LANDLORD / TENANT ISSUES

Early Termination of Residential Tenancies

NC LAMP 2027

Disclaimer

- Not legal advice for any particular case
- Consult counsel
- Consult sources cited, especially primary sources
- Law, regulations change
- Court cases may alter rules
- Not a spokesman for United States and / or its armed forces

References

- 50 U.S.C. 3955 (SCRA Lease termination)
- NC Gen Stat 127B-25 et seq (NC SCRA)
- NCGS 42-45.1 DV (Sexual assault, stalking)
- NCGS 42-12 (Property destroyed or damaged}
- NCGS 42-45.2 (Foreclosure)

References

Military Lease Termination (selected states)

- VA Code Ann 55.1-1235
- FL Stat 83.682
- CA Military and Veterans Code section 409
- Official Code of Georgia: Title 44, ch 7 section 22 (44-7-22)
- MD Real Property Code 8-212.1
- Texas Property Code 92.017

So, you think you know this topic…

- Can lease termination right be waived?
- When is the effective date of termination?
- What is proper notice?
- Who's covered?

Answer: It depends.

- Waiver. Depends on jurisdiction.
- Effective date: depends on reason for termination
- Notice: Depends on reason for termination.
- Coverage
  - Active Duty
  - Dependents (if on lease)
  - On NC state guard service (NC SCRA)
  - On other state guard service in NC (NC SCRA)
  - “Military Technician” NC GS 42-45

And one more question…

- What is a PCS Order?

What is a PCS Order

- Per SCRA amendment includes separation or retirement
- PCS order is whatever the DoW says it is. See JTR.

OK, now that I have your attention, let’s begin…

S ervicemember

C ivil

R elief

A ct

SCRA: Residential Lease Termination

50- USC 3955

- Joint leases. Termination of SM obligation terminates obligations of dependent lessees
- "Dependent"
  - 50 USC 3911 (4)
  - Spouse, or
  - Child (as defined at 38 USC 101(4), or
  - SM provided over 1/2 support for 180 days

SCRA Applicability

- Pre-service lease
- PCS orders **after** lease executed (2003 amendment)
- Deployment orders **after** lease executed (2003 amendment)
- Death of SM on ActDu (Dec 2018 amendment)
- Catastrophic illness or injury (Dec 2019 amendment)
- Stop Movement Order (August 2020 amendment)

SCRA Applicability

Pre-Service Lease

- The original SCRA lease termination provision
- "the lease is executed by or on behalf of a person who thereafter and during the term of the lease enters military service"
- May initiate termination at any time after entry into military service
- Effective date of termination: 30 days after next rental payment due after notice

SCRA Applicability

PCS Orders

- SM executes lease and thereafter receives PCS orders
- Receipt of the orders, not their execution, triggers the right to terminate
- Effective date of termination:
  - Monthly rent: 30 days after next rent payment due after notice
  - Non-monthly rent: Last day of the month following the month in which notice is given

Permanent Change of Station

Includes more than you might think

- Where / How is it defined?
  - Joint Travel Regulation
  - US DoJ Enforcement
  - Dec 2019 SCRA amendment
    - PCS specifically includes retirement and separation

PCS Orders

Joint Travel Regulations

- See esp. Ch 5 part B section 507 et seq
- Organization of JTR frequently changes, substance of text much less so
- PCS Includes
  - Initial accession travel (507)
  - Certain OCONUS travel (508)
  - Change in homeport of ship (509)
  - Separation / Retirement (510)
  - Medical / Death Related travel (511)

Joint Travel Regulations
"Other Categories and Situations" 0512

- 051202 Travel to designated place en route to PDS to assist dependent to travel
- 051203 TDY en route to PCS
- 051204 Certain dependent travel associated with custody change
- 051205 Certain travel associated with evacuation to safe-haven to assist dependents to travel
- 051207 Travel allowances authorized *if ordered by service HQ* for indeterminate TDY

PCS Orders

Retirement / Separation Travel JTR section 510

- Discharge, resignation, separation under honorable conditions, or
- Release of RC member from actdu following 20 weeks at one location, or
- Transfer to Fleet Reserve or Fleet Marine Corps Reserve, or
- Retirement, or
- Temporary Disability Retirement, or

PCS Orders

Retirement / Separation Travel JTR section 510

- Discharge under OTHC (limited allowances)

In any case where legal counsel is considering assertion of federal lease termination rights that are not clearly specified in SCRA:

Carefully review the JTR and

Consult with other counsel

PSC Orders

US DoJ Enforcement



- US v Empirian Property Management, Inc. (D. Neb. 8:12 CV 87 Consent Decree March 8, 2012)
  - Includes sep / retirement

US v Empirian Property Management

Case 8:12CV87 8 Mar 2012 (D. Nebraska)

- Allegation: Refusal to terminate lease of PCSing SMs (including those separating)
- Terms
  - Post SCRA rights
  - Employee training re SCRA
  - $12,500 restitution for wrongfully withheld deposits
  - Review of documents to discover if additional aggrieved persons and additional aggregate payments of up to $20K

PCS Orders

SCRA Amendment

- NDAA for FY 2020
  - Signed by POTUS December 2019
  - NDAA Section 546
  - **Amends 50 U.S.C 3955 so that PCS now specifically includes separation or retirement**

SCRA Applicability

Deployment

- SM executes lease and thereafter receives orders to deploy for not less than 90 days
- Receipt of the orders, not their execution triggers the right to terminate
- Effective date:
  - Monthly rent: 30 days after next rent due after notice
  - Non-Monthly rent: Last day of the month following month in which notice is given

SCRA Applicability

Death of SM

- Dec 2018 amendment
- Spouse has termination rights for 1 yr following qualifying death
- Qualifying Death
  - Dies while in military service or
  - Performing full-time NG or active guard and reserve duty, or
  - Inactive duty training as defined at 10 USC 101(d)

SCRA Applicability

Death of SM

- Manner of lease termination
  - Delivery of written notice and military orders
    - What orders?
    - In practice, provide letter from CO regarding the death or other credible documentation of death
  - Effective date not specifically addressed.
    - Termination right for 1 yr following death of SM

SCRA Applicability

Catastrophic Illness or Injury

- Dec 2019 amendment (NDAA for 2020 sec 545)
- SM may terminate lese if suffers catastrophic illness/ injury [defined at 37 U.S.C. 439)G)]
- Spouse (or dependent) may terminate SM lease if SM lacks mental capacity
- May terminate within 1 year of SM incurring the illness / injury

SCRA Applicability

Catastrophic Illness or Injury

- Manner of termination
  - Delivery of written notice and military orders
    - What orders?
    - In practice, provide letter from CO regarding the injury /illness or other credible documentation of illness /injury
  - Effective date in injury / illness cases not specifically addressed except that…
    - Termination right for 1 yr following date injury / illness incurred

What is a catastrophic Illness or Injury?
37 U.S.C. 439(g)

- Permanent, severely disabling injury, disorder, or illness that the Secretary concerned determines compromises the activities of daily living such that the afflicted persons requires:
  - Personal or mechanical assistance to leave home or bed, or
  - Constant supervision to avoid physical harm to self or others

Catastrophic Illness or Injury

37 U.S.C. 439

- Special compensation authorized thru the earlier of
  - Death
  - Recovery
  - 90 days after separation / retirement from service
  - Receipt of compensation under 38 U.S.C. 1114(r) (2)
    - war related compensation provided to certain severely injured veterans

SCRA Applicability

Stop Movement Orders

- Requirements
  - SM receives orders for PCS, or deployment for at least 90 days
  - SM Executes a lease in reliance on orders
  - Secretary concerned issues stop movement in response to local, national, global emergency
  - Secretary order is for at least 30 days or indefinite
  - Secretary order prevents SM or dependents from occupying the lease

Stop Movement Orders

Effective date of termination

- Effective upon delivery of required notice
- Notice:
  - Notice of termination
  - Copy of orders

SCRA Notice Requirements

- Written notice to landlord or agent and
- Military orders
- Effective date: (pre-service, deployment, PCS) 30 days after next rent is due. E.g., rent due on the 5th, notice given 1 April. Lease terminate 5 April plus 30 days.
- Effective date: Death, Illness/Injury: May terminate within one year of death or inj/illness. Immediate on notice??
- Stop Movement: Upon delivery of notice

Notice requirements

Military Orders

- Actual written orders or
- A letter from the CO. Specifically:
  - "any notification, certification, verification from SM CO with respect to SM's current or future military duty status"

Orders Verification

"by direction" authority

- SCRA does not specifically address
- Military Orders "from" CO [no statutory requirement that they be "signed" by the CO]
- Standard military practice
- Supreme Court guidance: interpret favorably to SM

SCOTUS SCRA Guidance

- SCRA Purpose:
  - "Protect those who have been obligated to drop their own affairs to take up the burden of the nation." Boone v Lightener 319 US 561, 575 (1943)
- Interpretation
  - "The Act should be read with an eye friendly to those who dropped their affairs to answer their country's call." LeMaistre v Leffers, 333 US 1, 6 (1948)

Orders Verification

"By direction" authority

- Conclusion # 1: Verification of orders signed "by direction" by person so designated is probably legally sufficient
- Conclusion # 2: Better practice is to provide either orders or letter signed by CO actual

Notice

Manner of delivery

- Hand delivery
- Private business carrier
- U.S. mail (return receipt requested)
- Electronic (5 January 2021 amendment)

Notice

Electronic Delivery

- Electronic includes
  - Direct to e-address designed by landlord or agent
  - Posting to website or other electronic based info repository to which access has been granted to tenant, landlord, or landlord agent and
  - Other electronic means reasonably calculated to reach landlord or agent

Forfeiture clauses and the SCRA

- Up front rent concession ("first month free") can not be forfeit if terminate per for SCRA protected reason
- Forfeiture specifically prohibited by 2010 SCRA amendment:
  - Rent for period prior to effective date of termination "shall be paid on a prorated basis."
  - " The lessor may not impose an early termination charge…"

U.S. v Crowe

2-17-CV-385 M.D. Ala 16 June 2017

- Settlement 16 June 2017
- DoJ alleged
  - unwarranted physical damage claims were an unwarranted early termination charge
  - Lease provision requiring forfeiture of rent concession is facial violation of SCRA
- Settlement terms
  - Landlord to pay $1,900 ($1,425 for security deposit refund plus $475 civil penalty to US)
  - Change lease to comply w/ SCRA
  - Report to US on SCRA compliance

U.S. v Belshaw

2:18 CV 02993 C.D. CA April 11, 2018

- Allegations
  - Lease clause requiring 60 days notice violates SCRA
  - Puffed up damage fees amount to prohibited early termination charge
- Settlement
  - D to pay $2,595 damages (return of pet & key deposits plus $1,000)
  - D to pay $1,595 civil penalty to U.S.
  - Amend lease to comply with SCRA

US v Twin Creek Apts

8:18-cv-00428-JMG-SMB 11 Sep 2018 (D. Neb)

- 8:18-cv-00428-JMG-SMB 11 Sep 2018 (D. Neb)
- D required forfeiture of rent concessions when tenant terminated pursuant to military orders
- Case initiated on tip from USAF legal assistance
- Settlement terms:
  - Update policies to ensure no further violations
  - Compensate 65 SMs aggregate $76K
  - Credit Repair
  - $20K civil penalty

U.S. v United Communities, LLC

27 Sep 2018 (Case 3:18-CV-14355 D. NJ)

- Allegation:

  D, the Joint Base McGuire / Ft Dix housing partner, requires forfeiture of up front rent concession when tenants deploy
- Settlement terms
  - Develop plan to ensure compliance w/ SCRA 3955
  - Pay double the amount forfeited (Total $45K)
  - Pay $17,500 civil penalty

US v PRG Real Estate Management

2:19 CV 00125 (ED Virginia 15 March 2019)

- Settlement 15 March 2019, case # 2:19 CV 00125 (ED Virginia)
- Allegations/ Lease termination
  - Lease requires one month rent as damages for early lease termination, violating SCRA
  - Lease requires dependents to apply to court for order showing that ability to comply is materially affected by SM orders
  - 10 SMs terminating lease early for PCS / deployment orders charged illegal termination fees

US v PRG Real Estate Management

- Allegations/ Default Judgements
  - 152 default judgements in violation of SCRA. Service affiliation affs claim no service or unknown, even when PRG has copious info showing military service
- Case began w/ tip from Norfolk LegAsst

US v PRG Real Estate Management

- Settlement:
  - $35K restitution for illegal termination charges
  - **$1.5 million** restitution for illegal defaults
  - $62K civil penalty
  - Develop SCRA compliance plan
  - Ensure leases are SCRA compliant
  - Conduct SCRA training for employees
  - Repair credit of SM victims

Civil Liability

50 U.S.C. 4041: Enforcement by the Attorney General

- US Attorney General can act if defendant:
  - Engages in pattern or practice of SCRA violations, or
  - Violations of SCRA raise an issue of significant public importance
- Relief
  - Equitable, declaratory
  - All appropriate relief including damages
- Civil penalty
  - $55K 1st offense. $110K subsequent offenses)

Private Right of Action

50 U.S.C. 4042

- Relief
  - Equitable, declaratory relief
  - Recover all other appropriate relief including monetary damages
  - If person alleging SCRA violation prevails, may be awarded court costs and attorney fees
- Class action
  - "Any person aggrieved by a violation [the SCRA]"can be member of a class action lawsuit "notwithstanding any previous agreement to the contrary."

Criminal Liability: Knowing violation

50 U.S.C. 3955 (h)

“(h) Misdemeanor. Any person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or a servicemember's dependent who lawfully terminates a lease covered by this section or who knowingly interferes with the removal of such property from premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.”

U.S. Department of Justice Servicemembers and Veterans Initiative

- Mission: Legal support & Protection for SMs, Vets, and their Families
- https://www.justice.gov/servicemembers
  - Online Information
  - Enforcement
  - Online complaints (SCRA, USERRA, UOCAVA)*

*Uniformed and Overseas Citizens Absentee Voting Act

Waiver of SCRA

- Authorized: 50 USC 3918
- Statutory Requirements:
  - In writing
  - Executed in instrument separate from obligation to which it applies
  - Executed during or after SM's military service
  - Specify the legal instrument to which it applies

US v Western Rim Investors

520 CV 01147 (W Dist Tx Sep 28, 2020)

- Allegations
  - Deny lease termination based on CO written verification, requiring actual orders instead (2 cases)
  - Deny lease termination based on sep from service & charged rent and "re-letting fee" of 85% of monthly rent (2 cases)
  - Required forfeiture of up-front rent concession when SM terminated per SCRA (41 cases)
  - Relied on invalid SCRA waiver that was not "executed as an instrument separate from the obligation or liability to which it applies"

US v Western Rim Investors

520 CV 01147 (W Dist Tx Sep 28, 2020)

- Waiver addendum not separate because not "executed as an instrument separate from the obligation or liability to which it applies"
  - Expressly incorporated into the lease
  - Not supported by additional consideration
  - Not signed separately (in fact, in some cases all docs e-signed)

Waiver Prohibited

North Carolina

- NC Senate Bill 420 General Assembly Session 2019
- NC SCRA Signed by Governor July 25, 2019
- Adds article 4 to NCGS Chapter 127B
- Overview
  - Incorporates Federal SCRA into NC law
  - SCRA rights extended to
    - NC National Guard
    - Other state National Guard members who reside in NC
  - **Prohibits waiver of incorporated SCRA rights**
  - **Narrows protections of NC GS 42-45 to "military technician" per 10 U.S.C. 10216**

Military Technician

10 U.S.C. 10216

- Federal civil service employee who
  - Is employed under 5 U.S.C. 3101 or 32 U.S.C. 709(b) and
  - Is required to maintain membership in Selected Reserve, and
  - Is assigned as technician in organizing, administering, instructing Selected Reserve or maintenance and repair of supplies equipment issued to Selected Reserve or the armed forces.

In 20 yrs as JAG + 21 yrs as legal assistance civilian, I have NEVER come across a "military technician."

Waiver Prohibited:

Virginia

- Virginia HB 2161 (2021 session)
- Effective 1 July 2021
  - Pre-dispute waiver of SCRA prohibited (55.1-1208 A 8)
  - Discrimination in sale / rental of realty on basis of military status prohibited (36-96.3)

Waiver Prohibited

Florida

- FL Stat 83:682
- State lease termination right may not be waived or modified by agreement by the parties under any circumstances

SCRA Lease Termination

Relationship to State Law

- U.S. Const, Art VI, Section 2: Supremacy Clause
  - State may add, but not detract from SM rights
- SM chooses which law to use
- Federal Preemption
  - No explicit preemption in SCRA
  - 3955 not so extensive as to imply preemption
  - State may provide supplemental rules

Misleading Leases

- Misleading by omission
- General forfeiture provisions
- Misleads tenants & landlords (and attorneys unfamiliar w/ SCRA)
- Invalid waivers
  - Non-compliance w/ SCRA waiver requirements
  - Non-compliance with state waiver prohibitions

Selected SCRA Enforcement Cases

US v Waterleaf Apt, Villa Del Mar Apts, Prominence Apts

- US Attorney S. Dist CA Jan 13, 2012
- DoJ alleged that defendants (CamPen area property managers) charged rent beyond date leases were terminated under the SCRA
- Settlement terms
  - Refunds to all unjustly charged service members
  - Revise records to show lawful termination of contract

Lincoln Military Housing to Pay $200K

- Consent Order 10 Aug 2016 w/ US DoJ
- Military partner that runs installation housing!
- DoJ alleged that Lincoln obtained default judgements in violation of SCRA
  - Erroneous affidavits stating that tenants were not in the armed forces
  - No appointment of counsel as required by SCRA for default
- Remedies
  - $35K restitution per case
  - Vacate defaults
  - Clean up credit reports
  - $60K civil penalty

Non-military Lease termination rights

North Carolina

- Domestic Violence, Sexual Assault, Stalking
- Property destroyed or damaged
- Foreclosure
- Material breach / habitability

Non-Military Lease termination

Domestic Violence, Sexual Assault, Stalking

- NCGS 42-45.1
- Three Requirements:
  - (1) 30 day written notice to landlord AND
  - (2) Safety plan issued during term of tenancy recommending relocation & issued by program substantially complying w/ 50B-9 AND

Non-Military Lease termination

Domestic Violence, Sexual Assault, Stalking

- (3) 50B or 50C protection order (other than ex parte) or
- Criminal order restraining person from contacting protected tenant or
- Address confidentiality program card per NC Gen Stat 15C-4

Non-Military Lease Termination

Renter may Surrender When Property Destroyed or Damaged NCGS 42-12

- Damages such that premises can't be made fit except at cost in excess of 1 yr's rent, and
- Tenant, his agents or servants didn't cause the damage, and
- Written notice & payment of rent up thru date of damage w/in 10 days of damage.
- Statutory provision may be altered by contrary lease provisions.

Non-Military Lease Termination

NCGS 42-45.2. Foreclosure

- Requirements
  - Residential property less than 15 units
  - Tenant receives notice of foreclosure
  - Written notice to landlord
    - Identifying effective date 10-90 days from date of sale
  - Homeowner has not cured by tenant effective date

Non-Military Lease Termination

Foreclosure: Gov't funded short term move

- MARADMIN 588/08 (still active as of 260812)
- Joint Travel Regulation (JTR 051904 C)
- Requirements
  - SM / dependent tenant relocates due to foreclosure on landlord / homeowner
  - Request to local military housing office (MHO)
  - MHO consults w/ SJA and issues (or not) authorization and funding cite
  - Member "encouraged" to exhaust any remedies per 50 U.S.C. 3951 (limitations of eviction) and state law

Non-Military Lease Termination

Uninhabitability

- Common Law Contracts / Material Breach
- NCGS 42-41 Mutuality of Obligations
- Creekside Apts v Poteet 116 NC App 26 414 SE 2d 826 (NC App 1994)
  - Breach of warranty of habitability as defense to nonpayment, basis for rent abatement
  - Demanding rent for unfit housing may be basis for unfair trade practice claim (NCGS 75-1,1)

Selected State Lease Termination Statutes

Virginia

- VA Code Ann 55.1-1235 Effective 1 Oct 2019
- Applies to ActDu, Natl Guard, Civil Tech of Natl Guard
- Circumstances Authorizing Termination
  - PCS Orders or 35 miles from dwelling
  - Temp duty over 3 months / 35 mi from dwelling
  - Discharge / release fm actdu or FT Tech status w/ Guard
  - Ordered to gov't qtrs. And forfeit BAH
- No liquidated damages

Virginia

Procedural Requirements

- Written notice specifying date
- NLT 30 days after next rent due
- No more than 60 days before departure to comply w/ orders or interim training or duty prior to transfer
- Provide landlord with
  - Official notification of orders or
  - Signed letter, confirming the orders, from to CO

Virginia

Lease termination waiver

- Pre-dispute waiver of SCRA prohibited (55.1-1208 A 8)
- Discrimination in sale / rental of realty on basis of military status prohibited (36-96.3)
- No prohibition on waiver of state lease termination right

Florida

- FL Stat 83.682
  - PCS
  - Premature or involuntary discharge
  - Released fm actdu & home of record over 35 mi away
  - Ordered to gov't qtrs
  - Becomes eligible for gov't qtrs & takes that option
  - Temp duty for over 60 days over 35 miles away
  - Signs lease, but before possession gets PCS over 35 mile away
  - SM dies on active duty
  - No rent due if terminate 14 days prior to occupancy
- Effective date: 30 days after notice

California

- -CA Military and Veterans Code section 409
- Amended 1 January 2019
- -Applicability
  - Pre-service lease
  - PCS / deployment at least 90 days
- -Effective last day of the month following
- notice

Georgia

- Official Code of Georgia: Title 44, ch 7 section 22 (44-7-22)
  - PCS at least 35 miles away
  - Release fm actdu & go to home of record at least 35 miles away
  - Orders to gov't quarters
  - Eligible for govt qtrs. & failure to move in forfeits BAH
  - TAD 35 miles away for over 60 days
  - SM dies on active duty
- Effective date: 30 days after notice

South Carolina

- SC Code of Laws Title 27, ch 40 (SC Residential Landlord and Tenant Act)
- No SC military lease termination statute

Maryland

- Real Property Code 8-212.1
- Coverage: Receives "change of assignment" after signing lease
- "Change of assignment" defined
  - PCS
  - TAD over 90 days
  - Orders to government qtrs.
  - Release from actdu
    - Retire
    - Separation or discharge under honorable conditions
    - Reservist Demobilized after serving at least 180 consecutive days
- Rent ends 30 days after delivery of notice and "proof of change of assignment"

Texas

- Texas Property Code 92.017
- Applicability: Preservice, PCS, Deployment
- Effective date: 30 days after next rent due after notice
- If lease fails to provide written notice of military lease termination rights:
  - Tenant release from liability for all rent due on effective date of termination
  - Landlord liable for actual damage, civil penalty of 1 mo. rent, and attorney fees

Texas

- General Rule: Not Waivable
  - Exception: May be waived when tenant or dep moves into any qtrs. w/in 30 miles, including base qtrs.
  - Exception to Exception:
    - Not waivable where tenant moves into qtrs. occupied by family or relatives, or
    - Tenant moves due to significant financial loss (income reduction at least 10%) due to military service

Practice Pointer

- If SCRA does not apply, review state law for possible relief