

Property Manager's Guide to the Servicemember Civil Relief Act

The Servicemember Civil Relief Act (50 U.S.C. 3901 et seq), or SCRA, is a federal law designed to ensure that service members (SMs) are not disadvantaged in their civil affairs simply because they have answered their nation's call to military service. Or, as the U.S. Supreme Court eloquently stated so long ago, to "protect those who have been obligated to drop their own affairs to take up the burdens of the nation." *Boone v Lightner*, 319 U.S. 561 (1943). The SCRA is a powerful and unique statute, altering contracts across the country and affecting civil procedure in every state and federal court and administrative agency. Its provisions have an extraordinary effect on courtroom procedures in all civil cases, including those initiated by a landlord or property manager to enforce a lease. Some of its provisions are targeted to specific issue areas, such as: lending and interest, installment contracts, storage liens, mortgages, telephone service contracts, motor vehicle leases, life and health insurance, and tax. The SCRA also contains provisions relating to issues near and dear to the hearts of property managers: eviction and early termination of residential leases. SM rights under the SCRA may be enforced through private civil suit (50 U.S.C. 4042) or through enforcement action by the United States Attorney General (50 U.S.C. 4041).

Termination of Residential Leases

Historical Background. The SCRA provides SMs and their dependents with the right to terminate a residential lease under certain circumstances (50 U.S.C. 3955). The extent and nature of this right is almost certainly the most common SCRA issue between property managers / landlords and their military tenants. The predecessor to the SCRA, the Soldiers' and Sailors' Civil Relief Act, authorized the service member to terminate a residential lease only if it had been entered into prior to military service. In 2003, a major revision of the statute was enacted, changing its title and expanding the circumstances under which a SM may terminate the lease. The revision retained the SM's right to terminate a lease executed prior to military service, but added a right to terminate a lease executed by or on behalf of a service member *after* military service where (a) the SM thereafter received permanent change of station (PCS) orders or (b) received orders to deploy in excess of 90 days. Additional amendments addressed the lease obligations of the service member's dependents, the documentation which a tenant must provide to prove the existence of military orders, the imposition of any early lease termination charges, and criminal penalties for SCRA violations.

Under what circumstances may a service member terminate a lease under SCRA Section 3955?

As noted above, the SCRA authorizes an active duty SM to terminate a lease executed prior to the tenant's military service. For example, suppose that Mr. X enters a one year residential lease on January 1st. Mr. X thereafter enlists or otherwise becomes a member of the armed forces prior to the expiration of that lease. Private X, a military SM, has the right to terminate the lease during his military service.

The SCRA also authorizes the SM to terminate a lease executed while in the military service if the SM thereafter receives PCS orders or orders to deploy in excess of 90 days. Notice the timing aspects of this right. If the SM executes the lease *after* the receipt of PCS or deployment orders, no right to terminate arises under the statute as a result of those orders. Thus, if the SM already has PCS or deployment orders in hand when he signs the lease, he cannot thereafter use those same orders to terminate under SCRA section 535. [Note however that a right to lease termination may nonetheless arise under the applicable state law. See, for example, NC Gen. Stat. 42-45.]

The SCRA right to terminate a lease arises upon SM's *receipt* of the orders; the date that the orders are to be executed is irrelevant. For example, suppose that Sergeant X receives orders on January 1st to execute PCS orders not later than March 15th. On January 1st, the SM may initiate steps to terminate the lease; he need not wait until March 15th to provide the notice to quit. Theoretically, the military tenant may terminate a lease several months, even years prior to the date that the orders must be executed. For example, suppose that on January 1st, 2015, Sergeant X, a residential tenant in Jacksonville, North Carolina, receives orders to execute a PCS move to Camp Pendleton, California no later than May 1st, 2016. The right to terminate the lease arises on January 1st, 2015, the date when the orders were received, 16 months prior to the date the orders must be executed. As a practical matter, however, SMs rarely, if ever, receive orders so far in advance.

What is a PCS Order?

We should know that a PCS order is one that directs a SM for extended duty from one permanent duty station to another; for example, from XVIII Airborne Corps at Fort Bragg, North Carolina to the 21st Cavalry Brigade at Fort Hood, Texas. However, PCS orders include types of orders other than permanent re-assignment to a new military duty station. Orders that are considered to be PCS by the armed forces are listed in the Joint Travel Regulation for Uniformed Service Members and Department of Defense Civilian Employees (formerly the Joint Federal Travel Regulation or JFTR). The order is "Joint" because it applies to all branches of the armed forces. The types of orders that chapter five, section 5000B of the aforementioned regulation considers to be "PCS" are listed, verbatim, below:

1. Transfer. Travel in connection with a permanent duty transfer from one station to another.
2. Change in a Unit's Home Port/PDS [Permanent Duty Station] Location. Travel ICW [in connection with] a ship's home port/mobile unit's PDS [Permanent Duty Station] at location change.
3. Call to Active Duty. Travel from home/PLEAD [Place from which entered active duty service] to the first PDS [permanent duty station] upon:
 - a. Appointment/re-appointment (including reinstatement) to regular service from civilian life or from an RC [Reserve component];
 - b. An RC [Reserve Component] member called/ordered to active duty (including duty for training) for 20 or more weeks at one station;

- c. Recall to active duty from the Fleet Reserve or the Fleet Marine Corps Reserve, or from retirement (including temporary disability retirement); or
 - d. Enlistment/induction into the service (regular or during emergency).
4. Separation or Retirement. Travel from the last PDS [Permanent Duty Station] to home upon:
- a. Discharge, resignation, or separation from the service under honorable conditions;
 - b. An RC member's release from active duty (including active duty for training) to which called for 20 or more weeks at one station;
 - c. Transfer to the Fleet Reserve or to the Fleet Marine Corps Reserve;
 - d. Retirement; or
 - e. Temporary disability retirement.

As seen above, the Department of Defense itself defines what a PCS order is. Furthermore, this rather expansive definition of PCS order has been adopted by the U.S. Department of Justice in enforcing the SCRA. Thus, in the case of U.S. v Emperian Property Management, Inc. (Case 8-12 CV 87, D. Nebraska, consent order March 8, 2012) the United States successfully sought to compel the defendant to authorize early lease termination in the event of discharge, release, or separation of its SM tenants under honorable conditions.

Types of Discharges.

As noted above, PCS includes orders home upon separation from the armed forces "under honorable conditions," which begs the question, which types of discharges qualify?

There are, essentially, seven types of discharge characterization; three resulting from the sentence of a court-martial, and four resulting from either an administrative proceeding or simply the expiration of the SM's contractually obligated service. A SM may be tried at a military criminal tribunal for a wide variety of criminal offenses. If convicted, the sentence of the court, depending on the severity of the offense and the type of court martial proceeding, can include various punishments, including a *punitive discharge*. Not surprisingly, the receipt of any type of punitive discharge gives rise to no lease termination right under the SCRA. [Note that such a right may arise under state law, notwithstanding the punitive nature of the discharge. For example, North Carolina General Statute 42-45 provides a right to lease termination whenever the SM is "prematurely or involuntarily released or discharged from active duty," without listing any statutory requirements as to the characterization of the discharge.] Punitive discharges include a dishonorable discharge and a bad conduct discharge. A third type of punitive discharge, a dismissal, may only be awarded to officers.

In the vast majority of cases, the SM will successfully complete his enlistment, avoid a court-martial, and receive an Honorable Discharge. However, SMs may also be prematurely separated from the armed forces through an administrative procedure, without a court martial, for a variety of reasons. Such reasons for separation include various types of misconduct, physical / mental ailments, and other miscellaneous causes, such as parenthood (inability to perform duties as a result of being a parent); disenrollment from officer candidate program, refusal of medical treatment, failure to maintain required standards of fitness, defective, erroneous, or fraudulent enlistment; and unsatisfactory performance of duty. Depending on the basis for separation, as well as all of the facts and circumstances, the SM may receive one of the following types of discharges:

Honorable
General (Under Honorable Conditions)
Under Other Than Honorable Conditions
Uncharacterized

Only the first two listed administrative discharges give rise to a lease termination right under the SCRA. The characterization of the discharge will be indicated on DD Form 214. SMs who receive an honorable discharge, or who are discharged “under honorable conditions,” will also typically receive a certificate to that effect.

What are the lease termination rights of SM’s dependents under the SCRA?

The SCRA is quite clear with respect to the termination of lease obligation of the SM’s dependents, providing as follows:

Joint Leases. A lessee’s termination of a lease pursuant to this subsection shall terminate any obligation a dependent of the lessee may have under the lease.

The SCRA provides that the term “dependent” includes the SM’s spouse, the SM’s children [as defined at 38 U.S.C. 101(4)], and any person for whom the SM provided more than one half of the individual’s support for 180 days immediately preceding an application for the exercise of SCRA rights [50 U.S.C.3911(4)]. As a practical matter, any dependent over the age of ten years will typically have a military dependent’s identification card.

Dependent lease obligations are terminated only as to the lease terminated by the SM. The SCRA does not terminate lease obligations of dependents who execute a lease independent of the SM. Consider the following hypothetical: Mrs. X, a civilian, leases an apartment on 123 Main Street, USA for one year, beginning on January 1st. She is the only tenant on the lease. Thereafter, Mrs. X marries Sergeant Y, who is a tenant at 321 Broadway, USA. On March 1st, Sergeant Y receives orders to deploy in excess of 90 days. Those deployment orders give rise to Sergeant Y’s right to terminate the lease at 321 Broadway, but Mrs. X has no SCRA right to terminate her lease on Main Street.

What if the tenants do not leave the area?

There is no statutory requirement for dependents to actually leave the local area in order to terminate a lease under the SCRA. To illustrate, consider the following hypothetical: Sergeant and Mrs. X are both tenants on a one year lease for premises at 1600 Pennsylvania Avenue, Anytown, North Carolina. After signing the lease, Sergeant X receives orders to deploy in excess of 90 days. Sergeant X uses these orders to terminate his residential lease obligations as well as the lease obligations of his dependents. Sergeant X soon departs for whatever danger zone he has been directed to serve in. Although Mrs. X doesn't like her current landlord and / or her current lease; she enjoys living in Anytown and wants to stay there for the duration of her husband's deployment. She therefore rents an apartment down the street from her current address. While the actions of Mrs. X have no doubt irritated her landlord by terminating her lease only to move down the street, her actions are lawful and authorized by the SCRA.

SCRA Lease Termination Procedure. In order to terminate the lease early under the SCRA, the lease must be one that is covered by the statute, as described in some detail above. That is, the SM executed the lease as a civilian and thereafter entered military service, or the tenant signed the lease while on active duty and thereafter received PCS or deployment orders. Assuming that the lease is one so covered by the SCRA, the tenant must then provide proper notice to the landlord. Specifically, the tenant must provide to the lessor or the lessor's agent (a) written notice of intent to terminate the lease, and (b) a copy of the orders giving rise to the right to lease termination, or any verification or certification from the tenant's commanding officer of the existence of such orders. Let's examine these requirements more carefully.

Tenant's Notice to Terminate. The requirements of the tenant's notice to quit are (a) that it be in writing, (b) that it express an intent to terminate the lease, (c) that it be delivered to the landlord or his agent, and (d) that it include a copy of military orders giving rise to the right to terminate the lease, or a notification from the SM's commanding officer verifying such orders. There is no statutory requirement to cite the SCRA as legal justification for lease termination, or to indicate a specific date of vacating. Thus, for example, an e-mail from the tenant to the landlord indicating a desire to terminate the lease due to the receipt of PCS or deployment orders, and attaching the requisite proof of military orders, satisfies the requirements of the statute. In practice, however, forms and letters produced by military legal assistance offices and used by troops will generally cite the SCRA, indicate the date to vacate the premises, and refer to attached orders or letter from the commander. Such letters may also refer to additional matters related to lease termination, such as the return of a security deposit.

Military Orders. It is usually very easy to determine that a particular document is a military order. It will indicate that it is from some military authority and will clearly and conspicuously direct the SM to do something, for example, to deploy or to execute travel from one permanent duty station to another, or to travel home upon retirement or separation from the armed forces. Orders for temporary duty, which do not give rise to a right to terminate under the SCRA will typically be marked clearly and conspicuously as temporary duty orders. Such orders may arise, for example, when a SM is sent for two to three months to some military school to learn a special skill. Occasionally, temporary duty orders will be combined with PCS orders; for

example, an order to go to a specialty school and thereafter to travel to a permanent duty station. Such orders should be considered PCS orders.

Commander's Verification. When a unit is ordered to deploy, every person in that unit will not necessarily be given individual orders, or the orders may even be classified. To resolve this problem, the SCRA contains a provision that defines the term "military orders," as follows:

Military orders. The term "military orders" with respect to a servicemember, means official military orders, or any notification, certification, or verification from the servicemember's commanding officer, with respect to the servicemember's current or future duties. [50 U.S.C. 3955(i)(1)]

The only statutory requirements for the commander's verification are that it be *from* the commander and that it verify the orders received or to be received by the SM. Read literally, the statute does not even require that the commander's verification need be in writing, although that will invariably be the case. A letter from an officer in charge, or the sergeant major, or any other official does not constitute verification *from* the commander, except when such other officials are acting "by direction" of the commander, as discussed below.

By Direction Authority. It is very common for military commanders to delegate some area of authority to a subordinate officer. The larger the command, the more prevalent is the practice. For example, the installation CO may delegate the expenditure of certain funds to the comptroller, or the preparation of certain types of personnel orders to the adjutant, or the approval of certain contracts to the contracting officer, and so forth. When a subordinate officer takes action under these circumstances, that officer is said to be acting "by direction" of the commanding officer. Such orders will generally indicate at the top of the page that they are from the commanding officer, but they will be signed at the bottom by the subordinate, along with the words "by direction," or sometimes just "by dir."

What do we make of a letter verifying the SM's orders and signed "by direction" by some subordinate rather than the by the CO himself? Assuming that the signing official actually has *by direction authority*, does such a letter meet the requirements of the SCRA's definition of "military orders?"

Although the SCRA itself makes no mention of *by direction authority*, and there is no appellate case addressing this issue, the likely answer is that a letter verifying the tenant's orders and signed by direction of the CO qualifies as "military orders" under the SCRA because (a) The SCRA definition of military orders requires that the verification be "from" the commander, not that it be "signed" by the CO; (b) military regulations authorize the delegation of authority and it is a common practice to do so; (c) the U.S. Supreme Court has long espoused the policy that the SCRA should be construed liberally in favor of those it is designed to protect; see e.g., *LeMaister v Leffers* 333 U.S. 1,6 (1948), and (d) the SCRA does not prohibit the use of by direction authority for orders verification.

Nonetheless, SMs and their superiors are cautioned concerning the use of *by direction authority* letters for lease termination, and should generally avoid this practice unless it is

completely impractical to obtain a copy of orders or to have an actual commander sign a verification letter. *By direction* letters may raise issues best avoided. It may be that in some cases, officials believe that they have such authority when they do not, or that military regulations concerning the delegation of such authority - for example, that such authority be delegated in writing - were not followed. Use of *by direction* authority may also make it more difficult for the landlord or property manager to determine the letter's authenticity.

Effective Date of Lease Termination. When the SM terminates the lease pursuant to the SCRA, and rent is paid monthly, the lease (and the obligation to pay rent) end "30 days after the first date on which the next rental payment is due and payable after the date on which the notice [required by the SCRA] is given." Here's an example. Suppose the lease calls for the payment of monthly rent on the fifth day of each month. Sgt X provides the required termination notice on April 1st. The lease, and his obligation to pay rent, end 30 days after April 5th. In cases in which the rent is not paid monthly, the lease ends on the last day of the month following the month in which notice is provided.

Damages and Arrearages. As can be seen above, the SCRA severely restricts the damage that the landlord may recover as a result of the loss of rent occasioned by early lease termination. In fact, this is the principal reason for the enactment of this provision. The tenant is obligated to pay rent through the effective date of the lease termination, and no longer, regardless of how many months remain in the contractual lease period.

Not only is the SM-tenant obligated to pay rent through the effective date of lease termination, he must also pay any other contractually obligated charges on a prorated basis. Thus, for example, if the contract calls for the tenant to pay a monthly tax, or a utility bill, those fees must also be paid up through the date of lease termination. On the other hand, in accordance with the changes wrought by the Veteran's Benefits Act of 2010, the SCRA now specifically prohibits the landlord from imposing any charge whatsoever solely because the SM chose to exercise his rights under the SCRA. The enactment of this provision was probably a reaction to landlords seeking to circumvent the SCRA by providing tenants with an up-front rent concession which was forfeit if the tenant terminated the lease for any reason, including military orders.

The SCRA does not contain any precise limitation on the amount that the property manager can assess as a result of *physical* damage to the premises caused by the SM or his dependents or guests. It simply provides that the landlord may impose reasonable charges for excess wear. It would seem therefore that this matter is governed principally by state statute and interpretive case law. Typical state rules authorize the landlord to withhold from the tenant's security deposit those amounts representing damage beyond ordinary wear and tear and, if the damage exceeds the amount of the security deposit, to pursue an action to recover such costs.

Dealing with Orders Suspected to be Forgeries. For a variety of reasons unrelated to military orders, SMs, like any other tenants, may not be content with their current rental residence. Perhaps they have found an alternative rental residence more to their liking, or wish to purchase a home. Or maybe they just aren't getting along with the landlord, property manager, or neighbors. The point is, there may be some motivation to prepare and use false orders to

terminate the lease. These actions are crimes that should be reported to the tenant's commanding officer if known, or to the military police. Such misconduct can result in adverse comments in the military service record, inability to reenlist, limitations on duty assignment or clearance, commanding officer's non-judicial punishment, administrative discharge from the service, or even court-martial conviction and sentence. However, human nature being what it is, despite these potential sanctions, it is inevitable that some tenants will present phony orders to the property manager for the purpose of lease termination. How is the property manager to know the difference?

Property managers, particularly those who routinely rent to SMs, should endeavor to become familiar with the format for military orders; fake orders will often be obvious due to deviations, or at least may contain some telltale clues. In some cases, however, due to the skill of the forger, proficiency with word processing equipment, and familiarity with military orders, fake orders may be indistinguishable from genuine orders. The property manager with concerns as to the validity of orders will need to contact military superiors to confirm validity of orders. Ideally, local property managers can establish a single point of contact at an installation for such orders confirmation.

Remedies and Enforcement of SCRA Lease Termination Rights. In addition to whatever remedies may be available pursuant to state law, the SM or his dependents may pursue a private right of action under the SCRA. Should such a plaintiff be successful, he can obtain appropriate remedial orders of the court (such as an order to correct a credit report), monetary damages, court costs, and reasonable attorney fees. Landlord / property manager violation of SCRA lease termination provisions may also constitute a criminal offense.

Any person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or a servicemember's dependent who lawfully terminates a lease covered by this section, or who knowingly interferes with the removal of such property from premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both. [50 U.S.C. 3955(h)]

SCRA Procedural Rights

Generally. The most basic purpose of the SCRA is to ensure that SMs don't lose civil cases simply because military duties preclude their ability to appear and defend. There are certain procedural rights designed to prevent such defaults from occurring, and to rectify the matter if it does. In broad strokes, those protections include: a requirement for the plaintiff to advise the court of the defendant's military status, appointment of counsel for the absent military defendant, a right to delay proceedings where military service materially affects ability to appear and defend, and a right to reopen certain default judgements. The SCRA also contains provisions altering state or federal law concerning the tolling of the statute of limitations.

Applicability of the SCRA. Congress intended that the SCRA have both the broadest possible geographic application and the widest possible application to various kinds of proceedings. As for geographical coverage, the SCRA specifies that it is applicable to the United States, each of the states (and all of their political subdivisions), and to all U.S. Territories [50 U.S.C. 3912]. It applies to the District of Columbia which, for the purposes of the SCRA, is considered a “state” [50 U.S.C. 3911(6)]. As to the range of proceedings, the SCRA applies to “any judicial or administrative proceeding commenced in any court or agency” in any of those places [50 U.S.C. 3912]. The term “court” is defined as “a court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record.” [50 U.S.C. 3911(5)] The SCRA does not apply to criminal proceedings. In the absence of statutory language affirmatively including arbitration, such proceedings probably fall outside of the SCRA’s coverage. In the 113th Congress, Senators Lindsey Graham (R. S.C.) and Senator Jack Reed (D. R.I.) jointly sponsored Senate Bill 1999, “SCRA Rights Protection Act of 2014,” that would have addressed this issue of arbitration, making contractual arbitration provisions invalid against SMs and their families unless the parties consented in writing to arbitration after the dispute arose. This bill was not enacted.

Affidavit requirement. In every case in which the defendant does not appear, the plaintiff is required to file an affidavit concerning the defendant’s military service [50 U.S.C. 3931]. This requirement applies to “any civil action or proceeding, including any child custody hearing, in which the defendant does not make an appearance.” The specific reference to child custody hearings resulted from a 2008 amendment, presumably because so many judges ignored the SCRA in such cases. Since the plaintiff will not know in advance of filing the petition whether the defendant is going to show up for the hearing or enter an appearance in writing, the better and more practical practice is to file such an affidavit in every case.

Affidavit Contents. The affidavit must state whether the defendant is or is not a member of the armed forces and show the necessary facts to support such a conclusion. Or, the affidavit may indicate that the plaintiff is unable to determine whether the defendant is a member of the armed forces. Plaintiffs should be ready to demonstrate that they have taken reasonable efforts to determine military status. Knowingly filing a false affidavit is a criminal offense, punishable by a fine and up to a year in prison.

Department of Defense Manpower Data Center. The Department of Defense has made it extremely easy to determine the military status of a defendant, provided that the plaintiff knows either the social security number or the date of birth of the defendant. Landlords and property managers are therefore well advised to obtain at least one of these data elements during the tenant application process. The Department of Defense Manpower Data Center (DMDC) maintains a website <https://www.dmdc.osd.mil/appj/scra/> for use in determining military status. The website is free, efficient, and open to the public. Plaintiffs seeking the military status of the defendant should click on the icon for “single record request,” and then type in the name of the subject of the inquiry as well as that person’s date of birth or social security number. Within seconds, the site will produce a certificate indicating whether the subject is a current member of the armed forces. There may be some cases where it is important to determine whether the subject was a SM at some date in the past. This information is available as well, by adjusting the “active duty status date” field to the desired date in the past (but no earlier than September 30,

1985). The default date is the current date. If the subject is a member of the armed forces (or was a member on the adjusted active duty status date) the certificate will indicate when military service began and, if applicable, when it ended. If the subject was not a member of the armed forces as of the “active duty status date,” then the certificate will so state, even if the subject was a SM on an earlier date. For example, suppose that on January 1, 2015, a property manager looks up the active duty service date of tenant T as of that date. If T is not on active duty on January 1, 2015, the certificate will merely indicate that T is not on active duty...even if T served on active duty prior to that date.

Form of the Affidavit. The SCRA identifies required substantive content for the affidavit, but does not mandate any specific format. However, some jurisdictions have developed preferred or mandated forms for the affidavit. For example, the North Carolina Administrative Office of the Courts has developed Form AOC G-250 for this purpose; Virginia District Courts use Form DC-418.

Appointment of Counsel. If it appears to the court that the defendant is a service member, a default judgment shall not be entered unless the court first appoints counsel to represent the absent defendant [50 U.S.C. 3931(b) (2)]. The SCRA does not specify where the appointed attorneys will come from, how they will be paid, or what they will do. The SCRA does specify one thing that appointed counsel will *not* do: waive any defense without the express permission of the military defendant. Given the purpose of the SCRA, it would appear that the mission of appointed counsel includes locating the military defendant, advising of the pending proceedings, determining whether the defendant wants a stay of proceedings, and if so, to assert such a stay. Is appointed counsel obligated to litigate the substance of the case as well on behalf of the defendant? Probably not, but again, the SCRA itself is silent on the issue.

Stay of Proceedings When SM Has Notice. The requirements for a “stay,” or delay, of proceedings vary depending on whether the SM does or does not have notice of the pending case. When the SM has received notice of pending proceedings, he may apply to the court for a “stay,” or a delay of proceedings. When the SM has notice of the proceedings, the stay request must include all of the following:

- (a) “a letter or other communication setting forth the facts stating the manner in which the current duty requirements materially affect the servicemember’s ability to appear”
- (b) and stating a date when the SM can appear and
- (c) “a letter or other communication” from the commanding officer stating that SM’s current military duties prevent appearance and
- (d) stating that leave is not authorized for the SM to attend the proceeding.

[50 U.S.C. 3932(b)(2)]

If the stay request meets all of these requirements, the judge must grant a delay of not less than 90 days. A longer stay may be granted if the court, in its discretion, determines a longer stay is needed.

Procedures if SM has not made an appearance. The court must appoint counsel for the absent SM defendant who has made no court appearance. Appointed counsel must make a diligent effort to contact the SM. On its own motion, or pursuant to appointed counsel's motion, the court shall delay the proceedings at least 90 days if it determines that (a) there may be a defense to the action that cannot be presented without the presence of the defendant; or (b) despite diligent effort, appointed counsel "has been unable to contact the defendant or otherwise to determine if a meritorious defense exists."

Tolling of the Statute of Limitations. State and federal laws create deadlines for the filing of civil actions. For example, the law of State X may require that the plaintiff file a contract action within three years of the conduct alleged to constitute the breach. However the SCRA changes all such civil deadlines, or statutes of limitation. The SCRA provides that the period of military service may NOT be included in determining whether the deadline has been passed [50 U.S.C. 3936]. Thus, for example, suppose that State X has a three-year statute of limitations on contract actions. On January 1, 2014, Mr. Jones is alleged to have breached his contract. On February 1, 2015, Mr. Jones enlists in the armed forces and remains on active duty until February 20, 2018. On May 1, 2018, the plaintiff initiates suit against Mr. Jones for breach of contract. The three- year statute of limitations shall not bar the suit notwithstanding the fact that the alleged breach occurred over three years ago. This is so because the period of Mr. Jones' military service does not count in computing whether the statute of limitations has run. In like manner, this provision extends the time period in which the SM may initiate statute suit against other persons or entities.

Remedies for defective default judgements. The SCRA provides that a default judgement shall be set aside upon application of the defendant if (a) the defendant applies to the court that rendered the original judgement, and (b) the judgement was entered when the SM was on active duty or 60 days thereafter, and (c) the application is filed when SM is on active duty or 90 days thereafter, and (d) SM's military service prejudiced his ability to defend the action, and (e) there is a meritorious defense to the original claim. As a practical matter, either through ignorance of the law or otherwise, some judges or entire jurisdictions routinely proceed as if the SCRA doesn't exist, paying attention to it only when the defendant either applies for a stay of proceedings or moves to set aside the default judgment. At least one state has publically sanctioned the presiding judge for failure to comply with SCRA procedural requirements. (See *In Re Branch*, 367 N.C. 733; 767 S.E. 2d 47; N.C. Supreme Court 2015). As noted above, filing a false affidavit concerning military service is a criminal offense, as are certain knowing violations of lease terminations provisions of the SCRA.

Eviction

Generally. Eviction is a civil proceeding designed to allow landlords and their agents to eject tenants in a fairly quick manner who fail to pay their rent or otherwise breach the lease. Although the procedures for eviction (also called "summary ejection") are prescribed by state law, the SCRA also plays a part. Property managers who wish to evict a tenant must comply with both the SCRA and the applicable state law. Thus, careful review of state law is necessary not only to ensure compliance, but also to achieve the desired result. State statutes and court

cases impact whether certain claims, for example for possession of the premises and money damages, must be brought in the same or separate action or in a certain court. Failure to review and comply with applicable state law can seriously affect, and potentially bar, the landlord's remedies against a defaulting tenant. In any event, detailed review of state law concerning summary ejectment and civil procedure is beyond the scope of this article.

SCRA Procedural Limitations Concerning Eviction. Eviction is a civil proceeding and is subject to all of the SCRA procedural protections discussed above, including those related to the affidavit of service affiliation, stay of proceedings, appointment of counsel, and default judgements.

Prohibition against self-help eviction. The SCRA prohibits non-judicial eviction of the SM or his dependents during SM's military service where (a) the premises are occupied or intended to be occupied primarily as a residence and (b) the monthly rent charged does not exceed \$2,400 (with certain adjustments made for inflation) [50 U.S.C. 3951]. The adjustment for inflation shall be amount that the Consumer Price Index Housing Component (CPI) for November of the previous calendar year exceeds the CPI for November 1984. The Secretary of Defense publishes the amount in effect in the Federal Register. Non-judicial, self-help eviction; that is, the ouster of the tenant without resort to the legal system, includes such matters as locking out the tenant, or forcibly removing the tenant or his property. Since self-help remedies, particularly with respect to residential tenants, have essentially been eliminated by state law, this SCRA provision may have little practical effect. It is worth noting, however, that this prohibition of non-judicial eviction follows a theme running throughout the SCRA, a disdain for self-help remedies against SMs: prohibiting non-judicial repossession to enforce pre-service financial obligations [50 U.S.C. 3952]; prohibiting non-judicial foreclosure on pre-service mortgages [50 U.S.C. 3953]; and prohibiting non-judicial foreclosure or enforcement on a storage lien during the SM's period of military service or 90 days thereafter [50 U.S.C. 3958]. The SCRA does not prohibit repossession, foreclosure, eviction, or storage lien enforcement; it does, however, require that such covered actions be pursued only through a court order. Eviction, like every other civil proceeding, is also subject to the procedural provisions of the SCRA, as described below. In general, these provisions tend to protect SMs and their families, and in doing so, impose barriers and delays upon plaintiffs.

Protection of Personal Property

Enforcement of Storage Liens. It is sometimes the case that a property manager may be in possession of personal property of a tenant, perhaps because the tenant has been evicted or perhaps because the tenant has simply vanished, vacated without paying rent due, leaving odd bits of property behind. Or perhaps the tenant has paid the rent through the lease term, but just left property behind. A property manager may be inclined to sell, destroy, throw out or otherwise dispose of such property, particularly if there is a state statute that purports to authorize such disposition. However, the SCRA prohibits enforcement of any storage lien without court order. This prohibition applies to the SM's period of active duty service and for 90 days thereafter. It is immaterial whether the contract giving rise to the lien was entered into prior to or during military service. Pursuant to the statute, the term lien includes "a lien for storage, repair, or cleaning of

the property or effects of a servicemember or a lien on such property or effects for any other reason.” Knowingly taking an action contrary to the SCRA is a criminal offense punishable by a fine and up to a year in jail. Accordingly, property managers are well advised to obtain a court order for the disposition of property left behind by evicted or absconding tenants. Property managers are cautioned that compliance with federal law is a necessary, but not sufficient condition of enforcing a storage lien. The applicable state law should also be consulted. For example, North Carolina General Statute 42-25.9 and 42-36.2 address in detail the disposition of personal property that remains in the premises following the tenancy. A review of state statutes concerning the disposition of abandoned property is beyond the scope of this article.

Protection Under Installment Contracts for Purchase or Lease. The SCRA prohibits repossession of the SM’s property without court order where the contract giving rise to the action for repossession was executed (and at least one installment payment made) prior to military service [50 U.S.C. 3952]. This provision most often comes up in the context of a civilian who finances a purchase, enlists in the armed forces, and then defaults. However, the text of the statute refers to the pre-service purchase *or lease* of any real or personal property. Knowing violation of this provision is a criminal offense.

Waiver

From the perspective of the property manager, the overall effect of the SCRA is to allow tenants to terminate leases under circumstances that would otherwise constitute breach, prohibit self-help, delay civil suits, and generally create additional burdens on civil actions to evict the tenant or to seize or dispose of the tenant’s property. A property manager may therefore ask, what about waiver? Can’t I just make SCRA rights go away? The answer is *a qualified yes*.

The SM may waive SCRA rights, but only if the waiver meets the statutory requirements. The waiver must be:

- in writing;
- signed by SM during or after his period of military service;
- an instrument separate from the obligation or liability to which it applies; i.e., the waiver must be in a document separate from the lease;
- specify the legal instrument to which it applies; and
- be in at least 12 point type.

If the SM is not a party to the waiver, the waiver must identify the SM concerned.

[50 U.S.C. 3918]

As a practical matter, it is advisable to specify the particularly relevant SCRA rights to be waived. Even if the intent is for the tenant to waive all SCRA rights, the waiver should contain a non-exhaustive list of specific waived rights as well as a blanket statement that all SCRA rights are waived. If any SCRA rights are to be excepted out of the waiver, the waiver should state the exception with precision. Spelling out the rights waived in this manner may serve to better

inform the tenant and thereby head off disputes down the road. Additionally, this level of detail in a waiver may be useful in showing that it was knowingly and voluntarily executed, thereby enhancing the likelihood of the property manager prevailing in a judicial proceeding.

A waiver of the SCRA does not necessarily waive state rights, particularly with respect to lease termination. Many states have enacted military lease termination statutes. Some of them, notably North Carolina (NC Gen. Stat. 42-45) and Florida (FL Stat 83.682), have even made their state lease termination rights non-waivable. Texas' military lease termination statute (Texas Property Code section 92.017) limits the waiver of the state right to terminate only to those situations in which the tenant vacates to take military or other quarters within 30 miles of the current residence. Even this limited Texas waiver is inapplicable if the tenant moves into housing owned or occupied by family, relatives, or dependents or if the move was motivated by a significant loss of income caused by military service. As can be seen, in states with their own military lease termination statutes, the effect of an SCRA waiver may be significantly limited.

There are also potential adverse downstream effects concerning SCRA waiver that property managers should be aware of. The first of these is the potential for legislative backlash. The evolution of the lease termination provisions of the SCRA has tracked a Congressional intent to frustrate the efforts of property managers seeking to evade its effects. Thus, amendments clarified that the termination of SM's lease obligations terminated those of co-tenant dependents, expanded the definition of "military orders," prohibited the imposition of any early termination charges, and added criminal penalties. It is reasonably likely that if property managers begin to routinely write waivers into their leases, Congress may respond by prohibiting or limiting SCRA waivers.

Secondly, the potential exists for off-limits designation by the installation commander, particularly if there are significant competitor property managers that do not require SCRA waiver. Each military installation is served by an Armed Forces Disciplinary Control Board (AFDCB) which makes recommendations to the installation commander concerning off-limits designation. The commander has no authority to direct the off base activities of any business; he does, however, have the authority to direct SMs to refrain from going to a particular place or business. Except in an emergency situation, the subject business will have an opportunity to appear before the AFDCB to demonstrate why it should not be placed off-limits. In an emergency situation, the installation commander can designate a business or location off-limits immediately, and hold the required hearing s soon thereafter as practicable. The AFDCB is guided by a joint force order published as Army Regulation 190-24, Chief of Naval Operations Instruction 1620.2A, Air Force Instruction 31-213, Marine Corps Order 1620.2D, and Commandant of the Coast Guard Instruction 1620.1E. The commander may designate a business or location off-limits to help maintain good order and discipline, health, morale, safety, and welfare of SMs or to protect SMs from crime-conducive conditions. Illegal conduct of the subject business is not a precondition for off limits designation, although typically business put off-limits have committed some criminal or illegal practice.

Thirdly, the installation will generally have a newspaper and other advertising venues for local businesses. The commander generally maintains wide discretion to determine which ads to accept for publication or which businesses may be allowed to sponsor an on-base event.

Finally, the installation is likely to have some routine means of providing incoming personnel with information concerning off base housing. A property manager engaging in practices deemed detrimental to SMs by the commander or his designee may find itself conspicuously absent from lists of local property managers, and from housing referrals.

Relationship Between Federal and State Lease Termination Statutes

Several states have enacted their own military lease termination statutes. These include but are not necessarily limited to the following:

California (Military and Veterans Code section 409)
Florida (Fl stat 83.682)
Missouri (Military and Police Code section 41.944)
North Carolina (NC Gen. Stat. 42-45)
Texas (Property Code section 92.017)
Virginia (Virginia Code section 55-248.21:1)

In some cases, such as California, the state statute is far less generous to the SM than the SCRA (probably because it preceded the 2003 amendment to the SCRA). In most other cases, the state statute not only provides for lease termination in cases covered by the SCRA, but also extends coverage to other circumstances beyond the ambit of the SCRA's protection. Thus, a state may provide for various lease termination rights in the event of financial hardship due to military service, death of the SM, the receipt of temporary military orders, an opportunity to take advantage of military housing offered on the installation, or other reasons. In those circumstances covered by both federal and state statutes addressing military lease termination, the question naturally arises, *which law governs?* The short answer is that the law that most favors the tenant applies. Here's why.

The rule is simply that a state is not allowed to detract from rights provided under federal law. It may, however, add thereto. When a Federal law conflicts with a state law, the state law must yield. This is so due to Article VI, section 2 of the U.S. Constitution, the so called "Supremacy Clause." Thus, (a) a state law cannot limit rights provided by a federal law and (b) a state law that is in direct conflict with a federal law must give way. Unless there is a Congressional intent that only its laws regulate the field, a state may prescribe *supplemental* rules. The SCRA contains no explicit preemption of state regulation, nor is 50 U.S.C. 3955 so extensive (it's about 2-3 pages long) that preemption is implied, and no appellate court has so held.

Additional SCRA Resources:

Sullivan, M. "A Judges Guide to the Servicemembers Civil Relief Act," On line in the "Resources" section of the website of the NC State Bar Committee on Legal Assistance for Military Personnel. www.nclamp.gov.

Odom,J , “A Judge’s Benchbook for the Servicemember Civil Relief Act,” 216 pages. ABA Publishing. Available for purchase on line at the ABA Webstore
<http://shop.americanbar.org/ebus/store.aspx?term=odom>

Army Judge Advocate Legal Center and School Publication JA 260, “The Servicemember Civil Relief Act Guide” (2006) Although no longer published or updated by the Army, it can be still found on- line. Enter “JA 260” into Google, Yahoo, or other search engine.

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