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# INDIANA JUDGE'S GUIDE: SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

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# INDIANA JUDGE'S GUIDE TO THE SERVICEMEMBERS CIVIL RELIEF ACT *SPECIAL EDITION*

The 2016 Indiana Judge's Guide to the Servicemembers Civil Relief Act is a project of the Indiana University, Robert H. McKinney School of Law, Army OneSource and the Servicemembers Civil Relief Act Foundation, Inc.



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## FOREWORD

By The Honorable Steven H. David, Indiana Supreme Court

“The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the Veterans of earlier wars were treated and appreciated by their nation.” *President George Washington*

Relief for servicemembers can be traced as far back as the Civil War when Congress passed a total moratorium on civil actions that could be brought against Union soldiers and sailors. Today’s Servicemember’s Civil Relief Act (SCRA) has expanded and improved the former Soldiers’ and Sailors’ Civil Relief Act (SSCRA). The SCRA applies to all active duty servicemembers, including members of the National Guard, and the Reserve Components while on active duty. It provides a wide range of protections for active duty servicemembers so that while they are serving their country, they and their families do not have to worry about certain problems that might arise at home. For example, courts will generally require litigants to provide proof that an individual is not on active duty before adverse action is taken, i.e. foreclosures, garnishments, attachments, evictions, and judgments. Other areas in which servicemembers may receive help under the SCRA include outstanding credit card debt, mortgages, leases, taxes, insurance, and child custody.

As one who has served on active duty, including two post 9-11 mobilizations, I have personally benefited from the protections afforded under the SCRA and I have seen countless examples of where it has made a significant difference in the lives of those who serve our country and their families.

Our Military puts their country first, always. The SCRA is an effort at understanding the sacrifices our servicemembers make on a daily basis, ensuring their contribution and efforts are advocated and their absences bearable.



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## 1. **INTRODUCTION**

Congress enacted the Servicemembers Civil Relief Act of 2003, 50 U.S.C. App. §§ 3901 - 4043 (the “SCRA” or “Act”), to provide temporary suspension of administrative and judicial proceedings when military service materially affects the ability of a servicemember to meet or attend to civil obligations. The purpose of this Guide is to provide an overview of the SCRA, and to assist the judiciary and other members of Indiana’s legal community in understanding the Act and its protections for military personnel and their families.

### 1.1 **HISTORY AND PURPOSE OF THE SCRA**

Congress passed the Soldiers’ and Sailors’ Civil Relief Act of 1940 “SSCRA”<sup>1</sup> to uphold the civil and constitutional rights of men and women in uniform during service to their country.<sup>2</sup> Because of its limitations, the SSCRA was superseded on December 19, 2003 by the SCRA. Although the SCRA considerably changed the older SSCRA, many of the primary benefits and protections for servicemembers remain the same. The SCRA has been subsequently amended to expand and clarify protections.

The purpose of the SCRA is twofold:

- To provide for, strengthen, and expedite the national defense through protection to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation;<sup>3</sup> *and*
- 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.<sup>4</sup>

As stated by the leading expert on the SCRA, Colonel (Ret.) John S. Odom, Jr., the guiding principle for courts is to liberally interpret the Act in favor of the servicemembers it is intended to protect. The SCRA “must be read with an eye friendly to those who dropped their affairs to answer their country’s call.”<sup>5</sup>

## 2. **ORGANIZATION**

The location of the SCRA within the United States Code has recently changed. Previously found at (codified and cited as) 50 U.S.C. App. §§ 501-597b, there was an editorial reclassification of the SCRA by the Office of the Law Revision Counsel of the United States House of Representatives that became effective on December 1, 2015. The SCRA is now found at (codified as) 50 U.S.C. App. §§ 3901 - 4043.

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<sup>1</sup> Soldiers’ and Sailors’ Civil Relief Act of 1940 (SSCRA), 76 P.L. 861, 54 Stat. 1178, 76 Cong. Ch. 888 (1940).

<sup>2</sup> U.S. Department of Justice, *The Servicemembers Civil Relief Act (SCRA)*, available at <https://www.justice.gov/crt-military/servicemembers-civil-relief-act-skra>.

<sup>3</sup> 50 U.S.C. App. § 3902.

<sup>4</sup> *Id.*

<sup>5</sup> *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948); *See also, Boone v. Lightner*, 319 U.S. 561, 575 (1943) (holding that the Act is to be “liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation”).

The SCRA consists of two brief introductory sections, followed by eight titles:

- **Title I** – General Provisions
- **Title II** – General Relief
- **Title III** – Rent, Installment Contracts, Mortgages, Liens, Assignments, Leases, Telephone Service Contracts
- **Title IV** – Life Insurance
- **Title V** – Taxes and Public Lands
- **Title VI** – Administrative Remedies
- **Title VII** – Further Relief
- **Title VIII** – Civil Liability<sup>6</sup>

### 3. **GENERAL PROVISIONS**

#### 3.1. **JURISDICTIONAL APPLICATION**

The SCRA applies to any civil judicial or administrative proceeding in the United States and its territories, including both federal and state courts and administrative agencies.<sup>7</sup> The SCRA does *not* apply to criminal cases.

#### 3.2. **INDIVIDUALS COVERED BY THE SCRA**

- Members of the Army, Navy, Air Force, Marine Corps, and Coast Guard on *active* duty (including reserves ordered to active duty).<sup>8</sup>
- National Guard members called to *active* service under Title 32, U.S.C. for over 30 consecutive days by the President or the Secretary of Defense in response to a federally-funded response to a national emergency.<sup>9</sup>
- Commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration when on active service.<sup>10</sup>
- In limited circumstances (e.g., evictions, lease terminations, foreclosures, and installment contract terminations), SCRA protections extend to servicemembers' dependents. Dependents include the servicemembers spouse, children, and any other individual(s) for whom the servicemember provided

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<sup>6</sup> Title VIII was added by P.L. 111-275, effective October 13, 2010.

<sup>7</sup> 50 U.S.C. App. §§ 3911(5), 3912.

<sup>8</sup> *Id.* at § 3911(2); 10 U.S.C. 101(d)(1).

**Indiana Practitioners' Note:** SCRA protections begin on the date the servicemember enters *active* duty military service. For military reservists, protections begin *upon receipt of military orders* calling the servicemember to active duty (protections apply from the date a servicemember receives the *mobilization order*. A Reservist's two-week annual tour will count as active duty under the SCRA; however, weekend drills or inactive duty for training will not.

<sup>9</sup> 50 U.S.C. App. § 3911(2)(A)(ii).

<sup>10</sup> *Id.* at § 3911(2)(B); 10 U.S.C. §§ 101(a)(5)(B)-(C).



more than one-half of the individual's financial support for 180 days immediately preceding application for relief under the Act.<sup>11</sup>

- Anyone to whom the servicemember has granted a Power of Attorney.<sup>12</sup>

### 3.3. MILITARY SERVICE DEFINED

#### 3.3.1. Army, Navy, Air Force, Marine Corps, and Coast Guard Members

For members of the above branches of the Armed Forces, *active* military service is defined as training or duty under federal laws in the active military service of the United States.<sup>13</sup> This includes full-time training duty, annual training duty, and attendance (while in the active military service) at a school designated as a military service school.<sup>14</sup> The SCRA applies regardless of duty location.

#### 3.3.2. National Guard Members

For members of the National Guard, military service includes service under federal calls to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days, in response to a national emergency declared by the President and supported by national funds.<sup>15,16</sup>

#### 3.3.3. Absences Due to Illness or Injury

Military service includes time periods of a servicemember's absence from *active* duty due to sickness, wounds, leave, or other lawful causes.<sup>17</sup>

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<sup>11</sup> 50 U.S.C. App. §§ 3911(4), 3959; Ind. Code § 10-16-20-3; *See also Balconi v. Dvascas*, 507 N.Y.S.2d 788 (N.Y. City Ct. 1986) (holding that a servicemember's ex-wife was a dependent within the meaning of the Act because she was still financially dependent on the servicemember).

<sup>12</sup> Anyone to whom the servicemember has given a Power of Attorney can demand any and all protections available under the SCRA on the servicemember's behalf.

<sup>13</sup> 50 U.S.C. App. § 3911(2)(a)(i); 10 U.S.C. § 101(d)(1); Ind. Code § 10-16-7-23.

<sup>14</sup> 10 U.S.C. § 101(d)(i).

**Indiana Practitioners' Note:** Under Ind. Code § 10-16-7-23(a)(2), this *includes* state active duty in accordance with Ind. Code § 10-16-7, performed under an order the governor of Indiana or the governor of any other state.

<sup>15</sup> 50 U.S.C. App. § 3911(2)(A)(ii).

**Indiana Practitioners' Note:** Under Ind. Code § 10-16-6-13, the Indiana National Guard *shall* provide to members and reserve members, a list of the rights a servicemember or a servicemember's dependent has under the state and federal SCRA as of July 1, 2015.

<sup>16</sup> **Indiana Practitioners' Note:** Under Ind. Code § 10-16-20-2, Indiana law provides protections to National Guard members ordered by the governor to *active* service for *more than* 30 consecutive days in support of state emergencies or similar situations. As of July 1, 2016, National Guard members of another state are extended protections for service under an order by the governor of that state to active duty for a period of more than 30 consecutive days, amending Ind. Code § 10-16-7-23, § 10-16-20-2, § 36-8-3.5-12, § 36-8-4-7, § 36-8-8-7.

<sup>17</sup> Ind. Code § 10-16-20-2(1)(E).

### **3.3.4. What is Not Military Service**

Military service does not include absence from *active* duty while incarcerated in a military prison, absence without leave (AWOL),<sup>18</sup> or citizens working as contractors.

## **3.4. PERIOD OF MILITARY SERVICE**

### **3.4.1. Period of Military Service Defined**

The period beginning on the date that a servicemember begins military service, and ending on the date of a servicemember's release from military service or death during military service.<sup>19</sup>

## **3.5. WAIVER OF BENEFITS AND PROTECTIONS**

### **3.5.1. Benefits and Protections Not Necessarily Automatic**

Many SCRA protections are not necessarily automatic. Instead, they require the servicemember to assert the protections in a timely manner to prevent a waiver of such protections.<sup>20</sup>

### **3.5.2. Waiver Requirements**

Certain SCRA rights and protections may only be waived pursuant to a separate signed, written agreement that meets the Act's specific waiver requirements.<sup>21</sup> Written waivers are effective only if executed *during* or *after* the relevant period of military service and *must* be in at least 12-point font. In order to be effective, the written waiver must be its own document. For example, written waivers are required in the following contexts:

- (a) The modification, termination, or cancellation of:
  - (i) A contract, lease, or bailment; or
  - (ii) An obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage; *or*
- (b) The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that:
  - (i) Is security for an obligation; or

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<sup>18</sup> See *Reed v. Albaaj*, 723 N.W.2d 50, 54 (Minn. Ct. App. 2006) (holding that husband was not entitled to protections of the Act, because he was not on *active* duty when he was incarcerated in an out-of-state military prison during the dissolution-of-marriage proceeding).

<sup>19</sup> 50 U.S.C. App. § 3911(3).

<sup>20</sup> *Id.* at § 3955(d)(1) (A residential lease is not terminated until 30 days after the next rent payment is due. For termination clock to start, servicemember must present military orders to landlord). See *Walters v. Nadell*, 481 Mich. 377, 386; 751 N.W. 2d 431 (2008) (determining that the Act's mandatory tolling protection may be waived if it is not raised in a timely fashion during litigation). See also *Stillwell v. Deer Park Mgmt.*, 873 N.E.2d 647, 648-49 (Ind. Ct. App.), *on reh'g*, 877 N.E.2d 227 (Ind. Ct. App. 2007) (finding servicemembers have 30 days to present current military orders to his or her landlord).

<sup>21</sup> 50 U.S.C. App. § 3918(a).

- (ii) Was purchased or received under a contract, lease, or bailment.<sup>22</sup>

### **3.6. ENFORCEMENT**

#### **3.6.1. Civil Liability for Violations of the SCRA**

##### **3.6.1.1. *Civil Actions by the Attorney General***

The Attorney General *may* bring a civil action in federal district court against any person who violates the Act or whose violation raises an issue of significant public importance.<sup>23</sup>

##### **3.6.1.2. *Relief for Civil Actions by the Attorney General***

The court *may* grant appropriate equitable, declaratory, and other relief, including monetary damages.<sup>24</sup> The court *may*, in the public interest, assess a civil penalty up to \$55,000 for a first violation, and up to \$110,000 for a subsequent violation.<sup>25</sup> An action brought by the Attorney General does not preclude or limit any other remedies available by law, including consequential and punitive damages.<sup>26</sup>

##### **3.6.1.3. *Civil Actions by an Aggrieved Party***

A servicemember or servicemember's dependent protected by the SCRA *may* bring a civil action against violations of the Act.<sup>27</sup>

##### **3.6.1.4. *Relief for Civil Actions by an Aggrieved Party***

The court may grant appropriate equitable, declaratory, and other relief, including monetary damages, court costs, and reasonable attorney fees.<sup>28</sup> However, the availability and appropriate measure of such remedies have been found to be governed solely by federal law.<sup>29</sup> An action brought by an aggrieved party does not preclude or limit any other remedies available by law, including consequential and punitive damages.<sup>30</sup>

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<sup>22</sup> *Id.* at § 3918(b)(1)(A).

<sup>23</sup> *Id.* at § 4041(a); Ind. Code § 10-16-20-5.

<sup>24</sup> 50 U.S.C. App. §§ 4041(b)(1)-(2).

<sup>25</sup> *Id.* at § 4041(b)(3).

<sup>26</sup> *Id.* at § 4043.

<sup>27</sup> *Id.* at § 4042.

<sup>28</sup> *Id.*

<sup>29</sup> See *Hurley v. Deutsche Bank Trust Co. Ams.*, 2009 U.S. Dist. LEXIS 20261, at \*29 (W.D. Mich. Mar 13, 2009) (noting that because the Act is a federal statute, federal law should control the availability of punitive damages for SCRA violations, not state law).

<sup>30</sup> 50 U.S.C. App. § 4043; See *Hurley*, 2009 U.S. Dist. LEXIS 20261, at \*8 (noting that remedies under the Act are separate and distinct from state law remedies because the SCRA arises from Congress's enumerated power to raise and maintain national armed forces).

### **3.6.1.5. *Statute of Limitations Applicable to Civil Actions for Violations of the SCRA***

The SCRA is silent concerning the statute of limitations for civil actions brought by or on behalf of an aggrieved party; applicable state law and other federal law control. However, in all actions other than actions arising under United States Internal Revenue Code, the tolling provision of SCRA § 3936 requires the servicemember's period of military service to be added to the applicable statute of limitations.<sup>31</sup> For example, when a servicemember brings a claim for improper mortgage foreclosure in violation of SCRA §3953, the claim, being "founded upon covenants in deeds and mortgages of real estate," must be brought within the overall period of the term of military service plus 10 years.<sup>32</sup>

## **3.6.2. Criminal Liability for Violations of the SCRA**

### **3.6.2.1. *Violations Subject to Criminal Liability***

Concerning only the protections discussed in this Guide, a person who engages in any of the following is subject to criminal liability:

- **SCRA § 3931** Protection of servicemembers against default judgments: knowingly making or using a false affidavit concerning a servicemember's military status.<sup>33</sup>
- **SCRA § 3937** Maximum rate of interest on debts incurred before military service: knowingly exceeding the 6% interest rate limitation in violation of the Act.<sup>34</sup>
- **SCRA § 3951** Evictions and distress: knowingly taking part in an eviction or distress in violation of the Act, or knowingly attempting to do so.<sup>35</sup>
- **SCRA § 3952** Protection under installment contracts for purchase or lease: knowingly resuming possession of property in violation of the Act, or knowingly attempting to do so.<sup>36</sup>
- **SCRA § 3953** Mortgages and trust deeds: knowingly making or causing a sale, foreclosure, or seizure of property in violation of the Act, or knowingly attempting to do so.<sup>37</sup>
- **SCRA § 3955** Termination of residential or motor vehicle lease: knowingly seizing, holding, or detaining the personal effects,

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<sup>31</sup> 50 U.S.C. App § 3936(a).

<sup>32</sup> *Id.* at § 3936(a).

<sup>33</sup> *Id.* at § 3931(c).

<sup>34</sup> *Id.* at § 3937(a).

<sup>35</sup> *Id.* at § 3951.

<sup>36</sup> *Id.* at § 3952.

<sup>37</sup> *Id.* at § 3953(d).

security deposit, or other property of a servicemember or their dependent who lawfully terminates a lease, or knowingly interfering with the removal of such property from premises covered by such lease, for the purpose of subjecting or attempting to subject such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempting to do so.<sup>38</sup>

- **SCRA § 3958** Enforcement of storage liens: knowingly foreclosing or enforcing a lien on the property or effects of a servicemember in violation of the Act, or attempting to do so.<sup>39</sup>

### **3.6.2.2. *Penalty for Criminal Violations***

A person who engages in any of the above conduct in violation of the SCRA may be fined under 18 U.S.C. § 3571, imprisoned for not more than one year, or both.<sup>40</sup>

## **4. PROCEDURAL PROTECTIONS**

### **4.1. DEFAULT JUDGMENTS**

A critical area of concern for many servicemembers is the inability to attend to important legal matters during military service. To help alleviate such concerns, the SCRA provides certain protections from default judgments<sup>41</sup> but does not grant immunity from liability.<sup>42</sup> Those protections are embodied in SCRA § 3931.

#### **4.1.1. Applicability**

SCRA § 3931 applies to all civil actions or proceedings, including child custody proceedings,<sup>43</sup> in which the servicemember does not make an appearance. This includes proceedings in all federal and state courts and administrative agencies.<sup>44</sup>

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<sup>38</sup> *Id.* at § 3955(h).

<sup>39</sup> *Id.* at § 3958.

<sup>40</sup> *Id.* at §§ 3931(c), 3937(e), 3951(c), 3952(b), 3953(d), 3955(h), 3958(c).

<sup>41</sup> *Id.* at § 3931; *See also In re Redmond*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008) (finding the SCRA prevents default judgments against members of the military when they might be unable to participate in litigation).

<sup>42</sup> *See Boylston v. Our Lady of Bellefonte Hospital, Inc.*, 2008 WL 5047678 (E.D. Ky. 2008) (finding that while the SCRA grants servicemembers the option to suspend certain cases; however, it does not give them immunity from claims. In particular, the servicemember was given loan-assistance from an employer prior to being called up to active duty).

<sup>43</sup> Concerning child custody matters, the SCRA gives courts no guidance regarding how to balance servicemembers' interests against other relevant interests, including the best interests of the child.

<sup>44</sup> 50 U.S.C. App. §§ 3911, 3931.

#### 4.1.2. Affidavit Requirement

Before any default judgment may be entered, the plaintiff must file an affidavit<sup>45</sup> stating:

- a) Whether or not the defendant is in military service (with supporting facts); *or*
- b) That the plaintiff is unable to determine whether the defendant is in military service.<sup>46,47</sup>

##### 4.1.2.1. Form of Affidavit

The affidavit requirement may be satisfied by a signed, written statement certified to be true under penalty of perjury.<sup>48</sup>

#### 4.1.3. Military Service Certificates

Because it is the court's duty to determine the status of a defendant's military service before entering a default judgment, the SCRA permits the court or the parties to apply for a certificate from the Department of Defense "DoD" concerning a party's military service.<sup>49</sup> The DoD office contact for such inquiries is the Defense Manpower Data Center which services an online database, available at <https://scra.dmdc.osd.mil/>

#### 4.1.4. Attorney Appointment

Where it appears the defendant is in military service and has not entered an appearance, the court *may not* enter a judgment until after the court appoints an attorney to represent the defendant. If the appointed attorney cannot locate the servicemember, actions by the attorney in the case will not waive any defense or otherwise bind the servicemember.<sup>50</sup> The court may by rule, or on an individual basis, make a determination in each case as to the amount and source of compensation of any counsel appointed to represent the servicemember. Factors include but are not limited to: the merits of the

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<sup>45</sup> See *Merrill v. Beard*, 2007 WL 461469 (N.D. Ohio 2007) (the court granted a servicemember relief from a default judgment after finding that the plaintiff had not filed an affidavit with the court certifying whether or not the defendant was a servicemember. The court held that the statute required strict adherence).

<sup>46</sup> 50 U.S.C. App. § 3931(b)(3).

<sup>47</sup> **Indiana Practitioners' Note:** The law generally does not allow non-military defendants to collaterally attack default judgments merely on the technical ground that an affidavit concerning military service was not filed. See, e.g., *Haller v. Walczak*, 347 Mich. 292, 296-299; 79 N.W. 2d 622 (1956) (holding that the SCRA was enacted to protect those in the military, not others, and affirming a default judgment because, *inter alia*, the non-servicemember defendants had not been prejudiced by the plaintiff's failure to file an affidavit concerning military service before the default judgment was entered).

<sup>48</sup> 50 U.S.C. App. § 3931(b)(4).

<sup>49</sup> *Id.* at § 4012.

<sup>50</sup> *Id.* at § 3931(b)(2).

case; the servicemember's ability to pay; and whether the costs should be shifted to the plaintiff.

#### 4.1.5. Posting a Bond

If the court cannot determine whether the defendant is in military service before entering judgment, it *may* require the plaintiff to post a bond in an amount approved by the court to indemnify a servicemember against any loss or damage that the servicemember may suffer by reason of the judgment, should that judgment later be set aside, in whole or in part. Such bond will remain in effect until the expiration of the time for setting aside the judgment and for the applicable appeal period.<sup>51</sup>

#### 4.1.6. Stays in Default Proceedings

In any proceeding where a defendant is in military service and fails to make an appearance, the court *must* grant a stay of such proceedings for a minimum of 90 days upon application of counsel, or on the court's own motion, if the court determines that:

- a) There may be a defense to the action and a defense cannot be presented without an appearance of the defendant;<sup>52</sup> *or*
- b) After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.<sup>53</sup>

Such stays are separate and distinct from stays in cases where the servicemember *receives actual notice* of the action.<sup>54</sup> Where the servicemember *receives actual notice* of the proceedings, stays are controlled by 50 U.S.C. App. § 3932.

#### 4.1.7. Reopening and Vacating Default Judgments

Default judgments entered in violation of the SCRA *are* voidable and may be vacated.<sup>55</sup>

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<sup>51</sup> *Id.* at § 3931(b)(3); *See also Seton v. United Gold Network, LLC*, 2008 WL 1925180 (D. Md. 2008) (the creditor-plaintiff was unable to establish whether the debtor was a service-member prior to the court's ruling and the court required the creditor to file a bond to indemnify the defendant before awarding a default judgment. The court reasoned that this bonding was to protect the defendant, should they be found to be an *active* duty servicemember protected under the SCRA).

<sup>52</sup> 50 U.S.C. App. § 3931(b)(3).

**Indiana Practitioners' Note:** Although a servicemember's absence is considered *prima facie* prejudicial, such a presumption of prejudice has been found to be rebuttable. *See also Barry v. Keeler*, 322 Mass 114, 121; 76 N.E.2d 158 (1947) (finding that granting non-military codefendants a stay or continuance due to the servicemember-codefendant's military service is within the sound discretion of the court).

<sup>53</sup> 50 U.S.C. App. § 3931(d); *See also U.S. v. Pilling*, 2012 U.S. Dist. LEXIS 111858 (D. Mass. Aug. 9, 2012) (the court rejected a mortgagor's request for a court order authorizing foreclosure. The court found that the SCRA requires the mortgagor to show that the servicemember had been put on *actual notice* of the proceedings against them, and that the mortgagor's failure to find a valid street address for the service-member barred the court from allowing the foreclosure).

<sup>54</sup> 50 U.S.C. App. §§ 3931(e)-(f).

<sup>55</sup> *Id.* at § 3931(g).

#### 4.1.7.1. *Procedures for Vacating Default Judgments*

Default judgments *may* be reopened and vacated under the following conditions:<sup>56</sup>

- (a) The default judgment *must* have been entered during the servicemember's period of military service or within 60 days after termination of or release from military service;<sup>57</sup>
- (b) The servicemember *must* file an application with the court or tribunal that issued the default judgment, and affirmatively seek to vacate the default judgment and reopen the case for purposes of defending against the action. Such an application must be filed no later than 90 days after the termination of or release from military service;<sup>58</sup> *and*
- (c) The servicemember must establish that, at the time the judgment was entered, the servicemember:
  - (i) Was *materially affected*<sup>59</sup> by their military service in making a defense; *and*
  - (ii) Has a meritorious or legal defense to the action, in whole or in part.<sup>60</sup>

#### 4.1.7.2. *Protections for Bona Fide Purchasers*

Even where a court or tribunal vacates a default judgment against a servicemember pursuant to a provision of the SCRA, such an action will not impair a right or title acquired by a bona fide purchaser for value under the default judgment.<sup>61</sup>

## 4.2. STAY OF JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

SCRA § 3932 provides for stays in court and other proceedings where the servicemember *receives notice* of the action or proceeding.

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<sup>56</sup> See *U.S. v. Payton-Hubbard*, 2008 WL 824249 (C.D. Ill. 2008) (the court vacated default judgments entered against the defendant after it was later found that they had been in *active* military service during the trial. Before setting aside the judgment, the court *required* the service member show that they were on *active* duty and that the active duty *materially affected* their ability to appear for trial).

<sup>57</sup> 50 U.S.C. App. at § 3931(g)(1).

<sup>58</sup> *Id.* at § 3931(g)(2).

<sup>59</sup> **Indiana Practitioners' Note:** Any court has the discretion to inquire into *material effect* that may include:

(1) an affidavit setting out all the facts and circumstances, usually executed by the member or the member's commander; (2) a copy of the member's Leave and Earnings Statement (the military equivalent of a pay statement) to show his or her basic pay, Basic Allowance for Housing, Basic Allowance for Subsistence, other pay or allowances, tax withholdings, voluntary allotments to pay bills or support, and accrued leave; or (3) a more specific affidavit detailing the member's efforts to appear in court, and the next court date when he or she would be available.

<sup>60</sup> 50 U.S.C. App. §§ 3931(g)(1)(A)-(B).

<sup>61</sup> *Id.* at § 3931(h).



#### 4.2.1. Applicability

Subject to the minor limitations discussed in Section 4.2.5, SCRA § 3932 contains the general stay provisions. These provisions apply to *all* civil actions or proceedings, including child custody proceedings, in which, at the time of filing an application, the plaintiff *or* defendant:

- (a) Is in military service, or has not been terminated or released from military service for longer than 90 days; *and*
- (b) Has *received notice* of the action or proceeding.<sup>62</sup>

#### 4.2.2. Stay Application Process

At any stage before final judgment in a proceeding, a servicemember *may* file an application for or otherwise request a stay of proceeding.<sup>63</sup>

##### 4.2.2.1. Initial 90 Day Stay

Where a stay application is made, the court or tribunal *must* stay the proceeding for no less than 90 days<sup>64</sup> – subject to the conditions discussed in Section 4.2.2.2.<sup>65</sup>

##### 4.2.2.2. Conditions for Stay

The servicemember's stay application *must* include:

- (a) A statement that:
  - (i) Explains how the servicemember's current military duties *materially affect* the servicemember's ability to appear; and
  - (ii) States a date when the servicemember will be available to appear; *and*
- (b) A statement from the servicemember's commanding officer stating that:
  - (i) The servicemember's current military duties prevent appearance; and
  - (ii) Military leave is not available at the time of the letter.<sup>66, 67</sup>

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<sup>62</sup> *Id.* at § 3932(a).

<sup>63</sup> *Id.* at § 3932(b)(1) (the court may grant a stay on its own motion).

<sup>64</sup> *See In re A.R.*, 88 Cal. Rptr. 3d 448 (4th Dist. 2009) (the court suspended a case after the servicemember met SCRA requirements, stating that the specific language of the Act made the suspension mandatory upon the servicemember meeting the requirements).

<sup>65</sup> 50 U.S.C. App. § 3932(b)(1).

<sup>66</sup> *Id.* at § 3932(b)(2).

<sup>67</sup> **Indiana Practitioners' Note:** The 90 day stay set forth in 50 U.S.C. App. § 3932(b) is mandatory, but only if the servicemember satisfies the conditions identified in 50 U.S.C. App. § 3932(b)(2). *See e.g., In re Marriage of Bradley*, 137 P.3d 1030 (Kan. 2006) (holding, in a divorce proceeding, that the servicemember failed to meet the

#### 4.2.2.3. *Application Not a Waiver of Defenses*

A stay application *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).<sup>68</sup>

#### 4.2.3. Stay Extensions

A servicemember may apply for an extension of the mandatory 90-day stay based on the continuing *material affect* of military duties on the servicemember's ability to appear.<sup>69</sup> Such an application may be made as part of the initial stay application or thereafter where it appears the servicemember will remain unavailable to prosecute or defend the action. The same conditions for the initial 90 day stay apply to applications for stay extensions (see Section 4.2.2.2 above).<sup>70,71</sup>

#### 4.2.4. Appointment of Counsel

If a court or tribunal refuses to extend a stay beyond 90 days, it must appoint counsel to represent the servicemember.<sup>72</sup>

#### 4.2.5. Coordination of Stay Proceedings

A servicemember who is denied a stay under SCRA § 3932 may not seek a stay in default judgment proceedings under SCRA § 3931.<sup>73</sup> Further, SCRA § 3932 protections do not apply to SCRA § 3951, which governs eviction and distress proceedings, as SCRA § 3951 contains its own stay procedures.<sup>74</sup>

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conditions for a mandatory stay by neglecting to state when he would be available to appear and not providing the court with a statement from his commanding officer); *See also City of Pendergrass v. Skelton*, 628 S.E.2d 136 (Ga. Ct. App. 2006) (determining that a National Guard member's stay application was insufficient where he failed to provide the necessary specific information in support of the application); *See also Boone*, 319 US 561 (1943) (finding that determination of whether the servicemember has met the required conditions for a stay is within the sound discretion of the trial court).

<sup>68</sup> 50 U.S.C. App. § 3932(c).

<sup>69</sup> *Id.* at § 3932(d)(1).

<sup>70</sup> *Id.*

<sup>71</sup> **Indiana Practitioners' Note:** To obtain an extended stay, the servicemember must establish that his or her military service *materially affects* the ability to appear in the action. It is within the court's sound discretion to determine whether military service actually affects the servicemember's ability to appear. *See e.g., Chlebek v. Mikrut*, 336 Mich. 414, 421-423; 58 N.W.2d 125 (1953) (finding that the only *material affect* the plaintiff's military service created was a limit on his ability to testify at a hearing; and ordering the case to be heard on the first opportunity the plaintiff had to return home, and if not in a reasonable time, that the plaintiff's deposition be taken in the alternative).

<sup>72</sup> 50 U.S.C. App. § 3932(d)(2).

<sup>73</sup> *Id.* at § 3932(e).

<sup>74</sup> *Id.* at § 3932(f).

#### **4.3. STAYING AND VACATING JUDGMENTS OF EXECUTION, ATTACHMENT, AND GARNISHMENTS**

SCRA § 3934 provides protections to servicemembers whose ability to comply with a court order or judgment is *materially affected* by military service.

##### **4.3.1. Applicability**

SCRA § 3934 applies to any action or proceeding covered by the Act commenced in court against a servicemember *before* or *during* the period of military service or within 90 days after such service terminates.<sup>75</sup>

##### **4.3.2. Actions Taken Upon a Material Affect Determination**

Where a court determines, in its opinion, that a servicemember's military service *materially affects* the servicemember's ability to comply with a court order or judgment, it may on its own motion, and must on an application by the servicemember:

- (a) Stay the execution of any judgment or order entered against the servicemember; *and*
- (b) Vacate or stay any attachments or garnishments of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.<sup>76</sup>

Courts should consider whether the servicemember had previously provided the creditor with adequate proof of *material effect*. If the creditor ignored *material effect* evidence and brought suit against the servicemember, it is within the discretion of the Court to impose sanctions on the creditor.

#### **4.4. SETTING TERMS AND CONDITIONS OF STAYS AND OTHER ORDERS**

While some of the Act's stay provisions are mandatory (*see* Section 4.2.2.1 above), SCRA § 3935 provides some discretion in setting the terms and conditions of stays granted under the Act.

##### **4.4.1. Setting the Stay Period**

A stay of an action, proceeding, attachment, or execution *may* be ordered for the period of military service and 90 days thereafter, or for any part of that period.<sup>77</sup>

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<sup>75</sup> *Id.* at § 3934(b).

<sup>76</sup> *Id.* at § 3934(a)(2).

<sup>77</sup> *Id.* at § 3935(a).

#### 4.4.2. Setting the Terms of Installment Payments

The court may set the terms and amounts for installment payments ordered under the Act (*see* Section 4.4.3.3 below), as it considers reasonable.<sup>78</sup>

#### 4.4.3. Allowing Proceedings Against Codefendants

Where the servicemember is a codefendant with others who are not in military service and who are not otherwise entitled to the SCRA's protections, the court *may* permit a plaintiff to proceed with an action against such non-servicemember codefendants.<sup>79</sup>

#### 4.4.4. Inapplicability

SCRA § 3935 does not apply to stay proceedings when servicemember has *notice* brought under SCRA § 3932 or to anticipatory relief sought under SCRA § 4021.<sup>80</sup>

### 4.5. STATUTE OF LIMITATIONS TOLLING

SCRA § 3936 tolls the applicable statute of limitations for claims brought against a servicemember *during* the period of military service.<sup>81</sup> Courts have also applied the tolling requirement to non-traditional limitation-type periods.<sup>82</sup> The SCRA's tolling provisions are *mandatory*, and there is no requirement to show that military service prejudiced the servicemember's ability to defend or prosecute a claim.<sup>83</sup>

#### 4.5.1. Tolling Limitations Periods

A servicemember's military service *may not* be included in computing any limitations period established by law, regulation, or order for bringing an action or other proceeding in any state or federal court or agency by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.<sup>84,85</sup> SCRA § 3936's tolling requirements *do not*

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at § 3935(b); *See also Garcia v. Grimm*, 2008 WL 4629928 (S.D. Cal. 2008) (finding that although there were multiple defendants, the servicemember's call to *active* duty status merited suspension of the entire case until the servicemember had returned from duty).

<sup>80</sup> 50 U.S.C. App. § 3935(c).

<sup>81</sup> *Id.* at § 3936 (underlying statute of limitations for a claim against a servicemember or dependent, as the case may be, remains governed by applicable state law).

<sup>82</sup> *See In re Adoption of W.C.*, 189 Ohio App. 3d 386, 938 N.E.2d 1052 (2010) (adoption proceeding holding that the only critical factor in determining tolling of statute of limitations is military service, and once that circumstance is shown, the period of limitation is automatically tolled for the duration of the servicemember's service).

<sup>83</sup> *Conroy v. Aniskoff*, 507 U.S. 511 (1993); *See Walters*, 481 Mich. at 383.

<sup>84</sup> 50 U.S.C. App. § 3936(a).

<sup>85</sup> **Indiana Practitioners' Note:** SCRA tolling provisions are asserted only during *active* time served in the military. *See e.g., Pulliam v. Mansards Apts.*, 2011 U.S. Dist. LEXIS 49773, 2011 WL 1769147 (N.D. Ind. May 6, 2011) (finding that state law claims will be tolled during the time served in military service).

apply to periods of limitation established by the United States Internal Revenue Code.<sup>86</sup>

#### 4.5.2. Redemption of Real Property

SCRA § 3936 further provides that a period of military service may not be included in computing any period provided by law for redeeming real property sold or forfeited to enforce an obligation, tax, or assessment.<sup>87</sup>

### 5. EVICCTIONS, LEASE TERMINATIONS, MORTGAGE FORECLOSURES, AND INSTALLMENT-CONTRACT RELIEF

Title III of the SCRA governs evictions, leases, installment contracts, and mortgage relief. Title III protections are applicable not only to servicemembers, but also to their dependents – where it is proven that the servicemember’s military service *materially affects* the dependent’s ability to fulfill the obligation in question.<sup>88</sup>

#### 5.1. EVICCTIONS AND DISTRESS

##### 5.1.1. Court-Ordered Eviction

Under SCRA § 3951, landlords or persons with paramount title *may not* evict<sup>89</sup> a servicemember or their dependent during military service, without a court order.<sup>90</sup> Servicemembers and dependents are eligible for this protection if:

- a) The property is occupied or intended to be occupied primarily as a residence,<sup>91</sup> *and*
- b) The monthly rent does not exceed the statutorily set amount.<sup>92</sup>

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<sup>86</sup> 50 U.S.C. App. § 3936(c).

<sup>87</sup> *Id.* at § 3936(b).

<sup>88</sup> *Id.* at § 3959.

**Indiana Practitioners’ Note:** Under Ind. Code § 10-16-20-3, after giving notice to a plaintiff, as applicable, the dependent of a servicemember has the same rights and protections provided to a servicemember under Title II of the federal SCRA.

<sup>89</sup> *See Arkless v. Kilsten*, 61 F. Supp. 886 (E.D. Pa. 1944) (holding that the Act’s meaning of eviction is a dispossession of a tenant by a landlord).

<sup>90</sup> 50 U.S.C. App. § 3951(a)(1)(A).

<sup>91</sup> *Id.* at § 3951(a)(1)(A)(i).

<sup>92</sup> *Id.* at § 3951(a)(1)(A)(ii).

**Indiana Practitioners’ Note:** The statutorily set amount was 2,400 dollars in 2003. It is modified every year by the housing price inflation adjustment. The housing price inflation adjustment is the percentage of inflation listed in the Consumer Price Index that is calculated by the Bureau of Labor Statistics. In 2016, the set amount was \$3451.20 per month. *See* 81 F.R. 6842, 2/09/2016. The updated figure is reported each year in the Federal Register; *See* Publication of Housing Price Inflation Adjustment under 50 U.S.C. § 3951.

### 5.1.2. Distress

If a servicemember and their dependents are eligible for protection against eviction, the SCRA *prohibits* a landlord or person with paramount title<sup>93</sup> from subjecting the premises to a distress during active military service.<sup>94</sup> Distress is a common-law right that allows a landlord to engage in self-help by going on the demised premises and seizing personal property as security for rent arrearages.<sup>95</sup>

### 5.1.3. Stay of Eviction Proceedings

The court may, on its own motion, stay eviction proceedings for a period of 90 days, and *must* do so if a request is filed by a servicemember or their dependent whose ability to pay the agreed rent is *materially affected* by military service.<sup>96</sup>

### 5.1.4. Lease Term Adjustments

As an alternative remedy to the stay discussed in Section 5.1.3 above, the court *may* adjust lease obligations to preserve the interests of all parties.<sup>97</sup> Further, if a stay is granted, the SCRA permits the court to provide the landlord or person with paramount title such relief as equity may require.<sup>98</sup>

## 5.2 RESIDENTIAL AND AUTOMOBILE LEASE TERMINATIONS

### 5.2.1. Lease Terminations

Servicemembers and their dependents *may* terminate residential or motor vehicle leases at any time after entering military service or after the date of military orders.<sup>99</sup> They are not required to demonstrate that their ability to perform under the lease agreement is *materially affected* by military service. Notice of lease terminations *must* be provided to the lessor in writing, accompanied by a copy of the servicemember's military orders.<sup>100</sup>

Servicemember is responsible to pay all lease payments due to the date of termination on a prorated basis and rent paid in advance must be refunded

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<sup>93</sup> Paramount title can come up in a variety of ways, such as in cases of personal representatives of estates. The importance of the paramount title issue is that it comes into play most commonly in conjunction with the Protecting Tenants at Foreclosure Act (PTFA). There does *not* need to be privity between the plaintiff and the soldier and/or dependents for the SCRA to apply.

<sup>94</sup> 50 U.S.C. App. § 3951(a)(1)(B).

<sup>95</sup> 49 Am. Jur. 2d, Landlord and Tenant § 813 (2006).

<sup>96</sup> 50 U.S.C. App. § 3951(b)(1)(A).

<sup>97</sup> *Id.* at § 3951(b)(1)(B).

<sup>98</sup> *Id.* at § 3951(b)(2); *See also Jonda Realty Corp v. Marabotto*, 178 Misc. 393, 34 N.Y.S.2d 301 (N.Y. Sup. Ct. 1942) (denying eviction after the servicemember requested a 3-month stay and offered to pay 1 month's rent, yet holding that the servicemember's obligation for past-due rent continued).

<sup>99</sup> 50 U.S.C. App. § 3955(a)-(b).

<sup>100</sup> *Id.* at § 3955(c)(1)(A) (termination of a lease for a motor vehicle is effective on the day on which the notice of termination is delivered or the vehicle is returned to the lessor, whichever is later).

to the member. The lessor *may not* impose an early termination charge, but all other charges in accordance with the terms of the lease must be paid by the member.

### 5.2.2. Real Estate Leases

Servicemembers and their dependents may terminate, without penalty, leases for premises that are occupied or intended to be occupied, including those leased for residential, professional, business, or agricultural purposes.<sup>101</sup> To qualify for such relief, the lease must have been entered into *before* military service.<sup>102</sup>

- (a) Servicemembers may, however, cancel real-estate leases executed *during* military service if they receive a permanent change of station or deployment orders for 90 days or more.<sup>103</sup>
- (b) For month-to-month leases, termination is effective 30 days after the date on which the next rental payment is due.<sup>104</sup> For all other leases, termination is effective on the last day of the month following the month of written notice.<sup>105</sup>

### 5.2.3. Automobile Leases

Leases for motor vehicles that are used or intended to be used for personal or business transportation by servicemembers or their dependents may be terminated under the following conditions:

- (a) The lease must have been entered into *before* military service.<sup>106</sup>
- (b) The servicemember must be under a call or order specifying military service for 180 days or more during the lease term.<sup>107</sup> If military service initially is ordered for less than 180 days, service time *must* be uninterrupted and extended for a total period of 180 days or more.<sup>108</sup>
- (c) Servicemembers *may* cancel automobile leases executed *during* military service if they receive a permanent change of station outside the continental United States or any territory, possession, or non-contiguous state of the United States, or an order to deploy with a military unit for 180 days or more.<sup>109</sup>

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<sup>101</sup> See *Omega Industries, Inc. v. Raffaele*, 894 F. Supp. 1425 (D. Nev. 1995) (holding that an optometrist who voluntarily became an active duty officer in the Public Health Service was relieved from his commercial lease obligations under the Act).

<sup>102</sup> *Id.* at 1429; 50 U.S.C. App. § 3955(b)(1)(A).

<sup>103</sup> *Id.* at § 3955(b)(1)(B).

<sup>104</sup> *Id.* at § 3955(d)(1).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at § 3955(b)(2)(A).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at § 3955(b)(2)(B).

- (d) Termination is effective upon return of the motor vehicle to the lessor within 15 days after the required written notice of termination that includes a copy of military orders.<sup>110</sup>

#### **5.2.4. Joint Leases**

A dependent co-lessee's responsibility to perform under a lease agreement is terminated once the servicemember's obligation is terminated.<sup>111</sup>

#### **5.2.5. Arrearages and Advance Payments**

Rent or lease amounts unpaid for the period *before* the effective termination date shall be paid on a prorated basis.<sup>112</sup> Any amount paid in advance for a period after the effective termination date must be refunded within 30 days after the effective termination date.<sup>113</sup>

#### **5.2.6. Lessor Relief**

In very limited circumstances, a lessor may request relief from the court before the lease termination date as justice and equity may require. The court may then modify the relief granted to a servicemember.<sup>114</sup> Equitable remedies are not limited to the servicemember's monthly rental obligations and security deposit.<sup>115</sup>

#### **5.2.7. Penalties**

Any person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or their dependents after lawful lease termination, or who *knowingly* interferes with the removal of personal property from premises covered by such lease, may be fined under 18 U.S.C. § 3571, imprisoned for not more than 1 year, or both.

### **5.3. MORTGAGES**

SCRA § 3953 provides certain forms of mortgage relief to servicemembers and their dependents on *active* duty and for a limited period of time after the servicemember leaves active duty. This section applies only to an obligation on real or personal property owned by a servicemember that:

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<sup>110</sup> *Id.* at §§ 3955(d)(2), (c)(1)(B).

<sup>111</sup> *Id.* at § 3955(a)(2).

<sup>112</sup> *Id.* at § 3955(e).

<sup>113</sup> *Id.* at § 3955(f).

<sup>114</sup> *Id.* at § 3955(g).

<sup>115</sup> *See Omega Industries*, 894 F. Supp. at 1430 (establishing that a lessor may be awarded additional remedies, including induced tenant improvements, realty commissions, and attorney's fees and costs, while also holding that such equitable remedies must be exercised with *extreme caution* given the purpose of the Act).



- (a) Originated *before* the period of the servicemember's military service and for which the servicemember is still obligated; *and*
- (b) Is secured by a mortgage, trust deed, or other security in the nature of a mortgage<sup>116</sup> and the foreclosure, sale, or seizure action *must* have been filed during, or within 1 year after active military service. This temporal requirement is effective until 01/01/2018, after which it may revert back to 90 days unless extended by further legislation.<sup>117</sup>

### 5.3.1. Sale, Foreclosure, or Seizure

Under SCRA § 3953, a sale, foreclosure, or seizure of servicemembers' or their dependents' property for breach of mortgage or trust-deed obligations during the prescribed period is invalid, unless made pursuant to a court order or a servicemember's written waiver.<sup>118</sup>

### 5.3.2. Available Mortgage Relief

#### 5.3.2.1. Stay of Mortgage Enforcement Proceedings

In mortgage-enforcement actions filed during the prescribed period, the court *may* stay the proceedings as long as justice and equity require, or equitably adjust the mortgage obligation after a hearing and on its own motion.<sup>119</sup> The court *must* do so when a servicemember or their dependent applies for such relief and proves that their ability to comply is *materially affected* by military service.<sup>120</sup>

##### 5.3.2.1.1. Proving Material Affect

The SCRA does not specify which party must prove *material affect*. Some courts have held that the servicemember must prove *material affect*,<sup>121</sup> while others have held that the party

<sup>116</sup> 50 U.S.C. App. § 3953(a); *See also Whitaker v. Hearnberger*, 123 Colo. 545; 233 P.2d 389 (1951) (holding that the Act does not prevent the foreclosure of security for obligations that arise out of written agreements executed during the period of military service).

<sup>117</sup> 50 U.S.C. App. § 3953(c); 114 Pub. L. 142, 130 Stat. 326, 114 Pub. L. 142, 130 Stat. 326.

<sup>118</sup> 50 U.S.C. App. §§ 3953(c), 3918(b).

**Indiana Practitioners' Note:** On March 31, 2016, the Foreclosure Relief and Extension for Servicemembers Act of 2015 (Publ. L. 114-142) extended, on a temporary basis, duration of foreclosure relief coverage from 9 months to 1 year after a servicemember leaves active duty. The 9 month extension was added by P.L. 110-289, effective July 30, 2008 and was also temporary. Sunset of the 1 year coverage period ends on December 31, 2017 when coverage will revert to the original coverage period of 90 days after military service.

<sup>119</sup> 50 U.S.C. App. § 3953(b).

<sup>120</sup> *Id.*; *See also Hunt v. Jacobson*, 33 N.Y.S.2d 661 (N.Y. Sup. Ct. 1942) (recognizing that the criteria for a servicemember's mortgage debt relief under the former Act are whether (1) the servicemember's inability to comply is because of military service, and (2) such military service has *materially affected* the ability to comply).

<sup>121</sup> *See Queens County Sav. Bank v. Thaler*, 44 N.Y.S. 2d 4 (N.Y. Sup. Ct. 1943) (denying servicemember's motion to stay foreclosure proceedings because he failed to show that his ability to pay was *materially affected* by his military service).

bringing an action against a servicemember must prove lack of *material affect*.<sup>122</sup>

#### **5.3.2.2. Settlement of Stays Relating to Personal Property**

If a stay is granted in a foreclosure, repossession, or rescission/contract termination proceeding related to personal property, the court *may* appoint three disinterested parties to appraise the personal property.<sup>123</sup> If the servicemember's dependents will not face undue hardship because of the foreclosure, repossession, or contract rescission/termination, the court *may* order that the servicemember's equity in the property be paid to the servicemember or their dependent.<sup>124</sup>

#### **5.3.2.3. Reopening or Setting Aside Foreclosure Default Judgments**

If a default judgment in a foreclosure proceeding is entered *during* a servicemember's *active* duty, or within 60 days after active duty, the court *must* reopen or set aside the judgment to allow the servicemember or their counsel to assert the servicemember's rights under the SCRA.<sup>125</sup> However, the court *must* do so only if the servicemember's ability to defend the action was *materially affected* by military service, and the servicemember has a meritorious or legal defense.<sup>126</sup> The servicemember *must* move to reopen such a default judgment no later than 90 days after the end of active duty.<sup>127</sup>

#### **5.3.2.4. Statutory Redemption Period Tolled**

Where real property is sold or forfeited to enforce an obligation, tax, or assessment, a servicemember's period of *active* military service may not be included in any statutory redemption period.<sup>128</sup> It is *not* necessary for servicemembers to show that military service adversely affected their ability to redeem title to the property before qualifying for the tolling provision.<sup>129</sup>

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<sup>122</sup> See *Meyers v. Schmidt*, 46 N.Y.S. 2d 420 (N.Y. Co. Ct. 1944) (holding that the burden is on the plaintiff to show that military service does not *materially affect* the servicemember's ability to meet the debt obligation).

<sup>123</sup> 50 U.S.C. App. § 3954(a).

<sup>124</sup> *Id.* at § 3954(b).

<sup>125</sup> *Id.* at § 3931(g).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at § 3931(g)(2); See also *Flagg v. Sun Investment & Loan Corporation*, 373 P.2d 226 (Okla. 1962).

<sup>128</sup> 50 U.S.C. App. § 3936(b).

<sup>129</sup> *Conroy*, 507 U.S. at 517 (holding that a servicemember need not show that his military service prejudiced his ability to redeem title to property before qualifying for the suspension of time under the Act).

#### 5.3.2.5. *Conditional Stay*

To preserve the interests of all parties,<sup>130</sup> the court *may* grant the servicemember conditional relief. Typically, conditional relief involves a stay of foreclosure proceedings conditioned upon the servicemember making regular, partial payments on the outstanding debt.<sup>131</sup>

#### 5.3.2.6. *Subsequent Good-Faith Purchasers*

Servicemembers may not be able to recover property sold to a good-faith purchaser. The SCRA protects the rights of subsequent good-faith purchasers by stating that vacating, setting aside, or reversing any default judgment under the Act will not impair any right or title acquired by a bona fide purchaser for value.<sup>132</sup>

### 5.3.3. **Limitations on Contract Fines and Penalties**

Where an action to enforce a contract has been stayed, it is *impermissible* for the contract holder to assess fines or penalties for a servicemember's failure to comply with the contract during the period of the stay.<sup>133</sup> The reviewing court has discretion to reduce or waive penalties or fines resulting from a servicemember's non-performance under a contract where:

- (a) The servicemember was on *active* military service at the time the penalty or fine was assessed; *and*
- (b) The servicemember's ability to perform under the contract was *materially affected* by military service.<sup>134</sup>

## 5.4. **LIMITATION ON STORAGE LIEN ENFORCEMENT**

### 5.4.1. **General Protection**

Foreclosure of liens<sup>135</sup> for storage of a servicemember's household goods or other personal property is *prohibited* under the SCRA *during* the period of military service, and for 90 days after, without a court order.<sup>136</sup>

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<sup>130</sup> 50 U.S.C. App. § 3953(b)(2).

<sup>131</sup> See, e.g., *Fed Nat'l Mortgage Ass'n v. Deziel*, 136 F. Supp. 859 (E.D. Mich. 1956) (granting a stay of foreclosure proceedings conditioned upon the servicemember making a payment of \$100 each month for one year); See also *Nassau Savings & Loan Ass'n v. Ormond*, 39 N.Y.S.2d 92 (N.Y. Sup. Ct. 1942) (granting a stay of mortgage foreclosure proceedings on the condition that servicemember's dependent pay a monthly sum to plaintiff).

<sup>132</sup> 50 U.S.C. App. § 3931(h).

<sup>133</sup> *Id.* at § 3933(a).

<sup>134</sup> *Id.* at § 3933(b).

<sup>135</sup> *Id.* at § 3958(a)(2) (SCRA lien definition includes liens for storage, repair, or cleaning of the property or effects of a servicemember, or a lien on such property or effects for any reason).

<sup>136</sup> *Id.* at § 3958(a)(1).

#### 5.4.2. Stay of Proceedings

The court *must* stay lien foreclosure or enforcement proceedings or adjust the lien obligation in the interests of all parties, if a servicemember or their dependent applies for such relief and shows that their ability to comply with the lien obligation is *materially affected* by military service.<sup>137</sup> The court *may* also do so on its own motion.<sup>138</sup>

### 5.5. INSTALLMENT CONTRACTS

SCRA § 3952 protects servicemembers and their dependents who entered into installment contracts for real or personal property (including motor vehicles), or the lease or bailment of such property, *before active* military service. If a servicemember or their dependent subsequently breaches the contract terms, the property may not be rescinded, terminated, or repossessed without a court order.<sup>139</sup>

#### 5.5.1. Covered Obligations & Applicability

Installment-contract protections only apply to contracts where the servicemember or their dependent has made a deposit or installment payment before active military service.<sup>140</sup> Obligations entered into *during active* duty generally are not protected.<sup>141</sup> Protection extends to installment contracts breached before or during active duty.<sup>142</sup>

#### 5.5.2. Material Affect

A servicemember or their dependents are only required to establish *material affect* under SCRA § 3952 when the court considers staying the matter pending final resolution. In that situation, the court can compare a servicemember's financial situation *before* and *during* active duty.<sup>143</sup>

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<sup>137</sup> *Id.* at § 3958(b).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at § 3952(a)(1) (A person who knowingly takes action in contravention of this rule or attempts to do so shall be fined up to \$100,000 or imprisoned for up to 1 year).

<sup>140</sup> *Id.* at § 3952(a)(2); *See also Cox v. McGregor*, 330 Mich. 260; 47 N.W.2d 87 (1951) (holding that the former Act's provision against rescission and termination of installment contracts for the purchase of real or personal property did not apply where servicemember did not make a payment or deposit).

<sup>141</sup> *Jim's Trailer Sales, Inc. v. Shutok*, 153 F. Supp. 274 (W.D. Pa, 1957) (holding that the servicemember was not protected by the SSCRA because he purchased the house trailer at issue after entering military service).

<sup>142</sup> 50 U.S.C. App. § 3952(a)(1); *See Hampton v. Commercial Credit Corp*, 176 P.2d 270 (1946) (holding that the servicemember's automobile was wrongfully seized, possessed, and sold, although he breached the installment contract shortly before active military service).

<sup>143</sup> *See, e.g., Harvey v. Home Owners' Loan Corp*, 67 N.Y.S.2d 586 (N.Y. Sup. Ct. 1946) (holding that servicemember did not establish *material affect* where he was able to pay the monthly amount before military service, and his income during military service was equal to or greater than his income before military service).

### 5.5.3. Available Resolutions

#### 5.5.3.1. Reimbursement

A court may order complete or partial repayment of deposits or installments made by a servicemember as a prerequisite of cancellation of the contract and the creditor regaining possession of the property.<sup>144</sup>

#### 5.5.3.2. Stay of Proceedings

Upon the petition of the servicemember or their dependent, the court *must* stay the proceedings for a period of time, as justice and equity may require, if the court finds that the servicemember or their dependent's ability to comply with the contract is "materially affected" by military service.<sup>145</sup> The court may also stay proceedings on its own motion.<sup>146</sup>

#### 5.5.3.3. Equitable Resolution

The SCRA empowers the court to make any other disposition that is equitable to preserve the interests of all parties.<sup>147</sup> Courts have stressed that the interests of both the servicemember and creditor *must* be weighed equally, and that protections under this provision of the Act in no way provide complete immunity from contract obligations.<sup>148</sup>

#### 5.5.3.4. Penalties

A person who *knowingly* resumes possession of property in violation of SCRA § 3952, or attempts to do so, shall be fined under 18 U.S.C. § 3571, or imprisoned for not more than 1 year, or both.

## 5.6. TERMINATION OF CONTRACTS FOR CELLULAR PHONE SERVICE

Servicemembers who receive orders to relocate for 90 days or more to a location that does not support a cellular phone contract *may* terminate the contract if it was entered into *before* receiving military orders.<sup>149</sup> Termination notice *must* be made

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<sup>144</sup> 50 U.S.C. App. § 3952(c)(1).

<sup>145</sup> *Id.* at § 3952(c)(2).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at § 3952(c)(3).

<sup>148</sup> *See Nassau Savings & Loan Ass'n*, 39 N.Y.S. 2d at 94.

<sup>149</sup> 50 U.S.C. App. §§ 3956(a)(1), (b).

**Indiana Practitioners' Note:** Under Ind. Code § 10-16-20-4(b), this section applies to a contract to provide any of the following: (1) telecommunication services; (2) internet services; (3) television services; (4) athletic club or gym memberships; and (5) satellite radio services.

by delivery of a written or electronic means and must be accompanied by a copy of the servicemember's orders.<sup>150</sup>

Servicemembers are not required to demonstrate that their ability to perform under the contract is *materially affected* by military service. If the servicemember is part of a family plan, the plan holder may terminate the servicemember and any other plan members who relocate with the servicemember.<sup>151</sup>

### 5.6.1. Cellular Phone Service Relief

The cellular phone provider *may* not charge an early termination fee and *must* provide a refund within 60 days after termination for any amount paid in advance for a period *after* the effective termination date, except for the remainder of the billing period in which termination occurs.<sup>152</sup> The service provider *may* not charge a reinstatement fee if the servicemember re-subscribes within 90 days after the period of relocation.<sup>153</sup>

## 6. FINANCIAL PROTECTIONS

### 6.1. INTEREST RATE CAP

To help ease financial burdens created by active military service, SCRA § 3937 provides servicemembers with a 6% interest rate cap on debts incurred *prior* to active duty, including credit cards, automobile, ATV, boat and other vehicle loans, mortgages, home equity loans, and student loans.<sup>154</sup>

#### 6.1.1. Covered Debt Obligations

The 6% interest cap applies to *all* obligations and liabilities incurred by a servicemember individually, jointly with a spouse,<sup>155</sup> or in the name of a

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<sup>150</sup> 50 U.S.C. App. § 3956(a)(3).

<sup>151</sup> *Id.* at § 3956(d).

<sup>152</sup> *Id.* at §§ 3956(e)-(f).

**Indiana Practitioners' Note:** Under Ind. Code § 10-16-20-4(e), any tax or any other obligation or liability of the servicemember that, in accordance with the terms of the contract, is due and unpaid at the time of termination of the contract shall be paid by the servicemember.

<sup>153</sup> 50 U.S.C. App. § 3956(e).

**Indiana Practitioners' Note:** Under Ind. Code § 10-16-20-4(f), if the servicemember re-subscribes to the service provided under a contract that was terminated during the 90 day period immediately following when the servicemember has returned from service, the service provider may not impose any charges or services fees, other than the usual and customary charges and fees for the installation or acquisition of customer equipment imposed on any other subscriber.

<sup>154</sup> 20 U.S.C. § 1087-1(g). *See* Higher Education Opportunity Act of 2008, Pub. L. 110-315, amended 20 U.S.C. § 1078(d) to make federally guaranteed student loans protected under the SCRA. There are four types of federally guaranteed student loans: (1) private loans (which have always been covered by the SCRA); (2) Direct Department of Education Student Loans; (3) student loans originated under the Federal Family Education Loan ("FFEL") Program that are owned by the Department of Education; and (4) student loans originated under the FFEL program that are not owned by the Department of Education. So, for Direct Department of Education Student Loans and FFEL loans that originated before August 14, 2008, the servicemember borrower is *not* covered by the SCRA.

<sup>155</sup> *Rodriguez v. American Express*, 2006 WL 908613 (E.D. Cal. April 7, 2006) (finding that the SCRA does not place a cap on the interest rates of debts held exclusively by the spouses of service-members. The mandatory

closely held business entity<sup>156</sup> as long as the servicemember is not a guarantor.<sup>157</sup> In addition, courts have held that the cap also applies to Chapter 13 repayment plans<sup>158</sup> and foreign judgments.<sup>159</sup>

The interest protections do not cover debts incurred by servicemembers *during* or *after* the end of active duty.<sup>160</sup> Moreover, debts incurred solely by a servicemember's spouse are not eligible for the 6% interest cap.

#### **6.1.1.1 Student Loan Consolidation**

A servicemember is entitled to the 6% interest rate cap *only* for the period of time between when he or she entered military service and consolidated private student loans. SCRA protections may lapse once a servicemember consolidates student loans, if a brand new loan is created after active military service.<sup>161</sup>

#### **6.1.2. Interest Defined**

The interest-cap provision of the SCRA defines interest to include service charges, renewal charges, fees, or any other charges (except bona fide insurance) resulting from a debt or obligation.<sup>162</sup> Creditors may violate the SCRA's 6% interest-cap protection by charging late fees that have the effect of raising the applicable interest rate above the 6% limit.<sup>163</sup>

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maximum interest rate cap of 6% is only applicable to debts held by the service-member or jointly by the service-member and their spouse).

<sup>156</sup> *Linscott v. Vector Aerospace*, 2007 WL 2220357 (D. Or. July 27, 2007) (finding that the SCRA interest cap extends to corporations when they are personally guaranteed by service-members. The servicemember's corporation was protected under the SCRA while they were on active duty and that the corporation was only required to pay at 6% during the period of active duty); *See also Cathey v. First Rep Bank*, 2001 U.S. Dist. LEXIS 13150 (W.D. La. August 14, 2001) (finding that a corporation's debts are provided interest rate protections under the Act when the note is signed as a maker, not simply a guarantor).

<sup>157</sup> *See Newton v. Bank of McKenney*, 2012 U.S. Dist. LEXIS 68731, 2012 WL 1752407 (E.D. Va. May 16, 2012) (finding that the plaintiffs' liability is distinct from their corporations' liability because the plaintiffs are guarantors).

<sup>158</sup> *See In re Watson*, 292 BR 441 (Bankr. S.D. Ga. 2003) (the court ordered the interest rate paid on allowed secured claims be reduced to 6% during the time of *active* federal military service).

<sup>159</sup> *See Linscott*, 2007 WL 2220357 at \*1 (the court applied the SCRA to a servicemember's debt with a foreign entity, refusing to enforce an 18% interest rate included in a Canadian court-ordered payment against a servicemember's corporation).

<sup>160</sup> 50 U.S.C. App. § 3937 (the Act provides that the interest cap will extend for one year after the active service for mortgages, trust deeds, and other security "in the nature of a mortgage"); *See, e.g., Shield v. Hall*, 207 S.W.2d 997 (Tex. Civ. App. 1948) (finding that the SCRA had no application because at the time defendant executed the note and mortgage he was in *active* military service).

<sup>161</sup> U.S. Department of Justice. *Servicemembers and Veterans Initiative: USAO Servicemembers Toolkit* (Dec. 4, 2015), available at <https://www.justice.gov/crt-military/file/797491/download>.

<sup>162</sup> 50 U.S.C. App. § 3937(d)(1).

<sup>163</sup> *See Koenig v. Waukesha State Bank*, 2006 WL 2334841 at \*1 (E.D. Wis. August 10, 2006) (the court entered summary judgment in favor of a bank after finding that it had more than fully mitigated the damages caused by charging an servicemember an interest rate in excess of 6% on late fees incurred during active duty. The court found that by waiving other fees incurred by the service member in excess of the servicemember's overpayment, the bank had gone beyond its obligation to the service member).

### 6.1.3. Temporal Scope of Interest Rate Reduction

The 6% interest cap on mortgages and mortgage equivalents applies *during active service* and for 1 year after active service ends.<sup>164</sup> The interest cap reduction on all non-mortgage debts and obligations is limited to the duration of active service.<sup>165</sup>

### 6.1.4. Forgiveness of Interest Exceeding the Limitation

Any interest incurred *during active* military service (and for one year thereafter for mortgages and mortgage equivalents) in excess of the SCRA's mandated 6% cap shall be forgiven, and the servicemember does not owe any deficiency resulting from the interest reduction.<sup>166</sup> The creditor is *prohibited* from accelerating the payment of principal in response to a properly made request for a 6% interest rate cap.

### 6.1.5. Activation of 6% Interest Cap

The 6% interest cap is not self-executing. To receive this protection, servicemembers *must* provide a creditor with written notice and a copy of military orders detailing active duty, within 180 days after the end of active military duty.<sup>167</sup> Once notice is provided, the creditor is obligated to retroactively implement the 6% interest rate beginning on the date *active service* commenced, not the date that notice is received.<sup>168</sup>

#### 6.1.5.1. Exception to the Interest Cap

The court may order that a creditor need not reduce a servicemember's interest rate to 6% if the creditor can establish that the servicemember's ability to pay the contracted rate of interest was not *materially affected* by entering *active duty*.<sup>169</sup>

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<sup>164</sup> 50 U.S.C. App. § 3937(a)(1)(A).

<sup>165</sup> *Id.* at § 3937(a)(1)(B) (obligation is defined as either a mortgage debt or “any other obligation,” added by §2203 of P.L. 111-289, effective July 30, 2008).

<sup>166</sup> *Id.* at § 3937(a)(2).

<sup>167</sup> *Id.* at § 3937(b)(1).

<sup>168</sup> *Id.* at § 3937(b)(2); *See also Rodriguez*, 2006 WL 908613 at \*6 (holding that a creditor violated the interest cap provision when it did not reduce the interest rate to 6% starting on the date servicemember's active duty began, and did not credit excess interest paid to the remaining principal balance).

<sup>169</sup> 50 U.S.C. App. § 3937(c) (generally this requirement means that the person is making less money in the military than he or she did as a civilian).



## 7. MISCELLANEOUS PROTECTIONS

### 7.1. TAX PROTECTIONS

#### 7.1.1. Residency for Tax Purposes

A servicemember and their spouse do not lose or acquire residency status for tax purposes due to their presence in a state solely for compliance with military orders.<sup>170</sup> Furthermore, military compensation of a servicemember and any income of their spouse are *not* income for state tax purposes in a state where they are non-residents.<sup>171</sup> The same protections extend to a servicemember's spouse, and subjects the spouse's income to taxation by the spouse's state of residence, rather than the state where the income is earned.<sup>172</sup> Similarly, for tax purposes, a servicemember's or their spouse's personal property is *not* deemed to be located in a state where they are non-residents.<sup>173</sup>

#### 7.1.2. Property Tax

The SCRA provides relief to servicemembers from tax assessments that fall due and remain unpaid before or during military service.<sup>174</sup> This protection applies to taxes for personal property and for real property occupied for dwelling, professional, business, or agricultural purposes by a servicemember or their dependents or employees.<sup>175</sup> It further prevents assessment of any additional penalty or interest above 6% for the non-payment of taxes.<sup>176</sup>

#### 7.1.3. Limitation on Sale of Property to Enforce Tax Assessment

Qualifying property cannot be sold to enforce the collection of a tax or assessment, unless by court order and upon the court's determination that military service does not *materially affect* the servicemember's ability to pay the outstanding tax or assessment.<sup>177</sup>

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<sup>170</sup> *Id.* at § 4001(a).

<sup>171</sup> *Id.* at §§ 4001(b)-(c); *See also U.S. v. State of Kan.*, 580 F. Supp. 512 (D. Kan., 1984) (recognizing that the SCRA prohibits the use of military compensation as taxable "income" for non-residents, yet holding that it may be considered in a formula to determine the *rate* of taxation for state income of non-residents), *aff'd*, 810 F.2d 935 (10th Cir. 1987).

<sup>172</sup> Military Spouses Residency Relief Act, P.L. 111-97, effective November 11, 2009.

<sup>173</sup> 50 U.S.C. App. § 4001(d); *Dameron v. Brodhead*, 345 U.S. 322 (1953) (holding that the taxable domicile of a servicemember shall not be changed by military assignments).

<sup>174</sup> 50 U.S.C. App. § 3991(a).

<sup>175</sup> *Id.*; *See also Farran v. Wayne County*, No. 261185, 2005 WL 2219417 (Mich. App. 2005) (finding that 50 U.S.C. App. § 3991 does not apply to vacant land because it is not *occupied* for dwelling, professional, business, or agricultural purposes as required under the SCRA).

<sup>176</sup> 50 U.S.C. App. § 3991(d).

<sup>177</sup> *Id.* at § 3991(b)(1).

#### 7.1.4. Redemption

In cases involving a court-ordered sale of property to satisfy taxes or assessments, the SCRA provides servicemembers with a right to redeem the property *during* military service or within 180 days after the end of military service.<sup>178</sup>

#### 7.1.5. Deferral of Income Tax Collection

When a servicemember's state or federal income taxes are due *before* or *during* military service, payment shall be deferred at the servicemember's request for not more than 180 days after the termination of *active* duty, if the servicemember's ability to pay is *materially affected* by military service.<sup>179</sup> However, the Act neither grants relief from filing tax returns nor suspends statutes of limitations prescribed under the United States Internal Revenue Code.<sup>180</sup>

### 7.2. INSURANCE PROTECTIONS

The SCRA prevents a servicemember's loss of health, life, or professional liability insurance coverage if the servicemember is called to *active* duty.<sup>181,182</sup>

#### 7.2.1. Health Insurance

Servicemembers *may* have health insurance policies immediately reinstated upon return from active duty.<sup>183</sup> They *must* apply for reinstatement within 120 days after release from active military duty.<sup>184</sup> Furthermore, there can be no exclusions for health conditions that arose *before* or *during* military service, as long as the condition would not have been excluded had the servicemember remained covered, and the condition has *not* been determined by the Secretary of Veterans Affairs to be a disability incurred or aggravated in the line of duty.<sup>185</sup>

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<sup>178</sup> *Id.* at § 3991(c).

<sup>179</sup> *Id.* at § 4000(a). *See also Paulson v. Mo. Dept. of Revenue*, 961 S.W.2d 63 (Mo. Ct. App. 1998) (denying deferral of a servicemember's income tax payment where he did not prove active duty impaired his ability to pay the taxes).

<sup>180</sup> *See* Judge Advocate General's Legal Center and School, U.S. Army JA 260, *Servicemembers Civil Relief Act*, pp. 5-11 (March 2006).

<sup>181</sup> 50 U.S.C. App. §§ 3975, 4023, 4024.

<sup>182</sup> **Indiana Practitioners' Note:** The SCRA contains many provisions relating to life insurance matters. As such insurance matters are not the focus of this Guide, however, a complete analysis of the Act's insurance provisions has been omitted for the sake of brevity. For additional information on SCRA's life insurance provisions, refer to 50 U.S.C. App. §§ 3957, 3971-3977.

<sup>183</sup> 50 U.S.C. App. §§ 4024(a)-(b).

<sup>184</sup> *Id.* at § 4024(d).

<sup>185</sup> *Id.* at § 4024(b).

### 7.2.2. Life Insurance

The SCRA *prevents* life insurers from decreasing coverage or requiring additional premiums, except age-based increases in term policies, for servicemembers *during* active duty.<sup>186</sup> However, the life insurance policy *must* have been in place for at least 180 days before military service,<sup>187</sup> *during* active duty and for 2 years after, a servicemember's life insurance policy is protected from lapse, termination, and forfeiture for non-payment of premiums.<sup>188</sup> For this protection, the insured servicemember or their beneficiary *must* apply with the insurer and forward a copy to the Veterans Administration.<sup>189</sup>

### 7.2.3. Professional Liability Insurance

Servicemembers who engage in health-care, legal services, or other professions declared by the Secretary of Defense *may* suspend their professional liability insurance policies upon written request to the insurance carrier.<sup>190</sup>

## 7.3. ANTICIPATORY RELIEF

Although rarely invoked, the SCRA's anticipatory relief protections allow a servicemember to apply to a court for relief from any obligation incurred *before* military service, or from taxes falling due *before* or *during* military service, when the servicemember anticipates that a breach or default will occur because of their military service.<sup>191</sup> Under this section, a servicemember can initiate a declaratory action (to prevent any legal action against them) *during* military service or within 180 days after.<sup>192</sup> The court has discretion to grant such relief.

### 7.3.1. Requirements

To receive anticipatory relief, the following *must* occur:

- (a) The servicemember *must* prove that the obligation arose before active duty, including taxes falling due during active duty;
- (b) The action must begin during, or within 180 days after, *active* military service; *and*
- (c) The servicemember must show that military service *materially affected* the ability to discharge the obligation.<sup>193</sup> The servicemember is entitled to one hearing to establish *material* affect.

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<sup>186</sup> *Id.* at § 3971(1)(A).

<sup>187</sup> *Id.* at § 3971(1)(B).

<sup>188</sup> *Id.* at §§ 3974(b)-(c).

<sup>189</sup> *Id.* at § 3973.

<sup>190</sup> *Id.* at §§ 4023(a)(2)(A), (b)(1).

<sup>191</sup> *Id.* at § 4021(a).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at §§ 4021(a)-(b). See *Kindy v. Koenke*, 216 F. 2d 907 (8<sup>th</sup> Cir. 1954).

### 7.3.2. Covered Obligations

Because the anticipatory relief provision specifically protects *any* obligations incurred *before active* duty, such protection includes, but is not limited to, contracts, mortgages, taxes or assessments, and child support cases.<sup>194</sup>

### 7.3.3. Stay of Enforcement

Courts are authorized to issue stays of the enforcement of obligations and issue equitable repayment plans.<sup>195</sup> Any stay granted under this section should begin at the time of application and continue for a period equal to the time of active military service.<sup>196</sup>

For stays involving real estate contracts, a servicemember can make equal periodic payments to cover the principal and interest accrued during the stay, over a period not exceeding the remaining life of the contract plus term of military service.<sup>197</sup> For stays involving any other debt, the period of time allotted for back payment cannot be longer than the servicemember's total time of active military service.<sup>198</sup>

## 7.4. CHILD CUSTODY PROTECTIONS

The SCRA *prohibits* a court from making permanent revisions to a custody order based solely on a parent's pending or potential military deployment. Instead, the court *may* only issue a temporary custody order that spans the period of a servicemember's deployment.<sup>199</sup>

This section does *not* create a Federal right of action or otherwise give rise to Federal jurisdiction or create a right of removal in custody proceedings.<sup>200</sup>

### 7.4.1 Duration of Temporary Custody Order

A court issued temporary order cannot expire later than the period justified by the deployment of the servicemember.<sup>201</sup>

### 7.4.2 Limitations

A servicemember's deployment or possibility of deployment cannot be considered as the sole factor by the court.<sup>202</sup>

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<sup>194</sup> 50 U.S.C. App. § 4021(a).

<sup>195</sup> *Id.* at §§ 4021(b)(1)(B), 4021(b)(2)(B).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at § 4021(b)(1)(B).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at § 3938.

<sup>200</sup> *Id.* at § 3938(c).

<sup>201</sup> *Id.* at § 3938(a).

<sup>202</sup> *Id.* at § 3938(b).

#### 7.4.3 Requirements

Deployment is defined as the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders:<sup>203</sup>

- (a) That are designated as unaccompanied;
- (b) For which dependent travel is not authorized; *or*
- (c) That otherwise do not permit the movement of family members.

#### 7.4.4 Heightened Custody Protections

If state law affords greater rights to a deploying parent, the court should apply the applicable state law over the rights afforded under the SCRA.<sup>204</sup>

#### 7.4.5. Uniform Deployed Parents and Custody Visitation Act (UDPCVA)

For additional questions involving child custody, the UDPCVA<sup>205</sup> should be referenced. The UDPCVA encompasses the following:

- **Article 1** prohibits the court from considering deployment when making a best interest of the child determination in custody proceedings.
- **Article 2** sets the procedure for parents to make out-of-court agreements as to custody and visitation during deployment.
- **Article 3** allows for expedited proceedings to ensure a custody order is entered prior to deployment and prohibits a permanent custody arrangement to be ordered without deployed parent's consent.
- **Article 4** establishes the procedure used to terminate the temporary custody arrangement and when the court must intervene.
- **Article 5** sets out the effective date and uniform act language.<sup>206</sup>

## 8. CONCLUSION

This Guide provides an overview of the most significant aspects of the SCRA that might arise in an Indiana courtroom. However, this Guide is only a summary, and was not drafted as an attempt to discuss all components of the Act or every nuance of Indiana case law. For additional information on SCRA protections and related issues, please refer to Appendix A of this Guide.

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<sup>203</sup> *Id.* at § 3938(e).

<sup>204</sup> *Id.* at § 3938(d).

<sup>205</sup> Uniform Law Commission, *Uniform Deployed Parents Custody and Visitation Act*, available at <http://www.uniformlaws.org/ActSummary.aspx?title=Deployed%20Parents%20Custody%20and%20Visitation%20Act>.

<sup>206</sup> National Conference of State Legislatures, *Military Parent Custody and Visitation* (Mar. 8, 2016), available at <http://www.ncsl.org/research/military-and-veterans-affairs/military-parent-custody-and-visitation.aspx>; Uniform Law Commission, *Uniform Deployed Parents Custody and Visitation Act*, available at <http://www.uniformlaws.org/ActSummary.aspx?title=Deployed%20Parents%20Custody%20and%20Visitation%20Act>.

## APPENDIX A – ADDITIONAL RESOURCES

1. John S. Odom, Jr., *A Judge's Benchbook for the Servicemembers Civil Relief Act*, ABA Publishing (2011).
2. 53A Am. Jur. 2d, *Military and Civil Defense*, §§ 327-372, pp. 189-238.
3. 6 C.J.S., *Armed Services*, §§ 168-187, pp. 514-530.
4. Brennan, *Servicemembers Civil Relief Act: A Primer for Creditors*, Maryland Bar Journal, Nov-Dec 2007, pp. 32, 34-35.
5. Crawford, *Servicemembers Civil Relief Act: Procedural Overview*, Journal of Virginia Trial Lawyers Association, Volume 20 Number 2, 2008.
6. Johnston, Annotation, *Tolling Provision of Soldiers' and Sailors' Civil Relief Act (50 U.S.C.S. Appx. § 525)*, 36 ALR Fed 420 (1978).
7. Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*, 132 Mil. L. Rev. 116 (1991).
8. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief Act* (accessed September 4, 2016), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_assistance\\_military\\_personnel/scrajudgesguidecklist.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_assistance_military_personnel/scrajudgesguidecklist.authcheckdam.pdf)
9. Sullivan, *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, ABA Publishing (2006).
10. The Judge Advocate General's Legal Center & School, U.S. Army, JA 260, *The Servicemembers Civil Relief Act Guide* (March 2006).
11. Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), Pub. L. No. 103-353, 108 Stat. 3149 (codified in sections of 38 USC)
12. Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), previously codified and cited as 42 U.S.C. §§ 1973ff-1973ff-7, but there was an editorial reclassification of UOCAVA, now codified as 52 U.S.C. §§ 20301-20311
13. US Armed Forces SCRA Legal Assistance – Locate the closest military legal assistance office (accessed August 16, 2016), available at <http://legalassistance.law.af.mil/content/locator.php>

## APPENDIX B – JUDGES’ CHECKLISTS

### **Default Judgments Under the SCRA (50 U.S.C. App. § 3931)**

If the Defendant has not made an appearance and military service has not been confirmed:

- The court *may* request a military service certification from the U.S. DoD, if
  - ♦ The Plaintiff filed an affidavit, with supporting facts, denying Defendant’s military service; *or*
  - ♦ Stating that Plaintiff is unable to determine if Defendant is in military service.
- If the court cannot determine whether Defendant is in military service, it *may* require Plaintiff to post a bond to indemnify Defendant against loss or damage due to the judgment.

If the Defendant has not made an appearance and *is* in military service:

- The court *must* appoint an attorney to represent Defendant before entering judgment.
- If appointed attorney cannot locate a Defendant servicemember, the attorney’s actions will *not* waive any defense or bind the servicemember in any way.
- If a defense for the servicemember cannot be presented without their presence or the court-appointed attorney cannot locate the servicemember:
  - ♦ The court *must* enter a stay for at least ninety days when requested by the servicemember’s attorney; *or*
  - ♦ The court *may* enter a stay for at least ninety days on its own motion.

If the Defendant has not made an appearance and *is not* in military service, the court may proceed with default judgment.

### **Vacating and Reopening Default Judgments (50 U.S.C. App. § 3931)**

The court *may* vacate a default judgment and reopen a matter:

- If a default judgment was entered *during* the servicemember’s period of military service, or within 60 days thereafter; *and*
- The servicemember filed an application with the court or tribunal that issued the default judgment:
  - ♦ Within 90 days of the end of the servicemember’s military service, *and*
  - ♦ Specifically requesting to vacate and reopen the case; *and*
- The servicemember establishes that, at the time judgment was entered, the servicemember:
  - ♦ Was *materially affected* by military service in making a defense; *and*
  - ♦ Had a meritorious defense, in whole or in part.

## APPENDIX B – JUDGES’ CHECKLISTS

### **Staying Proceedings Under the SCRA (50 U.S.C. App. § 3932)**

If *all* of the following conditions are met, the court *must* grant a stay for no less than 90 days:

- The servicemember was in *active* military service within 90 days *before* the application for stay;
- The servicemember *received notice* of the action/proceeding; *and*
- The servicemember’s application for stay provides:
  - ♦ An explanation that military service *materially affects* the servicemember’s ability to appear;
  - ♦ A date when the servicemember will be available; *and*
  - ♦ A statement from servicemember’s commanding officer confirming that military duties prevent appearance and military leave is not available.

### **Granting Additional Stays (50 U.S.C. App. § 3932)**

The court *may* grant additional stays if:

- The servicemember establishes a *continuing material affect* of military duties on the servicemember’s ability to appear; *and*
- The request for an additional stay provides the same information as is *required* in the original application for stay.

If the court refuses to grant an extended stay, it *must* appoint counsel to represent the servicemember.

### **Anticipatory Relief Under the SCRA (50 U.S.C. App. § 4021)**

The court *may* grant anticipatory relief, including staying the enforcement of the obligation, if the servicemember:

- Incurred the obligation *before* military service, including taxes coming due before or during military service;
- Initiated declaratory action in anticipation that a breach or default on an obligation will occur because of servicemember’s military service;
- Initiated the action during or within 180 days after servicemember’s military service; *and*
- Shows that military service *materially affected* the servicemember’s ability to discharge the obligation.



**APPENDIX C – SCRA CROSS-REFERENCE OF  
CODE SECTIONS WITH PUBLIC LAW SECTIONS**

<b><u>Old 50 U.S.C.</u></b>	<b><u>New 50 U.S.C.</u></b>	<b><u>Title</u></b>	<b><u>Public Law</u></b>
<b><u>App. Section</u></b>	<b><u>App. Section</u></b>		<b><u>Section</u></b>
§ 501	§ 3901	Short Title	Sec. 1
§ 502	§ 3902	Purpose	Sec. 2
		<b>TITLE I – GENERAL PROVISIONS</b>	
§ 511	§ 3911	Definitions	Sec. 101
§ 512	§ 3912	Jurisdiction and applicability of Act	Sec. 102
§ 513	§ 3913	Protection of persons secondarily liable	Sec. 103
§ 514	§ 3914	Extension of Protection to citizens serving with allied forces	Sec. 104
§ 515	§ 3915	Notification of benefits	Sec. 105
§ 515a	§ 3916	Information for member of the Armed Forces and their dependents on rights and protections of the SCRA	Sec. 105a
§ 516	§ 3917	Extensions of rights and protections to reserves ordered to report for military service and to persons ordered to report for induction	Sec. 106
§ 517	§ 3918	Waiver of rights pursuant to written agreement	Sec. 107
§ 518	§ 3919	Exercise of rights under the Act not to affect certain financial transactions	Sec. 108
§ 519	§ 3920	Legal representatives	Sec. 109
		<b>TITLE II – GENERAL RELIEF</b>	
§ 521	§ 3931	Protection of servicemembers against default judgments	Sec. 201
§ 522	§ 3932	Stay of proceedings when servicemember has notice	Sec. 202
§ 523	§ 3933	Fines and penalties under contracts	Sec. 203
§ 524	§ 3934	Stay or vacation of execution of judgments, attachments, and garnishments	Sec. 204
§ 525	§ 3935	Duration and term of stays; codefendants not in service	Sec. 205
§ 526	§ 3936	Statute of limitations	Sec. 206
§ 527	§ 3937	Maximum rate of interest on debts incurred before military service	Sec. 207
§ 528	§ 3938	Child custody protection	Sec. 208

		<b>TITLE III – RENT, INSTALLMENT CONTRACTS, MORTGAGES, LIENS, ASSIGNMENTS, LEASES, TELEPHONE SERVICE CONTRACTS</b>	
<b>§ 531</b>	<b>§ 3951</b>	Evictions and distress	<b>Sec. 301</b>
<b>§ 532</b>	<b>§ 3952</b>	Protection under installment contracts for purchase or lease	<b>Sec. 302</b>
<b>§ 533</b>	<b>§ 3953</b>	Mortgages and trust deeds	<b>Sec. 303</b>
<b>§ 534</b>	<b>§ 3954</b>	Settlement of stayed cases relating to personal property	<b>Sec. 304</b>
<b>§ 535</b>	<b>§ 3955</b>	Termination of residential or motor vehicle leases	<b>Sec. 305</b>
<b>§ 535a</b>	<b>§ 3956</b>	Termination of telephone service contracts	<b>Sec. 305a</b>
<b>§ 536</b>	<b>§ 3957</b>	Protection of life insurance policy	<b>Sec. 306</b>
<b>§ 537</b>	<b>§ 3958</b>	Enforcement of storage liens	<b>Sec. 307</b>
<b>§ 538</b>	<b>§ 3959</b>	Extension of protections to dependents	<b>Sec. 308</b>
		<b>TITLE IV – LIFE INSURANCE</b>	
<b>§ 541</b>	<b>§ 3971</b>	Definitions	<b>Sec. 401</b>
<b>§ 542</b>	<b>§ 3972</b>	Insurance rights and protections	<b>Sec. 402</b>
<b>§ 543</b>	<b>§ 3973</b>	Application for insurance protection	<b>Sec. 403</b>
<b>§ 544</b>	<b>§ 3974</b>	Policies entitled to protection and lapse of policies	<b>Sec. 404</b>
<b>§ 545</b>	<b>§ 3975</b>	Policy Restrictions	<b>Sec. 405</b>
<b>§ 546</b>	<b>§ 3976</b>	Deduction of unpaid premiums	<b>Sec. 406</b>
<b>§ 547</b>	<b>§ 3977</b>	Premiums and interest guaranteed by the United States	<b>Sec. 407</b>
<b>§ 548</b>	<b>§ 3978</b>	Regulations	<b>Sec. 408</b>
<b>§ 549</b>	<b>§ 3979</b>	Review of findings of fact and conclusions of law	<b>Sec. 409</b>
		<b>TITLE V – TAXES AND PUBLIC LANDS</b>	
<b>§ 561</b>	<b>§ 3991</b>	Taxes respecting personal property, money, credits, and real property	<b>Sec. 501</b>
<b>§ 562</b>	<b>§ 3992</b>	Rights in public lands	<b>Sec. 502</b>
<b>§ 563</b>	<b>§ 3993</b>	Desert-land entries	<b>Sec. 503</b>
<b>§ 564</b>	<b>§ 3994</b>	Mining claims	<b>Sec. 504</b>
<b>§ 565</b>	<b>§ 3995</b>	Mineral permits and leases	<b>Sec. 505</b>
<b>§ 566</b>	<b>§ 3996</b>	Perfection or defense of rights	<b>Sec. 506</b>

§ 567	§ 3997	Distribution of information concerning benefits of title	Sec. 507
§ 568	§ 3998	Land rights of servicemembers	Sec. 508
§ 569	§ 3999	Regulations	Sec. 509
§ 570	§ 4000	Income taxes	Sec. 510
§ 571	§ 4001	Residence for tax purposes	Sec. 511
		<b>TITLE VI – ADMINISTRATIVE REMEDIES</b>	
§ 581	§ 4011	Inappropriate use of the Act	Sec. 601
§ 582	§ 4012	Certificates of service; persons reported missing	Sec. 602
§ 583	§ 4013	Interlocutory orders	Sec. 603
		<b>TITLE VII – FURTHER RELIEF</b>	
§ 591	§ 4021	Anticipatory relief	Sec. 701
§ 592	§ 4022	Power of attorney	Sec. 702
§ 593	§ 4023	Professional liability protection	Sec. 703
§ 594	§ 4024	Health insurance restatement	Sec. 704
§ 595	§ 4025	Guarantee of residency for military personnel and spouses of military personnel	Sec. 705
§ 596	§ 4026	Business or trade obligations	Sec. 706
		<b>TITLE VIII – CIVIL LIABILITY</b>	
§ 597	§ 4041	Enforcement by the Attorney General	Sec. 801
§ 597a	§ 4042	Private right of action	Sec. 802
§ 597b	§ 4043	Preservation of remedies	Sec. 803











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