

SERVICEMEMBER'S CIVIL RELIEF ACT

PREPARED AND PRESENTED BY:

**Michael H. Myers
MYERS WILSON P.C.
16660 Dallas Parkway
Suite 2500
Dallas, Texas 75248
Telephone: (972) 248-8080
michael@myerswilson.com**

TABLE OF CONTENTS

I.	Purpose.....	2
II.	Key Terms.....	2
III.	Protection Offered by the SCRA.....	4
	A. Protection of Servicemembers in the Reserves and Persons Drafted ...	5
	B. Protection of U.S. Citizens Serving with Allied Forces	5
	C. Protection of Persons Secondarily Liable	6
	D. Protection Against Default Judgments	6
	E. Protection Against Evictions.....	8
	F. Interest Rate Caps.....	9
	G. Stay on Proceedings and Execution on Judgments.....	9
	H. Mortgages and Trust Deeds	11
IV.	Waiver of Protection.....	11
V.	Exercise of Rights not to Affect Future Transactions	12

Servicemember's Civil Relief Act

I. Purpose.

The stated purpose of the Servicemember's Civil Relief Act ("SCRA") is to "provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to defense needs of the Nation; and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."¹ Regardless of your political preferences, there can be no argument that the men and women that serve in the United States Military, whether active, reserve, or national guard, have maintained a frenetic deployment pace during the past seven years. Deployment of military members creates havoc for their families as well as their ability to meet their financial obligations, and it is their sacrifice that has saved us or our children from being drafted to fight in this war.

II. Key Terms.

Several key terms need to be kept in mind when analyzing the protections of the SCRA, those key terms include: "servicemember"; "uniformed services"; "armed forces"; "military service"; "period of military service"; and "dependent." This paper will address the protections of the SCRA as it relates to debt collection, foreclosure, evictions, judgments, mortgages and deeds of trust, and will also touch on the relief servicemembers in the armed forces can seek upon termination of their military service.

¹ Title 50 App. U.S.C. § 502.

The term “servicemember” means a member of the “uniformed services,”² and also includes legal representatives of the servicemember (i.e. individuals holding power of attorney for the servicemember and an attorney acting on behalf of a servicemember).³ The term “uniformed services” means the armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service.⁴ And for the sake of clarity, the “armed forces” means the Army, Navy, Air Force, Marine Corps., and Coast Guard.⁵ The term “military service” for servicemembers in the armed forces means full time active duty in the active military service of the United States, including full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.⁶ The term “period of military service” means the period beginning on the date on which a service member enters military service and ending on a date on which the servicemember is released from military service or dies while in military service.⁷ The term “dependent” means a servicemember’s spouse,⁸ a servicemember’s child,⁹ and an individual for whom the servicemember provided more than one-half of the individual’s support for 180 days immediately preceding an application for relief under the SCRA.¹⁰

² Title 50 App. U.S.C. § 511(1).

³ Title 50 App. U.S.C. § 519.

⁴ Title 10 U.S.C.A. § 101(a)(5).

⁵ Title 50 App. U.S.C. § 511(1) and Title 10 U.S.C.A. § 101(a)(4).

⁶ Title 50 App. U.S.C. § 511(2)(A) and Title 10 U.S.C.A. § 101(d)(1).

⁷ Title 50 App. U.S.C. § 511(3).

⁸ Title 50 App. U.S.C. § 511(4)(A).

⁹ Title 50 App. U.S.C. § 511(4)(B) and Title 38 U.S.C. § 101(4).

¹⁰ Title 50 App. U.S.C. § 511(4)(C).

With a grasp of the key terms as defined in the SCRA, the protections proffered by the SCRA to servicemembers of the armed forces will be less puzzling (hopefully). The jurisdiction of the SCRA includes actions every federal court, state court, and subdivision of every State in the United States and U.S. territory.¹¹ The SCRA does not, however, extend to criminal proceedings.¹²

III. Protection Offered by the SCRA.

Just because a servicemember is in military service does not mean that the protection of the SCRA is automatic. The servicemember must show that the servicemember's military status inhibits or prevents them from preparing, maintaining, or presenting an adequate defense to the pending action.¹³ In fact, a U.S. Bankruptcy Court in Maryland declared that it is the servicemember's burden to show that his/her military status will prejudice his/her ability to present his/her defense.¹⁴ It can be presumed, therefore, that in order to avail himself/herself of the protections afforded by the SCRA, the servicemember must be able to present evidence that his/her military service will prejudice his/her ability to present a defense against the pending claim and/or proceeding. In fact, it can be said that there is a common theme that tempers the liberal construction of the SCRA, which was concisely set forth by the Texas Supreme Court when it stated that "[t]he trial court is given a wide discretion in determining whether a stay should be granted under the circumstances of a particular case in deciding which party should carry

¹¹ Title 50 App. U.S.C. § 512(a).

¹² Title 50 App. U.S.C. § 512(b).

¹³ *In re Lewis*, 257 B.R. 431, 434-35 (Bankr. D. Md. 2001)(citing *Royster v. Lederle*, 128 F.2d 197, 199 (6th Cir. 1942)).

¹⁴ *Id.* at 436.

the burden of proof on the issue of prejudice.”¹⁵ In manner that the SCRA provides servicemembers relief from creditors and/or obligations, it is done so only when the servicemember can demonstrate that their military service is having a negative impact on either (a) their ability to defend the action, (b) their ability to appear at the proceeding, and/or (c) their ability to perform the obligations that they are contractually obligated to perform.

A. Protection for Servicemembers in the Reserves and Persons Drafted.

The SCRA protects members of the reserves who are ordered to active duty and persons who receive orders to be inducted into the armed services.¹⁶ The protection for both members of the reserves and individuals who are ordered to be inducted into the armed services starts on the date the individual receives the order. This section of the SCRA is a bit misleading as it states that the protection extends to the reserves from the date the individual receives the order to report until the day they enter military service. This does not mean that reserves who enter military service are not protected by the SCRA, rather, it simply means that the protection extended by this section is inapplicable because the reservist would be protected under the provisions of the act pertaining to active service members.

B. Protection of U.S. Citizens Serving with Allied Forces. The SCRA provides protection for citizens of the United States that are serving with forces allied with the United States and who are engaged in the prosecution of war or military action if

¹⁵ *Womack v. Berry*, 291 S.W.2d 677, 681-82 (Tex. 1956).

¹⁶ Title 50 App. U.S.C. § 516(a-b).

his/her service is similar to that of military service as defined by the SCRA.¹⁷ This provision will protect United States citizens serving in nations with whom the United States is allied. Note that this section of the SCRA does not require the United States to be actively engaged in the prosecution of the war or military action, but rather only states that the United States be allied the nation who is prosecuting the war or military action. Don't be surprised if a United States citizen serving with the British SAS requests relief under the SCRA upon his termination of military service.

C. Protection of Persons Secondarily Liable. The key word in this section of the SCRA is the word "may." Section 513 of the SCRA states that whenever a court stays, postpones, or suspends (a) the enforcement of an obligation, the (b) prosecution of a suit or proceeding, (c) the entry of a writ or order, (d) or the performance of any other act, the court may grant a stay, postponement, and/or suspension to a surety, guarantor or other person who may be primarily or secondarily liable.¹⁸ Further, in any action where a judgment is vacated or set-aside, the court may set aside or vacate the judgment against a person who is primarily or secondarily liable.¹⁹ Then again, the court may also allow a plaintiff to continue its cause of action against co-defendants that are not in military service.²⁰

D. Protection Against Default Judgments. Plaintiffs in **any action** seeking to take a default judgment are required to file an affidavit stating whether or not the defendant is in military service and showing necessary facts to support the affidavit, or an

¹⁷ Title 50 App. U.S.C. § 514.

¹⁸ Title 50 App. U.S.C. § 513(a).

¹⁹ Title 50 App. U.S.C. § 513(b).

²⁰ Title 50 App. U.S.C. § 525(b).

affidavit stating that the Plaintiff was unable to determine whether or not the defendant is in military service.²¹ Clearly, this provision of the SCRA does not apply to actions involving corporations, partnerships, or other legal entities as the aforementioned cannot be servicemembers. If the defendant's military status is not ascertained by affidavit, the court **may** require the Plaintiff to post a bond in an amount approved by the court so that if the defendant is later found to be in military service the defendant can be indemnified by the Plaintiff for any damages incurred as a result of the default judgment.²² If it is determined that the defendant is a servicemember in military service then the court cannot enter a default judgment against the servicemember until the court appoints the servicemember an attorney.²³ Further, if the attorney appointed for the servicemember cannot find the servicemember, then any actions by the attorney shall not waive any defense of the servicemember or otherwise bind the servicemember.²⁴

If the court, upon application of counsel or on the court's own motion, determines that there may be a defense to the action and a defense cannot be presented without the presence of the servicemember, the court shall grant a minimum ninety (90) day stay of the proceedings.²⁵ The same minimum stay shall be granted if the court determines that counsel for the servicemember has used due diligence in attempting to contact the servicemember, but has been unable to do so.²⁶

²¹ Title 50 App. U.S.C. § 521(b)(1).

²² Title 50 App. U.S.C. § 521(b)(3).

²³ Title 50 App. U.S.C. § 521(b)(2).

²⁴ *Id.*

²⁵ Title 50 App. U.S.C. § 521(d)(1).

²⁶ Title 50 App. U.S.C. § 521(d)(2).

Further, if the court grants a default judgment against a servicemember and the servicemember files an application to vacate or set aside the judgment within ninety (90) days of his/her termination or release from military service, the court must vacate or set aside the judgment if the servicemember shows that (a) he/she was materially affected by reason of that military service in making a defense to the action, or (b) the servicemember has a meritorious defense to the action or some part of it.²⁷

E. Protection Against Evictions. A landlord or other person with paramount title (i.e. a foreclosing lender) may not evict a servicemember or the dependents of a servicemember during a term of military service from premises that are occupied or intended to be occupied as a primary residence and for which the monthly rent does not exceed \$2,400.00 (as adjusted) without a court order.²⁸ This section essentially cuts off a landlord's ability to engage in "self-help" and requires the landlord to seek judicial intervention, which also provides the servicemember an opportunity to seek protections afforded in other sections of the SCRA. Further, a court may on its own motion stay the eviction proceedings for a period of 90 days, unless the court finds that equity requires the stay be lengthened or shortened; or the court may adjust the obligation under the lease to preserve the interests of all parties.²⁹ If the application for a stay is made by the servicemember, then the court must stay the proceedings or adjust the obligation under the lease.³⁰ Of course, the application for the stay will have to conclusively show that the servicemember's military service is causing the default under

²⁷ Title 50 App. U.S.C. § 521(g).

²⁸ Title 50 App. U.S.C. § 531(a).

²⁹ Title 50 App. U.S.C. § 531(b)(1).

³⁰ *Id.*

the lease, and there is no mandate regarding the length of the stay so the court may or may not stay the eviction for a long period of time.

F. Interest Rate Caps. The SCRA limits the amount of interest that can be charged on a debt that was incurred by a servicemember and/or the servicemember's spouse prior to the servicemember entering into military service to 6% per annum during the servicemember's period of military service.³¹ Furthermore, any interest incurred in excess of 6% per annum during the period of military service is automatically forgiven.³² In order to take advantage of this section of the SCRA, the servicemember must provide the creditor with a copy of his/her orders and any orders extending the period of military service within 180 days of the servicemember's termination or release from military service.³³ Nevertheless, the creditor is required to give the servicemember credit for any interest charged in excess of 6% from the effective date the servicemember was called into military service.³⁴ This reduction in interest rate may also apply to debtor's plans in bankruptcy.³⁵ Courts limit the application of this provision to cases in which the servicemember is shown not to be able to afford to pay interest in excess of 6% per annum.³⁶

G. Stay on Proceedings and Execution on Judgments. The SCRA provides that a servicemember can apply for a stay of a proceeding even when the

³¹ Title 50 App. U.S.C. § 527(a)(1).

³² Title 50 App. U.S.C. § 527(a)(2).

³³ Title 50 App. U.S.C. § 527(b)(1).

³⁴ Title 50 App. U.S.C. § 527(b)(2).

³⁵ *In re Watson*, 292 B.R. 441, 445 (Bankr. S.D. Ga. 2003).

³⁶ Title 50 App. U.S.C. § 527(c) and *In re Watson*, at 443-44.

creditor has provided him/her with notice of the proceeding.³⁷ The servicemember can apply for relief under Section 522 while in military service or within 90 days after termination or release from military service, and if he/she has received notice of the proceeding. The servicemember must make the application before the rendition of a final order or judgement. The servicemember must provide the court with a communication setting forth why the current military duty requirements materially affect his/her ability to appear, and a date on which he/she will be available to appear.³⁸ Further, the servicemember must provide the court with a communication from their commanding officer stating that the servicemembers current military duty prevents him/her from appearing at the court, and that at the time of the letter he/she is not authorized to have leave.³⁹ The servicemember may also request an additional stay, and if the additional stay is denied then the court must appoint an attorney to represent the servicemember.⁴⁰

A servicemember can apply for a stay on the execution of any judgment or order against the servicemember and vacate or stay the garnishment of property or debts in the possession of third parties if the court finds that the servicemember was materially affected by reason of military service in complying with the court order.⁴¹ Stays are not permanent, and the courts are limited to the length of the stay they can grant. A stay can only last for as long as the servicemember is in military service plus 90 days thereafter.⁴² “A stay will be granted, in spite of the possibility that plaintiffs may suffer by not being

³⁷ Title 50 App. U.S.C. § 522.

³⁸ Title 50 App. U.S.C. § 522(b)(2)(A).

³⁹ Title 50 App. U.S.C. § 522(b)(2)(B).

⁴⁰ Title 50 App. U.S.C. § 522(d)(1-2).

⁴¹ Title 50 App. U.S.C. § 524(a)(1-2).

⁴² Title 50 App. U.S.C. § 525(a).

able to prosecute their claims in courts and the sacrifice is one of those which must be made in war for the common good.”⁴³ Eventually, and rightfully so, the creditor/plaintiff will be able to seek redress from the servicemember.

H. Mortgages and Trust Deeds. The SCRA applies to mortgages and trust deeds that were incurred by the servicemember before the period of military service and is secured by a mortgage, trust deed, or other security instrument.⁴⁴ An action filed during or within 90 days after the servicemember’s military service has ended can be stayed if the servicemember can show the court that his ability to comply with the obligation was materially affected by his/her military service.⁴⁵ The court has the option of staying the proceedings or adjusting the obligation to preserve the interests of all parties.⁴⁶ Furthermore, a non-judicial foreclosure sale that occurred when the servicemember’s ability to comply with the obligation was materially affected by his/her military service is not valid.⁴⁷ A judicial foreclosure, however, would be valid.⁴⁸ When in doubt, judicially foreclose.

III. Waiver of Protection.

A servicemember has the ability to waive the protections afforded him/her under the SCRA. The waiver must be in writing and must be executed in a separate instrument from the obligation or liability to which the waiver applies.⁴⁹ A waiver that provides for the modification, cancellation or termination of a contract, lease, bailment, or obligation

⁴³ *Continental Illinois Nat. Bank & Trust v. University of Notre Dame Du Lac*, 69 N.E.2d 301 (Ill. 1946).

⁴⁴ Title 50 App. U.S.C. § 533(a)(1-2).

⁴⁵ Title 50 App. U.S.C. § 533(b).

⁴⁶ Title 50 App. U.S.C. § 533(b)(1-2).

⁴⁷ Title 50 App. U.S.C. § 533(c).

⁴⁸ Title 50 App. U.S.C. § 533(c)(1).

⁴⁹ Title 50 App. U.S.C. § 517(a).

secured by a mortgage, lien, or other security instrument or the foreclosure or repossession of property that is collateral under any security instrument is only effective if the waiver is executed during or after the servicemember's period of service.⁵⁰ The waiver language must be prominent and in not less than 12-point font.⁵¹

IV. Exercise of Rights Not to Affect Future Transactions.

Simply stated, a servicemember's application for relief, whether successful or not, cannot be the sole basis for a determination by a lender that the servicemember is unable to pay a civil obligation, the denial or revocation of credit, a change in the terms of a credit agreement, an adverse report on the creditworthiness of the servicemember, a refusal to insure a servicemember, an annotation on the servicemember's credit report that he/she is a member of the National Guard or reserve component, and/or a change in the conditions required for the issuance of insurance.⁵² This restriction does not prohibit a creditor from providing negative reports regarding a servicemember's performance of obligations during a stay period.⁵³

SUMMARY

The United States Congress has provided for the protection of servicemembers whose military service prevents them from meeting their financial obligations at home. Substantial safeguards are in place to protect creditors from being prejudiced by members of the armed forces whose military service does not prejudice their ability to perform the obligations they contracted to perform, and puts the burden on the servicemember to

⁵⁰ Title 50 App. U.S.C. § 517(a-b).

⁵¹ Title 50 App. U.S.C. § 517(c).

⁵² Title 50 App. § 518.

⁵³ *Koenig v. Waukesha State Bank*, 2006 W.L. 2334841 (E.D. Wis. 2006).

provide evidence to the court that their military service is prejudicing their ability to perform their contractual obligations. The SCRA has the structural framework to provide protection for our troops while they protect us, and protection for creditors at home from being taken advantage of by individuals who try to use the SCRA to escape their obligations.