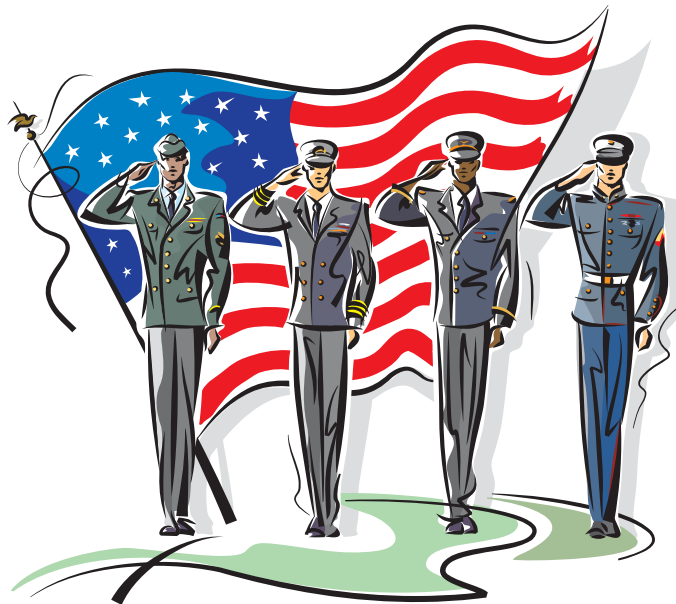


Servicemembers Civil Relief Act

BY JAMES N. HIGDON
AND STEPHANIE J. BANDOSKE



What is the Servicemembers Civil Relief Act?

The act provides for the temporary suspension of legal proceedings and transactions that might prejudice the civil rights of active duty servicemembers (SMs). Upon receipt of deployment orders, the SM is entitled to an automatic 90-day abatement of any adjudicatory proceeding if SCRA protection is requested by the SM or the court's own motion.

What the SCRA is not:

Although the SCRA is to be liberally construed, it is not to be used as a sword against persons with legitimate claims. The SCRA does not prevent suits against SMs; they can still be sued and can still lose their lawsuits. Nor does it extinguish the liabilities or obligations of SMs. Further, it does not apply if the divorce or SAPCR petitioner, plaintiff creditor, or other party can prove that the SM is not, or is no longer, materially impaired or materially affected by his or her military service.

Who is protected by the SCRA?

The SCRA protects all persons in military service on active duty with the five branches of service who are serving honorably; Public Health Service officers detailed for duty with the Army or Navy; reservists on active duty; persons in training or education preliminary to induction in the armed forces; in addition to a few other special categories of persons serving with allied nations in times of war. Dependents of the SM also have certain protections.

Who is not protected?

Those not protected include an active duty SM who is absent without authorized leave, confined under sentence of a court-martial, or is a deserter; retired or reserve personnel not on active duty; civilian employees of and/or accompanying one of the armed services; civilian employees of the armed services; contract surgeons; employees of government contractors; merchant seamen accompanying the Army and subject to courts-martial jurisdiction; and clients of attorneys recalled to active duty.

When and/or to what does the SCRA apply?

The act applies, and may be requested, in any civil or administrative proceeding, including workers' compensation matters, income tax assessment and/or appeals, State Bar grievance and/or disbarment proceedings, property tax adjudications, child support establishment and/or enforcement administrative proceedings, or immigration hearings. Criminal matters are the only proceedings exempted from this stay provision.

When does the SCRA have to be invoked?

The request for a 90-day stay may be made at any stage of the proceeding as long as it is made during active service or within 60 days of the SM's release from active duty. The court on its own motion may assert the act for the affected party, and the court shall grant stay upon application of the SM.

The initial duration of a stay shall be a period of not less than 90 days. Subsequent extensions of the stay shall depend upon the application of the SM and the

JAMES N. HIGDON and **STEPHANIE J. BANDOSKE** are with the San Antonio firm of Higdon, Hardy & Zuflacht, L.L.P. Higdon, a retired Naval Reserve captain and former Naval aviator, is certified in family law and civil appellate law by the Texas Board of Legal Specialization and is chair of the Military Law Section. Bandoske is a recent graduate of St. Mary's University School of Law.

continuing material effect of military duty on the SM's ability to appear. The maximum duration of a stay is the period of active service plus three months (90 days) after discharge or release from active duty. Upon expiration of the period of the stay, the SM must resume prosecution of his or her case or, if a defendant, must appear or answer to defend the action.

Statutes of limitation do not run against or for the SM during the period of military service. Additionally, a period of the SM's military service may not be included in computing any period for redemption of real property sold or forfeited to enforce a tax or assessment.

When is the rate on a servicemember's credit card debts reduced to 6 percent?

The maximum interest rate on debts incurred before military service is 6 percent. If the contract interest rate is in excess of 6 percent per annum, upon request of or notice by the SM to a creditor, the rate must be reduced during the period of military service to 6 percent per annum. This applies also to debts on which the SM's spouse is jointly liable. Any interest charged in excess of 6 percent is and shall be forgiven.

A creditor, however, may apply to a court for relief from the limitations of this interest-cap provision if it can convince the court that the SM's military service does not materially affect his or her ability to pay interest at a rate in excess of the 6-percent cap.

When can a servicemember terminate a business or home lease?

SMs may terminate their lease of "premises occupied or intended to be occupied" by the SM or his or her dependents "for a residential, professional, business, agricultural, or similar purpose" if the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service or by the SM who, while in military service, executes a lease and

thereafter receives military orders for a permanent change of station (PCS) or to deploy with a military unit or as an individual in support of a military operation, for a period of not less than 90 days.

When can a servicemember terminate a car/truck lease?

The SM may terminate a "lease of a motor vehicle used, or intended to be used, by an SM or [his or her] dependents for personal or business transportation" if the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service under orders for 180 days or more (or who enters military service under call or orders for 180 days or less and who, without a break in service, receives orders extending the period of service to a period of not less than 180 days) or by the SM who, while in military service, executes a lease and thereafter receives military orders for a PCS (1) from a location within the continental United States to a location outside CONUS or (2) from a location in a state outside CONUS to a location outside that state or to deploy with a military unit or as an individual in support of a military operation, for a period of not less than 180 days.

Can a mortgage company foreclose on a servicemember's home while he or she is deployed?

As to real or personal property owned by an SM that is secured by an obligation (mortgage, trust deed, or other security in the nature of a mortgage) that originated before the period of military service, any action to enforce such an obligation initiated during the military service or within 90 days thereafter, a court may on its own motion "stay the proceedings for a period of time as justice and equity require" or "adjust the obligation to preserve the interest of all parties" if the SM's ability to comply with the obligation is materially affected by military service.

Further, a creditor can only cause a sale, foreclosure, or seizure of the proper-

ty due to the SM's breach of a term of the contract only if made pursuant to a court order or duly signed waiver of the act. A sale, foreclosure, or seizure for breach of such an obligation shall not be valid if made during or within 90 days after the SM's military service unless made pursuant to a court order issued before the sale, foreclosure, or seizure with a return approved by the court or if made pursuant to an agreement (waiver) in accordance with §517.

Is a servicemember entitled to tax relief?

An SM can obtain an extension on the payment and/or collection of income taxes (even before a breach of default) while on active duty if he or she provides notice to the IRS, the tax authority of a state, or political subdivision of a state that his or her ability to pay the income tax is materially affected by military service.

Can a servicemember terminate a contract to buy real property?

Contracts for purchase of real or personal property (including a motor vehicle) or lease or bailment of real or personal property may not be rescinded or terminated for breach occurring before or during SM's military service, nor may the property be repossessed for such breach without a court order. The act applies only to a contract for which the SM made a deposit or installment payment before entering military service.

Is a servicemember's property protected from liens?

A person holding a lien on the property or effects of an SM may not, during any period of military service of the SM and for 90 days thereafter, foreclose or enforce any lien on such property or effects without a court order granted before foreclosure or enforcement. The term *lien* includes a lien for storage, repair, or cleaning of the property or effects of an SM or a lien on such property or effects for any other reason.