

# PUBLICATION

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## The Servicemembers' Civil Relief Act

July 14, 2011

The Soldiers' and Sailors' Civil Relief Act (SSCRA)<sup>1</sup> was first passed in 1918 to provide certain financial and civil rights protections to servicemembers during World War I. Although the original SSCRA expired in 1919, it was enacted again in 1940, but without a sunset provision. The SSCRA has been revised numerous times since 1940, with several major improvements made in 2003. With the 2003 revision, the SSCRA became the Servicemembers' Civil Relief Act (SCRA or Act). Although the SSCRA allowed for the termination of leased premises by servicemembers, the 2003 SCRA provided expanded termination provisions related to car leases.

In 2008 the SCRA was again amended, allowing for the termination of cell phone contracts under certain circumstances. Section 2203 of The Housing and Economic Recovery Act of 2008 (HERA) amended sections of SCRA to provide greater protections against foreclosure by extending the foreclosure protection period of Section 303 from 60 days to nine months after the servicemember's return from service, and by extending the reduced six percent maximum rate of interest on pre-service debts in Section 207 for one year after the servicemember's return from service. The 2008 amendments were enacted with a sunset provision which provided that the HERA amendments would expire on January 1, 2011. In late 2010, as the sunset approached, Congress passed the Helping Heroes Keep Their Homes Act of 2010, which was signed by President Obama on December 29, 2010, extending the sunset provisions until December 31, 2012.

The SCRA is more than just a law regarding consumer debt. It provides the legislation which allows servicemembers to vote in the state of their home and prevents them from paying taxes in two different states. Most provisions of the Act are automatic, but those involving debt payment are not.

The purpose of the provisions of the Act concerning debt is to protect members of the military from economic disadvantage when called to active service.

### Who is Entitled to Protection under the Act?

- Servicemembers are entitled to protection.
- Servicemembers are defined as:
  1. Members of the uniformed armed forces (Army, Navy, Air Force, Marine Corps or Coast Guard) on active duty, and National Guard members called to active service by the President or Secretary of State for a period of more than 30 days;<sup>2</sup>
  2. Commissioned officer of the Public Health Service; or
  3. Commissioned officers of the National Oceanic and Atmospheric Administration.
- The Act covers servicemembers on active duty. The term "active duty" means full-time duty in the active military service of the U.S. The term includes full-time training duty, annual training duty and attendance while in the active military service at a school designed by law or by the secretary of the military department concerned.
- The statutory "period of military service" begins on the date a person enters active service and ends on the date of the person's release from active service or death while in active service.
- National Guard: Generally, use of the term "active duty" in the SCRA does not include full-time National Guard duty. However, members of the National Guard under a call to active service

authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency declared by the President and supported by federal funds are covered under the Act.

- Dependents may also be protected under the Act. The provisions of the Act are not available for the debts of dependents to which a servicemember is not a party.
- The Act does not apply to a loan originated after the member began active duty.
- In order to confirm active service, check the website for the Defense Manpower Data Center: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>. The Data Center may also be contacted at:

Defense Manpower Data Center  
Attn: Military Status Verification  
1600 Wilson Boulevard, Suite 400  
Arlington, Virginia 22209  
Phone 703.696.6767  
Fax 703.696.4156

### Waiver of Rights under the Act

- Servicemembers may waive their rights under the Act. The waiver is effective only if **in writing and executed during or after the servicemember's period of military service**. The written agreement shall specify the legal instrument to which the waiver applies and if the servicemember is not a party to that instrument, the servicemember concerned must be identified.
- Written waivers apply to:
  4. The modification, termination or cancellation of an obligation secured by a mortgage, trust, deed, lien or other security in the nature of a mortgage;
  5. The repossession, retention, foreclosure sale, forfeiture or taking of a property that is security for an obligation.

### Reduced Interest Rate

- The Test:  
On what date did the debt originate?  
When did the active duty begin?
- The maximum rate of interest is six percent on obligations incurred prior to entry into military service.
- Exception: If a court finds that the ability of the person to pay is not materially affected by reason of the service, the court may determine the fair interest rate.
- The right to the lower interest rate is triggered by a borrower's written request accompanied by proof of active military service. The loan must be a contractual obligation of the servicemember, who can be the borrower or co-borrower.
- 6. In order to utilize this provision of the Act, the servicemember must provide the creditor with written notice and a copy of the military orders and any orders extending service, not later than 180 days after the date of the servicemember's termination or release from military service.
- 7. Upon notification by the borrower, the creditor must advise the mortgagor or representative of the adjusted amount due, provide adjusted coupons or billings and ensure that the reduced payments are not returned as insufficient.
- 8. Upon notification by the borrower, the creditor shall treat the debt as subject to the Act **as of the date on which the servicemember is called to military service**.

### Creditor Remedies to Avoid Interest Reduction

- The Test: Whether the servicemember's ability to pay interest at the stated note rate has not been "materially affected" by the servicemember's active duty.

9. An action for declaratory relief would be brought in court; and

10. Burden of proof is on the creditor.

- A creditor could be successful if:

11. The servicemember had substantial personal assets or active duty income;

12. The reduced interest request was for income-producing property rather than a personal residence;

13. During the period of active duty, the mortgage was paid on time at the contractual interest rate; and

14. The servicemember had an employed spouse during the period of active duty.

Exercise caution when attempting to avoid the reduction because it is potentially a public relations nightmare and the cost of litigation may exceed the difference in interest reduction.

## Stay of Foreclosure

- "A sale, foreclosure, or seizure of property for a breach of [a mortgage] obligation ...shall not be valid if made **during**, or **within 9 months** after, the period of the servicemember's military obligations except (1) upon a court order granted before such sale, foreclosure or seizure ...; or (2) if made pursuant to a [waiver of rights] agreement ...". Note: The 9-month period set forth above is scheduled to sunset on December 31, 2012, at which time the period will revert to 90 days.
- The court or the borrower/servicemember may halt the foreclosure:

15. The court *may* do so on its own motion.

16. The courts *shall* do so upon application of the borrower to the court.

17. The court may review the facts and, upon a showing of a material effect upon the servicemember, stay the proceedings for a period of time as justice and equity require, or adjust the obligation to preserve the parties' interests.

- Creditor must seek court relief to proceed. Contractual self-help remedies are not available under SCRA.

18. Non-Judicial Foreclosure: Litigation will be necessary. Creditor must file an action for declaratory relief seeking a court order allowing the foreclosure sale to commence or continue.

19. Judicial Foreclosure: Creditor can use the foreclosure action itself to seek an order to proceed with the foreclosure.

- Applies only to real property owned by the person in military service at the commencement of military service and still owned by that person at the time foreclosure commences. **Foreclosure is not barred where encumbered property is acquired after the borrower commences military service.**
- Check Investor Guidelines before commencing foreclosure or continuing foreclosure.
- **Can You Foreclose?**

20. Did the loan originate prior to the commencement of borrower's military service?

21. Is the borrower presently in the military?

**If you answer "yes" to these questions, then foreclosure cannot take place while the borrower is in the military and for a period of nine months after service ends unless the borrower consents or until a court order allowing foreclosure is obtained.**

## Stay of Other Legal Proceedings

- A stay is in effect only in any case where the servicemember is a defendant. (Examples include suits on the note; suits for deficiency judgment; suits for rent; suits for damage to the secured property). The stay applies to **all courts** (federal, state and bankruptcy) and to administrative agencies.
- Servicemembers are protected from default judgments if they have not previously made an appearance in the action.
- Plaintiffs are required by the Act to provide an affidavit as to the defendant's military status and should be prevented from obtaining judgment without such an affidavit. If the defendant's status can not be determined, the court may require a plaintiff to file a bond for the amount of the judgment if it cannot determine whether or not the defendant is in the military.
- A court action may be stayed at any stage of the proceeding prior to final judgment. A motion to stay may be brought at any time the party to the proceeding is in active military service or during the 90-day period following termination of active military service. (This is an increase of 30 days from the SSCRA.)
- The court considers whether the military service materially affects the servicemember's ability to comply with a court judgment or order. If so, the court may stay the execution of any judgment or order entered against the servicemember, or vacate or stay such orders.
- Statutes of limitation and other time periods governed by law or court order shall be tolled during the period of military service. Note: this section is also applicable to redemption periods.

22. If a valid foreclosure occurs, and the borrower becomes active during a redemption period, the time period is halted.

23. Check on a state-by-state basis to determine if a redemption period exists and if so, how long.

- This provision is applicable to bankruptcy proceedings.
- It is incumbent upon someone to present evidence to the court that its discretionary application of the Act is needed to accomplish justice between the parties. The Act provides no direction regarding which party should present such evidence. The U.S. Supreme Court did not declare a rigid doctrine of burden of proof in this matter, leaving it in the sound discretion of the courts.<sup>3</sup>
- In applying the Supreme Court standard, at least one bankruptcy court believes that "within the context of a bankruptcy case initiated by a serviceman-debtor under which creditor actions to protect their own interests are stayed until relief is granted by the bankruptcy court, the bankruptcy court should not exercise its discretion to apply the Act absent the presentation of some evidence by the serviceman-debtor from which the court could legitimately infer that his rights are being materially affected by his military service or that the applicability of the Act will otherwise promote the interests of substantial justice."<sup>4</sup>
- Note that the bar date to file proofs of claim may remain in place even though the statute indicates that "time period governed by law" shall be tolled. At least one court has distinguished the bar date from such "time periods."<sup>5</sup>
- The Act is applicable to eviction proceedings after foreclosure.

## Stay of Enforcement of Mortgage Obligation

- The court may grant a stay of the enforcement of the terms of the mortgage during:

24. The term of the servicemember's period of military service and from the date of termination of or release from military service; or

25. From the date of application if made after termination of or release from military service.

- Any stay shall be for:

- 26. A period equal to the remaining life of the loan, plus a period of time equal to the period of military service of the servicemember, or any part of such combined period; and
- 27. Subject to payment of the balance of the principal and accumulated interest due and unpaid at the date of the termination or release from the applicant's military service or from the date of application in equal installments during the combined period at the rate of interest on the unpaid balance prescribed in the instrument evidencing the obligation and subject to other terms as the court may find equitable.
- The servicemember must make application for this relief with a court during active service or within 180 days of termination or of release from military service.

### Protection from Retaliatory Actions

The Act provides protection to borrowers who invoke the Act from retaliatory action by lenders. No adverse credit report should be made. No future lending relationship should be decided on the basis of a borrower invoking the Act.

### Penalties for Violating the Act's Provisions

- Penalties for proceeding with foreclosure in violation of the Act:

- 28. A misdemeanor;
- 29. Prison term of up to one year or \$1,000 fine or both.

- Enforcement by the attorney general against any person who:

- 30. Engages in a pattern or practice of violating this Act; or
- 31. Engages in a violation of this Act that raises an issue of significant public importance.

In any action brought by the attorney general, the court may assess a penalty not exceeding \$55,000 for a first violation and not exceeding \$110,000 for any subsequent violation.

Servicemembers now specifically have a private right of action to sue the creditor for equitable relief, monetary damages, costs and attorney's fees.

Penalties other than those imposed by a court: (Also known as the "60 Minutes" test or "Do you really need Mike Wallace shoving a Microphone in your face to discuss why an American hero was improperly foreclosed on or denied a loan modification?") This title speaks for itself and caution is advised on dealing with these hot topic, media attractive issues. For a cautionary tale, Google "JP Morgan Chase" and "SCRA."

### Additional Information and Resources

- For the complete texts of investor announcements, visit [www.allregs.com](http://www.allregs.com). This is a fee- based subscription service but includes a complete library of announcements and other information. The AllRegs email alerts are free, helpful and available at the same web address.
- For further questions about the SCRA contact Linda S. Finley at [lfinley@bakerdonelson.com](mailto:lfinley@bakerdonelson.com).

### SSCRA/SCRA Reference Guide

Provision	SSCRA Sections	50 U.S.C. App. Old/New	SCRA Sections
Definitions	101	510/511	101

Application and Jurisdiction	102	512/512	102
Persons Liable on SM's Obligation	103	513/513	103
Waiver of Benefits	107	517	107
Effect on Future Financial Acts	108	518	108
Default Judgments	200	520/521	201
Stay of Proceedings	201	521/522	202
Statute of Limitations	205	525/526	206
Maximum Rate of Interest	206	526/527	207
Eviction and Distress	300	530/531	301
Installment Contracts	301	531/532	302
Mortgage Foreclosures	302	532/533	303
Termination of Leases	304	534/535	305
Extension of Dependents	306	536/538	308
Anticipatory Relief	700	590/591	701
Professional Liability Protection	702	592/593	703
Reinstatement of Health Insurance	703	593/594	704
Residency for Voting	704	594/595	705

1. 50. U.S.C. App. §501, et. Seq. (2010)

2. Section 502(f) of Title 32 of the US Code

3. *Boone v. Lightner* 319 U.S. 561, 569-70 (1943)

4. *In re Burrell*, 230 B.R. 309, 313 (E.D. Texas).

5. *In re A.H. Robins Co., Inc.*, 129 B.R. 457 (E.D. Va. 1991).