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# Regulatory Theory and the Enforcement of the Financial Protections of the Servicemembers Civil Relief Act

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**REGULATORY THEORY AND THE ENFORCEMENT  
OF THE FINANCIAL PROTECTIONS OF THE  
SERVICEMEMBERS CIVIL RELIEF ACT**

**Kirk D. Jensen\***

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## INTRODUCTION

In observing the behavior of regulatory agencies, scholars have observed many bureaucratic tendencies and biases that often influence agency decision making. Even well-intentioned agencies acting in good faith may be influenced by these predilections because they are a result of human cognitive processes and naturally-occurring incentives.<sup>1</sup> Scholars have identified many such tendencies and biases, including (1) the tendency for agencies to take increasingly aggressive interpretations of the laws they administer; (2) a tunnel vision and selection bias resulting in a myopic focus on regulatory mission; (3) a limited ability to evaluate the marginal costs and benefits of actions, including a discounting of externalized costs; and (4) a bias toward short-term goals even at the expense of long-term costs.<sup>2</sup>

The tendency toward aggressive administration can lead a regulatory agency to overextend, or take an overly muscular view of the laws it enforces in ways that may be inconsistent with broader public policy or even with the goals of the legislation itself. The tunnel vision bias can lead an agency to focus so closely on advancing its own regulatory agenda that it pays inadequate attention to costs that its actions may impose in other areas and that may impede other important policy goals. The limited ability to measure marginal costs and benefits can lead an agency to overvalue those marginal benefits consistent with its regulatory mission, while undervaluing the costs that are external to its regulatory purview. And the short-term bias can cause an agency to focus primarily or exclusively on the short-term gains of its actions while giving less attention to the longer-term implications of its actions.

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1. See, e.g., Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 313–14 (2013) (noting that cognitive biases do not evidence bad faith, but instead arise from “common human development.”).

2. See, e.g., Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 NW. U. L. REV. 861, 872 (2007).

These identified bureaucratic tendencies are useful in understanding agency decision making in connection with the many recent agency actions enforcing the financial protections of the Servicemembers Civil Relief Act (SCRA).<sup>3</sup> The SCRA provides wide-reaching protections to servicemembers<sup>4</sup>—defined generally in the SCRA as any member of the uniformed services, including the U.S. armed forces<sup>5</sup>—regarding consumer financial products, such as mortgages, credit cards, automobile loans, student loans, real estate and automobile leases, and more.<sup>6</sup> Although the SCRA languished in regulatory obscurity for many years, it is not surprising that—with over two million active duty servicemembers and National Guard and Reserve members<sup>7</sup>—the Act’s financial services protections have been the source of intense scrutiny in recent years. Since 2011, federal law enforcement and regulatory agencies have

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3. Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–515, 516–597b (2012) (effective Dec. 19, 2003).

4. Although use of the term “service member” would ordinarily be grammatically correct, this Article will use “servicemember” throughout in order to be consistent with the statute.

5. 50 U.S.C. app. § 511(1); 10 U.S.C. § 101(a)(5). The term “uniformed services” is defined to include members of the armed forces, as well as the commissioned corps of the Public Health Service and National Oceanic and Atmospheric Administration. 10 U.S.C. § 101(a)(5). The SCRA’s protections generally apply to servicemembers in “military service,” which includes active duty in the uniformed services, as well as active National Guard service in cases where the call to service is authorized by the President or Secretary of Defense, supported by federal funds, and meets other criteria. 50 U.S.C. app. § 511(2). “Active duty” extends beyond deployment, and includes many members of the full-time armed forces serving within the continental United States. 10 U.S.C. § 101(d)(1).

6. The SCRA provides wide-reaching protections to servicemembers regarding consumer financial products and services. These include limitations on the rate of interest on a credit obligation the servicemember incurs prior to military service, limitations on the foreclosure and repossession of collateral securing a credit obligation, the ability to terminate leases on premises and automobiles, and protections regarding eviction of a servicemember and his or her dependents from a rental property. 50 U.S.C. app. §§ 531–35 (2012). The Act also provides important procedural protections for servicemembers, including protections regarding default judgments, the ability to stay civil proceedings when military service materially affects the servicemember’s ability to participate in a proceeding, and the tolling of statutes of limitation and periods to redeem real property. *Id.* §§ 521–26.

7. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-221, *SERVICEMEMBERS CIVIL RELIEF ACT: INFORMATION ON MORTGAGE PROTECTIONS AND RELATED EDUCATION EFFORTS* 8 (2014) [hereinafter GAO SCRA REPORT], available at <http://www.gao.gov/assets/670/660398.pdf>.

entered into over twenty public settlements with financial institutions resulting in hundreds of millions of dollars in remediation and penalties.<sup>8</sup> Other non-public actions have increased the total amount even further. The U.S. Department of Justice has also brought criminal prosecutions against individuals it alleged violated the financial protections of the SCRA.<sup>9</sup> Recent statements by federal and state enforcement agencies indicate that this scrutiny has not abated and will not abate in the near future.<sup>10</sup> And other government agencies continue to scrutinize the Act and the financial protections it provides to servicemembers.<sup>11</sup> This government scrutiny is in addition to ongoing private litigation over SCRA issues.<sup>12</sup>

While the SCRA was obviously intended to protect servicemembers, it was also carefully designed to balance servicemember interests with the legitimate interests of servicemembers' creditors.<sup>13</sup> Unlike previous laws placing absolute moratoria on actions against servicemembers, the SCRA permits actions against servicemembers except in cases where the servicemember's military service materially affects the servicemember's ability to protect his or her

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8. See *infra* Part III.

9. See, e.g., David Palmer, *Cullman Used Car Dealer Indicted in Federal Court*, CULLMAN TIMES (Mar. 28, 2013), <http://www.cullmantimes.com/local/x237731114/Cullman-used-car-dealer-indicted-in-federal-court>.

10. See, e.g., Press Release, State of Del. News, Biden: Financial Institutions Must Follow Financial Laws Protecting Military Personnel (Oct. 3, 2013), available at <http://news.delaware.gov/2013/10/03/biden-financial-institutions-must-follow-financial-laws-protecting-military-personnel/> (demanding information from “nearly 30 leading lending institutions” regarding SCRA compliance and urging federal law makers to give state attorneys general authority to prosecute violations of the SCRA); CONSUMER FINANCIAL PROTECTION BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 7 (Oct. 16, 2013), available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_student-loan-ombudsman-annual-report.pdf](http://files.consumerfinance.gov/f/201310_cfpb_student-loan-ombudsman-annual-report.pdf) (noting ongoing complaints that “a number of market [student loan] participants were making improper demands of active-duty servicemembers seeking benefits under the Servicemembers Civil Relief Act” and committing that “[t]he CFPB will continue to work closely with bank regulators and the U.S. Department of Justice to ensure that the law is being followed and violators are held accountable.”).

11. See, e.g., GAO SCRA REPORT, *supra* note 7.

12. E.g., *Jimenez v. Miami-Dade Cnty.*, No. 1:11-cv-23131-SCOLA (S.D. Fla. Jan. 18, 2013).

13. See *infra* Part II.

interests or to comply with his or her obligations. But as regulatory theorists may predict, the agencies enforcing the SCRA have aggressively enforced the Act solely with a focus on benefitting servicemembers, giving short shrift to the balancing of interests central to the Act and the potential costs of these aggressive enforcement positions. This Article for the first time examines the positions adopted by the agencies enforcing the SCRA and shows that too many of these positions are inconsistent with the purpose, structure, and text of the SCRA itself. In so doing, this Article provides additional support for several of the bureaucratic tendencies observed by regulatory theorists.

This Article begins by focusing on the four bureaucratic tendencies identified above that are useful in understanding the agencies' SCRA enforcement actions and positions taken therein. Next, because understanding the balancing of servicemember and creditor interests built into the SCRA is critical to understanding the agency departure from that balancing of interests, this Article includes a discussion of the history and evolution of the SCRA, showing that for nearly a century the Act has been designed to balance servicemember and creditor interests. Following that discussion, the Article discusses recent SCRA enforcement decisions, and shows that many of the public and non-public positions on SCRA provisions taken by the agencies are inconsistent with the purpose and structure of the Act—and, in some cases, inconsistent with the statutory text itself. This result is consistent with regulatory theory's observations regarding bureaucratic tendencies and biases. Finally, the Article will discuss some of the external costs imposed by the agencies' enforcement of the SCRA that do not appear to have factored into the agencies' decision making.

### I. CHARACTERISTICS OF AGENCY BEHAVIOR

Regulatory theorists have identified many tendencies that can affect a regulatory agency's decision making processes for better or worse.<sup>14</sup> Some are the result of various incentives operating on the agency, some may be the result of cognitive biases that influence all human decision making,

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14. *E.g.*, Zywicki, *supra* note 2, at 872–78 (discussing factors that may contribute to poor decision making in governmental bureaucracies).

and some may have other root causes. Four of these tendencies in particular are useful in understanding agency behavior in SCRA enforcement actions. These are the tendency toward an agency taking increasingly aggressive positions in interpreting and enforcing the statutes under the agency's purview; a tunnel vision resulting in a myopic focus on regulatory mission; a limited ability to evaluate the marginal costs and benefits of actions, including a discounting of externalized costs; and a bias toward short-term goals even at the expense of long-term costs. It is important to note that while these predilections can have profound impact on agency decision making, they do not suggest bad faith on the part of any particular decision maker. While bad faith may be a risk in the case of any decision maker, the bureaucratic tendencies discussed below are a natural part of the human condition and therefore may influence agency decision making even when decision makers are well-intentioned and are making sincere efforts to achieve favorable policy results as they see them.

*A. Tendency toward Increasingly Aggressive Interpretations*

Government agencies have a natural tendency to take increasingly aggressive positions both in seeking to expand the agency's jurisdiction and in interpreting and applying the laws the agency administers. This tendency is largely the result of a variety of incentives that exist at both the agency and individual decision maker levels.

Scholars have argued that public entities respond to many of the same incentives to act in a self-interested fashion as private entities—including the incentive to try to maximize the financial recoveries from enforcement actions.<sup>15</sup> This position may seem counterintuitive, particularly given that public-sector employees—including decision makers at administrative agencies—are paid on salary. Thus, public-sector decision makers may not stand to profit financially in the same way that private sector employees would. For example, if counsel representing a class of plaintiffs helps her clients achieve a large cash award or settlement, counsel also

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15. See, e.g., Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 856–57 (2014).

generally will be handsomely compensated.<sup>16</sup> But counsel representing a government agency who helps the agency achieve a large cash award or settlement—whether the funds pass entirely to others, or part or all is retained by the agency—generally will not profit monetarily for her success.

That does not mean, however, that government agencies and those who work for them are not also strongly incentivized to maximize financial recoveries. Where agencies are entitled to retain a portion or all of the recovery, the agency has an obvious monetary incentive to maximize recoveries. Whether this added revenue supplements legislative appropriations, or offsets reduced appropriations, the impact on the agency's ability to maintain its activities and staffing levels can be significant.<sup>17</sup> And even where agencies do not retain all or part of the recovery, the agency remains highly incentivized to maximize recoveries. Agencies are incentivized by reputational awards as well as monetary ones. An agency's reputation for being a strong and effective enforcement agency can provide important benefits to the agency in terms of oversight by legislatures and executive officials, deference from judges, and perception of the public generally.<sup>18</sup>

This incentive may be particularly powerful for agencies previously accused of inadequate oversight of their respective stewardships. For example, the federal banking

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16. Indeed, in some cases the resolution of class action litigation enriches the plaintiffs' lawyers while class members receive only a coupon. See, e.g., Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991 (2002) (demonstrating that coupons issued in coupon-based settlements are increasingly being structured to resemble promotional coupons, "making the settlement worthless to many (and sometimes most) class members."); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 327 (2001) ("In a number of consumer fraud class actions, the lawyers negotiated deals, which some courts approved, in which class members received coupons of little real economic value, and the plaintiffs' lawyers received millions of dollars calculated based on the purely nominal value of the coupons."); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 34 (2000) ("The 'coupon' class actions have become symbolic of this concern, with class members receiving a few coupons toward the purchase of a new car, airline ticket, or dog food, while class attorneys reap large fees.").

17. Lemos & Minzner, *supra* note 15, at 864–71.

18. *Id.* at 877–78.

agencies have been subjected to withering public scrutiny regarding their efforts to ensure SCRA compliance. In January 2011, JPMorgan Chase announced that it had “made mistakes” in compliance with the SCRA’s foreclosure and interest rate cap protections.<sup>19</sup> This announcement quickly led the House Committee on Veterans’ Affairs to hold hearings on alleged SCRA violations.<sup>20</sup> During this hearing, members of the plaintiffs’ bar testified of the SCRA violations they claimed to have seen during their representations of servicemembers.<sup>21</sup> This increased scrutiny subsequently led to a report by the Government Accountability Office, which concluded that regulatory oversight of financial institutions’ SCRA compliance was limited.<sup>22</sup> Under such scrutiny, it should come as no surprise that the regulatory agencies tasked with SCRA oversight and enforcement—the federal banking agencies and the Department of Justice—would have strong incentives to demonstrate renewed and increased vigilance in ensuring SCRA compliance by bringing public enforcement actions. It is no coincidence that the first, in what has become a long line of SCRA enforcement actions, was settled just a few months after the Committee hearings on alleged SCRA violations.<sup>23</sup> It should also come as no surprise that regulatory agencies would seek to demonstrate this renewed vigilance by seeking large monetary recoveries. Scholars have observed that all else being equal, agencies will emphasize more easily measured metrics.<sup>24</sup> Thus, enforcement agencies seeking to build or rehabilitate reputations as strong and effective will naturally gravitate

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19. *E.g.*, Karen Jowers, *Chase Spends \$2M to Fix Errors on Military Mortgages*, USA TODAY (Jan. 21, 2011), [http://usatoday30.usatoday.com/money/economy/housing/2011-01-21-military-mortgage-blunder\\_N.htm](http://usatoday30.usatoday.com/money/economy/housing/2011-01-21-military-mortgage-blunder_N.htm).

20. *Alleged Violations of the Servicemembers Civil Relief Act: Hearing Before the H. Comm. on Veterans’ Affairs*, 112th Cong. 1 (2011).

21. *See id.* at 66–68 (statement of Richard A. Harpootlian); *id.* at 82–83 (statement of Col. John S. Odom, Jr.).

22. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-700, MORTGAGE FORECLOSURES: REGULATORY OVERSIGHT OF COMPLIANCE WITH THE SERVICEMEMBERS CIVIL RELIEF ACT HAS BEEN LIMITED 19–20 (2012) [hereinafter GAO MORTGAGE FORECLOSURES].

23. *See infra* notes 212–217 and accompanying text.

24. *See generally* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 12 n.30 (2009) (citing studies).

toward more easily measured forms of success.<sup>25</sup> And few measures of success are as easily measured as win rates and financial recoveries.<sup>26</sup> Indeed, because financial recoveries are stated in dollar amounts, they are easily understood and digested, are generally indisputable, and are easily comparable.<sup>27</sup> Unlike win rates and other metrics, financial recoveries convey information about the magnitude and importance of the agency's enforcement activities.<sup>28</sup> Agency focus on financial recoveries is perhaps most easily observed in the captions of the press releases announcing various settlements of SCRA-related enforcement actions, which typically trumpet the amount of financial recovery.<sup>29</sup> Because other aspects of enforcement actions are less easily quantifiable (e.g., forward-looking changes in a company's policies and practices), the amount of financial recovery takes on particular significance for enforcement agencies.<sup>30</sup>

Of course, government agencies are not sentient beings; agency actions are determined and conducted by individuals. The incentives of individual agency employees are complicated and have been the subject of substantial scholarly focus.<sup>31</sup> The general perception has been that

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25. See Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639, 639 (2010) ("[T]he SEC tends to pursue high profile matters, to change its priorities frequently in accordance with public opinion, and perhaps most significantly, to pursue readily observable objectives, often at the expense of more important but less observable objectives.").

26. See, e.g., *id.* at 644–45; Lemos & Minzner, *supra* note 15, at 876.

27. Lemos & Minzner, *supra* note 15, at 876.

28. *Id.* at 877.

29. See, e.g., Press Release, Bd. of Governors of the Fed. Reserve Sys., Amendments to Consent Orders Memorialize \$9.3 Billion Foreclosure Agreement (Feb. 28, 2013), available at <http://www.federalreserve.gov/newsevents/press/enforcement/20130228a.htm>; Press Release, U.S. Dep't of Justice, Service Members to Receive \$39 Million for Violations of the Servicemembers Civil Relief Act (Apr. 4, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-crt-383.html>; Press Release, U.S. Dep't of Justice, \$25 Billion Mortgage Servicing Agreement Filed in Federal Court (Mar. 12, 2012), available at <https://d9klfgibkcquc.cloudfront.net/Settlement-USDOJ-FILING-news-release.pdf>.

30. Lemos & Minzner, *supra* note 15, at 876.

31. See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36–42 (1971) (stating that theories of government agencies must take into account the personal preferences of bureaucrats); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES

agency employees, including enforcement counsel, have “low powered” incentives relative to private-sector employees.<sup>32</sup> However, Professors Lemos and Minzner have recently argued that agency enforcement attorneys, whether career or non-career, also have strong incentives to achieve large financial recoveries in enforcement actions.<sup>33</sup> These incentives may affect even the best-intentioned agency personnel. These include the incentive to increase their desirability to current and future employers (particularly for non-career counsel who may be eyeing a move to the private-sector), and the incentive to enhance their individual internal and external reputations.<sup>34</sup>

These agency and individual incentives naturally lead to action. And the incentives influence agency action in predictable ways. First, agency and individual incentives can lead to an increased volume of enforcement activity. When the agency has a financial or reputational incentive to pursue financial recovery through enforcement, agency officials will be inclined to initiate more enforcement actions.<sup>35</sup> Second, these incentives can influence the type of remedies sought. While forward-looking injunctive relief may provide for greater public benefit in many cases, it is inherently more difficult to measure and provides less short-term reward to the agency. For example, if SCRA enforcement actions increase SCRA compliance throughout the financial services industry, it is unlikely that the absence of SCRA claims five years in the future will result in increased recognition or accolades to the enforcement agencies. But large financial recoveries provide significant recognition immediately. Accordingly, all else being equal, one would expect that both financial and reputational incentives would shift agency efforts toward greater financial recoveries.<sup>36</sup>

A focus on financial recovery can be increased by

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DO AND WHY THEY DO IT, at x (1989) (noting that economic and political scientists have recognized that bureaucrats, like entrepreneurs, seek to maximize their utility).

32. See, e.g., Lemos & Minzner, *supra* note 15, at 887–89 (summarizing research).

33. Lemos & Minzner, *supra* note 15, at 893.

34. *Id.* at 891–94.

35. *Id.* at 896–98.

36. *Id.* at 898–900.

competition among administrative agencies. Where multiple agencies have overlapping jurisdiction, one can expect that the financial and reputational incentives of enforcement actions can lead to competition among agencies, particularly competition with respect to recovery amounts.<sup>37</sup> In the SCRA enforcement context, this is evident in the remediation frameworks established by different federal enforcement agencies. The SCRA provides that the Department of Justice may seek penalties of up to \$55,000 for a first violation, and up to \$110,000 for subsequent violations.<sup>38</sup> But in the April 2012 National Mortgage Settlement,<sup>39</sup> the Department of Justice increased the penalty amount to \$116,785 per violation (plus any additional amount representing equity lost by the borrower).<sup>40</sup> Not to be outdone, in June 2012, the Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board announced a remediation framework for use in the Independent Foreclosure Review that further increased the SCRA per-violation penalty to \$125,000 (plus lost equity).<sup>41</sup> The agencies did not provide a public explanation for the successive increases over the statutory cap of \$110,000 per violation, but inter-agency competition would appear to be the most likely explanation.

These incentives also lead regulatory agencies to seek to expand their power and influence within whatever constraints and counter-incentives exist within the institutional framework in which they operate. This tendency can manifest itself in a sort of “empire building,” through which the agency seeks to expand its jurisdiction and sphere of influence.<sup>42</sup> But it can also manifest itself in an increasingly aggressive assertion of the laws the agency is empowered to enforce. Scholars have similarly identified this tendency in specialty tribunals, such as the Federal Circuit Court of Appeals, which tend to adopt an overly muscular

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37. *Id.* at 901–03.

38. Servicemembers Civil Relief Act, 50 U.S.C. app. § 597b (2012).

39. *See infra* notes 221–32 and accompanying text.

40. Consent Judgment § II(a)(1) Ex. H at 3–4, *United States v. Bank of Am. Corp.*, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012).

41. Office of the Comptroller of the Currency & Bd. of Governors of the Fed. Reserve Sys., *Financial Remediation Framework for Use in the Independent Foreclosure Review*, at 2 (June 21, 2012), *available at* <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20120621b2.pdf>.

42. Zywicki, *supra* note 2, at 872–74.

view of the laws entrusted to them.<sup>43</sup> And, of course, an aggressive interpretation of the laws it administers can contribute to the agency achieving greater financial and reputational awards in more cases—particularly if that aggressive interpretation is applied retroactively through an enforcement action.

A tendency to take increasingly aggressive positions in interpreting a statute through enforcement may be exacerbated if the agency views the risk of losing in litigation as minimal.<sup>44</sup> SCRA enforcement may be a case study of this principle. Servicemembers are held in high esteem by the majority of Americans. They have also been defined as a vulnerable population under the Dodd-Frank Act.<sup>45</sup> Financial institutions, on the other hand, generally have not been considered sympathetic defendants in recent years.<sup>46</sup> Financial institutions must exercise caution in litigating SCRA issues against servicemembers because such actions, even if the institution believes them to be completely justified and consistent with the Act, may be portrayed by those opposing the financial institution as an effort to erode servicemember protections. The negative public relations risk of appearing anti-servicemember is significant. And this risk likely would be heightened if the opponent in such litigation is a government agency, which no doubt would broadcast its efforts as motivated solely by desires to protect servicemember interests. It is no surprise that no financial

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43. *E.g.*, John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 659 (2009).

44. *E.g.*, Zywicki, *supra* note 2, at 873 (“[R]egulators’ decisions as to when and how to intervene are understood to result from the interplay between the pursuit of their own self-interests and the constraints and incentives created by the institutional framework in which they operate.”).

45. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1013(e), 124 Stat. 1376 (2010) (creating the Office of Servicemember Affairs to assist military families); *but see* Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 675–76 (2012) (arguing that military families enjoy financial benefits that exceed those enjoyed by civilians, including health care benefits, tax advantages, and housing).

46. *E.g.*, Laura Alix, *Credit Unions Reporting Steady Loan Growth*, BANKER & TRADESMAN (Sept. 22, 2013) (reporting that “banks are still battling negative PR and the perception that all banks operate like the behemoths that contributed to the financial crisis.”), *available at* <http://www.bankerandtradesman.com/news156618.html>.

institution has litigated SCRA issues with government agencies. And agency officials are no doubt aware of this dynamic. It seems likely, therefore, that SCRA enforcement may be an area where enforcement officials are even more emboldened to take aggressive positions because of the perceived minimal risk of losing in court.

### *B. Tunnel Vision*

Just as an agency's decision making may be influenced by incentives that lead it to take increasingly aggressive positions, it may also be influenced by tunnel vision, a focus on the agency's regulatory agenda to the exclusion of other important social and policy goals.<sup>47</sup> This myopic focus—similar to the concept of “escalation of commitment” studied in psychology and management<sup>48</sup>—is hardly surprising. Specific agencies have specific spheres of responsibility and areas of expertise. The agency and its resources will be focused on accomplishing its regulatory mission.<sup>49</sup> Other competing goals that are not part of that regulatory mission will receive less if any attention. And the subject matter expertise may not lend itself to considering other costs or implications of regulatory positions. Indeed, the Department of Justice itself has noted that other agencies may be too prone to tunnel vision, focusing only, or primarily, on the agency's own interests to the potential detriment of other public policy concerns.<sup>50</sup> For example, Professor Zywicki has noted that an environmental enforcement agency may be poorly suited to evaluate—and may not even consider—the impact its environmental policy decisions may have on

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47. *E.g.*, Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 *CARDOZO L. REV.* 2189, 2195 (2011) (concluding that agency decisions may reflect “‘tunnel vision,’ an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside.”).

48. *E.g.*, Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 *IOWA L. REV.* 471, 504 n.82 (2014) (collecting studies).

49. *E.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *GEO. L.J.* 97, 119 (2000) (“That agencies are systematically more loyal to their basic mission seems persuasive, even obvious.”).

50. *E.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 *COLUM. L. REV.* 507, 539 (2012) (discussing concerns about tunnel vision among the DOJ's justifications for centralized government litigation control).

matters outside its sphere, such as on economic development or national security.<sup>51</sup> And scholars have observed that this tunnel vision may be exacerbated in adversarial proceedings.<sup>52</sup> Thus, one would expect the tunnel vision tendency to be heightened in enforcement actions relative to rulemakings.

A selection bias in hiring may also exacerbate this tendency. It seems obvious that employees of an agency are more likely to be sympathetic to, rather than skeptical of, the agency's mission.<sup>53</sup> A person who believes in the mission of the agency, and is more willing to carry out that mission, is more likely to seek employment at the agency than a person who is not. And the good feelings and emotional satisfaction resulting from the employee's commitment to the agency's mission may help offset the reduced monetary income of working for a government agency relative to the private sector.<sup>54</sup> Thus, those who believe in the agency's mission generally will carry out that mission, heightening the tendency to focus narrowly on the agency's mission to the exclusion of other goals and ends. This selection bias may also increase the tendency toward adopting increasingly aggressive interpretations of the laws the agency administers, since those who are most committed to an agency's mission would be more prone to trying to expand that mission.

### C. *Evaluation of Marginal Costs and Benefits*

Regulatory theorists also observe that regulatory agencies tend to experience difficulties in estimating the marginal costs and benefits of regulatory action. This is largely because the costs of agency action often do not fall upon the agency, but rather on private parties.<sup>55</sup> In recognition of this limitation, Congress and executive officials

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51. *E.g.*, Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 893 (1999).

52. *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

53. Spence & Cross, *supra* note 49, at 119 ("People who are sympathetic to that mission are more likely to be attracted to work at the agency.").

54. *See, e.g.*, Zywicki, *supra* note 2, at 877 (discussing psychic and monetary income in selection bias); Lemos & Minzner, *supra* note 15, at 889 (comparing income for government lawyers with first year associates at large law firms).

55. *E.g.*, Zywicki, *supra* note 2, at 875.

have taken several steps to increase agency awareness of the costs imposed by regulatory actions. For example, President Clinton issued Executive Order 12866, which required agencies to assess the costs and benefits of intended regulations.<sup>56</sup> Additionally, the Regulatory Right-To-Know Act requires the Office of Management and Budget to prepare annual reports to Congress regarding the costs of federal regulations.<sup>57</sup> But the same type and level of cost-benefit analysis and public disclosure is not applicable to enforcement actions. Although enforcement agencies are expected to determine the public benefit of an enforcement action, including any deterrent on undesired conduct, the financial and reputational incentives will no doubt be factored (consciously or not) into this analysis.<sup>58</sup>

This limitation on ability to evaluate benefits and costs may be exacerbated when the potential costs are in spheres outside the agency's jurisdiction and expertise. As noted above, an environmental regulatory agency may be poorly suited to evaluate, if it even considers, the costs of its environmental policy decisions on areas outside its area of expertise, such as economic development and national security.<sup>59</sup> Another example illustrating the limited ability of agencies to evaluate marginal costs involves the FDA's limitations on manufacturers' ability to communicate correct information about the effects of their products. The FDA did not, however, factor into its decisions the impact its limitations had on the First Amendment rights of these manufacturers—an oversight for which courts subsequently took the FDA to task.<sup>60</sup>

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56. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) ("Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.").

57. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(3) [Title VI, § 624], 114 Stat. 2763, 2763A-161 (2000).

58. Lemos & Minzner, *supra* note 15, at 897–98 (arguing that an agency's cost-benefit analysis will be affected by the agency's potential self-interest in the enforcement action).

59. *See supra* note 51 and accompanying text.

60. *See Zywicki, supra* note 2, at 877–78 (discussing cases).

#### D. Short-Term Bias

A fourth tendency scholars have identified in regulatory agencies is a bias toward focusing on short-term results over longer-term effects. This cognitive bias is not a result of bad faith, but is a natural tendency to focus on short-term goals such as winning cases and maximizing recovery.<sup>61</sup> It is also a natural result of the incentives of administrative agencies. Agencies function in a political world which prioritizes public results. Short-term gains, particularly those that can be counted in dollars, make more public and political impact than longer-term welfare improvements. Political officials may hold their positions only until the next election or administration change. Accordingly, they may be more inclined, whether intentionally or not, to support enforcement officials who achieve short-term results that are readily identifiable and easily quantifiable. Even agency officials who would consciously prefer long-term welfare maximization may suffer from this cognitive bias, leading to an inadvertent focus on short-term over long-term benefits.<sup>62</sup> This bias may affect the evaluation of costs as well as benefits. This may be particularly true when the benefit is immediate but the cost is borne over the long term.<sup>63</sup>

## II. THE HISTORY AND EVOLUTION OF THE SCRA'S BALANCING OF SERVICEMEMBER AND CREDITOR INTERESTS

One of the ways the bureaucratic tendencies identified by regulatory theorists has been exhibited by the agencies' SCRA enforcement efforts is in the agencies' departure from the SCRA's balancing of servicemember and creditor interests. As was true of its predecessor legislation, the SCRA is obviously intended to benefit servicemembers and their dependents.<sup>64</sup> Servicemembers face serious challenges

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61. See, e.g., Barkow, *supra* note 1, at 313–14 (citing studies).

62. E.g., James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL'Y 779, 795 (2012).

63. Cooper & Kovacic, *supra* note 62, at 782.

64. See, e.g., James P. Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 115, 116 (1991) (“The premise underlying the SSCRA is that service members should not be disadvantaged either legally or financially when called to active service.”).

when they enter military service, particularly those who are called by their nation to leave civilian life to enter the military. As one commentator observed, “active military service may cause severe, often insurmountable, problems in handling personal affairs back home: frequent involuntary moves, extended deployments overseas, long separations from families sometimes with little advance notice.”<sup>65</sup> Such concerns understandably can distract servicemembers from the task at hand, not only jeopardizing their own security but also potentially impairing the national defense.<sup>66</sup> Accordingly, Congress enacted the SCRA “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service” in order “to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation.”<sup>67</sup>

But as important as that objective is, the Act was designed to do even more.

Congress addressed these problems [faced by servicemembers] adequately and equitably through the Act’s skillfully crafted balance among the needs of our nation for a strong national defense, the needs of Servicemembers—and their families—for security in their personal affairs, and the needs of those who have dealt with and depend upon Servicemembers for fulfillment of their obligations.<sup>68</sup>

In other words, Congress designed the SCRA not only to protect servicemembers and their interests, but also to

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65. H.R. REP. NO. 108-81, at 51 (2003) (quoting *The Servicemembers’ Civil Relief Act and the Soldiers’ and Sailors’ Civil Relief Act, Hearings on H.R. 5111 and H.R. 4017 Before the Subcomm. on Benefits of the H. Comm. on Veterans’ Affairs*, 107th Cong., 2d Sess. 3 (2002) (statement of Craig W. Duehring, Acting Assistant Sec’y of Def., Reserve Affairs, Dep’t of Def. [hereinafter Duehring Statement])).

66. See, e.g., *id.* (“Congress also recognized the need to have military men and women focused on their operational mission free from worry about the welfare of their families or their personal affairs.”).

67. Servicemembers Civil Relief Act, 50 U.S.C. app. § 502 (2003).

68. H.R. REP. NO. 108-81, at 51 (quoting Duehring Statement, *supra* note 65, at 3–4, 133).

protect creditors to whom servicemembers owe obligations.<sup>69</sup> This Part discusses the history and evolution of the balancing of these interests, following with a discussion of the agencies' departure from this balancing of interests in Part III.

#### A. Pre-1918 Moratory Legislation

The SCRA has its roots in moratory legislation from the Civil War and earlier. Moratory legislation—legislation staying actions against military servicemembers while those servicemembers were at war—has a long history. Moratory legislation was passed by European countries during the Thirty Years' War, the war of Spanish succession, the Napoleonic Wars, and the War of 1870.<sup>70</sup> The first such law in the United States was passed during the War of 1812.<sup>71</sup> In December of 1812, with British troops advancing rapidly on New Orleans and battles raging along the nation's then-western border, the Louisiana legislature implemented a "stay law" which provided that "no civil suit or action shall be commenced, or prosecuted before any court of record, or any tribunal of the state, till the first of May next."<sup>72</sup>

During the American Civil War, the legislatures of several states—both Union and Confederate—passed laws designed to stay legal actions to which the servicemember was a party.<sup>73</sup> The U.S. Congress also enacted legislation

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69. *E.g.*, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 260, SERVICEMEMBERS CIVIL RELIEF ACT GUIDE § 1-2, at 1-3 (2006) [hereinafter JAG SCRA GUIDE] ("[The] Act is also designed to protect rights of individuals having causes of action *against* persons in the military service." (emphasis in original) (citing *Ray v. Porter*, 464 F.2d 452 (6th Cir. 1972); *Ricard v. Birch*, 529 F.2d 214 (4th Cir. 1975))).

70. A. H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061, 1064 (1933); Robert H. Skilton, *The Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942*, 91 U. PA. L. REV. 177, 178-79 (1942) [hereinafter Skilton, *SSCRA*]; see also generally Robert H. Skilton, *Moratoria and the Soldiers' and Sailors' Civil Relief Act*, 227 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 28 (1943) [hereinafter Skilton, *Moratoria*].

71. H.R. REP. NO. 108-81, at 32 (2003) (citing the Louisiana law as the first moratoria statute in the United States).

72. *Johnson v. Duncan*, 3 Mart. 530, 546 (La. 1815) (quoting the Louisiana statute). The *Johnson* court upheld the Louisiana law as a valid exercise of the State's police power. *Id.* at 542, 545. See also Feller, *supra* note 70, at 1072-73 (discussing the Louisiana stay law and *Johnson*); H.R. REP. NO. 108-81, at 32 (2003).

73. See Feller, *supra* note 70, at 1081-85 (detailing state moratoria laws); *Soldiers' and Sailors' Civil Relief Bill: Hearings on S. 2859 and H.R. 6361*

automatically suspending statutes of limitation in matters involving servicemembers.<sup>74</sup>

*B. The Soldiers' and Sailors' Civil Relief Act of 1918*

Decades later, in the late stages of World War I, Congress again considered legislation to protect servicemembers whose military service may impair the servicemember's ability to protect his or her interests. At the time it was discussed, many of the states had already enacted moratory laws similar to those discussed above.<sup>75</sup> These laws, like their predecessors, were absolute in character, preventing legal actions from commencing or progressing against servicemembers during military service.<sup>76</sup> The inflexible nature of these laws was deemed unfair by many at the time of the First World War, since there were many cases where a servicemember may be in a position to protect his or her interests—and so the moratorium would provide little benefit to the servicemember, but substantial hardship to a servicemember's creditors.<sup>77</sup>

In August of 1917, just weeks after the United States entered World War I, the Office of the Judge Advocate General prepared a draft of a bill that would later become the

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*Before the S. Subcomm. on the Judiciary, 65th Cong. 38 (1917) (discussing state laws protecting servicemembers); Skilton, SSCRA, supra note 70, at 178 (discussing same); see also WILLIAM M. ROBINSON, JR., JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA 83–88 (1941). Moratory laws were also enacted subsequent to World War I during the Great Depression. See, e.g., Skilton, SSCRA, supra note 70, at 178–79 (“The late depression (and indeed all previous major depressions) produced many notable examples of governmentally imposed stays upon obligations, beginning with the Banking Holiday of 1933 and including a variety of moratoria on mortgage foreclosures.”).*

74. Act of June 11, 1864, ch. 118, 13 Stat. 123.

75. Skilton, *SSCRA*, *supra* note 70, at 179; *see also* H.R. REP. NO. 181, at 3 (1917), *reprinted in* 55 CONG. REC. 7789 (1917) (“In our own Civil War, almost every State, both North and South, passed some law to give protection against suit to men in military service. Even now in the present war States have passed stay laws of one kind or another. State statutes granting exemption to men in the National Guard are almost universal. The variety of these laws now and in the Civil War is as wide as the laws are numerous.”). Moratory legislation had also been passed in Germany, England, and France. Comment, *Moratory Legislation by Congress*, 27 *YALE L.J.* 802, 805 (1918).

76. Skilton, *SSCRA*, *supra* note 70, at 179.

77. *Id.*

Soldiers' and Sailors' Civil Relief Act of 1918 (SSCRA).<sup>78</sup> Assisting the Judge Advocate General were prominent military lawyers, private-sector lawyers, and academics, including John H. Wigmore, the author of *Wigmore on Evidence* and later Dean of the Northwestern School of Law, who had been inducted into the military and assigned to the Judge Advocate General's Office.<sup>79</sup> Once the bill had been introduced into the House, the House Committee on the Judiciary, along with Major/Professor Wigmore and others, spent ten continuous days working on the draft, eventually producing a new bill.<sup>80</sup>

This new bill reflected the lessons learned from the unfairness of the Civil War federal legislation and other absolute moratoria. The Committee's report recommending enactment of the SSCRA explained that some servicemembers would be able to comply with their obligations and may continue to need unimpeded access to credit while in military service. Because an absolute moratorium may risk creditors reducing servicemembers' access to credit, the Committee concluded that an absolute moratorium "is as much mistaken kindness to the soldier as it is unnecessary."<sup>81</sup> Yet the Committee acknowledged that "freedom from harassing debts will make them better and more effective, more eager soldiers, than if their loyalty and zeal is tempered with the knowledge that their country,

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78. See Mansfield Ferry, Samuel Rosenbaum & John H. Wigmore, *The History of the Soldiers' and Sailors' Civil Relief Act (With Explanatory Notes to the Different Sections and a Discussion of Its Constitutionality)*, 3 MASS. L. Q. 204, 204 (1918) (discussing the history of the SSCRA legislation).

79. See *id.*; H.R. REP. NO. 108-81, at 33 (2003). One of the principal concerns of the Committee was whether such civil relief legislation was permitted under the Constitution. See, e.g., Ferry, Rosenbaum & Wigmore, *supra* note 78 at 215-27 (analyzing the constitutionality of the SSCRA of 1918 and concluding that the Act was constitutional). In 1953, the SSCRA survived a challenge on constitutionality grounds. In *Dameron v. Brodhead*, 345 U.S. 322 (1953), the Court held that such legislation is authorized by Congress' power "to declare war" and "to raise and support armies." U.S. CONST. art. I, § 8, cls. 11-12.

80. Ferry, Rosenbaum & Wigmore, *supra* note 78, at 204 (discussing the process of drafting the bill); 55 CONG. REC. 7788 (1917) (statement of Rep. Webb) (discussing same); *id.* at 7793 (statement of Rep. Morgan) ("The authors of the bill were friends of all those in the military service. They were in full sympathy with the men in our land and naval forces, and desired to give them every reasonable protection.").

81. H.R. REP. NO. 181 (1917), *reprinted in* 55 CONG. REC. 7789 (1917).

which demands the supreme sacrifice, grudges a small measure of protection to their families and their homes.”<sup>82</sup>

Recognizing its duties both to servicemembers and to commercial interests,<sup>83</sup> the Committee and those working with it produced a bill that sought to balance the needs of those competing interests. Rather than enacting an absolute moratorium on civil actions, the Committee recommended giving discretion to courts regarding whether to stay matters or take other action to protect the interests of servicemembers and other parties.<sup>84</sup> Three of those who worked with the Committee in drafting the legislation explained that the SSCRA was designed to be a departure from other previous and then-current approaches.<sup>85</sup> Other approaches, including moratory legislation, created too broad an exemption from legitimate obligations since “there are many cases where the financial ability of soldiers to meet obligations in some way is not materially impaired by their entrance into service.”<sup>86</sup> Representative Webb, Chair of the House Committee on the Judiciary, confirmed that the bill that would become the SSCRA was a departure from previous moratory legislation which was “arbitrary, inelastic, inflexible.”<sup>87</sup> Rather than adopt similarly inflexible moratory legislation, Representative Webb explained that the bill was intended to give discretion to courts to achieve “even-handed justice between the creditor and the soldier,” and to avoid where possible the disruption of business interests.<sup>88</sup>

Thus, the Committee resolved to protect servicemembers in cases where the protection would be meaningful to the servicemember, while also giving creditors

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82. *Id.*

83. *Id.* at 7788 (“The committee has felt keenly its duty and responsibility, not only to the soldiers and sailors but to the commerce of the country, which in many ways already bears heavy war burdens. It has not failed to appreciate that a large view of the exigencies of the war requires that any relief that is given to a soldier shall not be at the expense of industry. The committee fully realizes the truth of the statement that the war is being fought in this country as well as on the battle fields of France, and that any drastic measure which even tended to cripple manufacturing and trade would be prejudicial to the country’s best interest.”).

84. Ferry, Rosenbaum & Wigmore, *supra* note 78, at 207.

85. *Id.*

86. *Id.*

87. 55 CONG. REC. 7787 (1917) (statement of Rep. Webb).

88. *Id.*

of servicemembers as much protection as possible under the circumstances.<sup>89</sup> And to accomplish this balancing of interests, the Committee elected to grant broad discretion to the courts to resolve matters equitably and preserve the status quo where appropriate.<sup>90</sup> This approach was adopted to provide protections both regarding procedural and substantive issues. The drafters explained that the bill was not intended to prevent creditors from exercising legitimate obligations, but to require them to do so in court. The court would then have discretion to protect a servicemember's interests where the servicemember's military service materially affected the servicemember's ability to do so.<sup>91</sup>

On October 4, 1917, the House voted unanimously to pass the bill.<sup>92</sup> The Senate then considered the bill passed by the House,<sup>93</sup> and in turn voted unanimously to pass.<sup>94</sup> The SSCRA of 1918 became law on March 8, 1918.<sup>95</sup> The Act contained many provisions intended to benefit servicemembers, procedurally and substantively, in matters related to a servicemember's financial obligations. Procedurally, the Act's protections included (1) protections to servicemembers against default judgments, requiring plaintiffs to file an affidavit indicating whether a servicemember is in military service and permitting the vacation of judgments against servicemembers in certain circumstances;<sup>96</sup> (2) requiring courts to stay civil actions or proceedings in which a servicemember is a party in certain circumstances;<sup>97</sup> and (3) tolling statutes of limitation during a servicemember's period of military service.<sup>98</sup> Substantively, the SSCRA of 1918 included (1) limitations on eviction of a

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89. Skilton, *SSCRA*, *supra* note 70, at 180.

90. *Id.* ("The solution was to throw the entire matter upon the courts, by giving them discretion to decide upon the grant of moratoria in individual cases, subject to certain guides defined in the statute. . . . It had both the advantages and disadvantages of elasticity.")

91. Ferry, Rosenbaum & Wigmore, *supra* note 78, at 207-08.

92. *Id.* at 204.

93. 56 CONG. REC. 1747 (1918) (statement of Sen. Overman) (stating that the Senate considered the bill as passed by the House).

94. *Id.* at 1755.

95. Soldiers' and Sailors' Civil Relief Act, Pub. L. No. 65-103, 40 Stat. 440 (1918).

96. *Id.* § 200.

97. *Id.* § 201.

98. *Id.* § 205.

servicemember or a servicemember's dependents without a court order;<sup>99</sup> (2) limitations on the repossession of real or personal property purchased through an installment contract for purchase, or leased "with a view to purchase such property," without a court order, and permitting a court to stay repossession proceedings in certain circumstances;<sup>100</sup> and (3) provision that a foreclosure of real or personal property secured by a mortgage, trust deed, or other security in the nature of a mortgage is invalid unless pursuant to court order, and permitting a court to stay foreclosure proceedings in certain circumstances.<sup>101</sup> In the final Act, the balancing of servicemember and commercial interests was achieved by introducing into the Act the concept of "material effect." This concept—either in those or related terms—is an essential element in nearly all of the financial services-related provisions of the SSCRA of 1918, as well as other provisions.<sup>102</sup> This concept is discussed in greater detail below.<sup>103</sup>

The drafters' intent to balance servicemember and commercial interests is also evidenced by the anti-evasion provision of the SSCRA of 1918. This provision allowed courts to take action notwithstanding the provisions of the SSCRA if "it is made to appear to the satisfaction of the court that any interest, property, or contract has since the date of the approval of this Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act . . . ."<sup>104</sup> The drafters explained that

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99. *Id.* § 300.

100. Soldiers' and Sailors' Civil Relief Act, Pub. L. No. 65-103, § 301, 40 Stat. 440, 443–44.

101. *Id.* § 302.

102. *See, e.g., id.* §§ 200(4) (permitting vacation of default judgment if, in part, the person "was prejudiced by reason of his military service."); 201 (requiring stay unless servicemember "is not materially affected by reason of his military service."); 300(2) (permitting stay of eviction proceedings unless court determines that the ability of tenant to pay rent "is not materially affected by reason of such military service."); 301(2) (permitting stay of repossession proceedings unless court determines that the ability of the servicemember to comply with the contract "is not materially affected by reason of such service."); 302(2) (permitting stay of foreclosure proceedings unless court determines that the ability of the servicemember to comply with the contract "is not materially affected by reason of his military service.").

103. *See infra* Part II.G.

104. Soldiers' and Sailors' Civil Relief Act § 600.

this provision “makes it useless for ingenious debtors to seek to obtain the benefits of this act by colorable transfers or assignments to persons who are or may become soldiers or sailors.”<sup>105</sup> Thus, for example, a business entity could not avoid enforcement of an obligation by transferring a deed to one of its officers as the officer is entering military service.<sup>106</sup> By its terms, the Act expired six months after the end of World War I.<sup>107</sup>

### C. *Soldiers’ and Sailors’ Civil Relief Act of 1940*

In 1940, as the United States prepared once again to enter a world war, the SSCRA was resurrected.<sup>108</sup> The 1940 version of the Act was virtually identical to the 1918 version.<sup>109</sup> As a result, the balancing of interests built into the 1918 Act remained intact.

When the 1940 Act was first enacted, it was widely approved.<sup>110</sup> It soon became apparent, however, that the Act was insufficient to address changed social, military, and economic circumstances.<sup>111</sup> Among these changes was the

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105. Ferry, Rosenbaum & Wigmore, *supra* note 78, at 213.

106. JAG SCRA GUIDE, *supra* note 69, § 2-8, at 2-11.

107. Soldiers’ and Sailors’ Civil Relief Act § 603, 40 Stat. at 449 (“[T]his Act shall remain in force until the termination of the war, and for six months thereafter . . .”).

108. Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178. Great Britain similarly enacted legislation to protect servicemembers during World War II. For a discussion of this legislation, see generally Rowland Frederick John Sanders, *Wartime Relief from Civil Obligations in Great Britain*, 227 ANNALS AM. ACAD. POL. & SOC. SCI. 62 (1943).

109. See, e.g., H.R. REP. NO. 108-81, at 33 (2003) (noting that in 1940 “Congress re-enacted the SSCRA almost verbatim.”); Amy J. McDonough, Gregory M. Huckabee & Christopher C. Gentile, *Crisis of the Soldiers’ and Sailors’ Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore*, 43 MERCER L. REV. 667, 670 (1992) (noting same); Skilton, *SSCRA*, *supra* note 70, at 179. Two of the most significant changes made in the 1940 SSCRA were the addition of a method for administering insurance protection and protections with respect to public lands, and an increase of the rent eviction ceiling from \$50 to \$80. H.R. REP. NO. 108-81, at 33 (citing *Civil Liabilities of Military Personnel: Hearing on S. 4270 Before the S. Comm. on Military Affairs*, 76th Cong., vol. 2, 18 (1940)).

110. See, e.g., Skilton, *SSCRA*, *supra* note 70, at 181.

111. H.R. REP. NO. 108-81, at 33 (2003) (“Within two years [of 1940] it became apparent that new social and business realities made a major update necessary.”); McDonough, Huckabee & Gentile, *supra* note 109, at 670 (noting same); Skilton, *SSCRA*, *supra* note 70, at 181 (“At the time it was passed, it seemed adequate to meet the needs of men who were expected (by some Congressmen, at least) to remain in the services for one year of peaceful

realization that the increased duration of military service may impose substantial hardship on servicemembers whose military pay was significantly less than their civilian pay had been.<sup>112</sup> Additionally, ambiguities in the SSCRA,<sup>113</sup> and dissatisfaction in how the Act had been interpreted,<sup>114</sup> supplied additional motivation to modify the Act. In response to these concerns, a team led by Major William Partlow, U.S. Army, JAGC, prepared amendments to the 1940 Act.<sup>115</sup> These amendments ultimately were passed in 1942.<sup>116</sup>

One of the most notable additions proposed by Maj. Partlow's team was the creation of an interest rate ceiling. Under this provision, credit obligations incurred by a servicemember prior to military service could not accrue interest at a rate in excess of six percent annually.<sup>117</sup> Consistent with the 1918 Act's balancing of interests, this benefit would not apply if the borrower's ability to pay

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training. The actualities of war have destroyed these pleasant illusions. The army must be held intact, and it must grow. More married men, and older men, whose financial problems demand a broad and comprehensive program of moratory relief, are being inducted. The conflict may be protracted; it became obvious that the short period originally provided for payment by the soldier of his obligations upon his return from service, would not be enough." The growing dissatisfaction with the SSCRA of 1940 is evidenced by the number of bills introduced between 1940 and 1942 to amend the Act. See, e.g., Skilton, *SSCRA*, *supra* note 70, at 180 & n.15 (collecting bills).

112. See, e.g., 88 CONG. REC. 5368 (1942) (statement of Rep. Brooks) (explaining that the bill in part "arises from the differences in pay which a soldier receives and what the same man normally earns in civil life."); Gregory M. Huckabee, *Operations Desert Shield and Desert Storm: Resurrection of the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 141, 146-47 (1991) ("Differences in pay was a key factor in Congress's decision to provide special protection for indebtedness existing prior to call up to active duty.").

113. Skilton, *SSCRA*, *supra* note 70, at 181 (noting ambiguities).

114. THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 260, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT GUIDE § 1-1, at 1-1 (2000) [hereinafter JAG SSCRA GUIDE] ("In amending the Act [in 1942], Congress was motivated, in part, by the desire to override court decisions that, in some instances, had led to restrictive interpretations of the Act."); see also S. REP. NO. 1558, at 2 (1942) ("[I]n some instances where there has been doubt as to whether particular transactions or proceedings are within the scope of the Civil Relief Act, a new section on language has been added for the purpose of clarification only and to carry out the original intent of the Congress, but with no intent to exclude from the provisions of the Act any transaction or proceeding now included.").

115. McDonough, et al., *supra* note 109, at 670.

116. Soldiers' and Sailors' Civil Relief Act Amendments of 1942, Pub. L. No. 77-732, 56 Stat. 769.

117. *Id.* § 206.

interest on the obligation “is not materially affected by reason of such [military] service.”<sup>118</sup> The bill also included a new provision that would allow a court, in cases where the servicemember had received a stay of a foreclosure or repossession proceeding, to appoint a three-person panel to appraise the property and to order an amount “as may be just” be paid to the servicemember as a condition of foreclosure or repossession.<sup>119</sup>

The 1942 amendments were expressly designed to continue the balancing of interests established in the 1918 and 1940 Acts. Testifying before Congress regarding the bill that would become the 1942 amendments, Maj. Partlow “reaffirmed that the purpose of the Act was ‘toward the withholding of remedies, rather than the extinguishments of rights.’”<sup>120</sup> Recognizing this balancing of interests, one commentator at the time observed that the Act did not create an opportunity for servicemembers to avoid legitimate obligations; rather, it provides courts with discretion to provide temporary relief when military service materially affects a debtor’s ability to comply with obligations.<sup>121</sup> The amendments were signed into law on October 6, 1942.<sup>122</sup>

#### *D. Developments Between 1942 and 2003*

In the sixty years following the 1942 amendments, the balancing of servicemember and commercial interests

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118. *Id.*

119. *Id.* § 303. The bill included other protections beyond the scope of this Article, including provisions allowing servicemembers to terminate leases in circumstances but allowing lessors to apply to a court for relief that “in the opinion of the court justice and equity may in the circumstances require,” *id.* § 304, allowing courts to grant servicemembers anticipatory relief relating to a credit obligation, upon application from the servicemember, unless the court determines that the servicemember’s ability to comply with the terms of the obligation “has not been materially affected by reason of his military service,” *id.* § 700, and amendments relating to insurance, public lands, and others, *id.* arts. IV–V.

120. H.R. REP. NO. 108-81, at 34 (2003) (quoting *Soldiers’ and Sailors’ Civil Relief Act: Hearings on H.R. 7029 Before the H. Comm. on Military Affairs*, 77th Cong. 11 (1942)).

121. M. R. Neifeld, *Consumer Credit and the Soldiers’ and Sailors’ Civil Relief Act*, 227 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 45 (1943). Prof. Neifeld also wrote that the SSCRA was “a social scientist’s dream come true” because it would give unique insights into issues related to consumer credit, such as the psychology of credit and credit judgment.

122. Skilton, *SSCRA*, *supra* note 70, at 182.

remained in place as the central concept of the Act. The SSCRA of 1940, like the SSCRA of 1918, was designed to expire by its terms. The SSCRA of 1940 was to remain in force until the later of May 15, 1945, or six months after the end of World War II.<sup>123</sup> However, in 1948, after the SSCRA had expired, Congress passed the Military Selective Service Act, which contained a provision requiring the SSCRA to remain in force until it was “repealed or otherwise terminated by a subsequent Act of Congress.”<sup>124</sup>

Between 1942 and 2003, the SSCRA was amended twelve times (excluding the 1942 amendments discussed above). The amendments were relatively discreet, and in general were designed to update the Act to a changing world.<sup>125</sup> For example, to account for rising rents, Congress raised the rent ceiling in the SSCRA’s eviction protection from \$80 to \$150 in 1966,<sup>126</sup> and from \$150 to \$1,200 in 1991.<sup>127</sup> Additionally, in response to the terrorist attacks of September 11, 2001, and the large number of National Guard members called to active duty to protect infrastructure assets, Congress extended SSCRA protections to National Guard members called to active duty under 32 U.S.C. § 502(f) for at least thirty consecutive days.<sup>128</sup> Notwithstanding these and other updates during these decades, a consensus began to develop as the twentieth century drew to a close that the

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123. Act of Oct. 17, 1940, ch. 888, § 604, 54 Stat. 1178, 1191 (“This Act shall remain in force until May 15, 1945: [p]rovided, that should the United States be then engaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter . . . .”) (emphasis in original).

124. Selective Service Act of 1948, Pub. L. No. 758, ch. 625, tit. I, § 14, 62 Stat. 604, 623; *see also* H.R. REP. NO. 108-81, at 35 (discussing extension of SSCRA).

125. *See* Huckabee, *supra* note 112, 154–57 (discussing the various amendments); *see also* H.R. REP. NO. 108-81, at 34–35 (summarizing amendments).

126. Act of Mar. 7, 1966, Pub. L. No. 89-359, ch. 41, § 10, 80 Stat. 26, 28.

127. Soldiers’ and Sailors’ Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, § 2(a), 105 Stat. 34, 34.

128. Veterans Benefits Act of 2002, Pub. L. No. 107-330, tit. III, § 305, 116 Stat. 2820, 2821; *see also* J. Thomas Parker, *Soldiers’ and Sailors’ Civil Relief Act Now Applicable to the National Guard . . . Sort of*, 2003 ARMY LAW. 17, 19 (2003). Curiously, the Department of Defense opposed the provision of SSCRA benefits to National Guard members. *See* Duehring Statement, *supra* note 65, at 5, 136 (stating that the Department of Defense believed that state law, not federal, should apply to such duty).

SSCRA had become out of date. In 1991, three commentators wrote that “[p]atchwork amendment repairs since 1942 have proven insufficient to keep the SSCRA in step with the explosion of modern day technology and societal demands and obligations. . . . [M]ajor revision of the SSCRA must be undertaken to repair the armor that time has rusted.”<sup>129</sup>

One significant change in the military environment was the Department of Defense’s (DOD) initiation of the Total Force Policy. When the Selective Service Act terminated in 1973, effectively ending the draft, the DOD initiated the Total Force Policy which provided that reserve personnel, rather than draftees, would serve as the primary source of personnel to provide “surge” capabilities to the U.S. armed forces to allow the mobilization of large forces on short notice.<sup>130</sup> In the following decades, the armed forces shifted more and more of its combat readiness resources to the reserves as a fiscal measure.<sup>131</sup> As of 2012, the DOD reported that there were approximately 1.4 million active duty servicemembers and 850,000 National Guard and Reserve members. In the years following implementation of the Total Force Policy, and especially during the Persian Gulf War in the early 1990s, this shift from full-time military personnel to reserve personnel, and the difficulties faced by reservists called to active duty, raised concerns that the SSCRA did not adequately address the changing military and social environment.<sup>132</sup>

The consumer credit marketplace had also changed substantially. Consumer credit products had become more pervasive and had changed substantially since 1918 and

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129. McDonough, Huckabee & Gentile, *supra* note 109, at 683–84; *see also id.* at 671 (“Many provisions that had offered protection to servicemembers seventy years ago were hopelessly out of date in 1991.”); *Soldiers’ and Sailors’ Civil Relief Act and Veterans’ Reemployment Rights: Joint Hearing Before the Comms. on Veterans’ Affairs of the H.R. and U.S. Sen.*, 101st Cong., 2d Sess. 3 (1990) (statement of Rep. Smith) (“Since the Act was written at a time when our country was very different, both economically and socially, some of the provisions are fairly dated and perhaps needing revision.”).

130. *See, e.g., Role of the Reserves in the Total Force Policy: Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Services*, at 2–3 (1989) (statement of Richard A. Davis, Dir., Army Issues, Nat’l Sec. & Int’l Affairs Div.).

131. *See, e.g., id.*; McDonough, Huckabee & Gentile, *supra* note 109, at 668.

132. *See, e.g., McDonough, Huckabee & Gentile, supra* note 109, at 668; Huckabee, *supra* note 112, at 142.

1942.<sup>133</sup> For example, credit cards as they existed in the late twentieth century were unknown at the time of the First and Second World Wars.<sup>134</sup> Thirty-year mortgages were also very rare.<sup>135</sup> And the extensive leasing of automobiles and business equipment was a development the drafters of the original SSCRA could not have imagined.<sup>136</sup> In short, the drafters of the 1918 Act and the 1942 amendments could not have foreseen the revolution in consumer financial products and services that had taken place by the end of the twentieth century.

Nevertheless, Congress did not make any changes to the SSCRA during the sixty years after the 1942 amendments that indicated any intent to depart from the policy of balancing servicemember and commercial interests first built into the SSCRA of 1918 and continued in the SSCRA of 1940. Indeed, shortly before the SSCRA was replaced by the SCRA, the SSCRA itself had remained very similar to the original 1918 Act.<sup>137</sup> Thus, as of 2002, it was still the view of many that the Act remained designed to protect both servicemembers and those to whom servicemembers owed obligations. For example, Acting Assistant Secretary of Defense Craig W. Duehring testified before a subcommittee of the Senate Committee on Veterans' Affairs that Congress equitably addressed the challenges faced by servicemembers through "the Act's skillfully crafted balance" among the nation's need for a strong national defense, the servicemembers' interests, and the interests of the servicemembers' creditors.<sup>138</sup> And this view was consistent with decades of court jurisprudence.<sup>139</sup>

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133. See generally LENDOL CALDER, *FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT* (1999) (discussing the evolution of consumer credit products and services throughout the twentieth century).

134. *Id.* at 72, 220, 292–93.

135. *Id.* at 280–83.

136. H.R. REP. NO. 108-81, at 52 (2003) (quoting Duehring Statement, *supra* note 65, at 4, 134).

137. Memorandum from John T. Meixell, Office of the Judge Advocate Gen., U.S. Army, Legal Assistance Policy Div., *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act 1* (undated), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/lamp/servicememberscivilreliefact.authcheckdam.pdf>.

138. Duehring Statement, *supra* note 65, at 3, 133, quoted in H.R. REP. NO. 108-81, at 51.

139. See, e.g., JAG SSCRA GUIDE, *supra* note 114, § 1-5, at 1-5 ("[T]he Act

*E. The Servicemembers Civil Relief Act of 2003*

The SCRA continued the decades-old policy of balancing servicemember and commercial interests. The 2003 legislation was the culmination of efforts dating back to as early as 1991 to clarify and modernize the SSCRA.<sup>140</sup> Much of the final SCRA reflects a proposed revision of the SSCRA prepared by the DOD in 1991 and updated in 2002.<sup>141</sup> These proposed revisions had three stated goals: (1) “to make the Act easier to read and understand by clarifying its language and putting it in modern legislative drafting form;” (2) “to incorporate into the Act many years of judicial interpretation;” and (3) “to update the Act to take into account generally accepted practice under its provisions and new developments in American life not envisioned by the original drafters.”<sup>142</sup> In particular, changes in the financial products available to and utilized by servicemembers fueled the perception that a significant update to the Act was required.<sup>143</sup> As the bill that eventually became the SCRA moved through the legislative process in 2002 and 2003, these goals remained.<sup>144</sup>

In addition to these goals, the drafters and sponsors of the bill intended to maintain the balance between servicemember and commercial interests.<sup>145</sup> The report from

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‘may not be employed to enable one who had flouted his obligations in civilian life to obtain indefinite delay.’” (quoting *Franklin Soc’y for Home-Building & Sav. v. Flavin*, 40 N.Y.S.2d 582, 583, *aff’d*, 50 N.E.2d 653, *cert. denied*, 320 U.S. 786 (1943)); *see also* *Diamond v. United States*, 344 F.2d 703 (Ct. Cl. 1965); *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981).

140. *See, e.g.*, Gregory M. Huckabee, *Congress Does it Again—The Ghost of Major John Wigmores Returns!*, FED. LAW., May 2004, at 22 (describing the 2003 enactment of the SCRA as “a 12-year legislative pilgrimage into law.”).

141. Meixell, *supra* note 137, at 1.

142. *Id.* (quoting Memorandum from Colonel Steven T. Strong, Dir., Legal Policy, Office of the Sec’y of Def. (Pers. & Readiness), to Serv. Legal Assistance Chiefs (Oct. 3, 2001)).

143. *E.g.*, H.R. REP. NO. 108-81, at 52 (2003).

144. *See, e.g., id.* at 35 (noting that the bill was intended to clarify and modernize the SSCRA).

145. *See, e.g., id.* at 51 (“H.R. 5111 [the bill that formed the basis of the SCRA of 2003] maintains this important balance [between servicemember and commercial interests] while addressing three areas where our experience with the Act indicates that change is needed: clarifying and simplifying the language; incorporating generally accepted procedures; and updating the Act to reflect 60 years of change in America.” (quoting Duehring Statement, *supra* note 65, at 4, 134)); Eugene J. Kelly, Jr., John L. Ropiequet & Sharilee Smentek,

the Senate Committee on Veterans' Affairs accompanying the SCRA legislation noted that Congress's intent with the 2003 legislation was the same as it was in 1940.<sup>146</sup> On the floor of the House, Rep. Chris Smith of New Jersey, the author of the House bill, emphasized that "the act is intended to give a temporary reprieve to a servicemember and that it reflects the need to be fair to all parties . . . ."<sup>147</sup> In the proposed legislation, courts would serve the same role they had in the 1918 and 1940 versions of the Act, and the concept of "material effect" remained in existing protections and was expanded to new protections.<sup>148</sup> Rather than changing the purpose of the Act and the balance between interests built into it, Congress was focused on clarifying and modernizing the Act.<sup>149</sup> The SCRA became law on December 19, 2003.<sup>150</sup>

#### *F. Post-2003 Amendments*

In the years since the 2003 enactment of the SCRA, the Act's financial protections—and the balancing of interests built into them—have undergone few changes. One significant change was implemented in 2008 by the Housing and Economic Recovery Act (HERA).<sup>151</sup> HERA extended the duration of the interest rate benefit for mortgage loans to a

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*Servicemembers Civil Relief Act of 2003: Old Wine in a New Bottle?*, 59 CONSUMER FIN. L. Q. REP. 362, 363 (2005) (discussing same).

146. S. REP. NO. 108-197, at 7 (2003).

147. 149 CONG. REC. H3697 (daily ed. May 7, 2003) (statement of Rep. Smith).

148. *See, e.g.*, H.R. 100, 108th Cong. §§ 201–02, 204, 207, 301–03, 305, 701 (1st Sess. 2003), reprinted in H.R. REP. NO. 108-81, at 1–21. Much of the bill considered in the Senate, S. 1136, was "identical to—or at least similar in substance to—provisions contained in H.R. 100," so much so that the Senate committee declined to discuss most of the provisions of S. 1136 because it would be duplicative of the House report. S. REP. NO. 108-197, at 7–8 (2003).

149. *See, e.g.*, H.R. REP. NO. 108-81, at 32 (2003) ("[T]he Committee believes the Soldiers' and Sailors' Civil Relief Act (SSCRA) should be restated and strengthened to ensure that its protections meet their needs in the 21st century.").

150. Soldiers' and Sailors' Civil Relief Act Amendments of 2003, Pub. L. No. 108-189, 117 Stat. 2835; *see also* Susan H. Seabury & Jack F. Williams, *Bankruptcy and Debt Under the Servicemembers Civil Relief Act*, 2008 ANN. SURV. BANKR. L. 445 (noting that the differences between the House and Senate bills were negotiated without need of committee).

151. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2847.

servicemember's period of military service plus one year,<sup>152</sup> and the duration of the foreclosure protection after a servicemember leaves military service from ninety days to nine months.<sup>153</sup> In 2012, this protection period was further extended from nine months to one year.<sup>154</sup> Aside from changing the duration of these protections, HERA did not otherwise amend the SCRA.

The SCRA was subsequently amended by the Veterans' Benefits Act of 2010 (VBA).<sup>155</sup> Prior to the enactment of the VBA, the SCRA did not expressly provide private rights of action for servicemembers to enforce SCRA provisions—although courts had generally held that the SCRA did provide private rights of action.<sup>156</sup> The VBA amended the SCRA expressly to permit private rights of actions.<sup>157</sup> The VBA also amended the SCRA to provide that the U.S. Attorney General is authorized to enforce the SCRA and seek civil monetary penalties of up to \$55,000 for a first violation of the Act, and penalties of up to \$110,000 for subsequent violations.<sup>158</sup>

These post-2003 amendments left the provisions that balanced the interests of servicemembers and commercial interests intact. To date, the SCRA retains the interest-balancing structure that was originally implemented in the 1918 Act.

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152. *Id.* § 2203(b).

153. *Id.* § 2203(a). HERA also provided that this protection would sunset on Dec. 31, 2010. *Id.* § 2203(c). On Dec. 29, 2010, the expiration date was extended until Dec. 31, 2012. Helping Heroes Keep Their Homes Act of 2010, Pub. L. No. 111-346, § 2, 124 Stat. 3622, 3622.

154. Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 710(a), 126 Stat. 1165, 1208. Unless otherwise amended, this extension of time is set to expire on Dec. 31, 2014. *Id.* § 710(d).

155. Veterans Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864.

156. *See, e.g.*, Lt. Col. Conrad, Federal Court Rules that Military Members Have a Private Cause of Action Under the Soldiers' and Sailors' Civil Relief Act, ARMY LAW, July 1998, at 63.

157. Veterans Benefits Act § 303(a); H.R. REP. NO. 111-324, at 17 (2009).

158. Veterans Benefits Act § 303(a); H.R. REP. NO. 111-324, at 17. Additionally, the VBA amended the lease provisions of the SCRA to prohibit early termination charges. Veterans Benefits Act § 301; *see also* H.R. REP. NO. 111-324, at 17.

*G. The Central Concept: Material Effect*

The concept of “material effect” is the central equitable concept in the SCRA, and the primary means by which the balancing of servicemember and commercial interests is achieved.<sup>159</sup> This concept has been the principal component of the balancing of interests since the first SSCRA was enacted in 1918. It was designed to ensure that the protections and benefits of the SSCRA would apply only when the servicemember was geographically or economically prejudiced by military service. For example, Major/Professor John Wigmore explained that the “material effect” standard was not intended to protect those whose noncompliance with credit obligations was unrelated to military service; instead, “[w]e have tried to hitch up those provisions so that no relief shall be given to any person in the military service, unless he needs the relief, just because he is in military service.”<sup>160</sup> In other words, “material effect” is limited to difficulties *caused* by military service, not merely difficulties experienced *while in* military service. Or, to use a sports metaphor, the SCRA “does not excuse a servicemember from his/her obligations, but it will level the playing field so that military personnel are not disadvantaged because of their commitment to our nation.”<sup>161</sup>

With respect to the financial protections, the concept of material effect is generally raised in two, sometimes interconnected, ways: geographic prejudice (i.e., military service impairs the servicemember’s ability to protect his or her rights because of where the servicemember is stationed); and economic prejudice (i.e., military service, including the possibility of reduced income, impairs the servicemember’s ability to meet financial obligations).<sup>162</sup> Thus, a servicemember serving overseas who is sued in the United States likely is materially affected in his or her ability to defend the case; but a servicemember serving in the continental United States who is sued in a court located just

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159. See, e.g., Kathleen H. Switzer, *Mortgage Defaults and the Soldiers’ and Sailors’ Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 REAL ESTATE L.J., 171, 173–74 (1989).

160. *Soldiers’ and Sailors’ Civil Relief Bill: Hearing on S. 2859 and H.R. 6361 Before the S. Subcomm. on the Judiciary*, 65th Cong. 217 (1917).

161. JAG SCRA GUIDE, *supra* note 69, § 1-2, at 1-3.

162. *Id.* § 3-3, at 3-8 to -9.

minutes from the base where he or she is serving likely would not be.<sup>163</sup> Similarly, a physician who is called to military service and whose income is dramatically reduced as a result may be materially affected in his or her ability to comply with a credit obligation; but a person who is unemployed and then called into military service may not be.<sup>164</sup>

To best serve the balancing of interests between parties, the Supreme Court has held that courts must be flexible in applying the material effect test.<sup>165</sup> In particular, the Court declined to specify which party has the burden to establish material effect, concluding that courts should have discretion to allocate the burden on a case-by-case basis.<sup>166</sup> Thus, in many cases, the burden may fall on the servicemember to prove material effect, rather than on a creditor to disprove it.<sup>167</sup> Prior to the enactment of the SCRA in 2003, some urged Congress to further define “material effect.”<sup>168</sup> The final Act did not contain such a definition, however. The House Committee on Veterans’ Affairs explained that this was because the Committee concluded that “courts, in considering the facts and circumstances of

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163. *Id.* § 3-3, at 3-8 to -9 (noting that military service often may have no more impact on a servicemember’s ability to protect his or her rights than would any other pursuit, and that “[l]ike any other citizen, the servicemember may have to work through an attorney.”); *see also* Cornell Leasing Corp. v. Hemmingway, 553 N.Y.S.2d 285 (N.Y. Civ. Ct. 1990) (finding that defendant failed to show prejudice where servicemember lived in vicinity of court and status as reserve or active duty military was unclear); Burgess v. Burgess, 234 N.Y.S.2d 87 (N.Y. Sup. Ct. 1962). In this case, the servicemember was stationed where “he was always accessible to the court” and had been “fully informed of the pendency of the action.” *Id.* at 89. The court concluded he was not materially affected by reason of his military service in his ability to participate in the action.

164. *See, e.g.*, Creamer v. Ansoplano, 52 N.Y.S.2d 862 (N.Y. Sup. Ct. 1945) (noting that a pattern of compliance begun before the debtor’s induction into military service supports the conclusion that military service did not materially affect the debtor’s ability to comply with the obligation). *But see* Fourte v. Countrywide Home Loans, Inc., No. 07-cv-1363, 2009 WL 2998110, at \*3-4 (D.N.J. Sept. 15, 2009) (holding that mere potential of increased civilian income supported finding of material effect even though military income was higher than actual civilian income).

165. Boone v. Lightner, 319 U.S. 561, 569 (1943).

166. *Id.*

167. Some have argued that the burden of proof should never be on the servicemember. *See, e.g.*, Lanourra L. Phillips, *The Servicemembers Civil “\_\_\_\_\_” Act: Giving the Act the “Relief” It Deserves*, 34 U. DAYTON L. REV. 103 (2008).

168. H.R. REP. NO. 108-81, at 36 (2003).

specific cases, have generally interpreted the term in ways that are consistent with the intent of the Act as Major Wigmore explained it.”<sup>169</sup>

### III. THE SCRA AND AGGRESSIVE ENFORCEMENT

Notwithstanding the abundant evidence in the structure and history of the SCRA and its predecessors regarding the central role the balancing of servicemember and creditor interests plays in the statutory scheme, recent government enforcement actions have given short shrift to this balancing of interests. Instead, government agencies have focused exclusively on short-term benefits to servicemembers, without apparent regard to the costs to, and burdens on, creditors or to potential long-term costs to servicemembers. And acting with this focus, the agencies have aggressively expanded their interpretation of the SCRA in ways that are not only inconsistent with the purpose and structure of the SCRA, but also in several cases inconsistent with the statutory text. And in at least some cases, the agencies acknowledged that the remedies provided under the settlements exceeded the requirements of the SCRA itself.<sup>170</sup> As one may expect from a retroactive application of newly-expanded interpretations of a statute, these enforcement actions have resulted in hundreds of millions of dollars in remediation and penalties.

Thus, the government agencies’ conduct in these enforcement actions is consistent with the bureaucratic tendencies discussed in Part I above. This part will examine in more detail the positions taken by the government agencies in their SCRA enforcement actions, illustrating how the agencies’ conduct is consistent with the observations of regulatory theory. In particular, this part will focus on several of the agencies’ positions that constitute significant expansions of the standards established by the SCRA. First, it will discuss the agencies’ adoption of a strict liability theory

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169. *Id.*

170. Press Release, U.S. Dep’t of Justice, \$25 Billion Mortgage Servicing Agreement Filed in Federal Court (Mar. 12, 2012) (“The consent judgments provide enhanced protections for service members that go beyond those required by the Servicemembers Civil Relief Act (SCRA).”), *available at* <https://d9klfgibkcquc.cloudfront.net/Settlement-USDOJ-FILING-news-release.pdf>.

for alleged SCRA violations, and examine the flaws in the reasoning supporting this position. It will then discuss specific positions on two central SCRA protections—the protection regarding default judgments and the interest rate cap—and show how the agencies’ positions are departures from the text and purpose of the Act. Finally, it will discuss how the agencies’ positions are incompatible with the rule of lenity, which applies to the SCRA as it does to other hybrid civil-criminal statutes.

*A. Strict Liability: A New Standard*

Perhaps the agencies’ most dramatic departure from the SCRA’s purpose and structure—and the starkest example of the tendency to adopt expansive interpretations of the law—is the imposition of civil liability for alleged SCRA violations on a strict liability theory. The adoption of strict liability under the SCRA first occurred not in an agency enforcement action, but in a civil action brought by the Department of Justice against a towing company. In *United States v. B.C. Enterprises, Inc.*,<sup>171</sup> the DOJ brought a civil action against three defendants alleging that the sale of twenty vehicles owned by active-duty servicemembers at auction violated the SCRA’s protection against the enforcement of storage liens without court orders.<sup>172</sup> The defendants argued that they exercised due diligence in enforcing their storage liens and therefore could not be liable, whereas the DOJ argued that the applicable standard is strict liability.<sup>173</sup> The court, recognizing this was a case of first impression, ruled against the defendants and held that strict liability is the standard.<sup>174</sup> The court reasoned that the language in the SCRA’s storage lien provision closely resembled language in other strict liability statutes.<sup>175</sup> The court also looked to dicta from a then-recent case, as well as a 1918 case construing the SSCRA, and concluded that those cases further supported the strict liability view.<sup>176</sup> Noting that the SCRA’s interest rate cap required the servicemember

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171. *United States v. B.C. Enters., Inc.*, 667 F. Supp. 2d 650 (E.D. Va. 2009).

172. *Id.* at 653.

173. *Id.* at 662.

174. *Id.* at 662–63.

175. *Id.* at 662.

176. *Id.* at 662–63.

to provide written notice and a copy of military orders to be eligible for the protection, and that the storage lien provision contained no such requirement, the court concluded that strict liability was supported by the structure of the SCRA.<sup>177</sup> Finally, the court rejected the defendant's factual evidence that it is not possible to verify accurately a vehicle owner's military status.<sup>178</sup> While the court acknowledged that "the inadvertent sale of servicemembers' vehicles may occasionally be unavoidable," the court concluded that the defendant could simply obtain a court order in every case before selling a vehicle.<sup>179</sup> Thus, the court concluded, "even if the Defendants exercised the utmost care in investigating their victims' military status, they face liability for their actions."<sup>180</sup>

The *B.C. Enterprises* decision has formed the basis for the position taken by the DOJ, the federal banking agencies, and the state attorneys general that the SCRA is a strict liability statute<sup>181</sup>—and is therefore worthy of further examination. Ultimately, the agencies' reliance on *B.C. Enterprises* is misplaced.<sup>182</sup> First, the question of whether the SCRA is a strict liability statute itself reflects a misunderstanding of the SCRA's (and SSCRA's) scheme of balancing servicemember and creditor interests. The Act was

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177. *United States v. B.C. Enters., Inc.*, 667 F. Supp. 2d 650, 663 (E.D. Va. 2009).

178. *Id.*

179. *Id.*

180. *Id.* at 663–64.

181. Statement of Amber Standridge, Trial Attorney, U.S. Dep't of Justice, *Servicemembers Civil Relief Act*, Women in Housing and Finance Brown Bag Lunch (June 8, 2011) (stating that *B.C. Enterprises* provides the basis for the DOJ's determination that the SCRA is a strict liability statute); In the author's experience in representing many clients in numerous SCRA reviews conducted by independent consultants ("ICs") required by various SCRA-related consent orders, the ICs have reported receiving this guidance from enforcement agencies. To the author's knowledge, this guidance has not previously been made public by any of the enforcement agencies. This Article references this informal and non-public guidance to the ICs as "IC Guidance" hereinafter.

182. Following *B.C. Enterprises*, courts are split regarding whether the SCRA's provisions support a strict liability theory. *Roberts v. Chips Express, Inc.*, No. 12-cv-42-JPS, 2012 WL 4866495, at \*3–5 (E.D. Wis. Oct. 12, 2012) (finding strict liability); *Gordon v. Pete's Auto Serv.*, 837 F. Supp. 2d 581, 585 (E.D. Va. 2011) (finding same); *but see Frazier v. HSBC Mortg. Servs., Inc.*, No. 8:08-cv-02396-T-24-TGW, 2009 WL 4015574, at \*6 (M.D. Fla. Nov. 19, 2009) (holding that the SCRA does not impose strict liability on a servicemember who inadvertently overcharges a servicemember under the interest rate cap but then corrects the error).

not designed to create liability except in cases where a creditor acted knowingly in a manner inconsistent with the Act's protections.<sup>183</sup> Instead, the Act was designed to preserve the status quo while a servicemember was in military service unless a court found that military service did not materially affect the servicemember's ability to protect his or her interests.<sup>184</sup> The imposition of civil liability in cases where a creditor had no knowledge, constructive or otherwise, of a servicemember's eligibility for protection is fundamentally inconsistent with the SCRA's structure and purpose.

Reliance on *B.C. Enterprises* is further misplaced because of the many flaws in the court's reasoning. For example, the *B.C. Enterprises* court relied on the 1918 case of *Hoffman v. Charlestown Five Cent Sav. Bank*,<sup>185</sup> which analyzed the SSCRA's provision providing foreclosure protection. The *Hoffman* court was asked to provide relief for (i.e., to unwind) a foreclosure, not to impose civil liability.<sup>186</sup> The defendant in *Hoffman* argued that it did not know or have any reason to know that an owner of the property was in military service (and, indeed, the servicemember held equitable title only), and therefore the foreclosure was valid.<sup>187</sup> The court rejected this argument, concluding that when the SSCRA said that "[n]o sale under a power of sale . . . shall be valid if made during the period of military service" except upon court order, that applied in all cases even if the bank had no notice.<sup>188</sup> The court concluded that

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183. See, e.g., Servicemembers Civil Relief Act, 50 U.S.C. app. § 531(c) (2003) (providing for criminal liability if a person "knowingly" evicts or attempts to evict a person inconsistent with the sections protections); *id.* § 532(b) (discussing same regarding foreclosures).

184. See, e.g., *id.* § 502(2) ("The purposes of this Act are— . . . to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."); see also *supra* notes 81–91 and accompanying text; L. Sue Hayn, *Soldiers' and Sailors' Civil Relief Act Update*, 1989 ARMY LAW. 40, 40 (1989) ("Congress attempted to preserve the status quo during the conflict by permitting the service member to delay these actions until circumstances allowed the service member to return to defend endangered interests.").

185. *Hoffman v. Charlestown Five Cents Sav. Bank*, 121 N.E. 15 (Mass. 1918).

186. *Id.* at 16.

187. *Id.*

188. *Id.* (citing *Soldiers' and Sailors' Civil Relief Act*, Pub. L. No. 65-103, § 302(3), 40 Stat. 440, 444 (1918)).

since the owner of the property was in military service, and since the foreclosure had been effected without court order, the foreclosure was not valid and granted relief to the servicemember.<sup>189</sup> In other words, and consistent with the SSCRA's structure and balancing of interests, the court returned the parties to the status quo ex ante. *Hoffman* supports the proposition that a court can return the parties to the positions they were in prior to the servicemember's military service even if the creditor was unaware of that military service; but it does not support the proposition that liability may be imposed on a creditor who acts without such knowledge.

The *B.C. Enterprises* holding is further flawed because the court misunderstood the structure of the SCRA. The court noted that the SCRA requires a servicemember to submit written notice and a copy of military orders to a creditor to become eligible for the interest rate cap.<sup>190</sup> The court reasoned that the absence of such a requirement in the storage lien protection suggested Congress intended that the protection apply even if the servicemember did not notify the lienholder.<sup>191</sup> This reasoning overlooks the purpose of the requirement for notice and a copy of military orders in the interest rate cap provision. The interest rate cap limits the rate of interest on certain credit obligations during a servicemember's period of military service.<sup>192</sup> The benefit can be requested retroactively back to the date the servicemember first became eligible, up until 180 days after the servicemember leaves military service.<sup>193</sup> But for a creditor to apply the benefit retroactively, the creditor must know when the servicemember's military service started. Prior to the 2003 enactment of the SCRA, the SSCRA did not provide guidance regarding how a servicemember should request the SCRA benefit.<sup>194</sup> During congressional hearings in 1990, witnesses informed the House and Senate Committees on Veterans' Affairs that creditors were generally requesting a

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189. *Id.* at 16–17.

190. *United States v. B.C. Enters., Inc.*, 667 F. Supp. 2d 650, 663 (E.D. Va. 2009) (citing Servicemembers Civil Relief Act, 50 U.S.C. app. § 527(b)(1) (2006)).

191. *Id.*

192. Servicemembers Civil Relief Act § 527(a)(1).

193. *Id.* § 527(b)(1).

194. *Id.* § 526; H.R. REP. NO. 108-81, at 39 (2003).

written statement requesting the benefit and a copy of the orders calling the servicemember to military service which showed when military service commenced.<sup>195</sup> In its 2003 report explaining the bill that eventually became the SCRA, the House Committee on Veterans Affairs clarified that the bill would modify the interest rate cap provision to codify the practices discussed during the 1990 hearings.<sup>196</sup> The Committee explained that this requirement to submit orders was designed to show when a servicemember begins military service—information essential for proper implementation of the interest rate cap.<sup>197</sup> Since this requirement is designed to provide creditors with information about the period of time a servicemember was in military service—information relevant to the interest rate protection, but less relevant to other protections—it is not surprising that other SCRA provisions would not include such requirements. And accordingly, the absence of such a requirement in other provisions does not support a conclusion that those other provisions provide for strict liability.

Reliance on *B.C. Enterprises* is also misplaced because the court erred in concluding that hardship to creditors is not relevant to a determination of whether a provision imposes strict liability.<sup>198</sup> A statutory interpretation that renders compliance impossible is precisely the type of absurd result courts should avoid.<sup>199</sup> In many cases, it is impossible for a creditor to determine if a borrower or lessee is a servicemember. Even though the Department of Defense has created a website that allows creditors with certain information to determine whether a person is in military

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195. See, e.g., *Soldiers' and Sailors' Civil Relief Act and Veterans' Reemployment Rights: Joint Hearing Before the Comms. on Veterans' Affairs of the H.R. and U.S. Sen.*, *supra* note 129, at 186–87 (statement of Thomas J. Hughes, President and Chief Exec. Officer, Navy Fed. Credit Union).

196. H.R. REP. NO. 108-81, at 39 (“Section 207 would codify the practices established during the Persian Gulf War.”).

197. *Id.* at 39 (“These orders indicate the period of time for which the servicemember is called to duty.”).

198. See *supra* notes 173–84 and accompanying text.

199. See, e.g., *In re Fed.-Mogul Global, Inc.*, 684 F.3d 355, 370 (3d Cir. 2012) (rejecting interpretation as “absurd” where compliance with that interpretation would be impossible in some instances); *Alt. Aviation Servs. Inc. v. Meggitt (UK) Ltd.*, 207 F. App'x 506, 513 (6th Cir. 2006) (same); *Sandler ex rel. Sandler v. Hickey*, 5 F. App'x 233, 236 (4th Cir. 2001) (same).

service,<sup>200</sup> there are many people who might be eligible for SCRA protection that either would not appear in the database or for whom a creditor/lessor would not have the necessary information to perform the search. For example, the SCRA's eviction protection applies to dependents as well as to servicemembers.<sup>201</sup> But there is no database available to creditors or lessors providing information about whether a particular individual is the dependent of a servicemember. Additionally, the SCRA extends benefits to U.S. citizens serving in the armed forces of an allied nation.<sup>202</sup> There is at present no database available to creditors or lessors that would provide information on people serving in this capacity. Adopting a strict liability interpretation of such provisions would place creditors and lessors in a position where compliance would be impossible unless the servicemember notified the creditor of his or her military service.

The *B.C. Enterprises* court's response to the argument about impossibility of compliance is similarly flawed. The court stated that compliance with the SCRA's storage lien protection could be achieved simply by conducting all auction sales pursuant to court order.<sup>203</sup> But such an interpretation would have the effect of reading the SCRA to preempt all laws permitting lien holders to exercise their liens without obtaining a court order. There is no authority to support the position that Congress intended the SCRA or its predecessors to preempt or otherwise invalidate all laws that allow lienholders, secured parties, or landlords from availing themselves of laws permitting them to exercise their rights outside of court. And without such authority, the court's interpretation is inconsistent with the interpretive canon that courts should avoid interpreting a statute so as to implicitly preempt other laws.<sup>204</sup>

Finally, whatever merit the *B.C. Enterprises* court's analysis of the text of the storage lien protection may have, that analysis is inapplicable to other SCRA provisions. The

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200. See *infra* notes 252–267 and accompanying text.

201. Servicemembers Civil Relief Act, 50 U.S.C. app. § 531 (2012).

202. *Id.* § 514.

203. See *supra* note 179 and accompanying text.

204. See, e.g., *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 176 (3d Cir. 2013) (“We tend to interpret federal statutes in a way that avoids implied preemption.”).

*B.C. Enterprises* court focused on the language in the storage lien provision prohibiting the enforcement of a storage lien without court order,<sup>205</sup> and concluded that this language sufficiently resembled other strict liability statutes to support a conclusion that the SCRA's storage lien protection imposed strict liability.<sup>206</sup> But many other provisions in the SCRA are not phrased in terms of a prohibition as is the storage lien provision; instead, they simply provide that the action taken is invalid. For example, the SCRA's foreclosure protection does not provide that a creditor "may not" foreclose on a mortgage because of default, but provides that a foreclosure "shall not be valid" if made during the servicemember's period of eligibility.<sup>207</sup> The text of the foreclosure protection does not establish a prohibition that can be violated; rather, it provides that a foreclosure that is not pursuant to a court order or written waiver is not valid. In other words, consistent with the SCRA's balancing of interests, it returns the parties to the status quo ex ante. This confusion appears to have been exacerbated by the 2010 amendment to the statute authorizing the Attorney General and private plaintiffs to bring civil actions for "violations" of the Act.<sup>208</sup> It is axiomatic that a "violation" can exist only where a requirement or prohibition exists to be violated.<sup>209</sup> In statutes that do not contain requirements or prohibitions—as is the case in many SCRA provisions—there is simply no provision to violate. Where a provision of the Act is designed to return parties to the status quo ex ante, the remedy is a return to that position—not the imposition of civil penalties under a strict liability theory. But as discussed above, the imposition of civil penalties is consistent with regulatory theory's observations regarding an agency's incentives to seek large financial remedies.

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205. Servicemembers Civil Relief Act § 537(a)(1) ("A person holding a lien on the property or effects of a servicemember may not . . . foreclose or enforce any lien on such property or effects without a court order . . .").

206. *United States v. B.C. Enters., Inc.*, 667 F. Supp. 2d 650, 662 (E.D. Va. 2009) (citing *Md. Dep't of Natural Res. v. Kellum*, 51 F.3d 1220, 1225 (4th Cir. 1995)).

207. Servicemembers Civil Relief Act, 50 U.S.C. app. § 533(c) (2012).

208. *Id.* §§ 597–597a; *see also supra* notes 155–58 and accompanying text.

209. *See, e.g.*, BLACK'S LAW DICTIONARY 1705 (9th ed. 2009) (defining "violation" as including "the contravention of a right or duty.").

*B. Strict Liability in Government Enforcement*

Notwithstanding the flaws in the *B.C. Enterprises* decision and its inconsistencies with the SCRA's purpose and structure (as well as its limitation to storage liens), the DOJ, the federal banking agencies, and the state attorneys general have settled over twenty enforcement actions and imposed hundreds of millions of dollars in civil liability since 2011 under the SCRA's foreclosure and repossession protections applying the strict liability theory first articulated in *B.C. Enterprises*. This approach is inconsistent with the historical understanding of the statute,<sup>210</sup> as well as the statutory text and the balancing of interests built into the Act. To be consistent with the statutory text and structure, a violation should be found only where a person acts contrary to an express requirement or prohibition. But while inconsistent with the statutory text and structure, this expansion of liability is consistent with the bureaucratic tendencies toward maximizing financial recovery, expanding the reach of the statutes the agencies administer, and agency tunnel vision.

The strict liability theory was first applied in SCRA enforcement actions against financial institutions in 2011.<sup>211</sup> In April of that year, the federal banking agencies entered into settlements with fourteen federally-regulated mortgage servicers.<sup>212</sup> These settlements addressed a range of

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210. See, e.g., Kathleen H. Switzer, *Benefits for Reserve and National Guard Members Under the Soldiers' and Sailors' Civil Relief Act of 1940*, 110 *BANKING L.J.* 517, 526 (1993) ("Regardless of the type of relief that is available, borrowers have an obligation to notify their banks that they are on active duty. Thus, banks have no duty to seek out those who might be eligible for relief but should be prepared to handle requests for relief and inquiries regarding the SSCRA.").

211. The DOJ resolved an enforcement action in 2008 against Homecomings Financial, LLC. That case involved a prepayment penalty against a single servicemember, which Homecomings ultimately agreed to waive. The strict liability issue was not raised. Press Release, U.S. Dep't of Justice, *The Justice Department Resolves Investigation Under Servicemembers Civil Relief Act of Homecomings Financial, LLC* (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crt-1108.html>.

212. Press Release, Bd. of Governors of the Fed. Reserve Sys., *Federal Reserve issues enforcement actions related to deficient practices in residential mortgage loan servicing* (Apr. 13, 2011), available at <http://www.federalreserve.gov/newsevents/press/enforcement/20110413a.htm>; Press Release, Office of the Comptroller of the Currency, U.S. Dep't of the Treasury, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html>;

foreclosure-related practices, including allegations of SCRA violations.<sup>213</sup> To identify the alleged foreclosure-related violations, the settlements required the mortgage servicers to engage independent consultants (ICs) to conduct a comprehensive foreclosure review process known as the Independent Foreclosure Review (IFR).<sup>214</sup> As part of the IFR, the ICs were required to review loans for SCRA compliance.<sup>215</sup> And in guidance provided by the federal banking agencies to the ICs, the agencies instructed the ICs that the SCRA is a strict liability statute and has no safe harbors.<sup>216</sup> The federal banking agencies subsequently agreed to terminate the IFR in exchange for compensation and other relief to borrowers totaling \$9.3 billion.<sup>217</sup>

This strict liability theory was applied one month later in another two foreclosure-related settlements: one between the Department of Justice and Countrywide (through its successor-in-interest), and the other between the DOJ and Saxon Mortgage Servicing.<sup>218</sup> These settlements involved allegations that the servicers had foreclosed on SCRA-eligible borrowers without a court order or written waiver from the servicemembers. In the complaints, the DOJ alleged that the servicers “had actual or constructive notice of the military

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Press Release, Office of Thrift Supervision, OTS 11-008, OTS Takes Action to Correct Foreclosure Deficiencies (Apr. 13, 2011), *available at* <http://www.occ.gov/static/news-issuances/ots/press-releases/ots-pr-2011-08.pdf>.

213. Federal Reserve System, Office of the Comptroller of the Currency & Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices*, at 3, 7, 11 (Apr. 2011), *available at* <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf>.

214. *E.g.*, Consent Order at art. VII, *In re Citibank, N.A.*, No. AA-EC-11-13 (Comptroller of the Currency, U.S. Dep’t of the Treasury 2011). The IFR was subsequently the source of substantial public criticism. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-550T, FORECLOSURE REVIEW, LESSONS LEARNED COULD ENHANCE CONTINUING REVIEWS AND ACTIVITIES UNDER AMENDED CONSENT ORDERS: TESTIMONY BEFORE THE SUBCOMM. ON Hous., TRANSP., AND Cmty. Dev., COMM. ON BANKING, Hous., AND URBAN AFFAIRS, U.S. S. (2013) (statement of Lawrence L. Evans, Jr., Director, Fin. Mkts. and Cmty. Inv.) (criticizing the IFR process and oversight).

215. *E.g.*, Citibank, N.A., *supra* note 214, art. VII, ¶ 3(b) (requiring the servicer to determine whether each foreclosure was in accordance with applicable law “including but not limited to SCRA.”).

216. IC Guidance, *supra* note 181

217. Press Release, Bd. of Governors of the Fed. Reserve Sys., *supra* note 29.

218. Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Justice Department Settles with Bank of America and Saxon Mortgage for Illegally Foreclosing on Servicemembers (May 26, 2011).

service” of many of the servicemembers—indicating that the servicers had no notice of military service, either actual or constructive, in many other cases and that liability was being imposed under a strict liability theory.<sup>219</sup> The parties collectively agreed to settle the allegations for a total of over \$61 million.<sup>220</sup>

The application of strict liability was continued with the SCRA allegations that were part of the National Mortgage Settlement (NMS) between the nation’s five largest mortgage servicers and the DOJ and forty-nine state attorneys general (AGs).<sup>221</sup> Among the various foreclosure-related allegations in the NMS, the DOJ and state AGs also alleged a variety of SCRA violations.<sup>222</sup> These allegations show that the DOJ and state AGs continued the application of the strict liability theory. For example, the complaint alleges that the mortgage servicers “failed to determine consistently and accurately the military status of borrowers in foreclosure.”<sup>223</sup> In other words, in many cases the agencies acknowledged that the mortgage servicers were not aware of the borrower’s military service and, therefore, of the borrower’s potential SCRA eligibility.

Shortly after the NMS, the DOJ and the Office of the Comptroller of the Currency (OCC) announced they had

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219. Compl. ¶ 7, *United States v. BAC Home Loans Servicing, LP*, No. 11-cv-04534 (C.D. Cal. May 26, 2011). The Saxon complaint was more specific, alleging only that Saxon “had actual or constructive notice of the military service of at least ten of the seventeen servicemembers”—indicating that Saxon had no notice, either actual or constructive, of military service for as many as 40% of the borrowers. Compl. ¶ 7, *United States v. Saxon Mortg. Servs., Inc.*, No. 3:11-cv-01111-F (N.D. Tex. May 26, 2011).

220. Consent Order ¶ 18, *BAC Home Loans Servicing*, No. 11-cv-04534 (C.D. Cal. May 31, 2011); Consent Order ¶ 17, *Saxon Mortg. Servs., Inc.*, No. 3:11-cv-01111-F (N.D. Tex. May 26, 2011). Subsequently, the DOJ announced an additional \$39 million in payments under these consent orders. Press Release, U.S. Dep’t of Justice, *Service Members to Receive \$39 Million for Violations of the Servicemembers Civil Relief Act* (Apr. 4, 2013), *available at* <http://www.justice.gov/opa/pr/2013/April/13-crt-383.html>.

221. Press Release, U.S. Dep’t of Justice, *supra* note 170.

222. Compl. ¶¶ 97–101, *United States v. Bank of Am. Corp.*, No. 1:12-cv-00361 (D.D.C. Mar. 12, 2012) (alleging various SCRA violations); Consent Judgment, *supra* note 40, ¶ 11, Ex. A at 32–35, Ex. H at 2, 8, 10–11 (imposing various requirements regarding SCRA issues and requiring extensive review of files for SCRA issues).

223. Compl., *supra* note 222, ¶ 97.

entered into settlements with Capital One.<sup>224</sup> Unlike previous settlements, this settlement was not limited to foreclosure-related issues but also included allegations related to auto lending and the application of the SCRA's interest rate benefit to various types of credit products.<sup>225</sup> With the exception of the interest rate protection, which the DOJ and the OCC acknowledged required the servicemember to submit written notice and a copy of military orders to qualify, the other protections were again enforced under a strict liability theory.<sup>226</sup> The DOJ's press release announced that the settlement would be for approximately \$12 million,<sup>227</sup> but the settlement agreements required compensation to borrowers based on a formula applied to the results of the file review.<sup>228</sup>

In September 2013, the OCC announced a settlement with three banks regarding SCRA benefits and protections.<sup>229</sup> The settlement resolved allegations that the banks failed to comply with the SCRA's interest rate cap and with various other SCRA protections, including the default judgment protection, in the banks' collections activities.<sup>230</sup> Again, the OCC took the position that the SCRA is a strict liability statute.<sup>231</sup> The settlement required the bank to provide an undisclosed amount of compensation to affected consumers.<sup>232</sup>

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224. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Reaches \$12 Million Settlement to Resolve Violations of the Servicemembers Civil Relief Act by Capital One (July 26, 2012), *available at* <http://www.justice.gov/opa/pr/2012/July/12-ag-933.html>; Press Release, Office of the Comptroller of the Currency, U.S. Dep't of the Treasury, OCC Takes Actions Against Capital One to Assure Servicemembers Receive Credit Protections for Their Mortgages and Other Loans (July 26, 2012), *available at* <http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-115.html>.

225. Consent Order ¶ 1, *United States v. Capital One, N.A.*, No. 1:12-cv-00828 (E.D. Va. July 27, 2012).

226. *Id.*

227. *See supra* note 224.

228. Consent Order, *supra* note 220, ¶¶ 36–51.

229. Press Release, Office of the Comptroller of the Currency, U.S. Dep't of the Treasury, OCC Takes Action Against JPMC to Protect Consumers and to Ensure Servicemembers Receive Credit Protections for Their Non-Home Loans (Sept. 19, 2013), *available at* <http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-139.html>.

230. Consent Order, *In re JPMorgan Chase Bank, N.A.*, No. AA-EC-13-76 (Comptroller of the Currency, U.S. Dep't of the Treasury 2013).

231. *Id.* at art. I, ¶ 1(f).

232. *Id.*

Most recently, the DOJ and FDIC announced settlements with Sallie Mae regarding the SCRA's interest rate benefit and default judgment protections.<sup>233</sup> The settlement resolved allegations that Sallie Mae failed to comply with the SCRA's interest rate cap in three ways: (1) by failing to apply the benefit after receiving written notice and qualifying active duty military orders; (2) by "failing to make acceptable efforts to obtain qualifying active duty military documents from servicemembers who requested benefits, but did not provide qualifying military documents;" and (3) by "failing to notify servicemembers that they might be eligible for SCRA benefits when they provided their military documents to Defendants for purposes other than seeking the 6% interest rate."<sup>234</sup> Although the Department of Justice's complaint alleges that the violations were intentional,<sup>235</sup> the inclusion of allegations related to borrowers who expressly did not satisfy the statutory prerequisites for receiving the SCRA's interest rate benefit reflects a continuation of the strict liability theory.

### *C. Expansion of Liability Under the SCRA*

In addition to adopting the strict liability theory, the agencies acted consistent with regulatory theorists' expectations by expanding the reach of many provisions of the SCRA in a way that increased the financial recovery under these enforcement actions. These expansive interpretations have been adopted both through public consent orders and through non-public guidance to independent consultants tasked with reviewing loan files under the settlements described above.<sup>236</sup> Although non-public, many financial

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233. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Reaches \$60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans (May 13, 2014), *available at* <http://www.justice.gov/opa/pr/2014/May/14-ag-502.html>; Press Release, Fed. Deposit Ins. Corp., FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act (May 13, 2014), *available at* <http://www.fdic.gov/news/news/press/2014/pr14033.html>.

234. Compl. ¶ 16, *United States v. Sallie Mae, Inc.*, No. 1:99-mc-09999 (D. Del. May 13, 2014); Consent Order ¶ 2, *Sallie Mae, Inc.*, No. 1:99-mc-09999 (D. Del. May 13, 2014).

235. Compl., *supra* note 234, ¶ 21.

236. *See supra* notes 211–15 and accompanying text.

institutions are being held to these non-public standards even though they had not been made aware of them. In the author's experience while advising clients regarding SCRA matters, many financial institutions have indicated that the federal agencies are requiring institutions to adopt these non-public—and, in some cases, not previously communicated—rules going forward, and are imposing liability retroactively based on these non-public standards. And because these standards are new, non-public, and inconsistent with the text of the SCRA itself, it is not surprising that creditors had not historically adopted these positions. Nor is it surprising that the retroactive application of these standards would result in substantial monetary penalties. This section will focus on two areas of such expansive non-public interpretations: interpretations regarding the SCRA's default judgment protection, and regarding the SCRA's interest rate cap protection.

1. *Expansion of the Scope of Default Judgment Protection*

Among the ways the agencies have increased financial penalties under the SCRA is through the expansion of the scope of the SCRA's default judgment protection. This protection was a key component of the original SSCRA of 1918,<sup>237</sup> and as codified was indicative of the balance between servicemember and creditor the Act was designed to achieve.<sup>238</sup> The 1918 version of the Act provided that if a defendant did not make an appearance in any action or proceeding commenced in any court, the plaintiff must file an affidavit before judgment is entered stating (1) that the defendant is in military service; (2) that the defendant is not in military service; or (3) that the plaintiff is unable to determine the defendant's military status.<sup>239</sup> If the plaintiff did not file such an affidavit, the court was prohibited from

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237. Soldiers' and Sailors' Civil Relief Act, Pub. L. No. 65-103, § 200, 40 Stat. 440, 441-42 (1918).

238. H.R. REP. NO. 181 (1917), *reprinted in* 55 CONG. REC. 7789 (1917) (touting the fact that the bill does not "cast a cloud on all default judgments" and that a defendant can reopen a judgment only if military service prejudiced the servicemember's defense as evidence of "[t]he spirit of moderation which runs through the bill" and the bill's "policy of moderation and flexibility.").

239. *Id.*

entering a default judgment against the defendant unless the court appointed an attorney to represent the defendant.<sup>240</sup> The court could also require the plaintiff to post a bond to indemnify the defendant against loss as a condition to entering the default judgment, and take such other action as the court deemed appropriate.<sup>241</sup> If a default judgment was entered against a defendant servicemember, and if the defendant was “prejudiced by reason of his military service in making a defense thereto,” the servicemember could within ninety days of leaving military service apply to the court to open the judgment—“provided . . . that the defendant has a meritorious or legal defense to the action or some part thereof.”<sup>242</sup> Criminal penalties applied to anyone who knowingly filed a false affidavit.<sup>243</sup> Although the language of the statute has been amended and updated over the nearly one hundred years since it was first enacted, the framework of this provision remains very similar to the 1918 version.<sup>244</sup>

*a. The Affidavit Requirement.* While the framework remains largely the same, the current text contains a number of important changes from the 1918 SSCRA. One important change made in the 2003 re-enactment is a clarification of which party has the obligation under the default judgment protection. Prior to the enactment of the SCRA, the Act provided that “*the plaintiff*, before entering judgment shall file in the court an affidavit” indicating military status.<sup>245</sup> This language was confusing, in no small part because a plaintiff cannot enter judgment against a defendant. The 2003 SCRA clarified this provision to provide that “*the court*, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit” indicating military status.<sup>246</sup> The change is a small but significant one. Rather than the SCRA placing the burden on the plaintiff to file the affidavit as did the SSCRA, the SCRA now places the burden

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240. *Id.*

241. *Id.*

242. Soldiers’ and Sailors’ Civil Relief Act § 200(4).

243. *Id.* § 200(2).

244. Compare Servicemembers Civil Relief Act, 50 U.S.C. app. § 521 (2012), with Soldiers’ and Sailors’ Civil Relief Act, Pub. L. No. 65-103, § 200, 40 Stat. 440, 441–42 (1918).

245. 50 U.S.C. app. § 520(1) (2000) (emphasis added).

246. 50 U.S.C. app. § 521(b)(1) (2012) (emphasis added).

on the court to require the affidavit.<sup>247</sup> Many litigants—including pro se plaintiffs, litigants in small claims court, and unsophisticated or inexperienced counsel—may be unfamiliar with the SCRA and its affidavit requirement. It is therefore more appropriate to place the obligation on the court to require the affidavit, since courts may more reasonably be expected to have notice of this requirement. The practical impact of this clarification is that a plaintiff cannot violate the SCRA by not filing an affidavit because the SCRA imposes requirements on courts, not plaintiffs.<sup>248</sup>

Notwithstanding this significant clarification in language, federal and state agencies have continued to enforce the SCRA's affidavit requirement against plaintiffs—and to impose substantial civil liability—as if the phrase, “the court . . . shall require” can be read to mean “the plaintiff . . . shall file.”<sup>249</sup> And they have taken this view even in cases where the court itself did not require the plaintiff to file an affidavit prior to the court entering a default judgment. For example, in guidance to the independent consultants (ICs) reviewing loan files as part of the Independent Foreclosure Review, the agencies instructed the ICs to find liability in any case where a mortgage servicer did not file an affidavit regardless of whether or not the court required an affidavit—and even if the court discouraged affidavits.<sup>250</sup> Thus, mortgage servicers seeking a default judgment in a court that did not require, or even discouraged, the filing of an affidavit were surprised to discover they were being held liable under the SCRA for complying with a court's instructions.<sup>251</sup> While

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247. Pre-2003 cases placed the obligation on the plaintiff, consistent with the statutory text at the time. See JAG SCRA GUIDE, *supra* note 69, § 3-4(a)(4), at 3-14 (collecting cases).

248. Even if a court expressly required a plaintiff to file an affidavit (e.g., through local rule or standing order), a plaintiff's failure to do so would at most be a violation of the court's requirement and not of the SCRA.

249. *E.g.*, Consent Judgment, *supra* note 40, Ex. A at 32–35, Ex. H at 1–11.

250. IC Guidance, *supra* note 181.

251. In the author's representation of many financial institutions on SCRA issues, several of the foreclosure counsel retained by the institution reported that some courts affirmatively discouraged filing any documents other than those specified by the court for seeking a default judgment. If an affidavit was not required by the court, foreclosure counsel followed the court's instructions and did not file the affidavit. The agencies have taken the position that this is not a defense to SCRA liability, notwithstanding the statute's direction that “the court . . . shall require” the filing of the affidavit.

this result is starkly at odds with the text of the statute, it is consistent with the bureaucratic tendency to adopt aggressive enforcement positions and to maximize financial recoveries.

*b. Reliance on the DMDC.* Until recent years, a creditor seeking to determine whether a person was in military service was largely dependent on the servicemember, or someone familiar with the servicemember, informing the creditor of the servicemember's military status. Alternatively, the creditor could request a certificate from the branch of the armed forces.<sup>252</sup> While such certificates were and are considered prima facie evidence of military service,<sup>253</sup> a creditor who had no notice of a debtor's military service, or in which branch the person might be serving, would not know to request a certificate or from which service branch. And it seems highly unlikely that Congress intended every creditor to send letters to every branch of the armed forces any time the creditor intended to take action against a debtor—particularly during times of armed conflict, when service branches would have much more important things to do than respond to millions of such certificate requests.

In 2002, the Department of Defense's Defense Manpower Data Center (DMDC) established a website through which creditors and other interested parties with certain information could determine whether a person was on active duty.<sup>254</sup> The results from the DMDC website searches were intended to be "certificates" under the Act.<sup>255</sup> The DMDC website was not publically accessible until April 2005—approximately sixteen months after the SCRA was enacted.<sup>256</sup> Until April 2012, the information available on the

252. 50 U.S.C. app. § 581(1) (2000); 50 U.S.C. app. § 582(a)–(b) (2012).

253. 50 U.S.C. app. § 581(1) (2000); 50 U.S.C. app. § 582(a) (2012). The certificate requirement was part of the original SSCRA of 1918. The drafters explained that the certificate "is designed to remove difficulties that might occur in the manner of satisfying any court of the fact of service as a soldier or sailor and of establishing the fact of the death of any one in military service. It does not make a hard and fast requirement that a certificate shall be furnished in all cases, but suggests that to be a most satisfactory method. This statement in the certificate is subject to rebuttal." Ferry, Rosenbaum & Wigmore, *supra* note 78, at 214.

254. Aff. of Kris L. Hoffman 1, *Hurley v. Deutsche Bank Trust Co. Ams.*, No. 1:08-cv-00361 (W.D. Mich. Dec. 22, 2010) [hereinafter *Hoffman Affidavit*].

255. *Id.* at 2 (attesting that an inquiry will result in a "certificate" bearing the facsimile signature of the Director of the DMDC).

256. *Id.* at 1.

DMDC website was limited: it would provide only (1) the name of the person as submitted by the requestor; (2) the date the person first entered military service (but not the date the person entered the most recent period of military service or information about any intervening periods when a person was not on active duty); (3) whether the individual is on active duty on the date the search is performed; (4) the individual's active duty end date (if the person was in military service within the previous 367 days and is no longer on active duty); and (5) the military branch in which the individual served or is serving.<sup>257</sup> Thus, the DMDC did not provide all of the information a creditor would need to determine SCRA eligibility, such as active duty status at time of loan origination. And the DMDC website permitted only single searches; it did not provide multiple-search (i.e., batch search) capability. In April 2012, after many of the DOJ's and federal banking agencies' enforcement actions had either settled or had been initiated, the DMDC modified the website to allow for batch searching; to allow for searches of historical "as of" dates; and to provide the date a reservist received orders to report for active duty.<sup>258</sup>

Unfortunately, even after the DMDC was updated to provide more of the information creditors need to determine SCRA eligibility, the DMDC website has suffered from chronic accuracy problems.<sup>259</sup> The DMDC itself has acknowledged accuracy problems, which it characterizes as a

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257. *Id.* at 2. In the experience of the author, having run dozens of DMDC searches, the beginning dates returned during this period reflected the date the individual first entered military service. For example, a person who entered military service five years ago and served for one year, left military service for three years, and then resumed military service would have a beginning date in the DMDC of five years ago.

258. Def. Manpower Data Ctr., *SCRA-News: Announcing SCRA 2.0, SERVICEMEMBERS CIVIL RELIEF ACT, SERVICEMEMBERS CIVIL RELIEF ACT (SCRA) WEBSITE* (Apr. 10, 2012), <http://www.dmdc.osd.mil/appj/scra/news.xhtml>; see also GAO MORTGAGE FORECLOSURES, *supra* note 22, at 19 (noting that prior to April 2012, only single searches were available); GAO SCRA REPORT, *supra* note 7, at 10 (noting that the April 2012 upgrade to the DMDC permitted batch file searches). Additionally, in the author's experience, the beginning dates were changed to reflect the beginning date of the servicemember's most recent period of military service.

259. *E.g.*, GAO MORTGAGE FORECLOSURES, *supra* note 22, at 19 (discussing reports of accuracy problems).

“small error rate.”<sup>260</sup> Nevertheless, the DMDC cautions users of its website from relying on the website if there are any other indicia of a servicemember’s military service, stating that even if the DMDC website indicates a person is not on active duty, a person may be liable under the “punitive provisions of the SCRA.”<sup>261</sup> The DMDC has also noted that it previously had only captured active duty periods of thirty days or more,<sup>262</sup> even though servicemembers on active duty may still be SCRA eligible during those shorter periods of service, and that its use of “active duty” is more limited than the SCRA’s use of that term.<sup>263</sup> Additionally, creditors have observed significant lag times between a person entering military service and the information appearing on the DMDC website.<sup>264</sup> These accuracy and latency issues can cause substantial problems for creditors relying on the website, which many are required to do under various settlement

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260. *E.g.*, Def. Manpower Data Ctr., *Servicemembers Civil Relief Act Website v. 2.9 Users Guide*, *SERVICEMEMBERS CIVIL RELIEF ACT (SCRA) WEBSITE 3* (2012). In the author’s experience working with clients, this error rate has been as high as fifteen percent.

261. *Id.* at 3, 6. At least one court has held that reliance on the DMDC search results in executing an affidavit indicating whether a defendant was in military service is insufficient when other documents (in this case, a bankruptcy petition) show military service. *In re Templehoff*, 339 B.R. 49, 51–54 (Bankr. S.D.N.Y. 2005).

262. Def. Manpower Data Ctr., *supra* note 260, at 14 (“Prior to 2007, DMDC only received information on active duty periods of more than 30 consecutive days.”).

263. *Id.* (“Coverage under the SCRA is broader in some cases and includes some categories of persons on active duty for purposes of the SCRA who would not be reported as on Active Duty in this file.”).

264. During the Independent Foreclosure Review (IFR), *see supra* notes 212–17 and accompanying text, independent consultants and mortgage servicers reported lags in the updating of the DMDC website. They identified cases where the mortgage servicer had relied on DMDC search results indicating a person was not in military service, but later DMDC website searches indicated the person had been on active duty at the time of foreclosure. IC Guidance, *supra* note 181. In the author’s experience in working with many clients on DMDC search issues, the author has heard of latency periods as large as thirty days. The DMDC reports, however, that its database is updated daily and that most service branches submit data to it daily. Letter from Col. Paul E. Kantwill, Dir., Office of Legal Policy, Dep’t of Def., to Mr. John H. Dalton, President, Hous. Policy Council, Fin. Servs. Roundtable 3 (Jan. 3, 2013) (on file with author) [hereinafter Kantwill Letter] (“DMDC updates all data within 24 hours of receipt from the Service Components, and most of the components submit data daily to DMDC.”).

agreements with federal regulators,<sup>265</sup> since the creditor may take action in reliance on the DMDC's representation—and without any information to suggest that the DMDC's representation is inaccurate—only to learn after the fact that the debtor was in military service and that the creditor may be subject to strict liability.<sup>266</sup> The DMDC has stated that it continues to work on improving the accuracy of the website.<sup>267</sup> But that may be cold comfort to those who have been subjected to civil liability for relying on the DMDC website's results.

Although the DMDC certificates are by statute deemed *prima facie* evidence of the individual's military service or lack thereof, the federal agencies have imposed liability on mortgage servicers in cases where the servicer relied on a DMDC website result and otherwise had no knowledge of the borrower's military service.<sup>268</sup> Creditors who relied on a certificate from the DMDC indicating that a borrower was not in military service, and who otherwise had no knowledge of the servicemember's military service, were not simply required to return the servicemember to the status quo *ex ante*, but were also required to pay substantial civil penalties.<sup>269</sup> The agencies' imposition of liability in such cases—where a creditor relied on a certificate issued by the Department of Defense's DMDC database—is unjustifiable under the SCRA, but is consistent with bureaucratic incentives to maximize recoveries.

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265. *E.g.*, Consent Order, *supra* note 220, ¶ 4.

266. Even consultants working with the government have experienced these accuracy issues with the DMDC website. During the IFR, ICs were instructed to re-run their batch testing of in-scope borrower populations because of concerns that previous search results were inaccurate. IC Guidance, *supra* note 181.

267. Kantwill Letter, *supra* note 264, at 1 (“DMDC has, and will continue to, work with its Service Components to identify known areas of data accuracy and timeliness concerns. While recognizing that no system is perfect, we are committed to continuously improving the quality, reliability, and efficacy of available information.”).

268. *E.g.*, IC Guidance, *supra* note 181 (stating that the SCRA's foreclosure protection provision is a strict liability statute and that “there is no safe harbor for servicers who conducted a DMDC query that did not accurately report the Early Alert status.”).

269. *Id.* at 2–3. The agencies indicated, however, that they might consider a reduced civil penalty in a case where an affidavit was based on a DMDC result which later turned out to be inaccurate. *Id.*

*c. Servicemembers with Notice of the Proceedings.* Prior to the 2003 reenactment of the SCRA, there was confusion about the interaction between the SCRA's default judgment protection and the SCRA's provision allowing a servicemember to seek a stay of civil proceedings when military service materially affected the servicemember's ability to participate in the proceeding.<sup>270</sup> The principal difference between the default judgment and stay protections is that the default judgment protection permits servicemembers to seek vacation of a default judgment in certain circumstances.<sup>271</sup> Some had argued that the two provisions were designed for mutually exclusive situations: the default judgment provision for when a servicemember does not have notice of a proceeding, and the stay provision for when the servicemember does.<sup>272</sup> Yet others argued that the default judgment and stay protections are two items on the menu of options from which servicemembers may choose.<sup>273</sup>

In 1990, an effort was made to resolve this tension by providing that an application for a stay—and thus notice of the action—would not preclude the operation of the default judgment protection.<sup>274</sup> A proposal was made to amend the default judgment provision to provide: “An application for a stay pursuant to section 201 of this Act shall not be an appearance that would preclude a service member from reopening a default judgment.”<sup>275</sup> This proposal was eventually withdrawn.<sup>276</sup>

In 2003, Congress took a different direction. In reporting the bill that eventually became the SCRA, the

270. 50 U.S.C. app. § 522 (2000).

271. *Id.* § 521(g).

272. McDonough, Huckabee & Gentile, *supra* note 109, at 678, 687 (“It is inappropriate and inconsistent with case law to allow a servicemember two forms of relief, when each was initially adopted to protect servicemembers in mutually exclusive circumstances.”).

273. JAG SCRA GUIDE, *supra* note 69, § 3-6, at 3-36 (“[W]hen a servicemember has notice of a proceeding, that servicemember will have to decide whether to enter an appearance, attempt to be released from duty to defend, and to defend or whether to await a default judgment and attempt to reopen it at a more convenient time.”).

274. Huckabee, *supra* note 112, at 161.

275. *Id.*

276. *Id.* at 163, 172 (“The amendments were eventually deleted due to political compromise.”).

House Committee on Veterans' Affairs explained that the SCRA was intended to clarify that the default judgment and stay provisions apply in mutually exclusive circumstances. The report stated that the "protections against default judgments would clarify that the protections under this section are intended to apply when a servicemember does not receive notice of an action or proceeding."<sup>277</sup> To effect this clarification, the default judgment provision was amended to provide that "[i]f a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding . . . ."<sup>278</sup> The 2003 SCRA also clarified that the stay of proceedings protection applied to cases where the servicemember has notice of a proceeding.<sup>279</sup> For example, the stay of proceedings section was given the heading "Stay of proceedings when servicemember has notice."<sup>280</sup> The first subsection of the provision also clarifies that the stay of proceedings applies to any civil action or proceeding when the servicemember "has received notice of the action or proceeding."<sup>281</sup>

Notwithstanding these clarifications, the agencies have imposed civil penalties on mortgage servicers when the servicemember had actual knowledge of the foreclosure proceeding yet took no apparent effort to seek a stay or otherwise participate in the proceeding. In guidance to the independent consultants conducting the file reviews required by many of the settlements, the agencies do not make any provision for viewing cases differently where a borrower clearly had notice of a proceeding than cases where there may be no evidence of borrower notice.<sup>282</sup> Creditors were surprised to learn that some servicemembers would receive six-figure checks as compensation for foreclosures when the servicemember had notice of the foreclosure proceeding but

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277. H.R. REP. NO. 108-81, at 37 (2003); *see also id.* at 45 (distinguishing between the procedures for the default judgment protection and those for a request for a stay "when the service member has notice of a hearing.").

278. Servicemembers Civil Relief Act, 50 U.S.C. app. § 521(f) (2003).

279. H.R. REP. NO. 108-81, at 45-46 (explaining that the provision regarding stay of proceedings "when the servicemember defendant has notice" was amended for clarity).

280. 50 U.S.C. app. § 522.

281. *Id.* § 522(a)(2).

282. IC Guidance, *supra* note 181, at 14.

took no effort to stay or otherwise participate in the proceeding.<sup>283</sup> Such windfalls for servicer inaction are fundamentally inconsistent with the balancing of servicemember and creditor interests built into the Act, but are consistent with the bureaucratic tendency toward large financial recoveries.

## 2. *Expansion of the Interest Rate Protection*

The predicted bureaucratic proclivities have been further manifest by the agencies' expansion of liability under the SCRA's interest rate protection. The interest rate cap is one of the most frequently used SCRA financial protections.<sup>284</sup> One of the central additions of the 1942 amendments, the interest rate protection caps at six percent the interest a servicemember can incur on credit obligations, originated prior to the servicemember's period of military service.<sup>285</sup> The act requires that a creditor forgive any interest above six percent and reduce the periodic payment in accordance with the reduction in interest.<sup>286</sup> The servicemember is required to provide the creditor with "written notice and a copy of the military orders calling the servicemember to military service" to qualify for the benefit, and may do so up to 180 days after leaving military service.<sup>287</sup> Once the servicemember qualifies for the benefit, the creditor must apply the benefit effective as of the date of military service—which often will result in a retroactive application of the benefit.<sup>288</sup> Consistent with the SCRA's balancing of servicemember and commercial interests, a court may grant a creditor relief from this protection if it appears that the servicemember's ability to pay the contract rate of interest is not materially affected by the servicemember's military service.<sup>289</sup>

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283. This conduct by some servicemembers was inconsistent with guidance that some commentators have been providing to servicemembers for decades. *See, e.g.*, Garth K. Chandler, *The Impact of a Request for a Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 102 MIL. L. REV. 169, 178–79 (1983).

284. Meixell, *supra* note 137, at 2.

285. 50 U.S.C. app. § 527(a)(1).

286. *Id.* § 527(a)(2)–(3).

287. *Id.* § 527(b)(1).

288. *Id.* § 527(b)(2).

289. *Id.* § 527(c). Some have argued that the burden of proving no material effect rests on the creditor. *See, e.g.*, JAG SCRA GUIDE, *supra* note 114, § 3-12,

The widespread use of the interest rate cap in the early 1990s during the Persian Gulf War drew renewed attention to this provision and highlighted some of its shortcomings. Financial services products had evolved substantially since 1942, and the application of the then-50-year-old law to the modern consumer credit marketplace created unforeseen challenges.<sup>290</sup> Additionally, the Act was silent regarding how the interest rate protection should be implemented, leaving servicemembers and creditors guessing.<sup>291</sup>

In 1990, the House and Senate Committees on Veterans' Affairs held joint hearings on the SCRA's interest rate protection. During these hearings, several witnesses testified that creditors were asking servicemembers to provide the creditor with a written request and copy of the orders calling the servicemember to military service so that the creditor could confirm military service, know the effective date of the benefit, and identify which obligations might be eligible for the benefit.<sup>292</sup> For example, the CEO of Navy Federal Credit Union testified:

We are requiring only a statement in writing, in no particular format, from our members advising us that they

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at 3-34. However, this is inconsistent with the Supreme Court's instruction that the burden of proof be determined on a case-by-case basis. *Boone v. Lightner*, 319 U.S. 561, 569 (1943); *see also supra* notes 165-69.

290. *See, e.g.*, James Pottorff, *A Look at the Credit Industry's Approach to the Six Percent Limit on Interest Rates*, 1990 ARMY LAW. 49, 50 (1990) ("The first-time application of this law to a computerized credit industry has resulted in numerous unanticipated problems for creditors and debtors alike."); *id.* at 52 ("Even for creditors who correctly apply section 526, compliance is sometimes technically difficult."); *see also supra* notes 133-136 and accompanying text.

291. *See, e.g.*, McDonough, Huckabee & Gentile, *supra* note 109, at 680.

292. *See, e.g.*, *Soldiers' and Sailors' Civil Relief Act and Veterans' Reemployment Rights: Joint Hearing Before the Comms. on Veterans' Affairs of the H.R. and U.S. Sen.*, *supra* note 129, at 48-49 (statement of Robert J. Engelstad, Senior Vice President, Mortg. and Lender Standards, Fed. Nat'l Mortg. Ass'n) (stating that FNMA (Fannie Mae) required servicemembers to provide notice and a copy of the call-up orders) [hereinafter Engelstad Statement]; *Soldiers' and Sailors' Civil Relief Act and Veterans' Reemployment Rights: Joint Hearing Before the Comms. on Veterans' Affairs of the H.R. and U.S. Sen.*, *supra* note 129, at 186 (statement of Thomas J. Hughes, President and Chief Exec. Officer, Navy Fed. Credit Union) (same) [hereinafter Hughes Statement]; *see also* Pottorff, *supra* note 290, at 50 ("As a general rule, these organizations [the GSEs] require that mortgage issuers obtain a copy of a reserve component service member's orders to active duty before granting the reduction in interest.").

are being called to active duty and requesting relief under the Act for whichever of the many types of credit they may have with Navy Federal. A copy of the call-up orders is sufficient confirmation.<sup>293</sup>

Testimony was also taken regarding whether the interest rate protection should be self-effecting, or whether servicemembers should be required to take steps to initiate the protection. Some argued that it should be viewed as self-effecting.<sup>294</sup> Most witnesses testified, however, that orders were necessary to assist creditors in properly applying the protection.<sup>295</sup> And at that time the Judge Advocate General's Office provided guidance that servicemembers were required to inform creditors of their military service and to provide a request for the SCRA interest rate cap and a copy of military orders.<sup>296</sup> When the SCRA was enacted in 2003, the Act included the requirement that a servicemember provide "written notice and a copy of the military orders calling the servicemember to military service" to qualify for the benefit.<sup>297</sup> The House Committee on Veterans' Affairs explained that this requirement "codif[ied] practices established during the Persian Gulf War" and that it believed the "burden should be on the servicemember to initiate the protection."<sup>298</sup>

Although the statutory text and guidance from legislative history are consistent and quite clear regarding what the SCRA requires a servicemember to provide to qualify for the interest rate protection, the agencies' aggressive interpretations of this requirement have imposed

293. Hughes Statement, *supra* note 292, at 186.

294. See, e.g., Memorandum from Henry B. Shepard, Jr., Lynne B. Barr, Gordon H. Piper & Bradford J. Smith, Goodwin, Procter & Hoar, *Federal Laws Protecting Persons in Military Service*, (Aug. 27, 1990), reprinted in *Soldiers' and Sailors' Civil Relief Act and Veterans' Reemployment Rights: Joint Hearing Before the Comms. on Veterans' Affairs of the H.R. and U.S. Sen.*, *supra* note 129, at 156.

295. See, e.g., Hughes Statement, *supra* note 292, at 186 ("There can be nothing automatic, since the financial institution needs to know what individuals and which of their obligations are affected.")

296. McDonough, Huckabee & Gentile, *supra* note 109, at 682 (citing Gregory M. Huckabee, *Legal Assistance for Those Who Go in Harm's Way*, 71 MIL. REV. 33 (1991); Dale Ellis, *Give Credit Where Credit is Due*, 8 COMPLEAT LAW. 19, 21 (1991)).

297. Servicemembers Civil Relief Act, 50 U.S.C. app. § 527(b)(1) (2003).

298. H.R. REP. NO. 108-81, at 39 (2003).

liability for practices that not only comply with the plain language of the SCRA, but also complied with guidance from other regulatory agencies. Four areas of expansion in particular demonstrate the agencies' expansion of liability under the SCRA: (1) what qualifies as "written notice;" (2) what qualifies as a copy of "military orders calling the servicemember to military service;" (3) what constitutes "interest" under the SCRA; and (4) what happens when a servicemember fails to satisfy the statutory prerequisites.

*a. What is "written notice"?* One significant area of expansion in the agencies' recent SCRA enforcement efforts is what constitutes "written notice." Many in the industry, and indeed most administrative agencies, had interpreted "notice" as synonymous with "request." But the DOJ and federal banking agencies departed from this interpretation, instead taking the position in their recent enforcement actions that virtually any communication informing a creditor that a servicemember is in military service constitutes the required "notice." As a result, the agencies have since imposed liability in thousands of cases where borrowers had not requested SCRA interest rate protections.<sup>299</sup>

Prior to the recent enforcement actions, the consensus view was that "notice" meant "request." During the 1990 hearings, some witnesses characterized the requirement for "notice" as requiring "notice" of qualification for the interest rate benefit.<sup>300</sup> The American Forces Information Service—a division of the Department of Defense—emphasized that "the interest rate reduction doesn't occur automatically—service members must request it."<sup>301</sup> Most government agencies have

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299. See, e.g., Consent Order at 5, *Sallie Mae, Inc.*, No. 1:99-mc-09999 (D. Del. May 13, 2014) (clarifying that nearly half of the settlement fund established by the consent order is attributable to borrowers who had not requested SCRA interest rate benefits).

300. See, e.g., Engelstad Statement, *supra* note 292, at 138 (discussing "notice" of eligibility requirements).

301. AM. FORCES INFO. SERV., SOLDIERS' AND SAILORS' CIVIL RELIEF ACT PROVIDES UMBRELLA OF PROTECTION 2 (2002), available at [http://www.defense.gov/specials/Relief\\_Act\\_Revision/index.html](http://www.defense.gov/specials/Relief_Act_Revision/index.html); *The Servicemembers' Civil Relief Act and the Soldiers' and Sailors' Civil Relief Act, Hearings on H.R. 5111 and H.R. 4017 Before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 107th Cong., 2d Sess. 130 (2002) (emphasis added). The American Forces Information Service was disestablished in 2008, at which time Department of Defense formed the Defense Media Activity. U.S. DEP'T OF DEF., DIR. 5105.74 (Dec. 18, 2007).

similarly interpreted “notice” as synonymous with “request.” For example, the Department of Education’s regulations provide that a servicemember with student loans must provide a written “request” and copy of orders to be eligible for the interest rate benefit,<sup>302</sup> and has explained that it views “notice” and “request” as “substantively the same.”<sup>303</sup> In a 2012 settlement, the DOJ also equated written notice to a creditor’s receipt of a written “request” for SCRA benefits,<sup>304</sup> although, as discussed below, the DOJ subsequently departed from this position. Similarly, the Consumer Financial Protection Bureau’s website instructs servicemembers that to obtain the SCRA’s interest rate benefit “[y]ou will need to send a written *request* to your servicer, and will also need to provide your servicer with a copy of your orders calling you on to active duty.”<sup>305</sup> The Judge Advocate General’s School also interpreted “notice” to mean “request,”<sup>306</sup> and included in its *SCRA Guide* a “Sample Letter to Creditor Requesting Reduction to 6% Interest.”<sup>307</sup> And the OCC, in its *Comptroller’s Handbook* that predates its enforcement actions against financial institutions and that as of this writing is still in circulation, explained that a creditor must reduce the interest rate to six percent “[u]pon receiving a written *request* for relief and a copy of the service member’s military

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302. 34 C.F.R. § 682.202(a)(4), (a)(8) (2013).

303. Letter from Pamela Moran, Dep’t of Educ., to the Consumer Bankers Assoc., Educ. Fin. Council, Nat’l Council of Higher Educ. Loan Programs & the Student Loan Servicing Alliance 1 (undated) (on file with author). In response to a request that SCRA interest rate benefits be provided solely on basis of receipt of military orders, the Department of Education stated, “[T]his suggestion is not consistent with the SCRA. It also is not consistent with the Department’s regulations in this area because it eliminates the servicemember’s request.” *Id.*

304. Consent Order at 6, 8, *Capital One, N.A.*, No. 1:12-cv-00828 (E.D. Va. July 26, 2012).

305. CONSUMER FIN. PROTECTION BUREAU, *How can I Reduce my Student Loan Interest Rate under the Servicemembers Civil Relief Act (SCRA)?*, <http://www.consumerfinance.gov/askcfpb/1501/how-can-i-reduce-my-student-loan-interest-rate-under-servicemembers-civil-relief-act-scra.html> (updated June 17, 2013) (emphasis added).

306. THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, COMMANDER’S LEGAL HANDBOOK, at 247 (2013) (explaining that to qualify for the interest rate protection “[s]ervice member must request and provide copy of orders.”).

307. JAG SCRA GUIDE, *supra* note 69, app. B, at B-1.

orders.”<sup>308</sup> As discussed below, though, the agencies have since changed this position in its enforcement actions (although it has not taken this previous guidance out of circulation).

These consistent interpretations of “notice” as synonymous with “request” made it even more surprising when the federal agencies provided guidance to independent consultants conducting file reviews required by various settlements that “notice” need not be a request, but could be any form of notice of military service to the creditor.<sup>309</sup> In other words, “notice” no longer meant notice of the intent to claim SCRA benefits, but merely notice of military service. This guidance appeared to ignore the many other reasons a servicemember may submit military orders to a creditor, such as to request a military deferment<sup>310</sup> or to demonstrate hardship in connection with a short sale request.<sup>311</sup> The retroactive application of this new standard had resulted in a substantial expansion of liability for financial institutions that had provided servicemember with a deferment, short sale, or other assistance requested by the servicemember, but not with SCRA interest rate benefits that were not requested by the borrower.<sup>312</sup> And even more surprisingly, the agencies imposed liability in cases where the notice was provided orally rather than in writing.<sup>313</sup> This expansion of the

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308. OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S HANDBOOK: SERVICEMEMBERS CIVIL RELIEF ACT OF 2003 2 (2011) (emphasis added).

309. *See, e.g.*, IC Guidance, *supra* note 181. This guidance was inconsistent with the OCC’s own previous guidance. *See supra* note 294.

310. *E.g.*, FED. STUDENT AID, OFFICE OF THE DEP’T OF EDUC., *Deferment and Forbearance*, <http://studentaid.ed.gov/repay-loans/deferment-forbearance> (last visited Feb. 14, 2014).

311. *E.g.*, FED. HOUS. FIN. AGENCY, *Fact Sheet: FHFA Short Sale Assistance for Military Home Owners with Fannie Mae and Freddie Mac Loans* [hereinafter *FHFA Fact Sheet*], <http://www.militaryfamily.org/assets/pdf/MilitaryShortSaleAssistanceFactSheet.F.PDF> (last visited Jan. 28, 2014) (requiring copies of military orders for servicemember to qualify for short sale); *see also* FANNIE MAE, *Servicing Guide Announcement SVC-2012-19*, (Aug. 12, 2012), <https://www.fanniemae.com/content/announcement/svc1219.pdf> (same).

312. The DOJ established a penalty formula for alleged interest rate violations of a refund of the difference between the rate charged and six percent, plus the greater of three times that amount or \$500. Consent Order at 29–30, *Capital One, N.A.*, No. 1:12-cv-00828 (E.D. Va. July 26, 2012).

313. *See, e.g.*, IC Guidance, *supra* note 181.

statutory requirement that the servicemember provide “written notice” to include oral requests is impossible to reconcile with the statute. But it is consistent with regulatory theory’s predictions.

*b. What is a “military order calling the servicemember to military service”?* Another area where the agencies have expanded creditor liability is by expanding the meaning of “military orders calling the servicemember to military service.”<sup>314</sup> “Military service” is a defined term under the SCRA, and for members of the U.S. armed forces generally means “active duty.”<sup>315</sup> Thus, orders calling a servicemember “to military service” can only mean those orders calling the servicemember to “active duty” (i.e., ordering the servicemember to leave a non-active duty status and enter active duty).<sup>316</sup> As discussed above, this requirement was added to the statute to allow creditors to know the time period during which to apply the interest rate cap, since the cap often must be applied retroactively.<sup>317</sup> Only the orders calling the servicemember to active duty provide this critical information to the creditor.

Here again, the agencies have departed from the plain meaning of the statute in imposing substantial liability. Servicemembers receive myriad different orders during their military service. These include permanent change of station (PCS) orders, temporary change of station (TCS) orders, temporary duty (TDY) orders, as well as many others.<sup>318</sup> While these orders are certainly “military orders” requiring a servicemember to take certain action, these are not the orders

314. See Servicemembers Civil Relief Act, 50 U.S.C. app. § 527(b)(1) (2012).

315. *Id.* § 511(2)(A)(i).

316. See, e.g., CONSUMER FIN. PROTECTION BUREAU, *How can I Reduce my Student Loan Interest Rate under the Servicemembers Civil Relief Act (SCRA)?*, <http://www.consumerfinance.gov/askcfpb/1501/how-can-i-reduce-my-student-loan-interest-rate-under-servicemembers-civil-relief-act-scra.html> (updated June 17, 2013) (“You will need to send a written request to your servicer, and will also need to provide your servicer with a copy of your orders calling you on to active duty.”).

317. See *supra* notes 190–98 and accompanying text; see also McDonough, Huckabee & Gentile, *supra* note 109, at 688 (“The orders also indicate the period of time for which the servicemember is ordered to duty . . . [and] provide[] guidance to the creditor on when and how long the interest protection should be applied.”).

318. E.g., Army Reg. 600-8-105, *Military Orders*, available at [http://www.apd.army.mil/pdffiles/r600\\_8\\_105.pdf](http://www.apd.army.mil/pdffiles/r600_8_105.pdf).

that call the servicemember to military service; rather, they are orders instructing a servicemember already in military service to take specified action. Yet federal agencies providing guidance in connection with the file reviews required by the various SCRA settlements have concluded that these orders and many others which do not call the servicemember to military service are qualifying orders for SCRA purposes.<sup>319</sup> And in the DOJ's settlement with Sallie Mae, the DOJ appears to signal that a qualifying military "order" includes any document prepared by a branch of the armed forces, the Department of Defense, or a borrower's commanding officer indicating active duty military service—even if the document is not an "order" under any accepted meaning of that term.<sup>320</sup> And because many creditors had not provided benefits where servicemembers had not provided qualifying military orders, the agencies have imposed substantial civil liability on that basis.<sup>321</sup>

The drafters of the SCRA understood that there is a difference between military orders and PCS orders. This is evidenced by the specific inclusion of PCS orders in the SCRA's lease protection.<sup>322</sup> There, Congress expressly allows PCS orders to fulfill the eligibility requirements to terminate a lease of premises or an automobile.<sup>323</sup> It is a longstanding rule of statutory interpretation that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>324</sup> It follows that the drafters' omission of PCS orders in Section 527 should be seen as intentional—and that PCS orders, like other orders that do not call the servicemember to military service, should not be

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319. See, e.g., IC Guidance, *supra* note 181.

320. Consent Order at 17, *Sallie Mae, Inc.*, No. 1:99-mc-09999, (D. Del. May 13, 2014) (explaining that qualifying military orders include documents such DD-214 forms and letters from a borrower's commanding officer to the creditor).

321. See, e.g., Kirk D. Jensen, John C. Redding & Sasha Leonhardt, *Highway to the Danger Zone: Automotive Lending and the Servicemembers Civil Relief Act*, 131 BANKING L.J. 126, 137 (2014); Kirk D. Jensen & Sasha Leonhardt, *Students, Loan Servicers, and the Servicemembers Civil Relief Act*, 19 WESTLAW J. BANK & LENDER LIABILITY 1, 3 (Oct. 7, 2013).

322. Servicemembers Civil Relief Act, 50 U.S.C. app. § 535 (2012).

323. *Id.*

324. *Russello v. United States*, 464 U.S. 16, 23 (1983).

considered “military orders” under the interest rate protection.<sup>325</sup> But again, while the agencies’ position is inconsistent with the Act, it is consistent with bureaucratic tendencies.

*c. What is “interest”?* Yet another aggressive agency interpretation resulting in increased creditor liability is in an unprecedented expansion of the meaning of “interest.” The statute includes a broad but non-illustrative definition of the term “interest”: interest includes “service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability.”<sup>326</sup> While the plain language of the definition of “interest” is undeniably broad, the language must be interpreted consistent with the ordinary meaning of the words used.<sup>327</sup>

For centuries, the term “interest” has been used to refer to the creditor’s compensation for the borrower’s use of the money borrowed. In the eighteenth century, William Blackstone wrote that “when money is lent on a contract to receive not only the principal sum again, but also an increase *by way of compensation for the use*; which generally is called *interest . . .*”<sup>328</sup> Thus, “interest” was the compensation to the creditor for the borrower’s use of the borrowed funds. This understanding of the meaning of “interest” as referring to compensation to the creditor continued into the nineteenth century. For example, a law dictionary from the 1850s defined interest as “[t]he *compensation* which is paid to the lender or by the debtor to the creditor for . . . use [of money].”<sup>329</sup> A few decades later, the Supreme Court similarly explained that “[i]nterest is the *compensation* allowed by law, or fixed by the parties, for the use or forbearance of money or

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325. In 2011, the Department of Defense worked with a financial services trade association to develop an alternative form servicemembers can submit to request the SCRA benefit that is easier to interpret than military orders. See GAO MORTGAGE FORECLOSURES, *supra* note 22, at 20. But while this form may be easier to understand and interpret than a military order, it is not an “order calling the servicemember to military service” as required by the statute. *Id.*

326. 50 U.S.C. app. § 527(d)(1).

327. *E.g.*, *Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 539 (2009) (“[T]he ordinary meaning of the words chosen by Congress provides the starting point for interpreting the statute.”).

328. 2 William Blackstone, *Commentaries on the Laws of England* 454 (1915) (emphasis added).

329. J. Bouvier, A LAW DICTIONARY 652 (6th ed. 1856) (quoted in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 745 (1996) (emphasis added)).

as damages for its detention.”<sup>330</sup>

This understanding of the meaning of “interest” has continued into the present day. Indeed, in 1996 the Supreme Court in *Smiley v. Citibank (South Dakota), N.A.* relied on long-standing precedent and definitions in concluding that “interest” included compensation to the creditor in addition to the rate.<sup>331</sup> And more recently, *Black’s Law Dictionary* has defined “interest” as “the *compensation* fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use.”<sup>332</sup>

When Congress used the term “interest” in the SCRA and in the SSCRA, it must be presumed that it did so in the context of this centuries-old understanding of the meaning of the term.<sup>333</sup> Accordingly, “interest” in the SCRA should be interpreted consistent with its well-established historical meaning, which includes “service charges, renewal charges, fees, or any other charges” retained by the creditor, but does not include fees or charges, such as those paid to third parties, that do not compensate the creditor.

In the SCRA enforcement actions, however, the federal agencies have taken a more expansive view of the meaning of “interest” under the Act. They have concluded that any fee or

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330. *Brown v. Hiatts*, 82 U.S. 177, 185 (1873) (emphasis added).

331. *Smiley*, 517 U.S. at 745–46.

332. BLACK’S LAW DICTIONARY 397 (9th ed. 2009).

333. The historical meaning of “interest” has consistently been applied in other federal and state laws that address interest and similar concepts. For example, the National Bank Act—enacted prior to the 1942 enactment of the definition of interest in the SSCRA—empowers national banks to charge “interest” on obligations. 12 U.S.C. § 85 (2012). The OCC has defined the meaning of “interest” in its regulations: “The term ‘interest’ as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit . . . .” 12 C.F.R. § 7.4001(a) (2014) (emphasis added). State law also generally follows the historical understanding of the term “interest.” For example, California law defines interest as “any fee, bonus, commission, discount or other *compensation*” received from a borrower. CAL. CONST. art. XV, § 1(2) (2014) (emphasis added). Similarly, New York law excludes from the definition of “interest” reasonable fees, charges and costs for “services actually and necessarily rendered,” including costs for appraisals, title examinations, legal services, and inspections. N.Y. COMP. CODES R. & REGS. tit. III, § 4.3(b) (2014). Texas law also defines “interest” as “*compensation* for the use, forbearance, or detention of money.” TEX. FIN. CODE ANN. § 301.002(a)(4) (2013) (emphasis added). When Congress used the term “interest” in the SCRA, it did so in the context of the numerous federal and state laws that consistently define “interest” as including various charges that compensate creditors for the extension of credit but excluding charges that are not retained by the creditor.

charge related to the underlying credit obligation is part of “interest” for SCRA purposes, specifically including inspection fees, Broker Price Opinion (BPO) fees, legal fees, and foreclosure-related charges—fees that generally are not retained by and therefore do not “compensate” the creditor.<sup>334</sup> Under this analysis, the only fees excluded are those for a separate product or service the consumer purchased independently, such as debt protection or credit monitoring.<sup>335</sup> This expansive interpretation of “interest” leads to the unprecedented result that charges for services such as property preservation (e.g., charges for lawn mowing, winterizing a home, and performing other assorted repairs) are for the first time under any federal or state law considered part of “interest.” The result of this expansive interpretation is that alleged “violations” of the law have been found in many cases where charges were imposed that were not retained by the creditor, did not compensate the creditor, and would not be considered “interest” in any other context. While this expansion of liability is inconsistent with the structure and text of the statute, it is consistent with the bureaucratic tendencies observed by regulatory theorists.

*d. What happens when a servicemember fails to satisfy the statutory prerequisites?* Historically, the financial services industry interpreted the requirements of “written notice” and “a copy of military orders calling the servicemember to military service” as being statutory prerequisites that a servicemember must satisfy to qualify for the SCRA’s interest rate benefit. Just as taxpayers must satisfy specific requirements to receive tax refunds, the industry believed servicemembers must satisfy the SCRA’s requirements to qualify for SCRA benefits.

This view was supported by the SCRA requiring that the Department of Defense educate servicemembers regarding SCRA benefits. Section 515 of the SCRA orders the Secretary of each branch of the military to “ensure that notice of the benefits accorded by this Act is provided in writing to persons in military service and to persons entering military service.”<sup>336</sup> Consistent with this provision, creditors have

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334. IC Guidance, *supra* note 181.

335. *Id.*

336. 50 U.S.C. app. § 515 (2000).

previously assumed that the responsibility of educating servicemembers about SCRA benefits rested on the Department of Defense rather than on creditors. This view was reinforced by the legislative history to the SCRA, which clarified that the burden of satisfying the statutory prerequisites was intentionally placed on the servicemember.<sup>337</sup>

In recent SCRA enforcement activity, the agencies have signaled that they now expect creditors to shoulder much of the burden of educating servicemembers regarding SCRA benefits. Specifically, the Sallie Mae Complaint indicates that the agencies believe a creditor violates the SCRA if the creditor “fail[s] to make acceptable efforts” to elicit qualifying documents from servicemembers who have not otherwise provided them, or if the creditor “fail[s] to notify servicemembers that they may be eligible for SCRA benefits” when they provide military documents for reasons unrelated to SCRA benefits.<sup>338</sup> And because more than half of the Sallie Mae settlement fund is allocated toward borrowers who did not provide a written request and copy of active duty orders,<sup>339</sup> it appears that this interpretation will be enforced retroactively. While this shifting of the burden of educating servicemembers onto creditors and away from the Department of Defense is inconsistent with the statutory text and history, it is consistent with the predictions of regulatory theory.

#### *D. Expansion of Liability and the Rule of Lenity*

The agencies’ aggressive expansions of theories of liability under the SCRA are not only inconsistent with the text and structure of the SCRA, but they are also inconsistent with the rule of lenity.<sup>340</sup> The rule of lenity, a rule that “is

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337. H.R. REP. NO. 108-81, at 39 (2003).

338. Compl. at 5, *Sallie Mae, Inc.*, No. 1:99-mc-09999.

339. *Id.* at 4.

340. One might argue that the application of the rule of lenity to the SCRA is inconsistent with the Supreme Court’s mandate that the SCRA be liberally construed in favor of servicemembers. *E.g.*, *Boone*, 319 U.S. at 575; *LeMaistre v. Leffers*, 333 U.S. 1, 4–6 (1948). The Court’s jurisprudence however does not justify departing from the meaning of the text itself. In *Boone*, the Court was instructing that the “material effect” test should be interpreted liberally in favor of servicemembers, even as the Court itself ruled against the servicemember. *Boone*, 319 U.S. at 575. In *LeMaistre*, the Court rejected an argument that the

perhaps not much less old than construction itself,”<sup>341</sup> requires a court to interpret ambiguous laws with criminal penalties in favor of defendants, thereby giving fair warning to potential defendants and narrowing potential criminal liability.<sup>342</sup> In other words, the rule of lenity is a “basic axiom of federal criminal jurisprudence” requiring “that a court should adopt the harsher of two rational readings of a criminal statute only when Congress has spoken in clear and definite language.”<sup>343</sup>

The SCRA, like its predecessors, is a “hybrid” statute—providing for both civil and criminal penalties in many of its provisions.<sup>344</sup> The application of the rule of lenity to hybrid statutes like the SCRA has been the subject of much debate.<sup>345</sup> But courts have increasingly embraced the application of the rule of lenity to statutes that, like the SCRA, provide for criminal penalties as well as other potential consequences. And where a statute is susceptible to multiple interpretations that might otherwise be acceptable, the most limiting interpretation must apply in all applications—because a single law must have a single meaning in all contexts, and the “lowest common

text of the Act should be interpreted more narrowly than the text itself justified. In the last sentence, and as a final explanation for why the Court would not read the statute in a manner the text itself could not support, the Court cited *Boone*. Neither case is incompatible with the application of the rule of lenity.

341. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

342. *E.g.*, *C.I.R. v. Acker*, 361 U.S. 87, 91 (1959); *Keppel v. Tiffin Sav. Bank*, 197 U.S. 356, 362 (1905) (“[A] person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it.”).

343. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (internal quotations omitted).

344. *See* 50 U.S.C. app. §§ 597-597a (providing for civil liability); 50 U.S.C. app. §§ 521(c), 527(e), 531(c), 532(b), 533(d), 535(h), 536(e), 537(c) (providing for criminal penalties).

345. *See, e.g.*, Stephen Wills Murphy, *The Rule of Lenity and Hybrid Statutes*: WEC Carolina Energy Solutions LLC v. Miller, 64 S.C. L. REV. 1129 (2013); Mark S. Popofsky, *The Section 2 Debate: Should Lenity Play a Role?*, 7 RUTGERS BUS. L.J. 1 (2010); Jonathan Marx, *How To Construe A Hybrid Statute*, 93 VA. L. REV. 235 (2007); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339 (2005); Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025; Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves*, 51 WASH. & LEE L. REV. 61 (1994); Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 336–37 (1994).

denominator, as it were, must govern.”<sup>346</sup>

*United States v. Thompson/Center Arms*<sup>347</sup> illustrates the point. In *Thompson/Center Arms*, the Court had to interpret an ambiguous provision of the National Firearms Act that included both a civil tax penalty and a criminal penalty.<sup>348</sup> The plurality opinion applied the rule of lenity, reasoning that it “is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.”<sup>349</sup>

The Court in *Leocal v. Ashcroft*<sup>350</sup> again raised the application of the rule of lenity to hybrid statutes. In *Leocal*, the Court addressed whether a DUI conviction was a “crime of violence” under 18 U.S.C. § 16 and therefore an “aggravated felony” under the Immigration and Nationality Act that could serve as the basis for deportation.<sup>351</sup> The court ultimately concluded that the term was unambiguous.<sup>352</sup> But in dicta, the Court noted that if the term had lacked clarity, it would have been constrained to interpret the term consistent with the rule of lenity.<sup>353</sup> Although the court dealt with the provision only in the deportation context, the Court noted that “it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”<sup>354</sup>

The Supreme Court appeared again to invoke the rule of lenity in a case involving the Sherman Act. In 2006, the Court in *Illinois Tool Works*<sup>355</sup> overturned the presumption of market power in antitrust patent tying cases.<sup>356</sup> In reaching this decision, the Court contrasted “the normal rule of lenity

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346. *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (collecting cases).

347. *United States v. Thompson/Ctr. Arms*, 504 U.S. 505 (1992).

348. *Id.* at 518.

349. *Id.* at 519 & n.10 (Scalia, J., concurring).

350. 543 U.S. 1.

351. 543 U.S. at 3.

352. *Id.* at 11–13.

353. *Id.* at 12 n.8.

354. *Id.*

355. *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

356. *Id.* at 31.

that is applied in criminal cases” with what the Court termed “a rule of severity for a special category of antitrust cases.”<sup>357</sup> The Court emphasized that the same text that would establish civil liability under the Sherman Act also “makes the conduct at issue a federal crime.”<sup>358</sup> Accordingly, the Court adopted an interpretation that was consistent with the rule of lenity.

Recent circuit court opinions have been even more definitive in their analysis. In 2012, the Fourth Circuit in *WEC Carolina Energy Solutions LLC v. Miller*<sup>359</sup> held that the rule of lenity applies to both the civil and criminal enforcement of a hybrid statute.<sup>360</sup> The court was faced with conflicting interpretations of a provision in the Computer Fraud and Abuse Act.<sup>361</sup> In explaining why it would adopt the reading most favorable to the defendant, the court explained that the statute must be interpreted in the same way whether civil or criminal penalties were sought.<sup>362</sup> And, because the rule of lenity would apply to criminal prosecution, the rule of lenity must also dictate the interpretation in civil proceedings.<sup>363</sup> Ruling in favor of the defendant, the Fourth Circuit declined to follow a Ninth Circuit decision interpreting the same statutory language in a different way, reasoning that while “[t]he interpretation is certainly plausible,” it is “not clearly warranted by the statutory text. . . . Thus, faced with the option of two interpretations, we yield to the rule of lenity and choose the more obliging route.”<sup>364</sup>

In 2013, the Sixth Circuit also raised the use of the rule of lenity in the context of hybrid statutes. In *Carter v. Welles-Bowen Realty, Inc.*,<sup>365</sup> the court held that the Department of Housing and Urban Development’s (HUD) policy statement on title services companies paying fees to real estate agents under the Real Estate Settlement

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357. *Id.* at 45.

358. *Id.* at 42.

359. 687 F.3d 199 (4th Cir. 2012).

360. *Id.* at 204.

361. *Id.* at 203.

362. *Id.* at 204.

363. *Id.*

364. *Id.* at 205–06 (declining to follow *U.S. v. Nosal*, 642 F.3d 781 (9th Cir. 2011), *rev’d en banc*, 676 F.3d 854 (9th Cir. 2012)).

365. 736 F.3d 722 (2013).

Procedures Act—a hybrid statute that provides for both civil and criminal penalties—was not entitled to deference.<sup>366</sup> Although he wrote the opinion for the unanimous panel, Judge Sutton also authored a concurrence addressing the interplay between *Chevron* deference and the rule of lenity. Judge Sutton noted that HUD’s position on deference “would allow one administration to criminalize conduct within the scope of the ambiguity, the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress.”<sup>367</sup> Rejecting this view, he argued that a statute “is not a chameleon,” and its meaning does not change depending on the type of action in which it is raised.<sup>368</sup> Judge Sutton concluded that “[a]gencies, no less than courts, must honor the rule of lenity.”<sup>369</sup>

The DOJ’s and federal banking agencies’ application of a strict liability theory to the SCRA, and the agencies’ aggressively expansive interpretations of the statutory text, are fundamentally inconsistent with the rule of lenity. As discussed above, in many cases the agencies have adopted interpretations of the statute that are inconsistent with the text of the statute itself. In such cases, creditors have not received fair warning that conduct inconsistent with the agencies’ new positions could result in liability. And even if the agencies’ positions could be viewed as reasonable interpretations of the statute, the rule of lenity would mandate that the interpretation more favorable to the defendant must be applied. But while the agencies’ interpretations are inconsistent with the rule of lenity, they are consistent with predicted agency behavior in light of observed bureaucratic tendencies. The departure from the rule of lenity is one more example of the agencies succumbing to the pathologies predicted by regulatory theory.

#### IV. THE COSTS OF UPSETTING THE BALANCE

While the agencies’ SCRA enforcement actions illustrate bureaucratic tendencies toward expansive and aggressive interpretations of the laws the agencies administer

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366. *Id.* at 726.

367. *Id.* at 729 (Sutton, J., concurring).

368. *Id.* at 730.

369. *Id.* at 736.

and seeking to maximize financial recoveries, the enforcement actions also illustrate the observed limitations of administrative agencies in evaluating the marginal costs and benefits of their actions and a bias toward short-term goals. Regulatory theory predicts that agencies will be limited in their abilities to evaluate marginal benefits of their actions.<sup>370</sup> This limitation may be more pronounced in enforcement actions, where the agencies' actions are not informed by the notice and comment rulemaking process. The agencies' enforcement actions create significant potential costs to consumers generally and servicemembers in particular.<sup>371</sup> There is no indication that the agencies considered these costs or how the agencies evaluated them.

One potential cost of the agencies' expansive imposition of liability in the SCRA enforcement actions seems rather obvious. When costs are imposed on a company, the company will generally pass those costs on to its customers, often in the form of higher prices. This may be particularly true when the company competes in a market with imperfect competition, a trait common to most markets.<sup>372</sup> Thus, when a financial institution is penalized for alleged non-compliance with the SCRA, the cost of that penalty may be passed on to consumers. The net result is that consumers ultimately bear the price of the penalty imposed by the agency.<sup>373</sup> In the case of the agencies' SCRA enforcement actions, this means that consumers, including other servicemembers, who remained current on their financial obligations may pay the price for the hundreds of millions of dollars the agencies have required to be paid to servicemembers who did not remain current on their obligations—even where there is no indication that

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370. See *supra* Part I.C.

371. E.g., Andrew L. Sandler & Kirk D. Jensen, *Disparate Impact in Fair Lending: A Theory Without a Basis & the Law of Unintended Consequences*, 33 *BANKING & FIN. SERVS. POL. REP.* 18 (2014) (discussing unintended costs resulting from aggressive interpretation of fair lending laws).

372. E.g., John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 *MICH. L. REV.* 386, 402 (1981) ("If the corporation competes in a product market characterized by imperfect competition (a trait of most of the 'real world'), then the fine may be recovered from consumers in the form of higher prices.").

373. E.g., Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, U. COLO. L. REV. 1, 26 (2014) (noting that consumers in general may be harmed when banks are penalized because the costs of the penalties are ultimately passed to the consumer).

military service in any way affected the servicemember's ability to comply with the obligation. Ensuring low cost financial products for consumers generally falls outside the jurisdiction of the agencies that have enforced the SCRA,<sup>374</sup> so it would be no surprise if it was not fully or adequately evaluated.

Additionally, the agencies' expansive interpretations of the SCRA through enforcement action increase the risk that creditors may be less willing to lend to servicemembers. The concern that an absolute moratorium on actions against servicemembers would negatively impact the availability of credit to servicemembers was a primary reason the drafters of the original SSCRA adopted the balancing of interests over the moratorium approach.<sup>375</sup> In referring to moratory legislation as "mistaken kindness" to servicemembers, the House Committee on the Judiciary's report explained that the Committee was concerned that "if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit."<sup>376</sup> Continued access to credit may be even more important to a servicemember and his or her family at a time of activation, particularly in cases where a servicemember's military income may be significantly less than the servicemember's civilian income had been.

Although the agencies' expansive interpretations of SCRA provisions and imposition of liability on a strict liability theory are not the same as effecting a complete moratorium on actions against servicemembers, the agencies' actions still create negative incentives for creditors. The

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374. *E.g.*, Professor Adam J. Levitin, Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs on Enhanced Consumer Financial Protection After the Financial Crisis 2-4 (July 19, 2011) (asserting that the federal banking agencies' focus was on the safety and soundness of financial institutions, and that consumer protection is not a primary role of the banking regulators). The CFPB, which has consumer protection as its primary focus, does not have jurisdiction over the SCRA. *See* 12 U.S.C. §§ 5581-87; *see also* Hollister K. Petraeus, *Protecting Military Families*, 38 THE REPORTER 235, 238 (2011) (noting that Congress did not give the CFPB jurisdiction over the SCRA).

375. H.R. REP. NO. 181 (1917), *reprinted in* 55 CONG. REC. 7789 (1917); *see also* 55 CONG. REC. 7787 (Statement of Rep. Webb) (noting that a rigid moratorium would "disturb the soldier's credit probably in many cases.").

376. *Id.*

agencies' enforcement actions have placed creditors on notice that they will face substantial penalties for noncompliance with the SCRA. But creditors are also now aware that this liability will be imposed on a strict liability theory, so that no amount of due diligence, compliance efforts, or good intentions may shield the creditor from liability. Indeed, the agencies' guidance in the foreclosure-related file reviews have placed creditors familiar with those standards on notice that liability may be imposed even when the creditor relied on information provided by the Department of Defense indicating that a debtor was not eligible for SCRA protections.<sup>377</sup>

The agencies' actions to compensate servicemembers under the agencies' expansive theories also raise issues of moral hazard. Government actions that make it more difficult and more expensive for creditors to take actions against delinquent consumers create incentives—or at least remove disincentives—for consumers to default on their obligations.<sup>378</sup> For example, a consumer may choose to stop making mortgage payments if the consumer believes he or she may be able to continue living in the property rent-free and pocket the savings.<sup>379</sup> Similarly, scholars have shown how foreclosure rates are two to three-times higher in states with anti-deficiency laws (i.e., laws that prohibit a creditor from seeking from a debtor the amount owed beyond the value of the collateral).<sup>380</sup> In such states, consumers may rationally conclude that the lack of ongoing personal liability for the mortgage loan after foreclosure makes foreclosure a less unattractive option. Moral hazard issues also arise under the positions taken by the agencies in their enforcement actions. For example, if a servicemember can

377. See *supra* notes 259–66 and accompanying text.

378. Similarly, scholars have argued that government action to modify the consequences of lending practices can raise moral hazard issues with respect to lenders. E.g., George Lipsitz, “*In an Avalanche Every Snowflake Pleads Not Guilty*”: *The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 *UCLA L. REV.* 1746, 1787 (2012).

379. E.g., Todd Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 *HARV. J.L. & PUB. POL’Y* 195, 211–12 (2012); see also Editorial, *Dukes of Moral Hazard*, *WALL ST. J.*, Feb. 19, 2009, at A18.

380. E.g., Zywicki, *supra* note 379, at 211; Lawrence D. Jones, *Deficiency Judgments and the Exercise of the Default Option in Home Mortgage Loans*, 36 *J.L. & ECON.* 115, 135 (1993).

benefit from the SCRA's default judgment protection by not making an appearance even if the servicemember has actual notice of the proceeding, why bother seeking a stay?<sup>381</sup> Or if a servicemember believes that he or she may receive substantial (i.e., six-figure) monetary compensation for a mortgage servicer's technical violation of the SCRA's default judgment protection, a servicemember may have an incentive to gamble that a servicer may get it wrong rather than work with the mortgage servicer to resolve the debt in a less risky way, such as through a loan modification.

This lack of evidence regarding a cost-benefit analysis is consistent with the predictions of regulatory theory discussed above. For example, while the risk of limitations on credit availability to servicemembers is real, maintaining available credit to servicemembers is not within the regulatory mission of the DOJ or the federal banking agencies.<sup>382</sup> Similarly, the negative consequences of moral hazard may impact individual servicemembers, but generally falls outside these agencies' regulatory mandate. So it is not surprising that these risks would not factor into the agencies' decisions regarding the positions it has taken in its SCRA enforcement actions. The apparent omission of any cost-benefit analysis including such longer-term costs is consistent with the short-term bias (of providing financial recovery of servicemembers the agencies viewed as aggrieved), a tunnel vision-type focus on its regulatory mission (taking action against perceived violations of the SCRA), and a limited ability to evaluate costs outside agencies' area of expertise (costs to other consumers, reduced credit availability to servicemembers, and moral hazard).

#### CONCLUSION

"Support the troops" has long been a national rallying cry. In recent years, this rallying cry has been raised more and more in the context of consumer financial services.<sup>383</sup>

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381. *See supra* note 273 and accompanying text.

382. *See supra* note 374.

383. *E.g.*, Jacqueline S. Atkins, *Lending to the Military*, 64 CONSUMER FIN. L. Q. REP. 145 (2010); Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653 (2005).

This call recognizes the important contributions and tremendous sacrifices servicemembers make in defending our nation and its freedoms. And this rallying cry has been extended to the families of servicemembers, who also sacrifice when the servicemember is on active duty.<sup>384</sup>

For decades, the SCRA has provided important procedural and substantive rights to servicemembers and their families regarding consumer financial products and services. For many years, these protections were interpreted by the financial services industry and financial services regulators consistent with the text and purposes of the Act. This changed suddenly and dramatically in the recent and extensive series of enforcement actions. In these enforcement actions, the enforcement agencies have taken many expansive and aggressive positions inconsistent with the text and purposes of the SCRA—and, in some cases, with the agencies' own prior guidance.

Whether one agrees or not with the sentiment underlying the positions taken in these enforcement actions, these actions provide further evidence of the bureaucratic tendencies predicted by regulatory theorists. Regulatory theory posits that administrative agencies will seek to expand their reach and the application of the statutes they administer, subject to the constraints and incentives created by their operational framework and various external pressures. Given the sympathetic nature of servicemembers, and the widespread negative perception of the financial services industry, it is not surprising that enforcement agencies would feel relatively unrestrained in how they interpret and enforce the SCRA. And this sentiment has been dramatically displayed in the agencies' enforcement of the SCRA in recent years. Other predilections and cognitive biases observed by regulatory theorists in other contexts can also be observed in SCRA enforcement actions.

Understanding the impact these tendencies and biases have on agency decision making is a necessary first step in improving that decision making. While it is possible that enforcement agencies might make similar decisions without

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384. *E.g.*, THE WHITE HOUSE, *Joining Forces*, <http://www.whitehouse.gov/joiningforces> (last visited Feb. 3, 2014) (“When our troops serve, their families are serving, too.”).

the influence of these tendencies, such an outcome is hardly guaranteed. As discussed above, a careful review of the history and purpose of the SCRA, the text of the Act implementing that purpose, and the potential costs that arise from an overly expansive interpretation of the statute, strongly support an argument that the agencies should adopt different interpretations of the SCRA than they have in recent years. Agency enforcement actions would be better informed and more defensible if these regulatory tendencies are appropriately considered and transparently addressed.