

SCRA Forbids Non-Judicial Foreclosure During or Within Nine Months After Active Duty

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

4.6—Eviction and Foreclosure Protection

Q: I am an enlisted member of the Marine Corps Reserve. Last year, I was called to active duty for seven months (May-December) and deployed to Afghanistan. I lost a lot of income during that period, because my civilian job pays me substantially more than I earned on active duty, even when you factor in the hazardous duty pay and tax break for serving in Afghanistan. I was having some financial difficulties even before I was called to active duty, and the active duty made them worse. As a result, I fell behind in the mortgage payments on my house, and now the bank is threatening to foreclose.

When I obtained the mortgage and bought the house in 2005, I signed a “deed of trust” that provides that if I fall behind in mortgage payments the “trustee” can agree to foreclosure without the bank having to go to court. That is the provision that the bank is threatening to

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.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

invoke now. I heard a presentation by a military lawyer, and she said that a federal law called the Servicemembers Civil Relief Act (SCRA) forbids *non-judicial* foreclosure during or within nine months after my active duty. How does this provision work?

A: Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which dates back to 1917. The SCRA is codified at sections 501-597b of the Appendix to title 50 of the United States Code (50 U.S.C. App. 501-597b). Section 533(c) provides:

A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, *or within 9 months after*, the period of the servicemember's military service except—

(1) *Upon a court order granted* before such sale, foreclosure, or seizure with a return made and approved by the court; or

(2) If made pursuant to an agreement as provided in section 107 [50 U.S.C. App. 517].

50 U.S.C. App. 533(c) (emphasis supplied).

It is clear that your mortgage qualifies. Under the SCRA, it is unlawful to foreclose on the property without a court order. It does not matter that your state law permits non-judicial foreclosure under these circumstances. Under Article VI, Section 2 of the United States Constitution (commonly called the "Supremacy Clause"), a federal statute like the SCRA trumps a conflicting state law or a provision of a state constitution.

Under section 107 of the SCRA (50 U.S.C. App. 517), you can waive your right to avoid non-judicial foreclosure on the property, but such a waiver must be in writing and must be made during or after (not before) your period of active military service. Since you signed the deed of trust in 2005, when you bought the property, and since you were not on active duty at that time, that deed of trust does not validly waive your rights.

If you are going to sign a waiver of your rights, you should obtain something of value in exchange for the waiver. For example, the bank might agree to a "short sale" wherein the bank agrees to accept the purchase price that you receive in exchange for the property as a full and final satisfaction of your obligations under the mortgage; i.e., the bank agrees to release you from liability over and above that purchase price. I suggest that you need an attorney to arrange for such a settlement. Please remember Abraham Lincoln's famous maxim: "A man who represents himself has a fool for a client."

Q: What happens if the bank proceeds with the non-judicial foreclosure during the nine months after I left active duty?

A: Some serious consequences could follow as stated in the United States Code:

A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c) [50 U.S.C. App. 533(c)], or who knowingly 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. 533(d) (emphasis supplied).

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 did not change the substance or application of the sections.

The relevant sections cited throughout the article can be found at:

50 U.S.C. App. § 517 discussing the waiver of rights pursuant to a written agreement can be found under 50 U.S.C. § 3918.

50 U.S.C. App. § 533 discussing mortgages and trust deeds can be found at 50 U.S.C. § 3953. A notable change in 50 U.S.C. § 3953 is that the subsection (c) and (d) have increased the period from nine months to one year. Therefore, when applying the change to this article, it would be unlawful for the bank to foreclose on the servicemember's home within one year of the servicemember returning from Afghanistan without a court order or pursuant to an agreement as provided in 50 U.S.C. § 3918.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁵

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³Update by Second Lieutenant Lauren Walker, USMC.

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

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

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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⁶Congress recently established the United States Space Force as the 8th uniformed service.