UNITED STATES BANKRUPTCY COURT
Western District of New York

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SERVICEMEMBER'S CIVIL RELIEF ACT OF 2003

No. 04-01 February 6, 2004

On December 19, 2003, the President signed into law H.R. 100, the Servicemembers Civil Relief Act of 2003, Pub.L.No. 108-189, 117 Stat. 2835 (the act), which revises the Soldiers' and Sailors' Civil Relief Act of 1940. The purpose of the act is to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect servicemembers during their military service, thereby enabling them to devote their energy to the defense needs of the United States.

Attached is a Review of the Servicemember's Civil Relief Act of 2003. You are strongly encouraged to read the full text of the act, available from the Library of Congress at http://thomas.loc.gov.

PAUL R. WARREN
Clerk of Court

Attachment

Review of the Servicemember's Civil Relief Act of 2003

A stay of proceedings, reopening of judgment, and other relief granted by the Servicemember's Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (the act), can be initiated at the court's discretion or upon application to the court by the servicemember or the servicemember's legal representative. The general standard for granting such extraordinary relief is that the servicemember's military service materially affects the servicemember's ability to defend a civil action or comply with the underlying obligation. Additionally, many of the provisions of this act continue to apply following the servicemember's release from military service.

The act provides, in part, as follows:

- **Default Judgments.** Before entry of a default judgment, the plaintiff must file with the court an affidavit indicating whether the defendant is or is not in military service or that the plaintiff is unable to determine the defendant's military status. If the court cannot determine the defendant's military status based upon the affidavit(s), it may require the plaintiff to post a bond before entry of a default judgment. If it is later discovered that the defendant is in military service, the bond would be available to indemnify the defendant servicemember against any loss or damage suffered due to entry of a default judgment, should that default judgment be set aside.

  If it appears that the defendant is in military service, the court may not enter a judgment until after it appoints an attorney to represent the defendant. Further, the court may upon its own motion and shall upon application by counsel for the defendant grant a stay of proceedings for a minimum period of 90 days if there may be a defense to the action requiring the defendant's presence or if counsel is unable to contact the defendant or determine if a meritorious defense exists.

  A servicemember or representative may apply to the court to reopen the default judgment. The act authorizes a court to vacate or set aside a default judgment it entered against a servicemember during that servicemember's period of military service plus 60 days to allow the servicemember to defend the action if it appears that the military service interfered with the ability to defend the civil action and the servicemember has a meritorious or legal defense to the action. The act specifically provides, however, that the rights, title, and interest acquired by a bona fide purchaser for value are not impaired by vacating the default judgment. An

application to reopen a default judgment must be made during or up to 90 days after the servicemember's military service.

- **Stay of Proceedings When Servicemember Has Notice**. The act provides that at any stage before final judgment is entered in a civil action in which a servicemember is a party, the court may on its own motion or shall upon application of the servicemember (including supporting documentation) stay the action for a period of not less than 90 days. An application for a stay of proceedings does not constitute the servicemember's appearance or waiver of any substantive or procedural defenses. A servicemember may apply to the court for an extension of the initial stay. A court that refuses to grant an additional stay must appoint counsel to represent the servicemember in the action.

  When a civil action is stayed pursuant to the act, penalties for the servicemember's non-compliance with the underlying contract obligation shall not accrue during the period of the stay. Further, the court may reduce or waive any penalty incurred by the servicemember during the period of military service for failure to perform under the terms of a contract, if the military service materially affected the servicemember's ability to perform the obligation.

- **Stay of Execution or Vacation of Judgment, Attachment, or Garnishment.** A court may on its own motion or shall upon application stay the execution of any judgment or order entered against the servicemember and vacate or stay an attachment, garnishment of property or money, or debts in the possession of the servicemember or a third party, if it determines that the servicemember's ability to comply with a court judgment or order is materially affected by military service. This court power extends to actions or proceedings commenced before, during, or up to 90 days after the defendant's military service. The stay of execution may be ordered for the period of military service plus 90 days, or for any part thereof. The court may order the servicemember to make installment payments to the plaintiff during the stay period.

- **Statute of Limitations.** The act tolls the statute of limitations for bringing any civil action or proceeding in a court by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns during the servicemember's period of military service (excluding any statute of limitations under the Internal Revenue Code).

- **Interest Cap.** Interest on an obligation or liability, entered into by the servicemember or the servicemember and spouse jointly prior to the servicemember's entry into military service, can not bear interest in excess of six percent per year during the period of military service. Contract rate interest in excess of six percent is forgiven. The amount of any periodic payment due under the terms of the contract shall be reduced by the amount of the forgiven interest for that payment period.

  The servicemember must provide written notice and documentation to the creditor to access the limited interest rate provided by this act. A court, however, may grant a creditor relief from the interest cap if it finds the servicemember's ability to pay the contract rate of interest on the obligation is not materially affected by military service.

- **Evictions and Distress.** The act provides that, absent court order, a landlord may not evict a servicemember or dependants from a primary residence for which normal monthly rent does not exceed $2,400 (subject to an annual price inflation adjustment) or subject the premises to a distress action. Upon application by the landlord for an order permitting eviction or distress of the premises, the court may on its own motion or shall on application of the servicemember stay an eviction or proceeding for distress, or may adjust the obligation under the lease to preserve the interests of all parties. The court is empowered to grant equitable relief to a landlord if a stay of eviction is granted. An allotment from the servicemember's pay can be made to satisfy the terms of the court's order.

- **Protection Under Installment Contracts for Purchase or Lease.** The act provides that a contract for the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property, for which the servicemember made a deposit or installment payment before entering military service, may not be rescinded or terminated for a breach of terms occurring before or during military service without court order. Likewise, the property may not be repossessed absent a court order. Courts are granted the authority to order repayment to the servicemember of installment payments or deposits as a condition of termination of the contact, to stay the proceedings for an equitable period of time, or to make other equitable disposition to preserve the interests of all parties.

- **Mortgages and Trust Deeds.** In the case of a secured debt on real or personal property owned by the servicemember, which originated before the period of military service, the court may or shall upon application, after hearing, stay a proceeding to enforce the mortgage obligation brought during or within 90 days after the military service. Alternatively, the court may adjust the obligation to preserve the interests of all parties. Absent a court order or written agreement between the lender and the servicemember, a sale or foreclosure of the property for breach of a mortgage or trust obligation is not valid if made during or within 90 days after military service. As a condition of permitting foreclosure, repossession, or termination of the contract, the court may order the servicemember's equity in the property (as valued by court appointed appraisers) to be paid to the servicemember or dependents.

- **Termination of Residential or Motor Vehicle Leases.** A servicemember may terminate a residential or automotive lease entered into before the start of military service. Further, a servicemember, who executes a residential or automotive lease and subsequently receives military orders for a permanent change of duty station or to deploy for a period of not less than 90 days, may terminate such lease. A servicemember terminates a lease by delivery of written notice with documentation to the lessor, and by return of the motor vehicle not later than 15 days after delivery of the written notice. The act provides for payment of arrearage and other obligations incurred by termination of the lease and for refund of rents or lease payments made in advance.

- **Assignment of Insurance Policies.** If, prior to entry into military service, a servicemember assigned a life insurance policy to secure payment of an obligation, the assignee may not, absent court order, exercise any right or option obtained under the assignment during the period of military service plus one year. Exceptions to the prohibition include: by written consent of the servicemember; when the premiums are due and unpaid; or upon the death of the insured. A court may refuse to grant the assignee leave to exercise its rights under the assignment if the court determines that the servicemember's ability to comply with the terms of the underlying obligation is materially affected by military service.

- **Enforcement of Storage Liens.** A party that holds a lien on the property or effects of a servicemember may not, absent court order, foreclose or otherwise enforce any liens on such property during the servicemember's military service plus 90 days. The court may on its own motion or shall on application stay the foreclosure or adjust the obligation equitably.

- **Protection of Life Insurance.** The act provides protection to the servicemember for life insurance policies up to $250,000 in coverage and in force not less than 180 days before the date of the insured's entry into military service and at the time of application under the act. The insured, the insured's legal representative, or the insured's beneficiary may apply in writing for protection of the life insurance contract from lapse, termination, or forfeit for the nonpayment of a premium from the date of receipt of the application through the period of the insured's military service plus two years. After receipt of the application, the Secretary of Veterans Affairs determines whether the particular insurance contract is entitled to such protection. The Secretary will notify the insured and insurer of the determination. The insured and the insurer are deemed to have constructively agreed to any policy modification.

  Unpaid premiums due under a protected life insurance policy are to be treated as a policy loan on the policy. If the policy matures during the protection period, unpaid premiums plus interest will be deducted from the insurance proceeds.

  Unpaid premiums due on a policy protected by the act are guaranteed by the United States. The amount paid by the United States shall be treated as a debt owed to the United States by the servicemember. The United States may collect the debt from the servicemember or offset the debt against funds owed to the servicemember. **This debt is non-dischargeable in bankruptcy (an uncodified priority unsecured debt)**.

- **Taxes and Assessments**. The act addresses taxes or assessments (other than income tax) due and unpaid before or during the servicemember's period of military service. This includes taxes on personal property (*e.g.*, an automobile tax) and real property taxes. Absent a court order, the servicemember's personal or real property may not be sold to enforce collection of such tax. Further, the court may stay a proceeding to enforce the collection of a tax or assessment during the period of military service plus 180 days. Interest may accrue on the unpaid tax at a rate of six percent per year. If a servicemember's property is sold or forfeited to enforce the collection of a tax or assessment, the servicemember has the right to redeem the property or commence an action to redeem during the period of military service plus 180 days.

  The act also addresses a servicemember's income taxes. It provides that upon the servicemember's notice to the taxing authority, the collection of income tax on the income of a servicemember falling due before or during military service is deferred for a period of not more than 180 days after the servicemember's release

from military service if the servicemember's ability to pay the income tax is materially affected by military service. No interest or penalties accrue during this deferral period. However, the statute of limitations against the collection of an income tax obligation deferred pursuant to this act is tolled for the period of the servicemember's military service plus 270 days.

The act also addresses the issue of a servicemember's residence and domicile with respect to the person, personal property, and income of the servicemember due to the servicemember's presence or absence in any jurisdiction of the United States in compliance with military orders.

- **Anticipatory Relief.** The act provides that a servicemember may, during military service or within 180 days following release from the military, apply to a court for relief from any obligation or liability incurred by the servicemember before the servicemember's military service or from a tax or assessment falling due before or during the servicemember's military service. Subject to the act's requirements and court determination, servicemembers are able to apply for relief before a default occurs.

- **Business or Trade Obligations.** The act provides that if a servicemember's business has an obligation or liability for which the servicemember is personally liable, the servicemember's assets not held in connection with the business may not be available for satisfaction of the business' obligation or liability during the servicemember's military service.

- **Protection of Persons Secondarily Liable on Servicemember's Obligations.** The act permits a court to extend the protections granted to servicemembers to any persons secondarily liable on the servicemember's obligations. Whenever pursuant to the act a court stays, postpones, or suspends: (1) the enforcement of an obligation or liability; (2) the prosecution of a suit or proceeding; (3) the entry or enforcement of an order, writ, judgment, or decree; or (4) the performance of any other act, the court may also grant such relief to a surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on the obligation. Additionally, when a court vacates or sets aside the judgment or decree entered against the servicemember, the court may set aside or vacate a judgment or decree as to another person who is liable on the obligation.

  A surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on a servicemember's obligation may execute a waiver of these protections in a separate writing (with exceptions).

- **Waiver of Rights by a Servicemember**. A servicemember may waive the rights and protections provided by the act. A waiver permitting:

  1) modification, termination, or cancellation of a contract, lease, bailment, obligation secured by a mortgage, or other security interest; or

  2) permitting the repossession or foreclosure of property securing a debt

  must be made in a separate writing, executed during or after the servicemember's period of military service.

- **Other Topics Addressed.**

  - Enforcement of Bail Bonds During Military Service
  - Effect of Exercise of Rights under the Act (e.g. prohibition on future denial or revocation of credit based upon exercise of rights under the act)
  - U.S. Citizens Serving with Allied Forces
  - Co-Defendants Not in Military Service
  - Extension of Protections to Reservists and Inductees
  - Rights in Public Lands // Desert Land Entries // Mining Claims // Mineral Permits