

**Podcast:** *The Consumer Finance Podcast*

**Episode:** MLA and SCRA 103: Beyond Pricing — Non-Rate Protections, Enforcement Pitfalls, and Servicing Considerations

**Host:** Chris Willis

**Guests:** Jeremy Sairsingh and Taylor Gess

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**Chris Willis (00:05):**

Welcome to [The Consumer Finance Podcast](#). I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice, and today's episode is another in our ongoing series about service member protections under federal law. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [troutmanfinancialservices.com](https://troutmanfinancialservices.com) and [consumerfinancialserviceslawmonitor.com](https://consumerfinancialserviceslawmonitor.com). And don't forget about all of our other great podcasts: the [FCRA Focus](#), [Payments Pros](#), [Moving the Metal](#), and [The Crypto Exchange](#). Those are all available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your platform of choice and tell us how we're doing.

Now, as I said, today we're going to be doing another installment in our series about service member protections, which remain a very important regulatory priority under the current presidential administration. And today we're going to be extending our prior conversation by talking about substantive protections for service members under the MLA and the Servicemembers Civil Relief Act that go beyond the 6% interest rate cap and other pricing provisions in those two statutes. And as before, I'm joined by two of my colleagues, Taylor Gess and Jeremy Sairsingh, to talk about these things and walk you through them. So Taylor, Jeremy, thanks for being on again. I'm looking forward to this conversation.

**Taylor Gess (01:22):**

Thanks, Chris.

**Jeremy Sairsingh (01:22):**

Thanks, Chris. Good to be here.

**Chris Willis (01:24):**

We've talked in our previous episodes about various protections under both statutes, like the 6% interest limitation under the SCRA and the all-in military APR under the

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MLA, but there's a whole lot of other protections under these statutes for service members and, under the MLA, their dependents. So Taylor, let's start with some stuff about the MLA about disclosures and delivery mechanics. Tell the audience about what protections there are for service members and dependents in that vein.

**Taylor Gess (01:54):**

Sure, Chris. As you mentioned, we previously talked a lot about the pricing limitations in the MLA, but there are other substantive requirements we want to highlight that impact both the product structure and agreement drafting. And as is generally true with the MLA, these requirements are typically upfront requirements at the time the credit is extended to the covered borrower, which, as you said, could be the service member or the dependent. And so first, the MLA requires written and oral disclosures before or at the time of the extension of credit or establishment of a credit account. There are a few elements of information that need to be disclosed in both the written agreement and oral disclosures. First, there's a statement of the MAPR. And as to this requirement, the MLA regulations, they set forth model language for the statement, which describes that 36% MAPR limitation that we previously discussed and an overview of the types of fees included in the MAPR calculation.

There also must be Reg Z disclosures given and a clear description of a payment obligation, and that could be the Reg Z payment schedule for a closed-end credit or account opening disclosures for open-end accounts. So as to the content of the disclosures, the statement of MAPR with that MLA regulation model language is really the new item to consider as long as Reg Z disclosures are being provided. And the oral disclosures, those can take two forms. They can either be in person or given via a toll-free telephone number that a covered borrower can call to receive the information. That number needs to be provided to the consumer at the time of application or in the document with the written disclosures that I just discussed. And so here we see most of our clients use that toll-free telephone number approach as the method to provide the oral disclosures and, along with that option, have procedures in place internally for call agents that have some sort of MLA disclosure script language to make sure that that proper information is getting to consumers that request it.

**Chris Willis (03:52):**

Thanks, Taylor. Jeremy, let me transition to you and get you to talk about some of the aspects of the SCRA that come into play later in the product life cycle.

**Jeremy Sairsingh (04:01):**

Sure. While the 6% rate cap is important, the SCRA, like the MLA, does a lot more in terms of non-rate protections, and these are where some of the statute's most dangerous pitfalls lurk. Now, not to downplay the MLA in any way, but I think it's fair to

say the SCRA is a much more expansive statute in terms of the scope of economic activity that it regulates, the types of products that it can touch. As a basic example, mortgages, purchase money auto loans that are secured by the vehicle, while generally falling outside of the MLA, are readily covered by the SCRA. And these non-rate aspects of the SCRA raise a whole host of compliance issues that can touch on collections, litigation, foreclosure, repossession, lease termination, and credit reporting, just to name a few.

**Chris Willis (04:46):**

You're right, Jeremy. There are a lot of aspects of the SCRA and lots of opportunities for creditors and other financial services companies to get caught out by not understanding them. Do you mind going through some of those protections that commonly come into play as we see them with clients?

**Jeremy Sairsingh (05:01):**

Focusing on the issues that are most relevant to the consumer finance space, these protections fall into a few buckets. First, there are some litigation protections. For example, before obtaining a default judgment, a plaintiff, including a creditor in a collections action, would need to identify the defendant's military status. And if the defendant is a service member, a court may need to stay the proceeding. As another example or another bucket, there are collateral protections. So mortgage foreclosures and repossessions of secured property like motor vehicles can require court orders unless there's a valid waiver of SCRA protections, which we'll discuss a bit later. Third, there are what I'll call mobility protections. So service members may be able to terminate residential leases, auto leases, certain types of consumer service contracts like phone contracts and cable subscriptions, when they're called up for service or if they receive orders while on active duty. So bottom line, the MLA and the SCRA go well beyond APR when it comes to compliance.

**Chris Willis (06:02):**

Jeremy, thanks for that. And I know that one of the most prominent issues historically under the Servicemembers Civil Relief Act is auto repossessions and the prohibition on repossessing the vehicle of someone who's on active duty. And can you tell the audience a little bit about that? Because I think even under the current administration, there have been three DOJ consent orders on that topic alone.

**Jeremy Sairsingh (06:24):**

Definitely. The non-rate SCRA protections are most certainly not fringe issues. And the significant SCRA enforcement activity we've seen in the auto finance space in particular shows how these protections are really some of the most visible and actively enforced

parts of the statute. I want to touch on two separate auto finance concepts that are sometimes conflated in terms of how they're covered by the SCRA. You mentioned repossessions. That's one. And first, I want to talk about early terminations of auto leases and the SCRA protections that attach around those terminations. The repossession and termination protections under the SCRA are fundamentally different and have different triggers. So starting with lease termination, while there's no general right under the SCRA for a service member to walk away from an auto loan, there is a rather broad right to terminate motor vehicle leases without an early termination penalty provided certain conditions are met. And notably, these protections can apply both to pre-service leases, pre-service obligations that we typically think about when we're looking at what the SCRA covers, but also in-service leases. So here's where the service member has entered the lease while already on active duty. And this is an often misunderstood aspect of the SCRA.

For pre-service leases, the trigger is fairly straightforward. The service member has got a lease that was entered into before entering military service and they're called up for, to summarize, at least 180 days. For in-service leases, when the service member is already on active duty, the triggers are narrower but more complicated. Basically, if the service member obtains a lease while on active duty and then receives qualifying orders, it could be a move from the continental U.S to a duty station outside the continental U.S, or from a state like Alaska or Hawaii to another duty station. Or a deployment of 180 days can also be the trigger. To terminate a lease under the SCRA, the service member must provide written notice and a copy of military orders. So there's really a duty also on the part of the service member to invoke this protection. And the lessor can't impose an early termination charge. And lease amounts paid in advance of the post-termination period must be refunded within 30 days. And this has been an ongoing topic of DOJ enforcement, whether lessors have properly refunded prepaid lease amounts. And DOJ has repeatedly addressed alleged failures to issue such refunds or charging amounts after termination in SCRA enforcement actions.

**Chris Willis (08:51):**

Yeah. All of that is really important information, Jeremy, with respect to the lease termination, and very critical that the audience understands that unlike some other SCRA protections, it also protects post-active duty leases under the circumstances as you described them. But let's move on to a discussion of repossessions, which again, has been an area of very vigorous regulatory enforcement over the past many years. Talk to us about some of the issues there, because this is one where I think there's a lot of opportunity for errors on the part of people in the financial services industry.

**Jeremy Sairsingh (09:27):**

So to summarize the prohibition briefly, the SCRA prohibits creditors from repossessing personal property, which includes motor vehicles, without a court order, based on a

breach of a contract entered into prior to active duty military service. So this protection would apply if the service member purchased or leased a vehicle or other personal property before entering military service and then made a deposit or installment payment on that vehicle purchase or lease contract before entering military service. And the key point is that unlike lease terminations, the SCRA's repossession restriction does not require the service member to give notice. And this is where the room for error that you mentioned, Chris, really comes up. If you don't have a court order or a waiver and the customer is an SCRA-covered service member, then the statute is strict liability. You can check with the DMDC database, but if there's a delay and maybe the service member was called up right before the repossession occurred and there was a timing lag, you could still be on the hook for that illegal repossession under the SCRA. DOJ has repeatedly told auto finance companies that they bear the burden of identifying whether borrowers are protected by the SCRA. And again, to distinguish from leases, there's no obligation on the part of the service member to notify the company of their military status, unlike lease terminations and unlike, say, the 6% interest rate reduction.

**Chris Willis (10:57):**

And I think our listeners would do well to read some of the recent SCRA repossession consent orders or settlement agreements that the DOJ has entered into, which are very descriptive about exactly what they expect an auto finance company to do prior to a repossession and then after a repossession and prior to sale, because there are also opportunities for the service member to go on active duty in between repossession and sale. And so there are also requirements to take actions during that period as well under those consent orders and settlement agreements.

**Jeremy Sairsingh (11:28):**

Yeah. Absolutely. The best practices, they really arise from those consent orders, for example, when you should be looking at the DoD database to check active duty status. This stuff is not in the statute itself.

**Chris Willis (11:40):**

No. That's right. So, Taylor, let me switch over back to you and another topic under the MLA. In the consumer financial services industry, we're very accustomed to resolving disputes with borrowers through arbitration. Arbitration clauses are very popular across the industry, except in mortgage, where they're prohibited under Title XIV of Dodd-Frank. But the MLA has something to say about dispute resolution and waivers in contracts. Would you mind telling the audience about that?

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**Taylor Gess (12:07):**

Yeah, Chris. I totally agree. An important part of product structure and agreement preparation is considering what happens when there is a disagreement or something that goes unplanned. And that typically includes ensuring that the agreement and perhaps the application flow has a state-of-the-art arbitration provision with features like mass arb protection. But when we are thinking about the MLA, we have to keep in mind that the MLA prohibits covered borrowers from being subject to mandatory arbitration provisions. And it also prohibits creditors from demanding onerous notice provisions when there is a dispute. So this means that when we're drafting the agreement and any other places where there might be an arbitration provision, like the terms and conditions or otherwise in the application flow, the arbitration provision itself, and ideally the header at the top of the agreement that calls out the existence of the arbitration provision, should both have language covering carving covered borrowers out of the scope of the arbitration provision. And also in this vein, there's a prohibition on waivers of rights under any federal or state law. So this means that agreements need to be careful to not include any language that could be construed as waiving any rights owed to the covered borrower under applicable law. And this includes these SCRA protections Jeremy has been and will be continuing to discuss.

**Chris Willis (13:22):**

Yeah. And I think that's a very important point. And one of the themes that the two of you have emphasized throughout this series is how important consideration of these topics are to both product design and agreement drafting. And the example you just gave, Taylor, is a wonderful one of that. Jeremy, Taylor brought up waivers of rights. Yeah. That's a concept under the SCRA too, because there are certain things that a creditor or a company can do if it obtains a waiver of rights from the service member. Talk to us, though, about the restrictions and conditions around doing a waiver of rights under the SCRA.

**Jeremy Sairsingh (13:57):**

Both the MLA and SCRA address essentially the same policy goal here, which is a service member should not lose key legal protections because of broad waiver language that's in a form contract. But as Taylor discussed, the MLA prohibitions are, I'd say, more categorical. No mandatory arbitration for a covered borrower, for example. The SCRA does not say that every waiver is prohibited. Instead, if the service member is going to waive rights as to certain protections afforded by the SCRA, the waiver has to be handled in a specific way, subject to specific form and timing requirements. The general rule is that a service member may waive various SCRA rights, but for key actions, that waiver is effective only if it's in writing, documented separately from the underlying obligation or liability. So practically, you couldn't bury an SCRA waiver in the

consumer credit contract, and that might violate the MLA's anti-waiver provisions as well.

The statute contains detailed form requirements. For example, you have to use 12-point font for the waiver. And then as to timing, the waiver has to be executed either during or after the service member's period of military service, so it couldn't be at the origination phase. The SCRA also tells us what actions are subject to heightened treatment for such waivers, including modification, termination, or cancellation of various contracts, including leases, as well as repossessions and foreclosures. As a practical takeaway, if you're going to rely on a waiver, you have to ask a few questions first: was it separately executed? Did it meet the statute's form and timing requirements? Does it actually cover the action the company now wants to take?

**Chris Willis (15:37):**

Yeah. All that makes sense. And again, the content of these waivers and the appearance of them is something that's also covered in DOJ consent orders and settlement agreements. And so that's another source of best practice, at least from my point of view, with respect to the topic you just addressed, Jeremy. Taylor, back to you on the MLA. The MLA has a number of payment and contract term restrictions that again are critical not only to understand but to take into account in designing a product and a contract. Do you mind going through those with the audience?

**Taylor Gess (16:08):**

When we're thinking about structuring an MLA compliant product and drafting the corresponding agreement, you're right, there are more things to consider beyond the MAPR cap and ensuring that the arbitration provision has that carve-out that we just discussed. So first, there are some payment requirements that must be considered related to prepayments and payment methods. I do have to say, I don't see many products these days that restrict prepayments or impose penalties for prepayments. But when developing products, we still need to keep in mind that the MLA provides that prepayments in whole or in part must be permitted and prepayment penalties are prohibited. Also on the payments front, creditors cannot require payment by military allotment. So the allotment system was originally intended to make sure payments that were needed, like mortgages, were made out of military pay while someone was on service. But the intent of the allotment system was not for creditors to effectively use that system as guaranteed repayment on credit to lower default or delinquency rates in the modern age. It was more to make sure that the service member's life and standard that their family was using before they went on service was able to be maintained with that income from the service.

And the CFPB somewhat recently entered a consent order with a lender on this very allotment issue, so it's definitely something to keep in mind. There's also another

payment related limitation that needs to be considered when drafting an agreement. So the MLA prohibits payment by remotely created checks or remotely created payment orders. We're seeing an increased interest in these types of payment methods from our clients. So if your business is considering RCCs or RCPOs, it is really important to have a plan in place for how to handle those payment methods with respect to covered borrowers. And Chris, I think we do need to point out that the consequences for MLA violations are pretty severe. So that includes voiding of the credit contract from its inception so that the borrower would not be obligated to repay any amounts on the extension of credit and any amounts paid, including any interest and fees, refunded. And there are also civil penalties such as actual damages with a \$500 per violation minimum and potential criminal penalties for knowing violations. So it's really a key law to keep in mind.

**Chris Willis (18:26):**

Yeah. Absolutely. Because the consequences, as you said, Taylor, for non-compliance are severe for the creditor. Jeremy, let me wind up the episode with you because there's another important aspect of the SCRA that may, again, not occur to creditors, but nevertheless is very important, and that's the anti-retaliation protections. Do you mind talking about that?

**Jeremy Sairsingh (18:47):**

Sure. So, Taylor was just going through prohibitions in the MLA that restrict various types of leverage from being built into the credit contract itself, such as arbitration, mandatory allotments, prepayment penalties. There's no direct SCRA analog to these, but as you mentioned, the SCRA does contain a somewhat analogous and often overlooked anti-retaliation provision that addresses somewhat similar policy aims. And as with other SCRA protections, often comes up at different points in the customer relationship than the protections under the MLA that Taylor was discussing. At a high level, the anti-retaliation prohibition in the SCRA says that after a service member invokes a protection, whether it's an early lease termination, the 6% rate reduction, repossession related protections, that request for SCRA relief cannot by itself become the reason the company treats the customer worse. So that invocation of SCRA rights can't be the basis for denying or revoking credit, changing the terms of an existing credit arrangement, not granting credit in the same or substantially similar amount or on similar terms than what the customer requests, or reporting adverse credit information related to the customer's creditworthiness. This doesn't prohibit normal credit risk management and underwriting. You can still report negative information if, say, the customer misses a payment or is otherwise in default under the agreement. But the lender, for example, cannot furnish negative information or revoke credit or change the customer's agreement terms solely because the customer exercised SCRA rights.

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**Chris Willis (20:20):**

Yeah. And I think the best way for companies to think about this is there's a provision in the Equal Credit Opportunity Act that prohibits discrimination or negative treatment because of a borrower's good faith exercise of rights under certain federal consumer protection statutes like Truth in Lending, EFTA, FDCPA, et cetera. And I feel like this provision under the SCRA is very similar to that and we should think about it the same way. That if someone exercises their rights under the SCRA, we can't have negative consequences flowing to them from that, just like we can't under that analogous provision in the Equal Credit Opportunity Act.

**Jeremy Sairsingh (20:55):**

Exactly. And it also goes to how accounts are coded after such an invocation of rights. So you don't want to treat that, say, 6% rate reduction in a way that looks like a derogatory remark on the account. I mean, it shouldn't be a trigger for things like credit line reductions, just like under ECOA, or some other collection escalation or negative reporting. So both as to prospective actions taken and also just the ongoing servicing and treatment and recording of the account are affected by this provision.

**Chris Willis (21:27):**

Yeah. And it makes intuitive sense that you would be taking a giant risk by penalizing a service member for invoking rights under the SCRA. But I think beyond just understanding that we shouldn't do that, it raises, again, another important product and servicing system design consideration of making sure that our credit reporting, servicing, whatever systems don't take this information into account in a negative way. Jeremy, Taylor, thanks very much for being on today's episode. I think this is incredibly valuable information for our listeners. And of course, thanks to our listeners for listening today as well. As I said at the top of the show, don't forget to visit and subscribe to our blogs, [troutmanfinancialservices.com](http://troutmanfinancialservices.com) and [consumerfinancialserviceslawmonitor.com](http://consumerfinancialserviceslawmonitor.com). And we'd also really appreciate it if you could come and visit us on the web at [troutman.com](http://troutman.com) and add yourself to our consumer financial services email list. That way we can send you copies of our alerts and advisories, as well as the invitations to our occasional industry-only webinars. And of course, stay tuned for a great episode of this podcast hitting your feed every Thursday afternoon. Thank you all for listening.

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