCRA "allows military personnel, and sometimes military dependents, to postpone or suspend some civil obligations so they can devote their energy and attention to the defense needs of the Nation."<sup>26</sup> It covers active duty service members, reservists, and members of the National Guard on active duty. SCRA protections include reductions in interest rates to six percent on pre-service loans and obligations; a stay on court hearings if military service affects service members' ability to defend their interests, and required court action before a family member is evicted from rental property or faces repossession of property.<sup>27</sup>

The SCRA also appears to preserve service members' rights to turn to the courts for relief. The law specifically states that "any person aggrieved by a violation of the 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..."<sup>28</sup> However, the SCRA protections are not reinforced by a specific ban on forced arbitration. Consequently, based on recent court decisions, military consumers have been unable to enforce a law meant to assist them at the most trying times.

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<sup>23</sup> See, *Sternlight*, 90 Or. L. Rev. 703, 709 (2012)

<sup>24</sup> DoD report, at 21.

<sup>25</sup> 50 U.S.C. App. §§501-597b.

<sup>26</sup> Langley Law Center of the The U.S. 633rd Air Base Wing Judge Advocate, *Servicemembers Civil Relief Act & Consumer Protection*, 2010, <http://1.usa.gov/Pg5nnc>.

<sup>27</sup> 50 U.S.C. App. §§501-597b.

<sup>28</sup> 50 U.S.C. App. § 597a.

*While Serving in Iraq His Car is Repossessed Without a Court Order, Violating SCRA*

In 2007, Charles Beard, a sergeant in the U.S. Army National Guard, entered into a contract with automotive financing company Santander Consumer USA, Inc., and lender Triad Financial Corp., to finance the purchase of his new Kia Sportage.<sup>29</sup> A year later, he was called into active military service, and prepared to leave the country for Iraq. Beard notified the lender of his deployment and requested assistance on future payments.<sup>30</sup>

The lender offered him a forbearance for a few months' car payments.<sup>31</sup> Left with little choice, Beard signed a second contract, presented to him on a take-it-or-leave-it-basis before departing for Iraq. The contract formalized an extended period for making his payments and contained a forced arbitration clause and a ban on class actions. As he served in Iraq, Beard fell behind on his payments. The lender repossessed his vehicle "without a court order and sold it at auction."<sup>32</sup>

While Beard was on active duty, an Iraq-based office of the U.S. Army's legal assistance division submitted a letter dated February 26, 2009 to Beard's lender informing it of its potential violations of the Servicemembers Civil Relief Act [Appendix A].<sup>33</sup> It noted that under the SCRA, Beard was entitled to an interest rate deduction to 6 percent for his car loan.<sup>34</sup> According to the letter, "Mr. Beard's entry into active military service (had) materially affected his ability to meet this obligation," and that the SCRA's interest rate ceiling must apply.<sup>35</sup> The Army letter also warned that the repossession of Beard's car violated federal law.<sup>36</sup>

In 2011, Beard sued the lenders on behalf of himself and other service members for improperly repossessing vehicles while the service members were on active duty, and for charging more than 6 percent on his loan.<sup>37</sup> In April 2012, the court dismissed Beard's lawsuit and directed his case into private arbitration.<sup>38</sup> Beard had argued that the SCRA granted him a right to pursue a civil action. However, the court held that the SCRA was not

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<sup>29</sup> *Beard v. Santander Consumer USA, Inc.*, 2012 WL 1292576 (E.D. Cal. Apr. 16, 2012) report and recommendation adopted, 2012 WL 1576103 (E.D. Cal. May 3, 2012).

<sup>30</sup> *Beard*, 2012 WL 1292576, at 2.

<sup>31</sup> *Id.*

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

<sup>33</sup> See, Letter from Emily C. Mason, U.S. Army Captain and Legal Assistance Attorney to Triad Financial Services (Feb. 26, 2009), Appendix A.

<sup>34</sup> *Id.*, Appendix A.

<sup>35</sup> *Id.*, Appendix A.

<sup>36</sup> *Id.*, Appendix A.

<sup>37</sup> *Beard*, at 2. See, also, *Beard v. Santander Consumer USA, Inc., Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel Individual Arbitration and to Stay Action*, 1:11-CV-01815-LJO, at 1 (Feb. 24, 2012).

<sup>38</sup> *Beard*, 2012 WL 1576103, at 2.

sufficiently explicit on whether he had a guaranteed right to pursue his case in court.<sup>39</sup> The court said that the SCRA “does not contain provisions similar to the anti-arbitration provisions found in legislation such as the (2010 financial reform law), the Dodd-Frank Act,”<sup>40</sup> which bars arbitration in various financial services contexts and authorizes federal agencies to do the same.<sup>41</sup> The court relied on a post-*Concepcion* Supreme Court decision, *CompuCredit Corp. v. Greenwood*<sup>42</sup> that held where a federal law did not state whether claims under the law may or may not proceed in arbitration, the Federal Arbitration Act requires enforcement of the arbitration clause.<sup>43</sup>

Following the court’s order directing Beard into arbitration, Beard’s attorney Sergei Lemberg initiated arbitration proceedings on his behalf.<sup>44</sup> While the arbitration has not begun, Lemberg reported that he had advanced over \$300 in fees to start the arbitration.<sup>45</sup> He plans to follow through with the proceeding on his client’s behalf.<sup>46</sup>

#### *More Signals That Forced Arbitration Suppresses SCRA Claims*

An April 2012 Public Citizen report recounted a similar story of Matthew Wolf, a Judge Advocate General officer who filed a class action in 2010 on behalf of himself and others against an auto company for SCRA violations.<sup>47</sup> Section 305 of the SCRA allows service members to terminate car leases and receive a refund for all advance payments made. According to his complaint, when Wolf returned his car, the dealer refused to refund the advance payments. Wolf’s case was also forced into individual arbitration.<sup>48</sup>

Advocates for service members regularly observe unfair practices. Retired U.S. Air Force Colonel John Odom, Jr., testified before Congress in 2010 on military protections. Odom’s first recommendation was an amendment to the SCRA to eliminate forced arbitration so that service members could enforce their rights and obtain damages resulting from

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<sup>39</sup> *Beard*, at 5-6.

<sup>40</sup> *Beard*, at 6.

<sup>41</sup> See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111-203, § 1414 (2010).

<sup>42</sup> *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012).

<sup>43</sup> 132 S.Ct. 665, 669, 181 L.Ed.2d 586 (2012).

<sup>44</sup> Interview with Sergei Lemberg, notes on file with the author (Sept. 17, 2012).

<sup>45</sup> *Id.*, Lemberg Interview.

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

<sup>47</sup> Public Citizen, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident*, at 14 (April 2012), <http://bit.ly/JcxLlw> and *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 (D.N.J. June 22, 2011).

<sup>48</sup> *Wolf*, 2011 WL 2490939, at 8.

violations of the statute.<sup>49</sup> It is indisputable that forced arbitration clauses in consumer contracts have denied service members in active duty of their rights under the SCRA.

## II. Military Lending Act

In 2006, Senators Jim Talent (R-MO) and Bill Nelson (D-FL) introduced an amendment to the John Warner National Defense Authorization Act for Fiscal Year 2007 to safeguard active duty military members from predatory lending and to provide them with protections when acquiring consumer credit products. The amendment, which became law and is known as the Military Lending Act, followed the 2006 Department of Defense report to Congress that set forth its findings on predatory lending in the military community.

Among its recommendations, the agency recommended that Congress: “(p)rohibit provisions in loan contracts that require Service members and family members to waive their rights to take legal action.”<sup>50</sup>

Congress adhered to the DoD’s recommendations. The Military Lending Act contained the following requirements, changing the landscape for lending to military consumers.

- It sets a cap for the annual percentage rate (APR) for loans at 36 percent and requires all charges (with few exceptions) be included in the cap.
- It prohibits the use of checks, electronic funds transfer, and vehicle titles to secure these loans.
- It covers all financial institutions and ensures service members and their dependents receive the protections provided by state laws.
- It forbids creditors from forcing borrowers into arbitration in the event of a dispute.
- It prohibits lenders from forcing borrowers into arbitration to resolve disputes.
- It does not apply to residential mortgages or products to finance auto purchases or leases.<sup>51</sup>

In its regulations implementing the statute, the Department of Defense determined that the protections applied to three types of consumer credit products: vehicle title loans, tax refund anticipation loans, and certain payday loans.<sup>52</sup> The MLA effectively eliminated refund anticipation loans because they typically cost more than the 36 percent cap.<sup>53</sup>

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<sup>49</sup> Transcript, Hearing Before The Committee On Veterans' Affairs, U.S. House Of Representatives, *Alleged Violations Of The Servicemembers Civil Relief Act*, 112<sup>th</sup> Congress, First Session, February 9, 2011, <http://1.usa.gov/Q20ShJ>.

<sup>50</sup> DoD report, at 7.

<sup>51</sup> 10 U.S.C. § 987(i)(6).

<sup>52</sup> 32 C.F.R. § 232.3 (b) (2007).

<sup>53</sup> See, also, Fox, at 9, <http://bit.ly/KU942e>.

### A. Ban on Forced Arbitration Proves Beneficial to Service Members

The MLA has proven to be a significant benefit for military members. “To the extent products met these (statutory and regulatory) definitions, the law has been largely effective in curbing predatory payday, car title, and tax refund lending to covered borrowers,” said a 2012 report by the Consumer Federation of America documenting the MLA’s impact on predatory lending five years after its passage.<sup>54</sup> The CFA report observed a marked decline in payday loan outlets around military bases and a decrease in the number of military members needing assistance to recover from high-risk loans.<sup>55</sup> The MLA also restored military members’ ability to access the judicial system for some lending claims.

#### *Auto Title Lender Allegedly Violates MLA, Attempt to Force Private Arbitration Fails*

Jason Cox, a U.S. Army Staff Sergeant recently relied on the MLA’s terms to get his case against an auto title lender heard in court.<sup>56</sup> Cox was on active-duty at Georgia Army base in 2010 when he took out a short-term loan using his auto title as security. His loan came from a loan outlet of Alabama Title Loans (ATL), an Alabama corporation owned by Community Loans of America (CLA), operator of more than 900 title loan stores in 22 states and Puerto Rico.<sup>57</sup> Cox reportedly “needed quick cash to drive to Minnesota to pick up his daughter during a family crisis.”<sup>58</sup>

As a condition for obtaining the loan, Cox gave the lender the title to his car.<sup>59</sup> Cox alleged that he was charged an interest rate of 146 percent.<sup>60</sup> According to the complaint, “the initial vehicle title loan was rolled over, renewed and/or refinanced multiple times since (he received it in 2010) through June 1, 2011, each time with an interest rate exceeding more than three times the 36 percent APR authorized by the MLA.”<sup>61</sup> Cox maintained that he made every payment for a year but eventually fell behind in the payments and could not pay the balance due to obtain his car title.<sup>62</sup> Ultimately, the lender repossessed his car at the U.S. military base in Georgia where he was stationed with his family.<sup>63</sup>

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<sup>54</sup> See, also, Fox, 9, <http://bit.ly/KU942e>.

<sup>55</sup> Id.

<sup>56</sup> Cox v. Community Loans of America, Inc., *Verified Amended Complaint for Damages and Corresponding Request for Declaratory and Injunctive Relief*, (U.S. Dist. Ct. Ga.), Case No. 4:11-cv-00177-CDL, filed January 26, 2012.

<sup>57</sup> Cox, *Verified Amended Complaint*, 3-4.

<sup>58</sup> Ruben Rosario, *Legal battle on over loan to soldier*, TwinCities.com, Nov. 26, 2011.

<sup>59</sup> Cox v. Cmty. Loans of Am., Inc., 2012 WL 773496, 1 (M.D. Ga. Mar. 8, 2012).

<sup>60</sup> Cox, *Verified Amended Complaint*, 2.

<sup>61</sup> Id.

<sup>62</sup> Id, at 11, 13.

<sup>63</sup> Id, at 13-14.

Cox initiated a lawsuit with two active duty service members who were also bound by auto title loans set up by CLA-owned stores. The service members, seeking a class action on behalf of themselves and other similar situated military members, contended that the vehicle title loans they received violated numerous provisions of the Military Lending Act including, applying interest rates that exceeded the law's APR cap; failing to make mandatory disclosures; rolling over, renewing, or refinancing vehicle title loans to continue the debt cycle; forcing waivers of the right to legal recourse; and inserting forced arbitration clauses in the loan terms.<sup>64</sup>

The lenders asked the court to dismiss the lawsuit and force the service members into individualized arbitration.<sup>65</sup> They claimed that the loans offered were not credit transactions subject to the Military Lending Act, which would mean the forced arbitration clause was enforceable.<sup>66</sup> However, the Georgia court disagreed with the lenders, holding that the complaint described vehicle title loans that were covered under the MLA, therefore the forced arbitration clauses were ineffective.<sup>67</sup> Due to the MLA, the service members' case could move forward in court.

"Through its edict in the Military Lending Act, Congress has expressly recognized that in some financial services transactions binding mandatory arbitration has no place," said former Georgia Gov. Roy Barnes in written comments to the Consumer Financial Protection Bureau.<sup>68</sup> Barnes cites the MLA's prohibition on forced arbitration as a compelling reason to expand the policy to other consumer financial services and beyond.<sup>69</sup>

### **B. DoD's Narrow Interpretation Leaves Many Products Uncovered**

However, despite Congress' actions, the Department of Defense's regulations implementing the MLA adopted a narrow approach for determining the consumer financial products covered under it, thus limiting the usefulness of the forced arbitration ban in the statute. Congress specifically excluded mortgages and auto finance loans from the act's protections, but the DoD's restrictions went further, limiting the act's protections to closed-end loans, specifically vehicle title loans with terms of 181 days or less, tax refund anticipation loans, and payday loans up to \$2,000 that are borrowed for a term of 91 days or less.

Installment loans, rent-to-own contracts, and transactions to finance personal property when the credit is secured by that property are not included in the MLA.<sup>70</sup> The DoD also

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<sup>64</sup> Cox v. Community Loans of America, Inc., *Verified Amended Complaint*, 25-26.

<sup>65</sup> Cox v. Cmty. Loans of Am., Inc., 2012 WL 773496, 1 (M.D. Ga. Mar. 8, 2012).

<sup>66</sup> Cox, 2012 WL 773496, 1.

<sup>67</sup> Cox, 2012 WL 773496, 6.

<sup>68</sup> Former Georgia Gov. Roy E. Barnes, *Comments to Consumer Financial Protection Bureau*, CFPB-2012-0017-0057, at 1 (June 22, 2012).

<sup>69</sup> *Id.*

<sup>70</sup> 32 C.F.R. § 232.3. See, also, Fox, at 5-6, <http://bit.ly/KU942e>.

excluded open-end credit from the act's protections, including credit cards, other open lines of credit, and open-ended payday and vehicle title loans.

Forced arbitration clauses in these and other similar financing contracts deny individual service members the ability to sue to recover their losses caused by unlawful, fraudulent or deceptive lending practices.

### III. Conclusion – A CFPB Rule for All

Despite the laws passed to shield military members from predatory lending, carrying out their safeguards have been frustrated for various reasons. For instance, financial institutions must first identify customers who would be covered by military lending laws. Some military members and their legal representatives are also unaware of their rights under these laws. And service members sometimes are forced to waive their rights in order to receive financial services or products.<sup>71</sup>

One way to tackle some of these issues, which the DoD has noted, is to increase awareness of military members' rights and obligations. The CFPB has an Office of Servicemember Affairs, whose staff has toured the country to educate military consumers about consumer about various protections and the CFPB's role. Members of Congress have also sought to fix "loopholes" in the military lending laws, such as eliminating predatory practices of the rent-to-own industry which burdens service members with expensive contracts to rent personal property such as furniture, and car title and payday lenders that "find ways around the law (MLA) by creating open-end loans with interest topping 500 percent."<sup>72</sup>

The Senate version of the National Defense Authorization Act for Fiscal Year 2013 also proposes changes to the MLA, and includes provisions to improve access to justice for military members including "relief in civil actions for violations of protections on consumer credit extended to members of the armed forces and their dependents."<sup>73</sup> If passed, these provisions may be vulnerable if consumer contracts continue to include arbitration clauses, and the Federal Arbitration Act is found by a court to override these statutory protections.<sup>74</sup>

The most effective solution to address forced arbitration for military borrowers is a law or regulation that covers all consumers. The 2010 Dodd-Frank Wall Street Reform and

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<sup>71</sup> See, Holly Petraeus, Help for military homeowners, *The Virginian-Pilot* (June 22, 2012), <http://bit.ly/LdiX7G>. See, also U.S. Department of Justice Guide, *Servicemembers Civil Relief Act*, at 3, <http://1.usa.gov/srosgu>.

<sup>72</sup> Stop Predatory Lending To Military, 158 CONG. REC. H5075 ( July 19, 2012), <http://1.usa.gov/RqGoNn>.

<sup>73</sup> S. 3254, National Defense Authorization Act For Fiscal Year 2013 FY 2013, Sec. 653.

<sup>74</sup> See, *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), where the Supreme Court said that the Federal Arbitration Act must be followed in a case where the federal statute was silent on whether claims should proceed in court.

Consumer Protection Act is a compilation of protections intended to assist all consumers, including service members.

During the mortgage crisis that impacted millions of homeowners, there was substantial evidence that banks were also willfully violating the SCRA by illegally foreclosing on service members.<sup>75</sup> The Dodd-Frank Act included protections for all consumers from predatory mortgage practices.<sup>76</sup> The Act noted the importance of assuring that “consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.”<sup>77</sup> The Act also included a prohibition on arbitration clauses from residential mortgages.<sup>78</sup> These safeguards benefit service members as well.

Similarly, the Consumer Financial Protection Bureau, an independent watchdog created by the Dodd-Frank Act, is required to study the use of forced arbitration, a project which began in April 2012.<sup>79</sup> Following the study, the Bureau is authorized to write a rule to limit or ban forced arbitration in all consumer contracts for financial services and products under its jurisdiction.<sup>80</sup> This undertaking would apply to all consumers, military and civilian consumers alike.

A CFPB rule on forced arbitration will have the same impact as other consumer protection laws. That is, it will assist military and civilian consumers when they need to exercise their right to seek relief in court. A single rule by the agency restricting the practice in all contracts for financial services and products will restore the rights of military members and civilian consumers.

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<sup>75</sup> See, e.g. Diana B. Henriques, *A Reservist in a New War, Against Foreclosure*, The New York Times (Jan. 26, 2011), <http://nyti.ms/Qhtp0v>.

<sup>76</sup> See, e.g. U.S. Government Accountability Office, *Mortgage Reform: Potential Impacts of Provisions in the Dodd-Frank Act on Homebuyers and the Mortgage Market* (July 2011), <http://1.usa.gov/S3C24X>.

<sup>77</sup> Dodd-Frank Act, § 1491.

<sup>78</sup> Dodd-Frank Act, § 1414.

<sup>79</sup> CFPB, *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, Notice and Request for Information*, CFPB-2012-0017, April 27, 2012.

<sup>80</sup> *Id.*