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## **Going on the Offensive Using Section 590 of the SSCRA**

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Any military unit would rather be on the offensive instead of maintaining a defensive position waiting for an attack. When it comes to protecting your financial well-being in the event of a mobilization, consider going on the offensive. There's a way you can protect yourself using the Soldiers' and Sailors' Civil Relief Act (SSCRA) to get relief from pre-mobilization debts before financial disaster occurs. The relief that is available can postpone the due date of all or a part of your financial obligations during the period of active duty, although it does not relieve you of ultimate responsibility for the payments. In many cases, however, just having some extra time to pay the obligations may mean the difference between success and bankruptcy.

One of the least utilized, but potentially most powerful provisions of the SSCRA is 50 U.S.C. App. Section 590.<sup>2</sup> By properly invoking this provision, a mobilized Guard or Reserve member can go into court—either before or after a default—and ask a judge to either completely stay the enforcement of pre-service obligations<sup>3</sup> or require the creditors to accept reduced payments on those obligations.<sup>4</sup> The court-ordered relief can be for the duration of the member's period of service, or if the relief is not sought until after discharge, for a period equal to the member's period of active duty. The duration of the post-active duty period during which the deferred payments (plus accrued interest) must be repaid depends on the kind of obligation.<sup>5</sup> The idea behind Section 590 is to give the member some financial "breathing room" during the period of active duty.

Most of the protections of the SSCRA are defensive in nature: a creditor has sued and the military member needs protection to stay the lawsuit, halt the foreclosure, or prevent the

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<sup>1</sup>Military title used for purposes of identification only. The views expressed in these articles are the 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.

<sup>2</sup>In over 60 years, only eight reported appellate cases refer to Section 590. See *Kindy v. Koenke*, 216 F. 2d 907 (8th Cir. 1954); *Koury v. Sood*, 74 R.I. 486, 62 A. 2d 649 (1948); *Application of Pickard*, 187 Misc. 400, 60 N.Y.S.2d 506 (1946); *Morris Plan Industrial Bank v. Petluck*, 187 Misc. 87, 60 N.Y.S.2d 162 (1946); *Application of Marks*, 181 Misc. 497, 46 N.Y.S.2d 755 (1944); *New York Life Ins. Co. v. Litke*, 181 Misc. 32, 45 N.Y.S.2d 576 (1943); *Application of Aber*, 180 Misc. 736, 40 N.Y.S.2d 48 (1943); and *Brooklyn Trust Co. v. Shapiro*, 180 Misc. 454, 41 N.Y.S.2d 286 (1943).

<sup>3</sup>Generally, Section 590 applies to pre-service obligations. An exception is for taxes and assessments, which are subject to Section 590 even if they become due during the period of service.

<sup>4</sup>The member must be able to prove that his/her service has materially affected ability to pay the obligation on its contractual terms.

<sup>5</sup>If the obligation is for the purchase of real estate or is secured by a mortgage, the deferred payments must be repaid, after discharge, during a period equal to the period of service plus the remaining life of the obligation. If the debt is for any other purpose, the deferred payments must be made up, after discharge, over a period equal to the period of service.

cancellation of an installment contract. Under Section 590, however, a member (assuming he or she can show that the military service has materially impaired his or her ability to perform the obligation at the contract rate of payment) can make a pre-emptive strike and get some relief before financial disaster strikes, even if he or she is not in default on the obligation.<sup>6</sup>

An example will illustrate the operation of Section 590. The member can go to a court and say: "I've been mobilized for military service. Before my call-up, I had credit obligations owed to X, Y and Z of \$1,500, \$1,200 and \$900 per month. I made \$75,000 per year in my civilian job and now I'm making \$37,500 on active duty. I now have 50 percent as much cash flow, so I'm requesting that the court order my creditors to accept 50 percent payments on my debts for the duration of my service, with the understanding that after my discharge, they will get paid the deferred payments (plus interest) over time<sup>7</sup> plus the new payments as they come due. I just need some temporary relief, Your Honor."

In the example above, the member's hypothetical pay decrease was 50 percent. But, what if the pay decrease is much more than that? Take, for example, the doctor or lawyer with his own practice or the owner of a small business. When that member takes up the colors to serve the nation, the practice or the business may simply cease to exist. The Reserve doctor who may make \$475,000 per year as a surgeon in civilian life may suffer as much as a 75 percent (or greater) reduction in pay if mobilized. The Guard attorney with a successful practice may take a similar pay cut, while the money she has borrowed to set up her law practice (and the fixed expenses of her family) will still be owed to the creditors, whether she's practicing law or not. Similarly, the contractor who runs his own business will still owe the bank the monthly payments on his track-hoe, whether it's digging ditches or sitting idle.

In an extreme case, a court could completely stay (halt) the enforcement of the member's obligations for the duration of the period of service, subject to repayment after the active duty was concluded. In other words, if the impact of the mobilization on the member was great enough—as it might be in the case of a small business or medical or law practice—the court has the power to simply tell the creditors: "The Court is deferring all this person's payments until after he or she comes off active duty. You'll ultimately get all your money, but you have to give this person a payment moratorium during their period of active duty."

Section 590 is ideally suited to provide a small business owner with some protection before the creditors start knocking at the door. Plan ahead: if you see that your income is going to decrease substantially during the period of service, seek the relief offered by the SSCRA before things get completely out of hand. Hire counsel and go to court, seeking a restructuring of the

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<sup>6</sup>The application for relief can be filed at any time during the active-duty period, or within six months after discharge.

<sup>7</sup>If the debts are secured by mortgages or are for the purchase of real estate, the deferred payments have to be made up over the remaining life of the obligation plus a period equal to the period of active duty. For all other obligations, the deferred payments must be made up over a period equal to the period of active duty.

debt even before there is a default. Relations with creditors are not likely to improve after you default on the debts.

There is an important case pending now in United States District Court in Fresno, Calif., involving an Air Force Reserve master sergeant who is seeking post-discharge protection under Section 590.<sup>8</sup> MSgt Oscar Rodriguez, who has given permission for his story to be told in The Officer and elsewhere, owns a construction company in Modesto, Calif., called Pacific Construction Concepts. Sergeant Rodriguez is a true American success story, a man who started with a used pickup truck and a shovel in 1986 and by 2001 had built his business to 16 employees and more than \$1.5 million in revenue. In February 2002, he was mobilized for a year and, while he was gone, his construction company essentially was out of business. He and his wife used their life savings to try to keep all his business creditors fully paid while he made a fraction of his former income as a C-5 Galaxy maintainer at Travis AFB, Calif. At about the ninth month of his call-up, he essentially ran out of money. Most of his creditors had complied with the SSCRA and reduced his interest rates to six percent, but Rodriguez simply lacked the cash flow to

pay the creditors, even at the reduced interest rate.

After his discharge, Sergeant Rodriguez became aware of Section 590. Because he was within six months of his discharge, he filed a suit naming all of his creditors, asking the court to grant him a period equal to his one year of active duty, during which his payments would be reduced by 90 percent, subject to the obligation of repayment after the period of relief. He simply needed some time to get his business re-started. Although the suit is pending, at this writing many of the defendants have contacted MSgt Rodriguez' counsel and basically asked "what can we do to help?" As is frequently the case, relief under Section 590 is a question of getting the creditor's attorney involved, rather than trying to explain the law to the credit department collection specialist who calls every day.

Section 590 of the SSCRA is a protection that all Reserve and Guard members—especially professionals and business owners—should be aware of and be prepared to use if mobilized. A mobilization is going to be difficult enough without payments on pre-service debts completely draining bank accounts and wiping out life savings. Let a legal assistance officer explain Section 590 of the SSCRA sooner, rather than later. ROA

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<sup>8</sup>Oscar Rodriguez Jr., d/b/a Pacific Construction Concepts v. American Express et al, Case No. CIV- F-03-5946, United States District Court for the Eastern District of California. Plaintiff's counsel is LTC James A. McKelvey, CA ANG (Ret.), of Motschiedler, Michaelides & Wishon, L.L.P. in Fresno, Calif.

## Update – March 2022<sup>9</sup>

### SCRA

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.<sup>10</sup> 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 the article would still apply the same today.

The relevant section cited throughout the article can be found as followed:

50 U.S.C. App. § 590 discussing anticipatory relief can now be found at 50 U.S.C. § 4021.

### *Rodriguez v. American Express*

In 2006, *Rodriguez v. American Express* was decided by the United States District Court for the Eastern District of California.<sup>11</sup> The case proceeded with XX defendants involved. Applying section 590 to the first creditor, Valley First Credit Union, the court held that Rodriguez was filed within the six-month statutory period, Rodriguez did not file the necessary notice motion for stay.<sup>12</sup> Rodriguez had the burden to file and serve a separate motion for stay and failed to do so.<sup>13</sup> Section 591 did provide for a stay to continue from the time of application for a period equal to the time of military service, or one year in this case, however it is inapplicable in this case.<sup>14</sup> The court held for the other three defendants (Citibank, Bank of America, and American Express) on similar grounds.<sup>15</sup>

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<sup>9</sup>Update by Second Lieutenant Lauren Walker, USMC.

<sup>10</sup>*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).

<sup>11</sup>*Rodriguez v Am. Express*, No. CV F 03-5949 AWI LJO, 2006 WL 908613 (E.D. Cal. Apr. 7, 2006).

<sup>12</sup>*Id.* at \*8

<sup>13</sup>*Id.*

<sup>14</sup>See *Id.*

<sup>15</sup>*Id.* at \*8—\*11.

mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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<sup>16</sup>Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.