

BY CAPT. THOMAS A. GABRIELE

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# Protecting

## The Servicemembers Civil Relief Act

**M**ilitary attorneys in the Judge Advocate Generals Corps (JAG) wear many hats in the service. JAGs are asked to perform two very important missions: to advise and aid military

commanders on various legal issues that affect the base mission and to provide legal assistance to military personnel, their dependents and retired military members.

With regard to the base's mission, JAGs advise commanders on issues such as military justice, civil law, ethics, labor law, contract, and operational law. However, it is the military's legal assistance program that requires that JAG attorneys be knowledgeable about a wide range of issues that affect all airmen, including domestic law, fiscal law, tax law and proceedings in local courts. These are areas in which the Servicemembers Civil Relief Act (SCRA) protects those serving. Since the enactment of the SCRA in 2003, JAGs—and other lawyers—have increasingly responded to questions about its scope and applicability.<sup>1</sup>

The SCRA was enacted for two reasons:

1. to provide for, strengthen and expedite the national

defense by allowing service members to devote their full energy to the defense needs of the nation.

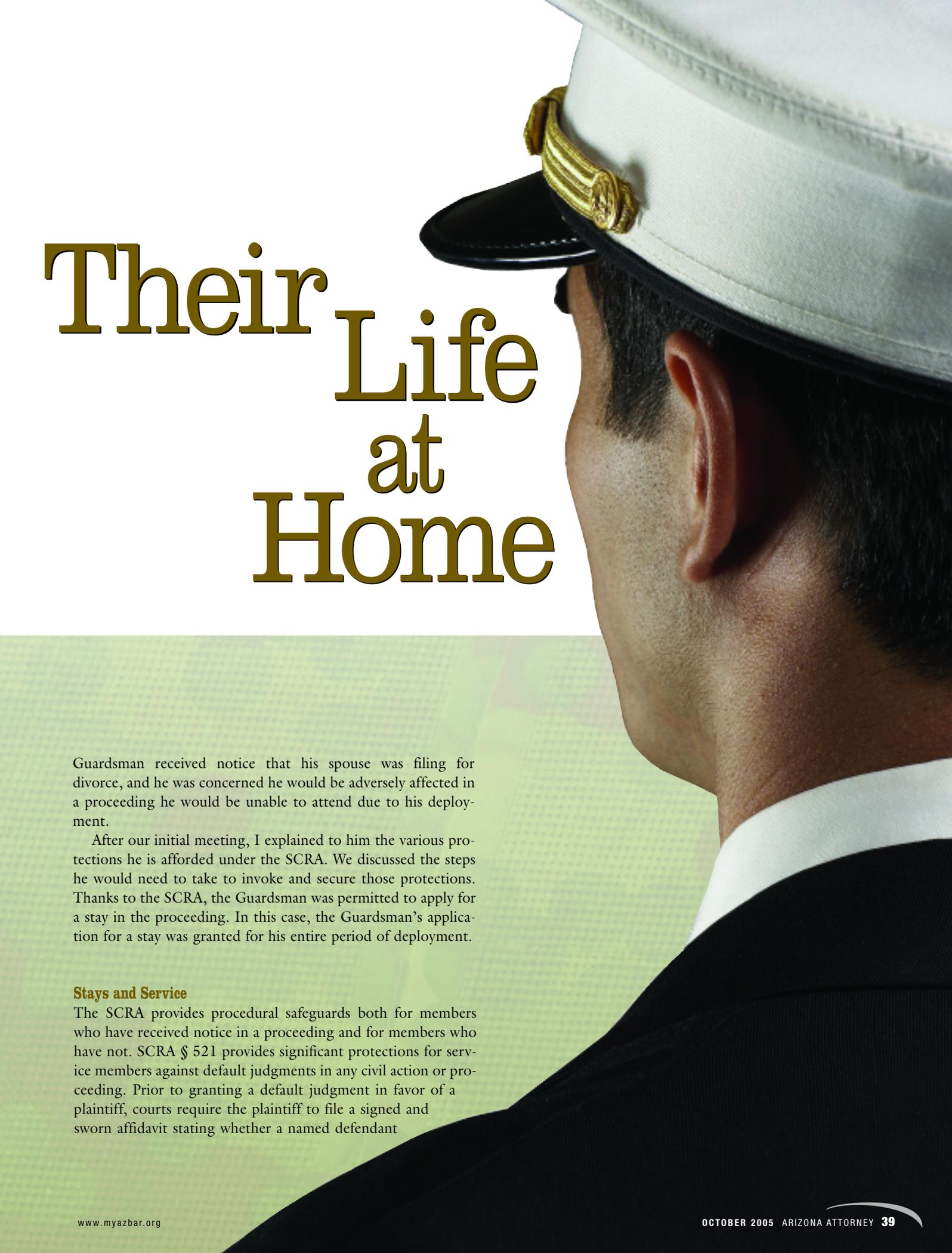
2. to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service.<sup>2</sup>

The protections afforded under the SCRA apply to active-duty members of the Armed Forces as well as to Reserve Units and members of the National Guard activated by the President of the United States or the Secretary of Defense. The intent of Congress was to broaden the various protections afforded to these service members.

In this article, I highlight the important protections afforded by the SCRA, addressing stays of judicial proceedings, default judgments and residential leases.

### Judicial Proceedings

This past year, I received a legal assistance call from an activated Army Guardsman deployed in Iraq.<sup>3</sup> While there, the



# Their Life at Home

Guardsman received notice that his spouse was filing for divorce, and he was concerned he would be adversely affected in a proceeding he would be unable to attend due to his deployment.

After our initial meeting, I explained to him the various protections he is afforded under the SCRA. We discussed the steps he would need to take to invoke and secure those protections. Thanks to the SCRA, the Guardsman was permitted to apply for a stay in the proceeding. In this case, the Guardsman's application for a stay was granted for his entire period of deployment.

## **Stays and Service**

The SCRA provides procedural safeguards both for members who have received notice in a proceeding and for members who have not. SCRA § 521 provides significant protections for service members against default judgments in any civil action or proceeding. Prior to granting a default judgment in favor of a plaintiff, courts require the plaintiff to file a signed and sworn affidavit stating whether a named defendant

is in military service. If a plaintiff is unable to determine whether a defendant is in military service, that plaintiff must affirm that he or she is unable to determine whether the defendant is in military service. 50 U.S.C. § 521(b)(2).

If the affidavit indicates that the defendant is in the military service or appears to be in the military service, the court may not enter a judgment in favor of the plaintiff until after it has appointed an attorney to represent the defendant's interests. If the defendant is in the military service, the court must grant a stay in the proceedings upon the application of counsel for a minimum period of 90 days. In the alternative, the court may grant a stay, on its own motion, if it determines that "there may be a defense to the action and a defense cannot be presented without the presence of the defendant or after due diligence, counsel has been unable to contact the defendant, or otherwise determine if a meritorious defense exists." *Id.* § 521(d).

SCRA § 501 affords military defendants far greater protection than did its antecedent, the Soldiers and Sailors Civil Relief Act (SSCRA). That act allowed, but did not require, the court to grant a stay in the proceedings.

If a court-appointed attorney is unable to locate the service member, the attorney's actions shall not bind the defendant or waive any of his defenses. *Id.* § 521. Furthermore, if the defendant's military status cannot be ascertained, the court may require the plaintiff to file a bond with the court to indemnify the defendant against any damages that may result if the judgment is later set aside, in whole or in part. Any plaintiff that knowingly files

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a false affidavit faces the possibility of being fined, imprisoned for not more than one year, or both. *Id.* § 521(c).

The SCRA also provides safeguards for members who have received service of process in a civil action or proceeding but are unable to appear due to military commitments. The court on its own motion may at any point prior to the issuance of a final judgment grant a stay of 90 days in the proceeding and must grant a stay of no less than 90 days upon petition of the defendant if two conditions are satisfied: The service member must submit:

- (1) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the service member's ability to appear and stating a date when the service member will be available to appear, and
- (2) a letter or other communication from the service member's commanding officer stating that the service member's current military duty prevents appearance and military leave is not authorized for the service member at the time of the letter.

*Id.* § 522(b)(2)(A), (B).

This provision, § 522(b)(2)(A) and (B) of the SCRA, is significant for the service member because it provides a process for obtaining a stay. Previously, under the SSCRA, stays were completely

discretionary. Under that act, some courts interpreted an application for stay as an appearance in the proceeding. It is important then that § 522(c) of the SCRA explicitly states that an application for a stay in the proceeding does not constitute an appearance for jurisdictional purposes and does not waive any potential defenses. *Id.* § 522(c).

In addition, a service member may apply for an additional stay at any point in the proceeding as long as it is shown that the ability to appear is materially affected by his military service. *Id.* § 522(d)(1). If the court refuses the application for an additional stay, the court must appoint an attorney to represent the service member's interests in the proceeding. *Id.* § 522(d)(2).

The SCRA also provides the court an important tool in the event multiple defendants are named. In the event the court grants a stay in the proceedings or vacates a judgment, the court may also grant a stay or vacate the judgment for any other party that may be primarily or secondarily liable for the action stayed or vacated for the service member. *Id.* § 526(a)(b). It should also be noted that the military member's time in service may not be included

when computing the appropriate statute of limitations. *Id.* § 526(a).

### **Default Judgment**

In the event a default judgment is entered against a service member during the period of military service or within 60 days of his termination or release from military service, the court has the authority under the SCRA to set aside a judgment upon application of the service member or by a third party acting on the service member's behalf. *Id.* § 521(g)(1).

(In contrast, the SSCRA permitted challenges to default judgments only within 30 days of the termination or release from active duty.)

Upon application, the court must reopen the judgment and allow the service member to defend the action if it appears the service member was materially affected as a result of military service in making a defense to the action and the service member has a meritorious or legal defense to the action or some part of it." *Id.* § 521(g)(1)(A), (B). This application must be filed no later than 90 days after the termination of or release from military service.

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### **Residential Leases**

#### **Termination**

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among the most common issues raised by service members with military attorneys. The SCRA broadens the limited protections that existed for service members under the SSCRA. Whereas the SSCRA provided an escape clause only for initial entry into the military service, the SCRA allows a lessee to terminate a lease any time after the lessee's entry into military service, upon receipt of military orders for a permanent change of station, or receipt of military orders for a deployment for a period of not less than 90 days. *Id.* § 535 (a), (b).

This provision was fortified because Congress understood that the occurrence of such subsequent events is not within the control of the service member. In most cases, military orders do not allow for delay or extension at the current station to accommodate obligations under a lease or other contractual arrangement.

Similarly, certain other types of leases may be terminated to accommodate a service member's military activity. Covered leases under the SCRA include any premises occupied by a service member or service member's dependents for residential, professional, business or similar purposes as long as the lease is executed by or on behalf of the person who subsequently enters the military service or the service member executes a lease while on active duty and subsequently receives orders to deployment for at least 90 days or permanent change of station orders. *Id.* § 535(b)(1)(A), (B). As such, when a military member terminates a lease under the SCRA, he or she also terminates the obligations of any dependents under the SCRA.

Termination of a lease under the SCRA is effective when the lessee delivers written notice of the termination to the lessor along with a copy of the lessee's military orders. Delivery may be accomplished by hand delivery or may be mailed with a return receipt requested. *Id.* § 535(c)(1), (c)(2). If the terminated lease provides for monthly payment of rent, the termination is effective 30 days after the first date on which the next rental payment becomes due. *Id.* § 535(d).<sup>4</sup> For instance, if a service member pays rent on the first of each month and sends his termination notice on June 29, the lease will be cancelled on August 1.

As for what financial obligations remain, § 305(e) states, "Rents or lease amounts unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis." The only remaining obligation is for damage caused to the residence, which will be assessed against the security deposit and will become a debt of the member, as will any unpaid rent due prior to the termination if the lease.

### Evictions

Under the SCRA, Congress also afforded service members greater protections against evictions than they previously had under the SSCRA.

A landlord may not evict a service member or the dependents of a service member during the period of military service

without a court order for premises that are occupied primarily as a residence and that has a monthly rent not exceeding \$2,400 for years after 2003. *Id.* § 531(a)(1)(A)(i), (ii).<sup>5</sup> In the event a landlord seeks an eviction from a court, the court may, on its own motion, or shall, upon application by or on behalf of the service member, stay the proceedings for a period of 90 days or adjust the obligation under the lease to preserve the interest of all parties if the ability to pay rent is materially affected by military service. *Id.* § 531(b)(1)(A), (B). The court may grant a stay for a period of less than 90 days or more than 90 days if it determines that justice and equity require an adjusted stay. *Id.* § 531(b)(1)(B). Finally, the court has discretion to grant the landlord any equitable relief it finds appropriate. *Id.* § 531(b)(2).

Under the SCRA, landlords are prohibited from subjecting the premises to distress during the period of military service. *Id.* § 531(a)(1)(B). Landlords who knowingly cause distress or proceed with an eviction under this section without a court order face the possibility of being fined or imprisoned for not more than one year, or both. *Id.* § 531(c).

### Lease Concessions

One of the hottest issues under the SCRA deals with concessions and where they fit into the equation.

Concessions have been offered to our service members in a variety of ways. The most common is in the form of one or two months of free rent at the beginning of the lease or one free month prorated throughout the lease. Such concessions are not considered outstanding rent and cannot be categorized as damages. Therefore, the service member is not required to refund any concessions afforded. The intent of Congress was to protect service members receiving orders to the greatest extent to ensure the maximum performance of their military responsibilities. Requiring service members to repay concessions could result in members having to refund hundreds or even thousands of dollars immediately prior to deployment. The imposition of such financial obligations is exactly the result Congress intended to prevent.

Congress, however, did consider the plight of the lessor. Section 305(g) allows a lessor to petition the court when the effect of the SCRA is inequitable. It should also be noted that service members may waive any of the rights and protections afforded in the SCRA. *Id.* § 517. However, any waiver relating to the modification, termination or cancellation of a lease is only effective if it is in writing and executed separately from the obligation or liability to which it applies.

### Conclusion

The Servicemembers Civil Relief Act is an important law designed to protect those individuals who daily defend our

freedoms. The SCRA does not provide military members a mechanism to shirk their responsibilities, but rather a necessary tool to protect them from civil actions and obligations that they are unable to address or fulfill due to military necessity. The proper application of the SCRA will allow our service members to focus their full efforts and energies on the military mission. 

## endnotes

1. President George W. Bush signed the SCRA into law in December 2003. The SCRA supersedes the Soldiers and Sailors Civil Relief Act, which provided similar protections to those provided under the SCRA, but to a lesser extent.
2. 50 U.S.C.S. § 502.
3. The JAG assigned at the Guardsman's deployed location was tending to matters at another deployed location, so the member asked to be connected with another JAG and was routed to my office. Military attorneys are stationed at every deployed location. While deployed, military attorneys advise commanders on issues affecting the military mission and provide legal assistance for deployed members.
4. In the case of any other lease, termination of the lease under subsection (a) is effective on the last day of the month following the month in which the notice is delivered.
5. This amount is subject to increases in inflation and generally will rise every year. *See* 50 U.S.C.S. § 531(a)(2)(A).