

SCRA Update and Practice

John S. Odom, Jr.
Colonel, USAFR (Ret.)

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



SCRA – AN INCREDIBLE CONSUMER LAW!!!

- Alters conventional contracts – **NO SELF HELP ENFORCEMENT!!!!**
- 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

JAG CORPS

LIVING THE VISION



WHO IS PROTECTED?

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

JAG CORPS

LIVING THE VISION



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.

JAG CORPS

LIVING THE VISION



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)



JAG CORPS

LIVING THE VISION



LIBERAL CONSTRUCTION

“The Act should be read with an eye friendly to those who dropped their affairs to answer their country's call.”

LeMaistre v. Leffers, 333 U.S. 1, 6 (1948)

JAG CORPS

LIVING THE VISION



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)
 - Preservation of other remedies (including punitive damages) (new Section 803 – 50 USC App §597b)

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



DEFINITIONS -- §511

Court includes

- All Courts -- including bankruptcy and family courts
- 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.

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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 ANY court which would otherwise have jurisdiction

JAG CORPS

LIVING THE VISION



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 SCRA)
 - Other person who may be primarily or secondarily subject to the obligation or liability

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



DATE OF OBLIGATION IMMATERIAL

- 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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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”

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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**
- Pre-payment penalty in mortgage would qualify

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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. Aniskoff

JAG CORPS

LIVING THE VISION



MAXIMUM RATE OF INTEREST §527

- **PRE-SERVICE** loans incurred by SM, or SM and spouse jointly
 - Now includes *guaranteed student loans under (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 to enforce or seek damages -- §597a

JAG CORPS

LIVING THE VISION



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.

JAG CORPS

LIVING THE VISION



Absolute rule in Title III of SCRA

**NO
SELF
HELP**

JAG CORPS

LIVING THE VISION



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**

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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 non-judicial 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.

JAG CORPS

LIVING THE VISION



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”

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



Section 537 – Storage Liens

- 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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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/appi/scra/scraHome.d>
- A SM missing in action is presumed to continue in service until accounted for.

JAG CORPS

LIVING THE VISION



Welcome to the Official Servicemembers Civil Relief Act (SCRA) Website

Home Single Record Request Multiple Record Requests User's Guide FAQs News My Account

Single Record Request

Use this page to request a Certificate verifying Active Duty Status for an individual on a specified date

* Indicates a required field

* SSN
* Repeat SSN
* Birth Date

SSN OR Birth Date Required

* Last Name
First Name
Middle Name

* Active Duty Status
Date

Clear Submit

Tips & Notes

- Without a Social Security Number, DMDC cannot authoritatively assert that this is the same individual that your query refers to. Name and date of birth alone do not uniquely identify an individual.
- Check your data entry before submitting it.
- Response may take up to 15 seconds after clicking "Submit"

Resources

Download Adobe Reader

Unsuccessful results?

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)

JAG CORPS

LIVING THE VISION



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 over remaining period of obligation

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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*

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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**

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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)

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



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

JAG CORPS

LIVING THE VISION



- *Resource for SCRA Issues*

- *A Judge's Benchbook for the Servicemembers Civil Relief Act*
 - ABA Publishing, 2010
 - Available on ABA Publications website
- JA 260
 - *The Servicemembers Civil Relief Act Guide*

JAG CORPS

LIVING THE VISION



Col John S. Odom, Jr.
Jones & Odom, LLP
Shreveport LA 71104
john.odom@jodplaw.com
318-221-1600

JAG CORPS

LIVING THE VISION

