

ServiceMembers Civil Relief Act: Procedural Overview

by J. Penn Crawford

The first incarnation of the ServiceMembers Civil Relief Act (hereinafter “SCRA” or “the Act”) was enacted during the Civil War to suspend or toll any statute of limitation where the “war worked to thwart the administration of justice.”¹ The Act’s essential purpose, to protect “those who dropped their affairs to answer their country’s call,”² has remained largely unchanged through several legislative updates spanning from World War I to the present day. The Act puts the burden on the servicemember to show that their military service has materially affected their ability to deal with their civilian obligations.³ Once that burden has been met, the servicemember is eligible for a number of protections under the Act.

Common consumer protections of the Act

The SCRA provides many forms of relief to those servicemembers eligible for protection. In many ways, the Act functions as a consumer protection statute for the covered class by providing substantial relief in the following commonly encountered areas:

Termination of Automobile Leases:

The SCRA allows its beneficiaries to terminate automobile leases *pre-service* if they are called to duty for a period of 180 days or longer. Members who sign post-service leases are entitled to relief *only* if they receive an order stationing them permanently outside of the continental United States. However a servicemember may petition for relief from this post-service lease under the Act if the servicemember

is deployed with a military unit for at least 180 days.⁴

Mortgages: A beneficiary of the Act may obtain relief under the SCRA where the mortgage was entered into prior to active duty, and the military member is listed as an owner of the property (both prior and during active duty).⁵

Protection from Eviction: A beneficiary of the SCRA whose monthly rent is below the statutory threshold⁶ may be protected from eviction for an unspecified amount of time (often three months in practice).⁷ A landlord who attempts to move forward with the eviction after receiving proper notice under the Act may be subject to criminal penalties.

Termination of Residential Leases: A beneficiary of the Act may terminate a residential lease if the servicemember will be deployed for 90 days or more, or if the member has received orders for a permanent change of station (PCS).⁸

6 Percent Cap on Interest Rates: Under SCRA, a military member can cap certain pre-service obligations to an interest rate of 6 percent. These obligations include *inter alia*, credit cards, mortgages and any student loans that are *not* federally guaranteed.⁹

Procedural aspects of the Act

There are two major procedural aspects of the SCRA. Many practitioners have at some time or another encountered the first when attempting to obtain default judgment. According to the SCRA and its counterpart Va. Code §8.01-15.2, a creditor is required to state via affidavit, declaration, written statement or certifica-

tion i) whether the defendant is in military service¹⁰ and/or ii) whether the creditor is able to determine the member’s service status, prior to the entry of any default judgment.¹¹

The court then must determine whether it is able to ascertain the defendant’s military service status. If it appears that the defendant is in active duty with the military, the court may not enter judgment against the servicemember without first appointing an attorney to protect the servicemember’s interests in the lawsuit.¹² If court-appointed counsel is unable to locate the servicemember, then none of the attorneys’ actions will serve to waive any defense or otherwise bind the servicemember.¹³ Additionally, under Va. Code §8.01-15.2 the court has the power to assess fees for the appointed counsel to *either* party. Finally, if default judgment is ultimately granted, it may nevertheless be set aside by the SCRA.¹⁴ The Act allows the judgment to be vacated within 90 days of the servicemember’s release from active service where that member can show that the i) military service materially affected the member’s defense to the action; ii) the servicemember had a “meritorious or legal defense” to “some part” of the action; *and* iii) the servicemember made no appearance in the case.¹⁵ By contrast, if the servicemember has made an appearance in a lawsuit, he or she has waived a number of rights to the SCRA default judgment protections.¹⁶ In short, a practitioner would be wise to avoid this scenario all together. On balance it would appear that the initial delay of waiting for the servicemember’s return or release from military duty could

ultimately prove less costly and more expedient.

Stay of Proceedings: The SCRA allows a servicemember to request a stay of judicial or administrative proceedings during *any* phase of the lawsuit.¹⁷ The Act does not allow for indefinite stays and the burden falls on the servicemember to show that military service has materially affected his or her ability to appear in court and otherwise defend his interests.¹⁸ A showing of military service by itself is not enough.¹⁹ Moreover, the servicemember must provide a letter from his or her commanding officer that states that the servicemember's current military duty prevents an appearance and that military leave is not authorized for the servicemember at the time of the letter. The servicemember must also set forth the facts in which the member's military duty materially affects the servicemember's ability to appear *and* establishes a date by which the member will be available to appear in court.²⁰

Dealing with the Act as a Plaintiff

What can a plaintiff do when protections of the Act are claimed as defenses? When faced with a federal act and clear corresponding state provisions, some plaintiff's lawyers might view waiting out the servicemember's eligibility under the Act as the only viable option. However, there are a number of ways the Act's protections can fail if the party claiming SCRA protections is held to their burden.

To begin with, the service status of the party claiming the Acts provisions should be verified. Outside of the aforementioned default provisions, the burden is on the servicemember to provide proof of SCRA eligibility, and, as discussed above, this should include both proof of active service as well as the beginning and end dates of that service. The practitioner's first step is to verify this information. It is critical to determine precisely when the particular benefit ends under the Act. Post September 11, neither LEXIS nor Westlaw offers this as an up-to-date service. However, the practitioner can contact the appropriate base of the servicemember to confirm his or her status. The practitioner can access a Department of Defense database to determine the servicemember's status by using the servicemember's social security number or a birth date, free of charge.²¹

The Practitioner should also assess whether the servicemember is absent without leave or "AWOL." The cases are split on whether a finding of AWOL status necessarily divests the servicemember of benefits. It would appear that the general rule is that AWOL status often *would* divest the servicemember of the Act's provisions, but many members of the bench are unwilling to deny the servicemember protections under the Act before considering the circumstances surrounding the servicemember's AWOL status.²² By contrast, if a servicemember is deemed to be "missing" the member is protected by SCRA until a more definitive determination can be made.²³

Once eligibility has been determined, the second area of inquiry is whether the servicemember's military duty has "materially affected" his or her ability to meet civil obligations.²⁴ Courts are given wide discretion and make their decisions on a case by case basis.²⁵ Common sense tells us that a soldier deployed abroad would most always qualify for the Act's protections while a servicemember stationed domestically near the venue of the action would have a more difficult argument for his or her eligibility under the Act. Indeed, some courts have held that being stationed overseas is a *prima facie* showing that military service has materially affected the servicemember's ability to defend suit.²⁶

The courts have also spelled out that the responsibility is on the servicemember to meet his/her burden, noting that the servicemember is not automatically entitled to *de facto* relief simply because he or she is a member of the armed services.²⁷ At least one court has also noted that "...the ability to communicate across the Atlantic Ocean has improved from its condition in 1940...."²⁸ Thus, practitioners should avail themselves of technological advances such as video conferencing and video depositions which are available in Federal Court under FRCP Rule 30(b)(4) and in Virginia under Rule 4:5 of the Rules of the Virginia Supreme Court.

Where there is a contractual or quasi-contractual relation, the plaintiff's attorney should check for potential waiver issues, bearing in mind that the waiver must be as follows: i) in writing ;ii) executed separately from the obligation to which it applies; iii) executed during the period of the servicemember's period of military service; and iv) written in 12 point type.²⁹ If the practitioner is forced to pursue the servicemember's assets, the Act has provisions designed to prevent inappropriate uses of the Act by an eligible member, such as the transfer of "any interest, property, or contract" designed to delay or prevent the enforcement of a valid civil right.³⁰

Lastly, the practitioner should take care to note whether the servicemember is a necessary party. If a party's presence is unnecessary there is little need to pursue further SCRA inquiry. The plaintiff's attorney should note that many courts have held that in personal injury cases it is the insurance company and not the insured servicemember who is the true party in interest.³¹

Conclusion

In sum, SCRA and its predecessors were enacted to protect servicemembers from civil obligations during active duty to "enable such persons to devote their entire energy to the defense needs of the Nation."³² The Act has, in large part, been strengthened throughout its legislative history. Given these facts and Congress' clear intent, the Act can be a powerful ally for defense attorneys and a rather large obstacle for plaintiff attorneys. It is however, only designed to provide temporary relief and the burden

is on the claiming servicemember to show that:

- 1) he or she is on active duty;
- 2) this duty will materially affect the servicemember's ability to meet civil obligations and;
- 3) there is a legal defense to at least part of the pending action.³³

The servicemember carries the burden on these elements. If the servicemember meets all three prongs of this test, the practitioner should monitor the member's service status. Should active duty end, most of the acts procedural protections will cease within 90 days of the end date.³⁴ The practitioner should seek and be awarded default judgment whenever the servicemember has made any appearance in the case and then later failed to appear at trial—even if the appearance is solely for the request of a stay of proceedings.³⁵

To counter a stay of proceedings the practitioner has a four-part inquiry:

- i) has the servicemember met each element of his/her burden;
- ii) have I taken steps to verify their proof;
- iii) is there a technological solution, such as teleconferencing or video deposition;
- iv) is the servicemember truly a necessary party or real party in interest?

Should none of these inquiries yield favorable results, the practitioner may admittedly be forced to patiently wait for the servicemember to return from active duty. Nevertheless, the practitioner should require that the servicemember provide proof of his or her eligibility under the act and the practitioner should now have the servicemember's scheduled release date for determining the end of the act's protections and planning future litigation.

Finally, Virginia courts have not interpreted the Act a great deal in its current form. Should a practitioner not find the answer to their question in Virginia case law or by reading the Act itself, the *Judge Advocate General's School Guide to the Servicemembers Civil Relief Act*, published by the ABA Standing Committee on Legal Assistance for Military Personnel (2007), is an excellent source.

Endnotes

1. See Act of June 11, 1864, ch. 118, 13 Stat. 123.
2. *LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948).
3. See generally, *Standing Committee on Legal Assistance for Military Personnel, American Bar Association, The Judge Advocate General's School Guide to the Servicemember's Civil Relief Act* (2007)
4. See 50 U.S.C. app. §532.
5. See *Id.* app. §533.
6. In 2003, this figure was \$2400, and was raised to \$2465 in 2004 per its annual consumer price index adjustment. See U.S. Coast Guard Legal Assistance, *About the Servicemembers Civil Relief Act*, http://www.uscg.mil/legal/la/topics/sscra/about_the_sscra.htm, (last visited Nov. 5, 2007).
7. 50 U.S.C. app. §531(a)(1)(A).
8. *Id.* app. §535.
9. *Id.* app. §527.
10. *Id.* app. §521(b)(1)(A).
11. *Id.* app. §521(b)(1)(B).
12. *Id.* app. §521(b)(2)
13. *Id.*
14. *Id.* app. §521(g)(1).
15. *Id.*
16. *Id.* app §521(a).
17. *Id.* app. §521(d) & 522(b).
18. See 50 USC. App. §522(b)(2)(A), which calls for a "communication" from the servicemember setting forth facts to support their stay request.
19. See generally 50 U.S.C. app. §522(b)(2)(A)&(B)
20. *Id.*
21. See U.S. Department of Defense, <https://www.dmdc.osd.mil/sscra/owa/home> (last visited Nov. 6, 2007).
22. See generally *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996). *But see Shayne v. Burke*, 27 So.2d 751 (1946) (holding that a soldier who went AWOL for 16 days to attend the birth of his child was not divested of his rights under the Act).
23. 50 USC. App. 582(c)
24. *Standing Committee on Legal Assistance for Military Personnel, supra* note 3, at 28.
25. See, e.g., *Id.* citing *LaMar v. LaMar*, 505 P.2d 566, 568 (1973); *Krumme v. Krumme*, 636 P.2d 814, 817 (1981); *Ostrowski v. Pethick*, 590 A.2d 1290, 1293 (1991).
26. *Murdock v. Murdock*, 526 S.E. 2d 241 (S.C. Ct. App. 1999).
27. *Wilson v. Butler*, 584 So.2d 414, 416 (Miss. 1991).
28. *Massey v. Kim*, 455 S.E.2d 306, 307 (Ga. Ct. App.1995).
29. 50 U.S.C app. §517(a)-(d).
30. *Id.* app. §581.
31. See generally *Underhill v. Barnes*, 288 S.E. 2d 905 (Ga. Ct. App. 1982); *Hackman v. Postel*, 675 F. Supp. 1132 (N.D. Ill. 1988).
32. 50 U.S.C. app. §502(1).
33. *Id.* app. §§521-22.
34. *Id.* app. §521(g)(2) & 522(a)(1).
35. *Id.* app. §522.



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