

Soldiers' and Sailors' Civil Relief Act Protection: an Update for the War Against Terrorism

by James P. Pottorff

This article is an update of an earlier article by the author that was published by the Virginia Lawyer Register in December 1990. It also draws on several notes and an article on the Soldiers' and Sailors' Civil Relief Act written by the author and published in The Army Lawyer and in the Military Law Review in 1990 and 1991. The opinions and conclusions reflected in this article are those of the author and do not necessarily reflect the views of any federal or state agency.

Operation Enduring Freedom, the United States' response to the terrorist attacks on the World Trade Center and the Pentagon, involves a concerted effort by the nation to bring to bear all the instruments of national power—economic, diplomatic, informational and military—against the attackers and their supporters. The Bush administration has ordered the mobilization of more than 50,000¹ reserve component service members in what appears to be the largest mobilization since the end of the Gulf War more than ten years ago. As in operations Desert Shield and Desert Storm during the Gulf War, these call-ups to active duty raise a variety of legal issues. To assist those who were mobilized, attorneys should be familiar with pertinent provisions of the Soldiers' and Sailors' Civil Relief Act² (SSCRA) and understand Congressional philosophy and intent in maintaining this wide-ranging act.

What is the Purpose of the SSCRA?

Enacted in 1940, and amended periodically over the last 50 years—including amendments in 1991 responding to problems identified during the Gulf War³—the SSCRA is intended to protect those who serve in the armed forces. The premise underlying the SSCRA is that service members should not be disadvantaged either legally or financially when called to active service.⁴ As a general rule, courts interpreting the SSCRA have been liberal in applying its protections to service members.⁵ In fact, any case in which military service materially affects a service member's ability to meet financial or legal obligations may be open to corrective action under the SSCRA.⁶ While the SSCRA results from Congressional efforts to avoid the adverse effects of service, it does not explicitly address all such problems. Although financial agreements such as mortgages,⁷ installment contracts⁸ and other interest bearing obligations⁹ receive treatment under the SSCRA, other obligations, such as child and spousal support, do not.

When there is no provision of the SSCRA that applies to a specific problem, however, some of the more broadly worded provisions of the SSCRA may be helpful. In this respect, Section 510 of Title 50, *United*

States Code Appendix, is particularly useful. Section 510 states that the purpose of the SSCRA is to suspend legal proceedings and transactions “in order to enable [military service members] to devote their entire energy to the defense needs of the Nation”¹⁰ In a judicial endorsement of this policy, the Supreme Court has stated that the SSCRA should be interpreted “with an eye friendly to those who dropped their affairs to answer their country's call.”¹¹ This statement reflects and guides the approach taken by most courts, particularly when the person seeking relief is an activated member of the reserve components.¹² Judicial interpretation or legislative change has not established the applicability of these provisions, such as section 510, to many contemporary issues. In these cases, when no specific provision of the SSCRA applies, a policy-based argument is useful.

How and When Are Reserve Component Service Members Eligible for SSCRA Coverage?

The SSCRA applies to “persons in the military service.”¹³ The SSCRA defines “military service” as “federal service on active duty with any branch of service”¹⁴ The *SSCRA Amendments of 1991* included language making it clear that members of the Air Force receive coverage.¹⁵ Under the SSCRA, “persons” in military service “shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy.”¹⁶ Upon reporting for active duty, these persons are then eligible for all SSCRA protections.¹⁷

Although the SSCRA does not define the composition of each of the armed services, other federal statutes in *Title 10, United States Code*, give helpful definitions. The Army of the United States includes the Regular Army, the Army National Guard of the United States, the Army National Guard while in service of the United States, the Army Reserve and all persons appointed, enlisted or conscripted without component.¹⁸ Similarly, the Air Force includes the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, the Air Force Reserve, those without component and all other units and individuals who form the basis for complete mobilization for national defense in the event of a national emergency.¹⁹ The United States Navy includes the Regular Navy, the Fleet Reserve and the Naval Reserve.²⁰ The Marine Corps includes the Regular Marine Corps, the Fleet Marine Corps Reserve and the Marine Corps Reserve.²¹ Members of the Coast Guard include the Regular Coast Guard and the Coast Guard Reserve,²² whether actually operating with the Navy or with the Department of Transportation.²³ The *SSCRA Amendments of 1991* also substituted “reserve component of the Armed Forces” for “enlisted reserve corps” in Section 516, Title 50, *United States Code Appendix*, and thereby extended protections under Article I, II and III of

the SSCRA to all reserve component service members upon receipt of orders to active duty. To put this into perspective for those unfamiliar with military orders, Section 516 provides the basic protections of the first three articles of the SSCRA upon receipt of orders to report to active duty even if the active duty period does not begin immediately. Once on active federal duty, the full range of SSCRA protections applies to the service member.

In broad terms, the “reserve components” are the National Guard and the reserves. Key to determining whether a member of the National Guard is on active federal duty is the actual written order to duty received by the guard member. If the active military service is to be active federal military service, the order should indicate that it is based on authority under Title 10, *United States Code*. If a guard member is called to duty in state service, the order will not be pursuant to Title 10 of the *U.S. Code* and will likely specify it is pursuant to Title 32 of the *U.S. Code*, which signifies state service status. If a guard member is serving in state status, the protections of the SSCRA are not applicable.²⁴ The National Guard is distinct from the military reserves. The “reserves” are composed of individuals in the federal military reserves, and they are not subject to the state governments. When the reserves are called to active duty, it will be pursuant to authority in Title 10 of the *U.S. Code*, and the SSCRA will be available to these individuals.

Actual implementation of the SSCRA demonstrates more clearly how Congress intended to protect reserve component service members when called to federal duty. Many provisions of the SSCRA, such as those protecting against mortgage foreclosure, limiting maximum interest rates and allowing termination of leases, require that service members have obligations that predate their active service. Consequently, the majority of the protections provided by the SSCRA ordinarily are unavailable to career soldiers because these individuals routinely enter such legal and financial obligations during their active service. The following discussion helps clarify this point.

What Are the Requirements for Terminating a Lease?

If a service member entered a “lease covering premises occupied for dwelling, professional, agricultural or similar purposes” before beginning active duty or receiving orders to active duty, Section 534 provides a means by which the service member may lawfully terminate the lease.²⁵ Unlike many other provisions of the SSCRA, to invoke this protection, the service member need not show that military service is materially affecting the ability to meet obligations under the lease, particularly rent payments. Instead, the service member need only show that the lease was entered prior to military service (which the SSCRA defines as active service), the lease was for dwelling, professional, business, agricultural or similar purposes by the service member or the service member's dependents and the service member is currently in military service.

Unfortunately, many service members and their commanders misconstrue this provision. They understand it to allow soldiers who entered into leases after entry into active duty to terminate their leases, particularly during emergencies, such as the reserve call-ups following the attacks on the World Trade Center and the Pentagon. The SSCRA, however, provides no such protection. Several states, such as Virginia,²⁶ have statutes that allow termination of leases under these circumstances, but these state laws do not represent the majority of states. On the pos-

itive side, this provision is written in such a way that reserve component service members who enter a lease while in the reserves or national guard, but not while on active federal status, may terminate that lease upon receipt of orders to active duty.²⁷ Upon furnishing written notice to their landlords and proof of active duty, such as orders, they may terminate their leases. The SSCRA provides specific guidelines for calculating when the termination becomes effective.

Who is Protected from Eviction from Leased Housing, and How May This Protection be Obtained?

The SSCRA provides protection from eviction for a service member and his or her dependents regardless of whether the service member entered a lease before or after entry upon active duty.²⁸ If the service member or the service member's dependents are occupying leased premises, the service member's military service is materially affecting his or her ability to make rental payments and the rent does not exceed \$1200 per month, the SSCRA provides for a stay of eviction for up to three months following discharge. The *SSCRA Amendments of 1991* set the rent cap at \$1200, up from \$150, where it had languished since 1966.²⁹

The SSCRA provides no mechanism to adjust the established ceiling on rent to account for inflation. Obviously, as time passes, inflation will reduce the protection provided by this provision. By 1991, inflation had rendered the previous \$150 rental ceiling essentially useless. At least one court has been receptive to a request that it adjust for inflation in considering the amount of the rent. In *Balconi v. Dvascas*,³⁰ a pre-1991 case, the monthly rent was \$340. The court concluded, however, that the rent was actually less than \$150 in 1966 dollars, after adjustment for inflation occurring since 1966. Accordingly, the court stayed an eviction proceeding. Since Congress has not yet chosen to base the cap on an inflation-adjusted standard, this approach may have continued usefulness.³¹

The *Balconi* case also is significant because it illustrates the independent ability of dependents to assert protection from eviction, in accordance with Section 536. The tenant in *Balconi* was the ex-wife of a service member who was not a party to the lease. She lived with their minor child, who was a dependent of the service member. The court held that since they were both dependent on the service member for financial support, they were both dependents for purposes of this provision.

Will the SSCRA Protect a Service Member Who is Having Difficulty Making Payments on an Automobile Lease?

Like other consumers, reserve and active component soldiers often enter automobile leases. Service members facing overseas deployments, particularly single soldiers, may find continued payments on these leases difficult or undesirable when their cars must be left behind. The SSCRA does not provide explicit authority to terminate an automobile lease, but several provisions of the SSCRA should provide relief to some reserve component service members faced with continued lease payments.³²

Section 531 affords protection from rescission or termination of installment contracts and “leases . . . with a view to purchase.”³³ If a service member has made a deposit or a payment on an installment contract or

Soldiers' and Sailors' Civil Relief Act Protection

a lease with a view to purchase real or personal property, only a court may approve contract termination and repossession of the property. As with many provisions of the SSCRA, the service member seeking the protection must have entered the underlying obligation *before* beginning active service. Furthermore, the service member must have made a deposit or a payment on the obligation before active service. If the service member meets these criteria, the seller or lessor may not terminate the contract and repossess the property unless a court determines that military service is not affecting materially the service member's ability to comply with the obligation. Reference to the Truth in Lending Act³⁴ (TILA) and the Consumer Leasing Act³⁵ (CLA) may be useful. If an automobile lease falls under the provisions of the CLA, it is likely to be a true leasing agreement. On the other hand, if the terms of a lease indicate it is actually a disguised financing arrangement, then the disclosures required by the TILA should be present.³⁶ An automobile financing arrangement disguised as a car lease lends credence to the argument that such a lease is truly a "lease with a view to purchase." Knowing repossession or attempts to repossess property subject to this provision without judicial approval is punishable under Title 18 of the *United States Code* by a fine or by imprisonment of up to one year, or both.

The central issue for an attorney helping a client who is being sued for nonpayment of an automobile lease is whether or not the client entered the lease with a view to purchase the automobile.³⁷ An option to purchase at the conclusion of the lease may meet this requirement, particularly if any part of the lease payments is credited toward the purchase price. If the court determines the SSCRA to be applicable to an action for failure to make payments on a car lease, it has several alternatives. Many service members would likely prefer to terminate such a lease, since their cars may be of little value to them while deployed, particularly if they are single. The court may order refund of installment payments and any deposit as a condition of repossession.³⁸ If a service member desires to retain the automobile and requests a stay of proceedings, the court may grant a stay. The duration of a stay of court proceedings under the SSCRA may run up to three months following termination of active service.³⁹

If a service member wishes to initiate action-seeking relief, instead of waiting for a creditor to take action for nonpayment, the SSCRA provides an alternative provision. Under Section 590, if the service member entered the automobile lease before active duty and subsequently experiences difficulty making payments because of military service, he or she may apply for a stay of the obligation.⁴⁰ In this event, the court may stay enforcement of the obligation to make lease payments during the service member's military service. Additionally, the court may continue the stay after termination of service for a period of time equal to the time in active service. If the court extends the stay for a period of time after active service ends, the discharged service member must pay all back payments during this time. At the same time the discharged service member is making these payments in arrears, he or she must resume making regular payments on the lease as well.

Are Service Members Protected from Foreclosure Actions?

Unlike automobile leases, protection in the SSCRA against foreclosures is well established. Although similar to the protection against termination of installment contracts, the protection in Section 532 against foreclosure requires that real or personal property secure the underlying

financial obligation. For reserve component service members who entered security agreements on personal property such as their automobiles, or who entered mortgages for the purchase of real property, this provision may afford much needed relief. If a service member owned the property in question before beginning active service, entered a mortgage or security agreement before entry on active duty, and military service is materially affecting the ability to pay, relief is available under the SSCRA. This relief may consist of a stay of the foreclosure proceedings or a decrease in payments during the period of service.⁴¹ Other relief may include reopening a default foreclosure judgment⁴² or an extension of the redemption period by an amount of time equal to the active military service.⁴³

May a Service Member Obtain a Stay of Civil Proceedings While He or She is on Active Duty?

Section 521 of the SSCRA authorizes a state or federal court, either on its own motion or upon application by a service member, to stay a civil court proceeding.⁴⁴ Under Section 521, the court must enter a stay unless military service is not materially affecting a service member's ability to defend or prosecute an action. The court may enter such a stay at any stage of a proceeding in which a service member is either a plaintiff or a defendant. This stay may be entered in proceedings occurring up to 60 days after a service member leaves service, and it may last for up to 3 months following termination of service.⁴⁵ While Section 521 does not expressly limit its application to civil proceedings, Section 510 indicates the purpose of the SSCRA is to provide protection with respect to "civil liabilities."⁴⁶ Accordingly, courts have not applied the SSCRA to stay criminal proceedings.⁴⁷

As discussed above, other provisions of the SSCRA, such as those providing protection against mortgage foreclosure and installment contract termination, permit a court to enter a stay. These other provisions stay enforcement of an underlying obligation, such as the obligation to make payments on a mortgage. Section 521, however, is much broader. Rather than staying an obligation, Section 521 authorizes the stay of litigation arising from such an obligation. As such, it is not limited to any one situation, but has broad application, making it very useful.

As a general rule, courts have applied Section 521 liberally and have used it to benefit service members who could not participate in proceedings because of their service.⁴⁸ If a court finds that military service is materially and adversely affecting a service member's ability to defend or prosecute an action, it will stay a proceeding. Consequently, mustering facts supporting or rebutting the presence of the "material effects" is essential. The Supreme Court determined early on that the burden of proving material effect, that is not allocated in Section 521, will depend on the relative circumstances of the parties.⁴⁹ Service members who are not overseas and who are assigned to nearby installations can expect to be assigned the burden of proving material effect.

The most common pitfall associated with Section 521 deals with personal jurisdiction over an absent service member. Because of the transitory nature of military service, service members are commonly sued in courts in jurisdictions in which they have never or rarely lived or traveled. The majority of courts recognize that a letter or motion by an absent service member requesting a stay pursuant to the SSCRA is insufficient to provide personal jurisdiction that a proceeding otherwise lacks.⁵⁰ Some courts, however, have taken a more draconian approach

and concluded that such a communication, even if limited to the purpose of requesting a stay, provides personal jurisdiction over an absent service member.⁵¹

Compounding the problem is the subsequent inability of the service member to reopen the resultant default judgment. The SSCRA provides that a service member with a meritorious defense may reopen a default judgment when service materially affected the ability to appear.⁵² In order to obtain this protection, however, the service member must have defaulted of “any appearance” in the original proceeding.⁵³ The same courts that find a letter or a motion gives personal jurisdiction have found that such a letter or motion is also “an appearance,” thereby forfeiting the right to reopen the judgment.⁵⁴

The United States House of Representatives passed legislation in 1990 that would have prevented a court from obtaining personal jurisdiction based on a letter, affidavit or motion.⁵⁵ The Senate, however, did not act on a similar amendment. Subsequently, in February 1991, Congress passed a temporary variation of this proposed amendment as part of the *SSCRA Amendments of 1991*. Unlike Section 521, the new provision did not require a showing of material effect. Instead, if the applicant—or someone acting on the applicant’s behalf—was on active duty and serving outside the state in which the action is located, an action would be stayed at any stage before final judgment.⁵⁷ Congress, however, limited the duration of this amendment. Any stay entered would remain effective until after June 30, 1991, presumably in anticipation of the end of hostilities during Operation Desert Storm.⁵⁸ Congress clearly intended for this amendment to help service members involved in operations Desert Shield and Desert Storm in 1990 and 1991. It does not, however, have value today, unless Congress acts to renew it as part of the response to the September 11 terrorist attacks. Additionally, absent some action by Congress, the problem remains of inadvertently submitting to personal jurisdiction when requesting a stay in some jurisdictions.

May Service Members Limit Interest Rates on Financial Obligations?

One of the most helpful provisions of the SSCRA is the maximum rate of interest provision found in Section 526.⁵⁹ This provides a six percent per annum cap on the interest that a lender may charge a service member for credit extended to the service member before his or her entry on active duty. During a typical peacetime scenario, soldiers rarely invoke this provision. It is seldom used because the requirements that the soldier’s military service materially affect the ability to pay the obligation and the obligation predate the active service. Most active component officers and enlisted soldiers entering the military from civilian life experience an enhanced ability to meet any pre-service financial obligations. The reserve component call-up during Operation Enduring Freedom presents a different scenario. Many reserve component service members who are called to active federal service will experience financial difficulties because their military pay and benefits will not match their civilian pay. Nearly all of these financial commitments will be pre-service. Although these service members may have entered financial commitments while members of the reserve components, they, nevertheless, entered the commitments before entry on active federal duty. Most creditors will likely assert that they will abide by the SSCRA and limit interest rates to six percent for those soldiers meeting the criteria set out above. This provision of the SSCRA puts the burden on the creditor to demonstrate that a soldier’s military service is not affecting the ability to

repay a loan. Attorneys should take the initiative and advise clients’ creditors if financial obligations cannot be met. This is a far better course than allowing a client to go into default and then invoking the SSCRA after the fact, as a defense.

Under the SSCRA Six-Percent Cap, What Happens to Interest above Six Percent during Active Service?

Perhaps the most important question concerning the six percent limitation pertains to interest above six percent. What happens when a loan agreement provides that the debtor will pay interest at an annual rate in excess of six percent? Legislative history indicates that Congress intended for excess interest to be forgiven. The six percent cap was not part of the original SSCRA, which Congress enacted in 1940. Instead, it was included as one of several 1942 amendments to the SSCRA. In referring to the 1940 version of the SSCRA, a 1942 Senate report noted that it did not “prevent an accumulation of excess interest” and only allowed for a stay of proceeding in the event collection action was initiated.⁶⁰ To correct this problem, the report indicated that the 1942 amendment would prohibit accumulation of interest.⁶¹ During debate in the House of Representatives, a member of the House Committee on Military Affairs, explained this provision. He stated that “while a man is in service, the interest on his contract shall not exceed 6 percent per annum.”⁶² He pointed out that some state laws allowed interest charges of up to three percent per month and that this new provision would prevent such practices.⁶³

What Should be the Response if Creditors Attempt to Circumvent the Six Percent Limitation?

Mortgage companies and other creditors who choose not to comply fully with the SSCRA have done so in various ways—some of which are subtle, but effective. During the Gulf War, two well-known finance companies, one specializing in personal loans and the other in automobile purchase loans, interpreted the SSCRA as forgiving interest above six percent. The companies insisted, however, on increasing payments on principal to the point that total monthly payments under their revised plans were equal to payments before application of the SSCRA protection. Although this may have resulted in early repayment of the loan, it provided no current relief from payments that may have been unmanageable on a military salary. This approach defeated the Congressional purpose behind enactment of this provision and was a violation of the SSCRA.

Another approach some finance companies have taken has been to agree to reduce the interest charges to six percent by refinancing the loan at a six percent rate. The companies then charged the service member new finance charges associated with loan initiation. A variation of this was refinancing at the six percent rate, but requiring payments based on the number of years remaining on the mortgage, rather than on the number of years agreed upon in the original financing arrangement. This approach results in higher payments at the six percent rate than a service member would pay if the new mortgage were based on the original term of years.

In each of these scenarios, service members stand to lose some, if not all, of the benefits of the six percent limitation. They would be paying

Soldiers' and Sailors' Civil Relief Act Protection

more than the appropriate amounts, based on the additional charges and/or higher monthly payments. Further, they could lose entirely the protection of the six percent interest cap. Unscrupulous creditors may argue this provision becomes inapplicable upon refinancing. This argument would be based on the fact the new loan agreement for refinancing was signed after entry on active duty. The six percent protection applies only to pre-active duty financing.

The response to these tactics is threefold. First, in the language of Section 526, Congress included as interest subject to the six percent cap charges such as "service charges, renewal fees, fees or any other charges (except bona fide insurance) in respect of [the loan]."⁶⁴ This language is sufficiently broad and prohibitory so as to preclude so-called "refinancing" fees and charges. Second, Congressional debate prior to enactment of the provision anticipated attempts by creditors to affect the underlying obligations in these situations. One member of Congress noted that the intent of this provision was to avoid affecting the "substance of the contract," and to address only a contract's enforcement.⁶⁵ Obviously, a finance company's attempt to refinance a loan entirely would affect the substance of the contract and contravene Congressional intent. Third, as discussed in the following section, the 1991 amendments to the SSCRA include a provision prohibiting retaliatory action by creditors. A creditor's effort to change the terms of an existing credit arrangement along the lines of one of the preceding scenarios would violate this new provision. Consequently, service members should refuse to apply for refinancing and insist that interest charges be reduced to six percent, with no provision for accrual. The burden of persuasion rests with the creditor, who, under the SSCRA, must convince a court the service member's military service is not materially affecting his or her ability to pay. In recent cases, several federal courts have indicated service members may have a cause of action against a creditor when Section 526 is implicated.⁶⁶

Some creditors are refusing to reduce interest to six percent until a service member submits proof of pre-mobilization income compared to current military income. Section 526 puts the burden on the creditor to establish that military service is not affecting the ability to repay a loan or a mortgage. As a practical matter, however, service members can best take advantage of the SSCRA by putting the creditor on notice of their desire to benefit from this provision. A reasonable amount of proof of material effect from a service member should be furnished to a creditor.

Other creditors are more aggressive in their demands for proof of material effect. Some require current lists of debts and assets as well as completion of new loan applications. These requirements are contrary to the SSCRA. As discussed previously, invocation of Section 526 is not intended to affect the underlying contract. Submission of information regarding debts, assets, and new loan applications indicates a creditor's intent to reappraise the credit-worthiness of a customer. This evaluation should have been completed at the time of the initial loan application. The SSCRA places the burden on the creditor to establish no material effect from active service. Submission of proof of a significant reduction in salary while on active duty should be sufficient, and, as noted, is more than the SSCRA actually requires of a service member.

What Impact Does Section 526 have on Interest on Student Loans?

Many reserve component service members called to active duty during Operation Enduring Freedom have student loan debts. While several

provisions of the SSCRA provide various forms of relief, for a number of years the United States Department of Education (DE) has considered the six percent limitation on interest rates to be inapplicable to loans it administers. In September 2001, the DE issued a memorandum reiterating that this limitation on interest rates is ineffective with respect to Federal Family Education Loan (FFEL) program loans and other guaranteed student loans under DE programs.⁶⁷ According to the DE, Section 1078(d), Title 20, *United States Code*,⁶⁸ limits the scope of the Section 526, SSCRA, protection. Section 1078(d) states that no provision of any federal or state law that limits the interest rate on a loan will apply to loans issued or insured under the FFEL program. The DE's position is that Section 1078(d) renders ineffective the six percent interest cap if the loan in question was made under the FFEL program. All other types of loans and credit arrangements, however, remain unaffected by Section 1078(d). Accordingly, other provisions of the SSCRA, including those providing for a stay of proceedings⁶⁹ and reopening default judgments⁷⁰ remain available to FFEL debtors.

While the six percent protection is not available for holders of FFELs, the DE has issued directives to lenders to automatically postpone student loan payments for service members who are in school or whose payments are currently deferred because they are in school. The length of the deferment will be through the borrower's active duty service, up to a three year maximum.⁷¹

Additionally, for those who currently are repaying their loans, the DE has directed a one-year forbearance following notification of the call to active duty, including verbal notification, to the lender from the service member, a family member, or another reliable source. "Forbearance" means permitting the temporary cessation of payments, allowing an extension of time for making payments, or accepting smaller payments than were previously scheduled.⁷² Forbearance beyond one year will require documentation establishing the active duty status and an agreement with the lender.⁷³

Borrowers serving on active duty, including reserve component personnel on active duty, would probably be better served by applying for a military deferment of their FFELs. Under DE regulations, borrowers serving for up to three years on active duty in the United States armed forces may receive a military deferment.⁷⁴ In most cases, a deferment means a borrower will have periodic installment payments of principal deferred during active service of up to three years. Interest, however, will usually accrue and must be paid by the borrower during the deferment period, and during any post-deferment grace period.⁷⁵

Are there Protections for Service Members in the Event Creditors, Landlords and Others Take Retaliatory Action Against a Service Member Who Has Invoked the Protections of the SSCRA?

As part of the *SSCRA Amendments of 1991*, Congress amended Section 518⁷⁶ to prohibit retaliatory action against those who invoke the SSCRA. Under this amendment, an application by a service member for, or the receipt of, a stay, postponement or suspension under the SSCRA of the payment of any tax, fine, penalty, insurance premium or other *civil obligation or liability* cannot itself be the basis for certain actions.⁷⁷ Specifically, following a service member's invocation or receipt of the protections of a provision of the SSCRA, a lender cannot then determine

that the service member is unable to pay an obligation or liability. In a credit transaction between service members and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the amount or on the terms requested, submit adverse credit reports to credit reporting agencies or, if an insurer, refuse to insure a service member.

This amendment has added significance with respect to the six percent cap on interest rates. Invocation of the six percent cap could otherwise provide a very real incentive for a lender to take adverse action on a service member's credit, including changing the terms of the underlying credit arrangement, which was attempted by a number of lenders, as discussed in the preceding section on the six percent interest limitation, before this provision was enacted.

Is there Continued Protection for Professionals Who Must Maintain Malpractice Insurance Coverage in Their Civilian Occupations?

The SSCRA Amendments of 1991 included a new provision designed to protect health care providers and other professionals called to active service.⁷⁸ This provision is intended to ensure that professionals who have suspended their civilian practice during military service will not suffer from financial inability to maintain insurance coverage for incidents occurring prior to their active duty service. Many carriers require ongoing premium payments, even after professional practice has ended, in order to maintain coverage for claims that might subsequently be filed. In some instances, military salaries of health care providers have been less than their annual malpractice premiums.


Under the new provision, health care providers, and others furnishing "services determined by the secretary of defense to be professional services,"⁷⁹ may be eligible for protection. To qualify, they must have been ordered to active duty after July 31, 1991, and have had professional liability insurance in effect before beginning active duty. If so, they will be allowed to apply to have their insurance policies suspended during active service. Insurance carriers may not charge premiums during active service, and providers will receive refunds of any premiums paid for future coverage or credit toward payment of premiums after active service ends. After active service, health care providers have 30 days to request reinstatement of insurance. This provision provides a stay of civil actions against the provider while insurance coverage is suspended if the action is commenced during the period of suspension or if the action is based on an incident occurring before the date the suspension became effective and the insurance would otherwise cover the alleged malpractice. If an action is stayed, it would be deemed filed on date the insurance is reinstated. Further, the statute of limitations would not run during periods of suspended insurance coverage.

It is important to recognize this provision does not relieve a professional from liability for incidents arising before beginning active service. Legal actions based on pre-active service incidents may not be initiated, or, if begun will be stayed, when a professional properly invokes this provision by requesting suspension of coverage during the period of active service. The professional has 30 days following release from active duty in which to submit a written request for reinstatement of liability insur-

ance. The coverage will be reinstated on the date on which the professional transmits the request to the insurance carrier. At that point, an action may be commenced or, if previously filed, it may be renewed against the professional for incidents occurring before the active service.

Some insurance carriers may attempt to limit coverage by reliance on clauses in professional coverage contracts that indicate coverage for prior incidents will not be effective if the policy is ever placed in suspension. The response should be two-pronged. First, Section 592 of the SSCRA arguably supersedes such a limitation; otherwise, drafting changes in the insurance industry would quickly make this protection illusory. Second, under Section 518 of the SSCRA, such a construction of the contract would be a prohibited retaliatory action. In other words, had the service member not invoked this protection, the insurance carrier would not have refused to cover the pre-service period. Instead, based on the service member's invocation of a protection under the SSCRA, the carrier has refused insurance coverage for this period of time. Section 518 appears to directly address and prohibit such an action.

Conclusion

The fundamental purpose of the SSCRA is to ensure that service members are not disadvantaged either legally or financially when serving their country. The foregoing discussion highlights several of the more commonly used protections of the SSCRA, but by no means covers the full range of available protections. A quick scan of *50 United States Code Appendix*, Sections 501 through 593, would be useful preparation for answering the legal questions of service members activated for this present war on terrorism. While many of the SSCRA's provisions are inapplicable to professional soldiers from the active duty ranks, these same provisions can provide much needed relief for reserve component soldiers who are ordered to leave their civilian occupations and salaries for active duty. Timely and informed use of the provisions of the SSCRA will help provide military members serving their country during these difficult times with the assurance they will not be financially or legally impaired as a result of their service. 

Endnotes are available on the following page.

James P. Pottorff, Jr., colonel (retired), U.S. Army, is general counsel at the University of Kansas, Lawrence, Kansas. His military assignments include staff judge advocate, 10th Mountain Division and Fort Drum, Fort Drum, New York; deputy staff judge advocate, United States Military Academy, West Point, New York; and instructor in administrative and civil law, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. He received his B.S. from the United States Military Academy, West Point, New York in 1975; his M.A., in 1979 from Pepperdine University, Malibu, California; and his J.D., in 1984 from the University of Kansas.

Endnotes

- 1 *Kansas City Star*; November 1, 2001, at A 1, A 14.
- 2 50 U.S.C. App. §§ 501-548, 560-591 (1994). All references to the SSCRA in this Article will be to United States Code Appendix provisions.
- 3 The Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, 105 Stat. 34 et. seq. (1991) [hereinafter SSCRA Amendments of 1991]. Other protections in this act that are not discussed in detail in this article include health insurance reinstatement upon reemployment, SSCRA § 593; clarification of title 38 reemployment rights coverage for reservists, *see also* Veterans' Employment and Reemployment Rights Law, 38 U.S.C. § 4311 - 4319; and technical amendments that made no substantive changes, but cleared up areas of confusion and uncertainty in the SSCRA (Pub. L. No. 102-12, § 9).
- 4 *See* 50 U.S.C. App. § 510.
- 5 *See, e.g., Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948) (purpose of SSCRA is to protect those who have dropped their own affairs and taken up the burdens of the nation); *Meyers v. Schmidt*, 181 Misc. 589, 46 N.Y.S.2d 420 (N.Y. Civ. Ct. 1943) (any doubt about application of the SSCRA should be resolved in favor of the service member); *see also* The Judge Advocate General's School Publication JA 260, *The Soldiers' and Sailors' Civil Relief Act Guide*, para. 1-5 (July 2000) [hereinafter JA 260]. This publication is updated and edited by instructors in the Legal Assistance Branch, Administrative and Civil Law Division, The Judge Advocate General's School, U.S. Army. An electronic copy may be obtained from the publication menu at The Judge Advocate General's School Web site through contacting its home page at <http://www.jagc.army.mil>.
- 6 *See* 50 U.S.C. App. § 510.
- 7 *Id.* § 532.
- 8 *Id.* § 531.
- 9 *Id.* § 526.
- 10 *Id.* § 510.
- 11 *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948) (SSCRA tolls statute of limitations, thereby extending state statutory redemption period). *See also Engstrom v. First National Bank*, 47 F.3d 1459 (5th Cir. 1995), *cert. denied* 116 S.Ct. 75 (provisions of the SSCRA are to be liberally construed).
- 12 *See* JA 260, *supra* note 5, para. 1-5.
- 13 50 U.S.C. App. § 510.
- 14 *Id.* § 511(1).
- 15 Pub.L. 102-12, § 9(1)(A), 105 Stat. 39 (50 U.S.C. App. § 511 (1)). As a practical matter, members of the Air Force have been protected without lapse since the Air Force was made a separate Department of the Armed Services, National Security Act of 1947, ch. 343, 61 Stat. 508.
- 16 50 U.S.C. App. § 511(1).
- 17 *Id.*
- 18 10 U.S.C. § 3062(c) (1994).
- 19 *Id.* § 8062(d).
- 20 *Id.* § 5001(a)(1).
- 21 *Id.* § 5001(a)(2).
- 22 14 U.S.C. §§ 211-213, 351, 751a, 762 (1994).
- 23 *Id.* § 1 (1994).
- 24 It is likely that many of the national guard soldiers presently patrolling our nation's airports are in state status, rather than federal status, because of *Posse Comitatus Act* concerns. "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1835.
- 25 50 U.S.C. App. § 534.
- 26 Va. Code § 55-248.21:1 A (2000). "Any member of the armed forces of the United States or a member of the Virginia National Guard serving on full-time duty or as a Civil Service technician with a National Guard unit may, through the procedure detailed in subsection B, terminate his rental agreement if the member (i) has received permanent change of station orders to depart thirty-five miles or more (radius) from the location of the dwelling unit; (ii) has received temporary duty orders in excess of three months' duration to depart thirty-five miles or more (radius) from the location of the dwelling unit; (iii) is discharged or released from active duty with the armed forces of the United States or from his full-time duty or technician status with the Virginia National Guard; or (iv) is ordered to report to government-supplied quarters resulting in the forfeiture of basic allowance for quarters."
- 27 50 U.S.C. App. § 534, to be read in conjunction with § 516.
- 28 50 U.S.C. App. § 530.
- 29 Pub.L. 102-12, § 2(a), 105 Stat. 34, 39 (50 U.S.C. App. § 530).
- 30 133 Misc. 2d 686, 507 N.Y.S.2d 788 (N.Y. Civ. Ct. 1986).
- 31 *See, e.g., Cornell Leasing Corp. v. Hemmingway*, 197 Misc. 2d 83, 553 N.Y.S.2d 285 (N.Y. Civ. Ct. 1990) (eviction granted but court noted that the \$150 amount was not a *sine qua non* for application of section 530).
- 32 50 U.S.C. App. § 531 (installment contracts for the purchase of property); *id.* § 532 (mortgages of real and personal property).
- 33 *Id.* § 531.
- 34 15 U.S.C. § 1602-1667 (1994).
- 35 *Id.* § 1667. The Consumer Leasing Act is actually part of the Truth in Lending Act.
- 36 *See* 12 C.F.R. § 226 (2001). Commonly known as "Regulation Z," this regulation contains required disclosures for consumer credit transactions).
- 37 On the other hand, if a reserve component service member is buying a car on an installment contract basis, and military service is affecting materially the ability to pay, this provision should have direct applicability.
- 38 50 U.S.C. App. § 533 allows a court that has stayed an action for rescission or contract termination to appoint three disinterested parties to appraise the property involved. The court may then order the service member's equity to be paid to him or her or a representative as a condition of rescission or contract termination.
- 39 A stay under this circumstance would likely be pursuant to two provisions of the SSCRA. 50 U.S.C. App. § 521 allows service members to stay any action in any court during the period of service or within 60 days thereafter. 50 U.S.C. App. § 524 authorizes such a stay for a period of up to three months following termination of active service.
- 40 50 U.S.C. App. § 590(1)(b).
- 41 *Id.* § 532(2).
- 42 *Id.* § 520.
- 43 *Id.* § 525.
- 44 *Id.* § 521. The SSCRA applies to proceedings commenced in courts of "the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States . . ." *Id.* § 512.
- 45 *Id.* § 521.
- 46 *Id.* § 510.
- 47 *See, e.g., Dotseth v. Arizona*, 5 Ariz. App. 424, 427 P.2d 558 (Ariz. Ct. App. 1967) (court determined that SSCRA was inapplicable to stay criminal proceedings for burglary).
- 48 *See, e.g., Kramer v. Kramer*, 668 S.W.2d 457 (Tex. Ct. App. 1984) (defendant's letter invoking SSCRA and requesting a stay did not provide personal jurisdiction that otherwise was lacking; proceeding should have been stayed).
- 49 *Boone v. Lightner*, 319 U.S. 561 (1943) (service member stationed in area in which litigation occurred had burden of establishing military service impaired his ability to appear).
- 50 *See, e.g., Kramer v. Kramer*, 668 S.W.2d 457; *Lackey v. Lackey*, 222 Va. 49, 278 S.E.2d 811 (1981) (sailor was entitled to stay of custody proceedings when service aboard ship precluded his participation in the proceedings).
- 51 *See, e.g., Skates v. Stockton*, 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1984) (even though court did not otherwise have personal jurisdiction, it determined that legal assistance constituted an appearance sufficient to give it personal jurisdiction).
- 52 50 U.S.C. App. § 520.
- 53 *Id.*
- 54 *See Skates v. Stockton*, 140 Ariz. 505, 638 P.2d 304; *see also Artis-Wergin v. Artis-Wergin*, 444 N.W.2d 750 (Wis. Ct. App. 1989) (legal assistance attorney requested a stay, but did not invoke SSCRA in request; court determined defendant had made an appearance and refused to reopen subsequent default judgment); *Kasubaski v. Kasubaski*, No. 95-0710 (unpublished opinion), 2001 Cornell Legal Information Institute (Wisc. Ct. App. (Aug. 7, 1996)) (memorandum from service member in Turkey requesting postponement of divorce proceedings based on the SSCRA did not raise jurisdictional objection and therefore constituted an appearance sufficient to give the court personal jurisdiction over service member).
- 55 H.R. 5814, 101st Cong., 2d Sess. § 2 (1990) [hereinafter H.R. 5814]. The pro-

- posed amendment provided that an application for a stay pursuant to section 521 would not constitute an appearance for any purpose.
- 56 SSCRA Amendments of 1991, §6.
- 57 *Id.*
- 58 *Id.*
- 59 50 U.S.C. App. § 526 (1994).
- 60 S. Rep. No. 1558, 77th Cong., 2d Sess. 4 (1942).
- 61 *Id.*
- 62 88 Cong. Rec. 5366 (1942).
- 63 *Id.*
- 64 50 U.S.C. § 526 (1994).
- 65 88 Cong. Rec. 5366 (1942).
- 66 *Moll v. Ford Consumer Finance Company, Inc.*, No. 97 C 5044, 1998 WL 142411, at 2-4 (N.D. Ill. Mar. 23, 1998); *Marin v. Citibank*, No. 98-7976, 2001 Cornell Legal Information Institute (2d Cir. Mar. 10, 2000); see generally JA 260, *supra* note 5, at 3-34.
- 67 Department of Education Memorandum, *Recent Terrorist Attacks—Persons Affected by Military Mobilization* [hereinafter DE Memorandum] <http://www.ifap.ed.gov/dpclatters/GEN0113.html> (September 2001); see also Department of Education Memorandum, *FFEL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations* (August 29, 1990).
- 68 Congress passed this provision as section 428(d) of the Higher Education Act of 1965.
- 69 50 U.S.C. App. § 521.
- 70 *Id.* § 520.
- 71 DE Memorandum.
- 72 34 C.F.R. § 682.211(a)(1) (2000).
- 73 *Id.*
- 74 *Id.* § 682.210(b)(2)(i).
- 75 *Id.* § 682.210(a)(3).
- 76 SSCRA Amendments of 1991, Pub. L. No. 102-12, § 7, 105 Stat. 38.
- 77 *Id.* (emphasis added).
- 78 SSCRA Amendments of 1991, Pub. L. No. 102-12, § 4, 105 Stat. 34.
- 79 *Id.* This provision is sufficiently broad to provide protection for attorneys called into active duty, if the Secretary of Defense should choose to do so, as was the case during operations in Kosovo in 1999. Secretary of Defense Memorandum, *Personnel and Pay Policy for the Presidential Callup of the Selected Reserve and Certain Individual Ready Reserve Members in Support of Kosovo Operations*, May 1999. See also Reserve Component Note, *Professional Liability Protection for Attorneys Ordered to Active Duty*, *The Army Lawyer*, August 1999, at 44.