

THE NEW SERVICEMEMBERS CIVIL RELIEF ACT

by Mark E. Sullivan

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INTRODUCTION

On December 19, 2003, President Bush signed into law the “Servicemembers Civil Relief Act” (SCRA), a complete revision of the statute known as “The Soldiers' and Sailors' Civil Relief Act,” or SSCRA. Even for lawyers with no military base nearby, this federal statute is important. There are over 160,000 National Guard and Reserve personnel at present who have been called up to active duty, and over 40% of the armed forces serving in Iraq are Reserve/Guard servicemembers. These Reserve Component (RC) military members often come from the big cities and small towns of America, and lawyers need to know their way around the basic federal statute that protects those on active duty. Although previously there was limited coverage by the SSCRA for Guard members, the new Act extends protections to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense. 50 U.S.C. App. § 511(2)(A)(ii).

Up until the passage of the SCRA, the basic protections of the SSCRA for the servicemember (SM) included:

1. Postponement of civil court hearings when military duties materially affected the ability of a SM to prepare for or be present for civil litigation;
2. Reducing the interest rate to 6% on pre-service loans and obligations;
3. Barring eviction of a SM's family for nonpayment of rent without a court order for monthly rent of \$1,200 or less;
4. Termination of a pre-service residential lease; and
5. Allowing SMs to maintain their state of residence for tax purposes despite military reassignment to other states.

The SSCRA, enacted in 1940 and updated after the Gulf War in 1991, was still largely unchanged as of 2003. Congress wrote the SCRA to clarify the language of the SSCRA, to incorporate many years of judicial interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. Since many of the Act's provisions are particularly useful (and potentially dangerous) in domestic litigation, the family law attorney should have a good working knowledge of them. Here's an overview of what the SCRA does.

STAYS AND DELAYS

The SCRA expands the application of a SM's right to stay court hearings to include administrative hearings. Previously only civil courts were included, and this caused problems in cases involving administrative child support determinations as well as

other agency determinations which impacted servicemembers. Criminal matters are still excluded. 50 U.S.C. App. § 511-512. There are several provisions regarding the ability of a court or administrative agency to enter an order staying, or delaying, proceedings. This is one of the central points in the SSCRA and now in the SCRA – the granting of a continuance which halts legal proceedings.

In a case where the SM lacks notice of the proceedings, the SCRA requires a court or administrative agency to grant a stay (or continuance) of at least 90 days when the defendant is in military service and –

- > the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant's absence, or
- > with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

In a situation where the military member has notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon the request of the SM, so long as the application for a stay includes two things. The first is a letter or other communication that 1) states the manner in which current military duty requirements materially affect the SM's ability to appear, and 2) gives a date when the SM will be available to appear. The second is a letter or other communication from the SM's commanding officer stating that 1) the SM's current military duty prevents appearance, and 2) that military leave is not now authorized for the SM. 50 U.S.C. App. § 522. Of course, these two communications may be consolidated into one if it is from the SM's commander.

FAMILY LAW SIDEBAR

Pause for a moment to think through the potential impact of this stay provision on the family lawyer and her client. How would this affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? How are you going to get the child back when mom's lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan (FCP), which is required by military regulations, leaving custody with the maternal grandmother, will that document – executed by mom, approved by her commanding officer and accompanied by a custodial power of attorney – displace or overcome a court order transferring custody to dad? Can the court even enter such a custody order given the stay and default provisions of the SCRA? To see how the battle is being joined in this area, compare *Lenser v. Lenser*, 2004 Ark. LEXIS 490 (upholding the judge's grant of custody to the mother when the mobilized father requested a stay of proceedings to keep physical custody with his own mother) with *In re Marriage of Grantham*, 2004 Iowa App. LEXIS 1257 (upholding judge's stay of mother's custody petition when father was mobilized and gave custody via his FCP to his mother).

On another front, think about support. How does this stay provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve? When she leaves behind her “day job,” her pay stops and so does the monthly wage garnishment for support of their children. How can dad get the garnishment restarted while she’s in uniform on active duty? Will the reduction in pay she probably gets result in less child support? Or will her reduced cost of living in the military (how much does it cost to live in a tent outside Bagram Air Base in Afghanistan?) have the opposite result? How can dad move the case forward to establish a new garnishment when he cannot locate her, he might not be able to serve her (if he *can* locate her), and she probably will have a bullet-proof motion for stay of proceedings if dad ever gets the case to court?

ADDITIONAL STAYS

An application for an additional stay may be made at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

Once again, give this some thought. What is the attorney supposed to do – tackle the entire representation of the SM, whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm’s way?

And, by the way, who pays for this? There is no provision for compensation in the SCRA. How would *you* respond if her honor beckons you to the bench next Monday and says, “Counselor, I am appointing you as the attorney for Sergeant Sandra Blake, the absent defendant in this case. I understand that she’s in the Army, or maybe the Army Reserve or National Guard. Whatever. Please report back to the court in two weeks and be ready to try this case.”?

DANGERS AND DEFAULTS

Does a stay request expose a SM to any risks? The SCRA states that an application for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c) eliminates the previous concern that a stay motion would constitute a general appearance, exposing the SM to the jurisdiction of the court. This new provision makes it clear that a stay request “does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense.”

Can you obtain a default judgment against a SM? Broadly construing “default judgment” as any adverse order or ruling against the SM’s interest, the SCRA clarifies how to proceed in a case where the other side seeks a default judgment (that is, one in which the SM has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine if the defendant is in military service.

A default judgment may not be lawfully entered against a SM in his absence unless the court follows the procedures set out in the SCRA. When the SM *has not made an appearance*, 50 U.S.C. App. § 521 governs. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the plaintiff), the movant must file an affidavit stating “whether or not the defendant is in military service and showing necessary facts in support of the affidavit.” Criminal penalties are provided for filing a knowingly false affidavit. 50 U.S.C. App. § 521(c).

When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond. If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmovant later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside). 50 U.S.C. App. § 521(b)(3).

When the filed affidavit states that the party against whom the default order or judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM.

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

50 U.S.C. App. § 521(b)(2).

If the court fails to appoint an attorney then the judgment or decree is voidable.

ATTORNEY FOR “THE ABSENT”

The role of the appointed attorney is to “represent the defendant.” The statute does not say what happens if the SM is, in fact, the plaintiff in a particular domestic case, but undoubtedly this wording is careless drafting. Particularly in domestic cases, it is as likely that the SM would be the plaintiff as the defendant, the petitioner as the respondent, and default decrees are sought against both sides, not just defendants.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should

always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the client's participation.

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

DEFAULT PROTECTIONS

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves. The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order. In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g). Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. 521(h).

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

INTEREST RATES

The Act clarifies the rules on the 6% interest rate cap on pre-service loans and obligations by specifying that interest in excess of 6% per year must be forgiven. 50 U.S.C. App. § 527(a)(2). The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% is merely deferred.

It also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is

called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

LEASES, LIENS AND MORE

The SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent is \$1200 or less. 50 U.S.C. App. § 531(a) modifies the eviction protection section by barring evictions from premises occupied by SMs for which the monthly rent does not exceed \$2,400 for the year 2003. The new Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2005 monthly rent ceiling is \$2,534.32.

A substantial change is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service "dwelling, professional, business, agricultural, or similar" lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who is required to move due to military orders. The SCRA remedies these problems. Under the old statute, a lease covering property used for dwelling, professional, business, agricultural or similar purposes could be terminated by a SM if two conditions were met:

- a. The lease/rental agreement was signed before the member entered active duty; and
- b. The leased premises have been occupied for the above purposes by the member or his or her dependents.

The new Act still applies to leases entered into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a "permanent change of station" (PCS) or a deployment for a period of 90 days or more.

It also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre-service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more. 50 U.S.C. App. § 535.

CONCLUSION

The family law attorney, perhaps even more than the general practitioner, needs to know and understand the SCRA for those occasions when a military member is one of the parties to the litigation. Mobilizations and deployments affect mothers and fathers,

wives and husbands, and separated partners who are in the Reserves, on active duty and in the National Guard. They will have an impact on income, visitation, family expenses, custodial care for children, mortgage foreclosures, garnishments, and many other domestic issues.

The best source of quick information on the SCRA is “A Judge’s Guide to the Servicemembers Civil Relief Act,” found at the website of the Military Committee of the ABA Family Law Section, www.abanet.org/family/military. An extended treatment of the SCRA and family law issues may be found in Sullivan, “Family Law and the Servicemembers Civil Relief Act,” “Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical,” *Divorce Litigation*, Vol.16/Number 3, March 2004. Also see Sullivan, “The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys,” in Brown and Morgan, *2005 Family Law Update*, pp. 23-54 (Aspen Publishers 2005). The Army JAG School’s SCRA guide will be published and posted on-line shortly, taking the place of the SSCRA guide which is presently available (and still quite useful in understanding and interpreting the statute). This can be found at the School’s website, www.jagcnet.army.mil/tjaglcs. Click on TJAGLCS Publications, then scroll down to Legal Assistance, and then look for the publication, which is JA 260.

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