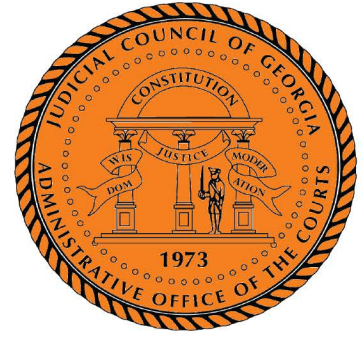


A Georgia Courts Guide to the  
Servicemembers Civil Relief Act  
(SCRA)  
2019



Access to Justice Committee  
Judicial Council of Georgia  
Administrative Office of the Courts

# **Georgia Courts Guide to the Servicemembers Civil Relief Act (SCRA)**

Access to Justice Committee  
Judicial Council of Georgia  
2019



## **Acknowledgements for 2019 Edition**

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## Part I: Background and Definitions

## **PART I - BACKGROUND AND DEFINITIONS**

### **1. INTRODUCTION**

Congress enacted the Servicemembers Civil Relief Act (SCRA) in 2003, 15 U.S.C. App. §§ 3901-4043 (referred throughout this guide as the “SCRA” or the “Act”). Most judges and attorneys still refer to the SCRA by its predecessor—the Soldiers’ and Sailors’ Civil Relief Act (“SSCRA”) enacted during World War II. However, the history of civil protections for service members dates all the way back to the Civil War when Congress immunized all soldiers and sailors from civil lawsuits.<sup>1</sup>

The first SSCRA became law in 1918 during World War One, and protected soldiers and sailors against most but not all civil actions. This enactment automatically expired at the end of World War I.<sup>2</sup> The second SSCRA, enacted in 1940, was a law designed to ease the financial burdens on service members during their periods of military service. The Act, albeit amended over the years, remained in effect until 2003, when it was amended and replaced by the current version, now titled the Servicemembers Civil Relief Act. The SCRA, like its predecessor, provides certain protections in civil actions occurring during servicemembers’ absence and provides additional benefits. The SCRA’s protections are broad, covering issues such as rental agreements, security deposits, prepaid rent, evictions, installment contracts, interest rates, foreclosures, civil proceedings, automobile leases, life insurance, medical insurance, and income taxes.

In one of the earliest cases interpreting the SSCRA, *Boone v. Lightner*, the U.S. Supreme Court stated that “the Soldiers’ and Sailors’ Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”<sup>3</sup>

The purpose of this Guide is to provide an overview of the SCRA, and to assist the judiciary and other members of Georgia’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>4</sup> to uphold the civil and constitutional rights of men and women in uniform during service to their country.<sup>5</sup> Because of its limitations, the SSCRA was superseded on December 19, 2003, by the SCRA.

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<sup>1</sup> Act of June 11, 1864, ch. 118, 13 Stat. 123.

<sup>2</sup> The Judge Advocate General’s Legal Center & School, U.S. Army, JA 260, *The Servicemembers Civil Relief Act*, pg. 1-1 (March 2006).

<sup>3</sup> *Boone v. Lightner*, 319 U.S. 561 (1943).

<sup>4</sup> Soldiers’ and Sailors’ Civil Relief Act of 1940 (SSCRA), 76 P.L. 861, 54 Stat. 1178, 76 Cong. Ch. 888 (1940).

<sup>5</sup> U.S. Department of Justice, *The Servicemembers Civil Relief Act (SCRA)*, available at <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-sdra>.

Although the SCRA considerably changed the older SSCRA, many of the primary benefits and protections for service members 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 service members of the United States to enable such persons to devote their entire energy to the defense needs of the Nation;<sup>6</sup> and
- To provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service.<sup>7</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 service members 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>8</sup>

## 2. ORGANIZATION

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

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

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<sup>6</sup> 50 U.S.C. § 3902 (2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948); *See also Boone*, 319 U.S. at 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”).

- **Title VII** – Further Relief
- **Title VIII** – Civil Liability<sup>9</sup>

The organization of this guide is in three Parts:

- **Part I** – Background and Key Definitions under the Act
- **Part II** – Procedural Protections under the Act
- **Part III** – Substantive Protections under the Act

The procedural protections under the Act include protections against default judgments and stays of proceedings. These protections are found under Title II of the Act.

The substantive protections are found in the remaining titles of the Act.

### **3. KEY DEFINITIONS UNDER THE ACT<sup>10</sup>**

#### **3.1. Jurisdictional Application<sup>11</sup>**

The SCRA applies to any civil judicial or administrative proceedings in the United States and its territories, including both federal and state courts and administrative agencies.<sup>12</sup> The SCRA does *not* apply to criminal cases.

#### **3.2. Individuals Covered by the SCRA**

The SCRA applies to all service members, which under the Act are defined as a member of the “uniformed services.”<sup>13</sup> Uniformed services include the following:

- Members of the active component and reserve component of the Army, Navy, Air Force, Marine Corps, and Coast Guard on *active* duty (including reserves ordered to active duty).<sup>14</sup>
- National Guard members called to *active* service under Title 32, U.S.C. for over 30 consecutive days for purposes of responding to a national emergency declared by the President and supported by Federal funds.<sup>15</sup>

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<sup>9</sup> Title VIII was added by P.L. 111-275, effective October 13, 2010.

<sup>10</sup> 50 U.S.C. § 3911 (2018).

<sup>11</sup> 50 U.S.C. § 3912 (2018).

<sup>12</sup> 50 U.S.C. §§ 3911(5), 3912 (2018).

<sup>13</sup> 50 U.S.C. § 3911(1) (2018).

<sup>14</sup> 50 U.S.C. § 3911(2); 10 U.S.C. 101(d)(1) (2018).

<sup>15</sup> 50 U.S.C. § 3911(2)(A)(ii) (2018).



- Commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration when on active service.<sup>16</sup>
- In limited circumstances, SCRA protections extend to the service member’s dependents (e.g., evictions, lease terminations, foreclosures, and installment contract terminations). Dependents include the service members’ spouse, children, and any other individual(s) for whom the service member provided more than one-half of the individual’s financial support for 180 days immediately preceding application for relief under the Act.<sup>17</sup>
- Anyone to whom the service member has granted a Power of Attorney and is acting on behalf of the service member.<sup>18</sup>
- Service members who are absent from duty for a lawful cause or because of sickness, wounds, or leave are covered by the SCRA.<sup>19</sup>

Additionally, any “citizen of the United States who is serving with the forces of a nation with which the United States is allied in the prosecution of a war or military action is entitled to the relief and protections provided under this Act if that service with the allied force is similar to military service.”<sup>20</sup>

The Act does not apply to Department of Defense civilians, contractors who are deployed with the military,<sup>21</sup> or military retirees.

### **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>22</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>23</sup> The SCRA applies regardless of duty location.

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<sup>16</sup> 50 U.S.C. § 3911(2)(B) (2018); 10 U.S.C. §§ 101(a)(5)(B)-(C) (2018).

<sup>17</sup> 50 U.S.C. §§ 3911(4), 3959 (2018); *See also Balconi v. Dvascas*, 507 N.Y.S.2d 788 (City Ct. 1986) (holding that a service member’s ex-wife was a dependent within the meaning of the Act because she was still financially dependent on the service member).

<sup>18</sup> Anyone to whom the service member has given a Power of Attorney can demand any and all protections available under the SCRA on the service member’s behalf.

<sup>19</sup> 50 U.S.C. § 3911(2)(C) (2018).

<sup>20</sup> 50 U.S.C. § 3914 (2018).

<sup>21</sup> *Abbattista v. U.S.*, 95 F.Supp. 679 (N.J. 1951).

<sup>22</sup> 50 U.S.C. § 3911(2)(a)(i) (2018); 10 U.S.C. § 101(d)(1) (2018).

<sup>23</sup> 10 U.S.C. § 101(d)(i) (2018).

### **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>24</sup>

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

Military service includes time periods of a service member's absence from *active* duty due to sickness, wounds, leave, or other lawful causes.<sup>25</sup> This includes periods when the service member might be missing in action ("MIA") or wounded in action ("WIA").

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

Military service does not include absence from *active* duty while incarcerated in a military prison or absence without leave (AWOL).<sup>26</sup>

## **3.4. Period of Military Service**

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

The period beginning on the date that a service member begins military service and ending on the date of a service member's release from military service or death during military service.<sup>27</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 service member to assert the protections in a timely manner to prevent a waiver of such protections.<sup>28</sup>

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<sup>24</sup> 50 U.S.C. § 3911(2)(A)(ii) (2018).

<sup>25</sup> *Cronin v. U.S.*, 765 F.3d 1331 (Fed. Cir. 2014).

<sup>26</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>27</sup> 50 U.S.C. § 3911(3) (2018).

<sup>28</sup> 50 U.S.C. § 3955(d)(1) (2018) (A residential lease is not terminated until 30 days after the next rent payment is due. For termination clock to start, service member 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. 2007), *on reh'g*, 877 N.E.2d 227 (Ind. Ct. App. 2007) (finding service members have 30 days to present current military orders to his or her landlord).

### 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>29</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 a separate 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
  - (ii) Was purchased or received under a contract, lease, or bailment.<sup>30</sup>

## 4. ENFORCEMENT

### 4.1. Civil Liability for Violations of the SCRA

#### 4.1.1. Civil Actions by the Attorney General

The U.S. 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>31</sup>

#### 4.1.2. Relief for Civil Actions by the Attorney General

The court *may* grant appropriate equitable, declaratory, and other relief, including monetary damages.<sup>32</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>33</sup>

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<sup>29</sup> 50 U.S.C. § 3918(a) (2018).

<sup>30</sup> 50 U.S.C. § 3918(b)(1)(A) (2018).

<sup>31</sup> 50 U.S.C. § 4041(a) (2018).

<sup>32</sup> 50 U.S.C. § 4041(b)(1),(2) (2018).

<sup>33</sup> 50 U.S.C. § 4041(b)(3) (2018).

An action brought by the Attorney General does not preclude or limit any other remedies available by law, including consequential and punitive damages.<sup>34</sup>

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

A service member or service member's dependent protected by the SCRA may bring a civil action against violations of the Act.<sup>35</sup>

#### **4.1.4. 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>36</sup> However, the availability and appropriate measure of such remedies have been found to be governed solely by federal law.<sup>37</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>38</sup>

#### **4.1.5. Statute of Limitations Applicable to Civil Actions for Violations**

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 service member's period of military service to be added to the applicable statute of limitations.<sup>39</sup> For example, when a service member 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 term of military service (see the definition of military service in Section 3.4.1) plus 10 years.<sup>40</sup>

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<sup>34</sup> 50 U.S.C. § 4043 (2018).

<sup>35</sup> 50 U.S.C. § 4042 (2018).

<sup>36</sup> *Id.*

<sup>37</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>38</sup> 50 U.S.C. § 4043 (2018); *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).

<sup>39</sup> 50 U.S.C. § 3936(a) (2018).

<sup>40</sup> *Id.*

## 4.2. Criminal Liability for Violations of the SCRA

### 4.2.1. 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 service members against default judgments: knowingly making or using a false affidavit concerning a service member's military status.<sup>41</sup>
- **SCRA § 3937** Maximum rate of interest on debts incurred before military service: knowingly exceeding the six percent interest rate limitation in violation of the Act.<sup>42</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>43</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>44</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>45</sup>
- **SCRA § 3955** Termination of residential or motor vehicle lease: knowingly seizing, holding, or detaining the personal effects, security deposit, or other property of a service member 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 knowingly attempting to do so.<sup>46</sup>
- **SCRA § 3958** Enforcement of storage liens: knowingly enforcing a lien on the property or effects of a service member in violation of the Act, or knowingly attempting to do so.<sup>47</sup>

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<sup>41</sup> 50 U.S.C. § 3931(c) (2018).

<sup>42</sup> 50 U.S.C. § 3937(a) (2018).

<sup>43</sup> 50 U.S.C. § 3951 (2018).

<sup>44</sup> 50 U.S.C. § 3952 (2018).

<sup>45</sup> 50 U.S.C. § 3953(d) (2018).

<sup>46</sup> 50 U.S.C. § 3955(h) (2018).

<sup>47</sup> 50 U.S.C. § 3958 (2018).

#### 4.2.2. 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>48</sup>

An example of the criminal liability is the case of *U.S. v. Kaufman* where the defendant was convicted of 90 counts of falsifying the affidavit required under the Act pursuant to 50 U.S.C. § 3931.<sup>49</sup>

In the case of *U.S. v. McLeod*, the defendant was sentenced to six months in prison, one year of supervised release, \$1,000.00 fine, and restitution to his former tenants after he violated the eviction provisions of the SCRA.<sup>50</sup>

#### 4.3 Potential Ethical Liability for SCRA Violations

In the case of *In re Branch*, Judge Branch in North Carolina was publicly reprimanded for not following the procedural protections outlined in the SCRA. Specifically, the investigative panel found that:

“The Judge engaged in conduct inappropriate to her judicial office by:

- a. making inadequate inquiry into the rights afforded to Defendant... a litigant protected under the Servicemember's [sic] Civil Relief Act of 2003, 50 U.S.C. App. §§501-597b (hereafter "the SCRA"), and failing to maintain adequate professional competence in this area of the law;
- b. imprudently relying upon the counsel for the opposing party in the matter for a determination of the rights afforded to Defendant... under the SCRA, without sufficiently performing her own independent inquiry and research into the law, and allowing opposing counsel to present such advice and opinion on the law to the Court outside of the presence of Defendant or anyone appointed as legal representation for Defendant; and,
- c. inappropriately denying Defendant... the appointment of legal representation guaranteed under the SCRA, thereby denying him his full right to be heard according to the law.”<sup>51</sup>

*In re Branch*, 767 S.E.2d 47 (2015). While this case stands alone, judges (and attorneys) need to be aware of the seriousness of compliance with the SCRA.

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<sup>48</sup> 50 U.S.C. §§ 3931(c), 3937(e), 3951(c), 3952(b), 3953(d), 3955(h), 3958(c) (2018).

<sup>49</sup> *U.S. v. Kaufman*, 453 F.2d 306 (2d Cir. 1971) decided under the SSCRA.

<sup>50</sup> *U.S. v. McLeod*, 2008 U.S. Dist. LEXIS 1500, 2008 WL 114789 (W.D. Mich. Jan 9, 2008).

<sup>51</sup> *In re Branch*, 767 S.E.2d 47 (2015).



## Part II: Procedural Protections Under The Act



## PART II - PROCEDURAL PROTECTIONS UNDER THE ACT

### 5. PROTECTION AGAINST DEFAULT JUDGMENTS

Section 3931 of the SCRA protects service members against the entry of default judgments.<sup>52</sup> This section applies to any civil action or proceeding, including those for child custody, in which the defendant does not make an appearance.<sup>53</sup>

#### 5.1 Affidavit Requirement

##### 5.1.1 Plaintiff to File Affidavit

In any civil action or proceeding where the defendant has not made an appearance, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit.<sup>54</sup>

If the court enters a default judgment in favor of the plaintiff without requiring an affidavit pursuant to 50 U.S.C. § 3931, the default judgment is not void, but is voidable.<sup>55</sup>

##### 5.1.2 Content of the Affidavit

The affidavit shall state whether the defendant is in military service and show necessary facts to support the affidavit.<sup>56</sup>

The Defense Manpower Data Center is a website which allows attorneys to confirm whether a defendant is in the military. The website is found at <https://scra.dmdc.osd.mil/scra/#/home>. Sufficient facts can include an affidavit from plaintiff's attorney with the report and search results from the DMDC website.<sup>57</sup> Users may submit a single record request on the DMDC<sup>58</sup> website without setting up an account, however multiple record requests, including multiple dates, requires an account. The DMDC does not require that the requestor know the date of birth and/or social security number for the service member.

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<sup>52</sup> 50 U.S.C. § 3931 (2018).

<sup>53</sup> 50 U.S.C. § 3931(a) (2018).

<sup>54</sup> 50 U.S.C. § 3931(b) (2018).

<sup>55</sup> See *Merrill v. Beard*, No. 5:05CV768, 2007 WL 461469 (N.D. Ohio Feb. 7, 2007); *Davidson v. General Finance Corp.*, [295 F.Supp. 878, 881 \(D.C.Ga.1968\)](#).

<sup>56</sup> 50 U.S.C. § 3931 (b)(1) (2018).

<sup>57</sup> See *Ameris Bank v. Abdi Abschir Musse*, No. 11-EV-014058H, 2012 Ga. State LEXIS 1437 (March 5, 2012); *One Ga. Bank v. Lewis*, No. 11-EV-012594F, 2011 Ga. State LEXIS 460 (July 11, 2011).

<sup>58</sup> <https://scra.dmdc.osd.mil/scra/#/home>.

An oral statement does not suffice for the affidavit requirement.<sup>59</sup>

If the plaintiff is unable to determine whether the defendant is in military service, the affidavit shall state that the plaintiff is unable to determine whether the defendant is in military service.<sup>60</sup>

The law generally holds that a default judgment is not appropriate when the plaintiff has failed to file an affidavit regarding military status of the Defendant.<sup>61</sup>

### **5.1.3 The Court is Unable to Ascertain Defendant's Military Status – 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 service member against any loss or damage that the service member 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>62</sup>

### **5.1.4 Format of the Affidavit**

The requirement for an affidavit may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

### **5.1.5 Penalty for Making a False Affidavit**

A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in Title 18 or imprisoned for not more than one year, or both.

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<sup>59</sup> See *Merrill v. Beard*, No. 5:05CV768, 2007 WL 461469 (N.D. Ohio Feb. 7, 2007).

<sup>60</sup> 50 U.S.C. § 3931 (b)(1) (2018).

<sup>61</sup> See *Chase Bank USA, N.A., v. Hampson (In re Hampson)*, 429 B.R. 360 (Banker. N.D. Ga. 2009).

<sup>62</sup> 50 U.S.C. § 3931(b)(3) (2018); See also *Seton v. United Gold Network, LLC*, No. DKC-06-1246, 2008 WL 1925180 (D. Md. April 30, 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 service member protected under the SCRA).

In the case of *United States v. Kaufman*, the defendant was convicted of 90 counts of falsifying affidavits. The defendant claimed that he spoke with personnel and that they were not in military service; however, in actuality, defendant never spoke to the personnel nor made any efforts to confirm that the individuals were in military service or not.<sup>63</sup>

## 5.2 Appointment of an Attorney in Default Proceedings

If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. The SCRA does not indicate if or how this appointed attorney will be paid. If an attorney appointed under this section to represent a service member cannot locate the service member, actions by the attorney in the case shall not waive any defense of the service member or otherwise bind the service member.<sup>64</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 service member. Factors include but are not limited to: the merits of the case; the service member's ability to pay; and whether the costs should be shifted to the plaintiff. In rare instances, courts have specified the source and amount of compensation due to attorneys appointed under the act, while also noting that the attorney may request compensation before the conclusion of the case, as the attorney's fee is not dependent upon the outcome of the case.<sup>65</sup>

As in the section regarding the affidavit requirement, the SCRA does not specify what happens if a court fails to appoint an attorney for the military defendant prior to the granting of a default judgment. Although the SCRA makes the requirement mandatory, most jurisdictions hold that a failure to appoint an attorney makes the default judgment voidable but not void.<sup>66</sup>

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<sup>63</sup> See *United States v. Kaufman*, 453 F. 2d 306 (2d Cir. 1971) decided under SSCRA (penalty imposed by trial court where attorney submitted false affidavits swearing parties were not in military service affirmed).

<sup>64</sup> 50 U.S.C. § 3931 (b)(2) (2018).

<sup>65</sup> *State, Dept. of Revenue v. Superior Court*, 917 P.2d 14 at 16 (Alaska 1995) (where the court found that the services rendered by the appointed attorney are analogous to service rendered by persons who assist a party in effectuating a lawsuit, such as process servers. While the attorney's services are not ministerial, they are limited and largely informational in nature. Significantly, the plaintiff cannot obtain a default judgment unless an attorney is appointed and performs the services required by the SSCRA. Whether the plaintiff prevails is irrelevant to the question of whether the State or superior court must pay the appointed attorney's fees.

<sup>66</sup> See *Merrill v. Beard*, 2007 U.S. Dist LEXIS 9210 (N.D. Ohio 2007); See also *Krumme v. Krumme*, 6 Kan. App. 2d 939, 636 P.2d 814 (1891); *Rentfrow v. Wilson*, 213 A.2d 195 (D.C. App. 1965); *Smith v. Davis*, 88 N.C. App. 557 (1988); *Murdock v. Murdock*, 338 S.C. 322 (1999); but see *Real v. Real*, 2010 Me 92 (Me 2010) (where the court said the default judgment must be vacated where no attorney has been appointed for the military defendant); and *Bernhardt v. Alden Café*, 374 N.J. Super. 271, 864 A.2d 421 (2005).

When appointing an attorney, the court needs to be aware of any potential conflicts of interest. A plaintiff creditor may recommend a certain attorney to be appointed. That attorney may then only send notice to the service member's last known address and then tell the court that while no contact has been made, the attorney knows of no reason why the default judgment cannot move forward. This makes this provision ineffective and is an end run around the protections.

### 5.3 Stays in Default Proceedings

In any proceeding in which a defendant is in military service and fails to make an appearance, the court *must* grant a stay of such proceeding 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>67</sup> *or*
- b) After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.<sup>68</sup>

Such stays are separate and distinct from stays in cases in which the service member receives actual notice of the action.<sup>69</sup> When the service member receives actual notice of the proceedings, the stay is controlled by 50 U.S.C. § 3932.

### 5.4 Setting Aside Default Judgments

Default judgments entered in violation of the SCRA *are* voidable and may be vacated.<sup>70</sup>

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<sup>67</sup> 50 U.S.C. § 3931(b)(3) (2018). *But see Massey v. Kim*, 455 S.E.2d 306, 307 (Ga. Ct. App. 1995), where the service member asked for a stay of proceedings to delay pending discovery until the completion of his overseas tour of duty. The court denied his request, pointing out improvements in modern communications since the passage of the SSCRA; *In re Diaz* 82 B.R. 162, 165 (Bankr. Ga. 1988), where the court specifically pointed out that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country."

A service member's absence creates the rebuttable presumption of prejudice. *See also Barry v. Keeler*, 322 Mass 114, 121 (1947) (finding that granting non-military codefendants a stay or continuance due to the service member-codefendant's military service is within the sound discretion of the court).

<sup>68</sup> 50 U.S.C. § 3931(d) (2018); *See also U.S. v. Pilling*, No. 12-cv-40054-TSH, 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 service member had been put on *actual notice* of the proceedings against him, and that the mortgagor's failure to find a valid street address for the service member barred the court from allowing the foreclosure).

<sup>69</sup> 50 U.S.C. § 3931(e)-(f) (2018).

<sup>70</sup> 50 U.S.C. § 3931(g) (2018).

### 5.4.1 Procedures for Vacating Default Judgments

Default judgments *may* be reopened and vacated under the following conditions.<sup>71</sup>

The default judgment *must* have been entered during the service member's period of military service or within 60 days after termination of or release from military service;<sup>72</sup>

The service member *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>73</sup> even if the service member was unaware of the default judgment until expiration of the 90 days (*Morris Plan Bank of Georgia v. Hadsall*, 202 Ga. 52, 53 (1947)) holding that the defendant did not bring his motion to vacate default judgment within the statutorily required 90 days, even though he was not aware of the default judgment until the 90 days expired).

And the service member must establish that, at the time the judgment was entered, the service member:

- a) Was prejudiced by his or her military service, or materially affected<sup>74</sup> by their military service in making a defense. *Boone v. Lightner*, 63 U.S. 1223, 1229 (1943) (holding defendant was not materially affected by military service in properly preparing a defense because the defendant did not act in good faith and had ample time to prepare a defense as he had already presented to the court pleadings, depositions, and affidavits), *and*
- b) Has a meritorious or legal defense to the action, in whole or in part.<sup>75</sup> *Wilson v. Butler*, 584 So.2d 414 (Miss. 1991) (holding that the service member failed to show he had a meritorious defense in a paternity action because he failed to state any such defense in his motion to set aside the paternity judgment).

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<sup>71</sup> See *Saborit v. Welch*, 108 Ga.App. 611, 613-15 (1963) (holding that the default judgment be set aside because the defendant pled a meritorious defense against the default judgment, and did not appear due to his military service as he was unaware of the action taken against him until receiving the default ruling of the court).

<sup>72</sup> 50 U.S.C. at § 3931(g)(1) (2018).

<sup>73</sup> 50 U.S.C. § 3931(g)(2) (2018).

<sup>74</sup> 50 U.S.C. §3931(g)(1)(A) (2018).

<sup>75</sup> 50 U.S.C. 3931(g)(1)(B) (2018).

### 5.4.2. Protections for Bona Fide Purchasers

Even where a court or tribunal vacates a default judgment against a service member 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>76</sup>

## 6. STAYS OF PROCEEDINGS

50 U.S.C. § 3932 provides for stays in court and other proceedings where the service member *receives notice* of the action or proceeding. The provision applies to plaintiffs and defendants alike. This provision effectively levels the playing field by mitigating any adverse effects a service member may experience during military service through the temporary suspension of any claims or transactions. However, this provision is not intended to afford service members an advantage over their civilian counterparts; rather, the Act functions to relieve service members of any disadvantages of military service.<sup>77</sup>

### 6.1 Applicability

Subject to the minor limitations discussed below, § 3932 of the SCRA contains the general stay provisions. These provisions apply to *all* civil actions or proceedings, including administrative hearings and child custody proceedings, and 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>78</sup> Generally, courts have held that a service member “*receives notice*” when either service of process is perfected in accordance with the rules of civil procedure, or a procedurally defective service of process is corrected, granting the service member sufficient notice of the proceedings and time to prepare and present his or her arguments.<sup>79</sup>

At any stage before a final judgment in a proceeding, a service member may file an application for a stay of proceeding.<sup>80</sup>

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<sup>76</sup> 50 U.S.C. § 3931(h) (2018).

<sup>77</sup> See *Lenser v. McGowan*, 358 Ark. 423, 431 (2004).

<sup>78</sup> 50 U.S.C. § 3932(a) (2018).

<sup>79</sup> *Childs v. Childs*, 310 P.3d 955, 957 (Alaska 2013) (a father’s right to due process was not violated for lack of notice because the record indicated that the mother corrected her service of process, giving the father ample notice of the proceedings).

<sup>80</sup> 50 U.S.C. § 3932(b)(1) (2018).

## 6.2. Initial 90 Day Stay

### 6.2.1. When to Grant the Initial Request for a Stay.

The Act states that a Court *may*, on its own motion, grant a stay of proceedings.<sup>81</sup> Where a stay application is properly made by the service member, the court or tribunal *must* stay the proceeding for no less than 90 days,<sup>82</sup> subject to the conditions discussed in the next section of this guide.<sup>83</sup> The requirement that a judge must grant an initial stay upon a service members' completion of the application requirements supplants the SSCRA's previous provision which granted judges the discretion to approve or deny the motion.<sup>84</sup>

Under the current version of the SCRA, a stay of proceedings is mandatory upon a service member submitting a properly supported application.<sup>85</sup> Moreover, a judge's failure to grant a stay of proceeding after the statutory requirements are met can render a judge subject to discipline.<sup>86</sup> If, however, the statutorily prescribed application requirements are not met, the service member is not necessarily entitled to a stay of proceedings.<sup>87</sup> Thus, the requirement that a judge grant a service member's initial stay application hinges on whether the stay application contains the necessary requirements.

Failure to satisfy the statutorily prescribed information renders the stay discretionary. Some courts have adopted a more liberal reading of the requirements, asserting that the SCRA is to be liberally construed in favor of those "who dropped their affairs to answer their country's call."<sup>88</sup>

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<sup>81</sup> 50 U.S.C. § 3932(b)(1) (2018).

<sup>82</sup> 50 U.S.C. § 3931(b)(1) (2018); *but see Ensley v. Carter*, 245 Ga. App. 453, 455 (2000) (defendant service member's counsel 'misapprehends' the nature of the act by requesting a 30 to 40 year stay noting that the service member intended to make a career of military service).

<sup>83</sup> 50 U.S.C. § 3932(b)(2) (2018).

<sup>84</sup> *See Boone v. Lightner*, 319 U.S. 561 (1943) where the U.S. Supreme Court held that a determination of whether the service member has met the required conditions for a stay is within the sound discretion of the trial court.

<sup>85</sup> *In re A.R.*, 88 Cal. Rptr. 3d 448, 454 (4th Dist. 2009).

<sup>86</sup> *In re Branch*, 367 N.C. 733, 734 (2015) (the court issued a public reprimand against a North Carolina Judge for failure to grant a stay of proceeding after the statutory requirements were met).

<sup>87</sup> *See In re Marriage of Herridge*, 169 Wash. App. 290, 301 (2012) (holding trial court did not err in denying a stay where the service member failed to satisfy the requirements for a mandatory stay by submitting only a letter stating he would be unable to attend the hearing as he would be deployed overseas and a redacted letter from his commanding officer stating the dates of his deployment).

<sup>88</sup> *Higgins v. Timber Springs Homeowners*, 126 So. 3d 394, 396 (Fla. App. 2013) (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943)). In *Higgins*, the Court held that the trial court erred in not granting a stay after a service member filed a letter attesting to his active duty military service and a copy of his military orders which required him to report to his new duty station two weeks before the hearing. The court reasoned that although the service member failed to submit the necessary documents including a letter from his commanding officer, under a liberal construction of the statute, the service member should have been given an opportunity to supplement his request for a stay under the SCRA before proceeding.

## 6.2.2 Conditions for Stay

The service member's stay application must include:<sup>89</sup>

- (a) A statement that explains how the service member's current military duties *materially affect* the service member's ability to appear, and includes a date when the service member will be available to appear; and
- (b) A statement from the service member's commanding officer stating that the service member's current military duties prevent appearance, and military leave is not available at the time of the letter.<sup>90</sup>

Should a service member fail to properly complete the aforementioned requirements, a court may deny a service member's request for a stay of proceedings.<sup>91</sup> While the statute provides no clear definition of the term "*materially affects*," the term is generally thought to require more than just active duty military service.<sup>92</sup>

## 6.2.3. Exceptions to the Mandatory Grant of the Initial Stay

**Child Custody Cases.** While the granting of a stay is mandatory upon satisfaction of the application requirements, courts have differed in their interpretation of the Act specifically within the context of child custody proceedings. Courts are often faced with the challenge of balancing the interests of the child against those of the service member. For example, some courts have declined to apply a stay to a temporary custody agreement noting that a temporary agreement is less prejudicial to the service members' rights.

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<sup>89</sup> The initial 90 day stay set forth in 50 U.S.C. § 3932(b) is mandatory, but only if the service member satisfies the conditions identified in 50 U.S.C. § 3932(b)(2).

<sup>90</sup> 50 U.S.C. § 3932(b)(2) (2018); *See City of Pendergrass v. Skelton*, 628 S.E.2d 136 (Ga. Ct. App. 2006) (holding service member is not entitled to a stay of proceedings when he submits a letter from his commander which only asserts his availability on the present day and for 24 subsequent days, but fails to address whether service member was entitled to leave after that period, or that service member would be deploying to Iraq).

<sup>91</sup> *Childs v. Childs*, 310 P.3d 955, 955 (Alaska 2013). (superior court did not abuse its discretion in declining to stay child support modification proceedings because father who was active military member was not qualified for stay under Servicemembers' Civil Relief Act, given that his military duties did not prevent him from actively participating in proceedings).

<sup>92</sup> *Id.* at 960 (holding protection under the Act requires that the movant make a showing of his unavailability and that his rights would be adversely affected by his absence); *Steffenhagen v. Beck*, No. 7:09-CV-57-HL, 2009 U.S. Dist. Lexis 56925 (M.D. Ga. July 6, 2009) (holding that the obligation to protect the civil rights of services members whose rights might otherwise be prejudiced due to their service is dependent on the service member first demonstrating the manner in which his military duty affects his ability to appear); *See also Ensley v. Carter* 245 Ga. App. at 455 (holding trial court did not abuse its discretion in denying a motion for a stay under the Soldiers' & Sailors' Civil Relief Act where the service member failed to present evidence that he had sought leave to attend the trial and where the defendant had already provided depositions and testimony).



In *Lenser v. McGowan*, the Arkansas Supreme Court held that the trial did not err in denying the service member’s application to stay a temporary child custody agreement granting custody to child’s mother as opposed to service member’s grandmother, reasoning that the temporary agreement was not a final determination and thus less prejudicial. Additionally, the Court held that even when a stay is granted, the court may still retain jurisdiction to consider matters such as child support and custody, which arise during the stay, asserting that a stay under the Act does not “freeze a case in permanent limbo and leave a circuit court with no authority to act at all.”<sup>93</sup> Conversely, other courts have favored the service member, opting to both grant a stay and allow a child to remain with service member’s ‘paramour’.<sup>94</sup>

**Bad Faith Application of the Act.** Courts may decline to grant a stay when a service member attempts to use the Act to gain an unfair advantage. As noted above, the Act serves to level the playing field, and should not be used as a procedural loophole.<sup>95</sup>

#### **6.2.4. 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>96</sup>

### **6.3 Additional Stays**

A service member may apply for an extension of the mandatory 90-day stay based on the continuing *material affect* of military duties on the service member’s ability to appear.<sup>97</sup> Such an application may be made as part of the initial stay application or thereafter where it appears the service member will remain unavailable to prosecute or defend the action. The same conditions for the initial stay apply to applications for stay extensions. *See Griffith v. Ault*, No. ST-06-CV-352, 2017 V.I. Lexis 128, (Super. Ct. Aug. 16, 2017) (in which a motion to extend a stay was denied due to failure of the motion to satisfy the statutory requirements needed for the original stay).

Whether to grant subsequent stays under § 3932(d)(1) is discretionary. *Hernandez v. Hernandez*, 169 MD. App. 679, 691 (2006) (finding reversible error where circuit court failed to grant initial stay but recognized that after the initial stay the court had the authority to deny any additional stays).

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<sup>93</sup> *Lenser v. McGowan*, 358 Ark 423, 429 (2004).

<sup>94</sup> *Wood v. Woeste*, 461 S.W.3d 778 (Ky. Ct. App. 2015).

<sup>95</sup> *Lenser*, 358 Ark. at 431 (holding court did not err in denying a service member’s application for stay of proceedings when the service member applied for a stay in order to preserve custody of his child while the stay was in place, reasoning that the Act is a “shield” and not a “sword”).

<sup>96</sup> 50 U.S.C. § 3932(b)(2) (2018).

<sup>97</sup> 50 U.S.C. § 3932(d)(1) (2018).

To obtain an extended or subsequent stay, the service member must again 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 service member's ability to appear. *See Ridley v. Young*, 64 Cal. App. 2d 503, 514 (1944), decided under SSCRA (the court denied additional stay because "[n]o showing whatever was made to indicate that [defendant] could not obtain a leave of absence to attend the trial, or that his defense would be materially affected by his absence when nothing but a certificate showing he was engaged in military service was offered as evidence").

The length of additional stays is within the discretion of the court. Although the initial stay must be "a minimum period of 90 days,"<sup>98</sup> there is no such required minimum period for subsequent stays. *See Nakayama v. Cameron*, No. 27746, 2007 Haw. App. Lexis 263 (Ct. App. Apr. 16, 2007) (finding additional stays were issued correctly even if issued for less than 90 days because no required minimum period of time for additional stays is present in § 3932(d)(1)).

When considering appropriateness of subsequent stays, it is important to note that the aim of the SCRA is not to improve service members' positions in litigation, rather, it is to relieve any disadvantages arising from service.<sup>99</sup>

#### **6.4 Appointment of an Attorney under a Stay of Proceedings**

If the court refuses to grant an additional stay of proceedings under this section, the court shall appoint an attorney to represent the service member in the action or proceeding.<sup>100</sup>

The SCRA does not define the role of the appointed attorney, however the Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App. § 520 (1990)), which the SCRA replaced on December 19, 2003, gave the appointed attorney the following duties (note that these duties were not included in the SCRA):

1. contact the defendant and assure the defendant has actual notice of the lawsuit;
2. advise the defendant of the protections of the Soldiers' and Sailors' Civil Relief Act;
3. advise the defendant of the possibility of entry of default judgment and of the consequences of such a judgment;

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<sup>98</sup> 50 U.S.C. § 3932(b)(1) (2018).

<sup>99</sup> *Lenser v. McGowan*, 358 Ark. 423, 432 (2004) (stating SCRA is not to be used as a sword).

<sup>100</sup> 50 U.S.C. § 3932(d)(2) (2018).

4. ascertain whether the defendant’s ability to appear and defend his or her legal interests is affected in any way by the defendant’s military status; and
5. if the defendant wishes, move for a stay of the proceedings to enable defendant to obtain counsel or prepare a defense on the merits of the case.<sup>101</sup>

The SCRA provides no guidelines on how an appointed attorney shall be compensated and different measures have been taken by different courts. *See In re Cool’s Estate*, 18 A.2d 714, 717 (Orphans Ct. 1941) (holding that an attorney appointed under the Act receives no compensation for performing his “patriotic duty”). *See also In re Ehlke’s Estate*, 27 N.W.2d 754, 759 (Wis. 1947) (compensation commonly allowed to those in public service), *Barnes v. Winford*, 833 P.2d 756, 758 (Colo. App. 1991) (requiring the plaintiff to bear the costs) and *State, Dep’t of Revenue, Child Support Enf’t Div. ex rel. Dew v. Superior Court*, 907 P.2d 14 (Alaska 1995) (using indigent defense funds). However, probate matters are typically allocated to the estate. *In re Ehlke’s Estate*, 27 N.W.2d at 759.

## **7. PROCEDURAL PROTECTIONS IN CHILD CUSTODY CASES<sup>102</sup>**

### **7.1 Temporary Custody Orders on Deployments**

If a court renders a temporary order for custodial responsibility for a child based solely upon a deployment or anticipated deployment of a parent who is a service member, the court must require the temporary order shall expire not later than the time period justified by the deployment.<sup>103</sup>

For the purposes of this section, deployment is defined as “the movement or mobilization of a service member to a location for a period of longer than 60 days and not longer than 540 days pursuant to temporary or permanent official orders such that: 1) service member is designated as unaccompanied; 2) for which dependent travel is not authorized; or 3) that otherwise do not permit the movement of family members to that location.”<sup>104</sup>

### **7.2 Deployment Cannot be Sole Factor in Determining Custody**

If a motion or a petition is filed seeking a permanent order to modify the custody of the child of a service member, no court may consider the absence of the service member by reason of deployment, or the possibility of deployment, as the sole factor in determining the best interest of the child.<sup>105</sup>

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<sup>101</sup> *State, Dept. of Revenue v. Superior Court*, 907 P.2d 14, 15 n.2 (Alaska 1995).

<sup>102</sup> 50 U.S.C. § 3938 (2018).

<sup>103</sup> 50 U.S.C. § 3938(a) (2018).

<sup>104</sup> 50 U.S.C. § 3938(e) (2018).

<sup>105</sup> 50 U.S.C. § 3938(b) (2018).

### **7.3 Preemption of State Law**

In any case where state law applicable to a child custody proceeding involving a temporary order as contemplated in this code section provides a higher standard of protection to the rights of the parent who is a deploying service member than the rights provided under this section with respect to such temporary order, the appropriate court shall apply the higher state standard.<sup>106</sup>

Most states have passed extensive “military parents’ rights acts.” Georgia’s military parents’ rights act is codified at O.C.G.A. § 19-9-3(i). This Act provides a higher standard of protections for military parents in the event of deployments and should be followed by Georgia courts.<sup>107</sup>

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<sup>106</sup> 50 U.S.C. §3938(d) (2018).

<sup>107</sup> O.C.G.A. § 19-9-3(i) (2018).



## Part III: Substantive Protections Under The Act

## PART III – SUBSTANTIVE PROTECTIONS UNDER THE ACT

### 8. EVICTIONS AND DISTRESS

#### 8.1 Court-Ordered Eviction<sup>108</sup>

Under SCRA § 3951, landlords or persons with paramount title may not evict<sup>109</sup> a service member or their dependents during military service, without a court order.<sup>110</sup> Service members and dependents are eligible for this protection if the property is occupied or intended to be occupied primarily as a residence,<sup>111</sup> and the monthly rent does not exceed the statutorily set amount.<sup>112</sup>

#### 8.2 Distress

If a service member and his or her dependents are eligible for protection against eviction, the SCRA prohibits a landlord or person with paramount title<sup>113</sup> from subjecting the premises to a distress during active military service.<sup>114</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>115</sup>

#### 8.3 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 service member or his or her dependents whose ability to pay the agreed rent is materially affected by military service.<sup>116</sup>

#### 8.4 Lease Term Adjustments

As an alternative remedy to the stay discussed above, the court may adjust lease obligations to preserve the interests of all parties.<sup>117</sup>

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<sup>108</sup> See Eviction Procedures (GA), Practical Law Practice Note w-000-2748.

<sup>109</sup> See *Arkless v. Kilsten*, 61 F. Supp. 886, 888 (E.D. Pa. 1944) (holding that the Act's meaning of eviction is a dispossession of a tenant by a landlord).

<sup>110</sup> 50 U.S.C. App. § 3951(a)(1)(A) (2018).

<sup>111</sup> 50 U.S.C. § 3951(a)(1)(A)(i) (2018).

<sup>112</sup> 50 U.S.C. § 3951(a)(1)(A)(ii) (2018). Applying the inflation adjustment for 2017, the maximum monthly rental amount for 50 U.S.C. § 3951(a)(1)(A)(ii) as of January 1, 2018, would be \$3,716.73. Publication of Housing Price Inflation Adjustment, 83 Fed. Reg. 5409, 2/07/2018.

<sup>113</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. There does not need to be privity between the plaintiff and the soldier and/or dependents for the SCRA to apply.

<sup>114</sup> 50 U.S.C. § 3951(a)(1)(B) (2018).

<sup>115</sup> 49 Am. Jur. 2d, *Landlord and Tenant* § 782 (2018). See also O.C.G.A. § 44-7-70 et. seq. on distress warrants.

<sup>116</sup> 50 U.S.C. § 3951(b)(1)(A) (2018).

<sup>117</sup> 50 U.S.C. § 3951(b)(1)(B) (2018).

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>118</sup>

## **9. RESIDENTIAL AND AUTOMOBILE LEASE TERMINATIONS**

### **9.1 Lease Terminations**

Service members 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>119</sup> To qualify for such relief, the lease must have been entered into before military service or the service member receives orders for a permanent change of station (“PCS”) or deployment orders for a period of at least ninety (90) days.<sup>120</sup>

Service members and their dependents may terminate residential or motor vehicle leases at any time after entering military service or after the date of military orders for a PCS or deployment.<sup>121</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 service member’s military orders.<sup>122</sup> The service member is responsible to pay all lease payments due through the date of termination on a prorated basis.

The lessor must refund to the service member any rent paid in advance. 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 service member.

### **9.2 Residential Leases**

Service members may also 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>123</sup>

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<sup>118</sup> 50 U.S.C. § 3951(b)(2) (2018); *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 service member requested a three month stay and offered to pay one month’s rent, yet holding that the service member’s obligation for past-due rent continued).

<sup>119</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>120</sup> *Id.* at 1429; 50 U.S.C. § 3955(b)(1)(A) (2018).

<sup>121</sup> 50 U.S.C. § 3955(a)-(b) (2018).

<sup>122</sup> 50 U.S.C. § 3955(c)(1)(A) (2018) (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).

<sup>123</sup> 50 U.S.C. § 3955(b)(1)(B) (2018).



For month-to-month leases, termination is effective 30 days after the date on which the next rental payment is due.<sup>124</sup> For all other leases, termination is effective on the last day of the month following the month of written notice.<sup>125</sup>

Georgia law limits the liability for service members to “(1) ‘Thirty days’ rent after written notice and proof of the assignment are given to the landlord; and (2) The cost of repairing damage to the premises caused by an act or omission of the tenant.”<sup>126</sup>

Further, Georgia law specifies that to take advantage of early termination:

- 1) the service member is required, pursuant to a permanent change of station orders, to move 35 miles or more from the location of the rental premises; or
- 2) the service member is released from active duty or state active duty after having leased the rental premises while on active duty status and the rental premises is 35 miles or more from the service member's home of record prior to entering active duty; or
- 3) after entering into a rental agreement, the service member receives military orders requiring him or her to move into government quarters; or
- 4) after entering into a rental agreement, the service member becomes eligible to live in government quarters and the failure to move into government quarters will result in a forfeiture of the service member's basic allowance for housing; or
- 5) the service member receives temporary duty orders, temporary change of station orders, or state active duty orders to an area 35 miles or more from the location of the rental premises, provided such orders are for a period exceeding 60 days; or
- 6) the service member has leased the property but prior to taking possession of the rental premises receives a change of orders to an area that is 35 miles or more from the location of the rental premises.<sup>127</sup>

The notable divergence from the SCRA occurs under Georgia law where the service member may break the lease agreement with a 60 day temporary deployment period; whereas, the SCRA specifies at least a 90 day period. On the other hand, Georgia law is stricter because it specifies that the duty orders must require the service member to move at least 35 miles from the rental premise or into government housing.

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<sup>124</sup> 50 U.S.C. § 3955(d)(1) (2018).

<sup>125</sup> *Id.*

<sup>126</sup> O.C.G.A. § 44-7-37 (2018).

<sup>127</sup> O.C.G.A. § 44-7-22(b)(6) (2018).

### 9.3 Automobile Leases

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

- 1) The lease must have been entered into before military service (or during military service – see subsection 3 below).<sup>128</sup>
- 2) The service member must be under a call or order specifying military service for 180 days or more during the lease term.<sup>129</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>130</sup>
- 3) Service members 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 noncontiguous state of the United States, or an order to deploy with a military unit for 180 days or more.<sup>131</sup>
- 4) 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>132</sup>

### 9.4 Joint Leases

A dependent co-lessee's responsibility to perform under a lease agreement is terminated once the service member's obligation is terminated.<sup>133</sup>

In the event a service member dies during active duty, an adult member of his or her immediate family may terminate the service member's residential rental or lease agreement by providing the landlord with a written notice of termination to be effective on the date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders showing the service member was on active duty or a written verification signed by the service member's commanding officer and a copy of the service member's death certificate.<sup>134</sup>

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<sup>128</sup> 50 U.S.C. § 3955(b)(2)(A) (2018).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 50 U.S.C. § 3955(b)(2)(B) (2018).

<sup>132</sup> 50 U.S.C. § 3955(d)(2), (c)(1)(B) (2018).

<sup>133</sup> 50 U.S.C. § 3955(a)(2) (2018).

<sup>134</sup> O.C.G.A. § 44-7-22 (2018).

## 9.5 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>135</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>136</sup>

## 9.6 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 service member.<sup>137</sup> Equitable remedies are not limited to the service member's monthly rental obligations and security deposit.<sup>138</sup>

## 9.7 Penalties

Any person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a service member 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 one year, or both.

# 10. MORTGAGES

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

- a. Originated before the period of the service member's military service and for which the service member is still obligated;
- b. Is secured by a mortgage, trust deed, or other security in the nature of a mortgage;<sup>139</sup> and
- c. The foreclosure, sale, or seizure action must have been filed during, or within 1 year after active military service.<sup>140</sup>

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<sup>135</sup> 50 U.S.C. § 3955(e) (2018).

<sup>136</sup> 50 U.S.C. § 3955(f) (2018).

<sup>137</sup> 50 U.S.C. § 3955(g) (2018).

<sup>138</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).

<sup>139</sup> 50 U.S.C. § 3953(a) (2018); 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>140</sup> 50 U.S.C. § 3953(c) (2018).

## 10.1 Sale, Foreclosure, or Seizure

Under SCRA § 3953, a sale, foreclosure, or seizure of service members' 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 service member's written waiver.<sup>141</sup>

## 10.2 Available Mortgage Relief

### 10.2.1 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>142</sup> The court must grant a stay as long as justice and equity require when a service member or their dependent applies for such relief and proves that their ability to comply is materially affected by military service.<sup>143</sup>

### 10.2.2 Proving Material Affect

The SCRA does not specify which party must prove that the service member will be materially affected. Some courts have held that the service member must prove that military service materially affected his or her ability to comply,<sup>144</sup> while others have held that the party bringing an action against a service member must prove lack of material affect.<sup>145</sup>

### 10.2.3 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 (such as a third party neutral) to appraise the personal property.<sup>146</sup>

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<sup>141</sup> 50 U.S.C. §§ 3953(c), 3918(b) (2018).

<sup>142</sup> 50 U.S.C. § 3953(b) (2018).

<sup>143</sup> *Id.*; *See also Hunt v. Jacobson*, 33 N.Y.S.2d 661, 664 (N.Y. Sup. Ct. 1942) (recognizing that the criteria for a service member's mortgage debt relief under the former Act are whether (1) the service member's inability to comply is because of military service, and (2) such military service has materially affected the ability to comply).

<sup>144</sup> *See Queens County Sav. Bank v. Thaler*, 44 N.Y.S.2d 4 (N.Y. Sup. Ct. 1943) (denying service member's motion to stay foreclosure proceedings because he failed to show that his ability to pay was materially affected by his military service); *See also New York Life Ins. Co. v. Litke*, 45 N.Y.S.2d 576, (N.Y. Sup. Ct. 1943) (citing *Thaler*).

<sup>145</sup> *See Meyers v. Schmidt*, 46 N.Y.S. 2d 420, 422 (N.Y. Co. Ct. 1944) (holding that the burden is on the plaintiff to show that military service does not materially affect the service member's ability to meet the debt obligation); *See also Fleet Mortgage Corp. v. Hansen*, No. 90 C 6866, 1991 WL 134183, at \*1 (N.D. Ill. July 12, 1991), and *Martin v. Armstrong*, 3:97-CV-2784-D, 1998 WL 1765716, at \*2 (N.D. Tex. Sept. 21, 1998) ("Any doubt regarding the application of the SSCRA should be resolved in favor of the service member").

<sup>146</sup> 50 U.S.C. § 3954(a) (2018).

If the service member's dependents will not face undue hardship because of the foreclosure, repossession, or contract rescission/termination, the court may order that the service member's equity in the property be paid to the service member or their dependents.<sup>147</sup>

### 10.3 Reopening or Setting Aside Foreclosure Default Judgments

If a default judgment in a foreclosure proceeding is entered during a service member's active duty, or within 60 days after military service, the court must reopen or set aside the judgment to allow the service member or their counsel to assert the service member's rights under the SCRA.<sup>148</sup> However, the court must do so only if the service member's ability to defend the action was materially affected by military service, and the service member has a meritorious or legal defense.<sup>149</sup> The service member must move to reopen such a default judgment no later than 90 days after the end of military service.<sup>150</sup>

#### 10.3.1 Statutory Redemption Period Tolled

When real property is sold or forfeited to enforce an obligation, tax, or assessment, a service member's period of active military service may not be included in any statutory redemption period.<sup>151</sup> It is not necessary for service members to show that military service adversely affected their ability to redeem title to the property before qualifying for the tolling provision.<sup>152</sup>

#### 10.3.2 Conditional Stay

To preserve the interests of all parties,<sup>153</sup> the court may grant the service member conditional relief. Typically, conditional relief involves a stay of foreclosure proceedings conditioned upon the service member making regular, partial payments on the outstanding debt.<sup>154</sup>

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<sup>147</sup> 50 U.S.C. § 3954(b) (2018).

<sup>148</sup> 50 U.S.C. § 3931(g) (2018).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at § 3931(g)(2) (2018); *See also Flagg v. Sun Investment & Loan Corporation*, 373 P.2d 226 (Okla. 1962).

<sup>151</sup> 50 U.S.C. § 3936(b) (2018).

<sup>152</sup> *Conroy v. Aniskoff*, 507 U.S. at 517 (holding that a service member 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).

<sup>153</sup> 50 U.S.C. § 3953(b)(2) (2018).

<sup>154</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 service member 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 service member's dependent pay a monthly sum to plaintiff).

### 10.3.3 Subsequent Good-Faith Purchasers

Service members 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>155</sup>

### 10.3.4 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 service member's failure to comply with the contract during the period of the stay.<sup>156</sup> The reviewing court has discretion to reduce or waive penalties or fines resulting from a service member's non-performance under a contract where:

- 1) The service member was on active military service at the time the penalty or fine was assessed; and
- 2) The service member's ability to perform under the contract was materially affected by military service.<sup>157</sup>

## 11. INSTALLMENT CONTRACTS

SCRA § 3952 protects service members who entered into installment contracts for real or personal property (including motor vehicles), or the lease or bailment of such property, before being in military service (or during military service if then later the service member receives deployment orders for ninety (90) days or more). If a service member subsequently breaches the contract terms, the property may not be rescinded, terminated, or repossessed without a court order.<sup>158</sup>

### 11.1 Covered Obligations and Applicability

Installment contract protections only apply to contracts where the service member or their dependents have made a deposit or installment payment before active military service.<sup>159</sup>

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<sup>155</sup> 50 U.S.C. § 3931(h) (2018).

<sup>156</sup> 50 U.S.C. § 3933(a) (2018).

<sup>157</sup> 50 U.S.C. § 3933(b) (2018).

<sup>158</sup> 50 U.S.C. § 3952(a)(1) (2018) (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 one year).

<sup>159</sup> 50 U.S.C. § 3952(a)(2) (2018); *See also Cox v. McGregor*, 47 N.W.2d 87, 91 (1951) (holding that the former Act's provision against rescission and termination of installment contracts for the purchase of real or personal

Obligations entered into while in military service generally are not protected.<sup>160</sup> Protection extends to installment contracts breached before or during military service.<sup>161</sup>

## 11.2 Materially Affected

A service member or their dependents are only required to establish that military service has materially affected their ability to defend under SCRA § 3952 when the court considers staying the matter pending final resolution. In this situation, the court can compare a service member's financial situation before and during military service.<sup>162</sup>

## 11.3 Available Resolutions

### 11.3.1 Reimbursement

A court may order complete or partial repayment of deposits or installments made by a service member as a prerequisite of cancellation of the contract and the creditor regaining possession of the property.<sup>163</sup>

### 11.3.2 Stay of Proceedings

Upon the petition of the service member 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 service member or their dependent's ability to comply with the contract is "materially affected" by military service.<sup>164</sup> The court may also stay proceedings on its own motion.<sup>165</sup>

In *In re Cockerham*, a 2005 Georgia District Court proceeding, the court rejected a request for stay because the co-debtor (service member's spouse) requested the stay when the service member had not done so earlier in a bankruptcy proceeding.<sup>166</sup>

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property did not apply where service member did not make a payment or deposit).

<sup>160</sup> *Jim's Trailer Sales, Inc. v. Shutok*, 153 F. Supp. 274 (W.D. Pa. 1957) (holding that the service member was not protected by the SSCRA because he purchased the house trailer at issue after entering military service).

<sup>161</sup> 50 U.S.C. § 3952(a)(1) (2018); *See Hampton v. Commercial Credit Corp.*, 176 P.2d 270 (1946) (holding that the service member's automobile was wrongfully seized, possessed, and sold, although he breached the installment contract shortly before active military service).

<sup>162</sup> *See e.g., Harvey v. Home Owners' Loan Corp.*, 67 N.Y.S.2d 586 (N.Y. Sup. Ct. 1946) (holding that service member 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).

<sup>163</sup> 50 U.S.C. § 3952(c)(1) (2018).

<sup>164</sup> 50 U.S.C. § 3952(c)(2) (2018).

<sup>165</sup> *Id.*

<sup>166</sup> *In re Cockerham*, 336 B.R. 592 (Bankr. S.D. Ga. 2005).

The service member and his wife were co-debtors on the obligation to a car loan. The service member was deployed overseas while a bankruptcy proceeding was in the process of being adjudicated. In the service member's Chapter 13 plan, the service member proposed to surrender the car in satisfaction of the obligation. When the court recognized the service member's inclusion of the car in the Chapter 13 plan, the court denied the wife's stay.<sup>167</sup>

In light of this case, it is important for the service member or service member's dependent to preserve rights. The Georgia court, in effect, held that once a service member can use a stay, the service member must use the stay or lose the ability to do so in the future.

An application for a stay must include a letter or other communication setting forth facts describing the manner in which current military duty requirements materially affect the service member's ability to appear and stating a date when the service member will be available to appear; and a letter or other communication from the service member's commanding officer stating that the service member's current military duty prevents appearance and that military leave is not authorized for the service member at the time of the letter.<sup>168</sup>

### **11.3.3 Equitable Resolution**

The SCRA empowers the court to make any other disposition that is equitable to preserve the interests of all parties.<sup>169</sup> Courts have stressed that the interests of both the service member 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>170</sup>

### **11.3.4 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 one year, or both.

## **11.4 Termination of Contracts for Cellular Service**

Service members 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>171</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> Servicemembers' Civil Relief Act, Ga. Practice Handbook § 1:29.

<sup>169</sup> 50 U.S.C. § 3952(c)(3) (2018).

<sup>170</sup> *See Nassau Savings & Loan Ass'n*, 39 N.Y.S. 2d at 94.

<sup>171</sup> 50 U.S.C. § 3956(a)(1), (b) (2018).



Termination notice must be made by delivery of a written or electronic means and must be accompanied by a copy of the service member's orders.<sup>172</sup>

Service members are not required to demonstrate that their ability to perform under the contract is materially affected by military service. If the service member is part of a family plan, the plan holder may terminate the service member and any other plan members who relocate with the service member.<sup>173</sup>

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>174</sup> The service provider may not charge a reinstatement fee if the service member re-subscribes within 90 days after the period of relocation.<sup>175</sup>

## 12. FINANCIAL PROTECTIONS

### 12.1 Interest Rate Cap

To help ease financial burdens created by active military service, SCRA § 3937 provides service members with a six percent 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>176</sup>

#### 12.1.1 Activation of Six Percent (6%) Interest Cap

The six percent interest rate cap is not self-executing. To receive this protection, service members must provide a creditor with written notice and a copy of military orders detailing military service, not later than 180 days after the end of military service.<sup>177</sup> Once notice is provided, the creditor is obligated to retroactively implement the six percent interest rate beginning on the date military service commenced, not the date that notice is received.<sup>178</sup>

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<sup>172</sup> 50 U.S.C. § 3956(a)(3) (2018).

<sup>173</sup> 50 U.S.C. § 3956(d) (2018).

<sup>174</sup> 50 U.S.C. §§ 3956(e)-(f) (2018).

<sup>175</sup> 50 U.S.C. § 3956(e) (2018).

<sup>176</sup> 20 U.S.C. § 1087-1(g) (2018). 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 service member borrower is not covered by the SCRA.

<sup>177</sup> 50 U.S.C. § 3937(b)(1) (2018).

<sup>178</sup> 50 U.S.C. § 3937(b)(2) (2018). See also *Rodriguez v. American Express*, 2006 WL 908613 (E.D. Cal., April 7, 2006) (holding that a creditor violated the interest cap provision when it did not reduce the interest rate to 6%

## 12.1.2 Covered Debt Obligations

The six percent interest rate cap applies to all obligations and liabilities incurred by a service member individually, jointly with a spouse,<sup>179</sup> or in the name of a closely held business entity<sup>180</sup> as long as the service member is not a guarantor.<sup>181</sup> In addition, courts have held that the cap also applies to Chapter 13 repayment plans<sup>182</sup> and foreign judgments.<sup>183</sup>

In 2010, a case before the 11<sup>th</sup> Circuit dealt with a lender that failed to reduce the interest rate although the service member had provided adequate notice.<sup>184</sup> Prior to the lawsuit, the bank retroactively reduced the interest rate, and thereby lowered the total amount owed on the loan. The court held that the bank's actions were a sufficient remedy.<sup>185</sup>

The interest protections do not cover debts incurred by service members during or after the end of active duty.<sup>186</sup> Moreover, debts incurred solely by a service member's spouse are not eligible for the six percent interest rate cap.

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starting on the date the service member's active duty began and did not credit excess interest paid to the remaining principal balance).

<sup>179</sup> *Rodriguez*, WL 908613 (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 maximum interest rate cap of six percent is only applicable to debts held by the service-member or jointly by the service member and their spouse).

<sup>180</sup> *Linscott v. Vector Aerospace*, No. CV05-682-HU, 2006 U.S. Dist. LEXIS 30023 (D. Or. May 12, 2006) (finding that the SCRA interest cap extends to corporations when they are personally guaranteed by service members. The service member's corporation was protected under the SCRA while he was on active duty and that the corporation was only required to pay at six percent during the period of active duty); *See also Cathey v. First Rep Bank*, No. 00-2001-M, 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>181</sup> *See Newton v. Bank of McKenney*, No. 3:11cv493-JAG, 2012 U.S. Dist. LEXIS 68731 (E.D. Va. May 16, 2012) (finding that the plaintiffs' liability is distinct from their corporations' liability because the plaintiffs are guarantors).

<sup>182</sup> *Baxter v. Watson (In re Watson)*, 292 B.R. 441 (Bankr. S.D. Ga. 2003) (the court ordered the interest rate paid on allowed secured claims be reduced to six percent during the time of active federal military service).

<sup>183</sup> *See Linscott* 2006 WL 1310511 (the court applied the SCRA to a service member's debt with a foreign entity, refusing to enforce an 18% interest rate included in a Canadian court-ordered payment against a service member's corporation).

<sup>184</sup> *Frazier v. HSBC Mortgage Servs., Inc.*, 401 Fed. Appx. 436, 441 (11th Cir. 2010).

<sup>185</sup> *Id.*

<sup>186</sup> 50 U.S.C. § 3937 (2018) (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).

### **12.1.3 Student Loan Consolidation**

A service member is entitled to the six percent 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 service member consolidates student loans, if a brand-new loan is created after active military service.<sup>187</sup>

### **12.1.4 Interest Defined**

The interest rate 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>188</sup> Creditors may violate the SCRA's six percent interest-cap protection by charging late fees that have the effect of raising the applicable interest rate above the six percent limit.<sup>189</sup>

### **12.1.5 Temporal Scope of Interest Rate Reduction**

The six percent interest rate cap on mortgages and mortgage equivalents applies during active service and for one year after active service ends.<sup>190</sup> The interest cap reduction on all non-mortgage debts and obligations is limited to the duration of active service.<sup>191</sup>

### **12.1.6 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 six percent interest rate cap shall be forgiven, and the service member does not owe any deficiency resulting from the interest reduction.<sup>192</sup> The creditor is prohibited from accelerating the payment of principal in response to a properly made request for a six percent interest rate cap.

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<sup>187</sup> U.S. Department of Justice. Service members and Veterans Initiative: USAO service members Toolkit (Dec. 4, 2015), available at <https://www.justice.gov/crt-military/file/797491/download>.

<sup>188</sup> 50 U.S.C. § 3937(d)(1) (2018).

<sup>189</sup> See *Koenig v. Waukesha State Bank*, No. 05-C-255, 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 service member an interest rate in excess of six percent on late fees incurred during active duty. The court found that by waiving other fees incurred by the service member in excess of the service member's overpayment, the bank had gone beyond its obligation to the service member).

<sup>190</sup> 50 U.S.C. § 3937(a)(1)(A) (2018).

<sup>191</sup> 50 U.S.C. § 3937(a)(1)(B) (2018) (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>192</sup> *Id.* at § 3937(a)(2) (2018).

### 12.1.7 Exception to the Six Percent (6%) Interest Rate Cap

The court may order that a creditor need not reduce a service member's interest rate to six percent if the creditor can establish that the service member's ability to pay the contracted rate of interest was not materially affected by entering active duty.<sup>193</sup>

In *Hatcher v. Edwards*, a 2011 Georgia District Court case, the service member received was unemployed prior to military service, and thus was in a superior position to pay the mortgage while in military service.<sup>194</sup> The court denied the service member's request for a cap on the interest rate.<sup>195</sup>

## 12.2 Payday Lender<sup>196</sup>

If the customer is a member of the military services or their spouse, a payday lender:

- a. Cannot garnish military wages or salaries.
- b. Cannot conduct a collection activity against a military customer or the customer's spouse when the military member is deployed to a combat or combat support position.
- c. Cannot contact the military member's commanding officer to collect the debt.
- d. Is bound by the terms of a repayment agreement that it negotiates through military or third-party counselors.
- e. Must honor any statement or proclamation by a military base commander that a specific payday lender branch location has been declared off-limits to military personnel and their spouses.
- f. Must disclose these requirements to the military customer.

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<sup>193</sup> 50 U.S.C. § 3937(c) (2018) (generally this requirement means that the person is not making less money in the military than he or she did as a civilian).

<sup>194</sup> *Hatcher v. Edwards*, No. 1:08-CV-3260-CC, 2011 WL 13096136, at \*4 (N.D. Ga. Sept. 1, 2011).

<sup>195</sup> *Id.*

<sup>196</sup> Consumer Financial Regulation: Georgia, Practical Law State Q&A w-001-8235; O.C.G.A. § 16-17-9: "payday lending" as used in this chapter encompasses all transactions in which funds are advanced to be repaid at a later date, notwithstanding the fact that the transaction contains one or more other elements and a "payday lender" shall be one who engages in such transactions. This definition of "payday lending" expressly incorporates the exceptions and examples contained in subsection (a) and (b) of O.C.G.A. § 16-17-2.

## 13. TAX PROTECTIONS

### 13.1 Residency for Tax Purposes

A service member 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>197</sup> Further, military compensation of a service member and any income of their spouse are not income for state tax purposes in a state where they are non-residents.<sup>198</sup> The same protections extend to a service members' spouse, and subjects spousal income to taxation by the spouse's state of residence, rather than the state where the income is earned.<sup>199</sup> Similarly, for tax purposes, a service member's or their spouse's personal property is not deemed to be located in a state where they are nonresidents.<sup>200</sup>

### 13.2 Property Tax

The SCRA provides relief to service members from tax assessments that fall due and remain unpaid before or during military service.<sup>201</sup> This protection applies to taxes for personal property and for real property occupied for dwelling, professional, business, or agricultural purposes by a service member or their dependents or employees.<sup>202</sup> It further prevents assessment of any additional penalty or interest above six percent for the nonpayment of taxes.<sup>203</sup>

#### 13.2.1 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 service member's ability to pay the outstanding tax or assessment.<sup>204</sup>

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<sup>197</sup> 50 U.S.C. § 4001(a) (2018).

<sup>198</sup> 50 U.S.C. § 4001(b)-(c) (2018); *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), affirmed, 810 F.2d 935 (10th Cir. 1987).

<sup>199</sup> Military Spouses Residency Relief Act, Pub. L. 111-97, 123 Stat. 3007 (2009).

<sup>200</sup> 50 U.S.C. § 4001(d) (2018); *Dameron v. Brodhead*, 345 U.S. 322 (1953) (holding that the taxable domicile of a Service member shall not be changed by military assignments).

<sup>201</sup> 50 U.S.C. § 3991(a) (2018).

<sup>202</sup> *Id.*; *See also Farran v. Wayne County*, No. 261185, 2005 WL 2219417 (Mich. Ct. App. 2005) (finding that 50 U.S.C. § 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>203</sup> 50 U.S.C. § 3991(d) (2018).

<sup>204</sup> 50 U.S.C. § 3991(b)(1) (2018).

### 13.2.2 Redemption

In cases involving a court-ordered sale of property to satisfy taxes or assessments, the SCRA provides service members with a right to redeem the property during military service or within 180 days after the end of military service.<sup>205</sup>

### 13.2.3 Deferral of Income Tax Collection

When a service member's state or federal income taxes are due before or during military service, payment shall be deferred at the service member's request for not more than 180 days after the termination of active duty, if the service member's ability to pay is materially affected by military service.<sup>206</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>207</sup>

## 14. INSURANCE PROTECTIONS

The SCRA prevents a service member's loss of health, life, or professional liability insurance coverage if the service member is called to active duty.<sup>208, 209</sup>

Georgia law diverges from the SCRA,<sup>210</sup> allowing for a provision in an accident policy to exclude coverage because of the insured's connection with or entry into military service.<sup>211</sup> A Georgia appellate court has held that such an exclusion is valid and not unreasonable or against public policy.<sup>212</sup>

Insurance provisions excluding liability in the event the insured engages in military service apply both to an insured who enlists and to one who is drafted.<sup>213</sup>

A policy may provide that an accident occurring while the insured is in military service is covered only if the insured has notified the insurer and paid an additional premium.<sup>214</sup>

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<sup>205</sup> 50 U.S.C. § 3991(c) (2018).

<sup>206</sup> 50 U.S.C. § 4000(a) (2018). *See also Paulson v. Mo. Dept. of Revenue*, 961 S.W.2d 63 (Mo. Ct. App. 1998) (denying deferral of a service member's income tax payment where he did not prove active duty impaired his ability to pay the taxes).

<sup>207</sup> *See Judge Advocate General's Legal Center and School, U.S. Army JA 260, Service Members Civil Relief Act*, pp. 5-11 (March 2006).

<sup>208</sup> 50 U.S.C. §§ 3975, 4023, 4024.

<sup>209</sup> For additional information on SCRA's life insurance provisions, refer to 50 U.S.C. App. §§ 3957, 3971-3977 (2018).

<sup>210</sup> 16 Ga. Jur. Insurance § 14:44.

<sup>211</sup> *State Mut. Ins. Co. v. Harmon*, 72 Ga. App. 117, 33 S.E.2d 105 (1945); *Lindsey v. Life & Cas. Ins. Co.*, 70 Ga. App. 190, 27 S.E.2d 877 (1943).

<sup>212</sup> *State Mut. Ins. Co.*, 72 Ga. App. 117.

<sup>213</sup> *Railey v. United Life & Accident Ins. Co.*, 26 Ga. App. 269, 106 S.E. 203 (1921); *See Life & Cas. Ins. Co. v. McLeod*, 70 Ga. App. 181, 27 S.E.2d 871, 875 (1943) (citing *Railey* as good law).

<sup>214</sup> *Life & Casualty Ins. Co. of Tennessee v. Wood*, 55 S.E.2d 254 (1949).

When a policy excludes any claim arising while the insured is in military service, it is applicable to all hazards, not just those applicable to the insured's status as a soldier.<sup>215</sup> Note that Georgia law requires the service member to communicate with the member's insurer in order to take advantage of the SCRA provision.

#### **14.1 Insurance Commissioner's Power to Regulate Insurance Scams**

In Georgia, insurers engaging in dishonest, unfair, or deceptive insurance practices in marketing or sales of insurance to service members of the armed forces of the United States is a prohibited trade practice and, notwithstanding any other provision of the title, the Insurance Commissioner may promulgate such rules and regulations as necessary to define dishonest, unfair, or deceptive military marketing and sales practices.<sup>216</sup>

#### **14.2 Health Insurance**

Service members may have health insurance policies immediately reinstated upon return from active duty.<sup>217</sup> They must apply for reinstatement within 120 days after release from active military duty.<sup>218</sup> Further, 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 service member 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>219</sup>

#### **14.3 Life Insurance**

The SCRA prevents life insurers from decreasing coverage or requiring additional premiums, except age-based increases in term policies, for service members during active duty.<sup>220</sup> However, the life insurance policy must have been in place for at least 180 days before military service.<sup>221</sup> During military service and for two years after, a service member's life insurance policy is protected from lapse, termination, and forfeiture for non-payment of premiums.<sup>222</sup> For this protection, the insured service member or their beneficiary must apply with the insurer and forward a copy to the Veterans Administration.<sup>223</sup>

Georgia law does permit an insurer to require an additional premium to be paid if and when the service member enters military service.<sup>224</sup>

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<sup>215</sup> *Lindsey*, 70 Ga. App. 190.

<sup>216</sup> 16 Ga. Jur. Insurance § 2:116.

<sup>217</sup> 50 U.S.C. § 4024(a)-(b) (2018).

<sup>218</sup> 50 U.S.C. § 4024(d) (2018).

<sup>219</sup> 50 U.S.C. § 4024(b) (2018).

<sup>220</sup> 50 U.S.C. § 3971(1)(A) (2018).

<sup>221</sup> 50 U.S.C. § 3971(1)(B) (2018).

<sup>222</sup> 50 U.S.C. § 3974(b)-(c) (2018).

<sup>223</sup> 50 U.S.C. § 3973 (2018).

<sup>224</sup> *Life & Cas. Ins. Co. of Tennessee v. Wood*, 80 Ga. App. 56, 55 S.E.2d 254 (1949).

Service members should communicate with their insurer so that the insurer abides by the SCRA and not the lower standard in Georgia law.

#### **14.4 Professional Liability Insurance**

Service members, 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>225</sup>

#### **14.5 Auto Insurance**

Georgia law prohibits an auto insurer from non-renewal of a policy because of a person's military service.<sup>226</sup>

### **15. ANTICIPATORY RELIEF**

Although rarely invoked, the SCRA's anticipatory relief protections allow a service member 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 service member anticipates that a breach or default will occur because of their military service.<sup>227</sup> Under this section, a service member can initiate a declaratory action (to prevent any legal action against them) during military service or within 180 days after.<sup>228</sup> The court has discretion to grant such relief.

#### **15.1 Anticipatory Relief: Requirements**

To receive anticipatory relief, the following must occur:

- 1) The service member must prove that the obligation arose before active duty, including taxes falling due during active duty;
- 2) The action must begin during, or within 180 days after, active military service; and
- 3) The service member must show that military service materially affected the ability to discharge the obligation.<sup>229</sup> The service member is entitled to one hearing to establish material affect.

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<sup>225</sup> 50 U.S.C. § 4023(a)(2)(A), (b)(1) (2018).

<sup>226</sup> O.C.G.A. § 33-24-45 (2018).

<sup>227</sup> 50 U.S.C. § 4021(a) (2018).

<sup>228</sup> *Id.*

<sup>229</sup> 50 U.S.C. § 4021(a)-(b) (2018). *See Kindy v. Koenke*, 216 F. 2d 907 (8th Cir. 1954).



## 15.2 Anticipatory Relief: 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>230</sup>

## 15.3 Anticipatory Relief: Stay of Enforcement

Courts are authorized to issue stays of the enforcement of obligations and issue equitable repayment plans.<sup>231</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>232</sup>

For stays involving real estate contracts, a service member 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 the term of military service.<sup>233</sup> For stays involving any other debt, the period of time allotted for back payment cannot be longer than the service member's total time of active military service.<sup>234</sup>

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<sup>230</sup> 50 U.S.C. § 4021(a) (2018).

<sup>231</sup> 50 U.S.C. § 4021(b)(1)(B), 4021(b)(2)(B) (2018).

<sup>232</sup> *Id.*

<sup>233</sup> 50 U.S.C. § 4021(b)(1)(B) (2018).

<sup>234</sup> *Id.*

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## Part IV: Conclusion

## **PART IV- CONCLUSION**

This Guide provides an overview of the most significant aspects of the SCRA that might arise in a Georgia 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 Georgia case law.

Please find additional information at these resources:

<https://www.servicememberscivilreliefact.com>

<https://www.justice.gov/servicemembers>

<http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/servicemembers-civil-relief-act-sdra>

[https://www.benefits.va.gov/homeloans/documents/docs/sdra\\_notice.pdf](https://www.benefits.va.gov/homeloans/documents/docs/sdra_notice.pdf)

[https://www.americanbar.org/content/dam/aba/administrative/legal\\_assistance\\_military\\_personnel/SCRAguide.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_assistance_military_personnel/SCRAguide.authcheckdam.pdf)

