

Bankruptcy and the SSCRA

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4.3—Right to Continuance and Protection against Default Judgment

Operation Iraqi Freedom has brought about the mobilization of several hundred thousand Reserve and Guard personnel. Because demographic statistics in the military community are similar to those in society as a whole, a certain percentage of those service members either will or may become involved in a bankruptcy proceeding (as debtor or creditor) before they are demobilized.

This article summarizes some main areas of interaction between the Federal Bankruptcy Code (Title 11 of the U.S. Code) and the Soldiers' and Sailors' Civil Relief Act (SSCRA) (50 U.S.C. App. Sections 501–593).

Q: Does the SSCRA, 50 U.S.C. App. Sections 501–593 apply to bankruptcy cases?

A: Yes. See *Anderson v. Dalkon Shield Claimants Trust*, 996 F.2d 716 (4th Cir. 1993) (finding that a bankruptcy creditor is a “plaintiff or defendant” for purposes of the SSCRA); *In re Ladner*, 156 B.R. 664 (Bankr. D. Colo. 1993) (finding that a bankruptcy debtor is a “plaintiff or defendant” for purposes of the SSCRA). See also *Young v. Higbee Co.*, 324 U.S. 204, 208 n.5 (in which the petitioner in an adversary proceeding observed that one of the respondents had entered the armed forces and agreed that no judgment would be taken against him during his period of service; the court concurred and cited the SSCRA).

Q: Is there any guidance on how the SSCRA is to be interpreted?

A: Yes. In numerous cases decided since 1944 (when most of the World War II cases first reached the U.S. Supreme Court), the Supreme Court has consistently held that the SSCRA is to be liberally interpreted in favor of the service member. See, e.g., *Boone v. Lightner*, 319 U.S. 561, 575: “The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²Military title used for purposes of identification only. The views expressed in this article are personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.

been obliged to drop their own affairs to take up the burdens of the nation." See also *LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948).

Q: Are there particular provisions of the SSCRA that have direct application in bankruptcy cases?

A: Yes. The sections most applicable would appear to be Section 521, application for a stay in proceeding; Section 520, procedure for taking a default judgment; Section 525, tolling provision prescription runs neither against nor in favor of service member; and Section 517, waiver of SSCRA protections by service member.

Q. Can a default judgment (whether in an adversary proceeding, a motion to lift a stay, or a trustee's motion to dismiss for failure to file a plan, for example) be taken against a service member?

A. Yes, provided you follow Section 520 requirements of the SSCRA. Specifically, before any default judgment can be taken in any case, the moving party must file an affidavit of non-military service. If no such affidavit can be filed (either because you don't know if the person is in the military or if the person actually is in the military), an attorney must be appointed to represent the person against whom the default is sought. Unless and until this is done, any default judgment against a service member is a voidable judgment (provided the member moves to reopen the proceedings within 90 days of release from active duty and had a valid defense to the proceedings).

The provisions of Section 520 do apply to bankruptcy proceedings. See *In re Montano*, 192 B.R. 843 (D. Md. 1996) for an excellent analysis of the requirements of the affidavit required by Section 520.

The applicable bankruptcy rules are 7055 (making applicable Rule 55 of the FRCP) and Rule 9014 (making Rule 7055 applicable to contested matters).

For an amazing example in which the Bankruptcy Court apparently disliked creditor's counsel so much it granted the motion of a confined federal prisoner to set aside a default judgment rendered in a bankruptcy case because the affidavit of non-military service filed by the creditor's counsel did not comply with Section 520 of the SSCRA (which was not even applicable to the prisoner-debtor), see *In re Bodziak*, 92 B.R. 954 (M.D. Fla. 1988).

Q: If a service member requests a stay under Section 521 of the SSCRA, must it automatically be granted by the court?

A: No. Under the terms of Section 521, the court may grant a stay for an absent military member on the court's own motion. The court must grant the stay upon application of the service member unless, in the opinion of the court, the ability of the member to prosecute or defend the action "is not materially affected by reason of his military service."

Having quoted the statute, however, an appropriate exercise of judicial discretion on whether or not to grant the stay is the mandate of the SSCRA, not the automatic granting of a stay. An

automatic stay was specifically rejected as a means of providing relief during the debate on enactment of the first SSCRA in 1917. In the seminal U.S. Supreme Court case decided during World War II, *Boone v. Lightner*, 319 U.S. 561 (1943), the Supreme Court affirmed a trial judge's determination that, under the facts of that case, the service member was not entitled to a stay. The Court took great pains to point out that the SSCRA was drafted intentionally to avoid absolute rules on granting or refusing to grant stays in cases involving military members. The military member's service had to materially affect either their ability to

prosecute or defend the action. A determination of material effect was always going to be a fact-sensitive determination best left to the trial judge. Moreover, the Boone court declined (as have all courts thereafter) to place the burden of proof on either side. It leaves the determination of material effect to the trial court.

There is an excellent discussion of Section 521 stays in the bankruptcy context in *In re Lewis*, 257 B.R. 431 (D. Md. 2001), in which the bankruptcy court had granted stays to the service member debtor while he was stationed in Korea, but declined to continue the stay after the service member debtor returned to the United States and failed to show the court that he could not appear and participate in the case.

Another good analysis of the types of evidence a service member requesting a Section 521 stay should be prepared to produce is found in *In re Diaz*, 82 B.R. 162 (M.D. Ga. 1988). See also *In re Wlaschin*, 260 B.R. 306 (M.D. Fla. 2000) (court refused a complete stay, but extended filing deadlines for service-member creditor).

Q: Do bar dates and filing deadlines apply to service members?

A: No, according to Section 525 of the SSCRA. Section 525 tolls the running of prescription in favor of or against a service member. When military service has been shown, the provisions of the section automatically apply. This section of the SSCRA does apply to bankruptcy. See *In re Robins Co., Inc. v. Dalkon Shield Claimants Trust*, 996 F. 2d 716 (4th Cir. 1993) (claim filed by military member after bar date for filing claim was allowed to be late-filed).

Section 525 applies to career military personnel, as well as those who only serve a brief period. See *Conroy v. Aniskoff*, 507 U.S. 511, 113 S.Ct. 1562, 123 L.Ed. 2d 229 (1993). Colonel Conroy purchased a tract of property in Danforth, Maine while he was on active duty as a career Army officer. He paid the property taxes for several years but then stopped paying them. After the expiration of Maine's 18-month period for redemption of properties seized for non-payment of taxes, the property was sold to a third party.

When Colonel Conroy returned from an assignment in Germany three years later, he tendered the back-due taxes, but the city of Danforth refused to accept them because the property had already been sold (and not yet developed). Colonel Conroy sued and both the trial court and the Maine Supreme Court ruled against him, holding that the member would have to show material effect to be eligible for the tolling provision of Section 525.

The U.S. Supreme Court, in a 9–0 ruling, held that the SSCRA applied to career military personnel and that Section 525 meant precisely what it says: No showing of material effect was necessary in a Section 525 case. Colonel Conroy won and the city of Danforth had to reacquire the property from the two parties who had purchased it at the tax sale and reconvey the property

to Colonel Danforth. Fortunately for the city, the property involved was a 100-acre tract of cutover timberland. One of the purchasers had used his portion for a hunting camp and the other had purchased the land for future development, but had not yet developed the acreage. Both purchasers let the city have the property back for what they had paid in back taxes, plus their attorney's fees.

For a Louisiana case (non-bankruptcy) affirming that Section 525 means precisely what the statute says, see *Jennings American Legion Hospital v. Jones*, 829 So. 2d 1203 (3d Cir. 2002) (medical malpractice claim filed after prescriptive date; exception of prescription denied based on Section 525).

Q: Can a service member waive the protections of the SSCRA?

A: Yes, but not until he or she is entitled to those protections (after they are on active duty). Section 517 allows a written waiver, but the waivers are interpreted narrowly. That is, a waiver of the prohibition against foreclosure (ordinarily protected under Section 532) would not necessarily waive the right to seek a stay in the enforcement of a judgment (Section 523).

Q: Can a creditor note that a military member has claimed rights under the SSCRA in an adverse credit report entry?

A: No. Section 518 prevents the exercise of rights under the SSCRA from being the sole cause of adverse credit reports, refusals to grant credit or changes in existing credit agreements. ROA

Update – March 2022³

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁴ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written. For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁵

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⁴*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

⁵Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).