COMMUNITY COUNSEL

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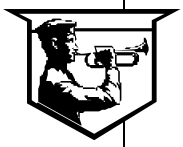
THE SOLDIERS' AND SAILORS' RELIEF ACT

RECENT CASES

- We give an overview of Protections afforded active military personnel.
- A prevailing party bears burden of allocating fees between claims where some allow recovery of fees and some do not.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

Recently an old federal law has gained modern relevance. It is the "Soldiers' and Sailors' Civil Relief Act of 1940" ("SSCRA"). Dating back as early as the civil war, all versions of SSCRA have been enacted primarily to assist service members of the US military in fulfilling their financial obligations while deployed in active military service.



SSCRA hits close to home for associations whose members have been deployed for "Operation Enduring Freedom," particularly on the issue of the collection of assessments. In a number of instances, we have seen service members (or their families) raise application of SSCRA to prevent an association from charging interest higher than six percent, or to cause judges to delay foreclosure sales for six months (or in one occasion declining to set a foreclosure sale at all, to allow ample opportunity for the service member to make payment arrangements) Is this proper under SSCRA? Probably, yes.

As to interest rates, Section 526 of SSCRA provides that the rate of interest on pre-service debts cannot exceed six percent per year during the member's period of service. Dependents of the service members who are co-liable on the debt can also claim the protection of the interest rate cap. To qualify for this benefit, three primary requirements have to be met. First, the debt must pre-date the member's call to federal active duty. Second, the member must request the application of Section 526. Third, the member's military service must materially affect his/her ability to pay the debt.

To avoid the application of this provision, the creditor has the burden of showing that the service member's military service does not materially affect his/her ability to repay the debt, a very difficult thing, when the service person is stationed, say, in the Middle East. Traditionally, Section 526 has been applied to mortgage loans, business loans and to credit card debts.

Whether Section 526 applies to the payment of assessments is unclear, since there are no reported cases on the issue. An association can argue that SSCRA does not apply to the payment of assessments because there is no extension of credit and interest is not an integral part of the debt until such time as the member fails to pay his/her obligation. Even if SSCRA is found to apply, associations need to remember that the cap only applies to those assessments coming due prior to the member's military deployment. As a practical matter, an association may want to reduce interest rates as a good will gesture to support the member's service to our country. In addition, the cost of litigating the application of Section 526 will far outweigh the additional amounts collected under the higher rate.

IMMEDIATE HELP IS NEEDED TO DEFEAT S.B. 2004. IT WILL DO SERIOUS HARM TO MIXED USE COMMUNITIES WITH BOTH CONDOS & HOMEOWNERS !!!

Section 532 can be used to stay mortgage foreclosures. Section 532 is applicable to associations since the lien foreclosure action is, in effect, a seizure of property for nonpayment of a financial obligation. Further, for condominiums, Section 718.116, Florida Statues clearly states that an association's lien is to be foreclosed in the same manner as a mortgage foreclosure. Thus, Section 532 can be used by a service member to prevent a foreclosure during the period of military service or within three months after termination of service unless allowed by court order or unless the service member …… {CONTINUED OVER}

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RECENT CASE SUMMARIES

{CONTINUED FROM FIRST SIDE} …. has agreed to the foreclosure by written agreement during his military service. Unless an association can demonstrate that the member's military service affects his/her ability to pay, the court may enter a stay and will more than likely abate the action out of deference to the service member.

Further, SSCRA can be used to stay almost any civil proceeding where the service member is either a plaintiff or defendant. Given the broad nature of the term "civil proceeding" contained in Section 521, an association can face the application of this section in covenant enforcement matters and possibly in arbitration matters. Section 521 of SSCRA allows a state or federal court to stay an action from sixty days after a service member leaves for service and for up to three months following the end of service. The court, on its own motion, or by motion made by the service member, can invoke the stay. To avoid the stay, a party must show that military service does not materially affect the member's ability to participate in the legal proceeding. Although Congress' intent was to temporarily suspend legal proceedings against service members, the provisions of SSCRA can be used to abate legal proceedings for a lengthy period of time, especially when the act gives the court discretion in determining the length of the stay. Associations can anticipate stays lasting for six months to a year.

A more routine use of SSCRA is the requirement that a party bringing an action must show that the defendant(s) is/are not in military service. Often directors are called upon to sign an affidavit of non-military service based on personal knowledge. The purpose of this affidavit is to comply with SSCRA. In most instances, a default judgment cannot be entered against a party unless an affidavit is filed showing that the defendant is not in military service. However, the failure to file an affdavit does not affect the validity of the judgment until such time as the service member properly shows that he or she was prejudiced by reason of military service in responding to the action.

As if associations were not already facing enough problems, they now have to deal with SSCRA, at least during the current war. If you know where Osama bin Laden is hiding, it might help your association to notify the authorities.

In **Clipper vs. Bay Oaks Condominium Association, Inc., et al.,** 27 Fla. L. Weekly D354 (Fla. 2nd DCA 2/8/2002) Clipper filed suit against Association and two other corporations alleging tortious interference with a business relationship, breach of fiduciary duty, libel, and slander. Association and the other defendants submitted a joint proposal for settlement to Clipper offering to settle the case for $7,500.00. Clipper rejected the proposal for settlement. The case ultimately went to trial and judgment was entered in favor of Association, which then sought a recovery of attorney fees incurred in the lawsuit based on the language of the declaration of condominium and the proposal for settlement. The trial court awarded Association its reasonable attorney fees and costs based upon both the proposal for settlement and the declaration of condominium. The Second District Court of Appeal reversed the trial court and held that Association was not entitled to an award of attorney fees based upon the settlement proposal due to technical errors in the proposal. The proposal, though submitted jointly by all of the defendants, failed to specify how much each defendant was willing to pay Clipper to settle the respective claims against each defendant. Additionally, the appellate court reversed the fee award to the Association based on the language of the declaration. The District Court of appeal determined that only one of the four counts of Clipper's complaint alleged violations of the declaration. The remaining counts of Clipper's complaint did not allege statutory violations nor violations of the declaration. The appellate court noted that where a party is entitled to fees pursuant to a written agreement, that entitlement extends only to the counts of the complaint which are based on that agreement. The party claiming fees has the burden of allocating the fees to the issues on which fees are awarded, or of showing that the issues are so intermingled that allocation is not feasible. In this case, the Association's expert witness on attorney fees failed to allocate or apportion the fees attributable to the claims arising under the declaration. The Court of Appeal noted that apportionment of the fees should have been an easy task because the portion of the complaint alleging a violation of the declaration was dismissed by the trial court for failure to file a petition for non-binding arbitration with the Division of Florida Land Sales, Condominiums, and Mobile Homes as required by Florida Law. Accordingly, the Court of Appeal remanded the case to the trial court for a hearing to determine the fees awardable solely for the defense of the count alleging violations of the declaration.

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