

UNDERWRITING MEMORANDUM 04-01

To: All South Carolina Agents
From: South Carolina State Office
Date: February 5, 2004
Re: Servicemember's Civil Relief Act

The *Soldiers' and Sailors' Civil Relief Act* from 1940 has been replaced, effective December 19, 2003 with the Servicemembers Civil Relief Act (108 P.L. 189; 117 Stat. 2835; 2003 Enacted H.R. 100). This is a complete restatement of the original Act. To access a complete copy of the Act, try <http://www.mortgagebankers.org/industry/docs/04/HR100enr.pdf>

Like the old version, this Act provides protective rights to the men and women serving in our armed forces. What is most important to the title industry are the provisions that allow for extended redemption rights and defenses to the foreclosure of liens. Since the new act is a complete restatement, and the last memo that went out on the old version was in 1990, below is a discussion of some of the pertinent sections.

Sec. 101. DEFINITIONS

- (1) Servicemember.--The term 'servicemember' means a member of the uniformed services...

This includes Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, Public Health Service, the National Oceanic and Atmospheric Administration, to name a few. In addition, Sec. 104 extends these rights to any U.S. citizen serving in any *other* Allied Forces.

Sec. 107. WAIVER OF RIGHTS PURSUANT TO WRITTEN AGREEMENT

- (a) In General.--A servicemember may waive any of the rights and protections provided by this Act. In the case of a waiver that permits an action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.
- (b) Actions Requiring Waivers in Writing.- - The requirement in subsection (a) for a written waiver applies to the following:

- (1) The modification, termination, or cancellation of - -

...(B) an obligation secured by a mortgage, trust, deed, lien or other security in the nature of a mortgage...

As stated, the Servicemember may waive these rights in writing, but cannot waive them prior to entry into "Military Service" (which can mean from receipt of call-up orders or induction notice to 90-180 days after discharge). So language in a mortgage which purports to waive these rights cannot be relied upon if the borrower subsequently is covered by this Act.

Sec. 201. PROTECTION OF SERVICEMEMBERS AGAINST DEFAULT JUDGMENTS.

...(b) Affidavit Requirement

- (1) Plaintiff to file affidavit. - - In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit-
 - (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
 - (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service...
- (3) Defendant's military status not ascertained by affidavit. - - If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court...

This is the Affidavit of Non-Military Service, which is routinely used in foreclosures. This section also provides for a stay of not less than 90 days if the defendant is in the military. An additional provision allows the servicemember the ability to file for a stay up to 90 days after being discharged from the service.

Sec. 206. STATUTE OF LIMITATIONS

- (b) Redemption of Real Property. - - A period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax or assessment.

Be careful when dealing with titles that include tax foreclosure sales in the chain. In addition, Sec. 501 deals with the sale of property to enforce taxes, and must be considered. What kind of evidence a municipality might offer to overcome the issue of military service of the taxpayer is yet to be seen.

Sec. 303. MORTGAGES AND TRUST DEEDS

- (a) Mortgage as Security. - - This section applies only to an obligation on real or personal property owned by a servicemember that - -
 - (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and
 - (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage...
- (c) Sale or Foreclosure. - - 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 90 days 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 [a written waiver under sec. 107]

The real issue is what we will now accept as sufficient for an Affidavit of Non-Military service. Minimally it should be expanded to cover all of the parties covered by the new law, including U.S. citizens serving in other Allied Forces. The penalties for violation include fines and imprisonment, in addition to the voiding of the title if the information on the affidavit should prove false or insufficient.

There is a new website for a commercial search service, www.ServiceMemberCivilReliefAct.com which is supposed to be online within a month that may be useful. It will generate inquiries to all of the military branches, including the Public Health Service. The Navy, in particular, takes over 10 weeks to respond, so the inquiries need to be made in a timely fashion.