

THE IMPACT OF THE SERVICEMEMBERS CIVIL RELIEF ACT (50 USC §§ 3901 – 4043) ON ALASKA NON-JUDICIAL FORECLOSURE LAW

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The current version of the Servicemembers Civil Relief Act (“SCRA” or “Act”) was redrafted in 2013 to restate and modernize a law that has been providing enhanced protections in civil proceedings to active duty servicemembers since World War I and is currently located at 50 U.S.C. §§ 3901 – 4043.¹ The Act, as Justice Jackson wrote in *Boone v. Lightener*, “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.”² Those covered under the Act include:

- Members of the Army, Navy, Marine Corps, and Coast Guard who are on active duty, which is defined as “full-time duty in the active military service of the United States,” including “full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned”³;
- Commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration⁴;
- A member of the reserves who is ordered to report to military service “beginning on the date of the member’s receipt of the order and ending on the date on which the member reports for military service”⁵;
- National Guard members who are called to “active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days . . . for purposes of responding to a national emergency declared by the President and supported by Federal Funds;”⁶ and
- “Members of the Alaska National Guard and Alaska Naval Militia while on active duty for the state by order of the governor.”⁷

The protections of the Act apply to the Servicemembers defined above even when they are “absent from duty on account of sickness, wounds, leave, or other lawful cause.”⁸

¹ See *Sibert v. Wells Fargo Bank, N.A.*, 863 F.3d 331, 334-35 (4th Cir. 2017).

² *Id.* at 337 (King., J., dissenting (quoting 319 U.S. 561, 575 (1943))).

³ 50 U.S.C. § 3911 (citing 10 U.S.C. §§ 101(a)(5), (d)(1)).

⁴ *Id.*

⁵ 50 U.S.C. § 3917(a).

⁶ 50 U.S.C. § 3911.

⁷ AS 26.05.135

⁸ 50 U.S.C. § 3911.

I. Section 3953 of the Act – “Mortgages and Deeds of Trust”

When initiating a non-judicial foreclosure, the first thing to determine is whether the property sought to be foreclosed upon was acquired by a servicemember **before the period of military service**. Property acquired during a servicemember’s service is not protected under the Act. The rationale for protecting only properties acquired pre-service is that:

In choosing to protect obligations incurred during civilian life, Congress recognized that those obligations could unexpectedly be impacted by entry into military service and the changes in the servicemember’s income and status, which were not contemplated at the time the obligation was incurred. Conversely, [Congress] chose not to protect obligations incurred during military service because both the servicemembers and lenders would be aware of the servicemember’s income and military status.⁹

Therefore the section of the Act that applies to mortgages and deeds of trust “applies only to an obligation on real or personal property owned by a servicemember that (1) **originated before the period of the servicemember’s military service** and for which the servicemember is still obligated; and (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.”¹⁰

Three protections apply to obligations on real property covered by the Act: a stay of proceedings; an equitable readjustment of the obligation; and the requirement that a court order issue before property is foreclosed upon. Each of these protections applies automatically – the servicemember does not have to do anything to avail herself of this portion of the SCRA.¹¹

⁹ *Sibert v. Wells Fargo Bank, N.A.*, 863 F.3d 331, 334 (4th Cir. 2017). The dispute in *Sibert* was whether a home acquired while Mr. Sibert was in the Navy was protected by the SCRA against a non-judicial foreclosure that occurred when Mr. Sibert was later serving in the Army after a 4 year stint as a civilian. A majority of the Fourth Circuit held that because the property was acquired during Sibert’s prior naval service, it was not covered by the SCRA. Sibert petitioned for certiorari on October 11, 2017. See <https://buckleysandler.com/sites/default/files/Buckley%20Sandler%20InfoBytes%20-%20Petition%20for%20Writ%20of%20Cert%20Sibert%20SCRA%20Case%202017.10.25.pdf>

¹⁰ 50 U.S.C. § 3953(a) (emphasis added).

¹¹ The sources researched for this memorandum were unanimous on this point. See, e.g., U.S. Gov’t Accountability Office, Report to Cong. Committees on SCRA (Jan. 2014), at 6 (“[T]he responsibility of extending SCRA foreclosure protections to eligible servicemembers often falls to mortgage servicers. The burden is on the financial institution to ensure that borrowers are not active duty military before conducting foreclosure proceedings. Eligible servicemembers are protected even if they do not tell their financial institution about their active duty status.”), available at <http://www.gao.gov/assets/670/660398.pdf>

A. Stay of Proceedings/Readjustment of Obligation: 50 U.S.C. § 3953(b)

For judicial foreclosure actions against property acquired before service, this subsection provides:

In an action filed during, or within one year after, a servicemember's period of military service to enforce an obligation described in subsection (a) [property acquired before military service], the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service:

- (1) Stay the proceedings for a period of time as justice and equity require; or
- (2) Adjust the obligation to preserve the interests of all parties.¹²

It is possible that because non-judicial foreclosures require a court order to proceed against covered property (explained below), a stay could be requested in non-judicial foreclosure actions.

Alaska's Supreme court has yet to address the stay of proceedings under section 3953, although it has weighed in on the general stay of all civil proceedings found at section 3932 of the SCRA, which permits "any civil action or proceeding" to be stayed for "not less than 90 days" – either *sua sponte* or upon a servicemember's request – so long as the member's commanding officer communicates that the member's "current military duty prevents appearance" and other facts show that the duty requirements "materially affect the servicemember's ability to appear."

In a custody dispute our Supreme Court stressed that the general civil stay was only available upon a showing by the servicemember that his "rights or ability to present a defense would be materially affected by [his] military duties."¹³ Section 3953's stay provision, which narrowly applies to trust deeds, is sufficiently similar to Section 3932's general civil stay provisions that this case should carry some precedential weight.

The "one-year" period of post-service protection in subsection 3953(b) is temporary and is currently set to expire on December 31, 2019¹⁴, at which time coverage "will revert to the original coverage period of 90 days after military service."¹⁵

¹² 50 U.S.C. § 3953(b).

¹³ *Childs v. Childs*, 310 P.3d 955, 959 & n.13 (Alaska 2013) (collecting cases).

¹⁴ U.S. Dep't of Justice, *The Servicemembers Civil Relief Act*, available at <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra>

¹⁵ Ohio State Bar Association, Ohio Guide to the Servicemembers Civil Relief Act (2d 2016), at 19 n.128, available at <https://www.ohioabar.org/ForPublic/Resources/Documents/Ohio-Guide-to-SCRA.pdf> ("Ohio Article"); see also National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 557.

As to section 3953(b)(2)'s provision permitting the court to adjust the parties' obligations to preserve their interests, examples include staying foreclosure proceedings conditioned upon the servicemember's payment of \$100 per month for a year or upon a servicemember's dependent's monthly payment.¹⁶

B. Court Order required to foreclose: 50 U.S.C. § 3953(c)

This subsection provides:

A sale, foreclosures, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within one year after, the period of the servicemember's military service except (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or (2) if made pursuant to an agreement [waiver] as provided in section 3918 of this title.

Although case law is not clear, it appears that non-judicial foreclosure proceedings against SCRA protected property can proceed upon a court order. One practitioner states that litigation will be necessary for non-judicial foreclosures and that the "creditor must file an action for declaratory relief seeking a court order allowing the foreclosure sale to commence or continue."¹⁷ Similarly, a U.S. DOJ report references a case it brought against Northwest Trustee Services Inc. for conducting non-judicial foreclosures without court orders on 28 SCRA-protected properties, suggesting that the non-judicial foreclosures would have been authorized under the SCRA had a court-order been sought first.¹⁸

C. Waiver under Section 3918 can be used to Foreclose

Apart from a court order, property protected under the SCRA can be foreclosed upon if the servicemember is willing to execute a waiver in compliance with Section 3918 of the Act. Servicemembers "may waive any of the rights and protections provided by" the Act with respect to "the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that . . . is security for any obligation."¹⁹

¹⁶ See Ohio Article at 21 n.142 (citing *Fed Nat'l Mortgage Ass'n v. Deziel*, 136 F. Supp. 859 (E.D. Mich. 1956); *Nassau Sav. & Loan Ass'n v. Ormond*, 39 N.Y.S.2d 92 (N.Y. Sup. Ct. 1942)).

¹⁷ Linda S. Finley, Baker Donelson, The Servicemembers' Civil Relief Act (July 14, 2011), available at <https://www.bakerdonelson.com/The-Servicemembers-Civil-Relief-Act-07-14-2011>

¹⁸ DOJ press release (Nov. 9, 2017), available at <https://www.justice.gov/opa/pr/justice-department-sues-northwest-trustee-services-inc-bellevue-washington-illegally> ; Complaint, *United States v. Northwest Trustee Services, Inc.*, No. 2:17-cv-01686 (W.D. Wash, Nov. 9, 2017), available at <https://www.justice.gov/opa/press-release/file/1010081/download>

¹⁹ 50 U.S.C. § 3918.

To be valid, the waiver must:

- Be “executed as an instrument separate from the obligation or liability to which it applies”;
- Be “executed during or after the servicemember’s period of military service”;
- “specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned”; and
- “be in at least 12 point type.”²⁰

The waiver provision “is designed to induce servicemembers and their creditors to adjust their respective rights privately and to make it clear that no restrictions have been placed upon the usual right of the parties to re-negotiate an obligation.”²¹

II. Interest Rate Cap: 50 U.S.C. § 3937

This section of the SCRA limits interest to 6 percent and applies to “an obligation or liability” incurred by the servicemember – or by the member and his or her spouse jointly – before the servicemember enters military service.

In the case of an obligation secured by a deed of trust, the obligation “shall not bear interest at a rate in excess of 6 percent during the period of military service and one year thereafter.”

In the case of “any other obligation or liability,” the interest rate cap applies “during the period of military service.” As explained by the American Banker’s Association (“ABA”), “The law is designed to protect the servicemember when his or her status and income change as a result of being called to active duty. The interest rate cap does not apply to a loan entered after or during active duty. If a loan is contracted after active duty begins, it is assumed that a servicemember knows what he or she can afford and the underwriter will also be able to assess ability to repay based on current income.”²²

The ABA also cautions that the “broad language” of the SCRA [“any obligation or liability”] “means that the SCRA applies to **all** of an eligible borrower’s pre-existing loans, including installment loans, mortgages, credit card balances, and pre-existing draws on home equity lines of credit as well as any other pre-existing loan made by any lender to the servicemember.”²³

²⁰ *Id.*

²¹ The Judge Advocate General’s Legal Center and School, U.S. Army, JA 260, *Servicemembers Civil Relief Act*, 2-8 (Mar. 2006), available at https://www.americanbar.org/content/dam/aba/administrative/legal_assistance_military_personnel/SCRA_guide.authcheckdam.pdf .

²² American Banker’s Association (ABA), ABA Staff Analysis: Servicemembers Civil Relief Act Compliance (May 2011), available at <https://www.aba.com/aba/documents/Compliance/StaffAnalysis/SASCRA2012.pdf> (“ABA Article”).

²³ *Id.*

The Interest Rate Cap section of the Act also provides that any periodic payment due from the servicemember by reason of a protected debt “shall be reduced by the amount of the interest forgiven . . . that is allocable to the period for which such payment is made.”²⁴

Unlike the act’s protections against foreclosures of pre-service property, this section must be invoked by the servicemember “not later than 180 days after” the end of his military service by providing the creditor with “written notice and a copy of the military orders.”²⁵

“A court may grant a creditor relief from the limitations of this section if, in the opinion of the court, the ability of the servicemember to pay interest upon the obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of the servicemember’s military service.”²⁶ The ABA cautions against seeking court relief in this area for two reasons: (1) the servicemember may seek a general civil stay; and (2) there may be “reputation risks” associated with asking a court to order an otherwise protected servicemember to pay the full amount of his or her pre-service interest obligation.²⁷

Finally, it is worth mentioning that the term “interest” is written broadly to include “service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability.”²⁸ According to the ABA, “the creditor should re-compute payments so that interest and all fees stay within the 6% cap per annum.”²⁹

III. Statute of Limitations

Section 3936 of the Act tolls any statute of limitations “during military service.” It provides that

the period of a servicemember’s military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember’s heirs, executors, administrators, or assigns.

²⁴ 50 U.S.C. § 3937(a)(3).

²⁵ 50 U.S.C. § 3937(b)(1).

²⁶ 50 U.S.C. § 3937(c).

²⁷ ABA Article (May, 2011), at 4.

²⁸ 50 U.S.C. § 393(d)(1).

²⁹ ABA Article, at 4.

This section of the Act also provides explicitly that “a period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment.” Under Alaska law there is only a period of redemption after a non-judicial foreclosure sale if the deed of trust so provides.³⁰ In judicial foreclosures, the judgement debtor has a year from the sale’s confirmation within which to redeem the property.³¹

IV. Determining a Borrower’s Military Status

To reemphasize, the provisions of the SCRA (§ 3953) protecting servicemembers from foreclosure actions apply automatically, whereas a servicemember must affirmatively claim the interest rate cap relief in section 3937. “The Department of Justice and the courts take the position that the limitations on foreclosure apply automatically, and that the **creditor** bears the burden of determining whether the borrower is on active duty prior to initiating non-judicial foreclosure proceedings.”³²

The best way to determine whether a borrower is a servicemember is to research the Department of Defense’s Defense Manpower Data Center:

- https://www.dmdc.osd.mil/appj/dwp/status_finder.jsp

With a name and either a social security number or date of birth, this website will determine whether a person is active duty or has been in the previous 366 days because the interest rate cap for preservice mortgage obligations extends for one year past active duty.

Lenders should take pains to keep detailed records as to whether borrowers were active duty when the loan was made. If so, the SCRA does not apply. On the other hand, if the borrower is not active duty, but then enlists, the lender will be able to see the borrower’s status through the above website prior to foreclosure proceedings. This website should be checked consistently throughout foreclosure proceedings.

V. Protections to Dependents and Others

Section 3913 of the Act provides that whenever the enforcement of an obligation or liability is stayed, postponed, or suspended, such a stay, postponement, or suspension may be granted as to “a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability the performance or enforcement of which is stayed, postponed, or suspended.”

³⁰ AS 34.20.090(a).

³¹ AS 09.35.250.

³² ABA Article, at 7.

Section 3959 of the Act extends protections to “a dependent of a servicemember . . . if the dependent’s ability to comply with a lease, contract, bailment, or other obligation is materially affected by reason of the servicemember’s military service.”³³ And the interest rate cap (Section 3937), by its plain terms, applies to an obligation incurred by the member and his or her spouse jointly.

VI. Penalties

Violations of sections 3953 (mortgages & deeds of trust) and 3937 (maximum rate of interest) are both punishable by fines “as provided in Title 18,” imprisonment for not more than one year, or both. Section 3953 explicitly states that any knowing violation is a misdemeanor.

Section 4041 permits enforcement of the Act by the Attorney General for a pattern of violations or for a violation “that raises an issue of significant public importance.” Punitive damages may be assessed by statute “to vindicate the public interest”: \$55,000 for the first violation, and an amount “not exceeding \$110,000 for any subsequent violation.”

In 2015 the DOJ reached a settlement for \$123 million payable to servicemembers for violations of the Act’s nonjudicial foreclosure provisions by JP Morgan Chase, Wells Fargo, Citi Residential Lending, and others.³⁴ This lawsuit was touted as a cautionary tale by many sources researched for this memorandum. Later in September, an additional settlement of \$186 million was reached, bringing the grand total of settlement monies under the SCRA to \$311 million for a pattern of violation by big lenders, including: “foreclosures that took place between Jan. 1, 2006, and Apr. 4, 2012, where the servicer obtained a foreclosure without a judicial proceeding or where the servicer obtained a default foreclosure judgment without filing a proper affidavit with the court stating that the service member was in military service.”³⁵ As referenced above, a lawsuit has commenced in federal district court in Washington alleging the same violations by Northwest Trustee Services, Inc. and seeking statutory damages for 28 unlawful foreclosures, or in excess of \$3 million in statutory damages alone.³⁶

³³ A “dependent” is defined by statute as a servicemember’s spouse, child, or “an individual for whom the servicemember provided more than one-half of the individual’s support for 180 days immediately preceding an application for relief under this Chapter.” 50 U.S.C. § 3911(4).

³⁴ DOJ Press Release, *Service Members to Receive Over \$123 Million for Unlawful Foreclosures Under the Servicemembers Civil Relief Act* (Feb. 9, 2015), available at <https://www.justice.gov/opa/pr/service-members-receive-over-123-million-unlawful-foreclosures-under-servicemembers-civil>

³⁵ DOJ Press Release, *Service Members’ Compensation for Unlawful Foreclosures Under the Servicemembers Civil Relief Act Rises to \$311 Million* (Sept. 30, 2015), available at <https://www.justice.gov/opa/pr/service-members-compensation-unlawful-foreclosures-under-servicemembers-civil-relief-act>

³⁶ See *supra* note 18.

Section 4042 of the Act creates a private cause of action for aggrieved individuals to recover monetary damages or appropriate equitable or declaratory relief. A prevailing plaintiff may recover “a reasonable attorney fee.”

VII. Other Protections

Although this memorandum focuses on the SCRA’s protections pertaining to non-judicial foreclosures, many other types of civil actions against servicemembers are curtailed by the SCRA’s protections, which often include stays and adjustments of a servicemember’s obligation upon a showing that military service has materially affected the servicemember’s ability to comply with the obligation. The following is a brief overview – the statutes cited provide more detail and should be consulted.

A court-order is required to evict a servicemember from her primary residence, and the court has authority to adjust the rental obligation if the servicemember can establish that her service materially affects her ability to pay rent.³⁷

Installment contracts for real or personal property entered into before military service may not be terminated by reason of a breach during military service without a court order, and the court may issue a stay, enjoin a forfeiture of the servicemember’s equity, or readjust the obligations of the parties to preserve their interests.³⁸

Servicemembers who leased residential or business property or leased automobiles before joining the service can terminate those leases upon proper notice to the lessor and are entitled to any pre-paid rent, but the servicemember is still liable for any “excess wear” to the premises or vehicle.³⁹

Subject to certain exceptions, “If a life insurance policy on the life of a servicemember is assigned before military service to secure the payment of an obligation, the assignee of the policy (except the insurer in connection with a policy loan) may not exercise, during a period of military service of the servicemember or within one year thereafter, any right or option obtained under the assignment without a court order.”⁴⁰

Liens on the personal property or effects of servicemembers (i.e., storage liens) may not be foreclosed during any period of military service and for 90 days thereafter without a court order.⁴¹

Other specific sections deal with taxes that accrue on land or property of a servicemember,⁴² and servicemember’s rights to public lands, mining claims, mineral permits, and land rights generally.⁴³

³⁷ 50 U.S.C. § 3951.

³⁸ 50 U.S.C. § 3952.

³⁹ 50 U.S.C. § 3955.

⁴⁰ 50 U.S.C. § 3957.

⁴¹ 50 U.S.C. § 3958.

⁴² 50 U.S.C. § 3991.

⁴³ 50 U.S.C. §§ 3992 – 3998.

VIII. Conclusion

The guiding principal of the SCRA is to protect debts incurred by servicemembers before they entered service to encourage participation in our Armed Forces. Lenders must realize that under the Act, the borrower's active duty status as of the date when the obligation, loan, or debt was incurred is of primary importance. The protection against foreclosures applies automatically, whereas a servicemember must affirmatively claim an interest rate reduction. Lenders should keep meticulous records of their borrowers' military status through the Department of Defense website – both at the time the loan originated and when collection or foreclosure efforts begin. Civil penalties are significant to encourage compliance with this remedial statute aimed at protecting “those who have been obliged to drop their own affairs to take up the burdens of the nation.”⁴⁴

⁴⁴ *Boone v. Lightner*, 319 U.S. 561, 575 (1943).