

**COMPLYING WITH THE
SERVICEMEMBERS CIVIL RELIEF ACT OF 2003
(50 USC App. §502, *et seq.*)**

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Introduction: The Servicemembers Civil Relief Act (“SMCRA”) replaced the old Solders’ and Sailors’ Civil Relief Act of 1940 (“SSCRA”) effective December 19, 2003. Its precedent stretches back to the Civil War, when Congress originally enacted legislation suspending civil lawsuits against (Union) army and navy members. A similar act followed during WWI, which expired in 1919. Congress reenacted it as SSCRA in 1940, together with the first peacetime draft.

SMCRA’s purposes are announced in this preamble:

- To provide for national defense by extending the Act to all servicemembers so they may devote their entire energy to the defense 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.”

I. Who is covered by SMCRA?

- A. Active duty Army, Navy, Air Force, Marine Corps and Coast Guard servicemembers, just as under SSCRA; *but also*
- B. National Guard and Reserve called to active duty for more than 30 consecutive days to respond to a national emergency.
 - 1. This will exclude weekend drills and summer bivouacs.
 - 2. Also excluded is temporary service for natural disasters, since they are not a national emergency.
 - 3. National Guard and Reserve get “advance application”, unlike regular servicemembers: SMCRA applies to National Guard and Reserve members from the date they receive their orders until the date of their release. With regular servicemembers, SMCRA applies from the first date of active service, not the date they receive their first orders.

4. With more than 100,000 National Guard and Reserve members now called into active service nationwide, SMCRA's reach will eventually extend to every consumer lender in NC.
 5. Check the status of any member's military service by running the member's full name, DOB & SSN through the search engine found at <https://www.dmdc.osd.mil/scra/owa/home>. That will tell you whether (s)he is on active duty, and provides a printable response e-signed by the Director of the Manpower Data Center.
- C. Commissioned members of the Public Health Service (remember the Surgeon General?) and NOAA.
- D. Certain sections of SMCRA apply to servicemembers' dependents (spouse, child, or anyone else for whom servicemember provided more than 50% of their support in the six months preceding application for relief under the Act). *This includes live-ins.*

II. What Courts are covered by SMCRA?

- A. Every civil state and federal court nationwide, all administrative hearings, Small Claims, Special Proceedings before Clerks, but excluding all criminal matters.
1. In NC that means every Small Claims, District, and Superior Court, the Court of Appeals and the state Supreme Court.
 2. It also covers all US Bankruptcy, District and Circuit Courts of Appeals.
- B. What about criminal complaints for cold checks or converted collateral? SMCRA does not apply to these criminal actions, nor any other. (Note: It is considered unethical for any lawyer to advance a criminal action in an effort to gain a civil advantage. Therefore, you must pursue criminal actions with the District Attorney or United States Attorney directly.)

III. Can SMCRA's protections be waived? Only under sorely limited circumstances.

- A. Waivers by servicemembers are valid only if:
1. They are in a separate writing, signed by the servicemember after commencement of military service; and
 2. The waiver specifies the particular contract to which it applies.
 3. Waivers are specifically required to modify a contract, mortgage, deed of trust or lien documents. They are also required for the

voluntary repossession, foreclosure and sale of real and personal property that is security for a pre-service debt.

- B. Waivers by civilian co-makers must also be in writing, in a document separate from the contract it applies to, and signed by the co-member. Such waivers cease to be valid if the co-maker later begins military service of his own, unless the waiver is signed after he has received his orders, but before commencement of active duty.

IV. Servicemembers' use of SMCRA protections do not permit lenders to react by:

- A. Deciding that servicemembers cannot pay their civil obligations; or
- B. Denying or revoking credit by the lender; or
- C. Changing the terms of an existing credit arrangement, except to reduce interest to 6% for the year of military service; or
- D. Refusing to grant credit to the servicemember in the amount or upon the terms requested; or
- E. Making a derogatory report to any credit bureau; or
- F. Noting in any credit bureau that servicemember is a member of the National Guard or Reserve; or
- G. Refusing to sell credit life or credit accident and health to the servicemember.

V. SMCRA's "stays" - its principle benefits to servicemembers and their dependents. These can be invoked not only by lawyers on their behalf, but also by holders of their Powers of Attorney - typically spouses or family members.

- A. Protection against default judgments. This section applies to lawsuits against servicemembers who have not made an "appearance" in a lawsuit by the filing of an Answer to a Complaint, nor hired an attorney to file a Notice of Appearance or other general pleading.
 - 1. Before any Court can enter a default judgment, the plaintiff must file an Affidavit stating whether or not the defendant is in the military service of the USA. *There is no exception for complaints in Small Claims Courts.*
 - 2. If the defendant is in military service, a "Military Attorney" must be appointed to represent him at the plaintiff's expense, even if the debt was incurred after the defendant joined the military.

3. If the defendant is found to be in military service, the Court must grant a stay of proceedings for at least 90 days upon request of any lawyer, or on the Court's own motion, if the Court decides that there may be a defense to the complaint that cannot be presented without the presence of the defendant or the military attorney has been unable to contact the servicemember to determine if a defense exists.
 4. In effect, this means that suits against servicemembers cannot be advanced through a default judgment like any civil action against a civilian.
 5. What if suit is filed against a civilian who then joins the military, and later the lender obtains a judgment? If a judgment was entered against the servicemember during his military service (or within 60 days after the end of his service), the Court *shall* set aside the judgment to allow the defendant to defend himself if:
 - a. The servicemember was materially affected in his ability to defend himself during his military service, and
 - b. The servicemember does have a meritorious defense to the complaint, and
 - c. So long as the servicemember applies to have the judgment set aside at any time within 90 days after the end of his military service.
 6. What happens if collateral was repossessed and resold to a bonafide purchaser in violation of SMCRA? Setting aside a judgment does not impair the right of ownership of the buyer of the collateral, but it does expose the lender to SMCRA violation penalties.
- B. Suppose the servicemember has actual notice of the lawsuit? The Court must stay a civil suit for at least 90 days, upon application of a servicemember (or his attorney, or his POA holder), so long as the request includes all of the following:
1. A statement as to how the servicemember's military duties materially affect his ability to appear; and
 2. A date when the servicemember will be available to defend himself; and
 3. A statement from the servicemember's CO stating that his current military duty prevents his appearance and that military leave is not authorized at the time of the statement. The CO's statement can be a

fax, an e-mail, a letter, memo, etc. The form is not specified in the statute.

4. Servicemember's request for a stay is not a General Appearance, nor does it waive any defense to the underlying lawsuit.
5. Servicemember may request additional stays, or a stay of more than 90 days' length initially, when it appears he is unavailable to defend and the above statement requirements are satisfied.
 - a. A Court may extend the stay without limitation, on servicemember's request or its own motion;
 - b. If the Court refuses more than the additional 90 days stay, the Court must appoint an attorney to represent the servicemember in the action beginning on the 91st day, at the plaintiff's expense.

C. Stays of execution on judgments, attachments and garnishments. What if you **have** a judgment against a civilian, who later enters the military?

1. If the servicemember requests it, and the Court determines that the judgment defendant's military service "materially affects" the judgment defendant's ability to comply with a judgment, the Court must stay the execution of any judgment against the servicemember and must vacate or stay any attachment or garnishment of property whether placed before or after judgment.
2. The above applies to any lawsuit begun against a servicemember before his military service, during it, or within 90 days after service terminates.
3. The period of the stay can be the entire term of the military service and 90 days thereafter, or for any part of the term of service, or the Court can modify or reduce the amount of each garnishment permitted, without restriction.
4. If the servicemember is a co-defendant with civilians who are not entitled to SMCRA's protections, the plaintiff may proceed against the civilian defendants *with the approval of the Court*.
 - a. This amounts to a co-debtor's stay, similar to that in Chapter 13 bankruptcy;
 - b. Example: Lender sues A and B (both civilians) and obtains a judgment against both of them. A then enters active duty. May lender proceed to collect from B? Answer: Yes, with the

Court's prior approval. In other words, hire a lawyer to disclose the military service of A to the Court and obtain the Court's permission to continue collection efforts against B.

- VI. The SMCRA "co-debtor stay". SMCRA's protections to the servicemember can be extended by a Judge to a co-maker or guarantor upon request, including:
- A. Enforcement of contracts, judgment collection, and replevin of collateral; and
 - B. Judgments against co-debtors can be set aside or vacated, in whole or in part, even if the benefit to the co-maker does not match the protection granted to the servicemember.
- VII. Interest rate abatement - one of the most popular aspects of SSCRA and SMCRA.
- C. Applies to debts incurred by servicemembers individually or jointly with their spouses before commencement of military service. Query: What about servicemember's co-signed debts with live-ins or family members? The statute is silent.
 - D. Forgiven or simply deferred? The answer is clear: *forgiven*. In the past, some creditors deferred the interest differential to the back of the contract, presuming the servicemember would re-enter civilian life.
 - 1. Congress requires an absolute forgiveness of the interest, and a recalculation of the monthly payment so that it is lowered, instead of a reduction of the principle owed.
 - 2. The purpose is to lighten the burden of monthly payments, not shorten the term of the contract.
 - C. How the right to 6% interest is invoked:
 - 1. Servicemember must provide lender with
 - a. a written request,
 - b. together with a copy of his orders calling him to military service,
 - c. not later than 180 days after the servicemember's termination or release from the military.
 - 2. Upon receipt of the written notice and a copy of the orders, the lender must forgive the interest in excess of 6% **for the year of military service**, effective as of the date on which the servicemember was called to service, not the date of the receipt of the request.

D. A back door exception:

1. If the lender can demonstrate that the ability of the servicemember to pay has not been “materially affected” by reason of military service, a Court may grant the creditor relief from the 6% rule.
2. Some individuals actually make more in the military than they did in civilian life, especially if they entered the military straight from school.
3. Flight pay, combat pay, allowances, separate rations, etc. all can serve to actually increase a borrower’s disposable income.

VIII. SMCRA’s protections against self-help repo’s and strict foreclosures.

A. Repossessions. If a civilian pays a deposit or makes at least one installment payment on a contract secured by a car and then enters military service, subsequent self-help repossession upon default is forbidden. Recovery may be had only upon a Court order.

1. Suppose the contract is 100% financing with a first payment default? SMCRA does *not* apply, because neither a deposit nor any one payment was made while the member was a civilian.
2. Suppose the note is co-signed by a civilian, the principal debtor enters the military, and leaves the car behind? Provided anyone has made an initial down payments or even one payment before commencement of military service, SMCRA forbids self-help repossession.
3. Penalties for violation are stiff.
 - a. Even *an attempt at* repossession (even if unsuccessful) by self-help means subjects the lender and the repo man each to 1 year in jail.
 - b. The lender can be sued for wrongful conversion, including consequential and punitive damages, **costs and attorney’s fees.**
4. Resort to the Courts will satisfy the “no self-help” rule, but subject the lender to stays of enforcement by the Court or upon the servicemember’s motion, or on the Court’s own Motion.
5. If the lender goes to Court to get a replevin order and the servicemember does not request a stay, the Court can still:

- a. Require that the lender refund all the prior payment and the deposit to the servicemember before allowing repossession; or
 - b. Stay the proceedings as long as he thinks justice requires; or
 - c. “Make any other disposition as is equitable to preserve the interests of all parties”. (In other words, do whatever the Court wants).
- B. Foreclosures of mortgage or deeds of trust. SMCRA applies to foreclosure of deeds of trust securing debts incurred while servicemember was a civilian, and for which he remains liable after beginning military service.
1. If a foreclosure is filed during a period of military service, or within 90 days thereafter, the servicemember has a right to apply to the Court to stay the proceedings for “a period of time as justice and equity require” or to re-write the mortgage contract, to change its terms, etc., “to preserve the interests of all parties”.
 2. Strict foreclosure without a Court order is forbidden by SMCRA.
 3. Even *an attempt at* foreclosure without a prior Court permission subjects the lender to a year in jail, as well as lawsuits for wrongful conversion and consequential and punitive damages, **costs and attorney’s fees**.
 - a. Settlement of stayed cases. If the Court grants a stay of repossession or foreclosure, it may appoint three disinterested parties to appraise the property in question. Based on the appraisal, and if undue hardship to the servicemember’s dependents will not result, the Court may order that the servicemember’s equity in the property be paid to him or his dependents as a condition to foreclosure, repossession and resale of collateral.
 - b. In other words, in addition to suspending foreclosure indefinitely, or stopping repossession or re-writing the contract, the Court can order the lender to cash out the member’s equity (if any) in collateral as a condition precedent to enforcement of its security interest.
- C. Lease terminations. SMCRA applies to all such lease contracts.
1. Pre-service lease agreements. If a civilian signs a lease and then enters into a period of military service of at least 180 days, he can reject the lease and terminate it.

2. Post-service lease agreements. If a servicemember executes a car lease while in the military and then receives a permanent change of station outside the continental US or is deployed with a military unit for a period of at least 180 days, he can reject the lease and terminate it.
 - a. Note "continental US". This means that if he moves to Pearl Harbor in Hawaii or Roosevelt Roads in Puerto Rico he can walk away from a lease but, if he moves to Point Barrow, Alaska, he cannot.
 - b. Note that deployment must last at least 180 days, but permanent change of station does not require a definite term.
3. Method of termination. The lease is effectively terminated if the servicemember:
 - a. Delivers written notice of termination to the lender with a copy of his orders; and
 - b. Delivers the written notice by hand, by overnight courier, or by ordinary US first class mail.
 - c. Returns the motor vehicle to the lessor within 15 days after the date of the written notice; and
3. Provided the termination is correct, it is effective when the notice is sent.
4. What about pre-termination arrearages? The servicemember remains liable for pre-termination arrearages, excess wear, excess mileage, etc. due at the time of the termination of the lease.

IX. Civil Penalties. SMCRA was amended in 2010 to include more civil penalties for violation.

- A. **Private Right of Action. SMCRA was amended by the Veterans' Benefits Act of 2010 to add a section which specifically provides a private right of action to any person aggrieved by a violation of SMCRA.**
 1. **A servicemember or person harmed by violation of SMCRA may obtain equitable or declaratory relief with respect to the violation, and**

2. **Recover other appropriate relief, which includes compensatory and punitive damages, costs of the action and reasonable attorneys fees.**
 3. **SMCRA is silent on any retroactive application of the recent amendment. Recently however, the 4th Cir. Ct. App, allowed retroactive application for a private civil right of action in a case where the servicemember's vehicle was towed and sold without notice. Because the servicemember had a right of action in state court, and the new amendment did not alter the scope of a servicemember's rights under SMCRA, the servicemember was allowed to bring his action in federal court under the amendment. The Court clearly prohibited any double recovery in state and federal court for the same action.**
- B. Attorney General Civil Action. If a servicemember or person has been harmed by a violation of SMCRA, the attorney general may commence civil action with monetary damages of \$55,000 for the first violation and \$110,000 for additional violations. If the attorney general files suit, the individual harmed still has a right to private right of action as long as the claim is filed timely.**
- X. Anticipatory relief - How SMCRA can be invoked by a member as a sword instead of as a shield.
- A. During military service, or within 180 days after release from military service, a servicemember can apply to a Court for relief from any contract or other obligation incurred before entry into military service, including:
 1. A stay of enforcement of any deed of trust securing a contract, during the entire period of military service; and
 2. A stay of any other contract or obligation, whether or not secured by collateral, for the entire term of military service.
 - B. The stay does not mean forgiveness, but simply a deferral of the principal and accumulated interest, with payments to begin again after the end of military service, to be repaid at the contract rate, and subject to any other terms that the Court may consider equitable.
 1. This is not a forgiveness of any portion of the principal interest, unlike the 6% rule, but instead a suspension of the servicemember's liability to make periodic payment and
 2. The terms of the contract cannot only be suspended, but also re-written by whatever means the Court deems equitable. If the Court grants such anticipatory relief, no penalty shall accrue for the period of the stay, including late charges.

- XI. SMCRA's special exemptions of assets from creditors' claims. During the period of the member's military service,
- A. If the trade or business of a servicemember has an obligation or liability for which the member is personally liable (like a business debt of a sole proprietorship), his personal non-business assets may not be executed upon to satisfy a "business" judgment.
 - B. The purpose of the above exemption is to protect the civilian business of a citizen who enlists or is called up, during the period of his military service.
 - C. The prohibition against execution ends when the member returns to civilian life, but how to make the distinction or assert the exemption is a mystery.
 - D. The above exemption applies "without regard to the form in which such trade or business is carried out". In other words, a member's personal assets cannot be used to satisfy a judgment upon his guaranty for a corporate debt. Neither can his "personal assets" be used to satisfy debts he incurred as a sole proprietor, at least during the term of his military service.
 - E. Note that the above prohibition does not require the member's application, assertion of exemption, etc. It is automatic, even if dangerously vague.

Conclusion: Before enforcing any contract against a defaulting consumer, first determine his (or her) military status. If the borrower is in uniform, or has been called up into the National Guard or active Reserves, do not repossess, do not make a derogatory credit bureau report, and do not execute upon his assets before consulting counsel.