

**AMERICAN BAR ASSOCIATION
PAST, PRESENT, AND FUTURE IMPLEMENTATION OF THE
SERVICEMEMBERS CIVIL RELIEF ACT OF 2003 (50 U.S.C. App. § 501 et seq)
OUTLINE**

INTRODUCTION:

I. SCRA OVERVIEW:

- A. History – 1917-1918 and Major John Wigmore
- B. 1940
- C. 1991 and DoD SSCRA Task Force – U.S. House of Rep. Veterans’ Affairs Committee
- D. Operation Iraqi Freedom and a new window of opportunity – 50 U.S.C. App. 501 et seq., Dec. 19, 2003; Technical Amendments Nov. 17, 2004

II. CONGRESSIONAL SCRA THEME:

- A. Purpose - to enable servicemembers (SMs) to devote their entire energy to the defense needs of the Nation; and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. 50 U.S.C. App. § 502.
- B. Only civil relief, not criminal.
- C. “The Shylock, to whom his pound of flesh is dearer than patriotism, is not the only man against whom the soldier must be given relief.” U.S. House Military Affairs Subcommittee Report, 1917

III. JUDICIAL INTERPRETATION:

- A. Courts generally construed the SSCRA liberally to protect those in uniform, and the same should be true with the SCRA.
- B. “Protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575 (1943)
- C. The U.S. Supreme Court has said that the statute should be read “with an eye friendly to those who dropped their affairs to answer their country's call.” *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

Questions: Is this still good law? Has there been any judicial change since 1948? What do think future judicial disposition will be? Will it depend to any great extent on how well the war in Iraq develops? How does this work in domestic relations cases involving child support, custody, etc.?

IV. SCRA APPLICATION?

- A. Pursuant to 50 U.S.C. App. § 511, covered servicemembers include:
 - 1. Those members of the Army, Navy, Air Force, Marine Corps and Coast Guard on

active duty under 10 U.S.C. 101(d)(1);

2. Members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days under 32 U.S.C. 502(f) to respond to a national emergency declared by the President and supported by federal funds; and

3. Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

4. Under 50 U.S.C. App. § 516, the protections of the Act are extended to members of the National Guard and Reserve, from receipt of orders to report for duty to the date that they report.

B. Covered individuals **under certain sections** of the SCRA **include dependents of SM** (a spouse, child, or anyone for whom the SM provided over half of the person's support for 180 days immediately preceding application for relief under the Act).

V. WHAT TRIBUNALS COVERED?

Under 50 U.S.C. App. § 511(5), any court or administrative agency of the United States, a state or a political subdivision thereof is covered. Criminal proceedings are excluded. 50 U.S.C. App. § 512(b).

VI. DEFAULT JUDGMENTS - DELAY OF JUDICIAL PROCEEDINGS WHEN SM HAS NOT ENTERED APPEARANCE IN COURT PROCEEDING:

A. 50 U.S.C. App. § 521 governs when the SM has made no appearance. When a judgment, order or adverse ruling is sought against a party who has not made an appearance, it is the duty of the court to determine whether that party is in the military. The SCRA states that either side or the court may apply for information as to whether the party is in military service to the Department of Defense (DOD), which must issue a statement as to military service. 50 U.S.C. App. § 582. The office in DOD to contact for information under the SCRA on whether a person is in the armed forces is:

Defense Manpower Data Center, Attn: Military Verification
1600 Wilson Blvd., Suite 400
Arlington, VA 22209-2593
Telephone 703-696-6762 or -5790/ fax 703-696-4156
By email <https://www.dmdc.osd.mil/scra/owa/scra.home>

B. If court determines other party is in military, then the court **may not** enter default judgment against the SM **without appointing an attorney for SM.**

C. Then the court must decide on a stay of proceedings. In cases where the defendant is in military service, the court **must stay the proceedings for at least 90 days** (upon application of counsel or on the court's own motion) if the court determines that:

1. There may be a defense to the action and a defense cannot be presented without the presence of defendant, or

2. After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

D. If a judgment has been entered against the SM during period of military service (or within 60 days after the end of service), the court **must reopen the judgment** to allow the SM to defend if:

1. He was materially affected due to military service in asserting a defense, and
2. He has a meritorious or legal defense to the action or some part of it, so long as application is filed within 90 days after the end of military service. 50 U.S.C. App. § 521(g).

Questions: Can a default judgment be entered against a servicemember in his absence? What does the court-appointed attorney do? Can a court require a bond to be posted before entry of a default judgment?

VII. IF SM ENTERED APPEARANCE: STAY REQUEST

A. When SM entered appearance and has filed an application for stay (including an application filed within 90 days after the end of military service), which **applies regardless whether the SM is a plaintiff or defendant**, 50 U.S.C. App. § 522 states that the court may (upon its own motion) and **shall (upon the application of a SM) enter a stay of proceedings for at least 90 days** if the motion includes information required by the statute for the court to determine whether a stay is needed. This “90-day stay” (although it can be for a longer period of time) requires four elements; the checklist below shows what is required:

SCRA Stay Request – a Checklist for the Initial 90-Day Stay

4	Elements of a Valid 90-Day Stay Request. Does the request contain:
	A <u>statement</u> as to how the SM’s current military duties materially affect his ability to appear... and stating a date when the SM will be available to appear?
	A <u>statement</u> from SM’s commanding officer stating SM’s current military duty prevents appearance and stating that military leave is not authorized for the SM at the time of the statement?

Caveat: There is no indication that a request must be in the form of an affidavit or, for that matter, in any particular format whatsoever. Apparently a letter, a formal memo or even an e-mail message will suffice.

- B. A request for a stay does not constitute an appearance for jurisdictional purposes or a waiver of any defense, substantive or procedural. 50 U.S.C. App. §522(c).
- C. SM may request an additional stay based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. **Same information as given above is required.** 50 U.S.C. App. § 522(d)(1).
- D. If the court refuses an additional stay, then the court must appoint an attorney to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

Questions: What does this attorney do? Who pays him or her? How does the attorney get in touch with the unavailable defendant or plaintiff? How can the attorney hope to represent the SM with no information, preparation or input by the “involuntary client?” Is the attorney supposed to try the entire case in the SM’s absence? Whose malpractice policy is going to cover this representational nightmare?

E. What about additional stay requests?

1. The additional stay is discretionary; in order to allow the additional stay, the court must find that the member's ability to prosecute or defend is "materially affected" by reason of his or her active duty service.

2. Once this finding of material effect is made, the member is entitled to a stay for such period as is necessary until the material effect is removed. (While this is not explicitly stated in the SCRA, it was the rule with the SSCRA and most likely will be the rule under the current Act as well.)

Questions: Can a court ask for a copy of the SM's LES (Leave and Earnings Statement)? What is the nature of the "military necessity" that prevents a hearing? Is the SM serving in Iraq, where he cannot be given leave and is facing hostile fire on a daily or weekly basis? Or is he serving as "backfill" at Ft. Bragg or Ft. Lewis so that others may deploy overseas, working a comfortable day shift of 7:30 – 4:30 with weekends off? Is member's presence necessary? What about video depositions? Use of the Internet? Is anyone truly "unavailable" any more?

VIII. WHAT IS "MATERIAL EFFECT"?

A. There is no one definition of "material effect." The court should make a finding of "material effect" when a military member's ability to prosecute or defend a civil suit **is impaired by military duties which prevent the member from appearing in court** at the designated time and place, or from assisting in the preparation or presentation of the case.

B. An adverse material effect might also be found when **military service impairs substantially** the member's **ability to pay financial obligations.**

Questions: If the court is not convinced of "material effect," can it:

- Require an affidavit setting out all the facts and circumstances, usually executed by the member or the member's commander?

- Ask for a copy of the member's *Leave and Earnings Statement* (the military equivalent of a pay statement) to show his or her Base Pay, Basic Allowance for Housing, Basic Allowance for Subsistence, tax withholdings, voluntary allotments to pay bills or support, and accrued leave?

- Request a more specific affidavit detailing the member's efforts to appear in court, for example, and the next court date when he or she would be available?

IX. LEASE AND RENTAL AGREEMENTS:

A. The SCRA allows SM 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. Additionally, it now extends 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. The Technical amendments specifically provide that this protection extends to leases **entered into by a SM and his spouse.**

B. The SCRA also **adds a new provision allowing termination of automobile leases** (for business or personal use) by SMs and their dependents (amended 17 Nov 04 clarifying PCS). 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(b)(2).

Questions: What about leases that have both the nonmilitary spouse and SM on the blame line? Is the nonmilitary spouse still liable? Is SM entitled to return of his/her security deposit or prepaid rent?

X. SIX PERCENT INTEREST CAP:

A. For all obligations incurred before entry on active duty, the interest rate is capped at 6%, unless the creditor (bank, finance company, credit card issuer, etc.) can prove in court that the member's ability to pay was **not materially affected** by military service. The term's "interest" includes service charges.

B. The SCRA clarifies the rules on 6% interest rate cap on pre-service loans and obligations specifying that interest in excess of 6% per year **must be forgiven**. 50 U.S.C. App. § 527(a)(2).

C. The SCRA also specifies the 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 creditor receives notice, it 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 the periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2).

D. 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).

E. Private Right of Action – See *Moll v. Ford Consumer Finance Co., Inc.*, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998)(unpub.); also see **Cathey v. First Republic Bank**, 201 U.S. Dist. LEXIS 13150 (2001).

Questions: Is this a blank check for SM's to borrow huge sums of money prior to entering active duty capping the interest rate while investing the funds for a higher rate of return? How does this apply to business loans, e.g., physician or lawyer who has a mortgage on a shopping center? Does it apply to loans where the SM is jointly and severally liable with nonmilitary debtors on a business loan? Do the other partners (obligors) derivatively benefit from the 6% cap for the SM?

XI. IS BREACH REQUIRED BEFORE PROTECTIONS AVAILABLE?

A. SCRA does not require breach or default before offering protections to covered individuals. The anticipatory relief provision is set out in 50 U.S.C. App. §591:

ANTICIPATORY RELIEF.

(a) APPLICATION FOR RELIEF.—A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief— (1) from any obligation or liability incurred by the servicemember before the servicemember's military service; or (2) from a tax or assessment falling due before or during the servicemember's military service.

B. Anticipatory relief provisions can be used to request relief from pre-service obligations, such as child support or alimony, when a prospective breach is likely.

Questions: What must SM demonstrate to obtain requested relief? Under what circumstances should such relief be granted? Under what circumstances should it be denied?

XII. KEY CONCEPTS: PROTECTIONS NOT RIGHTS.

Department of Justice 1991 SCRA Enforcement Letters to DoD General Counsel and U.S. Attorneys

(see attached).

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SEE www.usd.edu/~ghuckabe/scramain.htm for more SCRA information!



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 12, 1991

Honorable Terrence O'Donnell
General Counsel
Department of Defense
The Pentagon
Room 3E 980
Washington, D.C. 20301

Dear Terry:

The Soldiers' and Sailors' Civil Relief Act provides several important protections for our active and reserve service members defending the nation's interests. One of those protections is a maximum interest cap on the financial obligations of individuals who were subject to an obligation prior to entering on active duty and whose active duty materially affects their ability to pay on the obligation. Persons meeting these requirements are entitled to a 6 per centum cap on the obligation during the period of active duty.

Most reputable financial institutions are aware of this provision and promptly give effect to its protections upon application by the service member. There have, however, been reports that some institutions are not so cooperative. In the event an individual service member is denied this protection it is reasonable to expect that requests may be made for representation of the interests of these individuals by the United States. Although the Act does not provide for such representation, 28 U.S.C. § 517 authorizes the Department to represent individuals when such representation is in the interests of the United States. In appropriate circumstances, a denial of Soldiers' and Sailors' Relief Act benefits would warrant such representation. By the attached memorandum I have informed all United States Attorneys of the procedures which should be used to request representation.

Obviously the Department of Defense shares our commitment to protect all benefits which Congress has provided for our service members. In that spirit, I would appreciate your assistance in disseminating the information and procedures contained in the

Accordingly, an individual who was subject to an obligation prior to entering on active duty and whose active duty materially affects his or her ability to pay on the obligation, is entitled to a 6 per centum cap on the obligation during the period of active duty.

Most reputable financial institutions are aware of this provision and promptly give effect to its protections upon application by the servicemember. There have, however, been reports that some institutions are not so cooperative. In the event an individual servicemember is denied this protection it is reasonable to expect that either the Civil Division or United States Attorneys will receive inquiries asking whether the United States may represent the individual. The Act does not provide for such representation. Nevertheless, Title 28 U.S.C. § 517 authorizes the Department to represent individuals when such representation is in the interests of the United States. In appropriate circumstances, a denial of Soldiers' and Sailors' Relief Act benefits would warrant such representation. An individual wishing to request Department of Justice representation concerning this provision needs to submit a signed request through the military department with which the individual served to this office for consideration by the representation committee. The request should include information sufficient to determine the precise nature of the underlying obligation, and how military service has materially affected the individual's ability to meet the obligation. The military department concerned should include its recommendation in a forwarding endorsement.

The Department of Justice views the protection of the benefits of the Act as a very serious matter particularly in this time of reliance on our reserve forces.



U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 11, 1991

MEMORANDUM

TO: All United States Attorneys

FROM: Stuart M. Garson *SMG*
Assistant Attorney General
Civil Division

SUBJECT: Requests For Representation Concerning the Soldiers' and Sailors' Civil Relief Act

The deployment of our armed forces to the Arabian Gulf and the extensive reliance upon reservists to meet deployment needs may result in reservists invoking the protections of the Soldiers' and Sailors' Civil Relief Act limiting the rate of interest which they may be charged in certain circumstances. Efforts to realize the benefits of that Act may generate inquiries to your offices concerning the potential availability of representation by the United States in actions to enforce the protections. The purpose of this memorandum is to outline the provisions of the Act and appropriate procedures for processing requests.

The maximum rate of interest provision of 50 USC App. § 526 states:

No obligation or liability bearing interest at a rate in excess of 6 per centum per annum incurred by a person in military service prior to his entry into such service shall, during any part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [October 6, 1942], bear interest at a rate in excess of 6 per centum per annum unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 per centum per annum is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.

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enclosed memorandum to appropriate offices within the Department
of Defense and its military components.

Sincerely,



Stuart M. Gerson
Assistant Attorney General
Civil Division