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## Preventative Law Series

## SCRA

### INTRODUCTION

In December 2003, President Bush signed the Servicemembers Civil Relief Act (SCRA), Public Law 108-189, which updated and replaced the former Soldier's and Sailor's Civil Relief Act (SSCRA). The Servicemembers Civil Relief Act can be found at 50 United States Code Appendix Sections 501-593. The full text of the Act is available on the link to the right.

The stated purpose of the 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 the defense needs of the Nation; and to provide for temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."

### WHO DOES THE SCRA PROTECT?

The SCRA defines servicemembers as those who are on active duty in the armed forces of the United States. This includes, the Army, Navy, Air Force, Marine Corps and Coast Guard. It also includes national guardsmen and reservists who are called to active duty for a period in excess of 30 consecutive days. It may also in some cases cover dependants, which includes a spouse, a child, or anyone for whom a servicemember provides over half financial support for the 180 days prior to requesting relief under the Act. It is important to note that a servicemember may divest themselves from protections under the Act by being willfully absent from duty such as being in an unauthorized absence status.

There are territorial and jurisdictional limitations on the application of the SCRA. For a good discussion of these limitations see, The Judge Advocate General's Legal Center and School, U.S. Army, JA 260, The Servicemembers Civil Relief Act, page 2-10, March 2006.

### SUMMARY OF THE MAJOR TYPES OF RELIEF PROVIDED BY THE SCRA

#### DEFAULT JUDGMENTS, 50 U.S.C. app. § 521

A. PROTECTION AGAINST DEFAULT JUDGMENT. A default judgment is entered against a party where the party fails to defend a claim. Typically, default judgments are entered where one party fails to defend because she is absent from the proceedings. To obtain a default judgment, the moving party must file a petition for a default judgment accompanied by an affidavit affirmatively claiming that the non-moving party is not in the military service and has not requested a stay. The moving party has a duty to effect service of process on the non-moving party. In the event that a servicemember receives such a petition and affidavit, and military service can be shown to materially affect the member's ability to defend her interests, a legal assistance attorney should notify the court of the member's inability to attend the hearing and request a stay of proceedings. See section below on requesting a stay of proceedings. If a stay is obtained, the court is required to give the servicemember a minimum of 90 days prior to the next hearing date. In many cases, a member may be able to extend that time if good cause can be shown for a continuance.

B. REOPENING A DEFAULT JUDGMENT. In those cases where a servicemember does not receive notice of the proceedings until after a default judgment has been entered, the member may request that the court reopen the default judgment. This can be done by taking the following steps. First, the servicemember must show that the judgment was entered during active duty military service or within 60 days after termination or release from service. Second, the member must request in writing that the court reopen the default judgment while the member is still on active duty or within 90 days of termination or release. Third, the servicemember must not have made any kind of appearance in court, prior to the default judgment being entered. A legal assistance attorney seeking to stay a petition for default judgment should be careful not to enter any type of appearance on behalf of the member. Even a limited or special appearance for the purpose of challenging the petition for a default judgment could be interpreted as an appearance which could prohibit the reopening of a default judgment subsequently entered.

Finally, the member must claim that the military service prejudiced her ability to defend the case. In other words, the servicemember must be able to show that a valid defense to the claim existed at the time of the default judgment. The Act does not require that the member show that he would have prevailed in maintaining the defense, but only that a potential defense, however weak, existed at the time of the default judgment.

#### **STAY OF CIVIL AND ADMINISTRATIVE PROCEEDINGS, 50 U.S.C. app. § 522**

The SCRA contains a provision which provides for a stay of proceedings where civil or administrative litigation has commenced and the servicemember is subsequently recalled to active duty. This is particularly beneficial to reservists and members of the National Guard who may be recalled to active duty during the course of a civil or administrative matter.

As with most provisions of the SCRA, the Act requires that the servicemember, through counsel, send a letter to the court explaining why the servicemember will not be able to attend the hearing or hearings and why such absence will materially affect the member's ability to represent his interests. The letter should include reference to a letter from the member's Commanding Officer in which such officer informs the court that the member will not be granted military leave to attend the proceedings.

The availability of this provision is limited to those servicemembers who are serving on active duty during the scheduled time of the civil or administrative hearing and for 90 days after termination or release from the active duty period. Of course, as with nearly all sections of the SCRA, a member cannot obtain a stay of proceedings for a criminal matter. Furthermore, this type of protection is available to the servicemember alone and will not apply to the member's spouse or other dependants. However, there are limited circumstances where a third party may obtain a stay based upon the member's status. For example, where the party seeking to enforce the servicemember's right is the co-maker of a negotiable instrument such party may be able to obtain a stay by asserting the member's absence. Unlike the default judgment protections built into the Act, this provision does not require that the member be unaware of the proceedings. In fact, this may be the only appropriate remedy for those members who were properly served with personal service of process and were aware of the hearing before commencing active duty.

It is important to note that the determination of whether the member's service has a material affect on the member's ability to represent her interests is a matter of discretion with the respective court. Accordingly, it is of utmost importance that the legal assistance attorney ensure that all information bearing on the issue of material affect be provided to the court in making its decision. In many cases, the material affect, such as absence from a significant hearing, will be self-evident. Nonetheless, the attorney providing legal assistance should focus the correspondence on persuading the court that such discretion should be exercised in favor of the member. A legal assistance attorney should be mindful that protection under the Act is not afforded because of the member's status in the armed forces, but rather, because the member's military duties will necessarily materially affect her ability to defend against the action, and the legal assistance attorney must be certain to establish this with the court. Once the court has determined that military service will have a material affect, the Act requires that the court must grant a stay of proceedings.

Although the issue of the burden of proof is not completely settled, a legal assistance attorney should generally assume that the servicemember bears the burden of showing by a preponderance of the evidence that her military service has a material affect on her ability to represent herself.

#### **TOLLING OF THE STATUTE OF LIMITATIONS, 50 U.S.C. app. § 527**

This section of the SCRA tolls the statute of limitations on most types of civil actions during the period of time that the member is on active duty. It does not matter whether the servicemember is the plaintiff or defendant in the action. Nor does the Act require that the member show that her military service materially affected her ability to participate in the proceeding. For a more in-depth discussion of the types of actions this section applies to, and the periods which may be tolled, see The Judge Advocate General's Legal Center and School, U.S. Army, JA 260, The Servicemembers Civil Relief Act, section 3-9, March 2006.

6% CAP ON INTEREST RATES, 50 U.S.C. app. § 527 Under the SCRA, a servicemember can secure a maximum of 6% per annum rate of interest on all loans incurred prior to coming onto active duty if military service affects the member's ability to meet the obligation. This can include interest rates on credit cards, mortgages, and even some student loans (federally guaranteed student loans are specifically exempted), to name a few. Typically, this protection will also extend to joint and several obligations incurred by the servicemember and his or her spouse.

To qualify for the interest rate cap the military member has to show that he or she is now on active duty, that the obligation or debt was incurred prior to entry on active duty, and that military service has a material effect on the members' ability to pay. Under this provision, the servicemember is required to provide the lender with notice of the member's commencement of active duty service. This is typically done by sending a letter requesting relief along with a copy of the current military orders to the lender. The burden then shifts to the lender to show either that the debt was incurred after entry onto active duty or the lender must allege that the military service obligation will not materially affect the member's ability to pay the earlier agreed upon rate of interest. The interest rate cap lasts for the duration of active duty service and will apply from the first date of entry onto active duty. If orders are subsequently amended to extend the period of service, the servicemember is under a continuing duty of disclosure to provide the lender with a copy of the amended orders. If for example, a member's orders were cut short, the servicemember is under a continuing duty to disclose this to the lender. The military member must provide written notice to the lender and a copy of military orders not later than 180 days after the servicemember's termination or release from military service. It is important to note that the reduced interest during the period of active duty service is required to be forgiven and not simply deferred.

**PROTECTION FROM EVICTION**, 50 U.S.C. app. § 531 A servicemember leasing a house or apartment, whose rental payment is below a specified amount, may be protected under the SCRA from being evicted for a period of 90 days. The dwelling place must be occupied by either the active duty member or his dependents, and the rent on the premises cannot exceed the annually adjusted ceiling. This ceiling, which began in 2003 as \$2400.00 per month, is adjusted annually in accordance with changes in the Consumer Price Index (CPI). The member must also show that the period of active military service has materially affected his ability to pay rent. If a landlord continues to try to evict the military member or does actually evict the member, he or she can be subject to criminal sanctions such as fines or even imprisonment.

#### **MORTGAGES, 50 U.S.C. app. § 533**

The SCRA can also provide temporary relief from mortgage payments. This section pertains to any type of property, whether real or personal, wherein a third party holds a security interest in the form of a mortgage or trust deed. To obtain relief, a military member must show that the instrument creating the security interest was entered into prior to beginning active duty, that the property was owned prior to entry into military service, that the property is still owned by the military member, and that the member's military service materially affects his ability to pay the mortgage. This protection covers the period of active duty service and 90 days after termination or release from active duty. The provision also allows the servicemember to request a stay of proceedings where the party seeking to enforce the security interest has filed an action against the property. In order to prevail, the servicemember should furnish the court with detailed information showing the member's changed financial condition upon entering onto active duty.

#### **TERMINATION OF LEASES, 50 U.S.C. app. § 535**

The SCRA also permits a servicemember called to active duty for a period in excess of 90 days to lawfully terminate a lease without penalty. The member should provide written notice to the landlord of her intent to terminate the lease. This notice should include a copy of orders proving that the lease was signed by the member, or on the behalf of the member, prior to entry onto active duty.

The Act expressly extends this protection to the lease of automobiles where the period of active duty service of at least 180 days begins during the lease term. This portion of the Act also provides for the termination of an automobile lease on the occasion of the member receiving PCS orders to an overseas duty location. Legal assistance attorneys should follow the same procedures for assisting their clients in termination of an automobile lease as they do in seeking termination of a residential lease.