

JUDGES' GUIDE TO THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

INTRODUCTION

During your term on the bench, there's a good chance you'll encounter plaintiffs or defendants who are on active duty in the armed forces. This Guide will help you deal with issues related to the impact of military service on civil litigation, financial obligations, mortgages, leaves, and other matters.

The Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA), as amended, was passed by Congress to provide protection to those who are called to active duty in the U.S. Armed Forces or who are deployed. Reservists and members of the National Guard are also protected under the SSCRA. The protection begins with the date of entering active duty service and generally terminates within 30 to 90 days (and in certain cases for up to six months) after release from active duty. Significant changes in the SSCRA were made at the time of the Gulf War. The present law is found in 50 U.S.C. App. 501-548, 560-593. Courts have generally constructed the SSCRA liberally so as to protect those in uniform. 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 AND ANSWERS

1. Q. WHAT DOES THE SSCRA SAY ABOUT DELAY OF JUDICIAL PROCEEDINGS?

A. Under 50 U.S.C.App. 521, here are the rules:

>A servicemember who is a party in civil (not criminal) judicial proceedings may obtain a stay of these proceedings if certain conditions are met.

>The request for a stay can be a motion by the member or on the court's own motion.

>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.

>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.

>Since courts are reluctant to grant long-term stays of proceedings, they can and should require members to act in good faith and be diligent in their efforts to appear in court.

2. Q. WHAT IS "MATERIAL EFFECT"?

A. There's no one definition of "material effect." The court should make a finding of "material effect" when a servicemember's ability to prosecute or defend a civil suit is impaired by military duties which prevent him or her from appearing in court at the designated time and place, or from assisting in the preparation or presentation of his or her case. An adverse material effect might also be found when military service impairs substantially the member's ability to pay financial obligations.

3. Q. IF THE MEMBER ISN'T IN COURT BEFORE ME, HOW CAN I INQUIRE INTO "MATERIAL EFFECT"?

A. Here are some pointers:

>An affidavit setting out all the facts and circumstances can be required, usually executed by the servicemember or the member's commander.

>You can ask for a copy of the member's Leave and Earnings Statement (the military equivalent of a pay stub) 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.

>Remember that servicemembers from all branches of military service, from the lowest private to a three-star general, all get thirty days' leave each year, accruing at the rate of 2.5 days per month.

>You can also request a more specific affidavit, if an unsatisfactory one has been submitted, detailing the efforts that the member has made to be present in court, for example, and the next court date when he or she would be available.

>Keep in mind that members who are going through basic or advanced training may be unable to appear in court due to the training schedule; there are no extra days built into the schedule to accommodate court dates, depositions or family emergencies, and being gone from training frequently means that the trainee will have to repeat the same training program from the beginning.

4. Q. CAN A DEFAULT JUDGMENT BE ENTERED AGAINST A SERVICEMEMBER IN HER ABSENCE?

A. Yes, but there are restrictions under the SSCRA. When the plaintiff applies for a default judgment or when the moving party attempts to have a hearing in the absence of the defendant, the SSCRA comes into play. It requires the movant to sign and file an affidavit with the court stating that the other party is not in the military service before a decree or judgment can be obtained by default. None of these provisions applies unless the member has defaulted of any appearance at all. If, for example, she has retained counsel of record, or if she has filed pleadings in the case, this provision doesn't apply. 50 U.S.C.App. 520 governs default entries and reopening defaults.

5. Q. WHAT IF THE AFFIDAVIT SHOWS THAT THE PARTY TO BE DEFAULTED IS IN THE ARMED FORCES?

A. When this happens, no default can be taken until the court has appointed an attorney to represent the servicemember. If the court fails to appoint an attorney then the judgment or decree is voidable. In *Smith v. Davis*, 364 S.E. 2d 156 (N.C. Ct. App. 1988), for example, the judge's failure to appoint an attorney for the member, in itself, didn't necessitate reversal, but only entitled the member to reopen the default judgment since he'd shown that his military service materially affected his ability to defend and that he had a meritorious defense.

6. Q. WHAT DOES THE COURT-APPOINTED ATTORNEY DO?

A. The SSCRA doesn't say what the appointed attorney does, but the probable role of the attorney is to protect the interests of the absent servicemember, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. No provision of the SSCRA says who pays the appointed attorney.

7. Q. CAN I REQUIRE A BOND TO BE POSTED BEFORE ENTRY OF A DEFAULT JUDGMENT?

A. Yes. The SSCRA allows the court to require the moving party to file a bond as a condition for the entry of a default judgment, in addition to the other provisions set out above, in order to indemnify the absent servicemember against loss or damage in case the decree is later overturned. The court can also make such other provisions as are deemed necessary to protect the member's rights.

8. Q. WHAT ARE THE PROVISIONS FOR REOPENING A DEFAULT JUDGMENT?

A. When a default has already been entered, a member has the right to have it reopened upon certain conditions. If the default is granted during the period of service or within 30 days thereafter, the member can apply to have it set aside, provided that the member requested reopening the decree within 90 days after the end of military service, and that no appearance has been entered, either *pro se* or through an attorney. The member's application to set the decree aside should be granted if he or she can show that he or she has a good and legal defense to the claim, and that he or she can show prejudice resulting from not being able to appear in person to defend or prosecute.

9. Q. ARE THERE ALSO PROVISIONS FOR STAYING THE EXECUTION OF A JUDGMENT?

A. Yes -- they're found at 50 U.S.C.App. 523. As to any case filed against a servicemember, the court may grant a stay of the execution of a judgment or order entered against the member, and vacate or stay an attachment or garnishment on its own motion. When this is upon motion by the member or someone on the member's behalf, the court must grant the above relief unless the court determines that the member's ability to comply with the judgment or order is not materially affected by reason of military service.

10. Q. WHAT DOES THE SSCRA SAY ABOUT STATUTES OF LIMITATION?

A. This is covered at 50 U.S.C. App. 525, which states that the period of military service shall not be included in computing any limitation period for filing suit, either by or against any person in military service. This also includes suit by or against the heirs, executors, administrators, or assigns or the member, when the claim accrues before or during the period of service. Thus this section of the Act tolls statutes of limitations during the period of military service of any military plaintiff or defendant. The statute doesn't, however, affect time periods within a suit, such as time periods to avoid motions to dismiss for failure to prosecute an action. Once military service is shown, the period of limitations is automatically tolled for the duration of the service.

11. Q. CAN A SERVICEMEMBER GET OUT OF A LEASE OR RENTAL AGREEMENT?

A. Yes. Lease terminations are covered at 50 U.S.C. App. 530. A lease covering property used for dwelling, professional, business, agricultural or similar purposes may be terminated by a servicemember if two conditions must be met:

>The lease/rental agreement was signed before the servicemember entered active duty; and

> The leased premises have been occupied for the above purposes by the servicemember or his or her dependents.

12. Q. HOW DOES THE SERVICEMEMBER GO ABOUT TERMINATING THE LEASE?

A. To terminate the lease, the servicemember must deliver written notice to the landlord after entry on active duty or receipt of orders for active duty. Oral notice is not sufficient. The effective date of termination is determined as follows:

>For month-to-month rentals, termination becomes effective 30 days after the first date on which the next rental payment is due after the termination notice is delivered. For example: if rent is due on the first of the month and notice is mailed on 1 August, then the next rent payment is due on 1 September. Thirty days after that date would be 1 October, the effective date of termination.

>For all other leases, termination becomes effective on the last day of the month after the month in which proper notice is delivered. For example: if the lease calls for a yearly rental and notice of termination is given on 20 July, the effective date of termination would be 31 August.

13. Q. CAN A SERVICEMEMBER GET A REFUND OF SECURITY DEPOSIT OR PREPAID RENT?

A. If rent has been paid in advance, the landlord must refund the unearned portion. If a security deposit was required, it must be refunded to the servicemember upon termination of the lease. The servicemember is required to pay rent only for those months before the lease is terminated.

14. Q. CAN I STOP AN EVICTION ACTION BY A LANDLORD?

A. If the property is rented for \$1,200 per month or less, the court may delay the eviction action for up to three months. The court must grant the stay if the member requests it and can prove that his or her ability to pay was materially affected by military service.

15. Q. DOES THE ACT APPLY TO TIME PAYMENTS OR INSTALLMENT CONTRACTS?

A. Yes. Under 50 U.S.C. App. 531, servicemembers who signed an installment contract for the purchase of real or personal property before active duty will be protected if their ability to make the payments is "materially affected" because of active duty service. Remember--

- a. The servicemember must have paid, before entry into active duty, a deposit or installment payment under the contract.
- b. If the servicemember is not able to make payments because of his or her military duty, the SSCRA applies.
- c. The vendor is thereafter prohibited from exercising any right or option under the contract, such as to rescind or terminate the contract or to repossess the property, unless authorized by a court order.
- d. The court may determine whether a servicemember's financial condition is "materially affected" by comparing the servicemember's financial condition before entry on active duty with his financial condition while on active duty.

16. Q. WHAT ABOUT THE INTEREST RATES ON DEBTS AND MORTGAGE PAYMENTS -- DO THEY GO DOWN WHEN A PERSON ENTERS MILITARY SERVICE?

A. Yes--when an obligation was incurred before entry on active duty, the interest rate goes down to 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 terms "interest" includes service charges. This is covered in 50 U.S.C.App. 526.

17. Q. ARE THERE PROTECTIONS AGAINST MORTGAGE FORECLOSURES?

A. The SSCRA (50 U.S.C. App. 532) protects servicemembers against foreclosures of mortgages, deeds of trust, and similar security devices, provided the following conditions are met:

- a. The relief is sought on an obligation secured by a mortgage, deed of trust, or similar security on either real or personal property;
- b. The obligation originated prior to entry upon active duty;
- c. The property was owned by the servicemember or dependent before entry on active duty status;
- d. The property is still owned by the servicemember or dependent at the time relief is sought;
- e. The ability to meet the financial obligation is "materially affected" by the servicemember's active duty obligation.

Courts can stay proceedings until members are available to answer, extend the mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by a servicemember, and extend the period of redemption by a period equal to the servicemember's military service.

18. Q. IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?

A. Fire up your ISP (internet service provider), then go to: www.jagcnet.army.mil/TJAGSA, the home page of the Army JAG School. Click on "Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Soldiers' and Sailors' Civil Relief Act Guide," a thorough examination of every section of the SSCRA by the faculty of the Army JAG School, updated in July 2000. You can also find useful material at the following URL's--

>"Soldiers' and Sailors' Civil Relief Act Provides Umbrella of Protection" - Department of Defense article, Armed Forces Information Service: www.defenselink.mil/Specials/Relief_Act/

>US Coast Guard article on SSCRA: www.uscg.mil/milclant/1_01/soldiersyl.htm

>Air Force Academy article on SSCRA: www.usafa.af.mil/10ja/sscra.htm

>Coast Guard Fact Sheet on SSCRA: www.uscg.mil/legal/la/topics/sscra/SSCRA_Factsheet.htm

>Article by Carreon and Associates, Cypress, CA, on SSCRA: www.carreonandassociates.com/soldiersact.html

>Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel" - section on SSCRA: www.acf.dhhs.gov/programs/cse/pcf/militaryguide2000.htm#relief

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