Protections for Military Service in Chapter 45 Foreclosures

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1

Training Goals

Understand the laws that apply to a power of sale foreclosure related to military service

Practice applying those laws to the clerk's determination of whether to authorize or not authorize a foreclosure sale

2

The Foreclosure Hearing – GS 45-21.16(d)

To enter an order authorizing the foreclosure sale, the clerk must find competent evidence of the following:

1. Holder of a valid debt
2. Right to foreclose
3. Default
4. Notice
5. Home Loan
6. Military Service

Plus one, loss mitigation**.**

3

G.S. 45-21.16(d)

If the clerk finds the existence of ….

(vi) that the sale is not barred by **G.S. 45-21.12A**, then the clerk shall authorize the mortgagee or trustee to proceed...

4

Compliance with Three Key Laws to Authorize Sale

1. The Servicemembers Civil Relief Act, 50 U.S.C. ch. 50
2. The North Carolina Servicemembers Civil Relief Act, Chapter 127B, Article 4
3. G.S. 45-21.12A

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The Servicemembers Civil Relief Act

Purpose of the SCRA

1 – Strengthen national defense by enabling servicemembers to focus on defense

2 – Provide for temporary suspension of proceedings that may adversely affect the civil rights of servicemembers during service

Remember: It's a shield, not a sword.

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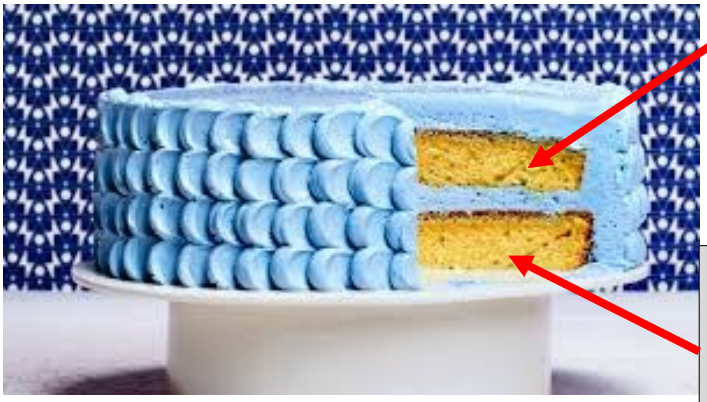
SCRA: The Layer Cake



Section 3953: Foreclosure only

Section 3931 (appearance) and Section 3932 (stay) – all non-criminal

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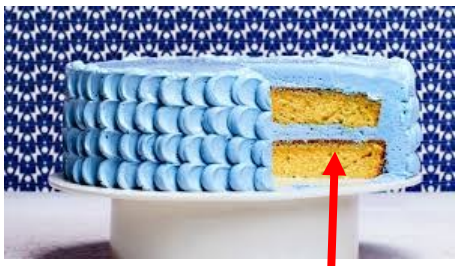
SCRA: The First Layer

It applies to all non-criminal proceedings….

- Default Judgments
- **Foreclosure**
- Estate Proceedings (and related SPs)
- Incompetency Proceedings
- Private Condemnation
- Legitimation
- Adoptions
- Partitions
- **And the list goes on**….



Section 3931 and 3932: All non-criminal

50 U.S.C. sec. 3912(b)

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SCRA: The First Layer (Sec. 3931)

Obligation is on the court to ensure compliance.

The SCRA imposes an obligation on the court if the defendant/respondent has **not made an appearance** to require an **affidavit** *before* entering **judgment for the plaintiff**, temporary or permanent.

*Applies regardless of when the loan, deed of trust, or mortgage originated.

50 U.S.C. ch. 50, sec. 3931(b)(1).

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SCRA: The First Layer (Sec. 3931)

If the defendant **does not appear**, court shall require an affidavit from the plaintiff stating whether the defendant is:

1. In military service + necessary facts to support – **STOP AND ACT!**
   - Must appoint counsel (50 U.S.C. sec. 3931(b)(2)), and
   - Consider stay (50 U.S.C. sec. 3931(d))
2. Unable to determine – **CAUTION, BUT GO**
   - Consider bond to compensate (50 U.S.C. sec. 3931(b)(3)), or
   - Consider other order to protect rights (50 U.S.C. sec. 3931(b)(3))
3. Not in military service + necessary facts to support – **KEEP TRUCKIN'**

50 U.S.C. sec. 3931

Refer to: *On the Civil Side* Blog, Cheryl Howell, dated February 13, 2015.

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STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice

Name And Address Of Plaintiff

VERSUS

Name And Address Of Defendant

SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION

G.S. Ch. 127B, Art. 4; 50 U.S.C. 3901 to 4043

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

1. As of the current date: *(check one of the following)*
   - ☐ a. I have personal knowledge that the defendant named above is in military service.*
   - ☐ b. I have personal knowledge that the defendant named above is **not** in military service.*
   - ☐ c. I am unable to determine whether the defendant named above is in military service.*
2. As of the current date, I ☐ have ☐ have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. *See* G.S. 127B-27 and G.S. 127B-28(b).
3. I ☐ used ☐ did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.
   ☐ The results from my use of that website are attached.
   (**NOTE:** *The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will **not** appear in the SCRA Website database.*)
4. The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the*

SCRA Form, AOC-G-250

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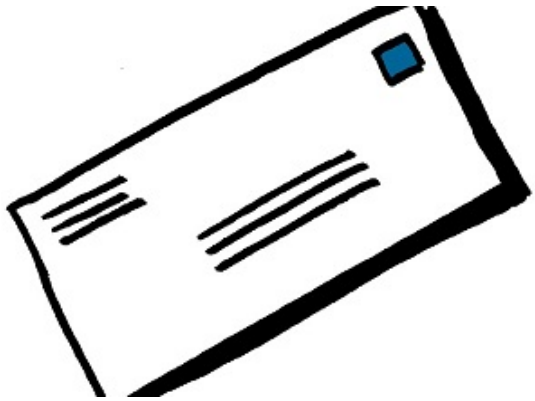
SCRA: The First Layer (Sec. 3932)



Respondent in military service or within 90 days after termination.

Servicemember received notice of the foreclosure proceeding.

Letters provided to the court….

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SCRA: The First Layer (Sec. 3932)

At any stage before final judgment, the court may on its own motion and shall, upon application by the servicemember, **stay the action** for a period of not less than 90 days, if:

1. A letter or other communication establishes that a servicemember's military duty requirements materially affect the servicemember's ability to appear and gives a date when the servicemember will be available to appear; and
2. A letter or other communication from the servicemember's commanding officer shows that the servicemember's military duty prevents appearance and that leave is not authorized for the servicemember at the time of the letter.

50 U.S.C. sec. 3932(b).

*Applies regardless of when the loan, deed of trust, or mortgage originated.

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SCRA: The Second Layer

Section 3953: Foreclosure only

- Additional protections in the SCRA applicable to **certain** foreclosures
- Applies **only** to an obligation on real property owned by servicemember that
  - Originated *before* the period of military service, and
  - Is secured by mortgage, deed of trust, or other security in nature of mortgage

50 U.S.C. sec. 3953

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SCRA: The Second Layer (Sec. 3953)

- Protection during and within one year **after** a period of military service
- More than just **current** military service status (Section 3931 applies to current military service; Section 3932 applies to current plus 90 days)

50 U.S.C. sec. 3953(b)

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SCRA: The Second Layer (Sec. 3953)

A foreclosure shall not be valid if made during, or within one year after a period of military service, EXCEPT

1. Upon **court order** granted before the sale and a return made and approved by the court, or
2. **Waiver** pursuant to section 3918 of the SCRA.

50 U.S.C. sec. 3953(c)

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SCRA: The Second Layer (Sec. 3953)

If a foreclosure is filed during or within one year after a period of military service ***and*** the servicemember's ability to comply with the obligation is materially affected by military service the court may on the court's own motion after a hearing and shall on application of servicemember:

1. **Stay** the proceeding for a period of time as justice and equity require, or
2. **Adjust** the obligation to preserve interests of all parties.

50 U.S.C. sec. 3953(b)

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N.C. Servicemembers Civil Relief Act

Dual purpose of the NCSCRA:

- Incorporates into state law the rights, benefits, and protections of the federal SCRA
- Extends the rights, benefits, and protections to members of
  - NC National Guard on State active duty under an order of the Governor for a period of more than 30 consecutive days *and*
  - National Guard of other states under similar orders of the governor of those states for a period of more than 30 consecutive days who reside in NC

to the extent the servicemember's military service materially affects the ability to comply with his or her obligations.

G.S. Chapter 127B, Article 4

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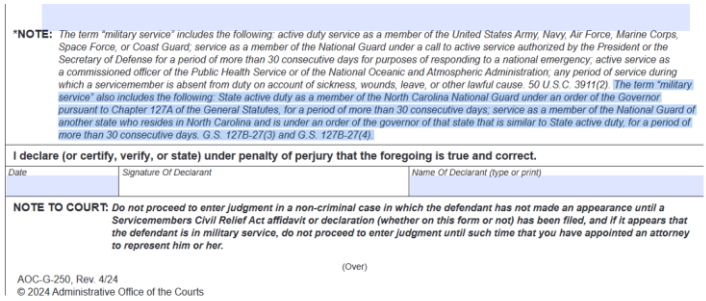
NC SCRA and Sec. 3931 of the SCRA



*NOTE: *The term "military service" includes the following: active duty service as a member of the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard; service as a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency; active service as a commissioned officer of the Public Health Service or of the National Oceanic and Atmospheric Administration; any period of service during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. 3911(2). The term "military service" also includes the following: State active duty as a member of the North Carolina National Guard under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days; service as a member of the National Guard of another state who resides in North Carolina and is under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days. G.S. 127B-27(3) and G.S. 127B-27(4).*

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Date	*Signature Of Declarant*	*Name Of Declarant (type or print)*

NOTE TO COURT: ***Do not proceed to enter judgment in a non-criminal case in which the defendant has not made an appearance until a Servicemembers Civil Relief Act affidavit or declaration (whether on this form or not) has been filed, and if it appears that the defendant is in military service, do not proceed to enter judgment until such time that you have appointed an attorney to represent him or her.***

(Over)

AOC-G-250, Rev. 4/24
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Limits of the DOD Database

Protection against default judgments under 50 U.S.C. sec. 3931:

- The Department of Defense SCRA database search results are frequently relied upon and attached to the G-250.
- The results of the SCRA database search is a fact to support the statement of whether a defendant *is* or *is not* in **federal** military service or has been in **federal** military service in the previous 367 days.
- Members of the National Guard in military service under the order of a governor will not appear in this database.
- There is no independent way to confirm.

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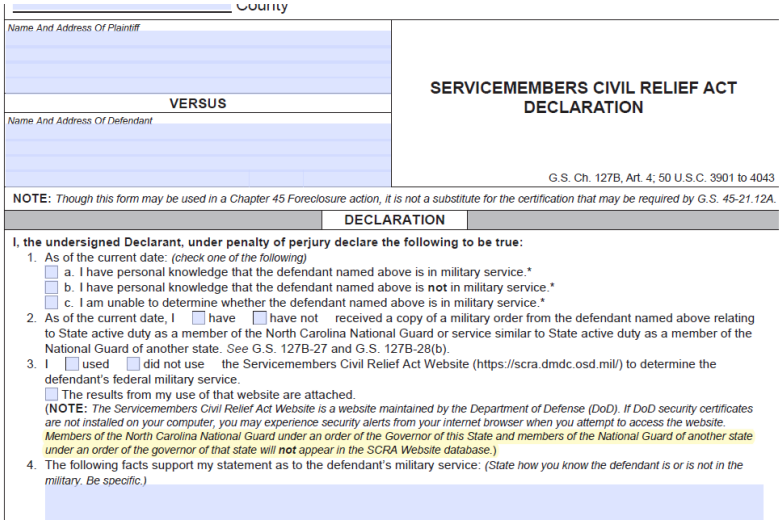

_____ County

Name And Address Of Plaintiff

VERSUS

Name And Address Of Defendant

SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION

G.S. Ch. 127B, Art. 4; 50 U.S.C. 3901 to 4043

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

1. As of the current date: *(check one of the following)*
   - ☐ a. I have personal knowledge that the defendant named above is in military service.*
   - ☐ b. I have personal knowledge that the defendant named above is **not** in military service.*
   - ☐ c. I am unable to determine whether the defendant named above is in military service.*
2. As of the current date, I ☐ have ☐ have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. *See* G.S. 127B-27 and G.S. 127B-28(b).
3. I ☐ used ☐ did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.
   ☐ The results from my use of that website are attached.
   (**NOTE:** *The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will* ***not*** *appear in the SCRA Website database.*)
4. The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the military. Be specific.)*

NC SCRA and Sec. 3931 of the SCRA

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NC SCRA and §3931 of the SCRA

Why is the G-250 asking question #2?

2. As of the current date, I ☐ have ☐ have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. See G.S. 127B-27 and G.S. 127B-28(b).

The response to this question provides a fact that supports the statement that a defendant *is* or *is not* in military service under the NC SCRA (NG servicemember serving under the order of a governor).

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NC SCRA and Sec. 3931 of the SCRA

#4 – Any other facts to support whether a respondent *is* or *is not* in military service.

4. The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the military. Be specific.)*

_____
_____

_____
_____

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SCRA and G.S. 45-21.12A: "Military Service"

1. **Active duty** who are a member of the Army, Navy, AF, Marines, Space Force, or Coast Guard;
2. **National Guard** under call to active service authorized by President or Sec. of Defense for more than 30 consecutive days responding to a national emergency;
3. Active service, commissioned officers of the **Public Health Service** (DHHS) or the **National Oceanic and Atmospheric Administration** (Dept. of Commerce)
4. Periods absent from duty due to **sickness**, **wounds**, **leave**, or other lawful cause.

50 USC ch. 50, sec. 3911(2)

G.S. 45-21.12A(d)(1)

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NC SCRA: "Military Service"

As defined in the SCRA, **plus**:

1. Active duty in the NC National Guard under an order of the Governor for period of more than 30 consecutive days, and

2. Service in another state's National Guard under the order of the governor of another that is similar to active duty for period of more than 30 consecutive days

G.S. 127B-27(3)

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NC SCRA: When a person is "subject to"

In the case of a servicemember engaged in military service as NC National Guard or another state's National Guard, a person is not subject to the remedies or penalties of the NCSCRA **unless…**

the servicemember gives to the person a written or electronic copy of the military order no later than 30 days after the military service terminates.

G.S. 127B-28(b)

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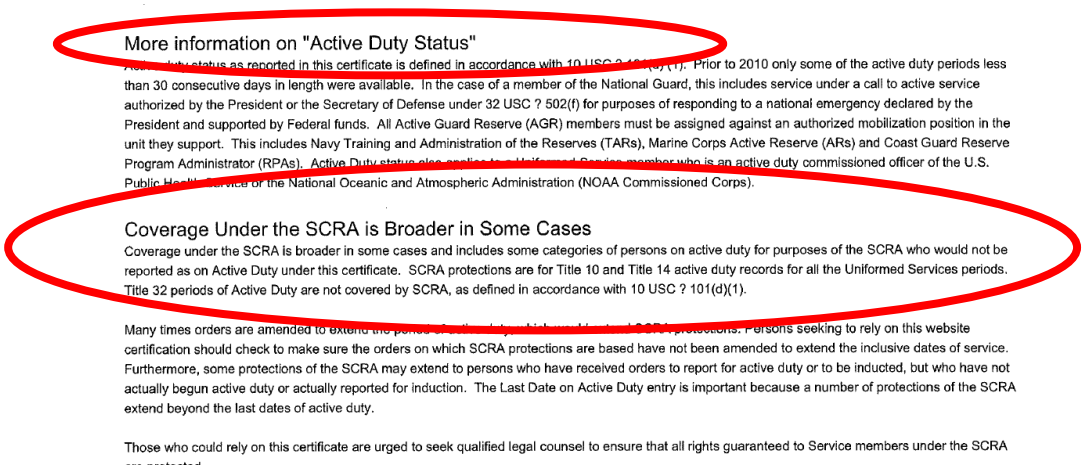
U.S. Dept. of Defense Database

The DOD database may be accessed at: https://scra.dmdc.osd.mil/scra/



More information on "Active Duty Status"

Active duty status as reported in this certificate is defined in accordance with 10 USC 3 101(d)(1). Prior to 2010 only some of the active duty periods less than 30 consecutive days in length were available. In the case of a member of the National Guard, this includes service under a call to active service authorized by the President or the Secretary of Defense under 32 USC ? 502(f) for purposes of responding to a national emergency declared by the President and supported by Federal funds. All Active Guard Reserve (AGR) members must be assigned against an authorized mobilization position in the unit they support. This includes Navy Training and Administration of the Reserves (TARs), Marine Corps Active Reserve (ARs) and Coast Guard Reserve Program Administrator (RPAs). Active Duty status also applies to a Uniformed Service member who is an active duty commissioned officer of the U.S. Public Health Service or the National Oceanic and Atmospheric Administration (NOAA Commissioned Corps).

Coverage Under the SCRA is Broader in Some Cases

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 under this certificate. SCRA protections are for Title 10 and Title 14 active duty records for all the Uniformed Services periods. Title 32 periods of Active Duty are not covered by SCRA, as defined in accordance with 10 USC ? 101(d)(1).

Many times orders are amended to extend the period of active duty and thereby extend SCRA protections. Persons seeking to rely on this website certification should check to make sure the orders on which SCRA protections are based have not been amended to extend the inclusive dates of service. Furthermore, some protections of the SCRA may extend to persons who have received orders to report for active duty or to be inducted, but who have not actually begun active duty or actually reported for induction. The Last Date on Active Duty entry is important because a number of protections of the SCRA extend beyond the last dates of active duty.

Those who could rely on this certificate are urged to seek qualified legal counsel to ensure that all rights guaranteed to Service members under the SCRA are protected.

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NC Law: G.S. 45-21.12A

- Additional protections under Chapter 45
- Applies only to mortgages and deeds of trust that originated *before* the mortgagor's or trustor's period of military service.

G.S. 45-21.12A

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NC Law: G.S. 45-21.12A

Power of Sale **Barred**.

A mortgagee, trustee, or other creditor shall not exercise a power of sale contained in a mortgage or deed of trust, or provided by statute, **during, or within 90 days after**, a mortgagor's, trustor's, or debtor's period of military service.

Does not apply to National Guard service in state active duty under the order of a Governor under NC SCRA. *See* definition of military service in G.S. 45-21.12A(d)(1).

G.S. 45-21.12A(a)

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NC Law: G.S. 45-21.12A

Power of Sale **Barred**.

The clerk **shall not conduct a hearing pursuant to G.S. 45-21.16(d)** unless the mortgagee, trustee or other creditor….files with the clerk a **certification** that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the mortgagor, trustor or debtor.

G.S. 45-21.12A

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NC Law: G.S. 45-21.12A

Finding #6

Clerk may not authorize trustee to proceed to sale unless the clerk finds "that the sale is **not barred by G.S. 45-21.12A**" (hearing may not take place during or within 90 days after a period of military service).

#3 of the G-250 form:

a. I have personal knowledge that the defendant named above is in military service.*

b. I have personal knowledge that the defendant named above is **not** in military service.*

c. I am unable to determine whether the defendant named above is in military service.*

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Foreclosure Hearing: The Clerk's Role

To authorize a power of sale foreclosure, there must be compliance with:

1. G.S. 45-21.12A – ("the sale is not barred by G.S. 45-21.12A")
2. SCRA
3. NC SCRA – GS 127A, Article 4

'Excellent! It's the disclosure documents for your hearing on Monday.'

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Breakout Instructions

1. Identify one person to be the recorder and another person to report out the group answers
2. Use the time to complete as many problems as possible. We will discuss the results and ask for volunteers to discuss your group's responses.
3. Focus on the content of the documents and for each case problem answer the following questions:
   a. **Would you authorize the foreclosure sale based on the information presented?**
   b. **If you authorize the sale, identify what elements in each document satisfy the requirements of (i) the SCRA, (ii) the NCSCRA, and (iii) G.S. 45-21.12A.**
   c. **If you do not authorize the sale, identify what is missing based on the requirements of (i) the SCRA, (ii) the NCSCRA, and (iii) G.S. 45-21.12A.**

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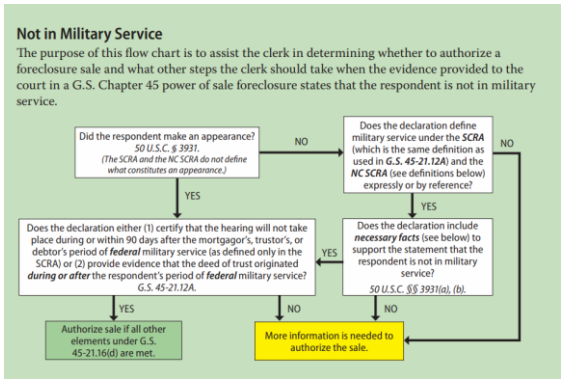
UNC SCHOOL OF GOVERNMENT

Protections for Military Servicemembers in North Carolina Power of Sale Foreclosures

Meredith Smith and Nicole Brinkley
October 2022

At a hearing on a power of sale foreclosure before the clerk of superior court, the clerk's authority is limited to six legal findings. Chapter 45, Section 21.16(d) of the North Carolina General Statutes (hereinafter G.S.). The purpose of this publication is to provide guidance to clerks related to one of these legal findings: military service of the respondent. There are both federal and state protections for servicemembers who are respondents in G.S. Chapter 45 foreclosure proceedings. These protections arise out of

1. the federal Servicemembers Civil Relief Act, 50 U.S.C. ch. 50 (SCRA);
2. Section 45-21.12A of the North Carolina General Statutes; and
3. the state North Carolina Servicemembers Civil Relief Act, G.S. Chapter 127B, Article 4 (NC SCRA).



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