

Michigan Judge's Guide to the Servicemembers Civil Relief Act (SCRA)



The Michigan Judge's Guide to the Servicemembers Civil Relief Act (SCRA)

A project of *Service to Soldiers: Legal Assistance Referral Program*, a component of Thomas M. Cooley Law School's Center for Ethics, Service, and Professionalism.



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FOREWORD

By The Honorable Marilyn J. Kelly, Chief Justice, Michigan Supreme Court

Common sense and gratitude for those who participate in our nation's defense dictate that those who serve our country in the military should be able to focus their full attention on their duties without forfeiting their interests under civil law. Those on active duty or called to new duty stations often find it difficult to be physically present for civil proceedings and to meet their financial and legal obligations at home. Recognizing this, the Servicemembers Civil Relief Act protects servicemembers' legal and economic interests by providing for the temporary suspension of certain legal and administrative actions.

The SCRA's immediate predecessor is the Soldiers' and Sailors' Civil Relief Act of 1940. But its roots go as far back as the Civil War, when Congress passed a total moratorium on civil actions brought against Union soldiers and sailors, such as breach of contract, bankruptcy, foreclosure or divorce. The SCRA certainly addresses some issues that our Civil War counterparts could not have anticipated, but its purpose is the same: to ease the economic and legal burdens often experienced by servicemembers and their families.

This guide furthers the SCRA's goals by making available the legislation, plus related case law, checklists, and other resources, in a concise, convenient format. It is a valuable resource for Michigan courts, particularly at this point in our nation's history. The guide is the good work of Ms. Shanta Anderson-Williams and Mr. Matthew Disbrow, both of the law firm of Honigman Miller Schwartz & Cohn, assisted by Mr. Ryan Plecha, Cooley Law School Class of 2008, and of Cooley's Service to Soldiers: Legal Assistance Referral Program. Funding was provided by the Michigan State Bar Foundation.

On behalf of the Michigan Supreme Court, I commend and thank everyone involved. You have done a valuable service, not only for Michigan courts, but also for the many servicemembers who serve so faithfully and well.

TABLE OF CONTENTS

1. INTRODUCTION1

2. HISTORY AND PURPOSE OF THE SCRA.....1

3. GENERAL PROVISIONS2

 3.1. Jurisdictional Application2

 3.2. Individuals Covered by the SCRA.....2

 3.3. “Military Service” Defined.....2

 3.3.1. Army, Navy, Air Force, Marine Corps, and Coast Guard Members2

 3.3.2. National Guard Members.....3

 3.3.3. Absences Due to Illness or Injury3

 3.3.4. What is Not “Military Service”3

 3.4. Period of Military Service.....3

 3.4.1. Definition3

 3.5. Waiver of Benefits and Protections4

 3.5.1. Benefits and Protections Not Necessarily Automatic4

 3.5.2. Waiver Requirements.....4

4. PROCEDURAL PROTECTIONS4

 4.1. Default Judgments4

 4.1.1. Applicability5

 4.1.2. Affidavit Requirement5

 4.1.3. Military Service Certificates6

 4.1.4. Appointment of Attorney6

 4.1.5. Posting a Bond6

 4.1.6. Stays in Default Proceedings6

 4.1.7. Reopening and Vacating Default Judgments7

 4.2. Stay of Judicial and Administrative Proceedings8

 4.2.1. Applicability8

4.2.2.	Stay Application Process	8
4.2.3.	Stay Extensions	9
4.2.4.	Appointment of Counsel	10
4.2.5.	Coordination of Stay Proceedings	10
4.3.	Staying and Vacating Judgments of Execution, Attachment, and Garnishments	10
4.3.1.	Applicability	10
4.3.2.	Actions Taken on a “Material Affect” Determination	11
4.4.	Setting Terms and Conditions of Stays and Other Orders	11
4.4.1.	Setting the Stay Period	11
4.4.2.	Setting the Terms of Installment Payments	11
4.4.3.	Allowing Proceedings Against Codefendants	11
4.4.4.	Inapplicability	12
4.5.	Statute of Limitations Tolling	12
4.5.1.	Tolling Limitations Periods	12
4.5.2.	Redemption of Real Property	12
5.	EVICCTIONS, LEASE TERMINATIONS, MORTGAGE FORECLOSURES, AND INSTALLMENT-CONTRACT RELIEF	13
5.1.	Evictions and Distress	13
5.1.1.	Court-Ordered Eviction	13
5.1.2.	Distress	13
5.1.3.	Stay of Eviction Proceedings	14
5.1.4.	Lease Term Adjustments	14
5.1.5.	Penalties	14
5.2.	Residential and Automobile Lease Terminations	14
5.2.1.	Lease Terminations	14
5.2.2.	Real Estate Leases	15
5.2.3.	Automobile Leases	15

5.2.4.	Joint Leases	16
5.2.5.	Arrearages and Advance Payments	16
5.2.6.	Lessor Relief	16
5.2.7.	Penalties	17
5.3.	Mortgages	17
5.3.1.	Foreclosure/Seizure.....	17
5.3.2.	Available Mortgage Relief.....	18
5.3.3.	Limitations on Contract Fines and Penalties	20
5.3.4.	Penalties	20
5.4.	Installment Contracts	21
5.4.1.	Covered Obligations & Applicability	21
5.4.2.	“Material Affect”	21
5.4.3.	Available Resolutions	22
5.4.4.	Penalties	22
5.5.	Termination of Contracts for Cellular Phone Service.....	23
5.5.1.	Cellular Phone Service Relief.....	23
6.	FINANCIAL PROTECTIONS.....	23
6.1.	Interest Rate Cap.....	23
6.1.1.	Covered Debt Obligations.....	23
6.1.2.	Definition of “Interest”	24
6.1.3.	Temporal Scope of Interest Rate Reduction	24
6.1.4.	Forgiveness of Interest Exceeding the Limitation	25
6.1.5.	Activation of 6% Interest Cap.....	25
6.1.6.	Exception to the Interest Cap.....	25
6.1.7.	Penalties	25
7.	MISCELLANEOUS PROTECTIONS	26
7.1.	Tax Protections	26

7.1.1.	Residency for Tax Purposes.....	26
7.1.2.	Property Tax.....	26
7.1.3.	Limitation on Sale of Property to Enforce Tax Assessment.....	26
7.1.4.	Redemption.....	27
7.1.5.	Deferral of Income Tax Collection.....	27
7.2.	Insurance Protections.....	27
7.2.1.	Health Insurance.....	27
7.2.2.	Life Insurance.....	28
7.2.3.	Professional Liability Insurance.....	28
7.3.	Anticipatory Relief.....	28
7.3.1.	Requirements.....	29
7.3.2.	Covered Obligations.....	29
7.3.3.	Stay of Enforcement.....	29
7.4.	Limitation on Storage Lien Enforcement.....	30
7.4.1.	General Protection.....	30
7.4.2.	Stay of Proceedings.....	30
7.4.3.	Penalties.....	30
8.	CONCLUSION.....	30
	APPENDIX A - ADDITIONAL RESOURCES.....	A-1
	APPENDIX B - JUDGES' CHECKLISTS.....	B-1

1. INTRODUCTION

No less an authority than Gen. George Washington once observed that “when we assumed the Soldier, we did not lay aside the Citizen.”¹ Nearly a century and a half later, President Calvin Coolidge reflected similar sentiments and concern for our soldiers and sailors, remarking that “the nation which forgets its defenders will itself be forgotten.”² In furtherance of such ideals, and with great respect and honor for our men and women in uniform, Congress enacted the Servicemembers Civil Relief Act of 2003, 50 USC App §§ 501-596 (the “SCRA” or “Act”), to protect the personal interests of servicemembers at home while they protect the interests of our Country abroad. The purpose of this Guide is to provide an overview of the SCRA, and to assist the judiciary and other members of Michigan’s legal community in understanding the Act and its protections for military personnel and their families.

2. HISTORY AND PURPOSE OF THE SCRA

The SCRA was signed into law on December 19, 2003, and has been subsequently amended in 2004, 2006, and 2008. The Act replaces and expands the Soldiers’ and Sailors’ Civil Relief Act (the “SSCRA”) of 1940.³ Although the SCRA considerably changed the older SSCRA, many of the primary benefits and protections are the same. Thus, this Guide (and much of the current SCRA jurisprudence) includes references to legal analyses and cases decided under the older SSCRA.

The SCRA’s primary purpose is to strengthen our national defense by enabling military personnel “to devote [their] entire energy to the defense needs of the Nation.”⁴ Thus, the legislative policy underlying the historic and existing enactments of the SCRA is to provide economic and procedural safeguards for servicemembers on active military service. To accomplish this, the Act provides a wide range of benefits protecting servicemembers from disadvantages that could arise because of their commitment to our Nation. Likewise, the Act is to be “liberally construed” in favor of servicemembers, and applied in a “broad spirit of gratitude towards service personnel.”⁵

¹ Schroeder, *Maxims of Washington* (New York: D Appleton and Co, 1894) ch v, p 166.

² Filton, *Leadership: Quotations of the World’s Greatest Motivators* (Boulder, Colorado: Westview Press, 1997), p 261.

³ Act of Oct 17, 1940, ch 888, 54 Stat 1178.

⁴ 50 USC App § 502; See also, *Walters v Nadell*, 481 Mich 377, 386; 751 NW2d 431 (2008) (finding that Congress enacted the SCRA to temporarily free servicemembers from participation in litigation).

⁵ *Davenport v Richards*, No. C06-5334RJB-KLS, 2006 WL 3791369 (WD Wash, 2006) (citing *Engstrom v First National Bank of Eagle Lake*, 47 F3d 1459, 1462 (CA5, 1995). See also, *Boone v Lightner*, 319 US 561, 575; 63 S Ct 1223; 87 L Ed 1587 (1943) (holding that the Act is to be “liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation”).

3. GENERAL PROVISIONS

3.1. Jurisdictional Application

The SCRA applies to any judicial or administrative proceeding in the United States and its territories, including both federal and state courts and administrative agencies, but excluding criminal proceedings.⁶

3.2. Individuals Covered by the SCRA

- Members of the Army, Navy, Air Force, Marine Corps, and Coast Guard on active duty (including reserves ordered to duty).⁷
- National Guard members called to active service for over 30 days by the President or the Secretary of Defense in response to a federally-funded national emergency.⁸
- Commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administrations when on active service.⁹
- In limited circumstances (e.g., evictions, lease terminations, foreclosures, and installment contract terminations), SCRA protections extend to servicemember dependents, which generally include spouses, children, or any other individuals for whom the servicemember provided more than one-half of the individuals' support for 180 days immediately preceding application for relief under the Act.¹⁰

3.3. “Military Service” Defined

3.3.1. Army, Navy, Air Force, Marine Corps, and Coast Guard Members

For members of the above branches of the Armed Forces, military service is “active duty,” which is defined as full-time duty in the active military service of the United States.¹¹ This includes full-time training duty,

⁶ 50 USC App § 512.

⁷ *Id.* at § 511(1); 10 USC 101(a)(5); 10 USC 101(a)(4).

⁸ 50 USC App § 511(2)(A)(ii).

⁹ *Id.* at § 511(1); 10 USC 101(a)(5)(B)-(C).

¹⁰ 50 USC App § 511-516. See also, *Balconi v Dvascas*, 133 Misc 2d 685; 507 NYS2d 788 (NY Civ Ct 1986) (holding that a servicemember's ex-wife was a “dependent” within the meaning of the Act because she was still financially dependent on the servicemember).

¹¹ 50 USC App § 511(2)(a)(1); 10 USC 101(d)(1).

annual training duty and attendance (while in the active military service) at a school designated as a military service school.¹²

3.3.2. National Guard Members

For members of the National Guard, military service includes only service under federal calls to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days, in response to a national emergency declared by the President and supported by national funds.^{13, 14}

3.3.3. Absences Due to Illness or Injury

Under the Act, military service includes time periods of a servicemember's absence from active duty due to sickness, wounds, leave or other lawful causes.¹⁵

3.3.4. What is Not "Military Service"

Military service does not include absences from active duty while incarcerated in a military prison or absence without leave (AWOL).¹⁶

3.4. Period of Military Service

3.4.1. Definition

The period beginning on the date that a servicemember begins military service, and ending on the date of a servicemember's release from military service or death while in military service.¹⁷

¹² *Id.*

¹³ 50 USC § 511(2)(a)(ii).

¹⁴ Under MCL 32.517, Michigan law provides many similar protections for National Guard members ordered by the governor to active service for more than seven days in support of state emergencies or other similar situations.

¹⁵ *Id.* at § 511(2)(C).

¹⁶ See, *Reed v Albaaj*, 723 NW2d 50, 54 (Minn Ct App, 2006) (holding that husband was not entitled to protections of the Act, because he was not on "active duty" when he was incarcerated in an out-of-state military prison during the dissolution of marriage proceeding).

¹⁷ 50 USC App § 511(3).

3.5. Waiver of Benefits and Protections

3.5.1. Benefits and Protections Not Necessarily Automatic

Many SCRA protections are not necessarily automatic. Instead, they require the servicemember to assert the protections in a timely manner to prevent a waiver of such protections.¹⁸

3.5.2. Waiver Requirements

Certain SCRA rights and protections only may be waived pursuant to a separate signed written agreement that meets the Act's specific waiver requirements.¹⁹ For example, written waivers are required in the following contexts:²⁰

- (a) The modification, termination, or cancellation of: (i) a contract, lease, or bailment; or (ii) an obligation secured by a mortgage, trust, deed, lien or other security in the nature of a mortgage; *or*
- (b) The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that: (i) is security for an obligation; or (ii) was purchased or received under a contract, lease or bailment.

4. PROCEDURAL PROTECTIONS

4.1. Default Judgments

A critical area of concern for many servicemembers is the inability to attend to important legal matters during military service. To help alleviate such concerns, the SCRA provides certain protections from default judgments. Those protections are embodied in Section 201 of the Act (50 USC App § 521).

¹⁸ *Id.* at § 517(a); See also, *Walters*, 481 Mich at 377 (determining that the Act's mandatory tolling protection may be waived if it is not raised in a timely fashion during litigation).

¹⁹ 50 USC App § 517(b).

²⁰ *Id.*

4.1.1. Applicability

Section 201 applies to all civil actions or proceeding, including child custody proceedings,²¹ in which the servicemember does not make an appearance. This includes proceedings in all federal and state courts and administrative agencies.^{22, 23}

4.1.2. Affidavit Requirement

Before any default judgment may be entered, the plaintiff must file an affidavit stating: (i) whether or not the defendant is in military service (with supporting facts); or (ii) whether the plaintiff is unable to determine if the defendant is in military service.^{24, 25}

4.1.2.1. *Form of Affidavit*

The affidavit requirement may be satisfied by a signed, written statement certified to be true under penalty of perjury.²⁶

²¹ Concerning child custody matters, MCL 722.27 further provides that, where a motion for change of custody is filed while a parent is on active military duty, the court is prohibited from modifying a previous order or issuing a new order that changes the child's placement existing on the date the parent was called to active military duty. The court may, however, enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. Upon a parent's return from active military duty, the court must reinstate the custody order in effect immediately preceding the period of active military duty. Further, after a parent returns from active military duty, the court cannot consider his/her absence due to that military duty in any best-interest-of-the-child determination.

²² 50 USC App §§ 511(5), 521(a).

²³ Similarly, MCL 32.517 states that suits brought in state court against officers and enlisted personnel covered by the Michigan Military Act, which are pending when the covered servicemember enters active service or are commenced during such service, stand adjourned until after the termination of the active service.

²⁴ 50 USC App § 521(b)(1); see also MCR 2.603(C) (requiring the filing of nonmilitary affidavits in default-judgment proceedings).

²⁵ **Michigan Practitioners' Note:** The law generally does not allow non-military defendants to collaterally attack default judgments merely on the technical ground that an affidavit concerning military service was not filed. See, e.g., *Haller v Walczak*, 347 Mich 292, 296-299; 79 NW2d 622 (1956) (holding that the SCRA was enacted to protect those in the military, not others, and affirming a default judgment because, *inter alia*, the non-servicemember defendants had not been prejudiced by the plaintiff's failure to file an affidavit concerning military service before the default judgment was entered). In addition, Michigan SCAO Approved Forms MC 07 and MC 07a, concerning defaults, both contain affidavits addressing the defendant's military status. A link to those and other forms can be found at <http://courts.michigan.gov/scao/courtforms/generalcivil/gcindex.htm>.

²⁶ 50 USC App § 521(b)(4).

4.1.2.2. *Penalty for False Affidavits*

Any person who makes or uses a false affidavit may be fined, imprisoned for up to a year, or both.²⁷

4.1.3. Military Service Certificates

Because it is the court's duty to determine the status of a defendant's military service before entering a default judgment, the SCRA permits the court or the parties to apply for a certificate from the Department of Defense ("DOD") concerning a party's military service.²⁸ The DOD office to contact for such inquiries is the Defense Manpower Data Center. Additionally, the DOD provides a website for SCRA inquiries, at <https://www.dmdc.osd.mil/scra/owa/home>.

4.1.4. Appointment of Attorney

Where it appears the defendant is in military service, and has not entered an appearance, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If the appointed attorney cannot locate the servicemember, actions by the attorney in the case will not waive any defense or otherwise bind the servicemember.²⁹

4.1.5. Posting a Bond

If the court cannot determine whether the defendant is in military service before entering judgment, it may require the plaintiff to post a bond in an amount approved by the court to indemnify a servicemember against any loss or damage he/she may suffer by reason of the judgment, should that judgment later be set aside, in whole or in part. Such bond will remain in effect until the expiration of the time for setting aside the judgment and for the applicable appeal period.³⁰

4.1.6. Stays in Default Proceedings

In any proceeding where a defendant is in military service and fails to make an appearance, the court must grant a stay of such proceedings for a minimum of 90 days upon application of counsel, or on the court's own motion, if the court determines that: (i) there may be a defense to the

²⁷ *Id.* at § 521(c).

²⁸ *Id.* at § 582.

²⁹ *Id.* at § 521(b)(2).

³⁰ *Id.* at § 521(b)(3).

action and a defense cannot be presented without the presence of the defendant;³¹ or (ii) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.³² Such stays are separate and distinct from stays in cases where the servicemember receives actual notice of the action.³³ Where the servicemember receives actual notice of the proceedings, stays are controlled by 50 USC App § 522.

4.1.7. Reopening and Vacating Default Judgments

Default judgments entered in violation of the SCRA are voidable and may be vacated.³⁴

4.1.7.1. *Procedures for Vacating Default Judgments*

Default judgments may be reopened and vacated under the following conditions:

- (a) The default judgment must have been entered during the servicemember's period of military service or within 60 days after termination of or release from military service;³⁵
- (b) The servicemember must file an application with the court or tribunal that issued the default judgment, and affirmatively seek to vacate the default judgment and reopen the case for purposes of defending against the action. Such an application must be filed no later than 90 days after the termination of or release from military service;³⁶ and
- (c) The servicemember must establish that, at the time the judgment was entered, he/she: (i) was "materially

³¹ **Michigan Practitioners' Note:** Although a servicemember's absence is considered prima facie prejudicial, such a presumption of prejudice is rebuttable. See, *Barry v Keeler*, 322 Mass 114, 121; 76 NE2d 158 (1947). In addition, because non-military codefendants are not covered under the SCRA, granting non-military codefendants a stay or continuance due to the servicemember codefendant's military service is within the sound discretion of the court. *Id.*

³² *Id.* at § 521(d).

³³ *Id.* at § 521(e)-(f).

³⁴ *Id.* at § 521(g).

³⁵ *Id.*

³⁶ *Id.* at § 521(g)(2).

affected”³⁷ by his/her military service in making a defense; and (ii) has a meritorious or legal defense to the action, in whole or in part.³⁸

4.1.7.2. *Protections for Bona Fide Purchasers*

Even where a court or tribunal vacates a default judgment against a servicemember pursuant to a provision of the SCRA, such an action will not impair a right or title acquired by a bona fide purchaser for value under the default judgment.³⁹

4.2. Stay of Judicial and Administrative Proceedings

Under Section 202 of the Act (50 USC App § 522), the SCRA provides for stays in court and other proceedings where the servicemember receives notice of the action or proceedings.

4.2.1. Applicability

Subject to the minor limitations discussed in Section 4.2.5, Section 202 of the Act contains the SCRA’s general stay provisions. Section 202 applies to all civil actions or proceedings, including child custody proceedings, in which, at the time of filing an application under Section 202, the plaintiff or defendant:

- (a) Is in military service, or was terminated or released from military service within 90 days or less from the filing of the application; and
- (b) Has *received notice* of the action or proceeding.

4.2.2. Stay Application Process

At any stage before final judgment in a proceeding in which Section 202 applies, a servicemember may file an application for or otherwise request a stay of proceedings.⁴⁰

4.2.2.1. *Initial 90-Day Stay*

³⁷ **Michigan Practitioners’ Note:** The phrase “material affect” (and variations of the phrase) is a term of art located in the Act. Although the phrase is grammatically incorrect, it is incorporated in this Guide for consistency with its use in the Act.

³⁸ *Id.* at § 521(g)(1)(A)-(B).

³⁹ *Id.* at § 521(h); see also, *Hurley v Deutsche Bank Trust Co Americas*, No 1:08-CV-361, 2008 WL 4539478 (WD Mich, Sept 30, 2008) (finding that the SCRA does not create a private right of action for damages arising from foreclosure, redemption, eviction, or sale to a bona fide purchaser).

⁴⁰ *Id.* at § 522(b)(1). In addition, the court may grant a stay on its own motion. *Id.*

Where a stay application is made, the court or tribunal must stay the proceeding for no less than 90 days – subject to the conditions discussed below.⁴¹

4.2.2.2. *Conditions for Stay*

The servicemember’s stay application must include:

- (a) A statement that: (i) explains how the servicemember’s current military duties “materially affect” his/her ability to appear; and (ii) states a date when he/she will be available to appear; and
- (b) A statement from the servicemember's commanding officer stating that: (i) the servicemember’s current military duties prevent appearance; and (ii) military leave is not available at the time of the letter.^{42, 43}

4.2.2.3. *Application Not a Waiver of Defenses*

A stay application 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).⁴⁴

4.2.3. Stay Extensions

A servicemember may apply for an extension of the mandatory 90-day stay based on the continuing “material affect” of military duties on his/her ability to appear.⁴⁵ Such an application may be made as part of the initial stay application or thereafter where it appears the servicemember will

⁴¹ *Id.* at § 522(b)(1).

⁴² *Id.* at § 522(b)(2).

⁴³ **Michigan Practitioners’ Note:** The 90-day stay set forth in Section 202 is mandatory, but only if the servicemember satisfies the conditions identified in 50 USC App 522(b)(2). See, e.g., *In re Marriage of Bradley*, 282 Kan 1; 137 P3d 1030 (2006) (holding, in a divorce proceeding, that the servicemember failed to meet the conditions for a mandatory stay by neglecting to state when he would be available to appear and not providing the court with a statement from his commanding officer); *City of Pendergrass v Skelton*, 278 Ga App 37; 628 SE2d 136 (2006) (determining that a National Guard member’s stay application was insufficient where he failed to provide the necessary specific information in support of the application). The determination of whether the servicemember has met the required conditions for a stay is within the sound discretion of the trial court. *Boone*, 319 US 561; 63 S Ct 1223; 87 L Ed 1587.

⁴⁴ 50 USC App § 522(c).

⁴⁵ *Id.* at § 522(d)(1).

remain unavailable to prosecute or defend the action. The same conditions for the initial 90-day stay apply to applications for stay extensions (see Section 4.2.2.2, above).^{46, 47}

4.2.4. Appointment of Counsel

If a court or tribunal refuses to extend a stay beyond 90 days, it must appoint counsel to represent the servicemember.⁴⁸

4.2.5. Coordination of Stay Proceedings

A servicemember who is denied a stay under Section 202 may not seek a stay in default-judgment proceedings under Section 201 (50 USC App § 521).⁴⁹ Further, Section 202 protections do not apply to Section 301 (50 USC App § 531), which governs eviction and distress proceedings, as Section 301 contains its own stay procedures.⁵⁰

4.3. Staying and Vacating Judgments of Execution, Attachment, and Garnishments

Section 204 of the Act (50 USC App § 524) provides protections to servicemembers whose ability to comply with a court order or judgment is “materially affected” by military service.

4.3.1. Applicability

Section 204 applies to any action or proceeding covered by the SCRA commenced in court against a servicemember before or during the period of military service or within 90 days after such service terminates.⁵¹

⁴⁶ *Id.*

⁴⁷ Significantly, to obtain an extended stay, the servicemember must establish his/her military service “materially affects” the ability to appear in the action. It is within the court’s sound discretion to determine whether or not military service actually affects the servicemember’s ability to appear. See, e.g., *Chlebek v Mikrut*, 336 Mich 414, 421-423; 58 NW2d 125 (1953) (determining that a plaintiff who had decided to make the army his career could properly prosecute his case through a representative; finding that the only “material affect” the plaintiff’s military service created was a limit on his ability to testify at a hearing; and ordering the case to be heard on the first opportunity the plaintiff had to return home, and if not in a reasonable time, that the plaintiff’s deposition be taken in the alternative).

⁴⁸ *Id.* at § 522(d)(2).

⁴⁹ *Id.* at § 522(e).

⁵⁰ *Id.* at § 522(f).

⁵¹ *Id.* at § 524(b).

4.3.2. Actions Taken on a “Material Affect” Determination

Where a court determines, in its opinion, that a servicemember’s military service “materially affects” his/her ability to comply with a court order or judgment, it may on its own motion, and must on an application by the servicemember:

- (a) Stay the execution of any judgment or order entered against the servicemember; *and*
- (b) Vacate or stay any attachments or garnishments of property, money, or debts in the possession of the servicemember, or a third party, whether before or after judgment.⁵²

4.4. **Setting Terms and Conditions of Stays and Other Orders**

While some of the SCRA’s stay provisions are mandatory (see, e.g., Section 4.2.2.1 above), Section 205 of the Act (50 USC App § 525), provides some discretion in setting the terms and conditions of stays granted under the SCRA.

4.4.1. Setting the Stay Period

A stay of an action, proceeding, attachment, or execution may be ordered for the period of military service and 90 days thereafter, or for any part of that period.⁵³

4.4.2. Setting the Terms of Installment Payments

The court may set the terms and amounts for installment payments ordered under the Act (see, e.g., Section 5.4.3.3, below), as it considers reasonable.⁵⁴

4.4.3. Allowing Proceedings Against Codefendants

In most cases, where the servicemember is a codefendant with others who are not in military service, and who are not otherwise entitled to the SCRA’s protections, the court may permit a plaintiff to proceed with an action against such non-servicemember codefendants.⁵⁵

⁵² *Id.* at § 524(a)(2).

⁵³ *Id.* at § 525(a).

⁵⁴ *Id.*

⁵⁵ 50 USC App § 525(b).

4.4.4. Inapplicability

Section 205 does not apply to stay proceedings brought under Section 202 (50 USC App § 522) or to anticipatory relief sought under Section 701 (50 USC App § 591).⁵⁶

4.5. Statute of Limitations Tolling

Section 206 of the Act (50 USC App § 526) tolls the applicable statute of limitations for claims brought against a servicemember during his/her period of military service. The SCRA's tolling provisions are mandatory, and there is no requirement to show the servicemember's military service prejudiced his/her ability to defend or prosecute a claim.⁵⁷

4.5.1. Tolling Limitations Periods

A servicemember's military service may not be included in computing any limitations period established by law, regulation, or order, for bringing an action or other proceeding in any state or federal court or agency by or against the servicemember or the servicemember's heirs, executors, administrators or assigns.⁵⁸ ⁵⁹ Section 206's tolling requirements do not apply, however, to periods of limitations established by the United States internal revenue laws.⁶⁰

4.5.2. Redemption of Real Property

Section 206 further provides that a period of military service may not be included in computing any period provided by law for redeeming real property sold or forfeited to enforce an obligation, tax, or assessment.⁶¹

⁵⁶ *Id.* at § 525(c).

⁵⁷ *Conroy v Aniskoff*, 507 US 511; 113 S Ct 1562; 123 L Ed 2d 229 (1993); see also, *Walters*, 481 Mich at 383.

⁵⁸ 50 USC App § 526(a).

⁵⁹ **Michigan Practitioners' Note:** The SCRA's tolling provisions may be asserted by non-military parties in litigation involving servicemembers; however, this benefit is "merely incidental to the protections that [the tolling] provision provides to servicemembers." *Walters*, 481 Mich at 386. Furthermore, the Supreme Court of Michigan recently held that the SCRA's tolling provisions are not self-executing, and are waived unless affirmatively asserted before the trial court. *Id.* at 390-391. While the Supreme Court of Michigan's decision is inconsistent with decisions on this subject in other jurisdictions (see, e.g., *Ricard v Birch*, 529 F2d 214, 216-217 (CA4, 1975); *Kenney v Churchill Truck Lines, Inc*, 6 Ill App 3d 983, 992-993; 286 NE2d 619 (1972)), it constitutes the current status of the law in Michigan.

⁶⁰ 50 USC App § 526(c).

⁶¹ *Id.* at § 526(b).

5. EVICTIONS, LEASE TERMINATIONS, MORTGAGE FORECLOSURES, AND INSTALLMENT-CONTRACT RELIEF

Title III of the SCRA governs evictions, leases, installment contracts, and mortgage relief. Title III protections are applicable not only to servicemembers, but also to their dependents – where it is proven that the servicemember’s military service “materially affects” the dependent’s ability to fulfill the obligation in question.⁶²

5.1. Evictions and Distress

5.1.1. Court-Ordered Eviction

Under Section 301 of the Act (50 USC App § 531), landlords may not evict⁶³ a servicemember or his/her dependents during military service, without a court order.⁶⁴ Servicemembers and dependents are eligible for this protection if: (i) the property is occupied, or intended to be occupied as a residence,⁶⁵ and (ii) the monthly rent does not exceed the statutorily set amount.⁶⁶ The Act’s requirement to obtain a court order before eviction is consistent with Michigan law.⁶⁷

5.1.2. Distress

If premises are occupied or intended to be occupied primarily as a residence, the SCRA prohibits a landlord from subjecting the premises to a distress during active military service.⁶⁸ Distress is a common-law right which allows a landlord to engage in self-help by going on the demised

⁶² *Id.* at § 538.

⁶³ See, *Arkless v Kilstein*, 61 F Supp 886 (ED Pa, 1944) (holding that the Act’s meaning of “eviction” is a dispossession of a tenant by a landlord).

⁶⁴ 50 USC App § 531(a)(1)(A).

⁶⁵ *Id.* at § 531(a)(1)(A)(i).

⁶⁶ *Id.* at § 531(a)(1)(A)(ii). As originally enacted, the SCRA established a maximum monthly rental value of \$2,400.00. That amount is adjusted for inflation annually, and the Secretary of Defense publishes the maximum values in the Federal Register each year. As of January 1, 2009, the maximum monthly rental amount was \$2,932.31. See, Publication of Housing Price Inflation Adjustments Under 50 USC App § 531, 74 Fed Reg 8068 (Feb 23, 2009).

⁶⁷ The procedure for court-ordered evictions in Michigan is set forth in MCL 600.5744 and MCR 4.201(L).

⁶⁸ 50 USC App § 531(a)(1)(B).

premises and seizing personal property as security for rent arrearages.⁶⁹ Such self help already is statutorily prohibited in Michigan.⁷⁰

5.1.3. Stay of Eviction Proceedings

The court may, on its own motion, stay eviction proceedings for a period of 90 days or adjust the servicemember's obligation under the lease to preserve each party's interest, and must do so if a request is filed by a servicemember whose ability to pay the agreed rent is "materially affected" by military service.⁷¹

5.1.4. Lease Term Adjustments

As an alternative remedy to the stay discussed in section 5.1.3. above, the court may adjust the lease obligations to preserve the interest of all parties.⁷² Further, if a stay is granted, the Act permits the court to provide such relief as equity may require.⁷³

5.1.5. Penalties

A person who knowingly evicts or attempts to evict a servicemember or his/her dependents during active duty may be fined under 18 USC § 3571, imprisoned for not more than one year, or both.⁷⁴ Servicemembers also may pursue other available legal remedies, such as wrongful conversion (or wrongful eviction) and recovery of punitive and consequential damages.⁷⁵

5.2. **Residential and Automobile Lease Terminations**

5.2.1. Lease Terminations

Servicemembers and their dependents may terminate residential or motor vehicle leases at any time after entering military service or after the date of

⁶⁹ 49 Am Jur 2d, Landlord and Tenant § 813 (2006).

⁷⁰ MCL 600.2918(2).

⁷¹ 50 USC App § 531(b)(1)(A)-(B).

⁷² 50 USC App § 531(b)(1)(B).

⁷³ *Id.* at § 531(b)(1)(3). See, e.g., *Jonda Realty Corp v Marabotto*, 178 Misc 393, 34 NYS2d 301 (NY Sup Ct, 1942) (denying eviction after the servicemember requested a three-month stay and offered to pay one month's rent, yet holding that the servicemember's obligation for past due rent continued).

⁷⁴ 50 USC App § 531(c).

⁷⁵ *Id.* at § 531(c)(2).

military orders.⁷⁶ They are not required to demonstrate that their ability to perform under the lease agreement is “materially affected” by military service. Notice of lease terminations must be provided to the lessor in writing, accompanied by a copy of the servicemember’s military orders.⁷⁷

5.2.2. Real Estate Leases

Servicemembers and their dependents may terminate, without penalty, leases for premises that are occupied or intended to be occupied, including those leased for residential, professional, business or agricultural purposes.⁷⁸

- (a) To qualify for such relief, the lease must have been entered into before military service.⁷⁹
- (b) Servicemembers may, however, cancel real estate leases executed *during* military service if they receive a permanent change of station or deployment orders for 90 days or more.⁸⁰
- (c) Termination is effective 30 days after the date on which the next rental payment is due for month-to-month leases.⁸¹ For all other leases, termination is effective on the last day of the month following the month of written notice.⁸²

5.2.3. Automobile Leases

Leases for motor vehicles that are used or intended to be used for personal or business transportation by servicemembers or their dependents may be terminated under the following conditions:

- (a) The lease must have been entered into before military service.⁸³

⁷⁶ *Id.* at § 535(a).

⁷⁷ *Id.* at § 535(c)(1)(A).

⁷⁸ See, e.g., *Omega Industries, Inc v Raffaele*, 894 F Supp 1425 (D Nev, 1995) (holding that an optometrist who voluntarily became an active duty officer in the Public Health Service was relieved from his commercial lease obligations under the Act).

⁷⁹ *Id.* at 1429; 50 USC App § 535(b)(1)(A).

⁸⁰ *Id.* at § 535(b)(1)(B).

⁸¹ *Id.* at § 535(d)(1).

⁸² *Id.*

⁸³ 50 USC App § 535(b)(2)(A).

- (b) The servicemember must be under a call or order specifying military service for 180 days or more during the lease term.⁸⁴ If military service initially is ordered for less than 180 days, service time must be uninterrupted and extended for a total period of 180 days or more.⁸⁵
- (c) Servicemembers also may cancel automobile leases executed *during* military service if they receive a permanent change of station outside the continental United States, or an order to deploy with a military unit for 180 days or more.⁸⁶
- (d) Termination is effective upon return of the motor vehicle to the lessor within 15 days after the required written notice of termination (including a copy of military orders).⁸⁷

5.2.4. Joint Leases

A dependent co-lessee's responsibility to perform under a lease agreement is terminated once the servicemember's obligation is terminated.⁸⁸

5.2.5. Arrearages and Advance Payments

Rent or lease amounts unpaid for the period *before* the effective termination date shall be paid on a prorated basis.⁸⁹ Any amount paid in advance for a period *after* the effective termination date must be refunded within 30 days of the effective termination date.⁹⁰

5.2.6. Lessor Relief

In very limited circumstances, a lessor may request relief from the court before the lease termination date as justice and equity may require. The court may then modify the relief granted to a servicemember.⁹¹ Equitable

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 50 USC App § 535(b)(2)(B).

⁸⁷ *Id.* at § 535(c)(B).

⁸⁸ *Id.* at § 535(a)(2).

⁸⁹ *Id.* at § 535(e).

⁹⁰ *Id.* at § 535(f).

⁹¹ *Id.* at § 535(g).

remedies are not limited to the servicemember's monthly rental obligations and security deposit.⁹²

5.2.7. Penalties

A person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or his/her dependents after lawful lease termination, or who knowingly interferes with the removal of personal property from premises covered by such a lease, may be fined under 18 USC § 3571, imprisoned for not more than one year, or both.⁹³ Servicemembers also may pursue other available legal remedies, such as wrongful conversion and recovery of punitive and consequential damages.⁹⁴

5.3. Mortgages

Section 303 (50 USC App § 533) provides certain forms of mortgage relief to servicemembers on active duty. For such relief, real or personal mortgaged property must be owned by a servicemember or his/her dependents *before* active duty,⁹⁵ and the foreclosure, sale, or seizure action must have been filed during, or within nine months after, active military service.⁹⁶

5.3.1. Foreclosure/Seizure

Under Section 303 of the Act, a sale, foreclosure, or seizure of servicemembers' or their dependents' property for breach of mortgage or trust-deed obligations during the prescribed period is invalid, unless made pursuant to a court order or a servicemember's written waiver.^{97, 98}

⁹² See, *Omega Industries*, 894 F Supp at 1430 (establishing that a lessor may be awarded additional remedies, including induced tenant improvements, realty commissions and attorneys fees and costs, while also holding that such equitable remedies must be exercised with *extreme caution* given the purpose of the Act).

⁹³ 50 USC App § 535(h)(1).

⁹⁴ *Id.* at § 535(h)(2).

⁹⁵ *Id.* at § 533(a)(1). See also, *Whitaker v Hearnberger*, 123 Colo 545; 233 P2d 389 (1951) (holding that the Act does not prevent the foreclosure of security for obligations that arise out of written agreements executed *during* the period of military service).

⁹⁶ 50 USC App § 533(b).

⁹⁷ *Id.* at §§ 533(c), 517(b).

5.3.2. Available Mortgage Relief

5.3.2.1. *Stay of Mortgage Enforcement Proceedings*

In mortgage enforcement actions filed during, or within 9 months after a servicemember's military service, the court may stay the proceedings as long as justice and equity require, or equitably adjust the mortgage obligation after a hearing and on its own motion.⁹⁹ It must do so when a servicemember applies for such relief and proves that his/her *ability to comply is "materially affected" by military service.*¹⁰⁰

5.3.2.1.1. *Proving "Material Affect"*

The Act does not specify which party must prove "material affect." Some courts have held that the servicemember must prove material effect,¹⁰¹ while others have held that the party bringing an action against a servicemember must prove lack of "material affect."¹⁰²

5.3.2.2. *Settlement of Stays Relating to Personal Property*

If a stay is granted in a foreclosure, repossession, or rescission/termination of purchase contract proceeding related to personal property, the court may appoint three disinterested

⁹⁸ **Michigan Practitioners' Note:** In *Grenshaw v Granet*, 237 Mich 367; 211 NW 636 (1927), the Supreme Court of Michigan analyzed a similar statute that prevented the taking of military officers' property for debts by execution, levy, seizure or attachment. The *Grenshaw* court held that forfeiture rights are enforceable against servicemembers where the parties stipulated to forfeiture for non-payment as part of the contract. However, the same result might not be reached today under the SCRA, due to the Act's requirement for a servicemember's waiver of such protection to be in the form of a *separate* written instrument. Nevertheless, Michigan practitioners should be aware of the holding in *Grenshaw*.

⁹⁹ 50 USC App § 533(b).

¹⁰⁰ 50 USC App § 533(b). See also, *Hunt v Jacobson*, 178 Misc 201, 33 NYS2d 661 (NY Sup Ct, 1942) (recognizing that the criteria for a servicemember's mortgage debt relief under the former Act are whether (1) his inability to comply is because of military service, and (2) such military service has "materially affected" the ability to comply).

¹⁰¹ See, e.g., *Queens County Sav Bank v Thaler*, 181 Misc 229; 44 NYS2d 4 (NY Sup Ct, 1943) (denying servicemember's motion to stay foreclosure proceedings because he failed to show that his ability to pay was "materially affected" by his military service).

¹⁰² See, e.g., *Meyers v Schmidt*, 181 Misc 589; 46 NYS2d 420 (NY Co Ct, 1944) (holding that the burden is on the plaintiff to show that military service does *not* "materially affect" the servicemember's ability to meet the debt obligation).

parties to appraise the personal property.¹⁰³ If the servicemember's dependents will not face undue hardship because of the foreclosure, repossession, or contract rescission/termination, the court may order that the appraised amount be paid to the servicemember or his/her dependents.¹⁰⁴

5.3.2.3. ***Reopening or Setting Aside Foreclosure Default Judgments***

If a default judgment in a foreclosure proceeding is entered during a servicemember's active duty, or within 60 days of active duty, the court must reopen or set aside the judgment to allow the servicemember or his/her counsel to assert the servicemember's rights under the Act.¹⁰⁵ However, the court must do so only if the servicemember was unable to defend the action due to his/her military service, and he/she has a meritorious or legal defense.¹⁰⁶ The servicemember must move to reopen such a default judgment no later than 90 days after the end of active duty.¹⁰⁷

5.3.2.4. ***Statutory Redemption Period Tolled***

Where real property is sold or forfeited to enforce an obligation, tax, or assessment, a servicemember may invoke the statutory redemption period, with additional time equal to the period of active military service.¹⁰⁸ It is not necessary for servicemembers to show that military service adversely affects their ability to redeem title to the property before qualifying for the tolling provision.¹⁰⁹

¹⁰³ 50 USC App § 534(a).

¹⁰⁴ *Id.* at § 534(b).

¹⁰⁵ 50 USC App § 521(g).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See also, *Flagg v Sun Investment & Loan Corporation*, 373 P2d 226 (Okla, 1962).

¹⁰⁸ 50 USC App § 526(b). See also, *Conroy*, 507 US at 514.

¹⁰⁹ *Id.* at 517 (holding that a servicemember need not show that his military service prejudiced his ability to redeem title to property before qualifying for the suspension of time under the Act).

5.3.2.5. *Conditional Stay*

To “preserve the interests of all parties,”¹¹⁰ the court may grant the servicemember conditional relief. Typically, this type of relief involves a stay of foreclosure proceedings conditioned upon the servicemember making regular, partial payments on the outstanding debt.¹¹¹

5.3.2.6. *Subsequent Good Faith Purchasers*

Servicemembers may not be able to recover property sold to a good faith purchaser. The Act protects the rights of subsequent good faith purchasers by stating that vacating, setting aside, or reversing any default judgment under the Act will not impair any right or title acquired by a bona fide purchaser for value.¹¹²

5.3.3. Limitations on Contract Fines and Penalties

Where an action to enforce a contract has been stayed, it is impermissible for the contract holder to assess fines or penalties for a servicemember’s failure to comply with the contract during the period of the stay.¹¹³ The reviewing court also has discretion to reduce or waive penalties or fines resulting from a servicemember’s nonperformance under a contract where:

- (a) The servicemember was in military service at the time the penalty or fine was assessed; and
- (b) The servicemember’s ability to perform under the contract was “materially affected” by military service.¹¹⁴

5.3.4. Penalties

A person who knowingly makes or causes a sale, foreclosure, or seizure of property that is prohibited under the Act, or knowingly attempts to do so,

¹¹⁰ *Id.* at § 533(b)(2).

¹¹¹ See, e.g., *Fed Nat’l Mortgage Ass’n v Deziel*, 136 F Supp 859 (ED Mich, 1956) (granting a stay of foreclosure proceedings conditioned upon the servicemember making a payment of \$100 each month for one year). See also, *Nassau Savings & Loan Ass’n v Ormond*, 179 Misc 447; 39 NYS2d 92 (NY Sup Ct, 1942) (granting a stay of mortgage foreclosure proceedings on the condition that servicemember’s dependent pay a monthly sum to plaintiff).

¹¹² 50 USC App § 521(h).

¹¹³ *Id.* at § 523(a).

¹¹⁴ *Id.* at § 523(b).

shall be fined under 18 USC § 3571, imprisoned for not more than one year, or both.¹¹⁵ Servicemembers also may pursue other available legal remedies, such as wrongful conversion and recovery of punitive and consequential damages.¹¹⁶

5.4. Installment Contracts

Section 302 of the Act (50 USC App § 532) protects servicemembers and their dependents who entered into installment contracts for real or personal property (including motor vehicles), or the leased or bailed such property *before* active military service. If a servicemember or his/her dependents subsequently breaches the contract terms, the property may not be rescinded, terminated, or repossessed unless ordered by the court pursuant to its authority under 50 USC App § 532(a).

5.4.1. Covered Obligations & Applicability

- (a) Installment-contract protections only apply to contracts where the servicemember has made a deposit or installment payment before entering military service.¹¹⁷
- (b) Obligations entered into during active duty generally are not protected.¹¹⁸
- (c) Protection extends to installment contracts breached before or during active duty.¹¹⁹

5.4.2. “Material Affect”

A servicemember only is required to establish “material affect” under Section 302 when the court considers staying the matter pending final

¹¹⁵ *Id.* at § 533(d)(1).

¹¹⁶ *Id.* at § 533(d)(2).

¹¹⁷ 50 USC App § 532(a)(2). See also, *Cox v McGregor*, 330 Mich 260; 47 NW2d 87 (1951) (holding that the former Act’s provision against rescission and termination of installment contracts for the purchase of real or personal property did not apply where servicemember did not make a payment or deposit).

¹¹⁸ *Jim’s Trailer Sales, Inc v Shutok*, 153 F Supp 274 (WD Pa, 1957) (holding that the servicemember was not protected by the SSCRA because he purchased the house trailer at issue after entering military service).

¹¹⁹ *Hampton v Commercial Credit Corp*, 119 Mont 476, 176 P2d 270 (1946) (holding that the servicemember’s automobile was wrongfully seized, possessed and sold, although he breached the installment contract shortly before active military service).

resolution. In that situation, the court can compare a servicemember's financial situation before and during active duty.¹²⁰

5.4.3. Available Resolutions

5.4.3.1. ***Reimbursement***

A court may order complete or partial repayments of deposits or installments made by a servicemember as a prerequisite of cancellation of the contract and the creditor regaining possession of the property.¹²¹

5.4.3.2. ***Stay of Proceedings***

Upon the petition of the servicemember, the court must stay the proceedings for a period of time, as justice and equity may require, if the court finds that the "servicemember's ability to comply with the contract is "materially affected" by military service."¹²² The court may also stay proceedings on its own motion.¹²³

5.4.3.3. ***Equitable Resolution***

The Act empowers the court to make any other disposition that is equitable "to preserve the interest of all parties."¹²⁴ Courts have stressed that the interest of both the servicemember and creditor must be weighed equally, and that protections under this provision of the Act in no way provide "complete immunity" from contract obligations.¹²⁵

5.4.4. Penalties

A person who knowingly resumes possession of property in violation of Section 302, or attempts to do so, shall be fined under 18 USC § 3571,

¹²⁰ See, e.g., *Harvey v Home Owners' Loan Corp.*, 189 Misc 73, 67 NYS2d 586 (NY Sup Ct, 1946) (holding that servicemember did not establish "material affect" where he was able to pay the monthly amount before military service, and his income during military service was equal to or greater than his income before military service).

¹²¹ 50 USC App § 532(c)(1).

¹²² 50 USC App § 532(c)(2).

¹²³ *Id.*

¹²⁴ *Id.* at § 532(c)(3).

¹²⁵ *Nassau Savings & Loan Ass'n*, 39 NYS2d at 94.

imprisoned for not more than one year, or both.¹²⁶ Servicemembers also may pursue other available legal remedies, including wrongful conversion¹²⁷ and recovery of punitive and consequential damages.¹²⁸

5.5. Termination of Contracts for Cellular Phone Service

Servicemembers who receive orders to deploy outside the continental United States for 90 days or more or for a permanent change of duty station may request to terminate or suspend any cellular phone contract entered into before the date of deployment if the servicemember's ability to satisfy his/her obligations under the contract or to use the service will be "materially affected" by the deployment or permanent change of duty station.¹²⁹ Such a request must be accompanied by a copy of the servicemember's orders.¹³⁰

5.5.1. Cellular Phone Service Relief

Upon request, the cellular phone provider must either suspend or terminate the service, without a reactivation or early termination fee,¹³¹ or allow the servicemember to suspend the contract during his/her deployment at no charge.¹³²

6. FINANCIAL PROTECTIONS

6.1. Interest Rate Cap

To help ease financial burdens created by active military service, Section 207 of the Act (50 USC App § 527) provides servicemembers with a 6% interest cap on all debts incurred prior to active duty.

6.1.1. Covered Debt Obligations

The 6% interest cap applies to all obligations and liabilities incurred by a servicemember, individually, jointly with a spouse,¹³³ or in the name of a

¹²⁶ 50 USC App § 532(b).

¹²⁷ *Id.* See also, *Luke v Mercantile Acceptance Corp of Cal*, 244 P2d 764 (Cal App, 1952) (holding that a creditor that involuntarily repossesses a servicemember's chattel without a court order is guilty of conversion).

¹²⁸ 50 USC App § 532(b).

¹²⁹ *Id.* at § 535a(a).

¹³⁰ *Id.*

¹³¹ 50 USC App § 535a(b)(1).

¹³² *Id.* at § 535a(b)(2).

¹³³ *Rodriguez v American Express*, No. CV F 03-5949, 2006 WL 908613 (ED Cal, April 7, 2006).

closely held business entity.¹³⁴ In addition, courts have held that the cap also applies to Chapter 13 repayment plans¹³⁵ and foreign judgments.¹³⁶

In contrast, the interest protections do not cover debts incurred by servicemembers during or after active duty ends.¹³⁷ Moreover, debts incurred solely by a servicemember's spouse are not eligible for the 6% interest cap.¹³⁸

6.1.2. Definition of "Interest"

The interest cap provision of the SCRA defines interest to include "service charges, renewal charges, fees, or any other charges (except bona fide insurance)" resulting from a debt or obligation.¹³⁹ At least one court has held that a creditor violated the SCRA's 6% interest cap protections by charging late fees that had the effect of raising the applicable interest rate above 6% limit.¹⁴⁰

6.1.3. Temporal Scope of Interest Rate Reduction

The 6% interest cap on mortgages and mortgage equivalents applies during active service and for one year after active service ends.¹⁴¹ But the interest cap reduction on all non-mortgage debts and obligations is limited to the duration of active service.¹⁴²

¹³⁴ *Linscott v Vector Aerospace*, No 05-CV-682-HU, 2007 WL 2220357 (D Or, July 27, 2007) (analyzing the SCRA protections in a case involving a servicemember's closely-held corporation). See also, *Cathey v First Rep Bank*, 2001 US Dist. Lexis 13150 (WD La, August 14, 2001) (stating that a corporation's debts are provided protection under the Act if the servicemember owner personally guarantees the debt and the corporation depends on his presence for profitability).

¹³⁵ *In re Watson*, 292 BR 441 (Bankr SD Ga, 2003).

¹³⁶ *Linscott*, 2007 WL 2220357 at *1 (applying SCRA to a servicemember's debt with Canadian entities).

¹³⁷ *Shield v Hall*, 207 SW2d 997 (Tex Civ App, 1948).

¹³⁸ *Rodriguez*, 2006 WL 908613 at *9 (holding that the 6% interest rate cap only applies to servicemembers' spouses for debts that servicemembers and their spouses jointly incur).

¹³⁹ 50 USC App § 527(d)(1).

¹⁴⁰ *Koenig v Waukesha State Bank*, No 05-C-255, 2006 WL 2334841 at *1 (ED Wis, Aug 10, 2006).

¹⁴¹ 50 USC App § 527 (a)(1)(A).

¹⁴² *Id.* at § 527 (a)(1)(B).

6.1.4. Forgiveness of Interest Exceeding the Limitation

Any interest incurred during active military service in excess of the SCRA's mandated 6% cap shall be forgiven, and the servicemember does not owe any deficiency resulting from the interest reduction.¹⁴³

6.1.5. Activation of 6% Interest Cap

The 6% interest cap is neither self-executing nor automatic. To receive this protection, servicemembers must provide a creditor with written notice and a copy of military orders detailing active duty, within 180 days from end of active military duty.¹⁴⁴ Once notice is provided, the creditor is obligated to retroactively implement the 6% interest rate beginning on the date active service commenced, not the date that notice is received.¹⁴⁵

6.1.6. Exception to the Interest Cap

The court may order that a creditor need not reduce a servicemember's interest rate to 6% if the creditor can establish that the servicemember's ability to pay the contracted rate of interest was not "materially affected" by entering active duty.¹⁴⁶

6.1.7. Penalties

A person or entity who knowingly charges a servicemember interest above 6% in violation the Act shall be fined under 18 USC § 3571, imprisoned for not more than one year, or both.¹⁴⁷ Servicemembers also may pursue other remedies available under law, including punitive and consequential damages.¹⁴⁸

¹⁴³ *Id.* at § 527(a)(2).

¹⁴⁴ *Id.* at § 527(b)(1).

¹⁴⁵ *Id.* at § 527(b)(2). See also, *Rodriguez*, 2006 WL 908613 at *6 (holding that a creditor violated the interest cap provision when it did not reduce the interest rate to 6% starting on the date servicemember's active duty began, and did not credit excess interest paid to the remaining principle balance).

¹⁴⁶ 50 USC App § 527(c). See also, *In re Watson*, 292 BR at 445.

¹⁴⁷ 50 USC App § 527(e).

¹⁴⁸ *Id.* at § 527(f).

7. MISCELLANEOUS PROTECTIONS

7.1. Tax Protections

7.1.1. Residency for Tax Purposes

A servicemember does not lose or acquire residency status for tax purposes due to his/her presence in a state for compliance with military orders.¹⁴⁹ Furthermore, military compensation is not “income” for state tax purposes in a state where the servicemember is a non-resident.¹⁵⁰ Similarly, for tax purposes, a servicemember’s personal property is not deemed to be located in a state where the servicemember is a non-resident.¹⁵¹

7.1.2. Property Tax

The Act provides relief to servicemembers from tax assessments that fall due and remain unpaid before or during military service.¹⁵² This protection applies to taxes for personal property and real property acquired for dwelling, professional, business or agricultural purposes by a servicemember or the servicemember’s dependents or employees.¹⁵³ It further prevents assessment of any additional penalties or interest above 6% for the nonpayment.¹⁵⁴

7.1.3. Limitation on Sale of Property to Enforce Tax Assessment

Qualifying property cannot be sold to enforce the collection of a tax or assessment, unless by court order and upon the court’s determination that

¹⁴⁹ *Id.* at § 571(a).

¹⁵⁰ *Id.* at § 571(b). But see, *US v State of Kan*, 580 F Supp 512 (DC Kan, 1984) (recognizing that the Act prohibits the use of military compensation as taxable “income” for nonresidents, yet holding that it may be considered in a formula to determine the *rate* of taxation for state income of nonresidents), *aff’d*, 810 F2d 935 (10th Cir 1987).

¹⁵¹ 50 USC App § 571(c); *Dameron v Brodhead*, 345 US 322; 73 S Ct 721; 97 L Ed 1041 (1953) (holding that an Army officer’s personal property could not be taxed by Colorado for the time he was in the state while assigned to military duty, because he was domiciled in Louisiana).

¹⁵² 50 USC App § 561(a).

¹⁵³ *Id.* But see, *Farran v Wayne County*, No 261185, 2005 WL 2219417 (Mich App, 2005) (finding that 50 USC App §561 does not apply to vacant land, because it is not occupied for dwelling, professional, business, or agricultural purposes as required under the Act).

¹⁵⁴ 50 USC App § 561(d).

military service does not “materially affect” the servicemember’s ability to pay the outstanding tax or assessment.¹⁵⁵

7.1.4. Redemption

In cases involving a court-ordered sale of property to satisfy taxes or assessments, the Act provides servicemembers with a right to redeem the property during military service or within 180 days after the end of military service.¹⁵⁶

7.1.5. Deferral of Income Tax Collection

When a servicemember’s state or federal income taxes are due before or during military service, payment shall be deferred at the servicemember’s request for not more than 180 days after the termination of active duty, if the servicemember’s ability to pay is “materially affected” by military service.¹⁵⁷ However, the Act neither grants relief from filing tax returns nor suspends statutes of limitations prescribed under the U.S. Internal Revenue Laws.¹⁵⁸

7.2. **Insurance Protections**

The Act prevents a servicemember’s loss of health, life, or professional liability insurance coverage if the servicemember is called to active duty.^{159, 160}

7.2.1. Health Insurance

Servicemembers may have health insurance policies immediately reinstated upon return from active duty.¹⁶¹ They must apply for reinstatement within 120 days after release from active military duty.¹⁶²

¹⁵⁵ *Id.* at § 561(b)(1).

¹⁵⁶ *Id.* at § 561(c).

¹⁵⁷ *Id.* at § 570(a). See also, *Paulson v Missouri Dept of Revenue*, 961 SW2d 63 (Mo Ct App, 1998) (denying deferral of a servicemember’s income tax payment where he did not prove that active duty impaired his ability to pay the taxes).

¹⁵⁸ See, Judge Advocate General’s Legal Center and School, U.S. Army JA 260, Servicemembers Civil Relief Act, p. 5-11, (March 2006).

¹⁵⁹ 50 USC App §§ 544, 593, 594.

¹⁶⁰ **Michigan Practitioners’ Note:** The SCRA contains many provisions relating to insurance matters. As such insurance matters are not the focus of this Guide, however, a complete analysis of the Act’s insurance provisions has been omitted for the sake of brevity. For additional information on SCRA’s insurance provisions, refer to 50 USC App §§ 536, 541-547.

¹⁶¹ 50 USC App §§ 594(a), 594(b)(1).

¹⁶² *Id.* at § 594(d).

Furthermore, there can be no exclusions for health conditions that arose before or during military service, as long as the condition would not have been excluded had the servicemember remained covered, and if the condition has not been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty.¹⁶³

7.2.2. Life Insurance

The SCRA prevents life insurers from decreasing coverage or requiring additional premiums (except for age-based increases in term policies) for servicemembers during active duty.¹⁶⁴ However, the life insurance policy must have been in place not less than 180 days before military service.¹⁶⁵ Also, a servicemember's life insurance policy is protected from lapse, termination, and forfeiture for nonpayment of premiums during active duty, plus two years.¹⁶⁶ For this protection, the insured servicemember or his/her beneficiary must apply with the Veterans Administration.¹⁶⁷

7.2.3. Professional Liability Insurance

Servicemembers who engage in health care, legal services, or other professions declared by the Secretary of Defense may suspend their professional liability insurance policies upon written request to the insurance carrier.¹⁶⁸

7.3. **Anticipatory Relief**

Though rarely invoked, the SCRA's anticipatory relief protections allow a servicemember to apply to a court for relief from any obligation incurred before military service or from taxes falling due before or during military service when he/she anticipates a breach or default will occur because of military service.¹⁶⁹ Under this section, a servicemember can initiate a declaratory action to prevent

¹⁶³ *Id.* at § 594(b)(3).

¹⁶⁴ *Id.* at § 541(1)(A).

¹⁶⁵ *Id.* at § 541(B).

¹⁶⁶ *Id.* at § 544(b)-(c).

¹⁶⁷ *Id.* at § 543.

¹⁶⁸ *Id.* at § 593(b)(2).

¹⁶⁹ *Id.* at § 591(a).

any legal action against him/her during military service, and 180 days after.¹⁷⁰ The court has discretion to grant such relief.¹⁷¹

7.3.1. Requirements

To receive anticipatory relief, the following must occur:

- (a) The servicemember must prove that the obligation arose before active duty;
- (b) The action must begin during, or within 180 days after, active military service; and
- (c) Servicemembers must show that military service “materially affected” the ability to discharge the obligation.¹⁷² They are entitled to one hearing to establish “material affect.”¹⁷³

7.3.2. Covered Obligations

Because the anticipatory relief provision specifically protects *any* obligations incurred before active duty, such protection includes, but is not limited to: contracts; mortgages; taxes or assessments; and child support cases.¹⁷⁴

7.3.3. Stay of Enforcement

Under this provision of the Act, courts are authorized to issue stays of the enforcement of obligations and issue equitable repayment plans.¹⁷⁵ Any stay granted under this section should begin at the time of application and continue for a period equal to the time of active military service.¹⁷⁶

For stays involving real estate contracts, a servicemember can make equal periodic payments to cover the principal and interest accrued during the stay, for the life of the contract.¹⁷⁷ For stays involving any other debt, the

¹⁷⁰ See, *Kindy v Koenke*, 216 F2d 907 (CA8, 1954).

¹⁷¹ *Carroll v Homecomings Financial Network*, 294 Fed Appx 945 (CA5, 2008).

¹⁷² *Id.* See also, 50 USC § 591(a)-(b).

¹⁷³ *Carroll*, 294 Fed Appx at 946.

¹⁷⁴ 50 USC App § 591(a).

¹⁷⁵ *Id.* at §§ 591(b)(1)(B), 591(b)(2)(B).

¹⁷⁶ *Id.* at §§ 591(b)(1)(B); (b)(2)(B).

¹⁷⁷ *Id.* at § 591(b)(1)(B).

period of time allotted for back payment cannot be longer than the servicemember's total time of active military service.¹⁷⁸

7.4. Limitation on Storage Lien Enforcement

7.4.1. General Protection

Under the Act, foreclosure of liens¹⁷⁹ for storage of a servicemember's household goods or other personal property is prohibited during the period of military service, and for 90 days after military service, without a court order.¹⁸⁰

7.4.2. Stay of Proceedings

The court must stay lien foreclosure or enforcement proceedings or adjust the lien obligation in the interest of all parties, if a servicemember applies for such relief and shows that his/her ability to comply with the lien obligation is "materially affected" by military service.¹⁸¹ The court may also do so on its own motion.¹⁸²

7.4.3. Penalties

A person who knowingly forecloses or enforces any lien on the property or effects of a servicemember, or attempts to do so, in violation of the Act shall be fined under 18 USC § 3571, imprisoned for not more than one year, or both.¹⁸³ Servicemembers also may pursue other remedies available under law, including punitive and consequential damages.¹⁸⁴

8. CONCLUSION

This Guide provides a brief overview of the most significant aspects of the SCRA that typically will arise in a Michigan courtroom. It is a summary only, however, and was not drafted as an attempt to discuss all components of the Act or every nuance of case law. For additional information on SCRA protections and related issues, please refer to Appendix A of this Guide.

¹⁷⁸ *Id.* at § 591(b)(2)(B). See also, *Koenig*, 2006 WL 2334841 at *1.

¹⁷⁹ The Act's definition of a "lien" includes liens for storage, repair, or cleaning of the property or effects of a servicemember or a lien on such property or effects for any reason. See, 50 USC App § 537(a)(2).

¹⁸⁰ 50 USC App § 537(a)(1).

¹⁸¹ *Id.* at § 537(b).

¹⁸² *Id.*

¹⁸³ 50 USC App § 537(c)(1).

¹⁸⁴ *Id.* at § 537(c)(2).

APPENDIX A - ADDITIONAL RESOURCES

1. 53A Am Jur 2d, *Military and Civil Defense*, §§ 327-372, pp 189-238.
2. 6 CJS, *Armed Services*, §§ 168-187, pp 514-530.
3. Brennan, *Servicemembers Civil Relief Act: A Primer for Creditors*, Maryland Bar Journal, Nov-Dec 2007, p 32, 34-35.
4. Crawford, *Servicemembers Civil Relief Act: Procedural Overview*, Journal of Virginia Trial Lawyers Association, Volume 20 Number 2, 2008.
5. Huckabee, *The Servicemembers Civil Relief Act: The Practitioner's Guide*, www.usd.edu/~ghuckabe/scra_website_files/civilpractitionersguide.htm, (accessed March 3, 2009).
6. Johnston, Annotation, *Tolling Provision of Soldiers' and Sailors' Civil Relief Act (50 USCS Appx § 525)*, 36 ALR Fed 420 (1978).
7. Palmer, *The Servicemembers Civil Relief Act: A Law for Mobilized Soldiers*, Mich Bar Journal, Oct 2008, p 34.
8. Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*, 132 Mil L Rev 116 (1991).
9. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief Act*, www.abanet.org/family/military/scrajudgesguidecklist.pdf (accessed March 3, 2009).
10. Sullivan, *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families* (ABA 2006).
11. The Judge Advocate General's Legal Center & School, US Army, JA 260, *The Servicemembers Civil Relief Act Guide* (March 2006).

APPENDIX B - JUDGES' CHECKLISTS

Default Judgments Under the SCRA (50 USC App § 521)

- Defendant has not made an appearance.
- Plaintiff filed affidavit (with supporting facts) denying Defendant's military service, *or* stating that Plaintiff is unable to determine if Defendant is in military service.
 - * Note: Michigan SCAO Approved Forms MC 07 and MC 07a (for Default Judgment Requests) include such affidavits.
- If Plaintiff is unable to determine whether Defendant is in military service, or states that Defendant is *not* in military service, the court may request a military service certification from the U.S. Department of Defense to confirm.
 - * Note: If the court cannot determine whether Defendant is in military service, it may require Plaintiff to post a bond to indemnify Defendant against loss or damage due to the judgment (if the judgment is later set aside).
- If Defendant indeed *is not* in military service, the court may proceed with default judgment.
- If Defendant *is* in military service (and has not entered an appearance) the court must appoint an attorney to represent Defendant before entering judgment.
 - * Note: If appointed attorney cannot locate a Defendant servicemember, the attorney's actions will not waive any defense or bind the servicemember in any way.
- If a defense for the servicemember cannot be presented without his/her presence, or the court-appointed attorney cannot locate the servicemember, the court must enter a stay for at least 90 days when requested by the servicemember's attorney. The court may also do so on its own motion.

Vacating and Reopening Default Judgments (50 USC App § 521)

- Default judgment entered during servicemember's period of military service, or 60 days thereafter.
- Servicemember filed, within 90 days after the end of military service, an application with the court or tribunal that issued the default judgment, specifically requesting to vacate and reopen the case.
- Servicemember establishes that, at the time judgment was entered, he/she:
 - * Was "materially affected" by military service in making a defense; and
 - * Has a meritorious defense, in whole or in part.

Staying Proceedings Under the SCRA (50 USC App § 522)

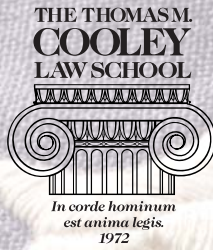
- Moving party (servicemember) was in active military service within 90 days before application for stay.
- Moving party (servicemember) received notice of action/proceeding.
- Servicemember's application for stay provides:
 - * Explanation that military service "materially affects" ability to appear;
 - * Date when he/she will be available; and
 - * A statement from servicemember's commanding officer confirming that military duties prevent appearance and military leave is not available.
- If all conditions met, the court must grant a stay for no less than 90 days.

Granting Additional Stays (50 USC App § 522)

- Servicemember establishes a *continuing* "material affect" of military duties on his/her ability to appear.
- Servicemember's request for additional stay provides the same information as required in original application for stay.
 - * Note: If the court refuses to grant extended stay, it must appoint counsel to represent the servicemember.

Anticipatory Relief Under the SCRA (50 USC App § 591)

- Servicemember initiates declaratory action in anticipation that a breach or default on an obligation will occur because of military service.
- Servicemember incurred the obligation *before* military service (includes taxes falling due before military service and any other obligations).
- Servicemember initiated the action during or within 180 days after military service.
- Servicemember shows that military service "materially affected" his/her ability to discharge the obligation.
- If all conditions met, the court has discretion to grant anticipatory relief, including staying the enforcement of the obligation.



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