

# SILENT PARTNER

## SUMMARY OF SERVICEMEMBERS CIVIL RELIEF ACT

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about legal assistance issues. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page. This **SILENT PARTNER** was adapted from an advisory memorandum, "Servicemembers' Civil Relief Act Primer," prepared by Chris Rydelek, head of the Legal Assistance Branch, U.S. Marine Corps, an information paper prepared by the Legal Assistance Policy Division, Office of the Judge Advocate General, U.S. Army and an article, "Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act," by John Meixell of that office*

On December 19, 2003, President Bush signed into law the "Servicemembers Civil Relief Act" (SCRA); the Act took effect upon the President's signature (12/19/03) for all cases which have not reached final judgment. This law is a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA.

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. The SCRA was written 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. Here's an overview of what the SCRA does:

### GENERAL RELIEF PROVISIONS

1. 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.
2. 50 U.S.C. App. § 519 defines a "legal representative" of the SM as either "[a]n attorney acting on the behalf of a servicemember" or "[a]n individual possessing a power of attorney." Under the SCRA a servicemember's legal representative can take the same actions as a servicemember.
3. The former statute referred to "dependents" and provided several protections that extended to them, but it never defined the term. 50 U.S.C. App. § 511(4) now contains a definition of the term

“dependent.” This includes anyone for whom the SM has provided more than half of his or her support during the 180 days before an application for relief under the SCRA. This is intended to include dependent parents and disabled adult children.

4. 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.
5. In a case where the SM has not made an appearance in 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 --
  - a. 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
  - b. 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).
6. 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:
  - a. a letter or other communication that:
    - i. states the manner in which current military duty requirements materially affect the SM's ability to appear, and
    - ii. gives a date when the SM will be available to appear, and
  - b. a letter or other communication from the SM's commanding officer stating that:
    - i. the SM's current military duty prevents appearance, and
    - ii. that military leave is not authorized for the SM at the time of the letter. 50 U.S.C. App. § 522.

[Query: How does this provision 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 does this 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, leaving behind her “day job” and the monthly wage garnishment for support of their children?]

7. 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)

[Query: 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?]

8. 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). Previously the recommended practice was to avoid having the military attorney or the SM request a stay out of concern that the court might consider the stay request as a general appearance. 50 U.S.C. App. § 522(c) eliminates this concern. 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.”
9. 50 U.S.C. App. § 521 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.
10. 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. The absence of such language in

the SSCRA had allowed some lenders to argue that interest in excess of 6% is merely deferred. 50 U.S.C. App. § 527(a)(2). 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).

#### RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS AND LEASES

1. 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 Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2008 monthly rent ceiling is \$2831.13. You can easily check this for the current year by doing an Internet search using "Servicemembers Civil Relief Act" and "maximum monthly rental amount" as the search terms.

2. A substantial change is found in 50 U.S.C. App. § 535. 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. Section 305 remedies these problems. Under the old SSCRA, 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.

3. The 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.

4. 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.

#### LIFE INSURANCE

Article IV of the SSCRA permitted a SM to request deferments of certain commercial life insurance premiums for the period of military service and two years thereafter. If the Department of Veterans Affairs approved the request, then the US government guaranteed the payments and the policy continued in effect. The SM had two years after the period of military service to repay all premiums and interest. There was a \$10,000 limit for the total amount of life insurance that this program could cover. The SCRA, 50 U.S.C. App. § 542, increases this total amount to the greater of \$250,000 or the maximum limit of the Servicemembers Group Life Insurance.

#### TAXES

The SCRA adds a provision that would prevent states from increasing the tax bracket of a nonmilitary spouse who earned income in the state by adding in the service member's military income for the limited purpose of determining the nonmilitary spouse's tax bracket. This practice has had the effect of increasing the military family's tax burden. 50 U.S.C. App. § 571(d).

### FURTHER RELIEF

1. The new Act adds legal services as a professional service specifically named under the provision that provides for suspension and subsequent reinstatement of existing professional liability (malpractice) insurance coverage for designated professionals serving on active duty. The SSCRA specifically named only health care services for protection in the 1991 amendment. The insurance provider would be responsible for any claims brought as a result of actions prior to the suspension. The carrier would not charge premiums during the period of suspension, and must reinstate the policy upon the request of the professional. Legal services have been covered since 3 May 1999 by Secretary of Defense designations. The SSCRA permitted such a Secretarial designation, but 50 U.S.C. App. § 593 clarifies this area.

2. Historically, the SSCRA applied to members of the National Guard only if they were serving in a Title 10 status. Effective 6 December 2002, the SSCRA protections were extended 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. This continues in the SCRA. 50 U.S.C. App. § 511(2)(A)(ii).

### RESOURCES ON THE INTERNET

As to Internet resources about the SCRA, you should start with a visit to the home page of the Army JAG School, <http://www.jagcnet.army.mil/TJAGLCS>. When you get there, click on "TJAGLCS Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Servicemembers Civil Relief Act Guide," written by the faculty of the Army JAG School in 2006.

You should also visit the Servicemember's Civil Relief Act information center at the public preventive law page of the Army Judge Advocate General's Corps, found at <http://www.jagcnet.army.mil/legal>.

"A Judge's Guide to the Servicemembers Civil Relief Act" is at [www.abanet.org/family/military](http://www.abanet.org/family/military) and at [www.nclamp.gov](http://www.nclamp.gov) > Resources.

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