

What Every Attorney Should Know about the Servicemembers Civil Relief Act

BY KENNETH T. LUMB

The Armed Forces of the United States have been engaged in continuous combat operations for almost a decade. The number of Reservists and National Guardsmen who have been called onto active duty since 2001 grows daily. It is therefore more likely than ever that any particular lawsuit or administrative proceeding will involve a party who is on active duty. The Servicemembers' Civil Relief Act (SCRA) provides an assortment of benefits and legal protections to active-duty servicemembers and their families and the careful legal practitioner must be aware of these protections.

Service in the armed forces entails many sacrifices, not the least of which is the inability to assert certain legal rights due to overseas deployments and other hardships. Since the Civil War, Congress has attempted to ameliorate these hardships through legislative protections of servicemembers' rights in civil actions. The latest permutation is the Servicemembers' Civil Relief Act (SCRA). As the United States Supreme Court has said of previous versions, this legislation protects "those who dropped their affairs to answer their country's call."¹

The SCRA provides a number of protections and benefits, which can be broadly divided into procedural and substantive. Procedural protections include limitations on default judgments against servicemembers and an expanded ability to vacate default judgments, stays of civil and administrative proceedings, and tolling of civil statutes of limitations. Substantive benefits include protections against eviction and repossession of property, a right

to terminate automobile and residential leases, and reduction of interest on pre-service obligations, among others. Basic familiarity with these provisions is essential for every lawyer or jurist involved in any kind of civil or administrative proceeding.

Persons Covered. The SCRA's protections are available to active duty members of the Armed Forces and to commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration on active duty.² The Act is also applicable to members of the Reserve (Army, Navy, Air Force, Marine Corps and Coast Guard Reserves) while they are on active duty, but not while they are on inactive duty.³ A reservist is on active duty during annual training, but not during weekend drills.⁴

Applicability to members of the Army and Air Force

¹ *LeMaistre v. Leffers*, 333 U.S. 1, 68 S.Ct. 371 (1948).

² 50 U.S.C. app. § 511.

³ 50 U.S.C. app. § 511; 10 U.S.C. § 101(d).

⁴ 10 U.S.C. 101 (d)(1) and (d)(7).

National Guard is more complicated because Guardsmen can serve in any one of three statuses: (1) On state active duty under state command and control and with state funding; (2) On federal active duty, under federal command and control and with federal funding (Title 10 status); and (3) On active duty under state command and control, but with federal funding (Title 32 Status).⁵

In short, the Act does not apply to Guardsmen during state activations, weekend drills and most Title 32 activities. It does apply to Guardsmen who have been called to federal active duty. It also applies when they are on active duty in a Title 32 status longer than thirty days *and* in response to a presidential declaration of emergency.⁶

Some of the Act's protections are available to a servicemember's immediate family members (spouse and children). The definition of "servicemember" under the Act includes a legal representative.⁷ A "legal representative" under the Act is an attorney acting on behalf of the servicemember or any other person acting under a valid power of attorney.⁸

Proceedings Covered. The SCRA applies in every state and territory of the United States. The procedural protections of the SCRA are applicable to all civil and administrative proceedings in federal, state or municipal venues. The Act does not apply, however, to criminal proceedings.

Timing of Protections. Generally, the SCRA's protections begin upon entry onto active duty.⁹ For members of the Reserve or National Guard, however, some of the Act's protections take effect on the date they receive orders calling them onto active duty.¹⁰ Many of these protections end on the date the servicemember is released from active duty or dies while on active duty.¹¹ Several sections extend this

period; for example, 90 days after release from active duty (REFRAD) to request a stay of proceedings or 90 days after REFRAD to move to set aside a default judgment.¹²

Default Judgments. The SCRA provides protection against default judgment in any civil action or proceeding, specifically including child custody proceedings, in which a servicemember defendant does not appear.¹³ A court cannot enter a default judgment unless the plaintiff files an affidavit stating whether or not the defendant is in military service and providing supporting facts.¹⁴ If the plaintiff cannot determine whether the defendant is in military service, the affidavit must so state.

The requirement to file an affidavit becomes applicable technically when the defendant fails to appear and practically when the plaintiff files a motion for default. Some courts have distinguished a default order from a default judgment and only require an affidavit for a default judgment after a prove-up proceeding.¹⁵ The better practice, however, and the one followed by most courts, is to require an affidavit for an initial default motion.

The plaintiff's affidavit must state either that the defendant is in military service, is not in military service or that the plaintiff cannot determine whether the defendant is in military service. If the answer is "not in military service," the affidavit must contain facts sufficient to support that conclusion.¹⁶

The surest method to satisfy a court on this question is to query the Department of Defense (DOD). The SCRA provides that either side or the court in a covered action may apply for information to DOD as to the military status of an individual.¹⁷ The point of contact within DOD for these requests is the Defense Manpower Data Center (DMDC).

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5 The Judge Advocate General's Legal Center and School, U.S. Army, JA 260, Servicemembers Civil Relief Act, page 2 (March 2006).

6 32 U.S.C. § 502(f).

7 50 U.S.C. app. § 519(b).

8 50 U.S.C. app. § 519(a).

9 50 U.S.C. app. § 511(3).

10 50 U.S.C. app. § 516(a).

11 50 U.S.C. app. § 511(3).

12 50 U.S.C. app. § 522(a)(1) and § 521(g)(2), respectively.

13 50 U.S.C. app. § 521.

14 50 U.S.C. app. § 521.

15 See *Interinsurance Exchange of the Auto Club of S. California v. Collins*, 37 Cal. Rptr. 2d 126 (Cal. App. 2nd Dist. 1994).

16 50 U.S.C. app. § 521(b)(1)(A).

17 50 U.S.C. app. § 582. See also *Premier Financial Services LLC v. Morris*, 2010 WL 3342002 (D. Ariz. 2010) for an explanation of other sources of information.

SCRA inquiries can be made at DMDC's website: www.dmdc.usd.mil/scra. The website contains a form with fields for various information. Only the fields for last name and social security number are mandatory. If the social security number is not known, a search using date of birth and name can be requested by mail via a letter addressed to: Defense Manpower Data Center, Attention: Military Verification, 1600 Wilson Blvd., Suite 400, Arlington, Virginia 22209-2593.

If the movant or the court discovers through any means - including a DMDC request - that a non-appearing defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant.¹⁸ The current version of the SCRA does not succinctly or plainly describe the precise parameters of the role of the attorney appointed under these circumstances, though that role certainly does not include taking over the defense and trying the case.¹⁹ One court has described the attorney's role as analogous to that of a

guardian *ad litem*.²⁰

Certainly, locating the defendant and informing him or her of the action comes within this definition. So also does inquiring whether the servicemember would like to request a stay of the proceedings. The Alaska Supreme Court's summary of an appointed attorney's duties is as good as any: (1) contact defendant and assure that defendant has actual notice of the lawsuit, (2) advise defendant of the protections of the Soldiers' and Sailors' Civil Relief Act, (3) advise defendant of the possibility of entry of default judgment and of the consequences of such a judgment; (4) ascertain whether defendant's ability to appear and defend his or her legal interests is affected in any way by defendant's military status, and (5) if the defendant wishes, move for a stay of the proceedings to enable defendant to obtain counsel or prepare a defense on the merits of the case.²¹

When the plaintiff cannot determine whether or not the defendant is in the military, the court may require the

18 50 U.S.C. app. § 521(b)(2).

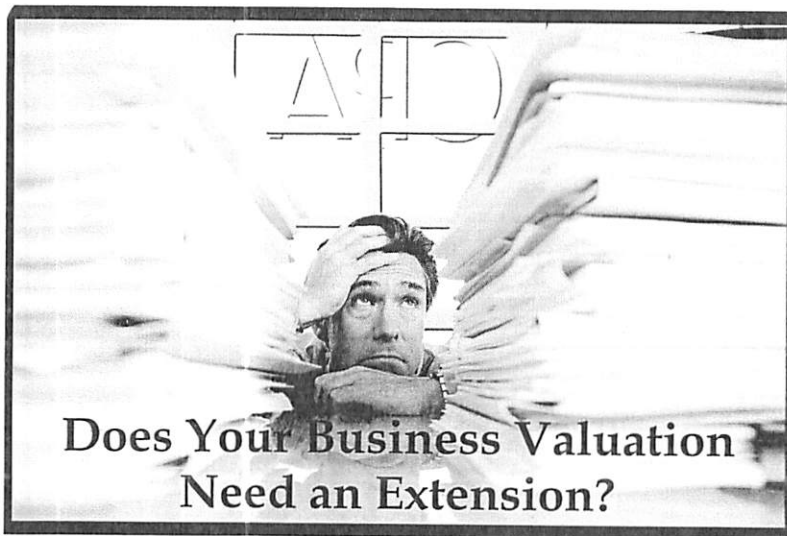
19 The Judge Advocate General's Legal Center and School, U.S. Army, JA 260, Servicemembers Civil Relief Act, page 2 (March 2006), pages 3-21, 22.

20 *Rutherford v. Bentz*, 345 Ill.App.3d 532, 104 N.E.2d 343 (3rd Dist. 1952).

21 *State of Alaska, ex rel. Dew v. Superior Court for the State of Alaska*, 907 P.2d 14, 15 (Alaska 1995).

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plaintiff to file a bond.²² If a default judgment is taken and the defendant turns out to have been in military service, the bond is available to reimburse the defendant against any loss caused by the judgment.²³

Though the affidavit requirement is clearly mandatory, the failure to file the affidavit does not nullify a judgment. Rather, failure to file an appropriate affidavit renders a judgment voidable by a servicemember who shows that his defense was prejudiced by reason of his military service.²⁴ Conversely, a non-military defendant who is defaulted for failing to appear cannot use the SCRA's protections to vacate the judgment.²⁵ Those protections are only available to members of the class protected by the Act, namely, military servicemembers.²⁶ Knowingly submitting or making a false affidavit is a federal crime, punishable by fine or up to a year in prison.²⁷ Further,

a false affidavit by a bill collector can support an action under the Fair Debt Collection Practices Act (FDCPA).²⁸

Regardless of general state or federal deadlines to reopen a judgment, a servicemember may use the SCRA to vacate a default judgment entered against him while he was on active duty or entered up to sixty days *after* release from active duty.²⁹ A petition under the SCRA must be filed within ninety days of leaving active duty and it must show that the servicemember had a meritorious defense to at least some part of the action and that military service materially affected the ability to raise that defense.³⁰

Finally, a servicemember can only use this provision if he has not previously appeared in the action.³¹ The Courts are split on what exactly constitutes an appearance for this purpose. Some courts have held that requesting a stay of the proceeding is an appearance which precludes later use

of the SCRA to vacate a default judgment.³² Other courts have come to the opposite conclusion. Clearly, a servicemember who is aware of a proceeding must weigh the risks and benefits of requesting a stay versus taking a default and moving to vacate it later. One thing is certain, however. If the court appoints an attorney, any actions by that attorney will not bind the servicemember nor waive any defenses.³³

Stays of Proceedings. One of the most important benefits in the SCRA is the ability to stay a civil or administrative proceeding. The main stay provision in the SCRA states in pertinent part:

(a) *Applicability of Section.* This section applies to any civil action or proceeding in which the plaintiff or defendant at the time of filing an application under this section... (1) is in military service or is within 90 days after termina-

tion of or release from military service; and (2) has received notice of the action or proceeding.

(b) *Stay of proceedings.* (1) *Authority for Stay.* At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met. (2) *Conditions for Stay.* An application for a stay under paragraph (1) shall include the following: (a) A letter or other communication setting forth facts stating the manner in which military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear. (b) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

(c) *Application not a waiver of defenses.* An application

22 50 U.S.C. app. § 521(b)(3).

23 50 U.S.C. app. § 521(b)(3).

24 50 U.S.C. app. § 521(g).

25 50 U.S.C. app. § 521(c).

26 50 U.S.C. app. § 521(c).

27 50 U.S.C. app. § 521(c).

28 *Owings v. Hunt & Henriques*, 2010 WL 3489342 (S.D. Cal. 2010), interpreting 15 U.S.C. § 1692, et. seq.

29 50 U.S.C. § 521(g)(1).

30 50 U.S.C. § 521(g)(1).

31 50 U.S.C. § 521(a).

32 See, e.g., *Blankenship v. Blankenship*, 263 Ala. 297, 82 So.2d 335, 336 (Ala. 1955).

33 50 U.S.C. § 521 (b)(2).

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for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).³⁴

An active duty servicemember can request a stay when distance or military duties materially affect the ability to defend. A stay can also be extremely useful to a reservist or member of the national guard mobilized onto active duty in the middle of a lawsuit. According to the Act, a court *may* grant a stay on its own motion, but *must* grant a stay upon a proper application by the servicemember. A proper application for an initial stay must contain: (1) a statement how the servicemember's duties materially affect his ability to appear; (2) a statement when he will be able to appear; (3) a statement from the commander stating that current military duties prevent the servicemember's appearance and that military leave is not authorized.³⁵

There is no particular form required. The request can be "a letter or other communication," which would include a memorandum or even e-mails.³⁶ Any combination of written documents or electronically delivered communications from both the servicemember and his commander should suffice.

Where a proper factual basis is presented, a court must grant a stay of *at least* 90 days. After this initial stay, however, the servicemember may request an additional stay, supporting the request with the same type of information required for the initial stay. If an additional stay is denied, however, the court must appoint an attorney to represent an unrepresented servicemember.³⁷ Unlike the initial stay, granting an additional stay is discretionary with the court.

Statutes of Limitations. The SCRA tolls any limitation period for filing suit during a servicemember's military service.³⁸ The tolling provision includes the servicemember's heirs, executors, administrators or assigns, but does *not* include a spouse or dependents. Thus, a soldier injured in an automobile collision while on active duty will have two years after leaving active duty to file suit. If his wife is also injured in the collision, she must file suit for her own injuries within two years of the collision.

The SCRA's tolling provision applies not only to actions by a servicemember, but also to causes of action *against* a servicemember. In *Santiago v. Childers*,³⁹ the U.S. District Court for the Southern District of Illinois explained one of the benefits of this provision. In *Santiago*, the plaintiff was

SIDEBAR: CRIMINAL LAW

BY ANNE THERIEAU

Aggravated Kidnapping. *People v. Gonzalez*, ___ Ill. 2d ___, 2011 WL 188869 (2011). The victim in this case was a three week old child with the initials R.O. The parents of R.O. brought her to Stroger hospital where her father had a doctor's appointment. At some point while at the doctor, R.O.'s mother stepped outside to make a phone call and her father remained to fill out some paperwork. Defendant offered to hold the baby while R.O.'s father filled out the paperwork. When he was finished, R.O.'s father looked for the defendant and his baby, but could find neither. He looked outside the waiting room and inside the hospital but with no luck. Defendant was eventually apprehended fifteen minutes later, approximately two blocks away at another hospital. The Illinois Appellate Court agreed with defendant's contention on appeal that the State failed to prove the defendant guilty beyond a reasonable doubt of aggravated kidnapping when the evidence failed to show that she secretly confined the baby. Because the baby was in constant public view or awareness, the Appellate Court reasoned, the baby had not been secretly confined within the meaning of the aggravated kidnapping statute. The Illinois Supreme Court reversed the judgment of the Appellate Court and affirmed the judgment of the trial court. The Court found that defendant's conduct isolated the baby from meaningful contact with the public. The baby was unable to escape or cry out and was taken without permission of her parents. The defendant sought to pass the baby off as her own. Therefore, the defendant's actions isolated the baby from the public even though the defendant kept the baby in public view and consequently, the requirements for secret confinement under the aggravated kidnapping statute had been met.

Right to Testify. *In re Joshua B*, ___ Ill. App. 3d ___, 2011 WL 181435 (1st Dist. 2011). Defendant was adjudicated delinquent for robbing a fellow student. At the delinquency hearing, the defendant, who was represented by counsel, was not advised of his right to testify by the court and did not testify. The defendant appealed, claiming he was denied due process because the trial court failed to advise him of his right to testify and failed to verify that he knowingly and voluntarily waived that right. In affirming the defendant's adjudication, the Illinois Appellate Court noted that it has long been held that when a defendant is represented by counsel, the trial court does not have a duty to inform the defendant of his right to testify. Rather, it is the responsibility of defense counsel to advise the defendant of his right to testify and explain any advantages or disadvantages of exercising this right. The Court explained that by having the trial court advise a defendant of his right to testify, he may influence the defendant to waive his right not to testify. Furthermore, a court may interfere with the attorney-client relationship by advising a defendant of his right to testify. Finally, a trial judge is not required to advise a defendant of his right to testify because it is difficult to determine when during the course of the proceedings it is appropriate to advise a defendant of this right. □

34 50 U.S.C. § 522.

35 50 U.S.C. § 522.

36 50 U.S.C. app. § 522(b).

37 50 U.S.C. app. § 522(d)(2).

38 50 U.S.C. app. § 526.

39 *Santiago v. Childers*, Case no. 05-512 MJR, 2007 U.S. Dist. LEXIS 83787 (S.D. Ill. 2007).

unable to serve the defendant, a soldier on active duty, with a summons because he was in Iraq. After two years without service, the court observed that the case would likely be dismissed without prejudice for failing to serve defendant Childers. However, the court also observed that the statute of limitations against Childers was tolled by the SCRA, so the plaintiff could refile his lawsuit in the future.⁴⁰

The SCRA tolling provisions do not require any showing that military service would or did prejudice a servicemember's ability to prosecute or defend a case. The possibility exists, therefore, that a servicemember could bring a twenty or thirty-year-old cause of action. The one caveat is the claim of laches. If the other party can show inexcusable delay and prejudice resulting from the delay, the claim can be dismissed.⁴¹

Evictions. Section 531 of the SCRA provides certain protections for servicemembers and their families from eviction from their home for nonpayment of rent under an annually adjusted amount. The section requires that the landlord obtain a court order for eviction, notwithstanding contrary state law. If the servicemember or his dependent requests a stay and shows that the ability to pay the rent has been materially affected by military service, the court must grant a stay. The length of the stay lies within the discretion of the court. Section 531 also gives the court the power to adjust the obligation under the lease to "preserve the interests of all parties."⁴²

Lease Termination. The SCRA also allows servicemembers to terminate a lease for property used for residential, professional, business or agricultural purposes. The Act applies when a servicemember: enters active duty, is deployed for 90 days or more, or when he receives permanent change of station (PCS) orders; i.e., he is transferred to another post.

The termination request must be in writing and include a copy of the orders. It is effective 30 days after the next rental payment is due. Unlike with many other SCRA provisions, there is no requirement to show material effect.⁴³

Automobile Leases. Section 534 of the SCRA also allows a servicemember to terminate an automobile lease. A lease can be terminated upon entry onto active duty, but

only if that period of duty is 190 days or longer. A lease can also be terminated for PCS orders from a post in the continental United States (CONUS) to another post outside of the continental United States (PCONUS) and *vice versa*. Lastly, when a soldier deploys individually or with a unit "in support of a military operation," he may terminate a lease if the deployment is for 180 days or more.⁴⁴

Installment Contracts. The SCRA provides protections for servicemembers who entered into installment contracts before entering military service and whose service materially affects their ability to make the payments. The Act applies to installment contracts to purchase any real or personal property. In short, the Act prohibits the seller/lessor from taking any action to rescind or terminate the contract for breach or to repossess the property absent a court order.⁴⁵

Mortgage Foreclosures. The SCRA provides additional protection specific to foreclosures of mortgages and other security interests. The Act applies to relief sought on any obligation secured by mortgage, deed of trust or other security device. The obligation must have been entered into and the property owned by the servicemember or a dependent prior to military service. If these conditions are met, and a servicemember's ability to defend has been materially affected by his service, then any foreclosure action filed during or within 90 days after military service is covered. Possible relief includes a stay, an adjustment of the obligations (extending the maturity date, etc.), granting foreclosure and extending the period of redemption.⁴⁶

Interest Rate Reduction. Regardless of other protections applicable, the SCRA limits to six percent the interest that can be charged on any obligation incurred prior to military service. Thus, when a servicemember enters active duty, he has the right to have interest on debts reduced to six percent.

The servicemember must notify the creditor in writing, provide a copy of his orders, and request the reduction during the period of the military service or within 180 days thereafter. Upon receipt, the creditor must reduce the interest rate to six percent and forgive interest in excess of six percent. Simply extending the loan or deferring the interest will not comply with the Act. Though the servicemember is not required to prove material effect, the creditor can challenge the reduction in court by proving that military service has not materially affected the servicemember's ability to pay.⁴⁷ □

40 *Santiago v. Childers*, Case no. 05-512 MJR, 2007 U.S. Dist. LEXIS 83787 (S.D. Ill. 2007) ("[P]laintiff must be aware that it appears that the statute of limitations is tolled during Childers' military service, so if Childers is dismissed without prejudice for this action, another action could theoretically be filed."), citing 50 U.S.C. app. § 526.

41 The Judge Advocate General's Legal Center & School, U.S. Army, JA 260, Servicemembers Civil Relief Act, page 3-43 (March 2006).

42 50 U.S.C. app. § 531.

43 50 U.S.C. app. § 534.

44 50 U.S.C. app. § 534.

45 50 U.S.C. app. § 532.

46 50 U.S.C. app. § 533.

47 50 U.S.C. app. § 527.