

# BURR ARTICLE

## Battling on the Front Lines of Foreclosures:

What must a Lender consider and do when foreclosing on a property owned by a Servicemember under the “ACT”

A complicated, but sometimes overlooked, issue facing foreclosing lenders is properly handling and defending against claims that a servicemember-owner is entitled to protections from foreclosure based on his or her status as a servicemember. The “Servicemembers Civil Relief Act (2003),” 50 App. U.S.C. §§ 501-515, 516-597b, (the “SCRA” or the “Act”), provides protections to Servicemembers in various legal contexts, including foreclosure actions. The Act’s stated purposes are “to provide for, strengthen, and expedite the national defense through protection . . . to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation” and “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.” 50 App. U.S.C. § 502. With such an overarching “patriotic”-sounding purpose, many lenders are understandable hesitant to foreclose upon any person serving in the armed forces for fear of bad press and public backlash. However, there are many things to consider and do when developing strategy and tactics when a lender seeks to foreclose upon a property owned by a member of the armed forces.

### WHO IS A “SERVICEMEMBER” UNDER THE SCRA?

#### I. Generally

A “Servicemember” includes the following:

1. Members of the Army, Navy, Air Force, Marine Corps and Coast Guard *on active duty* under 10 U.S.C. § 101(d)(1)<sup>1</sup> (italics added);
2. Members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days under 32 U.S.C. § 502(f)<sup>2</sup> to respond to a national emergency declared by the President and supported by federal funds; and

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<sup>1</sup> 10 U.S.C. § 101(d)(1): The term “active duty” means full-time duty in the active military service of the United States. Such term includes 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. Such term does not include full-time National Guard duty.”

<sup>2</sup> 32 U.S.C. § 502(f):

(1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—

(A) without his consent, but with the pay and allowances provided by law; or

3. Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration while on “active service”<sup>3</sup>.

The Act also covers Servicemembers that are absent from duty because of sickness, wounds, leave or other lawful cause. In other words, “active duty” for purposes of the SCRA includes time periods when the Servicemember is absent from duty for any of these reasons. 50 App. U.S.C. App. § 511(1), (2).

## II. National Guard and Reserve

In addition to “Servicemembers”, the Act covers members of the National Guard and Reserve, from receipt of orders to report for duty.

## III. Dependents

The Act covers Servicemembers’ “dependents”. Dependents are primarily the spouses and children of Servicemembers, but if a Servicemember has provided over half a person’s support for the 180 days immediately preceding an application for relief under the Act, that person qualifies as a dependent. 50 App. U.S.C. § 511(4).

## IV. Citizens Serving With Allied Forces

A 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 the Act if the service with the allied force is similar to military service as defined in the Act.<sup>4</sup>

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(B) with his consent, either with or without pay and allowances;

be ordered to perform training or other duty in addition to that prescribed under subsection (a).

(2) The training or duty ordered to be performed under paragraph (1) may include the following:

(A) Support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.

(B) Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations—

(i) are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and

(ii) are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty troops), Department of Defense contractor personnel, or Department of Defense civilian employees.

(3) Duty without pay shall be considered for all purposes as if it were duty with pay.”

<sup>3</sup> “Active Service” means service on active duty or full-time National Guard duty. 10 U.S.C. § 101(d)(3).

<sup>4</sup> See, e.g., *Barnsbee v. Barnsbee*, 45 N.Y.S.2d 173, 173-74 (N.Y. Sup. Ct. 1943) (officer in British Navy covered under SCRA); *State ex rel. Buck v. McCabe*, 45 N.E.2d 763, 765-67 (Ohio 1942) (person who enlisted in the Canadian armed forces covered under SCRA). But see *Gorman v. City of Olathe, Kan.*, 2013 WL 5930368 at \*6 (D. Kan. 2013) *aff’d*, 2014 WL 2724633 (10th Cir. 2014) (SCRA does not apply to civilian employee of private contractor doing work for uniformed services of the United States); *Morris v. Gaddy*, 2004 WL 2044107 at \*3 (Bankr. D. Kan. 2004) (same).

The relief and protections provided to such citizen terminates on the date of discharge or release from such service. 50 App. U.S.C. § 514.

#### V. Other Co-Defendants

Other than the dependent of a Servicemember, the Act does not apply to co-defendants who are not, themselves, Servicemembers. 50 App. U.S.C. § 525(b).

### **WHERE DOES THE SCRA APPLY AND WHAT IS COVERED?**

The Act applies in any court or administrative proceeding of the United States and its territories and possessions, all courts in any state or any political subdivision of any state. 50 App. U.S.C. §§ 511(5), 512(a).

The jurisdiction of the Act covers *any* judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to the Act. The Act does not, however, apply to criminal proceedings. 50 U.S.C. App. § 512(b).

### **PROTECTIONS GRANTED BY THE SCRA**

#### I. When Servicemember has not appeared in the case

##### A. Affidavit Required

When a judgment, order, or adverse ruling is sought against a party who has not made an appearance in the case, the Lender must first file an affidavit stating whether the defendant is in the military, and demonstrating the facts supporting that conclusion (commonly referred to as a “non-military affidavit”, or “affidavit of non-military service” when filed to establish that the defendant is not in military service), or stating that the plaintiff was unable to determine the party’s military status. 50 App. U.S.C. §521(b)(1). The affidavit may be any “statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.” 50 App. U.S.C. § 521(b)(4). The plaintiff may apply to the Department of Defense (“DOD”) for military information regarding the defendant, and the DOD must issue a statement as to the defendant’s military service. 50 App. U.S.C. § 582.

##### B. Court to Determine Military Status of Defendant

##### 1. Defendant in Military Service

Based upon the Lender’s affidavit, the court is to determine whether the party is in the military. If the court determines the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If the appointed attorney cannot locate the Servicemember, actions by the attorney in the case will not waive any defense of the Servicemember or otherwise bind the Servicemember. 50 App. U.S.C. § 521(b)(2). The court must also grant a stay of proceedings for a minimum period of 90 days if the court determines that, (1) there may be a defense to the action and a defense cannot be presented without the presence of the

Servicemember; or (2) after due diligence, counsel has been unable to contact the Servicemember or otherwise determine if a meritorious defense exists. 50 App. U.S.C. §521(d).

## 2. Military Service Undetermined

If the court cannot determine whether the defendant is in military service, the court may require the Lender to post a bond to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the Lender, should the judgment later be set aside. The bond must remain in effect until the time for appeal and setting aside of a judgment under applicable law expires. 50 App. U.S.C. § 521(b)(3). The bond is not mandatory, and the court is granted discretion to issue such as orders as may be necessary to effectuate the purposes of the Act. *Id.*

### C. Default Judgments

If a default judgment is entered against a Servicemember during his period of military service (or within 60 days after the end of such service), the court must reopen the judgment to allow the Servicemember an opportunity to defend if: (1), the Servicemember's military service "materially affected"<sup>5</sup> his ability to assert a defense, (2) the Servicemember has a meritorious or legal defense to the action or some part of it, and (3) the application to reopen the judgment is filed within 90 days after the end of military service. 50 App. U.S.C. § 521(g). Note that the reopening of the judgment is not automatic. The Servicemember must show that, *inter alia*, military service *materially affected* his ability to assert a defense.

## II. When servicemember has received notice – 90 Day Stay

When a Servicemember has received notice of an action or proceeding pending against him, there is an option for the case to be stayed for a minimum of 90 days. In order for the stay to apply, the Servicemember must be in military service or within 90 days after termination of, or release from, military service. 50 App. U.S.C. § 522(a). The court may issue the stay itself, or if applied for by the Servicemember, *must* issue the requested stay. 50 App. U.S.C. §522(b)(1). The application filed by the Servicemember must include the following: (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements *materially affect* the Servicemember's ability to appear, and stating a date when the Servicemember will be available to appear; and (B) A letter or other communication from the Servicemember's commanding officer stating that the Servicemember's current military duty prevents appearance and that military leave is not authorized for the Servicemember at the time of the letter. 50 App. U.S.C. §522(b). An application

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<sup>5</sup> See, e.g., *Boone v. Lightner*, 319 U.S. 561 (1943) ("mere showing that the defendant was in Washington in the military service" was not sufficient to demonstrate that person was materially affected by his military service so as to not be able to conduct his defense, even during wartime when the workload was heavy and no leaves had been granted, except in cases of serious emergency); *Amber L. v. Superior Court*, 2003 WL 21967266 (Cal. Ct. App. 2003) (mother in juvenile dependency case who was enlisted in Navy and deployed to Japan, but was able to continue court required therapy via the Internet and furnish documentary evidence for a hearing to her attorney, was not materially affected by military service); *Johnson v. Johnson*, 139 P.3d 33 (Cal. Dist. Ct. App. 1943) (defendant who merely claimed that he was enlisted in the Navy during a time of war, who had been fully deposed, who submitted no affidavits of superior officers that he would be unable to attend trial, who was represented by counsel, and whose liability was being covered by insurance was not sufficient to demonstrate that person was materially affected by his military service so as to not be able to conduct his defense).

for a stay under this section does not constitute an appearance for jurisdictional purposes, and does not constitute a waiver of any defense (including a defense relating to lack of personal jurisdiction). 50 App. U.S.C. §522(c). The Servicemember may apply for an additional stay at any time, but must file the same documents in support of the request as are required for the initial 90 day stay. If the court refuses the additional stay, the court must appoint counsel to represent the Servicemember in the proceeding. 50 App. U.S.C. §522(d). Note, again, that the stay is not automatic. The Servicemember must show that military service *materially affects* his ability to appear and defend.

### III. After Judgment – Stay of Collections

If the court determines the Servicemember is *materially affected* by reason of military service in complying with a court judgment or order, the court may on its own motion, and *shall* on application by the Servicemember: (1) stay the execution of any judgment or order entered against the Servicemember; and (2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the Servicemember or a third party, whether before or after judgment. 50 U.S.C. App. §524(a). This section applies to an action or proceeding commenced against a Servicemember before or during the period of the Servicemember’s military service, or within 90 days after such service terminates. 50 U.S.C. App. §524(b). The creditor could thus potentially be forced to return or reimburse garnishment funds or other property obtained in the collections process.<sup>6</sup> Note, once again, that the stay of collections is not automatic. The Servicemember must show that military service *materially affects* his ability to comply with the court order or judgment.

### IV. Tolling of Statute of Limitations and Redemption Deadline

The period of a Servicemember’s military service may not be included in computing any time 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. 50 App. U.S.C. § 526(a). 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. 50 App. U.S.C. § 526(b). This section obviously has ramifications in the foreclosure context. A servicemember may apply to redeem a mortgage well after the foreclosure sale and redemption period have passed.<sup>7</sup>

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<sup>6</sup> However, the Servicemember must plead facts that “show that his [or her] military service *makes it impossible* for him [or her] to allow his [or her] salary to be garnished or his [or her] property to be taken.” *Vockroth v. 1st Cir. Fam. Ct. of Haw.*, 747 F. Supp. 2d 1297, 1300 (M.D. Ala. 2010).

<sup>7</sup> See, e.g., *Wilkin v. Shell Oil Co.*, 197 F.2d 42 (10th Cir. 1951) (“[I]t was intent of Congress that period of military service not be included in computing period for redemption of land.”); *Stevahn v. Meidinger*, 57 N.W.2d 1 (N.D. 1952) (SCRA does not create a new right to redeem from a mortgage foreclosure interest of person in military service in mortgaged property but extends time within which the right of redemption, as created and existing, may be exercised); *Kasner v. Ashburn*, 192 P.2d 649 (Okla. 1948) (two-year period after date of recording a resale tax deed within which to bring action by holder of deed to quiet title to and recover possession of property was tolled by SCRA during military service of a necessary party defendant); *Day v. Jones*, 187 P.2d 181 (Utah 1947) (under SCRA, period from date of landowner’s induction into military service until date of which time for redemption of land from tax sale would normally expire should not be included in computing time for redemption under Utah Code 1943, 80-10-31, 80-10-59, after

## V. Protection against Fines/Penalties; Reduction of Same

When an action on a contract is stayed pursuant to the Act, penalties shall not accrue for failure to comply with the terms of the contract during the period of the stay. 50 App. U.S.C. §523(a). If a Servicemember fails to perform an obligation arising under a contract, resulting in a penalty for that nonperformance, a court may reduce or waive the fine or penalty if: (1) the Servicemember was in military service at the time the fine or penalty was incurred; and (2) the ability of the Servicemember to perform the obligation was *materially affected* by such military service. 50 App. U.S.C. §523(b). Again, note that the court waiver or reduction of penalties is not automatic. The Servicemember must show that military service *materially affected* his ability to comply with the contract.

## VI. Interest Cap

An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a Servicemember, or the Servicemember and the Servicemember's spouse jointly, before the Servicemember enters military service shall not bear interest at a rate in excess of 6 percent: (A) during the period of military service and one year thereafter, in the case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage; or (B) during the period of military service, in the case of any other obligation or liability. 50 App. U.S.C. §527(a)(1). Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven. 50 App. U.S.C. §527(a)(2). "Interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability. 50 App. U.S.C. §527(d).

For an obligation or liability of a Servicemember to be subject to the interest rate limitation described above, the Servicemember must provide the creditor written notice and a copy of the military orders calling the Servicemember to military service, and any orders extending military service, within 180 days after the date of the Servicemember's termination or release from military service. Upon receipt of the written notice and a copy of the orders, the creditor shall apply the interest rate cap effective as of the date on which the Servicemember is called to military service. 50 App. U.S.C. §527(b).

The court may grant a creditor relief from the interest limitations 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.<sup>8</sup>

## VII. Protection against foreclosure; stay of foreclosure proceedings

When a Servicemember owes a debt secured by real or personal property owned by the Servicemember, and (1) the debt originated before the period of the Servicemember's military

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termination of such service); *Ill. Nat'l Bank of Springfield v. Gwinn*, 61 N.E.2d 249 (Ill. 1945) (the provision of this section, excluding any part of a person's period of military service occurring after Oct. 6, 1942, from computation of time provided by any existing or future statute for the redemption of real estate sold under a decree of foreclosure, must be regarded as written into state statutes of redemption and, in effect, amending such statutes by giving additional time for redemption in certain cases).

<sup>8</sup> "The lender bears the burden of showing that the serviceman has the ability to pay at the original interest rate." *Watson v. Watson*, 292 B.R. 441, 444 (Bankr. S.D. Ga. 2003).

service and the Servicemember is still obligated on the debt; and (2) the debt is secured by a mortgage, trust deed, or other security in the nature of a mortgage, the following provisions apply. In an action filed during, or within 9 months after, a Servicemember's period of military service to enforce an obligation described above, the court may conduct a hearing to determine whether the Servicemember's ability to comply with the debt obligation is materially affected by military service. If the court determines the Servicemember's military service does *materially affect* the ability to comply with the debt obligation, the court must (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.<sup>9</sup> 50 App. U.S.C. §533(a) and (b). In addition, a sale, foreclosure, or seizure of property for a breach of an obligation described above shall not be valid if made during, or within 9 months 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 as provided in section 107 (section 517). 50 App. U.S.C. §533(c).<sup>10</sup>

## STRATEGY FOR LENDERS

With all of these complicated provisions of the Act in mind, what should a Lender do when foreclosing a mortgage where the defendant is a Servicemember? *First, the Lender must file the required affidavit with the court as soon as possible.* The day the Lender files its foreclosure complaint, it should also file the affidavit stating that the defendant is a member of the armed forces. This will expedite the process of the court appointing an attorney to represent the Servicemember. Further, determining whether a defendant is a Servicemember from the start should greatly reduce any unnecessary costs associated with reopening a judgment or, even worse, vacating a foreclosure sale. *Second, if the Servicemember requests a stay, conduct discovery to determine whether the Servicemember's duty requirements truly "materially affect" his or her ability to appear.* This is the situation in which many Lenders may be wary to challenge a Servicemember. However, the Act is

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<sup>9</sup> The court has fairly broad discretion to change the contract under this section. *See, e.g., Clements v. McLeod*, 22 So. 2d 220 (Fla. 1945) (where \$2,000 realized from first mortgage loan had been given to second mortgagee as a down payment on property purchased, first mortgage was being maintained by mortgagor out of his allotments for service in the Navy, property was worth more than outstanding mortgage loan, and except for fact that second mortgage sought to be foreclosed contained acceleration clause, mortgagor could never have been indebted to second mortgagee at any time prior to suit in amount greater than \$25, an order staying foreclosure suit under this section upon certain conditions was not an abuse of discretion); *Brown Serv. Ins. Co. v. King*, 24 So. 2d 219, 222 (Ala. 1945) (in mortgage foreclosure suit against one whose capital was reduced to less than \$100 because of illness in his family since his induction into Army, court did not exceed its discretion under this section in directing defendant to pay only current taxes and hazard insurance monthly out of his income, as his ability to comply with terms of obligation was materially affected by reason of his military service); *Fed. Home Loan Mortg. Corp. v. Taylor*, 318 So. 2d 203 (Fla. 1st DCA 1975) (Trial court in mortgage foreclosure action was within discretion in determining that acceleration of entire mortgage debt would be unconscionable, on basis of a technical default of one month's installment which could have arisen from excusable misunderstanding and lack of effective and timely communications because mortgagors were in the Philippines in connection with mortgagor husband's military duty). The court's power to change the contract is not limitless, however. *See, e.g., Brown Serv. Ins. Co. v. King*, 24 So. 2d 219, 222 (Ala. 1945) ("[T]he Act does not apply merely because such person is in military service, and is not to be invoked for a needless purpose, but is to be administered as an instrument to accomplish substantial justice, and has application only when the military service has prevented or is preventing a member of the military forces from meeting the obligations imposed upon him by the instrument sued on."); *O'Leary v. Horgan*, 39 N.Y.S.2d 555 (N.Y. Sup. Ct. 1943) (SCRA does not contemplate complete immunity since court is required to make such disposition "as may be equitable to conserve the interest of all parties").

<sup>10</sup> §517 addresses written waivers of rights under the Act

meant as a temporary shield for those Servicemembers that are truly unable to defend, *inter alia*, a foreclosure action due to the obligations of their service (i.e. a Servicemember deployed to and actively engaged in a combat zone). A Servicemember residing in the home and conducting home-base duties, or even a Servicemember stationed overseas in a non-hostile environment, should not generally qualify for a stay. Remember, the Servicemember must provide a letter from both him- or herself and his or her commander stating that his or her duty prevents the Servicemember from appearing and defending. Further, the stay is not indefinite—revisit the stay after the 90 days because Servicemembers typically are not deployed to combat zones or otherwise unavailable indefinitely in today’s military environment. Most deployments are for between 90 days and 6 months. Additionally, if, for example, a Servicemember can be deposed and represented by counsel, a subsequent deployment or period of time in which the service otherwise materially affects his or her ability to appear may not require a stay. *Third, remember that the Act does not apply to a Servicemember that purchased and encumbered the property during the period of military service for which the Servicemember is still obligated.* Again, the Act is not meant to be used as a sword, but only as a shield in situations where a person was called to active duty after becoming obligated on a note secured by a mortgage. A Servicemember is prohibited from claiming protection under the Act if the Servicemember was in the military in the same capacity at the time he or she gave a mortgage on the property.

One additional tactic exists to remove the Act entirely from the picture. *The Lender can obtain a written waiver of any and all of the rights and protections provided by the Act.* Section 517 of the Act allows for a Servicemember to waive his or her rights under the Act. The waiver must be in writing and must be in a separate instrument from the mortgage—it cannot be a clause within the mortgage itself. This waiver can be obtained as part of the mortgage transaction, or at any other time up to and including during the foreclosure process. It is important, however, to specify exactly which rights are being waived in the waiver—a general waiver will likely not suffice.

## CONCLUSION

Although a somewhat sensitive issue for Lenders, foreclosing upon the property of a member of the armed forces does not have to be a costly and frustrating process, as often depicted in the media. The difficulties arise when Lenders wait until the last minute to determine whether a defendant is, in fact, a Servicemember—including after the foreclosure sale has already occurred. The SCRA provides protections against foreclosure for those who are called to active duty, which may be truly necessary in some situations when a Servicemember is deployed to a warzone and is truly unable to defend the action. It is vital, given the Act’s protections and nuances, that Lenders develop a strategy of how to best handle potential Servicemember issues before the foreclosure is completed and, preferably, early in the foreclosure process.

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**If you have any questions or need further information, please contact:**

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