

## The Servicemembers' Civil Relief Act and Non-Judicial Foreclosures

Cheryl recently [posted](#) about the [Servicemembers' Civil Relief Act \(SCRA\)](#). The SCRA is intended to provide protections for servicemembers on active duty and returning from active duty by suspending certain legal processes against them. The SCRA applies to all non-criminal proceedings, including areas subject to the clerk's authority such as adoptions, legitimations, foreclosures, and default judgments, among others. Cheryl's post identifies and walks through four steps judges and clerks should follow in applying the SCRA to most non-criminal proceedings. However, with regard to non-judicial power of sale foreclosures, a different analysis applies. These foreclosures are filed before the clerk of superior court under Chapter 45 of the General Statutes.

- **How does the SCRA fit with North Carolina General Statutes Chapter 45?**

Under Chapter 45 of the North Carolina General Statutes, one of the six elements the clerk must find prior to entering an order for sale relates to the military service of any borrower of a loan and any grantor under a deed of trust. [G.S. 45-21.12A](#) states that the clerk shall not conduct a hearing unless the trustee or lender files a certification that the hearing will not take place at a time that is during or within 90 days after a period of military service of any borrower or grantor. The lender or trustee must file the certification required under G.S. 45-21.12A in all foreclosure cases filed before the clerk of superior court.

The SCRA, a federal law, applies *in addition to* this North Carolina statute.

### **What does the SCRA require in addition to G.S. 45-21.12A?**

The SCRA adds an additional requirement in those foreclosure cases where any individual borrower or grantor does not make an appearance. Where an individual borrower or grantor is not present at the hearing and does not file anything in the foreclosure proceeding, the lender or the trustee must file an affidavit regarding the military status of that individual. [50 U.S.C. app. sec. 521](#). A certification alone will not suffice. As Cheryl noted in her post, the SCRA places the responsibility for making sure the affidavit is filed on the court and, in the case of non-judicial foreclosures, on the clerk.

An affidavit requires more than a certification because it must be signed under oath and notarized.

[50 U.S.C. app. sec. 521\(b\)\(4\)](#). In addition, the affiant must have personal knowledge of the facts they are attesting to in the affidavit. [In re Yopp, 217 N.C. App. 489, 492 \(2011\)](#). When an affidavit is submitted by the trustee or lender to the clerk, ideally it will have a copy of the [Department of Defense \(DOD\) Manpower Data Center](#) database search attached evidencing the affiant's search of the DOD records, either via online search or pursuant to written request to the DOD. If the affidavit does not include the results of such a search, the affidavit should set forth facts that are *within the personal knowledge of the affiant* that support the affiant's statement regarding the defendant's military status. A bare assertion in the affidavit that the defendant is not in the military is not sufficient to satisfy the SCRA. It is in the clerk's discretion as the judge in the foreclosure proceeding to determine whether the affidavit is competent and sufficient evidence of the defendant's military status. If the affiant is unable to determine whether or not the individual is in military service, then the affidavit should state that fact and the clerk should not proceed with the hearing until the individual's military status is determined. [50 U.S.C. app. sec. 521\(b\)\(1\)\(B\)](#); [G.S. 45-21.12A\(a\)](#).

An affidavit filed pursuant to the SCRA in those cases where a defendant does not make an appearance may incorporate language to satisfy the certification requirement under GS 45-21.12A so that a trustee or lender does not have to file both a certification and an affidavit. Wake County adopted a [form SCRA affidavit](#) for use in civil proceedings that may be adapted for use in a foreclosure proceeding by a lender or trustee.

- **What is the applicable period of protection for the servicemember under the SCRA?**

The period of protection for servicemembers under the SCRA is the same as under G.S. 45-21.12A, which is during service and up to 90 days after the end of the period of military service. [50 U.S.C. app. sec. 533\(b\)](#). Under the SCRA, there was previously an exception for actions to enforce a mortgage or deed of trust, including foreclosures, which extended this period to 9 months after the period of service. *Id.* However, this 9 month protection ended on December 31, 2014. There has been no further extension of the 9 month protection past this date. Therefore, as of January 1, 2015, the protection period for an action to enforce a mortgage or deed of trust is now during service plus the 90 day period after service ends.

- **What if the certification or affidavit filed in the foreclosure proceeding states that a borrower or grantor is on active duty or within 90 days of service?**

Under G.S. 45-21.12A, the lender and the trustee may not exercise the power of sale and the clerk may not hold the foreclosure hearing if the certification or the affidavit states that the servicemember is on active duty or within 90 days of service. The clerk also should not hold the hearing if an individual borrower or grantor personally appears or appears through their counsel and provides evidence that they are in fact on active duty or within 90 days of service. [G.S. 45-21.12A\(a\)](#). This prohibition on continuing with the hearing set forth in G.S. 45-21.12A is more stringent than the SCRA, which allows for other non-criminal proceedings to continue on certain terms as noted in steps two through four Cheryl's [blog post](#).

- **Is it possible for the servicemember to waive the requirements of the SCRA and G.S. 45-21.12A?**

Yes. The parties and the clerk may proceed with the foreclosure hearing if the servicemember waives the protections of Chapter 45 and the SCRA by filing a waiver that is:

1. In writing that is at least 12-point type,
2. Located in a document that is separate and apart from the loan documents, including the note and deed of trust,
3. Executed during or after the servicemember's period of military service, and
4. Specifies the legal instrument and the servicemember to which the waiver applies.

[50 U.S.C. app. sec. 517](#); [G.S. 45-21.12A\(b\)](#).