SCRA Update and Practice John S. Odom, Jr. Colonel, USAFR (Ret.)

Theory versus practice

- SCRA practice primarily one of education
 - Opposing counsel
 - Judges and their law clerks
- Rule No. 1: the Act means only what the judge interpreting it says it means
 - Appellate courts grade papers, but it's expensive

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Trends in SCRA Practice

- Creditors are getting more aggressive in opposing SCRA claims
 - "New SCRA" isn't so new any more 2003
- Courts are issuing opinions narrowly construing the SCRA
 - Appeals are expensive and rare
- PACER means everything gets cited

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SCRA – AN <u>INCREDIBLE</u> CONSUMER LAW!!!

- Alters conventional contracts NO SELF HELP ENFORCEMENT IIII
- 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

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WHO IS PROTECTED?

- -All active duty military members
 - Approximately 1,450,000
- –All Reserve and National Guard members – about 800,000

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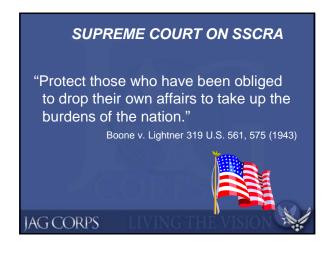


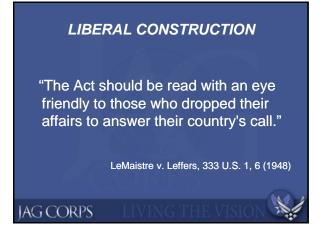
PURPOSE OF THE SCRA

- (1) to provide for, strengthen, and expedite the <u>national</u> <u>defense</u> 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 <u>temporary suspension</u> of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

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2010 AMENDMENTS - HOT !!!!

- New Title VIII to SCRA
 - Enforcement by the Attorney General authorized (new Section 801 – 50 USC App §597)
 - Private cause of action to recover damages and attorneys fees recognized (new Section 802 – 50 USC App §597a)

ORGANIZATION OF SCRA

- Found beginning at 50 USC App. § 501 (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

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ORGANIZATION (con't.)

- 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





ORGANIZATION (con't.)

- 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

ORGANIZATION (con't.)

- Title VIII
 - Section 597 enforcement by Attorney General
 - Section 597a private cause of action, damages and attorneys fees
 - Section 597b preservation of other remedies

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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)
 - Public Health Service Officers
 - National Oceanic & Atmospheric Officers
- Dependents
 - SM's spouse or child
 - Person that SM provided more than 1/2 support for 180 days preceding application for relief under act

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DEFINITIONS -- §511

Court includes

- All Courts -- including bankruptcy and
- 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.

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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

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JURISDICTION -- §512

- SCRA applies to all courts & administrative agencies - federal, state and local -- ALL MEANS ALL
- SCRA applies to civil cases only
- May apply to <u>ANY</u> court which would otherwise have jurisdiction

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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, co maker (added by
 - Other person who may be primarily or secondarily subject to the obligation or liability



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

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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 <u>during or after period of service</u>

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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

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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

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

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STAY PROVISION OF §521

- If defendant is in military, court <u>SHALL</u> 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



SETTING ASIDE DEFAULT JUDGMENTS

- Court <u>SHALL</u> 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

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- Section 521 applies regardless of when the obligation was incurred
- Especially important in mortgage foreclosures
 - Banks and courts do not understand that even if there is judicial foreclosure on a mortgage, must comply with Section 521

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How to challenge default judgment

- Must file motion to set aside or vacate judgment within 90 days of REFRAD
- Must show "material effect" and meritorious defense
- Courts and counsel don't have a clue what this is all about
 - SPC Matthew Smith in Kentucky

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Be prepared to challenge court-appointed attorney

- Even when plaintiff does it right, they frequently do it wrong
- Get copies of the record see what the appointed attorney filed
- Appointed attorney cannot waive defenses or "otherwise bind the servicemember"

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

- <u>Temporary</u> 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

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CLARIFICATION OF "APPEARANCE"

- Application for a stay under §522 does <u>not</u> 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



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

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Stay applications -- §522

- Critical to do the written application for a stay as required by SCRA
 - Military duties prevent appearance
 - State a date when available in the future
 - Commanding officer concurs that leave not available
- Write the letter for the client and commanding officer – do it RIGHT

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FINES & PENALTIES -- §523

- <u>NO</u> penalties under a contract if performance <u>stayed</u> by <u>Court</u>, 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
- Pre-payment penalty in mortgage would qualify

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STAY OR VACATION OF JUDGMENTS -- §524

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

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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

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STATUTE OF LIMITATIONS §526

- Period of Military Service <u>NOT</u> 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. Aniskoff



MAXIMUM RATE OF INTEREST §527

- PRE-SERVICE loans incurred by SM, or SM and spouse jointly
 - Now includes guaranteed student loans under
 (20 LISC \$1078(d))
- Cap of 6% per annum; all excess <u>FORGIVEN</u>
- 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 to enforce or seek damages --§597a

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- 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.

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Absolute rule in Title III of SCRA NO SELF HELP

Section 531 -- Evictions

- Provided monthly rental does not exceed approx. \$3,135 (less in earlier years):
 - NO EVICTION WITHOUT COURT ORDER
 - COURT CAN STAY EVICTION FOR 90 DAYS; OR
 - ADJUST THE OBLIGATION TO PRESERVE INTERESTS OF ALL PARTIES

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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 – no self-help.
- 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

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SECTION 533 – FORECLOSURE PROTECTION

- NO NONJUDICIAL FORECLOSURES ON PROPERTY MORTGAGED PRIOR TO ENTERING SERVICE WITHOUT A VALID COURT ORDER
 - No self-help foreclosures EVER!!!!
- Amendments now extend the protection against nonjudicial foreclosures until one year after REFRAD.
- Federal misdemeanor for violation
- Bona fide third party purchasers are protected if property seized in violation of SCRA is sold to them.



Powers of a court under §533

- Court can restructure the mortgage
- Court can order the foreclosure halted
 for how long only the court can say
- Court can order creditor to accept lowered payment – "adjust the obligation"



Mortgage foreclosures

- 50 U.S.C. App. §533
 - Applies to pre-service mortgages only
 - Protects against non-judicial foreclosures
 - 27 states have non-judicial foreclosures
 - No court proceedings of any kind required
 - Burden is on the creditor to ascertain military status of defendant
 - Without a court order, a foreclosure is invalid
 - Hurley v. Deutsche Bank

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Impact of foreclosure and repossession

- Security clearances
- Credit score
- Reporting to the credit reporting agencies is strictly voluntary
 - The creditors can report anything they want to report
 - Insist on them cleaning up the client's credit as part of any settlement

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Topic of great interest to Congress

- Current Congress considering massive expansion of SCRA protections: ALL MORTGAGES for
 - Deployed personnel
 - Wounded warriors
 - Surviving spouses
- Regardless of when mortgage incurred

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National Mortgage Settlement

- April 2011 Consent Judgment
- Five largest mortgage servicers
 - Provided liquidated damages amount
 - Going forward, required additional protections beyond SCRA
 - Not binding on any servicers other than those five

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Independent Review

- OCC required independent review by all mortgage companies
- Paid Rust Consulting and Deloitte & Touche approximately \$1.2 billion to conduct review
 - Reviewers decided it was too hard and it was halted
 - Payment checks have been insultingly low

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Section 535 -- Leases

- Defines situations in which property and motor vehicle leases can be terminated without penalty
 - Pre-service leases
 - Leases executed during periods of service
- Different rules for real estate vs.
 vehicle leases check the statute

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- No foreclosure or sale of a SM's property to enforce a storage lien without a court order
- Compliance with state laws immaterial
- Big problem with outsourcing and consolidation of TMO function

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TAXES RESPECTING PERSONAL & REAL PROPERTY -- §561

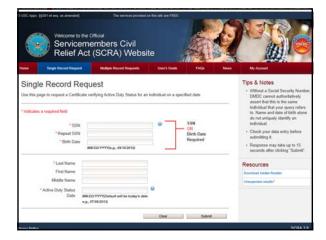
- Tax or assessment falls due and is unpaid
- Which arose before or during military service on
 - Personal Property, including vehicles; or
 - Real Property occupied by SM, dependents, or employees
 - Before entry into military service, and
 - During period of service tax remains unpaid
- Court can order 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

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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.d
- A SM missing in action is presumed to continue in service until accounted for.

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IMPROVEMENTS TO DMDC WEBSITE

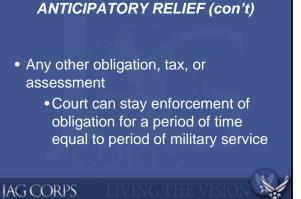
- DMDC Website will also supply information for LAST DATE OF ACTIVE DUTY
 - Important due to amendments to Sections 527 (interest rate protection) and 533 (mortgage foreclosures)



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 <u>plus</u> period equal to period of military service over remaining period of obligation

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ANTICIPATORY RELIEF (con't)

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

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Now for the hard part – child custody • DoDI 1342.19 – Family Care Plans – New instruction signed on 7 May 2010 – All services now have implementing instructions/regulations

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Family Care Plans

- DoDI requires a FCP for
 - All single parents
 - All custodial parents
 - All "blended families" in which both biological parents are not in the same household
- Must attempt to contact other biological parent for concurrence in FCP

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Negotiate – don't litigate

- Vast majority of child custody fights are self-inflicted wounds
 - Custodial parent makes unilateral decision on custody during deployment
- CANNOT CHANGE CUSTODY JUDGMENT BY A POWER OF ATTORNEY



No good deed goes unpunished

- Case of MSgt Aki Summers
 - Stationed in Korea
 - Teenage son visits grandmother in Rayville,
 LA for summer (with Dad's consent)
 - MSgt Summers gives mother a POA so the grandmother can exercise the mother's summer visitation
 - Teenage son won't return to Virginia at end of summer

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Hello disaster

- Father brings action in Virginia state court for return of son
- MSgt Summers makes three correct SCRA applications for stay
- Court never rules on stay application, proceeds and finds her in contempt in absentia, fines her \$7,000 and sentences her to 6 months jail

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When judges go wrong

- In clear violation of SCRA, Virginia state juvenile and domestic court judge holds hearing, finds MSgt Summers in contempt of court, orders her fined and jailed
- Maj Alexis Stackhouse, USAFR, representing MSgt Summers

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Wait – it gets worse

- Judge orders §522 application made under oath
 - No basis for that in SCRA
- Judge grants stay and resets hearing.
 - When MSgt Summers (now home) shows up for hearing, judge vacates earlier contempt order and then finds her in contempt (30 days confinement suspended, \$2,000 fine)

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What to do with judges who are wrong

- Appellate courts exist for a reason
 - Clients rarely can afford the appeal
 - Clients don't want to wait for an appeal
 - Settlements usually result rather than making good case law
- Consider "motion to reconsider", "motion for new trial" or other pleading

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Congress wants to "help"

- Family law is a matter for state law courts
 - Expertise with custody disputes
 - Facilities and personnel experienced in dispute resolution or intervention
- 42 of the States currently have a military-friendly custody statute
- Uniform Laws commissioners



