



# The Servicemembers *Civil Relief Act* A Law for Mobilized Soldiers

By Charles A. Palmer

The United States has long recognized the hardships borne by our servicemembers when they leave their jobs and homes to perform military service. Congress enacted legislation during the Civil War to suspend the statutes of limitations for servicemembers. The rights of servicemembers have been expanded through the years. Most recently, Congress passed the Servicemembers Civil Relief Act (SCRA)<sup>1</sup> in 2004, amending an earlier act from 1940. The act provides a number of protections to servicemembers that the general practitioner should be familiar with.<sup>2</sup>

## Tolling of the Period of Limitations

The period of military service may not be included in computing the period of limitations for or against a servicemember.<sup>3</sup> The tolling provision applies whether the cause of action accrued before or after the beginning of military service and does not require a showing that military service materially affects the servicemember's ability to participate in the litigation. It even tolls the running of the period of limitations for a career servicemember,

### *Fast Facts:*

The Servicemembers Civil Relief Act may make military service the best defense to the numerous foreclosures facing Americans today.

The rate of interest on all liabilities of servicemembers and their spouses incurred before military service shall be reduced to 6 percent when they begin active duty.

A soldier called to active duty with the military may terminate a residential, business, or agricultural real estate lease by service of a notice of termination and military mobilization orders on the lessor.

i.e., the cause of action may be tolled for many years. However, a servicemember who unnecessarily delays bringing suit could face the defense of laches. Although the tolling provision applies to the servicemember's estate, it does not apply to family members or dependents. The tolling provision applies to the limitations period for bringing the cause of action, not to civil procedure time limits imposed within a suit. It applies to National Guard and reserve servicemembers on active duty for training or military duty, but does not apply to them when they are performing weekend duty or their annual training.

The Michigan Supreme Court recently considered the application of the SCRA tolling provision to a cause of action brought against a servicemember in *Walters v Nadell*.<sup>4</sup> In that case, the plaintiff wanted to sue a servicemember for negligent driving that had caused an injury. A summons was issued, but could not be served because the defendant was in the military. The period of limitations ran while the plaintiff was unsuccessfully attempting to serve the summons. The defendant was finally served with the second summons at Fort Benning, Georgia. He moved to dismiss, arguing that the period of limitations had run. The plaintiff responded to the motion by arguing that the period of limitations had been tolled while the defendant was out of the state, but the plaintiff did not raise the SCRA tolling provision. The trial court granted the motion to dismiss the cause of action on the basis that the period of limitations had run.

The Court of Appeals affirmed, as did the Supreme Court. The Supreme Court ruled that while the SCRA tolling provision was mandatory, it could be waived, at least with respect to civilians bringing suits against servicemembers. Since the plaintiff had failed to raise the SCRA tolling provision in the response to the motion to dismiss, he waived the tolling provision.

*Walters* puts additional pressure on plaintiffs' counsel to know or find out whether the defendant is or was in the military. The plaintiff in *Walters* knew that the defendant was in the military, since the defendant was served at Fort Benning. But plaintiffs in other cases might miss the fact that the defendant was in the military for a limited time, during which the period of limitations was tolled, and has now returned to his or her nonmilitary status.

### The 6 Percent Solution

The SCRA limits the legal interest rate on all liabilities of servicemembers and their spouses incurred before military mobilization to 6 percent as of the date the servicemember begins active duty.<sup>5</sup> A recent amendment of this provision, often called the foreclosure prevention act of 2008, extended the period of the 6 percent interest-rate cap on mortgages to the period of military service plus one year thereafter.<sup>6</sup> This may be the most important protection under the act for mobilized soldiers. Interest above 6 percent is not deferred, as it was under the former version of the provision; it is now forgiven. Thus, the monthly payment on a 7 percent, 30-year, \$200,000 mortgage will be reduced from \$1,330.60 to \$1,199.10. The reduction of credit card payments will be just as dramatic. Under the act, interest includes service charges, renewal charges, fees, and any other charges except those for bona fide insurance. The servicemember must provide the creditor with written notice of mobilization, along with a copy of the active duty military orders. The servicemember may give this notice up to 180 days after his or her release from active duty.

A creditor may seek relief from the interest-rate cap by showing a court that the servicemember's mobilization does not materially affect his or her ability to pay the contractual interest rate. Thus, high school and college students who join the military directly out of school and receive a regular paycheck for the first



time will often be unable to prove that their military service materially affects their ability to pay the contractual interest rate.<sup>7</sup>

The United States Department of Education has taken the position that the 6 percent interest-rate cap does not apply to guaranteed student loans, but there are other statutory and regulatory provisions that offer the servicemember protection in those circumstances.<sup>8</sup>

### Foreclosure

While a servicemember is on active duty, a creditor may not foreclose on or repossess real property for the breach of a mortgage the servicemember executed before active duty unless the creditor first obtains a court order or a waiver from the servicemember.<sup>9</sup> To do so is a federal misdemeanor.<sup>10</sup> If the creditor or the servicemember goes to court, the court may stay the proceedings, lower the payments, extend the redemption period by a period equal to that of the servicemember's military service, or set aside a foreclosure judgment already entered to allow the servicemember to assert a valid defense. The court may order a stay or adjust the payments only if the servicemember shows that his or her military service has materially affected the ability to pay the mortgage. Finally, a court may appoint three disinterested persons to appraise the property.<sup>11</sup> If undue hardship to the servicemember's dependents will not result, the court may allow the foreclosure to proceed, but condition it on the creditor paying the servicemember the equity in the property. The SCRA also provides that the period provided by law for redeeming real property must be extended to include any period of active military service.<sup>12</sup>

The SCRA may make military service one of the best defenses to the numerous home foreclosures facing Americans.

### Evictions

During the servicemember's military service, a landlord may not evict a servicemember or the servicemember's dependents from premises occupied primarily as a residence and for which the monthly rent does not exceed \$2,400 (which is adjusted for inflation) unless the landlord first obtains a court order.<sup>13</sup> If a

court determines that military service materially affects the servicemember's ability to pay the agreed-to rent, the court may stay the proceedings for 90 days or longer or adjust the monthly payments under the lease.

### Termination of a Lease

A mobilized servicemember may terminate a residential, business, or agricultural real estate lease by serving on the lessor a notice of termination and his or her military mobilization orders.<sup>14</sup> This may be done after entry into military service or after receiving military orders for a permanent change of station. The termination is effective 30 days after the next rental payment is due and the notice is delivered. This notice will also terminate the obligation of any dependent of the servicemember. Note that the servicemember may terminate a lease regardless of whether military service materially affects his or her ability to perform the lease requirements.<sup>15</sup>

### Taxation

The SCRA provides that a servicemember does not lose residency status for tax purposes in his or her state of residence solely as a result of complying with military orders.<sup>16</sup> Since the state of Michigan does not tax military pay, Michigan servicemembers should be relieved of paying state income tax on their military pay, regardless of the tax laws of the states where they are stationed. However, servicemembers may be subject to a state income tax in a state where they earn income from a second job.

### Default

Most practitioners are familiar with the SCRA requirement that a court may not enter a default judgment unless the plaintiff files an affidavit setting forth whether the defendant is in the military. This affidavit is required in any civil action when the defendant does not appear.<sup>17</sup> An affidavit may not be required in in rem proceedings or other actions that are not against a defendant.<sup>18</sup>

Once it is determined that the defendant in default is in the military service, the court may not enter a default judgment until it appoints an attorney to represent the defendant.<sup>19</sup> The attorney's duties are to contact the servicemember, advise him or her of the protections of the SCRA, determine the servicemember's wishes concerning the case, and, if appropriate, move for a stay of the proceedings.<sup>20</sup> If the attorney cannot locate the servicemember,



---

Since the state of Michigan does not tax military pay, Michigan servicemembers should be relieved of paying state income tax on their military pay, regardless of the tax laws of the states where they are stationed.

---

the attorney's actions do not waive any defense or bind the servicemember in any way. However, the servicemember will be bound by acts of his or her appointed attorney that the servicemember authorizes.

A default judgment taken against a servicemember in violation of the SCRA is voidable rather than void.<sup>21</sup> If a default judgment is wrongfully entered against a servicemember during his or her period of active duty, or within 60 days thereafter, the servicemember has until 90 days after active service to apply to reopen the default judgment. To reopen the default judgment, the servicemember must show that he or she did not appear in the case, that military service materially affected his or her ability to defend the suit, and that he or she has a meritorious defense.<sup>22</sup> Servicemembers and their attorneys must be careful, since there are many actions that constitute "an appearance." The courts are split on whether a request for a stay pursuant to the SCRA constitutes an appearance.<sup>23</sup> Generally, the actions of a court-appointed attorney will not constitute an appearance.

### Request for a Stay

The SCRA also provides for a stay of pending litigation when the servicemember is mobilized.<sup>24</sup> If the servicemember is in military service, or has been released from military service for no more than 90 days, and becomes involved in a legal matter, the court *must* stay the action for 90 days. An application for such a stay must include facts showing that military service materially affected the servicemember's ability to appear, when the servicemember anticipates being available to appear, and a letter from the servicemember's commanding officer stating that military leave is not authorized for the servicemember to attend court proceedings.<sup>25</sup> The delay or inconvenience that may result from postponing the proceedings is immaterial with regard to the issue whether to grant a stay. Federal law requires the Department of Defense to facilitate leave for servicemembers involved in child-custody or paternity proceedings.<sup>26</sup> The department has issued an instruction that leave must be granted in those cases unless the servicemember is in a deployed unit or his or her presence for military duty requires a denial of leave.<sup>27</sup>

A court may continue a stay if it finds a continuing material effect of military duty. The courts have yet to decide how to factor in the options or availability of video depositions, video conferencing, and the Internet when deciding if there is a material effect. Every party prefers to be present for trial, but whether the courts choose to use these new substitutes for a personal appearance by the servicemember is still to be determined.<sup>28</sup> If the court denies a stay, it must appoint counsel to represent the servicemember.<sup>29</sup>

### Stay of Execution of a Judgment

If military duty materially affects a servicemember's ability to comply with a judgment, the court may stay the execution of a judgment or vacate any attachment or garnishment.<sup>30</sup>

### Conclusion

The transition from civilian to military life leaves the citizen-soldier vulnerable. Soldiers do not control where they live, what they do, or how they are paid. The courts should interpret the Servicemembers Civil Relief Act with that in mind. Our citizen-soldiers deserve protection. ■

*Charles A. Palmer is a professor of law at the Thomas M. Cooley Law School and a retired lieutenant colonel in the Judge Advocate General's Corps of the Michigan Army National Guard. Professor Palmer is also an active participant in Cooley Law School's Service to Soldiers Program.*

### FOOTNOTES

- 50 USC Appendix 501 through 596.
- One of the best sources of information on the Servicemembers Civil Relief Act is the booklet titled *The Servicemembers Civil Relief Act Guide*, JA260 (March 2006), published by the Judge Advocate General's School of the United States Army, available at <[https://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/8f7edfd448e0ec6c8525694b0064ba51/3f3df08556f42b808525713f004ee09f/\\$FILE/JA%20260%20\(March%202006\).pdf](https://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/8f7edfd448e0ec6c8525694b0064ba51/3f3df08556f42b808525713f004ee09f/$FILE/JA%20260%20(March%202006).pdf)> (accessed September 22, 2008). I highly recommend this booklet to any practitioner dealing with a mobilized soldier's legal rights.
- 50 USC Appendix 526.
- Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008).
- 50 USC Appendix 527.
- See PL 110-289, § 2203, 122 Stat 2654.
- Guide*, p 6-3.
- Id.*, p 6-4.
- Id.*, p 4-20; 50 USC Appendix 533.
- 50 USC Appendix 533(d)(1).
- 50 USC Appendix 534.
- 50 USC Appendix 526.
- 50 USC Appendix 531.
- 50 USC Appendix 535.
- Guide*, p 4-11.
- 50 USC Appendix 571(a).
- 50 USC Appendix 521.
- Guide*, p 3-11.
- 50 USC Appendix 521(b)(2).
- Guide*, p 3-21.
- Id.*, p 3-15; *Thompson v Lowman*, 108 Ohio App 453, 456; 155 NE2d 258, 261 (1958).
- Guide*, p 3-4; 50 USC Appendix 521.
- Guide*, pp 3-5 to 3-6; *Blankenship v Blankenship*, 80 So 2d 335, 336 (Fla, 1955); *O'Neill v O'Neill*, 515 So 2d 1208 (Miss, 1987).
- 50 USC Appendix 522.
- 50 USC Appendix 522(2).
- 10 USC 704.
- United States Department of Defense, Instruction 1326.7, Leave and Liberty Procedures, ¶ 6.22 (April 22, 2005), available at <<http://www.dtic.mil/whs/directives/corres/pdf/132706p.pdf>> (accessed September 22, 2008).
- Guide*, p 3-33.
- 50 USC Appendix 522(d)(2).
- 50 USC Appendix 524.

