

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

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The Servicemembers Civil Relief Act (“SMCRA”) replaced the old Solders’ and Sailors’ Civil Relief Act of 1940 (“SSCRA”) effective December 19, 2003.


# 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.

# Who is covered by SMCRA?

- Active duty Army, Navy, Air Force, Marine Corps and Coast Guard servicemembers, just as under SSCRA; but also
- National Guard and Reserve called to active duty for more than 30 consecutive days to respond to a national emergency.



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.

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>

# What Courts are covered by SMCRA?

- Every civil state and federal court nationwide, all administrative hearings, Small Claims, Special Proceedings before Clerks, but excluding all criminal matters.

What about criminal complaints for cold checks or converted collateral? SMCRA does not apply to these criminal actions, nor any other.



## Waivers by servicemembers are valid only if:

- They are in a separate writing, signed by the servicemember after commencement of military service; and
- The waiver specifies the particular contract to which it applies.
- 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.

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.

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.*

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.

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.

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:

- A statement as to how the servicemember's military duties materially affect his ability to appear; and
- A date when the servicemember will be available to defend himself;  
and
- 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.

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



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.

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.

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.*

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:

- Enforcement of contracts, judgment collection, and replevin of collateral; and
- 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.



Interest rate abatement - one of the most popular aspects of SSCRA and SMCRA.

## How the right to 6% interest is invoked:

Servicemember must provide lender with

- a written request,
- together with a copy of his orders calling him to military service,
- not later than 180 days after the servicemember's termination or release from the military.

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.

## A back door exception:

- 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.



**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.

## Penalties for violation are stiff.

- 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.
- The lender can be sued for wrongful conversion, including consequential and punitive damages, **costs and attorney's fees.**

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.

## **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.

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”.

Strict foreclosure without a Court order is forbidden by SMCRA.

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.**

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.

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

**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



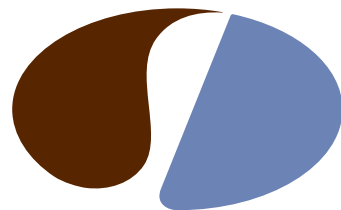
Anticipatory relief - How SMCRA can be invoked by a member as a sword instead of as a shield.

- 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

- A stay of enforcement of any deed of trust securing a contract, during the entire period of military service; and
- A stay of any other contract or obligation, whether or not secured by collateral, for the entire term of military service.

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.

*Thank you.*



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