
2010 SCRA Update – *The War Continues*



John S. Odom, Jr.
COL, USAF (Ret.)

How we'll spend time in this class

- Overview of the SCRA
 - Detailed review of significant provisions of the SCRA and trends in SCRA practice
 - Review 2008 amendments to SCRA
 - Case studies and practical applications of SCRA
-

James Hurley v. Deutsche Bank Americas, et al

- Sgt James Hurley – Michigan Army National Guard
 - Mobilized for two months in 2005 for retraining
 - Duty NOT covered by SCRA – Title 32 duty
 - Got behind on his mortgage when he had to quit his second job
 - Unit received 1st Army mob orders in October
 - Individual members did not receive their “by name” orders until later
 - Non-judicial foreclosure before Hurley deployed to Iraq, but after Hurley had received the unit mob order
-

Mortgage horrors in Michigan

- Michigan law provides for 180 day redemption period for foreclosed properties before they can be sold by the bank
 - Redemption periods do not run against SMS on active duty
 - Hurley's wife and family evicted from the property after the 180 days ran – Hurley in Iraq
 - Property sold to bona fide purchaser in November 2006
 - Hurley returned from Iraq in December 2006 and found his home and property gone.
-

How wrong can you get????

- Both sides moved for summary judgment
 - Deutsche Bank argued there is no private cause of action under the SCRA and Hurley had no right to sue them for damages for their violations of the SCRA
 - Judge Gordon Quist *granted* the bank's motion for summary judgment and ruled there is no private cause of action to sue for damages under the SCRA
 - Request for reconsideration denied
 - Motion for certification of the ruling so an appeal can be taken is pending
 - State wrongful conversion claims still alive
-

ABA, DoD and Guard to the rescue?

- Amendment to the SCRA introduced in 111th Congress to clarify that there has always been a private cause of action to sue violators of the SCRA for damages (H.R. 3949)
 - Adding attorneys fee and damages provisions to the SCRA
 - HR3949 passed House 382-2 on 3 Nov 2009
 - Currently in SVAC for hearings
-

SCRA – AN INCREDIBLE CONSUMER LAW!!!

- Alters conventional contracts
- Prevents default judgment except in accordance with its provisions
- Allows for cancellation of premises leases and auto/truck leases
- Reduces interest rates on some pre-service obligations to 6%
- Gives consumers anticipatory relief option without filing bankruptcy

7

WHO IS PROTECTED?

- All active duty military members
 - Approximately 1,450,000
- All Reserve and National Guard members
 - Over 900,000 have already been mobilized for the Global War on Terrorism since 9/11

8

PURPOSE OF THE SCRA

- (1) to provide for, strengthen, and expedite the **national defense** through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and
- (2) to provide for the **temporary suspension** of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

9

SUPREME COURT ON SSCRA

“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)



10

LIBERAL CONSTRUCTION

“The Act 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)

11

NEW, IMPROVED SCRA

- In 2003, SSCRA completely re-written and becomes SCRA
- The SCRA was written to:
 - clarify the language of the SSCRA
 - to incorporate and codify many years of judicial interpretation of the SSCRA
 - to update the SSCRA to reflect developments in American life since 1940
- 2004 and 2008 amendments – some very important

12

ORGANIZATION – no change

- Found at **50 USC App. §§501-596** (cites herein are to 50 U.S.C. App. §___)
- Title I - General Provisions
 - Persons protected and jurisdiction
 - Non-discrimination provision
- Title II - General Relief
 - Default judgments and stays --§§521, 522, 524, 525
 - Fines & Penalties in contracts - §523
 - Statutes of Limitation --§526
 - Maximum rate of interest - §527

13

ORGANIZATION (cont.)

- Title III (§§531-538)
 - Major substantive protections against evictions, termination of installment contracts, foreclosure on mortgages and termination of leases by lessees, protection to dependents
- Title IV - Life Insurance (§§541-549)
- Title V - Taxes and Public Lands
 - §571 - Residence for tax purposes

14

ORGANIZATION (cont.)

- Title VI - Administrative Remedies
 - Inappropriate use of act - §581
- Title VII - Further Relief
 - Anticipatory relief - §591
 - Malpractice insurance - §593
 - Self-funded medical insurance coverage reinstatement - §594
 - Voting residency - §595
 - Non-availability of non-business assets for business or trade obligations - §596

15

DEFINITIONS -- §511

- Servicemember
 - Active Duty Military of 5 services -
 - includes Reserves and Guard under Title 10
 - National Guard under 32 U.S.C. §502(f)
 - PHS and NOAA Officers
 - **NOT CIVILIANS OR CONTRACTORS**
- Dependents
 - SM's spouse or child
 - Person that SM provided more than 1/2 support for 180 days preceding application for relief under act

16

DEFINITIONS -- §511

- Court includes
 - All Courts -- **including bankruptcy**
 - All Administrative Agencies
 - Whether or not of record

Adding Administrative Agencies is a huge expansion of coverage under the SCRA
Child support, zoning, tax appeals, professional disciplinary actions
*Mandatory arbitrations are **NOT** covered by SCRA.*

17

DEFINITIONS (con't)

- “Judgment” – defined for the first time
 - “Any judgment, decree, order or ruling, final or temporary.”
- Potential pitfall for domestic practitioners for temporary child custody and support orders

18

JURISDICTION -- §512

- SCRA applies to all courts & administrative agencies – federal, state and local -- **ALL MEANS ALL**
 - If you thought it was hard before, think of all those ALJs who've never heard of SCRA.
- SCRA applies to civil cases only
- May apply to ANY court which would otherwise have jurisdiction

19

PERSONS SECONDARILY LIABLE -- §513

- If court grants relief (stay, postponement, suspension of obligation) to servicemember, the relief may also be granted to persons primarily or secondarily liable with the SM
 - Surety, guarantor, endorser
 - Accommodation maker, *comaker* (added by SCRA)
 - Other person who may be primarily or secondarily subject to the obligation or liability

20

RESERVES ORDERED TO DUTY -- §516

- Members of Reserve component entitled to protection of SCRA from receipt of mobilization orders
 - Allows for time to put affairs in order
 - **Make sure your troops understand effective date of their protection under SCRA**

21

WAIVER OF RIGHTS -- §517

- Member may waive protections
- Waiver must be in a separate writing
 - ◆ Contract, lease or bailment
 - ◆ Mortgage, trust, deed, lien, other security
 - ◆ Repossession, retention, foreclosure, sale, forfeiture, taking possession of property
- Must be made during or after period of service

22

NON-DISCRIMINATION -- §518

- Claiming rights under SCRA cannot be basis for:
 - Determination by lender that the member is unable to pay
 - Denial or revocation of credit
 - Change in terms of existing credit arrangement
 - Refusal to grant credit to the member
 - Adverse credit report
 - Refusal by insurer to insure member
 - Identifying SM as member of NG or Reserve
 - Changing the conditions or terms of insurance

23

LEGAL REPRESENTATIVES §519

- SCRA adds a provision recognizing a legal representative of the Servicemember:
 - An attorney acting on the behalf of a Servicemember; or
 - An individual possessing a power of attorney
- Legal representative can take the same actions as a Servicemember

24

EXTENSION OF PROTECTION §§514 and 538

- §514 - Citizens of the U.S. serving with allied forces if service similar to “military service”
- §538 - Dependents of SM if dependent’s ability to comply is materially affected by SM’s military service they may apply for the protections found in Title III

25

DEFAULT JUDGMENTS -- §521

- Applies only if defendant has not appeared
- Plaintiff’s Affidavit
 - Whether or not defendant is in military; or
 - If unable to determine status - court may require plaintiff to post bond
- If defendant is a military member, court cannot enter default judgment until attorney is appointed to represent military member

26

DEFAULT JUDGMENTS -- §521

- Applies only if defendant has not appeared
- Plaintiff’s Affidavit
 - Whether or not defendant is in military; or
 - If unable to determine status - court may require plaintiff to post bond
- If defendant is a military member, court cannot enter default judgment until attorney is appointed to represent military member

27

DEFAULT JUDGMENTS -- §521

- Applies only if defendant has not appeared
- Plaintiff’s Affidavit
 - Whether or not defendant is in military; or
 - If unable to determine status - court may require plaintiff to post bond
- If defendant is a military member, court cannot enter default judgment until attorney is appointed to represent military member

28

NEW STAY PROVISION OF §521

- If defendant **is in military**, court ***SHALL*** stay proceedings
 - Minimum 90 days on application of counsel or court’s own motion
- Court must determine that there
 - may be a defense that cannot be presented without presence of defendant; or
 - after due diligence counsel has been unable to contact defendant or otherwise determine if a meritorious defense exists

29

SETTING ASIDE DEFAULT JUDGMENTS

- Court ***SHALL*** reopen a default judgment entered while SM on active duty or within 60 days thereafter, when
 - SM applies while on active duty or within 90 days thereafter, and shows
 - Material affect, plus
 - Meritorious defense
- ✓ *BONA FIDE* purchasers protected

30

STAY PROVISIONS (SM Has Notice of Lawsuit) -- §522

- Temporary delay in civil actions until servicemember can appear
 - During period of service plus 90 days
 - Servicemember has received notice of proceeding
- Automatic 90 day stay if:
 - SM shows military duty materially affects ability to appear, and date when can appear
 - Commanding officer writes letter stating duty prevents appearance and leave not authorized

31

STAY PROVISIONS (SM Notice of Lawsuit) -- §522

- Temporary delay in civil actions until servicemember can appear
 - During period of service plus 90 days
 - Servicemember has received notice of proceeding
- Automatic 90 day stay if:
 - SM shows military duty materially affects ability to appear, and date when can appear
 - Commanding officer writes letter stating duty prevents appearance and leave not authorized

32

CLARIFICATION OF "APPEARANCE"

- Application for a stay under §522 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)
- Legislative removal of legal conundrum

33

EXTENSION OF STAY

- SM may apply for additional stay based on continuing material affect of military duty on SM's ability to participate in the litigation
- If Court does not grant additional stay, it shall appoint counsel to represent SM
Query: attorney's duties, who pays fee?

34

2008 AMENDMENTS TO SCRA

- 50 U.S.C. App. 521(a) (default judgment section) was amended by inserting ` , **including any child custody proceeding,** after `proceeding'.
- 50 U.S.C. App. 522(a) (stays of proceeding section) was amended by inserting ` , **including any child custody proceeding,** after `civil action or proceeding'.

35

Family law and SCRA Stays

- Legal Assistance attorneys need to be able to communicate with courts and advocate their clients' position
 - Write the letters for the client and their commander
 - Don't leave something this important for the client to do
- Clients **CANNOT** change custody of minor children by issuing a power of attorney to another family member

36

Family Care Plans

- Most important document in prevention of custody fights while members are deployed
 - New Army Regulation about to be published
 - Congress is requiring a report by 31 Mar 2010 on compliance with upcoming DoDI on FCPs
 - Make sure your clients understand that the “other parent” is a potential threat and must be at least notified and consulted about FCPs that result in child/children going to someone other than the natural parent
-

37

FINES & PENALTIES -- §523

- **NO** penalties under a contract if performance *stayed by Court*, and if no stay --
 - Court may reduce or waive fine or penalty if
 - SM was in military service at time of fine/penalty
 - Performance materially affected by military service
 - **MUST APPLY TO COURT FOR RELIEF**
-

38

PRE-PAYMENT PENALTIES

- Are pre-payment penalties in home mortgages “penalties” so that judicial relief can/should be sought if mortgagee attempts to charge the fees when SM goes PCS before the holding period?
 - Recurring issue
 - Some national lenders say “no”
 - Recent settlement with Homecomings
-

39

STAY OR VACATION OF JUDGMENTS -- §524

- If military service materially affects compliance with judgment or order:
 - Court **SHALL** on application of SM
 - Stay execution; *and*
 - Vacate or stay attachment or garnishment
 - Court may also act on its own motion
-

40

DURATION OF STAYS §525

- May be for the period of service plus 90 days, or any part thereof
 - Court may set the terms and amounts of any installment payments
 - Plaintiff may proceed against any codefendants not in military service with court approval
-

41

STATUTE OF LIMITATIONS §526

- Period of Military Service **NOT** included:
 - In any period limited by law, regulation or order to bring any action or proceeding (including redemption of real property)
 - By or against SM or heirs or assigns
 - Does not apply to IRS
 - *Material affect* **NOT** required
-

42

STATUTE OF LIMITATIONS §526

- Period of Military Service **NOT** included:
 - In any period limited by law, regulation or order to bring any action or proceeding (including redemption of real property)
 - By or against SM or heirs or assigns
- Does not apply to IRS
- **Material affect NOT required**
 - *Conroy v. Ansikoff*

43

MAXIMUM RATE OF INTEREST §527

- **PRE-SERVICE** loans incurred by SM, or SM and spouse jointly
 - But not guaranteed student loans (20 USC §1078(d))
- Cap of 6% per annum; all excess **FORGIVEN**
- Have to recompute payments at 6% rate
- Cap rescinded if creditor shows no material effect
- SM must give written notice w/copy of orders
- Private right of action – *Cathey v. First Republic Bank*

44

2008 Amendments to §527

- Two kinds of obligations or liabilities now defined:
 - Obligations secured by a mortgage, trust deed or other security in the nature of a mortgage
 - All other obligations
- For obligations secured by a mortgage, the duration of the 6% cap is now extended to **one year after REFRAD.**
- For all other obligations, the 6% cap ends at REFRAD.

45

More 2008 Amendments

- P.L. 110-389 makes intentional failure to grant interest rate cap a federal misdemeanor
- Also adds “savings clause” concerning “other rights and remedies” for suits to enforce the cap (similar to the “savings clauses” found in Sections 531, 532 and 533).
- Still having trouble with courts not recognizing a private cause of action to sue to enforce SCRA rights
 - This battle should have been over in 2002 with *Cathey v. FRB*

46

HOW TO ENFORCE 6% CAP?

- Notify Lender - See Section 527(b)(1) Notice
- What if Creditor Ignores Your Notice?
 - Send Notice and just pay loan at the 6% interest rate amount amortization, and let the lender sue your client for default. You counterclaim/defend raising SCRA.
 - Possible DoJ assistance?
 - Sue the lender for SCRA non-compliance-- *Moll v. Ford Consumer Finance* and *Cathey v. First Republic Bank*

47

EVICCTIONS & DISTRESS §531

- Can **ONLY** evict upon court order: **no self-help**
 - Applies to SM or dependents
 - Residential rent does not exceed \$2,400/mo (in 2003) (CPI adjusted to \$2,831 in 2008)
 - Ability to pay materially affected by service
 - Court **SHALL** stay for minimum 90 days, or
 - Adjust the lease obligations
- Criminal sanctions for violation
- **Dependents have right to invoke**

48

INSTALLMENT CONTRACTS FOR PURCHASE OR LEASE --§532

- In event of breach of **pre-service contract**, no termination or repossession of property **by creditor** without court order
- Purchase or lease of **real or personal property**
 - Payment or deposit made prior to service
- After hearing, a court may order repayment to SM to terminate contract, or
- **SHALL** stay the proceeding if SM's ability to comply is materially affected and SM applies– length of stay determined by Court

49

Hot issue – auto repos

- Multiple ramifications of an illegal auto repo
 - No vehicle for the SM or dependents after repo
 - Deficiency judgment for balance of car loan
 - Bad entries on credit report
 - Security clearances – AFCAF doesn't like repos on credit report
 - Can't refinance house when mortgage lender sees a car repo on the credit report

50

Helpful phrase to use when speaking with repo agent's counsel

■ **I DON'T CARE.**

51

Section 533 – Foreclosure Protection

- **NO FORECLOSURES ON PROPERTY OWNED PRIOR TO ENTERING SERVICE WITHOUT A VALID COURT ORDER**
 - No self-help foreclosures – EVER!!!!
- **2008 Amendment** extends the protection against non-judicial foreclosures **until 9 months after REFRAD.**
- Federal misdemeanor for violation
- Bona fide third party purchasers are protected if property seized in violation of SCRA is sold to them.

52

RIGHT TO TERMINATE LEASES §535 – HOME, BUSINESS, AUTO

- **SCRA provisions on lease cancellation are significantly different from the old SSCRA**
- May apply regardless of whether lease is pre-service or not
- Takes into consideration the realities of long-term deployments on both active duty and Guard/Reserve members
- **Adds ability to cancel vehicle leases in certain situations**
- Obviates the need for “military clauses” in leases
- Continues criminal penalties for noncompliance by lessors

53

TERMINATION OF PREMISES LEASES

- Applies to **pre-service** leases of premises (rent cap of \$2,932.31 for 2009); or
- Premises leases signed by SM (or on SM's behalf) **after entering military service** when SM receives PCS orders or deployment orders for not less than 90 days
- Qualifying lease is terminated by delivery of written notice with copy of orders to lessor or lessor's agent (hand delivery, mail, FedEx)
- Termination by SM also terminates lease co-signed by spouse (2004 technical amendment)

54

TERMINATION OF PREMISES LEASES (con't.)

- Termination effective:
 - If rent payable monthly – 30 days after first date next payment due after notice is delivered
 - All others – last day of month following month in which notice is delivered
- Rentals unpaid for period preceding the effective date of termination must be prorated and paid

55

TERMINATION OF VEHICLE LEASES

- **Pre-service vehicle leases**
 - If SM is called up or enters service for 180 days or more; or
- **Vehicle lease executed after service commences if:**
 - SM receives OCONUS PCS orders or
 - SM receives deployment orders for period of 180 days or more
- Notice of termination must be in writing, delivered to lessor (or lessor's agent or grantee) along with copy of military orders (by hand, mail or FedEx)

56

TERMINATION OF VEHICLE LEASES (con't.)

- Vehicle must be surrendered within 15 days of termination notice
- Lease terminated effective date vehicle surrendered
- No penalties allowed for early termination
- Misdemeanor to wrongfully retain personal property or security deposit
- **Leasing companies were initially clueless of this new section; now have industry and DoD-approved form for cancellation**

57

TERMINATION OF LEASES §535

- RELIEF TO LESSOR.—Upon application by the lessor to a court before the termination date provided in the written notice, relief granted by this section to a Servicemember may be modified as justice and equity require.
- SCRA recognizes right to seek award for consequential or punitive damages “otherwise available under law”
- Balloon financing contracts are **NOT** leases – they look a lot like leases. Ask **who owns the vehicle??**

58

New Section 535A-- Cellphones

- New Section 535A added to allow termination or suspension of certain cellphone contracts
- Statute added by P.L. 110-389 (effective 10 Oct 2008)
- Applies to overseas deployment of NLT 90 days or within-CONUS PCS if ability to utilize the service is materially affected
- If a CONUS-to-CONUS PCS – provider either terminates the contract or allows suspension with no termination/reinstatement fee
- If an overseas deployment, provider suspends the contract until servicemember returns without requiring extension of contract

59

TAXES RESPECTING PERSONAL & REAL PROPERTY -- §561

- Tax or assessment falls due and is unpaid
- Which arose **before or during** military service on
 - Personal Property, including vehicles; or
 - Real Property occupied by SM, dependents, or employees
 - Before entry into military service, and
 - During period of service tax remains unpaid
- Court can order sale only if no material affect
- Court may stay for period of service plus 180 days
- SM has right to redeem for service plus 180 days

60

INCOME TAXES §570

- Must be able to show material affect
- Payment of Federal, State or Local tax deferred for period of service plus 180 days
- No interest or penalty
- Statute of limitations suspended for period of service plus 270 days

61

RESIDENCE FOR TAX PURPOSES -- §571

- Applies to income and personal property tax
- Can be taxed only by state of SM's domicile
- Applies only to military pay
- May not use the military pay to gross-up combined income into a higher bracket (overrules the "Kansas Rule")
- Protects Native American SM from State Income Tax if Indian Reservation domicile

62

CERTIFICATES OF SERVICE §582

- A Certificate of the Service Secretary shall be *prima facie* evidence as to all aspects of a person's military service, or non-service.
- Such a certificate shall be furnished upon application (to each service) – **use DMDC website**
- <https://www.dmdc.osd.mil/appj/scra/scraHome.do>
- A SM missing in action is presumed to continue in service until accounted for.

63

The screenshot shows a web browser window titled "Service Members Civil Relief Act" with a search form. The form is titled "Service Members Civil Relief Act (SCRA) (50 USC App. § 501 et seq, as amended) (SCRA) Service Members Civil Relief Act". It contains a privacy notice on the left and a search form on the right. The search form has fields for SSN, Last, First, Middle, Birth Yr, Month, and Day, with a "Repeat" section for each. There are "LookUp" and "Erase" buttons. Below the form, there is a privacy notice and a "Digital Certificate Help" link.

Improvements to DMDC website

- Website shown on previous slide will also supply information for **LAST DATE OF ACTIVE DUTY**
- Important due to 2008 amendments to Sections 527 (interest rate protection) and 533 (mortgage foreclosures)

64

ANTICIPATORY RELIEF §591

- Anticipatory relief available for:
 - **Pre-service** obligations, taxes or assessments **arising during** period of service
- Contract for purchase of real property or secured by mortgage
 - Court can stay enforcement of obligation during military service plus period equal to period of military service plus remaining period of obligation

65

ANTICIPATORY RELIEF (con't)

- Any other obligation, tax, or assessment
 - Court can stay enforcement of obligation for a period of time equal to period of military service

67

ANTICIPATORY RELIEF (con't)

- Deferred payments must be paid over "extension period" plus new payments as they accrue
- Must show material affect
- Must apply (file suit) during period of service or within 180 days after
- No penalties may be imposed for claiming protections of SCRA

68

MALPRACTICE INSURANCE PROTECTIONS -- §593

- Physicians, lawyers and other professionals designated by SECDEF
 - Suspends policy during active duty; no premiums owed during suspension
 - Reinstatement at original rates
 - Stay of actions
 - Statute of limitations increased by period of suspension

69

OTHER PROTECTIONS

- Private Health insurance reinstated -- §594
- State of domicile for voting -- §595
- May not use personal assets to satisfy trade or business obligations even though SM personally liable -- §596 (result of *Cathey* case)

70

DoJ Enforcement Section

- DoJ now has an SCRA enforcement section at Main Justice in Washington DC
 - Contact Legal Assistance Division if you have a case needing counsel
 - DoJ is looking for cases – they want winners!!

71

ABA Pro bono Project

- ABA has enlisted attorneys around the country to assist on *pro bono* basis in certain cases
- Need to send requests up through channels to heads of Legal Assistance who will screen cases and make referrals
 - Participation in ABA *pro bono* project is going to be one of the points in the DoD report back to Congress in March 2010, prior to Congressional hearings on child custody matters

72

CITATIONS

- *Cathey v. First Republic Bank*, 2001 U.S. Dist. LEXIS 13150
 - www.bankersonline.com/lending/catheycase.html
 - http://www.roa.org/site/PageServer?pagename=law_review_01
 - Get The Book on SSCRA free:
 - www.jagcnet.army.mil/TJAGSA
 - click on "Publications"
 - scroll down to "Legal Assistance" and click on JA 260
-

73

COL JOHN S. ODOM, JR.
USAF (Ret.)
318-221-1600
John.odom@jodplaw.com
Jodomjr@aol.com

74